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Department of the Treasury
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CC:PSI:B6
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Date:
May 06, 2011

LEGEND:
Taxpayer

Corp A
Possession
Utility
Location
Date

Dear :

This is in response to your request for rulings, submitted by your authorized representative, concerning the federal income tax consequences of the transaction described below: The facts as represented by the Taxpayer are as follows.

Taxpayer has a December 31 taxable year-end and uses the accrual method of accounting for income tax and financial statement purposes. Taxpayer is a wholly-owned domestic single member limited liability company disregarded as an entity separate from its owner (the "Original Member") for United States federal income tax purposes. Taxpayer will be owned by a number of domestic corporations that are subject to United States federal income tax and United States citizens that are subject to United States federal income tax (*i.e.*, none of which are exempt from tax pursuant to §§ 931, 933 or 936, as applicable). The domestic corporations and United States citizens will own their respective interests in Taxpayer through various passthrough entities (*e.g.*, wholly owned single member limited liability companies, domestic partnerships and foreign partnerships). None of the owners of Taxpayer will be a tax-exempt entity within the meaning of § 168(h)(2) and (as stated above) none of such

owners will have elected to be exempt from United States federal income tax pursuant to §§ 931, 933 or 936, as applicable.

Taxpayer's primary business is the construction, operation, management and ownership of a 20 megawatt ground-mounted solar energy facility (the Project) located in Location through its wholly-owned subsidiary, Corp A, a Possession limited liability company that will be organized under the laws of Possession. All items of income, gain, loss and deduction generated from the operation of the Project will be passed through Corp A and up to the Taxpayer (*i.e.*, all of the income and gain derived from the operation of the Project by Corp A will be subject to Untied States federal income tax). The Taxpayer anticipates that the Project will be placed in service and begin commercial operation in Date. The Project will use solar energy to generate electricity, within the meaning of § 48(a)(3)(A)(i), and will sell all such electricity to Utility pursuant to a 20-year power purchase agreement. Furthermore, no portion of the Project will include any property that is part of a facility the production from which is allowed as a credit under § 45. At no time will any portion of the Project be used (i) for lodging, (ii) by a tax-exempt organization described in § 50(b)(3) or (iii) by governments or foreign persons.

At the time the Project achieves commercial operation, it is anticipated that a taxable entity incorporated in a state of the United States (the "New Member," and together with the Original Member, each a "Partner") and subject to United States federal income tax (*i.e.*, the New Member will not have elected to be exempt from United States federal income tax pursuant to § 936) will make a capital contribution to the Taxpayer in consideration for an interest therein. It is the intent of the Original Member and the New Member that, upon the capital contribution of the New Member, the Taxpayer will convert from a disregarded entity to a partnership for United States federal income tax purposes. The partnership will own and operate the Project pursuant to a limited liability company agreement and will allocate income, gain, loss and deductions and distribute cash received from operations (*i.e.*, from the sale of electricity) pursuant to the terms of such agreement.

RULINGS REQUESTED

The Taxpayer has requested the Service to rule that:

(i) assuming the Taxpayer will be regarded as a valid partnership for United States federal income tax purposes and that each partner will be regarded as a valid partner of Taxpayer, each partner will be regarded as an owner and user of the Project to the extent of its respective shares of the basis of the Project for purposes of § 50(b)(1)(B) and, therefore, will be entitled to a share of the energy credit to the extent the partners share in the gross profits of Taxpayer; and

(ii) to the extent each partner is so regarded, the Project will not be excluded by § 50(b)(1)(A) from the definition of energy property (as defined below).

LAW AND ANALYSIS

Section 48(a) of the Code provides for an energy credit equal to 30 percent of the cost basis of qualifying energy property placed in service before January 1, 2017.

Section 48(a)(3)(A)(i) of the Code provides that energy property includes equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, excepting property used to generate energy for the purposes of heating a swimming pool.

Treasury Regulations § 1.48-9(a)(2) provides that in order to qualify as "energy property" under § 48 of the Code, property must be depreciable property with an estimated useful life when placed in service of at least three years and constructed after certain dates.

Section 1.48-9(d)(1) of the regulations provides as follows:

(d) Solar energy property--(1) In general. Energy property includes solar energy property. The term "solar energy property" includes equipment and materials (and parts related to the functioning of such equipment) that use solar energy directly to (i) generate electricity, (ii) heat or cool a building or structure, or (iii) provide hot water for use within a building or structure. Generally, those functions are accomplished through the use of equipment such as collectors (to absorb sunlight and create hot liquids or air), storage tanks (to store hot liquids), rockbeds (to store hot air), thermostats (to activate pumps or fans which circulate the hot liquids or air), and heat exchangers (to utilize hot liquids or air to create hot air or water). Property that uses, as an energy source, fuel or energy derived indirectly from solar energy, such as ocean thermal energy, fossil fuel, or wood, is not considered solar energy property.

Section 1.48-9(d)(3) of the regulations provides, in part, that solar energy property includes equipment that uses solar energy to generate electricity, and includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items. Such property, however, does not include any equipment that transmits or uses the electricity generated.

Section 1,46-3(f)(1) of the regulations, provides, in part that in the case of a partnership, each partner shall take into account separately, for his taxable year with or within which the partnership taxable year ends, his share of the basis of partnership new section 38 property and his share of the cost of partnership used section property

placed in service by the partnership during such partnership taxable year. Each partner shall be treated as the taxpayer with respect to his share of the basis of partnership new section 38 property and his share of the cost of partnership used section 38 property.

Section 50(b)(1)(A) provides that except as provided in § 50(b)(1)(B), no investment credit is determined for any property that is used predominantly outside the United States. Section 50(b)(1)(B) provides that § 50(b)(1)(A) does not apply to any property described in § 168(g)(4).

Section 168(g)(1)(A) provides that any tangible property used predominantly outside the United States during the taxable year must be determined under the alternative depreciation system of § 168(g).

Section 168(g)(4) has an exception from § 168(g)(1)(A) for certain property used outside the United States. Section 168(g)(4)(G) provides that property will not be treated as used predominantly outside the United States if the property is owned by a domestic corporation (other than a corporation which has an election in effect under former § 936) or by a united States citizen (other than a citizen entitled to the benefits of § 931 or § 933) and which is used predominantly in a possession of the United States by such a corporation or such a citizen, or by a corporation created or organized in, or under the law of, a possession of the United States.

The background of § 168(g)(4) provides insight in determining whether § 168(g)(4)(G) applies to domestic partnerships where all of the partners are domestic corporations (none of which has an election in effect under § 936) or United States citizens (none of whom is entitled to the benefits of §931 or § 933). The rules in § 168(g)(4) are derived from former § 48(a)(2)(B). Prior to 1990, § 168(g)(4) provided, in relevant part, that for purposes of § 168(g)(4), rules similar to the rules under § 48(a)(2) (including the exceptions contained in § 48(a)(2)(B) shall apply in determining whether property is used predominantly outside the United States. When former § 48 was repealed in 1990, § 168(g)(4) was amended to incorporate the enumerated exceptions contained in former § 48(a)(2)(b). See § 11813 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508 (the "Act"). The language of § 168(g)(4)(G) is the same as the language in former § 48(a)(2)(B)(vii) prior to its repeal in 1990.

The Senate Finance Committee stated the following comments, in relevant part, on the reason for the enactment of former § 48(a)(20)(B)(vii):

> "Your committee's amendment extends the application of the investment credit provision to property used in a possession by a U.S. person or by a corporation organized in a possession provided the property would otherwise have qualified for the investment credit. This rule is not extended if the property is owned or used in the possession by U.S. persons who are presently exempt from U.S. tax due to the application

> of the special provisions of the Code which exempt U.S. persons who derive substantially all of their income from a U.S. possession (section 931, 932, 933, 934(b)).” S. Rep. No. 1707, 89th Cong., 2d Sess. 58 (1966), 1966-2 C.B. 1100.

Based on the Senate Report, it appears that Congress intended former § 48(a)(2)(B)(vii) to apply to United States persons even though the literal language of former § 48(a)(20)(B)(vii) applied to United States citizens or domestic corporations. When former § 48(a)(2)(B)(vii) was enacted in 1966, the term “United States person” was defined under § 7701(a)(3) as meaning: (A) a citizen or resident of the United States, (B) a domestic partnership, (C) a domestic corporation, and (D) any estate or trust (other than a foreign estate or foreign trust within the meaning of § 7701(a)(31)).

Similar to former § 48(a)(2)(B)(vii), the literal wording of § 168(g)(4)(G) applies to domestic corporations or United States citizens, but not to domestic partnerships. However, the repeal of the former provision and the amendment to § 168(g)(4) by § 11813 of the Act were not intended to be substantive changes in the tax law. H.R. Rep. No. 101-894, 101st Cong., 2d Sess (Oct. 17, 1990).

Section 7701(a)(30) defines the term “United States person” as: (A) a citizen or resident of the United States, (B) a domestic partnership, (C) a domestic corporation, (D) any trust if a court within the United States is able to exercise primary supervision over the administration of the trust, and one or more United States persons have the authority to control all substantial decisions of the trust.

In light of the legislative history of § 168(g)(4) and former § 48(a)(2)(B)(vii), we believe that § 168(g)(4)(G) is intended to apply to a domestic partnership where all of its partners are domestic corporations that do not have an election in effect under § 936 or are United States citizens that are not entitled to the benefits of § 931 or § 933.

In this case, Taxpayer represents that when the Project is placed in service and begins commercial operations in Date, Taxpayer will be a partnership and the partnership will own and operate the Project. Therefore, provided that Taxpayer is a domestic partnership where all of its partners are domestic corporations (other than a corporation which has an election in effect under § 936) or United States citizens (other than a citizen entitled to the benefits of § 931 or § 933), the Project that is owned by Taxpayer for depreciation purposes and is used by Taxpayer only in Possession is property described in §168(g)(4)(G).

Accordingly, we conclude that

> (i) assuming Taxpayer will be regarded as a valid partnership for United States federal income tax purposes and that each partner will be regarded as a valid partner of Taxpayer, each partner will be regarded as an owner

and user of the Project to the extent of its respective shares of the basis of the Project for purposes of § 50(b)(1)(B) and, therefore, will be entitled to a share of the energy credit to the extent the partners share in the gross profits of Taxpayer; and

(ii) to the extent each partner is so regarded, the Project will not be excluded by § 50(b)(1)(A) from the definition of energy property.

In accordance with the Power of Attorney on file with this office, we are sending a copy of this letter to your authorized representatives. A copy of this ruling must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling

We express no opinion concerning any issue not directly addressed in this ruling.

This ruling is directed only to the Taxpayer who requested it. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent. We are sending a copy of this letter ruling to the Industry Director.

Sincerely,

Peter C. Friedman
Senior Technician Reviewer, Branch 6
Office of Associate Chief Counsel (Passthroughs & Special Industries)