Treasury Decision 8563, IRC Sec(s). 42

Treasury Decisions

TD 8563, State housing credit ceiling for low-income housing credit., Code Sec. 42 ,

HEADNOTE:

Final regs issued under Code Sec. 42(h)(3) relating to the order for allocating housing credit dollar amounts from each state's housing credit ceiling, and the determination of which states qualify to receive credits from a national pool of unused carryovers.

Reference(s): Code Sec(s). Code Sec. 42

FULL TEXT:

Agency: Internal Revenue Service (IRS), Treasury.

Action: Final regulations.

Summary: This document contains final regulations concerning the low-income housing credit under section 42 of the Internal Revenue Code. The regulations provide rules relating to the order in which housing credit dollar amounts are allocated from each State's housing credit ceiling under section 42(h)(3)(C) and the determination of which States qualify to receive credit from a national pool of credit under section 42(h)(3)(D). The regulations affect State and local housing credit agencies and taxpayers receiving credit allocations, and provide them with guidance for complying with section 42. The final regulations also amend §1.42-5 to provide a cross reference to section 42(g)(8)(B).

Effective Date: These regulations are effective January 1, 1994.

For Further Information Contact: Christopher J. Wilson 202-622-3040 (not a toll-free call).

Supplementary Information:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504(h)) under control number 1545-1423. The estimated annual burden per State or local government respondent varies from 2 hours to 6 hours, with an estimated average of 4 hours. The estimated annual burden for all other respondents varies from .5 hours to 1.5 hours, with an estimated average of 1 hour.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the IRS, Attn: IRS Reports Clearance Officer, PC:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. Background

On December 29, 1993, the IRS published a notice of proposed rulemaking in the Federal Register (58 FR 68799) proposing amendments to the Income Tax Regulations (26 CFR part 1) under section 42 of the Internal Revenue Code of 1986, as amended. These amendments provide guidance on several requirements of the low-income housing tax credit relating to determinations of the housing credit dollar amount available to housing credit agencies for allocation in any given year.

Written comments responding to the notice of proposed rulemaking were received. A public hearing was scheduled for April 26, 1994, pursuant to a notice of public hearing published simultaneously with the notice of proposed rulemaking. The IRS received one request to speak at the public hearing. This request was withdrawn before the hearing date. On April 14, 1994, the IRS published a notice (59 FR 17747) cancelling the public hearing on the proposed regulations. After consideration of the comments received, the proposed regulations are adopted as revised by this Treasury decision. Explanation of Provisions

Section 42 provides for a low-income housing credit that may be claimed as part of the general business credit under section 38. In general, the credit is allowable only if the owner of a qualified low-income building receives a housing credit allocation from a State or local housing credit agency (Agency) of the jurisdiction where the building is located.

The aggregate housing credit dollar amount that an Agency may allocate for any calendar year is limited to the State housing credit ceiling apportioned to the Agency for that year. Under section 42(h)(3)(C), the State housing credit ceiling of any State for any calendar year is an amount equal to the sum of: (a) $1.25 multiplied by the State population (the population component); (b) the unused State housing credit ceiling, if any, of the State for the preceding calendar year (the unused carryforward component); (c) the amount of State housing credit ceiling returned in the calendar year (the returned credit component); plus (d) the amount, if any, allocated to the State by the Secretary under section 42(h)(3)(D) from a national pool of unused credit (the national pool component).

The final regulations set forth the rules governing the order in which credit is allocated from the various components of the State housing credit ceiling under section 42(h)(3)(C) (the stacking rules). In general, under the stacking rules, credit is allocated first from the sum of the population and returned credit components, then from the unused carryforward component, and finally from the national pool component. The final regulations also reflect the statutory rule that unallocated credit attributable to the national pool component cannot be carried forward, and, therefore, is not included in the carryforward component for the following year. In addition, the final regulations provide that no credit allocated prior to calendar year 1990, and no credit allowable under section 42(h)(4) (relating to the portion of credit attributable to eligible basis financed by certain tax-exempt obligations under section 103), may be returned for reallocation. Thus, this credit is not included in the returned credit component for any year.

One commentator requested clarification of the rule in the proposed regulations that if the terms of the allocation violate any requirement of section 42, the allocation is not valid. Specifically, the commentator expressed concern that a misrepresentation by a taxpayer to an Agency would result in the allocation being treated as not valid and as if it had never been made and ineligible for treatment as a returned credit. The final regulations do not include this statement. First, the determination of whether an allocation is valid is not within the scope of these regulations. Second, given the general requirement that an allocation must be valid to qualify as a returned credit, it is unnecessary to include the additional statement that, if the terms of the allocation violate any requirement of section 42, the allocation is not valid and is treated as if it had not been made. However, for all purposes of section 42, including qualification as a returned credit, an allocation must be validly made. See, for example, §1.42-1T and 1.42-6.

The final regulations adopt the provision of the proposed regulations requiring that if a credit is returned within 180 days following the close of the first taxable year of a building's credit period and a Form 8609, Low-Income Housing Credit Allocation Certification, has been issued for the building, an Agency must notify the IRS that the credit has been returned. One commentator requested that the procedure for notifying the IRS be clarified. Accordingly, the final regulations clarify that if all of the credit is returned, the Agency must follow the procedures in §1.42-5(e)(3) for filing the Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance. In situations where the credit is only partially returned, the Agency must follow the procedures prescribed for filing an amended Form 8610, Annual Low-Income Housing Credit Agencies Report.

The proposed regulations permit an Agency to treat credit returned from a project to the Agency after October 31 of any calendar year and not reallocated by the Agency by the close of the year as returned at the beginning of the succeeding calendar year (the two-month rule). One commentator suggested that the two-month rule of the proposed regulations be changed to allow more time to reallocate credits before the close of the calendar year. Accordingly, the final regulations provide that credit returned to the Agency after September 30 of any calendar year and not reallocated by the close of the year may be treated as returned at the beginning of the succeeding calendar year. In response to another comment, the final regulations clarify that an Agency, in its discretion, may treat a portion of a credit that is so returned and that is not reallocated before the close of the calendar year as returned in the next calendar year. However, to the extent any portion of a credit returned after September 30 of any calendar year is allocated by the close of the calendar year in which it is returned, that portion of the credit is included as part of the returned credit component of the State housing credit ceiling for the year in which the credit is returned.

The proposed regulations provide that, if an allocation is cancelled by mutual consent, a signed and dated written agreement between the Agency and the allocation recipient (or its successor in interest) must indicate the amount of the allocation returned and the date on which the credit is returned. Commentators suggested that, if the terms of an allocation state that any unused amounts are automatically returned to the Agency by mutual agreement, the regulations should not require a signed and dated written agreement. If this suggestion were adopted, neither the IRS nor the Agency would know with enough precision the amount of credit returned and the date on which the credit is returned. This information is necessary to determine with certainty the returned credit component of the State housing credit ceiling and to avoid discrepancies in the amount of credit allocated to a particular project. Thus, the final regulations do not adopt this suggestion.

Under section 42(h)(3)(D), States that have unused housing credit carryovers must assign them to the Secretary for inclusion in a national pool of unused housing credit carryovers (National Pool), and the Secretary must allocate National Pool credit among qualified States.

In determining whether there is any unallocated credit within the State at the close of a calendar year, the housing credit dollar amounts apportioned to all Agencies within the State (including Agencies of constitutional home rule cities in the State) and the allocations of all Agencies within the State are considered. One commentator suggested that a constitutional home rule city be considered alone rather than in combination with other constitutional home rule cities or Agencies within a State in determining access to the National Pool. Section 42(h)(3)(E) does provide special rules for apportioning credits to constitutional home rule cities. Under these rules, however, credits are apportioned to these cities from the State housing credit ceiling. There is no provision in the Code that permits a constitutional home rule city to receive credit that is not apportioned from the State housing credit ceiling. Accordingly, the final regulations do not adopt this suggestion.

In addition to a de minimis exception for States that have 1 percent or less of unallocated credit remaining in their State housing credit ceiling at the close of a calendar year (de minimis rule), the proposed regulations provide that, in other circumstances where relief is deemed appropriate, the IRS may determine that a State is a qualified State eligible to participate in the National Pool. One commentator requested that States that cannot allocate their entire ceiling as a result of a natural disaster be allowed to participate in the National Pool. This type of relief exceeds the scope and intent behind the limited exception provided in the proposed regulations. Further, this type of relief would be inequitable to other States that qualify for the National Pool. Thus, the final regulations do not adopt this suggestion.

Another commentator suggested that the de minimis rule provide an alternative fixed dollar amount measurement of de minimis amount to reflect unallocated amounts that are, as a practical matter, insufficient to provide an allocation to a project. Due to variations in construction and housing costs across the United States, this suggestion was not adopted. Similarly, a suggestion that the final regulations provide a separate de minimis rule for the set-aside for nonprofit organizations was not adopted. Under the regulations, however, these situations can be addressed by the IRS on a case-by-case basis. Moreover, if appropriate, additional safe harbors could be provided in the future (e.g., to respond to other common situations not addressed by the 1 percent rule).

The final regulations also amend §1.42-5 to provide a cross reference to section 42(g)(8)(B), as added by section 13142(b)(3) of the Revenue Reconciliation Act of 1993. Section 42(g)(8)(B) provides that on application by the taxpayer, the Secretary may waive any annual recertification of tenant income (the Waiver) for purposes of section 42(g), if the entire building is occupied by low-income tenants. Instructions on how to obtain the Waiver will be contained in a forthcoming revenue procedure.

Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has 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 Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information

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

Adoption of amendments to the regulations.

[TD 8563 adds Reg §1.42-14; and amends §1.42-5 and 602.101(c).]