bakertilly

Baker Tilly US, LLP
8219 Leesburg Pike, Ste 800
Tysons, VA 22182-2625

T: +1 (703) 923 8300
F: +1 (703) 923 8330

bakertilly.com

December 5, 2022

Via Electronic Submission

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203, P.O. Box 760
Ben Franklin Station
Washington, DC 20044

Dear Sir or Madam:

Re: Guidance recommendations re: certain energy credit provisions of the Inflation Reduction Act

Baker Tilly US, LLP, on behalf of our clients, offers the following comments regarding guidance relating to certain energy credit provisions of the Inflation Reduction Act (the IRA). Our comments respond to the requests for comments issued by the Internal Revenue Service (the Service) in Notice 2022-46, Notice 2022-50, and Notice 2022-56.

Executive summary

Our comments relate to (1) taxpayers who are transferees of credits under §6418, and (2) taxpayers who are dealers (or resellers) of either (a) clean energy vehicles eligible for credits under §30D or (b) alternative fuel vehicle refueling property eligible for credits under §30C.

We recommend that the Department of the Treasury (Treasury) and the Service issue guidance:

1. Expressly providing that credits transferred to a taxpayer under §6418 will not be considered passive activity credits under §469 if the transferee taxpayer has not acquired the credit in connection with the taxpayer's trade or business.

2. Clarify that dealers (or resellers) of property eligible for credits under §30C or §30D to credit-ineligible end users are the parties eligible for credits under the statutory scheme and that prior sellers of the property are not eligible.

1. Transferees of credits under §6418

Potential interaction of IRC §6418 and IRC §469

We are requesting clarification under Internal Revenue Code (IRC) §6418 as to the possible interaction with IRC §469. This is in response to your request as to whether any other code provision applies to the transferee taxpayer. Section 6418(a) states in part that "… the transferee taxpayer specified in such election (and not the eligible taxpayer) shall be treated as the taxpayer for purposes of this title with respect to such credit … ." This wording has resulted in considerable debate in the practitioner community as to whether the passive loss rules under §469 would then apply to the purchaser of the credit, due to the language "for purposes of this title." It should be noted that prior to the advent of §6418, a taxpayer would have needed to own an equity interest in an activity to be subject to the rules of §469 as there would be no other way for the taxpayer to be allocated a distributive share of a loss or credit generated by such activity. However, since the definition of "passive activity" under §469(c) is one which "involves the conduct of any trade or business, and in which the taxpayer does not materially participate," it is possible that this definition can be broadly interpreted to include the activity that generated the credit for which an election under §6418 is made and subject a purchaser to §469, regardless of the fact that they do not own an interest in the underlying activity.

Baker Tilly US, LLP, trading as Baker Tilly, is a member of the global network of Baker Tilly International Ltd., the members of which are separate and independent legal entities. © 2022 Baker Tilly US, LLP

We believe that §6418(a) should be read as only transferring the rights of the credit to the purchaser, rather than subjecting the purchaser to the passive regime. Such clarification is needed to avoid any confusion that the credit is passive in the hands of the purchasing taxpayer based on the broad definition of passive activity under §469(c)(1). We believe that to subject a purchaser to the passive credit regime would be fundamentally unfair as well as frustrate the underlying intent of the transferability provision.

We believe passive treatment would be fundamentally unfair to the purchaser because unlike a partner or S corporation shareholder, a purchaser that does not also hold an ownership interest in the entity generating the credit would have no means of meeting the material participation tests under §469. Consequently, unless the purchaser also had passive income from other sources, the credit would not be usable and would carry forward indefinitely. Such a limitation would restrict the pool of possible purchasers significantly. This appears to be contradictory to the intent of the legislation to encourage energy-efficient projects by making it easier to monetize the credits.

We believe the appropriate treatment is that a purchaser is engaged in the activity of investing, rather than the underlying activity of the business selling the credit. Such treatment would be consistent with the conclusion reached in Rev. Rul. 2010-16 where the acquisition of the investment generating the new markets tax credit was determined not to be subject to the passive activity credit rules. More accurately, in the current situation with the energy credits, the purchase of the credit is nothing more than an investment of cash seeking a return. There is no business involvement either passive or active by the purchaser of the credit, nor does there need to be for the purchaser to utilize the credit. In Rev. Rul. 2010-16, the Service said in part:

> The CDE [community development entity] does not pass through the new markets tax credit to the person claiming the new markets tax credit. Rather, the amount of the new markets tax credit is determined based on a percentage of the amount paid to the CDE for the qualified equity investment at its original issue. Accordingly, in determining whether the new markets tax credit under §45D is disallowed under §469, the determination depends on whether the acquisition of the qualified equity investment in the CDE arises in connection with the conduct of a passive activity. The determination of whether the new markets tax credit under §45D is disallowed under §469 does not depend on the taxpayer's interest or extent of participation in the CDE's trade or business.
>
> To be a passive activity, the activity of acquiring a qualified equity investment in the CDE must be in connection with the conduct of a trade or business in which the person claiming the new markets tax credit does not materially participate or be a rental activity. Because the activity of acquiring an equity investment in a CDE is not a rental activity, the only issue is whether the acquisition activity is in connection with the conduct of a trade or business activity (or in anticipation of a trade or business) in which the person claiming the new markets tax credit does not materially participate.

The Service's reasoning in Rev. Rul. 2010-16 is sound, and similar reasoning should apply to §6418. We respectfully request that Treasury issue guidance clarifying that the passive credit rules are not applicable to the transferee taxpayer under §§469 or 6418(a).

2. Dealers of property qualifying for credits under §30C or §30D

The §30C alternative fuel vehicle refueling property credit and the §30D clean energy vehicle credit generally are available to taxpayers placing qualified property in service. These credit provisions also include a mechanism permitting sellers of the qualified property to claim the credit where they have sold the qualified property to a purchaser who put the property in service but cannot claim the credit due to its tax-exempt status. These mechanisms are available if the qualified property is not subject to a lease and its use is described in §50(b)(3) or §50(b)(4). For purposes of the credit, these mechanisms treat the dealer (or reseller) selling the property to the tax-exempt end user as if it had placed the qualified property in service itself.

By these mechanisms, the Code encourages production of the qualified property regardless of whether the end user is a tax-exempt entity. The Code requires the seller of the qualified property in these cases to document its disclosure to the purchaser information about the amount of credit available.

We are requesting that Treasury and the Service provide clarification regarding dealer sales — situations where a tax-exempt end user of the property acquires the qualified property directly from a dealer or reseller (i.e., not directly from the property's manufacturer). Clarification on this point would be helpful because the statutory language is somewhat difficult to parse. Section 30C(e)(2), for example, states: "In the case of any qualified alternative fuel vehicle refueling property the use of which is described in paragraph (3) or (4) of section 50(b) and which is not subject to a lease, the person who sold such property to the person or entity using such property shall be treated as the taxpayer that placed such property in service … ." The requirement to document disclosure of the credit to the tax-exempt user of the property could be met in the ordinary course by the dealer (or reseller) selling the qualified property to the end user and might be met only with some difficulty by other prior sellers of the property. Accordingly, we believe it is reasonably clear that in situations where a tax-exempt end user of the qualified property acquires the property directly from a dealer (or reseller), that dealer may qualify for the credit and previous sellers of the property who did not sell the property to the end user may not. We nonetheless request that this point be clarified in guidance since the statutory language may be considered difficult to parse.

Treasury and the Service could use an example in regulations or in a Notice to provide the clarification. The example would illustrate a reseller (or dealer) purchasing qualified property from a manufacturer (or another dealer) and subsequently selling that property to a tax-exempt end user of the property. The example would conclude that only the reseller (or dealer) that sold the property to the tax-exempt end user may be eligible for the credit and any prior seller of the property will not be. The clarification should expressly apply for purposes of both §30C and §30D, whether via use of parallel clarificatory provisions or examples issued under §30C and under §30D, or via cross reference.

We appreciate your time and consideration. We would be pleased to discuss these comments with you if that would be helpful. To discuss this or other related matters, please contact Paul Dillon at paul.dillon@bakertilly.com or Stefan Gottschalk at stefan.gottschalk@bakertilly.com.

Baker Tilly US, LLP, trading as Baker Tilly, is a member of the global network of Baker Tilly International Ltd., the members of which are separate and independent legal entities.

Very truly yours,

BAKER TILLY US, LLP

Paul H. Dillon
Director, Washington National Tax

Direct Dial: +1 (703) 923 8489
paul.dillon@bakertilly.com

PHD/mcl

cc:

- Lily Batchelder, Assistant Secretary (Tax Policy), Department of the Treasury
- Krishna Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
- William Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service
- Holly Porter, Associate Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service