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Department of the Treasury
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Person To Contact:
, ID No.

Telephone Number:

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PLR-131802-17

Date:
March 07, 2018

LEGEND:

Taxpayer/Seller	=	
		(EIN:)
X	=	
		(EIN:)
Y	=	
		(EIN:)
Parent	=	(EIN:)
State A	=	
State B	=	
Unit	=	
Operator	=	
State B Commission	=	
Buyer	=	
Date 1	=	
Date 2	=	
Date 3	=	
Date 4	=	
Year 1	=	
Year 2	=	
a	=	
b	=	
c	=	
d	=	
e	=	
Director	=	

Dear :

This letter responds to your request for private letter ruling dated September 27, 2017. You requested that we rule on certain tax consequences of the proposed transaction discussed below.

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

X, a State A limited liability company, is an indirectly wholly-owned subsidiary of Parent. Y, a State A corporation is a direct, wholly-owned subsidiary of Parent. Both X and Y are included in the consolidated federal income tax return of Parent.

In Year 1, X, through its disregarded subsidiary Taxpayer, acquired the Unit and the associated nuclear decommissioning trust (NDT) and assumed the nuclear decommissioning liability (NDL) for the Unit. X was the tax owner of the Unit until Date 1, at which time Taxpayer issued an equity interest to Y, thereby converting Taxpayer to a partnership for federal income tax purposes.

Taxpayer is the owner of the Unit, which is operated by Operator, a corporate affiliate of Taxpayer. With respect to the Unit, Taxpayer is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), the Nuclear Regulatory Commission ("NRC"), and the State B Commission. Taxpayer shut down and defueled the Unit in Year 2. The Unit began decommissioning on Date 2. As the owner, Taxpayer is obligated to undertake the decommissioning of the Unit.

Taxpayer is also the tax owner of the NDT that is dedicated to the decommissioning of the Unit. The NDT currently holds assets in a trust that meets the requirements for a qualified decommissioning fund within the meaning of § 468A of the Internal Revenue Code (the Qualified Fund). As of Date 3, the assets of the NDT had a fair market value of approximately $a that were held entirely in the Qualified Fund. Taxpayer also maintains a trust (SRT) separate and apart from the NDT for the restoration of the site as required by the State B Commission. This SRT is treated as a Nonqualified Fund. As of Date 3, the fair market value of the SRT was approximately $b.

Prior to the closing date of the proposed transaction (on or about Date 4) Taxpayer will transfer the Unit and associated assets such as land and improvements, and the NDT to a limited liability company that will be a disregarded entity for federal income tax purposes. The proposed transaction contemplates, subject to obtaining

regulatory approval, that all assets held by the SRT will be converted to cash and contributed to the Qualified Fund prior to the closing date.

On the closing date, Taxpayer will sell all membership interests in the disregarded entity to the Buyer. For federal income tax purposes, Taxpayer will be treated as conveying to the Buyer all assets and liabilities of the disregarded entity and the Buyer will be treated as assuming the liabilities associated with the Unit, including the NDL. On the closing date, the Qualified Fund is expected to hold assets valued at approximately $c. On the same date, the NDL associated with the Unit is expected to be approximately $d, which exceeds the fair market value of the assets held in the Qualified Fund by $e. The transfer of the Unit NDT to the Buyer is referred to as the Fund Transfer.

Rulings Requested:

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

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

3) Seller will not recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of the Fund Transfer.

4) The tax basis of the Qualified Fund in its assets will not change by reason of the Fund Transfer.

5) The amount realized by Seller from the Proposed Transaction will include the amount of liabilities assumed by Buyer, including the NDL associated with the Unit, but not including the portion of the NDL funded by the Qualified Fund on the date of the Proposed Transaction.

6) To the extent that it is included in the amount realized from the Proposed Transaction, Seller will be entitled to treat the NDL as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5).

Law and Analysis

Issues 1-4:

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” or a “Qualified Fund”).

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

Section 1.468A-5(a) 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, § 1.468A-6(b) provides that § 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 § 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 § 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 § 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 § 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 § 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 5

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 6, 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 Buyer 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 Buyer. Because the transfer of the Qualified Fund from Taxpayer to Buyer will not be a taxable transfer, the amount of the liabilities assumed by Buyer 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 6

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 Unit'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. Rpt. 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 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 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, we reach the following conclusions:

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

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

3) Taxpayer/Seller will not recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of the Fund Transfer.

4) The tax basis of the Qualified Fund in its assets will not change by reason of the Fund Transfer.

5) The amount realized by Taxpayer from the proposed transaction will include the amount of liabilities assumed by Buyer, including the NDL associated with the Unit, but not including the portion of the NDL funded by the Qualified Fund on the date of the proposed transaction.

6) Based on Taxpayer's representation that the Unit will be Taxpayer's only electricity generation plant at the time of the proposed transaction, Taxpayer will be entitled to treat the NDL as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5) to the extent that Taxpayer includes the NDL 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. Also, except as specifically determined above, we express no opinion on the federal income tax consequences to Buyer 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 representatives. We are also sending a copy of this letter ruling to the Director.

Sincerely,

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

cc: