

**Internal Revenue Service**

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Person To Contact:  
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Telephone Number:

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Date:  
December 05, 2012

In Re:

LEGEND

Tribe =

State =

County 1 =

County 2 =

Year 1 =

Renewable Energy Assets =

b =

Dear :

This letter responds to your letter dated March 14, 2011, and subsequent correspondence, requesting a letter ruling under § 50(d)(5) of the Internal Revenue Code, that Tribe may elect to pass investment credits associated with renewable energy assets to an unrelated third party lessee (Lessee).

Tribe represents that the facts are as follows:

Tribe is a federally-recognized Native American tribe included on the list of recognized tribal entities published by the Secretary of the Interior. Tribe is located in State, on land held in trust for Tribe by the United States in County 1 (the "County 1 Reservation") and in County 2 (the "County 2 Reservation"), and on land owned by the Tribe in fee simple title (the "Fee Land").

Tribe plans to place into service by the end of Year 1 a variety of renewable energy assets on the County 1 Reservation, the County 2 Reservation, and the Fee Land (collectively, the Renewable Energy Assets). The Renewable Energy Assets will generate electricity that will be sold to third-party utilities and used by Tribe in its governmental activities. Tribe will lease the Renewable Energy Assets to Lessee for a lease term of not less than b years. Tribe will maintain ownership of the Renewable Assets at all times. Tribe will not produce electric or thermal energy prior to leasing the Renewable Energy Assets to Lessee.

Taxpayer represents that the Renewable Energy Assets qualify as energy property under § 48.

During the lease term, Lessee will operate the Renewable Energy Assets, and will be entitled to the net revenue derived from the operation of the assets, including the net revenue derived from the sale of electricity to third-party utilities and to Tribe. At the conclusion of the lease term, Tribe will assume control over the Renewable Energy Assets and will operate them directly.

Taxpayer requests the Service to rule that under § 50(d)(5), Tribe may elect to pass investment credits associated with the Renewable Energy Assets to Lessee.

Section 38(a)(2) allows as a credit an amount equal to the current year business credit. Under § 38(b), the current year business credit includes the investment credit determined under § 46. Section 46 provides that, for purposes of § 38, the investment credit determined under § 46 includes the energy credit.

Section § 48(a)(1) provides that for purposes of § 46, except as provided in paragraphs (1)(B), (2)(B), (3)(B), and (4)(B) of § 48(c), the energy credit for any taxable year is the energy percentage of the basis of each energy property placed in service during such taxable year.

Section 50(b)(3) provides that no credit shall be determined under Subpart E of Part IV of Subchapter A of Chapter 1 of Subtitle A with respect to any property used by an organization (other than a cooperative described in § 521) which is exempt from the tax imposed by this chapter unless such property is used predominantly in an unrelated trade or business the income of which is subject to tax under § 511.

Section 50(b)(4) provides that no credit shall be determined under Subpart E of Part IV of Subchapter A of Chapter 1 of Subtitle A with respect to any property used by the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing (“governmental unit”), or by any foreign person or entity (as defined in § 168(h)(2)(C)).

Section 50(d)(5) provides that for purposes of subpart E of Part IV of Subchapter A of Chapter 1 of Subtitle A of the Code (Rules for Computing Investment Credit §§ 46-50), rules similar to the rules of § 48(d), as in effect on the last date before the enactment of the Revenue Reconciliation Act of 1990 shall apply.

Former § 48(d)(1)(A) provided that a person (other than a person referred to in § 46(e)(1)) who is a lessor of property may (at such time, in such manner, and subject to such conditions as are provided by regulations prescribed by the Secretary) elect with respect to any new § 38 property (other than property described in former § 48(d)(4)) to treat the lessee as having acquired such property for an amount equal to the fair market value of such property.

Former § 48(b)(1) defined the term “new section 38 property” as § 38 property the original use of which commences with the taxpayer. Former § 48(a)(1) defined the term “section 38 property” as, inter alia, property with respect to which depreciation (or amortization in lieu of depreciation) is allowable and having a useful life of 3 years or more.

Section 1.48-4(a)(1) of the Income tax regulations provides that a lessor of property may elect to treat the lessee of the property as having purchased the property if: 1) the property is § 38 property in the hands of the lessor, 2) the property is new § 38 property in the hands of the lessor and the original use of the property commences with the lessor, and 3) the property would constitute new § 38 property in the hands of the lessee if the lessee had purchased the property.

Section 1.48-4(b) provides that, for purposes of § 1.48-4, both the lessor and the lessee of leased property may be considered as the original users of the property. The determination of whether the lessee qualifies as the original user of leased property is made under § 1.48-2(b)(7), which defines the term “original use” as the first use to which the property is put.

No constitutional or other statutory provision expressly exempts Indian tribes from federal income taxation. However, Revenue Ruling 67-284, 1967-2 C.B. 55, 58, *modified on another issue by* Rev. Rul. 74-13, 1974-1 C.B. 14, holds that income tax statutes do not tax Indian tribes. As such, Indian tribes are not subject to federal income taxes.

Section 7871 provides that Indian tribal governments (or subdivisions thereof) will be treated as states for certain enumerated federal tax purposes. However, the provisions provided in § 7871 are not exhaustive. Other sections of the Code may specify that Indian tribal governments are to be treated as States or tax-exempt entities for purposes of specific Code sections.

Section 50(b)(3) and (4) provides that no credit shall be determined under Subpart E with respect to property used by tax-exempt organizations and governmental units.

Section 50(b)(3) provides that no investment credit shall be determined under Subpart E with respect to any property used by “an organization (other than a cooperative described in § 521) which is exempt from the tax imposed by this chapter....” (For purposes of § 50(b)(3), “this chapter” means Chapter 1, Subtitle A of the Code. Subtitle A includes the Code’s income tax provisions. Chapter 1, titled “Normal Taxes and Surtaxes” includes the income taxes discussed in Rev. Rul. 67-284.) As mentioned above, Rev. Rul. 67-284 holds that income tax statutes do not tax Indian tribes. Thus, an Indian tribal government is not an organization exempt from tax imposed by Chapter 1 for purposes of § 50 because, as explained in Rev. Rul. 67-284, income tax statutes do not tax Indian tribes to begin with.

Section 50(b)(4) provides, in part, that no investment credit shall be determined under Subpart E with respect to property used by the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the foregoing.” Section 7871 does not list § 50 as a code section for which an Indian tribal government is considered a State or political subdivision. An Indian tribal government is, therefore, not a governmental unit described in § 50(b)(4).

Based on your representation that the Renewable Energy Assets qualify as energy property under § 48 and our conclusion that an Indian tribal government is neither a governmental unit described in § 50(b)(4) nor an organization exempt from tax imposed by Chapter 1 for purposes of § 50, we conclude that Tribe may elect to pass investment credits associated with the Renewable Energy Assets to Lessee under § 50(d)(5).

Except as provided above, no opinion is expressed or implied regarding the application of any other provisions of the Code or regulations. Specifically, we express no opinion on whether the Renewable Energy Assets qualify for the energy credit under § 48.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

The ruling contained in this letter is based upon information and representations submitted by Taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Nicole Cimino  
Senior Technician Reviewer, Branch 5  
Office of Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosure: 6110 copy

cc: