

Private Letter Ruling 9308012, IRC Section 42

Date: November 24, 1992

Dear ***

This is a reply to a letter dated May 12, 1992, and subsequent correspondence submitted by your authorized representative on behalf of Agency requesting four rulings under section 42 of the Internal Revenue Code.

The facts as represented in your May 12, 1992, ruling request are stated below.

Facts

Agency is a "mixed ownership government corporation," established to manage and resolve cases involving depository institutions previously insured by Corporation and placed into conservatorship or receivership between t1 and t2, or within three years from t2. The operations of Agency are funded out of Congressional appropriations, and obligations issued by Agency are generally backed by the full faith and credit of the United States.

In addition to acting on its own behalf as an independent corporation, Agency is authorized to act as a receiver or conservator for failed or failing depository institutions. As conservator, Agency attempts to restore an ailing depository institution to a sound and solvent condition. As receiver, Agency's principal function is to wind up the affairs of a failed institution and liquidate its assets, including loans, securities and real property.

In general, Agency is charged to conduct its operations so as to maximize the net present value return from the sale or other disposition of the institutions and assets of the institutions for which it acts as receiver or conservator. In addition, however, Congress issued Agency a particular mandate to preserve the available stock of affordable housing; Agency must conduct its receivership and conservatorship operations in a manner which preserves, to the maximum extent possible, the availability and affordability of residential real property.

As part of its mandate to preserve the availability and affordability of residential real property, Agency is authorized to provide financing assistance to purchasers of eligible residential rental properties. Agency may provide a loan at market interest rates to the purchaser of eligible residential property for all or a portion of the purchase price, which loan shall be secured by a first or second mortgage on the property. In addition, this seller financing may be made available at below-market interest rates to the extent necessary to facilitate an expedited sale of eligible residential property and permit (I) a lower-income family to purchase an eligible single family property; or (II) a public agency or nonprofit organization to comply with the lower-income occupancy requirements applicable to the purchase of an eligible residential property.

Agency plans to seek allocations of low-income housing tax credits for certain multifamily residential properties acquired by the failed or failing depository institutions for which it acts as receiver or conservator. In some cases, the institution

foreclosed on its mortgage against the property prior to Agency's involvement as receiver or conservator. In other cases, the foreclosure may have occurred during Agency's conservatorship or receivership. Agency anticipates that the low-income housing credit may enhance the marketability of the properties, enabling Agency to both obtain a higher price for the properties and sell the properties more quickly than it otherwise would be able to sell them. Agency, in its capacity as receiver or conservator, will apply for a carryover allocation of credit under section 42(h)(1)(E) of the Code on the anticipated rehabilitation expenditures to be done to the project under section 42(e)(2)(A). If a state or local housing credit agency awards a carryover rehabilitation credit to a project of Agency, Agency will subsequently sell the project to a purchaser who will "step in the shoes" of Agency under section 42(d)(7) of the Code.

Agency requests four rulings in the May 12, 1992 letter:

A. Agency, in its capacity as receiver or conservator for a failed or failing financial institution, may apply for and receive an allocation of low-income housing tax credit with respect to property owned by the financial institution, on behalf of the institution's receivership or conservatorship estate.

B. For purposes of obtaining a carryover allocation under section 42(h)(1)(E) of the Code, the basis of property owned by a failed or failing institution for which Agency acts as receiver or conservator is determined by reference to the institution's basis in the property for which the carryover allocation is sought, calculated under applicable rules and regulations of the Code, and is not limited to expenditures made in the year that the carryover allocation is received.

C. A purchaser of a property for which Agency, as receiver or conservator, has obtained a carryover allocation of rehabilitation credit, may apply for and receive an allocation of acquisition credit prior to the time the property is required to be placed in service in compliance with the terms of the carryover allocation of the rehabilitation credit.

D. Financing provided by Agency, as receiver or conservator of a failed or failing institution, will be treated as (a) a loan funded with Federal funds under section 42(i)(2)(D) of the Code, and (b) "qualified commercial financing" under sections 42(k)(2)(A)(ii) and 49(a)(1)(D)(ii)(III).

After discussions with the Internal Revenue Service, Agency asked to withdraw its request for rulings on Issues C and D by letter dated November 18, 1992.

Law

Section 42 of the Code provides a low-income housing tax credit for investment in qualified low-income buildings placed in service after December 31, 1986. Under section 1.42-1T(a)(2) of the Temporary Income Tax Regulations, the credit is allowed for any tax year to the extent the owner of the qualified low-income building receives a housing credit allocation from a state or local housing credit agency.

Under section 42(h)(1)(E)(i) of the Code, an allocation may be made for a qualified building that is not yet placed in service, as long as the qualified building is placed in

service not later than the close of the second calendar year following the calendar year of the allocation. Section 42(h)(1)(E)(ii) provides that for these purposes, the term "qualified building" means any building that is part of a project if the taxpayer's basis in the project (as of the close of the calendar year of the allocation) is more than 10 percent of the taxpayer's reasonably expected basis in the project (as of the close of the second calendar year following the calendar year of the allocation).

Notice 89-1, 1989-1 C.B. 620, provides that the following rules shall apply for purposes of determining whether a taxpayer has incurred more than 10 percent of the reasonably expected basis in the project under section 42(h)(1)(E) of the Code:

(1) Basis means the adjusted basis of land and depreciable real property, whether or not these amounts are includable in eligible basis; however, an allocation under section 42(h)(1)(E) of the Code is based upon items includable in eligible basis.

(2) A taxpayer has basis in land and other acquired real property when the benefits and burdens of ownership have been transferred to the taxpayer. In the case of purchased property, this transfer normally occurs at closing. For example, amounts paid to acquire an option to purchase land or a building are not includable in basis because the full benefits and burdens of ownership have not been transferred to the taxpayer; nor have the benefits and burdens of ownership been transferred merely because a nonrefundable down payment is made.

(3) Whether a taxpayer has basis in construction costs depends upon the method of accounting used by the taxpayer. For example, the cost of construction services is included in the basis of an accrual method taxpayer when the services are performed, and in the basis of a cash method taxpayer when the bill for the services is paid.

(4) With respect to taxpayers who are members of partnerships or other flow-through entities, the accounting method of the flow-through entity shall be applied to determine whether the 10 percent exception applies.

HOLDINGS

A. Agency, in its capacity as receiver or conservator for a failed or failing financial

institution, may apply for and receive an allocation of low-income housing tax credit with respect to property owned by the financial institution, on behalf of the institution's receivership or conservatorship estate.

B. For purposes of obtaining a carryover allocation under section 42(h)(1)(E) of the Code, the basis of property owned by a failed or failing institution for which Agency acts as receiver or conservator is determined by reference to the institution's basis in the property for which the carryover allocation is sought, calculated under applicable rules and regulations of the Code, and is not limited to expenditures made in the year that the carryover allocation is received.

No opinion is expressed or implied regarding Issues C and D of Agency's May 12, 1992, ruling request. Furthermore, no opinion is expressed as to what will constitute

the basis of the property owned by the failed financial institution for which Agency acts as receiver or conservator.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent. Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not yet been adopted. Therefore, this ruling may be modified or revoked if the adopted temporary or final regulations are inconsistent with any conclusion in this ruling. See section 11.04 of Rev. Proc. 92-1, 1992-1 I.R.B. 9, 30. However, when the criteria in section 11.05 of Rev. Proc. 92-1 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

Sincerely,

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Office of the Assistant Chief Counsel

(Passthroughs & Special Industries)