

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Unrelated Taxpayer; Trade Organization;
Government Agency
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Index (UIL) No.: 103.02-01
CASE-MIS No.: TAM-127670-12

Director

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No

Year(s) Involved:

Date of Conference:

LEGEND:

Issuer

Developer

State

Town

County

Act

Ordinance

Development

Bank

Partnership

Corporation

Department

A

B

C

Bonds

Date 2

Date 3

Date 4

Date 5

Date 6

Date 7

Date 8

Date 9

Date 10

Date 11

Date 12

Date 13

Date 14

Year 1

Year 2

Year 3

Year 4

a

b

c

d

e

f

g

h

i

j

k

l

m

n

o

p

q

r

s

t

u

v

w

x

y

z

aa

bb

ISSUE:

Whether the Issuer was a political subdivision within the meaning of section 1.103-1(b) of the Income Tax Regulations during the period of Date 1 through Date 2.

CONCLUSION:

The Issuer was not a political subdivision within the meaning of section 1.103-1(b) at any time during the period of Date 1 through Date 2 because it was not a division of a state or local governmental unit during that period. Because we find that the Issuer was not a division, we do not address the delegation of sovereign power.

FACTS:**The Developer**

The Developer is a State corporation incorporated in Year 1. At all times relevant to the legal issue in this case, Date 1 through Date 2, the Developer was directly or indirectly owned by A and his family.

The Development

In Year 2, the Developer began development of a retirement community within Town and an unincorporated area of County. As part of that development, the Developer constructed, owned and operated various recreation facilities, postal facilities, water management and control systems, fire equipment, and fire stations (“Amenity Facilities”). As the development became profitable, the Developer purchased additional tracts of land for development.

In Year 3, the Developer petitioned the Town to create a community development district in accordance with Act, and, later in Year 3, Town established Issuer as a community development district pursuant to Ordinance. Thereafter, the Developer acquired substantial amounts of additional land and successfully petitioned for the creation of a other separate community development districts, eventually resulting in b community development districts. The b community development districts include c districts that consist of primarily residential areas (“Residential Districts”), the Issuer, which has been solely a commercial area, and d other solely commercial district. The b community development districts, along with certain other areas in County and Town, are known as the Development.

During the relevant years, the Issuer’s board of supervisors petitioned the Town for four separate changes to Issuer’s geographical boundaries. On Date 3, the Town approved the first change, which reduced Issuer’s acreage from e acres to f acres. The removed land was used for g residential dwellings approximately h years after the boundary change. On Date 4, the Town approved the second change, which reduced Issuer’s acreage from f acres to i acres and removed j existing (but then unoccupied) dwellings from Issuer boundaries. The remainder of the land removed from the Issuer’s acreage was used to construct k residential units approximately l years after the change. On Date 5, the Town approved a third change, which corrected a boundary error and reduced Issuer’s acreage from i acres to m acres, and on Date 6, the Town approved

the fourth change, increasing Issuer's acreage to 0 acres consisting of commercial properties.

Lots within the Development are sold subject to deed restrictions ("deed restrictions"), requiring services to be provided by the Developer including an obligation to "perpetually provide the recreational facilities." The deed restrictions require property owners to pay the Developer a monthly fee ("Amenities Fee"). Owners of property within the Residential Districts are required to pay the Amenities Fee even if the recreational facilities are located outside of, and are not owned by, their respective Residential District. The Developer's rights and obligations may be assigned.

Governing Body of Issuer

Each community development district in State is governed by its own board of supervisors. Under the Act, a majority of the board constitutes a quorum and action is taken by majority vote of the members present unless general law or a rule of the district requires a greater number. The board of supervisors is initially elected by landowners, generally based on acreage owned, with a majority of votes controlling. In community development districts such as Issuer, beginning after 0 years, when there are 0 or more residents within the district eligible to vote ("Qualified Electors"), the election process changes and the board is thereafter elected by the Qualified Electors at a general election.

Issuer is governed by a g-member board of supervisors ("Board"). Because the Issuer has never had 0 or more Qualified Electors, landowners in the Issuer have always elected the Board despite the fact that the Issuer has been in existence for well over 20 years. In fact, Issuer expressed intention was that there would never be 0 or more Qualified Electors residing within Issuer. The Official Statement for bonds issued on Date 7 states that there will be no residential development within the Issuer, and the Offering Statement for Issuer's Date 8 bond issuance confirmed that, because of the non-residential nature of the development in the Issuer, it was unlikely that there would ever be Qualified Electors in the Issuer. During the relevant years, the g-member Board consisted of A, members of his family, directors, officers, or employees of the Developer, and the chief executive officer of the Bank, a majority of the stock of which was at all times owned by A and his family. For a short period in Year 4, the Board also included an employee of an investment bank not affiliated with A.

The Board appoints a district manager who is accountable to the Board. The district manager has charge and supervision of the works of Issuer, is responsible for preserving and maintaining any improvement or facility constructed or erected pursuant to the provisions of Act, for maintaining and operating equipment owned by Issuer, and for performing such other duties as may be prescribed by the Board.

Landowners

The Board always has been appointed by the landowners in Issuer. The Developer, either alone (from Date 1 through Date 9) or in conjunction with the Partnership, has owned sufficient land to appoint the Board throughout the relevant period.

The Partnership has been controlled at all relevant times directly or indirectly by A, B and C. C is an immediate family member of A, and B at the time was an officer and director of the Developer and served, on at least some occasions, as legal counsel to the Developer. Prior to Date 10, A, B and C served directly as the general partners of the Partnership. On Date 10, the Corporation was formed to serve as the corporate sole general partner, and A, B and C became the owners and directors of the Corporation. The Partnership functioned as an employment incentive for employees of the Developer, and the limited partners in Partnership consisted solely of A, B, A's family members, current or former directors, officers, or employees of the Developer, or trustees or beneficiaries of trusts established by such individuals.

Issuer's Powers and Limitations under the Act

The Act defines a community development district as a local unit of special-purpose government limited to the performance of functions authorized by the Act, the governing body of which is authorized to function to deliver urban community development services, and for which the operation, duration, accountability, disclosure requirements, and termination are determined by general law. The stated primary purpose of community development districts is to provide for specified capital infrastructure, such as that provided by the Issuer.

The Department, which is a department of State, is required by the Act to annually monitor the status of Issuer under the Act. The Issuer must provide financial reports and audits to State, and is required to use a qualified public depository.¹ The Issuer must comply with bidding requirements under State law when seeking to construct or improve a public building or structure. Board meetings are open to the public, the Board must keep permanent records of all proceedings, and such records are open to inspection in the same manner as government records in State. Issuer's properties are exempt from execution and sale by general creditors.

The Board approves the Issuer's annual budget after a hearing. The proposed budget is then submitted to the local general purpose governmental unit for disclosure and information purposes only. The local general purpose governmental unit may review the proposed budget and submit written comments for assistance and information purposes.

The Issuer will remain in existence unless (a) it is merged with another district; (b) all of its facilities and services are transferred to a local general-purpose government unit,

¹ When there was uncertainty about how to interpret the State statutes, including the Act, we generally used the Issuer's interpretations.

subject to the underlying debts being assumed and guaranteed by such unit;² or (c) it is dissolved due to inactivity. Upon dissolution, assets of the district would be liquidated to pay the district debts and the remainder, if any, would be transferred to an appropriate local government or political subdivision.

Board members are subject to general laws relating to public officers and employees, including ethical standards requiring that public officials be independent and impartial, and that public office not be used for private gain other than the remuneration provided by law. Public officials must discharge their duties in the public interest and must act as agents of the people in holding their positions for the benefit of the public.³ The Act also provides that it shall not be a conflict of interest for a board member, district manager or other employee of the district to be a stockholder, officer, or employee of a landowner.

The Issuer is vested with limited powers. Issuer can exercise the power of condemnation to acquire public easements, dedications to public use, platted reservations for public purposes, or any reservations for those purposes authorized by the Act. The Act allows the Issuer to exercise eminent domain over any property within the state, except municipal, county, state, and federal property. If the property that is the subject of the eminent domain is outside Issuer, Issuer must obtain the prior approval of the governing body of the jurisdiction in which the property is located. The Issuer may exercise eminent domain solely for uses relating to water, sewer, district roads, and water management. Any exercise of eminent domain by the Issuer is in the Issuer's name and results in title to the condemned land being transferred to the Issuer. The Issuer is authorized to impose user charges or fees and special assessments to finance the Issuer's activities authorized by the Act. The Act provides that community districts generally may levy and assess ad valorem taxes, but this power applies only when all Board members are elected by Qualified Electors at a general election and is not available to the Issuer. The Issuer may not exercise any "police power," as that term is used under the Act and must obtain prior consent from the local general-purpose government agencies to provide security services within the Issuer.

² Act provides that the local general purpose government within the boundaries of which Issuer lies may adopt a nonemergency ordinance providing for a plan for the transfer of a specific community development service to the local general purpose government. The plan must provide for the assumption and guarantee of Issuer's debt that is related to the service by the local general purpose government and must demonstrate the ability of the local general purpose government to provide such service (a) as efficiently as the district, (b) at a level of quality equal to, or higher than, the level of quality actually delivered to the users of the service, and (c) at a charge equal to, or lower than, the actual charge by Issuer to the users of the service.

³



Outstanding Bonds

Between Date 1 and Date 2, Issuer issued Bonds in the total principal amount of \$r to acquire or refinance the acquisition of assets from Developer and its affiliates, along with the right to collect related Amenities Fees from current residents of the Development. The Issuer asserts that interest on these bonds is exempt from tax under §103. We do not have information on all of these sales, but in the sales for which we have information, the amount of proceeds paid to the Developer and its affiliates significantly exceeded the Developer's costs for the assets acquired, with the remaining proceeds having been allocated to the right to collect future Amenity Fees from then current residents. Developer retained the right, however, to collect Amenities Fees from future residents of the Development who purchased their property from the Developer. Such future residents would have the right to use the Amenity Facilities owned by the Issuer, despite retention of the Amenity Fees by the Developer.⁴

The information we have indicates that, on Date 11, Issuer issued \$s in bonds to purchase recreational and utility facilities from the Developer along with related Amenity Fees. The Developer's cost in these facilities was \$t, and almost 70% of the purchase price was allocated to future Amenity Fees. On Date 12, Issuer issued \$u in bonds to acquire recreational facilities and Amenity Fees from the Developer. The Developer's cost in these facilities was \$v, which left almost 67% of the proceeds allocated to future Amenity Fees. Similarly, on Date 13, Issuer used \$w to purchase recreational facilities and future Amenity Fees from the Developer. The Developer's cost for these facilities was \$x, leaving almost 89% of the proceeds allocated to future Amenity Fees, and on Date 14, the Issuer issued \$y in bonds to purchase a utility system from a utility affiliated with Developer; the utility's cost for the system was \$z, leaving about 54% of the proceeds allocated to transferred utility fees. Finally, on Date 2, Issuer issued \$aa in bonds for recreational facilities for which the Developer's cost was \$bb, resulting in 83% of the proceeds being allocated to future Amenity Fees. The monthly Amenities Fees and utility fee payments assigned to the Issuer are pledged to secure the Bonds, along with other sources of Issuer revenue.

LAW AND ANALYSIS:

Section 103(a) of the Internal Revenue Code ("Code") provides that gross income does not include interest on any State or local bond. Section 103(c) provides that the term "State or local bond" means an obligation of a State or political subdivision thereof.

The term "political subdivision" is defined in Treasury Regulations §1.103-1(b) as "any division of any state or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit." Under

⁴ It appears from the submissions that current residents and their grantees and successors who pay Amenities Fees to the Issuer received an easement to use future facilities constructed by the Developer without making payments to the Developer.

this definition, Issuer cannot qualify as a political subdivision whether or not it is a municipal corporation (which Issuer concedes that it is not) or has the right to exercise sovereign powers (which Issuer claims that it has) unless it also can demonstrate that it is a division of a state or local government. See Rev. Rul. 78-276, 1978-2 C.B. 256.

Is Issuer a Division of a State or Local Government?

The phrase “division of a state or local government” must be read in the context of the purpose of § 103, which is to provide subsidized financing for State and local government purposes. The Code permits the benefit of this subsidy to be passed on to private persons under some circumstances, but only if a governmental unit determines that the issuance of such bonds is appropriate. A governmental unit is inherently accountable, directly or indirectly, to a general electorate. In effect, § 103 relies, in large part, on the democratic process to ensure that subsidized bond financing is used for projects which the general electorate considers appropriate State or local government purposes. A process that allows a private entity to determine how the bond subsidy should be used without appropriate government safeguards cannot satisfy § 103.

For these reasons, the mere delegation of sovereign power is not sufficient to create a political subdivision. If it were sufficient, then a clearly private entity with powers of eminent domain, including some railroads and utilities, could issue bonds without any political oversight.

We believe that an entity that is organized and operated in a manner intended to perpetuate private control, and to avoid indefinitely responsibility to a public electorate, cannot be a political subdivision of a State. Cf. Revenue Ruling 83-131, 1983-2 C.B. 184 (concluding that certain corporations did not qualify as political subdivisions, in part because they were “not controlled directly or indirectly by a state or local government,” but rather by a board of directors “independent of such authority”).

In this case, the Issuer was organized and operated in manner that insured continued effective control of the Board by A, rather than a general electorate or an existing governmental body. The Board was selected by majority vote of landowners, and, at all times, A was in a position, through entities under his control, to select all members of the Board. During the relevant period, two landowners, the Developer and the Partnership, held a clear majority of the land within the boundaries of the Issuer. The Developer was owned and controlled by A and A’s family members. The Partnership was controlled by A, B and C, first as general partners and later as the owners and directors of the sole corporate general partner. The result was that during the relevant years, the Board was composed of individuals who, in all but one limited case, consisted of A, members of his family, directors, officers, or employees of the Developer, and the chief executive officer of Bank owned and controlled by A and his family.

The Act contemplated that a board would be elected by the Qualified Electorate when a district acquired a sufficient number of residents. Even after over 20 years, this has not happened in the Issuer's case. Indeed, the facts indicate that Issuer was intentionally structured to ensure that this never could happen. Bond offering documents indicate that there would be no residential development in the Issuer and that it was unlikely that there ever would be Qualified Electors in the Issuer. Consistent with these statements, on at least two occasions the Board successfully petitioned the Town to change the Issuer's boundaries in such a way that land on which current or future residential development would be located would be removed from within the Issuer's boundaries.

Throughout all relevant years, the Board and its district manager controlled the day-to-day operations of the Issuer. Neither the State nor local government participated in or had authority to overrule decisions of the Board, including decisions to purchase assets from the Developer whose owner controlled the Board. Although a government received the Issuer's financial reports, audits, and budget, this was largely for informational purposes only.

The Issuer argues that it is a political subdivision because it is sufficiently controlled by the State and serves a public purpose, although the Issuer claims that the threshold is too high if it requires that the entity be motivated wholly by a public purpose. See Revenue Ruling 83-131 (indicating entity must be motivated by a wholly public purpose). The Issuer argues that it was created to fulfill the public purpose of managing and financing basic community development services. The Issuer points out that the Act placed a number of legal restrictions on it and the Board. In particular, the Issuer notes that--

- 1) Issuer had financial and reporting requirements to the State,
- 2) Issuer was subject to bidding requirements when seeking to construct or improve a public building or structure,
- 3) Issuer was required to use a qualified public depository,
- 4) Issuer was subject to open record and open meeting requirements,
- 5) Issuer was required to submit its budget for disclosure purposes,
- 6) Issuer was required to comply with the State administrative procedure act,
- 7) Issuer's property was exempt from sale by general creditors,
- 8) The local government could adopt and submit a nonemergency plan providing for the transfer of assets or services from a district to the local general-purpose government under certain limited circumstances;
- 9) On dissolution all of Issuer's assets transferred to public entities,
- 10) Under State ethics laws, the Board members were required to be independent and impartial; public office could not be used for private gain other than remuneration; board members were required to discharge their duties in the public interest and must act as agents of the people; and financial interests were required to be publicly disclosed, among other requirements.

These restrictions, however, do not address the fact that the Issuer was organized and operated to perpetuate private control and avoid indefinitely responsibility to a public electorate, either directly or through another elected State or local governmental body. That fact is not consistent with qualification as a political subdivision. We need not discuss any other requirements that a division of a State or local governmental unit might need to meet to qualify as an issuer of tax exempt bonds. Issuer is not a “state or political subdivision thereof” for purposes of section 103(c)(1).

Has Issuer been Delegated Sovereign Power?

Having concluded that the Issuer is not a division of a State or local government, we need not examine the extent to which the Issuer has been delegated sovereign powers.

CAVEAT(S):

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.