

Internal Revenue Service

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LEGEND:

- Corp A =
- Corp B =
- Corp C =
- Corp D =
- Corp E =
- Corp F =
- Mine =
- City =
- Tribe =
- a =
- b =
- c =
- d =
- e =
- f =
- g =
- h =
- i =
- j =
- k =
- l =
- m =
- n =

Dear _____ :

This is in response to your letter dated October 3, 2008, supplemented by additional letters, with regard to a ruling requested relating to the production and sale of coal from

an Indian production coal facility under section 45(d) of the Internal Revenue Code (the Code).

Facts

Corp A, a wholly owned subsidiary of Corp B and a member of the Corp B consolidated group, is engaged in the business of producing and selling coal from Mine, a single pit surface mine complex located near City on property leased from Tribe.

Corp C will produce and sell coal reserves from Mine.

Corp D is a special purpose subsidiary of Corp A organized to own an interest in Corp C.

Corp E (an investor) is a special purpose company that is a disregarded entity for federal income tax purposes. Corp E was organized in order to own an interest in Corp C. Corp E is owned by Corp F. Corp F is a S corporation engaged (through subsidiaries almost all of which are disregarded entities) in various lines of businesses.

The Tribe is an Indian Tribe within the meaning of section 7871(c)(3)(E)(ii) of the Code. Since a the United States has held in trust for the Tribe the coal reserves underlying the Mine located near City. In b, Corp A entered into mining leases with the Tribe with respect to reserves at the Mine. Corp A has owned the working interest in the Mine and has produced and sold coal from those reserves continuously since c.

On d, the reserves at the Mine were held in trust by the United States for the Tribe.

Corp A currently leases certain of the Mine reserves pursuant to a lease dated e, as amended, between the Tribe and Corp A. Under this lease, Corp A operates the Mine to remove exclusively Tribal coal from the Mine reserves, and the Tribe retains a royalty based upon specified percentages of revenues from the sale of coal produced from the Tribal Mine reserves.

Corp A and the Tribe executed a second lease dated f, which was approved by the U.S. Bureau of Indian Affairs (the BIA). In a letter dated h, the BIA approved the second lease conditioned upon compliance with the National Environmental Policy Act. This second lease provides Corp A with access to coal reserves underlying property that is to the south of, and adjacent to, the lands on which coal is currently being mined pursuant to the first lease. The reserves at the Mine subject to the second lease are part of the same mineral deposit from which Corp A extracts coal under the first lease. Under the second lease, as under the first lease, Corp A will operate the Mine to extract exclusively Tribal coal from the reserves and the Tribe will retain a royalty based upon specified percentages of revenues from coal sales.

Corp C was formed on i by Corp A. At the time of its formation, Corp C was a disregarded entity for federal income tax purposes. On or about j, Corp A transferred a g interest in Corp C to Corp D. As a result of this contribution, Corp C had two members (Corp A and Corp D), and therefore became a partnership for federal income tax purposes.

Corp A will sublease to Corp C in a single sublease, its leasehold interests in the Mine reserves under both the first and second leases. Under the sublease Corp C will assume Corp A's obligation to pay the royalty to the Tribe based upon specified percentages of coal sales. The sublease has been approved by the BIA. Under the sublease, Corp C will be entitled to extract and sell a certain amount of coal from the Mine reserves. Pursuant to the sublease, Corp C will agree to pay Corp A a certain dollar amount per year, with the final payment made on k.

Corp A sold its l interest in Corp C to Corp E.

Corp E will generally be entitled to l of distributions from operations paid by Corp C to its members until Corp E has achieved an m internal rate of return on the equity payment (Payout). Corp E will generally be entitled to n of distributions from operations after Payout. It is not anticipated that Payout will occur during the term of the sublease.

Issue

Whether Corp C will be the sole producer (as that term is used in section 45(e)(10)(A) of the Code) of Indian coal from an Indian coal production facility (as that term is used in section 45(d)(10) of the Code) with respect to all of the production under the sublease from the Tribe reserves.

Law and Analysis

Section 45(d)(10) of the Code provides that in the case of a facility that produces Indian coal, the term "Indian coal production facility" means a facility which is placed in service before January 1, 2009.

Section 45(c)(9)(A) of the Code provides that the term "Indian coal" means coal which is produced from coal reserves which, on June 14, 2005 (i) were owned by an Indian tribe, or (ii) were held in trust by the United States for the benefit of an Indian tribe or its members.

Section 45(c)(9)(B) of the Code provides that for purposes of this paragraph, the term "Indian tribe" has the meaning given such term by section 7871(c)(3)(E)(ii).

Section 45(e)(10) of the Code provides, in part, in the case of a producer of Indian coal at an Indian coal production facility, such coal must be sold to an unrelated person.

Certain facilities described in section 45(d) of the Code must also be owned by the producer of the electricity . See, for example, section 45(d)(1) in the case of a wind facility. Other provisions provide that the producer of electricity at the facility need not be the owner of the facility. See, for example, sections 45(d)(2)(B)(iii) and (d)(3)(B) in the case of closed loop and open loop biomass facilities. In the instant case, section 45(d)(10) does not require the producer of Indian coal at the facility to own such facility as well.

Accordingly, we conclude that since Corp C is the sublessee and is entitled to extract and sell a certain amount of coal from the Mine reserves, Corp C will be the sole producer (as that term is used in section 45(e)(10)(A) of the Code) from an Indian coal production facility (as that term is used in section 45(d)(10) of the Code) with respect to all of the production under the sublease from the Tribe reserves.

Except as specifically set forth above, no opinion is expressed or implied concerning the federal income tax consequences of the above described facts under any other provision of the Code or regulations

Sincerely,

Peter C Friedman
Senior Technician Reviewer, Branch 6
(Passthroughs & Special Industries)