

Part III - Administrative, Procedural and Miscellaneous

Applicable Percentage under Section 3002(A)(1) of the Housing Assistance Tax Act of 2008

Notice 2008-106

Purpose

This notice clarifies that the 9 percent applicable percentage floor for non-Federally subsidized new buildings that are placed in service after July 30, 2008, and before December 31, 2013, enacted pursuant to section 3002 of the Housing Assistance Tax Act of 2008 (Pub. L. 110-289) (Act), applies notwithstanding an irrevocable election by the taxpayer under former § 42(b)(2)(A)(ii) of the Internal Revenue Code (now § 42(b)(1)[(A)](ii) of the Code, as amended by the Act) made on or before July 30, 2008.

Background

Section 42(a) of the Code provides that for purposes of § 38, the amount of the low-income housing credit for any taxable year in the credit period shall be an amount equal to (1) the applicable percentage of (2) the qualified basis of each qualified low-income building.

Section 42(b)(1) of the Code, as amended by the Act, provides, in part, that the term “applicable percentage” means, with respect to any building, the appropriate percentage prescribed by the Secretary for the earlier of (i) the month in which such building is placed in service, or (ii) at the election of the taxpayer the month in which the taxpayer and the housing credit agency enter



into an agreement with respect to such building (which is binding on such agency, the taxpayer, and all successors in interest) as to the housing credit dollar amount to be allocated to such building. A month may be elected by the taxpayer only if the election is made not later than the 5th day after the close of such month. Such an election, once made, shall be irrevocable. Guidance on the election of the appropriate percentage month can be found under § 1.42-8 of the Income Tax Regulations.

Section 42(b)(1)(B) of the Code, as amended by the Act, provides that the percentages prescribed by the Secretary for any month shall be percentages which will yield over a 10-year period amounts of credit which have a present value equal to (i) 70 percent of the qualified basis of a new building which is not federally subsidized for the taxable year, and (ii) 30 percent of the qualified basis of a building not described in (i).

Section 42(b)(1)(C) of the Code, as amended by the Act, provides that the present value shall be determined as of the last day of the 1st year of the 10-year period referred to in § 42(b)(1)(B) by using a discount rate equal to 72 percent of the average of the annual Federal mid-term rate and the annual Federal long-term rate applicable under § 1274(d)(1) to the month applicable under § 42(b)(1)(A)(i) and (ii) and compounded annually, and by assuming that the credit allowable for any year is received on the last day of such year.

Section § 42(b)(2) of the Code, as amended by the Act, provides that in the case of a new building (A) which is placed in service by the taxpayer after the date of enactment of this paragraph (i.e., July 30, 2008), and before



December 31, 2013, and (B) which is not federally subsidized for the taxable year, the applicable percentage shall not be less than 9 percent.

Section § 42(i)(2) of the Code, as amended by the Act, provides that for purposes of § 42(b)(1) a new building shall be treated as “federally subsidized” for any taxable year if, at any time during such taxable year or any prior taxable year, there is or was outstanding any obligation the interest on which is exempt from tax under § 103, the proceeds of which are or were used (directly or indirectly) with respect to the building or the operation thereof.

Section 42(m)(2)(A) of the Code provides that the housing credit dollar amount allocated to a project shall not exceed the amount the housing credit agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period. In making the determination, the housing credit agency shall consider (i) the sources and uses of funds and total financing planned for the project, (ii) any proceeds or receipts expected to be generated by reason of tax benefits, (iii) the percentage of the housing credit dollar amount used for project costs other than the cost of intermediaries (this clause shall not be applied so as to impede the development of projects in hard-to-develop areas), and (iv) the reasonableness of the developmental and operational costs of the project. See also § 1.42-8(a)(5) of the regulations.

For newly constructed and substantially rehabilitated buildings that are not federally subsidized, the applicable percentage (i.e., 70-percent present value credit) has been temporarily increased by the Act to not less than 9 percent. This



temporary increase applies to buildings placed in service by the taxpayer after July 30, 2008, and before December 31, 2013. The definition of a “federally subsidized” building has also been changed by the Act to include only those buildings financed with tax-exempt bonds. At issue is the correct applicable percentage to apply in a situation in which a taxpayer, on or before July 30, 2008, irrevocably elected under former § 42(b)(2)(A)(ii) of the Code to apply an applicable percentage that is less than 9 percent, and places in service after July 30, 2008, and before December 31, 2013, a newly constructed or substantially rehabilitated building that is not federally subsidized.

Conclusion

The Service has determined that the 9 percent applicable percentage floor under § 42(b)(2) of the Code, as amended by the Act, will apply to a building that meets the requirements of § 42(b)(2), even if an election under former § 42(b)(2)(A)(ii) was made with respect to such building on or before July 30, 2008. Notwithstanding the application of the 9 percent applicable percentage floor, the housing credit dollar amount allocated to a project shall not exceed the amount the housing credit agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period. See § 42(m)(2).

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