

Treasury Decision 8368, IRC Sec(s). 42

AGENCY:

Internal Revenue Service, Treasury.

ACTION:

Final regulations.

SUMMARY:

This document contains final Income Tax Regulations concerning the low-income housing credit of section 42 of the Code. The final regulations address the question whether a building financed with the proceeds of a below market loan under an Affordable Housing Program established pursuant to section 721 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) is a federally subsidized building for purposes of section 42. This information will enable taxpayers who obtain financing under an Affordable Housing Program for a building eligible for the section 42 credit to determine the correct applicable percentage under section 42(b).

EFFECTIVE DATE:

The regulations are effective for Affordable Housing Program loans made after August 8, 1989 (the effective date of FIRREA).

FOR FURTHER INFORMATION CONTACT:

Christopher J. Wilson, 202-377-6349 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking published in the Federal Register on February 5, 1991 (56 FR 4588), provides that a below market loan funded in whole or in part with funds from an Affordable Housing Program established under section 721 of FIRREA is not, solely by reason of the Affordable Housing Program funds, a below market Federal loan (as defined in section 42(i)(2)(D)), and that any building financed with the proceeds of such a loan is not, solely by reason of the Affordable Housing Program funds, a federally subsidized building for purposes of determining the applicable percentage under section 42(b). Section 42(i)(2)(D) defines a below market Federal loan, in part, as any loan funded in whole or in part with Federal funds.

This proposed rule was predicated upon an examination of the characteristics of the Federal Home Loan Banks and the Affordable Housing Programs. Analysis of these characteristics leads to the conclusion that funds loaned under the Affordable Housing Programs should not be considered Federal funds for purposes of section 42. As a result, a new building financed with the proceeds of an Affordable Housing

Program loan will not, solely by reason of such proceeds, be ineligible for the applicable percentage described in section 42(b)(1)(A) (i.e., the appropriate monthly percentage that will yield, over a 10-year period, amounts of credit that have an aggregate present value equal to 70 percent of the qualified basis of the building).

Public Comment

All comments received by the Internal Revenue Service support the conclusion reached by the notice of proposed rulemaking. Several commentators urged that the final regulations also address the treatment of "direct subsidies" funded under an Affordable Housing Program. See, e.g., section 42(d)(5)(A). One commentator suggested that the final regulations clarify that a building that is financed with a below-market loan under an Affordable Housing Program and that is not otherwise federally funded will not be considered a federally subsidized building if the loan is insured by the Federal Housing Administration. These comments exceed the scope of the regulations as proposed and are not addressed by the final regulations.

Special Analyses

The Commissioner of Internal Revenue has determined that this final rule is not a major rule as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required.

Although a notice of proposed rulemaking that solicited public comment was issued, the Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 did not apply. Accordingly, the final regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6). Pursuant to section 7805(f) of the Internal Revenue Code, the notice of the proposed rulemaking for the regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these final regulations is Christopher J. Wilson, Office of the Assistant Chief Counsel (Passthroughs and Special Industries), Internal Revenue Service. However, other personnel from the Service and the Treasury Department participated in their development.

List of Subjects in 26 CFR 1.37-1 Through 1.44A-4

Credits, Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

The amendments to 26 CFR part 1 are as follows:

PART 1-INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 is amended by adding a citation to read as follows:

Authority:

Sec. 7805, 68A Stat. 917 (26 U.S.C. 7805) Section 1.42-3 is also issued under 26 U.S.C. 42(n).

Par. 2. New 1.42-3 is added to read as follows:

§1.42-3 Treatment of buildings financed with proceeds from a loan under an Affordable Housing Program established pursuant to section 721 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).

(a) Treatment under sections 42(i) and 42(b). A below market loan funded in whole or in part with funds from an Affordable Housing Program established under section 721 of FIRREA is not, solely by reason of the Affordable Housing Program funds, a below market Federal loan as defined in section 42(i)(2)(D). Thus, any building with respect to which the proceeds of the loan are used during the tax year is not, solely by reason of the Affordable Housing Program funds, treated as a federally subsidized building for that tax year and subsequent tax years for purposes of determining the applicable percentage for the building under section 42(b).

(b) Effective date. The rules set forth in paragraph (a) of this section are effective for loans made after August 8, 1989.

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Approved: September 3, 1991.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.