[Alerts and Updates]

IRS Issues Guidance on Electing Investment Tax Credit in Lieu of Production Tax Credit for Specified Renewable Energy Property

June 15, 2009

On June 5, 2009, the Internal Revenue Service ("IRS") issued Notice 2009-52 (the "Notice") providing guidance on the process for electing an investment tax credit ("ITC") rather than a production tax credit ("PTC") for specified renewable energy facilities. Provisions in the American Recovery and Reinvestment Act of 2009 ("ARRA") allow for the ability to make such an election. These provisions allow a taxpayer to make an irrevocable election to receive an ITC calculated based on 30 percent of the cost of qualifying property in the year the property is placed in service, in lieu of a PTC claimed over a 10-year period based on the electricity produced.

The election of the ITC over the PTC is available for property associated with wind, closed- and open-loop biomass, geothermal, landfill gas, trash facilities, qualified hydropower, and marine and hydrokinetic electric-power production facilities.

In order to claim the ITC, the taxpayer must irrevocably elect the energy credit for qualified property that is an "integral" part of the facility, using IRS Form 3468. Form 3468 must be filed with the taxpayer's return for the year in which the property is placed in service. The taxpayer must make a separate election for each qualified facility that the taxpayer intends to elect to take the ITC. The taxpayer must also attach a statement to Form 3468 that includes the following information:

1. Taxpayer identification information;
2. For each qualifying facility:
    a. A detailed technical description of the facility;
    b. A detailed technical description of the energy property placed in service, including a statement that the property is an integral part of such facility;
    c. The date the energy property was placed in service;
    d. Accounting of the taxpayer's basis in the property; and
    e. A depreciation schedule showing the taxpayer's remaining basis in the property after the credit;
3. A statement that the taxpayer has not and will not claim a Section 1603 grant for the same property for which the taxpayer is claiming the ITC; and
4. A declaration in the following form: "Under penalties of perjury, I declare that I have examined this statement, including accompanying documents, and to the best of my knowledge and belief, the facts presented in support of this statement are true, correct, and complete."

The taxpayer must retain adequate books and records including the required statement, Form 3468 and all other supporting documentation demonstrating the taxpayer's entitlement to the credit.

Although Notice 2009-52 provides guidance on the procedural aspects of electing to take the ITC in lieu of the PTC, several open questions remain. For instance, the Notice does not provide guidance on what type of property is considered "integral," a key issue in determining if the property is eligible for the ITC. Some uncertainty also exists regarding the meaning of the term "qualifying facility" and whether that term covers the entire facility or each generating unit, such as a turbine, within the facility.

It is anticipated that the IRS will provide additional guidance on these topics within the next several months.

For taxpayers seeking an alternative to the PTC, it is important to note that Section 1603 of the ARRA provides for a one-time grant from the U.S. Department of the Treasury in lieu of the ITC for specific property, including:

1. Wind, closed- and open-loop biomass, geothermal, landfill gas, trash, qualified hydropower, marine and hydrokinetic facilities;
2. Qualified fuel cell property;
3. Certain solar property;
4. Qualified small wind-energy property;
5. Geothermal property;
6. Qualified microturbine property;
7. Combined heat and power system property; and
8. Geothermal heat-pump property.

Given the anticipated popularity of this Treasury Department grant in lieu of the ITC, additional guidance is likely to be warranted on the procedure for electing this federal grant. The IRS is expected to provide additional guidance on the procedures for applying for such a grant by later this summer.

For Further Information

If you have questions about this Alert, please contact Benjamin L. Israel in our Washington, D.C. office, James W. McTarnaghan in our San Francisco office, Daniel J. Bauer in our New York office, any other member of the Renewable Energy and Sustainability Practice Group or the attorney in the firm with whom you are regularly in contact.

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