

Part III – Administrative, Procedural, and Miscellaneous

Notice 2002-51

PURPOSE

The Treasury Department and the Internal Revenue Service have received inquiries regarding the application of section 142(a)(6) of the Internal Revenue Code to recycling facilities. As part of the Priority Guidance Plan for the period July 1, 2002 through June 30, 2003, Treasury and the IRS intend to undertake a guidance project to address the application of section 142(a)(6) to recycling facilities. Accordingly, Treasury and the IRS are soliciting public comment on the issue.

BACKGROUND

Generally, interest on a state or local bond is excluded from gross income under section 103. However, section 103(b) provides that the exclusion does not apply to a private activity bond unless the bond is a qualified bond. Section 141(e) defines “qualified bond” to include an exempt facility bond that meets certain requirements. Section 142(a) lists the categories of exempt facility bonds, which include bonds for solid waste disposal facilities under section 142(a)(6).

Section 142(a)(6) was added to the Code as part of the Tax Reform Act of 1986, P.L. 99-514; 100 Stat. 2606; 1986-3 C.B. (Vol. 1) 523. However, exempt activity financing for solid waste disposal facilities was not first introduced in the 1986 Act. Rather, it was also permitted under section 103(b)(4)(E) of the Internal Revenue Code of 1954. Guidance has been issued under section 103(b)(4)(E) that is applicable to section 142(a)(6). The Conference Report to the 1986 Act provides that “[t]he conference agreement allows exempt-facility bonds to be issued to finance solid waste disposal facilities, defined generally as under present law.” Conf. Rpt. 99-841 (Vol. II), at II-704; 1986-3 C.B. (Vol. 4) 704.

Section 1.103-8(f)(2)(ii)(a) of the regulations defines “solid waste disposal facilities” as any property or portion thereof used for the collection, storage, treatment, utilization, processing, or final disposal of solid waste. Section 1.103-8(f)(2)(ii)(b) provides that the term “solid waste” has the same meaning as in former section 203(4) of the Solid Waste Disposal Act (42 U.S.C. § 3252(4)), as quoted in the regulations, except that material will not qualify as solid waste unless, on the date of issue of the obligations issued to provide the facility to

dispose of the waste material, it is property that is useless, unused, unwanted, or discarded solid material which has no market or other value at the place where it is located. Thus, where any person is willing to purchase the property, at any price, the material is not waste. However, if any person is willing to remove the property at his own expense but is not willing to purchase it at any price, the material is waste.

Former section 203(4) of the Solid Waste Disposal Act, as quoted in § 1.103-8(f)(2)(ii)(b), provides that,

The term “solid waste” means garbage, refuse, and other discarded solid materials, including solid-waste materials resulting from industrial, commercial, and agricultural operations, and from community activities, but does not include solids or dissolved material in domestic sewage or other significant pollutants in water resources, such as silt, dissolved or suspended solids in industrial waste water effluents, dissolved materials in irrigation return flows or other common water pollutants.

Section 1.103-8(f)(2)(ii)(c) states that a facility that disposes of solid waste by reconstituting, converting, or otherwise recycling it into material that is not waste shall also qualify as a solid waste disposal facility if solid waste constitutes at least 65 percent, by weight or volume, of the total materials introduced into the recycling process. Such a recycling facility shall not fail to qualify as a solid waste disposal facility solely because it operates at a profit.

Section 17.1(a) of the Temporary regulations provides that, in the case of property that has both a solid waste disposal function and a function other than the disposal of solid waste, only the portion of the cost of the property allocable to the function of solid waste disposal is taken into account as an expenditure to provide solid waste disposal facilities. However, a facility that otherwise qualifies as a solid waste disposal facility will not be treated as having a function other than solid waste disposal merely because material or heat which has utility or value is recovered or results from the disposal process. Where materials or heat are recovered, the waste disposal function includes the processing of those materials or heat that occurs in order to put them into the form in which the materials or heat are in fact sold or used, but does not include further processing which converts the materials or heat into other products.

Section 17.1(c) of the Temporary regulations contains an example in which Company A proposed to build a recycling facility that would process discarded waste by separating out metals, glass, and similar materials. As separated, some of the items were commercially saleable. However, A did not intend to sell the metals and glass until the metals were further separated, sorted, sized and cleaned and the glass was pulverized. The metals and pulverized glass would then be sold to commercial users. The example

concludes that the waste disposal function includes such processing of the metals and glass, but does not include further processing.

The example further provides that the remaining waste was burned and the heat produced was used to make steam. Company B, which operated an adjacent generating facility, could use steam for power. B needed steam with certain characteristics and as a result, certain of A's equipment was more costly than it would have been to produce steam for some other uses. The example concludes that the disposal function includes the equipment actually used to put the heat into the form in which it was sold. If A constructed pipes to carry the steam to B's facility, the pipes would not be included in the solid waste disposal function. Similarly, if A installed generating equipment and used the steam to generate electricity, the disposal function would not include the generating equipment.

In Revenue Ruling 72-190, 1972-1 C.B. 29, bonds financed facilities leased to a private corporation. The facilities reconstituted discarded solid materials from a manufacturing process so that the materials could be reintroduced into a manufacturing process. The corporation had previously discarded the materials resulting from its manufacturing process because they could not be reintroduced into its production process or sold for use by someone else. Thus, at the time the facilities were constructed, the discarded materials were of no value to the corporation at the place where they were discarded. The ruling concludes that the facilities are solid waste disposal facilities.

In Revenue Ruling 75-184, 1975-1 C.B. 41, bonds financed facilities leased to a private person, P, that used the facilities to recycle used corrugated containers into corrugated paperboard. To provide the raw material needed for the operations, P entered into a ten-year contract with an unrelated corporation, M. M collected and sorted discarded corrugated containers from the refuse stream to meet its obligations under the contract with P, which included baling and loading for transportation. The price P paid to M consisted of a specified amount per ton for processing plus an additional specified amount per ton for the containers, F.O.B., at M's location. The ruling concludes that the containers were not solid waste because they had value at M's location and P was willing to purchase them at a stated price.

In Revenue Ruling 76-222, 1976-1 C.B. 26, bonds financed facilities leased to a private person, X, that used the facilities for collecting and processing garbage into fuel for subsequent sale to Y, a public utility. X received the garbage from garbage collectors at collection stations. X did not pay for the garbage; rather, it received a fee from the garbage collectors for the privilege of dumping their garbage. The garbage was then packed into containers for transportation by truck or train to X's processing station adjacent to Y's utility plant. At the processing station, the garbage was reduced to a small, uniform size and classified into noncombustible and combustible fractions.

Noncombustible fractions were sold to scrap dealers or placed in a landfill. The combustible fraction was fed to a surge bin from which it was blown into boilers at Y's utility plant. Y paid X a stipulated amount per ton for the combustible fractions based on their BTU value. The ruling concludes that the facilities, other than the equipment used to transport the fuel from the surge bin to the boilers, are solid waste disposal facilities.

In Revenue Ruling 80-197, 1980-2 C.B. 44, bonds financed facilities acquired by the taxpayer, a private beverage manufacturer. The taxpayer used the facilities to package beverages in reusable containers. State law prohibited the sale of beverages in non-returnable containers and required beverage purchasers to pay a deposit that was refunded on return of the beverage containers. The taxpayer determined that it was less costly to use reusable containers than it was to use new containers. The ruling notes that if a reusable container is not returned, but is discarded, it could potentially become solid waste. However, once the reusable container is returned to the taxpayer and the deposit is refunded to the retailer, the reusable container is not useless, unwanted, or discarded solid material. The ruling concludes that even though a market for used containers did not exist by virtue of the mandatory deposit, reusable containers had value to the taxpayer because reuse of these containers was less costly than the purchase of new containers, and thus the containers were not solid waste.

REQUEST FOR PUBLIC COMMENTS

Treasury and the IRS are soliciting public comments regarding the application of section 142(a)(6) to recycling facilities. Treasury and the IRS also invite comments on any other issues concerning the application of that Code provision.

Taxpayers may submit comments in writing to:

Internal Revenue Service
Attn: CC:CORP:R (Notice 2002-51, Room 5226)
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Alternatively, taxpayers may submit comments electronically at:

<http://www.irs.ustreas.gov/prod/cover.html> (the IRS Internet Site)

All comments should be received by October 21, 2002. The comments submitted will be available for public inspection and copying.

DRAFTING INFORMATION

The principal authors of this notice are Michael Brewer and Rebecca Harrigal of the Office of the Assistant Chief Counsel (CC:TEGE:EOEG). For further information regarding this notice contact Mr. Brewer on (202) 622-3980 (not a toll free call).