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**SOUTHWESTERN ELECTRIC POWER COMPANY'S RESPONSE TO COMMISSION
STAFF'S SEVENTEENTH REQUEST FOR INFORMATION**

Question Staff No. 17-3:

Please confirm that the Bradley M. Seltzer that provided rebuttal testimony in this proceeding is the same Bradley M. Seltzer shown as a contact related to the article titled "*But wait, there's more.*" – Rev. Proc. 2020-39 provides guidance on the proper treatment of excess deferred taxes, and other normalization issues" that was published on the Eversheds Sutherland website on August 17, 2020, and which states in part:

The IRS has issued a series of private letter rulings regarding the treatment of net operating loss carryforwards (NOLCs). Those rulings recognize that until the RPU's actually utilize the net operating loss, they have not received the interest-free loan from the government provided by accelerated depreciation. Virtually all of these rulings require the use of the "with and without" method to determine the portion of the NOLC that is attributable to accelerated depreciation and hence cannot be used to reduce the rate base of the utility. Rev. Proc. 2020-39 departs from this consistent guidance and authorizes the use of "any reasonable method...that does not clearly violate the normalization requirements."

Eversheds Sutherland Observation – Although it is true that the existing regulations do not prescribe a single method of addressing NOLCs, and the IRS is understandably reluctant to overstep its jurisdiction over regulatory issues consistent with the Tenth Amendment to the U.S. Constitution, the adoption of this flexible standard and uncertainty over whether a method "clearly" violates normalization introduces unnecessary potential future disputes (and a proliferation of private letter ruling requests) in an otherwise settled area.

Response Staff No. 17-3:

Confirmed. Please see Staff 17-3 Attachments 1 and 2 for complete copies of the referenced article and IRS Rev. Proc. 2020-39.

Prepared By: Bradley M. Seltzer

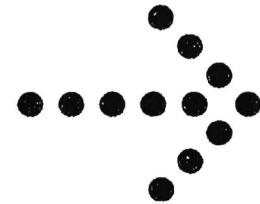
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"But wait, there's more." – Rev. Proc. 2020-39 provides guidance on the proper treatment of excess deferred taxes, and other normalization issues



On August 14, 2020, the Internal Revenue Service (IRS) issued Rev. Proc. 2020-39 to provide guidance on the proper treatment of excess deferred taxes under the normalization provisions of section 168(i)(9) of the Internal Revenue Code following the enactment of the Tax Cuts and Jobs Act (TCJA). After reviewing comments received in response to Notice 2019-33,¹ the IRS also addressed certain other normalization issues in Rev. Proc. 2020-39, in some ways helpful, in other ways, less so.

Background

The Revenue Procedure contains a concise explanation of the normalization rules and how excess deferred taxes are created. In order to take advantage of accelerated depreciation under section 168, a regulated public utility (RPU) must use a normalization method of accounting for ratemaking purposes. That method requires that if a RPU uses a different method of depreciation for tax purposes (i.e., accelerated depreciation), than it uses for ratemaking purposes (i.e., typically straight-line depreciation), it must make adjustments to a reserve to reflect the deferral of taxes, computed at statutory rates, resulting from the difference. This reserve is commonly referred to as the Accumulated Deferred Income Taxes (ADIT) reserve. Under Treas. Reg. Sec. 1.167(l)-1(h)(2) the reserve can only be reduced when and as regulatory depreciation exceeds tax depreciation, or upon the retirement of the subject asset or expiration of tax depreciation. When tax rates are reduced, however, as they were in the TCJA from 35% to 21%, the ADIT reflects deferred taxes collected at a 35% rate that will be paid when they become due at 21%.² This difference is denominated as excess deferred taxes, or in the nomenclature of the Revenue Procedure, "ETR."³ Section 13001(d)(1) of the TCJA essentially adopted the same approach prescribed by section 203(e) of the Tax Reform Act of 1986, regarding the proper treatment of the excess deferred taxes under the normalization rules.

Allowable Methodologies for Amortization of the Deferred Tax Reserves

The Revenue Procedure provides the following rules governing amortization of the excess deferred taxes:

- If the taxpayer has adequate vintage account data, it may not reduce the

Contacts

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed or the Eversheds Sutherland attorney with whom you regularly work.

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**"But wait, there's more." –
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continued

ETR more rapidly than under the Average Rate Assumption Method (ARAM).

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- If the taxpayer regularly computes regulatory depreciation using average life or composite rate methods, and therefore lacks the requisite vintage account data to utilize ARAM, it may use the "Alternative Method."⁴ Under this method the taxpayer uses the weighted average life or composite depreciation rate to reduce the ETR ratably over the remaining regulatory life of the property.
- Taxpayers that currently use ARAM must continue to use ARAM as they are presumed to have adequate vintage data.
- Taxpayers are not required to create or cure deficiencies in their vintage data if they do not currently have adequate data, but the current or prior use of the Alternative Method does not entitle the taxpayer to use the Alternative Method if they in fact have adequate vintage data.
- Taxpayers utilizing a composite method approved by FERC or another regulatory agency may use the Alternative Method.
- Utilities that commenced reversing the ETR in a manner inconsistent with the Revenue Procedure are not considered to be in violation of the normalization rules provided they prospectively correct the method "at the next available opportunity."

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- Amish M. Shah
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Eversheds Sutherland Observation – It would have been helpful for the Revenue Procedure to have clarified the meaning of "the next available opportunity." Presumably, RPUs do not need to initiate a rate proceeding to correct the reversal methodology. Similarly, RPUs presumably need not correct the method if they have a limited rate proceeding, e.g., addressing "true-ups" of estimated items such as purchased power adjustments.⁵ The most logical approach is to treat the next available opportunity as one in which the regulatory depreciation expense is an issue in the rate proceeding.

Other Issues

The IRS has issued a series of private letter rulings regarding the treatment of net operating loss carryforwards (NOLCs).⁶ Those rulings recognize that until the RPUs actually utilize the net operating loss, they have not received the interest-free loan from the government provided by accelerated depreciation. Virtually all of these rulings require the use of the "with and without" method to determine the portion of the NOLC that is attributable to accelerated depreciation and hence cannot be used to reduce the rate base of the utility. Rev. Proc. 2020-39 departs from this consistent guidance and authorizes the use of "any reasonable method... that does not clearly violate the normalization

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Eversheds Sutherland Observation – Although it is true that the existing regulations do not prescribe a single method for addressing NOLCs, and the IRS is understandably reluctant to overstep its jurisdiction over regulatory issues consistent with the Tenth Amendment to the U.S. Constitution, the adoption of this flexible standard and uncertainty over whether a method "clearly" violates normalization introduces unnecessary potential future disputes (and a proliferation of private letter ruling requests) in an otherwise settled area.

As noted above, the ETR mandates in the Tax Reform Act of 1986 and the TCJA have not been codified. Treasury Regulation Sec. 1.168(i)-3 addressed the treatment of the ETR arising under the former, but not the latter. Rev. Proc. 2020-39 cures this defect by allowing the TCJA ETR to be shared with ratepayers upon a retirement or disposition of public utility property.

¹ 2019-22 I.R.B. 1255

² We note that whether corporate tax rates will be increased (likely necessitating recalculation of the ETR) in the future remains an area of uncertainty.

³ Given that ETR is universally recognized as referring to the "Effective Tax Rate," it would have been preferable for the Revenue Procedure to refer to the excess tax reserve as EDIT (Excess Deferred Income Taxes).

⁴ Traditionally the Alternative Method has been commonly referred to as the "Reverse South Georgia" method.

⁵ See PLR 202010002. For more information on PLR 202010002, see our legal alert [here](#).

⁶ See, e.g., PLRs 201548017, 201519021, 201534001, 201438003, 201709008, and 202010002.

If you have any questions about this legal alert, please feel free to contact any of the attorneys listed under Related People/Contributors or the Eversheds Sutherland attorney with whom you regularly work

26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement;
determination of correct tax liability.
(Also: § 1.168(i)-3)

Rev. Proc. 2020-39

SECTION 1. PURPOSE

This revenue procedure provides guidance under § 168 of the Internal Revenue Code (Code) to clarify the normalization requirements following the corporate tax rate reduction provided in section 13001 of Public Law No. 115-97, 131 Stat. 2054 (2017), commonly referred to as the Tax Cuts and Jobs Act (TCJA). On May 28, 2019, the Internal Revenue Service published Notice 2019-33, 2019-22 I.R.B. 1255, requesting comments on issues arising in this area. This revenue procedure provides guidance on these issues.

SECTION 2. BACKGROUND

.01 In general, normalization is a system of accounting used by regulated public utilities to reconcile the tax treatment of accelerated depreciation of public utility assets with their regulatory treatment. The use of normalization is required for a utility to take advantage of the accelerated cost recovery system under § 168 of the Code for public utility property. Under normalization, a utility receives the tax benefit of accelerated

depreciation in the early years of an asset's regulatory useful life and passes that benefit through to ratepayers ratably over the regulatory useful life of the asset in the form of reduced rates.

.02 In order to use a normalization method of accounting, § 168(i)(9)(A)(i) requires a taxpayer, in computing its tax expense for establishing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account (regulated tax expense), to use a method of depreciation for property that is the same as, and a depreciation period for such property that is no shorter than, the method and period used to compute its depreciation expense for establishing its cost of service for ratemaking purposes. If the amount allowable as a deduction under § 168 differs from the amount that would be allowable as a deduction under § 167 of the Code using the method, period, first and last year convention, and salvage value used to compute regulated tax expense under § 168(i)(9)(A)(i), then, under § 168(i)(9)(A)(ii), the taxpayer must make adjustments to a reserve to reflect the deferral of taxes resulting from such difference. This reserve is referred to as the Accumulated Deferred Income Taxes (ADIT) reserve.

.03 Taxpayers calculate the amount of the adjustments to the ADIT reserve by reference to the corporate tax rate applicable in each year that the depreciation deduction allowable as a deduction under § 168 exceeds the amount calculated under § 168(i)(9)(A)(i) for the taxpayer's regulated tax expense.

.04 Section 1.167(l)-1(h)(2)(i) of the Income Tax Regulations provides that the taxpayer must credit this amount of deferred taxes to a reserve for deferred taxes, a depreciation reserve, or other reserve account. This regulation further provides that,

with respect to any account, the aggregate amount allocable to deferred tax and included in such reserve under § 167(l) “shall not be reduced except to reflect the amount for any taxable year by which Federal income taxes are greater by reason of the prior use of different methods of depreciation” under § 1.167(l)-1(h)(1)(i). That section notes that, additionally, the aggregate amount allocable to deferred taxes may be properly adjusted to reflect asset retirements or the expiration of the period for depreciation used for determining the allowance for depreciation under § 167(a). Consequently, the ADIT increases in each year the accelerated depreciation under § 168 exceeds the tax depreciation amount used for calculating the taxpayer’s regulated tax expense and the ADIT decreases in each year the accelerated depreciation under § 168 is less than the tax depreciation amount used for calculating the taxpayer’s regulated tax expense. These increases and decreases are measured by the differences in the two depreciation methods multiplied by the tax rate in effect for the year of the adjustment to the ADIT.

.05 The TCJA, enacted on December 22, 2017, generally reduced the corporate tax rate under § 11 of the Code from 35 percent to 21 percent for taxable years beginning after December 31, 2017. Section 13001(a) of the TCJA. Because of the reduction in rates, for property subject to depreciation in a taxable year beginning on or before December 31, 2017, and not yet fully depreciated in the first taxable year beginning after December 31, 2017, a portion of the ADIT reserve will reflect this reduction. For purposes of this revenue procedure, the portion of the ADIT reserve that reflects the difference in tax rates due to accelerated depreciation is referred to as the Excess Tax Reserve (ETR). The ETR represents the amount by which the ADIT reserve exceeds

the amount it would have contained had the reduction in rates been in effect for every year the property was subject to depreciation. That is, the ETR is the amount of accelerated depreciation-related taxes that have been collected from ratepayers but have not yet been paid by the utility and become excess due to the reduction in rates.

.06 Section 13001(d) of the TCJA includes accompanying but uncodified normalization requirements related to the reduction of the corporate tax rate. Section 13001(d)(1) provides that “[a] normalization method of accounting shall not be treated as being used with respect to any public utility property for purposes of [§§ 167 or 168] if the taxpayer, in computing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account, reduces the excess tax reserve more rapidly or to a greater extent than such reserve would be reduced under the average rate assumption method” (ARAM).

.07 Section 13001(d)(2) of the TCJA provides an alternative method for certain taxpayers. If, as of the first day of the taxable year that includes the date of enactment of the TCJA, the taxpayer was required by a regulatory agency to compute depreciation for public utility property on the basis of an average life or composite rate method, and the taxpayer's books and underlying records did not contain the vintage account data necessary to apply ARAM, the taxpayer will be treated as using a normalization method of accounting if, with respect to such jurisdiction, the taxpayer uses the alternative method for public utility property that is subject to the regulatory authority of that jurisdiction.

.08 Section 13001(d)(3)(C) of the TCJA defines the “alternative method” (AM) as the method in which the taxpayer computes the ETR on all public utility property included in

the plant account on the basis of the weighted average life or composite rate used to compute depreciation for regulatory purposes, and reduces the ETR ratably over the remaining regulatory life of the property.

SECTION 3. SCOPE

.01 In general. This revenue procedure applies to public utilities subject to normalization that have ETR resulting from the corporate tax rate reduction provided in section 13001 of the TCJA.

.02 Issues beyond the scope of this revenue procedure. This revenue procedure addresses only the effects of tax rate changes on timing differences related to accelerated depreciation. Any issues unrelated to the effects of tax rate changes on accelerated depreciation are beyond the scope of this revenue procedure. For example, the effects of tax rate changes on timing differences associated with unprotected plant or non-plant related items, are not addressed in this revenue procedure. The appropriate amortization or other ratemaking treatment of timing differences unrelated to accelerated depreciation, such as unprotected plant or non-plant related items, are to be determined by the regulator in a rate proceeding, consistent with the regulatory authority over the ratemaking treatment of all other elements of jurisdictional cost of service.

SECTION 4. APPLICATION

.01 Requirement to use ARAM or the AM.

(1) In General. Generally, under section 13001(d)(1) of the TCJA, taxpayers must use ARAM to calculate the reversal of their ETR if the taxpayer's regulatory books (the financial and tax information used by their regulator in setting rates which may include

but is not limited to materials submitted to public service commissions as well as any supporting materials) are based upon the vintage account data necessary to use ARAM. However, if the taxpayer's regulatory books are not based upon the vintage account data that is necessary for the ARAM, use of the ARAM is not required.

(2) Curing Vintage Account Data Deficiencies. A taxpayer whose regulatory books do not contain sufficient vintage account data to apply the ARAM is not required to use the ARAM. Determination of whether a taxpayer's regulatory books contain sufficient vintage account data necessary to use the ARAM is determined based on all the facts and circumstances. A taxpayer is not required to cure deficiencies in its regulatory books by the creation, re-creation, or restoration of books or records, including through the use of estimates, statistical sampling, or the accessing of data through the use of computer systems not currently in use for its financial processes. Deficiencies in data need not be cured, but taxpayers that have taken such actions to cure all deficiencies by the effective date of this revenue procedure are permitted to use ARAM. Lastly, a regulated utility that is currently using ARAM to reverse prior ETR is presumed to have sufficient vintage account data to use ARAM.

(3) Taxpayers Use of AM for Prior Periods. Taxpayers that do not meet the requirements to use the AM provided in the TCJA and described in this revenue procedure may not continue to use the AM simply because they have done so in the past.

(4) Composite Method. Under a composite method, the uniform system of accounts does not generally require a company to maintain vintage accounts for depreciation purposes; therefore, companies regulated by Federal Energy Regulatory

Commission (FERC) utilizing this method generally do not have the data necessary to utilize ARAM. Taxpayers may utilize AM whenever a composite method approved by FERC or another applicable regulatory agency is applied for depreciation purposes, and a taxpayer may rely on its cost of service rate filing to FERC as sufficient documentation that a composite method of depreciation has been used.

(5) Jurisdiction of Multiple Regulatory Bodies. In the interest of economy and efficiency, taxpayers under the jurisdiction of multiple regulatory bodies may use a single method, ARAM or the AM, provided that the regulatory bodies agree. For example, a utility that is under the regulatory jurisdiction of FERC, which uses a composite method of calculating depreciation, and a state regulatory body that does not use a composite method (and therefore would generally use the AM for FERC purposes but has the data necessary to use ARAM for state purposes) may, if approved by the state regulator, use the AM for state purposes as well.

(6) Transition Rules. Many utilities have already been required to adjust rates due to the TCJA. Utilities may correct any method of reversing ETR that is not in accord with this revenue procedure at the next available opportunity. The methods adopted prior to the publication of this revenue procedure that are not in accord with this revenue procedure are not considered to be a violation of the normalization rules if so corrected. This corrective action will require the utility to consult with its regulator and obtain its regulator's consent. Utilities are not in conflict with section 13001(d) of the TCJA if the utilities follow such a path to correct potential normalization violations prospectively. These rules extend to companies that may not have started the amortization of ETRs or may be re-deferring the amortization as they evaluate their records.

.02 Net operating loss carryforward (NOLC). Compliance with normalization requires a determination of the source of an NOLC so that rate base is not overstated in jurisdictions in which net deferred tax liabilities reduce rate base. While § 1.167(l)-1(h)(1)(iii) is the relevant general authority, there is not one single methodology provided for determination of the portion of an NOLC that is attributable to depreciation. Section 1.167(l)-1(h)(1)(iii) instead informs taxpayers that the amount and time of the deferral of tax attributable to depreciation when there is an NOLC should be taken into account in such “appropriate time and manner as is satisfactory to the district director.” Regulating commissions have expertise in this area, and any reasonable method for determining the portion of the NOLC attributable to depreciation should generally be respected provided such method does not clearly violate normalization requirements.

.03 Application of 2008 regulations (§ 1.168(i)-3). The rules in § 1.168(i)-3 of the Income Tax Regulations, adopted by T.D. 9387 (73 F.R. 14934, 14937) on March 20, 2008, apply only to section 203(e) of the Tax Reform Act of 1986. Generally, the IRS will apply § 1.168(i)-3 of the regulations as if that limitation date language is not present. Thus, the sharing of ETRs with customers continues to be permitted in most circumstances after a retirement or disposition and upon the sale of public utility property to another regulated utility as set forth in § 1.168(i)-3.

SECTION 5. EFFECT OF THIS REVENUE PROCEDURE ON EXISTING NORMALIZATION RULES

The TCJA ETR normalization requirements are part of the overall pre-existing deferred tax normalization rules, and this revenue procedure is intended to be consistent with those rules. This revenue procedure does not create an exception to

how the overall pre-existing deferred tax normalization rules would apply, except as noted.

SECTION 6. EFFECTIVE DATE

This revenue procedure is effective August 14, 2020.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Martha M. Garcia of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure contact Martha M. Garcia on 202-317-6853 (not a toll free call).