



COLORADO
Department of Revenue
Taxation Division

Physical Address:
Office of Tax Policy Analysis
1375 Sherman Street, Room 607
Denver, CO 80203

Mailing Address:
Office of Tax Policy Analysis, Room 607
P.O. Box 17087
Denver, CO 80217-0087

PLR 19-004

November 7, 2019

XXXXXX
Attn: XXXXXX
XXXXXX
XXXXXX

Re: Affordable Housing Tax Credit

Dear XXXXXX,

You submitted a request for a private letter ruling on behalf of XXXXXX ("Company") to the Colorado Department of Revenue ("Department") pursuant to 1-C.C.R. 201-1, Reg. 24-35-103.5. This letter is the Department's private letter ruling. This ruling is binding on the Department to the extent set forth in 1-C.C.R. 201-1, Reg. 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Issues

1. If the CO Fund is treated as a partnership for federal income tax purposes, will it be treated as a partnership for Colorado income tax purposes?
2. If the Fund Manager's interest and the Class A member's interest in the CO Fund are treated as partnership interests for federal income tax purposes, will they be treated as partnership interests for Colorado income tax purposes?
3. If the CO Fund's interest in a Development Partnership is treated as a partnership interest for federal income tax purposes, will it be treated as a partnership interest for Colorado income tax purposes?
4. Does the structure of the CO Fund allow for a Class B member to receive allocations of Colorado Affordable Housing Credits from the CO Fund in accordance with the CO Fund's operating agreement?
5. If the federal income tax treatment of the proposed credit allocation is accepted, will it be accepted for Colorado income tax purposes?
6. Are Colorado Affordable Housing Credits subject to recapture? If so, which taxpayers in the proposed credit allocation are subject to recapture?
7. If each Class B member is admitted to CO Fund prior to the end of the year in which each year's Credits vest, is there a limitation on the number of Class B members who may participate in the CO Fund's Credits?
8. If Class A and B members own their respective interests in the CO Fund by December 31 in the year in which Colorado Affordable Housing Credits are allocated, will those members be able to claim the credits for the allocation year?

Conclusions

1. If the CO Fund is treated as a partnership for federal income tax purposes, it will be treated as a partnership for Colorado income tax purposes.
2. If the Fund Manager's interest and the Class A member's interest in the CO Fund are treated as partnership interests for federal income tax purposes, they will be treated as partnership interests for Colorado income tax purposes.

3. If the CO Fund's interest in a Development Partnership is treated as a partnership interest for federal income tax purposes, it will be treated as a partnership interest for Colorado income tax purposes.
4. A Class B member's interest in the CO Fund is structured so that a Class B member may receive allocations of Colorado Affordable Housing Credits from the CO Fund.
5. If the federal income tax treatment of the proposed allocation is respected, it will be respected for Colorado income tax purposes.
6. Any taxpayer who claims the Colorado Affordable Housing Credit to lower its Colorado income tax liability is subject to recapture.
7. There are no limitations on the number of purchasers who may participate in the CO Fund's as Class B members, so long as each Class B member is admitted to the CO Fund prior to the end of the year in which such year's Colorado Affordable Housing Credits vest.
8. If Class A and B members own their respective interests in the CO Fund by December 31 in the year in which Colorado Affordable Housing Credits are allocated, those members will be eligible to claim the credits for the allocation year.

Background

Company and a subsidiary of Company ("Fund Manager") propose to form a partnership ("CO Fund") in order to invest in projects that would be eligible for the Colorado affordable housing tax credit under section 39-22-2101, C.R.S. ("Colorado Credits"), and the federal low-income housing tax credit under section 42 of the Internal Revenue Code. Fund Manager would form CO Fund as a single member LLC under XXXXXX law. CO Fund would become a partnership by admitting Company as a "Class A member" for a small capital contribution. Additional members ("Purchasers") would be admitted to CO Fund as "Class B Members" by making a nominal capital contribution.

To earn the credits, CO Fund would enter into numerous limited partnerships with real estate developers ("Development Partnerships"). The CO Fund would be entitled to a proportional share of all the tax attributes of a Development Partnership, except that the CO Fund would be entitled to a one hundred percent allocation of the Colorado Credits generated by the Development Partnership. Class A and B members would thereafter have an annual right to negotiate an allocation of the credits.

Discussion

1. If the CO Fund is treated as a partnership for federal income tax purposes, it would be treated as a partnership for Colorado income tax purposes.

In Colorado, a partnership is defined as a group or organization that is a partnership for federal tax purposes under I.R.C. section 761(a), and that is required to file a return under I.R.C. section 6031(a).¹ A partnership that is recognized as such for federal tax purposes will be similarly recognized as a partnership for Colorado income tax purposes. Company requests that the Department assume that the CO Fund will qualify as a partnership for federal income tax purposes. If the CO Fund qualifies as a partnership for federal tax purposes, it will qualify as a partnership for Colorado income tax purposes.

2. If the Fund Manager's interest and the Class A member's interest in the CO Fund are treated as partnership interests for federal income tax purposes, they would be treated as partnership interests for Colorado income tax purposes.

Colorado does not define the term "partnership interest" and instead looks to the Internal Revenue Code to define the term.² The determination of a partner's interest, for Colorado income tax purposes, is

¹ § 39-22-103(5.6), C.R.S.

² § 39-22-103(11), C.R.S.

determined pursuant to subchapter K of the Internal Revenue Code.³ Company requests that the Department assume that the Fund Manager's interest and Class A member's interest will qualify as a partnership interest for federal income tax purposes. Assuming that the Fund Manager's interest and Class A member's interest do qualify as partnership interests for federal income tax purposes, they will qualify as partnership interests for Colorado income tax purposes.

3. If the CO Fund's interest in a Development Partnership is treated as a partnership interest for federal income tax purposes, it would be treated as a partnership interest for Colorado income tax purposes.

Company requests that the Department assume that the CO Fund's interest in a CO Partnership will qualify as a partnership interest for federal income tax purposes. Assuming that CO Fund's interest in a CO Partnership does qualify as a partnership interest for federal tax purposes, it will qualify as a partnership interest for Colorado income tax purposes for reasons discussed in conclusion 2, above.

4. A Class B member's interest in the CO Fund is structured so that a Class B member may receive allocations of Colorado Credits from the CO Fund.

Colorado Credits are awarded by the Colorado Housing and Finance Authority ("CHFA") to owners of eligible qualified developments.⁴ If the owner of a qualified development is a partnership, the partnership may allocate the credit among its "partners, shareholders, members, or others qualified taxpayers in any manner agreed to by such persons."⁵ In order to receive an allocation of the credits, a qualified taxpayer is required to have a direct or indirect interest in the qualified development.⁶ The allocation of the credits may be in any manner agreed to by those taxpayers eligible to receive an allocation.⁷ Pursuant to the operating agreement of the CO Fund, Class B member's interest in qualified developments is, at a minimum, indirect. As such, Class B members are eligible to receive an allocation of the credits.

5. If the federal income tax treatment of the proposed credit allocation is respected, it will be respected for Colorado income tax purposes.

Company, for federal income tax purposes, will treat the proposed credit allocation as a disguised sale.⁸ As a disguised sale, Company will recognize gain on their federal income tax return in the form of capital contributions received from Class A and B members in exchange for the Colorado Credits. Colorado's state income tax calculation for partnerships and partners begins with the federal taxable income for the applicable year. As such, if the federal treatment of the proposed credit allocation is allowed, the Colorado income tax return will reflect such treatment and be respected for Colorado income tax purposes.

6. Any taxpayer who claims the Colorado Credits to lower its Colorado income tax liability is subject to recapture.

Recapture of the credits is required when, on the last day of a taxable year during the compliance period for the credit, the qualified basis of the qualified development is less than the amount of the qualified basis on the last day of the prior taxable year.⁹ When recapture is required, the taxpayer who previously claimed the credit must include on its income tax return for that tax year the portion of the credit required

³ 26 U.S.C. § 705.

⁴ § 39-22-2102(3), C.R.S.

⁵ *Id.*

⁶ § 39-22-2101(11), C.R.S.

⁷ § 39-22-2102(3), C.R.S.

⁸ 26 U.S.C. § 721.

⁹ § 39-22-2103(1), C.R.S.

to be recaptured.¹⁰ As a result, only taxpayers who have previously claimed the credits to reduce their Colorado income tax liability are required to recapture the credits.

7. There are no limitations on the number of purchasers who may participate in the CO Fund's Credits as Class B members, so long as each Class B member is admitted to the CO Fund prior to the end of the year in which each year's credits vest.

Section 39-22-2102(3), C.R.S. does not provide a limit on the number of taxpayers to which the Colorado Credit may be allocated. A partnership that owns a qualified development is only limited in its ability to allocate the credit among its partners, shareholders, members, or other qualified taxpayers.¹¹

8. If Class A and B members own their respective interests in the CO Fund by December 31 in the year in which credits are allocated, those members will be eligible to claim their credits for the allocation year.

Once the credits are awarded by CHFA, the credits are eligible to be claimed. In order to claim the credits, the owner of the qualified development must certify to the Department the amount of the credit allocated to each partner or qualified individual by filing an allocation certificate and an allocation schedule with the Department.¹² This certification includes information on: the amount of the total credit, the amount of credit that may be claimed in a year, the names and federal taxpayer identification numbers of qualified taxpayers receiving an allocation, the qualified taxpayer's beginning credit allowance, and the tax year in which the credit will be allocated to each qualified taxpayer.¹³ Once a credit has been allocated and claimed on an income tax return, the allocation of the credit cannot be amended for that year.¹⁴ So long as the allocation to each taxpayer, as stipulated, occurs prior to the close of the allocation year, those taxpayers will be eligible to claim the credit in the allocation year.¹⁵

Miscellaneous

This ruling is premised on the assumption that Company has completely and accurately disclosed all material facts and that all representations are true and complete. The Department reserves the right, among others, to independently evaluate Company's representations and assumptions. The ruling is null and void if any such assumption and representation is incorrect and has a material bearing on the conclusions reached in this ruling and is subject to modification or revocation in accordance to 1-C.C.R. 201-1, Reg. 24-35-103.5.

This ruling is binding on the Department to the extent set forth in 1-C.C.R. 201-1, Reg. 24-35-103.5. It cannot be relied upon by any taxpayer other than the taxpayer to whom the ruling is made.

Sincerely,

Office of Tax Policy & Analysis
Colorado Department of Revenue

This ruling cannot be relied upon by any other taxpayer other than the taxpayer to whom the ruling is made.

¹⁰ § 39-22-2103(4), C.R.S.

¹¹ § 39-22-2102(3), C.R.S.

¹² Colo. Reg. 39-22-2102(1)(a).

¹³ Id.

¹⁴ Id.

¹⁵ Id.