Internal Revenue bulletin

Bulletin No. 2005-28
July 11, 2005

HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Rev. Rul. 2005–41, page 69.

Special use value; farms; interest rates. The 2005 interest rates to be used in computing the special use value of farm real property for which an election is made under section 2032A of the Code are listed for estates of decedents.

Rev. Rul. 2005–42, page 67.

Environmental remediation costs. This ruling holds that environmental remediation costs that are incurred to clean up land that a taxpayer contaminated with hazardous waste by the operation of the taxpayer's manufacturing activities are incurred by reason of production activities and are properly allocable under section 263A of the Code to the inventory produced during the taxable year the costs are incurred. Rev. Proc. 2002–9 modified and amplified.

Notice 2005–51, page 74.

Tobacco quota termination payments. This notice provides guidance in a Q&A format regarding the tax treatment of payments made to eligible tobacco quota holders for the termination of tobacco marketing quotas and related price support programs under the American Jobs Creation Act of 2004.

Rev. Proc. 2005–35, page 76.

Utilities; taxable income. For federal income tax purposes, if certain conditions are satisfied, a utility may treat an up-front payment for network upgrades as not being taxable income under section 61 when received. Rev. Proc. 2002–9 modified and amplified.

EMPLOYMENT TAX

Rev. Proc. 2005–39, page 82.

This procedure updates Rev. Rul. 82–29 to allow corporate officers or authorized agents to sign additional employment tax related documents using alternative signature methods. Rev. Rul. 82–29 modified and clarified.

TAX CONVENTIONS

Announcement 2005–47, page 71.

This announcement provides a memorandum of understanding (MOU) between the Competent Authorities of the United States and Canada regarding the mutual agreement procedure (MAP) process in accordance with the terms set forth in the United States – Canada income tax convention. The MOU establishes principles and guidelines to improve the performance and efficiency of the MAP process.

ADMINISTRATIVE

Notice 2005–52, page 75.

This notice provides that, in the case of bonds subject to the 1989 regulations or the 1992 regulations, rebate payments must be filed at the same place designated by the Commissioner for bonds subject to section 1.148–3 of the regulations.

(Continued on the next page)

Finding Lists begin on page ii.

Department of the Treasury
Internal Revenue Service

Rev. Proc. 2005–36, page 78.
Low-income housing tax credit. This procedure publishes the amounts of unused housing credit carryovers allocated to qualified states under section 42(h)(3)(D) of the Code for calendar year 2005.

Rev. Proc. 2005–37, page 79.
This procedure establishes a safe harbor under which housing credit agencies and project owners may meet the requirements of section 42(h)(6)(B)(i) of the Code as described in Q&A-5 of Rev. Rul. 2004–82, 2004–35 I.R.B. 350, concerning extended low-income housing commitments.

Rev. Proc. 2005–38, page 81.
This procedure describes how taxpayers may seek administrative relief when the Service has assessed interest for periods during which interest should have been suspended under section 6404(g) of the Code.

Rev. Proc. 2005–39, page 82.
This procedure updates Rev. Rul. 82–29 to allow corporate officers or authorized agents to sign additional employment tax related documents using alternative signature methods. Rev. Rul. 82–29 modified and clarified.

Rev. Proc. 2005–40, page 83.
This procedure provides issuers of state or local bonds subject to Code section 148(f)(3) and regulations section 1.148–3(g) with procedures for correcting a failure to timely pay the proper amount of arbitrage rebate. The procedure also modifies Rev. Proc. 90–11, 1990–1 C.B. 469, which provides similar procedures for bonds subject to regulations section 1.148–1T. The modification provides a new address for filing late rebate payments and related requests. Rev. Proc. 90–11 modified.

The IRS Mission

Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly and may be obtained from the Superintendent of Documents on a subscription basis. Bulletin contents are compiled semiannually into Cumulative Bulletins, which are sold on a single-copy basis.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

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Part I. Rulings and Decisions Under the Internal Revenue Code of 1986

Section 42.—Low-Income Housing Credit

26 CFR 1.42–14: Allocation rules for post-1989 State housing credit ceiling amounts.

Guidance is provided to state housing credit agencies of qualified states that request an allocation of unused housing credit carryover under section 42(h)(3)(D) of the Internal Revenue Code. See Rev. Proc. 2005-36, page 78.

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26 CFR 1.42–5: Monitoring compliance with low-income housing credit requirements.

A safe harbor is provided under which housing credit agencies and project owners may meet the requirements of section 42(h)(6)(B)(i) of the Internal Revenue Code as described in Q&A-5 of Rev. Rul. 2004–82, 2004–35 I.R.B. 350, concerning extended low-income housing commitments. See Rev. Proc. 2005-37, page 79.

Section 263A.—Capitalization and Inclusion in Inventory Costs of Certain Expenses

26 CFR 1.263A–1: Uniform capitalization of costs.

Environmental remediation costs. This ruling holds that environmental remediation costs that are incurred to clean up land that a taxpayer contaminated with hazardous waste by the operation of the taxpayer's manufacturing activities are incurred by reason of production activities and are properly allocable under section 263A of the Code to the inventory produced during the taxable year the costs are incurred. Rev. Proc. 2002–9 modified and amplified.

Rev. Rul. 2005–42

ISSUE

Are environmental remediation costs incurred to clean up land that a taxpayer contaminated with hazardous waste by the operation of the taxpayer's manufacturing activities properly allocable under § 263A of the Internal Revenue Code to the inventory produced during the taxable year the costs are incurred?

FACTS

Situation 1. *N*, a corporation using an accrual method of accounting, owns land and operates a manufacturing plant on Site *X* that *N* uses to produce stoves. Stoves are the only property produced by *N* and are inventory in *N*'s hands. *N*'s manufacturing activities discharge hazardous waste. In the past, *N* buried this waste on portions of Site *X* in accordance with then applicable law. Site *X* was not contaminated by hazardous waste when purchased by *N*.

In order to comply with federal, state, and local environmental requirements, *N* incurs costs in 2005 to remediate the contaminated soil and groundwater at Site *X*. The costs *N* incurs are not research and experimental expenditures within the meaning of § 174, qualified environmental remediation expenditures within the meaning of § 198(b), or environmental management policy costs. The soil remediation and groundwater treatment restores Site *X* to essentially the same physical condition that existed prior to the contamination. The soil remediation and groundwater treatment does not materially add to the value of Site *X*, appreciably prolong its life, or adapt it to a new or different use. During and after the remediation, *N* continues to manufacture stoves at Site *X*.

Situation 2. The facts are the same as in *Situation 1*, except that *N* manufactures clothes washers at Site *X* and no longer manufactures stoves. Clothes washers are the only property produced by *N* and are inventory in *N*'s hands.

Situation 3. The facts are the same as in *Situation 1*, except that *N* temporarily ceases its manufacturing activities at Site *X* during a part of 2005 while it remediates the contaminated soil and groundwater.

Situation 4. The facts are the same as in *Situation 1*, except that *N* has permanently ceased its manufacturing activities at Site *X* and manufactures stoves at another site.

Situation 5. The facts are the same as in *Situation 1*, except that in the past *N* buried the waste on portions of Site *Y*, a remote dump site that *N* did not own or otherwise use in its manufacturing activities. *N* was not obligated to clean up the site when *N* buried the waste. In order to comply with federal, state, and local environmental requirements, *N* incurs costs in 2005 to remediate the contaminated soil and groundwater at Site *Y*. The soil remediation and groundwater treatment restores Site *Y* to essentially the same physical condition that existed prior to the contamination. The soil remediation and groundwater treatment does not materially add to the value of any of *N*'s property, appreciably prolong its life, or adapt it to a new or different use. During and after the remediation, *N* continues to manufacture stoves at Site *X*, but has permanently stopped using Site *Y* to bury waste.

LAW

Section 263A(a) provides that the direct costs and indirect costs properly allocable to property that is inventory in the hands of the taxpayer are included in inventory costs.

Section 1.263A–1(a)(3)(ii) of the Income Tax Regulations provides, in part, that taxpayers that produce tangible personal property must capitalize (1) all direct costs of producing the property, and (2) the property's properly allocable share of indirect costs.

Section 1.263A–1(c)(1) provides that to determine these capitalizable costs, taxpayers must allocate or apportion costs to various activities, including production activities. Section 1.263A–1(c)(1) further provides that after § 263A costs are allocated to the appropriate production activities, these costs generally are allocated to the items of property produced during the taxable year and capitalized to the items that remain on hand at the end of the taxable year. As a result, costs incurred during the taxable year are either included in the cost of goods sold during the taxable year or are capitalized to the items that remain on hand at the end of the taxable year using a method permitted under § 1.263A–1(f).

Section 1.263A–1(c)(2)(ii) provides that the amount of any cost required to be capitalized under § 263A may not be included in inventory or charged to capital accounts or basis any earlier than the taxable year during which the

amount is incurred within the meaning of § 1.446–1(c)(1)(ii).

Section 1.263A–1(c)(3) provides that capitalize means, in the case of property that is inventory in the hands of a taxpayer, to include in inventory costs.

Section 1.263A–1(c)(4) provides that costs that are capitalized under § 263A are recovered through depreciation, amortization, cost of goods sold, or by an adjustment to basis at the time the property is used, sold, placed in service, or otherwise disposed of by the taxpayer.

Section 1.263A–1(e)(3)(i) provides, in part, that indirect costs are properly allocable to property produced when the costs directly benefit or are incurred by reason of the performance of production activities. Generally, producers must capitalize direct and indirect costs properly allocable to property produced under § 263A, without regard to whether those costs are incurred before, during, or after production. See § 1.263A–2(a)(3)(i).

Section 1.263A–1(e)(3)(ii) provides examples of indirect costs that must be capitalized to the extent they are properly allocable to property produced. Indirect costs required to be capitalized include the costs of repairing and maintaining production equipment or facilities. See § 1.263A–1(e)(3)(ii)(O). In addition, costs related to temporarily idle production equipment or facilities, other than depreciation, amortization and cost recovery allowances, are indirect costs that are required to be capitalized. See § 1.263A–1(e)(3)(iii)(E).

Rev. Rul. 94–38, 1994–1 C.B. 35, holds that costs incurred to clean up land and to treat groundwater contaminated with hazardous waste from the taxpayer's business are not capital expenditures under § 263 because these costs do not materially add value to the land, prolong the useful life of the land or adapt the land to a new or different use and, therefore, such costs are deductible by the taxpayer as business expenses under § 162. Costs incurred for constructing groundwater treatment facilities, however, are capital expenditures under § 263.

Rev. Rul. 2004–18, 2004–1 C.B. 509, considers whether costs incurred to clean up land that a taxpayer contaminated with hazardous waste by the operation of the taxpayer's manufacturing activities are includible in inventory costs under § 263A. Rev. Rul. 2004–18 states that the holding of Rev. Rul. 94–38 that the costs to construct a groundwater treatment facility must be capitalized under §§ 263(a) and 263A, rather than deducted under § 162, demonstrates the distinction between capital expenditures and costs that are more in the nature of repairs than capital improvements. As with other types of deductible business costs, such as labor costs, taxes, rent, and supplies, once repair costs are determined to be deductible under § 162, a taxpayer with inventories still must apply the rules of § 263A to determine whether the repair costs must be included in inventory. Rev. Rul. 2004–18 concludes, therefore, that environmental remediation costs similarly are subject to capitalization under § 263A and are required to be included in inventory costs under the facts of that ruling.

ANALYSIS

Environmental remediation costs incurred to clean up land and to treat groundwater that a taxpayer contaminated with hazardous waste from its production activities do not materially add to the value of the land, appreciably prolong its life, or adapt it to a new or different use. Rev. Rul. 94–38. Thus, these costs are more in the nature of repairs than capital improvements and, under § 263A, are indirect costs that must be included in inventory costs to the extent allocable to inventory. Rev. Rul. 2004–18. Generally, repair costs incurred to keep equipment or facilities used in production activities in an ordinarily efficient operating condition directly benefit or are incurred by reason of the performance of the production activities and, therefore, are properly allocable to inventory, without regard to whether those costs are incurred before, during, or after production. See §§ 1.263A–1(e)(3)(i), 1.263A–1(e)(3)(ii)(O) and 1.263A–2(a)(3)(i). Under §§ 1.263A–1(c)(1) and 1.263A–1(c)(2), these repair costs are allocable to the property produced during the taxable year in which the costs are incurred, even though the repairs may have been necessitated by the use of the equipment or facilities in the production of property in prior taxable periods.

Like repair costs, environmental remediation costs incurred by a taxpayer to clean up land and to treat groundwater that the taxpayer contaminated with hazardous waste from its production activities are costs that directly benefit or are incurred by reason of the performance of the production activities even if the condition that necessitated the remediation arose during prior taxable periods. See § 1.263A–2(a)(3)(i). As with repair costs, environmental remediation costs are properly allocable to inventory without regard to whether those costs are incurred before, during, or after production. See § 1.263A–1(c)(2). Likewise, remediation costs are allocable under § 1.263A–1(c)(1) to the property produced during the taxable year in which the costs are incurred.

In *Situation 1*, during 2005, *N* manufactures stoves at Site *X*. The costs *N* incurs in 2005 to clean up Site *X* are incurred by reason of *N*'s production activities, within the meaning of § 1.263A–1(e)(3)(i). Because the environmental remediation costs to clean up Site *X* are incurred in 2005, they are properly allocable to the inventory produced by *N* in 2005, in accordance with §§ 1.263A–1(c)(1) and 1.263A–1(c)(2). Therefore, the environmental remediation costs are allocable to the stoves produced by *N* during 2005, using an allocation method permitted under § 1.263A–1(f).

In *Situation 2*, during 2005, *N* manufactures clothes washers at Site *X*. The costs *N* incurs in 2005 to clean up Site *X* are incurred by reason of *N*'s production activities, within the meaning of § 1.263A–1(e)(3)(i). Because the environmental remediation costs to clean up Site *X* are incurred in 2005, they are properly allocable to the inventory produced by *N* in 2005, in accordance with §§ 1.263A–1(c)(1) and 1.263A–1(c)(2). Therefore, the environmental remediation costs are allocable to the clothes washers produced by *N* during 2005, using an allocation method permitted under § 1.263A–1(f).

In *Situation 3*, during a part of 2005, Site *X* is temporarily idle. Nevertheless, the costs *N* incurs in 2005 to clean up Site *X* are incurred by reason of *N*'s production activities, within the meaning of § 1.263A–1(e)(3)(i). See § 1.263A–2(a)(3)(i). Because the environmental remediation costs to clean up Site *X* are incurred in 2005, they are properly allocable to the inventory produced by *N* in 2005, in accordance with §§ 1.263A–1(c)(1) and 1.263A–1(c)(2).

Therefore, the environmental remediation costs are allocable to the stoves produced by *N* during 2005, using an allocation method permitted under § 1.263A–1(f).

In *Situation 4*, *N* has permanently ceased its manufacturing activities at Site *X*. Nevertheless, the costs *N* incurs in 2005 to clean up Site *X* are incurred by reason of *N*'s production activities, within the meaning of § 1.263A–1(e)(3)(i). See § 1.263A–2(a)(3)(i). Because the environmental remediation costs to clean up Site *X* are incurred in 2005, they are properly allocable to the inventory produced by *N* in 2005, in accordance with §§ 1.263A–1(c)(1) and 1.263A–1(c)(2). Therefore, the environmental remediation costs are allocable to the stoves produced by *N* during 2005, using an allocation method permitted under § 1.263A–1(f).

In *Situation 5*, *N* has permanently ceased burying waste from its manufacturing activities on Site *Y*. Nevertheless, the costs *N* incurs in 2005 to clean up Site *Y* are incurred by reason of *N*'s production activities, within the meaning of § 1.263A–1(e)(3)(i). See § 1.263A–2(a)(3)(i). Because the environmental remediation costs to clean up Site *Y* are incurred in 2005, they are properly allocable to the inventory produced by *N* in 2005, in accordance with §§ 1.263A–1(c)(1) and 1.263A–1(c)(2). Therefore, the environmental remediation costs are allocable to the stoves produced by *N* during 2005, using an allocation method permitted under § 1.263A–1(f).

HOLDING

Environmental remediation costs that are incurred to clean up land that a taxpayer contaminated with hazardous waste by the operation of the taxpayer's manufacturing activities are incurred by reason of the taxpayer's production activities and are properly allocable under § 263A to the inventory produced during the taxable year the costs are incurred.

CHANGE IN METHOD OF ACCOUNTING

A taxpayer using a method of accounting that does not comply with this revenue ruling is using an impermissible method of accounting. Any change in a taxpayer's treatment of environmental remediation costs to conform with this revenue ruling is a change in method of accounting to which the provisions of §§ 446 and 481 and the regulations thereunder apply.

A taxpayer changing its method of accounting to comply with this revenue ruling must file a Form 3115 in accordance with the automatic change in method of accounting provisions of Rev. Proc. 2002–9, 2002–1 C.B. 327, as modified and clarified by Announcement 2002–17, 2002–1 C.B. 561, modified and amplified by Rev. Proc. 2002–19, 2002–1 C.B. 696, and amplified, clarified, and modified by Rev. Proc. 2002- 54, 2002–2 C.B. 432, except that the scope limitations in section 4.02 of Rev. Proc. 2002–9 do not apply to a taxpayer that makes the change for its first or second taxable year ending after February 6, 2004. A taxpayer that files Form 3115 to comply with Rev. Rul. 2004–18 and this revenue ruling for its first taxable year ending after February 6, 2004, may effect the change using either a § 481(a) adjustment as provided in sections 5.03 and 5.04 of Rev. Proc. 2002–9 or a cut-off method. See Rev. Rul. 2004–18. Additionally, a taxpayer that (1) files a Form 3115 on or before July 20, 2005, to comply with Rev. Rul. 2004–18 for its first taxable year ending after February 6, 2004, or was not required to change its method of accounting to comply with Rev. Rul. 2004–18, and (2) files Form 3115 to comply with this revenue ruling for its first taxable year ending after June 20, 2005, may effect the change using either a § 481(a) adjustment or a cut-off method.

For purposes of Line 1a of Form 3115 (revised December 2003), the designated number for the automatic accounting method change authorized by this revenue ruling is "92." A taxpayer making the automatic change in method of accounting authorized by this revenue ruling and another automatic change in method of accounting under § 263A for the same taxable year may file one Form 3115 to make both changes, but must comply with the ordering rules of § 1.263A–7(b)(2) and must enter the automatic accounting method change numbers for both changes on Line 1a of Form 3115 (revised December 2003).

EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2002–9 is modified and amplified to include in the APPENDIX the automatic change provided in this revenue ruling.

DRAFTING INFORMATION

The principal author of this revenue ruling is John Roman Faron of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding this revenue ruling, contact Mr. Faron at 202–622–4930 (not a toll-free call).

Section 446.—General Rule for Methods of Accounting

If certain conditions are satisfied, a Utility has automatic consent to change to a method under which it may treat an Up-front Payment for Network Upgrades as not being taxable income when received. See Rev. Proc. 2005-35, page 76.

Section 451.—General Rule for Taxable Year of Inclusion

For federal income tax purposes, if certain conditions are satisfied, a Utility may treat an Up-front Payment for Network Upgrades as not being taxable income when received. See Rev. Proc. 2005-35, page 76.

Section 2032A.—Valuation of Certain Farm, etc., Real Property

26 CFR 20.2032A–4: Method of valuing farm real property.

Special use value; farms; interest rates. The 2005 interest rates to be used in computing the special use value of farm real property for which an election is made under section 2032A of the Code are listed for estates of decedents.

Rev. Rul. 2005–41

This revenue ruling contains a list of the average annual effective interest rates on new loans under the Farm Credit System. This revenue ruling also contains a list of the states within each Farm Credit System Bank Chartered Territory.

Under § 2032A(e)(7)(A)(ii) of the Internal Revenue Code, rates on new Farm Credit System Bank loans are used in computing the special use value of real property used as a farm for which an election is made under § 2032A. The rates in this

revenue ruling may be used by estates that value farmland under § 2032A as of a date in 2005.

Average annual effective interest rates, calculated in accordance with § 2032A(e)(7)(A) and § 20.2032A–4(e) of the Estate Tax Regulations, to be used under § 2032A(e)(7)(A)(ii), are set forth in the accompanying Table of Interest Rates (Table 1). The states within each Farm Credit System Bank Chartered Territory are set forth in the accompanying Table of Farm Credit System Bank Chartered Territories (Table 2).

Rev. Rul. 81–170, 1981–1 C.B. 454, contains an illustrative computation of an average annual effective interest rate. The rates applicable for valuation in 2004 are in Rev. Rul. 2004–63, 2004–27 I.R.B. 6. For rate information for years prior to 2004, see Rev. Rul. 2003–53, 2003–1 C.B. 969, and other revenue rulings that are referenced therein.

DRAFTING INFORMATION

The principal author of this revenue ruling is Lane Damazo of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue ruling, contact Lane Damazo at (202) 622–3090 (not a toll-free call).

REV. RUL. 2005–41 TABLE 1

TABLE OF INTEREST RATES
(Year of Valuation 2005)

Farm Credit System Bank Servicing State in Which Property is Located	Rate
AgFirst, FCB	7.68
AgriBank, FCB	6.44
CoBank, ACB	5.91
Texas, FCB	6.11
U.S. AgBank, FCB	6.25

REV. RUL. 2004–41 TABLE 2
TABLE OF FARM CREDIT SYSTEM BANK CHARTERED TERRITORIES

Farm Credit System Bank	Location of Property
AgFirst, FCB	Delaware, District of Columbia, Florida, Georgia, Maryland, North Carolina, Pennsylvania, South Carolina, Virginia, West Virginia.
AgriBank, FCB	Arkansas, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee, Wisconsin, Wyoming.
CoBank, ACB	Alaska, Connecticut, Idaho, Maine, Massachusetts, Montana, New Hampshire, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington.
Texas, FCB	Alabama, Louisiana, Mississippi, Texas.
U.S. Agbank, FCB	Arizona, California, Colorado, Hawaii, Kansas, New Mexico, Nevada, Oklahoma, Utah

Section 6011.—General Requirement of Return, Statement, or List

A revenue procedure sets out the circumstances under which facsimile signatures may be used on any form within the Form 94X series. See Rev. Proc. 2005-39, page 82.

Part II. Treaties and Tax Legislation

Subpart A.—Tax Conventions and Other Related Items

Canadian Memorandum of Understanding on Mutual Agreement Procedure

Announcement 2005–47

The following is a copy of the News Release issued by the Director, International (U.S. Competent Authority) on June 15, 2005 (IR–2005–66).

Memorandum of Understanding Between the Competent Authorities of the United States and Canada Regarding the Mutual Agreement Procedure

IR–2005–66, June 15, 2005

WASHINGTON — On June 3, 2005, the Competent Authorities of the United States and Canada entered into a Memorandum of Understanding (MOU) to establish principles and guidelines to improve the performance and efficiency of the mutual agreement procedure (MAP) process in accordance with the terms set forth in the *United States — Canada Income Tax Convention (1980)*, as amended from time to time.

The fundamental purpose of the mutual agreement procedure is to endeavor to resolve double taxation or taxation contrary to a convention. Upon making a MAP request, the taxpayer places responsibility for a principled and timely resolution of the issue in the hands of the respective Competent Authorities and the manner in which the resolution of double taxation is accomplished is at the discretion of the Competent Authorities. It is for this reason the two Competent Authorities have reached the understandings outlined in the MOU.

The text of the Memorandum of Understanding is as follows:

MEMORANDUM OF UNDERSTANDING BETWEEN THE COMPETENT AUTHORITIES OF CANADA AND THE UNITED STATES REGARDING THE MUTUAL AGREEMENT PROCEDURE

The Director General, International Tax Directorate, Canada Customs and Revenue Agency (CCRA), Competent Authority for Canada and the Director-International, Large and Medium Size Business (LMSB), Internal Revenue Service (IRS), Competent Authority for the United States through this Memorandum of Understanding ("MOU") agree to establish principles and guidelines to improve the performance and efficiency of the mutual agreement procedure ("MAP") process in accordance with the terms set forth in the Canada-United States Income Tax Convention (1980), as amended from time to time (the "Convention").

Purpose of the MAP

The fundamental purpose of the MAP is to endeavour to resolve double taxation or taxation contrary to a convention. Upon making a MAP request, the taxpayer places responsibility for a principled and timely resolution of the issue in the hands of the respective Competent Authorities and the manner in which the resolution of double taxation is accomplished is at the discretion of the Competent Authorities. It is for this reason that the two Competent Authorities have reached the following understandings:

I. *Emphasis on Reaching Agreement*. The Competent Authorities for Canada and the United States are committed to the principle that the resolution of double taxation or taxation contrary to the Convention should be possible in all cases. To improve the MAP process between our two countries, the Competent Authorities agree to adhere to the following principles and guidelines when seeking to reach a resolution in a particular case:

   A. *Positions shall be Principled, Reasonable and Consistent*. The positions advanced by the Competent Authorities in each case should be well documented, have merit, and follow the principles of consistency and reciprocity. Consistency means the Competent Authorities will strive to ensure that similar cases are resolved in a similar manner. Reciprocity means the adjusting Competent Authority in a particular case should only advance a position that it would be prepared to accept if it were the relieving Competent Authority.

   B. *Agreement on the Facts*. The Competent Authorities recognize the importance of reaching agreement on the facts in MAP cases. Disagreements on the facts as to the nature of a taxpayer's business operations can cause, or contribute to, difficulties in resolving a MAP case. Generally speaking, the Competent Authorities shall accept a transaction as structured by the taxpayer and only consider disregarding or restructuring a transaction in exceptional cases.

   If the Competent Authorities are unable to obtain agreement on the underlying facts and circumstances of a particular MAP case after six months of negotiations, they shall agree to refer the case to a joint panel comprised of tax administration officials chosen by the Assistant Commissioner of Appeals for the CCRA and the Chief of Appeals for the IRS. An agreement reached as to the facts of the case will be binding on the respective MAP organizations. The details of this procedure will be set forth in a separate MOU between the Competent Authorities.

   The Competent Authorities agree to consider conducting joint site visits with taxpayers in specific

cases in an effort to reach agreement regarding the underlying facts and circumstances of a taxpayer's business; however, it is recognized that the use of joint site visits must be prudent and judicious, due to resource limitations in each of the respective tax administrations.

C. *Means of Resolving Cases*. Despite the best efforts of Competent Authority officers, it is recognized that substantive differences on issues may complicate the ability to reach a resolution on a specific case even when there is an agreement on the underlying facts and circumstances of the case.

In these situations, Competent Authority officers shall look for appropriate opportunities to compromise. Compromise is often required when diverging views otherwise make resolution difficult to achieve.

If resolution is still not possible, the appropriate first level managers in the Competent Authority organizations will jointly undertake a detailed review of the case to ensure that all appropriate action has been taken to facilitate a resolution. If a MAP request has not been resolved within two years from the date of acceptance, the Director General, International Tax Directorate, CCRA and the Director-International, LMSB, IRS agree to meet, or, if more appropriate, agree to have their subordinates meet, in order to resolve the case.

II. *Procedural Issues*. Procedural issues may delay or impede the resolution of MAP cases. These issues could result from administrative policies, practices and procedures of the respective Competent Authority organizations.

A. *Removal of Barriers*. It is hereby agreed that administrative policies, procedures and practices that impede or delay the process of resolving a MAP case will be identified and removed to the extent possible under the delegated powers of the Competent Authorities in their respective tax administrations.

B. *Notification*. The Competent Authorities also agree to interpret "notification" broadly under the Convention so as to reflect the intention to be as inclusive as possible when considering requests for MAP assistance. A separate MOU to be executed by the Competent Authorities will address a number of issues surrounding notification.

III. *Substantive Issues in MAP Cases*. The Competent Authorities will follow the OECD's *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* to resolve substantive issues in cases involving transactions between related parties. Notwithstanding, the Competent Authorities have identified a number of issues that have resulted, or could result, in a failure to resolve double taxation or taxation contrary to the Convention. These issues include, but are not limited to, the determination of:

- an arm's length compensation for consignment manufacturing operations;
- whether a business is integrated to the point where a profit split method is appropriate and, if so, the relative value of contributions made by related parties toward the generation of profit;
- the presence of non-routine intangible assets and the determination of an arm's length value;
- whether a permanent establishment (PE) exists and the amount of profit to be attributable to the PE;
- whether a transaction is properly characterized as a service versus a license of intangibles;
- the amount of compensation, if any, upon either the closure or relocation of a business and the allocation of associated closing costs; and
- appropriate relief where source and residence country's laws are in conflict.

The Competent Authorities express their commitment to reach an agreement establishing guidelines to be applied to resolving cases involving the issues identified above as well as other issues that are identified and agreed to by the Competent Authorities. The Director General, International Tax Directorate, CCRA and the Director-International, LMSB, IRS will designate one or more representatives from their respective organizations to meet for the purpose of establishing such guidelines for the above issues as well as other issues that are identified and agreed to. Moreover, the Director General, International Tax Directorate, CCRA and the Director-International, LMSB, IRS agree to designate one or more representatives from their respective competent authority organizations to meet at such time as new issues emerge that impede the resolution of MAP cases. The Director General, International Tax Directorate, CCRA and the Director-International, LMSB, IRS recognize that they may be required to look beyond their own Competent Authority organizations to find a designate elsewhere within their respective tax administration with the appropriate level of expertise to assist in developing guidelines.

Conclusion

Through the execution of this MOU, our respective Competent Authority organizations will initiate discussions as soon as possible to: (1) create a MOU to establish a binding procedure to determine the underlying facts and circumstances of a specific case; (2) create a set of guidelines to be used in resolving cases involving the above substantive issues that complicate case resolution; (3) identify and remove procedural obstacles that impede or delay the process of resolving double taxation cases; and (4) create a MOU to address a number of issues surrounding notification.

Other Provisions

The Competent Authorities for Canada and the United States agree to publish this MOU to demonstrate our mutual commitment to improving the MAP process.

This is a MOU between the Competent Authorities of Canada and the United States addressing procedural matters under the Convention. This MOU is not to be interpreted as creating any cause of action, rights or benefits in favor of third parties or taxpayers.

This MOU may be modified at any time by agreement between the Competent Authorities. The Competent Authorities agree to implement this MOU as soon as possible after signing this agreement. Either Competent Authority may terminate the MOU at any time by giving written notice to the other Competent Authority.

Competent Authority for Canada

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Frederick R. O'Riordan
Director General
International Tax Directorate
Canada Customs and Revenue Agency

Date: __________________________

Competent Authority for the United States

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Robert H. Green
Director-International
Large and Medium Size Business
Internal Revenue Service

Date: __________________________

Part III. Administrative, Procedural, and Miscellaneous

Termination of Tobacco Quotas and Price Support Programs

Notice 2005–51

PURPOSE

This notice provides answers to frequently asked questions regarding the tax treatment of federal payments made pursuant to § 622 of the Fair and Equitable Tobacco Reform Act of 2004, Title VI of the American Jobs Creation Act of 2004, Pub. L. No. 108–357, 118 Stat. 1418, 1521–36 (2004) (the Act).

BACKGROUND

Sections 611 and 612 of the Act terminate the tobacco marketing quota program and the tobacco price support program. Section 622 of the Act provides that the United States Department of Agriculture (USDA) will offer to enter into a contract with an eligible tobacco quota holder (Owner) under which the Owner may receive total payments of $7 per pound of quota in 10 equal annual payments in fiscal years 2005 through 2014 (Owner Payments) in exchange for the termination of the tobacco marketing quotas and related price support. Section 622 does not provide for stated interest on payments due under the contracts.

For federal income tax purposes, Owner Payments are the proceeds from a sale of the Owner's tobacco quota as of the effective date applicable to the Owner. The effective date applicable to an Owner is the earlier of (1) June 30, 2005, for flue-cured tobacco and September 30, 2005, for all other types of tobacco, or (2) the date on which an Owner and USDA enter into a contract for Owner Payments with respect to the quota.

QUESTIONS AND ANSWERS

Q–1. Are Owner Payments received under the Act subject to federal income tax?

A–1. Yes, Owner Payments are subject to federal income tax. If the amounts received by the Owner are more than the Owner's adjusted basis in the quota, the Owner has a taxable gain; if the Owner receives less than the Owner's adjusted basis, the Owner has a loss that may be deductible for tax purposes if the requirements for deduction under § 165 of the Internal Revenue Code are satisfied. In determining an Owner's gain or loss, the amount received for the quota does not include any amount treated as interest for federal tax purposes. See Q&A–7 for help in determining whether any portion of an Owner Payment is treated as interest for federal tax purposes.

Q–2. How does an Owner determine the adjusted basis of a quota?

A–2. The adjusted basis of a quota is determined differently depending upon how the Owner acquired the quota.

- An Owner who holds a quota that is derived from an original grant by the federal government has a basis of zero in the quota.
- The basis of a purchased quota is the price the Owner paid for it.
- Generally an Owner who received a quota as a gift has the same basis in the quota as the person who gave the quota to the Owner. Under certain circumstances, the basis is increased by an amount related to the amount of gift tax paid. If the basis is greater than the fair market value of the quota at the time of the gift, the basis for determining loss is that fair market value.
- The basis of a quota that an Owner inherited generally is the fair market value of the quota at the time of the decedent's death.

The basis of a tobacco quota is not subject to adjustment through amortization, depletion, or depreciation. However, if an Owner improperly has deducted any amount for these purposes, the Owner must reduce the basis by the amount deducted before determining the Owner's gain or loss. A similar reduction in the basis of a quota must be made for any amount previously deducted as a loss because of a reduction in the number of pounds of tobacco allowable under the quota. If an Owner purchased a quota and deducted the entire cost in the year of purchase, then the Owner's basis in the quota is zero.

Q–3. If an Owner has a gain and reports Owner Payments under the installment method, when must the gain be included in income?

A–3. The installment method may be used to report gain if an Owner receives at least one Owner Payment after the close of the Owner's taxable year that includes the effective date applicable to the Owner. The amount of the gain is the excess of the total amount of Owner Payments to be received, reduced by any amount treated as interest, over the Owner's adjusted basis in the quota. Under the installment method, a proportionate amount of the gain is taken into account in each year in which an Owner Payment is received. See the instructions for Form 6252, *Installment Sale Income*.

Q–4. If an Owner has a gain and elects not to report Owner Payments under the installment method, when must the gain be included in income?

A–4. The Owner must report the entire gain on the Owner's federal income tax return for the taxable year that includes the effective date applicable to the Owner.

Q–5. Is the gain or loss with respect to a quota ordinary or capital gain or loss?

A–5. Whether the gain or loss with respect to a quota is ordinary or capital depends on how the Owner used the quota.

- If an Owner used a quota in the trade or business of farming and, on the effective date applicable to the Owner, the Owner's holding period for the quota was more than one year, then the transaction is reported under § 1231 on Form 4797, *Sales of Business Property*. If an Owner has no other § 1231 transactions reportable on Form 4797, any gain is treated as long-term capital gain and any loss is treated as ordinary loss. Even if an Owner has other reportable § 1231 transactions, the net result of all § 1231 transactions reported generally is either long-term capital gain or ordinary loss. See the instructions for Form 4797 for more detailed information.
- If an Owner held a quota for investment purposes, or for the production of income, but did not use the quota in

a trade or business, any gain or loss is capital gain or loss.

Under certain circumstances, some or all of the gain must be recharacterized and reported as ordinary income. If an Owner previously deducted (1) the cost of acquiring a quota, (2) amounts for amortization, depletion, or depreciation, or (3) amounts to reflect a reduction in the quota pounds, any gain is taxed as ordinary income up to the amount previously deducted. The Owner must report this amount of ordinary income on the Owner's return for the taxable year that includes the effective date applicable to the Owner, even if the Owner uses the installment method to report the remainder of the gain.

Q–6. Are Owner Payments received under the Act subject to Self-Employment Contributions Act (SECA) tax (see § 1402)?

A–6. No.

Q–7. Is any portion of an Owner Payment treated as interest for federal tax purposes?

A–7. (a) If the total amount to be paid under a contract does not exceed $3,000, no portion of an Owner Payment is treated as interest for federal tax purposes.

(b) If § 483 applies to a contract, a portion of each Owner Payment (other than an Owner Payment due within six months of the effective date applicable to the Owner) is treated as interest for federal tax purposes. For example, § 483 generally applies to a contract if the total amount to be paid under the contract does not exceed $250,000 or if a cash method election is made under §§ 1274A and 1.1274A–1(c). A contract is eligible for the cash method election only if the total amount to be paid under the contract does not exceed the inflation-adjusted amount for a cash method debt instrument ($3,202,100 for 2005).

(c) In all situations not described in (a) or (b) above, a portion of each Owner Payment is treated as interest for federal tax purposes under § 1274.

(d) In general, to determine the amount of an Owner Payment that is treated as interest, see § 483 or § 1274, whichever is applicable, and the regulations thereunder. You may wish to consult a tax advisor for assistance in determining the portion of an Owner Payment that is treated as interest and the taxable year in which the interest is includible in income.

Q–8. Does an individual Owner's gain or loss from Owner Payments qualify for farm income averaging?

A–8. No. A tobacco quota is considered an interest in land, and farm income averaging is not available for gain or loss arising from the sale or other disposition of land.

Q–9. Are Owner Payments subject to information reporting?

A–9. Yes. Because a tobacco quota is considered an interest in land, the total amount received under a contract by an owner in a taxable year generally will be reported by USDA on Form 1099–S, *Proceeds From Real Estate Transactions*, if the amount is $600 or more. In addition, any portion of an Owner Payment treated as interest for federal tax purposes generally will be reported by USDA on Form 1099–INT, *Interest Income*, if the total amount of interest received in a taxable year is $600 or more.

Q–10. Is the termination of a tobacco quota under the Act an involuntary conversion of the quota?

A–10. No.

Q–11. May an Owner enter into a like-kind exchange of a quota?

A–11. Yes. An Owner may postpone reporting the gain or loss from the termination of a quota by entering into a like-kind exchange if the Owner complies with the requirements of § 1031 and the regulations thereunder. For purposes of § 1031, the date on which an Owner is deemed to relinquish a quota is the effective date applicable to the Owner.

SUBSEQUENT GUIDANCE

Section 623 of the Act provides that USDA will offer to enter into a contract with an eligible tobacco producer (Grower) under which the Grower may receive total payments of up to $3 per pound of quota in 10 equal annual payments in fiscal years 2005 through 2014 (Grower Payments) in exchange for the termination of the tobacco marketing quotas and related price support. Grower Payments are determined by reference to the amount of quota under which the Grower produced (or planted) tobacco during the 2002, 2003, and 2004 tobacco marketing years and are prorated based on the number of years that the Grower produced (or planted) quota tobacco during those years. The federal tax treatment of Grower Payments is expected to be addressed in subsequent guidance.

DRAFTING INFORMATION

The principal author of this notice is Marnette M. Myers of the Office of Associate Chief Counsel (Income Tax & Accounting). For further information regarding Q&A–7 of this notice, contact Pamela Lew of the Office of Associate Chief Counsel (Financial Institutions and Products) at (202) 622–3950 (not a toll-free call). For further information regarding the remainder of this notice, contact Ms. Myers at (202) 622–4920 (not a toll-free call).

Address Change for Arbitrage Rebate Payments

Notice 2005–52

SECTION 1. PURPOSE

This notice announces that the Income Tax Regulations under § 148 of the Internal Revenue Code will be amended to provide that, in the case of bonds subject to (a) § 1.148–1T which was initially published on May 12, 1989, as part of T.D. 8252, 1989–1 C.B. 25 (and which expired in May of 1992), or (b) § 1.148–1 which was published on May 18, 1992, as part of T.D. 8418, 1992–1 C.B. 29 (and which expired on June 30, 1993), rebate payments must be filed at the same place or places designated by the Commissioner for bonds subject to § 1.148–3.

SECTION 2. BACKGROUND

.01 Section 103(a) generally provides that gross income does not include interest on any State or local bond. Under § 103(b)(2), however, interest on an arbitrage bond (within the meaning of §148) is includable in gross income.

.02 Section 148(f)(1) generally provides that a bond that is part of an issue shall be treated as an arbitrage bond unless the issuer pays to the United States the amounts described in § 148(f)(2) for the issue (*rebate amounts*) in accordance with § 148(f)(3).

.03 Section 148(f)(3) provides that, except to the extent provided by the Secretary, rebate amounts must be paid in installments that are made at least once every five years. The last installment must be made no later than 60 days after the day on which the last bond of the issue is redeemed.

.04 Section 1.148–3(g) provides that a rebate payment is paid when it is filed with the Internal Revenue Service at the place or places designated by the Commissioner. *See* § 7502(a) for the treatment of certain payments made by U.S. mail.

.05 Section 1.148–1T, which was initially published on May 12, 1989, as part of T.D. 8252 and which expired in May of 1992 (the *1989 regulations*), provides rules for complying with the rebate requirement with respect to certain bonds issued before the expiration of the 1989 regulations. Section 1.148–1T(b)(3)(v) of the 1989 regulations provides that a rebate or correction amount is paid when filed with the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255.

.06 Section 1.148–1, which was published on May 18, 1992, as part of T.D. 8418 and which expired on June 30, 1993 (the *1992 regulations*), provides rules for complying with the rebate requirement with respect to certain bonds issued before July 1, 1993. Section 1.148–1(b)(3)(v) of the 1992 regulations provides that a rebate or correction amount is paid when filed with the Internal Revenue Service Center, Philadelphia, Pennsylvania 19255.

SECTION 3. AMENDMENTS TO REGULATIONS

The regulations will be amended to provide that, in the case of bonds subject to the 1989 regulations (as defined in section 2.05) or the 1992 regulations (as defined in section 2.06), rebate payments must be filed at the same place or places designated by the Commissioner for bonds subject to § 1.148–3. Until further notice, rebate payments for bonds subject to the 1989 regulations or the 1992 regulations should be sent to the following address:

Internal Revenue Service
Ogden Submission Processing Center
Ogden, Utah 84201

DRAFTING INFORMATION

The principal author of this notice is David White of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this revenue procedure, contact Mr. White at (202) 622–3980 (not a toll-free call).

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26 CFR 601.204: Changes in accounting periods and in methods of accounting.
(Also Part I, §§ 61, 446, 451.)

Rev. Proc. 2005–35

SECTION 1. PURPOSE

This revenue procedure sets forth a safe harbor method of accounting for a Utility's treatment of an Up-front Payment that the Utility receives from a Generator to finance Network Upgrades to the Utility's Transmission System. This revenue procedure also provides a procedure for a Utility to obtain automatic consent of the Commissioner to change to the safe harbor method of accounting. Finally, this revenue procedure provides audit protection to a Utility that has used the safe harbor method of accounting, provided that certain conditions are satisfied.

SECTION 2. BACKGROUND

.01 A Utility is required pursuant to Federal Energy Regulatory Commission (FERC) rules and policy to accommodate any request from a Generator to interconnect the Generator to the Utility's Transmission System. In general, for a Generator to begin providing electricity from its facility to its customers over a Utility's Transmission System, certain Network Upgrades must be made to the Transmission System to accommodate the addition of the facility's electricity. Under FERC policy, costs of the Network Upgrades generally must be paid in advance to the Utility in the form of an Up-front Payment by the interconnecting Generator. To comply with FERC policy, the Interconnection Agreement between the Utility and the Generator typically requires that the Generator's Up-front Payment to the Utility be reimbursed by the Utility.

.02 The FERC standard Interconnection Agreement, FERC Order No. 2003–B issued December 20, 2004 (70 FR 265), requires that the Utility reimburse the Generator's Up-front Payment in cash, plus make additional payments to the Generator that are designated as interest by FERC Order No. 2003–B ("FERC Interest"). Prior FERC approved Interconnection Agreements permit the Utility to make reimbursements in cash, in assignable transmission credits that may be used to offset the cost of transmission services, or in a combination of cash and assignable transmission credits.

.03 The IRS has received numerous inquiries about how Utilities should treat Up-front Payments for federal income tax purposes.

.04 Section 1.446–1(e)(3)(ii) of the Income Tax Regulations authorizes the Commissioner to prescribe administrative procedures setting forth the limitations, terms, and conditions deemed necessary to permit a taxpayer to obtain consent to change a method of accounting.

.05 Rev. Proc. 2002–9, 2002–1 C.B. 327 (as modified and clarified by Announcement 2002–17, 2002–1 C.B. 561, modified and amplified by Rev. Proc. 2002–19, 2002–1 C.B. 696, and amplified, clarified, and modified by Rev. Proc. 2002–54, 2002–2 C.B. 432) provides procedures by which a taxpayer may obtain automatic consent to change to a method of accounting described in the Appendix of Rev. Proc. 2002–9.

.06 Section 2.04 of Rev. Proc. 2002–9 provides that unless specifically authorized by the Commissioner, a taxpayer may not request, or otherwise make, a retroactive change in method of accounting, regardless of whether the change is from a permissible or an impermissible method. See generally Rev. Rul. 90–38, 1990–1 C.B. 57.

SECTION 3. SCOPE

This revenue procedure applies to a Utility that receives an Up-front Payment from a Generator to finance Network Upgrades to the Utility's Transmission System.

SECTION 4. DEFINITIONS

The following definitions apply for purposes of this revenue procedure:

.01 *Commercial Operation Date* means the date on which the Generator commences commercial operation of its facility after trial operation of such facility has been completed and confirmed in writing as prescribed by FERC.

.02 *Generator* means the owner or operator of an electric generation facility.

.03 *Interconnection Agreement* means the agreement entered into between a Utility and a Generator for the purpose of interconnecting the Generator with the Utility's Transmission System.

.04 *Network Upgrades* mean the additions, modifications, and upgrades to the Transmission System required at or beyond the point at which the Generator interconnects to the Transmission System to accommodate the interconnection of the Generator to the Transmission System.

.05 *Transmission System* means the facilities owned, controlled, or operated by a Utility that are used to provide electric transmission service, including any additions, modifications, or upgrades made to such facilities.

.06 *Up-front Payment* means the amount or amounts paid by a Generator to a Utility pursuant to their Interconnection Agreement for costs with respect to Network Upgrades to the Utility's Transmission System.

.07 *Utility* means an electrical transmission or distribution system owner or operator that is subject to the regulatory authority of FERC as well as a State public utility commission or other appropriate State agency.

SECTION 5. APPLICATION

.01 For federal income tax purposes, if an Up-front Payment is made pursuant to an Interconnection Agreement that satisfies all of the conditions of either section 5.02 or 5.03 of this revenue procedure, whichever is applicable, a Utility may treat that Up-front Payment as not being taxable income under § 61 of the Internal Revenue Code when received (the "safe harbor method"). In addition, a Utility that uses the safe harbor method is not entitled to any deduction for its reimbursements of the Up-front Payment. To the extent that FERC Interest is deductible, it must be properly allocated to the periods in which it accrues.

.02 For Interconnection Agreements entered into on or after December 20, 2004:

(1) The Interconnection Agreement must entitle the Generator to receive reimbursement of an amount that is not less than the amount of the Up-front Payment;

(2) The Interconnection Agreement must require reimbursement of the Up-front Payment to be made in cash;

(3) The Interconnection Agreement must require that the Utility pay the Generator FERC Interest calculated in accordance with FERC Order No. 2003–B; and

(4) The Interconnection Agreement must require full reimbursement of the Up-front Payment, plus the FERC Interest calculated in accordance with FERC Order No. 2003–B, to be paid to the Generator no later than twenty (20) years after the Commercial Operation Date.

.03 For Interconnection Agreements entered into before December 20, 2004:

(1) Pursuant to the Interconnection Agreement, the Generator either has received, or must be entitled to receive, reimbursement of an amount that is not less than the amount of the Up-front Payment;

(2) The Interconnection Agreement must require reimbursement of the Up-front Payment to be made either in cash, assignable transmission credits, or a combination of both; and

(3) On July 11, 2005, the Utility must reasonably expect that under the terms of the Interconnection Agreement, full reimbursement of the Up-front Payment will be made no later than twenty (20) years after the Commercial Operation Date.

SECTION 6. CHANGE IN METHOD OF ACCOUNTING

.01 *In general*. A change in a Utility's treatment of an Up-Front Payment, including a change to the safe harbor method provided in section 5.01 of this revenue procedure, is a change in method of accounting to which the provisions of §§ 446 and 481 and the regulations thereunder apply. For Up-front Payments received pursuant to Interconnection Agreements that satisfy the conditions of section 5.02 or 5.03 of this revenue procedure, whichever is applicable, a Utility must follow section 6.02 or 6.03 of this revenue procedure to change its treatment of the Up-front Payments to the safe harbor method provided in section 5.01 of this revenue procedure.

.02 *Automatic change*. A Utility within the scope of this revenue procedure that desires to change its treatment of Up-front Payments to the safe harbor method provided in section 5.01 of this revenue procedure for any taxable year ending on or after July 11, 2005, must follow the automatic change in accounting method provisions of Rev. Proc. 2002–9 (or its successor), with the following modifications:

(1) The scope limitations in section 4.02 of Rev. Proc. 2002–9 do not apply for the first taxable year ending on or after July 11, 2005; and

(2) The Utility must prepare and file a Form 3115 in accordance with section 6 of Rev. Proc. 2002–9 and must enter the designated number for the automatic change in method in Line 1a of Form 3115. The designated number for the automatic accounting method change to the safe harbor method provided in section 5.01 of this revenue procedure is "91".

.03 *Change for prior taxable years*. A Utility within the scope of this revenue procedure that desires to change its treatment of Up-front Payments to the safe harbor method provided in section 5.01 of this revenue procedure for any open taxable year in a series of consecutive open taxable years ending with the taxable year immediately prior to Utility's first taxable year ending on or after July 11, 2005, must follow the automatic change in accounting method provisions of Rev. Proc. 2002–9 (or its successor), with the following modifications:

(1) The scope limitations in section 4.02 of Rev. Proc. 2002–9 do not apply;

(2) The Utility must prepare a Form 3115 in accordance with section 6 of Rev. Proc. 2002–9 and must enter the designated number for the automatic change in method in Line 1a of Form 3115 (the designated number for the automatic accounting method change to the safe harbor method provided in section 5.01 of this revenue procedure is "91"); and

(3) The timely duplicate filing requirements of section 6.02(3) of Rev. Proc. 2002–9 do not apply; in lieu of such requirements, the Utility must:

(a) attach a completed Form 3115 to an amended return for the year of change, and must file, on or before December 31, 2005, that amended return and amended returns

for all subsequent affected taxable years, if any; and

(b) file a copy of the Form 3115 with the IRS National Office no later than when the original Form 3115 is filed with the amended return.

In accordance with § 1.446–1(e)(3)(ii) and Rev. Rul. 90–38, a Utility complying with the provisions of this section 6.03 is hereby granted consent to make a retroactive change in method of accounting to the safe harbor method provided in section 5.01 of this revenue procedure.

SECTION 7. AUDIT PROTECTION

.01 If a Utility uses the safe harbor method provided in section 5.01 of this revenue procedure for Up-front Payments and does not deduct its reimbursements of the Up-front Payments, the method of accounting for an Up-front Payment will not be raised as an issue by the IRS in a taxable year that ends on or before July 11, 2005, provided the Up-front Payment was made pursuant to an Interconnection Agreement that satisfies all of the conditions of either section 5.02 or 5.03 of this revenue procedure, whichever is applicable. Also, if a Utility uses the safe harbor method provided in section 5.01 of this revenue procedure for Up-front Payments and does not deduct its reimbursements of the Up-front Payments, and its use of that method is an issue under consideration (within the meaning of section 3.09 of Rev. Proc. 2002–9) in examination, before an appeals office, or before the U.S. Tax Court for any taxable year that ends on or before July 11, 2005, that issue will not be further pursued by the IRS, provided that the conditions in either section 5.02 or 5.03 of this revenue procedure, whichever is applicable, are satisfied.

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2002–9 is modified and amplified to include this automatic change in the APPENDIX.

SECTION 9. DRAFTING INFORMATION

The principal author of this revenue procedure is David B. Silber of the Office of the Associate Chief Counsel (Financial Institutions and Products). For further information regarding this revenue procedure, contact Mr. Silber at (202) 622–3930 (not a toll-free call).

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, § 42; 1.42–14.)

Rev. Proc. 2005–36

SECTION 1. PURPOSE

This revenue procedure publishes the amounts of unused housing credit carryovers allocated to qualified states under § 42(h)(3)(D) of the Internal Revenue Code for calendar year 2005.

SECTION 2. BACKGROUND

Rev. Proc. 92–31, 1992–1 C.B. 775, provides guidance to state housing credit agencies of qualified states on the procedure for requesting an allocation of unused housing credit carryovers under § 42(h)(3)(D). Section 4.06 of Rev. Proc. 92–31 provides that the Internal Revenue Service will publish in the Internal Revenue Bulletin the amount of unused housing credit carryovers allocated to qualified states for a calendar year from a national pool of unused credit authority (the National Pool). This revenue procedure publishes these amounts for calendar year 2005.

SECTION 3. PROCEDURE

The unused housing credit carryover amount allocated from the National Pool by the Secretary to each qualified state for calendar year 2005 is as follows:

Qualified State	*Amount Allocated*
Alabama	$107,035
Alaska	15,486
California	848,068
Connecticut	82,780
Delaware	19,619
Florida	411,045
Georgia	208,613
Idaho	32,919
Illinois	300,387
Indiana	147,376
Kansas	64,632
Kentucky	97,956
Maine	31,123
Maryland	131,321
Massachusetts	151,604
Michigan	238,932
Minnesota	120,521

Qualified State	Amount Allocated
Mississippi	68,589
Missouri	135,965
Nebraska	41,282
New Hampshire	30,703
New Jersey	205,530
New Mexico	44,969
New York	454,281
North Carolina	201,805
Ohio	270,744
Oregon	84,930
Pennsylvania	293,125
Rhode Island	25,532
Tennessee	139,423
Texas	531,375
Utah	56,446
Virginia	176,254
Washington	146,578
West Virginia	42,892
Wisconsin	130,162

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective for allocations of housing credit dollar amounts attributable to the National Pool component of a qualified state's housing credit ceiling for calendar year 2005.

DRAFTING INFORMATION

The principal author of this revenue procedure is Christopher J. Wilson of the Office of Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Mr. Wilson at (202) 622–3040 (not a toll-free call).

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26 CFR 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, § 42; 1.42–5.)

Rev. Proc. 2005–37

SECTION 1. PURPOSE

This revenue procedure establishes a safe harbor under which housing credit agencies and project owners may meet the requirements of § 42(h)(6)(B)(i) of the Internal Revenue Code as described in Q&A–5 of Rev. Rul. 2004–82, 2004–35 I.R.B. 350, concerning extended low-income housing commitments (commitments).

SECTION 2. BACKGROUND

Section 42(a) provides for a credit for investment in qualified low-income buildings (as defined in § 42(c)(2)). Under § 42(i)(3)(A), low-income units in a building must be occupied by individuals who meet the income limitation applicable under § 42(g)(1) to the project of which the building is a part. The building owner must elect under § 42(g)(1) to rent a percentage of the residential units to individuals whose income is 50 percent or less of area median gross income or 60 percent or less of area median gross income.

Section 42(h)(6)(A) provides that no credit will be allowed with respect to any building for the taxable year unless a commitment (as defined in § 42(h)(6)(B)) is in effect as of the end of the taxable year.

Section 42(h)(6)(B)(i) requires commitments to include the prohibitions against the actions described in subclauses (I) and (II) of § 42(h)(6)(E)(ii) during the extended use period, that is, prohibitions against eviction or termination of tenancy of an existing tenant of any low-income unit (other than for good cause) and any increase in the gross rent with respect to a low-income unit not otherwise permitted by § 42, applicable throughout the entire commitment period.

Section 42(h)(6)(B)(ii) provides that a commitment must allow individuals who meet the income limitation applicable to the building under § 42(g) (whether prospective, present, or former occupants of the building) the right to enforce in any state court the prohibitions of § 42(h)(6)(B)(i).

Section 42(h)(6)(J) provides that if, during a taxable year, there is a determination that a commitment was not in effect as of the beginning of the taxable year, the determination shall not apply to any period before the year and subparagraph (A) shall be applied without regard to the determination if the failure is corrected within 1 year from the date of determination.

Section 1.42–5(c)(1)(xi) of the Income Tax Regulations provides that a housing credit agency must require the owner of a low-income housing project to certify at least annually to the housing credit agency that, for the preceding 12-month period, a commitment as described in § 42(h)(6) was in effect (for buildings subject to § 7108(c)(1) of the Omnibus Budget Reconciliation Act of 1989, 1990–1 C.B. 210), including the requirement under § 42(h)(6)(B)(iv) that an owner cannot refuse to lease a unit in the project to an applicant because the applicant holds a voucher or certificate of eligibility under

section 8 of the United States Housing Act of 1937, 42 U.S.C. 1437f (for buildings subject to § 13142(b)(4) of the Omnibus Budget Reconciliation Act of 1993, 1993–3 C.B. 1).

On August 30, 2004, the Service ruled in Q&A–5 of Rev. Rul. 2004–82 that § 42(h)(6)(B)(i) requires commitments to include the prohibitions against the actions described in subclauses (I) and (II) of § 42(h)(6)(E)(ii) during the extended use period, that is, prohibitions against eviction or termination of tenancy of an existing tenant of any low-income unit (other than for good cause) and any increase in the gross rent with respect to a low-income unit not otherwise permitted by § 42, applicable throughout the entire commitment period. This requirement for commitments extends back to the effective date of § 42(h)(6)(B)(i). See § 11701(a)(7)(A) of the Omnibus Budget Reconciliation Act of 1990, 1991–2 C.B. 481, 531.

Q&A–5 provided that if it is determined by the end of a taxable year that a taxpayer's commitment does not meet the requirements for a commitment under § 42(h)(6)(B) (for example, it does not provide no-cause eviction protection for the tenants of low-income units throughout the extended use period), the low income housing credit is not allowable with respect to the building for the taxable year, or any prior taxable year. However, if the failure to have a valid commitment in effect is corrected within 1 year from the date of the determination, the determination will not apply to the current year of the credit period or any prior year.

Q&A–5 required each Agency to review its existing commitments by December 31, 2004, to ensure that the no-cause eviction protection and the prohibition against improper increases in gross rent apply throughout the extended use period. If during that review, an Agency determined that a commitment did not comply with these requirements, the 1-year period described under § 42(h)(6)(J) will commence on the date of that determination.

SECTION 3. SAFE HARBOR

.01 The Service has determined that Agencies may satisfy the review requirements under Q&A–5 for commitments entered into before January 1, 2006, under § 42(h)(6)(B)(i) in the following manner:

(1) Commitments entered into before January 1, 2006, that contain general language requiring building owners to comply with the requirements of § 42 (catch-all language) satisfy the requirements under Q&A–5, if:

(a) Agencies notify building owners in writing on or before December 31, 2005, that consistent with the interpretation in Q&A–5, the catch-all language prohibits the owner from evicting or terminating the tenancy of an existing tenant of any low-income unit (other than for good cause) throughout the entire commitment period. Further, Agencies must notify building owners that the catch-all language prohibits the owner from making an increase in the gross rent with respect to a low-income unit not otherwise permitted by § 42 throughout the entire commitment period;

(b) The owner must, as part of its certification under § 1.42–5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under § 42;

(c) If the owner fails to make the certifications in (b) above or the Agency learns that the owner has evicted tenants in low-income units or terminated their tenancies other than for good cause or has increased the gross rent of a tenant with respect to a low-income unit not otherwise permitted under § 42, the Agency shall report the owner to the Internal Revenue Service using Form 8823, *Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition*; and

(d) Section 3.02 shall also apply to any amendment to any commitment containing catch-all language if the amendment is executed after December 31, 2005.

(2) Commitments entered into before January 1, 2006, that do not contain specific language on the § 42(h)(6)(B)(i) prohibition against the actions described in subclauses (I) and (II) of § 42(h)(6)(E)(ii) or catch-all language do not satisfy the requirements of Q&A–5 and must be amended to clearly provide for the § 42(h)(6)(B)(i) prohibition against the actions described in subclauses (I) and (II) of § 42(h)(6)(E)(ii) by December 31, 2005.

.02 The Service has determined that Agencies may satisfy the review requirements under Q&A–5 for commitments executed after December 31, 2005, under § 42(h)(6)(B)(i) in the following manner:

(1) Commitments executed after December 31, 2005, must clearly provide for the § 42(h)(6)(B)(i) prohibition against the actions described in subclauses (I) and (II) of § 42(h)(6)(E)(ii);

(2) The owner must, as part of its certifications under § 1.42–5(c)(1)(xi), certify annually that for the preceding 12-month period no tenants in low-income units were evicted or had their tenancies terminated other than for good cause and that no tenants had an increase in the gross rent with respect to a low-income unit not otherwise permitted under § 42; and

(3) If the owner fails to make the certifications in (2) above or the Agency learns that the owner has evicted tenants in low-income units or terminated their tenancies other than for good cause or has increased the gross rent of a tenant with respect to a low-income unit not otherwise permitted under § 42, the Agency shall report the owner to the Internal Revenue Service using Form 8823, *Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition*.

EFFECTIVE DATE

This revenue procedure is effective on June 21, 2005, the date this revenue procedure was released to the tax services.

DRAFTING INFORMATION

The principal author of this revenue procedure is Jack Malgeri of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this revenue procedure, contact Mr. Malgeri at (202) 622–3040 (not a toll-free call).

26 CFR § 301.6404–2: Abatement of interest.
(Also: § 6404(e), (g), and (h);
26 CFR § 301.6404–1.)

Rev. Proc. 2005–38

SECTION 1. PURPOSE AND SCOPE

This revenue procedure describes how taxpayers may seek administrative relief if the Internal Revenue Service (the Service) has assessed interest for periods during which interest should have been suspended under section 6404(g) of the Internal Revenue Code (the Code). Although there is no prepayment right to administrative relief under the Code with respect to the abatement of interest assessed in violation of section 6404(g), this revenue procedure provides a permissive procedure for seeking such relief.

SECTION 2. BACKGROUND

.01 Section 6601 requires the payment of interest on any amount of tax imposed by title 26 that is not paid on or before the last date prescribed for payment of the tax. Section 6151 provides that the date for payment of tax is generally the date a taxpayer must file a return reporting the tax (determined without regard to any extension of time for filing the return). Section 6601(e) provides that interest shall be assessed, collected, and paid in the same manner as tax, and that any reference to tax in title 26 (except subchapter B of chapter 63, relating to deficiency procedures) shall be deemed also to refer to interest imposed under section 6601.

.02 Section 6404(a) authorizes the Secretary to abate an assessment of tax or any liability in respect thereof (including interest) if the assessment is excessive in amount, untimely, or erroneously or illegally assessed. Notwithstanding the authority provided by section 6404(a), section 6404(b) precludes taxpayers from filing administrative claims for abatement with respect to income, estate, or gift taxes. For other types of tax, taxpayers may file an administrative claim requesting that the Service abate an improper assessment as provided in section 301.6404–1(c) of the Regulations on Procedure and Administration.

.03 Section 6404(e) authorizes the Secretary to abate an assessment of interest where the interest is attributable in whole or in part to any unreasonable error or delay by an officer or employee of the Service in performing a ministerial or managerial act. Section 6404(e) provides a limited exception to the general prohibition against claims for abatement with respect to income, estate, or gift taxes that is set forth in section 6404(b). *See Urbana v. Commissioner*, 122 T.C. 384, 389–90 & n.4 (2004); *see also* Treas. Reg. § 301.6404–2 (describing interest abatement rules under section 6404(e)).

.04 Except as provided in section 6404(g)(2), in the case of an individual who files an income tax return, section 6404(g)(1) suspends the accrual of interest and time-sensitive penalties if the Secretary does not provide notice to the taxpayer specifically stating the amount due and the basis for the liability within 18 months of the later of the due date of the return (without regard to extensions) or the date the return was filed.

Section 6404(g) was enacted as part of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, 112 Stat. 685, and relates to interest suspension, rather than interest abatement. Nothing in the statute or its legislative history suggests that Congress intended section 6404(g) to create an exception to the general rule of section 6404(b) that prohibits taxpayers from filing claims for abatement with respect to income tax. *See* H.R. Conf. Rep. No. 599, 105th Cong. 2d Sess. 259–60 (1998). *Compare id. with* H.R. Rep. No. 506, 104th Cong. 2d Sess. 27–28 (1996) (discussing amendments to section 6404(e) and an expansion of the circumstances in which interest can be abated and abatement determinations can be reviewed). Accordingly, claims for abatement of interest assessed for periods during which interest should have been suspended under section 6404(g) are barred by section 6404(b).

.05 Section 6404(h) provides the United States Tax Court with jurisdiction over any action brought by a taxpayer who meets the requirements of section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest was an abuse of discretion, and to order an abatement. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest.

The judicial review provisions of section 6404(h) apply where the Service has abused its discretion by failing to abate interest as provided by section 6404. These provisions do not apply where the Service has failed to suspend interest under section 6404(g), except as provided in paragraph 3.03 below.

SECTION 3. ADMINISTRATIVE REVIEW PROCEDURE

.01 Subject to the exception in paragraph 3.03 below, taxpayers may not submit claims for abatement of interest assessed with respect to periods during which interest should have been suspended under section 6404(g). Pursuant to this revenue procedure, however, taxpayers may notify the Service that interest was assessed in violation of section 6404(g) by submitting Form 843, *"Claim for Refund and Request for Abatement."* Taxpayers should write "Section 6404(g) Notification" at the top of the Form 843. The Service will review the Form 843 notification, decide whether to abate interest under section 6404(a), and notify the taxpayer of its decision. Because section 6404(g) is an interest suspension provision, rather than an interest abatement provision, and because section 6404(b) generally bars claims for abatement with respect to income tax, the notification to the taxpayer of the Service's abatement determination does not constitute a final determination letter from which the taxpayer can petition the Tax Court under section 6404(h).

.02 If the Service does not exercise its authority under section 6404(a) to abate interest alleged to have been assessed in violation of section 6404(g), the taxpayer may pay the disputed interest assessment, file an administrative claim for refund and, if that claim is denied or not acted upon within six months from the date of filing, bring suit for refund under section 7422 and 28 U.S.C. § 1346(a)(1).

.03 If a taxpayer asserts that the Service failed to suspend interest under section 6404(g) as a result of an unreasonable error or delay in performing a ministerial or managerial act within the meaning of section 6404(e), the taxpayer may submit a claim for abatement on Form 843. The Service will consider the claim and

issue a notice of final determination. If the Service denies the taxpayer's claim in whole or in part, taxpayers who meet the requirements referred to in section 7430(c)(4)(A)(ii) may petition the Tax Court under section 6404(h) to determine whether the denial was an abuse of discretion. Pursuant to section 6404(b), a claim may not be submitted under this section 3.03 asserting only that interest was assessed for periods during which interest should have been suspended under section 6404(g).

SECTION 4. EFFECTIVE DATE

This revenue procedure is effective July 11, 2005, the date this revenue procedure was released in the Internal Revenue Bulletin.

SECTION 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Julie A. Jebe of the Office of Associate Chief Counsel (Procedure and Administration), Administrative Provisions and Judicial Practice Division. For further information regarding this revenue procedure, contact Branch 3 of Administrative Provisions and Judicial Practice at (202) 622–7950 (not a toll-free call).

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26 CFR 31.6061–1: Signing of returns.
(Also: 26 CFR 31.6011(a)–7.)

Rev. Proc. 2005–39

SECTION 1. PURPOSE

This revenue procedure sets out the circumstances under which facsimile signatures may be used on (1) any form within the Form 94X series (including, but not limited to, Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*; Form 941, *Employer's Quarterly Federal Tax Return*; Form 943, *Employer's Annual Federal Tax Return for Agricultural Employees*; and Form 945, *Annual Return of Withheld Federal Income Tax*); (2) Form 1042, *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*; (3) Form 8027, *Employer's Annual Information Return of Tip Income and Allocated Tips*; (4) Form CT–1, *Employer's Annual Railroad Retirement Tax Return*; or (5) any variant of these forms (*e.g.*, Form 941c, *Supporting Statement to Correct Information*; Form 941–SS, *Employer's Quarterly Federal Tax Return*).

SECTION 2. BACKGROUND

Section 6061(a) of the Internal Revenue Code generally provides that any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall be signed in accordance with forms or regulations prescribed by the Secretary.

Section 6061(b) authorizes the Secretary to develop procedures for the acceptance of signatures in digital or other electronic form. Section 6061(b)(1)(B) provides that the Secretary may provide for alternative methods of signing returns, declarations, statements, or other documents. Section 6061(b)(2) provides that, notwithstanding any other provision of law, any return, declaration, statement, or other document signed under an approved alternative method will be treated for all purposes as an original signature.

Section 31.6061–1 of the Regulations on Employment Taxes and Collection of Income Tax at Source provides that employment tax returns must be signed by:

(a) the individual, if the person required to make the return is an individual;

(b) the president, vice president, or other principal officer, if the person required to make the return is a corporation;

(c) a responsible and duly authorized member or officer having knowledge of its affairs, if the person required to make the return is a partnership or other unincorporated organization; or

(d) the fiduciary, if the person required to make the return is a trust or estate.

Returns may also be signed for the taxpayer by a duly authorized agent in accordance with section 31.6011(a)–7 of the regulations.

Section 31.6011(a)–7 provides that an employment tax return may be made by an agent in the name of the person required to make the return if an acceptable power of attorney is filed with the Service and if the return includes all taxes required to be reported by such person on such return for the period covered by the return.

Section 301.6061–1(b) of the Regulations on Procedure and Administration provides that the Secretary may prescribe in forms, instructions, or other appropriate guidance, the method of signing any return, statement, or other document required to be made under any provision of the internal revenue laws or regulations.

SECTION 3. SCOPE AND APPLICATION

Corporate officers or duly authorized agents may sign any of the following forms by facsimile (*i.e.*, by rubber stamp, mechanical device, or computer software program): (1) the Form 94X series; (2) Form 1042; (3) Form 8027; (4) Form CT–1; or (5) any variant of such designated form (*e.g.*, Form 941c; Form 941–SS). Officers or agents using a facsimile means of signature are personally responsible for ensuring that their facsimile signature is affixed to returns. The person filing the form must retain a letter, signed by the officer or agent authorized to sign the return, declaring under penalties of perjury that the facsimile signature appearing on the form is the signature adopted by the officer or agent and that the facsimile signature was affixed to the form by the officer or agent or at his or her direction. The letter must list each return by name and identifying number. The letter should not be sent to the Internal Revenue Service unless specifically requested by the Service. The letter shall be maintained for at least four years after the due date of such tax as the return relates, or the date such tax is paid, whichever is later.

SECTION 4. EFFECT ON OTHER DOCUMENTS

Rev. Rul. 82–29, 1982–1 C.B. 200, is modified to add the forms designated above to the list of forms for which facsimile signatures are accepted by the Service. Rev. Rul. 82–29 is clarified as to the definition of facsimile signature, and is modified to delete the requirement that each group of returns forwarded to the Internal Revenue Service be accompanied by a list of such returns and a letter, signed by

the person authorized to sign the returns, adopting the signature on the returns.

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective for any of the designated forms filed with the Internal Revenue Service on or after July 1, 2005.

SECTION 6. DRAFTING INFORMATION

The principal author of this revenue procedure is Richard Charles Grosenick of the Office of Associate Chief Counsel (Procedure & Administration). For further information regarding this revenue procedure, contact Richard Charles Grosenick at (202) 622–7950 (not a toll-free call).

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26 CFR 601.201: Rulings and determination letters. (Also Part I, §§ 148; 1.148–3.)

Rev. Proc. 2005–40

SECTION 1. PURPOSE

This revenue procedure provides issuers of State or local bonds described in § 103(a) of the Internal Revenue Code and subject to § 148(f)(3) and § 1.148–3(g) of the Income Tax Regulations with procedures for correcting a failure to timely pay the proper amount of arbitrage rebate as required by the regulations. This revenue procedure also modifies Rev. Proc. 90–11, 1990–1 C.B. 469, which provides similar procedures for State or local bonds subject to § 1.148–1T of the temporary Income Tax Regulations initially published on May 12, 1989, as part of T.D. 8252, 1989–1 C.B. 25. The modification provides a new address for filing late rebate payments and related requests.

SECTION 2. BACKGROUND

.01 Section 103(a) generally provides that gross income does not include interest on any State or local bond. Under § 103(b)(2), however, interest on an arbitrage bond (within the meaning of §148) is includable in gross income.

.02 Section 148(f)(1) generally provides that a bond that is part of an issue shall be treated as an arbitrage bond unless the issuer pays to the United States the amounts described in § 148(f)(2) for the issue (*rebate amounts*) in accordance with § 148(f)(3).

.03 Section 148(f)(3) provides that, except to the extent provided by the Secretary, rebate amounts must be paid in installments that are made at least once every five years. The last installment must be made no later than 60 days after the day on which the last bond of the issue is redeemed.

.04 Section 1.148–3(f) provides in part that the first rebate installment payment must be made for a computation date (as determined under § 1.148–3(f)) that is not later than five years after the issue date. Subsequent rebate installment payments must be made for a computation date that is not later than five years after the previous computation date for which an installment payment was made.

.05 Section 1.148–3(g) provides that each rebate payment must be paid no later than 60 days after the computation date to which the payment relates. Any rebate payment paid within this 60-day period may be treated as paid on the computation date to which it relates. A rebate payment is paid when it is filed with the Internal Revenue Service at the place or places designated by the Commissioner. See § 7502(a) for the treatment of certain payments made by U.S. mail.

.06 Section 148(f)(7) provides that if an issue would, but for § 148(f)(7), fail to meet the requirements of § 148(f)(2) or (3), the Secretary may treat the issue as not failing to meet those requirements if: (1) no bond of the issue is a private activity bond, as defined in § 141 (other than a qualified 501(c)(3) bond within the meaning of § 145); (2) the failure to meet those requirements is not due to willful neglect; and (3) the issuer pays to the United States a penalty in an amount equal to the sum of (i) 50 percent of the amount that was not paid in accordance with § 148(f)(2) and (3), plus (ii) interest (at the underpayment rate established under section 6621) on the portion of the amount that was not paid on the date required under § 148(f)(3) for the period beginning on that date. Section 148(f)(7) further provides that the Secretary may waive all or any portion of the penalty under § 148(f)(7).

.07 Section 1.148–3(h)(1) provides that the failure to pay the correct rebate amount when required will cause the bonds of an issue to be arbitrage bonds unless the Commissioner determines that the failure was not caused by willful neglect and the issuer promptly pays a penalty to the United States. If no bond of the issue is a private activity bond (other than a qualified 501(c)(3) bond), the penalty equals 50 percent of the rebate amount not paid when required to be paid, plus interest on the rebate amount not paid when required to be paid. Otherwise, the penalty equals 100 percent of the rebate amount not paid when required to be paid, plus interest on the rebate amount not paid when required to be paid.

.08 Section 1.148–3(h)(2) provides that interest accrues at the underpayment rate under § 6621 beginning on the date the correct rebate amount is due and ending on the date ten days before it is paid.

.09 Section 1.148–3(h)(3) provides that the penalty is automatically waived if the rebate amount that the issuer failed to pay is paid with interest within 180 days after discovery of the failure, unless the Commissioner determines that the failure was due to willful neglect, or the issue is under examination by the Commissioner at any time during the period beginning on the date the failure first occurred and ending on the date 90 days after the receipt of the rebate amount. Generally, extensions of this 180-day period and waivers of the penalty in other cases will be granted by the Commissioner only in unusual circumstances.

.10 Rev. Proc. 90–11 provides issuers of State or local bonds subject to § 1.148–1T, initially published on May 12, 1989, as part of T.D. 8252, with guidance for filing (1) a request for an extension of time to pay a correction amount of arbitrage rebate, (2) an explanation of an innocent failure to meet a requirement for payment of arbitrage rebate, or (3) a request for a ruling regarding a failure (other than an innocent failure or one that is so treated) to meet a requirement for payment of arbitrage rebate.

SECTION 3. PROCEDURES FOR CORRECTING A FAILURE TO PAY REBATE

.01 *In general*. A failure to pay the correct rebate amount when required by § 148(f)(3) and § 1.148–3(g) will not cause the bonds of an issue to be arbitrage bonds

if the requirements of section 3.01(1) or 3.01(2) are met.

(1) *Payment within 180-day period*. The requirements of this section 3.01(1) are met if, within 180 days after the issuer discovers the failure to pay the correct rebate amount when required (the *180-day period*), the rebate amount that the issuer failed to pay, plus interest, is paid to the United States in accordance with section 3.04, unless—

(a) The Commissioner determines that the failure was due to willful neglect, or

(b) The issue is under examination by the Service at any time during the period beginning on the date the failure first occurred and ending on the date 90 days after the Service receives the rebate amount.

(2) *Payment after 180-day period*. The requirements of this section 3.01(2) are met if, after the expiration of the 180-day period—

(a) The rebate amount that the issuer failed to pay, plus interest, plus the penalty determined under section 3.02, is paid to the United States in accordance with section 3.04, and

(b) The Commissioner determines that the failure was not caused by willful neglect.

.02 *Penalty*.

(1) *Governmental and qualified 501(c)(3) bonds*. If no bond of the issue is a private activity bond (other than a qualified 501(c)(3) bond), the penalty equals 50 percent of the rebate amount not paid when required to be paid.

(2) *Private activity bonds (other than qualified 501(c)(3) bonds)*. If the issue consists of private activity bonds (other than qualified 501(c)(3) bonds), the penalty equals 100 percent of the rebate amount not paid when required to be paid.

.03 *Extensions of 180-day period and waivers of penalty*. An issuer may apply for an extension of the 180-day period for purposes of section 3.01(1), or a waiver of the penalty for purposes of section 3.01(2), in accordance with the procedures set forth in section 5. Under § 1.148–3(h)(3), extensions of the 180-day period and waivers of the penalty generally will be granted only in unusual circumstances.

.04 *Payment and explanation of why the late payment was not due to willful neglect*. The amount described in section 3.01(1) or (2) must be mailed to the Internal Revenue Service, Ogden Submission Processing Center, Ogden, Utah 84201, together with Form 8038–T (*Arbitrage Rebate and Penalty in Lieu of Arbitrage Rebate*) and a detailed explanation addressing why the failure to timely pay the correct rebate amount was not due to willful neglect. The explanation must include the following declaration signed by an individual who has personal knowledge of the relevant facts and circumstances: "Under penalties of perjury, I declare that I have examined this explanation, including accompanying documents, and, to the best of my knowledge and belief, the explanation contains all the relevant facts relating to the explanation, and such facts are true, correct, and complete." The explanation must include all relevant information, including when the rebate amount was required to be paid, why the rebate amount was not timely paid and a description of the events that led up to both the failure to timely pay and discovery of the failure. The explanation should also discuss the factors set forth in section 4.01 and should indicate whether the bond issue in question is under examination by the Service. Acceptance and processing of the payment by the Ogden Submission Processing Center does not constitute a determination by the Commissioner that the failure was not caused by willful neglect. The determination of whether a failure was due to willful neglect is made in accordance with the procedures set forth in section 4.

.05 *Interest*. For purposes of section 3.01, interest accrues at the underpayment rate under § 6621 beginning on the date the correct rebate amount is due and ending on the date ten days before it is paid. For this purpose, a rebate amount is due on the date that is 60 days after the computation date to which the rebate amount relates.

.06 *Issue under examination*. For purposes of this revenue procedure, an issue is under examination by the Service on the date a letter opening an examination of the issue is sent.

SECTION 4. PROCEDURES FOR ESTABLISHING LACK OF WILLFUL NEGLECT

.01 In determining whether a failure to timely pay the correct rebate amount was due to willful neglect, the Service will consider the following factors:

(1) The unpaid rebate amount;

(2) The sophistication of the issuer;

(3) The length of the delay;

(4) The steps taken to comply, including the steps taken after the discovery of the failure to pay;

(5) The steps taken to prevent recurrence of a failure to pay;

(6) The nature of the failure;

(7) Any history of timely or late payments by the issuer; and

(8) Any other relevant information.

.02 If the Service does not notify the issuer in writing within 90 days after receiving the explanation submitted in accordance with section 3.04, the explanation is accepted, and the issuer's failure to timely pay the rebate amount will be treated as not due to willful neglect.

.03 If, based on the explanation submitted by the issuer, the Service is unable to make a determination that the failure to timely pay the rebate amount was not due to willful neglect, the Service will notify the issuer in writing within 90 days after the Service's receipt of the explanation and late payment. The written notice will describe any additional information needed, identify a contact person who is handling the matter, and provide the issuer with a reasonable period of not less than 21 days to provide additional information.

.04 Generally, within 90 days of receiving the additional information requested, the Service will notify the issuer in writing that either (1) the Service has determined that the failure to timely pay the rebate amount was not due to willful neglect or (2) the Service is unable to make a determination that the failure to timely pay the rebate amount was not due to willful neglect.

.05 If the Service notifies the issuer under section 4.04 that the Service is unable to make a determination that the failure to timely pay the rebate amount was not due to willful neglect, the issuer will be entitled, upon request, to a conference with the Service.

.06 After conducting the conference and reviewing any additional submissions by the issuer, the Service will notify the issuer in writing that either (1) the Service has determined that the failure to timely pay the rebate amount was not due to willful neglect or (2) the information available to the Service is insufficient for the Service to find a lack of willful neglect. If the Service is unable to find a lack of willful

neglect, an examination of the bond issue may be opened. If, however, an examination of the bond issue is not opened within 180 days after the date the Service's notification described in this section 4.06 is sent, then the issuer's failure to timely pay the rebate amount will be treated as not due to willful neglect.

.07 For purposes of this section 4, a notification in writing is made on the date the written notification is sent.

SECTION 5. PROCEDURES CONCERNING REQUESTS FOR AN EXTENSION OF TIME OR A WAIVER OF PENALTY

.01 *Extension of time to pay the late payment amount*. Prior to the expiration of the 180-day period described in section 3.01(1), an issuer may request that the Service grant it an extension of 180 days to pay the late payment amount determined under section 3.01(1). The request should be submitted to Internal Revenue Service, ATTENTION: SE:T:GE:TEB:O, 1111 Constitution Avenue, N.W., PE–5T2, Washington, D.C. 20224. The request should include the explanation required by section 3.04 and should address the unusual circumstances upon which the extension should be granted. Within 90 days after receiving a request for extension, the Service will notify the issuer in writing whether the extension is approved. If the Service does not notify the issuer in writing within that 90-day period, the issuer's request for extension is approved. If a request for extension is approved, and payment is made within 180 days after the expiration of the 180-day period, then the late payment amount is the rebate amount that the issuer failed to pay, plus interest, as determined under section 3.01(1). If a request for extension is not approved, the issuer must pay either: (1) if within the 180-day period, the amount determined under section 3.01(1); or (2) if after the 180-day period, the amount determined under section 3.01(2).

.02 *Waiver of penalty*. Within 180 days after the expiration of the 180-day period described in section 3.01(1), an issuer may request that the Service grant it a waiver of the penalty described in section 3.02. The request for a waiver of penalty must be submitted to the Internal Revenue Service, Ogden Submission Processing Center, Ogden, Utah 84201, and must be accompanied by payment of the amount determined under section 3.01(2), together with Form 8038–T (*Arbitrage Rebate, Yield Reduction and Penalty in Lieu of Arbitrage Rebate*). The request for a waiver of penalty should include the explanation required by section 3.04 and should address the unusual circumstances that justify waiver of the penalty. The Ogden Submission Processing Center will process the payment and immediately forward the request to SE:T:GE:TEB:O. Within 90 days after receiving a request for a waiver of penalty, the Service will notify the issuer in writing whether any portion of the penalty is waived and, if applicable, will promptly thereafter refund to the issuer any amount so waived. If the Service does not approve a waiver request with respect to any portion of the penalty, the issuer will be entitled, upon request, to a conference with the Service. If a conference is held, then, within 30 days after the conference, the Service will notify the issuer in writing whether any portion of the penalty is waived and, if applicable, will promptly thereafter refund to the issuer any amount so waived.

.03 *Date of notification or refund*. For purposes of this section 5, a notification in writing (or a refund) is made on the date the written notification (or refund) is sent.

SECTION 6. EFFECT OF CORRECTING A FAILURE TO PAY REBATE

If an issuer satisfies the requirements of this revenue procedure for correcting a failure to timely pay a rebate amount under § 148(f)(3) and § 1.148–3(g), the rebate amount will be treated as paid on the computation date to which it relates. Any interest or penalty amounts paid under this revenue procedure are not treated as payments under § 1.148–3(d) for purposes of computing the rebate amount. Acceptance by the Service of a late payment amount under this revenue procedure does not constitute a determination by the Service that the issuer paid a correct rebate amount as required by § 148(f) and § 1.148–3.

SECTION 7. MODIFICATION OF REV. PROC. 90–11

Rev. Proc. 90–11 is modified by changing all references to the Internal Revenue Service Center, Philadelphia, Pennsylvania in sections 3.02(5), 4.02(1)(c), 4.02(3), and 5.02 of the revenue procedure to:

Internal Revenue Service
Ogden Submission Processing Center
Ogden, Utah 84201

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 90–11, 1990–1 C.B. 469, is modified in part.

SECTION 9. EFFECTIVE DATE

This revenue procedure applies to discoveries after July 11, 2005, of a failure to timely pay the correct rebate amount under § 148(f)(3) and §1.148–3(g) (or, with respect to the modification of Rev. Proc. 90–11 made by section 7 of this revenue procedure, § 1.148–1T initially published on May 12, 1989, as part of T.D. 8252).

SECTION 10. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545–1880.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

This revenue procedure contains a collection of information requirement in sections 5.01 and 5.02. The purpose of the collection of information is to enable the Service to evaluate an issuer's request for a waiver of a penalty, or an extension of time to make a late payment, in the case of a failure by the issuer to timely pay the correct rebate amount:

The likely respondents are state and local governments.

The estimated total annual reporting burden is: 3 hours.

The estimated annual burden per respondent: 30 minutes.

The estimated number of respondents: 6.

The estimated annual frequency of responses: on occasion.

The collection of information contained in section 3.04 of this revenue procedure has been previously reviewed and approved by OMB under control number 1545–1219.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

DRAFTING INFORMATION

The principal authors of this revenue procedure are Lynn Kawecki of the Tax Exempt Bond office of the Tax Exempt and Government Entities (TE/GE) Division and David White of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). For further information regarding this revenue procedure, contact Mr. Kawecki at (202) 283–9782 (not a toll-free call).

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D. —Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z —Corporation.

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[1] A cumulative list of current actions on previously published items in Internal Revenue Bulletins 2005–1 through 2005–26 is in Internal Revenue Bulletin 2005–26, dated June 27, 2005.

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