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Submitted via www.regulations.gov

The Honorable Lily Batchelder
Assistant Secretary of Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Mr. William M. Paul
Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Comments in Response to Notice 2022-50

Dear Assistant Secretary Batchelder and Deputy Chief Counsel Paul:

Atheva is pleased to provide comments in response to Notice 2022-50 regarding the elective credit transfer provisions in Section 6418 of the Internal Revenue Code. The transferability of credits is an important component to encourage investment to improve energy efficiency and the state of the environment. To that end, we believe it is important that any procedures put in place serve the dual purpose of providing a simple method that will encourage buyers to purchase the credits while, at the same time, provide sufficient protections to prevent duplication, fraud, improper payments and excessive payment transfers.

The comments below are recommendations to achieve those ends and address the request for comments regarding (i) the factors that should be considered in determining the time and manner for making the election, (ii) what information should be required as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant and (iii) the substantiation for reasonable cause.

Simple documentation should be provided to the IRS in from both the transferor and the transferee of tax credit to prevent fraud and abuse.

In that vein, we recommend that a form should be filled out and executed by the transferor and the transferee of the credit.

a. The form should include the following information:

   i. The name of the transferor;

   ii. The taxpayer identification number of the transferor;

   iii. The code section under which the credit was earned;

   iv. The tax year in which the credit was earned;

   v. The amount of the credit being transferred;

1. This should include a representation that the taxpayer has done what is necessary to earn the credit and any information that would be required on the taxpayer's tax return with respect to the underlying credit.

vi. The name of the transferee;

vii. The taxpayer identification number of the transferee.

b. The form should be signed under penalties of perjury by both parties with the transferor certifying items i.-v. and the transferee certifying items vi. and vii.

c. The form should be able to be executed electronically.

i. This will make it easier for parties to comply with the filing requirements.

d. The form should provide that each party agrees to provide a copy of the form with its tax return.

i. Having each party attach a copy of form should reduce the likelihood of duplication as the transferor would expect that all transferees will report the sale to the IRS and that the IRS will be able to match credits.

Allow transferees to use the Taxpayer Identification Number Matching Program

One additional suggestion to help prevent fraud would be to allow potential purchasers of credits, and their agents, to utilize the Taxpayer Identification Number Matching Program. This would allow purchasers of credits to check the EIN that they are provided to ensure that the EIN matches the information provided by the seller of the tax credits.

Liability for recapture should be placed on the transferor.

One question that is not clear in the statute is, assuming the credit is valid when transferred, whether the transferor or the transferee is responsible to pay the recapture amount to the IRS. The statute provides that information would be shared by the transferor to the transferee and by the transferee to the transferor so that both would have the relevant information to pay the recapture amount. For a variety of reasons, we believe it would make sense to have the transferor be liable for the payment.

First, from a practical perspective, it is expected in the case of recapture, the transferor will indemnify the transferee for any recapture amounts. If the indemnitee will be ultimately liable, it seems to add additional complication (without any benefit) if the IRS would seek payments for recapture from the transferee who would then need to seek reimbursement from the transferee.

Second, from a practical perspective of the IRS being able to audit whether a payment is due as a result of recapture, it would seem highly improbable that the IRS would ever be able to effectively audit recapture if the payment is due from the transferee. If an auditor was to review the tax return of the transferee and saw that a credit was taken, it isn't clear how the IRS would obtain information from the

transferee regarding whether the asset was sold. While regulations can nominally require that the transferor provide notice to the IRS of a disposition that would generate a credit, and many would comply with such a regulation, there is no penalty that would compel the transferor to provide such information (and they may be incentivized to not provide the notice due to the indemnification provisions).

Stated differently, if the onus is on the transferor, then the IRS would just need to audit the transferor. If the onus is on the transferee, then the IRS would need to audit the transferee and rely on the transferor to provide documentation to the IRS to let the IRS know that there has been a recapture event (as, without the documentation from the transferor, the transferee would have no information to provide to the IRS regarding whether the facility was still owned by the transferor). Since the transferee will have to indemnify the transferee if it were to provide a recapture notice to the transferee, they may not provide the notice and may be more emboldened to not provide the notice because they would view it as difficult to audit. However, a transferee may believe that an audit is a more likely outcome if the transferee was liable.

Reasonable Cause Substantiation

Another topic on which comments were requested, relates to the circumstances in which a taxpayer would have reasonable cause for purposes of Code § 6418(g)(2)(B). We believe relying on a system similar to the withholding regime would be appropriate. The two situations are similar in that they place a potential liability on one party when the information related to the potential liability is held by another party.

In that vein, we would recommend that receipt of the form (which the seller signed under penalties of perjury) combined with sending the form into the IRS should constitute reasonable cause similar to the manner in which withholding agents are able to rely on signed documentation provided to them.

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Thank you for the opportunity to submit comments. For more information, please contact Seth Feuerstein at 203-927-0971.

Sincerely,

Seth Feuerstein
Atheva