Internal Revenue Service

Number: **202117004**
Release Date: 4/30/2021

Index Number: 468A.06-03

Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

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Refer Reply To:
CC:PSI:B06
PLR-115994-20

Date:
January 15, 2021

In Re: Request for Rulings Under Sections 461 and 468A of the Internal Revenue Code

LEGEND:

Seller	=
Purchaser	=
Company A	=
Company B	=
Company C	=
Company D	=
Company E	=
Company F	=
Company G	=
Company H	=
Company I	=
Company J	=
Country A	=
State A	=
Plant	=
Location	=
Method	=
Commission A	=
Commission B	=
Date A	=
Date B	=
Date C	=
Date D	=
Date E	=
Date F	=

Date G =
Date H =
a =
Year A =
Year B =
Directors =

Dear :

FACTS

This letter responds to your joint request, dated July 16, 2020, for Rulings under sections 461 and 468A of the Internal Revenue Code (Code) and § 1.468A-6(f)(2) of the Income Tax Regulations regarding the transfer of qualified nuclear decommissioning reserve funds.

Seller represents the facts and information relating to their request for rulings as the following:

Company A, a State A corporation, is the common parent of an affiliated group of corporations filing a consolidated federal income tax return on a calendar-year basis using the accrual method of accounting. Company A is in the business of owning and running regulated electric utilities and merchant power generations businesses. Seller is a limited liability company formed under State A law and is taxed as a corporation. Seller is indirectly and wholly owned by Company A but is not a member of Company A's consolidated group. Seller files its separate tax return on a calendar year basis using the accrual method of accounting. For income tax purposes, Seller owns Unit 1, Unit 2, and Unit 3 of Plant (The Plant Units). All units for Plant are subject to the jurisdiction of Commission A and Commission B.

Purchaser, an S corporation, files its federal income tax return on a calendar year basis using the accrual method of accounting. Purchaser is a diversified energy technology company, that is in the business of nuclear decommissioning and nuclear fuel management technologies. Company B is a wholly owned State A limited liability company whose sole member, Company C, is a subchapter S subsidiary of Purchaser. Company C is a disregarded entity of Company B.

Plant is located at Location. Unit 1 permanently ceased operation on Date A. All nuclear fuel was removed from the reactor in Year A. Unit 1 has since been maintained in Method as allowed by Commission A. Unit 2 is operated by Company D, an indirect wholly owned subsidiary of Company A. Unit 2 permanently ceased operations on Date B, and the unit will be defueled before Date C. Unit 3 of Plant is also operated by

Company B. Unit 3 is expected to permanently cease operations on Date D and will be defueled before Date E.

Seller maintains master nuclear decommissioning trusts (NDTs) that are dedicated to the decommissioning of all three units of Plant. These trusts are named Trusts. The agreement with the Trustee regarding the purpose and operation of each NDT authorizes the deposit and holding of assets in two sub-trusts that are trusts under state law: one that meets the requirement for a nuclear decommissioning reserve fund withing the meaning of section 468A (Qualified Fund); and one that does not met those requirements (Non-qualified Fund).

Company A has routinely prepared or commissioned studies for each of its nuclear facilities. Each study comprehensively estimates the cost of all activities necessary for Company A to discharge its decommissioning obligation. Beginning in Year B, Company A contracted Company J, a private engineering firm, to prepare the decommissioning cost studies for its nuclear plants. The cost estimating process developed by Company J has since become a well-recognized standard and has been widely used by governmental agencies and the nuclear industry. Company J has prepared decommissioning studies for all of Company A's plants and typically reviews and updates the studies every three to five years.

Company J's estimates have been accepted by the Commission A, which is charged with ensuring that sufficient funds are available for decommissioning nuclear power plants.

The Decommissioning Cost Studies are prepared by Company J in accordance with the Nuclear Energy Institute's Guidelines and have been used to satisfy regulatory requirements regarding the establishment of a fund that satisfies the decommissioning funding assurance requirements.

On Date F, Seller filed requests to the Service for a revised Schedule of Rulings Amounts for each Qualified Fund. Prior to closing of the transaction described below, Seller will cause almost all assets held in all Non-qualified Funds to be converted to cash and contributed to the associated Qualified Funds in accordance with the revised Schedule of Rulings Amounts.

On Date G, Seller and Purchaser executed an Equity Purchase and Sale Agreement (Purchase Agreement) providing for the acquisition by Purchaser of all the equity interests in the disregarded entities that will own the Units of Plant (Transaction). The Transaction will be treated as a sale of assets for U.S. federal income tax purposes and is expected to close on Date H. The terms Purchase Agreement require that on the date of Closing, Seller will transfer all membership interests in Unit 1, Unit 2, and Unit 3 of Plant to Company B in consideration for $a and the assumption of the associated decommissioning liability for the Plant Units.

Prior to Closing, Seller will form a wholly owned subsidiary, Company E, that will be disregarded for federal income tax purposes. Immediately thereafter, Company E, will form a wholly owned subsidiary, Company F, that will be disregarded for federal income tax purposes. Seller will then contribute all equity interests in Unit 1, Unit 2, and Unit 3 to Company E with will then contribute those interests to Company F. At the Closing of the Transaction. Company E will sell the equity interests in Company F to Company B.

Upon Closing of the Transaction, Purchaser will acquire ownership and beneficial interests in the Plant's NDTs (Fund Transfers). Additionally, Purchaser will assume all liabilities related to Unit 1, Unit 2, and Unit 3 of Plant, including the Nuclear Decommissioning Liabilities (NDLs).

Purchaser's subsidiary, Company G, is intended to become the operator of Unit 1, Unit 2, and Unit 3 of Plant as licensed by Commission A. Company G expects to engage Company H, a joint venture of Purchaser and Company I, a Country A company, to perform the decommissioning of Unit 1, Unit 2, and Unit 3 of Plant.

The above described transaction is subject to the jurisdiction of and must be approved by Commission A and Commission B. Upon Closing, the risk and responsibility for decommissioning Unit 1, Unit 2, and Unit 3 of Plant will be transferred to Purchaser.

Purchaser and Seller make further independent representations.

Seller Representations

Immediately prior to the Closing of the Transaction:

- Seller will have a qualifying interest in Unit 1, Unit 2, and Unit 3 of Plant within the meaning of Treas. Reg. section 1.468A-1(b)(2);

- Seller will have maintained Unit 1, Unit 2, and Unit 3's Qualified Funds as a trust under applicable state law for the exclusive purpose of providing funds for decommissioning;

- Seller will have maintained each Qualified Fund as a separate fund and as the sole qualified fund for each respective Unit of Plant;

- Seller will not have made any contributions to the Qualified Funds other than those for which a deduction will be allowed under section 468A;

- The assets of each Qualified Fund will have been used exclusively to (A) satisfy, in whole or in part, the liability for decommissioning costs of the related Units of Plant, (B) pay administrative costs and other incidental expenses of such Qualified Fund, and (C) make investments, to the extent the assets of such Qualified Fund are not needed to satisfy the purposes in (A) and (B) above;

- The trust agreement for each Qualified Fund provides that the assets in that Qualified Fund must be used as authorized in section 468A and the regulations thereunder, including the prohibition against self-dealing, and that the agreement cannot be amended to violate such provisions; and

- The Qualified Funds did not engage in self-dealing.

Purchaser Representations

Immediately after the Closing of the Transaction:

- Purchaser will have a qualifying interest in Unit 1, Unit 2, and Unit 3 of Plant within the meaning of Treas. Reg. section 1.468A-1(b)(2);

- Purchaser will maintain each Qualified Fund as a trust under applicable state law for the exclusive purpose of providing funds for decommissioning;

- Purchaser will maintain each Qualified Fund as a separate and as the sole qualified fund for each respective Unit of Plant;

- Purchaser will not make contributions to the Qualified Funds other than those for which a deduction is allowed under section 468A and the regulations thereunder;

- The assets of Each Qualified Fund will be used to (A) satisfy, in whole or in part, the liability for decommissioning costs of the related Units of Plant, (B) pay administrative costs and other incidental expenses of such Qualified Fund, and (C) make investments, to the extent the assets of such Qualified Fund are not needed to satisfy the purposes in (A) and (B) above;

- The trust agreement for each Qualified Fund will provide that the assets in the Qualified Fund must be used as authorized in section 468A and the regulations thereunder, including the prohibition against self-dealing, and that the agreement cannot be amended to violate such provisions.

RULINGS REQUESTED

Seller has requested the following rulings:

(1) The Plant Units QF's will not be disqualified by reason of the Fund Transfers

(2) The Plant Units QFs will continue to be treated as satisfying the requirements of section 468A and Treas. Reg. section 1.468A-5 following the Fund Transfers.

(3) The Plant Units QFs will not recognize gain or loss by reason of the Fund Transfers.

(4) Seller and Purchaser will not recognize gain or loss under section 468A by reason of the Fund Transfers.

(5) The tax basis of Plant Units QFs in their respective assets will not change by reason of the Fund Transfers.

(6) Seller's amount realized from the Transaction will include the excess of the NDL associated with each Unit of the Plant (if any) over the value of the respective QFs on the date of the Transaction.

(7) To the extent that it is included in the Seller's amount realized from the Transaction, Seller will be entitled to treat the NDL for each Unit of the Plant as satisfying economic performance under Treas. Reg. section 1.461-4(d)(5)

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;

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 section 468A.

Issue 6

Section 1001(b) provides that a seller's amount realized from the sale 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 a seller's amount realized from the sale of property includes the amount of liabilities from which the seller is discharged as a result of the sale.

The decommissioning liabilities from which Seller 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 amount realized. See § 1.461-4(d)(5). As an owner and operator of a nuclear-powered plant, Seller is required by law to provide for eventual decommissioning, and the amount of each seller's liability can be determined with reasonable accuracy. Accordingly, the amount of each seller's nuclear decommissioning liability that is assumed by Purchaser in excess of the fair market value of the assets in the qualified funds on the date of the transfer will be included in each seller's amount realized and taken into account in computing taxable income in the year of the sale. As discussed above, the proposed transaction will not result in the disqualification of the qualified funds and each seller will not have any gain or income as a result of the transfer of its interests in the assets of the qualified funds to Purchaser. Because the transfer of the qualified funds by each seller to Purchaser will not be a taxable transfer, the amount of the liabilities assumed by Purchaser that are included in each seller's amount realized will not include the portion of the liability to

decommission the plant 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 Seller. Here, Seller, as an owner and operator 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). Seller 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 each seller 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 can be determined with reasonable accuracy. See § 1.461-1(a)(2)(ii). This prong is also satisfied. In the instant case, the amount of each seller's decommissioning liability has been determined by experts in the nuclear decommissioning industry. Their estimates have been accepted by the Nuclear Regulatory Commission, 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 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.

Conclusion

Based on the information submitted by Purchaser and Seller, we reach the following conclusions:

Ruling #1: The respective Qualified Funds of the Units of the Plant will not be disqualified by the transfer from Seller to Purchaser.

Ruling #2: The respective Qualified Funds of the Units of the Plant will each continue to be treated as satisfying the requirements of § 468A and § 1.468A-5 following the transfers of the qualified funds to Purchaser.

Ruling #3: The respective Qualified Funds of the Units of the Plant will not recognize any gain or loss or otherwise take any income or deduction into account by reason of the transfers of the qualified funds to Purchaser.

Ruling #4: Purchaser and Purchaser will not recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of transfers of the qualified funds to Purchaser.

Ruling #5: Pursuant to § 1.468A-6(c), the tax basis of the assets of the qualified funds will not be changed by the transfers of the qualified funds to Purchaser.

Ruling #6: Seller's amount realized from the Transaction will include the excess of the NDL associated with each Unit of the Plant (if any) over the fair market value the assets of the Plant Units QFs on the Date of the Transaction

Ruling #7: To the extent that it is included in Seller's amount realized from the Transaction, Seller will be entitled to treat the NDL for each Plant Units Unit as satisfying economic performance under § 1.461-4(d)(5) of the Income Tax Regulations.

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

This letter ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) provides that this ruling may not be used or cited as precedent. In addition, a copy of this letter ruling is being sent to the Directors.

Sincerely,

Patrick S. Kirwan
Branch Chief, Branch 6
(Passthroughs & Special Industries)

cc: