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# Placed-in-Service Date Issues

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# Agenda

- Importance of Placed-in-Service (“PIS”) to renewable energy incentives
  - ITC, PTC, 1603, Depreciation, Begun Construction
  - Timing of tax equity investment
- What you need to know about PIS
  - 5 factors
  - Structuring Transactions (Examining PPAs, EPCs, etc.)
  - Case study
- Current Issues in Applying the Law
  - IRS and 1603 grant controversy
- Questions

# Importance of Placed-in-Service Date

- Investment Tax Credit (“ITC”) under IRC section 48 allows a taxpayer to claim a 30% (or 10%) tax credit in year the property is “placed in service”
- Production Tax Credit (“PTC”) under IRC section 45 provides a production based tax credit currently adjusted to 2.3 cents/kWh (or 1.2 cents/kWh) for electricity sold to an unrelated party for a 10 year period beginning when such facility is “placed in service”
- An ITC in lieu of PTC is available for certain technologies that have “begun construction” prior to a certain date
  - Deemed continuous progress if the facility is “placed in service” before a certain date

# Importance of Placed-in-Service Date

- ARRA Section 1603 provides a 30% (or 10%) cash grant in lieu of ITC or PTC if the facility is “placed in service” by a specific credit termination date and grant application is filed within 180 days of the “placed-in-service” date
- Bonus depreciation also may be available based on the year eligible property is “placed in service”
  - Depreciation of property begins when the property is “placed in service”
- Timing of tax equity investments
  - Expected sharing of tax benefits between sponsor and tax equity investor (i.e., ITC, PTC, depreciation)
  - Flip partnerships, sale leasebacks, inverted leases

# What You Need to Know About Placed-in-Service Dates



# What You Need to Know About PIS

- How to determine when property is placed in service
  - Regulations
    - “ready and available for its specifically assigned function”
  - 5 Factors: IRS and the courts historically look to five factors, none of which is controlling, in evaluating whether an electric generating facility is ready and available for its specifically assigned function and, therefore, placed in service
    1. Approval of required licenses and permits;
    2. Passage of control of the facility to taxpayer;
    3. Completion of critical tests;
    4. Synchronization to the power grid for generating electricity to produce income; and
    5. Commencement of daily or regular operation

# What You Need to Know About PIS

- How to determine when property is placed in service
  - Case Law
    - Developed case law over 50 years have weighed and interpreted various facts and circumstances
    - *Oglethorpe, Grodt & McKay, Sealy Power, Valley Natural Fuels, Brown*
  - IRS Guidance
    - Revenue rulings
      - Rev. Rul. 76-256; Rev. Rul. 76-248
    - Recent private letter rulings
      - Wind (PLR 201311003) ; and Solar (PLR 201326008)

# Case Study

Wind Developer is developing and installing a large wind project in a deregulated market. Wind Developer enters into a TSA with Manufacturer, an EPC with Contractor, and an Interconnection Agreement with Utility. Each turbine is delivered to the site and separately commissioned. Interconnection occurs for the entire wind project at once. Each agreement has a separate milestones.

When is the merchant wind facility “placed in service” for federal income tax purposes (i.e., COD, Substantial Completion, Commissioning Completion)?

- Timing of tax equity entrance
- Contractual obligations under EPC terms
  - Liquidated damages
- Begun construction
- PTCs and depreciation begin accruing under the model

# Structuring Transactions

- Front-end considerations of placing a facility into service to align technical and legal milestones with tax
  - Harmonizing language in PPAs, EPCs, GIAs
  - Beginning work on projects in time
- Determining when a facility was PIS after the fact
  - Analysis of deal documents
  - Varying/ inconsistent provisions
  - Delays outside of taxpayer's control

# Applying the Law to Determine PIS

- IRS and 1603 Grant Controversies
  - Murkiness in applying the law
  - Varying taxpayer goals - to be placed in service or not to be placed in service?
  - Binary issue?
  - Specific examples
    - Solar, wind, biomass, waste, battery storage



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