Internal Revenue Service

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Person To Contact:
, ID No.
Telephone Number:

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April 23, 2004

LEGEND:

P	=
P1	=
S	=
T	=
U	=
V	=
W	=
W1	=
X	=
Y	=
Z	=
A	=
B	=
C	=
D	=
E	=
Location 1	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Date 6	=
Date 7	=
Date 8	=
Date 9	=
Date 10	=
Amount 1	=
Amount 2	=

Amount 3 =
Amount 4 =

Dear :

This letter responds to a letter, dated November 25, 2003 as supplemented by a letter dated February 17, 2004, submitted on behalf of P and its members by their authorized representatives, requesting rulings under § 29 of the Internal Revenue Code.

The facts as represented by P and its members by their authorized representatives are as follows:

P received PLR-100244-98 on Date 1, PLR-138078-02 on Date 2, and P1 received PLR-100241-98 on Date 1 (Prior Rulings), which ruled on similar issues addressed by this letter. P seeks a confirmation of the rulings in light of the change in membership interests in P, and a potential change in the chemical reagents used to produce synthetic fuel as described in the ruling request.

P is a Delaware limited liability company, taxable as a partnership. P owns and operates two Facilities for producing a solid synthetic fuel from coal (the Product) using the process described below. The Facilities were constructed by P and P1. The Facilities are Secondary Coal Recovery System # facilities designed by A. Each Facility consists of production lines each of which consists of a briquetter which is fed by its associated mixer and each of which is capable of being operated independently. Because each production line is capable of being operated independently and can independently produce synthetic fuel, each independent production line may be treated as a separate facility.

Each Facility was constructed pursuant to a written contract entered into by A and B on Date 4. A assigned to each of P and P1 all of its rights and obligations under the construction contract with respect to one facility. On Date 5, B subcontracted with C to perform the procurement, assembly and installation services under the construction contract. P provided an opinion of counsel that the construction contract constituted a binding written contract under applicable state laws prior to January 1, 1997, and at all times thereafter through completion of the contract.

The issue regarding when the facilities were placed in service was subject to examination and the issue was reviewed by Appeals. Following such examination and review, the Service determined, without mutual concessions, that the facilities were placed in service prior to July 1, 1998. It is the policy of the Internal Revenue Service that such determinations are not reconsidered absent extraordinary circumstances (for example fraud or misrepresentation) and then only with the consent of the Regional Director of Appeals.

P and P1 were originally owned 95% by D and 5% by A. On Date 6, X purchased an interest in P and P1 from A pursuant to a Purchase Agreement. S purchased the remaining interest in P and P1 from D on Date 7 pursuant to a Purchase Agreement. On Date 3, P merged with P1, and P became the resulting partnership for federal income tax purposes.

P has relocated the Facilities to a site in Location 1 (the Site). In connection with the relocation of the Facilities, most major components of each Facility directly necessary to produce a qualified fuel were relocated to the Site. Certain equipment included in the original construction was scrapped or sold and not relocated. In connection with the relocation, P also installed certain equipment that is not directly necessary for the production of qualified fuel such as coal and material handling equipment, a building, and an office/maintenance building at the Site. Following the relocation, the fair market value of the original property included in each Facility is more than 20 percent of each Facility's total value (the cost of the new equipment included in the Facility plus the value of the original property).

P has entered into a Synthetic Fuel and Coal Supply Agreement with E under which E agreed to purchase a minimum of Amount 1 tons of synthetic fuel a year and to use commercially reasonable efforts to purchase up to Amount 2 tons of synthetic fuel a year. If E does not satisfy its purchase obligation or the production of synthetic fuel exceeds E's requirements, P can sell synthetic fuel to third parties. P has represented that all sales of synthetic fuel will be to unrelated persons.

Effective Date 8, S sold a 49% membership interest in P to Z, a Delaware limited liability company and wholly-owned subsidiary of Y. Pursuant to the purchase agreement, Z paid $1 million at closing and executed fixed payment and variable payment promissory notes. P has provided evidence that the net present value of the initial payment and the fixed payments exceeds 50% of the total purchase price determined on a net present value basis.

On Date 9, Z sold a 49% membership interest in P to T, S sold a 6% membership interest in P to T, and X sold a 4% membership interest in P to T. For the period from the sale until the transaction on Date 10, discussed below, T owned a 59% membership interest in P, S owned a 40% membership interest in P, and X owned a 1% membership interest in P. T is a Delaware limited liability company that is wholly-owned by U, and disregarded for federal income tax purposes.

In consideration of the membership interest, T paid Amount 3 at closing to the sellers, and agreed to pay quarterly fixed and variable payments. P has provided evidence that the net present value of the initial payment and the fixed payments exceeds 50% of the total purchase price determined on a net present value basis.

On Date 10, S sold a 40% membership interest in P to V, a Delaware limited liability company that is classified as a partnership for federal income tax purposes. The members of V are W and W1. Following the sale, V owns a 40% membership interest in P, T owns a 59% membership interest in P, and X owns a 1% membership interest in P.

In consideration of the membership interest, V paid Amount 4 at closing to S, and agreed to pay quarterly fixed and variable payments. P has provided evidence that the net present value of the initial payment and the fixed payments exceeds 50% of the total purchase price determined on a net present value basis. T, V and X have made (and are expected to continue to make) periodic capital contributions to P to enable it to pay its operating costs and other obligations. A proforma attached to the ruling request demonstrates that project expenses are projected to exceed revenues.

P has supplied a detailed description of the process employed at the Facilities. P also has proposed that, from time to time, one of six alternative chemical reagents may be used in the process for the production of Product. As described, the Facilities and the process implemented in the Facilities, including the chemical reagents, meet the requirements of Rev. Proc. 2001-34, 2001-22 I.R.B. 1293.

A recognized expert in coal combustion chemistry has performed numerous tests on the coal used at the Facilities and the Product produced at the Facilities and has submitted reports in which the expert concludes that significant chemical changes take place with the application of the process to the coal, including the alternative chemical reagents. P, with use of the process, expects to maintain a level of chemical change in the production of synthetic fuel that is determined through similar analysis by experts to be a significant chemical change.

The rulings issued in Prior Rulings, which you wish to be reconfirmed in this private letter ruling, are as follows:

1. P, with use of the enumerated process, will produce a "qualified fuel" within the meaning of § 29(c)(1)(C).

2. The contract for the construction of the Facilities constitutes a "binding written contract in effect before January 1, 1997" within the meaning of § 29(g)(1)(A).

3. Production from the Facilities will be attributable solely to P within the meaning of § 29(a)(2)(B), and P will be entitled to the § 29 credit for qualified fuel from the Facilities that is sold to an unrelated person.

4. The § 29 credit attributable to P may be allocated to the members of P, presently consisting of V, T, and X, in accordance with the members' interests in P when the credit arises. Each such member will take into account its allocated share of the § 29

credit in computing its tax liability and, for the allocation of the § 29 credit, a member's interest in P is determined based on a valid allocation of the receipts from the sale of the § 29 qualified fuel.

5. A termination of P under § 708(b)(1)(B) will not preclude the reconstituted partnership from claiming the § 29 credit on the production and sale of synthetic fuel to unrelated persons.

6. Because each Facility was "placed in service" prior to July 1, 1998 within the meaning of § 29(g)(1), relocation of a Facility to a different location after June 30, 1998, or replacement of part of a Facility after that date, will not result in a new placed in service date for that Facility for purposes of § 29 provided the fair market value of the original property is more than 20 percent of that Facility's total fair market value at the time of relocation or replacement.

7. Because each Facility was "placed in service" prior to July 1, 1998 within the meaning of § 29(g)(1), relocation of one or more of the independent production lines of a Facility to a new location after June 30, 1998 will not result in a new placed in service date for that Facility or an independent production line for purposes of § 29 provided all essential components of the independent production line are retained and the production capacity of the independent production line is not significantly increased at the new location.

The changes in facts since the issuance of Prior Rulings are the changes in membership interests of P, and the potential change in chemical reagents used to produce the synthetic fuel as described in the ruling request.

RULING REQUESTS #1 AND #3

Section 29(a) allows a credit for qualified fuels sold by the taxpayer to an unrelated person during the taxable year, the production of which is attributable to the taxpayer. The credit for the taxable year is an amount equal to $3.00 (adjusted for inflation) multiplied by the barrel-of-oil equivalent of qualified fuels sold.

Section 29(c)(1)(C) defines "qualified fuels" to include liquid, gaseous, or solid synthetic fuels produced from coal (including lignite), including such fuels when used as feedstocks.

In Rev. Rul. 86-100, 1986-2 C.B. 3, the Internal Revenue Service ruled that the definition of the term "synthetic fuel" under § 48(l) and its regulations are relevant to the interpretation of the term under § 29(c)(1)(C). Former § 48(l)(3)(A)(iii) provided a credit for the cost of equipment used for converting an alternate substance into a synthetic liquid, gaseous, or solid fuel. Rev. Rul. 86-100 notes that both § 29 and former § 48(l) contain almost identical language and have the same overall congressional intent,

namely to encourage energy conservation and aid development of domestic energy production. Under § 1.48-9(c)(5)(ii) of the Income Tax Regulations, a synthetic fuel "differs significantly in chemical composition," as opposed to physical composition, from the alternate substance used to produce it. Coal is an alternate substance under § 1.48-9(c)(2)(i).

Consistent with its private letter ruling practice that began in the mid 1990's, the Service, in Rev. Proc. 2001-30, provided that taxpayers must satisfy certain conditions in order to obtain a letter ruling that a solid fuel (other than coke) produced from coal is a qualified fuel under § 29(c)(1)(C). Rev. Proc. 2001-30, as modified by Rev. Proc. 2001-34, 2001-1 C.B. 1293. The revenue procedure requires taxpayers to present evidence that all, or substantially all, of the coal used as feedstock undergoes a significant chemical change. To meet this requirement and obtain favorable private letter rulings, taxpayers provided expert reports asserting that their processes resulted in a significant chemical change.

In Announcement 2003-46, 2003-30 I.R.B. 222, the Service announced that it was reviewing the scientific validity of test procedures and results presented of significant chemical change in expert reports. In Announcement 2003-70, 2003-46 I.R.B. 1090, the Service announced that it had determined that the test procedures and results used by taxpayers were scientifically valid if the procedures were applied in a consistent and unbiased manner. However, the Service concluded that the processes approved under its long standing ruling practice and as set forth in Rev. Proc. 2001-30 did not produce the level of chemical change required by § 29(c)(1)(C). Nevertheless, the Service announced that it recognized that many taxpayers and their investors have relied on its long standing ruling practice to make investments. Therefore, the Service announced that it would continue to issue rulings on significant chemical change but only under the guidelines set forth in Rev. Proc. 2001-30, as modified by Rev. Proc. 2001-34.

This ruling is provided to P and its members consistent with Announcement 2003-70 and the Service's long standing ruling practice. Accordingly, based on the expert test results submitted by P, T and V, we conclude that P, T and V, with use of the described process and specified chemical reagents, will produce a solid synthetic fuel from coal constituting a "qualified fuel" within the meaning of § 29(c)(1)(C). Because P owns the Facilities and operates and maintains the Facilities through its agent, we conclude that P will be entitled to the § 29 credit for the production of the qualified fuel from the Facilities that is sold to an unrelated person.

RULING REQUEST #2

Sections 29(f)(1)(B) and (f)(2) provide that § 29 applies with respect to qualified fuels which are produced in a facility placed-in-service after December 31, 1979, and before January 1, 1993, and which are sold before January 1, 2003.

Section 29(g)(1) modifies § 29(f) in the case of a facility producing qualified fuels described in § 29(c)(1)(C). Section 29(g)(1)(A) provides that for purposes of § 29(f)(1)(B), a facility shall be treated as placed-in-service before January 1, 1993, if the facility is placed-in-service before July 1, 1998, pursuant to a binding written contract in effect before January 1, 1997. Section 29(g)(1)(B) provides that if the facility is originally placed-in-service after December 31, 1992, § 29(f)(2) shall be applied by substituting "January 1, 2008" for "January 1, 2003".

A contract is binding only if it is enforceable under local law against a taxpayer, and does not limit damages to a specified amount, *e.g.,* by use of a liquidated damages provision. A contract provision limiting damages to an amount equal to at least five percent of the total contract price, for example, should be treated as not limiting damages. The construction contract, executed prior to January 1, 1997, includes such features as a description of the facility to be constructed, a completion date, and a maximum price. The contract also provides that damages shall not be less than six percent of the total contract price. P provided an opinion of counsel that the contract is binding under applicable law. Therefore, the contract is a binding written contract for purposes of § 29(g)(1).

RULING REQUEST #4

Section 29(a) allows a credit for qualified fuels sold by the taxpayer to an unrelated person during the taxable year, the production of which is attributable to the taxpayer.

Section 7701(a)(14) provides that "taxpayer" means any person subject to any internal revenue tax. Generally, under § 7701(a)(1), the term "person" includes an individual, a trust, estate, partnership, association, company, or corporation.

Section 702(a)(7) provides that each partner determines the partner's income tax by taking into account separately the partner’s distributive share of the partnership's other items of income, gain, loss, deduction, or credit to the extent provided by regulations prescribed by the Secretary. Section 1.702-1(a) provides that the distributive share is determined as provided in § 704 and § 1.704-1.

Section 704(a) provides that a partner's distributive share of income, gain, loss, deduction, or credit is, except as otherwise provided in chapter 1 of subtitle A of title 26, determined by the partnership agreement.

Section 704(b) provides that a partner's distributive share of income, gain, loss, deduction, or credit (or item thereof) is determined in accordance with the partner’s interest in the partnership (determined by taking into account all facts and circumstances) if (1) the partnership agreement does not provide as to the partner’s distributive share of income, gain, loss, deduction, or credit (or item thereof), or (2) the

allocation to a partner under the agreement of income, gain, loss, deduction, or credit (or item thereof) does not have substantial economic effect.

Section 1.704-1(b)(4)(ii) provides that allocations of tax credits and tax credit recapture (except for § 38 property) are not reflected by adjustments to the partners' capital accounts. Thus, these allocations cannot have economic effect under § 1.704-1(b)(2)(ii)(b)(1), and the tax credits and tax credit recapture must be allocated in accordance with the partners' interests in the partnership as of the time the tax credit or credit recapture arises. If a partnership expenditure (whether or not deductible) that gives rise to a tax credit in a partnership tax year also gives rise to valid allocations of partnership loss or deduction (or other downward capital account adjustments) for the year, then the partners' interests in the partnership with respect to such credit (or the cost giving rise to it) are in the same proportion as the partners' respective distributive shares of the loss or deduction (and adjustments). See § 1.704-1(b)(5), example (11). Identical principles apply in determining the partners' interests in the partnership with respect to tax credits that arise from receipts of the partnership (whether or not taxable).

Based on the information submitted and the representations made, we conclude that the § 29 credit attributable to P may be allocated to the members of P in accordance with the members' interests in P when the credit arises. For the allocation of the § 29 credit, a member's interest in P is determined based on a valid allocation of the receipts from the sale of the § 29 qualified fuel.

RULING REQUEST #5

Section 708(b)(1)(B) provides that a partnership shall be considered as terminated if within a twelve-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits.

Section 1.708-1(b)(1)(iv) provides that if a partnership is terminated by a sale or exchange of an interest, the following is deemed to occur: The partnership contributes all of its assets and liabilities to a new partnership in exchange for an interest in the new partnership; and, immediately thereafter, the terminated partnership distributes interests in the new partnership to the purchasing partner and the other remaining partners in proportion to their respective interests in the terminated partnership in liquidation of the terminated partnership, either for the continuation of the business by the new partnership or for its dissolution and winding up. Section 1.708-1(b)(1)(iv) applies to terminations of partnerships under § 708(b)(1)(B) occurring on or after May 9, 1997.

As discussed above, the placed-in-service deadline in §§ 29(f)(1)(B) and 29(g)(1)(A) must be read as applying to when the facility is first placed in service within the applicable dates. The placed-in-service deadlines contained in §§ 29(f)(1)(B) and 29(g)(1)(A) focus on the facility, and not the taxpayer owning the facility.

Accordingly, the determination of whether a facility has satisfied the placed-in-service deadline under §§ 29(f)(1)(B) and 29(g)(1)(A) is made by reference to when the facility is first placed in service, not when the facility is placed in service by a transferee taxpayer. Therefore, we conclude that a termination of P under § 708(b)(1)(B) will not preclude the reconstituted partnership from claiming the § 29 credit on the production and sale of synthetic fuel to unrelated persons.

RULING REQUEST #6

To qualify for the § 29 credit, P's facility must be placed-in-service before July 1, 1998, pursuant to a binding written contract in effect before January 1, 1997. While § 29 does not define "placed-in-service," the term has been defined for purposes of the deduction for depreciation and the investment tax credit. Property is "placed-in-service" in the taxable year the property is placed in a condition or state of readiness and availability for a specifically assigned function. Treas. Reg. §§ 1.167(a)-11(e)(1)(i) and 1.46-3(d)(1)(ii). "Placed in service" has consistently been construed as having the same meaning for purposes of the deduction for depreciation and the investment tax credit. See Rev. Rul. 76-256, 1976-2 C.B. 46. As discussed above, the Service made a determination that the Facilities were placed in service prior to July 1, 1998.

Rev. Rul. 94-31, 1994-1 C.B. 16, concerns § 45, which provides a credit for electricity produced from certain renewable resources, including wind. The credit is based on the amount of electricity produced by the taxpayer at a qualified facility during the 10-year period beginning on the date the facility was originally placed in service, and sold by the taxpayer to an unrelated person during the taxable year. Rev. Rul. 94-31 holds that, for purposes of § 45, a facility qualifies as originally placed in service even though it contains some used property, provided the fair market value of the used property is not more than 20 percent of the facility's total value (the cost of the new property included in the facility plus the value of the used property).

Rev. Rul. 94-31 describes a windfarm that consists of an “array of wind turbines, towers, pads, transformers, roadways, fencing, on-site power collection systems, and monitoring and meteorological equipment.” Notwithstanding that the windfarm consisted of all of these items, the ruling concludes that the “facility” for purposes of § 45 is confined to “the property on the windfarm necessary for the production of electricity from wind energy.” (emphasis added.) The present situation is similar to Rev. Rul. 94-31. Thus, for purposes of determining the Facility’s total fair market value at the time of relocation or replacement, the Facility consists of the process equipment directly necessary for the production of the qualified fuel, starting at the immediate input of the coal and chemical reagents to the pug mills or mixers (including any coal hoppers and reagent tanks directly feeding the pug mills or mixers) through the output from the briquetters or other forming equipment (including output hoppers, if any). Hence, the Facility’s total fair market value includes the process equipment such as pugmills or mixers, the briquetters or other forming equipment, the equipment necessary to

interconnect such equipment, the electrical, instrumentation, control systems and auxiliaries related to such equipment (including the structures that house such electrical, instrumentation and control systems), the foundation platform(s) for the above-referenced equipment, and an appropriate allocation of the engineering, project management, overhead, and other costs assignable to the relocation of such equipment and construction. The Facility's total fair market value does not include costs associated with the purchase and installation of equipment that supports the operation of the Facility but is not directly necessary for the production of the qualified fuel, such as coal beneficiation, or preparation equipment (e.g., crushers, screens, dryers, or scales), other material handling or conveying equipment (e.g., stacking tubes, transfer towers, storage bunkers, mobile equipment, or conveyors), certain site improvements (e.g., fencing, lighting, earthwork, paving), separate office and bathhouse trailers for facility personnel, and buildings (if a "building" for purposes of § 168 of the Code).

Sampling and quality control are necessary for operational control of a production facility. However, a particular type of sampling equipment generally is not necessary for the production of qualified fuel. Thus, the costs of sampling equipment are excluded from the Facility's total fair market value unless the particular sampling equipment is necessary for operational control of the facility.

Consistent with the holding in Rev. Rul. 94-31, because P's Facilities were "placed in service" prior to July 1, 1998, within the meaning of § 29(g)(1), relocation of the Facility to a different location, or replacement of part of the Facility after June 30, 1998, will not result in a new placed in service date for the Facility for purposes of § 29 provided the fair market value of the original property is more than 20 percent of the Facility's total fair market value at the time of relocation or replacement (the cost of the new equipment included in the Facility plus the value of the used property).

RULING REQUEST #7

Revenue Procedure 2001-30, 2001-19 I.R.B. 1163, provides that "a facility (including one of multiple facilities located at the same site) may be relocated without affecting the availability of the credit if all essential components of the facility are retained and the production capacity of the relocated facility is not significantly increased at the new location."

P has represented that each of the Facilities are designed with three separate and independent production lines so that each line can be operated as a separate unit to produce synthetic fuel. P has represented that all of the major components of the production line would be relocated if the production line is relocated to a new site. P has also represented that relocation of one or more production lines to another site would require the duplication of relatively minor components, and site specific items involved in the relocation of any facility, such as site preparation, paving, foundations, area lighting, and utilities.

Based on the information submitted and the representations made, we conclude that P may relocate one or more of the independent production lines provided the major or essential components of the independent production line are retained and the "production output" of the relocated production line is not significantly increased at the new location. The "production output" is the amount of qualified fuel (including the production of a briquetted fuel product) that can reasonably be expected to be actually produced by each facility using the prevailing practices in the industry regarding the performance of maintenance with regard to the various pieces of equipment in the facility, reasonable allowances for shutdowns for repairs and/or replacement of parts, etc.

CONCLUSIONS

Accordingly, we re-issue the rulings given in Prior Rulings, and conclude as follows:

1. P, with use of the enumerated process and specified chemical reagents, will produce a “qualified fuel” within the meaning of § 29(c)(1)(C).

2. The contract for the construction of the Facilities constitutes a "binding written contract in effect before January 1, 1997" within the meaning of § 29(g)(1)(A).

3. Production from the Facilities will be attributable solely to P within the meaning of § 29(a)(2)(B), and P will be entitled to the § 29 credit for qualified fuel from the Facilities that is sold to an unrelated person.

4. The § 29 credit attributable to P may be allocated to the members of P, presently consisting of V, T, and X, in accordance with the members’ interests in P when the credit arises. Each such member will take into account its allocated share of the § 29 credit in computing its tax liability and, for the allocation of the § 29 credit, a member’s interest in P is determined based on a valid allocation of the receipts from the sale of the § 29 qualified fuel.

5. A termination of P under § 708(b)(1)(B) will not preclude the reconstituted partnership from claiming the § 29 credit on the production and sale of synthetic fuel to unrelated persons.

6. Because each Facility was "placed in service" prior to July 1, 1998 within the meaning of § 29(g)(1), relocation of a Facility to a different location after June 30, 1998, or replacement of part of a Facility after that date, will not result in a new placed in service date for that Facility for purposes of § 29 provided the fair market value of the original property is more than 20 percent of that Facility's total fair market value at the time of relocation or replacement.

7. Because each Facility was "placed in service" prior to July 1, 1998 within the meaning of § 29(g)(1), relocation of one or more of the independent production lines of a Facility to a new location after June 30, 1998 will not result in a new placed in service date for that Facility or an independent production line for purposes of § 29 provided all essential components of the independent production line are retained and the production capacity of the independent production line is not significantly increased at the new location.

The conclusions drawn and rulings given in this letter are subject to the requirements that the taxpayer (i) maintain sampling and quality control procedures that conform to ASTM or other appropriate industry guidelines at the facility that is the subject of this letter, (ii) obtain regular reports from independent laboratories that have analyzed the fuel produced in such facility to verify that the coal used to produce the fuel undergoes a significant chemical change, and (iii) maintain records and data underlying the reports that taxpayer obtains from independent laboratories including raw FTIR data and processed FTIR data sufficient to document the selection of absorption peaks and integration points.

Except as specifically ruled upon above, we express no opinion concerning the federal income tax consequences of the transaction described above.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent. Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not yet been adopted. Therefore, this ruling may be modified or revoked by the adoption of temporary or final regulations to the extent the regulations are inconsistent with any conclusion in this ruling. See § 12.04 of Rev. Proc. 2003-1, 2003-1 I.R.B. 1. However, when the criteria in § 12.05 of Rev. Proc. 2003-1 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

/s/
Joseph H. Makurath
Senior Technician Reviewer, Branch 7
Office of Associate Chief Counsel
(Passthroughs and Special Industries)