

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200923008**
Release Date: 6/5/2009

Third Party Communication: None
Date of Communication: Not Applicable
Person To Contact:
, ID No.
Telephone Number:

Index Number: 142.04-00

Refer Reply To:
CC:FIP:BR5
PLR-142013-08
Date:
January 26, 2009

LEGEND:

Agency =

Developer =

State =

Area =

Bonds =

a =

b =

Damage =

Year 1 =
Year 2 =
Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =
Date 7 =

Dear :

This responds to Agency's and Developer's request for a ruling that the low-income units in a qualified residential rental project within the meaning of § 142(d)(1) of the Internal Revenue Code (the "Code") are deemed continuously rented or available for rent for purposes of § 1.103-8(b)(5)(i) of the Income Tax Regulations, and continuously occupied for purposes of § 1.103-8(b)(5)(ii).

Facts and Representations

You make the following factual representations. Agency was created under State law as a corporate governmental agency, constituting a public benefit corporation. The purpose of Agency is, in part, to provide safe and sanitary housing accommodations at rental rates that families and persons of low-income can afford. Agency is authorized to issue bonds in furtherance of this purpose.

Developer was formed in Year 1 for the purposes of constructing and developing the multi-family housing project described herein (the "Project"). Agency issued the Bonds to finance the Project pursuant to a bond resolution adopted on Date 1.

The Project consists of a residential buildings with a total of b residential units. At least twenty percent of the total units in the Project (the "Low-Income Units") were initially occupied by households with gross incomes that did not exceed fifty percent of the area

median income for the Area of State, as adjusted for family size, in accordance with § 142(d)(1)(A) (“Low-Income Tenants”). Developer has elected for the Project to be treated as a deep rent skewed project pursuant to § 142(d)(4)(B). Pursuant to that election, at least fifteen percent of the Low-Income Units were initially occupied by households with gross incomes that did not exceed forty percent of the area median gross income for Area, as adjusted for family size, in accordance with § 142(d)(4)(B)(i).

The first building in the Project was initially placed in service in approximately Date 2, with all remaining buildings completed by approximately Date 3. In Year 2, it was discovered that there was extensive Damage to the buildings in the Project. Developer has represented that for safety and engineering reasons, the Project could not be renovated with the units occupied. On Date 4, all residents of the Project were notified of the Damage to the Project, the estimated time period necessary for completion of the repairs, and that the repairs could not be performed until the residents vacated the units. All residents of the Project received lease termination notices requiring them to vacate their units by Date 5. Prior to the displacement of the residents, the units in the Project (once available for occupancy) had been leased on a continuous basis since Date 6.

At the same time that original lease agreements with Low-Income Tenants were terminated, Developer entered into new lease agreements with Low-Income Tenants, the terms of which were similar in form and substance to the original lease agreements (“Replacement Leases”). The Replacement Leases permit Low-Income Tenants to reoccupy a unit in the Project upon completion of the renovations, subject to the terms and conditions thereof. Further, Developer agrees to compensate the Low-Income Tenants for their estimated cost of temporary housing, calculated as the monthly market-rate rental reduced by the amount of rent previously paid by such Low-Income Tenant while residing in the Project. Developer represents that it will not rent to another tenant any unit occupied by a Low-Income Tenant prior to the vacating of the tenants from the Project, unless the unit was vacant immediately prior to Date 5, or the Low-Income Tenant decides not to return to his or her unit. The Developer expects that Low-Income Tenants will begin to reoccupy units in the Project starting in Date 7.

Developer represents that it took action to begin repairing the Damage as soon as possible after discovering the Damage, that it has proceeded with due diligence to complete the renovations that will repair the Damage, and that it will begin the process of moving Low-Income Tenants back into the Project as soon as it is safe to do so after completion of the renovations. Developer represents that it will meet the requirements of and perform any and all annual, renewal income certifications required to be performed under § 142(d)(3) and the regulations thereunder. Developer also represents that if the gross income of any returning Low-Income Tenant exceeds 170 percent of the applicable income limit under § 142(d)(1), Developer will rent the next available Low-Income Unit to a very-low income person pursuant to § 142(d)(3)(B).

Law and Analysis

Section 103(a) provides that, except as provided in § 103(b), gross income does not include interest on any state or local bond. Section 103(b)(1) provides that § 103(a) shall not apply to any private activity bond unless it is a qualified bond. Section 141(e) provides that an exempt facility bond is a qualified bond. Section 142(a)(7) provides that the term exempt facility bond includes any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to provide a qualified residential rental project.

Section 142(d) defines a qualified residential rental project as a project for residential rental property that, at all times during the qualified project period (defined below), meets one of two set-aside requirements elected by the issuer on the issue date of the issue for the project. Specifically, § 142(d)(1) requires that either 20 percent or more of the residential units in the project be occupied by individuals whose income is 50 percent or less of the area median gross income, or that 40 percent or more of the residential units in the project be occupied by individuals whose income is 60 percent or less of the area median gross income.

Section 142(d)(2)(A) defines the qualified project period as the period beginning on the first day on which 10 percent of the residential units in the project are occupied and ending on the latest of: (i) the date which is 15 years after the date on which 50 percent of the residential units in the project are occupied, (ii) the first day on which no tax-exempt private activity bond issued with respect to the project is outstanding, or (iii) the date on which any assistance provided with respect to the project under section 8 of the United States Housing Act of 1937 terminates.

Section 142(d)(3)(A) provides that the determination of whether the income of a resident of a unit in a project exceeds the applicable income limit shall be made at least annually on the basis of the current income of the resident. Section 142(d)(3)(B) generally provides that the income of a resident, whose income did not exceed the applicable income limit upon either the commencement of the resident's occupancy or at a prior determination specified in subparagraph (A), may increase above the applicable limit and will be treated as continuing to not exceed the applicable income limit. However, subparagraph (B) ceases to apply if upon a determination date such resident's income exceeds 140 percent of the applicable limit, and after the determination date, but before the next determination date, any comparable or smaller residential unit in the same project is occupied by a new resident whose income exceeds the applicable income limit.

Section 142(d)(4)(A) provides that in the case of a project described in § 142(d)(4)(B), the second sentence of § 142(d)(3)(B) shall be applied by substituting "170 percent" for

“140 percent” and “any low-income unit in the same project is occupied by a new resident whose income exceeds 40 percent of area median gross income” for “any residential unit of comparable or smaller size in the same project is occupied by a new resident whose income exceeds the applicable income limit.”

Section 142(d)(4)(B) provides that if the owner of a project elects to have the project treated as a deep rent skewed project, the project will be treated as such if at all times during the qualified project period it meets the following requirements: (i) 15 percent or more of the low-income units in the project are occupied by individuals whose income is 40 percent or less of area median gross income, (ii) the gross rent with respect to each low-income unit in the project does not exceed 30 percent of the applicable income limit which applies to individuals occupying the unit, and (iii) the gross rent with respect to each low-income unit in the project does not exceed $\frac{1}{2}$ of the average gross rent with respect to units of comparable size which are not occupied by individuals who meet the applicable income limit.

Regulations have not been promulgated under § 142(d). The regulations promulgated pursuant to § 103(b)(4) of the Internal Revenue Code of 1954 (the “1954 Code”), the predecessor to § 142(d), continue to apply to bonds issued to finance residential rental projects, except as otherwise modified by the Tax Reform Act of 1986, 1986-3 (Vol. 1) C.B. 519-575 (the “1986 Act”), and subsequent law. In the 1986 Act, Congress reorganized §§ 103 and 103A of the 1954 Code regarding tax-exempt bonds into § 103 and §§ 141 through 150 of the Code. Congress intended that to the extent not amended by the 1986 Act, all principles of pre-1986 Act law would continue to apply to the reorganized provisions. See 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-686 (1986), 1986-3 (Vol. 4) C.B. 686.

Section 1.103-8(b)(5)(i) provides that once available for occupancy, each unit in a residential rental project must be rented or available for rental on a continuous basis during the longer of: (a) the remaining term of the bond, or (b) the qualified project period (as defined in § 1.103-8(b)(7)).

Section 1.103-8(b)(5)(ii) provides that individuals or families of low or moderate income must occupy that percentage of completed units in such project applicable to the project under § 1.103-8(b)(1) continuously during the qualified project period. For this purpose, a unit occupied by an individual or family who at the commencement of the occupancy is of low or moderate income is treated as occupied by such an individual or family during their tenancy in such unit, even though they subsequently cease to be of low or moderate income. Moreover, such unit is treated as occupied by an individual or family of low or moderate income until reoccupied, other than for a temporary period, at which time the character of the unit shall be redetermined. In no event shall such temporary period exceed 31 days.

Section 1.103-8(b)(6)(i) provides that unless corrected within a reasonable period, noncompliance with the requirements of § 1.103-8(b) shall cause the project to not be treated as a qualified residential rental project under § 103(b)(4)(A) and paragraph § 1.103-8(b) as of the date of issue of the bonds. After an issue to provide such project ceases to qualify, subsequent conformity with the requirements will not alter the taxable status of the issue.

Section 1.103-8(b)(6)(ii) provides that if the issuer corrects any noncompliance arising from events occurring after the issuance of the obligation within a reasonable period, such noncompliance (e.g., an unauthorized sublease) shall not cause the project to be treated as a project not described in § 1.103-8(b). A reasonable period is at least 60 days after such error is first discovered or would have been discovered by the exercise of reasonable diligence.

In the instant case, after issuance of the Bonds, Developer discovered the Damage and acted to repair the Damage soon after discovery. Developer represents that due to safety and engineering reasons, such repair required that the units be vacated during the renovation period. In order to preserve the ability of Low-Income Tenants to reoccupy units in the Project, the Developer entered into the Replacement Leases which permit the Low-Income Tenants to reoccupy the Low-Income Units upon completion of the renovations, thus effectively prohibiting Developer from re-leasing the Low-Income Units to other prospective tenants. Developer will permit Low-Income Tenants to reoccupy Low-Income Units as soon as it is safe to do so after completion of the renovations. Based on the foregoing, we find that the Developer is correcting any noncompliance within a reasonable period within the meaning of § 1.103-8(b)(6)(ii), and therefore such noncompliance will not cause the Project to be one that is not described in § 1.103-8(b).

Accordingly, based on the facts and circumstances, the Low-Income Units are deemed to be rented or available for rental on a continuous basis for purposes of § 1.103-8(b)(5)(i), and continuously occupied by Low-Income Tenants for purposes of § 1.103-8(b)(5)(ii), during the period the Project is being renovated. Upon completion of the renovations, any Low-Income Tenant who reoccupies a unit in the Project will be treated as a continuing resident of the Project for purposes of the higher income limitation rules of §§ 142(d)(3) and (4) of the Code.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any transaction or item discussed or referenced in this letter. In particular, no opinion is expressed regarding the application of the rules with respect to the low-income housing tax credit under § 42 of the Code, specifically as it relates to whether tenants whose leases were terminated continue to be tenants for § 42 purposes, or the application of the disallowance of interest deductions for a change in use of facilities under § 150(b) of the Code.

This 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.

In accordance with Powers of Attorney on file with this office, copies of this letter are being sent to the authorized representatives of Agency and Developer.

The ruling contained in this letter is based upon information and representations submitted by Agency and Developer and accompanied by penalty of perjury statements executed by the appropriate parties. While this office has not verified any of the materials submitted in support of the request for a ruling, it is subject to verification upon examination.

Sincerely,

Associate Chief Counsel
(Financial Institutions and Products)

By: _____
Carla A. Young
Assistant to the Branch Chief
Branch 5

cc: