

## Internal Revenue Service

Department of the Treasury

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### LEGEND:

State =

Year 1 =

Year 2 =

a =

b =

Dear

This is in response to a request submitted by State for an extension of time under § 301.9100-1 of the Procedure and Administrative Regulations to file an amended Form 8328 (Carryforward Election of Unused Private Activity Bond Volume Cap) in order to make a carryforward election under § 146(f) of the Internal Revenue Code.

### **Facts and Representations**

You make the following factual representations. On February 7 of Year 1, State timely filed a Form 8328 (Carryforward Election of Unused Private Activity Bond Volume Cap) with respect to \$a of unused private activity bond volume cap from the prior year. In the Form 8328, State specified that \$b of the \$a of unused volume cap was to be used for qualified enterprise zone facility bonds.

In January of the following year, Year 2, in connection with the preparation of the Form 8328 for Year 1, State determined that the Form 8328 it had previously filed in February of Year 1 should not have specified \$b of the \$a unused volume cap for qualified enterprise zone facility bonds because State could not issue bonds for that purpose.

The error was made because the State official who prepared and filed the Form 8328 on February 7 of Year 1 was under the mistaken impression that certain State law provisions gave the State the authority to issue qualified enterprise zone facility bonds. Had State been aware that it was not eligible to issue qualified enterprise zone facility bonds, it would have elected to have the entire \$b designated as a carryforward for a permitted carryforward purpose.

On February 20 of Year 2, State filed with the IRS a proposed amended Form

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8328, by which it amended the Form 8328 filed on February 7 of Year 1 to redesignate \$b as a carryforward to finance solid waste disposal facilities. Soon thereafter, State filed a request for a private letter ruling with the IRS. Before this letter ruling request was filed, the IRS had not discovered the invalid carryforward designation contained in the original Form 8328.

### **Law and Analysis**

Section 146(f) 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.

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.

The election must identify the purpose for which the carryforward is elected, and specify the amount to be carried forward for that purpose. I.R.C. § 146(f)(2). The election is irrevocable. I.R.C. § 146(f)(4).

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 (9<sup>th</sup> 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(c) of the Procedure and Administrative 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 regulations, 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 requested relief under that section

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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).

In the instant case, State elected to carryforward \$b of its unused volume cap for qualified enterprise zone facility bonds. This election was not available to State because State could not issue qualified enterprise zone facility bonds. Accordingly, we conclude that the election was invalid and State should be treated as if it had not made an election for the \$b of volume cap.

Moreover, we conclude that under the facts and circumstances of this case, State acted reasonably and in good faith, and that granting an extension of time under § 301.9100-1 to file an amended Form 8328 will not prejudice the interest of the government.

### **Conclusion**

Based on the facts and representations submitted, State is granted an extension of time to 45 days after the date of this letter to file the amended Form 8328, by which it amends the original Form 8328 to redesignate the \$b as a carryforward for the purpose of issuing qualified exempt facility bonds to finance solid waste disposal facilities.

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 on examination.

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(s) 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 State.

Sincerely yours,  
Assistant Chief Counsel  
(Exempt Organizations/Employment Tax/  
Government Entities)  
By: Rebecca L. Harrigal  
Chief, Tax Exempt Bond Branch