



INTERIOR BOARD OF INDIAN APPEALS

State of Alaska v. Alaska Regional Director, Bureau of Indian Affairs

49 IBIA 290 (06/26/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

STATE OF ALASKA,) Order Affirming Decision
Appellant,)
)
v.)
) Docket No. IBIA 07-56-A
ALASKA REGIONAL DIRECTOR,)
BUREAU OF INDIAN AFFAIRS,)
Appellee.) June 26, 2009

The State of Alaska (State), through its Department of Commerce, Community and Economic Development, Division of Investments, appeals from a November 8, 2006, decision of the Alaska Regional Director, Bureau of Indian Affairs (Regional Director; BIA), that denied the State's application for a guaranty on its loan to a tribal fish hatchery entity under BIA's Loan Guaranty Program. The Regional Director concluded that the loan was ineligible for the Loan Guaranty Program because the interest earned on the loan was not reportable under Federal income tax laws. We affirm.

Statutory and Regulatory Background

BIA's Loan Guaranty Program (Program) is part of the Indian Financing Act of 1974 (Act), Pub. L. No. 93-262, Section 1, 25 U.S.C. §§ 1451 *et seq.* Among other things, Title II of the Act, governing loan guaranties and insurance, authorizes the Secretary of the Interior (Secretary) to guaranty up to 90% of the unpaid principal and interest due on loans to Indian entities or individuals "[i]n order to provide access to *private* money sources which otherwise would not be available." 25 U.S.C. § 1481 (emphasis added); *see also* 25 C.F.R. § 103.2 ("The direct function of the Program is to help lenders reduce excessive risks on loans they make[, which] in turn helps borrowers secure conventional financing that might otherwise be unavailable"); *United National Bank v. U.S. Dept. of the Interior*, 54 F. Supp. 2d 1309, 1311 (S.D. Fla. 1998).

Congress specified that loans guaranteed under the program can be issued "by any lender satisfactory to the Secretary, except as provided in section 1486 of this title." 25 U.S.C. § 1488. In Section 1486, Congress chose to exclude the following loans from eligibility for guaranty or insurance under the Program:

Loans made by an agency or instrumentality of the Federal Government, or by an organization of Indians from funds borrowed by the United States, and loans *the interest on which is not included in gross income* for the purposes of Chapter 1 of Title 26 shall not be eligible for guaranty or insurance hereunder.

25 U.S.C. § 1486 (emphasis added); *see also* 25 C.F.R. § 103.10(b)(3) (“A lender that does not include the interest on loans it makes in gross income, for purposes of [C]hapter 1, [T]itle 26 of the United States Code, [is] not qualified to issue loans under the Program.”).

Factual and Procedural Background

In May 2006, the Port Graham Hatchery Corporation (Hatchery Corporation) applied to the State for a loan in the amount of \$928,773, *see* Hatchery Corporation loan application cover letter, May 31, 2006, at 1, which amount subsequently was reduced by the Hatchery Corporation to \$650,000, Brief of Amici Curiae at 7. By letter dated September 5, 2006, the State notified the Hatchery Corporation that its loan had been conditionally approved for \$650,000 at an interest rate of 9 percent to be repaid over a 30-year period with repayment deferred until the 7th year of the loan. Letter from the State to the Hatchery Corporation, Sept. 5, 2006, at 1. The loan was conditioned on, among other things, “[a] loan guaranty in the amount of \$520,000.00, or 80% of the loan amount, from the Bureau of Indian Affairs (BIA).” *Id.*

The State submitted a request to BIA, dated September 7, 2006, for a guaranty under the Program on a loan amount of \$650,000¹ to the Hatchery Corporation. The State stated in its cover letter that the loan would “otherwise not be approved” without a guaranty from BIA. State’s Loan Guaranty Application cover letter, Sept. 7, 2006, at 1.²

¹ The State characterized the loan as a “Fisheries Enhancement loan.” State’s Loan Guaranty Application cover letter, Sept. 7, 2006, at 1. According to the State, “Fisheries Enhancement loans may be made for planning, construction, and operation of fish hatchery facilities, including preconstruction activities necessary to obtain a permit, construction activities to build the hatchery facility, and costs to operate the facility.” *Id.*

² The Hatchery Corporation had eight outstanding loans with the State at the time of its application for the subject loan, which would be its ninth loan. The Hatchery Corporation’s existing eight loans had an aggregate outstanding balance in excess of \$2.5 million. Brief of Amici Curiae at 7. Apparently, none of these prior loans was conditioned on, or guaranteed by, a BIA guaranty.

In a decision dated November 8, 2006, the Regional Director informed the State that the Division of Capital Investment in Washington, D.C.,³ had reviewed the State's application, and had determined that current law and regulations excluded the State as an eligible lender under the Program pursuant to 25 U.S.C. § 1486 and 25 C.F.R. § 103.10(b)(3).⁴ This appeal followed.

The State filed both an opening brief and a reply brief. The Board granted amicus curiae status to the Hatchery Corporation and to the Alaska Federation of Natives; Amici jointly filed a brief in support of the State. BIA filed an Answer Brief.

Discussion

The issue presented on appeal is strictly a question of law: Whether the Regional Director erred in determining that the State's Fisheries Enhancement Revolving Loan Fund was excluded by law as an eligible lender under the Loan Guaranty Program. Because interest earned on the subject loan would not be "included in gross income for the purposes of chapter 1 of title 26 [of the United States Code]," we affirm the Regional Director's decision.

In cases arising under Indian Financing Act programs, it is the Board's responsibility to ensure that proper consideration was given by BIA to all legal prerequisites to BIA's exercise of discretion in determining whether or not to approve a loan guaranty request. *See Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director*, 22 IBIA 153, 157 (1992), and cases cited therein. The Board has full authority to review legal issues de novo, other than issues raising the constitutionality of laws or regulations. *See Valley Bank of Glasgow v. Director, Office of Indian Energy and Economic Development*, 49 IBIA 42, 50 (2009). As part of its review of the record, the Board may take into consideration the Regional Director's explanations for his decision that are proffered in his answer brief, provided that opposing parties have been provided with the opportunity to respond. *State of Minnesota v. Acting Midwest Regional Director*, 47 IBIA 122, 125 (2008) (citing *Bonanza Fuel, Inc. v. Director*,

³ The Division of Capital Investment is part of the Office of Indian Energy and Economic Development, which is directly under the Assistant Secretary -- Indian Affairs, Department of the Interior. *See* www.doi.gov/bia/asia_iedd.

⁴ The Regional Director's decision refers to 25 C.F.R. § 103.10(3)(b)(3), which does not exist. We presume he meant to refer to section 103.10(b)(3).

The record provided to the Board does not include any communications to or from the Division of Capital Investment. Inasmuch as this appeal rests not on disputed facts but on a question of law, the omission does not affect our decision.

Office of Economic Development, 33 IBIA 203, 205 n.5 (1999)). However, the burden remains at all times with the appellant to show error in the Regional Director's decision. *Navajo Precision Built Systems*, 22 IBIA at 157. This burden is not met by simple disagreement with BIA's reasoning nor is it adequate merely to allege error in the decision. *See Laducer v. Acting Great Plains Regional Director*, 48 IBIA 294, 300 (2009).

The Regional Director concluded that it was appropriate to deny the State's application for the requested guaranty. The Regional Director determined that 25 U.S.C. § 1486 and 25 U.S.C. § 103.10(b)(3) "exclude[]" the State's Fisheries Enhancement Revolving Loan Fund from participating in BIA's Loan Guaranty program. November 8 Decision. The Regional Director quotes from sections 1486 and 103.10(b)(3), but does not explain how these two sections bar or "exclude" the State's loan from eligibility for a loan guaranty from BIA. In his answer brief, the Regional Director explains that he rested his "decision on the elementary proposition that if the State as lender does not report gross income, or pay income taxes, then the interest it earns on loans it makes is not included in gross income for purposes of administration of the Federal Income Tax Code." Answer Brief at 4-5.⁵

The Regional Director's interpretation of sections 1486 and 103.10(b)(3) as barring the State from eligibility for a loan guaranty from BIA is premised on the unambiguous language of the statute and regulation. Both 25 U.S.C. § 1486 and 25 C.F.R. § 103.10(b)(3) expressly prohibit BIA guarantees of loans made by a lender that does not include the interest therefrom in gross income pursuant to Chapter 1, Title 26 of the United States Code. That the State may be exempt from Federal income taxation and does not report income to the Federal government, including interest income, does not alter our analysis. Indeed, available legislative history supports the conclusion that public lenders such as the State were not the intended recipients of BIA guarantees. In a letter to the Speaker of the House in support of the Indian Financing Act of 1974, Acting Secretary of the Interior John C. Whitaker stated that the Act "would provide additional incentives in the form of loan guarantees, and interest subsidies to encourage *private* lenders to loan more money for Indian economic projects." H.R. Rep. No. 93-907, *reprinted at* 1974 U.S.C.C.A.N. 2873, 2880 (emphasis added). While the State contends — without support — that Congress did not intend to preclude states or their loans from qualifying for loan guarantees from BIA, we are compelled to agree with the Regional Director that "neither the BIA nor the [Board] has the authority to disregard Congress's decision to exclude states from eligibility, expressed in the final clause of 25 U.S.C. § 1486, and faithfully

⁵ The Regional Director is reminded that he bears the responsibility of explaining the basis of his decision, which should appear in the first instance in his decision rather than in his answer brief in an appeal before the Board.

incorporated by the Secretary into his regulations at 25 C.F.R. § 103.10(b)(3).” Answer at 8.

The State nevertheless urges us to overturn the Regional Director’s decision principally on the grounds that Chapter 1 simply does not apply to the State or its agencies and, therefore, the State somehow does not fall within the exclusions of sections 1486 and 103.10(b). According to the State, “[i]f states cannot be taxed, then they do not fall within the purview of . . . Chapter 1.” Reply Brief at 3. But the State’s analysis is wrong on both counts: In certain circumstances, states *can be and are* subject to Federal income taxes under 26 U.S.C. Chapter 1, and are exempt from Federal income tax only to the extent that their income derives from (1) a public utility or (2) “the exercise of any essential governmental function,” and that the income accrues to the State. 26 U.S.C. § 115(1). Other income is not necessarily exempt. *Compare, e.g., New York v. United States*, 326 U.S. 572 (1946) (income from the sale by the state of mineral water is taxable) *with Michigan v. United States*, 40 F.3d 817 (6th Cir. 1994) (income from education trusts established under state law is exempt from Federal taxation). Here, we need not determine whether the interest income earned by the State would or would not be subject to reporting and taxation under Chapter 1; it is sufficient for our decision today that the State maintains that any interest income from the loan to the tribal fish hatchery would not be included in gross income for the purposes of Chapter 1. *See* Notice of Appeal at 1 (“[Chapter 1 of Title 26 . . . is in no way, shape or form applicable to the Division] of Investments”); Opening Brief at 3-4; Reply Brief at 3.⁶

Even if none of the provisions of Chapter 1 applied to the State (or, conversely, that the State simply was not within the scope of Chapter 1), neither section 1486 nor 103.10(b) makes any exception for entities that are not subject to the requirements of Chapter 1, and we are not free either to presume that Congress did not intend to exclude governmental lending agencies or to engraft an exception that Congress did not choose to articulate. Therefore, we reject the State’s argument that because it is not subject to Chapter 1, sections 1486 and 103.10(b) do not apply to it. The legal test is not as complicated as the State tries to make it: Either the interest on a loan is included in “gross income” for purposes of Chapter 1 or it is not. There is no exception for “income not included in gross income because the interest is earned by a state.”

⁶ According to the State, the Division of Investments reports income earned under the revolving loan fund to the Division of Finance within the State’s Department of Administration. The State does not controvert the Regional Director’s conclusion that income earned on the loan to the Hatchery Corporation is not included in the State’s gross income for purposes of 26 U.S.C. Chapter 1.

The State also asserts that the Regional Director’s “narrow construction” of the relevant law violates a “cardinal tenet of federal Indian law” — that statutes passed for the benefit of Indian tribes be liberally construed, with any doubt regarding meaning resolved in favor of Indians. Reply Brief at 5. We do not find either that the Regional Director has narrowly construed section 1486 or that section 1486 is ambiguous. Thus, there is no ambiguity in the statute to resolve.

The State makes additional arguments that it is a qualified lender under 25 C.F.R. § 103.10(a) and that the loan is entitled to approval under the criteria of 25 C.F.R. § 103.16(a), neither of which regulations were addressed by the Regional Director in his decision.⁷ But regardless of whether the State satisfies the lender criteria under subsection 103.10(a), that subsection is expressly subject to subsection (b), which specifically excludes as unqualified any lender “that does not include the interest on loans it makes in gross income, for purposes of chapter 1, title 26 of the United States Code.” 25 C.F.R. § 103.10(b)(3). The Regional Director was not required to determine whether the State met the criteria of subsection (a) because he determined that the State was unqualified under subsection (b). Similarly, whether the State’s application satisfies the requirements of subsection 103.16(a) is irrelevant: If the Regional Director determines, as a threshold matter, that a lender or a loan is ineligible for a guaranty under sections 1486 and 103.10(b), his inquiry ends there. Consideration of additional criteria under section 103.16(a) would be fruitless.⁸

Finally, the State speculates that “the only reason . . . the Regional Director chose § 1486 and § 103.10(b)(3) as the grounds for his denial is the lack of understanding, and possible confusion on his part, regarding how the fisheries enhancement loan program

⁷ Subsection 103.10(a) states that “[e]xcept as specified in [subsection 103.10(b)], a lender may be considered for BIA approval under the Program, if the lender is:

- (1) Regularly engaged in the business of making loans;
- (2) Capable of evaluating and servicing loans in accordance with reasonable and prudent industry standards; and
- (3) Otherwise reasonably acceptable to BIA.

⁸ It appears that the State may be arguing that the Board should determine not only that sections 1486 and 103.10(b) do not apply to the State, but should also then proceed to determine that both the State, as lender, and the fish hatchery loan qualify for an 80% loan guaranty from BIA. Even if we were to conclude that the State and the loan are not excluded from consideration for a loan guaranty under sections 1486 or 103.10(b), we would not make any ultimate determination on the State’s application but would vacate the Regional Director’s November 8 Decision and remand the matter to the Regional Director for a new decision.

works . . . [which] may be based on the fact that under this loan program interest on principal does not accrue during the first six years and no payments are required during this same period.” Appellant’s Opening Brief at 6. The State and Amici both assert that “the denial by the Regional Director flies in the face of the purpose for the BIA Loan Guaranty Program” by allowing Indians to secure lending which might not otherwise be available, quoting 25 C.F.R. § 103.2.⁹ *Id.* at 8; Amici Curiae Brief at 7. The purpose of the Act is to encourage “conventional financing” and “conventional lender financing,” both of which phrases appear in section 103.2. These terms refer to private, nongovernmental financing, and not to funding through state agencies. *See, e.g., Wiggins v. Shewmake*, 374 N.W.2d 111, 116 (N.D. 1985) (a “conventional loan” is one “obtained through a local lending agency not guaranteed by a governmental agency”). The purpose for which the loan is made and the purpose of the State’s lending program play no role in determining the eligibility of the proposed loan for a guaranty from BIA.

We thus find none of the State’s arguments sufficient to meet its burden of showing that the Regional Director’s decision was in error. Neither the State nor the proposed loan are eligible for a guaranty from BIA under the terms set forth by Congress in 25 U.S.C. § 1486 and by BIA in its regulations at 25 C.F.R. § 103.10(b)(3).

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director’s November 8, 2006, decision.

I concur:

 // original signed
Debora G. Luther
Administrative Judge

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Steven K. Linscheid
Chief Administrative Judge

⁹ 25 C.F.R. § 103.2 provides:

The purpose of the Program is to encourage eligible borrowers to develop viable Indian businesses through conventional lender financing. The direct function of the Program is to help lenders reduce excessive risks on loans they make. That function in turn helps borrowers secure conventional financing that might otherwise be unavailable.