

Beginning of Construction for Sections 45 and 48; Extension of Continuity Safe Harbor to Address Delays Related to COVID-19 and Clarification of the Continuity Requirement

Notice 2021-41

SECTION 1. PURPOSE

This notice clarifies and modifies the prior Internal Revenue Service (IRS) notices¹ addressing the beginning of construction requirement for both the production tax credit for qualified facilities under § 45 of the Internal Revenue Code (Code) and the investment tax credit for energy property under § 48 of the Code. In response to the Coronavirus Disease 2019 (COVID-19) pandemic, this notice provides that the safe harbor originally provided in section 3.02 of Notice 2013-60 and in section 6.05 of Notice 2018-59 and extended in prior IRS notices (Continuity Safe Harbor) is further extended for property the construction of which began in 2016 through 2020. This notice also provides a clarification of the methods that taxpayers may use to satisfy the Continuity Requirement (as provided in prior IRS notices and defined in section 2 of this notice) to satisfy the beginning of construction requirements under §§ 45 and 48.

SECTION 2. BACKGROUND

Section 38 of the Code allows certain business credits. Among the credits allowed by § 38 are the renewable electricity production tax credit under § 45 and the

¹ Notice 2013-29, 2013-20 I.R.B. 1085; Notice 2013-60, 2013-44 I.R.B. 431; Notice 2014-46, 2014-36 I.R.B. 520; Notice 2015-25, 2015-13 I.R.B. 814; Notice 2016-31, 2016-23 I.R.B. 1025; Notice 2017-04, 2017-4 I.R.B. 541; Notice 2018-59, 2018-28 I.R.B. 196; Notice 2019-43, 2019-31 I.R.B. 487; Notice 2020-41, 2020-25 I.R.B. 954; and Notice 2021-5, 2021-3 I.R.B. 479 (collectively, the prior IRS notices).

investment tax credit determined under § 46 of the Code (which includes the energy credit under § 48). The credits under §§ 45 and 48 generally are referred to as the production tax credit (PTC) and the investment tax credit for energy property (ITC), respectively.

To qualify for the PTC, electricity must, among other things, be produced by the taxpayer at a qualified facility as defined in § 45(d). The PTC for any taxable year is calculated by multiplying an inflation-adjusted credit rate by kilowatt hours of electricity produced and sold by the taxpayer to an unrelated person. The ITC is calculated as a percentage of the basis of energy property (as defined in § 48(a)(3)) placed in service during the taxable year. Additionally, under § 48(a)(5), a taxpayer may elect to treat certain renewable energy facilities that otherwise qualify under § 45(d) as energy property to claim the ITC in lieu of the PTC with respect to the facility. Both the PTC and the ITC have a beginning of construction requirement.

On December 27, 2020, the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (TCDTRA), enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, Title I, 134 Stat. 1182, 3052-53, 3057-58, amended §§ 45 and 48 with regard to the PTC and the ITC. Section 131(a) of the TCDTRA extended the deadline to begin construction for certain qualified facilities for one year to December 31, 2021. Section 131(b) of the TCDTRA extended the beginning of construction deadline applicable to the election to claim the ITC in lieu of the PTC by one year with respect to certain qualified facilities to December 31, 2021. Section 132(a) of the TCDTRA extended the deadlines for the beginning of construction requirements for certain ITC-

eligible energy property to December 31, 2023. In addition, sections 131(c) and 132(b) of the TCDTRA extended the beginning of construction deadlines for the phaseout provisions applicable to the PTC and the ITC. Finally, section 204 of the TCDTRA amended § 48(a)(5) to provide special rules for “qualified offshore wind facilities.”

The Department of the Treasury (Treasury Department) and the IRS have published several notices regarding the beginning of construction requirement. Notice 2013-29 provides two methods to establish that the beginning of construction requirement under §§ 45 and 48(a)(5) has been satisfied with respect to a facility: the Physical Work Test and the Five Percent Safe Harbor. Both methods require a taxpayer to make continuous progress towards completion of the facility once construction has begun (Continuity Requirement).

Section 4 of Notice 2013-29 provides the Physical Work Test. Section 4.01 of Notice 2013-29 provides:

Construction of a qualified facility begins when physical work of a significant nature begins. . . . Whether a taxpayer has begun construction of a facility before [the statutory deadline] will depend on the relevant facts and circumstances. The Internal Revenue Service will closely scrutinize a facility, and may determine that construction has not begun on a facility before [the statutory deadline] if a taxpayer does not maintain a continuous program of construction as determined under section 4.06.

Section 4.06(1) of Notice 2013-29 provides that a continuous program of construction involves continuing physical work of a significant nature (Continuous Construction Test).

Further, section 4.06(1) of Notice 2013-29 provides that whether the taxpayer has maintained a continuous program of construction will be determined by the relevant facts and circumstances.

Section 5.01 of Notice 2013-29 provides the Five Percent Safe Harbor:

Construction of a facility will be considered as having begun before [the statutory deadline] if (1) a taxpayer pays or incurs (within the meaning of Treas. Reg. § 1.461-1(a)(1) and (2)) five percent or more of the total cost of the facility, except as provided in section 5.01(2), before [the statutory deadline] and (2) thereafter, the taxpayer makes continuous efforts to advance towards completion of the facility (as determined under section 5.02).

Section 5.02(1) of Notice 2013-29 provides that whether a taxpayer makes continuous efforts to advance towards completion of the facility will be determined by the relevant facts and circumstances (Continuous Efforts Test). This section also provides that facts and circumstances indicating continuous efforts to advance towards completion of the facility may include, but are not limited to:

- (a) paying or incurring additional amounts included in the total cost of the facility;
- (b) entering into binding written contracts for components or future work on construction of the facility;
- (c) obtaining necessary permits; and
- (d) performing physical work of a significant nature.

Notice 2013-60 clarifies certain concepts provided in Notice 2013-29. Notice 2013-60 provides a Continuity Safe Harbor that allows a facility to be deemed to have satisfied the Continuity Requirement. Section 3.02 of Notice 2013-60 provides that if a facility is placed in service before January 1, 2016, the facility will be considered to satisfy the Continuous Construction Test (for purposes of satisfying the Physical Work Test) or the Continuous Efforts Test (for purposes of satisfying the Five Percent Safe Harbor). Section 3.02 of Notice 2013-60 also provides that if a facility is not placed in service before January 1, 2016, whether the facility satisfies the Continuous Construction or Continuous Efforts Tests will be determined by the relevant facts and

circumstances, as described in section 4.06 and section 5.02 of Notice 2013-29.

The Treasury Department and the IRS have published several notices further extending and modifying the Continuity Safe Harbor. Notice 2015-25 extended the Continuity Safe Harbor for one year by replacing “January 1, 2016” provided in Notice 2013-60 with “January 1, 2017.” Notice 2016-31 modified the Continuity Safe Harbor originally provided in section 3.02 of Notice 2013-60 and extended by Notice 2015-25. Section 3 of Notice 2016-31 provides that if a taxpayer places a facility in service by the later of (1) a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began or (2) December 31, 2016, the facility will be considered to satisfy the Continuity Safe Harbor. Notice 2017-04 further extended and modified the Continuity Safe Harbor by providing that if a taxpayer places a facility in service by the later of (1) a calendar year that is no more than four calendar years after the calendar year during which construction of the facility began or (2) December 31, 2018, the facility will be considered to satisfy the Continuity Safe Harbor.

Notice 2018-59 provides guidance on determining when construction has begun on energy property eligible for the § 48 credit. It provides two methods to establish the beginning of construction (Physical Work Test and Five Percent Safe Harbor), a Continuity Requirement for both methods, rules for transferring energy property, and additional rules applicable to the beginning of construction requirement of § 48 with respect to “energy property” described in sections 2.02 and 2.03 of Notice 2018-59. Section 6.05 of Notice 2018-59 provides a Continuity Safe Harbor for energy property under § 48 that mirrors that provided for the PTC under § 45 in the prior IRS notices:

Except as provided in this section, if a taxpayer places an energy property in service by the end of a calendar year that is no more than four calendar years after the calendar year during which construction of the energy property began (the Continuity Safe Harbor Deadline), the energy property will be considered to satisfy the Continuity Safe Harbor. The excusable disruption rules in section 6.03 do not apply for purposes of applying the Continuity Safe Harbor. However, if an energy property is not placed in service before the end of the fourth calendar year after the calendar year during which construction of the energy property began, whether the energy property satisfies the Continuity Requirement under either the Physical Work Test or the Five Percent Safe Harbor will be determined by the relevant facts and circumstances.

In response to the COVID-19 pandemic, on May 27, 2020, the Treasury Department and the IRS released Notice 2020-41, which provides that for projects that began construction in either calendar year 2016 or 2017, the Continuity Safe Harbor is satisfied if a taxpayer places the qualified facility or energy property in service by the end of a calendar year that is no more than five calendar years after the calendar year during which construction with respect to that qualified facility or energy property began. Notice 2020-41 also provides a 3½ Month Safe Harbor for services or property paid for by the taxpayer on or after September 16, 2019 and received by October 15, 2020.

The Treasury Department and the IRS recognize that regional, national, or global circumstances due to the COVID-19 pandemic have continued to cause delays in the development of certain facilities eligible for the PTC and the ITC. These extraordinary delays have adversely affected the ability of many taxpayers to place facilities in service in time to meet the Continuity Safe Harbor. Accordingly, this notice provides relief for projects on which construction began in 2016 through 2020 by expanding the period that qualifies for the Continuity Safe Harbor. In addition, in response to requests from taxpayers, this notice harmonizes the methods for satisfying the Continuity Requirement

under the Physical Work Test and Five Percent Safe Harbor. Except as otherwise specified in this notice, the guidance provided in the prior IRS notices continues to apply.

SECTION 3. EXTENSION OF THE CONTINUITY SAFE HARBOR FOR SECTIONS 45 and 48

This notice provides that for any qualified facility or energy property that began construction under the Physical Work Test or the Five Percent Safe Harbor in calendar year 2016, 2017, 2018, or 2019, the Continuity Safe Harbor is satisfied if a taxpayer places the qualified facility or energy property in service by the end of a calendar year that is no more than six calendar years after the calendar year during which construction with respect to that qualified facility or energy property began. Additionally, for any qualified facility or energy property that began construction under the Physical Work Test or the Five Percent Safe Harbor in calendar year 2020, the Continuity Safe Harbor is satisfied if a taxpayer places the qualified facility or energy property in service by the end of a calendar year that is no more than five calendar years after the calendar year during which construction with respect to that qualified facility or energy property began.

SECTION 4. CLARIFICATION OF METHODS TO SATISFY THE CONTINUITY REQUIREMENT

This notice further provides that for any qualified facility or energy property to which the Continuity Safe Harbor does not apply, the Continuity Requirement is satisfied if the taxpayer demonstrates satisfaction of either the Continuous Construction Test or the Continuous Efforts Test, regardless of whether the Physical Work Test or the Five Percent Safe Harbor was used to establish the beginning of construction.

SECTION 5. EFFECT ON OTHER DOCUMENTS

Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, Notice 2016-31, Notice 2017-04, Notice 2018-59, Notice 2019-43, Notice 2020-41, and Notice 2021-5 are modified.

SECTION 6. NO RULE

The IRS will not issue private letter rulings or determination letters to a taxpayer regarding the application of this notice, the prior IRS notices, or the beginning of construction requirement under §§ 45 and 48.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Jennifer Bernardini of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Jennifer Bernardini on (202) 317-6853 (not a toll-free call).