

STATE OF COLORADO

DEPARTMENT OF REVENUE
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PLR-14-001

January 14, 2014

XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
Attn: XXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXX

Re: Private Letter Ruling

Dear XXXXXXXXXXXX,

You submitted on behalf of XXXXXXXXXXXX ("Company") a request for a private letter ruling to the Colorado Department of Revenue ("Department") pursuant to Regulation 24-35-103.5. This letter is the Department's private letter ruling.

Issue

Is a non-profit corporation a "taxpayer" as defined in §39-22-522(1), C.R.S. and Department Rule 39-22-522(1)?

Conclusion

Company, as a non-profit corporation, is a "taxpayer" as defined in §39-22-522(1), C.R.S. and Department Rule 39-22-522(1).

Background

Company makes the following representations. Company is a domestic nonprofit corporation, which holds a certificate of exemption issued by the Internal Revenue Service pursuant to 26 U.S.C. §501(c)(3). Company is not a certified land trust under §38-30.5-104(2). Company donated a perpetual conservation easement in gross to XXXXXXXXXXXX XXXXXXXXXXXXXXXXXXXXXXXX certified land trust. Company obtained a qualified appraisal for the conservation easement, which was valued at \$545,000.

Company donated the perpetual conservation easement in gross to preserve the scenic open space and natural habitat of the land Company owns. Company operates youth camps on the land and intends to do so in the future. Company was paid \$400,000 from XXXXXXXXXXXXXXXXXXXX and other funders for a conservation easement. This was a "bargain sale" because the payment was less than the appraised fair market value of the conservation easement. The donated value of the conservation easement is \$145,000.

Company used the funds to maintain the land and continue the camp operation on the land. The funds received have only partially covered the expenses of donating the easement and the carrying costs of the property. Company is currently working to fill the shortfall of funds needed to pay down the debt on the property and to continue camp operations and maintenance of the property. There is substantial community support for this project.

Discussion

Colorado allows “taxpayers” to receive a credit against income for donating gross conservation easements.¹ A “taxpayer” is defined to include, among other types of entities, a corporation that is “subject to” the requirements of part 3 of article 39, Colorado Revised Statutes. Part 3 sets forth the income tax for corporations that derive net income from Colorado sources and are doing business in Colorado. The Department has previously issued guidance stating that a nonprofit corporation cannot claim this credit unless it had unrelated business income because its income is exempt from Colorado corporate income tax.² Company, which is a nonprofit corporation, asks the Department to reconsider this guidance. We do so here.

Company does not, in the normal course of its business activities, generate taxable income. Income of a tax exempt nonprofit corporation is exempt from federal and state income taxes. Thus, in at least the broadest sense, Company is not a “taxpayer” and is not “subject to” Colorado income tax. However, and for the reasons discussed below, we conclude this interpretation is overly restrictive.

¹ See, generally 39-22-522, C.R.S.

² *Income Tax - Gross Conservation Easement*

Can a nonprofit agency claim the gross conservation easement income tax credit for the donation of a conservation easement, then sell the credit to another taxpayer?

There are two requirements that must be specifically addressed to determine whether this credit can be claimed by a nonprofit organization.

First, does the organization meet the definition of a “taxpayer” as defined in §39-22-522(1), C.R.S. : “For purposes of this section, “taxpayer” means a resident individual or a domestic or foreign corporation subject to the provisions of part 3 of this article, a partnership, S corporation, or other similar pass-through entity, estate, or trust that donates a conservation easement as an entity, and a partner, member, and subchapter S shareholder of such pass-through entity.” For a C corporation, or any organization that would be taxed under corporate rules, to qualify as a taxpayer it must be subject to the provisions of part 3 of article 22 of the Colorado Revised Statutes.

For a tax exempt entity to be subject to taxation it must qualify under §39-22-112(2), C.R.S. as having “unrelated business taxable income, as computed under the provisions of the internal revenue code.” Therefore a nonprofit corporation or organization would not qualify as a taxpayer unless it has unrelated business taxable income (UBTI) during the year of the conservation easement donation. If it does have UBTI during the year in question, then the organization would meet the first requirement.

For a nonprofit trust that donates an easement, it is not required that they be subject to any provisions of article 22. Therefore, a trust would automatically meet the first requirement.” The second requirement referred to in this guidance concerns land trusts and is addressed below.

First, the gross conservation easement credit statute does not require a “taxpayer” have taxable income. Indeed, the individuals and entities who are the primary beneficiaries of this statute typically have little or no taxable income. Land rich but cash poor ranchers and farmers often have years of no taxable income, yet these are the very individuals and entities the legislature had in mind when it enacted this legislation.³ Moreover, the legislature made the credit refundable and transferrable precisely because the legislature was fully aware that the people and entities who claim this credit will have little or no income.

Similarly and more closely related to Company’s circumstances, for-profit corporations may have one or more years when they do not have taxable income. The Department has not interpreted “taxpayer” and “subject to” to mean that the corporation must have taxable income in order to qualify for the credit. For these reasons, the Department has never interpreted “taxpayer” or “subject to” to mean that the taxpayer must have taxable income in order to claim the credit.

Second, Company is subject to part 3. Company correctly observes that it is a corporation, is authorized to do, and does, business in Colorado, derives income from sources in Colorado, and owns real property in Colorado from which it derives income. If Company engages in income producing activities that are unrelated to its exempt purpose, then the income is subject to Colorado income tax.⁴ It seems problematic to say that Company can claim the conservation easement credit in years that it has unrelated business income because it is “subject to” part 3 but not in years when it does not have taxable income, yet, on the other hand, characterize a for-profit corporation as subject to part 3 even in years it has no income. Nor are we persuaded that the “subject to” provision should be interpreted to make a distinction between exempt income and no income. We would allow, for example, a for-profit corporation to claim the credit even if all its income were exempt interest on obligations or securities issued by the federal government.⁵ Thus, we conclude that a corporation engaged in income producing activities in Colorado is “subject to” part 3, regardless of whether it has exempt or taxable income in the year it claims the credit.

We have, in other circumstances, reached a similar conclusion regarding the meaning of “subject to”. In Department Private Letter Ruling 08-001, we held that a taxpayer is “subject to” the gross premium tax even though its income was, under the terms of that statute, exempt from the gross premium tax. Colorado does not levy income tax on insurance premiums if the insurance company is “subject to” a separate statute that imposes tax on insurance premiums. The company’s income was derived from insurance premiums and, therefore, was “subject to” the statutory provisions governing gross premium tax. However, the company’s revenues were, by virtue of a specific

³ See, for example, 39-22-522.5(1)(a), C.R.S. The legislature made the credit refundable and transferrable precisely because the legislature was fully aware that the people and entities who would claim this credit will have little or no income.

⁴ 26 USC 513 (unrelated trade or business) and IRS Publication 598 (“Tax on Unrelated Business Income of Exempt Organizations”).

⁵ See, 39-22-304(3)(b), C.R.S.

provision of the gross premium tax statute, also exempt from gross premium tax. This posed the question of whether the company was “subject to” the gross premium tax (and, therefore, exempt from Colorado corporate income tax) even though its income was largely exempt under the gross premium statute. We concluded that “subject to” the gross premium tax statute does not mean that the company must actually have a gross premium tax liability, but, rather, that it meant only that the income was from insurance premium whose tax liability, if any, was governed by the gross premium tax statute.

For these reasons, we reverse the guidance previously issued on the status of nonprofit corporations as taxpayers and conclude that Company is a “taxpayer” because it is “subject to” part 3.

We think it prudent to note that our conclusion here should not be read to suggest that we have re-evaluated and altered our guidance on nonprofits which operate as land trusts. In our guidance we stated,

Second, does the donation meet the requirement of a qualified conservation contribution pursuant to section 170(h) of the internal revenue code [§39-22-522(2), C.R.S.]? Section 170(h), among its restrictions, requires that the contribution be made exclusively for conservation purposes. In order to meet this requirement it must be shown that the nonprofit organization was not already responsible for protecting the conservation of the property, which would preclude the donation from qualifying for either the federal charitable deduction or the conservation easement credit. A nonprofit organization must meet both of these requirements* in addition to the general requirements of the law to qualify for the gross conservation easement tax credit.

*(*see footnote 1, above, for statement of the first requirement.)*

The Department does not believe donations of gross conservation easements by land trusts, which commonly operating as nonprofit corporations, will qualify for the gross conservation easement credit. These trusts, either by their organic charter, common law governing trusts, or by the terms on which they acquire the property in trust, must hold land for conservation purposes much in the same way as is a gross conservation easement. Such trusts cannot claim this credit because they have not met the requirements of IRC 170(h).

Miscellaneous

This ruling assumes Company completely and accurately disclosed all material facts. The Department reserves the right, among others rights set forth in department’s regulation 24-35-103.5 and title 39, C.R.S., to independently evaluate Company’s representations. This ruling is null and void if any such representation is incorrect and has a material bearing on

the conclusions reached in this ruling. This ruling is subject to modification or revocation in accordance to Department Regulation 24-35-103.5.

Enclosed is a redacted version of this ruling. Pursuant to statute and regulation, this redacted version of the ruling will be made public within 60 days of the date of this letter. Please let me know in writing within that 60 day period whether you have any suggestions or concerns about this redacted version of the ruling.

Sincerely,

Neil L. Tillquist
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