

Novogradac Report on Tax Credits
Transcript: January 12, 2010

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(Intro music)

Hello! It's Tax Credit Tuesday and I'm Michael Novogradac.

Today is Tuesday, January 12th, 2010. This week's I will share some recently released accounting guidance from the Financial Accounting Standards Board. It affects book consolidation issues that corporate investors are very concerned about.

I will also review a recent U.S. Tax Court ruling in a case involving the treatment of partner capital contributions and distributions as disguised sale, thereby subjecting them to current taxation.

And finally, I have a quick update on a previous podcast topic from late last year regarding whether funding provided by the renewable energy provisions of the Recovery Act is actually creating jobs overseas, as opposed to in the United States.

Before I begin though, I have several breaking news items.

First, the House of Representative is back in session today, with votes expected throughout this week.

No schedule has been released on what bills may be considered, however. The Senate remains out of session until next week, returning for substantive legislative work on January 20th. By

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the terms of the agreement reached to conclude debate on the health care bill before the Senate adjourned, the Senate will first take up the nomination of a Circuit Court of Appeals judge and then turn to a resolution to increase the federal debt ceiling.

Of other note on the Hill this week, tomorrow Wednesday, January 13th, the Financial Crisis Inquiry Commission is going to hold a hearing with representatives from large financial institutions, including J.P. Morgan Chase, Goldman Sachs and Bank of America.

On the tax credit front, in the breaking news area, the *Los Angeles Times* is reporting that there will be no more extensions of the Tax Credit for First-Time Homebuyers.

The federal tax credit for first-time and move-up house buyers will not be renewed when it expires at the end of April, according to U.S. Senate Finance Committee Chairman Max Baucus. Chairman Baucus was quoted by the *Times* as saying, "It is important that this tax credit does not become a permanent fixture of the tax code."
close quote

The first tax credit for first-time house buyers was implemented as part of the Housing and Economic Recovery Act of 2008. That tax credit version required that up to \$7,500 in credit would have to be repaid. The tax credit was increased to a maximum of \$8,000 under the American Recovery and Reinvestment Act of 2009, and it expired

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on November 30th, 2009. The latest iteration of the tax credit -- 10 percent of the purchase price up to \$8,000 for new buyers and \$6,500 for repeat buyers -- requires buyers to sign a transaction, sign a purchase by April 30th, 2010 and close the transaction by June 30th, 2010.

On the low-income housing tax credit front, a recent report notes that there is cautious optimism that much delayed affordable rental housing production will occur in 2010, although more should be done to mitigate vulnerabilities in the low-income housing tax credit program and address issues surrounding investor demand.

The report was released last week and it's from the Harvard University's Joint Center for Housing Studies and is entitled "The Disruption of the Low-Income Housing Tax Credit Program: Causes, Consequences, Responses and Proposed Correctives." The report examines the experience to date with two programs created by the Recovery Act — the Tax Credit Assistance Program or TCAP and the Section 1602 cash grant program. The report discusses the current situation and assesses several proposals for reform. Go to www.taxcredithousing.com to download the paper from the Joint Center for Housing Studies.

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The findings of this report will be one of the many topics that I'm going to be addressing discussed at Novogradac's low-income housing tax credit conference in Miami later this week.

On the renewable energy front, Treasury has posted an updated list of frequently asked questions regarding the Section 1603 cash in lieu of tax credits program.

Go to www.energytaxcredits.com for a link. Next week, I will discuss this updated FAQ.

The last breaking news item is regarding one of the renewable energy programs created by the Recovery Act.

Last week, on January 8th, President Obama himself announced the award of \$2.3 billion in Advanced Energy Manufacturing Tax Credits. It is significant that President Obama himself chose to participate in the announcement. Perhaps he will participate in the next announcement of New Markets Tax Credits as well, which is a comparably sized tax credit program that also creates jobs.

Advanced Energy Manufacturing Tax Credits were created under Section 48 cap C to provide developers with an investment tax credit equal to 30 percent for facilities that manufacture particular types of energy equipment.

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According to last week's announcement, 183 projects in 43 different states were awarded tax credits and those projects are expected to create more than 17,000 jobs and spur manufacturing of advanced clean energy technologies, including solar, wind, and efficiency and energy management technologies.

The Advanced Energy Manufacturing Tax Credit is administered through a partnership between the Departments of Treasury and Energy. The Recovery Act authorized Treasury to provide developers with an investment tax credit of 30 percent for facilities that manufacture solar, wind and geothermal energy equipment; as well as fuel cells, microturbines, and batteries; electric grids to support the transmission of renewable energy; energy conservation technologies; and more.

The Department of Energy reports that although projects selected for this tax credit equity generally must be placed in service by 2014, approximately 30 percent of them will be completed in 2010.

For additional information about this tax credit, I encourage you to contact my partner Tony Grappone in our Boston office or Dan Smith in our Dover, Ohio office.

The projects announced last week address the broad spectrum of manufacturing capabilities eligible for the credits, which brings us to this week's Project Profile segment.

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The Department of Energy says the projects that were chosen for the \$2.3 billion in Advanced Energy Manufacturing Tax Credits were competitively selected through a rigorous merit review process. One of the companies that was awarded funding in last week's announcement is PPG Industries Incorporated. PPG produces a double anti-reflective coating for glass to make solar cells more efficient. PPG pioneered the first low-iron glass that has been used in solar cells and on countless solar installations over the past two decades. The tax credits awarded last week will help PPG to expand facilities that manufacture one of the critical components of glass solar cells, namely the transparent conductive oxide coatings of the glass.

For a full list of selected projects, and other information about the Advanced Energy Manufacturing Tax Credit program, I invite you to visit www.energytaxcredits.com.

Now, for our first scheduled topic of the day, I want to alert listeners to some recently released guidance that may be of interest.

On December 23rd, the Financial Accounting Standards Board issued two final accounting standard pronouncements, amending guidance about variable interest entities and transfers of financial assets.

In Accounting Standards Update - or ASU - 2009-17, the board amended its accounting guidance resulting from FASB Statement

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167 and amended FASB Interpretation 46(R), commonly referred to as FIN 46R. Accounting rules under FAS 166 and 167 require banks to bring certain off-balance sheet assets back onto their balance sheets starting in 2010.

The Financial Accounting Standards Board also issued ASU 2009-16, which amends accounting guidance resulting from FAS 166, which addresses accounting for transfers of financial assets. Under the board's accounting requirements, all transfers of financial assets will need to be evaluated to see if they represent a sale of an asset. In its guidance, the Financial Accounting Standards Board said an entire financial asset cannot be divided into components before a transfer unless all of the components meet the definition of a participating interest.

Novogradac & Company's team of accounting experts is reviewing the new guidance to determine its potential impact on the tax credit community. The impact of this topic on the LIHTC, NMTC, HTC and RETC communities will be discussed next week. In the interim, please send us e-mails at cpas@novoco.com with any questions or observations that you have. Feel free to also contact my partner Bentley Stanton, in our Atlanta office.

Our second topic for this week is a ruling that is the first court case ever to consider the disguised sale statute under Internal Revenue Code section 707(a)(2)(B).

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In a ruling released last week, the U.S. District Court for the District of New Jersey held that a transaction between a debtor company and a partnership involving the contribution and distribution of assets was a sale and therefore taxable. Fortunately for the taxpayer, however, the court also held that the government failed to assess the tax due within the three-year limitations period of section 6501(a) and there was no omission of gross income that would extend the limitations beyond that period of three years.

According to a summary released by BNA, the court's ruling was based largely on expert testimony. While the court concluded that a large part of the transaction was a sale, the court also concluded that part of the transfer at issue was, in substance, a contribution from a partner to a partnership. And because of that - in part - the taxpayer's understatement was less than a 25 percent threshold that would have caused there to be a six-year statute of limitations, the government's asserted deficiency on the disguised sale was barred by the statute of limitations.

If you are involved in transaction that does combine contributions of assets with distributions of assets, it will be important for you to review the analysis of this case in order to ascertain its impact on your transaction. The case is United States versus G-I Holdings Inc. and a copy can be found on our web site in the court cases area at www.taxcredithousing.com. Feel free also to give me a

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call at (415) 356-8000 in you have a transaction that you are concerned about.

Let's shift gears now to an update on a topic from late last year regarding concerns over the Section 1603 cash grant program.

As many listeners may recall from our podcasts on November 17th and December 1st, Senator Chuck Schumer had expressed concern regarding funds allocated to foreign companies under the Section 1603 renewable energy tax credit program that provides cash grants in lieu of federal energy tax credits. In response to those concerns, *USA Today* reported that Energy Secretary Steven Chu sent a letter defending the awards process.

Despite Secretary Chu's defense of the program, it appears that some concerns persist at the congressional level. In a letter to Treasury Secretary Tim Geithner, dated December 18th, Senator Paul Kirk of Massachusetts expressed concern that there were no caps or criteria established to determine the maximum amount of cash grant assistance that a company could obtain under the program. He also echoed Senator Schumer's concern that funds provided through the program could be used to build renewable energy projects overseas.

In his letter, Senator Kirk says he is certain that quote: "this well-intended program can be shaped to serve as an incentive to support renewable energy projects across our country that create good-paying American jobs in emerging new industries." close quote.

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To that end, he recommends that prudent guidelines be put in place to avoid abuses and embarrassments.

Speaking of abuses and embarrassments, last month Senators Tom Coburn of Oklahoma and John McCain of Arizona released an oversight report on the Recovery Act that they labeled quote a “Stimulus Checkup.”

Senators Coburn and McCain say the report illustrates how \$7 billion in Recovery Act funds have been wasted, mismanaged or directed toward what they call silly and shortsighted projects.

Nine months after Congress passed the \$787 billion recovery package, Senators Coburn and McCain charge that many projects may not produce the types of jobs that most Americans had hoped for or expected.

As many listeners are aware, the focus on job creation continues to be central to gaining support for various programs in Congress. As the tax credit community gears up to continue its pursuit legislative proposals related to affordable housing, community development and renewable energy tax credits in the coming legislative session, job creation will remain a key piece of the puzzle.

To see a copy of this report, simply go to Senator Coburn’s web site in the press releases area.

Which brings us to this week’s look at the Tax Credit Calendar.

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Tomorrow, Wednesday January 13th, I will be participating in the New York City Economic Development Corporation's 5th Annual New Markets Tax Credit Workshop. I will provide keynote remarks that will cover recent and anticipated legislative reform that may transform the tax credit landscape during the coming year.

Then I will travel to Miami, Florida to join my colleagues for the 16th Annual Tax Credit Developers Conference that will be held January 14th and 15th in Miami, Florida. If you aren't able to join us in Miami this week you can still hear what was discussed by ordering a CD-Rom of the event. We are compiling materials CD that will feature the presentations from all the panels. To pre-order this CD-Rom, you can visit novoco.com or call our Products Desk at (415) 356-7960. That's 415-356-7960.

Well, that brings me to the end of this week's report.

Please join me again next week when I will review the findings of a report released late last week by the Department of Energy's Lawrence Berkeley National Laboratory. The report analyzes the impact of the ability for qualifying wind projects to choose either a 30 percent investment tax credit or a 30 percent cash grant in lieu of the production tax credit. It's an interesting report.

I will also provide update on a previous podcast discussion about the comprehensive review of state tax credits in Iowa. This review could serve as an example for numerous other states.

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I will also follow up on several items already mentioned in this podcast.

And, as always, we will have more breaking news. With the House in session this week and the Senate returning next week, we are sure to have much breaking news for next week's podcast.

This is Michael Novogradac and I'll be back next Tuesday. Thanks for listening.

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