



August 14, 2023

The Honorable Lily Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. William Paul
Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

CC:PA:LPD:PR (T.D. 9975, REG-105595,
REG-101607-23,REG-101610-23)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Comments on Proposed and Temporary Regulations on Section 6417 Regarding Elective Payment of Applicable Energy Credits, Section 48D Elective Payment of Applicable Credits and Section 6418 on Transfer of Certain Credits (T.D. 9975, REG-105595-23, REG-101607-23, and REG-101610-23)

Dear Ms. Batchelder and Mr. Paul:

The American Institute of CPAs (AICPA) appreciates the efforts of 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 (H.R. 5376)¹ (IRA) and on the section² 48D advanced manufacturing investment credit provisions of the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022 (H.R. 4346).³ On June 21, 2023, Treasury and the IRS issued proposed regulations ([REG-101607-23](#)) (“proposed regulations”) to implement section 6417, Elective Payment of Applicable Credits. On the same day, Treasury and the IRS also issued proposed regulations ([REG-105595-23](#) and [REG-101610-23](#)) on section 48D Elective Payment of Advanced Manufacturing Investment Credit, section 6418, Transfer of Certain Credits, respectively and temporary regulations ([T.D. 9975](#)) providing information and registration requirements that must be completed before elections available under section 48D(d), section 6417, and section 6418 may be made.

We are pleased to submit this letter in response to the proposed and temporary regulations. We offer these comments in addition to our letters previously submitted on December 20, 2022,⁴ and January

¹ [P.L. 117-169](#), enacted August 16, 2022.

² Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986 (Code), as amended, or to the Treasury Regulations promulgated thereunder.

³ [P.L. 117-167](#), enacted August 9, 2022.

⁴ See AICPA letter, “[Notice 2022-50, Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits](#),” December 20, 2022.

25, 2023,⁵ to Treasury and the IRS. Specifically, in this letter, the AICPA provides recommendations and requests guidance on the following items.

Treasury and IRS should:

- A. Consider an expedited process for the issuance of quick refunds for applicable entities eligible for direct pay.
- B. Provide additional clarity and simplify the pre-filing registration process by:
 - 1. Establishing a minimum credit threshold to relieve some tax-exempt taxpayers who are claiming lower credit amounts from the pre-filing registration requirement.
 - 2. Providing clarity about the pre-filing process; including timeline, process time and mode, and specified changes regarding amendment.
 - 3. Providing clarity about the pre-filing process specific to the credits using qualified progress payments made in 2022.
- C. Consider allowing partnerships with all tax-exempt partners to be considered “applicable entities.”
- D. Provide further guidance on the definition of Restricted Tax-Exempt Amount.
- E. Retain in the final regulations the clarification of “applicable entities” and the definitions as included in Prop. Reg. § 1.6417-1(c).
- F. Omit the 5-step computation rule and provide guidance that allows taxpayers to elect to treat the advanced manufacturing investment and energy tax credits as a payment against tax “equal to the amount of such credit” under the direct payment final regulations.
- G. Provide in the final regulations that taxpayers who perform the carbon capture and receive the section 45Q tax credit in a transfer from the property owner be allowed to transfer the credit to another third party.
- H. Remove section 469 from Prop. Reg. § 1.6418-2(d)(1) and Prop. Reg § 1.6418-2(f)(3)(ii) in its entirety.

⁵ See AICPA letter, “[Proposed Regulations on Prevailing Wage and Apprenticeship Requirements Under Section 45\(b\)\(6\)\(B\)\(ii\) and Other Substantially Similar Provisions](#),” January 25, 2023.

SPECIFIC COMMENTS

A. Treasury and the IRS should consider an expedited process for the issuance of quick refunds for applicable entities eligible for direct pay.

Overview

An “applicable entity” eligible for direct pay under section 6417 includes any organization exempt from the tax imposed by subtitle A, any State or political subdivision thereof, the Tennessee Valley Authority, an Indian tribal government (as defined in section 30D(g)(9)), any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)), and any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas. In situations where the forementioned applicable entities are required to file a tax return, the return is due four and a half months after the entity’s tax year end and can be extended for six months with a final due date of 10 and a half months after year end. A corporation that overpaid its estimated tax for the tax year may apply for a quick refund if the overpayment is at least 10% of the expected tax liability and is \$50 or more, as permitted under section 6425. The application is made by the corporation by filing Form 4466, *Corporation Application for Quick Refund of Estimated Taxes*.

Recommendation

The AICPA recommends that applicable entities eligible for direct pay credits under section 6417 be permitted to include such credits within the calculation of estimated tax for Form 4466.

Analysis

The IRA largely expanded the energy credits to permit further investment in sustainability for all taxpayers; however, the inability to receive the incentives associated with eligible credits outside of the filing of the tax return makes the credits prohibitive for many taxpayers – especially small tax-exempt organizations. The tax return due dates for applicable entities eligible for direct pay is almost a year after the tax year has ended (e.g., a calendar year-end tax-exempt organization’s final due date including extensions is November 15). The processing of tax returns can take several months – sometimes up to a year. This means that direct pay eligible entities could be waiting years before receiving refunds associated with creation and investment in renewable energies.

To encourage applicable entities eligible for direct pay, including smaller tax-exempt organizations, to invest in renewable energies, it is essential to provide a mechanism for drawing upon the funds sooner than the processing of the tax returns. Form 4466 is already in place for processing by the IRS and would provide a method to obtain funds associated with energy credits sooner as the filing of Form 4466 is only permitted after the taxpayer’s year end but before the initial due date of its tax return. A taxpayer could include the energy credits the taxpayer is eligible for as estimated tax payments in the determination for the eligibility for filing Form 4466.⁶

⁶ Per the Form 4466 instructions: “any corporation that overpaid its estimated tax for the tax year may apply for a quick refund if the overpayment is: at least 10% of the expected tax liability, and at least \$500.”

B. IRS should provide additional clarity and simplify the pre-filing registration process.

Overview

Section 6417(a) provides that an elective payment election is made “at such time and in such manner as the Secretary may provide....” Specifically, Prop. Reg. § 1.6417-2(b)(2) would require that pre-filing registration is a required condition of treating any amount as a payment made by an applicable entity under section 6417(a). For an elective payment election to be valid, with respect to an applicable credit on applicable credit property, an applicable entity or electing taxpayer must first receive a valid registration number for the applicable credit property. Such valid registration number must then be provided for each applicable credit property on its Form 3800 attached to the tax return claiming such credit(s).

Proposed Reg. § 1.6417-5(a) outlines the process and requirements associated with the pre-filing registration. The process outlined in Prop. Reg. § 1.6417-5(b) includes 1) completing the online submission via IRS electronic portal, 2) satisfying the registration requirements and receiving a registration number, 3) obtaining a registration number for each applicable credit property, and 4) providing the specific information required to be provided as part of the pre-filing registration process; including address, beginning of construction and placed in service dates. Prop. Reg. § 1.6417-5(c)(2) would provide that a registration number is valid only for the taxable year for which it is obtained, with the ability to renew the registration each year. The renewal requires attestation that the previously provided facts are still correct or updating any facts. Proposed Reg. § 1.6417-5(c)(4) would provide that, if any specified changes occur with respect to an applicable credit property for which a registration number was obtained, but not yet used, the applicable entity or electing taxpayer would need to amend the registration (or may need to submit a new registration) in order to update for the new facts.

Furthermore, under Treas. Reg. § 1.46-5, taxpayers may claim a portion of their investment tax credit for qualified progress expenditures before placing the property in service. Section 48D proposed regulations published on March 23, 2023, providing substantive rules for the Section 48D credit, provide that a taxpayer may elect to take Section 48D credit for qualified progress expenditures paid after August 9, 2022.

Recommendations

Treasury and the IRS should:

1. Establish a minimum credit threshold to relieve some tax-exempt taxpayers who are claiming lower credit amounts from the burdensome pre-filing registration requirement.
2. Include in its pre-registration system the ability for tax professionals to efficiently access and assist their tax-exempt organizations with this process, which will enable less sophisticated organizations to take advantage of the opportunities this credit affords and help prevent fraud and errors.
3. Consider the least burdensome and more streamlined pre-filing registration process that balances

the need of the IRS to mitigate duplication, fraud, and improper payments with the limited resources and costly administrative procedures required of the taxpayer.

4. Clarify the proposed timeline for such a pre-filing registration process, including the lead-time required to initiate the process before the anticipated date of filing the applicable tax return. We request that the taxpayer receive the registration number electronically, to avoid delays and errors within the paper mail delivery system. In addition, we request that the IRS provide examples or parameters that constitute a “specified change” requiring amendment or re-submission.
5. Clarify regarding the proposed timeline for such a pre-filing registration process, specific to qualified progress payments made between August 9, 2022, and December 31, 2022.

Analysis

The pre-filing registration requirements proposed by Treasury and the IRS create administrative burdens which can adversely impact smaller tax-exempt taxpayers. Smaller tax-exempt taxpayers may not have access to tax professionals to inform them of the various pre-filing registration requirements needed to obtain a registration number for each property, or the expertise to provide the required documentation to complete the pre-filing registration process, which is needed to claim the credit when the tax return is filed. A small project, such as a day-care installing solar panels on its roof should not need to undergo the same rigorous application process as a large university constructing a multi-phase building project. Relieving lower credit amounts from the pre-filing registration would free up IRS resources to review and approve higher dollar value tax credit registrations.

Furthermore, the pre-filing registration process is currently structured such that pre-registration is required on a per facility basis. A process that requires pre-registration based on project or other grouping would simplify the process while still providing for the oversight sought by the Treasury and the IRS.

Additionally, the pre-filing registration process requires a long lead time for planning, researching, and executing upon seeking the tax credits. Prior to making a direct payment election, an applicable entity must satisfy the pre-filing registration requirements described in Prop Reg. Sec. 1.6417-5(b)(3) and then wait for the IRS to provide the registration number, which must be included on a timely filed original return. Since taxpayers must adequately plan for the resources and time needed to obtain their registration number, it is vitally important that they receive real-time information related to their application, including the review time details of any data or documentation needed, and expected delivery date of the registration number. Thus, an electronic registration portal is preferred as the mode of information sharing and keeping the applicant advised of the status of the process.

For a 2022 calendar year taxpayer with qualifying progress expenditures under section 48D made between August 9, 2022, and December 31, 2022, the requirements related to Prop. Reg. § 1.6417-5(a) may not allow time for the taxpayer to pre-file the registration of the applicable credit to be included on the taxpayer timely filed 2022 tax return.

Lastly, to best comply with the proposed regulations, clarity is needed relating to what constitutes a specified change and how material those changes need to be to warrant amendment/refiling or previously submitted registration information. Although Prop. Reg. §1. 6417-5(c)(4) provided a specific example that a change in ownership as a result of a merger would represent a specified change, it would be helpful if the final regulations provided a definition of “specified change” as well as other examples.

C. IRS should consider allowing partnerships with all tax-exempt partners to be considered “applicable entities.”

Overview

Section 6417 provides special rules for partnerships and S corporations that directly own facilities or property for which an applicable credit is determined. Section 6417(c)(1) provides that, any elective payment election for property or facility held directly by a partnership or S corporation must be made by such partnership or S corporation. Section 6417(c)(2) provides that, in such a case, no election by any partner or shareholder is allowed under section 6417(a) with respect to any applicable credit determined on such facility or property. The only noted exceptions to such rule are that of a disregarded entity or those partnerships that have elected out of Subchapter K tax treatment. Furthermore, the proposed regulations would clarify that partnerships or S corporations are not applicable entities described in section 6417(d)(1)(A). As such, any partnership making an elective payment election must be an electing taxpayer, and as such, the only applicable credits with respect to which the partnership can make an elective payment election are section 45V, section 45Q, and section 45X.

Recommendation

Treasury and the IRS should consider allowing partnerships with all tax-exempt partners to be considered “applicable entities.”

Analysis

There are situations where a tax-exempt organization will enter into a partnership with related entities or with other tax-exempt organizations that share mission-related infrastructure facilities. In addition, nonprofit organizations will often partner with state and local governments to efficiently deliver services and charitable benefits to communities. The proposed regulations hold such mission-related, tax-exempt partnership structures at a distinct disadvantage. Congress intended for tax-exempts to be able to enjoy the benefits of these credits and such partnerships of tax-exempt entities should not be barred from accessing credits for joint venture clean energy projects. The proposed regulations narrowly require specific rules requiring direct ownership of assets by tax-exempt entities; however, it would create an extreme administrative and cost prohibitive burden to restructure these partnerships to fit into the proposed structure to allow such organizations to take advantage of these credits. Treasury should clarify that the direct pay election for energy credits under section 6417 should be available to partnerships that are comprised of tax-exempt partners that are individually eligible for the credit; this should apply for all the applicable credits within the IRA.

D. Treasury and IRS should provide further guidance on the definition of Restricted Tax-Exempt Amount.

Overview

Proposed Reg. § 1.6417-2(c)(3) limits the applicable credit under sections 30C, 45W, 48, 48C, or 48E such that the total amount of the credit plus any Restricted Tax-Exempt Amount (RTEA) cannot be more than the cost of the investment-related credit property. The RTEA is defined as a grant, forgivable loan, or other income exempt from taxation under Subtitle A that is used for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property.

Recommendation

Treasury and the IRS should provide further guidance on the definition of RTEA to clarify if all governmental and private grants are included, to provide more specific information about “other amounts generally exempt from taxation under Subtitle A,” and to comment on any potential tax credit recapture if a loan for the project that was not intended to be forgivable is later forgiven by the lender.

Analysis

The AICPA recognizes the perceived double benefit of government grant funds being included in the calculation of the above-referenced tax credits. However, nearly all section 501(c)(3) organizations solicit donations from private individuals and entities for capital projects. Such donations are vital to the completion of the project, and the absence of such funds will render most projects unattainable. While we realize that donations are not subject to income tax under section 501(a), it is difficult to understand why such amounts cannot also be part of the tax credit calculation.

The Proposed Regulation’s definition of RTEA includes “other amounts generally exempt from tax.” All revenues earned by section 501(c) entities that are not subject to the unrelated business income provisions of sections 511 through 514 are generally exempt from tax. Thus, an organization’s cash reserves and investments that were accumulated through furthering exempt purposes could be considered as part of the RTEA definition. This position is contrary to Examples 2 and 3 in the proposed regulations which feature an exempt organization using its own funds other than grants to support the project. Specifically, Example 2 has entity A using \$100,000 of its own unrestricted funds, and Example 3 has public charity B using \$20,000 of its own funds. Such funds could only have been generated by earning revenue that was exempt from tax except for possible net earnings from unrelated business activities after paying tax.

Many exempt organizations will enter into loan agreements with the expectation of fully repaying the loaned amount. Such loans often have interest-only payments during the first few years or no payments for a few years with the unpaid interest increasing the principal amount of the loan. Should a lender later desire to forgive the exempt organization’s loan, generally by cancelling the loan agreement and treating the transaction as a donation, the question arises as to whether future loan forgiveness compromises a portion of the credit and creates a credit recapture situation. Treasury and

the IRS should consider providing guidelines about the effect of a loan becoming forgivable years after the initial decision of treating the transaction as a bona fide loan.

E. Retain in the final regulations the clarification of “applicable entities” and the definitions as included in Prop. Reg. § 1.6417-1(c).

Overview

Under section 6417, for tax years beginning after December 31, 2022, certain “applicable entities” can choose to make an elective payment election, which will treat certain credits as a payment against their federal income tax liabilities rather than as a nonrefundable credit. The statute defines applicable entities generally to include tax-exempt organizations, state and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, and rural electric cooperatives.

Recommendation

Treasury and the IRS should retain in the final regulations its clarification of “applicable entities” and the definitions as included in Prop. Reg. § 1.6417-1(c).

Analysis

The AICPA compliments Treasury and the IRS for its clarification of “applicable entities.” The AICPA appreciates Treasury and the IRS recognizing the intent of Congress was to provide access to clean energy incentives to a broad range of tax-exempt and government entities by clarifying that “applicable entities” also include the District of Columbia, subdivisions of Indian tribal governments, and any agency or instrumentality of any State, District of Columbia, Indian tribal government, U.S. territory, or political subdivision of any of the foregoing as “applicable entities.” The importance of this clarification by Treasury and the IRS to the tax-exempt sector cannot be overstated.

F. Omit the 5-step computation rule and provide guidance that allows taxpayers to elect to treat the advanced manufacturing investment and energy tax credits as a payment against tax “equal to the amount of such credit” under the direct payment final regulations.

Overview

The CHIPS Act⁷ enacted section 48D, the advanced manufacturing tax credit, which provides a tax credit for investment in facilities that manufacture semiconductors or the equipment to manufacture semiconductors. Section 48D(d)(1) allows taxpayers to elect to receive the section 48D credit as a direct payment against tax “equal to the amount of such credit.”

In addition to extending and adding a number of energy tax credits, the IRA enacted section 6417, which similarly allows tax-exempt taxpayers to elect to receive energy tax credits under sections

⁷ [P.L. 117-167](#), enacted August 9, 2022.

30C, 45, 45Q, 45U, 45V, 45W, 45X, 45Y, 45Z, 48, 48C, and 48E as a direct payment against tax “equal to the amount of such credit” (applicable credits). Other taxpayers may elect direct payments for credits under sections 45Q, 45X, and 45Y.

Section 48D and section 6417 are the first tax provisions to use the direct payment mechanism to allow taxpayers with no tax liability to receive the economic benefit of tax credits rather than providing for the credits to be refundable (many of the applicable energy credits were already in the Code as nonrefundable credits and were amended rather than added by the IRA).

Section 38 provides rules for claiming many nonrefundable business credits, including all of the applicable credits, as part of a general business credit (GBC). The GBC is subject to a net income tax limitation that may result in a portion of the total credit being carried back or carried forward. Section 38(d) provides ordering rules that determine which individual credit amounts are taken into account in the current year GBC and which are carried back or carried forward. The ordering rules are based on the order in which the credits are listed in section 38(b) and, for the investment credits (sections 47, 48, 48A, 48B, 48C, 48D, and 48E), in section 46.

The proposed regulations provide rules for a complex computation of the amount of a direct payment that apply the GBC tax limitation and ordering rules, ostensibly to prevent taxpayers electing direct payments to receive a double benefit. As a result, a direct payment in the amount of the underlying credit may be reduced to a “net elective payment amount.” The proposed regulations provide that this computation does not apply to direct payments to partnerships or S corporations because the GBC limitations are applied at the partner or shareholder level.

Recommendation

Direct payment final regulations should omit the 5-step computation rule and provide guidance that allows taxpayers to elect to treat the advanced manufacturing investment and energy tax credits as a payment against tax “equal to the amount of such credit.” This rule would be more consistent with the language in section 48D(d)(1) and section 6417(a).

Analysis

Direct payment of applicable credits provides credit monetization that not only allows taxpayers with little or no tax liability to receive the economic benefit of the credit but also incentivizes clean energy production and investment. The exclusion of direct payments from adjusted financial statement income for purposes of the corporate alternative minimum tax (section 56A(c)(9)) indicates Congress’s intent to maximize the economic benefit of direct payments. The proposed computation rule that potentially limits direct payments to a net amount undermines this effect and purpose. The result is to potentially provide less liquidity for investments in these projects than Congress intended. Direct payments serve the same purpose as refundable credits. It is expected that, like refundable credits, direct payments will be entered in the payment section of the relevant tax return. Refundable credits are not subject to section 38 limitations. The proposed computation rule results in disparate treatment of taxpayers that may derive economic benefits by claiming refundable credits and those that must attempt to achieve similar benefits by electing direct payments.

The proposed computation rule creates inequity between passthrough entities, which are not required

to reduce their direct payment amounts, and other taxpayers. Although the GBC limitations apply to partners and shareholders, the section 38(c) tax limitations at that level may be less dramatic.

The proposed computation rule results in disparity among taxpayers based on the types of “direct pay” credits they are eligible for. Thus, taxpayers investing in new semiconductor manufacturing facilities or certain energy projects that are earlier in section 38(b) priority are disadvantaged and may be denied the benefit of a direct payment.

The following examples illustrate these impacts.

Example 1: In calendar year 2023, Taxpayer J (a C corporation) qualifies to claim \$100,000 as a section 48 energy project investment credit, \$40,000 as a section 41 research credit, and \$50,000 as a section 45X advanced manufacturing production credit. These credits are listed in section 38(b) in that order. J elects to treat the section 45X credit as a payment against tax. J’s tax liability before GBCs is \$160,000, and J’s GBC is limited by section 38(c) to \$120,000. The \$100,000 section 48 credit and \$20,000 of the section 41 credit are included in the GBC. Accordingly, J carries back or carries forward \$20,000 of the section 41 credit. J treats \$50,000, or the full amount of its 45X credit, as a payment against tax. J receives a refund of \$10,000.

Example 2: In calendar year 2023, Taxpayer K (a C corporation) qualifies to claim \$50,000 as a section 48D advanced manufacturing investment credit, \$40,000 as a section 41 research credit, and \$100,000 as a section 45 renewable electricity production credit. These credits are listed in section 38(b) in that order. K’s tax liability before GBCs is \$160,000, and K’s GBC is limited by section 38(c) to \$120,000. Accordingly, under the proposed regulations, \$70,000 of the section 41 credit would be carried back or carried forward and, contrary to section 48D(d), K would be able to elect \$0 as a payment against tax. K pays tax of \$40,000.

Although the direct payment provisions in section 48D(d) and section 6417(a) are identical, in applying the section 38 ordering rules the proposed computation rule operates inequitably. Despite similar circumstances, Taxpayer J is in a more favorable position than Taxpayer K.

Example 3: Taxpayer R determines it has a \$100,000 tax liability at year end. R’s GBC is limited by section 38(c) to \$75,000, subject to the ordering rules under section 38. R qualifies to claim \$100,000 as a section 48D advanced manufacturing investment credit and \$75,000 of a section 41 research credit. R has no other GBCs and no carry forwards.

Based off the plain language of section 48D(d), a direct pay election would be treated as a payment against tax equal to the credit amount, in this case \$100,000. R would exclude the direct payment amount when applying the GBC ordering rules because the section 48D credit would be reduced to \$0 to prevent double dipping. As a result, R would claim a current year research credit of \$75,000 and be treated as making a \$100,000 payment against their tax liability from the section 48D direct pay election. R would have no credits to carry back or carry forward and would receive a refund of \$75,000.

In contrast, under the proposed regulations, R would determine its GBC limitation, then use GBC credits up to the limit pursuant to the ordering rules, including the credit(s) for which direct pay is

elected. In this scenario, taxpayer would get a \$75,000 GBC from the section 48D credit, a \$25,000 “net elective payment amount” that would be treated as a payment against their taxes under section 48D(d), and a \$75,000 credit carryback or carryforward from the section 41 research credit generated in the current year (i.e., “crowded out” from current year use). R would have tax liability after credits of \$0.

Accordingly, under the proposed regulations, when the direct payment credit is high in the section 38 priority, it has the same effect as if it were claimed as a credit. The GBC absorbs the benefit of the direct payment election, more credit must be carried back or carried forward, and the taxpayer’s tax liability is increased. The taxpayers receive no economic benefit from the direct pay provisions.

Section 48D(d) and section 6417(a) provides that a direct payment is a payment against tax “equal to the amount of such credit.” We urge that the final regulations omit the computation rule and permit taxpayers to receive the full amount of direct payments without reduction by the GBC limitations. This will prevent the distortions noted above.

G. The final regulations should provide taxpayers who perform the carbon capture and receive section 45Q tax credit in a transfer from the property owner be allowed to transfer the credit to another third party.

Overview

Under section 6418, for tax years beginning after December 31, 2022, taxpayers may make an election to transfer their tax credit for carbon oxide sequestration under section 45Q to a third party. The tax credit is made separately with respect to each facility and for each taxable year during the credit period of the respective credit. The taxpayer would be required to register and make an election on the basis of a single unit of carbon capture equipment.

The current rules provide that the taxpayer that owns the section 45Q carbon capture equipment is entitled to claim the tax credit and then may transfer the credit to the individuals that are performing the sequestration. The taxpayer that receives the section 45Q credit in a transfer from the property owner, is not allowed to transfer the credit again. The transfer of the section 45Q credit from the property owner to the third party that is performing the carbon sequestration is being treated as credit transfer and not eligible for further credit transfer.

Recommendation

The final regulations should provide taxpayers who perform the carbon capture and receive the section 45Q tax credit in a transfer from the property owner be allowed to transfer the credit to another third party. This treatment will allow for entities that are performing the carbon capture that may not have a tax liability and be able to use the tax credit to monetize the credit.

Analysis

The AICPA appreciates Treasury and the IRS recognizing the intent of Congress was to provide access to clean energy incentives to a broad range of entities including entities that may not be paying

income taxes. This treatment is clearly the intent outlined in the section 6417 and section 6418 proposed and temporary regulations by allowing tax-exempt entities to receive a direct payment from the IRS for certain tax credits and allowing taxable entities to monetize their tax credits through a transfer to a third party. In the case of section 45Q carbon oxide sequestration, the parties performing the carbon capture are typically incentivized by tax credits relating to the unit of property involved in the carbon capture. By making the section 45Q tax credit available for the additional third party transfer, Treasury will expand the number of service contractors that will be incentivized to engage in the carbon oxide capture and sequestration.

H. Remove section 469 from Prop. Reg. § 1.6418-2(d)(1) and Prop. Reg. §1.6418-2(f)(3)(ii) in its entirety.

Overview

Section 6418(a) provides in the case of an eligible taxpayer which elects to transfer all (or any portion specified in the election) of an eligible credit determined with respect to such taxpayer for any taxable year to a taxpayer (referred to in this section as the “transferee taxpayer”) which is not related (within the meaning of section 267(b) or section 707(b)(1)) to the eligible taxpayer, the transferee taxpayer specified in such election (and not the eligible taxpayer) shall be treated as the taxpayer for purposes of this title with respect to such credit (or such portion thereof).

Section 469 disallows losses from passive activities to the extent they exceed income from passive activities and similarly disallows credits from passive activities to the extent they exceed tax liability allocable to passive activities. Passive activity means any activity which involves the conduct of trade or business, and in which the taxpayers does not materially participate.⁸

Recommendation

Treasury and the IRS should remove section 469 from Prop. Reg. § 1.6418-2(d)(1) and Prop. Reg § 1.6418-2(f)(3)(ii) in its entirety.

Analysis

Section 469 should be removed from Prop. Reg. § 1.6418-2(d)(1) and Prop. Reg § 1.6418-2(f)(3)(ii) in its entirety because the passive credit rules are not applicable to the transferee taxpayer under section 469 and section 6418(a). The treatment in the proposed regulations is also fundamentally inconsistent with the operation of section 469 and the regulations thereunder; and it is internally inconsistent with the statutory language in section 6418(a). Credits that are subject to section 469 are, and have been since enactment of section 469, generated from an activity owned by a taxpayer. In the case of acquired credit, there is no activity owned by the taxpayer which generates a credit, thus transferred credits fall naturally outside of section 469. Additionally, there was no indication in the legislative history of the enactment of section 6418 that section 469 should be read into the regime to limit which taxpayers

⁸ Section 469(c)(1). *See also* Temporary Reg. § 1.469-1T(e)(2) and section 469(c)(6) for the meaning of trade or business.

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could benefit from the transferability afforded by section 6418.

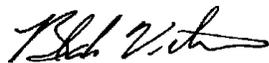
Prop. Reg. § 1.6418-2(f)(3)(iii) treats a purchased credit as a passive activity credit if the transferee taxpayer is subject to the passive activity rules. Generally, the passive activity rules apply to individuals, estates and trusts, personal service corporations and closely held C corporations. The purchaser would be subject to the passive treatment, and unlike a partner or S corporation shareholder, a purchaser that does not also hold an ownership interest in the entity generating the credit would have no means of meeting the material participation tests under section 469. Consequently, the transferee taxpayer can only utilize a purchased credit in a tax year that the taxpayer has a tax liability stemming from other sources of passive income, otherwise the credit would be carried forward indefinitely. This limitation will restrict the pool of possible purchasers significantly. Such a result appears to be contradictory to the intent of the legislation to encourage energy-efficient projects by making it easier to monetize the credits.

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The AICPA is the world's largest member association representing the accounting profession, with more than 421,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of our recommendations and welcome the opportunity to further discuss our comments. 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; Reema Patel, Senior Manager - AICPA Tax Policy & Advocacy, at (202) 434-9217, or reema.patel@aicpa-cima.com; or me at (830) 372-9692 or bvickers@alamo-group.com.

Sincerely,



Blake Vickers, CPA, CGMA
Chair, AICPA Tax Executive Committee

cc: The Honorable Daniel I. Werfel, Commissioner, Internal Revenue Service
Mr. Edward Killen, Deputy Commissioner, TE/GE Internal Revenue Service
Ms. Amber MacKenzie, Attorney-Advisor, Department of the Treasury
Mr. Robert Choi, Deputy Commissioner (TE/GE), Internal Revenue Service
Mr. Robert Malone, Director (TE/GE), Internal Revenue Service
Ms. Rachel Levy, Associate Chief Counsel (EEE), Internal Revenue Service
Mr. Shamik Trivedi, Attorney-Advisor, Office of Tax Policy, Department of the Treasury
Mr. Jarrett Jacinto, Attorney-Advisor, Office of Tax Policy, Department of the Treasury

The Honorable Lily Batchelder
Mr. William Paul
August 14, 2023
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Mr. Jeremy Milton, Senior Attorney, Office of the Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service
Mr. James Holmes, Attorney, Office of the Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service
Ms. Lani M. Sinfield, Attorney, Office of the Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service