Holland & Hart



Adam M. Cohen

Partner
303.295.8372
Denver
acohen@hollandhart.com

New Final Tax Credit Transferability Regulations Issued; Changes Minimal

Insight — April 29, 2024

On April 25, 2024, the IRS and US Treasury Department issued the final regulations under Section 6418 of the Code, the provision that allows sales of certain tax credits, including credits for renewable energy production and investment. In the context of a quickly growing marketplace for such sales, the final regulations made few changes in response to comments from stakeholders. From our experience advising clients on tax credit sales, it appears the changes incorporated into the final regulations will address some of the lingering questions our clients and other stakeholders had with the proposed regulations.

Highlights of the changes include:

- Transfers may not occur without a registration number.
- If a tax return is filed before the extended due date without a sale being reflected, a superseding return (i.e., a new tax return also filed before the extended due date) with a sale reflected may be filed.
- Amended tax returns (and “administrative adjustment requests” for partnerships) may be filed after the extended due date to correct information about the sale previously included on the tax return.
- While a purchased credit still may not be re-sold, the final regulations clarify that a contract to purchase future tax credits may be assigned (including by sale) before the credit purchase has occurred.
- Likewise, the final regulations clarify that the “extraordinary item” (for partnerships) of the credit purchases occurs when the cash payment is made for the credits, meaning that partnership interest transfers after the commitment has been made, but before the cash payment has been made will permit the buyers of those interests to participate in the credits.
- While the final regulations continue to permit purchased credits to offset estimated tax payments before the purchase has been completed, they clarify that this may not occur prior to when the seller would be able to reduce its estimated tax payments and must occur in the buyer's tax year in which the sale occurs.
- The “anti-abuse” rule to prevent taxpayers hiding income or increasing deductions was revised to compare sales prices to an arm's-length price (rather than an average market price).

- If a purchaser pays for credits that are ultimately determined not to exist (e.g., an excessive credit transfer), the payments may be deductible, depending on the purchaser's particular tax situation.
- If a credit seller retains some of its tax credits, recapture applies proportionately to the retained credits and the sold credits.
- If some of an investment tax credit is recaptured due to a transfer of partnership interests in a partnership credit seller, the recaptured credits will reduce the credits that a credit buyer may have to recapture from other events.

Highlights of important elements of the proposed regulations that did not change include:

- Passive activity loss rules still apply to credit buyers, but the final regulations did clarify that a credit buyer that (outside the purchase) is active may utilize the credit as a non-passive credit and that credit buyers with passive income may use purchased credits to offset the tax on that passive income.
- Purchases of tax credits are still the purchase of a “vertical” slice of the entire credit, including any multipliers for prevailing wage and apprenticeship or adders for domestic content, energy communities or low-income.
- While the final regulations reiterated the inability to make payments for tax credits in advance of the year in which they are generated, the preamble also restated the ability of credit sellers to receive loans, including from their credit buyers.
- Investment tax credits passed through a lease still may not be sold.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.