

## Part III

### Administrative, Procedural, and Miscellaneous

26 CFR 601.601: Rules and regulations  
(Also Part I, §§ 103; 148; 1.148-3, 1.148-13T)

#### Claims for Recovery of Overpayments of Arbitrage Rebate and Similar Payments on Tax-exempt Bonds

Rev. Proc. 2008-37

#### SECTION 1. PURPOSE

In general, this revenue procedure provides guidance to issuers of tax-exempt bonds regarding the terms and procedures for claims for recovery of overpayments under § 1.148-3(i) of the Income Tax Regulations of amounts paid to the United States with respect to the arbitrage rebate requirement under § 148(f) of the Internal Revenue Code, the penalty in lieu of rebate provisions under § 148(f)(4)(C)(vii) and (viii), or the yield reduction payment provision under § 1.148-5(c) for purposes of the arbitrage investment restrictions generally under § 148. This revenue procedure also establishes a deadline for claims for these recoveries of overpayments which requires that issuers file these claims by no later than the date that is two years after the final computation date with respect to the applicable issue of bonds under § 1.148-3(e)(2), or two years from July 1, 2008, for an issue of bonds whose final computation date is on or before June

24, 2008. Further, this revenue procedure provides that claims for recovery of overpayments of rebate or penalty in lieu of rebate with respect to bonds that are subject to § 1.148-13T of the temporary Income Tax Regulations published in the Federal Register on May 18, 1992 (57 Fed. Reg. 20971) (the 1992 regulations) will be treated in the same manner as claims for recovery of overpayments made under § 1.148-3(i).

## SECTION 2. BACKGROUND

.01 Under § 103(a) and (b)(2), the exclusion from gross income of interest on any State or local bond does not apply to interest on an arbitrage bond within the meaning of § 148.

.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 arbitrage rebate amounts described in § 148(f)(2) for the issue (rebate) in accordance with § 148(f)(3).

.03 Section 148(f)(3) provides, in part, that, except to the extent provided by the Secretary, rebate 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 discharged.

.04 Sections 148(f)(4)(C)(vii) and (viii) permit issuers of certain construction issues to elect to pay a penalty in lieu of rebate (penalty) in the manner and amount described in § 148(f)(4)(C)(vii) and (viii).

.05 Section 1.148-5(c)(1) permits issuers to pay yield reduction payments that may be taken into account in determining the yield on an issue for arbitrage

purposes under § 148 (yield reduction) in the circumstances and manner described in § 1.148-5(c).

.06 Section 1.148-13T of the 1992 regulations provides rules for recovering an overpayment of rebate or penalty in lieu of rebate with respect to certain bonds issued before July 1, 1993. Under § 1.148-13T(a) and (c)(1) of the 1992 regulations, an issuer may recover an overpayment of rebate or penalty to the extent that recovery on the date requested would not result in an additional rebate amount as of the date requested if the issuer proves to the satisfaction of the Commissioner that the overpayment occurred and was paid as a result of a mistake.

.07 Section 1.148-3(i)(1) provides that, in general, an issuer may recover an overpayment of rebate by establishing to the satisfaction of the Commissioner that the overpayment occurred. An overpayment is the excess of the amount paid over the sum of the “rebate amount” (as defined in § 1.148-3(b)), as of the most recent “computation date” (as defined in § 1.148-3(e)) and all amounts that are otherwise required to be paid under § 148 as of the date the recovery is requested.

.08 In general, overpayments of penalty and yield reduction are treated in the same manner as overpayments of rebate. See generally §§ 1.148-3(i)(1), 1.148-7(k)(3), and 1.148-5(c)(1) and (2).

.09 In Rev. Proc. 92-83, 1992-2 C.B. 487, the Internal Revenue Service (the Service) sets forth procedures for claims for recovery of overpayments of rebate.

.10 In Announcement 2001-115, 2001-2 C.B. 539, the Service announced

that Form 8038-R, Request for Recovery of Overpayments Under Arbitrage Rebate Provisions, replaces the procedures set forth in Rev. Proc. 92-83.

.11 Under 26 U.S.C. § 7422, in general, a civil action may not be commenced against the United States to recover any internal revenue tax, any applicable penalty or “any sum alleged to have been excessive or in any manner wrongly collected” until a claim for refund has been duly filed according to the provisions of law in that regard. The Service has determined that this provision applies to claims with respect to overpayments of rebate, penalty, and yield reduction because the amount of any such overpayment is covered within the “any sum” language of § 7422. *Cf. United States v. Clintwood Elkhorn Mining Co.*, 128 S. Ct. 1511 (2008).

### SECTION 3. PROCEDURE FOR FILING CLAIMS FOR RECOVERY OF OVERPAYMENT OF REBATE, PENALTY, AND YIELD REDUCTION

.01 Form 8038-R. This section sets forth terms and procedures for filing claims for recovery of an overpayment of rebate, penalty, or yield reduction with respect to an issue (an overpayment amount). In order to receive any recovery of an overpayment amount, an issuer must duly file a claim for recovery of an overpayment amount (a refund claim) on the then-applicable form (form) and at the then-applicable place of filing, as announced by the Service from time to time. Presently, a refund claim shall be made by completing Form 8038-R and filing the form and any attachments thereto with the Internal Revenue Service, Ogden Submission Processing Center, Ogden, Utah, 84201 (Ogden Center).

.02 Filing Deadline for Refund Claims on Overpayment Amounts. Except as

provided in section 6.02, the form for making a refund claim for an overpayment amount must be filed by an issuer no later than the date that is two years after the final computation date for the applicable issue of bonds under § 1.148-3(e)(2).

.03 Processing a Refund Claim. This section 3.03 describes the present procedures that the Service will employ in processing refund claims on overpayment amounts. These procedures may be refined or revised as necessary, without affecting the issuer's responsibilities under this revenue procedure, by publication in the Internal Revenue Manual.

(1) The Ogden Center will determine whether the issuer has satisfied the following initial processing requirements: (i) that the form has been completed according to the instructions for the form and includes the required attachments; (ii) that the issuer has previously submitted rebate, penalty, or yield reduction payments accompanied by one or more Forms 8038-T (Arbitrage Rebate, Yield Reduction and Penalty in Lieu of Arbitrage Rebate) with respect to the issue in question; and (iii) the amount previously submitted as rebate, penalty, or yield reduction payments is greater than or equal to the overpayment amounts stated in the refund claim. If the initial processing requirements are satisfied, the Ogden Center will promptly forward a copy of the refund claim to the Service's Office of Tax Exempt Bonds, Compliance and Program Management (TEB CPM) for further processing. If the Ogden Center concludes that the initial processing requirements are not satisfied, the Ogden Center will notify the issuer by telephone or letter (the Ogden Notification) describing any requirements that

have not been satisfied. If the issuer fails to file a supplement satisfying the initial processing requirements within 45 days starting on the date of the Ogden Notification, the Ogden Center will forward the refund claim to TEB CPM for issuance of a Refund Claim Rejection letter. Any refiling must be within the period for filing the form in section 3.02 of this procedure.

(2) TEB CPM will review the processing requirements and determine whether an overpayment occurred and the amount of the overpayment that an issuer may recover as follows:

(a) Refund Claim Approval. If TEB CPM determines that the correct amount of overpayment is equal to or greater than the overpayment amounts on the refund claim, TEB CPM will notify the issuer in writing of the approval and will authorize a refund for the entirety of the requested overpayment amounts.

(b) Refund Claim Rejection. TEB CPM may reject a refund claim based on an issuer's failure to follow the procedures for refund claims set forth in section 3.03(1) of this revenue procedure or an issuer's failure to provide sufficient information to enable TEB CPM to determine that an overpayment occurred. The issuer may resubmit a refund claim in compliance with the initial processing requirements provided that any such resubmission is made by the filing deadlines set forth in sections 3.02 and 6.02 of this revenue procedure. A refund claim that is rejected on the basis of a procedural deficiency or incomplete information is not a Refund Claim Denial under section 3.03(2)(c) of this revenue procedure.

(c) Refund Claim Denial. Excluding rejections of refund claims for

procedural deficiencies or incomplete information, as described in section 3.03(2)(b) of this revenue procedure, TEB CPM may deny a refund claim, in full or in part, on the following grounds: (i) the correct amount of overpayment is less than the requested overpayment amounts, or (ii) no overpayment occurred. If TEB CPM makes a preliminary determination that a refund claim should be denied, TEB CPM will notify the issuer in writing that it may submit additional information to support the refund claim or participate in a conference or both. Any additional information must be submitted within 21 days of the later of either the notification to allow additional information in support of the refund claim or the conference. If the issuer fails to submit additional information within the 21-day period to support the refund claim to the satisfaction of TEB CPM, or TEB CPM still disagrees that an overpayment occurred, TEB CPM will issue, by certified or registered mail, a formal letter to the issuer stating that the refund claim is denied (a Refund Claim Denial), subject only to the issuer's appeal right, as described in section 3.04 of this revenue procedure. The Refund Claim Denial letter will explain the reasons for the determination to deny the refund claim and inform the issuer of its right to request from the Office of Appeals an administrative appeal of the denial pursuant to Revenue Procedure 2006-40, 2006-42 I.R.B. 694, as subsequently amended, supplemented, or superseded. If an appeal is not requested within 30 days of the date of the Refund Claim Denial letter, then the Refund Claim Denial becomes final, as of the date of issuance of the Refund Claim Denial letter by certified or registered mail, and the issuer may not refile the refund claim thereafter.

.04 Appeals. An issuer is entitled to appeal a Refund Claim Denial to the Office of Appeals pursuant to section 3.01 of Rev. Proc. 2006-40, as subsequently amended, supplemented, or superseded.

#### SECTION 4. EFFECT ON OTHER DOCUMENTS

This revenue procedure obsoletes Rev. Proc. 92-83.

#### SECTION 5. AMENDMENT TO REGULATIONS

The Service and the Department of the Treasury expect to issue regulations under § 148 and § 1.148-3(i) to provide that a claim for recovery of an overpayment of rebate, penalty, or yield reduction must be filed with the Commissioner by no later than two years after the final computation date of the issue of bonds to which the refund claim relates.

#### SECTION 6. EFFECTIVE DATE

.01 In General. Except as provided in Section 6.02, this revenue procedure applies to refund claims arising from an issue of bonds for which the final computation date is after June 24, 2008.

.02 Transition Rule. For refund claims arising from an issue of bonds for which the final computation date is on or before June 24, 2008 the two year period in section 3.02 begins on July 1, 2008.

#### SECTION 7. PAPERWORK REDUCTION ACT

The collection of information contained in section 3 of this revenue procedure has been previously reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. § 3507) under control number 1545-1750.



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.

#### SECTION 8. DRAFTING INFORMATION

The principal authors of the revenue procedure are Christopher C. Woodin, Tax Exempt Bonds, Compliance and Program Management, and Timothy L. Jones, Office of Chief Counsel (Financial Institutions and Products), Internal Revenue Service. For further information regarding this revenue procedure, contact Mr. Woodin at 202-283-9780 or Mr. Jones at 202-622-3980 (not toll-free numbers).