

# Client Alert

September 2013

## **Internal Revenue Service Issues Clarification of Beginning of Construction Rules for Purposes of the Production Tax Credit (and Investment Tax Credit in Lieu of Production Tax Credit)**

On September 20, 2013, the Internal Revenue Service (the “Service”) released [Notice 2013-60](#) to clarify Notice 2013-29, which provides guidance on the guidelines for determining when construction has begun on a facility ([see previous alert](#)). Under the American Taxpayer Relief Act of 2012 Congress extended the production tax credit (PTCs) for wind projects until January 1, 2014, and adopted a “beginning of construction” deadline in lieu of the placed-in-service deadlines for wind, closed- and open-loop biomass, geothermal, landfill gas, trash, hydropower and marine and hydrokinetic facilities. [See previous alert](#). Congress also conformed the election to claim investment tax credits (ITCs) in lieu of PTCs to match the new sunset date and beginning of construction rule applicable to the PTCs.

Notice 2013-60 clarifies Notice 2013-29 regarding (i) determining whether a taxpayer satisfies the continuous construction and continuous efforts tests, (ii) the applicability of the “master contract” provision and (iii) the effect of a transfer of a facility after construction has begun.

### **Continuous Construction/Continuous Efforts Tests**

Notice 2013-29 provides two ways to establish that construction of a qualified facility has begun for purposes of the PTC and the ITC: First, a taxpayer may establish the beginning of construction by starting physical work of a significant nature prior to January 1, 2014 (the “Physical Work Test”). Second, a taxpayer may establish the beginning of construction by incurring 5 percent or more of the total cost of the facility prior to January 1, 2014 (the “Safe Harbor”). Each method requires that a taxpayer make continuous progress toward completion once construction has begun—under the “Continuous Construction Test” (as set forth in section 4.06 of Notice 2013-29), and under the “Continuous Efforts Test” (as set forth in section 5.02 of Notice 2013-29), respectively.

Provided that a facility satisfies either the Physical Work Test or the 5 percent Safe Harbor as of December 31, 2013, then if the facility is placed in service before January 1, 2016, the facility will be deemed to satisfy the Continuous Construction Test, for purposes of satisfying the Physical Work Test, or the Continuous Efforts Test, for purposes of satisfying the Safe Harbor. If a facility is not placed in service before January 1, 2016, whether such facility satisfies the Continuous Construction Test or Continuous Efforts Test will be determined under the facts and circumstances described in Notice 2013-29.

### **Master Contract**

Notice 2013-60 clarifies that the master contract provision in Notice 2013-29, section 4.03(2), also applies for purposes of the Safe Harbor in addition to the Physical Work Test.

**Transfer of a Facility**

Notice 2013-60 addresses the transfer of a facility after construction commences and explains that Section 45(d)(1) of the Internal Revenue Code and Notice 2013-29 do not require construction to be begun by the taxpayer claiming the PTC or ITC. If a qualified facility satisfies either the Physical Work Test or the Safe Harbor, a taxpayer that owns the facility at any time during the 10-year period beginning on the date the facility was originally placed in service may claim the PTC with respect to that facility, even if the taxpayer did not own the facility at the time construction began. Alternatively, a taxpayer that owns the facility on the date such facility is originally placed in service may elect to claim the ITC, even if the taxpayer did not own the facility at the time construction began.

This clarification provides needed comfort in understanding how sales of and investments in safe-harbored projects will be treated for purposes of the “beginning of construction” rules.

Click the following link for a copy of [Notice 2013-60](#). If you have any questions regarding the Notice, please contact us.

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