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Legal Alert: IRS Tells Utility Not To Count Its (Deferred Tax) Chickens Before They Hatch.

The affiliated group of which a taxpayer-utility was a wholly owned subsidiary filed tax returns on which it did not claim bonus depreciation since the availability of bonus depreciation had temporarily expired. Following the retroactive restoration of bonus depreciation,¹ the affiliated group filed amended tax returns claiming refunds attributable to the increased depreciation deductions. In PLR 201842001 (Oct. 19, 2018), the Internal Revenue ruled that “in calculating the amount of the [accumulated deferred income taxes] under Section 1.167(l)-1(h)(1)(iii)” that are used to reduce rate base, the reserve “should only include amounts of tax that are actually deferred and amounts of zero-cost capital that are actually received.” Thus, until the refunds were actually received, the deferred taxes attributable to the incremental depreciation deductions could not be used to reduce base.

Eversheds Sutherland Observation: PLR 201842001 is entirely consistent with prior rulings that provide that to the extent accelerated depreciation deductions contribute to a net operating loss, the deferred taxes related thereto may not be used to reduce rate base, consistent with the normalization rules, until the losses are realized. See, e.g., PLR 201709008 (normalization rules require that deferred taxes attributable to accelerated depreciation that are used to reduce rate base must be reduced by the deferred tax asset reflecting yet-unused net operating losses).

¹ P.L. 113-295 (Tax increase Prevention Act of 2014); P.L. 114-113 (Protecting Americans from Tax Hikes (PATH) Act of 2015).

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