

Alert | Tax/Public Finance

September 2017

IRS Provides More Flexibility for Arbitrage Rebate Refunds

On Aug. 26, 2017, the Internal Revenue Service (IRS) released [Revenue Procedure 2017-50](#), which liberalizes the time frame for requesting a refund of an overpayment of arbitrage rebate, yield-reduction, or penalty-in-lieu of rebate payments. In particular, the Revenue Procedure provides additional time to file an overpayment claim with respect to payments made after the general payment deadline.

Background

Tax-exempt bonds must comply with the arbitrage rules, including the yield restriction rules and arbitrage rebate rules under section 148 of the Internal Revenue Code of 1986, as amended.

Arbitrage Rebate

Under the arbitrage rebate rules, unless an issuer elects to pay a penalty-in-lieu-of rebate (which is rarely done), an issuer investing bond proceeds and earning a positive net yield on that investment may be required to rebate (*i.e.*, pay) that positive yield to the United States. An issuer is required to compute rebate, under a cumulative computation, at least every five years (on a computation date) and pay the amount owed within 60 days of the computation date to which it relates. An issuer may make a rebate payment more than 60 days after the computation date, but interest and penalties may apply. Arbitrage rebate is paid in installments, with 90 percent of the rebatable amount being paid in each installment. When the bonds are redeemed or mature, the issuer must pay the incremental rebate owed within 60 days so that 100 percent of arbitrage rebate owed on the bonds is paid. This process also applies if an issuer elects to pay penalty-in-lieu-of rebate.

Yield Reduction

The yield-restriction rules generally provide that a bond will not be tax-exempt if the issuer reasonably expects or takes an action to invest bond proceeds in a materially higher yielding investment. For certain types of transactions, the regulations allow the issuer to “reduce” the yield on an investment to the yield permitted under those rules, by making a yield reduction payment to the United States. The procedures for computing and making these payments generally follow the procedures for arbitrage rebate.

Overpayment Claims

Because the computations under the arbitrage rebate rules are cumulative, it is possible for an issuer to experience positive investment yield in one computation period and make a payment based on that computation, and experience a lower investment yield in a later computation period that results in the prior total payments exceeding the amount then owed. The Code and regulations provide rules under which an issuer may seek a refund of these overpayments. Refunds are permitted for arbitrage rebate, yield-reduction payments, and payment of a penalty in lieu of rebate.

Old Rule

Payments of rebate owed or paid under the arbitrage rules are not treated as payments of tax; the IRS cannot assess and collect these amounts from the issuer. This has resulted in some difficult procedural questions for the IRS. One area of difficulty is what refund procedures should apply to these payments, including the time in which a refund claim must be filed. In [Revenue Procedure 2008-37](#), the IRS provided procedures for requesting refunds of arbitrage rebate, yield-reduction payments, or penalty-in-lieu-of rebate. Section 3.02 of Revenue Procedure 2008-37 required that the refund claim be filed within two years of the final computation date (not two years from the date the payment was required to be made). The rules in Revenue Procedure 2008-37 were added to the regulations under Section 148 of the Code at Regulations §1.148-3(i)(3) in 2014. Under these procedures, an issuer that paid rebate late may not have been able to claim a refund of overpaid rebate.

Revenue Procedure 2017-50

The IRS has now modified Revenue Procedure 2008-37 to provide administrative relief to issuers claiming refunds under Regulations §1.148-3(i)(3), because it viewed the prior rules as not providing adequate opportunity for issuers to recover overpayments for late payments. The IRS, using its authority under Treasury Regulations Section 1.148-10(g), which provides the Commissioner with the authority to waive regulatory limitations in certain circumstances and for sound tax administration, modified the refund claim period by (i) starting the two-year period 60 days after the final computation date for payments made timely and (ii) providing that issuers that file late would have two years from the date the late payment is made to file a refund claim.

Effective Date: The new procedures apply to a claim for refund pending or filed with the Internal Revenue Service on or after Aug. 25, 2017; an issuer that made payment after the final computation date but prior to Aug. 25, 2017, will be deemed to have made the payment on Aug. 25, 2017.

This means that an issuer with a final computation date of Aug. 1, 2015, that timely paid its final rebate payment on Sept. 20, 2015, but did not file a refund claim, can now file a refund claim. This also means that an issuer with a final computation date of Aug. 1, 2015, that did not pay the rebate owed until Aug. 15, 2017, would now be entitled to request a refund under the new procedure. It is unclear whether an issuer that already had a refund claim denied, because it was filed more than two years after the computation date (but not more than two years and 60 days after the computation date), could now file another claim as timely. An issuer in such position may want to file a refund claim asserting the claim is now timely under the relief provided by the Revenue Procedure.

Authors

This GT Alert was prepared by **Rebecca L. Harrigal**, **Vanessa Albert Lowry**, and **Linda L. D’Onofrio**. Questions about this information can be directed to:

- [Rebecca L. Harrigal](mailto:harrigalr@gtlaw.com) | +1 215.988.7836 | harrigalr@gtlaw.com
- [Vanessa Albert Lowry](mailto:lowryv@gtlaw.com) | +1 215.988.7811 | lowryv@gtlaw.com
- [Linda L. D’Onofrio](mailto:donofriol@gtlaw.com) | +1 212.801.6870 | donofriol@gtlaw.com
- Or your **Greenberg Traurig** attorney

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.[~] Houston. Las Vegas. London.^{*} Los Angeles. Mexico City.⁺ Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.[∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.[^] Tokyo.^² Warsaw.⁻ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Alert is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer’s legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ~Greenberg Traurig’s Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig’s Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig’s Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ²Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig’s Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2017 Greenberg Traurig, LLP. All rights reserved.*