

Verne, B. Michael

From: [REDACTED]
Sent: Wednesday, March 13, 2013 1:55 PM
To: Verne, B. Michael; Walsh, Kathryn
Subject: 801.1(a)(2) - State Agency/Political Subdivision Question

Hi guys,

Here is another question (a little more complicated than my earlier question.

Facts:

1. The transaction meets the size of transaction and size of person tests.
2. As detailed below, the acquiring person is a municipal authority ("the Authority") under Pennsylvania Municipal Authorities Act. The Authority's mission, as stated in its Articles of Incorporation, is to manage solid waste and recyclable materials in an environmentally safe, reliable and efficient manner to benefit the residents of County A ("the County") and contiguous counties.
3. The Authority will purchase a waste-to-energy facility ("the Facility") from another Pennsylvania municipal authority. Under the County's 2010 Waste Management Plan, which was approved by the County Commissioners and the Pennsylvania Department of Environmental Protection, the Authority is responsible for securing adequate processing and disposal capacity for the County's municipal waste. The Authority's objective in purchasing the Facility is to meet the Plan's requirement that it secure such adequate capacity.

HSR Analysis

1. Section 7A(c)(4) exempts "transfers to or from a Federal agency or a State or political subdivision thereof." Section 801.1(a)(2) defines the term "entity" under the Act and provides that "the term 'entity' shall not include . . . the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation or unincorporated entity engaged in commerce)."
2. By informal interpretation, municipal entities that engage in governmental functions have been treated as political subdivisions or agencies and therefore excluded from the definition of "entity" under Section 801.1(a)(2). Informal interpretation 1011009 (<http://www.ftc.gov/bc/hsr/informal/opinions/1011009.htm>), for example, agreed that a local government corporation which was purchasing assets of an electrical power generating plant in West Texas constituted a government agency rather than an "entity." Similarly, informal interpretation 0711008 (<http://www.ftc.gov/bc/hsr/informal/opinions/0711008>) agreed that the acquisition of a power plant in Ohio by a Municipal Power Agency that was organized by specific legislative act of its members, all political subdivisions, for the sole purpose of benefiting its members, was not an "entity." See also 0211005 (agreeing that a development authority formed by two counties pursuant to state legislation was not an "entity"), <http://www.ftc.gov/bc/hsr/informal/opinions/0211005>.
3. We have concluded that the Authority constitutes a political subdivision or agency of the Commonwealth of Pennsylvania and is not an "entity" based on the following factors:
 - a. *Authorizing Statute.* The Authority is a Pennsylvania municipal authority organized and operating under the Pennsylvania Municipal Authorities Act, 53 Pa. C.S. § 5601, *et seq.* Section 5620 of the Act states that municipal authorities "perform[] essential governmental functions." See *Commonwealth v. Erie Metropolitan Transit Authority*, 281 A.2d 882, 884 (1971) (Pennsylvania Supreme Court holding "that municipal authorities are independent agencies of the Commonwealth, and part of its sovereignty"); *Commonwealth v. Lucas*, 632 A.2d 868,

870 (1993) (Pennsylvania Supreme Court stating that municipal authorities are "independent agencies of the Commonwealth"). Section 5607(b) of the Act states that the purpose of municipal authorities is to benefit the "commerce, health, safety and prosperity" of the people of the Commonwealth of Pennsylvania, and that municipal authorities must not "interfere with existing business by the establishment of competitive enterprises." As further evidence of their inherently governmental nature, Section 5614 of the Act requires that municipal authorities conduct a public bidding process before awarding a work contract to a private contractor and Section 5615(a) grants municipal authorities the power to acquire title to land, water and water rights by eminent domain, both within and outside the municipality which created the municipal authority.

b. *The Authority Serves a Government Function.* Under the Pennsylvania Solid Waste Management Act ("Act 97") and the Pennsylvania Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), each Pennsylvania county is required to adopt a municipal waste management plan for municipal waste generated within its boundaries. Under the County's 2010 Waste Management Plan ("the Plan"), the Authority is a public agency responsible for operating an integrated system of managing municipal solid waste and implementing the Plan. The effect of the Plan, and all implementing ordinances and agreements, is to delegate the County's rights, duties and obligations for implementation of the Plan to the Authority. The Plan has the force of law and violators are subject to civil and criminal penalties.

c. *Taxation.* The Authority is an entity qualified to issue bonds exempt from federal taxation under present statutes, regulations, and judicial decisions. The Authority is exempt from federal income taxation on its gross income. Section 5620 of the Municipal Authorities Act exempts the Authority from taxation by the Commonwealth, provided that the Authority acts within the express purposes of the Municipal Authorities Act. Section 5620 additionally holds that bonds issued by a municipal authority are exempt from taxation by the Commonwealth.

d. *Governance.* The Commissioners of the County appoint the Authority's board of directors. All of the members of the board are residents of the County as required by Section 5610 of the Municipal Authorities Act. The Authority is subject to Pennsylvania's Right-to-Know Law, 65 P.S. § 67.101, *et seq.*, as a government agency.

e. *Income.* The Authority is not operated with the possibility of or motive for profit, and the excess of revenues generated over expenses cannot benefit any private party.

Please confirm that you agree that the Authority constitutes a state agency or political subdivision and is therefore not an "entity" under Section 801.1(a)(2).

Many thanks as always,

AGREE -
BN
3/14/13

KW } SP CONCUR

To comply with IRS regulations, we advise you that any discussion of Federal tax issues in this e-mail was not intended or written to be used, and cannot be used by you, (i) to avoid any penalties imposed under the Internal Revenue Code or (ii) to promote, market or recommend to another party any transaction or matter addressed herein.