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MEMORANDUM FOR Sharon M, Oliver
Director, Reporting Compliance S:C:CP:RC

FROM: Harold Burghart
Assistant to the Chief, Branch 5 CC:PSI:5

SUBJECT: Low Income Housing Credit: Clarification of § 42(l)(1),
Certification With Respect to 1st Year of Credit Period.

This Chief Counsel Advice responds to your memorandum dated April 2, 2001. In accordance with § 6110(k)(3) of the Internal Revenue Code, this Chief Counsel Advice should not be cited as precedent. Your memorandum concerns certain questions under § 42(l)(1) and Form 8609, Low-Income Housing Credit Allocation Certification. These questions are summarized below.

- Q1. When is a building placed in service and how can this be documented?
- Q2. Once a Form 8609 is first issued by an applicable allocating authority, can the taxpayer file an amended return to claim credits for taxable years in a building's compliance period prior to the issuance of the Form 8609?
- Q3. If a taxpayer has claimed § 42 credits for any year prior to the issuance of the Form 8609, can all credits claimed prior to the issuance of the Form 8609 be disallowed?
- Q4. Can a taxpayer satisfy the certification requirements of § 42(l) during the examination process?
- Q5. If a revenue agent finds that the first year certification requirements of § 42(l)(1) have not been met, can the entire credit amount for the first and all successive years be disallowed?

LAW & ANSWERS

Section 42(l)(1) provides that following the first year of the credit period for any qualified low-income building, the taxpayer shall certify to the Secretary (at such time and in such form and in such manner as the Secretary prescribes)--

(a) the taxable year, and calendar year, in which the building was placed in service,

(b) the adjusted basis and eligible basis of the building as of the close of the 1st year of the credit period,

(c) the maximum applicable percentage and qualified basis permitted to be taken into account by the appropriate housing credit agency under § 42(h),

(d) the election made under § 42(g) for the qualified housing project of which such building is a part (i.e., the "minimum set-aside requirement"), and

(e) such other information as the Secretary may require.

In the case of a failure to make the certification required by the preceding sentence on the date prescribed therefore, unless it is shown that such failure is due to reasonable cause and not to willful neglect, no credit shall be allowable under § 42(a) to such building for any taxable year ending before such certification is made.

Section 42(l)(2) provides that the Secretary may require taxpayers to submit an information return (at such time and in such form and manner as the Secretary prescribes) for each taxable year setting forth--

(a) the qualified basis for the taxable year of each qualified low-income building of the taxpayer,

(b) the maximum applicable percentage and qualified basis permitted to be taken into account by the appropriate housing credit agency under § 42(h) for the taxable year, and

(c) such other information as the Secretary may require.

The penalty under § 6652(j) shall apply to any failure to submit the return required by the Secretary under the preceding sentence on the date prescribed therefor.

Section 1.42-1T(d)(8)(ii) of the Income Tax Regulations provides that credit allocations are made when Part 1 of Form 8609 is completed and signed by an

authorized official of the housing credit agency and mailed to the owner of the qualified low-income building.

Section 1.42-1T(h)(1) provides that a form shall be treated as completed if the state or local housing credit agency or the building owner has made a good faith effort to complete the form in accordance with the form and the form's instructions.

Section 1.42-1T(h)(2) provides that a completed Form 8609 (or copy thereof) shall be filed with the owner's Federal income tax return for each of the 15 taxable years in the compliance period. For tax-exempt bond financed projects for which no allocation is made, an owner is to obtain a blank copy of Form 8609 and fill in the address of the building and the name and address of the owner. Part II of Form 8609 is to be completed by the building owner only for the first year the low income housing credit is claimed by the building owner. Part III of Form 8609 (Statement of Qualification) shall be completed by the owner of the building for each year of the 15-year compliance period.

Section 1.42-1T(h)(3) provides that if any form is revised or renumbered, any reference in this section to the form shall be treated as a reference to the revised or renumbered form.

The instructions to Form 8609 provide that an owner must get a Form 8609 from the appropriate housing credit agency (with the applicable items of Part 1, completed, including an assigned building identification number (BIN)).

Enumerated below are our answers to your questions.

A1. Notice 88-116, 1988-2 C.B. 449, provides guidance on when a building will be considered to be placed in service for purposes of § 42. It provides that the placed-in-service date for a new or existing building used as residential rental property is the date on which the building is ready and available for its specifically assigned function, i.e., the date on which the first unit in the building is certified as being suitable for occupancy in accordance with state or local law. See the notice for rules on rehabilitation expenditures treated as a building. A building may be placed-in-service even if the rental units in it are not currently occupied by low-income tenants.

Documentation of a building's placed-in-service date is generally fact specific. For example, for new buildings, a temporary certificate of occupancy (TCO) might provide adequate documentation if the local jurisdiction that issues the TCO requires that the building be habitable at the time the TCO is issued.

A2. Once a Form 8609 is issued by the applicable allocation authority, the taxpayer can file an amended return to claim credits for taxable years in a building's compliance period prior to the year in which the Form 8609 is issued.

A3. Under certain circumstances, if a taxpayer claimed § 42 credits for a year prior to issuance of the Form 8609 by the applicable allocating authority, all credits claimed prior to issuance of the Form 8609 can be disallowed.

Section 1.42-1T(h)(1) provides that a form is not completed unless the state or local housing agency or the building owner has made a good faith effort to complete the form in accordance with the form and the instructions for the form. Form 8609 provides that Part 1 is to be filled out by the housing credit agency only. Section 1.42-1T(h)(2) provides that a completed Form 8609 (or copy thereof) shall be filed with the owner's Federal income tax return for each of the 15 taxable years in the compliance period (which encompasses the first year of the credit period). This requirement cannot be satisfied in the case of an *incomplete* Form 8609. If, in the case of an allocation from the state housing credit ceiling, the state agency has not completed Part 1, the form is incomplete. Since the first-year certification requirement of § 42(l)(1) is incorporated into Form 8609, an incomplete form under these circumstances would not satisfy the § 42(l)(1) first year requirement. The flush language following § 42(l)(1)(E) provides that in the case of a failure to make the certification required by § 42(l)(1) on the date prescribed thereof, unless it is shown that such failure is due to reasonable cause and not to willful neglect, no credit shall be allowable under § 42(a) for any taxable year before such certification is made. If the failure to meet the § 42(l)(1) certification requirement is a result of the taxpayer's willful neglect, credit may be disallowed for any open years (assuming no fraud) in the compliance period until this requirement is met.

The above paragraph pertains to buildings that receive a credit allocation from the state housing credit ceiling. It is not clear what the result would be for a tax-exempt bond project. Section 1.42-1T(h)(2) provides that for tax-exempt bond financed projects for which no allocation is made, an owner is to obtain a blank copy of Form 8609 and fill in (for Part 1) the address of the building and the name and address of the owner. This requirement is inconsistent with the Form 8609 instructions that Part 1 is to be completed by the housing credit agency only and post 1986 amendments to § 42 that provide an implicit oversight responsibility by the applicable state housing credit agency (see e.g., § 42(m)).

A4. There is no prohibition against satisfying the certification requirements of § 42(l) during the examination process.

A5. The answer to whether the entire credit amount for the first and all successive years can be disallowed if the first-year certifications requirements of § 42(l)(1) have not been met is similar to that in A3. The flush language following § 42(l)(1)(E) provides that in the case of a failure to make the certification required by § 42(l)(1) on the date prescribed thereof, unless it is shown that such failure is due to reasonable cause and not to willful neglect, no credit shall be allowable under § 42(a) for any taxable year before such certification is made. If the failure to meet the § 42(l)(1) certification requirement is a result of the taxpayer's willful neglect, credit may be disallowed for any open years (assuming no fraud) in the compliance period until this requirement is met.

If you have any questions about this memorandum or further questions about these issues, please call Christopher Wilson at (202) 622-3040.