

Private Letter Ruling 9735007, IRC Section 42

Date: May 22, 1997

Dear \*\*\*

This letter responds to your letter of July 1, 1996, and subsequent correspondence, on behalf of the Corporation, requesting a private letter ruling concerning the issue of whether a transfer of property pursuant to a court-ordered restructuring of administrative control of a housing program constitutes a new "placement in service" for purposes of the 10-year placed-in-service requirement under section 42(d)(2)(B)(ii) of the Internal Revenue Code.

#### FACTS

In a, a class of plaintiffs ("Plaintiffs") successfully enjoined Defendants from proceeding with the construction of the proposed Highway until the Defendants undertook to (i) build the Highway with supporting transit facilities, (ii) provide for the housing needs of those living in the path of the Highway and (iii) ensure employment opportunities for the benefit of communities impacted by the Highway. The Plaintiffs and Defendants settled the Plaintiffs' claims pursuant to an Amended Final Consent Decree entered into on b (the "Consent Decree"), as amended, interpreted, and implemented by subsequent orders of the Court.

Under the Consent Decree, the Defendants, for the benefit of the Plaintiffs, were required to establish and fund a Housing Program. The Consent Decree designated Agency B as the agency responsible for coordination and implementation of the Housing Program. Assets of the Housing Program, including cash, real property, and real property interests were irrevocably paid or committed to the Housing Program in settlement of the underlying lawsuit by the Defendants pursuant to the Consent Decree. The real property and improvements (i.e., the Properties) were held in trust by and with title vesting in State A (through Agency C and Agency D) for the benefit of the Housing Program.

The Consent Decree required that approximately c units of affordable housing be built with settlement funds provided to the Housing Program; approximately d affordable housing units have been built or are under construction or planned. The parties to the Consent Decree projected that the Housing Program would not be able to allocate funds for additional affordable housing production and to monitor the affordability of the current units if the Housing Program were continued to be administered by State A (through Agency B). Plaintiffs and Defendants agreed that the Housing Program should be restructured to meet the above goals. Pursuant to the Order, the Housing Program has been reorganized and restructured as the Corporation.

The Order requires the Corporation to assume all obligations to the Plaintiffs and to the Court and of the Defendants that were the obligations of State A (through Agency B) to implement the Housing Program, as administrator of the Housing Program. The

Corporation also is required to assume title to the Housing Program assets, including the Properties. The Order creates in the Corporation the duty to the Court and the obligation to the Plaintiffs and Defendants of the Corporation to comply with the Consent Decree concerning the administration of the Housing Program.

Under the Order, the Corporation has been given all of the rights and privileges that Agency B enjoyed when it administered the Housing Program, including: (a) the Corporation can petition the Court at any time on any matter not clearly or adequately addressed in the Consent Decree or subsequent orders; and (b) the Corporation has the right to enforce against all third parties and any all rights available to it as successor-in-interest to Agency C (a Property titleholder) and Agency B (the Housing Program administrator) under any document executed by or for the benefit of the Housing Program prior to the date of the Order.

In summary, the Consent Decree established the Housing Program, which was funded by the Defendants and administered, under Court supervision, by State A which was also nominal title holder to the Housing Program's assets. The Order consolidates the Housing Program and its administration and title ownership in the Corporation.

The Order provides that title to the Properties, which have been nominally held by State A through its agencies for the benefit of the Plaintiffs and Defendants under the Housing Program is transferable to the Corporation upon written request of the administrator of the Corporation if such transfer would not adversely affect the holding period applicable to the Properties for purposes of the federal low income housing tax credit under Code section 42. If such transfer would have an adverse effect, then the Order provides that the State would retain nominal title until the Board of Directors of the Corporation authorized transfer of each of the Properties to designated third parties. Until each Property is transferred by the State, the Property will continue to be operated and maintained in the same manner as it was operated and maintained by the Housing Program prior to issuance of the Order (until the Property is sold).

Many of the Properties held in nominal title by State A require rehabilitation to maximize their useful lives as affordable housing. The Order encourages the Housing Program to sell the Properties to third parties. To ensure affordability, the Corporation and the parties to whom the Corporation is responsible (the Court and the Housing Program) would like to sell the Properties in a manner that would qualify the Properties for the federal low income housing tax credit, including the acquisition credit under Code section 42(b)(2)(B)(ii).

Many of the Properties have not been held for the requisite 10 year period by the Housing Program, which holding period is required under Code Section 42 for a project to be eligible for the acquisition credit. Within the next few years, all of the Properties will have been held by State A, as nominal titleholder for the benefit of the Housing Program, for 10 years, if the Properties have not been transferred to the Corporation. Pursuant to the Order, the Corporation would like to have the Properties transferred to it immediately, but is unable to do so if such transfer would make the Properties ineligible for the

acquisition credit until the Corporation has owned the Properties, as titleholder, for 10 years.

## DISCUSSION

Section 38(a) of the Code provides for a general business credit against tax that includes the amount of the current year business credit.

Section 38(b)(5) of the Code provides that the amount of the current year business credit includes the low-income housing credit determined under section 42(a). The low-income housing credit that may be claimed in any year is subject to the general business tax credit limitation of section 38(c).

Section 42(a) of the Code provides that, for section 38 purposes, the amount of the low-income housing credit determined under section 42 for any taxable year in the credit period shall be an amount equal to the "applicable percentage" of the qualified basis of each qualified low-income building.

Section 42(b)(1) provides that the term applicable percentage means 9 percent for new buildings which are not federally subsidized for the taxable year, or 4 percent for new buildings which are federally subsidized for the taxable year, and existing buildings.

Section 42(e)(1) provides that rehabilitation expenditures paid or incurred by the taxpayer with respect to any building shall be treated for purposes of this section as a separate new building.

Section 42(d)(2)(A) of the Code provides that the eligible basis for an existing building is equal to its adjusted basis as of the close of the first taxable year of the credit period provided the building meets certain requirements set forth in section 42(d)(2)(B). The eligible basis for any existing building not meeting the requirements of section 42(d)(2)(B) is zero.

Under section 42(d)(2)(B)(ii) of the Code in order for an existing building to qualify for the 4 percent low-income housing tax credit, there must 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 most recent nonqualified substantial improvement of the building.

Under the circumstances set forth, we conclude that the transfer of properties pursuant to court-ordered restructuring of administrative control of the Housing Program does not constitute a transfer and therefore does not result in a new placement in service for purposes of section 42(d)(2)(B)(ii). Accordingly, Corporation's holding period of the properties includes the period the properties were held by Agency B for purposes of determining whether the 10-year requirement is met under section 42(d)(2)(B)(ii).

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 any of the properties qualify for the low-income housing tax credit under section 42.

Under the power of attorney on file, we are sending a copy of this ruling to the Corporation's authorized representative.

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,

Walter H. Woo

Senior Technician Reviewer

Branch 5

Office of the Assistant

Chief Counsel

(Passthroughs and Special Industries)