Process for Electing the Investment Tax Credit In Lieu of the Production Tax Credit – IRS Notice 2009-52

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June 17, 2009

As part of broad-based federal support for the renewable energy sector, the American Recovery and Reinvestment Act of 2009 (the "Recovery Act") changed federal tax law to allow developers of certain types of renewable energy projects to elect the Section 48 investment tax credit (the "ITC") in lieu of the Section 45 production tax credit (the "PTC"). On June 5, 2009, the Internal Revenue Service (the "IRS") issued Notice 2009-52 outlining the procedures taxpayers are to follow in making this election.

Overview of the ITC and PTC

The ITC allows taxpayers to take a single tax credit in a project's first year equal to a certain percentage—either 30 percent or 10 percent—of the project's tax basis. By contrast, PTCs are typically earned and claimed annually in each of the first 10 years of a project's commercial operation. The PTCs accrue based on the actual production and sale of electricity from eligible renewable sources.

Historically, wind power projects have relied solely on the PTC whereas solar projects have relied on the ITC. Under the Recovery Act, wind projects described in the PTC rules may now instead elect the ITC benefit. In addition, certain other types of renewable energy projects that previously were only eligible for the PTC, such as projects based upon biomass, geothermal, and wave power, are now ITC-eligible as well.

Procedures for electing the ITC in lieu of the PTC

Pursuant to Notice 2009-52, a taxpayer may irrevocably elect the ITC instead of the PTC for qualifying renewable energy projects by completing Form 3468 and filing this Form with the taxpayer's income tax return for the year in which the eligible renewable energy property is placed in service. Each such taxpayer also will be required to attach additional information and statements to Form 3468, including statements providing various technical information about the project, the date the project was placed in service, an accounting of the taxpayer's tax basis in the energy property and a depreciation schedule reflecting the tax basis remaining after election of the ITC. The IRS also will require a declaration of an authorized person, made under penalties of perjury, as to the truth, correctness and completeness of the filing.

The Treasury Department grant program

As one of its most important changes to the renewable energy tax credit regime, the Recovery Act also created a cash grant as an alternative incentive for renewable energy projects otherwise eligible for the ITC (including those projects described under the PTC rules that can now elect the ITC). Taxpayers eligible to take the ITC instead may apply to receive a cash grant from the Treasury Department in an amount equal to either 30 percent or 10 percent of the eligible tax basis in the project, depending on the type of project. Regulations or other guidance from Treasury describing the procedures required for obtaining this grant are anticipated by July 2009.

Once Treasury releases information on the grant application procedures, developers of renewable energy projects will be better able to plan and structure their investments around the Treasury grant, the ITC or the PTC based on their available capital and financing methods.

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