

Comments re: Notice 2022-50

Sections:

.01 Elective Payment

Clarify that Section 6417(c)(1) provision relating to partnerships doesn't mean that a partnership is an "applicable entity" with a general ability to elect payment. These partnership provisions seem to relate only to those special exception facilities for which the owner need not be an "applicable entity."

.02 Transfer of Certain Credits

Transfer by lowest tier partnership only? If an owner consists of multiple tiers of partnership, clarify whether the credit may only be transferred by the lowest tier partnership, or may be allocated to an upper tier partnership and then transferred by that upper tier partnership.

Recapture determined at transferor level. Clarify that recapture is determined by whether there would be recapture by the transferor. In the case of a transfer by a partnership, recapture is determined by whether the partnership experienced an event which would cause recapture to the partnership. In such case, clarify that recapture is not measured by partner events, if such events would not been a recapture by the transferor partnership.

Transfer to a partnership / Allocation by transferee partnership. Clarify that a partnership may be a transferee of the credit. In such case, the credit may be allocated to the partners in the transferee partnership under normal allocation principles applicable to the credit.

Transfer to a §6417(d)(1)(A) entity? Clarify that a §6417(d)(1)(A) entity may not be a transferee of the credit. We assume this would provide an unintended path for other entities to indirectly access elective payment.

Carryback and Carryforward by Transferee. Clarify that after the transferee takes the credit into account at the time prescribed by §6418(d), the normal carryback and carryforward rules apply to the transferee.

Not an activity. Refer to Revenue Ruling 2010-16 in which the IRS ruled that New Markets Tax Credit was allowed for acquiring an investment in a CDE, regardless of whether such investment did or did not constitute an "activity" by the investor. Similarly, please clarify that the acquisition of a credit does not in and of itself constitute an activity by the transferee. If the acquisition is determined not be an activity, one consequence is that the transferred credit will not be treated as a passive activity for the transferee.

Partial Transfer. Clarify the types of portions that may be transferred under the "any portion" language in §6418(a). We suggest that "any portion" should mean any portion contractually

agreed by the transferor and transferee, and which may be precisely calculated not later than when the total credit for the tax year is known. This could include, by way of example: (i) a % of the total credit, (ii) a stated dollar amount of credit, (iii) the first or last stated dollar amount of credit out of the total credit, or (iv) the credit generated during a stated period of time.

Tax-exempt income on use of credit by transferee. Clarify that the use of the credit by the transferee is results in tax-exempt income (or in the alternative is not a gain recognition event). More specifically, to the extent that the transferee paid a purchase price of less than the par amount of the credits (i.e. a discount), the discount is not taxable gain to the transferee. The tax-exempt treatment of transfer proceeds in IRA implies that the credit is not itself intended to be taxed. Also the use of no other federal credit to our knowledge is a taxable event. Therefore to mirror the tax-exempt income treatment of proceeds, we suggest the discount should be similarly considered tax-exempt income. Or in the alternative, not considered a gain recognition event.

Winthrop & Weinstine, P.A.
225 South Sixth Street
Suite 3500
Minneapolis, MN 55402
Attn: Norm Jones

25074944v1