

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Number: **200913013**

Release Date: 3/27/2009

CC:PSI:B05

POSTS-101101-09

UILC: 42.00-00

date: February 20, 2009

to: Ronald Pinsky,
Assistant Division Counsel (Tax Litigation)
Division Counsel, (Small Business/Self-Employed), SBSE

Glenn DeLoirea,
Program Manager, Examination Specialization & Technical Guidance, (Small
Business/Self-Employed), SBSE
Attn: Grace Robertson

from: Paul Handleman, Chief, Branch 5, Office of the Associate Chief Counsel
(Passthroughs & Special Industries), CC:PSI:5

subject: Section 42, Low-Income Housing Credit: Assessment of Penalties under section
42(l)(3)

This Chief Counsel Advice responds to your request for assistance regarding
section 42(l)(3) of the Internal Revenue Code.

Issues

1. Under section 6652(j) of the Internal Revenue Code, as referenced in section 42(l)(3), the penalty for a housing credit agency (Agency) failing to timely submit the annual report is \$100 for each such failure. Is the penalty limited to \$100 for the failure to file Form 8610, "Annual Low-Income Housing Credit Agencies Report" only, or is the penalty also assessed for failure to file each Form 8609, "Low-Income Housing Credit Allocation and Certification," Schedule A (Form 8610), "Carryover Allocation of Low-Income Housing Credit," and, if applicable, failure to provide information concerning buildings receiving disaster relief under Rev. Proc. 2007-54, 2007-31 I.R.B. 293, or Rev. Proc. 95-28, 1995-1 C.B. 704, which is required to be attached to Form 8610 to meet the requirements of section 42(l)(3)(A), (B), and (C)?

2. An Agency filed an inaccurate Form 8610, which includes certifications that the Agency complied with the compliance monitoring requirements under section 1.42-5(c)(2) of the Income Tax Regulations and compliance notification requirements under section 1.42-5(e). What sanctions are available for failure to comply with these requirements?

Discussion

Under section 42(l)(3), each agency which allocates any housing credit amount to any building for any calendar year shall submit to the Secretary (at such time and in such manner as the Secretary shall prescribe) an annual report specifying (A) the amount of housing credit amount allocated to each building for such year, (B) sufficient information to identify each such building and the taxpayer with respect thereto, and (C) such other information as the Secretary may require. The penalty under section 6652(j) shall apply to any failure to submit the report required by the preceding sentence on the date prescribed therefor.

Section 6652(j) states that in the case of each failure to provide a certification as required by section 142(d)(7) at the time prescribed therefore, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such certification, an amount equal to \$100 for each such failure.

Under section 1.42-1T(d)(8)(ii) of the temporary Income Tax Regulations, the date prescribed for filing Form 8610 is February 28th after the close of the calendar year in which housing credit was allocated to a qualified low-income building. Each Agency uses Form 8610 to provide the annual report to the Service, specifying the amount of housing credit allocated during the calendar year. In combination with the Form 8609 and Schedule A (Form 8610), which are required to be attached to the Form 8610, the form and schedule provide the means for each Agency and the Service to reconcile the allocations of credit for each building with the aggregate amount of credit available to the Agency for allocation under the State housing credit ceiling (as defined in section 42(h)(3)). Each Agency must not allocate more credit than it is authorized to allocate during the calendar year.

Form 8610 also requires an Agency to certify under penalties of perjury that, for the reporting year, 1) the state's qualified allocation plan was in effect; 2) the Agency was in compliance with compliance monitoring requirements under section 42(m)(1)(B)(iii) and section 1.42-5(a)(2); and 3) the Agency fulfilled its noncompliance notification responsibilities under section 1.42-5(e).

Section 42(m)(1)(A)(i) provides that housing credit with respect to any building shall be zero unless credit was allocated pursuant to a qualified allocation plan. One of the requirements for a qualified allocation plan under section 42(m)(1)(B)(iii) is that the Agency must monitor for compliance with the requirements of section 42.

Conclusions

Because section 42(l)(3) specifies a requirement for only one annual report, it is not possible to fine an Agency multiple times for one year. However, if the report is inaccurate or incomplete (e.g., missing required forms that make up the report) or late, the Agency has not satisfied its duty under section 42(l)(3), and it may be fined \$100, regardless of the fact that an annual report was submitted.

As noted previously, an Agency must certify annually through Form 8610 that it met its compliance monitoring responsibilities as part of its qualified allocation plan under section 42(m)(1)(B)(iii). Section 42(m)(1)(A)(i) provides that housing credit with respect to any building shall be zero, unless credit was allocated pursuant to a qualified allocation plan. If upon review, SBSE determines that an Agency is not meeting its compliance monitoring requirements or that the Agency is not making allocations of credit pursuant to a qualified allocation plan (as defined in section 42(m)(1)(B)) that meets the requirements under section 42(m)(1)(A), then the Service has the authority to reduce the amount of low-income housing credit allocated by an Agency to a building to zero.

In accordance with section 6110(k)(3), this document may not be used or cited as precedent. Please call me at (202) 622-3040 if you have any further questions about this matter.