

“BEGINNING CONSTRUCTION” AND “PLACED IN SERVICE” UNDER THE ITC GRANT

Gregory F. Jenner, Stoel Rives LLP

Section 1603

Specified energy property is eligible for the grant if:

1. Property is placed in service in 2009 or 2010; or
2. Property is placed in service before credit termination date and construction of such property began during 2009 or 2010.

When Does Construction Begin?

Treasury Guidance

• **Two alternative tests:**

1. Activity Test

- Construction begins when work of a significant nature begins.
- May take into account work performed by others under binding written contract, either on-site or off-site.
- On-site work includes excavating for the foundation, pouring of concrete pads, road building, etc.
- Preliminary activities, including planning and designing, securing financing, exploring, researching, clearing a site, test drilling and land contouring, do not count.
- Must use reasonable methods to associate equipment being manufactured with particular facilities.

2. Safe Harbor Expenditure Test

- More than 5 percent of total cost of property paid or incurred.
- For self-constructed property, when actually paid or incurred by developer.
- For property manufactured, constructed or produced by another person, must have a binding written contract that predates manufacture.
- Paid or incurred when property delivered to applicant, or when other costs paid or incurred by such other person.
- May combine self-constructed and manufactured.

THERE ARE NO BRIGHT LINES.

Where Do Things Stand?

- The new “clarifications” really haven’t clarified anything.
- Although delivery under the economic performance standard no longer appears to be required in all cases, it still plays a significant role.
- Whether the facility is self-constructed or built by someone else likely no longer matters for either test.
 - The level of physical activity is the key to that test, regardless of who performs the activity.
 - The 5 percent safe harbor specifically allows costs to be combined.
- 5 Percent Safe Harbor:
 - Costs are treated as paid or incurred by a developer when either:
 - The property is delivered to the developer by the manufacturer (or within 3 1/2 months of year end); or
 - When funds paid by the developer to the manufacturer are spent by the manufacturer for components of the property being manufactured.
- Likely Problems Meeting the Safe Harbor:
 - Manufacturers do not identify funds they spend with the particular projects (e.g., interchangeable components);
 - Treasury may require delivery of the components to the manufacturer by year end (or within 3 1/2 months) before spending counts toward the safe harbor; and
 - Non-refundable deposits will apparently not count.
- Lenders will require certainty. If there is any doubt about meeting the safe harbor, build something!
- Treasury may begin issuing preliminary letters confirming that construction began by 12/31/2010.

When Is Property Placed in Service?

No Statutory Definition

- Defined in regulations and elsewhere as: “a condition or state of readiness and availability for a specifically assigned function.”
- Whether property meets this standard depends on all the facts and circumstances.

THERE ARE NO BRIGHT LINES.

Rulings and Cases

- Factors to be considered:
 1. Approval of required licenses and permits for operation (not testing)
 2. Passage of control of the facility to the taxpayer
 3. Completion of critical testing
 4. Commencement of daily or regular operation
 5. Synchronization into the power grid
- No single factor is determinative.
- Property may be placed in service even though testing is still being performed to detect defects and maximize performance.
- IRS requires the facility to be capable of operating on a sustained and reliable basis in commercial quantities.
- Each turbine is considered a separate facility for purposes of being placed in service.
- Section 1603 grant applications allow for (but do not require) “batching.”

Come see us at booth #8240.

Gregory F. Jenner
Stoel Rives LLP
gfjenner@stoel.com
612-373-8857