

802.2(b)

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, November 04, 2009 3:37 PM
To: Verne, B. Michael
Subject: Assistance Rule 802.2(b)

Mike, I hope all is well. I have a somewhat technical question of what constitutes "sole and continuous possession and use of the facility" in Rule 802.2(b). The Buyer here is a lessee of an undivided 35% interest in a power plant and is acquiring that 35% interest from the lessor who held title for financing purposes. Buyer was one of the original owners of the facility and then the plant was transferred to the seller and this lease was entered into at the same time the plant became operational. Thus, the Buyer was in "continuous possession and use." Technically the Buyer was not in "sole . . . possession and use of the facility" because there were other lessees. However, I do not think this should bar application of the exemption. First, under Informal Interpretation 0406008, Rule 802.2(b) was applied to the acquisition of a fractional interest (although it seems the Buyer was the only lessee). If the Rule applies to the acquisition of a fractional interest then it should not matter if there were other lessees in possession and use. Finally, as a practical matter, the Buyer is obtaining the same interest it is currently leasing, 35% of the power plant, and is not obtaining more capacity than it has pursuant to the lease. Thus, from a practical and competitive standpoint, nothing has really changed.

Thanks in advance!

[REDACTED]

[REDACTED]

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I agree - the lessee did have sole and continuous use of the 35% undivided interest in the plant, so the exemption would apply.

BW
11/9/09