

Global Project Finance Alert

After Pressure from Treasury, IRS Revokes Favorable PPA Private Letter Ruling

December 11, 2012

In January 2012, the IRS issued a private letter ruling that came as a pleasant surprise. The IRS ruled that when a taxpayer purchased wind farms subject to favorable power purchase agreements (“PPAs”), none of the purchase price was required to be allocated to the PPAs. If some portion of the purchase price were required to be allocated to the PPAs, that portion would not be eligible for accelerated depreciation. Thus, the private letter ruling enabled taxpayers to claim accelerated depreciation with respect to the full purchase price of wind farms. P.L.R. 201214007 (Jan. 3, 2012).

The tax bar was pleasantly surprised by this ruling when it was made public on April 6, 2012, because it appeared to conflict with a memorandum issued by Treasury on June 30, 2011 that addressed the Section 1603 cash grant program for renewable energy projects. That memorandum provides: “In cases where the income approach yields a value that exceeds the cost to build the property by a significant margin ... a portion of the claimed value should, in fact, be allocated to other ineligible assets ... such as a power purchase agreement.” As the value allocated to the PPA would not be eligible for the Treasury cash grant, it would follow that this value would not be eligible for accelerated depreciation either.

When the private letter ruling was made public in April 2012, tax advisors were surprised but pleased with the favorable answer. Tax advisors were left wondering how the result could be different for the Section 1603 grant program and for tax purposes, given that the grant program is supposed to “mimic” the tax rules. The Treasury apparently had a similar thought. After the ruling was made public, Treasury and IRS lawyers began to informally comment that the ruling was under review.

That review was completed on September 6, 2012, when the revocation of the prior private letter ruling was communicated to the taxpayer that requested the ruling. P.L.R. 201249013 (Sept. 6, 2012). Pursuant to IRS policy, a redacted version of the ruling was not released to the public until three months later – December 7, 2012.

Fortunately for the sharp-eyed taxpayer that requested the ruling, the revocation only applies to taxable years beginning on or after September 6, 2012 (*i.e.*, generally 2013 and subsequent years). Therefore, the taxpayer in question was able to use a material portion of the benefit from the allocation of the entire tax basis to the wind turbines and related tangible assets which are eligible for five-year accelerated depreciation. Following the effective date of the revocation, the taxpayer will have to allocate a portion of any remaining tax basis to the favorably priced PPAs and recover this portion straight-line over the remaining terms of the PPAs, which are presumably substantially in excess of five years.

In light of the revocation, grant applicants and taxpayers acquiring or building energy projects subject to favorable PPAs should consider how much value is appropriately attributed to such PPAs. Then they should assume that portion is not eligible for cash grant, investment tax credits or accelerated depreciation and is recovered straight-line over the term of the applicable PPA.



It is highly unusual for the IRS to revoke a private letter ruling based on a change in its view of the law. The revocation is another example of the challenging environment in which renewable energy tax planning is conducted.

Treasury Memo of June 30

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