

NDT Conference

Final Regulations under Code section 468A

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Martha Pugh

McDermott, Will & Emery

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Final Regulations Issued

- On December 22, 2010, the IRS and Treasury issued final regulations under section 468A relating to deductions for contributions to qualified nuclear decommissioning trust funds (“Qualified Funds”).
- The Final 468A Regulations generally adopt the language of the temporary and proposed regulations issued in December 2007 (the “Proposed 468A Regulations”), with important changes which incorporate many of the suggestions proposed by the Nuclear Energy Institute (“NEI”) and the Utility Decommissioning Tax Group (“UDTG”).
- The Final 468A Regulations are effective as of December 23, 2010.

Extended Deadline for Special Transfers Relating to Past Taxable Years

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- The most important feature of the Final 468A Regulations is that they allow taxpayers to make special transfers under Code section 468A(f) relating back to taxable years 2006 through 2009 provided taxpayers comply with certain filing and funding requirements.
- Code section 468A(f) provides that any taxpayer maintaining a Qualified Fund may transfer into such fund not more than an amount equal to the present value of the portion of the total nuclear decommissioning costs with respect to such nuclear power plant previously excluded under the qualifying percentage limitation as in effect immediately the date of enactment of the Energy Policy Act of 2005.

Extended Deadline for Special Transfers Relating to Past Taxable Years

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- Treas. Reg. § 1.468A-8 allows taxpayers 60 days from publication of the regulations to file a ruling request for a schedule of deduction amounts for a special transfer relating back to taxable years 2006, 2007, 2008 or 2009.
- This filing deadline was February 22, 2011 to take advantage of this provision.

Special Transfers of Built-In Loss Assets

- The Final 468A Regulations retain the rule that a deduction for property contributed in a special transfer to a Qualified Fund is limited to the lesser of the fair market value of the property or the transferor's basis in the property.
- However, new Treas. Reg. § 1.468A-8(b)(2)(ii) provides an election that enables a transferor to claim a deduction equal to the transferor's adjusted basis in the transferred built-in-loss property, provided the Qualified Fund elects to treat the fair market value of the transferred property as its adjusted basis in the property.
- The Final 468A Regulations allow this election even for property transferred in special transfers prior to December 23, 2010, provided the prior tax returns of the Qualified Fund and the taxpayer are amended.
- Taxpayers who contributed in-kind assets as part of a special transfer will want to review their tax treatment of built-in loss property and assess the benefits of making this election.

License Renewal and Revised Ruling Amounts

- The Service and Treasury declined to extend the mandatory filing deadline for a taxpayer whose operating license is extended. The Proposed 468A Regulations required taxpayers to request a revised schedule of ruling amounts by the deemed payment deadline for the year in which the operating license for the nuclear power plant is extended by the Nuclear Regulatory Commission. (March 15th of the year following the license extension)
- NEI and the UDTG had advocated that the deadline be extended to the deemed payment deadline for the year following the year in which the operating license is extended. Taxpayers will need to continue to monitor the status of license extensions in order not to miss this potentially short deadline.

Expanded Definition of “Nuclear Decommissioning Costs” or “Decommissioning Costs”

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- Final 468A Regulations expand the definition of “nuclear decommissioning costs” and “decommissioning costs” to include costs to decommission structures, systems, and components of a nuclear power plant that continues to produce electric energy and costs to store spent nuclear fuel pending delivery to a permanent repository.
- The Preamble to the Final 468A Regulations notes that the Service generally has included such costs as nuclear decommissioning costs in issuing its private letter rulings; this change will eliminate the need to request rulings on these points in certain instances.

Net Operating Loss Carryback Rules

- NOL's generally can be carried back 2 years.
- Decommissioning Costs are a "Specified Liability" and have more liberal carryback rules.
- Nuclear decommissioning costs as defined under the 468A regulations meet the definition of decommissioning costs for this purpose.
- 10 year carryback or carryback to the year the plant was placed in service (but not before 1984).
- Does not include contributions into a Qualified Fund

Conclusion

- The Final 468A maintain the benefits that the industry worked so hard to achieve after the changes to 468A were made under the Energy Policy Act of 2005.
- The Final 468A Regulations may provide flexibility for taxpayers to take advantage of the expanded definition of “decommissioning costs” for purposes of NOL planning.

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