



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: Deputy Area Counsel (TEGE) Pacific Coast/Central
Mountain Area

FROM: Mary Oppenheimer
Assistant Chief Counsel CC:TEGE:EOEG

SUBJECT: , \TL-N-4478-01

This Chief Counsel Advice responds to your memorandum dated September 6, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Issuer =
Company =
Bonds =
Facility =
Date 1 =
Metal =
Waste Material =

ISSUES

1. Was the bond-financed facility a “qualified hazardous waste facility” as defined in § 142(a)(10) of the Internal Revenue Code?

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2. Can a facility, which processes solid hazardous waste, qualify as a “solid waste disposal facility” as defined in § 142(a)(6)?
3. Did the conduit borrower spend bond proceeds on a qualified exempt facility pursuant to § 142(a)?

CONCLUSIONS

1. The Facility is not a “qualified hazardous waste facility” within the meaning of § 142(a)(10).
2. A solid hazardous waste treatment facility can qualify as a solid waste disposal facility within the meaning of § 142(a)(6).
3. Assuming the requirements under § 142(a) not specifically addressed in this Field Service Advice are met, the Facility is an exempt solid waste disposal facility within the meaning of § 142(a)(6).

FACTS

The Company manufactures Metal in a process that produces Waste Material that must be disposed of. The United States Environmental Protection Agency has designated the Waste Material as hazardous waste. The Waste Material is solid; it is not liquid, gaseous, or radioactive material. The Waste Material has no market value.

The Issuer issued the Bonds on Date 1, and loaned the proceeds to the Company to finance the acquisition, construction, and equipping of the Facility. The Bonds were issued as solid waste facility bonds under § 142(a)(6) of the Internal Revenue Code of 1986.

The Facility was built and equipped and is used for the transportation, treatment, and storage of the Waste Material from the Company’s various Metal production facilities around the United States. The treatment produces a hazardous powdery residue that is placed in a landfill intended for hazardous material disposal.

LAW AND ANALYSIS

Generally, interest on a private activity bond is not excludable from gross income under § 103(a) unless the bond is a qualified bond. Section 141(e) provides that a qualified bond includes any private activity bond that is 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 exempt facilities. Section 142(a)(6) describes

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“solid waste disposal facilities” as exempt facilities. Section 142(a)(10) describes “qualified hazardous waste facilities” as exempt facilities. The above statutory scheme was enacted by the Tax Reform Act of 1986 (the “1986 Act”). See sections 1301 et seq., of Pub. L. No. 99-514, 1986-3 C.B. (Vol. 1) 519-527.

1. Was the Facility a “qualified hazardous waste facility” as defined in § 142(a)(10)?

Section 142(h) provides in part that the term “qualified hazardous waste facility” means any facility for the disposal of hazardous waste by incineration or entombment – but only if the portion of such facility which is to be provided by the issuer does not exceed the portion of the facility which is to be used by persons other than the owner or operator of such facility, and any related person (within the meaning of § 144(a)(3)) to such owner or operator.

From the facts given, it appears that the Company is the source of all of the Waste Material treated at the Facility. We thus conclude that the Facility is not a “qualified hazardous waste facility” within the meaning of § 142(a)(10).

2. Can the Facility, which processes solid hazardous waste, qualify as a “solid waste disposal facility” as defined in § 142(a)(6)?

Tax-exempt financing was permitted for solid waste disposal facilities under § 103(b)(4)(E) of the 1954 Code. Regulations were issued under the 1954 Code, providing definitions of solid waste disposal facility and solid waste, § 1.103-8(f)(2)(ii). The legislative history accompanying the 1986 Act imports these definitions to § 142(a)(6). The House Report incorporates all of the present law to the extent not amended, while characterizing the present law definition of “solid waste disposal facilities” by reference to the regulatory rules found in § 1.103-8(f)(2)(ii). H.R. Rep. No. 99-426, at 497, 518 (1985), 1986-3 C.B. (Vol. 2) 497, 518. The Conference Report states that “solid waste disposal facilities” are generally defined as under present law. H.R. Conf. Rep. No. 99-841, at II-704 (1986), 1986-3 C.B. (Vol. 4) 704.

Section 1.103-8(f)(2)(ii)(a) of the Income Tax Regulations generally defines the term “solid waste disposal facility” as meaning any property or portion thereof used for the collection, storage, treatment, utilization, processing, or final disposal of solid waste. The term generally does not include facilities for collection, storage, or disposal of liquid or gaseous waste.

Section 1.103-8(f)(2)(ii)(b) provides in part that the term “solid waste” means garbage, refuse, and other discarded solid materials, including solid-waste materials resulting from industrial, commercial, and agricultural operations. Material will not qualify as solid waste unless, on the date of issue of the obligations issued to provide the disposal facility, it is property which is useless,

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unused, unwanted, or discarded solid material which has no market or other value at the place where it is located.

In its discussion of solid waste disposal facility bonds, the Conference Report to the 1986 Act clarifies that solid waste does not include most hazardous waste. H.R. Conf. Rep. No. 99-841, at II-704 (1986), 1986-3 C.B. (Vol. 4) 704. In its discussion of qualified hazardous waste facility bonds, the Conference Report states that the law prior to the 1986 Act had no provision allowing tax-exempt industrial development bonds to be issued to finance hazardous waste treatment or disposal facilities. The Conference Report notes that under then current law, solid waste disposal facilities do not include facilities disposing of liquid or gaseous wastes, including most hazardous waste. H.R. Conf. Rep. No. 99-841, at II-706 (1986), 1986-3 C.B. (Vol. 4) 706. The conference agreement then states that the Act permits exempt facility bonds to be issued to finance qualified hazardous waste facilities. H.R. Conf. Rep. No. 99-841, at II-707 (1986), 1986-3 C.B. (Vol. 4) 707.

The Waste Material treated at the Facility is solid in form but is also classified as a hazardous material. We conclude that the fact that the waste is hazardous does not prevent the facility from qualifying as an exempt solid waste disposal facility. Section 1.103-8(f)(2)(ii) does not exclude hazardous waste from the definition of solid waste. Moreover, § 142 does not contain any language indicating that a facility that treats a waste material that is both solid and hazardous cannot be financed with solid waste disposal facility bonds if the facility otherwise meets the Code requirements for solid waste disposal facility bonds. Further, there is no language in § 142 or the regulations thereunder stating that any exempt facility bonds issued to provide a facility that treats a waste material that is both solid and hazardous, must be issued as qualified hazardous waste facility bonds.

The legislative history to the 1986 Act supports our conclusion. As noted above, the Conference Report to the 1986 Act states that solid waste disposal facilities do not include facilities disposing of liquid or gaseous wastes, including most hazardous wastes. It appears that Congress, in enacting § 142(a)(10), was operating from the premise that most hazardous waste is liquid or gaseous, so that most hazardous waste processing facilities could not be financed as solid waste facility bonds. By addition of the provision allowing for tax-exempt financing of qualified hazardous waste facilities, Congress apparently meant to expand the types of hazardous waste disposal facilities that can be financed with tax-exempt bonds; but not to change current law governing solid waste disposal facility bonds.

3. Did the conduit borrower spend bond proceeds on a qualified exempt facility pursuant to § 142(a)?

Assuming compliance with the requirements of § 142 not specifically addressed in this Field Service Advice, the Bonds were spent on a qualified exempt facility.

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CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

We recognize that our conclusion that the Bonds are solid waste exempt facility bonds under § 142(a) is not without doubt. In arriving at our conclusion, we suggested that Congress, in expanding the list of exempt facilities to include hazardous waste facilities, meant to correct a deficiency in the law, which allowed facilities for solid hazardous waste but not facilities for gaseous or liquid hazardous waste, to be financed as exempt facilities. If Congress was merely “filling a gap,” it is unclear why it chose to impose a limitation on liquid or gaseous hazardous waste that it did not impose on solid hazardous waste. As noted above, the Code imposes a limitation upon the source of the hazardous waste to be processed at the bond-financed portion of the facility. No similar requirement exists for solid waste facility bonds. We have not been able to find an explanation. Nevertheless, we believe that the better reading of the Code is as discussed above.

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Please call me at (202) 622-3980 or David White at (202) 622-3049 if you have any further questions.

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Branch Chief
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