

PLR 200029044 - IRC Section 42

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Internal Revenue Service
Department of the Treasury
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044
April 24, 2000

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Legend:

Taxpayer =

Corp =

Project =

State =

District =

Place =

Town =

Authority =

d =

h =

j =

This letter responds to a letter dated February 7, 2000, submitted on behalf of Taxpayer, requesting a private letter ruling regarding the application of § 42(j) of the Internal Revenue Code to a proposed transfer of bare legal title to certain real property owned by Taxpayer to Corp.

Taxpayer represents the following facts:

Taxpayer, a State limited partnership, was established to acquire, hold, invest in, and otherwise deal with particular real estate located in Place. Taxpayer has constructed and operates a j unit low-income residential rental housing project located in Place (the "Project"). Corp, the general partner of Taxpayer, is a nonprofit corporation formed under the laws of State to construct, rehabilitate, own, and operate affordable housing. Corp is an exempt organization under § 501(c)(3).

Under applicable State law, the Project is subject to real estate taxes levied by Town. Under State law, if Corp were to own the Project and use it for its own purposes, the Project would not be subject to real estate taxes in Town. Therefore, Taxpayer intends to transfer record title in the Project to Corp through a quitclaim deed and lease the Project

back from Corp. The parties do not intend to transfer any of the benefits or burdens of ownership of the Project, which will remain with Taxpayer.

Taxpayer acquired the land underlying the Project on d, and built the Project with the proceeds of a construction loan from a commercial lender and an investment in Taxpayer by a limited partner. Taxpayer repaid the construction loan with, inter alia, the limited partner's investment in Taxpayer and the proceeds of loans from the Authority (the § 42 low-income housing credit allocating agency for State). The loans are evidenced by two nonrecourse promissory notes, and are secured by mortgages on the Project in favor of Authority as mortgagee.

Taking into account the rental income restrictions under § 42, the payment of real estate taxes to Town jeopardizes Taxpayer's ability to operate the Project economically. Taxpayer has been advised by Town that the Project currently does not qualify for real estate tax exemption under State law, but that it would qualify if it were owned by Corp and leased back to Taxpayer. Taxpayer has informed Town of the intended sale-leaseback transaction. Subject to review of the transaction documentation, Town has agreed that the Project would be exempt from real estate taxes after the sale-leaseback.

Taxpayer intends to transfer to Corp record title to 1) the real estate and improvements with respect to the Project, subject to existing easements and encumbrances pursuant to a statutory form quitclaim deed with covenant in consideration of \$h, and 2) the personal property (primarily equipment and furniture) with respect to the Project pursuant to a bill of sale in consideration of \$h. Immediately after this transaction, Corp would lease the property back pursuant to a lease agreement (the "Lease"). Taxpayer represents that Taxpayer would retain all of the benefits and burdens of ownership; therefore, there will be no sale or exchange of the Project for federal or state income tax purposes.

Based on the foregoing, which assumes that under these facts the transfer of bare legal title to the Project from Taxpayer to Corp is not a sale or exchange (for federal and state income tax purposes), and does not result in a shift in the benefits and burdens of ownership (for federal and state income tax purposes), Taxpayer requests a ruling that the section 42(j) recapture provisions do not apply to the proposed transfer of bare legal title to the Project by Taxpayer to Corp.

Section 42(a) provides a tax credit for investment in low-income housing buildings placed in service after December 31, 1986. For any taxable year in a 10-year credit period, the amount of credit is equal to the applicable percentage of the qualified basis of each qualified low-income building.

In the case of any qualified low-income building placed in service by the taxpayer after 1987, section 42(b) provides, in part, that the term "applicable percentage" means the appropriate percentage prescribed by the Secretary for the month applicable under Section 42(b)(2)(A)(i) or (ii). Section 42(b)(2)(B) provides that the percentages prescribed by the Secretary for any month shall be percentages that will yield over a 10-year period amounts of credit that have a present value equal to:

(i) 70 percent of the qualified basis of new buildings that are not federally subsidized for the taxable year (70-percent present value credit), and (ii) 30 percent of the qualified basis of existing buildings, and of new buildings that are federally subsidized for the taxable year (30-percent present value credit).

Section 42(c)(1)(A) provides that the qualified basis of any qualified low-income building for any taxable year is an amount equal to the applicable fraction (defined in section 42(c)(1)(B)) of the eligible basis of such building. In general, under section 42(d)(1), the eligible basis of a new building is its adjusted basis as of the close of the first taxable year of the credit period.

Section 420 provides rules concerning the recapture of low-income housing tax credits. Section 42(j)(1) provides that if as of the close of any taxable year in the compliance period, the qualified basis of any building with respect to the taxpayer is less than the amount of qualified basis as of the close of the preceding taxable year, the taxpayer's tax for the taxable year shall be increased by the credit recapture amount. The credit recapture amount for a recapture event occurring during any year in the credit period (as defined in Section 42(f)(1)) is one-third of all credits claimed (assuming no prior recapture) plus interest at the overpayment rate under section 6621, beginning with the date the recaptured amount was claimed.

The legislative history to section 42 provides generally that any change in ownership during the compliance period is a recapture event and that all dispositions of ownership interests in buildings are treated as transfers for purposes of recapture. See 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess., 11-96 and 11-102 (1986), 1986-3 (Vol. 4) C.B. 1,96, 102. However, under section 42(j)(6), in the case of a disposition of a low-income building or an interest therein, a taxpayer can avoid recapture liability for the disposition if the taxpayer posts a satisfactory bond using Form 8693, Low-Income Housing Credit Disposition Bond, and it is reasonably expected that the building will continue to be operated as a qualified low-income building for the remaining compliance period of the building.

Taxpayer represents in the above facts that the transfer of bare legal title from Taxpayer to Corp is not a sale or exchange for federal and state income tax purposes and will not result in a shift of the benefits and burdens of ownership for federal and state income tax purposes from Taxpayer to Corp. This representation is a material fact in this case. Therefore, the issue being considered in this case is not whether a sale or exchange or a transfer of the burdens and benefits of ownership is, for federal income tax purposes, a recapture event under Section 42, but whether the transfer of bare legal title under the above facts is a disposition or change in ownership contemplated by the Section 42 legislative history that results in a recapture event.

The transfer of bare legal title under the above circumstances would not be made for the evasion or avoidance of federal income tax. Further, the federal tax treatment of the proposed transaction has been disclosed to Town officials. Taxpayer represents that all

indicia of ownership of the Project other than bare legal title) would remain unchanged. Consequently, the transfer of bare legal title in this case is not a disposition or change in ownership contemplated by the Section 42 legislative history to result in a recapture event.

Accordingly, based solely on the representations and the relevant law set forth above, we rule as follows:

The transfer of bare legal title to the Project by Taxpayer to Corp will not, under these facts, result in recapture under Section 42.

No opinion is expressed or implied regarding the application of any other provisions of the Code or regulations. Specifically, no opinion is expressed or implied regarding whether the transfer of bare legal title to the Project from Taxpayer to Corp is a sale or exchange (for federal or state income tax purposes), or causes a shift in the benefits and burdens of ownership (for federal or state income tax purposes). Nor is any opinion expressed or implied regarding whether the Project otherwise qualifies for the low-income housing credit under Section 42.

According to the power of attorney on file with the ruling request, a copy of this letter was sent to Taxpayer.

This letter ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,
Harold E. Burghart
Assistant to the Branch Chief, Branch 5
Office of Assistant Chief Counsel
(Passthroughs and Special Industries)