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Reed Smith: IRS Extends Continuous Construction/Continuous Efforts Safe Harbors for Production Tax Credit/Investment Tax Credit Qualification.

Production tax credits ("PTCs") are available for wind, biomass, geothermal, landfill gas, trash, hydropower, and marine and hydrokinetic facilities, if construction of the facility began before January 1, 2015. Alternatively, taxpayers can elect to take investment tax credit (the "ITC") in lieu of the PTC.

A taxpayer can establish that it began construction of a project either by having started physical work of a significant nature prior to January 1, 2015 (the "Physical Work Test"), or having paid or incurred (depending on its method of accounting) five percent or more of the total cost of the facility prior to January 1, 2015 (the "Safe Harbor"). Both the Physical Work Test and the Safe Harbor require the taxpayer to make continuous progress towards completion of a project once construction has begun. In the case of the Physical Work Test, the requirement is that the taxpayer must maintain a continuous program of construction (the "Continuous Construction Test"). In the case of the Safe Harbor, the requirement is that the taxpayer must make continuous efforts to advance towards completion of the facility (the "Continuous Efforts Test").

On March 11, 2015, the IRS issued Notice 2015-25, which provides that the Continuous Construction and Continuous Efforts Tests will be deemed to be satisfied with respect to a facility if the facility is placed in service before January 1, 2017. Although Notice 2015-25 does not provide a definition of placed in service for this purpose, existing Treasury Regulations treat property as being placed in service when such property is in a condition or state of readiness and is available for a specifically assigned function. Equipment that is operational but undergoing testing to eliminate defects is considered to be in a condition or state of readiness and availability for a specifically assigned function.

In the case of power plants, the IRS has stated in a number of Revenue Rulings that the following factors are to be considered:

- approval of required licenses and permits;
- passage of control of the facility to the taxpayer;
- completion of critical tests;
- commencement of daily or regular operation; and
- synchronization into a power grid for generating electricity to produce income

Importantly, the IRS does not view these factors as hard and fast rules, but only as tools to be used in determining whether property is in a state or condition of readiness and is available for a specifically assigned function.

If a facility is not placed in service before January 1, 2017, the determination as to whether the Continuous Construction and Continuous Efforts Tests have been satisfied will be based on relevant facts and circumstances. In the case of the Continuous Construction Test, the requirement is that

the taxpayer has a continuous program of construction that involves continuing physical work of a significant nature. In the case of the Continuous Efforts Test, ongoing efforts could include incurring additional costs in connection with a facility, entering into binding written contracts for components or for construction of the facility, obtaining necessary permits, and performing work of a significant nature.

Notice 2015-25 updates the guidance provided in Notice 2013-60, which had been in effect prior to the one-year extension of ITC and PTC that was enacted by Congress on December 19, 2014 as part of the Tax Increase Prevention Act of 2014.

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