

NewsAlert

Real Estate Tax Services



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Expiring Soon: Grants for Specified Energy Property In Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009

The American Recovery and Reinvestment Act of 2009 (P.L. 111-5) (the “ARRA”) was signed into law on February 17, 2009, with the goals of creating jobs, fostering energy efficiency, and stimulating long term economic recovery. In furtherance of those goals, Section 1603 of the ARRA provides for direct cash payments to be made to eligible persons who place in service specified clean energy property and elect to receive such payments in lieu of claiming tax credits that are otherwise available (each a “clean energy grant”). The opportunity to receive grants in lieu of tax credits expires at the end of 2010 unless the applicant can qualify for the 5% safe harbor described below. In order to receive the clean energy grant, the property must ultimately be placed in service, and the application submitted, before October 1, 2011.

Clean energy grants

In lieu of claiming tax credits for placing certain clean energy property in service, section 1603 of the ARRA allows eligible applicants to elect to receive direct payments of cash from the U.S. Department of the Treasury (“Treasury”) as a reimbursement of a portion of the cost of such property. Clean energy grants are available for specified clean energy property placed in service in 2009 or 2010, or property placed in service at certain later dates if construction began on the property during 2009 or 2010. There are highly detailed rules on when the construction is

considered to have commenced. In addition, a safe harbor exists (described below) for taxpayers that incur 5% of project costs before the end of 2010.

By electing to receive clean energy grants taxpayers potentially can receive cash more quickly than would be the case if they claimed the available tax credits on their tax returns. The availability of clean energy grants is not dependent on the taxpayer having taxable income. Accordingly, a taxpayer may be entitled to receive clean energy grants even if the taxpayer does not

have taxable income in the year in which costs associated with clean energy property are incurred. By contrast, a taxpayer electing to take advantage of available tax credits would need to wait for a year in which it has taxable income and, thus, a tax liability that could be refunded, to receive a tax benefit.

The amount of the grant in lieu is generally either 30% or 10% of the cost basis of the installed clean energy property, depending on the type of clean energy property for which grants are sought.

The 10% clean energy grant is available for the following clean energy property:

- Certain geothermal equipment;
- Geothermal heat pump equipment;
- Microturbine property; and
- Combined heat and power system property.

The 30% clean energy grant is available for the following clean energy property:

- Solar equipment;
- Certain other geothermal equipment;
- Fuel cell property;
- Wind facilities;
- Biomass facilities;
- Landfill gas facilities;
- Trash facilities;
- Hydropower facilities; and
- Marine and hydrokinetic facilities.

Receipt of the clean energy grants, similar to the credit, reduces the basis in the property by 50% of the amount of the grant or credit. Therefore, while one-half of the grant is potentially subject to tax on the ultimate disposition of the property or through reduced depreciation, the other half of the payment is a permanent tax-free benefit to the taxpayer.

If an applicant disposes of the property to a disqualified person or the property ceases to qualify as a specified clean energy property within five years from the date the property is placed in service, the clean energy grant must be repaid to the Treasury. However, the percentage that must be repaid to the Treasury reduces ratably each year over the five-year period.

The 5% Safe harbor

As indicated above, although the clean energy grant program is set to expire at the end of 2010, taxpayers can apply for clean energy grants with respect to qualifying property which they begin to construct in 2010. For this purpose, taxpayers are entitled to treat construction as having begun if more than 5% of the total cost of the property has been paid or incurred by December 31, 2010. Costs are generally treated as paid or incurred when paid or incurred by the applicant, if self-constructed, or when paid or incurred by the producer/manufacturer if the property is not constructed by the applicant.

Possible extension of the cash In lieu of tax credits program

On December 9, 2010, Senate Majority Leader Harry Reid (D-Nev) introduced legislation (the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, H.R. 4853) which would, in addition to extending certain currently applicable income and capital gains tax rates, extend for one year the ARRA cash grant in lieu of tax credit program.

Eligibility

For an applicant to be eligible to receive a Section 1603 payment it must be the owner or lessee of the property and must have originally placed the property in service.

Certain persons are not eligible to for the clean energy grants. These include:

- Federal, state or local governments, including political subdivisions, agencies or instrumentalities thereof;
- certain tax-exempt organizations;
- certain clean renewable energy bond lenders, cooperative electric companies, and governmental bodies; and
- partnerships or other pass-thru entities, if any direct or indirect holder of equity interests therein is an organization or entity described above, unless this person holds the applicable interest through a taxable C corporation.

Application process

To apply for the clean energy grants, taxpayers must submit a special application to the Treasury. For property placed in service in 2009 or 2010, applications must be submitted after the property has been placed in service and before October 1, 2011. For property not placed in service in 2009 or 2010 but for which construction began in 2009 or 2010, applications must be submitted after construction commences but before October 1, 2011.

A completed application will include the signed and completed application form, supporting documentation (including a detailed breakdown of all costs included in the basis), signed Terms and Conditions, and complete payment information. Other supporting documentation, such as contracts, copies of invoices, and proof of payment must be retained by the applicant and made available to Treasury upon request.

Applicants requesting clean energy grants of less than \$1 million with respect to clean energy properties having a cost basis in excess of \$500,000 must also submit a report of Agreed-Upon Procedures prepared by an independent accountant in accordance with attestation standards of the American Institute of Certified Public Accountants. Applicants requesting payments of \$1 million or more for a specified property must submit a certification from an independent accountant attesting to the accuracy of all costs claimed as part of the basis of the property.

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