

Private Letter Ruling 9432006, IRC Section 42

Full Text:

Date: May 6, 1994

Dear ***

This letter responds to your letter of January 4, 1994, that requested a ruling under section 42(n) of the Internal Revenue Code and section 1.42-13 of the Income Tax Regulations.

Facts

The Agency and the Partnership have made the following representations.

The Partnership was formed to build, develop, own, and operate a a-unit apartment complex known as the Project.

As originally designed, the Project was to consist of 10 buildings: nine residential "four-plexes" and a community building containing the manager's office, laundry facilities, a meeting room, a small recreational room, and a kitchenette. This design was reflected in materials submitted on t1 to the Farmer's Home Administration (FmHA) in connection with a loan application for financing and in the original architectural blueprints prepared for the Project.

The design of the Project was changed in t2 after the City agreed to allow the construction of "six-plexes." Following this change, the revised plans and specifications called for a Project consisting of six residential buildings and one community building.

An application for a t2 housing credit dollar amount (Credit) for the Project was made in t3 to the Agency for Credit in the amount of \$b (the Credit Application). In the Credit Application, the Partnership stated simply -- and accurately -- that the Project consisted of seven buildings. No item on the Credit Application requested any breakdown stating how many of the buildings in the Project were residential buildings and how many were nonresidential buildings. As a result, nothing in the material submitted to the Agency indicated that one of the seven buildings in the Project was a nonresidential community building. Attached to the Credit Application is a document titled "Management Plan" that indicates that the Project will include a unit occupied by a full-time resident manager.

The Agency on t4 issued a letter reserving a t2 Credit for the Project (the Letter) and another letter on t5 committing Agency to allocate Credit to the Project (the Commitment). The Letter and the Commitment each reflected a Credit for the Project in the aggregate of \$c. Neither documents contained any reference to the number of buildings -- residential or otherwise -- in the Project.

The Partnership submitted a carryover certification (the Certification) in t6 that showed that it would have an accumulated basis in the Project as of t6 equal to at least \$d, which represented e percent (more than 10 percent) of the reasonably anticipated total basis in the project of \$f. The Certification included a series of seven tax credit calculation exhibits that requested allocations of Credit for seven buildings in the following amount per building:

Building # Qualified Basis Credit Allocation

One \$g \$h

Two i j

Three i j

Four i j

Five i j

Six k l

Seven k l

Totals \$m \$n

Building One in the above list actually was the community building, to which, because it does not contain any residential units, no Credit may be allocated.

The Agency issued a Carryover Allocation of t2 Tax Credit Authority on t7 (the Carryover Allocation). The Carryover Allocation included a tax credit calculation exhibit (the Carryover Allocation Exhibit) showing a carryover allocation of Credit for \$bb to seven buildings with a total anticipated eligible basis and qualified basis of \$o. The Carryover Allocation Exhibit indicated that the Agency had assigned Building Identification Numbers (BINs) A through B to the seven buildings in the Project.

Construction of the Project began in t8 and was completed in t9. In t9, the City began issuing certificates of occupancy to the Partnership for the buildings in the Project. At the time the Partnership submitted its final cost certification forms (the Final Certifications), however, the Partnership submitted nine such forms requesting Credit in the following amounts:

FINAL CERTIFICATION

Building # Qualified Basis Credit Allocation

One \$p \$q

Two p q

Three p q

Four p q

Five r s

Six r s

Seven p q

Eight p q

Nine p q

Totals \$t \$u

This error occurred because of a mistake of fact on the part of X, the person who prepared the Final Certifications for the Partnership. When X prepared the Final Certifications, he mistakenly used the original plans and specifications that were submitted to the FmHA. Because those plans called for a project consisting of 10 buildings, nine of which were residential buildings, X used the square footage of the nine residential buildings to pro rate the eligible basis of the Project among the buildings to complete the Final Certifications.

When it received the Final Certifications, the Agency first corrected a minor error relating to the allocation of eligible basis between the buildings and recalculated the allowable Credit. Then, despite that it had approved a project consisting of seven buildings, had issued the Carryover Allocation for seven buildings, and had issued seven BINs for those buildings, the Agency issued nine Forms 8609 for the Project to the Partnership. Thus, the Agency issued nine Forms 8609 allocating Credit in the total amount of \$aa and nine new BINs (C through D) to the Project. The Agency assigned new BINs so that the nine BINs assigned to the Project would be sequential.

The Partnership's accountant discovered the error in t10 while preparing the Partnership's Form 1065 for tax year t11. Once the partners of the Partnership learned of the error, they contacted the Agency asking it to issue corrected Forms 8609 for the six qualified buildings in the following amounts:

REVISED FINAL CERTIFICATIONS

Building # Qualified Basis Credit Allocation

One \$v \$w

Two v w

Three v w

Four v w

Five x y

Six x y

Totals \$z \$aa

At the present time, the Partnership has not yet filed its Form 1065 for t11.

As it has actually been built, the Project conforms in all material aspects with the plans and specifications approved by the FmHA and upon which the Credit Application and the Carryover Allocation were based. That is, the Project has the same number of buildings (both residential and nonresidential), each building in the Project has the same number of residential units, and all of the units in each building will be occupied by low-income tenants. The Partnership did not apply for Credit for a nine or 10 building project; the Agency did not award Credit to any such project. There are no material differences between the project that was planned, the project that received the Carryover Allocation, and the project that was built. The error that the Agency seeks to correct occurred solely from a mistake of fact about the Project. The Agency's reliance on the mistake of fact caused the issuance of Forms 8609 for buildings that did not actually exist in the Project.

Law AND ANALYSIS:

Under section 42(n)(4), state and local housing credit agencies may correct administrative errors and omissions concerning allocations and recordkeeping within a reasonable period of time after their discovery. Section 1.42-13(b)(2) defines an administrative error or omission as a mistake that creates a document that inaccurately reflects the intent of the Agency at the time the document is originally completed or, if the mistake affects a taxpayer, a document that inaccurately reflects the intent of the Agency and the affected taxpayer at the time the document is originally completed. Section 1.42-13(b)(1), however, provides that an administrative error does not include a misinterpretation of the applicable rules and regulations under section 42.

When submitting the Project's Final Certification and requesting the Forms 8609, X assumed that the earlier plans still applied to the Project. The Agency assumed that those plans reflected the current plans for the Project when it issued the Forms 8609 for the Project. The Agency, however, should have, at the very least, inquired about the change in plans from the plans upon which it issued the Carryover Allocation before issuing the Forms 8609. Nonetheless, we do not believe the Agency's actions were the result of a misinterpretation of the applicable rules and regulations under section 42. The Carryover Allocation and the Forms 8609 issued to the Project inaccurately reflect the intent of the parties involved because X and the Agency made factual mistakes as to the design and character of the buildings in the Project.

We believe three correctable administrative errors occurred in this case. The first, when the Agency made the Carryover Allocation that included an allocation and a BIN for a non-residential building. The second, when X submitted the Final Certification based on outdated plans. The third, when the Agency issued a BIN and a Form 8609 to non-existent buildings and a non-residential building.

In this situation, the Carryover Allocation is the actual Credit allocation document, and the Form 8609 is an administrative document. Under section 1.42-13(b)(3)(iii)(A), the Secretary must pre-approve a correction of an administrative error or omission if the correction is not made before the close of the calendar year of the error or omission AND the correction requires a numerical change to the Credit amount allocated for a building or project. To correct the administrative error on the Carryover Allocation, the Agency would not have to change the number of Credits allocated to the Project or allocate Credit to a building that was not originally included in the project-based Carryover Allocation. Thus, the Agency would not have to obtain the Secretary's approval before reapportioning the basis in the common area to the residential rental buildings listed on the Carryover Allocation.

After applying the relevant law and regulations to the facts submitted and the representations set forth above, we rule that: (1) the Agency committed an administrative error on the Carryover Allocation; (2) due to that administrative error, the Carryover Allocation inaccurately reflects the intent of the Agency and the Partnership as of the time they executed the Carryover Allocation; and (3) the Agency will correct the administrative error within a reasonable period of time after the Agency became aware of the administrative error. We also rule that: (1) the Agency and X committed an administrative error regarding the issuance of the Forms 8609 for the Project; (2) due to that administrative error, the Forms 8609 inaccurately reflect the intent of the parties at the time the Agency executed the Forms 8609; and (3) the Agency will make the correction within a reasonable period of time after the Agency became aware of the administrative error.

To correct these administrative errors, the Agency must:

1. Retrieve all nine of the Forms 8609 for the Project previously sent to the Partnership.

2. File a Form 8823 for each of the nine Forms 8609 issued for the Project and indicate that each BIN is no longer valid because of a correction made under section 1.42-13.
3. Correct the Carryover Allocation document so that it reflects a proper allotment of the adjusted basis of the common area in the Project to the residential rental buildings and indicate at the top of the first page of the Carryover Allocation document, or on an attached cover page, that it made the corrections under section 1.42-13. (For the proper allotment of the adjusted basis of the common area, follow section 42(d)(4)(B) and Rev. Rul. 92-61, 1992-2 C.B. 7.)
4. File a Form 8610 with the amended box checked and an attached copy of the corrected Carryover Allocation.
5. Complete and issue a new Form 8609 for each of the six residential rental buildings described in the Carryover Allocation. Each new Form 8609 should: (i) have the BIN shown on the Carryover Allocation for the corresponding residential rental building, (ii) reflect the correct Credit for each residential rental building, and (iii) indicate at the top that it reflects a correction made under section 1.42-13.

No opinion is expressed or implied regarding the application of any other provisions of the Code or regulations. Specifically, we express no opinion on whether the eligible basis or qualified basis is as represented in this letter ruling, or whether the Project otherwise qualifies for the low-income housing credit under section 42.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

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Office of the Assistant Chief Counsel

(Passthroughs and Special Industries)