

Beginning of Construction for Sections 45 and 48; Tolling and Extension of Continuity Safe Harbor to Mitigate Significant National Security Concerns

Notice 2019-43

SECTION 1. PURPOSE

This notice modifies 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; Notice 2016-31, 2016-23 I.R.B. 1025; Notice 2017-04, 2017-4 I.R.B. 541; and Notice 2018-59, 2018-28 I.R.B. 196 (collectively, the prior IRS notices) to provide that the continuity safe harbor (as defined below) may be tolled and extended in certain limited circumstances involving significant national security concerns.

SECTION 2. BACKGROUND

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 are the investment credit determined under § 46 and the renewable electricity production credit under § 45(a). The investment credit includes the energy credit under § 48. The credits under §§ 45(a) and 48 generally are referred to as the production tax credit (PTC) and the 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). 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. A taxpayer may elect under § 48(a)(5) to treat a certain qualified facilities under § 45(d) as energy property and claim the ITC rather than the PTC with respect to the facility.

On December 18, 2015, the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. P and Q, 129 Stat. 2242, (CAA) enacted amendments to the PTC and the ITC for certain renewable energy facilities and energy properties. The CAA extended the PTC for two years with respect to certain facilities the construction of which began before January 1, 2017, and further extended the PTC for wind facilities the construction of which begins before January 1, 2020. The CAA also modified the PTC for wind facilities by providing that the credit will phase out over four years and extended the election to claim the ITC in lieu of the PTC with respect to certain renewable energy facilities if construction of such facility began before January 1, 2017 (or January 1, 2020, in the case of wind facilities).

On February 9, 2018, the Bipartisan Budget Act of 2018, Pub. L. 115-123, Div. D, 132 Stat. 64, (BBA) modified the ITC under § 48 by replacing the requirement to place energy property in service by a certain date with a requirement to begin construction by a certain later date. As modified, construction of energy property must begin before January 1, 2022. This modification has the effect of retroactively extending by five years the ITC for fiber-optic solar energy property, qualified fuel cell property, qualified microturbine property, combined heat and power system property, qualified small wind

energy property, and geothermal heat pump property the construction of which begins before January 1, 2022. The BBA amendments also phase out the ITC for fiber-optic solar energy property, qualified fuel cell property, and qualified small wind energy property over five years. For these energy properties, regardless of when construction begins, the projects must be placed in service before January 1, 2024.

Notice 2013-29 provides two methods to establish beginning of construction under § 45: starting physical work of a significant nature or incurring five percent or more of the total cost of the facility. Both methods require a taxpayer to make continuous progress towards completion once construction has begun (under either the Continuous Construction Test of section 4.06 or the Continuous Efforts Test of section 5.02 of Notice 2013-29).

Notice 2013-60 provides a safe harbor (Continuity Safe Harbor) that allows a taxpayer to be deemed to satisfy the Continuous Construction Test or the Continuous Efforts Test based on the date the facility is placed in service. If a facility is not placed in service before the required date, 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.

Section 3 of Notice 2017-04 further 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, 2018, the facility will be considered to satisfy the Continuity Safe Harbor.

For purposes of the beginning of construction requirement under § 48, section 6.05 of Notice 2018-59 also provides a Continuity Safe Harbor. If a taxpayer places 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 energy property will be considered to satisfy the Continuity Safe Harbor.

A plan to develop or construct a facility or energy property (Plan) includes the construction of the electricity generating equipment, but may also include the construction or installation of additional equipment that is not part of the facility or energy property itself but which is necessary to connect the facility or energy property to the energy grid or to customers (including, but not limited to, a distribution or transmission line or other interconnection equipment).

The Treasury Department and the Internal Revenue Service recognize that, in some situations, a Plan may raise significant national security concerns for the Department of Defense (DOD). Any efforts to mitigate these significant national security concerns by pursuing a modification to the Plan may delay the development and construction of the facility or energy property. This notice therefore provides that, with respect to any Plan that satisfies the requirements provided in section 3.01, the Continuity Safe Harbor may

be tolled and extended in certain limited circumstances involving significant national security concerns. Except as otherwise specified in this notice, the guidance provided in the prior IRS notices continues to apply.

SECTION 3. TOLLING AND EXTENSION OF THE CONTINUITY SAFE HARBOR

.01 Tolling and Extension of Continuity Safe Harbor To Mitigate Significant National Security Concerns. This notice provides that if all of the requirements set forth in this section 3.01 are satisfied, for purposes of §§ 45 and 48, the Continuity Safe Harbor will be tolled and extended for a period of time to account for delays that result from pursuing a modification to a Plan to mitigate significant national security concerns raised by the DOD (Tolling Period). On the date that the Tolling Period ends the Continuity Safe Harbor resumes. The Continuity Safe Harbor will be tolled and extended if all of the following requirements are satisfied:

(1) Construction has begun (within the meaning of the prior IRS notices) with respect to the facility or energy property that will generate the credits under §§ 45 or 48 pursuant to the Plan;

(2) Parties holding an ownership interest in property that is part of the Plan (or that will hold an ownership interest in property that is part of the Plan after such property is constructed), including (a) the facility or energy property, or (b) the additional equipment that is not part of the facility or energy property itself but which is necessary to connect the facility or energy property to the energy grid or to customers (including, but not limited to, a distribution or a transmission line or other interconnection equipment) have received one or more government permits or approvals necessary to implement the Plan;

(3) The DOD provides written notice directly to one or more of the parties described in paragraph (2) of this section 3.01 that one or more aspects of the Plan raises significant concerns related to national security and that modification of the Plan would be in the best interests of national security objectives;

(4) Such parties pursue a modification of the Plan acceptable to DOD to mitigate these significant national security concerns and to further the national security objectives; and

(5) The modification of the Plan requires the parties to obtain new or additional permits or licenses, which delays placing the facility or energy property in service.

.02 Calculation of Tolling Period. The Tolling Period will result in a day-for-day extension of the Continuity Safe Harbor. The first day of the Tolling Period is the date on which the DOD provides the written notice described in requirement (3) of section 3.01 of this notice. The last day of the Tolling Period is the date on which the parties described in requirement (2) of section 3.01 of this notice:

(1) obtain all new or additional permits or licenses (and any potential administrative appeals or potential judicial review by the applicable federal or state courts are finally resolved) described in section 3.01(5) of this notice;

(2) obtain written confirmation that the new or additional permits or licenses described in section 3.01(5) of this notice to be completed will not be issued; or

(3) notify the relevant federal or state regulatory, permitting, and/or licensing authorities in writing that the modification of the Plan will no longer be pursued.

In no event shall the Tolling Period exceed a period of four years.

.03 Example. X has an ownership interest in a facility. In September 2016, X begins

construction of the facility. As part of a Plan to connect the facility to the energy grid, a new transmission line must be constructed. Y will develop, own, and operate the new transmission line. The route for the proposed transmission line runs adjacent to a DOD facility. In June 2018, Y receives all permits necessary for constructing the transmission line, although during the permitting process the DOD raised concerns with permitting authorities regarding the location of the proposed transmission line. Y identifies an alternative route for the transmission line and proposes to build the transmission line over this alternative route rather than over the original route. On December 1, 2018, Y receives a written notice from the DOD stating that the Plan raises significant concerns related to national security and that the proposed alternative route for the transmission line would be in the best interests of national security objectives. Constructing the transmission line along this alternative route requires that certain new permits and licenses be granted by various federal and state permitting and licensing agencies. On June 30, 2021, after any potential administrative appeals or potential judicial review of the permitting and licensing process have been resolved, Y obtains from the relevant federal and state agencies the new permits and licenses required to allow the transmission line to be completed.

The Tolling Period is calculated to run from December 1, 2018, through June 30, 2021 (943 days). The Continuity Safe Harbor will resume on July 1, 2021 and will be satisfied if the facility is placed in service by August 1, 2023 (943 days after December 31, 2020, which would have been the placed in service deadline under the Continuity Safe Harbor had it not been tolled and extended).

SECTION 4. EFFECT ON OTHER DOCUMENTS

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

SECTION 5. NO RULE

The Internal Revenue Service 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 6. 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 Ms. Bernardini at (202) 317-6853 (not a toll-free call).