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Florida's Current Climate is Ripe for Solar Energy Tax Incentives

By: Michael D. Minton, Dana M. Apfelbaum and Mark E. Holcomb

For a number of years, certain Federal, state and local tax incentives have been available to promote, among other things, the importance of renewable energy like solar power. These incentives benefit Florida's business owners and residents who choose to implement solar energy systems on their property. Although this article will focus on opportunities for solar power, however similar or comparable incentives are available for other forms of renewable energy, such as wind and biofuels.

Code § 48(a) provides for an energy credit, commonly known as the "investment tax credit", equal to thirty percent (30%) of the cost basis of qualifying energy property placed in service during a taxable year, the construction of which begins before January 1, 2022. For these purposes, "energy property" means equipment using solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, but not with regard to heating a swimming pool. Additionally, such property must be depreciable, with an estimated useful life of at least three (3) years. Beginning with any property on which construction of which begins after December 31, 2019, there is a phase-out of this credit, creating an incentive not to wait to convert. Lastly, if the energy property is not placed in service before January 1, 2024, the credit is limited to ten percent (10%).

Beyond the credit, qualifying depreciable renewable energy property receives an additional benefit from accelerated and bonus depreciation. Code § 168(e)(3)(B)(vi) provides that most solar energy property is five-year property, which qualifies under Code § 168(k) for bonus depreciation. The practical effect of this is that taxpayers may deduct fifty percent (50%) of the cost of qualified energy property in the year it is first placed in service, with the remainder depreciated over the course of the property's useful life. This percentage is reduced to forty percent (40%) for property placed in service in 2018 and thirty percent (30%) for property placed in service in 2019, after which bonus depreciation is scheduled to expire.

Together, the investment tax credit and the depreciation benefits allow a significant portion of the cost of investing in solar energy to be essentially paid for by federal tax incentives.

In the alternate, but not in addition to the investment tax credit to the extent elected for the same property, a "production tax credit" is available under Code § 45. For 2017, the production tax credit is currently 2.4 cents (a number adjusted annually for inflation) per kilowatt hour of electricity produced from eligible solar systems. In order to qualify, the energy must be sold to an unrelated person during the ten-year period beginning on the date the facility is placed in service.

Florida also offers incentives for solar energy at the state level. The Florida property tax exemption available for solar energy systems (and other renewable energy source devices – including wind energy and geothermal energy) has been expanded effective January 1, 2018. While solar energy systems installed on or after January 1, 2013 continue to be excluded from the assessed value of residential property, the exclusion is extended to 80% of the assessed value of such systems installed on or after January 1, 2018 for nonresidential properties. Eligible solar energy source devices include portions of the system up to the point of interconnection to an electric utility's distribution grid or transmission lines. These changes to the law are scheduled to expire at the end of 2037. New regulations governing the terms of contracts for the sale or lease of solar energy systems, including numerous required disclosures, became effective July 1, 2017.

Businesses and individuals alike may wish to take advantage of these incentives, many of which have time limitations making early participation potentially more advantageous due to phase-outs or limited availability. Regardless, the current climate is ripe to explore these opportunities.

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Dangerous Waters – Navigating Controlled Group Rules for Qualified Plans in the M&A Context

By: Quinn D. Baker[1]

Corporate counsel navigating the treacherous waters of domestic and international mergers and acquisitions would do well not to ignore what at first glance may seem to be a fairly obscure corner of the tax code – the controlled group rules as applied to tax-qualified retirement plans (and other employee benefits).

Controlled group rules applicable to qualified plans can be found in I.R.C. §§ 414(b), (c), and (m), and generally follow the rules at I.R.C. § 1563. A company can be a member of a parent-subsidiary group, a brother-sister group, or a combination. Analysis of controlled group status is a hazardous sea to navigate, with the need to factor in constructive ownership rules and compare common ownership among related companies.[2]

Why do these rules matter? According to the Investment Company Institute, $15.8 trillion were held in private and public retirement plans as of the first quarter of 2017.[3] These retirement plans must meet a number of nondiscrimination rules to enjoy tax-qualified status. Generally, tax-qualified plans cannot discriminate in favor of highly compensated employees (and owners) in either eligibility or benefits. The number of highly versus non-highly compensated employees considered for this purpose includes those not only in the company sponsoring the plan, but in all companies in the sponsor's controlled group. This means that an addition to the controlled group via merger or acquisition can potentially sink testing results, resulting in significant IRS penalties up to and including plan disqualification.

A recent tax court opinion illustrates the peril.[4] An employee stock ownership plan (ESOP) owned 100% of the shares of Paza Staffing Services, Inc. (Paza), valued at $333,000 in 1999. The sole participant in the ESOP was the 100% owner of another company, Golden Gate. Through attribution rules, the IRS determined that Paza and Golden Gate were in the same controlled group and that the non-highly compensated Golden Gate employees should have been included in discrimination testing (causing the ESOP to fail that testing), going back to the year 1999. Accordingly, the IRS disqualified the ESOP, retroactively to 1999, and the tax court entered summary judgment in favor of the IRS.

There is limited relief in IRS regulations with respect to some nondiscrimination testing in connection with controlled group changes,[5] and there are a number of planning tools that can be used during the due diligence phase in order to mitigate against potential issues that may arise. For example, an acquired company may be able to be set up as a qualified separate line of business (QSLOB), enabling it to be treated as a separate employer for purposes of discrimination testing.[6] Of course, to use these tools, counsel must first be aware of the shallows through which their clients are sailing.

(Endnotes)

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2 *See* I.R.C. §§ 1563(a), (e) (as modified by I.R.C. § 414(b)).

3 Investment Company Institute, Defined Contribution Plan Participants' Activities, First Quarter 2017, available at https://www.ici.org/pdf/ppr_17_rec_survey_q1.pdf (last visited September 5, 2017).

4 *See* Paza Staffing Services, Inc. v. Comm'r, Docket No. 6881-12R (Aug. 17, 2017).

5 *See* I.R.C. § 410(b)(6)(C).

6 *See* I.R.C. § 414(r); 26 C.F.R. §1.414(r)-1 et. seq.