

December 2009

Contacts

David S. Lowman, Jr.

1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8789
dlowman@hunton.com

Laura Ellen Jones

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8746
ljones@hunton.com

David B. Weisblat

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1980
dweisblat@hunton.com

Timothy L. Jacobs

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8362
tjacobs@hunton.com

House Tax Technical Corrections Act Introduced; Energy Tax Credit Update

On December 2, 2009, House Ways & Means Committee Chairman Rangel and Ranking Member Camp introduced H.R. 4169, the "Tax Technical Corrections Act of 2009" (the "Bill"). The Bill provides numerous technical corrections to energy tax credit provisions in the Internal Revenue Code (the "Code") and the Treasury grant program provided under Section 1603 of the American Recovery and Reinvestment Act of 2009. Specifically, the Bill would make the following clarifications:

- For purposes of the investment tax credit in lieu of production tax credit election: (i) only property that is an integral part of a qualified investment credit facility qualifies as energy property for purposes of the election; (ii) a building or its structural components are not qualified property regardless of whether they are tangible personal property or other tangible property; and (iii) the original use of the property must commence with the taxpayer.
- The grant in lieu of tax credits is not includible in alternative minimum taxable income (including adjusted current earnings of a corporation).
- Property must be originally placed in service by the taxpayer or the original use of the property must commence with the taxpayer in order to be eligible for a grant in lieu of tax credits.
- An election to claim a grant in lieu of tax credits for a production tax credit facility is available only if the facility otherwise meets all the Section 45 eligibility requirements other than the requirement that the electricity be sold to an unrelated person.
- Excessive grants are recaptured as if they were underpayments of tax owed by the persons to whom the grants were made.
- Certain information related to grants will not be treated as confidential tax return information and is thus subject to disclosure (including the amount a grant, the identity of a grant recipient, a description of property, information contained in any report required by the Secretary, and the fact and amount of any recapture).
- Grants may be made to certain tax-exempt entities to the extent that the grant is with respect to unrelated trade or business property (i.e., substantially all the income derived from the property is by a Section 511(a)(2) organization subject to unrelated business income tax). In the case of a partnership or other pass-through entity, the partners or other interest holders in such entity must provide information to the entity as the Secretary of Treasury may require in order to confirm that the entity is an eligible entity.

→ Section 45K tax credits are not available for coke and coke gas that are produced using steel industry fuel if Section 45 tax credits are allowed with respect to the fuel.

Read the [Bill](#) and the [Joint Committee on Taxation description](#).

IRS Rules that Reflective Roof Surface is “Energy Property”

In PLR 200947027, the IRS ruled that a reflective roof surface was “energy property” eligible for the energy tax credit under Section 48 of the Code. This reflective surface was installed together with an array of cylindrical photovoltaic cells on top of an existing roof. The spacing between the cylinders allows light to pass through the array and hit the reflective surface underneath. That surface reflects the light back onto the underside of the cells. The cylindrical cell design in conjunction with a reflective surface allows light to be collected from many angles, potentially increasing the amount of energy produced compared to a conventional array.

The IRS reasoned that because the reflective surface enabled the generation of significant amounts of electricity from reflected sunlight, the surface was equipment that uses solar energy to generate electricity under Section 48(a)(3)(A)(i) of the Code and Treas. Reg. § 1.48-9(d)(1) and (3) and thus was energy property eligible for the energy tax credit under Section 48.

In requesting the ruling, the taxpayer’s likely concern was whether the IRS would conclude that the reflective surface was separate from the cell array and other equipment used to

generate electricity. If so, one could argue that the reflective surface was not equipment that uses solar energy to generate electricity. However, the IRS apparently viewed the cylindrical cell array and the reflective surface as one working unit that uses solar energy to generate electricity. The ruling mentions several times that the statutory and regulatory definitions are met when the surface is “installed in connection with the [s]ystem.”

In addition, the taxpayer may have been concerned that the IRS would consider the reflective roof surface to be a part of the building. If so, one could argue that the reflective surface did not qualify as energy property since Treas. Reg. § 1.48-1(a) specifically excludes buildings. However, the facts indicate that the reflective roof surface was installed on top of an existing roof. Thus, the IRS concluded that the reflective roof surface “when installed **over an existing roof in connection with the [s]ystem**” is energy property for purposes of Section 48 of the Code.

While this ruling indicates how the IRS would likely rule on similar facts, private letter rulings are applicable only to the taxpayer to which they are issued and may not be cited as precedent.

Manufacturing Investment Tax Credit Legislation and Guidance

On November 9, 2009, Senators Menendez, Stabenow, Bennet and Gillibrand introduced S. 2755, the “Solar Manufacturing Jobs Creation Act” and on November 17, 2009, Representative Thompson introduced a companion bill, H.R. 4085 (collectively, the “Manufacturing Bills”). The Manufacturing Bills would amend

Section 48 of the Code to provide a 30 percent investment tax credit for equipment designed to be used for the manufacture of solar energy property, but only with respect to periods ending before January 1, 2017. Accordingly, solar manufacturing property would be eligible for an investment tax credit and would not be subject to the application and allocation process currently provided under Section 48C of the Code. In addition, the Manufacturing Bills would amend Section 1603 of the American Recovery and Reinvestment Act of 2009 to provide that a grant in lieu of investment tax credit would be available for the manufacturing property.

In November 2009, several senators wrote a letter to Treasury Secretary Geithner asking the Department of Treasury to confirm that a nuclear technology project would qualify for the Section 48C manufacturing investment tax credit. On November 20, 2009, the Department of Treasury confirmed that a “nuclear technology project may qualify as other property designed to reduce greenhouse gas emissions and may be allocated a credit under Section 48C if it receives a Department of Energy recommendation and a sufficiently high ranking within the pool of competing projects.” This confirmation was provided after the deadline for submission of an application for DOE recommendation and ranking. However, nuclear technology manufacturers may have submitted applications in advance of this confirmation in order to preserve their ability to compete for an allocation of Section 48C tax credits in the first round. It is expected that the \$2.3 billion of Section 48C tax credits will be fully allocated in the first round.