



Common Tax Questions Associated with Renewable Energy Projects

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Issues with Respect to Qualifying Facilities

Landfill Gas Facilities – What must you own?

- Code section 45.
 - (a)(2)(A) produced by the taxpayer—
 - (i) from **qualified energy resources**, and
 - (ii) at a **qualified facility** during the 10-year period beginning on the date the facility was originally placed in service, and
 - (B) sold by the taxpayer to an unrelated person during the taxable year.
 - (c)(1) The term “qualified energy resources” means—
 - (G) municipal solid waste,
 - (d) Qualified facilities.
 - (6) Landfill gas facilities. In the case of a facility producing electricity from gas derived from the biodegradation of municipal solid waste, the term “qualified facility” means any facility owned by the taxpayer which is originally placed in service after the date of the enactment of this paragraph and before January 1, 2014.

Trash Facilities - Gasifying MSW to produce electricity.

- Section 148(d)(7). Current Language:

Trash facilities. In the case of a facility (other than a facility described in paragraph (6)) which **uses** municipal solid waste to produce electricity, the term “qualified facility” means any facility owned by the taxpayer which is originally placed in service after the date of the enactment of this paragraph and before January 1, 2014. Such term shall include a new unit placed in service in connection with a facility placed in service on or before the date of the enactment of this paragraph, but only to the extent of the increased amount of electricity produced at the facility by reason of such new unit.

- 2008 changes:

Trash Facility Clarification - Paragraph (7) of section 45(d) is amended—

(1) by striking “facility which **burns**” and inserting “facility (other than a facility described in paragraph (6)) which uses”, and

(2) by striking “COMBUSTION”.

Qualifying Costs

Step-Up transformer.

- From Treasury Qs & As: “However, physical work on a transformer that steps up the voltage of electricity produced at the facility to the voltage needed for transmission is physical work of a significant nature because power conditioning equipment is part of the qualified facility.”

Energy storage devices at power plant.

- Treasury Grant Guidance: “For qualified property that generates electricity, qualified property includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items but does not include any electrical transmission equipment, such as transmission lines and towers, or any equipment beyond the electrical transmission stage, such as transformers and distribution lines.”
- Regulations section 1.48-9(d)(1) (solar) – “Solar energy property includes equipment that uses solar energy to generate electricity, and includes storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items.”
- Regulations section 1.48-9(e) (wind) – “Wind energy property is equipment (and parts related to the functioning of that equipment) that performs a function described in paragraph (e)(2) of this section. In general, wind energy property consists of a windmill, wind-driven generator, storage devices, power conditioning equipment, transfer equipment, and parts related to the functioning of those items.”

Roads. [From Treasury Qs & As.]

- Roads on the site that are integral to the qualified facility are specified energy property; these include on-site roads that are used for moving materials to be processed and roads for equipment to operate and maintain the qualified facility.
 - Roads for access to the site, or roads used solely for employee or visitor vehicles are not specified energy property.

Pollution control equipment amortized under section 169.

- From Treasury Grant Guidance: General rule, costs that will be deducted for federal income tax purposes in the year in which they are paid or incurred are not includible in the basis on which the payment is determined.
- Costs of pollution control facilities that otherwise qualify for the section 1603 grant would not cease to qualify just because a taxpayer elects to amortize the costs under section 169.

Site.

- From Treasury Grant Guidance: Qualified property includes only tangible property that is both used as an integral part of the activity performed by qualified facility and located **at the site** of the qualified facility.
 - Would facilities for getting water to the site qualify?
 - Off-site facilities for fuel handling would not qualify.

Removal costs.

- From Treasury Qs & As: Cost of removal is associated with the property being removed or is capitalized to non-depreciable land.
 - From Treasury Qs & As: Removal of the existing turbines and towers is preliminary work and does not constitute physical work of a significant nature on specified energy property.
 - Removal of roof as part of adding solar panels.

Treasury Grant Question – Costs incurred after a facility is placed in service.

Commencement of Construction

Two ways to show that construction has begun.

1. Begin physical work of a significant nature.
2. Meet a 5% safe harbor.

Physical work of a significant nature.

- Includes any physical work on the specified energy property at the site.
- Also includes physical work that has taken place under a binding written contract for the manufacture, construction, or production of specified energy property for use by the applicant's facility provided the contract is entered into prior to the work taking place.
- In general, any physical work on the specified energy property will be treated as the beginning of construction even if such work relates to only a small part of the facility.
 - Treasury will closely scrutinize any construction activity that does not involve a continuous program of construction or a contractual obligation to undertake and complete within a reasonable time a continuous program of construction.
 - Disruptions in the work schedule that are beyond the applicant's control (for example, unusual weather or a site at which work can only be performed during certain seasons) will be taken into account in determining whether or not an applicant has undertaken a continuous program of construction.

- To be binding, a contract:
 - Must be enforceable under state law.
 - Must not limit damages to a specified amount.
 - § For this purpose, a contractual provision that limits damages to an amount equal to at least 5% of the total contract price will not be treated as limiting damages to a specified amount.
- Work performed under the contract includes only work that takes place after the binding written contract is entered into.
 - What if contract is modified?

5% Safe Harbor.

- An applicant meets the 5% safe harbor if the applicant pays or incurs 5.00% or more of the total cost of the specified energy property before the end of 2010.
 - Make sure 5% safe harbor is not met before the beginning of 2009.
- In the case of property manufactured, constructed, or produced for the applicant by another person under a binding written contract that is entered into prior to the manufacture, construction, or production of the property:
 - The cost of the property under the contract is treated as paid or incurred when the property is provided to the applicant, and
 - For periods before the property is provided to the applicant, costs paid or incurred with respect to the property by such other person are treated as costs of the property that are paid or incurred when paid or incurred by such other person.

- A cost is generally “incurred” for tax purposes when:
 - the fact of the liability is fixed,
 - the amount of the liability is determinable with reasonable accuracy, and
 - the economic performance test has been met with respect to such cost.
- Property is provided to the applicant either when title to the property passes to the applicant or when it is delivered to or accepted by the applicant, depending on the applicant’s method of accounting.
 - In addition, property that the applicant reasonably expects to be provided within 3-1/2 months of the date of payment will be considered to be provided on the payment date.

- Exception to the general principles that are used to determine when amounts are “incurred.”
 - For periods before the property is provided to the applicant, costs incurred with respect to the property by such other person are treated as costs of the property that are incurred by the applicant when the costs are incurred by such other person.
 - § Applicant may rely on a statement by the supplier as to the amount incurred by the supplier.
 - § Supplier may use any reasonable, consistent method to allocate the costs incurred by the supplier among the units of property to be manufactured, constructed, or produced by the supplier.
 - § Only costs incurred by the supplier after the binding written contract is entered may be reasonably allocated to the property manufactured, constructed, or produced under that contract.

- Indirect costs.
 - For example, is capitalized interest counted for 5% test?
 - Do you capitalize interest on solar and wind facilities? See Regulations section 1.263A-8(c)(3).
 - § But see Rev. Rul. 94-31.
- To satisfy the 5% safe harbor applicants must demonstrate that costs paid or incurred before the end of 2010 are equal to or greater than 5% of the actual total costs of the specified energy property.
 - Must be actual costs, not estimated costs.
 - Just look at costs.
 - § Work does not need to be continuous.
 - § Amounts do not have to be allocated to project by the end of 2010.
 - Turbines in storage.