

TAX EXEMPT STATUS OF OBLIGATIONS USED TO PROVIDE CERTAIN IRRIGATION FACILITIES

DECEMBER 16 (legislative day, DECEMBER 15), 1975.—Ordered to be printed

Mr. LONG, from the Committee on Finance,
submitted the following

REPORT

[To accompany H.R. 9968]

The Committee on Finance, to which was referred the bill (H.R. 9968) to amend section 103 of the Internal Revenue Code of 1954 with respect to certain obligations used to provide irrigation facilities, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

I. SUMMARY

H.R. 9968 would clarify the tax-exempt status of obligations the proceeds of which are to be used to reconstruct the American Falls Dam in Idaho.

Present law provides that an industrial revenue bond whose proceeds are used to build a dam to store water for irrigation purposes may be eligible for tax-exempt status. Where, however, the water also has a subordinate use in generating electricity, the status of the bonds is not clear under existing law. The American Falls Dam is used principally for irrigation purposes, but the water has a subordinate use in generating electricity. H.R. 9968 provides that industrial revenue bonds issued in such a case may qualify for exempt status if substantially all of the stored water is contractually available for irrigation purposes and the water is available on reasonable demand to members of the general public.

II. GENERAL EXPLANATION OF THE BILL

Present law provides that interest on obligations of State and local governments generally is exempt from Federal income tax. In 1968 tax-exempt status was withdrawn from industrial development bonds

which State and local governments were using to finance and attract private industrial development within their jurisdictions.

Industrial development bonds are generally considered to be State or local obligations, a major portion of the proceeds of which are to be used in, and repaid by, a taxable trade or business. Such bonds are normally issued to acquire a facility for private business in which the beneficial ownership of the facility remains in the private trade or business, although (in order to secure repayment of the bonds) legal title normally remains with the State or local unit issuing the obligations.

When the industrial development bond limitation was enacted, exceptions were provided for certain small issues (sec. 103(c)(6)) and for certain specified public activities (sec. 103(c)(4)) in which cases tax-exempt status was continued. As initially enacted, one of the public activities for which an exemption was provided (sec. 103(c)(4)(E)) was "sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy, gas or water."

In 1971, Congress amended the exception in subparagraph (E) to delete "water" and added the present law subparagraph (G) which extends the exception to "facilities for the furnishing of water, if available on reasonable demand to members of the general public."

As a result, in those cases where obligations are issued for facilities for the furnishing of water which meet the exception (under sec. 103(c)(4)(G)) but where the water is also used to generate electricity, it is uncertain as to whether the obligations would qualify for exempt status unless the use of the electric energy meets the "local" furnishing test (under sec. 103(c)(4)(E)), which has been interpreted to cover an area of two contiguous counties.

The American Falls Reservoir District applied to the Internal Revenue Service in June 1974 for a ruling that bonds to be issued to finance the replacement and rehabilitation of the American Falls Dam would qualify as a tax-exempt issue under section 103(c)(4)(G). The Internal Revenue Service, however, had questions of interpretation with respect to the interrelationship of the exceptions for facilities for furnishing of water and the local furnishing of electric energy and their application to the specific facts of this case. The committee reviewed the facts involved, as described below, and believed it is appropriate to specifically except the bond issue in this case as a result of the special circumstances.

The original American Falls Dam was constructed in 1927 by the Bureau of Reclamation. The dam was restricted to two-thirds of its 1.7 million acre foot capacity in 1972 by the Bureau of Reclamation of the Department of the Interior for safety reasons because of excessive pressures on the dam which were caused by an alkali-aggregate reaction and deterioration in the concrete.

Legislation was enacted on December 28, 1973, to permit replacement and rehabilitation of the American Falls Dam by the American Falls Reservoir District, which is a political subdivision of the State of Idaho. Replacement of the existing dam by the American Falls Reservoir District is an action to be taken in lieu of waiting for a Federal appropriation that would enable the Bureau of Reclamation to build the replacement dam.

The Act of December 28, 1973, also provides that upon completion of construction the United States shall take title to the dam as a feature of the Minidoka Project, located in the upper Snake River basin, Idaho.

As the constructing agent, the American Falls Reservoir District was authorized to contract with an electric utility for the use of the falling water at the dam for hydroelectric power generation. Revenues from such a contract with help defer the costs of constructing the dam. Prior to the adoption of the Act of December 28, 1973, the Idaho Power Company, which is a spaceholder in the reservoir and which owns and operates a powerplant below the existing dam, expressed interest in the execution of a falling water contract. Subsequent to the adoption of the Act, the District, as the constructing agency, entered into negotiations with the Secretary of the Interior, the Idaho Power Company and the other water users for the preparation of various contracts including a contract for the use of falling water.

It was intended that in normal circumstances substantially all of the falling water would be made available to the Power Company only when water was released from the dam for irrigation purposes. There has been no intention to release water specifically for use by the Idaho Power Company to generate electricity, except for 45,000 acre-feet (2.65 percent of the storage capacity) whose release the power company, in its capacity as a space holder in the irrigation district, can schedule for the purpose of generating electric energy. Thus, the use of water for electric energy would be subordinated to the use of the water for irrigation.

Although the Federal Government might well eventually completely finance the reconstruction of the American Falls Dam, the American Falls Reservoir District is undertaking the reconstruction now in order to make the dam fully operational for the spaceholders (rather than the present restricted two-thirds capacity). If it were not for the use of the water by the Idaho Power Company for hydroelectric power generation, any bonds issued by the Reservoir District would presently qualify for tax-exempt status. In this case the Idaho Power Company has a limited spaceholder right (under 3 percent) and is financing a large portion of the debt to assist the reconstruction of the dam and has use of the falling water for its hydroelectric power generation purposes. In addition, since the dam is to be turned over to the Federal Government after its reconstruction for ownership and operation, in effect, this financing can be viewed as saving the Federal Government the expenditure it would have had to make to reconstruct the dam several years in the future. In view of these special circumstances, the committee believes it is appropriate to extend tax-exempt status to the bonds to be issued to finance the reconstruction of the dam.

The bill adds a new exception to industrial development bond treatment to specifically allow tax-exempt status for the bonds issued to reconstruct the American Falls Dam. This exception is to apply to obligations for a dam which furnishes water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water if substantially all of the stored water is contractually available for release from the dam for irrigation pur-

poses and if the water released is available on reasonable demand for members of the general public.

The committee intends that subordinate use of water for generating electric energy means that less than 10 percent of the normal supply of stored water may contractually be scheduled for release by the power company and used for generating electric energy. Normal refers to conditions that generally prevail in the service area of this reservoir, and it is recognized that unusually wet or dry weather can cause a significant distortion in the 2.65 percent of water contractually scheduled for release to be used for generating electric energy. The committee intends that such unusual circumstances not be guiding in determining the subordinate use of water. In addition, normal use does not include a temporary increase in water released for the power company following contractual default by a spaceholder and his water share being made available to other spaceholders under the terms of the contract for the construction and operation of the dam and its facilities.

Thus, the provision applies the requirements of subsection (c) (4) (G) where substantially all of the stored water (under normal weather and climatic conditions) is available for release to be used for irrigation in the American Falls Reservoir District. The requirement that the released water be available on reasonable demand to members of the general public is retained in the new subsection (e). The committee understands that the American Falls project conforms with this requirement.

The bill is to apply to obligations issued after the date of the enactment of this Act.

III. COSTS OF CARRYING OUT THE BILL AND EFFECT ON THE REVENUES OF THE BILL

In compliance with section 252(a) of the Legislative Reorganization Act of 1970, the following statement is made relative to the costs to be incurred in carrying out this bill and the effect on the revenues of the bill.

The committee estimates that the bill, relating to the tax-exempt status of obligations used to provide certain irrigation facilities, will result in an annual revenue loss of about \$1 million in each of the five fiscal years following the current fiscal year. No revenue loss is expected in the current fiscal year.

IV. VOTE OF COMMITTEE IN REPORTING THE BILL

In compliance with section 133 of the Legislative Reorganization Act, as amended, the following statement is made relative to the vote of the committee on reporting the bill. This bill was ordered favorably reported by the committee without a rollcall vote and without objection.

V. CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as

reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

INTERNAL REVENUE CODE OF 1954

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Chapter 1—Normal Taxes and Surtaxes

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Subchapter B—Computation of Taxable Income

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Part III—Items Specifically Excluded From Gross Income

Sec. 103. Interest on Certain Governmental Obligations.

(a) **GENERAL RULE.**—Gross income does not include interest on—
 (1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia ;

(2) the obligations of the United States ; or

(3) the obligations of a corporation organized under Act of Congress, if such corporation is an instrumentality of the United States and if under the respective Acts authorizing the issue of the obligations the interest is wholly exempt from the taxes imposed by this subtitle.

(b) **EXCEPTION.**—Subsection (a) (2) shall not apply to interest on obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit, to the extent they represent deposits made before March 1, 1941), unless under the respective Acts authorizing the issuance thereof such interest is wholly exempt from the taxes imposed by this subtitle.

(c) **INDUSTRIAL DEVELOPMENT BONDS.**—

(1) **SUBSECTION (a) (1) NOT TO APPLY.**—Except as otherwise provided in this subsection, any industrial development bond shall be treated as an obligation not described in subsection (a) (1).

(2) **INDUSTRIAL DEVELOPMENT BOND.**—For purposes of this subsection, the term “industrial development bond” means any obligation—

(A) which is issued as part of an issue all or a major portion of the proceeds of which are to be used directly or indirectly in any trade or business carried on by any person who is not an exempt person (within the meaning of paragraph (3)), and

(B) the payment of the principal or interest on which (under the terms of such obligation or any underlying arrangement) is, in whole or in major part—

(i) secured by any interest in property used or to be used in a trade or business or in payments in respect of such property, or

(ii) to be derived from payments in respect of property, or borrowed money, used or to be used in a trade or business.

(3) **EXEMPT PERSON.**—For purposes of paragraph (2) (A), the term “exempt person” means—

(A) a governmental unit, or

(B) an organization described in section 501(c) (3) and exempt from tax under section 501(a) (but only with respect to a trade or business carried on by such organization which is not an unrelated trade or business, determined by applying section 513(a) to such organization).

(4) **CERTAIN EXEMPT ACTIVITIES.**—Paragraph (1) shall not apply to any obligation which is issued as part of an issue substantially all of the proceeds of which are to be used to provide—

(A) residential real property for family units,

(B) sports facilities,

(C) convention or trade show facilities,

(D) airports, docks, wharves, mass commuting facilities, parking facilities, or storage or training facilities directly related to any of the foregoing,

(E) sewage or solid waste disposal facilities or facilities for the local furnishing of electric energy or gas,

(F) air or water pollution control facilities, or

(G) facilities for the furnishing of water, if available on reasonable demand to members of the general public.

(5) **INDUSTRIAL PARKS.**—Paragraph (1) shall not apply to any obligation issued as part of an issue substantially all of the proceeds of which are to be used for the acquisition or development of land as the site for an industrial park. For purposes of the preceding sentence, the term “development of land” includes the provision of water, sewage, drainage, or similar facilities, or of transportation, power, or communication facilities, which are incidental to use of the site as an industrial park, but, except with respect to such facilities, does not include the provision of structures or buildings.

(6) **EXEMPTION FOR CERTAIN SMALL ISSUES.**—

(A) **IN GENERAL.**—Paragraph (1) shall not apply to any obligation issued as part of an issue the aggregate authorized face amount of which is \$1,000,000 or less and substantially all of the proceeds of which are to be used (i) for the acquisition, construction, reconstruction, or improvement of land or property of a character subject to the allowance for depreciation, or (ii) to redeem part or all of a prior issue which was issued for purposes described in clause (i) or this clause.

(B) **CERTAIN PRIOR ISSUES TAKEN INTO ACCOUNT.**—If—

(i) the proceeds of two or more issues of obligations (whether or not the issuer of each such issue is the same) are or will be used primarily with respect to facilities located in the same incorporated municipality or located in the same county (but not in any incorporated municipality),

(ii) the principal user of such facilities is or will be the same person or two or more related persons, and

(iii) but for this subparagraph, subparagraph (A) would apply to each such issue, then, for purposes of subparagraph (A), in determining the aggregate face amount of any later issue there shall be taken into account the face amount of obligations issued under all prior such issues and outstanding at the time of such later issue (not including as outstanding any obligation which is to be redeemed from the proceeds of the later issue).

(C) RELATED PERSONS.—For purposes of this paragraph and paragraph (7), a person is a related person to another person if—

(i) the relationship between such persons would result in a disallowance of losses under section 267 or 707(b), or

(ii) such persons are members of the same controlled group of corporations (as defined in section 1563(a), except that “more than 50 percent” shall be substituted for “at least 80 percent” each place it appears therein).

(D) \$5,000,000 LIMIT IN CERTAIN CASES.—At the election of the issuer, made at such time and in such manner as the Secretary or his delegate shall by regulations prescribe, with respect to any issue this paragraph shall be applied—

(i) by substituting “\$5,000,000” for “\$1,000,000” in subparagraph (A), and

(ii) in determining the aggregate fact amount of such issue, by taking into account not only the amount described in subparagraph (B), but also the aggregate amount of capital expenditures with respect to facilities described in subparagraph (E) paid or incurred during the 6-year period beginning 3 years before the date of such issue and ending 3 years after such date (and financed otherwise than out of the proceeds of outstanding issues to which subparagraph (A) applied), as if the aggregate amount of such capital expenditures constituted the face amount of a prior outstanding issue described in subparagraph (B).

(E) FACILITIES TAKEN INTO ACCOUNT.—For purposes of subparagraph (D)(ii), the facilities described in this subparagraph are facilities—

(i) located in the same incorporated municipality or located in the same county (but not in any incorporated municipality), and

(ii) the principal user of which is or will be the same person or two or more related persons.

For purposes of clause (i), the determination of whether or not facilities are located in the same governmental unit shall be made as of the date of issue of the issue in question.

(F) CERTAIN CAPITAL EXPENDITURES NOT TAKEN INTO ACCOUNT.—For purposes of subparagraph (D)(ii), any capital expenditure—

(i) to replace property destroyed or damaged by fire, storm, or other casualty, to the extent of the fair market value of the property replaced,

(ii) required by a change made after the date of issue of the issue in question in a Federal or State law or local

ordinance of general application or required by a change made after such date in rules and regulations of general application issued under such a law or ordinance, or

(iii) required by circumstances which could not be reasonably foreseen on such date of issue or arising out of a mistake of law or fact (but the aggregate amount of expenditures not taken into account under this clause with respect to any issue shall not exceed \$1,000,000), shall not be taken into account.

(G) **LIMITATION ON LOSS OF TAX EXEMPTION.**—In applying subparagraph (D) (ii) with respect to capital expenditures made after the date of any issue, no obligation issued as a part of such issue shall be treated as an obligation not described in subsection (a) (1) by reason of any such expenditure for any period before the date on which such expenditure is paid or incurred.

(H) **CERTAIN REFINANCING ISSUES.**—In the case of any issue described in subparagraph (A) (ii), an election may be made under subparagraph (D) only if all of the prior issues being redeemed are issues to which subparagraph (A) applies. In applying subparagraph (D) (ii) with respect to such a refinancing issue, capital expenditures shall be taken into account only for purposes of determining whether the prior issues being redeemed qualified (and would have continued to qualify) under subparagraph (A).

(7) **EXCEPTION.**—Paragraphs (4), (5), and (6) shall not apply with respect to any obligation for any period during which it is held by a person who is a substantial user of the facilities or a related person.

(d) **ARBITRAGE BONDS.**—

(1) **SUBSECTION (a) (1) NOT TO APPLY.**—Except as provided in this subsection, any arbitrage bond shall be treated as an obligation not described in subsection (a) (1).

(2) **ARBITRAGE BOND.**—For purposes of this subsection, the term “arbitrage bond” means any obligation which is issued as part of an issue all or a major portion of the proceeds of which are reasonably expected to be used directly or indirectly—

(A) to acquire securities (within the meaning of section 165(g) (2) (A) or (B) or obligations (other than obligations described in subsection (a) (1)) which may be reasonably expected at the time of issuance of such issue, to produce a yield over the term of the issue which is materially higher (taking into account any discount or premium) than the yield on obligations of such issue, or

(B) to replace funds which were used directly or indirectly to acquire securities or obligations described in subparagraph (A).

(3) **EXCEPTION.**—Paragraph (1) shall not apply to any obligation—

(A) which is issued as part of an issue substantially all of the proceeds of which are reasonably expected to be used to provide permanent financing for real property used or to be

used for residential purposes for the personnel of an educational institution (within the meaning of section 151(e)(4)) which grants baccalaureate or higher degrees, or to replace funds which were so used, and

(B) the yield on which over the term of the issue is not reasonably expected, at the time of issuance of such issue, to be substantially lower than the yield on obligations acquired or to be acquired in providing such financing.

This paragraph shall not apply with respect to any obligation for any period during which it is held by a person who is a substantial user of property financed by the proceeds of the issue of which such obligation is a part, or by a member of the family (within the meaning of section 318(a)(1)) of any such person.

(4) SPECIAL RULES.—For purposes of paragraph (1), an obligation shall not be treated as an arbitrage bond solely by reason of the fact that—

(A) the proceeds of the issue of which such obligation is a part may be invested for a temporary period in securities or other obligations until such proceeds are needed for the purpose for which such issue was issued, or

(B) an amount of the proceeds of the issue of which such obligation is a part may be invested in securities or other obligations which are part of a reasonably required reserve or replacement fund.

The amount referred to in subparagraph (B) shall not exceed 15 percent of the proceeds of the issue of which such obligation is a part unless the issuer establishes that a higher amount is necessary.

(5) REGULATIONS.—The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this subsection.

(e) CERTAIN IRRIGATION DAMS.—*A dam for the furnishing of water for irrigation purposes which has a subordinate use in connection with the generation of electric energy by water shall be treated as meeting the requirements of subsection (c)(4)(G) if—*

(1) *substantially all of the stored water is contractually available for release from such dam for irrigation purposes, and*

(2) *the water so released is available on reasonable demand to members of the general public.*

[(e)] (f) CROSS REFERENCES.—

For provisions relating to the taxable status of—

(1) Bonds and certificates of indebtedness authorized by the First Liberty Bond Act, see sections 1 and 6 of that Act (40 Stat. 35, 36; 31 U.S.C. 746, 755);

(2) Bonds issued to restore or maintain the gold reserve, see section 2 of the Act of March 14, 1900 (31 Stat. 46; 31 U.S.C. 408);

(3) Bonds, notes, certificates of indebtedness, and Treasury bills authorized by the Second Liberty Bond Act, see sections 4, 5 (b) and (d), 7, 18 (b) and 22(d) of the Act as amended (40 Stat. 290; 46 Stat. 20, 775; 40 Stat. 291, 1310; 55 Stat. 8; 31 U.S.C. 752a, 754, 747, 753, 757c);

(4) Bonds, notes, and certificates of indebtedness of the United States and bonds of the War Finance Corporation owned by certain nonresidents, see section 3 of the Fourth Liberty Bond Act, as amended (40 Stat. 1311, § 4; 31 U.S.C. 750);

(5) Certificates of indebtedness issued after February 4, 1910, see section 2 of the Act of that date (36 Stat. 192; 31 U.S.C. 769);

(6) Consols of 1930, see section 11 of the Act of March 14, 1900 (31 Stat. 48; 31 U.S.C. 751);

(7) Obligations and evidences of ownership issued by the United States or any of its agencies or instrumentalities on or after March 28, 1942, see section 4 of the Public Debt Act of 1941, as amended (c. 147, 61 Stat. 180; 31 U.S.C. 742a);

(8) Commodity Credit Corporation obligations, see section 5 of the Act of March 8, 1938 (52 Stat. 108; 15 U.S.C. 713a-5);

(9) Debentures issued by Federal Housing Administrator, see sections 204(d) and 207(i) of the National Housing Act, as amended (52 Stat. 14, 20; 12 U.S.C. 1710, 1713);

(10) Debentures issued to mortgages by United States Maritime Commission, see section 1105(c) of the Merchant Marine Act, 1936, as amended (52 Stat. 972; 46 U.S.C. 1275);

(11) Federal Deposit Insurance Corporation obligations, see section 15 of the Federal Deposit Insurance Act (64 Stat. 890; 12 U.S.C. 1825);

(12) Federal Home Loan Bank obligations, see section 13 of the Federal Home Loan Bank Act, as amended (49 Stat. 295, § 8; 12 U.S.C. 1433);

(13) Federal savings and loan association loans, see section 5 (h) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 133; U.S.C. 1464);

(14) Federal Savings and Loan Insurance Corporation obligations, see section 402(e) of the National Housing Act (48 Stat. 1257; 12 U.S.C. 1725);

(15) Home Owners' Loan Corporation bonds, see section 4(c) of the Home Owners' Loan Act of 1933, as amended (48 Stat. 644, c. 168; 12 U.S.C. 1463);

(16) Obligations of Central Bank for Cooperatives, production credit corporations, production credit associations, and banks for cooperatives, see section 63 of the Farm Credit Act of 1933 (48 Stat. 267; 12 U.S.C. 1138c);

(17) Panama Canal bonds, see section 1 of the Act of December 21, 1904 (34 Stat. 5; 31 U.S.C. 743), section 8 of the Act of June 28, 1902 (32 Stat. 484; 31 U.S.C. 744), and section 39 of the Tariff Act of 1909 (36 Stat. 117; 31 U.S.C. 745);

(18) Philippine bonds, etc., issued before the independence of the Philippines, see section 9 of the Philippine Independence Act (48 Stat. 463; 48 U.S.C. 1239);

(19) Postal savings bonds, see section 10 of the Act of June 25, 1910 (36 Stat. 817; 39 U.S.C. 760);

(20) Puerto Rican bonds, see section 3 of the Act of March 2, 1917, as amended (50 Stat. 855; 48 U.S.C. 745);

(21) Treasury notes issued to retire national bank notes, see section 18 of the Federal Reserve Act (38 Stat. 268; 12 U.S.C. 447);

(22) United States Housing Authority obligations, see sections 5(e) and 20(b) of the United States Housing Act of 1937 (50 Stat. 890, 898; 42 U.S.C. 1405, 1420);

(23) Virgin Islands insular and municipal bonds, see section 1 of the Act of October 27, 1949 (63 Stat. 940; 48 U.S.C. 1403).

