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**Sent:** Wednesday, December 11, 2013 7:50 PM  
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**Subject:** Ra3 Audit-McConkie Letter  
**Attach:** Tax Kirton Comments.doc

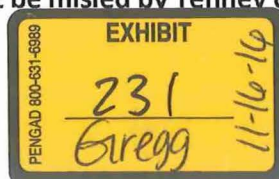
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TO ALL:

First, we are really progressing down in Delta. Weather is cold but sunny. We do not slow down at all.

Second, the last time I wrote to you it was concerning the Kirton-McConkie Memorandum Letter. The concerns stemmed from an audit a RaPower3 Team Member went through with IRS officer, Mark Tenney. I went down to Kirton-McConkie and spoke with COO Ken Olson who then talked with Ken Birrell who wrote a Tax Attorney Opinion Letter for one of our big clients and who also wrote a the Memorandum Letter to Solco1 and Neldon Johnson.

Mark Tenney vociferously stated the letter written by Birrell had been recinded and was adamant that RaPower3 members had no business using it. **Do not be misled by Tenney or allow him to intimidate you.**



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This morning I wrote Ken Birrell and Ken Olson a detailed letter about the situation and asked Mr. Birrell to write a letter of clarification.

While I'm waiting for his clarification, here are the facts as we see them:

1. Kirton-McConkie did write an opinion letter for a big client and Solco1, the entity we use for multi-million dollar deals.
2. Kirton-McConkie did write a Memorandum for Solco1 and Neldon Johnson. Memorandums are what Neldon uses to confirm wordings in contracts.
3. RaPower3 owns Solco1 (Tenney does not know this)
4. Neldon paid Kirton-McConkoe for the Memorandum and thus Neldon Johnson owns that Memorandum. (Tenney does not know this)
5. Kirton-McConkie has a disclaimer at the end of the Memorandum basically saying you can't use their letter to avoid penalties and to also seek tax advice elsewhere.
6. **So what did you do as a RaPower3 Team Member? Neldon owns the letter. Therefore, you can use his letter (which is the Memorandum) for your purposes.**

**BOTTOM LINE:** The Memorandum cannot be rescinded. You can use it. Tenney's assertions are patently false.

**ATTACHED IS A SYNOPSIS OF THE KIRTON-MCCONKIE MEMORANDUM. I REDUCED IT DOWN TO TWO-PLUS PAGES FOR EASIER UNDERSTANDING. I TRIED TO CAPTURE THE ESSENCE OF THE CODES AND TAX COURT RULINGS FOR YOUR BENEFIT. HOPE IT HELPS.**

**Warmest Regards, Greg**

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## KIRTON-MCCONKIE MEMORANDUM COMMENTS

**SUBJECT:** Tax Issues relating to Purchases of solar lenses

**INTRO:** Based on existing & current IRS codes and rulings

**DISCLOSURE:** At the end- can't be used for avoiding penalties. "written to support the promotion or marketing of the transactions." Each taxpayer should seek advice elsewhere.

**EXECUTIVE SUMMARY:** Solar Lenses will qualify as "energy property" that is eligible for the energy tax credit under Code Section 48. Each Lens costs \$3,500 = 30% tax credit or \$1,050. Also eligible for depreciation under Code Section 168 (a) as a 5-year property.

**FACTUAL BACKGROUND:** Taxed as subchapter C corporations for Fed. Tax purposes. Same lenses and for power generation or other uses. Promissory Note same. Same LTB, LLC serving as the operator in the O&M Agreement. Same kind of rental agreement. Basically, it's the very same deal.

### **EXPLANATION OF THE LAW AND APPLICATION OF THE FACTS TO THE LAW ;**

**I. Sale vs. Lease:** Buyer becomes and remains the owner and can claim the tax benefits. Rental payments not interest. Operator will never become the owner. Buyer will always have title. \$1,050 down payment is construed as a substantial risk to the buyer- it's fully recourse and there's no inflated sales price. Operator cannot buy the lenses and it's anticipated that the Buyer should have substantial positive cash flows. Buyer bears the economic benefits and burdens of ownership. Transaction should be treated as a sale and Kirton-McConkie believes the buyer should claim the tax benefits.

**II. Energy Tax Credit:** Code Section 38-section 46 and Code Section 48 (a) cited. Also, 48(a)(3) and 50(b). Talks about providing solar process heat and the different ways the heat can be used.

**A. Energy Property:** Six requirements to qualify as "energy property". **We qualify.**

1. It is not necessary for solar energy property to comprise a completely functional solar system in order to qualify for the energy credit. The court found that an incomplete system made up of qualifying parts, such as collectors, storage tanks, thermostats, heat exchangers, etc. can qualify for the credit.

The Solar Lenses will be capable of using solar energy to generate electricity and/or solar process heat once they have been properly installed in a tower and otherwise incorporated into a larger solar energy system. The fact that the Solar Lenses must be installed and incorporated into a larger solar energy system does not prevent them from qualifying as energy property. See Code Section 48(a)(3)(A)(i).

2. **Acquisition and Original Use**
  3. **Qualifies for Depreciation** (We measure depreciation in terms of years)
  4. **Satisfy Performance Standards:** Taxpayers need not wait for issuance of performance standards before proceeding with the acquisition of the property or the claiming of the energy credit.
  5. **No Claiming of Code Section 45 Credit:** (We don't make this claim)
  6. **No Disqualifying Use:** (Energy property will be used in the USA, does not predominantly furnish lodging, is not part of a tax-exempt organization, is not a government entity and is not a foreign person or entity)
- B. Energy Percentage:** The tax credit is 30% because we purchased before 2017
- C. Basis:** Purchase price = \$3,500 – Qualified energy property is any property that satisfies each if the four following conditions: **We do.**
1. **Losses are subject to limitation**
  2. **Energy percentage more than zero. It's 30%.**
  3. **No more than 75% Qualified Nonrecourse Financing:** We are at 70%. Buyer not protected against loss through guarantees. Seller has no interest other than a creditor. Seller gets none of the net profits; only rental fees.
  4. **Level Payment Loan:** Our payments are equal over 30 years.
- D. Placed in Service:** Property is placed in service when it is "placed in a condition or state of readiness and availability for a specifically assigned function." (Treas. Reg. Section 1.46-3(d)(1)(ii)). However, the Tax Court has held that for property purchased for lease to others to be placed in service, **"it is not necessary that the property actually be used during the taxable year in the taxpayer's profit-motivated venture. It is sufficient that the property be available for use."**
- The Buyer will enter into the O&M Agreement, which effectively leases the Solar Lenses to the Operator, simultaneously with the execution of the Purchase Agreement. Thus, the Solar Lenses will be available for use in the Buyer's leasing operations as soon as they are manufactured and Buyer acquires them. **Therefore, the Solar Lenses will be considered to have been placed in service as soon as they are acquired by the Buyer even though they will not be installed and actually used by the Operator to generate electricity or solar process heat until some later date.**

**III. Depreciation:** Property is used in a business. Use double declining balance over five years. Amount of depreciation is \$2,975 per solar lens.

**IV. Limitations upon Use of Credits and Depreciation Deductions**

**A. At-Risk Limitations:** Taxpayers are considered to be at risk for borrowed amounts only if the taxpayer is personally liable for repayment. It depends upon whether there was “a genuine intention to create debt, with reasonable expectation of repayment and did that intention comport with the economic reality of creating a debtor-creditor relationship.”

The parties genuinely intend to create a debt in the form of the Promissory Note and the Buyer’s obligation to make the Installment Payments and that the parties intend for the Installment Payments to be made. The Installment Payments are secured by the Solar Lenses, which the Seller may repossess in the event the Buyer fails to make the Installment Payments when due. Therefore, the Buyer’s amount of risk with respect to the Solar Lenses shall be an amount equal to the aggregate Purchase Price for the Solar Lenses.

**B. Passive Activity Limitations:** So long as a Buyer’s principal activity is something other than the performance of personal services, the Buyer will be able to use the credits and losses attributable to the Solar Lenses to offset active income from other sources.

**Shepard’s Note:** The Kirton-McConkie Memorandum was written specifically for corporations or limited liability companies. While some RaPower3 Team Members have purchased their Solar Lenses as an LLC, most have purchased as a sole proprietor. However, Shepard believes that the vast majority, if not all, of the references and information contained therein also applies to sole proprietors