



September 10, 2010

Tribal Economic Development Bond Comments
Department of the Treasury
1500 Pennsylvania Avenue, NW.
Room 3454
Washington, DC 20220.

Re: Comments in response to Treasury Department Notice and Request published July 12, 2010 in Federal Register (the "Notice")

Ladies and Gentlemen:

Thank you for your request, published in the Federal Register, to Indian Tribal Governments for submission of comments regarding tribal economic development bonds (TEDBs), as authorized in section 7871(f) of the Internal Revenue Code (the Code), and also on the question of whether the "essential governmental function" standard, as set forth in section 7871(c) of the Code, should be repealed in connection with tax-exempt financing by Indian tribal governments.

Preparation of these comments has been a collaborative effort organized by the National Congress of American Indians (NCAI). As the representative congress for American Indian tribal governments, NCAI involved tribal officials and representatives of numerous Indian tribes and participants active in tribal finance matters, including attorneys practicing in the area of tribal finance and financial institutions active in this arena. NCAI sought input during national and regional conferences, through an open national call for comments, and in an open working group developed specifically to solicit input on the various questions put forth in the formal request for comments and other related issues of concern. We encourage Treasury to consider all comments by tribes and representatives.

While NCAI has developed these inclusive comments for consideration, we feel it would be appropriate for the Department of Treasury to continue its outreach in developing the report and working through any policy changes, especially since some of the questions raised nuances that generated productive discussion that should be considered. NCAI can serve to assist in coordinating these conversations.

For decades, and in various forums, tribal government leadership has clearly and emphatically expressed the need for parity with state and local governments in accessing the tax exempt debt market for government purposes. Current law contains "separate and unequal" standards for tribal governments. These standards are not only inequitable, but also have proven

to be difficult to administer. Thus, NCAI applauds the Treasury Department for providing this opportunity for tribal input on the TEDB study and for broadening the scope of comments to include the effectiveness of the TEDB included in the American Recovery and Reinvestment Act and whether to repeal, on a permanent basis, the restrictive "essential governmental function" standard for tribal governmental bonds.

Overview of Comments

Our comments strongly support suggestions made by Treasury in the Notice that the "essential governmental function," currently applicable to tax-exempt financing for Indian tribal governments, be replaced by the state or local governmental standard for issuing tax-exempt obligations. Our comments emphasize that, to apply such state or local government standard in the context of tribal financings, several clarifications should be made to such standard, including certain clarifications suggested by Treasury in the Notice.

Our comments also support Treasury's suggestion that Indian tribal governments be allowed to issue qualified private activity bonds for similar types of projects and activities as are allowed for state and local governments, again with certain clarifications to implement the use of such bonds in light of the special needs and unique circumstances of tribes. In the Notice, Treasury asked whether certain additional types of private activity bonds (PABs) should be authorized for Indian tribal governments, beyond those allowed for states and local governments, in light of the special needs and unique circumstances of tribes. We recommend that certain additional types of PABs should be authorized for tribes, and our comments describe potential examples of such kinds of bonds. Our comments also address related questions raised by Treasury relating to the application of a national volume cap to tribal private activity bonds, and offer suggestions on how such a cap, if deemed necessary, could be implemented.

As requested by Treasury, our comments also address whether certain existing limitations applicable to tribal economic development bonds (TEDBs) should be modified. These limitations include restrictions against financing gaming activities and against financing projects not located on a tribe's reservation, as defined. We recommend that modifications should be made to such restrictions and our comments offer certain specific recommendations as to how such modifications could be fashioned.

Finally, as requested by Treasury, our comments address certain additional factors that should be considered in refining the scope of tax-exempt financing for Indian tribal governments, in particular, how the existing \$2 billion volume cap applicable to TEDBs could be implemented by the I.R.S. in light of the pending sunset, and potential forfeiture, of existing TEDB volume cap allocations awarded under I.R.S. Notice 2009-51.

In offering our comments, we would like to emphasize our strong belief that many of Treasury's suggestions will be very helpful to Indian tribal governments in meeting their financing needs and the needs of their members. We also emphasize that refined tax law authority will likely not be sufficient to meet those needs effectively if not coupled with greater market access. It is common knowledge that Indian tribal governments suffer from a lack of adequate market access. There are a number of causes for this, but significant among them is that many tribes simply lack the kind of resource and tax base needed to support their desired

economic growth and to adequately support debt obligations in the manner required by current market conditions. Our comments note that one effective way to couple such refined tax law authority with enhanced market access would be to allow the use of federal guarantees in connection with tax-exempt tribal financing. Although current tax law permits state and local governments to use federal guarantees only in the context of housing bonds, federal guarantees should be authorized for a much wider array of tribal bonds, due to the special needs and unique circumstances of tribes.

Comments

Our comments are based on the interests of tribes and are also offered with a view toward the need for the administrability of applicable tax law requirements. Our comments follow the order of the questions raised in the Notice.

Whether the State or Local Governmental Standard for Tax-Exempt Governmental Bond Status Should Replace the Essential Governmental Function Standard

Introduction

A State or local governmental bond is treated as a tax-exempt governmental bond (rather than a private activity bond) under Section 141 of the Internal Revenue Code of 1986, as amended (the Code) if either 90 percent or more of the bond proceeds are used for governmental use (*i.e.*, not private business use) or 90 percent or more of the debt service on the bonds is payable or secured from governmental payments or property, as previously described herein. In treating Indian tribal government use of facilities financed with Tribal Economic Development Bonds as governmental use under Section 141, the Tribal Economic Development Bond provision effectively applies this standard.

Treasury has asked whether, in general, tax law should be permanently changed to apply the standard described above, applicable to State and local governments under Section 141, with respect to tax-exempt bond financing for Indian tribal governments (rather than the existing essential governmental function standard under Section 7871(c) of the Code).

Recommendation

We strongly recommend that Treasury recommend to Congress that the state or local government standard for tax-exempt bonds replace the essential governmental standard currently applicable to tribal government bonds, subject to the comments below. Our recommendation is based on a number of factors. Among them, we believe that using the state and local standard for tribal bonds (with certain clarifications) will achieve appropriate tax law parity between state and local governments and Indian tribal governments. In addition, we believe that using this new standard for tribal bonds will facilitate and enhance the administrability of applicable tax law requirements.

Nevertheless, we believe that focusing on Indian tribal governmental use of bond-financed facilities (rather than essential governmental functions) under the standard applicable to State and local governments, will likely not, absent certain clarifications, provide Indian tribal governments with a sufficiently workable and flexible standard for tax-exempt governmental

bond financing. This is primarily because tribal governmental use of facilities often involves use by tribal enterprises and other tribal entities, the functional characteristics of which may differ from those of agencies, authorities and other instrumentalities formed by state and local governmental governments.

Use of Bond-Financed Facilities

Rules for State and Local Governments. In the context of state and local government activities, existing tax law establishes with relative certainty which authorities, agencies and other instrumentalities have the ability to issue tax-exempt obligations and to use bond-financed facilities without triggering private use. Notwithstanding differences in the laws of the various states, these kinds of entities share many common characteristics from one state to another and typically include housing authorities, redevelopment agencies, building authorities, water and sewer districts, and others.

Governmental Units of Tribes Generally. Enterprises and other entities formed by tribal governments vary considerably from one tribe to another. For example, the purposes for which tribal enterprises and entities are formed vary widely, as do their operational characteristics and the tribal codes and other laws under which they are formed. This makes tax law classification of such enterprises and entities more difficult than in the case of state and local governments. Frequently such entities are formed in significant part to promote economic development goals. The activities conducted by such entities have similarities with those of many state and local governments, such as the operation of state lotteries, state and municipal liquor stores, convention center hotels, municipal golf courses and marinas, and other proprietary ventures. In forming such entities, tribal governing bodies typically deem the corresponding economic development purposes and activities to be significant to the tribe's governmental interests and as conferring important public benefits. Typically, tribal instrumentalities are subject to control by the tribe's governing body, oftentimes through appointment by the tribe's governing body of the members of the governing body of the tribal instrumentality.

Moreover, as discussed further below, one of the most significant differences between tribal governments and state governments is that tribal governments frequently have a different mix of revenue sources. Tribes have strong taxing authority for sales and excise taxes, but generally lack the practical ability to impose property taxes or income taxes. Those tribal lands that are held in trust by the United States are not subject to property taxes, and tribes have generally been reluctant to impose income taxes on their tribal members. As a result, tribal government revenues include a higher proportion of revenue from natural resources development and from enterprise operations. At the same time, State governments also conduct proprietary ventures and exploit revenue sources with commercial characteristics, notwithstanding their ability to levy income and property taxes. Several examples are given above. The use by tribal governments and their governmental units of alternative sources of government revenue should not limit their ability to obtain tax-exempt financing for tribal government projects.

Recommendation. Tax law clarification would be useful to confirm that use of bond-financed facilities by tribal entities should not trigger private use concerns where the entity is formed to fulfill purposes and carry out powers specifically delegated by the tribe's governing

body, and where effective control of the instrumentality is lodged in the tribe's governing body, for example, through appointment of the members of its governing body.

Governmental Sources of Payment

Unique Sources of Tribal Revenue Identified by Treasury. In determining qualified governmental sources of payment for tax-exempt governmental bonds for Indian tribal governments, special consideration should be given to various unique sources of revenue for Indian tribal governments, including (i) income derived from tribal lands held in trust by the United States, (ii) state and local government revenues from oil, gas, or other natural resources, including tax sharing or other revenue sharing on tribal lands, and (iii) revenue derived from gaming or other tribally owned business activities, in comparison to the general tax-based sources of revenue for State and local governments.

Other Examples. Other examples of the unique sources of revenue available to Indian tribal governments include: (a) income from federally funded trust accounts created to compensate tribes for tribal lands lost through federal takings, such as flooding as a result of dam construction; and (b) oil and gas revenues other than state and local government revenue (e.g., tribal revenues generated from oil and gas leases).

Federal Guarantees. As mentioned above, refinement of tax law requirements applicable to tax-exempt obligations will not effectively allow many tribal governments to meet their financing needs without also facilitating tribal access to credit markets. We believe that there is no more effective way to improve the access of tribes to credit markets than to permit tax-exempt tribal obligations to be federally guaranteed.

Recommendation. A cornerstone of the State and Local Governmental Standard in current tax law is an emphasis on generally applicable taxes levied by state and local governments, such as income taxes and ad valorem property taxes. These tax revenue sources are generally unavailable to tribes. In applying the State and Local Government Standard to tribal finance, tax law should recognize and respect the need for tribal governments to turn to other sources of governmental revenue to pay debt service obligations, including, specifically, the revenue sources identified above. In addition, tax law should permit tax-exempt tribal obligations to be federally guaranteed.

Qualified Tribal Issuers

In seeking comments pursuant to the Notice, Treasury did not specifically ask whether, in the context of Indian tribal governments, consideration should be given to clarification of the rules governing the requirements of qualified issuers of tax-exempt obligations. Nevertheless, as mentioned above, such clarification would be helpful.

In the context of state and local bonds, several tax law tests identify the characteristics that must be met for entities formed by or on behalf of states and local governments to issue tax-exempt bonds. In the context of state and local bonds, to qualify as an authorized issuer, an entity (other than the government itself) must be: (a) a "political subdivision;" (b) an "on behalf of" issuer, including issuers that consist of "constituted authorities;" or (c) an "integral part" issuer.

Application of these tests to governmental units formed by tribes can be challenging. For example, in determining whether a tribal government entity constitutes a political or governmental subdivision, Rev. Proc. 84-36, as modified by Rev. Proc. 86-17, lists tribal entities that qualified as subdivisions of their respective tribes in 1984 and in 1986; however, for tribal entities formed since that time, , an often lengthy and two-step process is mandated. The tribal entity must first obtain a determination from the Interior Department that the tribe has delegated a sovereign power to the tribal entity. Then the tribal entity must obtain a separate private letter ruling from the I.R.S confirming its political subdivision status.

Recommendation. Whether or not legislation is adopted to repeal the essential governmental function test, a much more streamlined process should be created for determining whether a tribal entity is a political or governmental subdivision. In addition, qualified tribal issuers should include any tribal governmental unit to which the tribe's governing body has properly delegated governmental purposes and powers and over which the tribal government exercises governance control, , Furthermore, for the reasons explained below, Treasury should confirm in generally applicable guidance (e.g., a Revenue Ruling or regulations) that Section 17 corporations are qualified tribal issuers and that use of bond-financed facilities by Section 17 corporations constitutes governmental use, for tax-exempt financing purposes.

Types of Projects and Activities Eligible for Financing With Private Activity Bonds

Introduction

For state and local governments, Section 141 of the Code provides that certain specific types of projects and activities may be financed with qualified tax-exempt private activity bonds. In the Notice, Treasury has asked whether consideration should be given to changing the law permanently to authorize Indian tribal governments to use qualified tax-exempt private activity bonds for similar types of projects and activities as those allowed for State and local governments.

Recommendations

Tax law should be changed permanently to authorize Indian tribal governments to use qualified tax-exempt private activity bonds for similar types of projects and activities as those allowed for State and local governments. In this regard, we would like to emphasize specifically that qualified small issue manufacturing bonds, as authorized for state and local governments, will be more useful than the existing more limited form of manufacturing bonds currently authorized for Indian tribal governments under Code Section 7871(c)(3)(B).

In addition, Indian tribal governments should be authorized to use qualified tax-exempt private activity bonds for certain other types of projects or activities beyond those allowed for state and local governments, in light of the special needs and unique circumstances of Indian tribes, as described in further detail below.

New Categories of Tribal Private Activity Bonds

Housing. Primary examples of new categories of private activity bonds that should be authorized for Indian tribal governments include qualified mortgage bonds and qualified

residential rental bonds that would specifically address the unique housing needs and circumstances of tribes. In the context of state and local bonds, these types of bonds are intended to provide housing for lower income families and qualifying first time home buyers, according to requirements fashioned with those priorities in mind. These requirements are implemented by, among other things, project set-aside rules, qualified project period requirements and other tax rules. In the context of tribal housing, however, these rules may not adequately address the special needs and unique circumstances of tribes.

In general, tribal housing needs have a different character from those of most cities and states. Tribal members seeking housing on trust lands face the difficulty that such lands are not able to be encumbered; thus, traditional mortgage financing is unavailable to them. Many reservations are not situated in close proximity to metropolitan areas and, on those reservations, housing needs can be considerable—partly to fill the needs of low and moderate persons and families, and partly for other reasons. Among other things, tribal governments may want to incent tribal members and others to live on the reservation to ensure that qualified employees will be available for governmental or other jobs as well as ensure community income diversity. Tribes that develop medical facilities or other facilities offering specialized services on their reservations may need qualified medical or other personnel to live on the reservation to fill corresponding staffing positions. In other instances, tribes may want to insure that lack of adequate housing options does not serve as a motivation for tribal members to leave the reservation in favor of opportunities elsewhere.

Economic Development. In assessing whether Indian tribal governments should be authorized to use qualified tax-exempt private activity bonds for projects or activities beyond those allowed for state and local governments, in light of the special needs and unique circumstances of Indian tribes, one other point should be noted: namely, that there may be no private activity of greater interest to most tribes than economic development. If Treasury considers recommending new types of qualified private activity bonds beyond those allowed for state or local governments, it should consider providing authorization of qualified private activity bonds for such economic development needs as development of tourism and recreational facilities, travel centers and the like. In addition, a wide variety of private activity commercial projects should be considered, particularly where employment of tribal members would be enhanced, such as retail mall facilities and facilities for big box retailers. In this regard, it should be noted that states and localities have an extensive array of economic development financing tools available to them related to their power to levy property and income taxes, including tax increment financing. In contrast, tribes have virtually no corresponding tax-advantaged financing tools to promote economic development. Adding new categories of tribal private activity bonds for commercial projects would help to alleviate that disparity.

Use of Private Activity Bonds by Section 17 Corporations

In the Notice, Treasury asked whether federal corporations chartered under Section 17 of the Indian Reorganization Act of 1934 (25 U.S.C. 477) require special provisions to use qualified tax-exempt private activity bonds. Section 17 corporations exist under charters issued by the Secretary of the Interior to tribal governments. To secure an approved charter, the corporation must be wholly owned and controlled by a tribal government. Such corporations have been held to be qualified governmental issuers of tax-exempt bonds (see P.L.R. 9847018), but, as discussed

above, it would be considerably more effective if the ability of such corporations to issue tax-exempt obligations was confirmed in generally applicable guidance.. Tribes often prefer to use entities under their control as financing vehicles in order to insulate unrelated tribal assets from exposure to the satisfaction of the borrowing obligation, similar to many financing plans developed by state and local governments.

Private Activity Bond Volume Cap Considerations

Introduction

In the case of State and local governments, an annual State bond volume cap applies to qualified tax-exempt private activity bonds based on State populations. For 2010, each State's private activity bond volume cap is equal to the greater of: (1) \$90 multiplied by the State population; or (2) \$273,775,000. In the case of Indian tribal governments, the new Tribal Economic Development Bond provision under Section 7871(f) included a \$2 billion total national bond volume cap on these bonds.

If Congress were to determine that it was necessary to impose some form of bond volume cap on the use of qualified tax-exempt private activity bonds by Indian tribal governments similar to that imposed on State and local governments, how specifically should such a bond volume cap be structured to best promote fair, effective, and workable use?

Initially, we would like to point out that qualified 501(c)(3) bonds and certain other bonds constitute specific exceptions to the existing volume cap requirements applicable to state and local bonds. We believe, and understand from Treasury's corresponding suggestion in the Notice, that such exceptions would also be incorporated in any prospective volume cap requirement for tribal private activity bonds.

Treasury has suggested that one option would be to allocate the private activity bond volume cap among Indian tribal governments based on population, coupled with some minimum allocation for small Indian tribal governments. Another option, similar to that used for the \$2 billion Tribal Economic Development Bond authorization, would be for Treasury (or another Federal agency, such as the Department of the Interior's Bureau of Indian Affairs) to allocate the volume cap using some prescribed method, such as a population-based allocation method that incorporates an adjustment factor to take into account holdings of land and other natural resources in the case of tribes with small populations.

Methodologies Based on Population or Land

In implementing a tribal private activity bond volume cap, Treasury should consider the problems that would arise if the methodology were population-based. One fundamental problem results from tribes having different rules as to membership. Most tribes use various blood quantum minimums to determine membership, but others use descendency – for example, one of the largest tribes in the nation by population enjoys its high ranking because anyone who has any ancestor who was a tribal member is eligible to be a tribal member. Another problem associated with a population-based methodology is that a significant portion of the membership of many tribes resides off-reservation.

Unfortunately, a land-based methodology is not likely to be effective either – land base varies significantly, based on historical factors that have no relationship to the need for, or ability of a tribe to use, financing. In addition, land within reservation boundaries is often heavily “checker boarded,” meaning that title to various parcels is held in a mixture of tribal trust, individual trust, tribal or individual fee, non-Indian fee and other states.

Assignability of Volume Cap Allocations

Regardless of how a prospective tribal private activity bond volume cap would be allocated to tribes, Treasury, in considering such a volume cap, should recall that, under existing law, states that receive volume cap allocations for private activity bonds have considerable discretion in how to allocate their volume caps to state agencies and units of local government. Further, many states have rules that provide significant flexibility in re-assigning their volume caps when necessary due to changed circumstances, for example, by allowing allocations, once granted, to be returned or re-allocated. In considering how to apply a volume cap to tribal private activity bonds, Treasury should consider how to provide flexibility in the implementation of any tribal volume cap, analogous to the way that volume caps are administered by states. Allowing tribes, under appropriate conditions, to assign their allocations in whole or part to other tribes or to pool their allocations with other tribes for economic development would promote such flexibility without imposing undue burden on Treasury or other affected federal agencies.

Recommendation

Particularly if tribal volume cap allocations are allowed to be assignable, the most straightforward way of implementing a national volume cap might be to award allocations in equal amounts to all federally recognized Indian tribes, the amount of each allocation to be determined by dividing the amount of the overall national volume cap by the number of federally recognized Indian tribes. In any case, allocations of tribal volume caps should have the same kinds of “carry-forward” provisions as volume caps for states and local governments, allowing volume cap authority, if not completely used in the year in which it was awarded, to be used under qualifying circumstances in subsequent years.

Considerations Regarding the Restriction Against Financing Projects Located Outside of Indian Reservations

Introduction

Section 7871(f)(3)(B)(ii) of the Code limits the use of Tribal Economic Development Bonds to the financing of projects that are located on Indian reservations (as defined in Section 168(j)(6)). Section 168(j)(6) provides that the term “Indian reservation” means a reservation as defined in:

(A) § 3(d) of the Indian Financing Act of 1974, 25 U.S.C. 1452(d), applied by treating the term “Indian reservations in Oklahoma” as including only lands that are within the jurisdictional area of an Oklahoma Indian tribe (as determined by the Secretary of the Interior) and which are recognized by the Secretary of the Interior as eligible for trust land status under 25 C.F.R. part 151 (as in effect on August 5, 1997); or

(B) § 4(10) of the Indian Child Welfare Act of 1978, 25 U.S.C. 1903(10).

In the Notice, Treasury has asked whether the limitation on use of Tribal Economic Development Bonds to finance projects that are located only on Indian reservations should be modified to address the special needs or unique circumstances of Indian tribal governments. For example, Treasury has asked whether consideration should be given to allowing the use of Tribal Economic Development Bonds to finance projects within some prescribed reasonable proximity to Indian reservations or projects located on land owned by Indian tribal governments which has not formally been designated in trust as part of an Indian reservation.

Recommendation

This limitation should be modified, subject to the comments below.

Tribal Governmental Bonds and Tribal Private Activity Bonds

Facilities acquired or constructed to meet tribal government needs, when financed by tax-exempt obligations issued by qualified tribal issuers, should not be subject to a restriction requiring that the financed facilities be located on or near the tribe's reservation. State and local government issuers are not subject to such a restriction (where facilities financed by tax-exempt bonds would be required to be located within or near the jurisdictional boundaries of the issuer), other than for private activity bonds. The appropriate test, at least for governmental (as opposed to private activity) bonds, should be whether the governing body of the issuer has made the requisite findings supporting a determination that acquisition or construction of the financed facilities confers a public benefit to or serves the public purposes of the issuer.

Substantial Connection or Nexus Requirement

In any case, the best way to incorporate these kinds of requirements for tribal bonds would be by reference to certain analogous rules for private activity bonds issued by state or local governments. In that context, existing tax law requires that facilities financed by certain qualified private activity bonds have a "substantial connection" or an appropriate "nexus" to or with the jurisdictional territory of the issuer. These requirements are well illustrated by private letter ruling 8442023 (described below), issued by the IRS in the context of qualified small issue bonds. This approach provides needed flexibility to issuers but also stems arbitrary or inappropriate use of tax-exempt financing. In the context of tribal bonds, this approach would provide symmetry with the rules for state and local bonds and also avoid the sometimes arbitrary results of a bright line rule establishing a certain distance in miles as being the appropriate benchmark, regardless of the particular facts and circumstances of a specific transaction.

The "substantial connection" or "substantial nexus" requirement, as articulated by the IRS in a number of rulings, was originally developed in Revenue Ruling 77-281. Applied to the facts described in P.L.R. 8442023, this rule permits a project outside the jurisdictional boundaries of an issuer to be financed with tax-exempt obligations where the issuer can establish specific benefits to be gained by the issuer from the project, such as increased employment opportunities for residents of the issuing jurisdiction.

Definition of "Reservation"

In the Notice, Treasury asks whether tribes should be able to use tax-exempt obligations “to finance projects within some prescribed reasonable proximity to Indian reservations or projects located on land owned by Indian tribal governments which has not formally been designated in trust as part of an Indian reservation.” 75 Fed. Reg. 39730, 39732. This question is incongruent with the existing requirements of Section 7781(f) of the Code, applicable to tribal economic development bonds. Under Section 7781(f), TEDBs may be issued for qualifying projects if the project is located on the tribe’s “reservation,” as that term is defined in Section 168(j)(6) of the Code. Section 168(j)(6) in turn defines “reservation” by cross-referencing the applicable sections of two other federal laws, section 3(d) of the Indian Financing Act of 1974 (25 U.S.C. 1452(d)) and section 4(10) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(10)). Consequently, the term “reservation,” as used in the context of tribal economic development bonds, includes the following:

- Reservations acknowledged by the United States (through, for example, federal statutes, treaties, executive orders, or final administrative or judicial decisions) as land over which the tribe exercises governmental jurisdiction;
- In Oklahoma, lands that are within the tribe’s jurisdictional area as determined by the Secretary of the Interior and are recognized by the Secretary as eligible for trust land status under 25 C.F.R. Part 151;
- Lands in New Mexico within the exterior boundaries of land granted, confirmed to, or acquired by the Pueblo as reported by the Pueblo Lands Board or reserved, set aside, or held in trust by the United States for the use of the Pueblo or its members¹;
- Lands in Alaska held by incorporated Native groups, regional corporations, and village corporations under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1603 *et seq.*
- Indian country as defined as the land within the limits of any reservation under the jurisdiction of the United States government, including patented land and rights of way;
- dependent Indian communities and all Indian allotments, Indian title to which has not been extinguished;
- trust land held by the United States for the benefit of a tribe;
- trust land held by the United States for the benefit of an Individual;

¹ While none of the statutes incorporated in the IRC definition specifically address Pueblo lands in New Mexico, the Department of the Interior has in the past used this definition for land recognized as within the jurisdiction of the Pueblos.

- land held by a tribe or an individual subject to restrictions by the United States on alienation.

When the federal statutes incorporated in Section 168(j)(6) are reviewed, it is clear that the definition of reservation already includes land that may not formally be held in trust but over which a tribe exercises jurisdiction and which is considered Indian country, as well as lands held in trust by the United States for the benefit of a tribe or tribal members which has not formally been prescribed as a “reservation.”²

Any such modification, then, should not alter or limit the existing framework for determining whether a project site is on a “reservation.”

Considerations Regarding the Restriction Against Financing Gaming Facilities

Introduction

Section 7871(f)(3)(B)(i) of the Code prohibits the use of Tribal Economic Development Bonds to finance any portion of a building in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming. In the Notice, Treasury has asked whether the prohibition on the use of Tribal Economic Development Bonds to finance gaming facilities should be modified to address special needs or unique circumstances of Indian tribal governments.

Recommendation

Such prohibition should be modified.

As noted above, many tribes fund a significant portion of their governmental and social service programs with revenues from gaming operations. For those tribes, such revenues are the functional equivalent of the ad valorem tax revenues received by most units of local government and the income tax revenues received by most states. Tribal gaming revenues bear a similarity to the revenues received by many states from state lottery and other commercial or proprietary operations. Accordingly, the development, improvement and expansion of gaming operations, under appropriate circumstances, should, for federal income tax purposes, be viewed, from a functional standpoint, as analogous to the enactment of tax levies by states and localities or the modification of their income tax rates or ad valorem property tax rates, or as the development of other needed revenue streams such as those generated by state lotteries or other commercial or proprietary operations. Because of the dependence of many tribes on gaming revenues to finance a significant portion of their governmental programs, restrictions should not be imposed on the use of tax-exempt bond proceeds to finance gaming operations or buildings in which class II or class III gaming (as defined in section 4 of the Indian Gaming Regulatory Act) is conducted or housed or any other property actually used in the conduct of such gaming. In this connection

² The fact that trust lands have or have not been formally proclaimed as a “reservation” is generally irrelevant to most issues of federal Indian law. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

it should be noted that, in many states, tribal gaming compacts require that tribal gaming operations make substantial ongoing payments to the state, and that such payments are made from gaming revenues that the recipient state may treat as governmental in character.

Even if such prohibition against financing gaming facilities is not modified, current tax law authority allowing the proceeds of TEDBs to be used for casino hotels and related infrastructure, subject to applicable restrictions, should in any event be retained. Such authorization should be included in any new tax law authority eliminating the “essential governmental function” test, so that authorization for qualified tribal issuers to issue tax-exempt obligations as tribal governmental bonds, not subject to the “essential governmental function” test, and not as private activity bonds, should include the financing of such kinds of facilities.

Additional General Comments on Special Needs or Unique Circumstances of Indian Tribal Governments

Introduction

In the Notice, Treasury has asked whether there are additional factors that should be considered in refining the statutory scope of tax-exempt bond financing for Indian tribal governments to better address the special needs or unique circumstances of Indian tribal governments. Factors cited by Treasury include special sources of revenue, priority government-like activities, geographic distribution and legal status of land associated with Indian tribal governments, or credit market access considerations. Several of these factors have been discussed above.

There follow certain additional factors Treasury should consider in connection with addressing the special needs or unique circumstances of tribes, including particularly factors concerning the ongoing implementation of the tribal economic development bond program and the need for further guidance on existing tax requirements promulgated in connection with volume cap allocations awarded by the IRS to tribes under the provisions of Notice 2009-51.

These factors are suggested particularly in light of the unfortunate and somewhat anomalous status of pending transactions undertaken pursuant to the TEDB program. On the one hand, tribes have clearly demonstrated a need for this financing tool, as evidenced by the oversubscription for both tranches of TEDB allocations awarded by the I.R.S. On the other hand, the relative dearth of closed TEDBs transactions to date also demonstrates that further attention must be given to the implementation of this program.

Potential Forfeiture of Existing Volume Cap Allocations

Introduction. Under Notice 2009-51, if, in connection with any or all of an allocation received by an issuer pursuant to the First Allocation (as described in Notice 2009-51), tribal economic bonds are not issued by December 31, 2010, then such allocation is treated as forfeited. Similarly, if bonds are not issued by December 31, 2011 for any or all of the allocation received by an issuer pursuant to the Second Allocation, then such allocation is treated as forfeited. Any allocation amounts treated as forfeited may be available for allocation by the IRS as part of an allocation process to be announced by the IRS at some future date.

Recommendations. Many contemplated issuances of TEDBs have been delayed as a result of the unprecedented credit crisis that arose almost simultaneously with the enactment of Code Section 7871(f). With respect to these sunset provisions, Treasury should consider the following issues:

(1) Whether the I.R.S. should grant extensions of volume cap awards that are subject to forfeiture under Notice 2009-51, at least for projects that are viable but cannot be successfully completed without an extension of the otherwise applicable sunset date. Such determinations of viability could be made by third party participants in the financing process, for example, banks, financial advisory firms or investment banking firms.

(2) Whether, notwithstanding the insubstantial deviation rule (discussed below), the I.R.S. should allow tribes to assign allocations in whole or part to other tribes, or internally to themselves (for example, where separate allocations were granted to a single tribe in multiple tranches for different projects), if doing so would allow such allocations to be used prior to a relevant sunset date.

(3) Whether administrability of such authorized allocation assignments could be facilitated through a straightforward requirement that notice thereof be provided to the I.R.S., together with delivery to the I.R.S. of supporting documentation.

Insubstantial Deviations

Introduction. Under Notice 2009-51, allocations of volume cap will be valid notwithstanding insubstantial deviations from the information submitted in the application. Procedures are set forth in the Notice for applicants to seek IRS approval of specific insubstantial deviations.

Recommendation. Treasury should consider whether the I.R.S. should broaden the insubstantial deviation rule to allow TEDB financing of projects that have changed or evolved (even if in a manner that is more than insubstantial) due to legitimate or unforeseeable reasons.

Joint Projects

Introduction. Under Notice 2009-51, Indian tribal governments are authorized to request TEDB volume cap allocations to finance the Indian tribal government's share of a joint project all of which will be owned by Indian tribal governments or which will, in part, be owned by an entity that is not an Indian tribal government, provided that the joint project will be located entirely on one or more of the reservations of any of the Indian tribal governments receiving an allocation with respect to such project. For this purpose, the type of joint ownership of facilities to be financed with Tribal Economic Development Bonds include only those recognized under the private activity bond restrictions on tax-exempt bonds under Section 141 of the Code.

Recommendation. Treasury should consider whether the I.R.S. should broaden the joint projects rule to allow tribes to assign existing allocation awards to other tribes under circumstances where both tribes will continue to be involved in the projects that were previously awarded separate volume cap allocations. In addition, Treasury should consider whether the

I.R.S. should combine such broadened joint project authority with an authorization for the tribes to seek extensions of otherwise applicable sunset dates.

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