

Beginning of Construction for Sections 45 and 48; Extension of Continuity Safe Harbor to Address Delays Related to COVID-19

Notice 2020-41

SECTION 1. PURPOSE

This notice modifies the prior Internal Revenue Service (IRS) notices¹ addressing the beginning of construction requirement for both the production tax credit for renewable energy facilities under section 45 of the Internal Revenue Code (Code) and the investment tax credit for energy property under § 48. In response to the Coronavirus Disease 2019 (COVID-19) pandemic, this notice provides that the Continuity Safe Harbor provided and extended by the prior IRS notices is further extended for projects that began construction in either calendar year 2016 or 2017. This notice also provides a 3½ Month Safe Harbor for services or property paid for by the taxpayer on or after September 16, 2019 and received by October 15, 2020.

SECTION 2. BACKGROUND

Section 38 allows certain business credits against the tax imposed by chapter 1 of the Code. Among the credits allowed by § 38 are the investment tax credit determined under § 46 and the renewable electricity production tax credit under § 45. The investment tax credit includes the energy credit under § 48. The credits under §§ 45 and 48 generally are referred to as the production tax credit (PTC) and the

¹ Notice 2013-29, 2013-1 C.B. 1085; Notice 2013-60, 2013-2 C.B. 431; Notice 2014-46, 2014-2 C.B. 520; Notice 2015-25, 2015-13 I.R.B. 814; Notice 2016-31, 2016-1 C.B. 1025; Notice 2017-04, 2017-4 I.R.B. 541; Notice 2018-59, 2018-28 I.R.B. 196; and Notice 2019-43, 2019-31 I.R.B. 487 (collectively, prior IRS notices).

investment tax credit (ITC), respectively.

To qualify for the PTC, electricity must, among other things, be produced by the taxpayer at a qualified facility as defined in § 45(d).² The PTC for any taxable year is calculated by multiplying an inflation-adjusted credit rate by kilowatt hours of electricity produced and sold by the taxpayer to an unrelated person. The ITC is calculated as a percentage of the basis of energy property (as defined in § 48(a)(3)) placed in service during the taxable year. Additionally, under § 48(a)(5), a taxpayer may elect to treat certain renewable energy facilities that otherwise qualify under § 45(d) as energy property to claim the ITC in lieu of the PTC with respect to the facility. Both the PTC and the ITC have a beginning of construction requirement.

On December 20, 2019, the Further Consolidated Appropriations Act of 2020, Pub. L. 116-94, Div. Q, 133 Stat. 2534 (FCAA), enacted significant amendments to the PTC and the ITC. The FCAA amended the PTC by extending the beginning of construction deadline for certain qualifying facilities to December 31, 2020. This modification retroactively extended the beginning of construction deadline to qualify for the PTC by three years for closed-loop biomass facilities, open loop biomass facilities, geothermal facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and marine and hydrokinetic renewable energy facilities. Additionally, the FCAA extended the beginning of construction deadline for the PTC for wind facilities by one

² Section 45 also provides a PTC for refined coal, steel industry fuel, and Indian coal, which is calculated based on the tons of coal sold to an unrelated party. However, the beginning of construction requirement does not apply to these facilities.

year to December 31, 2020, and reduced the credit rate applicable to such facilities by 40-percent for facilities the construction of which begins after December 31, 2019, and before January 1, 2021. Under the FCAA, the 40-percent phaseout also applies to such wind facilities treated as energy property for purposes of the ITC. The FCAA also retroactively extended the election to claim the ITC in lieu of the PTC by three years with respect to certain renewable energy facilities if construction of such facility begins before January 1, 2021.

Notice 2013-29 provides two methods to establish that the beginning of construction requirement under §§ 45 and 48(a)(5) has been satisfied with respect to a facility: the Physical Work Test and the Five Percent Safe Harbor. Both methods require a taxpayer to make continuous progress towards completion of the facility once construction has begun (Continuity Requirement).

Section 4 of Notice 2013-29 provides the Physical Work Test. Section 4.01 of Notice 2013-29 provides:

Construction of a qualified facility begins when physical work of a significant nature begins. . . . Whether a taxpayer has begun construction of a facility before [the statutory deadline], will depend on the relevant facts and circumstances. The Internal Revenue Service will closely scrutinize a facility, and may determine that construction has not begun on a facility before [the statutory deadline], if a taxpayer does not maintain a continuous program of construction as determined under section 4.06.

Section 4.06(1) of Notice 2013-29 provides that a continuous program of construction involves continuing physical work of a significant nature. Further, section 4.06(1) of Notice 2013-29 provides that whether the taxpayer has maintained a continuous

program of construction will be determined by the relevant facts and circumstances.

Section 5.01 of Notice 2013-29 provides the Five Percent Safe Harbor:

Construction of a facility will be considered as having begun before [the statutory deadline], 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 [the statutory deadline], and (2) thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility (as determined under section 5.02).

Section 5.01(2) of Notice 2013-29 allows a look-through for economic performance for purposes of the Five Percent Safe Harbor:

Solely for purposes of this notice, for property that is manufactured, constructed, or produced for the taxpayer by another person under a binding written contract with the taxpayer, costs incurred with respect to the property by the other person before the property is provided to the taxpayer are deemed incurred by the taxpayer when the costs are incurred by the other person under the principles of section 461.

Section 5.02(1) of Notice 2013-29 provides that whether a taxpayer makes continuous efforts to advance towards completion of the facility will be determined by the relevant facts and circumstances. This section also provides that facts and circumstances indicating continuous efforts to advance towards completion of the facility may include, but are not limited to:

- (a) paying or incurring additional amounts included in the total cost of the facility;
- (b) entering into binding written contracts for components or future work on construction of the facility;
- (c) obtaining necessary permits; and
- (d) performing physical work of a significant nature.

Notice 2013-60 clarifies certain concepts provided in Notice 2013-29. Notice

2013-60 provides a Continuity Safe Harbor that allows a facility to be deemed to have satisfied the Continuity Requirement. Section 3.02 of Notice 2013-60 provides that 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 Five Percent Safe Harbor). Section 3.02 of Notice 2013-60 also provides that 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 of Notice 2013-29.

The Department of the Treasury (Treasury Department) and the IRS published several notices further extending and modifying the Continuity Safe Harbor. Notice 2015-25 extends the Continuity Safe Harbor for one year. Notice 2016-31 modifies the Continuity Safe Harbor originally provided in section 3.02 of Notice 2013-60 and extended by Notice 2015-25. Section 3 of Notice 2016-31 provides that if a taxpayer places a facility in service by the later of (1) a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began or (2) December 31, 2016, the facility will be considered to satisfy the Continuity Safe Harbor. Notice 2017-04 further extends and modifies the Continuity Safe Harbor by providing that if a taxpayer places a facility in service by the later of (1) a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began or (2) December 31, 2018, the facility will be considered

to satisfy the Continuity Safe Harbor.

Notice 2018-59 provides methods to establish the beginning of construction (Physical Work Test and Five Percent Safe Harbor), a Continuity Requirement for both methods, rules for transferring energy property, and additional rules applicable to the beginning of construction requirement of § 48 with respect to “energy property” described in sections 2.02 and 2.03 of Notice 2018-59. Section 6.05 of Notice 2018-59 provides a Continuity Safe Harbor for energy property under § 48 that mirrors that provided for the PTC under § 45 in the prior IRS notices:

Except as provided in this section, if a taxpayer places an energy property in service by the end of a calendar year that is no more than four calendar years after the calendar year during which construction of the energy property began (the Continuity Safe Harbor Deadline), the energy property will be considered to satisfy the Continuity Safe Harbor. The excusable disruption rules in section 6.03 do not apply for purposes of applying the Continuity Safe Harbor. However, if an energy property is not placed in service before the end of the fourth calendar year after the calendar year during which construction of the energy property began, whether the energy property satisfies the Continuity Requirement under either the Physical Work Test or the Five Percent Safe Harbor will be determined by the relevant facts and circumstances.

The Treasury Department and the IRS recognize that the COVID-19 pandemic is causing delays in the development of certain facilities eligible for the PTC and the ITC. As a result, many taxpayers will not place facilities in service in time to meet the Continuity Safe Harbor or may have difficulty demonstrating to investors that they have met the Continuity Requirement based on the relevant facts and circumstances. This situation is resulting in significant impacts on project financing and development. Thus, an extension of the Continuity Safe Harbor and the addition of a 3½ Month Safe Harbor

are necessary to provide relief for taxpayers to satisfy the beginning of construction requirements under §§ 45 and 48. Except as otherwise specified in this notice, the guidance provided in the prior IRS notices continues to apply.

SECTION 3. EXTENSION OF THE CONTINUITY SAFE HARBOR FOR SECTIONS 45 and 48

This notice provides that for any qualified facility or energy property that began construction under the Physical Work Test or the Five Percent Safe Harbor in either calendar year 2016 or 2017, the Continuity Safe Harbor is satisfied if a taxpayer places the qualified facility or energy property in service by the end of a calendar year that is no more than five calendar years after the calendar year during which construction with respect to that qualified facility or energy property began.

SECTION 4. SAFE HARBOR FOR 3½ MONTH RULE

The Five Percent Safe Harbor treats construction as beginning with respect to any qualified facility or energy property when the taxpayer (or another person in the case of the look-through provision) pays or incurs five percent of total projects costs. Under the principles of § 461(h), the all events test for determining whether a liability has been incurred generally is not satisfied any earlier than when economic performance occurs with respect to the liability. Under § 1.461-4(d)(2)(i) of the Income Tax Regulations, if the liability of the taxpayer arises out of the provision of services or property, economic performance for the liability ordinarily occurs as such services or property is provided to the taxpayer. However, under the special rule set forth in § 1.461-4(d)(6)(ii) (3½ Month Rule), a taxpayer may treat services or property as

provided to the taxpayer as the taxpayer makes payment to the person providing the services or property if the taxpayer can reasonably expect the person to provide the services or property within 3½ months after the date of payment. If the taxpayer's reasonable expectation at the time they made the payment was that the person would provide the ordered services or property within 3½ months, regardless of any subsequent events that prevent that reasonable expectation from actually occurring, the 3½ Month Rule is satisfied and the cost is treated as incurred when paid.

As noted, the taxpayer's reasonable expectation at time of payment is relevant for purposes of the 3½ Month Rule. However, to provide certainty and assurance, this notice further provides that for services or property paid for by the taxpayer on or after September 16, 2019, the taxpayer will be deemed to have had a reasonable expectation that the services or property would be received within 3½ months after the date of payment in the case of any services or property actually received by a taxpayer by October 15, 2020 (3½ Month Safe Harbor). Although this 3½ Month Safe Harbor will not apply to any services or property received by a taxpayer after October 15, 2020, the 3½ Month Rule may still be satisfied, as described above, based on reasonable expectations at the time of payment. The 3½ Month Safe Harbor applies only for purposes of the beginning of construction requirement for the PTC and the ITC.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, Notice 2016-31, Notice 2017-04, Notice 2018-59, and Notice 2019-43 are modified.

SECTION 6. NO RULE

The IRS will not issue private letter rulings or determination letters to a taxpayer regarding the application of this notice, the prior IRS notices, or the beginning of construction requirement under §§ 45 and 48.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Jennifer Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Jennifer Bernardini on (202) 317-6853 (not a toll-free call).