

Rev. Proc. 90-11, 1990-1 C.B. 469 — Innocent Failure to Pay Rebate (ARB)

Section 1. Purpose

This revenue procedure provides issuers of state or local bonds described in section 103(a) of the Internal Revenue Code with guidance for filing (1) a request for an extension of time to pay a correction amount of arbitrage rebate, (2) an explanation of an innocent failure to meet a requirement for payment of arbitrage rebate, or (3) a request for a ruling regarding a failure (other than an innocent failure or one that is so treated) to meet a requirement for payment of arbitrage rebate.

Sec. 2. Background

.01 Section 103 of the Code provides, in general, that interest on any state or local bond is tax-exempt. Interest on an arbitrage bond within the meaning of section 148, however, is not tax-exempt. Section 103(b)(2).

.02 Section 148(f) of the Code generally provides that a bond that is part of an issue shall be treated as an arbitrage bond unless the issuer of the bond rebates to the United States arbitrage profits on nonpurpose investments allocable to the issue. Innocent failure and certain other failures to meet this requirement, however, are disregarded if the issuer takes certain actions, including payment of the correction amount. Section 1.148-1T(c) of the temporary Income Tax Regulations.

.03 Section 148(f)(3) of the Code provides that the arbitrage rebate is paid in installments. The rebate installments are generally due 60 days after the last day of the fifth bond year and each succeeding fifth bond year. The final rebate is generally due 60 days after the last bond that is part of the issue is discharged. In no case, however, is any rebate installment or final rebate due until January 16, 1990. Section 1.148-1T(b)(3) of the temporary regulations.

.04 Section 1.148-1T(b)(3)(v) of the temporary regulations provides that a rebate installment, final rebate, or correction amount is paid when filed with the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255. The payment must be accompanied by Form 8038-T.

.05 Section 1.148-1T(c)(1)(i) of the temporary regulations provides that an innocent failure to meet a rebate requirement may be corrected by payment of the correction amount. If the correction amount is \$50,000 or more, it must be paid no more than 60 days after the later of the date the failure first occurred or the date it was discovered. If the correction amount is less than \$50,000, it must be paid no more than 180 days after the later of those two dates. The Commissioner may extend these times if the correction amount is less than \$50,000 or if the issuer files a request for extension before the expiration of such times. See section 3 of this revenue procedure for the procedures to request an extension of time.

.06 Section 1.148-1T(c)(2) of the temporary regulations provides the rules for computing the correction amount. The correction amount may be described generally as the sum of (1) the amount not paid when required, and (2) the amount that would have been earned if the preceding amount had been invested for the period of delay at the rate of interest for a United States Treasury obligation—Time Deposit State and Local Government Series with a term equal to such period. In the case of a rebate installment, however, these earnings are generally computed at a rate no less than the yield on the issue of bonds for which the rebate is payable.

.07 Section 1.148-1T(c)(1)(ii)(A) of the temporary regulations provides that the factors to be taken into account in determining whether a failure is innocent include the size of the correction amount, the size of the issue, the sophistication of the issuer (or ultimate obligor), the steps taken to comply with the requirements, the nature of the failure, and the length of the delay.

.08 Section 1.148-1T(c)(1)(ii)(B) of the temporary regulations provides that, if the correction amount is \$50,000 or more, a failure cannot be treated as innocent unless the correction amount is accompanied by a brief explanation of the failure and the basis for concluding that the failure is innocent. An issuer need not explain an innocent failure requiring payment of a correction amount of less than \$50,000. See section 4 of this revenue procedure for the procedures for filing an explanation of an innocent failure.

.09 Under section 1.148-1T(c)(1)(ii)(C) of the temporary regulations, a failure is treated as innocent if:

- (1) The correction amount is paid no later than the date specified in section 2.05 of this revenue procedure;
- (2) In the case of a correction amount that is \$50,000 or more, the brief explanation described in section 2.08 of this revenue procedure is reasonably accurate; and
- (3) The Commissioner does not notify the issuer within 90 days after receipt of the correction amount that section 1.148-1T(c)(1)(ii)(C) does not apply.

.10 If the Service determines that section 1.148-1T(c)(1)(ii)(C) of the temporary regulations does not apply, the Service generally will proceed to determine whether the failure is otherwise treated as an innocent failure and will inform the issuers of both determinations within 90 days of the receipt of the correction amount.

.11 If the Service determines that section 1.148-1T(c)(1)(ii)(C) of the temporary regulations does apply, the Service will nevertheless inform the issuer that the failure is innocent, but only if the correction amount exceeds \$50,000. The issuer will be so informed within 90 days of the receipt of the correction amount.

.12 Even if the failure to meet a rebate requirement is not innocent or not so treated, the failure may be disregarded under section 1.148-1T-(c)(3) of the temporary regulations if:

- (1) The Commissioner determines that the failure is not due to willful neglect; and
- (2) The issuer pays to the United States no later than the date specified by the Commissioner in such determination—
 - (a) The correction amount; and
 - (b) A penalty equal to the sum of—
 - (i) 50 percent of the amount of the rebate not paid when required (100 percent if any bond that is part of the issue is a private activity bond other than a qualified 501(c)(3) bond); and
 - (ii) An amount computed under the rules of sections 6621(a)(2) and 6622(a) of the Code with respect to the rebate not paid when required computed from the date the rebate was required to be paid to the payment date.

.13 Pursuant to section 1.148-1T-(c)(3) of the temporary regulations, the Commissioner may waive all or any portion of the penalty described in section 2.12 of this revenue procedure. See section 5 of this revenue procedure for the procedures to request a waiver of the penalty.

Sec. 3. Procedures for Requesting Extensions of Time

.01 Scope. This section applies to issuers that need extensions of the time limits described in section 2.05 of this revenue procedure.

.02 Procedures. Issuers of state or local bonds that are requesting an extension of time as described in section 2.05 of this revenue procedure must:

- (1) Prepare a request with the typed or printed heading “This Request For Extension Is Submitted Under Section 3 of Rev. Proc. 90-11”;
- (2) Set forth in the request—
 - (a) the name of the issuer,
 - (b) the name of the issue with respect to which the extension is requested,
 - (c) the CUSIP number for the bond with the latest maturity for which there is a CUSIP number,
 - (d) the date on which the rebate installment or final rebate is or was due, the date the failure first occurred, the date it was discovered, and the date to which the extension is requested (that is, the date the correction amount will be paid), and
 - (e) a brief explanation of the reasons why the rebate requirement was not timely met and a statement whether the bond issue in question is under examination by the Service;
- (3) Include in the request a copy of the Form 8038, 8038-G, or 8038-GC filed with respect to the issue (if such form was required to be filed), but not a copy of any of the bond documents;
- (4) Include in the request the following declaration signed by an authorized official of the requesting issuer or obligor with personal knowledge of the facts: “Under penalties of perjury, I declare that I have examined this request, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.”; and

(5) Mail the request to the Internal Revenue Service Center, Statistics of Income Unit, P:DA:Unit F-SO1, Stop #335, Philadelphia, Pennsylvania 19255.

.03 Request By Obligor. An obligor on a purpose investment may make the request described in this section if the issuer has delegated to the obligor the authority and responsibility for compliance with section 148(f) of the Code.

.04 Fee. There is no fee for a request made pursuant to this section.

Sec. 4. Procedures for Filing an Explanation of an Innocent Failure

.01 Scope. This section applies to issuers that must file a statement of explanation described in section 2.08 of this revenue procedure.

.02 Procedures. When paying the correction amount, issuers of state or local bonds must:

(1) Attach a statement to the Form 8038-T that—

(a) explains the failure to meet the reusable requirement and the basis for concluding that the failure is innocent,

(b) discusses the factors set forth in section 2.07 of this revenue procedure and any other factors the issuer believes are relevant,

(c) includes any letters from the Philadelphia Service Center regarding extensions of time to file described in section 2.05, and

(d) specifies whether the bond issue in question is under examination by the Service (Copies of the bond documents should not be submitted with the statement.);

(2) Include in the explanation the following declaration signed by an authorized official of the requesting issuer or obligor with personal knowledge of the facts: “Under penalties of perjury, I declare that I have examined this explanation, including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete”; and

(3) Mail the correction amount, Form 8038-T, and explanation to the Internal Revenue Service Center, Statistics of Income Unit, P:DA:Unit F-SOI, Stop #335, Philadelphia, Pennsylvania 19255.

.03 Explanation By Obligor. An obligor on a purpose investment may file the explanation described in this section if the issuer has delegated to the obligor the authority and responsibility for compliance with section 148(f) of the Code.

.04 Fee. There is no fee for filing an explanation of a failure to meet a rebate requirement pursuant to this section.

Sec. 5. Procedures for Requesting a Waiver of Penalty From the National Office

.01 Scope. This section applies if an issuer of state or local bonds (or obligor on a purpose investment) has been informed by the Philadelphia Service Center that a failure to meet a rebate requirement is not innocent. The issuer (and, if desired, the obligor on the purpose investment) may then request a ruling from the National Office of the Internal Revenue Service—

(1) Holding that the failure to meet a rebate requirement was not due to willful neglect, and

(2) Waiving all or a portion of the penalty described in section 2.12 of this revenue procedure.

.02 Procedures. The request for a ruling must comply with the requirements of Rev. Proc. 90-1, page 356, this Bulletin, and Rev. Proc. 88-33, 1988-1 C.B. 835 (or their successors). The materials accompanying the request for ruling must include the letter from the Philadelphia Service Center concluding that the issuer's failure to meet a rebate requirement is not innocent.

Sec. 6. Effective Dates

This revenue procedure is effective with respect to any request relating to rebate installments, or final rebates, that are due on or after January 16, 1990.