Private Letter Ruling 9336034, IRC Section 42

10-year Holding Period Waived.

Date: June 15, 1993

Dear ***

This letter responds to your letter of February 25, 1993, and subsequent correspondence submitted on behalf of Owner requesting a private letter ruling that will waive, for the Project, the 10-year holding period requirement for existing buildings of section 42(d)(2)(B)(ii) of the Internal Revenue Code, under the exception provided in section 42(d)(6)(D).

The Project consists of b buildings housing c apartment units located on a d acre parcel of land in City A. The Project was previously financed by a mortgage from the prior owners to what is now Bank. Subsequently, the prior owners defaulted on the mortgage payments and, on t1, Bank repossessed the Project. As evidence of the repossession, Owner has submitted a copy of the substitute trustee's deed reconveying the Property to Bank.

On t2, Agency 1 was appointed conservator for Bank, and, on t3, Agency 1 was appointed receiver for Bank, an insured depository institution in default (as defined in section 3 of the Federal Deposit Insurance Act). On t4, Owner purchased the Project from Agency 1, acting as receiver for Bank.

Consideration for the Project consisted of a cash payment of $e, a loan of $j from Agency 1, and an exchange of like kind property under the nonrecognition provisions of section 1031 of the Code. In accordance with section 42(d)(2)(C), the purchase price of the Project was reduced by both the deferred gain and the adjusted basis of the asset exchanged in calculating the eligible basis for the acquisition credit. The sale of the Project to Owner is evidenced by the submission of the copies of the purchase contract, the purchaser's statement, and the special warranty deed.

Owner represents that he has acquired the Project for the purpose of providing affordable housing to low-income households. Owner applied for and received a t5 housing credit dollar amount allocation of $f from Agency 2, in order to comply with the state credit limitations provided in section 42(h)(3) of the Code. This allocation includes the 30-percent present value tax credit on the eligible basis of the acquisition costs, and the 70-percent present value tax credit on the new rehabilitation costs. The housing tax credits were approved by Agency 2 through a carryover allocation issued on t6. Owner estimates that re-habilitation costs will average $g per apartment unit in each building and, therefore, meet the minimum rehabilitation expenditures requirement of section 42(e)(3)(A).

The Project currently has qualified low-income families that benefit from the rent restricted rents as stated in the United States Department of Housing and Urban

Development income tables. Owner represents he is making good faith efforts to market the apartments to other qualified low-income households.

Owner has made the following additional representations and certifications with respect to the Project:

1. The acquisition of the buildings in the Project is by purchase (as defined in section 179(d)(2) of the code, as applicable under section 42(d)(2)(D)(iii)(I)).

2. The buildings in the Project were not previously placed in service by Owner, or by a person who was a related person (as defined in section 42(d)(2)(D)(iii)(II) of the Code) with respect to Owner as of the time the Project was last placed in service.

3. As of the earlier of the time of acquisition of the Project or the time of the application for the waiver, the Project is being acquired from an insured depository institution in default (as defined in section 3 of the Federal Deposit Insurance Act), or from a receiver or conservator of such institution (as defined in section 42(d)(6)(D) of the Code).

4. Owner has submitted a letter from Agency 1, dated t7, stating that Agency 1 was the conservator for Bank, an insured depository institution in default (as defined in section 3 of the Federal Deposit Insurance Act).

5. To the best of the knowledge of Owner and his representatives, there have been no nonqualified substantial improvements to the buildings in the Project since they were last placed in service.

6. To the best of the knowledge of Owner and his representative, no prior owner of the Project was allowed a low-income housing tax credit under section 42 of the Code for the Project.

7. All terms and conditions of section 42 and related sections of the Code will be met, including substantial rehabilitation of a minimum of $3,000 per apartment unit, except for the 10-year holding period requirement provided by section 42(d)(2)(B)(ii), and owner asks that this requirement be waived under the authority granted the Secretary of the Treasury by section 42(d)(6)(D).

8. Section 42(d)(2)(C) of the Code provides a limitation on the eligible basis of existing buildings. It states that the adjusted basis for any low-income housing credit building shall not include so much of the basis of such building as is determined by reference to the basis of other property held at any time by the person acquiring the building. In this case a portion of the consideration for the Project was a section 1031 exchange involving nonrecognition of any gain or loss. In calculating the qualifying eligible basis Owner has appropriately made reductions of $h for the deferred gain, $i for the prior basis of the asset exchanged, and $k for the cost of land.

9. The date of purchase of the Project was after the date of enactment of the Revenue

Reconciliation Act of 1989 (December 19, 1989) and therefore, the purchase complies with the effective date of section 42(d)(6)(D) of the Code.

10. This application for the waiver is being timely filed within 12 months after the acquisition of the Project.

For an existing building to qualify for the 30-percent present value housing tax credit section 42(d)(2)(B)(ii) of the Code requires there be a period of at least 10 years between the date of the building's acquisition by the taxpayer and the later of:

1. The date the building was last placed in service, or

2. The date of the most recent nonqualified substantial improvement of the building.

As additional clarification of the placed in service date, section 42(d)(2)(D)(ii)(IV) of the Code provides a limitation of one year on the holding period for property received in a foreclosure. In this situation, the period between the date of foreclosure by Bank, t1, and the date of sale to Owner, t4, exceeds one year. Therefore, in accordance with the limitations provided in section 42(d)(2)(D)(ii)(IV), the foreclosure date is a new placed in service date for the Project.

However, section 42(d)(6)(D) of the Code provides an exception to the 10-year holding period requirement of section 42(d)(2)(B)(ii) to the effect that on application by the taxpayer, the Secretary may waive this requirement with respect to any building if the Secretary (after consultation with the appropriate federal official) determines that the building is being acquired from an insured depository institution in default (as defined in section 3 of the Federal Deposit Insurance Act) or from a receiver or conservator of such an institution.

Based upon the representations of Owner and the fact that Owner acquired the Project from Agency 1 as receiver for an insured depository institution in default, under the authority of section 42(d)(6)(D) of the Code, we rule that the 10-year holding period requirement of section 42(d)(2)(B)(ii) is waived with respect to Owner's acquisition of the Project.

No opinion is expressed or implied regarding whether Owner's costs of acquisition and rehabilitation of the buildings in the Project will qualify otherwise 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 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 the ruling. See section 11.04 of Rev. Proc. 93-1, 1993- 1 I.R.B. 10, 39. However, when the criteria in section 11.05 of Rev. Proc. 93-1 are satisfied, a ruling is not revoked or modified retroactively except in rare or unusual circumstances. A copy of this letter should be filed with the Owner's federal income tax return for the taxable year in which the transaction covered by this ruling is consummated.

Sincerely yours,

James F. Ranson

Chief, Branch 5

Office of the Assistant Chief Counsel

(Passthroughs & Special Industries)