



[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9854]

RIN 1545-BO77

Arbitrage Investment Restrictions on Tax-Exempt Bonds

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations regarding the arbitrage investment restrictions under section 148 of the Internal Revenue Code (Code) applicable to tax-exempt bonds and other tax-advantaged bonds issued by State and local governments. The final regulations clarify existing regulations regarding the definition of “investment-type property” by expressly providing an exception for investment in capital projects that are used in furtherance of the public purposes of the bonds. The final regulations affect State and local governmental issuers of these bonds and potential investors in capital projects financed with these bonds.

DATES: Effective Date: These final regulations are effective **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: For the date of applicability, see §1.148-11(n).

FOR FURTHER INFORMATION CONTACT: Lewis Bell at (202) 317-6980 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to 26 CFR part 1 under section 148 of the Code. For interest on State or local bonds to be excluded from the gross income of the bondholder under section 103, the bonds must satisfy various eligibility requirements, including a requirement that the bonds not be arbitrage bonds as defined in section 148. Section 148(a) generally defines an “arbitrage bond” as any bond issued as part of an issue any portion of the proceeds of which are reasonably expected to be used or are intentionally used to acquire “higher yielding investments” or to replace funds so used. Section 148(b)(1) defines the term “higher yielding investments” as any “investment property” that produces a yield over the term of the issue that is materially higher than the yield on the issue. Section 148(b)(2) defines the term “investment property” to include any security (within the meaning of section 165(g)(2)(A) or (B)), any obligation, any annuity contract, certain residential rental property, and any “investment-type property.” Section 1.148-1(e)(1) of the Income Tax Regulations defines “investment-type property” to include any property (other than securities, obligations, annuity contracts, and covered residential rental property for family units under section 148(b)(2)(A), (B), (C), and (E)) “that is held principally as a passive vehicle for the production of income.” Section 1.148-1(e)(1) provides that, for this purpose, the production of income includes any benefit based on the time value of money.

Institutional investors have suggested clarification of the scope of the regulatory definition of investment-type property under §1.148-1(e)(1) to ensure that the definition does not impede greater investment in public infrastructure.

The legislative history to the Tax Reform Act of 1986, Public Law 99-514, 100 Stat. 2085, indicates that Congress intended to limit the scope of the arbitrage restriction on investment-type property so that it did not extend to investments in capital projects in furtherance of the public purposes of the bonds. In this regard, the House Report to the Tax Reform Act of 1986 included the following statement about the intended scope of the definition of investment-type property: “The restriction would not apply, however, to real or tangible personal property acquired with bond proceeds for reasons other than investment (e.g., courthouse facilities financed with bond proceeds).” H.R. Rep. No. 99-426, at 552 (1985), 1986-3 (vol. 2) C.B. 457; see also S. Rep. No. 99-313, at 844 (1986), 1986-3 (vol. 3) C.B. 682 (containing a statement substantially identical to that in the House report); H.R. Rep. No. 99-841, at II-747 (1986) (Conf. Rep.), 1986-3 (vol. 4) C.B. 608 (stating that the conference agreement follows the House bill and the Senate amendment on this restriction).

To clarify the scope of the investment-type property definition consistent with Congressional intent reflected in the legislative history, in a notice of proposed rulemaking published in the **Federal Register** (83 FR 27302; REG-106977-18) on June 12, 2018 (the Proposed Regulations), the Department of the Treasury (Treasury Department) and the IRS proposed an exception to the definition of investment-type property for certain capital projects that further the public purposes for which the tax-exempt bonds were issued.

The Treasury Department and the IRS solicited requests for a public hearing and written comments on the Proposed Regulations. No public hearing was held because no request for a hearing was received. The Treasury Department and the IRS received

four public comments favoring finalization of the Proposed Regulations to allow greater capital investment in public infrastructure and did not receive any unfavorable public comments. Accordingly, the Treasury Department and the IRS adopt the Proposed Regulations, without substantive change, as final regulations by this Treasury Decision.

Explanation of Provisions

1. Section 1.148-1(e)(4): Exception to Investment-Type Property Definition for Certain Capital Projects

Section 1.148-1(e)(4) of the Final Regulations provides that investment-type property does not include real property or tangible personal property (for example, land, buildings, and equipment) that is used in furtherance of the public purposes for which the tax-exempt bonds are issued. For example, investment-type property does not include a courthouse financed with governmental bonds or an eligible exempt facility under section 142, such as a public road, financed with private activity bonds.

2. Applicability Dates and Reliance

The amendments to the definition of investment-type property in the final regulations apply to bonds sold on or after **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Issuers may apply the provisions of the final regulations to bonds that are sold before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations. Because this regulation does not impose a collection of information on

small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding this regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

Drafting Information

The principal authors of these regulations are Lewis Bell and Spence Hanemann of the Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.148-0(c) is amended by adding entries for §§1.148-1(e)(4) and 1.148-11(n) to read as follows:

§1.148-0 Scope and table of contents.

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(c) * * *

§1.148-1 Definitions and elections.

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(e) * * *

(4) Exception for certain capital projects.

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§1.148-11 Effective/applicability dates.

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(n) Investment-type property.

Par. 3. Section 1.148-1 is amended by:

1. Revising the first sentence of paragraph (e)(1).

2. Adding paragraph (e)(4).

The revision and addition read as follows:

§1.148-1 Definitions and elections.

* * * * *

(e) *Investment-type property--(1) In general.* Except as otherwise provided in this paragraph (e), investment-type property includes any property, other than property described in section 148(b)(2)(A), (B), (C), or (E), that is held principally as a passive vehicle for the production of income. * * *

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(4) *Exception for certain capital projects.* Investment-type property does not include real property or tangible personal property (for example, land, buildings, and equipment) that is used in furtherance of the public purposes for which the tax-exempt bonds are issued. For example, investment-type property does not include a courthouse financed with governmental bonds or an eligible exempt facility under section 142, such as a public road, financed with private activity bonds.

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Par. 4. Section 1.148-11 is amended by adding paragraph (n) to read as follows:

§1.148-11 Effective/applicability dates.

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(n) *Investment-type property.* Section 1.148-1(e)(1) and (4) apply to bonds sold on or after **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. An issuer may apply the provisions of §1.148-1(e)(1) and (4) to bonds sold before **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Kirsten Wielobob,

Deputy Commissioner for Services and Enforcement.

Approved: November 16, 2018.

David J. Kautter,

Assistant Secretary of the Treasury (Tax Policy).

Editorial Note: This document was received for publication by the Office of the Federal Register on April 3, 2019.

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