

Internal Revenue Service

Department of the Treasury
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Date:

June 01, 2004

Legend:

Authority =

State =

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Date 1 =

Date 2 =

Date 3 =

Date 4 =

Year 1 =

Year 2 =

Dear :

This is in response to your request for an extension of time under § 301.9100-1 of the Procedure and Administration Regulations to file an amended Form 8328 (Carryforward Election of Unused Private Activity Bond Volume Cap) for Authority to make a carryforward election under § 146(f) of the Internal Revenue Code with respect to \$a of unused private activity bond volume cap from Year 1 for the purpose of issuing qualified mortgage bonds.

Facts and Representations

You make the following factual representations. Authority is a body politic and corporate organized under the laws of State. Authority is authorized to issue obligations for a variety of purposes, including the development of affordable housing described in § 143(a). Authority is not authorized to issue qualified student loan bonds. On Date 1, the board of directors of Authority directed that all unused Year 1 volume cap be carried forward for qualified mortgage bonds.

On Date 2, Authority timely filed a Form 8328 to carry forward \$a of unused private activity bond volume cap from Year 1 for the purpose of issuing qualified student loan bonds. The Form 8328 should have designated the \$a as a carryforward to finance qualified mortgage bonds. In Date 3, Authority discovered the error in preparing its carryforward election for Year 2. On Date 4, Authority filed with the IRS a proposed amended Form 8328, which amended the Form 8328 filed on Date 2 by designating the \$a as a carryforward to finance qualified mortgage bonds. Also on Date 4, Authority submitted a ruling request for an extension of time to file the amended Form 8328 for Year 1 unused private activity bond volume cap. As of Date 4, the IRS had not discovered the invalid carryforward designation contained in the original Form 8328.

Law and Analysis

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.

The 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.

The election must identify the purpose for which the carryforward is elected, and specify the amount to be carried forward for that purpose. Section 146(f)(2). Carryforward elections (and any identifications or specifications stated therein) are irrevocable. Section 146(f)(4).

When a taxpayer makes an election that it is not entitled to make, the election is invalid and the taxpayer is treated as if it had not made the election. 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 the 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 the election).

Section 301.9100-1 of the Procedure and Administration Regulations provides, in part, that the Commissioner 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 regulations published in the Federal Register, 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. Requests for relief will be granted if the taxpayer provides evidence 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 the taxpayer is deemed to have acted reasonably and in good faith if the taxpayer requested 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 the taxpayer would have had if the election had been timely (taking into account the time value of money).

Authority timely filed a Form 8328 on Date 2, to carry forward \$a of its unused private activity bond volume cap for qualified student loan bonds. This election was not available to Authority because Authority could not issue qualified student loan bonds. Accordingly, we conclude that the election was invalid and Authority should be treated as if it had not made an election for the \$a of volume cap.

Before the IRS discovered the invalid election, Authority filed a proper Form 8328 along with a request for an extension of time to file the proper Form 8328.

Conclusion

Under the facts and circumstances of this case, we conclude that the Form 8328 filed by Authority on Date 2 is void. We further conclude that Authority acted reasonably and in good faith, and that granting an extension of time under § 301.9100-1 to file the proper Form 8328 to carry forward \$a of unused Year 1 volume cap for qualified mortgage bonds will not prejudice the interests of the government. Authority is granted an extension of time to 45 days from the date of this letter ruling to file the Form 8328 to carry forward \$a in unused Year 1 volume cap for qualified mortgage bonds.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with a Power of Attorney on file with this office, a copy of this letter is being sent to Authority's authorized representatives.

The ruling contained in this letter is based upon information and representations submitted by Authority and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the materials submitted in support of the request for a ruling, it is subject to verification upon examination.

Sincerely,

Assistant Chief Counsel
(Exempt Organizations/Employment
Tax/Government Entities)

By: _____
Rebecca L. Harrigal
Branch Chief, Tax Exempt Bond Branch