



Facility-Specific Power Purchase Agreements Are Part of the Facility

The Internal Revenue Service recently ruled that certain facility-specific power purchase agreements (PPAs) are considered part of the underlying energy facility, and are not separate property. In PLR 201214007, an electric company acquired all of the membership interests in an unrelated entity that owned and operated (or was constructing) wind energy facilities. The entity had entered into PPAs that obligated the energy producer to sell and, the purchaser to buy, all or a specified cap amount of electricity that was produced at that specific facility at a specified price for a specified term of years. In the case of a specified cap amount, some PPAs contained a price adjustment for sales in excess of the cap amount. Under no circumstances could the entity fulfill its obligations under the PPAs from sources other than the specified energy facility. As a result, a transfer of a PPA without a transfer of the related wind energy facility would leave the transferee with no way to satisfy the PPA.

The PPAs had significant value because energy rates had fallen since the PPAs' execution. The taxpayer did not want to allocate any of the purchase price to the PPAs, which would have had to be amortized over 15 years, rather than the five year depreciation period for the energy facilities. The IRS agreed. Because each PPA could only be satisfied with the power produced at the specified facility designated in the PPA, the IRS determined that the facility-specific PPA was not a separate asset from the wind energy facility. Although the ruling is based on wind energy facilities, the analysis should apply to other types of energy property. Private letter rulings may only be relied on by the requesting taxpayer and may not be used or cited as precedent, but generally indicate the IRS's position on particular issues.

The ruling may also support a position that the PPA should be taken into account in determining Treasury Section 1603 cash grants (which expired December 31, 2011, subject to commencement of construction by that date) and investment tax credits. The major benefit would come from grants and credits which are based on value, and not just cost. With respect to cash grants, the Treasury had previously implied that PPAs with significant value are generally separate non-qualified property. Whether the Treasury will modify its position in light of the IRS ruling is not clear.

If you have any questions, please contact Alan J. Tarr at atarr@loeb.com or 212.407.4900.

If you received this alert from someone else and would like to be added to the distribution list, please send an email to alerts@loeb.com and we will be happy to include you in the distribution of future reports.

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

Circular 230 Disclosure: To ensure compliance with Treasury Department rules governing tax practice, we inform you that any advice contained herein (including any attachments) (1) was not written and is not intended to be used, and cannot be used, for the purpose of avoiding any federal tax penalty that may be imposed on the taxpayer; and (2) may not be used in connection with promoting, marketing or recommending to another person any transaction or matter addressed herein.

© 2012 Loeb & Loeb LLP. All rights reserved.

This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.

*For more information about Loeb & Loeb's Energy Practice,
please contact:*

ARTHUR W. ADELBERG	AADELBERG@LOEB.COM	202.618.5020
KENNETH A. ADLER	KADLER@LOEB.COM	212.407.4284
ROBERT S. BARRY, JR.	RBARRY@LOEB.COM	310.282.2258
NORWOOD P. BEVERIDGE, JR.	NBEVERIDGE@LOEB.COM	212.407.4970
GREGORY J. BLASI	GBLASI@LOEB.COM	212.407.4236
ALBERT M. COHEN	ACOHEN@LOEB.COM	310.282.2228
ANGELA M. SANTORO DOWD	ADOWD@LOEB.COM	212.407.4097
THEODORE F. DUVER	TDUVER@LOEB.COM	212.407.4158
FRANK LEE	FLEE@LOEB.COM	212.407.4825

RICHARD M. LORENZO	RLORENZO@LOEB.COM	212.407.4288
ELIZABETH L. MAJERS	EMAJERS@LOEB.COM	312.464.3142
JAY MATSON	JMATSON@LOEB.COM	202.618.5010
RONELLE C. PORTER	RPORTER@LOEB.COM	212.407.4110
STEVE A. SEMERDJIAN	SSEMERDJIAN@LOEB.COM	212.407.4218
AKIBA STERN	ASTERN@LOEB.COM	212.407.4235
ALAN J. TARR	ATARR@LOEB.COM	212.407.4900
NICOLE A. TRAVERS	NTRAVERS@LOEB.COM	202.618.5030
MARY C. WARNER	MWARNER@LOEB.COM	310.282.2057