

Part IV - Items of General Interest

Wind Energy Partnerships

Announcement 2009-69

This announcement revises Revenue Procedure 2007-65 by replacing the following language in Section 3: “The Service generally will closely scrutinize a Project Company as a partnership or Investors as partners if a Project Company’s partnership agreement does not satisfy each requirement of this revenue procedure. The requirements set forth in this revenue procedure that must be satisfied in order to qualify for the Safe Harbor, however, are not intended to provide substantive rules and are not to be used as audit guidelines. The Safe Harbor in this revenue procedure is to provide guidance to taxpayers establishing or participating in wind energy partnerships in lieu of taxpayers requesting a letter ruling. Therefore, the Service will not rule on any issues under Subchapter K for partnerships claiming the credit under § 45.” with “The requirements set forth in this revenue procedure that must be satisfied in order to qualify for the Safe Harbor are not intended to provide substantive rules and are not to be used as audit guidelines. Returns claiming wind energy production tax credits under § 45 are subject to examination by the Service. The Safe Harbor in this revenue procedure is to

provide guidance to taxpayers establishing or participating in wind energy partnerships in lieu of taxpayers requesting a letter ruling. Therefore, the Service will not rule on any issues under Subchapter K for partnerships claiming the credit under § 45.”

This announcement also replaces the following language from Section 4.05: “Neither the Developer, the Investors nor any related parties may have a contractual right to purchase, at any time, the Wind Farm, any property included in the Wind Farm or an interest in the Project Company at a price less than its fair market value determined at the time of exercise of the contractual right to purchase, and provided further that the Developer (or any party related to the Developer) may not have a contractual right to purchase the Wind Farm or an interest in the Project Company earlier than 5 years after the qualified facility is first placed into service,” with “The Developer, the Investor, or any related party may only have a contractual right to purchase the Wind Farm, any property included in the Wind Farm, or an interest in the Project Company (the Property) that satisfies the requirements of this section 4.05. The contractual right must be negotiated for valid non-tax business reasons at arm’s length by parties with material adverse interests. The purchase price for the Property must either be a price that is not less than the fair market value of the Property determined at the time of exercise or, if the purchase price is determined prior to exercise, a price that the parties reasonably believe, based on all facts and circumstances at the time the price is determined, will not be less than the fair market value of the Property at the time the right may be exercised. Finally, the Developer (or any party related to the Developer) may not have a contractual right to purchase the Property earlier than 5 years after the qualified facility is first placed in service.”

This announcement also replaces the following language in Section 4.09: “Thus, generally only entities not subject to § 469, and not individuals, will be able to offset non-project income with credits received as a passive investor in the partnership,” with “Generally, a taxpayer subject to § 469 may utilize passive activity credits from qualified wind facilities only to the extent of their tax liability allocable to passive activities, whether from qualified wind facilities or other sources.”

Finally, this announcement replaces the following language in Section 5.02: “Example 2. The facts are the same as in Example 1, except Investor is initially allocated 99.5% of LLC’s gross income or loss and § 45 credits. Under these facts, the wind energy limited liability company’s classification as a valid partnership would be closely scrutinized by the Service. Likewise, if any other provision of this safe harbor is not followed for any wind energy partnerships, the Service will closely scrutinize the validity of such purported partnerships,” with, “Example 2. The facts are the same as in Example 1, except Investor is initially allocated 99.5% of LLC’s gross income or loss and § 45 credits. Under these facts, the wind energy LLC’s classification as a valid partnership would not be governed by the safe harbor in this revenue procedure. Likewise, if any other provision of this safe harbor is not followed for any wind energy partnerships, such partnerships would not be governed by the safe harbor in this revenue procedure.”

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