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Person to Contact:
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Refer Reply To:
CC:PSI:6/PLR-118879-00
Date:
May 15, 2001

Re: Private Letter Ruling Request on Treatment of Costs Associated With Independent Spent Fuel Storage Installation

Taxpayer =

Parent =

Plant =
Location =
Commission A =
Commission B =
Director =
Fund =

Dear :

This letter responds to the request of Taxpayer, dated June 22, 2000, and subsequent correspondence, for a determination as to whether the costs associated with the construction, operation, and decommissioning of an independent spent fuel storage installation ("ISFSI") can be financed from amounts held in Fund pursuant to § 1.468A-1(b)(5) of the Regulations, and whether, prior to the ultimate shut-down of the plant, such costs are deductible in the taxable year paid or incurred.

Taxpayer represents that the facts and information relating to its request are as follows:

Taxpayer is percent owned by Parent and files a consolidated income tax return with Parent. Taxpayer has a direct ownership interest of percent in Unit 1 and Unit 3 of the Plant, as a tenant-in-common with other electric utility companies, which is situated at Location. Taxpayer has a direct ownership interest of percent and a leasehold interest of percent in Unit 2 of the Plant. Taxpayer is under the audit jurisdiction of the Director.

Plant consists of three nuclear generating units. Plant's operating licenses for

the three units expire in , respectively. Taxpayer expects to cease its power-generating operations at Plant in . At this time, Taxpayer will begin its decommissioning process for the Plant. Taxpayer is subject to the jurisdiction of both Commission A and Commission B.

A major by-product of nuclear power generation is "spent fuel," which must be safely stored because it remains radioactive. Because the U.S. Department of Energy ("DOE") has not begun accepting spent fuel assemblies from nuclear generating facilities, Taxpayer must store them at its own independent spent fuel storage installation ("ISFSI"). Taxpayer will utilize dry spent fuel storage systems approved by the Nuclear Regulatory Commission ("NRC") for this purpose. This system consists of two main components -- canisters and casks. Taxpayer will place the spent fuel assemblies into a canister and seal it. Then, Taxpayer will place the sealed canister into a concrete cask to protect the canister and provide radiation shielding.

Each loaded cask will weigh approximately tons and will be placed on a concrete pad. Each pad will hold casks and Taxpayer's ISFSI is designed for pads. Thus, Taxpayer's ISFSI has a maximum design capacity of casks, which will be built by outside contractors. The first cask will be built in , and the remaining casks will be built over the operating life of the Plant and the decommissioning period. Taxpayer does not intend to buy the casks in bulk and wait years to fill them with canisters. Instead, Taxpayer will purchase turn-key casks from these contractors. Barring any safety-related failure of the canister or final expiration of Taxpayer's license granted by the NRC, the spent fuel will not be removed from the canisters.

Taxpayer expects to begin shipping the spent fuel assemblies to a permanent, government-approved repository after decommissioning begins. The empty casks will not be reused and will be decommissioned when the Plant is decommissioned. Taxpayer will not store spent fuel assemblies from other nuclear generating facilities, so the ISFSI will not produce any income for Taxpayer.

Section 1.468A-1(b)(5) of the regulations defines the term "nuclear decommissioning costs" or "decommissioning costs" to mean all otherwise deductible expenses incurred in connection with the entombment, decontamination, dismantlement, removal and disposal of the structures, systems and components of a nuclear power plant that has permanently ceased the production of electric energy. Such term does not include otherwise deductible expenses to be incurred in connection with the disposal of spent nuclear fuel under the Nuclear Waste Policy Act of 1982. Thus, nuclear decommissioning costs are broadly defined to include expenses incurred before, during and after the actual decommissioning process of the nuclear power plant that has ceased operations.

Section 468A(c)(2) provides that in addition to any deduction under section 468A, there shall be allowable as a deduction for any taxable year the amount of the nuclear decommissioning costs with respect to which economic performance (within the

meaning of section 461(h)(2)) occurs during such taxable year. Thus, costs meeting the definition of nuclear decommissioning costs under section 468A of the Code are not automatically deductible. These costs are deductible when economic performance occurs under section 461(h)(2) if the costs are deductible under section 162 (or are otherwise deductible under another provision of the Code).

Section 162(a) provides that there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

Section 165(a) provides that there shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

Section 165(b) provides that for purposes of section 165(a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

Section 1.165-1(d)(2)(i) of the regulations provides that if a casualty or other event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to such reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received. Whether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances. Whether or not such reimbursement will be received may be ascertained with reasonable certainty, for example, by a settlement of the claim, by an adjudication of the claim, or by an abandonment of the claim.

Section 1.165-2(c) of the regulations provides that for the allowance under section 165(a) of losses arising from the permanent withdrawal of depreciable property from use in the trade or business or in the production of income, see section 1.167(a)-8.

Section 1.167(a)-8(a)(4) of the regulations provides that in order to qualify for the recognition of loss from physical abandonment, the intent of the taxpayer must be irrevocably to discard the asset so that it will neither be used again by him nor retrieved by him for sale, exchange, or other disposition.

Rev. Rul. 87-117, 1987-2 C.B. 61, holds that a public utility company's abandonment of a partially constructed nuclear power plant is not "compensated for by insurance or otherwise," as that phrase is used in section 165(a), when the taxpayer obtains a rate increase partly based on costs attributable to that abandoned plant.

As the following four examples clearly show, property interests can be

abandoned by a taxpayer for federal income tax purposes even if the taxpayer does not transfer those property interests to another party. In Rev. Rul. 56-599, 1956-2 C.B. 122, the Service held that an abandonment occurred when the taxpayer filled and sealed a water well excavation. In Seminole Rock & Sand Co. v. Commissioner, 19 T.C. 259 (1952), acq. 1953-1 C.B. 6, an asphalt plant was abandoned when the taxpayer dismantled the plant and moved it to another location but did not reassemble it. In A. J. Industries, Inc. v. United States, 503 F.2d 660 (9th Cir. 1974), a mine was abandoned when the taxpayer stopped working it, reduced its work force and maintenance budget, sold the mine equipment for salvage, had its board of directors vote to abandon the mine, and wrote off the cost of the mine on the company's books. Finally, in Hanover v. Commissioner, T.C. Memo. 1979-332, a hotel was abandoned when the taxpayer locked and boarded hotel, placed barricades around it, cut off its utilities, terminated its insurance, discontinued its maintenance, and made no efforts to sell or lease it.

Legal restrictions upon the physical disposition of spent fuel assemblies will not preclude a finding of abandonment for federal income tax purposes if all the other facts and circumstances demonstrate an intent to cease using a property permanently and if all the requisite overt acts related to an abandonment have occurred. Of course, the extent of these overt acts depends upon the particular circumstances. In the present case, the spent fuel assemblies owned by Taxpayer are heavily regulated assets that Taxpayer cannot simply haul to a local waste disposal facility. Until Taxpayer is able to ship its spent fuel assemblies to a permanent repository, Taxpayer has no alternative to storing these items on site. Thus, based on Taxpayer's representations, Taxpayer may deduct the canister, cask, and on-going monitoring expenses.

Therefore, costs associated with the canisters, casks, and on-going monitoring of the ISFSI for Plant constitute deductible costs if, in connection with the ultimate abandonment of Plant, they are irrevocably committed to the process of decommissioning. In addition, since costs associated with the construction, operation, and decommissioning of an ISFSI for Plant constitute decommissioning costs pursuant to § 1.468A-1(b)(5) of the regulations, such costs may be paid by the nuclear decommissioning fund.

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the facts described above. This letter ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that this ruling may not be used or cited as precedent.

Pursuant to section 1.468A-7(a) of the regulations, a copy of this letter must be attached (with the required Election Statement) to the Taxpayer's federal income tax return for each taxable year in which the Taxpayer claims a deduction for payments made to the Fund.

Pursuant to the power of attorney on file with this office, a copy of this letter is being sent to the authorized legal representatives.

Sincerely yours,
PETER C. FRIEDMAN
Senior Technician Reviewer, Branch 6
Office of the Assistant Chief Counsel
(Passthroughs and Special Industries)

Enclosure:
6110 copy