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Client Alert
News Flash

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Alta Wind Wins Cash Grant Dispute in Court of Federal Claims – Awarded US$206 Million

Favorable decision clarifies the value of cash grants and investment tax credits for renewable energy projects.

A large wind developer won a significant victory in the Court of Federal Claims on October 28 in a case that is being closely watched by the renewable energy industry. A copy of the court's decision is available here, and judgment is available here.

The court held that the US Treasury Department (Treasury) must pay a cash grant equal to the applicant's tax basis in its wind farms even though that basis was far larger than the cost to build the wind farms. This decision has important implications to dozens of pending cases, as well as to many owners of renewable energy projects who saw their cash grant awards reduced by Treasury under circumstances similar to those in this case. The decision is also helpful to developers and financing parties in the solar sector who are seeking more clarity on how to determine the amount of the investment tax credit available to their projects.

The issue in this case was how to interpret the meaning of the word "basis" when determining the amount of a cash grant. The cash grant program was created by Congress in 2009 as a temporary substitute for the investment tax credit and production tax credit. Under the program, owners of renewable energy projects were entitled to cash grants equal to 30% of "the basis of such property." Congress specified that the term basis in the cash grant context should have the same meaning and rules applicable to the investment tax credit in the Internal Revenue Code.

The *Alta* case involved what has now become a familiar fact pattern in the development and financing of renewable energy projects. Alta Wind developed and constructed a series of wind farms and then either sold them outright to investors or sold and leased-back the wind farms with large financial institutions who were better able to use the tax benefits associated with these projects. The purchase prices paid by the buyers were significantly higher than Alta Wind's cost to build the projects. Each of the purchasers obtained an appraisal that supported the price it paid for the project, and then claimed a cash grant equal to 30% of its purchase price. Treasury reduced the cash grant award to 30% of Alta's cost to build the project and Alta filed suit in the Court of Federal Claims where all the cases were consolidated into one action. A trial took place over nine days in May, 2016 and closing arguments were heard on September 16, 2016.

The government advanced the following theories in support of its position, all of which were rejected by the court. It argued that a significant portion of the purchase price paid for the projects were attributable to goodwill, going concern value or the project contracts and therefore ineligible for the grant. It further contended that the parties inflated the purchase price through the use of a sale-leaseback, rent prepayments and tax indemnities.

The court rejected these theories and held that the increased value of the wind farms were instead attributable to "turn-key value" — a term it used to refer to the value of an asset over and above the value of each individual component before it is assembled into a complete and functioning unit. Significantly, the court held that the wind farms could not have goodwill or going concern value because the wind farms had been sold prior to becoming operational. It further held that power purchase agreements were not separate intangible assets with value independent of the tangible property constituting the wind farms because of the close nexus between a wind farm and the related power purchase agreement and the fact that the contract could not be sold or assigned separate and apart from the facility. Lastly, the court was not convinced that a sale-leaseback transaction with customary rent prepayment and indemnities presented peculiar circumstances that supported a finding that the purchase prices for these assets were highly inflated. Rather, the court found the pro rata allocation method used by the plaintiffs to allocate the incremental "turn-key value" to the tangible property constituting the wind farms (based on the direct and indirect costs of such property) to be "the most reasonable solution" based on the evidence presented.

This decision marks the first time that a court has directly weighed in on what has become a central issue in the cash grant program and one that applies broadly to all projects that qualify for cost-based tax incentives such as the investment tax credit and tax depreciation. The decision in this case should bode well for the industry and provide further clarity to transactions that involve the investment tax credit.

The Department of Justice may decide to appeal this decision to the Federal Circuit.

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