

April 30, 2012

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2012-25)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2012-25, Guidance Priority List

Dear Ladies and Gentlemen:

We are writing this letter on behalf of the LIHTC Working Group. The LIHTC Working Group is made up of low-income housing tax credit (LIHTC) industry participants including nonprofit and for profit developers, syndicators, investors, accountants and lawyers. We are proposing an issue for addition to the 2012-2013 Guidance Priority List that will help resolve a technical issue for our industry and provide clarification that can help lead to better efficiencies in delivering benefits to low-income families.

The issue we would like to propose surrounds charging rent for exempt units in LIHTC properties. We believe charging rent on exempt units, such as manager and maintenance units, does not disqualify the unit under Internal Revenue Code ("IRC") §42. Along with this discussion, we contend that those units, whether free of rent or not, should not be included in the applicable fraction under IRC §42(c)(1)(B). Lastly, we are requesting that not only this issue be added to the Guidance Priority List, but also the Guide for Completing Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition (the "Guide") be revised to agree as such.

As noted in Revenue Ruling 92-61, the legislative history of IRC §42 states that the definitions of residential rental units and residential rental property follow the definitions under IRC §103. In accordance with Treasury Regulation 1.103-8(b)(4)(iii), units for resident managers or maintenance personnel that are reasonably required for a project are not considered residential rental units but are instead residential rental property. Under Revenue Ruling 92-61, residential rental property includes facilities for use by tenants and other facilities reasonably required by the project as well as residential rental units. We believe that under the arguments stated above, exempt units are residential rental property and not residential rental units.

This distinction is important because under IRC §42(c)(1)(B), the applicable fraction is the smaller of the unit fraction or the floor space fraction in which denominator of the fraction is determined by the number or size of the residential rental units. Since exempt units are deemed residential rental property and not residential rental units, they are not included in the calculation of the applicable fraction of a building.

The Guide has the following guidance in Chapter 8, page 8-5 concerning resident managers and maintenance personnel:

Rev. Rul. 92-61 holds that the adjusted basis of a unit occupied by a full-time resident manager is included in the Eligible Basis of a qualified low-income building under IRC §42(d)(1), but the unit is excluded from the applicable fraction under IRC §42(c)(1)(B) for purposes of determining the building's Qualified Basis. The unit is considered a facility reasonably required for the benefit of the project and the resident manager and/or maintenance personnel are not required to be income qualified. **If the owner is charging rent for the unit, the Service may determine that the unit is not reasonably required by the project because the owner is not requiring the manager to occupy the unit as a condition of employment.** Later conversion of the unit into a residential rental unit will not change the Eligible Basis.

Although we agree that exempt units are included in eligible basis and excluded from the applicable fraction, we do not believe that a unit must be rent free in order for it to qualify as reasonably required. We are unable to find in the IRC or legislative history a requirement that the manager has to live in the unit as a “condition of employment.” Treasury Regulation 1.103-8(b)(4) only indicates that the manager unit be reasonably required, which is a completely different test than a condition of employment. In addition, we are unable to find in the IRC or legislative history, language that indicates that charging for a manager unit will disqualify its status as a residential rental property. As stated above, Treasury Regulation 1.103-8(b)(4) specifically states that a manager unit is residential rental property.

We also believe that the economics of charging rent to a manager residing in the project and giving free rent to a manager residing in the project are essentially the same. A manager who has free rent is essentially paying rent because the manager with free rent is often paid less compared to other managers who pay rent. The net salary from the manager's perspective is the same since the manager with free rent is indirectly paying rent because of his or her lower salary.

We request that Treasury amend the Guide to conform with definitions outlined in Treasury Regulation 1.103-8(b)(4) and Revenue Ruling 92-61 and our arguments stated above; and therefore, replace the existing sentence below with wording similar to the new sentences below.

Existing sentence: If the owner is charging rent for the unit, the Service may determine that the unit is not reasonably required by the project because the owner is not requiring the manager to occupy the unit as a condition of employment.

New sentences: Whether the owner is charging rent for the unit does not generally affect whether a unit is an exempt unit. The important factor in determining if a unit is an exempt unit is if the unit is reasonably required by the project. For example, one of the factors to determine if an on-site manager unit is an exempt unit would be the number of units in a project that might necessitate an on-site manager to serve the large number of tenants.

We have also reviewed the guidance below and believe there is nothing that precludes charging rent on exempt units.

Rev. Rul. 2004-82
PLR 9330013
PLR 9538015

We are requesting that Treasury add this issue to the Guidance Priority List confirming that property owners can charge rent for exempt units and revise the Guide to agree as such.

We appreciate the opportunity to comment on the Guidance Priority List. The furtherance of this issue along with the other IRC §42 issues already on the Guidance Priority List will help the LIHTC program better provide affordable housing and help increase the number of jobs in our communities by providing clarification and lessening the risks in the LIHTC program. Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance.

Very truly yours,
NOVOGRADAC & COMPANY LLP

NOVOGRADAC & COMPANY LLP



by
Michael J. Novogradac



by
Michael G. Morrison

cc: Paul F. Handleman
Christopher J. Wilson