



November 4, 2022

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

Re: Notice 2022-50, Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

To Whom it May Concern:

On behalf of the members of the Novogradac Renewable Energy Working Group (the RE Working Group), we appreciate the opportunity to comment on Notice 2022-50, Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits (the Notice). The RE Working Group was founded to identify and address technical and administrative issues that arise around the Inflation Reduction Act (IRA) of 2022. The group counts among its members attorneys, investors, syndicators, lenders, for-profit and nonprofit developers, sponsors, consultants, and other renewable energy professionals interested in working together to coalesce around solutions to technical renewable energy issues and make the renewable energy tax credit programs more efficient in providing benefits.

Attached please find the RE Working Group's comments include requests for guidance, responses to questions and recommendations regarding the Notice. Our comments are meant to provide the Treasury and IRS with information needed to help guide their decisions as they make plans to implement the IRA's energy provisions.

Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance. We would be happy to discuss our comments in further detail. Thank you in advance for your time and consideration.

Yours very truly,

Novogradac & Company LLP

By

Tony Grappone, Partner

Attachment: RE Working Group Comments on Notice 2022-50

**Response to Notice 2022-50, Request for Comments on Payment of Elective Payment of
Applicable Credits and Transfer of Certain Credits
Novogradac Renewable Energy Working Group**

.01 Elective Payment of Applicable Credits (§ 6417)

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6417, such as applicable credit and excessive payment? Is there any term not defined in § 6417 that should be defined in future guidance? If so, what is the term and how should it be defined?

Comments

We respectfully request the “excessive payment” meaning to exclude applicable tax credit utilization rules, including but not limited to, IRC § 38, 49 and 469.

(2) With respect to the Secretary’s discretion to determine the time and manner for making an election under § 6417(a):

(a) What, if any, issues could arise when an applicable entity described in § 6417(d)(1)(A) makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

Comments

We respectfully request guidance that encourages parity between applicable entities under § 6417 and non-applicable entities with respect to establishing basis under Treasury Regulation § 1.46-3 including the impact of various federal, state, and public utility grants, rebates, and subsidies on basis or qualified investment when applicable.

(3) In determining the amount treated as making a payment against tax under § 6417(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed? What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a)?

Comments

We respectfully request the amount treated as a payment of tax under § 6417 be treated consistently with the payment of estimated tax under § 6654 and 6655.

(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to § 6417(c)(1) for any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation:

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

(b) Is guidance needed to clarify the treatment of a payment made pursuant to § 6417(c)(1)(A) to the electing partnership or S corporation? If so, what clarification is needed?

Comments

Comment 1

We respectfully request clarification on a partnership scenario whereby applicable entity partners are able to claim elective pay in proportion to their profit and loss allocations while partners that are not an applicable entity are permitted to be allocated tax credits in proportion to their profit and loss allocations.

Comment 2

We also request that Treasury clarify that a partnership or S corporation that makes an elective payment and allocates the corresponding tax-exempt income to its partners and shareholders based on their distributive share of the credits as if no election had been made can distribute cash in accordance with the manner the partnership agreement provides. There should be no limitation on how the partners or shareholders intend to utilize the cash proceeds from an overpayment of tax.

(5) With respect to the definition of the term “applicable entity” in § 6417(d)(1):

(a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of § 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D) for purposes of § 6417?

(b) What types of structures are anticipated to be used by applicable entities, and taxpayers who have elected to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D), when seeking to apply § 6417(a)?

(c) Is guidance needed to clarify the application of any Code provision other than § 6417 to an applicable entity, or a taxpayer electing to be treated as an applicable entity, that makes an election under § 6417(a)? If so, what is the Code provision and what clarification is needed?

(d) Are there specific issues that the Treasury Department and the IRS should address for applicable entities that are subject to non-tax legal requirements or other rules that may affect such entities’ ability to make an election under § 6417(a)?

Comments

Comment 1

We respectfully request clarification of the meaning of “organization” in § 6417(d)(1)(A)(i).

Comment 2

We respectfully request guidance that contains a list and/or examples of common entities that would qualify under (i) and (ii) of § 6417(d)(1)(A)(i) and consider including a reference to entities defined in § 50(b)(4)(i).

Comment 3

We respectfully request guidance clarify that Treasury Regulation § 1.46-3 should apply to both applicable entities and relevant partnerships and S corporations where a applicable entity may have an ownership interest.

(6) With respect to the elections under § 6417(d)(1)(B), (C), or (D):

(a) What, if any, issues could arise when an entity makes an election under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

(c) What, if any, issues could arise when an entity revokes an election made under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

(d) Is guidance needed to clarify the prohibition of a transfer described in § 6418(a) by a taxpayer who has made an election under § 6417(d)(1)(B), (C), or (D)? If so, what clarification is needed?

Comments

Treasury should provide examples that show whether and when such transfer and election are mutually exclusive, including with respect to the amount of the applicable credit treated as an elective payment under § 6417(a).

(7) Section 6417(d)(3)(A)(i)(I) provides that, in the case of any government, or political subdivision, described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), any election made by these applicable entities under § 6417(a) must be made no later than such date as is determined appropriate by the Secretary. What factors should the Treasury Department and the IRS consider when providing guidance on the due date of the election for these applicable entities? What factors should the Treasury Department and the IRS consider when providing guidance to clarify the timing and manner of a payment made by these governments or political subdivisions, for which no return is required?

Comments

We respectfully request the Treasury and IRS should consider guidance that encourages parity with entities that file tax returns.

(8) Section 6417(d)(4)(A) provides that, in the case of any government, or political subdivision described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), the payment described in § 6417(a) is treated as made on the later of the date that a return would be due under § 6033(a) if such government or subdivision were described in § 6033 or the date on which such government or subdivision submits a claim for credit or refund at such time and in such manner as the Secretary provides. What factors should the Treasury Department and the IRS consider when providing guidance to clarify the timing and manner of a payment made by these governments or political subdivisions?

Comments

We respectfully request the Treasury and IRS should consider guidance that encourages parity with entities that file tax returns.

(9) Section 6417(d)(4)(A) provides that, in the case of any government, or political subdivision described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), the payment described in § 6417(a) is treated as made on the later of the date that a return would be due under § 6033(a) if such government or subdivision were described in § 6033 or the date on which such government or subdivision submits a claim for credit or refund at such time and in such manner as the Secretary provides. What factors should the Treasury Department and the IRS consider when providing guidance to clarify the timing and manner of a payment made by these governments or political subdivisions? 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 § 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 § 6417?

Comments

We respectfully request the Treasury Department and the IRS also consider additional fraud risk mitigants such as a process requiring applicable entities to obtain and furnish items such as third party production reports and support of eligible costs for applicable credits, etc. to the extent it does not create unreasonable administrative burden.

(10) What, if any, guidance is needed to clarify the application of the excessive payment provisions of § 6417? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6417(d)(6)(B)? What, if any, guidance is needed to calculate the excessive payment amount under § 6417(d)(6)(C)?

Comments

We respectfully request that guidance be provided in the form of examples that illustrates the application of the excessive credit transfer provisions of § 6417.

(11) For purposes of § 6417(g), what, if any, guidance is needed to clarify the application of § 50 for credit recapture and basis adjustments to investment credit property?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate the manner in which § 50 shall be applied for purposes of credit recapture, basis adjustments, and eligibility related to § 50(b)(3).

(12) The advanced manufacturing investment credit under § 48D also contains an elective payment provision under § 48D(d). The Treasury Department and the IRS seek comments on whether the elective payment provisions of § 6417 should operate similarly or differently than the elective payment provision under § 48D.

Comments

We respectfully request guidance clarifying consistency between § 6417 and § 48D especially as it pertains to excessive payment and § 50 considerations.

(13) Please provide comments on any other topics that may require guidance.

Comments

We respectfully request guidance clarifying the timing and receipt of elective payments to applicable entities.

.02 Transfer of Certain Credits (§ 6418)

General guidance request

We request guidance that clarifies if a transferee taxpayer recognizes income or expense in situations where the amount of cash paid for a transferred tax credit is less or more than the face value of the tax credit transferred. For example, if a transferee taxpayer pays .95 cents for \$1 dollar of tax credits, is the .05 cent difference included in gross income of the transferee taxpayer? Please note that our understanding of industry consensus is that the .05 cent difference is not includable in the gross income of the transferee taxpayer and is instead accounted for as a reduction in federal tax expense.

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6418, such as eligible credit, eligible taxpayer, and excessive credit transfer? Is there any term

not defined in § 6418 that should be defined in guidance? If so, what is the term and how should it be defined?

Comments with respect to excessive credits

We respectfully request guidance related to the manner in which excessive credits are apportioned between the transferor and transferee in situations where only a portion of the total credits were transferred. For example, if an eligible taxpayer elects to transfer \$8 million of credits, which represents only a portion of its total eligible credits of \$10 million, to an unrelated transferee taxpayer and the IRS later makes a determination that \$1 million of the total \$10 million were excessive credits, can the transferor and transferee agree on which of the total credits are excessive? In other words, can the transferor and transferee agree that any excessive credits are first associated with the non-transferred portion of credits and that none of the transferred credits are considered excessive unless the total excessive credits exceed the amount of non-transferred credits. Or are all excessive credits apportioned between transferred and non-transferred credits proportionately?

Additionally, we respectfully request to what extent, if any, an excessive credit transfer should be deemed to apply if the credit percentage is reduced after a facility has been placed in service (for example, a recapture occurring under § 48(e)(5) or § 45(b)(7)(B)(iv).

We also request clarity with respect to situations involving qualified facilities where a taxpayer claims the energy credit under § 48 based on satisfying the prevailing wage criteria in years one and two of the recapture period however fails to satisfy the prevailing wage and apprenticeship criteria in years three-five of the recapture period *and* fails to meet the correction and penalty provisions with respect to satisfying such requirements as provided for under § 45(b)(7)(B). We request the Treasury Department and the IRS provide one or more illustrative examples that illustrate to what degree this type of situation results in a determination of excessive credits or tax credit recapture under § 50.

(2) Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under § 6418(a) with respect to such credit.

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6418(a) and what, if any, guidance is needed with respect to such issues?

Comments

We respectfully request guidance with respect to the following issues surrounding transferor elections under § 6418(a) that involve transferee taxpayers that are partnerships or S corporations.

Issue 1:

If a transferee taxpayer partnership or S corporation allocates tax credits to its partners or shareholders which the partnership or S corporation obtained pursuant to an election under § 6418(a), we respectfully request guidance that makes it clear that when a partnership or S corporation allocates credits which were obtained by the transferee taxpayer partnership or S corporation, the allocated credits are not considered additional transfers under § 6418(e)(2).

Issue 2:

If credits are allocated to partners or shareholders of a transferee taxpayer partnership or S corporation, we respectfully request guidance that makes it clear that the transfer election under § 6418(a) not be required to disclose the names of the partners or shareholders of the transferee taxpayer partnership or S corporation.

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate the time and manner for making the election.

(3) Section 6418(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder is allowed under § 6418(a) with respect to any eligible credit determined with respect to such facility or property. If the election is made, what issues should be considered regarding the transfer of any portion of an eligible credit and what, if any, guidance is needed with respect to such issues?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate allowable transfers of any portion of an eligible credit, in particular with respect to transfers to partnerships or S corporations.

(4) What, if any guidance is needed with respect to parameters or limitations on a transferee taxpayer's eligibility to claim the credit?

Comments

Issue 1:

We respectfully request guidance that indicates if a transfer of eligible credits involving a transferee taxpayer individual which is not in connection with the conduct of the individual's trade or business (or in anticipation of the individual's trade or business) will be considered a passive activity credit under § 469, similar to the holding provided for in Revenue Ruling 2010-16.

Issue 2:

We respectfully request guidance that indicates if a transfer of eligible credits involving a transferee taxpayer partnership which is not in connection with the conduct of the partnership's trade or business (or in anticipation of the individual's trade or business) will be considered a passive activity credit under § 469, similar to the holding provided for in Revenue Ruling 2010-16.

Issue 3:

What dates or dates may be used by transferee partnership to determine appropriate allocations of tax credits allocated by the transferee partnership.

(5) For purposes of § 6418(d), what, if any, guidance is required to determine the proper taxable year in which to claim any credit that was transferred pursuant to an election made under § 6418(a)?

Comments:

We respectfully request that guidance be provided in the form of examples that illustrate the proper taxable year in which to claim any credit that was transferred pursuant to an election made under § 6418(a).

(6) In determining the amount of eligible credit transferred, is guidance needed to clarify the application of any other Code provision?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate the amount of eligible credit transferred with respect to each applicable eligible credit.

(7) Is guidance needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under § 6418. If so, what is the Code provision and what clarification is needed?

Comments

We request guidance that clarifies whether or not the noncorporate lessor provisions in old Code Section 46(e)(3) (which are arguably applicable via Code Section 50(d)(1)) apply to transfer situations, noting that application of this provision could potentially eliminate the ability to transfer investment tax credits where the members of the transferor-lessor LLC are individuals.

We also request guidance that clarifies the manner in which non-taxable transferor income may or must be allocated under section 702 or whether or not they can be specially allocated.

(8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 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 § 6418(a)?

Comments with respect to duplication, fraud, improper payments, or excessive credit transfers

Comment 1

We request that a registration process be considered that requires transferor taxpayers who participate in eligible credit transfer elections under § 6418(a) be assigned a transfer number (TN) which they request and obtain from the United States Department of the Treasury (Treasury) and also requires the transferee taxpayer to register in the System for Awards Management (SAM) and provide a notice of transfer to Treasury which discloses information such as their Data Universal Number System number (DUNS Number), the TN, the address of the transferee taxpayer which is signed by an authorized representative of the transferee taxpayer. A database such as SAM could also potentially be used by transferee taxpayers to help verify if the credits they seek to purchase have not already been sold prior to entering into a credit transfer transaction.

Comment 2

With respect to transferred credits the Treasury Department and the IRS could also consider additional fraud risk mitigants such as a process requiring applicable entities to obtain and furnish items such as third party production reports and support of eligible costs for applicable credits, etc. to the extent it does not create unreasonable administrative burden.

(9) What, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of § 6418?

Comments

We respectfully request that guidance be provided in the form of examples that illustrates the application of the excessive credit transfer provisions of § 6418 (including whether an excessive credit transfer is deemed to exist if the credit percentage is reduced following the date of PIS, consistent with our prior question).

What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6418(g)(2)(B)?

Comments

We respectfully request that guidance be provided in the form of examples that are not all inclusive but illustrate situations that qualify as reasonable cause, and particularly with respect to the situation referenced previously, what proof could a transferee taxpayer provide to establish good cause that an excessive credit transfer should not be deemed to apply if the eligible credit percentage decreases after the PIS date, notwithstanding appropriate representations, warranties, covenants, and other protections from the transferor taxpayer in favor of the transferee.

What guidance is needed to calculate the excessive credit transfer amount?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate how excessive credit transfers are calculated, including examples outlined in the comments to item (1) above.

(10) For purposes of § 6418(g)(3), what, if any, guidance is needed to clarify the application of § 50 for purposes of credit recapture, basis adjustments, and eligibility related to § 50(b)(3)?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate the manner in which § 50 shall be applied for purposes of credit recapture, basis adjustments, and eligibility related to § 50(b)(3), with specific consideration being given to clarification on whether disposal by the original taxpayer (or a partner thereof) would be considered to cause recapture, noting this could have chilling effect on transfer market because of risk of lender foreclosure and potential impact to transferor business model.

Pursuant to § 6418(g)(3)(B)(i), an eligible taxpayer must notify the transferee taxpayer if, during any taxable year, the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period. What factors should be considered in determining the form and manner of this notice?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate the manner in which eligible taxpayer must notify transferee taxpayers if, during any taxable year, the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property and take into consideration factors such as the deadline for providing such notice and if such notification is required in the event such event occurred following the 5th anniversary following the date the investment credit property was placed in service. We also respectfully request that the guidance take into consideration situations involving transferee taxpayers which are no longer in existence.

Likewise, pursuant to § 6418(g)(3)(B)(ii), the transferee taxpayer must notify the eligible taxpayer of the recapture amount. What factors should be considered in determining the form and manner of this notice?

Comments

We respectfully request that guidance be provided in the form of examples that illustrate the manner in which transferee taxpayers must notify the eligible taxpayer of the recapture amount and should consider situations in which the eligible taxpayer is no longer in existence.

(11) Is guidance needed to clarify the application of § 6418(g)(4) regarding progress expenditures? If so, what clarification is needed?

Comments

We respectfully request that guidance be provided that indicates any credits previously transferred with respect to progress expenditures be considered recapture.