

**Internal Revenue Service**

Department of the Treasury

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Washington, DC 20224

Person to Contact:

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Refer Reply To:  
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Date:  
**April 3, 2002**

**LEGEND:**

Authority 1 =

Authority 2 =

State =

\$a =

\$b =

\$c =

Year =

Date 1 =

Date 2 =

Dear \_\_\_\_\_ :

This is in response to a request submitted by Authority 1 to void the Form 8328 filed by Authority 1 on Date 2 and grant an extension of time pursuant to § 301.9100 of the Procedure and Administration Regulations to file Form 8328 Carryforward Election of Unused Private Activity Bond Volume Cap to make a carryforward election under §146(f) of the Internal Revenue Code (the "Code") for \$c in unused Year volume cap.

**Facts and Representations**

You make the following factual representations. Under State law, Authority 1 allocates certain of the State's volume cap and makes provisions to carryforward any of that volume cap that is not used by the end of the year. Authority 1 is also authorized under State law to issue private activity bonds on a conduit basis for certain types of qualified private activity bonds, not including student loan bonds.

On Date 1, Authority 1 adopted a resolution to carry forward \$a of the unused Year volume cap to finance student loans. Also on Date 1, Authority 1 allocated \$b of the \$a unused Year volume cap to Authority 2 to carryforward for the purpose of financing student loans. Authority 1 did not allocate any of the remaining \$c (\$a - \$b) in unused volume cap for Year.

On Date 2, Authority 1 timely filed a Form 8328 (Carryforward Election of Unused Private Activity Bond Volume Cap) to carry forward \$a in Year volume cap to finance student loans. Subsequently, Authority 1 received advice from bond counsel that its Form 8328 was improper. Prior to filing a request for an extension of time to file a Form 8328, the IRS had not discovered the failure of Authority 1 to timely file a proper Form 8328. The preparation and filing of the ruling request followed the advice from counsel without unreasonable delay.

### **Law and Analysis**

Except as otherwise provided, § 103(a) of the Code provides that gross income does not include interest on any state or local bond. Section 103(b) provides, in part, that § 103(a) shall not apply to any private activity bond that is not a qualified bond (within the meaning of § 141). Generally, under § 141(e) of the Code, a private activity bond is not a qualified bond unless the bond meets the volume cap requirements of § 146.

Section 146(a) provides that a private activity bond issued as part of an issue meets the volume cap requirements if the aggregate face amount of the private activity bonds issued pursuant to such issue, when added to the aggregate face amount of tax-exempt private activity bonds previously issued by the issuing authority during the calendar year, does not exceed such authority's volume cap for the calendar year.

Section 146(f)(1) provides that if an issuing authority's volume cap for any calendar year after 1985 exceeds the aggregate amount of tax-exempt private activity bonds issued during the calendar year (by the authority), the authority may elect to treat all (or any portion) of the excess as a carryforward for one or more carryforward purposes. Section 146(f)(2) requires the issuing authority to identify the purpose for which the carryforward is elected and to specify the portion of the carryforward which is to be used for that purpose. Under § 146(f)(4), any election (including any identification and specification contained therein), once made, shall be irrevocable.

The election is made by filing Form 8328 with the Internal Revenue Service Center, Ogden, UT 84201. Under Notice 89-12, 1989-1 C.B. 633, Form 8328 must be filed by the earlier of (1) February 15 of the calendar year following the year in which the excess amount arises, or (2) the date of issue of bonds issued pursuant to the carryforward election.

When a taxpayer makes an election that it is not entitled to make, the election is

invalid and the taxpayer is treated as if it had not made the election. See Mamula v. Commissioner, 346 F.2d 1016 (9th Cir. 1965); (taxpayer who elected method of reporting that was not available to taxpayer was not bound by election); Plumb v. Commissioner, 97 T.C. 632 (1991) (taxpayer who elected improper method of carrying over net operating losses was treated as not having made election).

Section 301.9100-1 of the Procedure and Administrative Regulation provides, in part, that the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulation, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin), or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements for automatic extensions in § 301.9100-2, must be made under the rules of § 301.9100-3. Requests for relief will be granted if the taxpayer provides evidence establishing to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, that the taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief under that section before the failure to make the regulatory election is discovered by the IRS.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability than if the election had been made timely (taking into account the time value of money).

Authority 1 had only \$c in unused and unallocated volume cap for Year; it had allocated the remaining unused volume cap, \$b, to Authority 2. Nevertheless, Authority 1 filed a Form 8328 to carryforward the entire \$a in unused Year volume cap. In addition, the Form 8328 elected to carryforward the \$a in volume cap to finance student loans, a purpose for which Authority 1 was not entitled to issue bonds under State law. Because Authority 1 made an election that it was not entitled to make, the election is void.

Before the IRS discovered the failure, Authority 1 filed a request for an extension of time to file a proper Form 8328 for Year. The interest of the government will not be harmed by granting an extension of time to file a proper Form 8328.

## **Conclusion**

Based on the facts and representations submitted, we conclude that the Form

8328 filed by Authority 1 on Date 2 is void. We further conclude that Authority 1 is granted an extension of time of 45 days from the date of this letter ruling to file a Form 8328 to carry forward \$c in unused Year volume cap.

The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification upon examination. Except as specifically ruled above, no opinion is expressed concerning this matter under any provision of the Code or the regulations thereunder, including §§ 103 and 146.

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. Pursuant to a Power of Attorney on file with this office, a copy of this letter is being sent to Authority 1's authorized representative(s).

Sincerely yours,  
Assistant Chief Counsel  
(Exempt Organizations/Employment Tax/  
Government Entities)

By: \_\_\_\_\_  
Rebecca L. Harrigal  
Chief, Tax Exempt Bonds Branch