

May 31, 2011

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2011-39)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2011-39, Priority Guidance Plan

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, and accountants. We would like to propose two issues for addition to the Priority Guidance List for 2011-2012.

The first issue pertains to the codification of the economic substance doctrine. In the Health Care and Education Affordability Reconciliation Act of 2010 (Act), the economic substance doctrine was codified in Section 7701(o) of the Internal Revenue Code of 1986, as amended (IRC). In a technical explanation prepared by the Joint Committee on Taxation (JCT) explaining revenue provisions of the Act, footnote 344¹ clarified that the codification of the economic substance doctrine is not intended to disallow tax benefits in a transaction that achieves the basic purpose or plan for which the tax benefit was designed by Congress. The LIHTC community, as well as other tax credit communities, applauds the explanatory guidance provided by this footnote since it recognizes and is consistent with Congress' legislative intent in codifying the economic substance doctrine as well as Congress' legislative intent in enacting tax credits that provide incentives for investments in affordable rental housing, historic properties, underserved economic areas, and renewable energy resources.

We request that Treasury provide guidance that, in applying the economic substance doctrine, it will follow the documented legislative intent expressed in footnote 344. While case law and historical Treasury guidance is generally consistent with the

¹ Joint Committee on Taxation Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection and Affordable Care Act", JCX-18-10, March 21, 2010, page 152.

interpretation provided in footnote 344, we believe that industry participants and practitioners can more readily rely on written guidance from Treasury expressing Treasury's agreement with the explanatory statements provided in footnote 344. Such guidance from Treasury would receive greater deference by a court interpreting the economic substance statute than the JCT explanatory footnote.

In addition, we request that Treasury provide guidance as to the applicability of footnote 344 to Section 1602 of the American Recovery and Reinvestment Act of 2009. We believe that transactions using subawards from grants in lieu of LIHTCs should be allowed to rely on footnote 344 as well.

The second issue we would like added to the Priority Guidance List relates to the loss of LIHTCs when a building suffers from a casualty loss. In general, a building generates LIHTCs based on its qualified basis, as defined under IRC Section 42(c)(1), at the end of the first taxable year of the credit period. These credits are earned over 15 years, but claimed by a taxpayer over 10 years. Whenever the qualified basis of a building, at the end of a taxable year during the compliance period, falls in comparison to its qualified basis at the end of the previous taxable year, the taxpayer could lose LIHTCs for that year and/or face the recapture of the accelerated portion of LIHTCs taken in previous years. There are a few exceptions to these rules, and we are requesting additional guidance as it pertains to a decrease in qualified basis due to a casualty loss and the potential loss of LIHTCs.

First, IRC Section 42(j)(4)(e) states that no credit recapture will apply under Section 42(j) to the extent the loss in qualified basis was due to a casualty loss and that loss was restored within a reasonable period of time. Secondly, in Revenue Procedure 2007-54, which superseded Revenue Procedure 95-28, Treasury provided relief from not only the recapture of the accelerated portion of the LIHTCs, but also the actual loss of credits for the year if the property suffering from the casualty loss is located in a presidentially declared disaster area. Treasury states that to the extent the building is in a presidentially declared disaster area and the qualified basis was restored in a reasonable period of time not to exceed two years from the end of the year the area was declared a presidentially declared disaster area, the building will not face recapture nor lose any credits during the reasonable period of time, even though there was a reduction in qualified basis at the end of a tax year. Treasury stated that it had the authority to make this determination under Treasury Regulations 1.42-13(a), which provides that under IRC Section 42(n), the Secretary has the authority to provide guidance through various publications in the Internal Revenue Bulletin to carry out the purposes of IRC Section 42.

We applaud the flexibility provided to presidentially declared disaster areas, but also believe that this flexibility should be extended to all casualty losses and not just those buildings in presidentially declared disaster areas. We believe that if Treasury has the authority to exempt casualty losses in presidentially declared disaster areas under Treasury Regulations 1.42-13(a) and IRC Section 42(n), it should have the authority to exempt all casualty losses. Whether a building is in a presidentially declared disaster

area or not, casualty losses can have a large financial effect on a building's cash flow, which could send a building into foreclosure and risk the future of the badly needed affordable rental housing. We believe that protecting the affordable rental housing is in agreement with Congress' intent when it created IRC Section 42. Therefore, we request that Treasury add this issue to the Priority Guidance List and issue guidance in support of this belief.

We appreciate the opportunity to comment on the Priority Guidance Plan. The furtherance of these issues along with the other IRC Section 42 issues already on the Priority Guidance 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



by

Michael J. Novogradac

NOVOGRADAC & COMPANY LLP



by

Michael G. Morrison

cc: Paul F. Handleman