Part III - Administrative, Procedural, and Miscellaneous

Clarification of Notice 2013-29

Notice 2013-60

SECTION 1. PURPOSE

The American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (ATRA), modified the definition of a qualified facility under section 45(d) of the Internal Revenue Code by replacing the placed in service requirement with a begin construction requirement. A taxpayer will be eligible to receive the renewable electricity production tax credit (PTC) under section 45, or the energy investment tax credit (ITC) under section 48 in lieu of the PTC, with respect to a facility if construction of such facility begins before January 1, 2014. Notice 2013-29, 2013-20 I.R.B. 1085, provides two methods to determine when construction has begun on such a facility. This notice clarifies Notice 2013-29 regarding (i) the determination of whether a taxpayer satisfies either of those methods with respect to a facility, (ii) the applicability of the "master contract" provision in that notice, and (iii) the effect of a transfer of a facility after construction has begun.

SECTION 2. BACKGROUND

Notice 2013-29 provides two methods that a taxpayer may use to establish that

construction of a qualified facility has begun. A taxpayer may establish the beginning of construction by starting physical work of a significant nature as described in section 4 of the notice (Physical Work Test). Alternatively, a taxpayer may establish the beginning of construction by meeting the safe harbor provided in section 5 of the notice (Safe Harbor). These methods require that a taxpayer make continuous progress towards completion once construction has begun (as set forth in sections 4.06 (Continuous Construction Test) and 5.02 (Continuous Efforts Test) of Notice 2013-29, respectively). Notice 2013-29 provides that a taxpayer may enter into a master contract for purposes of the Physical Work Test in section 4.03(2). Notice 2013-29 does not address the effect of a transfer of a facility after construction has begun.

The Treasury Department and the Internal Revenue Service have received a significant number of questions regarding the application of the Continuous Construction and Continuous Efforts Tests in Notice 2013-29, the applicability of the master contract provision for purposes of the Safe Harbor, and the effect that a transfer of a facility after construction has begun will have on its ability to qualify for the PTC or ITC. In response to these questions, this notice provides a method that will allow taxpayers to be deemed to satisfy both the Continuous Construction and Continuous Efforts Tests. In addition, this notice provides that the master contract provision in Notice 2013-29 also applies for purposes of the Safe Harbor, and that the transfer of a facility after construction has begun will not prevent a facility from qualifying for the PTC or ITC.

SECTION 3. CONTINUOUS CONSTRUCTION/CONTINUOUS EFFORTS TESTS

.01 In general. Section 4.01 of Notice 2013-29, setting forth the Physical Work Test, provides:

> The Internal Revenue Service will closely scrutinize, and may determine that construction has not begun on a facility before January 1, 2014, if a taxpayer does not maintain a continuous program of construction as determined under section 4.06.

Section 4.06(1) provides that whether a taxpayer maintains a continuous program of construction will be determined by the relevant facts and circumstances. Section 4.06(2) provides that certain disruptions in the taxpayer's construction of a facility that are beyond the taxpayer's control will not be considered to indicate that a taxpayer has failed to maintain a continuous program of construction, and sets forth a non-exclusive list of examples of such disruptions.

Section 5.01 of Notice 2013-29, setting forth the Safe Harbor, provides:

> Construction of a facility will be considered as having begun before January 1, 2014, if (1) a taxpayer pays or incurs (within the meaning of Treas. Reg. § 1.461-1(a)(1) and (2)) five percent or more of the total cost of the facility, except as provided in section 5.01(2), before January 1, 2014, and (2) thereafter, the taxpayer maintains continuous efforts to advance towards completion of the facility (as determined under section 5.02).

The exception in section 5.01(2) deals with costs incurred by a person other than the taxpayer under a binding written contract with the taxpayer. Section 5.02(1) provides that whether a taxpayer maintains continuous efforts to advance towards completion of

the facility will be determined by the relevant facts and circumstances. Section 5.02(2) provides that certain disruptions in the taxpayer's continuous efforts to advance towards completion of the facility that are beyond the taxpayer's control will not be considered as indicating that a taxpayer has failed to maintain continuous efforts to advance towards completion of the facility, and sets forth a non-exclusive list of examples of such disruptions.

.02 Deemed satisfaction of Continuous Construction/Continuous Efforts Tests. If a facility is placed in service before January 1, 2016, the facility will be considered to satisfy the Continuous Construction Test (for purposes of satisfying the Physical Work Test) or the Continuous Efforts Test (for purposes of satisfying the Safe Harbor). If a facility is not placed in service before January 1, 2016, whether the facility satisfies the Continuous Construction or Continuous Efforts Tests will be determined by the relevant facts and circumstances, as described in section 4.06 and section 5.02 in Notice 2013-29.

SECTION 4. MASTER CONTRACT

.01 In general. Section 4.03(2) of Notice 2013-29, setting forth the Physical Work Test, provides:

> If a taxpayer enters into a binding written contract for a specific number of components to be manufactured, constructed, or produced for the taxpayer by another person under a binding written contract (a "master contract"), and then through a new binding written contract (a "project contract") the taxpayer assigns its rights to certain components to an affiliated special purpose vehicle that will

own the facility for which such property is to be used, work performed with respect to the master contract may be taken into account in determining when physical work of a significant nature begins with respect to the facility.

.02 Master contract for Safe Harbor. The master contract provision, as described in section 4.03(2) of Notice 2013-29 under the Physical Work Test, also applies for purposes of the Safe Harbor.

SECTION 5. TRANSFER OF A FACILITY

.01 In general. Notice 2013-29 did not address the effect of a transfer of a facility after construction has begun. Section 45(d)(1), as amended by ATRA, provides:

> In the case of a facility using wind to produce electricity, the term 'qualified facility' means any facility owned by the taxpayer which is originally placed in service after December 31, 1993, and the construction of which begins before January 1, 2014.

The statutory language requires only that construction of a facility begin before January 1, 2014. It does not require the construction to be begun by the taxpayer claiming the credit. If a qualified facility satisfies either the Physical Work Test or the Safe Harbor, a taxpayer that owns the facility during the 10-year period beginning on the date the facility was originally placed in service may claim the PTC with respect to that facility even if the taxpayer did not own the facility at the time construction began. Alternatively, a taxpayer that owns the facility on the date it is originally placed in service may elect to claim the ITC in lieu of the PTC with respect to that facility even if the taxpayer did not own the facility at the time construction began. Any ITC claimed on a

facility will be limited to the taxpayer's basis in qualified property (as defined in section 48(a)(5)(D)).

.02 Example. In August 2013, Developer acquires a parcel of land on which it intends to build and operate a wind farm (Facility). Developer contributes the land to its wholly-owned limited liability company (LLC), which is disregarded as an entity separate from its owner for federal tax purposes, to hold and develop Facility. In November 2013, Developer incurs 5 percent of the cost of Facility and thereafter maintains continuous efforts to advance towards the completion of Facility. In April 2014, to finance the development of the project, Developer sells 95 percent of the interests in LLC to a group of investors (Investors) who are not related to Developer, and Developer does not contribute sales proceeds to LLC. Under Rev. Rul. 99-5, 1999-1 C.B. 434, Developer is treated as selling 95 percent of each of the assets of LLC to Investors, and immediately thereafter Developer and Investors are treated as contributing their respective 5 percent and 95 percent interests in those assets to LLC, which is now a partnership and the owner of Facility for federal tax purposes. In October 2015, LLC places Facility in service. Because Facility satisfies the Safe Harbor and assuming Facility is otherwise a qualified facility under section 45(d), LLC is eligible to claim the PTC with respect to electricity generated by Facility and sold to an unrelated party. Alternatively, LLC may elect to claim the ITC in lieu of the PTC.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Notice 2013-29 is clarified.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Brian J. Americus of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice, contact Brian J. Americus on (202) 622-3110 (not a toll-free call).