

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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CC:LB&I:

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UILC: 761.01-00; 45.07-00

date: December 3, 2015

to: _____, Team Manager
()

Attn: _____, Team Coordinator
()

from: Associate Area Counsel ()
(Large Business & International)

subject: Section 45 Refined Coal Credit
Taxpayer:
TIN:
Tax Period:

This memorandum responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. Whether _____ () investment in _____ () constitutes a bona fide partnership interest under the test established by Commissioner v. Culbertson, 337 U.S. 733 (1949) and Historic Boardwalk Hall, LLC v. Commissioner, 694 F.3d 425 (3d Cir. 2012), such that _____ () is entitled to the Section 45 refined coal credit.

CONCLUSIONS

1. After considering the facts and circumstances surrounding _____ investment in _____, we believe that _____ is not a bona fide partner in _____ because, due to the agreements and conduct of the parties, the lack of significant downside risk

and the lack of significant upside potential, does not hold a meaningful stake in the success or failure of .

FACTS

is in the Compliance Assurance Process (CAP) program. Its tax return is currently under a CAP examination. During that tax year, was the sole owner of , a single member LLC that elected to be treated as a corporation. During , invested through in an entity that claims is a partnership. The entity is .

was formed on as a limited liability company, at

(Amended LLC Agreement). Upon its formation on , was wholly owned by (). Id. is a wholly owned subsidiary of (). was formed to own and operate a facility for the production of refined coal as defined by I.R.C. § 45(c)(7) that would be located at the power plant owned by (Utility). Amended LLC Agreement, at . By the terms of the Amended LLC Agreement, it will continue until , unless earlier terminated under applicable provisions. Id. at .

Prior to investment in , provided a document to . The document is titled (Promotional Material). is the 100% owner of , as mentioned above. The Promotional Material stated that “up to [a] % ownership interest is available for sale in ”, “ , as the producer and seller of the refined coal, should be entitled to receive production tax credits” and will “allocate [the tax credits] to the owners of the company on a pro rata basis.” Promotional Material, at .

The following statements from the Investor Highlights and Risk Mitigation portions of the Promotional Material speak to commercial and tax risks that a potential investor would be protected against:

Further, the Promotional Material included an Investor Benefits Schedule, showing projected capital contributions and tax benefits of a % interest in .

The Investor Benefits Schedule shows expected costs to _____ of \$ _____ with total after-tax benefits of \$ _____¹ and net after-tax cash flow of \$ _____².

Purchase of Membership Interest in

_____ ultimately determined it would enter into a transaction regarding the refined coal facility at the _____ power plant. To make the investment, _____ created a wholly owned subsidiary called _____. Effective _____, the members of _____ were:

In an email dated _____, _____ admits that all the investors in _____ are direct or indirect investors in _____:

_____ and _____ are all indirect owners of _____ through a company called _____ which owns _____ % of _____. _____ is a disregarded LLC owned by _____. _____ is also a _____ % owner of _____.

During the summer of _____, [_____] purchased the interests of _____ and _____. As such, at year end _____, _____ was owned _____ % by _____, _____ % by [_____], and _____ % by _____, and _____ % by _____.

¹ Calculated as follows:

| | |
|----------------------------------|-------------------|
| Tax credits | \$ |
| Taxable loss | \$ |
| x Tax rate @ 35% | |
| Taxable loss benefits | \$ |
| Total tax benefits | \$ |
| ² \$ _____ - \$ _____ | = \$ _____ |