Internal Revenue Service

Index No.: 42.07-00

Department of the Treasury

199949044

Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:P&SI:5 — PLR-109942-99

Date:
SEP 14 1999

Legend:

Taxpayer =

State =

City =

Partnership =

Agency =

a =

b =

c =

d =

Dear :

This letter responds to your letter dated May 14, 1999, and subsequent correspondence, submitted on behalf of Taxpayer, requesting a private letter ruling regarding whether Taxpayer's proposed assisted living facility is residential rental property under § 42 of the Internal Revenue Code.

Taxpayer represents that the facts are as follows:

222

FACTS:

Taxpayer is a State nonprofit corporation exempt from federal income taxes under § 501(c)(3) which owns and operates a nonprofit rehabilitation hospital located in City.

Taxpayer is building an a unit assisted living low-income housing complex (the "Project"). The Project will consist of a private living units, each with a bedroom and bathroom, plus a communal kitchen, laundry, living and dining room areas, a patio, and outdoor amenities. The Project will be located on the northwest corner of Taxpayer's b acre campus, placed toward the residential corner of the property.

Taxpayer will apply for licensure as an assisted living facility from State upon completion of the Project.

Through the Project, Taxpayer will be assisting persons with special needs to achieve a more independent lifestyle. The Project is designed to serve persons whose care needs do not require the intensive nursing intervention provided by a nursing facility. Specifically targeted residents include, but are not limited to, persons with quadriplegia and/or mobile ventilator-dependence. These persons have chronic disabling conditions requiring physical assistance that will be provided by non-licensed personal care assistants. Taxpayer will utilize the services of a registered nurse consultant up to c hours per week per ventilator resident for education and assessment activities needed in order for the resident to make healthy choices. It is anticipated that not all of the residents will require nurse consultation; however, for budgetary planning purposes, a maximum has been established. If the Project is fully occupied by a residents, and if all a residents are utilizing ventilators, the maximum nurse consultant time per resident would be no more than d hours per week. No other nursing services are contemplated in connection with the Project. Of the current persons on the "waiting list," only c tenants are ventilator-dependent.

Taxpayer is required pursuant to a contract with State to offer the following assisted living services: (a) adult day care/socialization activities; (b) travel escort services; (c) essential shopping; (d) health maintenance activities; (e) housekeeping activities; (f) laundry services; (g) meal service; (h) medication assistance; (i) personal care services; and (j) transportation services.

If a resident's physical condition deteriorates, such resident would need to find an appropriate setting. If a medical emergency arises, a resident would need to go to a local acute care hospital of his/her choice. Taxpayer is not an acute care hospital. If it would be a gradual deterioration where the resident's needs exceed what can be provided in this assisted living setting, the resident would need to find a setting of his/her choice that could meet his/her needs. There is no provision for transfer to

Taxpayer. Most residents would not be eligible to be admitted to Taxpayer. Taxpayer is a free-standing, independent entity, with no exclusive affiliations with any other health provider systems.

Construction costs of the Project will be partially funded from equity contributions to Partnership, a State limited partnership to be formed with Taxpayer serving as the sole general partner. The Project residents will be required to meet certain admission criteria, including all requirements for residents of "low-income units," as defined in § 42(i)(3) of the Code, for purposes of qualifying the Project units for low-income housing tax credits under § 42. Taxpayer has filed an application for low-income housing tax credits with Agency.

The assisted living services to be provided to residents of the Project are inseparable from the amount of rental assistance provided, thus qualifying as "supportive services" under § 42(g)(2)(B)(iii) of the Code and § 1.42-11(b)(3)(ii)(A) of the Regulations.

The Project will not be used on a transient basis and will be available for use by the general public.

RULING REQUESTED:

Taxpayer's proposed assisted living facility qualifies as residential rental property for purposes of § 42 of the Code.

LAW AND ANALYSIS:

Section 38(a) provides for a general business credit against tax that includes the amount of the current year business credit. Section 38(b)(5) provides that the amount of the current year business credit includes the low-income housing credit determined under § 42(a).

Section 42(a) provides a tax credit for investment in qualified low-income housing buildings placed in service after December 31, 1986. For any taxable year in a ten-year credit period, the amount of credit is equal to the applicable percentage of the qualified basis of each qualified low-income building.

Section 42(g)(1) provides that the term "qualified low-income housing project" means any project of residential rental property if the residential units within such project meet the income limitation elected for the project for purposes of the minimum set-aside requirement and if the units meet the gross rent limitation, as well as all other requirements applicable to units satisfying the minimum set-aside requirement.

Section 42(g)(2)(B)(iii) provides, for purposes of § 42(g)(1), that gross rent does not include any fee for a supportive service which is paid to the owner of the unit (on the basis of the low-income status of the tenant of the unit) by any governmental program of assistance (or by any organization described in § 501(c)(3) and exempt from tax under § 501(a)) if such program (or organization) provides assistance for rent and the amount of assistance provided for rent is not separable from the amount of assistance provided for supportive services.

For purposes of § 42(g)(2)(B)(iii), the term "supportive service" means any service provided under a planned program of services designed to enable residents of a residential rental property to remain independent and avoid placement in a hospital, nursing home, or intermediate care facility for the mentally or physically handicapped.

Section 1.42-11(a) provides that the furnishing to tenants of services other than housing (whether or not the services are significant) does not prevent the units occupied by the tenants from qualifying as residential rental property eligible for the credit under § 42. However, any charges to low-income tenants for services that are not optional generally must be included in gross income for purposes of § 42(g).

Section 1.42-11(b)(1) provides that a service is optional if payment for the service is not required as a condition of occupancy.

Section 1.42-11(b)(2) provides that if continual or frequent nursing, medical, or psychiatric services are provided, it is presumed that the services are not optional and the building is ineligible for the credit, as is the case with a hospital, nursing home, sanitarium, lifecare facility, or intermediate care facility for the mentally and physically handicapped.

Section 1.42-11(b)(3)(i) provides that the cost of services that are required as a condition of occupancy must be included in gross rent even if federal or state law requires that the services be offered to tenants by building owners.

Section 1.42-11(b)(3)(ii) explains that § 42(g)(2)(B)(iii) provides an exception for certain fees paid for supportive services.

The distinction drawn in the regulations under § 42 regarding the nature of the facility based on the frequency of nursing, medical, or psychiatric services available in the facility is also the appropriate standard for determining whether facilities are residential rental property for purposes of § 142(d) or § 145(d).

Revenue Ruling 98-47, 1998-39 I.R.B. 4, provides guidance on whether facilities offering non-housing services for the residents of the facility will cause the facility to be other than residential rental property. For purposes of § 142(d) and § 145(d), if a

facility makes available continual or frequent nursing, medical, or psychiatric services, the facility will not be residential rental property under § 142(d) or § 145(d). The focus of these sections, their legislative histories, and the applicable regulations thereunder, is whether the facilities are, in substance, residences or health care facilities. Therefore, the nature and degree of the services provided by the facility controls.

In the present case, significant non-housing services will be made available to the residents of the Project, including meals and various support services. The services which will be available to the residents of the Project do not include continual or frequent nursing, medical, or psychiatric services. Thus, under the principles set forth above, the Project would be residential rental property for purposes of § 42.

No opinion is expressed or implied regarding the application of any other provisions of the Code or regulations. Specifically, we offer no opinion, either expressly or impliedly, on whether the Project will qualify for the low-income housing tax credit under § 42 or the validity of the Project's costs included in eligible basis.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the power of attorney filed with this request, we are sending a copy of this letter ruling to Taxpayer's authorized representative.

Sincerely yours,

(Signed) Harold E Burghart

Harold E. Burghart
Assistant to the Branch Chief,
Branch 5
Office of Assistant Chief Counsel
(Passthroughs and Special
Industries)

Enclosure: 6110 copy

226