The 50-Day Short Term Private Use Exception

How does the 50-day short-term exception to private use work?

Introduction

The IRS recognizes that bond-financed facilities may have de minimis use by private business users from time to time in the course of normal operations by governmental entities, such as CSU. Common facilities that may benefit from short-term use exceptions include housing (dorms), conference facilities, auditoriums, stadiums and sports facilities, and other meeting places. A user-friendly exception is the 50-Day exception, where, if it is met, the use by the outside user is not counted as private business use of the bond-financed facility.

The rule

Re-phrasing the applicable Treasury regulations, the IRS provides that: Any arrangement with a non-CSU party (auxiliaries are counted as CSU parties; state and local governments are counted as CSU parties for this purpose; the federal government or a nonprofit organization, such as a 501c3 organization, is NOT a CSU party) qualifies for the exception (that means NOT counted as private business use) if--

(A) The term of the use under the arrangement, including all renewal options, is not longer than 50 days;

(B) The arrangement is a negotiated arm's-length arrangement, and compensation under the arrangement is at fair market value; and

(C) The property is not financed for a principal purpose of providing that property for use by that nongovernmental person.

What type of arrangement?

Generally, arrangements could be oral or written; written arrangements, such as contracts, MOUs, licenses or agreements definitely get counted. The arrangement cannot be for the ownership of the property by the outside user; that is excluded from this exception. All arrangements with the same non-CSU party need to be counted together, so we cannot just break them up into multiple arrangements. Different but related non-CSU parties should also be counted together. However, arrangements for different areas of a bond-financed facility can be counted as different (separate) arrangements.

All entities involved in the space or the arrangement are counted. Note commercial brokers or marketers that promise or guarantee to fill up space for CSU. That arrangement with the broker may be longer than 50 days, which will result in private business use.

How do I count the 50 days?

Subject to what is an arrangement as provided above, the arrangement with the same non-CSU party cannot exceed 50 days. The 50 days need not be consecutive, and are not limited by year. For example, it can be each Sunday for 50 weeks (total of 50 days), or one Sunday each year for 50 years (total of 50
days), or all of July for a year. Terms should be clear that no more than 50 days is contemplated. Without more, fraction of a day (even a few hrs, or even an hr) should be counted as a day, to be safe. All renewal options have to be included in the 50 days. Use is not limited to the actual time the outside user is physically occupying the space. As long as the user has the legal right to use the space, that time is included even if the entity does not show up.

Renewal Options and Evergreen Contracts

A renewal option that is counted against the 50 days is a legally enforceable option to renew by CSU or the non-CSU party. Expectations to renew are ignored if there is no such legally enforceable right. A 50-day arrangement can be automatically renewed for additional periods (that is, another 50 days) if either party can give reasonable notice not to renew. Note, both parties must be given the right not to renew.

Compensation matters

As noted in the Treasury regulation, payment to CSU under this exception needs to be negotiated at arm’s-length and at fair market value. Charging below market does not meet this exception, unless no compensation is charged at all.

What happens if the arrangement does not qualify?

There are other exceptions available under the Treasury regulations for short-term use, but the 50-day exception is relatively easy to use. If no exception qualifies, then the arrangement to use is counted against the private use limit.