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CC: PA:LPD:PR (Reg-136806-06)
Internal Revenue Service
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Written Comments of Good Jobs New York on the Proposed Regulations of the Internal Revenue Service regarding the Treatment of Payments in Lieu of Taxes under Section 141 of the Internal Revenue Code.

My name is Dan Steinberg, Research Analyst for Good Jobs New York, a joint project of the Fiscal Policy Institute, with offices in Albany and New York City, and Good Jobs First, based in Washington, DC. Good Jobs New York promotes accountability to taxpayers in the use of economic development subsidies.

Good Jobs New York is concerned that the proposal to set guidelines for the treatment of payments-in-lieu of taxes (PILOTs) as generally applicable taxes is beyond the scope of a regulatory action.

The explicit legislative intent of the 1986 Tax Reform Act was to repeal the use of tax-exempt bonds for sports facilities except when debt is paid off with tax dollars.¹ If the proposed modifications are adopted, it could result in more and more municipalities using tax-exempt financing for sports facilities by servicing bond debt with funds that bear only a superficial resemblance to generally applicable taxes.

Indeed, the current regulations are not clear on the issue of whether PILOTs collected from tax-exempt facilities qualify as generally applicable taxes. The IRS is therefore proposing to eliminate the following sentence from section 1.141-4(e)(5)(ii) of the Internal Revenue Code:

For example, a payment in lieu of taxes made in consideration for the use of property financed with tax-exempt bonds is treated as a special charge.

The meaning of this sentence is hardly ambiguous since it clearly states that PILOT revenue from a project financed with tax-exempt bonds in consideration for the use of that property is a special charge. The elimination of this sentence serves to make the regulations more rather than less ambiguous.

Furthermore, in specifying how the structure of a PILOT arrangement must resemble generally applicable taxes, the IRS proposal does not address the fundamental issue of how PILOTs are collected, held and expended. For instance, in New York City, where the IRS approved the use of PILOTs to service debt for over \$1.4 billion in tax-exempt bonds for two baseball stadiums, PILOT payments are deposited by the New York City Department of Finance into an account maintained by the Bank of New York (BONY). BONY may disburse the PILOT funds only at the request of the New York City Economic Development Corporation as directed by the New York City Office of Management and Budget. In effect, the Mayor has the ability to disburse PILOT funds at his discretion, requiring only an authorizing resolution from the City Council.

Thus, the protocol for collecting and spending PILOT funds is clearly outside of New York City's generally applicable manner of treating real property taxes, and those PILOT funds are not allocated for governmental purposes in the same manner as the property taxes to which they are being compared. In fact, during public hearings before the New York City Council Finance Committee on April 25, 2005, New York City's Corporation Counsel Michael Cardozo argued that PILOTs are not the same as taxes:

Contractual rights to receive PILOTs in the future, directed by the Mayor pursuant to economic development agreements, are not 'revenues of the city.' They are instead contract rights that can be transferred or otherwise disposed of by the Mayor...and they are therefore not subject to payment into the general fund and subsequent appropriation.

The IRS' proposal to modify its regulations has far-reaching implications. Good Jobs New York is concerned that the proposed regulations, if adopted, would make it relatively easy for municipalities to dress up private payments as generally applicable taxes. This, in turn, could lead to a proliferation of tax-exempt bonds being issued by local governments to finance private purpose sports facilities in violation of the legislative intent of the 1986 Tax Reform Act. Since such a development could adversely affect state governments with income taxes in a material way, we believe that this is a significant regulatory action pursuant to Executive Order 12866 and that a regulatory assessment is therefore required.

We also object to the determination that section 553(b) of the Administrative Procedures Act does not apply to these regulations. Such a determination is inconsistent with the letter and the purpose of the act.

Please do not hesitate to contact me with any questions you may have.

¹ Tax Reform Act of 1986, Conference Report to Accompany H.R. 3838, Volume II of 2 Volumes, September 18, 1986, U.S. Government Printing Office, Washington, p. II-700.