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Person to Contact:

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Refer Reply To:
CC:IT&A PLR-104928-98
Date: September 25, 2000

Taxpayer:

Taxpayer's EIN:

Taxpayer's Address:

Legend:

X	=	
A	=	
B	=	
C	=	
D	=	
E	=	
F	=	
G	=	
Bank 1	=	
Bank 2	=	
Bank 3	=	
Lender	=	
State	=	
City	=	
State Act	=	
State Statute	=	
Agreement	=	
q	=	
Country Y	=	
Proposal	=	
m	=	
n	=	
Year 1		

Year 2
Year 3
Year 4
Year 5
Year 6
Year 7
Year 8
Year 9
Year 10
Year 11

Dear :

This responds to Taxpayer’s request for a private letter ruling dated February 12, 1998. Specifically, Taxpayer has requested a ruling that the termination of Taxpayer’s power purchase agreement ("PPA") pursuant to the Agreement constitutes a "compulsory or involuntary conversion" of its PPA within the meaning of §§ 1033 and 1231 of the Internal Revenue Code ("Code"). Taxpayer has also requested a ruling that the amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA is a § 1231 gain or § 1231 loss. Taxpayer also requests rulings that the amounts paid to terminate certain agreements relating to its facility are deductible under § 162 in the year paid. Finally, Taxpayer requests a ruling that the amounts paid to terminate certain currency hedge agreements relating to its facility are ordinary losses in the year paid.

CONCLUSIONS

(1) The termination of the PPA pursuant to the Agreement constitutes a "compulsory or involuntary conversion" of the PPA within the meaning of §§ 1033 and 1231.

(2) The amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA will be treated as a "§ 1231 gain" or "§ 1231 loss" in accordance with the provisions of § 1231.

(3) The amounts paid by Taxpayer to terminate certain agreements discussed below that were necessary for the operation of its facility are deductible under § 162.

(4) Taxpayer’s termination payments that are deductible under § 162 are deductible in the taxable year in which the termination payments were paid.

(5) Taxpayer’s termination payments with respect to the Currency Hedge Agreements are ordinary losses in the year such Agreements were terminated.

FACTS

X is a regulated public utility furnishing electricity to various parts of State. Taxpayer is an independent power producer ("IPP") that was organized in Year 2 for purposes of developing, financing, constructing, and operating a q megawatt natural gas fired cogeneration facility ("facility") at City in State. The facility was placed in service in May, Year 5 and is certified as a Qualifying Facility ("QF") under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a, as amended ("PURPA"), and the implementing FERC regulations (18 C.F.R. § 292.207).

PURPA requires electric utilities to purchase electricity from, and enter into legally enforceable obligations with, QFs. In addition, State enacted parallel provisions to PURPA that obligated regulated public utilities, such as X, to enter into long-term contracts to purchase electricity from, and granted additional rights to, entities such as Taxpayer that qualified under the State Act as co-generation facilities or alternate energy production facilities.

The prices paid for electricity under these statutorily-mandated contracts were based upon projections of the costs that the regulated public utility otherwise would incur to meet its service requirements ("avoided costs"). These avoided costs were composed of (1) in all cases, variable costs associated with producing electricity, and (2) in some cases, fixed costs associated with developing and constructing a facility if the regulated public utility did not have the generation capacity to meet the demand for electricity.

In December, Year 1, X entered into a PPA with A (who subsequently assigned the PPA to Taxpayer) that was priced to reflect both the fixed and variable costs of producing electricity required to be purchased under the agreement. For the output of Taxpayer's facility, X was obligated to pay Taxpayer an amount determined by reference to its long run avoided cost forecasts, as set forth in certain State Public Service Commission ("PSC") approved filings. X's Year 1 long run avoided costs were determined with reference to the fixed and variable costs that X would have incurred if it instead generated the quantity of electricity acquired from Taxpayer or purchased the electricity elsewhere. The price paid per kilowatt hour was based on the Year 1 long run avoided costs and was fixed for the initial pricing period of the PPA; it was based on the parties' estimate of X's avoided costs over the term of the PPA at the time the legal obligation was entered into. Taxpayer projected that the payments to be made to it under the PPA would cover both the fixed costs associated with the development, construction, maintenance, and operation of the facility, as well as certain other costs, such as fuel and fuel transportation costs and variable operation and maintenance costs associated with the production of electricity.

The PPA has a term of 25 years, during which term, X is required to take and pay for 100 percent of the electricity that Taxpayer's facility is capable of producing. Taxpayer is not required to produce any specified amount of electricity. The PPA can be assigned to a third party by Taxpayer with prior written notification to X.

At the time that the PPA was executed, the price X was to pay for electricity was agreed to by Taxpayer and X and was believed to be a fair price based on X's projections of the costs it would otherwise have incurred over the term of the PPA. However, by mid-Year 3, X had projected that it had excess electric production capability and thus its new avoided costs rates (and accordingly the prices it was required to pay new projects for electricity) were substantially less than its Year 1 rates. Thus, the price paid by X pursuant to Taxpayer's PPA has for some time exceeded the State PSC's current approved rates.

Initially, X was able to recover its costs for electricity produced by, and purchased from, Taxpayer and other IPPs under its State PSC-approved tariffs, which included a fuel adjustment clause. However, X's electricity rates are much higher than in other areas of the United States. Due to the disparity between actual market electricity prices and the price paid for electricity under Taxpayer's PPA and other PPAs, the State PSC and consumers pressured X to reduce its rates and move toward a competitive market. As early as March, Year 4, the State PSC began to investigate methods to create competitive opportunities for State electricity consumers, including X's customers, and requested that the utilities do the same. Pursuant to the State PSC's request, X commenced negotiations with Taxpayer and other IPPs to reduce its cost for electricity purchased under those PPAs. As of April, Year 5, X had renegotiated PPA agreements with 20 of 175 IPPs that had PPAs.

In an attempt to reduce its costs, X sought to have rules adopted by the State PSC which would permit X to curtail purchases of electricity from the IPPs. In April, Year 5, X petitioned the State PSC, suggesting that such rules were necessary and stating that the currently available settlement opportunities with the IPPs had been exhausted. Although the State PSC did not adopt a formal curtailment plan in Year 5, it continued its efforts to encourage regulated public utilities, including X, to develop a competitive electric market for State.

In response, in October, Year 6, X submitted a proposal entitled "Proposal" to the State PSC for reducing its electric rates to its customers. Stating that the differences with the IPPs had not been resolved, the Proposal set forth several alternative ways to restructure the PPAs, including the taking by eminent domain of the IPPs' electricity generating facilities and the curtailment of X's obligations to purchase electricity generated by the IPPs, emphasizing that it was essential to the creation of a competitive market that PPAs with a significant number of the unregulated IPPs be restructured such that those generating units become independent suppliers competing in the wholesale spot market or become suppliers to customers directly.

In the Proposal, X stated that if negotiations with the IPPs failed to produce the necessary cost savings, it proposed to utilize its power of eminent domain to acquire the generating units owned by the IPPs with which it has PPAs and subsequently resell them at auction in order to increase competition in the wholesale power market. It also stated that it would soon initiate the process necessary to exercise its power of eminent domain by filing a petition with the State PSC.[1]

Taxpayer believed that X would institute an eminent domain proceeding against the facility unless X was otherwise able to reduce its payments to a significant number of IPPs with which it had PPAs. After the Proposal was made public, X and certain of the IPPs entered into negotiations. X took no further action towards exercising its eminent domain powers because of progress with the negotiations with the IPPs. During these negotiations, X's counsel stated to one of the IPPs that if the negotiations were not successful, X would have no way to restructure its markets and reduce its costs other than by commencing eminent domain proceedings.

In May, Year 7, the State PSC issued an order describing its goals and strategies for restructuring State's electric utility industry and stated that all possible efforts to reduce electric rates should be continued, including efforts to reduce utility commitments under IPPs contracts that include obligations for payments well above current wholesale prices. It further stated that if the parties were unwilling to restructure these contracts voluntarily, it would pursue policies to mitigate the impact of such contracts on rates. Subsequently, in July, Year 7, the State PSC stated publicly that the PPAs with the IPPs were a major hurdle to lowering electric rates in State and achieving a competitive electric market. Two weeks after this public statement, X made an offer to 44 IPPs to buy out their PPAs. Those IPPs retained an investment banking firm to evaluate X's offer.

Active negotiations between X and the IPPs continued until December, Year 7, when the negotiations stalled. In December, Year 7, the administrative law judge considering X's request for curtailment of purchases from the IPPs recommended that State utilities be allowed to curtail purchases. Although Taxpayer's PPA prohibits X's curtailment of purchases, Taxpayer was still concerned that some action by X or government authorities could result in curtailment of electricity purchases to some degree. In March, Year 8, Taxpayer and other IPPs made a counterproposal to the X's offer, which became the basis for further negotiations. In May, Year 8, the State PSC approved, but did not issue, a curtailment order, which allowed X to reduce the quantity of electricity that it was required to purchase from certain IPPs. The IPPs believed that the approval of the curtailment order was intended to place additional pressure on the negotiations with X.

In July, Year 8, Taxpayer and the other IPPs signed the Agreement, which was subsequently amended five times. In June, Year 9, the transaction was consummated in accordance with the terms of the amended Agreement. Pursuant to the amended Agreement,

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[1] The power of eminent domain was delegated to X pursuant to State Statute which provides that "[a]n electric corporation shall have the power and authority to acquire such real estate as may be necessary for its corporate purposes ... in the manner prescribed by the Eminent Domain Procedure Law."

consideration in the aggregate of $ m cash and n shares of X common stock would be available for IPPs to elect from. Taxpayer's PPA will be terminated, but it will have the right to maintain its status as a State QF, the right to wheel its output to third parties, and the right to have X act as an agent for sales of its electricity to the State electric power pool.

Taxpayer represents that X had threatened, during negotiations, to pursue eminent domain actions against the IPPs' facilities, including Taxpayer's facility, if the restructuring negotiations were not successful. In November, Year 8, X informed the State PSC that it had not pursued the exercise of its power of eminent domain due to the progress in negotiations with the IPPs, but that it would take necessary measures, including exercise of its power of eminent domain, if the restructuring pursuant to the Agreement was not effected. Based on X's actions, Taxpayer states that it had a reasonable belief that a threat or imminence of condemnation existed against its facility.

Taxpayer further represents that if X had condemned its facility, the PPA would have been unenforceable and wholly worthless, and that it could not have sold electricity to X pursuant to the terms of the PPA. Taxpayer represents that the PPA was "site-specific" because that the PPA is limited to the purchase and sale of electricity produced and delivered by the facility referenced in the PPA. Thus, if Taxpayer's facility were taken by X pursuant to its eminent domain powers, Taxpayer could not sell electricity to X pursuant to the terms of the PPA, nor could it assign its PPA to a third party for value because the third party could not sell electricity to X pursuant to the terms of the PPA.

Taxpayer further represents that one of the requirements for QF status is that the facility must 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). Thus, once X (an electric utility) acquired the facility, the facility would lose its QF status, which is required by the PPA to be maintained. If the QF status is not maintained, X has the option of terminating the PPA, and it would have terminated the PPA. It is also represented that if X had acquired Taxpayer's facility, it would have auctioned the facility and the new owner of the facility could not have sold power to X pursuant to the PPA, but would have to abide by new pricing protocols in the competitive market.

Taxpayer sold its assets, including the facility in December, Year 9 because the termination of its PPA severely restricted or eliminated the economic viability of operating the facility under then current market conditions.

Taxpayer has not treated the PPA as a separate and distinct asset on its books and records. Costs associated with acquiring the PPA, such as attorney's fees and other related costs, have been capitalized into a general asset category and amortized accordingly.

Taxpayer entered into a fuel supply agreement, dated as of October, Year 2 and expiring in Year 11 (with renewals), with B, as successor to C (the Fuel Supply Agreement). Under the Fuel Supply Agreement, Taxpayer is obligated to purchase all of its natural gas requirements from B. As a result of the restructuring, Taxpayer terminated the Fuel Supply Agreement and made a cash termination payment to C, an affiliate of B. Taxpayer does not intend to enter into a new fuel supply agreement with B or another party.

Taxpayer entered into a fuel transportation agreement, dated as of February, Year 6 and expiring in Year 11, with D (the Fuel Transportation Agreement). Under this contract, Taxpayer is obligated to pay for transporting gas through the transporter's pipeline. As a result of the restructuring, Taxpayer terminated the Fuel Transportation Agreement and made a cash termination payment to D. Taxpayer entered into an interruptible gas transportation agreement with D. Under this gas transportation agreement, neither Taxpayer nor D has any obligation to buy or sell any amount of transportation services.

Taxpayer entered into a subordinated financing agreement dated August, Year 3, with Bank 1, as administrative agent for various lenders, and Lender (the Financing Agreement) relating to the construction and operation of the facility. As a result of the restructuring, Taxpayer repaid the loan in cash pursuant to a loan termination agreement.

The underlying loan documents required Taxpayer to enter into hedges to ensure that it was protected against changes in interest rate fluctuations. To hedge its interest rate risk on the loan, Taxpayer entered into three interest rate swap contracts. Under each of the swaps, the counterparty was obligated to pay Taxpayer amounts calculated by reference to a variable interest rate upon a notional principal amount and Taxpayer was obligated to pay the counterparty amounts at a specified fixed interest rate in respect of that notional principal amount.

The swaps were entered into primarily to reduce Taxpayer's interest rate risk with respect to its variable interest rate payments under the construction loan. The variable interest rate payments under the swaps are indexed in the same manner as the variable rate payments on the underlying borrowings. Further, the notional principal amount of the interest rate swaps is approximately equal to the outstanding loan balance on the underlying debt. Thus, the swaps act to convert the underlying variable rate obligation into a fixed rate obligation, protecting Taxpayer from an increase in interest rates.

Taxpayer entered into an interest rate hedge agreement dated October, Year 3, and expiring in March, Year 10, with Bank 2 (the First Interest Rate Hedge Agreement, together with the other interest rate hedge agreements referred to as the Interest Rate Hedge Agreements), and a currency hedge agreement dated October, Year 3, and expiring in September, Year 10 with Bank 2 (the First Currency Hedge Agreement, together with the other currency hedge agreements referred to as the Currency Hedge Agreements). Taxpayer did not identify the First

Interest Rate Hedge Agreement or the First Currency Hedge Agreement as hedging transactions during the period described by § 1.221-2(g) of the Income Tax Regulations. Taxpayer has not treated the First Interest Rate Hedge Agreement or the First Currency Hedge Agreement as Section 1256 contracts. As a result of the restructuring, Taxpayer terminated the First Interest Rate Hedge Agreement and the First Currency Hedge Agreement and made cash payments to the counterparty.

Taxpayer also entered into an interest rate and currency exchange agreement dated August, Year 3, and expiring in March, Year 10 (with respect to the interest rate swap) and September, Year 10 (with respect to the foreign currency exchange agreement), with Bank 1 (the Second Interest Rate Hedge Agreement and the Second Currency Hedge Agreement, respectively). Taxpayer did not identify the Second Interest Rate Hedge Agreement or the Second Currency Hedge Agreement as hedging transactions during the period described by § 1.221-2(g) of the regulations. Taxpayer has not treated the Second Interest Rate Hedge Agreement or the Second Currency Hedge Agreement as Section 1256 contracts. As a result of the restructuring, Taxpayer terminated the Second Interest Rate Hedge Agreement and the Second Currency Hedge Agreement and made cash payments to the counterparty.

Taxpayer also entered into an interest rate and currency exchange agreement dated August, Year 3, and expiring in March, Year 10 (with respect to the interest rate swap) and September, Year 10 (with respect to the foreign currency exchange agreement), with Bank 3 (the Third Interest Rate Hedge Agreement and the Third Currency Hedge Agreement, respectively). Taxpayer did not identify the Third Interest Rate Hedge Agreement or the Third Currency Hedge Agreement as hedging transactions during the period described by § 1.221-2(g) of the regulations. Taxpayer has not treated the Third Interest Rate Hedge Agreement or the Third Currency Hedge Agreement as Section 1256 contracts. As a result of the restructuring, Taxpayer terminated the Third Interest Rate Hedge Agreement and the Third Currency Hedge Agreement and made cash payments to the counterparty.

In March, Year 7, Taxpayer's tax matters partner conducted an internal review of all outstanding derivative contracts and discovered its failure to identify the Interest Rate Hedge Agreements and the Currency Hedge Agreements as hedging transactions. That same month, the tax matters partner prepared a file memorandum indicating its failure to identify such agreements as hedging transactions. The memorandum further indicated Taxpayer's desire to treat these agreements as hedging transactions, as well as Taxpayer's belief that its failure to identify the agreements as hedging transactions was inadvertent.

LAW AND ANALYSIS

(1) Whether the termination of Taxpayer's PPA pursuant to the Agreement constitutes a "compulsory or involuntary conversion" of its PPA within the meaning of §§ 1033 and 1231.

Section 1033(a)(2) provides in part that if property (as a result of its destruction in whole or in part, theft, seizure, or requisition or condemnation or threat or imminence thereof) is compulsorily or involuntarily converted into money, the gain (if any) shall be recognized except to the extent hereinafter provided in this paragraph.

Section 1033(a)(2)(A) provides that if a taxpayer during the period specified in § 1033(a)(2)(B), for the purpose of replacing the property so converted, purchases other property similar or related in service or use to the property so converted, then at the taxpayer's election, the gain shall be recognized only to the extent that the amount realized upon such conversion (regardless of whether such amount is received in one or more taxable years) exceeds the cost of such other property.

Section 1.1033-1(a) of the Income Tax Regulations provides in part that an involuntary conversion may be the result of the destruction of property, in whole or in part, the theft of property, the seizure of property, the requisition or condemnation of property, or the threat or imminence of requisition or condemnation of property.

Rev. Rul. 63-221, 1963-2 C.B. 332, establishes the criteria necessary for the existence of a threat or imminence of condemnation based on the taxpayer's reasonable belief. Generally, the threat or imminence of condemnation exists when a property owner is informed, either orally or in writing, by a representative of a governmental body or public official authorized to acquire property for public use, that such body or official has decided to acquire the owner's property, and the owner has reasonable grounds to believe, from the information conveyed to him by such representative, that the necessary steps to condemn the property will be instituted if a voluntary sale is not arranged.

Rev. Rul. 74-8, 1974-1 C.B. 200, modifying Rev. Rul. 63-221, provides that a threat or imminence of condemnation may exist where the purchaser, a public utility, lacked actual condemnation authority prior to or at the time of the sale, but it generally could readily obtain the power to condemn by application to the appropriate state official authority in the event that a voluntary sale was not arranged, and there was no reason to believe that such power to condemn the land purchased would be denied.

Rev. Rul. 59-361, 1959-2 C.B. 183, recognized the economic unit theory of Masser v. Commissioner, 30 T.C. 741 (1958), acq. 1959-2 C.B. 5. The taxpayer in Masser owned a freight terminal and the parking lots across the street from the terminal that were necessary for its operation. The parking lots were condemned and the taxpayer being unable to secure adequate replacement lots in the same vicinity sold the freight terminal. The proceeds of the sale of the freight terminal, together with the proceeds from the condemnation of the parking lots, were reinvested in a similar terminal and parking facilities suitable for the taxpayer's business. The court allowed involuntary conversion treatment for the terminal proceeds and the parking lot proceeds on the theory that the two properties were used as an economic unit. Accordingly, the Service stated that where all the facts and circumstances show a substantial economic relationship between the condemned property and the other property sold by the taxpayer, so that together they constituted one economic property unit, such as existed in the Masser case, involuntary conversion treatment for the proceeds of the voluntary sale will be permitted.

Rev. Rul. 82-147, 1982-2 C.B. 190, held that the sale of the taxpayer's fishing resort due to an act of Congress declaring the area in which it is located a Boundary Waters Canoe Area Wilderness constituted an involuntary conversion. The act prohibited the use of motorboats with motors of greater than 25 horsepower on the lake. The restriction on horsepower of motorboats effectively denied the taxpayer the former economic use of its resort. The act gave an affected resort owner the option to require the government to purchase the resort at its fair market value without regard to the restriction. The restriction together with the provision authorizing purchase effectively constituted a taking of the property upon payment of fair compensation.

The actions of the State PSC and X with regard to the establishment of a competitive electricity market for State provide notice to Taxpayer as well as a reasonable basis for Taxpayer to conclude that X would pursue its threat to condemn Taxpayer's facility if Taxpayer did not renegotiate its PPA. Further, it is clear that X had the authority under State Statute to commence eminent domain proceedings against Taxpayer's facility.

Taxpayer's representations regarding the relationship between its PPA and its facility establish that the property converted (the PPA) bears a "substantial economic relationship" to the threatened property (the facility) against which X has taken actions that constitute a threat or imminence of condemnation. Further, if X were to condemn the facility, this action would damage completely the value of the PPA to Taxpayer. Thus, although X's threat of condemnation was made to Taxpayer's facility, because the facility and the PPA form an economic unit, the termination of Taxpayer's PPA pursuant to the Agreement constitutes an involuntary conversion made under a threat or imminence of condemnation by X of the PPA.

(2) Whether the amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA is a § 1231 gain or § 1231 loss.

Section 1231(a) prescribes in part the treatment of certain gains from involuntary conversions. Section 1231(a)(3)(A)(ii) provides that the term § 1231 gain means any recognized gain from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) into other property or money of (1) property used in a trade or business, or (2) any capital asset which is held for more than 1 year and is held in connection with a trade or business or a transaction entered into for profit. See also § 1231(a)(3)(B) (losses). Under § 1231(a), if § 1231 gains for the year exceed § 1231 losses, they are treated as long-term capital gains and losses; if § 1231 losses exceed § 1231 gains, they are treated as ordinary gains and losses.

The provisions in § 1231 that deal with involuntary conversions provide a statutory sale or exchange for such transactions, so that they may qualify for potential capital gain treatment, depending on the netting of gains and losses under § 1231. These provisions were added by Congress in part to supplement what is now § 1033, and are generally interpreted in a similar manner. See H. Rep. No. 2333, 77th Cong., 2d Sess., 1942-2 C.B. 372, 415; Conf. Rep. No. 2586, 77th Cong., 2d Sess. 1942-2 C.B. 701, 708-9. Cf. Rev. Rul. 271, 1953-2 C.B. 36 (treatment of severance damages under § 1231). Accordingly, any gain (or loss) recognized by Taxpayer in connection with the conversion of its PPA will be treated as a "§ 1231 gain" or "§ 1231 loss."

(3) Whether Taxpayer may deduct under § 162 the amounts paid to terminate the Fuel Supply Agreement, Fuel Transportation Agreement, and Interest Rate Hedge Agreements.

Section 162 provides, in part, that taxpayers may deduct all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Further, § 1.162-1(a) provides, in part, that deductible business expenses include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer’s trade or business.

Sections 263(a)(1) and (a)(2) provide that taxpayers may not deduct amounts paid for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or making good the exhaustion thereof for which an allowance is or has been made.

Section 1221 defines the term capital asset as property held by a taxpayer (whether or not connected with the taxpayer’s trade or business). Prior to its amendment by the Ticket to Work and Work Incentives Improvement Act of 1999, P.L. 106-170, enacted on December 17, 1999, § 1221(1)-(5) generally excludes from this definition five classes of property: inventory; depreciable property and real property used in the taxpayer’s business; certain types of intellectual property; accounts and notes receivable acquired in the ordinary course of the taxpayer’s business; and certain United States government publications.

Section 1.1221-2 provides rules governing the character of hedging gains and losses. This regulation generally applies to all open taxable years. Section 1.1221-2(a)(1) generally provides that the term capital asset does not include property that is part of a hedging transaction, as defined in § 1.1221-2(b). Section 1.1221-2(b) defines a hedging transaction to include a transaction that a taxpayer enters into in the normal course of its trade or business primarily to reduce risk of interest rate fluctuations with respect to borrowings made or to be made, or ordinary obligations incurred or to be incurred, by the taxpayer.

Section 1.1221-2(e) provides rules for identifying a hedging transaction and the item or risk being hedged. A taxpayer that enters into a hedging transaction must identify it as a tax hedge before the close of the day on which the taxpayer enters the transaction. Treas. Reg. § 1.1221-2(e)(1). In addition, the taxpayer must identify the item being hedged substantially contemporaneously with entering into the hedging transaction. Treas. Reg. § 1.1221-2(e)(2). In general, failure to identify a hedging transaction in accordance with the regulations prohibits a transaction from being treated as a tax hedge. Therefore, the character of gain or loss from the transaction is determined without reference to whether the transaction is a surrogate for a noncapital asset or otherwise serves the function of a hedge. Treas. Reg. § 1.1221-2(f)(2). However, if the taxpayer's failure to identify the hedging transaction was due to inadvertent error, and certain other requirements are met, the taxpayer may treat the gain or loss from the transaction as ordinary gain or loss. Treas. Reg. § 1.1221-2(f)(2)(ii).

These identification rules apply to transactions entered into after December 31, 1993, or to transactions entered into before January 1, 1994, and still in existence on March 31, 1994. Treas. Reg. § 1.1221-2(g)(1)(i). In the case of a hedging transaction entered into before January 1, 1994, an identification is generally timely if made by the close of business on March 31, 1994. Treas. Reg. § 1.1221-2(g)(1)(ii).

In certain instances, the courts have allowed taxpayers to currently deduct amounts paid to terminate burdensome and uneconomic contracts. See, e.g., Capitol Indemnity Ins. Co. v. Commissioner, 237 F.2d 901, 903 (7th Cir. 1956) (amounts incurred by taxpayer to free itself from an unprofitable agency contract were deductible); Montana Power Co. v. U.S., 171 F. Supp. 943 (Ct. Cl. 1959) (cash paid and the fair market value of stock surrendered to relieve the taxpayer of its obligation under supply contract was deductible business expense); Stuart Co. v. Commissioner, T.C. Memo ¶50,171, aff'd, 195 F.2d 176 (9th Cir. 1952) (an amount allocable to the cancellation of an onerous supply contract was deductible as an ordinary and necessary business expense); Olympia Harbor Lumber Co. v. Commissioner, 30 B.T.A. 114 (1934), aff'd, 79 F.2d 394 (9th Cir. 1935) (amount paid to terminate an unsatisfactory waste disposal contract was a currently deductible business expense).

In addition, both the courts and the Service have maintained that amounts paid solely to reduce or eliminate future costs are also deductible. See, e.g., T.J. Enterprises, Inc. v. Commissioner, 101 T.C. 581, 589 (1993) (amounts paid to majority shareholder to compensate her for refraining from causing a royalty rate increase were currently deductible); Rev. Rul. 95-32, 1995-1 C.B. 8 (expenditures incurred by a public utility for the implementation and operation of energy load management programs are currently deductible under § 162); Rev. Rul. 94-77, 1994-2 C.B. 19 (Supreme Court's decision in INDOPCO, Inc. v. Commissioner, 503 U.S. 79 (1992), does not affect the treatment of severance payments, made by a taxpayer to its employees, as business expenses that are generally deductible).

Although the interest rate swaps meet the definition of a hedging transaction within the meaning of § 1.1221-2(b), Taxpayer did not timely identify the swaps in accordance with § 1.1221-2(g)(1)(ii). Under § 1.1221-2(f)(2), failure to identify generally prohibits the transaction from being treated as a tax hedge, unless the failure was inadvertent and other requirements are met.

The issue here is the meaning of the term "inadvertent error" in the context of § 1.1221-2(f)(2)(ii). The issue is a novel one. Section 1.1221-2(f)(2)(ii) does not define the term. In the absence of a specific definition in the regulations, the term "inadvertent error" should be given its ordinary meaning. See McClelland Farm Equipment Co. v. United States, 601 F.2d 365, 368 (8th Cir. 1979)("The words of regulations ... should be interpreted where possible in their ordinary, everyday senses."); Bookwalter v. Mayer, 345 F.2d 476, 479 (8th Cir. 1965). The ordinary meaning of the term "inadvertence" is "an accidental oversight; a result of carelessness." Black's Law Dictionary 762 (7th ed. 1999).

After applying the applicable regulations to the facts and representations of this ruling request, we conclude that Taxpayer's failure to identify the interest rate swaps was due to inadvertent error within the meaning of § 1.1221-2(f)(2)(ii).

Taxpayer paid the termination payments to terminate certain of its long-term contractual obligations with respect to operation of its facility, and therefore reduce its future costs. Further, because Taxpayer's failure to identify the swaps was inadvertent, the Interest Rate Hedge Agreements constitute hedging transactions within the meaning of § 1.1221-2(b). Accordingly, the amounts paid by Taxpayer to terminate the Fuel Supply Agreement, Fuel Transportation Agreement and Interest Rate Hedge Agreements are deductible expenses under § 162.

(4) In which taxable year may Taxpayer deduct the termination payments for the Fuel Supply Agreement, Fuel Transportation Agreement, and Interest Rate Hedge Agreements.

Section 461(a) provides generally that the amount of any deduction shall be taken for the taxable year which is the proper year under the method of accounting used in computing taxable income.

Section 461(h) 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.

Section 461(h)(2)(D) provides generally that in the case of liabilities other than those described in §§ 461(h)(2)(A), (B), and (C) economic performance occurs at the time determined under the regulations prescribed by the Secretary.

Section 1.461-1(a)(2) provides generally that under the accrual method of accounting, a liability is incurred and generally taken into account for federal income tax purposes, in the taxable 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 1.461-4(g)(1)(i) provides that in the case of liabilities described in paragraphs (g)(2) through (7) of this section, economic performance occurs when, and to the extent that, payment is made to the person to which the liability is owed.

Section 1.461-4(g)(1)(ii)(B) provides that payment to a particular person is accomplished if § 1.461-4(g)(1)(ii)(A) is satisfied and a cash basis taxpayer in the position of that person would be treated as having actually or constructively received the amount of the payment as gross income under the principles of § 451.

Section 1.461-4(g)(2) through (g)(6) set out specific liabilities for which payment is economic performance. In general, these liabilities include those arising under a workers compensation act or out of any tort, breach of contract, or violation of law, liabilities to pay rebates or refunds, liabilities to provide awards, prizes, or jackpots, liabilities arising out of the provision to the taxpayer of insurance, warranty or service contracts, and liabilities of a taxpayer to pay taxes.

Section 1.461-4(g)(7) provides that in the case of a taxpayer's liability for which economic performance rules are not provided elsewhere in this section or in any other regulation, revenue ruling or revenue procedure, economic performance occurs as the taxpayer makes payment in satisfaction of the liability to the person to whom the liability is owed.

On the date that the Fuel Supply Agreement, Fuel Transportation Agreement and the Interest Rate Hedge Agreements were terminated, Taxpayer's liability became fixed and the amount of each liability could be determined with reasonable accuracy under §1.461-1(a)(2). Further, Taxpayer's liability to compensate the other party to each of these terminated agreements constitutes a liability for which economic performance rules are not provided elsewhere in § 1.461-4 of the regulations, in any other regulation, revenue ruling, or revenue procedure. Thus, pursuant to § 1.461-4(g)(7), economic performance occurred when Taxpayer made the termination payment to the other party to each of these terminated agreements.

Based on the foregoing analysis, Taxpayer may deduct termination payments for the Fuel Supply Agreement, Fuel Transportation Agreement and Interest Rate Hedge Agreements in the taxable year in which the termination payment was paid with respect to each agreement.

(5) Whether Taxpayer's termination payments with respect to the Currency Hedge Agreements are ordinary losses in the year such Agreements were terminated.

Section 988 of the Code and the regulations thereunder govern the timing, amount, character, and source of foreign currency gain or loss with respect to notional principal contracts that are "section 988 transactions." A "section 988 transaction" includes entering into or acquiring a forward contract, futures contract, option or similar financial instrument. § 988(c)(1)(B)(iii). A "similar financial instrument" includes a notional principal contract if the payments to be made or received under the contract are determined with reference to a nonfunctional currency and the property to which the instrument relates is a nonfunctional currency. Treas. Reg. § 1.988-1(a)(2)(iii)(A) and (B)(1).

If a notional principal contract qualifies as a § 988 transaction, gain or loss on the contract is treated as foreign currency gain or loss under § 988(b)(3). Any such exchange gain or loss is treated as ordinary income or loss under § 988(a)(1)(A).

Under Taxpayer's Currency Hedge Agreements, which are structured as swaps, payments received by Taxpayer are determined with reference to the currency of Foreign Country Y, a nonfunctional currency of Taxpayer. Accordingly, the Currency Hedge Agreements are considered notional principal contracts under § 1.988-1(a)(2)(iii)(A) and (B)(1). As notional principal contracts, the Currency Hedge Agreements qualify as section 988 transactions. Treas. Reg. § 1.988-1(a)(2)(iii)(B)(1); see, e.g., Treas. Reg. § 1.988-2(e)(5), Ex. 1. Thus, termination payments made with respect to the Currency Hedge Agreements are considered foreign currency losses under § 988(b)(3) and are treated as ordinary losses under § 988(a)(1)(A).

Under § 1001(c), the termination payments made with respect to the Currency Hedge Agreements are recognized in the taxable year the agreements were terminated. The timing rules of § 1.446-3 and § 1.446-4 do not apply to the termination payments because the agreements were entered into prior to the effective dates of § 1.446-3 and § 1.446-4 (December 13, 1993 and October 1, 1994, respectively).

* * * * *

Based on Taxpayer's representations and the above analysis, we rule as follows:

(1) The termination of the PPA pursuant to the Agreement constitutes a "compulsory or involuntary conversion" of the PPA within the meaning of §§ 1033 and 1231.

(2) The amount of any gain (or loss) required to be recognized by Taxpayer in connection with the conversion of its PPA will be treated as a "§ 1231 gain" or "§ 1231 loss" in accordance with the provisions of § 1231.

(3) The amounts paid by Taxpayer to terminate the Fuel Supply Agreement, Fuel Transportation Agreement and Interest Rate Hedge Agreements are deductible under § 162.

(4) Taxpayer's payments to terminate the Fuel Supply Agreement, Fuel Transportation Agreement and Interest Rate Hedge Agreements are deductible in the taxable year in which the payments were paid.

(5) Taxpayer's termination payments with respect to the Currency Hedge Agreements are ordinary losses in the year such Agreements were terminated.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer(s) requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. A copy of this letter must be attached to any income tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

Associate Chief Counsel
(Income Tax & Accounting)

By: ______________________________
Kelly E. Alton
Senior Technician Reviewer
Branch 5

Enclosures (2):
6110 copy
copy of ruling