INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM
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CASE MIS No.: TAM-100953-00/CC:TEGE:EOEG:TEB

District Director

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No:
Years Involved:
Date of Conference: April 25, 2000

LEGEND:

Issuer

Borrower

Bonds

Prior Owner

League

State

City

Affiliate

$A

$B

C

D

<u>E</u>

<u>F</u>

<u>G</u>

<u>H</u>

<u>I</u>

Date 1

Year 1

ISSUES:

(1) Whether use of the Borrower's Minor League franchise by the Affiliate constitutes private business use under § 141(b)(1) of the Internal Revenue Code?

(2) If the Affiliate's use of the Borrower's Minor League franchise constitutes private business use, what is the amount of private business use that results from that use?

(3) Whether the Affiliate's use of the Stadium (hereinafter defined) constitutes private business under § 141(b)(1)?

(4) If the Affiliate's use of the Stadium constitutes private business use, what is the amount of private business use that results from that use?

(5) Whether the method of payment of debt service on the Bonds constitutes private payments under § 141(b)(2)?

(6) Whether the Lease Payment-Contribution (hereinafter defined) and the Reimbursement Payment-Contribution (hereinafter defined) are properly characterized as an equity contribution by the City to the Stadium?

(7) If the Lease Payment-Contribution and the Reimbursement Payment-Contribution are properly characterized as an equity contribution by the City, whether the concession area, private seat area, private use events, and skyboxes are discrete areas to which that equity contribution may be allocated?

(8) If the Lease Payment-Contribution and the Reimbursement Payment-Contribution are properly characterized as an equity contribution by the City, whether stadium use days which are reserved for various private organizations ("Event Private Uses") are discrete areas to which that equity contribution may be allocated?

CONCLUSIONS:

(1) Use of the Borrower's minor league franchise by the Affiliate constitutes private business use under § 141(b)(1) of the Internal Revenue Code.

(2) The amount of private business use of the Bond proceeds used to acquire the minor league franchise is 100%.

(3) Use of the Stadium by the Affiliate constitutes private business under § 141(b)(1).

(4) The amount of private business use of the Bond proceeds used to construct the minor league Stadium by the Affiliate is 76.7 percent.

(5) It is not necessary to address this issue because the Issuer concedes that the method of payment of debt service on the Bonds constitutes private payments under § 141(b)(2).

(6) The Lease Payment-Contribution and the Reimbursement Payment-Contribution are not properly characterized as an equity contribution by the City to the Stadium.

(7) Because the Lease Payment-Contribution and the Reimbursement Payment-Contribution are not properly characterized as an equity contribution by the City, it is not necessary to address whether the concession area, private seat area, private use events, and skyboxes are discrete areas to which the equity contribution may be allocated.

(8) Because the Lease Payment-Contribution and the Reimbursement Payment-Contribution are not properly characterized as an equity contribution by the City, it is not necessary to address whether the Event Private Uses are discrete areas to which the equity contribution may be allocated.

FACTS:

The Issuer is a public not-for-profit corporation of the State, and is equally controlled by the City and the County.

The Issuer issued the Bonds on Date 1 and loaned the proceeds to the Borrower, a 501(c)(3) organization. The Borrower used the proceeds of the Bonds to acquire a Triple-A minor league baseball franchise (the "Franchise"), to pay certain costs associated with the construction of a minor league baseball stadium (the "Stadium"), to fund a debt service reserve fund for the Bonds, and to pay certain costs of issuance relating to the Bonds.

The Borrower used $A of Bond proceeds to acquire the Franchise from the Prior Owner. Ownership of the Franchise conveys membership in the League and the right to operate a minor league baseball club in a protected territory (the “Team”). The protected territory is a specific geographic area in which no other minor league or major league team may be located. The Franchise has no termination date.

The League is a voluntary association composed of the Triple-A minor league baseball clubs within the League’s designated geographic territory. The League is one of the various leagues that, collectively, make up minor league professional baseball (the “Minor Leagues”). Through its Articles of Incorporation and Bylaws, the League regulates its member baseball clubs, including the Team.

The League is a member of the National Association. The National Association is a voluntary association composed of the Minor Leagues and currently consists of 5 classes of membership: Triple-A, Double-A, Single-A, Short-season A, and Rookie. The National Association is a party to the Professional Baseball Agreement (the “PBA”) with the National League of Professional Baseball Clubs and the American League of Professional Baseball Clubs (together, the “Major Leagues”). The PBA establishes the relationship between the Major Leagues and the Minor Leagues. All National Association members, including the League and each of its member baseball clubs, have the rights and obligations set forth in the PBA and the rules adopted pursuant to the PBA. The PBA incorporates the Major League Rules (the “MLRs”) as if they were part of the PBA. The MLRs govern professional baseball and include rules with respect to player selection, player contracts, Major and Minor League territorial rights, Minor League expansion, regulation of Minor League franchises, and Minor League playing facilities. Unless otherwise noted, subsequent references to the “PBA” are to the PBA and the MLRs, collectively.

Ownership of the Franchise includes the affiliation with a Major League baseball club. This affiliation is established under the terms of a player development contract, which incorporates the PBA.[1] Prior to the purchase of the Franchise by the Borrower, the Prior Owner entered into a player development contract (the “PDC”) with the Affiliate. The Prior Owner assigned its rights in the PDC to the Borrower when the Borrower acquired the Franchise. The PDC is for a term of C years and expires in Year 1. If the PDC is not terminated in Year 1, the PDC is automatically renewed. If the PDC is terminated, the Borrower is permitted to enter into a player development contract with another Major League club if one is available. If no other Major League clubs are available because their player development contracts have not been terminated, the Borrower must renew the player development contract with the Affiliate.

Under the PBA (as described in the offering circular for the Franchise (the “Circular”)), a Minor League club may use only players, managers, coaches, instructors and trainers

[1] The standard player development contract is the only form of working agreement or contract permitted between Major and Minor League clubs.

provided to the Minor League club by the Major League club that enters into a player development contract with the Minor League club and the Minor League club may use only umpires that are provided by the League.[2]

Under the PBA, the players, managers, coaches, instructors, and trainers are under exclusive contract to the Major League club and are compensated only by the Major League club. The Major League club has exclusive authority and control over the selection and supervision of the players, managers, coaches, instructors, and trainers. The Major League club has the sole right to assign, direct, designate or otherwise transfer any player to any other Major League club or Minor League club. The Minor League club that is a party to the player development contract cannot interfere with, limit, or restrict this right.

Under the PBA, the purchaser of a franchise is required to provide a playing facility that meets the specified playing facility standards. The application for purchase must identify the proposed site of the facility. The site is a factor that is reviewed in the application process and is approved or disapproved as part of the application.[3] If the proposed location is unsatisfactory, an application will not be approved.

Under the PBA, if there is a failure to comply with the playing facility standards following the acquisition of a franchise, and the failure is not corrected in a timely fashion, the president of the League may order the player development contract voidable at the option of the Major League club that is a party to the player development contract, and may require the Minor League club to divest its interest in the franchise.

The PBA requires a Minor League club to obtain the Major League club's approval to relocate or to change league affiliation. The Major League club is entitled to terminate the player development contract if the Minor League club fails to seek the requisite approval or if the Minor League club takes action that is not in accord with the Major League club's decision. The Minor League club is further required to notify the Commissioner of the Major Leagues and the President of the National Association in writing at least 18 months before the opening day of the season in which the new location will be used and receive approval of such relocation by the President of the National Association. In order for a relocation to be approved, the Minor League club must establish that improved business operations (taking into account the quality of the

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[2] The PBA prohibits the Team from using umpires other than those provided by the League. The Major Leagues, collectively, pay umpire salaries and expenses and are entitled to select the contracts of those umpires.

[3] Some factors considered in evaluating a proposed location include compliance with the facility standards outlined in the PBA, seating capacity of the proposed facility, availability of the proposed facility for playing dates from April through September, location of the proposed site relative to the League's geographic boundaries, location of the proposed site relative to the existing territories of other Minor League clubs, attitude of local government and community, lease terms and the size and other attributes of the market in which the proposed site is located.

playing facility and the classification of play involved) and/or improved player development will be achieved at the new location.

The PBA requires each Major League club to support (through a player development contract or ownership) at least one Triple-A Minor League club. Under the PBA, expansions of the Minor Leagues occur only when a corresponding Major League club is available to purchase the expansion club or to enter into a player development contract with the expansion club (*i.e.*, when the Major Leagues expand).

As described in the PBA, the purpose of the relationship between the Major Leagues and the Minor Leagues is to:

A. Provide an environment for athletes to develop their potential as Major League players . . .

B. Provide an opportunity for baseball managers, umpires, trainers, and administrators to enhance the professional skills needed for Major League organizations.

C. Create locally-owned and/or managed sports franchises that grow while stressing customer satisfaction and the well-being of the local community.

D. Provide quality entertainment at affordable prices to a geographically diverse audience complementing those markets served by Major League baseball.

The Circular describes the Minor Leagues, including the League, as a “farm system” and a source of future baseball players for the Major Leagues. According to the Director of Player Development for the Affiliate, Minor League teams are a necessity in baseball for the players to develop to their fullest potential; spectators help to develop the players; collegiate teams do not fully develop baseball players; and if the Major Leagues did not develop players in the Minor Leagues, more players would have to be obtained through free-agency, a more costly and ineffective method.

The Borrower used proceeds of the Bonds to pay costs of construction for the Stadium. The Stadium satisfies the playing facility standards set forth in the PBA. The Stadium is the only stadium within the Borrower’s protected territory that satisfies the PBA playing facility standards.

There is no Stadium lease between the Borrower and the Affiliate. The Affiliate does not compensate the Borrower for use of the Stadium. The Borrower is entitled to retain revenues generated from the Team games and does not share those revenues with the Affiliate.

The Stadium is expected to be used for Team baseball games on D days (for E games). The Borrower expects that the Stadium will be used F days per year for various activities, including Minor League baseball games. The Team receives priority in its use of the Stadium for its games. For example, the Borrower would not allow a person to schedule use of the Stadium in advance of the proposed date of use if that date falls within the Team's season and the schedule of games had not yet been established for the season.

The City owns the land on which the Stadium is located (the "Stadium Site") and leased that Site to the Issuer for a nominal amount (the "Issuer Lease"). The Issuer Lease term is G years with one H-year renewal. The Issuer, in turn, leased the Stadium Site to the Borrower (the "Borrower Lease") under a lease that is identical in all material respects to the Issuer Lease. The Issuer Lease and the Borrower Lease provide that the Stadium Site will be developed and maintained as a baseball park for use by a Triple-A baseball team. In addition, during the term of the Issuer Lease and the Borrower Lease, the Borrower must maintain ownership of the Team and the Team must play its home games in the Stadium.

The Issuer characterized an amount equal to $B as an equity contribution by the City to the Stadium. The Issuer allocated this equity contribution to the costs of issuance in excess of 2 percent of the Bond proceeds and costs not otherwise permitted to be financed with Bond proceeds, such as privately used concession areas, private seat areas, private use events, skyboxes, and Event Private Uses.

There was no actual contribution of $B by the City. The basis for the City's equity contribution is two deemed payments of Bond proceeds to the City and deemed contributions of those payments by the City to the Issuer, as described in a certificate of the Issuer on the issue date of the Bonds. The first deemed contribution results from the City's purchase of the Stadium Site, the City's lease of the Stadium Site to the Issuer for a nominal amount pursuant to the Issuer Lease, and the Issuer's lease of the Stadium Site to the Borrower pursuant to the Borrower Lease, also for a nominal amount. The Borrower Lease was valued, and an amount equal to a portion of the difference between the fair market value of the Borrower Lease and the actual payments thereunder was deemed paid by the Borrower, using Bond proceeds, to the City as a payment to compensate the City for leasing the Stadium Site for a nominal amount; the City was deemed to have contributed that same amount back to the Borrower (the "Lease Payment-Contribution"). The second deemed contribution results from City's expenditure of funds for certain costs with respect to the Stadium Site. The Borrower was deemed to have reimbursed the City for these costs, using Bond proceeds, and the City was deemed to have contributed that same amount back to the Borrower (the "Reimbursement Payment-Contribution"). Based on the Lease Payment-Contribution and the Reimbursement Payment-Contribution, the Issuer states that the Bond proceeds that were the subject of these deemed payments were allocated to expenditures, and thus, the deemed contributions by the City are not Bond proceeds.

LAW:

Section 103(a) generally provides that gross income does not include interest on any State or local bond. Section 103(b)(1) provides that this exclusion does not apply to any private activity bond unless it is a qualified bond (as such terms are defined under § 141). Under § 145(e)(1)(G), the term qualified bond means any private activity bond if such bond is a qualified 501(c)(3) bond.

Section 145(a) provides that the term qualified 501(c)(3) bond means any private activity bond issued as part of an issue if—

> (1) all property which is to be provided by the net proceeds of the issue is to be owned by a 501(c)(3) organization or a governmental unit, and
> (2) such bond would not be a private activity bond if—
>> (A) 501(c)(3) organizations were treated as governmental units with respect to their activities which do not constitute unrelated trades or businesses, determined by applying § 513(a), and
>> (B) paragraphs (1) and (2) of § 141(b) are applied by substituting "5 percent" for "10 percent" each place it appears and by substituting "net proceeds" for "proceeds" each place it appears.

Under § 1.145-2(a), with exceptions that are not material here, §§ 1.141-0 through 1.141-15 apply to § 145(a). For example, an issue ceases to be an issue of qualified 501(c)(3) bonds if the issuer or a conduit borrower 501(c)(3) organization takes a deliberate action, subsequent to the issue date, that causes the issue to fail to comply with the requirements of §§ 141(e) and 145 (such as an action that results in revocation of exempt status of the 501(c)(3) organization).

Section 141 provides that a bond is a private activity bond if the bond satisfies the private business use test and the private security or payment test of § 141(b) or the private loan financing test of § 141(c). Under § 141(b)(1), an issue meets the private business use test if more than 10 percent of the proceeds of the issue are to be used for any private business use. Under § 141(b)(6)(A), the term "private business use" means use (directly or indirectly) in a trade or business carried on by any person other than a governmental unit. For this purpose, use as a member of the general public shall not be taken into account. Under § 141(b)(6)(B), any activity carried on by a person other than a natural person is treated as a trade or business.

Section 1.141-2(d)(1) provides, in part, that an issue is an issue of private activity bonds if the issuer reasonably expects, as of the issue date, that the issue will meet either the private business test or the private loan financing test. Section 1.141-2(d)(2)(i) provides that in general, the reasonable expectations test must take into account reasonable expectations about events and actions over the entire stated term of an issue.

Under § 1.141-3(a)(1), the 10 percent private business use test of § 141(b)(1) is met if more than 10 percent of the proceeds of an issue is used in a trade or business of a nongovernmental person. For this purpose, the use of financed property is treated as the direct use of proceeds.

Under § 1.141-3(a)(2), in determining whether an issue meets the private business use test, it is necessary to look to both the indirect and direct uses of proceeds.

Under § 1.141-3(b)(1), both actual and beneficial use by a nongovernmental person may be treated as private business use.   In most cases, the private business use test is met only if a nongovernmental person has special legal entitlements to use the financed property under an arrangement with the issuer. In general, a nongovernmental person is treated as a private business user of proceeds and financed property as a result of ownership; actual or beneficial use of property pursuant to a lease, or a management or incentive payment contract; or certain other arrangements such as a take or pay or other output-type contract.

Under § 1.141-3(b)(7)(i), any other arrangement that conveys special legal entitlements for beneficial use of bond proceeds or of financed property that are comparable to ownership, leases, management contracts, output contracts, or research agreements results in private business use. For example, an arrangement that conveys priority rights to the use or capacity of a facility generally results in private business use.

Under § 1.141-3(g)(1), in general, the private business use of proceeds is allocated to property under § 1.141-6. The amount of private business use of that property is determined according to the average percentage of private business use of that property during the measurement period.

Section 1.141-3(g)(2) provides, in pertinent part, that the measurement period of property financed by an issue begins on the later of the issue date of that issue or the date the property is placed in service and ends on the earlier of the last date of the reasonably expected economic life of the property or the latest maturity date of any bond of the issue financing the property (determined without regard to any optional redemption dates).

Under § 1.141-3(g)(3), the average percentage of private business use is the average of the percentages of private business use during the 1-year period within the measurement period. Appropriate adjustments must be made for beginning and ending periods of less than 1 year.

Under § 1.141-3(g)(4)(i), the percentage of private business use of property for any 1-year period is the average private business use during that year. This average is determined by comparing the amount of private business use during the year to the total amount of private business use and use that is not private business use (“government use”) during that year. Section 1.141-3(g)(4)(ii) through 1.141-3(g)(v) apply to determine the average amount of private business use for a 1-year period.

Under § 1.141-3(g)(4)(ii), for a facility in which actual government use and private business use occur at different times (*e.g.*, different days), the average amount of private business use generally is based on the amount of time that the facility is used for private business use as a percentage of the total time for all actual use. In determining the total amount of actual use, periods during which the facility is not in use are disregarded.

Under § 1.141-3(g)(4)(iii), for a facility in which government use and private business use occur simultaneously, the entire facility is treated as having private business use. For example, a governmentally owned facility that is leased or managed by a nongovernmental person in a manner that results in private business use is treated as entirely used for a private business use. If, however, there is also private business use and actual government use on the same basis, the average amount of private business use may be determined on a reasonable basis that properly reflects the proportionate benefit to be derived by the various users of the facility (*e.g.*, reasonably expected fair market value of use). For example, the average amount of private business use of a garage with unassigned spaces that is used for government use and private buiness use is generally based on the number of spaces used for private business use as a percentage of the total number of spaces.

Under § 141(b)(2), the private security or payment test is satisfied if payment of the principal of, or the interest on, more than 10 percent of the proceeds of the issue is directly or indirectly (1) secured by any interest in property used or to be used for a private business use, or payments in respect of such property; or (2) to be derived from payments (whether or not to the issuer) in respect of property, or borrowed money, used or to be used for a private business use.

Section 1.141-6(a) provides that for purposes of §§ 1.141-1 through 1.141-15, the provisions of § 1.148-6(d) apply for purposes of allocating proceeds for expenditures. Allocations generally may be made using any reasonable, consistently applied accounting method, and allocations under § 141 and § 148 must be consistent with each other.

Section 1.148-6(d)(1)(i) provides that reasonable accounting methods for allocating funds from different sources to expenditures for the same governmental purpose include any of the following methods if consistently applied: a specific tracing method; a gross proceeds spent first method; a first-in, first-out method; or a ratable allocation method. Section 1.148-6(d)(1)(ii) requires that an allocation of gross proceeds of an issue to an expenditure must involve a current outlay of cash for a governmental purpose of the issue.

Section 1.148-6(a)(3) states that if an issuer fails to maintain books and records sufficient to establish the accounting method for an issue and the allocation of the proceeds of that issue, the rules of § 1.148-6 are applied using the specific tracing method.

ANALYSIS:

ISSUE ONE

The Affiliate has priority rights to use the Franchise to develop its players, managers, coaches, instructors and trainers. The Affiliate is the only nongovernmental person that enjoys these rights.

The Franchise provides the right to operate a team in the League and requires the Borrower to maintain an affiliation with a Major League club for the duration of the Borrower's ownership of the Franchise. The Franchise has no termination date. The player development contract is the exclusive mechanism by which the Major League club affiliation is established and it is the exclusive mechanism by which the Major League affiliate personnel are provided. Hence, through the operation of the PDC, only players, managers, coaches, instructors, and trainers provided by the Affiliate make up the team. Accordingly, it is the Affiliate that has the right to field the team that plays games in the League.

The Affiliate's rights with respect to the team go beyond simply fielding a team. Under the PBA, the players, managers, coaches, instructors, and trainers are under the exclusive contract to the Affiliate and are compensated only by the Affiliate. The Affiliate has exclusive authority and control over the selection and supervision of these persons. The Affiliate has the sole right to assign, direct, designate, or otherwise transfer any player to any other Major League club or Minor League club. The Borrower is prohibited from restricting any of the Affiliate's rights with respect to these persons.

Under the Franchise, the Borrower must provide a stadium that meets certain playing facility standards. Through the PDC, the Affiliate is entitled to play its games in such a facility. If the Borrower fails to provide a facility for the Team's games that meet the playing facility standards, and this failure is not corrected as provided in the PBA, the Borrower is subject to certain sanctions, including the Affiliate's termination of the PDC and the Borrower's divestiture of its interest in the Franchise.

It can be reasonably inferred from the facts that, as of the issue date of the Bonds, the Borrower reasonably expected to be a party to a player development contract with the Affiliate or another Major League club during the term of the Bonds. For the Borrower to use the Franchise to operate a baseball club in the League, it must enter into a player development contract with a Major League affiliate and, therefore, it use players, managers, coaches, instructors and trainers provided by a Major League club.

The Issuer argues that the Affiliate is not a private business user of the Franchise because the Borrower, not the Affiliate, is the ultimate beneficiary of the Franchise and that the benefits flowing to the Affiliate should be disregarded as incidental to the benefits derived by the Borrower. The Issuer also argues that the Affiliate received nothing as a result of the Borrower's acquisition of the Franchise because the Affiliate was guaranteed an affiliation with a Triple-A minor league team and a playing facility long before the Affiliate entered into the PDC with the Borrower. It notes that the Affiliate does not receive profits, revenues, or gains from the Franchise or its operation by the Borrower. The Issuer further notes that, according to the Director of Player Development for the Affiliate, the value of the Affiliate would be unaffected by its relationship with the Borrower.

These arguments do not recognize the significance of the Franchise to the Affiliate. While the Borrower is a beneficiary of the Franchise, this does not prohibit the Affiliate from also being a beneficiary. Functionally, the Franchise, through the Team, serves as a "farm system" for the Affiliate the purpose of which is, in part, to enable athletes to develop their potential as Major League players and to provide an opportunity for managers, coaches, instructors, and trainers to enhance the skills needed to work for the Affiliate. The Affiliate's player development occurs as a direct result of competition in League baseball games (*i.e.*, the rights flowing from the Franchise). As characterized by the Director of Player Development for the Affiliate, the Affiliate's use of the Franchise permits it to develop future Major League team personnel for its own benefit and to do so in a manner that avoids not only the costs borne by the Borrower, but also reduces the costs of obtaining players by the free-agency method. These avoided costs are a no less important right to the Affiliate than the right to receive or share in the profits, revenues, or gains of the Franchise. That the Affiliate was assured of being able to enter into a player development contract with an unspecified Minor League team does not mean the use by the Affiliate as a result of the PDC should be ignored.

Finally, the Issuer argues that the Affiliate is merely providing contractual services under the PDC which enable the Borrower to present entertainment and, thereby fulfill its purposes of providing baseball in the City. The Issuer analogizes its facts to a governmental entity's purchase of a computer as described in The Joint Committee on Taxation, General Explanation of the Tax Reform Act of 1986, at 1160. We disagree.

The distinction between use that satisfies the private business use test and use that is characterized as merely providing products or services, as illustrated by the Joint Committee computer example, turns on the type of benefit derived by the nongovernmental person. When a person purchases a computer, the benefit received from its use arises from the ongoing functions provided to the user of the computer (*e.g.*, word processing, spreadsheets, internet). As long as it owns the computer, the governmental purchaser receives all of these benefits and may exclude other persons from using the computer. The provider may earn a profit on the sale, but it may not use the functions of the computer in its trade or business. Any ongoing relationship between the governmental purchaser and the computer provider is in furtherance of the governmental purchaser's primary function(s). The Affiliate's use of the Franchise is distinctly different. Unlike a computer provider, who does not actually use the computer it sells, the Affiliate uses the Franchise to field a team and thereby develop its players, managers, coaches, instructors, and trainers.

Accordingly, we conclude that under § 1.141-3(b)(7)(i), the Affiliate has a special legal entitlement to use the Franchise and, therefore, is a private business user of the Franchise.

ISSUE TWO

During the term of the PDC, the Borrower and the Affiliate use the Franchise at the same time. The Borrower uses the Franchise as its owner, and the Affiliate uses the Franchise to develop its players, managers, coaches, instructors, and trainers.

Whether or not use occurs on the same basis depends on the form of use by the governmental user and the private business user. For example, in the management contract example in § 1.141-3(g)(4)(iii), the facility is not used on the same basis where the governmental user owns a building and the private business user manages the building. However, in the parking garage example in that section, the facility is used on the same basis where the use by the governmental user and the private business user takes the same form, parking cars in the garage. Here, use by the Borrower and the Affiliate is not on the same basis; the Borrower uses the Franchise as its owner and the Affiliate uses the Franchise as a tool to develop its players, managers, coaches, instructors and trainers.

Thus, the use of the Franchise is simultaneous use that is not on the same basis; for each 1-year period during the term of the PDC, the entire Franchise is used by the Affiliate for a private business use.

The PDC between the Borrower and the Affiliate expires in Year 1. Notwithstanding, as described above, it can be reasonably inferred from the facts that, as of the issue date of the Bonds, the Borrower reasonably expected to be a party to a player development contract with the Affiliate or another Major League club throughout the measurement period. Any player development contract, like the PDC, will result in private business use.

Accordingly, we conclude that the average amount percentage of private business use of the Franchise over the measurement period is 100 percent and thus, 100 percent of the proceeds of the Bonds used to purchase the Franchise are used for a private business use.

ISSUE THREE

The Affiliate, and only the Affiliate, is entitled to have its players, managers, coaches, instructors, and trainers play in a stadium that meets the playing facility standards set forth in the PBA. The Stadium is currently the only playing facility within the protected territory covered by the Franchise that satisfies the playing facility standards. If the

Borrower fails to provide a facility for the Team's games that meet the playing facility standards, and this failure is not corrected as provided in the PBA, the Borrower is subject to certain sanctions, including the Affiliate's termination of the PDC and the Borrower's divesture of its interest in the Franchise.

In the operation of the Stadium, the Team is given priority for use of the Stadium for its games over other uses of the facility. For example, the Borrower will not allow a person to schedule use of the Stadium in advance of the proposed date of use if that date falls within the Team's season and the schedule of games had not yet been established for the season.

The Issuer Lease and the Borrower Lease provide that the Stadium will be used, developed, and maintained as a baseball park for use predominantly by a Triple-A club (whether with the Affiliate or another Major League club). In addition, during the term of the Issuer Lease and the Borrower Lease, the Borrower must maintain ownership of the Team and the Team must play its home games in the Stadium. The term of the Issuer Lease and the Borrower Lease (excluding any extensions) is coterminous with the term of the Bonds. Thus, as of the issue date of the Bonds, the Borrower expected to use the Stadium, and not another facility, for the Team's baseball games during the term of the Bonds.

Any relocation by the Borrower is subject to a number of limitations. In particular, the Borrower must obtain the approval of the Affiliate (or any subsequent Major League club) before relocating. In addition, the Borrower must also notify the Commissioner of the Major Leagues and the President of the National Association in writing at least 18 months before the opening day of the season in which the new location will be used and receive approval of such relocation by the President of the National Association. In order for the relocation to be approved, the Borrower must establish that improved business operations (taking into account the quality of the playing facility and the classification of play involved) and/or improved player development will be achieved at the new location.

The Issuer argues that the Affiliate has no enforceable right to use the Stadium. In particular, the Issuer argues that the Affiliate does not have a right to use a particular stadium, and thus, the Affiliate cannot have special legal entitlements to use the Stadium. This argument does not accurately reflect the facts. In order to meet the scheduling needs of the Team arising from playing games in the League, the Team must receive priority rights to play its games in a stadium. The Affiliate, through its personnel which compose the Team, is entitled to a stadium that meets certain playing facility standards. The only stadium in the Franchise's protected territory that meets these standards is the Stadium. Thus, through the Team, the Affiliate has priority rights to use the Stadium. Any other conclusion ignores the Borrower's obligation under the Franchise and the PDC as well as the necessities of League operation.

The Issuer further argues that the Affiliate does not have special legal entitlements because it has no rights to control the operation of the Stadium. Practically, the

Affiliate requires no control over the Stadium. The Borrower, as owner of the Franchise and the Stadium, gives the Team preference in scheduling games. Thus, the Affiliate is assured that it will be able to develop its players, managers, coaches, instructors, and trainers by playing baseball games in the Stadium.

Finally, the Issuer argues that even if the Affiliate is a private business user of the playing field and clubhouse areas at the Stadium, they are not a private business user of the remaining part of the Stadium (*e.g.*, the seating area). This argument fails to recognize the inseparable nature of these portions of the Stadium. The PBA require a stadium facility that meets certain minimum standards. These standards go beyond providing specifications for the playing field and the clubhouse areas, but rather specify the size of the overall facility, including recommendations regarding seating, public comfort stations, concession areas, novelty stands, and ticket windows. Given that the requirements for the Stadium originate in the PBA, it is inappropriate to view the different portions of the facility separately. Moreover, according to the Director of Player Development for the Affiliate, spectators help to develop the players, which indicates that the Affiliate perceives its use as coming not just from the playing field and clubhouse areas of the Stadium, but rather from the entire facility.

Accordingly, we conclude that the Affiliate has a special legal entitlement to use the Stadium and, therefore, is a private business user of the Stadium. While there is no single agreement that conveys to the Affiliate a special legal entitlement to use the Stadium, such entitlement can be established viewing the facts and circumstances as a whole.

ISSUE FOUR

The use of the Stadium occurs in two situations -- Team games and other events. Based on the facts provided, the Stadium is expected to be used approximately D days per year for Team games and I days per year for other uses. During the I days of other use, no facts have been presented indicating there is private business use of the Stadium by the Affiliate. Thus, the expected amount of private business use by the Affiliate for any 1-year period is equal to D divided by F (or 76.7 percent) multiplied by the amount of private business use during the D days, as described below.

During Team games, the Borrower and the Affiliate use the Stadium at the same time. As described above, whether or not use occurs on the same basis depends on the form of use by the governmental user and the private business user. Here, use by the Borrower and the Affiliate is not on the same basis; the Borrower uses the Stadium as its owner and the Affiliate uses the Stadium as a tool to develop its players, managers, coaches, instructors and trainers.

Hence, the use of the Stadium is simultaneous use that is not on the same basis; for each 1-year period during the Affiliate's use of the Stadium, the entire Stadium is used for a private business use. Based on the other uses of the Stadium, this results in the average private business use by the Affiliate of the Stadium during any 1-year period being equal to 76.7 percent.

As described above, it can be reasonably inferred from the facts that, as of the issue date of the Bonds, the Borrower reasonably expected the Stadium to be for Team games over the entire measurement period. Therefore, a Major League club (whether the Affiliate or otherwise) will be as a private business user of 76.7 percent of the Stadium during each year of the measurement period.

Accordingly, we conclude that the average percentage of private business use of the Stadium over the measurement period is 76.7 percent and thus, 76.7 percent of the proceeds of the Bonds used to construct the Stadium are used for a private business use.

ISSUE FIVE

The Issuer has conceded that the method of payment of debt service on the Bonds constitutes private payments under § 141(b)(2).

ISSUE SIX

The Issuer has not maintained sufficient books and records to support its assertion that the City intended to make an equity contribution with the Lease Payment-Contribution and the Reimbursement Payment-Contribution. Accordingly, we conclude that the specific tracing method must be used to account for the Bond proceeds that were the subject of such deemed payments and receipts. Thus, any expenditures made with the City's "equity contribution" shall be treated as made with Bond proceeds.

The Issuer has provided no contemporaneous evidence that the City intended to make an equity contribution; rather, the contemporaneous City documents (*e.g.*, the Issuer Lease and the City's related resolutions) provided to us are silent as to the "receipts" under the Lease Payment-Contribution and the Reimbursement Payment-Contribution, and the intent to "contribute" those receipts to the Stadium. While the Issuer, purporting to act on behalf of the City, did execute a certificate at the time of issuance of the Bonds, which described the Lease Payment-Contribution and the Reimbursement Payment-Contribution, the Issuer is not related to the City. No facts have been presented to suggest that the Issuer is authorized to act on behalf of the City. It was only after we pointed out to the Issuer that there was no record of the City's intent to make an equity contribution that the City executed and provided a certificate similar to the Issuer's certificate. Given the context in which this certificate was provided, it is inappropriate to give weight to the City's certificate. Thus, from the record, all that can be inferred is that the City intended to purchase the Stadium Site, ultimately lease it to the Borrower, and expend its funds for certain costs relating to the Stadium Site.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.