

Beginning of Construction for Sections 45 and 48

Notice 2017-04

SECTION 1. PURPOSE

Section 38 of the Internal Revenue Code (the Code) allows certain business credits against the tax imposed by Chapter 1 of the Code. Among the credits allowed by § 38 is the credit for renewable electricity production described in § 45(a). To qualify for the renewable electricity production tax credit, electricity must, among other things, be produced by the taxpayer at a qualified facility as defined in § 45(d). If the taxpayer makes an election under § 48(a)(5), the taxpayer may instead claim the investment tax credit with respect to the facility.

On December 18, 2015, the Protecting American from Tax Hikes Act of 2015, Pub. L. No. 114-113, Div. Q, 129 Stat. 2242 (the PATH Act), enacted amendments to the production tax credit under § 45 (PTC) and the investment tax credit under § 48 (ITC) for certain renewable energy facilities. The PATH Act extended the PTC for two years with respect to certain facilities the construction of which begins before January 1, 2017, and further extended the PTC for wind facilities the construction of which begins before January 1, 2020. The PATH Act also modified the PTC for wind facilities by providing that the credit will phase out over the next four years. Under § 45(b)(5) as modified by the PATH Act, wind facilities the construction of which begins before January 1, 2017 are eligible to receive 100 percent of the PTC; wind facilities the

construction of which begins after December 31, 2016 and before January 1, 2018 are eligible to receive 80 percent of the PTC; wind facilities the construction of which begins after December 31, 2017 and before January 1, 2019 are eligible to receive 60 percent of the PTC; and wind facilities the construction of which begins after December 31, 2018 and before January 1, 2020 are eligible to receive 40 percent of the PTC. In addition, the PATH Act extended the election to claim the ITC in lieu of the PTC with respect to certain renewable energy facilities if construction of such facility begins before January 1, 2017 (or January 1, 2020 in the case of wind facilities).

Similarly, the PATH Act also extended and modified the ITC for solar energy facilities the construction of which begins before January 1, 2022. The Treasury Department and the Internal Revenue Service (Service) anticipate issuing separate guidance addressing the extension and modification of the ITC for solar energy facilities.

This notice updates and clarifies the guidance provided in 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; and Notice 2016-31, 2016-23 I.R.B. 1025 (collectively “the prior IRS notices”). The Service will not issue private letter rulings to taxpayers regarding the application of this notice, the prior IRS notices, or the beginning of construction requirement under §§ 45(d) and 48(a)(5).

SECTION 2. BACKGROUND

On June 6, 2016, the Treasury Department and the Service published Notice 2016-31 to extend and modify the Continuity Safe Harbor, as defined in section 3.02 of

Notice 2013-60, and to provide additional guidance regarding the beginning of construction requirement. Notice 2016-31 also clarifies the application of the Five Percent Safe Harbor, as defined in section 5 of Notice 2013-29, to retrofitted renewable energy facilities.

After the publication of Notice 2016-31, the Treasury Department and the Service received requests for further clarification regarding the extension and modification of the Continuity Safe Harbor, the prohibition against combining methods by which to satisfy the beginning of construction requirement, and the costs that may be included in the Five Percent Safe Harbor for retrofitted renewable energy facilities. This notice modifies and clarifies Notice 2016-31. Except as otherwise specified in this notice, the guidance provided in the prior IRS notices continues to apply.

SECTION 3. EXTENSION AND MODIFICATION OF THE CONTINUITY SAFE HARBOR

Section 3.02 of Notice 2013-60 provides a Continuity Safe Harbor that allows a facility to be deemed to satisfy the Continuous Construction Test, as defined in section 4.06 of Notice 2013-29 (for purposes of satisfying the Physical Work Test provided in section 4 of Notice 2013-29), or the Continuous Efforts Test, as defined in section 5.02 of Notice 2013-29 (for purposes of satisfying the Five Percent Safe Harbor), based on the date on which a facility is placed in service. If a facility does not satisfy the Continuity Safe Harbor, whether the facility satisfies the Continuous Construction or Continuous Efforts Tests is determined by the relevant facts and circumstances.

Section 3 of Notice 2016-31 modifies and extends 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, 2016, the facility will be considered to satisfy the Continuity Safe Harbor.

This notice modifies the Continuity Safe Harbor provided in section 3 of Notice 2016-31 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. For example, if construction begins on a facility on January 15, 2013, and the facility is placed in service by December 31, 2018, the facility will be considered to satisfy the Continuity Safe Harbor. Alternatively, if construction begins on a facility on January 15, 2016, and the facility is placed in service by December 31, 2020, the facility will be considered to satisfy the Continuity Safe Harbor.

SECTION 4. PROHIBITION AGAINST COMBINING METHODS BY WHICH TO SATISFY THE BEGINNING OF CONSTRUCTION REQUIREMENT

Section 4.01 of Notice 2016-31 provides that a taxpayer may not rely upon the Physical Work Test and the Five Percent Safe Harbor in alternating calendar years to satisfy the beginning of construction requirement or the Continuity Requirement. For example, if a taxpayer performs physical work of a significant nature on a facility in 2015, and then pays or incurs five percent or more of the total cost of the facility in 2016, the Continuity Safe Harbor will be applied beginning in 2015, not in 2016.

This notice modifies section 4.01 of Notice 2016-31 by providing that this rule applies to facilities the construction of which begins after June 6, 2016 (the date on which Notice 2016-31 was published in I.R.B. 2016-23).

SECTION 5. COSTS INCLUDED IN THE APPLICATION OF FIVE PERCENT SAFE HARBOR TO RETROFITTED FACILITIES

Section 6.01 of Notice 2016-31 provides that a facility may qualify as originally placed in service even though it contains some used property, provided the fair market value of the used property is not more than 20 percent of the facility's total value (the cost of the new property plus the value of the used property) (the 80/20 Rule).

Section 6.02 of Notice 2016-31 provides that to satisfy the beginning of construction requirement for §§ 45 and 48, the Five Percent Safe Harbor is applied only with respect to the cost of new property used to retrofit an existing facility. Therefore, only expenditures paid or incurred that relate to new construction should be taken into account for purposes of the Five Percent Safe Harbor.

Section 5.01(1) of Notice 2013-29 provides that for purposes of the Five Percent Safe Harbor, all costs properly included in the depreciable basis of the facility are taken into account to determine whether the Safe Harbor has been met. The total cost of the facility does not include the cost of land or any property not integral to the facility, as described in section 4.05(1) of Notice 2013-29.

This notice clarifies that for purposes of the 80/20 rule, the cost of new property includes all costs properly included in the depreciable basis of the new property.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, and Notice 2016-31 are clarified and modified. The guidance provided in this notice is applicable to any project for which a taxpayer claims the PTC or the ITC under §§ 45 or 48, as modified by ATRA, that is placed in service after January 2, 2013.

SECTION 7. DRAFTING INFORMATION

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