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

## 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 (T.D. 8418, 1992-1 C.B. 29 [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 fail-

ure 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, 2006-2 C.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).

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26 CFR 301.7121-1: Closing agreements.  
(Also Part I, §§ 7702, 7702A.)

## Rev. Proc. 2008-38

### SECTION 1. PURPOSE

This revenue procedure provides a procedure by which an issuer of a life insurance contract may remedy a failure to account for charges for qualified additional benefits (QABs) under the expense charge rule of § 7702(c)(3)(B)(ii) of the Internal Revenue Code. Rev. Rul. 2005-6, 2005-1 C.B. 471, is amplified.

### SECTION 2. BACKGROUND

*.01 Definition of a life insurance contract.*

(1) Section 7702(a) provides that, for a contract to qualify as a life insurance contract for Federal income tax purposes, the contract must be a life insurance contract under the applicable law and must either—

(a) satisfy the cash value accumulation test of § 7702(b), or

(b) both meet the guideline premium requirements of § 7702(c) and fall within the cash value corridor of § 7702(d).

(2) A contract meets the cash value accumulation test of § 7702(b) if, by the terms of the contract, the cash surrender value of the contract may not at any time exceed the net single premium that would have to be paid at that time to fund future benefits under the contract.

(3) A contract meets the guideline premium requirements of § 7702(c) if the sum of the premiums paid under the contract does not at any time exceed the guideline premium limitation as of that time. The

guideline premium limitation as of any date is the greater of the guideline single premium, or the sum of the guideline level premiums to that date. The guideline single premium is the premium that would be required on the date the contract is issued to fund the future benefits under the contract.

(4) A contract falls within the cash value corridor of § 7702(d) if the death benefit under the contract at any time is not less than the applicable percentage of the cash surrender value, based on the table set forth in § 7702(d)(2).

(5) Section 7702 is effective for contracts issued after December 31, 1984, in tax years ending after that date.

*.02 Definition of a modified endowment contract (MEC).*

(1) Section 7702A(a) provides that a life insurance contract is a MEC if the contract—

(a) is entered into on or after June 21, 1988, and fails to meet the 7-pay test of § 7702A(b), or

(b) is received in exchange for a contract described in paragraph (a) of this section 2.02(1).

(2) A contract fails to meet the 7-pay test if the accumulated amount paid under the contract at any time during the first 7 contract years exceeds the sum of the net level premiums that would have to be paid on or before such time if the contract were to provide for paid-up future benefits after the payment of 7 level annual premiums.

(3) Section 72(e)(12) provides that, for purposes of determining amounts includible in gross income, all MECs issued by the same company to the same contract holder during any calendar year are treated as one MEC.

*.03 Accounting for charges for QABs.* Section 7702(f)(5) identifies five categories of benefits as QABs: guaranteed insurability; accidental death or disability benefit; family term coverage; disability waiver benefit; or other benefits prescribed under regulations. These benefits are not treated as future benefits under the contract, but charges for the benefits are treated as future benefits. For purposes of the cash value accumulation test of § 7702(b), § 7702(b)(2)(B) requires that charges for QABs be accounted for using the expense charge rule of § 7702(c)(3)(B)(ii), rather than the mortality charge rule of § 7702(c)(3)(B)(i).

Section 7702A(c)(1) requires that the same rule be used for purposes of the 7-pay test as well. Although § 7702 is silent on the treatment of charges for QABs for purposes of applying the guideline premium requirements, Rev. Rul. 2005-6 concludes that charges for such benefits are to be taken into account under the expense charge rule of § 7702(c)(3)(B)(ii) for that purpose as well.

*.04 Authority to enter into closing agreements.* Under § 7121, the Secretary is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal revenue tax for any period. Such agreement is generally final and conclusive, except upon a showing of fraud, malfeasance, or misrepresentation of a material fact.

*.05 Correction procedure for QABs.* Rev. Rul. 2005-6 sets forth three alternatives for issuers whose compliance systems do not currently account for charges for QABs under the expense charge rule of § 7702(c)(3)(B)(ii):

(1) Alternative A provides that, if an issuer's compliance system does not properly account for charges for QABs but no contracts have failed to satisfy the requirements of § 7702(a) as a result of the system's deficiency, the issuer may correct its compliance system to account for those charges using the expense charge rule without contacting the Internal Revenue Service (Service).

(2) Alternative B provides a correction procedure for closing agreements that were requested on or before February 7, 2006.

(3) Alternative C provides that an issuer whose compliance system does not properly account for charges for QABs may request a closing agreement under terms and conditions that are enumerated in Rev. Rul. 2005-6.

*.06 Changes to correction procedure.* In Notice 2007-15, 2007-1 C.B. 503, the Service requested comments as to how various correction procedures — including those for improper accounting for charges for QABs under Rev. Rul. 2005-6 — may be improved. This revenue procedure incorporates a number of changes that taxpayers suggested in response to Notice 2007-15. Most significantly, this revenue procedure sets forth a model closing agree-