

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201308021**
Release Date: 2/22/2013

Third Party Communication: Private Firm
Date of Communication: September 4, 2012
Person To Contact:

Index Number: 45.00-00

, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B06
PLR-134338-12
Date:
November 15, 2012

LEGEND

- Taxpayer =
- Subsidiary A =
- Subsidiary B =
- State =
- Project =
- Location =
- Bank =
- a =
- b =
- c =
- d =
- e =
- f =
- g =
- h =
- i =
- j =
- k =
- l =

Dear _____ :

This letter responds to your letter dated August 8, 2012, requesting rulings concerning the application of section 45 of the Internal Revenue Code (the Code) to the facts described below.

Facts

The facts are represented by Taxpayer to be as follows.

Taxpayer is a publicly-held corporation that was formed under the laws of State, and is the parent of a consolidated group that files its federal income tax return on a calendar year basis and uses an accrual method of accounting.

Taxpayer is an electric power holding company that engages in the development, construction, and operation of renewable energy projects such as wind and solar facilities, primarily through its direct and indirect wholly-owned subsidiaries. Sub A and Sub B (the Subs) are State limited liability companies that are each indirectly wholly-owned by Taxpayer. The Subs are the direct owners of a wind power project consisting of wind farms (each a Project, collectively the Projects) now under construction at Location. The Subs will build, own, and operate the Projects and Taxpayer will sell all of the output from the Projects to separate retail electric service providers. The Projects will be originally placed in service within the dates specified in section 45(d)(1).

The Bank is a tax-exempt entity that was formed by the governments of the United States and Mexico under the auspices of the North American Free Trade Agreement (NAFTA) to provide financing for projects to preserve, protect and enhance the environment of the United States-Mexico border region in order to advance the well-being of the people of the United States and Mexico. The Bank's priority sectors are potable water supply, wastewater treatment, water conservation, and municipal solid waste management. The Bank also makes loans to promote air quality improvement, use of clean and renewable energy, energy efficiency, industrial and hazardous waste, and public transportation, but none of these sectors is the Bank's priority.

Bank is owned and capitalized equally by the United States and Mexico with total authorized capital of a with equal commitments from each country. Each country authorized the subscription of b shares of Bank's capital stock with a par value of c per share with d percent of the authorized capital in the form of paid-in capital and the remaining e percent in the form of callable capital. Paid-in capital consists of cash funds contributed to the Bank by the two governments and is invested in short- to medium-term, high quality, fixed-income securities that act as Bank's cash reserves, which, in addition to providing loan loss reserves, can be used for a limited amount of direct lending. The paid-in capital of the Bank must be maintained at adequate levels to protect Bank's creditors and ensure its operational integrity. Callable capital does not represent actual cash funds contributed to the Bank by the two governments. It is composed of funds that are pledged to be provided to the Bank from the two governments only if required to meet the Bank's obligations on borrowings of funds for inclusion in its capital resources as specified in the Bank's charter. Therefore, callable capital is essentially a guaranty for any bonds issued by the Bank to raise funds in the capital markets for its lending program.

The Projects will be financed with two tranches of amortizing debt: approximately f in

loans from the Bank (g for each Project) and approximately h in loans from a group of conventional banks (i for one Project and j for the other Project). Each tranche is secured by the assets of the Projects and will rank pari passu in seniority. Each of the Bank's loans will have a term of k years and bear interest at a fixed rate that is anticipated to be less than a conventional market rate. Each of the loans from the conventional banks will have a term of l years and bear interest at a floating rate to be determined.

In connection with, but prior to, the Bank making a loan to the Subs, the Bank will offer fixed rate notes to investors (the Notes). The source of funds for the Bank's loans to the Subs will be from one or more taxable debt offerings by the Bank to investors. It is anticipated that the interest rate on the Notes will be less than the interest rate that the Subs will pay to the Bank for the Bank loans, thus enabling the Bank to earn a profit on the spread. Taxpayer represents that the Bank notes will not be the obligations of any government, will not be guaranteed by any government and the obligations deriving from the Notes will constitute direct, unsecured and general obligations of the Bank that will rank pari passu with all other unsecured obligations of the Bank. Interest paid with respect to the Notes will be taxable income to taxable United States persons.

Rulings Requested

- 1) The proposed Bank loans will not constitute "subsidized energy financing provided (directly or indirectly) under a Federal, State, or local program" provided in connection with the Projects within the meaning section 45(b)(3)(A)(iii).
- 2) In the alternative, if the Service were to determine that the Bank loans constitute "subsidized energy financing provided (directly or indirectly) under a Federal, State, or local program" provided in connection with the Projects within the meaning of section 45(b)(3)(A)(iii), if Taxpayer pays off the Bank loans prior to the end of the calendar year in which the Bank loans occur, then the section 45(a) credit for the Projects would not be required to be reduced under section 45(b)(3).

Law and Analysis

Section 45 of the Code provides a tax credit for electricity produced from certain renewable resources. Section 45(a)(2) provides, in part, that the credit is 1.5 cents times the kilowatt hours of electricity produced from qualified resources and at a qualified facility. Under the calculation required by section 45(b)(2), 2.2 cents is substituted for 1.5 cents for the calendar year 2012 on the sale of electricity produced from the qualified energy resource of wind. See Notice 2012-35, 2012-21 I.R.B. 937.

Section 45(c)(1) of the Code provides that, in general, the term "qualified energy resources" includes wind. Section 45(d)(1) further provides that in the case of a facility

using wind to produce electricity, the term “qualified facility” means any facility owned by the taxpayer that is originally placed in service after December 31, 1993, and before January 1, 2013.

Under section 45(b)(3) of the Code, the amount of the credit with respect to any project for any taxable year is reduced by an amount equal to the product of 1) the amount of the credit otherwise allowable for such year and 2) a fraction, the numerator of which is the sum of i) grants provided by the United States, a State, or a political subdivision of a State for use in connection with the project; ii) proceeds of an issue of State or local government obligations used to provide financing for the project the interest on which is exempt from tax under section 103 of the Code; iii) the aggregate amount of subsidized energy financing provided (directly or indirectly) under a Federal, State or local program in connection with the project; and iv) the amount of any other credit allowable with respect to any property which is part of the project, and the denominator of which is the aggregate amount of additions to the capital account for the project for the taxable year and all prior taxable years. The amounts under the preceding sentence for any taxable year shall be determined as of the close of the taxable year.

Section 45 of the Code does not define subsidized energy financing. However, under section 48(a)(4)(C) of the Code, the term means financing provided under a Federal, State, or local program a principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy.

In the instant case, the Bank loans are not provided (directly or indirectly) under a governmental program the principal purpose of which is to provide subsidized financing for projects designed to conserve or produce energy. Based upon your representations and our legal analysis, we conclude that the Bank loans provided in connection with the Projects are not subsidized energy financing as defined in section 45(b)(3)(A)(iii). Accordingly, we conclude that there is no reduction in the amount of the credit determined under section 45(a) required by the application of section 45(b)(3).

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. Specifically, no opinion is expressed or implied regarding whether the credit reduction provision under section 45(b)(3) would apply to reduce the section 45(a) credits for the Projects if the Bank loans were considered “subsidized energy financing” and the Taxpayer paid off the Bank loans prior to the end of the calendar year in which they occurred.

This ruling is directed only to the Taxpayer who requested it. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, we are sending a copy of this letter to your authorized representatives. A copy of this ruling must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling. We are also sending a copy of this letter ruling to the Industry Director.

Sincerely yours,

Charles B. Ramsey
Chief, Branch 6
(Passthroughs & Special Industries)