

Notice of Proposed Rulemaking and Notice of Public Hearing

Arbitrage and Related Restrictions Applicable to Tax-exempt Bonds Issued by State and Local Governments, Investment-Type Property

REG-113526-98

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations on the arbitrage and related restrictions applicable to tax-exempt bonds issued by State and local governments. The proposed amendments affect issuers of tax-exempt bonds and provide guidance on the definition of investment-type property to help issuers comply with the arbitrage and related restrictions.

DATES: Written comments must be received by December 23, 1999. Outlines of topics to be discussed at the public hearing scheduled for January 12, 2000, at 10 a.m. must be received by December 15, 1999.

ADDRESSES: Send submissions to CC:DOM:CORP:R (REG-113526-98), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to CC:DOM:CORP:R (REG-113526-98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS site at http://www.irs.ustreas.gov/tax_regs/regslst.html. The public hearing is in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Barbara Jane League, (202) 622-3980; concerning submissions of comments, the hearing, and/or requests to be placed on the building access list to attend the hearing, LaNita Van Dyke, (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 148 of the Internal Revenue Code provides rules addressing the use of proceeds of tax-exempt State and local bonds to acquire higher-yielding investments. On June 18, 1993, final regulations (T.D. 8476, 1993-2 C.B. 13) relating to the arbitrage restrictions and related rules under sections 103, 148, 149, and 150 were published in the **Federal Register** (58 F.R. 33510). Corrections to these regulations were published in the **Federal Register** on August 23, 1993 (58 F.R. 44451), May 11, 1994 (59 F.R. 24350), and July 9, 1999 (64 F.R. 37037). On May 9, 1997, additional final regulations (T.D. 8718, 1997-1 C.B. 47) relating to the arbitrage restrictions and related rules under sections 103, 148, 149, and 150 were published in the **Federal Register** (62 F.R. 25502). This document proposes to modify §1.148-1(e) to clarify which prepayments are investment-type property under section 148(b)(2)(D).

Explanation of Provisions

The current regulations, at §1.148-1(e)(2), provide that prepayments for property or services give rise to investment-type property if a principal purpose for prepaying is to obtain an investment return from the time that the payment is made until the time that payment otherwise would be made. A prepayment does not give rise to investment-type property if (1) the prepayment is made for a substantial business purpose other than investment return and the issuer has no commercially reasonable alternative to the prepayment, or (2) prepayments on substantially the same terms are made by a substantial percentage of persons who

are similarly situated to the issuer but who are not beneficiaries of tax-exempt financing.

Recently, an issue arose about whether investment-type property includes the prepayment of a contract for property or services after the date that the contract is entered into. In *City of Columbus v. Commissioner*, 112 F.3d 1201 (D.C. Cir. 1997), the court held that a prepayment for property cannot occur after the property is acquired. The court's holding suggests that an issuer could avoid investment-type property by entering into a contract for property or services and, at a later date, prepaying that contract. This result is inconsistent with the intent of section 148. The legislative history indicates that Congress intended that the arbitrage rules apply broadly. For example, the Conference Report to the Tax Reform Act of 1986 provides that investment property includes the acquisition of any property held for investment (other than another tax-exempt bond). H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-747, 1986-3 C.B. (Vol.4) 747.

This document proposes modifications to the regulations to establish that prepayments that give rise to investment-type property can occur after the contract for property or services is entered into and to make other non-substantive, clarifying changes. It is intended that these regulations address only the potential issue created by the *City of Columbus* opinion as noted above. Comments are requested on whether the affect of the changes proposed in this document is broader than intended.

In addition to comments on the proposed regulations, comments are requested on whether additional guidance is needed to clarify other aspects of the investment-type property definition. For example, comments are requested on whether clarification is needed on which prepayments of an obligation will be treated as a prepayment for property or services that gives rise to investment-type property, and whether a contract under which property or services are to be provided over time and the payments for those property or services are to be made

over time gives rise to investment-type property when the payment schedule does not match the schedule for the provision of the property or services.

Finally, Treasury and the IRS have become aware of certain transactions involving prepayments for the purchase of a commodity. In these transactions, an issuer generally enters into a long-term contract with a supplier (for example, a natural gas supply company) to supply over a number of years a fixed amount of the commodity to the issuer at a fixed price (the "supply contract"). In return, the issuer makes a single lump-sum prepayment for the commodity to the supplier. The prepayment is financed through the issuance of bonds. The amount of the prepayment is determined in a manner that permits the issuer to obtain an investment return from the prepayment. The issuer also enters into other agreements, including one or more swap agreements, that result in the issuer converting substantially all of the issuer's cost for the commodity under the supply contract into a variable cost that approximates the then current price of the commodity when the issuer takes delivery.

Based on the information received, and viewing the transaction as a whole, it appears that a principal purpose of the prepayment for the supply contract was to earn an investment return. If so, the supply contract is investment-type property unless the requirement of §1.148-1(e)(2)(i) or (ii) are met. Treasury and the IRS are concerned that the supply contract may be investment-type property and request comments on these transactions.

The regulations, when finalized, will apply to bonds issued after a date of applicability that will be set forth in the final regulations. Treasury and the IRS have not yet determined such date of applicability other than to have made the determination that the date of applicability will not be before August 25, 1999. Treasury and the IRS request comments as to the date of applicability of the final regulations. No inference is intended as to the treatment of bonds issued prior to the date of applicability of the final regulations.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a signifi-

cant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic and written comments (a signed original and eight (8) copies, if written) that are submitted timely to the IRS. In particular, the IRS and Department of Treasury specifically request comments on the clarity of the proposed rule and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for Wednesday, January 12, 2000, beginning at 10 a.m. in room 2615, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the "For Further Information Contact" section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons who wish to present oral comments at the hearing must submit written comments by December 23, 1999, and submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by December 15, 1999. A period

of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal authors of these proposed regulations are Rebecca L. Harrigal and Barbara Jane League, Office of Assistant Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and Treasury Department participated in their development.

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Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.148-1(e) is amended as follows:

1. Paragraph (e)(1) is revised.
2. Paragraphs (e)(2) introductory text, (e)(2)(i) and (e)(2)(ii) are redesignated as paragraphs (e)(2)(i) introductory text, (e)(2)(i)(A), and (e)(2)(i)(B), respectively.
3. Paragraph (e)(2) the heading is revised.
4. Newly designated paragraph (e)(2)(i) introductory text is revised.
5. New paragraph (e)(2)(ii) is added.

The revisions and addition read as follows:

§1.148-1 Definitions and elections.

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(e) *Investment-type property*—(1) *In general.* Investment-type property includes any property, other than property described in section 148(b)(2)(A), (B), (C) or (E), that is held principally as a passive vehicle for the production of income. For this purpose, production of income includes any benefit based on the time value of money.

(2) *Prepayments.* (i) Except as otherwise provided in this paragraph (e), a prepayment for property or services, includ-

ing a prepayment of a contract for property or services that is made after the date that the contract is entered into, also gives rise to investment-type property if a principal purpose for prepaying is to receive an investment return from the time the prepayment is made until the time payment otherwise would be made. A prepayment does not give rise to investment type property if—

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(ii) *Example.* The following example illustrates an application of paragraph (e)(2)(i) of this section:

Example. In 1996, City A entered into a ten-year contract with Company Y. Under the contract, Company Y is to provide services to City A and in return City A will make fixed annual payments to Company Y. In 1998, Company Y and City A agree that City A will prepay its obligation under the contract. To finance the prepayment, City A will issue bonds. The amount of the prepayment is determined in a manner that permits City A to obtain an investment return from the prepayment. A principal purpose for City A agreeing to make the prepayment is to obtain an investment return from the time of the prepayment until the time payment otherwise would be made. The prepayment is not made for a substantial business purpose other than to obtain the investment return and City A had a commercially reasonable alternative to the prepayment. In addition, prepayments on substantially the same terms are not made by a substantial percentage of persons who are similarly situated to City A but who are not beneficiaries of tax-exempt financing. When the prepayment is made, City A will have acquired investment-type property. It does not matter that the prepayment occurred after the date that the contract was entered into.

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Robert E. Wenzel,
*Deputy Commissioner
of Internal Revenue.*

(Filed by the Office of the Federal Register on August 24, 1999, 8:45 a.m., and published in the issue of the Federal Register for August 25, 1999, 64 F.R. 46320)