

CCA 200137028 - IRC Section 42 - Low-income housing credit

IRC Section 42

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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224
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MEMORANDUM FOR William J. Healey
Team Manager, Examination Specialization and Processes
S:C:CP:RC:ES

FROM: Harold Burghart
Assistant to the Branch Chief, Branch 5
CC:PSI:5

SUBJECT: Low Income Housing Credit Program: Clarification of "Reasonable Attempts" for Purposes of § 1.42-5(c)(ix)

This Chief Counsel Advice responds to your memorandum dated March 13, 2001. In accordance with § 6110(k)(3) of the Internal Revenue Code, this Chief Counsel Advice should not be cited as precedent.

In your memorandum, you ask if the vacant unit rule in § 1.42-5(c)(ix) of the Income Tax Regulations can be applied on a building-by-building basis, rather than on a project basis. Also, you inquire about the definition of "reasonable attempts" made to rent a vacant low-income unit. Lastly, you ask whether the qualification under the available unit rule in § 42(g)(2)(D)(ii) that a unit is not available for rent when subject to a reservation that is binding under local law can be applied to the vacant unit rule.

The available unit rule under § 42(g)(2)(D)(i) provides that, except as provided in § 42(g)(2)(D)(ii), notwithstanding an increase in the income of the occupants of a low-income unit above the income limitation applicable under § 42(g)(1), the unit will continue to be treated as a low-income unit if the income of the occupants initially met the income limitation and the unit continues to be rent-restricted. However, under § 42(g)(2)(D)(ii), if the income of the occupants of the unit increases above 140 percent of the applicable income limitation, the unit will no longer be treated as a low-income unit if any residential unit in the building (of a size comparable to, or smaller than, the unit) is occupied by a new resident whose income exceeds the applicable income limitation.

Section 1.42-15(c) provides that a unit is not available for purposes of the available unit rule when the unit is no longer available for rent due to contractual arrangements that are binding under

local law (for example, a unit is not available if it is subject to a preliminary reservation that is binding on the owner under local law prior to the date a lease is signed or the unit is occupied).

The vacant unit rule in § 1.42-5(c)(1)(ix) provides that the owner of a low-income housing project must be required to certify that if a low-income unit in the project became vacant during the year, that reasonable attempts were or are being made to rent that unit or the next available unit of comparable or smaller size to tenants having a qualifying income before any units in the project were or will be rented to tenants not having a qualifying income.

Under the vacant unit rule of § 1.42-5(c)(ix), vacant units formerly occupied by low-income individuals may continue to be treated as occupied by a qualified low-income individual for purposes of the set-aside requirement (as well as for determining qualified basis) provided reasonable attempts are made to rent the unit and no other units of comparable or smaller size in the project are rented to nonqualifying individuals. As stated in the legislative history, the vacant unit rule is applied on a project-wide basis, rather than on a building-by-building basis. H.R. Conf.Rep. No. 99-41, 99th. Cong. 2d Sess. 11-94 (1986). Therefore, we do not apply the vacant unit rule on a building-by-building basis. Note, however, that § 42(g)(2)D(ii) specifically requires that the available unit rule be applied on a building-by-building basis.

What constitutes a reasonable attempt to rent a vacant unit is factual, and may differ from project to project depending on the size, location, and dollar value of the particular project. Also, the different advertising media and technologies accessible (geographically and financially) to projects would affect what is considered reasonable. Therefore, we do not define what is a reasonable attempt to rent a vacant unit.

The fact that a unit is subject to a reservation under local law would indicate that reasonable attempts have been made to rent the unit. Although not specifically provided, it appears appropriate to apply this reservation standard for purposes of the available unit rule to determine when a unit is considered rented under the vacant unit rule.

If you have any questions regarding this memorandum or further questions relating to these issues, please call Dave Selig at (202) 622-3040.