Private Letter Ruling 9336020, IRC Section 42

IRS Grants Agency and Nonprofit Relief from Low-Income Housing Credit Carryover Allocation Rules.

Full Text:

Date: June 10, 1993

Dear ***

This letter ruling responds to a request for a ruling dated January 26, 1992, submitted on behalf of Agency and Applicant, The ruling request is that Agency made a carryover allocation of low-income housing tax credit ("Credit") under section 42(h)(1)(E) of the Internal Revenue Code to Applicant on t1, and that at that time Applicant elected the applicable percentage, as defined by section 42(b)(1), for the month of t2.

Facts

Agency and Applicant represent the following facts. Agency is the organization specifically authorized to make Credit allocations on behalf of State and to carry out the provisions of section 42(h) of the Code. The City X District Director has examination jurisdiction over Agency.

Applicant is a nonprofit organization engaged in the development and ownership of low-income housing since t3. The City X District Director has examination jurisdiction over the Applicant's return. Applicant files its returns with the City Y Service Center.

The Project consists of a g-unit building located in City X. The project is intended to address a critical need for h housing in downtown City X and will provide significant, long-term (i.e., a i-year commitment to low-income housing will be recorded as a restrictive covenant) housing opportunities to elderly persons who are homeless or in danger of becoming homeless. j percent of the Project units will be restricted to elderly persons earning less than k percent of area medium gross income ("AMGI") and the remaining units will be restricted to elderly persons earning less than 1 percent of AMGI. For units restricted to tenants earning less than k percent of AMGI, Applicant has agreed to restrict Project rents to m percent of the amount otherwise changeable under section 42(g)(2) of the Code. Commitments have been received from Authority to provide subsidies to make the Project affordable to tenants earning less than k percent of AMGI. In addition, Project C has committed $n annually in social services funds to provide two on-site case workers to coordinate an area of services to Project tenants in an effort to help elderly residents live independently.

Agency adopted the following schedule to implement its qualified plan under section 42(m) of the Code for allocation of Credits among project applicants:

t4 Program guidelines and application materials released

t5 Pre-application deadline

t6 Review of pre-application mailed to applicants

t7 Final application deadline

t8 Announcement of Credit awards

t1 Confirmation of Credit allocation

Applicant applied to Agency on a timely basis, in accordance with the schedule set forth above, for an allocation of Credit pursuant to section 42(h)(1)(E) of the Code for the Project. Applicant requested $a from State's t9 Credit ceiling. At that time, the State's t9 Credit ceiling consisted of the amount available under section 42(h)(3)(C)(i).

Competition for t9 Credit allocations from Agency was intense. Agency experienced a b% increase in the number of applications submitted in comparison to the prior year. The dollar amount of requested t9 allocations equaled c% of the applicable State housing Credit ceiling. Less than one out of every d applications was eventually awarded Credits by Agency.

Based on the criteria set forth in its plan to rank the various projects vying for t9 Credit allocations, the Project had A and was ranked e by Agency among potential first round Credit recipients. Minutes of Agency's Finance Committee dated t8 indicate that the Project was approved to receive a Credit allocation of 5a and that award winners could be announced to the public. By letter dated t10, notification was given to Applicant of Agency's reservation of Credits and a conference was scheduled to "sign formal documents," pending verification of certain items such as evidence of site control, updated financing commitments from lenders and a description of how Applicant would document compliance by t11 with the 10% cost incurrence requirement of section 42(h)(i)(E) of the Code. (All of which were verified to the satisfaction of Agency on or before t1.) On t12, Agency issued a widely circulated press release identifying all of the award recipients of t9 Credits. The press release announced that the Project was awarded $a of Credits. By check dated t13, Agency was paid the required f% reservation fee for the Project.

On t1, Applicant formally accepted the terms set forth in the reservation letter, which had been re-sent without modification to Applicant on t14. On t1, both Agency and Applicant executed the "Agency Low-Income Housing Tax Credit Reservation and Extended Use Agreement" that, among other things, identifies the requirements Applicant must satisfy before Agency will issue Form 8609 and specifies the terms agreed to by the parties with respect to the Extended Use Agreement. Also on t1, Agency provided the Carryover Allocation Agreement for the Project to Applicant, which was signed by Applicant. The Carryover Allocation Agreement is intended to, among other things, contain the

information required by Notice 89-1, 1989-1 C.B. 620. The Carryover Allocation Agreement executed by Applicant included an election to fix the applicable percentage pursuant to section 42(b)(2) of the Code for the month of t2.

The Carryover Allocation Agreement, however, was misplaced after it was executed on a timely basis by the Agency. This timely execution of the Carryover Allocation Agreement is supported by the contents of a Notary Journal that reflects contemporaneous entries of executed documents acknowledged by B in B's capacity as a notary public for State. B's contemporaneous journal entry for documents acknowledged on t1 evidences that both the Reservation Agreement and the Allocation Agreement were executed by Agency on said date. Upon learning that an executed Carryover Allocation Agreement could not be located, Agency, on t15, re-signed the Carryover Allocation with an "as of" t1 date.

Law

Section 42 of the Code provides a tax credit for investment in qualified low-income buildings placed in service after December 31, 1986. In general, the credit is allowable only if the owner of a qualified low-income building receives a housing credit dollar amount allocation from the state or local housing credit agency (Agency) in whose jurisdiction the building is located. The housing credit dollar amount that an Agency may allocate in any calendar year is limited to its portion of the state housing credit ceiling for the calendar year.

Section 42(b)(2) of the Code provides that in the case of any qualified low-income building placed in service by the taxpayer after 1987, the term "applicable percentage" means the appropriate percentage prescribed by the Secretary for the earlier of -- (i) the month the building is placed in service, or (ii) at the election of the taxpayer-- (I) the month in which the taxpayer and the housing credit agency enter into the agreement with respect to the building (that is binding on the agency, the taxpayer and all successors in interest) as to the housing credit dollar amount to be allocated to the building, or (II) in the case of any building to which section 42(h)(4)(8) applies, the month in which the tax-exempt obligations are issued. A month may be election under clause (ii) only if the election is made not later than the 5th day after the close of the month. The election once made is irrevocable.

Section 42(h)(1)(8) of the Code provides that an allocation shall be taken into account only if it is made not later than the close of the calendar year in which the building is placed in service.

Under section 42(h)(1)(E)(i) of the Code, however, an allocation meets the requirements of section 42(h)(1) if the allocation is made with respect to a qualified building that is placed in service not later than the close of the second calendar year following the calendar year in which the allocation is made. Section 42(h)(1)(E)(ii) defines a qualified building as any building that is part of a project if the taxpayer's basis in the project (as of the close of the calendar year in which the allocation is made.) The term does not include

any existing building unless a credit is allowable for rehabilitation expenditures paid or incurred by the taxpayer with respect to the building for a taxable year ending during the second calendar year following the calendar year in which the allocation is made or the prior taxable year.

Section 42(h)(3)(C) of the Code provides that the state housing credit ceiling applicable to any state for any calendar year is equal to the sum of the following components:

(i) $1.25 multiplied by the state population (the population component);

(ii) the unused state housing credit ceiling (if any) of the state for the preceding calendar year (the unused carryforward component);

(iii) the amount of state housing credit ceiling returned in the calendar year (the returned credit component); plus

(iv) the amount, if any, allocated to the state by the Secretary under section 42(h)(3)(D) from a "national pool" of unused credits.

Under section 42(o)(1)(A) of the Code, the population component of the state housing credit ceiling shall not apply to any amount allocated after June 30, 1992.

Section 42(n)(4) of the Code gives the Secretary the authority to prescribe regulations as may be necessary or appropriate to carry out the purposes of section 42, including regulations providing the opportunity for housing credit agencies to correct administrative errors and omissions with respect to allocations and record keeping within a reasonable period after their discovery, taking into account the availability of regulations and other administrative guidance from the Secretary.

On January 4, 1993, the Secretary published a Notice of Proposed Rulemaking on the subject of administrative errors.

Conclusions

Based upon the representations of Agency and Applicant and the evidence presented that supports these representations, we rule that (1) Agency's Carryover Allocation of t9 Credit to Applicant in the amount of $a may be treated by Agency and Applicant as having been made on t1 and (2) Agency and Applicant may treat the election of the applicable percentage as having been made for the month of t2.

No opinion is expressed or implied regarding whether Applicant's project will otherwise qualify for the low-income housing credit under section 42 of the Code.

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 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. 93-1, 1991-1 I.R.B. 10, 39. However, when the criteria in section 11.05 or Rev. Proc. 93- 1 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.

Sincerely,

JAMES RANSON

Chief, Branch 5

Office of the Assistant Chief Counsel

(Passthroughs and Special Industries)