

## §5c.168(f)(8)–2

## 26 CFR Ch. I (4–1–02 Edition)

the property. Y's basis in the property is \$1 million. Y must report the rent as income and will be entitled to deduct the interest on the purchase money note. No gain or loss will be recognized by X on the sale of the property since the sale price equals X's basis in the property. X must report as income the interest paid by Y on the note and will be entitled to a deduction for the rental payments it makes under the lease in accordance with §5c.168(f)(8)–7.

*Example (3).* Assume that in both examples (1) and (2) X has an option to purchase the equipment at the end of the lease term for \$1.00. The fact that the property may (or must) be bought or sold at the end of the lease term at a fixed or determinable price that is more or less than its fair market value is not taken into account in determining the status of the transactions as leases under section 168(f)(8).

[T.D. 7791, 46 FR 51907, Oct. 23, 1981, as amended by T.D. 7795, 46 FR 56148, Nov. 13, 1981]

### §5c.168(f)(8)–2 Election to characterize transaction as a section 168(f)(8) lease.

(a) *Election*—(1) *In general.* The election to characterize a transaction as a lease qualifying under section 168(f)(8) shall be made within the time and manner as set forth in this section without regard to section 168(f)(4).

(2) *Lease agreement.* For an agreement to be treated as a lease under section 168(f)(8) and this section, the lease agreement must be executed not later than 3 months after the property was first placed in service, as defined in §5c.168(f)(8)–6(b)(2)(i) (or prior to November 14, 1981, if the property was first placed in service by the lessee after December 31, 1980, and before August 14, 1981). The agreement must be in writing and must state that all of the parties to the agreement agree to characterize it as a lease for purposes of Federal tax law and elect to have the provisions of section 168(f)(8) apply to the transaction. The agreement must also name the party who will be treated as the lessor and the party who will be treated as the lessee.

(3) *Information return concerning the election.* (i) Except as provided in subdivision (ii), for each lease agreement, the lessor and lessee must jointly file Form 6793, Safe Harbor Lease Information Return, concerning their election under section 168(f)(8). The information return must be signed by both the les-

sor and the lessee and filed not later than the 30th day after the agreement is executed with the Commissioner of Internal Revenue, 1111 Constitution Avenue, N.W., Washington, D.C. 20224 (Attn: Form 6793). Unless the failure to file timely is shown to be due to reasonable cause, the failure to file the information return timely shall void the section 168(f)(8) election as of the date of the execution of the lease agreement. The information return shall include the following items:

(A) The name, address, and taxpayer identifying number of the lessor and the lessee (and the common parent company if a consolidated return is filed);

(B) The service center with which the income tax returns of the lessor and lessee are filed;

(C) A description of each property with respect to which the election is made;

(D) The date on which the lessee places the property in service (determined as defined in §5c.168(f)(8)–6(b)(2)(i)), the date on which the lease begins, and the term of the lease;

(E) The recovery property class of the leased property under section 168(c)(2) (for example, 5 years) and the ADR midpoint life of the leased property;

(F) The terms of the payments between the parties to the lease transaction;

(G) Whether the ACRS deductions and the investment tax credit are allowable to the same taxpayer;

(H) The aggregate amount paid to outside parties to arrange or carry out the transaction, such as, for example, legal and investment banking fees;

(I) For the lessor only: The unadjusted basis of the property as defined in section 168(d)(1);

(J) For the lessor only: If the lessor is a partnership or a grantor trust, the name, address, and taxpayer identifying number of the partners or the beneficiaries, and the Service Center with which the income tax return of each partner or beneficiary is filed; and

(K) Such other information as may be required by the return or its instructions.

The aggregate amount paid to outside parties which is described in paragraph

(a)(3)(i)(H) of this section need not be disclosed unless it is reasonable to estimate that either the lessor or the lessee will lease property under section 168(f)(8) for the calendar year which has an aggregate adjusted basis to such person of more than \$1,000,000. If either the lessor or the lessee reasonably expects to lease property with an aggregate basis of more than \$1,000,000, then both parties must disclose their transaction costs.

(ii) In the case of an agreement executed before January 1, 1982, only the lessor is required to file the information return described in paragraph (a)(3)(i) of this section and the return must be postmarked not later than January 31, 1982. Unless the failure to file timely is shown to be due to reasonable cause, or unless the lessee files the information return postmarked by January 31, 1982, the lessor's failure to file the information return timely shall be a disqualifying event as of February 1, 1982, which shall cause an agreement to cease to be treated as a lease under section 168(f)(8). For the Federal income tax consequences of a disqualifying event, see §5c.168(f)(8)-8.

(iii) A copy of the information return described in paragraph (a)(3)(i) and (ii) shall be filed by each party with its timely filed Federal income tax return for its taxable year during which the lease term begins. However, for taxable years ending in 1981 with respect to lease agreements executed during calendar year 1981, such statement shall be filed by the later of (A) the due date (taking extensions into account) of the party's 1981 Federal income tax return, or (B) where the filing of an amended return is required, with the amended return within 3 months following the execution of the lease agreement. For the requirement to file an amended return within 3 months and the consequences of the failure to so file, see §5c.168(f)(8)-6(b)(2)(ii). A taxpayer that is required to file the information return with its Federal income tax return before an information return form is available shall file, in lieu of the required information return, a statement which contains the information set forth in subparagraphs (A) through (J) of paragraph (a)(3)(i). The failure by the lessor to file the information return

(or, if applicable, the statement referred to in the preceding sentence) with its timely filed Federal income tax return shall be a disqualifying event which shall cause an agreement to cease to be treated as a lease under section 168(f)(8). For the Federal income tax consequences of a disqualifying event, see §5c.168(f)(8)-8.

(4) *Election is irrevocable.* An agreement made pursuant to paragraph (a)(2) of this section shall be irrevocable as of the later of the date such agreement was executed or November 23, 1981.

(5) *Disposition by lessee.* Except in the case of transactions described in subparagraph (6), of this paragraph, if the lessee (or any transferee of the lessee's interest) sells or assigns its interest in the lease or in the property, the agreement will cease to be characterized as a lease under section 168(f)(8) as of the time of the sale or assignment unless the transferee furnishes to the lessor within 60 days following the transfer the transferee's written consent to take the property subject to the lease, and the transferee and lessor file a statement with their timely filed Federal income tax returns for the taxable year in which the transfer occurs containing the following information:

(i) The name, address, and taxpayer identifying number of the lessor and the transferee;

(ii) The district director's office with which the income tax returns of the lessor and transferee are filed;

(iii) A description of the property; and

(iv) Confirmation of the transferee's consent.

See §5c.168(f)(8)-8 for the Federal income tax consequence where an agreement ceases to be characterized as a lease under section 168(f)(8).

(6) *Disposition of lessee's interest in bankruptcy, etc., or similar proceeding.* In the case of an agreement executed after May 31, 1982, where the lessee's interest in the lease or in the property is sold or assigned in a bankruptcy, liquidation, receivership, a court-supervised foreclosure, or in any similar proceeding for the relief or protection of insolvent debtors in Federal or State court, the agreement will continue to

be characterized as a lease under section 168(f)(8) and the purchaser or assignee shall take the property subject to the lease if—

(i) Prior to the consummation of the sale or assignment, the lessor gives written notice of its Federal income tax ownership to the judicial or administrative body having jurisdiction over the proceeding and to the debtor in possession of the interest or, if at such time a trustee, receiver or similar person has been appointed by the court, to the person appointed. The notice must contain a request that the court and the debtor or the person appointed provide a copy of the notice to the purchaser or assignee prior to the consummation of the sale or assignment. Within 60 days following the sale or assignment, the lessor must provide notice of its Federal income tax ownership and copies of the lease agreement, and, in the case of a sale and leaseback transaction, the lessor's purchase money obligation, to the purchaser or assignee;

(ii) The lessor files a statement with its timely filed Federal income tax return for the taxable year in which the sale or assignment occurs containing the following information:

(A) The name, address, and taxpayer identifying number of the lessor and the purchaser or assignee;

(B) The district director's office with which the Federal income tax returns of the lessor and purchaser or assignee are filed;

(C) A description of the property; and

(iii) Prior to the consummation of the sale or assignment, all secured lenders of the lessee with interests in the property, which interests arose not later than the time the lessee first used the property under the lease (and which were perfected in accordance with applicable local law), specifically either exclude or release in writing the Federal income tax ownership of the property from their interests.

The purchaser or assignee of the interest with respect to which this paragraph applies shall file a statement with its timely filed Federal income tax return for the taxable year in which the sale or assignment occurs containing the information described in subdivision (ii) of this subparagraph.

If the interest is subsequently transferred (other than in a bankruptcy, liquidation, receivership, court-supervised foreclosure, or similar proceeding) during the term of the lease, the agreement will continue to be characterized as a lease under section 168(f)(8) and the transferee will take the property subject to the lease if either (A) the lessor gives the transferee, prior to the transfer, a copy of the lease, written notice of its Federal income tax ownership, and, in the case of a sale and leaseback transaction, a copy of the lessor's purchase money obligation, and the lessor files a statement with its timely filed Federal income tax return as described in subdivision (ii) of this subparagraph, or (B) within 60 days following the transfer, the transferee agrees in writing to take the property subject to the lease and the lessor and transferee file a statement with their timely filed Federal income tax returns within the time and in the manner described in paragraph (a)(5) of this section. However, an agreement will not continue to be characterized as a lease under this subparagraph if, under another applicable provision, it would cease to be characterized as a lease. See §5c.168(f)(8)-8 for the Federal income tax consequences where an agreement ceased to be characterized as a lease under section 168(f)(8).

(7) *Consequences of taking the property subject to the lease agreement.* For purposes of §§5c.168(f)(8)-1 through 5c.168(f)(8)-11, in a situation where a transferee of a lessee's interest acquires the property subject to the lease, the transferee shall be deemed to have acquired a leasehold interest in the property equal to the remaining lease term, any unpaid obligation of the lessor arising in connection with the sale of the property by the original lessee in a sale and leaseback transaction, and any option of the lessee to purchase the property. Any consideration paid by the transferee for the property shall be allocated to the lessor's obligation to the extent of the unpaid balance of the obligation. Any excess over the unpaid balance shall be

allocated between the leasehold interest and the purchase option in proportion to their relative fair market values. As the new lessee, the transferee shall not be entitled to claim any ACRS deduction with respect to the property while the lease remains in effect and shall not be entitled to any investment tax credit with respect to the property. The transferee shall report interest income on the lessor's obligation, and shall be entitled to deduct the rent paid under the lease, in accordance with § 5c.168(f)(8)-7. In addition, the transferee shall be entitled to amortize the portion of its cost allocable to the leasehold interest. Conversely, as long as the lease remains in effect, the lessor will continue to be recognized as the owner of the property for Federal income tax purposes, shall be required to report rents due under the lease, and shall be entitled to deduct interest on its obligation.

(8) *Election to treat certain leases under subparagraph (6) rules.* The lessor under a section 168(f)(8) lease executed on or before May 31, 1982, may elect to have the provisions of paragraph (a)(6) of this section apply in the case of a sale or assignment of the lessee's interest in the lease or in the property in a bankruptcy, receivership, liquidation, court-supervised foreclosure, or similar proceeding. The election of the lessor with respect to any leased property may be made at any time prior to the consummation of any sale or assignment of such property in a bankruptcy, etc., or similar proceeding, by complying with the provisions of subparagraph (6) of this paragraph.

(b) *Examples.* The application of the provisions of this section may be illustrated by the following examples:

*Example (1).* X Corp. maintains its books and records for Federal tax law purposes on a calendar year basis. On February 1, 1981, X acquires certain equipment for use in its business, and the equipment is deemed to be placed in service on that date within the meaning of § 5c.163(f)(8)-6(b)(2)(i). On November 1, 1981, X sells the equipment to Y and leases it back under a lease in which the parties elect to have the provisions of section 168(f)(8) apply. The election is considered timely for purposes of making Y the owner of the property under section 168(f)(8) since the lease agreement was executed before November 14, 1981.

*Example (2).* The facts are the same as in example (1) except that X Corp.'s taxable year ends on February 28, 1981. X claimed the investment tax credit and depreciation deductions with respect to the property in its return filed April 1, 1981. The lease will qualify for safe harbor treatment under section 168(f)(8) provided X, within 3 months after the lease agreement was executed, files an amended return pursuant to § 5c.168(f)(8)-6(b)(2)(ii) for its taxable year ending February 28, 1981, in which X foregoes its right to claim any investment tax credit or ACRS deductions with respect to the property subject to the lease.

*Example (3).* X Corp. (as lessee) sells certain new equipment to Y Corp. (as lessor) and leases it back under a section 168(f)(8) lease. During the term of the lease X sells its interest in the property to T Corp. (other than in a bankruptcy or similar proceeding), and T does not give Y a written consent to take the property subject to the lease. The agreement ceases to be treated as a lease under section 168(f)(8) as of the date of the sale.

*Example (4).* The facts are the same as in example (3) except that the sale of the property takes place while X is under the jurisdiction of a court in a bankruptcy proceeding. All lenders of X having perfected interests in the property that arose by the time the property was first used under the lease have specifically either excluded or released the ownership of the property for Federal income tax purposes from their interests. Within the required time periods, Y gives appropriate notification to the court, the bankruptcy trustee, and T that the property is subject to the lease and files the required statement with its Federal income tax return for the taxable year in which the sale occurs. The agreement continues to be treated as a lease under section 168(f)(8). T will take the property subject to the lease. T must allocate the purchase price among the lessor's note, the leasehold interest, and the option (if any) to purchase the property.

*Example (5).* The facts are the same as in example (4), except that one lender of X having a perfected and timely interest in the property does not specifically exclude or release the Federal income tax ownership of the property from its interest. The agreement will cease to be treated as a lease under section 168(f)(8) as of the date of the transfer to T. The result would be the same if Y failed to furnish any of the notices required by subdivision (i) of paragraph (a) and (6) or failed to file a statement as required by subdivision (ii) of paragraph (a)(6).

*Example (6).* The facts are the same as in example (4). In addition, during the term of the lease T transfers the property to U Corp. and Y fails to furnish U with written notice that the property is subject to the lease prior to the sale and U refuses to agree to

### §5c.168(f)(8)-3

### 26 CFR Ch. I (4-1-02 Edition)

consent to the lease agreement. The agreement will cease to be treated as a lease under section 168(f)(8) as of the date of the transfer to U. The result would be the same if Y furnished U with timely written notice of its tax ownership but failed to file the required statement with its tax return for its taxable year in which the sale occurred.

[T.D. 7791, 46 FR 51907, Oct. 23, 1981, as amended by T.D. 7795, 46 FR 56148, Nov. 13, 1981; T.D. 7800, 46 FR 63257, Dec. 31, 1981]

#### §5c.168(f)(8)-3 Requirements for lessor.

(a) *Qualified lessor.* In order for an agreement to be treated as a lease under section 168(f)(8), the party characterized in the agreement as the lessor must be a qualified lessor. The term “qualified lessor” means—

(1) A corporation which is neither an electing small business corporation under section 1371(b) nor a personal holding company under section 542(a), or

(2) A partnership all of whose partners are corporations described in subparagraph (1), or

(3) A grantor trust whose grantor and beneficiaries are all corporations described in paragraph (a)(1) or partnerships described in paragraph (a)(2).

(b) *Effect of disqualification of lessor.* If at any time during the term of the agreement the lessor ceases to be a qualified lessor, the agreement will lose its characterization as a lease under section 168(f)(8) as of the date of the event causing such disqualification. If any partner of a partnership described in paragraph (a)(2) ceases to be a corporation described in paragraph (a)(1), the partnership entity shall cease to be a qualified lessor. Similarly, if any beneficiary of a trust described in paragraph (a)(3) ceases to be a corporation described in paragraph (a)(1), the trust shall cease to be a qualified lessor. See §5c.168(f)(8)-8 for the Federal income tax consequences of such a disqualification.

(c) *One tax owner per property.* Only one person may be a qualified lessor under section 168(f)(8) with respect to leased property. Thus, property that is subject to a lease under section 168(f)(8) may not be subleased under a lease for which a section 168(f)(8) election is made. In addition, if a lessor sells or assigns in a taxable transaction its in-

terest in a section 168(f)(8) lease or in the underlying property, the lease shall cease to qualify under section 168(f)(8) and no other lease may be executed under section 168(f)(8) with respect to the property. The preceding sentence applies to a sale or assignment of its interest by a partner of a lessor that is a partnership described in paragraph (a)(2) of this section or by a beneficiary of a lessor that is a trust described in paragraph (a)(3) of this section. See §5c.168(f)(8)-8 for the Federal income tax consequences where a lease ceases to qualify under section 168(f)(8). However, lease brokers, agents, etc., may, for example, prepare executory contracts with the lessee whereby the broker's assignee may execute a lease as lessor, and, if the requirements of section 168(f)(8) and §§5c.168(f)(8)-1 through 5c.168(f)(8)-11 are met, the lease will qualify under section 168(f)(8).

(d) *Examples.* The application of paragraph (c) may be illustrated by the following examples:

*Example (1).* X Corp. (as lessee) sells certain new equipment to Y Corp. (as lessor) and leases it back under a section 168(f)(8) lease. Within 3 months after the property was placed in service, Y assigns its interest in the lease to Z. Upon the transfer to Z, the lease will no longer qualify for treatment under section 168(f)(8). The property may not thereafter be the subject of a section 168(f)(8) lease.

*Example (2).* X Corp., which wishes to acquire certain equipment for use in its business and to transfer ownership of the property for Federal income tax law purposes, purchases the equipment and enters into an executory contract with LB, a lease broker, under which X agrees to execute a section 168(f)(8) lease as lessee with a third party lessor. At a later date (but within the prescribed 3-month period), LB arranges for X and T Corp. (which wishes to secure Federal income tax law ownership) to execute a lease agreement in accordance with §5c.168(f)(8)-2. The lease will qualify for treatment under section 168(f)(8).

[T.D. 7791, 46 FR 51907, Oct. 23, 1981, as amended by T.D. 7795, 46 FR 56149, Nov. 13, 1981]

#### §5c.168(f)(8)-4 Minimum investment of lessor.

(a) *Minimum investment.* Under section 168(f)(8)(B)(ii), an agreement will