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IRS Issues Guidance on ITC Eligibility for Solar Projects in Notice 2018-59 Including Methods for Establishing Beginning of Construction and Eligibility of Transferred Energy Property.

On June 22, 2018, the IRS issued Notice 2018-59 (the "ITC Notice"), providing guidance as to how a taxpayer establishes that construction has begun with respect to solar facilities qualifying for the Internal Revenue Code Section 48 investment tax credit (the "ITC"). The ITC provides a credit to taxpayers equal to a percentage of the basis of qualifying energy property, which percentage varies depending on the type of such property, the year in which construction begins, and the year in which the property was placed in service. In general, the ITC Notice is similar to guidance provided for wind facilities qualifying for the ITC or the Internal Revenue Code Section 45 production tax credit and promulgated in Notice 2013-29, as clarified and modified by later notices.

Construction has begun when a taxpayer establishes either of the following:

1. Physical work of a significant nature has begun and the taxpayer maintains a continuous program of construction. Work performed for the taxpayer pursuant to a binding written contract entered into prior to the manufacture, construction or production of the energy property or components of energy property for use by the taxpayer in the taxpayer's trade or business (or for the taxpayer's production of income) is taken into account in making this determination. This test depends on the relevant facts and circumstances and is focused on the nature of the work performed rather than the amount or the cost; it is not subject to a fixed minimum amount of work or cost threshold. The test includes both on-site and off-site work, such as off-site manufacture of components and on-site installation of racks or other structures to attach photovoltaic panels to a site. Preliminary activities, such as clearing a site, are not physical work of a significant nature under this test.

A continuous program of construction involves continuing physical work of a significant nature, as determined based on the facts and circumstances. Certain disruptions beyond the taxpayer's control, such as severe weather conditions and natural disasters and delays in obtaining permits and licenses, are treated as excusable and will not cause a taxpayer to fail to satisfy the continuity requirement. Notwithstanding the foregoing, if a taxpayer places an energy property in service by the end of a calendar year that is no more than four calendar years after the calendar year during which construction of the energy property began, the continuity requirement will be deemed satisfied with respect to the energy property.

2. The taxpayer has paid or incurred five percent (5%) or more of the total cost of the energy property and makes continuous efforts to advance toward completion of the energy property. All costs properly included in the depreciable basis of the energy property are taken into account to determine whether this test is met. The total cost of energy property does not include the cost of land or any property not integral to the energy property. If the total cost of an energy project that is a single project comprised of multiple energy properties exceeds its anticipated total cost such that less than 5% of the total cost of the project at the time it is placed in service was in fact paid or

incurred at the time the 5% standard is tested, the five percent safe harbor is not met with respect to the entire project but may met with respect to some of the energy properties comprising the project so long as the total aggregate cost of such energy properties is not more than twenty times greater than the amount the taxpayer paid or incurred. This relief is not available where a single project is not comprised of multiple energy properties.

The determination of whether multiple energy properties are operated as part of a single energy project is made during the calendar year during which the last of the properties is placed in service and depends on the relevant facts and circumstances, including whether the properties have a common intertie, share a common substation, were financed pursuant to the same loan agreement, and other non-exclusive factors. However, the taxpayer may disaggregate such property for purposes of applying the continuity requirement.

The five percent safe harbor test also includes a continuity requirement that, based on the relevant facts and circumstances, a taxpayer make continuous efforts to advance towards completion of an energy property. This may generally include paying or incurring additional amounts, entering into binding written contracts for future work to construct the energy property, obtaining necessary permits, or performing physical work of a significant nature. As with the physical work test, certain disruptions beyond the taxpayer's control are considered excusable for purposes of the continuity requirement and the continuity requirement is deemed met if certain timelines are met, as described above.

With respect to facilities that are transferred, a fully or partially developed energy property that satisfies the "begun construction" qualification will continue to satisfy such qualification with respect to a transferee acquiring such property before the facility is placed in service. However, in the case of a transfer of solely tangible personal property to an unrelated transferee, amounts paid or work performed by the transferor with respect to such transferred property will not be taken into account to determine whether construction has begun.

The IRS also advised in the ITC Notice that it will not issue private letter rulings to taxpayers regarding the application of the ITC Notice or the beginning of construction requirement of Internal Revenue Code Section 48.

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