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June 11, 2012

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Ms.
 County Counsel
 Attention:
 Assistant County Counsel
 Riverside County
 3960 Orange Street, Suite 500
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**Re: *New Construction Exclusion for Active Solar Energy Systems
 Assignment No.: 12-050***

Dear Mr. and Ms. :

This is in response to your February 16, 2012 and February 17, 2012 letters in which you submitted comments to the Proposed Guidelines for Active Solar Energy Systems New Construction Exclusion. In particular, you inquire as to whether Revenue and Taxation Code¹ section 73 (the Solar Exclusion), which excludes "active solar energy systems" from the definition of "newly constructed" in article XIII A, section 2 of the California Constitution, applies to utility-scale, commercial, solar power plants (solar power plants). For the reasons set forth below, in our opinion, solar power plants are eligible for the Solar Exclusion.

As you know, the passage of Proposition 7 in November 1980 authorized the exclusion of solar energy systems from the definition of new construction. Subsequently, the Legislature enacted the Solar Exclusion, and then reenacted it five more times.² Notably, we have not been able to identify any language in Proposition 7, the arguments for and against Proposition 7, or in any enacted version of section 73 that suggests that an active solar energy system must be limited

¹ All further statutory references are to the California Revenue and Taxation Code, unless otherwise specified.

² Section 73 was initially enacted in 1980 by Senate Bill No. (SB) 1306 (1980 Reg. Sess.), to apply to lien dates for fiscal years 1981 through 1985. In 1985 the sunset was extended to January 1, 1991 by Assembly Bill No. (AB) 1412 (1985 Reg. Sess.). AB 4090 (1989-1990) proposed an extension to the 1993-1994 fiscal year and was passed by both houses, but was vetoed by the Governor. However, on May 14, 1991, the governor signed SB 103 (1991 Reg. Sess.), extending the section 73 exclusion to January 1, 1995. The exclusion then lapsed again until AB 1755 (1997-1998 Reg. Sess.) was approved by the Governor on September 24, 1998 and filed with the Secretary of State the next day, extending the section 73 exclusion to 2006. Subsequently, AB 1099 (2005 Reg. Sess.) extended it to 2010, and AB 1451 (2008 Reg. Sess.) extended it to January 1, 2017, on which date it is currently scheduled to expire.

in any way by size, scale, or on-site or off-site usage. There is, in fact, no language distinguishing or restricting active solar energy systems in any way. To the contrary, where "active solar energy system" is used to describe what type of property is eligible to receive the Solar Exclusion, the modifying word "any" is always used.

For example, the original text of Proposition 7 amended Article XIII A, section 2 of the California Constitution to read:

(c) For purposes of subdivision (a) [when determining full cash value], the Legislature may provide that the term "newly constructed" shall not include the construction or addition of ***any active solar energy system***. [Emphasis added.]

Likewise, the official title and summary of Proposition 7 described the measure, in part, as follows:

TAXATION, REAL PROPERTY VALUATION, SOLAR ENERGY SYSTEMS, LEGISLATIVE CONSTITUTIONAL AMENDMENT. Amends Article XIII A, Section 2 to authorize Legislature to provide that, in valuing real property, the term "newly constructed" shall not include the construction or addition of ***any active solar energy system***. [Emphasis added.] (Ballot Pamp. General Elec. (November 4, 1980), text of Prop. 7.)

Subsequently, the legislature, under the authority granted by Proposition 7, enacted section 73, which, in its original version provided as follows:

For purposes of subdivision (a) of Section 2 of Article XIII A of the Constitution, the term "newly constructed" shall not include the construction or addition of ***any solar energy system***, as defined in subparagraph (A) of paragraph (6) of subdivision (h) of Section 17052.5.³ [Emphasis added.] (Stats. 1980, ch. 1245, § 1 (Senate Bill No. 1306 (1980 Reg. Sess.).)

Section 73 was amended by Stats. 1981, ch. 239, to add the word "active" before the words "solar energy system," and to add subdivision (b), which provided a definition for "active solar energy system." The present version of section 73 is substantially similar in form and identical in meaning to section 73 as amended in 1981, insofar as it relates to the definition of active solar energy system. The current version of section 73 provides, in relevant part, as follows:

(a) Pursuant to the authority granted to the Legislature pursuant to paragraph (1) of subdivision (c) of Section 2 of Article XIII A of the California Constitution, the term "newly constructed," as used in subdivision (a) of Section 2 of Article XIII A of the California Constitution, does not include the construction or addition of ***any active solar energy system***, as defined in subdivision (b). [Emphasis added.]

In your opinion, the Solar Exclusion does not extend to solar power plants because when section 73 was initially enacted, it incorporated the definition of "solar energy system" from section 17052.5, which fell within Part 10 of the Revenue and Taxation Code (entitled Personal Income Tax). You are of this opinion because the Personal Income Tax provisions do not

³ As noted in your letter, the reference to subdivision (h) was incorrect, as the definition was actually stated in subdivision (i). For the remainder of this letter, we will refer to the correct subdivision.

include corporations in its definition of "taxpayers," and because solar tax credits for corporations were governed by section 23601, which was in Part 11 of the Revenue and Taxation Code (entitled Corporation Tax Law) and was not referenced or incorporated by section 73.

However, as initially enacted, section 73 did not incorporate the definitions of "taxpayer" used in either Part 10 or Part 11 of the Revenue and Taxation Code.⁴ Rather, it only incorporated the definition of "solar energy system." Although the definition in only Part 10 was referenced, the definition of "solar energy system" in Part 11 was identical. Furthermore, the "Argument in Favor of Proposition 7" as well as the "Rebuttal to Argument Against Proposition 7" on the California Ballot Pamphlet for Proposition 7 stated that Proposition 7 provides a tax incentive to homeowners and *businesses* for the installation of solar energy systems. (Ballot Pamp. General Elec. (November 4, 1980), p. 30-31.) We do not believe it is reasonable to assume that the Ballot Pamphlet was referring only to businesses that operated as sole proprietorships and would thus be governed by Part 10 of the Revenue and Taxation Code.

We also note in this regard that section 17052.5(i)(6)(A), to which the original version of section 73 referred, defined "solar energy system" as one that used "solar devices for the individual function of ... (iii) Production of electricity," with no limitation as to the amount of electricity that may be produced, the size of the facility that produces the electricity, or the location of where the electricity would ultimately be used. Likewise, section 73, subdivision (b)(3)(C), as currently enacted, states that "solar energy systems" that qualify for the exclusion include those used for the "production of electricity," again with no limitations on either the amount of electricity produced, the size of the facility that produces the electricity, or the location of ultimate usage.

Therefore, in our view, section 73 as enacted did not intend to make any distinction among businesses according to size or scale, and did not exclude corporations.

In addition to the plain language of Proposition 7 and section 73, we believe that the actions of the Legislature in reenacting section 73 are compelling. This is because the Legislature and Governor specifically acknowledged that solar power plants would receive the tax exclusion when re-enacting section 73 in 1991.

Section 73 was initially enacted in 1980, and, after amendments in 1985, was scheduled to expire in 1991. During that time, LUZ International (LUZ), a large, utility-scale, solar facility received the benefit of the section 73 exclusion. Governor Pete Wilson signed Senate Bill No. 103 (1990-1991) (SB 103) on May 14, 1991, extending the section 73 exclusion from 1991 to 1995. According to the legislative history of SB 103, it was clear that the Legislature was aware that LUZ was receiving the benefit of the exclusion. This is indicated by the following:

1. At its hearing on January 16, 1991, the Senate Revenue and Taxation Committee⁵ discussed that most of the State's expected revenue loss would result from LUZ's solar-electric facilities. It specifically states that the exemption would ultimately result in an ongoing loss of \$8 million per year for San Bernardino County, due to LUZ's plans to build four new facilities

⁴ The definition of "taxpayer" is found at section 17004 in Part 10 and at section 23037 in Part 11.

⁵ A copy of the report on the January 16, 1991 Senate Revenue and Taxation Committee hearing on Senate Bill No. 103 is attached hereto as Exhibit 1. In 2011, the Senate Revenue and Taxation Committee combined with the Senate Local Government Committee to form the current Senate Governance and Finance Committee.

valued at \$200 million each. (Sen. Rev. & Tax. Com. on Sen. Bill No. 103 (1990-1991) January 16, 1991, p. 2-4.)

2. The Legislative Analysis of January 25, 1991⁶ states that qualifying solar energy systems that are not subject to property taxes pursuant to SB 103 "include...large-scale solar-electric facilities." It also discussed an annual property tax loss to San Bernardino County of up to \$9.2 million based on the anticipated construction and completion of major solar-electric facilities owned by LUZ.
3. The March 18, 1991 report for the hearing at the Assembly Committee on Revenue and Taxation,⁷ as well as the Bill Analysis of the Department of Finance signed on March 15, 1991,⁸ extensively discussed the fact that LUZ International, which sells its energy to Southern California Edison, was the primary beneficiary of the economic benefits of SB 103, and described the expected fiscal effect on the State due to the property tax loss resulting from LUZ's property tax exemption.
4. A statement from the Department of Finance which was approved on March 25, 1991⁹ states that "large commercial solar installation owners would experience major savings (estimated to be \$16 million between 1991 and 1994)" and that only 20 percent of LUZ's four facilities would be taxable with the passage of SB 103.
5. Governor Wilson's press release,¹⁰ announcing the passage of SB 103, stated that LUZ, the "only solar power company in the world," planned to build four more solar thermal electric plants if it could arrange financing, which was based on a continuation of the property tax incentives. Governor Wilson stated the need for utility companies to substantially increase energy resources in California, and suggested that SB 103 would assist solar plants in competing against fossil fuel plants.

⁶ A copy of pertinent portions of The Legislative Analyst, dated January 25, 1991, is attached hereto as Exhibit 2.

⁷ A copy of the report on the March 18, 1991 hearing at the Assembly Committee on Revenue and Taxation is attached hereto as Exhibit 3.

⁸ A copy of the Bill Analysis of the Department of Finance signed on March 15, 1991 is attached hereto as Exhibit 4.

⁹ A copy of the statement from the Department of Finance, approved on March 25, 1991, is attached hereto as Exhibit 5.

¹⁰ A copy of Governor Pete Wilson's press release dated May 14, 1991 is attached hereto as Exhibit 6.

Thus, it is clear that at the time the Legislature enacted SB 103, reauthorizing the new construction exclusion for active solar energy systems, LUZ, an owner of large, utility-scale commercial solar energy facilities, was already receiving the tax exclusion and was intending to apply it to its planned future facilities. The Legislature and Governor explicitly contemplated the fiscal impact of granting LUZ the subject property tax exclusion and passed SB 103 without including language making solar power plants ineligible for section 73. In fact, one option suggested by the Committee to reduce the cost of the exemption was to limit the exemption to large commercial facilities, if the intent of SB 103 was to encourage the improvement and cost competitiveness of solar energy. (See Exhibit 1, Sen. Rev. & Tax. Com. on Sen. Bill No. 103 (1990-1991) January 16, 1991, p. 4.)

Finally, Annotations¹¹ 610.0065¹² and 610.0085¹³ imply that solar power plants qualify for the Solar Exclusion. Soon after Proposition 7 was adopted by California voters, the backup letter to Annotation 610.0065 opined that Atlantic Richfield Company (ARCO)'s planned photovoltaic electric power generating plant was excluded from assessment under the "new construction" category of subdivision (a) of section 2 of article XIII A of the California Constitution, on the grounds that "new construction" includes the "construction or addition of any active solar energy system" (Rev. & Tax. Code, § 73, subd. (a)). One example of such a system is one that is used for the "Production of Energy" (Rev. & Tax. Code, § 73, subd. (b)(3)), and ARCO's was such a system, thereby receiving the tax exclusion. The backup letter to Annotation 610.0085 states that ARCO constructed a solar energy facility on land leased from Pacific Gas & Electric Company. The letter opines that the solar energy systems, as opposed to the facilities, are excluded from the term "newly constructed," pursuant to Proposition 7 and section 73. Thus, just a few years after Proposition 7 was enacted, the Board's Legal Department opined that solar energy systems owned by large-scale commercial solar facilities qualified for the property tax exclusion.

For all of the foregoing reasons, we conclude that solar power plants may qualify for the section 73 exclusion.

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ Sonya Yim

Sonya Yim
Tax Counsel III (Specialist)

SSY:mcb

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Enclosures: Exhibits 1 - 6

¹¹ Property tax annotations are summaries of the conclusions reached in selected legal rulings of State Board of Equalization counsel published in the State Board of Equalization's Property Tax Law Guide. (See Cal. Code Regs., tit. 18, § 5700 for more information regarding annotations.)

¹² Property Tax Annotation 610.0065 (February 18, 1983).

¹³ Property Tax Annotation 610.0085 (April 11, 1986).

Mr.
Ms.

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June 11, 2012

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