Internal Revenue Service

Number: **201432012**
Release Date: 8/8/2014

Index Number: 468A.01-00

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:B6
PLR-147158-13
Date:
March 31, 2014

LEGEND:

Taxpayer	=
Parent	=
Plant A	=
Plant B	=
Location	=
Commission	=
State	=
Year A	=
Year B	=
Date 1	=
Date 2	=
Date 3	=
P	=
D	=
Fund	=
Director	=

Dear :

This letter responds to your request, dated November 8, 2013, for rulings concerning whether certain payments made to employees and certain payments of "pre-dismantlement costs" constitute "nuclear decommissioning costs" as defined in § 468A of the Internal Revenue Code and § 1.468A-1(b)(6) of the Income Tax Regulations. In

addition, you ask whether these payments generate a specified liability loss under § 172(f), and if so, what is the earliest taxable year to which such a loss may be carried.

Taxpayer represents the facts and information relating to its request for rulings as follows:

Taxpayer, a corporation, is wholly-owned (through an additional corporation) by Parent. Taxpayer owns a P percent interest in both Plant A and Plant B and is responsible for D percent of the cost of decommissioning each Plant. The Plants are at Location and the amended operating license of Plant A is scheduled to expire on Date 1 and the operating license of Plant B is scheduled to expire on Date 2. On Date 3 Taxpayer notified the Nuclear Regulatory Commission (NRC) that both Plants had permanently ceased operations. With respect to nuclear decommissioning costs that are included in the Taxpayer's cost of service for ratemaking purposes as well as for other matters, Taxpayer is subject to regulation by Commission. Taxpayer maintains a separate Fund for each of the Plants. Commission has authorized collections of amounts for decommissioning from ratepayers and the Service has approved schedules of ruling amounts for contributions to these Funds.

In the transition of the Plants from operational status to a safe shutdown and then to physical dismantlement of the Plants and restoration of the site as required by Commission and the Nuclear Regulatory Commission, the operational workforce of the Plants will be reduced overall. The Taxpayer has broadly described the types of tasks to be performed by employees during the decommissioning process as follows: (1) to plan and design all of the logistical and technical aspects required to take a nuclear power plant from an operational-ready status to safe shutdown and non-operational status to a fully dismantled and restored site; (2) to ensure the safe and orderly transition of the Plants from an operational-ready status to safe shutdown and non-operational status; (3) maintain the Plants in a safe condition during the actual dismantlement of the Plants; and (4) dismantle, remove, and restore the site to its regulatory and legally required condition. When employees are no longer needed for operation and or any phase of the decommission process, those employees are released from service with the Taxpayer. Rules of the Commission allow the collection of decommissioning amounts for the severance and other assistance payments to separated employees who become unemployed as a result of decommissioning.

In addition to the severance payments described above, Taxpayer will incur "pre-dismantlement costs." These costs are described by the Taxpayer broadly as follows: (1) preparation for physical decommissioning of the units; (2) consolidation and restoration of the facilities of the Plants and the site upon which they are located; (3) security for the Plants and the surrounding site; (4) communication with affected communities regarding the permanent retirement of the Plants and plans for decommissioning of the Plants; and (5) staffing costs incurred as a result of the

permanent retirement and prior to the commencement of physical dismantlement of major components of the Plants.

For reasons of administrative necessity, many of the costs described above will be paid initially, either by an unrelated company that owns the remainder of Plant A and Plant B not owned by Taxpayer, or by Taxpayer. These costs will then be reimbursed to the unrelated company or to Taxpayer by the Fund.

Taxpayer requests the following rulings:

(1) Severance payments as described in the Taxpayer's request constitute "nuclear decommissioning costs" within the meaning of § 468A and § 1.468A-1(b)(6), and therefore can be paid out of the Funds for the related Plant.
(2) Pre-dismantlement decommissioning costs as described above constitute "nuclear decommissioning costs" within the meaning of § 468A and § 1.468A-1(b)(6), and therefore can be paid out of the Funds for the related
(3) Reimbursement by the Funds to the unrelated company or to the Taxpayer of severance payments and pre-dismantlement decommissioning costs represent a permissible use of the Funds under § 468A(c)(4) and §§ 1.468A-5(a)(3)(i) and 1.468A-5(b)(2)(i), and is not a prohibited self-dealing transaction under § 1.468A-5(b)(1).
(4) May deductions for the Severance Payments described in Issue 1 and the Pre-Dismantlement Decommissioning Costs described in Issue 2 generate a specified liability loss under § 172(f), and if so, what is the earliest taxable year to which such a loss may be carried?

LAW AND ANALYSIS

Issues 1, 2, and 3

Section 468A(a) was added to the Code in 1984 by Deficit Reduction Act of 1984, Pub. L. No. 98-369. Section 468A(a) allows owners/operators of nuclear power plants to currently deduct the future costs of decommissioning a nuclear power plant by making contributions to a Fund prior to when economic performance occurs.

Section 468A(c)(1) and § 1.468A-2(d)(1) generally require the owner/operator to include in gross income amounts that are distributed from a Fund. In addition to any deduction under section 468A(a) for contributions to a Fund, section 468A(c)(2) recognizes that an owner/operator may deduct otherwise deductible nuclear decommissioning costs, (such as under § 162), for which economic performance (within the meaning of section 461(h)) occurs during a taxable year.

Section 468A(e)(4) limits the use of the amounts in a Fund to satisfying any liability of any person contributing to the Fund for the decommissioning of a nuclear power plant, the payment of administrative and other incidental expenses of the Fund, and making investments.

Section 1.468A-1(b)(6) states, in part, that "nuclear decommissioning costs" means "all otherwise deductible expenses to be incurred in connection with the entombment, decontamination, dismantlement, removal and disposal of the structures, systems and components of a nuclear power plant, whether that nuclear power plant will continue to produce energy or has permanently ceased to produce electric energy. Such term includes all otherwise deductible expenses to be incurred in connection with the preparation for decommissioning, such as engineering and other planning expenses, and all otherwise deductible expenses to be incurred with respect to the plant after the actual decommissioning occurs, such as physical security and radiation monitoring expenses."

Section 162 generally allows a deduction for the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Section 468A(e)(5) provides that, under regulations prescribed by the Secretary, for purposes of § 4951 the Fund shall be treated in the same manner as a trust described in § 501(c)(21). This section is implemented by §1.468A-5(b). Section 1.468A-5(b)(1) states that the excise taxes imposed by § 4951 apply to each act of self-dealing between the Fund and a disqualified person.

In part, § 1.468A-5(b)(2) defines "self-dealing" for purposes of § 468A and the regulations thereunder as any act described in section 4951(d) except: (i) A payment by a nuclear decommissioning fund for the purpose of satisfying, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the nuclear decommissioning fund relates.

Section 1.468A-5(b)(3) provides that the term "disqualified person" includes each person described in § 4951(e)(4) and § 53.4951-1(d). Section 4951(e)(4) of the Code provides the term "disqualified person," with respect to a trust, includes a contributor to the trust and a trustee of the trust.

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).

We have examined the representations and information submitted by the Taxpayer in relation to the requirements set forth in § 468A and the regulations thereunder. Based solely upon these representations of the facts, we conclude that severance payments and pre-dismantlement decommissioning costs are nuclear decommissioning costs within the meaning of § 468A and § 1.468A-1(b)(6). The expenses, as broadly described by Taxpayer, are incurred in connection with the entombment, decontamination, dismantlement, removal, and disposal of the structures, systems, and components of a nuclear power plant. We note that we are not ruling on any particular expense but on broad categories of expense and emphasize that each specific expense must satisfy the tests in § 468A and the regulations thereunder.

Regarding the reimbursement by the Funds of severance payments and predismantlement decommissioning costs, these amounts fall into two groups: (1) those paid initially by the unrelated company and then invoiced to Taxpayer and paid by the Funds and (2) those paid initially by the unrelated company, invoiced and paid by Taxpayer and then reimbursed by the Funds to Taxpayer. In both cases, we conclude that such payments are a permissible use of the Funds and that the reimbursements are within the exception to the self-dealing rules contained in § 1.468A-5(b)(2)(i). That section defines “self-dealing” for purposes of § 468A and the regulations thereunder as any act described in section 4951(d) except “(i) A payment by a nuclear decommissioning fund for the purpose of satisfying, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the nuclear decommissioning fund relates.” Here the reimbursement of severance payments and pre-dismantlement decommissioning costs made by the Funds are made for the purpose of satisfying the liability of Taxpayer for decommissioning costs of the nuclear power plant to which the Fund relates and are therefore not “self-dealing.” Thus, the reimbursement by the Funds to the unrelated company or to Taxpayer of severance payments and pre-dismantlement decommissioning costs represent a permissible use of the Funds. This reimbursement constitutes an amount distributed from a Fund as described in § 468A(c)(1) and § 1.468A-2(d)(1). We note that this ruling applies only to reimbursement of the amounts paid for the severance payments and the pre-dismantlement decommissioning costs by the Taxpayer, and not any additional

amounts such as “service fees” or any other amounts not solely to reimburse Taxpayer for decommissioning costs actually paid.

Issue 4

Section 172(a) allows a deduction for the taxable year equal to the aggregate of (1) the net operating loss carryovers to such year, plus (2) the net operating loss carrybacks to such year. With certain modifications, § 172(c) defines a net operating loss as the excess of the deductions allowed by Chapter 1 of the Code over the gross income.

Section 172(b)(1)(A) generally provides that a net operating loss (NOL) for any taxable year is carried back to each of the 2 taxable years preceding the taxable year of the loss and carried forward to each of the 20 taxable years following the year of the loss. However, § 172(b)(1)(C) provides a special carryback period for the portion of any NOL that qualifies as a specified liability loss.

Section 172(f)(1)(B)(i) defines a specified liability loss, in part, as any amount allowable as a deduction under Chapter 1 of the Code (other than §§ 468(a)(1) or 468A(a)) which is in satisfaction of a liability under a federal or state law requiring the decommissioning of a nuclear power plant (or any unit thereof) that is taken into account in computing the NOL for the taxable year. Section 172(f)(1)(B)(ii) provides that a deduction for a liability may only generate a specified liability loss if (I) the act (or failure to act) giving rise to such liability occurs at least 3 years before the beginning of the taxable year, and (II) the taxpayer used an accrual method of accounting throughout the period or periods during which such act (or failure to act) occurred.

Section 172(f)(3) provides that, except as provided in regulations, that portion of a specified liability loss which is attributable to amounts incurred in the decommissioning of a nuclear power plant (or any unit thereof) may, for purposes of subsection (b)(1)(C), be carried back to each of the taxable years during the period (A) beginning with the taxable year in which such plant (or unit thereof) was placed in service, and (B) ending with the taxable year preceding the loss year.

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) makes clear that generally the all events test is not treated as having been met any earlier than the taxable year in which economic performance has occurred with respect to a liability. See also section 1.461-4(a)(1) of the regulations.

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) of the regulations provides that economic performance occurs with respect to such service liabilities as the taxpayer incurs costs in connection with the satisfaction of the liability.

The phrase "amounts incurred in the decommissioning of a nuclear power plant" should be interpreted to have the same meaning as the term "nuclear decommissioning costs" under § 468A because the relevant language contained in both §§ 172(f)(3) and 468A was added to the Code by the same section of the Tax Reform Act of 1984 (the 1984 Act), and both sections were intended to provide relief to the nuclear power plant industry. See generally H. Rep. No. 861, 98th Cong., 2d Sess. 877 (1984). Accordingly, a taxpayer's expenses in decommissioning the power plants that are deductible under Chapter 1 of the Code are "amounts incurred in the decommissioning of a nuclear power plant" under section 172(f)(3) to the extent they are amounts described in section 1.468A-1(b)(6) of the regulations.

Moreover, the act or failure to act giving rise to such liabilities has occurred at least 3 years prior to the beginning of the taxable year when such liabilities will be deductible. In the case of pre-dismantlement decommissioning costs, the act giving rise to the liability occurred when licenses to operate the Plants were granted and the Plants were placed in service. In the case of the liability for severance payments, the act giving rise to such liability was when State enacted a statute which could be interpreted to allow such costs and the Commission approved such costs as decommissioning expenses. Finally, the Taxpayer uses the accrual method of accounting. Consequently, to the extent deductions for nuclear decommissioning costs generate an NOL, that portion of the NOL will qualify as a specified liability loss as defined in § 172(f).

The remaining issue concerns the taxable years to which such a loss may be carried. As a general rule, § 172(b)(1)(C) allows the unabsorbed portion of a specified liability loss to be carried back to each of the 10 taxable years preceding the taxable year of the loss, with the 10^{th} preceding taxable year being the first year to which the loss is carried. However, as noted above, § 172(f)(3) generally permits the portion of a specified liability loss attributable to nuclear decommissioning expenses to be carried back to each of the taxable years during the period (A) beginning with the taxable year in which such plant (or unit thereof) was placed in service, and (B) ending with the taxable year preceding the loss year.

This special rule for NOLs generated by nuclear decommissioning costs and the economic performance requirements of section 461(h) for accrual method taxpayers were both originally enacted in the same section of the 1984 Act. In adding § 172(k) to the Code, the 1984 Act provided for an extended carryback period for such losses. However, former § 172(k)(4) did not allow carrybacks to taxable years beginning before

January 1, 1984, unless the loss could be carried back to those years without the benefit of special rules for deferred statutory or tort liability losses.

In section 11811 of the Omnibus Budget Reconciliation Act of 1990 (the 1990 Act), Congress reorganized the provisions in section 172. Congress placed the 10-year carryback for product liability losses and what had previously been called deferred statutory or tort liability losses under the same subsection of § 172, namely § 172(f), labeling such losses specified liability losses. After striking certain sections of § 172, in section 11811(b)(2)(A) of the 1990 Act Congress enacted a new § 172(f). Included in section 11811(b)(2)(B) of the 1990 Act is the following savings provision which continued the carryback limitation originally contained in the 1984 Act:

The portion of any loss which is attributable to a deferred statutory or tort liability loss (as defined in § 172(k) of the Internal Revenue Code of 1986 as in effect on the day before the date of the enactment of this Act) may not be carried back to any taxable year beginning before January 1, 1984, by reason of the amendment made by subparagraph (A).

In section 3004 of the Tax and Trade Relief Extension Act of 1998 (the 1998 Act), Congress restricted the types of liabilities the deduction of which could generate a specified liability loss to five enumerated liabilities (in addition to product liability losses), including federal or state law liabilities to decommission a nuclear power plant (or any unit thereof). Prior to the 1998 Act, a specified liability loss could be based on any deduction arising out of a federal or state law provided the additional requirements of the statute were satisfied.

In contrast to the prior acts, in the 1998 Act Congress did not enact a savings provision prohibiting the carryback of specified liability losses to any taxable year beginning before January 1, 1984. Plant A was placed in service in Year A, but Plant B was placed in service in Year B. This raises the question of whether the portion of any specified liability loss attributable to expenses to decommission Plant A may be carried back to Year A, a taxable year beginning before January 1, 1984.

In the 1998 Act Congress only amended the definition of a specified liability loss. Congress did not amend the Code sections that addressed the taxable years to which such losses could be carried back. Congress did not amend section 172(f)(3) which contains the special carryback rule for specified liability losses attributable to deductions for nuclear decommissioning costs. Consequently, the savings provision contained in the 1990 Act continues to apply to section 172(f)(3) after the purely definitional changes that Congress made in the 1998 Act. Therefore, the first taxable year that any specified liability loss attributable to decommissioning Plant A may be carried back to is Year B. The first taxable year that the portion of any specified liability loss attributable to decommissioning Plant B may be carried back to is also Year B.

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the transaction described above. We note that, even though the granting of the license by the NRC is the act giving rise to the liability, the liability is not incurred until economic performance occurs – when the actual decommissioning takes place. The taxpayer may apply § 172(f) after such time.

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 representatives. We are also sending a copy of this letter ruling to the Director.

Sincerely,

Peter C. Friedman
Senior Technician Reviewer, Branch 6
(Passthroughs & Special Industries)

cc: