

Internal Revenue Service

Department of the Treasury

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Person to Contact:

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Date: August 1, 2003

LEGEND:

Issuer =

Authority =

State =

Bonds =

\$a =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Dear

This is in response to a ruling request submitted by the Issuer for an extension of time pursuant to § 301.9100-3 of the Procedure and Administration Regulations to file Form 8328, Carryforward Election of Unused Private Activity Bond Volume Cap, to make a carryforward election under § 146(f) of the Internal Revenue Code of \$a in unused Year 1 private activity bond volume cap.

Facts and Representations

You make the following factual representations. Issuer is authorized under State law to issue qualified mortgage revenue bonds. Authority is a division of State responsible for allocating the private activity bond state ceiling among authorized issuers in State.

In Year 1, pursuant to State law, the Issuer received an allocation of \$a of State Year 1 state ceiling for qualified mortgage bonds. On Date 1, Issuer notified Authority of its intent to carry forward unused Year 1 volume cap of \$a. On Date 2, pursuant to State law, Authority issued a notice that the Issuer's request to carry forward \$a of Year 1 volume cap for qualified mortgage bonds had been granted. On Date 3, Issuer issued the Bonds. Issuer, however, not realizing its obligation to file a carryforward election, failed to file Form 8328 on or before Date 3.

Upon the discovery by bond counsel that the Form 8328 had not been timely filed, on Date 4, the Authority filed the Form 8328 with the Internal Revenue Service. This ruling request followed the late filing of the Form 8328. Prior to the filing of this ruling request, the failure of the Issuer to timely file Form 8328 had not been discovered by the IRS.

Law and Analysis

Except as otherwise provided, § 103(a) provides that gross income does not include interest on any state or local bond. Section 103(b) provides, in part, that § 103(a) shall not apply to any private activity bond that is not a qualified bond (within the meaning of § 141). Generally, under § 141(e), a private activity bond is not a qualified bond unless the bond meets the volume cap requirements of § 146.

Section 146(a) provides that a private activity bond issued as part of an issue meets the volume cap requirements if the aggregate face amount of the private activity bonds issued pursuant to such issue, when added to the aggregate face amount of tax-exempt private activity bonds previously issued by the issuing authority during the calendar year, does not exceed such authority's volume cap for that calendar year.

Section 146(f)(1) provides that if an issuing authority's volume cap for any calendar year after 1985 exceeds the aggregate amount of tax-exempt private activity bonds issued during the calendar year by the authority, the authority may elect to treat all (or any portion) of the excess as a carryforward for one or more carryforward purposes. Section 146(f)(2) requires the issuing authority to identify the purpose for which the carryforward is elected and to specify the portion of the carryforward which is to be used for that purpose. Section 146(f)(5) defines "carryforward purpose" to mean four different purposes, including the purpose of issuing qualified mortgage bonds. Under § 146(f)(4), any election (including any identification and specification

contained therein), once made, shall be irrevocable.

Section 146(f)(3)(A) provides that if any issuing authority elects a carryforward under § 146(f)(1) with respect to any carryforward purpose, any private activity bonds issued by such authority with respect to such purpose during the 3 calendar years following the calendar year in which the carryforward arose shall not be taken into account under § 146(a) to the extent the amount of such bonds does not exceed the amount of the carryforward elected for such purpose. Section 146(f)(3)(B) provides that carryforwards elected with respect to any purpose shall be used in the order of the calendar years in which they arose.

The carryforward election is made by filing Form 8328 with the Internal Revenue Service Center, Ogden, UT 84201. Under Notice 89-12, 1989-1 C.B. 633, Form 8328 must be filed by the earlier of (1) February 15 of the calendar year following the year in which the excess amount arises, or (2) the date of issue of bonds issued pursuant to the carryforward election.

Section 301.9100-1(c) provides that the Commissioner of Internal Revenue has discretion to grant a reasonable extension of time to make a regulatory election (defined in § 301.9100-1(b) as an election whose due date is prescribed by regulation, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin) or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3(a) provides that requests for extensions of time for regulatory elections that do not meet the requirements for automatic extensions in § 301.9100-2, must be made under the rules of § 301.9100-3. Section 301.9100-3(a) further provides that requests for relief will be granted if the taxpayer provides evidence (including affidavits described in § 301.9100(e)) establishing to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that the grant of relief will not prejudice the interests of the Government.

Section 301.9100-3(b)(1) provides, in part, that generally a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requests relief under that section before the failure to make the regulatory election is discovered by the IRS.

Section 301.9100-3(c)(1)(i) provides, in part, that the interests of the Government are prejudiced if granting relief would result in a taxpayer having a lower tax liability than if the election had been made timely (taking into account the time value of money).

Rev. Proc. 2003-46, 2003-28 I.R.B. 54, provides relief if a Form 8328 was filed by an authority responsible for allocating state ceiling to carry forward unused private activity bond volume cap arising in any calendar year prior to 2003 that was properly

allocated to an issuing authority (other than the allocating authority). Section 3.02 of the revenue procedure provides that the revenue procedure only applies when all requirements of § 146 (other than the requirement that the issuing authority file the carryforward election containing the information required under § 146(f)) have been met.

The carryforward election filed by the Authority is void because the Authority was not entitled to file the election under § 146(f). See Mamula v. Commissioner, 346 F.2d 1016 (9th Cir. 1965) (taxpayer who elected method of reporting that was not available to taxpayer was not bound by election); Plumb v. Commissioner, 97 T.C. 632 (1991) (taxpayer who elected improper method of carrying over net operating losses was treated as not having made election). In addition, the improper election could not be corrected by the application of Rev. Proc. 2003-46 because the election was filed late. See id. § 3.01.

Conclusion

Under the facts and circumstances of this case, we conclude that the Issuer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the Government. Issuer is granted an extension of time of 45 days from the date of this letter ruling to file Form 8328 to carry forward Year 1 unused volume cap in the amount of \$a for the purpose of issuing the Bonds.

Except as specifically ruled above, no opinion is expressed or implied concerning this matter under any provision of the Code or the regulations thereunder, including §§ 103 and 146. The ruling contained in this letter is based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for a ruling, it is subject to verification upon examination.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. Pursuant to a Power of Attorney on file with this office, a copy of this letter is being sent to Issuer's authorized representative.

Sincerely yours,
Assistant Chief Counsel
(Exempt Organizations/Employment Tax/
Government Entities)
By: Rebecca L. Harrigal
Chief, Tax Exempt Bonds Branch

cc: