IRS UPDATE

FROM: Janet Y. Tutt, District Manager

DATE: October 17, 2013

The District's attorney, Perry Israel, sent the attached letter to Rebecca Harrigal, Director, Tax Exempt Bonds, Internal Revenue Service (IRS) on October 15, 2013. The attachment is a supplement to Mr. Israel's original letter, August 23, 2013, requesting 7805(b) relief on behalf of the Village Center Community Development District. I believe this supplement provides an even more interesting analysis of the Technical Advice Memorandum issued by the IRS.

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October 15, 2013

Rebecca L. Harrigal
Director, Tax Exempt Bonds
Internal Revenue Service
Room 6234, IRS Building
1111 Constitution Ave., NW
Washington, DC 20224-0001

Request for Relief Under §7805(b)
Technical Advice Memorandum
Index (UIL) No.: 103.02-01
CASE-MIS No.: TAM-127670-12

Dear Ms. Harrigal:

On August 23, 2013, I submitted a request for relief under §7805(b) on behalf of my client, the Village Center Community Development District, seeking relief from the retroactive application of the above-described Technical Advice Memorandum. As provided in the last sentence of Section 14.02 of Revenue Procedure 2013-2, that request was sent to Steven Chamberlin, who was then Acting Director of Tax Exempt Bonds. Pursuant to Section 14.02, the Director to whom the request is submitted "should then forward the request to the Associate office for consideration."

Attached is a supplement to my request of August 23, 2013, providing additional grounds as to why relief should be granted. Because of the possibility that the original request for relief may not yet have been forwarded to the Associate office and to ensure that you have a complete file, I am also enclosing a copy of the original request for relief, including the cover letter to Mr. Chamberlin.

If you have any questions concerning this request, please contact me.

Very truly yours,

Perry Israel

cc: Deborah Arceneaux

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October 15, 2013

Ms. Helen Hubbard
Associate Chief Counsel (Financial Institutions & Products)
Internal Revenue Service
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1111 Constitution Avenue, NW
Washington, DC 20224

Request for Relief Under §7805(b)
Technical Advice Memorandum
Index (UIL) No.: 103.02-01
CASE-MIS No.: TAM-127670-12

Dear Ms. Hubbard:

This letter is to supplement my letter of August 23, 2013, requesting relief under Internal Revenue Code (the "Code") section 7805(b) with respect to the above-described Technical Advice Memorandum (the "TAM").

In addition to the reasons set forth in my prior letter that Code section 7805(b) relief should be granted, relief should also be granted because of prior representations made in Announcement 2011-78 (the "Announcement") and further clarified and reinforced by a representative of the Chief Counsel at a meeting of the American Bar Association Tax Section Tax Exempt Financing Committee on May 11, 2012, to the effect that a rule requiring that the administering or governing body of an instrumentality or a political subdivision be responsible to other public officials or to the general electorate would not be applied in the context of Code section 103 without the development of a substantial regulations project that included section 103.

The Announcement proposes a new test for political subdivision and instrumentality status that for the first time in the federal tax law incorporates a requirement to be "administered by individuals who are responsible to public officials or to the general electorate."

That proposal, which has been widely criticized, is a significant departure from the existing tax law and is based, according to the Announcement, on the principles set forth in the United States Supreme Court case *NLRB* v. *Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971). *Hawkins County* is a NLRB case and has never been cited in any tax case or any other tax-related authority. It is possible that the desire to reconcile IRS, DOL and ERISA standards may justify adoption of a *Hawkins County*-like test under Code section 414, however, the Treasury Department and the IRS correctly realized that such a substantial change to existing

law, even in the context of just Code section 414, requires a full rule-making process (including the Announcement to be followed by proposed regulations and then final regulations). Furthermore, the Announcement is quite clear that (1) the proposal would be a **change in the interpretation of the law**, affecting numerous governmental plan participants and (2) **that the proposed definition of political subdivision that incorporates the *Hawkins County* test would not be applied for any other purposes under the Code, including whether an entity is treated as a political subdivision for purposes of Code section 103.**

At the May 2012 meeting of the ABA, the Announcement was the subject of discussion among the Tax Exempt Financing Committee because of concerns that it might indicate future changes being contemplated to the definition of "political subdivision" for purposes of Code section 103. It was noted that there is no obvious justification for adopting a *Hawkins County*-like test under Code section 103. The section 103 definition of political subdivision is widely cited and used under the federal tax law. It traces back to *Shamberg's Estate* and other long-standing authorities, as discussed in my prior letter. It was suggested that the adoption of a *Hawkins County*-like test under Code section 103 is a more significant step than simply adopting such a test solely for purposes of Code section 414. It was noted that the Treasury and IRS have only made a proposal to propose regulations under Code section 414 in any event, and the Announcement states that the proposed definition of political subdivision would not be applied in determining whether an entity is treated as a political subdivision for purposes of Code section 103. Nonetheless, concerns were raised about whether the rulemaking process relating to Code section 414 could affect the determination of whether an entity is a political subdivision or an instrumentality under Code section 103.

In response to these concerns, the Branch Chief for the Chief Counsel branch responsible for Code section 103 (who is also the signatory of the TAM) publicly stated, in a recorded and transcribed meeting, that the rule changes contemplated under the Announcement were not intended to and would not impact the application of Code section 103 without some warning and rulemaking process being undertaken for Code section 103. He said that the new approach to defining a political subdivision set forth in the Announcement was certainly intended to be "compartmentalized" to apply only to Code section 414 and that intent should be expressed clearly and explicitly so that the proposed change would not be applied as a result of any "tendency to analogize" to other areas of law. The clarity of his position was unmistakable and certainly understood and appreciated by the tax exempt bond bar.

Despite the language in the Announcement disclaiming application of the not-yet-adopted test to Code section 103 and the statements of the Branch Chief, **the TAM clearly applies a rationale similar to the *Hawkins County* case and to the Announcement when it states that a "governmental unit [must be] inherently accountable, directly or indirectly to a general electorate" for purposes of Code section 103.**

The rationale and holding of the TAM is not only inconsistent with prior law, but even the person who signed the TAM indicated less than a year earlier that a change from that prior law to a requirement that the governing body of a political subdivision must be controlled by a general

electorate would not occur without a substantial rulemaking process. It would also be a very strange result to have a rule requiring a political subdivision to be inherently accountable to a general electorate only applied prospectively and with grandfather rules in the context of Code section 414, but to have it applied without notice on a retroactive basis in the context of Code section 103, where it arguably has an even greater impact. Accordingly, it is appropriate to grant Code section 7805(b) relief to the Center District to prevent its bondholders from being subjected to such a change arising in the context of purportedly enforcing existing law.

Relief sought

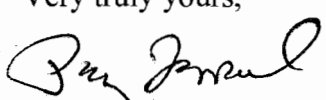
As stated in my letter of August 23, the Center District continues to believe that the TAM is incorrectly decided and should be withdrawn. However, at the very least, the Center District urges that this situation is very appropriate for relief under Code section 7805(b) and that the rational and conclusions of the TAM should not be applied retroactively to bonds previously issued by the Center District. To do otherwise would be a shameful abandonment by the Service of proper procedures relating to changes in law, particularly when Service personnel have publicly stated that such changes would not take place without a rulemaking process.

Request for conference

As stated in my letter of August 23, in accordance with section 14.04 and section 9 of Revenue Procedure 2013-2, the Center District respectfully requests a conference of right concerning the application of Code section 7805(b) in the event that you tentatively conclude that Code section 7805(b) relief is not appropriate in this case.

If you need further information with respect to this request, please contact me.

Very truly yours,



Perry Israel