

Part III. Administrative, Procedural, and Miscellaneous

Administrative Appeal of Adverse Determination of Tax-Exempt Status of Bond Issue

Notice 98-58

This notice provides a proposed revenue procedure that, when finalized, will provide the procedures for issuers to request an administrative appeal of an adverse determination by the Employee Plans/Exempt Organizations Key District (District) that interest on their debt obligations (Bond Issue) is not excludable from gross income under § 103 of the Internal Revenue Code. Beginning December 7, 1998, issuers may use the procedures set forth in the proposed revenue procedure until it is finalized. The revenue procedure also modifies the Internal Revenue Service's existing procedures that the District must receive a technical advice memorandum from Assistant Chief Counsel (Financial Institutions & Products) that is unfavorable to the issuer prior to declaring that the interest on the Bond Issue is not excludable from gross income under § 103 of the Code, and makes other modifications to the examination process made appropriate by the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 (the Act).

Section 3105 of the Act directs the Service to modify its administrative procedures to allow issuers to appeal an adverse determination. The Act requires that the appeals be heard by senior officers of the Office of Appeals (Appeals) having experience in resolving complex cases. An issuer, having received an adverse determination following an examination of its Bond Issue, may protest the determination to Appeals before the interest on the Bond Issue is declared not excludable from gross income under § 103 of the Code. The appeal is optional and is initiated by the issuer.

Section 3465 of the Act provides that the Service shall prescribe procedures by which a taxpayer may request early referral of one or more unresolved issues to Appeals. Certain issues arising during an examination of a Bond Issue may be appropriate for early referral. For an exam-

ple of how early referral operates, see Rev. Proc. 96-9, 1996-1 C.B. 575, which describes the method by which a Coordinated Examination Program taxpayer requests early referral of one or more unagreed issues from Examination to Appeals. The Service is developing new procedures for early referral and seeks comments regarding the applicability of early referral procedures to examinations of Bond Issues.

The Service welcomes comments on the proposed revenue procedure provided in this notice and on the application of the early referral program to Bond Issues. Comments should be submitted by March 7, 1999, either to:

National Director of Appeals

901 D Street, S.W.

Box 68

Washington, D.C. 20024

Attn: C:AP:ADR&CS, Room 236

or electronically via: http://www.irs.us-treas.gov/prod/tax_regs/comments.html (the Service Internet site).

Part IV - Items of General Interest

ADMINISTRATIVE APPEAL OF ADVERSE DETERMINATION OF TAX-EXEMPT STATUS OF BOND ISSUE

PROPOSED REVENUE PROCEDURE

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SECTION 1. PURPOSE

As required by § 3105 of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206 (the Act), this revenue procedure provides procedures for issuers to request an administrative appeal to the Office of Appeals (Appeals) of an adverse determination by an Employee Plans/Exempt Organizations Key District (the District) that the interest on their debt obligations (the Bond Issue) is not excludable from gross income under § 103 of the Internal Revenue Code. This revenue procedure also modifies the Internal Revenue Service's existing procedures that the District must receive a technical advice memorandum from Assistant Chief Counsel (Financial Institutions & Products) that is unfavorable to the issuer prior to declaring that the interest on the Bond Issue is not excludable from gross income under § 103 of the Code, and makes other modifications to the examination process made appropriate by the Act.

SECTION 2. BACKGROUND

Examination procedures set forth in Announcement 95-61, 1995-33 I.R.B. 25,

provide that an agent may, in consultation with District Counsel, arrive at a preliminary adverse determination that interest on a Bond Issue is not excludable from gross income under § 103 of the Code. If the District determines that a closing agreement is appropriate, the agent generally will inform the issuer, orally or in writing, of the agent's preliminary adverse determination and give the issuer an opportunity to enter into a closing agreement. If the issuer and the District fail to reach an agreement, Internal Revenue Manual section 7(10)(7)(11) and the examination procedures require that prior to declaring that the interest on a Bond Issue is not excludable from gross income under § 103 of the Code, the District must receive a technical advice memorandum from Assistant Chief Counsel (Financial Institutions & Products) that is unfavorable to the issuer. If the technical advice memorandum concludes that interest on the Bond Issue is not excludable from gross income under § 103 of the Code, the District may proceed with its determination that interest on the Bond Issue is not excludable from gross income when received or accrued by bondholders. Under existing procedures, the issuer may not request an appeal of the District's adverse determination.

Section 3105 of the Act directs the Service to modify its administrative procedures to allow issuers to appeal an adverse determination. An issuer, having received an adverse determination following an examination of its Bond Issue, may protest the determination to Appeals before the interest on the Bond Issue is declared not excludable from gross income under § 103 of the Code.

SECTION 3. SCOPE

.01 In general. All issues raised by the District during an examination of a Bond Issue that would cause the interest on the Bond Issue not to be excludable from gross income under § 103 of the Code are appropriate for consideration by Appeals. The appeal is optional and is initiated by the issuer as described below.

.02 Issuers may request technical advice referral. For purposes of examining Bond Issues, issuers are treated as taxpayers. Thus, the procedures for requesting technical advice referral that apply to all taxpayers apply to issuers of Bond Issues

under examination. See § 601.105 *et seq.* of the Statement of Procedural Rules and Rev. Proc. 98-2, 1998-1 I.R.B. 74, or subsequent procedure.

.03 Early referral. Section 3465 of the Act provides that the Service shall prescribe procedures by which a taxpayer may request early referral of one or more unresolved issues to Appeals. Prior to the adoption of generally applicable early referral procedures, an issuer may make a separate request to the District for the early referral to Appeals of one or more issues regarding a Bond Issue set forth in section 3.01.

SECTION 4. ADMINISTRATIVE APPEAL PROCESS

.01 In general. Sections 4.03, 4.04, and 4.05 describe the circumstances in which an issuer may appeal an adverse determination by the District that interest on a Bond Issue is not excludable from gross income under § 103 of the Code. Following the receipt of a written notice from the District described in sections 4.03(b), 4.04(b), or 4.05(b), the issuer may request an appeal in accordance with section 5.

.02 Consultations with District Counsel. Prior to issuing a preliminary adverse determination to the issuer regarding the excludability of interest on the Bond Issue from gross income under § 103 of the Code, the District will consult with District Counsel regarding whether technical advice should be requested by the District. Technical advice should be requested, for example, when there is a lack of uniformity regarding the disposition of an issue or when an issue is unusual or complex enough to warrant consideration by the National Office.

.03 The District requests technical advice. (a) If the District, in consultation with District Counsel, determines that technical advice is warranted, the District will follow the procedures for requesting technical advice set forth in § 601.105 *et seq.* of the Statement of Procedural Rules and Rev. Proc. 98-2, 1998-1 I.R.B. 74. If the National Office issues a technical advice memorandum to the District, the District will notify the issuer, in writing, of its determination.

(b) The written notice will identify the Bond Issue under examination, include a copy of the technical advice memoran-

dum and, if the District's determination is adverse to the issuer, inform the issuer of the availability of an administrative appeal of the adverse determination.

.04 The issuer requests technical advice referral. (a) If the District, after consultation with District Counsel, determines that technical advice is not necessary, the District will notify the issuer, in writing, of its preliminary adverse determination that the interest on the Bond Issue is not excludable from gross income under § 103 of the Code, and provide the issuer with an opportunity to have closing agreement discussions. The notice will also inform the issuer that it may request technical advice referral in accordance with § 601.105 *et seq.* of the Statement of Procedural Rules. If the issuer requests technical advice referral, such request will be made, and considered, in accordance with the procedures set forth in § 601.105 *et seq.* of the Statement of Procedural Rules and Rev. Proc. 98-2, 1998-1 I.R.B. 74, or subsequent procedure. If the National Office issues a technical advice memorandum to the District, the District will notify the issuer, in writing, of its determination.

(b) The written notice will identify the Bond Issue under examination, include a copy of the technical advice memorandum and, if the District's determination is adverse to the issuer, inform the issuer of the availability of an administrative appeal of the adverse determination.

.05 Technical advice not requested. (a) If, after receiving notice of the District's preliminary adverse determination described in section 4.04(a), the issuer does not request technical advice referral or if the issuer's request is denied, the District will provide the issuer with an opportunity to have closing agreement discussions. If closing agreement discussions between the issuer and the District are unsuccessful, the District will send the issuer a written notice to the effect that the District has made an adverse determination that the interest on the Bond Issue under examination is not excludable from gross income under § 103 of the Code.

(b) The written notice will identify the Bond Issue under examination, state the District's reasons for its adverse determination and inform the issuer of the availability of an administrative appeal of the District's adverse determination.

.06 Closing agreement with the District. The District will retain jurisdiction over the Bond Issue until the issuer has made a request to appeal the District's adverse determination that interest on the Bond Issue is not excludable from gross income under § 103 of the Code and the agent's file has been sent to Appeals in accordance with section 6. Prior to requesting an appeal, the issuer may enter into closing agreement discussions with the District and execute a closing agreement with respect to the Bond Issue. The District will generally prepare a closing agreement using the model closing agreement provided in Announcement 95-61, 1995-33 I.R.B. 25.

SECTION 5. HOW TO REQUEST AN APPEAL

.01 In general. Established Appeals procedures, including those governing submissions and taxpayer conferences, apply to requesting an appeal of an adverse determination that interest on a Bond Issue is not excludable from gross income under § 103 of the Code. *See* § 601.106 *et seq.* of the Statement of Procedural Rules.

.02 The issuer's request for appeal and response to the District's notice. The issuer's appeal request must be in writing. In addition, the issuer must provide a detailed written response to the District's notice of the District's adverse determination, and include any further explanation of the issuer's position regarding the issue(s) in dispute. The issuer's written appeal request and detailed written response must be submitted to the District within 30 days of the date of the notice from the District regarding its adverse determination. This 30-day requirement may be extended by the District. For both the request and response, the issuer must satisfy the declaration and signature requirements below:

(1) Declaration:

Under penalties of perjury, I declare that I have examined this request [or submission], including accompanying documents, and to the best of my knowledge and belief, the facts presented are true, correct, and complete.

This declaration must be signed and dated by the issuer, not the issuer's representative. A stamped signature is not permitted.

(2) Signatures: An appeal request and response must be signed by the issuer or the issuer's authorized representative. It is preferred that Form 2848, Power of Attorney and Declaration of Representative, be used to designate an authorized representative when making an appeal request under this revenue procedure.

SECTION 6. THE DISTRICT FORWARDS CASE FILE TO APPEALS

After the issuer has requested an appeal and has responded in writing to the notice of an adverse determination, the District will forward the agent's file to Appeals. The file should include copies of the following:

1. the technical advice memorandum, if any;
2. all information received by the agent from the issuer regarding the Bond Issue;
3. all work papers of the agent examining the Bond Issue;
4. the District's notice;
5. the issuer's written appeal request;
6. the issuer's written response to the notice; and
7. the District's response to the issuer's position, if any.

After the agent's file is sent to Appeals, Appeals will have jurisdiction over the Bond Issue.

SECTION 7. PROCESSING AN APPEAL REQUEST

An appeal by an issuer of an adverse determination will be assigned to a senior Appeals officer, who will make every effort to resolve the case as expeditiously as possible.

SECTION 8. RESOLVING AN APPEAL ISSUE(S)

.01 In general. Established Appeals procedures, including those governing submissions and taxpayer conferences, apply to resolving appeals regarding Bond Issues. *See* § 601.106 *et seq.* of the Statement of Procedural Rules. The procedures in sections 8.03 and 8.04, specifically apply to bond issues.

.02 New information provided. If the issuer provides additional information not previously given to the District, Appeals will forward the information to the District for its comments.

.03 If agreement is reached. If Appeals and the issuer agree that no action is necessary with respect to the Bond Issue, Appeals will notify the District and close the case. If Appeals and the issuer reach an agreement with respect to the Bond Issue, Appeals will generally prepare a closing agreement using the model closing agreement provided in Announcement 95-61, 1995-33 I.R.B. 25.

.04 If agreement is not reached. (a) If Appeals and the issuer fail to reach an agreement with respect to an appeal, Appeals will close the appeal file, return jurisdiction over the Bond Issue to the District for appropriate action, and send a copy of the Appeals Case Memorandum with respect to the Bond Issue to the District.

(b) Appeals will not reconsider an unagreed appeal unless there has been a substantial change in the circumstances regarding the appeal issue.

SECTION 9. NO USER FEE

There is no user fee for an appeal request.

SECTION 10. EFFECTIVE DATE

These procedures are generally effective with respect to adverse determinations made by the District on or after July 22, 1998, and in the case of a technical advice memorandum the public release of which occurred within one year prior to July 22, 1998, an appeal may be requested not later than 90 days after the publication of this revenue procedure in the Internal Revenue Bulletin.

DRAFTING INFORMATION

The principal authors of this revenue procedure are Thomas Carter Louthan, Director, Office of Alternative Dispute Resolution & Customer Service Programs, National Office Appeals; Sunita B. Lough, Senior Trial Attorney, Office of Assistant Chief Counsel (Field Service Division); and Joseph Grabowski, Analyst, Exempt Organizations Division. For further information regarding this revenue procedure, please contact Mr. Louthan at (202) 401-4098, Ms. Lough at (202) 622-7870, or Mr. Grabowski at (202) 622-7761 (not toll-free numbers).