



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: Internal Revenue Service National Office Field Service
Advice

This Field Service Advice responds to your memorandum dated July 29, 1998. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Entity =
Year 1 =
Date 1 =
Date 2 =
Underwriter =
Bank =
Agent =
m =
n =
p =
s =
t =
x =
y =

ISSUE(S):

1. Whether Entity issued registration-required obligations within the meaning of I.R.C. § 163(f)(2)(A).
2. If Entity issued registration-required obligations and did not satisfy the requirements of section 163(f), is Entity liable for the excise tax imposed pursuant to section 4701?

CONCLUSION:

1. Given the facts that we have received, we conclude that Entity did not issue registration-required obligations because the debt obligations were issued with maturities of less than one year. See section 163(f)(2)(A)(iii).
2. Given our conclusion with respect to Issue 1, we further conclude that Entity is not liable for the excise tax imposed pursuant to section 4701.

FACTS:

In Year 1, Entity commenced a commercial paper program, which was underwritten by Underwriter. Entity arranged a liquidity facility with Bank to support the program during periods of market disruption. Entity also selected Agent to be the program's issuing and paying agent. The commercial paper received an x rating from Standard & Poor's and a y rating from Moody's.

The program involved the issuance of short-term paper in bearer form. All of the paper issued pursuant to the program had a maturity significantly less than one year. Entity's paper generally had a n-day maturity. However, Entity constantly rolled over the paper. Entity approved the issuance of \$m worth of paper through the program, but never issued more than \$p. Entity used the proceeds from the sale of commercial paper to fund the development of several real estate ventures. There is no indication that Entity issued its short-term commercial paper with the intention of avoiding tax.

From Date 1 through Date 2, Entity issued the commercial paper to s investors. The list of investors included commercial banks and other financial institutions, governmental entities, retirement funds and corporations. The list of investors included only United States entities, and the interest on the paper was payable within the United States.

The examining agents propose to assert an excise tax pursuant to section 4701(a) on the grounds that the debt obligations issued through the commercial paper program are registration-required obligations which were not issued in registered form.

LAW AND ANALYSIS

Pursuant to section 4701(a), an excise tax is imposed on any person that issues registration-required obligations which are not in registered form. Thus, the threshold issue is whether the obligations issued pursuant to the commercial paper program constitute registration-required obligations. Section 4701(b) refers to section 163(f) for the definition of the term “registration-required obligations.”

In general, section 163(f)(2) defines the term “registration-required obligation” to mean any debt obligation other than an obligation which (1) is issued by a natural person, (2) is not of a type offered to the public, (3) has a maturity (at issue) of not more than one year, or (4) is designed to be sold only to a person who is not a United States person with the payment of interest payable only outside the United States.

Here, elements (1), (2), and (4) are answered in the negative. That is to say, Entity is not a natural person, the debt obligations were offered to the public, and the sale of the commercial paper was sold to United States persons.¹ Accordingly, the only issue that we must consider is whether the debt obligations had a maturity (at issue) of more than one year. If the facts show that the debt obligations had a maturity of one year or less, then the obligations are not registration-required obligations.

The facts as developed indicate that the debt obligations issued pursuant to the short-term commercial paper program possessed maturities that were significantly less than one year. Given this information, we conclude that the debt obligations were not registration-required obligations within the meaning of section 163(f)(2)(A). Accordingly, Entity is not liable for the section 4701 excise tax.

The examining agents and District Counsel contend that although the debt obligations specified maturities of less than one year, it is appropriate to consider Entity’s intent at the time it issued the commercial paper to determine the length of maturity. Based on the facts, the examiners and District Counsel conclude that Entity intended to issue debt obligations with maturities in excess of one year. The field bases its conclusion on the following grounds. First, the short-

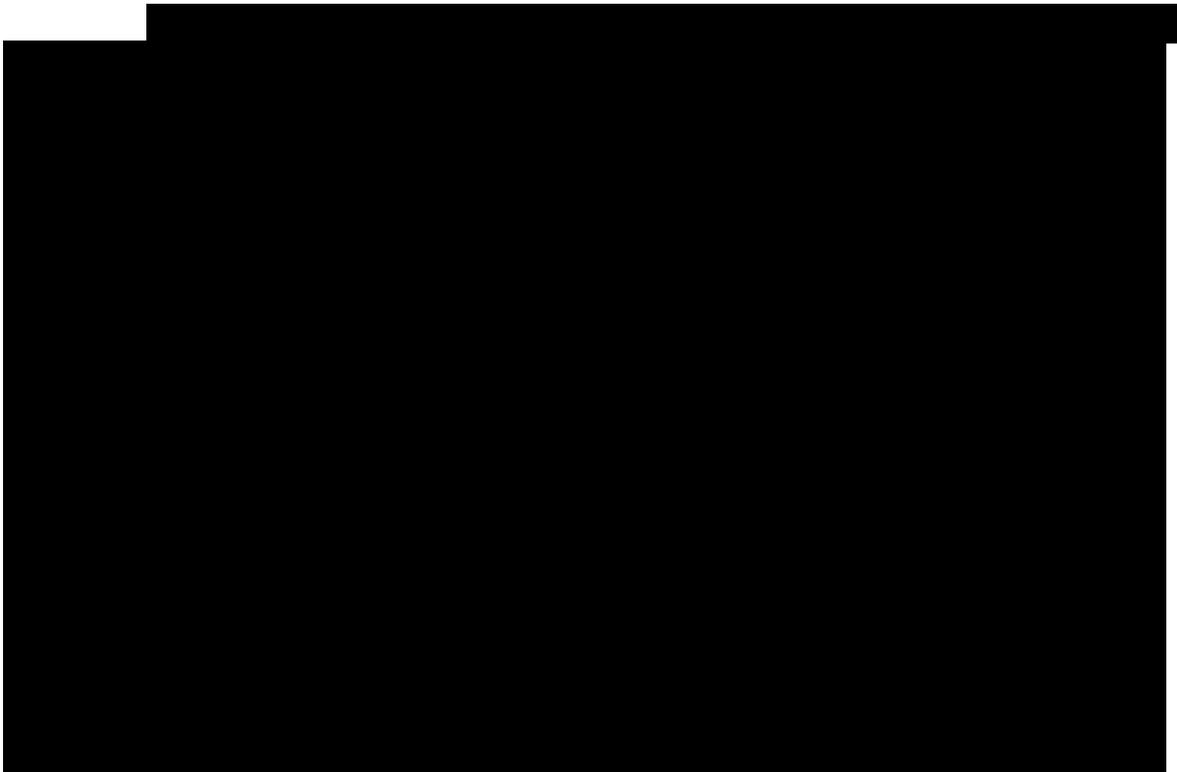
¹ We agree with your analysis of elements (1), (2), and (4) and thus will not reiterate that discussion here.

term paper program was instituted to fund long-term real estate development projects. Second, Entity established a practice of continually rolling over the commercial paper.

We respectfully disagree with the field's conclusion. Our research has failed to produce any authority in the Code, legislative history, Treasury Regulations, or case law that would support the implementation of an "intent" standard when construing section 163(f)(2)(A)(iii). The statute is clear on its face that a registration-required obligation does not include debt obligations with maturities of one year or less. Neither the language of the statute nor the legislative history of section 163(f)(2)(A)(iii) leave room to incorporate such an "intent" standard.

Moreover, even assuming a legal basis exists to consider Entity's intent, the economic climate of the early 1 would support Entity's position that it intended to issue short-term commercial paper to take advantage of falling interest rates. Although Entity could have achieved the same result by issuing floating rate debt, the use of short-term commercial paper provided a measure of flexibility to Entity to lock in a fixed rate when it deemed such action reasonable and appropriate.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:





If you have any further questions, please call (202) 622-7870.

DEBORAH A. BUTLER

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