

# LIHC Newsletter

ISSUE #49

SEPTEMBER 2012

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

## **Rev. Proc. 2012-27: Notification Procedures under IRC §42(j)(6)(B)**

### Background

As amended by HERA in 2008, IRC §42(j)(6) provides that there is no recapture solely because a taxpayer disposes of a low-income building (or interest therein) if the taxpayer reasonably expects that the building will continue to be operated as a qualified low-income building for the remainder of the building's 15-year compliance period. However, if there is any reduction in the building's qualified basis (other than the disposition) which results in an increase in tax in the year of the disposition or any subsequent year, the taxpayer is subject to recapture under IRC §42(j).

The Code also provides a unique statutory period for assessing the recapture amount if a recapture event occurs after the disposition. This special rule is applicable notwithstanding the provisions of any other law or rule of law which would otherwise prevent such assessment. IRC §42(j)(6)(B)(i) states:

- (i) the statutory period for the assessment of any deficiency with respect to such increase in tax shall not expire before the expiration of 3 years from the date the Secretary is notified by the taxpayer (in such manner as the Secretary may prescribe) of such reduction in qualified basis,...

### Providing Notice

Rev. Proc. 2012-27 provides the instructions for providing notice to the IRS if there has been a reduction in qualified basis resulting in an increase in tax under IRC §42(j).

A taxpayer must submit a letter to the Internal Revenue Service, signed by the taxpayer and including the following:

1. A lead-in declaration stating: "By this letter I am making the notification prescribed by IRC §42(j)(6)(B)(i);
2. The taxpayer's name, address, and taxpayer identification number;
3. The name (if any), address, and Building Identification Number of each building to which the taxpayer's disposition relates. If a taxpayer received a credit from a pass-through entity but does not know the information required by the preceding sentence, the taxpayer must provide the name and employer identification number of the pass-through entity from which the taxpayer received the credit;
4. To the extent known, the name, address, and taxpayer identification number of any person(s) to whom the increase in tax under IRC §42(j)(6)(B) applies as a result of a reduction in the qualified basis of any building to which the taxpayer's disposition relates; and

*(Continued on page 2)*

### **INSIDE THIS ISSUE:**

Notice of Proposed Rulemaking for Treas. Reg. §1.42-10, Utility Allowances	2
Revised Dictionary of Deficiency Definitions Released by HUD	3
Subscribing to the LIHC Newsletter	4
Guide for Completing Form 8823	4
♪ Grace Notes ♪	4

(Continued from page 1)

5. A concluding declaration stating: "Under penalties of perjury, I declare that I have examined this letter and the representations made therein, and to the best of my knowledge and belief, they are true, correct, and complete."

The taxpayer must mail the letter to the address where the most current Form 8609, Low-Income Housing Credit Allocation and Certification, would be filed. The [instructions for Form 8609](#) contain the address and are available on the IRS website.

For purposes of determining the 3-year period for assessment under IRC §42(j)(6)(B), the Secretary is deemed to be notified as of the postmark date of the letter.

#### Clarification

It isn't necessary to provide the notice simply because a taxpayer disposed of a low-income building (or interest therein). Notice should be provided only when a recapture event (i.e., reduction of qualified basis) has occurred *after* the disposition.

#### Helpful Information

Although not explicitly requested in the revenue procedure, including a *concise* description of the event causing the reduction in qualified basis in the notice is helpful.

## **Notice of Proposed Rulemaking for Treas. Reg. §1.42-10, Utility Allowances**

On August 7, 2012, the IRS provided a notice of proposed rulemaking to amend Treas. Reg. §142-10 to clarify that utility costs paid by a tenant based on actual consumption in a submetered rent-restricted unit are treated as paid by the tenant directly to the utility company.

After the 2008 amendment of the 1994 final regulation, commentators requested clarification about how the regulations apply to submetering arrangements. Typically, a submetering system has a master meter, which is owned or controlled by the utility provider and which the utility provider uses to measure overall consumption and then bill the owner. The building owner (or the owner's agent) use unit-based meters (submetering) to measure utility consumption and then bill each residential unit based on actual consumption.

Notice 2009-44 was issued to clarify that, for purposes of Treas. Reg. §1.42-10(a), utility costs paid by a tenant based on actual consumption in a submetered rent-restricted unit are treated as paid directly to the utility company and not by or through the owner of the building. To summarize the notice:

- For RHS-assisted buildings, buildings with RHS tenant assistance, HUD-regulated buildings, and rent-restricted units in other buildings occupied by tenants receiving HUD rental assistance, the applicable RHS or HUD rules apply. See Treas. Reg. §1.42-10(b)(1)-(4)(i).
- For all other tenants in rent-restricted units in other buildings under Treas. Reg. §1.42-10(b)(4)(ii):
  1. The utility rates charged to tenants in each sub-metered rent-restricted unit must be limited to the utility company rates incurred by the building owners (or their agents);
  2. If building owners (or their agents) charge tenants a reasonable fee for the administrative costs of sub-metering, then the fee will not be considered gross rent under §42(g)(2). The fee must not exceed an aggregate amount per unit of 5 dollars per month unless State law provides otherwise; and
  3. If the costs for sewerage are based on the tenants' actual water consumption determined with a sub-metering system and the sewerage costs are on a combined water and sewerage bill, then the tenants' sewerage costs are treated as paid directly by the tenants for purposes of the utility allowances regulations.

The notice also explained that Treas. Reg. §1.42-10 would be amended to incorporate the guidance set forth in the notice and requested comment. Comments were received and the comments were taken into consideration in developing the proposed regulation. The proposed regulation also includes additional modifications.

(Continued on page 3)

(Continued from page 2)

First, if two or more utilities such as electricity and water are treated as submetered under the proposed regulation, then the building owner (or its agent or other party acting on behalf of the building owner) must separately state the amount billed to the tenants for each submetered utility.

Second, if a building owner imposes an administrative fee on a unit's tenants for the costs of administering a submetering arrangement, then the fee generally is not included in gross rent for purposes of IRC §42(g)(2). The exclusion from gross rent does not apply to any amount by which the aggregate monthly fee for all of a unit's utilities under one or more submetering arrangements exceeds the lesser of the following: (A) Five dollars per month or (B) the owner's actual monthly costs paid or incurred for administering the arrangement (whether internal costs or amounts paid to third parties).

The proposed regulation also amends Treas. Reg. §1.42-10(b)(4)(ii)(A) to clarify that for all rent-restricted units not subject to the rules under Treas. Reg. §1.42-10(b)(1)-(4)(i), the owner may choose one of the options under Treas. Reg. §1.42-10(b)(4)(ii)(B)-(E) or the applicable PHA utility allowance for determining the utility allowance for those rent-restricted units.

Before the proposed regulation is adopted as a final regulation, consideration will be given to any comments that are received by the IRS by October 9, 2012. A public hearing is scheduled for November 27, 2012, in Washington, DC.

For a more detailed discussion of the proposed changes to Treas. Reg. §1.42-10, and information about submitting comments or attending the public hearing, the notice is available in the [Federal Register, Vol. 77, No. 152](#), August 7, 2012.

## Revised Dictionary of Deficiency Definitions Released by HUD

On August 7, 2012, HUD provided notice in the Federal Register to, in part, make changes to the Dictionary of Deficiency Definitions (Dictionary). This is important for the IRC §42 program because residential rental units must be suitable for occupancy (see IRC §42(i)(3)(B)) and the IRS has adopted the Dictionary for purposes of evaluating whether IRC §42 housing meets this standard.

The dictionary is still divided into the same six sections:

1. Site Inspection
2. Building Exterior Inspectable Items
3. Building Systems Inspectable Items
4. Common Areas Inspectable Items
5. Unit Inspectable Items
6. Health and Safety Inspectable Items

Each section is still divided into "Inspectable Items" with specific deficiencies described in ascending levels of severity. However, revisions have been made for precision of measurements, ranking of the deficiency's severity, and reorganizing the deficiencies (just a little) to be more concise and avoid "double" counting a single deficiency.

### Important Points

- The Dictionary is part of HUD's protocol for inspecting their housing projects. The protocol includes a scoring system based on weighted values assigned to the deficiencies and different levels of severity, resulting in an overall score for the project. *The IRS does not use the scoring system or consider an overall "score" when determining whether housing is suitable for occupancy.*
- In CCA 201042025, Chief Counsel explained that even though the IRS uses the Dictionary, "a taxpayer, in response to the IRS finding a violation, may raise an affirmative defense by proving that local health, safety, or building codes address the specific point in question, and after application of the facts, local law reaches a taxpayer favorable result where as the HUD standard does not reach a taxpayer favorable result. Under these circumstances, the local law would control as respects the violation itself."

### Effective Dates

State agencies must inspect LIHC projects to ensure that the low-income buildings and units are suitable for occupancy. Under Treas. Reg. §1.42-5(C)(2)(ii)(B), on-site inspections must be made at least once every three years. State agencies should use the revised Dictionary for all inspections conducted after December 31, 2012.

(Continued on page 4)

## Administrative Procedures

### Project/Tracking Codes:

All LIHC cases should include Project Code 0670 and 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 designations.

### Revenue Protection:

Form 5344, Examination Closing Record, 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 IRC 4.4.12.4.58 for an example.

### Surveying LIHC Tax Returns:

If you believe it is appropriate to survey an LIHC tax return, please fax Form 1900 to Grace Robertson at (202) 283-2485 for signature approval.

### TEFRA Requirements:

As IRC §42 project owners are almost always partnerships and are likely to be subject to TEFRA procedural requirements, please remember to document actions taken and decisions made by completing:

- Form 12813, TEFRA Procedures
- Form 13814, TEFRA Linkage Package Checklist
- Form 13828, Tax Matters Partner (TMP) Qualifications Checklist
- Form 13827, Tax Matter Partner (TMP) Designation Checklist

(Continued from page 3)

For IRS audit purposes, we will use the version of the Dictionary that was used by the state agency to conduct the inspection and report the noncompliance to the IRS. The determination will be based on the date entered on line 8 of Form 8823, Low-Income Housing Credit Agencies Report of Noncompliance or Building Disposition

## References

The complete Dictionary as revised, with explanations of each change, is included with the [notice in the Federal Register](#), Vol. 77, No. 154, August 9, 2012.

For more information about the "suitability for occupancy" requirement, please refer to Newsletter #43...the *whole* newsletter.

## 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 at [Grace.F.Robertson@irs.gov](mailto:Grace.F.Robertson@irs.gov). Also designate whether you would like to receive the Adobe pdf version or the Word document.

## Guide for Completing Form 8823

The "Guide" is available on the IRS website. There's a [searchable html version](#) and a [downloadable pdf file](#). On the IRS website, [www.irs.gov](http://www.irs.gov), enter "ATG" in the search engine. Select the first link on the list of results for "Audit Technique Guides." Then select "L" from the alphabet list and the Guide will be listed as "Low-Income Housing Credit-Guide for Completing Form 8823." Clicking on the title will lead you to the html version and the link to the right of the title will link you to the pdf file.

## ♪ Grace Notes ♪

I found myself in traffic on August 5<sup>th</sup>, listening intently to the radio and enthralled as Curiosity sat down on Mars. Incredible! And I almost jumped for joy along with all those NASA engineers! And then, in their jubilation, they explained when they anticipated getting the first pictures of the landing site back from Mars... considering Mars "time."

Mars *time*? What's this? So, as soon as I got home (okay, not really right when I got home, but later that night when the cats were asleep) I got on the internet to find out just what "Mars time" is. So, just in case you, too, want to know....

- Mars tilts and rotates much like the earth, experiences spring, summer, fall and winter, and its day is about the same length.
- It takes longer to rotate around the sun, so it's year is about twice as long as the earth's, and its orbital "eccentricity" is considerably larger than earth's, which means that it's orbit is much less circular than earth's, which means that the lengths of the Marian seasons differ considerably.

- The average length of a Mars "solar day" is 24 hours, 39 minutes, 35.24409 seconds. For earth, its 24 hours, zero minutes and 0.002 seconds. Thus, Mars's solar day is about 2.7% longer than earth's.
- The operations team works on Mars time, with a work schedule synchronized to the local time at the landing site on Mars, which means that the crew's schedule slides about 40 minutes later in Earth time each day. They even have wristwatches on Mars time.

Cool, huh? There's a whole lot more to learn, but I don't want to spoil your fun (see Newsletter #40). I'm just glad I only have to deal with Eastern, Central, Mountain, and Pacific Time zones, daylight savings time, and a few outlier territories half way around *this* sphere.

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