Private Letter Ruling 9543009, IRC Section 42

Date: July 21, 1995

Dear ***

This letter responds to your and *** letter of *** requesting a ruling under section 42(n) of the Internal Revenue Code and section 1.42-13 of the Income Tax Regulations to allow Agency and Partnership to correct an administrative error in an allocation of low-income housing dollar amounts to Project.

FACTS:

Agency and Partnership have made the following representation. As to each of the Partnership, the General Partners, the Limited Partner and the Special Limited Partner: its annual accounting period is the calendar year, its overall method of accounting for maintaining its accounting books and filing its federal income tax returns is the accrual method. The location of the District Office of the Internal Revenue Service that will have examination jurisdiction over all returns filed by Partnership and the General Partners is ***. The location of the District Office of the Internal Revenue Service that will have examination jurisdiction over all returns filed by the Limited Partner and the Special Limited Partner is ***.

Partnership represents and warrants that the facts relating to the transaction are as follows: Partnership was formed for the purpose of building, developing, owning and operating Project, a a-unit apartment complex in City C. City C is in County. All of the units in Project were intended for occupancy as low-income units within the meaning of section 42(i)(3) of the Code.

The development of Project was begun by Church in early i. Church owned a parcel of land immediately adjacent to Highway on which it wished to build an apartment complex for low-income residents of County. On b, Church, which had no prior experience in the development of multi-family rental properties, executed an agreement (Basic Services Agreement) with Architect A for architectural and engineering design and management services. The Basic Services Agreement specifically excluded civil engineering services, land surveying and soil testing from the services required to be provided by Architect A. Moreover, in fact Architect A did not provide any civil engineering services, surveying or soil testing services with respect to the development of Project.

On c, Church executed an agreement (Development Agreement) with Developer, pursuant to which Developer was to provide various services in the development of Project. The services to be provided by Developer pursuant to the Development Agreement included the preparation and submission of an application for credits, the preparation and submission of an application for construction and permanent financing, the preparation of financial pro-formas for tax credit syndication, the coordination of pre-

construction development activities, the monitoring of the construction of Project and the initial lease-up of Project.

On d, Church formed General Partner A, as a State nonprofit corporation to hold Church's general partner interest in Partnership, which would be created to construct, own and operate Project. The Articles of Incorporation of General Partner A appointed e members of Church as the initial Board of Directors, provided that there were to be at least f but no more than e directors at all times, and provided that future directors were to be elected by the board of directors. General Partner A applied for and received tax-exempt status as an organization exempt from federal income taxation under section 501(c)(3).

The initial site plan for Project was produced by Architect A in g. A copy of this initial site plan has not been located. Because Church was concerned that locating the buildings too close to Highway would subject tenants of Project to too much noise, the initial site plan showed that the a units of Project would be located in h buildings situated as far away from Highway as possible.

An application for i housing credit dollar amounts for Project was submitted by Developer on j, to Agency. However, reflecting the fact that the site plan of Project had not been finalized as of j, the credit application did not specify either the number or the location of the buildings in Project. The credit application further specified that the eligible basis of Project would be $k. Because one hundred percent (100%) of the units were intended for rental to qualified low-income tenants, the credit application specified that the qualified basis of Project also would be $k. Because Project involved new construction with no federally-subsidized financing, Project qualified for the nine percent (9%) credit under section 42(b)(1)(A). Accordingly, Partnership requested a credit allocation in the amount of $1. At roughly the same time, Developer submitted an application for construction and permanent financing for Project from Agency.

After reviewing the application for financing, Agency notified Church that, because Church lacked both multifamily rental property development experience and the financial capacity to provide the necessary loan guarantees during the construction phase, any financing provided for Project by State would specifically be conditioned on Church bringing in an experienced developer with adequate financial strength to serve as a co-general partner.

In mid-m, negotiations began between Church and General Partner B through an affiliate of General Partner B, regarding whether General Partner B would agree to become a co-general partner in the development of Project. The principals of General Partner B have considerable experience in the development of multifamily rental properties and could provide the necessary guarantees during the construction period. On o, Church and General Partner B, through its affiliate, executed a co-venture agreement, pursuant to which General Partner B was given a right of first refusal to become a co-general partner in Partnership. To help General Partner B determine whether or not it wanted to become a co-general partner, it consulted with: (1) Builder, which General Partner B intended to

use as the general contractor for Project if it became a co-general partner, and (2) Architect B, to evaluate the location of the buildings on the site and the feasibility of the initial site plan previously prepared by Architect A.

In p, Builder and Architect B inspected the site and determined that, because of certain civil engineering concerns (relating to the grading of the site, necessary storm water management, sediment control, water and sewer feasibility) the initial site plan was not feasible. Advised of these civil engineering considerations, General Partner B and Church decided in g to revise the initial site plan. On the advice of Builder and Architect B and after consultation with Architect A, General Partner B and Church decided to revise the initial site plan by "pushing" the h buildings shown on the original site plan "up" the site closer to Highway. Simply "pushing" the buildings toward Highway, however, would have resulted in one of the buildings being situated unacceptably closely to the creek. Accordingly, also on the advice of Builder, Architect B, and Architect A, General Partner B and Church decided to split one of the buildings into two separate buildings, so that r buildings, rather than h buildings, are to be built. Neither the number of low-income units in Project nor the estimated cost of its construction were affected by the design change. This decision was made in g. At that time, General Partner B and Church asked Architect A to produce a new site plan showing r buildings located closer to Highway.

No contemporaneous documents exist to prove that the change in the number of buildings in Project was changed from h to r in g. However, Developer, Architect A, General Partner A, Builder, Architect B, and General Partner B (that is, all of the parties involved in the development of Project in g) all agree that the design change was made in g.

Partnership submitted a low-income housing credit certification of basis expenditure on s (Carryover Certification), showing that it would have an accumulated basis in Project as of t, equal to at least $u, representing approximately 10% of the reasonably anticipated total basis in Project of $k. Nothing in the Carryover Certification or in any other material submitted to Agency specified the total number of buildings in Project as of the date of the Carryover Certification or in any way indicated that the number of buildings in Project had changed.

Agency issued a Carryover Allocation of i Tax Credit Authority on z in the amount of $v per year. The Carryover Allocation was issued on z instead of w because the authority to allocate credit from the i year expired on Z. In the Carryover Allocation, h building identification numbers (BINs) were assigned to the h originally- contemplated buildings. This was because Agency previously had been told by a representative either of Partnership or of Developer that Project consisted of h buildings and was not informed of the change in the number of buildings prior to the date on which the Carryover Allocation was issued.

At the time that it received the Carryover Allocation, Partnership understood that Project now included r buildings, rather than h buildings, but it did not understand the significance of the lack of a BIN for all h buildings in Project. Accordingly, Partnership

did not realize that the fact that only h BINs had been assigned to Project would create a problem.

Project was completed and all buildings were placed in service prior to the close of x, the date prescribed in section 42(h)(1)(E)(i). On y, Partnership submitted use and occupancy certificates, a cost certification, a breakdown of basis, evidence that the extended-use covenants had been recorded and a copy of the limited partnership agreement of Partnership to Agency (collectively, the Cost Certification) and requested that Agency issue r Forms 8609 for the r buildings in Project. After checking its records, Agency realized that its Carryover Allocation had included only h BINs and so notified Partnership. Following conversations between Agency and Partnership as to exactly what had transpired, the parties realized that an administrative error or omission had occurred.

In connection with the above statement of facts, Agency represents that (1) it intended to make a project-based allocation to Project pursuant to section 42(h)(1)(F), (2) the number of buildings in Project was not material to the Carryover Allocation for Project and (3) the fact that Project had r buildings rather than h buildings would not have affected (a) the amount of credit allocated to Project, (b) the ranking of Project in Agency's i allocation round or (c) any other aspect of the Carryover Allocation for Project.

RULING REQUESTED:

Agency and Partnership hereby request permission pursuant to section 42(n) to correct the administrative error described herein by:

1. Amending the Carryover Allocation to include a BIN for each of the r buildings in Project. The BINs for these buildings will be sequential. On the amended Carryover Allocation, Agency will indicate that it is making the correction under Regulations section 1.42-13(b); and

2. Attaching a copy of the amended Carryover Allocation to Agency's Form 8610 for 1995.

As required under Regulation section 1.42-13(b)(3)(v), Agency, General Partners, and Partnership hereby agree to such conditions as the Secretary considers appropriate if the above ruling request is granted.

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 or omission does not include a misinterpretation of the applicable rules and regulations under section 42.

Partnership committed an omission by failing to inform Agency prior to the date that the Carryover Allocation was issued that the composition of the buildings in Project had changed. We do not believe that this omission was a misinterpretation of the applicable rules and regulations under section 42. This omission created an allocation document that did not reflect the intent of Agency and Partnership at the time they executed the Carryover Allocation. The absence of a specific dollar amount allocated to each of the h buildings in the Carryover Allocation indicates that Agency intended to make a project based allocation, and that Partnership clearly intended to receive a project based allocation. Thus, a correctable administrative Omission occurred in this situation.

Under the represented facts, the Carryover Allocation is the credit allocating 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. This correction would involve a numerical change to the credit amount allocated to the buildings in Project because the additional building was not included in the project-based Carryover Allocation. Thus, to correct this administrative omission, Agency must obtain the Secretary's prior approval.

After applying the relevant law and regulations to the facts submitted and the representations set forth above, we rule as follows:

1. Partnership committed an administrative omission when it failed to inform Agency that the composition of the buildings in Project had changed from h to r;

2. Because of that administrative omission, the Carryover Allocation inaccurately reflects the intent of Agency and Partnership as of the time they executed the Carryover Allocation; and

3. Agency will correct the administrative omission within a reasonable period of time after Agency became aware of the administrative omission. Thus, it is appropriate for Agency to issue a BIN to the building added to Project under the new site plan. To correct this administrative omission, Agency must do the following:

1. Amend the Carryover Allocation to include a BIN for each of the r buildings in Project. The BINs for these buildings should be sequential. On the amended Carryover Allocation, Agency should indicate that it is making the correction under section 1.42-13(b), and

2. Attach a copy of the amended Carryover Allocation to an amended Form 8610 and file the amended Form 8610. When completing the amended Form 8610, Agency should follow the specific instructions on the Form 8610 under the heading "Amended Reports."

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 Project 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,

James Ranson

Chief, Branch 5

Office of the Assistant Chief Counsel

(Passthroughs and Special Industries)