



## §45L Energy Efficient Tax Credit

### All The Details

#### Overview

The New Energy Efficient Home Credit under Internal Revenue Code §45L was established by the Energy Policy Act of 2005 and was subsequently extended under the American Taxpayer Relief Act of 2012, the Tax Increase Prevention Act of 2014, the Protecting Americans from Tax Hikes Act of 2015, the Bipartisan Budget Act of 2018, the Further Consolidated Appropriations Act of 2020, and the Consolidated Appropriations Act, 2021. The credit, which is only available to eligible contractors, is potentially worth up to \$2,000 for each qualified new energy efficient home acquired for use as a residence from an eligible contractor after December 31, 2005, and before January 1, 2022.

#### Qualifying Property

Property eligible for the credit (a qualified new energy efficient home) must be a dwelling unit, located in the U.S., construction of which is substantially completed after August 8, 2005, that was acquired from an eligible contractor, for use as a residence during the taxable year, and that meets the energy saving requirements of §45L(c)(1).

A “dwelling unit” is defined under Notice 2008-35 as a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation, within a building that is not more than three stories above grade in height.

“Substantially completed” is not defined in the statute or by regulation, but was previously defined under the similar §23 Residential Energy Credit (now repealed) as “when construction had progressed to a point where the unit could be put to use as a personal residence, even though comparatively minor items remained to be finished or performed in order to conform to the plans or specifications of the completed building.” See §1.23-3(f).

“Acquired” generally means purchase or lease, but it may include other types of acquisitions, such as by gift or exchange.

An “eligible contractor” is the person that constructed the property, and who owned and had basis in the property during its construction. For example, if a person who owns and has basis in a property hires a third-party contractor to construct a qualified energy efficient home and then sells the home to the homeowner, the person who hires the third-party contractor is the eligible contractor and the third-party contractor is not an eligible contractor. The contractor may be an individual, trust, partnership, association, company, or corporation.

# §45L New Energy Efficient Home Credit

## All The Facts

The property can be new construction or a property that has undergone substantial reconstruction or rehabilitation. However, the property must be acquired from an eligible contractor, and a home is not acquired from an eligible contractor if the person that constructed the home retains the home for use as a residence. Therefore, reconstruction/rehabilitation costs for properties already owned by the resident do not qualify.

There is no requirement that the dwelling be a primary residence; thus, vacation or second homes generally qualify.

In general, the property must have a level of annual heating and cooling energy consumption which is at least 50% below the annual level for a reference property constructed in accordance with the standards of Chapter 4 of the 2006 International Energy Conservation Code, as such Code (including supplements) was in effect on January 1, 2006, and for which the heating and cooling equipment efficiencies correspond to the minimum allowed under the regulations established by the Department of Energy pursuant to the National Appliance Energy Conservation Act of 1987 and in effect at the time of completion of construction. See §45L(c)(1)(A).

Additionally, the building envelope component improvements must account for at least 1/5 of such 50%. See §45L(c)(1)(B). Building envelope components are basement walls, exterior walls, floor, roof, and any other building element that encloses conditioned space, including any boundary between conditioned space and unconditioned space. See Notice 2008-35, §4.01(1).

To determine if a property qualifies, an inspection must be performed by an eligible certifier, accredited or authorized by RESNET or an equivalent rating network, who is unrelated (under §45(e)(4)) to the eligible contractor. In addition, the certifier must use an IRS eligible software program.

An “eligible certifier” is a person that is not related (within the meaning of § 45(e)(4)) to the eligible contractor and has been accredited or otherwise authorized by RESNET (or an equivalent rating network) to use energy performance measurement methods approved by RESNET (or the equivalent rating network). An employee or other representative of a utility or local building regulatory authority qualifies as an eligible certifier if the employee or representative has been accredited or otherwise authorized by RESNET (or an equivalent rating network) to use the approved energy performance measurement methods.

An “equivalent rating network” includes, in a state that has established energy efficiency standards under which a dwelling unit is required to achieve a specified aggregate level of heating and cooling energy consumption for any purpose (including compliance with building codes or eligibility for a state grant or tax credit), the state agency administering those standards. Thus, if the agency has accredited or otherwise authorized a person to use energy performance measurement methods approved by the

# §45L New Energy Efficient Home Credit

## All The Facts

agency for use in determining whether the state's energy efficiency standards are satisfied, the person so accredited or authorized qualifies as an eligible certifier.

If a builder constructs at least 85 homes during a twelve-month period or builds a subdivision with the same floor plan using the same subcontractors, the IRS allows a sampling method to determine eligibility for the credit.

The builder or contractor must obtain a certification from the eligible certifier meeting specific IRS requirements. This statement does not have to be submitted to the IRS but must be kept with the taxpayer's records. The certification will be treated as satisfying the requirements of §45L(c)(1) if all construction has been performed in a manner consistent with the design specifications provided to the eligible certifier and the certification contains all of the following:

1. The name, address, and telephone number of the eligible certifier.
2. The address of the dwelling unit.
3. A statement by the eligible certifier that:
  - a. The dwelling unit has a projected level of annual heating and cooling energy consumption that is at least 50 percent below the annual level of heating and cooling energy consumption of a reference dwelling unit in the same climate zone;
  - b. Building envelope component improvements alone account for a level of annual heating and cooling energy consumption that is at least 10 percent below the annual level of heating and cooling energy consumption of a reference dwelling unit in the same climate zone; and
  - c. Heating and cooling energy consumption have been calculated in accordance with the procedures prescribed in Residential Energy Services Network (RESNET) Publication No. 05-001 (Nov. 17, 2005) or No. 06-001 (June 1, 2006) or in accordance with an equivalent calculation procedure.
4. A statement by the eligible certifier that field inspections of the dwelling unit (or of other dwelling units under the sampling protocol) performed by the eligible certifier during and after the completion of construction have confirmed that all features of the home affecting such heating and cooling energy consumption comply with the design specifications provided to the eligible certifier. With respect to builders who build at least 85 homes during a twelve-month period or build subdivisions with the same floor plan using the same subcontractors, the eligible certifier may use the sampling protocol found in the current ENERGY STAR® for Homes Sampling Protocol Guidelines instead of inspecting all of the homes.

# §45L New Energy Efficient Home Credit

## All The Facts

### 5.A list identifying:

- a. The dwelling unit's energy efficient building envelope components and their respective energy performance ratings as required by §401.3 of the 2004 IECC Supplement; and
- b. The energy efficient heating and cooling equipment installed in the dwelling unit and the energy efficiency performance of such equipment as rated under applicable Department of Energy Appliance Standards test procedures.

6. Identification of the listed software program used to calculate energy consumption.

7. A declaration, applicable to the certification and any accompanying documents, signed by a person currently authorized to bind the eligible certifier in these matters, in the following form:

“Under penalties of perjury, I declare that I have examined this certification, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this certification are true, correct, and complete.”

### Tax Credit

The 45L credit is equal to the applicable amount for each qualified new energy efficient home constructed by an eligible contractor, and acquired by a person from such eligible contractor for use as a residence during the taxable year. Any 45L credit taken must reduce the basis of the property for depreciation or gain and loss purposes.

The “applicable amount” is equal to \$2,000 for each dwelling unit that meets the 50% standard referenced above, or \$1,000 for each dwelling unit that is a manufactured home and meets the 30% standard.

The credit is claimed in the year the property is sold or leased. To claim the credit, the eligible contractor generally must complete Form 8908. The credits then flow to Form 3800 as a General Business Credit under §38. A taxpayer that is not a partnership or an S corporation, and whose only source of the credit is a partnership or S corporation, does not have to complete Form 8908, but can report the credit directly on Line 1p of Part III of Form 3800. Generally, the credit can be carried back one year (five years for credits arising in 2010 for an Eligible Small Business) or forward 20 years. See §39. (However, since the first year the credit was available was 2006, the carryback period for 2010 is essentially four years.)

However, a taxpayer's passive activity credit for the tax year isn't allowed, but the disallowed credits are allocated to the taxpayer's passive activities and carried over to the following year. A taxpayer's passive activity credit for a tax year is the amount by which the sum of the taxpayer's

## §45L New Energy Efficient Home Credit

### All The Facts

credits that are subject to the passive activity loss rules for the tax year exceeds the taxpayer's regular tax liability allocable to all passive activities for the tax year. Separate rules apply to the treatment of passive activity credits of corporations.

Taxpayers can amend their returns to claim the credit. If a taxpayer fails to claim all or part of a business credit earned in a year closed by the statute of limitations on credits or refunds of taxoverpayments, the taxpayer can carryforward the unclaimed amount to open years (reduced by the amount that would have been allowed in closed years). See PLR 201548006.

Most credits claimed on Form 3800 are not available under the AMT. However, credits arising in 2010 may be offset against AMT for eligible small businesses (ESB).

An ESB is a corporation the stock of which is not publicly traded, a partnership, or a sole proprietorship that has \$50 million or less in average annual gross receipts for the three-taxable-year period preceding the tax year of the credit. For partners and S corporation shareholders, the eligible small business credit test is applied at the partner or shareholder level.

In these uncertain times, individuals and businesses need to retain cash, whether to offset lower revenues, negative cash flows, or to capitalize on buying/investing opportunities.

Let Scarpello Consulting provide you with tax consulting services that allow you to maximize the tax attributes of your real estate investments while minimizing associated audit risks.

