December 20, 2022

Ms. Holly Porter
Associate Chief Counsel
(Passthroughs and Special Industries)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

RE: Notice 2022-50, Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Dear Ms. Porter:

The American Institute of CPAs (AICPA) appreciates the efforts by the Department of the Treasury ("Treasury") and the Internal Revenue Service (IRS) to provide guidance to taxpayers pertaining to energy tax credit provisions of the Inflation Reduction Act of 2022[1] (IRA). On October 5, 2022, Treasury and the IRS issued IR-2022-172 and Notices 2022-46 through 2022-51. Additionally, on November 3, 2022, IR-2022-193 and Notices 2022-56 through 2022-58 were released, requesting comments on various components of the new energy credits. This letter provides comments on Notice 2022-50.

Background

The IRA created several new energy tax credits, while also enhancing and expanding other established credits. Additionally, the IRA created new section 6417[2] and section 6418 to provide taxpayers with efficient ways to claim or otherwise benefit from such credits. Section 6417 allows certain taxpayers to elect to treat certain credits as direct payments rather than credits against their federal income tax liabilities. Section 6418 permits eligible credits to be transferred from eligible taxpayers to an unrelated taxpayer.

For most credits, entities eligible to elect under section 6417 are limited to organizations exempt from tax imposed by Subtitle A of the Internal Revenue Code (IRC), States and its political subdivisions, the Tennessee Valley Authority, an Indian tribal government, an Alaska Native Corporation, or a corporation operating on a cooperative basis that is engaged in furnishing electrical energy to persons in rural areas. This limitation does not apply, and direct payment may be elected by other taxpayers and entities, in the case of credits under section 45V for the production of clean hydrogen, section 45Q for carbon oxide capture and section 45X for advanced manufacturing production.

[1] P.L. 117-169.
[2] Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

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Section 6418 provides an election to transfer eligible credits from taxpayers to an unrelated taxpayer if the payment is made in cash. A section 6418 transfer is not available if direct payment under section 6417 is available or elected.

Partnerships and S corporations elect the use of section 6417 and section 6418 at the entity level. Payments under section 6417 are made directly to the entity. Amounts received for the transfer of credits under section 6418 are received directly by the entity. In both cases, amounts received by the entity are treated as tax exempt income.

Limitations on the use of sections 6417 and 6418 include a prohibition on "excessive payments." For this purpose, the term excessive payment is defined as the amount treated as a payment (under section 6417) or the amount transferred (under section 6418) over the amount which, without the application of section 6417 or 6418 would be otherwise allowable with respect to the facility or property for such taxable year. If the Secretary of the Treasury ("the Secretary") determines that an excessive payment or transfer exists, the income tax liability of the electing entity for the year in which the determination is made will be increased by the amount of the excessive payment or transfer plus, unless reasonable cause is demonstrated, a 20 percent penalty.

Recommendation

The AICPA recommends that Treasury and the IRS provide guidance for section 6417 and section 6418 which afford partnerships and S corporations an opportunity for effective use of these sections.

Analysis

The inclusion of new section 6417 and section 6418 in the IRA significantly increases the ability of eligible credits to serve their intended purpose of incentivizing an investment in clean energy by making those credits available to entities that are not otherwise subject to the income tax, or do not have sufficient taxable income to make use of the credits within a reasonable period. However, certain risks and concerns are inherent to taxpayers who wish to utilize these sections currently.

For example, there is uncertainty as to whether an excessive payment or transfer may exist. If such excessive payment does exist, there is risk that a portion of otherwise eligible credits may be extinguished without the opportunity for carryover. The general uncertainty as to the potential effect of an election may prevent partnerships and S corporations from considering the use of section 6417 and section 6418. Instead, they may be forced to continue to rely on the use of partnership structures that allow passive outside investors to claim those credits.

Section 6417 and section 6418 provide taxpayers with an optimized approach for the allocation of credits, and guidance should be provided for in a manner that does not dissuade taxpayers from utilizing them. If guidance of these sections is overly restrictive, taxpayers will continue to utilize past methods to allocate credits, regardless of the economic dissonance or structural complexity inherent in them.

Recommendation

The AICPA recommends that Treasury and the IRS issue guidance defining the terms "excessive payment" and "excessive credit transfer." In addition, we recommend providing illustrative examples showing the determination of the amount of such payments or transfers.

Analysis

The definitions of excessive payment included in sections 6417 and excessive credit transfer in section 6418 are unclear and have created uncertainty among taxpayers and tax practitioners. Specifically, both items refer to "the amount of such credit which, without application of this section, would be otherwise allowable under this title with respect to such facility or property for such taxable year." Uncertainty lies in determining the amount that would be considered "otherwise allowable" and whether this amount is determined with respect to a partner or shareholder's ability to utilize such credit based on their own tax attributes.

Before utilizing section 6417 or section 6418, taxpayers require certainty on how such amounts are to be determined. We suggest that guidance indicate which factors affect the determination of the amount allowable with respect to such facility or property. Also, illustrative examples showing the determination of both the amount of an excessive payment or credit transfer, and the result to a taxpayer from these items should be provided.

Recommendation

If excessive payments and excessive credit transfers are determined, in part, by a partner or shareholder's ability to claim such credit, the AICPA recommends that Treasury and the IRS provide guidance allowing for the following:

1. Reasonable Cause – Including procedures considered to satisfy the reasonable cause exception to the 20 percent penalty on excessive payments and transfers.

2. Partial Election – Elections under section 6417 and section 6418 with respect to portions of any eligible credit to avoid the creation of excessive payments and credits transfers.

3. Carryover – Carryover provisions to prevent the extinguishment of otherwise valid credits due to excessive payment determinations.

4. Allocation – Stacking rules to minimize the risk that an excessive payment be determined in a situation where only a portion of available credits would be disallowed to an individual owner.

5. Effect on Governing Instrument – Transactions between a partnership and its partners or an S corporation and its shareholders intended to resolve an excessive payment issue are considered a transaction separate and apart from the entity's governing instrument.

Analysis

Excessive payment and credit transfers determined by a partner's or shareholder's tax attributes create significant concerns for partnerships or S corporations who wish to utilize section 6417 and section 6418. These excessive amounts determined in relation to certain partners or shareholders would create risk for both the entity utilizing the excessive payment and credit transfer provisions and partners or shareholders whose factors did not contribute to such excessive items being created. Our recommendations would minimize the risk in the following ways:

1. Reasonable Cause – For a partnership or S corporation making an election under section 6417 or section 6418, the owners must be confident that the entity will not be subject to additional cost of the 20 percent excessive payment or transfer penalty. The partnership or S corporation should be allowed to rely on the statement of its owners as to whether they believe that they would be able to use the credit were it to be passed through to them.

2. Partial Election – In order to facilitate elections under section 6417 and section 6418 while limiting the incidence of excessive payments and transfers, a partial election that applies only to the portion of the credit that the electing entity believes will not potentially create an excessive payment or transfer should be allowed. The portion of the credit that is not included in the partial election would be passed through to the partner or shareholder and claimed or disallowed at that level under normal rules. The statute is silent as to the scope of the election under section 6417 and section 6418. While it does not specifically provide for a partial election it does not prohibit one.

3. Carryover – If an entity makes a section 6417 or section 6418 election, and a portion of the eligible credit would not be allowed in the year of the election were it passed through to the partner or shareholder, the amount not allowable is treated as an excessive payment or transfer. Any excessive payment or transfer must be repaid, and no provision is made for the consideration of an excessive payment or transfer in a future year. However, had no election been made, the partner or shareholder that was not able to utilize the credit in the current year would be allowed a carryover period of up to 20 years in which to use these credits. To provide consistency of treatment, a rule should be provided allowing the portion of any credit giving rise to an excessive payment or transfer amount to be carried forward and claimed by the partner or S corporation shareholder at such time as the credit would not result in an excessive payment if treated as arising in that future year.

4. Allocation – The determination of which passive activity credits are allowed in any particular year is normally calculated by pro rata allocation. In the case of an individual partner or S corporation shareholder holding multiple passive investments, it is difficult to determine whether some or all of one credit will be allowed in a particular year until detailed results from all passive investments has been received. For an entity to determine if it can make a section 6417 or section 6418 election without risk of triggering an excessive payment or credit transfer, it must be able to rely on statements from its owners as to their ability to use the credits were no election to be made. Allowing credits eligible for the

election to be assigned first to any available passive income will facilitate this determination.

5. Effect on Governing Instruments – A wide variety of provisions are found in the governing documents of partnerships and S corporations, some of which relate to transactions between the entity and its owners and could affect the rights and obligations of different owners. If the amount of any excessive payment or transfer (plus any penalty) is treated as a tax liability of the partnership or S corporation, such amounts and penalties affect all of the entities owners who may seek reimbursement of that burden from the specific owner whose inability to use the credit created the excessive payment or transfer. A statement that the existence or absence of any such arrangement will not result in the finding of a second class of stock in the case of an S corporation or of an inappropriate allocation in the case of a partnership would eliminate a barrier to the election.

Recommendation

The AICPA recommends that Treasury and the IRS provide guidance clarifying that tax-exempt income created under section 6417 and section 6418 of an S corporation is attributable to the other adjustments account (OAA).

Analysis

Taxpayers and tax practitioners need to be provided with a clear statement that tax-exempt income created under these sections is attributable to OAA to avoid confusion.

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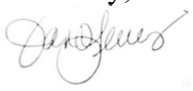
We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact April Little, Chair, AICPA Environmental, Social, and Governance (ESG) Tax Task Force, at (832) 476-3730, or April.Little@us.gt.com; Jon Williamson, AICPA Senior Manager – Tax Policy & Advocacy, at (216) 509-2972, or me, at (601) 326-7119, or JanLewis@HaddoxReid.com

Sincerely,



Jan Lewis
Chair, AICPA Tax Executive Committee

cc: The Honorable Lily Batchelder, Assistant Secretary for Tax Policy, Department of the Treasury
Mr. Douglas O'Donnell, Acting Commissioner, Internal Revenue Service
Mr. William Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service