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INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR CHARLES W. JEGLIKOWSKI
DEPUTY AREA COUNSEL (TEGE) PACIFIC
COAST/CENTRAL MOUNTAIN AREA TE/GE:PCCM:THO

FROM: Mary Oppenheimer
Assistant Chief Counsel

SUBJECT:

This Chief Counsel Advice responds to your memorandum dated July 27, 2001. In accordance with I.R.C. § 6110(k)(3), this Chief Counsel Advice should not be cited as precedent.

LEGEND

Authority =

State =

City =

Airport =

Date 1 Bonds =

Date 2 Bonds =

Airline =

X =

Y =

Date 3 =

Z =

ISSUES

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Is the Facility available to serve, on a regular basis, the general public as required by § 142(a)(1) of the Internal Revenue Code and § 1.103-8(a)(2) and § 1.103-8(e)(1) of the Treasury Regulations?

Is the Facility a directly related and essential part of the Airport, an airport as defined by § 142(a)(1) and § 1.103-8(e)(2)(ii)(a), servicing aircraft or enabling aircraft to take-off and land?

Is the Facility functionally related to the Airport, as defined in § 142(a)(1) and § 1.103-8(a)(3) and § 1.103-8(e)(2)(b)?

CONCLUSIONS

The Facility meets the public use requirements of § 142(a)(1) and § 1.103-8(a)(2) and § 1.103-8(e)(1) because it is leased by a common carrier who uses it in the business of providing scheduled passenger service to the general public.

The Facility is a directly related and essential part of the Airport, an airport as defined by § 142(a)(1) and § 1.103-8(e)(2)(ii)(a).

The Facility is functionally related to the Airport, as defined in § 142(a)(1) of and § 1.103-8(a)(3) and § 1.103-8(e)(2)(b).

FACTS

The Airport is owned by a political subdivision of the State (the "City"). The City formed the Authority to issue bonds on its behalf. The Authority issued Date 1 Bonds and Date 2 Bonds to finance the acquisition, construction, equipping, and improvement of certain maintenance engineering facilities adjacent to the Airport for lease to the Airline (the "Facility"). The Airport's major tenant was and continues to be the Airline, a common carrier. The Airline leases the Facility (the land and improvements on it) and leases the equipment in the Facility from the Authority. The Authority will eventually transfer the Facility to the City subject to the Airline's leases.

The Facility, approximately X square feet in total area, is located adjacent to the Airport. The Facility consists of a hangar, engine overhaul buildings, and various administrative and support structures. The Facility is used to provide maintenance service and engine overhauls for the Airline's passenger aircraft. The Airline uses the Airport to take-off and land all of its aircraft in transit to its maintenance facility. The Airline does not provide passenger service at the Airport. However, the Airline does provide scheduled passenger service at other airports.

The Airport is an airport as defined by the Federal Aviation Agency (the "FAA"), and is open to the public. It consists of one runway and two taxiways, one

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of which is designated an auxiliary runway. The Airport provides service for air freight, air cargo, charter flights, flight instruction, avionics service, and major repairs. However, the Airport has no regularly scheduled air carrier service. In a 1-year period unscheduled air carrier traffic, including the Airline's use and the other air carrier's use, accounted for Y percent (less than 10 percent) of the Airport's total traffic. As of Date 3, Z percent (more than 50 percent) of the Airport's operations were training flights. The Airline was one of two air carriers using the Airport during this year. The other air carrier transports cargo for the general public. For purposes of this field service advice, we have assumed that the Airport is an exempt facility as described in § 142(a)(1).

LAW AND ANALYSIS

Under § 103(a) gross income does not include interest on a State or local bond. Section 103(b)(1) provides that § 103(a) does not apply to any private activity bond, unless it is a qualified bond under § 141.

Section 141(a) provides that the term "private activity bond" means any bond issued as part of an issue which meets the private business use test and the private security or payment test or which meets the private loan financing test. Section 141(b)(1) generally provides that an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Section 141(b)(6) provides that the term "private business use" means use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. However, use as a member of the general public is not taken into account. Section 141(e) provides, in part, that a qualified bond means any private activity bond that is an exempt facility bond. Therefore, a private activity bond may be financed with tax-exempt bonds if the private activity bond is a qualified bond (defined in § 141(e)) and an exempt facility bond (defined in § 142).

The Tax Reform Act of 1986 amended § 103(b)(4)(D) of the Internal Revenue Code of 1954, creating new § 142(c), to allow exempt facility bonds to be issued to finance airports and storage and training facilities directly related to such airports. An exempt facility bond means any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide airports. Section 142(a)(1). To be treated as an exempt facility terminal (airport) all of the property to be financed with the net proceeds of the issue must be owned by a governmental unit. Section 142(b)(1)(a).

To qualify as an exempt facility, a facility must serve or be available on a regular basis for general public use, or be a part of a facility so used, as contrasted with similar types of facilities which are constructed for the exclusive use of a limited number of nonexempt persons in their trades or businesses. For example, a private dock or wharf owned by or leased to and serving only a single

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manufacturing plant would not qualify as a facility for general public use, but a hangar or repair facility at a municipal airport, or a dock or wharf, would qualify even if it is owned by or leased or permanently assigned to a nonexempt person provided that such person directly serves the general public, such as a common passenger carrier or freight carrier. Treas. Reg. § 1.103-8(a)(2).

An exempt facility includes any land, building, or other property functionally related and subordinate to such facility. Property is not functionally related and subordinate to a facility if it is not of a character and size commensurate with the character and size of such facility. Treas. Reg. § 1.103-8(a)(3).

Section 1.103-8(e)(2)(ii)(a) provides that an airport includes facilities which are directly related and essential to servicing aircraft or enabling aircraft to take-off and land, or transferring passengers or cargo to or from aircraft. A facility does not satisfy either of the foregoing requirements if the facility need not be located at, or in close proximity to, the take-off and landing area in order to perform its function. An airport includes facilities other than those described in § 1.103-8(e)(2)(ii)(a) only if they are functionally related to an airport (as defined in § 1.103-8(e)(2)(ii)(a)). A facility is not functionally related and subordinate to an airport if the facility is not of a character and size commensurate with the character and size of the airport at or adjacent to which the facility is located, or is not located at or adjacent to that airport. Treas. Reg. § 1.103-8(e)(2)(ii)(b).

As an illustration of the rules of § 1.103-8(e)(2)(ii), an office building or a computer facility, either of which serves a system-wide or regional function of an airline, is not considered part of an airport since that facility is not described in either § 1.103-8(e)(2)(ii)(a) or (b). However, a maintenance or overhaul facility which services aircraft is considered part of an airport under § 1.103-8(e)(2)(ii)(a) since that facility is directly related and essential to servicing aircraft and must be located where aircraft take-off and land in order to perform its function. Treas. Reg. § 1.103-8(e)(2)(ii)(c).

The regulations provide that a hangar or repair facility at a municipal airport, or a dock or wharf, would qualify even if it is owned by or leased or permanently assigned to a nonexempt person provided that such person directly serves the general public, such as a common passenger carrier or freight carrier. Because of the very broad definition of common carrier it cannot be concluded that all entities which technically qualify as common carriers do in reality serve the general public. The need for a factual determination as to whether a facility to be operated by a common carrier will actually serve the general public is most apparent when the primary business of the common carrier is not that of being a common carrier but rather is another business that is directly benefitted from the availability of the Airport. In this case, the primary business of the Airline is providing scheduled passenger service as a common carrier. Essential repair and maintenance for the Airline's passenger aircraft is performed at the Facility. Therefore, we conclude

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that the Facility will meet the public use test because it is leased to the Airline, a common carrier who directly serves the general public by providing scheduled passenger service.

Having concluded that the Facility meets the public use requirement, we now consider if the Facility is a directly related and essential part of the Airport servicing aircraft or enabling aircraft to take-off and land. A facility is not directly related and essential to an airport if it need not be located at, or in close proximity to, the take-off and landing area in order to perform its function. Under the facts of this case the Facility services and maintains aircraft used by the Airline in its business of providing regularly scheduled passenger service. The Airport is capable of handling the size and type of aircraft serviced at the Facility. Also, the Facility is located at or adjacent to the Airport and must be so located in order to perform its function. The Airport is a facility described in § 1.103-8(e)(2)(ii)(a). Therefore, the Facility is directly related and essential to the Airport.

In the alternative, we believe that the Facility is functionally related to the Airport because its character and size are commensurate with the character and size of the Airport. Traffic to and from the Facility is included in the Y percent (less than 10 percent) of traffic at the Airport. Comparing the size of the Facility to the size of the Airport based on the amount and kind of traffic at the Airport indicates that the size of the Facility is commensurate with the size of the Airport. The Airport represents to air service providers that aircraft repair and maintenance service are available at the Airport. The Facility provides aircraft repair and maintenance service. This indicates that the character of the Facility is commensurate with the character of the Airport. Finally no other facts were submitted to suggest that the Facility's character and size are not commensurate with the character and size of the Airport.

Please call Timothy L. Jones or Allan B. Seller at (202) 622-3980 if we can provide further assistance.

Mary Oppenheimer
Assistant Chief Counsel
By: TIMOTHY L. JONES
Assistant to the Branch Chief
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