

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

Number: **201146016**

Release Date: 11/18/2011

CC:PSI:B05:  
POSTN-132219-11

Third Party Communication: None  
Date of Communication: Not Applicable

UILC: 42.00-00

date: October 18, 2011

to: Glenn DeLorica s/GD  
Program Manager, Technical Advisors Group IV  
(Small Business/Self-Employed)

from: Christopher J. Wilson, Senior Counsel, Branch 5  
(Passthroughs & Special Industries)

---

subject: POSTN-132219-11

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUE:

Does termination of a building's extended use period under § 42(h)(6)(E)(i)(I) upon foreclosure (or instrument in lieu of foreclosure) of the building result in automatic recapture of credits under § 42(j)?

CONCLUSION:

No. The termination of a building's extended use period under § 42(h)(6)(E)(i)(I) upon foreclosure (or instrument in lieu of foreclosure) does not result in automatic recapture of credits under § 42(j).

LAW AND ANALYSIS:

Under § 42(j)(1), if at the close of any taxable year in the compliance period (as defined under § 42(i)(1)) the amount of the qualified basis of any building with respect to the taxpayer is less than the amount of such basis as of the close of the preceding taxable year, the taxpayer's tax for the taxable year will be increased by the credit recapture amount. The credit recapture amount is determined under §§ 42(j)(2) and (3).

The legislative history to § 42 provides that, generally, any change in ownership of a low-income building during the compliance period is a recapture event and that all dispositions of ownership interests in buildings are treated as transfers for purposes of recapture. See 2 H.R. Conf. Rep. No. 841, 99<sup>th</sup> Cong., 2d Sess., II-96 and II-102 (1986), 1986-3 (Vol.4) C.B. 1, 96, 102.

Section 42(j)(6)(A) provides that the increase in tax under § 42(j) shall not apply solely by reason of the disposition of a building (or interest therein) if it is reasonably expected that such building will continue to be operated as a qualified low-income building for the remainder of the building's compliance period. Thus, under § 42(j)(6)(A) a disposition in and of itself (assuming it is reasonably expected that such building will continue to be operated as a qualified low-income building for the remainder of the building's compliance period) will not result in recapture under § 42(j)(1) absent another recapture event (e.g., reduction in qualified basis resulting from a decrease in the building's applicable fraction, etc.).

Section 42(h)(6)(A) generally provides that no credit shall be allowed under § 42 for any building for the taxable year unless an extended low-income housing commitment (Commitment) is in effect as of the end of such taxable year.

Section 42(h)(6)(B) defines a Commitment and requires, in part, that the application fraction (as defined under § 42(c)(1)) for the building "for each taxable year in the *extended use period* will not be less than the applicable fraction specified in the [Commitment]..." (see § 42(h)(6)(B)(i)) (emphasis added).

Section 42(h)(6)(D) defines the extended use period generally as beginning with the first day of a building's compliance period and ending on the later of the date specified in the Commitment or 15 years after the end of the building's compliance period.

Section 42(h)(6)(E)(i)(I) provides that the extended use period for any building shall terminate on the date the building is acquired by foreclosure (or an instrument in lieu of foreclosure) unless the Secretary determines that such acquisition is part of an arrangement with the taxpayer a purpose of which is to terminate such period.

Termination of an extended use period and the disposition of a building (or interest therein) are independent concepts. Termination of an extended use period is not (nor does it result in) a disposition of the building (or interest therein). Acquisition of the building (or interest therein) by foreclosure (or instrument in lieu of foreclosure) results in the disposition. While the disposition of a building (or interest therein) upon foreclosure (or instrument in lieu of foreclosure) may result in an imputed decrease of the building's qualified basis and recapture under § 42(j), the termination of the extended use period does not, in and of itself, result in a decrease in the building's qualified basis upon which recapture can be predicated. Accordingly, the disposition of a building upon foreclosure (or instrument in lieu of foreclosure) is treated the same as any other disposition of the building (or interest therein) under § 42(j)(6). It does not result in automatic recapture of credits under § 42(j).

Please call Julie-Hanlon Bolton or Chris Wilson at (202) 622-3040 if you have any further questions.