

From: Gillis, Diana L.
Sent: Tuesday, July 19, 2016 10:34 AM
To: [REDACTED]
Cc: [REDACTED] Carson, Timothy; Whitehead, Nora
Subject: RE: Questions re: 802.2

This would not be considered constructed for sale.

From: [REDACTED]
Sent: Tuesday, July 19, 2016 9:54 AM
To: Gillis, Diana L.
Cc: [REDACTED] Carson, Timothy; Whitehead, Nora
Subject: RE: Questions re: 802.2

Diana,

Thanks so much for your opinion. Turning to the new facilities exemption, as I mentioned, we're looking for guidance on when a facility is considered to be "constructed by the acquired person for sale" under 802.2(a). The Statement of Basis and Purpose indicates that we look to whether the seller has held the facility "at all times" solely for sale. In our case, the seller's plans changed while the solar power plants were being built. The seller initially envisioned a tax equity transaction. The power plants are held by an LLC. The seller planned to create two classes of securities, A and B. The seller would retain Class A shares, which give it the right to exercise operational control of the facilities. The counterparty would receive Class B shares, to which certain financial and other rights would attach. In general terms, the counterparty would be investing in the project in exchange for the right to most of the tax credits associated with the solar power plant and a defined portion of the available cash flow (together with consent rights over major decisions). During construction, the seller changed its plans and chose to pursue an outright sale of approximately 80% of the projects, rather than the tax equity transaction.

Would the seller's intent to pursue a tax equity transaction satisfy the requirement that the facility be constructed for sale? Or in your view would the facility still be "constructed for the [seller's] use" under the Statement of Basis and Purpose and Example 1 from 802.2? Does the answer depend on whether there would have been a change in control? Given that the entity holding the facility is an LLC, is operational control significant, or is it just the economic rights that define "control" of an LLC?

Second, on the requirement that the new facility cannot have produced income: we understand that selling test power does not disqualify the facility from this exemption (see informal interpretation no. 0703005), but are there limits to the amount of test power that may be sold without being deemed to have "produced income" for purposes of 802.2(a)? Generally solar power facilities have a fairly long testing phase, so the amount of testing income can be significant.

Let us know if any additional information would be helpful, or if you'd prefer to speak by phone.

Best,

[REDACTED]

From: Gillis, Diana L. [<mailto:dgillis@ftc.gov>]
Sent: Monday, July 18, 2016 2:05 PM

To: [REDACTED]
Cc: [REDACTED] Carson, Timothy; Whitehead, Nora
Subject: RE: Questions re: 802.2

[REDACTED] –The plant sounds substantially complete and would therefore be considered turnkey. The unproductive real property exemption cannot apply. The new facility exemption could apply, if satisfied. The Statement of Basis and Purpose provides some guidance on when something is constructed by the acquired person for sale (see below). Let us know if you have any specific questions on that point.

It also applies only if the acquired person has held the facility at all times solely for sale. The language of the exemption allows the holder of the new facility to be either a builder of the facility (“constructed by the acquired person for sale”) or other persons, such as a creditor, who take possession of a new facility with the intention of selling it (“held at all times by the acquired person solely for resale”). These limitations prevent the sale by an acquired person of capacity constructed for the acquired person’s use, as Example 1 to § 802.2 illustrates.”

Examples. 1. “A,” a major automobile manufacturer, builds a new automobile plant in anticipation of increased demand for its cars. The market does not improve and “A” never occupies the facility. “A” then sells the facility, which is fully equipped and ready for operation, to “B,” another automobile manufacturer. The acquisition of this plant, including any equipment and assets associated with its operation, is not exempt as an acquisition of a new facility, even though the facility has not produced any income, since “A” did not construct the facility for sale or hold it at all times solely for resale. Also, the acquisition is not exempt as an acquisition of unproductive property, because manufacturing facilities that have not yet begun operations are explicitly excluded from that exemption.

From: [REDACTED]
Sent: Thursday, July 14, 2016 12:34 PM
To: 'Gillis, Diana L.'; Whitehead, Nora
Cc: [REDACTED]
Subject: RE: Questions re: 802.2

Diana,

Here is a summary of the status of construction at the anticipated closing date. If any other facts would be material to the determination, please let me know.

Best,

[REDACTED]

- At the anticipated closing date, the party building the plant anticipates that:
 - o It will still need to spend approximately 3-5% of the total budget (remaining amount is \$10-15 million) to complete the facility.
 - o The facility is in a testing phase.
 - o 2 of 4 circuits are projected to be commissioned. The 3rd is projected to be commissioned around the time of closing. The 4th is projected to be commissioned about 3 weeks after closing.
 - o The commissioning guarantee date is 4-6 weeks after closing.
 - o Substantial Completion is 2.5 months after closing. (“Substantial Completion” is a term of art in the industry. I can get more detail on what it entails if that would be material.)
 - o Final completion date is over 3 months after closing.

From: Gillis, Diana L. [<mailto:dgillis@ftc.gov>]
Sent: Thursday, July 14, 2016 12:18 PM
To: [REDACTED] Whitehead, Nora
Cc: [REDACTED]
Subject: RE: Questions re: 802.2

[REDACTED], please send us an email with your specific facts.

-Diana

From: [REDACTED]
Sent: Thursday, July 14, 2016 12:09 PM
To: Whitehead, Nora; Gillis, Diana L.
Cc: [REDACTED]
Subject: Questions re: 802.2

Nora and Diana,

Would either of you have a few minutes this afternoon to discuss a few questions related to the new facilities exemption and the unproductive real property exemption? Specifically, we are hoping you can provide some guidance regarding when a structure becomes a facility under interpretation 1511001, i.e. when something is considered to be “capable of commencing operations immediately with minimal additional capital investment.” We also are looking for guidance on when a facility is considered to be “constructed by the acquired person for sale” under 802.2(a). This relates to the sale of a new solar power plant that is under construction.

We can be available any time this afternoon or tomorrow morning. Thanks in advance for your guidance.

Best,

[REDACTED]