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[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-112800-16]

RIN 1545-BN42

Nuclear Decommissioning Funds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document provides proposed changes to the regulations under section 468A of the Internal Revenue Code of 1986 (Code) relating to deductions for contributions to trusts maintained for decommissioning nuclear power plants and the use of the amounts in those trusts to decommission nuclear plants. The proposed regulations revise certain provisions to: address issues that have arisen as more nuclear plants have begun the decommissioning process; and clarify provisions in the current regulations regarding self-dealing and the definition of substantial completion of decommissioning.

DATES: Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-112800-16), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-112800-16), Courier's Desk, Internal

Revenue Service, 1111 Constitution Avenue N.W., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at <http://www.regulations.gov/> (IRS REG-112800-16).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Jennifer C. Bernardini, (202) 317-6853; concerning submissions and to request a hearing, Regina Johnson, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

There is no new collection of information contained in this notice of proposed rulemaking. The collection of information contained in the regulations under section 468A has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) under control number 1545-2091. Responses to these collections of information are required to obtain a tax benefit.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103 of the Code.

Background

This proposed rulemaking consists of several amendments to the existing regulations under section 468A. Section 468A was originally enacted by section 91(c)(1) of the Deficit Reduction Act of 1984, Public Law 98-369, (98 Stat 604) and has been amended, most recently by section 1310 of the Energy Policy Act of 2005, Public Law 109-58 (119 Stat 594). Temporary regulations (TD 9374) under section 468A were published in the **Federal Register** for December 31, 2007 (72 FR 74175). Regulations finalizing and removing the temporary regulations (TD 9512) were published in the **Federal Register** on December 23, 2010 (75 FR 80697).

Explanation of Provisions

1. Definition of Nuclear Decommissioning Costs

A. Inclusion of amounts related to the storage of spent fuel within definition of nuclear decommissioning costs

Section 468A is intended to allow taxpayers to currently deduct amounts set aside in a qualified fund (Fund) for the purpose of decommissioning a nuclear power plant. The taxpayer must include the amount of any actual or deemed distribution from the Fund in gross income in the year of the distribution, as provided in §1.468A-2(d)(1). Taxpayers may then claim an offsetting deduction for amounts spent on decommissioning costs as determined under section 461(h) and other sections. See §1.468A-2(e).

Taxpayers that operate nuclear power plants, whether such plants are currently operating or have ceased operations, must safely store spent fuel. Nuclear fuel assemblies are removed from the reactor and those assemblies are stored in a spent fuel pool for cooling. Subsequently, the spent fuel may be inserted into storage casks

and the casks transferred to an on-site Independent Spent Fuel Storage Installation (ISFSI). An ISFSI consists of a concrete storage pad on which the storage casks are placed. Although the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10101, et seq, requires the Department of Energy (DOE) to take and dispose of spent nuclear fuel in a permanent geologic repository, no such repository has been established and the government has not yet begun accepting spent fuel. Thus, operators of nuclear power plants must safely store spent fuel in an on-site ISFSI.

Existing §1.468A-1(b)(6) defines nuclear decommissioning costs as including “all otherwise deductible expenses to be incurred in connection with” the disposal of certain nuclear assets. Section 1.468A-1(b)(6) continues that “such term also includes costs incurred in connection with the construction, operation, and ultimate decommissioning of a facility used solely to store, pending acceptance by the government for permanent storage or disposal, spent nuclear fuel generated by the nuclear power plant or plants located on the same site as the storage facility.” The Treasury Department and the IRS have become aware that there are questions regarding whether ISFSI-related costs for the construction or purchase of assets that would not necessarily qualify as “otherwise deductible” expenses under the current regulation are included as nuclear decommissioning costs. The proposed regulations clarify the definition of nuclear decommissioning costs to specifically provide for ISFSI-related costs.

B. Inclusion of amounts for purchase or construction of a depreciable asset as part of decommissioning process within definition of nuclear decommissioning costs

Under the existing regulations, questions have arisen as to whether a cost must be currently deductible for that amount to be payable currently from the Fund under the “otherwise deductible” language of §1.468A-1(b)(6). For example, where a depreciable

asset is purchased or constructed as part of the decommissioning process (and the asset is not considered abandoned) questions have arisen regarding whether the “otherwise deductible” language is satisfied solely by the fact that the property is depreciable or whether the expense is treated as a deductible decommissioning expense only to the extent that depreciation is currently allowed. This raises a timing issue regarding whether a fund may pay for the purchase or construction of a depreciable asset to be used in decommissioning that is not considered abandoned when completed. Under the present regulations, because the asset would be fully depreciable but the cost of the asset is not otherwise deductible, a fund may only pay for the portion of the depreciation allowable in the tax year in which such property is placed in service. The intent of section 468A is to allow owners of nuclear power plants to put amounts in a Fund on a tax-free basis and then to use those amounts and the earnings on those amounts to pay for decommissioning. In order to effectuate that intent, the proposed regulations broaden the definition of nuclear decommissioning costs to include the total cost of depreciable assets by adding the words “or recoverable through depreciation” following “otherwise deductible” in §1.468A-1(b)(6).

2. Clarification of the Applicability of the Self-Dealing Rules to Transactions Between the Fund and Related Parties

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

Section 1.468A-5(b)(2) defines “self-dealing,” for purposes of §1.468A-5(b), as any act described in section 4951(d), but provides for some exclusions, including a payment by a Fund for the purpose of satisfying, in whole or in part, the liability of the taxpayer who has elected section 468A and established a Fund (electing taxpayer) for decommissioning costs of the nuclear power plant to which the Fund relates. Section 1.468A-5(b)(3), by reference to section 4951(e)(4) and §53.4951-1(d), provides that the term “disqualified person” includes, with respect to a trust, a contributor to the trust and a trustee of the trust.

The IRS has issued several private letter rulings holding that a reimbursement to an electing taxpayer or an unrelated party by a Fund of decommissioning costs, such as severance payments and pre-dismantlement decommissioning costs, is made for the purpose of satisfying the liability of the electing taxpayer for decommissioning costs of the nuclear power plant to which the Fund relates and therefore is not self-dealing. Thus, under these rulings, the reimbursement by a Fund of these costs represents a permissible use of the Funds. To remove any lingering uncertainty, as well as to avoid the burden on taxpayers of filing additional ruling requests on these issues, the proposed regulations clarify that reimbursements of decommissioning costs by the Fund to related parties (including the electing taxpayer) that paid such costs are not an act of self-dealing. However, no amount beyond what is actually paid by the related party, including amounts such as direct or indirect overhead or a reasonable profit element, may be included in the reimbursement by the Fund.

3. Definition of “Substantial Completion” in §1.468A-5(d)(3)(i)

Existing §1.468A-5(d)(3)(i) defines the substantial completion date as “the date that the maximum acceptable radioactivity levels mandated by the Nuclear Regulatory Commission [NRC] with respect to a decommissioned nuclear power plant are satisfied.” However, §1.468A-5(d)(3)(ii) provides that, if a significant portion of the total estimated decommissioning costs are not incurred on or before the substantial completion date, the electing taxpayer may request a ruling that designates a date subsequent to the substantial completion date as the termination date; such later date may be no later than the last day of the third taxable year after the taxable year that includes the substantial completion date. Under certain state and local requirements, the plant operator must return the site of the plant to conditions requiring time beyond that needed to reach the maximum radioactivity level mandated by the NRC. To accommodate these situations without requiring that the taxpayer request a ruling, the proposed regulations amend the definition of “substantial completion” to the date on which all Federal, state, local, and contractual decommissioning liabilities are fully satisfied.

Proposed Effective/Applicability Date

The rules contained in these regulations are proposed to apply to taxable years ending on or after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**. Notwithstanding the prospective effective date, the IRS will not challenge return positions consistent with these proposed regulations for taxable years ending on or after the date these proposed regulations are published.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and affirmed by Executive Order 13563. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on (1) the fact that the rules in these proposed regulations primarily affect owners of nuclear power plants which are not small entities as defined by the Regulatory Flexibility Act (5 U.S.C. 601) and (2) the proposed regulations do not impose a collection of information on small entities. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. 601) is not required. We request comment on the accuracy of this certification. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronically generated comments that are submitted timely to the IRS. The Treasury Department and the IRS generally request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by a person who timely submits comments. If a public hearing is

scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is Jennifer C. Bernardini, Office of Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section §1.468A-1 is amended by revising paragraph (b)(6) to read as follows:

§1.468A-1 Nuclear decommissioning costs; general rules.

* * * * *

(b) * * *

(6)(i) The term nuclear decommissioning costs or decommissioning costs includes 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 electric 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. An expense is otherwise deductible for purposes of this paragraph (b)(6) if it would be deductible or recoverable through depreciation or amortization under chapter 1 of the Internal Revenue Code without regard to section 280B.

(ii) The term nuclear decommissioning costs or decommissioning costs also includes costs incurred in connection with the construction, operation, and ultimate decommissioning of a facility used solely to store, pending delivery to a permanent repository or disposal, spent nuclear fuel generated by the nuclear power plant or plants located on the same site as the storage facility (for example, an Independent Spent Fuel Storage Installation). 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 (Public Law 97-425).

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Par. 3. Paragraph §1.468A-5 is amended by revising the heading and paragraphs (b)(2)(i) and (d)(3)(i) to read as follows:

§1.468A-5 Nuclear decommissioning fund--miscellaneous provisions.

* * * * *

(b) * * *

(2) * * *

(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, whether such payment is made to an unrelated party in satisfaction of the decommissioning liability or to the plant operator or other otherwise disqualified person as reimbursement solely for actual expenses paid by such person in satisfaction of the decommissioning liability;

* * * * *

(d) * * *

(3) * * *

(i) The substantial completion of the decommissioning of a nuclear power plant occurs on the date on which all Federal, state, local, and contractual decommissioning requirements are fully satisfied (the substantial completion date). Except as otherwise provided in paragraph (d)(3)(ii) of this section, the substantial completion date is also the termination date.

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John Dalrymple

Deputy Commissioner for Services and Enforcement

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