Advisory Committee on Tax Exempt and Government Entities (ACT) Releases Public Report.

The 14th report of recommendations of the Advisory Committee on Tax Exempt and Government Entities (ACT) addresses five issues:

Employee Plans: Analysis and Recommendations Regarding 403 (b) Plans
Exempt Organizations: The Redesigned Form 990 – Recommendations for Improving its Effectiveness as a Reporting Tool and Source of Data for the Exempt Organization Community
Federal, State and Local Governments: FSLG Education and Outreach – Review and Recommendations
Indian Tribal Governments: Report on Recommendations for Outreach and Training – A Revision to the Indian Tax Desk Guide
Tax Exempt Bonds: Doing More With Less – Balancing Resources and Needs.

The 20 members of the ACT presented their report to the IRS in a public meeting in Washington, DC on June 17, 2015.

TAX - CONNECTICUT

Town of Groton v. Commissioner of Revenue Services

Supreme Court of Connecticut - June 30, 2015 - A.3d - 2015 WL 3853561

Municipality sought judicial review of sales tax assessment issued by commissioner of revenue services on fees that municipality charged for refuse removal services. The Superior Court concluded that municipality had failed to establish that the assessment was incorrect and dismissed the appeal. Municipality appealed and case was transferred.

The Supreme Court of Connecticut held that fees that municipality charged to commercial, industrial, and income producing end users on a revenue-neutral basis did not constitute a sale for "consideration" subject to sales tax.

Refuse removal fees that municipality charged to commercial, industrial, and income producing end users on a revenue-neutral basis did not constitute a sale for "consideration" subject to sales tax, where the fees were a mere pass-through arrangement on which the municipality did not turn a profit in carrying out the statutorily authorized, governmental function of garbage collection via a municipal or regional authority, as distinguished from acting in a proprietary capacity for purposes of corporate benefit or profit for the municipality.

Moody's: Mergers and Acquisitions Will Grow as Distressed Not-for-Profit Hospitals Seek Fiscal Solutions.

New York, June 22, 2015 — Merger and acquisition activity will remain elevated for the next two years as fiscally distressed not-for-profit hospitals increasingly seek consolidation with larger, for-profit entities, Moody's Investors Service says in a new report.

NFP hospitals with revenues less than $500 million are the most likely to consider consolidating with a larger provider to avoid a payment default, a bankruptcy filing, or to fund unaffordable but necessary capital needs.

"Many independent hospitals face increasing pressure to consolidate with larger ones due to regulatory and financial changes in the industry. Declining reimbursement, shifting patient volumes and emerging critical projects like IT upgrades are increasing financial pressures on smaller entities," Lisa Goldstein, Moody's Associate Managing Director says in "Under Threat of Default, Distressed Hospitals Turn to Mergers and Acquisitions."

Notable examples of smaller hospitals that sought a capital partner include St. Joseph Health Services of Rhode Island (rating withdrawn), Citrus Memorial Hospital (rating withdrawn) in Florida, and Somerset Hospital (Ba2 stable before consolidating) in New Jersey. Before they were acquired, both St. Joseph and Citrus Memorial were rated well below investment grade.

All were burdened with either low liquidity or fiscal deterioration, had weakening financial metrics, and were possibly headed toward default or bankruptcy prior to their M&A strategies.

Moody's notes that while the smaller, distressed non-profit hospitals are commonly rated below investment grade and the for-profits are often highly leveraged, the latter possess a sizable revenue base and access to capital.

Additionally, larger hospitals have greater size and resources to absorb these same pressures as the smaller ones, and they are usually better able to navigate challenges facing the health care sector.

While a merger or acquisition is credit positive for the bondholders of the smaller providers, the transactions are complicated and not all make it to fruition. For the NFP, the inability to execute a M&A strategy could increase the probability of a payment default or bankruptcy filing as well as intensify the search for a new capital partner.

The report is available to Moody's subscribers here.

Report of the Advisory Committee on Tax Exempt and Government Entities (ACT).

The fourteenth report of recommendations of the Advisory Committee on Tax Exempt and Government Entities (ACT) on five issues:

- Employee Plans: Analysis and Recommendations Regarding 403 (b) Plans;

- Exempt Organizations: The Redesigned Form 990 – Recommendations for Improving its Effectiveness as a Reporting Tool and Source of Data for the Exempt Organization Community;
- Federal, State and Local Governments: FSLG Education and Outreach – Review and Recommendations;
- Indian Tribal Governments: Report on Recommendations for Outreach and Training – A Revision to the Indian Tax Desk Guide; and
- Tax Exempt Bonds: Doing More With Less – Balancing Resources and Needs.

The 20 members of the ACT presented their report to the IRS in a public meeting in Washington, DC on June 17, 2015.

Read the Report.

IRS Revamps Proposed Issue Price Definition For Municipal Bonds: Mintz Levin

Treasury and IRS today announced a decision to withdraw the much-criticized portion of the notice of proposed rulemaking published in the Federal Register on September 16, 2013 (the "2013 Proposed Regulations") related to the definition of issue price for tax-advantaged obligations and to propose a revised definition of issue price in its place. A determination by the IRS that the "issue price" has been erroneously calculated can have ramifications, including for the calculation of arbitrage yield, that could ultimately cause loss of tax-exempt status in the case of tax-exempt bonds and loss of federal subsidy in the case of Build America Bonds (BABs), hence the importance to the tax-exempt bond community of a clear and predictable definition.

The new proposed regulations (the "2015 Proposed Regulations") are scheduled to be published in the Federal Register on June 24, 2015 and can be found here. A 90-day comment period will be followed by a hearing on October 28, 2015.

The 2015 Proposed Regulations eliminate most of the troublesome features of the 2013 Proposed Regulations, including maintaining a 10% standard rather than the 2013 Proposed Regulations 25% standard for what constitutes a "substantial amount" of obligations sold to the public. However, the 2015 Proposed Regulations do not maintain the long-established "reasonable expectations" standard for establishing issue price. Instead, the 2015 Proposed Regulations look to actual facts as the general rule.

In recognition of the need in the tax-advantaged debt world for certainty as of the sale date (particularly in the case of advance refundings), the 2015 Proposed Regulations helpfully provide an alternative method in the event a substantial amount of bonds have not been sold to the public as of the sale date. The alternative method allows reliance on the initial offering price if certain conditions are satisfied.

Procedures for satisfying the conditions for use of this alternative method will have to be developed, and underwriters may conclude that compliance will be difficult. In particular, a preclusion of sales at prices above the initial offering price unless it can be demonstrated that the differential is based on market changes could be problematic.

The 2015 Proposed Regulations will be effective for obligations that are sold on or after 90 days after final regulations are published in the Federal Register. However, issuers may rely upon the

2015 Proposed Regulations with respect to obligations that are sold on or after June 24, 2015, the date the 2015 Proposed Regulations will be published in the Federal Register.

Last Updated: June 24 2015

Article by Maxwell D. Solet and Christie L. Martin

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Treasury and IRS Re-Propose Issue Price Rules.

WASHINGTON – The Treasury Department and Internal Revenue Service released new proposed rules on the definition of issue price that market participants consider to be a significant improvement over rules proposed on the topic in 2013.

The re-proposed rules, which were released Tuesday and are scheduled to appear in Wednesday's edition of the Federal Register, would allow issuers to rely on the initial offering price under certain circumstances and provide a narrower definition of an underwriter. The document that contains the re-proposed rules also withdraws issue price rules proposed in September 2013.

"[The new proposal] provides more flexibility than the 2013 proposal," said Michael Decker, managing director and co-head of municipal securities at the Securities Industry and Financial Markets Association.

"Based on an initial reading, the new proposal is a vast improvement over the 2013 issue price amendments," said Mike Nicholas, chief executive officer of the Bond Dealers of America. "Retaining the current regulatory framework for establishing issue price based on a substantial amount of an issuance being sold and providing a mechanism to permit reliance on the initial offering prices are especially positive developments for the municipal market."

National Association of Bond Lawyers president Tony Martini said there's "a lot to be encouraged by" in the new proposal.

The re-proposed rules apply to bonds that are sold at least 90 days after the rules are adopted in final form, but issuers can rely on them for bonds sold on or after Wednesday, the regulators said. A public hearing on the proposal is scheduled for Oct. 28.

Issue price is used to determine the yield on bonds for purposes of arbitrage investment restrictions.

Existing rules generally provide that the issue price of a maturity is the first price at which a substantial amount of the bonds is sold to the public, with substantial defined as 10%. But for bonds that are publicly offered, the issue price is the first price at which 10% of the bonds are reasonably expected to be sold to the public. When there is a bona fide public offering, the issue price is determined as of the sale date – the date when the underwriter signs the agreement to buy the bonds from the issuer and when the terms of the bonds are set — based on reasonable expectations of the initial offering price.

The rules proposed in 2013 eliminated the “reasonable expectations” standard and the definition of substantial as 10%. Instead, they provided a safe harbor that would allow the issuer to treat as the issue price of a maturity the first price at which at least 25% of the bonds is sold to the “public,” with that term referring to anyone other than an “underwriter.”

Those rules defined underwriter as “any person that purchases bonds from the issuer for the purpose of effecting the original distribution of the bonds, or otherwise participates directly or indirectly in the original distribution.”

Market participants raised a number of concerns about the issue price rules proposed in 2013 and wanted them to be withdrawn or re-proposed. The new proposed rules aim to address market participants’ concerns about the 2013 proposed rules.

Kim Betterton, a partner at Ballard Spahr in Baltimore who took the lead on NABL’s comments on the 2013 proposal, said it looks like Treasury and the IRS accepted most of NABL’s suggestions.

Under the re-proposed regulations, as in the existing regulations, the general rule would remain that the issue price is the first price at which 10% is sold to the public. But issuers could use an alternative method to determine issue price if 10% of a maturity hasn’t been sold by the sale date. In those cases, an issuer could use the initial offering price to the public as of the sale date as the issue price if certain requirements are met. Those requirements include that the underwriters fill all orders from the public on or before the sale date at the initial offering price, and that the lead or sole underwriter provide a certification that no underwriter will fill an order from the public after the sale date and before the issue date at a higher price than the initial offering price unless the market moves after the sale date.

Underwriters could document the initial offering price with a copy of the pricing wire. They should document an order that’s higher than the initial offering price after the sale date by including both pricing information and information regarding the corresponding market change, such as proof that there were changes to the values of a muni interest rate index, Treasury and the IRS said.

“The issuer must not know or have reason to know, after exercising due diligence, that the certifications are false,” the agencies said.

Market participants had some questions about the alternative method.

Decker said he thought the regulators’ proposal could suggest that if the market moves, the price of bonds may have to keep the same spread compared to the index. However, that approach doesn’t take into account market reasons why the spread could change.

Since the certification would be a new requirement for underwriters, it’s unclear how easy it would be for the underwriters to comply with it, Decker said.

Betterton said she wants to make sure that underwriters can comply with the certification requirements and wants to get more information about the documents needed to demonstrate market changes.

She and Matthias Edrich, a lawyer at Kutak Rock, both said that there could be clarifications about what type of due diligence issuers would need to do to determine the veracity of the underwriters’ certifications.

The re-proposed rules define underwriter to include anyone who “contractually agrees to participate in the initial sale of the bonds to the public by entering into a contract with the issuer or into a

contract with a lead underwriter to form an underwriting syndicate" and anyone who directly or indirectly enters into a contract or other arrangement to sell the bonds with any of the syndicate members.

Tom Vander Molen, a partner at Dorsey and Whitney in Minneapolis, said he particularly appreciates "the recognition that a dealer without a contract before the sale date is considered part of the 'public.'"

THE BOND BUYER

BY NAOMI JAGODA

JUN 23, 2015 9:36am ET

Mayors' Resolution Defends Tax-Exempt Bonds.

WASHINGTON – The U.S. Conference of Mayors adopted a resolution against limiting tax-exempt bonds this weekend.

The tax-exempt bond resolution adopted at the mayors' annual meeting in San Francisco supports the idea that state and local entities would suffer under proposals from Congress and the Obama administration to cap, limit or eliminate tax-exempt municipal bonds.

Obama proposed capping the value of muni exemption at 28% in his fiscal 2016 budget. Opponents of the limitation, which has been an ongoing debate for several years, say the move would drive up borrowing costs to the issuers and deflate infrastructure and job development.

The mayors' resolution says tax-exempt bonds keep local taxation levels down and allow small issuers to participate in the bond market. It also argues that the ability to issue tax-exempt bonds frees state and local governments from exclusively relying on federal money, which the resolution says has been "stagnant at best and in many cases declined precipitously" over the past decade.

"In an era of increasing federal mandates and federal budget austerity, capping, limiting or eliminating tax-exempt bonds would essentially signal a divestment in infrastructure," the resolution says.

Michael Decker, managing director and co-head of the Securities Industry and Financial Markets Association's muni division, expressed support for the resolution, saying a congressional move toward tax reform could be a "serious threat."

"We, like the U.S. Conference of Mayors believe it is a vital component of financing infrastructure in the country and we agree wholeheartedly with their view that we should work against any movement to curtail or eliminate the tax-exemption," Decker said.

Bond Dealers of America CEO Mike Nicholas also said he supports the resolution, which "recognizes that tax-exempt bonds have been vital to local communities in financing critical infrastructure and community investment projects while keeping financing costs low for taxpayers."

The mayors did not adopt another resolution that would have addressed "excessive cost impacts on municipalities" from municipal financial service providers.

That resolution's text enumerated concerns that some municipalities fall prey to poor advice from service professionals and suffer from fee-based models that can create a situation where the providers profit as municipalities suffer from certain types of deals.

"This model creates perverse incentives in certain cases for financial service providers to aggressively work against the best interests of municipalities and taxpayers," the resolution said.

It proposed remedying the issues by having municipalities network to establish an industry standard for financial service providers and maintain communication to make sure the providers "comply with said guidelines and consent to be rigorously monitored for compliance."

Decker said the resolution was not very constructive. He added that if the Conference of Mayors wanted to take a more formal position, SIFMA would like to work with it.

THE BOND BUYER

BY JACK CASEY

JUN 23, 2015 1:56pm ET

TIF - SOUTH CAROLINA

Donohue v. City of North Augusta

Supreme Court of South Carolina - June 17, 2015 - S.E.2d - 2015 WL 3757108

Resident brought action challenging validity of ordinance which amended an ordinance which created a tax increment financing district. The Circuit Court upheld ordinance. Resident appealed.

The Supreme Court of South Carolina held that:

- Amending ordinance was valid, and
- Mayor's and city council's announcement of an executive session to discuss negotiations incident to a proposed contractual matter did not satisfy Freedom of Information Act's (FOIA) requirement that specific purpose of executive session be announced in open session.

Statutory subsection providing that a municipality could by ordinance make changes to a redevelopment plan in accordance with procedures for initial approval referred only to the procedural requirements, such as public notices and hearings, and not to substantive requirements, and since there was no claim that mayor and city council did not meet those requirements for ordinance amending tax increment financing district ordinance, amending ordinance was valid.

NABL Submits Comments to IRS on TEFRA Regulations.

NABL has submitted comments to the Internal Revenue Service and Department of the Treasury regarding the temporary regulations governing the TEFRA public approval requirement under Section 147(f) of the Internal Revenue Code of 1986 contained in Section 5f. 103-2 of the income tax regulations and (ii) the proposed regulations governing the TEFRA public approval requirement published on September 9, 2008, and corrected on October 8, 2008.

The comments can be seen here.

New Issue Price Regs Proposed.

The Treasury Department and the IRS have decided to withdraw §1.148-1(f) of the 2013 Proposed Regulations relating to issue price and to propose new regulations. The new proposed regulations have been filed with the Federal Register and are scheduled to be published in the Federal Register tomorrow, June 24. There will be a 90-day comment period and a hearing is scheduled for October 28, 2015.

The new proposed regulations are available here.

Oregon Out-of-State Issuance Bill Heads To Governor's Desk.

WASHINGTON – A bill that would allow an Oregon authority to issue bonds for projects in other states is headed for the governor's desk after passing through the state Senate this week.

House Bill 2492-A, which would give the Oregon Facilities Authority the power to issue revenue bonds for projects across state lines, won Senate approval by an 18-11 margin Tuesday. It had previously passed the House by a 53-6 vote, and has the support of Oregon Treasurer Ted Wheeler.

The OFA is a conduit issuer whose bonds are not obligations of nor guaranteed by Oregon tax dollars, but are rather backed by fees charged to nonprofit borrowers in the program. The OFA said that by gaining cross-border issuance authority, it could help borrowers such as hospitals and retirement communities that have facilities in both Oregon and in other states lower their costs because they would not have to seek out government issuers in other states and so separate transactions there.

Only nonprofits with operations or facilities in Oregon could benefit from the bill, and the state personal income tax exemption for interest on OFA bonds would only be available for projects within Oregon. OFA has also said that the bill would help its Small Nonprofit Accelerated Program or "SNAP" bond program for smaller nonprofits. That program for small borrowers is largely supported by the fees charged to larger ones.

A spokesman for Oregon Gov. Kate Brown said the legislation had not yet reached Brown's office but that the governor would review it when it does.

THE BOND BUYER

BY KYLE GLAZIER

JUN 17, 2015 4:37pm ET

Panel Suggests How IRS Tax-Exempt Bond Office Can Increase Efficiency.

WASHINGTON – An advisory panel has made recommendations on how the Internal Revenue Service's tax-exempt bond office can increase its efficiency and effectiveness in a time of dwindling resources and increased market complexity.

The tax-exempt bond panel of the IRS' Advisory Committee on Tax-Exempt and Government Entities presented its report on balancing resources and needs at the committee's public meeting here on Wednesday. The panelists who worked on the report were Lorraine Tyson, a partner at Pugh, Jones & Johnson in Chicago, Katherine Newell, director of risk management for the New Jersey Educational Facilities Authority, and Floyd Newton, a partner at King & Spalding in Atlanta.

TEB director Rebecca Harrigal said the panel's recommendations are "very helpful" and in line with what the office is already doing.

The municipal bond market has become more complex over the years, but issuers and TEB are facing budgetary challenges. The number of TEB staff has declined since 2009, and the money available for outreach programs and employee training has decreased. "These challenges point to the need for a re-examination of many of the 'old' ways of doing things," the panel said in the report.

The panelists recommended that TEB improve its efficiency and effectiveness by adapting two IRS programs currently used in other divisions of the service: the Industry Issue Resolution (IIR) program and the Industry Director Directive (IDD) program.

Under the IIR program, stakeholders have the chance to request published or administrative guidance on frequently burdensome or disputed tax issues. The requests are reviewed, and the IRS may then recommend that an issue be included on its priority guidance plan. If an issue is selected, a team that includes IRS and Treasury representatives is formed to work on the matter, according to the report.

Muni market groups have previously submitted comments that the IRS and the Treasury Department have taken into consideration. "However, adoption by TEB of the IIR program would include procedures such as prioritizing issues, setting due dates for response and interacting with industry experts that provide a framework for resolving issues more quickly and effectively," the report said. "In addition, the IIR program could provide a framework for identifying ways of streamlining audits of issues within TEB's jurisdiction."

The IDD program is used to provide guidance to ensure that tax administration is consistent and to address matters related to internal operations. IDDs have implemented procedures that reduce the documentation that taxpayers need to produce in audits and that examiners need to review, according to the report.

The panel believes that "TEB Director Directives" could be used to streamline the audit process and other interactions between TEB and issuers. For example, a directive on arbitrage rebate audits could identify bonds that shouldn't be subject to these types of examinations because they were issued when interest rates were at record lows. The directive could also outline the planning and conduct of audits in ways that would reduce the time and resources that the issuer and IRS agent need to use, according to the report.

Harrigal said that TEB is already looking at ways to use IDDs and will look at the panel's suggested directive about rebate audits.

The report recommends that TEB consider using written compliance examination requests as a way to determine which bond issues should be audited, and that TEB narrow the scope of materials it

requests in audits. TEB currently selects bond issues in various market segments to be audited and then often examines all potential issues raised by a bond transaction rather than focusing on particular problems, which is inefficient and time-consuming, according to the panel. Also information that issuers provide to the IRS on certain forms do not provide TEB with enough information to focus its examination efforts easily, the panel said.

Mark Scott, a former TEB director who now has a law practice where he represents whistleblowers, said after the meeting that limited-scope audits are good when the IRS has already identified a specific problem and wants to see if it persists in other cases, but that it's hard to identify previously unidentified problems through these types of audits. He said he thinks focusing on audits based on tips is the best way for the IRS to find bad situations.

The panel also had recommendations for the training of TEB employees. For example, the report said it would be beneficial for market participants to be involved in efforts to train TEB personnel.

Additionally, the panel suggested that TEB implement knowledge management tools, such as creating an online "experience database" of TEB personnel who can be contacted for subject-matter expertise when needed.

THE BOND BUYER

BY NAOMI JAGODA

JUN 17, 2015 3:22pm ET

Hospital Munis' Record Rally at Risk as Health Law Goes to Court.

As the fate of President Barack Obama's signature health-care law awaits a Supreme Court ruling, an unprecedented winning streak by hospital debt hangs in the balance.

Municipal bonds sold by hospitals have earned 0.9 percent this year, while the $3.6 trillion municipal market as a whole has lost 0.1 percent amid a broad fixed-income selloff, Bank of America Merrill Lynch data show. The securities are beating the market again in June, prolonging a record 15 months of outperformance. Hospitals have drawn buyers with a combination of higher yields and bolstered balance sheets as the Affordable Care Act covers millions more Americans seeking treatment.

The legal decision, likely in the next two weeks, may upend the rally by ending federal premium subsidies in states that didn't set up exchanges for buying insurance. That result would pose a risk to not-for-profit hospitals, which have increased operating margins as more patients show up with insurance, according to Moody's Investors Service.

With a ruling against the health law, "you have to imagine that will create some volatility and uncertainty as it relates to anything health-care related," said James Iselin, head of munis in New York at Neuberger Berman, which oversees about $10 billion of munis, including hospital bonds.

Medicaid Expansion

The suit, King v. Burwell, challenges the availability of tax credits to discount the cost of insurance in at least 34 states. Opponents say the law allows subsidies only in the 16 states that created

insurance marketplaces. Three years ago, the court upheld the core of Obama's health-care overhaul.

The 2010 law has strengthened some hospitals' finances by cutting their unpaid bills in the states that expanded Medicaid to the poor as part of the law's introduction, according to Moody's. Twenty states have refused to expand Medicaid, though two are considering it, according to the Kaiser Family Foundation in Menlo Park, California.

Rockcastle Regional Hospital & Respiratory Care Center in Mount Vernon, Kentucky, shows the financial gains from changes in health-care and the appeal of high-yielding hospital debt to investors.

'Sky High'

The facility sold $7.2 million of bonds last month to pay for expansion. The hospital, in a state that expanded Medicaid and has its own insurance exchange, has benefited from the flow of newly insured patients, according to Jana Bray, a spokeswoman.

"The number of uninsured we had here was sky high," Bray said. "People are actually coming to get care now because they can."

Rockcastle Regional issued unrated bonds maturing in June 2030 that priced to yield 4.25 percent, data compiled by Bloomberg show. That was about 1.6 percentage points more than AAA munis. By comparison, benchmark BBB revenue bonds with a similar maturity yielded 3.75 percent.

Snoqualmie Valley Hospital, near Seattle, has a similar story. It plans to borrow as much as $82 million next week and expects to draw investors because Medicaid coverage has increased while it sees fewer uninsured patients, Chief Executive Officer Rodger McCollum said. Other changes from the law have helped fill rehabilitation beds, he said.

Borrowing Increase

Moody's raised the ratings of more health-care issuers than it lowered in the last quarter of 2014. For the first time since 2011, not-for-profit hospitals saw revenue grow faster than expenses, the credit rater said.

As a result of stabilizing margins, hospitals have borrowed about $14 billion through the municipal market this year, the fastest pace since 2012, data compiled by Bloomberg show.

"Hospitals have been trying to tighten their expenses, and now they're spending some of the extra cash flow they're generating," Daniel Steingart, a Moody's analyst, said in an interview.

That could change with a decision against Affordable Care Act subsidies. The ruling would drive up uncompensated care costs as more people give up coverage they can no longer afford, undoing some of the systems' gains from an improving economy and reduced expenses, according to Moody's.

"It's clearly going to be negative: Even on the margin, people will lose insurance coverage," Steingart said. "There's no other way to spin it."

Bloomberg

by Brian Chappatta & Margaret Newkirk

June 16, 2015 — 9:01 PM PDT

TAX - MICHIGAN

Rafaeli, LLC v. Wayne County

United States District Court, E.D. Michigan, Southern Division - June 4, 2015 - Slip Copy - 2015 WL 3522546

Plaintiffs brought a putative class action against Counties, alleging that the notices required by the Michigan General Property Tax Act ("GPTA") regarding delinquent real estate taxes, judicial tax foreclosure proceedings and the subsequent judicial foreclosure proceedings do not comport with the constitutional requirements of Due Process and Equal Protection. Plaintiffs also challenged the foreclosure and taking of the entire equity in properties in order to satisfy minor tax deficiencies, claiming that this practice is forbidden by the Takings Clause of the Fifth Amendment to the United States Constitution. Accordingly, Plaintiffs sought an award of "just compensation," as well as a declaration from the court that Michigan's GPTA is unconstitutional.

The District Court held that the Tax Injunction Act and the principles of comity barred Plaintiffs from bringing this case in the federal courts.

"In sum, accepting the allegations in Plaintiffs' Complaint as true, this case may be litigated in state court, and adequate remedies found there. Plaintiffs' Due Process claim is quite clearly a direct challenge to the way that Oakland and Wayne County "collect" delinquent property taxes. As such, Plaintiffs' Due Process claim is barred by the express terms of the Tax Injunction Act, as well as under the principle of comity. A comprehensive administrative scheme is available for Plaintiffs to challenge the alleged Due Process violations in question in Michigan's court of claims, or in Michigan's circuit courts. If Plaintiffs want to raise constitutional claims, Michigan's state courts are equally equipped to hear § 1983 claims. Because a plain, adequate, and complete remedy is available in the state courts, and Plaintiffs may ultimately seek review of the state court decisions in the United States Supreme Court, this action is not appropriately before this Court, and must be dismissed without prejudice for want of subject matter jurisdiction."

TAX - NEW HAMPSHIRE

Nashua Coliseum, LLC v. City of Nashua

Supreme Court of New Hampshire - June 5, 2015 - A.3d - 2015 WL 3525081

City and taxpayer, the owner of a shopping plaza, executed an agreement to settle taxpayer's appeal from city's denial of taxpayer's application for an abatement of property tax for 2011. The agreement stated in part that nothing other than a specified limitation would preclude taxpayer from pursuing abatement proceedings for the 2012 tax year. Subsequently, taxpayer filed a motion in limine with the court, seeking a declaration that the 2012 tax abatement was properly before the court. After a hearing, the Superior Court granted the motion, ruling that it could address the 2012 tax year even though taxpayer did not file an abatement request with city for that year. Thereafter, city and taxpayer entered into an agreement for judgment regarding the 2012 tax year, preserving city's right to appeal the court's ruling. The court approved the agreement. City appealed.

The Supreme Court of New Hampshire held that:

- Transcript of the hearing on the motion in limine was not necessary for the Supreme Court to decide the abatement issue on appeal, and
- Statutory provision on the effect of a successful abatement appeal on subsequently assessed taxes did not apply to allow trial court to consider a tax abatement for 2012.

Statutory provision on the effect of a successful abatement appeal on subsequently assessed taxes did not apply to allow trial court, in a proceeding on a motion in limine following an agreement between taxpayer and city to settle taxpayer's appeal from city's denial of taxpayer's application for an abatement of property tax for 2011, to consider a tax abatement for 2012. Taxpayer did not file a timely request for abatement of the 2012 taxes, the statutory provision protected taxpayers from the need to exhaust administrative remedies for subsequent tax years only if the court later determined that the assessment value for the year before the court was incorrect, trial court never made a finding that the 2011 assessment value was incorrect, and the settlement agreement precluded such a necessary finding by trial court.

Moody's: US Hospital Strategies Increasingly Shaped by Patients Seeking Value and Convenience.

New York, June 11, 2015 — Not-for-profit hospitals that provide their patients with greater physical and online convenience and high-quality care, especially for less complex services, will improve their market share and boost their credit strength, Moody's Investors Service says in "The Patient as Consumer: Convenience and Value Drive Hospital Strategies."

Consumers are becoming increasingly discerning as they shoulder more healthcare costs and hospitals increasingly face expanding competition as patient expectations rise.

"While convenience, experience, and value will influence choices for highly price-sensitive patients, we expect the market impact will be most significant for simpler, lower-acuity services," author of the report and Moody's VP — Senior Credit Officer Kimberly Tuby says.

Physical convenience and proximity is an increasingly important factor for patients, and accessibility is becoming a crucial element in healthcare choice. Many hospitals are expanding their geographic diversity in outpatient settings with satellite sites in urban areas.

Moreover, expansion in for-profit retail clinics and walk-in urgent care centers reflect competitive forces in primary and preventative care.

Online accessibility has emerged as a key component in accessibility and many hospitals have built a virtual presence with aggressive IT spending. Moody's says the successful implementation of user-friendly, cost-effective technology is credit positive owing to the convenience a patient has to interact with their healthcare provider.

Additionally, hospitals are devoting more resources to improving the customer experience while measuring and publicizing patient satisfaction data via surveys and outreach. "A positive patient experience can generate new business through targeted recruitment and marketing initiatives, or just simple word of mouth," Tuby says.

Another priority for the consumer-oriented patient is value and pricing transparency, with pricing likely to have the greatest impact among routine, low-acuity services. Moody's says this transparency will gradually influence consumer decisions regarding routine physician questions, and

help hospitals with higher customer satisfaction experience increase market share.

However, more complex and non-routine healthcare decisions will be driven by physician relationships, clinical reputation and outcomes. But, many patients will seek treatment where their physician recommends since it requires less effort and is inherently more convenient.

The report is available to Moody's subscribers here.

House Passes Legislation to Permanently Prohibit Taxes on Internet Access.

On June 9, the full House passed H.R. 235, the Permanent Internet Tax Freedom Act (ITFA) – legislation that would permanently block state and local governments from collecting hundreds of millions of dollars in revenue. The legislation, sponsored by Bob Goodlatte (R-VA), would extend the 1998 Internet Tax Freedom Act's moratorium on state and local governments' ability to assess taxes on Internet access; that moratorium was set to end October 1, 2015. Most states (with the exception of Hawaii, North Dakota, South Dakota, New Mexico, Ohio, Texas, and Wisconsin) are currently affected by the temporary ban. H.R. 235 would extend the ban permanently and impose it on the seven grandfathered states.

The legislation is now headed to the Senate, which is hesitant to pass a permanent ITFA without addressing the Marketplace Fairness Act (which would allow state and local governments to enforce existing sales taxes on remote sellers), or possibly combining the two measures. A 2014 "compromise measure" continued the exemption for states that already collect taxes on Internet access. A Senate version of PITFA (S. 431) was introduced earlier this year.

Making the ITFA permanent would arbitrarily exempt a fast-growing sector of the economy from taxation and unfairly shift the burden of supporting essential local services onto other businesses and residents in a community. GFOA continues to oppose legislation that would make permanent the Internet Tax Freedom Act's moratorium on state and local governments' ability to tax Internet access, but remains optimistic that the Marketplace Fairness Act will remain a part of the compromise.

On June 8, the GFOA joined with the National League of Cities, U.S. Conference of Mayors, National Association of Counties, and National Association of Telecommunications Officers and Advisors to urge members of the House of Representatives to oppose H.R. 235. (View the joint letter here.) The GFOA will organize advocacy materials for our members to use in engaging their senators on ITFA and MFA, which will be available on our Federal Government Relations page in the coming weeks.

Wednesday, June 10, 2015

Bills Would Reinstate BAB Program With Lower Subsidy Rates.

WASHINGTON —Rep. Richard Neal and Sen. Edward Markey, both Massachusetts Democrats, introduced identical bills Thursday that would permanently revive the Build America Bond program with lower subsidy rates and prevent issuers from being hurt by sequestration.

Under the bills – H.R. 2676, S. 1515: "Bolstering Our Nation's Deficient Structures Act of 2015" or

“BONDS Act — the subsidy rate for issuers would be 32% for BABs issued in calendar year 2015, lowered by 1% for bonds issued in each successive year, and remaining at 28% for BABs issued in 2019 and thereafter.

The legislation was introduced one day before Fitch Ratings released a paper concluding that financing options that compliment traditional tax-exempt bonds would be beneficial because they would broaden the U.S. infrastructure-investment base. These financing options include America Fast Forward Bonds, another type of direct-pay bond proposed by the Obama administration that would be similar to BABs and could also finance any projects eligible for tax-exempt private-activity bond financing.

The BAB program, originally authorized by the American Recovery and Reinvestment Act, allowed state and local governments in 2009 and 2010 to issue taxable bonds and receive subsidy payments from the federal government equal to 35% of their interest costs.

From April 2009 through the end of 2010, more than $181 billion of BABs were issued. Massachusetts issued close to $5 billion of BABs, $3 billion of which benefited the Accelerated Bridge program, which repairs and rebuilds structurally deficient bridges in the commonwealth, according to a summary of the BONDS Act.

“During the Great Recession, when we were facing dire times, the Build America Bonds program was there to create jobs and economic opportunity,” Neal said in a news release. “The surest way to jumpstart our economy is investing in our infrastructure. Programs like these put Americans back to work immediately and make long-term investments in our future by updating our schools, roads, bridges, and hospitals. I was proud to support the Build America Bonds program then, and I continue to support this highly successively program now.”

The subsidy payments for BABs have been reduced since March 2013 as result of spending cuts known as sequestration. However, under Neal and Markey’s legislation, issuers would not be hurt by sequestration cuts for any federal subsidy payments made after the date of enactment.

The legislation also would allow BABs to be current refunded with bonds for which issuers could also receive subsidy payments. In December, the Internal Revenue Service chief counsel’s office issued a memorandum concluding that under current law, issuers are not eligible to receive subsidy payments for BABs that have been legally defeased.

The legislation is similar to bills measures Neal and Markey introduced during the last Congress.

The bills have been referred to the House Ways and Means Committee and the Senate Finance Committee. Neal is the top Democrat on the HWM committee’s select revenue measures subcommittee and 10 Democrats on that panel have cosponsored the legislation.

Infrastructure financing is a major issue in Congress. Spending from the Highway Trust Fund, which reimburses states for surface transportation spending, is only authorized through the end of July, and the HTF is nearing insolvency.

Markey said he hopes his bill can be approved during Congress’ transportation-funding debate.

“As the Senate debates passage of a long-term transportation bill, I look forward to working with my colleagues to get this important job-creating legislation passed,” he said.

Fitch said that when BABs were issued in the past, they, “supported new public capital infrastructure projects, such as schools, bridges and hospitals, and had a very strong reception from

both issuers and non-traditional municipal investors." The largest buyers of BABs included pension funds and foreign investors, which do not benefit from the tax-exemption for traditional municipal bonds, the rating agency said.

Almost half of all sovereign bonds had yields of less than 1% and nearly $5 trillion had negative yields at the end of April. Therefore, U.S. infrastructure debt "could be an increasingly important asset class for institutional investors searching for yield," Fitch said.

"The BAB-comparable AFFBs, or some variation thereof, could potentially offer investors higher yields with little additional issuer credit risk, while issuers would benefit from low borrowing costs via an interest subsidy, in this case proposed at 28%," the rating agency said. "This would allow issuers to select the optimal capital structure based on current market conditions and investor preferences rather than a 'one-size-fits-all' approach."

THE BOND BUYER

BY NAOMI JAGODA

JUN 5, 2015 4:45pm ET

Congressman Tom Reed: A Former Mayor and Muni Supporter.

WASHINGTON — As Mayor of Corning, N.Y., Tom Reed saw how capital could be raised for road, water and sewer improvements through the issuance of tax-exempt bonds.

Now, as a congressman and member of the powerful House Ways and Means Committee, Reed has made tax-exempts one of his priorities, introducing legislation on bank-qualified bonds and disaster relief.

Some opponents of tax exemption for municipal bonds think that governments can pay for projects through one year's tax levy or by saving up money over time. However, many communities do not have access to a large tax base, said Reed, a Republican whose district includes parts of upstate New York.

"When you're talking millions of dollars that are necessary for a small community to put in a roadway, to put in a sewer line or water line or wastewater treatment facility, you need the leverage of bonding in order to get that done," he said in a recent interview for The Bond Buyer, part of a series of profiles of members of Congress.

Reed, 43, was first elected to Congress in a special election in 2010.

Reed, who served as mayor of Corning, a city of about 11,000, in 2008 and 2009, said his time in the post greatly affected how he views issues in Congress. Also, it's a "natural fit" for him to work with Democrats in Congress who are also former mayors, he said.

"As mayors, you get a different sense of the needs of local communities because you've been on the front line" he said. "And as we deal with municipal financing, making sure that the front line voices of our local officials are listened to, is something that I think naturally brings us together in bipartisan ways."

Chuck Samuels, a partner at Mintz Levin and counsel to the National Association of Health and Educational Facilities Finance Authorities, said Reed has been a leading supporter of bonds in Congress in part because of his connections to his district.

While some people come to Congress and forget their roots, Reed is “absolutely not that person,” he said.

Bank-Qualified Bond Bill

Reed introduced a bill on bank-qualified bonds last month. It is similar to measures he sponsored in prior years.

Bank-qualified bonds are bonds that small issuers can sell to banks, who can then deduct 80% the interest expense they incur from purchasing or carrying the bonds.

Currently, bonds can only be bank-qualified if the issuer reasonably expects to issue no more than $10 million a year. The $10 million limit was temporarily increased to $30 million under the American Recovery and Reinvestment Act, but that expired at the end of 2010. Outside of that temporary increase, the bank-qualified limit has never been raised or indexed to inflation.

Reed’s bill, H.R. 2229, would raise the bank-qualified bond limit to $30 million from $10 million and index the limit to inflation. It would also apply the limit at the borrower level in conduit transactions involving 501(c)(3) nonprofit bonds. As a result, bonds issued for nonprofits that borrow no more than $30 million in bond proceeds in a year could be bank-qualified even if the issuer sells more than that amount of bonds annually.

Bank-qualified bonds are most often privately placed with banks. Since there is only one purchaser of the bonds and the issues tend to be small, issuers of the bonds don’t have to pay as much in costs for bond counsel, bankers and advisors, Samuels said.

“Some of these communities that can benefit from the bank-qualified bonds are smaller communities, they don’t necessarily need to have the bond counsel cost and the time that’s necessary to go through a normal bonding process,” Reed said.

Also, the banks that buy bank-qualified bonds tend to be local banks. “Who best knows their community than your local representatives, your local bankers who are living and breathing in the community day in and day out?” Reed asked.

The Municipal Bond Market Support Act was last introduced in the Senate in 2011 by former Sen. Jeff Bingaman, D-N.M.., who has since retired. Reed said he is trying to identify Senators to take the lead on this issue in that chamber and is particularly looking at members of the Senate Finance Committee, which has jurisdiction over tax issues.

Reed said he hopes the legislation could pass as a stand-alone bill, but “realistically it’s probably going to have to ride along with some other reforms” such as package of tax reforms or legislation relating to expired tax provisions known as “extenders.”

Samuels said that Reed recognizes the connection between what appears to be an esoteric issue and facilities in his district that provide services to his constituents. In October 2014, Reed explained his bank-qualified bill to students at Jamestown High School in his district.

Muni market groups back Reed’s bill and hope to see it enacted.

“The BDA has worked hard for an increase in bank-qualified bond issuance for years and we greatly appreciate Congressman Reed’s continued leadership and his support in promoting the benefits of tax-exempt bonds to local communities,” said Mike Nicholas, chief executive officer of the Bond Dealers of America.

“We support his bill to expand bank-qualified bonds and we urge Congress to act on it quickly,” said Michael Decker, managing director and co-head of municipal securities for the Securities Industry and Financial Markets Association.

Disaster-Relief Bill

Reed also introduced a bill last year called the National Disaster Tax Relief Act, which included some bond provisions and had 41 cosponsors but was not brought to a vote. The legislation would create qualified disaster area recovery bonds, which would be exempt facility bonds that could be used to finance certain types of projects states or other political subdivisions that are in areas affected by federally-declared disasters that occurred in 2012 through 2014. It would also allow certain mortgage revenue bond requirements to be relaxed if they serve people whose homes were destroyed or damaged during disasters occurring in those years.

The bill came about in the wake of Hurricane Sandy, which hurt Reed’s home state, and the congressman said he was in a good position to introduce the legislation because he’s on the Ways and Means Committee. Communities recover from disasters faster when they have easy access to capital, he added.

“I envision we’ll probably carry that water again and go forth,” he said. “Just God forbid hopefully we don’t have another disaster like Sandy in the state of New York.”

Reed has been on the House Ways and Means Committee since 2011and is a member of the select revenue measures subcommittee, which deals with taxes.

“As the sole representative for New York State sitting in the majority on the Ways & Means Committee, Rep. Reed has played an important role advocating for industries like ours that are critical to the state’s economy,” said Payson Peabody, SIFMA managing director and tax counsel.

When asked about the timing of tax reform, Reed said that he supports both individual and corporate tax reform, but the Obama administration is focusing only on the latter.

“I’m the eternal optimist and the administration is giving some indication that it recognizes the code needs to be reformed, and we’re going to push the ball as far as possible and whatever we can get done, we’ll get done,” he said. However, there may not be the presidential leadership needed to get comprehensive tax reform enacted until after President Obama leaves office, he added.

The House has been passing legislation that would make permanent some expired tax provisions known as “extenders,” such as the state and local sales tax deduction. However, the Senate has not followed suit and President Obama has threatened to veto these bills. Reed said he thinks that if extenders can be made permanent, “I think that will lead to bigger victories like international potential reform. Like overall business and individual corporate reform.”

The Obama administration has proposed using transition revenue from business tax reform produced by taxing the foreign earnings U.S. companies to provide revenue for the Highway Trust Fund, which reimburses states for surface transportation projects. A number of members of Congress have endorsed the idea.

Reed said he would support this as well as alternative ideas, such as using revenue from leasing the mineral rights of federal land with oil and gas reserves. He also said he supports developing infrastructure through public-private partnerships and generally would be supportive of expanding the types of projects that can be financed with tax-exempt private-activity bonds.

However, he would not support raising the gasoline tax, which has traditionally been the primary source of funding for the HTF.

Congress recently passed a two-month extension of authority for funding surface transportation programs which expires at the end of July. While Reed would like there to be long-term legislation, "the two-month bill was a necessary evil to continue to have the conversation [to] come up with a long-term bill," he said.

Reed said it would be a "realistic goal" for Congress in July to pass an extension that goes to the end of the year, and that it is more likely that a four-to-six-year bill would be passed next year.

Reed's Background

In addition to previously serving as mayor of Corning, Reed also had a municipal law practice, a property-development firm and a real-estate business. One of the things he did as a lawyer was advise small towns in upstate New York on their statutory installment bonds, he said.

These are a simpler form of bond that localities in New York usually sell to local banks that hold them. Statutory installment bonds can also be bank-qualified bonds, said Tom Myers, a partner at Orrick, Herrington and Sutcliffe in New York.

"We would actually be the legal opinion on some of the smaller issues, certifying that the process was done right … the statutory installment bonds were in compliance with state and federal law, filling out tax forms necessary to get them registered appropriately," Reed said.

Being involved in the bonding process as a lawyer, he saw how municipalities needed financing for projects like highways and town halls. "People lose sight of … where it's going to," he said.

Reed grew up in Corning and has a bachelor's degree from Alfred University and a law degree from Ohio Northern University.

The son of a career military man, Reed and his 11 older brothers and sisters were raised with the mindset that commitment and service to the United States is important.

"I always thought in the back of my mind, the way – cause I didn't go into the military – the way I could honor that commitment is to do public service" and run for office, he said.

Orrick's Myers, who first met Reed when he was working as a lawyer and who also worked on some Corning bonds while Reed was Mayor, called the congressman "a very likeable guy."

"Tom is a very smart guy and entrepreneurial as well," Myers said.

THE BOND BUYER

BY NAOMI JAGODA

JUN 3, 2015 1:19pm ET

CHARITABLE IMMUNITY - VIRGINIA

Councill v. Damascus Volunteer Fire Dept., Inc.

United States District Court, W.D. Virginia, Abingdon Division - June 1, 2015 - Slip Copy - 2015 WL 3459204

The Damascus Volunteer Fire Department is a 501(c)(3) tax exempt non-profit entity that offers fire fighting and rescue services to the Damascus, Virginia, community. Charitable contributions make up a substantial portion of the Fire Department's revenues.

In order to raise funds, the Fire Department owns and operates a bingo hall in Damascus, which is run solely by volunteers. The bingo hall is operated pursuant to a Charitable Gaming Permit from the Commonwealth, and all proceeds of the bingo games are used for the Fire Department's charitable purposes of firefighting and rescue services. On July 13, 2012, the plaintiff, Wanda Councill, tripped and was injured while leaving the bingo hall. Councill claimed that her injuries were attributable to the Fire Department's negligence and sued.

The Fire Department filed a Motion for Summary Judgment on the ground that it is entitled to charitable immunity from suit under Virginia law.

To establish charitable immunity, a defendant entity must prove two distinct elements: a) That the entity is organized with a recognized charitable purpose and that it operates in fact in accord with that purpose; and b) That the plaintiff was a beneficiary of the charitable institution at the time of the alleged injury.

The District Court held that the Fire Department satisfied the first element, but not the second, finding that the plaintiff was not a beneficiary of the Fire Department's charitable purposes at the time of her injury. Thus, the Fire Department was not entitled to charitable immunity.

TAX LIENS - NEBRASKA

Echo Financial v. Peachtree Properties, L.L.C.

Court of Appeals of Nebraska - May 19, 2015 - N.W.2d - 22 Neb.App. 898

In tax lien foreclosure action, the district court granted Echo Financial's motion for summary judgment entering a decree of foreclosure whereby Sarpy County's lien against the property for unpaid weed assessments would be deemed second to Echo Financial's lien for general taxes.

In the decree of foreclosure, the district court found that (1) Echo Financial's motion for summary judgment should be granted, (2) Echo Financial held a valid first lien against the subject property, (3) the County held a lien for unpaid special assessments (weed liens), which were junior only to the interests of Echo Financial, and (4) the subject property was to be sold subject to the County's unpaid real property taxes for the second half of 2011 and 2012.

The County appealed, contending that the district court erred in (1) granting Echo Financial's motion for summary judgment, (2) ordering that the County's weed liens were junior to the interests of Echo Financial, and (3) failing to find that the County had general tax liens for the second half of 2011 and 2012 and ordering the subject property to be sold subject to the County's lien for unpaid real property taxes instead of ordering that these general tax liens were to be paid from the proceeds of the sheriff's sale.

The Court of Appeals held that:

- The County's weed assessments were junior to Echo Financial's general lien represented by the tax certificate;
- County's general tax liens for the second half of 2011 and 2012 were to be paid from the proceeds of the foreclosure sale; and
- County's general tax liens took priority over Echo Financial's liens.

TAX SALE - GEORGIA

Land USA, LLC v. Georgia Power Co.

Supreme Court of Georgia - June 1, 2015 - S.E.2d - 2015 WL 3447926

Tax deed purchaser filed suit against power company for quiet title, trespass, and ejectment, challenging the validity of an easement power company claimed on property purchaser owned. The Superior Court granted power company's motion for summary judgment on all counts. Purchaser appealed.

The Supreme Court of Georgia held that:

- Easement was extinguished when the property was not redeemed after tax sale purchaser properly invoked the state barment statutes;
- Purchaser had cause of action for trespass;
- Purchaser had standing to bring trespass action; and
- Purchaser did not have an ejectment claim.

Express easement that power company had obtained from record property owner after he had already lost the property to a tax sale was extinguished when the property was not redeemed after tax sale purchaser properly invoked the state barment statutes. At best the easement granted to power company by record owner conveyed an interest in the property which provided the power company with a right of redemption.

TAX - KANSAS

Petrella v. Brownback

United States Court of Appeals, Tenth Circuit - June 1, 2015 - F.3d - 2015 WL 3452663

Students and their parents brought § 1983 action against various state officials, alleging that provision of Kansas School District Finance and Quality Performance Act (SDFQPA) which capped districts' ability to raise extra money by levying additional property taxes violated their constitutional rights. The United States District Court dismissed the suit for lack of standing. Plaintiffs appealed. The Court of Appeals for the Tenth Circuit vacated in part, reversed in part, and remanded. On remand, the District Court denied plaintiffs' motions for preliminary injunction and reconsideration, and granted in part officials' motions to dismiss. Plaintiffs appealed.

The Court of Appeals held that:

- Changes to state's system of school financing did not render the case moot;
- SDFQPA's cap provision did not violate plaintiffs' right to free speech;

- The cap did not violate plaintiffs' right to association;
- The cap was subject to rational basis, not strict scrutiny, standard of review; and
- Cap was enacted to meet legitimate government interest of promoting equity in education funding.

TAXPAYER STANDING - FLORIDA

Kneapler v. City of Miami

District Court of Appeal of Florida, Third District - May 27, 2015 - So.3d - 2015 WL 3397037

Taxpayer brought action against city, alleging that leasing of city's real property violated city charter. The Circuit Court entered summary judgment in city's favor. Taxpayer appealed.

The District Court of Appeal held that taxpayer lacked standing to bring action, where taxpayer did not allege a special injury different in kind than any other voter of the city.

To have standing to challenge the validity of a resolution passed by a municipality directing a referendum to be placed on the general election ballot, a plaintiff must allege that he has suffered or will suffer a special injury which is distinct from that suffered by others in the district.

Moody's: Affordable Care Act's Medicaid Expansion Linked with Decline in U.S. Hospitals' Bad Debt.

New York, June 03, 2015 — Unpaid bills — better known as "bad debt" — at US non-profit hospitals declined in states that expanded Medicaid during 2014, Moody's Investors Service says in "Medicaid Expansion Linked to Lower Bad Debt Amid Improving Hospital Financials."

The hospitals in 29 states and Washington, D.C. that expanded Medicaid experienced an average reduction in bad debt of 13%. The expense reduction was over 40% in some cases. Concurrently, these hospitals in Medicaid expansion states benefited from declines in charity care, where charges are voluntarily waived for medical care.

In contrast, hospitals in non-expansion states saw bad debt increase through much of the year before dropping slightly in the fourth quarter, and the payor mix was largely unchanged as compared to 2013.

"Bad debt represented only 4.8% of median hospital revenue in 2013 in Medicaid expansion states, so big drops in bad debt do not necessarily lead to big improvements in operating performance," author of the report and Moody's VP — Senior Analyst Daniel Steingart says.

During 2014, hospitals in Medicaid expansion states saw bad debt expense sharply decrease by the end of the year, Moody's says, following increases in the first quarter where there was volatility in the roll out of healthcare exchanges.

However, the report notes that other factors like macroeconomic conditions and an industry-wide push by non-profit hospitals to cut expenses and productivity also had a positive impact on the sector's overall financial improvement. In fact, financial performance in the sector improved nationwide and the Medicaid expansion states did not outperform hospitals in non-expansion states.

Moody's says the decline in bad debt is credit positive, but hospitals in the expansion states have not comprehensively shifted this lessened exposure into higher cash flow, or materially better financial results than non-expansion states.

"A reduction in bad debt will not result in stronger margins by itself. Other factors, particularly the overall economic environment and hospitals' ability to control other expenses, has a larger impact on financial performance," Steingart says.

The report is available to Moody's subscribers here.

GFOA Provides Comments as House Judiciary Committee Considers Digital Tax Legislation.

On June 2 the GFOA provided joint comments to members of the House Judiciary Committee, which is holding a hearing on the Digital Goods and Services Tax Fairness Act of 2015 (HR 1643) and the Business Activity Tax Simplification Act of 2015 (HR 2584). The GFOA, along with our colleagues at the National League of Cities, U.S. Conference of Mayors and National Association of Counties has significant concerns with each of these bills.

The Digital Goods legislation would significantly reduce state and local revenues by preempting the taxation of purchases such as downloaded music, movies and online services. One very concerning aspect of the bill is language that would define digital service in such a way as to exclude from local cable franchise fee revenues generated from on-demand and pay-per-view services. With the increasing popularity of these services, local governments would lose millions of dollars in revenues currently allocated for a variety of purposes, including supporting public safety and educational needs, as well as providing park, community center and library space and facilities.

The Business Activity Tax legislation would mandate the use of a physical presence standard for determining whether a state or locality can assess a tax on a company. The bill represents an unwarranted federal intrusion into state and local affairs that would allow companies to avoid and evade taxation, increase the tax burden on small businesses and individuals, alter established constitutional standards for state taxation, and cost billions of dollars in existing state and local tax revenue.

In addition to our joint comments, the National Governors Association (NGA) also testified at the hearing. The full testimony of NGA Executive Director Dan Crippen is available here. The GFOA will be organizing advocacy materials for our members to use in engaging their federal elected leaders on these bills, which will be available on our Federal Government Relations page in the coming weeks.

Download Sales Tax and Government Preemption Legislation Letter.

Supreme Court Rules That Dormant Commerce Clause Limits Maryland's Taxing Powers Over Its Residents.

The U.S. Supreme Court issued its long-awaited decision in Comptroller of the Treasury of Maryland v. Wynne on May 18. In a split 5-4 decision, the Court struck down as unconstitutional a feature of

Maryland's income tax system because it could result in double taxation and discriminates against interstate commerce in violation of the dormant Commerce Clause.

Under Maryland's laws, residents are taxed on personal income earned both within and outside the State, and nonresidents are taxed on personal income earned only within the State. Maryland does not, however, permit its residents to take full credits for income taxes paid to other states on personal income earned outside the State. Maryland's personal income tax consists of a "state" tax component and a "county" tax component, although both components are state taxes collected by Maryland's Comptroller. Maryland allows credits to be taken for income taxes paid to other states against the Maryland "state" tax component, but not for the "county" tax component. This potentially results in double taxation of income earned by Maryland residents outside the State with respect to the "county" tax component.

The Wynnes, who are Maryland residents, earned income outside the State through their ownership interest in a Subchapter S corporation. The Wynnes paid personal income tax based on their share of the corporation's pass-through income earned in other states. On their Maryland tax return, the Wynnes claimed a credit against their Maryland personal income tax for the personal income taxes paid in those other states. The Comptroller allowed the credit as to the Maryland "state" tax component, but denied the credit as to the "county" tax component. The Wynnes challenged the denial of the credit, but lost at the administrative level. The state circuit court reversed and found the Maryland tax scheme unconstitutional under the Commerce Clause. The Court of Appeals of Maryland, the state's highest court, affirmed the lower court under the four-part test of Complete Auto Transit, Inc. v. Brady. The Maryland Comptroller sought review by the U.S. Supreme Court. Numerous amici curiae filed briefs, including the U.S. Solicitor General, the Multistate Tax Commission, and the Council On State Taxation.

In the majority opinion authored by Justice Alito—who was joined by an interesting coalition of Chief Justice Roberts and Justices Kennedy, Breyer, and Sotomayor—the Court agreed that Maryland's denial of a full credit to its residents for income taxes paid to other states is unconstitutional. In reaching that conclusion, the Court first confirmed its prior interpretation of the Commerce Clause as containing a dormant or negative command prohibiting state taxation that discriminates against or imposes excessive burdens on interstate commerce, even where Congress has not legislatively acted. "[I]t strikes at one of the chief evils that led to the adoption of the Constitution, namely, state tariffs and other laws that burdened interstate commerce." The Court found that existing dormant Commerce Clause cases "all but dictate the result," citing J.D. Adams Mfg. Co. v. Storen, Gwin, White & Prince, Inc. v. Henneford, and Central Greyhound Lines, Inc. v. Mealey. In each of those earlier cases, the Court had struck down a state gross receipts tax that could have resulted in multiple taxation of income earned outside of the state and was found to discriminate against interstate in favor of intrastate economic activity.

The Court rejected the argument that any distinction exists in the case law between gross receipts taxes and net income taxes based on gross receipts taxes being "direct and immediate" burdens on interstate commerce while net income taxes are "indirect and incidental" burdens on interstate commerce. The Court noted that current jurisprudence has replaced the "direct-indirect burdens" test with a "more practical approach" based on the economic impact of the tax. The Court also rejected Maryland's attempt to draw a distinction between corporations and individuals in applying the protection of the dormant Commerce Clause. Both corporations and individuals receive the benefit of state and local government services that are funded through the state income tax, and the Court found no reason for treating individuals less favorably than corporations.

In examining the constitutionality of Maryland's tax scheme under the dormant Commerce Clause, the Court principally relied on the "internal consistency" test adopted in Container Corp. of America

v. Franchise Tax Bd. As explained by the Court, the test focuses on the structure of the tax to see whether its identical application by every state would treat interstate commerce the same as intrastate commerce. Applying the test to Maryland's tax scheme "as a whole," the Court found that it failed the test and was "inherently discriminatory and operates as a tariff" due to its unfavorable treatment of interstate commerce and the risk of double taxation of income earned outside the state.

To the surprise of some observers, the "tariff" issue was raised during oral argument by both Justices Alito and Breyer, and the majority opinion makes clear why they pursued that line of questioning. A good portion of the majority opinion was devoted to refuting arguments made in the multiple dissenting opinions.

Justices Scalia and Thomas expressed their continuing view in dissent that the dormant Commerce Clause is a "judicial fraud" because it is not part of the Constitution. Justice Ginsberg's dissent, joined by Justices Scalia and Kagan, did not dispute the majority's interpretation of the dormant Commerce Clause or its internal consistency test, but argued that the test should be inapplicable to Maryland's power to tax personal income earned by its own citizens no matter the source of the income. The majority dispensed with this argument, explaining that the dissent was confusing the requirements of the Due Process Clause, which addresses a state's jurisdiction to tax, with the dormant Commerce Clause that restricts a state from exercising its power to impose a discriminatory tax.

May 26 2015

Article by Patricia Head Moskal and Bruce P. Ely

Bradley Arant Boult Cummings LLP

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

TAX - FLORIDA

Milan Inv. Group, Inc. v. City of Miami

District Court of Appeal of Florida, Third District - May 27, 2015 - So.3d - 2015 WL 3390260

Property owner brought class action complaint against city and its downtown development authority, among others, seeking declaratory and monetary relief for an allegedly unconstitutional ad valorem tax levied by city in its downtown development district. The Circuit Court dismissed the action with prejudice. Owner appealed.

The District Court of Appeal held that:

- City was statutorily authorized to levy ad valorem tax, and
- Tax did not violate constitution's uniform taxation requirement.

City was statutorily authorized to levy ad valorem tax in city's downtown development district, even though statute granting municipalities the authority to levy and collect ad valorem taxes on properties within the district had been repealed, where savings clause preserved the substance of the authority-granting statute and placed the provisions into a municipal ordinance, and legislature amended two statutes that acknowledged the downtown development authority's existence after the

authority-granting statute was repealed.

City's ad valorem tax on property owners located within the downtown development district of city did not violate state constitution's requirement that all ad valorem taxation be at a uniform rate within each taxing unit, even though property owners in the downtown development district were paying different rate than other property owners in the city, where all property owners within the district were taxed uniformly, and city had legislative authority for the taxation.

TAX - ILLINOIS

Marks v. Vanderventer

Supreme Court of Illinois - May 21, 2015 - N.E.3d - 2015 IL 116226

Plaintiffs brought class action against county recorder of deeds and county, challenging constitutionality of a $10 Rental Housing Support Program surcharge collected by the recorder of deeds for the recordation of any real estate-related document in a county. The Circuit Court granted summary judgment in favor of plaintiffs. Recorder and county appealed.

The Supreme Court of Illinois held that:

- One dollar portion of $10 surcharge retained by county did not violate constitutional prohibition on fee offices;
- Surcharge did not violate uniformity clause of state constitution;
- Surcharge did not violate due process clause of state constitution; and
- Rational basis review, rather than strict scrutiny, applied to substantive due process challenge to surcharge.

FORECLOSURE - ILLINOIS

Baker v. Forest Preserve Dist. of Cook County

Appellate Court of Illinois, First District, First Division - May 18, 2015 - N.E.3d - 2015 IL App (1st) 141157

Taxpayers brought action against bank and county's Forest Preserve District (FPD) seeking declaratory and injunctive relief related to FPD's purchase of farm's note by using public funds and subsequent acquisition of title to farm in foreclosure sale. The Circuit Court granted summary judgment and dismissal for bank and FPD and denied summary judgment for taxpayers. Taxpayers appealed.

The Appellate Court, Connors held that:

- It had jurisdiction to review action;
- Action was not moot; and
- FPD had authority to acquire lien on farm.

Appellate Court had jurisdiction to review taxpayers' action against bank and county's Forest Preserve District (FPD) seeking declaratory and injunctive relief related to FPD's purchase of farm's note by using public funds and subsequent acquisition of title to farm in foreclosure sale, despite claim that judgment in separate mortgage foreclosure action could be affected by Court's finding.

Foreclosure action was not of same nature as taxpayer suit, as FPD submitted documentary proof that it owned mortgage and note to farm in foreclosure action while taxpayer suit challenged FPD's ownership of mortgage and note based on county's Forest Preserve District Act, not based on documentary proof, and, while, in taxpayer suit, taxpayers brought action on behalf of all taxpayers and did not seek personal gain, in foreclosure action, mortgagors and affiliated corporate entities sought to defend property against foreclosure for their own benefit and benefit of their companies.

Taxpayers' action against bank and county's Forest Preserve District (FPD) seeking declaratory and injunctive relief related to FPD's purchase of farm's note by using public funds and subsequent acquisition of title to farm in foreclosure sale was not moot, despite claim that, before taxpayers filed notice of appeal in said action, foreclosure court entered order confirming sale of farm and that deed to farm was subsequently delivered to FPD. Actual controversy existed over FPD's expenditure of public funds to purchase farm's note, taxpayers had not already received what they sought in their suit, and, while title to farm had vested in FPD, taxpayers could still seek relief, because it would have been their responsibility to replenish tax revenue for FPD's use going forward.

County's Forest Preserve District (FPD) had authority, under Forest Preserve District Act, to acquire lien on farm by using public funds and to subsequently acquire title to farm in foreclosure sale, despite taxpayers' claim that FPD's power under the Act was limited to acquiring property in fee simple. FPD did not acquire farm for profit but for the public purpose of creating a forest preserve, Act did not require simultaneous exchange of money and title for FPD to acquire farm, and, after foreclosure sale and delivery of deed, FPD owned farm in fee simple.

Hawkins Advisory (Average Area and Nationwide Purchase Price Safe Harbor Limits).

This Hawkins Advisory contains information of specific interest to single-family housing bond issuers regarding Average Area and Nationwide Purchase Price Safe Harbor Limits.

Read the Advisory.

5/26/2015

Move America Bonds – Close Enough for Government Work.

Senator Ron Wyden (D-Oregon) and Senator John Hoeven (R-North Dakota) have sponsored a bill to encourage private parties to help repair the nation's infrastructure by encouraging the broader use of public-private partnerships, or P3s. The bill, called "The Move America Act of 2015," proposes a new type of tax-exempt bond, the "Move America Bond." (Move America Bonds will undoubtedly be described as "MABs" and will undoubtedly adopt the B(b)uild America B(b)ond convention of ignoring Congress's capitalization.)

Move America Bonds are a variation on the theme of "qualified public infrastructure bonds," or "QPIBs," which we first encountered in the president's budget earlier this year. Both QPIBs and MABs are tax-exempt bonds, so neither program has the "direct pay" feature notably used by Build America Bonds that has since fallen into disfavor because of sequestration. Both programs seek to encourage private investment in infrastructure by putting private activity bonds that are issued to

finance public infrastructure on a more equal footing with governmental use bonds that are issued for the very same purpose. Each program tries to do this by exempting interest on these private activity bonds from the alternative minimum tax, which does not apply to interest on governmental use bonds.

Comparing Move America Bonds and QPIBs

As we noted in our QPIB post, the key to enacting QPIBs would be to strip them off of the President's budget, which like it or not stood little chance of blossoming into actual legislation, and attach the QPIB pieces to a free-standing piece of legislation. Move America Bonds are a step in this direction. (We are of course only speculating about what QPIBs would look like, because a budget proposal by its nature speaks only in terms of general concepts rather than specific legislative language.) It's a useful exercise to compare QPIBs and MABs at this stage, so we've prepared a chart that does that.

Some additional thoughts:

MABs go beyond the existing list of exempt facility projects and would not require "governmental ownership" of the bond-financed project.

The two big benefits of MABs over QPIBs are that an issuer can use MABs to finance a project even if the economic owner of the property is not a state or local government entity (so long as the project is available for use by the general public) and that MABs greatly expand the list of projects that can be financed well beyond the existing list of projects that are eligible for exempt facility bond financing. The main drawback of MABs as compared to QPIBs is that QPIBs would not be subject to any volume cap, but MABs are subject to a new, independent volume cap system, capped at the level of 50% of the current state private activity bond volume cap. In addition, although the general descriptions of the MAB proposal state that the project must be available to the general public, the MAB legislation does not create a new, separate "general public use" requirement (or even a link to the existing general public use rules in the Treasury Regulations) apart from the existing exempt facility bond rules.

MABs would create a new Code Section and a new volume cap system, which likely would take time to learn before MABs became widely used.

Prior, we discussed the difficulty that always arises when Congress creates a new type of tax-advantaged bond – everyone has to take time to learn the new rules and this can delay the start of the activity that Congress intends to encourage with that new tax-advantaged bond program. Although we have not seen legislative language, QPIBs seemed like they would operate within the existing framework of exempt facility bonds under Section 142 of the Code, with fairly few changes.

The draft MABs legislation, however, would create a new Code Section – 142A – which contains some rules that are similar to the existing rules in Section 142, but the relationship isn't fully fleshed out. For example, Proposed Section 142A(b)(1) authorizes Move America Bond financing for "airports," without an explicit link to Code Section 142(a)(1). It leaves open the question of whether the body of existing law regarding airport financings (private letter rulings about what constitutes an "airport," for example) applies to both provisions. Logic would tell you yes, and Proposed Section 142A(a)(1) does say that "[e]xcept as otherwise provided . . . a Move America bond shall be treated for purposes of this part as an exempt facility bond," but these kinds of questions are what can slow things down.

In addition, the Move America Bond legislation includes new types of facilities that have not been financeable with tax-advantaged debt as an exempt facility. There are several references to laws that

are probably outside of the common working areas of public finance and public finance tax lawyers. For example, the MAB legislation would allow Move America Bond financing for "railroads (as defined in section 20102 of title 49, United States Code) and any associated rail and road infrastructure for the purpose of integrating modes of transportation." It will take time for stakeholders to learn what this does and does not include. (In some ways, it is ironic that MABs would allow railroads to be financed with tax-exempt bonds. After all, some of the very first municipal bonds were issued to finance railroad lines shortly after the Civil War. Unfortunately, many of those railroad bond issues went into default when the recession of 1871 overcame the country. That may explain why railroads were never a permitted category of exempt facility bond in the next 144 years since that recession hit. We certainly hope that unfortunate circumstance will not be repeated if railroads can be financed in the future.)

In addition, the MAB legislation expands the definition of "docks and wharves" to include "waterborne mooring infrastructure, dredging in connection with a dock or wharf, and any associated rail and road infrastructure for the purpose of integrating modes of transportation." Presumably the definitions of these items will be left up to the IRS, which will further delay the use of MABs for these projects.

MABs would create a separate volume cap system that is similar to the existing private activity bond volume cap, but distinct.

The Move America Bond legislation exempts Move America Bonds from the traditional state private activity bond volume cap in Section 146 of the Code, but instead creates a new volume cap for these bonds. The amount of the volume cap is allocated among the states similar to the way that the existing volume cap is allocated. It is capped at 50% of the amount of the existing volume cap, but Move America Bonds would not count against the traditional private activity bond volume cap. One nice feature of the MAB volume cap is that any carried-over volume cap not used after three years is reallocated to States that have fully utilized their MAB volume cap.

As an alternative, the Move America Act creates a tax credit available to private investors.

The Move America Act also proposes "Move America Credits," which would be transferable tax credits in exchange for equity investments in eligible projects. Currently, the complicated partnership structures that often are beneficial for purposes of tax credit programs such as the low-income housing tax credit program make it difficult to fully integrate these programs with the tax-exempt bond provisions. Move America Credits would allow states to "trade in" their Move America Bond volume cap ($1 of MAB volume cap = $0.25 of MAC credit authority) for Move America Credits. Like many existing tax credit programs, the tax credit would be claimed proportionately over a set period (here, 10 years), with a recapture mechanism if the project ceases to qualify under the MAC provisions. The Move America Credits could be combined with MABs and other federal or state funding, including TIFIA loans or FHWA grants.

All in all, QPIB supporters should be encouraged by MABs.

As noted above, proposals like Move America Bonds are the next step if qualified public infrastructure bonds are to be enacted. While Move America Bonds contain some drawbacks from the broad outlines of QPIBs in the President's budget, it also has some benefits, such as removing the governmental ownership requirement and recognizing that the transportation projects that are eligible for MAB financing are effectively already public projects. Although the legislative language itself is not without its faults, it is a good start and a good first attempt at doing the difficult work of hashing out the actual legislative language for enactment of the QPIB concepts.

The National Law Review

John Hutchinson

Thursday, May 28, 2015

John W. Hutchinson
Senior Associate

Johnny Hutchinson focuses his practice on taxation. He has significant experience in tax issues relating to public finance. Johnny has devoted substantial time to all types of tax-advantaged state and local debt, including governmental financings and financings for 501(c)(3) health systems, colleges and universities throughout the country. He also has experience with private activity financings, including solid waste disposal and sewage facilities for large utilities and one of the nation's largest waste management companies.

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That Cessna Flying Over Your House May Be Sending Photos to the Tax Assessor.

Would-be gawkers in New York's wealthy Hamptons neighborhoods are easily foiled by tall, thick hedgerows and long, gated driveways. For a long time, so were tax assessors wanting to check properties with a quick drive-by. Then they found an easy way past all those defenses. They just went over their heads—or specifically, a pilot in a tricked-out Cessna did, with cameras in the plane's belly and sides taking high-resolution photos of lawns speckled with pools, cabanas, and tennis courts.

The Southampton town assessor used such aerial photos of one of the most highly assessed gated properties in Sagaponack to show the town board how useful the flyover imagery, which cost around $110,000, could be. "We could see everything," says Lisa Goree, the town assessor. "We could measure every roofline, every structure, the land between the structures. It was amazing." The town already had the permits for construction done on the property, but the added detail from on high helped send the assessed value of the property from $218 million to $240 million, she says.

Resource-strapped local governments across the U.S. like how the photos can lead to more accurate tax rolls, greater tax revenue, and a far faster, easier way to assess properties. For an extra fee, counties can use software to compare current photos with prior flyovers. That helps them find potential changes to properties—and a good recent aerial photo can also stop a property tax appeal in its tracks. So while government users of the photos welcome it as a revenue and productivity boon, the impact on homeowners is more mixed.

In addition to being shot straight down, the photos are taken at an angle, from all four directions. That makes changes to a property far easier to see and measure, and with every pixel in the photo geo-referenced, land parcels are easy to identify. Southampton's vendor, aerial measurement company Pictometry International, which developed an angled "oblique" photography method, merged with EagleView Technologies, an aerial roof and wall measurement company, in 2013.

Pictometry's 80 Cessnas have shot high-resolution aerial photography in counties that include about 90 percent to 95 percent of the U.S. population, according to Chris Barrow, EagleView's chief executive officer. The company has clients from every state, more than 1,300 counties in total, he says, and more than 1,700 clients if municipalities and Canada are included.

Since Southampton's first run of photos in 2009, it has paid for two more flights and bought more of the company's analytics software to identify property changes and track valuation trends among homes. In 2014, two staffers used Pictometry's ChangeFinder software, which cost the town $18,000, and found second-floor additions, extensions to first-floor living space, new garages, and other changes that all added $41 million in assessed value to the tax rolls, says Goree.

Appraisers in Florida's Hillsborough County, which started using aerial photography last year, have spotted everything from an entire house that had been left off the rolls to a new fireplace chimney. After analyzing more than a quarter of the tax roll, the head of the property appraiser's office, Bob Henriquez, says the photos and software added a net of $9.5 million to the value of properties in the area, amounting to about $182,000 in tax revenue to be collected every year.

The photos, though, can be a big investment. Angled photos by Pictometry at a 3-inch resolution (the better the resolution, the more expensive the photos) cost Hillsborough about $272,000 per year for a four-year contract. It used another firm, Aerial Cartographics of America (ACA), for the straight-down shots.

But prices for aerial imagery are coming down, says Kevin Cameron, chief appraiser for Georgia's 374-square-mile Elbert County. After looking around at a variety of companies, including Pictometry, he chose one that began expanding into the aerial imagery business in the past few years2, ControlCam, for his most recent flyover. Its bid of less than $30,000 for both straight-down and oblique imagery, at a 6-inch resolution, was much lower than that of Pictometry and other vendors, he says. Cameron hasn't received the imagery yet, so he can't speak to its quality.

The aerial imagery isn't entirely a game of gotcha for those who don't bother, or aren't prompt, about getting building permits. "For every dollar that we placed on the tax roll, we've taken a quarter off," says Henriquez. His staff is finding "subtractions" to valuations, such as pools that added value but are now filled in or a dock that is no longer there.

The photos do make it harder for property owners to fudge facts. "It's pretty funny sometimes," says Goree, the Southampton assessor. When attorneys or homeowner representatives make a claim about a property that's not quite right, "when I pull out this big beautiful photo just taken in 2014 there's not really much they can argue," she says.

Assessors say the flights don't spark much in the way of privacy concerns. Issues that have popped up when some jurisdictions start using Pictometry's product "are often quickly addressed when residents understand that the images are captured on a schedule of once every two years and do not involve satellites or real-time monitoring," the company has written.

Imagery at a 3-inch resolution means that one pixel represents 3 inches on the ground. At that resolution, you can see rooflines and shrubs, according to Pictometry, but a face or license plate would be only a few pixels and so not recognizable. (Pictometry also offers 1-inch resolution and says even then it's very hard to identify faces or smaller details.)

"The larger point is that advancing technology—particularly drone technology—will increase the privacy risks associated with this kind of work," says Jeramie Scott, national security counsel for the Electronic Privacy Information Center. Once technology has evolved so that drones don't have to be

within a line of sight, “having so many drones flying may add additional avenues for revenue, like collecting license plate data or mapping the presence of Wi-Fi or cellphones,” he says.

Drones will definitely allow for higher resolution; that’s one reason the Federal Aviation Administration is working on regulations for the use of commercial drones, says EagleView. Last December, the company led the formation of the Property Drone Consortium. A white paper written for the group by an EagleView executive notes that drones “can make a huge impact” in lowering the cost of aerial assessments of low-density rural areas, as well as the expense of the multiple low-altitude flyovers planes must take to get resolution at 1-inch per pixel.

The paper’s less compelling, if true, argument? “The reduction of site inspections … lessens the chances of [assessor] run-ins with angry dogs.”

Bloomberg

by Suzanne Woolley

May 28, 2015

Moody's: Preliminary FY 2014 US NFP Hospital Medians Show First Revenue Growth Since 2011.

New York, May 27, 2015 — The preliminary FY 2014 US not-for-profit and public hospital medians indicate a rise in annual median revenue growth to 4.7%, while the annual expense growth rate declined to 4.6% in FY 2014, Moody’s Investors Service says in a new report.

The annual median revenue growth reverses the 2013 all-time low of 3.9%, while the pull back in the annual median expense growth rate continues a trend Moody’s observed last year when the rate eased to 5.0% in FY 2013 from 5.5% in FY 2012.

“Revenue growth was supported by continued consolidation in the not-for-profit hospital sector and the initial influence of the Affordable Care Act (ACA), as benefits of the exchanges and Medicaid expansion were realized,” Moody’s VP — Senior Credit Officer Beth Wexler says in “Growth in Hospital Revenue Edges Ahead of Expenses in 2014.”

Moody’s says the slowdown in the expense growth rate reflects the ongoing shift of patient care to lower-cost and more efficient settings, such as outpatient and ambulatory arenas, as well as operating efficiencies gained from size and scale.

Other findings in the preliminary medians include an increase in cash on hand and unrestricted cash and investments. The median cash on hand rose to 212 days in FY 2014 from 207 days in 2013, and up 15 days from 2012. Unrestricted cash and investments increased $20 million to $377 million in FY 2014 from the previous year, owing to solid equity gains and restrained capital spending.

Operating performance slightly improved and operating cash flow suggests new stability as revenue growth rebounded and expense growth decelerated.

However, Moody’s expects the final medians will show weaker operating performance than the preliminary medians as more hospitals are included which are concentrated in geographic areas with weaker economies.

The preliminary medians are based on FY 2014 audited financial statements representing 48% of Moody's-rated portfolio. These medians primarily reflect audit year ends of September 30, 2014 and prior.

The full report will be published later this year and reflect a larger sample of Moody's-rated portfolio of not-for-profit hospitals and health systems.

The report is available to Moody's subscribers here.

Global Credit Research – 27 May 2015

IRS Announces MRB Average Prices, Safe Harbors.

On May 22, the Internal Revenue Service released Revenue Procedure 2015-31 that provides nationwide average purchase prices for residences located in the United States, and average area purchase price safe harbors for residences located in statistical areas in each state, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, the Virgin Islands, and Guam for qualified mortgage bonds and mortgage credit certificates.

TAX - IOWA

Dolphin Residential Cooperative, Inc. v. Iowa City Bd. of Review

Supreme Court of Iowa - May 15, 2015 - N.W.2d - 2015 WL 2261250

Purported cooperative brought action to contest city board of review's refusal to reclassify 22 multiunit apartment buildings as residential property rather than commercial. The District Court ordered reclassification, and board appealed.

The Supreme Court of Iowa held that attorneys who organized cooperative did not "organize themselves" as required to create valid cooperative.

Attorneys who organized residential apartment cooperative did not "organize themselves" for purposes of ownership of residential property on a cooperative basis, as they lacked any putative interest in the cooperative, and thus cooperative was not a properly organized residential cooperative and was not entitled to favorable tax treatment of property as residential rather than commercial.

TAX - IOWA

City of Iowa City v. Iowa City Bd. of Review

Supreme Court of Iowa - May 15, 2015 - N.W.2d - 2015 WL 2261303

City sought review of decision of its board of review reclassifying 18 properties held by eleven multiple housing cooperatives from commercial to residential for property tax purposes. The District Court affirmed. City appealed.

The Supreme Court of Iowa held that:

- Two corporations were statutorily permitted to organize multiple housing cooperative, and
- Cooperative statute did not require one-apartment-unit-per-member ownership ratio.

Two corporations were statutorily permitted to organize multiple housing cooperatives, and therefore cooperatives were permitted to be classified as residential for property tax purposes, where statute governing organization of multiple housing cooperatives expressly stated that corporations were persons within the meaning of the statute.

Statute governing organization of multiple housing cooperatives did not require one-apartment-un-t-per-member ownership ratio for cooperative to be properly organized, where statute did not expressly require organizers to be members of cooperative or own any property at the time of organization, and nothing in the statute prohibited one person from holding ownership and corresponding membership interest in more than one apartment unit.

TAX - OHIO

Cincinnati v. Testa

Supreme Court of Ohio - May 14, 2015 - N.E.3d - 2015 -Ohio- 1775

City appealed decision of state tax commissioner, revoking real estate tax exemption for golf courses owned by city and operated by private entity. The Board of Tax Appeals (BTA) reversed the commissioner's decision. Commissioner appealed.

The Supreme Court of Ohio held that golf courses owned by city and operated by private entity were used exclusively for a public purpose, as required for the courses to be qualify for public property real estate tax exemption.

City exercised extensive control over the courses, courses were used to make golfing available to the general public, sales of food, beverages, management fee paid to private operator was a flat fee unconnected with financial performance of the courses, merchandise from which private operator derived revenue were incidental to courses' public purpose, and management agreement did not grant private operator with exclusive right to possession of the courses, and city personnel were on the courses on a daily basis.

Taxpayers Beware: Bidding Wars for NFL Teams Are Losing Bets.

Recently, the Washington, D.C. mayor, Muriel Bowser, announced that she has reached out to Dan Snyder, owner of the Redskins, the D.C.-area NFL team, about returning the team to the nation's capital from its current location in suburban Maryland.

Maryland Governor Larry Hogan has made clear that he wants the team to stay, and Virginia Governor Terry McAuliffe is aggressively courting the team to move to Virginia. This setup makes a bidding war likely, with each location promising a newer and fancier replacement stadium for the team's current home.

Wherever the Washington team winds up, there's little doubt that taxpayers—both locally and across the nation—will be on the hook for much of the stadium's bill.

Conventional wisdom is that the gains to the local economy from a stadium are worth the cost to local taxpayers. However, the evidence for this view is weak, and even weaker is any claim that federal taxpayers outside of the D.C. metropolitan area should also subsidize the location of a local team.

Despite the fact that new stadiums are often thought to boost local economic growth and job creation, these benefits are often overstated. Academic studies typically find no discernible positive relationship between sports facility construction and economic development.

Most evidence suggests that sports subsidies cannot be justified on the grounds of local economic development, income growth or job creation. In fact, after 20 years of academic research on the topic, “peer reviewed economics journals contain almost no evidence” that sports stadiums or franchises measurably improve local economies.

To cite just one specific example, in the mid-1990s, the state of Maryland projected that a new football stadium in downtown Baltimore (now the home of the Baltimore Ravens) would create 534 jobs at $331,000 per job. The projected economic benefits of $33 million were only a fraction of the projected $177 million investment. It is therefore no surprise that economists overwhelmingly oppose sports subsidies.

Even if one buys the argument that local taxpayers win from subsidizing a team to locate in their area, there’s no reason that federal taxpayers should be part of this bidding war. Residents of, say, Wyoming, Maine or Alaska gain nothing whether the D.C.-area football team is lured to Washington or Virginia or Maryland. Yet, under current federal tax law, taxpayers throughout the country will wind up subsidizing the stadium, wherever it’s located.

The future home of the D.C. area’s NFL team will most likely be financed, at least in part, by the issuance of municipal bonds. Holders of municipal bonds pay no federal tax on the interest income, in effect providing a federal subsidy for the financing of a stadium for Snyder’s team.

President Obama recently proposed eliminating the tax exemption for interest on bonds that are used to finance sports stadiums, which would mean an estimated $542 million more in tax revenue between 2016 and 2025. And the president is hardly the first to consider this idea. When Congress last undertook major tax reform, in 1986, the House’s version of the bill would have taxed interest income from bonds used to pay for stadiums, though that provision did not become law.

Let’s hope Congress revisits the issue. While local football fans will undoubtedly be intensely interested in where the D.C.-area team will end up, there is no reason why fans and non-fans alike across the country should help subsidize the new stadium.

NEWSWEEK

BY ALEX GOLD AND TED GAYER

5/24/15 AT 11:57 AM

Ted Gayer is vice president and director, economic studies, and the Joseph A. Pechman Senior Fellow, and Alex Gold is research associate, economic studies, at the Brookings Institution. This article first appeared on the Brookings site.

Supreme Court Ruling on Maryland's Double Income Tax Could Impact Other States and Localities.

The U.S. Supreme Court has ruled that Maryland's local tax on out-of-state income is unconstitutional and amounts to double taxation, a ruling that could impact more than a dozen other states with similar local taxes.

In a divided 5-4 ruling issued Monday, the justices' reasoning relied heavily on the question of tax fairness for Maryland residents, concluding that "Maryland's tax scheme is inherently discriminatory and operates as a tariff." (The U.S. Constitution prohibits tariffs between states.) The court ruled Maryland's local tax on out-of-state income violated the Interstate Commerce Clause, adding that such a "tariff is the quintessential evil" targeted by the so-called dormant Commerce Clause principle.

Chief Justice John Roberts, and Justices Anthony Kennedy, Stephen Breyer, Samuel Alito and Sonia Sotomayor joined the majority opinion. Justices Antonin Scalia, Clarence Thomas, Ruth Bader Ginsburg and Elena Kagan dissented in three separate opinions.

At issue was a dispute between Maryland residents Brian and Karen Wynne and the state controller over local taxes levied by Howard County, where the Wynnes live. As a partial owner of a national health-care corporation, Brian receives income in dozens of states. Maryland, like every state that taxes income, gives a state income tax credit to residents for income earned out-of-state. But it doesn't give any credit for local taxes owed. This essentially means that the Wynnes and other Maryland residents pay taxes on their out-of-state income to the state where they work and the locality where they live.

In the 28-page majority opinion by Alito, the court picked apart the arguments made by Maryland that the tax was fair because residents can purportedly respond to unfair taxes at the ballot box. Alito soundly rejected that argument: "the notion that the victims of such discrimination have a complete remedy at the polls is fanciful," he wrote. Especially, he added, because only a distinct minority of the state's residents likely earn income out of state and therefore hardly amount to enough of a quorum to effect change.

Maryland also argued that any ruling against the state would compromise the state's taxing power and be an extreme action to accommodate people who want to live in Maryland but work elsewhere. But the court called that notion a "red herring," and said that that the overall point is that the state's tax burden is higher and therefore unfair to those who earn out-of-state income.

In his dissenting opinion, Scalia disagreed with the ruling based on his belief that courts have too broadly interpreted the Constitution's Commerce Clause. "The Clause says nothing about prohibiting state laws that burden commerce," Scalia wrote, and was joined in the dissent by Thomas in calling the negative Commerce Clause a "judicial fraud." (Thomas also wrote his own dissent, joined by Scalia.)

Ginsburg, joined in dissent by Scalia and Kagan, argued that Maryland was justified in applying the local tax to the Wynnes' out-of-state income because the Wynnes were residents and used local services and therefore all their income should be taxed by that locality. On the issue of fairness, Ginsburg noted that the other states that taxed the Wynnes' income also elected not to give them a credit for their county taxes, and wrote that "More is given to the residents of a State than to those who reside elsewhere, therefore more may be demanded of them."

It’s unclear so far to what extent this ruling will impact localities in other states. Maryland’s comptroller estimates that the state’s counties will now owe a combined $200 million in tax refunds to taxpayers across the state. A total of 16 other states have localities that also levy local income taxes but some may already give local tax credits for income earned out-of-state. For those that don’t, some localities may try to distinguish between their case and Maryland’s. That is, that Maryland’s local taxes are collected by the state, which is subject to the Interstate Commerce Clause, and then redistributed back to localities. By contrast, localities in other states collect their own income tax and therefore could argue the Interstate Commerce Clause doesn’t apply to them.

“I think that’s guaranteed to be an argument localities put forward,” said Alan D. Viard, a resident scholar and tax policy expert at the American Enterprise Institute. “But collecting taxes at the state or city level, in my mind, there’s no distinction. People are going to have to actually look at these laws in detail and see how it actually affects them.”

For any localities that are affected by the decision, said the Tax Foundation’s Joseph Henchman, the solution is relatively straightforward. Either start offering a credit on out-of-state income or repeal the local tax.

He added that the 5-4 split decision would likely be the closest one issued by the court this term. That’s because taxes typically get a lot deference from judges who don’t want to appear as if they are interfering with the elected branches on tax policy. In fact, Henchman, an attorney and policy analyst, was one of the many people who was surprised the court took up the case at all after the Maryland Court of Appeals ruled in favor of the Wynnes.

“There’s a lot of power on the state and local government side for tax policy,” he said. “So it’s really important that what protections there are for taxpayers be very well guarded. And that’s argument I think Alito made yesterday.”

GOVERNING.COM

BY LIZ FARMER | MAY 19, 2015

IRS: Disclosure of Determination Letters Issued by the Exempt Organizations Rulings & Agreements function in Washington, DC .

The IRS shares information with the public whenever possible. This includes exemption letters issued by the National Office in Washington, DC.

In the past, the IRS shared exemption letters processed in Washington with some members of the press. Due to changes in the approval process starting in 2014, applications for exemption are no longer processed in the National Office. The National Office is currently working on a few remaining applications and when a final disposition is made, EO will provide determination letters or denial letters, as applicable, for those organizations in the Electronic Reading Room as well as to the members of the media.

The IRS continues to release redacted copies of denial letters it issues to organizations. Denial letters also are released through the electronic reading room.

The IRS provides a list of all 501(c)(3) organizations that have received a favorable determination letter on our EO Select Check tool. We also provide additional information on all organizations

exempt from tax on our Exempt Organizations Business Master File Extract page.

A copy of an application and/or a determination letter of an exempt organization may be requested from the Internal Revenue Service by submitting Form 4506-A to:

Internal Revenue Service
Attn: Correspondence Unit
P.O. Box 2508, Room 4024
Cincinnati, OH 45201

TAX - CONNECTICUT

Town of Canton v. Cadle Properties of Connecticut, Inc.

Supreme Court of Connecticut - May 19, 2015 - A.3d - 2015 WL 2189610

Town brought action against property owner seeking appointment of a receiver of rents in connection with delinquent property taxes on the property, and tenant sought to intervene. The Superior Court appointed a receiver, and denied tenant's motion to remove receiver. Tenant appealed. The Appellate Court affirmed in part and reversed in part. Town sought certification to appeal, which was granted.

The Supreme Court of Connecticut held that:

- Receiver of rents was permitted to collect all rents, including back rent owed, but
- Receiver of rents was not permitted to evict tenant or enter into new lease.

Statute that permitted appointment of a receiver of rents when real property taxes due to a municipality were delinquent permitted receiver to collect all rent owed, including back rent, rather than only rent owed subsequent to appointment of receiver, where statute permitted receiver to collect "all rents" and to collect rents "in place of the owner," who undoubtedly would have been entitled to collect past and presently due rent.

Receiver's responsibilities under statute that permitted appointment of a receiver of rents when real property taxes due to a municipality were delinquent were limited to collecting rents, that in turn were to be used to pay taxes and utilities, due after the date of the receiver's appointment, and therefore receiver was not permitted to evict tenant and secure new tenant, where statute only expressly permitted receiver to collect funds and make payment, and there was no authorization to evict a tenant or to enter into a new lease.

TAX - MASSACHUSETTS

Goduti v. City of Worcester

Appeals Court of Massachusetts, Suffolk - May 13, 2015 - N.E.3d - 2015 WL 2210594

Mortgagee brought declaratory judgment action against city challenging the legality of city's tax assessment. The Land Court granted summary judgment in favor of city. Mortgagee appealed.

The Appeals Court held that:

- Payment of tax debt and release of tax lien rendered appeal moot, and
- Mortgagee was not record owner entitled to have real property taxes assessed to him by municipality.

Mortgagee was not record owner of real property statutorily entitled to have real property taxes assessed to him by municipality, rather than to mortgagor, where, by law, mortgagee did not acquire title to the property until three years after he recorded certificate of entry, and mortgagee accepted payments from mortgagor during that three-year period.

TAX - PENNSYLVANIA

Links v. Keystone Oaks School Dist.

Commonwealth Court of Pennsylvania - May 8, 2015 - A.3d - 2015 WL 2137643

Exempt organization appealed from the order of the trial court affirming the decision of the Allegheny County Board of Property Assessment Appeals and Review's (Board) to refuse its property exemption from July 3, 2012, the day that it acquired ownership, based on the Tax Assessment Day Rule. Under that Rule, the taxable status of a property becomes fixed as of the date designated by law as assessment day, i.e., January 1 of each year.

The appeals court affirmed, finding that Section 505(b) of the General County Assessment Law is inconsistent with Section 10 of the Second Class County Assessment Law and thus the Tax Assessment Day Rule had not been abrogated in Allegheny County.

TAX - CALIFORNIA

Cafferkey v. City and County of San Francisco

Court of Appeal, First District, Division 5, California - May 8, 2015 - Cal.Rptr.3d - 15 Cal. Daily Op. Serv. 4571

Property taxpayers filed claim for property tax refund, claiming that city erroneously collected taxes for lot which did not exist on parcel maps. The Superior Court granted city's motion for summary judgment, and taxpayers appealed.

The Court of Appeal held that city assessor-recorder's office created lot pursuant to its statutory authority rather than by mistake such that taxes assessed on the lot were valid. City had intended to split the base year value of the property between taxed lot and 10 additional condominium lots, and lot was clearly identifiable on assessor's map and was undisputedly owned by taxpayers.

IRS Closes Audits of BABs, Tax Exempts, With No Change.

WASHINGTON The Internal Revenue Service has closed audits with no changes to $1.38 billion of Build America Bonds issued by the New Jersey Turnpike Authority in 2009 and bonds from a $26.56 million mortgage revenue and refunding issue sold by Lakeland, Fla. in 2008.

The IRS did not eliminate the federal subsidy payments of the New Jersey authority's BABs or the tax exempt status of the Florida issuer's bonds.

The conclusions of the audits were disclosed in event notices posted on the Municipal Securities Rulemaking Board's EMMA system on Tuesday.

The IRS began auditing the turnpike authority's series 2009F BABs in 2010. In the letter informing the authority of the audit, the IRS said, "At this time, we have no reason to believe that your debt issuance fails to comply with any of the applicable tax requirements."

The IRS notified the authority that the audit had been completed last month, according to the authority's recent event notice.

The audit was held up for a while because the IRS raised an issue in another audit of a different BAB issuer. Both audits were eventually closed with no change, a source said.

BABs are taxable, directpay bonds that could be issued in 2009 and 2010. The turnpike authority was the eighth largest issuer of BABs, issuing two transactions totaling $3.23 billion, roughly according to Thomson Reuters data.

The authority issued the 2009 BABs, along with $375 million of tax exempt bonds, to pay the principal on bond anticipation notes and the costs of construction for projects that were part of the authority's 10-year capital improvement program for the turnpike system it operates. A syndicate led by Morgan Stanley underwrote the bonds, and Wilentz, Goldman and Spitzer was the authority's bond counsel, according to the official statement for the bonds.

Brad Waterman, a lawyer who was special tax counsel for the authority in the audit, declined to comment.

The IRS began auditing the Lakeland bonds in April 2014 and had no reason to believe at that time that there were any tax problems with the bonds, according to a 2014 event notice. The IRS told the issuer that the audit was completed in a letter dated May 5, according to the city's recent event notice.

The city's retirement community first mortgage revenue and refunding bonds were issued for the benefit of Carpenter's Homes Estates, Inc. The official statement for the bonds was not posted on EMMA.

The Bond Buyer

by Naomi Jagoda

MAY 13, 2015 4:38pm ET

BDA Supports Rep. Reed's Bank-Qualified Bond Legislation.

Rep. Tom Reed (R-NY) introduced the Municipal Bond Market Support Act of 2015 (HR 2229), which would increase the annual limit for bank-qualified bonds to $30 million, index the level to inflation in the future, extend the use of bank-qualified bonds to 501(c)(3) organizations, and allow for pooled financing.

In his press release, Reed featured a quote from the BDA supporting his legislation: "The Bond Dealers of America organization supports this legislation and we hope to see it move forward this

year. Bank-qualified bonds are a cost-effective method of financing for local governments and financing authorities, incentivizing community banks to invest in tax-exempt bonds to finance important local projects," said Bond Dealers of America CEO, Mike Nicholas.

Congress approved these measures under the American Recovery and Reinvestment Act of 2009, however they expired at the end of 2010 and bipartisan legislation has been introduced several times since then to make these changes permanent.

The BDA and other industry groups have supported bank-qualified legislation since 2008 and sent a letter of support to Rep. Reed and the five cosponsors in support of the bill. We will continue to work with the House and Senate to promote additional support and passage of the bill.

05-12-2015

IRS Rules on Highway Fare Revenues for Tax-Exempt Bond Purposes: Tax Analysts

The IRS ruled that fare revenues collected by a state political subdivision for bus service along two highway lanes are not "payments in respect of" the lanes under section 141(b)(2)(B) for purposes of the tax-exempt bond provisions.

Continue reading. (Subscription required.)

Citations: LTR 201519015

Tax Analysts: Charter School Isn't Instrumentality of State.

In a legal memorandum, the IRS concluded that a charter school doesn't qualify as a wholly owned instrumentality of the state or of a political subdivision of the state for purposes of FICA tax liability under section 3121(b)(7)(F) for compensation paid to the school's employees.

Continue reading. (Subscription required.)

Citations: ILM 201519027

ABA Section Submits Letter to IRS on Definition of Political Subdivision.

The American Bar Association's Section of Taxation submitted comments this week to the Internal Revenue Service requesting guidance on the definition of political subdivision for tax exempt bonds and other tax-advantaged bonds, related to the technical advice memorandum issued in 2013 (TAM 201224038). In the comments, the tax section of ABA said that parts of the 2013 TAM "appear to set forth new substantive requirements not previously considered in the various statutory, administrative or judicial precedents."

The letter voices concern that "auditors of tax-exempt bonds may use the 2013 TAM to apply a new

standard not based on existing law, thereby creating significant uncertainty in a well-established transactional practice that relies on unqualified tax opinions."

The 2013 TAM concluded that, since "the Issuer is not directly or indirectly answerable to the electorate, it is not a division of a state or local government," and therefore not a political subdivision. The ABA Section on Taxation argues that "accountability has not previously been required to achieve political subdivision status and control has been analyzed as a factor in whether sovereign power has been delegated."

The letter recommends that, "in light of these new requirements that the 2013 TAM seems to impose to qualify as a political subdivision… [it should] be withdrawn or modified to conform with existing precedent." It also recommends that "the Service and Treasury issue a notice providing interim guidance prior to the issuance of new political subdivision regulations and stating that any change to the definition of political subdivision will apply solely on a prospective basis."

Tax Analysts: Groups Seek Withdrawal of Requirement in Charitable Hospital Rules.

The Association of American Medical Colleges and the American Hospital Association, responding to a request (Notice 2014-27) for 2015-2016 priority guidance plan projects, have recommended the withdrawal of a requirement in the final charitable hospital regulations (T.D. 9708) regarding provider listings in a hospital's financial assistance policy.

Continue reading. (Subscription required.)

MAY 1, 2015

Bill on Bank-Qualified Bonds Introduced in the House.

WASHINGTON – Rep. Tom Reed, R-N.Y., has reintroduced legislation that would increase the annual issuance limit for issuers of bank-qualified bonds to $30 million from $10 million.

The Municipal Bond Market Support Act of 2015, H.R. 2229, was introduced on Friday. It is co-sponsored by Reps. Richard Neal, D-Mass., Todd Young, R-Ind., John Larson, D-Conn., Randy Hultgren, R-Ill., and Ron Kind, D-Wis. The bill, which is similar to a measure that was offered in July of last year, has been referred to the House Ways and Means Committee.

Currently, banks can buy the bonds of issuers who issue $10 million or less of tax-exempt bonds per year and deduct 80% of their carrying costs, the interest expense they incur from purchasing or carrying an inventory of tax-exempt bonds. The $10 million limit was temporarily increased to $30 million under the American Recovery and Reinvestment Act, but that expired at the end of 2010. Outside of that temporary increase, the bank-qualified limit has never been raised or indexed to inflation.

The bill would raise the bank-qualified limit to $30 million and index it to inflation.

Additionally, it would apply the limit at the borrower level for 501(c)(3) nonprofit bonds. As a result,

bonds issued for nonprofits that borrow no more than $30 million in bond proceeds in a year could be bank-qualified even if the issuer sells more than that amount of bonds annually.

“Municipal bonds are a lifeline to local communities looking to expand a high school or repair their infrastructure,” Hultgren said in a release. “These tools of ‘fiscal federalism’ allow municipalities to raise their own funds tax-free, using their own expertise and avoiding the heavy bureaucracy of the federal government. We should expand this Main Street financing tool for municipalities intimately connected to the needs of their communities.”

Larson said that under the Municipal Bond Market Support Act, “bank-qualified bonds will enable smaller communities to finance these vital improvements, which in turn will create jobs, improve local economies, and ensure the safety of our citizens through much needed upgrades.”

Reed and some of same co-sponsors introduced the similar bank-qualified bond bill last year, but it failed to gain traction.

A version of the Municipal Bond Market Support Act was introduced in the Senate in 2011. The Senator who introduced it – Jeff Bingaman, a Democrat from New Mexico – retired from the Senate in 2013.

Updating the bank-qualified bond rules is a priority for a number of municipal market groups. Associations including the Bond Dealers of America, the Government Finance Officers Association and the Independent Community Bankers of America lobbied for changes to the bank-qualified bond rules in recent letters to the Senate Finance Committee tax reform working group on community development and infrastructure.

“The increased limit and other fixes in the bill will give more opportunities particularly to the smaller issuers that our regional and middle market dealers serve,” said Mike Nicholas, BDA’s chief executive officer.

The Bond Buyer

by Naomi Jagoda

MAY 4, 2015 7:29pm ET

TAX - MISSISSIPPI

Castigliola v. Mississippi Dept. of Revenue

Supreme Court of Mississippi - April 30, 2015 - So.3d - 2015 WL 1955575

Taxpayer challenged Mississippi Department of Revenue’s use tax assessment on his purchase of a yacht in Florida involving marketing services of a broker. The Chancery Court granted summary judgment for the Department. Taxpayer appealed.

The Supreme Court of Mississippi held that:

- The Department had burden to prove the purchase was within the state’s statutory authority to tax, and
- As a matter of first impression, taxpayer’s use of a broker did not make the casual sale taxable.

Casual-sales exception to sales and use tax was an exclusion and not an exemption, therefore, Mississippi Department of Revenue had the burden to prove taxpayer's boat purchase in Florida was within the state's statutory authority to tax.

Taxpayer's use of a broker, in what was otherwise a casual sale, to purchase a yacht in Florida, in order for taxpayer to qualify for Florida sales tax exemption, did not trigger Mississippi's use tax, and therefore, Mississippi Department of Revenue's tax assessment was arbitrary and capricious.

TAX - MICHIGAN

Lucre, Inc. v. City of Grand Rapids

Court of Appeals of Michigan - April 28, 2015 - Not Reported in N.W.2d - 2015 WL 1931223

Lucre, Inc. is a telephone company and one of its business premises is leased from Kent County. The subject property is located in the city of Grand Rapids.

The Michigan Tax Tribunal took up the issue of whether the property should be taxed by the City of Grand Rapids, or the State of Michigan.

The Tribunal concluded that because petitioner did not *own*, use, and occupy the subject property – as required by statute – it was not subject to assessment by the State, and Lucre's interest in the subject property was assessable by the City.

TAX - OHIO

Saturday v. Cleveland Bd. of Rev.

Supreme Court of Ohio - April 30, 2015 - N.E.3d - 2015 -Ohio- 1625

Nonresident professional football player sought income tax refund. The Central Collection Agency, city's tax administration authority, denied claim, and player appealed. The Board of Review upheld Agency's decision, and player appealed. The Board of Tax Appeals ruled that city's municipal-income-tax ordinance and the nonresident-professional-athlete regulation did not operate in contravention of any state statute, and player appealed.

The Supreme Court of Ohio held that player, whose team played a game in city, but who remained in Indianapolis participating in team-mandated activities, was not liable for city municipal income tax.

None of player's work was performed in city, player's service to his employer encompassed his rehabilitation activity outside city on the day of football game in city, player's absence from city and his performance of duties elsewhere on the same day suggested that the imposition of city tax would constitute extraterritorial taxation.

NFL Players Score Court Victory Forcing Cleveland Tax Refund.

Two former National Football League players won refunds after the Ohio Supreme Court ruled that the way Cleveland calculated a tax on their income was improper.

Former Chicago Bears linebacker Hunter Hillenmeyer and former Indianapolis Colts center Jeff Saturday sued Cleveland's tax board separately last year. Saturday is entitled to a full refund and Hillenmeyer to a partial refund, the Supreme Court said in its ruling Thursday. That opens the door for other players to ask for reimbursement.

Seven other U.S. cities besides Cleveland that have major professional sports teams tax visiting players, coaches and others traveling with the team. The issue in Ohio centers on how the city imposes its 2 percent income tax. Cleveland stands to lose at least $1 million a year if it calculates the levy based on days worked in a season, as the players wish, rather than games played, according to a 2013 city analysis.

The city is reviewing the decisions and "considering all available options and any potential economic or operational consequences," according to a statement.

Many players will now file refund claims, said Stephen Kidder, the Boston attorney for the players. "The decisions in both cases represent clear victories for professional athletes who often are unfairly targeted by jurisdictions," Kidder said in a statement.

Cleveland had said its approach was reasonable. Just as entertainers are paid only for performances regardless of how much they rehearse, athletes are paid to perform in games, officials said.

Saturday was a center who played 13 years with the Indianapolis Colts and won the 2007 Super Bowl before retiring with the Green Bay Packers in 2012. He argued that he shouldn't have been taxed because he was injured and didn't travel to Cleveland for a 2008 game.

Tax Bill

He was still hit with a $3,594 tax because of city regulations that count payments an employer makes to a sick and absent employee.

Saturday, now an ESPN analyst, said he was pleased with the result.

"This wasn't about the money; it was the principle of it," Saturday said in a telephone interview. "I'm excited for the guys who won't be unfairly taxed by Cleveland."

Hillenmeyer, a linebacker for the Chicago Bears for eight seasons, said Cleveland improperly uses a calculation based on the number of games in the city divided by total contests in a season. That method means that a player performs a greater proportion of his work in the city.

Other cities and states base the tax on number of days spent in a city divided by days in the season, which yields a smaller proportion and therefore less revenue for a municipality.

Cleveland calculated his taxable income for a 2006 preseason game as $162,002, based on his $3.2 million total salary that year, according to papers Hillenmeyer filed with the Ohio Board of Tax Appeals. The state, using a different method, calculated the taxable income for the game as $38,557, according to the filing.

Hillenmeyer last year called Cleveland's approach "an egregious and shameless money grab." He said Thursday that while he wouldn't expect fans to be sympathetic to well-paid professional athletes avoiding some taxes, the ruling is good for players.

"At a certain point, what's fair is fair," Hillenmeyer said in a telephone interview.

The cases are Saturday v. City of Cleveland Board of Review, 14-0292, and Hillenmeyer v. City of Cleveland Board of Review, 14-0235, both in the Supreme Court of Ohio (Columbus).

Bloomberg

by Sophia Pearson and Mark Niquette

April 30, 2015

BDA Submits Comment Letter to IRS on Issue Price to Inform 2015-16 IRS Priority Guidance.

The Bond Dealers of America submitted a comment letter to IRS in response to its request for comment on the 2015-2016 IRS Priority Guidance Plan. The purpose of BDA's letter is to reaffirm BDA's concerns with IRS's proposed rule changes related to issue price if IRS choses to move forward on the proposed rule changes in 2015-16.

The letter reaffirms BDA's previously stated concerns with the rule's elimination of the "reasonable expectations" standard, the unworkable nature of the general rule, and the overly burdensome "safe harbor," which would require 25 percent of an issuance to be sold in order to establish issue price.

BDA's December 2013 comment letter on proposed issue price rule amendments can be read here.

BDA's August 2010 joint trade association guidance letter on issue price can be read here.

05-06-15

IRS Webinar: Taxability of Fringe Benefits, Part One.

What: Free Webinar – Taxability of Fringe Benefits Part One: What Is A Fringe Benefit and When Is It Taxable?

When: May 19, 2015; 2 p.m. (Eastern)

How: Register for this event. You will use the same link to attend the event.

Learn about:

- What fringe benefits are
- Which fringe benefits are taxable
- Special accounting rules for fringe benefits
- What is a working condition fringe benefit
- What is a *de minimis* fringe benefit
- Taxability of per diem payments
- The accountable plan rules

TAX - OHIO

Hillenmeyer v. Cleveland Bd. of Rev.

Supreme Court of Ohio - April 30, 2015 - N.E.3d - 2015 -Ohio- 1623

Nonresident professional football player filed applications for refunds of income taxes paid to city. The Central Collection Agency (CCA), city's tax administration authority, upheld its imposition of tax using the games-played method of allocation, and player appealed. City's Board of Review upheld the CCA's position, and player appealed. The Board of Tax Appeals (BTA) affirmed, and player appealed.

The Supreme Court of Ohio held that:

- Statutory occasional-entrants rule did not violate player's equal protection rights;
- City's application of its games-played method of allocating income violated due-process rights of player; and
- Duty-days method comported with due process and ensured that the tax collected was not disproportionate to the income received for work in city.

Nonresident professional football player's election of appellate avenues, namely appealing to Board of Tax Appeals (BTA), rather than the common pleas court, did not waive his constitutional claim that city's allocation method known as "games-played," under which the taxable portion of professional athlete's income was based on the number of games the athlete played in city in relation to the total number of games played that year, violated due process. Statute, governing appeal from final determination of local board of tax review, set forth appellant's right to choose the forum and imposed no restrictions on its doing so.

Nonresident professional football player did not ignore statutory grounds for relief in order to present a constitutional argument, namely that city's allocation method known as "games-played," under which the taxable portion of professional athlete's income was based on number of games the athlete played in city in relation to total number of games played that year, violated due process. Player argued that Central Collection Agency's regulation conflicted with city ordinance and that the games-played method was preempted by statutory occasional-entrants rule, stating that municipal corporation shall not tax the compensation paid to a nonresident individual for personal services performed by the individual in the municipal corporation on twelve or fewer days in calendar year unless individual is a professional athlete.

Statutory occasional-entrants rule, stating that municipal corporation shall not tax the compensation paid to a nonresident individual for personal services performed by the individual in the municipal corporation on twelve or fewer days in a calendar year unless individual is a professional athlete, did not violate nonresident professional football player's equal protection rights. Classification of professional athletes as distinct from other occasional entrants neither involved fundamental rights nor proceeded along suspect lines, there was rational relationship between disparity of treatment and legitimate governmental purpose, professional athletes were typically highly paid so that a city could earn significant revenue with comparative ease, professional athletes and their events incurred much larger public burdens relating to police protection and traffic and crowd control than did other occasional entrants, and imposing limit on local taxation while protecting cities' interest in collecting existing taxes constituted adequate rational basis for General Assembly's actions.

Although city had right to tax the compensation earned by a nonresident professional athlete for his work performed in city, the city's application of its games-played method of allocating income

violated due-process rights of nonresident professional football players. Under games-played method, taxable portion of a professional athlete's income was based on number of games the athlete played in city in relation to the total number of games played that year, games-played method resulted in city allocating approximately 5 percent of player's income to itself on the basis of two days spent in city, games-played method reached income that was performed outside of city because it foreseeably imposed city income tax on compensation earned while player was working outside city, and thus, city's income tax, as applied to players, was extraterritorial and violated due process.

Consistent with the rule that the taxing authority could not collect tax on a nonresident's compensation earned outside its jurisdiction, the duty-days method, whereby the numerator represented the number of days spent in the taxing city and denominator represented the total number of work days, properly included as taxable income only that compensation earned in city by accounting for all the work for which nonresident professional football player was paid, rather than merely the football games he played each year, and as such, the duty-days method comported with due process and ensured that the tax collected was not disproportionate to the income received for work in city.

TAX - TEXAS

Texas Student Housing Authority v. Brazos County Appraisal District

Supreme Court of Texas - April 24, 2015 - S.W.3d - 2015 WL 1870013

Higher education facility authority sought review of county appraisal district's denial of tax exemptions for a student residential facility that it used as summer housing for non-college students attending university-sponsored instructional programs. The District Court affirmed the denial. Authority appealed. The Court of Appeals affirmed in part, reversed in part, and rendered in part. Both parties appealed.

As a matter of first impression, the Supreme Court of Texas held that authority did not forfeit its tax exemption by using the facility as it did.

Higher education facility authority did not forfeit its tax exemption for a student residential facility, under a provision of the Education Code, by using the facility as summer housing for non-college students attending university-sponsored instructional programs. The provision exempted property owned by a properly constituted higher education facility authority and did so without conditions, and county appraisal district did not dispute authority's assertion that authority was properly constituted.

TAX - WASHINGTON

New Cingular Wireless PCS, LLC v. City of Clyde Hill

Court of Appeals of Washington, Division 1 - April 20, 2015 - P.3d - 2015 WL 1788055

Taxpayer that was assessed municipal fine for allegedly making false statements or misrepresentations in its utility tax returns brought action against city, seeking declaratory judgment that the municipal fine was invalid. The Superior Court entered summary judgment for city and dismissed taxpayer's complaint. Taxpayer appealed.

The Court of Appeals held that:

- Taxpayer was not limited to appellate review of city mayor's dismissal of its protest of the fine;
- Statute governing writs of review did not prohibit taxpayer from invoking trial court's original trial jurisdiction; and
- Taxpayer was not barred from seeking declaratory judgment, despite availability of appellate review as a remedy.

Provision of city code stating that determination by mayor regarding municipal fine was "final" unless a "judicial appeal" was filed in the superior court could not limit the superior court to its appellate jurisdiction and, thus, did not preclude taxpayer from bringing declaratory judgment action in superior court to challenge assessment of municipal fine for allegedly making false statements or misrepresentations in its utility tax returns.

Taxpayer was not limited to appellate review of city mayor's dismissal of its protest of municipal fine, imposed for allegedly making false statements or misrepresentations in its utility tax returns, and thus it could challenge the fine by invoking trial court's original trial jurisdiction by filing a declaratory judgment complaint, where no statute required appellate review or any specific procedure for challenging the legality of a municipal fine, and taxpayer had exhausted its administrative remedies.

Statute governing writs of review did not prohibit taxpayer, after dismissal of its protest by city mayor, from invoking trial court's original trial jurisdiction through declaratory judgment complaint to challenge the legality of a municipal fine, imposed for allegedly making false statements or misrepresentations in its utility tax returns. The statute provided a means of invoking trial court's appellate jurisdiction and explained the circumstances under which a writ of review should be granted, but the statute did not say that a writ of review was the exclusive means of resolving a dispute over the validity of a municipal fine.

Taxpayer was not barred from seeking declaratory judgment in action challenging legality of municipal fine, which taxpayer filed after city mayor dismissed its protest, even though an alternative remedy was available in that taxpayer could have challenged the mayor's decision by obtaining a writ of review. The availability of appellate review as a remedy was not an absolute bar to seeking declaratory judgment, and city identified no statute establishing strict procedural rules or short time limits in connection with the mayor's decision concerning the validity of the fine that would weigh against granting declaratory judgment as an alternative remedy.

Rep. Larson: Munis 'The Lifeline of Any Given Community'

WASHINGTON – House Ways and Means Committee member Rep. John Larson considers municipal bonds to be "the lifeline of any given community."

"Without the ability to use municipal bonds, both municipalities and not-for-profits, 501(c)(3)s, have a very difficult time in funding the projects that they need," the Democrat from Connecticut said. Munis help cities and towns, including those in rural areas, address issues like infrastructure and housing, he added.

Larson, 66, talked about bonds and other topics in a recent interview with The Bond Buyer, part of an ongoing series of profiles of members of Congress, particularly those with backgrounds in state and local government.

A former teacher and insurance agency owner, Larson previously served on the Board of Education and Town Council of East Hartford, Conn., as well as in the Connecticut State Senate. He was elected to the U.S. House of Representatives in November 1998 and is currently in his ninth term.

The congressman, in 2005, was named to the House Ways and Means Committee which has jurisdiction over tax policy and has co-sponsored bond bills. These include the Municipal Bond Market Support Act, which would have increased the annual issuance limit for issuers of bank-qualified bonds to $30 million from $10 million, and the Build America Bonds Act, which would have reinstated the popular direct-pay bond program at lower subsidy rates. Both bills were pending in the last Congress but failed to gain traction.

Larson said he worked closely with Rep. Richard Neal, D-Mass., as well as with Republicans such as Rep. Tom Reed of New York, on the legislation. He said he plans to get the bills reintroduced in the current Congress.

“The concept is that you want to create both capacity and also, in this time of lack of work, you want to be able to help create jobs,” Larson said. “And I think there’s a direct correlation between both creating capacity — and by that I mean what municipalities can borrow — and then also tying it to specific initiatives that are usually primarily infrastructure-related.”

The idea is that, “you’re both enhancing the community’s ability to deliver a service to pay for roads, to build whatever’s necessary, but also making sure that it’s easing the burden on taxpayers as well,” he added.

In any tax reform legislation, Congress should not just protect bonds but also preserve and expand municipalities’ abilities to finance their own projects. But this becomes more difficult to do if tax reform isn’t done through “regular order” and instead Congress votes on bills whose contents are only known by the chairmen of the tax-writing committees, Larson said.

Congressional Democrats want tax reform in “as open and as transparent a manner as you can,” Larson said. He praised former Ways and Means Committee Chairman Dave Camp, R-Mich., for setting up working groups in 2013 that brought in industry groups to talk about the impacts of tax-code changes. Larson was vice chairman of the working group on financial services.

Larson hopes current Ways and Means chairman Paul Ryan, R-Wis. continues along the same lines. He was not happy that Ryan held votes on making certain expired tax provisions permanent because the legislation would lose revenue that could be used for tax reform.

During the last Congress, Larson was a co-sponsor of the Marketplace Fairness Act, which would allow states to require out-of-state online retailers to collect their sales taxes if the states simplified their sales tax laws. Larson said the online sales tax issue is important to Connecticut Gov. Dan Malloy and Commissioner of Revenue Services Kevin Sullivan.

Currently, states can only require a remote seller to collect its sales taxes if it has a physical presence in the state. While customers are supposed to pay use tax on their remote purchases, they typically don’t and this requirement is not well-enforced.

States are losing revenue and their finances will improve if they can recoup the money, Larson said.

Infrastructure

Larson is also an advocate for the federal government helping state and local governments to fund infrastructure.

He has introduced legislation last year called the America's Energy Security Trust Fund Act that would use revenue from a carbon tax to make up for the shortfalls in the dwindling Highway Trust Fund. He plans to reintroduce the bill in this Congress.

He also recently co-sponsored the Bridge to Sustainable Infrastructure Act, H.R. 1846, which would index federal gasoline and diesel taxes to inflation and create a bicameral, bipartisan commission that would be tasked with making recommendations for sustainable transportation funding.

"If you don't have a steady stream of revenue coming in, a predictable stream, then how can any business, or any municipality, or any state plan?" Larson asked.

On the day The Bond Buyer interviewed Larson, groups from a transportation construction coalition met with the congressman. Representatives from the groups were "nearly distraught," Larson said, noting that it will be difficult if "we have to go through another kick-the-can-down-the-road" temporary extension of funding for the HTF.

Don Shubert, the executive director of several of the construction groups that visited the congressman, said Larson is important because of his position on the Ways and Means committee, which is responsible for the funding portion of surface transportation legislation.

When it comes to the benefits of investing in infrastructure, Larson "really understands the whole picture," Shubert said. The groups visit Larson "not to lobby, but to learn," Shubert added.

Ray Oneglia, vice chairman of construction company O & G Industries who also attended the meeting, said Larson is good at bringing people together who are interested in infrastructure. Larson brought House Transportation and Infrastructure Committee Chairman Bill Shuster, R-Pa., the committee's top Democrat Peter DeFazio of Oregon, and others to Connecticut to meet with transportation industry groups, Oneglia said.

The New England Water Environment Association also met with Larson that day to bring attention to the need to improve water infrastructure, said that group's executive director, Mary Barry.

In the Hartford area, there are levees that are in great need of repair. "There is always going to be the need for federal and state assistance," Larson said.

Lengthy Public Service Career

A life-long resident of East Hartford, Conn., Larson has always had an interest in public service. He learned politics from his mother, who served on the East Hartford Town Council and was active in the Federation of Democratic Women and the Democratic Town Committee. His interest in serving the public also was piqued when John F. Kennedy was president.

Kennedy viewed giving back to the community as an important value and "something that one should aspire to," said Larson, who was sitting near a picture of the former president during the interview.

Larson was a high-school teacher from 1971 to 1976 and then owned a Mom-and-Pop insurance agency until around the time he was elected to Congress. As he was leaving the education profession, there was an opening on the East Hartford Board of Education. "I ran and I got the most votes and the rest is history," he said.

After serving on the Board of Education from 1977 to 1979, Larson then served on the East Hartford Town Council from 1979 to 1983. The two entities are intertwined. The BOE is a "creature of the

state," but its members are elected locally. The board develops its budget separately from the town council, but the council has to approve it.

"You get very intimately involved and understand and appreciate the need for the bonding capacity of a town and specifically where it most frequently it comes up is on educational and infrastructure needs," he said.

Larson served in the Connecticut State Senate from 1983 to 1995, and for eight of those 12 years, he served as Senate President Pro Tempore, a position that is third in line to the governor. Following a loss in the 1994 Connecticut gubernatorial Democratic primary election, he returned to the private sector, lectured at Yale University's Bush Center in Childhood Development and Social Policy, now the Edward Zigler Center in Childhood Development and Social Policy, and continued to stay active in community service. He was elected to Congress four years after that election.

When asked how his time in state and local government has influenced his role in Congress, Larson referenced the famous quote from former House Speaker Tip O'Neill: "All politics is local." His background helped him learn about the needs and concerns of municipalities, which are very different from those of the federal government.

"In terms of an education and in terms of understanding at a grassroots level the needs of a constituency, a background first in local government … puts you in touch at a level where government is most directly in touch with the people," Larson said. "And whenever you are most directly in touch with the people, it creates a greater demand, but also I think gives you better access and better opportunity to understand their needs."

THE BOND BUYER

BY NAOMI JAGODA

APR 24, 2015 11:45am ET

TAX INCREMENT FINANCING - ARIZONA

City of Apache Junction v. Doolittle

Court of Appeals of Arizona, Division 1 - March 17, 2015 - 345 P.3d 138 - 708 Ariz. Adv. Rep. 4

Cities brought actions against county treasurer, seeking writ of mandamus ordering treasurer to distribute all past and future owed tax increment financing (TIF) funds. The Superior Court entered judgment in favor of county treasurer, and cities appealed.

The Court of Appeals held that:

- Repealing act did not leave intact cities' right to TIF distributions arising from taxes levied after December 31, 1998;
- Repealing act did not violate the rule of statutory construction that "no right accrued is affected by the repealing act"; and
- Repealing act's abrogation of a municipality's authority to include a TIF based repayment provision in any new redevelopment plan did not violate the deeply rooted policy against retroactive legislation.

Repealing act, which abrogated a municipality's authority to include a tax increment financing (TIF) based repayment provision in any new redevelopment plan, did not leave intact cities' right to TIF distributions arising from taxes levied after December 31, 1998, even though they had adopted their plans before the repeal. The act also repealed the obligation of taxing agencies like the county treasurer to allocate, collect and pay the portion of property taxes generated when redevelopment property exceeds its base value.

Cities' authority to include a tax increment financing (TIF) based repayment provision in any new redevelopment plan did not accrue when they approved their respective plans, but rather were expectant and contingent on property values within the redevelopment areas exceeding their base values, taxes being levied, allocated, and collected, and thus, the repealing act did not violate the rule of statutory construction that "no right accrued is affected by the repealing act."

Repealing act's abrogation of a municipality's authority to include a tax increment financing (TIF) based repayment provision in any new redevelopment plan did not violate the deeply rooted policy against retroactive legislation, absent any claim by cities to a vested right to TIF distributions.

TAX - FLORIDA

AHF-Bay Fund, LLC v. City of Largo

District Court of Appeal of Florida, Second District - April 22, 2015 - So.3d - 2015 WL 1809577

In December 2000, RHF Brittany Bay, LLC (RHF) acquired the subject property. RHF was a tax exempt 501(c)(3) organization. RHF planned to develop the property to provide affordable housing for persons with low to moderate income pursuant to chapter 420, Florida Statutes. As set forth in section 196.1978, Florida Statutes (2000), affordable housing projects owned by a 501(c)(3) organization are exempt from ad valorem taxation.

To finance the project, RHF reached an agreement with the City wherein the City would arrange for the issuance of tax-exempt bonds that carried a considerably lower interest rate than RHF could have obtained using traditional bank financing. In exchange for the issuance of the bonds, RHF entered into a "payment in lieu of taxes" (PILOT) agreement, thereby agreeing to make annual payments to the City "in an amount equal to the portion of ad valorem taxes to which the City would otherwise be entitled to receive for the [p]roperty as if the [p]roject were fully taxable in accordance with standard taxing procedures."

AHF–Bay Fund, LLC (AHF) subsequently purchased the property but failed to make the payments as required. As a result, the City sued, and the trial court entered summary judgment on the two claims, followed by entry of final judgment in the City's favor. AHF appealed.

The District Court of Appeal reversed, holding that:

- Based on the statutory exemption from ad valorem taxation as set forth in section 196.1978, the City did not have authority to collect ad valorem taxes from AHF via enforcement of the PILOT agreement;
- The PILOT agreement violates the public policy of promoting the provision of affordable housing for low to moderate income families and is therefore void;
- A PILOT agreement that requires a party to make payments that are the equivalent of ad valorem taxes that would otherwise be due but for a statutory tax exemption violates article VII, § 9(a) of

the Florida Constitution, which permits municipalities to impose taxes only as authorized by law.

"Finally, we recognize that PILOT agreements similar to the one in this case abound in municipalities throughout Florida. Thus, the magnitude of our opinion holding that these types of agreements violate Florida law may pose a significant hardship on municipalities that rely on such payments to meet their budget requirements. We therefore certify to the Florida Supreme Court the following question to be of great public importance:

DO PILOT AGREEMENTS THAT REQUIRE PAYMENTS EQUALING THE AD VALOREM TAXES THAT WOULD OTHERWISE BE DUE BUT FOR A STATUTORY TAX EXEMPTION VIOLATE SECTION 196.1978, FLORIDA STATUTES (2000), AND ARTICLE VII, § 9(a) OF THE FLORIDA CONSTITUTION?"

TAX INCREMENT FINANCING - INDIANA

Redevelopment Com'n of Town of Munster v. Indiana State Bd. of Accounts

Court of Appeals of Indiana - March 16, 2015 - N.E.3d - 2015 WL 1186102

Town redevelopment commission filed complaint against the State Board of Accounts, seeking declaratory relief allowing it to use tax increment financing funds to maintain redeveloped parks. The Circuit Court granted summary judgment in favor of the Board. Commission appealed and Board cross-appealed.

The Court of Appeals held that:

- Commission had standing to bring action for declaratory relief, and
- Statutes did not permit commission to use tax increment financing funds for the continued maintenance of completed, redeveloped parks.

Town redevelopment commission had standing to bring action against State Board of Accounts for declaratory relief to determine its authority to use tax increment financing funds to pay for the maintenance of completed, redeveloped parks, where the commission had already budgeted and utilized tax increment financing funds to pay for park maintenance, and the Board sent letter to commission stating such funds could not be used to maintain park land.

Statutes listing permissible uses of tax increment financing funds by redevelopment district, authorizing the use of tax increment financing funds for the maintenance of buildings before redevelopment is complete, and prohibiting fund allocation for redevelopment commissions' operating expenses, did not permit town redevelopment commission to use tax increment financing funds for the continued maintenance of completed, redeveloped parks.

IRS Gives Authority More Time to Spend QZAB Proceeds.

WASHINGTON - An authority can have additional time to spend proceeds of its qualified zone academy bonds after there were "unforeseen circumstances" such as contractor disputes, permitting delays and development plan changes, the Internal Revenue Service has ruled.

The IRS reached its conclusion in a private letter ruling that was dated Dec. 18 but not released

until Friday. The PLR did not identify the issuer or other parties and did not give specific dates. It was signed by James Polfer, chief of the tax exempt bond branch of the IRS chief counsel's office.

QZABs are tax credit bonds whose proceeds can be used to finance renovations, equipment, course materials and teacher training at public schools or academic programs in them that meet certain requirements. The IRS chief counsel's office has granted a number of extensions to spend the proceeds of QZABs and other tax credit bonds, which are supposed to be spent within three years of issuance.

The issuer in the ruling is an authority that is an instrumentality of a state. The authority designs and constructs facilities for lease to the state and its agencies and municipalities.

The authority issued QZABs whose proceeds were to be spent on rehabilitating and repairing public schools in the state. The authority initially expected to spend all available project proceeds within three years.

However, the authority now doesn't expect to complete the rehabilitation efforts within three years because of "unforeseen circumstances" at some of the public schools. The unexpected events included major contract disputes with contractors, delays in the permitting process, the state's re-designating some schools as historic buildings, and altered development plans due to significant and unexpected population migration, according to the ruling.

The authority expects to spend all of the bond proceeds by about 10 months after the original expenditure period expires. It requested an extension before the three-year period ends.

Under federal tax law, 100% of available project proceeds for QZABs, qualified school construction bonds and other taxcredit bonds must be spent within three years of issuance and any proceeds unspent in that time period must be used to redeem the bonds.

Before the original expenditure period expires, issuers can request additional time to spend the proceeds. An extension can be granted if the issuer establishes that there's a reasonable explanation for why the proceeds won't be spent within the original time period and that "the expenditures for qualified purposes will continue to proceed with due diligence."

The IRS chief counsel's office concluded in the ruling that the district met the criteria for an extension, and it granted the district an approximate 10-month extension.

The Bond Buyer

by Naomi Jagoda

APR 21, 2015 10:48am ET

IRS Notice: Application of the General Welfare Exclusion to Indian Tribal Government Programs That Provide Benefits to Tribal Members.

Notice 2015-34 advises taxpayers that they may continue to rely on Rev. Proc. 2014-35 following passage of the Tribal General Welfare Exclusion Act of 2014 (the Act), and requests comments on interpreting certain provisions of the Act. (Under the general welfare exclusion, payments or benefits under certain governmental programs for the promotion of the general welfare are not

includible in a recipient's gross income. Revenue Procedure 2014-35 provides safe harbors for applying the general welfare exclusion to Indian tribal government programs.)

Notice 2015-34 will be published in Internal Revenue Bulletin 2015-18 on May 4, 2015.

IRS FSLG Webinar: What is a Fringe Benefit and When is it Taxable?

What: Free Webcast – What Is A Fringe Benefit and When Is It Taxable?

When: April 23, 2015; 12 p.m. (Eastern)

How to attend:

Register for this event.

- You will receive an e-mail requesting your confirmation.
- Once you confirm, you will receive an e-mail with the link to attend.
- Make sure you check your Spam folder if you don't receive any e-mails.
- Registration is limited and is on a first come, first served basis.

Learn about:

- What fringe benefits are
- Which fringe benefits are taxable
- Special accounting rules for fringe benefits
- What is a working condition fringe benefit
- What is a de minimis fringe benefit
- Taxability of per diem payments
- The accountable plan rules

TAX - NEW JERSEY

In re Council on Affordable Housing

Superior Court of New Jersey, Appellate Division - April 9, 2015 - A.3d - 2015 WL 1582908

Non-profit housing organization sought judicial review of Council on Affordable Housing's (COAH) failure to promulgate regulations defining when affordable housing trust funds were committed.

The Superior Court, Appellate Division, held that COAH's failure to adopt legislatively-mandated regulations warranted enjoinment of COAH's seizure of trust funds.

Council on Affordable Housing's (COAH) failure to promulgate regulations defining when affordable housing trust funds were committed, as required by legislative amendments to Fair Housing Act (FHA) and judicial order, warranted judicial order enjoining COAH and executive branch from seizing any trust funds and requiring the future disposition of trust funds to be directed by courts on case-by-case basis. COAH had taken no action in furtherance of adoption of required regulations in the four years since legislative mandate.

TAX - IOWA

LSCP, LLLP v. Kay-Decker

Supreme Court of Iowa - April 10, 2015 - N.W.2d - 2015 WL 1586184

Ethanol producer, which connected directly to interstate pipeline to obtain natural gas to operate ethanol manufacturing plant, sought review of Department of Revenue's denial of producer's claim for a refund of replacement tax on natural gas delivery, asserting that tax was unconstitutional. The District Court denied producer's constructional challenges. Producer appealed.

The Supreme Court of Iowa held that:

- Replacement tax did not violate Equal Protection Clause;
- Replacement tax did not violate uniform law provision of constitution;
- Framework of replacement tax did not violate dormant Commerce Clause; and
- Replacement tax did not violate extraterritoriality doctrine.

NABL Seeks Guidance Projects on Reissuance, Issue Price.

WASHINGTON The National Association of Bond Lawyers would like to see reissuance, management contracts, issue price and other projects on the Treasury Department and Internal Revenue Service 20152016 priority guidance plan.

NABL made its recommendations in a letter sent to the IRS Thursday that was signed by the group's president, Antonio Martini.

Treasury and the IRS use their guidance plan to identify and prioritize tax issues that should be dealt with through guidance. The 20152016 guidance plan will identify projects that Treasury and the IRS intend to work on from July 1, 2015 to June 30, 2016.

Only one of NABL's recommendations guidance concerning the reissuance of tax-exempt and tax-advantaged bonds was not on the 20142015 plan.

Matthias Edrich, an attorney at Kutak Rock and chair of NABL's tax law committee, said NABL has requested guidance on reissuance in the past. The association is specifically interested in guidance on reissuance as it relates to private placements with banks, he said.

NABL also submitted suggestions for the guidance plan that relate to items that are on the plan for 2014-2015.

The current plan includes projects that will update the existing guidance on when management contracts do not give rise to private business use. NABL would like to see updates to the management and service contract safe harbors, with an emphasis on the safe harbors working better with transportation projects and arrangements entered into under the Affordable Care Act, Edrich said.

In October, the IRS released interim guidance on accountable care organizations, which is one type of arrangement encouraged by the ACA. The guidance includes a safe harbor about when participation in certain ACOs won't give rise to private business use.

NABL recommends that Treasury and the IRS provide additional guidance on how the private business use test applies to ACOs and other shared savings arrangements entered into under the ACA. The group submitted comments about the interim guidance in January and it wants the regulators to adjust the safe harbor to work better with ACOs that already exist, Edrich said.

The current plan includes arbitrage regulations. Treasury and the IRS proposed arbitrage regulations in 2007 and 2013. The 2013 proposed regulations included a definition of issue price that has been widely criticized by market participants.

NABL wants Treasury and the IRS to revise and repropose regulations on issue price and to finalize the 2007 proposed regulations and the nonissue price parts of the 2013 proposed regulations.

With issue price, “I think everyone understands that there are still some concepts to work through to make these regulations workable,” Edrich said.

Treasury associate tax legislative counsel John Cross has said that the agencies will repropose issue price regulations and handle that topic separately from the other provisions included in the proposed arbitrage regulations.

NABL would also like to see guidance on the definition of a political subdivision. This issue has become a particular concern since the IRS issued a technical advice memorandum in May 2013 arguing that the Village Center Community Development District in Florida is not a political subdivision that can issue tax-exempt bonds because its board does not, and will not, include elected officials.

The current guidance plan also includes regulations on allocation and accounting principles and final regulations on public approval requirements for private activity bonds. NABL is recommending that Treasury and the IRS repropose regulations on these topics. Edrich noted that the proposed regulations in these areas were published a while ago.

In addition to the interim guidance on ACOs, the IRS has also published three other sets of guidance on the current plan regarding reallocation of new clean renewable energy bonds, temporary relief after a declared disaster, and arbitrage rebate overpayments.

The Bond Buyer

by Naomi Jagoda

APR 10, 2015 12:18pm ET

GFOA Submits Tax Reform Comments to Senate Finance Committee.

This week, the GFOA joined with the National League of Cities, U.S. Conference of Mayors, National Association of Counties, and International City/County Management Association in providing comments to the Senate Finance Committee. Priorities highlighted in the joint comment letter include preservation of the tax exemption on municipal bond interest and the federal tax deduction for state and local taxes, as well as recommendations to the committee to approve the Marketplace Fairness Act and oppose legislation that would preempt state and local government taxing authority, such as the Wireless Tax Fairness Act and the Digital Goods and Services Tax Fairness Act. The joint comments were submitted in response to the committee’s request for recommendations on

overhauling the federal tax code that was issued in March 2015.

GFOA will continue to be engaged in the ongoing congressional discussions on comprehensive tax reform and to provide regular updates on the latest developments related to this effort. Members who are interested in engaging in the effort to preserve the tax exemption are encouraged to visit and review the information and materials on our Federal Tax Exemption Resource Center page.

Tuesday, April 14, 2015

TAX - FLORIDA

Stranburg v. Panama Commons L.P.

District Court of Appeal of Florida, First District - April 8, 2015 - So.3d - 2015 WL 1546080

Nonprofit Florida limited partnership ("Panama") constructed a ninety-two-unit affordable housing project in Panama City. The Bay County Property Appraiser granted the project a full tax exemption for the 2012 tax year under section 196.1978. Panama then renewed its exemption for the 2013 tax year by filing a timely application. After Panama filed its application, the Legislature passed legislation eliminating the tax exemption for affordable housing property owned by limited partnerships retroactively to the 2013 tax roll.

Panama then challenged the property appraiser's decision in Circuit Court, claiming the retroactive repeal of the tax exemption for limited partnerships was unconstitutional. The Circuit Court held for Panama and County appealed.

The Court of Appeal affirmed. By setting January 1 as the date on which the taxable or tax exempt status of real property is to be determined, the Legislature had created a constitutionally protected expectation that the substantive law in effect on that date will be used to make the determination.

The court rejected the contention that the tax exemption could not vest until the property appraiser ruled on appellee's application, which occurred after the repeal of the tax exemption.

TAX - MONTANA

Prairie County, Mont. v. U.S.

United States Court of Appeals, Federal Circuit - April 6, 2015 - F.3d - 2015 WL 1515897

Counties brought suit against United States to recover monies that they claimed were owed to them under Payment in Lieu of Taxes Act (PILT) to compensate them for loss of tax revenue from tax-exempt federal property located in counties. The United States Court of Federal Claims dismissed complaint, and counties appealed.

The Court of Appeals held that United States' liability for payments to counties under PILT was limited to amounts appropriated by Congress.

TAX - MISSISSIPPI

SASS Muni-V, LLC v. DeSoto County

Supreme Court of Mississippi - April 2, 2015 - So.3d - 2015 WL 1485013

Tax sale purchaser brought action against city, county, and various corporate defendants, asking the court to declare tax sale void and to order a refund of the purchase price. The Chancery Court dismissed with regard to all defendants based on purchaser's lack of standing and caveat emptor. Purchaser appealed.

The Supreme Court of Mississippi held that:

- Tax-sale purchaser had standing to contest the validity of the sale under the notice statutes, and
- Doctrine of caveat emptor did not apply to bar tax sale purchaser from attempting to void its purchase and obtain a refund based on alleged defects in the sale.

Tax-sale purchaser had standing to contest the validity of the sale under the notice statutes, even if purchaser was not entitled to notice of the expiration of the redemption period under the tax-sale statutes. Chancery clerk's failure to comply with notice requirements rendered tax sale void, not simply voidable by property owner, commencement of a cause of action was not even necessary to set aside the sale, and purchaser obtained an actionable interest in the property as a statutory lienholder.

Doctrine of caveat emptor did not apply to bar tax sale purchaser from attempting to void its purchase and obtain a refund based on alleged defects in the sale, as refund of the purchase price was specifically allowed by statute when a tax sale is void for lack of notice.

S&P Methodology: Not-For-Profit Public and Private Colleges and Universities.

1. Standard & Poor's Ratings Services is requesting comments on proposed changes to its methodology for assigning stand-alone credit profiles (SACPs), issuer credit ratings (ICRs), and issue credit ratings to not-for-profit public and private colleges and universities globally.

2. The request for comment (RFC) proposes changes that are intended to provide additional transparency to help market participants better understand our approach in assigning ratings to not-for-profit public and private colleges and universities globally, to enhance the forward-looking nature of these ratings, and to enable better comparison between these ratings and ratings in other sectors and asset classes.

3. If adopted, these criteria will supersede "Approaches To Rating U.K. Universities Amid Growing Credit Diversity," published March 28, 2003. These criteria would also partially supersede the "Higher Education" criteria, published June 19, 2007. Specifically, the sections "Private College and University Credit Ratings", "Management and Governance", "Debt", and "Rating Public Colleges and Universities" would be superseded by these criteria. This methodology is related to our criteria article: "Principles Of Credit Ratings", published on Feb. 16, 2011.

4. All terms followed by an asterisk (*) are defined in the glossary in Appendix.

Continue reading.

08-Apr-2015

S&P Live Webcast and Q&A: RFC on Proposed Criteria for Not-For-Profit Public and Private Colleges and Universities.

Tuesday, April 21, 2015, at 1:00 PM EDT

Please join Standard & Poor's Ratings Services on Tuesday, April 21, 2015, at 1:00 p.m. Eastern Time for a live Webcast and Q&A on the recently released Request for Comment regarding proposed changes to the methodology for assigning stand-alone credit profiles (SACPs), issuer credit ratings (ICRs), and issue credit ratings to not-for-profit public and private colleges and universities globally.

Register for the complimentary webcast here.

S&P Request for Comment: Not-for-Profit Public and Private Colleges and Universities Rating Methodology.

1. Standard & Poor's Ratings Services is requesting comments on proposed changes to its methodology for assigning stand-alone credit profiles (SACPs), issuer credit ratings (ICRs), and issue credit ratings to not-for-profit public and private colleges and universities globally.

2. The request for comment (RFC) proposes changes that are intended to provide additional transparency to help market participants better understand our approach in assigning ratings to not-for-profit public and private colleges and universities globally, to enhance the forward-looking nature of these ratings, and to enable better comparison between these ratings and ratings in other sectors and asset classes.

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Continue reading.

08-Apr-2015

IRS EO Update: e-News for Charities & Nonprofits - April 1, 2015

1. Don't miss the IRS webinar: Unrelated Business Income Tax and Tax-Exempt Organizations

Wednesday, April 8
2-3 p.m. ET

Presentation topics include:

- Unrelated Business Income Tax
- Three parts test
- Common types of UBI activities
- Exceptions and exclusions
- Principal form used to report
- IRS resources

Send advanced questions about this topic only to tege.eo.ceo@irs.gov. We'll incorporate answers to selected questions in the presentation.

Register for this presentation.

2. IRS releases FY 2014 Data Book

The IRS recently released statistics on Fiscal Year 2014 activities in its annual release of the Data Book.

Read news release.

3. Top eight tax tips about deducting charitable contributions

When you give a gift to charity that helps the lives of others in need, it may also help you at tax time. You may be able to claim the gift as a deduction that may lower your tax. Here are eight tax tips you should know about deducting your gifts to charity.

4. Interim Guidance issued on Applicability of Unrelated Business Income Tax to State Chartered Credit Unions

This directive modifies and supersedes Interim Guidance Memorandum TEGE-04-0314-0005 (March 24, 2014) and provides direction to Exempt Organization examiners in the processing of UBIT issues of state charted credit union organizations described in section 501(c)(14)(A) of the Internal Revenue Code.

Read memorandum.

5. Recent revocations

For the latest list, go to Revocations of 501(c)(3) Determinations.

6. Register for EO workshops

Register for our upcoming workshops for small and medium-sized 501(c)(3) organizations. Remember to check this page periodically for new workshops being planned in a town near you.

MBFA Signs On to Letters to President Obama and Congressional Leadership.

Through the efforts of Chairman Mayor Benjamin, the Municipal Bonds for America (MBFA) Coalition signed on to letters to President Obama and House and Senate leadership advocating for the retention of current law tax exemption for municipal bonds. The letters express concern about proposals seeking to end the tax exempt status of municipal bond interest and urge that any elimination or cap of the tax exemption not be included in comprehensive tax reform.

- The letter to President Obama is available here.
- The letter to Senate leadership is available here.
- The letter to House leadership is available here.

If you need further information on MBFA or issues raised in this update, please contact info@munibondsforamerica.org.

Municipal Bonds For America | | info@munibondsforamerica.org |
http://www.munibondsforamerica.org/
21 Dupont Circle, NW
Suite 750
Washington, DC 20036

TAX - GEORGIA

SJN Properties, LLC v. Fulton County Bd. of Assessors

Supreme Court of Georgia - March 27, 2015 - S.E.2d - 2015 WL 1393398

Taxpayer brought action for declaratory judgment, injunction, and mandamus against county board of assessors, its chief appraiser, and its members, challenging board's method of valuing leasehold estates arising from sale-leaseback bond transaction involving local development authority. Specifically, taxpayer argued that so-called "50% ramp-up" methodology resulted in the valuation of the developers' bond transaction leasehold estates at less than fair market value, in violation of county's statutory and constitutional duties to ensure that ad valorem taxes are assessed uniformly and at fair market value.

The Superior Court entered judgment in favor of defendants. Taxpayer appealed. The Supreme Court of Georgia reversed. On remand, the trial court granted summary judgment in favor of county. Taxpayer appealed.

The Supreme Court of Georgia held that:

- Affidavits filed on the day before summary judgment hearing were timely;
- Taxpayer's attorney's affidavit was insufficient to support create an issue of material fact regarding the tax-exempt status of certain properties;
- Claims for injunctive relief were barred by sovereign immunity;
- Taxpayer had standing to bring mandamus action;
- Taxpayer failed to establish that board's valuation method resulted in the underestimating of the value of the leasehold estates at issue; and
- Taxpayer faced no uncertainty or insecurity as to its own future conduct, and thus was not entitled to declaratory relief.

Schumer, in Line For Senate Leadership, Is Friend to Munis.

WASHINGTON — The municipal bond market will have an ally in the top echelon of Senate leadership if Sen. Chuck Schumer, DN.Y., becomes the Senate Democratic leader in 2017, as is

widely expected, tax and municipal bond experts said.

Senate Minority Leader Harry Reid, DNev., announced on March 27 that he will retire and not seek reelection in 2016. After Reid leaves the Senate, Schumer is expected to become its top Democrat and either minority or majority leader depending on the outcome of the November elections next year. He is currently the third-ranked Senate Democrat, behind Sen. Dick Durbin from Illinois.

Schumer currently serves on the Senate Finance, Banking, Judiciary and Rules Committees. The finance committee has jurisdiction over taxes and the banking committee has jurisdiction over financial institutions, housing and urban mass transit.

Ed Kleinbard, a professor at the University of Southern California and former chief of staff at the Joint Committee on Taxation, said that Schumer “is an extraordinarily intelligent man” with a good grasp of tax and financial issues.

A Senator since 1999 and a House member for 18 years before that, Schumer has taken an interest in munirelated issues.

“He’s already been quite influential when it comes to policy on municipal bonds,” said Susan Collet, president of H Street Capitol Strategies.

Schumer’s status as a senator from New York — home to the center of the financial industry and many large issuers — has made him knowledgeable about, and a proponent of, municipal bonds, tax experts said.

“He understands the industry,” said Anthony Figliola, vice president of Empire Government Strategies, a Long Island-based economic development consulting company. The industry “has a friend in Senator Schumer,” he said.

Schumer was a state assemblyman for six years and one of the things that the state legislature does is support capital projects.

“He’s certainly someone who gets it.” Figliola said.

Schumer has relationships with people on Wall Street that have existed for many years, Collet said. “He’s extraordinarily well-positioned to access thorough information” about the impacts of muni-related policies, she said.

New York has significant infrastructure needs in areas such as transportation and low-income housing, and has a lot of its population in urban areas. As a result, curbs on munis would be felt acutely in the state, Collet said.

While congressional leaders make decisions on a national level, they “still remain really sensitive to how their states would be affected by policies,” Collet said. She expects Schumer would be cautious about policies that would increase issuers’ borrowing costs.

Micah Green, a partner at Squire Patton Boggs here, said that what drives Schumer’s support for munis is not really Wall Street’s presence in his state but rather the fact that New York has many major issuers and bond-financed projects.

“The municipal bond market has been critical to the financial viability of the city of New York and the state of New York,” Green said.

Schumer understands the importance of low borrowing costs for state and local governments, and having a leader who has that perspective “can only be helpful in ensuring that those issues are fully debated” in a tax reform debate, Green said.

Schumer makes an effort to visit all of New York’s counties each year and understand how federal policies affect the state and its localities. “That is relatively rare for a Senator to do,” said Frank Shafroth, director of the Center for State and Local Government Leadership at George Mason University.

Municipal finance would be a key issue for Schumer during tax reform, and his knowledge of the market would be helpful for state and local governments, Shafroth said.

In New York, there may be projects that can’t get enough capital and Schumer might be able to help. “Being the top Democrat will only bolster New York’s ability to get additional capital funding from Washington,” Figliola said.

Reid hasn’t been very visible in the municipal bond area and Schumer could be more vocal on the topic, Shafroth said. He is more likely to be visibly engaged in legislation and will incorporate his own interests into bills.

“Chuck Schumer is a New Yorker,” Shafroth said. “He’s going to be noisy. He’s going to be in people’s faces.”

While Reid has not been outspoken about munis, he has not been bad for the market. He was Senate Majority Leader when the Build America Bond program was authorized and other tax-advantaged bond programs were expanded, primarily through the American Recovery and Reinvestment Act in 2009 and Hiring Incentives to Restore Employment Act in 2010.

While the ideas for these actions didn’t necessarily originate with Reid, they wouldn’t have happened if Reid hadn’t supported them, Collet said.

Republicans have criticized BABs and fought against reinstating them since the program expired at the end of 2010. They have argued BABs provide lucrative fees to underwriters and encourage states with lower credits to issue more munis. New York issuers ranked second highest for BAB issuance, with roughly $20.35 billion in par value, behind California governments.

Private activity bonds also have received criticism from several lawmakers because they benefit private parties. Former House Ways and Means Committee chairman David Camp, RMich.’s tax reform draft proposed eliminating tax exemption for new PABs. New York issuers, in 2013 (the most recent year for available statistics), had the highest amount of issuance for PABs subject to state volume caps, at $1.86 billion.

Schumer has been pushing hard for municipal bonds to be included as high-quality liquid assets under a federal banking rule designed to ensure large financial institutions have enough assets that could be quickly and easily converted to cash during periods of liquidity stress.

“Senator Schumer has been an outspoken advocate for municipal bonds in arguing that they be included as high quality liquid assets under the liquidity coverage ratio,” said Jessica Giroux, general counsel and managing director of the Bond Dealers of America. “We expect his financial services expertise and understanding of the fixed income market will be helpful in his anticipated new role as Democratic leader and we welcome the opportunity to work with him on issues of mutual importance.”

Last year, Schumer sponsored a bill that would allow New Clean Renewable Energy Bonds to finance qualified biogas property, though it didn't move forward.

Schumer also has been an advocate for disaster relief. He sponsored a disaster tax relief bill last year that included several bond provisions, which failed to gain traction. He did, however, help New York get federal funds after Hurricane Sandy. On Tuesday he announced the Federal Emergency Management Agency is providing its largest grant ever — $3 billion — to repair and protect 33 public housing developments that sustained severe damage from the hurricane.

Bill Daly, the director of governmental affairs for the National Association of Bond Lawyers and a former director of New York City's Washington office, said Schumer and his staff paid a lot of attention to New York Liberty Zone Bonds and extending the program. Liberty Zone bonds could be issued to finance projects in lower Manhattan after the Sept. 11, 2001 terrorist attacks.

Schumer and his staff were also very interested in other issues affecting New York City's government, such as reimbursements for Medicaid, Daly said.

THE BOND BUYER

BY NAOMI JAGODA

APR 2, 2015 1:06pm ET

McGuireWoods: IRS Extends Safe Harbor for Completion of PTC-Qualifying Facilities to Jan. 1, 2017.

Yesterday, March 11, 2015, the Internal Revenue Service issued Notice 2015-25, which extends by one year certain tests taxpayers can use to establish that a qualifying renewable energy facility is eligible for the production tax credit (PTC) or, alternatively, the investment tax credit (ITC).

Notice 2015-15 updates prior IRS guidance in response to a change made by the Tax Increase Prevention Act of 2014, Pub. L. No. 113-295, 128 Stat. 4010 (2014 Extenders Bill). The date by which construction must have begun for a qualifying renewable energy facility to be eligible for the PTC or ITC was extended from "before January 1, 2014," to "before January 1, 2015." Under prior guidance, a taxpayer could establish the beginning of construction by either starting physical work of a significant nature (Physical Work Test) or paying or incurring 5 percent or more of the total cost of the facility (Safe Harbor). Under either method, the taxpayer was required to make continuous progress toward completion once construction began. Prior guidance further provided that if a facility was placed in service before January 1, 2016, the facility would be considered to satisfy the Continuous Construction Test (for purposes of satisfying the Physical Work Test) or the Continuous Efforts Test (for purposes of satisfying the Safe Harbor).

Under Notice 2015-25, taxpayers now have until January 1, 2017, to complete construction of pre-2015 facilities. The IRS extension of the Continuous Construction and Continuous Efforts tests does not apply to Section 1603 Grants, which have independent requirements to complete construction by a certain date and, in many instances, dates that have already passed.

The PTC provides certain renewable-energy-electricity-producing projects (including those involving wind, geothermal sources, biomass and municipal solid waste, such as biomethane) with a tax credit of approximately $0.023/kWh for energy generated and sold to a third party. The tax credit can be

claimed for the 10-year period following commercial operation of the project and often is used in tax equity transactions to offset some of the capital costs of constructing qualifying renewable energy facilities. Alternatively, taxpayers can elect to take the ITC in lieu of the PTC for certain qualifying facilities. The ITC provides a one-time tax credit equal to 30 percent of the tax basis of the qualifying facility.

One-Year Extension of the PTC Drives IRS Extension of the Safe Harbor

The notice provides a one-year extension of the current Continuous Construction Test and the Continuous Efforts Test provided in IRS Notice 2013-60. The PTC previously expired on January 1, 2014, but was extended late last year. Under the 2014 Extenders Bill, a taxpayer would be eligible to claim the PTC, or the ITC in lieu of the PTC, if construction began on the qualifying renewable energy facility before January 1, 2015. As now revised, the Continuous Construction and Continuous Efforts tests are consistent with this one-year extension.

Prior IRS Guidance for Satisfying "Begin Construction" Requirement

As noted above, a taxpayer can satisfy the "begin construction" requirement of Code Section 45(d) if it meets either the Physical Work Test or the Expenditure Safe Harbor before January 1, 2015. In both cases, the taxpayer must make continuous progress toward completion once construction has begun. In an effort to provide clarity and certainty to the Continuous Construction and Continuous Efforts tests, the IRS issued Notice 2013-60. The earlier, 2013 notice provided a useful safe harbor by deeming the continuous construction or efforts requirement to be satisfied if the facility was placed in service before January 1, 2016. Notice 2015-25 extends this date to January 1, 2017.

At the time the IRS provided the initial safe harbor for satisfying the continuous construction or efforts requirement, the PTC was set to expire on December 31, 2013. This gave taxpayers two years after the scheduled PTC expiration date to place facilities into service and still satisfy the Continuous Construction or Continuous Effort Test without having to show that they were making continuous progress toward completion once construction began. As explained below, the extended date of January 1, 2017, is important to current projects.

2014 PTC Extension Created Construction Pressure and Questions

The passage of the 2014 Extenders Bill placed construction pressure on 2014 projects since they could rely on the safe harbor for satisfying the continuous construction or efforts requirement only if their projects were actually completed before the end of 2015. Tax practitioners also began fielding questions from developers concerned that projects satisfying the begin-construction requirement in 2014 would likely spill into 2016, given construction schedules, financing considerations and other commercial matters. Many developers had valid concerns about how to meet the Continuous Construction or Continuous Efforts tests without a safe harbor, and how to satisfy the conservative nature of tax equity investors or project lenders.

Safe Harbor Extension Relieves Construction Pressure for 2014 PTC Projects

Fortunately, the IRS has now issued guidance allowing facilities that are completed before January 1, 2017, to satisfy the Continuous Construction and Continuous Efforts tests if construction of the facility began before January 1, 2015. This extension of the safe harbor comes at a valuable time, when 2014 projects still have sufficient opportunities to secure construction contracts, financing and tax equity investments. Additionally, the safe harbor extension creates IRS precedent to extend the safe harbor in lockstep with any future extensions of the PTC. Clearly, the IRS intends to allow a two-year window after the expiration of the PTC for taxpayers to complete construction of a

renewable energy facility without having to show continuous progress toward completion once construction of a qualifying facility has begun.

Last Updated: March 23 2015

Article by E. Brett Breitschwerdt, Douglas W. Charnas, Douglas E. Lamb, Durham C. McCormick Jr. and Robert G. McElroy

McGuireWoods LLP

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

McDermott: IRS Issues Additional Guidance on Beginning of Construction Rules for Renewable Projects.

The Internal Revenue Service (IRS) issued Notice 2015-25 (Notice) on March 11, 2015, to provide further guidance on meeting the beginning of construction requirements for wind and other qualified facilities (biomass, geothermal, landfill gas, trash, hydropower, and marine and hydrokinetic facilities). The Notice extends the date by which a facility can meet the beginning of construction deadline to correspond with the extension of Code Section 45 passed by the U.S. Congress at the end of 2014.

Background

The Tax Increase Prevention Act of 2014 (Act) extended through December 31, 2014, the deadline by which construction of a qualified facility must begin for purposes of qualifying for the production tax credit under Code Section 45 (PTC) or the investment tax credit under Code Section 48 (ITC). Previously, a taxpayer could only meet the deadline by placing the facility in service prior to January 1, 2014. Following the extension of the ITC and PTC, a taxpayer may be eligible for the ITC or PTC if construction of the facility began before January 1, 2015.

The Notice updates the guidance provided in prior notices (Notices 2013-29, 2013-60 and 2014-46, together referred to herein as the Prior Guidance) consistent with the statutory extension under the Act. The Notice notes that the IRS will not issue private letter rulings to taxpayers regarding the application of the Notice or the application of the beginning of construction requirement under Code Sections 45(d) and 48(a)(5).

Notice 2013-29

Under Notice 2013-29, a taxpayer may establish that construction has begun on a qualified facility by demonstrating that “physical work of a significant nature” has begun (Physical Work Test) or by satisfying a 5 percent safe harbor (Safe Harbor). Notice 2013-29 lists several examples of work that meet the Physical Work Test, including, with respect to a wind energy facility, the beginning of the excavation for the foundation, the setting of anchor bolts into the ground or the pouring of the concrete pad of the foundation. Work completed onsite or offsite may be taken into account. The IRS also imposed a requirement that a “continuous program of construction,” as defined in the Prior Guidance (Continuous Construction Test), be maintained after performance of physical work in 2013.

The Safe Harbor set forth in Notice 2013-29 provides that the construction of a qualified facility is considered to have begun before January 1, 2014, if a taxpayer paid or incurred (within the meaning of Treas. Reg. Section 1.461-1(a)(1) and (2)) 5 percent or more of the total cost of the facility before such date. Thereafter, the taxpayer must make continuous efforts to advance toward completion of the facility (Continuous Efforts Test) to be deemed to have begun construction.

For more information on these tests and their requirements, see McDermott's On the Subject regarding Notice 2013-29.

Notice 2013-60

In September 2013, the IRS issued Notice 2013-60, clarifying questions left outstanding by Notice 2013-29. See McDermott's previous On the Subject for more information. First, Notice 2013-60 provided that a facility will be considered to satisfy the Continuous Construction Test and the Continuous Efforts Test if it is placed in service before January 1, 2016. Second, Notice 2013-60 permitted a taxpayer to claim the PTC or ITC even if the taxpayer was not the owner of the facility on the date construction began.

Notice 2014-46

Notice 2014-46 clarifies that the Physical Work Test focuses on the nature of the work performed rather than the amount or cost of such work. Notice 2014-46 also provides guidance regarding transfers of a facility by the taxpayer that begins construction of a facility prior to placing the facility in service. This Notice modifies the Safe Harbor rule set forth in earlier guidance by providing that, if a taxpayer incurred at least 3 percent of the total cost of such a facility before January 1, 2014, the Safe Harbor may be satisfied with respect to some (although not all) of the individual facilities that are part of this larger project. See McDermott's summary in its On the Subject regarding Notice 2014-46.

Notice 2015-25

The Notice extends the relevant dates under the Prior Guidance so that the beginning of construction guidance mirrors the 2014 statutory extension of the PTC and ITC under the Act. Prior to the statutory extension of the PTC and ITC, Code Sections 45(d) and 48(a)(5) required that construction of a qualified facility begin before January 1, 2014, for the facility to be eligible for the PTC or ITC. Based on the language of those sections as in effect before the Act, the Prior Guidance provided guidance to determine whether construction has begun on a qualified facility prior to January 1, 2014. Because the Act extended the date by which construction of a qualified facility must begin to January 1, 2015, the Notice replaces all references to "January 1, 2014" in the Prior Guidance to "January 1, 2015" as such references relate to the date by which construction must begin on a facility.

As noted previously, Notice 2013-60 provided that a facility will be considered to satisfy the Continuous Construction Test and the Continuous Efforts Test if it is placed in service before January 1, 2016. Consistent with the one-year extension of the beginning of construction date under the Act, the Notice extends the placed in service date provided in Notice 2013-60 to January 1, 2017. Thus, if a taxpayer begins construction of a facility prior to January 1, 2015, and places the facility in service before January 1, 2017, the facility will be considered to satisfy the Continuous Construction Test (with respect to the Physical Work Test) or the Continuous Efforts Test (with respect to the Safe Harbor), regardless of the amount of physical work performed or the amount of costs paid or incurred with respect to the facility after December 31, 2014, and before January 1, 2017.

Conclusion

The Notice provides much-needed clarity for taxpayers that began construction of a facility prior to January 1, 2015, pursuant to last year's statutory extension of the ITC and PTC.

Last Updated: March 23 2015

Article by Gale E. Chan, Madeline M. Chiampou Tully, Heather Cooper, Martha Groves Pugh and Philip Tingle

McDermott Will & Emery

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

IRS EO Update: e-News for Charities & Nonprofits - March 25, 2015

1. Register for IRS webinar: Unrelated Business Income Tax and Tax-Exempt Organizations

Wednesday, April 8

2-3 p.m. ET

Presentation topics include:

- Unrelated Business Income Tax
- Three parts test
- Common types of UBI activities
- Exceptions and exclusions
- Principal form used to report
- IRS resources

Register for this presentation.

2. Public comment invited for 2015-2016 Priority Guidance Plan

The Department of Treasury and the IRS invite public comment on recommendations for items that should be included on the 2015-2016 Priority Guidance Plan.

Review Notice 2015-27.

3. Recent revocations

For latest list, go to Revocations of 501(c)(3) Determinations.

4. Don't include Social Security numbers on publicly disclosed forms

Because the IRS is required to disclose exemption applications and information returns, tax-exempt organizations should not include personal information, such as Social Security numbers, on these forms. Brochures and other extraneous materials also are not required and should not be sent.

5. Register for EO workshops

Register for our upcoming workshops for small and medium-sized 501(c)(3) organizations. Remember to check this page periodically for new workshops being planned in a town near you.

IRS Guidance Will Enable Some Zones to Qualify for Tax Credit: Tax Analysts

The IRS explained that businesses in a particular area that currently don't qualify for the empowerment zone employment credit for 2014 will, with the implementation of new IRS guidance, qualify for the credit as long as the entity that nominated the area as an empowerment zone provides a new termination date of December 31, 2014.

Continue Reading (subscription required).

Tax Analysts
March 31, 2015

TAX - MICHIGAN

City of Sterling Heights v. Chrysler Group, L.L.C.

Court of Appeals of Michigan - March 19, 2015 - N.W.2d - 2015 WL 1258090

On June 15, 2012, Chrysler filed two petitions for air pollution control tax exemption certificates with the Michigan Department of Treasury.

In December 2012, the Tax Commission held a hearing on Chrysler's petitions. At the hearing, the City of Sterling Heights contended that Chrysler's painting building did not qualify for exemptions because it served the primary purpose of painting vehicles rather than removing air pollution. Chrysler responded that it could seek exemptions for those portions of the building that did serve the primary purpose of air pollution control. The Commission declined to refer the petitions to the Michigan Department of Environmental Quality (MDEQ), and it granted the air pollution control certificates in the full amounts.

Sterling Heights appealed to the circuit court. The parties reiterated the arguments that they raised before the Commission. The circuit court reversed and remanded. It reasoned that, because the Commission was required to submit the petition to the MDEQ but had failed to do so, its decision was not supported by competent, material, and substantial evidence. The circuit court required the Commission to refer the petitions to the MDEQ "for a technical evaluation." Chrysler appealed.

The Court of Appeals affirmed, holding that:

- Chrysler could seek an exemption certificate for parts of a structure, as long as the primary purpose of that part of the structure was pollution control;
- Chrysler was not entitled to rely on the MDEQ's list of preapproved facilities, as the list did not contain the specific equipment or parts of structures for which Chrysler sought exemption.

Tax Unfairness.

This month marked the 5th edition release of the Institute on Taxation & Economic Policy's (ITEP) Who Pays? A Distributional Analysis of the Tax Systems in All Fifty States. The report looks at states' reliance on sales tax for revenue, whether states have personal income taxes and the number of tax brackets states have. The following table shows ITEP's most and least regressive state tax systems. Among the states labeled as most regressive, Washington, Florida, Texas, South Dakota and Tennessee lack a broad-based income tax. Conversely, the seven states listed as having the least regressive systems have some combination of no or low sales taxes, progressive income tax structures and refundable earned income tax credits (a tax credit for the poor).

ITEP's Most and Least Regressive State & Local Tax Systems

Most	Least
Washington	Delaware
Florida	District of Columbia
Texas	California
South Dakota	Oregon
Illinois	Montana
Pennsylvania	Vermont
Tennessee	Minnesota
Arizona	
Kansas	
Indiana	

An analysis released Mar. 24 by the Federal Funds Information for States warns that fairness is but one feature of a good tax system. Others are adequacy, simplicity, transparency and ease of administration. "Sometimes the policies that satisfy one feature run contrary to another, making it important that a system be evaluated in its entirety rather than in a piecemeal fashion," FFIS says. "This limits the usefulness of ITEP's analysis, since only one of the five attributes is evaluated." For example, Washington puts more of its revenues toward programs that support low-income families.

Final ACA Reporting Forms on Minimum Essential Coverage and Employee Coverage and Enrollment Now Available.

Form 1094-B, Form 1095-B and Instructions

Form 1094-C, Form 1095-C and Instructions

TIF - INDIANA

Redevelopment Com'n of Town of Munster v. Indiana State Bd. of Accounts

Court of Appeals of Indiana - March 16, 2015 - N.E.3d - 2015 WL 1186102

The Munster Redevelopment Commission appealed the Circuit Court's order entering summary judgment in favor of the Indiana State Board of Accounts in which the trial court determined that

Indiana Code section 36–7–14–28 does not permit the Commission to use tax incremental financing funds to pay for the ongoing maintenance of redeveloped properties.

The Court of Appeals affirmed, as Indiana Code section 36–7–14–39(b)(2) provides that TIF funds "may be used by the redevelopment district only to do one or more of the following," then lists the allowable uses. Notably absent from the list of permissible uses is general and ongoing maintenance of redeveloped properties. Instead, the language of the statute indicates that TIF funds are to be spent on the construction and installation of improvements, rather than continuing maintenance.

IRS 2015 Resident Population Figures.

IRS Notice 2015-23, 2015-12 IRB 769 contains the 2015 resident population figures for use in determining the state housing credit ceiling under section 42(h) and the private activity bond volume cap under section 146.

The notice also details the private activity bond volume limit under section 142(k).

Read the Notice.

Foley: IRS Issues Notice 2015-25 Extending Safe Harbor for Continuous Construction in Order to Take Advantage of Renewable Energy Tax Credits.

Yesterday, the IRS issued Notice 2015-25, which updates the guidance in Notices 2013-29, 2013-60, and 2014-46. These Notices provide that a taxpayer can show that it has "begun construction" of its qualified renewable energy facility by December 31, 2014 for purposes of taking advantage of the section 45 renewable electricity production tax credit (PTC) or the section 48 investment tax credit (ITC) in lieu of the PTC by either: (1) beginning physical construction of a significant nature and maintaining a continuous program of construction (the Physical Work and Continuous Construction Tests), or (2) incurring at least 5% of the total cost of the eligible facility and maintaining continuous efforts to advance towards the completion of the project (the 5% Safe Harbor and Continuous Efforts Test). Notice 2015-25 extends a safe harbor provided in Notice 2013-60 in which a taxpayer that places its renewable energy facility in service before January 1, 2016 will be deemed to satisfy the Continuous Construction and Continuous Efforts Tests under the Physical Work Test and the 5% Safe Harbor. The new notice extends this date. The extension is in response to the recent 1-year extension of the beginning of construction deadline to December 31, 2014. (See our prior blog post on that extension here.)

Takeaway: The new notice addresses uncertainty regarding how (or whether) the IRS would interpret the change to the beginning of construction deadline described above. By extending the safe harbor, taxpayers have an opportunity to avoid a subjective determination as to whether the taxpayer maintained continuous construction activities, provided that the project is placed in service by December 31, 2016. With these recent changes, so long as a taxpayer (1) "begins construction" on its renewable energy facility prior to **January 1, 2015**, and (2) the taxpayer (or eligible transferee) places that facility in service prior to **January 1, 2017**, the facility will be deemed to satisfy the Continuous Construction Test (for purposes of the Physical Work Test) or the Continuous Efforts Test (for purposes of the 5% Safe Harbor), regardless of the actual amount of physical work performed or costs paid or incurred within the January 1, 2015 through December 31, 2016

timeframe. However, to the extent the taxpayer does not place the facility in service by January 1, 2017, the taxpayer will still be required to show that based on the facts and circumstances it made continuous progress toward completion of the facility once construction began (or at least 5% of the total costs have been paid or incurred). (For more information on satisfying this requirement see our prior blog post here.)

Last Updated: March 17 2015
Article by John A. Eliason
Foley & Lardner

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

TIF - ARIZONA

City of Apache Junction v. Doolittle

Court of Appeals of Arizona, Division 1 - March 17, 2015 - P.3d - 2015 WL 1223491

In May 1999, the Arizona Legislature repealed the statute that enabled municipalities to use tax increment financing ("TIF") to finance redevelopment projects. The Cities of Apache Junction and Casa Grande filed suit against of the Pinal County Treasurer, alleging that she was required to distribute TIF revenues to the Cities because, before the effective date of the repeal, the Cities adopted redevelopment plans that allowed them to use TIF.

The Court of Appeals held that the County Treasurer was not required to make TIF revenue distributions, affirming the superior court's judgment in her favor. The Court held that the repealing act did not preserve the Cities' right to TIF distributions arising from taxes levied after December 31, 1998, and it affirmatively abrogated the County Treasurer's obligation to make TIF distributions after that date.

TAX - COLORADO

Cantina Grill, JV v. City & County of Denver County Board of Equalization

Supreme Court of Colorado - March 16, 2015 - P.3d - 2015 CO 15

Concessionaires at city-owned airport sought review of decision by board of equalization valuing their possessory interests for property tax purposes. The District Court concluded that the possessory interests were taxable, and affirmed the valuations. Concessionaires appealed, and the Court of Appeals affirmed. Concessionaires petitioned for writ of certiorari.

The Supreme Court of Colorado held that:

- Concessionaires' possessory interests were sufficiently exclusive to qualify as taxable real property interests;
- Concessionaires' possessory interests provided a revenue-generating capability that was sufficiently independent of city for the interests to qualify as taxable real property;
- City assessor could use the minimum monthly guarantee provided for in the concession agreements to determine the "reasonably estimated future annual rents" on which valuation of the interests was to be based;

- No portion of the future rent represented payments for the right to conduct business, so as to be excludable from the valuation; and
- No portion of the future rent represented reimbursements to city for the costs of operating and maintaining the airport, so as to be excludable from the valuation.

The possessory interests held by airport concessionaires in their respective concession spaces at city-owned airport were sufficiently exclusive to qualify as taxable real property interests, even though concessionaires' agreements with city allowed city to grant other concessionaires the right to operate similar businesses at the airport. Each concessionaire had the right to exclude others from using their particular concession space to operate a concession business, and operation of competing concession businesses at nearby locations had no bearing on the exclusivity of concessionaires' rights.

The possessory interests held by airport concessionaires in their respective concession spaces at city-owned airport provided a revenue-generating capability that was sufficiently independent of city for the interests to qualify as taxable real property, even though concessionaires' agreements with city contained extensive operating restrictions. Concessionaires' revenue came from the traveling public, city did not control the amount of concessionaires' profit, concessionaires were responsible for supplies, equipment, and improvements to and maintenance of their concession spaces, and operating restrictions did not deprive concessionaires of control and supervision of their operations.

In valuing, for tax purposes, the possessory interests held by airport concessionaires in their respective concession spaces at city-owned airport, city assessor could use the minimum monthly guarantee provided for in the concession agreements to determine the "reasonably estimated future annual rents" on which such valuation was to be based, even if most concessionaires paid a percentage of their monthly gross revenues instead of the minimum guarantee. Use of the guarantee was reasonable, given that concessionaires were obligated to pay at least that amount, and assessor inquired into the market rate for the concession spaces but determined that the only comparable market was the airport.

No portion of the future rent to be paid by concessionaires at city-owned airport represented payments for the right to conduct business, so as to be excludable from the tax valuation of concessionaires' possessory interests in their concession spaces. Concession agreements stated that the compensation due under the agreements was for the "rights and privileges" granted by city, which consisted of the "right to occupy, improve, and use" the concession spaces, and valuation of the interests was based on minimum monthly guaranteed rent payments, rather than a percentage of gross revenues, and was representative of market rent.

No portion of the future rent to be paid by concessionaires at city-owned airport represented reimbursements to city for the costs of operating and maintaining the airport, so as to be excludable from the tax valuation of concessionaires' possessory interests in their concession spaces. Concession agreements stated that the compensation due under the agreements was for the "rights and privileges" granted by city, which consisted of the "right to occupy, improve, and use" the concession spaces, and any use by city of payments from concessionaires to operate, maintain, and repair airport did not transform such payments into reimbursements of those costs.

Reed Smith: IRS Extends Continuous Construction/Continuous Efforts Safe Harbors for Production Tax Credit/Investment Tax Credit Qualification.

Production tax credits ("PTCs") are available for wind, biomass, geothermal, landfill gas, trash, hydropower, and marine and hydrokinetic facilities, if construction of the facility began before January 1, 2015. Alternatively, taxpayers can elect to take investment tax credit (the "ITC") in lieu of the PTC.

A taxpayer can establish that it began construction of a project either by having started physical work of a significant nature prior to January 1, 2015 (the "Physical Work Test"), or having paid or incurred (depending on its method of accounting) five percent or more of the total cost of the facility prior to January 1, 2015 (the "Safe Harbor"). Both the Physical Work Test and the Safe Harbor require the taxpayer to make continuous progress towards completion of a project once construction has begun. In the case of the Physical Work Test, the requirement is that the taxpayer must maintain a continuous program of construction (the "Continuous Construction Test"). In the case of the Safe Harbor, the requirement is that the taxpayer must make continuous efforts to advance towards completion of the facility (the "Continuous Efforts Test").

On March 11, 2015, the IRS issued Notice 2015-25, which provides that the Continuous Construction and Continuous Efforts Tests will be deemed to be satisfied with respect to a facility if the facility is placed in service before January 1, 2017. Although Notice 2015-25 does not provide a definition of placed in service for this purpose, existing Treasury Regulations treat property as being placed in service when such property is in a condition or state of readiness and is available for a specifically assigned function. Equipment that is operational but undergoing testing to eliminate defects is considered to be in a condition or state of readiness and availability for a specifically assigned function.

In the case of power plants, the IRS has stated in a number of Revenue Rulings that the following factors are to be considered:

- approval of required licenses and permits;
- passage of control of the facility to the taxpayer;
- completion of critical tests;
- commencement of daily or regular operation; and
- synchronization into a power grid for generating electricity to produce income

Importantly, the IRS does not view these factors as hard and fast rules, but only as tools to be used in determining whether property is in a state or condition of readiness and is available for a specifically assigned function.

If a facility is not placed in service before January 1, 2017, the determination as to whether the Continuous Construction and Continuous Efforts Tests have been satisfied will be based on relevant facts and circumstances. In the case of the Continuous Construction Test, the requirement is that the taxpayer has a continuous program of construction that involves continuing physical work of a significant nature. In the case of the Continuous Efforts Test, ongoing efforts could include incurring additional costs in connection with a facility, entering into binding written contracts for components or for construction of the facility, obtaining necessary permits, and performing work of a significant nature.

Notice 2015-25 updates the guidance provided in Notice 2013-60, which had been in effect prior to the one-year extension of ITC and PTC that was enacted by Congress on December 19, 2014 as part of the Tax Increase Prevention Act of 2014.

Last Updated: March 16 2015

Article by Arnold E. Grant, Henry R. King and Robert M. Vilter

Reed Smith

This article is presented for informational purposes only and is not intended to constitute legal advice.

Tax Analysts: IRS Addresses Treatment of Qualified Low-Income Building Units.

In program manager technical assistance, the IRS concluded that charging resident managers or maintenance personnel rents, utilities, or both for units in a qualified low-income building doesn't change the treatment of the units as facilities reasonably required for the qualified low-income housing project.

Citations: PMTA 2014-022

Read the letter (subscription required).

JUNE 2, 2014

TAX - FLORIDA

Russell v. Southeast Housing, LLC

District Court of Appeal of Florida, Third District - March 11, 2015 - So.3d - 2015 WL 1044315

County Property Appraiser appealed a judgment holding that certain properties were not subject to ad valorem taxes for the years 2008 through 2013. The properties are five military housing complexes serving the Naval Air Station at Key West. The housing complexes are being improved and operated pursuant to a public-private partnership between the United States Navy and a private developer. The terms of the public partnership are set forth in the ground lease, operating agreement, and management agreement.

The court held that a review of these three documents revealed that the Navy retained equitable and beneficial ownership of the properties. Because property owned by the United States is immune from state taxation, the properties were immune from Florida ad valorem taxes.

ZONING - ILLINOIS

Joan Dachs Bais Yaakov Elementary School - Yeshivas Tigeres Tzvi v. City of Evanston

Appellate Court of Illinois, First District, Sixth Division - March 6, 2015 - Not Reported in N.E.3d - 2015 IL App (1st) 131809-U

The City Council of the City of Evanston to denied a zoning application by Joan Dachs Bais Yaakov Elementary School (JDBY) to rezone a parcel of industrial property in Evanston so that JDBY could

use the site for a parochial elementary school. Citing the burden of removing the property from the tax rolls, the City Council denied the application. After the denial of its application, JDBY sued Evanston, asserting claims under the “equal terms” and “nondiscrimination” provisions of the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

The Appeals Court found no violation of the RLUIPA.

As to JDBY’s as-applied equal terms challenge – requiring that no government shall implement a land use regulation in a manner treating a religious assembly or institution “on less than equal terms” with a non-religious assembly or institution – under the RLUIPA, the court held that JDBY argument failed, due to its failure to offer any similar nonreligious comparators for purposes of the RLUIPA.

The court found that every one of those nonreligious comparators presented by JDBY was a taxable use which would continue to pay property taxes under the accepted zoning criterion, whereas JDBY’s proposed use of a parochial elementary school would result in the removal of one of the largest industrial parcels left in Evanston from the property tax rolls.

Senate Finance Panel Leaders Solicit Tax Reform Recommendations.

WASHINGTON — Leaders of the Senate Finance Committee are soliciting ideas from stakeholders and members of the public on how best to overhaul the nation’s “broken” tax code to make it simpler, fairer and more efficient.

Committee chair Orrin Hatch, R-Utah and top Democrat Ron Wyden, D-Ore., made their pitch on Wednesday, saying they want to provide additional information and data to the committee’s five bipartisan tax reform working groups.

The working groups, which are currently examining the existing tax law as well as possible policy trade-offs and reform options, are to submit reports with recommendations to the committee leaders by the end of May.

Recommendations and comments submitted to the committee by stakeholders and the public will be accepted through April 15 and will be made public at a later date, according to a release issued by the committee.

“By opening up our bipartisan working groups to public input, we hope to gain a greater understanding of how tax policy affects individuals, businesses, and civic groups across our nation,” Hatch and Wyden said. “In doing so, we will also equip our working groups with valuable input, and we hope these suggestions will help guide the groups through the arduous task of putting forth substantive ideas to reform the tax code in each of their areas.”

The five working groups are: Individual Income Tax, which is co-chaired by Sens. Chuck Grassley, R-Iowa, and Mike Enzi, R-Wyo., and can be reached at individual@finance.senate.gov; Business Income Tax, which is headed by Sens. John Thune, R-SD, and Ben Cardin, D-Md., and can be reached at Business@finance.senate.gov; Savings & Investment, led by Sens. Mike Crapo, R-Idaho and Sherrod Brown, D-Ohio, at Savings@finance.senate.gov; International Tax, co-chaired by Sens. Rob Portman, R-Ohio, and Chuck Schumer, D-NY at International@finance.senate.gov; and Community Development & Infrastructure, chaired by Sens. Dean Heller, R-Nev., and Michael Bennet, D-Colo. at CommunityDevelopment@finance.senate.gov.

All recommendations and comments must be submitted as a pdf attachment, which is saved using the name of the organization or individual submitting the recommendations, the committee said in its release.

Those submitting recommendations should list the name of the tax working group they want to contact. They would also include a contact name, the organization (if the submission is being made on behalf of a group), phone number, and email address in the body of the email.

If technical issues arise, parties can contact the committee at (202) 224-4515, according to the release.

The committee said it reserves the right, if these directions are not followed, to exclude the submissions from consideration.

THE BOND BUYER

BY LYNN HUME

MAR 11, 2015 12:45pm ET

Tax Analysts: Latest 'Begin Construction' Guidance Resolves Financing Issue.

The IRS released guidance March 11 that extends the deadline for beginning construction on qualified facilities for purposes of the renewable electricity production and the energy investment tax credits, resolving what many in the renewable energy industry considered an important open question that was hurting project financing.

Continue Reading (subscription required).

MARCH 12, 2015

Matthew R. Madara

IRS N-2015-26: Empowerment Zone Designation Extension.

Notice 2015-26 explains how a State or local government amends the nomination of an empowerment zone to provide for a new termination date of December 31, 2014.

It will appear in IRB 2015-11 dated March 16, 2015.

IRS RP-2015-21: ACA - Correction and Disclosure Procedures for Charitable Hospitals.

Revenue Procedure 2015-21 provides correction and disclosure procedures under which failures to meet the additional requirements for charitable hospital organizations added by the Patient

Protection and Affordable Care Act of 2010 will be excused. This revenue procedure affects charitable hospital organizations.

Revenue Procedure 2015-21 will be published in Internal Revenue Bulletin 2015-13 on March 30, 2015.

McDermott: United States Renewable Energy Tax Update.

Renewable energy continues to be an active area for tax planning following the legislative extension in late 2014 of the federal tax credits for wind, solar and other renewable projects. Since 2013, there has also been increased interest in the securitization of revenue streams from solar portfolios. Although the future availability of these tax incentives remains uncertain, there are still many tax-planning opportunities in the renewables market for developers and investors.

Impact of 2014 Extenders Bill on Wind Projects

After several failed attempts to enact a two-year extension package, on December 16, 2014, Congress settled on a bill that retroactively extended for one year most of the federal tax code provisions that were otherwise set to expire. The final extenders bill, H.R. 5771, included one-year extensions for the Section 45 production tax credit (PTC) and the Section 48 elective investment tax credit (ITC) for wind and other renewable projects, including biomass, geothermal, solid waste, hydropower, and marine and hydrokinetic renewable energy. Prior to the extension, the PTC and ITC were available to wind projects for which construction had begun prior to January 1, 2014. H.R. 5771 thus gave taxpayers an additional one-year window during which they can satisfy the requirement for beginning construction on wind projects through the end of 2014.

Because this extension occurred so late in the year, it did not provide wind industry participants with much time to begin construction on new projects. Generally, taxpayers can satisfy the beginning of construction requirement by either commencing physical work of a significant nature on the facility (Physical Work Test) or incurring at least 5 percent of the total cost of the facility (Safe Harbor). Thus, taxpayers had just over two weeks to either begin constructing a project or to purchase equipment that could meet the Safe Harbor. Notwithstanding the short timeframe to begin construction, some wind industry participants did enter into turbine supply agreements intended to meet the Safe Harbor in the last week or two of 2014.

One positive consequence of the one-year extension was that it potentially revived projects that had begun construction in 2013 but arguably failed to meet the additional Internal Revenue Service (IRS) requirements of maintaining continuous construction or continuous efforts on the project after 2013. These projects may have encountered delays where it is unclear under the IRS guidance whether or for how long such a delay would be excusable for purposes of satisfying the continuous construction and efforts requirement. With the enactment of the extension, the potential failure to meet the continuous construction and efforts tests in 2014 became moot to the extent progress could be made on those projects by the end of 2014 that satisfied either the Physical Work Test or the Safe Harbor. If those projects could show that they had performed activities by the end of 2014 that would themselves qualify as beginning construction, the clock could restart on the continuous construction and efforts tests in 2015.

While the one-year extension of the ITC and PTC was more helpful to wind and other renewable energy projects than no extension, a longer extension of such credits would have permitted the

continued development of projects. Since the ITC and PTC are again expired code provisions for 2015, it seems unlikely that new wind projects will begin construction this year unless such projects have the ability to incorporate equipment that qualified for the Safe Harbor prior to 2015.

Securitizations of Solar Portfolios

Another hot topic in the renewable energy world is the recent securitization of a number of solar portfolios. Since the first securitization of such a portfolio in 2013, solar developers and tax equity investors have shown continued interest in securitizing the revenue streams from host customers (either residential or commercial and industrial) that have solar equipment installed at their homes or sites.

While these securitizations do not necessarily present tax issues, some tax consequences should be considered, such as the potential for recapture of the ITC. The recapture rules broadly provide for recapture of ITCs previously taken if ownership of the solar project changes hands or, in lease transactions where the ITC is passed through to the lessee, the lease is terminated. As a result, any potential securitization generally must retain the original tax equity structure. Nonetheless, there is some flexibility to change the ownership of a lessor in a lease pass-through structure or to change the ownership of a partnership owning solar equipment to the extent no partner transfers more than 33.33 percent of its interest. This is an exciting area likely to see continued growth.

The Renewable Landscape

Unless there is a further extension of the PTC and ITC for wind in the near future, wind projects in 2015 will dwindle without the tax credits to spur new projects. Tax equity investors and other industry participants continue to make investments in solar and other renewable projects, because the ITC for solar, fuel cell, microturbine and geothermal heat pumps, among others, does not expire until January 1, 2017. The potential for extension or modification of the ITC for solar and other renewable energy beyond 2017 remains uncertain.

Last Updated: March 5 2015

Article by Madeline M. Chiampou Tully and Heather Cooper

McDermott Will & Emery

Fitch: TX Tax Cap Bill Could Put Some Local Governments on Edge.

Fitch Ratings-New York-09 March 2015: The proposal to lower the annual property tax levy increase threshold could limit local governments' revenue-raising capability and restrict flexibility, Fitch Ratings says. Texas' State Senator Paul Bettencourt of Harris County proposed the change in a bill filed last week.
The proposal would lower the state's threshold of the annual property tax levy increase that subjects local governments to rollback petitions from 8% to 4%. It also expands the list of entities that must hold a tax ratification election if their levy increases beyond the rollback level. Texas law currently requires such election only of school districts but under SB 182 would include all local taxing agencies.

Statutory restrictions can constrain local governments' revenue-raising capabilities. However, compared with many other states, the current 8% rollback limit is generous, and the proposed 4%

limit is not draconian. We believe the tax ratification election requirement may discourage boards and councils from seeking to increase levies beyond the threshold, given the cost and risk of voter disapproval.

In our view, most local government entities will likely not feel constrained by the 4% cap in most years. However, population growth creates demands for additional services, which could result in tax rate pressures that eclipse the 4% cap in a given year. According to the Census Bureau, seven of the fastest growing U.S. cities in 2013 were in Texas. Also, the 4% cap could seem insufficient if there were a notable increase in the rate of inflation.

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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article, which may include hyperlinks to companies and current ratings, can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

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Maine Considers a Property Tax on Some Nonprofits.

AUGUSTA, Me. — Nonprofit organizations across the country are closely watching Maine as it considers becoming the first state to impose property taxes on hospitals, private colleges and summer camps under a plan put forth by Gov. Paul LePage.

Mr. LePage's proposal has sparked a fiery debate over what impact nonprofits have on their communities and whether they should have to cover the costs for municipal services they receive.

David L. Thompson, vice president of public policy for the National Council of Nonprofits, said all states exempted nonprofits from property taxes, either through laws or their constitutions.

Mr. LePage, a Republican, has called nonprofits "takers, not givers," and argues that they need to contribute for services like the police, firefighters and snow removal. His proposal, which is part of his $6.3 billion budget plan, would require organizations to pay taxes to municipalities if their properties were worth more than $500,000. They would pay taxes only on the property value over that threshold and get a 50 percent discount on the rate.

In Maine, hospitals, colleges and other groups that are lobbying heavily against the proposal warn that it would force them to raise costs or eliminate jobs.

The Good Shepherd Food Bank estimates it would owe $24,500 annually to the City of Auburn under the governor's plan. A spokeswoman, Clara Whitney, said it also would mean providing 100,000 fewer meals every year.

Some nonprofits already provide payments to Maine municipalities in lieu of taxes, but those payments fall well short of covering the services those organizations receive, said Jonathan LaBonte, director of the governor's Office of Policy and Management.

"The governor put this in the budget to start the conversation," said Mr. LaBonte, who also is the mayor of Auburn. "If municipalities have another approach, the governor has kept that door open."

By THE ASSOCIATED PRESS

MARCH 7, 2015

TAX - ILLINOIS

Grand Chapter, Order of Eastern Star of State v. Topinka

Supreme Court of Illinois - January 23, 2015 - N.E.3d - 2015 IL 117083

Fraternal organization that operated nursing home brought declaratory judgment action against Department of Public Health alleging that provision of Public Aid Code that taxed licensed beds of nursing home providers violated uniformity clause of state constitution. The Circuit Court granted summary judgment in favor of organization. Department appealed.

The Supreme Court of Illinois held that, as applied, section of Public Aid Code did not violate uniformity clause.

Nonproperty tax classification bore some reasonable relationship to object of legislation or public policy, and therefore, as applied to fraternal organization that was not-for-profit corporation and ran nursing home, section of Illinois Public Aid Code that taxed licensed beds of all Illinois nursing home providers did not violate the uniformity clause of the state constitution. Purpose of tax was to fund

Long-Term Care Provider fund, which provided disbursements for seven distinct purposes, nursing home was licensed and operated under various permits issued by Department of Public Health, which received nearly $2 million annually from Long-Term Care Provider Fund, and nursing benefited from operating within regulated industry that was subject to uniform standards of quality and care, enforcement and oversight of which was paid for in part by Long-Term Care Provider Fund.

TAX - CALIFORNIA

Jacks v. City of Santa Barbara

Court of Appeal, Second District, Division 6, California - February 26, 2015 - Cal.Rptr.3d - 15 Cal. Daily Op. Serv. 1950 - 2015 Daily Journal D.A.R. 2246

Utility consumers, who incurred 1% surcharge on their electricity bills collected by electric company and remitted to city, filed class action complaint against city, seeking order declaring that surcharge was invalid as a tax imposed without voter approval, enjoining city from further collection of surcharge, and requiring city to repay revenues already collected. The Superior Court granted city summary judgment. Consumers appealed.

The Court of Appeal held that surcharge was a tax subject to voter approval, rather than a franchise fee.

Franchise agreement between city and electric company treated surcharge differently from franchise fee, from the perspective of utility consumer there was no functional difference between surcharge and user utility tax, and surcharge was not being collected for grant of right of way, but rather for revenue purposes.

IRS Publication: Tax Exempt Status for your Organization.

The IRS has released a publication entitled, Tax Exempt Status for your Organization.

TAX - MICHIGAN

Hartland Glen Development, LLC v. Township of Hartland

Court of Appeals of Michigan - February 19, 2015 - Not Reported in N.W.2d - 2015 WL 728640

Property Owner appealed the opinion and judgment issued by the Michigan Tax Tribunal (MTT) regarding property tax assessments levied by Hartland Township on Owner's golf course for tax years 2011 and 2012. The crux of the appeal concerned the MTT's ruling that sewer-related special assessments encumbering the property and payable in installments, some of which were past due with the remaining due in the future, did not result in a decrease in the property's true cash value (TCV). The MTT essentially found this proposition to be true in all tax cases involving property subject to outstanding special assessments.

This conclusion was based, in part, on the argument that a township special assessment is levied on

particular real property to cover the costs of an improvement project that must benefit that real property, with the requirement that the amount of the assessment be reasonably proportionate to the benefit. Thus, one could conclude that the cost of the special assessment is automatically offset by the directly-proportionate increase to the property resulting from the improvements to the property underlying the special assessment

The Court of Appeal rejected this argument, reversed, and remanded.

The Court of Appeal noted that the Owner's appraiser opined that the outstanding special assessments decreased the golf course's TCV and the Township's appraiser indicated that, if a purchaser had to make future special-assessment payments, it would likely decrease the property's TCV. Therefore, there was no evidence supporting the MTT's ruling that the outstanding special assessments would not decrease the TCV. The MTT treated the issue as a purely legal question, but the testimony of the township's appraiser suggested that it is a factual question, at least in part, where he testified that a decrease in TCV would likely result if a purchaser had to assume an outstanding special assessment, but a new appraisal would have to be undertaken to make a definitive determination.

The Court of Appeals remanded for the purpose of conducting a factual inquiry as to whether the outstanding special assessments can and did decrease the property's TCV.

"To provide clarity on remand, we provide the following directives. First, because the focus of the dispute concerns the special assessments and because the related appeal challenges those assessments, remand proceedings here shall await final resolution of that appeal. Thereafter, and as framed by and depending on the result of the other appeal, proceedings are to be conducted to fully explore the question whether outstanding special assessments can and did decrease the property's TCV. The proceedings should entail arguments, testimony, and evidence on the issues and questions raised and highlighted in this opinion, including clarification and elaboration with respect to the township's appraiser's testimony cited in this opinion and possibly the preparation of new appraisals."

IRS Issues Proposed Regs on Determining AFRs for Tax-Exempt Bonds: Tax Analysts

The IRS has issued proposed regulations that provide the method to be used to adjust the applicable federal rates under section 1288 for tax-exempt obligations and the method to be used to determine the long-term tax-exempt rate and the adjusted federal long-term rate under section 382. (REG-136018-13)

Read the proposed regs (subscription required).

Letter Urges House Leaders to Back Exemption.

Reps. Dutch Ruppersberger (D-MD) and Randy Hultgren (R-IL) are circulating a Dear Colleague letter urging House members to sign onto a letter addressed to House leadership supporting the tax-exempt status of municipal bonds. The letter addresses proposals to both cap and eliminate the deduction, saying those efforts "would severely curtail state and local governments' ability to invest

in themselves… increase borrowing costs to public entities and shift costs to local residents through tax or rate increases."

Both the Dear Colleague letter and the letter to House leadership can be seen here. Despite the deadline on the Dear Colleague in the link, NABL members can contact their Representatives (or suggest their clients do so) and urge the Representatives to sign on to the letter.

MBFA Sends Letter to Senate Finance Committee Tax Reform Working Group.

The Municipal Bonds for America (MBFA) Coalition sent a letter to Senators Dean Heller (R-NV) and Michael Bennet (D-CO), the co-chairs of the Senate Finance Committee Community Development & Infrastructure tax reform working group. The working groups are in the process of gathering information to make recommendations on their group's topic regarding tax reform to the full Senate Finance Committee. The MBFA wrote in strong support of the current law tax exemption for municipal bonds, discussing the benefits of bonds for state and local governments, community investment, and taxpayers.

MBFA Letter to Senate Finance Committee Tax Reform Working Group

February 27, 2015

NABL Questions BABs Reissuance Memo.

NABL sent a memorandum today to the IRS Chief Counsel's office disagreeing with the conclusion in Advice Memorandum 2014-009. The advice memorandum concluded that BABs which were defeased were reissued. The AM relied on part of a sentence, taken out of context, in the preamble to the reissuance regulations to come to its conclusion even though BABs meet the requirements of the regulations.

The NABL memorandum is available here.

FASB Won't Require Nonprofit Disclosure of Taxes on Investment: Tax Analysts

The Financial Accounting Standards Board decided February 25 to not include its proposed guidance on nonprofit financial reporting a requirement that nonprofit organizations disclose the taxes assessed on income from their investment activity.

Continue Reading (subscription required).

FEBRUARY 27, 2015

Thomas Jaworski

IRS Private Letter Ruling “Shinin’ Down Like Water” - Squire Patton Boggs

In 1971, Creedence Clearwater Revival (CCR) released the song, “Have You Ever Seen the Rain”. One line in the song says “When it’s over, so they say, it’ll rain a sunny day, I know, shinin’ down like water”. We have to concede that when it comes to song lyrics, poetic license occasionally must trump the rules of grammar. Whatever John Fogerty (lead singer and song writer) and CCR were trying to convey, it probably had nothing to do with tax-exempt bonds.

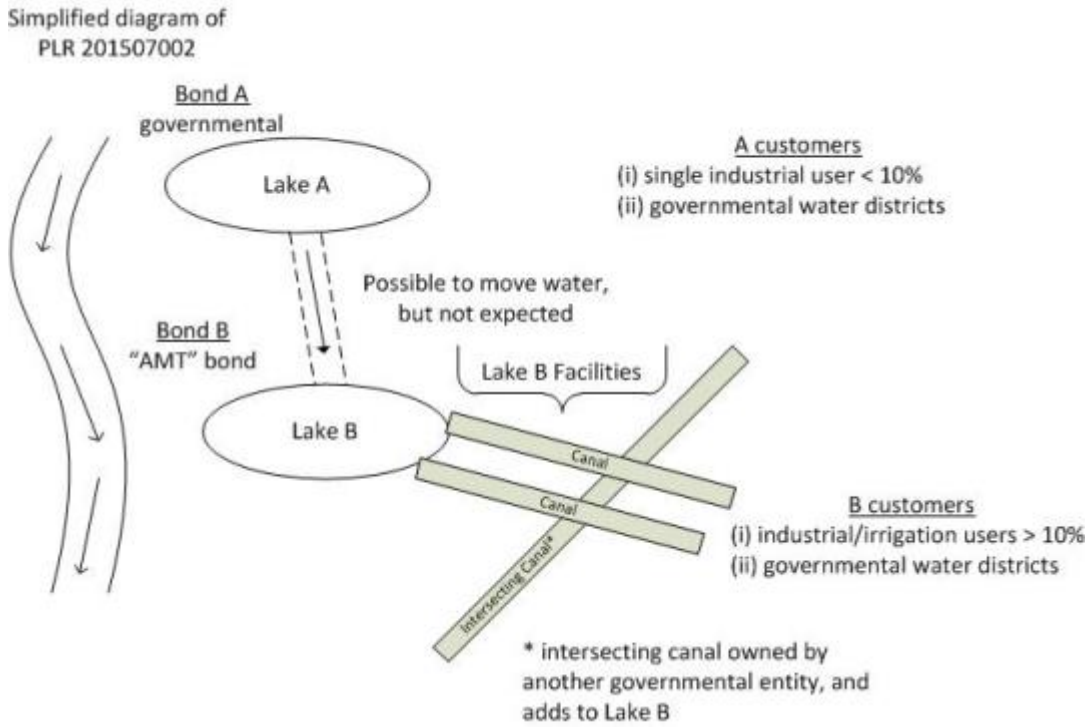
Nonetheless, on October 28, 2014, the IRS issued a private letter ruling, “shinin’ down” about bonds for water projects. PLR 201507002, which was publicly released on February 13, 2015, was a favorable ruling for the issuer that requested it. Whether CCR had anything to do with the favorable treatment or it was a simple matter of the IRS correctly applying the law to the facts, we will never know. Perhaps it was a bit of both.

The ruling deals with two different types of water bonds. The first issue is a governmental bond (Bond A). A governmental bond is defined in Treas. Reg. §1.150-1(b) as an issue of tax-exempt bonds none of which are private activity bonds. The second issue is a type of permitted private activity bond, an exempt facility bond issued under Section 142(a)(4) of the Code to finance “facilities for the furnishing of water” (Bond B). Because it is a governmental bond, the interest on Bond A will not be subject to the alternative minimum tax imposed by Section 55 of the Code (AMT) for individual holders (a so-called “non-AMT” Bond) under the exception found in Section 57(a)(5) of the Code. Conversely, the interest on Bond B will be subject to the AMT (a so-called “AMT” bond). Because of the additional tax implications, AMT Bonds carry a higher interest rate than non-AMT bonds. Thus, as a proportion of the overall financing, the issuer would like Bond A to be as large as possible and Bond B to be as small as possible. One nice feature of the ruling is the recognition by the IRS that, while there is a physical connection between the fungible water supplies, they chose to treat each water supply separately.

FACTS

As is the case with all private letter rulings, the IRS begins with a recitation of the facts and representations made by the issuer.

The issuer of the bonds is a political subdivision of a state whose task is to develop, conserve and protect water resources in a river watershed. To accomplish that, the issuer operates facilities to collect, store and distribute raw water for industrial, municipal, and irrigation purposes, primarily relying on gravity. The storage facilities consist of two respective lakes (Lake A and Lake B) and related facilities. The water is distributed to different, respective sets of customers (A Customers and B Customers). The Lake B facilities include two canals that deliver the water to the B Customers. The river that is the source of the water for Lake B and the two canals intersects a third canal which is owned by another governmental entity and that governmental entity’s water enters one of the Issuer’s canals. The Lake B water is extracted downstream from Lake A and the issuer has the ability to move water from Lake A to Lake B, but the issuer does not expect this to occur in any significant amount based on recent history. The issuer represents that at least 95% of the proceeds of Bond B will be spent on Lake B facilities.



The issuer has entered into or will enter into "take or pay" contracts with both the A Customers and the B Customers. Because a water supply is dependent on the uncontrollable forces of nature, the supply may not always be fully available. A simple "take" contract is a contract where the purchaser agrees to pay for the output only if the facility is capable of producing that output. If the facility fails to meet the customer's needs, the customer does not have to pay. But a "take or pay" contract is defined in Treas. Reg. §1.141.-7(b)(4) as a contract under which the purchaser agrees to pay for the output from the financed facility regardless of whether the facility can actually deliver all of the expected output. This means the A Customers and the B Customers will pay for the output even if there is a drought and the output is less than expected. The A Customers and the B Customers cannot get out of the contract just because there is insufficient water to meet their needs. We note that the printed ruling has a glitch in its cite to Treas. Reg. §1.141-7(c)(4) (instead of (b)(4)) for the definition of a take or pay contract but the meaning is clear.

The A Customers consist of (i) a single industrial user and (ii) governmental water districts. The issuer has already entered into the take or pay contract with the industrial user and expects to enter into the take or pay contracts with the governmental water districts. The issuer expects that the industrial user will use less than 10% of the water supply and the remainder will be used by the governmental water districts.

The B Customers are (i) industrial and irrigation users and (ii) governmental water districts. The industrial and irrigation customers will take more than 10% of the supply funded with proceeds of Bond B. For this reason, Bond B cannot be a governmental, non-AMT bond and has to be issued as an exempt facility, AMT bond. The issuer represents that at least 25% of the Lake B supply will go to the municipal water districts.

LAW

Again, as is the case in every private letter ruling, the IRS then recites its view of the relevant law and applies it to the facts. It breaks that analysis into two parts, the rules for governmental bonds and the rules for exempt facility bonds.

Governmental Bonds. The IRS starts with the fundamental premise that a private activity bond

cannot be a tax-exempt bond under Section 141(a)(1) of the Code. A private activity bond is a bond that meets both the private business use test and the private security or payment tests described in Section 141(b) of the Code. The IRS then turns to an analysis of the private business use test found in Section 141(b)(1) of the Code and the definition of private business use found in Section 141(b)(6) of the Code, which states that private business use is use in a trade or business by any person other than a governmental unit. Use as a member of the general public is not use in a trade or business.

The IRS then notes that the Treasury Regulations provide special rules for the application of the private business use test to the purchase of output from "output facilities". While most people are likely to think of electric generation facilities as output facilities, most people are not likely to have ever thought about whether water production facilities are output facilities. But Treas. Reg. 1.141-1(b) clearly defines an output facility to include water collection, storage, and distribution facilities. The IRS notes that Treas. Reg. §1.141-7(c)(1) provides that purchase of output by a nongovernmental person is taken into account under the private business use test if the contract providing for that purchase transfers the benefits and burdens of paying the debt service on the bonds to a non-governmental person. Treas. Reg. §1.141-7(c)(2) states that a take or pay contract does transfer the benefits and burdens to the purchaser of the output. Treas. Reg. §1.141-7(d) tells the reader that the amount of private business use will be based on the amount of output purchased. Treas. Reg. 1.141-7(h) instructs the reader to determine whether the output contract should be allocated to an issuer's entire system, a particular facility, or a portion of a financed facility based on all the facts and circumstances. This allocation can greatly affect the amount of private business use because the numerator, the amount of the purchase, remains unchanged but the denominator, the capacity against which that use is to be measured, can vary widely as between one unit of a facility versus the capacity of the issuer's entire system. On the other hand, the allocation to a more limited portion of a facility can restrict a contract that gives rise to private business use to a particular bond issue where its use is a more favorable percentage.

The IRS analyzes the facts in this matter and concludes that the A Customers will only receive Lake A supply funded by Bond A and the B Customers will only receive Lake B supply funded by Bond B and that there is no expected interaction between the two supply sources and so no expected interaction between the two bond issues. The IRS therefore concludes that Bond A is a good governmental bond because the one industrial customer of Lake A supply will take less than 10% of supply from Lake A.

Of course, if the facts change over the period of time Bond A is outstanding, the issuer may have to make adjustments. Three conceivable changes would be (i) an increase in the amount of Lake A supply going to the existing industrial user, (ii) the addition of more industrial or irrigation users, or (iii) a mixing of the Lake A and Lake B supply.

Exempt Facility Bonds. The IRS then turns its attention to an analysis of exempt facility bonds for the furnishing of water. A qualified exempt facility bond must (i) use at least 95% of the proceeds (ii) for the permitted purpose, in this case furnishing water.

Because the issuer represented that it will satisfy the 95% test, the IRS focuses on what constitutes furnishing water and determines that several factors are critical in making that determination. First, the IRS reaches the obvious conclusion that the issuer is supplying water and cites the conference report regarding the statute that enacted the furnishing of water category of exempt facility bonds, H.R. Conf. Rep. No. 95-1800, at page 237 (1978), (Vol. 1) C.B. 521, at 571, which states that a facility for the furnishing of water is a facility that must be a component of a system or project which furnishes water. That is not an earth shattering conclusion! The statute, the legislative history and the applicable regulations never require that the water be potable. Raw water is acceptable. Second, the IRS concludes that the facilities financed are for furnishing water. Treas. Reg. 1.103-8(h) defines

water facilities to include “artesian wells, reservoirs, dams, related equipment and pipelines, and other facilities used to furnish water for domestic, industrial, irrigation and other purposes. Interestingly, the IRS never cites these regulations in the ruling. Third, Section 142(e) of the Code also requires that a facility for furnishing of water must be a facility that makes water available to the general public. The general public is defined for this purpose to include electric utilities, industrial, agricultural or commercial users. The Lake B supply will only go to governmental water districts, industrial and irrigation customers (agricultural users) and the issuer had represented that at least 25% was going to municipal water districts, so this test is clearly met. Fourth, Section 142(e) of the Code requires that the facility either be operated by a governmental unit or that the rates to be paid by customers are either established by state or political subdivision thereof, an agency or instrumentality of the United States, or a public service or public utility commission or similar body. In this case, the Lake B facilities will be operated by the issuer, a governmental unit, and so the IRS acknowledges that this requirement is also satisfied.

The IRS also recognizes that there is an interaction between the Lake B supply and another governmental authority where the canal operated by the other governmental authority intersects and adds supply to the Lake B supply. The IRS again reaches an obvious conclusion that the Lake B supply is operated by a governmental unit because the other source of water is operated by another governmental unit.

CONCLUSION

While the facts of this ruling make the legal analysis relatively straightforward, the IRS does a nice job of reciting the relevant law and reaching the foregone conclusion. We often are inclined to criticize the IRS when we disagree and perhaps more reluctant to congratulate them for a job well done. This is a job well done. So, to quote CCR, “Someone told me long ago, there’s a calm before the storm”. We should enjoy the calm this ruling provides as a storm will undoubtedly come along before we know it.

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Todd Cooper focuses his practice on tax matters related to public finance, primarily the federal taxation aspects of municipal bonds, and tax matters related to tax exempt organizations. He also serves as bond and underwriter’s counsel on public finance transactions. Areas of special focus include the federal tax aspects of transportation, healthcare, student loan, and single and multifamily housing transactions; advance refundings; electric power, natural gas, water and sewer utility debt issues; stadium and convention center financings; private and public…

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TAX - IDAHO

North Idaho Bldg. Contractors Ass'n v. City of Hayden

Supreme Court of Idaho, Boise, January 2015 Term - February 26, 2015 - P.3d - 2015 WL 797524

Building contractors association filed action to have city's sewer connection fee declared unlawful because it was an impermissible tax rather than a fee for services. The District Court held fee was lawful and dismissed complaint. Association appealed.

The Supreme Court of Idaho held that:

- Fee was an impermissible tax, and
- Fee was not authorized under Idaho Revenue Bond Act.

Because there was nothing in the record showing that city's sewer capitalization fee was the actual cost of providing sewer service to a new customer connecting to the city sewer system, and also no showing that the amount of the fee was based upon any such calculation, the fee was not a lawful fee for services, but, was rather, an impermissible tax.

Because portion of connection fee charged by city for water and sewer service for new users was not based upon the sewer service rendered to the new user who connected to the city's sewer system, rather, it was based upon the estimated cost of new construction needed to extend the system to future users in other areas, including areas outside the city in its area of impact, in order to meet public needs, fee was not authorized under Idaho Revenue Bond Act.

Orrick: New Clean Renewable Energy Bonds IRS Notice 2015-12 Application Submission and Requirements.

Orrick has published a Public Finance Alert entitled New Clean Renewable Energy Bonds IRS Notice 2015-12 Application Submission and Requirements.

Mixed Reviews on Disclosing Tax Incentives.

While most favor increasing transparency in tax incentives, some of the biggest players in state and local government have spoken out against the latest proposal.

Back in the last century, actors, playwrights and producers of Broadway shows would linger on opening night in the famous restaurant, Sardi's, awaiting the newspaper reviews. While there are minimal similarities between the board members of the Governmental Accounting Standards Board (GASB) and the cast of My Fair Lady, they do have one thing in common: When the board decides to move forward on a project and issues a draft for public comment, there's a great deal of anticipation awaiting the thoughts of a variety of individuals and organizations with strong opinions about GASB's proposals.

The organization has recently been through that process with its recent proposal for governments to share data about tax incentive programs. GASB is the rule-making body for local government public disclosure in America. Its pronouncements form the backbone of generally accepted accounting principles.

“This proposal is trying to fill a pretty important hole in terms of understanding governments’ finances,” said Dean Mead, GASB’s research manager. “Tax abatements are very widespread and involve a tremendous amount of money. But they’re not apparent on the face of the financial statements.”

According to a recent brief by the Pew Charitable Trusts, GASB is seeking required disclosure of “the purpose of the incentive,” “the amount of revenue forgone during the financial reporting period,” “the total number of incentives in effect and awarded during the reporting period,” and “provisions for recapturing abated taxes.”

Given all the interest in recent years in the use of tax incentives to attract or retain business, it seemed to us, since the proposal was first released in October, that this was a winner. We anticipated some problems for smaller governments with tight budgets that might have difficulty complying, but that’s the case with most GASB proposals.

Now, back to Sardi’s. The period of time for comment letters has just ended, and we’ve gone through two hundred plus notes sent to GASB. The vast majority of them were in favor of the proposal — some even wanted more disclosure. Then there were the comments from some of the biggest and most respected membership organizations in state and local government. A note from five of them — the Government Finance Officers Association, the International City/County Management Association, the National League of Cities, the National Association of Counties and the U.S. Conference of Mayors — indicated support for the goals of the proposal but objected the proposal itself.

The major objection cited in the comment letter was that “including only a disclosure about the abated tax revenue, without any mention of the return on investment analysis that preceded it or a discussion of the benefits expected” would be troublesome and would only provide “part of the story and would mislead, rather than inform, the users of government financial statements.”

It’s an interesting point, but the “benefits expected” from tax abatements often turn out to be far more optimistic than the benefits actually achieved. It’s not uncommon for a company to promise far more job creation than actually materializes, for example. There’s a real danger that mixing real forgone revenues with hoped-for savings would leave users with the false impression that tax incentives are always a worthwhile investment. Perhaps the additional disclosure could come after the fact; when the returns the state gets for its abatements have been realized in reality — not just in plan.

GOVERNING.COM

BY KATHERINE BARRETT & RICHARD GREENE | FEBRUARY 19, 2015

TAX - NEW JERSEY

Borough of Hamburg v. Trustees of Presbytery of Newton

Tax Court of New Jersey - February 11, 2015 - 2015 WL 604073

Borough’s tax assessor issued a letter denying the Presbytery of Newton’s request for tax-exempt status of the Subject Property – a storage building adjacent to a Church – for tax year 2013. The Presbytery thereafter filed an appeal to the County Board, challenging the tax assessor’s denial of tax-exempt status. The County Board granted tax-exempt status to the Subject Property, finding that the Presbytery satisfied the requirements of the religious use exemption pursuant to N.J.S.A.

54:4–3.6. The Borough appealed to the Tax Court.

The Tax Court affirmed the County Board's judgment granting tax-exempt status to the Subject Property pursuant to N.J.S.A. 54:4–3.6.

The court found that the testimony during trial adequately established that a substantial quantity of religious artefacts were stored in the Subject Property. Based on the size and quantity of these artefacts, no reasonable storage alternative was available to the Church. Further, the use of the Church to store goods in connection with the Foundation for Peace was a valid charitable purpose that advanced the religious mission of the Presbytery. Accordingly, the court concluded that the Church was reasonably necessary for the Presbytery's religious purpose, and therefore satisfied the actual use requirement of the use test.

As for worship services, there is no requirement in N.J.S.A. 54:4–3.6 that worship services must be offered in order to qualify for exemption. After reviewing the evidence presented during trial regarding the use of the Subject Property, the court found that the Church and Subject Property were an "integral part of the operations of the active parishes" and therefore "reasonably necessary" for the Presbytery's religious purpose. The court found that the Presbytery actually used the Subject Property for its religious purpose, thus satisfying the requirements for exemption under N.J.S.A. 54:4–3.6.

EO Update: e-News for Charities & Nonprofits - February 17, 2015

1. Register for IRS phone forum: Employment Taxes for Exempt Organizations

Thursday, Feb. 19
2 p.m., ET

Topics include:

- What are employment taxes?
- Independent contractors vs. employees
- Voluntary Classification Settlement Program
- Church and the clergy
- Electronic filing and payment options for employment tax returns
- Small Business Health Care Tax Credit
- Additional Employment Tax Resources

Register for this phone forum.

2. Review recent EO published guidance

- TD 9708 Final regulations under section 501(r) of the Code providing guidance regarding the requirements for charitable hospital organizations added by the Patient Protection and Affordable Care Act of 2010.
- Revenue Procedure 2015-17 sets forth procedures for issuing determination letters and rulings on the exempt status of qualified nonprofit health insurance issuers.

Go to the Recent EO Published Guidance page for more information.

IRS to Allocate Nearly $1.4 Billion in New CREBs Volume Cap: McGuireWoods

With close to $1.4 billion in volume cap for New Clean Renewable Energy Bonds (New CREBs) remaining, Notice 2015-12 (the 2015 Notice) announces the March 5 opening of the rolling volume-cap application window for governmental bodies (governments) and cooperative electric companies (co-ops), as well as a closed-end application period for public power providers.1 This Client Alert summarizes the volume-cap application process under the 2015 Notice, including certain new monitoring and filing requirements that require vigilance. For information on New CREBs, including pertinent pronouncements of the Internal Revenue Service (IRS), please see our prior Client Alerts.

Allocation Summary

The amounts, methods and limits of volume cap, as well as application periods and reallocation procedures, for each category are as follows:

Qualified Owners	**Governmental Bodies**	**Cooperative Electric Companies**	**Public Power Providers**
Volume Cap Available	$597,134,963.60	$280,778,469.00	$516,565,691.35
Allocation Method	First-come, first-served	First-come, first-served	Pro rata if oversubscribed
Allocation Limit (per applicant) to be updated periodically	Greater of: (i) 20% of available volume cap, or (ii) $40 million	Greater of: (i) 20% of available volume cap, or (ii) $40 million	Amount requested in application, subject to ratable allocation if oversubscribed
Application Period	Accepting on and after March 5, 2015	Accepting on and after March 5, 2015	Filed by June 3, 2015
Awarded and Forfeited Allocation	Reallocable under the 2015 Notice	Reallocable under the 2015 Notice	Not reallocable under the 2015 Notice; will be subject to future guidance

Application Requirements; Optional Disclosure

Applicants must be qualified issuers and use a form of application substantially similar to the form included in the 2015 Notice as Appendix A. Among other requirements, the application must:

1. be signed by an authorized official of the applicant;
2. designate a person with knowledge of the project and with whom the IRS may communicate;
3. describe the project in reasonable detail, including applicable acquisition, commencement and completion dates, as well as location, expected costs and amount of requested allocation;
4. certify that the project is a qualified facility;2
5. include an engineer's certification of the facility's qualification under applicable provisions of the Internal Revenue Code and expectation of electricity production upon project completion;
6. specify the project owner and certify that such owner is a qualified owner, although (a) for governmentally or co-op owned projects, the application must state that the owner is not a public power provider, (b) if the project may satisfy more than one qualified owner category, the application must identify only one such category, and (c) projects owned by public power providers are ineligible for governmental or co-op volume cap;
7. certify that none of the costs were the subject of a prior application, and if they were, (a) the IRS has been notified that the application has been withdrawn or (b) applicable awarded allocation has reverted to the IRS, plus address any situations of awarded and either expired or forfeited

allocation under the 2015 Notice;

8. state that all necessary federal, state and local regulatory and issuance approvals have been received, identify any approvals that have not been received, including the plan and timeframe for securing such approvals and certify that the applicant expects to receive such outstanding approvals to permit the issuance;
9. provide a plan of financing that details use of the proceeds of the New CREBs, other sources of financing, and marketability of the New CREBs prior to the allocation expiration date; and
10. certify reasonably expected compliance with applicable requirements of the Internal Revenue Code and engagement of bond counsel to opine to such compliance.

As with prior awards, the IRS desires to disclose information about the awards, such as the project owner, type, location and amount of awarded volume cap, and it needs the applicant's consent for such disclosure. Such consent is optional and not a condition to receiving volume cap. The form of that disclosure consent is provided in Appendix B of the 2015 Notice.

Application Process; "Accept or Decline" Feature; Allocation Options

Beginning March 5, 2015, the IRS will accept applications for volume cap to governments and co-ops on a first-come, first-served basis, and any applications received before that date will be treated as received on that date. If any government or co-op submits an application requesting an amount exceeding the volume cap available on a particular date, each applicant will be offered a ratable portion of the available volume cap. Each applicant will have 30 days to (i) accept the reduced amount (using Appendix C to the 2015 Notice), or (ii) delay allocation for up to 90 days from its application date in the event additional volume cap becomes available (using Appendix D to the 2015 Notice). If no additional volume cap becomes available, the IRS will notify the applicant, who will have 30 days to accept the reduced allocation or to withdraw its application.

For public power providers, the IRS will accept their applications up to and including June 3, 2015, and in the event of oversubscription, will then offer allocations of volume cap on a pro rata basis relative to the amount of allocation available and the amounts requested. The IRS will notify each applicant of the reduced amount available, and each applicant will have 30 days to accept or decline the reduced amount.

An application will be treated as received either on the date of its receipt or upon the receipt of any supplemental information the IRS requests.

Substantial Deviations

Similar to the prior New CREBs Notice 2009-33, the 2015 Notice contains the "insubstantial deviation" concept; however, unlike the prior notice, an allocation of volume cap under the 2015 Notice will become invalid if, prior to the issuance of the New CREBs, there is a change to, among other things, the New CREB project that substantially deviates from the New CREB project noted in the allocation application. If there is such a change, the 2015 Notice allows the applicant to forfeit its allocation and to submit a new application correcting the deviation.

Additionally, if there is a substantial deviation after the issuance of the New CREBs, the allocation will remain valid if, and only if, the deviation does not change the category of qualified owner and the applicant submits a supplemental notice of issuance to the IRS. The supplemental notice requires the applicant to certify that it reasonably expected, at the time of issuance of the New CREBs, that the use of New CREB proceeds would not substantially deviate from the proposed New CREB project. The supplemental notice further requires a certification that the applicant has obtained an opinion of bond counsel that the change will not cause the New CREBs to fail to meet

the applicable requirements of the Internal Revenue Code.

180-Day Expiration Date; Notice of Issuance

Under the 2015 Notice, New CREBs must be issued within 180 days of the allocation date. After 180 days, any unissued allocation will revert to the IRS and be available for reallocation.

Moreover, upon issuance the issuer must file IRS Form 8038-TC as well as a notice of issuance. Such notice must be filed no later than 15 days after the issuance. Such notice shall provide, among other things, the issue price and the issue date of the New CREBs and a project description. If an applicant fails to file such notice within 15 days of the expiration of the 180-day period, the IRS will request such applicant either to submit such notice or to confirm that the allocation has been forfeited. If the applicant fails either to submit the notice within 15 days of the IRS request or to confirm that the allocation was forfeited, the IRS, in its discretion, may treat the allocation as forfeited and as having reverted back to the IRS and available for reallocation.

Footnotes

1, 2. New CREBs may be used for capital expenditures incurred by governments, public power providers or co-ops for one or more qualified renewable energy facilities. Such facilities include certain wind, closed- and open-loop biomass, geothermal or solar energy, small irrigation power, landfill gas, trash, qualified hydropower and marine and hydrokinetic renewable energy facilities.

February 12 2015

Article by Douglas E. Lamb, Michael Dow, John J. Semeniak and James E. Gross

McGuireWoods LLP

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

IRS Releases Qualified Zone Academy Bond Allocations for 2014.

The Internal Revenue Service has released Notice 2015-11, which announces the total Qualified Zone Academy Bond allocation for each state, totaling a $400 million national limitation for calendar year 2014. The national limitation allocated for 2014 is effective for QZABs issued after December 31, 2013.

Part III — Administrative, Procedural, and Miscellaneous

SECTION 1. PURPOSE

This notice sets forth the maximum face amount of Qualified Zone Academy Bonds (“QZABs”) that may be issued for each State for the calendar year 2014 under § 54E(c)(2) of the Internal Revenue Code. Under § 54A(e)(3), the term State includes the District of Columbia and any possession of the United States.

SECTION 2. BACKGROUND

.01 INTRODUCTION

Section 313 of the Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Div. C of Pub. L. No. 110-343, 122 Stat. 3765 (2008) ("Act") added new § 54E, which provides revised program provisions for QZABs in lieu of the existing provisions under § 1397E, effective for obligations issued after October 3, 2008. The Act amended § 54A(d)(1) to provide that the term qualified tax credit bond ("QTCB") means, in part, a qualified zone academy bond which is part of an issue that meets the requirements of §§ 54A(d)(2), (3), (4), (5), and (6) regarding expenditures of bond proceeds, information reporting, arbitrage, maturity limitations, and prohibitions against financial conflicts of interest. The Act also amended § 54A(d)(2)(C) to provide that, for purposes of § 54A(d)(2), the term "qualified purpose" for a QZAB means a purpose specified in § 54E(a)(1), described below.

The Act added § 54E(c)(1) to provide a national zone academy bond limitation authorization for QZABs of $400 million for each of calendar years 2008 and 2009. Section 1522 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("2009 Act") amended § 54E(c)(1) to provide an increased national zone academy bond limitation authorization for QZABs of $1.4 billion for each of calendar years 2009 and 2010. Section 758 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Public L. No. 111-312, 124 Stat. 3296 (2010) ("2010 Act") amended § 54E(c)(1) to provide an authorization for QZABs of $400 million for calendar year 2011. Section 310 of the American Taxpayer Relief Act of 2012, Public L. No. 112-240, 126 Stat. 2313 (2012) ("2012 Act") amended § 54E(c)(1) to provide authorization for QZABs of $400 million for each of calendar years 2012 and 2013. Section 120 of the Tax Increase Prevention Act of 2014, Public L. No. 113-295 (2014) ("2014 Act") amended § 54E(c)(1) to provide authorization for QZABs of $400 million for calendar year 2014. The amendment made by § 120 of the 2014 Act applies to obligations issued after December 31, 2013. Section 202 of the 2014 Act also amended § 6431(f)(3)(A)(iii) to provide that the direct-pay subsidy option does not apply to any national zone academy bond limitation for years after 2010 or any carryforward of any such limitation.

.02 QUALIFIED ZONE ACADEMY BOND UNDER § 54E

Section 54E(d) defines "qualified zone academy" as any public school (or academic program within a public school) which is established by and operated under the supervision of an eligible local education agency to provide education or training below the postsecondary level provided: (A) the public school or program is designed in cooperation with business to enhance the academic curriculum, increase graduation and employment rates and prepare students for college and the workforce; (B) students will be subject to the same academic standards and assessments as other students educated by the eligible local education agency; (C) the comprehensive education plan is approved by the eligible local education agency; and (D)(i) such public school is located in an empowerment zone or enterprise community including such designated after October 3, 2008; or (ii) there is a reasonable expectation (as of the date of bond issuance) that at least 35 percent of the students will be eligible for free or reduced cost lunches under the school lunch program established under the National School Lunch Act.

Section 54E(a) provides that a "qualified zone academy bond" or QZAB means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of such issue are to be used for a qualified purpose with respect to a qualified zone academy established by an eligible local education agency; (2) the bond is issued by a State or local government within the jurisdiction of which such academy is located, and (3) the issuer: (A) designates such bond for purposes of this section; (B) certifies that it has written assurances that the private business contribution requirement of § 54E(b) will be met; and, (C) certifies that it has the written approval of the eligible local education agency for such bond issuance.

Section 54E(d)(3) provides that a qualified purpose with respect to each academy means: (A)

rehabilitating or repairing the public school facility; (B) providing equipment; (C) developing course materials; and, (D) training teachers and other school personnel. The private business contribution requirement of § 54E(b) is met if the eligible local education agency that established the qualified zone academy has written commitments from private entities to make qualified contributions having a present value (as of the date of issuance of the issue) of not less than 10 percent of the proceeds of the issue. Section 54E(d)(4) defines "qualified contributions" as any contribution (of a type and quality acceptable to the eligible local education agency) of: (A) equipment for use in the qualified zone academy (including state-of-the-art technology and vocational equipment); (B) technical assistance in developing curriculum or in training teachers to promote appropriate market driven technology in the classroom; (C) employees' services as volunteer mentors; (D) internships, field trips, or other educational opportunities outside the academy; or (E) any other property or service specified by the eligible education agency. Section 54E(d)(2) defines "eligible local education agency" as any local educational agency as defined in § 9101 of the Elementary and Secondary Education Act of 1965.

Section 54E(c)(2) provides that the Department of the Treasury shall allocate the national zone academy bond limitation among the States on the basis of their respective populations of individuals below the poverty line (as defined by the Office of Management and Budget). The limitation amount allocated to a State under the preceding sentence shall be allocated by the State education agency to qualified zone academies within such State.

Under § 54E(c)(3), the maximum aggregate face amount of bonds issued during any calendar year which may be designated as QZABs with respect to any qualified zone academy shall not exceed the limitation amount allocated to such academy for such calendar year. However, under § 54E(c)(4)(A), if for any calendar year the limitation amount for any State exceeds the amount of bonds issued during such year which are designated QZABs with respect to qualified zone academies within such State, the limitation amount for such State for the following calendar year shall be increased by the amount of such excess. Under § 54E(c)(4)(B), however, any carryforward of a limitation amount may be carried only to the first 2 years following the unused limitation year. For these purposes, the limitation amount shall be treated as used on a first-in first-out basis.

Sections 1.1397E-1 (the "Final Regulations") sets forth regulations that were issued under § 1397E. For other guidance concerning the applicability of the regulations issued under § 1397E, the credit rate, and the sinking fund yield see § 1.397E-1(m), and Notice 2009-15, 2009-6 I.R.B. 449, Notice 2009-30, 2009-16 I.R.B. 852, Notice 2010-22, 2010-10 I.R.B. 435, and Rev. Proc. 2011-19, 2011-6 I.R.B. 465.

SECTION 3. NATIONAL ZONE ACADEMY BOND LIMITATION FOR 2014

The national limitation for QZABs issued under § 54E for calendar year 2014 is $400 million. This amount is allocated among the States as follows:

Qualified Zone Academy Bond Allocations (in dollars)
by State or Territory, 2014

State or Territory	QZAB Allocation
Alabama	$7,035,000
Alaska	$575,000
Arizona	$9,550,000

Arkansas $4,410,000
California $50,069,000
Colorado $5,264,000
Connecticut $2,954,000
Delaware $916,000
DC $911,000
Florida $25,858,000
Georgia $14,637,000
Hawaii $1,214,000
Idaho $1,952,000
Illinois $14,574,000
Indiana $7,979,000
Iowa $2,983,000
Kansas $3,099,000
Kentucky $6,354,000
Louisiana $7,099,000
Maine $1,435,000
Maryland $4,680,000
Massachusetts $6,100,000
Michigan $13,024,000
Minnesota $4,688,000
Mississippi $5,476,000
Missouri $7,349,000
Montana $1,260,000
Nebraska $1,857,000
Nevada $3,428,000
New Hampshire $911,000
New Jersey $7,876,000
New Mexico $3,465,000
New York $24,276,000
North Carolina $13,540,000
North Dakota $641,000
Ohio $14,191,000
Oklahoma $4,939,000
Oregon $5,044,000
Pennsylvania $13,355,000
Rhode Island $1,173,000
South Carolina $6,793,000
South Dakota $904,000
Tennessee $8,930,000
Texas $35,854,000
Utah $2,849,000
Vermont $585,000
Virginia $7,446,000
Washington $7,620,000
West Virginia $2,624,000
Wisconsin $5,963,000
Wyoming $491,000

American Samoa $247,000
Guam $287,000

Northern Mariana Islands $211,000
Puerto Rico $12,872,000
U.S. Virgin Islands $183,000

Total Allocation $400,000,000

SECTION 4. EFFECTIVE DATE OF NATIONAL ZONE ACADEMY BOND LIMITATIONS

The national limitation allocated in section 3 for calendar year 2014 is effective for QZABs issued after December 31, 2013.

SECTION 5. DRAFTING INFORMATION

The principal authors of this notice are James A. Polfer and David E. White of the Office of Associate Chief Counsel (Financial Institutions and Products). For further information regarding this notice contact David White or James Polfer at (202) 317-6980 (not a toll-free call).

Ryan: Tax Reform Difficult After the Summer.

WASHINGTON – A tax-reform agreement has to be reached by the end of the summer or it will not happen during this Congress, House Ways and Means Committee Chairman Paul Ryan said Friday.

“We’re operating on the timeline that it’s got to be done within the first seven or so months of the year,” Ryan said at a question-and-answer session with reporters. It’s hard to see how any tax reform gets done after a new budget cycle starts in the fall, he said.

Ryan said he wants tax reform to be comprehensive, applying to both individuals and businesses. However he is open to accomplishing tax reform in phases if it is necessary to do it that way while there is a Democratic president and a Republican-controlled Congress. President Obama is only interested in doing business tax reform.

“The question is, can we find an agreement this year,” Ryan said. That means doing business tax reform and possibly some individual changes under a divided government and doing the rest of tax reform in the next Congress.

“I think we’re going to reform this tax code somewhere between one and three years away,” Ryan said. “And if we can do part of it in year one, great, but if we have to wait for year three to do it all, so be it, as long as we get it done.”

Another issue on the Ways and Means Committee’s agenda this year is a highway bill. The committee will also have to find a way to pay for highway funding, since the current law expires May 31.

One transportation funding idea that has been floated in Congress, notably by Sens. Barbara Boxer, D-Calif. and Rand Paul, R-Ky., is a one-time repatriation holiday. But Ryan is not a fan of this idea.

“That doesn’t work,” he said, adding that it doesn’t produce the money for the Highway Trust Fund. The only way repatriation can work to provide funds for the HTF is if it is done as part of tax reform, Ryan said. Obama is proposing to use one-time revenues from a transition business tax to provide transportation funds.

The top Democrat on the Senate Finance Committee, Ron Wyden of Oregon, wants bonds to be used to help finance infrastructure. Ryan said he hasn't talked to Wyden about this idea.

On Thursday, the Ways and Means committee passed a bill that would make the state and local sales tax deduction permanent. The deduction, which can be taken in lieu of the deduction for state and local income taxes and expired at the end of 2014, is particularly important for states that do not have income taxes.

Ryan said the state and local sales tax deduction is "an issue of parity."

THE BOND BUYER

BY NAOMI JAGODA

FEB 13, 2015 4:28pm ET

TAX - OREGON

Oregon School Boards Association v. Marion County Assessor

Oregon Tax Court, Magistrate Division, Property Tax - February 3, 2015 - 2015 WL 556433

Unincorporated nonprofit association of school boards composed of 196 K–12 school districts, 17 community colleges, 19 education service districts, 87 public charter schools and the State Board of Education purchased property to be used for additional parking and filed an application with the Marion County Assessor seeking a property tax exemption for the property.

The Assessor denied the Association's application for exemption pursuant to ORS 307.090, on the basis that: 1. Association was not itself a "school district;" 2. Association was not a "public or municipal corporation" because it was organized for the benefit of its members; and 3. Association was not organized as a corporation. Association appealed.

The Tax Court held that the Association was in fact a "corporation" under state law, but that record was not sufficiently developed for the court to conclude whether the Association served a public purpose and therefore qualified as a "public corporation."

TAX - NEW YORK

Rite Aid Corp. v. City of Troy Bd. of Assessment Review

Supreme Court, Rensselaer County, New York - February 5, 2015 - N.Y.S.2d - 2015 N.Y. Slip Op. 25036

Commercial lessee, which operated a free-standing retail pharmacy under 20-year lease, challenged city's real estate tax assessment for three tax years. The Supreme Court, Rensselaer County, granted city's motion to dismiss. Lessee filed motion to reargue.

The Supreme Court, Rensselaer County, held that:

- Capitalization rate offered by lessee's appraiser was not based on sound theory and objective data set forth with sufficient particularity, but
- National survey of capitalization rates conducted by accounting firm was based on sound theory

and objective data.

Capitalization rate, which appraiser for commercial lessee, which operated a free-standing retail pharmacy under 20-year lease, derived by reviewing four sales of comparable properties, was not based on sound theory and objective data set forth with sufficient particularity, as would be required to satisfy lessee's initial burden of rebutting the presumption that city's real estate tax assessments were valid. Lessee's appraiser provided information regarding income for two comparable properties but no information regarding expenses, appraiser relied completely on brokers involved in sales of the other two properties for information regarding income and expenses, and appraiser admitted that while a triple-net lease minimized the impact of expenses on the lessor, there were obviously expenses that needed to be paid and estimated.

National survey of capitalization rates conducted by accounting firm, which survey was used by appraiser for commercial lessee that operated a free-standing retail pharmacy under 20-year lease, was based on sound theory and objective data, as required to satisfy lessee's initial burden of rebutting the presumption that city's real estate tax assessments were valid.

IRS LTR: Water Distributor Improvements Constitute Facilities: Tax Analytsts

The IRS ruled that the private business use of proceeds from bonds issued by a water distributor for improvements and equipment does not exceed 10 percent and that other improvements and equipment constitute facilities for furnishing water under section 142(e).

Read the Letter (subscription required).

Citations: LTR 201507002

IRS Issues Guidance on New Clean Renewable Energy Bond Projects: Tax Analysts

The IRS has solicited (Notice 2015-12) applications for allocations of the remaining available amount of the national limitation for new clean renewable energy bonds under section 54C(a). The available amounts include forfeited amounts previously allocated under prior guidance (Notice 2009-33 and Announcement 2010-54).

Continue reading (subscription required).

TAX ANALYSTS
FEBRUARY 3, 2015

Improvements Underway for Exempt Bonds VCAP, Official Says: Tax Analysts

The IRS has made a number of improvements to its voluntary closing agreement program for issuers of tax-exempt bonds and will keep working to improve the program in 2015, Rebecca Harrigal, director of the IRS Office of Tax Exempt Bonds, said February 5.

Continue reading (subscription required).

Fred Stokeld

February 6, 2015

IRS EO Update: e-News for Charities & Nonprofits - February 5, 2015

1. Register for IRS Phone Forum: Employment Taxes for Exempt Organizations

Thursday, February 19, 2015 – 2 p.m., ET

Topics include:

- What are employment taxes?
- Independent contractors vs. employees
- Voluntary Classification Settlement Program
- Church and the clergy
- Electronic filing and payment options for employment tax returns
- Small Business Health Care Tax Credit
- Exempt Organizations: Additional Employment Tax Resources

Register for this phone forum.

2. Renew your PTIN

Recently, the IRS sent expiration notices to PTIN holders who have not yet renewed their PTIN for 2015. Anyone receiving a notice can still renew their PTIN online at any time, but their status has been changed to "expired" until they do so.

To date, approximately 635,000 tax return preparers have valid PTINs for tax year 2015.

If you do not renew your PTIN, you can no longer prepare federal tax returns for compensation. If you intend to renew your PTIN for 2015, you can renew online or submit a paper application.

Online renewal

You can renew online. If you need assistance, review our instructional videos for help.

Paper renewal

If you prefer, you can renew by paper using Form W-12, available via the IRS homepage. It will take 4-6 weeks to process.

3. New EO published guidance posted

Review the following revenue procedures:

- Revenue Procedure 2015-9, which concerns issuing determination letters on the exempt status of organizations under sections 501 and 521 of the Code.
- Revenue Procedure 2015-10, which concerns issuing determination letters and rulings on private

foundation status under section 509(a) of the Code.

4. Register for EO workshops

Register for our upcoming workshops for small and medium-sized 501(c)(3) organizations. Remember to check this page periodically for new workshops being planned in a town near you.

TAX - UTAH

Anadarko Petroleum Corp. v. Utah State Tax Com'n

Supreme Court of Utah - January 30, 2015 - P.3d - 2015 UT 25

Owner of oil and gas interests appealed decision of Tax Commission disallowing severance tax deductions they made for tax-exempt federal, state, and Indian tribe royalty interests.

The Supreme Court of Utah held that severance tax statute categorically excludes any federal, state, and Indian tribe interests from the net taxable value of an oil or gas interest for purposes of calculating the applicable tax rate.

IRS Seeks Applications for New CREB Volume Cap.

Read the Notice.

Recent Favorable IRS Guidance for Tax-Exempt Bond Financed Facilities: Ballard Spahr.

The IRS has released guidance in three areas of interest to entities that benefit from tax-exempt bond financings, particularly hospitals and educational institutions. This guidance creates new rules related to management contracts and participation by a nonprofit entity in an accountable care organization (ACO), final rules addressing requirements for charitable hospital organizations added by the Patient Protection and Affordable Care Act (ACA), and the creation of a standardized voluntary closing agreement program (VCAP) for issuers of 501(c)(3) bonds for the benefit of a 501(c)(3) organization that had its tax-exempt status reinstated after having it revoked for failure to file returns for three consecutive years. Highlights of the guidance are summarized below.

New Five-Year Safe Harbor for Management Contracts

For the first time in 18 years, the IRS made a significant change to existing IRS safe harbors under which management contracts do not result in private business use of tax-exempt bond financed facilities. Notice 2014-67, which was released on October 24, 2014, provides a new favorable five-year safe harbor from private business use for management contracts and expands the types of productivity awards that are permitted. The changes apply to contracts entered into or materially modified on or after January 22, 2015, but may be applied to contracts entered into before that date. The new management contract safe harbor has important immediate implications for borrowers or

issuers of bonds who have entered into management contracts with service providers for their bond financed facilities.

New Bond Guidance on Accountable Care Organizations

Notice 2014-67 also is the first step taken by the IRS in addressing the tax issues raised by nonprofit organizations with tax-exempt bond financing participating in ACOs. According to the Notice, the participation of a 501(c)(3) hospital organization (or governmental entity) in the Medicare Shared Savings Program through an ACO will not result in private business use of the tax-exempt bond financed facility if certain conditions are met. The conditions set forth in Notice 2014-67 parallel the conditions in Notice 2011-20, which provided guidance related to the tax treatment for exempt organizations seeking participation in ACOs. These provisions apply to bonds sold on or after January 22, 2015, but may be applied to bonds sold before that date.

Final Section 501(r) Regulations for Charitable Hospitals

In December 2014, Treasury and the IRS released final regulations regarding the requirements charitable hospital organizations must meet under new section 501(r) of the Internal Revenue Code added by the ACA. Under section 501(r), charitable hospital organizations or entities seeking 501(c)(3) status face additional requirements to maintain their tax-exempt status. These requirements include conducting a community health needs assessment at least once every three years. The final regulations provide needed guidance regarding the potential effects on tax-exempt bonds in the event the charitable hospital organizations do not meet the requirements.

Voluntary Closing Agreement Program for 501(c)(3) Organizations

The IRS announced a simplified process for issuers of 501(c)(3) bonds to request a closing agreement in situations where the borrower received prospective reinstatement after its tax-exempt status was automatically revoked for failure to file an annual return for three consecutive years. The closing agreement amount for each bond issue covered by an agreement is equal to $500 for each calendar month or portion thereof in the period, starting with the month of revocation and ending in the month when the organization's exempt status was reinstated.

Ballard Spahr will host a webinar on Friday, February 27, from 12:00 p.m. to 1:00 p.m. ET, on the recent IRS developments affecting tax-exempt bond financed educational institutions, which will include a detailed discussion of the new management contract safe harbor. Register for this webinar here.

The firm will also be hosting a webinar on recent health care developments on Thursday, April 16. Registration details will be distributed as soon as they are available.

February 2, 2015

by Vicky Tsilas and Linda B. Schakel

Attorneys in Ballard Spahr's Public Finance Department have participated in every kind of tax-exempt bond financing. These financings include bond issues for hospitals and health care institutions, as well as universities, colleges, and student housing. For more information, please contact Vicky Tsilas at 202.661.2283 or tsilas@ballardspahr.com, or Linda B. Schakel at 202.661.2228 or schakel@ballardspahr.com.

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This alert is a periodic publication of Ballard Spahr LLP and is intended to notify recipients of new developments in the law. It should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.

College Sports Ticket Tax Break Would Vanish in Obama Budget.

(Bloomberg) — President Barack Obama wants to remove a tax benefit for college sports fans.

Obama's budget proposal sent to Congress Monday would end the deduction available to some fans for donations they make to get seats at college sporting events. This is a new proposal by the administration.

By closing what the White House calls a loophole in the system, people would pay about $2.5 billion over the next decade in higher taxes. Currently, college sports fans can deduct 80 percent of the cost of such donations.

The budget plan also would end the use of tax-exempt bonds to build professional sports facilities. Debt to finance stadiums and arenas would be taxable if more than 10 percent of the location is used for private-business use.

Repealing such financing would save $542 million from 2016 through 2025, according to the proposal.
While some alumni and fans would give money to schools regardless of tax benefits, ending the deduction would hurt revenue at some sports programs, said Robert Spielman, a senior tax partner at Marcum LLP who advises high-net-worth clients.

Some U.S. colleges use the tax benefit to generate more revenue from sports. They set a price for season tickets and then demand donations in the hundreds or thousands of dollars on top of that cost as a condition of the sale. Part of the pitch is that fans can claim the expense as a charitable deduction when they itemize their tax return.

Required Donations

At certain universities, fans can't buy tickets unless they make a donation, and at other schools the donations help people get premium seating on the 50-yard line.

One athletic department that uses the donation is the University of Louisville, whose men's basketball team made $40.5 million in revenue in 2013-2014, about $15 million more than the next closest program.

Louisville requires a donation to the Cardinal Athletic Fund for most of its season tickets — contributions that range from $2,500 to $250 a seat. Of the university's $40.5 million in men's

basketball revenue, $21.7 million come from donations, according to the school's annual report to the NCAA.

Contribution totals, and season ticket policies, vary significantly across the NCAA's top division. The University of Washington, which requires a donation for its premium football season tickets, reported $19.1 million in football contributions in 2013-14. Rival Washington State's program reported $2.1 million by comparison.

Duke Basketball

At Duke University in Durham, North Carolina, people who give $7,000 a year can get priority for coveted men's basketball season tickets, according to the website for the school's booster club. Buyers could then deduct 80 percent of that cost. For those in the top federal income tax bracket of 39.6 percent, the break is worth $2,218.

Richard Schmalbeck is a Duke law professor who has donated to the university's athletic department to secure the right to buy basketball tickets. He has taken the allowed tax deduction, he said in a phone interview Monday. Even so, the law should change because it's inconsistent with how the Internal Revenue Service usually treats charitable gifts, he said.

Typically, to get a deduction when a charity gives something of worth to the donor, the contribution amount must be reduced by the value of the benefit received, such as dinners and concert tickets at fundraising events, Schmalbeck said.

Sports Facilities

The separate proposal in the budget to eliminate the use of tax-exempt debt for sports facilities would affect states and municipalities that are working with professional teams to finance new or improved stadiums and arenas.

Wisconsin Governor Scott Walker Jan. 27 proposed funding a new arena for the Milwaukee Bucks basketball team, in part with $220 million of bonds backed by taxes generated by the team.

Officials in Missouri are considering a new stadium for the St. Louis Rams NFL team. Two other new NFL venues are being considered in San Diego for the Chargers and in Oakland for the Raiders.

Theodore L. Jones, a lawyer in Baton Rouge, Louisiana, who lobbied Congress for the deduction for donations to college sports programs in 1986, said he opposes Obama's plan to eliminate the break for donations because it helps colleges and universities raise money, he said in a phone interview Monday.
"It's one of the best things to come down the pike," Jones, 80, said.

Jones holds season tickets at Tiger Stadium, home of the Louisiana State University football team, and benefits from the tax deduction, he said.

"I wouldn't want to take on all the college presidents and college sports programs around the country," Jones said of the budget plan. "But I'm not the president."

by Margaret Collins and Richard Rubin

February 2, 2015

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TAX - ARIZONA

Hub Properties Trust v. Maricopa County

Court of Appeals of Arizona, Division 1 - January 27, 2015 - Not Reported in P.3d - 2015 WL 357850

Hub Properties Trust (Hub) purchased real property (the Property) from the City of Phoenix on March, 2011. After Hub purchased the Property, the County Assessor's Office determined the Property was no longer exempt municipal commercial property. As a result, the Property was included in the Assessor's roll as taxable property and was included in the County's tax roll for tax year 2011. The Maricopa County Board of Supervisors then fixed, levied and assessed property taxes for the Property for the County's assessment and tax roll for the 2011 tax year.

Hub appealed, arguing that because the City owned the Property "during the entire assessment period for the tax year 2011, on the tax lien date, and for more than two full months of the tax year at issue herein," the Property was tax exempt during tax year 2011. Thus, Hub contended the Property was illegally taxed that year. Hub's argument stemmed from the notion that once property is exempt, it is exempt for the entire tax year even if there is a change of use or ownership.

The Court of Appeals agreed with the tax court's conclusion that the period of exemption begins on the date the property enters government ownership and ends on the date it leaves government ownership. Although the Property was tax exempt while the City owned it in 2011, the exemption was lifted when Hub purchased the Property in March. Thus, the court affirmed the tax court's ruling that the Property was not tax exempt after the City sold it to Hub in 2011.

TAX - ALABAMA

Montgomery County Com'n v. Federal Housing Finance Agency

United States Court of Appeals, Eleventh Circuit - January 16, 2015 - F.3d - 2015 WL 223699

This consolidated appeal arose from six district court actions in this circuit. In each of the six cases, the district court ruled in favor of the Appellees, the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and the Federal Housing Finance Agency (collectively referred to as the "federal entities").

Appellants' position on appeal was that the state taxes normally imposed on real estate transfers apply when the federal entities transfer real property in their respective states. The federal entities have not paid the transfer taxes, citing their Congressional charter exemptions from "all taxation." These statutory exemptions contain an exception allowing states to impose real estate taxes on the federal entities, and Appellants contended their transfer taxes fall into that exception. Appellants also made the constitutional argument that even if the exemptions precluded the states from imposing the transfer taxes, the exemptions themselves are unconstitutional under the Commerce, Necessary and Proper and Supremacy Clauses.

The district court in each case, as have several Circuit Courts of Appeal, found the federal entities are exempt from paying transfer taxes, and the statutes are otherwise constitutional. The U.S. Court of Appeals affirmed.

TAX - SOUTH DAKOTA

Deadwood Stage Run, LLC v. South Dakota Dept. of Revenue

Supreme Court of South Dakota - December 17, 2014 - N.W.2d - 2014 S.D. 90

Taxpayer brought action seeking declaratory judgment prospectively establishing the 2006 assessed valuation of tax incremental district, which consisted of taxpayer's land, as the appropriate tax incremental base, rather than the 2007 valuation. The Circuit Court entered summary judgment in favor of Department of Revenue.

Taxpayer appealed, arguing that in calculating the tax incremental base for a tax incremental district, SDCL chapter 11–9 required the Department to use the last aggregate assessed valuation certified by the Department prior to the date of creation of the tax incremental district.

The Supreme Court of South Dakota held that Department was required to determine aggregate assessed value of the property by using the last previously certified valuation for any buildings or additions completed or removed and to adjust it for the value to the date the district was created. The phrase "last previously certified" in the statute referred only to improvements in the land, and this reading harmonized the statute with other statutes.

IRS Issues Favorable But Limited Ruling on Total Return Swaps.

WASHINGTON – The Internal Revenue Service has issued a favorable but limited private-letter ruling concluding a total return swap entered into between a borrower and a bank at the same time the underlying tax-exempt bonds were sold is "not an abusive arbitrage device," tax lawyers said.

The IRS always cautions that its PLRs are based on specific transactions or fact patterns and should not be read broadly to cover other deals. But muni market participants typically read them for clues in areas where there is no current tax guidance.

Tax lawyers said the letter-ruling is favorable to primary market total return swaps and the ever growing number of bank loans that are hedged. The PLR answers some tax questions about TRS that had been troubling, they said. However, because of the narrow facts of the case, the ruling is limited, and the IRS gives no rationale for its conclusions, several of them added.

"I think it's a good ruling," said Rich Moore, a partner at Orrick, Herrington & Sutcliffe in San Francisco. "I think it made clear that if there are no bond proceeds subject to rebate, there is nothing inappropriate about a borrower using a total return swap to hedge its interest rate exposure."

IRS agents have taken positions contrary to that in audits in the past, some lawyers said.

"The ruling indicates that there is nothing improper or abusive per se about the use of a total return swap in connection with a tax-exempt bond issue in a primary market transaction," said Hobby

Presley, Jr., a partner at Balch & Bingham in Birmingham, Ala. “The ruling also indicates that it’s possible for a bondholder who buys a tax-exempt bond in a primary market transaction to provide a hedge agreement with respect to that bond.”

The PLR, which did not identify the parties involved, seems to suggest that a borrower can elect not to integrate its bonds and a total return swap to determine the bond yield for rebate purposes and that the IRS will honor that election, some of the lawyers said.

“I think [the PLR] is favorable, but it doesn’t answer all the questions that may be relevant for transactions, said David Cholst, a partner with Chapman and Cutler in Chicago. “This was a fact pattern that assumed away some of the concerns that have been raised in some transactions.”

TRS’, possibly hundreds of which have been done over many years, hedge interest rate risk and lower the cost of borrowing for a conduit borrower, while providing banks with earnings – possibly more than they would receive from letter of credit or direct loan fees. TRS may also provide banks with deductions of their losses from the swap payments, though this is the case with all swaps.

These involve conduit bond deals. The borrowers are almost always nonprofit hospitals, which tend to have a lot of cash reserves on hand for liquidity purposes. Initially, TRS’ were secondary market transactions. They were done to allow bonds to retain their insurance. They also are used to allow borrowers to refinance their bonds when the tax law does not permit them to do an advance refunding.

Most TRS are done today in primary market transactions. These transactions involve-long term bonds and a short-term TRS. In such deals, a hospital through an issuer privately places long-term bonds with a bank, which then enters into a much shorter term TRS with the hospital. The bank becomes the holder of the bonds as well as the swap counterparty.

The borrower typically swaps fixed for variable rates to lower its cost of borrowing. It also takes risk and provides price protection for the bank/bondholder/swap counterparty. When the TRS terminates, or is terminated, the bonds are valued. If the bonds’ value is below par, the hospital pays the bank. If the value is above par, the bank pays the hospital. But many TRS’ are rolled over or replaced and new negotiated terms during the life of the bonds. The hospital could be forced to pay if interest rates rise.

The bank/bondholder/swap counterparty makes money from the higher tax-exempt bond rate and its deduction of its loss from the swap payments.

Example

For example, a hospital will privately place 30-year fixed-rate bonds with a tax-exempt coupon of 5% with a bank. The bank will then enter into a three-year TRS with the hospital. The bank will pay the hospital a variable rate based on the Securities Industry and Financial Markets index plus 100 basis points. If the SIFMA index is 1%, the bank will pay the hospital a total of 2%, taking into account the 100 basis points. The hospital will pay the bank/bondholder the 5% tax-exempt interest on the bonds. That interest rate may be worth more like 7.5% to the bank, when one takes into account its corporate tax rate. The hospital will also make a swap payment to the bank of SIFMA plus 100, or 2%. The bank will make a swap payment to the hospital of 5%.

In this example, the borrower’s net cost of borrowing is lowed from 5% to SIFMA plus 100 basis points, or 2%. The bank is getting 5% tax-exempt interest on the bonds, which might be worth more like 7.5% to it, and it can also take a deduction for a 3% loss on the swap (the total of the 5% swap

payment it makes to the borrower minus the 2% swap payment it receives from the borrower).

Some sources question whether the bank should be allowed to take the deduction. But the lawyers said banks have many loss carry forwards and that, in any case, this is a question for bank regulators, not the IRS. They also point out that there's always a risk that variable rate bond rates will rise and there will be no deduction.

In the early 2000s, TRS' were done with so-called coerced tenders that were designed to get the bonds in the hands of the bank. The issuer would tell investors they could tender the bonds back to it at a premium, say 101, or wait for the bond call at par. Most investors wanted the premium, but fund managers and analysts were upset that these high-coupon bonds were being taken from them sooner than expected and they began complaining loudly to the press and regulators.

The IRS began auditing these secondary market transactions toward the end of that decade and raised concerns that a TRS either caused the bonds to be reissued and subject to the most recent tax law changes. The Service also said the deal constituted an abusive arbitrage device that could force the integration of the bond and the swap. Integration could lead to a lower bond yield and therefore, a lower investment yield if the hospital wanted to avoid arbitrage earnings that would have to be rebated.

Under the tax law, issuers or borrowers can elect whether or not to integrate the bond and swap. But if the IRS Commissioner finds a transaction is an abusive arbitrage device, he or she and can force the issuer or borrower to integrate the bonds and swap, which might lower the bond yield, and therefore the investment yield.

The PLR

The IRS private-letter ruling was based was a primary market transaction that involved long-term tax-exempt bonds privately placed with a bank and a short-term TRS that was entered into at the same time the bonds were placed. The borrower and bank wanted to extend to the TRS by five years. The pricing of the extended TRS was to be amended so the borrower's net financing would be reduced to the SIFMA index plus 80 basis points.

The bond proceeds had all been used to current refund some previously issued bonds, as well as to pay issuance costs. As a result, there were no proceeds remaining and there was no debt service reserve fund, for which arbitrage might have had to have been rebated. A debt service reserve fund typically holds a year's worth of interest rate payments. If there had been bond proceeds or a reserve fund outstanding, the IRS could have questioned whether rebate calculations should have been based on the bond yield or an integrated bond and swap. But the facts of the case rendered this issue moot.

The IRS said there were no replacement proceeds. Under the tax rules, if a transaction is found to be an abusive arbitrage device, the Commissioner can decide that even though no bond proceeds remained, the hospital's funds could serve as replacement proceeds for the bond proceeds and cause arbitrage problems.

"There are no replacement proceeds otherwise created and no transferred proceeds were received," the IRS said in the PLR. "The proposed extension of the TRS does not affect the gross proceeds of the bonds…."

The IRS declined to take any position whether the TRS extension would cause a reissuance. The issuer and the bank/bondholder/swap counterparty, as a precautionary step, filed another Form

8038 for the bonds in case the IRS decided there was a reissuance. But in that Form 8038, which issuers file for the issuance of 501(c)(3) bonds for nonprofits, they did not include any election to integrate the bonds and swap.

“We specifically express no opinion about whether of the TRS causes a reissuance under Section 1001 [on reissuance] or about issuer’s precautionary treatment of such extension as a reissuance,” the IRS said in its PLR.

The lawyers said that reissuance wouldn’t pose problems for current TRS’ because there have been no tax law changes in recent years that could be applied to these transactions.

The IRS found the transaction was not an abusive arbitrage device because it did not exploit the difference between tax-exempt and taxable rates and it did not overburden the tax-exempt bond market.

“We conclude that the original structure of the financing plan, including the TRS, and the extension of the TRS for the bonds, does not enable the borrower to exploit a difference between tax-exempt and table interest rates to obtain a material financial advantage,” the IRS said. “The financing structure does not result in any gross proceeds available for non-purpose investment beyond the first 30 days during which initial time period they qualified for an applicable temporary period. The financing structure and the terms of the TRS extension do not reflect an intent to exploit tax-exempt versus taxable interest rate differentials for arbitrage purposes. Since rate exploitation is not present, it is unnecessary to determine if overburdening is present.”

Regarding the question of whether the bonds and TRS should be integrated, the IRS said: “We conclude that the structure of the original financing, including the TRS, and the proposed extension of the TRS, does not reflect a principal purpose by the borrower to obtain a material financial advantage by either rate exploitation or by overburdening. Improved market conditions and the improved credit quality of the borrower are the motivating factors for the extension. The modified pricing reflected in the extension was negotiated in an arms’ length transaction based on fair market value pricing and not on the amount of arbitrage earned or expected to be earned on the hedged bonds in a manner that is inconsistent with the purposes of Section 148.” That section of the Internal Revenue Code contains arbitrage provisions and defines an arbitrage bond, which is taxable.

THE BOND BUYER

BY LYNN HUME

JAN 26, 2015 11:05am ET

S&P's U.S. Not-For-Profit Healthcare 2015 Outlook - Webcast Replay Now Available.

Standard & Poor’s Ratings Services held a live Webcast and Q&A on Thursday, December 18, 2014, at 2:00 p.m. Eastern Standard Time, on the 2015 outlook for U.S. not-for-profit health care. We discussed our view on the outlook for the U.S. not-for-profit health care sector, along with the potential impact on ratings for 2015.

Listen to the replay.

Download the slides.

Speakers were:

Martin Arrick
Managing Director, U.S. Public Finance
Standard & Poor's Ratings Services

Kevin Holloran
Senior Director, U.S. Public Finance
Standard & Poor's Ratings Services

Standard & Poor's Ratings Services' Webcasts deliver audio and slides in a streamlined presentation. You will need computer speakers or headphones to listen to the audio stream. Throughout this live webcast, you may submit your questions for the presenters in real time via the Webcast interface.

TAX - CALIFORNIA

Citizens for Fair Reu Rates v. City of Redding

Court of Appeal, Third District, California - January 20, 2015 - Cal.Rptr.3d - 2015 WL 252175

The City of Redding engaged in the practice of making an annual budget transfer from the Redding Electrical Utility to Redding's general fund. Because the Utility is municipally owned, it is not subject to a one percent ad valorem tax imposed on privately owned utilities in California. However, the amount transferred between the Utility's funds and the Redding general fund is designed to be equivalent to the ad valorem tax the Utility would have to pay if privately owned. Redding describes the annual transfer as a payment in lieu of taxes (PILOT). The PILOT is not set by ordinance, but is part of the Redding biennial budget.

Plaintiffs challenged the PILOT on grounds it constitutes a tax for which article XIII C of Proposition 26 required approval by two-thirds of voters. Redding responded that the PILOT was not a tax, and if it was a tax, it was grandfathered-in because it preceded the adoption of Proposition 26.

The Court of Appeal concluded that the PILOT constituted a tax under Proposition 26 for which Redding must secure two-thirds voter approval unless it proves the amount collected is necessary to cover the reasonable costs to the city to provide electric service.

The court rejected Redding's assertion that the PILOT was grandfathered-in by preceding Proposition 26's adoption. As a budget line item, the PILOT is subject to annual discretionary reauthorization by Redding's city council. The PILOT does not escape the purview of Proposition 26 because it is a long-standing practice.

The court remanded for an evidentiary hearing in which Redding has the opportunity to prove the PILOT does not exceed reasonable costs under article XIII C, section 1, subdivision (e)(2).

IRS Addresses Timeliness of Refundable Bond Credit Claims: Tax Analysts

In partially redacted program manager technical assistance, the IRS concluded that because Forms 8038-CP can function as both a return and refund claim, an initial Form 8038-CP filed more than three years after the date of a bond interest payment date may be timely for purposes of section 6511(a), but the amount of the credit or refund will be limited under section 6511(b)(2)(A).

Continue reading. (Subscription Required)

IRS Anticipates Issuing Proposed Regs on Governmental Plans: Tax Analysts

The IRS announced (Notice 2015-7) that it intends to issue proposed regulations that would permit a state or local retirement system that is a governmental plan within the meaning of section 414(d) to cover public charter school employees if specified requirements are satisfied.

Continue reading. (Subscription Required)

JANUARY 23, 2015

NABL Comments on Notice 2014-67.

NABL has submitted comments to the Internal Revenue Service ("IRS") in response to Notice 2014-67 regarding the interim guidance provided for the participation by governmental persons or 501(c)(3) organizations in accountable care organizations ("ACOs") under the Medicare Shared Savings Program of the Patient Protection and Affordable Care Act and regarding the amplification of the private business use safe harbors in Revenue Procedure 97-13.

Regarding ACOs, NABL asked that the IRS and Treasury Department confirm that (1) the six-prong standard described in section 3.01 of Notice 2014-67 (the "ACO Safe Harbor") is in fact a safe harbor for purposes of determining whether participation in an ACO results in private business use; and (2) the ACO Safe Harbor does not displace the general facts and circumstances approach set forth in the Code and Treasury Regulations or other existing guidance, such as Revenue Procedure 97-13, for purposes of determining whether an arrangement gives rise to private business use. NABL requested that further clarification be included in subsequent guidance with respect to several of the specific ACO Safe Harbor requirements.

Regarding Revenue Procedure 97-13, NABL suggested amendments to clarify the application of the Management Contract Safe Harbor, including a definition of the term "stated amount" and an extension of the management contract safe harbor to apply to incentive payments based on maximizing revenue or minimizing expense.

The comments were prepared by an ad hoc task force (listed in Exhibit A of the document) and approved by the NABL Board of Directors. The comments on Notice 2014-67 can be seen here.

Lew: Agreement on Business Tax Reform Possible.

WASHINGTON — Treasury Secretary Jack Lew said Wednesday that congressional Republicans and the Obama administration are too far apart on individual tax reform but could reach an agreement on business tax reform.

The chances of getting business tax reform done by the end of Barack Obama's presidency are "better than 50-50," Lew said at the Brookings Institution.

Lew seemed to discount the possibility of individual tax reform after Senate Finance Committee leaders began pushing for comprehensive tax reform. Finance Committee chairman Orrin Hatch, R-Utah, and ranking minority member Ron Wyden, D-Ore., set up working groups, including one on community development and infrastructure, in order to boost comprehensive tax reform efforts. Hatch said Tuesday that he wants working groups' efforts to lead to tax reform legislation that will be introduced and voted on in the committee later this year.

But Lew said that the administration and congressional Republicans disagree substantially about individual tax reform. Congressional Republicans want to lower the top individual rate, which Lew doesn't think is the best idea. "I don't think lowering the top individual rate is the way to grow our economy or create a better future for middle-class workers or for the country at large," he said.

However, there are tax changes for businesses that both the administration and congressional Republicans can support, Lew said. He added that he's remained in close contact with the chairmen and ranking minority members of the tax-writing committees and is encouraged that there's interest in having bipartisan discussion on business tax reform.

"I'm optimistic that we can reach an agreement here. I really am. I think there's goodwill on both sides to pursue the conversation," Lew said, though he noted doing business tax reform will be challenging.

The Obama administration wants to do business tax reform that makes changes that help small businesses as well as corporations, Lew said.

The Treasury Secretary spoke about business tax reform the day after President Obama gave his State of the Union address. Both Lew and Obama said that revenues from business tax reform should be used for infrastructure.

Lew said, "Rebuilding America's core infrastructure will have the long-term benefit of making America a more attractive place to invest and do business so that our economy is stronger not just today but for the future." He noted that the tax reform plan put out by former House Ways and Means Committee Chairman Dave Camp also would use temporary revenue created by tax reform for infrastructure.

Lew also criticized the new House rule that will require the Joint Committee on Taxation and the Congressional Budget Office to do "dynamic scoring" for some legislation. Dynamic scoring is when the macroeconomic activity that would or wouldn't occur if legislation went into effect is taken into consideration for revenue estimates.

"We think [the House rule] is unwise given the uncertainty involved in dynamic scoring, the assumptions that have to be made, and the unequal treatment of tax cuts versus pro-growth investments funded through annual appropriations," Lew said. It is very dangerous to use scoring methods that may exaggerate savings and underestimate costs, he said.

Lew praised the bipartisan budget agreement reached in December 2013 that “created a framework that showed we can work through the differences to find a path forward.”

The House and the Senate appropriations committees implemented the agreement, which set the discretionary spending levels for fiscal 2014 and 2015, with the spending bill that passed last month. That bill didn’t make either Democrats or Republicans completely happy, but it was a compromise that funded government programs through the end of the fiscal year, Lew said.

“Looking ahead, we can build on this momentum and pass bipartisan business tax reform so that our economy is one where innovation and ingenuity thrive, where hard work and determination pay off, and where the opportunity to succeed is available to everyone,” he said.

The budget agreement left in place the discretionary spending caps for fiscal 2016 and later that were set by the 2011 Budget Control Act. Lew said he doesn’t like the levels of the caps, and that conversations about spending above the levels of the caps will have to include discussions about how to pay for that spending.

THE BOND BUYER

BY NAOMI JAGODA

JAN 21, 2015 3:06pm ET

Hatch: Tax Reform Top Priority, Legislation This Year.

WASHINGTON – Senate Finance Committee chairman Orrin Hatch said tax reform is his top priority and that he is aiming for bipartisan tax-reform legislation to be introduced and voted on by the committee later this year.

Meanwhile, the National Association of State Treasurers sent a letter to Hatch, R-Utah, and other leaders of the tax writing committees Tuesday urging them to preserve the tax-exemption for municipal bonds.

Speaking at the U.S. Chamber of Commerce on Tuesday, Hatch said, “I don’t want just to release a framework or a proposal that doesn’t go anywhere. My only goal when it comes to tax reform is to make new law.”

Hatch and the top Democrat on the finance committee, Ron Wyden from Oregon, have set up five working groups on the topic, including one on community development and infrastructure.

“My hope is that the committee members in these five bipartisan working groups will use this opportunity to uncover real tax reform solutions and give us real ideas that will aid us through tax reform,” Hatch said.

Addressing those who are skeptical of the intentions of the working group process, Hatch said, “This is not theater, nor is it just for show. This is a very real undertaking.” The groups’ endeavors should lead to the introduction of tax-reform legislation later this year, he said.

Some members of Congress have suggested using budget reconciliation to pass tax reform. Hatch said that he would prefer for items that fall under his committee’s jurisdiction to be done in a

bipartisan manner, but that budget reconciliation should not be taken off the table.

He also said that Congress will need to find a way to fund a highway bill, since the current funding expires at the end of May. A gas tax increase is “very unlikely” but Congress can find other solutions, whether highway funding is addressed in a standalone bill or as part of tax reform, he said.

NAST urged the tax-writing committees not to view the new type of bond Obama proposed Friday to help facilitate public-private partnerships for infrastructure as a substitute for traditional tax-exempt bonds. The bonds, called qualified public infrastructure bonds, would have features of governmental and private-activity bonds.

NAST told the lawmakers that while QPIBs “may increase infrastructure investment by permitting public private partnerships to tap into previously unavailable funding sources,” they would not be “a panacea.”

“Tax-exempt municipal bonds remain critical for the financing and construction of schools and other basic infrastructure needs,” said the letter, which was signed by NAST President and Tennessee Treasurer David Lillard and NAST Senior Vice President and Washington Treasurer James McIntire.

Curbing or eliminating the muni exemption would increase state and local governments’ borrowing costs and lead to fewer infrastructure projects and jobs. It’s important for states and localities to be able to save money by using the tax-exempt market since they have constrained budgets, NAST said.

And while states and localities could ask the federal government for more subsidies, “rather than having Congress dictate which projects get built, it’s far more efficient to have state and local governments set their own priorities and shoulder the bulk of the cost of their investments,” the group said.

In addition to talking about tax reform and highway funding, Hatch talked about other items on the finance committee’s agenda.

Congress will also need to address the debt ceiling this year, likely around the middle of the year, Hatch said. The current suspension of the debt limit expires in March. Hatch said it’s uncertain how the next debt limit extension will be done, but the finance committee will be involved.

In the last Congress, Hatch introduced a pension reform bill called the Secure Annuities for Employee (SAFE) Retirement Act. He said he wants Congress to enact the legislation.

The bill would allow state and local governments to invest in annuity contracts with private life insurance companies for employee retirement benefits. Hatch said that poorly-funded state and local defined benefit pension plans are “bankrupting” governments. He pointed to Illinois as an example.

Also during the last Congress, Hatch worked with Sen. Michael Bennet, D-Colo., to introduce legislation to promote “social impact bonds,” or public-private partnerships to promote social interventions. “This approach to social service delivery could offer states and the federal government a viable pathway to innovate with promising strategies to achieve positive results and save taxpayer dollars,” he said.

THE BOND BUYER

BY NAOMI JAGODA

JAN 20, 2015 11:47am ET

Foley: IRS Releases Guidance on Performance and Quality Standards for Small Wind Energy Property.

The IRS recently released Notice 2015-4 (the Notice), which provides performance and quality standards that small wind energy property (defined under section 48(c)(4) of the Code as property utilizing a "qualifying small wind turbine" with a nameplate capacity of not more than 100 kilowatts (kW)) must meet to qualify for the section 48 investment tax credit (ITC).

ITC eligible small wind energy property acquired or placed in service after January 26, 2015, must now meet the performance and quality standards set forth in either:

(1) American Wind Energy Association Small Wind Turbine Performance and Safety Standard 9.1-2009 (AWEA); or

(2) International Electrotechnical Commission 61400-1, 61400-12, and 61400-11 (IEC).

The Notice further explains that small wind turbines must comply with the applicable AWEA or IEC performance and quality standards in effect at the time of acquisition, defined for these purposes as the time the taxpayer that constructed, reconstructed, or erected the small wind turbine places it in service.

Manufacturers of small wind turbines may certify that the turbine meets the AWEA or IEC performance and quality standards by providing the taxpayer with a certification that satisfies the Notice's requirements. Taxpayers can then rely on the certification to claim the ITC. In the event that the IRS later determines that a manufacturer issued an erroneous certification, the manufacturer may be subject to penalties and its right to provide a certification to future purchasers will be withdrawn. Taxpayers that purchase the small wind turbines after the IRS publishes an announcement withdrawing the manufacturer's certification cannot rely on the certification, but taxpayers that purchased the equipment on or prior to the date on which the announcement of the withdrawal is published can still continue to rely on the certification (even if the equipment is not installed or the credit is not claimed before the announcement of the withdrawal is published).

Takeaways: The Notice imposes performance and quality standards on small wind energy property while providing a convenient and clear certification process that manufactures can utilize to advertise their equipment as meeting these standards and which taxpayers can then rely on to claim the ITC. Going forward we recommend that taxpayers purchase property certified pursuant to this Notice and then ensure that they maintain this certification in their records.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Last Updated: January 17 2015

Article by John A. Eliason and Kurt R. Rempe

Foley & Lardner

TAX - LOUISIANA

Pot-O-Gold Rentals, L.L.C. v. City of Baton Rouge

Supreme Court of Louisiana - January 16, 2015 - So.3d - 2014-2154 (La. 1/16/15)

Taxpayer that operated waste removal business brought action against city seeking refund of sales taxes. The District Court granted taxpayer summary judgment. City appealed. The Court of Appeal reversed and remanded. Taxpayer sought review.

The Supreme Court of Louisiana held that lease of portable toilet with cleaning services included was not taxable pursuant to sales tax statute.

The “true object” of the transactions was, in the least, debatable, requiring the court to adopt the interpretation urged by the applicant as the least onerous to the taxpayer, and, to hold that providing cleaning services for portable toilets was not a taxable event if the toilet was owned by someone else, but was a taxable service if the toilet was owned by the lessor, would have created an absurd result.

Congress Extends QZABs, New Markets Tax Credits; Continuing Effect of Sequestration: McGuire Woods

On Dec. 19, 2014, President Barack Obama enacted the Tax Increase Prevention Act of 2014 (the “Act”), commonly referred to as the tax extenders bill (H.R. 5771), which you may read here. Generally, the Act extends many programs that expired at the end of 2013.

This Client Alert focuses on the extension of Qualified Zone Academy Bonds (QZABs), New Markets Tax Credits (NMTCs), and empowerment zone employment credits and on the enduring impact of sequestration on direct-pay bonds.

Qualified Zone Academy Bonds

The Act authorizes the Secretary of the Treasury to allocate an additional $400 million in QZABs for 2014. Prior to the Act, no additional allocations of QZABs were to be available to the states after Dec. 31, 2013. The 2014 round of QZABs allocations will expire if not issued on or before Dec. 31, 2016. QZABs issued under the 2014 allocations are eligible only for the tax credit and may not use the direct-pay option. This limitation also applies to QZABs issued under the 2013 allocations that expire at the end of 2015.[1]

As a reference, QZABs benefit a “qualified zone academy” (typically, a public school) that is designated as such by the “applicable local education agency,” which is oftentimes the governing local school board or district. As more fully described in Section 54A of the Internal Revenue Code of 1986, as amended, a holder of a QZAB receives a credit against federal income taxes.

New Markets Tax Credits

The Act also authorizes $3.5 billion in allocations for the New Markets Tax Credit program. This authorization is for 2014. Prior to the Act, the last round of allocation related to 2013. The 2014 allocations must be used by Dec. 31, 2019.

The New Markets Tax Credit program is designed to encourage investment in qualifying low-income communities. An investor receives a tax credit in return for equity investments in community development entities that use those invested funds for eligible purposes aimed at targeted populations and low-income areas. The credit is 39 percent, taken over seven years. Many states have programs similar to the federal New Markets Tax Credit program.

Empowerment Zones

Moreover, the Act extends the benefits of empowerment zone designation by providing that any existing empowerment zone will remain designated as such until Dec. 31, 2014. Previously, the designation of existing empowerment zones expired on Dec. 31, 2013.

The benefits of empowerment zone status include the empowerment zone employment credit, which provides employers a federal tax credit equal to 20 percent of qualified zone wages paid during a calendar year. Qualified zone wages are wages paid to an employee who lives in an empowerment zone and performs substantially all of his or her employment in that empowerment zone. Other tax benefits include increased deductions for equipment placed in service in empowerment zones and delayed recognition of any gains on the sale of qualifying empowerment zone assets.

Federal Sequestration and Direct-Pay Bonds

All direct-pay bonds, including QZABs, Build America Bonds, Qualified School Construction Bonds, New Clean Renewable Energy Bonds, Qualified Energy Conservation Bonds and Recovery Zone Economic Development Bonds, remain subject to the ongoing effects of federal sequestration. For fiscal year 2015 (which ends on Sept. 30, 2015), the direct-pay subsidy for those bonds issued as direct-pay bonds is subject to a 7.3 percent reduction.

Unless a law is enacted that cancels or otherwise amends the sequestration, the existing subsidy reduction will remain in effect through the end of fiscal year 2024.

1. Included as Title II of H.R. 5771 is the “Tax Technical Corrections Act of 2014.” See Section 202(d) for the above-mentioned provisions relating to QZABs.

NABL Submits Comments on IRS Notice 2014-67.

NABL has submitted comments to the Internal Revenue Service (“IRS”) in response to Notice 2014-67 regarding the interim guidance provided for the participation by governmental persons or 501(c)(3) organizations in accountable care organizations (“ACOs”) under the Medicare Shared Savings Program of the Patient Protection and Affordable Care Act and regarding the amplification of the private business use safe harbors in Revenue Procedure 97-13.

Regarding ACOs, NABL asked that the IRS and Treasury Department confirm that (1) the six-prong standard described in section 3.01 of Notice 2014-67 (the “ACO Safe Harbor”) is in fact a safe harbor for purposes of determining whether participation in an ACO results in private business use; and (2) the ACO Safe Harbor does not displace the general facts and circumstances approach set forth in the Code and Treasury Regulations or other existing guidance, such as Revenue Procedure 97-13, for purposes of determining whether an arrangement gives rise to private business use. NABL requested that further clarification be included in subsequent guidance with respect to several of the specific ACO Safe Harbor requirements.

Regarding Revenue Procedure 97-13, NABL suggested amendments to clarify the application of the Management Contract Safe Harbor, including a definition of the term “stated amount” and an extension of the management contract safe harbor to apply to incentive payments based on maximizing revenue or minimizing expense.

The comments were prepared by an ad hoc task force (listed in Exhibit A of the document) and approved by the NABL Board of Directors. The comments on Notice 2014-67 can be seen here.

Jan 22, 2015

TAX - CALIFORNIA

Williams & Fickett v. County of Fresno

Court of Appeal, Fifth District, California - January 9, 2015 - Cal.Rptr.3d - 2015 WL 128539

Taxpayer brought action against county for refund of personal property taxes. The Superior Court sustained demurrer without leave to amend and dismissed the complaint. Taxpayer appealed.

The Court of Appeal, Levy held that:

- Exhaustion of administrative remedies did not require application for an assessment reduction, and
- Taxpayer’s filing of applications for changed assessment did not trigger one-year limitations period.

Taxpayer was not required to apply to the county board of equalization or assessment appeals board for an assessment reduction to satisfy the exhaustion of administrative remedies requirement for taxpayer’s judicial action for refund of taxes on the basis that taxpayer did not own the personal property covered by the challenged assessment and therefore the assessment was a nullity.

Taxpayer’s filing of applications for changed assessment seeking to cancel an assessment on personal property, which the county assessment appeals board returned as untimely, did not trigger the limitations period for a tax refund claim of one year after the county assessment appeals board fails to hear evidence and fails to make a final determination on an assessment reduction application, since the applications to cancel the assessment were not assessment reduction applications, and taxpayer had not yet paid the tax.

Upping the Ante: Costs Of Luring Top Students Keep the Outlook Negative on U.S. Not-For-Profit Higher Education Sector.

Standard & Poor’s Ratings Services’ 2015 outlook for the U.S. not-for-profit higher education sector remains negative as colleges and universities struggle to balance the demands of their expenditures while addressing student affordability and access. We believe this tug-of-war in an increasingly competitive market will continue to compress overall operating performance and put an additional strain on these institutions’ financial resources, especially those whose credit characteristics are already at the cusp of a lower rating.

Continue reading the report.

15-Jan-2015

Not-for-Profit Hospitals Shunned Bond Market in 2014.

Hospital bond issuances fell to their lowest level in more than a decade last year as not-for-profit providers scaled back their capital spending despite low interest rates and eager lenders.

“Most of our clients have made a deliberate effort to pull back on major capital projects,” said Pierre Bogacz, managing director at HFA Partners. “We’ve seen a lot of them keeping these projects on the backburner.”

Instead of investing in traditional brick-and-mortar building projects, many health systems are focusing their attention on upgrading their information technology systems. These projects are not only less expensive, but they have a relatively short lifespan before providers must make the next upgrade. That makes them better-suited for a 10- to 15-year bank loan than for a bond issuance with a 30-year amortization schedule, Bogacz observed.

In an otherwise stable municipal bond market, the value of healthcare bond issuances in 2014 fell 16% compared with the previous year, according to data from Thomson Reuters. Only borrowers in the education sector had a similar pullback.

The total value of long-term bond offerings from healthcare providers was only $24.3 billion last year compared with $28.9 billion in 2013, and marked the lowest level of activity since 2001’s $23.4 billion in offerings.

“It’s not a situation where hospitals aren’t investing,” Bogacz said. “It’s a situation where they’re not investing so much that they need to go out and borrow.”

Healthcare providers have pulled back on projects that require new funds as they grapple with reimbursement cuts and decreased patient volume, said Cormac Cullen, a healthcare analyst at Fidelity investments.

“Debt, especially additive debt, can limit their flexibility,” he said.

But even refinancings in the beginning of the year suffered because of the complex relationship between yield curves on municipal bonds and Treasury bonds.

“Lower interest rates aren’t the end of the story,” Cullen said. “Both of those two different dynamics are affecting debt issuances.”

When a borrower wants to take out debt before it’s allowed to be redeemed, it can do so by setting up an escrow account that is typically funded with U.S. Treasuries. The Treasuries are purchased with the proceeds from the refinancing offering and used to make payments on the older bonds.

Therefore, it wasn’t until the Treasury yield curve flattened that there was an uptick in refundings in the fourth quarter, said Kevin Ramundo, a municipal portfolio manager at Fidelity.

Nine not-for-profit healthcare providers have filed official statements for bond offerings on MuniOS through Jan. 9. In contrast, just seven healthcare issuers filed official statements for offerings during the entire month of January 2014.

Of this year's nine healthcare issuances, all but one plan to use the proceeds for refundings. Only Lakeland (Fla.) Regional Health Systems is planning to use the proceeds from its $180 million offering to finance a new Women's and Children's Pavilion; build a new inpatient rehabilitation facility; and expand its emergency department, operating suites and cancer center.

Although the debt market typically drives the M&A market in the for-profit healthcare sector, the same is not true on the not-for-profit side, so the slowdown is not a sign that providers will pull back on their deal-making activity.

Most not-for-profit deals do not require up-front cash. Moreover, if not-for-profit providers can't access the bond market for their capital needs, they're more likely to seek out a partner, Cullen said.

Yet the decline in borrowing contrasts with the optimism from lenders, who note that the debt markets are wide open to healthcare borrowers. "They're ready to go—but the hospitals aren't," Bogacz said. "And it takes two to tango to issue debt."

It also comes as hospital financial metrics are improving; cash on hand is continuing to climb while leverage, or the amount of debt that providers have, has fallen, Bogacz said.

But then there's the question of how much longer providers can defer major projects. That may give a boost to the hospital bond market this year, especially if interest rates begin to rise.

"That could be a good opportunity for hospitals to pull the trigger on something they've been considering," Bogacz said. "I think it's going to be a wake-up call for hospitals that don't have a sense of urgency. But that's a big if—it really depends on what the Feds are going to be doing."

Modern Healthcare

By Beth Kutscher | January 12, 2015

IRS Publication: Tax on Unrelated Business Income of Exempt Organizations.

The IRS has released Publication 598 (rev. Jan. 2015), Tax on Unrelated Business Income of Exempt Organizations.

View the publication.

IRS FSLG Newsletter.

The January 2015 edition of the Federal State and Local Government Newsletter is now available.

Inside this issue:

- Withholding on Remuneration Paid to Foreign Students, Scholars, Teachers, Researchers and Trainees
- Tax Treatment of Employer-Provided Meals
- Adjustments for Additional Medicare Tax
- New Edition of Publication 963 Available

- Directory of FSLG Specialists

Click here to read the January 2015 edition of the FSLG Newsletter.

Senate Finance Panel Takes Step Toward Comprehensive Tax Reform.

WASHINGTON -The Senate Finance Committee took a step toward comprehensive tax reform on Thursday by launching five bipartisan working groups charged with issuing a report with recommendations by the end of May.

Several municipal market participants and tax experts suggested the recommendations could include changes to municipal bonds.

The groups will examine current tax law, policy trade-offs and options for reform. They will work with the Joint Committee on Taxation to come up with an in-depth analysis of options and possible legislative solutions in their subject areas, according to a release issued by Senate Finance Committee chairman Orrin Hatch, R-Utah, and ranking minority member Ron Wyden, D-Ore.

The groups' recommendations "will serve as a foundation for the development of bipartisan tax reform legislation," the release said.

Frank Shafroth, director of the Center for State and Local Government Leadership at George Mason University, said muni changes are "more likely than not" to be part of the recommendations, since Congress is still looking to find ways to offset lowering tax rates.

Dustin McDonald, director of the Government Finance Officers Association's federal liaison center, also said that the groups will be looking at ways to raise revenue that could be used to lower rates. "I think they'll be no stone unturned," he said.

The tax reform plan released by former House Ways and Means Committee Chairman Dave Camp, R-Mich., would have capped the value of tax-exemption at 25% and eliminated the tax exemption for new private-activity bonds. McDonald said it is unclear if the working groups will use Camp's plan as a guide, but "the same concerns remain for us" that any tax-reform plan would include changes to bonds.

While John Godfrey, government relations director for the American Public Power Association, agreed that the working groups are unlikely to stay silent on bonds, he said that the groups won't necessarily make changes that would hurt bonds.

If the groups focus on improving the tax code and do not have to come up with a certain amount of money that can be used to lower rates, there are "some opportunities to make improvements," such as updating private-activity bond rules to make it easier for public power utilities to finance electric power transmission investments using PABs, Godfrey said.

Tax experts pointed out that the House Ways and Means Committee similarly had tax reform working groups in 2013. They had mixed views on how these new groups would impact the chances for tax reform.

Howard Gleckman, a resident fellow at the Urban Institute, said the groups "can't hurt" the chances for tax reform, and it's always good to have members engaged in a topic. But he acknowledged that

Camp's working groups didn't necessarily help him move tax reform, and Camp only used a little of the groups' product in his bill.

Godfrey suggested the groups will create subject-matter experts, which could help efforts to do piecemeal tax reform.

But Shafroth said the groups will have to collect a lot of information, which will "bog down" the tax-reform process.

Micah Green, chair of the financial services and tax policy practice group at Squire Patton Boggs, said "irrespective of these bipartisan working groups, it will remain a difficult task to develop a consensus on broad based comprehensive individual and business tax reform."

However, "this process will surely serve as a significant framework for the debate on the various major topics of focus for each group," Green said. "The municipal bond community should take this as a very serious opportunity to have meaningful and timely input."

Michael Decker, Securities Industry and Financial Markets Association managing director and co-head of municipal securities, said, "We're glad to see that Congress is working in a bipartisan manner to address the important issue of tax reform. We look forward to working with these groups on issues important to the municipal bond community, such as preserving the tax exemption for muni bonds."

The working groups will have Democratic and Republican co-chairs. The community development and infrastructure working group will be co-chaired by Sens. Dean Heller, R-Nev., and Michael Bennet, D-Colo.

Mike Nicholas, chief executive officer of the Bond Dealers of America, called the senators "two good choices."

In 2009, Bennet and other senators sent a letter to then-Treasury Secretary Timothy Geithner urging the department to backstop municipal debt during the financial crisis.

Bennet "has been an advocate for municipal debt in the past," Nicholas said.

Also, Bennet previously served as superintendent of the Denver public schools and as chief of staff to a former mayor of the city.

The senator "understands municipal issues and capital expenditures for school construction. That background will certainly be important in analyzing these issues in the context of this particular working group," Green said.

Speaking about Heller, Nicholas said, "We've always found him to be reasonable and open-minded to discussions."

Gleckman said that Bennet and Heller have reputations for reaching across the aisle.

In addition to infrastructure, the groups will focus on individual income tax, business income tax, international tax and savings and investment.

THE BOND BUYER

BY NAOMI JAGODA

JAN 15, 2015 4:15pm ET

TAX - VIRGINIA

CVAS 2, LLC v. City of Fredericksburg

Supreme Court of Appeals Virginia - January 8, 2015 - S.E.2d - 2015 WL 103731

City brought suit against real estate developer seeking to have developer's real estate sold in order to collect outstanding payments for delinquent real estate taxes and special assessments. The Circuit Court entered decree of sale. Developer appealed.

The Supreme Court of Virginia held that:

- City had no authority to bring suit to sell the real estate as a means to collect delinquent real estate taxes;
- City had no authority to bring suit to sell the real estate as a means to collect delinquent special taxes; and
- City had no authority to bring suit to sell the real estate as a means to collect delinquent special assessments.

Because city did not strictly comply with time period in tax code allowing for a suit to sell real estate to be brought, the city had no authority under the code to bring suit to sell taxpayer's real estate as a means to collect delinquent real estate taxes.

Because city did not strictly comply with the time period in tax code allowing for a suit to sell real estate to be brought, and had not adopted an ordinance pursuant to code provision allowing for it to expedite and collect delinquent special taxes independent from its collection of another type of delinquent "locality's taxes," the city had no authority under the code to bring suit to sell taxpayer's real estate as a means to collect delinquent special taxes.

Because city had not shown that it had strictly complied with tax code provisions allowing for it to bring suit to collect delinquent special assessments on behalf of a community development authority, the city did not establish authority under the code to bring suit to sell taxpayer's real estate as a means to collect the delinquent special assessments.

Dynamic Scoring Could Make Tax Reform Easier.

WASHINGTON – New House rules on dynamic scoring could make tax reform easier to do, said municipal and tax experts who differed on whether such scoring would benefit or hurt municipal bonds.

Dynamic scoring is when the macroeconomic activity that would or wouldn't occur if legislation went into effect is taken into consideration for revenue estimates. The House rules package adopted Tuesday require the Congressional Budget Office and the Joint Committee on Taxation, when possible, to take the macroeconomic effects of "major legislation" into consideration in cost estimates.

"Major legislation" is defined as a bill that causes a budgetary effect of at least 0.25% of the

projected gross domestic product in any fiscal year covered by the budget resolution. The House Budget Committee chairman and the top House member on JCT can also designate bills to be major legislation.

Ken Kies, managing director of the Federal Policy Group and a former JCT chief of staff, said that dynamic scoring may slightly improve the chances for tax reform "at the margin." The dynamic scoring models assume that lowering tax rates improves economic growth. As a result, dynamic scoring could make tax-reform plans less costly. Still, he warned that dynamic scoring doesn't make tax reform easy.

Tax experts said that JCT would probably do macroeconomic analyses for whole bills but continue to produce revenue estimates for specific provisions of the bill using static scoring.

Kies said that when JCT does an overall dynamic analysis of a bill, he would expect a favorable treatment of bonds to be a plus. Tax-exempt bonds make capital cheaper and more readily available, he said.

Mike Nicholas, chief executive officer of the Bond Dealers of America, said "we think that tax legislation scored dynamically benefits the municipal market."

Michael Decker, Securities Industry and Financial Markets Association managing director and co-head of municipal securities, said he hopes dynamic scoring would lead to "more realistic estimates of revenue effects."

In theory, dynamic scoring "provides some flexibility to the tax-writers" and could make tax reform easier, said Chris Mauro, director of municipal bond research at RBC Capital Markets. However, munis are most likely to be hurt by comprehensive tax reform, and in order for that to be accomplished, there needs to be cooperation between both parties, both chambers of Congress and the president. That cooperation doesn't exist right now, Mauro said.

Congress is likely to focus on corporate tax reform this year, since they won't have time to do comprehensive tax reform before the 2016 presidential election gets into full swing, said Frank Shafroth director of the Center for State and Local Government Leadership at George Mason University. Dynamic scoring could show that cuts to corporate tax rates will produce revenue because the lower rates will lead to corporations stimulating the economy, he said.

"Moving from static to dynamic scoring will positively impact tax reform," he said. While it's unclear to what extent any tax reform will get done, "if anyone can do it, it's Paul Ryan," the new Republican chairman of the House Ways and Means Committee, Shafroth said.

Under dynamic scoring, Congress does not need to cut as many tax preferences in order to pay for lowering rates. However, Shafroth thinks that tax-exempt bonds are still likely to be on the menu of preferences to cut, since the White House hasn't supported them. President Obama's last few budget proposals have included capping the value of the muni exemption at 28%.

Howard Gleckman, a resident fellow at the Urban Institute, also said that tax preferences for bonds could still be cut even with dynamic scoring. JCT did dynamic scoring for former House Ways and Means Committee Chairman Dave Camp's tax reform proposal, and it found that by using this method, Camp's bill would have raised an additional $50 billion to $700 billion over 10 years. The low end of that range is essentially revenue neutral, meaning that a lot of tax expenditures would still have to be cut, he said.

If dynamic scoring makes it easier for tax reform to be enacted, "it will increase pressure on tax-

exempt bonds," Gleckman said. "Any cut in tax rates makes munis less attractive to investors. And tax-exempts are always a potential target if Congress is looking to curb tax preferences."

The House rules package that included dynamic scoring passed Tuesday, hours after the 114th Congress began, by a vote of 234 to 172. The vote was partisan, with most Republicans favoring the measure and Democrats primarily opposing it. House Democrats accused Republicans of supporting dynamic scoring so that they can use "voodoo economics" to cut taxes for the wealthy.

"They are changing House rules to be able to cook the books to implement their long-held, discredited notion that tax cuts pay for themselves," said Sander Levin, the top Democrat on the House Ways and Means Committee.

John Buckley, former chief tax counsel for the Democrats on the House Ways and Means Committee, said Democrats in Congress won't support tax reform under "dubious" economic scoring and that Republicans don't have enough support for tax reform within their own caucus to do it without some Democratic votes.

Dynamic scoring "turns tax reform, regrettably, into a partisan issue," he said.

House Republicans, on the other hand, argue that dynamic scoring provides more accurate estimates.

"This change will give members of Congress and the American people an accurate idea of the real-world effects of proposed legislation designed to grow the economy and create jobs," House Rules Committee Chairman Pete Sessions, R-Texas, said in a statement.

The House rules do not apply in the Senate, though Senate Finance Committee Chairman Orrin Hatch, R-Utah, supports using dynamic scoring for major reforms, a spokeswoman for the senator said.

THE BOND BUYER

BY NAOMI JAGODA

JAN 8, 2015 3:15pm ET

IRS Announces Simplified Voluntary Closing Agreement Program.

Announcement 2015-2 provides a simplified Voluntary Closing Agreement Program (VCAP) process for issuers of qualified 501(c)(3) bonds. Issuers can request a closing agreement in situations in which the borrower of the proceeds of the bonds received Prospective Reinstatement, as defined in the Announcement, after its tax-exempt status was automatically revoked under section 6033(j)(1) of the Internal Revenue Code.

An issuer of 501(c)(3) bonds can apply for a closing agreement under the announcement if the organization's status had not been previously revoked since the issue date of the bonds. The bonds in question must not be under examination by the IRS. Issuers need to submit the closing agreement within 12 months of the date of the reinstatement letter.

The closing agreement amount for each bond issue covered by the agreement will equal $500 for

each calendar month or portion thereof in the period starting with the month that includes the Revocation Date and ending in the month that includes the effective date of the reinstatement of the exempt status of the Organization.

IRS Chief Counsel Office Hit Hard by Budget Cuts.

The Internal Revenue Service is facing budget cuts that may cause the agency to make drastic changes to the Office of Chief Counsel. The total number of lawyers in the office, the time it can spend speaking with the public, and its ability to issue guidance and private rulings have all already been affected.

In 2014, the number of public letter rulings issued by the office dropped by 10 percent from the previous year. Speaking to press at an event earlier this week held by Buchanan Ingersoll & Rooney PC, IRS Deputy Chief Counsel Erik Corwin told Bloomberg reporters that part of that was by design, telling press that the rulings "are less efficient than published guidance." The agency may consider shaping its annual guidance plan to reflect the cuts. NABL President Tony Martini has written to the Chief Counsel's office urging continued attendance by staff of the Chief Counsel's office at NABL conferences. President Martini's letter is available here.

TAX - OREGON

Evergreen Aviation and Space Museum v. Department of Revenue, State

Oregon Tax Court, Regular Division, Property Tax - December 19, 2014 - 2014 WL 7213197

Plaintiffs ("Taxpayer") own and lease property in Yamhill County that is operated generally as a museum relating to air and space equipment, activity and exploration and related scientific educational activity. The County and Defendant Department of Revenue ("Department") acknowledged that much of the property is exempt from taxation as being related to scientific activity.

However, the Department asserted that some of the property for which Taxpayer claimed exemption did not qualify for exemption, which Taxpayer disputed.

The Oregon Tax Court held that:

- An analysis of the time used for exemption-related movies as compared with time used for nonexemption-related movies and rentals to third parties would be the better analysis than a relative revenue test for purposes of determining whether any portion of the museum's theater was exempt;
- The case would be continued for the purpose of allowing the parties to consider whether they could agree on a conclusion as to partial exemption for the museum's theater;
- The museum's kitchen and cafe were exempt, as the food service activity that existed at the museum implemented the objectives of Taxpayer in a substantial way;
- The concession stand was not exempt;
- The gift shop was not exempt, as the sale of items related to the purpose of the museum were a small fraction of the total sales of the shop and thus the gift shop did not meet the substantial

factor test;
- The land adjacent to the museum not used for the purposes of the museum was nonexempt, notwithstanding Taxpayer's argument that it was used to create a "campus atmosphere"; and
- An allocation was required and should be done on the basis of the ratio of space occupied by the for-profit entity and otherwise found to be nonexempt (such as the space in the theatre allocated to nonexempt use by reason of display of nonexempt movies) as compared with the total space in the museum and theatre properties for the parking area.

Off-Key BABs: IRS Hits Wrong Note in Reissuance Analysis - Mintz Levin

The IRS recently published a December 9, 2014 Chief Counsel Advice Memorandum to the effect that the defeasance of taxable Build America Bonds (BABs) causes a tax reissuance of the bonds, with the consequence that the municipal issuer ceases to be eligible for federal government interest subsidies for the period from the defeasance date to the redemption date. (A "reissuance" means that from a tax perspective existing bonds are deemed exchanged for new bonds issued on the reissuance date.) The BABs subsidy was available for bonds issued in 2009 and 2010; bonds issued or deemed issued in 2014 are ineligible.

This internal counsel advice is not particularly consequential in the specific context to which it applies. As noted in a Bond Buyer article on the advice memorandum, defeasance escrows for taxable bonds tend to be established for short periods, usually the thirty day period between the date a redemption notice is mailed and the redemption date. Accordingly, any loss of BABs subsidy to the issuer resulting from a purported reissuance is minor. Similarly, though a reissuance of taxable bonds may accelerate realization of gain or loss by a bondholder, if the reissuance occurs 30 days before the redemption date, it is unlikely to change the tax year in which such gain or loss occurs.

The larger point is that the advice memorandum reflects a troubling approach by the IRS to the interpretation of its rules. A legal defeasance of taxable bonds generally causes a reissuance (which is why taxable bond indentures provide for "covenant defeasance", which permits the creation of a defeasance escrow that economically defeases the bonds while the issuer retains theoretical liability for any escrow shortfall.) However, the reissuance regulations provide an exception for municipal bonds. The reissuance exception applies to "tax-exempt bonds", which IRS Regulation 1.1001-3(f)(5)(iii) defines as "a state or local bond that satisfies the requirements of § 103(a)." Section 103(a) of the Internal Revenue Code sets forth the requirements that must be satisfied by tax-exempt municipal bonds.

BABs are required to meet the requirements of Section 103(a) in order to be eligible for the federal subsidy. This is because the BABs subsidy, which is paid by the Treasury to the issuer and offsets the issuer's interest cost, is merely an alternative mechanism for lowering the interest costs to a municipal issuer of issuing bonds that satisfy the criteria for a federal subsidy. Instead of exempting the bondholder from income tax on the bond interest, thereby lowering the rate the issuer must pay to attract bond purchasers, the BABs mechanism pays a subsidy directly to the issuer, which some believe to be a more cost-effective form of federal subsidy. But in order to be eligible for either form of subsidy – tax-exemption of interest, or direct subsidy payments to the issuer by the federal government – the applicable bonds must comply with the same Section 103(a) requirements.

So why does the IRS advice memorandum conclude that the reissuance exception for defeasance of bonds that satisfy the requirements of Section 103(a) is inapplicable to BABs? The memorandum

acknowledges that the legislation creating BABs was enacted subsequent to the promulgation of the relevant reissuance exception, and that the regulatory exception was not revised at that time to exclude BABs from the exception. But the memorandum asserts that the concerns that gave rise to the reissuance exception for such defeasances focused on preserving the tax-exemption of interest to bondholders, and that taxable BABs do not present the same concerns for bondholders. Respected bond counsel dispute the advice memorandum's characterization of the regulatory history of the reissuance exception.

But the more troubling feature of the IRS analysis is that BABs satisfy the literal requirements of the reissuance exception for defeasance. Regulatory history and speculation as to whether the rulemakers would or wouldn't have included BABs if they had focused on the question should only be relevant if there is ambiguity in the regulation. In this instance, there is none.

Issuers should be entitled to rely on the plain meaning of IRS regulations in structuring their bond issues and/or refinancing their bond issues. If circumstances change and the IRS does not wish a rule that literally applies to such changed circumstances to be applicable, the burden should be on the IRS to change the rule, versus expecting issuers and practitioners to pre-clear with the IRS whether some unwritten carveout to the rule exists in the minds of individuals at the IRS. A more famous (and tonally adept) Babs once sang "If You Could Read My Mind," but that is no way to run a tax system.

By Len Weiser-Varon

Mintz Levin

December 30th, 2014

IRS TEB Voluntary Closing Agreement Program: Relief From Violation of Qualified Ownership and Use Requirements for Qualified 501(c)(3) Bonds.

Announcement 2015-2 provides a simplified VCAP process for issuers of qualified 501(c)(3) bonds, as defined in the Announcement, to request a closing agreement in situations in which the borrower of the proceeds of the bonds received Prospective Reinstatement, as defined in the Announcement, after its tax-exempt status was automatically revoked under section 6033(j)(1) of the Internal Revenue Code (the "Code").

States Will Have Greater New Capacity to Issue PABs in 2015.

WASHINGTON — States on the whole will see a slight increase in their new capacity to issue private-activity bonds in 2015.

The 50 states, the District of Columbia and Puerto Rico will have a total of about $35.23 billion of new capacity in 2015, up 0.97% from roughly $34.89 billion in 2014. The increase is based on the latest population figures released last week by the U.S. Census Bureau and a revised PAB cap formula published by the Internal Revenue Service in October.

Private-activity bonds are issued by public entities to provide low-cost financing for the projects of

nonprofit organizations or companies that serve a public purpose. Most types of PABs – including certain types of exempt-facility bonds, mortgage-revenue bonds, industrial development bonds, student-loan bonds and first-time farmer bonds – are subject to state volume caps.

States receive annual PAB volume caps and also can carry over any unused cap for up to three years. Volume caps for 2015 are the greater of $100 per capita or $301.52 million, according to the IRS. For 2014, the per capita rate was the same, and the minimum amount was $296.83 million. States use the minimum cap rather than the per capita amount when they have small populations.

Between July 1, 2013 and July 1, 2014, the population of the 50 states and D.C. increased by 0.75% to 318.86 million in 2014, according to the latest Census Bureau estimates. The U.S. population as of July 1, 2013 was 316.50 million, up from the estimate released last year of 316.13 million. The 2014 state volume caps are based on the 2013 population estimates that were released last December.

Nearly all states will see increases in their new capacity to issue PABs in 2015, but none will see an increase of more than 2%. Texas, the nation's second most populous state, will see the greatest increase in new volume cap, with a 1.92% gain. Florida, which overtook New York to become the third most populous state in 2014, will see a 1.74% rise in new cap, the second greatest increase.

California, the most populous state, will have its new capacity increase by 1.23% to $3.88 billion in 2015.

Nineteen states and D.C. used the minimum amount in 2014 and will use it again in 2015. These jurisdictions will see a 1.58% increase in new cap. Mississippi, whose population falls in between the 2014 and 2015 minimum caps, will use the minimum amount in 2015 but did not do so in 2014.

Illinois and Puerto Rico both saw population declines and will have a smaller amount of new capacity to issue PABs in 2015 than in 2014. Illinois' cap will decrease 0.01% to $1.29 billion, while Puerto Rico's cap will fall by 1.84% to $354.84 million. Five other states also saw population declines in 2014, according to the Census Bureau, but they will not see declines in new cap, in most cases because they use the minimum amount.

States rarely issue the maximum amount of PABs that they can issue under their caps in any year. In 2013, states only used about 10% of their total capacity, according to a survey by the Council of Development Finance Agencies.

The PAB volume cap figures for 2015 do not include American Samoa, Guam, the Northern Mariana Islands and the U.S. Virgin Islands because they are not included in the Census Bureau's population estimates.

THE BOND BUYER

BY NAOMI JAGODA

DEC 30, 2014 2:09pm ET

IRS EO Update: e-News for Charities & Nonprofits - December 31, 2014

1. IRS issues final regulations on new requirements for tax-exempt hospitals

The IRS and Department of Treasury have issued final regulations that provide guidance regarding the requirements for charitable hospital organizations added by the Affordable Care Act.

Each Section 501(c)(3) hospital organization is required to meet four general requirements on a facility-by-facility basis:

- establish written financial assistance and emergency medical care policies,
- limit amounts charged for emergency or other medically necessary care to individuals eligible for assistance under the hospital's financial assistance policy,
- make reasonable efforts to determine whether an individual is eligible for assistance under the hospital's financial assistance
- policy before engaging in extraordinary collection actions against the individual, and conduct a community health needs assessment (CHNA) and adopt an implementation strategy at least once every three years.

(The first three requirements listed above are effective for tax years beginning after March 23, 2010 and the CHNA requirements are effective for tax years beginning after March 23, 2012.)

The ACA also added new section 4959, which imposes an excise tax for failure to meet the CHNA requirements, and added reporting requirements under section 6033(b) related to sections 501(r) and 4959.

These final regulations provide guidance on the requirements described in section 501(r), the entities that must meet these requirements, and the reporting obligations relating to these requirements under section 6033. In addition, the final regulations provide guidance on the consequences for failing to satisfy the section 501(r) requirements.

2. Register for IRS webinar: Gaming and Tax-Exempt Organizations

Thursday, January 22 at 2 p.m. ET

Learn about:

- Gaming's impact on tax-exempt status
- Gaming and unrelated business income
- Maintaining records
- Reporting requirements
- Workers conducting gaming activities
- Reporting winnings and withholding income tax
- Gaming Excise taxes
- IRS resources

Register for this event.

3. Register for EO workshops

Register for our upcoming workshops for small and medium-sized 501(c)(3) organizations on:

Jan. 9 – Salt Lake City, UT

Hosted by University of Utah & the Utah Nonprofits Association

4. IRS EO phone forum and webinar Q&As posted

Review answers to questions posed by attendees of recent IRS Exempt Organizations phone forums and webinars. Submit questions to tege.eo.ceo@irs.gov.

Bond Tax-Break Threat Recedes With Federal Deficit: Muni Credit.

One thing is unlikely to change as Republicans take control of Congress: the century-old tax break for investors in the $3.6 trillion municipal-bond market, which has been threatened by proposals advanced in Washington during the past four years.

With the U.S. budget deficit shrinking and President Barack Obama in office through 2016, analysts at banks including JPMorgan Chase & Co. and Citigroup Inc. see little chance of a broad tax-code overhaul that could reduce the subsidies given to state and local government bonds.

The prospect of taxing muni-bond interest has been raised since 2010 as Obama and congressional Republicans looked to lower the deficit or pay for cuts to income-tax rates. Such a change would reduce the value of munis, which command higher prices than other securities because the interest has been exempt from the federal income tax since its creation in 1913.

“As for the risk of a near-term tax reform, it’s very minimal,” said Mikhail Foux, a municipal-market analyst with Citigroup in New York. “We’re unlikely to see anything before the next presidential election.”

Obama said during a press conference last month that he wants to reach an agreement with the new Congress to revamp the tax code. While Republicans will control both the House of Representatives and the Senate, they still don’t have enough power to override a veto by the Democratic president.

Veering Away

Representative Paul Ryan of Wisconsin, the next chairman of the tax-writing House Ways and Means Committee, has said that focusing on business taxes may represent the best chance for success, given how far apart Obama and Republicans are over how to approach taxes on individuals.

That approach lessens the odds that Congress may alter the status of municipal bonds, most of which are held by individuals seeking tax-free income, said Dustin McDonald, Washington lobbyist for the Government Finance Officers Association, which represents local officials.

“That would require a lot of support from those parties that they’ve had trouble corralling,” he said. “You’re going to have to gore a lot of oxen to do that.”

The tax break, forecast to cost the Treasury about $47 billion this year in foregone revenue, has been targeted along with dozens of other provisions in overhauls that failed to advance during the past four years.

In 2010, Obama’s deficit-cutting commission proposed taxing munis to lower rates and increase revenue. Obama and Republican Representative Dave Camp, the departing head of Ways and Means, later endorsed taxing some interest income received by the highest-earning households.

Reaping Gains

The failure of the plans was welcomed by investors and state and local government officials, who

said that changing the tax status of municipal bonds would depress prices because buyers would demand higher yields to offset the cost. On Dec. 31, benchmark 10-year munis yielded 2.11 percent, about 0.07 percentage points less than Treasury bonds, a reflection of the tax advantages.

Josh Gonze, who helps oversee $10 billion in municipal bonds for Thornburg Investment Management in Santa Fe, New Mexico, said he foresees scant risk that tax status of the state and local debt will be changed.

“It’s not on our radar screen,” he said. “This is something that has been discussed for the past 50 years. I don’t think there’s anything that’s happened that’s going to bring this to the forefront.”

Street Yawns

The perspective is widely shared on Wall Street. Since the elections last month, municipal analysts at brokers and banks including UBS AG, Janney Montgomery Scott LLC and Macquarie Group Ltd. have said the divide between Congress and the White House makes change unlikely.

“It’s definitely a good thing for the muni market,” said Foux, the Citigroup analyst. “For the most part, it’s priced in. I think most investors dismiss the risk.”

Governors, legislators and local officials have lobbied Congress to prevent any such change. More than 100 House Democrats and Republicans in 2013 signed a letter supporting the break. At a hearing on the issue in the Ways and Means Committee that year, lawmakers from both parties said taxing munis would push costs onto local governments and taxpayers.

The improving economy has eased the pressure on Congress to reduce the federal budget deficit, said Susan Collet, the president of H Street Capitol Strategies, who lobbied Congress on the issue for the Bond Dealers of America. In the year ended in September, the deficit shrank to $483.4 billion, about a third of the record $1.4 trillion hit in 2009.

“The immediate pressures that Congress would have to feel to put something that controversial on the table aren’t present,” she said. “It’s gone away for a while.”

(An earlier version of this story was corrected to reflect that the income tax code, not munis, dates from 1913.)

Bloomberg Muni Credit

By William Selway Jan 2, 2015 7:23 AM PT

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Expect More Tax Guidance in 2015.

WASHINGTON — The Treasury Department and Internal Revenue Service next year will be working on further guidance on issue price, regulations finalizing other proposed arbitrage rules, and additional rulemaking projects.

The agencies came out with their 2014-2015 priority guidance plan in August. “We hope to work very actively and hard to accomplish as much as we possibly can on that guidance plan,” Treasury associate tax legislative counsel John Cross told state and local finance officials earlier this month.

Cross, who rejoined Treasury in November after working at the Securities and Exchange Commission, discussed the items on the plan at the winter meeting of the Government Finance Officers Association’s committee on governmental debt management. Market participants also spoke to The Bond Buyer about what guidance they would like or expect to see in 2015.

Treasury and the IRS plan to release guidance on the determination of issue price separately from rulemaking on other arbitrage-related issues so that one piece focuses “more quickly and discretely on [issue price],” Cross said.

Treasury and the IRS released proposed arbitrage regulations that addressed several topics, including the definition of issue price in September 2013. Market participants have warned the proposed issue price rules are unworkable. Cross said the IRS may propose new rules on issue price.

Leslie Norwood, managing director, associate general counsel, and co-head of municipal securities at the Securities Industry and Financial Markets Association, — said she is hopeful there will be movement on issue price regulations with Cross back at Treasury. SIFMA was among the groups that sent the regulators comments criticizing the rules proposed in 2013.

Treasury and the IRS also hope to work on guidance that encompasses the non-issue price portions of the arbitrage regulations proposed in 2013 as well as a set of arbitrage rules proposed in 2007. The hope is to “wrap those all up with a bow and finalize those in a somewhat more substantial project,” Cross said.

Jack Browning, a senior partner at Squire Patton Boggs, said that some of the non-issue price proposed arbitrage rules are “noncontroversial,” so it would be helpful if they were finalized.

The National Association of Bond Lawyers has recently released comments on part of the non-issue price part of the 2013 proposed arbitrage rules. NABL president Tony Martini, a partner at Edwards Wildman Palmer, said these comments will hopefully be helpful to Treasury and the IRS.

Also on the guidance plan are final allocation and accounting rules, which relate to facilities that are used for both governmental and private use, Cross said. Allocation and accounting rules were proposed in 2006.

Perry Israel, a lawyer with his own firm in Sacramento, Calif., said he would like to see the final regulations take into account comments on the proposed sent to the regulators, such as that when an issuer contributes both tax-exempt bond proceeds and other funds to a project, they should be able to allocate the private business use first to the other funds, and then to the bond proceeds without having to make a special election to do so. Under the proposed rules, an issuer can only allocate private business use this way if it makes a special election, Israel said.

The IRS is also working on guidance on the definition of a political subdivision, according to its priority list. Cross told state and local finance officers that the IRS chief counsel’s office has a “strong interest” in looking into this topic.

In 2013, the IRS issued a technical advice memorandum that concluded the Village Center Community Development District in Florida was not a political subdivision that can issue tax-exempt bonds. NABL and other members of the municipal bond community have expressed concern about the ruling, Cross said.

Matthias Edrich, a shareholder at Greenberg Traurig and chair of the National Association of Bond Lawyers' tax law committee, said, "The tax committee looks forward to getting clarifying guidance from the Treasury Department regarding political subdivisions."

Dave Caprera, an attorney at Kutak Rock in Denver, said he thinks the political subdivision issue is the most important topic on the guidance plan because "it impacts the most transactions." The issue affects outstanding bonds issued by special districts as well as similar deals that haven't been done because bond lawyers are unable to give an opinion.

Israel, who represents the Village Center CDD in the dispute with the IRS, said it could take a while for Treasury and the IRS to develop political subdivision rules. He pointed out that there hasn't been activity on the audit of the district's bonds for many months.

The Treasury and the IRS also are working on a notice to provide a process for allocating unused volume cap of new clean renewable energy bonds. There was a $2.4 billion authorization of the bonds in 2009, and there is about $1.3 billion of unused volume cap, Cross said.

Finalizing proposed rules on public approval requirements for private-activity bonds is also on the list. Israel said he is "hopeful" that these final rules will be released this year. NABL is looking to see if there's something the group can do to speed up the process of finalizing these regulations, since there is "broad consensus" that they have many positive elements, Martini said.

In October, the IRS released interim guidance on accountable care organizations and management contracts to prevent them from causing private-activity bond problems. The notice invited the public to submit comments on the guidance to the agencies by Jan. 22.

Edrich said NABL plans to prepare three comment documents relating to the notice and the management contract issue. They will address the safe harbor in the notice for when ACOs don't result in private business use, the new safe harbor in the guidance for when management contracts don't result in private business use, and other management contract issues.

In addition to the notice on ACOs and management contracts, Treasury and the IRS also released final regulations on arbitrage rebate overpayments and guidance on temporary relief after a disaster in 2014. Martini said that the regulators are making "good, steady progress" on completing items on the guidance list.

Tax controversy lawyer Brad Waterman said he would like to see guidance about procedural questions related to Build America Bonds, such as those relating to the statute of limitations and litigation procedures that have never been addressed.

IRS Enforcement

Rebecca Harrigal, the director of the IRS tax-exempt bond office, said at the GFOA committee meeting that her office in fiscal 2015 will continue to evaluate its programs for "risks, inefficiencies and ineffectiveness." TEB will also target its resources toward the areas where there is the greatest risk of noncompliance with tax rules, she said.

TEB is looking at certain types of bonds early on in the process of using its revised market segment audit program. The bonds include: certain types of advance refunding bonds, bonds for which Form 8038-T's are filed, governmental bonds for environmental and transportation projects, Build America Bonds, private-activity bonds for non-hospital 501(c)(3) organizations, and PABs for solid waste and single-family and multifamily housing, she said.

Under the program, TEB has come up with hypotheses about where there might be the greatest risk of noncompliance that can be identified from data in information returns or readily available public sources. In order for the IRS to test its hypotheses, issuers that are frequently in the market in selected segments may see multiple audits, Harrigal said.

After the IRS has tested its hypotheses, it will look to see if the predictions were proven. If the hypothesis was validated, the IRS may: conduct more audits in that area; set up a special voluntary closing agreement program; or provide more education. The end goal is for market segments where there is a higher level of noncompliance will see a reduction in that level.

Israel said he would like to see the IRS continue to close market segment audits as quickly as reasonably possible.

In fiscal 2014, which ended Oct. 30, TEB spent a lot of time reworking the closing agreement process, for settlements resulting from audits and from the VCAPs. The office created a closing agreement team that looks at the consistency and enforceability of settlements. TEB also put into place "template closing agreements," so that the closing agreement process is more standardized and structured, Harrigal said.

"As you'd expect, with any new thing, there is a learning curve," Harrigal said. But toward the end of fiscal 2014, closing agreements, especially those that had been stuck in the VCAP process for a while, started to clear out faster.

TEB closed about 51 VCAP settlements in fiscal 2014, and from Oct. 1 through the beginning of December, it has closed about 23. "You can see there's a significant uptick in the amount of closing agreements we're actually processing and getting out," she said.

There were 25 closing agreements that stemmed from audits in fiscal 2014, a five-year high, Harrigal said.

TEB plans to continue to place an emphasis on completing settlements quickly. The office is also looking into further standardizing the closing agreement process. For example, TEB will to see if specific VCAP programs could have "fill-in-the-blank" closing agreements, Harrigal said.

TEB staff is monitoring trends in the market, and if they spot an issue, they will reach out to industry groups to figure out if the problem is big. If it is, TEB will try to figure out how to address it, whether through education or a VCAP initiative. Harrigal said she is also examining whether TEB can use industry director directives, a vehicle that other IRS offices use, to address messy issues.

The office is reworking the Internal Revenue Manual, which provides instructions to TEB staff, to make it clear what the office's process and expectations are, Harrigal said.

Johnny Hutchinson, a senior associate at Squire Patton Boggs, said that people are "eagerly awaiting" the revisions to the IRM.

NABL's tax committee is working on suggestions for additions to the IRM relating to exams and the use of technical advice requests for tax-advantaged bonds such as BABs. The committee is also working on providing comments about the IRM that pertain to VCAPs, Martini said.

TEB hopes to offer three more webcasts in 2015, provided that the office has the budget to do so, Harrigal said. The first, during which Harrigal will speak, will likely take place in January, she said. The IRS has not yet disclosed the topics.

The office also expects to release taxpayer publications on governmental bonds, 501(c)(3) bonds and private-activity bonds soon, Harrigal said she wants to do more of these publications. Additionally, TEB is working on customer satisfaction surveys that will be sent to bond counsel and issuers at the end of VCAPs and audits.

THE BOND BUYER

BY NAOMI JAGODA

DEC 26, 2014 9:07am ET

IRS Chief Counsel: BABs Defeasance Causes Reissuance.

The IRS Chief Counsel's office has issued an Advice Memorandum to the Office of Tax Exempt Bonds that concludes that the legal defeasance of taxable direct pay Build America Bonds resulted in an exchange of the BABs for modified instruments that differed materially from the original issue of BABs and therefore caused the defeased bonds to be reissued.

The Advice Memorandum is available here.

An Overview of S&P's Updated Methodology For Rating U.S. Not-For-Profit Acute-Care Stand-Alone Hospitals.

Standard & Poor's Ratings Services today published its updated criteria for rating U.S. not-for-profit acute-care stand-alone hospitals. The update is part of our regular criteria review process, and its goal is to clarify and enhance certain parts of our methodology. This article addresses some of the questions investors and other market participants might have about our updated criteria.

For the full criteria article, see "U.S. Not-For-Profit Acute-Care Stand-Alone Hospitals — Methodology And Assumptions", and watch the related CreditMatters TV segment titled "U.S. Not-For-Profit Acute-Care Stand-Alone Hospital Revised Criteria Published", also dated Dec. 15, 2014.

Continue reading the Overview.

15-Dec-2014

S&P U.S. Not-For-Profit Acute-Care Stand-Alone Hospitals -- Methodology and Assumptions.

1. Standard & Poor's Ratings Services is updating its methodology for assigning stand-alone credit profiles (SACPs), group credit profiles (GCPs), issue credit ratings, and issuer credit ratings (ICRs) to U.S. not-for-profit acute-care stand-alone hospitals (hospitals). These updated criteria will be implemented under the rating framework established in Chart 1 where the final outcome can be a SACP, GCP, issue credit rating, or ICR. These criteria supersede only in part "Public Finance Criteria: Not-For-Profit Health Care" (June 14, 2007) because health care systems will continue to be

rated under the existing criteria.

2. This update provides additional transparency and comparability to help market participants better understand our approach in assigning ratings to acute-care stand-alone health care providers, to enhance the forward-looking nature of these ratings, and to enable better comparisons between the sector's ratings and all other ratings. This article is related to our criteria article "Principles Of Credit Ratings", published on Feb. 16, 2011.

Continue reading.

15-Dec-2014

How S&P Intends to Implement Its U.S. Not-For-Profit Acute-Care Stand-Alone Hospital Criteria and Apply Them to Ratings.

Standard & Poor's Ratings Services today published its revised criteria for rating U.S. not-for-profit acute-care stand-alone hospitals (see "U.S. Not-For-Profit Acute-Care Stand-Alone Hospitals — Methodology and Assumptions"). The revised criteria is effective immediately. We plan to complete our review of the existing ratings covered by these criteria within 12 months. These criteria apply to hospitals with revenue bonds and hospitals with debt portfolios that include both tax-secured and revenue bonds. Ratings on hospitals with tax-secured bonds continue to be governed by our criteria "Tax-Secured Hospital Debt", published May 3, 2007, while the revenue bond rating is governed by these criteria. Multihospital health systems, as defined in the revised criteria, are not rated under these criteria but will continue to be rated under the applicable sections of our June 14, 2007, criteria "Not-For-Profit Health Care".

The criteria update is part of Standard & Poor's commitment to enhance the transparency, rigor, and specificity of its criteria across sectors and asset classes. Our objective is to provide market constituents with greater insight into how we rate stand-alone hospitals and to enhance the global comparability of our ratings through a clear, coherent, and globally consistent criteria framework.

We began communicating the process for updating our criteria when we published an advance notice of proposed criteria change on Nov. 13, 2013. We then published our proposed revised ratings framework on Dec. 5, 2013 (see "Request For Comment: U.S. Not-For-Profit Acute-Care Stand-Alone Hospitals — Methodology And Assumptions"). During the subsequent three-month comment period which ended in March 2014, we interacted with market participants through seminars, teleconferences, and one-on-one meetings. We used the sessions to increase participants' awareness and understanding of the proposed changes and to solicit, evaluate, and incorporate feedback as appropriate. We also solicited written comments through a criteria mailbox. We have summarized changes to the criteria, which were made based on market feedback as well as additional testing, in a report published today (see "RFC Process Summary: Rating Methodology And Assumptions For U.S. Not-For-Profit Acute-Care Stand-Alone Hospitals"). Summary information about the revised criteria is also available in an article released today: "Credit FAQ: An Overview Of Standard & Poor's Updated Methodology For Rating U.S. Not-For-Profit Acute-Care Stand-Alone Hospitals" on RatingsDirect, and a CreditMatters TV segment, "U.S. Not-For-Profit Acute-Care Stand-Alone Hospital Revised Criteria Published".

Continue reading.

15-Dec-2014

TAX - MICHIGAN

Rental Properties Owners Ass'n of Kent County v. Kent County Treasurer

Court of Appeals of Michigan - December 18, 2014 - N.W.2d - 2014 WL 7202844

Various individuals, companies, and associations involved in property ownership, rehabilitation, and development in Kent County (the 3830 G parties) sought to invalidate tax deeds executed by the Kent County Treasurer (the Treasurer) to Kent County (the County) and the city of Grand Rapids (the City) and from the County and the City to Kent County Land Bank Authority (KCLBA), claiming that their actions deprived the 3830 G parties of the opportunity to purchase the properties.

The Court of Appeals held that the Kent County Treasurer, and not Kent County, was the foreclosing governmental and thus, once Kent County purchased the tax-foreclosed properties from Kent County Treasurer pursuant to MCL 211.78m(1), there was no requirement that its later sale of those properties be by public auction.

TAX - LOUISIANA

Mooring Tax Asset Group, L.L.C. v. James

Supreme Court of Louisiana - December 9, 2014 - So.3d - 2014-0109 (La. 12/9/14)

Tax sale purchaser of real property filed petition to quiet title to the property, which had been sold by the taxpayers to a third-party after the tax sale, and then sold by the third party to the current owner. Current owner filed reconventional demand seeking nullification of the tax sale. The District Court awarded summary judgment to current owner, finding the tax sale to be an absolute nullity due to insufficient notice to the taxpayers. The District Court allowed tax sale purchaser to submit proof of costs, but granted current owner’s motion to contest costs. Tax sale purchaser appealed, and the Court of Appeal affirmed. Tax sale purchaser filed petition for writ of certiorari, which was granted.

The Supreme Court of Louisiana held that:

- Trial court could not give immediate effect to its judgment annulling the tax sale without providing for reimbursement of the taxes and costs paid by tax sale purchaser, and
- Current owner was the party responsible for reimbursing the taxes and costs paid by tax sale purchaser.

TAX - SOUTH DAKOTA

Deadwood Stage Run, LLC v. South Dakota Dept. of Revenue

Supreme Court of South Dakota - December 17, 2014 - N.W.2d - 2014 S.D. 90

Taxpayer brought action seeking declaratory judgment prospectively establishing assessed valuation of tax incremental district, which consisted of taxpayer’s land, as the appropriate tax incremental base, rather than prior assessed valuation. The Circuit Court entered summary judgment in favor of Department of Revenue. Taxpayer appealed.

The Supreme Court of South Dakota held that Department was required to determine aggregate assessed value of the property by using the last previously certified valuation for any buildings or additions completed or removed and to adjust it for the value to the date the district was created.

Department of Revenue was statutorily required, in establishing assessed valuation of tax incremental district, to determine the aggregate assessed value of the taxable property in the district by using the last previously certified valuation for any buildings or additions completed or removed and to adjust it for the value to the date the district was created. The phrase “last previously certified” referred only to improvements in the land, and this reading harmonized the statute with other statutes.

TAX - NEW YORK

Trump Village Section 3, Inc. v. City of New York

Court of Appeals of New York - December 17, 2014 - N.E.3d - 2014 N.Y. Slip Op. 08788

Residential housing cooperative corporation brought action against a city for a declaratory judgment that a taxable transfer of the residential housing cooperative complex did not occur when the corporation amended its certificate of incorporation as a part of its voluntary dissolution, reconstitution, and termination of participation in the Mitchell-Lama affordable housing program. The Supreme Court, Kings County, granted summary judgment to the city. The housing cooperative corporation appealed.

The Supreme Court, Appellate Division reversed, and leave to appeal was granted on a certified question.

The Court of Appeals held that the corporation’s termination of its participation in the Mitchell-Lama affordable housing program was not a taxable transfer of real property.

Congress Extends QZABs, New Markets Tax Credits; Continuing Effect of Sequestration: McGuire Woods

On Dec. 19, 2014, President Barack Obama enacted the Tax Increase Prevention Act of 2014 (the “Act”), commonly referred to as the tax extenders bill (H.R. 5771), which you may read here. Generally, the Act extends many programs that expired at the end of 2013. This Client Alert focuses on the extension of Qualified Zone Academy Bonds (QZABs), New Markets Tax Credits (NMTCs), and empowerment zone employment credits and on the enduring impact of sequestration on direct-pay bonds.

Qualified Zone Academy Bonds

The Act authorizes the Secretary of the Treasury to allocate an additional $400 million in QZABs for 2014. Prior to the Act, no additional allocations of QZABs were to be available to the states after Dec. 31, 2013. The 2014 round of QZABs allocations will expire if not issued on or before Dec. 31, 2016. QZABs issued under the 2014 allocations are eligible only for the tax credit and may not use the direct-pay option. This limitation also applies to QZABs issued under the 2013 allocations that expire at the end of 2015.[1]

As a reference, QZABs benefit a “qualified zone academy” (typically, a public school) that is designated as such by the “applicable local education agency,” which is oftentimes the governing local school board or district. As more fully described in Section 54A of the Internal Revenue Code of 1986, as amended, a holder of a QZAB receives a credit against federal income taxes.

New Markets Tax Credits

The Act also authorizes $3.5 billion in allocations for the New Markets Tax Credit program. This authorization is for 2014. Prior to the Act, the last round of allocation related to 2013. The 2014 allocations must be used by Dec. 31, 2019.

The New Markets Tax Credit program is designed to encourage investment in qualifying low-income communities. An investor receives a tax credit in return for equity investments in community development entities that use those invested funds for eligible purposes aimed at targeted populations and low-income areas. The credit is 39 percent, taken over seven years. Many states have programs similar to the federal New Markets Tax Credit program.

Empowerment Zones

Moreover, the Act extends the benefits of empowerment zone designation by providing that any existing empowerment zone will remain designated as such until Dec. 31, 2014. Previously, the designation of existing empowerment zones expired on Dec. 31, 2013.

The benefits of empowerment zone status include the empowerment zone employment credit, which provides employers a federal tax credit equal to 20 percent of qualified zone wages paid during a calendar year. Qualified zone wages are wages paid to an employee who lives in an empowerment zone and performs substantially all of his or her employment in that empowerment zone. Other tax benefits include increased deductions for equipment placed in service in empowerment zones and delayed recognition of any gains on the sale of qualifying empowerment zone assets.

Federal Sequestration and Direct-Pay Bonds

All direct-pay bonds, including QZABs, Build America Bonds, Qualified School Construction Bonds, New Clean Renewable Energy Bonds, Qualified Energy Conservation Bonds and Recovery Zone Economic Development Bonds, remain subject to the ongoing effects of federal sequestration. For fiscal year 2015 (which ends on Sept. 30, 2015), the direct-pay subsidy for those bonds issued as direct-pay bonds is subject to a 7.3 percent reduction.

Unless a law is enacted that cancels or otherwise amends the sequestration, the existing subsidy reduction will remain in effect through the end of fiscal year 2024.

1. Included as Title II of H.R. 5771 is the “Tax Technical Corrections Act of 2014.” See Section 202(d) for the above-mentioned provisions relating to QZABs.

December 22, 2014

McGuireWoods LLP

Municipal Bond Interest Paid By a Bond Insurer After an Issuer’s Bankruptcy

Discharge Can Remain Tax-Exempt: Mintz Levin.

In the aftermath of recent municipal bankruptcies in which issuers proposed and/or implemented bankruptcy plans involving partial discharges of the issuer's payment obligation on insured bonds, there has been increased focus on whether municipal bond interest paid by a bond insurer after the bankruptcy plan's effective date continues to be tax-exempt.

Market confusion as to the treatment of bond insurance payments in the discharged issuer context is at least partially attributable to an incomplete understanding of why bond insurer payments of municipal bond interest are deemed tax-exempt in other contexts. Although the IRS has not specifically addressed the tax status of bond insurer payments following the issuer's partial (or full) discharge in bankruptcy, review of IRS rulings on bond insurance suggests that, in ordinary circumstances, interest on the insured bond continues to be tax-exempt notwithstanding that the only source of payment is the bond insurance.

The technical basis for the continued tax-exemption of post-discharge interest is discussed in detail below. The analysis is rooted in one simple concept articulated in an IRS revenue ruling: in ordinary circumstances, a payment by a bond insurer is deemed, for tax purposes, to have been made by the issuer of the bonds. For this reason, although a bankruptcy may, for non-tax purposes, discharge an issuer from further liability on all or a portion of bond payments, for tax purposes the bond payments made by the bond insurer continue to be treated as being made by the issuer. All else is detail, for those with an interest in such detail.

And so, on to the technical discussion.

The tax-exempt treatment of interest paid by a municipal bond insurer is founded on a trio of favorable IRS revenue rulings, which, unlike private letter rulings, are statements of IRS policy on which the market can rely.

The first such ruling, Revenue Ruling 72-134, dealt with the situation where the issuer pays for bond insurance when the bonds are issued, and concluded that "defaulted interest paid by the independent insurance company is excludable from the gross income of the bondholders."

Revenue Ruling 72-575 extended such favorable treatment to a bond insurance policy purchased by the underwriter, and Revenue Ruling 76-78 went a substantial step further, upholding the tax-exemption of interest payments received under secondary market bond insurance purchased by a bondholder.

These three rulings state a favorable result without discussing the rationale. The technical basis for the tax-exemption of bond insurance payments is illuminated in Revenue Ruling 94-42, an adverse ruling involving a bondholder that purchased secondary market bond insurance on zero coupon bonds, rerated the bonds AAA and resold the bonds. The bond insurance premium for the secondary market insurance was an amount sufficient to fund the bond insurer's purchase of a high-yielding portfolio of Treasury securities that economically defeased most of its insurance obligation. In the ruling, the IRS expressed concern that treating such bond insurance interest payments as tax-exempt would effectively permit a secondary market arbitrage bond, and set about distinguishing the scenario under review from "customary" bond insurance payments treated as tax-exempt in the earlier rulings.

In the 1994 ruling, the IRS noted that customarily bond insurance enhances marketability and reduces interest rates, which is consistent with the IRS's objective of preventing overburdening of the market with tax-exempt interest. The ruling stated that such tax-exempt treatment is

accomplished by “integrating the insurance contract with the obligation of a political subdivision” instead of treating the bond insurer’s obligation as a separate debt instrument.

According to this key ruling, “an insurance contract or similar agreement is treated as both incidental to bonds and not a separate debt instrument … only if, at the time it is purchased, the amount paid is reasonable, customary, and consistent with the reasonable expectation that the issuer of the bonds, rather than the insurer, will pay debt service on the bonds.” The ruling concluded that at the time the bond insurance policy under review was purchased, the insurance premium was not reasonable and customary and reflected an expectation of default by the issuer. The IRS ruled that because the insurance purchaser looked primarily to the insurer for payment of the debt service on the bonds, the bond insurance was not incidental and should be treated as a separate non-municipal obligation rather than integrated with the insured bonds. The conclusion that the interest payments by the bond insurer were taxable followed from the treatment of the bond insurance as a non-municipal obligation.

Two significant concepts are articulated in Revenue Ruling 94-42. First, the technical basis for treating bond insurance interest payments as tax-exempt is that, for customary bond insurance transactions, the bond insurance is integrated with and treated as the same debt instrument as the insured municipal bond. Second, the treatment of bond insurance as integrated with the insured bond versus as a separate debt instrument that is not a municipal bond is determined based on reasonable expectations at the time the bond insurance is purchased.

In other words, provided the bond insurance is “customary” at the time it is purchased, it becomes another source of payment by the issuer of the insured bonds, albeit one that, at the time the insurance is purchased, is not expected to be needed. If circumstances change and defaulted interest is paid from the bond insurance, it is deemed a payment by the municipal issuer on the insured bond, not a separate payment by the bond insurer.

Nothing in the revenue rulings on the tax-exemption of interest payments sourced to a bond insurer makes the integration of the bond insurance with the bond dependent on the continuing legal obligation of the issuer to make the insured debt service payment. The above-summarized favorable revenue rulings describe customary bond insurance as including provisions under which a bond insurer’s payment to a bondholder does not discharge the bondholder’s payment claim against the issuer, to which the insurer becomes subrogated. But such revenue rulings do not suggest that if a bondholder has no claim against the issuer because the issuer has received a bankruptcy discharge, the worthlessness of the bond insurer’s subrogation claim alters the character of the bond insurance payment as an integrated tax-exempt payment on the municipal bond constructively made by the issuer, notwithstanding the issuer’s discharge as a source of payment for non-tax purposes.

The utility of bond insurance, and the reduction in bond interest rates and the aggregate amount of tax-exempt bond interest that have justified its tax treatment, would be substantially eroded if the IRS were to rule (which it never has) that the tax-exempt nature of bond insurance payments hinges on abstract distinctions between whether non-payment from other sources is due to the issuer’s financial condition or to the legal discharge in bankruptcy of the issuer’s duty to make such payments. Bond insurance is purchased for the precise purpose of insuring against default by the issuer, foreseeably and prominently including the possibility of the issuer’s bankruptcy and the potential legal discharge of part or all of its legal obligation to pay debt service.

The cause of non-payment of the bonds from sources other than the bond insurance is immaterial for tax-exemption purposes once the bond insurance payment is recognized as integrated with and indistinguishable from the other sources of payment of the bond. Moreover, the line between an issuer’s lack of a legal obligation to pay and factual insolvency is often vague, and if such a

distinction affected tax-exemption of bond insurer payments, uncertainty would prevail. For example, a conduit bond issuer whose obligation to pay is limited to loan or lease payments from a conduit obligor that is not making any payments could be characterized as lacking a legal obligation to pay and/or the financial ability to pay. Similarly, an issuer that ceases to operate and is dissolved without assumption of its liabilities by another party could be characterized as legally non-existent and/or factually unable to pay.

The tax treatment of bond insurance should not, and the relevant revenue rulings support the view that it does not, depend on distinctions that are esoteric, unpredictable and impractical. Notably, in a slightly different context, the market does not doubt the continued tax-exemption of interest on innumerable “legally defeased” bonds payable solely from portfolios of Treasury securities, although the issuer is contractually discharged from making payments from other sources.

The tax impact of bankruptcy plan modifications of an issuer’s rights and duties on insured bonds are often an afterthought not adequately focused on in the plan or the plan disclosure. Documentation and characterizations of what is technically occurring to the insured bonds under the plan may be imprecise. A bankruptcy plan may suggest that portions of insured bonds that the issuer will be discharged from paying are being extinguished, when what is actually meant is that such bonds will remain outstanding and payable from bond insurance that for tax purposes is attributed as an issuer payment.

To be sure, some bankruptcy plans may purport to make changes to insured bonds beyond the full or partial discharge of the issuer’s liability. Presumptively, a modification of the issuer’s contractual duties under a bankruptcy plan does not change the payment obligations insured by the bond insurer. Nonetheless, to avoid muddying the waters plan language should be crafted in a manner that ensures that any portion of the original insured bond from which the issuer is discharged remains outstanding for tax purposes as well as for purposes of claiming against the bond insurer.

Any purported changes by a bankruptcy plan to the terms of the bonds beyond a reduction or elimination of the issuer’s liability require separate tax analysis. The devil is frequently in the details, and the debtor and its representatives may not be focused on or impacted by the tax treatment of insured future bond payments from which the issuer has been discharged. Holders of insured tax-exempt bonds that are being modified in any manner by a bankruptcy plan may wish to obtain input from tax counsel experienced in bankruptcy-related tax-exemption issues in time to impact the plan wording and structure relating to such bonds. But, although the IRS has not directly addressed the topic, there is no reason to presume that interest paid by a bond insurer on an outstanding municipal bond will be taxable simply because the issuer will have no remaining legal obligation to make the insured payment from another source.

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Fitch: US Healthcare Spending Rise Will Lift Nonprofit Hospitals.

Fitch Ratings-New York/Chicago-11 December 2014: Overall spending on healthcare should rise in the coming years as the overall economy has become more robust, Medicaid spending increases and certain procedures delayed due to costs are addressed, Fitch Ratings says. We believe the impact of this growth will be beneficial to the nonprofit hospital sector. However, continued migration toward high-deductible health plans is likely to inhibit the rate of spending growth and increase bad debt expense.

The Centers for Medicare and Medicaid Services (CMS) reported that total healthcare spending rose by 3.6% in 2013. This marked the fifth straight year of increases below 5%. The rate of health spending grew by 3.9% annually from 2009 to 2011, compared with an annual growth rate of between 4.7% and 6.6% the prior three years.
One of the main drivers of this year's increased healthcare spending is the expansion of Medicaid coverage. The Congressional Budget Office projects total Medicaid payments will rise from approximately $300 billion in 2014 to $368 billion in 2016. This benefit will accrue to hospitals and healthcare systems operating in states that expanded Medicaid coverage under the Patient Protection and Affordable Care Act (ACA), while providers in states that did not will not benefit.

We believe that, over the last several years, certain medical care and procedures have been delayed as rising patient co-pays and deductibles have caused people to postpone care. Gallup polls have consistently suggested that one in three respondents reported that they or a family member delayed medical care because of the costs. As the economy has become more robust and coverage options

are available to more people, we believe these deferments will slow. However, continued movement toward high-deductible health plans may help temper the overall rate of spending growth.

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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article, which may include hyperlinks to companies and current ratings, can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

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TAX - MISSISSIPPI

Booneville Collision Repair, Inc. v. City of Booneville

Supreme Court of Mississippi - December 4, 2014 - So.3d - 2014 WL 6843483

Purchaser of property that had been sold for delinquent municipal taxes brought action against county, city, and municipal tax collector for damages incurred from failure to provide notice of tax sales. The Chancery Court granted city's and collector's motion to dismiss for failure to state a claim. Purchaser appealed.

The Supreme Court of Mississippi held that:

- Issue of statutory liability was placed in issue by consent;
- Statute imposing liability on tax collectors for failure to perform duties applied to municipal tax collectors;
- Purchaser was intended claimant under statute imposing liability on tax collectors for failure to perform duties;
- Claim under statute imposing liability on tax collectors for failure to perform duties was not subject to Mississippi Tort claims Act (MTCA);
- Purchaser was not judicially estopped from asserting that MTCA did not apply;
- On issue of apparent first impression, claims did not arise out of assessment and collection of taxes within meaning of MTCA; and
- Statutory duty to file tax-sale list was ministerial, rather than discretionary, duty.

TAX - INDIANA

In re Carroll County 2013 Tax Sale

Supreme Court of Indiana - December 4, 2014 - N.E.3d - 2014 WL 6843641

In petitions to the Circuit Court, two landowners objected to their respective properties being listed for tax sale based on sewer bill delinquency and attached sewer lien. Lienholder, a non-municipal regional sewer district, intervened and requested hearing. The Circuit Court entered order in favor of landowners, finding that neither property was subject to tax sale, citing the lien foreclosure prohibition clause in statute governing the collection of regional sewer district sewer liens. Lienholder appealed and its petition requesting Supreme Court to accept jurisdiction was granted.

The Supreme Court of Indiana hold that lien foreclosure prohibition clause in statute governing the collection of regional sewer district sewer liens did not operate to prohibit a tax sale of properties owned by landowners who were delinquent in payment to lienholder, a non-municipal regional sewer district, when the sewer bill lien was the only lien on the two properties. Because lienholder employed the tax sale method and did not seek collection of landowners' unpaid sewer bills and penalties through the lien foreclosure method, the lien foreclosure prohibition clause did not apply.

Hawkins Advisory: Medicare Shared Savings Program.

Introduction

On October 24, 2014, the Internal Revenue Service ("IRS") issued Notice 2014-67 (the "Notice"), in an effort to provide interim
guidance to governmental and 501(c)(3) hospitals and health care organizations participating in the Medicare Shared Savings Program ("MSSP") described in §§ 3022 and 10307 of the Patient Protection and Affordable Care Act, Pub. L. 111- 148, 124 Stat. 119 ("Affordable Care Act"), enacted March 23, 2010. Participation in the MSSP through an "accountable care organization" ("ACO") will not result in a private business use of a facility financed with the proceeds of a tax-exempt bond issue if the guidance provided in the Notice is followed. The question of whether such participation will result in an unrelated trade or business activity in respect of the rules governing 501(c)(3) organizations is addressed in Notice 2011-16, dated April 18, 2011. The provisions of Notice 2011-16 are reflected in the interim guidance provided by the IRS in the Notice.

The Notice also addresses certain provisions of Rev. Proc. 97-13, 1997-1 C.B. 632, as amended by Rev. Proc. 2001-39, 2001-2 C.B. 38 ("Rev. Proc. 97-13"), describing management contracts with private service providers that will not result in private business use.

Continue reading the Advisory.

Hawkins Delafield & Wood LLP

12/10/14

NABL Submits Comments to IRS on Purpose Investment Valuation.

The National Association of Bond Lawyers (NABL) has submitted to the Internal Revenue Service comments on the valuation of purpose investments under the proposed arbitrage regulations published on September 16, 2013 (REG-148659-07). In the comments, NABL stated its position that purpose investments are properly valued at present value at all times. "In our view, tax policy and practical considerations pertaining to purpose investments require that such an approach continue to apply under any successor to the Existing Regulations."

The comments went further to say that "any future regulations under Code § 148 should retain the rule that purpose investments are valued at present value." If the current rule were to change, "a practical issue would arise with regard to how to establish the fair market value of the investments in the absence of an established market."

Read the letter.

TAX - MICHIGAN

Hope Network-Rehabilitation Services v. City of Kentwood

Court of Appeals of Michigan - December 2, 2014 - Not Reported in N.W.2d - 2014 WL 6778955

Hope Network–Rehabilitation Services (HNRS) appealed the Tax Tribunal's final opinion and judgment denying it a charitable institution tax exemption for its Forest Glen facility – an adult foster care facility – under MCL 211.7o for the 2010, 2011, and 2012 tax years.

The Tribunal found that the Forest Glen facility was not used solely for charitable activity since its articulated charitable efforts of writing off bad debt for insured patients whose insurance did not cover the billed costs was nothing more than a business practice.

The Court of Appeals affirmed the Tax Tribunal's judgment.

IRS EO Update: e-News for Charities & Nonprofits - December 5, 2014

1. Register for IRS webinar: Help for charities

Thursday, Dec. 18 at 2 p.m. ET

You'll learn:

- Section 501(c)(3) Exempt Purposes
- Key activities including
  Private benefit or inurement activities
  Lobbying or legislative activities
  Filing requirements
  Unrelated business income activities
  Failing to operate with an exempt purpose

Register for this event.

2. Announcement addresses realignment of technical work between TE/GE and Office of Associate Chief Counsel

Announcement 2014-34 addresses the transfer of certain technical responsibility for issues involving exempt organizations, qualified retirement plans, and individual retirement annuities and accounts (IRAs) to the Office of Chief Counsel that will occur with the realignment of the Tax Exempt and Government Entities Division (TE/GE).

3. Register for EO workshops

Register for our upcoming workshops for small and medium-sized 501(c)(3) organizations on

Dec. 9 – Austin, TX
Hosted by Austin Community College

Jan. 9 – Salt Lake City, UT
Hosted by University of Utah & the Utah Nonprofits Association

4. Modified 403(b) plan Listing of Required Modifications coming soon

In conjunction with establishing the 403(b) pre-approved plan program in 2013, the IRS issued sample plan language – 403(b) Plans Listing of Required Modifications (LRMs) – that sponsors of 403(b) pre-approved plans may use to draft their plans.

The modified 403(b) LRMs will be available before the April 30, 2015, deadline to submit a 403(b) pre-approved plan under the program. Section 403(b) pre-approved plan sponsors will have an opportunity to make changes to reflect the modified 403(b) LRMs.

Moody's: US Non-Profit Hospitals Struggle to Grow Cash Flow and Adapt to Health Care Reform.

Our negative outlook for the US not-for-profit healthcare sector in 2015 reflects the sector's historically weak operating cash flow growth and margin contraction. US hospitals are making substantial investments and operating changes to comply with the federal government's Affordable Care Act (ACA) and new reimbursement models. We expect the largest hospital systems will achieve operating cash flow growth of 3% – 4%, while cash flow at smaller hospitals will likely decline…

Purchase the Report.

TAX - UTAH

Mawhinney v. City of Draper

Supreme Court of Utah - November 25, 2014 - P.3d - 2014 UT 54

Petitioners filed petition for extraordinary writ to order city to certify petition for referendum to voters for establishment of equalized property tax for all property located within special district.

The Supreme Court of Utah held that:

- Proposed referendum was proper exercise of people's legislative authority under Utah Constitution;
- Provision of Truth in Taxation imposing notice and hearing requirements for levy of tax exceeding taxing entity's certified tax rate had no bearing on whether proposed referendum was proper exercise of legislative authority; and
- Statute allowing residents of special district to challenge laws applicable to them through referendum was permissible delegation by Legislature of its legislative authority under Utah Constitution.

Referendum on resolution approved by city council for special district to establish equalized property tax rate for all property located within district was legislative in nature, and thus, was proper exercise of people's constitutional authority. Levied tax was generally applicable to all who owned property within district, city council was required to weigh need and benefit of services to be provided to property owners in District against tax burden to be imposed, levying tax was exercise of legislative power under Constitution and was a power that Legislature had traditionally exercised.

TAX - ILLINOIS

Bank of Camden v. Village of West Dundee

United States District Court, N.D. Illinois, Eastern Division - November 21, 2014 - Not Reported in F.Supp.3d - 2014 WL 6655892

In 2008, Village set up a Tax Increment Financing (TIF) District in order to provide Springhill Shopping Center with $4 million in initial funding for renovations at the Shopping Center. By 2009, the Shopping Center was facing economic problems with the renovations. Springhill then asked the Village to establish some other mechanism to provide additional funding for renovations.

This time, the Village decided to establish a "special service area" pursuant to the SSA Act. The SSA Act generally allows a municipality to levy additional property taxes in a specific geographic area for the purpose of providing special services not otherwise available to the entire municipality. On December 7, 2009, the Village adopted Ordinance 09–27 proposing the establishment of a special service area (SSA #6) and the issuance of SSA bonds in an amount not to exceed $2.95 million (later reduced to $1.5 million). The SSA bonds for SSA #6 were to be repaid through a levy of property taxes for the properties in the SSA.

The Shopping Center contains approximately 180,000 square feet of retail space. F.A.S.T. owns approximately 60,000 square feet of that space (the "East Property"). The remaining 120,000 square

feet of the center lies west of the East Property (the "West Property").

Notwithstanding the $1.5 million bond amount in the ordinance, the taxes assessed upon the East Property were based on the original amount of $2.95 million. So far, $866,423 of the $1.5 million in proceeds from the bonds has been spent. Of that $866,423, only $16,255 benefitted the East Property. The Bank or any subsequent owner of the East Property must continue paying its share of the additional property taxes through 2029.

In 2013, the East Property, which takes up 33% of the total square footage of SSA #6, was responsible for 44% of the SSA tax burden and did not receive any SSA distributions. The East Property was also encumbered with a tax rate increase associated with the SSA #6 bonds within the TIF which devalued the East Property by $500,000.

Foreclosed Assets Sales and Transfer Partnership (F.A.S.T.) and its "authorized agent" – Bank of Camden – filed suit against the Village and Springhill alleging that the Village was disproportionately distributing funds from the SSA in violation of the SSA Act and the local ordinance enacted thereunder. Plaintiffs also alleged that the Village improperly enacted a moratorium and ordinance preventing the issuance of a business license to one of their potential tenants. Additionally, plaintiffs alleged that the Village was improperly paying legal fees related to this litigation out of SSA funds.

The District Court held that:

- Bank of Camden lacked standing;
- Although it had not paid any of the property taxes associated with the East Property, including the SSA or TIF taxes, F.A.S.T. had standing due to the alleged injury with respect to the resale value of the East Property;
- The SSA Act does not mandate that taxpayers within a SSA receive equal amounts of the SSA proceeds or amounts equal to the SSA taxes they paid, and thus plaintiff's allegations that SSA #6 disproportionately benefitted the owner of the West Property to the detriment of the East Property failed to state a claim;
- Plaintiffs were not entitled to a mandamus for the court to order the Village Clerk to issue a business license to the Salvation Army to occupy and lease space in the East Property;
- Ambiguity existed within the documents regarding whether the Village was entitled to pay its attorneys' fees from the SSA #6 improvement fund, precluding summary judgment on this issue.

Georgia Caps Tax Rate It Hasn't Raised in 30 Years: Muni Credit.

This month, Georgia became the first U.S. state to make raising its income-tax rate unconstitutional, a move that could hamstring its ability to raise revenue in tough economic times.

Voters approved a ballot measure Nov. 4 that caps the top rate at its current 6 percent, forbidding lawmakers from even temporarily raising the levy that accounts for about half of Georgia's revenue.

Georgia's fiscal management has earned it top bond grades and borrowing costs among the lowest of states tracked by Bloomberg. Yet the experience of the recession that ended in June 2009 shows the risk of writing off any fiscal tool: Most states resorted to tax increases to balance budgets during the crisis, according to the Tax Policy Center.

"It's like taking a weapon out of your revenue-raising arsenal," said Brenda Ojendyk, a senior

research analyst for Chicago-based Nuveen Asset Management. “You don’t want to do that if you don’t have to.”

The tax cap adds Georgia to a list of Republican-dominated governments pushing cuts and limits for income, business and estate taxes paid disproportionately by the rich. The reductions create risks for budgets: In Kansas, a 2013 law reduced income-tax revenue by almost one-third, according to Moody’s Investors Service.

Georgia Alone

In locking a cap into its constitution, Georgia has taken it further than most, said Dan Close, a senior vice president at Nuveen who manages two Georgia bond funds with $388 million in assets.

“This is the first voter-approved constitutional amendment limiting income taxes in the country,” Close said.

Moody’s also flagged the cap as a challenge, because it bans the state from raising its biggest revenue source. Levies on individual income account for 47 percent of Georgia’s $19.7 billion general fund for fiscal 2015, it said in a report. The state also gets revenue from sales, corporate and excise taxes.

Eric Kim, an analyst with Fitch Ratings, said the limit is more hypothetical than real, since the state hasn’t increased income taxes in decades. The top rate hasn’t changed since at least 1980, said Nick Genesi, a Revenue Department spokesman.

Limiting Response

The concept of using a constitution to freeze income taxes hasn’t arisen in other states, which is a good thing, said Michael Leachman, director of state fiscal research in Washington for the Center on Budget and Policy Priorities, which analyzes the ways fiscal decisions affect the poor.

“It’s a terrible idea, just really awful fiscal management,” he said. “When recessions hit, you want to be able to respond with all the tools available.”

Thirty-three states raised taxes either temporarily or permanently in response to the 18-month recession, according to the Tax Policy Center, a joint venture of the Urban Institute and Brookings Institution.

Georgia responded by cutting education and other spending and by tapping reserves, which dropped from $1.5 billion in 2007 to $116 million in 2010, according to the Atlanta-based Georgia Budget and Policy Institute, which opposed the tax cap.

Pleasing Business

None of the biggest credit-rating companies have changed their outlook on Georgia’s $10.8 billion in debt because of the cap, although Moody’s warned that Kansas and North Carolina faced challenges after cutting income-tax rates. In North Carolina, tax collections on individual income fell 6.2 percent in fiscal 2014, while the revenue dropped 32 percent in Kansas.

Georgia’s borrowing costs are on a par with benchmark rates. The state’s 10-year tax-exempt debt yields about 2.3 percent, data compiled by Bloomberg show. Only North Carolina and Virginia boast lower yields among the 20 states followed by Bloomberg.

Republican State Senate President Pro Tem David Shafer sponsored the bill putting the tax cap on the November ballot, where it was approved by 74 percent of voters.

In an e-mailed statement, Shafer said the cap will bring jobs to a state with the nation's highest unemployment rate, at 7.7 percent in October, compared with a national average of 5.8 percent.

"Leading economists have told us that the business certainty promised by the constitutional amendment will encourage existing businesses to expand here and new businesses to locate here," the statement said.

No Panacea

Backers included the Georgia Chamber of Commerce and Christine Ries, an economist at the Georgia Institute of Technology in Atlanta, who said the cap will force Georgia to rely more on sales taxes, which she said business prefers.

"What this is saying is not that we will never raise taxes," Ries said. "It means if they do raise taxes it will be on consumption, not income. A signal like this is extremely important in attracting new companies."

Opponents call the move a stunt, since no one was proposing raising the income tax, anyway.

Republican lawmakers put it on the ballot "so they can go back to the constituents and say they did something to limit taxes," said Senate Democratic Leader Steve Henson.

They also say jobs claims are exaggerated.

"This idea that it's going to be some big boon to the economy is just self-evidently, wildly overblown," said Leachman of the Washington-based budget and policy center.

Emory University economist Paul Rubin, who backed the limit, also said benefits will be moderate.

"It will add a little bit of certainty but it's not a world-breaker, because taxes weren't that high," Rubin said.

"People aren't going to say, 'Ah, let's move to Georgia because they capped their taxes,'" he said.

BLOOMBERG

By Margaret Newkirk Nov 25, 2014 5:00 PM PT

To contact the reporter on this story: Margaret Newkirk in Atlanta at mnewkirk@bloomberg.net

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TAX - NEW YORK

Maimonides Medical Center v. U.S.

United States District Court, E.D. New York - September 19, 2014 - F.Supp.3d - 114 A.F.T.R.2d 2014-6060

Not-for-profit corporation brought action against the United States to recover overpayments of employment taxes. After agreeing that a refund was owed and on amount of refund, both parties filed motions for summary judgment on issue of applicable interest rate.

The District Court held that:

- Corporation was a business entity within meaning of “check-the-box” regulations;
- Corporation could not elect to classify itself as a partnership; and
- As matter of apparent first impression, corporate interest rate applied to the refund.

TAX - PENNSYLVANIA

Friends of Pennsylvania Leadership Charter School v. Chester County Bd. of Assessment Appeals

Supreme Court of Pennsylvania - September 24, 2014 - A.3d - 2014 WL 4745702

Domestic nonprofit corporation affiliated with public charter school appealed from order of the Court of Common Pleas denying its claim for refund of real estate taxes paid to county. The Commonwealth Court affirmed. Corporation petitioned for allowance of appeal.

The Supreme Court of Pennsylvania held that statute granting retroactive real estate tax exemption to charter schools and nonprofit entities affiliated with charter schools violated constitutional doctrine of separation of powers, and thus was invalid, since it interfered with valid final judgment of Commonwealth Court, which had determined that nonprofit corporation associated with charter school was not exempt from real estate taxes as a purely public charity.

NABL: Senate Subcommittee Holds Hearing on Disaster Tax Relief.

The Senate Finance Committee Subcommittee on Taxation and IRS Oversight held a hearing this week on “Tax Relief after a Disaster” and discussed, among other things, the effectiveness of disaster bonds and the possibility of a permanent tax relief program available for FEMA-designated disaster areas. Steve Ellis, vice president of Taxpayers for Common Sense, told members of the subcommittee that tax-exempt bonds issued for disaster relief in the past have been “blunt instruments” that “reward much reinvestment that would happen regardless and may create subsidies that are out of proportion to the losses incurred when other federal, state, and charitable programs are taken into account.”

When asked by Senator Mike Enzi (R-WY) if he has seen tax changes provide relief outside the scope of the affected disaster areas, Mr. Ellis specifically mentioned GO Zone Bonds, telling the subcommittee that the states generally allocated the GO Zone private activity bonds and the additional advance refunding authority on a first-come, first-serve basis and for the most part did not focus their allocations on helping with recovery in the areas that were most damaged by the hurricanes. He urged the committee to require more accountability from communities who have access to tax relief after a disaster.

You can watch the hearing and read witness testimony here.

IRS EO Update: e-News for Charities & Nonprofits.

1. Register for IRS webinar: Introduction to tax-exempt status

Thursday, Nov. 20 at 2 p.m. ET

You will learn how to:

- Differentiate between the terms “nonprofit” and “tax exempt”
- List some of the common types of exempt organizations
- Understand the requirements for exemption under 501(c)(3)
- Apply for recognition of exemption
- Identify some of the ongoing compliance issues for exempt organizations

Register for this event.

2. Register for EO workshops

Register for our upcoming workshops for small and medium-sized 501(c)(3) organizations on:

Dec. 9 – Austin, TX
Hosted by Austin Community College

Jan. 9 – Salt Lake City, UT
Hosted by University of Utah & the Utah Nonprofits Association

3. PTIN renewal season underway

The renewal fee is $63. The fee for a new PTIN application is $64.25.

The easiest way to renew is online. It takes about 15 minutes. There is a new October 2014 version of the paper Form W-12 available on IRS.gov for those who prefer to use it. However, it takes 4-6 weeks to process.

4. In 2015, various tax benefits increase due to inflation adjustments

For tax year 2015, the IRS announced recently annual inflation adjustments for more than 40 tax provisions, including the tax rate schedules, and other tax changes. Revenue Procedure 2014-61 provides details about these annual adjustments.

Inflation adjusted items of interest to exempt organizations affect the:

- Treatment of dues paid to agricultural or horticultural organizations
- Insubstantial benefit limitations for contributions associated with charitable fund-raising campaigns
- Reporting exception for certain exempt organizations with nondeductible lobbying expenditures

Read news release.

5. IRS announces tax guidance related to Ebola outbreak in Guinea, Liberia and Sierra Leone

The IRS recently issued two items of guidance in response to the need for charitable and other relief due to the Ebola outbreak in Guinea, Liberia and Sierra Leone. One provides special relief intended to support leave-based donation programs to aid victims who have suffered from the Ebola outbreak in those countries. The other designates the Ebola outbreak in those countries as a qualified disaster for federal tax purposes.

Read news release.

6. Notice 2014-67 issued

Notice 2014-67 provides guidance for determining whether a state or local government entity or a 501(c)(3) organization will be considered to have private business use of its tax-exempt bond-financed facilities due to its participation in an "accountable care organization" and guidance regarding certain management contracts that do not result in private business use.

Notice 2014-67 appeared in IRB 2014-46 dated Nov. 10, 2014.

Texas Court Rules Natural Gas Destined For Interstate Commerce Properly Subject To Local Property Tax.

The Texas First Court of Appeals has ruled that the owner of natural gas stored in a Texas reservoir was properly assessed local property tax, regardless of whether the gas was sold in interstate commerce.1 Rejecting the taxpayer's contention that the "dormant" U.S. Constitution Commerce Clause rendered the assessment unconstitutional, the Court concluded that the tax did not fail any of the four prongs of the substantial nexus test established in Complete Auto.2

Background

ETC Marketing, Ltd. (ETC) is a marketer of natural gas with offices and employees in Texas. ETC buys, sells, and markets natural gas to customers located outside Texas, but is not in any way restricted from selling to Texas customers. Its affiliate, Houston Pipeline Company (Houston Pipeline), operates an intrastate natural gas pipeline and a reservoir for the storage of natural gas in Texas.

ETC buys natural gas destined for sale to interstate purchasers from multiple sellers, and "immediately entrusts" the product to Houston Pipeline for storage. ETC's storage agreement with Houston Pipeline allows it to purchase gas and "time the market" by holding the gas for delivery at a later date in order to maximize the sale price.3 Because natural gas is considered to be fungible, the points of transfer from ETC to Houston Pipeline and ultimately to ETC's customers do not necessarily relate to a physical location associated with the seller's gas, as gas owned by various marketers is physically commingled in the pipeline system which includes both intrastate and interstate pipeline. Distinct volumes of gas are segregated by paper allocation, but due to the fungible nature of the product, cannot be separately identified and tracked by the owners.

Since the reservoir where ETC stores its natural gas is located in Harris County, Texas, the Harris County Appraisal District (HCAD) appraised the value of approximately 33 billion cubic feet of natural gas owned by ETC and stored in the reservoir for calendar year 2010, and assessed related ad valorem taxes. While ETC conceded that it was the owner of the natural gas, it contended that all of the gas stored in the reservoir was exempt from property tax under the Commerce Clause of the U.S. Constitution because the gas was destined to be sold in interstate commerce. HCAD countered

that the sale of gas was not in interstate commerce, but even if the sale were considered to be in interstate commerce, it would still be subject to tax under the Complete Auto test. The 127th District Court rejected ETC's summary judgment motion and rendered final judgment for HCAD, holding that the stored gas was subject to ad valorem taxation as the gas was not in interstate commerce.4 ETC appealed the decision to the Court of Appeals.

Application of Complete Auto to Ad Valorem Tax

Texas law provides that all tangible personal property is subject to property tax if it is located in a taxing unit for longer than a temporary period, unless forbidden by law.5 In addition, property exempt from ad valorem taxation by federal law is exempt from taxation.6 Noting that the federal exemption applies only to activities related to interstate commerce, the Court accepted that the natural gas at issue was in the stream of interstate commerce. To decide whether an applicable exemption was available under federal law, the Court focused its attention on whether the application of property tax to the natural gas failed any of the prongs of the dormant Commerce Clause test established in Complete Auto. The Court considered each of the four factors necessary to allow a local government to tax goods in interstate commerce: (i) substantial nexus to the taxing state; (ii) fair apportionment; (iii) no discrimination against interstate commerce; and (iv) a fair relation to state-provided services.7 Importantly, the Court noted that the burden of proof is on the taxpayer to show that the tax fails to meet at least one of the prongs.8

Substantial Nexus

First, to survive constitutional scrutiny, a tax must apply to an activity that has a substantial nexus with the taxing state. ETC argued that physical presence alone does not satisfy the substantial nexus prong in ad valorem cases. The Court disagreed, referencing both federal and Texas cases in which physical presence was found to be sufficient to meet this part of the test.9 The Court focused on ETC's physical presence in Harris County and other parts of Texas, including its offices, employees and stored natural gas, in finding a substantial nexus between the activity being taxed and Texas.

Fair Apportionment

The second prong of the Complete Auto test is whether the tax is fairly apportioned (i.e., each state taxes only its fair share of an interstate transaction). In order for the requirements of this prong to be met, a tax must be both internally and externally consistent.10

A tax is considered to be internally consistent when it is structured so that if every state were to impose an identical tax, multiple taxation would not result.11 The Court quickly dismissed this requirement, noting that because ETC was not attempting to store gas in two states at the same time, there was no risk of multiple taxation.

The external consistency test examines whether the state has taxed only the portion of revenue from the interstate activity which reasonably reflects the in-state component of the activity being taxed.12 ETC argued that the ad valorem tax at issue was externally inconsistent because it would be impossible to determine, at any given time, the actual physical location of each molecule of its owned natural gas. However, because ETC had conceded its ownership of 33 billion cubic feet of natural gas stored in the reservoir located in Harris County, the Court rejected this contention. Accordingly, the Court found the ad valorem tax to be fairly apportioned.

Discrimination Against Interstate Commerce

The Court subsequently considered whether the ad valorem tax discriminated against interstate

commerce. Noting that the U.S. Supreme Court had previously determined that "ad valorem tax of general application … is of necessity non-discriminatory,"13 the Court concluded that this particular tax was valid.

Fair Relation to State-Provided Services

The final prong of the Complete Auto test considers whether the tax is fairly related to services provided by the state. The Court noted that no detailed accounting of the services provided to a taxpayer was necessary to prove this fact, but instead "police and fair protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough."14

ETC argued that this prong was not satisfied because the gas was entrusted to Houston Pipeline, which pays property taxes on the reservoir and related equipment. Also, ETC argued that Houston Pipeline had complete and exclusive control over the activity being taxed, which was storage of gas in the reservoir. Finding that ETC had not met its burden of proof on this issue, the Court noted that ETC retained control over the disposition of the gas in the reservoir, as indicated in the evidence provided during the district court's decision. While the gas is stored in the reservoir, the Court found that ETC "enjoys the benefit of public services which facilitate gas storage, which in turn allows it to accomplish its business objective of buying natural gas and holding it for sale at some later point in time." Thus, the Court concluded that the ad valorem tax was fairly related to the services provided by Texas.

In ruling against ETC, the Court reiterated that it was not necessary to resolve the dispute between ETC and the HCAD regarding whether the natural gas was sold in interstate commerce to evaluate the validity of the tax. The ad valorem tax was properly imposed because ETC stored the gas in Texas for the business purpose of selling the gas at a higher price at a later time.

Commentary

The interstate commerce exemption is especially significant for taxpayers engaged in the oil and gas industry in Texas because it is one of the few exemptions potentially applicable to ad valorem taxes on oil and natural gas. Three general exemptions from Texas ad valorem taxes are available for tangible personal property: (i) the freeport exemption; (ii) the goods-in-transit exemption; and (iii) the interstate commerce exemption. The freeport exemption applies when certain types of property are transported outside Texas within 175 days,15 but is not available for oil, natural gas or other petroleum products. Similarly, the goods-in-transit exemption does not apply to oil, natural gas, or petroleum products.16 Thus, businesses in the oil and gas industry generally must rely solely on the interstate commerce exemption for relief from Texas property taxation.

This decision is distinguishable from two recent Texas appellate court decisions that were favorable to the taxpayer and addressed the same constitutional concerns.17 Both cases involved petroleum products being stored in Texas that were later to be transported out of state. In Peoples Gas, the Sixth District Court of Appeals, which sits in Texarkana, held that the natural gas could not be taxed locally because there was insufficient nexus.18 In BP America, the Eleventh District Court of Appeals, which sits in Eastland, held that an ad valorem tax could not be imposed on crude oil stored in a tank farm that is an integral part of an interstate pipeline system.19 The Texas Supreme Court has yet to rule in either of these cases. It is interesting to note that the dissenting opinion in ETC cited Peoples Gas as indistinguishable on the substantial nexus issue.20

The issue of whether property tax properly applies to stored oil and natural gas has been highly litigated in recent years, both in Texas and in other states. For example, both the Oklahoma and

Kansas State Supreme Courts found against taxpayers in recent decisions, finding that property tax was validly assessed.21 The United States Supreme Court has refused to hear both the Oklahoma and the Kansas cases,22 despite the fact that the Solicitor General of the United States was requested to file a brief expressing the views of the federal government on this issue.23

The Court's insightful analysis reflects the far-reaching effect of the Complete Auto precedent.24 In practice, Complete Auto's four-prong test continues to lessen the practical effect of the Dormant Commerce Clause, and defenses based upon the concept, with respect to interstate commerce (in contrast to foreign commerce).

Finally, it is important to note that ETC is an appellate court decision that is binding in the area of the court's jurisdiction,25 but is not binding in other parts of Texas. The taxpayer will still have an opportunity to appeal to the Texas Supreme Court.26

Footnotes

1 ETC Marketing, Ltd. v. Harris County Appraisal District, Texas Court of Appeals, First District, No. 01-12-00264-CV, Oct. 2, 2014.

2 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). The test addresses whether the entity has substantial nexus under the Commerce Clause, thereby allowing a state to impose a tax.

3 ETC has historically stored gas in the reservoir for several months at a time, buying it during warmer months and selling it to northern markets in the winter months. The length of time the gas is stored depends on the volume, time of year, and demand for natural gas.

4 Harris County Appraisal District v. ETC Marketing, Ltd., 127th District Court, No. 2010-71360.

5 TEX. TAX CODE ANN. § 11.01.

6 TEX. TAX CODE ANN. § 11.12.

7 Barclays Bank PLC v. Franchise Tax Board, 512 U.S. 298, 310-11 (1994).

8 Vinmar, Inc. v. Harris County Appraisal District, 947 S.W.2d 554, 555 (Tex. 1997).

9 Relying upon Quill Corp. v. North Dakota, 50 U.S. 298 (1992), which reaffirmed that physical presence satisfies the first prong of the Complete Auto test for sales and use tax purposes. Several Texas cases reached the same conclusion with respect to ad valorem taxes. See, for example, Rylander v. 3 Beall Bros. 3, Inc., 2 S.W.3d 562, 570 (Tex. Ct. App. 1999), cert. denied, 538 U.S. 1013 (2003) and Peoples Gas, Light, and Coke Co. v. Harrison Central Appraisal District, 270 S.W.3d 208 (Tex. Ct. App. 2008), cert. denied, 131 S. Ct. 2097 (2011).

10 Goldberg v. Sweet, 488 U.S. 252 (1989).

11 Id.

12 Id.

13 Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434, 445 (1979).

14 Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 200 (1995).

15 TEX. CONST. art. VIII, §1-j.

16 TEX. TAX CODE ANN. §11.253(a)(2)(D).

17 See Peoples Gas, Light & Coke v. Harrison Central Appraisal District, 270 S.W.3d 208 (Tex. Ct. App. 2008), in which the Court held that a tax assessment on stored natural gas was invalid because of a lack of substantial nexus; Midland Central Appraisal District v. BP America Production Co., 282 S.W.3d 215 (Tex. Ct. App. 2009), in which ad valorem tax was found to be improperly assessed on oil passing in interstate commerce through an interstate pipeline, but temporarily held in Texas.

18 The majority in ETC distinguishes Peoples Gas by saying the natural gas marketer's "only connection to Texas was through the 'structure and location' of the separately owned pipeline which made the decision about where to store the gas and paid its own ad valorem taxes on the facility and equipment used for storage of natural gas in Texas. In contrast, ETC Marketing had a physical presence in Harris County including employees, offices, and – most significantly – natural gas that it had specifically contracted to store with Houston Pipeline. Unlike the pipeline at issue in Peoples Gas, Houston Pipeline's facilities are located entirely within Texas, including the Bammel reservoir in Harris County. There was no evidence that the gas was already bound for another state when it was committed to Houston Pipeline."

19 The majority distinguishes BP from ETC because the oil in the BP case "was not held in the tank farm for storage purposes or for any business purpose of the owner other than its transmission through the pipeline."

20 ETC Marketing, No. 01-12-00264-CV (Keyes – dissenting) pg. 9.

21 In re Assessment of Personal Property Taxes, 234 P.3d 938 (Okla. 2008); In the Matter of the Appeals of Various Applicants from a Decision of the Division of Property Valuation of the State of Kansas for Tax Year 2009 Pursuant to K.S.A. 74-2438, 313 P.3d 789 (Kan. 2013).

22 Certiorari was denied for the Kansas case on Oct. 6, 2014, while certiorari in the Oklahoma case was denied on Mar. 1, 2010.

23 In her brief to the Court, the Solicitor General argued that the Oklahoma Supreme Court had correctly rejected the dormant Commerce Clause challenge.

24 In comparison, this is the precedential effect some commentators thought, and some tax practitioners wished, the U.S. Supreme Court decision in the Quill case (Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992)) had. The precedential effect of Quill has, however, been relied upon sparingly by the courts.

25 Counties served by the First Court of Appeals are Austin, Brazoria, Chambers, Colorado, Fort Bend, Galveston, Grimes, Harris, Waller and Washington.

26 The taxpayer filed a motion for rehearing with the Court of Appeals on October 20. If the Court refuses to rehear the case, the taxpayer will have 45 days from that refusal to file a petition for review with the Texas Supreme Court. Indeed, there might be increased incentive for the Texas Supreme Court to take this case (if appealed) to resolve a perceived split in the Courts of Appeals between ETC on one side, and BP America and Peoples Gas on the other.

Last Updated: November 6 2014

Article by John LaBorde, P.J. Olzen, Don Lippert Jr., Pat McCown, Terry Gaul, Jamie C. Yesnowitz and Lori Stolly

Grant Thornton LLP

Firm Forwards Amicus Brief on Hospital Community Benefit Reporting.

Catherine Livingston of Jones Day, on behalf of the American Hospital Association, has provided Treasury with a copy of an amicus brief the firm filed with the Supreme Court in Perez v. Mortgage Bankers Association, describing how the IRS changed its position retroactively on hospital community benefit reporting without notice or explanation.

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October 17, 2014

Ms. Emily McMahon
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Dear Emily:

I am writing on behalf of our client, the American Hospital Association ("AHA") to provide you with a copy of the brief we have filed with the Supreme Court of the United States as amici curiae in Perez v. Mortgage Bankers Association, describing how the IRS changed its position retroactively on the reporting of hospital community benefit without notice or explanation. You will recall that AHA and other stakeholders were deeply concerned by the change to the Schedule H form instructions made abruptly last December, not only because the substantive position was problematic but also because the process that was followed was so flawed.

The rules for reporting community benefit expenditures are contained exclusively in the instructions for Form 990 Schedule H (Hospital). Notwithstanding their status as form instructions, they function as rules given the penalties that can apply for failure to file a complete and accurate return and given the lack of any other guidance on measuring community benefit through expenditures. From 2008 when the instructions were first issued through 2012, the instructions for Schedule H consistently treated all hospital expenditures for research funded by the government or another tax-exempt entity as community benefit expenditures that were to be included in computing the hospital's net community benefit percentage. In December of 2013, the IRS issued draft instructions reversing that position and excluding research expenditures for projects specifically funded by grants from government or tax-exempt entities from net community benefit expenditures. The IRS finalized these instructions eleven days later, never explaining the change. AHA and others submitted comments in December of 2013 objecting to the change as it had the nonsensical effect of treating most medical research as something other than a community benefit activity. AHA also met with Ms. Tamera Ripperda, Director of Exempt Organizations, and other IRS representatives on June 9, 2014 to express its concerns. The IRS has never issued a public explanation for the change.

As explained in the brief, the lack of transparency and explanation is entirely counter to the open process that was followed in developing Schedule H and its instructions. The community benefit standard was created in revenue rulings, and there is no published guidance whatsoever on measuring community benefit through expenditures. The process for developing Schedule H and its

instructions respected those facts and provided notice and comment. Moreover, the substantive position adopted in the draft instructions is illogical and contrary to the considered position on the same issue that was adopted in 2008 after notice and comment.

The substantial majority of medical research funding in this country comes from the federal government. It does not have the infrastructure or talent to perform all the medical research the public is seeking. Therefore, the federal government funds research performed in hospitals and universities all over the country that invest in the infrastructure and recruit and support the scientists needed to perform the research. The Schedule H instructions appear to take the position that hospitals are not providing a community benefit when they conduct research projects to find new ways to delay and prevent type 1 diabetes or to find new therapies for Alzheimer's disease because the instructions treat most of the dollars spent on these activities as not being net community benefit expenditures. That makes no sense. The hospital's research infrastructure and scientific personnel are critical to converting the grant dollars into research activities. The research is a public good, not a service to a particular patient where it may be relevant whether the hospital or a third party payor is covering the cost. The relevant consideration for exemption is the amount of community benefit generated by the hospital. The change to the Schedule H instructions was certainly not propelled by changes to the law as section 501(c)(3) has not changed since 2008, and the enactment of section 501(r) does not change the community benefit standard or the treatment of medical research as an activity that promotes the health of the community as a whole.

The IRS issued draft instructions for the 2014 Schedule H last month and retained the language used in the 2013 Schedule H instructions with respect to the reporting of research expenditures for purposes of determining net community benefit expenditures. On behalf of AHA, I would like to reiterate the concerns with this language and the continuing lack of sound rationale or explanation for the change and ask that the language adopted after the 2008 notice and comment process be reinstated.

Sincerely,

Catherine E. Livingston
Jones Day
Washington, DC

Enclosure

Group Seeks Removal of New Community Benefit Reporting Rule.

Edward Goodman of VHA Inc. has expressed concerns about a policy change that was made by the IRS without adequate notice or public comment in the 2013 instructions to Schedule H (Form 990), "Hospitals," urging the IRS to remove a new rule treating restricted grants as "direct offsetting revenue" for community benefit reporting purposes.

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October 21, 2014

The Honorable John A. Koskinen
Commissioner
Internal Revenue Service

1111 Constitution Ave, N.W.
Washington, DC 20224

Dear Commissioner Koskinen:

On behalf of VHA Inc. ("VHA"), we are writing to express our concern about a policy change that was made by the IRS without adequate notice or public comment in the 2013 Instructions to Schedule H of the Form 990. As described in a recently-filed amicus curiae brief submitted by the American Hospital Association (AHA) to the United States Supreme Court,1 this ill-considered change appears likely to have serious tax consequences for a wide array of tax-exempt hospitals and represents a significant departure from longstanding IRS rulings that were recently reaffirmed by Congress when it enacted new Code section 501(r).

VHA is a national health care network that serves more than 1,500 not-for-profit hospitals nationwide. VHA is dedicated to the success of nonprofit community-based health care. VHA has participated for many years with the Catholic Health Association of the United States (CHA) in developing resources to help community hospitals fulfill their mission and maintain their tax-exempt status.

AHA's amicus brief, a copy of which is enclosed for ease of reference, recounts how the IRS first developed reporting rules for measuring community benefit in consultation with the hospital community, and then precipitously altered a significant aspect of the rules retroactively with only 10 days' notice and no meaningful opportunity for comment. The amicus brief also discusses the negative impact that the rule change is likely to have on the tax status of medical research hospitals.

VHA shares AHA's concerns about the flawed administrative process by which this key rule was changed (i.e., lack of public notice and comment) as well as its adverse impacts on academic medical centers. Further, VHA believes the following factors should be considered:

- The new IRS rule will likely have a negative impact not only on research hospitals, but also on community hospitals (including critical access hospitals operating under significant financial constraints) to the extent that such hospitals' community benefit expenditures are funded in whole or part through designated grants and contributions.
- The new IRS rule is inconsistent with health care accounting principles and best practices developed by the Health Care Financial Management Association (HFMA) for the purpose of accurately measuring hospitals' provision of community benefits, including charity care.
- The new IRS rule is not only at odds with longstanding IRS revenue rulings, but also runs contrary to Congressional intent as expressed in the legislative history of new Code section 501(r).

In light of these significant procedural and substantive deficiencies, VHA urges the Commissioner to immediately withdraw the new rule and revert to the well-reasoned former rule, which excluded both restricted and unrestricted grants from the definition of "direct offsetting revenue."

The New Rule Announced in IRS Form Instructions

The new rule, imposed by a change in IRS Form Instructions first announced on December 9, 2013 and finalized on December 20, 2013, treats "restricted grants" as "direct offsetting revenue" for community benefit reporting purposes. As such, it would prevent tax-exempt hospitals that rely on grant funding to extend their reach into the communities they serve from being able to fully and accurately report their community benefit expenditures.

From the inception of the new Schedule H in 2008 through the first 11 months of 2013, the

Instructions for Schedule H provided as follows:

"Direct offsetting revenue" means revenue from the activity during the year that offsets the total community benefit expense of that activity, as calculated on the worksheets for each line item. "Direct offsetting revenue" includes any revenue generated by the activity or program, such as payment or reimbursement for services provided to program patients. ***Direct offsetting revenue does not include restricted or unrestricted grants or contributions that the organization uses to provide a community benefit.***

However, in the final 2013 Instructions released on December 20, 2013, the IRS included a sentence that states the opposite, specifically that "[d]irect offsetting revenue also includes restricted grants or contributions that the organization uses to provide a community benefit, such as a restricted grant to provide financial assistance or fund research." The same sentence is included in the recently released 2014 Draft Schedule H Instructions along with a statement advising hospitals that "Organizations may describe any inconsistencies from reporting in prior years in Part VI."

Negative Impacts of IRS Rule Reversal

The new reporting regime imposed by the IRS form will artificially depress many hospitals' community benefit expenditure percentages — in particular, those community hospitals and academic medical centers that rely on foundation and government grants to help fund their community benefit expenditures (including research, community health improvement initiatives, and charity care).

VHA is particularly concerned about the new rule's adverse impact on financially struggling community hospitals that pro-actively extend their community benefit reach by partnering with community organizations and foundations. While the IRS in its new community health needs assessment rules encourages hospitals to partner with other hospitals, community health organizations and local, state and federal health agencies, the new Schedule H reporting rule will unfairly penalize hospitals funding community benefit expenditures with grant funds derived from most charitable or government grants. Although the reporting rule would allow full credit for expenditures made with "unrestricted" grants, the reality of institutional grant-making is that the majority of grants made to hospitals (whether for research or community health programs) are "restricted" grants.

Inconsistency of New Rule with HFMA Charity Care Valuation Principles

According to guidelines developed by the HFMA on calculating charity care and community benefit, the concept of subtracting out **"direct offsetting revenue"** was intended to make sure that hospitals did not inflate the value of charity care by including "any patient-related revenue" in the amount counted as charity care. The subtraction of "direct offsetting revenue" was not intended to create disincentives for charitable hospitals to use grants to fund community benefit initiatives. For that reason, Statement 15 of the HFMA Principles & Practices (P&P) Board Statement on Valuation of Charity Care by Health Care Providers (" Statement 15 ") (issued Dec. 2006) only stipulates that health care providers subtract out patient-related revenue in determining the net cost of charity care. Further, Section 7.1 of Statement 15 explains the accounting principle as follows: "The goal of charity care disclosure is to identify the net cost related to charity care, as determined by the total cost of charity care services **less any patient-related revenue** due to sliding scale payments or other patient-specific sources." HFMA recognized that charity care is frequently funded by external sources (such as grants, contributions and special taxes) as well as by hospital surplus revenues.

The IRS's rule reversal deviates from these common-sense principles. It would allow hospitals

funding charity care or other community benefit with their own surplus operating revenues to fully report such community benefit expenditures, while discounting the community benefit expenditures of those financially struggling or low-margin hospitals that solicit and receive grants to help fully fund their programs. Consequently, the IRS's proposed treatment of most hospital grants as "Direct Offsetting Revenue" will result in reporting distortions and the creation of perverse incentives.

Inconsistency of the New Rule with IRS Rulings Recently Affirmed By Congress

When it passed the Affordable Care Act (ACA), Congress imposed new requirements on tax-exempt hospitals, including the following:

- Section 9007(a) of the ACA added new statutory requirements that must be met by all hospitals seeking exemption from federal income tax and other tax benefits as 501(c)(3) organizations. These provisions, now contained in new Internal Revenue Code ("Code") Section 501(r), require hospitals to — prepare a community health needs assessment (CHNA) every three years, — adopt a financial assistance policy to provide charity care and emergency medical services, — abide by a limitation on charges for medical care provided to needy patients, and — refrain from engaging in certain types of collection efforts
- Section 9007(b) added a new penalty excise tax (new Code section 4959) to help enforce the new CHNA requirements.
- Section 9007(c) mandates IRS review of each 501(c)(3) hospital and its community benefit activities at least once every three years.
- Section 9007(d) imposes new reporting and disclosure requirements on 501(c)(3) hospitals filing the annual information return known as the IRS Form 990.

The new ACA requirements are entitled, "Additional Requirements for Section 501(c)(3) Hospitals," and the legislative history of the ACA makes it clear that the new requirements are in addition to, and not in lieu of, the requirements otherwise applicable to 501(c)(3) organizations.2 In fact, the legislative history of the ACA describes in great detail the prevailing IRS standard for tax-exemption as follows:

Since 1969, the IRS has applied a "community benefit" standard for determining whether a hospital is charitable. According to Revenue Ruling 69-545, community benefit can include, for example: maintaining an emergency room open to all persons regardless of ability to pay; having an independent board of trustees composed of representatives of the community; operating with an open medical staff policy, with privileges available to all qualifying physicians; providing charity care; and utilizing surplus funds to improve the quality of patient care, expand facilities, and advance medical training, education and research.3

As emphasized by the AHA amicus brief, this longstanding IRS community standard has never required hospitals to discount their community benefit expenditures by the amount of restricted grants they receive.

Conclusion

In 2008, the IRS, in consultation with the Treasury Department and the hospital community, promulgated a definitional rule that made sense. In 2013, the IRS unilaterally and retroactively replaced the rule with one that is inconsistent with recognized accounting practices, published revenue rulings and the intent of Congress. In view of these inconsistencies and the negative impact of the rule on both research and community hospitals, the IRS should immediately withdraw the new rule and replace it with the former rule.

If you have any questions about VHA's comments or have further questions, please contact VHA's Senior Director, Governmental Relations, Cidette Perrin at (202) 354-2608 or at cperrin@vha.com.

Sincerely,

Edward N. Goodman
Vice President, Public Policy
VHA, Inc.
901 New York Avenue, N.W.
Washington, D.C. 20001

cc:
Chairman Dave Camp and Ranking Member Sander S. Levin,
Committee on Ways and Means, United States House of Representatives

Assistant Secretary (Tax Policy) Mark J. Mazur,
United States Treasury Department

Kathleen M. Nilles, Holland & Knight LLP

FOOTNOTES

1 The amicus brief was filed in Perez v. Mortgage Bankers Association, Nos. 13-1041, 13-1052. See Brief for the American Hospital Association, Association of American Medical Colleges, and Healthcare Financial Management Association as Amici Curiae Supporting Respondent, 2014 WL 5299417 (2014).

2 See S. Rep. No. 111-89, at 346-348 (2009). See also Staff of the Joint Committee on Taxation, 111th Cong., Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in combination with the "Patient Protection and Affordable Care Act" ("Technical Explanation), at 78 (J. Comm. Print. 2010) (citing Rev. Rul. 69-545, 1969-2 C.B. 117).

3 S. Rep. No. 111-89 at 346.

IRS LTR: Extension Granted to Elect Period for Low-Income Housing Credit.

The IRS granted a property owner an extension to elect when to start the credit period for its qualified low-income building.

Citations: LTR 201444013

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact: * * *, ID No. * * *
Telephone Number: * * *

Index Number: 9100.01-00, 42.00-00
Release Date: 10/31/2014
Date: July 29, 2014

Refer Reply To: CC:PSI:B5 – PLR-108988-14

LEGEND:

Taxpayer = * * *
Address = * * *
BIN = * * *
Agency = * * *
Accounting Firm = * * *
Year 1 = * * *
Year 2 = * * *

Dear * * *:

This letter responds to a letter dated February 26, 2014, submitted on behalf of Taxpayer by Taxpayer's authorized representative requesting an extension of time to make an election under § 42(f)(1) of the Internal Revenue Code pursuant to § 301.9100-3 of the Procedure and Administration Regulations.

According to the information submitted, Taxpayer owns and operates a low-income housing building located at Address and identified by BIN. The building was placed in service in Year 1. In Year 2, Taxpayer received a Form 8609 for the building from the Agency, and provided the form to Accounting Firm to complete Part II of the form. Taxpayer intended to start the credit period for the building in Year 2, the year following the year the building was placed in service. However, Accounting Firm inadvertently checked the "No" box on line 10a of the Form 8609 for the building indicating that the credit period for the building was to begin in Year 1, the year the building was placed in service. Consistent with its intent, Taxpayer seeks an extension of time to make the election under § 42(f)(1) to start the credit period for the building in Year 2.

Section 42(f)(1) defines "credit period" to mean, with respect to any building, the period of 10 taxable years beginning with the taxable year in which the building is placed in service, or at the election of the taxpayer, the succeeding taxable year, but in either case only if the building is a qualified low-income building as of the close of the first year of such period. The election, once made, is irrevocable.

Section 301.9100-8(b) provides that the election under § 42(f)(1) generally must be made for the taxable year in which the building is placed in service, or the succeeding taxable year if the § 42(f)(1) election is made to defer the start of the credit period, and must be made in the certification required to be filed pursuant to § 42(l)(1) and (2). Section 301.9100-8(a)(4)(i) provides that the election under § 42(f)(1) is irrevocable.

Section 1.42-1(h) provides, in part, that unless otherwise provided in forms or instructions, a completed Form 8609 (or any successor form) must be filed by the building owner with the IRS. The requirements for completing the Form 8609 are provided in the instructions to the form.

Sections 301.9100-1(b) through 301.9100-3 provide the standards the Commissioner will use to determine whether to grant an extension of time to make an election.

Section 301.9100-1(b) defines the term "regulatory election" as including an election whose due date is prescribed by a regulation published in the Federal Register, or a revenue ruling, revenue procedure, notice, or announcement published in the Internal Revenue Bulletin.

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time

under the rules set forth in §§ 301.9100-2 and 301.9100-3 to make a regulatory election, or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Code, except E, G, H, and I.

Section 301.9100-2 provides automatic extensions of time for making certain elections. Section 301.9100-3 provides extensions of time for making elections that do not meet the requirements of § 301.9100-2.

Requests for relief under § 301.9100-3(a) will be granted when the taxpayer provides evidence (including affidavits described in § 301.9100-3(e)) to establish that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

In the instant case, based solely on the facts submitted and the representations made, we conclude that the requirements of §§ 301.9100-1 and 301.9100-3 have been met. Accordingly, Taxpayer is granted an extension of time to make the § 42(f)(1) election on Form 8609 to treat the credit period for the building located at Address and identified by BIN, as beginning in Year 2. The election must be made by filing within 120 days from the date of this letter an amended Form 8609 that includes this intended election. The amended Form 8609 (along with a copy of this letter) is to be sent to the following address:

Department of the Treasury
Internal Revenue Service Center
Philadelphia, PA 19255-0549

A copy of this letter is enclosed for this purpose.

No opinion is expressed or implied regarding the application of any other provisions of the Code or regulations. Specifically, we express no opinion on whether the building located at Address and identified by BIN otherwise qualifies for credit under § 42.

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

The ruling contained in this letter is based upon information and representations submitted by 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 rulings, it is subject to verification on examination.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Associate Chief Counsel
(Passthroughs & Special Industries)

By: Christopher J. Wilson
Senior Counsel, Branch 5
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2):
Copy of this letter

Copy for § 6110 purposes

Foley: IRS Releases Favorable Private Business Use Rules For Facilities Financed With Tax-Exempt Bonds.

On October 24, 2014, the IRS released Notice 2014-67, which establishes more favorable safe harbors for types of service contracts and other arrangements using property financed with tax-exempt bonds. The Notice also provides helpful guidance of more limited scope regarding the treatment of Accountable Care Organizations under the Medicare Shared Savings Program.

The more favorable rules generally can be applied retroactively, and are of immediate practical importance.

Notice 2014-67 is available here.

Highlights of the New Rules

- The Notice includes a very significant expansion of the safe harbors for service contracts that are not treated as resulting in "private business use" previously set forth in IRS Revenue Procedures 97-13 and 2001-39.
- The Notice establishes a new safe harbor for contracts with a 5-year term. In practice, this new more favorable safe harbor in most instances displaces the existing safe harbors for 2-year, 3-year and 5-year contracts.
- 5-year contracts qualifying for the safe harbor do not need to be terminable by the qualified user (that is, the issuer or borrower) before the end of the 5-year term.
- Many, but not all, types of compensation are permitted for the 5-year safe harbor. To qualify for the 5-year safe harbor all compensation for services must be based on a stated amount; periodic fixed fee; a capitation fee; a per-unit fee, or a combination of the preceding. The compensation for services also may include a percentage of gross revenues, adjusted gross revenues, or expenses of the facility (but not both revenues and expenses). In addition, for this purpose, a tiered productivity award as described in the Notice will be treated as a stated amount or a periodic fixed fee, as appropriate.
- The new rules expand the types of permitted productivity awards. The Notice provides that a productivity award for services in any annual period during the term of the contract generally also does not cause the compensation to be based on a share of net profits of the financed facility if (1) the eligibility for the productivity award is based on the quality of the services provided under the management contract (for example, the achievement of Medicare Shared Savings Program quality performance standards or meeting data reporting requirements), rather than increases in revenues or decreases in expenses of the facility and (2) the amount of the productivity award is a stated dollar amount, a periodic fixed fee, or a tiered system of stated dollar amounts or periodic fixed fees based solely on the level of performance achieved with respect to the applicable measure.

Highlights of New Rules for Certain Accountable Care Organizations

- The Notice provides helpful, but limited guidance on whether a State or local government entity or 501(c)(3) organization that benefits from tax-exempt financing will be considered to have private business use of its facilities as a result of participation in the Medicare Shared Savings Program through an "accountable care organization" ("ACO").
- The Notice provides that the participation of a nonprofit hospital organization (or other "qualified

user") in the Medicare Shared Savings Program through an ACO will not result in private business use of the tax-exempt bond financed facility if all of the following conditions are met: (1) the terms of the qualified user's participation in the Medicare Shared Savings Program through the ACO (including its share of Shared Savings Program payments or losses and expenses) are set forth in advance in a written agreement negotiated at arm's length; (2) the Centers for Medicare and Medicaid Services has accepted the ACO into, and has not terminated the ACO from, the Medicare Shared Savings Program; (3) the qualified user's share of economic benefits derived from the ACO (including its share of Medicare Shared Savings Program payments) is proportional to the benefits or contributions the qualified user provides to the ACO; if the qualified user receives an ownership interest in the ACO, the ownership interest received is proportional and equal in value to its capital contributions to the ACO and all ACO returns of capital, allocations, and distributions are made in proportion to ownership interests; (4) the qualified user's share of the ACO's losses (including its share of Medicare Shared Savings Program losses) does not exceed the share of ACO economic benefits to which the qualified user is entitled; (5) all contracts and transactions entered into by the qualified user with the ACO and the ACO's participants, and by the ACO with the ACO's participants and any other parties, are at fair market value; and (6) the qualified user does not contribute or otherwise transfer the property financed with tax-exempt bonds to the ACO unless the ACO is an entity that is a governmental person, or, in the case of qualified 501(c)(3) bonds, either a governmental person or a 501(c)(3) organization.

Practical Consequences of the New Rules

The following is a list of certain of the most important consequences of the new IRS rules. Because the rules may be applied to outstanding bond issues and contracts, many of these consequences may apply immediately.

- Borrowers and issuers of tax-exempt bonds (including particularly nonprofit hospital organizations) generally will need to revise bond compliance procedures to reflect the new, more favorable rules.
- In many instances, it is possible that "carve outs" for new financings and refundings to address private business use compliance (that is, reduction in the size of tax-exempt bond issues) could be reduced or eliminated under the new, more favorable rules.
- Borrowers and issuers of tax-exempt bonds and service providers may request, or consider, amendment of existing contracts (or renewals of existing contracts on different terms). This may arise in particular in cases where the private business use rules prevented service contract provisions with business terms otherwise desired by both parties.
- Nonprofit organizations that have reported the amount of private business use of bond issues in Form 990, Schedule K, may be able to reduce the amount of private business use reported.
  The proposed resolution of voluntary closing agreement requests to the IRS, and IRS examinations of tax-exempt bonds, which involve service contracts may be affected by this development.

Further Discussion

Tax-exempt bonds that benefit State and local governments and section 501(c)(3) organizations are subject to "private business tests" under sections 141 and 145 of the Internal Revenue Code that restrict the use of bond-financed facilities. These rules include restrictions on the "private business use" of bond-financed facilities.

The main impetus for publication of the Notice appears to have been to provide helpful guidance for certain accountable care organizations. In practice, however, the new rules in the Notice for service contracts are a more significant development that has widespread significance for issuers and borrowers of tax-exempt bonds, and also service providers to those issuers and borrowers. The Notice is the most significant IRS guidance on the treatment of service contracts involving facilities

financed with tax-exempt bonds since the publication of IRS Rev. Proc. 97-13 in 1997.

For the most part, the new safe harbor for 5-year contracts displaces the existing Rev. Proc. 97-13 safe harbors for 2-year, 3-year and 5-year contracts. Each of those safe harbors requires that the qualified user (generally, the issuer or borrower) have the right to terminate the contract without penalty or cause after a 1-year, 2-year or 3-year period, respectively. The new 5-year safe harbor does not require any such termination provision. The types of compensation arrangements permitted by the new 5-year safe harbor are broad, but do not include all types of compensation arrangements. It is possible that, in some cases, issuers and borrowers may seek to continue to use an existing 2-year, 3-year or 5-year safe harbor; the existing safe harbors are not affected, and may still be relied upon.

The new rules set forth safe harbors, not requirements. The IRS has issued many private letter rulings providing that certain service contracts that do not technically meet all of the requirements of a Rev. Proc. 97-13 safe harbor, but are nonetheless sufficiently consistent with the principles of a published safe harbor, may still be favorably treated as not giving rise to private business use. Accordingly, it can be expected that many interpretive questions will arise regarding whether contracts that do not exactly meet all of the requirements of the new safe harbor for 5-year contracts, but are consistent with the spirit of the new safe harbor, may receive similar favorable treatment.

Use of the new 5-year safe harbor for service contracts may heighten the need to consider and review the general requirements of Rev. Proc. 97-13, as amended, and other federal tax and regulatory requirements for service contracts. For example, the safe harbors of Rev. Proc. 97-13, and the rules under section 501(c)(3) of the Internal Revenue Code, generally require that all such service contracts be entered into at fair market value. The longer term contracts permitted under the new rules may heighten the need to consider how to best establish and document that a contract is entered into a fair market value. As another example, the regulations continue to provide that a service contract generally results in private business use if the contract provides for compensation based, in whole or in part, on a share of net profits from operation of the facility. The new 5-year safe harbor may heighten the need to consider and review whether the compensation arrangement meets this requirement.

The new rules may be applied immediately, but are not required to be applied until on or after January 22, 2015. The Notice states that the provisions relating to ACOs under the Medicare Shared Savings Program apply to bonds sold on or after January 22, 2015, but may be applied to bonds sold before that date. The Notice states that the provisions relating to service contracts apply to contracts entered into, or materially modified or extended (other than pursuant to a renewal option) on or after January 22, 2015, but may be applied to contracts entered into, modified or extended before or after that date.

The favorable treatment for ACOs entered into under the Medicare Shared Savings Program is similar to the approach taken in IRS Notice 2011-20, which provided similar favorable treatment for purposes of section 501(c)(3) of the Internal Revenue Code. Guidance regarding the treatment of the many other types of ACOs is not provided in this Notice, although nonprofit organizations and their counsel may look to Notice 2014-67 for helpful benchmarks for the analysis of treatment of other ACO arrangements. In other words, particularly because participation in the Medicare Shared Savings Program is limited, the portion of Notice 2014-67 that concerns ACOs represents only a helpful “toe in the water” towards providing broader needed guidance on the treatment of ACOs.

The Notice concerns only “short-end” safe harbors for service contracts (that is, contracts having a term not longer than 5 years). The existing Rev. Proc. 97-13 also sets forth safe harbors for longer

term contracts (10-year, 15-year and 20-year), which are not directly affected by the Notice. In general, the safe harbors for the “short-end” have more significance in certain sectors (particularly including health care) than others. Public comments have also been submitted to the IRS for additional safe harbors on the “long-end”. For example, more flexible long-term safe harbors could be particularly helpful for governmental utility systems, convention centers, and similar facilities financed with tax-exempt bonds. It is possible that the release of the favorable guidance for the “short-end” increases the possibility of future favorable guidance on the “long-end” as well.

Last Updated: October 29 2014

Article by Michael G. Bailey, David Y. Bannard, Chauncey W. Lever, Richard F. Riley, Jr. and Mark T. Schieble

Foley & Lardner

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Philadelphia 2010 Water Bonds’ Tax-Exemption Under IRS Scrutiny.

Philadelphia water and wastewater revenue bonds sold in 2010 are being audited by the Internal Revenue Service to verify they meet tax-exempt requirements, the city said in a filing.

The city received a notice from the agency around Oct. 8 that the $396 million issue is being examined because of “concern that the debt issuance may fail one or more provisions” of the code regarding tax-free securities, according to a posting on the Municipal Securities Rulemaking Board’s website.

Proceeds from the debt went toward refinancing 2003 securities and funding a $48.8 million payment to terminate a swap agreement, bond documents show.

Philadelphia reviewed the IRS matter and will provide the information requested, Treasurer Nancy Winkler said by telephone.

“We don’t see anything that should cause a problem,” she said. “We have not identified anything that would lead us to believe that the bonds fail to meet the applicable requirements.”

Winkler said the city has undergone five audits on debt issues in the past four years without any action taken.

Ubon Mendie, an IRS spokesman in Washington, declined to comment on the Philadelphia case.

Bloomberg

By Romy Varghese Oct 27, 2014 7:56 AM PT

To contact the reporter on this story: Romy Varghese in Philadelphia at rvarghese8@bloomberg.net

To contact the editors responsible for this story: Stephen Merelman at smerelman@bloomberg.net Mark Tannenbaum, Stacie Sherman

IRS Rules on Tax Consequences of Plan Contributions, Transfers.

The IRS ruled that some employer contributions, including picked-up contributions, to a city's defined contribution plan aren't includable in the employee's gross income until distributed and that trustee-to-trustee transfers from a participant's account in the plan to purchase service credit will not be included in their gross income.

Citations: LTR 201443035

Uniform Issue List: 414.00-00, 414.09-00

Date: July 28, 2014

Refer Reply To: T:EP:RA:T3

LEGEND:

City A = * * *
State B = * * *
Plan C = * * *
Plan D = * * *
Plan E = * * *
Board F = * * *
Class G Employees = * * *
Class H Employees = * * *

Dear * * *:

This letter is in response to correspondence dated April 22, 2005, as supplemented by correspondence dated February 29, 2008, January 28, 2009, February 3, 2009, August 17, 2009, August 31, 2009, April 15, 2013, May 7, 2013, November 22, 2013, March 6, 2014, March 25, 2014, and May 15, 2014, submitted on behalf of City A by its authorized representatives, in which a request for a letter ruling was submitted with respect to the federal tax consequences of certain contributions to, and trustee-to-trustee transfers from, Plan C, as established effective December 20, 2004, and as most recently amended and restated as of January 1, 2014.

The following facts and representations are submitted under penalties of perjury in support of your request:

City A is a municipal corporation and a political subdivision of State B. Pursuant to a certain ordinance enacted effective December 20, 2004, City A established Plan C, a defined contribution retirement plan for eligible employees of City A. Plan C is intended to be a tax-qualified retirement plan under section 401(a) of the Internal Revenue Code ("Code"), and is represented to be a governmental plan under section 414(d) of the Code. Plan C has been amended from time to time and, on December 19, 2013, Plan C was amended and restated in its entirety, effective January 1, 2014. A First Amendment to Plan C, as amended and restated effective January 1, 2014, was adopted by City A on March 14, 2014 (such Amendment hereinafter referred to as the "First Amendment"). In addition, City A proposes to adopt a Second Amendment, also effective January 1, 2014 (such Amendment hereinafter referred to as the "Second Amendment"),

Two categories of employees eligible to participate in Plan C are Class G Employees and Class H

Employees. Other categories of City A employees are eligible to participate in Plan C as determined by City A's Personnel Department.

Effective March 1, 2014, section 1.1 of Plan C defines the term "Accumulated Leave Time Value" as the value of an employee's accumulated sick leave at retirement determined by multiplying the applicable percentage, based on the collective bargaining agreement or City A policy to which the employee is subject, by the amount of Plan-eligible accumulated sick leave available for conversion under such collective bargaining agreement or City A policy.

Section 1.1 of Plan C defines the term "Supplemental Contributions" as mandatory contributions made pursuant to section 3.1(d) of Plan C.

Pursuant to the Second Amendment, section 3.1(a)(2) of Plan C provides that, on and after April 1, 2014, City A shall automatically make an "Accumulated Leave Contribution" to Plan C on behalf of a Class G Employee equal to his or her Accumulated Leave Time Value at retirement. Section 3.1(a)(2) of Plan C, as set forth in the Second Amendment, further provides that no Class G Employee eligible for such an Accumulated Leave Contribution may receive any portion of his or her Accumulated Leave Time Value in cash.

Under the Second Amendment, section 3.1(a)(4) of Plan C provides that, on and after April 1, 2014, City A shall automatically make an Accumulated Leave Contribution to Plan C on behalf of a Class H Employee equal to his or her Accumulated Leave Time Value at retirement. Section 3.1(a)(4) of Plan C, as set forth in the Second Amendment, further provides that no Class H Employee eligible for such an Accumulated Leave Contribution may receive any portion of his or her Accumulated Leave Time Value in cash.

Section 3.1(b)(1) of Plan C provides that certain "Nonelective Employer Contribution Amounts" shall be contributed by City A to Plan C. Different classifications of eligible employees under Plan C are entitled to different Nonelective Employer Contribution Amounts in accordance with a specified Appendix of Plan C. Section 3.1(b)(1) of Plan C further states that no employee may elect to receive any portion of such Nonelective Employer Contribution Amounts in cash.

Pursuant to the Second Amendment, section 3.1(d)(1)(A) of Plan C provides that certain eligible classifications of City A employees hired on or after January 1, 2014, may make an election to have "Supplemental Contributions" made to Plan C. Under section 3.1(d)(1)(A), eligible employees may irrevocably elect salary reduction in the amount of a designated percentage (from among the available percentages set forth in a specified Appendix of Plan C, as amended from time to time) of the compensation otherwise payable to him or her on or after January 1, 2014 to be paid by City A into Plan C. Section 3.1(d)(1)(A) of Plan C further provides that such payment by City A into Plan C shall be a "pick up contribution" pursuant to section 414(h)(2) of the Code. Under section 3.1(d)(1)(A) of Plan C, such election must be made no later than the eligible employee's first becoming eligible under any plan or arrangement of City A. Furthermore, section 3.1(d)(1)(A) says that, pursuant to such election, City A will pick up and pay the elected amount directly to Plan C, and the eligible employee will not have the option of choosing to receive the elected amount directly instead of having it paid by City A to Plan C. Section 3.1(d)(1)(A) also provides that no employee eligible for such a "pick up contribution" shall be permitted to make contributions of any portion of his or her compensation directly to Plan C.

Section 3.1(d)(1)(C) of Plan C provides that an eligible employee described in section 3.1(d)(1)(A) of Plan C who fails to make the election specified in that section shall be deemed to have irrevocably elected to have 0% of the compensation otherwise payable to him or her contributed to Plan C. Section 3.1(d)(1)(D) provides that the election made by an eligible employee to make (or not make)

Supplemental Contributions is irrevocable and remains in place in the event the employee transfers to a position under the same or different employee classification (or terminates employment with City A and is subsequently reemployed under the same or different employee classification).

City A also established and maintains Plan D, which is represented to be a governmental plan within the meaning of section 414(d) of the Code, and is intended to be a qualified plan under section 401(a) of the Code. Plan D is a defined benefit plan. Plan D will accept transfers from Plan C for the purchase of service credit. Plan D contains distribution restrictions on any transferred amounts it receives that are at least as restrictive as the distribution restrictions of Plan C.

State B established and maintains Plan E, which is represented to be a governmental plan within the meaning of section 414(d) of the Code, and is intended to be a qualified plan under section 401(a) of the Code. Plan E is a defined benefit plan. Plan E will accept transfers from Plan C for the purchase of service credit. Plan E contains distribution restrictions on any transferred amounts it receives that are at least as restrictive as the distribution restrictions of Plan C.

Section 6.3 of Plan C provides that, if authorized by Board F (or its designee), and to the extent permitted by applicable law, Plan C shall allow participants to make voluntary plan-to-plan transfers directly to Plan D or Plan E, or another qualified defined benefit plan from which the participant is entitled to a benefit and which allows for such transfers (hereinafter "transferee plan"), for the purchase of service credit under such transferee plan. Under section 6.3 of Plan C, a participant may not request a transfer of an amount that exceeds 100% of the actuarial cost of the service credit being purchased, as determined by the transferee plan. Further, a participant must request a transfer to purchase service credit under section 6.3 of Plan C before his or her termination of employment with City A or retirement.

Based on the above facts and representations, you request the following rulings:

1. The employer contributions of Accumulated Leave Time Value made to Plan C on and after January 1, 2014, for Class G Employees in accordance with section 3.1(a)(2), and for Class H Employees in accordance with section 3.1(a)(4), are not contributions under a cash or deferred arrangement and are not includible in the gross income of the employee, because these mandatory, non-elective leave contributions are employer contributions to a qualified plan, subject to the limits on annual additions to a qualified plan,

2. The Nonelective Employer Contributions made to Plan C for eligible employees in accordance with section 3.1(b) are not includible in the gross income of the employee because these contributions are employer contributions to a qualified plan, subject to the limits on annual additions to a qualified plan.

3. The Supplemental Contributions made to Plan C for eligible employees in accordance with section 3.1(d) and which are (i) made pursuant to an irrevocable election of each eligible employee hired on or after January 1, 2014, upon first becoming eligible under any plan or arrangement of City A, and (ii) picked up by City A pursuant to section 414(h)(2) of the Code, are not includible in the gross income of each such employee, subject to the limits on annual additions to a qualified plan.

4. Trustee-to-trustee transfers made pursuant section 6.3 of Plan C from a participant's account in Plan C to Plan D for the purchase of service credit will not be included in the gross income of the participant under section 402 of the Code and are not subject to withholding under section 3405 of the Code or tax reporting under section 6047 of the Code. Furthermore, such transferred amounts are not annual additions under section 415(c) of the Code, and the benefit attributable to the transferred amounts is not subject to the limitation on benefits under section 415(b) of the Code. In

addition, section 415(n) of the Code is not applicable to the transferred amounts and the transferred amounts are not subject to limitation under section 415 of the Code at the time of transfer.

With respect to your first two requested rulings, section 401(a) of the Code provides that a trust created or organized in the United States and forming a part of a qualified stock bonus, pension, or profit sharing plan of an employer constitutes a qualified trust only if the various requirements set out in section 401(a) of the Code are met.

Section 401(k)(1) of the Code provides that a profit sharing or stock bonus plan, pre-ERISA money purchase pension plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of section 401(a) of the Code merely because the plan includes a qualified cash or deferred arrangement as defined in section 401(k)(2) of the Code.

Section 401(k)(4)(B)(ii) of the Code provides that "a cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof." Section 1116(f)(2)(B)(i) of the Tax Reform Act of 1986, P.L. 99-514, provides a transition rule pursuant to which the prohibition of section 401(k)(4)(B)(ii) of the Code does not apply to any cash or deferred arrangement adopted by a State or local government (or political subdivision thereof) before May 6, 1986. Thus, if a governmental employer maintains a qualified defined contribution plan, the plan cannot generally include a qualified cash or deferred arrangement within the meaning of section 401(k), unless the cash or deferred arrangement was adopted before May 6, 1986.

Section 1.401(k)-1(a)(2) of the Income Tax Regulations ("Regulations") provides that, subject to certain exceptions, which are inapplicable in this case, a cash or deferred arrangement is an arrangement under which an eligible employee may make a cash or deferred election with respect to contributions to, or accruals or other benefits under, a plan that is intended to satisfy the requirements of section 401(a) of the Code.

Section 1.401(k)-1(a)(3) of the Regulations generally defines a cash or deferred election as any direct or indirect election (or modification of an earlier election) by an employee to have the employer either: (1) provide an amount to the employee in the form of cash (or some other taxable benefit) that is not currently available, or (2) contribute an amount to a trust, or provide an accrual or other benefit under, a plan deferring the receipt of compensation.

Section 402(a) of the Code generally provides that any amount actually distributed to any recipient by any employees' trust described in section 401(a) of the Code, which is exempt from tax under section 501(a) of the Code, shall be taxable to the recipient, in the taxable year of the distribution, under section 72 of the Code (relating to annuities).

Section 1.402(a)-1(a)(1)(i) of the Regulations provides that if an employer makes a contribution for the benefit of an employee to a trust described in section 401(a) of the Code for the taxable year of the employer which ends within or with a taxable year of the trust for which the trust is exempt under section 501(a) of the Code, the employee is not required to include such contribution in his or her income except for the year or years in which such contribution is distributed or made available to him or her.

Section 415(a)(1)(B) of the Code provides that a defined contribution plan is not a qualified plan if contributions and other additions made to the plan with respect to any participant in a taxable year exceed the limitation of section 415(c) of the Code.

In the present case, pursuant to section 3.1(a)(2) and section 3.1(a)(4) of Plan C, on and after

January 1, 2014, City A automatically contributes an amount equal to an eligible employee's Accumulated Leave Time Value to Plan C on behalf of the employee at the time of the employee's retirement. Under the terms of Plan C, no such eligible employee may receive any portion of his or her Accumulated Leave Time Value in cash.

Accordingly, no eligible employee is permitted a cash or deferred election with respect to his or her Accumulated Leave Time Value, as the employee cannot elect to receive any portion of such amount in the form of cash (or some other taxable benefit) rather than to have such amount contributed by City A to Plan C on the employee's behalf pursuant to section 3.1(a)(2) or section 3.1(a)(4) of Plan C. Therefore, contributions under section 3.1(a)(2) and section 3.1(a)(4) of Plan C are treated as employer contributions for purposes of section 1.402(a)-1(a(1))(i) of the Regulations, and not as contributions made pursuant to a cash or deferred arrangement within the meaning of section 1.401(k)-1(a)(2) of the Regulations.

Similarly, no employee is allowed a cash or deferred election with respect to contributions made by City A to Plan C of Nonelective Employer Contribution Amounts pursuant to section 3.1(b) of Plan C. Section 3.1(b) of Plan C explicitly states that no employee may elect to receive any portion of such Nonelective Employer Contribution Amounts in cash rather than having such amounts contributed to Plan C.

Pursuant to section 415(a)(1)(B) of the Code, the contributions made on behalf of an eligible employee under section 3.1(a)(2), section 3.1(a)(4), and section 3.1(b) of Plan C, and any other contributions and additions made to Plan C with respect to any participant, are subject to the limitation of section 415(c) of the Code. Additionally, in accordance with section 1 402(a)-1(a)(1)(i) of the Regulations, employer contributions made by City A to Plan C on behalf of an employee pursuant to section 3.1(a)(2), section 3.1(a)(4), and section 3.1(b) of Plan C are not required to be included in the taxable income of the employee until such time as such amounts are distributed or made available to him or her.

Therefore, with respect to ruling request 1, we conclude that the employer contributions of Accumulated Leave Time Value made to Plan C on and after January 1, 2014, for Class G Employees in accordance with section 3.1(a)(2), and for Class H Employees in accordance with section 3.1(a)(4), are not contributions under a cash or deferred arrangement and are not includible in the gross income of the employee until such time as such amounts are distributed to the employee, because these mandatory, non-elective leave contributions are employer contributions to a qualified plan, subject to the limits on annual additions to a qualified plan.

With respect to ruling request 2, we also conclude that the Nonelective Employer Contributions made to Plan C for eligible employees in accordance with section 3.1(b) of Plan C are not includible in the gross income of the employee until such time as such amounts are distributed to the employee because these contributions are employer contributions to a qualified plan, subject to the limits on annual additions to a qualified plan.

With respect to your third requested ruling, section 1.401(k)-1(a)(3)(v) of the Regulations provides that a cash or deferred arrangement does not include certain one-time irrevocable elections. Under section 1.401(k)-1(a)(3)(v), such an election must be made no later than the employee's first becoming eligible under the plan or any other plan or arrangement of the employer. The election must be to have contributions equal to a specified amount or percentage of the employee's compensation made by the employer on the employee's behalf to the plan and a specified amount or percentage divided among all other plans or arrangements of the employer. Furthermore, pursuant to section 1.401(k)-1(a)(3)(v), such an election must be for the duration of the employee's employment with the employer.

Section 414(h)(1) of the Code provides that any amount contributed to an employees' trust described in section 401(a) of the Code shall not be treated as having been made by the employer if it is designated as an employee contribution.

Section 414(h)(2) of the Code provides that, for purposes of section 414(h)(1), in the case of any plan established by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or a governmental plan described in the last sentence of section 414(d) (relating to plans of Indian tribal governments), where the contributions of employing units are designated as employee contributions but where any employing unit picks up the contributions, the contributions so picked up shall be treated as employer contributions.

The federal income tax treatment to be afforded contributions that are picked up by the employer within the meaning of section 414(h)(2) of the Code has been developed in a series of revenue rulings. In Revenue Ruling 77-462, 1977-2 C.B. 358, the employer school district agreed to assume and pay the amounts employees were required by state law to contribute to a state pension plan. Revenue Ruling 77-462 concluded that the school district's picked-up contributions to the plan were excluded from the employees' gross income until such time as they were distributed to the employees. The revenue ruling further held that, under the provisions of section 3401(a)(12)(A) of the Code, the school district's contributions to the plan were excluded from wages for purposes of the collection of income tax at the source on wages. Therefore, no withholding was required for federal income tax purposes from the employees' salaries with respect to such picked-up contributions.

Revenue Ruling 81-35, 1981-1 C.B. 255, and Revenue Ruling 81-36, 1981-1 C.B. 255, established that the following two criteria must be met: (1) the employer must specify that the contributions, although designated as employee contributions, are being paid by the employer in lieu of contributions by the employee; and (2) the employee must not be given the option of choosing to receive the contributed amounts directly instead of having them paid by the employer to the pension plan.

Revenue Ruling 87-10, 1987-1 C.B. 136, provides that the required specification of designated employee contributions must be completed before the period to which such contributions relate. If not, the designated employee contributions paid by the employer are actually employee contributions paid by the employee and recharacterized at a later date. The retroactive specification of designated employee contributions as paid by the employing unit (i.e., the retroactive pick-up of designated employee contributions by a governmental employer), is not permitted under section 414(h)(2) of the Code. Thus, employees may not exclude from current gross income designated employee contributions to a qualified plan that relate to compensation earned for services rendered prior to the date of the last governmental action necessary to effect the pick-up.

Revenue Ruling 2006-43, 2006-35 I.R.B. 329, amplifying and modifying Revenue Ruling 81-35, Revenue Ruling 81-36, and Revenue Ruling 87-10, describes the actions required for a state or political subdivision of a state, or an agency or instrumentality of either, to pick-up employee contributions to a plan qualified under section 401(a) of the Code so that the contributions are treated as employer contributions pursuant to section 414(h)(2). Specifically, Revenue Ruling 2006-43 provides that a contribution to a qualified plan established by an eligible employer (i.e., a governmental employer) will be treated as picked-up by the employing unit under section 414(h)(2) of the Code if two conditions are satisfied:

1. First, the employing unit must specify that the contributions, although designated as employee contributions, are being paid by the employer. For this purpose, the employing unit must take formal action to provide that the contributions on behalf of a specific class of employees of the employing

unit, although designated as employee contributions, will be paid by the employing unit in lieu of employee contributions. A person duly authorized to take such action with respect to the employing unit must take such action. The action must apply only prospectively and be evidenced by a contemporaneous written document (e.g., minutes of a meeting, a resolution, or ordinance).

2. Second, the pick-up arrangement must not permit a participating employee from on and after the effective date of the pick-up to have a cash or deferred election right within the meaning of section 1.401(k)-1(a)(3) of the Regulations with respect to designated employee contributions. Thus, for example, no participating employee may be given the right to opt out of the pick-up arrangement described in section 414(h)(2) of the Code, or to receive the contributed amounts directly instead of having them paid by the employing unit to the plan.

Revenue Ruling 2006-43 states that the pick-up rules expressed in Revenue Ruling 81-35 and Revenue Ruling 81-36 apply even if the employer picks up contributions through a reduction in salary or through an offset against future salary increases.

In this case, the Supplemental Contributions made under section 3.1(d) of Plan C on behalf of certain eligible classifications of City A employees hired on or after January 1, 2014, are made pursuant to “one-time irrevocable elections” within the meaning of section 1.401(k)-1(a)(3)(v) of the Regulations. Each eligible employee’s election to have salary reduction contributions made under section 3.1(d) by City A to Plan C on the employee’s behalf in the amount of a designated percentage of the compensation otherwise payable to the employee, must be irrevocable and for the duration of the employee’s employment with the employer, and must be made no later than the employee’s first becoming eligible under Plan C or any other plan or arrangement of the employer. Consequently, pursuant to section 1.401(k)-1(a)(3)(v), the one-time irrevocable election offered under section 3.1(d) with respect to Supplemental Contributions does not constitute a cash or deferred arrangement within the meaning of section 1.401(k)-1(a)(2) of the Regulations. Since such a one-time irrevocable election is not a cash or deferred arrangement, it follows that it is also not a cash or deferred election within the meaning of section 1.401(k)-1(a)(3) of the Regulations.

Furthermore, consistent with the requirements stated in Revenue Ruling 81-36, Revenue Ruling 81-36, and Revenue Ruling 2006-43, with respect to a valid pick-up arrangement under section 414(h)(2) of the Code, Plan C, as formally adopted by City A, explicitly states that the Supplemental Contributions under section 3.1(d) described immediately above, although designated as elective, employee contributions, shall be paid by City A into Plan C. Section 3.1(d)(A) of Plan C provides that such payments by City A to Plan C shall be pick-up contributions pursuant to section 414(h)(2) of the Code. In further satisfaction of the requirements of Revenue Ruling 81-35, Revenue Ruling 81-36, and Revenue Ruling 2006-43, section 3.1(d)(A) of Plan C provides that no employee eligible for such a pick-up contribution has the option of choosing to receive the elected amount directly instead of having it paid by City A to Plan C. Moreover, since City A’s formal commitment to pick up the Supplemental Contributions on behalf of an employee exists under Plan C before the employee earns any compensation for Plan C purposes, there can be no retroactive pick-up of designated employee contributions by City A in contravention of Revenue Ruling 87-10 Additionally, as mandated by Revenue Ruling 2006-43, and for the reasons stated earlier, we find that section 3.1(d) of Plan C does not permit a participating employee from on and after the effective date of the pick-up of Supplemental Contributions by City A to have a cash or deferred election right within the meaning of section 1.401(k)-1(a)(3) of the Regulations with respect to designated employee contributions.

Accordingly, with respect to ruling request 3, we conclude that the Supplemental Contributions made to Plan C for eligible employees in accordance with section 3.1(d), and which are made pursuant to an irrevocable election of each eligible employee hired on or after January 1, 2014, upon first becoming eligible under any plan or arrangement of City A, shall be treated for federal income

tax purposes as employer contributions pursuant to section 414(h)(2) of the Code. Therefore, in accordance with Revenue Ruling 77-462, we further conclude that, subject to the limits on annual additions to a qualified plan of section 415(c) of the Code, such picked-up contributions to Plan C are not includible in the gross income of each such employee until such time as such amounts are distributed to the employee.

With respect to your fourth requested ruling, section 415(a)(1)(A) of the Code provides that a defined benefit plan is not a qualified plan if the plan provides for the payment of benefits with respect to a participant which exceed the limitation of section 415(b) of the Code.

Section 1.415(b)-1(b)(1)(ii) of the Regulations provides that an annual benefit, for purposes of determining the section 415(b) limitation, does not include the annual benefit attributable to either employee contributions or rollover contributions (as described in sections 401(a)(31), 402(c)(1), 403(a)(4), 403(b)(8), 408(d)(3), and 457(e)(16) of the Code), determined pursuant to the rules of section 1.415(b)-1(b)(2) of the Regulations. Section 1.415(b)-1(b)(1)(ii) further provides that the treatment of transferred benefits is determined under the rules of section 1.415(b)-1(b)(3) of the Regulations.

Section 1.415(b)-1(b)(2)(iii) of the Regulations provides that, in the case of mandatory employee contributions, as defined in section 411(c)(2)(C) of the Code and section 1.411(c)-1(c)(4) of the Regulations (or contributions that would be mandatory employee contributions if section 411 applied to the plan), the annual benefit attributable to those contributions is determined by applying the factors applicable to mandatory employee contributions, as described in sections 411(c)(2)(B) and (C) of the Code and regulations promulgated under section 411, to those contributions to determine the amount of a straight life annuity commencing at the annuity starting date, regardless of whether the requirements of sections 411 and 417 of the Code apply to that plan,

Section 1.415(b)-1(b)(2)(v) of the Regulations provides that the annual benefit attributable to rollover contributions from an eligible retirement plan, as defined in section 402(c)(8)(B) of the Code (for example, a contribution received pursuant to a direct rollover under section 401(a)(31)(A) of the Code), is determined in the same manner as the annual benefit attributable to mandatory employee contributions if the plan provides for a benefit derived from the rollover contribution (other than a benefit derived from a separate account to be maintained with respect to the rollover contribution and actual earnings and losses thereon). Thus, in the case of rollover contributions from a defined contribution plan to a defined benefit plan to provide an annuity distribution, the annual benefit attributable to those rollover contributions for purposes of section 415(b) is determined by applying the rules of section 411(c) as described in section 1.415(b)-1(b)(2)(iii) of the Regulations, regardless of the assumptions used to compute the annuity distribution under the plan and regardless of whether the plan is subject to the requirements of sections 411 and 417 of the Code. Accordingly, in such a case, if the plan uses more favorable factors than those specified in section 411(c) to determine the amount of annuity payments arising from rollover contributions, the annual benefit under the plan would reflect the excess of those annuity payments over the amounts that would be payable using the factors specified in section 411(c).

Section 1.415(b)-1(b)(3)(ii) of the Regulations provides that if there is an elective transfer of a distributable benefit to a defined benefit plan from either a defined contribution plan or a defined benefit plan, the amount transferred is treated as a benefit paid from the transferor plan, and the annual benefit provided by the transferee defined benefit plan does not include the annual benefit attributable to the amount transferred (determined as if the transferred amount were a rollover contribution subject to the rules of section 1.415(b)-1(b)(2)(v) of the Regulations). Section 1.415(b)-1(b)(3)(ii) further states that the rule described in the preceding sentence applies regardless of whether the requirements of section 411 of the Code apply to the plan and, in the case of a transfer

from a defined contribution plan that is not subject to the requirements of section 411 (such as a governmental plan) to a defined benefit plan, the rule applies even if the participant's benefits are not distributable from the defined contribution plan at the time of the transfer.

Section 415(n) of the Code generally provides that if a participant makes one or more contributions to a defined benefit governmental plan (within the meaning of section 414(d) of the Code) to purchase permissive service credit under such plan, then the requirements of section 415 of the Code shall be treated as met only if —

1. The requirements of section 415(b) of the Code are met, determined by treating the accrued benefit derived from all such contributions as an annual benefit for purposes of section 415(b); or

2. The requirements of section 415(c) of the Code are met, determined by treating all such contributions as annual additions for purposes of section 415(c).

Section 415(n)(3) defines "permissive service credit" as service credit —

1. recognized by the governmental plan for purposes of calculating a participant's benefit under the plan,

2. which such participant has not received under such governmental plan, and

3. which such participant may receive only by making a voluntary additional contribution, in an amount determined under such governmental plan, which does not exceed the amount necessary to fund the benefit attributable to such service credit.

Revenue Ruling 67-213, 1967-2 C.B. 149, involves the transfer of funds attributable to employer contributions directly from the trust forming a part of a qualified pension plan to the trust forming part of a qualified stock bonus plan. The revenue ruling provides, in part, that if funds are transferred from one qualified plan to another, without being made available to the participants, no taxable income will be recognized by the participants by reason of such a transfer. The revenue ruling further provides that since the funds are not considered as having been made available to the participants, they continue to be funds derived from employer contributions and do not constitute employee contributions even though they are fully vested.

In this case, section 6.3 of Plan C provides that, if authorized by Board F (or its designee), and to the extent permitted by applicable law, Plan C shall allow participants to make voluntary plan-to-plan transfers directly to Plan D (or another qualified defined benefit plan from which the participant is entitled to a benefit and which allows for such transfers) for the purchase of service credit under such transferee plan. Pursuant to Revenue Ruling 67-213, the plan-to-plan transfers from Plan C to Plan D will not be treated as a distribution from Plan C followed by an employee contribution to Plan D. Therefore, the trustee-to-trustee transfers made pursuant to section 6.3 of Plan C from a participant's account in Plan C to Plan D for the purchase of service credit will not be included in the gross income of the participant at the time of such transfer under section 402 of the Code.

As discussed above, section 415(n) of the Code provides that, in order to meet the requirements of section 415 of the Code, if a participant makes voluntary additional contributions to a defined benefit plan for the purchase of permissive service credit, the plan must either: (1) treat the accrued benefit derived from all such contributions as an annual benefit for purposes of section 415(b); or (2) all such contributions must be treated as annual additions for purposes of section 415(c).

In the present case, the voluntary plan-to-plan transfers from Plan C to Plan D, in accordance with section 6.3 of the Plan, do not constitute voluntary additional contributions made by a participant to

Plan D. Since section 415(n) of the Code applies to voluntary additional contributions made by a participant to purchase permissive service credit, and the transferred amounts are not voluntary additional contributions made by a participant, we find that section 415(n) does not apply to the transferred amounts.

As stated earlier, section 1.415(b)-1(b)(3)(ii) of the Regulations provides that if an elective transfer of a benefit is made from a governmental defined contribution plan to a defined benefit plan, the amount transferred is treated, for purposes of applying the section 415 limitations, as a benefit paid from the transferor plan. Section 1.415(b)-1(b)(3)(ii) further states that, for purposes of section 415, the annual benefit provided by the defined benefit plan does not include the annual benefit attributable to the amount transferred (determined as if the transferred amount were a rollover contribution subject to the rules of section 1.415(b)-1(b)(2)(v) of the Regulations).

In the present case, in accordance with section 1.415(b)-1(b)(2)(v) of the Regulations, the annual benefit attributable to the plan-to-plan transfers from Plan C to Plan D, for purposes of section 415(b), is determined by applying the rules of section 411(c) as described in section 1.415(b)-1(b)(2)(iii) of the Regulations. Therefore, if Plan D uses the factors specified in section 411(c) of the Code to calculate the annual benefit under the plan, then, for purposes of the limitation of section 415(b), as provided in section 1.415(b)-1(b)(3)(ii) of the Regulations, the annual benefit provided under Plan D does not include the annual benefit attributable to the amounts transferred from Plan C for the purchase of service credit. However, pursuant to section 1.415(b)-1(b)(2)(v) of the Regulations, if Plan D uses more favorable factors than those specified in section 411(c) of the Code to determine the amount of annuity payments arising from the transferred amounts, the annual benefit under Plan D, for purposes of the limitation of section 415(b), would reflect the excess of those annuity payments over the amounts that would be payable using the factors specified in section 411(c).

Based on the foregoing, with respect to ruling request 4, we conclude that trustee-to-trustee transfers made pursuant to section 6.3 of Plan C from a participant's account in Plan C to Plan D for the purchase of service credit will not be included in the gross income of the participant under section 402 of the Code. We further conclude, with respect to ruling request 4, that such transferred amounts are not annual additions under section 415(c) of the Code, and the benefit attributable to the transferred amount is not subject to the limitation on benefits under section 415(b) of the Code; provided, however, if Plan D uses more favorable factors than those specified in section 411(c) of the Code to determine the amount of annuity payments arising from the transferred amounts, the annual benefit under Plan D would reflect the excess of those annuity payments over the amounts that would be payable using the factors specified in section 411(c). In addition, with respect to ruling request 4, we conclude that section 415(n) of the Code is not applicable to the transferred amounts and the transferred amounts are not subject to limitation under section 415 of the Code at the time of transfer.

No opinion is expressed as to the federal tax consequences of the transactions described above under any other provisions of the Code.

This ruling is based on the assumption that Plan C, Plan D, and Plan E satisfy the qualification requirements set forth in section 401(a) of the Code, and constitute governmental plans within the meaning of section 414(d) of the Code, at all relevant times.

This ruling is directed only to the specific taxpayers that requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited by others as precedent.

Pursuant to a power of attorney on file with this office, a copy of this letter ruling is being sent to

your authorized representatives.

Should you have any questions or concerns regarding this ruling, please contact * * * (I.D. Number * * * at * * *. Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours,

Laura B. Warshawsky, Manager
Employee Plans Technical Group 3
Enclosures:
Deleted copy of this letter
Notice of Intention to Disclose

cc:
* * *

IRS Issues Guidance on Facilities Financed With Tax-Exempt Bonds.

The IRS has provided guidance (Notice 2014-67) for determining whether a state or local government entity or an exempt organization that benefits from tax-exempt bond financing will be considered to make private business use of its bond-financed facilities as a result of participating in the Medicare shared savings program through an accountable care organization (ACO).

Section 103 provides that gross income generally does not include interest on any state or local bond, but the exclusion does not apply to any private activity bond that is not a qualified bond. A private activity bond is defined in section 141(a) as any bond issued as part of an issue (1) that meets the private business use test and private security or payment test, or (2) that meets the private loan financing test. A bond issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use.

An ACO is a legal entity established by two or more healthcare providers or suppliers to coordinate and improve care for some Medicare beneficiaries and reduce costs. Under the Medicare shared savings program, an ACO that meets quality performance standards and satisfies specified cost savings benchmarks is eligible to receive payment of a portion of the total savings generated. Both for-profit entities and organizations exempt from tax under section 501(c)(3) may participate in an ACO. Notice 2014-67 is in part a response to governmental entities and tax-exempt hospitals that asked whether participating in an ACO with a for-profit entity will result in private business use of facilities financed with tax-exempt bonds.

According to Notice 2014-67, participation by a user of a healthcare facility financed with tax-exempt bonds in the shared savings program through an ACO that includes participants that are nongovernmental persons must be structured to not result in private business use of the facility. Also, any section 501(c)(3) organization using a facility financed with tax-exempt bonds must structure its participation in an ACO so that it neither jeopardizes its exempt status nor causes it to be engaged in an unrelated trade or business under section 513(a). Notice 2014-67 specifies six conditions under which the participation of a qualified user in the shared savings program through an ACO in itself will not result in private business use of the bond-financed facility.

Similarly, Notice 2014-67 provides that management contracts between qualified users of hospitals or other healthcare facilities that are financed with tax-exempt bonds and nongovernmental persons

to provide healthcare services at the facilities must be structured to avoid private business use. Notice 2014-67 amplifies the permitted productivity rewards and the types of permissible arrangements described in Rev. Proc. 97-13 that do not result in private business use, provided all other requirements of the revenue procedure are met. The notice also solicits public comments on further guidance needed to facilitate participation in the shared savings program.

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Notice 2014-67; 2014-46 IRB 1

Private business use of tax-exempt bond financed facilities

Part III — Administrative, Procedural, and Miscellaneous

SECTION 1. INTRODUCTION

The Internal Revenue Service (IRS) is considering the application of the provisions of the Internal Revenue Code (Code) governing tax-exempt bonds to arrangements entered into by hospitals or other health care organizations participating in the Medicare Shared Savings Program (Shared Savings Program) described in §§ 3022 and 10307 of the Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (Affordable Care Act), enacted March 23, 2010. This notice provides interim guidance for determining whether a State or local government entity or an organization described in § 501(c)(3) of the Code that benefits from tax-exempt bond financing will be considered to have private business use of its bond-financed facilities under § 141 or § 145(a)(2)(B) of the Code as a result of its participation in the Share Savings Program through an “accountable care organization” (ACO). In addition, this notice amplifies Rev. Proc. 97-13, 1997-1 C.B. 632, as amended by Rev. Proc. 2001-39, 2001-2 C.B. 38 (cited herein as “Rev. Proc. 97-13”), regarding certain management contracts that do not result in private business use. This notice also solicits public comments on this interim guidance and on further guidance needed to facilitate participation in the Shared Savings Program.

SECTION 2. BACKGROUND

ACOs and the Shared Savings Program

Section 3022 of the Affordable Care Act amended Title XVIII of the Social Security Act (SSA) (42 U.S.C. 1395 et seq.) by adding a new § 1899, which directs the Secretary of the Department of Health and Human Services (HHS) to establish a Medicare shared savings program that promotes accountability for care of Medicare beneficiaries, improves the coordination of Medicare fee-fo--service items and services, and encourages investment in infrastructure and redesigned care processes for high quality and efficient service delivery. Under § 1899(b)(1) of the SSA, groups of health care service providers and suppliers that have established a mechanism for shared governance and that meet criteria specified by HHS are eligible to participate as ACOs under the program.

Section 1899(b)(1) of the SSA provides examples of groups of service providers and suppliers that may form an ACO, including (i) physicians and other health care practitioners (ACO professionals) in a group practice, (ii) a network of individual practices, (iii) a partnership or joint venture arrangement between hospitals and ACO professionals, and (iv) a hospital employing ACO professionals. ACOs eligible to participate in the Shared Savings Program will manage and coordinate care for their assigned Medicare fee-for-service beneficiaries. Health care service providers and suppliers participating in an ACO will continue to receive Medicare fee-for-service

payments in the same manner as such payments would otherwise be made. In addition, an ACO that meets quality performance standards established by HHS and demonstrates that it has achieved savings against an appropriate benchmark of expected average per capita Medicare fee-for-service expenditures will be eligible to receive payments for Medicare shared savings (Shared Savings Program payments) under § 1899(d)(2) of the SSA. Section 1899(i) of the SSA also authorizes the use of other payment models that the HHS Secretary determines will improve the quality and efficiency of items and services for Medicare.

Section 1899(b)(2) of the SSA establishes the following requirements for an ACO to participate in the Shared Savings Program:

(1) The ACO shall be willing to become accountable for the quality, cost, and overall care of the Medicare fee-for-service beneficiaries assigned to it.

(2) The ACO shall enter into an agreement with the HHS Secretary to participate in the Shared Savings Program for not less than a 3-year period.

(3) The ACO shall have a formal legal structure that would allow the organization to receive and distribute Shared Savings Program payments to participating providers of services and suppliers.

(4) The ACO shall include primary care ACO professionals that are sufficient for the number of Medicare fee-for-service beneficiaries assigned to the ACO under § 1899(c). At a minimum, the ACO shall have at least 5,000 such beneficiaries assigned to it under § 1899(c) to be eligible to participate in the Shared Savings Program.

(5) The ACO shall provide the HHS Secretary with such information regarding ACO professionals participating in the ACO as the Secretary determines necessary to support the assignment of Medicare fee-for-service beneficiaries to an ACO, the implementation of quality and the other reporting requirements under § 1899(b)(3), and the determination of Shared Savings Program payments.

(6) The ACO shall have in place a leadership and management structure that includes clinical and administrative systems.

(7) The ACO shall define processes to promote evidence-based medicine and patient engagement, report on quality and cost measures, and coordinate care, such as through the use of telehealth, remote patient monitoring, and other such enabling technologies.

(8) The ACO shall demonstrate to the HHS Secretary that it meets patient-centeredness criteria specified by the Secretary, such as the use of patient and caregiver assessments or the use of individualized care plans.

On November 2, 2011, the Centers for Medicare & Medicaid Services (CMS), the agency within HHS that administers the Medicare program, published final regulations addressing § 1899 of the SSA (76 FR 67802). The regulations contain specific eligibility criteria for entities to qualify as ACOs under the Shared Savings Program and describe quality measures, reporting requirements, and monitoring by CMS. The regulations require the ACO to be a legal entity formed under applicable State, Federal, or Tribal law, identified by a taxpayer identification number, and authorized in each State in which it operates for purposes of (1) receiving and distributing shared savings; (2) repaying shared losses or other monies determined to be owed to CMS; (3) establishing, reporting, and ensuring provider compliance with health care quality criteria, including quality performance standards; and (4) fulfilling other ACO functions identified in the regulations. The regulations

require an ACO to provide for meaningful participation in the composition and control of the ACO's governing body by ACO participants (or their designated representatives). In addition, the regulations generally require that the ACO's governing body include a Medicare beneficiary representative(s) served by the ACO who does not have a conflict of interest with the ACO.

The regulations require an ACO seeking to participate in the Shared Savings Program to submit a written application to CMS describing how the ACO plans to use and distribute any Shared Savings Program payments and how that plan would contribute to achieving the specific goals of the Shared Savings Program and the general aims of better care for individuals, better health for populations, and lower growth in expenditures.

Finally, consistent with the authorization in § 1899(i) of the SSA of alternative payment models, the regulations provide a "two-sided model" under which participating ACOs not only would be eligible to share in cost savings at higher rates but also would be required to repay losses resulting from spending that exceeds a benchmark of expected average per capita Medicare fee-for-service expenditures (Shared Savings Program losses).

Private Business Use of Tax-Exempt Bonds

Section 103(a) of the Code provides that, except as provided in § 103(b) of the Code, gross income does not include interest on any State or local bond. Section 103(b)(1) of the Code provides that § 103(a) of the Code shall not apply to any private activity bond that is not a qualified bond (within the meaning of section 141 of the Code).

Section 141(a) of the Code provides that the term "private activity bond" means any bond issued as part of an issue (1) that meets the private business use test and private security or payment test, or (2) that meets the private loan financing test.

Section 141(b)(1) of the Code provides generally that an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Section 141(b)(6) of the Code defines "private business use" as use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. For this purpose, any activity carried on by a person other than a natural person must be treated as a trade or business use.

Section 1.141-3(a) of the Income Tax Regulations provides, in part, that the 10 percent private business use test of § 141(b)(1) of the Code is met if more than 10 percent of the proceeds of an issue is used in a trade or business of a nongovernmental person. For this purpose, the use of financed property is treated as the direct use of proceeds. Section 1.141-1(b) defines a nongovernmental person as a person other than a governmental person. Pursuant to § 1.141-1(b), a governmental person means a State, territory, a possession of the United States, the District of Columbia, or any political subdivision thereof, or any instrumentality of the foregoing. The United States and any agencies and instrumentalities thereof are not governmental persons.

Section 1.141-3(b)(1) provides that both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer. In general, a nongovernmental person is treated as a private business user as a result of ownership; actual or beneficial use of property pursuant to a lease, a management contract, or an incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract. Section 1.141-3(b)(7) provides that any other arrangement that conveys special legal entitlements for beneficial use of bond proceeds or of financed property that are comparable to the special legal entitlements described above results in private business use.

Section 1.141-3(b)(4)(i) provides generally that a management contract with respect to financed property may result in private business use of that property, based on all of the facts and circumstances. A management contract with respect to financed property generally results in private business use of that property if the contract provides for compensation for services rendered with compensation based, in whole or in part, on a share of net profits from the operations of the facility.

Section 1.141-3(b)(4)(ii) defines “management contract” as a management, service, or incentive payment contract between a governmental person and a service provider under which the service provider provides services involving all, a portion, or any function, of a facility. For example, a contract for the provision of management services for an entire hospital, a contract for management services for a specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract.

Section 1.141-3(b)(4)(iii) provides that certain arrangements described therein generally are not treated as management contracts that give rise to private business use. The described arrangements include (A) contracts for services that are solely incidental to the primary governmental function or functions of a financed facility (for example, contracts for janitorial, office equipment repair, hospital billing, or similar services); and (B) the mere granting of admitting privileges by a hospital to a doctor, even if those privileges are conditioned on the provision of de minimis services if those privileges are available to all qualified physicians in the area, consistent with the size and nature of the hospital’s facilities.

Section 141(e) of the Code provides, in part, that the term “qualified bond” includes a qualified 501(c)(3) bond if certain requirements stated therein are met.

Section 145(a) of the Code provides generally that the term “qualified 501(c)(3) bond” means any private activity bond issued as part of an issue if (1) all property that is to be provided by the net proceeds of the issue is to be owned by a 501(c)(3) organization or a governmental unit, and (2) such bond would not be a private activity bond if (A) 501(c)(3) organizations were treated as governmental units with respect to their activities that do not constitute unrelated trades or businesses, determined by applying § 513(a) of the Code, and (B) §§ 141(b)(1) and (2) of the Code were applied by substituting “5 percent” for “10 percent” each place it appears and by substituting “net proceeds” for “proceeds” each place it appears. Section 150(a)(4) of the Code defines the term “501(c)(3) organization” to mean any organization described in § 501(c)(3) and exempt from tax under § 501(a) of the Code.

Section 1.145-2 provides that, with certain exceptions and modifications, §§ 1.141-0 through 1.141-15 apply to § 145(a) of the Code. Section 1.145-2(b) provides that, in applying §§ 1.141-0 through 1.141-15 to § 145(a), (1) references to governmental persons include 501(c)(3) organizations with respect to their activities that do not constitute unrelated trades or businesses under § 513(a) of the Code; (2) references to “10 percent” and “proceeds” in the context of the private business use test and the private security or payment test mean “5 percent” and “net proceeds”, respectively; and (3) references to the private business use test in §§ 1.141-2 and 1.141-12 include the ownership test of § 145(a)(1) of the Code.

Rev. Proc. 97-13 sets forth conditions under which a management contract between a qualified user and a service provider does not result in private business use under § 141(b) of the Code. Rev. Proc. 97-13 also applies to determinations of the effect of such a management contract on whether a bond meets the test in § 145(a)(2)(B) of the Code. Section 3.07 of Rev. Proc. 97-13 defines “qualified user” as any State or local governmental unit as defined in § 1.103-1 or any instrumentality thereof. The term also includes a 501(c)(3) organization if the financed property is not used in an unrelated trade or business under § 513(a) of the Code. The term does not include the United States or any agency

or instrumentality thereof.

Section 5.01 of Rev. Proc. 97-13 provides that if the requirements of section 5 of Rev. Proc. 97-13 are satisfied a management contract does not itself result in private business use. In addition, the use of financed property, pursuant to a management contract meeting these requirements, is not private business use if that use is functionally related and subordinate to that management contract and that use is not, in substance, a separate contractual agreement (for example, a separate lease of a portion of the financed property).

Under section 5.02(1) of Rev. Proc. 97-13, the management contract must provide for reasonable compensation for services rendered with no compensation based, in whole or in part, on a share of net profits from the operation of the facility.

Section 5.02(2) of Rev. Proc. 97-13 provides, for purposes of § 1.141-3(b)(4)(i) and Rev. Proc. 97-13, that compensation based on (a) a percentage of gross revenues (or adjusted gross revenues) of a facility or a percentage of expenses from a facility, but not both; (b) a capitation fee; or (c) a per-unit fee is generally not considered to be based on a share of net profits.

Section 5.02(3) of Rev. Proc. 97-13 provides, for purposes of § 1.141-3(b)(4)(i) and Rev. Proc. 97-13, that a productivity reward equal to a stated dollar amount based on increases or decreases in gross revenues (or adjusted gross revenues), or reductions in total expenses (but not both increases in gross revenues (or adjusted gross revenues) and reductions in total expenses) in any annual period during the term of the contract, generally does not cause the compensation to be based on a share of net profits.

Section 5.03 of Rev. Proc. 97-13 provides that the management contract must be described in section 5.03(1), (2), (3), (4), (5), or (6). Section 5.03(4) describes periodic fixed fee and capitation fee arrangements in certain 5-year contracts. Section 5.03(5) describes per-unit fee arrangements in certain 3-year contracts. Section 5.03(6) describes percentage of revenue or expense fee arrangements in certain 2-year contracts.

SECTION 3. INTERIM GUIDANCE

01. Participation by Governmental Persons or Section 501(c)(3) Organizations in the Shared Savings Program through ACOs

The IRS understands that governmental persons (as defined in § 1.141-1(b)) and 501(c)(3) organizations typically will be participating in the Shared Savings Program through ACOs with nongovernmental persons. The IRS further understands that this participation may take a variety of forms, including membership in a nonprofit membership corporation, ownership of shares in a corporation, ownership of a partnership interest in a partnership, and ownership of a membership interest in an LLC.

Under the private business use test described above, participation by a user of a health care facility financed with tax-exempt bonds in the Shared Savings Program through an ACO that includes participants that are nongovernmental persons must be structured so as not to result in private business use of the facility. In addition, any 501(c)(3) organization using a facility financed with tax-exempt bonds must structure its participation in an ACO so that its participation neither jeopardizes its 501(c)(3) status nor causes it to be engaged in an unrelated trade or business under § 513(a) of the Code.

The participation of a qualified user (as defined in section 3.07 of Rev. Proc. 97-13) in the Shared

Savings Program through an ACO in itself will not result in private business use of the tax-exempt bond financed facility if all of the following conditions are met:

The terms of the qualified user's participation in the Shared Savings Program through the ACO (including its share of Shared Savings Program payments or losses and expenses) are set forth in advance in a written agreement negotiated at arm's length.

CMS has accepted the ACO into, and has not terminated the ACO from, the Shared Savings Program.

The qualified user's share of economic benefits derived from the ACO (including its share of Shared Savings Program payments) is proportional to the benefits or contributions the qualified user provides to the ACO. If the qualified user receives an ownership interest in the ACO, the ownership interest received is proportional and equal in value to its capital contributions to the ACO and all ACO returns of capital, allocations, and distributions are made in proportion to ownership interests.

The qualified user's share of the ACO's losses (including its share of Shared Savings Program losses) does not exceed the share of ACO economic benefits to which the qualified user is entitled.

All contracts and transactions entered into by the qualified user with the ACO and the ACO's participants, and by the ACO with the ACO's participants and any other parties, are at fair market value.

The qualified user does not contribute or otherwise transfer the property financed with tax-exempt bonds to the ACO unless the ACO is an entity that is a governmental person, or in the case of qualified 501(c)(3) bonds, either a governmental person or a 501(c)(3) organization.

.02 Management Contracts

It is anticipated, further, that qualified users of hospitals or other health care facilities that are financed with tax-exempt bonds will enter into management contracts (as defined in § 1.141-3(b)(4)(ii)) with nongovernmental persons to provide health care services at the qualified users' facilities that will take into account the quality performance standards and Medicare fee-for-service expenditures relevant to participation in the Shared Savings Program. Under the private business use test described above, a qualified user must structure its management contracts with respect to those facilities to avoid private business use.

This notice amplifies the permitted productivity rewards and the types of permissible arrangements described in Rev. Proc. 97-13 that do not result in private business use, provided all other requirements of section 5 of Rev. Proc. 97-13 are met.

(1) Section 5.02(3) of Rev. Proc. 97-13 is amplified to add the following text at the end:

A productivity reward for services in any annual period during the term of the contract generally also does not cause the compensation to be based on a share of net profits of the financed facility if:

The eligibility for the productivity award is based on the quality of the services provided under the management contract (for example, the achievement of Medicare Shared Savings Program quality performance standards or meeting data reporting requirements), rather than increases in revenues or decreases in expenses of the facility; and

The amount of the productivity award is a stated dollar amount, a periodic fixed fee, or a tiered system of stated dollar amounts or periodic fixed fees based solely on the level of performance

achieved with respect to the applicable measure.

(2) Section 5.03 of Rev. Proc. 97-13 is amplified to revise the first sentence and add new section 5.03(7) at the end as follows:

.03 Permissible Arrangements. The management contract must be described in section 5.03(1), (2), (3), (4), (5), (6), or (7).
* * * * *

(7) Arrangements in certain 5-year contracts. All of the compensation for services is based on a stated amount; periodic fixed fee; a capitation fee; a per-unit fee; or a combination of the preceding. The compensation for services also may include a percentage of gross revenues, adjusted gross revenues, or expenses of the facility (but not both revenues and expenses). The term of the contract, including all renewal options, does not exceed five years. Such contract need not be terminable by the qualified user prior to the end of the term. For purposes of this section 5.03(7), a tiered productivity award as described in section 5.02(3) will be treated as a stated amount or a periodic fixed fee, as appropriate.

SECTION 4. REQUEST FOR PUBLIC COMMENTS

The IRS expects to issue guidance concerning management contracts for purposes of §§ 141 and 145(a)(2)(B) of the Code. That guidance may address issues relevant to participation in the Shared Savings Program. To help inform that guidance, the Treasury Department and the IRS solicit comments on the guidance that is described in section 3 of this notice and on further guidance needed to facilitate participation in the Shared Savings Program by qualified users of tax-exempt bond financed facilities through ACOs.

Public comments should be submitted in writing on or before January 22, 2015. Comments should be sent to the following address:

Internal Revenue Service
CC:PA:LPD:PR (Notice 2014-67)
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044
Comments may be hand delivered to:

CC:PA:LPD:PR (Notice 2014-67)
Courier’s Desk
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Comments may also be sent electronically to notice.comments@irscounsel.treas.gov. Please include “Notice 2014-67” in the subject line.
All comments will be available for public inspection.

SECTION 5. APPLICABILITY DATES

Section 3.01 of this notice applies to bonds subject to § 141 or § 145(a)(2)(B) of the Code sold on or after January 22, 2015. Section 3.01 may be applied to bonds sold before January 22, 2015 that are subject to § 141 or § 145(a)(2)(B) of the Code.

Section 3.02 of this notice applies to contracts entered into, materially modified, or extended (other than pursuant to a renewal option) on or after January 22, 2015. Section 3.02 may be applied to contracts entered into before January 22, 2015.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 97-13 is amplified by this notice.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Johanna Som de Cerff of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this notice contact Johanna Som de Cerff on (202) 317-6980 (not a toll-free call).

IRS Issues Guidance on Facilities Financed With Tax-Exempt Bonds.

The IRS has provided guidance for determining whether a state or local government entity or an exempt organization that benefits from tax-exempt bond financing will be considered to have private business use of its bond-financed facilities as a result of participating in the Medicare Shared Savings Program through an accountable care organization.

IRS Issues Guidance on ACOs.

The Internal Revenue Service today released Notice 2014-67, which provides guidance for determining whether a State or local government entity or a 501(c)(3) organization will be considered to have private business use of its tax-exempt bond-financed facilities due to its participation in an “accountable care organization” and guidance regarding certain management contracts that do not result in private business use.

IRS Notice 2014-67 on Private Business Use of Tax-Exempt Bond Financed Facilities can be seen here.

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