

**REDACTED VERSION**

[date]

[Taxpayer name and address]

Re: Formal Ruling 18-02

Dear [Taxpayer]:

This is a formal ruling for [Taxpayer] regarding the application of Taxpayer's allocable share of a limited liability company's investment tax credit against Taxpayer's Vermont corporate income tax liability. This ruling is based upon representations in your email [redacted] dated [date] and your follow-up email dated [date].

**FACTS**

Taxpayer is a corporation and is an owner "member" of a limited liability company (LLC). The LLC [redacted] has installed battery storage cells for storage of electricity [redacted].

It is assumed for purposes of this Ruling that Taxpayer's LLC is qualified for a Federal investment tax credit (ITC) for its investment in solar "energy property" located in Vermont.

**DISCUSSION**

You have asked for a ruling on whether Taxpayer is eligible for a Vermont investment tax credit for Taxpayer's share of its LLC's Federal ITC.

**Federal pass-through tax treatment for non-electing LLCs**

Federal income tax law allows an LLC to choose whether to be taxed for Federal income tax purposes as a corporation or a partnership. The choice to be treated as a corporation must be

affirmatively elected and is referred to as a “check-the-box” election.<sup>1</sup> If corporate treatment is elected, the LLC is taxed at the entity level, based on corporate income tax laws. If no election is made, the LLC is not taxed at the entity level, and instead is treated as a “pass-through” entity, subject to partnership treatment for tax purposes. Partnership treatment means that the LLC’s items of income and loss are “passed through,” and taxed to, the owners on their own tax returns, under the tax laws that pertain to each owner. You have stated that Taxpayer’s LLC is taxed as a pass-through entity for Federal income tax purposes.

#### Federal Business Credit: The Solar Energy ITC

Federal tax law allows an income tax “general business credit.” 26 U.S.C. (IRC) § 38. One component of the general business credit is the “investment credit determined under section 46.” IRC § 38(b)(1). One component of the investment tax credit (ITC) determined under Section 46 is the “energy credit.” IRC § 46(2). The energy credit is defined in Section 48 as 30 percent of the cost of certain depreciable “energy property placed in service” in the taxable year. IRC § 48(a)(1). The “energy property” eligible for the 30 percent credit includes “equipment which uses solar energy to generate electricity,” as well as certain other types of specified “energy property.” IRC § 48.

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<sup>1</sup> The United States Tax Court explains the election as follows:

Sections 301.7701–1 through 301.7701–3, *Proced. & Admin. Regs.* (check-the-box regulations), provide rules for the classification of business entities for Federal tax purposes. The check-the-box regulations provide rules and procedures for taxpayers to choose the tax treatment of their business entity.

A business entity, such as a limited liability company, with two or more members can be classified as either a partnership or a corporation. Upon formation an entity with two or more members is treated as a partnership unless it elects to be treated as a corporation. *Sec. 301.7701–3(b)(1)(I), Proced. & Admin. Regs.*

Comensoli v. C.I.R., 98 T.C.M. 362, 364 (T.C. 2009), aff’d, 422 F. App’x 412 (6th Cir. 2011).

Taxpayer's LLC is assumed for purposes of this Ruling to be qualified for the Federal ITC for its investments in the photovoltaic [redacted] storage batteries.

Partnership tax character carries through to partner for Federal tax purposes

Under Federal tax law, a partner's distributive share of income, gain or loss, deduction or credit is treated as if the partner had directly realized that item:

(b) Character of items constituting distributive share

The character of any item of income, gain, loss, deduction, or credit included in a partner's distributive share under paragraphs (1) through (7) of subsection (a) shall be determined as if such item were realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.

IRC § 702(b). As a general rule, this statute indicates that Taxpayer's distributive share of its LLC's ITC could be taken as a credit on Taxpayer's own Federal (corporate) tax return, subject to any limitations contained in other provisions of Federal tax law.<sup>2</sup>

Vermont ITC is not available to corporations

Vermont allows a credit against the personal income tax in the amount of 24 percent of the portion of a Federal ITC attributable to Vermont property:

(d)(1) A taxpayer shall be entitled to a credit against the tax imposed under **this section** of 24 percent of each of the credits allowed against the taxpayer's federal income tax for the taxable year as follows . . . investment tax credit attributable to the Vermont-property portion of the investment . . . .

32 V.S.A. § 5822(d)(1) (emphasis added). Since this credit in Subsection 5822(d) is available only "against the tax imposed under this section," and "this section" is Section 5822, which governs "taxation of individuals, trusts, and estates," this credit in Subsection 5822(d) is not available against the corporate income tax, which is imposed under Section 5832. As a result,

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<sup>2</sup> This Ruling does not provide legal advice with regard to Federal tax law. Federal tax law is discussed only to give context to the Ruling with regard to Vermont tax law.

Taxpayer corporation may not take its distributive share of the LLC's ITC against its Vermont corporate income tax.

#### Former Vermont ITC for Corporations (now expired)

A Vermont "solar energy tax credit," based on the Federal ITC, was available to both individuals and corporations under Section 5930z. 32 V.S.A. § 5930z. This credit, however, was available only for eligible investments made in 2010 and 2011 and certified by the Clean Energy Development Board, with a carry-forward of unused credits for five years. *Id.* As you note in your request letter, this credit and any carryforwards have now expired.<sup>3</sup>

#### No other Vermont law allows Taxpayer to use its share of LLC ITC credit

There is no other provision in Vermont law that allows Taxpayer to use its share of the ITC against its Vermont income tax liability. Vermont's corporate income tax is imposed on a corporation's "Vermont net income." 32 V.S.A. § 5832(1). "Vermont net income" is defined as a corporation's Federal taxable income, increased by three items and decreased only by two items, neither of which is the ITC. 32 V.S.A. § 5811(18)(A).

### **RULING**

Based upon the facts presented, Taxpayer is not eligible to apply its share of its limited liability company's Federal investment tax credit against Taxpayer's Vermont corporate income tax.

### **GENERAL PROVISIONS**

*Issuance of this ruling is conditioned upon the understanding that neither the taxpayer nor a related taxpayer is currently under audit or involved in an administrative appeal or litigation*

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<sup>3</sup> It might be argued that there is some ambiguity in Section 5930z, as Subsection (a) appears to allow a corporation the solar investment tax credit with no limitation, while Subsection (c) limits the credits to investments made in 2010 and 2011 if the credits are certified by the Clean Energy Development Board. It is unclear whether Board certification, and thus, the time limits, apply to all credits under Section 5930z. When the language of a tax credit or exemption is ambiguous, the ambiguity is resolved against the credit or exemption, unless to do so would "produce irrational results or defeat the purposes of the statute." *Richard and Amy Tarrant v. Department of Taxes*, 169 Vt. 189, 206 (1999).

*concerning the subject matters of the ruling. This ruling is issued solely to the taxpayer and is limited to the facts presented, as affected by current statutes and regulations.*

*Other taxpayers may refer to this ruling, when redacted to protect confidentiality, to see the Department's general approach, but the Department will not be bound by this ruling in the case of any other taxpayer or in the case of any change in the relevant statutes or regulations.*

*This ruling will be made public after deletion of the taxpayer's name and any information which may identify the taxpayer. A copy of this ruling showing the proposed deletions is attached, and you may request within 30 days that the Commissioner delete any further information that might identify the taxpayer. The final discretion as to deletions rests with the Commissioner.*

*You have the right to appeal this ruling within 30 days. 3 V.S.A. §§ 808, 815.*

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Emily Bergquist

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Date

Approved:

***Commissioner signed the original ruling on March 28, 2018.***

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Kaj Samsom  
Commissioner of Taxes

\_\_\_\_\_  
Date