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From:
Sent: Thursday 4/22/2010 5:00 PM
To:
Subject: RE: Section 48C question

As you recognized, the consequences of a significant change in plans for a project that was allocated a § 48C credit is denial of the credit. Because many of the allocations under § 48C were to projects that were still being developed, many taxpayers are concerned that the Service may argue that the taxpayer made significant changes to their projects and the Service will deny the credit for the project. The only change that Notice 2009-72 specifically allows is a transfer to a successor in interest, and that change requires execution of new agreements by the Service with the successor in order to preserve the credit for the project. Thus taxpayers are asking for guidance about what type of change will be considered significant.

The two changes most frequently raised by taxpayers are relocations of the projects and transfers of the projects and the credit under a sale-leaseback transaction described in § 50(d)(4)—former section § 48(b)(2) & (3). The easier of these two is the sale-leaseback transactions. I believe the Service can treat such transactions as transfers to a successor in interest and enter in to a new agreement with the transferee. This should give comfort to the taxpayers involved in these transactions. If the sale-leaseback transaction also includes an election by the lessor and lessee to pass the credit through to the lessee under § 50(d)(5)—former section 48(d), I believe that new agreements should be entered with both the lessor and the lessee. This will give assurance to both the lessee and the lessor that the credit will still be allowable and to the Service that party receiving the credit has agreed to recapture. will be happy to work with you in developing the terms (or drafts) of these new agreements.

The relocation of a project is more difficult to resolve. As a result of our hesitancy to approve relocation of a project under § 48A (or B), the Congress enacted § 48A(h), which requires, among other things, that we consult with the DOE before determining that a relocation of a § 48A or § 48B projects would not have caused the project to fail to be originally certified if the project was originally at the relocation site. The criteria for approval of a project under § 48A and § 48B were much simpler than those under § 48C. Thus I believe that the Service must consult with the DOE to determine if relocation of a § 48C project would have influenced DOE in recommending or ranking the project. Our contacts at DOE have indicated that they are willing to look at proposed changes on an expedited basis. If DOE concludes that the change would not have influenced it, then the Service should enter a new agreement with the taxpayer that describes the project with the change.

Note, however, that the test of § 8.03 of Notice 2009-72 is not that the change *would have* influenced DOE, but is "any change that a reasonable person would conclude *might* have influenced DOE" (emphasis added). Articulating the test this way sets the test of a significant change extremely low. The best way of passing the test is to have DOE state that a change would not have influenced it in recommending or ranking the project. I do not believe we can publish any useful general descriptions of changes that are not significant.

If taxpayers have raised any specific changes that do not appear to be significant enough to merit a referral to DOE, please send a brief description of them to or me. We want to think about these specific changes before we discuss how to handle this problem.

I suggest that you set up a phone conference some time next week among the people listed in your email to include in the discussion and and me.