

Internal Revenue Service

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Person To Contact:
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Telephone Number:

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June 23, 2015

Re: Request for Private Letter Ruling Regarding the Application of Section 168(e)(3)(B)(vi)(II) of the Internal Revenue Code

Taxpayer =
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Dear :

This letter responds to a letter dated December 23, 2014, submitted on behalf of Taxpayer requesting a letter ruling regarding the application of § 168(e)(3)(B)(vi)(II) of the Internal Revenue Code (“Code”) to a specific electric generation facility (“Facility”) that has converted from burning coal to burning biomass as fuel.

FACTS

Taxpayer represents that the facts are as follows:

Taxpayer is incorporated under the laws of C. Taxpayer is a wholly owned subsidiary of A, which is also a C corporation. Taxpayer is included in a consolidated federal income tax return of which A is the common parent. The consolidated group also includes B, a regulated electric public utility. Taxpayer uses an overall accrual method of accounting and reports income on a calendar year-end basis.

Taxpayer provides private utility-type services to customers in D states. Taxpayer focuses on developing, acquiring, building, owning, and operating projects for energy-intensive customers in E businesses. Among Taxpayer's business lines is the provision of biomass-generated electricity to utilities to help them meet local renewable portfolio standards. The rates Taxpayer charges for the provision of this electricity is negotiated with the counterparty and is not established by a governmental commission or agency based on Taxpayer's costs of producing the electricity.

The Facility is an electric generating plant located in E. The Facility was first placed in service in G as a coal-fired electric generation plant. It ceased operations in H. Taxpayer purchased the Facility in I (the year after H) with plans to convert it to using biomass (specifically, wood waste) as its fuel. This conversion was completed and the Facility was placed in service in J. The Facility has a capacity of approximately K and sells all of its output pursuant to a long-term power purchase agreement to L, a M electric utility company.

The Facility is owned by N, a O limited liability company. All of the membership interests in N were, prior to the ownership restructuring described below, owned by P, a limited liability company. At that time, N was a disregarded entity for tax purposes. All of the membership interests in P were, and still are, owned by Taxpayer. P was, and remains, a disregarded entity for tax purposes. Thus, up until the ownership restructuring described below, Taxpayer was deemed to own the Facility for tax purposes.

Pursuant to the Federal Energy Regulatory Commission ("FERC") regulations under § 3(17)(C) of the Federal Power Act (16 U.S.C. 796(17)(C)) ("FPA") as in effect on September 1, 1986, status as a qualifying small power production facility ("QSPPF") was unavailable to any facility more than fifty percent of which was owned by an electric utility or any affiliate of an electric utility. Because B was an affiliate of N's and because N owned all of the Facility, under the FERC's regulations, an electric utility was deemed to own one hundred percent of the Facility. The Facility could not, therefore, qualify as a QSPPF under § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986, before the ownership restructuring described below.

In Q (the year before the Facility was placed in service in J), the ownership of N was restructured. The purpose of the restructuring was solely to enable the Facility to qualify as a QSPPF under § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986. The transaction had no purpose other than such qualification.

The ownership restructuring took the form of a transfer by P of part of its ownership in N to R, an unrelated entity that was not an electric utility. Specifically, P transferred a percentage necessary to reduce its ownership in N to a level below the threshold established by FERC for QSPPF qualification under § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986, (i.e., equal to or less than fifty percent). The restructuring was designed to be effective under FERC rules, concepts, and precedents. It was not designed to effect a transfer of ownership under the applicable tax rules, concepts and precedents. In fact, Taxpayer believes that, applying the general tax principles applicable to determining ownership of an asset, P did not transfer any of its interest in N for tax purposes. Thus, for tax purposes, N remains a disregarded entity wholly owned by P after the ownership restructuring of N described in this paragraph. Further, Taxpayer represents that, for federal income tax purposes, it is deemed to own the Facility after such ownership restructuring.

Taxpayer requested and received an opinion letter dated S, from the FERC's Office of the General Counsel addressing the question of whether N meets the requirements to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986. The opinion letter recites in detail the facts provided by Taxpayer, including the ownership restructuring of N. The opinion letter further concludes that, after the ownership restructuring of N: (1) the Facility satisfies the ownership requirements that were in effect on September 1, 1986, to be a QSPPF; (2) the Facility satisfies the other requirements to be a QSPPF, which are the same requirements now as were in effect on September 1, 1986; and (3) N meets the requirements to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986.

Taxpayer represents that the Facility is property described in § 48(l)(15) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990).

RULING REQUESTED

Taxpayer requests a ruling that since the FERC's Office of the General Counsel has concluded that the Facility meets the qualifications to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986 (including ownership status ascertained under the FERC, not tax, rules and concepts), so long as the Facility is property described in paragraph (15) of § 48(l) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation

Act of 1990), the Facility qualifies as 5-year property under § 168(e)(3)(B)(vi)(II) of the Code.

LAW AND ANALYSIS

Section 168(e)(3)(B)(vi)(II) of the Code provides that 5-year property includes any property which is described in § 48(l)(15) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) and is a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986.

Section 48(l)(15) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) defines biomass property. Taxpayer represents that the Facility is property described in § 48(l)(15) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990). Therefore, the only issue is whether the Facility is a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986.

Section 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986, included, among other things, a requirement that a QSPPF had to be “owned by a person not primarily engaged in the generation or sale of electric power (other than electric power solely from cogeneration facilities or small power production facilities).” That requirement, which was commonly known as the ownership requirement for QSPPF status, was repealed by the Energy Policy Act of 2005.

However, to qualify as 5-year property under § 168(e) of the Code, § 168(e)(3)(B)(vi)(II) of the Code clearly states that, among other things, the facility must be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), *as in effect on September 1, 1986*. Accordingly, the facility must meet, among other things, the ownership requirement of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986.

An opinion letter dated S, from the FERC’s Office of the General Counsel addressing the question of whether N, after its ownership restructuring, meets the requirements to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986, concludes that N meets the requirements to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986. While the opinion letter states that N instead of the Facility meets the requirements to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986, when read in its entirety, the FERC Office of the General Counsel was referring to the Facility. Immediately before that statement, the FERC Office of the General Counsel concludes that, after the ownership restructuring of N, the Facility: (1) satisfies the ownership requirements that were in effect on September 1, 1986, to be a QSPPF; and (2)

satisfies the other requirements to be a QSPPF, which are the same requirements now as were in effect on September 1, 1986. Accordingly, for purposes of § 168(e)(3)(B)(vi)(II) of the Code, we will follow FERC's conclusion that the Facility after the ownership restructuring of N meets the requirements to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986.

CONCLUSION

Based solely on Taxpayer's representations and on the above-mentioned opinion letter dated S, from the FERC's Office of the General Counsel, we conclude that:

Since the FERC's Office of the General Counsel has concluded that the Facility meets the requirements to be a QSPPF within the meaning of § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986 (including ownership status ascertained under the FERC, not tax, rules and concepts), so long as the Facility is property described in paragraph (15) of § 48(l) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990), the Facility qualifies as 5-year property under § 168(e)(3)(B)(vi)(II) of the Code.

Except as specifically set forth above, no opinion is expressed or implied concerning the federal income tax consequences of the facts described above under any other provisions of the Code (including other subsections of § 168 of the Code). Specifically, no opinion is expressed or implied on: (i) what entity is the owner of, or has the depreciable interest in, the Facility for federal income tax purposes; (ii) whether the Facility is property described in § 48(l)(15) of the Code (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990); (iii) whether N is wholly owned by P for federal income tax purposes after the ownership restructuring of N previously described in this letter ruling; and (iv) the tax consequences under § 168 if the Facility does not meet the ownership requirement in § 3(17)(C) of the FPA (16 U.S.C. 796(17)(C)), as in effect on September 1, 1986, during J and subsequent taxable years.

In accordance with the power of attorney, we are sending a copy of this letter to Taxpayer's authorized representative. We are also sending a copy of this letter to the appropriate Industry Director, Large Business & International Division (LB&I).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely,

Kathleen Reed

Kathleen Reed
Branch Chief, Branch 7
Office of Associate Chief Counsel
(Income Tax and Accounting)

Enclosures (2):

copy of this letter
copy for section 6110 purposes