

Module D

Governmental and Private Activity Bonds

Module D

Governmental and Private Activity Bonds

Overview

General Rule Interest on State and local government bonds is taxable if the bonds are private activity bonds (bonds issued to finance private activities not specifically authorized by Congress) unless a specific exception is included in the Internal Revenue Code.

(See Conference Report No. 99-841, 1986-3 C.B. Vol. 4, 683.)

Purpose Our purpose is to determine whether interest on a particular obligation of a qualified governmental unit is tax-exempt, using the following three-part inquiry:

1. Determine the activity being financed, and thereby the type of bond being issued;
2. Determine if the issuer is authorized to issue tax-exempt debt; and
3. Determine if the bonds comply with the appropriate descriptive section of the Code.

Objectives At the end of this module the student will be able to:

- Identify issuers qualified to issue tax-exempt bonds.
- Describe the required characteristics of tax-exempt debt.
- Define a private activity bond.
- Determine if a bond meets any of the following tests:
 - private business use test,
 - private security or payment test,
 - private loan financing test, OR
 - unrelated or disproportionate use test.
- Explain the consequences for a bond that meets any of the above tests.

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Overview, Continued

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Section 1

Issuers Qualified to Issue Bonds

Overview

**Interest
Exclusion**

Interest on any state or local bond is not included in gross income, except as follows:

1. Nonqualified private activity bonds. A private activity bond must be qualified to be tax-exempt. **(See IRC section 141(e).)**
2. An arbitrage bond. The interest on a bond issued for the purpose of earning arbitrage is included in gross income. **(See IRC section 148.)**
3. Nonregistered bonds, etc. Bonds must generally meet the requirements of IRC section 149 to be tax-exempt.

**State or Local
bond**

"State or local bond" means an obligation of a State or **political subdivision** thereof. The term "governmental unit" does not include the United States or any agency or instrumentality thereof.

(See IRC section 150(a)(2).)

**District of
Columbia**

The District of Columbia **(see Rev. Rul. 76-202, 1976-1 C.B. 26)** and any possession of the United States (U.S. Virgin Islands, Puerto Rico, American Samoa and Guam) are included as **"states."**

In This Section

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Political Subdivisions

Definition "Political subdivision" denotes any division of any State or local government unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit.

Sovereign Powers In *Commissioner v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944, *cert. denied*), 323 U.S. 792 (1945), the U.S. Court of Appeals for the Second Circuit identified three sovereign powers the presence or absence of which form the basis for determining whether an entity is a political subdivision:

- the power of eminent domain;
- the power to tax; AND
- police power.

The regulation and the court in *Shamberg* require that only part of the sovereign power of the governmental unit needs to be delegated to an issuer in order to qualify as a "political subdivision." However, if only an insubstantial amount of any or all sovereign powers are delegated, then the entity is not a political subdivision.

(See Rev. Rul. 61-18, 1961-1 C.B. 5.)

Eminent Domain In Rev. Rul. 77-165, 1977-1 C.B. 21, only limited and specific delegations of the state's power of eminent domain (the power to take private property for public use) could be made to a state university under state law. The Service found that the right to exercise the power of eminent domain in specific projects designated by the legislature was not a substantial power of eminent domain. Lacking other substantial sovereign powers, the university was denied political subdivision status.

A similar result was reached in *Philadelphia National Bank v. United States*, 666 F.2d 834 (1981). Here the state authority had to accept and implement Temple University's requests to condemn property. Temple was held not to possess the power of eminent domain.

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Political Subdivisions, Continued

Power to Tax

In Rev. Rul. 77-164, 1977-1 C.B. 20, the power to tax was not considered present where service and user fees assessed and collected by a community development authority were only for the benefit of property owners of the improvements, and not for the purposes of raising revenues for public or governmental purposes.

In *Philadelphia National Bank*, supra, Temple University did not possess the power to tax because it was a beneficiary of the state's taxing power through the appropriation of funds to the University.

Police Power

In Rev. Rul. 77-164, 1977-1 C.B. 20, a community development authority was held not to possess police power where it had only limited authority to adopt and enforce rules regarding use of community facilities and such authority was subordinate to the police power of the municipality in the event of conflict.

In *Philadelphia National Bank*, supra, Temple University was held not to possess the police power by maintaining a campus police force authorized by state law to enforce only state laws but not university enacted rules or regulations. This was characterized by the court as "a minimal grant of police power" and as "limited authorization to exercise one small aspect of police power — one that has been delegated to private organizations as well." (See **PLR 811906.**) However, where an authority has the power to set rates, determine routes, and enforce its regulations by maintaining a security force, it is considered to possess police powers.

(See Rev. Rul. 73-563, 1973-2 C.B. 24.)

Special Assessment Districts

A political subdivision of any State or local governmental unit may or may not include special assessment districts such as road, water, sewer, gas, light reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of any such unit.

(See Treas. Reg. section 1.103-1(b).)

On Behalf of Issuers

General Rule

An entity that fails to qualify as a political subdivision may be able to issue tax-exempt bonds "on behalf of" a political subdivision as a "constituted authority" or as a "63-20 corporation". (See **Rev. Rul. 63-20, 1963-1 C.B. 24, and Rev. Proc. 82-26, 1982-1 C.B. 114.**) Property is treated as owned by a governmental unit if it is owned on behalf of such unit. (See **IRC section 150(a)(5).**)

Rev. Rul. 63-20 is included in this module as Exhibit D-1.

"Constituted Authorities"

Constituted authorities can issue tax-exempt bonds **on behalf of** a political subdivision if the following criteria are met:

- (1) the issuance of bonds must be authorized by a specific state statute;
- (2) the bond issuance must have a public purpose (which includes promotion of trade, industry, economic development);
- (3) the governing body of the authority must be controlled by the political subdivision;
- (4) the authority must have the power to acquire, lease, and sell property and issue bonds in furtherance of its purposes;
- (5) earnings cannot inure to the benefit of private persons; AND
- (6) upon dissolution, title to all bond-financed property must revert to the political subdivision.

(See **Rev. Rul. 57-187, 1957-1 C.B. 65 and Rev. Rul. 60-248, 1960-2 C.B. 35.**)

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On Behalf of Issuers, Continued

"63-20 Corporations"

"63-20 corporations" are formed under state nonprofit law for purposes of issuing obligations **on behalf of** a political subdivision. Rev. Proc. 82-26, 1982-1 C.B. 476, gives examples of circumstances in which the five criteria of Rev. Rul. 63-20, 1963-1 C.B. 24, will be met for purposes of obtaining an advance ruling (that obligations will be considered obligations of a state or a political subdivision) from the Service. All of the following criteria must be met:

- (1) the corporation must engage in activities which are essentially public in nature;
- (2) the corporation must be one which is not organized for profit (except to the extent of retiring indebtedness);
- (3) the corporate income must not inure to any private person;
- (4) the state or political subdivision thereof must have a beneficial interest in the corporation while the indebtedness remains outstanding and it must obtain bill legal title to the property of the corporation with respect to which the indebtedness was incurred upon the retirement of such indebtedness; AND
- (5) the corporation must have been approved by the state or political subdivision thereof, either of which must also have approved the specific obligations issued by the corporation.

(Rev. Rul. 63-20, 1963-1 C.B. 24 is attached to this module as Exhibit D-1.)

Beneficial Interest

Rev. Proc. 82-26, 1982-1 C.B. 476, provides that a state or political subdivision will have a beneficial interest in the "63-20 corporation" while the bonds are outstanding and obtain full legal title if (among other things):

- there is no agreement or obligation to transfer title to a third person within 90 days after the obligations are defeased,
- the financed property must retain at least 20 percent of its original value financed with the obligations, AND
- the financed property must retain at least 20 percent of its useful life on the latest maturity date of the obligations.

(Rev. Proc. 82-26 is attached to this module as Exhibit D-2.)

Other Issuers

Qualified Scholarship Bonds

A qualified scholarship funding bond is treated as a State or local bond. **(See IRC section 150(d).)** To issue qualified scholarship funding bond(s) the issuing corporation must satisfy the following criteria:

- (1) The corporation must be a not-for-profit established exclusively for the purpose of acquiring student loan notes incurred under the Higher Education Act of 1965, AND
 - (2) The corporation must be organized at the request of the state or one or more political subdivisions thereof and required by corporate charter and bylaws, or required by state law, to devote any income (after payment of expenses, debt service, and the creation of reserves) to purchase additional student loan notes or pay over any income to the United States.
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Volunteer Fire Departments

A volunteer fire department is treated as a political subdivision of a state if the following criteria are met. **(See IRC section 150(e).)**

1. The department is a "qualified volunteer fire department" with respect to an area within the jurisdiction of the state.
 2. Ninety-five percent or more of the net proceeds of the bond issue are used for the acquisition, construction, reconstruction, or improvement of a fire house (including land which is functionally related and subordinate thereto) or fire trucks to be used by such department.
 3. The qualified volunteer fire department is organized and operated to provide emergency medical services for persons in an area (within the jurisdiction of the political subdivision):
 - which is not provided with any other firefighting service, and
 - is required (by written agreement) by the political subdivision to furnish firefighting services in such area.
 4. The requirements of IRC sections 147(f) (public approval) and 149(d) (advance refunding) are met.
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Other Issuers, Continued

Indian Tribal Governments Treated as States for Certain Purposes	<p>An Indian tribal government shall be treated as a state for purposes of IRC section 103 (relating to State and local bonds) if certain additional requirements are met.</p> <p>(See IRC sections 7871(a)(4) and (c) for the additional requirements.)</p>
Definitions	<p>The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.</p> <p>(See IRC section 7871(c)(3)(E)(ii) and Rev. Proc. 83-87, 1983-2 C.B. 606 modified by Rev. Proc. 86-17, 1986-1 C.B. 550.)</p>
Additional Requirements	<p>Substantially all (95 percent) of the bond proceeds must be used to finance "essential governmental functions." Examples are schools, roads, government buildings, etc.</p> <p>(See Treas. Reg. section 1.141-5(d)(4).)</p>
Manufacturing Facilities	<p>Indian tribal governments cannot issue tax-exempt private activity bonds. However, they can issue bonds to finance manufacturing facilities located on Indian lands that are owned and operated by the Indian tribes and meet certain employment requirements.</p> <p>(See IRC section 7871(c)(3).)</p>

Section 2

Characteristics of Tax-Exempt Debt

Overview

Debt Must Be Valid Under State Law

Interest on the bonds issued by a political subdivision of a state is not excludable from gross income under IRC section 103(a) if, subsequent to the issuance, the bonds are determined to be invalid under state law.

Example:

City, a political subdivision of State, issued revenue bonds to finance the construction of a manufacturing facility. The bonds satisfied the requirements for exemption under IRC section 144(a)(4). Subsequently, the Supreme Court of State held that under state law the bonds were not valid obligations of City because State's voter approval requirement for issuance of bonds had not been satisfied. Because the bonds were not valid obligations of City under state law, the bonds are not the obligation of a state or political subdivision for purposes of IRC section 103(a). Therefore, interest on the bonds is not excludable from gross income. (See **Rev. Rul. 87-116, 1987-2 CB 44.**)

Debt Must Be an Exercise of Borrowing Power

In order for an obligation to exist for purposes of IRC section 103, it must be incurred in the exercise of the issuer's borrowing power. (See ***United States Trust Co. v Anderson*, 65 F.2d 575 (2nd cir. 1933).**)

Example:

Taxpayer's property was taken by condemnation. State court awarded taxpayer an amount for the property plus interest. State's obligation to pay compensation for property taken for public purposes arises as a result of the exercise of eminent domain, not as a result of, or in the course of, State's exercise of borrowing power. Therefore, interest received by the taxpayer from the State as a result of property condemnation for public purposes is not exempt from income tax as interest on an "obligation" of a State or political subdivision thereof. (See **Rev. Rul. 72-77, 1972-1 CB 28.**)

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Characteristics of Tax-Exempt Debt, continued

Debt Must Result from an Intent to Make a Loan

Interest on an obligation of a State or political subdivision is not excludable from gross income unless money was borrowed for its use with an obligation to repay.

Example:

Political subdivision proposed to issue bonds to finance the acquisition of land for construction of a dam. Property owners selling land may receive cash or negotiable warrants bearing interest at the current market rate. At the same time warrants are issued, the political subdivision will deposit bond proceeds equal to the face amount of the warrants issued to a special escrow (trust) account in a bank. Interest paid on the amounts placed in the special escrow account will be used to pay interest due on the warrants and the administrative costs. The holder of the warrant is entitled to receive the face amount of the warrant upon maturity plus annual interest. The political subdivision has made an immediate and full payment. Payment of principal and interest will be made from the amount deposited in the special escrow account and the earnings of such account. The political subdivision will not be liable for the warrants. Therefore, interest on the warrants to be issued by the political subdivision in exchange for land will not be excludable from the gross income of the holders of the warrants.

(See Rev. Rul. 74-13, 1974-1 C.B. 30.)

Debt Must Be an Obligation Regardless of the Source of Repayment

A loan will be treated as an "obligation" for purposes of IRC section 103 whether it is a general obligation of the political subdivision secured by its full faith and credit or whether repayment is restricted to revenues generated by the property purchased with the borrowed funds. The fact that the promise to repay bonds issued by a municipality was limited to the revenues to be derived from leasing the property financed with the bond proceeds did not cause interest on the bonds to be includable in gross income. It is not necessary that the obligation be a general one, pledging the general credit of the municipality or the use of its taxing power.

(See Rev. Rul. 54-106, 1956-1 C.B. 28.)

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Characteristics of Tax-Exempt Debt, continued

Substance Controls

The determination of whether a loan is made (whether debt constitutes an obligation) depends on the substance of a transaction rather than its form. (See **Treas. Reg. section 1.141-5(c)(1).**)

A lease or other contractual arrangement (for example, a management contract or an output contract) may in substance constitute a loan (debt) if the arrangement transfers tax ownership of the facility to a nongovernmental person.

(See **Treas. Reg. section 1.141-5(c)(1).**)

Interest on the Debt Must Be Interest for Federal Tax Purposes

Only “interest” on a municipal bond can be excluded from gross income by a bond purchaser.

The Supreme Court has defined interest as the amount one has contracted to pay for the use of borrowed money, and as the compensation paid for the use or forbearance of money.

(See *Old Colony Railroad Co. v. Commissioner*, 284 U.S. 552 (1932) and also **Rev. Rul. 69-188, 1969-1 C.B. 54.**)

Interest does not include separate charges made for investigating the prospective borrower and his security, closing costs of the loan and papers drawn in connection therewith, or fees paid to a third party for servicing and collecting a loan.

(See **Rev. Rul. 69-188, 1969-1 CB 54.**)

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Characteristics of Tax-Exempt Debt, continued continued

Insurance Proceeds as Tax-Exempt Interest

Defaulted interest paid by an independent insurance company pursuant to a bond insurance policy purchased by the issuer (**Rev. Rul. 72-134, 1972-1 C.B. 29**) or the underwriter (**Rev. Rul. 72-575, 1972-1 C.B. 74**) is excludable from the gross income of the bondholders.

Example:

In Rev. Rul. 94-42, 1994-2 C.B. 15, County issued zero coupon bonds with a 30-year maturity payable solely from revenues. One year later, the holder of the bonds purchased insurance sufficient to pay all scheduled debt service on the bonds. At that time, there was significant risk that revenues from the bond-financed facility would be insufficient to pay debt service. The insurer purchased treasury obligations sufficient to pay all the debt service on the bonds. The holder of the bonds then sold the bonds at a profit. The Service found that amounts paid or accrued under an agreement for defaulted interest are not excludable from gross income if the agreement is not incidental or is in substance a separate debt instrument or similar investment when purchased.

A bond insurance policy is treated as both incidental and not a separate debt instrument or similar investment if, at the time it is purchased:

- the amount paid to obtain it is reasonable,
- the purchase is customary, and
- it is consistent with the expectation that the issuer of the bonds, rather than the insurer, will pay debt service on the bonds.

The result is the same regardless of whether the holder acquired the bonds at original issuance or on the secondary market.

Section 3

Private Activity Bonds

Overview

Definition "Private activity bond" means any bond issued as part of an issue which meets:

- the private business use test, and
- the private security or payment test, OR
- the private loan financing test.

General Rule Interest on a private activity bond is not excludable from gross income under IRC section 103(a) unless the bond is a qualified bond.

Purpose of the General Rule The general rule limits the volume of tax-exempt bonds that finance the activities of nongovernmental persons, without regard to whether a financing actually transfers benefits of tax-exempt financing to a nongovernmental person.

It also identifies arrangements that have the potential to transfer the benefits of tax-exempt financing, as well as arrangements that actually transfer these benefits.

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Reasonable Expectations

Introduction

A bond issue is an issue of private activity bonds if the issuer reasonably expects, as of the issue date, that the issue will meet either:

- the private business tests (business use AND security or payment) OR
 - the private loan financing test.
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Term of Issue

The reasonable expectations test must take into account reasonable expectations about events and actions over the entire stated term of an issue.

Deliberate Actions

Introduction An issue is also an issue of private activity bonds if the issuer takes a deliberate action, subsequent to the issue date, that causes the conditions of either the private business tests (business use AND security or payment) or the private loan financing test to be met.

Definition A deliberate action is any action taken by the issuer that is within its control.

Intent An intent to violate the requirements of IRC section 141 is not necessary for an action to be deliberate.

Safe Harbor Exceptions An action is not treated as deliberate if:

- it would be treated as an involuntary or compulsory conversion under IRC section 1033, OR
- it is taken in response to a regulatory directive made by the federal government.

Timing A deliberate action occurs on the date the issuer enters into a binding contract with a nongovernmental person for use of the financed property that is not subject to any material contingencies.

Remedial Actions See **Treas. Reg. section 1.141-12** for certain remedial actions that prevent a deliberate action with respect to property financed by an issue from causing that issue to meet the private business use test or the private loan financing test.

See also Module L of this text for a complete discussion of these rules.

Section 4

The Private Business Use Test

Overview

General Rule	Interest on a private activity bond is not excludable from gross income under IRC section 103(a) if more than 10 percent of the proceeds of the issue are to be used for any private business use. Any activity carried on by a person other than a natural person is treated as a trade or business.
Business Test	The 10 percent private business use test is met if <i>more than</i> 10 percent of the proceeds of an issue are used in a trade or business of a nongovernmental person.
Use	The use of bond proceeds includes use of bond proceeds or use of the bond-financed property.
Indirect Use	<p>In determining whether an issue meets the private business use test, it is necessary to look to both the indirect and direct uses of proceeds.</p> <p>For example, a facility is treated as being used for a private business use if it is:</p> <ol style="list-style-type: none">1. leased to a nongovernmental person (indirect use) and subleased to a governmental person, or2. leased to a governmental person and then subleased to a person, <p>provided that in each case the nongovernmental person's use is in a trade or business.</p> <p>Similarly, the issuer's use of the proceeds to engage in a series of financing transactions for property to be used by nongovernmental persons in their trades or businesses may cause the private business use test to be met.</p>
Aggregation	The use of proceeds by all nongovernmental persons is aggregated to determine whether the private business use test is met.

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Overview, Continued

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Types of Private Business Use Arrangements (Treas. Reg. section 1.141-3(b))

General Rule Both actual and beneficial use by a nongovernmental person may be treated as private business use. In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer.

Private Business Users In general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of:

- ownership;
- actual or beneficial use of property pursuant to a lease,
- a management or incentive payment contract; or
- certain other arrangements such as a take-or-pay or other output-type contract.

The special rules for output contracts are in Treas. Reg. section 1.141-7T and 8T. These rules apply to bonds issued on or after February 23, 1998 that are subject to section 1301 of the Tax Reform Act of 1986.

Ownership Ownership by a nongovernmental person of financed property is private business use of that property. For this purpose, ownership refers to ownership for federal income tax purposes.

Leases The lease of financed property to a nongovernmental person is private business use of that property. For this purpose, any arrangement that is properly characterized as a lease for federal income tax purposes is treated as a lease.

Research Agreements An agreement by a nongovernmental person to sponsor research with respect to financed property results in private business use of that property if the sponsor is treated as the lessee or owner of financed property for federal income tax purposes.

(See Rev. Proc. 97-14, 1997-1 C.B. 634, for research agreements that do not result in private use. This is included in this module as Exhibit D-3.)

Management Contracts Resulting in Private Business Use (Treas. Reg. section 1.141-3(b)(4))

General Rule A management contract with respect to financed property generally results in private business use of that property if the contract provides for compensation for services rendered with compensation based, in whole or in part, on a share of net profits from the operation of the facility.

(See Rev. Proc. 97-13, 1997-1 C.B. 632, for contracts that do not result in private use. This is included in this module as Exhibit D-4.)

Definition A management contract is a management, service, or incentive payment contract between a governmental person and a service provider under which the service provider provides services involving all, a portion of, or any function of, a facility. For example, a contract for the provision of management services for an entire hospital, a contract for specific department of a hospital, and an incentive payment contract for physician services to patients of a hospital are each treated as a management contract.

Treatment as Lessee A management contract with respect to financed property results in private business use of that property if the service provider is treated as the lessee or owner of financed property for federal tax purposes.

Arrangements That Are Generally Not Treated as Management Contracts (Treas. Reg. section 1.141-3(b)(4)(iii))

Incidental Contracts

A contract for services that are solely incidental to the primary governmental function or functions of a financed facility (for example, contracts for janitorial, office equipment repair, hospital billing, or similar services) is **not** a management contract.

Hospital Admitting Privileges

The mere granting of admitting privileges by a hospital to a doctor is **not** a management contract, even if those privileges are conditioned on the provision of de minimis services, if those privileges are available to all qualified physicians in the area consistent with the size and nature of its facilities.

Operation of Public Utilities

A contract to provide for the operation of facilities that consists predominantly of public utility property, is **not** a management contract if the only compensation is the reimbursement of actual and direct expenses of the service provider and reasonable administrative overhead expenses of the service provider.

Service Providers

A contract to provide for services is not a management contract if the only compensation is reimbursement of the service provider for actual and direct expenses paid by the service provider to unrelated parties.

Use by the General Public

Public Use Use of financed property by nongovernmental persons in their trades or businesses is treated as general public use only if the property is intended to be available and in fact is reasonably available for use on the same basis by natural persons not engaged in a trade or business.

Example:

State issues bonds to purchase land and construct a hotel for use by the general public (that is, tourist, visitors, and business travelers). The bond documents provide that State will own and operate the project for the term of the bonds. State will not enter into a lease or license with any user for use of rooms for a period longer than 180 days (although users may actually use rooms for consecutive periods in excess of 180 days). Use of the hotel by hotel guests who are traveling in connection with trades or businesses of nongovernmental persons is not a private business use of the hotel by these persons because the hotel is intended to be available and in fact is reasonably available for use on the same basis by natural persons not engaged in a trade or business.

(See Treas. Reg. section 1.141-3(f) (Example 12).)

Facilities Not Available for Use by the General Public Private business use may be established solely on the basis of a special economic benefit to one or more nongovernmental persons. This is true even if those nongovernmental persons have no special legal entitlement to use of the property in the case of financed property that is not available for use by the general public.

Priority Rights An arrangement that conveys priority rights to the use or capacity of a facility is NOT use on the same basis as the general public. This type of use generally results in private business use.

(See Treas. Reg. section 1.141-3(b)(7)(i).)

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Use by the General Public, Continued

180 Day Use Arrangements longer than 180 days are NOT treated as general public use.
(See **Treas. Reg. section 1.141-3(c)(3).**)

Economic Benefits In the case of a tax-exempt financed facility that is NOT available for use by the general public, private use may be established solely on the basis of economic benefits to a nongovernmental person, even if the nongovernmental person has no special legal entitlement.

(See **Treas. Reg. section 1.141-3(b)(7)(ii).**)

Special Economic Benefit Test In determining whether special economic benefit gives rise to private business use it is necessary to consider all of the facts and circumstances, including one or more of the following factors:

- Whether the financed property is functionally related or physically proximate to property used in the trade or business of a nongovernmental person;
 - Whether only a small number of nongovernmental persons receive the special economic benefit; AND
 - Whether the cost of the financed property is treated as depreciable by any nongovernmental person.
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Other Exceptions to the Private Use Rule (Treas. Reg. section 1.141-3(d))

Agents Use of proceeds by nongovernmental persons solely in their capacity as agents of a governmental person is not private business use.

Use Incidental to Financing Use by a nongovernmental person that is solely incidental to a financing arrangement is not private business use. For example, bond trustees, servicers, and guarantors are generally not treated as private business users.

90 Day Use Use by a nongovernmental person is not private business use if:

- The term of use under the arrangement, including all renewal options, is less than 90 days;
- The arrangement would be treated as general public use, except that it is not available for use on the same basis by natural persons not engaged in a trade or business because generally applicable and uniformly applied rates are not reasonably available to natural persons not engaged in a trade or business; and
- The property is not financed for the principal purpose of providing that property for use by that nongovernmental person.

30 Day Use Use by a nongovernmental person is not private business use if:

- The term of use, including all renewal options, is not longer than 30 days;
- The arrangement is a negotiated arm's-length arrangement, and compensation under the arrangement is at fair market value; AND
- The property is not financed for a principal purpose of providing that property for use by that nongovernmental person.

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Other Exceptions to the Private Use Rule (Treas. Reg. section 1.141-3(d)), Continued

Temporary Use by Developers Use during an initial development period by a developer of an improvement that carries out an essential governmental function is not private business use if the issuer and the developer reasonably expect on the issue date:

- to proceed with all reasonable speed to develop the improvement and property benefited by that improvement, and
 - to transfer the improvement to a governmental person, if the improvement is in fact transferred to a governmental person promptly after the property benefited by the improvement is developed.
-

Incidental Use Incidental use of a financed facility, that does not exceed 2.5 percent of the proceeds of the issue, is disregarded if:

- **Except for vending machines, pay telephones, kiosks, and similar uses,** the use does not involve the transfer to the nongovernmental person of possession and control of space that is separated from other areas of the facility by walls, partitions, or other physical barriers;
 - The nonpossessory use is not functionally related to any other use of the facility by the same person (other than a different nonpossessory use); AND
 - All nonpossessory uses of the facility do not, in the aggregate, involve the use of more than 2.5 percent of the facility.
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Other Exceptions to the Private Use Rule (Treas. Reg. section 1.141-3(d)), Continued

Qualified Improvements Proceeds that provide a governmental owned improvement to a governmental owned building are not used for a private business use if:

- The building was placed in service more than one year before the construction or acquisition of the improvement is begun;
 - The improvement is not exclusively for any private business use;
 - No portion of the improved building or any payments in respect of the improved building are taken into account under IRC section 141(b)(2)(A) (the private security test); AND
 - No more than 15 percent of the building is used for a private business use.
-

Measurement of Private Business Use (Treas. Reg. section 1.141-3(g))

General Rule	The amount of private business use of property determined according to the average percentage of private business use of that property during the measurement period.
Measurement Period	<p>The measurement period of property financed by an issue begins on the later of:</p> <ul style="list-style-type: none">• the issue date of that issue, OR• the date the property is placed in service. <p>The measurement period ends on the earlier of:</p> <ul style="list-style-type: none">• the last date of the reasonably expected economic life of the property, OR• the latest maturity date of any bond of the issue financing the property (determined without regard to any optional redemption dates).
Measurement Period When Refunding	For short-term obligations that the issuer reasonably expects to refund (such as bond anticipation notes), the measurement period is based on the latest maturity date of any bond of the last refunding issue with respect to the financed property (determined without regard to any optional redemption dates).
Use Resulting from Ownership	The amount of private business use resulting from ownership by a nongovernmental person is the greatest percentage of private business use in any one-year period.
Anti-Abuse Rule	<p>If an issuer establishes the term of an issue:</p> <ul style="list-style-type: none">• for a period that is longer than is reasonably necessary for the governmental purposes of the issue, or• for a principal purpose of increasing the permitted amount of private business use, <p>the Commissioner may determine the amount of private business use according to the greatest percentage of private business use in any one-year period.</p>

Continued on next page

Measurement of Private Business Use (Treas. Reg. section 1.141-3(g)), Continued

Average Use The average percentage of private business use is the average of the percentages of private business use during the one-year periods within the measurement period.

Determining Average Use Average private business use during one-year is determined by comparing the amount of private business use during the year to the total amount of all use (private business use and government use) during the year. Periods of nonuse are disregarded when computing percentage use.

For example, the average amount of private business use of a garage with unassigned spaces is generally based on the number of spaces used for private business use as a percentage of the total spaces.

Simultaneous Use In general, if a facility in which governmental and private business use occur simultaneously, the facility is treated as having private business use. For example, a governmental owned facility that is leased or managed by a nongovernmental person in a manner that results in private business use is treated as entirely used for a private business use.

If, however, there is also private business use and actual government use on the same basis, the average amount of private business use may be determined on a reasonable basis that properly reflects the proportionate benefit to be derived by the various users of the facility.

For example, the average amount of private business use of a garage with unassigned spaces is generally based on the number of spaces used for private business use as a percentage of the total number of spaces.

Continued on next page

Measurement of Private Business Use (Treas. Reg. section 1.141-3(g)), Continued

Fair Market Value

If the private business use is reasonably expected to have a greater fair market value than the government use, the average amount of private business use must be determined according to the relative reasonably expected fair market values of use rather than another measure, such as average time of use.

Stadium Example:

City L issues bonds and uses all of the proceeds to construct a stadium. L enters into a long-term contract with a professional sports team T under which T will use the stadium 20 times during the year. This use will occur on nights and weekends. L reasonably expects that the stadium will be used more than 180 other days each year, none of which will give rise to private business use. This expectation is based on a feasibility study and historical use of the old stadium that is being replaced by the new stadium. There is no significant difference in the value of T's uses when compared to the other uses that T is reasonably expected to make for its use. Assuming no other private business use, the issue does not meet the private business use test because not more than 10 percent of the use of the facility is for a private business use. (See **Treas. Reg. section 1.141-3(g)(8) Example 2.**)

Airport Example:

City N issues bonds to finance the construction of an airport terminal. Eighty percent of the leasable space of the terminal will be leased to private air carriers. The remaining 20 percent of the leasable space will be used, for the term of the bonds, by N for its administrative purposes. The common areas of the terminal, including waiting areas, lobbies, and hallways are treated as 80 percent used by the air carriers for purposes of the private business use test. (See **Treas. Reg. section 1.141-3(g)(8) Example 3.**)

Section 5

Private Security or Payment Test

Overview

Introduction The private security or payment test is the second part of the private business test. If it **and** the private business use test described above are satisfied, a bond will be a private activity bond.

Private Security or Payment Test Except as otherwise provided in Treas. Reg. section 1.141-4, an issue meets the private security or payment test if the payment of the principal of, or the interest on, more than 10 percent of the proceeds of such issue is (under the terms of such issue or any underlying arrangement directly or indirectly) secured by an interest in:

- property used or to be used for a private business use, or
 - payments in respect of such property, OR
 - to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.
-

In this section This section contains the following topics:

Topic	See Page
Overview	D-30
Measurement of Private Payment and Security	D-31
Private Payments for Use	D-32
Private Security Test	D-33
Generally Applicable Taxes	D-34
Waste Remediation Bonds	D-36

Measurement of Private Payment and Security (Treas. Reg. section 1.141-4(b))

Present Value In determining whether an issue meets the private security or payment test, the present value of the payments or property taken into account is compared to the present value of the debt service to be paid over the term of the issue. (See **Treas. Reg. section 1.41-4(g) Example 3.**)

Module M of this text discusses the computation of present value.

Debt Service Debt service does not include any amount paid or to be paid from sale proceeds or investment proceeds. Debt service is adjusted to take into account payments and receipts that adjust the yield on an issue for purposes of IRC section 148(f).

Private Payments for Use

Direct and Indirect Both direct and indirect payments made by any nongovernmental person that is treated as using proceeds of the issue are taken into account as private payments to the extent allocable to the proceeds used by that person.

Not to Exceed Actual Use Payments are taken into account only to the extent that they are made for the period of time that proceeds are used for a private business use.

Payments cannot exceed the percentage of private use. **(See Treas. Reg. section 1.141-4(c)(2)(i)(B).)**

Payments for Other Property Private payments include payments made with respect to property financed with bond proceeds, even if such payments are not made by the private business user of bond proceeds. However, such payments are not taken into account if they are reasonably allocable to other property being used by the person making the payment.

(See Treas. Reg. section 1.141-4(g) (Examples 4 and 5).)

Payments for Operating Expenses Ordinary and necessary expenses properly allocable to the operation and maintenance of the financed property would not be considered a payment for the use of the proceeds allocable to that space.

Payments for Overhead Payments attributable to general overhead and administrative expenses, not directly attributable to operations and maintenance, are payments for use.

Refinanced Debt Service If the debt service on a bond issue is paid with proceeds of a refunding issue, the bond issue meets the private security or payment test if (and to the same extent that) the refunding issue meets the private security or payment test.

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Private Security Test (Treas. Reg. section 1.141-4(d))

General Rule Property used or to be used for a private business use and payments in respect of the property are treated as private security if any interest in that property or payments secures the payment of debt service on the bonds for this purpose.

For example, payments made by members of the general public for use of a facility used for a private business use (a facility that is the subject of a management contract that results in private business use) are taken into account as private security to the extent that they are made for the period of time that property is used by a private business user.

Security Taken into Account The property that is the security for, or the source of, the payment of debt service on an issue need not be property financed with proceeds, to the extent it is provided (directly or indirectly) by a user of proceeds of the issue.

Allocation of Security In general, property or payments from the disposition of that property that are taken into account as private security are allocated to each issue secured by the property or payments on a reasonable basis that takes into account bondholders' rights to the payments or property upon default.

Generally Applicable Taxes (Treas. Reg. section 1.141-4(e))

General Rule For purposes of the private security or payment test, generally applicable taxes are not taken into account (that is, are not payments from a nongovernmental person and are not payments in respect of property used for a private business use).

Definition A generally applicable tax is an enforced contribution exacted pursuant to legislative authority in the exercise of the taxing power that is imposed and collected for the purpose of raising revenue to be used for governmental purposes.

Uniform Tax Rate A generally applicable tax must have a uniform tax rate that is applied to all persons of the same classification in the appropriate jurisdiction and a generally applicable manner of determination and collection.

Special Charges A tax or a payment in lieu of tax that is limited to the property or persons benefited by an improvement is not a generally applicable tax.

Impermissible Agreements The following are examples of agreements that cause a tax to fail to have a generally applicable manner of determination and collection:

- an agreement to be personally liable on a tax that does not generally impose personal liability;
 - an agreement to provide additional credit support such as a third party guarantee, or to pay unanticipated shortfalls;
 - an agreement regarding the minimum market value of property subject to property tax; AND
 - an agreement not to challenge or seek deferral of the tax.
-

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Generally Applicable Taxes (Treas. Reg. section 1.141-4(e)), Continued

Permissible Agreements

The following are examples of agreements that do not cause a tax to fail to have a generally applicable manner of determination and collection:

- an agreement to use a grant for specified purposes (whether or not that agreement is secured);
 - a representation regarding the expected value of the property following the improvement;
 - an agreement to insure the property and, if damaged, to restore the property; a right of a grantor to rescind the grant if property taxes are not paid; AND
 - an agreement to reduce or limit the amount of taxes collected to further a bona fide governmental purpose.
-

Payments in Lieu of Taxes

A tax equivalency payment and any other payment in lieu of a tax is treated as a generally applicable tax if:

- The payment is commensurate with and not greater than the amounts imposed by a statute for a tax of general application; AND
 - The payment is designed for a public purpose and is not a special charge as described above.
-

Waste Remediation Bonds (Treas. Reg. section 1.141-4(f))

Purpose	This section applies to bonds issued to finance hazardous waste clean-up activities on privately owned land.
General Rule	Payments from nongovernmental persons who are not (other than coincidentally) either users of the site being remediated (cleaned up) or persons potentially responsible for disposing of hazardous waste on that site are not taken into account as private security.
Generally Applicable Requirement	<p>This provision applies only if the payments are made pursuant to either</p> <ul style="list-style-type: none">• a generally applicable state or local taxing statute, or• a state or local statute that regulates or restrains activities on an industrywide basis of persons who are engaged in generating or handling hazardous waste, or in refining, producing, or transporting petroleum, provided that those payments do not represent, in substance, payment for the use of proceeds.
Private Users	<p>The payments are not taken into account as private payments if:</p> <ul style="list-style-type: none">• payments from nongovernmental persons who are either users of the site being remediated or persons potentially responsible for disposing of hazardous waste on that site do not secure (directly or indirectly) the payment of principal of, or interest on, the bonds under the terms of the bonds.

(See Treas. Reg. section 1.141-4(f)(3) for additional requirements.)

Section 6

Private Loan Financing Test (Treas. Reg. section 1.141-5))

Overview

General Rule Bonds of an issue are private activity bonds if more than the lesser of five percent or \$5 million of the proceeds of the issue is to be used (directly or indirectly) to make or finance loans to persons other than governmental persons.

Measurement Test The amount actually loaned to a nongovernmental person is NOT discounted to reflect the present value of the loan repayments when determining whether the private loan financing test is met.

Definition of Private Loan Any transaction that is generally characterized as a loan for federal income tax purposes is a loan for purposes of this section.

In addition, a loan may arise from the direct lending of bond proceeds or may arise from transactions in which indirect benefits that are the economic equivalent of a loan are conveyed.

The determination of whether a loan is made depends on the substance of a transaction rather than its form.

Nonpurpose Loans A loan that is a nonpurpose investment does not cause the private loan-financing test to be met.

For example, proceeds invested in loans, such as obligations of the United States:

- during a temporary period,
- as part of a reasonably required reserve or replacement fund,
- as part of a refunding escrow, or
- as part of a minor portion (as each of those terms are defined in Treas. Reg. section 1.148-1 or 1.148-2)

are generally not treated as loans under the private loan financing test.

Continued on next page

Overview, Continued

Prepayment Loans

A prepayment for property or services is treated as a loan for purposes of the private loan financing test if a principal purpose for prepaying is to provide a benefit of tax-exempt financing to the seller.

(See Treas. Reg. section 1.141-5(c)(2)(ii) for limited exceptions.)

Tax Assessment Loans

A **tax assessment loan** is not a loan for purposes of Treas. Reg. section 1.141-5 (the private loan financing test) if certain requirements are met. A “tax assessment loan” arises when a governmental person permits or requires property owners to finance any governmental tax or assessment of general application for an essential governmental function that satisfies the following requirements:

- The tax or assessment must be an enforced contribution that is imposed and collected for the purpose of raising revenue to be used for a specific purpose (that is, to defray the capital cost of an improvement). The tax or assessment must be imposed pursuant to a state law of general application.
 - The mandatory tax or assessment that gives rise to a tax assessment loan must be imposed for one or more specific, essential governmental functions. **(See Treas. Reg. section 1.141-5(d)(4)(ii) for examples of essential governmental functions.)**
 - Owners of both business and nonbusiness property benefiting from the financed improvements must be eligible, or required, to make deferred payments of the tax or assessment giving rise to tax assessment loan on an equal basis (the equal basis requirement).
-

Section 7

Unrelated or Disproportionate Use Test (Treas. Reg. section 1.141-9))

Overview

General Rule Under IRC section 141(b)(3) (the unrelated or disproportionate use test), an issue meets the private business tests if the amount of private business use and private security or payments attributable to unrelated or disproportionate private business use exceeds five percent of the proceeds of the issue. The test is applied as follows:

- First, determine whether a private business use is related to a government use.
 - Next, examine private business use that relates to the government to determine whether it is disproportionate to that government use.
 - Then, aggregate all the unrelated use and disproportionate use financed with the proceeds of an issue to determine compliance with the unrelated or disproportionate use test.
-

Unrelated Use Whether a private business use is related to a government use financed with the proceeds of an issue is determined on a case-by-case basis, emphasizing the operational relationship between the government use and the private business use. In general, a facility that is used for a related private business use must be located within, or adjacent to, the governmentally used facility.

Use for Same Purpose as Government Use Use of a facility by a nongovernmental person for the same purpose as use by a governmental person is not treated as unrelated use if the government use is not insignificant. Similarly, a use of a facility in the same manner both for private business use that is related use and private business use that is unrelated use does not result in unrelated use if the related use is not insignificant.

(See Treas. Reg. section 1.141-9(b)(2) for examples.)

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Unrelated or Disproportionate Use Test, Continued

Disproportionate Use A private business use is disproportionate to a related government use only to the extent that the amount of proceeds used for that private business use exceeds the amount of proceeds used for the related government use.

Example: School and remote cafeteria

County issues bonds with proceeds of \$20 million and uses \$18.1 million of the proceeds for construction of a new school building and \$1.9 million of the proceeds for construction of a privately operated cafeteria in its administrative office building, which is located at a remote site. The cafeteria secures the bonds, in part. The \$1.9 million of proceeds is unrelated to the government use (that is, school construction) financed with the bonds and exceeds five percent of \$20 million. Thus, the issue meets the private business tests. **(See Treas. Reg. section 1.141-9(e) Example 1.)**

Example: Disproportionate use of garage

County Z issues bonds with proceeds of \$20 million for construction of a hospital with no private business use (\$17 million); renovation of an office building with no private business use (\$1 million); and construction of a garage that is entirely used for private business use (\$2 million). The use of the garage is related to the use of the office building but not to the use of the hospital. The private business use of the garage results in \$1 million of disproportionate use because the proceeds used for the garage (\$2 million) exceed the proceeds used for the related government use (\$1 million). The bonds are not private activity bonds, however, because the disproportionate use does not exceed five percent of the proceeds of the issue. **(See Treas. Reg. section 1.141-9(e) Example 4.)**

Section 8

Effective Dates

Overview

**1997
Regulations**

The private activity bond regulations (Treas. Reg. sections 1.141-0 through 1.141-16 and 1.145-0 through 1.145-2, along with others) apply to bonds issued on or after May 16, 1997.

**Retroactive
Application**

To promote compliance, the 1997 regulations generally permit elective, retroactive application of the regulations in whole, **but not in part**, to outstanding issues.

The 1997 regulations also permit elective retroactive application of any of the following to outstanding issues:

- Treas. Reg. section 1.141-12 (the remedial action rules),
 - Treas. Reg. section 1.141-3(b)(4) (the management contract rules), AND
 - Treas. Reg. section 1.141-3(b)(6) (the research agreement rules).
-

1986 Act

See **sections 1311 and 1312 of the Tax Reform Act of 1986** for effective dates and transition rules for the 1986 Act.

Section 9

Audit Techniques

Overview

IRC Section 141 Private Activity Bond (“PAB”) Tests

Review records of issuer to determine if private activity and private payments/security tests have been met. Meeting the tests causes a bond to become a private activity bond. Some of these records are:

- contracts and agreements,
- sources of revenue - to disclose payments from private users,
- in-house publications - to disclose private activities.

Tour the bond-financed facilities. Note any private use.

The allocation for partial use is similar to UBIT between related and unrelated use.

Remember that:

- Only 10 percent private activity and payment/security makes a bond a private activity bond.
 - Both private business use AND private payment/security tests must be met in order to have a private activity bond.
-

Example: Private Activity Bond

You have reviewed the income sources for the issuer and have noticed that they are receiving rent from a fast food restaurant. You ask what this is for. The information you receive leads you to believe that these activities could cause the bonds to become private activity bonds.

- You become aware of a potential issue through your review of the income sources.
 - You must research the complex private activity bond regulations.
 - You must make sure that both the business use and the payments are related to the bonds.
-

Summary

Review of Module D

Entities which are qualified to issue tax-exempt bonds are:

- political subdivisions, AND
- on behalf of issuers.

In order to be tax-exempt, the debt must possess certain characteristics. The debt must:

- be valid under state law,
- be an exercise of borrowing power,
- result from an intent to make a loan,
- be an obligation regardless of the source of repayment, AND
- be interest for federal tax purposes.

A private activity bond is any bond which meets:

- the private business use test, AND
- the private security or payment test, OR
- the private loan financing test.

The interest on a private activity bond cannot be tax-exempt, unless the bond is a qualified bond.

Both the reasonable expectations of the issuer on the issuance date and subsequent deliberate actions of the issuer are considered when determining if the private activity bond tests are met.

Preview of Module E

Module E introduces you to exempt facility bonds described in IRC section 142. These bonds are the first specific type of qualified private activity bonds to be discussed in the text. Other types will follow in Modules F through I.

There are many different kinds of exempt facility bonds, all of which are discussed in the module. Some rules in IRC section 142 apply to all types of exempt facility bonds while others apply only to a specific type of exempt facility bond.

The following sections also apply to exempt facility bonds:

- IRC section 141, AND
 - IRC sections 146 through 150.
-

Class Problem

FACTS:

On June 1, 1997, City L issues revenue bonds using all of the proceeds to construct a stadium that it will own. The stadium is placed in service on June 1, 1999. L enters into a 20-year contract with a professional sports team, T, under which **T** will use the stadium **20 times** during the year. This use will occur on nights and weekends. L reasonably expects that the stadium will be used **not more than 80 other times each year**, none of which will give rise to private business use. This expectation is based on a feasibility study and historical use of the old stadium that is being replaced by the new stadium. There is no significant difference in the value of T's use when compared to the other uses of the stadium.

T will not make any payments for its use of the stadium. The security for the bonds will be a ticket tax imposed on each person purchasing a ticket for T's events at the stadium. This ticket tax is unique to this stadium and is not imposed on other facilities in City L.

REQUIRED:

1. Prepare the business use schedule using the following information and "Mod D-use(st)" on your floppy disk:
 - Economic life of stadium - 40 years
 - Maturity date of bonds - June 1, 2027
2. Prepare the payment schedule using the following information and "Mod-D-Payment(st)" on your floppy disk:

Bond issue amount	\$100,000,000.
Fixed yield	5.348912 percent (30/360 basis)
Ticket tax	<ul style="list-style-type: none">• \$3.00/ticket• 50,000 attendees per event for T• Payments are calculated annually on June 1
Total annual operating/maintenance costs for stadium. Costs are paid ratably throughout the year.	\$1,000,000
Total annual administrative costs for the stadium. Costs are paid ratably throughout the year.	\$400,000

END OF MODULE D