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Person To Contact:
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Telephone Number:

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Date:
April 20, 2017

Legend:
Taxpayer =

Parent =
Company =
Operator =
Unit =
State =
Date 1 =
Date 2 =
a =
b =
c =
d =
e =

Dear :

This letter responds to your request for private letter ruling dated October 24, 2016. You requested that we rule on certain tax consequences of the restructuring discussed below.

Taxpayer has represented that, at the time that the private letter ruling was submitted, the facts were as follows:

Taxpayer is a limited liability company treated as a partnership for federal income tax purposes that is indirectly, wholly-owned by Parent. Taxpayer is in the merchant power generation business and is engaged in the generation of electricity within State. Taxpayer owns all of the interests in the Unit, its sole electricity generation asset. The Unit is operated by Operator, a corporate affiliate of Taxpayer. Taxpayer is an accrual method taxpayer that files its federal income tax returns on a calendar year basis.

Taxpayer is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), the Nuclear Regulatory Commission ("NRC"), and the State Public Service Commission.

Taxpayer maintains a master nuclear decommissioning trust, which currently holds assets dedicated to the decommissioning of the Unit, in two separate subsidiary trusts: one that meets the requirements for a qualified fund within the meaning of § 468A of the Internal Revenue Code (the Qualified Fund) and one that does not meet those requirements (the Nonqualified Fund). As of Date 1, the Qualified Fund totaled approximately $a and the Nonqualified Fund totaled approximately $b. As of Date 2, the estimated nuclear decommissioning liability is $c, which exceeds the fair market value of the assets held in the Qualified Fund and the Nonqualified Fund by approximately $d. On the date of the proposed transaction, the master nuclear decommissioning trust is expected to hold the assets valued at approximately $a plus $b.

The proposed transaction involves Taxpayer transferring the Unit, its associated nuclear decommissioning liability, and the master nuclear decommissioning trust to Company. Company is a single-member limited liability company owned by Taxpayer and is disregarded as an entity separate from Taxpayer for federal income tax purposes. Company will also be subject to the jurisdiction of FERC, NRC, and the State Public Service Commission.

As part of the proposed transaction, Company will elect to become an association taxable as a corporation for federal income tax purposes. Taxpayer and Company will treat such an elective change in classification as Taxpayer contributing all of the assets and liabilities of the disregarded entity to Company in exchange for stock of Company. Immediately after the exchange, Taxpayer is in control of Company because it will own an e% interest in Company.

Taxpayer represents that its liabilities (including the nuclear decommissioning liability) that are assumed by Company will exceed the basis of all of the property that it will transfer to Company in the proposed transaction by an amount at least equal to the nuclear decommissioning liability. Taxpayer will treat the proposed transaction (including the transfer of the Unit and the associated nuclear decommissioning trust) as a taxable transaction. Because it is being relieved of liabilities in excess of the adjusted basis of the property transferred, Taxpayer will recognize gain under § 357(c) assuming § 351 applies. Taxpayer will recognize gain under § 1001 if § 351 does not apply.

Rulings Requested:

1) The Qualified Fund will not be disqualified by reason of the proposed transaction.

2) The Qualified Fund will continue to be treated as satisfying the requirements of § 468A and Treas. Reg. § 1.468A-5 following the proposed transaction.

3) The Qualified Fund will not recognize any gain or loss or otherwise take any income or deduction into account by reason of the proposed transaction.

4) Neither Taxpayer nor Company will recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of the proposed transaction.

5) The tax basis of the Qualified Fund and its assets will not change by reason of the proposed transaction.

6) The amount realized by Taxpayer from the proposed transaction will include the nuclear decommissioning liability associated with the Unit, but not including the portion of the nuclear decommissioning liability funded by the Qualified Fund on the date of the proposed transaction.

7) Taxpayer will be entitled to treat the nuclear decommissioning liability as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5) to the extent that Taxpayer includes the nuclear decommissioning liability in the amount realized from the proposed transaction.

Law and Analysis

Issues 1-5:

Section 468A(a) of the Code provides that a taxpayer may elect to deduct payments made to a nuclear decommissioning reserve fund that meets the requirements of section 468A (i.e. a fund that is a "qualified nuclear decommissioning fund").

Section 1.468A-1(b)(4) provides that a "qualified nuclear decommissioning fund" is a fund that satisfies the requirements of section 1.468A-5.

Section 1.468A-5(a) of the Income Tax regulations sets out the qualification requirements for nuclear decommissioning funds. It provides, in part, that a qualified nuclear decommissioning fund must be established and maintained pursuant to an arrangement that qualifies as a trust under state law.

Section 1.468A-5(a)(1)(iii) provides that an electing taxpayer can establish and maintain only one qualified nuclear decommissioning fund for each nuclear power plant. If a nuclear power plant is subject to the ratemaking jurisdiction of two or more public utility commissions and any such public utility commission requires a separate fund to be maintained for the benefit of ratepayers whose rates are established or approved by the public utility commission, the separate funds maintained for such plant (whether or not established and maintained pursuant to a single trust agreement) shall be considered a single nuclear decommissioning fund.

Section 1.468A-6 provides rules applicable to the transfer of an interest in a nuclear power plant (and transfer of the qualified nuclear decommissioning fund) where certain requirements are met. Specifically, section 1.468A-6(b) provides that section 1.468A-6 applies if—

(1) Immediately before the disposition, the transferor maintained a qualified nuclear decommissioning fund with respect to the interest disposed of; and

(2) Immediately after the disposition--

(i) The transferee maintains a qualified nuclear decommissioning fund with respect to the interest acquired;

(ii) The interest acquired is a qualifying interest of the transferee in the nuclear power plant;

(3) In connection with the disposition, either—

(i) The transferee acquires part or all of the transferor's qualifying interest in the plant and a proportionate amount of the assets of the transferor's fund (all such assets if the transferee acquires the transferor's entire qualifying interest in the fund) is transferred to a fund of the transferee; or

(ii) The transferee acquires the transferor's entire qualifying interest in the plant and the transferor's entire fund is transferred to the transferee; and

(4) The transferee continues to satisfy the requirements of section 1.468A-5(a)(iii), which permits an electing taxpayer to maintain only one qualified nuclear decommissioning fund for each plant.

Section 1.468A-6(c) provides that a disposition that satisfies the requirements of section 1.468A-6(b) will have the following tax consequences at the time it occurs:

(1)(i) Neither the transferor nor the transferor's qualified nuclear decommissioning fund will recognize gain or loss or otherwise take any income into account by reason of the transfer of a proportionate amount of the assets of the transferor's qualified nuclear decommissioning fund to the transferee's qualified nuclear decommissioning fund (or by reason of the transfer of the transferor's entire qualified nuclear decommissioning fund to the transferee). For purposes of the regulations under section 468A, this transfer (or the transfer of the transferor's qualified nuclear decommissioning fund) will not be considered a distribution of assets by the transferor's qualified nuclear decommissioning fund.

(ii) Notwithstanding § 1.468A-6(c)(1)(i), if the transferor has made a special transfer under § 1.468A-8 prior to the transfer of the fund or fund assets, any deduction with respect to that special transfer allowable under § 468A(f)(2) for a taxable year ending after the date of the transfer of the fund or fund assets is allowed under § 468A(f)(2)(C) for the taxable year that includes the date of the transfer of the fund or fund assets.

(2) Neither the transferee nor the transferee's qualified nuclear decommissioning fund will recognize gain or loss or otherwise take any income into account by reason of the transfer of a proportionate amount of the assets of the transferor's qualified nuclear decommissioning fund to the transferee's qualified nuclear decommissioning fund (or by reason of the transfer of the transferor's entire qualified nuclear decommissioning fund to the transferee). For purposes of the regulations under section 468A, this transfer (or the transfer of the transferor's qualified nuclear decommissioning fund) will not constitute a payment or a contribution of assets by the transferee to its qualified nuclear decommissioning fund.

(3) Transfers of assets of a qualified nuclear decommissioning fund to which this section applies do not affect basis. Thus, the transferee's qualified nuclear decommissioning fund will have a basis in the assets received from the transferor's qualified nuclear decommissioning fund that is the same as the basis of those assets in the transferor's qualified nuclear decommissioning fund immediately before the distribution.

Under section 1.468A-6(f), the Service may treat any disposition of an interest in a nuclear power plant occurring after December 27, 1994, as satisfying the requirements of the regulations if the Service determines that such treatment is necessary or appropriate to carry out the purposes of § 468A.

Issue 6

Section 1001(b) provides that the amount realized from the sale or other disposition of property is the sum of any money received plus the fair market value of the property (other than money) received. Section 1.1001-2(a)(1) provides that the amount realized from the sale or other disposition of property includes the amount of liabilities from which the transferor is discharged as a result of the sale or disposition.

The decommissioning liabilities from which Taxpayer will be relieved are fixed and determinable for purposes of § 461 and, as discussed below under Issue 7, are described in § 1.461-4(d)(5). These amounts are included in the amount realized. As an owner of a nuclear-powered plant, Taxpayer is required by law to provide for eventual decommissioning, and the amount of Taxpayer's liability can be determined with reasonable accuracy. Accordingly, the amount of Taxpayer's nuclear decommissioning liability that is assumed by Company in excess of the fair market value of the assets in the Qualified Fund on the date of the transfer will be included in Taxpayer's amount realized and taken into account in computing taxable income in the year of the proposed transaction. As discussed above, the proposed transaction will not result in the disqualification of the Qualified Fund, and Taxpayer will not have any gain or income as a result of the transfer of its interests in the assets of the Qualified Fund to Company. Because the transfer of the Qualified Fund from Taxpayer to Company will not be a taxable transfer, the amount of the liabilities assumed by Company that are included in Taxpayer's amount realized will not include the portion of the liability to decommission the Unit that is equal to the fair market value of the assets in the Qualified Fund on the date of the transfer.

Issue 7

Section 1.446-1(c)(1)(ii)(A) provides that under an accrual method of accounting, a liability is incurred and generally taken into account for federal income tax purposes in the year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability.

Section 461(h)(1) provides that, in determining whether an amount has been incurred with respect to any item during any taxable year, the all events test shall not be treated as met any earlier than when economic performance with respect to such item occurs. See also § 1.461-4(a)(1). Section 461(h)(4) provides that the all events test is met with respect to any item if all events have occurred that determine the fact of liability and the amount of such liability can be determined with reasonable accuracy.

Section 461(h)(2)(B) provides that in the case of a liability that requires the taxpayer to provide services, economic performance occurs as the taxpayer provides the services. Section 1.461-4(d)(4)(i) provides that, except as otherwise provided in § 1.461-4(d)(5), if a liability requires the taxpayer to provide services to another person,

economic performance occurs as the taxpayer incurs costs in connection with the satisfaction of the liability. Section 1.461-4(d)(5) provides an exception to the general economic performance rule for services where the taxpayer sells or exchanges a trade or business. Where the purchaser expressly assumes a liability arising out of the taxpayer's trade or business that the taxpayer but for the economic performance requirement would have been entitled to incur as of the date of the sale, economic performance with respect to that liability occurs as the amount of the liability is properly included in the amount realized on the transaction by the taxpayer.

The first prong of the all events test requires that the fact of the liability be established at the time of the deduction. This prong of the all events test is satisfied in the instant case for Taxpayer. Here, Taxpayer, as an owner of a nuclear-powered plant, was required to obtain an operating license before commercial operations begun. 10 C.F.R. § 50.10; see also 10 C.F.R. § 50.33(k)(1). Taxpayer also has an obligation to seek license termination. 10 C.F.R. §§ 50.82(a)(9) and (10). The license termination process provides that a licensee shall take actions necessary to decommission and decontaminate the facility. 10 C.F.R. §§ 50.51(b)(1) and 50.54(bb); see also 10 C.F.R. § 72.30. The fact of the obligation arose at the time Taxpayer became subject to the decommissioning requirements associated with the plant's license. Moreover, Congress recognized the existence of the decommissioning liability when, in 1984, it enacted § 461(h) and § 468A, noting that "[g]enerally, under Federal and State laws, utilities that operate nuclear power plants are obligated to decommission the plants at the end of their useful lives." H.R. Conf. Rep. No. 98-861, 877 (1984). See also S. Prt. No. 169, Vol. 1, 98th Cong., 2d Sess. 277 (1984).

The second prong of the all events test requires that the amount of the liability be determined with reasonable accuracy. See § 1.461-1(a)(2)(ii). This prong is also satisfied. In the instant case, the amount of Taxpayer’s decommissioning liability has been determined by experts in the nuclear decommissioning industry. The estimate has been accepted by the NRC, which is charged with ensuring that sufficient funds are available to decommission the plants. In addition, there is also support in the Internal Revenue Code for finding that the amount of the decommissioning liability can be determined with reasonable accuracy at the time of a sale. Section 468A(d) generally permits a current deduction for a "ruling amount," based on estimated future decommissioning expenses. To the extent the decommissioning costs are sufficiently determinable to entitle a utility to a deduction under § 468A, it is reasonable to conclude that the costs must also be sufficiently determinable to satisfy the second prong of the all events test.

Conclusions:

Based on the information submitted by Taxpayer and Company, we reach the following conclusions:

1) The Qualified Fund will not be disqualified by reason of the proposed transaction.

2) The Qualified Fund will continue to be treated as satisfying the requirements of section 468A and Treas. Reg. § 1.468A-5 after the proposed transaction.

3) The Qualified Fund will not recognize gain or loss or otherwise take any income or deduction into account by reason of the proposed transaction.

4) Neither Taxpayer nor Company will recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of the proposed transaction.

5) The tax basis of the Qualified Fund and its assets will not change by reason of the proposed transaction.

6) The amount realized by Taxpayer from the proposed transaction will include the nuclear decommissioning liability associated with the Unit, but not including the portion of the nuclear decommissioning liability funded by the Qualified Fund on the date of the proposed transaction.

7) Taxpayer will be entitled to treat the nuclear decommissioning liability as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5) to the extent that Taxpayer includes the nuclear decommissioning liability in the amount realized from the proposed transaction.

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the transaction described above. Specifically, we express no opinion on the tax consequences of the transaction under § 351 or § 752. Also, except as specifically determined above, we express no opinion on the federal income tax consequences to Company resulting from the acquisition of assets and liabilities (including the nuclear-powered electric generating plants and the nuclear decommissioning liabilities) of Taxpayer.

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. In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representative. We are also sending a copy of this letter ruling to the Director.

Sincerely,

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