

BY THOMAS RATTs

Gone with the Wind (Energy)

The Transferability of Production Tax Credits and the Implications for Secured Lenders in Bankruptcy

As part of the One Big Beautiful Bill Act (OBBBA), Congress has limited clean-energy tax credit subsidies enacted under the Inflation Reduction Act of 2022 (IRA), while the fate of many clean-energy projects hinges on these subsidies.¹ As a result of anticipated distress in this market, bankruptcy courts may have to decide whether secured creditors have liens against clean-energy tax credits as a distinct asset. This article focuses on whether creditors' liens could attach to a debtor's production tax credits, which are transferable under the IRA.

The IRA's Tax Credit Transferability

The OBBBA is "rolling back" the production tax credit (PTC) for wind and solar projects.² The PTC is a "dollar-for-dollar" tax credit based on the kilowatt hours of electricity generated and sold by wind and solar projects and is available every tax year for the first 10 years of the project.³ The IRA had extended the PTC and also aimed, in part, to advance the use of such federal income tax credits as the PTC by introducing the concept of *transferability*: the ability for eligible taxpayers to transfer certain tax credits to unrelated third parties for cash consideration.⁴

The statutory basis for transferability lies in § 6418(a) of the Internal Revenue Code, which provides that an eligible taxpayer can transfer their PTC to a "transferee taxpayer," who "shall be treated as the taxpayer for purposes of this title with respect to such credit."⁵ Under § 6418, a PTC may only offset existing tax liability and cannot result in a tax refund.⁶ Consequently, clean-energy project companies, who might not have sufficient tax liability during the initial stages of devel-

opment, lose the value of the credit. Transferability resolves this issue: The taxpayer receives cash, while the transferee obtains the tax credit, which is sold at a discount (e.g., \$0.90 cents per \$1 of credit).⁷

Transferability gives clean-energy project companies an alternative to traditional tax equity arrangements, where developers must seek out tax-credit investors willing to enter into complex partnership structures.⁸ Prior to the IRA, project companies that generated the PTCs had to allocate them to tax-credit investors as majority equityholders, and the tax investor's equity position would diminish once the credits were exhausted.⁹ Non-partner lenders who finance the project company's operations could not assert control over the credits in the event of default.¹⁰ The transferability of PTCs under the IRA now renders them subject to security interests.¹¹

Securing an Interest in Tax Credits

PTCs are more frequently the subject of security agreements because most — if not all — of the transactions that generate these PTCs involve third-party lending.¹² Courts have held that a security interest cannot be created in a nonrefundable tax credit, and these courts have based this conclusion partly on the fact that non-refundable tax credits are typically not transferable.¹³

City of Chicago v. Michigan Beach Housing Cooperative was the first case to consider whether tax credits constitute general intangibles under Article 9.¹⁴ There, the City claimed a security interest in low-income housing tax credits pursuant to a lien on the borrower's personal property "used in connection" with the secured real estate.¹⁵ The City asserted that the credits qualified as general intangibles and that funds obtained through syndication of those credits to tax investors were proceeds of its collateral.¹⁶



Thomas Ratts
U.S. Bankruptcy
Court (D. Ore.)
Portland

Thomas Ratts is the term law clerk for Hon. Peter C. McKittrick of the U.S. Bankruptcy Court for the District of Oregon in Portland.

1 See Lindsey Wise & Jennifer Hiller, "Clean Energy Projects Hinge on Senate Megabill Showdown," *Wall St. J.* (June 19, 2025), [wsj.com/politics/policy/clean-energy-projects-hinge-on-senate-showdown-79b42f8e](https://www.wsj.com/politics/policy/clean-energy-projects-hinge-on-senate-showdown-79b42f8e) (subscription required to view article; unless otherwise specified, all links in this article were last visited on June 24, 2025).

2 One Big Beautiful Bill Act, P.L. 119-21, July 4, 2025, 139 Stat 72, § 70512.

3 See I.R.C. § 45.

4 Hayden S. Baker, Jeffrey Davis & Nadav C. Klugman, "Clean Energy Tax Credits — Transferability and Deal Structure Alternatives," White & Case LLP (May 20, 2025), [whitecase.com/insight-our-thinking/clean-energy-tax-credits-transferability-and-deal-structure-alternatives](https://www.whitecase.com/insight-our-thinking/clean-energy-tax-credits-transferability-and-deal-structure-alternatives).

5 See I.R.C. § 6418(a).

6 Nicholas H. Kappas, "Selling Federal Energy Tax Credits: Who, What, When, and How ... and Other Important Points," Thompson Coburn LLP (July 23, 2023), thompsoncoburn.com/insights/selling-federal-energy-tax-credits-who-what-when-and-how-and-other-important-points.

7 *Id.*

8 Harry Teichman, "Securing an Interest in Transferable Energy Credits," 187 Tax Notes Fed. 75, 75 (April 7, 2025).

9 *Id.*

10 *Id.* at 77.

11 See Christopher K. Odinet, "Testing the Reach of UCC Article 9: The Question of Tax Credit Collateral in Secured Transactions," 64 S. C. L. Rev. 143, 177 (2012) ("Courts should focus on the transferability characteristics of tax credits — the aspect that is most important in terms of providing security.").

12 Teichman, *supra* n.8.

13 *City of Chicago v. Michigan Beach Housing Coop.*, 609 N.E. 2d 877 (Ill. App. Ct. 1993); *In re Lewis & Clark Apartments LP*, 479 B.R. 47, 52 (B.A.P. 8th Cir. 2012).

14 *Michigan Beach Housing Coop.*, 609 N.E. 2d at 885.

15 *Id.* at 885.

16 *Id.*

The court rejected this view, reasoning that the credits “do not constitute a right to a payment of money, have no independent value, and are not freely transferable upon receipt,” and therefore could not be considered general intangibles.¹⁷ Accordingly, the City’s lien did not reach the tax credits or the syndication proceeds.¹⁸

In his article “Testing the Reach of UCC Article 9: The Question of Tax Credit Collateral in Secured Transactions,” Prof. Chris Odinet criticized the *Michigan Beach Housing Cooperative* court’s reasoning because while it is true that a nonrefundable tax credit does not entitle the holder to payment from the government *in the form of a refund*, the ability to reduce tax liability plainly has value.¹⁹ The court’s denial of “independent value” is debatable, but its emphasis on the nontransferability of the credits as the decisive factor was well-founded — and remains instructive.²⁰

Another opinion addressing this issue is *In re Lewis & Clark Apartments*, whereby the Eighth Circuit Bankruptcy Appellate Panel emphasized the significance transferability when it had to determine whether a lender held a security interest in low-income housing tax credits for purposes of valuing its secured claim.²¹ The court found that a party could not separately encumber credits as “general intangibles”; rather, they were inseparable from the real estate from which they arose. The court reasoned that although the partners could allocate credit use contractually, they could not transfer the credits to a party lacking an ownership interest in the underlying property.²²

PTC Secured Claims in Bankruptcy

The key question is whether a creditor with a security interest in a debtor’s “general intangibles” has a secured claim in a transferable PTC from clean energy generated prepetition, and how courts will treat these interests in bankruptcy. Whether, and to what extent, a creditor has a secured claim in bankruptcy is determined under § 506(a)(1) of the Bankruptcy Code, which provides that an allowed claim “secured by a lien on property in which the estate has an interest” is a secured claim “to the extent of the value of such creditor’s interest in the estate’s interest in such property.”²³

First, the estate has an interest in the PTC because it is property of the estate, defined under § 541(a)(1) of the Code to include “all legal or equitable interests of the debtor in property as of the commencement of the case.”²⁴ The fact that a debtor may have ability to transfer the PTC for value reflects a legally cognizable interest sufficient to bring the credit within the estate.²⁵

Second, the Code defines “lien” as an “interest in property to secure payment of a debt.”²⁶ Interests in property are

created and defined by state law.²⁷ The creditor’s interest in the property will depend on the validity of the lien, and the validity of a lien is also determined by underlying state law.²⁸

Under state law, PTCs likely qualify as intangible personal property because “they have limited intrinsic value, and ultimately can only be claimed or enforced by a legal action, much like goodwill, even if they are intrinsically tied to a business or real property.”²⁹ At common law, PTCs would likely be classified as a “chose in action,” a category incorporated into the definition of “general intangibles,” a type of collateral under Article 9.³⁰ Now that the PTC could hypothetically be transferred pursuant to § 6418 of the Internal Revenue Code to a secured party in the event of a default, it would appear to be an interest in property to secure payment of a debt.³¹

If a creditor’s security interest in a PTC is enforceable under state law against the debtor, the creditor will have a claim secured by a lien on the PTC (to the extent that the claim is supported by the PTC’s value).³² However, for the security interest to be enforceable against the debtor, the security interest must have attached.³³

Attachment Issues

Attachment under § 9-203 of the Uniform Commercial Code requires that the debtor have either (1) rights in the collateral, or (2) the power to transfer rights in the collateral to a secured party.³⁴ A claim to a federal tax benefit arises under federal tax law, therefore a debtor likely obtains rights in the PTC at the close of the relevant tax year when the taxpayer has satisfied the procedural requirements to obtain the credit according to relevant tax regulations.³⁵

The taxpayer satisfies the procedural requirements to obtain and transfer a PTC after the following conditions are met: Internal Revenue Service (IRS) registration of the credit, execution of a binding purchase agreement, generation of the credit by the project, timely filing of relevant information pertaining to the credit, and a “transfer election statement” with its annual return identifying the transferee taxpayer.³⁶ Once the transferee taxpayer has been identified in the transfer election statement filed, the transfer of the PTC is irrevocable,³⁷ and the transferee taxpayer may only claim the tax credit in the tax year ending with or after the tax year of the transferor.³⁸

Therefore, if a taxpayer elects to irrevocably transfer the PTC when filing its transfer election statement with its

27 *Butner v. United States*, 440 U.S. 48, 55 (1979).

28 See, e.g., *In re Holiday Airlines Corp.*, 620 F.2d 731, 733 (9th Cir. 1980); *In re Utah Aircraft All.*, 342 B.R. 327, 333 (B.A.P. 10th Cir. 2006).

29 *Kingfisher Wind LLC v. Wehmuller*, 521 P.3d 786, 792 (Okla. 2022).

30 See *In the Matter of Gross-Feibel Co. Inc.*, 21 B.R. 648, 649 (Bankr. S.D. Ohio 1982) (finding that right to receive check for refund of excess state unemployment taxes represents “a kind of property known in the law as a chose in action or a thing in action,” which is included in definition of “general intangible” in Article 9).

31 See Teichman, *supra* n.8 at 78.

32 See, e.g., *In re Woolsey*, 696 F.3d 1266, 1272 (10th Cir. 2012); *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 239 (1989).

33 U.C.C. § 9-203(a).

34 U.C.C. § 9-203(b)(2).

35 See *In re Richardson*, 216 B.R. 206, 211 (Bankr. S.D. Ohio 1997) (“In the context of a bankruptcy proceeding, it has also been determined that the obligation of the IRS to a debtor for a [refundable tax credit] arises as of the end of the relevant tax year and the debtor only has to have satisfied the procedural requirements to secure the tax refund.”).

36 See 26 C.F.R. § 1.6418-2; see also Teichman, *supra* n.8 at 76.

37 I.R.C. § 6418(e)(1).

38 I.R.C. § 6418(d).

17 *Id.* at 886 (citing *Randall v. Loftsgaarden*, 478 U.S. 647, 656-57 (1986)).

18 *Id.*

19 See Odinet, *supra* n.11 at 175-76.

20 See *id.* at 177.

21 *In re Lewis & Clark Apartments LP*, 479 B.R. 47, 52 (B.A.P. 8th Cir. 2012).

22 *Id.* at 53.

23 11 U.S.C. § 506(a)(1).

24 11 U.S.C. § 541(a)(1).

25 See *In re Woodside*, 538 B.R. 518, 523 (Bankr. C.D. Ill. 2015) (finding that nonrefundable tax credit is not property of estate because “[i]t is not itself an asset that can be garnished and liquidated by a creditor or distributed by a trustee”).

26 11 U.S.C. § 101(37).

continued on page 56

Lien on Me: Gone with the Wind (Energy)

from page 27

return, but could only obtain rights in the PTC upon filing that return, the transferee — not the original taxpayer/debtor — will be treated as the taxpayer and have rights in the PTC precisely when the original taxpayer would otherwise have acquired rights in the credit.³⁹

Furthermore, if a taxpayer can only validly transfer the credit by completing these procedural requirements, subject to IRS approval, and the transferee taxpayer can only claim the tax credit in the tax year ending with or after the tax year of the transferor, this might suggest that the taxpayer/debtor may also lack “the power to transfer rights in the collateral” for purposes of Article 9; that authority may ultimately reside with the IRS. As a result, a security interest in a PTC might never validly attach.

On the other hand, lenders may incorporate provisions into security agreements that require the borrower to list the lender as a party in the transfer election statement until the

lender gives permission to change the listed transferee, and this might make the security agreement enforceable against the debtor/taxpayer before filing the return.⁴⁰ Consequently, secured creditors who include such provisions may be in a stronger position in bankruptcy than those who merely claim a security interest in a debtor’s “general intangibles.”⁴¹

Conclusion

Although federal law permits the transfer of the PTC, the procedure for transferring those credits under the tax regulations may prevent a security interest from attaching to the credit under Article 9.⁴² Nevertheless, while the formal requirements of tax regulations complicate the attachment analysis, bankruptcy courts may ultimately favor commercial substance over regulatory form, particularly where the parties have structured their agreements with care. **abi**

39 See I.R.C. § 6418(a).

40 See Teichman, *supra* n.8 at 78.

41 *Id.*

42 See Odinet, *supra* n.11 at 178-79 (discussing “substantive” and “procedural transferability”).