Energy and Clean Technology Advisory: IRS Provides Guidance on Electing Investment Tax Credit in Lieu of Production Tax Credit

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The American Recovery and Reinvestment Act of 2009 (ARRA) expanded tax incentives for the renewable energy sector in several ways. One significant change allows taxpayers to elect the Code Section 48 investment tax credit (ITC) in lieu of the Code Section 45 production tax credit (PTC) with respect to qualifying renewable energy facilities. On June 5, the IRS issued Notice 2009-52 describing the procedures for making this election.

Background

Businesses that generate electricity from wind, geothermal energy, and "closed-loop" biomass (using dedicated energy crops) are eligible for the PTC under Code Section 45, which provides an income tax credit of 2.1 cents per kilowatt-hour (kWh) (adjusted annually for inflation) of electricity produced for the first ten years of a renewable energy facility's operation. Other technologies, such as "open-loop" biomass (using farm and forest wastes rather than dedicated energy crops), incremental hydropower, small irrigation systems, landfill gas, and municipal solid waste, receive a lesser credit of 1.0 cent per kWh.

The ITC allows businesses and individuals a one-time, upfront tax credit equal to a certain percentage of the tax basis of certain types of renewable energy property placed in service during the year. Certain solar energy property, small wind energy property, and qualified fuel cell property are eligible for a 30% credit. Other energy property, such as qualified microturbine property, geothermal power production property, geothermal heat pump property, and combined heat and power system property, are eligible for a lesser 10% credit.

Election to Take ITC

Code Section 48(a)(5), added by the ARRA, allows taxpayers to irrevocably elect to take the ITC in lieu of the PTC for certain renewable energy facilities placed in service after December 31, 2008 and before December 31, 2013 (2012 for wind facilities). Some eligible taxpayers undoubtedly will find the upfront ITC to be an attractive alternative to the PTC. The election to claim the ITC in lieu of the PTC applies to the following types of renewable energy facilities:

- Wind
- Biomass (both closed- and open-loop)
- Geothermal
- Landfill gas

- Trash
- Qualified hydropower
- Marine and hydrokinetic power.

Make the Election on Form 3468

Notice 2009-52 provides that taxpayers must elect to claim the ITC on Form 3468 and file it with their income tax return for the year in which the property was placed in service. Taxpayers must make a separate election for *each facility* for which the election is being made.

Observation: Notice 2009-52 does not define the term "facility" for purposes of making the election. Thus, for example, it is unclear whether a wind farm constitutes a single facility, or if each turbine on the wind farm is a separate facility. Clients may choose to be conservative and assume the latter until further guidance is issued.

Taxpayers must provide the following additional information with each election:

- The name, address, taxpayer identification number, and telephone number of the taxpayer.
- A detailed technical description of the facility, including generating capacity.
- A detailed technical description of the energy property placed in service during the taxable year as an integral part of the facility, including a statement that the property is an integral part of such facility.
- The date that the energy property was placed in service.
- An accounting of the taxpayer's basis in the energy property.
- A depreciation schedule reflecting the taxpayer's remaining basis in the energy property after the energy credit is claimed.
- A statement that the taxpayer has not and will not claim a Treasury grant for property for which the taxpayer is claiming the ITC.

Taxpayers are required to retain adequate books and records, which include the information listed above, Form 3468, and all supporting documentation relevant to the election and claim of the ITC.

Further Tax Guidance Expected Affecting Renewable Energy

Our Energy and Clean Technology group is currently awaiting two additional important pieces of tax-related guidance arising from the ARRA. First, the ARRA established a "grant in lieu of ITC" program. Projects otherwise eligible for the ITC (including PTC projects which could elect the ITC) may apply for cash grants equal to the value of the ITC. This will allow clients without tax appetite to benefit from renewable energy credits, without the need for tax-equity financing and without having to wait to claim the credit on a tax return. Full details on the grant program are expected in the coming weeks.

Second, new Code Section 48C established a new "manufacturing credit" equal to 30% of the cost of personal property and fixtures to outfit a facility manufacturing renewable energy-related products. Clients must apply for a portion of the $2.3 billion in credits available. Guidance on the manufacturing credit, including the application process, is expected in August.

Of course, we are monitoring these issues closely and will update our clients and friends as developments arise.

If you have any questions about renewable energy tax credits, please contact Travis Blais at (617) 348-1684, your Mintz Levin service professional, or any of those listed below.

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