

INTERNAL REVENUE SERVICE  
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

October 01, 2004

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Third Party Contact:

Index (UIL) No.: 142.11-00

CASE-MIS No.: TAM-149382-02, CC:TEGE:EOEG:TEB

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No

Years Involved:

Date of Conference:

LEGEND:

Issuer =

Bonds =

ISSUE:

Whether spent fuel rods are solid waste within the meaning of § 142(a)(6) of the Internal Revenue Code of 1986 (the 1986 Code).

CONCLUSION:

Spent fuel rods are not solid waste.

## FACTS:

The Bonds are subject to the 1986 Code and are private activity bonds under § 141. The Bonds were sold as exempt facility, solid waste disposal facility bonds under § 142(a)(6). Proceeds of the Bonds were used to finance a facility that stores spent fuel rods. The spent fuel rods 1) have no value within the meaning of § 1.103-8(f)(2)(ii)(b) of the temporary Income Tax Regulations, 2) are solid, and 3) are radioactive waste. The only issue presented is whether under the 1986 Code solid waste includes radioactive waste.

## LAW AND ANALYSIS:

Section 103(a) provides, in part, that gross income does not include interest on any state or local government obligation. This exclusion does not apply to any private activity bond unless the bond is a qualified bond within the meaning of § 141.

Section 141(e) defines a qualified bond to include an “exempt facility bond.” Section 142(a) provides that the term “exempt facility bond” means any bond issued as part of an issue 95 percent or more of the net proceeds of which are used to provide certain enumerated exempt facilities. One type of exempt facility is a solid waste disposal facility.” § 142(a)(6). The Code does not define solid waste disposal facility.

The predecessor to § 142(a)(6) was § 103(b)(4)(E) of the Internal Revenue Code of 1954 (the 1954 Code). Section 103(b) of the 1954 Code generally provided that the exclusion from gross income for interest on a state or local bond did not apply to an industrial development bond. However, interest on an industrial development bond substantially all of the proceeds of which were used to finance certain enumerated activities was excludable from gross income. The relevant enumerated activity for our analysis was in § 103(b)(4)(E) of the 1954 Code, which listed “sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy or gas.” As with the 1986 Code, the 1954 Code did not define solid waste disposal facility. The legislative history to the 1954 Code provided that solid waste disposal means the collection, storage, treatment, utilization, processing, or final disposal of solid waste as defined in the Solid Waste Disposal Act, 42 U.S.C. § 3252(4).” Conf. Rep. No. 1533 at 810, 1968-2 C.B. 715, 810.

Temporary regulations were issued in 1972 that define solid waste disposal facility under § 103(b)(4)(E) of the 1954 Code. In particular, § 1.103-8(f)(2)(ii)(a) of the regulations provide that a solid waste disposal facility includes property that is used for the storage or disposal of solid waste. Under § 1.103-8(f)(2)(ii)(b),

The term “solid waste” shall have the same meaning as in section 203(4) of the Solid Waste Disposal Act (42 U.S.C. 3252(4)), except that for purposes of this paragraph, material will not qualify as solid waste unless, on the date of issue of the obligations issued to provide the facility to dispose of such waste material, it is property which 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 such property, at any price, such material is not waste. Where any person is willing to remove such property at his own expense but is not willing to purchase such property at any price, such material is waste. Section 203(4) of the Solid Waste Disposal Act provides that:

- (4) 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.

In 1986, as part of the Tax Reform Act of 1986, Congress reorganized and amended the tax-exempt bond provisions. In doing so, the conferees provided that “[t]he conferees intend that, to the extent not amended, all principles of present law continue to apply under the reorganized provisions.” Conf. Rep. No. 99-841 at II-686, 1986-3 (vol. 4) C.B. II 686.

As part of the reorganization, § 103(b)(4)(E) was recodified and moved to § 142(a)(5) (sewage facilities), § 142(a)(6) (solid waste disposal facilities), and § 142(a)(8) (facilities for the local furnishing of electric energy or gas). § 1301 et seq. of the Tax Reform Act of 1986, P.L. 99-514, 1986-3 (vol.1) C.B. 523. With respect to solid waste disposal facilities, the conference report to the Tax Reform Act of 1986 provides,

#### Present Law

Exempt-facility IDBs may be issued to finance solid waste disposal facilities. Qualified steam-generating or alcohol-producing facilities may also be financed under this exception.

#### House Bill

Exempt-facility bonds may be issued to finance solid waste disposal facilities, defined generally as under present law, but limited to directly related and essential facilities. The provision regarding qualified steam-generating or alcohol-producing facilities is repealed.

#### Senate Amendment

The Senate amendment retains present law.

#### Conference Agreement

The conference agreement allows exempt-facility bonds to be issued to finance solid waste disposal facilities, defined generally as under present law. Thus, as under present law, tax-exempt financing may be provided for the processing of solid waste or heat into usable form, but not, as an exempt facility bond, for further processing that converts the resulting materials or heat into other products.... The special rule for certain qualified steam generating or alcohol-producing facilities is repealed. The conferees wish to clarify that solid waste does not include most hazardous waste (including radioactive waste). Conf. Rep. No. 99-841 at 704, 1986-3 (vol. 4) C.B. II 704.

The Issuer frames the question presented as requiring answers to two issues, whether the definition of solid waste, without consideration to the Tax Reform Act of 1986, included radioactive waste and, if solid waste included radioactive waste, whether the 1986 Code changed that result. We disagree with the Issuer's assessment of the relevant issues. The Bonds are subject to the 1986 Code, not the 1954 Code so the state of the law prior to the Tax Reform Act of 1986 has no direct bearing on the issue that is the subject of this memorandum. We need to determine only whether Congress, in reenacting the provision for solid waste disposal facilities, intended for solid waste to exclude radioactive waste under the 1986 Code. Whether the 1954 Code took the same or a different position could be relevant only to help parse through an ambiguity in the 1986 Code and legislative history. Although the statute is not clear on this matter, the legislative history is clear.

As noted above, the legislative history to the 1986 Code provides that solid waste does not include most hazardous waste (including radioactive waste). We conclude that this phrase means that solid waste does not include any radioactive waste; any hazardous waste that is radioactive waste is not solid waste. Our conclusion is consistent with the General Explanation of the Tax Reform Act of 1986 (the 1986 Blue Book).<sup>1</sup>

The 1986 Blue Book, in describing the solid waste disposal provisions, provides,

Exempt-facility bonds may be issued under the Act to finance solid waste disposal facilities, defined generally as under the prior-law exception for exempt-activity IDBs for solid waste disposal facilities. Thus, tax-exempt financing may be provided for the processing of solid waste or heat into usable form, but not, with exempt-facility bond proceeds, for further processing that converts the

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<sup>1</sup> The 1986 Blue Book, while not legislative history, can be used to verify an interpretation of statute. See e.g., Federal Power Commission v. Memphis Light, Gas & Water Div., 411 U.S. 458, 472 (1973) (referring to the General Explanation of the Tax Reform Act of 1969 as compelling contemporary indication of the effect of the relevant law); Allen v. U.S., 173 F.3d 533, 538 (4<sup>th</sup> Cir. 1999) ("We recognize that the General Explanation [of the Tax Reform Act of 1986] is not controlling authority, but, in the absence of any clearer statement of legislative intent, this explanation of the statute... may nonetheless shed some light on the matter.").

resulting materials or heat into other products.... Congress did not intend the term solid waste to include hazardous waste, including any radioactive waste.

The special rules of prior law, allowing exempt-activity IDB financing for certain qualified steam-generating or alcohol-producing facilities, are repealed.

Joint Committee on Taxation Staff, General Explanation of the Tax Reform Act of 1986, 99th Cong. (1986) at 1169-1170. Connected to this statement is a footnote that provides, “Congress intended that this clarification provide no inference regarding the treatment of radioactive waste under prior law (i.e., for bonds issued before [the effective date of the 1986 Act]). See, 132 Cong. Rec. E3392, October 2, 1986 (statement of Mr. Rostenkowski).”<sup>2</sup>

The Issuer argues that we should not look to the 1986 legislative history because the statute is unambiguous—it does not explicitly exclude solid radioactive waste from the definition of solid waste. We disagree with this characterization of the statute. The statute does not provide a definition of solid waste. It uses the term “solid waste disposal facilities” which is not defined, and it provides no context in which to determine what Congress intended by the phrase “solid waste disposal facilities.” When there is a gap or ambiguity in a statute, we must look to congressional intent and agency interpretation. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843. As discussed above, the legislative history accompanying the statute addresses what Congress intended and indicates that solid waste does not include radioactive waste.

The Issuer also argues that we cannot look to the Blue Book because it mischaracterizes the Conference Report and that the Blue Book should be given little, if any, weight when, as here, the statute is unambiguous, and the Blue Book is inconsistent with the statute and the legislative history. Even if this is a correct statement of the authority of a Blue Book, as noted above, the statute is ambiguous. Moreover, with respect to the Blue Book’s statement on radioactive waste, the Blue Book and Conference Report can be read consistently. They both indicate that radioactive waste is not solid waste. It is the Issuer’s reading of the Conference Report (i.e., that solid waste includes some radioactive waste) that results in the inconsistency.

## CONCLUSION:

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2 The Statement of Congressman Rostenkowski referenced in the 1986 Blue Book provides, ...the statement of managers contains a statement indicating that, for purposes of issuing exempt-facility bonds to finance solid waste disposal facilities, the term solid waste does not include most hazardous waste – including radioactive waste. This statement is not intended to affect the definition of what constitutes solid waste under present law. It is only intended to clarify the definition of solid waste for bonds issued after [the effective date of the 1986 Act], which are not covered by any transitional exceptions to the exempt-facility bond provisions contained in the conference agreement. (Statement of Chairman Rostenkowski, 99 Cong. 2nd sess. 132 Cong. Rec. E 3392).

Radioactive waste is not solid waste and, thus, spent fuel rods are not solid waste under § 142(a)(6) of the 1986 Code.

CAVEATS:

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.