



February 26, 2019

Internal Revenue Service
Attn: CC:PA:LPD:PR (REG-106089-18)
Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Limitation on Deduction for Business Interest Expense

Dear Ladies and Gentlemen:

The LIHTC Working Group was established by Novogradac & Company LLP to provide low-income housing tax credit (LIHTC) industry participants a platform to work together to resolve technical and administrative LIHTC program issues. On behalf of the members of the LIHTC Working Group, we would like to provide the following comments concerning the proposed regulations (Proposed Regulations) under Internal Revenue Code (IRC) Section 163(j), "Limitation on Business Interest."

Proposed Regulations Section 1.163(j)-6(i)

Proposed Regulations Section 1.163(j)-6(i) is currently reserved to address tiered partnership and S corporation structures. One item that is not immediately discernable from IRC Section 163(j) is whether a limited partner of a partnership, which is also organized as a partnership, is eligible to be an electing real property trade or business per IRC Section 163(j)(7)(ii). There does not appear to be any statutory language that prohibits this, however, we request that partnerships in a tiered partnership structure can in fact make the real property trade or business election if the underlying business is a real property trade or business.

Furthermore, an upper-tier partnership that is a partner in lower-tier partnership that is an electing real property trade or business may have a principal business activity that does not involve real property trade or business per IRC Section 163(j)(7)(ii). However, Proposed Regulations Section 1.163(j)-9(c)(1) states that "a taxpayer may make elections for multiple trades or businesses on a single election statement." Therefore, we request that an upper-tier partnership which is a partner of a lower-tier partnership that is an electing real property trade or business be allowed to make the same election pursuant to IRC Section 163(j)(7)(ii), even if the upper-tier partnership's principal business activity is not the same as the electing lower-tier partnership's.

Additionally, IRC Section 163(j) is not clear as to whether a lower-tier partnership must make the real property trade or business election in order to allow partnerships in upper-tiers to also make the election. We request that a mechanism be provided by which upper-tier partnerships in a tiered

partnership structure make the real property trade or business election if it is necessary for the lower-tier partnership to first make the election.

Proposed Regulations Section 1.163(j)-6(m)(3)

Proposed Regulations Section 1.163(j)-6(m)(3) addresses partners that are allocated excess business interest expense prior to becoming exempt from the interest expense limitations in IRC Section 163(j). According to the Proposed Regulations, if a partnership allocates excess business interest expense to one or more of its partners, and in a succeeding taxable year the partnership becomes exempt from the requirements of IRC Section 163(j), the excess business interest expense from the prior taxable years is treated as paid or accrued by the partner in such succeeding taxable year and is not subject to the business interest expense limitation. The Proposed Regulations then reference Example 6 and Example 7 in Section 1.163(j)-6(o). However, both Example 6 and Example 7 only address the treatment of excess business interest expense in scenarios that involve entities that become not subject to IRC Section 163(j) by way of IRC Section 163(j)(3), which is the exemption for certain small businesses.

Both Proposed Regulations Section 1.163(j)-6(m)(3) and the examples in Proposed Regulations Section 1.163(j)-6(o) are silent regarding the treatment of excess business interest expense for a scenario in which a taxpayer makes an election to be a real property trade or business in a later tax year pursuant to IRC Section 163(j)(7)(ii). It appears that a partnership electing to be a real property trade or business in a later tax year would treat excess business interest expense in a manner that is identical to the scenarios detailed in Examples 6 and 7 of Proposed Regulations Section 1.163(j)-6(o). However, it is not readily determinable that this is the intent of the statutory language.

Therefore, we request that prior taxable years' excess business interest expense allocable from a partnership electing to be a real property trade or business per IRC Section 163(j)(7)(ii) in a later taxable year be treated as paid or accrued by the partnership's partners in such succeeding taxable year and not be subject to the business interest expense limitation, similar to Examples 6 and 7 of Proposed Regulations Section 1.163(j)-6(o).

Proposed Regulations Section 1.163(j)-9(h)

Proposed Regulations Section 1.163(j)-9(h) addresses special anti-abuse rules for certain real property trades or business. It specifically states that if at least 80 percent of the fair market value of a business' real property is leased to a trade or business under common control with the real property's owner, then this real property trade or business is not eligible to be an electing real property trade or business pursuant to IRC Section 163(j)(b)(1).

For the purposes of this Proposed Regulations Section, common control is defined as 50 percent of the direct and indirect ownership of both businesses are held by related parties within the meaning of IRC Sections 267(b) and 707(b). In both IRC Sections 267(b) and 707(b), common ownership in partnership entities is defined as the same persons owning, directly or indirectly,

more than 50 percent of the capital interest or profits interest of the partnerships. However, an alternative reading of IRC Section 707(b) can lead one to the conclusion that regardless of the actual interest owned in a partnership's capital or profits, a partner is a related party to a partnership by virtue of being a partner. Consequently, the partnership would be ineligible to be an electing real property trade or business.

In some LIHTC transactions in which the LIHTC is paired with the historic rehabilitation tax credit (HTC), the transaction will be structured using a "master tenant" lease structure. That is, the LIHTC partnership that owns the property (Landlord) will lease it to another partnership (Master Tenant) that will be the recipient of the HTC via a pass-through election made pursuant to Treasury Regulations Section 1.48-4(f). In these structures, it is not uncommon for the HTC Master Tenant to own a partnership interest in the LIHTC Landlord. This can create a potential issue depending upon one's interpretation of the related party rules in IRC Section 707(b). If one concludes that under IRC Section 707(b) a "master lease" structure involving partnerships with common ownership is a related party relationship, then this would preclude the LIHTC Landlord from being an electing real property trade or business pursuant to IRC Section 163(j)(7)(ii). As a result, a LIHTC Landlord would be subject to the limitations on deducting business interest expense.

Therefore, we request that a Landlord partnership in a "master lease" structure be eligible to be an electing real property trade or business per IRC Section 163(j)(7)(ii) even though the business property may be leased to a Master Tenant that is also a partner of the Landlord partnership.

We appreciate the opportunity to comment on the Proposed Regulations under IRC Section 163(j). Additional guidance on this matter will help the LIHTC program better provide affordable housing in our communities by providing clarification and lessening the risks in LIHTC program compliance. Thank you in advance for your time and careful consideration of these issues. Please do not hesitate to contact us at Dirk.Wallace@novoco.com or (330) 365-5400, if you have any questions regarding our comments or if we can be of further assistance.

THE LIHTC WORKING GROUP

Very truly yours,
NOVOGRADAC & COMPANY LLP

by 

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