From: Michael Kotin [mike@kay-kay.biz]

Sent: Monday, May 11, 2009 11:57 AM

To: Notice Comments

Subject: Comments Reference IRS Notice 2009-44 Attention: David Selig

David:

As a follow-up to our telephone conversation, I would like to make two comments on the proposed regulations contained in Notice 2009-44

First, while the regulations do appropriately permit the use of tenant-paid sub-metering to (or through) the owner, it fails to address how the allowance should be calculated. Specifically, there are many jurisdictions where the local PHA utility tables provide allowances lower than actual costs, leaving the potential for owners to "skin" the deal. Consider a property that has a maximum gross rent of $1,000 for a unit, a corresponding PHA allowance of $50, but which bills (on average) utilities through submetering of $75 per unit. The owner is able to reduce the gross rent of $1,000 to a net rent of $950, rebill an average of $75 and essentially get $1025 for the unit. By submetering, total collections increase over the maximum gross allowable rent. True, there is a protection within 1.42-10 which allows any interested party (which presumably includes the tenant) to require that a property-specific calculation be computed and used. However, it is absurd to contend that low income tenants are aware of this protection which is buried deep within the Treasury Regulations. If a tenant were to exercise this right, the allowance would be adjusted upward to $75 and the system would be balanced. Solution: for non Section 8 properties with submetering, one of the allowable methods for determination of an actual property-specific allowance must be used.

Second, the language with respect to "actual" usage needs to be strengthened. As drafted, it does a good job removing RUBS types of charges which are based on arbitrary standards such as unit size or number of family members. However, it does not address charges based upon what I will call "quasi-usage". The problem arises at properties that do not have separate HVAC/heat or hot water heaters in each unit. For these properties, there is a master chiller or boiler—the cost of which is the most substantial part of the total property utility cost. Allocation of the cost of these machines cannot be made on actual usage without a myriad of assumptions. Some systems allocate this cost based upon the amount of general-use electricity used in a unit. This system is clearly unfair to the tenant who keeps his windows open but has the misfortune of watching a lot of T.V. Other systems allocate the expense based upon a "click" system that attempts to measure the amount of time the fan motor blows heat or air conditioning into the unit. The charges are then allocated based upon unit clicks as a percentage of total clicks. The problem with this system is that the cost is charged disproportionately to the occupied units. Consider a property with 100 units, 20 of which are vacant. If management turns the HVAC/heat off on the vacant units, the click method will allocate 100% of the cost of the chiller across

the 80 occupied units. Solution: the solution to this issue is a bit tougher to define. It may be that the regulations could address “quasi usage” allocations; alternatively, the regs could be allowed to stand and states could be provided monitoring guidance on this point.

As a general comment, submetering should not be a profit center to owners. To the contrary, it should be a zero sum game. Accordingly, save for an argument that all this monitoring equipment somehow makes tenants more energy conscious and frugal, it really should all be a wash. Using the numbers in the first example, as an owner, I should be indifferent between getting $1000 a month for rent (all utilities included) and $925 net rent along with $75 average submetering rebillings. It's a whole lot of work to go nowhere.

Thank you for your time. Should you wish to speak with me on either of these points, I can be reached during business hours at 480-941-6141.

Michael Kotin, CPA
Kay-Kay Realty Corp.
6908 East Thomas Road #300
Scottsdale, AZ 85251
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