Attorney at Law

December 7, 2018

Re: **Tax Credits for Prepaid PPA Solar Facilities**

Ladies and Gentlemen:

You have requested our opinion as to the qualification for the investment tax credit (the "ITC") under Section 46 of the Internal Revenue Code of 1986, as amended (the "Code"), of an individual investor (an "Investor") in portfolios of Solar Facilities (as defined below), including Solar Facilities developed and financed under the California Property Assessed Clean Energy Program, California Streets and Highways Code Sections 5898.20-5899.3 (the "PACE Program").

Opinion

Based on the assumed facts and analysis that follow, although the issues are not free from doubt, we are of the opinion, subject to the qualifications, general provisions and limitations set forth in this letter, that (1) an Investor should qualify for the ITC with respect to any Solar Facility to the extent of the Solar Facility's eligible basis and (2) neither the amount of the ITC nor the amount of any tax loses should be deferred or reduced by application of the passive activity rules or the at-risk rules.

Analysis

Assumed Facts

Investor

Investor will be a United States citizen and will reside in the United States at all times that Investor owns any Solar Facilities. Investor will not be related to DevCo (as defined below). Investor will form a limited liability company ("Investment LLC") to own the Solar Facilities and enter into the various agreements relating to the ownership, operation, maintenance and management of the Solar Facilities.

With your permission, we have assumed Investment LLC will be a single-member limited liability company in which Investor will be the sole Member and that Investment

LLC will, for U.S. federal tax purposes, be treated as an entity disregarded as separate from Investor. Accordingly, any activity ofInvestment LLC will be treated for U.S. federal tax purposes as an activity oflnvestor. For simplicity and ease ofunderstanding in this opinion letter, we will refer to Investment LLC as Investor.

With your permission, we have assumed that any amounts invested by Investor in any Solar Facility or to make any other payments in connection with the ownership and management ofSolar Facilities will be funded by Investor's own funds and will not be borrowed from any bank, financial institution or other lender.

We have also assumed with your permission that Investor will carry on the business ofowning and operating Solar Facilities in a business-like and formal manner. In particular, we have assumed with your permission that (1) Investor will engage in the business of owning and managing Solar Facilities for more than 100 hours in any single tax year, (2) no single person will perform services for Investor related to the business ofowning and managing Solar Facilities for more than 100 hours in any single tax year and (3) Investor will keep contemporaneous records to support assumptions (1) and (2).

Finally, we have assumed with your permission that Investor will have an expectation ofpost-tax profit after taking into account the ITC and expected depreciation benefits.

PPA and Financing

will enter into a Solar Power Purchase Agreement (a "PPA") with a property owner (the "Customer"). Under the PPA, the Customer agrees to allow DevCo to install a photovoltaic solar power system
(including panels, inverters, racking, meters and associated equipment, a "Solar Facility") on the Customer's property. The PPA provides that DevCo or its successors or assigns will be the owner ofthe Solar Facility and that DevCo will retain all rights to any ITC amount attributable to the Solar Facility.

Each PPA will have an initial term of25 years. On or before the date that the local utility grants permission to begin operating the Solar Facility (the "Facility Start Date"), the Customer will pre-pay for all the electricity to be produced by the Solar Facility during the 25-year term (the "Prepayment Amount"). The Prepayment Amount may be paid in cash or financed through the PACE program using proceeds provided by an investor in the PACE

Program.[1] It is expected that the Prepayment Amount will equal approximately 70% ofthe Investor Purchase Price (as defined below).[2]

With your permission, we have assumed that the Facility Start Date will occur upon receipt ofpermission to operate ("PTO") from the applicable electric utility to which the Solar Facility will interconnect, which shall occur after the date the Solar Facility has been sold and transferred by DevCo to Investor and will be on or prior to the date that the Solar Facility is placed in service for U.S. federal tax purposes.

The Prepayment Amount is the only amount paid by the Customer for power delivered by the Solar Facility during the initial 25-year term ofthe PPA. During the initial 25-year term ofthe PPA, DevCo (or its successors or assigns) is required (for no additional payment from the Customer) to operate, maintain and monitor the Solar Facility to produce electricity in accordance with prudent utility practices. Ifthe Customer has not acquired the Solar Facility before the end ofthe initial 25-year term, the PPA will be extended for successive one-year terms, and, during any such extension, the Customer will pay for any electricity delivered to the Customer from the Solar Facility at a scheduled energy cost set forth in the PPA plus a reasonable operation and maintenance surcharge.

The PPA provides that the electricity generated by the Solar Facility will be used for general household or business purposes but not to heat a swimming pool.

The Customer has the option to purchase the Solar Facility at the following times:

(a) At and any time after the sixth anniversary ofthe Facility Start Date (the "Option Date");
(b) At the end ofthe initial 25-year term ofthe PPA; and
(c) At the time the Customer sells the property where the Solar Facility is located at any time on or after the Option Date.

The purchase price under the Customer's option will be determined at the time the option is exercised and will be the greater at such time of(1) the fair market value ofthe Solar Facility ("FMV") and (2) the "Remaining Amount," as defined below. DevCo (or Investor as successor to DevCo under the PPA) is responsible for preparing a valuation to show the FMV, and the valuation will take into account, among other items: (i) the Solar Facility's age, location and size; (ii) operating, maintenance and service costs; (iii) the value ofelectricity in the Customer's area; and (iv) any applicable solar incentives.

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[1] We express no opinion as to any matter oftax law (or any other law) under the PACE Program, or as to the treatment ofa Solar Facility, a Customer, a PACE Program investor, DevCo or any other person or entity under the PACE Program.

[2] We express no opinion as to how much ofthe Investor Purchase Price will be treated as eligible basis of energy property for purposes ofthe ITC or as to the amount ofany depreciation Investor may claim with respect to any Solar Facility in any year.

The "Remaining Amount" will be the excess ofthe Prepayment Amount over the total value ofelectricity actually delivered prior to the date the purchase option is exercised, where the total value ofelectricity actually delivered is based on the Prepayment Amount and the expected production for each year ofthe initial 25-year term as reflected in an exhibit to the PPA.

DevCo (or Investor as successor to DevCo under the PPA) will transfer ownership of the Solar Facility to the Customer on the Option Date ifthe Remaining Amount on the Option Date exceeds the FMV ofthe Solar Facility on the Option Date. DevCo (or Investor as successor to DevCo under the PPA) may transfer the Solar Facility to the Customer at any time after the Option Date that the Remaining Amount exceeds the FMV ofthe Solar Facility.

Transfer of a Solar Facility to Investor

Investor and DevCo will enter into a Master Purchase and Sale Agreement (the "Master PSA"). Under the Master PSA, after a review and evaluation period, [3] Investor will have the right to acquire each PPA and associated Solar Facility from DevCo for an agreed purchase price (the "Investor Purchase Price").

After Investor pays DevCo the Investor Purchase Price for a Solar Facility, Investor will have no further payment obligations to DevCo under the Master PSA with respect to such Solar Facility. Other than under the O&M Agreement (as defined below), DevCo has no rights to receive any amounts from the operation ofthe Solar Facility, including, without limitation, any amounts paid or to be paid to Investor by the Customer under the PPA.

With your permission, we have assumed that the Investor Purchase Price for each Solar Facility is not more than the amount a buyer and unrelated seller (both in possession of all relevant facts and neither under any compulsion to buy or sell) would agree as the fair market value for an installed solar system substantially similar to the Solar Facility.

O&MAgreement. Investor and DevCo will enter into an Operation, Maintenance and Administration Services Agreement (the "O&M Agreement") with respect to each Solar Facility sold by DevCo to Investor. With your permission, we have assumed that substantially all ofthe services required for Investor to meet its obligations under the PPA will be provided by DevCo on behalfofInvestor under the O&M Agreement.[4]

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[3] As discussed above, with your permission, we have assumed that the Facility Start Date will occur at the time the Solar Facility has received PTO from the interconnecting utility, which will occur after DevCo as transferred title to the Solar Facility to Investor and will be on or prior to the date that the Solar Facility is placed in service for U.S. federal tax purposes.

[4] As noted above, we have assumed with your permission that (I) Investor will engage in the business of owning and managing Solar Facilities for more than I00 hours in any single tax year and (2) no single person will perform services for Investor related to the business of owning and managing Solar Facilities for more than I00 hours in any single tax year.

Under the O&M Agreement, Investor will pay DevCo approximately $14 per kW each year with respect to each Solar Facility for operational, maintenance and administrative services.

With your permission, we have assumed that the amounts to be paid by Investor to DevCo under the O&M Agreement represent the fair market value of the services to be provided by DevCo under that agreement.

Applicable Law

ITC Eligibility

Code Section 38(a)(2) allows as a credit against the regular income tax[5] imposed on a taxpayer for a tax year "an amount equal to ... the amount of the current year business credit." The current year business credit includes the ITC. Code Section 38(b)(l). The ITC includes "the energy credit." Code Section 46(2).

Code Section 48(a)(l) provides as follows:

> For purposes of section 46 ... the energy credit for any taxable year is the energy percentage of the basis of each energy property placed in service during such taxable year.[6]

"Energy property" means any qualifying property if (1) either (i) the construction, reconstruction, or erection of the property is completed by the taxpayer or (ii) the property is acquired by the taxpayer and the original use of such property commences with the taxpayer, and (2) depreciation (or amortization in lieu of depreciation) is allowable with respect to such property. Code Section 48(a)(3)(B)-(C).

Property that qualifies as energy property includes "equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, excepting property used to generate energy for the purposes of heating a swimming pool." Code Section 48(a)(3)(A)(i). The energy percentage for solar property the construction of which begins before January 1, 2020 is 30%.[7] Code Section 48(a)(2)(A)(i)(II); Code Section 48(a)(6)(A).

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[5] We express no opinion as to the availability or treatment of the ITC under the alternative minimum tax or for any purpose other than the regular income tax.

[6] We express no opinion as to how much of the equipment included in a Solar Facility qualifies as "energy property" within the meaning of Code Section 48(a) or as to the basis of any such energy property.

[7] We express no opinion regarding the phaseout of the ITC under Code Section 48(a)(6) for solar projects the construction of which begins after December 31, 2019 or which are not placed in service before January 1, 2024.

Treasury Regulations Section 1.48-9(a)(2) provides that to qualify as "energy property" under Section 48 of the Code, property must be depreciable property with an estimated useful life when placed in service of at least three years.

Treasury Regulations Section 1.48-9(d)(l) provides as follows:

> The term "solar energy property" includes equipment and materials (and parts related to the functioning of such equipment) that use solar energy directly to (i) generate electricity, (ii) heat or cool a building or structure, or (iii) provide hot water for use within a building or structure.

Treasury Regulations Section 1.48-9(d)(3) provides that solar energy property includes storage devices, power conditioning equipment, transfer equipment and parts related to the functioning of those items but does not include any equipment that transmits or uses the electricity generated.

Under Code Section 167(a), depreciation is allowable with respect to property that is "used in a trade or business" or "held for the production of income." Code Section 162(a) allows deductions for "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." Code Section 212(2) allows deduction for "all the ordinary and necessary expenses paid or incurred during the taxable year … for the management, conservation, or maintenance of property held for the production of income."

The Code does not define "trade or business" or "held for the production of income." Code Section 183(c), however, provides a point of reference for these terms by stating that an '"activity not engaged in for profit' means any activity other than one with respect to which deductions are allowable for the taxable year under section 162 or under paragraph (1) or (2) of section 212." Code Section 183(a) limits deductions for any activity not engaged in for profit.

Treasury Regulations Section 1.183-2(b) provides as follows:

> In determining whether an activity is engaged in for profit, all facts and circumstances with respect to the activity are to be taken into account. No one factor is determinative in making this determination. In addition, it is not intended that only the factors described in this paragraph are to be taken into account in making the determination, or that a determination is to be made on the basis that the number of factors (whether or not listed in this paragraph) indicating a lack of profit objective exceeds the number of factors indicating a profit objective, or vice versa. Among the factors which should normally be taken into account are the following:
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> *(]) Manner in which the taxpayer carries on the activity.* The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records may indicate that the activity is engaged in for profit. Similarly, where an activity is carried on in a manner substantially similar to other

activities of the same nature which are profitable, a profit motive may be indicated. A change of operating methods, adoption of new techniques or abandonment of unprofitable methods in a manner consistent with an intent to improve profitability may also indicate a profit motive.

(2) The expertise ofthe taxpayer or his advisors. Preparation for the activity by extensive study of its accepted business, economic, and scientific practices, or consultation with those who are expert therein, may indicate that the taxpayer has a profit motive where the taxpayer carries on the activity in accordance with such practices. Where a taxpayer has such preparation or procures such expert advice, but does not carry on the activity in accordance with such practices, a lack of intent to derive profit may be indicated unless it appears that the taxpayer is attempting to develop new or superior techniques which may result in profits from the activity.

(3) The time and effort expended by the taxpayer in carrying on the activity. The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit. A taxpayer's withdrawal from another occupation to devote most of his energies to the activity may also be evidence that the activity is engaged in for profit. The fact that the taxpayer devotes a limited amount of time to an activity does not necessarily indicate a lack of profit motive where the taxpayer employs competent and qualified persons to carry on such activity.

(4) Expectation that assets used in activity may appreciate in value. The term "profit" encompasses appreciation in the value of assets, such as land, used in the activity. Thus, the taxpayer may intend to derive a profit from the operation of the activity, and may also intend that, even if no profit from current operations is derived, an overall profit will result when appreciation in the value of land used in the activity is realized since income from the activity together with the appreciation of land will exceed expenses of operation. ...

(5) The success ofthe taxpayer in carrying on other similar or dissimilar activities. The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable.

(6) The taxpayer's history ofincome or losses with respect to the activity. A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit. However, where losses continue to be sustained beyond the period which customarily is necessary to bring the operation to profitable status such continued losses, if not explainable, as due to customary business risks or reverses, may be indicative that the activity is not being engaged in for profit. If losses are sustained because of unforeseen or fortuitous circumstances which are beyond the control of the taxpayer, such as drought, disease, fire, theft, weather damages, other involuntary conversions, or depressed market conditions, such losses would not be an indication that the activity is not engaged in for profit. A series of years in which net

income was realized would of course be strong evidence that the activity is engaged in for profit.

(7) The amount ofoccasional profits, ifany, which are earned The amount of profits in relation to the amount of losses incurred, and in relation to the amount of the taxpayer's investment and the value of the assets used in the activity, may provide useful criteria in determining the taxpayer's intent. An occasional small profit from an activity generating large losses, or from an activity in which the taxpayer has made a large investment, would not generally be determinative that the activity is engaged in for profit. However, substantial profit, though only occasional, would generally be indicative that an activity is engaged in for profit, where the investment or losses are comparatively small. Moreover an opportunity to earn a substantial ultimate profit in a highly speculative venture is ordinarily sufficient to indicate that the activity is engaged in for profit even though losses or only occasional small profits are actually generated.

(8) Thefinancial status ofthe taxpayer. The fact that the taxpayer does not have substantial income or capital from sources other than the activity may indicate that an activity is engaged in for profit. Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved.

(9) Elements ofpersonal pleasure or recreation. The presence of personal motives in carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved. On the other hand, a profit motivation may be indicated where an activity lacks any appeal other than profit. It is not, however, necessary that an activity be engaged in with the exclusive intention of deriving a profit or with the intention of maximizing profits. For example, the availability of other investments which would yield a higher return, or which would be more likely to be profitable, is not evidence that an activity is not engaged in for profit. An activity will not be treated as not engaged in for profit merely because the taxpayer has purposes or motivations other than solely to make a profit. Also, the fact that the taxpayer derives personal pleasure from engaging in the activity is not sufficient to cause the activity to be classified as not engaged in for profit if the activity is in fact engaged in for profit as evidenced by other factors whether or not listed in this paragraph.

In considering a similar issue under Code Section 165,[8] the Tax Court held that the general requirement that a taxpayer have a primary economic profit motive independent of the tax consequences ofan activity is limited when a transaction in entered into to take advantage oftax benefits intended by Congress:

[8] Code Section 165(c) generally allows an individual to deduct only (1) "losses incurred in a trade or business," (2) "losses incurred in any transaction entered into for profit, though not connected with a trade or business" and (3) "losses ofproperty not connected with a trade or business or a transaction entered into for profit, if such losses arise from fire, storm, shipwreck, or other casualty, or from theft."

> We therefore relax our holding that section 165(c)(2) permits loss deductions only from transactions entered into primarily for profit to allow for those essentially tax-motivated transactions which are unmistakably within the contemplation ofcongressional intent. The determination whether a transaction is one Congress intended to encourage will require a broad view of the relevant statutory framework and some investigation into legislative history. The issue ofcongressional intent is raised only upon a threshold determination that a particular transaction was entered into primarily for tax reasons.

Fox v Comm'r, 92 TC 1001, 1021 (1984). The court specifically identified "purchases of property motivated by the availability of... the investment credit" as an example ofthe type ofactivity "sanctioned under the tax laws" that should receive special consideration in this regard. Id. The court acknowledged that "some ofthese transactions are arguably *solely* tax motivated." Id. (emphasis in original).

More recently, when Congress codified the judicial "economic substance" doctrine in Code Section 7701(0), the Joint Committee ofTaxation in its technical explanation ofthe provision stated:

> Ifthe realization ofthe tax benefits ofa transaction is consistent with the Congressional purpose or plan that the tax benefits were designed by Congress to effectuate, it is not intended that such tax benefits be disallowed. See, e.g., Treas. Reg. sec. 1.269-2, stating that characteristic ofcircumstances in which an amount otherwise constituting a deduction, credit, or other allowance is not available are those in which the effect ofthe deduction, credit, or other allowance would be to distort the liability ofthe particular taxpayer when the essential nature ofthe transaction or situation is examined in the light ofthe basic purpose or plan which the deduction, credit, or other allowance was designed by the Congress to effectuate. Thus, for example, it is not intended that a tax credit (e.g., section 42 (low-income housing credit), section 45 (production tax credit), section 45D (new markets tax credit), section 47 (rehabilitation credit), section 48 (energy credit), etc.) be disallowed in a transaction pursuant to which, in form and substance, a taxpayer makes the type ofinvestment or undertakes the type ofactivity that the credit was intended to encourage.

Joint Committee on Taxation, "Technical Explanation ofthe Revenue Provisions ofthe 'Reconciliation Act of2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act'" (JCX-18-10, Mar. 21, 2010) at 152 n. 344.

Ownership and Placement in Service

The Tax Court has identified the following factors as relevant to the determination of whether a sale of property has occurred for tax purposes and who is the owner of the property for federal income tax purposes:

(i) whether legal title passes;
(ii) how the parties treat the transaction;
(iii) whether an equity was acquired in the property;
(iv) whether the contract creates a present obligation on the seller to execute and deliver a deed and a present obligation on the purchaser to make payments;
(v) whether the right of possession is vested in the purchaser;
(vi) which party pays the property taxes;
(vii) which party bears the risk ofloss or damage to the property; and
(viii) which party receives the profits from the operation and sale of the property.

See Grodt &McKay Realty. Inc. v. Comm'r, 77 TC 1221, 1237-38 (1981) (internal citations omitted).

Treasury Regulations Section 1.167(a)-1 l(e)(l)(i) provides that property is placed in service when first placed in a condition or state of readiness and availability for a specifically designed function and that the provisions of Treasury Regulations Sections 1.46-3(d)(l)(ii) and (d)(2) generally apply for purposes of determining the date on which property is placed in service.

Treasury Regulations Section 1.46-3(d)(l)(ii) states that:

> The taxable year in which the property is placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business, in the production of income, in a tax-exempt activity, or in a personal activity

Treasury Regulations Section 1.46-3(d)(2) provides examples of when property is in a condition of readiness and availability. One of those examples is equipment that is acquired for a specifically assigned function and is operational but undergoing tests to eliminate any defects. See also Rev. Rul. 79-40, 1979-1 C.B. 13 (machinery and equipment were placed in service in the year critical tests and operational tests were completed).

The Internal Revenue Service has ruled that the following are common factors to be considered in determining placed in service dates for power plants:

(i) receipt of required licenses and permits;
(ii) passage of control of the facility to the taxpayer;
(iii) completion of critical tests;

(iv) commencement of daily or regular operations; and
(v) synchronization into a power grid for generating electricity to produce mcome.

See generally, Rev. Rul. 76-256, 1976-2 C.B. 46, and Rev. Rul. 76-428, 1976-2 C.B. 47.

Code Section 7701(e)

Code Section 7701(e) provides as follows:

(e) Treatment of certain contracts for providing services, etc.

For purposes of chapter 1-

(1) In general.

A contract which purports to be a service contract shall be treated as a lease of property if such contract is properly treated as a lease of property, taking into account all relevant factors including whether or not-

(A) the service recipient is in physical possession of the property,
(B) the service recipient controls the property,
(C) the service recipient has a significant economic or possessory interest in the property,
(D) the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract,
(E) the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and
(F) the total contract price does not substantially exceed the rental value of the property for the contract period.

(2) Other arrangements.

An arrangement (including a partnership or other pass-thru entity) which is not described in paragraph (l) shall be treated as a lease if such arrangement is properly treated as a lease, taking into account all relevant factors including factors similar to those set forth in paragraph (1).

(3) Special rules for contracts or arrangements involving solid waste disposal, energy, and clean water facilities.

(A) In general. Notwithstanding paragraphs (1) and ill, and except as provided in paragraph (4). any contract or arrangement between a service provider and a service recipient-

(i) with respect to-

(1) the operation of a qualified solid waste disposal facility,
(II) the sale to the service recipient of electrical or thermal energy produced at a cogeneration or alternative energy facility, or
(111) the operation of a water treatment works facility, and

(ii) which purports to be a service contract, shall be treated as a service contract.

(B) Qualified solid waste disposal facility. For purposes of subparagraph (A}_ , the term "qualified solid waste disposal facility" means any facility if such facility provides solid waste disposal services for residents of part or all of 1 or more governmental units and substantially all of the solid waste processed at such facility is collected from the general public.

(C) Cogeneration facility. For purposes of subparagraph (A), the term "cogeneration facility" means a facility which uses the same energy source for the sequential generation of electrical or mechanical power in combination with steam, heat, or other forms of useful energy.

(D) Alternative energy facility. For purposes of subparagraph (A), the term "alternative energy facility" means a facility for producing electrical or thermal energy if the primary energy source for the facility is not oil, natural gas, coal, or nuclear power.

(E) Water treatment works facility. For purposes of subparagraph (A), the term "water treatment works facility" means any treatment works within the meaning of section 212(2) of the Federal Water Pollution Control Act.

(4) **Paragraph (3) not to apply in certain cases.**

(A) In general. Paragraph (3) shall not apply to any qualified solid waste disposal facility, cogeneration facility, alternative energy facility, or water treatment works facility used under a contract or arrangement if-

(i) the service recipient (or a related entity) operates such facility,

(ii) the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or arrangement (other than for reasons beyond the control of the service provider),

(iii) the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement, or

(iv) the service recipient (or a related entity) has an option to purchase, or may be required to purchase, all or a part of such facility at a fixed and determinable price (other than for fair market value).

For purposes of this paragraph, the term "related entity" has the same meaning as when used in section 168(h).

(B) Special rules for application of subparagraph (A) with respect to certain rights and allocations under the contract. For purposes of subparagraph ® , there shall not be taken into account-

(i) any right of a service recipient to inspect any facility, to exercise any sovereign power the service recipient may possess, or to act in the event of a breach of contract by the service provider, or

(ii) any allocation of any financial burden or benefits in the event of any change in any law.

(C) Special rules for application of subparagraph (A) in the case of certain events.

(i) Temporary shut-downs, etc. For purposes of clause (ii) of subparagraph (A), there shall not be taken into account any temporary shut-down of the facility for repairs, maintenance, or capital improvements, or any financial burden caused by the bankruptcy or similar financial difficulty of the service provider.

(ii) Reduced costs. For purposes of clause (iii) of subparagraph (A), there shall not be taken into account any significant financial benefit merely because payments by the service recipient under the contract or

> arrangement are decreased by reason of increased production or efficiency or the recovery of energy or other products.

Partnership Authorities

Code Section 761(a) defines "partnership" as follows:

> For purposes of this subtitle, the term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a corporation or a trust or estate.

Code Section 7701(a)(2) provides as follows:

> The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization.

Treasury Regulation Section 301.7701-l(a)(2) provides as follows:

> A joint venture or other contractual arrangement may create a separate entity for federal tax purposes if the participants carry on a trade, business, financial operation, or venture and divide the profits therefrom.

The Supreme Court has articulated the following analytical approach for determining whether parties have established a partnership for tax purposes:

> The question is ... whether, considering all the facts -- the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent -- the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.

Comm'r v. Culbertson, 337 US 733, 742 (1949).

The Tax Court has identified the following factors as relevant to the determination of whether a partnership exists for tax purposes:

(i) the agreement of the parties and their conduct in executing its terms;
(ii) the contributions, if any, that each party made to the arrangement;

(iii) the parties' control over income and capital and the right of each to make withdrawals;

(iv) whether each party was a principal and coproprietor, sharing a mutual proprietary interest in the net profits and having an obligation to share losses, or whether one party was the agent or employee of the other, receiving for his services contingent compensation in the form of a percentage of income;

(v) whether business was conducted in the joint names of the parties;

(vi) whether the parties filed federal partnership returns or otherwise represented to persons with whom they dealt that they were joint venturers;

(vii) whether separate books of account were maintained for the venture; and

(viii) whether the parties exercised mutual control over and assumed mutual responsibilities for the enterprise.

See Luna v. Comm'r, 42 TC 1067, 1077-78 (1964).

In Federal Bulk Carrier , Inc. v. Comm r, 68 TC 283 (1976), affd, 558 F.2d 128 (2nd Cir. 1977), the Tax Court stated that the "central feature of a joint venture" that would cause the joint venture to be treated as a partnership for tax purposes is "a proprietary interest in the net profits of the enterprise coupled with an obligation to share its losses." 68 TC at 293.

In Historic Boardwalk Hall, LLC v. Comm'r, 694 F.3d 425 (3rd Cir. 2012), cert. denied, 133 S. Ct. 2734 (2013), the court focused on two aspects of a relationship to determine whether a participant would be treated as a partner for tax purposes. The first was whether the participant had any meaningful downside risk. See 694 F.3d at 455. The court held that the participant in that case bore "no meaningful risk" that it would bear any losses from the putative partnership. See id. at 458. The second key aspect of partner or partnership characterization for the Third Circuit in Historic Boardwalk was whether the participant had "meaningful upside potential" in the profits of the putative partnership. See id. at 459.

The Court of Appeals for the Fifth Circuit has stated that "the parties, to form a valid partnership, must have two separate intents: (1) the intent to act in good faith for some genuine business purpose and (2) the intent to be partner, demonstrated by an intent to share 'the profits and losses.'" Chemtech Royalty Assocs., L.P. v. US, 766 F.3d 453,461 (5th Cir. 2014), cert. denied, 196 L. Ed. 2d 516 (2017). The court further stated "[i]fthe parties lack either intent, then no valid tax partnership has been formed." Id.

At-Risk Rules[9]

Code Section 49(a)(l)(A) states that "[t]he credit base of any property to which this paragraph applies shall be reduced by the nonqualified nonrecourse financing with respect to such credit base (as of the close of the taxable year in which placed in service)."

Under Code Section 49(a)(l)(C)(ii), the credit base of energy property is the property's tax basis.

Code Section 465(a) disallows in the current year for an individual any tax losses to the extent such tax losses exceed the taxpayer's amount "at risk" with respect to the activity creating the tax losses.

Code Section 465(b)(1) provides as follows:

> For purposes of this section, a taxpayer shall be considered at risk for an activity with respect to amounts including-
>
> (A) the amount of money and the adjusted basis of other property contributed by the taxpayer to the activity, and
>
> (B) amounts borrowed with respect to such activity.

Under Code Section 465(b), borrowed amounts generally constitute amounts at risk with respect to a taxpayer only if the taxpayer can be made personally liable for repayment of the debt.

Proposed Treasury Regulations Section l.465-22(c)(l) provides as follows:

> A taxpayer's amount at risk in an activity shall be increased by an amount equal to the excess of the taxpayer's share of all items of income received or accrued from the activity during the taxable year over the taxpayer's share of allowable deductions which are allocable to the activity for the taxable year. A taxpayer's amount at risk in an activity shall also be increased by the taxpayer's share of tax-exempt receipts of the activity.

[9] In addition to the at-risk rules and the passive activity rules, the ability oflnvestor to use losses generated by depreciation deductions allowed with respect to a Solar Facility against non-business income oflnvestor may be limited by the loss limitation rules of Code Section 461(1). We express no opinion on the potential application of Code Section 461(I) to Investor or DevCo.

Passive Activity Rules[10]

Code Section 469(a) disallows in the current year for an individual any tax credits or losses derived from a "passive activity."

Code Section 469(c)(l) defines a passive activity as any activity that involves the conduct of a trade or business with respect to which the taxpayer does not materially participate.

Under Code Section 469(c)(2), unless a taxpayer qualifies as a "real estate professional," any "rental activity" is treated as a passive activity with respect to the taxpayer regardless of whether the taxpayer materially participates in the rental activity. Under Code Section 469(i)(8), "[t]he term "rental activity" means any activity where payments are principally for the use of tangible property." Temporary Treasury Regulations Section 1.469-1T(e)(3)(i) provides as follows:

> (i) In general. Except as otherwise provided in this paragraph (e)(3), an activity is a rental activity for a taxable year if-
>
> (A) During such taxable year, tangible property held in connection with the activity is used by customers or held for use by customers; and
>
> (B) The gross income attributable to the conduct of the activity during such taxable year represents (or, in the case of an activity in which property is held for use by customers, the expected gross income from the conduct of the activity will represent) amounts paid or to be paid principally for the use of such tangible property (without regard to whether the use of the property by customers is pursuant to a lease or pursuant to a service contract or other arrangement that is not denominated a lease).

Code Section 469(h)(l) provides as follows:

> A taxpayer shall be treated as materially participating in an activity only if the taxpayer is involved in the operations of the activity on a basis which is-
>
> (A) regular,
> (B) continuous, and
> (C) substantial.

[10] In addition to the at-risk rules and the passive activity rules, the ability of Investor to use losses generated by depreciation deductions allowed with respect to a Solar Facility against non-business income oflnvestor may be limited by the loss limitation rules of Code Section 461(1). We express no opinion on the potential application of Code Section 461(1) to Investor or DevCo.

Temporary Treasury Regulations Section 1.469-ST(a) provides as follows:

[A]n individual shall be treated, for purposes of section 469 and the regulations thereunder, as materially participating in an activity for the taxable year if and only if-

(]). The individual participates in the activity for more than 500 hours during such year.

(2) The individual's participation in the activity for the taxable year constitutes substantially all of the participation in such activity of all individuals (including individuals who are not owners of interests in the activity) for such year;

(3) The individual participates in the activity for more than I00 hours during the taxable year, and such individual's participation in the activity for the taxable year is not less than the participation in the activity of any other individual (including individuals who are not owners of interests in the activity) for such year;

(4) The activity is a significant participation activity (within the meaning of paragraph (c) of this section) for the taxable year, and the individual's aggregate participation in all significant participation activities during such year exceeds 500 hours;

(5) The individual materially participated in the activity (determined without regard to this paragraph (a)(5)) for any five taxable years (whether or not consecutive) during the ten taxable years that immediately precede the taxable year;

(6) The activity is a personal service activity (within the meaning of paragraph (d) of this section), and the individual materially participated in the activity for any three taxable years (whether or not consecutive) preceding the taxable year; or

(7) Based on all of the facts and circumstances (taking into account the rules in paragraph (b) of this section), the individual participates in the activity on a regular, continuous, and substantial basis during such year.

Temporary Treasury Regulations Section 1.469-ST(a) provides as follows:

The extent of an individual's participation in an activity may be established by any reasonable means. Contemporaneous daily time reports, logs, or similar documents are not required if the extent of such participation may be established by other reasonable means. Reasonable means for purposes of this paragraph may include but are not limited to the identification of services performed over a period of time and the approximate number of hours spent performing such services during such period, based on appointment books, calendars, or narrative summaries.

Under Code Section 469(b), any tax credit not allowed in a year by application of Code Section 469 is carried forward to the next year, and such carryforwards may continue indefinitely.

Under Code Section 469(f)(1), if a taxpayer disposes of an activity that was a passive activity as to the taxpayer and with respect to which the taxpayer had unused tax credit under Code Section 469(b), the taxpayer generally may claim those tax credits in the year that the taxpayer disposes of the passive activity.

Discussion

Each Solar Facility Includes Energy Property

Each Solar Facility uses equipment to produce electricity. Under the PPAs, each Customer agrees that the electricity produced by the Solar Facility installed on the Customer's property will not be used to heat a swimming pool.

Also with your permission, we have assumed that Investor will acquire title to each Solar Facility on or before the Facility Start Date for each Solar Facility, which will occur on or prior to the date that the Solar Facility is placed in service for U.S. federal tax purposes. Under this assumption, original use of each Solar Facility will commence with Investor within the meaning of Code Section 48(a)(3)(B)(ii). Transfer of title of each Solar Facility will occur before the Solar Facility receives PTO. Under these facts and based on the Revenue Rulings and Treasury Regulations identified above, no Solar Facility should be treated as being placed in service prior to the date that the Solar Facility achieves PTO, which will be after the date that Investor acquires title to the Solar Facility.

For property to qualify as energy property eligible for the ITC, depreciation must be allowable with respect to the property. [11] See Code Section 48(a)(3). Depreciation is allowable with respect to property if the property is used in a trade or business or if the property is held for investment in an income-producing activity. See Code Section 167(a). We believe that, where property is held by an individual such as Investor, the best way to analyze the question of whether the property is held for use in a trade or business or for investment in an income-producing activity is by negative inference from the Code Section 183 hobby loss rules but with due regard for the fact that investment in property eligible for the ITC should be subject to less stringent requirements as to a purely economic, pre-tax profit motive. See Fox v. Comm'r, 92 TC 1001, 1021 (1984). See also Joint Committee on Taxation, "Technical Explanation of the Revenue Provisions of the 'Reconciliation Act of 2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act'" (JCX-18-10, Mar. 21, 2010) at 152 n. 344.

[11] We express no opinion as to the amount of any depreciation Investor may claim with respect to any Solar Facility in any year.

The regulations under Code Section 183 provide a non-exclusive list of factors to be considered in determining whether a taxpayer has a profit motive in engaging in a particular activity. See Treas. Reg. Section 1.183-2(b). Applying these factors to Investor:

(1) Manner in which Investor carries on the activity- With your permission, we have assumed Investor will carry on the business of owning and operating Solar Facilities in a business-like and formal manner. We believe the presence of the O&M Agreement, in particular, supports this assumption. In addition, our assumption that Investor will keep contemporaneous records to support our assumptions regarding the amount of activity undertaken by Investor and other individuals further supports this assumption that Investor will carry on the business of owning and operating Solar Facilities in a business-like manner. Accordingly, we believe this factor supports a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

(2) Expertise oflnvestor or Investor's advisors - Even iflnvestor does not have expertise in owning and operating Solar Facilities, Investor will engage DevCo to provide its expertise under the O&M Agreement. Accordingly, we believe this factor supports a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

(3) Time and effort expended by Investor in carrying on the activity-Although there is no authority directly on point on this question, we believe it is relevant that, under our factual assumption, Investor will be treated as materially participating in the business of owning and operating Solar Facilities. Accordingly, we believe this factor supports a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

(4) Expectation that Solar Facilities may increase in value. The Solar Facilities are generally depreciating assets, which makes this factor negative for Investor. One mitigating factor is that under the terms of the PPA, if a Solar Facility does increase in value, Investor will benefit from any such increase in value. Nevertheless, we believe this factor does not support a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

(5) Success of Investor in carrying on other similar or dissimilar activities - We have no knowledge of Investor's other activities, if any. We believe any such other activities are not likely to be relevant to the business of owning and operating Solar Facilities. Accordingly, we believe this factor does not support a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

(6) Investor's history of income or losses with respect to the activity-This factor is backward-looking and so is irrelevant to the question of whether Investor's activity in owning and managing Solar Facilities is carried on for profit.

(7) Amount of occasional profits, if any, which are earned- We believe this factor could be negative or positive for Investor. With your permission, we have assumed that Investor will have an expectation of post-tax profit after taking into account the ITC and expected depreciation benefits. Whether Investor has a reasonable expectation of realizing a pre-tax profit is less certain. Although this issue is not free from doubt, we believe the fact that the ITC is a congressionally-sanctioned tax benefit justifies viewing this factor on a post-tax basis. See Fox v. Comm'r, 92 TC 1001, 1021 (1984). See also Joint Committee on Taxation, "Technical Explanation of the Revenue Provisions of the 'Reconciliation Act of 2010,' as Amended, in Combination with the 'Patient Protection and Affordable Care Act'" (JCX-18-10, Mar. 21, 2010) at 152 n. 344. In this circumstance, therefore, we believe this factor supports a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

(8) Financial status oflnvestor - We believe this factor is negative for Investor as Investor will not be relying on income from Solar Facilities as Investor's primary source of income. This factor is mitigated somewhat, however, because Investor will not be using any Solar Facilities for personal pleasure or recreation, which the Treasury Regulations specifically identify as relevant to the evaluation of this factor. Nevertheless, we believe this factor does not support a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

(9) Elements of personal pleasure or recreation - We believe Investor is not investing in Solar Facilities for personal pleasure or recreational purposes. Accordingly, we believe this factor supports a conclusion that Investor's activity in owning and managing Solar Facilities is carried on for profit.

Taking all these factors together, although the issue is not free from doubt, we believe Investor should be treated as engaged in the activity of owning and operating Solar Facilities for profit. As a result, depreciation should be allowable with respect to the Solar Facilities, and the Solar Facilities should qualify as energy property eligible for the ITC.

Based on the foregoing, as long as Investor is treated as the sole owner of each Solar Facility (a matter discussed below), Investor should be eligible to claim the ITC with respect to each Solar Facility to the extent of the eligible tax basis of the Solar Facility treated as "energy property" under Code Section 48(a)(3) and Treasury Regulations Section l.48-9(d) (generally including all electrical generation equipment, storage devices, power conditioning

equipment and transfer equipment but not including any equipment that transmits or uses the electricity generated).[12]

Investor Should Be Treated as the Sole Owner of each Solar Facility

Under the Master PSA, Investor will acquire from DevCo ownership and title to each Solar Facility before the Facility Start Date for each Solar Facility. As long as Investor is treated as the sole owner of each Solar Facility for federal tax purposes, Investor should be entitled to claim the ITC and any tax losses with respect each Solar Facility.

Under our assumed facts, Investor should be treated as the sole owner of each Solar Facility for federal tax purposes and no other person should be treated as a direct or indirect (through a tax partnership) owner of any portion of any Solar Facility. This conclusion results because (1) Investor should be treated as acquiring tax ownership of each Facility under Grodt & McKay ReaJty, Inc. v. Comm r, 77 TC 1221 (1981), (2) each PPA should be treated as a service contract and not a lease or other arrangements under Code Section 7701(e) and (3) DevCo should not be treated as a partner in a tax partnership with Investor with respect to any Solar Facility.

We believe Investor should be treated for tax purposes as buying each Solar Facility. Specifically:

(1) legal title passes to Investor before a Solar Facility's Facility Start Date;
(2) Investor and DevCo will all treat these transactions as constituting sales to Investor;
(3) by paying fixed amounts and assuming liabilities with respect to each Solar Facility under the Master PSA, Investor will acquire an equity interest in each Solar Facility;
(4) the Master PSA creates (a) a present obligation on the part of DevCo to transfer title to each Solar Facility to Investor and (b) a present obligation on the part of Investor to make payments;
(5) pursuant to the Master PSA, right of possession of each Solar Facility vests in Investor;
(6) by assuming the liabilities with respect to each Solar Facility, Investor has undertaken the obligation to pay any property taxes that will be due with respect to each Solar Facility;
(7) Investor bears the risk of loss with respect to each Solar Facility; and
(8) Investor will receive the profits from the operation and sale of each Solar Facility.

As a result, under the Grodt McKay factors, we believe Investor should be treated for tax purposes as the purchaser and sole owner of each Solar Facility.

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[12] We express no opinion as to how much of the equipment included in a Solar Facility qualifies as "energy property" within the meaning of Code Section 48(a) or as to the basis of any such energy property.

Under the Code and general principles of federal tax law, economic arrangements among parties may be recharactrertized as something different from what the parties claim for tax purposes. Under our assumed facts, none of the transactions or agreements, including each PPA and O&M Agreement, should be treated as creating any relationship among the parties to those agreements other than service arrangements.

First, under each PPA, no Customer should be treated as having an ownership interest in any Solar Facility. Each PPA purports to be a service agreement with respect to an alternative energy facility. We believe that none of the factors in Code Section 7701(e)(4) applies to cause any PPA not to be treated as a service contract under Chapter 1 of the Code (which includes the ITC provisions). Specifically:

(1) no Customer (or a related entity) operates a Solar Facility;
(2) no Customer (or a related entity) bears any significant financial burden if there is nonperformance under the PPA (other than for reasons beyond the control oflnvestor);
(3) no Customer (or a related entity) receives any significant financial benefit if the operating costs of the Solar Facility are less than the standards of performance or operation under the PPA; and
(4) no Customer (or a related entity) has an option to purchase, or may be required to purchase, all or a part of any Solar Facility at a fixed and determinable price (other than for fair market value).

As a result, we believe each PPA should be treated for tax purposes as a service contract and not a lease or other arrangement.

Because each PPA should be respected as a service contract, we do not believe that any Customer should be treated as having any ownership interest in any Solar Facility for federal tax purposes. We also do not believe that DevCo should be treated as having an indirect ownership interest in any Solar Facility through a tax partnership with Investor. We begin our analysis of the partnership issues by applying the partnership characterization factors announced by the Supreme Court in Comm'r v. Culbertson.

The Agreements. Pursuant to the Master PSA, Investor will acquire title to each Solar Facility. Nothing in the Master PSA or O&M Agreement purports to create a partnership or joint venture between Investor and DevCo. Section 9.7 of the Master PSA specifically states that "nothing in this Agreement will be interpreted or applied so as to make the relationship of any of the Parties that of partners, joint venturers or anything other than independent contractors, and the Parties expressly disclaim any intention to create a partnership, joint venture, association or other such relationship." Similarly, Section 11.2 of the O&M Agreement provides that "nothing in this Agreement will be interpreted or applied so as to make the relationship of any of the Parties that of partners, joint venturers, employees, or anything other than independent contractors, and the Parties expressly disclaim any intention to create a partnership, joint venture, association, employment or other such relationship

Based on the foregoing, we believe that nothing in these agreements should cause to be treated as a partner in a tax partnership with Investor.

Conduct of the Parties. Consistent with the language in the operative agreements, it appears that Investor and DevCo will not conduct themselves as if they are in a tax partnership with one another.

Statements of the Parties or Disinterested Persons. There are no facts addressing either of these factors.

Relationship of the Parties. Investor will not be related to or affiliated with DevCo. As a result, there is no aspect to their relationships that should cause DevCo to be treated as a partner in a tax partnership with Investor.

Abilities and Capital Contributions. These factors arguably could be viewed as supporting a tax partnership or not, but we think the better view is that neither supports a conclusion that DevCo should be treated as a partner in a tax partnership with Investor.

Although DevCo is experienced and has abilities related to the development of solar projects, DevCo will be compensated for its expertise and services under the Master PSA and the O&M Agreement. With your permission, we have assumed that the Investor Purchase Price for each Solar Facility is not more than the amount a buyer and unrelated seller (both in possession of all relevant facts and neither under any compulsion to buy or sell) would agree as the fair market value for an installed solar system substantially similar to the Solar Facility. We have also assumed with your permission that the amounts to be paid by Investor to DevCo under the O&M Agreement represent the fair market value of the services to be provided by DevCo under that agreement. In addition, we note that all payments to be made by Investor under the Master PSA and the O&M Agreement are fixed in amount and not contingent on the performance, revenues or profits of any Solar Facility.

Based on the foregoing, we do not believe that, as of the date that when Investor acquires a Solar Facility from DevCo, any party other than Investor should be treated as making a capital contribution or equity investment in the Solar Facility.

Actual Control of Income and Purposes for Which it is Used. Investor controls the income from each Solar Facility in the first instance. To the extent Investor has or will relinquish control of the Prepayment Amount or any other revenues from a Solar Facility, Investor will treat this as a payment of the purchase price or an operating expense of the Solar Facility. DevCo does not have any direct right to any revenues from a Solar Facility, and the indirect rights of DevCo to any such revenues are only with respect to and to the extent oflnvestor's obligations to DevCo under the Master PSA and each O&M Agreement. As a result, Investor has primary control over all of its revenues and income and how it is used, and this factor should not cause DevCo to be treated as a partner in a tax partnership with Investor.

In summary, we believe an analysis of the factors under Comm'r v. Culbertson supports our conclusion that DevCo should not be treated as a partner in a tax partnership with Investor.

We tum next to the factors identified by the Tax Court in Luna v. Comm'r:

Agreement and Conduct of the Parties. These are both factors under Comm'r v. Culbertson and are discussed above.

Contributions of the Parties. This is a factor under Comm'r v. Culbertson and is discussed above.

The Parties' Control over Income and Right to Make Withdrawals. The control of income is discussed above. DevCo does not have any right to withdraw capital from Investor or any Solar Facility. We believe this factor supports our conclusion that DevCo should not be treated as a partner in a tax partnership with Investor.

Mutual Proprietary Interests. Luna v. Comm'r instructs us to consider whether the parties share a mutual proprietary interest in the net profits and have an obligation to share losses, or whether one of the parties is an agent or employee of the other, receiving contingent income for services in the form of a percentage of income.

In the present case, Investor bears all the risk and obligation with respect to losses from the operation of each Solar Facility. As a result, we do not believe that DevCo has any "meaningful downside risk" with respect to a Solar Facility. See Historic Boardwalk Hall, LLC, 694 F.2d at 455. In addition, the fact that DevCo does not share in, or have any obligation with respect to, losses from the operation of any Solar Facility should be sufficient to defeat any claim that DevCo should be treated as a partner in a tax partnership with Investor. The Tax Court has stated that the "central feature" of a joint venture is "a proprietary interest in the net profits of the enterprise ***coupled with*** an obligation to share its losses." Federal Bulk Carriers, 68 TC at 293 (emphasis added). More recently, the Fifth Circuit Court of Appeals held that "the parties, to form a valid partnership, must have two separate intents: (1) the intent to act in good faith for some genuine business purpose and (2) the intent to be partner, demonstrated by an intent to share 'the profits ***and*** losses.' If the parties lack ***either*** intent, then no valid tax partnership has been formed." Chemtech Royalty Assocs., L.P., 766 F.3d t 461 (emphasis added). As a result, we believe the fact that DevCo does not share in, or have any obligation with respect to, losses from the operation of any Solar Facility supports our conclusion that DevCo should not be treated as a partner in a tax partnership with Investor.

In summary, we do not believe DevCo should be viewed or treated as engaged as a mutual proprietor with Investor in the operation of any Solar Facility.

Business in Joint Names of the Parties. The business will be conducted in the name oflnvestor and not in the name ofDevCo. We believe this factor supports our conclusion that DevCo should not be treated as a partner in a tax partnership with Investor.

Filing Partnership Returns or Representing Parties as Partners. Consistent with the terms of the operative agreements, Investor and DevCo will not hold themselves out to any third parties as engaged in a partnership or joint venture together. We believe this factor supports our conclusion that DevCo should not be treated as a partner in a tax partnership with Investor.

Separate Books of Account. Consistent with the terms of the operative agreements, Investor will operate each Solar Facility separate from DevCo. We believe this factor supports our conclusion that DevCo should not be treated as a partner in a tax partnership with Investor.

Mutual Control and Responsibilities. The parties do not have mutual control over, or mutual responsibility for, any Solar Facility. Consistent with the terms of the operative agreements, Investor will operate each Solar Facility separate from DevCo. We believe this factor supports our conclusion that DevCo should not be treated as a partner in a tax partnership with Investor.

In summary, we do not believe that the terms of the Master PSA or the O&M Agreement should cause DevCo to be treated as a partner in a tax partnership with Investor.

Based on the foregoing, we believe Investor should be treated as the sole owner of each Solar Facility at the time each Solar Facility is placed in service so that Investor should be entitled to claim the ITC amount and any tax loses with respect to each Solar Facility.[13]

At-Risk Rules[14]

With your permission, we have assumed that any amounts invested by Investor in any Solar Facility or to make any other payments in connection with ownership and management of Solar Facilities will be funded by Investor's own funds and will not be borrowed from any bank, financial institution or other lender. Based on this assumption, no portion of the ITC amount for any Solar Facility should be reduced under Code Section 49.

Similarly, because there will be no debt on any Solar Facility, no tax losses for any Solar Facility should be deferred under Code Section 465.

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[13] We express no opinion as to (i) how much of the equipment included in a Solar Facility qualifies as "energy property" within the meaning of Code Section 48(a), (ii) the basis of any such energy property or (iii) the amount of any depreciation Investor may claim with respect to any Solar Facility in any year.

[14] In addition to the at-risk rules and the passive activity rules, the ability oflnvestor to use losses generated by depreciation deductions allowed with respect to a Solar Facility against non-business income of Investor may be limited by the loss limitation rules of Code Section 461(1). We express no opinion on the potential application of Code Section 461(1) to Investor or DevCo.

Passive Activity Rules[15]

If the business of owning and operating Solar Facilities is a "rental activity," then this activity would be treated as a passive activity with respect to Investor, and the ITC amount and tax losses for any Solar Facility would be deferred until Investor disposes of the Solar Facility. As discussed above, however, the revenues from owning and operating a Solar Facility are earned under a PPA, and each PPA will be respected as a service contract and not a lease or any other arrangement under Code Section 7701(e). The treatment of the PPA as a service contract and not for the use of property under Code Section 7701(e) applies for all purposes of Chapter 1 of the Code, including the passive activity rules of Code Section 469. See idewater. lnc. v. U.S., 565 F.3d 299,303 (5th Cir. 2009). See also Wilson v. Comm'r, T.C. Memo 2012-101 (where Internal Revenue Service had argued in the alternative that the ownership and operation of a rooftop solar facility was a "rental activity" under Code Section 469, but the court declined to consider this argument).

With your permission, we have assumed that (1) Investor will engage in the business of owning and managing Solar Facilities for more than 100 hours in any single tax year, (2) no single person will perform services for Investor related to the business of owning and managing Solar Facilities for more than 100 hours in any single tax year and (3) Investor will keep contemporaneous records to support assumptions (1) and (2). Accordingly, Investor will be treated as materially participating in the activity of owning and operating Solar Facilities within the meaning of Temporary Treasury Regulation Section 1.469-5T(a)(3).

Based on the foregoing, no portion of the ITC amount or any tax losses for any Solar Facility should be deferred under Code Section 469.

General Provisions and Limitations

We have not conducted any independent outside review of agreements, contracts, indentures, instruments, orders, judgments, rules, regulations, writs, injunctions or decrees, or municipal ordinances, regulations or charter provisions by which DevCo or any Investor (each an "Opinion Party") or any property of any Opinion Party may be bound, nor have we made any outside independent investigation as to the existence of actions, suits, investigations or proceedings, if any, pending or threatened against any Opinion Party. We have not reviewed the financial books or records of any Opinion Party, and unless expressly stated, do not express any opinion as to financial or compliance with any laws or municipal ordinances, regulations or charter provisions.

[15] In addition to the at-risk rules and the passive activity rules, the ability oflnvestor to use losses generated by depreciation deductions allowed with respect to a Solar Facility against non-business income of Investor may be limited by the loss limitation rules of Code Section 461(1). We express no opinion on the potential application of Code Section 461(1) to Investor or DevCo.

We are members of the Bar of the State of New Hampshire, and we express no opinion as to matters involving the laws of any jurisdiction other than the State of New Hampshire and the Code.

Our opinions above are subject to bankruptcy, insolvency, fraudulent transfer, reorganization, moratorium and other similar laws of general application affecting the rights and remedies of creditors and to general principles of equity.

To insure compliance with the requirements imposed by the U.S. Internal Revenue Service, any U.S. federal income tax advice contained herein, as to which any taxpayer should seek individual advice based on the taxpayer's particular circumstances from an independent tax advisor, (i) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Code, and (ii) is written in connection with the promotion or marketing of the transaction or matters addressed herein.

This opinion letter has been given solely to and may not be furnished to, quoted to, or relied upon by any other person, firm or corporation for any purpose, without our prior written consent, except that copies of this opinion letter may be provided to potential investors in connection with the disclosure of the expected tax treatment and structure of the transactions to which this opinion letter relates as long as any such potential investor is subject to the terms of a non-disclosure agreement that restricts the potential investor's rights to provide copies of this opinion letter to other persons.
Notwithstanding the exception to the use of this opinion letter in the immediately preceding sentence, no attorney-client relationship exists or has existed by reason of this opinion letter between our firm and any person or entity other than . In permitting copies this opinion letter to be provided to any person or entity other than , we are not acting as counsel to for any such other person or entity and have not assumed and are not assuming any responsibility to advise such other person or entity with respect to the adequacy of this opinion letter for its purposes.

The opinion letter speaks only at and as of the date hereof and is based solely on the facts and circumstances known to us at and as of such date. We express no opinion as to the effect of any statute, rule, regulation or other law which is enacted or becomes effective after, or of any court decision which changes the law relevant to such rights which is rendered after, the date of this opinion or the conduct of the parties following the closing of the contemplated transactions. In rendering this opinion, we assume no obligation to revise or supplement this opinion should the Code or the present laws of the State of New Hampshire be changed by legislative action, judicial decision or otherwise. In addition, we assume no obligation to inform you of any other facts, circumstances or events that might arise or be

brought to our attention after the date of this opinion letter that may alter, affect or modify the opinions expressed herein.

Very truly yours,