Private Letter Ruling 9345036, IRC Section 42

Full Text:

Date: August 13, 1993

Dear ***

This letter responds to your letter of June 1, 1993, and subsequent correspondence submitted on behalf of the Partnership 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 with respect to the acquisition of the Project from an insured financial institution in default under the exception provided in section 42(d)(6)(D). The Partnership has made the following representations. The Partnership is a State P general partnership with L and M as the general partners. The Partnership is under the examination jurisdiction of the District Director in City O. The Project consists of b apartment units housed in c buildings, located in City N. On t1, Q and R borrowed $d from Association 1. In consideration of this loan, Q and R gave Association 1 a promissory note in the principal amount of $d, together with a mortgage on the Project in order to secure the note. On t2, pursuant to section 5(d)(2) of the Home Owners Loan Act of 1933, as amended by section 301 of the Financial Institutions Reform and enforcement Act of 1989, as enacted on t13, the Director of the Office placed Association 1 in receivership and assumed exclusive custody and control of the property and affairs of Association 1. The Director appointed Agency 1 as the receiver of Association 1 to have "all the powers of a conservator or receiver . . . ". The Director subsequently appointed Agency 1 as the conservator of the new institution, Association 2. Subsequently, certain assets of Association 1 were sold and transferred from Agency 1 as receiver for Association 1 to Association 2, by and through its conservator, Agency 1. Association 2, by and through Agency 1 purchased the Q and R note and mortgage. On t4, the last placed in service date for the Project prior to the Partnership's purchase, the Director placed Association 2 in receivership and appointed Agency 1 as receiver of Association 2. Agency 1 thereby succeeded to ownership and control of the Q and R note and mortgage, which as of t3, were in default. On t5, Agency 1 filed its petition for foreclosure of the Project in the Court. The foreclosure action was In Rem, so Agency 1 was only seeking the foreclosure sale of the Project, and not any judgement against Q and R for any deficiency between the foreclosure sale price of the Project and the amount owed under the Q and R note. On t6, pursuant to the application of Agency 1, the Court appointed S as receiver for the Project. As the Court appointed receiver of the project, S was to take physical possession of the property and keep it from further injury until completion of the foreclosure. On t7, Agency 1 obtained an In Rem Judgement concerning the Project that established: Agency 1's mortgage as the first and superior lien against the Project subject only to the lien of S for the costs and expenses as Court appointed receiver of the Project; Agency 1's In Rem judgement against Q and R in the principal sum of $d, plus accrued interest, costs and attorney fees; and establishing that the Project would be sold at sheriff's sale, with appraisement, with proceeds realized therefrom applied first to the costs of sale, next to the costs and expenses of S, next to the

judgement in favor of Agency 1, with any sums remaining thereafter being applied pursuant to further order of the Court. On t8, the Partnership and Agency 1 signed an agreement whereby the Partnership paid to Agency 1 $e (which included $f in earnest payment) for the Project. In return the Partnership received an assignment of Agency 1's note, mortgage, and judgement on the Project. At the sheriff's sale held on t9, the Partnership, as judgement creditor by assignment from Agency 1, purchased the Project by application of $g of its judgement debt against the purchase price. The foreclosure sale was confirmed, and a sheriff's deed conveying title to the Partnership was issued on t10. On t11, the Partnership received a 10-year annual housing credit dollar amount allocation from Agency 2 in the amount of $h for the Project. Most of this allocation related to rehabilitation credit. On t12, Agency 1 submitted a letter to this office stating that Agency 1 was the receiver for Association 2, an insured depository institution in default under section 3 of the Federal Deposit Insurance Act (Act). The Partnership has made the following additional representations and certifications with respect to the Project: 1. The acquisition of 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 the Partnership, 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 the Partnership as of the time the Project was last placed in service; 3. To the best of the knowledge of the Partnership and the Partnership's representatives, no prior owner of the Project was allowed a low-income housing tax credit under section 42 of the Code for the Project; 4. The apartment units comprising the Project are to be rehabilitated in a manner that satisfies the requirements of sections 42(d)(2)(B)(iv) and 42(e) of the Code. Section 42(d) of the code provides rules for determining the eligible basis of a new or existing building, a factor used in computing the amount of credit earned. Section 42(d)(2)(B)(ii), however, requires that as of the date the building is acquired by the taxpayer at least 10 years must have elapsed since the later of the date the building was last placed in service or the date of the most recent nonqualified substantial improvement of the building. 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 Act) or from a receiver or conservator of such an institution. Based upon the Partnership's representations, and the letter dated t12 from Agency 1 stating that it is the receiver of Association 2, an insured depository institution in default under section 42(d)(6)(D) of the Code, we rule that the 10-year holding period requirement under section 42(d)(2)(B)(ii) of the Code is waived with respect to the Partnership's acquisition of the Project. No opinion is expressed or implied regarding whether the Partnership'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 ruling should be filed with the Partnership'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)