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Department of the Treasury
Washington, DC 20224

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Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:ITA:7
PLR-125773-12

Date:
December 07, 2012

Re: Request for Extension of Time to Make the Election Under Section 169 and the Election Provided in Section 3.02(2)(b) of Rev. Proc. 2011-26

P =
S1 =
S2 =
S3 =
S4 =
S5 =
S6 =
S7 =
S8 =
S9 =
S10 =
S11 =
S12 =
S13 =
S14 =
S15 =
A =
Date1 =
Date2 =
Year1 =
Year2 =
Year3 =
State1 =
State2 =

Dear :

This letter responds to a letter dated June 14, 2012, submitted by P on behalf of S1, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make the election under section 169 of the Internal Revenue Code to amortize certain pollution control facilities placed in service in the taxable year ended Date1, and by P on behalf of S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15, requesting an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make the election provided in section 3.02(2)(b) of Rev. Proc. 2011-26, 2011-16 I.R.B. 664, to deduct the 100-percent additional first year depreciation under section 168(k)(5) for certain components of certain larger self-constructed properties placed in service in the taxable year ended Date1 (the Year1 taxable year).

FACTS

P represents that the facts are as follows:

P is the parent and holding company of an affiliated group of corporations which includes S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15. The companies are engaged in energy-related businesses. The affiliated group of corporations files consolidated federal income tax returns on a calendar-year end basis. The consolidated federal income tax return for the taxable year ended Date1, was timely filed on Date2, and was prepared by the tax staff of S5, which performs all tax functions for P and its subsidiaries.

S9 wholly owns S1. S9 provides energy related products and services to wholesale and retail electric customers. S1 owns and operates fossil (coal) and hydroelectric generating facilities located primarily in State1 and State2, and S1 sells its entire electric output to S9 pursuant to an intercompany power sales agreement.

One of the fossil plants that S1 owns and operates is the A. Different units of the A went into service in different years, but everything at the A was originally in operation prior to the end of Year2. Subsequent improvements/replacements of more than 20-percent of adjusted basis resulted in a new placed in service date after Year3.

During Year1, S1 placed in service certain pollution control equipment and related property at the A. For purposes of section 169, all of the pollution control equipment was placed in service in Year1; equipment for different pollution control units went into service in different months during Year1, and the units began to be amortized under section 169 the month following the month that the unit was placed in service. S1 represents that it will claim 84-month amortization on the pollution control equipment that is the subject of this letter ruling request. S1 has received the required state certification for the pollution control equipment. At this time, S1 is not in receipt of a copy of the federal certification.

For S1, P intended to make an election to deduct amortization under section 169 for the A on its timely filed consolidated federal income tax return for the taxable year ended Date1. On such return, P claimed the section 169 amortization deduction, but P did not identify the need to attach an election statement to the return for S1. P was otherwise unaware of the necessity to file an election statement to properly claim the section 169 deduction for S1. P's failure to attach the section 169 election statement for S1 as required by the regulations was simply an oversight.

On P's timely filed Year1 consolidated federal income tax return, S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15 claimed (i) the 100-percent additional first year depreciation under section 168(k)(5) for the components that are described in section 3.02(2)(b) of Rev. Proc. 2011-26, and (ii) the 50-percent additional first year depreciation under section 168(k)(1) for the corresponding larger self-constructed properties that are described in section 3.02(2)(b) of Rev. Proc. 2011-26. However, P inadvertently failed to attach the election statement required by section 3.02(2)(b) of Rev. Proc. 2011-26 with respect to the components to the Year1 consolidated federal income tax return for S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15.

S1 did not claim the 100-percent additional first year depreciation for the A on P's timely filed Year1 consolidated federal income tax return.

RULINGS REQUESTED

S1 requests an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to make the election under section 169 to amortize certified pollution control facilities with respect to the A that are placed in service in the taxable year ended Date1, and S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15 request an extension of time pursuant to § 301.9100-3 to make the election provided in section 3.02(2)(b) of Rev. Proc. 2011-26 to deduct the 100-percent additional first year depreciation under section 168(k)(5) for certain components of certain larger self-constructed properties placed in service in the taxable year ended Date1.

LAW AND ANALYSIS

Section 169(a) allows a taxpayer to elect to take a deduction for the amortization of the amortizable basis of any certified pollution control facility (as defined in § 169(d)), based on a period of 60 months. The 60-month period shall begin, as to any pollution control facility, at the election of the taxpayer, with the month following the month in which such facility was completed or acquired, or with the succeeding taxable year.

Under section 169(b), the taxpayer makes the election to take the amortization deduction and to begin the 60-month period with the month following the month in which

the facility is completed or acquired, or with the taxable year succeeding the taxable year in which such facility is completed or acquired, by filing with the Secretary, in such manner, in such form, and within such time, as the Secretary may by regulations prescribe, a statement of such election.

Section 169(d)(1) defines a certified pollution control facility as a new identifiable treatment facility which is used, in connection with a plant or other property in operation before January 1, 1976, to abate or control water or atmospheric pollution or contamination by removing, altering, disposing, storing, or preventing the creation or emission of pollutants, contaminants, wastes, or heat.

Additionally, under section 169(d)(1)(A), the State certifying authority having jurisdiction with respect to such facility has certified the facility to the Federal certifying authority as having been constructed, reconstructed, erected, or acquired in conformity with the State program or requirements for abatement or control of water or atmospheric pollution or contamination.

Similarly, under section 169(d)(1)(B), the Federal certifying authority has certified the facility to the Secretary as being in compliance with the applicable regulations of Federal agencies and as being in furtherance of the general policy of the United States for cooperation with the States in the prevention and abatement of water pollution under the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.), or in the prevention and abatement of atmospheric pollution and contamination under the Clean Air Act, as amended (42 U.S.C. 1857 et seq.).

Finally, under section 169(d)(1)(C), the facility does not significantly increase the output or capacity, extend the useful life, or reduce the total operating costs of such plant or other property (or any unit therof), or significantly alter the nature of the manufacturing or production process or facility.

Under section 169(d)(4)(A), for purposes of section 169(d)(1), a new identifiable treatment facility includes only tangible property (not including a building and its structural components, other than a building which is exclusively a treatment facility) which is of a character subject to the allowance for depreciation provided in section 167, which is identifiable as a treatment facility. Additionally, the taxpayer must complete the construction, reconstruction, or erection of this property after December 31, 1968, or taxpayer must acquire this property after December 31, 1968, if the original use of the property commences with the taxpayer and commences after such date. In applying this section in the case of property the taxpayer constructs, reconstructs, or erects after December 31, 1968, there shall be taken into account only that portion of the basis properly attributable to construction, reconstruction, or erection after December 31, 1968.

Under section 169(d)(4)(B), in the case of any facility described in section 169(d)(1) solely by reason of section 169(d)(5), section 169(d)(4)(A) shall be applied by substituting “April 11, 2005” for December 31, 1968” each place it appears therein.

Under section 169(d)(5)(A), in the case of any atmospheric pollution control facility which is placed in service after April 11, 2005, and used in connection with an electric generation plant or other property which is primarily coal fired, § 169(d)(1) shall be applied without regard to the phrase “in operation before January 1, 1976.”

Under section 169(d)(5)(B), in the case of a facility placed in service in connection with a plant or other property placed in operation after December 31, 1975, this section shall be applied by substituting “84” for “60” each place it appears in section 169(a) and section 169(b).

Under section 1.169-4(a)(1) of the Income Tax Regulations, a taxpayer making the election under section 169(b) shall make the election by attaching a statement of such election to its return for the taxable year in which falls the first month of the 60-month amortization so elected. Such statement must include the information specified in section 1.169-4(a)(1)(i) through (ix). Specifically, section 1.169-4(a)(1)(ix)(b) requires, in part, that if the facility has not been certified by the Federal certifying authority, the statement of election must include a statement that application has been made to the proper State certifying authority together with a copy of such application and a copy of the application filed, or to be filed, with the Federal certifying authority.

Section 1.169-3(a) provides, in part, that the amortizable basis of a certified pollution control facility for the purpose of computing the amortization deduction under section 169 is the adjusted basis of the facility for purposes of determining gain (see part II (section 1011 and following), subchapter O, chapter 1 of the Code), in conjunction with paragraphs (b), (c), and (d) of section 1.169-3.

Section 1.169-3(a) provides, in part, that before computing the amortization deduction allowable under section 169, the adjusted basis for purposes of determining gain for a facility that is placed in service by a taxpayer after September 10, 2001, and that is qualified property under section 168(k)(2) or section 1.168(k)-1 or 50-percent bonus depreciation property under section 168(k)(4) or section 1.168(k)-1 must be reduced by the amount of the additional first year depreciation deduction allowed or allowable, whichever is greater, under section 168(k), for the facility.

Section 168(k)(5) provides that in the case of qualified property acquired by the taxpayer (under rules similar to the rules of section 168(k)(2)(A)(ii) and (iii)) after September 8, 2010, and before January 1, 2012, and which is placed in service by the taxpayer before January 1, 2012 (January 1, 2013, in the case of property described in section 168(k)(2)(B) or (C)), a 100-percent additional first year depreciation deduction

for the taxable year in which such qualified property is placed in service by the taxpayer is allowable.

Section 3.01 of Rev. Proc. 2011-26 provides that depreciable property is eligible for the 100-percent additional first year depreciation deduction if the property is qualified property (as defined in section 168(k)(2)) and also meets the additional requirements in section 3.02 of Rev. Proc. 2011-26. Further, it provides that for purposes of determining whether depreciable property is qualified property, rules similar to the rules in section 1.168(k)-1 for "qualified property" or for "30-percent additional first year depreciation deduction" apply.

Section 3.02(1) of Rev. Proc. 2011-26 provides that for purposes of section 168(k)(5), qualified property is eligible for the 100-percent additional first year depreciation deduction if the property meets all of the following requirements in the first taxable year in which the property is subject to depreciation by the taxpayer, whether or not depreciation deductions for that property are allowable:

(a) The taxpayer acquires the qualified property after September 8, 2010, and before January 1, 2012 (before January 1, 2013, in the case of qualified property described in section 168(k)(2)(B) or (C)). Solely for purposes of section 168(k)(5) and section 3.02(1)(a) of Rev. Proc. 2011-26, a taxpayer acquires the qualified property when the taxpayer pays or incurs the cost of the property. Qualified property that a taxpayer manufactures, constructs, or produces (as defined under section 1.168(k)-1(b)(4)(iii)(A) and modified by section 3.02(1)(a) of Rev. Proc. 2011-26 solely for purposes of section 168(k)(5)) for use in its trade or business or for its production of income is acquired by the taxpayer for purposes of section 168(k)(5) and section 3.02(1)(a) of Rev. Proc. 2011-26 when the taxpayer begins constructing, manufacturing, or producing that property (as determined under section 1.168(k)-1(b)(4)(iii)(B)).

(b) The taxpayer places the qualified property in service after September 8, 2010, and before January 1, 2012 (before January 1, 2013, in the case of qualified property described in section 168(k)(2)(B) or (C)).

(c) The original use of the qualified property commences with the taxpayer after September 8, 2010.

Section 3.02(2)(a) of Rev. Proc. 2011-26 provides, in relevant part, that if a taxpayer manufactures, constructs, or produces qualified property for use by the taxpayer in its trade or business or for its production of income, rules similar to the self-constructed property rules in section 1.168(k)-1(b)(4)(iii) apply for determining whether this property meets the acquisition requirement of section 3.02(1)(a) of Rev. Proc. 2011-26.

Section 3.02(2)(b) of Rev. Proc. 2011-26, however, provides a limited exception to sections 1.168(k)-1(b)(4)(iii)(C)(*1*) and (*2*) for certain components of a larger self-constructed property solely for purposes of section 168(k)(5) and section 3.02(1)(a) of Rev. Proc. 2011-26. If before September 9, 2010, a taxpayer begins the manufacture, construction, or production of the larger self-constructed property that is qualified property for use in its trade or business or for its production of income, but this larger self-constructed property meets the requirements of sections 3.02(1)(b) and (c) of Rev. Proc. 2011-26, the taxpayer may elect to treat any acquired or self-constructed component of that larger self-constructed property as being eligible for the 100-percent additional first year depreciation deduction if the component is qualified property and is acquired or self-constructed by the taxpayer after September 8, 2010, and before January 1, 2012 (before January 1, 2013, in the case of qualified property described in section 168(k)(2)(B) or (C)). The taxpayer may make this election for one or more components that are described in section 3.02(2)(b) of Rev. Proc. 2011-26. The taxpayer must make the election in section 3.02(2)(b) of Rev. Proc. 2011-26 by the due date (including extensions) of the federal tax return for the taxpayer's taxable year in which the larger self-constructed property is placed in service by the taxpayer, and by attaching a statement to that return indicating that the taxpayer is making the election provided in section 3.02(2)(b) of Rev. Proc. 2011-26 and whether the taxpayer is making the election for all or some of the components described in section 3.02(2)(b) of Rev. Proc. 2011-26.

Under § 301.9100-1, the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election. Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Section 301.9100-3(a) provides that requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and the grant of relief will not prejudice the interests of the government.

CONCLUSIONS

Based solely on the facts and representations submitted, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 have been satisfied. Accordingly, S1 is granted 60 calendar days from the date of this letter to make the election under section 169 for the certified pollution control facilities with respect to the A that are placed in service by S1 in the taxable year ended Date1. This election must be made by P filing

an amended consolidated federal tax return for the taxable year in which falls the first month of the 84-month amortization period elected by S1. The election must comply with the requirements of section 1.169-4(a)(1), including the information required by section 1.169-4(a)(1)(i) through (ix).

Further, S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15 are granted 60 calendar days from the date of this letter to make the election provided in section 3.02(2)(b) of Rev. Proc. 2011-26 to deduct the 100-percent additional first year depreciation under section 168(k)(5) for components (i) that are described in section 3.02(2)(b) of Rev. Proc. 2011-26 of larger self-constructed properties that are described in section 3.02(2)(b) of Rev. Proc. 2011-26 and (ii) that are placed in service by, respectively, S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15 in the taxable year ended Date1. This election must be made by P filing an amended consolidated federal tax return for that taxable year, with a statement indicating that S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, and S15 are making the election provided in section 3.02(2)(b) of Rev. Proc. 2011-26 for the taxable year ended Date1, and indicating whether each such company is making this election for all or only for some of the components described in section 3.02(2)(b) of Rev. Proc. 2011-26.

If the period of limitations on assessment under section 6501(a) for the taxable year in which the section 169 election with respect to the A should have been made or for any taxable year that would have been affected by such election had it been timely made will expire before P has filed the certifications from the Federal certifying authority with the appropriate Internal Revenue Service official in the operating division that has examination jurisdiction over P's federal tax returns, P must consent under section 6501(a) to an extension of the period of limitations on assessment for such taxable years.

Except as specifically set forth above, we express no opinion concerning the federal income tax consequences of the facts described above under any other provisions of the Code. Specifically, no opinion is expressed or implied on whether the facilities subject to this letter ruling are certified pollution control facilities as defined in section 169(d) or whether the facilities subject to this letter ruling qualify for 60 or 84 month amortization periods. Further, no opinion is expressed or implied on whether any item of depreciable property placed in service by S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, or S15 during the taxable year ended Date1, is qualified property (as defined in section 168(k)(2) and section 1.168(k)-1) or is eligible for the 100-percent additional first year depreciation deduction, or whether any component or larger self-constructed property placed in service by S1, S2, S3, S4, S5, S6, S7, S8, S9, S10, S11, S12, S13, S14, or S15 in the taxable year ended Date1, is described in section 3.02(2)(b) of Rev. Proc. 2011-26.

In accordance with the power of attorney, we are sending a copy of this letter ruling to P's authorized representatives. We are also sending a copy of this letter ruling to the appropriate operating division director.

This letter ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

Kathleen Reed

Kathleen Reed
Branch Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax and Accounting)

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