

Bond Case Briefs

Municipal Finance Law Since 1971

McDermott: IRS Issues Additional Guidance on Beginning of Construction Rules for Renewable Projects.

The Internal Revenue Service (IRS) issued Notice 2015-25 (Notice) on March 11, 2015, to provide further guidance on meeting the beginning of construction requirements for wind and other qualified facilities (biomass, geothermal, landfill gas, trash, hydropower, and marine and hydrokinetic facilities). The Notice extends the date by which a facility can meet the beginning of construction deadline to correspond with the extension of Code Section 45 passed by the U.S. Congress at the end of 2014.

Background

The Tax Increase Prevention Act of 2014 (Act) extended through December 31, 2014, the deadline by which construction of a qualified facility must begin for purposes of qualifying for the production tax credit under Code Section 45 (PTC) or the investment tax credit under Code Section 48 (ITC). Previously, a taxpayer could only meet the deadline by placing the facility in service prior to January 1, 2014. Following the extension of the ITC and PTC, a taxpayer may be eligible for the ITC or PTC if construction of the facility began before January 1, 2015.

The Notice updates the guidance provided in prior notices (Notices 2013-29, 2013-60 and 2014-46, together referred to herein as the Prior Guidance) consistent with the statutory extension under the Act. The Notice notes that the IRS will not issue private letter rulings to taxpayers regarding the application of the Notice or the application of the beginning of construction requirement under Code Sections 45(d) and 48(a)(5).

Notice 2013-29

Under Notice 2013-29, a taxpayer may establish that construction has begun on a qualified facility by demonstrating that “physical work of a significant nature” has begun (Physical Work Test) or by satisfying a 5 percent safe harbor (Safe Harbor). Notice 2013-29 lists several examples of work that meet the Physical Work Test, including, with respect to a wind energy facility, the beginning of the excavation for the foundation, the setting of anchor bolts into the ground or the pouring of the concrete pad of the foundation. Work completed onsite or offsite may be taken into account. The IRS also imposed a requirement that a “continuous program of construction,” as defined in the Prior Guidance (Continuous Construction Test), be maintained after performance of physical work in 2013.

The Safe Harbor set forth in Notice 2013-29 provides that the construction of a qualified facility is considered to have begun before January 1, 2014, if a taxpayer paid or incurred (within the meaning of Treas. Reg. Section 1.461-1(a)(1) and (2)) 5 percent or more of the total cost of the facility before such date. Thereafter, the taxpayer must make continuous efforts to advance toward completion of the facility (Continuous Efforts Test) to be deemed to have begun construction.

For more information on these tests and their requirements, see McDermott’s [On the Subject regarding Notice 2013-29](#).

Notice 2013-60

In September 2013, the IRS issued Notice 2013-60, clarifying questions left outstanding by Notice 2013-29. See McDermott's previous [On the Subject](#) for more information. First, Notice 2013-60 provided that a facility will be considered to satisfy the Continuous Construction Test and the Continuous Efforts Test if it is placed in service before January 1, 2016. Second, Notice 2013-60 permitted a taxpayer to claim the PTC or ITC even if the taxpayer was not the owner of the facility on the date construction began.

Notice 2014-46

Notice 2014-46 clarifies that the Physical Work Test focuses on the nature of the work performed rather than the amount or cost of such work. Notice 2014-46 also provides guidance regarding transfers of a facility by the taxpayer that begins construction of a facility prior to placing the facility in service. This Notice modifies the Safe Harbor rule set forth in earlier guidance by providing that, if a taxpayer incurred at least 3 percent of the total cost of such a facility before January 1, 2014, the Safe Harbor may be satisfied with respect to some (although not all) of the individual facilities that are part of this larger project. See McDermott's summary in its [On the Subject regarding Notice 2014-46](#).

Notice 2015-25

The Notice extends the relevant dates under the Prior Guidance so that the beginning of construction guidance mirrors the 2014 statutory extension of the PTC and ITC under the Act. Prior to the statutory extension of the PTC and ITC, Code Sections 45(d) and 48(a)(5) required that construction of a qualified facility begin before January 1, 2014, for the facility to be eligible for the PTC or ITC. Based on the language of those sections as in effect before the Act, the Prior Guidance provided guidance to determine whether construction has begun on a qualified facility prior to January 1, 2014. Because the Act extended the date by which construction of a qualified facility must begin to January 1, 2015, the Notice replaces all references to "January 1, 2014" in the Prior Guidance to "January 1, 2015" as such references relate to the date by which construction must begin on a facility.

As noted previously, Notice 2013-60 provided that a facility will be considered to satisfy the Continuous Construction Test and the Continuous Efforts Test if it is placed in service before January 1, 2016. Consistent with the one-year extension of the beginning of construction date under the Act, the Notice extends the placed in service date provided in Notice 2013-60 to January 1, 2017. Thus, if a taxpayer begins construction of a facility prior to January 1, 2015, and places the facility in service before January 1, 2017, the facility will be considered to satisfy the Continuous Construction Test (with respect to the Physical Work Test) or the Continuous Efforts Test (with respect to the Safe Harbor), regardless of the amount of physical work performed or the amount of costs paid or incurred with respect to the facility after December 31, 2014, and before January 1, 2017.

Conclusion

The Notice provides much-needed clarity for taxpayers that began construction of a facility prior to January 1, 2015, pursuant to last year's statutory extension of the ITC and PTC.

Last Updated: March 23 2015

Article by Gale E. Chan, Madeline M. Chiampou Tully, Heather Cooper, Martha Groves Pugh and Philip Tingle

McDermott Will & Emery

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Copyright © 2025 Bond Case Briefs | bondcasebriefs.com