

# Low-Income Housing Credit Newsletter

Internal Revenue Service

Issue #36, July 2009

The LIHC newsletter provides a forum for networking and sharing information about IRC §42, the Low-Income Housing Credit and communicating technical knowledge and skills, guidance and assistance for developing LIHC issues. We are committed to the development of technical expertise among field personnel. Articles and ideas for future articles are welcome!! The contents of this newsletter should not be used or cited as authority for setting or sustaining a technical position.

## Notice 2009-44, Clarification of Treasury Regulation 1.42-10

On May 5, 2009, the IRS released Notice 2009-44 to clarify that utility costs paid by a tenant based on actual consumption in a sub-metered rent-restricted unit are treated as paid directly by the tenant for purposes of IRC §42(g)(2)(B)(ii), which requires that the rent for low-income units include a utility allowance if the tenant pays the utilities.

A sub-metering system typically includes a master meter, which is owned or controlled by the utility provider, with overall utility consumption billed to the building owner. The owner then uses unit-based meters to measure utility consumption and prepares a bill for each residential unit based on consumption.

For purposes of computing the utility allowance when a building is sub-metered as described above:

1. For RHS-assisted buildings, buildings with RHS tenant assistance, HUD regulated buildings and rent-restricted units in other buildings occupied by tenants receiving HUD rental assistance, the applicable RHS or HUD rules apply.
2. For all other rent-restricted units in other buildings:
  - a. The utility rates charged to tenants in each sub-metered rent-restricted unit must be limited to the utility company rates incurred by the building owners.
  - b. If building owners (or their agents) charge tenants a reasonable fee for the administrative costs of sub-metering, then the fee will not be considered gross rent

under IRC §42(g)(2). The fee must not exceed an aggregate amount per unit of \$5 per month unless State law provides otherwise.

- c. If the costs for sewerage are based on the tenants' actual water consumption determined with a sub-metering system and the sewerage costs are on a combined water and sewerage bill, then the tenants' sewerage costs are treated as paid directly by the tenants for purposes of the utility allowances regulation.

### Tax Consequences

1. Any fees collected are reportable as taxable income on the owner's federal tax return.
2. Any reimbursements of utility costs received by the owner from the tenants must be accounted for as taxable income. The income, however, will be offset by the utility expense claimed by the owner.

### Documentation

The utility allowance regulations in Treas. Reg. §1.42-10 include options for computing utility allowances based on data collected or prepared by the owner. Any consumption estimates and supporting data must be retained as part of the *taxpayer's* records for purposes of Treas. Reg. 1.6001-1(a); i.e., taxpayers are required to keep such permanent books of account or records as are sufficient to establish the amount of gross income, deductions, *credits*, or *other matters required to be shown* by such person.

### Effective Date

Owners may rely on this notice for any utility allowances effective no earlier than the first day of

the building owner's taxable year beginning on or after July 29, 2008.

### Request for Comments

The utility allowance regulations will be amended to incorporate the guidance provided in the notice. Treasury and the IRS invite taxpayers to submit written comments on issues related to the notice or any other issue regarding utility allowances. Methods for submitted comments are included in the notice.

## **PLR 200916007: Treatment of Off-Site Improvements as Eligible Basis**

In Private Letter Ruling 200912007, the IRS addresses the treatment of infrastructure improvements constructed by a taxpayer and then dedicated to the local government. The issue is whether the costs should be included in the eligible basis of qualified low-income residential rental buildings for purposes of computing the allowable IRC §42 credit.

### Facts

A taxpayer intends to construct a new IRC §42 project on seven acres of unimproved farmland. As part of the development of unimproved land without access to arterial streets and infrastructure, the local government requires the taxpayer to construct streets, curbs, sidewalks, storm water drainage and domestic water in-flow according to the City's specifications. In addition, the taxpayer must purchase and install steel casings within the streets through which utilities run gas lines, electrical wiring, cable, and phone wires.

If the taxpayer decides not to construct the project as planned, the City will modify the scope of improvements, expecting more improvements if the project size is expanded and less if the project size is constricted.

When completed, the improvements are dedicated for public use and ownership transfers to the City, which then releases the taxpayer's certificates of occupancy necessary for operating the completed project. The City will maintain the streets and steel casings and each utility provider will own and maintain its respective connective pipes and wires

### Conclusion

Chief Counsel determined that:

The costs incurred to construct the infrastructure improvements are indirect costs, within the meaning of Treas. Reg. §1.263A-1(e)(3)(i) for purposes of IRC §263A, and are capitalized into the bases of the project's residential rental buildings because the buildings directly benefited, or were incurred by reason of, the construction of the project. The cost is to be allocated among the residential rental buildings using a reasonable method of allocation.

Assuming that the project's residential rental buildings will be depreciated as residential rental property under IRC §168, the eligible basis of the project's residential rental buildings under IRC §42(d)(1) includes the cost of the infrastructure improvements.

The same conclusion was determined based on the same legal arguments in Rev. Rul. 2002-9 regarding impact fees imposed by a state or local government against new development or expansion of existing development. The fees are used to finance specific offsite capital improvements for general public use that are necessitated by the new or expanded development. Rev. Rul. 2002-9 was silent, however, regarding the costs of improvements constructed by a taxpayer and then dedicated to the state or local government in lieu of paying an impact fee.

## **Administrative Reminders**

**Expanding Audits, Project/Tracking Code:** All LIHC cases should include Project Code 0670 and ERCS Tracking Code 9812. If the audit is expanded to include additional years or related taxpayers, the additional returns should also carry the LIHC project code and tracking code designation.

**Form 5344, Revenue Protection:** The Examination Closing Record, Form 5344, requires entries if you are reducing the amount of credit to be carried forward to a tax year you are not going to audit. Enter the amount of credit carryforward to be disallowed for Item 46. Code "L" should be entered for Item 47. See IRM 4.4.12.4.58 for an example.

**Surveying LIHC Tax Returns:** If you believe it is appropriate to survey an LIHC return, please fax Form 1900 to Grace Robertson, at 202-283-7008, for signature approval.

**TEFRA Requirements:** As LIHC property owners are almost always partnerships, and are likely to be subject to TEFRA procedural requirements, please remember document actions taken and decisions made by completing:

- Form 12813, TEFRA Procedures
- Form 13814, TEFRA Linkage Package Checksheet
- Form 13828, Tax Matters Partner (TMP) Qualification Checksheet
- Form 13827, Tax Matters Partner (TMP) Designation Checksheet

More information is available on the TEFRA website, along with a list of TEFRA Coordinators who can help walk you through the procedures.

## Subscribing to the LIHC Newsletter

The LIHC Newsletter is distributed free of charge through e-mail. If you would like to subscribe, just contact Grace Robertson at [Grace.F.Robertson@irs.gov](mailto:Grace.F.Robertson@irs.gov).

## ♪ Grace Notes ♪

The TV ads proclaim that kids lose an incredible amount of knowledge over summer vacation...and as we approach the mid-summer holiday, I wouldn't want anyone to lose even an itsy-bitsy iota of IRC S42 vocabulary.

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## Across

- 1-Fail to impose consequences
- 7-Building Identification Number
- 11-Not out
- 12-Persons who are learning something
- 13-Documentation of household eligibility
- 15-Start business use
- 16-Real Estate Investment Trust
- 17-Reduces tax liability dollar for dollar
- 20-Attach or permanently affix
- 21-Obtain possession
- 24-Imposed to support government activities
- 25-Forget to include
- 26-To remain in the same place
- 27-The results of addition
- 29-Gross Receipts minus all expenses
- 31-Not on the table
- 33-Cleopatra's snake
- 35-Constructed with yellow bricks
- 36-Depreciable, Eligible, or Qualified
- 37-Slippery, snake-like fish
- 38-Chief Counsel's assistance during an audit
- 40-What investors did
- 41-Claim upon the property of another
- 42-Mr. Kettle's spouse
- 44-Baseball hat
- 46-Willingly relinquish
- 47-Drilled a hole
- 48-To investigate thoroughly
- 49-If you go here, you must come down
- 50-Combustion reaction
- 51-Applied fairly, equitably, & with integrity by the IRS
- 53-A juvenile male equine
- 54-A type of unconsciousness
- 55-An egress for departure
- 57-An adult feline
- 58-Consequence of three strikes
- 59-Ten years
- 60-A toddler's favorite word
- 61-Warmer than warm
- 62-A location's median income before adjustments
- 64-IRS examination
- 65-Require for survival
- 66-Same as 49 across
- 67-Unacceptable attitude-"ism" (acronym)
- 69-Comfortable location for 57 across
- 70-Suitable for intended use

71-Non-depreciable asset  
 72-The objective case of "we"  
 73-Minimum number of low-income units in a qualified IRC §42 project  
 74-Incremental parts of the Applicable Fraction  
 78-Slang for received or taken  
 79-To apply or put to work  
 81-IRS acronym for IRC §42  
 82-Chief Counsel's advice for the IRS when no specific audit is in progress  
 83- Caribbean or Mediterranean  
 84-Nonspecific  
 86-"H" in FHA  
 89-Revenue Agent's Report  
 90-Cactus-like plant in the Mojave Desert, or a small town in western Arizona  
 91-Jargon or a five-letter word game  
 92-Frequently  
 96-one hundredth of a dollar  
 98-Required in mixed-use projects  
 99-Subsequently,  
 100-Parts of Louisiana, Mississippi, and Alabama  
 101-To weaken or deplete  
 102-40 and 60, 20 and 50, and 70, 30, or 140.  
 105-Replaced 62 across for 2009  
 106-Less than six months  
 109-A metropolitan area  
 111-Internal Revenue Code  
 112-In the distance  
 113-Always rented in 100% LIHC projects

### **Down**

2-Taxpayer possessing IRC §42 project  
 3-Type of location for which increased eligible basis is allowable.  
 4-Procedures and Rulings  
 5-IRS organization for large and mid-sized businesses  
 6-A teacher's audience  
 7-Occupied, like a bee  
 8-10% of credit ceiling set aside for these entities  
 9-Assistance to fill a gap  
 10-The smallest percentage of low-income units required to be a qualified low-income project  
 14-The Addams family's cousin  
 18-Members of a partnership

19-Contains a state housing agency's criteria for determining housing priorities  
 22-Smallest unit of sunshine  
 23-Fifteen years  
 28-a spindle toy  
 30-should, would and \_\_\_\_\_  
 32-Form 8609, Part II  
 34-Unwanted e-mail  
 39-Used to assess locations' housing needs  
 43-Interprets law; writes Treasury regulations  
 45-One or more qualified low-income buildings, as elected by the owner  
 46-To rank in priority order, or assess quality  
 47-Contract  
 52-A 30-year contract  
 56-Neptune's pitchfork  
 59-A type of North Atlantic white fish  
 61-Administers Section 8 Housing Program  
 63-Between April and June  
 68-To watch, a state housing agent responsibility  
 69.5-Prepares for occupancy  
 75-Standards against suitability for occupancy is evaluated  
 76-Ability to choose or state-level organization that allocates IRC §42 credit  
 77-Not private, for everyone  
 80-Refurbish  
 82-Vehicle for transportation  
 85-Reduces eligible basis if federally sourced  
 87-A county in England  
 88-30%, before adjustments  
 93-Years taxpayers are subject to recapture  
 94-Accelerated credit is subject to this  
 95-Noncompliance  
 96-A big black avian animal with feathers and wings  
 97-Food, clothing and shelter  
 103-Contains an embryo plant  
 104-To divide, as in atoms  
 107-Not where you should be; missing  
 108-Crust of dried blood over a wound  
 109-A friendly, informal conversation  
 110-A tall tale

## The Mostly LIHC Crossword Puzzle

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