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Department of the Treasury
Washington, DC 20224

Third Party Communication: None
Date of Communication: Not Applicable

Person To Contact:
, ID No.
Telephone Number:

Refer Reply To:
CC:PSI:B06
PLR-119799-20
Date:
March 11, 2021

Re:

LEGEND

Parent	=
Transferor	=
Transferee	=
Operator	=
Commission 1	=
Commission 2	=
Commission 3	=
Commission 4	=
Director	=
Plant A	=
Plant B	=
State A	=
State B	=
State C	=
State D	=
a	=

Dear :

This letter responds to your request, dated September 1, 2020, for a letter ruling regarding certain federal income tax consequences under sections 468A and 461 of the Internal Revenue Code (Code) of a proposed transaction. The relevant facts as represented in your submissions are set forth below.

FACTS

Transferor, a State A limited liability company that is treated as an association taxable as a corporation for federal income tax purposes, is a subsidiary of Parent and a member of Parent's consolidated group. Transferor files its annual tax return on a calendar year basis using the accrual method of accounting. Transferor is in the retail electric utility business and through several wholly-owned disregarded subsidiaries is engaged in the generation of electricity within State B, State C, and State D.

Transferor, through its wholly-owned disregarded subsidiary Transferee (a State A limited liability company), is the sole owner of Plant A and Plant B (each a Facility, together, the Facilities) both of which are nuclear-powered electric generating plants. Transferor represents that its ownership of each Facility is a "qualifying interest" under § 1.468A-1(b)(2). Transferee and Operator (an affiliate of Transferor) hold operating licenses for the Facilities from Commission 1.

Transferor, as an owner and operator of nuclear-powered plants, was required to obtain an operating license before commercial operations began. 10 C.F.R. § 50.10; see also 10 C.F.R. § 50.33(k)(1). Transferor 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 amount of Transferor's nuclear decommissioning liability (NDL) for each Facility has been determined by experts in the nuclear decommissioning industry. Their estimates have been accepted by Commission 1, which is charged with ensuring that sufficient funds are available to decommission the plants.

Transferor maintains a separate nuclear decommissioning trust (NDT) for each Facility that is irrevocably committed to the decommissioning of that respective Facility. Transferor represents that the NDT for each Facility includes a nuclear decommissioning fund that meets the requirements of § 468A and §§ 1.468A-1 through 1.468A-9 (Qualified Fund). Transferor maintains a Qualified Fund for Plant A (Plant A Qualified Fund) as a separate account within the Plant A NDT, and represents that the Plant A Qualified Fund has always met and is in compliance with the requirements of § 468A and the regulations thereunder. Transferor also maintains a Qualified Fund for Plant B (Plant B Qualified Fund) as a separate account within the Plant B NDT. Transferor represents that it has always maintained the Plant B Qualified Fund in compliance with the requirements of § 468A and the regulations thereunder.

Parent is subject to the jurisdiction of Commission 2 as well as other federal and state regulatory agencies. Transferor and its disregarded entities are subject to the jurisdiction of Commission 2, Commission 3, and other state agencies including Commission 4. Transferee is subject to the jurisdiction of Commission 1, Commission 2, Commission 3, and Commission 4. The Facilities are subject to the jurisdiction of Commission 1.

Transferor and Transferee intend to take the following actions (the Proposed Transaction):

- Upon receiving approval by Commission 4, Transferee will elect to be treated as an association taxable as a corporation (Election).

- For federal income tax purposes, Transferor and Transferee will treat such an elective change as Transferor contributing all of the assets (including the Facilities and their associated NDTs and Qualified Funds) and liabilities (including the Facilities' associated NDLs) of Transferee (as a disregarded entity) to the newly-regarded Transferee in exchange for stock of Transferee.

- Transferee will sell membership interests to unrelated third parties on the same date as the contribution.

Transferor represents that following the transfers resulting from the Proposed Transaction (Qualified Fund Transfers), Transferee will possess an a% qualifying interest under § 1.468A-1(b)(2) in each of the Facilities. Transferor and Transferee represent that the compliance of the Plant A Qualified Fund and the Plant B Qualified Fund with § 1.468A-5 shall not be altered or otherwise affected by the Qualified Fund Transfers, and that the requirements of § 1.468A-6(b) will be met at the execution of the contemplated transactions. Transferor and Transferee represent that the requirements of § 1.468A-5 will continue to be met by Transferee following the completion of the Qualified Fund Transfers, and that the Plant A Qualified Fund and the Plant B Qualified Fund will be maintained in the same manner, to the same extent and subject to the same regulatory oversight and compliance.

Transferor represents that the Election will cause a change of tax ownership of the Facilities and their associated NDTs and Qualified Funds. Transferor represents that Transferee will not be a member of Parent's consolidated group because Parent and its affiliates will not own the requisite percentage of voting power pursuant to § 1504(a)(1). Transferor represents that its liabilities (including the NDL for each Facility) that are assumed by Transferee will exceed the basis of all of the property that Transferor will transfer to Transferee in the Proposed Transaction by an amount at least equal to the NDLs that are included in the amount realized.

Transferor represents that for each Facility the NDL exceeds the fair market value of that Facility's Qualified Fund. Transferor and Transferee expect the Proposed Transaction to qualify as a § 351 exchange. Transferor represents that on the date of the transfer of each Facility it will recognize gain under § 357(c) because Transferor is being relieved of liabilities in excess of the adjusted basis of the property transferred. Transferor represents that alternatively, if § 351 does not apply, Transferor will recognize gain under § 1001 on the date of the transfer for the same reason.

RULINGS REQUESTED

Transferor, on behalf of itself and Transferee, requests the following rulings:

1. The Plant A Qualified Fund and the Plant B Qualified Fund will not be disqualified from § 468A by the transfer associated with the Proposed Transaction (Qualified Fund Transfers).

2. The Plant A Qualified Fund and the Plant B Qualified Fund will each continue to be treated as satisfying the requirements of § 468A and § 1.468A-5 following the Qualified Fund Transfers.

3. The Plant A Qualified Fund and the Plant B Qualified Fund will not recognize gain or loss or otherwise take any income or deduction into account by reason of the Qualified Fund Transfers.

4. Transferor and Transferee will not recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of the Qualified Fund Transfers.

5. The tax basis that the Plant A Qualified Fund and the Plant B Qualified Fund have in their respective assets will not change by reason of the Qualified Fund Transfers.

6. The amount realized by Transferor will include the amount of the NDL associated with Plant A and Plant B but not including the portion of the NDL funded by the Plant A Qualified Fund and the Plant B Qualified Fund, respectively, on the date of the transfer.

7. Transferor will be entitled to treat the NDLs associated with Plant A and Plant B, to the extent the NDLs are included in amount realized, as satisfying economic performance under § 1.461-4(d)(5).

LAW AND ANALYSIS

Requested Rulings 1-5

Section 468A(a) provides that a taxpayer that elects the application of § 468A shall be allowed as a deduction for any taxable year the amount of payments made by the taxpayer to a nuclear decommissioning reserve fund during such taxable year.

Section 1.468A-1(b)(1) provides that an “eligible taxpayer” is a taxpayer that possesses a qualifying interest in a nuclear power plant.

Section 1.468A-1(b)(5) defines the term “nuclear power plant” as any nuclear power reactor used predominantly in the trade or business of the furnishing or sale of electric energy. Each unit (i.e., nuclear reactor) located on a multi-unit site is a separate nuclear power plant.

Under § 1.468A-1(b)(2), the definition of the term “qualifying interest” includes a direct ownership interest.

Section 468A(e)(1) requires each taxpayer who elects the application of § 468A to establish a nuclear decommissioning reserve fund for each nuclear power plant to which such election applies.

Section 1.468A-1(b)(4) defines the terms “nuclear decommissioning fund” and “qualified nuclear decommissioning fund” as a fund that satisfies the requirements of § 1.468A-5.

Section 1.468A-5(a)(1)(i) provides that a nuclear decommissioning fund must be established and maintained at all times in the United States pursuant to an arrangement that qualifies as a trust under state law. Such trust must be established for the exclusive purpose of providing funds for the decommissioning of one or more nuclear power plants, but a single trust agreement may establish multiple funds for such purpose.

Section 1.468A-5(a)(1)(iii) provides that an electing taxpayer can maintain only one nuclear decommissioning fund for each nuclear power plant with respect to which the taxpayer elects the application of § 468A.

Section 1.468A-5(a)(3)(i) provides that the assets of a nuclear decommissioning fund are to be used exclusively – (A) to satisfy, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which such fund relates; (B) to pay administrative costs and other incidental expenses of such fund; and (C) to the extent that the assets of such fund are not currently required for the purposes described in § 1.468A-5(a)(3)(i)(A) and (B), to make investments.

Section 1.468A-5(c)(1)(i) provides that, except as otherwise provided in § 1.468A-5(c)(2), the Internal Revenue Service (Service) may, in its discretion, disqualify all or any portion of a nuclear decommissioning fund if at any time during its taxable year – (A) the fund does not satisfy the requirements of § 1.468A-5(a); or (B) the fund and a disqualified person engage in an act of self-dealing (as defined in § 1.468A-5(b)(2)).

Section 1.468A-6 describes the federal income tax consequences of a transfer of the assets of a nuclear decommissioning fund in connection with a sale, exchange, or other disposition by a taxpayer (transferor) of all or a portion of its qualifying interest in a nuclear power plant to another taxpayer (transferee).

Section 1.468A-6(b) provides that § 1.468A-6 applies if – (1) immediately before the disposition, the transferor maintained a nuclear decommissioning fund with respect to the interest disposed of; and (2) immediately after the disposition – (i) the transferee maintains a nuclear decommissioning fund with respect to the interest acquired; and (ii) the interest acquired is a qualifying interest of the transferee in the nuclear power plant;

and (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 nuclear decommissioning fund (all such assets if the transferee acquires the transferor's entire qualifying interest in the plant) is transferred to a nuclear decommissioning fund of the transferee; or (ii) the transferee acquires the transferor's entire qualifying interest in the plant and the transferor's entire nuclear decommissioning fund is transferred to the transferee; and (4) the transferee continues to satisfy the requirements of § 1.468A-5(a)(1)(iii), which permits an electing taxpayer to maintain only one nuclear decommissioning fund for each plant.

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

(1)(i) Except as provided in § 1.468A-6(c)(1)(ii), neither the transferor nor the transferor's nuclear decommissioning fund will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of a proportionate amount of the assets of the transferor's fund to the transferee's fund (or by reason of the transfer of the transferor's entire fund to the transferee). For purposes of §§ 1.468A-1 through 1.468A-9, this transfer (or the transfer of the transferor's fund) will not be considered a distribution of assets by the transferor's fund.

(1)(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 a nuclear decommissioning fund (or its 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 its assets (the unamortized special transfer deduction) is allowed under § 468A(f)(2)(C) for the taxable year that includes the date of the transfer of the fund or its assets. If the taxpayer transfers only a portion of its interest in a nuclear power plant, only the corresponding portion of the unamortized special transfer deduction qualifies for the acceleration under § 468A(f)(2)(C).

(2) Neither the transferee nor the transferee's nuclear decommissioning fund will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of a proportionate amount of the assets of the transferor's fund to the transferee's fund (or by reason of the transfer of the transferor's fund to the transferee). For purposes of §§ 1.468A-1 through 1.468A-9, this transfer (or the transfer of the transferor's fund) will not constitute a payment or a contribution of assets by the transferee to its fund.

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

Under § 1.468A-6(f), the Service may treat a disposition as satisfying the requirements of § 1.468A-6 if it determines that this treatment is necessary or appropriate to carry out the purposes of § 468A and §§ 1.468A-1 through 1.468A-9.

Requested Ruling 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. It can include the purchaser's assumption of an obligation of the seller. Fisher Companies, Inc. v. Commissioner, 84 T.C. 1319 (1985).

The NDL for each Facility from which Transferor will be relieved is, as discussed below under Requested Ruling 7, fixed and determinable for purposes of § 461. As an owner and operator of a nuclear-powered plant, Transferor is required by law to provide for eventual decommissioning, and the amount of Transferor's liability can be determined with reasonable accuracy. Accordingly, the amount of Transferor's NDL for each Facility that is assumed by Transferee in excess of the fair market value of property in each Facility's Qualified Fund on the date of the transfer will be included in Transferor's amount realized and taken into account in computing taxable income in the year of transfer.

As discussed above, the Proposed Transaction will not result in the disqualification of the Qualified Funds for either Facility, and Transferor will not have any gain or income as a result of the transfer of its interests in the property of each Facility's Qualified Funds to Transferee. Because the transfer of each Facility's Qualified Funds by Transferor to Transferee will not be a taxable transfer, the amount of the liabilities assumed by Transferee that are included in Transferor's amount realized will not include the portion of the liability to decommission each Facility that is equal to the fair market value of the property in each Facility's Qualified Fund on the date of the transfer.

Requested Ruling 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 taxable 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 Transferor. Here, Transferor, as an owner and operator of nuclear-powered plants, was required to obtain an operating license before commercial operations began. 10 C.F.R. § 50.10; see also 10 C.F.R. § 50.33(k)(1). Transferor 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 Transferor became subject to the decommissioning requirements associated with the license for each Facility. 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).

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 the NDL for each Facility has been determined by experts in the nuclear decommissioning industry. Their estimates have been accepted by Commission 1, which is charged with ensuring that sufficient funds are available to decommission the plants. In addition, there is also support in the 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.

RULING

Based upon the facts submitted and the representations made by the taxpayer, we reach the following conclusions:

1. The Plant A Qualified Fund and the Plant B Qualified Fund will not be disqualified from § 468A by the transfer associated with the Proposed Transaction (Qualified Fund Transfers).

2. The Plant A Qualified Fund and the Plant B Qualified Fund will each continue to be treated as satisfying the requirements of § 468A and § 1.468A-5 following the Qualified Fund Transfers.

3. The Plant A Qualified Fund and the Plant B Qualified Fund will not recognize gain or loss or otherwise take any income or deduction into account by reason of the Qualified Fund Transfers.

4. Transferor and Transferee will not recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of the Qualified Fund Transfers.

5. The tax basis that the Plant A Qualified Fund and the Plant B Qualified Fund have in their respective assets will not change by reason of the Qualified Fund Transfers.

6. The amount realized by Transferor will include the amount of the NDL associated with Plant A and Plant B but not including the portion of the NDL funded by the Plant A Qualified Fund and the Plant B Qualified Fund, respectively, on the date of the transfer.

7. Transferor will be entitled to treat the NDLs associated with Plant A and Plant B, to the extent the NDLs are included in amount realized, as satisfying economic performance under § 1.461-4(d)(5).

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

This ruling is directed only to the taxpayer that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. This ruling is based upon information and representations submitted by the taxpayer and accompanied by penalties of perjury statements executed by the appropriate parties. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification on examination.

In accordance with the power of attorney on file with this office, copies of this letter ruling are being sent to your authorized representatives. A copy of this letter ruling is also being sent to the Director.

Sincerely,

Patrick S. Kirwan
Branch Chief, Branch 6
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

cc: