Internal Revenue Service

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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-114675-19

Date:
November 26, 2019

Re:

LEGEND:

Parent	=
Transferor	=
Transferee	=
Operator	=
State A	=
State B	=
Location	=
Plant A	=
Plant B	=
Date 1	=
Date 2	=
Date 3	=
a	=
b	=
c	=
d	=
e	=
f	=
g	=
h	=
Director	=

Dear :

This letter responds to your request for a private letter ruling, dated June 19, 2019. You requested that we rule on certain federal income tax consequences under §§ 468A and 461 of the Internal Revenue Code of the proposed transaction discussed below.

Facts

Transferor and Transferee represent the facts and information related to the request as follows:

Transferor, a State A limited liability company that elects to be classified as an association taxable as a corporation for federal income tax purposes, is an indirectly wholly-owned subsidiary of Parent. Parent and its affiliated group of corporations, including Transferor, file a consolidated federal income tax return on a calendar year basis using the accrual method of accounting.

Transferor is in the merchant power generation business and is engaged in the generation of electricity in State B. Transferor is the sole owner of Plant A and Plant B, which is a qualifying interest under § 1.468A-1(b)(2) of the Income Tax Regulations. Plant A and Plant B are located in Location. Transferor owns no other power plants. Plant A and Plant B are operated by Operator, an indirectly wholly-owned subsidiary of Parent. Plant A permanently ceased operations on Date 1. Transferor and Operator together hold a possession-only license issued by the Nuclear Regulatory Commission (NRC) to manage and maintain the shutdown of Plant A. Transferor and Operator together hold a facility operating license issued by the NRC for Plant B. With respect to Plant A and Plant B, Transferor is subject to the jurisdiction of the NRC, the Federal Energy Regulatory Commission, and the State B Public Service Commission. Transferor is not subject to the retail ratemaking jurisdiction of any regulator.

Transferor maintains a master nuclear decommissioning trust (NDT) that holds assets dedicated to the decommissioning of Plant A and Plant B. The NDT is comprised of two sub-trusts, one for Plant A and one for Plant B. Both the Plant A and Pant B sub-trusts are also each comprised of two separate state law trusts: one that meets the requirements for a qualified nuclear decommissioning fund within the meaning of § 468A and § 1.468A-5 (the Qualified Fund), and one that does not meet those requirements (the Nonqualified Fund). As of Date 2, the Plant A Qualified Fund had a fair market value of approximately $a and the Nonqualified Fund had a fair market value of approximately $b. As of Date 3, the estimated nuclear decommissioning liability for Plant A is $c, which exceeds the fair market value of the assets in the Plant A Qualified Fund by approximately $d. As of Date 2, the Plant B Qualified Fund had a fair market value of approximately $e and the Nonqualified Fund had a fair market value of approximately $f. As of Date 3, the estimated nuclear decommissioning liability for Plant B is approximately $g, which exceeds the fair market value of the assets in the Plant B Qualified Fund by approximately $h.

Transferee is a State A corporation that is indirectly wholly-owned by Parent. Transferee is not a member of any consolidated group for federal income tax purposes and files its separate federal income tax return on a calendar year basis using the accrual method of accounting.

Transferor and Transferee intend to treat the proposed transaction as part of an exchange that satisfies the requirements of § 351. Both Transferor and Transferee are entering the proposed transaction for bona fide business purposes. The proposed transaction requires Transferor to transfer Plant A and Plant B, all related assets of each plant, including the Qualified Funds and the Nonqualified Funds, and the associated liabilities of each plant, including the nuclear decommissioning liabilities, to a State A limited liability company that is disregarded as an entity separate from Transferee for federal income tax purposes. Therefore, after the transfer, Transferee will be the sole owner for federal income tax purposes of Plant A and Plant B, which is a qualifying interest under § 1.468A-1(b)(2), and the associated Qualified Funds. Transferor and Transferee represent that the Qualified Funds will continue to meet the requirements of § 1.468A-5 following the transfer of the Qualified Funds and that Transferee will maintain the Qualified Funds in accordance with § 1.468A-5 in the same manner, to the same extent, and subject to the same regulatory oversight and compliance as Transferor.

Transferor and Transferee represent that the proposed transaction is a realization event under § 1001 and § 1.1001-1(a). Accordingly, the amount of the nuclear decommissioning liability that is assumed by Transferee in excess of the fair market value of the assets in the Plant A Qualified Fund and the Plant B Qualified Fund on the date of the transaction will be included in Transferor's amount realized in computing taxable income in the year of the transaction.

Transferor and Transferee have requested the following rulings:

1) The Plant A Qualified Fund and the Plant B Qualified Fund will not be disqualified under § 468A by reason of the transfer of the Qualified Funds to Transferee.

2) The Plant A Qualified Fund and the Plant B Qualified Fund will both continue to be treated as satisfying the requirements of § 468A and § 1.468A-5 following the transfer of the Qualified Funds to Transferee.

3) The Plant A Qualified Fund and the Plant B Qualified Fund will not recognize gain or loss under § 468A by reason of the transfer of the Qualified Funds to Transferee.

4) Transferor and Transferee will not recognize gain or loss under § 468A by reason of the transfer of the Plant A Qualified Fund and the Plant B Qualified Fund to Transferee.

5) The tax basis of the assets in the Plant A Qualified Fund and the Plant B Qualified Fund will not change by reason of the transfer of the Qualified Funds to Transferee.

6) Transferor's amount realized from the proposed transaction will include the nuclear decommissioning liability associated with Plant A and Plant B, but not including the portion of the nuclear decommissioning liability funded by the Plant A Qualified Fund and the Plant B Qualified Fund on the date of the proposed transaction.

7) To the extent that it is included in the amount realized from the proposed transaction, Transferor will be entitled to treat the nuclear decommissioning liability for Plant A and Plant B as satisfying economic performance under § 1.461-4(d)(5).

Law and Analysis

Issues 1-5:

Section 468A(a) provides that a taxpayer may elect to deduct payments made to a nuclear decommissioning reserve fund that meets the requirements of § 468A (i.e. a fund that is a "qualified nuclear decommissioning fund" or a "Qualified Fund").

Section 1.468A-1(b)(4) 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 qualified nuclear decommissioning fund.

Section 1.468A-6 provides the rules applicable to the transfer of an interest in a nuclear power plant (and transfer of the associated 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;

(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 qualified nuclear decommissioning fund (all such assets if the transferee acquires the transferor's entire qualifying interest in the plant) is transferred to a qualified 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 qualified 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 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 or deduction 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 the fund assets is allowed under § 468A(f)(2)(C) for the taxable year that includes the date of the transfer of the fund or the fund assets.

(2) Neither the transferee nor the transferee's qualified 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 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 the 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 disposition.

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 6:

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 amount of Transferor's nuclear decommissioning liability that is assumed by Transferee, in excess of the fair market value of the assets in the Plant A Qualified Fund and the Plant B 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 the sale or disposition.

Because the transfer of the Plant A Qualified Fund and the Plant B Qualified Fund from 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 Plant A and Plant B that is equal to the fair market value of the assets in the Plant A Qualified Fund and the Plant B 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)(i) 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 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). 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 plants' licenses. 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 Transferor's decommissioning liability has been determined by experts in the nuclear decommissioning industry. Their estimates have been accepted by the NRC, 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.

Given that the two prongs of the all events test are satisfied, economic performance with respect to the decommissioning liability occurs as of the date of the proposed transaction to the extent the liability is included in Transferor's amount realized. At that time, Transferor will be entitled to a deduction for the amount of its decommissioning liability associated with Plant A and Plant B expressly assumed by Transferee and included in Transferor's amount realized.

Conclusions:

Based on the information submitted by Transferor and Transferee, we reach the following conclusions:

1) The Plant A Qualified Fund and the Plant B Qualified Fund will not be disqualified under § 468A by reason of the transfer of the Qualified Funds to Transferee.

2) The Plant A Qualified Fund and the Plant B Qualified Fund will both continue to be treated as satisfying the requirements of § 468A and § 1.468A-5 following the transfer of the Qualified Funds to Transferee.

3) The Plant A Qualified Fund and the Plant B Qualified Fund will not recognize gain or loss under § 468A by reason of the transfer of the Qualified Funds to Transferee.

4) Transferor and Transferee will not recognize gain or loss under § 468A by reason of the transfer of the Plant A Qualified Fund and the Plant B Qualified Fund to Transferee.

5) The tax basis of the assets in the Plant A Qualified Fund and the Plant B Qualified Fund will not change by reason of the transfer of the Qualified Funds to Transferee.

6) Transferor's amount realized from the proposed transaction will include the nuclear decommissioning liability associated with Plant A and Plant B, but not including the portion of the nuclear decommissioning liability funded by the Plant A Qualified Fund and the Plant B Qualified Fund on the date of the proposed transaction.

7) To the extent that it is included in the amount realized from the proposed transaction, Transferor will be entitled to treat the nuclear decommissioning liability for Plant A and Plant B 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 transactions 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 generation plants and the nuclear decommissioning liabilities) of Transferor.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) 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 to the Director.

Sincerely yours,

Jennifer A. Records
Senior Technician Reviewer, Branch 6
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

cc: