

Treasury Decision 8420, 26 CFR, 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 under section 42 of the Internal Revenue Code of 1986. The final regulations address the application of the not-for-profit rules of section 183 to activities entitling taxpayers to claim low-income housing credits.

EFFECTIVE DATE:

The regulations are effective with respect to buildings placed in service after December 31, 1986.

FOR FURTHER INFORMATION CONTACT:

Paul F. Handleman, (202) 377-6349 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

On November 13, 1991, the Internal Revenue Service published in the Federal Register a notice of proposed rulemaking (56 FR 57605) under section 42. No public comments or requests for a public hearing were received concerning these regulations. Therefore, the proposed regulations are adopted by this Treasury decision unchanged.

Explanation of Provisions

Section 252 of the Tax Reform Act of 1986 (Pub. L. 99-514), as amended by the Technical and Miscellaneous Revenue Act of 1988 (Pub. L. 101-647), the Revenue Reconciliation Act of 1989 (Pub. L. 101-239), the Revenue Reconciliation Act of 1990 (Pub. L. 101-508), and the Tax Extension Act of 1991 (Pub. L. 102-227), enacted and amended the low-income housing credit under section 42 of the Internal Revenue Code of 1986. Since the enactment of the low-income housing credit, taxpayers have raised questions concerning the application of the not-for-profit rules of section 813 to low-income housing credit activities.

The low-income housing credit under section 42 replaced a variety of tax preferences available under prior law for low-income rental housing because the credit was thought to be a more efficient mechanism for encouraging the provision of low-

income housing. See S. Rep. No. 313, 99th Cong., 2d Sess. 758-59 (1986), 1986-3 (Vol. 3) C.B. 758-59.

Although no explicit reference is contained in section 42 or its legislative history regarding its interaction with section 183, the legislative history of the low-income housing credit indicates that Congress contemplated that tax benefits such as the credit and depreciation would be available to taxpayers investing in low-income housing, even though such an investment would not otherwise provide a potential for economic return.

Therefore, to reflect the congressional intent in enacting section 42, the regulatory authority under section 42(n) is being exercised to provide that section 183 will not be used to limit or disallow the credit.

Special Analyses

These final regulations are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations, and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking 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 regulations is Paul F. Handleman, 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

26 CFR 1.37-1 through 1.44A-1

Credits, Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

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

Paragraph 1. The authority citation for part 1 is amended by adding the following citation:

Authority:

Sec. 7805, 68A Stat. 917 (26 U.S.C. 7805) Section 1.42-4 is also issued under 26 U.S.C. 42(n)

Par. 2. New §1.42-4 is added to read as follows:

§1.42-4 Application of not-for-profit rules of section 183 to low-income housing credit activities.

(a) Inapplicability to section 42. In the case of a qualified low-income building with respect to which the low-income housing credit under section 42 is allowable, section 183 does not apply to disallow losses, deductions, or credits attributable to the ownership and operation of the building.

(b) Limitation. Notwithstanding paragraph (a) of this section, losses, deductions, or credits attributable to the ownership and operation of a qualified low-income building with respect to which the low-income housing credit under section 42 is allowable may be limited or disallowed under other provisions of the Code or principles of tax law. See, e.g., sections 38(c), 163(d), 465, 469; *Knetsch v. United States*, 364 U.S. 361 (1960), 1961-1 C.B. 34 ("sham" or "economic substance" analysis); and *Frank Lyon Co. v. Commissioner*, 435 U.S. 561 (1978), 1978-1 C.B. 46 ("ownership" analysis).

(c) Effective date. The rules set forth in paragraphs (a) and (b) of this section are effective with respect to buildings placed in service after December 31, 1986.

Shirley D. Peterson,

Commissioner of Internal Revenue.

Approved: April 8, 1992.

Fred T. Goldberg, Jr.,

Assistant Secretary of the Treasury