DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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[redacted]

Dear [redacted]

Thank you for your letter of May 10, 2000, to [redacted] on behalf of a letter from your constituent, [redacted] wrote to you concerning the definition of a qualifying closed-loop biomass facility under section 45 of the Internal Revenue Code (the Code). When the Congress enacted the Tax Relief Extension Act of 1999, they rejected the idea of allowing co-fired closed-loop biomass facilities to be qualifying facilities under section 45.

Section 45(a) provides a renewable electricity production credit for the sale of electricity produced by the taxpayer in a closed-loop biomass facility. This facility must produce electricity using closed-loop biomass, organic material from a plant grown exclusively for the qualified production facility. The facility owned by the taxpayer is a qualified facility only if it is originally placed in service after December 31, 1992, and before January 1, 2002. Section 45(c).

[redacted] suggests that in defining a qualified closed-loop biomass facility under section 45, the Internal Revenue Service should follow the Department of Energy's (DOE) interpretation of the Renewable Energy Production Incentive (REPI) program, which has three ways for a facility to qualify for REPI payments. Those choices are based on: 1) the placed in-service date for a new facility; 2) modifying an existing renewable energy facility built before 1993; and 3) modifying an existing non-renewable energy facility (i.e., a power plant using fossil fuels.) Under the third choice, DOE permits a partial payment under the REPI program for the fraction of electricity produced resulting from the renewable fuel (co-firing).

A facility may qualify as a closed-loop biomass facility under section 45 if it is originally placed in service after December 31, 1992, and before January 1, 2002. Section 45, however, does not permit a co-fired closed-loop biomass facility to be a qualified facility.

Section 507 of the Tax Relief Extension Act of 1999 (the Act) extended and modified the tax credit under section 45 of the Code. The Senate Committee Report on the Act, S. Rep. No. 201, 106th Cong., 1st Sess. at 16 (1999), indicates a proposal to extend the credit to co-fired closed-loop biomass facilities without regard to whether the modification to the facility otherwise qualifies the facility as having been newly placed in service under general income tax principles. However, section 507 of the Act, as enacted, reflects action by the Conference Committee to exclude the provisions of the Senate amendment that would have expanded the meaning of qualified facilities under section 45 to include co-fired closed-loop biomass facilities. See H.R. Conf. Rep. No. 478, 106th Cong., 1st Sess. at 141 (1999). Enclosed for your reference is a copy of these reports.

In conclusion, we must interpret the Code consistent with congressional intent for section 45, which under current law excludes co-fired closed-loop biomass facilities from qualifying facilities.

I hope this information is helpful to your constituent. If you have further questions concerning this matter, please call me at (202) 622-3000, [redacted]

Sincerely,

Paul F. Kugler
Assistant Chief Counsel
Office of Chief Counsel
Passthroughs & Special Industries

Enclosures (2)