Internal Revenue Service

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Department of the Treasury
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In Re:

Refer Reply To:
CC:PSI:B07 – PLR-162130-02
Date:
March 16, 2004

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Dear :

This letter responds to a letter dated November 13, 2002, and subsequent correspondence submitted on behalf of Taxpayer by Taxpayer's authorized representative requesting rulings under sections 29 and 702 of the Internal Revenue Code.

FACTS

The facts as represented by Taxpayer and Taxpayer's authorized representative are as follows:

Taxpayer is a limited liability company formed to acquire and operate a facility (Facility) for the production of solid synthetic fuel from coal feedstock and classified as a partnership for federal income tax purposes. Taxpayer's members are A and B, both limited liability companies classified as partnerships for federal income tax purposes. A and B are each owned by C and D, both closely held limited liability companies. A holds a 99.9 percent ownership interest in Taxpayer. B holds a .1 percent ownership interest in Taxpayer.

E is a corporation wholly-owned by F, a corporation engaged in the energy technology business ranging from alternative fuels to waste management and recycling technologies. G is a limited liability company. On Date 1, E and G executed a contract (Construction Contract) pursuant to which E agreed as the general contractor to engineer, procure, and construct the Facility. E contracted with H, a corporation, to design, manufacture, and deliver the Facility's roll briquetter. I is a corporation wholly-owned by J, also a corporation. On Date 2, G assigned all of its rights and obligations under the Construction Contract to J. J then transferred all of its rights and obligations under the Construction Contract to I.

Taxpayer has provided an opinion of counsel dated Date 3 that the Construction Contract constituted a binding written contract under applicable state laws prior to January 1, 1997. The Construction Contract provides for liquidated damages of at least five percent of the total contract price upon its default. The Construction Contract also includes a description of the Facility to be constructed, a completion date, and a maximum price. After constructing and installing the Facility at Site 1, Taxpayer represents that the Facility was placed in service within the meaning of section 29(g)(1)(A) before July 1, 1998.

In Date 4, E and H obtained possession of the Facility pursuant to Event 1. H modularized and moved the Facility to Site 2 for storage in a warehouse. L, a limited liability company, directly or indirectly owns 100 percent of K, a limited liability company. In Date 5, K acquired title to the Facility from I pursuant to Event 2.

Taxpayer has entered into an agreement to purchase the Facility from K (Purchase Agreement). In consideration for the purchase, Taxpayer has agreed to pay a fixed amount in cash, and supplemental contingent payments. The fixed amount is comprised of several payments. First, Taxpayer has paid approximately $a to K. Second, Taxpayer has agreed to pay K $b within thirty days following receipt of a favorable ruling from the Internal Revenue Service (Service), or such other date as may be agreed by the parties. Third, Taxpayer has agreed to pay K $c within five days of the date on which the Taxpayer receives a determination letter from (or enters into an administrative agreement with) the Service, or a final order from a court of competent jurisdiction, affirming the determination that the Facility satisfies the "placed in service"

requirement in section 29 (Confirmation Date) or such other date as may be agreed by the parties. Finally, Taxpayer has agreed to pay K quarterly fixed installment payments approximating $d per quarter through Date 6 beginning after the Confirmation Date.

Taxpayer will make quarterly contingent payments to K determined by reference to the production of synthetic fuel produced by the Facility following sale to the Taxpayer. Specifically, Taxpayer will pay to K e% of the tax credit derived from production in excess of f tons per quarter. Taxpayer represents that, based on the maximum production of g tons per year and applying the discount rate of h%, the net present value of the contingent payments to be made to K under the Purchase Agreement will be less than 50 percent of the total payments made to K under the Purchase Agreement.

Within thirty days after receipt of the favorable ruling from the Service, (or as soon thereafter as reasonably possible), Taxpayer will sell to an investor an option to acquire all of the membership interests of Taxpayer. The investor will pay Taxpayer $i for the option. The investor exercises the option by paying Taxpayer $j. The option is expected to be exercised within thirty days following the Confirmation Date (or such other date as may be agreed by the parties). Further, the investor will fund Taxpayer quarterly in an amount equal to k% of the tax credit derived from production of synthetic fuel from the Facility after receipt of the membership interests.

Immediately upon the issuance of the membership interests to the investor (or as soon thereafter as reasonably possible), Taxpayer will redeem or cancel all or substantially all of A's and B's membership interests. In exchange for A's and B's membership interests, Taxpayer will pay A and B, collectively, fixed quarterly installments of approximately $l through Date 6. Taxpayer will also pay A and B, collectively, quarterly contingent payments determined by reference to the net cash available to Taxpayer after reduction for payments of operating expenses, the fixed note obligations to K, A, and B, and the contingent note obligation to K with respect to tonnage in excess of f tons per quarter. Taxpayer's contingent payments to A and B will not exceed the product of $m multiplied by the number of tons of synthetic fuel produced by the Facility during such quarterly period in excess of f. Payments made to A and B in redemption of their interests will be pro rata to each in accordance with their respective membership interests.

As described in the ruling request, the Facility consists of a blender, a two roll briquetter, a volumetric metering device, and a control system. Coal feedstock and a chemical reagent are mixed in a blender and transported by gravity feed through the volumetric metering device to a two roll briquetter, through which the finished product is derived. Taxpayer intends to relocate the Facility to Site 3. The equipment described above comprising the Facility will be used in the new location. However, Taxpayer has repaired or refurbished certain components of the Facility. Taxpayer represents that

none of the repairs, modularization, or refurbishment to the Facility undertaken after June 30, 1998, significantly increases the capacity of the Facility to produce synthetic fuel. Taxpayer further represents that, following the relocation, the fair market value of the original property comprising the Facility will be more than 20 percent of the Facility's total fair market value (the cost of the new property plus the value of the original property).

Taxpayer has supplied a detailed description of the process (Process) employed in the Facility for the production of synthetic fuel. As described, the Facility and the Process implemented in the Facility, including the utilization of a specified reagent, meet the requirements of Rev. Proc. 2001-30, 2001-1 C.B. 1163. Further, recognized experts in coal and chemical analysis have performed numerous tests on the coal to be used at the Facility and have submitted reports in which the experts conclude that significant chemical changes take place with the application of the Process to the coal.

Taxpayer intends to enter into several auxiliary agreements. Taxpayer will enter into a site lease and service agreement with M or one or more companies affiliated with M (hereafter, collectively M). M is unrelated to Taxpayer. Pursuant to the site lease and service agreement, Taxpayer will lease Site 3 from M. M will be responsible for moving feedstock from its storage pile to the Facility, for moving synthetic fuel from the Facility to the synthetic fuel stockpile designated for each customer, and for loading synthetic fuel onto the customers' railcars as they arrive at Site 3. In exchange, Taxpayer will pay M a fee of $n per ton of synthetic fuel produced or feedstock sold. Taxpayer will also pay for the cost of all electricity and utilities consumed.

Taxpayer will enter into an operation and maintenance agreement with M. Pursuant to the operation and maintenance agreement, M will be responsible for the day-to-day operation of the Facility. M will hire and train operating personnel and maintain the Facility. In exchange, Taxpayer will pay M a fee of $n per ton of synthetic fuel produced. Taxpayer will also reimburse M for all of its costs incurred in connection with the performance of the operation and maintenance agreement.

Taxpayer will enter into a synfuel sales agency agreement with M. Pursuant to the synfuel sales agency agreement, M will administer and monitor compliance with the synfuel sales agreements, including the collection of payments from customers. M will also arrange transactions set forth in the synfuel sales agreements. In exchange, for the services, Taxpayer will pay M a fee $o per ton of synthetic fuel or coal feedstock sold.

Taxpayer will enter into feedstock agreements with N and O. Pursuant to the feedstock agreements, Taxpayer will purchase collectively from N and O up to g tons of feedstock per year.

Taxpayer will produce up to g tons of synthetic fuel per year. Taxpayer will enter into a synfuel sales agreement with each of the following: P, Q, and R. P, Q, and R are unrelated to Taxpayer. Collectively, the three synfuel sales agreements will provide for the sale of up to g tons of synthetic fuel per year. If there is a shortfall in the production of synthetic fuel by the Facility, then Taxpayer will make up the difference through the sale of unprocessed feedstock to the customer. Any excess production will be sold by Taxpayer to an unrelated party.

Taxpayer requested the following rulings:

(1) The synthetic fuel produced at the Facility using the Process is a "qualified fuel" within the meaning of section 29(c)(1)(C).

(2) The Construction Contract constitutes a binding written contract in effect before January 1, 1997 within the meaning of section 29(g)(1)(A).

(3) The Facility is "placed in service" for purposes of section 29(g)(1) on the date that the Facility is first placed in a condition or state of readiness and availability to produce a qualified fuel, as provided in sections 1.46-3(d)(1)(ii) and 1.167(a)-11(e)(1)(i) of the Treasury Regulations.

(4) If the Facility was "placed in service" before July 1, 1998, within the meaning of section 29(g)(1), the Facility will continue to be treated as placed in service before July 1, 1998, if sold to a new owner after such date.

(5) If the Facility was "placed in service" before July 1, 1998, within the meaning of section29(g)(1), the relocation of the Facility after June 30, 1998, or replacement of parts of the Facility after that date, will not result in a new placed in service date for the Facility for purposes of section 29 provided the fair market value of the original property is more than 20 percent of the Facility's total fair market value at the time of the relocation or replacement.

(6) The production of the qualified fuel from the Facility will be attributable solely to Taxpayer within the meaning of section 29(a)(2)(B) and Taxpayer will be entitled to the section 29 credit for qualified fuel produced by the Facility and sold to unrelated persons.

(7) The section 29 credit attributable to Taxpayer may be allocated to the members of Taxpayer under the principles of section 702(a)(7) in accordance with each member's interest in Taxpayer when the credit arises. For the section 29 credit, a member's interest in Taxpayer is determined based on a valid allocation of the receipts from the sale of the section 29 qualified fuel.

(8) A termination of Taxpayer under section 708(b)(1)(B) of the Code will not preclude the reconstituted partnership from claiming the section 29 credit for the production and sale of qualified fuel to unrelated persons.

RULING REQUESTS #1 and #6

Section 29(a) allows a credit for qualified fuels sold by the taxpayer to an unrelated person during the taxable year, the production of which is attributable to the taxpayer. The credit for the taxable year is an amount equal to $3.00 (adjusted for inflation) multiplied by the barrel-of-oil equivalent of qualified fuels sold.

Section 29(c)(1)(C) defines "qualified fuels" to include liquid, gaseous, or solid synthetic fuels produced from coal (including lignite), including such fuels used as feedstocks.

In Rev. Rul. 86-100, 1986-2 C.B. 3, the Service ruled that the definition of the term "synthetic fuel" under section 48(l) and its regulations is relevant to the interpretation of the term under section 29(c)(1)(C). Former section 48(l)(3)(A)(iii) provided a credit for the cost of equipment used for converting an alternate substance into a synthetic liquid, gaseous, or solid fuel. Rev. Rul. 86-100 notes that both section 29 and former section 48(l) contain almost identical language and have the same overall congressional intent, namely to encourage energy conservation and aid development of domestic energy production. Under section 1.48-9(c)(5)(ii) of the regulations, a synthetic fuel "differs significantly in chemical composition," as opposed to physical composition, from the alternate substance used to produce it. Coal is an alternate substance under section 1.48-9(c)(2)(i).

Consistent with its private letter ruling practice that began in the mid 1990's, the Service, in Rev. Proc. 2001-30, provided that taxpayers must satisfy certain conditions in order to obtain a letter ruling that a solid fuel (other than coke) produced from coal is a qualified fuel under section 29(c)(1)(C). Rev. Proc. 2001-30, as modified by Rev. Proc. 2001-34, 2001-1 C.B. 1293. The revenue procedure requires taxpayers to present evidence that all, or substantially all, of the coal used as feedstock undergoes a significant chemical change. To meet this requirement and obtain favorable private letter rulings, taxpayers provided expert reports asserting that their processes resulted in a significant chemical change.

In Announcement 2003-46, 2003-30 I.R.B. 222, the Service announced that it was reviewing the scientific validity of test procedures and results presented of significant chemical change in expert reports. In Announcement 2003-70, 2003- I.R.B. 1090, the Service announced that it had determined that the test procedures and results used by taxpayers were scientifically valid if the procedures were applied in a consistent and unbiased manner. However, the Service concluded that the processes approved under its long standing ruling practice and as set forth in Rev. Proc. 2001-30 did not produce

the level of chemical change required by section 29(c)(1)(C). Nevertheless, the Service announced that it recognized that many taxpayers and their investors have relied on its long standing ruling practice to make investments. Therefore, the Service announced that it would continue to issue rulings on significant chemical change but only under the guidelines set forth in Rev. Proc. 2001-30, as modified by Rev. Proc. 2001-34.

This ruling is provided to Taxpayer as relief described in Announcement 2003-70. Based on the representations of Taxpayer and Taxpayer's authorized representative, including the test results submitted by Taxpayer, we conclude that Taxpayer may treat the fuel produced at the Facility using the Process as a solid synthetic fuel produced from coal constituting a "qualified fuel" within the meaning of section 29(c)(1)(C). Because taxpayer owns the Facility and operates and maintains the Facility through its agent, we conclude that Taxpayer will be entitled to the section 29 credit for the production of the qualified fuel from the Facility that is sold to any unrelated person.

RULING REQUEST #2

Sections 29(f)(1)(B) and (f)(2) provide that section 29 applies with respect to qualified fuels that are produced in a facility placed in service after December 31, 1979, and before January 1, 1993, and which are sold before January 1, 2003.

Section 29(g)(1) modifies section 29(f) in the case of a facility producing qualified fuels described in section 29(c)(1)(C). Qualified fuels include solid synthetic fuels produced from coal or lignite. Section 29(g)(1)(A) provides that for purposes of section 29(f)(1)(B), a facility shall be treated as placed in service before January 1, 1993, if the facility is placed in service before July 1, 1998, pursuant to a binding written contract in effect before January 1, 1997. Section 29(g)(1)(B) provides that if the facility is originally placed in service after December 31, 1992, section 29(f)(2) shall be applied by substituting "January 1, 2008" for "January 1, 2003."

A contract is binding only if it is enforceable under local law against a taxpayer, and does not limit damages to a specified amount, e.g., by use of a liquidated damages provision. A contract provision limiting damages to an amount equal to at least five percent of the total contract price is treated as not limiting damages. The Construction Contract, executed prior to January 1, 1997, includes liquidated damages of at least five percent as well as such essential features as a description of the Facility, a completion date, and a price. Taxpayer provided an opinion of counsel that the Construction Contract constituted a binding written contract under applicable state laws. In addition, the Construction Contract does not limit damages to a specified amount. Therefore, we conclude that the Facility was constructed pursuant to the Construction Contract, which constitutes a binding written contract in effect before January 1, 1997, within the meaning of section 29(g)(1)(A).

RULING REQUESTS #3 AND #5

Sections 29(f)(1)(B) and (f)(2) provide that section 29 applies with respect to qualified fuels which are produced in a facility placed in service after December 31, 1979, and before January 1, 1993, and which are sold before January 1, 2003.

Section 29(g)(1) modifies section 29(f) in the case of a facility producing qualified fuels described in section 29(c)(1)(C). Qualified fuels include solid synthetic fuels produced from coal or lignite. Section 29(g)(1)(A) provides that for purposes of section 29(f)(1)(B), a facility shall be treated as placed in service before January 1, 1993, if the facility is placed in service before July 1, 1998, pursuant to a binding written contract in effect before January 1, 1997. Section 29(g)(1)(B) provides that if the facility is originally placed in service after December 31, 1992, section 29(f)(2) shall be applied by substituting "January 1, 2008" for "January 1, 2003."

To qualify for the section 29 credit, a facility must be placed in service before July 1, 1998, pursuant to a binding written contract in effect before January 1, 1997. While section 29 does not define "placed in service," the term has been defined for purposes of the deduction for depreciation and the investment tax credit. Property is "placed in service" in the taxable year in which it is placed in a condition or state of readiness and availability for a specifically assigned function. Treas. Reg. §§ 1.46-3(d)(1)(ii) and 1.167(a)-11(e)(1)(i). "Placed in service" has consistently been construed as having the same meaning for purposes of the deduction for depreciation and the investment tax credit. See Rev. Rul. 76-256, 1976-2 C.B. 46. When property is placed in service is a factual determination. We express no opinion on when the Facility was placed in service.

Section 45 of the Code provides a credit for electricity produced from certain renewable resources, including wind. The credit is based on the amount of electricity produced by the taxpayer at a qualified facility during the 10-year period beginning on the date the facility was originally placed in service, and sold by the taxpayer to an unrelated person during the taxable year. Rev. Rul. 94-31, 1994-1 C.B. 16, has been interpreted for purposes of section 45 to mean that a relocated facility will not get a new in-service date, even though it contains some new property, provided the fair market value of the used property is at least 20 percent of the facility's total value (the cost of the new property plus the value of the used property).

The factual context in Rev. Rul. 94-31 is similar to the present situation. Consistent with the holding in Rev. Rul. 94-31, we conclude that (provided the Facility was placed in service before July 1, 1998, within the meaning of section29(g)(1)) the relocation of the Facility after June 30, 1998, or replacement of parts of the Facility after that date, will not result in a new placed in service date for the Facility for purposes of section 29

provided the fair market value of the original property is more than 20 percent of the Facility's total fair market value at the time of the relocation or replacement.

RULING REQUEST #4

The section 29 credit has always been a time sensitive credit in that eligibility for the credit is determined when facilities or wells producing qualified fuels are placed in service and when the qualifying fuels are produced and sold to unrelated persons. For example, the section 44D credit, as originally enacted in the Crude Oil Windfall Profit Tax Act of 1980, was generally available for the production and sale of alternative fuels after December 31, 1979, and before January 1, 1990, on property that first began production after January 1, 1980.

Congress has extended the section 29 credit four times. The placed in service deadline and the period for claiming the section 29 credit were extended in the Technical and Miscellaneous Revenue Act of 1988 (1991 for placed in service), Omnibus Budget Reconciliation Act of 1990 (1993 for placed in service and 2003 for the end of the credit period), Energy Policy Act of 1992 (1997 for placed in service and 2007 for the end of the credit period), and Small Business Job Protection Act of 1996 (June 30, 1998, for placed in service).

If section 29(f)(1)(B) were read as requiring facilities producing qualified fuels to be placed in service by the taxpayer, facilities placed in service before 1980 that are sold or transferred to a new taxpayer after 1979 would entitle the purchaser/transferee to claim the section 29 credit. It is clear from the legislative history of section 44D that Congress intended the credit to apply to facilities placed in service after 1979, and that the placed in service deadline in section 29(f)(1)(B) must be read as applying to when the facility is first placed in service within the applicable dates. The placed in service deadlines contained in section 29(f) and section 29(g) focus on the facility, and not the owner of the facility. The legislative history of section 44D clearly shows that Congress wanted to encourage the production of new alternative fuels from facilities first placed in service after 1979, and not provide a tax incentive for production capacity in service before 1980.

Section 29(g)(2) demonstrates that Congress knows how to preclude transferees of facilities from claiming the section 29 credit. That provision provides that the extension of the period for placing facilities in service after 1992 does not apply to any facility that produces coke or coke gas unless the original use of the facility commences with the taxpayer.

Accordingly, the determination of whether a facility has satisfied the placed in service deadline under either section 29(f)(1)(B) or section 29(g)(1)(A) is made by reference to when the facility is first placed in service, not when the facility is transferred or sold to a

different taxpayer. Therefore, we conclude that (provided the Facility was placed in service prior to July 1, 1998, within the meaning of section 29(g)(1)), the sale of the Facility after June 30, 1998, will not result in a new placed in service date for the Facility for purposes of section 29 for the new owner.

RULING REQUEST #7

Section 29(a) allows a credit for qualified fuels sold by the taxpayer to an unrelated person during the taxable year, the production of which is attributable to the taxpayer.

Section 7701(a)(14) defines the term "taxpayer" as any person subject to any internal revenue tax. Section 7701(a)(1) defines the term "person" as an individual, a trust, estate, partnership, association, company, or corporation.

Section 702(a)(7) provides that each partner determines the partner's income tax by taking into account separately the partner's distributive share of the partnership's other items of income, gain, loss, deduction, or credit to the extent provided by regulations prescribed by the Secretary. Section 1.702-1(a) of the regulations provides that the distributive share is determined as provided in sections 704 and 1.704-1.

Section 704(a) provides that a partner's distributive share of income, gain, loss, deduction or credit is, except as otherwise provided in chapter 1 of subtitle A of Title 26, determined by the partnership agreement.

Section 704(b) provides that a partner's distributive share of income, gain, loss, deduction, or credit (or item thereof) is determined in accordance with the partner's interest in the partnership (determined by taking into account all facts and circumstances) if (1) the partnership agreement does not provide for the partner's distributive share of income, gain, loss, deduction, or credit (or item thereof), or (2) the allocation to a partner under the agreement of income, gain, loss, deduction, or credit (or item thereof) does not have substantial economic effect.

Under section 1.704-1(b)(4)(ii) of the regulations, allocations of tax credits and tax credit recapture (except for section 38 property) are not reflected by adjustments to the partners' capital accounts. Thus, these allocations cannot have economic effect under section 1.704-1(b)(2)(ii)(b)(1), and the tax credits and tax credit recapture must be allocated in accordance with the partners' interests in the partnership as of the time the tax credit or tax credit recapture arises. If a partnership expenditure (whether or not deductible) that gives rise to a tax credit in a partnership taxable year also gives rise to valid allocations of partnership loss or deduction (or other downward capital account adjustments) for the year, then the partners' interests in the partnership with respect to such credit (or the cost giving rise to it) are in the same proportion as the partners' respective distributive shares of the loss or deduction (and adjustments). See Treas.

Reg. § 1.704-1(b)(5), example (11). Identical principles apply in determining the partners' interests in the partnership with respect to tax credits that arise from receipts of the partnership (whether or not taxable).

Based on the information submitted and the representations made, we conclude that the section 29 credit attributable to Taxpayer may be allocated to the members of Taxpayer under the principles of section 702(a)(7) in accordance with each member's interest in Taxpayer when the credit arises. For the section 29 credit, a member's interest in Taxpayer is determined based on a valid allocation of the receipts from the sale of the section 29 qualified fuel. We express no opinion regarding what constitutes a valid allocation.

RULING REQUEST #8

Section 708(b)(1)(B) provides that a partnership shall be considered as terminated if within a twelve month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits.

Section 1.708-1(b)(1)(iv) of the regulations provides that if a partnership is terminated by a sale or exchange of an interest, the following is deemed to occur: The partnership contributes all of its assets and liabilities to a new partnership in exchange for an interest in the new partnership; and, immediately thereafter, the terminated partnership distributes interests in the new partnership to the purchasing partner and the other remaining partners in proportion to their respective interests in the terminated partnership in liquidation of the terminated partnership, either for the continuation of the business by the new partnership or for its dissolution and winding up. Section 1.708-1(b)(1)(iv) applies to terminations of partnerships under section 708(b)(1)(B) occurring on or after May 9, 1997.

As discussed above, the placed in service deadline in section 29(f)(1)(B) and section 29(g)(1)(A) must be read as applying to when the facility is first placed in service within the applicable dates. The placed in service deadlines contained in section 29(f)(1)(B) and section 29(g)(1)(A) focus on the facility, and not the taxpayer owning the facility.

Accordingly, the determination of whether a facility has satisfied the placed in service deadline under section 29(f)(1)(B) and section 29(g)(1)(A) is made by reference to when the facility is first placed in service, not when the facility is placed in service by a transferee taxpayer. Therefore, we conclude that a termination of Taxpayer under section 708(b)(1)(B) will not preclude the reconstituted partnership from claiming the section 29 credit for the production and sale of synthetic fuel to unrelated persons.

CONCLUSIONS

(1) The synthetic fuel produced at the Facility using the Process and the specified reagent may be treated as a "qualified fuel" within the meaning of section 29(c)(1)(C).

(2) The Construction Contract constitutes a binding written contract in effect before January 1, 1997 within the meaning of section 29(g)(1)(A).

(3) The Facility is "placed in service" for purposes of section 29(g)(1) on the date that the Facility is first placed in a condition or state of readiness and availability to produce a qualified fuel, as provided in sections 1.46-3(d)(1)(ii) and 1.167(a)-11(e)(1)(i). We express no opinion on when the Facility was placed in service.

(4) Provided the Facility was "placed in service" before July 1, 1998, within the meaning of section 29(g)(1), the Facility will continue to be treated as placed in service before July 1, 1998, if sold to a new owner after such date.

(5) Provided the Facility was "placed in service" before July 1, 1998, within the meaning of section29(g)(1), the relocation of the Facility after June 30, 1998, or replacement of parts of the Facility after that date, will not result in a new placed in service date for the Facility for purposes of section 29 provided the fair market value of the original property is more than 20 percent of the Facility's total fair market value at the time of the relocation or replacement.

(6) The production of the qualified fuel from the Facility will be attributable solely to Taxpayer within the meaning of section 29(a)(2)(B) and Taxpayer will be entitled to the section 29 credit for qualified fuel produced by the Facility and sold to unrelated persons.

(7) The section 29 credit attributable to Taxpayer may be allocated to the members of Taxpayer under the principles of section 702(a)(7) in accordance with each member's interest in Taxpayer when the credit arises. For the section 29 credit, a member's interest in Taxpayer is determined based on a valid allocation of the receipts from the sale of the section 29 qualified fuel.

(8) A termination of Taxpayer under section 708(b)(1)(B) will not preclude the reconstituted partnership from claiming the section 29 credit for the production and sale of qualified fuel to unrelated persons.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. Specifically, we express no opinion regarding when the facility that is the subject of this ruling was placed in service by the taxpayer. Sections 29(f) and 29(g) provide that the credit allowed under section 29(a) applies to qualified fuels produced in a facility placed in service before July 1, 1998, pursuant to a binding written contract in

effect before January 1, 1997. The determination of the date on which a particular facility was placed in service is a highly factual matter that is within the purview of the examination function of the Internal Revenue Service. We note, however, that certain facts disclosed by the Taxpayer in its private letter ruling request are relevant to the determination of whether the facility was placed in service pursuant to a binding contract in accordance with the statute. While we express no opinion and have reached no conclusions regarding these facts, we will advise the appropriate examiners of them. The facts we will be noting include, for example, certain modifications to the facility and certain substitutions of components of the facility that were made during the period in which the facility was under construction and prior to July 1, 1998; the taxpayer's efforts after July 1, 1998 to improve the leased site for the facility as well as efforts to secure its own environmental permit, eliminating the need to use the Site 1 permit; and the limited quantities of product produced in the facility prior to July 1, 1998.

The conclusions drawn and rulings given in this letter are subject to the requirements that the taxpayer (i) maintain sampling and quality control procedures that conform to ASTM or other appropriate industry guidelines at the facility or facilities that are the subject of this letter, (ii) obtain regular reports from independent laboratories that have analyzed the fuel produced in such facility or facilities to verify that the coal used to produce the fuel undergoes a significant chemical change, and (iii) maintain records and data underlying the reports that taxpayers obtain from independent laboratories including raw FTIR data and processed FTIR data sufficient to document the selection of absorption peaks and integration points.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not yet been adopted. Therefore, this ruling will be modified or revoked by the adoption of temporary or final regulations, to the extent the regulations are inconsistent with any conclusion in the letter ruling. See section 12.04 of Rev. Proc. 2003-1, 2003-1 I.R.B. 1, 44. However, when the criteria of section 12.05 of Rev. Proc. 2003-1 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

In accordance with the power of attorney on file with this office, a copy of this letter is being sent to Taxpayer and to a second authorized representative.

Sincerely,

/s/
Joseph H. Makurath

Senior Technician Reviewer, Branch 7
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

cc: