Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **201611011**
Release Date: 3/11/2016

Index Number: 48.00-00

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B06
PLR-124984-15

Date:
December 10, 2015

Re: Request for Private Letter Ruling under Sections 38, 46, 48, 167, and 168

LEGEND

Taxpayer	=
Sub 1	=
Sub 2	=
Member	=
Holdco	=
Project Company A	=
Project Company B	=
State	=
Location	=
Project A	=
Project B	=
Utility	=
a	=
b	=
c	=
d	=
e	=
f	=
g	=
h	=
i	=
Year	=
Date 1	=
Date 2	=
Date 3	=

Dear :

This letter responds to a letter dated July 21, 2015, and supplemental correspondence, submitted by Taxpayer requesting a private letter ruling that certain circumstances will not prevent the Projects from being placed in service in Year for purposes of sections 38, 46, 48, 167, and 168 of the Internal Revenue Code.

FACTS

Taxpayer represents that the facts relating to its request are as follows:

Taxpayer, a State corporation, is a developer and seller of renewable energy solutions, an owner and operator of clean power generation assets, and a developer, manufacturer, and seller of components used in the renewable energy industry. Taxpayer is developing and owns several solar photovoltaic (PV) power generation facilities, directly and indirectly through subsidiaries.

Taxpayer wholly owns Sub 1, a State corporation. Sub 1 wholly owns Sub 2, a State corporation. Taxpayer, Sub 1 and Sub 2 are members of an affiliated group of corporations that files its tax returns on a consolidated basis with Taxpayer filing as the common parent. Taxpayer uses the accrual method of accounting and its taxable year is the calendar year.

Sub 2 wholly owns Member, a State limited liability company, which is disregarded for Federal tax purposes. Member wholly owns Holdco, a State limited liability company, which is disregarded for Federal tax purposes. Holdco wholly owns Project Company A and Project Company B, which are State limited liability companies that are disregarded for Federal tax purposes. It is expected that before the end of Year, a membership interest in Holdco will be sold to an investor, resulting in Holdco being classified as a partnership for federal income tax purposes after such transfer.

Project Company A is developing and owns a a megawatt nameplate capacity solar PV power generation facility sited near Location known as Project A. Project Company B is developing and owns a b megawatt nameplate capacity solar PV power generation facility also sited near Location known as Project B (“Project A” and “Project B” referred to collectively as “the Projects”).

The main components of Project A include (i) two solar panel PV circuits, each of which is comprised of direct current PV solar panel blocks (consisting of solar panel modules mounted on a single-axis tracking system), c megawatt alternating current inverter stations, and a medium voltage step-up pad mount transformer (each a “Project A Circuit”); and (ii) the electrical gathering and transmission facilities, including electrical substations. One Project A Circuit has a d megawatt nameplate capacity and the other Project A Circuit has a e megawatt nameplate capacity.

The main components of Project B include (i) two solar panel PV circuits, each of which is comprised of direct current PV solar panel blocks (consisting of solar panel modules mounted on a single-axis tracking system), c megawatt alternating current inverter stations, and a medium voltage step-up pad mount transformer (each a "Project B Circuit"); and (ii) the electrical gathering and transmission facilities, including electrical substations. One Project B Circuit has a e megawatt nameplate capacity and the other Project B Circuit has a f megawatt nameplate capacity.

It is expected that before the end of Year, physical construction will be completed on each Project, all of the components will have been commissioned and accepted, a final commissioning certificate will have been issued for each Project as a whole, each Project Company will have all the permits and licenses needed to operate the applicable Project, both Projects will be synchronized to the power grid (grid), and legal title and control over each Project will be conveyed to the applicable Project Company, and the Projects will be transmitting energy on a regular and routine basis.

The electricity generated by Project A will be connected to the grid over interconnection facilities (the "Project A Interconnection Facilities") connected to transmission facilities owned by Utility. The electricity generated by Project B will be connected to the grid over interconnection facilities (the "Project B Interconnection Facilities") connected to transmission facilities owned by Utility. Utility is solely responsible for the construction of both the Project A Interconnection Facilities and the Project B Interconnection Facilities.

The Project A Interconnection Facilities are scheduled to be completed by Utility by Date 1 and Taxpayer expects that this schedule will be met. The Project B Interconnection Facilities are scheduled to be completed by Utility by Date 2 but Taxpayer is concerned that this schedule will not be met. In such circumstances, Taxpayer will arrange to connect Project B to the grid through a temporary line connecting Project B to the Project A Interconnection Facilities (the "T-Line").

The T-Line arrangement will allow for up to d megawatts of electrical power from Project B to be transmitted to the Project A Interconnection Facilities. Under the T-Line arrangement, up to g megawatts of combined electrical power from Project A and Project B could be transmitted to the grid through the Project A Interconnection Facilities. Production at the two Projects will have to be coordinated to ensure that the combined limit of g megawatts from the Projects is observed. The T-Line will remain in place for an indefinite period until after the Project B Interconnection Facilities are completed.

Prior to initiating the T-Line arrangement, it is expected that Project A will operate at h% capacity (on both Project A Circuits) for at least one week. In the T-Line arrangement, Project Company A will rotate the use of the two Project A Circuits periodically over approximately one week periods, such that each Project A Circuit will

alternately be available to transmit up to h% of such Project A Circuit's capacity. Project Company A will rotate the Project A Circuits across the T-Line so that each Project A Circuit is operating a reasonably consistent number of hours overall. This will allow Project B to transmit up to either e or f megawatts, depending on which Project B Circuit is operating, to the Project A Interconnection Facilities over the T-Line. Project Company B will rotate the use of the two Project B Circuits periodically over approximately one week periods, such that each Project B Circuit will alternately be available to transmit up to h% of such Project B Circuit's capacity. Project B Company will rotate the Project B Circuits across the T-Line so that each Project B Circuit is operating a reasonably consistent number of hours overall.

RULING REQUESTED

Taxpayer requests the following rulings:

1) Project B will not be precluded from being in placed service in Year for federal income tax purposes of sections 38, 46, 48, 167, and 168, even if the permanent Project B Interconnection Facilities are not completed in Year, as long as Project Company B rotates Project B Circuit usage across the T-Line so that each Project B Circuit, and thus Project B is operating on a regular basis during Year.

2) Project A will not be precluded from being considered placed in service in Year for federal income tax purposes of sections 38, 46, 48, 167, and 168, even as a result of the T-Line arrangement, as long as Project A will operate at h% capacity (on both Project A Circuits) for at least one week prior to initiating the T-Line arrangement, and as long as Project Company A rotates Project A Circuit usage across the T-Line so that each Project A Circuit, and thus Project A is operating on a regular basis.

LAW AND ANALYSIS

Section 48(a) of the Code provides for an energy credit equal to 30 percent of the cost basis of qualifying energy property placed in service before January 1, 2017.

Section 48(a)(3)(A)(i) of the Code provides that energy property includes equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat, excepting property used to generate energy for the purposes of heating a swimming pool.

Section 1.48-9(a)(2) of the Income Tax Regulations provides that in order to qualify as "energy property" under § 48 of the Code, property must be depreciable property with an estimated useful life when placed in service of at least three years and constructed after certain dates.

Section 1.48-9(d)(1) of the regulations provides as follows:

(d) Solar energy property—(1) In general. Energy property includes solar energy property. The term "solar energy property" includes equipment and materials (and parts related to the functioning of such equipment) that use solar energy directly to (i) generate electricity, (ii) heat or cool a building or structure, or (iii) provide hot water for use within a building or structure. Generally, those functions are accomplished through the use of equipment such as collectors (to absorb sunlight and create hot liquids or air), storage tanks (to store hot liquids), rockbeds (to store hot air), thermostats (to activate pumps or fans which circulate the hot liquids or air), and heat exchangers (to utilize hot liquids or air to create hot air or water). Property that uses, as an energy source, fuel or energy derived indirectly from solar energy, such as ocean thermal energy, fossil fuel, or wood, is not considered solar energy property.

Section 1.48-9(d)(3) of the regulations provides, in part, that 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. Such property, however, does not include any equipment that transmits or uses the electricity generated.

Section 167(a) provides a depreciation deduction for the exhaustion, wear and tear, and obsolescence of property used in a trade or business or held for the production of income. The depreciation deduction provided by § 167 for tangible property placed in service after 1986 generally is determined under § 168. This section prescribes two methods for determining depreciation allowances. One method is the general depreciation system in § 168(a) and the other method is the alternative depreciation system in § 168(g). Under either depreciation system, the depreciation deduction is computed by using a prescribed depreciation method, recovery period, and convention.

For purposes of the general depreciation system, the depreciation method, recovery period, and convention are determined by the property's classification under § 168(e). Section 168(e)(3)(B)(vi) provides that 5-year property includes any property (modifying the language of § 48(a)(3)(A)(i)) which is equipment which uses solar or wind energy to generate electricity.

Section 1.167(a)-11(e)(1)(i) of the Income Tax Regulations provides, in part, that property is first placed in service when first placed in a condition or state of readiness and availability for a specifically designed function. It further provides that the provisions of § 1.46-3(d)(1)(ii) and (d)(2) generally apply for purposes of determining the date on which property is placed in service.

In general, property is placed in service in the taxable year the property is placed in a condition or state of readiness and availability for a specifically designed function. See §§ 1.46-3(d)(1)(ii) and 1.167(a)-11(e)(1)(i). Placed in service is construed as

having the same meaning for purposes of the investment tax credit under § 46 and depreciation under § 167. Section 1.46-3(d)(2) provides examples of when property is in a condition of readiness and availability. One of those examples is equipment that is acquired for a specifically assigned function and is operational but undergoing tests to eliminate any defects. See also Rev. Rul. 79-40, 1979-1 C.B. 13, where machinery and equipment were placed in service in the year critical tests (with appropriate materials) and operational tests were completed. Another example in § 1.46-3(d)(2) involved operational farm equipment acquired and placed in service in a taxable year even though it was not practical to use such equipment for its specifically designed function in the taxpayer's business of farming until the following year.

Several Tax Court cases have addressed placed in service questions in the context of electric power plants. In Olgethorpe Power Corp. v. Commissioner, T.C. Memo. 1990-505, and Consumers Power Co. v. Commissioner, 89 T.C. 710 (1987), facilities can be deemed placed in service upon sustained power generation near rated capacity. However, if the facility operates on a regular basis but does not produce the projected output, it may still be considered placed in service. Sealy Power, Ltd v. Commissioner, 46 F.3d 382 (5th Cir. 1995), nonacq. 1995-2 C.B. 2. In the Action on Decision for Sealy Power, the Service stated that at a minimum, the property would have to have been in a state of readiness sufficient to produce electricity on a sustained and reliable basis in commercial quantities. AOD 1995-010. Finally, in Rev. Rul. 84-85, 1984-1 C.B. 10, a solid waste facility that was experiencing operational problems such that it was unable to operate at its rated capacity was nonetheless considered to have been placed in service since it was being operated on a regular basis and saleable steam was being produced. However, if a facility is merely operating on a test basis, it is not placed in service until it is available for service on a regular basis. Consumers Power v. Commissioner, 89 T.C. at 724.

The above-referenced cases and revenue rulings provide that the following are common factors to be considered in determining placed in service dates for power plants:

(1) approval of required licenses and permits;
(2) passage of control of the facility to taxpayer;
(3) completion of critical tests;
(4) commencement of daily or regular operations; and,
(5) synchronization into a power grid for generating electricity to produce income.

See generally, Rev. Rul. 76-256, 1976-2 C.B. 46, and Rev. Rul. 76-428, 1976-2 C.B. 47. These factors are not exclusive – they are used as guideposts to determine whether, looking at the totality of the facts and circumstances, a facility has been placed in service.

The focus in determining a placed in service date is on ascertaining from the relevant facts and circumstances the date the unit begins supplying product in such a manner that it is routinely available and is consistent with the unit's design. It is necessary to examine relevant factors occurring both before and after the claimed placed in service date so that the date can be verified. However, a facility does not have to achieve full design output to be placed in service as long as it is in the process of ramping up its production levels. Subject to exceptions that are beyond the taxpayer's control, the Service has generally required actual operational use as a prerequisite for an asset to be deemed placed in service. See, e.g., SMC Corp. v. United States, 675 F.2d 113 (6th Cir. 1982).

To be qualified energy property for purposes of the § 48 energy credit the facility must be placed in service before January 1, 2017. Similarly, the period for tax depreciation of 5-year property begins when the depreciable solar equipment is placed in service. For purposes of the § 48 energy credit, a facility is placed in service when it would be placed in service for depreciation purposes. Thus, the project is placed in service when it is placed in a condition or state of readiness and availability for a specifically assigned function, that is, to produce and deliver electricity generated from solar energy.

Based on the facts provided and applying those facts to the factors delineated in Rev. Rul. 76-256, the Taxpayer represents that, as of Date 3:

(1) all necessary permits and licenses with respect to each Project will have been obtained;
(2) both Projects will have been synchronized to the power grid for its function of generating electricity for production of income;
(3) the critical tests for the various components of each Project will have been completed;
(4) the Projects will have been placed in the control of Taxpayer; and
(5) Taxpayer expects to have produced and sold more than a de minimis amount of electricity generated by each Project.

Taxpayer represents that both Projects are scheduled to be in commercial operation and generating electricity on a commercial basis during Year. The T-Line arrangement will result in Project A being able to deliver a nameplate capacity of either d or e megawatts, depending on which Project A Circuit is operating and Project B being able to deliver up to either e or f megawatts, depending on which Project B Circuit is operating, to market.

Daily operation at full rated capacity is not necessary to establish that the Projects are placed in service. As long as the Projects are ready and available for use and producing commercial output on a regular basis, operating at full rated capacity is not necessary to establish that the Projects are placed in service. See Sealy Power,

supra. The curtailment of Project A's and Project B's output due to temporary capacity limitations of Project B's transmission system does not affect adversely the regular use of, the availability for use and the production of commercial output by the Projects.

CONCLUSIONS

Accordingly, based solely on the representations submitted by Taxpayer and the applicable law discussion above, we conclude that Project A will not be precluded from being in placed service in Year for purposes of sections 38, 46, 48, 167, and 168 if the permanent interconnection facilities connecting Project B to the grid are not completed until after Year if Project B is connected to the grid during Year via a T-Line to the permanent interconnection facilities of Project A, so long as Project A will operate at h% capacity (on both Project A Circuits) for at least one week prior to initiating the T-Line arrangement, and as long as Project Company A rotates Project A Circuit usage across the T-Line so that each Project A Circuit, and thus Project A is operating on a regular basis. Similarly, we conclude that Project B will not be precluded from being in placed service in Year for purposes of sections 38, 46, 48, 167, and 168 if the permanent interconnection facilities connecting Project B to the grid are not completed until after Year if Project B is connected to the grid during Year via a T-Line to the permanent interconnection facilities of Project A, so long as Project Company B rotates Project B Circuit usage across the T-Line so that each Project B Circuit, and thus Project B is operating on a regular basis during Year.

The above ruling is expressly conditioned upon Taxpayer otherwise meeting the placed in service factors of Rev. Rul. 76-256 for Project A and Project B before January 1, 2017, and upon the operation of Project A and Project B in accordance with Taxpayer's representations.

Except as specifically set forth above, we express no opinion concerning the federal tax consequences of the facts described above under any other provisions of the Code. Specifically, no opinion is expressed or implied as to the entity classification of Taxpayer, Sub 1, Sub 2, Member, Holdco, Project Company A or Project Company B, or on when Project A and Project B are actually placed in service by Taxpayer.

In accordance with the Power of Attorney on file with this office, we are sending a copy of this letter to your authorized representative. A copy of this ruling must be attached to any income tax return to which it is relevant. Alternatively, taxpayers filing their returns electronically may satisfy this requirement by attaching a statement to their return that provides the date and control number of the letter ruling.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent. We are sending a copy of this letter ruling to the Industry Director.

Sincerely,

Peter C. Friedman
Senior Technician Reviewer, Branch 6
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures (2):
copy of this letter
copy for section 6110 purposes