

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Director, Tax-exempt Bonds
(Tax Exempt & Government Entities)

from: Associate Chief Counsel
(Financial Institutions & Products)

subject: Tribal Economic Development Bonds Under § 7871(f)

This memorandum addresses how to determine whether a project financed with tribal economic development bonds (“Tribal Economic Development Bonds”) in Oklahoma is within the Indian tribal government’s reservation for purposes of § 7871(f)(3) of the Internal Revenue Code. This advice may not be used or cited as precedent.

ISSUE

Will a project financed with Tribal Economic Development Bonds that is located on land described in Notice 98-45 be in an Indian reservation for purposes of § 7871(f)(3)?

CONCLUSION

A project financed with Tribal Economic Development Bonds that is located on land in Oklahoma that is described in Notice 98-45 will be deemed to be in the Indian tribal government’s reservation for purposes of § 7871(f)(3).

FACTS

An Indian tribal government (the “Tribe”) applied for and received an allocation under § 7871(f)(1) to issue Tribal Economic Developments for a project located in Oklahoma. The project is located on land identified in Notice 98-45, 1998-35 IRB 7, 1998-2 CB 257 as meeting the definition of “former Indian reservations in Oklahoma” for purposes of § 168(j)(6). The Tribe intends, pursuant to such allocation, to issue bonds (the “Bonds”) and to designate the Bonds as Tribal Economic Development Bonds. Interest on the Bonds would be exempt from tax under § 103 if issued by a State or local

government. The amount of the Bonds would not exceed the amount of the allocation received. Proceeds of the Bonds will not be used for any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming. The Bonds will otherwise satisfy all of the relevant requirements under § 103 to be treated as tax-exempt bonds.

LAW AND ANALYSIS

Section 103(a) provides that except as provided in § 103(b), gross income does not include interest on any State or local bonds. Section 103(b) provides that § 103(a) does not apply to any private activity bond which is not a qualified bond, any arbitrage bond and any bond which does not meet the applicable requirements of § 149. Section 103(c)(1) defines the term “State or local bond” as an obligation of a State or political subdivision thereof. Section 103(c)(2) defines the term State to include the District of Columbia and any possession of the United States.

Section 7871(a)(4) provides that, subject to § 7871(c), an Indian tribal government is to be treated as a State for purpose of § 103 (relating to State and local bonds). Section 7871(c)(1) provides generally that, except for obligations for certain manufacturing facilities described in § 7871(c)(3), § 103(a) shall apply to any obligation issued by an Indian tribal government (or subdivision thereof) only if such obligation is part of an issue substantially all of the proceeds of which are to be used in the exercise of any essential governmental function. Section 7871(e) provides that for purposes of § 7871 the term “essential governmental function” shall not include any function which is not customarily performed by State and local governments with general taxing power.

Section 1402 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009)(the “Act”), added new § 7871(f) to the Code providing for the authority to issue Tribal Economic Development Bonds. Section 7871(f)(1) provides that the Treasury Department shall allocate the \$2 billion national volume cap for Tribal Economic Development Bonds among the Indian tribal governments in such manner as the Treasury Department, in consultation with the Secretary of the Interior, determines appropriate. Section 7871(f)(2)(A) provides that notwithstanding the provisions of § 7871(c), Tribal Economic Development Bonds are treated for purposes of the Code as if they were issued by a State. Sections 7871(f)(2)(B) and (C) provide that an Indian tribal government issuing a Tribal Economic Development Bond shall be treated as a State for purposes of § 141 and that the volume cap requirement of § 146 does not apply.

Section 7871(f)(3)(A) defines a Tribal Economic Development Bond generally to mean any bond issued by an Indian tribal government the interest on which would be exempt from tax under § 103 if issued by a State or local government, and which is designated by the Indian tribal government as a Tribal Economic Development Bond for purposes of § 7871(f).

Section 7871(f)(3)(B) further provides that the term Tribal Economic Development Bond shall not include any bond issued as part of an issue if any portion of the proceeds of such issue are used to finance: (1) any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming, or (2) any facility located outside the Indian reservation (as defined in § 168(j)(6)).

Section 168(j)(6) provides that the term “Indian reservation” means a reservation as defined in section 3(d) of the Indian Financing Act of 1974, 25 U.S.C. § 1452(d), or section 4(10) of the Indian Child Welfare Act of 1978, 25 U.S.C. § 1903(10).

Section 3(d) of the Indian Financing Act of 1974 defines reservation to include “former Indian reservations in Oklahoma”. Section 168(j)(6) states that section 3(d) shall be applied by treating the term “former Indian reservations in Oklahoma” as including only lands which are within the jurisdictional area of an Oklahoma Indian tribe (as determined by the Secretary of the Interior) and are recognized by such Secretary as eligible for trust land status under 25 CFR Part 151 (as in effect on the date of the enactment of this sentence).

Notice 98-45, 1998-35 I.R.B. 7, 1998-2 C.B. 257, is relevant to the analysis because it defines the term “former Indian reservations in Oklahoma” for purposes of § 168(j)(6). Notice 98-45 states that the Secretary of the Interior has determined that, for purposes of § 168(j)(6), lands that are within the jurisdictional area of an Oklahoma Indian tribe are those lands within the boundaries of the last treaties, Executive Orders, federal agreements, federal statutes, and Secretarial Orders with the Oklahoma tribes. The Secretary of the Interior also has determined that any lands within the boundaries of the last treaties, Executive Orders, federal agreements, federal statutes, and Secretarial Orders with the Oklahoma tribes are lands eligible for trust land status under 35 CFR Part 151.

Based upon the facts, a project financed with Tribal Economic Development Bonds that is located on land that fits within the definition of “former Indian reservation in Oklahoma” as set forth in Notice 98-45 will be deemed to be within the Indian tribal government’s reservation for purposes of § 7871(f)(3).

Please call Timothy L. Jones or Vicky Tsilas at (202) 622-3980 if you have any further questions.