

Low-Income Housing Credit Newsletter

Internal Revenue Service

Issue #37, October 2009

The LIHC newsletter provides a forum for networking and sharing information about IRC §42, the Low-Income Housing Credit and communicating technical knowledge and skills, guidance and assistance for developing LIHC issues. We are committed to the development of technical expertise among field personnel. Articles and ideas for future articles are welcome!!

The contents of this newsletter should not be used or cited as authority for setting or sustaining a technical position.

Correction for Rev. Ruls. Providing Monthly Applicable Percentages

IRC 42(b)(2) is incorrectly cited in revenue rulings providing the month applicable percentage. Rev. Ruls. 2009-22, 2009-29, and 2009-33 are affected. The note for Table 4 should read:

“Under Section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after **July 30, 2008**, and before December 31, 2013, shall not be less than 9%.”

We are working on correcting the note for future revenue rulings and “thanks” to the Missouri Housing Development Commission for bringing the “oops” to our attention.

Filing Tax Returns for LIHC Property Owners

It's October! And if you think the IRS is busy in April...I'm pretty sure October is a bumper month for accountants preparing tax return “on extensions”...so just a few reminders about claiming the IRC §42 credit.

Form 8609-A

Form 8609-A is filed by the taxpayer owning the low-income building. A separate Form 8609-A is required for each allocation, so there is a one-to-one match of Forms 8609 and Forms 8609-A.

Part I, Compliance Information

Part I includes 5 questions (A-E) which, if answered, satisfy the annual certification requirement under IRC §42(l)(2). Just keep in mind that when the Tax Matters Person signs the tax return, the “under penalties of perjury” clause includes all the

accompanying schedules and statements. Perjury penalties under IRC §7206 include fines (no more than \$10,000, \$50,000 for a corporation) or imprisoned (no more than 1 year)...or both.

Part II, Computation of Credit

Form 8609-A, Part II, is the computation of the allowable credit for the tax year. The computation involves a number of steps needed to account for various types of low-income housing and circumstances. It is not necessary to analyze the whole equation here, but note the following:

1. The eligible basis entered on line 1 should be the same as disclosed on Form 8609, line 7.
2. The applicable fraction entered on line 2 is determined based on the number of qualifying low-income units *at the end of the taxable year* under IRC §42(c)(1)(B), except for the first year of the credit period, when the applicable fraction is computed as an average of the monthly applicable fractions under IRC §42(f)(2).

A common mistake is to treat a residential unit as a low-income unit beginning with the month in which it (or the building) was *placed in service*, rather than the first full month the building was placed in service *and* the unit was first occupied by a qualifying household (with restricted rent) as of the last day of the month. If households are moving between units in a building or between low-income buildings in the project, the “swapping rules” described in Treas. Reg. 1.42-15(d) and Rev. Rul. 2004-82, Q&A #8 apply, respectively.

Another mistake is relying on the percentage of low-income units to determine the applicable fractions rather than using the *smaller* of the unit fraction or floor space fraction. If using the

floor space fraction, use only the square footage of the residential rental units...do not include the hallways, common areas, other amenities used by tenants, or facilities necessary for the operation of the project.

3. The applicable percentage on line 5 should be the same as disclosed on Form 8609, line 2.
4. If residential units first qualify as low-income units after the end of the first year of the credit period, there will be an increase, or "excess" in qualified basis. The applicable percentage applied to the excess qualified basis is 2/3 of the applicable percentage on line 5, and is commonly referred to as the "2/3 Credit" under IRC §42(f)(3). The 2/3 Credit is accounted for on lines 7 and 9, and 10 and is actually a subtraction of the 1/3 portion of the credit that is not allowable. There's also a monthly averaging for the first year the unit is a low-income unit account for on line 11.

Rather than use the form, taxpayers sometimes compute the allowable credit manually and then plug numbers into key lines of the form to show the allowable credit on Line 15. However, taxpayers invariably skip the lines for the 2/3 credit adjustment. This can become an onerously troublesome short-cut if there's ever a credit recapture amount under IRC §42(j).

- Under IRC §42(j)(4)(C), the 2/3 credit is not subject to the recapture provisions. So, years after the original computation, that has been transferred from tax return to tax return, year after year by accountant after accountant, someone will have to go through some really dusty old records to figure out how much 2/3 credit was claimed each year (building by building) in order to enter the correct amount on line 2 of Form 8611, Recapture of Low-Income Housing Credit.
- If a taxpayer is audited and a recapture of credit under IRC §42(j) results, the starting point for computing the recapture amount will be the credit claimed on Form 8609-A. If the 2/3 credit is not identified, the IRS applies the "duty of consistency doctrine" to conclude that what's on the return is accurate and that the entire credit claimed in each prior year is subject to recapture. While the taxpayer can establish the amount of 2/3 credit during the audit, providing the

necessary documentation for all the prior years can be particularly difficult.

Note: See "Tenant Income Issues: A Tax Court Case" in LIHC Newsletter #21 for a discussion of the duty of consistency doctrine and its application in Bentley Court II L.P., T.C. Memo 2006-113.

5. Line 15 is the allowable credit, but can never be higher than the amount of credit identified on Form 8609, line 1b.
6. Line 17 reflects credit allowable under IRC §42(f)(2)(B), which is the credit disallowed in the first year of the credit period and is allowable in the 11th year of the 15-year compliance period.

A word to the wise: *please* read the instructions for Form 8609-A before filling it out. I've touched on the basic reconciliations and fundamental aspects of the computation, but there are so many variations of credit allocations and fact patterns that I really couldn't begin to discuss them all. The instructions are available on the IRS website, www.irs.gov. (Note: the form and instructions are no longer together as one e-file.)

Form 8586, Low-Income Housing Credit

Form 8586 summarizes key information from the Forms 8609-A. What's new? Taxpayers will forever need to keep track of when the buildings were placed in service because the portion of the low-income housing credit attributable to buildings placed in service after 2007 is not limited by the tentative minimum tax.

Which just begs the question, what do you do if you received an allocation of credit for the acquisition and rehabilitation of an existing building and the existing building was placed in service as residential rental property in 2007, but the rehabilitation wasn't placed in service until 2008?

The credit associated with the acquisition will be reflected in Part I used for buildings placed in service before January 1, 2008, and the credit associated with the rehabilitation will be reflected in Part II for buildings placed in service after December 31, 2007. Want some aspirin for that splitting headache?

Form 4562, Depreciation

One last consideration is whether depreciable basis is reduced for the amount of the credit claimed.

Eligible basis under IRC §42(d)(1) and (2) is the adjusted basis as of the close of the first taxable year of the credit period. Under IRC §42(d)(4), special rules relating to determination of adjusted basis, paragraph (D) states that there is no reduction of the adjusted basis for depreciation when determining the eligible basis. So, the answer is “no.”

IRC §42(l)(1) Certification for the First Year of the Credit Period

It's time to file tax returns on “extension”, and those taxpayers may have requested an extension to file while waiting for the Forms 8609, Part I, from the state agencies. Keep in mind that taxpayers need to complete the IRC §42(l)(1) First Year Certification. There a complete discussion in Newsletter #31. Just remember:

- The certification is made using Part II of the Form 8609 with Part I completed/signed by the state housing agency.
- The “tax year” on the line to the left of where you print your name, is the first year of the credit period.
- It's a *one* time filing with the Philadelphia Campus; you do *not* file them every year.
- The certification is not complete unless you sign and date *all* the Forms 8609. Just because you have an acquisition/rehab project with 100 buildings and 200 Forms 8609, it doesn't mean you can just sign one on behalf of all of them.
- The certification must be completed after the end of the first year of the credit period. No due date is specified and no requests for extensions of time to file the Forms 8609 are required or need be requested.
- Do not file tax returns with the LIHC Compliance Unit along with the Forms 8609; the unit does not process tax returns.
- Keep a copy of the completed certification for your records...*please*.

Form 8877 Obsolete

Form 8877, Request for Waiver of Annual Income Recertification Requirement for the Low-Income Housing Credit, has been obsolete and is no longer available for use.

- Forms 8877 submitted by LIHC project owners to the IRS requesting the waiver will be rejected and sent back to the owner.
- Existing waivers are now void, but state agencies do not need to technically revoke the waivers.

Explanation

As part of the Housing Assistance Tax Act of 2008, Congress amended IRC §142(d)(3)(A) to read (new language is italicized):

“...The determination of whether the income of a resident of a unit in a project exceeds the applicable income limit shall be made at least annually on the basis of the current income of the resident. *The preceding sentence shall not apply with respect to any project for any year if during such year no residential unit in the project is occupied by a new resident whose income exceeds the applicable income limit.*”

The amendment is effective for tax years ending after July 30, 2008, and under IRC §42(g)(4), the new exception is made applicable to IRC §42 properties. As a result, owners of §42 projects, where all the residential units are low-income units, can stop completing the annual tenant income recertifications.

However, Congress did not repeal IRC §42(g)(8)(B), which reads,

“...On application by the taxpayer, the Secretary [IRS] may waive....any annual recertification of tenant income for purposes of this subsection, if the entire building is occupied by low-income tenants.

Keep in mind, the IRS extended the rule to apply to qualified low-income housing *projects* that consist entirely of 100%percent low-income buildings in Revenue Procedures 94-64 and 2004-38.

So, now we have overlapping authorities relieving owners of 100% LIHC projects of the requirement to conduct annual tenant income recertifications. For all practical purposes, the new exception under IRC §142(d)(2) subsumed the IRC §42(g)(8)(B) waiver and there's no need to continue providing annual income recertification waivers. Therefore, no need for the form!

IRS Releases Updated Guide for Completing Form 8823

On September 25, 2009, the IRS released an updated revision of the Guide for Completing Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition. The guide was distributed directly to the state housing agencies, which use the guide in conjunction with their compliance monitoring activities. The guide was also made available to the public using the LIHC Newsletter distribution list. The guide is now available on industry websites and from the IRS by sending a request to Grace.F.Robertson@irs.gov.

Scope

The guide provides state housing agencies with a single accumulative reference of current legal authorities needed for determining whether Form(s) 8823 need to be filed with the IRS, along with guidelines and examples of the law's application to specific fact patterns. Generally, the guide does not address the tax consequences of noncompliance. Taxpayers are responsible for evaluating the tax consequences of noncompliance with IRC §42.

Authority

The guide is not a legal authority and should not be used or cited as authority for setting or sustaining a technical position. Instead, the Internal Revenue Code and formal IRS guidance, as referenced extensively in the text and footnotes, should be cited as authority.

Administrative Reminders

Expanding Audits, Project/Tracking Code: All LIHC cases should include Project Code 0670 and ERCS Tracking Code 9812. If the audit is expanded to include additional years or related taxpayers, the additional returns should also carry the LIHC project code and tracking code designation.

Form 5344, Revenue Protection: The Examination Closing Record, Form 5344, requires entries if you are reducing the amount of credit to be carried forward to a tax year you are not going to audit. Enter the amount of credit carryforward to be disallowed for Item 46. Code "L" should be entered for Item 47. See IRM 4.4.12.4.58 for an example.

Surveying LIHC Tax Returns: If you believe it is appropriate to survey an LIHC return, please fax Form 1900 to Grace Robertson, at 202-283-7008, for signature approval.

Subscribing to the LIHC Newsletter

The LIHC Newsletter is distributed free of charge through e-mail. If you would like to subscribe, just contact Grace Robertson at Grace.F.Robertson@irs.gov.

♪ Grace Notes ♪

I love October. The summer heat has cooled, the tourists have gone home, and it's the beginning of a new fiscal year for the IRS. I spent the last days of September finishing projects, writing reports and otherwise accounting for my whereabouts during FY 2009....and I even had time to clean (literally) a couple of stacks of paperwork off my desk! It's been a pretty good year, all things considered...like Congress passing the Housing Assistance Tax Act in July of 2008.

Technically...that was FY2007, but implementing new law takes a little time. Someone has to figure out how the new law impacts current operations, what needs to be done and how it should be done, and who should do it and when. And then, when we all more or less agree, we make an action plan. The plan lists all the things that need to be done, who is responsible, and when the action items are to be completed. Did I mention someone is keeping a list and checks it *every* month? Oh yeah...the *really* fun job! And that brings my back to the top of the list and the "someone" interpreting the new law, which isn't nearly as clear as Congress might have hoped. That "someone" is not a single person, of course, but Chief Counsel and it's been a particularly busy year for them. So.....

My thanks and appreciation to the attorneys in Chief Counsel working with IRC §§42 and 142, for their on-going assistance and support.

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Answers for the Mostly LIHC Crossword Puzzle

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