

Internal Revenue Service

Department of the Treasury
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Date:
May 2, 2012

Legend

Issuer =

State =

Date 1 =

a =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Bonds =

b =

Dear :

This letter is in response to your request for an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to make the election under § 142(d)(1) of the Internal Revenue Code (the “Code”) to satisfy either the 20-50 test or the 40-60 test. You state in your ruling request that, if the extension is granted, you will file an amended Form 8038 (Information Return for Tax-Exempt Private Activity Bond Issues) on which you will elect to meet the 40-60 test of § 142(d)(1)(B).

Facts and Representations

You make the following factual representations. The Issuer is a constituted authority created for a public purpose pursuant to the laws of the State and governed by a body ultimately controlled by one or more political subdivisions of the State. The Issuer planned to finance the development by a private party (the “Developer”) of a residential rental project (the “Project”) by issuing bonds intended to be tax-exempt under § 142(a)(7) and loaning the proceeds to the Developer.

On Date 1, the State authority that allocates private activity bond volume cap among issuing authorities within the State (the “Allocating Authority”) allocated \$a in volume cap to the Issuer for the purpose of issuing tax-exempt bonds under § 142(a)(7). The resolution in which the Allocating Authority made the allocation indicated that over 40 percent of the residential units would be occupied by individuals whose income was 60 percent or less of the area median gross income, and that less than 20 percent of the residential units would be occupied by individuals whose income was 50 percent or less of the area median gross income. In a report dated Date 2, the Issuer’s staff summarized the Project and made certain recommendations to the Issuer. Like the Allocating Authority’s resolution, the report indicated that over 40 percent of the residential units would be occupied by individuals whose income was 60 percent or less of the area median gross income, and that less than 20 percent of the residential units would be occupied by individuals whose income was 50 percent or less of the area median gross income.

On Date 3 and Date 4, the Issuer and the Developer, respectively, executed an agreement (the “Agreement”) containing a covenant by the Developer that no less than 20 percent of the total number of completed units in the Project would be occupied by tenants whose income was 50 percent or less of the area median gross income. On Date 5, a date within three years of the date of this ruling, the Issuer issued the Bonds in the amount of \$b. In connection with this issuance, the Issuer filed Form 8038, on which it elected to meet the 20-50 test under § 142(d)(1)(A). Both the election of the 20-50 test on Form 8038 and the covenant to satisfy the 20-50 test in the Agreement were clerical errors of those drafting the Agreement and Form 8038 who confused the Bonds with another issue of bonds they were working on at the same time. The Issuer was unaware of these errors when it executed the Agreement and filed Form 8038. As of the date of the ruling request, the Project had not yet been placed in service.

Law and Analysis

Section 103(a) provides that, except as otherwise provided in § 103(b), 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), a private activity bond that is also an exempt facility bond is a qualified bond.

Under § 142(a), the term “exempt facility bond” includes any bond issued as part of an issue, if 95 percent or more of the net proceeds of the issue are to be used to provide qualified residential rental projects. Under § 142(d), to be a qualified residential rental project, a project for residential rental property must, at all times during a prescribed period, satisfy either the 20-50 test or the 40-60 test, whichever is elected by the issuer. A project meets the 20-50 test if 20 percent or more of the residential units in the project are occupied by individuals whose income is 50 percent or less of the area median gross income. A project meets the 40-60 test if 40 percent or more of the residential units in the project are occupied by individuals whose income is 60 percent or less of the area median gross income.

The issuer elects either the 20-50 test or the 40-60 test by checking the appropriate box on Form 8038 and filing the form with the Internal Revenue Service Center in Ogden, Utah. Under § 301.9100-7T(a)(4)(i) of the Temporary Procedure and Administration Regulations, the election is irrevocable.

Section 301.9100-1 of the Procedure and Administration Regulations provides, in part, that the Commissioner 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 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, such as this request, must be made under the rules of § 301.9100-3. Pursuant to § 301.9100-3(a), 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 a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief under § 301.9100-3 before the failure to make the regulatory election is discovered by the IRS. Section 301.9100-3(b)(3)(iii) provides, however, that the taxpayer has not acted in good faith if it used

hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

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). Here, for purposes of the election under § 142(d)(1)(B), the taxpayer is the Issuer, and the Issuer will have no tax liability regardless of when the election is made. Even if the bondholders were the taxpayers contemplated in this section, a timely election of the 40-60 test would not have resulted in a lower tax liability because the Issuer always intended the Project to comply with that test. Furthermore, the Project has not yet been placed in service and, therefore, cannot currently be in violation of the 40-60 test.

Also, § 301.9100-3(c)(1)(ii) provides, in part, that the interests of the Government are prejudiced if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under § 6501(a) before the taxpayer receives a ruling under § 301.9100-3. Here, because the Issuer will have no tax liability, the period of limitation on assessment of the Issuer is irrelevant. Even if the bondholders were the taxpayers contemplated in this section, the relevant period of limitation on assessment of a bondholder will not expire until three years from the date the bondholder files a return affected by the election. Because three years have not elapsed since the Bonds were issued, it is not currently possible that the period of limitations on assessment of a bondholder has closed on any tax year affected by the election.

Conclusion

Under the facts and circumstances of this case, we conclude that the Issuer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government. The Issuer is granted an extension of time of 45 days from the date of this letter ruling to make the election under § 142(d)(1) by filing an amended Form 8038 on which it elects to meet the 40-60 test under § 142(d)(1)(B).

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 requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

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

The rulings contained in this letter are 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 rulings, it is subject to verification on examination.

Sincerely,

Associate Chief Counsel
(Financial Institutions and Products)

By: _____
Timothy L. Jones
Senior Counsel
(Financial Institutions & Products)

cc: