

Part III - Administrative, Procedural, and Miscellaneous

Credit for Production from Advanced Nuclear Facilities

Notice 2013-68

SECTION 1. PURPOSE

This Notice sets forth guidance relating to the credit under § 45J of the Internal Revenue Code for production of electricity at advanced nuclear power facilities. On May 1, 2006, the Internal Revenue Service (Service) and the Treasury Department published Notice 2006-40, 2006-1 C.B. 855, which specifies the method that will be used to allocate the national megawatt capacity limitation on the allowable credit and prescribes the application process by which taxpayers may request an allocation of the national megawatt capacity limitation. Notice 2006-40 also provides guidance on the requirement that the electricity be sold to an unrelated person and on the effect of grants, tax-exempt bonds, subsidized energy financing, and other credits. This Notice supersedes Notice 2006-40 by republishing the guidance contained in that notice with the following modifications: (1) the application process is streamlined so that the applicant submits the application only to the Service and the Service will obtain necessary certification from the U.S. Department of Energy (DOE); (2) the guidance is

modified to provide allocation rules for facilities that are directly or indirectly owned by more than one person; and (3) additional guidance is provided concerning the time for filing an application with the Nuclear Regulatory Commission.

SECTION 2. BACKGROUND

.01 Section 45J was enacted by section 1306 of the Energy Policy Act of 2005, Pub. L. No. 109-58 (199 Stat. 594). Section 45J permits a taxpayer to claim a credit for electricity that the taxpayer (1) produces at an advanced nuclear power facility during the eight-year period beginning when the facility is placed in service and (2) sells to an unrelated person (qualifying electricity).

.02 Under § 45J(d), an advanced nuclear power facility is a nuclear facility that meets all of the following requirements:

(1) The facility consists of a nuclear power reactor that uses nuclear energy to produce electricity. For purposes of this Notice, each nuclear power reactor located on a multi-reactor site is a separate facility.

(2) The facility is owned by the taxpayer.

(3) The reactor design for the facility is approved by the Nuclear Regulatory Commission after December 31, 1993 (and such design or a substantially similar design of comparable capacity was not approved on or before that date).

(4) The facility is placed in service before January 1, 2021.

.03 Under § 45J(b)(1), a taxpayer may claim a credit for qualifying electricity produced at an advanced nuclear power facility only if part of the national megawatt capacity limitation has been allocated to the facility (the facility limitation). See Section

4.04(3), (4), and (5) of this Notice for allocation rules in the case of a facility owned by more than one taxpayer, or owned by a partnership or an S corporation.

SECTION 3. COMPUTATION OF CREDIT

Under § 45J(b)(1) and (c), the credit allowed for a taxable year with respect to the qualified electricity produced at an advanced nuclear power facility is computed under the following rules:

(1) A tentative credit for the taxable year is computed for the facility. The facility's tentative credit for the taxable year is equal to 1.8 cents multiplied by the kilowatt hours of qualified electricity produced at the facility and sold during the taxable year to an unrelated person.

(2) The credit percentage is computed for each taxpayer that has been allocated all or part of the facility limitation. Each taxpayer's credit percentage is determined by dividing the facility limitation that is allocated to the taxpayer under Section 4.04(3), (4), or (5) of this Notice by the nameplate capacity of the facility.

(3) The credit allowed to a taxpayer is the lesser of (a) the tentative credit for the facility multiplied by the taxpayer's credit percentage, or (b) \$125,000,000 per 1000 megawatts of the facility limitation that is allocated to the taxpayer.

SECTION 4. ALLOCATION OF NATIONAL MEGAWATT CAPACITY LIMITATION

.01 In General. Section 45J(b)(2) provides that the national megawatt capacity limitation is 6,000 megawatts. Section 45J(b)(3) requires the Secretary to allocate this national megawatt capacity limitation in such manner as the Secretary may prescribe. Section 45J(b)(4) requires the Secretary to provide a certification process under which

the Secretary, after consultation with the Secretary of Energy, shall approve and allocate the national megawatt capacity limitation.

.02 Allocation Limited to Qualifying Facilities. The Service will allocate the national megawatt capacity limitation only to advanced nuclear facilities (within the meaning of § 45J(d)(2)) that satisfy the requirements of this Section 4.02 (qualifying facilities). An advanced nuclear facility is a qualifying facility only if each of the following requirements is satisfied:

(1) Construction on the facility begins before January 1, 2014. For this purpose, construction begins when a person who has applied for or been granted a construction permit or a combined license from the Nuclear Regulatory Commission for an advanced nuclear facility initiates the pouring of safety-related concrete for the reactor building.

(2) The DOE provides a certification to the Service that the facility qualifies as an advanced nuclear facility. See Section 4.05 of this Notice.

.03 Application Required.

The Service will allocate the national megawatt capacity limitation only to qualifying facilities for which the applications are submitted in accordance with Section 5 of this Notice.

.04 Allocation Method.

The national megawatt capacity limitation will be allocated as follows:

(1) If the total nameplate capacity of all qualifying facilities for which applications are submitted does not exceed the national megawatt capacity limitation, each of those facilities will be allocated an amount of national megawatt capacity limitation equal to its

nameplate capacity.

(2) If the total nameplate capacity of all qualifying facilities for which applications are submitted exceeds the national megawatt capacity limitation, the national megawatt capacity limitation will be allocated among the facilities in proportion to their nameplate capacities.

(3) If only one taxpayer owns a direct interest in a facility, the entire facility limitation is allocated to such taxpayer. If more than one taxpayer owns a direct interest in a facility, each taxpayer's undivided ownership share in the facility will be treated for purposes of this Notice as a separate facility owned by such taxpayer. In such cases, a taxpayer's application must identify the portion of the total nameplate capacity of the facility that is equal to its undivided ownership share in the facility.

(4) Except as provided in Section 4.04(5) of this Notice, if a facility is owned by a partnership or S corporation, then the partnership or S corporation, and not the partners or shareholders, will be treated as the taxpayer that owns the facility for the purposes of this Notice. In such cases, the § 45J credit must be allocated to the partners or shareholders in accordance with either § 1.704-1(b)(4)(ii), in the case of partnerships, or § 1.1366-1(a)(2)(v), in the case of S corporations.

(5) If a the facility is owned through an organization that has made a valid § 761(a) election, each member's undivided ownership share in the facility will be treated for purposes of this Notice as a separate facility owned by such member. In such cases, a member's application must identify the portion of the total nameplate capacity of the facility that is equal to its undivided ownership share in the facility.

.05 Service Action.

Upon receipt of the taxpayer's application, the Service will determine whether the application satisfies the provisions of Section 5 of this Notice. If the application does not satisfy that Section, the Service may advise the applicant regarding how to perfect the application and may request additional information necessary to complete the application. Once an application satisfies Section 5 of this Notice, the Service will forward the application to the DOE for the certification described in Section 4.02(2) of this Notice. Upon receipt of a certification by the DOE that the facility qualifies as an advanced nuclear facility, the Service will accept or reject the taxpayer's application and will notify the taxpayer, by letter, of its decision. If the taxpayer's application is accepted, the acceptance letter will state the facility limitation and the amount of the facility limitation allocated to the taxpayer.

SECTION 5. APPLICATIONS FOR ALLOCATION OF NATIONAL MEGAWATT CAPACITY LIMITATION

.01 A taxpayer must submit (in duplicate), for each facility for which an allocation of the national megawatt capacity limitation is requested, an application to the Service for an allocation under § 45J(b) ("application for § 45J allocation").

.02 Multiple taxpayers owning (or treated as owning) a direct interest in a facility (as described in section 4.04(3) or 4.04(5) of this Notice) may file separate applications for a § 45J allocation with respect to a single facility. See Section 5.05 and Section 5.06 of this Notice.

.03 Applications for § 45J allocation must be filed before February 1, 2014.

.04 The application for § 45J allocation must include all of the following:

(1) The name and taxpayer identification number of the taxpayer who will place the facility in service;

(2) The name and location of the facility;

(3) The nameplate capacity of the facility;

(4) The date on which the application for a construction permit or a combined license for the facility was filed with the Nuclear Regulatory Commission;

(5) A statement demonstrating that the facility is an “advanced nuclear facility” within the meaning of § 45J(d)(2); such statement should include when the reactor design for the facility was approved by the Nuclear Regulatory Commission, as well as a detailed explanation demonstrating that such design (or a substantially similar design of comparable capacity) had not been approved on or before December 31, 1993; and

(6) The date on which construction on the facility, as defined in Section 4.02(1) of this Notice, began.

.05 If a taxpayer’s application relates to a facility in which more than one person owns (or is treated as owning) a direct interest (as described in section 4.04(3) or 4.04(5) of this Notice), the taxpayer must submit documentation of its undivided ownership share in the facility.

.06 If the facility is owned by an organization that has made a valid § 761(a) election, then, in addition to the documentation described in Section 5.05, any application pertaining to the facility must contain a copy of the valid § 761(a) election.

.07 Applications for § 45J allocation should be marked: SECTION 45J

APPLICATION FOR ALLOCATION. There is no user fee for the § 45J application.

(1) The § 45J application should be sent to the following address:

Internal Revenue Service
Attn: CC:PSI:6, Room 5114
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

If a private delivery service is used, the address is:

Internal Revenue Service
Attn: CC:PSI:6, Room 5114
1111 Constitution Ave., N.W.
Washington, DC 20224

(2) The § 45J applications may also be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PSI:6, Room 5114
1111 Constitution Avenue N.W.
Washington, DC 20224

SECTION 6. REALLOCATION OF NATIONAL MEGAWATT CAPACITY LIMITATION IN CERTAIN CASES

If an amount of national megawatt capacity limitation is allocated to a facility and the facility is not placed in service before January 1, 2021, or the DOE informs the Service that the DOE certification for the facility has been withdrawn, the amount of the national megawatt capacity limitation allocated to that facility will be withdrawn and the national megawatt capacity limitation will be reallocated under the rules of Section 4.04 of this Notice among the remaining qualifying facilities.

SECTION 7. ADDITIONAL ISSUES

.01 Sale to Unrelated Person. The credit under § 45J is allowed only for electricity that the taxpayer produces and sells to an unrelated person. Electricity will be treated as sold to an unrelated person for this purpose if the ultimate purchaser of the electricity is not related to the person that produces the electricity. For purposes of § 45J only, the requirement of a sale to an unrelated person will be treated as satisfied in these circumstances even if the producer sells the electricity to a related person for resale by the related person to a person that is not related to the producer. For rules for determining whether a person is related to the producer of the electricity, see § 45(e)(4).

.02 Effect of Grants, Tax-Exempt Bonds, Subsidized Energy Financing, and Other Credits. The amount of the credit under § 45J is not reduced on account of any grants, tax-exempt bonds, subsidized energy financing, or other credits described in § 45(b)(3).

SECTION 8. PAPERWORK REDUCTION ACT

The collection of information contained in this Notice has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-2000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collections of information in this Notice are in Section 5. This information is required to be collected and retained in order for taxpayers to claim the credit for the

production of electricity from advanced nuclear power facilities under § 45J. The information will be used to determine the portion of the national megawatt capacity limitation to which a taxpayer is entitled. The collection of information is required to obtain a benefit. The likely respondents are corporations and partnerships.

The estimated total annual reporting burden is 600 hours.

The estimated annual burden per respondent varies from 10 to 60 hours, depending on individual circumstances, with an estimated average of 40 hours. The estimated number of respondents is 15.

The estimated frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

SECTION 9. DISCLOSURE OF INFORMATION

.01 In general. An application for an allocation of the national megawatt capacity limitation, any documentation submitted by the taxpayer in support of that application, and any documentation generated by the Service as part of this process are return information subject to § 6103. This material remains the applicant's confidential return information, which is exempt from disclosure under the Freedom of Information Act (FOIA), 5 USC § 552(b)(3), in conjunction with § 6103. Other FOIA exemptions may also apply.

.02 FOIA Requests. Anyone interested in submitting a request for records under

the FOIA with respect to the national megawatt capacity program under § 45J should direct a request that conforms to the agency's FOIA regulations, found at 26 C.F.R.

§ 601.702, to the following address:

IRS FOIA Request
Baltimore Disclosure Office
Room 940
31 Hopkins Plaza
Baltimore, MD 21201

.03 Consultation with DOE. Section 45J(b)(4) requires that the Secretary consult with the Secretary of Energy prior to allocating the national megawatt capacity limitation.

As stated in Section 4.05 of this Notice, the Service intends to forward applications for an allocation of the national megawatt capacity limitation to the DOE so that DOE may certify whether the facility is an advanced nuclear power facility.

SECTION 10. EFFECT ON OTHER DOCUMENTS

Notice 2006-40, 2006-1 C.B. 855, is superseded.

SECTION 11. DRAFTING INFORMATION

The principal author of this Notice is Patrick S. Kirwan of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this Notice contact Mr. Kirwan at (202) 622-3110 (not a toll-free call).