Internal Revenue Service

Department of the Treasury
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Date:
October 31, 2003

In Re:

LEGEND:

Taxpayer	=
Member A	=
Member B	=
Member C	=
Date 1	=
Date 2	=
Date 3	=
Company B	=
Company C	=
Company D	=
a	=

Dear :

This letter responds to a letter dated April 9, 2003, submitted on behalf of Taxpayer and its members (Member A, Member B, and Member C) by its authorized representative, for rulings under section 29 of the Internal Revenue Code.

On Date 1, Taxpayer received PLR 117299-02 (Private Letter Ruling), which ruled on similar issues addressed by this letter. Taxpayer seeks a confirmation of the rulings in light of the relocation of Taxpayer's three synthetic fuel facilities (Facilities), the purchase of an interest in Taxpayer by Member C, and the election of Member A to be classified as an association taxable as a corporation as described in the ruling request from Taxpayer's authorized representative.

Taxpayer is a Delaware limited liability company, classified as a partnership for federal income tax purposes. On Date 2, Company B and Company C contributed the Facilities to Taxpayer in exchange for interests therein. On the same date, Company B and Company C contributed their interests in Taxpayer to Member B in exchange for interests therein. In addition, Member A contributed cash to Taxpayer in exchange for an interest therein. Since Date 2, Taxpayer has owned and operated the Facilities for producing a solid synthetic fuel from coal (Product) using the process described below.

One of the Facilities consists of two pellet mills which are fed by its associated mixing equipment. The other two Facilities consists of two production lines, each of which consists of a pellet mill which is fed by its associated mixing equipment 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 of the Facilities has been relocated to the sites identified in the ruling request. In connection with the relocations of the Facilities, most major components of each Facility directly necessary to produce a synthetic fuel were relocated with each Facility. Taxpayer has represented that following the relocations, the fair market value of the original property included in each Facility is more than twenty percent of each Facility's total value (the cost of the new equipment included in the Facility plus the value of the original property).

Taxpayer has entered into contracts with Company B, Company C and Company D pursuant to which such companies have agreed to sell coal feedstock to Taxpayer necessary to satisfy its requirements to produce synthetic fuel. Taxpayer has represented that all sales of synthetic fuel will be to unrelated persons.

Taxpayer has supplied a detailed description of the process employed at the Facilities and the chemical reagents 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.

Recognized experts in coal combustion chemistry performed numerous tests on the coal used at the Facilities and the Product produced at the Facilities and have submitted reports concluding that significant chemical changes take place with the application of the process to the coal.

On Date 3, Member C purchased an interest in Taxpayer from Member B pursuant to a purchase agreement. Together with Member A, Member B and Member C have made (and are expected to continue to make) periodic capital contributions to enable Taxpayer to pay its operating costs and other obligations. The operating

agreement for Taxpayer sets forth each member's percentage interest in gross income from the sale of synthetic fuel, from time to time. The operating agreement establishes a ceiling on the amount of capital contributions that Member C is required to make to the Taxpayer. In addition, during periods where overall sales of qualified fuel from all facilities fall between a percent of then maximum anticipated sales, Member B may pay to Member C, under the purchase and sale agreement, an amount equal to all or a portion of Member C's capital contribution to the Taxpayer. Neither the ceiling on capital contributions nor any such low production payment will affect the percentage interests of the Members.

Effective on Date 3, Member A elected under § 301.7701-3 of the Treasury Regulation to be classified as an association taxable as a corporation for federal tax purposes.

The rulings issued in the Private Letter Ruling which you wish to be reconfirmed in this private letter ruling are as follows:

1. Taxpayer, with the use of the enumerated process, will produce a "qualified fuel" within the meaning of section 29(c)(1)(C), and the production of the qualified fuel from the Facilities will be attributable solely to Taxpayer within the meaning of section 29(a)(2)(B), entitling Taxpayer to the section 29 credit for the production of the qualified fuel from the Facilities that is sold to an unrelated person;

2. If the Facilities were "placed in service" prior to July 1, 1998, within the meaning of section 29(g)(1), relocation of a Facility after June 30, 1998, or replacement of parts of a Facility after that date, will not result in a new placed in service date for the Facility for purposes of section 29 provided the fair market value of the original property is more than 20 percent of Facility's total fair market value at the time of the relocation or replacement;

3. The section 29 credit attributable to Taxpayer may be allocated to the members of Taxpayer in accordance with the members' interest in Taxpayer when the credit arises. For the section 29 credit, a member's interest in Taxpayer is determined based on a valid allocation of the receipts from the sale of the section 29 qualified fuel; and

4. The relocation of independent production lines of a Facility that were "placed in service" prior to July 1, 1998, within the meaning of section 29(g)(1), to new locations after June 30, 1998, will not result in a new placed in service date for Facility for purposes of section 29 provided the essential components of the independent production lines are retained and the production output at the new location is not significantly increased at the new locations.

The changes in facts since the issuance of the Private Letter Ruling are the relocation of the three Facilities, the purchase of an interest in Taxpayer by Member C, and the election of Member A to be classified as an association taxable as a corporation. The above rulings are not affected by these changed facts.

To qualify for the section 29 credit, a facility must be placed in service before July 1, 1998, pursuant to a binding written contract in effect before January 1, 1997. While section 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. Treasury Regulation §§ 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.

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."

Revenue Ruling 94-31, 1994-1 C.B. 16, concerns section 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 section 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 twenty 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 concerns a factual context similar to the present situation. Consistent with the holding in Rev. Rul. 94-31, the relocation of the Facilities to different locations after June 30, 1998, or replacement of parts of the Facilities after that date, will not result in a new placed in service date for each Facility for purposes of section 29 provided the fair market value of the property used at the original facility is more than twenty percent of each 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 property used at the original facility).

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 section 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. Proc. 94-31. Thus, for purposes of determining a Facility's total fair market value at the time of relocation or replacement, a 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 pellet mills or other forming equipment (including output hoppers, if any). Hence, each Facility's total fair market value includes the process equipment such as pugmills or mixers, the pellet mills 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. A 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 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 or paving), separate office and bathhouse trailers for facility personnel, and buildings (if a "building" for purposes of section 168), and other administrative assets.

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.

Accordingly, based on the information submitted and the representations made, we conclude as follows:

1. Taxpayer, with the use of the enumerated process, will produce a "qualified fuel" within the meaning of section 29(c)(1)(C), and the production of the qualified fuel from the Facilities will be attributable solely to Taxpayer within the meaning of section 29(a)(2)(B), entitling Taxpayer to the section 29 credit for the production of the qualified fuel from the Facilities that is sold to an unrelated person;

2. If the Facilities were "placed in service" prior to July 1, 1998, within the meaning of section 29(g)(1), relocation of a Facility after June 30, 1998, or replacement of parts of a Facility after that date, will not result in a new placed in service date for the Facility for purposes of section 29 provided the fair market value of the original property is more than 20 percent of Facility's total fair market value at the time of the relocation or replacement;

3. The section 29 credit attributable to Taxpayer may be allocated to the members of Taxpayer in accordance with the members' interest in Taxpayer when the credit arises. For the section 29 credit, a member's interest in Taxpayer is determined based on a valid allocation of the receipts from the sale of the section 29 qualified fuel;

4. The relocation of independent production lines of a Facility that were "placed in service" prior to July 1, 1998, within the meaning of section 29(g)(1), to new locations after June 30, 1998, will not result in a new placed in service date for such Facility for purposes of section 29 provided the essential components of the independent production lines are retained and the production output at the new locations is not significantly increased at the new locations; and

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

The conclusions drawn and rulings given in this letter are subject to the requirements that Taxpayer (i) maintain sampling and quality control procedures that conform to ASTM or other appropriate industry guidelines at the facility or facilities that are the subject of this letter, (ii) obtain regular reports from independent laboratories that have analyzed the fuel produced in such facility or facilities 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 section 12.04 of Rev. Proc. 2003-1, 2003-1 I.R.B. 1, 50.

However, when the criteria of section 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 Member A and to a second authorized representative.

Sincerely,

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

cc: