INTERNAL REVENUE SERVICE
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CASE MIS No.: TAM-100727-00/CC:PSI:B5

Taxpayer's Name:
Taxpayer's Address:

Taxpayer's Identification No.:
Tax Year Involved:
Date of Conference:

LEGEND:

Taxpayer =

Project =

Address =

Agency =

State =

x =

y =

z =

a =

b =

c =

ISSUE:

What costs incurred in the construction of a low-income housing building are included in eligible basis under § 42(d)(1) of the Internal Revenue Code? Specifically, are certain land preparation costs and bond issuance costs incurred by the Taxpayer in constructing the Project included in eligible basis under § 42(d)(1)?

CONCLUSIONS:

Eligible Basis

A cost incurred in the construction of a low-income housing building is includable in eligible basis § 42(d)(1) if the cost is:

(1) included in the adjusted basis of depreciable property subject to § 168 and the property qualifies as residential rental property under § 103, or

(2) included in the adjusted basis of depreciable property subject to § 168 that is used in a common area or provided as a comparable amenity to all residential rental units in the building.[1]

Land Preparation Costs

For the cost of a land preparation to be includable in the Project's eligible basis under § 42(d)(1), the cost must be for property of a character subject to the allowance for depreciation under § 168. The cost of a land preparation is a depreciable property if the land preparation is so closely associated with a particular depreciable asset that the land preparation will be retired, abandoned, or replaced contemporaneously with that depreciable asset. Whether the land preparation will be retired, abandoned, or replaced contemporaneously with the depreciable asset is a question of fact. If it is determined, upon further factual development, that a land preparation cost is depreciable, such cost may be included in eligible basis if it is also determined as part of the adjusted basis of § 168 property that qualifies as residential rental property under § 103, or § 168 property used in a common area or provided as a comparable amenity to all residential rental units in the building.

Bond Issuance Costs

Costs associated with the issuance of tax-exempt bonds are not includable in the Project's eligible basis under § 42(d)(1) because they do not qualify as either § 168 property that is residential rental property under § 103 or as § 168 property that is used

1. This test does not exclude the application of other requirements that affect eligible basis under § 42. For example, the cost for constructing a parking area would qualify under this test. However, this cost would not be permitted in eligible basis if a separate fee were charged for use of the area. 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-90 (1986), 1986-3 (Vol. 4) C.B. 90.

in a common area or provided as a comparable amenity to all residential rental units in a building.

FACTS:

The Taxpayer, a State limited partnership, was formed to construct, develop, own and operate the Project, a x unit residential rental apartment complex located at Address. On y, the Project received from the Agency an allocation in the amount of $z in low-income housing credits under § 42 and began to develop the Project. The Taxpayer included certain land preparation costs and bond issuance costs in the Project's eligible basis under § 42(d)(1).[2]

LAW AND ANALYSIS:

Eligible Basis

Section 42(a) provides that the amount of the low-income housing tax credit determined for any tax year in the credit period is an amount equal to the applicable percentage of the qualified basis of each low-income building.

Section 42(c)(1)(A) defines the qualified basis of any qualified low-income building for any tax year as an amount equal to the applicable fraction, determined as of the close of the tax year, of the eligible basis of the building, determined under § 42(d)(5).

Section 42(c)(2) provides that the term "qualified low-income building" means, in part, any building to which the amendments made by section 201(a) of the Tax Reform Act of 1986 apply (the 1986 Act). Section 201(a) of the 1986 Act modified property subject to the accelerated cost recovery system (ACRS) under § 168 for property placed in service after December 31, 1986, except for property covered by transition rules.

Section 42(d)(1) provides that the eligible basis of a new building is its adjusted basis as of the close of the first tax year of the credit period. Section 42(d)(4)(A) provides that, except as provided in § 42(d)(4)(B), the adjusted basis of any building is determined without regard to the adjusted basis of any property that is not residential rental property. Section 42(d)(4)(B) provides that the adjusted basis of any building

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2. The facts relevant to these issues are subject to disagreement between the Taxpayer and the District Director's office. Pursuant to § 10.03 of Rev. Proc. 2000-1, I.R.B. 73, 86, the national office, if it chooses to issue technical advice, will base that advice on facts provided by the district office.

includes the adjusted basis of property (of a character subject to the allowance for depreciation) used in common areas or provided as comparable amenities to all residential rental units in the building.

The legislative history of § 42 states that residential rental property, for purposes of the low-income housing credit, has the same meaning as residential rental property within § 103. The legislative history of § 42 further states that residential rental property thus includes residential rental units, facilities for use by the tenants, and other facilities reasonably required by the project. 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-89 (1986), 1986-3 (Vol. 4) C.B. 89. Under § 1.103-8(b)(4) of the Income Tax Regulations, facilities that are functionally related and subordinate to residential rental units are considered residential rental property. Section 1.103-8(b)(4)(iii) provides that facilities that are functionally related and subordinate to residential rental units include facilities for use by the tenants, such as swimming pools and similar recreational facilities, parking areas, and other facilities reasonably required for the project. The examples given by § 1.103-8(b)(4)(iii) of facilities reasonably required for a project specifically include units for resident managers or maintenance personnel.

Based on the above, a cost is incurred in the construction of a low-income housing building under § 42(d)(1) if it is:

(1) included in the adjusted basis of depreciable property subject to § 168 and the property qualifies as residential rental property under § 103, or

(2) included in the adjusted basis of depreciable property subject to § 168 that is used in a common area or provided as a comparable amenity to all residential rental units in the building.

The Taxpayer contends that each state housing credit agency determines what costs are includable in eligible basis when determining the financial feasibility of a project under § 42(m)(2)(A). Consequently, the Taxpayer concludes that once the Agency has verified and accepted the Taxpayer's costs, the Service is bound by the Agency's determination. We disagree.

Section 42(m)(2)(A) provides, in part, that the housing credit dollar amount allocated to a project shall not exceed the amount the housing credit agency determines is necessary for the financial feasibility of the project and its viability as a qualified low-income housing project through the credit period. A state housing credit agency's responsibility under § 42(m)(2)(A) to determine the financial feasibility and viability of a project in no way abrogates the Service's authority and responsibility to administer the low-income housing tax credit and its various provisions.

The Taxpayer also cites Notice 88-116, 1988-2 C.B. 449, as authority for its position that all construction costs are costs includable in eligible basis. The Taxpayer's interpretation of Notice 88-116 is misplaced.

Notice 88-116, in part, provides guidance on what costs will be considered construction, reconstruction, or rehabilitation costs for the limited purpose of qualifying certain buildings for post-1989 credits after the (then) § 42(n) statutory sunset of a state's authority to allocate post-1989 credit. For this limited purpose, the notice provides that certain costs would satisfy the definition of construction, reconstruction or rehabilitation costs– but only if these costs are included in the eligible basis of the building. In other words, under the notice, a condition to qualifying a new building for post-1989 credit was that construction costs must also be included in eligible basis. The notice does not define what costs are included in eligible basis nor, as the Taxpayer proposes, does it stand for the proposition that all construction-related costs are included in eligible basis.

Land Preparation Costs

The Taxpayer incurred a variety of land preparation costs in constructing the Project that the Taxpayer included in the eligible basis of the Project buildings under § 42(d)(1). These costs included the following land surveys: boundary, topographic, mortgage, tree, architectural, Gopher Tortoise, ALTA, and recordation of the final plat. The Taxpayer also incurred costs for the following environmental surveys: percolation tests, soil borings, geotechnical investigations, contamination studies and suitability study. Additionally, the Taxpayer incurred costs for architectural services and traffic engineering services.

The following is a general discussion of when land preparation costs are depreciable and consequently may qualify for inclusion in eligible basis. Whether the Taxpayer's specific costs are includable in eligible basis will depend upon further factual development by the revenue agent.

Section 167(a) provides that there shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) of property used in the trade or business of the taxpayer, or of property held for the production of income.

Section 1.167(a)-2 provides that the depreciation allowance in the case of tangible property applies only to that part of the property which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence. The allowance does not apply to land apart from the improvements of physical development added to it.

Generally, the depreciation deduction provided by § 167(a) for tangible property is determined under § 168 by using the applicable depreciation method, the applicable recovery period, and the applicable convention. In the case of residential rental property, the applicable depreciation method is the straight line method (§168(b)(3)(B)), the applicable recovery period is 27.5 years (§ 168(c)), and the applicable convention is the mid-month convention (§ 168(d)(2)(B)). Land improvements, whether § 1245 property or § 1250 property, are included in asset class 00.3, Land Improvements, of Rev. Proc. 87-56, 1987-2 C.B. 674, 677, and have a class life of 15 years for the general depreciation system. Thus, for land improvements the applicable depreciation method is the 150 percent declining balance method (§ 168(b)(2)(A)), the applicable recovery period is 15 years (§ 168(c)), and the applicable convention is the half-year convention (§ 168(d)(1)).

The grading of land involves moving soil for the purpose of changing the ground surface. It produces a more level surface and generally provides an improvement that adds value to the land. Rev. Rul. 65-265, 1965-2 C.B. 52, clarified by Rev. Rul. 68-193, 1968-1 C.B. 79, holds that such expenditures are inextricably associated with the land and, therefore, fall within the rule that land is a nondepreciable asset. Rev. Rul. 65-265 further holds that excavating, grading, and removal costs directly associated with the construction of buildings and paved roadways are not inextricably associated with the land and should be included in the depreciable basis of the buildings and roadways. Accordingly, the costs attributable to the general grading of the land, not done to provide a proper setting for a building or a paved roadway, become a part of the cost basis of the land and, therefore, are not subject to a depreciation allowance. See Algernon Blair, Inc. v. Commissioner, 29 T.C. 1205 (1958), acq., 1958-2 C.B. 4. As such, the costs are not includable in eligible basis under § 42(d)(1).

Rev. Rul. 74-265, 1974-1 C.B. 56, involves the issue of whether landscaping for an apartment complex is depreciable property. The area surrounding the apartment complex was landscaped according to an architect's plan to conform it to the general design of the apartment complex. The expenditures for landscaping included the cost of top soil, seeding, clearing and grading, and planting of perennial shrubbery and ornamental trees around the perimeter of the tract of land and also immediately adjacent to the buildings. The replacement of these apartment buildings will destroy the immediately adjacent landscaping, consisting of perennial shrubbery and ornamental trees.

This revenue ruling held that land preparation costs may be subject to a depreciation allowance if such costs are so closely associated with a depreciable asset so that it is possible to establish a determinable period over which the preparation will be useful in a particular trade or business. A useful life for land preparation is established if it will be replaced contemporaneously with the related depreciable asset. Whether land preparation will be replaced contemporaneously with the related depreciable asset is necessarily a question of fact, but if the replacement of the depreciable asset will require the physical destruction of the land preparation, this test will be considered satisfied. Accordingly, landscaping consisting of the perennial shrubbery and ornamental trees immediately adjacent to the apartment buildings is depreciable property because the replacement of the buildings will destroy the landscaping. However, the balance of the landscaping, including the necessary clearing and general grading, top soil, seeding, finish grading, and planting of perennial shrubbery and ornamental trees around the perimeter of the tract of land, is general land improvements that will be unaffected by the replacement of the apartment buildings and, therefore, will not be replaced contemporaneously therewith. Accordingly, these types of property are not depreciable property but rather are considered inextricably associated with the land and as such are not includable in eligible basis under § 42(d)(1).

Rev. Rul. 80-93, 1980-1 C.B. 50, involves the issue of whether a taxpayer is allowed to take a depreciation deduction for costs incurred in the construction of electrical and natural gas distribution systems and for land preparation costs incurred in connection with the development of a mobile home park. Regarding the distribution systems, the taxpayer made expenditures for the distribution systems, but the utility company retained full ownership of them and would repair and replace the systems as necessary. The taxpayer also incurred costs for the clearing, grubbing, cutting, filling, and rough grading necessary to bring the land to a suitable grade. In addition, the land preparation costs incurred in the digging and the rough and finish grading necessary to construct certain depreciable assets will not be repeated when the depreciable assets are replaced. However, the excavation and backfilling required for the construction of the laundry facilities and the storm sewer system are so closely associated with those depreciable assets that replacement of the depreciable assets will require the physical destruction of that land preparation.

This revenue ruling held that the land preparation costs (clearing, grubbing, cutting, filling, rough and finish grading, and digging) that are unaffected by replacement of the components of the mobile home park and will not be replaced contemporaneously therewith are nonrecurring general land improvement costs and, therefore, are considered to be inextricably associated with the land and are added to the taxpayer’s cost basis in the land. These land preparation costs are not depreciable and, therefore, not includable in eligible basis under § 42(d)(1). However, the land preparation costs that are so closely associated with depreciable assets (laundry facilities and storm sewer system) such that the land preparation will be retired, abandoned, or replaced contemporaneously with those depreciable assets are capitalized and depreciated over the estimated useful lives of the assets with which they are associated. The amounts paid to the utility for the electrical and natural gas distribution systems are nonrecurring costs for betterments that increase the value of the land and are includable in the taxpayer’s cost basis of the land. These costs likewise are not depreciable and not includable in eligible basis under § 42(d)(1).

In Eastwood Mall, Inc. v. U.S., 95-1 USTC ¶ 50,236 (N.D. Ohio 1995), aff'd by unpublished disposition, 59 F.3d 170 (6th Cir. 1995), the issue before the court was whether the taxpayer, a developer, should depreciate the cost of reshaping land as part of the cost of a building. The court stated that costs for land preparation may or may not be depreciable depending on whether the costs incurred are inextricably associated with the land (nondepreciable) or with the buildings constructed thereon (depreciable). It further asserted that the key test for determining whether land preparation costs are associated with nondepreciable land or the depreciable building thereon is whether these costs will be reincurred if the building were replaced or rebuilt. Land preparation costs for improvements that will continue to be useful when the existing building is replaced or rebuilt are considered inextricably associated with the land and, therefore, are to be added to the taxpayer's cost basis in the land and are not depreciable. On the other hand, land preparation costs for improvements that are so closely associated with a particular building that they necessarily will be retired, abandoned, or replaced contemporaneously with the building are considered associated with the building and, therefore, are added to the taxpayer's cost basis in the building and are depreciable.

The cost of a land preparation inextricably associated with the land is added to a taxpayer's cost basis in the land and is not depreciable property. See Rev. Rul. 65-265; Algernon Blair; Eastwood Mall. Land preparation costs that are nonrecurring or that will continue to be useful when the related depreciable asset is replaced or rebuilt are considered to be inextricably associated with the land. See Rev. Rul. 80-93; Eastwood Mall. However, the cost of a land preparation inextricably associated with a particular depreciable asset (for example, an apartment building) is added to a taxpayer's cost basis in that depreciable asset and is depreciable property. The cost of a land preparation that is so closely associated with a particular depreciable asset that the land preparation will be retired, abandoned, or replaced contemporaneously with that depreciable asset is considered inextricably associated with the depreciable asset. See Rev. Rul. 74-265; Rev. Rul. 80-93; Eastwood Mall.

In applying this standard, the issue of whether a land preparation will be retired, abandoned, or replaced contemporaneously with a particular depreciable asset is a question of fact.

In the present case, further factual development is needed to determine whether each land preparation cost at issue is so closely associated with a particular depreciable asset (for example, building) that the land preparation will be retired, abandoned, or replaced contemporaneously with that depreciable asset. This test is satisfied if it is reasonable to assume the replacement of the depreciable asset will require the actual physical destruction of the land preparation. See Rev. Rul. 74-265. It is irrelevant that a state housing credit agency may require a taxpayer to incur a particular land preparation cost (for example, the planting of trees on the perimeter of the tract of land). Similarly, it is irrelevant that an ordinance may require a taxpayer to incur a particular land preparation cost (for example, tree preservation or endangered species survey).

Under these guidelines, the costs of clearing, grubbing, and general grading to prepare a site suitable for any type of structure are inextricably associated with the land and are added to the cost of land and, therefore, are not depreciable. Similarly, costs incurred for fill dirt that is used to raise the level of the site are considered to be inextricably associated with the land and, therefore, are not depreciable. Therefore, the costs are not includable in eligible basis under § 42(d)(1). However, earth-moving costs incurred for digging spaces and trenches for a building's foundation and utilities generally are considered to be inextricably associated with the building and are added to the cost of the building and, therefore, are depreciable. Similarly, costs incurred for fill dirt that is used to set the foundation of a depreciable asset generally are considered to be inextricably associated with the related depreciable asset and, therefore, are depreciable.

Land and environmental surveys are generally conducted over the entire property of the development, not just where the buildings and improvements will specifically be placed. Some surveys, such as boundary or mortgage surveys, help to define the property whereas other surveys, such as percolation tests and contamination studies, are used to determine if the improvements can properly be built on the site. Costs incurred for the former type of survey are clearly related to the land itself and are inextricably associated thereto and, therefore, are not depreciable and not includable in eligible basis under § 42(d)(1). The latter type of survey is performed on the land to determine its suitability for supporting the improvements to be constructed thereon. If this type of survey will not necessarily need to be redone contemporaneously when the depreciable improvement is replaced, the costs incurred for the survey are inextricably associated with the land and, therefore, are not depreciable and not includable in eligible basis under § 42(d)(1). A survey is considered to be redone contemporaneously with the replacement of the depreciable improvement if the physical replacement of the depreciable improvement mandates a reperformance of the survey. Although an ordinance may require reperformance of the survey, such requirement is irrelevant as to whether the physical replacement of a depreciable improvement necessarily mandates a reperformance of the survey.

If a cost of land preparation is associated with both nondepreciable property (for example, land) and depreciable property (for example, building), the cost should be allocated among the nondepreciable property and depreciable property using any reasonable method. For example, if staking costs are incurred to demarcate a variety of items related to the development of the project and such items may be depreciable improvements (for example, sidewalks) and nondepreciable improvements (for example, landscaping not immediately adjacent to a building), the staking costs should be allocated among the depreciable and nondepreciable assets. Similarly, if engineering services are performed partly for nondepreciable assets and partly for depreciable assets, the cost of such services should be allocated among the nondepreciable and depreciable assets.

The Taxpayer's main argument as to why the land preparation costs should be depreciable property is that without construction of the buildings and other infrastructure for the project, none of these expenses would have been incurred. However, the court in Eastwood Mall specifically denounced this argument as being incorrect. The court noted that in almost every instance, some costs–whether it be the cost of moving a single tree or the larger costs of raising a site–will be incurred in preparing the land for the construction of the building. The court further noted that under the taxpayer's argument, all costs incurred in preparing a site are depreciable and that the only situation where land preparation costs would not be depreciable is where nothing is constructed on the land. The court stated that "[t]his interpretation is illogical and contrary to the law." Eastwood Mall, at para. 9. Juxtaposing the Taxpayer's main argument with the argument made by the taxpayer in Eastwood Mall, the arguments are the same. Thus, the Taxpayer's main argument is without merit.

The Taxpayer further asserts that some of the land preparation costs may need to be redone if the building was replaced due to possible changes in applicable ordinances. The court in Eastwood Mall stated that "land preparation costs for improvements that are so closely associated with a particular building that they necessarily will be retired, abandoned, or replaced contemporaneously with the building are considered associated with the building." Eastwood Mall, at para. 12. See also Rev. Rul. 74-265 and Rev. Rul. 80-93. The Taxpayer's argument, however, does not satisfy the test that the costs necessarily will be replaced contemporaneously with the building. The fact that an ordinance may require a taxpayer to incur a particular land preparation cost does not mean that it thereby is considered to be inextricably associated with a building.

Based upon the above, once a land preparation cost is determined to be depreciable, that cost may be included in eligible basis to the extent it is treated as part of the adjusted basis of § 168 property that qualifies as residential rental property under §103, or § 168 property used in a common area or provided as a comparable amenity to all residential rental units in the building.

Bond Issuance Costs

Funding for the Project was sourced, in part, by $a in proceeds from a 30-year tax-exempt bond. The bond proceeds were received when construction of the Project began and were used as the construction loan. When construction was completed, the proceeds were used for permanent financing. The costs associated with issuing the tax-exempt bond (bond issuance costs) included FHFA fees, state board fees, rating agency fees, trustee fees, underwriter fees, investment fees, legal counsel fees, bank inspector fees, and costs for photos, prints, and renderings. The bond issuance costs totaled $b. Of this amount, the Taxpayer included $c as eligible basis costs in their final costs certification. The Taxpayer contends that the bond proceeds were used to fund both the construction loan and a permanent loan, which were separately negotiated loans, and any and all costs associated with the construction loan are includable in eligible basis.

Costs incurred in obtaining a loan (or tax-exempt bond) are capitalized and amortized over the life of the loan (or bond). See Enoch v. Commissioner, 57 T.C. 781, 794-5 (1972), acq. on this issue, 1974-2 C.B. 2. See also Rev. Rul. 70-360, 1970-2 C.B. 103, Rev. Rul. 75-172, 1975-1 C.B. 145, and Rev. Rul. 81-160, 1981-1 C.B. 312. Accordingly, the bond issuance costs incurred by the Taxpayer in obtaining the tax-exempt bond for the Project are not capitalized to depreciable property, but are treated as an amortizable § 167 intangible.

Section 42(c)(2) defines a qualified low-income building as a building subject to section 201(a) of the 1986 Act. Only property subject to §168 is subject to section 201(a). Property amortizable under §167 such as intangibles cannot be depreciated under §168. Accordingly, property not subject to depreciation under §168 such as the Taxpayer's bond issuance costs intangible cannot be included in the Project's eligible basis under §42(d)(1).

Nevertheless, an argument can be made under § 263A that an allocable portion of indirect costs of real or tangible personal property produced by a taxpayer can be capitalized to the property produced. Indirect costs that should be capitalized under § 263A to produced property are those that are properly allocable to the property. These are costs that directly benefit or are incurred by reason of the production of property.

In this case, the Taxpayers' bond issuance costs were used, in part, to fund construction activities. These costs would not have been incurred by the Taxpayer but for its housing construction activities. Thus, the costs were incurred by reason of the production of property and under the general rules of § 263A could reasonably be allocated to the property produced as indirect costs. However, notwithstanding the general rule of § 263A, we believe these bond issuance costs are not includable in eligible basis under the specific requirements of § 42(d)(1).

Section 103(a) provides that gross income does not include interest on any state or local bond. Section 103(b)(1), however, provides that the exclusion does not apply to any private activity bond unless it is one of the qualified bonds under § 141(e). Among these qualified bonds are exempt facility bonds.

Section 142(a) describes an exempt facility bond as any bond issued as part of an issue of bonds if 95 percent or more of the net proceeds of the issue are to be used to provide listed types of projects or facilities. Within the list, in §142(a)(7), are qualified residential rental projects.

Section 142(d) defines a qualified residential rental project as a project for residential rental property that houses occupants who meet one of the alternative income tests at all times throughout a qualified project period. In the 1986 Act, 1986-3 (Vol. 1) C.B. 519-575, Congress reorganized § 103 and § 103A of the Code of 1954 (the "1954 Code") regarding tax-exempt bonds into § 103 and §§ 141 through 150 of the Code of 1986. Congress intended that to the extent not amended by the 1986 Act, all principles of pre-1986 Act law would continue to apply to the reorganized provisions. 2 H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. II-686 (1986), 1986-3 (Vol., 4) C.B. 686. (Conference Report). Because no Income Tax Regulations have been promulgated under § 142(d), the regulations promulgated pursuant to § 103(b)(4) of the 1954 Code continue to apply to residential rental property except as otherwise modified by the 1986 Act and subsequent law.

As stated above, § 42 and its legislative history make clear that a necessary condition for tax credit eligibility is that the costs be included as part of the adjusted basis of depreciable property subject to § 168 that is residential rental property, or depreciable property subject to § 168 that is used in a common area or provided as a comparable amenity to all residential rental units in the building. Furthermore, the legislative history of § 142 provides that bond issuance costs cannot be paid from the 95% portion of the issue. Conf. Rpt. at II-729. Here, the exempt purpose to which the 95% test is applied is for qualified residential rental projects. Section 142(d)(1) provides, in part, that the term qualified residential rental project means any project for residential rental property. Since bond issuance costs are not costs used for qualified residential rental projects and since residential rental projects must be projects for residential rental property, we conclude that bond issuance costs are not residential rental property or costs used to provide residential rental property.[3] Since bond issuance costs are not residential rental property or costs used for residential rental property within the meaning of § 142 (nor do we believe these costs are depreciable property subject to § 168 that is used in a common area or provided as comparable amenities to all residential rental units in the building-- such as a stove or refrigerator) and since residential rental property has the same meaning under § 42 as it does for § 142, no § 42 credit may be claimed for these costs.

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3. Nothing in § 1.103-8(b)(4) (which applies to both §§ 42 and 142) or the legislative history to § 42 includes bond issuance costs within the definition of residential rental property, thereby preempting an argument that residential rental property has a broader meaning than residential rental project and that bond issuance costs fall within the definition of residential rental property but not within the definition of residential rental project.

Congress has determined that bond issuance costs, the components of which are identified in the legislative history to § 142, are not costs sufficiently associated with providing residential rental housing to satisfy the exempt purpose of the offering. Characterizing a certain portion of bond issuance costs under § 263A as satisfying the exempt purpose of the offering is directly contrary to this specific congressional determination. Permitting such a § 263A characterization of bond issuance costs for purposes of § 42 would result in the disparate treatment of the term residential rental property between §§ 42 and 142. This result is contrary to the statutory and legislative history construct governing § 42, that requires that residential rental property have the same meaning for purposes of both §§ 42 and 142.

Accordingly, notwithstanding the general rule of § 263A, no portion of bond issuance costs (as these costs are described in the legislative history to § 142) are included in eligible basis for purposes of § 42(d)(1).

CAVEAT:

No opinion is expressed on whether the Project otherwise qualifies for the low-income housing tax credit under § 42. A copy of this technical advice memorandum is to be given to the Taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent.

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