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# Municipal Bonds and Accountability to the General Electorate

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# Municipal Bonds and Accountability To the General Electorate

By Ellen P. Aprill

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A recent IRS technical advice memorandum denied tax-exempt status to the bonds of a development district because the district was not "inherently accountable, directly or indirectly, to a general electorate." Aprill argues that this is an unprecedented change that the IRS should introduce only in a format that includes notice-and-comment procedure.

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On May 9 the IRS issued TAM-127670-12, which concludes that bonds of a development district do not qualify as bonds of a political subdivision under reg. section 1.103-1(b). According to that technical advice memorandum (District TAM), "A governmental unit is inherently accountable, directly or indirectly, to a general electorate. In effect, section 103 relies, in large part, on the democratic process to ensure that subsidized bond financing is used for projects which the general electorate considers appropriate State or local government purposes." Later, the District TAM observes that entities that "avoid indefinitely responsibility to a public electorate, either directly or through another elected State or local government body" are not political subdivisions.

As Scott Lilienthal, president of the National Association of Bond Lawyers, noted, the District TAM "could create some widespread problems" because "special districts are a pretty widely used method of financing in various states."[1] Kristin Franceschi, former president of the National Association of Bond Lawyers, wrote the IRS before the issuance of the technical advice memorandum to say that "a departure (from the current status of dirt bonds) could have an immediate and disruptive effect in some quarters of the tax-exempt bond market."[2] The concerns that the District TAM raises, however, are legal as well as practical. That a bond of a political subdivision must have "inherent accountability, directly or indirectly, to a general electorate" has no basis in precedential tax authorities or in general local government law, including Supreme Court cases.

Reg. section 1.103-1(b) says, "The term 'political subdivision' . . . denotes any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit. As thus defined, a political subdivision of any State or local governmental unit may or may not . . . include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of any such unit." Rev. Rul. 77-164 elucidates, "Three generally acknowledged sovereign powers of states are the power to tax, the power of eminent domain, and the police power.[3] . . . It is not necessary that all three of these powers be delegated. However, possession of only an insubstantial amount of any or all sovereign powers is not sufficient."

The District TAM cites Rev. Rul. 83-131 for requiring an issuing entity of bonds to be "motivated by a wholly public purpose." That revenue ruling, which involved excise taxes and not tax-exempt bonds, concludes that the issuing entities, electric

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[1]Michael C. Bender et al., "Billionaire Morse's Florida Dirt Bonds Not Tax-Exempt," Bloomberg.com (June 6, 2013), *available at* http://www.bloomberg.com/news/2013-06-05/florida-billionaire-s-development-bonds-not-tax-exempt-irs-says.html.

[2]"IRS Rules Florida Development Bonds Should be Taxable," CNBC, June 6, 2013, *available at* http://www.cnbc.com/id/100796689. For additional coverage of the District TAM, see, *e.g.*, Jennifer DePaul, "Fla. Village Center CDD Lawyer Blasts Ruling, Asks IRS to Reconsider," *The Bond Buyer*, July 18, 2013, *available at* http://www.bondbuyer.com/issues/122_138/fla-village-center-cdd-lawyer-blasts-ruling-asks-irs-to-reconsider-1053857-1.html. Jennifer DePaul, "IRS Send Updated Notice of Proposed Issue to Fla. Village CDD," *The Bond Buyer*, Aug. 16, 2013, *available at* http://www.bondbuyer.com/issues/122_159/irs-sends-updated-notice-of-proposed-issue-to-fla-village-cdd-1054761-1.html; Jason Garcia, "As IRS Cracks Down on the Villages, Disney World Watches," OrlandoSentinel.com, July 13, 2103, *available at* http://articles.orlandosentinel.com/2013-07-13/business/os-disney-the-villages-tax-free-bonds-20130713_1_villages-walt-disney-world-disney-springs.

[3]Rev. Rul. 77-164 citing *Estate of Alexander J. Shamberg*, 3 T.C. 131 (1944), *acq.*, 1945 C.B. 6, *aff'd* 144 F.2d 998 (2d Cir. 1944), 1945 C.B. 335, *cert. denied*, 323 U.S. 792 (1944).



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membership corporations, are not so motivated. However, that observation is an aside. More significant is the IRS statement that the electric membership corporations "are not divisions of a state or local government unit but are financially autonomous and not controlled by a state or local government."

Rev. Rul. 83-131 revokes Rev. Rul. 57-193, which had determined that electric membership corporations were political subdivisions. In reaching that conclusion, Rev. Rul. 57-193 had relied on an applicable North Carolina law that clearly provided they were. Following Rev. Rul. 57-193, however, North Carolina amended its statute. Under the new statutory structure, when electric membership corporations dissolve, they distribute their remaining assets — after satisfaction of debt — to their members. The previous law had provided that those assets went to the state. The new provisions plainly say that electric membership corporations are not political subdivisions.

Nowhere does Rev. Rul. 83-131 reference accountability to a public electorate. It applies a two-prong analysis that concludes that the electric membership corporations are not divisions of a state or local government and that they do not have sufficient sovereign power. Based on those two factors, it concludes that the corporations are not political subdivisions.

Rev. Rul. 83-131 acknowledges that the electric membership corporations could fall under an exception and that the exemptions for state and local governments might still apply to them "if sales to them could be considered to be made for the exclusive use of a state or local government." In making that determination, the revenue ruling provided that "it must be established that the organization is either (a) controlled, directly or indirectly, by an agency of a state or local government, or (b) is performing a traditional governmental function on a nonprofit basis." The revenue ruling does not discuss or imply that public purpose entails accountability to a public electorate.

The private letter rulings and technical advice memoranda that cite Rev. Rul. 83-131 emphasize different aspects of it, but none makes accountability to a general electorate an element of their analyses, and many misstate the revenue ruling's analysis. Generally, those private letter rulings transform the "division of a state or local government" prong of Rev. Rul. 83-131's political subdivision analysis to require that the issuing entities are "motivated by a wholly public purpose."

The earliest TAMs that cite Rev. Rul. 83-131, TAMs 9103003, 91303004, 9103005, and 9107002 (involving sections 115, 3121(b)(7), and 3306(b)(7), but not section 103), point to the issuing entity in Rev. Rul. 83-131 not qualifying as a political subdivision because it, upon dissolution, distributed its assets to its members and had only a limited power of eminent domain.[4]

LTRs 9833002 and 9834002, which both involve credits and refunds for fuel excise taxes, emphasize the exceptions offered in Rev. Rul. 83-131. They explicitly describe the revenue ruling as providing a two-prong test with the first prong asking whether the taxpayer is a municipal corporation or a division of state government that has been delegated sovereign powers. Those letter rulings characterize the second prong as saying that "the exemption for state and local governments would include the taxpayer if the taxpayer is either directly or indirectly controlled by an agency of the state or local government *or* if the taxpayer is performing a traditional government function" (emphasis added). They apply the exceptions described in Rev. Rul. 83-131 as the second prong. Moreover, nothing in those letter rulings about the revenue ruling's two-prong test speaks of accountability to the general electorate to satisfy the control requirement, as the District TAM requires.

LTR 200017018, which involves section 103 and an authority created under state law by local governments to develop ports, changes the nature of Rev. Rul. 83-131's two-prong test. It states, citing the revenue ruling, "in determining whether an entity is a division of a state or local governmental unit, important considerations are the extent the entity is (1) controlled by the state or local government unit, and (2) motivated by a wholly public purpose." As noted above, while both of those factors are mentioned in Rev. Rul. 83-131, they do not constitute the two prongs of the test established by it. In Rev. Rul. 83-131, wholly public purpose is not an independent test. Evaluating whether an entity performs traditional functions of state or local government is an alternative test to determine whether the entity is under the control of state or local government. In restating the two-prong test of Rev. Rul. 83-131, the letter ruling misstates it.

Still, the indicia to which LTR 200017018 looks in determining governmental control are revealing. It considers whether "(1) the Authority is governed by a board of directors appointed by its member governmental units A, B, and C; (2) the Authority's net revenues inure to the benefit of the State and its

[4]Indeed, LTR 923006 recognized rural water districts as political subdivisions for purposes of sections 3121(b)(7) and 3306(c)(7), even though earlier TAMs had concluded the districts did not so qualify, because the state had amended the applicable dissolution provision to require that, upon dissolution, a district's assets would be distributed to another water district or to a local political subdivision.



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municipalities; and (3) the Authority's assets will be distributed to its member governmental units upon dissolution." The letter ruling goes into no detail about how the directors are appointed; we do not know how distant those with power to appoint are from the general electorate. Moreover, the nature of the authority's board is but one of three factors the letter ruling takes into account in determining governmental control. After listing those three factors, it concludes without explanation that "The Authority will be motivated by a wholly public purpose."

LTR 200151015, which involves whether a district is a political subdivision for purposes of section 170, repeats the erroneous, reformulated two-prong test — control by state or local government and wholly public motivation — of Rev. Rul. 83-131 as established in LTR 200017018. LTR 200151015 appears to find that the district is under governmental control because "the District is controlled by the Governor, the Country Executive and the Mayor (or their designees) who have the power to appoint the X members of its board of directors." While the facts indicate indirect — perhaps very indirect — control by the general electorate, nothing in the letter ruling makes that control a requirement. The letter ruling concludes that an entity providing for the development of cultural arts facilities serves a public purpose because the state legislature has so determined and because those establishments encourage economic development and tourism, and thus reduce unemployment.

LTR 200204032, which involves whether an agency formed to operate four hydroelectric generating facilities qualifies as a political subdivision under section 103, concludes that the agency is a division of the state under the transformed two-prong test of Rev. Rul. 83-131. "The Agency was created pursuant to State legislation, and the legislature may intervene to prevent a fundamental departure of the Agency from its public purposes. . . . Also, all of the Agency's directors and alternate directors are subject to control by the Municipal Utilities. A majority of the directors are appointees of the Municipal Utilities, and only the directors appointed by the Municipal Utilities may remove a director for cause. Directors and alternate directors appointed by the Electric Association [cooperative electric companies exempt under section 501(c)(12)], are not entitled to vote on the removal of a director or alternate director." The letter ruling explains that the municipal utilities are "each home rule municipalities and political subdivisions of the State," but it discusses not at all the extent to which the municipalities are subject to accountability to the general electorate.[5] Without any citation to authority, the letter ruling concludes that "owning hydroelectric generating facilities that provide electricity at a cost effective rate to citizens of the State . . . is a wholly public purpose." Importantantly, as in other letter rulings citing Rev. Rul. 83-131, the wholly public purpose factor goes to the nature of the entity's endeavor and not to the nature of control exercised by government.

LTR 200238001 involves whether the district established to provide fire protection is a political subdivision for purposes of tax-exempt interest and exemption from FUTA. It also relies on the reformulated Rev. Rul. 83-131 test, which looks to control and public purpose of the entity. LTR 200238001 finds that the district is a political subdivision because it "is formed pursuant to State law and has a substantial power, the right to levy a tax on property within its boundaries. . . . The District also performs a governmental function by providing fire protection and emergency services. Finally, at least five members of the Board of Trustees are subject to the control of either the County Judge/Executive, an elected official of the County, *or the control of the property owners of the District*" (emphasis added). That is, even under the mistakenly reformulated version of the Rev. Rul. 83-131's two-prong test, control by property owners is deemed adequate for governmental control. The letter ruling states that the district "performs a government function by providing fire protection and emergency services." Again, public purpose is a distinct inquiry, different from the nature of government control.

LTR 200305005, which involves whether an entity created to manage a medical university and related medical facilities was a political subdivision for purposes of sections 103 and 170, uses the revised version of the Rev. Rul. 83-131 test. As in other letter rulings, the discussion of public purpose is brief and conclusory: "The Entity's general purpose of management, regulation, and operation of the Medical University of State and related medical facilities, is a wholly public purpose." What appears to be the analysis of control is more detailed:

> The Entity was created pursuant to State legislation, and the Entity directly reports to the

[5]According to Osborne M. Reynolds Jr., *Local Government Law* 86, 111 (2009), home rule municipalities are granted the right under a state statute or constitution to govern their own affairs even in the case of a conflict with state law. Those rights would seem to include whether to have the general electorate or property owners vote on particular issues.



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> State governor and the State legislature. All actions of the Entity are subject to review by the State legislature. The State can thus prevent changes in the organization or operation of the Entity that would threaten the public purposes for which the Entity was created. All of the Entity's funds inure to the benefit of the State and may be used only for public purposes. The State legislature appropriates funds to Entity for its operating and maintenance expenses. The Entity is required to submit an annual audit and an annual budget to the State. Control and supervision of the Entity is vested in a board of directors that consists of the board of trustees of the Medical University of State, which is an integral part of State.

The nature of the entity's board is only one element of the multi-factor analysis, and that analysis does not speak to any role of the general electorate.

Similarly, TAM 200646017, which involves whether a nonprofit corporation organized to operate a public school and that issued debt on behalf of the state was a division of the state within the meaning of reg. section 1.103-1(b), considers multiple factors in deciding that the entity satisfied the transformed requirements of Rev. Rul. 83-131 of control and wholly public purpose:

> In accordance with the State Constitution, education is a public purpose of the State. Public schools perform the education function for the State. The Academy was created pursuant to State Law B which expressly permits and fosters the creation and operation of public school academies. Under State Law B, public school academies such as the Academy are public schools, and the powers granted by State Law B to academies constitute the performance of essential public purposes and governmental functions. Private inurement is not allowed in the organization or operation of the Academy. In addition, the operations of the Academy are subject to the control and supervision of the University Board, which is a part of the State, as well as by the State Board of Education. The State is the principal source of operating expenses for the Academy through the provision of State Funds. Accordingly, we conclude that the Academy is a division of the State.

This memorandum again illustrates that control of the board is but one factor in the wholly public purpose analysis, and nowhere does the memorandum require accountability to the general electorate. Although the memorandum does not explicitly say, it seems that the academy was organized in accordance with section 501(c)(3), which requires prohibition of inurement; that is, the inurement prohibition is a tax-exemption issue, not an issue relating to qualification of the academy as a division of the state.

The most recent letter ruling to cite Rev. Rul. 83-131, LTR 201050017, which addresses whether an association created to administer compensation in connection with state medical services was a division of the state that was not required to file tax returns or pay federal income tax. It revises the holding of Rev. Rul. 83-131 even more than earlier letter rulings. It cites Rev. Rul. 83-131 for determining that an entity is a division of a state which depends on factors including the entity's "public purpose and attributes, whether its assets or income will inure to private interests and the degree of its control by State." Yet the letter ruling, despite adding prohibition of inurement as a new factor found nowhere in Rev. Rul. 83-131, looks to several factors to support its conclusion, much like others that cited Rev. Rul. 83-131:

> Here, Association was established by State's legislature for a public purpose, and the Plan which it administers was funded by State with an initial appropriation of Y million. Funds held by the Association on behalf of the Plan are funds of State under State law. Association has been granted sovereign immunity under State law. Association's board of directors is appointed by State's chief financial officer. Moreover, Association is operated in accordance with a plan of operations that was approved by the Department. Cumulatively, the foregoing factors indicate that Association is a division of State.

That letter ruling evidences no concern about the distance of the board from the general electorate. The state CFO appoints the board, but the letter ruling does not tell us how the state's CFO is chosen. In particular, the letter ruling does not say whether the position is elected or appointed. The distance of the board from the general electorate is simply not a consideration in the letter ruling; it is irrelevant.

In sum, while several letter rulings reinterpret Rev. Rul. 83-131 to establish a two-prong test requiring an issuing entity to be controlled by the government and have public purpose, they analyze the nature of the entity's board as an aspect of government control and not as relevant to public purpose. The letter rulings evaluate public purpose according to the entity's activities and accord deference to the decisions of the state or local government establishing the entity. They do not discuss accountability to the general electorate. They permit government control to be shown in several ways,



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including through funding and financial reporting. The interpretation of Rev. Rul. 83-131 in the District TAM is unprecedented.

Rev. Rul. 77-164, quoted above, says that determining whether a municipal corporation has been delegated sufficient sovereign powers to be treated as a political subdivision requires consideration of "all of the facts and circumstances, including the public purposes of the entity and its control by a government." Those factors closely echo the restatement of Rev. Rul. 83-131 found in many of the letter rulings that cite it. Nowhere, however, does Rev. Rul. 77-164 require a municipal corporation to engage in direct or indirect democracy so that it will be considered a political subdivision.

Quoting Rev. Rul. 77-164's public purpose and government control criteria has become common. A Lexis search produces 185 letter rulings and TAMs citing it. Of the 15 letter rulings and memoranda issued since 2000, LTR 201114010 is particularly illuminating because it accepts a utility department created by a state "legislature pursuant to State statute as an independent department of City free from political influence from the Mayor of City or the City-County Council" as a political subdivision. The utility department was managed by a board, members of which were appointed annually by trustees "with no oversight by City." Although initial trustees were appointed by the city mayor, the city-county council, and the county circuit judge, subsequent trustees are appointed by remaining trustees on expiration of a trustee's term (or if the trustee dies, resigns, becomes a nonresident of the city, or is removed for cause). Thus, neither the department's board nor the trustees that appointed the board answered to the electorate. In the letter ruling the district established under a municipal code plan to establish an authority to run an additional utility system. Under the agreement, the department board will serve as the board of directors of the authority. The letter ruling concludes that the authority is a political subdivision, because, among other factors, it will be controlled by the department, which the letter ruling already concluded is a political subdivision. The utter insulation of both authority and department from the electorate did not affect the conclusion of the letter ruling or even merit comment.

I have found only one letter ruling in the bond area that refers to control by the electorate as a consideration in determining whether an issuer is a political subdivision. LTR 9725038 says that determination requires consideration of factors that show the issuing entity "will be a government rather than a private entity." Those factors include the entity's "public purpose and attributes, whether its assets or income will inure to private interests, the degree of its control by a state or local government or government official, and the degree of its control by an electorate." The letter ruling cites no authority for this list of factors. Moreover, "degree of control by an electorate" is only a factor, not a requirement, and the ruling does not specify that electorate refers to a public electorate. While the public in fact elected the governing board of the water district in LTR 9725038, any project to be paid for by assessment had to be approved by "property owners potentially affected by the [water district] project." That is, even the lone ruling discussing control by an electorate noted as a positive factor a special role for a vote by property owners.

Also illuminating is Announcement 2011-78, 2011-51 IRB 874, an advanced notice of proposed rulemaking under section 414(d) defining the term "governmental plan." The announcement explains *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971), as the case that courts have used to help determine "whether an entity is an agency or instrumentality of a State or a political subdivision of a State for purposes of ERISA. The two-prong test in *Hawkins County* analyzes whether the entity has been '(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.' *Hawkins County*, 402 U.S. at 604-05." I note that responsibility to public officials, and not necessarily publicly elected officials, is an alternative to responsibility to the general electorate, in that Supreme Court test. The announcement further explains:

> In addition to this two-prong test, the Supreme Court also analyzed other factors, including: whether the utility had broad powers to accomplish its public purpose; whether the utility's property and revenue were exempt from state and local taxes (as well as whether its bonds were tax-exempt); whether the utility had the power of eminent domain; whether the utility was required to maintain public records; whether the utility's commissioners were appointed by an elected county judge; and whether the commissioners could be removed by the State of Tennessee pursuant to State procedures for removal of public officials. Many of these factors are similar to the factors used in determining whether an entity is an agency or instrumentality of a State or a political subdivision of a State under these proposed regulations.

Announcement 2011-78 merits attention for its difference from the way the section 103 regulations analyze political subdivisions. The section 414(d)



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regulations as proposed in the announcement would define a political subdivision of a state as:

> 1. a regional, territorial, or local authority, such as a county or municipality (including a municipal corporation), that is created or recognized by state statute to exercise sovereign powers (which generally refer to the power of taxation, the power of eminent domain, and the police power); and
>
> 2. an authority whose governing officers either are appointed by state officials or publicly elected.

The second requirement has no parallel in section 103, and the announcement is careful to specify that the proposed regulations it contains are not applicable for any purpose of the code other than section 414(d), including section 103.[6] Moreover, that new requirement would be effective only when promulgated in the precedential form of final regulations, after comment. In the section 414(d) context, a new set of requirements as those proposed in the announcement are not to be applied retroactively in a non-precedential document, such as a TAM.

Two groups have criticized the announcement's restrictive definition of political subdivision. Kerry Korpi of the American Federation of State, County and Municipal Employees wrote that "existing policies [under reg. section 1.103-1(b)] provide sufficient guidance in determining whether an entity is a governmental subdivision or instrumentality, and that these definitions should be incorporated into the proposed regulations regarding the definition of governmental plan" (Mar. 12, 2012). The State Bar of Texas made a long list of suggestions. They include:

> Expanding the list of examples of local authorities to include local entities that are commonly created pursuant to State statutes or created pursuant to other local government laws, ordinances or other official action, such as local hospital districts created to provide medical care for indigent persons residing in a city or county, mental health and mental retardation authorities created to provide mental health services and mental retardation services for indigent persons residing in a city or county, local housing authorities created to provide affordable housing for local needy residents, airport authorities, transit authorities created to provide affordable mass transit for needy residents of a city or county, or city, county or local river or water authorities, school districts and special districts (or any entity similar to those described above created for legitimate governmental purposes).

Whether as a result of those comments or for other reasons, the regulations suggested in that announcement have gone no further than an advanced notice of proposed rulemaking. There has been no notice of proposed rulemaking published in the *Federal Register*.

The Supreme Court, in a series of nontax cases, has recognized the validity of political subdivisions that permitted only landowners to vote for their governing boards. In *Sayler Land Company v. Tulare Lake Basin Water*, 410 U.S. 719 (1973), litigants alleged that that kind of limitation on voting in a water storage district violated the equal protection clause of the Fourteenth Amendment. In the case, four landowners owned almost 85 percent of the land in the district. 410 U.S. at 735 (Douglas, J., dissenting). The Court rejected the challenge. It concluded that the "water storage district, by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group" did not require election by the general electorate. 410 U.S. at 1229. See also *Associate Enterprises Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973) (relying on *Sayler* and reaching the same conclusion). Similarly, in *Ball v. James*, 451 U.S. 355 (1981), the Court, relying on *Sayler*, upheld a voting scheme established by state law for electing directors of a water reclamation district that limited voting eligibility to landowners and apportioned voting power according to the amount of land each voter owns. The case explicitly discusses the ability of those districts to issue tax-exempt bonds. 451 U.S. at 360-361. In his concurrence, Justice Powell wrote:

> Our cases have recognized the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities. . . . As this case illustrates, it may be difficult to decide when experimentation and political compromise have resulted in an impermissible delegation of those governmental powers that generally affect all of the people to a body with a selective electorate. But state legislatures, responsive to the interests of all the people, normally are better qualified to make this judgment. 451 U.S. at 373.

Scholars analyzing those Supreme Court cases have made similar observations. In 1993, professor Richard Briffault of Columbia Law School observed

[6] *See* Lynn Hume, "Lawyer: IRS Position on Village Center CDD is Turnaround," *The Bond Buyer*, Oct. 18, 2013, *available at* http://www.bondbuyer.com/issues/122_202/lawyer-irs-position-on-village-center-cdd-is-turnaround-1056626-1.html, describing the argument by the development district's lawyer that the District TAM is inconsistent with reassurances given by an IRS representative during discussion of the announcement at an ABA tax section meeting.



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that "there are nearly 30,000 special districts in the United States, and the special district is our most rapidly growing form of local government."[7] States retain considerable control over the organization and structure of local governments because "local government organization does not abide by the 'plain vanilla' model."[8]

Professor Thomas W. Merrill of Columbia Law School, in considering the factors that argue for and against limiting local voting to property owners, argues that that form of voting is preferable when it is important to ensure "that voters are sufficiently informed and motivated to render a decision that accords with the preference of the members of the community and when the voting community will largely internalize both the benefits and costs of the proposals."[9] Merrill is an example of a scholar who concludes that voting by property owners is not only constitutional but also preferable in some situations. According to his criteria, community development districts would seem to be a place where that limitation on voting would work.

Whether an entity qualifies as a political subdivision for purposes of section 103 is, of course, a question for federal and not state government. Still, this delicate area of state-federal relations calls for comity and deference to state decisions. At the very least, a major change to the criteria of what constitutes a political subdivision, such as the unprecedented requirement of direct or indirect accountability to the general electorate that appears in the District TAM, should be offered in a format that gives notice to the tens of thousands of local governments and political subdivisions that provide services to U.S. taxpayers. Giving those local governments and political subdivisions an opportunity to offer comment to the IRS on the enormous disruption that that kind of change in legal standard would produce is critical to our tax system. The recent announcement in Treasury's 2013-2014 Priority Guidance Plan, released August 9, that it will provide guidance on the definition of political subdivision under section 103 is a good first step. An unprecedented and radical change should not be formulated in non-precedential guidance with retroactive effect, such as a technical advice memorandum. That approach undermines the respect accorded the IRS and its procedures.

[7]Briffault, "Who Rules at Home? One Person/One Vote and Local Governments," 69 *U. Chi. L. Rev.* 339, 361 (1993).

[8]*Id.* at 341.

[9]Merrill, "Reassessing the State and Local Toolkit: Direct Voting by Property Owners," 77 *U. Chi. L. Rev.* 275, 275 (2010).

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