Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:
ID No.
Telephone Number:

Refer Reply To:
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Date:
June 16, 2007

Legend:

Taxpayer =

Holding Company =

Generation =

Consolidation =

State A =

State B =

X =

Dear :

This letter responds to your request for private letter ruling dated June 29, 2006. You requested that we rule on the tax consequences of the situation described below.

Facts:

Taxpayer has represented the following facts and information relating to the ruling request:

Taxpayer, a corporation organized under the laws of State A, is the common parent of an affiliated group of companies that generates power, delivers power, and provides energy services. Holding Company is a single member limited liability company (LLC). Taxpayer owns the entire membership interest of Holding Company. Holding Company has elected to be treated as a corporation for federal income tax purposes. Generation is a single member LLC, the entire interest in which is owned by Holding Company.

Consolidation is a single member LLC, the entire membership of which is owned by Generation. Consolidation is treated as a disregarded entity and a division of Holding Company. Generation maintains a direct ownership interest in several nuclear power plants. Consolidation maintains separate Qualified Nuclear Decommissioning Trusts (QDTs) for each separate reactor, or unit, in those nuclear power plants. These QDTs are formed under a master trust agreement formed under the laws of State B. Holding Company is considered, for federal tax purposes, as the owner of the interests in the nuclear power plants, as well as in the associated QDTs.

Under the terms of the master trust agreement, Taxpayer appointed an investment manager to advise and direct the trustee regarding investment of the assets in the QDTs. In , the investment manager presented Taxpayer with a proposed investment strategy that would transition a portion of the assets of the QDTs to the broader domestic equity market. The investment advisor included analysis and projections to Taxpayer that represented that the QDTs would incur no income tax obligations under the proposed strategy. Taxpayer agreed, based on the analysis and projections of the investment manager, to implement the proposed strategy. On , the transactions implementing the strategy were executed by the investment manager.

Shortly after , Taxpayer determined that, as a result of implementing the proposed strategy, the QDTs had incurred income tax obligations in excess of those projected by the investment manager. After discussions and negotiations between Taxpayer and the investment manager, Taxpayer and the investment manager reached a settlement agreement with respect to the additional income tax liabilities incurred by the QDTs in excess of those projected by the investment manager. The investment manager agreed to reimburse the QDTs $X. This amount was deposited in a custody account established for the benefit of Taxpayer and the affected QDTs, pending the outcome of this ruling request.

The taxpayer has requested the following rulings:

Requested Ruling #1: Payment of the $X reimbursement amount to Taxpayer's QDTs will not constitute a contribution by Taxpayer to the QDTs under section 468A(a) of the Internal Revenue Code.

Requested Ruling #2: Payment of the $X reimbursement amount to Taxpayer's QDTs will not result in a disqualification of the QDTs under § 468A(e)(6) or section 1.468A-5(c) of the Income Tax regulations.

Requested Ruling #3: Payment of the $X reimbursement amount to Taxpayer's QDTs will not constitute a prohibited act of self-dealing under § 468A(e)(5) and § 1.468A-5(b).

Law and Analysis:

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)(3) provides that a "qualified nuclear decommissioning fund" is a fund that satisfies the requirements of section 1.468A-5, and a "nonqualified nuclear decommissioning fund" is a fund that does not satisfy those requirements.

Section 1.468A-5(a) sets out the qualification requirements for a qualified nuclear decommissioning fund. 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)(i) provides that a qualified nuclear decommissioning fund must be established exclusively for the purpose of funding the cost associated with decommissioning one or more nuclear facilities.

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.

Section 1.468A-5(a)(2) provides that a qualified nuclear decommissioning fund is not permitted to accept any contributions in cash or property other than cash payments with respect to which a deduction is allowed under section 468A(a) and section 1.468A-2(a).

Section 1.468A-5(a)(3) provides that the assets of a qualified 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 plant to which the fund relates, (B) to pay administrative and other incidental costs of the trust fund,

and (C) to the extent not currently required for the purposes described in (A) and (B) above, to make investments.

Section 1.468A-5(b)(1) provides that, except as otherwise provided in section 1.468A-5(b), the excise taxes imposed by section 4951 shall apply to each act of self-dealing between a disqualified person and a nuclear decommissioning fund.

Section 1.468A-5(b)(2)(iii) provides an exception from the general rule that, for purposes of section 1.468A-5(b), the term "self-dealing" means any act described in section 4951(d), for a withdrawal by the electing taxpayer of amounts that have been treated as distributed under section 1.468A-5(c)(3).

Section 4951 imposes a tax on each act of self-dealing between a disqualified person and a trust described in section 501(c)(21).

Section 4951(d)(1) describes “self-dealing” as any act between the fund and a disqualified person including direct or indirect sale, exchange, or leasing of real or personal property; lending of money or other extension of credit; furnishing of goods, services, or facilities; payment of compensation or payment or reimbursement of expenses; and transfer to, or use by or for the benefit of a disqualified person of the Fund’s income or assets.

Section 4951(e)(4) describes a “disqualified person” as including contributors to the Fund, trustees of the Fund, owners of 10 percent or more of a contributor to the Fund, officers, directors, and employees of contributors to the Fund, spouses, ancestors, lineal descendants, and spouses of lineal descendents of the preceding persons, corporations of which the preceding persons own more than 35 percent of total combined voting power, partnerships of which those persons own more than 35 percent of the profits interest, and trusts and estates in which those persons own more than 35 percent of the beneficial interests.

Section 53.4951-1(d) of the Foundation and Similar Excise Tax regulations defines “trustee” as used in section 4951(e)(5)(B) as including any person having powers or responsibilities with respect to a trust similar to those of trustees.

Section 1.468A-5(c)(1)(i) provides that if at any time during the taxable year a qualified nuclear decommissioning fund does not satisfy a requirement of section 1.468A-5(a), the Service may, in its discretion, disqualify all or a portion of the fund as of the date that the fund does not satisfy such requirements.

Section 1.468A-5(c)(3) provides that, if all or any portion of a qualified nuclear decommissioning fund is disqualified under section 1.468A-5(c)(1), the portion of the qualified nuclear decommissioning fund that is disqualified is treated as distributed to the electing taxpayer on the date of the disqualification. Such a distribution shall be

treated for purposes of section 1001 as a disposition of property held by the qualified nuclear decommissioning fund. In addition, the electing taxpayer must include in gross income for the taxable year that includes the date of disqualification an amount equal to the product of the fair market value of the assets of the fund determined as of the date of disqualification (reduced by certain amounts including any tax that is (1) imposed on the income of the fund, (2) is attributable to income taken into account before the date of the disqualification or as a result of the disqualification, and (3) has not been paid as of the date of the disqualification) and the fraction of the qualified nuclear decommissioning fund that was disqualified under section 1.468A-5(c)(1).

The $X is, in essence, being paid directly by the investment manager into the QDTs with the custody account used only to hold the money pending this ruling. The payment reimburses the QDTs for additional income tax liabilities incurred as a result of the strategy developed by the investment manager. Taxpayer is not making a contribution to the QDTs as a result of any actions it has taken to facilitate this payment by the investment manager.

The investment manager is not a disqualified person as defined in § 4951(e)(4) and the payment by the investment manager (through the means of the custody account) to the QDTs is therefore not an act of self-dealing as defined in § 4951(d).

Conclusions:

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

Ruling #1: Payment of the $X reimbursement amount to Taxpayer's QDTs does not constitute a contribution by Taxpayer to the QDTs under section 468A(a) of the Internal Revenue Code.

Ruling #2: Because there is no excess contribution to the QDTs by Taxpayer and because there has been no prohibited act of self-dealing (see Ruling #3, below), payment of the $X reimbursement amount to Taxpayer's QDTs will not result in a disqualification of the QDTs under § 468A(e)(6) or section 1.468A-5(c) of the Income Tax regulations.

Ruling #3: Payment of the $X reimbursement amount to Taxpayer's QDTs will not constitute a prohibited act of self-dealing under § 468A(e)(5), § 1.468A-5(b), and § 4951(d).

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the transaction described above.

Effective January 1, 2006, amendments were made to § 468A by the Energy Tax Incentives Act of 2005, Pub. L. 109-58, 119 Stat. 594. Regulations based on these amendments are being developed but have not yet been proposed. The discussion above is based on the law in effect prior to January 1, 2006. However, this ruling will be modified or revoked by the adoption of temporary or final regulations to the extent the regulations are inconsistent with any conclusion in the letter ruling. See section 11.04 of Rev. Proc. 2007-1, 2007-1 I.R.B. 1, 49. However, when the criteria in section 11.05 of Rev. Proc. 2007-1, 2007-1 I.R.B. 50, are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances.

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 accordance with the power of attorney on file with this office, the original of this letter is being sent to Taxpayer's authorized representative. We are also sending a copy of this letter ruling to Taxpayer and to the Industry Director, Natural Resources (LM:NR).

Sincerely,

PETER C. FRIEDMAN
Senior Technician Reviewer, Branch 6
Office of Associate Chief Counsel
Passthroughs and Special Industries

cc: