TAX - ALABAMA

City of Pike Road v. City of Montgomery

Supreme Court of Alabama - December 11, 2015 - So.3d - 2015 WL 8569354

Property owner filed interpleader action to resolve dispute between the City of Montgomery and the City of Pike Road concerning police jurisdiction over manufacturing plant located in unincorporated section of County and the corresponding right to sales and use taxes.

The Circuit Court entered judgment in favor of Montgomery and Pike Road appealed.

The Supreme Court of Alabama held that:

- Police jurisdiction could expand to include area within three miles of city limits only after either a federal decennial census or a municipal census established that population exceeded 6,000 inhabitants, and
- City's population was not proper subject of judicial notice.

Municipality's police jurisdiction could expand to include area within three miles of its city limits only after either a federal decennial census or a municipal census established that population exceeded 6,000 inhabitants, and, the jurisdiction could not expand based on United States Census Bureau's estimate showing population in excess of 6,000. (Per Justice Stuart with three Justices concurring and a Special Justice concurring in result).

City population between federal decennial censuses was not proper subject of judicial notice in cities' dispute over whether population of smaller city grew to exceed 6,000 residents and smaller city's police jurisdiction grew to three miles beyond its city limits. City's population was the subject of dispute. (Per Justice Stuart with three Justices concurring and a Special Justice concurring in result).

Tax-Exempt Hospitals Face Payments to Host Towns in New Jersey.

New Jersey's nonprofit hospitals, which have long enjoyed a tax exemption, would have to make payments to their host communities to cover the cost of municipal services under a bipartisan measure making its way through the state legislature.

Lawmakers are responding to a June court ruling which found that the 40-acre Morristown Medical Center owed local property taxes because of "blurred lines" between its nonprofit and for-profit businesses. The 687-bed hospital's owner agreed in November to pay the town $15.5 million over the next decade.

The decision opened the door for other municipalities that host nonprofit businesses, including hospitals and universities, to challenge their tax-exempt status. Hospitals in Illinois, Pennsylvania and Iowa also have faced challenges as towns struggle to balance budgets.

“It’s not a stretch to say that every nonprofit that owns property should be looking at this,” Linda Czipo, executive director of the Center for Non-Profits, an organization based in Mercerville, New Jersey that advocates for the groups in Trenton and Washington. “We’re concerned about how the whole property-tax issue might play out for the broader nonprofit community.”

The judge who issued the Morristown ruling is also presiding over a lawsuit against Princeton University, New Jersey’s only Ivy League school. Residents are challenging its exemption because it collects drug-patent royalties that it shares with faculty.

Tax Code

The Morristown hospital’s tax-exemption challenge, like those in other states, arose in part from President Barack Obama’s signature 2010 legislation designed to shrink the number of Americans without health insurance, and in large measure due to a wave of consolidations in the hospital industry. While the existence of a new generation of joint operations and profit-based services cropped up in order to trim costs, hospitals were still operating under a tax code put in place around the turn of the last century.

“The law as it was written in 1913 really didn’t apply today,” said Senator Joseph Vitale, a Democrat from Woodbridge. “It’s a new day of doing business for hospitals.”

Vitale is co-sponsoring a bill that would establish a payment formula for nonprofit hospitals that have for-profit businesses, such as doctor groups. The new payments would be less confusing for the governments who would have to decide how to assess the bills for the hospitals, and are designed to be lower than the full levies they might otherwise face, said Senator Robert Singer, a Republican from Lakewood who is also a co-sponsor.

“This is an opportunity for hospitals to keep their heads above water,” Singer said. “As municipalities get cash-strapped, they are looking at every resource, and the Morristown case was a ’my ship has come in’ moment.”

The legislation would obligate the hospitals to make “community service contributions” of $2.50 per bed a day to host municipalities to defray costs such as police, fire and ambulance crews. Many poor, inner-city hospitals or those deemed money-losing by the state would be exempt under the bill, which passed a Senate committee this month.

Statewide Solution

Hospitals account for 140,000 jobs in the state and see more than 18 million patients a year, according to the New Jersey Hospital Association, the state-level trade group representing almost 400 health-care organizations. The association supports the measure.

“Clearly, the Morristown tax court decision has created a great deal of uncertainty, for hospitals and municipalities alike,” Betsy Ryan, NJHA’s president, said in a statement. “Our goal was to support a statewide solution that would strike a fair balance.”

In New Jersey, property taxes make up almost all of the local revenue used to fund town, county and school budgets. While hospitals can serve as a community’s economic anchor, the towns — and their residents — are footing the bill for the cost of services such as police and fire.

Nonprofits employ 314,000 people in New Jersey, nearly 10 percent of the state's private workforce.

Nicole Sizemore, a spokeswoman for Governor Chris Christie, declined to comment on pending legislation.

"What folks forget is that for most non-profits the margin is razor thin," said Andrew Dick, an Indianapolis attorney who represents hospitals in tax-exemption cases for Hall, Render, Killian, Heath & Lyman P.C. "If they had to pay the property taxes, that could be enough to push them into the red."

Bloomberg News

by Terrence Dopp

December 28, 2015 — 4:57 AM PST

NABL: Tribal Economic Development Bonds, New CREBs.

On December 4, 2015, the IRS published Notice 2015-83 on Tribal Economic Development (TED) Bonds issued under a draw-down loan structure. Notice 2015-83 adds a new Section 10 to Notice 2012-48. Notice 2012-48 provided that any allocated bond volume unused after 180 days from the date of the allocation letter would be forfeit. Under Notice 2015-83, if a tribal government received a TED bond allocation and issues at least 10 percent of the allocation within 180 days, then the tribal government will have two years, or in some cases three years, to issue the remaining amount. The application for the allocation of volume cap must include a commitment letter from a financial institution stating that the institution reasonably expects to advance the total principal amount of the draw-down bonds no later than three years after the date of the allocation letter.

Notice 2015-83 also requests comments on whether similar rules should be provided for New CREBs.

The rule is effective for applications for TED bond volume cap submitted on or after December 4, 2015.

Allocations that did not expire before December 4, 2015 may also be able to rely on Notice 2015-83.

To read Notice 2015-83, please click here.

Notice 2012-48 is available here.

TAX - KANSAS

In re Equalization Appeal of Kansas Star Casino, L.L.C.

Court of Appeals of Kansas - November 20, 2015 - P.3d - 2015 WL 7375845

Kansas Star Casino, L.L.C. appealed from the ruling by the Kansas Court of Tax Appeals (COTA) that the appraised value of its property, a 195.5 acre tract of land located in the northeast corner of Sumner County and used for casino operations, was $80,510,000 for the tax year 2012. In reaching its conclusion, COTA determined that the value for Kansas Star's land was $16,931,250. This amount was based on the actual price Kansas Star's parent company paid for the land.

On appeal, Kansas Star argued that COTA erroneously inflated the value of its land and that the land should have been valued based on sales of agricultural property in the surrounding area. The County cross-appealed, arguing COTA erred in declining to include various additional costs as part of its valuation.

The Court of Appeals affirmed, holding that:

- Highest and best use of land was for casino operations, and, thus, appraisal complied with the law;
- Value added to land due to taxpayer's selection as gaming facility manager was not exempt from taxation;
- Option acquisition payment was properly included in property value;
- Taxpayer did not purchase land under undue compulsion; and
- County did not meet its burden to prove that taxpayer's marquee sign was personal property.

In appraising property for purposes of ad valorem taxation, highest and best use of tract of land was for operation of casino, where taxpayer was hired by state pursuant to Expanded Lottery Act as gaming facility manager via management contract to construct and own casino improvements and infrastructure and manage gaming operations, and no other entity was permitted to build a casino in south central gaming zone.

Value that was added to taxpayer's tract of land by Kansas Expanded Lottery Act (KELA) and management contract that allowed taxpayer to construct and own casino improvements and infrastructure and manage gaming operations on tract did not represent value that was separate from tract's property value so as to be exempt from ad valorem taxation.

In assessing ad valorem taxes, option acquisition payment was required to be included as part of value of real property, on which taxpayer was entitled under management contract with state to construct and own casino improvements and infrastructure and manage gaming operations on property. Without buying option, there would have been encumbrance on the tract, and taxpayer would not have possessed a fee simple interest.

Taxpayer's purchase of real property, on which taxpayer would operate casino pursuant to management contract with state, was not result of undue compulsion, and thus use of purchase price to determine fair market value property for purposes of ad valorem taxation was warranted, where taxpayer entered into options for property voluntarily in open and competitive market, and taxpayer was neither forced to pay a certain price nor to exercise its options after it was awarded contract.

County did not meet its burden to prove that taxpayer's marquee sign was personal property for purposes of valuing property for ad valorem taxation, where county pointed only to testimony that was largely conclusory.

Costs associated with trailer rentals for Racing and Gaming Commission (RGC) was not a "soft cost" subject to ad valorem taxation regarding real property used for casino operations by taxpayer, which was hired by the State pursuant to the Expanded Lottery Act as gaming facility manager via a management contract to construct and own the casino improvements and infrastructure and manage the gaming operations, although presence of RGC employees was necessary for licensing and approval of vendors. Requirement that RGC employees be present related to the management contract, not the construction of the casino itself.

Costs in organizational, administrative, and legal expenses were not "soft costs" subject to ad valorem taxation of property used for casino operations by taxpayer, which was hired by the State pursuant to the Expanded Lottery Act as gaming facility manager via a management contract to construct and own the casino improvements and infrastructure and manage the gaming operations, where the costs were for business start-up and preopening expenses, such as regulatory fees, preopening payroll, preopening marketing, preopening training and uniforms.

County did not meet its burden to prove that financing costs were soft costs subject to ad valorem taxation of property used for casino operations by taxpayer, which was hired by the State pursuant to the Expanded Lottery Act as gaming facility manager via a management contract to construct and own the casino improvements and infrastructure and manage the gaming operations, where appraiser's projected financing costs were called into question because they were based on 12 months, rather than the actual nine-month production cycle.

[IRS Amends TED Bond Volume Cap Rules To Accommodate Draw-Down Loans: Holland & Knight]

HIGHLIGHTS:

- The Internal Revenue Service (IRS) has issued Notice 2015-83, which will make it easier for Indian tribal governments to use tribal economic development (TED) volume cap for "draw-down" loan structures in which the lender advances funds for the loan on different dates.
- Draw-down loans are often a preferred means for tribal governments to borrow money for new construction projects because construction funds are borrowed in stages as needed, thereby reducing the "negative carry" associated with notes or bonds in which the full construction costs are borrowed and interest begins to accrue upon the sale of the securities.
- In addition, since draw-down loans are not considered securities subject to registration with the U.S. Securities and Exchange Commission (SEC), tribes can utilize them to borrow funds without incurring such increased costs.

The Internal Revenue Service (IRS) issued Notice 2015-83 on Dec. 4, 2015, a change that will make it easier for Indian tribal governments to use tribal economic development (TED) volume cap for "draw-down" loan structures in which the lender advances funds for the loan on different dates. Under a legislative provision enacted in 2009 as part of the American Recovery and Reinvestment Act, tribal governments may apply for TED volume cap in order to finance on-reservation, non-gaming economic development projects with tax-exempt debt. However, relatively few tribal governments have taken advantage of TED bonds or loans since they first became available in 2010.

Draw-down loans are often a preferred means for tribal governments to borrow money for new construction projects because construction funds are borrowed in stages as needed, thereby reducing the "negative carry" associated with notes or bonds in which the full construction costs are borrowed and interest begins to accrue upon the sale of the securities. Further, securities – such as bonds or notes – issued by a tribal governments are not exempt from registration requirements of the U.S. Securities and Exchange Commission (SEC) under the federal securities laws, often resulting in higher rates of interest and closing costs. Since draw-down loans are not considered securities subject to registration with the SEC, tribes can utilize them to borrow funds without incurring such increased costs.

In 2012, the IRS issued Notice 2012-48, under which a tribal government would have to issue debt obligations utilizing its allocated TED volume cap within 180 days of receiving the allocation. It was not clear how the IRS' 180-day rule, which was put in place administratively to encourage tribal governments use allocation awards promptly, would apply to draw-down loans. Arguably, draw-down loans were at odds with the IRS timing requirements because typically the loan proceeds would be drawn down over a longer period of time, sometimes two or three years.

Overview of Notice 2015-83 Requirements

Under Notice 2015-83, the IRS established new rules that accommodate the use of TED volume cap in the draw-down loan context. If a tribal government receives a TED allocation for a tax-exempt draw-down loan and spends at least 10 percent of the borrowed money within 180 days, it will have up to three years from the date of the allocation to spend the remaining volume cap amount. To have a full three years from the original allocation date, the tribal government must not only meet the 10 percent requirement above, it must also spend at least 50 percent of the proceeds of the draw-down loan within the first two years.

Notice 2015-83 also requires tribal governments to meet certain information reporting requirements to demonstrate readiness and compliance. First, a tribal government applying for a TED allocation must submit a commitment letter from a financial institution stating that the institution reasonably expects to advance the total principal amount of the draw-down loan no later than three years after the date of the allocation letter. Second, a tribal government awarded a TED allocation must submit notices of issuance to the IRS not later than 15 days after:

- the 180-day period
- the 2-year period
- the 3-year period

Each of the notices must indicate the amounts drawn and the remaining unused allocation (if any) for each period.

Notice 2015-83 states that the new rules are effective for applications for TED bond volume cap submitted on or after December 4, 2015. It also applies to applicants that have received TED volume cap that has not expired before December 4, 2015.

Considerations for Tribal Governments

In summary, Notice 2015-83 offers useful guidance for tribal governments that would like to participate in the advantages associated with tax-exempt financing without having to issue bonds that may have disadvantages when compared with draw-down loans.

Last Updated: December 8 2015

Article by Kathleen M. Nilles and Randolf A. DelFranco

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[IRS Helps Tribes Use TED Bond Volume Cap for Draw-Down Loans.]

WASHINGTON – The Internal Revenue Service issued a notice Friday that will make it easier for Indian tribal governments to use tribal economic development bond volume cap for draw-down loans.

Notice 2015-83 "is very important" for financing new construction projects, said Townsend Hyatt, a partner at Orrick, Herrington & Sutcliffe in Portland, Ore.

"It's really designed to deal with the borrowing reality, which is that in most cases tribes borrow through loans rather than through bonds," he said.

Because tribal economic development bonds are not exempt from registration requirements under the federal securities laws, most tribal governments borrow from banks, according to Hyatt.

For new construction projects, tribal governments would typically draw down the loan money over time as needed to cover costs.

But draw-down loans were at odds with IRS requirements set forth in a previous notice published in 2012 (Notice 2012-48), under which a tribal government would have to use all of its allocated TED bond volume cap within 180 days of receiving it.

This requirement made it very difficult to obtain TED bond volume cap allocation for the total cost and the total amount of a tax-exempt draw-down loan needed for a project because typically the money would be drawn down over a period of time, sometimes two or three years.

Under the notice issued Friday, if a tribal government receives a TED bond allocation for a tax-exempt loan and spends at least 10% of the borrowed money within 180 days, it will have the rest of two-year period from the date of the allocation to spend the remaining amount.

If the tribal government spends at least 50% of the proceeds of the loan within two years, it will have the remaining amount of time in the three-year period since the allocation to spend the rest of the money.

The IRS, however, requires tribal governments to file several notices with it. The tribal government applying for an allocation of TED bond cap for a draw-down loan must file one or more notices with the IRS that includes: its name and taxpayer identification number; the issue price of any bonds issued, the issue date of the bonds, a description of the project being financed; and any amount of the allocation that is being forfeited.

The applicant also must submit a notice of issuance not later than 15 days after the final draw for the draw-down loan. Other notices are required as well.

"There are numerous notice requirements but the basic substance of the rule is good," Hyatt said.

The notice said the rule is effective for applications for TED bond volume cap submitted on or after Dec. 4, 2015. It also applies to applicants that have received TED bond cap that did not expired before Dec. 4, the IRS said.

The published volume cap for the period that began Dec. 1 is almost $1.365 billion and the maximum amount of cap that any single borrower can apply for is $272.90 million, according to the IRS.

The IRS and Treasury Department, in the notice, also asked for public comments on whether they should provide special volume cap allocation rules for New Clean Renewable Energy Bonds issued as draw-down bonds or loans.

THE BOND BUYER

By Lynn Hume

DEC 4, 2015 4:00pm ET

Fitch: WIFIA Tax Exempt Ruling Is Positive for US Water Credits.

Fitch Ratings-New York-10 December 2015: Recent legislation lifting a ban on the use of tax-exempt bonds in conjunction with federal loans provided by the Water Infrastructure Finance and Innovation Act (WIFIA) pilot program will result in lower borrowing costs for US water utilities, Fitch Ratings says.

Utilities are facing significant costs to replace, rehabilitate, and improve their aging infrastructure. The American Water Works Association estimated the cost of maintenance of existing systems and expansion at $1 trillion over the next 25 years. Utilities will benefit from an overall lower cost of financing to the extent they are able to use low-cost loans from the five-year WIFIA pilot program in combination with tax-exempt bond proceeds. The legislation could also temper the need of some issuers to obtain rate increases related to capital.

WIFIA allows utilities to borrow up to 49% of the project cost at Treasury rates with 35-year amortization periods. However, the original legislation prohibited issuers from using tax-exempt financing for the remaining 51% of the cost. This recent legislation lifts that ban.

WIFIA was modeled after the more established Transportation Infrastructure Finance and Innovation Act program and was enacted in 2014 to provide $350 million in loans over five years for water, wastewater, storm water and water reuse projects, allowing for leverage of at least $3.5 billion. The WIFIA loans, authorized by the Water Resources Reform and Development Act, are the first new federal water finance tool established since the 1996 Drinking Water State Revolving Fund.

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Allowing Tax-Exempt Use with WIFIA Loans Will Lower Borrowing Costs.

WASHINGTON — A provision in the new transportation funding law that lifts the ban on using tax-exempt bonds in conjunction with federal loans will result in lower borrowing costs for water utilities, Fitch Ratings said on Thursday.

The provision in the Fixing America's Surface Transportation (FAST) Act that President Obama signed on Dec. 4 removes the ban that had been included in the Water Infrastructure Finance and Innovation Act (WIFIA). WIFIA was part of the Water Resources and Reform Development Act enacted last year.

The five-year, $350 million WIFIA pilot program, modeled on the Transportation Infrastructure Finance and Innovation program, allows utilities to borrow up to 49% of the costs for large drinking water, wastewater, stormwater and water reuse projects. The loans can be used to leverage at least $3.5 billion.

However, as written, the program could not be used in conjunction with tax-exempt bonds. FAST lifts that ban.

"Over the long run, this will help some utilities with capital costs and rate increases related to capital," Shannon Groff, director of U.S. public finance for Fitch who authored the release issued by the rating agency, said in a brief interview.

"Utilities are facing significant costs to replace, rehabilitate and improve their aging infrastructure," Groff said in the release.

Water groups also cited the importance of the FAST provision.

"By removing the ban on using tax-exempt bonds with WIFIA loans, Congress has freed WIFIA to do its important work in addressing America's enormous water infrastructure challenge," said David LaFrance, chief executive officer of the American Water Works Association.

The AWWA estimates the cost of maintaining and expanding existing water systems will reach $1 trillion over the next 25 years.

Rep. Bob Gibbs, R-Ohio, chairman of the House Transportation and Infrastructure Committee's water resources and environment subcommittee who was a key proponent for WIFIA and lifting the ban, said recently, "I am pleased to see a provision included [in FAST] that supplements the funding of public water infrastructure. Municipalities across the country are dealing with expensive and necessary improvements to public water systems. The ability to combine WIFIA funding with tax-exempt bonds gives cities and counties the ability to affordably address their public health needs."

Another champion of the WIFIA fix was Sen. Barbara Boxer, D-Calif.

LaFrance said water groups, including the AWWA, the National Association of Clean Water

Agencies, the Association of Metropolitan Water Agencies, and the Water Environment Federation fought for the ban to be lifted and are now urging Congress to provide WIFIA loans and state revolving fund programs in fiscal year 2016, which began Oct. 1.

"The sooner WIFIA is making loans for large water projects, the better," LaFrance said.

THE BOND BUYER

BY LYNN HUME

DEC 10, 2015 1:38pm ET

Fitch Replay: USPF Nonprofit Healthcare 2016 Outlook.

Fitch Ratings hosted a teleconference on Friday, December 4th to discuss the outlooks for the US Healthcare sector. Presenter Jim LeBuhn shared insights on key issues for 2016.

Key insights will include:

-Improving liquidity and leverage position cushion greater operating variability
-Impact of changing reimbursement deferred but not diminished
-Need for size and scale increasingly important

Listen to the teleconference replay.

NABL: Transportation Bill Allows Tax-Exempt Bonds for WIFIA.

The House and Senate passed and sent to the President this week the Conference Report on H.R. 22, the Fixing America's Surface Transportation Act or FAST Act. Section 1445 of the Act repeals Section 5028(a)(5) of the Water Resources Reform and Development Act of 2014 (33 U.S.C. 3907(a)(5)), which prohibits the use of tax-exempt and tax credit bonds in conjunction with the Water Infrastructure Finance and Innovation Act (WIFIA), a new program administered by EPA similar to the better-known transportation program TIFIA. The President has said he will sign the bill.

More information on WIFIA is available here.

The text of the H.R. 22 is available here.

Tribal Economic Development Bonds: Use of Volume Cap for Draw-down Loans.

Notice 2015-83 provides special rules regarding the process for allocation of the available amount of national volume cap for tax-exempt tribal economic development bonds under § 7871(f) of the Internal Revenue Code (TEDBs) for bonds issued under a "draw-down" loan structure in which the lender advances funds for the loan on different dates. The notice allows additional time to use allocated volume cap for issuance of TEDBs as draw-down loans if an issuer meets certain requirements.

Notice 2015-83 will be in IRB 2015-51, dated December 21, 2015.

Read the Notice.

TAX - OHIO

Megaland GP, L.L.C. v. Franklin Cty. Bd. of Revision

Supreme Court of Ohio - December 3, 2015 - N.E.3d - 2015 WL 7766712 - 2015 -Ohio- 4918

City's board of education appealed interim order of the Board of Tax Appeals (BTA) denying board's motion to reassign case regarding valuation of landowner's property to BTA's regular docket from its small-claims docket.

The Supreme Court of Ohio held that:

- The Supreme Court had jurisdiction to consider challenge to interim order, and
- Board was not "a party that is a taxpayer" under statute requiring reassignment of certain cases upon taxpayer's request.

Supreme Court had jurisdiction to consider city board of education's claim that interim order from Board of Tax Appeals (BTA) erroneously denied board's motion to reassign case regarding valuation of landowner's property to BTA's regular docket from its small-claims docket. Board had substantial right to participate in landowner's BTA appeal by virtue of its status as countercomplainant below, and BTA's retention of case on small-claims docket effectively foreclosed any appeal from ultimate BTA decision, preventing possibility of board's position being vindicated on later appeal. (Per curiam, with three justices concurring and one justice concurring in judgment only.)

City board of education was not "a party that is a taxpayer" under statute requiring Board of Tax Appeals (BTA) to reassign certain appeals assigned to small claims docket upon request by party that is taxpayer, even though board owned taxable property in county during time period at issue in case, where board was party only by virtue of its countercomplaint, its standing to have filed countercomplaint depended on its being a board of education, and its status as property owner was completely irrelevant. (Per curiam, with three justices concurring and one justice concurring in judgment only.)

TAX - CALIFORNIA

Golden Gate Hill Development Company, Inc. v. County of Alameda

Court of Appeal, First District, Division 5, California - November 25, 2015 - Cal.Rptr.3d - 2015 WL 7690054

Taxpayer brought action against county and school district for refund of special parcel taxes imposed under two voter-approved measures, alleging that tax rates were improper because different rates were imposed on residential and nonresidential properties, as well as nonresidential properties of different sizes.

The Superior Court sustained county's and school district's demurrer without leave to amend, and taxpayer appealed.

The Court of Appeal held that taxpayer's action seeking refund of special parcel taxes imposed under voter-approved measures, although not a reverse validation action, was based on the alleged illegality of the tax scheme enacted by the measures, which imposed different rates on residential and nonresidential properties, and thus, as measures had been deemed valid by operation of validation statutes, taxpayer failed to state a claim for a refund. Refund claim did not involve a matter beyond the validity of the measures themselves, claim that measures imposed an illegal tax could have been adjudicated in validation action, and, while measures specified procedure for refund, they did not specify a validation procedure different from that proscribed by validation statutes.

MILL LEVY - COLORADO

Prospect 34, LLC v. Gunnison County Board of County Commissioners

Colorado Court of Appeals, Div. III - November 5, 2015 - P.3d - 2015 WL 6746441 - 2015 COA 160

Reserve Metropolitan District No. 2 (RMD2) is a special district located entirely within the town of Mt. Crested Butte (Town) in Gunnison County. RMD2's service plan — a document statutorily required to organize a special district — states that RMD2's mill levy "shall not exceed 50 mills, subject to Gallagher Adjustments," and that any levy beyond 50 mills requires Town approval.

By 2013, the mill levy totaled 52.676 mills, including the Gallagher Adjustment of 2.676 mills. Then the RMD2 board approved certifying to the BOCC 55.676 mills, 3.000 mills in excess of the cap in the 2000 service plan. Although the maximum mill levy provision in the service plan had never been increased, the BOCC levied 55.676 mills on December 21, 2012.

The Town council protested the mill levy increase, noting that it "does not consent to any increase above 50 mills 'gallagherized' in the mill levy…." The Town sued in Gunnison County Court to enjoin the excess mill levy and for a declaratory judgment that the excess mill levy was void. The court denied the council's motion for summary judgment on this issue. That action remains pending.

When RMD2 taxed Prospect Development Company, Inc., and Prospect 34, LLC (together, Prospect) at a higher rate, Prospect petitioned the Gunnison County Board of County Commissioners (BOCC) to abate the excess taxes. After the BOCC denied the petition, Prospect appealed to the Board of Assessment Appeals (BAA). The BAA did not independently examine the legality of the excess mill levy. Instead, it relied sonly on the County Court's denial of summary judgment to conclude that the 3.000 mills were levied legally. Prospect appealed.

Section 39–10–114(1)(a)(I)(A) provides, as relevant here:

[I]f taxes have been levied erroneously or illegally, whether due to erroneous valuation for assessment, irregularity in levying, clerical error, or overvaluation, the treasurer shall report the amount thereof to the board of county commissioners, which shall proceed to abate such taxes in the manner provided by law.

Thus, the court was was obligated to examine if an excess mill levy

The Court of Appeals concluded that section 39–10–114(1)(a)(I)(A) provided a statutory basis for

Prospect to challenge the excess mill levy before the BAA, the BAA had authority to decide whether the excess mill levy was illegal, the BAA abused its discretion by instead relying on an order denying summary judgment as making a final determination, and the excess mill levy was illegal.

The Court reversed the BAA's decision and remanded for the BAA to order the BOCC to grant the petition and abate the excess taxes.

Mintz Levin: Helpful News from IRS on Student Loan Bonds.

On November 13, the IRS issued Notice 2015-78, providing favorable guidance on topics of interest to providers of "supplemental" or "alternative" student loans financed with tax-exempt bonds and to underwriters of such student loan bonds. Such guidance confirms that loans financeable under such programs include (i) parent loans as well as student loans and (ii) loans that refinance or consolidate prior loans that were or could have been financed on a tax-exempt basis.

Tax-exempt bonds used to finance student loans, so-called "qualified student loan bonds," come in two flavors under the Internal Revenue Code, those issued to finance federally-guaranteed loans made under the Federal Family Education Loan Program ("FFELP") and those issued to finance certain loans issued under programs created by the states, generally known as "supplemental" or "alternative" loan programs. While the FFELP program, historically much larger, terminated in 2010, tax-exempt financing for new loans under state supplemental programs has continued in approximately fifteen states.

Notice 2015-78 appears to have been prompted by recent efforts by governmental issuers to provide refinancing of student loan debt through non-federally guaranteed "consolidation loans", which presented questions on which the IRS had not previously provided guidance. The IRS also used the notice as an opportunity to address selected other issues applicable to all tax-exempt financed supplemental loans, not just refinancing loans. The Notice clarifies the following:

> **Eligible Borrowers.** Notwithstanding the widespread practice of making higher education loans to parents, a practice provided for by statute under FFELP through the Parent Loan to Undergraduate Students (PLUS) program, the IRS had expressed concerns in the context of ruling request discussions about whether loans to parents were bond-financeable student loans. Notice 2015-78 clarifies that the student, the parent, or both can be an eligible borrower of a bond-financed "student loan." The Notice attempts to provide a similar rule for refinancing loans, stating, "An eligible borrower of a refinancing loan … is the student or parent borrower of the original loan." In the refinancing loan context the Notice's particular wording leaves unclear whether if the sole borrower on the original loan was the parent, the sole borrower on the refinancing loan can be the proud young graduate who wishes to take on the debt through a consolidation loan. Such a fact pattern clearly satisfies the policy underlying this otherwise expansively drafted notice.
>
> **Nexus to State.** The Internal Revenue Code requires the student to be a resident of the state which provides the "volume cap" allocation for the bonds or enrolled at an educational institution in that state. In the case of a refinancing or consolidation loan, there has been some question whether such "nexus" is required to be established at the time the original loan was made or at the time the refinancing loan is made. The Notice provides the broadest rule, stating that a "refinancing loan," including a loan which allows the borrower to consolidate prior debt, complies with the statutory nexus requirement either if that requirement was satisfied at the

time of the original loan or if it is satisfied at the time of the refinancing loan. If reliance is placed on nexus at the time the original loan is made, in the case of a consolidation loan care may need to be exercised to establish nexus for all underlying loans.

Loan Size. The Code limits supplemental loans to "the difference between the total cost of attendance and other forms of student assistance … for which the student borrower may be eligible." The "may be eligible" language has resulted in troublesome challenges in IRS audits, where IRS agents have suggested that issuers might be responsible for documenting that students actually had applied for all other potentially available student assistance, or obligated to downsize loans by the amount of other student assistance that was hypothetically available but not received by the student. The Notice confirms that tax-exempt bond issuers may rely on certifications from the student's school as to total cost of attendance and as to other student assistance. Further, the school may rely on definitions provided under the Higher Education Act, including a definition of "estimated financed assistance" which looks only to assistance the student "will receive."

Type of Loans Eligible for Refinancing. The Notice states that supplemental student loan bonds can be used to refinance not only original loans which were themselves supplemental loans but also other loans, "for example, a FFELP loan or a student loan made by a private lender, provided that the refinancing loan meets all of the requirements for a State Supplemental Loan." Although not addressed by the Notice, it should be noted that tax-exempt bonds issued to refinance prior loans, including consolidation of prior loans, generally will require an allocation of state volume cap, which in some states is a scarce commodity. The need for volume cap may be avoided to the extent the refinancing loans made with proceeds of a bond issue refinance loans financed with other tax-exempt bonds issued by the same issuer or a related issuer and the payoffs on the refinanced loans are applied to redeem such other tax-exempt bonds in a manner that qualifies for the volume cap exception for current refunding bonds.

As a general proposition, the national student loan market is growing and dynamic. Notice 2015-78 will assist governmental issuers in fulfilling their intended role.

Article by Maxwell D. Solet

Last Updated: November 20 2015

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.

NABL Recommends Revisions to Management Contract Safe Harbors.

NABL has sent to the IRS and Treasury Department suggested revisions to expand the safe harbors against private business use in Rev. Proc. 97-13. NABL made three basic recommendations.

First, safe harbors for contracts having a term greater than five years relying on the "fixed fee" framework should be made more flexible in a manner comparable to the flexibility provided in Notice 2014-67 for five-year contracts, and certain principles developed in private letter rulings should be reflected in published guidance.

Second, there should be additional safe harbors that are not based on “fixed fee” limitations.

And third, the limitation set forth in the existing regulations prohibiting management and other service contracts “based, in whole or in part, on a share of net profits” should be reconsidered, and a more flexible rule focusing on control relationships should be adopted.

Read NABL’s Comment Letter.

TAX - INDIANA

Union Tp., St. Joseph County v. State, Dept. of Local Government Finance

Tax Court of Indiana - November 12, 2015 - N.E.3d - 2015 WL 7010912

In July of 2012, Union Township, together with the Union–Lakeville Fire Protection Territory, requested the Department of Local Government Finance’s (DLGF) permission to impose an excess property tax levy. Their appeal documentation asserted that due to a $40 million “error” in calculating Union Township’s 2010 net assessed valuation, they each suffered a property tax revenue shortfall in 2011. More specifically, they explained that the error was the result of the DLGF certifying Union Township’s 2011 budget based on a net assessed valuation of $159,424,430, but St. Joseph County subsequently issuing the tax bills using a lower net assessed valuation of $119,968,732. Union Township and the Union–Lakeville Fire Protection Territory therefore requested the DLGF to increase the current net assessed valuation by at least $40,000,000 and allow a levy for 2012 payable 2013 sufficient to make up for the cumulative effect of that error.

On October 16, 2012, Union Township submitted a second request for the DLGF’s permission to impose an excess levy. This second appeal again identified the $40 million error as the cause of a property tax revenue shortfall in 2011; it specifically sought a levy increase in the amount of $51,929.

On December 7, 2012, the DLGF issued two final determinations that denied both excess levy appeals. On January 8, 2013, Union Township initiated an original tax appeal.

The Tax Court reversed the final determinations of the DLGF, remanding to the DLGF so that it may determine whether an error caused the $40 million discrepancy between the net assessed valuation used to certify Union Township’s 2011 budget and the net assessed valuation the St. Joseph County Auditor used in issuing the property tax bills related to that budget.

“DLGF has not answered ‘the $40 million question:’ whether or not an “error” existed. Indeed, even assuming that 1) the St. Joseph County Auditor failed to timely certify Union Township’s 2010 pay 2011 net assessed valuation and 2) the DLGF was therefore authorized to certify Union Township’s 2011 budget using its 2009 pay 2010 net assessed valuation does not explain why the St. Joseph County Auditor subsequently issued the 2010 pay 2011 tax bills using a number that was $40 million lower.”

If an error did in fact occur, the DLGF shall order a correction to be applied to Union Township’s levy limitations, rate, and levy for the ensuing calendar year to offset the cumulative effect that the error caused.

[3 Things the New Tax Incentive Disclosures Rule Won't Reveal.]

Kraft Heinz announced this month that it’s closing six plants across North America and eliminating 2,600 jobs. That’s bad news for several states, except, perhaps, Iowa, which was able to negotiate a deal with the company to keep about a third or 1,400 jobs at its Davenport plant in exchange for more than $20 million in state and local subsidies.

It’s hard in deals like these to definitively say who the winner is, particularly when Iowa’s tax incentive package includes money for job retention even though the state is losing nearly 1,000 jobs. But a new rule could change that. Starting next year, Iowa and other governments have to start tracking, tallying up and reporting the tax incentives awarded on their annual financial statements as lost tax revenue. The new rule, mandated by the Governmental Accounting Standards Board (GASB), is a big step toward disclosing what has been a relatively difficult area of public finance to measure.

But there are at least three key areas the rule doesn’t cover, starting with who gets the money. When it files its 2017 financial report, Iowa won’t have to identify Kraft Heinz by name because the new rules only require voluntary disclosure of subsidy recipients. GASB thinks the reporting would be burdensome for reporting entities, especially if they’ve given out numerous awards.

But critics disagree, arguing that governments should at least be required to disclose the names of the largest recipients. One reason for this is that many believe subsidies don’t generally help small, homegrown businesses flourish. That belief and the increasing occurrence of so-called mega deals between states and companies, led the advocacy group Good Jobs First to conduct a survey on how some states spend certain types of tax incentives. The survey showed that an average of 70 percent of deals states reached were with large businesses (those with more than 100 employees). Those deals represented 90 cents of every $1 in incentives a state doled out.

Greg LeRoy, Good Jobs First’s executive director, says the survey gives ammunition to businesses owners who are tired of seeing their states spend money to keep or woo big business. “We’re not saying don’t spend money on economic development,” LeRoy said. “But we’ve heard overwhelmingly that small business owners don’t want them to allocate money in same way.”

Another area the rules ignore involves how rebates are spent. Take film tax credits. While they’re on the way out in many states, they remain a robust business in Massachusetts. The Bay State reasons that film tax credits attract productions that employ local workers — a boon for small businesses. But a recent examination by the Boston Herald revealed a stunning black market of sorts for Massachusetts’ film tax credits. At least $335 million of the state’s film tax credits were actually sold off to corporations and individuals who had little to do with the movie that won the tax credit in the first place.

So how does that work? The film tax credit is a 25 percent refund filmmakers earn if they spent at least $50,000 in Massachusetts. Many projects ultimately don’t end up owing enough in state taxes to use the entire credit, so instead they transfer it to someone else who needs it. In other words, a filmmaker who earns, say, a $1 million credit can sell it to a broker for $900,000. The broker then sells it to a corporation for $920,000. The broker earns a $20,000 profit and the corporation gets a $1 million credit it can claim on its taxes. At least a dozen other states, according to the Herald, have transferable film tax credits.

Finally, a point of ire for some governments is that they have to report their subsidies as lost income. While GASB reasons that doing so gives a better picture of a government’s overall financial health, the requirement will likely negatively affect a government’s bottom line. While governments also report the criteria that businesses must meet for their abatement, it doesn't reflect potential income on a balance sheet. "I think a lot of governments are afraid it's only going to tell half the story," said Ted Williamson, a partner in RubinBrown's Public Sector Services Group.

The rule applies to fiscal years that begin after Dec. 15. Most governments start their new fiscal years on July 1 so the first disclosures would go out in financial reports issued in 2017.

GOVERNING.COM

BY LIZ FARMER | NOVEMBER 24, 2015

[IRS: Mailing Address for Notices of Defeasance and Certain Elections Required by Treasury Regulations.]

The Treasury Regulations at 1.141-12(d)(3), 1.142(f)(4)-1(b)(1), and 1.142-2(c)(2) require that written notice be given to either the Commissioner [Internal Revenue Service] or the Internal Revenue Service within 90 days of the establishment of the defeasance escrows under Regs. 1.141-12 and 1.142-2, or the election under 1.141(d)(4)-1.

Treasury Regulations 1.150-5 provides that the notices required by these regulations be filed with the. Internal Revenue Service, 1111 Constitution Avenue, NW, Attention: T:GE:TEB:O, Washington, DC 20224.

[First Time Issuers of Tax-Advantaged Bonds – Part I Introductory Module - IRS Webinar.]

An Introduction to Tax-exempt Bonds for First Time Issuers

Learn about the basics of tax-advantaged bonds, including certain requirements and post-issuance compliance.

[Launch the Webcast.]

Wednesday, September 16, 2015

[First Time Issuers of Tax-Advantaged Bonds – Part II Private Business Use Module - IRS Webinar.]

Information for First Time Issuers of Tax Exempt Bonds – Introduction to Private Business Use

Learn about fundamentals of private business use and its impact on tax-advantaged bonds.

[Launch the Webcast.]

Wednesday, September 16, 2015

First Time Issuers of Tax-Advantaged Bonds – Part III Arbitrage Module - IRS Webinar.

Information for First Time Issuers of Tax Exempt Bonds – Introduction to Arbitrage

Launch the Webcast.

Wednesday, September 16, 2015

Ballard Spahr: New Rules Encourage Use of P3s.

The recently released Internal Revenue Service (IRS) rules in the final allocation and accounting regulations encourage the use of public-private partnerships (P3s). Under these rules, a private party can form a partnership with a public party and use both tax-exempt bonds and equity to finance a facility. Previously the tax rules did not permit these types of partnership structures.

What do the final regulations do?

In general, allocation and accounting rules play a role in determining whether tax-exempt bonds, including tax-exempt bonds issued to pay a portion of the capital costs of a P3, are categorized as governmental bonds or private activity bonds (PABs) under the Internal Revenue Code. Governmental bonds are bonds where the proceeds are primarily used to finance governmental functions or which are repaid with governmental funds. PABs are bonds in which the state or local government serves as a conduit, providing financing to private businesses or individuals. Regulations already exist for measuring the extent of use by a party other than a state of local government (private business use) in a bond financed facility. The existing regulations provide that if a facility is financed exclusively with tax-exempt bonds, up to 10 percent private business use generally is permitted.

Mixed-use facilities. The accounting rules are relevant when a facility being financed with tax-exempt bonds is used by both governmental users and private users (referred to as a mixed-use facility). The final regulations provide guidance on when more than 10 percent private business use of a facility can be permitted in circumstances where there is less than 100 percent tax-exempt bond financing. The final regulations provide a method to identify the portion of a mixed-use project that is governmentally used. Mixed-use financing is permitted where the financing reflects the proportionate benefit derived by the users.

P3s and the partnership piece of the final rules

In a major step forward, the final regulations permit partnerships between private and governmental partners without jeopardizing the tax-exempt status of bond-financed facilities and provide rules for measuring the use of bond-financed property by a private partner. In doing so, the IRS and U.S. Treasury Department specifically indicated that the change was made to accommodate pP3s and remove barriers to tax-exempt financing of the government's (or 501(c)(3) organization's) portion of the benefit of property used in joint ventures.

Measuring private business use. The final regulations set forth a method for measuring the private business use of a tax-exempt bond-financed property resulting from the use of the property by a partnership that includes a partner that is a nongovernmental person. The amount of the use by the private partner will be based on that partner's greatest share of the partnership items (income, gain, loss, deduction or credit) in any one-year period.

The final partnership rule is a great step forward for private parties seeking to enter into arrangements with public entities because it permits flexibility in structuring arrangements that will not jeopardize the tax-exempt status of the bonds. The need for this type of rule is evidenced both by the increased interest and the discussions regarding flexibility in structuring P3s for infrastructure projects. Moreover, the implementation of the Affordable Care Act has highlighted the need for recognition of the proportionate benefit to a governmental person or 501(c)(3) organization participating in a joint venture with private partners.

When can these regulations be applied?

The final regulations generally apply to bonds sold, and deliberate actions that occur, on or after January 25, 2016. Issuers also may elect to apply the partnership provisions and the allocation and accounting rules in whole but not in part to any bonds to which the current regulations apply.

by Vicky Tsilas, J. Brian Walsh, and Charles S. Henck

November 20, 2015

Attorneys in Ballard Spahr's Public Finance Group have participated in every kind of tax-exempt bond financing and have extensive experience with the rules and regulations set by the IRS and U.S. Treasury. Working closely with attorneys in Ballard Spahr's P3/Infrastructure Group, they routinely monitor and report on new developments that impact federal and state infrastructure programs related to transportation and other types of projects.

Hawkins Advisory: Final Allocation & Accounting Regulations under Section 141 of the Internal Revenue Code.

The attached Advisory describes in brief final Treasury Regulations promulgated under section 141 of the Internal Revenue Code of 1986, as amended, for purposes of allocating the proceeds of tax-advantaged bonds to assets or portions of assets and accounting for the use of such assets or portions thereof.

[Read the Advisory.]

Hawkins Delafield & Wood LLP

November 18, 2015

TAX - CALIFORNIA

[Carloss v. County of Alameda]

Court of Appeal, First District, Division 3, California - November 12, 2015 - Cal.Rptr.3d - 2015 WL 7008872

Son of deceased former resident of tax-defaulted property brought action against county for declaratory relief challenging county's denial of son's claim for excess proceeds of the tax sale. The Superior Court sustained demurrer without leave to amend. Son appealed.

The Court of Appeal held that:

- Statute of limitations began to run when decision was mailed, and
- Recorded grant deed is not the exclusive means of proving a person's "title of record."

The 90-day statute of limitations for an action to review the decision of a board of supervisors on a claim for excess proceeds from a default tax sale begins to run from the date the decision is mailed.

A petition for writ of administrative mandamus was the proper method for the son of a deceased former resident of tax-defaulted property to challenge county's denial of son's claim for excess proceeds of the tax sale, even though son argued that the refund statute was facially unconstitutional, where son's complaint and appeal rested primarily on the contention that the statute, even if constitutional on its face, was interpreted too narrowly by the county when ruling on his claim.

While a recorded grant deed may be the best evidence of "title of record" establishing a claimant's right to excess proceeds from a default tax sale, a recorded grant deed is not the exclusive means of proving a person's title of record, and such proof may consist of recorded instruments of various types, the assessor's records, and testimony that, as a whole, establishes that the claimant or the claimant's predecessor in interest held title of record immediately prior to the tax-default sale.

TAX - GEORGIA

[Glynn County v. Coleman]

Court of Appeals of Georgia - November 16, 2015 - S.E.2d - 2015 WL 7162162

Taxpayers filed three class action lawsuits against county seeking a refund of ad valorem taxes, declaratory judgment, and equitable, injunctive, and mandamus relief. The trial court granted class action certification. County appealed.

The Court of Appeals held that statute governing tax refund actions against counties and municipalities permitted class action certification of taxpayers.

Motion to dismiss asking trial court to dismiss taxpayers' class action claims because complaint generally was subject to dismissal based upon sovereign immunity, limitation periods in tax refund statute, and alleged flaws with taxpayers' claims for non-monetary relief, was not proper procedure to avoid certification of a class action, in taxpayers' action against county for refund of ad valorem taxes; rather, issue to be resolved was whether requirements of class action statute had been met.

Statute governing tax refund actions against counties and municipalities permitted class action certification of taxpayers in action against county seeking refund of ad valorem taxes. While general assembly had modified a different tax refund statute to disallow class action certification, it left statute in question intact.

The Hidden Cost to 'Pay for Success'.

Nonprofits have discovered a hidden cost in preventative social programs that's keeping many from even trying to start one.

Lili Elkins spends a lot of time planning and negotiating. It's her job as chief strategy officer of the Boston-area youth nonprofit Roca. But nothing could have prepared Elkins for the project that came across her desk in 2012: It was to help design what is so far the country's largest social impact bond.

The "bond" funds a program to help reduce recidivism and increase employment among young ex-offenders. Over seven years, Roca will provide counseling and job training to 929 young men in the probation system or exiting the state juvenile justice system.

In Elkins' prior experience at Roca negotiating grants, project design was generally ironed out in a few meetings over the course of a month. The social impact bond project for Massachusetts, however, took two years of negotiating. "I teach financial management to graduate students and I'm a lawyer," said Elkins," and I still needed help understanding the financing."

Social impact bonds, which many are now calling pay for success programs, work like this: Private funders pay a government to establish a preventative social program aimed at achieving a certain measurable result. The only way investors get their money back is if the program meets those results.

The Massachusetts project, which launched in late 2014, rounded up more than $20 million from investors. But the time and cost it took to design the project exposes a major, potential deterrent to other nonprofits interested in developing a pay for success project for a government.

Part of the problem is that each pay for success project — and there are only eight up and running across the country — is unique. That means that project designs aren't easily transferrable from one government to another. So each project requires a nonprofit to surrender their best talent for great lengths of time. To help with the burden, Roca was able to utilize $250,000-worth of free legal aid to help with the negotiating. Still, Roca ended up devoting more of its top staff time than it bargained for when it started.

It's because of this that Living Cities, one of the funders of the Massachusetts recidivism program, is creating a new funding option for nonprofits interested in getting involved in pay for success projects. The foundation has secured investors for a revolving loan fund that would help nonprofits pay for designing a project, which includes things like data gathering, analysis of that data, economic modeling, evaluation design and program training.

Called a "construction loan," it would be paid back by the nonprofit only if a pay for success project moves forward. The cost of the construction loan could be built into the overall financing of the project by private funders. If the project launches, part of the money the nonprofits receive in funding could be used to pay back the loan. Living Cities has so far advanced a total of $350,000 to support projects in Illinois, New York and Salt Lake County, Utah.

Eileen Neely, Living Cities' director of capital innovation, hopes it will help governments recognize the full cost of paying for social preventative programs. "Currently they just assume the service provider will find grant money for the other costs and that's part of the reason we don't have as many projects," she said. "This is another way to make sure we are being honest about the entire cost of pay for success."

GOVERNING.COM

BY LIZ FARMER | NOVEMBER 12, 2015

S&P Webcast Replay: U.S. Not-For-Profit Health Care Median Ratios.

Standard & Poor's Ratings Services held an interactive, live Webcast and Q&A on Thursday, September 10, 2015, at 2:00 p.m. Eastern Time where the discussion included the U.S. not-for-profit health care median ratios reports.

Listen to the webcast.

Download the slides.

Sep. 10, 2015

TAX - NEW JERSEY

Fields v. Trustees of Princeton University

Tax Court of New Jersey - November 5, 2015 - N.J.Tax - 2015 WL 6859580

Taxpayers filed a complaint challenging property tax exemptions that had been granted by municipal tax assessor for twenty-one individual parcels owned by university. University moved for a determination as to which party had burden of proof.

The Tax Court held that:

- Appealing taxpayer has burden of proving that assessment is erroneous;
- Presumption of validity afforded property tax assessor's original tax assessments does not extend to tax exemptions; and
- Taxpayers had right to appeal property tax exemption.

When challenger of a property tax exemption is the municipality proper, burden of proving tax-exempt status is always upon the claimant, even when taxing district initiates the action to overturn a county board judgment.

Burden of persuading Tax Court that a tax exemption is merited is on claimant even when county board has granted exemption and appeal is by municipality.

TAX - MICHIGAN

Hartland Glen Development, L.L.C. v. Township of Hartland

Court of Appeals of Michigan - October 20, 2015 - Not Reported in N.W.2d - 2015 WL 6161517

In 2005, the Township of Hartland levied a $792,000 Special Assessment for 144 Residential Equivalent Units ("REUs") for residential unit sewer taps on property owned by Hartland Glen Development.

The special assessment district originally allocated the REUs to the various ownership groups in the district, which were then divided equally across the various tax parcels each group owned. However, in 2011 the REUs were reallocated across the various tax parcels based on acreage, along with creating an additional supplemental assessment district to assess additional costs incurred by the district. This reallocation resulted in the transfer of 459.14 REUs to Hartland, for a total of 603.14 REUs, a levy of $2,364,596.85 for those REUs, and a Supplemental Special Assessment of $199,488.76.

The Michigan Tax Tribunal affirmed the special sewer assessments, including the Township's changes in 2011 to the initial assessments that were made in 2005. Hartland appealed.

The Court of Appeal held that:

- Hartland was not entitled to relief on the basis of either collateral or judicial estoppel;
- The Township possessed the statutory authority to reallocate the REUs; and
- The special assessment was valid because the benefits of the special assessments to the subject property outweighed the costs.

IRS Changes to the EO Determinations' Additional Information Request Process Beginning September 2015.

We're making changes to how we ask for additional information in the Exempt Organizations (EO) determination letter program. The revised procedures will generally apply to determination letter requests and will improve the program's efficiency and consistency. General application processing procedures are described in Revenue Procedure 2015-9.

These revised procedures will be effective for letters requesting additional information mailed on or after the effective date of an Interim Guidance memorandum to be issued in early September 2015.

EO Determinations reviews every request

EO Determinations reviews every determination letter request to determine if it meets applicable requirements.

1. If the request contains sufficient information, we consider the request and issue a determination letter.

2. If additional information is needed to make a determination, we'll ask for it by letter and give you a period of time (generally 28 days) to submit the information. We'll also attempt to contact you or your designated representative by telephone to alert you to the coming letter.

3. If you don't respond within the provided time frame, we'll close your request without making a determination. We won't return any submitted documents or any portion of your user fee. However, we'll attempt to contact you or your designated representative by telephone before closing the request. We'll no longer place requests that have no response in a suspense status for a period of time before closing the request.

What if my request is closed?

If your application is closed because you didn't respond within the allowable time frame, you'll need to submit a new determination letter request and user fee.

IRS Changes to the EO Determinations Process: Rejecting Incomplete Applications Beginning November 2015.

We continue to make changes to our Exempt Organizations (EO) determination letter program to improve the program's efficiency and consistency.

EO Determinations will no longer process substantially incomplete applications

Effective November 18, 2015, if you submit a substantially incomplete determination letter request (Form 1023, Form 1024, Form 1028, Form 8940 or other letter request), we'll return the application package and user fee to you with a letter of explanation.

Revenue Procedure 2015-9, Section 3.08 (updated annually), lists the requirements of a substantially complete application as:

- The current version of the application form found at www.irs.gov
- The correct user fee
- A signature by an authorized individual
- An employer identification number
- A statement of receipts and expenses
- A copy of your organizing document that meets the requirements of a conformed copy
- A detailed narrative of your proposed activities
- A copy of your bylaws or similar governing rules, if adopted

Note: If your particular letter request doesn't require a listed element, we won't consider that element when determining whether your application is substantially complete.

If we return your application package, our records won't show a pending application for a determination letter. If you still want a determination letter, you must resubmit your entire application package, including the missing information, and the correct user fee.

If your request is substantially complete, we'll review it to determine if it meets the requirements for the type of request and ask for any additional information needed. You can find information on case processing in Revenue Procedure 2015-9 as well as on the website at IRS processing of exemption applications.

Non-acceptance of Form 1023-EZ

We continue to not accept/reject an incomplete Form 1023-EZ. Generally, if you attempt to electronically submit an incomplete Form 1023-EZ, www.pay.gov won't accept the submission. Also, once submitted, if we determine your Form 1023-EZ is incomplete or otherwise not accepted for processing based on Revenue Procedure 2015-5, Section 4 (updated annually), we'll send you a letter of explanation, and we'll refund your user fee (certain exceptions apply).

NABL: IRS Issues Guidance on Student Loan Bonds.

The IRS today issued Notice 2015-78 providing guidance on qualified student loan bonds under Section 144(b) of the Code. The Notice addresses (1) the eligibility of parents to borrow for their child's education; (2) how the student nexus requirement applies in the context of refinancing loans; (3) the loan size limitation; and (4) the types of student loans that may be refinanced with a State Supplemental Loan. The Notice applies to loans originated on or after February 11, 2016, but issuers may apply this notice to loans originated before February 11, 2016.

The Notice will be published in the Internal Revenue Bulletin on November 30, 2015 (IRB 2015-48). The text of the Notice is available here.

Nonprofit-Government Contracts and Grants: The State Agency Perspective.

Public agencies, at all levels, increasingly rely on nonprofit organizations to address social issues and deliver publicly funded human and cultural programs and services. Therefore, strengthening relationships between nonprofits and government is essential to enhancing the quality of service delivery. This report provides information and insights on the nonprofit-government contracting and grants relationships from the state government perspective. The findings convey challenges administering government contracts and grants and strengthen the need for state government policymakers to strategize with their nonprofit and government partners about how to better align their efforts to address specific problems and improve nonprofit-government relations.

Read the full report.

The Urban Institute

by Saunji D. Fyffe

October 29, 2015

Foley: New IRS Regulations For Mixed Use Projects Financed With Tax-Exempt Bonds Have Practical Importance.

On October 27, 2015 the U.S. Treasury Department and Internal Revenue Service published final regulations concerning the treatment of "mixed-use" projects financed with tax-exempt bonds. These new regulations have significant and immediate importance for tax planning and tax compliance of tax-exempt bond issuers and borrowers.

A copy of the new final regulations can be obtained here. See 80 FR 65637.

The new regulations, which are published as "general allocation and accounting regulations" most importantly provide rules for the measurement of private use of a project that is financed in part with proceeds of tax-exempt bonds and in part with other funds of an issuer or borrower. The new regulations also facilitate the use of tax-exempt bonds in certain "public-private partnerships." In addition, the new regulations clarify the rules for taking "remedial actions" to correct noncompliance.

The new regulations apply to both bonds issued for the benefit of State and local government projects ("governmental bonds") and bonds issued for the benefit of borrowers that are section 501(c)(3) exempt organizations ("qualified 501(c)(3) bonds").

For convenience, references in this alert to "issuers" of tax-exempt bonds refer to both State or local government issuers of governmental bonds and borrowers that are section 501(c)(3) organizations. Reference to "private persons" in this alert refer to nongovernmental persons, in the case of governmental bonds, and to nongovernmental persons and persons that are not governmental persons or section 501(c)(3) organizations, in the case of qualified 501(c)(3) bonds.

Background

The Internal Revenue Code generally restricts the amount of "private business use" of projects to small amounts (generally, 10% for governmental bonds and 5% for qualified 501(c)(3) bonds, although other limitations apply in some circumstances). Although tax-exempt bond issues technically fail to comply only if the bond issue also fails to comply with a second "private security or payment" test, in most cases issuers rely on the private business use test to comply. Over the years, application of these "private business tests" has become increasingly burdensome and complex. In particular, in 1997 the Treasury Department published final regulations that require private use compliance to take into account "deliberate actions" after the date of issuance, which rule requires tax compliance monitoring throughout the term of a bond issue.

One of the most helpful strategies that issuers use to manage compliance with these complex rules is to finance the costs of a project that will be used for private uses with funds other than proceeds of tax-exempt bonds. Under that approach, the proceeds of the tax-exempt bonds are not treated as used for private uses, because the portion of the project paid with the "equity carve out" is instead treated as privately used. The new regulations set forth detailed new rules for how and when this commonly-used "equity carve out" approach works.

The Treasury Department published proposed regulations on this topic on September 26, 2006. Since the publication of the proposed regulations in 2006, issuers and practitioners have looked to the proposed regulations for general themes about how mixed-used projects should be treated, but have not been bound to follow all the specific details of the proposed regulations.

The 2006 proposed regulations also suggested that the Treasury Department would consider permitting projects financed with tax-exempt bonds to be used by a partnership including private persons. The Service has historically taken the position that use of projects financed with tax-exempt bonds by a partnership including private persons results in private business use.

Summary of the Final Regulations

Rules for equity contributions that are generally more flexible, but not in all cases more favorable. The new regulations provide that private business use of a project is allocated first to the portion of the project financed with "qualified equity."

The rules for "qualified equity" contain important limitations. Qualified equity generally means proceeds of taxable bonds (other than taxable bonds that are tax-advantaged, such as tax credit bonds) and funds that are not derived from proceeds of a borrowing. For example, qualified equity includes an issuer's cash derived from revenues and cash donations. Qualified equity does not include equity interests in real property or personal property. This approach is consistent with prevailing practice and the proposed regulations.

The rules for "qualified equity" also contain new limitations that may be problematic in some cases. Qualified equity must be contributed to a project as part of the "same plan of financing" as the tax-exempt bonds and must pay for capital expenditures of the project on a date that is not earlier than the date on which the expenditures would be applicable to reimbursement by proceeds of the applicable tax-exempt bonds. Among other things, this appears to mean that the tax-exempt bonds generally can qualify for the "qualified equity" benefits only to the extent bonds are issued no later than 18 months after the date of the expenditure (or 18 months after the placed in service date of the project, if later, but no more than three years after the date of the expenditure), although a definitive interpretation of certain aspects of this timing limitation may require clarification from the Service. This timing rule is new, and may raise a number of problems, including particular problems for projects that have a long construction period. Similarly, the new regulations may present difficulties in some cases where a single project is financed with a series of bond issues.

The new regulations also state that qualified equity contributions must be made before the placed in service date of the financed project, except for reasonable retainage.

"Floating use" is expressly permitted. The new regulations expressly and helpfully permit "floating" use of the portion of a project treated as financed with qualified equity. For example, suppose the costs of a 10-story building are funded 70% with tax-exempt bonds and 30% with an issuer's cash. The new regulations generally provide that private use of three floors will not be treated as private use of the tax-exempt bonds, even if the particular three floors change from year to year. The new regulations remove certain limitations on "floating" use that were set forth in the proposed regulations.

A "project" that may be treated as funded in part with qualified equity is defined very broadly. One of the most favorable rules in the new regulations is a very flexible definition of a "project." These rules are particularly important in light of the rules that permit private use to "float" within a mixed-use project. The new regulations permit an issuer to treat as a single "project" one or more facilities or capital projects, including land, buildings, equipment, or other property financed in whole or in part with the proceeds of a bond issue. The proposed regulations generally permitted only certain functionally related facilities, such as adjacent buildings, to be treated as part of the same project. The more flexible rule in the new regulations may present significant tax planning opportunities and tax compliance relief, although it may in some cases be complex to apply.

Annual measurement is required, except for output facilities. The final regulations expressly provide that the “qualified equity” rule must be applied on an annual basis, except for “output facilities.” In an example in the new regulations, a building is funded 70% with tax-exempt bonds and 30% with the issuer’s cash. In one year, 44% of the building is used for a private business use. The example states that the amount of private business use for that year is 20% (that is, 14% divided by 70%), regardless of whether there is any private business use in any other year.

The rules for “output facilities” are significantly more flexible. Output facilities generally consist of electric and gas generation, transmission, distribution and related facilities and water collection, storage and distribution facilities. In the case of output facilities, the benefits of “qualified equity” may generally be applied on an average basis over the term of a bond issue. This more flexible approach is consistent with the special treatment in the regulations for output facilities, including more flexible rules for how private business use is measured.

No special elections or recordkeeping requirements. The new regulations helpfully do not require any special elections or record retention requirements to make use of the “qualified equity” rules. The proposed regulations contained a number of such requirements that could have been traps for the unwary. Thorough and rigorous identification of qualified equity contributions to projects and retention of records relating to such contributions and identifications, however, will continue to be important in practice. In addition, the time limits for making allocations of bond proceeds in the existing final regulations may have relevance for taking actions under the new regulations. The existing regulations generally require that an issuer must allocate proceeds to expenditures no later than 18 months after a project is placed in service.

Favorable treatment of partnerships. The new regulations facilitate “public-private partnerships” by permitting tax-exempt bonds to be used to finance an issuer’s contribution to a partnership which includes private persons. Under this new rule, the amount of private business use by a private person resulting from the use of property by a partnership is the nongovernmental partner’s greatest percentage of any partnership item of income, gain, loss, deduction, or credit attributable to the period the partnership uses the property during the period private use needs to be taken into account. The rule generally requires that a State or local government (or, in the case of qualified 501(c)(3) bonds, a 501(c)(3) organization) be one of the partners.

This favorable rule for partnerships expressly applies to qualified 501(c)(3) bonds issued to benefit 501(c)(3) organizations. For that purpose, ownership by a partnership does not violate the requirement that all bond-financed property needs to be owned by a 501(c)(3) organization or a State or local government.

This rule can be expected to make tax-exempt financing eligible to some extent for public-private partnerships not previously eligible for tax-exempt bond financing to any extent.

Clarification of “remedial action” rules. Since 1997, the regulations have permitted certain remedial actions to correct noncompliance with the private use rules. One remedial action is the redemption or defeasance of “nonqualified bonds.” The new regulations make important revisions and corrections to these remedial action rules.

The most important “remedial action” rule in the new regulations concerns “anticipatory” remedial actions. The prior regulations expressly permitted remedial actions only in response to a deliberate action that resulted in noncompliance. Prevailing practice has been to permit redemption or defeasance in anticipation of such a deliberate action, but practice standards have varied. The new regulations permit redemption or defeasance of bonds in an anticipatory remedial action, but only if the issuer first declares an official intent on or before the date on which it defeases or redeems such bonds which identifies the financed property or loan with respect to which the anticipatory remedial action is being taken and describes the deliberate action that potentially may result in the private business tests being met. This rule states that it applies in a manner “similar” to the rules for declarations of intent for tax-exempt bond reimbursements. The required degree of specificity for declarations of intent for these anticipatory remedial actions will require consideration on a case-b--case basis.

Subsequent to 1997, the Treasury Department has published proposed regulations to make certain technical corrections to make the remedial action rules more readily administrable. The final regulations adopt in final form these favorable technical provisions. First, the final regulations confirm that an issuer may pick and choose the maturities of the nonqualified bonds that are required to be redeemed or defeased, provided that the weighted average maturity of the nonqualified bonds is not less than the weighted average maturity of the other bonds of the bond issue. Second, the new regulations confirm that the amount of nonqualified bonds does not need to correct all private use, but only an amount so that the remaining bond issue is compliant.

Clarification of “multipurpose allocation” rules. The new regulations include additional examples explaining how the rules for “multipurpose allocations” apply. The “multipurpose allocation” rules permit an issuer to break a bond issue into different portions, and to apply the private activity bond rules separately to each portion. The most helpful new example clarifies that an issuer may make a multipurpose allocation to treat governmental bonds and qualified private activity bonds for airport facilities as separate issues, even when sold on the same date pursuant to the same plan of finance.

The multipurpose allocation rules can be applied at any time and can be an important and useful tax planning and tax compliance tool, but may be complex to apply in many contexts.

Effective dates. Issuers are generally required to apply the new regulations to bonds that are sold on or after January 25, 2016, although certain special effective date rules apply.

Issuers are generally required to apply the rules for remedial actions to any “deliberate actions” that occur on or after January 25, 2016, even if the bonds were sold before that date. In this regard, it is important to note that, although the remedial action rules in the new regulations are generally favorable, the new regulations contain certain new requirements. In particular, the new rule for “anticipatory” remedial actions will generally apply to any deliberate action occurring on or after January 25, 2016. The new regulations also contain a special transition rule for remedial actions that is intended to accommodate existing bond indentures that require optional redemptions of a portion of a term bond to be applied first to reduce the earliest mandatory sinking fund payments on that bond; that special transition rule only applies to bonds issued before January 25, 2016.

Issuers may apply the new regulations to bonds sold before that date, but the effective date rules impose certain limitations on such retroactive application. An important limitation is that the effective date provisions provide that retroactive application is generally permitted only if all of the provisions of the new regulations are applied in whole. The clarification in the new regulations for “multipurpose allocations,” however, may be applied separately.

Except as described above, the application of the new regulations to bonds sold before the effective date is expressly permissive. There is no implication that bonds sold before the effective date need to comply with the new regulations, although as a practical matter issuers and practitioners may look to principles in the new regulations in taking positions with respect to pre-effective date bonds.

Implications for tax-exempt bond compliance procedures. Many issuers may wish to consider whether to revise their tax-exempt bond compliance procedures to reflect certain provisions of the new regulations. For example, an issuer may be able to make best use of the favorable provisions in the new regulations by adopting a formal process to review how those provisions can be applied to particular bond issues.

Expected future developments. In 2014, the Treasury Department published Notice 2014-67, which provided for more flexible safe harbors for management contracts for use of property financed with tax-exempt bonds that have a term not exceeding five years. Accordingly, the new regulations are the second significant recent action by the Treasury Department to facilitate more flexible public/private arrangements involving projects financed with tax-exempt bonds. In that light, there is reason to anticipate that the Treasury Department may follow the new regulations with guidance that provides additional safe harbors for longer-term management contracts involving projects financed with tax-exempt bonds.

Last Updated: October 29 2015

Article by Michael G. Bailey, David Y. Bannard, Chauncey W. Lever 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.

TAX - OHIO

Sears, Roebuck & Co. v. Franklin Cty. Bd. of Revision

Supreme Court of Ohio - November 3, 2015 - N.E.3d - 2015 WL 6742213 - 2015 -Ohio- 4522

School board sought review of valuation of property by the Board of Tax Appeals.

The Supreme Court of Ohio held that:

- Board had no obligation to make particularized findings of fact and conclusions of law in upholding appraiser's valuation, and
- Evidence supported appraiser's methodology.

Board of Tax Appeals had no obligation to make particularized findings of fact and conclusions of law in upholding appraiser's valuation of property. Board determined a value based on record that contained owner's appraisal as the only substantive evidence of value, and Board predicated its determination on that value and said so.

Evidence supported appraiser's methodology, which lumped together automobile service center and mall department store in order to create one building that was then valued as a mall department store. Appraiser advanced several grounds in support of her method, school board that opposed method did not remotely negate appraiser's reasons, and appraiser had valued analogous properties using same method.

McCarter & English: At Long Last – Allocation and Accounting Rules.

Good things come to those who wait. The tax-exempt bond industry has waited 18 years for a missing reserved section of the private activity bond regulations, the allocation and accounting regulations, Treas. Reg. Section 1.141-6. The regulations released by the IRS in final form October 27, 2015, (the “Regulations”) provide welcome guidance on allocation of bond proceeds and equity to expenditures and to particular uses within a financed project. The Regulations also take steps to accommodate public-private partnerships by providing for aggregate as opposed to entity treatment of a partnership that includes governmental entities or 501(c)(3) organizations and private persons. In addition, the Regulations amend Treas. Reg. Section 1.141-12 to provide a rule for anticipatory remedial action that permits bonds to be redeemed or defeased prior to an expected action that would cause the private activity limits to be exceeded.

The promulgation of the Regulations gives issuers and conduit 501(c)(3) borrowers the opportunity to rethink relationships with private entities as potential users of bond-financed property and consider the use of different, non-tax-exempt bond funding sources as part of a financing package to accommodate these relationships. The Regulations also provide planning opportunities relating to disposition of bond-financed property and remedial action. At the heart of all of these changes continues to be the IRS’ focus on effective post-issuance compliance procedures. The efforts by the IRS to provide simpler and more straightforward rules should make post-issuance compliance more manageable.

Undivided Portion Allocation

The Regulations provide a special, undivided portion allocation method as the exclusive method of allocation of sources of funding to expenditures and uses for eligible mixed-use projects. Under this method, qualified equity is allocated first to private business use of the eligible mixed-use project and then to governmental use, and tax-exempt bond proceeds are allocated first to governmental use and then to private business use. This allocation method inherently permits “floating private use”—private use that may move within a building from time to time.

An eligible mixed-use project is a project wholly owned by one or more governmental persons (or 501(c)(3) organizations) or by a partnership with at least one governmental partner that is financed with governmental bonds (or qualified 501(c)(3) bonds) and with qualified equity pursuant to the same plan of financing. Qualified equity includes proceeds of taxable bonds other than tax-credit bonds, and funds not derived from a borrowing. The qualified equity is treated as financing the project under the same plan of financing if it pays for capital expenditures of the project on a date no earlier than the date on which such expenditures would be eligible for reimbursement under the reimbursement regulations and no later than the date the measurement period begins, generally the placed-in-service date.

Read in conjunction with the allocation timing rule of Treas. Reg. Section 148-6(d)(1), which requires allocation of proceeds to expenditures not later than the later of 18 months after the expenditure is paid or the date the project is placed in service, and in no event later than 60 days after the fifth anniversary of the issue date, the issuer will at that time be able to identify qualified equity that was part of the plan of finance and allocate private business use to that equity.

Partnerships

In response to recent pressure for the development of tax-exempt bond rules that accommodate the participation of private entities in partnership with governmental entities in financing major projects, the Regulations permit the governmental share of a project used in joint ventures to be financed with governmental bonds by treating the partnership of governmental entities and private entities as an aggregate of the partners rather than as a separate taxable entity. The private business use by a private entity partner will be determined based on that partner’s greatest percentage share of any of the specified partnership items, income, gain, loss, deduction or credit attributable to the partnership during the measurement period. Taken together with the undivided portion allocation method, this treatment will permit qualified equity to be allocated to the private entity partner's private business use.

Anticipatory Remedial Action

The Regulations provide a rule that would permit an issuer to redeem or defease bonds in advance of an action that would cause the private activity limits to be violated, a remedial action not addressed by current regulations. To meet this new remedial action rule, an issuer must declare its official intent to redeem or defease all the bonds that would become nonqualified bonds as a result of a subsequent deliberate action and redeem or defease such bonds prior to the action occurring. The declaration of intent must precede the redemption or defeasance, identify the financed property with respect to which the remedial action is being undertaken and describe the deliberate action that is expected to occur. The redemption or defeasance of the nonqualified bonds must not result in an extension of the weighted average maturity of the bonds, subject to a limited transition rule.

Effective Dates

The Regulations generally apply to bonds sold on or after January 25, 2016, and the new remedial action rule applies to deliberate actions that occur on or after January 25, 2016. The partnership rules and the allocation and accounting rules may be permissively applied in whole, but not in part, to any bonds to which the private activity bond regulations apply.

McCarter & English LLP

by Jeannette M. Bond

November 3, 2015

Discerning the True Policy Debate over Donor-Advised Funds.

This brief summarizes discussion at a June 2015 Tax Policy and Charities Project session where the nation's leading Donor Advised Fund (DAF) providers, nonprofit leaders, and policy experts sought to clarify and distinguish the policy issues and debates surrounding DAFs, as well as to lay out a research agenda for the DAF field. This brief also contains a useful summary comparison, prepared by Victoria Bjorklund, retired partner of Simpson Thacher, of major differences in the laws and regulations applicable to public charities providing DAFs, other public charities and private foundations.

Download the brief.

Tax Policy Center

by C. Eugene Steuerle, Ellen Steele

Published: October 21, 2015

TAX - ILLINOIS

[Village of Bedford Park v. Expedia, Inc. (WA)]

United States District Court, N.D. Illinois, Eastern Division - September 28, 2015 - F.R.D. - 2015 WL 5693596

Fourteen Illinois municipalities – on behalf of a putative class of 154 municipalities – filed putative class action in state court against online travel companies seeking unpaid taxes owed under their municipal hotel tax ordinances. Following removal, pursuant to Class Action Fairness Act (CAFA), municipalities moved to certify class.

The District Court held that:

- Common questions did not predominate;
- Class action was not superior to other methods of resolving claims; and
- Class was ascertainable.

Questions affecting only individual members predominated over questions of law or fact common to class members, precluding certification of Illinois municipalities' class action claims against online travel companies for unpaid taxes owed under multiple municipal hotel tax ordinances. Although claims had been organized into subgroups that included like-worded ordinances, any statutory analysis to determine whether the ordinances set materially identical legal standards would require an individual inquiry into whether any relevant amendments had been enacted over time, as well as the nature and effect of these amendments, and individual analysis would be required to determine whether the same terms in different ordinances had the same legal meaning.

Class action was not superior to other available methods for fairly and efficiently adjudicating claims of 154 Illinois municipalities against online travel companies for unpaid taxes owed under multiple municipal hotel tax ordinances, precluding certification of the claims. Although, absent certification, a multitude of individual lawsuits would be filed against the online travel companies, the 154 ordinances at issue could not be easily arranged into a modest number of subclasses, given possibility that materially different legal standards applied between the individual ordinances.

Proposed definition of class was clear, and it defined membership by objective criteria, so as to ensure ascertainability of members, as required for certification of class action against online travel companies for unpaid taxes owed under multiple municipal hotel tax ordinances, where definition described putative class members as Illinois municipalities that had enacted and collected tax on a percentage of a retail rate that consumer occupants paid owners or operators of hotels for lodging within their cities. Although travel companies asserted that definition promoted only a proscribed fail-safe class, in that membership was defined in terms of success on the merits, definition did not include only those who were entitled to relief, given possibility of varying definitions of "owner" or "operator" in the ordinances, which might or might not include travel companies.

[IRS Official Tells Issuers to Monitor Compliance.]

PROVIDENCE, R.I. – Municipal issuers should monitor bond activity for compliance violations no matter how inadvertent, an Internal Revenue Service tax law specialist for tax-exempt bonds said Tuesday.

“It’s up to municipal issuers and conduit borrowers to identify and report these violations to assure continued tax-exempt borrowing. Otherwise, problems arise,” James Held said at The Bond Buyer’s Healthcare and Higher Education Finance Conference.

Institutional finance professionals and other muni market participants are discussing the challenges of these two sectors at the Omni Providence Hotel.

Many compliance failures related to 501(c)(3) nonprofit issuance are inadvertent in nature, according to Held, often because of misunderstanding legal complexities and lack of attention.

“We also know that bond counsel and other advisors are not around every day,” he added.

Self-correction steps are available, according to Held.

“The clock starts ticking on the day of the violation, not the day of discovery,” he said. Such steps could include redemption or defeasance of the non-qualified bonds or using the funds for alternative qualified use.

The federal tax code requires the use of 95% of the proceeds of the tax-exempt bonds toward the exempt activities of the 501(c)(3) organization. “We call it the 95% test,” said Held.

Ownership violations, according to Held, can involve a sale of a facility, a change in facility or a change in use.

“If the bonds are still outstanding, there could be a problem,” he said.

Held works with the IRS’ voluntary compliance, educational guidance and compliance analysis and review programs related to tax-exempt bonds, tax credit bonds and Build America Bonds. He works on self-reporting cases, and compliance initiatives within the muni bond market.

Earlier Tuesday, Rhode Island General Treasurer Seth Magaziner said his state is transitioning from low-cost jobs and manufacturing to an economy based on technology innovation.

“The good news is that we are well-positioned and you already see signs of that transformation,” he said in his morning keynote.

Magaziner, elected last fall after predecessor and fellow Democrat Gina Raimondo won the governor’s race, cited Ivy League Brown University’s $3 billion capital campaign with its emphasis on life sciences and biotech and the strong presence of Rhode Island School of Design.

“Industrial design is one of the most important disciplines,” he said.

THE BOND BUYER

BY PAUL BURTON

OCT 27, 2015 11:57am ET

[Disclosure of Determination Letters Issued by the Exempt Organizations Rulings & Agreements.]()

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

NABL Past President Testifies for NABL at IRS Hearing.

Linda Schakel, former NABL President and partner at Ballard Spahr, testified on behalf of NABL at the October 28 Internal Revenue Service (IRS) hearing on the proposed issue price regulations published in June. Ms. Schakel reiterated the points made in NABL's comments, which were submitted on September 22, particularly regarding the due diligence to be required of issuers.

NABL's written comments are available here.

Fitch: ACA Exchange Drop May Pressure Hospitals Long Term.

Fitch Ratings-New York/Chicago-21 October 2015: The long-term impact on not-for-profit hospitals of a continued decline in buyers of health insurance through federal and state insurance marketplaces will depend on their state's Medicaid program and the portion of their patients that have benefits, Fitch Ratings says. The impact of the decline in the short term is expected to be slight even as enrolees through these exchanges fell from 11.7 million to 9.9 million from February to June of this year.

The cost of health insurance in the 19 states that have not expanded Medicaid benefits under the Affordable Care Act (ACA) is likely the biggest factor in the declines. Although many enrolees received federal subsidies for the majority of the cost, wage stagnation and other personal budget factors may make the uncovered cost of the benefits untenable for some. The New York Times reported that Mississippi, where 95% of enrolees received subsidies, saw an 8% decline in enrolment from March 31 to June 30.

The long-run impact on hospitals would depend, in part, on their state's Medicaid program. In New York, which already had a robust Medicaid program in place, the subsidized healthcare exchanges have proven more beneficial to hospitals, as the underinsured have fuller coverage, helping increase utilization in a state where medical costs to patients can be high.

However, we would expect critical access hospitals (CAHs), which are inherently vulnerable to shifts in reimbursement due to their limited revenue base, to be at greater risk. The decline in the rural population that CAHs were created to serve is also pressuring the sector. This population shift is more common in the South and Midwest regions. Those regions are home to the most states that have not expanded Medicaid eligibility under ACA.

We believe the decline in enrolees could continue if stagnant wage growth for earners in the lowest quartile persists. According to the Bureau of Labor and Statistics, since 2000 the average hourly wage for non-management private-sector workers in the lowest quarter (when adjusted for inflation) has declined by 3%.

EXEMPT PROPERTY - WISCONSIN

SSM Health Care of Wisconsin, Inc. v. City of Fitchburg

Court of Appeals of Wisconsin - September 24, 2015 - Slip Copy - 2015 WL 5598829

SSM Health Care of Wisconsin, Inc., which owns and operates St. Mary's Hospital, sought a refund for property taxes levied by the City of Fitchburg against all of SSM's personal property that was located in a renal center and a sleep center owned and operated by SSM in Fitchburg during the 2009, 2010, and 2011 tax years.

On summary judgment, the circuit court held that some of SSM's personal property in the two centers was exempt from tax under WIS. STAT. § 70.11(4m)(a) (2013–14), the non-profit hospital tax exemption, and that SSM was entitled to a refund for that tax-exempt personal property.

The City appealed, arguing that the circuit court erred in granting summary judgment in favor of SSM for two reasons: (1) the non-profit hospital tax exemption under WIS. STAT. § 70.11(4m) does not apply here because the renal center and the sleep center are each used as a "doctor's office" and, therefore, all of the personal property located in each center is taxable; and (2) SSM initially sought tax exemption for "all" personal property in each center and, according to the City, SSM cannot subsequently "convert a request for a total tax exemption into a partial exemption in the midst of litigation."

The Court of Appeals affirmed, holding that:

- Neither the renal center, nor the sleep center are "doctor's offices" and
- Although SSM did not provide an itemized list of non-exempt property when it initially filed the tax-exemption requests, it does not follow that this bars SSM from entitlement to a refund for taxes levied against property that is tax-exempt.

TAX - NEW YORK

Allegany Mountain Resort, LLC v. Town of East Otto

Supreme Court, Appellate Division, Fourth Department, New York - October 9, 2015 - N.Y.S.3d - 2015 WL 5894848 - 2015 N.Y. Slip Op. 07361

Taxpayer brought proceeding to challenge town's tax assessments for property on which it operated a campground resort facility. The Supreme Court, Cattaraugus County, granted taxpayer's motion for summary judgment, and town appealed.

The Supreme Court, Appellate Division, held that measurements based upon the size of the chassis of each trailer at taxpayer's campground resort facility could not be used to establish that the trailers were 400 square feet or less in size, as required to qualify for exemption from property taxation.

Measurements based upon the size of the chassis of each trailer at taxpayer's campground resort facility could not be used to establish that the trailers were 400 square feet or less in size, as required to qualify for exemption from property taxation for recreational vehicles that are 400 square feet or less, self propelled or towable by an automobile or light duty truck and used as temporary living quarters for recreational, camping, travel or seasonal use. Trailers were vehicles, and their dimensions were thus required to be measured inclusive of load and bumpers.

While Arizona Cardinals Soar, Legal Battle Puts Stadium Investors in Red Zone.

Dispute over rental-car taxes that help cover stadium's payments highlights risks for bond investors

The Arizona Cardinals are one of the National Football League's hottest teams, leading their division with a 4-2 record.

Their stadium, however, is on a losing streak with investors. Its operator, along with state tax collectors, have lost two court rulings since last year over the legality of rental-car taxes used to fund the $455 million University of Phoenix Stadium in Glendale. The battle threatens the authority's capacity to collect revenue that accounts for nearly a third of the stadium's bond payments.

A lawyer for the operator, the Arizona Sports and Tourism Authority, said he expects the state agency to prevail on appeal.

The legal fight highlights the risk borne by investors who buy stadium bonds.

U.S. state and local governments from Florida to Arizona have financed stadium construction and improvements by linking bonds to tourism taxes, such as on hotels and rental cars. But the practice can backfire when collections decline, leaving taxpayers on the hook and investors facing downgrades and falling bond prices.

"These fluctuate and people cut back on things like tourism expenses when the economy's down," versus, say, a bond backed by water or utility fees, said Howard Cure, director of municipal research at Evercore Wealth Management.

Now, litigation is proving another risk. Rental-car agencies contend that the fees Arizona levies are a vehicle tax, which the state's constitution limits to supporting roads. A state court last year agreed, and in August, the state was ordered to refund what could amount to tens of millions of dollars while it appeals the case.

Those taxes make up about one-third of the payments on the authority's almost $270 million of municipal bonds. Without them, the Arizona stadium debt may be downgraded, ratings firms have warned. The bonds enjoy an investment-grade rating now. But Fitch Ratings said in an August report that the absence of legislative action to replace the money "could result in ratings dropping to below investment-grade levels."

Some Arizona Sports and Tourism Authority bonds maturing in 2036 traded recently at yields around 4%, about half a percentage point above comparably rated debt, according to Thomson Reuters Municipal Market Data. Yields rise as prices fall.

Tourism taxes are one of the most-common sources of public money for stadiums nationwide. U.S. cities and states owe around $3.5 billion in bonds backed in some part by hotel and rental-car payments, according to a Wall Street Journal analysis of Bloomberg and Electronic Municipal Market Access data. The money has helped build stadiums for teams including the Houston Texans, San Antonio Spurs and the under-construction ballpark for the Atlanta Braves.

Fitch downgraded bonds that paid for Orlando's basketball arena to junk in 2010, citing fluctuations in revenue from tourism taxes and warning officials would need to tap reserves to pay investors. The rating firm upgraded the bonds this year.

The use of tourism taxes is the result of public officials' attempting to make stadium borrowing more palatable to voters by passing on the cost to outsiders, several analysts said.

"For local officials, it makes it more appealing to say this particular tax is going to fall on nonresidents," said David Swindell, director of the Center for Urban Innovation at Arizona State University. "We saw that in authorities across the country during the recession—they took a big hit because they were so dependent on tourism dollars." That can leave taxpayers facing higher bills to make up the difference.

Now, lawyers for rental-car companies suing the stadium authority are asking a judge to escrow the taxes while the state appeals, a process that could mean years of uncertainty for bondholders. Shawn Aiken, who represents the plaintiffs, said that in Arizona, those taxes are reserved for highways and he is confident the state can find other sources of money to pay investors.

"The building of a football stadium is clearly a non-highway purpose," he said.

Timothy Berg, a lawyer who represents the stadium authority, said it will oppose the motion to withhold the taxes while it appeals.

While bonds sold for stadiums tend to be lower-rated and more volatile than other municipal debt, even the worst-off facilities typically avoid long-term distress, said John Miller, co-head of fixed income at Nuveen Asset Management LLC. His firm holds some of the Arizona bonds, as well as those that paid for Chicago's Soldier Field, ballparks for the New York Yankees and Mets, and Houston's venues.

"They tend to be lower rated, because of the reliance on these entertainment and travel sources of revenue," Mr. Miller said. "They're more economically sensitive, but they've come back stronger since 2009," as tourism rebounded after the recession.

The problems with the rental-car taxes are just the latest wrinkle in the region's misadventures hosting big league sports, Mr. Swindell said.

The city of Glendale suffered downgrades after it built a hockey arena for the Arizona Coyotes and spent tens of millions covering the team's losses, amid broader financial difficulties for the city.

The state stadium authority has already struggled to make ends meet. A legislative audit last month found tourism revenue was insufficient to fulfill its financial obligations, which include promoting tourism and funding youth sports. Tourism money has also fluctuated widely, exacerbating shortfalls, while debt payments are scheduled to increase in coming years.

THE WALL STREET JOURNAL

By AARON KURILOFF

Oct. 24, 2015 5:33 a.m. ET

TAX APPEAL - OHIO

Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision

Supreme Court of Ohio - October 20, 2015 - N.E.3d - 2015 WL 6288275 - 2015 -Ohio- 4304

Court-appointed receiver for former owner of property brought real property valuation complaint seeking reduction of valuation of real property. Following remand from the Court of Common Pleas, the county board of revision (BOR) dismissed complaint. School board and former owner appealed. The Board of Tax Appeals (BTA) dismissed appeal for lack of jurisdiction. School board and former owner appealed.

The Supreme Court of Ohio held that:

- Former owner's failure to serve subsequent owners with notice of appeal did not warrant dismissal of appeal;
- Initial appeal to court of common pleas did not deprive BTA of jurisdiction to consider subsequent appeal; and
- BOR was precluded by law of the case doctrine from dismissing complaint for lack of standing.

Former property owner's failure to serve subsequent owners with notice of appeal from dismissal of former owner's real property valuation complaint did not require dismissal of appeal. Although serving subsequent owners was required by statute, counsel for former owner had also appeared on behalf of subsequent owners, and counsel had pursued previous appeal on behalf of both former owner and subsequent owners.

Property owner's initial appeal to court of common pleas did not deprive Board of Tax Appeals (BTA) of jurisdiction, pursuant to subsequent-appeal rule, to consider property owner's and school board's subsequent appeal after court's remand to county board of revision (BOR). Although, in the context of appeals from decisions of county boards of revision, county courts of common pleas and the BTA had concurrent jurisdiction, school board was only statutorily permitted to appeal to BTA.

County board of revision (BOR) was precluded by the law of the case doctrine on remand from dismissing former owner's real property valuation complaint for lack of standing, where common pleas court had already determined that former owner had standing to file complaint.

Treasury, IRS Issue Rules that Will Help Facilitate P3s.

WASHINGTON — The Treasury Department and Internal Revenue Service have released final allocation and accounting rules that bond lawyers say will help in administering public-private partnerships for transportation and joint ventures involving hospitals.

“These final regulations are a great step forward for encouraging public and private funding for projects and therefore for encouraging public-private partnerships,” said Vicky Tsilas, a partner at Ballard Spahr in Washington.

The rules, which lawyers said are much better than those proposed in 2006, were released Monday and are scheduled to be published in the Federal Register on Tuesday. Some provisions of the proposed rules were withdrawn rather than finalized.

The rules will generally apply to bonds sold on or after a date that is 90 days after publication in the Federal Register, and the provisions regarding remedial actions will apply to deliberate actions that occur on or after that date. The rules provide issuers with guidance for applying the private-activity bond restrictions. Under federal tax law, for governmental bonds, no more than 10% of the proceeds can be used by private parties and no more than 10% of the debt service can be paid for or secured by private parties. The thresholds are lowered to 5% for 501(c)(3) bonds. If these limits are exceeded, bonds become private-activity bonds and are not tax-exempt unless they fall within specific categories.

Two key parts of the rules are the flexible proportional allocation provisions for mixed-use projects and the look-through treatment of public-private partnerships, said John Cross, Treasury associate tax legislative counsel.

Issuers may want to develop “mixed-use” projects that have some governmental use and some private use, finance the public portion with tax-exempt bonds and finance the private portion with equity. Under the rules, qualified equity is allocated first to the private-business use of the mixed use project and then to governmental use, while bond proceeds are allocated first to governmental use and then to private business use.

Carol Lew, a shareholder at Stradling Yocca Carlson & Rauth in Newport Beach, Calif, said that the concept of allocating equity first to private business use is helpful and “issuer sensitive.”

“These allocation provisions look good,” said Matthias Edrich, an attorney at Kutak Rock in Denver, though there’s a lot for bond lawyers to still consider.

The allocation rules for mixed-use projects are simpler in the new guidance than they were in the proposed rules, lawyers said. Under the proposed rules, there were two different allocation methods that could be used for mixed-use projects, and issuers had to elect to use one of the methods. But under the final rules, issuers do not have to make elections and bond proceeds and equity are always allocated using the “undivided portion” method, which is based on the percentage of use by an entity rather than the percentage of physical space used.

The rules expand the definition of a project that can be treated as partially financed with tax-exempt bond proceeds and partially funded by other means, a feature that bond lawyers praised.

“Under the new regulations, an issuer can choose to treat any property financed with the same bond issue as the same ‘project’ regardless of any functional relationship. That flexibility could provide for substantial post-issuance compliance relief," said Michael Bailey, a partner at Foley & Lardner in Chicago.

However, Bailey expressed concerns that the time limits placed on when equity contributions can be made might be overly restrictive for projects with long construction periods.

The rules also address allocating bond proceeds and other funds in cases where property is used by public-private partnerships.

In the proposed rules, partnerships were automatically treated as private entities unless all of its members were public. But the final rules take a different approach and treat partnerships as aggregates of their partners. Under the rules, the amount of private business use is the private partner's share of the amount of the use of the property by the partnership. The share is defined as the private partner's greatest percentage share of any of the partnership items attributable to the time during the measurement period that the partnership uses the property.

Tsilas said that "permitting aggregate treatment for all partnerships has become particularly important in recent years because of the need to implement policies of the Affordable Care Act that are intended to promote cooperation between the public and private sectors."

The look-through treatment of partnerships is in line with the recommendations made by the National Association of Bond Lawyers and the tax-exempt financing committee of the American Bar Association's taxation section.

The rules also provide guidance about when and how issuers can take "anticipatory remedial actions" and redeem tax-exempt bonds before they take actions that would cause there to be excessive private-business use. The proposed rules had set a lot of conditions that issuers had to meet to take anticipatory remedial action. The final rules are simpler and allow issuers to redeem or defease bonds if they declare their intent in advance. The declaration of intent has to identify the financed property or loan that the anticipatory remedial action would concern and describe the action that potentially may result in the private business tests being met.

Tom Vander Molen, a partner at Dorsey and Whitney in Minneapolis, praised the availability of anticipatory remedial actions under the rules but said, "the need to describe possible future private business use for anticipatory remedial actions is unnecessarily detailed."

Treasury and the IRS are also working on a separate project relating to remedial action rules, Cross said. One of the items that project will address is how leases fit with the remedial action rules.

THE BOND BUYER

BY NAOMI JAGODA

OCT 26, 2015 3:12pm ET

Treasury Issues Final Private Activity Bond Allocation and Accounting Regs.

Treasury has issued final allocation and accounting regulations under Section 141 of the Code. The regulations are expected to be published in the Federal Register tomorrow. The Final Regulations generally apply to bonds sold on or after 90 days after publication in the Federal Register. The rules regarding remedial actions, however, apply to deliberate actions that occur on or after 90 days after publication.

The Final Regulations allow permissive application of (1) the partnership provisions, the allocation and accounting rules, and certain corresponding rules for qualified 501(c)(3) bonds in whole, but not in part, to bonds to which the 1997 Final Regulations apply; and (2) the multipurpose rule to bonds to which the refunding rules apply.

The text of the final regulations is available here.

IRS Announces Inflation Adjustments for 2016.

On October 21, 2015, the Internal Revenue Service (IRS) released Rev. Proc. 2015-53 setting out amounts for items in the tax code that are adjusted for inflation. The state PAB volume caps for 2016 will be the greater of $100 per capita or $302.88 million, a slightly higher minimum amount than 2015. The Revenue Procedure includes the 2016 figures for other bond-related items as well, such as safe harbor rules for brokers' commissions for GICs and yield restricted defeasance escrows.

Click here to read the Revenue Procedure (see pages 15-16).

SCHOOL TAX REFERENDUM - DELAWARE

Young v. Red Clay Consolidated School District

Court of Chancery of Delaware - October 7, 2015 - A.3d - 2015 WL 5895838

After voter referendum to increase school-related property taxes paid by owners of non-exempt real estate located within school district passed in special election, owners who opposed tax increase but did not vote filed suit against district, asserting under § 1983 that district deprived owners of their right to vote without due process of law and of equal protection, and that district violated Elections Clause of state constitution by discouraging and raising impediments to voting by elderly and disabled residents. District filed motion to dismiss for failure to state a claim.

The Court of Chancery held that:

- District's interventions in special election was not constitutionally-protected government speech under First Amendment right to advocate;
- Elections Clause was not equivalent to government speech doctrine, and thus it was not appropriate to interpret Clause in lockstep with cases applying doctrine;
- Elections Clause had meaning independent from federal protections for voting rights developed under Fourteenth Amendment;
- Owners sufficiently pled that district's interventions affected result of election, as would support voiding result;
- Attorney General's decision not to bring charges against school district did not dispose of owners' civil claim;
- Owners stated a claim under § 1983 for due process and equal protection violations; and
- Owners stated a claim for violation of Elections Clause.

School district's interventions in special election, during which voters passed referendum to increase school-related property taxes paid by owners of non-exempt real estate located within school district, was not constitutionally-protected government speech under First Amendment right to advocate. Government speech doctrine responded to Free Speech Clause claims, and did not mean that there were no restraints on government speech.

State constitutional Elections Clause was not equivalent to government speech doctrine under First Amendment, and thus it was not appropriate to interpret Elections Clause in lockstep with federal jurisprudence applying doctrine. Government speech doctrine only responded to Free Speech Clause claims and did not provide defense to claim under state law, federal parallel for Elections Clause was not the Free Speech Clause and cases applying government speech doctrine, but rather was federal regime of implied constitutional protection for voting rights that developed under Due Process and Equal Protection Clauses, and Elections Clause was both separate from and more protective of electoral rights than implied federal regime.

Elections Clause of state constitution had meaning independent from federal regime of implied constitutional protection for voting rights developed under Due Process and Equal Protections Clauses, and thus it was not appropriate to interpret Elections Clause in lockstep with federal jurisprudence developed under Fourteenth Amendment. Unlike state constitution, federal constitution did not explicitly provide individual with right to vote or explicit guarantee of free elections, history of Elections Clause indicated that it had meaning independent from Fourteenth Amendment, and differences in structure between federal and states constitutions demonstrated independent meaning of Elections Clause.

Complaint filed by residents who opposed increase in school-related property taxes but did not vote in special election in which increase was passed sufficiently pled that school district’s interventions affected result of election in resident’s action seeking to void result, based on district’s alleged actions in discouraging and raising impediments to voting by elderly and disabled residents. According to complaint, district affected outcome by systematically encouraging and facilitating voting by residents with school-aged children who were more likely to vote in favor of increase, and that district’s family-focused get-out-the-vote events reduced turnout by elderly and disabled voters by interfering with their ability to access polls.

Failing to contact Department of Elections on day of special election, in which residents voted on and passed referendum to increase school-related property taxes paid by owners of non-exempt real estate located within school district, did not preclude owners who opposed tax increase but did not vote in special election from bringing civil action against district, seeking to invalidate election. Statutory provisions create post-election day private rights of actions.

Attorney General’s decision not to bring criminal charges against school district did not dispose of civil claim filed by residents to invalidate special election, alleging that district discouraged and raised impediments to voting by elderly and disabled residents on referendum to increase school-related property taxes paid by owners of non-exempt real estate located within district. Assuming that Attorney General concluded that there was insufficient evidence to prove guilt beyond a reasonable doubt as to criminal conduct, that assessment did not mean that evidence did not establish electoral misconduct under preponderance-of-the-evidence standard for purposes of civil claim, and Attorney General had no authority to enforce civil election violations.

School district residents who opposed increase in school-related property taxes but did not vote on referendum that proposed increase stated a claim under § 1983 against district for due process and equal protection violations based on district’s electoral interventions as a whole. Although district’s interest in fostering informed electorate was sufficient to justify engaging in government campaign speech, complaint alleged that district’s intervention in election by providing rewards for voting designed to appeal to demographic group that district believed was likely to support tax increase had purpose and effect of discouraging voting by identifiable group district believed would oppose increase, and for pleading purposes, district's desire to educate electorate did not justify selective get-out-the-vote efforts.

In challenging school district's electoral interventions as a whole, district residents who opposed increase in school-related property taxes but did not vote on referendum that proposed increase stated a claim against district for violation of Elections Clause of state constitution. Residents contended that district provided selective rewards for voting, which allegedly made election less free and equal, residents alleged that district violated Elections Clause based on its government campaign speech, which included engaging in electioneering in close proximity to voting rooms, and complaint alleged that district engaged in selective get-out-the-vote efforts directed towards an identifiable group, which had negative effects on the elderly and disabled.

Arizona Cardinals Stadium Debt Jeopardized by Car-Tax Challenge.

To money manager Todd Curtis, the decade-long fight over a tax that helped build the stadium for the National Football League's Arizona Cardinals didn't look good for bondholders.

Last year, a state judge ruled that a vehicle-tax that pays for about a third of the stadium's $266 million of debt is illegal. Then August brought another legal blow: The state was ordered to pay tens of millions of dollars in refunds while it appeals the case, threatening to reduce funding for the Arizona Sports & Tourism Authority, which issued the bonds. Curtis sold the securities.

"If they lose, they could probably still make their bond payments, but they couldn't pay for much else," said Curtis, a portfolio manager with Aquila Group of Funds in Phoenix who runs a $280 million Arizona bond fund. "The sports authority has always run on a very thin line."

While stadiums in cities including Indianapolis and Oakland have put taxpayers on the hook for subsidies to professional sports teams, the challenge over funding behind the Glendale, Arizona, coliseum has left another constituency at risk: Investors who bought its bonds.

Financial Toll

The loss of the car-tax money, if upheld on appeal, would put an added squeeze on the financially struggling tourism authority, whose credit rating is at risk of a downgrade from Moody's Investors Service and Fitch Ratings. The operator of the stadium, which hosted this year's Super Bowl, has already failed to bring in enough tax money to cover its operations, which include promoting tourism and assisting professional baseball teams that come to Arizona for spring training.

"If they can't collect this tax, that compounds the issue," said Heather Macre, a Phoenix attorney who represents Saban Rent-A-Car LLC and others that are challenging the tax.

The companies say that the subsidies violate the law because Arizona's constitution requires vehicle taxes to be used for roads. On Oct. 5, the companies filed a motion to put the disputed funds into an escrow account until the case is resolved, which may take years.

Pricing Risk

The legal risk has lingered in the background since not long after the first bonds were issued in

2003, and the prices of the securities were little changed after the recent court decision. On Oct. 16, the $19 million of stadium bonds maturing in 2028 traded for an average yield of 3.3 percent, about 1.7 percentage points more than benchmark securities, according to data compiled by Bloomberg. That yield is down from 3.8 percent in early August.

“Depending on what level they’re at, the risk can make it more attractive,” said Craig Brandon, a portfolio manager of Eaton Vance Management, which holds $29.7 billion of municipal bonds, including some of the stadium debt. “If it’s not going to continue generating income, we will be concerned. From an income perspective, we’re comfortable with the level we’re at.”

While Brandon considers the risk of default to be low, he said the bonds may be downgraded if the authority can no longer collect the rental-car tax. Fitch Ratings and Moody’s Investors Service put negative outlooks on the bonds in 2014 after the first decision, a first step toward a rating cut. Fitch grades the senior bonds A, the sixth-highest investment grade. Moody’s rates them A1, one step higher.

“The negative outlook is a flashing red light,” said Steve Murray, an analyst with Fitch in Austin. “Until this plays out, we’re watching very closely.”

Victory Seen

The authority expects to prevail in its appeal, which has yet to be filed, Timothy Berg, the agency’s attorney in Phoenix, said in an e-mail. The final verdict could take as much as three years if it goes all the way to the state Supreme Court, said Macre, the lawyer for the plaintiffs.

So far the case has had no impact on the state budget, said Daniel Scarpinato, a spokesman for Governor Doug Ducey. What happens if the tax is struck down will be up to the governor and state lawmakers, who so far have taken no steps to find a backup revenue source.

“I don’t think the state is going to let the sports authority go under,” said Curtis, the portfolio manager with Aquila Group. “But they aren’t going to do anything until their back is up against the wall.”

Bloomberg Business

by Darrell Preston

October 18, 2015

Appellate Court Upholds TIF District Levy and Collection of Taxes.

The Illinois Appellate Court recently upheld the actions of a city council in its establishment and implementation of a TIF district (*Devyn Corp. v. City of Bloomington*). In this case, the Court addressed the adequacy of a TIF district’s financial statements as well as when a TIF district’s authority to collect taxes terminates.

This case arises out of the creation of the Downtown Bloomington Tax Increment Redevelopment Plan (“the TIF District”) by the Bloomington City Council in December of 1986. The TIF District was scheduled to last 23 years and had an estimated date of completion of December 21, 2009. Through the duration of the TIF District, the city generated approximately $1.9 million, which was used to fund a number of projects focused on infrastructure improvements within the TIF District. During the city council meeting to approve the use of funds from the TIF District, Devyn Corp. objected, stating that the City's use of the funds was a violation of the TIF Act. Soon thereafter it filed a complaint alleging that the City's financial statements failed to account for certain expenditures and that the City unlawfully appropriated taxes from the TIF District by collecting taxes after the December 21, 2009 estimated date of completion.

The trial court found in favor on the City on both issues, holding that Devyn Corporation failed to establish that it lacked an adequate remedy at law to obtain the financial statements of the City regarding the funds collected from the TIF District. Additionally, the trial court held that the estimated date of completion for the TIF District served only as an estimate and therefore did not bar the City from levying taxes after December 21, 2009.

On appeal, the Fourth District Appellate Court affirmed the trial court's ruling. Specifically, the Court found no basis for an equitable accounting of the funds received and spent from the TIF District since Devyn Corp. could also obtain this information through the Freedom of Information Act or through discovery. The Court noted that Devyn Corp. did in fact make such a request after filing this lawsuit and received all financial information that would have been turned over in an equitable accounting. With respect to the estimated date of completion, the Court held that the legislature's intent was an estimate as opposed to a hard date of termination. As such, the City's levy and collection of incremental taxes on December 28, 2009 (after the estimated date of completion) was lawful.

This decision ultimately preserves the wide latitude municipalities are given in administering TIF Districts. Given this wide latitude afforded to municipalities, other taxing agencies should make the most of all the opportunities available to them to influence and monitor the creation of TIF Districts.

by Ares Dalianis, Jamel Greer, Scott R. Metcalf | Franczek Radelet P.C.

10/12/2015

TAX - NEW YORK

Level 3 Communications, LLC v. Erie County

Supreme Court, Appellate Division, Fourth Department, New York - October 2, 2015 - N.Y.S.3d - 2015 WL 5750574 - 2015 N.Y. Slip Op. 07104

Taxpayers brought hybrid article 78 proceeding and declaratory judgment action against city and school district, claiming that taxpayers' fiber optic cables did not conduct electricity and thus were not taxable real property. The Supreme Court, Erie County, dismissed the petition-complaint. Taxpayers commenced proceeding in the nature of mandamus.

The Supreme Court, Appellate Division, held that the Supreme Court could not dismiss taxpayers' hybrid article 78 proceeding and declaratory judgment action challenging a city's and school district's tax assessment on the basis of grounds not considered in administrative proceedings challenging the tax assessment, no matter how sound those grounds might be.

The appeals court remitted the matter to respondents for reconsideration of petitioners' applications, including determining whether the applications were timely and procedurally proper, whether the taxes that petitioners paid may be recovered despite the lack of protest by them, and whether the fiber optic cables at issue constitute taxable real property within the meaning of the

RPTL.

[ABA Submits Recommendations for Public-Private Partnerships.]

The American Bar Association's (ABA) Section of Taxation sent its recommendation to the Treasury Department and the Internal Revenue Service concerning the guidance to facilitate the development of public-private partnerships (P3's). The ABA's recommendations include the creation of a new safe harbor to ensure that P3 arrangements won't give rise to private business use.

The ABA's recommendations can be seen here.

TAX INCREMENT FINANCING - IOWA

Acciona Windpower North America, LLC v. City of West Branch

United States District Court, N.D. Iowa, Cedar Rapids Division - September 4, 2015 - F.Supp.3d - 2015 WL 5189017

Wind turbine manufacturer brought action against city, alleging breach of tax increment development agreement for urban renewal project. Parties cross-moved for summary judgment.

The District Court held that:

- Manufacturer complied with agreement requiring it create approximately 110 new, full-time jobs within five-year period;
- Under terms of agreement, city did not have a legal obligation to appropriate funds for tax refund;
- City's cancellation of agreement was without legal excuse, and thus constituted anticipatory breach of contract;
- Manufacturer was not entitled, as award of damages for city's breach of agreement, to five years of unpaid tax rebates;
- Manufacturer was entitled to specific performance; and
- Genuine issue of material fact existed as to whether city had legal obligation to pay manufacturer a rebate obligated for appropriation in city resolution.

Under Iowa law, wind turbine manufacturer complied with terms of tax increment development agreement requiring it to create approximately 110 new, full-time jobs within a period of not to exceed five years, despite manufacturer's failure to maintain that number of jobs during entirety of five year period, where manufacturer created more than 110 new, full-time jobs almost immediately, and nothing in the agreement required manufacturer to maintain a certain number of jobs over any particular length of time.

Under Iowa law, terms of tax increment development agreement between city and wind turbine manufacturer, which stated tax rebate payment would be subject to annual appropriation of the city council, did not create a legal obligation to appropriate funds for a tax rebate in any given year, despite moral or practical reasons for doing so.

Under Iowa law, city's cancellation of tax increment development agreement, based on wind turbine manufacturer's alleged breach of contract, was without legal excuse, and thus constituted anticipatory breach of contract, where manufacturer had, in fact, complied with agreement.

Under Iowa law, wind turbine manufacturer was not entitled, as award of damages for city's breach of tax increment development agreement, to five years of unpaid tax rebates. Agreement required only that city consider whether tax rebate would be paid in any given year, and automatically awarding tax rebates for remaining five years of contract would place manufacturer in a better position than if the contract had not been breached.

Under Iowa law, wind turbine manufacturer was entitled to specific performance of tax increment development agreement, which had been breached by city.

Genuine issue of material fact as to whether, under terms of tax increment development agreement, city had legal obligation to pay wind turbine manufacturer a percentage of incremental taxes paid by manufacturer to be rebated in later fiscal year, which had been approved by city resolution, precluded summary judgment on claim that failure to pay such amount constituted breach of agreement under Iowa law.

Bill Includes AMT Exemption for PABs, But Also 28% Cap.

WASHINGTON – A lengthy tax relief and job creation bill recently introduced in the House would exempt private-activity bonds issued from 2015 through 2018 from the alternative minimum tax, repeal sequestration, and create an infrastructure bank. But it also would cap the value of the municipal bond tax exemption at 28%.

Muni experts were disappointed to see the 28% cap, saying it contradicts the bill's aim of increasing employment while improving the nation's infrastructure.

"It's very commendable that these members of Congress are proposing concrete, meaningful actions to promote infrastructure financing," said Chuck Samuels, a member of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo. "Unfortunately, the 28% proposal may take away with one hand what they are trying to give with the other hand."

The 299-page bill, H.R. 3555 called "Jobs! Jobs! Jobs! Act of 2015," was introduced by Rep. Frederica Wilson, D-Fla., and has more than 30 Democrats as co-sponsors. It has been referred to nine committees, including the House Ways and Means Committee and the House Transportation and Infrastructure Committee.

The bill includes a number of provisions aimed at tax relief for workers and businesses, putting workers back on the job while rebuilding and modernizing the country and providing pathways for job-seeking Americans to get back to work. Several of these provisions relate to infrastructure.

The measure also would repeal federal spending cuts known as sequestration. The sequestration cuts have included reductions in the subsidy payments issuers receive from the Treasury Department for their direct-pay bonds, such as Build America Bonds.

But one of the offsets for the bill would be a 28% limit on certain deductions and exclusions, including the exclusion for tax-exempt interest. This offset is similar to a proposal in recent budget requests from President Obama.

Other offsets include taxing carried interest in investment partnerships as ordinary income, closing the loophole for corporate jet depreciation and repealing oil subsidies.

The bill would exempt PABs issued from 2015 through 2018 from the AMT. Generally, these types of bonds are subject to the AMT, increasing their yields, but PABs issued in 2009 and 2010 were exempted from the AMT under the American Recovery and Reinvestment Act.

By exempting PABs from the AMT, but subjecting all bonds to the 28% cap, PAB issuers may not be better off than they are under current law, and issuers of other types of bonds would be worse off, said Bill Daly, director of governmental affairs for the National Association of Bond Lawyers. The bulk of the muni market is governmental and 501(c)(3) bonds, which are not subject to the AMT.

“For the market as a whole, it is a negative,” Daly said.

Jessica Giroux, general counsel and managing director of federal regulatory policy for the Bond Dealers of America, said, “BDA believes the best way to finance infrastructure is to provide state and local governments access to numerous, cost-effective financing options and municipal bonds have been the best option for over a century and private-activity bonds also play an important role in many communities. However, Rep. Wilson’s recommendation to put limitations on the value of the federal tax-exemption tied to municipal bonds runs counter to the intent of her legislation and would drive-up not only the cost of bonds to state and local governments but also the billions of dollars in infrastructure financed by the bonds in the past year alone.”

The Council of Development Finance Agencies, whose members include issuers and borrowers in PAB transactions, does not support the bill on balance, said Jason Rittenberg, CDFA director of research and advisory services.

“Tax-exempt bonds are a proven and effective tool for infrastructure finance, and a cap on the exemption would cause unknown impacts on the market at a time when states and municipalities need access to stable and affordable financing,” he said.

Micah Green, co-chair of Steptoe & Johnson’s government affairs & public policy group, said that either the bill has an unintended consequence that needs to be fixed, or an intended consequence that makes it “far less attractive” to the muni market.

The bill also would create an infrastructure bank called the American Infrastructure Financing Authority that would provide loans and loan guarantees to facilitate transportation, water and energy infrastructure projects of regional or national significance.

Projects would generally need to have anticipated costs of at least $100 million to be eligible for assistance from the AIFA, but rural infrastructure projects would only need to have costs that are expected to be $25 million or more.

The AIFA could make up to $10 billion of loans and loan guarantees in each of its first two fiscal years of operation, up to $20 billion in each of fiscal years three through nine of its operations, and up to $50 billion in years after that.

The bill would appropriate $10 billion to the AIFA. In each of fiscal 2016 and 2017, no more than $25 million of those funds could be used for administrative costs, and in fiscal 2018, no more than $50 million could be used for administrative costs.

Also, the bill would make available $2 billion to the Secretary of Transportation to carry out airport improvements; $27 billion for certain surface transportation, passenger and freight rail, and port infrastructure projects; $4 billion for grants for high-speed rail and intercity passenger rail projects; $3 billion for grants for transit capital assistance; and $5 billion for capital investments in surface transportation infrastructure that would be distributed under a competitive grant program.

THE BOND BUYER

BY NAOMI JAGODA

OCT 2, 2015 11:12am ET

Bill Would Create Clean Energy Tax-Advantaged Bonds.

WASHINGTON — An energy bill offered by Senate Democrats would create Clean Energy Bonds that could be used as either tax-credit or direct-pay bonds with an initial 28% subsidy rate and that would not be subject to volume cap.

The bill, S. 2089 or the "American Energy Innovation Act," was introduced late last month by Sen. Maria Cantwell, D-Wash., the ranking minority member of the Senate Energy and Natural Resources Committee. It is co-sponsored by 30 Senate Democrats, including Senate Finance Committee ranking minority member Ron Wyden, D-Ore., and Senate Minority Leader Harry Reid, D-Nev.

The bill contains a number of provisions, including some aimed at encouraging investment in clean energy technologies.

The measure's proposed creation of Clean Energy Bonds would build upon current law. At present, several tax-advantaged bonds can be used to finance certain clean renewable energy facilities and conservation improvements. These include Clean Renewable Energy Bonds, Qualified Energy Conservation Bonds, tax-exempt bonds for public power providers and tax-exempt private-activity bonds for certain green buildings.

Like New CREBs, the proposed Clean Energy Bonds would be tax-advantaged bonds that could be issued by state, local and tribal governments, public power providers and electric cooperatives. But there would be some differences between the two types of bonds. A key difference is that Clean Energy Bonds would not be subject to volume cap. New CREBs have a national volume cap, and issuers have to request allocations of it from the Internal Revenue Service. Congress has not provided any new national volume cap for New CREBs since 2009, so issuers can only issue these bonds from allocations of the existing cap.

The American Public Power Association is appreciative that Cantwell and Wyden created a program that's longer-term and has no volume cap. The bill is a "step in the right direction," said John Godfrey, senior government relations director for the group.

He added that APPA also likes the fact that Clean Energy Bonds would supplement, rather than replace, tax-exempt bonds.

However, the bill does not appear to address the sequester cuts to subsidy payments to issuers of direct-pay bonds. Given how long it will take to pass an energy bill, "it would be a shame for it to be undermined from the start by the threat of sequestration," Godfrey said.

Clean Energy Bonds could be used for both facilities that produce clean electricity and those that produce clean transportation fuels. New CREBs are to be used for renewable energy projects. They cannot be used to finance clean transportation fuel projects.

The credit and subsidy rate for Clean Energy Bonds would start at 28% of interest costs, which is less than the 70% subsidy rate for New CREBs. If federal officials determine that the annual greenhouse gas emissions from electrical production or transportation fuel produced and sold at retail are equal to or less than certain percentages, the credit rate would be phased out for bonds issued for facilities producing that type of product in calendar years after the determination is made. The credit and subsidy rate would be zero for any bond issued more than three calendar years after the determination is made. Regardless of the emission levels, the phase outs would start in 2026.

Susan Collet, president of H Street Capitol Strategies, pointed out proposals to revive the Build America Bond program would do so at a 28% subsidy rate. That percentage is thought to be revenue neutral.

While issuers might choose to issue tax-exempt bonds over Clean Energy Bonds because tax exempts are simpler, the bill recognizes that there is a need for financing tools that can be used by nonprofit electric utilities, which can't take the production tax credit or investment tax credit.

Collet said that the legislation is "a message bill at this point" and reflects the priorities of Democrats. The Senate Energy Committee has approved a bipartisan energy bill, and the Democrats' bill includes items that the Senators could not get included in the bipartisan bill, she said.

The energy committee doesn't have jurisdiction over taxes, so Godfrey said he would expect Cantwell to offer an amendment to the bipartisan bill that includes tax provisions when the bill is considered on the Senate floor. However, the specifics of that amendment are unclear, he said.

The Democrats' energy bill could also be discussed in the context of a bill that would renew expired tax provisions known as extenders, Godfrey said. Some of the expired provisions relate to energy.

THE BOND BUYER

BY NAOMI JAGODA

OCT 6, 2015 2:37pm ET

Louisiana Election 2015: Should Governments Pay Taxes to Other States?

Louisiana is letting voters decide whether local governments should be allowed to tax property in their borders that's owned by other governments.

For four years, West Carroll Parish in the northwest corner of Louisiana billed the Memphis Light, Gas, and Water Division about $100,000 per year in property taxes for storing some of its natural gas in the parish limits.

But in 2013, Memphis stopped paying its bill. The Tennessee city argued that the natural gas storage site was government-leased property and used for a public purpose and therefore exempt from a property tax. Two years and a few court battles later, West Carroll Parish lost the argument and had to refund Memphis more than $400,000.

The problem? Louisiana's constitution doesn't clarify that the public-use exemption only applies to property owned by a Louisiana government, so outside state and local governments don't have to pay a tax either.

Many state exemptions are silent about this issue. Only 11 expressly allow local governments to tax property that's owned by another government, according to the Lincoln Institute on Land Policy. The bad news for Louisiana is that it is literally surrounded by states that do specify that other state and local governments have to pay property taxes in their state.

The state is trying to remedy the situation with a proposed constitutional amendment that would allow Louisiana to tax property owned by out-of-state governments like the Memphis utility.

"This will basically level the playing field for Louisiana and mirrors the current law in Texas, Arkansas, Mississippi and Tennessee," said State Rep. Charles Chaney, whose district includes West Carroll Parish.

Among the handful of states with laws about this issue, Ohio has a unique approach. Its law says that property in Ohio used for public purposes out-of-state can be tax-exempt only if that state can offer Ohio the same exemption.

Chaney said he won't push for the issue again if the ballot measure fails next month. Still, he's concerned the measure won't survive voter fatigue — Louisiana voters must choose a new governor, state legislators and other local officers. By the time they get to the statewide ballot measures, voters could be more inclined to vote "no" or leave the box blank, rather than decide for the measure on its merits, said Chaney.

"It's a down ballot issue and placement and that is very worrisome to me," he said.

GOVERNING.COM

BY LIZ FARMER | SEPTEMBER 29, 2015

TAX INCREMENT FINANCING - COLORADO

[1405 Hotel, LLC v. Colorado Economic Development Commission]

Colorado Court of Appeals, Div. I - September 10, 2015 - P.3d - 2015 WL 5259813 - 2015 COA 127

Hotels brought judicial review and declaratory judgment action challenging decision of Colorado Economic Development Commission (CEDC) to award city a tax increment subsidy under the Regional Tourism Act (RTA). The District Court dismissed action. Hotels appealed.

The Court of Appeals held that:

- As a matter of apparent first impression, point of administrative finality of award to city under RTA, as would trigger time period for filing of judicial review action, was time when CEDC adopted resolution memorializing terms of award;
- Hotels' premature filing of judicial review complaint did not render complaint untimely; and
- Hotels' alleged injury was indirect and incidental, and therefore hotels lacked standing to bring action.

Point of administrative finality of grant to city by the Colorado Economic Development Commission (CEDC) under the Regional Tourism Act (RTA), as would trigger time period for filing of action for judicial review, was time when CEDC adopted resolution memorializing terms of grant, not when CEDC gave it preliminary approval. Preliminary approval contained conditions which city had 120 days to fulfill, and to hold that conditional approval constituted final agency action would require parties affected by a conditional approval of a grant under the RTA to commence litigation before knowing whether the recipient of the RTA grant would fulfill those conditions and receive final approval.

Hotels' alleged injury from decision of Colorado Economic Development Commission (CEDC) to make grant to city for hotel and conference center development project, pursuant to the Regional Tourism Act (RTA), was indirect and incidental to city's alleged wrongdoing, and therefore hotels lacked standing to bring judicial review and declaratory judgment action challenging CEDC's and city's alleged failure to comply with RTA, including failure to require city to make new application for grant following change in developer. Even assuming project would cause hotels economic harm by drawing away some of their existing customers, such harm was not directly caused by CEDC's or city's alleged failure to comply with RTA but rather would result from development project's subsequent lawful conduct of competing in the tourism marketplace.

TAX - CALIFORNIA

Myers v. State Board of Equalization

Court of Appeal, Second District, Division 3, California - September 25, 2015 - Cal.Rptr.3d - 2015 WL 5656124

A taxpayer brought a mandamus and declaratory judgment action to compel state officials to collect a gross premium tax from two health care service plans on the basis that they were "insurers." The Superior Court sustained state officials' and health care service plans' demurrers without leave to amend. Taxpayer appealed.

The Court of Appeal held that:

- On issue of first impression, health care service plans were "insurers" subject to gross premium tax if indemnifying against future contingent claims represented a significant financial proportion of their businesses;
- Prior final judgment denying declaratory and injunctive relief on same issue was within public interest exception to res judicata rule; and
- Taxpayer's action did not improperly seek to prevent or enjoin the collection of any tax.

Two taxpayers were "insurers" subject to the state constitution's gross premium tax if indemnifying against future contingent claims represented a significant financial proportion of taxpayers' businesses, even if the taxpayers were designated as "health care service plans" for regulatory purposes under the Knox–Keene Health Care Service Plan Act.

Trial court's prior final judgment denying declaratory and injunctive relief to compel a health care service plan to pay the state constitutional gross premium tax as "insurers" was within the public interest exception to the res judicata rule, in a new mandamus and declaratory judgment action against the same health care service plan and another plan, since the applicability of the gross premium tax presented a pure question of law, the matter affected public finances, and the prior judgment did not result in an appellate opinion.

The constitutional provision stating that no legal or equitable process shall issue to prevent or enjoin the collection of any tax did not bar taxpayers' mandamus and declaratory judgment action to compel state officials to collect a gross premium tax from two health care service plans on the basis that they were “insurers,” since the action did not seek to enjoin the state from collecting any other taxes or fees. Whatever effect the “in lieu of” clause of the gross premium tax provision would have on the corporate franchise taxes the state had previously collected from the health care service plans was a matter for the plans to raise in a subsequent tax refund action.

TAX - ILLINOIS

Hertz Corp. v. City of Chicago

Appellate Court of Illinois, First District, Second Division - September 22, 2015 - N.E.3d - 2015 IL App (1st) 123210 - 2015 WL 5578591

Car rental companies brought declaratory judgment actions against city, asserting that ruling by city’s department of revenue as to tax on use of vehicles leased by city residents was unconstitutional. The Circuit Court declared ruling facially unconstitutional and entered permanent injunction. City appealed.

The Appellate Court held that:

- Tax which ordinance imposed on any lessee of personal property who entered into any lease transaction in the city, irrespective of where leased property was used, and on lessees who used leased personal property more than 50 percent of the time in the city, irrespective of where lease transaction took place, was a use tax rather than a transaction tax, and therefore tax did not exceed city’s home rule authority by taxing non-city vehicle lease transactions, even though ordinance imposing tax was titled “Personal Property Lease Transaction Tax.” Taxable event was the privilege of using leased personal property inside the city. and
- Ruling did not exceed scope of ordinance.

Ruling by city’s department of revenue requiring car rental companies to maintain records relating to whether vehicles were used within city and whether customers were residents of city, as proof of claimed exemption for vehicles used outside of city for more than 50% of time, was not unreasonable, in declaratory judgment action brought by companies challenging ruling, which was promulgated pursuant to ordinance which taxed use of vehicles within city even if lease transaction took place outside city but within three miles of city’s border, where companies already obtained such records from its customers in form of driver license information and form requiring customer to check box next to question on intended use of vehicle.

NABL: SLGS Window May Re-Open in 5 Weeks.

Few things are certain when it comes to legislating, but news from the Treasury Department yesterday could mean that the SLGS window will reopen in late October or early November. The window has been closed since the Federal government’s debt ceiling was reinstated last March. Treasury has been using its “extraordinary measures” to allow the government to continue to pay its bills and avoid default. Yesterday, Treasury Secretary Lew sent a letter to the Congressional leadership that tax receipts have not been as high and expenses have been higher than earlier projections indicated. The net result is that he now projects that on or about Thursday, November 5, the Treasury Department will have exhausted the extraordinary measures and have less than $30 billion in cash on hand. The following day is a payday for Federal employees and the following Tuesday is a payment date for some Social Security recipients. No doubt some Treasury bonds or notes will also mature around that time.

To read the full article, click here.

TEB Resources Allocation for FY 2016.

In a message released by IRS Tax Exempt and Government Entities Division (TE/GE) Commissioner Sunita Lough, half of the resources allocated to Tax-Exempt Bonds will be used for examination casework. Additionally, 30 percent of the resources will be used for the VCAP program to ensure its continued transparency and efficiency.

More information regarding the TE/GE workplan can be seen here on pages 12 and 13.

IRS Tax Exempt & Government Entities Priorities for FY2016.

Read the IRS report.

BDA Submits Issue Price Comment Letter to IRS.

BDA letter to IRS on Issue Price highlights potential negative impact to market and smaller issuers

Today, BDA submitted a comment letter to IRS in response to its request for comment on a proposed rule to re-define 'issue price'. The proposal partially withdraws the 2013 issue price proposal.

The BDA's draft letter focuses on:

- Problems for issuers and the marketplace that will be caused by an actual sales approach and the absence of a reasonable expectation standard
- Issues associated with the unworkable proposed alternative to the general rule, including compliance concerns
- The rule's negative impact on smaller issuers, especially due to the 10% maturity-by-maturity 'substantial amount'/actual-sales requirement
- The need for a safe harbor or alternative standard for competitive deals

BDA's previous issue price letters, including the BDA letter to IRS in May 2015 can be read here.

09-22-15

Fitch: Fewer Uninsured Brighten U.S. Nonprofit Hospitals.

Fitch Ratings-New York/Chicago-23 September 2015: The reduction in the number of uninsured patients served by nonprofit hospitals is positive for the sector overall, Fitch Ratings says. The increased numbers of patients with coverage have helped hospitals sustain operating margins even as inpatient volumes have remained largely flat and top-line revenue growth continues to be pressured. Fitch expects the positive impact on performance to continue over the near term, especially as the healthcare exchanges mature and additional states consider expanding Medicaid.

The U.S. Census Bureau reported that the number of Americans without health insurance fell to 33 million in 2014 from 41.8 million in 2013. Moreover, the number of uninsured declined in every state, even those that did not expand Medicaid. In our view, this is positive for the sector as hospitals are now receiving reimbursement for patients that previously would have been written off as charity care or bad debt. Fitch believes the sharp drop in the number of uninsured Americans also reflects a greater awareness of the eligibility under state Medicaid programs, as Medicaid enrollments have risen in a number of states that did not expand Medicaid.

Fitch’s rating actions over the last 18 months support this, as affirmations, upgrades and downgrades have shown little difference between those states that have expanded Medicaid and those that have not. The effect on individual hospital performance varies depending on a number of factors, even among states that have expanded Medicaid. In New York, for example, which already had a robust Medicaid program in place, the subsidized healthcare exchanges have proven more beneficial to hospitals, as the underinsured have fuller coverage, helping increase utilization in a state where medical costs to patients can be high.

The benefit of wider insurance coverage has helped mitigate the impact of tighter reimbursement increases from managed care and Medicare payors. Over the medium, Fitch expects Medicare’s value-based reimbursement programs and managed care “risk-based contracts,” combined with increasing consumerism among patients, could pressure sector profitability. Furthermore, the expected reduction and redistribution of federal disproportionate share funds could mute what has been solid performance for the healthcare sector.

TAX INCREMENT FINANCING - ILLINOIS

Devyn Corp. v. City of Bloomington

Appellate Court of Illinois, Fourth District - September 15, 2015 - N.E.3d - 2015 IL App (4th) 140819 - 2015 WL 5430992

Property owner brought action against city, seeking equitable accounting and declaratory judgment for city’s alleged failure to comply with various provisions of Tax Increment Allocation Redevelopment Act. The Circuit Court granted summary judgment to city and denied owner’s motion for leave to amend its complaint. Owner appealed.

The Appellate Court held that:

- City could take activities in furtherance of tax increment redevelopment plan after plan’s estimated date of completion;
- Property owner was not entitled to reconsideration on ground of newly discovered evidence;
- Owner was not entitled to equitable accounting; and
- Owner was not entitled to leave to amend its complaint.

TAX SALE - ALASKA

Tagaban v. City of Pelican

Supreme Court of Alaska - September 18, 2015 - P.3d - 2015 WL 5474352

Lienholder filed suit to challenge city's tax foreclosure sale on property in which he claimed an interest. Lienholder moved for summary judgment and city cross-moved. The Superior Court denied lienholder's motion and granted city's motion. Lienholder appealed.

The Supreme Court of Alaska held that:

- Statute governing municipalities' enforcement of tax liens did not violate lienholder's due process interests by limiting its foreclosure notice requirement to property owners;
- Because lienholder had actual knowledge of tax foreclosure during redemption period, and did not seek to redeem the property, he was precluded from raising a due process challenge to the redemption notice statute; and
- Prevailing party fees should not have been awarded for time city spent litigating lienholder's standing to sue as a class representative.

Even if judicial lienholder's interest was reasonably ascertainable, statute governing municipalities' enforcement of tax liens did not violate his due process interests by limiting its foreclosure notice requirement to property owners, where another statute that allowed mortgagees and lienholders to request foreclosure notice, provided a reasonable mechanism by which interest-holders such as the lienholder could protect their property rights.

Alaska's municipal foreclosure notice scheme, requiring lienholders to affirmatively request notice of pending tax sale, is reasonably calculated, under all circumstances, to apprise lienholders of the pendency of the action and afford them an opportunity to present their objections, as required by due process guarantees. Statutory structure reasonably balances lienholder's interest in preserving the ability to enforce a property interest against a governmental entity's interest in efficiently collecting taxes.

TAX - CALIFORNIA

Seibold v. County of Los Angeles

Court of Appeal, Second District, Division 3, California - September 22, 2015 - Cal.Rptr.3d - 2015 WL 5561222

After county assessment appeals board denied taxpayer's application for a refund of property taxes paid to county relating to ground lease and hangar at municipal airport, taxpayer filed complaint against county for declaratory relief and a refund of taxes paid for hangar and ground lease.

The Superior Court granted taxpayer summary judgment with respect to hangar, and following bench trial, found that ground lease constituted taxable possessory interest, but only entered judgment in favor of taxpayer for refund of taxes paid attributable to hangar. After taxpayer's motion to vacate was denied, county and taxpayer appealed. The Court of Appeal dismissed appeals and remanded with instructions, concluding that appeals were not taken from final appealable judgment. On remand, the trial court ruled in favor of taxpayer with respect to ground lease and entered orders enjoining collection of possessory interest taxes and ordering county to refund all possessory interest taxes paid on hangar and ground lease. County appealed.

The Court of Appeal held that:

- Taxpayer's right of possession under ground lease was sufficiently independent to establish taxable possessory interest in lease, and
- Fact issue as to whether hangar was taxable improvement on tax-exempt land precluded summary judgment with respect to hangar.

Taxpayer's right of possession under ground lease at municipal airport was sufficiently independent to establish a taxable possessory interest in lease. Ground lease conferred private benefit on taxpayer to use leased premises for storage of taxpayer's aircraft and aircraft-related equipment, use restrictions did not limit measure of control granted to taxpayer with respect to his authorized private use, but rather restrictions were fully consistent with airport's responsibility to safeguard use of public property and in no way required taxpayer to act as governmental agent when he enjoyed private benefit of storing his aircraft on leased premises.

Genuine issue of material fact existed as to whether taxpayer's airplane hangar located on leased premises at municipal airport was a privately-owned improvement on exempt public land taxable as a possessory interest, precluding summary judgment in favor of taxpayer in action against county for refund of property taxes paid for hangar.

IRS Chief Counsel Blasted for Favorable Ruling on Total Return Swaps.

WASHINGTON — Former Internal Revenue Service official Mark Scott is urging the IRS to revoke a private-letter ruling that was favorable for a total return swap, or TRS, arguing that they are "arbitrage schemes" that have "resulted in hundreds of millions of dollars of illegal tax benefits being stolen."

Scott, who spent 18 years at the IRS, was director of the tax-exempt bond office, or TEB, for several years before he left for private practice. He was also an ex-special assistant U.S. attorney for the Justice Department, who made the request in a blisteringly critical letter sent to William J. Wilkins, chief counsel in the IRS Office of Chief Counsel on Sept. 8. In an interview, Scott would not comment on whether he has launched a whistleblower case on TRS', but said this is irrelevant to his concerns about these transactions.

The website for his law practice says that he has been "specializing in representing whistleblowers on issues relating to tax-exempt bonds and taxes owed by state and local government," as well as arbitrage rebate payments.

Scott's letter to Wilkins refers to the favorable but limited PLR 201502008 that was dated May 21, 2014, but not publicly released by the IRS until Jan. 9 of this year. The ruling did not identify the parties involved but concluded that an extension of a TRS entered into between a borrower and a bank at the same time the underlying tax-exempt bonds were sold "will not be an abusive arbitrage device."

These transactions, possibly hundreds of which have been done, involve long-term bonds and a short-term TRS. In such deals, a hospital or other borrower through an issuer privately places long-term bonds with a bank, which then enters into a much shorter term TRS with the borrower. 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. However, many TRS' are rolled over or replaced with new negotiated terms for the life of the bonds. The borrower could be forced to pay if interest rates rise.

The bank/bondholder/swap counter party can make money from the higher tax-exempt bond rate and also from a deduction of its loss from the swap payments. In the case underlying the PLR, the bond proceeds had all been used to current refund some previous bonds, as well as to pay issuance costs. As a result there were no bond proceeds remaining and there was no debt-service reserve fund, from which arbitrage might have generated. If there had been bond proceeds or a reserve fund outstanding, the IRS could have questioned whether calculations should have been based on the bond yield or on the integrated bond and swap. But the facts of this case rendered this issue moot.

The borrower/bondholder/swap counterparty wanted to extend the TRS for another five years. The PLR essentially had to examine the bond and TRS transaction done several years ago to respond to the issuer about whether the extension would violate tax requirements.

In his letter, Scott took issue with the fact that, in this transaction and in any typical TRS, "one party wears two hats as both the swap counterparty and the holder of the tax-exempt debt." As a result, he said, "the swap counterparty/bondholder, through pricing terms applicable to the 'total return' portion of the TRS, can lower its taxable income in exchange for greater tax-exempt income."

"The ruling, therefore, describes an arbitrage scheme that is quite easy to abuse," Scott said. "The scheme has been abused using billions of dollars of bonds, and has resulted in millions of dollars of illegal tax benefits being stolen," he said. In an interview, he said: "The net effect is the bank is reducing its taxable income and increasing its tax-exempt income in a way that looks to be a tax shelter. It's a way to convert taxable income to tax-exempt income through the use of a tax-exempt bond issue and a TRS. It raises tax issues for the outstanding bonds and the bank."

TEB GETS UNDERCUT

Scott criticized the chief counsel's office for issuing the private-letter ruling, while the enforcement side of IRS' tax-exempt bond office is auditing these deals and finding the bonds taxable. He suggested the chief counsel's office be completely undercut, or steamrolled over, TEB. It "is well aware of this abuse" and "has investigated a number of high-coupon, tax-exempt bond issues where the bondholder/swap counterparty deployed TRS structures with phony terms to illegally generate greater tax-exempt income for a longer period of time in exchange for lower taxable income," Scott told Wilkins.

"These audits have been ongoing for some time and the office of tax-exempt bonds has, rightfully, issued adverse findings. Your office knew about these audits and the TRS scheme," Scott said.

Very few IRS audits of TRS' have been disclosed on the Municipal Securities Rulemaking Board's EMMA system: the Electronic Municipal Market Access website. In one that was, the IRS in 2013 found that revenue bonds issued by the New Jersey Health Care Facilities Authority for the Deborah Heart and Lung Center were taxable because the borrower entered into a total return swap. The $37.4 million of revenue bonds had been issued in 1993 and about $17.6 million remained outstanding. Neither the IRS nor the parties involved publicly disclosed the amount paid in settling the tax dispute.

Scott called this latest PLR "a mistake" and said that, "although innocent looking factual representations were presented, the favorable ruling, even with this ostensibly limited application, has emboldened the use of the TRS scheme." Some lawyers said that while PLRs are only supposed to apply to those taxpayers that requested them, this one has been taken as an encouragement that TRS' can be done without violating tax requirements.

Scott also claimed that the PLR was wrong by being limited and failing to address several tax issues. For example, the PLR declined to take a position on whether the TRS caused a reissuance, which would cause the bonds to be reissued and subject to the latest tax requirements. Lawyers had said a reissuance would not have been a problem because there have been no recent tax law changes that would have applied. The chief counsel's office also did not express any opinion on whether the interest paid on the bonds may be excluded from gross income.

Scott said: "The ruling was wrongly reasoned and overlooked the proper application of several long-standing regulations. The ruling should have pointed out that the payment to the issuer for 'price protection' results in additional gross proceeds, the TRS is investment property, and significant modifications made to outstanding tax-exempt debt by a person other than the governmental issuer results in the reissuance of taxable debt."

"By agreeing to entertain this ruling request and to restrict the scope of its legal analysis, your office was used to promote an abusive arbitrage scheme," he told Wilkins. Scott also claimed the chief counsel's office violated IRS procedures, which state that PLRs will not be issued for outstanding transactions. He accused the office of "erasing the distinction between private-letter rules and technical advice memorandums" and helping transaction participants "game the audit process."

"By expressing legal conclusions on outstanding bonds the ruling violates the clear standards set forth in [Revenue Procedure] 96-16, Section 5.04(1)" on rulings and determination letters, according to Scott. That section of the revenue procedure states: "The Service will not issue a nonreviewable ruling on whether an issued and outstanding obligation that is part of an issue of obligations meets one or more conditions for the exclusion of interest on the obligation from gross income under § 103 unless the request is received by the Service before interest on any obligation in that issue is required to be reported by a holder."

"It would be inexcusable to leave this mixed ruling (part technical advice memorandum/part private-letter ruling) on the books to serve as an example of how to game the audit process," Scott told Wilkins.

THE OTHER SIDE

Some lawyers disagreed with Scott.

"I think the ruling was sound and it was consistent with tax policy," said Hobby Presley, Jr. a partner at Balch & Bingham in Birmingham, Ala. "I can't tell from Mark's letter what his concern is. If people are using a total return swap structure in the existing environment, it's highly unlikely they are motivated by arbitrage. Because of the prevailing [low] investment rates, there's no arbitrage to be earned."

Other lawyers agreed, saying that in the TRS in the PLR, there was no real opportunity for arbitrage earnings because no bond proceeds remained outstanding and there was no debt service reserve fund. Milton Wakschlag, a partner at Katten Muchin Rosenman in Chicago, said that while Scott wants the ruling rescinded, "the IRS feels strongly about the quality of the guidance it issues in the first place and the process it goes through."

"In my anecdotal experience, they are not keen on interventions," he said. Wakschlag said the late, former House Ways and Means Committee chair Dan Rostenkowski, D-Ill., once tried to get one of his PLRs overturned, but did not succeed. “I suspect nothing will happen with this,” Wakschlag said. The PLR “seems to have taken longer to be released than the norm,” likely meaning it was reviewed by many IRS officials, he said. Some lawyers have said that there are questions in TRS’ about whether a bank, which often serves as both the swap counterparty and issuer, should be allowed to take tax deductions for loss carry forwards. However, this is an issue for a different IRS division or bank regulators, not TEB, they said.

THE BOND BUYER

BY LYNN HUME

SEP 21, 2015 1:10pm ET

SIFMA Submits Comments to the IRS on Re-proposed Issue Price Rules.

SIFMA provided comments to the Internal Revenue Service (IRS) and their recently re-proposed rules related to establishing the issue price on tax-exempt bond issuance transactions. In its release, the IRS withdrew the 2013 issue price proposal, which SIFMA opposed, and offered an alternative approach. The new proposal maintains the requirement that issue price is established when underwriters have firm orders for a threshold amount of each maturity in an offering. However, the new proposal offers an alternative means of establishing issue price when there are insufficient firm orders to meet the threshold test.

View SIFMA’s letter.

NABL Submits Issue Price Comments.

NABL has filed its comments on the arbitrage regulations proposed on June 24, 2015. NABL requested several items, including:

- (1) confirmation that an issuer need not choose between the general method and the alternative method prior to the issue date;
- (2) confirmation that, under the alternative method, the issuer’s obligation is limited to obtaining a covenant from the sole or lead underwriter;
- (3) clarification that the issuer’s due diligence obligation with respect to issue price is that of a prudent person;
- (4) elimination of the uncertainty in the definition of “underwriter;”
- (5) additional alternative methods for determining issue price for bonds sold pursuant to a competitive bid;(6) confirmation that bonds purchased directly from an issuer by a bank or another party for its own investment would fall under the general private placement and buyer rules of Section 1273 of the Code; and
- (7) addition of a cross-reference to the definition of “issue price” for other similar concepts in the tax code.

NABL also requested to testify at the hearing on the proposed regulations to be held on October 28, 2015.

Click here to read NABL's comments.

SIFMA: Alternative Issue Price Method 'Not Workable' As Proposed.

WASHINGTON – The Internal Revenue Service's alternative method for determining issue price is "not workable," though the overall issue price rules proposed in June are a "significant improvement" over those floated in 2013, the Securities Industry and Financial Markets Association told the IRS.

SIFMA made the comments and recommended how the proposed rules can be improved in a comment letter sent to the IRS on Thursday.

"We believe that the 2015 proposed regulations are a significant step forward and with certain clarifications and modifications, can establish a regulatory structure that will impede neither the efficient and aggressive marketing of new issues nor enforcement of the limitations mandated by Congress," SIFMA wrote in the letter, signed by managing director Michael Decker.

The general rule in the 2015 proposal is that the issue price of a maturity is the first price at which 10% is sold to the public. The public would be anyone other than the underwriters or a related party, with underwriters defined as the underwriting syndicate and anyone who enters into a contract or other arrangement to sell the bonds with any of the syndicate members.

If 10% of a maturity hasn't been sold by the sale date, an issuer could use the alternative method to determine issue price. Under this method, the issuer could use the initial offering price as the issue price for bonds sold to the public as of the sale date as long as certain conditions are met.

One condition is that underwriters fill all orders placed by the public and received by the underwriter on or before the sale date at the initial offering price. Another is that the lead or sole underwriter certifies 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.

The 2015 proposal is markedly better than rules proposed in 2013 and then withdrawn because it provides an alternative way to establish issue price when there are unsold maturities as of the sale date, SIFMA wrote. But because of ambiguities and constraints, the alternative method, as proposed, "does not provide a workable alternative for establishing issue price, principally due to the requirement that lead underwriters certify as to the actions of others," it added.

Lead underwriters can't certify about actions that haven't happened yet, and the lead underwriters can't certify that the syndicate members actually won't sell the bonds at a higher price during that period. Instead, SIFMA is recommending that under the alternative method, lead underwriters certify that all members of the syndicate have agreed in the agreement among underwriters or a related document to not sell bonds at a price higher than the initial offering price between the sale date and the closing date unless the market moves.

SIFMA also argued that it would be "exceedingly difficult" for the market change exception to be implemented, since there's no effective way to demonstrate market movement. "Price indicators, such as the Thomson Reuters Municipal Market Data (MMD) AAA Curve, are not traded actively on a two-way basis and do not necessarily reflect actual sales, intraday market movement, or the localized nature of the tax-exempt market," the group wrote.

Decker told The Bond Buyer that there's no good way to clarify market movement, so SIFMA asked Treasury and the IRS to make clarifications about the period between the sale and the issue dates under the alternative method.

The group also wants Treasury and the IRS to clarify that underwriters are only restricted from selling bonds above the initial offering price during this period until 10% of the maturity is sold. SIFMA also wants the agencies to clarify that underwriters can fill orders at prices lower than the initial offering price during the period between the sale date and the closing date. Sales during this period should only establish the issue price under the general rule at a price lower than the initial offering price at the option of the issuer, SIFMA wrote.

SIFMA also had several suggestions for improvements to facilitate the application of the general rule.

One recommendation is for there to be a special rule for competitively bid and sealed bid offerings. It is common for bidders in these types of transactions to submit bids with little-to-no premarketing, and as a result, it is likely that many will not meet the 10% threshold on the sale date, SIFMA wrote.

For competitive and sealed bid transactions, SIFMA would like issuers to be able to treat the offering price specified in the winning bid as the issue price, without the restrictions on sales occurring between the sale date and the issue date that are set forth in the alternative method.

Other suggestions pertain to the definition of the public and the underwriter. SIFMA would like the agencies to include a provision similar to one in the 2013 proposal that would count as a sale to the public a sale to anyone, including an underwriter, who holds the bonds for investment and not for redistribution. SIFMA would also like Treasury and the IRS to clarify what is meant by an arrangement with an issuer to sell bonds, other than a contract, that would cause someone to be treated as an underwriter.

Additionally, SIFMA would like Treasury and the IRS to clarify the meaning of "the first price" at which 10% of the bonds are sold to the public.

THE BOND BUYER

BY NAOMI JAGODA

SEP 18, 2015 4:24pm ET

IRS Rules that No Abusive Arbitrage Device Was Used in Connection With Bond Issue: Tax Analysts

In technical advice, the IRS concluded that no abusive arbitrage device was used in connection with bonds used to refund in advance a portion of the issuer's outstanding indebtedness.

Under section 148, the tax exemption for interest on state and local bonds does not apply to any arbitrage bond. Reg. section 1.148-10(a)(1) provides that bonds of an issue are arbitrage bonds if an abusive arbitrage device is used in connection with the issue.

The IRS found no evidence to indicate that any action was taken by the issuer to enable it to exploit the difference between tax-exempt and taxable interest rates to obtain a material financial advantage. Therefore, the IRS determined that no abusive arbitrage device was used in connection with the issue.

The IRS also concluded that neither the reserve portion nor the current portion of the bonds constitutes excess gross proceeds under reg. section 1.148-10(c)(2) because both are replacement proceeds in sinking funds for the refunding issue. Lastly, the IRS determined that the bonds were not an advance refunding in which a device was employed to obtain a material financial advantage apart from savings attributable to lower interest rates.

Summary by Tax Analysts®

Continue reading (subscription required).

Citations: TAM 201538013

SEPTEMBER 30, 2014

NABL: IRS Updates Sequestration Effects for FY 2016.

The Internal Revenue Service announced the FY 2016 updates on the effects of sequestration on State & Local Government Filers of Form 8038-CP. According to the IRS, refund payments processed on or after October 1, 2015 and on or before September 30, 2016 will be reduced by the fiscal year 2016 sequestration rate of 6.8 percent, unless a law is enacted that cancels or otherwise impacts the sequestration.

A press release from the IRS with more information can be seen here.

NABL: TEB Announces VCAP Changes.

The Internal Revenue Service Tax Exempt Bonds office (TEB) announced several changes to its tax-exempt bonds Voluntary Closing Agreement Program. The changes were announced during a September 3, 2015, webinar hosted by Karen Skinder, Acting TEB Program Manager for Compliance and Program Management.

The changes will be reflected in revised IRM sections 7.2.3 and 4.81.6, both of which will be published soon, according to the IRS. The changes include no longer providing relief for post-issuance compliance procedures (effective 6 months after publication in the IRM) and template agreements for certain violations.

The IRS TEB office will post the webinar, including copies of the slides, to their website here.

TAX - MASSACHUSETTS

Russell Block Associates v. Board of Assessors of Worcester

Appeals Court of Massachusetts, Suffolk - September 16, 2015 - N.E.3d - 2014 WL 10399795

City sought review of decision of the Appellate Tax Board, granting taxpayer an abatement of tax on its parking garage.

The Appeals Court held that:

- Evidence supported classification of parking garage as partially “residential” property, and
- The phrase “used exclusively,” in statute defining accessory residential property to include property used exclusively by the residents of the property or their guests, refers to that portion of mixed-use property used exclusively for residential accessory purposes.

Parking garage was an “accessory” building “incidental to habitation” within the meaning of tax statute, thus supporting “residential” classification. Parking garage was part and parcel of residential development plan, residents of the development needed a place to park their vehicles, and garage was designed and built to serve the development’s tenants’ parking needs and was required to do so to meet zoning and lending requirements for the development of the project.

In the context of a multiple-use property classified as mixed use, the phrase “used exclusively,” in statute defining accessory residential property to include property used exclusively by the residents of the property or their guests, refers to that portion of the property used exclusively for residential accessory purposes.

TAX - OREGON

City of Seattle v. Department of Revenue

Supreme Court of Oregon, En Banc - September 11, 2015 - P.3d - 2015 WL 5306744

Cities appealed from Tax Court’s summary judgment ruling that their interest in electrical transmission capacity could be taxed by Department of Revenue as a property interest “held” by taxpayers.

The Supreme Court of Oregon held that:

- Cities’ interest in electrical transmission capacity could be taxed, and
- Senate bill which repealed property tax exemption benefiting out-of-state municipal corporations was not a “bill for raising revenue” within meaning of state constitutional provision requiring that bill for raising revenue originate in House of Representatives.

Cities’ interest in electrical transmission capacity, purchased from electrical cooperative and used to transmit electricity over region’s federally administered power grid, could be taxed by Department of Revenue as a property interest “held” by the cities pursuant to statute under which real and personal property of the United States held by a taxpayer comes within exception of general exemption of federal property from taxation.

Senate bill which repealed property tax exemption benefiting out-of-state municipal corporations was not a “bill for raising revenue” within meaning of state constitutional provision requiring that bill for raising revenue originate in House of Representatives and pass by three-fifths vote, where bill, although generating revenue by removing a tax exemption, did not directly levy a tax.

Legality of Tax-Exempt Status for P3 Projects Scrutinized in Texas.

The long-standing practice of classifying student housing projects built through public-private partnerships on state university-owned land as tax-exempt is being questioned by a Texas county attorney's office.

County Attorney Rodney Anderson of Brazos County has asked state Attorney General Ken Paxton to deliver a legal opinion on whether taxes should be levied on two Texas A&M student housing P3s in College Station, which collectively will house more than 4,500 students. The projects are among five P3s the university has negotiated and from which it expects to earn $900 million in revenues over several decades.

In his letter to Paxton, Anderson points out that each developer of the two projects will own the facilities and improvements they build, finance and operate during the 32-year and 40-year ground leases that were negotiated. After the leases expire the university will take ownership of the properties.

One of the P3 agreements stipulates that the student accommodations can be used only by people associated directly with the university. However, language in the other, more recent contract does not rule out the option to sublease the housing to "persons who are not faculty, staff or students of Texas A&M or [the university-associated] Blinn College," Anderson pointed out.

The county attorney questions whether these elements of the P3 agreements meet the requirement that, to be accorded tax-exempt status, the property must be both publicly owned and used for public purposes.

He also pointed out that the P3-developed projects will compete with private housing projects that do not enjoy tax-exempt status, which puts owners of non-P3 housing units at a "competitive disadvantage."

In defense of the P3s' eligibility for tax exemptions, the university has cited case law that favors its position, including a 1992 court ruling that improvements to state land are tax exempt even if the state doesn't hold legal title to their improvement, reported the Houston Chronicle.

NCPPP
By Editor September 17, 2015

S&P's Pubic Finance Podcast (The U.S. Health Care Sector Outlook and Special Tax Ratios).

In this week's Extra Credit, Senior Director Kevin Holloran explains what's behind our outlook for the U.S. health care sector and Director Russell Bryce discusses special tax ratios.

Listen to the Podcast.

Sep. 18, 2015

IRS Conducting Targeted Audit of Troubled Wayne County Jail Bonds.

WASHINGTON – The Internal Revenue Service is conducting a targeted audit of $200 million of recovery zone economic development bonds issued in 2010 by the Wayne County Building Authority in Michigan to finance a jail facility that was never completed.

The county disclosed the audit in an event notice posted on the Municipal Securities Rulemaking Board's EMMA system on Sept. 9 in the "Other Event-Based Disclosures," rather than the "Communication from the Internal Revenue Service" or "Adverse Tax Opinion or Event Affecting Tax-Exempt Status" categories of event notices. The IRS audit notice is the latest in a series of headaches for the county tied to the abandoned jail site in downtown Detroit, the county seat.

The authority received the audit notice from the IRS on July 28. The Service said it decided to audit the bonds "because of information we received from external sources or developed internally that causes a concern" that the bonds may fail one or more of the bond provisions in the federal tax code. Bond lawyers have said that language like this is an indication that the audit is targeted.

If the IRS determines that the authority's bond issue violates any tax requirements, the federal subsidy payments the authority receives for the bonds could be at risk. The authority could lose part or all of the subsidy payments, and those losses could be retroactive to the issue date, or prospective, or both. A loss of the subsidy payments "could materially adversely impact the county's ability to pay debt service with respect to the Series 2010 jail facilities bonds or other obligations of the county," the county said.

The authority receives subsidy payments equal to 45% of the interest costs, minus any reductions due to sequestration. As of the date of the event notice, the authority has received about $36.88 million from the Treasury. The event notice said that the county and the authority are currently unable to determine if the audit will lead to the loss of the subsidy payments.

The county said it has hired Miller Canfield to handle the IRS review. A spokesman also said the county is not aware of the information the IRS says it received that suggest the bonds may not be compliant.

"Nothing has come to our attention which suggests that bond usage was non-compliant," county spokesman James Canning said in a statement. "The full amount of authorized bonds have not been spent and are being held in the project fund," said Canning. "Wayne County is cooperating with the IRS and believes that it is in full compliance with all tax requirements."

The county's building authority floated the $200 million bond issue in 2010 to consolidate three aging jail facilities into one adjacent to the Frank Murphy Hall of Justice in downtown Detroit. The bonds were structured as RZEDBs, carrying the county's limited-tax general obligation pledge. RZEDBs are federally taxable, direct-pay bonds whose available project proceeds have to be spent on purposes that promote development or other economic activities in recovery zones.

Wayne broke ground on the $300 million, 2,000-bed project in 2011 and halted it by the summer of 2013 as the estimated cost climbed to $390 million. The site has since sat vacant, with County Executive Warren Evans saying the cash-strapped county does not have the money to finish the project and cannot borrow the money without paying a hefty penalty. The county has the authority to issue another $100 million of bonds to complete the project.

Meanwhile, in 2014, the county's former chief financial officer and two others connected to the project were indicted by a grand jury for misconduct in office and willful neglect of duty tied to the jail financing.

Michigan Gov. Rick Snyder declared Wayne to be in a financial emergency in July, and the county is currently operating under a consent agreement with the state. As part of the decree, Wayne is required to present the state with a plan for the jail by Jan. 31. Officials are reportedly trying to sell the site to a local businessman.

Wayne is paying $14 million annually for the abandoned project, with debt service structured as cash rental payments from the building authority to the county, as well as an additional $3 million in storage costs.

Some of the bonds matured in 2014, and others mature in 2015, 2016, 2025 and 2040. Bonds maturing after 2021 have an optional redemption starting in December 2020. The bonds are also subject to an extraordinary optional redemption due to sequestration cuts to subsidy payments, but not due to any actions of the building authority.

The bulk of the $200 million of taxable bonds — $143.33 million — feature a 2040 maturity and a 10% coupon. The bonds were yielding 11.5% in Wednesday trading, according to EMMA. That’s down from 12.3% on July 15 trading and up from a 7.5% to 8% yield in January.

Fitch Ratings has warned that the jail debt could be particularly vulnerable to cuts or default because it is not subject to abatement or appropriation and the project is politically controversial.

“Debt service comprises a relatively small share of governmental spending, but Fitch believes the jail debt could be vulnerable given the failure to complete the project,” Fitch said in a March 2015 ratings commentary.

JP Morgan was the senior manager on the original deal. Government Finance Associates Inc. was the county’s financial advisor, and Miller, Canfield, Paddock and Stone, PLC was bond counsel, according to the official statement for the bonds.

THE BOND BUYER

BY NAOMI JAGODA and CAITLIN DEVITT

SEP 16, 2015 4:07pm ET

[Wayne County's $200 Million Debt for Jail Fiasco Audited by IRS.]

The U.S. Internal Revenue Service is auditing $200 million of bonds that built an unfinished jail in Wayne County, Michigan, seeking to determine whether to revoke federal subsidies given to the cash-strapped government.

Wayne County, which includes Detroit, sold the federally taxable debt in December 2010 to build a new jail, only to shut down the project in the middle of construction about three years later because of cost overruns. The U.S. Treasury pays 45 percent of the interest under a program aimed at spurring development in economically distressed areas.

The IRS told the county it is scrutinizing the bonds “because of information we received from external sources or developed internally that causes a concern that the debt issuance may fail one or more provisions" of the tax code, according to a Sept. 9 filing with the Municipal Securities Rulemaking Board.

A move to revoke the subsidies could foist added costs on Wayne County, which is already operating under state oversight to avoid bankruptcy after years of budget deficits. The county has received $36.9 million in tax credits so far for the ill-fated project, according to the filing, and spends about $14 million a year on debt service for the securities.

The IRS could put a stop to the credits or seek to recoup subsidies if the county ran afoul of U.S. tax law. That could affect its ability to pay debt service on the jail bonds or other obligations, according to the filing. The county said it can't determine "at this time" whether this audit will lead to a loss of funds.

Wayne is cooperating with the IRS, said James Canning, a county spokesman. Some of the money raised by the bond issue hasn't been spent and is held in the project fund, he said.

"Nothing has come to our attention which suggests that bond usage was non-complaint," Canning said in an e-mail. "Wayne County is cooperating with the IRS and believes that it is in full compliance with all tax requirements."

The disclosure of the audit hasn't affected the price of the bonds. A portion of the securities maturing in 2040 traded Wednesday at an average of 87 cents on the dollar to yield 11.6 percent, little changed from Sept. 8, the day before the filing.

Bloomberg News

by Elizabeth Campbell

September 17, 2015 — 9:16 AM PDT

Moody's: U.S. FY 2014 NFP Hospital Medians Show Stronger Profitability Margins and Revenue Growth.

New York, September 11, 2015 — The median annual revenue growth rate for not-for-profit hospitals and health systems in fiscal 2014 broadly surpassed the median expense growth rate, which reverses a two-year trend of expense growth outpacing revenues, Moody's Investors Service says in its annual medians for US NFP hospitals and health systems, "Strong Business Conditions Bolster Profitability and Growth, Moderating Fundamental Sector Risks."

"Notably, the spread in these growth rates is at a historic high," report author and Moody's VP — Senior Credit Officer Beth Wexler says. "The median annual revenue growth was 5.2%, while median expense growth was 4.6% in 2014."

Consolidation in the NFP sector, enrollment on the public health exchanges, and Medicaid expansion combined with generally favorable patient demand trends fueled the increase in revenues.

Moody's anticipates these favorable trends to continue in 2015 and into 2016, and supports Moody's stable outlook for the industry.

Balance sheets strengthened in 2014, with a 10% median growth in unrestricted cash and investments and a median decline in total direct debt of almost 2%. The median unrestricted cash and investments increased to $340 million in 2014 from $312 million in 2013.

However, the regional 2014 medians reveal varying market demographics, legislative oversight and strategic initiatives have resulted in a divergence of financial performance medians among the four US regions.

“The Northeast’s performance is most striking, owing to its flat median operating cash flow margin, and reflects the difficult environment in which it operates,” says Wexler in a related medians report, “Regional Hospital Medians Show Historically Weaker Financial Performance in the Northeast.”

The Midwest has a history of consolidation and physician alignment which supports its high growth rates, over 18% in median absolute cash flow, well above the rest.

In the West, strong investment returns and robust profitability facilitated growth in liquidity, while the South reports the highest level of self-pay & other in the payor category.

The reports are available to Moody’s subscribers here.

Bond Ruling Emboldens Abusive Scheme, Former IRS Official Says: Tax Analysts

A recent private letter ruling has emboldened the use of an abusive arbitrage scheme and should be withdrawn, says William Mark Scott, former director of the IRS Office of Tax-Exempt Bonds.

Summary by Tax Analysts®

September 8, 2015

William J. Wilkins, Esq.
Chief Counsel, IRS Office of Chief Counsel
1111 Constitution Ave., NW
Washington, DC 20224
Re: Priv. Ltr. Rul. 201502008

Dear Mr. Wilkins,
I write to you to lend my voice to the discontent over Priv. Ltr. Rul. 201502008 (dated May 21, 2014, and released Jan. 9, 2015). I believe your office erred when it issued this ruling, and that the ruling should be revoked per Rev. Proc. 2015-1, § 11.04. And, with full knowledge of the errors, I am hopeful you will act accordingly.

Priv. Ltr. Rul. 201502008 addresses the use of a total return swap (TRS) in conjunction with an issue of tax-exempt bonds. In the ruling, one party wears 2 hats as both the swap counterparty and the holder of the tax-exempt debt. Because of this dual role, the swap counterparty/bondholder, through pricing terms applicable to the “total return” portion of the TRS, can lower its taxable income in exchange for greater tax-exempt income. The ruling, therefore, describes an arbitrage scheme that is quite easy to abuse.

Continue reading (subscription required).

TAX - WASHINGTON

Automotive United Trades Organization v. State

Supreme Court of Washington, En Banc - August 27, 2015 - P.3d - 2015 WL 5076289

Industry group brought action challenging agreements under which Indian tribes agreed to buy taxed fuel and State agreed to refund portion of fuel tax receipts to tribes. The Superior Court granted summary judgment in favor of state. Industry group appealed.

The Supreme Court of Washington, en banc, held that:

- Fuel tax refund agreements between Indian tribes and State did not violate constitutional provision governing fuel tax receipts, and
- Agreements did not violate separation of powers provision of state constitution.

Agreements under which Indian tribes agreed to buy taxed fuel and the State agreed to refund a portion of the fuel tax receipts to the tribes did not violate state constitutional provision that limited use of state fuel tax receipts to highway purposes, where refunds were paid to tribal governments under contracts that limited their use to various government purposes, and governor was statutorily authorized to enter into such agreements.

Legislative authorization for executive to enter into agreements under which Indian tribes agreed to buy taxed fuel and the State agreed to refund a portion of the fuel tax receipts to the tribes did not constitute delegation of legislative authority in violation of separation of powers doctrine of state constitution, where legislature had provided fairly detailed standards and guidelines for such agreements, legislature defined objective of agreements, and legislature required regular audits and reports regarding agreements.

TAX - PENNSYLVANIA

GAI Consultants, Inc. v. Homestead Borough

Commonwealth Court of Pennsylvania - July 8, 2015 - A.3d - 2015 WL 4095523

School district brought declaratory judgment action against redevelopment authority, other taxing bodies, and waterfront partners, asserting authority had the contractual duty to direct bank holding tax increment financing (TIF) fund to pay any assessment appeal refunds on properties pledged to waterfront district at the direction of the taxing body, regardless of tax year.

Owner of parcel pledged to waterfront district brought action in assumpsit in order to recover $34,535 from borough taxing authority following assessment appeal. The Court of Common Pleas entered order declaring authority had a contractual duty under TIF agreement to direct payment of assessment appeal refunds, and ordered authority to direct reimbursement to county and school district of refunds paid to owner of pledged parcel. Borough appealed.

The Commonwealth Court held that four-year statute of limitations for contract actions did not bar claims of taxing authorities for pre-2010 property tax assessment appeal refunds.

TAX - ALABAMA

Bonedaddy's of Lee Branch, LLC v. City of Birmingham

Supreme Court of Alabama - September 4, 2015 - So.3d - 2015 WL 5192185

City brought action against limited liability company (LLC) that operated restaurant and member of LLC seeking payment of business-license, occupational, and sales taxes. Following a bench trial, the Circuit Court entered judgment in favor of city and permanently enjoined LLC and member from operating a business within the city's corporate limits until all tax liabilities were satisfied. LLC and member appealed.

The Supreme Court of Alabama held that:

- City's failure to follow administrative procedures prior to suing LLC member deprived court of subject matter jurisdiction over sales tax claim;
- Failure to follow administrative procedures did not deprive court of subject matter jurisdiction over business-license and occupational tax claims;
- Member was not personally liable for business-license and occupational taxes owed by LLC; and
- LLC was provided with notices of final assessments.

IRS Auditing Minnesota BAB Issue.

WASHINGTON — The Internal Revenue Service is auditing $91 million of Build America Bonds issued by the Minnesota Public Facilities Authority in fall 2010.

The authority disclosed the audit in an event notice posted on the Municipal Securities Rulemaking Board's EMMA system on Sept. 3.

The IRS informed the authority of the audit in a notification dated Aug. 26. The IRS' notice said that at that time, it had no reason to believe that the authority's BABs fail to comply with applicable tax requirements, according to the event notice.

The authority said that it is responding to the IRS' information document request. The bonds under audit are the authority's taxable state revolving fund revenue bonds, series 2010D, which were issued as BABs. Proceeds of the bonds were to be used to make or purchase clean water and drinking water loans, according to the official statement.

Bank of America Merrill Lynch was the underwriter of the bonds, which were sold competitively. Briggs and Morgan was bond counsel, and Public Financial Management and Springsted were financial advisors.

The Bond Buyer

by Naomi Jagoda

SEP 9, 2015 7:49am ET

TAX - ALASKA

DeVilbiss v. Matanuska-Susitna Borough

Supreme Court of Alaska - August 28, 2015 - P.3d - 2015 WL 5061501

Following borough assembly's denial of property owner's request that they remove his property from road service area, property owner filed a complaint against borough, contesting validity of road service tax. The Superior Court granted borough's cross-motion for summary judgment. Property owner appealed.

The Supreme Court of Alaska held that:

- Borough was not required to exclude owner's property from road service area;
- Road service tax was not an invalid special assessment;
- Borough was authorized to provide special services within road service area, thus it could levy taxes to finance those services;
- Validity of a tax does not depend on whether a taxpayer receives a special benefit; and
- Property owner had sufficient economic incentive to bring his claim, entitling borough to attorney fees.

What Will Tax Abatement Disclosures Mean for Economic Development Groups?

State and local governments will begin disclosing financial information about tax abatements under new guidance from the Governmental Accounting Standards Board (GASB). The requirements take effect for financial statements for periods beginning after December 15, 2015.

Tax abatements are defined by GASB as agreements between one or more governments and an entity or individual that reduce the taxes the entity or individual would otherwise owe, and in which the business or individual promises to take a specific action that contributes to economic development or otherwise benefits the governments or their citizens.

Continue reading.

Smart Incentives

Posted by Ellen Harpel | August 31, 2015

Not All Muni Interest Reported by High Earners.

WASHINGTON – Nearly half the tax-exempt interest reported on 2013 individual income tax returns was reported on returns filed by single or married taxpayers or heads of households with adjusted gross income of less than $200,000, according to recently released Internal Revenue Service statistics.

But a majority of the returns showing tax-exempt interest were from a primary taxpayer who was at least 65 years old, the report showed.

"Tax exempt municipal bonds are held by millions of middle-class investors but, in particular, half the holders of these bonds are over 65 and have presumably chosen to invest in the safety of municipal bonds for retirement," said Jessica Giroux, general counsel and managing director of federal regulatory policy for the Bond Dealers of America. "This is a significant demonstration of support for municipal bonds as a solid investment and a secure source of financing for local governments."

The statistics are from the IRS' recently released complete report on tax year 2013 individual tax returns, which include the returns of those who are single and married. They are estimates based on a sample of unaudited individual tax returns filed by U.S. citizens and residents during the 2014 calendar year, the latest full year for which the data is publicly available. The tax-exempt interest reported by taxpayers includes interest on municipal bonds and tax-exempt dividends from mutual funds, the IRS said.

Typically, IRS annual reports about high-income tax returns focus on returns with income of over $200,000.

The report showed that most of the tax-exempt interest reported was from high income households. About 44.06% of the tax-exempt interest reported was from taxpayers with AGI of under $200,000 (including those with no AGI), and about 25.84% of the tax-exempt interest was from taxpayers with AGI of under $100,000. These percentages are similar to the ones in 2012, according to the IRS estimates.

However, most returns with tax-exempt interest were filed by households with AGI below $200,000. Specifically, almost 76% of the number of returns with tax-exempt interest showed AGI of less than $200,000, including no AGI.

Less than 4% of the number of all tax returns, regardless of whether tax-exempt interest was reported, were filed by taxpayers with AGI of at least $200,000, according to the IRS.

The income distribution of tax-exempt interest is not new and is probably a driver behind proposals to curb the municipal bond tax exemption for high earners, such as President Obama's proposal to cap the value of the exemption at 28%, said Michael Decker, managing director and co-head of municipal securities at the Securities Industry and Financial Markets Association.

But to the extent that the 28% cap would apply to a sizable amount of tax-exempt bond interest, it would cause changes in the market. A 28% cap would cause investors to seek higher yields, which would translate to higher borrowing costs for state and local governments, Decker said.

In 2013, married taxpayers filing jointly would be in tax brackets above 28% if they had taxable income of more than $223,050. Taxable income tends to be less than adjusted gross income.

Howard Gleckman, a senior fellow at the Urban Institute, said that the most successful argument for the muni market to make to preserve the exemption is not to focus on the investors but instead to focus on how it helps state and local governments finance projects. Democrats like new projects and Republicans would prefer that projects be controlled at the state and local levels, he said.

Most tax-exempt interest reported on individual tax returns in 2013 was reported on returns with primary filers on the older side. Roughly 3.15 million of returns, or a little over half of the returns with tax-exempt interest, were filed by primary taxpayers who are 65 and older. Returns from those taxpayers reported interest of about $42.4 billion. An additional 1.39 million of returns with a total of about $15.04 billion tax-exempt interest were filed by primary taxpayers with ages of 55 to 64. In cases of joint tax returns, the age is based on the primary taxpayer's age, the IRS said.

"Munis tend to be a good product for retirees who are living off their savings," said Decker, who added that people shift from investing in equities to investing in the fixed-income markets as they approach retirement because bonds are safe and income bearing.

But Gleckman said it doesn't always make the most sense financially for seniors to invest in tax-exempt bonds, for example, if they live in a state without state income taxes and don't make much money.

About 5.99 million of the returns reported tax-exempt interest in 2013 of about $68.1 billion in current dollars, the IRS estimated. The number of returns with tax-exempt interest was half a percent higher in 2013 than it was the previous year, but the dollar amount was 4.2% less than in 2012.

The increase in the number of returns with tax-exempt interest comes after a decline in that category each year since 2008. The amount of tax-exempt interest has declined every year after 2010.

Decker said that the decline in tax-exempt interest in 2013 could be due to the fact that the muni market shrunk during that time. Also, in the low-interest rate environment, bonds are being refinanced and investors are holding bonds with lower interest rates, he said.

THE BOND BUYER

BY NAOMI JAGODA

AUG 31, 2015 4:41pm ET

TAX EXEMPTION - NEW YORK

Drug Policy Alliance v. New York City Tax Com'n

Supreme Court, Appellate Division, First Department, New York - September 1, 2015 - N.Y.S.3d - 2015 WL 5098407 - 2015 N.Y. Slip Op. 06693

Applicant for real property tax exemption petitioned under article 78 for order to annul determination of the New York City Department of Finance to deny that application. The Supreme Court, New York County, denied Department's motion to dismiss and directed Department to grant exemption. Department appealed.

The Supreme Court, Appellate Division, held that Department was entitled to answer petition after denial of its motion.

After court denied its motion to dismiss article 78 petition by applicant for real property tax exemption, seeking to annul determination by New York City Department of Finance to deny application, Department was entitled to answer petition prior to court effectively granting summary judgment to applicant, even though record was arguably substantial and Department had conceded that its motion would be same whether viewed as pre-answer motion to dismiss or one for summary judgment, where parties were not given adequate notice that court would indeed treat motion as one for summary judgment.

TAX SALES - MARYLAND

Kona Properties, LLC v. W.D.B. Corp.

Court of Special Appeals of Maryland - August 28, 2015 - A.3d - 2015 WL 5090056

“These cases contain a common thread tying each together and furnishing the reason we granted the motions to consolidate. In each case, subsequent to the tax sale, the tax sale certificate was transferred to another limited liability company that shared either the same address, attorney and/or incorporator. The new holder of the tax sale certificate foreclosed the property owner’s right of redemption and, for some unexplained reason, the certificate holder later decided that it did not want the property and failed to pay the bid price or the outstanding taxes and fees—payment of which is a prerequisite to obtaining the deed to the property. The original property owner or mortgage holder in each case later filed a motion in the circuit court to enforce the judgment against the certificate holder, requiring the certificate holder to pay taxes accruing after the tax sale and to pay the surplus bid to the property owner or mortgage holder. The circuit court granted all three motions to enforce and required the certificate holders to pay the taxes and bid surpluses to the collector.”

The Court of Special Appeals granted holders’ motions to consolidate appeals and held that:

- Orders granting motions to enforce judgment for surplus bids constituted final judgments;
- Trial court had jurisdiction to enforce judgments;
- Court did not abuse its discretion in finding lack of good cause to strike judgments foreclosing rights of redemption;
- Court had discretion to deny motion to strike mortgagee’s motion for monetary judgment against holder;
- Former property owner was entitled to request that court enter judgment for surplus bids against holder;
- Mortgagees were entitled to request that court enter judgments against holders;
- Owner and mortgagees were not unjustly enriched by judgments; and
- Public policy considerations did not preclude court from entering judgments against holders.

Orders granting motions to enforce judgment constituted final judgments for purposes of appeal, in actions in which trial court granted motions to enforce judgment for surplus bids from tax sales owed to former property owner and mortgagees. Orders were entered as separate documents from docket entry, were signed by judge, and decided issue of whether tax sale certificate holders were obligated to pay bid surplus and taxes and interests and penalties due under original judgments to foreclose redemption rights, orders had hallmark of finality in that they put parties out of court, and, by directing holders to pay surplus bids and all taxes together with interest and penalties on taxes due on properties, there was nothing left for court to do to ensure that owner and mortgagees received bid surplus, as parties knew amounts of surplus and, thus, knew exactly how much holders had to pay.

Trial court had jurisdiction to enforce judgments for surplus bids from tax sales owed to former property owner and mortgagee of another property against tax sale certificate holders, following foreclosures of right to redemption, and, thus, owner and mortgagee had standing, despite claim that court lacked jurisdiction because owner and mortgagee were not properly served. Holders could not have asserted allegedly defective service as justification for vacating judgments foreclosing rights to redeem, and owner and mortgagee had actual notice, as mortgagee filed affidavit stating that it received service and counsel for mortgagee proffered that officer for owner and mortgagee would have testified that they received notice.

Public policy considerations did not preclude trial court from entering monetary judgments against tax sale certificate holders for surplus bids owed to former property owner and mortgagees, despite claim that judgment would send signal to property owners that it was acceptable not to pay property taxes. None of the parties paid taxes due on properties before or after sale, and, thus, city had been subject to cycle of tax delinquency, whereby tax sale purchaser or certificate holder failed to pay its own property taxes after foreclosing title owner's right of redemption, which could not have been intent of Legislature in crafting provisions of tax sale statute.

TAX - OHIO

[Schwartz v. Cuyahoga Cty. Bd. of Revision]

Supreme Court of Ohio - August 27, 2015 - N.E.3d - 2015 WL 50383212015 -Ohio- 3431

Property owner sought review of decision of the county board of revision (BOR), which retained fiscal officer's valuation of property. The Board of Tax Appeals (BTA) affirmed. Property owner appealed.

The Supreme Court of Ohio held that:

- Constitution did not repeal by implication statutory restriction on using prices from auctions and forced sales as evidence of property value, and
- Forced sale of real property by United States Department of Housing and Urban Development (HUD) was voluntary and at arm's-length.

State constitutional provision requiring legislature to pass law taxing real property "according to its true value in money" did not repeal by implication statutory restriction on using prices from auctions and forced sales as evidence of property value. Auction-and-forced-sale statutory provision codified a general presumption that a sale price from an auction or forced sale was not good evidence of a property's value because the underlying transaction was not voluntary and at arm's-length, merely instructing assessors how to determine a property's value.

Forced sale of real property by United States Department of Housing and Urban Development (HUD) was voluntary and at arm's-length, and therefore purchaser rebutted statutory presumption that sale price was not evidence of property's value for tax purposes, where property was on the market for three years (including one year after the property was transferred to HUD), a for-sale sign was posted at the property and purchaser made several offers to buy it, owner rejected purchaser's offers and was planning to sell to a different prospective buyer, when that sale fell through, owner contacted purchaser and advised him that property would be razed unless he wanted to buy, and other sales on street evidenced that the market could not bear a higher sale price at that time.

TAX - NEW JERSEY

[Highpoint at Lakewood Condominium Ass'n, Inc. v. Township of Lakewood]

Superior Court of New Jersey, Appellate Division - August 14, 2015 - A.3d - 2014 WL 10222380

Condominium association challenged township's foreclosure of unbuilt condominium units, and sought declaration that township did not hold title to undeveloped portion of parcel removed from condominium's common property. The Superior Court dismissed quiet title complaint. Association appealed.

The Superior Court, Appellate Division, held that:

- As matters of first impression, declared but unbuilt condominium units are “units” for property tax purposes;
- Association was not entitled to separate notice of foreclosure;
- Township had not obtained fee simple ownership of undeveloped parcel of land; and
- Uncertainty as to whether condominium common expense assessment charged to undeveloped units owner should be equal to those imposed on finished units warranted remand.

SPECIAL ASSESSMENTS - MINNESOTA

McCullough and Sons, Inc. v. City of Vadnais Heights

Court of Appeals of Minnesota - August 17, 2015 - N.W.2d - 2015 WL 4877761

Landowner appealed city’s imposition of a special assessment. The District Court denied city’s motion for summary judgment and city appealed.

The Court of Appeals held that:

- As a matter of first impression, right to appeal a special assessment to the district court is forfeited unless taxpayer files the statutorily required written objection before or at the special assessment hearing, and
- Although landowner had objected orally at special assessment hearing, his actions did not satisfy statutory written-objection requirement, and, therefore, his appeal was not properly perfected.

TAX - ARIZONA

Hub Properties Trust v. Maricopa County

Court of Appeals of Arizona, Division 1 - August 20, 2015 - P.3d - 2015 WL 4965889

This appeal concerns a property tax assessment for real property in Maricopa County for tax year 2011. Hub purchased the Property from the City of Phoenix on March 4, 2011. When the City owned the Property, it was exempt from property taxes.

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.

On appeal, Hub argued 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 exempt during tax year 2011. Thus, Hub contended, the Property was illegally taxed that year. Hub’s argument presumed 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 affirmed 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.

IRS: Mailing Address for Notices of Defeasance and Certain Elections Required by Treasury Regulations.

The following Treasury Regulations – 1.141-12(d)(3), 1.142(f)(4)-1(b)(1), and 1.142-2(c)(2) – require that written notice be given to either the Internal Revenue Service or the IRS Commissioner within 90 days of the establishment of the defeasance escrows under Regs. 1.141-12 and 1.142-2, or the election under 1.141(d)(4)-1.

Treasury Regulations 1.150-5 provides that the notices required by these regulations be filed:

Internal Revenue Service
1111 Constitution Avenue NW
Attention: T:GE:TEB:O
Washington, DC 20224

Tax Analysts: IRS Details Tax Treatment of Police, Firefighter Uniforms.

The IRS Federal, State & Local Governments division has provided guidance on the tax treatment of casual items of clothing issued as uniforms to police officers and firefighters.

According to the directive, police officers and firefighters may treat the costs of the clothing as excluded from wages if two criteria are met: The employer requires the employees to wear the clothing as a condition of their employment; and the employer prohibits off-duty workers from wearing their designated uniforms as casual wear, such as a polo shirt or cap bearing official insignia.

Continue reading (subscription required).

Summary by Tax Analysts®

Court Decisions Extend Chicago's Transfer Tax Ordinance to Cover Mortgage Assignment: Seyfarth Shaw

Earlier this month, in a case of first impression, the Circuit Court of Cook County, Illinois in the consolidated cases of *City of Chicago v. KTCP 225, LLC*, Case No. 13 L 050290, and *City of Chicago v. Horizon Group XXI, LLC,* Case No. 13 L 050291 (the"KTCP/Horizon Cases"), reviewed and analyzed the Chicago Real Property Transfer Tax Ordinance (the "Ordinance") to determine whether one who purchases a loan and mortgage through an assignment of mortgage acquires a "beneficial interest in real property" such that the parties are subject to transfer taxes on the assignment, and further whether the transaction qualifies under Exception C of the Ordinance, which exempts from taxation the granting of mortgages. Just last week the Circuit Court of Cook County again addressed these issues in *Halsted West v. City of Chicago*, Case No. 11 CH 19010, consolidated in the *City of Chicago v. Elm State Property* and *Halsted West*, Case Nos. 14 L 050273 and 14 L 050274 (the "Halsted West Cases").

Although there are parts of the court's opinions with which we take exception, the purpose of this memorandum is to report not to present a critical analysis. While a trial court's decision is of limited precedential value and is subject to appeal, the tenor of the City's litigation position and the court's decisions cannot be ignored.

The Ordinance

The Ordinance in relevant part provides that "a tax is imposed upon the privilege of transferring title to, or *beneficial interest in*, real property located in the city." (Emphasis added.) The Ordinance does not define "beneficial interest in real property," but provides examples of what qualifies, "including, but not limited to:" a beneficial interest in an Illinois land trust, a lessee interest in a ground lease that provides for a term of 30 or more years, and controlling interest in a real estate entity. However, the Ordinance contains numerous exemptions. Prior to May 8, 2013, Exemption C of the Ordinance exempted from tax "[t]ransfers in which the deed, assignment or other instrument of transfer secures debt or other obligations."

Although not germane to the cases in question, note that, under a May 8, 2013 amendment to the Ordinance, Exemption C applies to "[t]ransfers in which the deed, assignment or other instrument of transfer secures debt or other obligations; *provided, however, that any transfer must be to a mortgagee or secured creditor*." (Emphasis added.) In addition to the revision of Exemption C, the Ordinance as amended defines a "mortgagee" and "secured creditor" as "a lender, such as a bank, credit union, mortgage company or other person who acquires a mortgage or other instrument of transfer *primarily for the purpose* of securing a loan, and *not primarily for the purpose of acquiring the real property or beneficial interest in real property* that is the subject of the mortgage or other instrument of transfer." (Emphasis added.)

The Cases

In the KTCP/Horizon Cases, the court recited facts that had the taxpayers entering into deed-in-lieu of foreclosure (DIL) agreements before the mortgages were assigned (and received the borrowers' deeds contemporaneously with the mortgage assignments), and ruled that: (1) assignments of mortgages did convey a "beneficial interest in real property"; (2) the assignment and DIL transactions in this case cannot be separated when applying Exemption C; (3) the assignments of mortgage did not secure debt, and therefore the taxpayers did not qualify for Exemption C.

The first ruling would put all mortgage transactions under the Ordinance, subject to the availability of an applicable exemption. The court concluded that "if a mortgage was not a 'beneficial interest in real property' then the inclusion of the C Exemption…would be superfluous." The court held that since legislation must be interpreted to avoid making a provision superfluous, a mortgage must be a beneficial interest: "[s]ince mortgage liens are not actual title, they must be beneficial interests in real property."

The second ruling, that the assignments of mortgages and deeds must be considered together would seem to be limited to the facts of the case wherein the two parts of the transaction (mortgage assignment and deed) were expressly linked and simultaneous.

The court's third ruling, that the transactions were not entitled to Exemption C, will engender the most uncertainty. The court acknowledges that the granting of a mortgage as security for debt was exempt under Exception C, but reasoned that the assignment of a mortgage did not secure a debt or obligation (the requirement for Exemption C) but rather was a "transfer of debt": "…the Assignments conveyed rights to immediate possession and did not secure debt or other obligations." Perhaps the opinion can be limited to its narrow facts based on the court's own conclusion that due to the express ties between the mortgage assignments and the deeds, there was no debt existing at that time: “the Assignments conveyed rights to immediate possession and did not secure debt.”

In the Halsted West Cases, the opinion is devoid of any discussion about the linking of the assignment of mortgage and deeds-in-lieu of foreclosure either in the facts or the legal analysis and thus would appear to broaden even further the taxability of mortgage assignments. In ruling that the mortgage assignments were taxable under the Ordinance, the court simply reiterated its earlier opinion that an assignment of a mortgage constituted a transfer of a beneficial interest in real property and that while Exemption C exempted mortgages from the transfer tax, it does not exempt assignments of mortgage:

> “The Assignments are transfers of an instrument, which instrument is a transfer that secures debt or other obligations. The Assignments themselves are not instruments of transfer which secure debt. They are an assignment of a document which assigns a lien to secure debt. The Assignments did not secure anything, they simply transferred rights. There was no amount loaned in exchange for the Assignments. Therefore, by the plain meaning of the C Exemption, the Assignments are not exempt as they do not secure debt or other obligations. The Assignments did not secure debt between Taxpayers and the original mortgagees.”

In the Halsted West Cases, the court makes no mention of DIL agreements, but recites, without connecting the fact to its argument, that deeds to the taxpayers from the borrowers were delivered many months after the mortgage assignments.

Conclusion

If nothing else, the rulings show the direction of the City’s litigation posture in similar cases. At worst, the cases make taxable the numerous mortgage assignments made each year where the underlying collateral is Chicago real estate. At its most favorable to taxpayers, perhaps the cases can be limited to the narrow facts wherein there are both mortgage assignments and deeds in-lieu of foreclosure.

Last Updated: August 21 2015

Article by Jeffrey Jahns and Daniel J. Hagedorn

Seyfarth Shaw 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 - OHIO

[MacDonald v. Shaker Hts. Bd. of Income Tax Rev.]

Supreme Court of Ohio - August 19, 2015 - N.E.3d - 2015 WL 4937143 - 2015 -Ohio- 3290

Taxpayer challenged assessment of municipal income tax on present value of taxpayer’s annuity payments from employer’s retirement plan. The Municipal Tax Board held that amount at issue was not pension exempt from municipal income tax, and taxpayer appealed. The Board of Tax Appeals (BTA) reversed. City tax administrator and Municipal Tax Board appealed. The Court of Appeals affirmed. City tax administrator and Municipal Tax Board appealed.

The Supreme Court of Ohio held that:

- Even assuming that statute governing appeal to BTA applied same standard of review as statute governing judicial review by Court of Common Pleas of administrative agency ruling, BTA's review of tax board's legal conclusion that present value of taxpayer's annuity from retirement pension did not come within pension exclusion from municipal income tax was de novo, with no deference to board, and
- On appeal to BTA, standard of review on questions of both law and facts was de novo.

NRA Sues Seattle Over Tax on Sales of Guns, Ammunition.

The National Rifle Association and other gun rights groups sued Seattle over the city's new tax on the sales of firearms and ammunition, echoing the legal battle that followed a similar measure adopted by Chicago three years ago.

The Second Amendment Foundation Inc. and the National Shooting Sports Foundation joined the NRA and two firearms retailers in Seattle in a complaint alleging municipalities are prohibited from enacting regulations of firearms that aren't authorized by state law.

Seattle Mayor Ed Murray said the city is committed to fighting back against an "ongoing national epidemic of gun violence," according to a statement issued after the city council's unanimous approval of the tax Aug. 10.

Seattle will levy a $25 tax on each retail firearm sale and collect two cents on each round of ammunition sold, according to the complaint. The ordinance is scheduled to take effect in January. Chicago, which also imposed a $25 tax on retail firearm sales, lost a bid in March to dismiss a constitutional challenge to its ordinance by area gun shops.

The gun rights advocates seek a court order barring the Seattle ordinance from taking effect, according to the complaint.

"The city believes it is well within its legal authority to tax the sales of firearms and ammunition, and will vigorously defend the ordinance in court," Kimberly Mills, a spokeswoman for Seattle City Attorney Pete Holmes, said in a phone interview.

A copy of the complaint was provided by the Second Amendment Foundation and the filing couldn't immediately be confirmed in Seattle state court records.

"We've been down this path before with Seattle when we sued them and won, knocking out their attempt to ban guns in city park facilities," Second Amendment Foundation founder and Executive Vice President Alan Gottlieb said in a statement. "The city does not seem to understand that no matter how they wrap this package, it's still a gun control law and it violates Washington's long-standing preemption statute."

Bloomberg

Joel Rosenblatt

August 24, 2015

Moody's Revises U.S. Not-for-Profit Healthcare Outlook to Stable from Negative as Cash Flows Increase.

New York, August 26, 2015 — Moody's Investors Service has revised the outlook for the US not-fo--profit and public healthcare sector to stable from negative due to improvement across the industry's fundamental business, financial and economic conditions. The outlook had been negative since 2008.

"The outlook revision represents significant gains in the number of people with insurance, growing patient volumes, and sizeable reductions in bad debt that are contributing to very strong growth in operating cash flow," Moody's Vice President — Senior Analyst Daniel Steingart says.

Following several years of flat growth, operating cash flow growth increased to 12.3% in 2014 from 0.3% in 2013. The metric remains solid at 11.5% through March 2015, Moody's says in "Not-Fo--Profit Healthcare Outlook Stabilizes; Cash Flow Buffers Long-term Pressures."

Moody's says factors driving the stronger operating cash flow are increases in the number of insured individuals and a reduction in bad debt, particularly in states which expanded Medicaid eligibility.

Further, pent-up demand among the newly insured as well as a strong flu season in 2014/2015 facilitated increases in inpatient volumes during the last several quarters.

While these factors are anticipated to continue, momentum is expected to taper to levels at or below historical levels.

The outlook change to stable from negative expresses Moody's views for the sector will neither erode nor significantly improve materially for the 12 to 18 months. Looking beyond that horizon, pressures linger.

"The not-for-profit and public healthcare sector industry faces long-term challenges stemming from who pays for care, how providers are reimbursed, and changes in patient behavior. These risks may weigh on profitability and growth," Steingart says.

The report is available to Moody's subscribers here.

States, Localities Saved More than $700B Due to Muni Exemption.

WASHINGTON — The municipal bond tax exemption saved state and local government borrowers more than $700 billion in debt service expenses from 2000 to 2014, according to a white paper released this week by two local government groups.

The estimated savings amount was in 2014 dollars, according to the paper, which was issued by the International City/County Management Association and the Government Finance Officers Association.

The paper was written by Justin Marlowe, a professor at the University of Washington. It was released as proposals from Congress members, the White House and other sources have suggested limiting or eliminating the federal tax exemption for munis.

The "vast majority" of state and local capital spending is financed through bonds. The muni market is complex, since there are many issuers that can issue many different types of bonds, Marlowe wrote. Some past analysis of how a major change to the tax exemption would affect state and local governments' cost of capital have assumed that ending the exemption would uniformly increase interest rates for all munis. However, there are drawbacks to this approach, Marlowe wrote. There is no evidence that ending the exemption would impact all bonds in the same way. Also, if analysts assume that repealing the exemption has a uniform effect on munis, they're not taking into account day-to-day market movements that affect both tax-exempt and taxable obligations.

Spreads between tax-exempt munis and taxable Treasuries are smaller and greater at different points in time. Since the financial crisis, it is typical for there to be a wide spread between muni and Treasury interest rates. The widening spread could be due to the lower overall liquidity of munis, concerns about state and local governments' credit quality, and changes in the value to investors of the tax exemption for munis, according to the paper.

Marlowe came up with estimates of the credit, liquidity and tax components of muni spreads that were based on market prices for more than 10 million muni transactions between 2000 and 2014. He found that from 2000 to 2014, the tax component of the muni spread was generally between -225 and -150 basis points, meaning that the muni exemption lowered interest rates on a typical bond by 1.50% to 2.25%.

Then he computed the amounts that borrowing costs would increase if the muni exemption was repealed. The calculations involved: increasing each bond's interest rates by the average tax component for all munis with the same maturity on the day the bond was sold; creating a "taxable equivalent" interest expense for each bond; and comparing the expense for the taxable equivalent to the expense for the actual bond.

Savings due to the tax exemption were much lower after the financial crisis than before it. This is not surprising because interest rates on Treasuries have been at record low levels for most of the post-crisis period, according to the paper.

Different types of borrowers had fairly consistent amounts of savings per $1,000 of borrowed money due to the exemption. Since the financial crisis, the exemption has meant savings of about $70 per $1,000 of borrowed money for cities in 2009 dollars, $76 per $1,000 of borrowed money for counties and $79 per $1,000 of borrowed money for schools, according to the paper.

The paper discussed two main alternatives to financing infrastructure through tax-exempt bonds — pay-as-you-go financing and public private partnerships.

"At the moment, there's no robust alternative to tax-exempt financing," Marlowe said in an interview with The Bond Buyer. While PAYGO financing and P3s definitely have a place in state and local finance, they're not as broadly useful as tax-exempt bonds, he said.

PAYGO is more flexible and more transparent than tax-exempt financing, but is hard to use for large projects such as new water treatment facilities, port infrastructure and major bridge replacements.

P3s provide state and local governments with access to new sources of capital and give governments the chance to improve their infrastructure capacity through a private partner. However, P3s carry a variety of risks, and it's unclear if they can work well to finance non-revenue generating infrastructure and smaller projects, according to the paper.

THE BOND BUYER

BY NAOMI JAGODA

AUG 19, 2015 3:10pm ET

GASB Requires Governments to Disclose Information on Tax Abatements.

The Governmental Accounting Standards Board (GASB) issued final guidance on August 14, 2015 that requires state and local governments for the first time to disclose information about tax abatement agreements.

Governments often agree to abate or reduce the taxes of individuals and corporate taxpayers to promote economic development, job growth, redevelopment of blighted or underdeveloped areas, and other actions that are beneficial to the government or its citizens.

The disclosure requirements in GASB Statement No. 77, Tax Abatement Disclosures, are designed to provide financial statement users with essential information about these agreements and the impact that they have on a government's finances.

IRS Seeks Applications for Advisory Committee for the Tax Exempt and Government Entities Division.

The Internal Revenue Service seeks applicants for vacancies on the Advisory Committee on Tax Exempt and Government Entities (ACT). The committee provides advice and public input on the various areas of tax administration served by the Tax Exempt and Government Entities Division (TE/GE).

News Release

TAX - CONNECTICUT

Town of Stratford v. Jacobelli

Supreme Court of Connecticut - August 18, 2015 - A.3d - 2015 WL 4727134

Town and its tax assessor brought action against owners of aircraft hangars located at airport for declaration that the hangars were subject to municipal taxation. The trial court rendered judgment in favor of town and assessor. Owners appealed.

The Supreme Court of Connecticut held that:

- Hangars were buildings subject to municipal taxation as real property;
- Hangars were not exempt as held in trust for State;
- Trial court did not clearly err in finding that owners failed to show a substantial measure of supervision and control over the hangars by the city; and
- Hangars were not exempt under statute requiring Office of Policy and Management to determine the amount due to each town for a municipally owned airport.

Portable aircraft hangars located on city land at airport were "buildings," similar to sheds, which were enumerated in statute making buildings used for business and sheds liable to taxation and, thus, hangars were subject to municipal taxation as real property, where hangars had shed-like metal walls with wooden cross-beams mounted with studs, were affixed to the ground by means of heavy spikes driven through openings in the metal base into the asphalt paving, and, although the hangars were capable of being disassembled, it would have required much effort, as the spikes and boards would have to be removed and the walls collapsed.

Aircraft hangars were not exempt from municipal taxation as held in trust for the State or belonging to any general aviation airport or other airport, where airport was not a general aviation airport, and airport was not owned by the State or the State Airport Authority.

Trial court did not clearly err in finding that hangar owners failed to show a substantial measure of supervision and control over the hangars by the city such that ownership should more properly be placed with the city, although terms of owners' occupancy pursuant to sublease and month-to-month lease with the city evinced some control by city over lessee's access to the airport, where terms did not necessarily amount to substantial control over the hangars such that ownership of the hangars was more properly placed in the city, and each hangar was for the private use of their respective owners or occupants, some hangars could be purchased with various options, and owners could purchase their hangars from any supplier.

Aircraft hangars were not exempt from taxation under statute that required Office of Policy and Management to determine the amount due, as a state grant in lieu of taxes, to each town for a municipally owned airport, where there were no facts in the record to suggest that city submitted the assessed value of the hangars to the State, received a grant in lieu of taxes that took into consideration lost tax revenue relating to the hangars, and also sought to assess the hangars to the owners.

TAX - WASHINGTON

Wedbush Securities, Inc. v. City of Seattle

Court of Appeals of Washington, Division 1 - August 10, 2015 - P.3d - 2015 WL 4726868

Registered securities broker sought review of decision of hearing examiner upholding city's business and occupation (B&O) tax assessment. The Superior Court affirmed. Broker appealed.

The Court of Appeals held that because broker's service income was derived from customer contacts by telephone and the Internet, the entire amount was subject to B&O tax.

TAX - NEW YORK

AJM Capital II, LLC v. Incorporated Village of Muttontown

Supreme Court, Appellate Division, Second Department, New York - July 29, 2015 - N.Y.S.3d - 130 A.D.3d 1018 - 2015 WL 4546740 - 2015 N.Y. Slip Op. 06335

Assignee of tax lien certificates for liens on three parcels owned by village brought action to enforce payment under the certificates. The Supreme Court, Nassau County, granted village's motion to dismiss. Assignee appealed.

The Supreme Court, Appellate Division, held that real property tax law that generally permitted municipalities to sell publicly owned land to satisfy tax liens on it did not apply to land held for public use.

Real property tax law that generally permitted municipalities to sell publicly owned land to satisfy tax liens on it did not apply to land held for public use, and thus village was not permitted to consent to the sale of parcels containing public streets in order to satisfy tax lien on property. Property containing public streets was held for public use, property's use as dedicated public streets had not been discontinued, real property tax law only authorized collection of validly levied or charged taxes, and property held for public use was exempted from taxation.

New Rule to Lift Veil on Tax Breaks.

Cities and states have plied companies with tax breaks for decades hoping to attract jobs and commerce. A new accounting standard will force many to disclose the total annual cost.

The rule approved Monday by the Governmental Accounting Standards Board, the municipal equivalent of the board that sets the standards for corporate reporting, will require government officials to show the value of property, sales and income taxes that have been waived under agreements with companies or other taxpayers. It kicks in starting next year.

Shelby County, Tenn., which includes the city of Memphis, waived about $48.7 million in property taxes last year, equivalent to 6.5% of its property tax receipts. Chicago channeled $372 million to nearly 150 special taxing districts in 2014, or $1 for every $13 of property taxes billed in the city, according to figures from the Cook County clerk's office, which collects city taxes. Before it was shut down in 2012, a major California tax-incentive program sent about 12% of statewide property taxes to redevelopment agencies—and more than 25% in some counties—often benefiting private industry.

Small towns can make big tax commitments as well. Belleville, Ill., with just 43,000 people about 20 miles east of St. Louis, sent $15.6 million of property- and sales-tax receipts—a big part of the city's nearly $97 million in total revenue—to its 19 special taxing districts last year, where the beneficiaries include developers that built shopping centers and residential homes. Special tax districts typically are created for private or public entities to finance, build or operate infrastructure or facilities.

The numbers show how the costs of discounted tax bills, special tax zones or outright waivers are piling up for local governments that in some cases have pressing problems with pensions and other budgetary issues. Deals like Nevada's promise last fall to give Tesla Motors Inc. up to $1.3 billion in tax breaks for building a battery plant there and the $8.7 billion of incentives Washington offered Boeing Co. and its suppliers to expand jetliner production in the state have long been subject to complaints that they increase the burden on existing businesses and individual taxpayers while creating too few jobs.

Now, investors, some government officials and others are becoming concerned that the combined effect of such deals over the years may be significantly limiting the financial flexibility of some cities. Governments rarely sum up the value of the tax breaks they have granted, and the accounting board worries that this leaves investors in the dark about the toll.

"These agreements reduce the amount of tax revenue you get, but you never see that, because it's not reflected in the accounting system," said Dean Mead, a research manager at the Governmental

Accounting Standards Board. “To understand what they can collect, you need to know about things that would prevent them from collecting taxes.”

Cities use a number of incentives to lure businesses or keep them there. They may reduce or even suspend tax collections of businesses for years, or transfer tax receipts directly to developers and employers. Another popular approach is to agree to spend any tax revenue from projects to improve the surrounding areas. That spending then benefits the companies that set up shop, directly or indirectly.

The choices can be difficult, because cities have to compete against rivals in neighboring states for investments that could create jobs. If they don’t bid aggressively, they could lose out entirely. But being too aggressive means missing out on tax revenue.

“Anything that gives more transparency to what a government is doing and what is behind government finances, I’m all for it,” said Hugh McGuirk, head of mutual-fund company T. Rowe Price Group Inc.’s municipal-bond team. “If we find out that, of the potential tax revenue, they’re only realizing 60%, versus another entity that’s realizing 98% of potential, maybe they’ve been a little too generous with their tax incentives.”

In Shelby County, Tenn., which competes with neighboring Arkansas and Mississippi for many industrial and commercial businesses, Memphis and other local governments have entered into more than 500 multiyear agreements with companies like Nike Inc., typically waiving 70% and often more of the property taxes that would otherwise be owed.

In a 2013 deal with Nike, Shelby County agreed to abate $30 million of property taxes over 15 years. That was on top of $28 million that Memphis had waived. In return, the sportswear company said it would invest $301 million to expand a distribution center and improve another facility, adding 250 jobs and $8.75 million in payroll.

Nucor Corp. paid just $300 in taxes last year on property in Shelby County that ordinarily would have been taxed at $1.3 million thanks to pacts that extend out as far as 2028. One, a 15-year deal signed in 2012, involved a promise by the steelmaker to add 27 jobs and invest $113 million in its facility there.

In January, a joint economic-development board for Memphis and the county voted to give Swedish home-furnishings retailer IKEA a combined $9.5 million in tax breaks over 11 years if it builds one of its stores in the county. An IKEA spokesman said the company plans to break ground this fall and open the store a year later. Spokesmen for Nucor and Nike declined to comment.

Absent such agreements, the county’s overall tax rate could be reduced, said Shelby County Trustee David Lenoir, who collects the county’s taxes, to about $4.07 from the current $4.37 per $100 of assessed property value. For a house assessed at $100,000, that would amount to a $300-a-year tax cut.

“It is a significant amount,” Mr. Lenoir said.

County economic-development officials said the incentives have paid off. The joint city-county economic development agency that negotiates many of the tax-incentive agreements estimates that they have created or saved nearly 9,500 jobs and spurred $2 billion in capital investment since 2011, in the process generating another $715 million in tax revenue. The estimate includes partial payments by the companies and a computer model’s projection of the taxes that will be generated by newly hired employees and the businesses they patronize.

Critics of economic-development incentives say such calculations are only as good as the assumptions that underlie them.

Chicago, meanwhile, has announced plans to eliminate some of the tax districts and freeze spending at others. In Belleville, Mayor Mark Eckert said the city's special tax districts are critical to its economic health. With neighboring troubled East St. Louis, Ill., Belleville has had to fight to retain car dealerships and other businesses.

THE WALL STREET JOURNAL

By THEO FRANCIS

Aug. 4, 2015 5:50 p.m. ET

Write to Theo Francis at theo.francis@wsj.com

GASB Statement Requires Governments to Disclose Information on Tax Abatements.

Norwalk, CT, August 14, 2015—The Governmental Accounting Standards Board (GASB) has issued final guidance that requires state and local governments for the first time to disclose information about tax abatement agreements.

The disclosure requirements in GASB Statement No. 77, Tax Abatement Disclosures, are designed to provide financial statement users with essential information about these agreements and the impact that they have on a government's finances.

Governments often agree to abate or reduce the taxes of individuals and entities to promote economic development, job growth, redevelopment of blighted or underdeveloped areas, and other actions that are beneficial to the government or its citizens. Many state and local governments have tax abatement programs in place and the effects of tax abatements on their financial health and ability to raise revenue can be substantial. However, until now it has been difficult to determine the extent and nature of these effects from financial statements.

"This new guidance will result in people who use governmental financial statements having access to essential information about the tax abatements governments enter into," said GASB Chair David A. Vaudt. "Not only will this mean that they'll have access to information that will allow them to better assess a government's financial health, but it will also make the impact of these agreements much more apparent."

Statement 77 requires governments to disclose information about their own tax abatements separately from information about tax abatements that are entered into by other governments and reduce the reporting government's tax revenues. The new disclosures about a government's own tax abatement agreements include:

- The purpose of the tax abatement program
- The tax being abated
- Dollar amount of taxes abated
- Provisions for recapturing abated taxes
- The types of commitments made by tax abatement recipients

Other commitments made by a government in tax abatement agreements, such as to build infrastructure assets.
The new disclosures about tax abatements that are entered into by other governments and reduce the reporting government's tax revenues include:

- The name of the government entering into the abatement agreement
- The tax being abated
- Dollar amount of the reporting government's taxes abated.

TAX - NEW YORK

George W. & Dacie Clements Agr. Research Institute, Inc. v. Green

Supreme Court, Appellate Division, Third Department, New York - July 30, 2015 - N.Y.S.3d - 2015 WL 4557775 - 2015 N.Y. Slip Op. 06399

After applying for property tax exemption, property owner, which was not-for-profit corporation and which operated farm, restaurant, and bed and breakfast on property, and provided public training and educational information concerning organic and biodynamic farming and gardening, brought proceedings for tax relief urging that its property was tax exempt for several tax years. All proceedings except one were consolidated. Town's board of assessment review determined property was exempt. Petitioner moved for summary judgment. The Supreme Court denied motion. Property owner appealed.

The Supreme Court, Appellate Division, held that no binding agreement had been reached between board and property owner.

Writings between town's attorney and president of property owner were merely agreement to agree to amplified terms of future writing, and were incomplete as to all terms necessarily material to settlement, and thus no binding agreement had been reached between town's board of assessment review and property owner in proceedings brought by property owner urging that its property was tax exempt. Writings described proposed settlement hypothetically referencing terms that settlement would involve, including that town's attorney "would draw the appropriate settlement papers and provide a copy to" property owner "for approval before submitting them to" court, and writings did not anticipate potential statutory conflict identified with respect to refund.

IRS Webcast: Voluntary Closing Agreement Program Updates for Tax Exempt Bonds.

Watch this free webcast about Voluntary Closing Agreement Program Updates for Tax Exempt Bonds

When: September 3, 2015; 2 p.m. (Eastern)

How: Register for this event (link to registration page). You will use the same link to attend the event.

Learn about:

- Updates to the Voluntary Closing Agreement Program
- Background
- Procedural Updates
- Request Submission
- Resolution Standards
- Other updates

Continuing Education Credit will not be offered for this event.

Special Report: Multitude of Local Authorities Soak Illinois Homeowners in Taxes.

(Reuters) – Mary Beth Jachec lives in a three-bedroom house in Wauconda, a village of 14,000 in Illinois, 45 miles northwest of Chicago. Her semi-detached brick home is unassuming. Her tax bills are not.

The 53-year-old insurance manager gets a real estate tax bill for 20 different local government authorities and a total payout of about $7,000 in 2014. They include the Village of Wauconda, the Wauconda Park District, the Township of Wauconda, the Forest Preserve, the Wauconda Area Public Library District, and the Wauconda Fire Protection District.

Then there is Wauconda Road and Bridge, not to be confused with Road and Bridge, Wauconda Gravel, or with Wauconda Special Road Improvement and Gravel unit – all three of which have imposed separate taxes on her and the village's other homeowners.

Those three road entities come under the auspices of Wauconda Township. Officials there struggled to explain exactly what they each do, and why three separate taxing bodies are needed. The Wauconda Township Highway Commissioner, Joe Munson, said: "They are all for road maintenance." So why three? "I don't know why," Munson said. "It's always been that way."

Jachec, looking at her property tax bill, is dismayed. "It's ridiculous," she said.

A lot has been said about the budget crisis faced by Illinois – the state government itself is drowning in $37 billion of debt, and has the lowest credit ratings and worst-funded pension system among the 50 U.S. states. But at street level, the picture can be even more troubling.

The average homeowner pays taxes to six layers of government, and in Wauconda and many other places a lot more. In Ingleside, 55 miles north of Chicago, Dan Koivisto pays taxes to 18 local bodies. "I pay $271 a month just to the school district alone," he said. "And I don't have children."

DUPLICATION OF SERVICES

The state is home to nearly 8,500 local government units, with 6,026 empowered to raise taxes, by far the highest number in the U.S. Texas – whose population is more than twice that of Illinois – is second highest with about 5,150 local government units. Florida, with a population 54 percent greater than Illinois, has just 1,650, according to the U.S. Census Bureau.

Many of these taxing authorities, which mostly rely on property tax for their financing, have their own budget problems. That includes badly underfunded pension funds, mainly for cops and firefighters.

The Illinois authorities range from those typical across the nation, such as school and fire districts, to the unusual: for example, districts that raise taxes solely for the purpose of killing mosquitoes, lighting streets or maintaining cemeteries.

A Reuters analysis of property tax data shows that the sheer number of local government entities, and a lack of oversight of their operations, can lead to inefficient spending of taxpayer money, whether through duplication of services or high overhead costs. It leads to a proliferation of pension funds serving different groups of employees. And there are also signs that nepotism is rife within some of the authorities.

There is no central repository of data on the size and geographical boundaries of the local government authorities. The state comptroller does not audit the annual financial reports the local governments submit to it, said Rich Carter, a spokesman for the Comptroller's office.

The state's revenue department does keep data on property taxes collected by counties, but does not track taxes on individual properties. This makes it virtually impossible to systematically determine how many taxing districts overlap on parcels of land, or how much tax residents in a particular area pay unless they are individually surveyed. Because of these gaps and omissions, it is difficult to assess whether multiple layers of government lead to higher taxes.

On average, Illinois' effective property taxes are the third highest in the U.S. at 1.92 percent of residential property values, only behind New Jersey and New Hampshire, according to the non-partisan Tax Foundation. (New Hampshire, unlike Illinois and New Jersey, doesn't have a state income tax or a state sales tax.)

Critics of both the high taxation and the state's governance structure say that it takes too much of a toll on homeowners, discouraging people from either coming to the state or staying in it. Illinois saw net migration of 95,000 people out of the state last year, the greatest in its history and second only to New York, according to U.S. Census data. It is unclear how much, if any, of that exodus might be due to high taxes.

In many Illinois cities and towns, high taxation still isn't enough to keep up with increasing outlays, especially soaring pension costs, and some services have been cut. For example, in the state capital Springfield, pension costs for police and fire alone will this year consume nearly 90 percent of property tax revenues, according to the city's budget director, Bill McCarty. Since 2008, Springfield has cut 11 percent of its police force, closed three libraries, and tapped into other funds to pay pensions, McCarty added.

Sam Yingling, a state representative who until 2012 was supervisor of Avon Township, north of Chicago, has become an outspoken critic of the multiple layers of local government.

Yingling said when he left the township three years ago, the township supervisor's office had annual overheads from salaries and benefits of $120,000. He claimed its sole mandated statutory duty was to administer just $10,000 of living assistance to poor residents. Lisa Rusch, the current Avon Township supervisor, disputed the welfare figure, saying her office provides between $50,000 to $70,000 in emergency and general assistance.

Yingling also criticizes the township for its road program. In its budget for the current fiscal year, more than $1.4 million has been appropriated for road and bridge maintenance. Bob Kula, Avon Township's highway commissioner, says the township maintains just under 13 miles of roads.

BORROWING RESTRICTIONS

The large number of local governments is a legacy of Illinois' 1870 constitution, which was in effect until 1970. The constitution limited the amount that counties and cities could borrow, an effort to control spending.

So when a new road or library needed building, a new authority of government would be created to get around the borrowing restrictions and to raise more money. Today, for example, there are over 800 drainage districts, most of which levy taxes.

A succession of Illinois governors over 20 years has called for a reduction of the number of government units, but made little progress, partly because of Byzantine regulations. To dissolve one of Illinois' 1,432 townships, for example, state law stipulates that three-quarters of voters in every township in that county must vote to approve.

When that state's newly elected Republican Governor Bruce Rauner established a commission to address the problem of local government, the group quickly discovered that the taxing units continue to proliferate. The net number of local government units increased by 148 between 1998 and 2015, the governor's office reported last month.

"You could probably get by with half as many," said Bill Brandt, the recently retired chair of the Illinois Finance Authority, which funds economic development projects. "But knocking out a local government is easier than it sounds. It requires legislation, and a lot of lawmakers on both sides of the aisle come from local government."

And it isn't only the number of authorities that is a concern. Illinois has about one sixth of America's public pension plans – 657 out of almost 4,000.

Local authorities in Illinois are mandated by law to keep the Illinois Municipal Retirement Fund, with 400,000 local government members, fully funded. They had to contribute $923 million in 2014, up from $543 million in 2005.

However, there is no such requirement for the local pension funds. The result: Many of these funds throughout the state are woefully underfunded, and some have less than 20 percent of what they need to meet obligations.

"Pension costs have been going up and up, so pension contributions have been going up and up, and property taxes are the single largest source of revenue to pay for them," Brandt said.

Townships alone provide a striking example of duplicated and costly services.

Cook County is the largest county in Illinois and second largest in America, with Chicago in its borders. There, property tax assessment and collection is done at the county level. But most of Cook County's 30 townships have elected and salaried property tax assessors. They neither assess nor collect property taxes, said Louise Muszynski, an assistant in the Cook County assessor's office.

"They do work," Muszynski said. "They help people at a local level to understand their bills, and help them with appeals."

Northfield Township's road district raised almost $1.4 million in property taxes in the last fiscal year – even though it contains parts of seven cities. Each of those cities has a government that provides road maintenance services, yet Northfield Township maintains its own network of 29 miles of roads, as well as sewers. It has six plow trucks and other equipment, and a full-time workforce of seven, said Wally Kehr, the township road district foreman, who earns more than $110,000 a year, according to the main Illinois pension database.

“We give a better service to local people than if the cities provided it,” Kehr said.

In a rare instance of local government consolidation, officials in DuPage County, west of Chicago, managed to pass legislation in 2012 giving them the power to cut waste. Since then, they have abolished defunct sanitary and fire protection districts, cut duplicate staff and reduced benefits. Officials estimate savings to taxpayers of $100 million over 20 years.

EMPLOYING RELATIVES

The multiplicity of local governments also affords opportunity for nepotism. Looking at the database of the Illinois Municipal Retirement Fund, the main pension system for local government workers, Reuters identified nearly a dozen instances where husbands employ wives, mothers employ daughters, and fathers hire sons.

In Collinsville Township, in southwestern Illinois, the elected Highway Commissioner, Larry Trucano, employs his son James as a laborer, earning $71,000 a year, plus pension and health benefits, according to the Illinois Municipal Retirement Fund database. An official at Collinsville confirmed that James was employed by his father. Four telephone calls to Larry Trucano went unanswered.

In Venice Township, Andrew Economy, the township supervisor who earns $46,300 plus pension – he also runs a local auto repair and tow service – employs his wife, Debra Economy, as administrator. She earns almost $62,000 plus pension.

Andrew Economy said his wife does the jobs of two employees who retired in 2003 and 2008, and does them efficiently.

In the Village of Rosemont, population 4,000, which services Chicago’s O’Hare Airport with hotels and a convention center, eight relatives of Mayor Bradley A. Stephens are village employees, including the police chief.

“Rosemont has never made an apology for the people they hire,” said Gary Mack, a village spokesman. “The mayor holds any employees who happen to be related to him to a much higher standard than others.”

By REUTERS

AUG. 5, 2015, 9:04 A.M. E.D.T.

(Reporting by Tim Reid in Los Angeles and Selam Gebrikadan in New York; Editing by David Greising and Martin Howell)

TAX - NEW JERSEY

AHS Hospital Corp. v. Town of Morristown

Tax Court of New Jersey - June 25, 2015 - N.J.Tax - 2015 WL 3956132

Hospital, as taxpayer, sought review of town’s denial of property tax exemption under statute granting exemption for nonprofit organizations.

As matters of first impression, the New Jersey Tax Court held that:

- For-profit activities of physicians and nonprofit activities carried out by hospital were unable to be separately stated and accounted for;
- Operation and use of hospital property was for benefit of affiliated and non-affiliated for-profit entities;
- Contracts for physicians employed directly by hospital had profit-making purpose; but
- Management agreement between hospital and contractor related to parking garage was not entered into with profit-making purpose;
- Hospital’s agreement with company to provide services including food and nutrition and laundry distribution demonstrated profit-making purpose;
- Gift shop was not reasonably necessary for hospital purpose; and
- Hospital auditorium and fitness center were not operated or used for profit.

For-profit activities of voluntary physicians and exclusive contract physicians and nonprofit activities carried out by hospital were unable to be separately stated and accounted for, such that areas in hospital in which physicians practiced were not exempt from property tax under statute granting exemption for nonprofit entities. For-profit voluntary and exclusive contract physicians were subject to taxation, and voluntary and exclusive contract physicians worked throughout hospital and were not contained within any particular area.

Hospital operated and used its property for profit-making purpose by entangling its activities with affiliated and non-affiliated for-profit entities, such that hospital did not qualify for property tax exemption for nonprofit organizations, since commingling of effort and activities with for-profit entities was significant and substantial benefit was conferred on for-profit entities as a result. Hospital provided substantial subsidies to affiliated and unaffiliated for-profit entities in form of working capital loans, capital loans, and recruitments loans, hospital employees worked at affiliated for-profit entity, and hospital executives also served affiliated entities in executive capacities, making arm’s-length transactions impossible.

Compensation hospital paid its executives was not reasonable, as factor weighing in favor of determination that hospital’s operation and use of its property was conducted for profit, rendering hospital ineligible for property tax exemption for nonprofit organization, absent evidence of salaries paid for similar positions by similar institutions.

Contracts for physicians employed directly by hospital had profit-making purpose, in violation of requirement under statute granting property tax exemption for nonprofit organizations that property must not be used for profit. Employed physicians were given incentive component in addition to their base compensation, incentive pools were derived from departmental expenses, and profit was split between hospital and physicians, indicating that revenue-sharing operation was conducted for profit-making purpose.

Management agreement between hospital and private, for-profit contractor to provide services related to visitors’ parking garage on hospital property was not entered into with profit-making purpose, such that agreement satisfied requirement that property not be used for profit under statute granting property tax exemption for nonprofit organizations. Hospital paid fixed management fee and bore expenses of operating parking garage, such that fee arrangement with contractor was no different from compensation paid to hospital employees, and hospital operated parking garage at a loss.

Hospital’s arrangement with company to provide food and nutrition services, environmental services, laundry and linen distribution, patient transportation, and plant operations maintenance demonstrated profit-making purpose, in violation of requirement that hospital property not be used for profit under statute granting property tax exemption for nonprofit organizations, such that areas of hospital in which company operated were subject to taxation. Hospital's agreement with company demonstrated that both parties contemplated generation of additional revenue in form of reduced expenses, and additional revenue was split between hospital and company.

Gift shop was not reasonably necessary for hospital purpose, but rather served as form of competition to commercially-owned facilities, such that gift shop was not actually and exclusively used for tax-exempt purpose of hospital, as required for gift shop to be exempt from taxation under statute granting property tax exemption for nonprofit organizations. Gift shop did not provide any medical service required by hospital patient, but rather gift shop simply sold items that visitor might bring to patient or use for his or her own purposes, and gift shop was merely a convenience for hospital visitors.

Hospital auditorium was not used for profit, as required for area of hospital in which auditorium was located to be exempt from property taxes under statute granting exemption for nonprofit organizations. Payments were not collected by hospital for use of auditorium.

Hospital fitness center was not used or operated for profit, as required for fitness center to be exempt from property tax under statute granting exemption for nonprofit organizations. Although small amount of hospital employees who used fitness center paid a minor fee, there was not considerable business activity involving fitness center, and no profit was made from fitness center.

Hospital day care center was not exempt from property taxes under statute granting exemption for nonprofit organizations, absent demonstration that day care center was not used or operated for profit.

"If it is true that all non-profit hospitals operate like the Hospital in this case, as was the testimony here, then for purposes of the property tax exemption, modern non-profit hospitals are essentially *legal fictions*; and it is long established that "fictions arise from the law, and not law from fictions." Accordingly, if the property tax exemption for modern non-profit hospitals is to exist at all in New Jersey going forward, then it is a function of the Legislature and not the courts to promulgate what the terms and conditions will be. Clearly, the operation and function of modern non-profit hospitals do not meet the current criteria for property tax exemption under N.J.S.A. 54:4–3.6 and the applicable case law."

IRS Grants Extension of Expenditure Period for Bond Proceeds: Tax Analysts.

The IRS granted a city authority an extension of the expenditure period for qualified new clean energy renewable bond proceeds after determining that the authority had reasonable cause for its failure to spend all the proceeds and that the remaining proceeds will be spent for qualified purposes with due diligence.

Summary by Tax Analysts®

To read the Private Letter Ruling, click here (subscription required).

APRIL 28, 2015

Citations: LTR 201531002

S. 1753 Would Modify and Extend Tax-Exempt Zone Academy Bonds: Tax Analysts

S. 1753, the Rebuilding America's Schools Act, introduced by Senate Finance Committee member Sherrod Brown, D-Ohio, would expand and permanently extend qualified zone academy bonds, and treat them as specified tax credit bonds.

Summary by Tax Analysts®

The full text of the bill is available here (subscription required).

JULY 13, 2015

Citations: S. 1753; Rebuilding America's Schools Act

TAX - MONTANA

Zinvest, LLC v. Anderson

Supreme Court of Montana - July 21, 2015 - P.3d - 2015 WL 4541239 - 2015 MT 204

Purchaser of tax lien brought quiet title action against owner of real property. The District Court nullified tax deed and quieted title in owner. Purchaser appealed.

The Supreme Court of Montana held that county failed to record its acquisition of tax lien, so as to render subsequent assignment invalid. Although there was an untitled document that stated that property was "struck off" to the county following tax lien sale, amount listed as paid in document did not correspond to amount of taxes owed on property at issue, and property was not individually identified in document.

Memo Provides Interim Guidance on Audits of Direct-Pay Bonds.

WASHINGTON – A memorandum recently issued by Rebecca Harrigal, director of the Internal Revenue Service tax-exempt bond office, provides examiners and managers in the office with interim guidance on conducting audits of Build America Bonds and other direct-pay bonds.

The guidance became effective July 20 and will be incorporated into the Internal Revenue Manual, which provides instructions to employees, within the next 12 months.

Direct-pay bonds are taxable bonds for which issuers receive subsidy payments from the federal government equal to some or all of their interest costs. In addition to BABs, direct-pay bonds include new clean renewable energy bonds, qualified energy conservation bonds, qualified zone academy bonds and qualified school construction bonds.

"The examination and processing of resolutions of these bonds present unique situations that require procedures specifically tailored to these bonds," Harrigal said in the memo.

In audits of tax-exempt bonds, the bondholders are relevant because if bonds are determined to be taxable, the bondholders will then have to pay taxes on the interest. However, in audits of direct-pay bonds, the bondholders are not relevant because the bonds are already taxable.

Instead, the eligibility for and the amount of the subsidy payments to the issuers is at stake. Issuers file Form 8038-CP tax returns to request subsidy payments.

Under the interim guidance, examinations of direct-pay bonds will follow the procedures generally applicable to audits of tax-exempt bonds, but with the modifications and additional procedures described in the 39-page memo.

The examination of bonds' qualification as direct-pay bonds and the examination of the 8038-CP forms will generally be handled under the guidance in coordinated but separate ways, said Tom Vander Molen, a partner at Dorsey & Whitney in Minneapolis.

An audit of direct-pay bonds will generally be initiated on the issuer's information return to the IRS that reported the bond transaction. Audits of the 8038-CP forms will generally be opened as related cases when the IRS issues a notice suggesting a problem with the bonds, according to the interim guidance.

Additionally, the memo said that the IRS can choose to audit an individual form 8033-CP to look at matters relating to the amount of the subsidy payment that do not relate to the bonds' status as qualified direct-pay bonds, such has if the issuer filed duplicate returns or did not request a subsidy payment in a timely manner.

The interim guidance addresses the statute of limitations for assessing a penalty on subsidy payments in audits. "For purposes of calculating assessment statute expiration dates, the examiner will treat the period for assessment of tax on Form 8038-CP returns as three years from the date the return is filed," the memo said.

This is similar to the statute of limitations on taxing tax-exempt bond interest as a result of an audit. Generally, if the IRS thinks a bondholder needs to pay tax on bond interest in a certain year, the service needs to take action within three years of when the taxpayer filed his or her return for that year.

The interim guidance states that the procedures for settling an audit of direct-pay bonds will generally follow existing procedures that apply to tax-advantaged bonds.

The guidance also describes what should be done if an issuer agrees that its bonds don't qualify for subsidy payments, enters into a closing agreement where future payments are reduced, or receives a final adverse determination letter. It provides procedures for examiners about the collection of payments from issuers.

Bond lawyers viewed the interim guidance positively.

Vander Molen said that for the most part, the procedures seem to be "appropriate."Carol Lew, a shareholder at Stradling Yocca Carlson & Rauth in Newport Beach, Calif, said she was happy to see the memo come out because it standardizes procedures.

Matthias Edrich, of counsel at Kutak Rock in Denver, said that the future publication of this guidance in the IRM "suggests that the Internal Revenue Service is continuing to look at its procedures proactively to make sure its processes are current and tailored to the characteristics of individual categories of bonds."

The Bond Buyer

by Naomi Jagoda

JUL 24, 2015 3:41pm ET

PAB Issuance Up in 2014, Reversing Three-Year Trend.

WASHINGTON — Issuance of private-activity bonds subject to state volume caps rose in 2014 following three years of declining issuance, according to an annual survey conducted by the Council of Development Finance Agencies.

The increase in PAB issuance is in line with issuance in the municipal bond market as a whole, which "bounced back" in the second half of 2014, CDFA said. States reported cap-subject PAB issuance of $11.61 billion in 2014 — $2.79 billion or 31.57% more than the $8.82 billion issued in 2013.

"Hopefully, this is the start of a trend that will continue, reversing the shrinking private-activity bond market that has occurred recently," CDFA officials wrote in their report on the survey. "Increased tax-exempt bond issuance may be a sign that businesses are investing in more projects, or at least larger projects, than have been initiated in recent years. Certainly a variety of indicators suggest that the economy has been improving, and private-activity bond issuance may be another sign of recovery."

Tax-exempt PABs face competition from bank loans and taxable bonds, particularly when interest rates are low. Rates are expected to increase in the near future, and "this change, coming on the back of a private-activity bond market that is already growing, could result in ample opportunity for bond issuance," the group said.

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.

Issuance of most types of PABs are subject to state volume caps based on a formula published by the Internal Revenue Service. In 2014, state volume caps for PAB issuance were the greater of $100 per capita or $296.83 million. Unused cap can be carried forward for up to three years but must be abandoned after that.

The types of bonds subject to the volume caps include certain types of exempt-facility bonds (such as multifamily housing bonds, water and sewer bonds and bonds for hazardous waste facilities), as well as mortgage-revenue bonds, industrial development bonds, student-loan bonds and agricultural bonds.

PABs that are not subject to the state volume caps include 501(c)(3) bonds, veterans' mortgage revenue bonds and certain types of exempt-facility bonds, such as those for airports, docks and wharves. Data on the issuance of these types of bonds was not included in CDFA's report.

CDFA's survey is based on data voluntarily reported each year by officials of the state and District of Columbia authorities that allocate PABs based on the state caps. The Internal Revenue Service, which oversees the program, only releases this data on a delayed basis.

Not every state provides data in every year, so some variation in the data can be attributed to their differing participation. Additionally, some of the numbers states report may not be accurate.

CDFA found that issuance of exempt-facility bonds, mortgage revenue bonds and student loan bonds increased in 2014, while issuance of IDBs declined.

The states that reported the most cap-subject PAB issuance in 2014 were New York, California, Massachusetts, Pennsylvania and Washington. All of those states except for Pennsylvania were also in the top five states for PAB issuance the previous year.

In 2014, the 50 states and D.C. received $34.53 billion of new volume cap allocation and carried forward $59.12 billion from 2011 to 2013. In total, states could issue about $92.08 billion of cap-subject PABs, according to CDFA.

Issuance in 2014 was about 12.61% of the total volume cap, a slightly greater percentage than the percent of total capacity that was used in 2013. With a greater percentage of total capacity being used in 2014, states reported that they expected to carry forward less cap into 2015 than they carried into 2014, CDFA said.

Housing Bonds

Issuance of multifamily housing bonds increased 37.13% in 2014 and issuance of tax-exempt, single-family mortgage-revenue bonds increased 55.39%.

Barbara Thompson, executive director of the National Council of State Housing Agencies, said that the numbers confirm what the group has heard anecdotally from its members, which is that “the bond market is truly coming back.”

Multifamily housing bonds are used to finance multifamily rental real estate with units set aside for lower income households. The rental market as a whole has been “booming” since the financial crisis, said Richard Froehlich, chief operating officer and general counsel of the New York City Housing Development Corp.

Also, the U.S Department of Housing and Urban Development’s Rental Assistance Demonstration (RAD) program has encouraged issuance, Froehlich said. The RAD program allows public housing agencies and owners of other HUD-assisted properties to convert their assistance for units to project-based Section 8 contracts. Public housing agencies that make RAD conversions can finance repairs for properties with private money.

Thompson said that the RAD program has created more demand for low income housing tax credits. If a project is financed with tax-exempt PABs, developers can get 4% LIHTCs.

Froehlich and Thompson said MRBs, which allow housing finance agencies to provide mortgages to first-time home buyers who meet certain income restrictions, are becoming more attractive compared to other financing tools. Housing finance agencies are again able to use MRBs to finance mortgages with rates lower than the conventional rates, Thompson said.

Student Loan Bonds/IDBs

Student-loan bond issuance rose in 2014. States reported issuing $754.3 million of student-loan bonds, compared to $480.2 million the previous year.

New Jersey did not provide 2013 data to CDFA but reported $226.1 million of student-loan bond issuance in 2014. States reporting increased issuance of these types of bonds in 2014 included

Michigan and Vermont.

Debra Chromy, president of the Education Finance Council, said that student-loan bond issuers in some states can offer loans with more competitive interest rates than Federal Direct PLUS loans, which are made to graduate students and the parents of undergraduate students. People are becoming more aware of this, she said.

Also, for Direct PLUS loans, there's a loan origination fee, but issuers in some states don't have upfront fees for their loans, Chromy said.

Issuance of IDBs, which provide financing for small manufacturers, fell to $269.5 million in 2014 from $355.8 million the previous year.

IDB issuance in recent years has been far less than the nearly $1 billion of IDBs states issued in 2009, according to CDFA.

Twenty-two states reported at least one IDB issuance in 2014. The Midwest region was the most active for IDB issuance, CDFA said.

Bolstering Issuance

Actions could be taken at the local, state and federal levels to increase PAB issuance, CDFA said.

At the state and local levels, bond programs could be branded better and marketed more. Also, issuers could standardize issuing documents or create private-activity bond banks to help borrowers save costs. And issuers could create their own credit-enhancement programs, CDFA said.

At the federal level, Congress could pass legislation to increase issuance of certain types of PABs, CDFA said. One such bill, backed by CDFA, is the Modernizing American Manufacturing Bonds Act. The bill, which was introduced in June by Reps. Randy Hultgren, R-Ill. and Richard Neal, D-Mass., would increase the types of projects that could be financed with IDBs and the maximum size of an IDB issue.

President Obama's fiscal 2016 budget included a 28% cap on the value of the tax-exemption for municipal bonds, but it also proposed some changes to ease restrictions on PABs. The president proposed creating a new type of PAB called qualified public infrastructure bonds, which could finance certain types of governmentally owned infrastructure projects and would not be subject to state volume caps or the alternative minimum tax. Sens. Ron Wyden, D-Ore., and John Hoeven, R-N.D., have also proposed creating a new type of PAB to finance infrastructure projects. Those bonds, called Move America Bonds, could finance projects that are privately owned and would not be subject to the AMT but would be subject to new volume caps that could be converted to tax-credit allocations.

The Bond Buyer

by Naomi Jagoda

JUL 31, 2015 12:45pm ET

TAX - GEORGIA

Fulton County Bd. of Tax Assessors v. Piedmont Park Conservancy

Court of Appeals of Georgia - July 16, 2015 - S.E.2d - 2015 WL 4314595

Charitable corporation appealed county board of tax assessor's denial of its charitable tax exemption as to its building in park owned by the corporation but occupied in part by lessees operating two restaurants. The trial court granted the corporation a tax exemption as to those portions of the building not occupied by the restaurants. Board appealed.

The Court of Appeals held that corporation was entitled to a proportional ad valorem tax exemption.

Charitable corporation was entitled to a proportional ad valorem tax exemption as to portions of its building not occupied by income producing restaurant tenants, where its building remained devoted entirely to its mission of furthering recreational and educational activities in park, its activities continued to be undertaken for the benefit of the public, and the organization's use of income generated at the property was used in furtherance of its religious, educational, and charitable purposes.

Nonprofit Hospitals in 2015: 15 Findings and Thoughts.

Wells Fargo Securities, the capital markets and investment banking division of Wells Fargo & Company, recently released a report on the state of nonprofit hospitals and how they fared in the first half of 2015.

In the report, called "NFP Hospitals H2 2015 Update," George Huang, municipal securities research director at Wells Fargo Securities, provided some thoughts on recent developments and looked ahead to the remainder of the year.

Here are 15 findings and thoughts from the report.

Political and legal challenges

1. The Supreme Court decision in the King v. Burwell case to uphold subsidies on federal exchanges provides stability for hospitals' strategic and operational planning.

2. The Affordable Care Act is a key issue in the 2016 presidential election. However, there is no consensus on Republican "repeal and replace" plans.

3. Congress is pursuing minor amendments to the ACA, but repealing the 2.3 percent medical device tax and the Independent Payment Advisory Board would require bipartisan compromises.

Health insurance exchanges

4. Health insurance enrollment in 2015 under the ACA totaled 10.2 million at the end of March, down from an estimate given earlier that month of 11.7 million people and exceeding the 9.1 million HHS year end-target.

5. Further enrollment growth is likely as individual mandate penalties increase, according to the report. However, adverse selection risk remains, as there is a continued lack of consumer awareness and poor healthcare and health insurance literacy.

Medicaid expansion

6. Although the optional nature of Medicaid expansion limited implementation, Wells Fargo believes most states will eventually opt in. Governors and legislatures in 29 states, plus Washington, D.C., have already made the decision to accept Medicaid expansion.

7. At least seven state governors (Ala., Alaska, Mo., S.D., Tenn., Utah, Va. and Wyo.) are currently open to expansion but may lack sufficient state legislative support. After failing to persuade his legislature to expand Medicaid, Alaska Gov. Bill Walker, a Republican-turned-independent, said he plans to unilaterally accept additional federal and Mental Health Trust Fund Authority money to expand Medicaid in his state.

8. If no other states expand Medicaid in 2016, the Washington, D.C.-based Urban Institute estimated there would be 4.2 million people who otherwise could have gained coverage through expansion.

9. Member hospitals of St. Louis-based Ascension Health benefited more from Medicaid expansion than health insurance exchange enrollments, while hospitals in non-expansion states experienced noticeably less improvement in payer mix. Ascension Health hospitals located in states that expanded Medicaid saw 32 percent fewer uninsured patients in 2014 than in 2013, while the system's hospitals in non-expansion states only experienced a 4 percent decline during the same time period, according to a Kaiser Family Foundation study. Ascension Health hospitals in Medicaid expansion states also saw a 7.4 percent increase in Medicaid discharge volumes from 2013 to 2014. That compares to a 1.4 percent increase for hospitals in non-expansion states during the same time period. Additionally, Ascension Health hospitals in Medicaid expansion states saw an 8.2 percent increase in Medicaid gross revenues from 2013 to 2014 and a 63.2 percent decrease in revenue from self-pay, according to the study. Ascension Health hospitals in non-expansion states saw a 9.4 percent decline in Medicaid gross revenues from 2013 to 2014 and a 2.6 percent increase in revenue from self-pay.

Medicaid enrollment

10. As of April 2015, there were 71.1 million total people enrolled in Medicaid.

11. As of that time, Medicaid enrollment was up 21.3 percent over average monthly enrollments prior to the ACA's 2014 open enrollment period.

Capital markets

12. Hospital bonds continue to be high demand, and that demand has outpaced supply, even in a higher issuance year.

13. In the first half of 2015, hospital bond volume was up dramatically — 87.5 percent year-ove--year.

14. About 80 percent of the hospital bond volume increase in the first half of this year was refunding/combined money deals, so issuance pace is likely to slow when rates rise.

15. Hospital bonds have still been good investments in the first half of 2015, as they are delivering positive returns in excess of other classes of municipal bonds. As of July 16, investing in hospital bonds would have earned an investor a total return of 0.83 percent for year-to-date 2015. By comparison, investing across asset classes as measured by broader indices like the Municipal Bond Index and the Revenue Bond Index, the year-to-date total return would have been 0.18 percent and 0.53 percent respectively.

Becker's Hospital Review

Written by Kelly Gooch | July 22, 2015

Senate Panel Passes Tax Extenders Bill with Bond, P.R. Provisions.

WASHINGTON — The Senate Finance Committee on Tuesday approved a bipartisan, modified two-year tax extenders bill that includes several provisions relating to bonds and Puerto Rico.

The modified bill, which the Senate's Joint Committee on Taxation estimated would result in $95.62 billion of lost revenues, was passed by a vote of 23 to 3 and is being referred to the full Senate.

Committee members proposed more than 100 amendments, but most of them were withdrawn for not being germane or after members said they would bring them up before the Senate. The vote came as several committee members complained a number of the tax provisions should be made permanent rather than extended.

"My goal is to see many of these provisions made permanent," said committee chairman Sen. Orrin Hatch, R-Utah, who explained that he postponed this issue "for the sake of making this markup less contentious." Sen. Ron Wyden, D-Ore., the panel's top Democrat, noted that the bill will extend the tax provisions "past the next election."

The modified bill "expresses the sense of the Senate that Congress should pursue comprehensive tax reform that eliminates temporary provisions from the tax code, thus making permanent those provisions that merit such treatment and allowing others to expire, and that a major focus of tax reform should be fostering economic growth and lowering tax rates by broadening the tax base."

Ahead of the vote, Hatch modified the bill to, among other things, ease restrictions on qualified zone academy bonds and enterprise zone facility bonds.

The bill would provide a $400 million national volume limitation for qualified zone academy bonds for each of 2015 and 2016. These bonds are tax-credit bonds whose proceeds can be used to finance renovations, equipment, course materials and teacher training at public schools or in academic programs that meet certain requirements. The volume cap is allocated to states, which can carry forward unused capacity under the limitation for up to two years.

Under current law, issuers have to certify that private entities will contribute property or services to the school with a value of at least 10% of the QZAB proceeds, but the bill was modified to lower that amount to 5%.

The modified QZAB provision in the bill is estimated to lead to revenue losses of $258 million over 10 years, according to the JCT.

The $400 million volume cap would be the same as the caps for each year from 2011 to 2014 and less than the caps of $1.4 billion for each of 2009 and 2010. As is the case with QZABs from allocations of the caps for 2011 and later, the QZABs from allocations of the 2015 and 2016 caps could not be issued as direct-pay bonds.

The legislation also would extend empowerment zone designations through the end of 2016. By extending the designations, certain distressed communities would remain eligible for tax incentives.

The incentives include enterprise zone facility bonds, though issuers would only be able to issue the bonds in empowerment zones if the zones have remaining volume cap. Additionally, public schools in empowerment zones could be eligible to have projects financed with QZAB proceeds.

The modified bill would ease a requirement for enterprise zone facility bonds. Under current law, after three years businesses that benefit from the proceeds of the bonds must have 35% of their employees as residents of the empowerment zone or enterprise community where the business is located. Under the bill, this requirement can be met if 35% of the employees are from an empowerment zone, enterprise community or qualified low-income community within the locality where the empowerment zone is located.

The JCT estimated that the modified empowerment zone provision would cost the federal government $647 million over ten years.

The bill would allow taxpayers in their 2015 and 2016 tax years to deduct state and local general sales taxes instead of state and local income taxes. This is particularly beneficial for taxpayers in states without income taxes for individuals, including Texas, Florida and Washington.

The JCT estimated that extending the sales tax deduction for two years would cost about $6.7 billion from fiscal years 2016 to 2025.

Sen. Dean Heller, R-Nev., introduced an amendment he sponsored along with Sens. Maria Cantwell, D-Wash., John Thune, R-S.D. and John Cornyn, R-Texas, that would make the deduction permanent. But he withdrew it.

Cantwell said this provision had been in the tax code for years before it was repealed and then reinstated on a temporary basis. She said Congress should make the provision permanent. The House earlier this year passed a bill to make the deduction permanent.

In addition, the extenders bill would extend through the end of 2016 two Puerto Rico-related tax provisions.

One provision would temporarily increase the limit on the amount of excise taxes on rum that are covered over to Puerto Rico and the U.S. Virgin Islands. Under the bill, the territories would be able to receive $13.25 rather than $10.50 per proof gallon. The JCT estimated that extending this provision would lead to federal outlays of $336 million over ten years.

The other provision would allow a domestic production activities deduction to be applied to activities in Puerto Rico. Under current law, special domestic production activities rules for the commonwealth apply for the first nine years of a taxpayer beginning after Dec. 31, 2005 and before Jan. 1, 2015. Under the bill, the rules would apply for the first eleven years of a taxpayer beginning after Dec. 31, 2005 and before Jan. 1, 2017.

Extending this provision would cost $234 million over ten years, the JCT estimated.

Several other bond-related amendments were offered but not discussed during the committee meeting. One by Sens. Robert Menendez, D-N.J. and Michael Crapo, D-Idaho, that would exempt water and sewer private-activity bonds from state volume caps. Another By Sen. Chuck Schumer, D-N.Y., and four colleagues, would provide disaster relief, including by reinstating and extending several provisions enacted in previous years including disaster-specific bond authority.

The Bond Buyer

by Naomi Jagoda and Lynn Hume

JUL 21, 2015 3:13pm ET

IRS Memo: Procedures for Conducting Examinations of Direct Pay Bonds.

The IRS has issued a memo to all employees entitled, “Interim Guidance – Procedures for Conducting Examinations of Direct Pay Bonds.”

The memo provides guidance to tax-exempt bond examiners and managers on conducting examinations of direct pay bonds, such as Build America, clean renewable energy, and qualified zone academy bonds.

The memo is available here.

NABL: Disaster Tax Relief Bills Introduced in House and Senate.

Legislation has been introduced in both the House and Senate that would provide tax relief to areas affected by disasters. The bills, which include several bond provisions, would create a new section in the Internal Revenue Code for qualified disaster area recovery bonds (which will inevitably be referred to as QDARBs). These bonds would be treated as an exempt facility bond and would not be subject to section 146, but the maximum amount a state can issue would be $10 billion. The bonds must be issued by a state or political subdivision that is part of the federally-declared qualified disaster area. At least 95% of the proceeds must be used for qualified project costs.

Both bills have bipartisan support. In the Senate, S. 1795 has been referred to the Finance Committee. H.R. 3110 has been referred to the House Committee on Ways and Means.

Texas' Property Tax Infrastructure Districts: Ongoing Growth Contributes To Credit Stability Despite Concerns Over Low Oil Prices.

We recently affirmed our ratings on 116 unlimited property tax infrastructure districts in Texas. The primary purpose of these districts is utility service or infrastructure provision; they are usually created at the request of real estate developers seeking to benefit from tax-exempt financing of infrastructure improvements to serve future development. The sector has seemingly demonstrated favorable credit quality over the past four years, and we expect continued credit stability for the foreseeable future despite concerns over the impact of currently low oil prices. The energy sector, which has historically been the state’s predominant industry, helped to insulate Texas from the effects of the national economic downturn and has more recently contributed to its recent growth. However, we have seen recent growth and diversification in other sectors, including Houston’s medical industry and Austin’s technology sector.

The full S&P report is available for purchase here.

Auditor: TIFs good for Denver

Tax-increment financing use by the Denver Urban Renewal Authority has been good overall for Denver, according to a new white paper by the Denver auditor’s office.

The sometimes controversial urban-renewal tool has been used to redevelop many areas in Denver. An audit shows that 42 tax-increment financing districts in place between 2004 and 2014 showed that TIF areas and projects were generating significant revenues and that overall, 80 percent of the total TIF amount outstanding has been paid off.

Tax-increment financing defers taxes for property declared as blighted for a specified period of time, allowing developers to invest in improvements on property that otherwise wouldn’t be developed. The smaller tax burden leaves more money available to finance the project and often is the difference between whether a project gets built or not.

Proponents of TIF say that it draws developers that might not otherwise be interested in a particular project or piece of property, but it hasn’t been without controversy.

Opponents say such programs need more oversight and unfairly allows cities to make tax decisions that impact counties, school districts and other taxing entities.

Of the 42 projects analyzed by the auditor’s office, 31 of them are still considered active. Of those, eight have generated more tax revenue than the original amount of the TIF, the report said. These projects have resulted in total tax collections of $446 million from 2004 to 2014, exceeding the $385 million in TIF initially awarded to them.

Another 23 TIF districts are partially repaid, ranging in percentages paid back between .02 percent and 96 percent. Eight of these fall on the very low end of the spectrum for repayment, from .02 percent to 25 percent and have an average remaining term of 17.6 years.

Seven TIF districts are between 25 percent and 75 percent paid back, according to the auditor’s report. Finally, five active TIF districts have paid back 75 percent or more of their TIF.

Two TIF districts in Denver are performing “marginally,” the report said.

Alameda Square, at West Alameda Boulevard and South Zuni Street received $7.3 million in tax increment financing, of which 40 percent has been paid back. A Lowe’s home improvement store that was once the anchor of the redevelopment closed, leaving the building vacant for years until it was acquired earlier this year. Costco Wholesale Corp. has plans to open a Costco Business Center there.

The Cherokee redevelopment site, formerly the Gates Rubber Plant, is also listed as a “marginally” performing TIF district, with 1.8 percent of its $85 million in TIF paid back, with 13 years left on its TIF term. Last September, the site was acquired by Frontier Renewal which is working on plans to develop the highly anticipated site into a mixed-use, transit-oriented development.

“As this analysis shows, TIFs over the last decade have not only met their pay-off obligations, they have in some cases generated additional tax revenue prior to their pay-off dates,” said the auditor’s report. “More importantly, because the properties were generating limited or no tax revenue prior to TIF funding, the projects have provided additional tax revenue to help the city and county of Denver.”

Other parts of the metro are beginning to raise concerns about tax-increment financing. Littleton recently passed a ballot measure that will allow residents to vote on any TIF deal by the city, and Wheat Ridge plans to vote on a similar measure this November.

Likewise, Northglenn and Glendale have recently been involved in eminent domain struggles, another component in urban-renewal law that is often contested.

Earlier this year, the state Legislature passed, and Gov. John Hickenlooper signed a controversial piece of urban-renewal law that gives non-city entities such as counties and special districts three voting seats on 13-member urban renewal authorities that have been formed by municipal officials.

Development officials and financiers said at the time of the bill's signing that it could bring high-profile projects, including the redevelopment of the Gates Rubber site, to a halt.

KATHLEEN LAVINE | DENVER BUSINESS JOURNAL

Jul 20, 2015, 2:19pm MDT

Morristown Memorial Hospital: A Tax Exemption Ruling All Nonprofit Hospitals Need to Know About.

A recent New Jersey Tax Court decision has nonprofit entities on edge. The decision may offer tax authorities the opportunity to pursue payments from nonprofit hospitals and may result in the redefining of tax exemptions by state legislators.

On June 25, 2015, the Tax Court of New Jersey held that Morristown Medical Center, a federally tax-exempt organization and New Jersey nonprofit corporation, should pay property taxes on virtually all of its 40-acre property in Morristown, New Jersey. Judge Vito Bianco ruled that the hospital failed to meet the legal test that it operated as a nonprofit, charitable organization under the state tax law for tax years 2006 through 2008. The ruling puts $2.5 million per year in play for each year covered by the decision.

The decision is unique in that it evaluated the entangled nature of the hospital's for-profit and nonprofit affiliates as compared to the more traditional approach of counting charitable contributions as the principal indicator of nonprofit status in order to decide to eliminate the hospital's property tax exemption. The ruling was limited to the hospital's state property tax exemption and did not affect its federal tax status as a nonprofit.

The Court stated that for-profit activities carried out on tax-exempt property must be "conducted so as to be evident, readily ascertainable, and separately accountable for taxing purposes." In rendering the decision the Court focused on the "blurred lines" between the hospital's nonprofit and for-profit activities with a specific focus on several aspects of its "labyrinth" and "entangled infrastructure." Specifically, Judge Bianco focused on the hospital's executive compensation arrangements with hospital executives, compensation paid to employed physicians, and third-party arrangements with service providers.

In evaluating the hospital's executive compensation arrangements, the Court held that the hospital failed to meet its burden of proof concerning the reasonableness of the compensation paid to some of its senior executives. In certain instances, executives were paid unreasonably high salaries (e.g., $5 million to its CEO in 2005) and received other benefits (such as automobile stipends and golf club memberships) that were unreasonable and excessive as compared to executive compensation arrangements for similarly situated executives. In making such a decision, the Court ruled that the hospital failed to convince it that the standard applied by the IRS to determine appropriate compensation should be adopted in New Jersey. The ruling also identified that productivity incentive payments contained in the hospital's contracts with its employed physicians demonstrated a "profit-making purpose" in instances in which employed physicians received additional compensation based on, in one instance, the number of new patients and number of surgeries performed.

Lastly, the hospital's management contract with a third-party service provider to manage the cafeteria was problematic for Judge Bianco since it included a split of budgetary savings and resembled incentive compensation or profit sharing disguised as cost savings. Specifically, Judge Bianco stated that the management contract "demonstrates that both parties contemplated the generation of additional revenue in the form of reduced expenses. This additional revenue was then split between the hospital and the third party. The Court found there is no meaningful distinction whether profit comes in the form of increased revenues or decreased expenses. Only the hospital's auditorium, fitness center and visitor's garage were held to be exempt from property taxes.

The activities which the Court found to be evidence of a "profit-making purpose" are activities in which federally tax-exempt hospitals have routinely engaged throughout the United States. If upheld, the ruling could have significant precedential value in New Jersey and beyond. As of July 9, 2015, the hospital and the municipality announced that they were engaging in "talks in an effort to end the court case." One possible resolution would be for the parties to enter into a PILOT program, which allows nonprofits to negotiate voluntary and arranged payments to municipalities in lieu of making payments for taxes. These types of arrangements can preempt the tax-exempt litigation on display in this case.

Regardless of the outcome, tax-exempt hospitals and nonprofit entities nationwide should be on notice. Municipalities suffering from budgetary constraints may use the ruling as the basis for additional challenges to a hospital's tax-exempt status. Hospitals and nonprofit entities should use this decision as the catalyst to audit their internal infrastructure to ensure sufficient distinctions between their for-profit and nonprofit activities.

Ballard Spahr LLP

by Denise M. Keyser, Patricia A. Smith, John W. Devine, and Holly V. Horsley

July 21, 2015

Attorneys in Ballard Spahr's Health Care Group represent clients across the health care industry, including hospitals, health systems, clinical laboratories, pharmacies, long-term care facilities, insurance companies, and pharmaceutical manufacturers. Our attorneys counsel clients on regulatory, compliance, privacy and data security, transactional, financing, benefits and compensation, and labor and employment matters.

If you have any questions regarding this alert or the potential effects of the decision outlined in this alert, please contact Denise M. Keyser at (856) 761-3442 or keyserd@ballardspahr.com, Patricia A. Smith at (856) 873-5521 or smithpa@ballardspahr.com, John W. Devine at (215) 864-8322 or devinej@ballardspahr.com, or Holly V. Horsley at (856) 761-3472 or horsleyh@ballardspahr.com.

Municipal Bond Dealers Lobbying Congress for Tax Exemption.

Municipal bond advocates are pressing lawmakers to preserve their tax exempt status.

The Municipal Bonds for America Coalition (MBFA) organized a fly-in lobbying day on Tuesday, where advocates met with congressmen and senators to “discuss the benefits of municipal bonds.”

More than 50,000 state and local governments rely on municipal bonds to finance the construction of new roads, bridges, and schools, according to MBFA.

But they are concerned that the tax exempt status of the $3 trillion industry may be under threat.

“As conversations about tax reform continue, we want to be out in front, talking about the issue and why this exemption is important,” said Samantha DeZur, spokeswoman for MBFA.

“We want to make sure they understand how important municipal bonds are to state and local governments,” she added.

Groups participating in the lobbying day include the American Public Power, American Public Transportation Association, Bond Dealers of America, Council of Development Finance Authorities, Investment Company Institute, Large Public Power Council, National Association of State Treasurers, National Council of State Housing Agencies, and National Development Council.

The Hill

By Tim Devaney – 07/21/15 03:57 PM EDT

Sen. Ron Wyden's Dream: Munis as Holiday Presents.

WASHINGTON — It’s Christmas morning, and little children make their way down the stairs of their home to find out what gifts they’ve received.

But instead of finding toys under the tree, their parents have bought them municipal bonds that will help finance the improvement of roads and other infrastructure in their community.

Can’t envision this scenario? Sen. Ron Wyden acknowledges it isn’t going to happen immediately. But he hopes that one day, parents will give their kids infrastructure bonds for the holidays.

“I think that it’s probably a lot better for the economy and the planet than buying a kid another toy that’s going to break in 20 minutes,” said Wyden, an Oregon Democrat and the ranking minority member of the Senate Finance Committee.

Wyden, 66, is probably one of the most well-known senators to muni market participants. Over the years, he has introduced a number of bond-related proposals, some more liked by market participants than others. He talked about munis and other topics in a recent interview for The Bond Buyer’s series of profiles of Congress members.

Wyden said his status as a Westerner has made him particularly sensitive to the importance of municipalities’ ability to finance and build infrastructure.

“If you’re from the West, you know that most of your state really got built with state and local infrastructure,” he said. “I mean, it was just kind-of almost embedded in our chromosomes.”

Wyden has held hundreds of town-hall meetings across Oregon. “Whenever you go out to counties and local municipalities, you see that their future to a great extent is about investments they make in infrastructure in states and local projects,” he said. Wyden added that he’s come away from his travels thinking that bond financing should be allowed as long as it’s done in a responsible fashion.

Move America Bonds

Wyden’s latest bond bill, the Move America Act of 2015 that he co-authored with Sen. John Hoeven, R-N.D., would create a new type of private-activity bond called Move America Bonds. These bonds could finance infrastructure projects that are publicly and/or privately owned and they would not be subject to the alternative minimum tax. The bonds would be issued under new state volume caps equal to 50% of the volume caps for PABs, and these caps could be converted to allocations of tax credits.

Wyden thinks Move America Bonds are potentially much more appealing than Build America Bonds, direct-pay bonds that the Senator says he created. BABs were authorized by the American Recovery and Reinvestment Act and could be issued in 2009 and 2010.

He said that, with Move America Bonds, “I think there’s something for conservatives, particularly the focus on states and on the private sector. Think there’s something there for progressives, which is the public and private investment.”

Muni experts in Washington praised Wyden’s interest in infrastructure and said they view the Move America Act favorably.

“Sen. Wyden has been a leader in promoting infrastructure finance throughout his career. He was an active supporter of Build America Bonds, and his most recent ‘Move America’ program represents an innovative approach to addressing the country’s infrastructure investment shortfall,” said Michael Decker, managing director and co-head of municipal securities at the Securities Industry and Financial Markets Association.

Mike Nicholas, chief executive officer of the Bond Dealers of America, said his group “appreciates Senator Wyden’s efforts to improve investment in transportation, infrastructure, and other community projects. We support his recently introduced legislation to create Move America Bonds, as long as these bonds are used as a supplement to [and not as a replacement for] traditional tax-exempt bonds.”

President Obama’s fiscal 2016 budget also proposes a new type of PAB for infrastructure – qualified public infrastructure bonds — that would not be subject to the AMT. However, there are some differences between the Obama and Wyden proposals. QPIBs could only finance publicly owned projects and would not be associated with tax credits or subject to volume caps.

Wyden said his office talked to administration officials about QPIBs and worked closely with them, but that his bill is more attractive.

“I think that the capacity to be able to sell the credits and create even more motion and even more interest and more players and more private-sector involvement is very appealing to us,” he said.

Senate Finance Committee Chairman Orrin Hatch, R-Utah, is studying the Move America Act, a spokeswoman said.

While the bill hasn’t been introduced in the House yet, Wyden said there are House members on both sides of the aisle that are interested in the proposal. He thinks it will have to have bipartisan support to pass.

“My view is, neither side has enough votes to tell the other side what to do,” Wyden said, so it’s important for members of Congress to find areas of agreement.

Tax Reform

As the ranking minority member, Wyden is the top Democrat on the Senate Finance Committee with jurisdiction over tax reform.

In the past, he has sponsored bipartisan tax-reform legislation that troubled the muni market. A bill he introduced with then-Sen. Judd Gregg, R- N.H., in 2010 and a similar measure he introduced with Sen. Dan Coats, R-Ind., in 2011, would have halted the issuance of tax-exempt bonds in favor of traditional tax-credit bonds that provided investors with tax credits equaling 25% of the interest costs.

Also he and Hoeven in 2011 sponsored a bill to create transportation and regional infrastructure project bonds, tax-credit bonds for infrastructure projects.

But Wyden said he isn’t wedded to the concept of replacing tax-exempts with tax credit bonds.

“This is not some ideological cause for me,” he said. “For me, it’s about trying to ream every bit of possible value out of the incentives that you end up with.”

Still, Wyden said he “will always be concerned about abuses” of munis.

“There have been some, no question about it,” Wyden said. He’s not a fan of tax-exempt bonds being used to finance professional sports stadiums.

“To me, a public project with publicly funded tax assistance needs to have a public purpose,” he said. “Quaint idea, huh?”

Wyden and finance committee chairman Hatch created bipartisan tax-reform working groups on five topic areas that released reports earlier this month. The report from the community development and infrastructure group did not recommend changes to bond provisions.

Asked about the report, Wyden said producing tax-reform legislation is “hard work.” He said his first choice would be to do comprehensive tax reform. He also said he would be sympathetic to a long-term transportation bill tied to some type of international tax reform, “but the details count, and we’ll have to have a chance to look through and see what the costs are who benefits and who doesn’t,” he said.

Wyden said he thought Congress made a “big mistake” when it didn’t pass a bill he introduced last year — the Expiring Provisions Improvement, Reform, and Efficiency (EXPIRE) Act of 2014 — that would have extended expired or expiring tax provisions through the end of 2015. That bill, which included extenders related to bonds, state and local taxes, and Puerto Rico, stalled after the Senate Finance Committee approved it.

“I think we should have passed it and used it as a two-year bridge to do tax reform,” Wyden said. “Instead, the Congress had a tax bill with a shelf life shorter than a carton of eggs.”

Congress passed legislation that only extended the provisions through the end of 2014. This year, the House has voted to make some of the provisions permanent, including the deduction for state and local sales taxes. The Senate Finance Committee is scheduled to vote on a two-year extenders bill on Tuesday.

Wyden was an author of the Internet Tax Freedom Act, which prevents state and local governments from taxing consumer Internet access and prevents “multiple or discriminatory” taxes on e-commerce. The moratorium on taxing Internet access went into effect in 1998 and has since been extended several times. The House has passed a bill to make the ITFA permanent. Wyden wants the Senate to take the same action.

Some members of Congress want to tie the ITFA to legislation that would allow states to require out-of state online retailers to collect their sales taxes. But Wyden does not support that legislation.

State and local government groups are major supporter of online sales tax legislation, saying that it would allow states to collect taxes that are already owed. While Wyden said he has “no problem” with jurisdictions collecting taxes already owed, he thinks online sales tax bills shift the burden of collecting the taxes from the states to the retailers.

“To some extent, this is transferring, or efforts to transfer, a state function to online retailer[s],” he said.

An Unusual Path

Unlike many of the main sponsors of muni-related legislation in Congress, Wyden doesn’t have a background in state and local government. In fact, he had never run for any elected office before running for Congress.

“It was not the usual path,” he said.

When he was younger, Wyden dreamed not about being a Senator but about being a professional basketball player. His love of the sport was evident in his Capitol Hill office, where a basketball rested on a coffee table and another was in a bookcase.

“I went to school on a basketball scholarship. All I wanted to do is play in the NBA, and that was a little delusional, ’cause I was too small and I made up for it by being slow,” Wyden said. So after playing for two seasons at the University of California, Santa Barbara, he gave up his hoops dreams and transferred to Stanford University. He then went to the University of Oregon for law school and worked with the elderly, co-founding the Oregon chapter of the Gray Panthers.

In 1980, at the age of 31, Wyden was elected to the House. He defeated the incumbent, former Rep. Bob Duncan in the Democratic primary and Republican Darrell Conger in the general election. “Portland had a Congress person, not a[n] evil, horrible person, but he just wasn’t involved very much,” Wyden said.

In 1996, Wyden was elected to the Senate, becoming Oregon’s first Democrat in that chamber in nearly 30 years. He succeeded Bob Packwood, who resigned amidst allegations of sexual misconduct.

Packwood had served as Senate Finance Committee chairman during the 1986 tax reform process, and Wyden would later hold that position for less than a year. Wyden took the helm of the committee in February 2014, after the Senate confirmed then-Sen. Max Baucus, D-Mont., as U.S. Ambassador to China, only to lose the post in 2015 when Republicans gained control of the Senate.

Wyden, who is seeking re-election in 2016, said he’ll work in a bipartisan manner no matter which political party has a majority in the Senate.

“I’d obviously rather be in the majority, but I’ve always been attuned to trying to find common ground,” he said.

Susan Collet, president of H Street Capitol Strategies, said Wyden is “someone willing to innovate and reach across the aisle to make deals.” He is willing to change what he proposes to get the political support needed to move debate forward, she said.

Howard Gleckman, a fellow at the Urban Institute, said Wyden is a “throwback to an older time in the Senate” when it was better to get a good bill than to fail to get a perfect bill.

Wyden said he feels strongly about a concept he calls “principled bipartisanship.”

“Principled bipartisanship is not taking each other’s bad ideas. It’s about taking good ideas,” he said.

THE BOND BUYER

BY NAOMI JAGODA

JUL 17, 2015 11:13am ET

TAX - NEBRASKA

TJ 2010 Corporation v. Dawson County Board of Equalization

Court of Appeals of Nebraska - June 23, 2015 - N.W.2d - 22 Neb.App. 989 - 2015 WL 3858529

TJ 2010 Corporation (TJ) appealed the order of the Tax Equalization and Review Commission (TERC) affirming the decision of the Dawson County Board of Equalization (Board) regarding the 2013 taxable value of a hotel owned by TJ.

The Dawson County assessor had determined that the value of the property was $4,510,230 for tax year 2013. TJ protested the assessment to the Board and requested a valuation of $2.8 million. The Board determined that the taxable value was $4,510,230, as originally assessed. TJ appealed the Board’s decision to TERC.

At the TERC hearing, TJ asserted that the most important method for valuing hotels is the income stream approach, which is determined by using a multiplier of the property's annual gross revenue averaged over the past 3 years. TJ indicated that the appropriate multiplier for most mainstream hotels is between 2.8 and 3.

The County's appraiser testified that he used both the cost approach and the income approach to calculate the value of the property. The appraiser opined that the income approach is generally more applicable to income-producing properties, but that for newer or unique properties such as this one, the cost approach is a better indicator of actual value.

TERC concluded that TJ had provided competent evidence to rebut the presumption that the Board had faithfully performed its duties and had sufficient competent evidence to make its determination. It criticized the appraiser's valuation for using outdated costing tables in the cost approach and for using market factors derived from comparable sales without making the necessary adjustments to the comparable properties. However, it determined that TJ's valuation method was not a commonly accepted real property appraisal method and was not supported by market data. Therefore, it found that while there were concerns about the reliability of the County's appraisal, there was no market data received in evidence to support a different opinion of any of the income approach factors. Thus, it concluded that TJ failed to present clear and convincing evidence that the Board's valuation was unreasonable or arbitrary.

The Court of Appeals affirmed, finding that TJ failed to establish by clear and convincing evidence that the county's valuation was arbitrary or unreasonable.

IRS Rules Student Loan Bonds still Tax-Exempt in PLR.

A private letter ruling from the Internal Revenue Service ruled that actions taken by an issuer of student loan bonds which would cause that issuer to cease being a qualified scholarship funding corporation would not cause the interest on the bonds to fail to be excludable from gross income under § 103.

The PLR states that "[b]ecause Issuer represents it was a corporation described under § 150(d)(2) at the time the Bonds were issued, it was a corporation described under § 150(d)(2) for the entire time the Bonds were outstanding, and it remained the obligor on the Bonds the entire time they were outstanding, Issuer's proposed actions will not cause interest on the Bonds to fail to be excludable from gross income under § 103."

TAX - GEORGIA

City of Atlanta v. Hotels.com, L.P.

Court of Appeals of Georgia - July 9, 2015 - S.E.2d - 2015 WL 4114057

City brought action against several online travel companies, asserting claims for conversion and breach of trust. The Superior Court granted summary judgment to defendants on both claims, and city appealed.

The Court of Appeals held that:

- There was no evidence that money collected by online travel companies, purportedly owned to city in the way of taxes collected by the companies from customers seeking to occupy city's hotel rooms but not remitted, comprised specific, separate, identifiable funds, as required to support city's conversion claim;
- Under the law of the case doctrine, there could be no claim by city for breach of a constructive trust; and
- The Superior Court did not abuse its discretion in denying city's motions for additional discovery.

TAX - CONNECTICUT

Chestnut Point Realty, LLC v. Town of East Windsor

Appellate Court of Connecticut - July 21, 2015 - A.3d - 2015 WL 4221518

Chestnut Point Realty, LLC is the owner of real property in the Town of East Windsor. The town assessor valued the property at $1,829,330. Chestnut appealed from the assessment to the Board of Assessment Appeals and appeared at a hearing to request a reduction in the assessment. On April 29, 2013, the board denied Chestnut's request. On May 1, 2013, the assessor mailed notice of the board's decision to Chestnut.

On June 28, 2013, Chestnut filed an application in the Superior Court that was titled "Complaint," bore a return date of July 23, 2013, and was accompanied by a citation and recognizance. On July 10, 2013, a marshal served the application, citation, and recognizance on the Town and, on July 17, 2013, filed the return of service in court. On August 14, 2013, the town filed a motion to dismiss the appeal on the ground that the court lacked subject matter jurisdiction because Chestnut had failed to serve the appeal within two months from the date notice of the board's decision was mailed. The parties appeared before the court to argue the Town's motion to dismiss. The court issued a memorandum of decision on April 14, 2014, in which it granted the motion, thus dismissing Chestnut's tax appeal.

The court found that Chestnut had filed a citation and complaint in the Superior Court in the judicial district of Hartford on June 28, 2013, but did not serve the town with the citation and complaint until July 10, 2013, which was beyond the two month period, commencing May 1, 2013, to take an appeal as required by § 12–117a. The issue decided by the court was whether "the act of filing an application and citation with the court effects an appeal from the [board] pursuant to § 12–117a." The court concluded that filing an application and citation in court does not commence a tax appeal.

Chestnut appealed and the Appellate Court affirmed.

TIF - PENNSYLVANIA

GAI Consultants, Inc. v. Homestead Borough

Commonwealth Court of Pennsylvania - July 8, 2015 - A.3d - 2015 WL 4095523

The Borough of Homestead appealed from the entry of judgment against it by the Court of Common Pleas. The primary basis of the appeal was Homestead's contention that the four-year statute of limitations for contract actions barred claims asserted by Allegheny County, Steel Valley School District, and the Borough of Munhall (collectively, the Taxing Bodies) to require the Redevelopment Authority of Allegheny County (Authority) to reimburse property tax assessment appeal refunds for pre–2010 tax years pursuant to a tax increment financing (TIF) agreement. The trial court concluded that the TIF Agreement was a continuing contract and therefore the statute of limitations would not begin to run until the termination of the contractual relationship in 2018.

On appeal, Homestead argued that the four-year statute of limitations for contract actions prevented the Taxing Bodies from asserting claims for reimbursement of refunds of assessment appeals due before 2010. Homestead asserted that Section 13 of the TIF Agreement did not impose an obligation on the Taxing Bodies to demand reimbursement from the TIF Fund and instead the Authority had the obligation under the contract to pay a refund when “the Bank receives moneys which are required to be refunded to the taxpayer of the Pledged Parcels as the result of an assessment appeal or otherwise.” Homestead argued that each failure of the Authority to cause a refund to be paid from the TIF Fund when the right to a refund came due created an immediate injury to the taxpayer, any Taxing Body that paid the refund from its general fund, and the Taxing Bodies collectively based on the resulting skewed accounting of TIF revenues and distributions. Thus, according to Homestead, the statute of limitations began to run on the day a taxpayer became entitled to a property tax refund and any claim for reimbursement by a Taxing Body more than four years after the determination by the Board lowering an assessment was barred.

Homestead argued that the trial court erred in concluding that the TIF Agreement is a continuing contract, and contended that it is in fact a complex contract with multiple, divisible duties, the breach of any one of which would be actionable and cause immediate damages to be suffered. Homestead asserted that the TIF Agreement did not satisfy the “test of continuity” because Section 13 of the TIF Agreement fixed the date of a determination by the Board to reduce an assessment as the specific date when the Authority is obligated to direct the payment of money from the TIF Fund to a taxpayer. Homestead argued that to interpret the TIF Agreement as a continuing contract and to allow a Taxing Body to assert a claim for reimbursement until 2022, four years after the expiration of the contract in 2018, would impermissibly burden the other Taxing Bodies by requiring them to make unforeseen adjustments to their budgeting and planning based upon lower than expected Net TIF Revenue distributions.

Homestead further argued that the Taxing Bodies cannot rely on either the discovery rule or the doctrine of *nullum tempus* to avoid the effect of the statute of limitations to bar their claims for reimbursement on pre–2010 assessment appeal refunds. Homestead argued that the discovery rule is inapplicable because the Taxing Authorities had all of the information necessary to know that the Authority was violating its obligations under the TIF Agreement, including annual accounting of the TIF Fund that showed all reimbursements paid to Taxing Bodies for assessment refunds, at the time the violations occurred. Homestead also argued that the doctrine of *nullum tempus*, which provides that statutes of limitations do not bar actions brought by a state or its agencies, is inapplicable because the doctrine requires that the governmental party be acting pursuant to a mandatory obligation required by law, and the Taxing Bodies here were not constitutionally or statutorily compelled to participate in the TIF Agreement.

The appeals court agreed with the trial court that the TIF Agreement is an ongoing contract and that Section 13 of the TIF Agreement did not impose an obligation on the Authority to immediately pay refunds on tax assessment appeals or set a deadline for the Taxing Bodies to make claims for reimbursement on refunds paid. The TIF Agreement therefore met the test for a continuing contract, and the reimbursement claims were not barred by the statute of limitations.

IRS Rules on Tax-Exempt Bonds Transaction: Tax Analysts

The IRS ruled that interest on tax-exempt bonds issued by a corporation that issues qualified scholarship funding bonds will still be excludable from gross income after the issuer offers scholarships and grants and stops issuing exempt bonds.

Continue reading (subscription required).

Citations: LTR 201528035

Tax Analysts

APRIL 7, 2015

NABL: Senate Finance Working Groups Release Tax Reform Reports.

The Senate Finance Committee's tax reform working groups have released reports providing policy options and recommendations from committee members on comprehensive tax reform. A report from the Community Development and Infrastructure Group, which has jurisdiction over bonds, does not recommend any changes to the tax treatment of municipal bonds, focusing instead on providing funds to the Highway Trust Fund. The muni bond exclusion did not make it in the top ten on a list of the most expensive individual income tax expenditures; however, the exclusion of bond interest for corporations, listed in the Business Income Tax Working Group's report, was the 3rd most expensive corporate tax expenditure.

The reports can be seen here.

New York Charity Joins in Record Bond Binge for Charter Schools.

A New York City charity for poor children is selling municipal bonds for the first time in its 162-year history, joining a record borrowing spree for charter schools across the U.S.

The Children's Aid Society is selling $36.6 million of debt Thursday for a new a six-story building to house its school in the South Bronx, one of the nation's poorest communities. The non-profit is using its own money to guarantee the bonds will be paid, providing added security to investors.

"The best and most reliable path out of poverty for children is educational achievement," Dan Lehman, Children's Aid's chief financial officer, said in an interview.

Bond sales by U.S. charter schools are on pace to break the $1.9 billion record set last year as turmoil in Greece helps hold interest-rates near a five-decade low. The borrowing reflects the swelling enrollment in the taxpayer-funded schools, which are independently run and provide an alternative for parents of children in poorly performing districts.

Charter schools have issued $1.14 billion of municipal bonds in 2015, up from $1.09 billion in the same period a year earlier, according to data compiled by Bloomberg.

Sales have more than doubled over the last four years, setting records every year since 2012, according to a survey to be released next week by Local Initiatives Support Corporation, a New York non-profit.

Yield Appetite

The issuance has benefited from demand for high-yielding bonds, the decision by some states to guarantee the debt, and the successful track records of established schools.

“Schools five or 10 years ago couldn’t get to the market because they were too new,” said Wendy Berry, a financial adviser to charter schools and former Moody’s Investors Service analyst who wrote the Local Initiatives survey.

Charter schools receive public funding based on how many students enroll. The debt is among the riskiest in the $3.6 trillion municipal-bond market because the schools can close if enrollment drops or they lose their charter.

Of 818 charter deals since 1998, 41 have defaulted, a rate of 5 percent, according to the survey.

Waiting List

Susan Courtney, who helps oversee $15 billion of municipal bonds at Prudential Investment Management in Newark, New Jersey, said she favors larger charter schools with an proven record.

“You want to see steady enrollment trends — you want to see a decent waiting list,” said Courtney, who isn’t planning on buying the Children’s Aid bonds. “Obviously we’re also focused on the management and the board.”

Children’s Aid was founded in 1853 by social reformer Charles Loring Brace, who wanted to provide services for poor and homeless children in a setting other than poorhouses and orphanages.

It opened its school in 2012, part of an expanding movement in New York. Enrollment in city charter schools has increased ten-fold in the past decade to more than 80,000 students, according to the New York City Charter School Center, an advocacy group. Almost 50,000 children are on waiting lists.

Children’s Aid currently teaches about 280 students, in kindergarten through third grade. It will use the proceeds of the bond sale for a new building that will allow it to expand.

New Building

The group has already bought and demolished an abandoned theater, with plans to replace it with a 73,300-square-foot school set to open next year. The building will accommodate about 420 students as the school plans to expand to the fifth grade, said Lehman, the chief financial officer.

Unlike most charters that rely on revenue from enrollment to repay bondholders, Children’s Aid has promised to fund the debt regardless of the school’s performance.

That led Standard & Poor’s to rate the bonds A+, based on the non-profit’s “niche status,” long record of successful operations and favorable fundraising trends. Similarly rated 30-year municipal debt yields about 4 percent, according to data compiled by Bloomberg.

Children’s Aid receives grants from more than 150 corporations and foundations and has over 140 government contracts that brought in about $75 million of revenue in fiscal 2014, according to a pre-sale presentation for the bonds. The contracts include administering health and foster-care programs.

$300 Million

The charity had about $300 million in cash and investments at the end of April.
It isn't the first to guarantee a charter-school bond to convince investors to accept lower yields.
In April 2014, Texas for the first time backed such a deal with the state-run pool that insures school debt. Utah and Colorado also have programs that support charter-school bonds with their obligation to pay the debt, said Berry, the financial adviser.

As a first-time issuer, putting Children's Aid Society's credit on the line shows the organization's commitment to paying the 30-year debt, Lehman, the chief financial officer, said. Children's Aid will pay principal and interest 90 days in advance of the due date. It also promised to keep unrestricted investments on hand that are sufficient to pay off the debt.

"This was something that we have proposed and put out there, so that everyone would recognize, 'Hey, we're serious about this and we're going to make good on our money,'" Lehman said.

Bloomberg

by Martin Z Braun

July 8, 2015

Disney Seeks Continued Tax Exemption From Anaheim, California.

LOS ANGELES — The "happiest place on Earth" will keep a special tax exemption in Anaheim, California, for 30 more years if the City Council approves the Walt Disney Co's plan for a $1 billion-plus expansion of its theme park complex in the city.

The five-member council is expected to vote on Tuesday on the company's proposal to go ahead with its Disneyland Resort makeover in exchange for a continued waiver of any future admission tax the city might impose on entertainment venues.

The resort's current exemption was granted by the city in 1996 and is due to expire on June 30, 2016.

No entertainment gate tax has ever been levied by the city of Anaheim, but an extension of Disney's special waiver would reimburse the company for any such taxes imposed during the next three decades, municipal spokeswoman Ruth Ruiz said.

Disney and its supporters say the exemption is merited because of the huge economic benefit Anaheim derives from the resort, which is the largest employer in the city and Orange County as a whole, accounting for 28,000 local jobs.

"Anaheim has been an economic success story thanks to its policies and initiatives that allow businesses to invest and thrive," Disneyland Resort President Michael Colglazier said in a statement.

But Mayor Tom Tait, a City Council member who backed the original tax exemption, has gone on record opposing the plan to renew it, citing an estimated $500 million in unfunded pension obligations now faced by the city.

"Chaining the hands of future residents on their ability to impose taxes will jeopardize the city's financial health," he was quoted as saying in the Orange County Register.

Two other council members support an extension, while two others have said they are undecided.

Disney's plan calls for breaking ground by the end of 2017 and finishing construction by 2024. A study commissioned by Disney projected the project would support an average of 2,600 local jobs a year, and lead to creation of 2,100 permanent jobs.

The company has not specified whether Disneyland itself or the adjacent Disney California Adventure park, or both, would be enlarged, or what new attractions might be added. But the project is to include a new 5,000-space parking structure.

Disneyland's original theme park opened to the public in 1955. No admission tax is currently collected at any Disney park in the world, company spokeswoman Suzi Brown said.

By REUTERS

JULY 6, 2015, 7:40 P.M. E.D.T.

(Reporting by Steve Gorman; Editing by Peter Cooney)

TAX - KANSAS

Heartland Apartment Ass'n, Inc. v. City of Mission

Court of Appeals of Kansas - July 2, 2015 - P.3d - 2015 WL 4033516

Landowner associations brought action against city for declaratory judgment, injunction, recovery of amounts paid, and due process and equal protection violations, claiming that the city's transportation utility fee was a prohibited excise tax. The District Court granted city summary judgment, finding the fee was a tax, but the fee was not a prohibited excise tax. Associations appealed, and city cross-appealed.

The Court of Appeals held that:

- Transportation utility fee was a tax, rather than a fee, and
- Transportation utility fee was an excise tax prohibited by law.

City's transportation utility fee imposed on owners of developed property within the city was a "tax" and not a "fee." Even though city labeled the expense a "fee," owners of improved real estate across the city were forced to pay annual fee and could not opt out, owners that were exempt from ad valorem property taxes were exempt from paying fee, purpose of fee was to raise revenue to help pay for street maintenance rather than a special service or benefit to any specific landowner, and money was to be used for the common good of providing a way to get around the city, which was one of the core governmental services provided by a city.

City's transportation utility fee, which was a tax calculated by estimating the average number of vehicle trips a developed property generated, was an "excise tax" prohibited by statute. "excise tax" had come to mean and include practically any tax which was not an ad valorem tax imposed on the value of the article or thing taxed, transportation utility fee was not based on the value of the developed property but on the number of vehicle trips, and transportation utility fee did not fit within any of statutory exceptions to ban on excise taxes.

TAX - TEXAS

AETC II Privatized Housing, LLC v. Tom Green County Appraisal District

Court of Appeals of Texas, Austin - June 24, 2015 - Not Reported in S.W.3d - 2015 WL 3918619

AETC II Privatized Housing, LLC (AETC) provides multi-family housing for United States Military personnel and their families under the Military Housing Privatization Initiative (MHPI), which is aimed at attracting private capital and expertise to build much needed military family housing in a quick and cost effective manner. AETC is a public-private venture in which the U.S. owns 49% as an investor member.

In 2007, the parties entered into a ground lease whereby, for a nominal amount, the Air Force leased to AETC for fifty years a tract of land adjacent to Goodfellow Air Force Base located in Tom Green County, Texas (Tract G). The U.S. acquired Tract G by warranty deed from the city of San Angelo, and jurisdiction over the tract has not been ceded to the U.S. by the state. The Air Force conveyed title to the improvements on Tract G to AETC by quitclaim deed. The agreements called for AETC to renovate existing housing units, construct additional units, and operate and manage the units as rental property for Goodfellow personnel and their families. Beginning in 2010, the Tom Green County Appraisal District issued an appraised value for the improvements on Tract G. AETC filed a protest with the Tom Green County Appraisal Review Board challenging the valuation and seeking an exemption for the improvements as property owned by the U.S. The Review Board and the district court upheld the appraisals. AETC appealed.

The District Court noted that the issue of whether the improvements on Tract G are taxable depends on whether they are privately or publicly owned.

The Appraisal District asserted that the U.S.’s participation in AETC did not convey government ownership because under the law applicable to limited liability companies, members have no ownership in property owned by the LLC. AETC did not produce summary judgment evidence to raise a fact issue as to governmental ownership. Therefore, the District Court concluded that the trial court did not err in granting the Appraisal District’s motion for summary judgment.

TAX - NEW YORK

Greater Jamaica Development Corporation v. New York City Tax Com'n

Court of Appeals of New York - July 1, 2015 - N.E.3d - 2015 WL 3965743 - 2015 N.Y. Slip Op. 05620

Taxpayers brought article 78 proceeding challenging city’s revocation of charitable tax exemption for public parking facilities that they owned and operated. The Supreme Court, Queens County, dismissed the petition. Taxpayers appealed. The Supreme Court, Appellate Division, reversed. City was granted leave to appeal.

The Court of Appeals of New York held that:

- A taxpayer’s federal charitable tax exemption does not create a presumption that the entity is entitled to a charitable tax exemption from New York real property taxes, abrogating *Oorah, Inc. v. Town of Jefferson,* 119 A.D.3d 1179, 990 N.Y.S.2d 669; *Matter of Plattsburgh Airbase Redevelopment Corp.*, 101 A.D.3d 21, 953 N.Y.S.2d 174, and

- Taxpayer's utilization of parking garages to provide below-market, reasonably priced parking did not constitute a charitable use of the parking garages.

IRS Request for Comments: Voluntary Closing Agreement Program for Tax-Exempt Bonds.

The IRS has issued a Request for Comments on its Voluntary Closing Agreement Program for Tax-exempt Bonds (Rev. Proc. 97-15).

Comments are due by August 28, 2015.

IRS Webinar: 501(c)(7) Social Clubs: How to Get and Keep Tax-Exempt Status.

2 p.m. to 3 p.m., Thursday, July 16

Topics include:

- Requirements a 501(c)(7) organization must meet
- Types of social club organizations
- How to obtain and maintain tax-exempt status
- Unique aspects that make 501(c)(7) organizations different from other tax-exempt organizations

Remember, if you hear something during the presentation that prompts a question, simply click on the "Ask a Question" link on your screen. Your questions will help us determine future topics as well as making sure we have updated information on IRS.gov.

Register for this presentation.

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

NABL Presses Treasury to Ease Public Approval Requirement for PABs.

WASHINGTON – The National Association of Bond Lawyers submitted recommendations to the Treasury Department and Internal Revenue Service on ways to ease and clarify the public approval requirement for private-activity bonds.

NABL sent the recommendations on Friday to James Polfer, chief of the tax-exempt bond branch of the IRS chief counsel’s office, and John Cross, Treasury associate tax legislative counsel. The group started working on the document after conversations with Treasury and the IRS about temporary and proposed regulations on public approval, said Clifford Gerber, a partner at Sidley Austin and one of the drafters of the latest comments.

Under federal tax law, PABs cannot be tax exempt unless they are approved by the governmental unit that issued the bonds or on whose behalf the bonds were issued. PAB issues are treated as being approved by governmental units if they were approved by voter referendum or “by the applicable elected representative of such governmental unit after a public hearing following reasonable public notice.”

The public approval requirement was added to tax law by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). In 1983, temporary regulations concerning the requirement were published, and in 2008, Treasury and the IRS released proposed regulations that have not yet been finalized. The temporary and proposed regulations, among other things, describe what information needs to be included in the public notice.

“The TEFRA public approval requirement is arguably one of the more burdensome requirements for tax exemption,” NABL said. “NABL believes that ways in which the requirement may be made less burdensome to issuers and conduit borrowers, while still achieving the underlying objectives of the requirement, should continually be reassessed, with deference given to how state and local governments carry out their day-to-day operations and with recognition of technological advances as tools for implementation.”

NABL submitted comments on the TEFRA requirement in 2007 and 2008. In its new paper, NABL affirmed those comments and applauded features of the 2008 proposed regulations that would streamline and modernize the rules.

The purpose of NABL’s paper is to provide additional comments for Treasury and the IRS to consider before they release the next set of public approval regulations, whether those are proposed, temporary or final rules.

“Our comments weren’t intended to cover the landscape. Rather, we wanted to address several important aspects of the TEFRA approval requirement that were not addressed in our previous comments or that we thought were in need of further explanation,” Gerber said. “We hope that these comments will be helpful to the IRS and Treasury in issuing the next set of TEFRA regulations.”

NABL recommended that regulations broaden the allowance for PAB proceeds to be used for working capital without the public notice specifically mentioning that proceeds would be used for that purpose. NABL said it doesn’t think issuers need to include reference to working capital in their notices because there are already restrictions on working capital for PABs and because working capital expenditures don’t give rise to facilities, “which were the original basis for giving notice to the public, and have long been recognized as such.”

Another recommendation was for the next set of regulations to clarify what constitutes “integrated operation.” The temporary regulations can be interpreted as requiring public notices to state the maximum dollar amount for bonds for each facility being financed by the issue. Separate tracts of land can be treated as one facility if they are used in an integrated operation, but that term is not defined in the temporary regulations or the proposed regulations. NABL is recommending that new regulations allow properties to be considered part of an integrated operation to the extent that the bond-financed improvements made at multiple locations are owned and operated by the same or related entities, under common management, or are part of a controlled group.

The temporary regulations and the proposed regulations don’t explain how the public approval requirements should be applied to PAB-financed property that is movable or intangible, such as mobile libraries or medical vans. NABL is proposing that the next set of regulations include a safe harbor under which the location listed in a TEFRA notice for movable or intangible property is: the location where the property must be licensed, titled, registered or insured; where the property returns after assignments; where the property is assigned to under applicable law; or where transmission of output associated with the property originate.

The rules proposed in 2008 allow supplemental, post-issuance public approval for projects that substantially deviate from what was described in pre-issuance TEFRA notices, so long as the deviation meets certain conditions. First the issuer has to have reasonably expected when the bonds were issued that the actual facts wouldn't substantially deviate from the information on the public notice. The second condition is that either the cost of the facility being financed was less than expected, or the issuer or borrower has to prove that originally expected use of the proceeds "is no longer feasible or viable."

NABL would like Treasury and the IRS to eliminate the second condition in the next set of regulations because it is "unnecessarily limiting," the group said.

NABL also made a recommendation relating to the cancellation of public hearings. Under the proposed regulations, if a government provides reasonable notice for a public hearing and receives no timely requests to participate, the government can cancel the hearing and treat the hearing requirement as met. NABL suggested that in the next set of regulations, the issuer should be allowed to provide notice of the cancellation of a public hearing on its website in the same manner that it posts other public notices.

Additionally, NABL suggested that if the next set of rules is still in proposed form, that issuers and borrowers be able to rely on them before they are adopted. "Because many provisions of the proposed regulations are intended to reduce the burden on issuers and borrowers and are ameliorative, it is important that the new TEFRA regulations provide for the ability of issuers and borrowers to apply the regulations prior to their adoption in final form," the group said.

THE BOND BUYER

by Naomi Jagoda

JUN 22, 2015 3:38pm ET

NABL: IRS Issues Notice Clarifying Requirements Related to Hospital Facility Financial Assistance Policies.

Notice 2015-46 clarifies how a charitable hospital organization may comply with the requirement in the final regulations under section 501(r) published on December 31, 2014, that a hospital facility include a list of providers in its financial assistance policy (FAP). This notice affects charitable hospital organizations. Section 501(r) was added by the Affordable Care Act and added requirements that hospitals must meet to remain 501(c)(3) organizations.

In August 2014, NABL published The 501(c)(3) Opinion In Qualified 501(c)(3) Bond Transactions: Background, Opinion Formulations and Due Diligence, which, among other topics, discusses the requirements of section 501(r).

Notice 2015-46 will appear in IRB 2015-28 dated July 13, 2015.

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.

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

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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-unit-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
