Webinar: What Does the New IRS PTC Guidance for Start of Construction Mean for Projects?

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PTC Start of Construction Guidance - Background

- The American Taxpayer Relief Act of 2012 enacted in the first week of 2013 extended the production tax credit (PTC) for projects that start construction in 2013
  - The Act contained no outside date by which time the project must be completed
  - The Act permits PTC eligible projects to waive the PTC and elect a 30% investment tax credit
- The IRS finally issued guidance in Notice 2013-29 on April 15th
PTC Start of Construction - IRS Notices 2013-29 / 2013-60

- IRS Notice 2013-29 is generally favorable

- The Notice provides two methods to start construction in 2013:
  - Commence physical work of a significant nature in 2013; or
  - A safe harbor requiring incurring at least 5% of the cost of the project in 2013
  - Both methods generally follow the Treasury Cash Grant guidance but with some key differences

- Notice 2013-29 added an additional requirement not contained in the PTC extension statute or in the Treasury Cash Grant Guidance: the taxpayer must *continually* pursue completion of the facility

- IRS then issued Notice 2013-60 providing a safe harbor for the *continuous* requirement, so long as the project is *placed in service* by the **end of 2015**
Theoretically Projects can be Complete After 2015

- A project that is complete after 2015, can still qualify for the PTC if there was “continuous” work
  - Post-2015 projects should expect IRS scrutiny and tax equity investor skepticism

- For non-5% safe harbor projects, the continuous work must be
  - Work must be “integral” to the facility (e.g., “transmission” does not count)
  - Preliminary work (e.g., planning and permits) does not count

- For 5% safe harbor projects, the continuous efforts includes
  - Paying or incurring additional amounts included in the basis of the facility
  - Entering binding written contracts for components or future work
  - Obtaining necessary permits
  - Performing work integral to the facility (see above)
Solutions to Common Problems
Project is unable to obtain a TSA?

- Buy a collection of components, rather than whole turbines

- Ask the BOP Contractor to help. The BOP Contractor orders parts and materials that equal 5% of the total ultimate tax basis of the project.
  - You can look through to the BOP contractor’s spend, so long as you have a binding written contract with the BOP contractor with any liquidated damages not limited to less than 5% of the face amount of the contract
  - The BOP contractor must pay for the parts and materials in 2013 and they must be delivered within 3.5 months of payment
  - The BOP contractor must be able to trace the parts and materials to your project
  - The project company does not have to pay the BOP contractor anything in 2013
Unable to Raise the Cash to Meet the 5% Safe Harbor

“Physical Work of a Significant Nature” to start construction in 2013
- Only rely on it if cash strapped
- Tax equity investors will be skeptical – may pass on your project or put your project at the bottom of their list

What counts?
- Excavating turbine sites
- Pouring foundations
- Setting anchor bolts
- Step-up transformer
- Roads only if for “operations and maintenance”

Many subjective issues as to what is “significant”
- What is “significant” – IRS’s example suggests 20% of the turbine sites
- Was it “significant” if you have to later move the turbine sites or the holes have to be re-dug after the spring thaw
- If you are building a road, how much road do you need to build to be “significant” – 100 feet, 1 mile, 2 miles?
Not Sure about PPA or Interconnection Status?

- Meet the 5% safe harbor in 2013 (or physical work of significant in 2013)
- Then suspend work until the PPA and/or interconnection is obtained
- But be certain the project is *placed in service* by the end of 2015
Unsure of the Project Site

- Notice 2013-60 extended the “master contract” rules to the 5% safe harbor.
- There is no requirement to identify the location of the project in 2013.
- Developer parent enters into a “master contract” with an OEM and orders standard parts in 2013 to meet the 5% test:
  - Parts must be paid for in 2013 and delivery within 3.5 months of payment.
- After 2013, the developer parent locks in sites and assigns its rights under the 2013 “master contract” to special purpose companies organized for each project.
- Would want to be certain projects were all complete by the end of 2015 to avoid the “continuous” construction requirements.
Not Enough Time to Ship “5%” Components to Project Site

- If a project plans to meet the 5% test, the components ordered with the 5% payment must be delivered within 3.5 months of payment.
- Delivery does not have to be to the project site or even to the U.S.
- The project could lease warehouse space abroad (e.g., Germany, China) and have the components delivered there:
  - Title and risk of loss must transfer to the project.
  - The project should have a signed lease and be paying rent.
  - The project should be responsible for insuring the components once delivered.
David K. Burton advises clients on a wide range of U.S. tax matters, with a particular emphasis on project finance and energy transactions. In addition, he also advises clients on tax matters regarding the formation and structuring of domestic and offshore investment funds.

**Areas of Experience**

- Tax
- Global Project Finance

**Practice & Background**

Mr. Burton has extensive experience structuring tax-driven vehicles, such as sale-leasebacks, flip partnerships, inverted leases and other structures, for the acquisition and financing of renewable energy assets.

Prior to joining Akin Gump, Mr. Burton was the managing director and senior tax counsel at GE Energy Financial Services (GE EFS), one of the world’s leading investors in energy projects. At GE EFS, Mr. Burton oversaw all of the tax aspects for over $21 billion in global energy projects from structuring transactions to accounting for taxes to formulating tax policy initiatives. During his tenure at GE EFS, the division’s investments in wind, solar, hydro, biomass and geothermal power grew to $6 billion, making GE EFS the largest tax-advantaged energy investor in the U.S. Before joining GE EFS, Mr. Burton was a tax lawyer at GE Capital and primarily focused on aircraft and equipment leasing and financing and asset acquisitions. From 1996-2000, Mr. Burton was a tax lawyer at a large, international law firm in Philadelphia.

Mr. Burton is editor of Akin Gump’s [Tax Equity Telegraph](#) blog that is intended to address the intersection of tax policy and energy policy in the United States.

Mr. Burton was also quoted in North American WindPower’s article “Is Treasury More Closely Scrutinizing Cash-Grant Applications.”
Adam Umanoff co-chairs Akin Gump’s global project finance practice. Mr. Umanoff focuses on the development, financing, operation, disposition and acquisition of infrastructure and energy projects and companies, with a particular focus on the renewable energy industry. He represents project sponsors and developers, lenders, equity investors, manufacturers, technology companies and other participants in the sector and has substantial experience across the wind, solar, geothermal and biomass industries.

Practice & Background
In the past few years, Mr. Umanoff served as lead counsel on five of the largest renewable energy projects in the world, three of which won “Deal of the Year” honors from Project Finance & Risk, Project Finance Magazine, Project Finance International and Solar Power Generation. He has been recognized as among California’s Top 100 Lawyers and Top 25 Clean Tech Lawyers, and is one of only nine attorneys in the United States recognized by Chambers and Partners in Band 1 for renewable energy projects.

Prior to joining Akin Gump, Mr. Umanoff was a partner at several international law firms, an independent renewable energy consultant and President and CEO of Enron Wind Corp.

Mr. Umanoff is a member of the American Bar Association, Business Law Section and the Los Angeles County Bar Association. He received his B.S. from Cornell University in 1980 and his J.D. in 1983 from Columbia Law School, where he was editor of the Columbia Journal of Environmental Law, a Harlan Fiske Stone Scholar and the recipient of the Wertheimer Prize in Labor Law.
Joshua R. Williams advises on a broad range of U.S. and international tax matters, with a focus on the formation and operation of domestic and offshore private investment funds and on the tax aspects of project finance and renewable energy transactions.

**Practice & Background**
Mr. Williams regularly advises on international tax issues that arise with respect to investments in the United States by non-U.S. investors (including investors subject to special U.S. tax treatment), as well as investments outside of the United States by U.S. persons. Mr. Williams also has experience in structuring tax-driven vehicles, such as sale-leasebacks, flip partnerships, inverted leases and other structures, for the acquisition and financing of renewable energy assets.

Prior to joining Akin Gump, Mr. Williams was an associate at two other major U.S. law firms, where he focused on U.S. and international tax matters.

Mr. Williams received his B.S. *summa cum laude* in accounting in 1999 from the University of South Carolina and his J.D. *cum laude* in 2002 from the University of South Carolina School of Law, where he was a member of the Order of the Coif and served as the student works editor of the *South Carolina Law Review*. Mr. Williams also received an LL.M. in taxation in 2003 from the New York University School of Law.