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September 28, 2017

Denver C. Snuffer, Jr.
Steven R. Paul
NELSON SNUFFER DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070

RE: USA v. RaPower-3, LLC, et al
U.S. District Court Case No. 15-828

Dear Steven and Denver,

You have asked that I provide expert opinions in the lawsuit against RaPower-3, LLC brought by the federal government over what they consider to be questionable tax treatment by buyers of solar energy lenses. I provide you the information contained in this letter and my experience to answer the two questions that you posed to me.

I understand that I am being designated as an expert in this case. I also understand I am to provide a copy of my resume, attached hereto. The following are responses to the questions you asked about my qualifications:

I have testified, in deposition only, in this case on September 20, 2017.

I have testified in the Oregon Tax Court on October 25 and 26, 2016.

I have not had any articles published in the last 10 years.

I am being compensated for my time in this case as an expert at the hourly rate of $150.00.

Plaintiff Exhibit
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OPINIONS

You have asked that I answer the following two questions. My answers are as indicated below:

> QUESTION 1: Do the solar lenses purchased by individuals or business entities from RaPower-3, LLC qualify under section 48 of the Internal Revenue Code as "energy equipment" and for tax reporting purposes, can those people claim the energy credit for the year their lens(es) are placed in service?
>
> ANSWER: For the reasons explained and stated herein, yes.
>
> QUESTION 2: Do buyers of solar lenses from RaPower-3, LLC qualify to deduct depreciation on their federal tax returns?
>
> ANSWER: For the reasons explained and stated herein, yes.

OVERVIEW

First, the taxpayer is not in the **solar energy business**, this is a complete misunderstanding. The taxpayer is in the business of renting tangible personal property. The solar lenses are tangible personal property. **(Internal Revenue Code §1231 property**). The lenses are used to produce heat. They are not solar panels that are used to produce electricity. The solar lenses are a modified version of the Fresnel lens, which was invented in 1822. The Fresnel lens is still used in movie theaters and light houses today.

LAWS

The United States Supreme Court's decision *in Frank Lyon Co v. United Sates*, 435 U.S. 561 (1978) was the key factor that the sale/lease back transaction was considered a substantial economic investment (20 percent) made by the buyer/lessor. The Supreme Court's decision to uphold the sale leaseback transaction was based in large measure on the significance of the buyer/lessor's economic investment. The court stated in part "The fact that favorable tax consequences were taken into account by Lyon on entering into the transaction is no reason for disallowing those consequences. We cannot ignore the reality that

tax laws affect the shape of nearly every business transaction." **See *Commissioner v. Brown, 380 U.S. 563, 579-580 (1965).*** The court also stated "We therefore, conclude that it is Lyon's capital that is invested in the building according to the agreement of the parties, and it is Lyon that is entitled to depreciation deductions, under **IRC §167**. **See *United States v. Chicago B. & Q. R. Co., 412 U.S. 401 (1973).*** One important statement that the court made in its ruling applies to the taxpayer's solar lens leasing business is in part "It suffices to say that, as here, a sale and leaseback, in and of itself, does not necessarily operate to deny a taxpayer's claim for deductions." **See *Commissioner v. Danielson, 378 F. 2d 771 (CA3), cert. denied, 389 U.S. 858 (1967), on remand, 50 T.C. 782 (1968) and Levinson v. Commissioner, 45 T.C. 380 (1966).***

See ***Franklin Estate v. Commissioner*, 64 T. C. 752 (1975), 544 F.2d 1045(9th Cir. 1976)** where the buyer will make a substantial economic investment in solar lenses. Also, see ***Sowerby v. Commissioner*, 47 T.C.M. 897 (1984), *Larsen v. Commissioner*, 89 T.C. 1229 (1987)** and ***Truman Bowen v. Commissioner*, 12 T. C. 446, acquiescence, C.B. 1951-2.**

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." **See *Waddall v. Commissioner*, 86 T.C. 848 (1986) and *Sears Oil Co. v. Commissioner*, 359 F.3d 191, 198 (2d Cir. 1966)** and ***Grow v. Commissioner*, 80 T. C. 314, 326-327 (1983).**

The Purchase Agreement specifies that the Promissory Note represents payment of the Purchase that remains due after receipt of the down payment**, see *Truman Bowen v. Commissioner*, 12 T.C. 446, acquiescence, C.B. 1951-2.**

Therefore, this clearly shows that the taxpayer is allowed the deprecation deduction for all years in question and they should not have been disallowed by the auditor. It also clearly shows that the individual who conducted the examination did not understand the taxpayer's business and just made up an imaginary business to create the outcome what she wanted, rather than what the law permitted.

The Emergency Economic Stabilization Act of 2008, HR 1424 Public Law 110-343 (Division B), includes a number of provisions supporting renewable energy, including solar. This law also includes commercial and residential solar investment tax credit (ITC), and allows utilities and alternative minimum tax (AMT) filers to

take the credit as per **IRC §196(c)**. Along with the **IRC §48(a)(3)(A)** investment tax credit, solar property also qualifies for accelerated depreciation through Dec. 31, 2016. The United States Congress implemented those laws with the intent that taxpayers would be encouraged to invest in renewable energy sources.

As long as the taxpayer materially participates in a business activity **(IRC §469(h)(1)),** then the taxpayer may deduct the losses from such activity. Because the business that the taxpayer is engaged in is the rental of tangible personal property, it is required to be reported on his Schedule C (as per several court cases see below). Regarding the question of material participation, **Treasury Regulations §1.469-5T(a)** states that if "The taxpayer does substantially all the work in the activity" then material participation is not a question that applies.

Furthermore, **Treasury Regulations §1.469-5T(a)** states very clearly that the taxpayer only needs to meet one of the 7 tests in this regulation. **Test #2 states** "The taxpayer does substantially all the work in the activity". Simply stated because the taxpayer does all the work in his business of leasing tangible personal property (the solar lenses) the income or loss will be non-passive. There is no specific number of hours associated with this test. In addition, the term "substantially" is not defined in the regulations.

The following court cases reinforce the requirement of reporting the income and expenses on a Schedule C or C-EZ for the business of renting tangible personal property. See ***Stevenson v. Commissioner 57 T.C.M. 1032 (1989)*** and ***Walker v. Commissioner 101 T.C. 537 (1993).*** The taxpayer meets all the requirements of the law allowing them to claim the credits and the depreciation on their tax returns

Therefore, the taxpayer is currently engaged in a business activity and entitled to all normal business deductions as per **IRC §162**. There are several court cases stating that the taxpayer is allowed losses under **IRC §162** in this circumstance. See ***Storey v. Commissioner*, TC Memo 2012-115 (4/19/2012)**, and ***Mullins v. U.S.*, Cite as 94 AFTR 2d 2004-5389 (334 F. Supp. 2d 1042), 07/14/2004**, also ***Holmes v. Comm.*, Cite as 83 AFTR 2d 99-2987 (184 F. 3d 536), 07/01/1999**, also ***Freddie Stromatt, et ux. V. Commissioner*, TC Summary Opinion 2011-42**, also ***John E. Morrissey, et ux. V. Commissioner*, TC Summary Opinion 2005-86**, and ***N. Joseph Calarco v. Commissioner*, TC Summery Opinion 2004-94**.

The Doctrine of Equity of Treatment. An agency may make rules and may exercise discretion in that regard, but it is bound by the requirement of equity. If

one party is treated differently than another that is discrimination. There is a duty of administrative consistency that the Internal Revenue Service must adhere to in all matters regarding taxpayers. See ***Contractors Tramp Crop. V. United States, 537 F2d 1160, 1162 (4th CIR. 1976)*** *and* ***IBM Corp v. United States, 343 F2d 914 (CT. CL. 1965)*** and ***Wheeler v. United States, 768 F2d 1333, 1337 (Fed. CIR. 1985).*** **The United States Supreme Court in *U.S. v. Caceres*, 440 US 741 (1979)** stated in part, "Agency violations of their own regulations, whether or not in violation of the United States Constitution, may well be inconsistent with the standards of agency action which the **Administrative Procedures Act (Public Law 79-404)** directs the courts to enforce."

The Rule of Adherence to Precedent. An agency must either adhere to its precedents or provide a reasoned explanation for its failure to do so. **The United States Supreme Court in *Atchison, Topeka & Santa Fe Railway v. Wichita Board of Trade*, 93 S. Ct. 2367, 37 L. Ed. 2nd 350.** stated that this rule was based on the rationale that a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress." These policies are presumed to be carried out best by adherence to the settled rule. Thus, from this presumption it becomes the agency's duty to explain any departure from "prior norms."

Treas. Reg. § 1.183-2(b)(1). This section states: "Similarly, where an activity is carried on in a manner substantially similar to other activities of the same nature which are profitable, a profit motive may be indicated. A change of operating methods, adoption of new techniques or abandonment of unprofitable methods in a manner consistent with an intent to improve profitability may also indicate a profit motive."

Treas. Reg. § 1.183-2(b)(2) this section states: "Where a taxpayer has such preparation or procures such expert advice, but does not carry on the activity in accordance with such practices, a lack of intent to derive profit may be indicated unless it appears that the taxpayer is attempting to develop new or superior techniques which may result in profits from the activity."

ENERGY CREDIT INFO

Qualified Energy Property includes solar energy property **(Treas. Reg. §1.48-9(d)(1)** which is equipment that uses solar energy to generate electricity; to heat, cool, or provide hot water for use in a structure; or to provide solar process heat **(IRC §48(a)(3)(A)(i) and Treas., Reg. § 1.48-9(d)(1).** Solar energy property

specifically does not include property used to generate energy for heating swimming pools. It includes equipment and materials, as well as parts related to the function of that equipment, that use solar energy directly to perform these functions, generally through the "use of equipment such as collectors (to absorb sunlight and create hot liquids or air), storage tanks (to store hot liquids), rock beds (to store hot air), thermostats (to activate pumps or fans which circulate the hot liquids or air), and heat exchangers (to utilize hot liquids or air to create hot air or water), **(Treas. Reg. §1.48-9(d)(1).** "Solar energy property includes equipment that uses solar energy to generate electricity, and includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items. In general, this process involves the transformation of sunlight into electricity through the use of such devices as solar cells or other collectors. However, solar energy property used to generate electricity includes only equipment up to (but not including) the stage that transmits or uses electricity." **See Treas. Reg. §1.49-9(d)(3).** "Equipment that uses solar energy beyond the distribution stage is eligible only if specially adapted to use solar energy." **See Treas. Reg. §1.48-9(d)(5).**

To qualify as solar energy property under **IRC §48,** and to be deductible against a taxpayer's taxes under **IRC §38** the Solar Lenses must therefore either generate electricity; heat, cool, or provide hot water for use in a structure; or provide solar process heat. The Solar Lenses qualify on at least two fronts: they will generate electricity—either through thermal generation or coupled with photovoltaic panels—but at a minimum they will also provide solar process heat through concentrating the sun's energy for use in generating electricity. The statute requires only one or the other, and therefore producing solar process heat is enough to qualify the Solar Lenses as solar energy property. The energy credit is calculated based on the "energy percentage of the basis of each energy property placed in service during the taxable year." Therefore, in order for Solar Lenses to qualify for the energy credit, they must be "energy property" that is "placed in service" during the taxable year for which the credit is claimed.

Energy Property

Under IRC §48(a)(3) and 50(b) and with respect to solar energy property, "Energy Property" is any property that satisfies the following six requirements, under **IRC §48(a)(3)** and **Treas. Reg. §1.49-9 as follows:**

1. The property must be qualified energy property**, see IRC §48(a)(3)(A)**
2. The construction, reconstruction, or erection of the property must be completed by the taxpayer**, (IRC §48(a)(3)(B)(i))** or acquired by the

taxpayer if the original use of the property begins with the taxpayer, **IRC §48(a)(3)(B)(ii).**

3. The property must be property with respect to which depreciation or amortization is allowable, **IRC §48(a)(3)(C).**
4. The property must meet the applicable performance and quality standards, **IRC §48(a)(3)(D).**
5. The property must not be part of a facility the production from which is taken into account in computing the credit for electricity produced from certain renewable resources, **see IRC §48(a)(3)(D).**
6. The property must not be property for which the taxpayer received a grant in lieu of the energy credit, **see IRC §48(d)(1).**

There is no evidence that the Solar Lenses fail under the final two requirements – i.e. (i) they are not part of a facility the production from which is taken into account in computing a credit under **IRC §45,** and (ii) that taxpayers received grants in lieu of the energy credit.

Acquisition and Original Use

The Solar Lenses must either be (i) constructed, reconstructed or erected by the taxpayer, or (ii) acquired by the taxpayer if the original use of such property commences with the taxpayer. **See IRC §48(a)(3)(B).** Property is deemed acquired when reduced to physical possession or control of the taxpayer **(see Treas. Reg. §1.48-2(b)(6),** and original use means the first use to which the property is put, whether or not such use corresponds to the use of such property by the taxpayer, **see Treas. Reg. §1.48-2(b)(7).**

Taxpayers acquire ownership and control of the Solar Lenses under the Purchase Agreement, and none of the Solar Lenses are used by any other person prior to their acquisition by the taxpayer. The Solar Lenses were therefore acquired by the taxpayer and put to their original use by the taxpayer and thus satisfy this requirement of classification as energy property.

Performance and Quality Standards

Energy Property must satisfy certain performance standards, if any, prescribed by the Service in regulation and which are in effect at the time the property is acquired. **See IRC §48(a)(3)(D).** But performance standards are only required to be met if the standards have been set by the Service; if no standards have been set, a taxpayer "need not wait until quality and performance standards are issued before making commitments to acquire property which may be eligible for the business energy credit." **See IRS Announcement 79-99, 1979-28 I.R.B. 36.**

On October 26, 2015, the Service issued a request for comments on definitions of **IRC §48** property and in particular on "the definition of certain equipment using solar energy." **See IRS Notice 2015-70, I.R.B. 2015-43.** Specifically, the Service requested comment on "whether only property that actually produces electricity may be considered energy property or whether property such as storage devices and power conditioning equipment may also be considered energy property." It is clear that the Service is considering applying the energy credit to non-electrical or non-heat producing property, or at the very least that it has been applied to such property in the past so long as it is part of an electrical or heat producing system.

Because no performance standards have been set that would apply to the Solar Lenses, there is no threshold level of electricity or heat that must be produced by the Alternative Energy System before the Solar Lenses can qualify as energy property.

Disqualifying Use

IRC §50(b) disqualifies certain property as energy property if the property is used (i) predominantly outside of the United States, **see IRC §50(b)(1), (ii)** predominantly to furnish lodging or in connection with the furnishing of lodging, **see IRC §50(b)(2), (iii)** by certain tax-exempt organizations, **see IRC §50(b)(3), (iv)** by a United Sates governmental entity, **see IRC §50(b)(4)(A)(i)** or **(v)** by a foreign person or entity **see IRC §50(b)(4)(A)(ii).** None of these disqualifications would apply to the Solar Lenses.

The Solar Lenses purchased by the taxpayers are and will be installed in Millard County, Utah and thus in the United States. Neither are they capable of furnishing lodging or in connection with furnishing lodging. As far as I have been made aware, none of the Purchasers or the Operator are either tax-exempt organizations, governmental entities, or foreign persons, and the Operating &Maintenance Agreement would prevent the Solar Lenses from being used by or assigned to such entities without the express written consent of the Purchaser. Thus, the Solar Lenses are not disqualified under **IRC §50(b)** as energy property.

Amount of Credit

IRC §48(1) states that the amount of the energy credit is calculated based on the basis of each energy property placed in service during the relevant taxable year. "The basis of property generally is the cost of such property." **See IRC §1012(a).** For current Solar Lens Purchasers under a Purchase Agreement, it clearly shows

that the initial basis amount be the Purchase Price of $3,500 per lens. Individual facts and circumstances may vary with each Purchaser that could adjust the basis, but based on the Purchase Agreement, the parties to such an agreement would agree on $3,500 per lens, as the cost and therefore set the initial cost basis of each Solar Lens at that amount.

It is not necessary for the solar energy property to comprise a completely functional solar system in order to qualify for the energy credit. In ***Cooper v. Commissioner*, 88 T.C. 84 (1987),** the Tax Court held that property within the meaning of **IRC §48(a)(3)(A)(i)** is any equipment that uses solar energy to generate electricity; to heat, cool, or provide hot water for use in a structure; or to provide solar process heat, and includes parts solely related to the functioning of such equipment; 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 Energy Policy Act of 2005 (Public Law 109-58) created a 30 percent ITC for residential and commercial solar energy systems that applied to projects placed in service between January 1, 2006 and December 31, 2007. **The Tax Relief and Health Care Act of 2006 (Public Law 109-432)** extended these credits for one additional year through December 31, 2008. **The Emergency Economic Stabilization Act of 2008 (Public Law 110-343)** included an eight-year extension of the residential and commercial ITC, eliminated the monetary cap for residential solar electric installations and permitted utilities and companies paying the alternative minimum tax (AMT) to qualify for the credit. In 2015, the **Omnibus Appropriations Act (Public Law 114-113)** included a multi-year extension of the residential and commercial Investment Tax Credit, changed the previous "placed in service" standard for qualification for the credit to a "commence construction" standard for projects completed by the end of 2023. The taxpayer's solar lenses placed in service letter clearly shows that the solar lenses are in service.

Internal Revenue Code §48(a)(3)(A)(i) clearly states, "Energy Property for purposes of this subpart, the term "energy property" means any property, which is, equipment which uses solar energy to generate electricity; to heat or cool or provide hot water for use in a structure; or to provide solar process heat."

Sale versus Leasing

Because the Solar Lenses qualify under **IRC §48** for a tax credit, whether the taxpayer can claim the energy credit depends in part on the structure of the purchase and lease transactions; that is, whether the sales and lease transactions

under a Purchase Agreement and Operating & Maintenance (O&M) Agreement vests and maintains ownership to the Solar Lenses in a Purchaser (taxpayer) and, therefore, makes a Purchaser (taxpayer) the party entitled to claim the credit.

It must be determined whether a sale occurred under a Purchase Agreement. **See Revenue Ruling 55-540.** Various factors are considered in determining whether a transaction constitutes a sale or a lease for tax purposes. The Service has stated that determining whether a transaction constitutes a sale or a lease "depends upon the intent of the parties as evidenced by the provisions of the agreement, read in light of the facts and circumstances existing at the time the agreement was executed." **See Revenue Ruling 55-540.** Although "no single test, or any special combination of tests, is absolutely determinative" of whether a transaction is deemed a sale, if several conditions are present, and in the absence of evidence to the contrary, the transaction will show an intent to be treated as a "purchase and sale rather than as a lease or rental agreement." **See Revenue Ruling 55-540.**

One condition indicating a sale is that "portions of the periodic payments are made specifically applicable to an equity to be acquired by the lessee." **See Revenue Ruling 55-540.** Under a Purchase Agreement, a Purchaser is obligated to make payments after the down payment on the remainder of the Purchase Price over a period of 30 years. However, the Operator under an O&M Agreement is not obtaining any equity interest in the Solar Lenses, and no part of any Rental Payments are meant to transfer equity to the Operator.
A sale transaction may also be indicated when "some portion of the periodic payments is specifically designated as interest or otherwise readily recognizable as the equivalent of interest." **See Revenue Ruling 55-540.** The Purchase Agreement designates a portion of the Installment Payments as interest at a specific rate. It is clearly noted that no portion of the Rental Payments under an O&M Agreement are designated or attributable as interest.

Finally, a third condition outlined by the Service indicating a sale is that "the lessee will acquire title upon the payment of a stated amount of 'rentals' which under the contract he is required to make." **See Revenue Ruling 55-540**. In this instance, a Purchaser (taxpayer) obtains title to the Solar Lenses under the Purchase Agreement, but does not transfer title to the Operator under the O&M Agreement at any point during the lease term.

Under all three conditions, the circumstances indicate that the lease arrangement under the O&M Agreement was a true lease and not a sale. It states very clearly

that the Purchase Agreement indicates the intention of the parties that the transactions be treated for tax purposes as a sale of Solar Lenses to a Purchaser, which are then subsequently and simultaneously leased to the Operator under an O&M Agreement. As described in a similar transaction in ***Cooper v. Commissioner*, 88 T.C. 84 (1987)** "there were bona fide sales of equipment" where, among other things, i) legal title of the solar equipment passed, ii) all the profits produced from the rental of the systems were received (at least constructively) by the buyers, iii) the seller neither used the equipment nor retained physical possession of it, and iv) the parties treated the transaction as a sale. **See T. C. Memo 1987-84, 105.** This information very clearly shows that a sale of Solar Lenses occurred under the Purchase Agreement.

Once a sale of Solar Lenses occurs under a Purchase Agreement, it must then be determined that the Solar Lenses were leased, rather than sold, under an O&M Agreement. Some of the factors discussed above relate to this issue. **In *Cooper v. Commissioner*,** the court looked at several considerations that would be relevant to such an inquiry: 1) "whether the lessor expected to own an asset with a meaningful residual value at the expiration of the lease term," **See T. C. Memo 1987-84, 106. 2)** "whether the lessor had an equity interest in the leased property," and 3) "whether the lessor retained any risk of economic loss with respect to the property or any potential for economic gain." This is more generally stated as whether the lessor retained the benefits and burdens of ownership. **See *Frank Lyon Co. v. United States, 435 U.S. 561 (1978).***

The Court in ***Cooper*** also recognized that the existence of tax benefits accruing to the lessor, the absence of significant positive net cash flow during the lease term, rental payment geared to the cost of interest and mortgage amortization, and the existence of nonrecourse financing had "minimal significance" to determining the characterization of a lease. ***See Cooper v. Commissioner at 105 citing Estate of Thomas v. Commissioner, 84 T.C. 412 (1985).*** Moreover, "the fact that a lease is part of a package put together by an orchestrator is not fatal to a finding that a lease existed, provided petitioners acquired substantial nontax interests." **See *Cooper v. Commissioner, 88 T.C. 84 (1987).***

Similar to the transactions in ***Cooper***, the lease under an O&M Agreement would be considered a lease rather than a sale. The Operator possesses no equity or ownership rights in the Solar Lenses, and Purchasers could, upon the expiration of their leases with LTB, repossess the Solar Lenses for use in any way they desired. For these and other reasons discussed below regarding the profit-motive of the

taxpayer, it is very clear that a lease under an O&M Agreement is just that: a lease.

DEPRECIATION DEDUCTION

This is the main item that is being disallowed, and is the largest factor in increasing the total income on the audited return. This item is allowed under **IRC §162** as an ordinary and necessary business expense based on the taxpayer's personal property leasing business. Also, see **IRC §48(a)(3)(A)(i)** clearly showing that 85% of the total cost of the solar lenses **(IRC §1231 property)** is eligible for the bonus depreciation **(as per the Tax Relief, Unemployment Insurance Re-Authorization, and Job Creation Act of 2010 Public Law 111-312).**

The taxpayer is allowed the deduction for depreciation of the lenses placed in service as per **Treasury Regulations §1.46-3(d)(2**) that states in part: "in the case of property acquired by the taxpayer for use in his trade or business (or for the production of income), the following are examples of cases where property shall be considered in a condition or state of readiness and availability for a specifically designed function: **(i)** Parts are acquired and set aside during the taxable year for operational time loss. Also **(iii)** Equipment is acquired for a specifically assigned function and is operational but is undergoing testing to eliminate any defects. The taxpayer's purchase and rental of the solar lenses meets these requirements. In addition, the company that rents the lenses from the taxpayer has always been in compliance with all the Millard County regulatory requirements at the research and development site, proving the lenses are placed in service. The company also has their business license and all conditional use permits required to operate the site in the city of Delta, Millard County, Utah.

Internal Revenue Code §167 (a)(1) clearly states "there shall be allowed as a deprecation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) of property used in a trade or business". The taxpayer has provided proof (the placed-in-service letters) that the solar lenses are placed in service and therefore allowed the deprecation deduction under **Internal Revenue Code §162.**

Internal Revenue Code §167(c)(2)(B) Special rule for leased property subject to lease clearly states, "if any property is acquired subject to a lease the entire adjusted basis shall be taken into account in determining the depreciation deduction (if any) with respect to the property subject to the lease." The taxpayer has attached proof of the lease in the Operation & Maintenance Agreement.

Internal Revenue Code §1012(a) sets forth the foundational principle that the basis of property for tax purposes shall be the cost of such property. The cost, in turn, is clearly defined by **Income Tax Regulation §1.1012-1(a)** as the amount paid for the property in cash or other property. The taxpayer has attached proof of payment (see Invoices) for the Solar Lenses

Useful life of the solar lenses is clearly shown in **Revenue Procedure 87-56 1987-2 CB 674 MACRS Asset Life table,** Description of assets included D: Alternative Energy Property described in **IRC §48(1)(3)(viii) or (iv), or IRC §48(1)(4)** as 5 years under the General Depreciation System**.** Also, **Internal Revenue Code §168(b)(4)** clearly shows that the solar lenses salvage value is treated as zero.

PLACED IN SERVICE

Solar energy property must be "placed in service" in order to qualify for the energy credit.

With respect to the purchasers of Solar Lenses from RaPower3, those taxpayer's have leased the Solar Lenses to LTB LLC for use in an Alternative Energy System. Property is placed in service when it is "placed in a condition or state of readiness and availability for a specifically assigned function," **see Treas. Reg. §1.46-3(D)(1)(II).** With respect to leased property, the Tax Court has determined that a lessor of solar energy property is deemed to have placed the property in service when it is first held out for leasing to others in a profit-motivated leasing venture, ***(Cooper v. Commissioner at 114 relying on Waddell v. Commissioner, 86 T.C. 848 (1986)*** the taxpayers executed distribution agreements simultaneously with the purchase, showing that the equipment was available for lease at the time of purchase even though it was not actually leased until more than a year later) although "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." **See *Waddell v. Commissioner, 86 T.C. 848, 897 (1986) and Commissioner v. Groetzinger, 480 U.S. 23, 36 (1987).***

The taxpayer's hold the Solar Lenses out for lease when they enter into the O&M Agreement. For most, if not all taxpayer's, that occurred on or about the same date they signed the Purchase Agreement. Therefore, the Solar Lenses will be available for lease as soon as they are manufactured and taxpayers acquire them. Because the taxpayer's hold the Solar Lenses out for lease on or about the date they acquire the Solar Lenses, the Solar Lenses are generally placed in service on the acquisition date even if they ultimately will not be actually leased and installed until a later time.

DESCRIPTION OF BUSINESS

The taxpayer is in the business of leasing solar lenses used to produce heat for various purposes by the company (LTB LLC) which is renting the lenses. **Treasury Regulations §1.469-5T(a)** states very clearly that the taxpayer only needs to meet one of the 7 tests in this regulation. **Test #2 states** "The taxpayer does substantially all the work in the activity". Simply stated because the taxpayer does all the work in his business of leasing tangible personal property (the Solar Lenses) the income or loss will be non-passive. There is no specific number of hours associated with this test. In addition, the term "substantially" is not defined in the regulations.

Substantially All Participation is by the Taxpayer. A taxpayer materially participates in an activity if his or her "participation in the activity for the taxable year constitutes substantially all of the participation in such activity of all individuals (including individuals who are not owners of interests in the activity) for such taxable year." **See Temp. Treas. Reg. §1.469-5T(a)(2).** As in ***Misko v. Commissioner, 90 T.C.M. (CCH) 15, 20 (2005),*** this "test is particularly relevant" to many of the taxpayer's who are operating a lens leasing business. In **Misko,** the taxpayer operated an equipment leasing business, whereby the taxpayer individually purchased equipment that was then leased to the taxpayer's law firm. In that case, the Tax Court found that the taxpayer materially participated in the business under this second material participation test found in **Temp. Treas. Reg. § 1.469-5T(a)(2)**. Because the taxpayer intends to exclusively manage the solar lens leasing business, then the taxpayer that would "meet this safe harbor test and thus satisfy the material participation standard", **see *Misko v. Commissioner, 90 T. C. M. (CCH) 15, 20 (2005)***

The Small Business/Self-Employed section of the IRS website defines self-employment as "an activity carried on for livelihood or in the good faith to make a profit". Beginning in 1991, the IRS issued instructions for the Form 1040, Schedules C and E that stated, "Use Schedule C to report income and expenses from the rental of personal property, such as equipment or vehicles". Then in 1992, the IRS added an instruction on the face of the Schedule E to "report income and expenses from the rental of personal property on Schedule C or C-EZ". Publication 334, Tax Guide for Small Business, page 21 states "If you are in the business of renting personal property (equipment, vehicles, formal wear, etc.), include the rental amount you receive in your gross receipts on Schedule C or C-EZ.

The following court cases reinforce the requirement of reporting the income and expenses on a Schedule C or C-EZ for the business of renting tangible personal property. See ***Stevenson v. Commissioner 57 T.C.M. 1032 (1989)*** and ***Walker v. Commissioner 101 T.C. 537 (1993).***

There is one other important fact. The taxpayer is also allowing International Automated Systems to use the solar lenses for advertising purposes and research and development. The taxpayer will then be allowed a bonus payment that will be sizeable. Therefore, the taxpayer is currently engaged in a business activity and entitled to all normal business deductions as per **IRC §162.**

Generally, "there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business ..." **IRC §162(a).** Specific to this case, **IRC §167** allows for depreciation deductions for "exhaustion, wear and tear" of property used in a "trade or business, or "of property held for the production of income." **See IRC §167(a)** Although **IRC § 162, and §167,** and their related treasury regulations do not contain a definition of "trade or business," the United States Supreme Court, in ***Commissioner v. Groetziner*, 480 U.S. 23 (1987)** has stated "that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify." **See *Commissioner v.Groetzinger, 480 U.S. 23 (1987) at* 35.** This has been referred to as the "primary purpose" standard, **see *Misko v. Commissioner*, T.C.M. (CCH) 15, 17 (2005).**

According to IRS Publication 334, Tax Guide for Small Business, for use in preparing 2016 Returns, "a trade or business is generally an activity carried on to make a profit. The facts and circumstances of each case determine whether or not an activity is a trade or business. You do not need to actually make a profit to be in a trade or business as long as you have a profit motive." The taxpayer leasing of the Solar Lenses to a third party would qualify as a "trade or business" as defined by the Court in **Commissioner v. *Groetzinger*** because an individual taxpayer could 1) engage in the activity for profit and 2) do so with continuity and regularity.

For taxpayer's who choose to operate their lens leasing business as a sole proprietor, an S corporation, or a single-member LLC, **Treas. Reg. § 1.183-2(b)** contains nine objective factors that are used to determine whether an activity is engaged in for profit, which will be addressed in more detail, below. However, if

the taxpayer chooses to operate his or her lens leasing business through a C corporation, **IRC § 183** does not apply. In this situation, a taxpayer must look to the "primary purpose" standard described in **Groetzinger.** In applying **Groetzinger,** courts have looked at whether the taxpayer's activity was a "hobby masquerading as a business," such as raising animals, **see *Misko at 18 (citing Cornfield v. Commissioner, 79 F 2nd 1049, 1052 (D. C. Cir. 1986) and Bessenyey v. Commissioner, 379 F.2nd252 (2d Cir. 1967)).*** In an equipment leasing case, the United States Tax Court also considered whether the leased equipment was purchased for personal use. A taxpayer who operates a solar lens leasing business through a C corporation should qualify as a "trade or business" for tax purposes so long as the taxpayer was not pursuing the business as a hobby and so long as the taxpayer was not going to personally use the Solar Lenses.

The nine factors, applied to a client considering a lens leasing business organized as a sole proprietor, are as follows:

1. **"Manner in Which the Taxpayer Carries on The Activity.** The fact that the taxpayer carries on the activity in a businesslike manner and maintains complete and accurate books and records may indicate that the activity is engaged in for profit." **See Treas. Reg. §1.183-2(b)(1).** A taxpayer who keeps records of his or her lens leasing business could meet this factor. To satisfy this factor, the taxpayer must keep records of amounts paid as down payments for Solar Lenses, commissions earned, money expended to visit the manufacturing facilities and installation site for the lenses, and/or logs of time spent researching and analyzing the energy market and any out of pocket business expenses.
2. **"The Expertise of the Taxpayer or His Advisors.** Preparation for the activity by extensive study of its accepted businesses, economic, and scientific practices, or consultation with those who are expert therein, may indicate that the taxpayer has a profit motive where the taxpayer carries on the activity in accordance with such practices." **See Treas. Reg. §1.183-2(b)(2).** An individual taxpayer would satisfy this factor by studying equipment leasing practices or by consulting with his or her attorney and/or accountant.
3. **"The Time and Effort Expended by the Taxpayer in Carrying on the Activity.** The fact that the taxpayer devotes much of his personal time and effort to carrying on an activity, particularly if the activity does not have substantial personal or recreational aspects, may indicate an intention to derive a profit. ...the fact that the taxpayer devotes a limited amount of time to an activity does not necessarily indicate a lack of profit motive where the taxpayer employs competent and qualified

persons to carry on such activity" **see Tears. Reg. §1.183-2(b)(3).** The taxpayers might spend a great deal of time promoting the sale of solar lenses in an effort to expand the commission-based side of the business, while others might spend little or no time on sales. The taxpayer might spend a great deal of time and effort understanding leasing businesses or solar energy. The taxpayer might also spend time traveling to the manufacturing and installation site to monitor the business and the progress of the companies from whom the taxpayer expects to generate income, including International Automated Systems (from whom the taxpayer expects to earn a percentage of profits) and the Operator. Based on these potential activities, a taxpayer would satisfy this factor.

4. **"Expectation That Assets Used in Activity May Appreciate in Value.** The term 'profit' encompasses appreciation in the value of assets, such as land, used in the activity. Thus, the taxpayer may intend to derive a profit from the operation of the activity, and may also intend that, even if no profit from current operations is derived, an overall profit will result when appreciation in the value of land used in the activity is realized since income from the activity together with the appreciation of land will exceed expenses of operation...." **see Treas. Reg. §1.183-2(b)(4).** Because the Solar Lenses are used in an Alternative Energy System, then it is possible that the Solar Lenses used in the taxpayer's business could increase in value over time.
5. **"The Success of The Taxpayer in Carrying on Other Similar or Dissimilar Activities.** The fact that the taxpayer has engaged in similar activities in the past and converted them from unprofitable to profitable enterprises may indicate that he is engaged in the present activity for profit, even though the activity is presently unprofitable" **see Treas. Reg. §1.183-2(b)(5).** Some taxpayers may own other equipment leasing businesses or engage in other entrepreneurial activities successfully.
6. **The Taxpayer's History of Income or Losses With Respect to the Activity.** A series of losses during the initial or start-up stage of an activity may not necessarily be an indication that the activity is not engaged in for profit. However, where losses continue to be sustained beyond the period which customarily is necessary to bring the operation to profitable status such continued losses, if not explainable, as due to customary business risks or reverses, may be indicative that the activity is not being engaged in for profit", **see Treas. Reg. §1.183-2(b)(6).** An individual taxpayer would likely not realize profit currently from the leasing activity itself, he or she could potentially realize a profit from the commission portion of selling Solar Lenses. Additionally, based on the

information provided, the taxpayer anticipates that as soon as the Solar Lenses are used in a system that generates revenue, the taxpayer will begin to realize profits from rent collections within that same year and bonus payments for the use of the solar lenses.

7. **"The Amount of Occasional Profits, If Any, Which Are Earned.** The amount of profits in relation to the amount of losses incurred, and in relation to the amount of the taxpayer's investment and the value of the assets used in the activity, may provide useful criteria in determining the taxpayer's intent. ...Moreover, an opportunity to earn a substantial ultimate profit in a highly speculative venture is ordinarily sufficient to indicate that the activity is engaged in for profit even though losses or only occasional small profits are actually generated", **see Treas. Reg. §1.183-2(b)(7).** The combination of the anticipated rental payments from the Operator and payments on bonus contracts does provide the taxpayer with "an opportunity to earn a substantial ultimate profit," however speculative it might be considered, satisfying this factor.
8. **"The Financial Status of The Taxpayer.** The fact that the taxpayer does not have substantial income or capital from sources other than the activity may indicate that an activity is engaged in for profit. Substantial income from sources other than the activity (particularly if the losses from the activity generate substantial tax benefits) may indicate that the activity is not engaged in for profit especially if there are personal or recreational elements involved", **see Treas. Reg. §1.183-2(b)(8).** Whether this factor can be met is highly dependent on the circumstances of the individual taxpayer. Until the taxpayer receives rental payments and bonus payments, however, it is likely that the losses from the activity will generate substantial tax benefits, making it less likely that taxpayers could satisfy this individual factor.
9. **Elements of Personal Pleasure or Recreation.** The presence of personal motives in carrying on of an activity may indicate that the activity is not engaged in for profit, especially where there are recreational or personal elements involved. On the other hand, a profit motivation may be indicated where an activity lacks any appeal other than profit...." **see Treas. Reg. §1.183-2(b)(9).** Although some taxpayers may be interested in purchasing Solar Lenses because they are interested in investing in renewable energy, some might be interested in purchasing Solar Lenses only for the potential long-term return from rents and bonuses, or from the more immediate potential for commission income. There is no element of personal pleasure or recreation inherent in the Solar Lenses.

Based on the nine factors, it is possible that a sole proprietor taxpayer could satisfy some, none, or all of the nine objective factors. As stated in **Treas. Reg. §1.183-2(a),** it is not necessary that the taxpayer's expectation of a profit be reasonable, only that "the facts and circumstances ... indicate that the taxpayer entered into the activity, or continued the activity, with the objective of making a profit. In determining whether such an objective exists, it may be sufficient that there is a small chance of making a large profit." It is very clear that (based on information from the taxpayer) that the taxpayer is entering into a trade or business "for profit," as defined in **IRC §183** so long as their individual situations satisfy at least one of the nine factors.

Material Participation

The taxpayer's business of leasing Solar Lenses constitutes a trade or business, as described above. Under **IRC § 469(h)(1),** "A taxpayer shall be treated as materially participating in an activity only if the taxpayer is involved in the operations of the activity on a basis which is "regular, continuous, and substantial." **See Temp. Treas. Reg. §1.469-5T(a)(1).** "Participation" generally means "any work done by an individual (without regard to the capacity in which the individual does the work) in connection with an activity in which the individual owns an interest at the time the work is done." **See Treas. Reg. §1.469-5T(f**). The taxpayer's solar lens leasing business is the rental of **IRC §1231** tangible personal property and, therefore, is not a passive activity under **IRC § 469(c)(2) and (j)(8).** The taxpayer's business activity qualifies for the incidental activity exception as described in **Temp. Treas. Reg. § 1.469-1(T)(e)(3)(vi)(C)(1)– (3**) because the taxpayer 1) owns an interest in the trade or business, 2) the solar lenses will predominantly be used in the trade or business during the taxable year, and 3) the gross rental income from the solar lenses for the taxable year will be less than 2 percent of the lesser of (i) the unadjusted basis of the lenses and (ii) the fair market value of the lenses. **See *Misko v. Commissioner, 90 T.C.M. (CCH) 15, 20 (2005),* at 19** (the equipment leasing business in question qualified for incidental activity exception conditions and, therefore, the solar lens leasing business was a non-rental activity, not to be treated as passive under **IRC §469**). **See *Stevenson v. Commissioner 57 T.C.M. 1032 (1989)*** and ***Walker v. Commissioner 101 T.C. 537 (1993).***

One of seven tests described in **Temporary Treas. Reg. §1.469-5T.70** would apply to the taxpayer depending on his or her circumstances. The activity of a taxpayer's spouse is also considered in determining whether the taxpayer meets one of the seven tests. **See IRC §469(h)(5)** that states in part, "In the case of any person who is a married individual (within the meaning of **IRC §7703**) for the

taxable year, any participation by such person's spouse in the activity during the taxable year (without regard to whether the spouse owns an interest in the activity and without regard to whether the spouses file a joint return for the taxable year) shall be treated, for purposes of applying **IRC §469** and the regulations there under to such person, as participation by such person in the activity during the taxable year." **Temp. Treas. Reg. § 1.469-5T(f)(3). See also Montgomery v. Comm'r, 105 T.C.M.(CCH) 1865, 1867 (2013).**

"The extent of an individual's participation in an activity may be established by any reasonable means. Contemporaneous daily time reports, logs, or similar documents are not required if the extent of such participation may be established by other reasonable means." **See Temp. Treas. Reg. §1.469-5T(f)(4).**

The application of the seven material participation tests is highly fact sensitive. The Tax Court carefully reviews and analyzes the individual circumstances of each taxpayer and the credibility of the evidence before it. **See Montgomery v. Comm'r, 105 T.C.M. (CCH) 18651867–1868 (2013)** (finding material participation based on taxpayer's credible testimony even though reports and logs not kept); **Hailstock v. Comm'r, 112 T.C.M. (CCH) 200 (2016)** (finding material participation based on taxpayer's "convincing" "narrative summary"); **Coastal Heart Medical Group, Inc. v. Comm'r, 109 T.C.M. (CCH) 1424, (2015)** (finding no material participation where taxpayer's testimony was "exaggerated and self-serving" and "vague" and where taxpayer provided inadequate documentary support); **Lamas v. Comm'r (109 T.C.M. (CCH) 1299 (2015)** (finding material participation based on detailed analysis of testimony of multiple witnesses and corroborating phone records).

Therefore, an individual taxpayer might satisfy the requirements of one or more of the material participation tests by several means depending on his or her particular circumstances.

1. **The 500 Hour Rule.** A taxpayer materially participates in an activity if he does so "for more than 500 hours" during a taxable year. **See Temp. Treas. Reg. §1.469-5T(a)(1).** Taxpayer's participating in a solar lens leasing business could meet this rule depending on their level of involvement in the business.
2. **Substantially All Participation is by the Taxpayer.** A taxpayer materially participates in an activity if his or her "participation in the activity for the taxable year constitutes substantially all of the participation in such activity of all individuals (including individuals who are not owners of interests in

the activity) for such taxable year." **See Misko v. Commissioner, 90 T.C.M. (CCH) 15, 20 (2005),** this "test is particularly relevant" to the taxpayer who is operating a solar lens leasing business. In **Misko,** the taxpayer operated an equipment leasing business, whereby the taxpayer individually purchased equipment that was then leased to the taxpayer's law firm. In that case, the Tax Court found that the taxpayer materially participated in the business under this second material participation test found in **Temp. Treas. Reg. § 1.469-5T(a)(2).** Because the taxpayer does exclusively manage the solar lens leasing business, then he or she does "meet this safe harbor test and thus satisfy the material participation standard."

3. **More than 100 Hours of Participation by Taxpayer, if No Other Individual Participates More.** A taxpayer materially participates in an activity if he or she does so "for more than 100 hours during the taxable year, and such individual's participation in the activity for the taxable year is not less than the participation in the activity of any other individual (including individuals who are not owners of interests in the activity) for such year." **See Temp. Treas. Reg. §1.469-5T(a)(3).**
4. **Significant Participation Activities.** A taxpayer materially participates in an activity if "the activity is a significant participation activity (within the meaning of paragraph (c) of this section) for the taxable year, and the individual's aggregate participation in all significant participation activities during such year exceeds 500 hours." **See Temp. Treas. Reg. §1.469-5T(a)(4).** An activity is a "significant participation activity" under **Temp. Treas. Reg. §1.469-5T(c)** if the activity would not otherwise qualify for material participation under the other six tests and if the taxpayer spends more than 100 hours participating in the activity. If the taxpayer also participates in other 100-plus-hour passive activities, which, in the aggregate, total more than 500 hours, the taxpayer would satisfy this test.
5. **Material Participation for Five out of Ten Years.** A taxpayer materially participates in an activity if the taxpayer "materially participated in the activity (determined without regard to this paragraph (a)(5)) for any five taxable years (whether or not consecutive) during the ten taxable years that immediately precede the taxable year." **See Temp. Treas. Reg. §1.469-5T(a)(5).**
6. **Personal Service Activity for any Three Prior Years.** A taxpayer materially participates in an activity if it "is a personal service activity (within the meaning of paragraph (d) of this section), and the individual materially participated in the activity for any three taxable years (whether or not consecutive) preceding the taxable year." **See Temp. Treas. Reg. §1.469-5T(a)(6).** The personal activities found in **Treas. Reg. § 1.469-5T(d)** are

defined as "personal services" performed in "the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, or consulting ..." The solar lens leasing business is not a personal service activity as defined in the regulations, so this section does not apply.

7. **Facts and Circumstances**. A taxpayer materially participates in an activity if, "based on all of the facts and circumstances (taking into account the rules in paragraph (b) of this section), the individual participates in the activity on a regular, continuous, and substantial basis during such year." **See Temp. Treas. Reg. §1-469-5T(a)(7).** Under paragraph (b), the taxpayer must participate for more than 100 hours during the taxable year, and no one besides the taxpayer may be paid for management services or participate more than the taxpayer. **See Temp. Treas. Reg. §1.469-5T(b)**. "Material participation may be difficult to show under the facts and circumstances test, and probably requires establishing an unusually important type of involvement by the taxpayer, preferably accompanied by close to 500 hours of involvement." **See Daniel N. Shaviro, 549-2nd T.M., Passive Loss Rules, Detailed Analysis, III. Identifying Passive Activities, B. Determining Whether an Activity Is Passive.**

As stated earlier in the energy credit section described above the one requirement for property to qualify is "energy property" within the meaning of **IRC § 48** is that the property qualify for depreciation. **See IRC §48(a)(3)(C). Treas. Reg. § 1.48-1(b)(1)** clarifies that, "a deduction for depreciation is allowable if the property is of a character subject to the allowance for depreciation under section 167 ..." Under **IRC § 167(a),** depreciation is allowed for property either (i) "used in the trade or business" **see IRC §167(a)(1)** or **(ii)** "held for the production of income." **See IRC §167(a)(2).**

One other important point is the **Kirton/McConkie** legal memorandum which states in part "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".

The **Anderson Law Center P C** letter explaining the potential tax advantages of the lenses. It reviews four possible ways to reduce tax liability. 1. Energy Credits, 2. Depreciation, 3. IRC Section 179 costs, and 4. Deductions and expenses.

IRS NOTICE 2016-31

The IRS said that developers will have 4 years to complete a new wind farm or other renewable energy project without having to prove that the construction work was continuous. The four years will be measured from the end of the year in which construction starts on the project.

For example, if a wind farm started in 2013, then the project must be completed by the end of 2017. If it takes longer, then the developer will have to prove that the work was continuous. A taxpayer may establish that the work was continuous from the beginning of construction by proving that "physical work of a significant nature" was at the project site or at a factory on equipment for the project.

PRIOR YEAR CREDIT

The fact that the auditor disallowed prior year credits from a closed tax year and then added it to another tax year is not accurate. The auditor also did not give any "**Explanation of Items**" that fully explains what Code Section is allowing this action. We request that the auditor give us a clear and concise explanation of their actions. We strongly believe that this action by the auditor does not follow the law as stated in **The Emergency Economic Stabilization Act of 2008, HR 1424 Public Law 110-343.**

CONCLUSION

For the reasons stated herein and the testimony that I gave during my deposition with the Department of Justice attorney on September 20, 2017, I believe the tax treatment I and others have recommended for energy tax credits and depreciation are valid and, until a tax court judge or appellate court authority dictates otherwise, said treatment continues to be valid.

Sincerely,

Richard Jameson

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Southern Utah State College 1980
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Major in Economics
William Howard Taft University 2008
Master of Science in Taxation
Professional Certificates
IRS Enrolled Agent #46729 1990
National Tax Practice Institute:
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Master Graduate of Examination 2004

EMPLOYMENT EXPERIENCE

1968-1969
United States Army
Fire Control Crewman Nike Hercules Missile
1970-1976
Eureka Paper Box Company
Right Angle Glue Machine Operator, Shipping Clerk and Truck Driver

1980-1987

Health Director Paiute Indian Tribe Cedar City, UT

Oversaw the delivery of health services to tribal members, wrote and supervised block grants for child care and energy assistance. Director of the tribe's Head Start Program. Supervised 22 full and part time employees.

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Tax Preparer H&R Block Cedar City, UT

Prepared tax returns for HRB clients as needed.

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