

Internal Revenue Service

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Department of the Treasury
Washington, DC 20224

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In Re:

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CC:TEGE:EOEG:TEB : PLR-122422-04

Date:

August 17, 2004

Legend

Issuer =

State =

Allocating =

Municipality =

Date 1 =

Date 2 =

Year =

a =

b =

c =

d =

Dear

This is in response to your ruling request on behalf of the Issuer for an extension of time pursuant to § 301.9100-3 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 of \$a in unused Year private activity bond volume cap.

Facts and Representations

The Issuer makes the following representations. The Issuer is a body politic and corporate of the State authorized under state law to issue bonds for the purpose of financing single and multi-family housing in the State. According to state law, the Allocating Authority may allocate private activity bond volume cap, and home rule authorities may assign all or part of their private activity bond volume cap, to the Issuer.

In Year, the Issuer requested Year private activity bond volume cap from the Allocating Authority for the purpose of issuing qualified mortgage single family and multi-family housing bonds. On Date 1, the Allocating Authority timely allocated \$b in volume cap to the Issuer and requested that the Issuer carry forward any amount of the \$b that the Issuer did not use in Year. At that time, the Issuer expected to need at least \$b (plus other volume cap already allocated to it) to finance single family housing.

Also in Year, the Issuer was assigned \$c in Year volume cap by Municipality, a home rule authority in the State. The resolution assigning the volume cap provides that the assigned volume cap must be used to finance affordable housing. Documentation surrounding the resolution indicates that the assignment was for a particular multi-family project.

When, on Date 2, the Issuer timely filed its Form 8328 to carry forward unused Year volume cap, it failed to include the \$b that it had been allocated by the Allocating Authority and most of the \$c, exactly \$d, that it had been assigned by Municipality. The Issuer excluded the \$b of the unused private activity bond volume cap because it did not realize that the Allocating Authority had approved its allocation request. The Allocating Authority's approval was sent to the Issuer, but because it was attached to another document the Issuer did not see the approval until after it had filed the Form 8328. The \$d was excluded due to a typographical error. In the aggregate, the Issuer had received \$a in Year volume cap that it did not include on its Form 8328.

When the Issuer discovered that the \$a had not been included in the Form 8328, it filed this letter ruling request. Concurrent with the filing of this request, the Issuer filed a new Form 8328 that includes the \$a in its Year unused volume cap carryforward. In its new Form 8328, the Issuer allocated the \$a in Year unused volume cap in the same manner it would have allocated the \$a had it been included in the Form 8328 that was filed on Date 2, that is, \$b was allocated to single family housing and \$d was allocated to multi-family housing. Prior to the Issuer's submission of this ruling request, the

Internal Revenue Service did not discover the Issuer's failure to include \$a in unused volume cap in the Form 8328 filed on Date 2.

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) 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 specify the portion of the carryforward which is to be used for that purpose. Section 146(f)(5) defines "carryforward purpose" to mean four different purposes, including issuing qualified residential rental project bonds and issuing qualified mortgage bonds or mortgage credit certificates. 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.

Section 301.9100-1 of the Procedure and Administration Regulations 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, such as this request, 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 generally a 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(b)(3)(iii) provides, however, that the taxpayer does not act in good faith if it uses 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).

In this case, the Issuer discovered its failure to carry forward \$a in Year volume cap before the IRS. Moreover, the Issuer did not use hindsight in requesting relief. Accordingly, we find that the Issuer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Conclusion

Under the facts and circumstances of this case, we conclude that the Issuer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government. Issuer is granted an extension of 45 days from the date of this letter to file Form 8328 to carry forward an additional \$a in Year unused volume cap, \$b of which is for qualified mortgage bonds or mortgage credit certificates and \$d of which is for qualified residential rental project bonds.

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, including whether any such aspect or item meets the requirements of §§ 25, 103, 142, 143, 146, and 147.

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. Pursuant to a Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

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 upon examination.

Sincerely yours,

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

By _____
Rebecca L. Harrigal
Chief, Tax Exempt Bonds Branch