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Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of Treasury

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel
Internal Revenue Service

RE: Comments for IRS Notice 2022-50

Dear Ms. Batchelder and Mr. Paul:

Hanwha Q CELLS USA Inc. ("**Qcells**") is submitting comments to the Department of the Treasury ("**Treasury**") and the Internal Revenue Service ("**IRS**") in response to your request for comments in IRS Notice 2022-50 issued in respect of amendments made to the Internal Revenue Code of 1986, as amended (the "**Code**"), as created by the Inflation Reduction Act (the "**IRA**"). All section references herein are to the Code unless otherwise indicated.

Qcells, the largest crystalline silicon solar manufacturer in North America, aspires to scale up its investments and build a complete U.S.-based clean energy supply chain from polysilicon to finished solar panels. Building a fully-integrated solar manufacturing supply chain is expected to create many thousands of careers in the industry and enable the United States to realize energy independence, supply chain security, and climate goals. Qcells currently has a Georgia-based factory which produces 1.7 gigawatts of solar modules per year and is in anticipated to open a second Georgia-based factory in early 2023 which will produce 1.4 gigawatts of solar modules. Together, the facilities will account for approximately one-third of the United States' solar module manufacturing capacity. Qcells' current facility provides more than 750 jobs and it is expected that the second facility will provide an additional 470 jobs. As a result of the IRA, Qcells aspires to add additional capacity across the solar supply chain and create high volumes of good-paying manufacturing jobs.

Additionally, Qcells recently expanded its scope by becoming the largest shareholder of REC Silicon, a major U.S. manufacturer of polysilicon, the key raw material used to produce solar modules. This investment will help U.S. businesses secure the raw material critical to the solar supply chain as global competition over clean energy sources intensifies in the coming years. Efforts are also underway to manufacture low-carbon polysilicon at the company's factory in Moses Lake, Washington, which is powered by emission-free hydroelectricity. That facility will restart production in the second half of 2023.

Qcells is the largest crystalline silicon solar manufacturer in the United States and expects to make significant additional investments to re-shore the U.S. solar supply chain as a result of the passage of the IRA. We respectfully submit the below recommendations for guidance to Treasury and the IRS. Set forth below are our responses to certain of the specific questions raised by Treasury and the IRS in IRS Notice 2022-50 as well as other general recommendations and requests for guidance which we believe are necessary.[1]

SUMMARY OF RECOMMENDATIONS

1. **Definition of "Taxpayer" for Direct Pay:** We recommend that guidance be issued to clarify that the direct pay election under section 6417 should be made on a taxpayer-by-taxpayer basis (*i.e.*, on an member-by-member basis) within a consolidated group, and that an election by one member of the consolidated group does not start the 5-year eligibility period for another member of the group that chooses to make the election beginning with a later tax year.

2. **Frequency of Direct Pay Election:** We recommend that guidance be issued which allows for taxpayers to make the direct pay election under section 6417 on a quarterly basis.

3. **Documentation for the Direct Pay Election:** If issued, we urge Treasury and the IRS to narrowly tailor any additional tax compliance obligations on taxpayers under section 6417(d)(5) to only the information necessary to prevent duplication, fraud, and improper or excessive payments.

4. **Documentation for the Transferability Election:** If issued, we urge Treasury and the IRS to narrowly tailor any additional tax compliance obligations on taxpayers under section 6418(g)(1) to only the information necessary to prevent duplication, fraud, improper or excessive payments.

I. SECTION 6417, DEFINITION OF "TAXPAYER" FOR DIRECT PAY

Notice 2022-50, Section 3.01(1): What, if any, guidance is needed to clarify the meaning of certain terms in section 6417, such as applicable credit and excessive payment? Is there any

[1] We note that certain of the comments below are consistent with our recommendations provided separately in response to IRS Notice 2022-47. We have included such comments in both letters for convenience of the IRS, as we understand that different personnel may be responsible for different aspects of IRA implementation.

term not defined in section 6417 that should be defined in future guidance? If so, what is the term and how should it be defined?

Taxpayers claiming a credit under section 45X may be eligible to make the "direct pay" election under section 6417. Section 6417 does not provide a definition of "taxpayer" and, thus, does not specifically address how the direct pay election applies in the context of separate members of an affiliated group of corporations that choose to file a consolidated U.S. federal income tax return. We think it is very important that the IRS and Treasury issue guidance clarifying that the direct pay election is to be made separately by different members of a consolidated group of corporations. Otherwise, if a parent of a consolidated group made a direct pay election beginning with the 2023 tax year, but a subsidiary constructed a manufacturing facility that did not begin producing eligible components until 2025, such subsidiary may lose out on two years of eligibility for the direct pay refund. In that case, such subsidiary would benefit from only three years of direct pay eligibility, after which time such subsidiary may be forced to transfer credits to another party under section 6418. It is unknown at this point what level of discount will be required in the market for the transfer of credits, but we expect that the net impact is that a portion of the credit under section 45X that would otherwise be paid to a manufacturer under the direct pay provisions would instead be captured by other market participants. Accordingly, we believe that it is important that Treasury and the IRS issue guidance clarifying that the full 5-year direct pay eligibility period will be available to each taxpayer (including taxpayers that are members of a consolidated group).

General Rule

Section 6417 provides that an "applicable entity" may elect to receive a refund of certain tax credits, as if the applicable entity had paid an amount of taxes equal to the credit and received a refund of such overpayment of taxes. Although section 6417(d)(1), narrowly defines "applicable entity" (*e.g.*, a tax-exempt organization or a state or local government), a taxpayer other than an "applicable entity" may make an election under section 6417(d)(1)(D) with respect to any taxable year in which such taxpayer has, after December 31, 2022, produced "eligible components" as defined in section 45X, and such taxpayer will be treated as an applicable entity for purposes of section 6417 for such taxable year and for each of the four succeeding taxable years ending before January 1, 2033. In relevant part, section 6417(d)(1)(D) provides that "[i]f a ***taxpayer*** . . . makes an election under this subparagraph with respect to any taxable year in which such ***taxpayer*** has, after December 31, 2022, produced eligible components . . . such ***taxpayer*** shall be treated as an applicable entity for purposes of this section for such taxable year" (emphasis added). Accordingly, the direct pay election is made at the "taxpayer" level, by the "taxpayer" that produced the eligible components.

In the case of a taxpayer that is treated as a partnership or S corporation for U.S. federal income tax purposes, section 6417 specifically contemplates that the election will be made at the level of the partnership or S corporation (and the direct payment of the credit will also be made to the partnership or S corporation), notwithstanding the fact that income from such entities is subject to tax at the level of the partner or shareholder. In that case, no direct pay election will be allowed by any partner or shareholder with respect to the relevant facility or property.

Because neither section 45X nor section 6417 defines "taxpayer," it is not obvious how such credit and direct pay election should apply in the context of a consolidated group. We believe

that each member of a consolidated group should be treated as a "taxpayer" for purposes of the credit under section 45X and the election under section 6417 as discussed in further detail below.

Support under the Code and Regulations for Separate Calculation of Credit for Members of a Consolidated Group

Under general U.S. federal income tax principles, a member of a consolidated group (which is included on a consolidated return) is still a separate taxpayer. Pursuant to the Code, section 7701(a) defines "taxpayer" as any person subject to any internal revenue tax and defines "person" as an individual, a trust, estate, partnership, association, company or corporation. Further, under the consolidated return rules, an affiliated group of corporations has the *privilege* of making a consolidated return with respect to the income tax imposed by Chapter 1 for the taxable year in lieu of separate returns.[2] Corporations must meet certain requirements and consent to being a member of such consolidated group. Such consent is made by a corporation by joining in the making of the consolidated return for such year through the filing of IRS Form 1122, *Authorization and Consent of Subsidiary Corporation to be Included in a Consolidated Income Tax Return*.

By filing a consolidated return, all of the members of the group consent to be bound by the consolidated return regulations prescribed under section 1502. Treasury regulation sections 1.1502-2(a) and 1.1502-11(a) provide that the tax liability of a group for a consolidated return year includes the tax on the group's consolidated taxable income for the year, which in turn includes each member's separate taxable income. The consolidated group's common parent and each subsidiary that was a member during any part of the consolidated return year are severally liable for the consolidated group's tax.[3]

The authorities above therefore support the conclusion that there is a distinction in the income tax treatment of members of consolidated groups (*i.e.*, persons subject to any internal revenue tax) as compared to disregarded entities (*i.e.*, persons not subject to any internal revenue tax), such as single member limited liability companies or qualified subchapter S subsidiaries and that the former retain their character as separate taxpayers, while the latter are disregarded into one single entity such that only a single "taxpayer" exists for U.S. federal income tax purposes.

Additional context to support such conclusion is detailed in Treasury regulation section 1.1502-3, which provides that tax credits allowed by section 38 (which when enacted included the prior investment tax credit) for a consolidated return year of a group are equal to the consolidated credit earned, where the consolidated credit earned is equal to the aggregate of the credit earned by all members of the group for the consolidated return year. Effective for components produced and sold after December 31, 2022, current year business credits under section 38 include credits received pursuant to section 45X. Thus, we believe the intent of section 6417 is to apply the direct pay election on a taxpayer-by-taxpayer basis (which in the case of a consolidated group of corporations means on a corporation-by-corporation basis).[4] Further, the general conclusion that

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2 *See* section 1501.

3 Treas. Reg. § 1.1502-6(a).

4 We note that the IRS has similarly treated members of a consolidated group as separate "taxpayers" in other analogous contexts. *See, e.g.*, Chief Counsel Advice 200707002 (December 20, 2006) ("we find nothing . . . that requires or suggests that when corporate taxpayers consolidate, the result is that the group and each consolidating member become one and the same taxpayer"); P.L.R. 9428004 (April 7, 1994) ("the term

a member of a consolidated group remains a separate taxpayer is supported by various U.S. Tax Court and U.S. Supreme Court decisions (*e.g.*, the Tax Court has specifically stated that "[e]ach corporation is a separate taxpayer whether it stands alone or is in an affiliated group and files a consolidated return").[5]

Accordingly, based on both general U.S. tax principles as well as specific rules that apply to members of a consolidated group of corporations, each member of a consolidated group is a "taxpayer" for purposes of sections 45X and 6417. Therefore, the credit under section 45X and the direct pay election under section 6417 should apply separately at the level of each member of a consolidated group of corporations.

Recommendation

As noted above, the direct pay election under section 6417 is contemplated to be made by the "taxpayer." Section 6417 does not specifically address how the election is to be made by members of an affiliated group of corporations filing a consolidated return. Based on the above, we believe that each member of a consolidated group is a "taxpayer" because existing guidance indicates that members of a consolidated group do not lose their own identities as taxpayers merely because they choose to report differently for U.S. federal income tax purposes.

Thus, we recommend that guidance be issued to clarify that the direct pay election under section 6417 should be made on a taxpayer-by-taxpayer basis (*i.e.*, on an member-by-member basis) within a consolidated group, and that an election by one member of the consolidated group does not start the 5-year eligibility period for another member of the group that chooses to make the election beginning with a later tax year.

If, contrary to our recommendation, such election is required to be made at the level of the parent of a consolidated group and is binding on all members of such consolidated group, we believe that taxpayers with affiliates at various stages of developing manufacturing facilities may affirmatively avoid consolidated group status. We do not believe that is the intent of sections 45X or 6417, and we believe that guidance should be issued so that those types of restructuring are not necessary.

'taxpayer' generally means a corporation that is a member of a consolidated group rather than the group as a whole, unless the statutory context or legislative history clearly requires otherwise"); *see, also, American Standard, Inc. v. United States*, 44 AFTR 2d 79-5149 (1979) ("[t]he consolidated return regulations, in fact, primarily deal with the affiliated corporations as separate corporate entities"); *Magma Power Co. v. United States*, 101 Fed. Cl. 562, 2011-2 (2011) ("It is well established that 'the separate corporations are the taxpayers, and the affiliated group is merely a tax-computing unit, not a taxable unit'") (*citing Swift & Co. v. United States*, 69 Ct. Cl. 171, 191 [8 AFTR 10182] (1930)). We note that private letter rulings, technical advice memoranda, and internal advice memoranda may not be relied upon as precedent and are not binding authority, but we believe the prior positions of the IRS are nevertheless relevant to the policy issues under current consideration.

[5] *Wegman's Properties, Inc. v Comm'r*, 78 T.C. 786 (1982). *See, also, National Carbide Corp. v. Comm'r*, 336 U.S. 422 (1949); *Interstate Transit Lines v. Comm'r*, 319 U.S. 590 (1943); *Woolford Realty Co. v. Rose*, 286 U.S. 319 (1932); *Electronic Sensing Products, Inc. v. Comm'r*, 69 T.C. 276, 281 (1977); *Trinco Industries, Inc. v. Comm'r*, 22 T.C. 959, 962 (1954).

Without this clarity, taxpayers may purposely avoid consolidated group status and take efforts to structure around this issue, which may be commercially inefficient. Taxpayers should not be discouraged from vertical integration if such structure is commercially efficient, and tax compliance matters should not drive taxpayers to use less efficient business structures solely to address tax compliance matters. In some cases, this uncertainty may cause consolidated taxpayers to seek to deconsolidate their group (or otherwise cause structural changes to therefore be ineligible to file a consolidated return), in order to avoid any risk that a direct pay election by one member of a consolidated group could bind other members of the consolidated group that would otherwise seek to make the direct pay election at a later time.

II. SECTION 6417, FREQUENCY OF THE DIRECT PAY ELECTION

Notice 2022-50, Section 3.01(2): With respect to the Secretary's discretion to determine the time and manner for making an election under section 6417(a): What, if any, issues could arise when an applicable entity described in section 6417(d)(1)(A) makes an election under section 6417(a) and what, if any, guidance is needed with respect to such issues? What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

Section 6417 provides that an "applicable entity" may elect to receive a refund of certain tax credits, as if the applicable entity had paid an amount of taxes equal to the credit and received a refund of such overpayment of taxes. Although section 6417(d)(1), narrowly defines "applicable entity" (*e.g.*, a tax-exempt organization or a state or local government), a taxpayer other than an "applicable entity" may make an election under section 6417(d)(1)(D) with respect to any taxable year in which such taxpayer has, after December 31, 2022, produced "eligible components" as defined in section 45X, and such taxpayer will be treated as an applicable entity for purposes of section 6417 for such taxable year and for each of the four succeeding taxable years ending before January 1, 2033. A similar special election is provided under section 6417(d)(1)(B) and section 6417(d)(1)(C) with respect to credits under section 45V (credit for the production of clean hydrogen) and section 45Q (credit for carbon oxide sequestration), respectively. Under section 6417(d)(1)(E), an election of such special rules is "made at such time and in such manner as the Secretary may provide." Accordingly, Treasury must issue guidance as to how and when such special elections under section 6417 will be made.

Recommendation

Because the refundability of the credits under section 45X will infuse market participants (*i.e.*, producers of eligible components) with cash to assist in continued and increased activities (through new and existing facilities for the production of eligible components), we recommend that Treasury provide for the election, and the related refund, under 6417(d)(1)(E) on a quarterly basis.

Quarterly refunds are not a new model under the Code and related Treasury regulations. For example, under section 6427(i) (fuel used for nontaxable purposes) a taxpayer may file a quarterly refund claim for any quarter for which a taxpayer has a claim of $750 or more. Further, taxpayers may submit IRS Form 8849 to obtain a quarterly refund with respect to credits under section 6426 (credit for alcohol fuel, biodiesel and alternative fuel mixtures).

Based on the special rule in section 6417 for the refundability of credits under section 48X, it is clear that Congress intended to provide preferential treatment to manufacturers producing eligible components. Because section 6417 provides cash refunds, it is reasonable to assume that Congress intended to assist certain market participants involved in specified activities (*e.g.*, the production of eligible components under section 45X) by providing immediate, regular, and recurring cash incentives. We believe that allowing refunds under section 6417 on a quarterly basis is consistent with such legislative intent. As a result, we recommend that guidance is issued which allows for taxpayers to obtain refunds on a quarterly basis in respect of credits for which the direct pay election under section 6417 has been made. And unlike certain other calculations that are required to be made on an annual basis (such as for U.S. federal income tax purposes), the credits under section 45X and other similar credits are dependent on a specified output or a specified amount of investment, which could be accurately determined on a more frequent basis than annually.

III. SECTION 6417, DOCUMENTATION FOR THE DIRECT PAY ELECTION

Notice 2022-50, Section 3.01(9): (9) For purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417, what information, including any documentation created in or out of the ordinary course of business, or registration, should the IRS require as a condition of, and prior to, any amount being treated as a payment made by an applicable entity under section 6417(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration as a condition of, and prior to, any amount being treated as a payment made by both an applicable entity as well as a taxpayer who is treated as an applicable entity after making an election under sections 6417(d)(1)(B), (C), or (D)? Should the IRS require the same documentation or registration for all applicable credits? If not, how should the information or registration differ between applicable credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 6417?

Section 6417 provides that an applicable entity may elect to receive a refund of certain tax credits, as if the applicable entity had paid an amount of taxes equal to the credit and received a refund of such overpayment of taxes. An election under section 6417 is made at such time and in such manner as Treasury may provide. Accordingly, Treasury must issue guidance as to how and when the election under section 6417 will be made.

Additionally, section 6417(d)(5) provides that Treasury ***may*** require such information or registration as Treasury deems necessary for purposes of preventing duplication, fraud, improper payments, or excess payments under section 6417. Comparable provisions were included in three other sections enacted under the IRA, including section 45X (advanced manufacturing production credit), section 48D (advanced manufacturing investment credit), and section 6418 (transfer of certain credits). Some tax practitioners have expressed concerns that documentation requirements may create an onerous burden on taxpayers, which in many cases may duplicate documentation or information that is already required to be maintained or provided to the IRS.

Recommendation

As a threshold matter, we urge Treasury and the IRS to streamline any documentation requirements under section 45X, section 48D, section 6417, and section 6418, so as to not create inconsistent standards or documentation burdens on taxpayers. In addition, we urge Treasury and the IRS to not impose onerous burdens on taxpayers in terms of documentation, but instead that Treasury and the IRS should narrowly tailor any additional tax compliance obligations on taxpayers to only the information necessary to prevent duplication, fraud, and improper or excessive payments. In many cases, concerns about duplication and improper or excessive payments will be adequately addressed through requirements under existing law to comply with transfer pricing rules and related documentation requirements under section 482 and the associated penalties under section 6662.

If Treasury and the IRS determine that documentation requirements under existing law are insufficient to prevent duplication, fraud, and improper or excessive payments, we suggest that Treasury and the IRS require information about taxpayers' operations that would be readily available to taxpayers and not require taxpayers to hire third-party experts to undertake studies or appraisals. For example, Treasury and the IRS may consider requiring taxpayers to report the estimated maximum output of a taxpayer's facility that produces eligible components for purposes of section 45X as well as the actual output of eligible components for each year the taxpayer claims the credit under section 45X. Such information would allow the IRS to efficiently monitor for excess payments. This information should be readily determinable by taxpayers and should not require taxpayers to undertake additional analysis or hire outside experts. In addition, in many cases, taxpayers may be subject to external audits for financial accounting purposes. In those cases, the external auditors will be obligated to perform tests to validate the amount of any credit claimed. Accordingly, we expect that the risk of duplication, fraud, and improper or excessive payments is likely lower for companies that are subject to external audits from independent accounting firms. Treasury and the IRS may consider whether a different standard should apply for taxpayers for whom an external audit has been performed in comparison to taxpayers who do not obtain an external audit.

In sum, we recommend that if Treasury and the IRS issues documentation requirements, that such requirements are narrowly tailor and limited the information necessary to prevent duplication, fraud, and improper or excessive payments. We note that section 6417(d)(5) provides that Treasury ***may*** require such information or registration as Treasury deems necessary for purposes of preventing duplication, fraud, improper payments, or excess payments under section 6417. Thus, Treasury is not required to issue additional compliance requirements if Treasury finds that existing compliance requirements are sufficient.

IV. SECTION 6418, DOCUMENTATION FOR THE TRANSFERABILITY ELECTION

Notice 2022-50, Section 3.02(8): For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under section 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to section 6418(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the

same documentation or registration for all eligible credits? If not, how should the information or registration differ between eligible credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive credit transfers under section 6418?

Section 6418 allows certain taxpayers to elect to transfer all (or any portion specified in the election) of an eligible credit to an unrelated taxpayer. An election under section 6418 can only be made at such time and in such manner as Treasury may provide. Accordingly, Treasury must issue guidance on the timing and manner of the election under section 6418.

Additionally, section 6418(g)(1) provides that Treasury ***may*** require such information or registration as Treasury deems necessary for purposes of preventing duplication, fraud, improper payments, or excess payments under section 6418. Some tax practitioners have expressed concerns that documentation requirements may create an onerous burden on taxpayers.

Recommendation

For the reasons discussed above with respect to the direct pay provisions under section 6417, we urge Treasury and the IRS to narrowly tailor any documentation requirements under section 6418 and to not impose onerous burdens on taxpayers in terms of documentation.

With respect to the unique considerations that arise under section 6418, we believe that Treasury could take an approach similar to other approaches in U.S. tax law where two parties are obligated to jointly file certain tax forms or make certain elections. For example, Treasury and the IRS could require both the transferor and the transferee taxpayers to file a form analogous to IRS Form 8594. IRS Form 8594 requires both the seller taxpayer and the buyer taxpayer to report on their separate U.S. federal income tax returns an allocation of purchase price among assets acquired by the seller in a sale of a business. This form allows the IRS to match the allocation between the seller and buyer to mitigate different U.S. federal income tax treatment of the assets. As another example where unrelated taxpayers jointly file an election, IRS Form 8023 allows unrelated persons to jointly make an election under section 338(h)(10) to treat certain stock acquisitions as the equivalent of an asset acquisition.

For transferability, Treasury and the IRS could similarly require the transferor taxpayer and transferee taxpayer to file a form with their U.S. federal income tax returns to report the amount of the credit transferred. That would allow the IRS to monitor for duplication, fraud, improper or excessive payments. The amount of the credit should be readily determinable by the taxpayers and should not require taxpayers to undertake additional analysis or hire outside experts.

In sum, we recommend that if Treasury and the IRS issues documentation requirements, that such requirements are narrowly tailored and limited the information necessary to prevent duplication, fraud, and improper or excessive payments. We note that section 6418(g)(1) provides that Treasury ***may*** require such information or registration as Treasury deems necessary for purposes of preventing duplication, fraud, improper or excessive payments under section 6418. Thus, Treasury is not required to issue additional compliance requirements if Treasury finds that existing compliance requirements are sufficient.

V. CONCLUSION

As the Treasury has stated, the IRA "represents the most significant legislation to invest in clean energy and address climate change in our nation's history."[6] Consistent with Treasury's stated goal to ensure that as many eligible taxpayers as possible benefit from the incentives provided by law, we urge Treasury and the IRS to mindfully consider the array of taxpayers that will be affected by the implementation of the IRA. We would like to help advance the dialogue and we are available to provide further information if you have any questions regarding the foregoing recommendations. If you have any questions, please contact me at andy.munro@qcells.com.

Respectfully Yours,

Andy Munro
Vice President and General Counsel
Hanwha Q CELLS USA Inc.

[6] U.S. Department of the Treasury, "Briefing on the Inflation Reduction Act Climate and Clean Energy Tax Incentive Implementation Process" (October 6, 2022).