Internal Revenue Service

Number: **202046007**
Release Date: 11/13/2020

Index Number: 168.24-00

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B06
PLR-106281-20

Date:
August 13, 2020

Re:

LEGEND

Taxpayer =

Company =

State A =

State B =

State C =

State D =

Commission 1 =

Commission 2 =

Commission 3 =

Director =

Year =

a =

Dear :

This letter responds to your request dated February 12, 2020, for a ruling regarding the application of § 168(i)(10) and former § 46(f)(5) of the Internal Revenue

Code to the facts described below. The relevant facts as represented in your submission are set forth below.

FACTS

Taxpayer is a publicly-traded holding company incorporated in State A. It is the parent of a group of affiliated companies that files a consolidated federal income tax return on a calendar year basis using an accrual method of accounting. The Company, a State A limited liability company, is a wholly-owned indirect subsidiary of Taxpayer. The Company is disregarded as an entity separate from Taxpayer for federal income tax purposes. The Company's offices are located in State B.

The Company was created to serve customers by providing energy services from renewable energy sources through long-term contractual agreements with customers. The Company has received certificates from Commission 1 and Commission 2 to lease electric generating facilities in State B and State C. The Company has solar energy leasing businesses in State B, State C, and State D (Solar Services Program). The Company's Solar Services Program in State D is not subject to the regulatory jurisdiction of Commission 3, or to rate regulation by any other state or federal regulatory body. The Company began marketing its solar energy services in State D in the first quarter of Year.

Under the Company's Solar Services Program, the Company will enter into a Solar Energy Service Agreement (Agreement) with a participating customer (Customer) for the provision of services (Solar Energy Services) with respect to a solar photovoltaic generation system (System) to be constructed and installed on the Customer's premises. The Company will own, operate, and maintain the System during the term of the Agreement. Under the Agreement, the Customer is entitled to a percent of the electrical energy generated by the System in exchange for a monthly fee, which could include a fixed percentage price escalator.

Participation in the Company's Solar Services Program is voluntary. None of the costs of the solar facilities installed under the Company's Solar Services Program will be included in a regulated rate base for the purpose of determining the price for Solar Energy Services. Instead, the Company will establish a market-based price for Solar Energy Services, to be determined with each Customer through arm's-length negotiation, based on criteria that includes, but is not limited to, an evaluation of the Customer's creditworthiness. Rates charged to Customers under the Company's Solar Services Program will be based on market-based prices for the particular System that each Customer selects to match its individual needs. Individual rates under the Agreement will not be set by, or subject to the approval of, any governmental or other regulatory body.

RULING REQUESTED

The Taxpayer requests a ruling that the System will not be public utility property within the meaning of § 168(i)(10) and former § 46(f)(5) because the contract price under the Agreement and the Company's Solar Services Program is not a cost-of-service based, rate-of-return price for the furnishing of electrical energy, and because the Company's Solar Services Program in State D is not subject to the regulatory jurisdiction of Commission 3 or any other state or federal regulatory body.

LAW AND ANALYSIS

Section 168(f)(2) provides that the depreciation deduction determined under § 168 shall not apply to any public utility property (within the meaning of § 168(i)(10)) if the taxpayer does not use a normalization method of accounting.

Section 168(i)(10) defines, in part, public utility property as property used predominantly in the trade or business of the furnishing or sale of electrical energy if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, or by a public service or public utility commission or other similar body of any State or political subdivision thereof.

Prior to the Revenue Reconciliation Act of 1990, § 168(i)(10) defined public utility property by means of a cross reference to § 167(l)(3)(A). Section 167(l)(3)(A) as then in effect contained the same definition of public utility property that is currently in § 168(i)(10). Section 1.167(l)-1(b) provides that under § 167(l)(3)(A), property is public utility property during any period in which it is used predominantly in a § 167(l) public utility activity. The term "section 167(l) public utility activity" means, in part, the trade or business of the furnishing or sale of electrical energy if the rates for such furnishing or sale, as the case may be, are regulated, i.e. have been established or approved by a regulatory body described in § 167(l)(3)(A). The term "regulatory body described in section 167(l)(3)(A)" means a State (including the District of Columbia) or political subdivision thereof, any agency or instrumentality of the United States, or a public service or public utility commission or other body of any State or political subdivision thereof similar to such a commission. The term "established or approved" includes the filing of a schedule of rates with a regulatory body which has the power to approve such rates, even though such body has taken no action on the filed schedule or generally leaves undisturbed rates filed by the taxpayer.

The definitions of public utility property contained in § 168(i)(10) and former § 46(f)(5) are essentially the same. Pursuant to § 50(d)(2), rules similar to the rules of former § 46(f) as in effect on November 5, 1990 continue to determine whether or not an asset is public utility property for purposes of the investment tax credit normalization rules. As in effect at that time, former § 46(f)(5) defined public utility property by reference to former § 46(c)(3)(B).

The regulations under former § 46 (of continuing applicability by virtue of § 50(d)(2)) contain an expanded definition of regulated rates in § 1.46-3(g)(2)(iii). This expanded definition embodies the notion of rates established or approved on a rate-of-return basis, where rate of return includes a fair return on the taxpayer's investment in providing such goods and services. Furthermore, rates are not "regulated" if they are established or approved on the basis of maintaining competition within an industry, insuring adequate service to customers of an industry, or charging "reasonable" rates within an industry. In addition to the definition in the § 46 regulations, there is an expressed reference to rate of return in § 1.167(l)-1(h)(6)(i).

The operative rules for normalizing timing differences relating to use of different methods and periods of depreciation are only logical in the context of rate-of-return regulation. The normalization method, which must be used for public utility property to be eligible for the depreciation allowance available under § 168, is defined in terms of the method the taxpayer uses in computing its tax expense for purposes of establishing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account. Therefore, for purposes of application of the normalization rules, the definition of public utility property is the same for purposes of the investment tax credit and depreciation.

Thus, under both the depreciation and the investment tax credit normalization rule definitions, a facility must meet three requirements to be considered public utility property:

1. It must be used predominantly in the trade or business of the furnishing or sale of, inter alia, electrical energy;

2. The rates for such furnishing or sale must be established or approved by a state or political subdivision thereof, any agency or instrumentality of the United States, or by a public service or public utility commission or similar body of any state or political subdivision thereof; and

3. The rates so established or approved must be determined on a rate-of-return basis.

The System will meet the first requirement as it will be used predominantly in the trade or business of the furnishing or sale of electrical energy.

The System will meet the second requirement with respect to the Company's Solar Services Program in State B and State C, as the Solar Services Program was approved by Commission 1 and Commission 2.

The System will not meet the second requirement with respect to the Company's Solar Services Program in State D, as the Company's Solar Services Program in State

D is not subject to the regulatory jurisdiction of Commission 3, or to rate regulation by any other state or federal regulatory body.

The System will not meet the third requirement because the monthly fee under the Agreement will not be determined on a rate-of-return basis. Instead, the Company will establish a market-based price for Solar Energy Services, determined through arm's-length negotiations with Customers. Individual rates under the Agreement will not be set by, or subject to the approval of, any governmental or other regulatory body.

Accordingly, we conclude that the System is not public utility property within the meaning of § 168(i)(10) and former § 46(f)(5).

Except as specifically determined above, no opinion is expressed or implied concerning the federal income tax consequences of the matters described above under any other provisions of the Code (including other subsections of § 168). In addition, no opinion is expressed concerning whether Taxpayer is the owner of the System generating electricity for federal income tax purposes.

This letter 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. This letter ruling is based upon information and representations submitted on behalf of Taxpayer and accompanied by penalty of perjury statements executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination. In accordance with the power of attorney on file with this office, a copy of this letter ruling is being sent to your authorized representative. We are also sending a copy of this letter ruling to the Director.

Sincerely,

Jennifer A. Records
Senior Technician Reviewer, Branch 6
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

cc: