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US Tax Court Sentences General Partner in LIHTC Partnership to 30 Months and $528,747 Recapture

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In a recent ruling, the United States Tax Court has held that a partnership must recapture low-income housing tax credits (LIHTCs) it claimed during closed tax years regardless of the statute of limitations. In the United States Tax Court case *Bentley Court II LP versus Commissioner of Internal Revenue*, the court ruled on May 31, 2006 that Bentley is bound by a duty of consistency. Bentley claimed that it had a qualified basis and later disclaimed that basis after the statute of limitations had passed. The outcome: the general partner was sentenced to 30 months in prison and recapture of $528,747 in tax credits for the closed years.

Findings of Fact

Bentley admitted to losing and concealing tenant files for the years of 1993, 1994 and 1995. Bentley also falsified documents by changing income levels and altering the student status of tenants for those same years. The state agency found that 90 percent of the tenants were students, although Bentley claimed the tenants were not students.

Findings of Law

Under Internal Revenue Code (IRC) Section 42(3)(D), units occupied entirely by full-time students are disqualified unless they meet one of four exceptions: 1) the student is receiving Temporary Assistance for Needy Families (TANF) assistance; 2) the student is in a job training program; 3) the student is a single parent and the child is a dependent of that student; or 4) the students are married and file a joint return.

The student tenants in question did not meet any of these four criteria and therefore did not qualify as low-income tenants. Bentley admitted to the falsifying of documents and acquiesced that the LIHTCs for 1993, 1994 and 1995 should be forfeited. Bentley did not agree, however, to the recapture of one-third of the credits for these three years. Recapture is triggered when there is a decrease in the number of qualified units. In this case, the general partner claimed that there should be no recapture because the general partner claimed that there were never any qualified units from 1990 through 1995, thus no decease. This was an inconsistent position by Bentley because Bentley had filed tax returns claiming tax credits based on 100 percent qualified units in years 1990, 1991 and 1992. The IRS held Bentley to the duty of consistency and held that Bentley could not have inconsistent positions; therefore the IRS continued with its position that the years 1990, 1991 and 1992 had qualified units.

The duty of consistency requires that a taxpayer remain constant with a representation that he/she has made. The duty of consistency doctrine is intended to prevent a taxpayer from taking a contrary position to a previous position from a closed tax year. The general partners's argument was rejected by the court because the general partner had previously claimed that there were qualified tenants from 1990 through 1992, and as a result received federal low-income housing tax credits of $1,587,831.

Penalties

The use of credits was disallowed in 1993, 1994 and 1995 because Bentley admitted to falsifying documents in those years. There also was recapture of $528,747 in credits, which was calculated based on one-third of the $1,587,831 LIHTCs taken in the prior years (1990, 1991 and 1992) under IRC §42(j) recapture provisions. The general partner was sentenced to 30 months in prison following his guilty plea of obstructing and impeding the administration of the Internal Revenue laws by losing and concealing tenant files

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that were to be examined by the IRS as part of an audit of the partnership return for 1993.

Conclusion

This case demonstrates that the statute of limitations, which is generally three years, does not protect closed years from recapture. The statute of limitations does, however, protect closed years from audit unless 1) the taxpayer's position in the closed years was frivolous, 2) the taxpayer committed fraud, or 3) the taxpayer's misrepresentation causes gross income to differ by 25 percent.

The result in this case begs the question why the IRS did not go with Bentley's position that there were no qualified units in years 1990, 1991, and 1992; and therefore have complete loss of credits in those years instead of just one-third recapture. It's possible that the taxpayer continued to be protected under the statute of limitations for those years if the IRS thought none of the 3 exceptions above to the statute of limitations could be proved, and therefore the IRS left years 1990, 1991 and 1992 out of the IRS audit. However, note again that the statute of limitations not protect closed years from recapture.

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