Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

Person To Contact:
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Telephone Number:

Refer Reply To:
CC:PSI:5 – PLR-101511-04
Date:
JUN 09 2004

Legend:

Taxpayer =

Subsidiary A =

Subsidiary B =

Subsidiary C =

Subsidiary D =

Date 1 =

Year 1 =

Dear :

This letter responds to your letter dated December 15, 2003, and supplemental submission dated April 14, 2004, submitted on behalf of Taxpayer, requesting a private letter ruling under § 45 of the Internal Revenue Code.

Taxpayer represents that the relevant facts are as follows:

Facts:

Subsidiary A is a wholly owned subsidiary of Taxpayer. Subsidiary A wholly owns Subsidiary B, which wholly owns Subsidiary C, which wholly owns Subsidiary D. Subsidiary B, Subsidiary C, and Subsidiary D are disregarded entities for Federal tax purposes.

On Date 1, Subsidiary B, through Subsidiary C and Subsidiary D, acquired a wind electricity generation facility and all related assets out of a bankruptcy estate. The facility was originally placed in service in Year 1. Electricity produced at the facility is sold to a utility pursuant to a power purchase agreement (PPA) originally entered into before January 1, 1987. The facility has not been re-powered or upgraded with new or more efficient equipment. The PPA has not been amended to comply with the provisions of § 45(d)(7)(B).

Ruling Requested:

Taxpayer requests the Service to rule that in the case of a transfer of a qualified facility, the determination of the facility's placed in service date for purposes of § 45(d)(7)(A)(i) is made by reference to the date the facility was originally placed in service, not the date the facility is placed in service by the transferee taxpayer.

Law and Analysis:

Section 45(a) provides that for purposes of § 38, the renewable electricity production credit may be claimed in an amount equal to 1.5 cents multiplied by the kilowatt hours of electricity produced by the taxpayer from qualified energy resources 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.

Section 45(c)(3)(A) provides that in the case of a facility using wind to produce electricity, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after December 31, 1993 and before January 1, 2004.

Section 45(d)(7)(A) provides that the credit does not apply to electricity (i) produced at a qualified facility described in subsection (c)(3)(A) which is placed in service by the taxpayer after June 30, 1999, and (ii) sold to a utility pursuant to a contract originally entered into before January 1, 1987 (whether or not amended or restated after that date). However, § 45(d)(7)(B) creates an exception whereby the provisions of subparagraph (A) will not apply if the contract is amended to impose a limit on the amount of electricity that may be sold under the contract at prices that exceed avoided cost prices determined at the time of delivery.

There is no discussion in the legislative history on why § 45 was amended to include § 45(d)(7). However, it seems clear from the wording of the statute that it was

directed at windfalls arising in situations where power under pre-1987 PPAs is sold to a utility in excess of amounts contemplated under the PPAs at above market prices.

Taxpayer maintains that § 45(d)(7) was intended to address two specific fact patterns related to pre-1987 power purchase contracts that were perceived to create a potential windfall for taxpayers that owned these contracts. First, the section prevents a taxpayer from constructing a new facility, using more advanced and efficient technology, that will sell power under an unutilized pre-1987 contract and also qualify for § 45 credits. Second, the section prevents an existing facility that was placed in service prior to June 30, 1999 from upgrading and re-powering its operations with new, more efficient equipment, and thereby generating more megawatts of power and more § 45 credits, while selling power at significantly above market prices under a pre-1987 contract.

Taxpayer would apply § 45(d)(7) only to disallow the credit for electricity from a newly developed facility placed in service after June 30, 1999 or an existing facility which had been re-powered. Taxpayer argues that § 45(d)(7) should not apply to a transferred qualified facility originally placed in service before July 1, 1999 if the facility had not been upgraded. Taxpayer would treat a qualified facility placed in service before July 1, 1999 and selling power pursuant to a pre-1987 PPA as a unit entitled to generate a credit for 10 years, regardless of any transfer of the facility after June 30, 1999. Accordingly, Taxpayer would interpret the placed in service date in § 45(d)(7)(A)(i) as the date the transferred facility was originally placed in service. Under the suggested interpretation, the date the transferee placed the facility in service would not be relevant if the transferred facility had not been upgraded.

We do not agree with Taxpayer's interpretation. The term "originally" does not appear in § 45(d)(7)(A)(i). The statutory scheme of § 45(d)(7)(A)(i) contemplates a two-prong determination. Section 45(d)(7)(A)(i) makes reference to a qualified facility described in § 45(c)(3)(A). The statute presupposes that a determination has been made that the requirements of a qualified facility under § 45(C)(3)(A) have been satisfied, including the requirement that the facility be originally placed in service within the requisite time period. Section 45(d)(7)(A)(i) then requires a determination as to whether the qualified facility was placed in service by the taxpayer after June 30, 1999. In the case of a facility that has been transferred, the date the transferee taxpayer places the facility in service is the relevant date.

Section 45(d)(7) does not require that an actual windfall exist but presumes a windfall if electricity from a qualified facility is sold pursuant to a pre-1987 PPA. The only exception provided by the statute to prevent the application of § 45(d)(7)(A) is set forth in § 45(d)(7)(B). The exception requires an amendment to the PPA to impose a limit on the amount of production that may be sold at the higher prices to a utility pursuant to the PPA.

Based solely on the foregoing analysis and the representations made by Taxpayer, in the case of a transfer of a qualified facility, we rule that the determination

of the facility's placed in service date for purposes of § 45(d)(7)(A)(i) is made by reference to the date the facility is placed in service by the transferee taxpayer.

Under the facts in this case, the subject PPA has not been amended in accordance with § 45(d)(7)(B) so as to make § 45(d)(7)(A) inapplicable. Therefore, in applying § 45(d)(7)(A) to the instant case, we rule that the § 45 credit does not apply to the electricity produced at the facility that is the subject of this ruling because the facility was placed in service by Taxpayer after June 30, 1999, and the electricity is sold to a utility pursuant to a PPA originally entered into before January 1, 1987.

Except as specifically set forth above, no opinion is expressed or implied concerning the federal income tax consequences of the above described facts under any other provision of the Code or regulations.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Powers of Attorney on file, a copy of this letter will be sent to each of your authorized representatives.

Sincerely,

/s/ Walter H. Woo

Walter H. Woo
Senior Technician Reviewer
Branch 5
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure: 6110 copy

cc: