

Chapter 24 Line 13 Building Disposition

Definition

Recapture of the accelerated portion of credits may be caused not only by noncompliance with the LIHC program *requirements,* but by either the sale or other disposition of an LIHC building or the sale of an ownership interest in such a building. It is important to report all dispositions* of low-income buildings that will *not* continue to be operated as a qualified low-income building after the disposition* so that the IRS can determine whether the taxpayer has complied with the requirements of IRC §42(j); i.e., the credits have been appropriately recaptured.¹

Types of Building Dispositions

Line 13a on Form 8823 identifies four categories of building dispositions.

1. SALE - Types of activities that would constitute a “sale” (which does not necessarily involve the seller receiving money) include:
 - a. Fee Title Sale of Building - Fee title passes from the seller to a whole new entity (buyer)
 - b. Termination of Partnership
2. FORECLOSURE - Foreclosure is the legal process reserved by a lender to terminate the borrower's interest in a property after a loan has been defaulted. On foreclosure, the *owner* is deemed to have made a sale of the property for the outstanding amount of the mortgage debt.
 - a. Deed of Property in Lieu of Foreclosure - the owner voluntarily conveys the property to the mortgage holder to avoid foreclosure proceedings.
3. DESTRUCTION - Destruction is related to a building's *physical structure*, and not to the ownership interest in the building. The destruction affects the building *in its entirety*, i.e., the eligible basis of the property is reduced to \$0. The destruction is *permanent* and the building is not expected to operate as a tax credit project again. Violations of the physical inspection standards, or casualty losses that are temporary in nature should not be reported as destruction, which is permanent.
4. OTHER (Attach Explanation) – Any event, not listed above, which results in the disposition of a low-income housing credit unit, building, or property.

¹ See Exhibit 24-1 for an explanation of the recapture requirements

**State Agency
Responsibility
for Reporting
Property
Dispositions**

The owner of a low-income housing building is the entity identified on the Form 8609. State agencies should confirm that the ownership has not changed as part of their monitoring and inspection responsibilities.

Example 1: Owners Sells LIHC Building

ABC, a limited partnership, owns and operates an LIHC building, and is identified as the owner on Form 8609. Mr. Jones is the general partner. There are two limited partners, Mr. Smith and the XYZ investment fund. On September 17, 2008, ABC sells the building to E&F, a limited partnership, *which intends to continue operating the building as an LIHC building.* As included in the extended use agreement, the state agency approved the sale. The state agency *is required to* report the disposition on Form 8823.

***Example 2: Owner Loses Ownership in Foreclosure Proceeding**

FGH, a limited partnership, owns and operates an LIHC building, and is identified as the owner on Form 8609. Mr. Jones is the general partner and the limited partner is the XYZ investment fund. On December 1, 2008, the partnership lost ownership of the building in a foreclosure proceeding. The new owner will not operate the building as a qualified low-income building. The state agency is required to report the disposition on Form 8823.*

LIHC buildings are generally owned by partnerships and identifying changes in the composition of the ownership entities is not required.

Example 3: State Agency Reviews Owner's Annual Certification

ABC, a limited partnership, owns and operates an LIHC building, and is identified as the owner on Form 8609. Mr. Jones is the general partner. There are two limited partners, Mr. Smith and the XYZ investment fund. As part of the regular monitoring procedures, the state agency reviews the owner's annual certification to confirm that ownership has not changed. The state agency is not required to ask whether Mr. Jones, Mr. Smith, or XYZ has disposed of their interest (or a portion of their interest).

References

1. IRC §42(j)(6) No recapture on disposition of building which continues in qualified use.
2. IRC §42(f)(4) Dispositions of property. If a building (or an interest therein) is disposed of during any year for which credit is allowable under subsection (a), such credit shall be allocated between the parties on the basis of the number of days during such year the building (or interest) was held by each. In any such case, proper adjustments shall be made in the application of subsection (j).
3. Rev. Rul. 91-38, 1991-26 I.R.B. 5, Q&A #5, "...For purposes of section 42(f)(4) of the Code, the owner who has held the property for the longest period during

the month in which a transfer occurs is deemed to have held the property for the entire month and may claim a credit accordingly. In cases in which the transferor and transferee have held the property for the same amount of time during the month of the transfer, the transferor is deemed to have held the property for the entire month and the transferee's ownership of the property is deemed to begin the first day of the following month..."

Exhibit 24-1 Explanation of Credit Recapture Requirements Under IRC §42(j)

As explained in the legislative history, the disposition of an LIHC building (or interest therein) is a recapture event.¹ The amount of the recapture is 1/3 of the allowable credit for each year if the building is disposed of through year 11 of the compliance period plus interest. The interest is computed at the overpayment rate established under IRC §6621 on the recaptured credit for each taxable year for the period beginning on the due date for filing the return for the prior taxable year involved. The amount of the recapture declines if the disposition occurs after year 11 of the credit period.

Taxpayers must file Form 8611, Recapture of Low-Income Housing Credit, with their tax return for the year of sale to recapture the LIHC.

Large Partnership Recapture

In the case of a large partnership (a partnership of 35 or more partners), the partnership is treated as the taxpayer to which the credit is allowable for purposes of recapture. The tax benefit rule under IRC §42(j)(4)(A) does not apply and the increase in tax because of the recapture amount is allocated among the partners in the same manner as the partnership's taxable income for the year is allocated among the partners.

The legislative history² also indicates that no change in ownership is deemed to occur on the disposition of a partner's interest provided that within a 12-month period at least 50 percent (in value) of the original ownership is unchanged. These conditions apply unless the partnership elects out of *large partnership treatment* under IRC §42(j)(5).

Other Partnerships and Recapture

For partnerships with fewer than 35 partners, and those electing out of the large partnership provisions of IRC §42(j)(5), a partner (taxpayer) may elect to avoid or defer recapture until the taxpayer has, in the aggregate, disposed of more than 33 1/3 percent of the taxpayer's greatest total interest in the qualified low-income building through the partnership at any time.

Once dispositions aggregate more than 33 1/3 percent, further deferral is possible *for dispositions on or before July 30, 2008,* only if a surety bond or alternative collateral was provided. The taxpayer that defers recapture by reason of the 33 1/3 percent rule will remain subject to recapture with respect to that interest. See Rev. Rul. 90-60, 1990-2 C.B. 35. *For dispositions after July 30, 2008, the taxpayer is not subject to the recapture requirement if it is reasonably expected that the building will continue to be operated as a qualified low-income buildings for the remaining compliance period.*

Posting Surety Bonds Upon Disposition

For dispositions on or before July 30, 2008, recapturing the accelerated portion of the credit could be avoided if it was reasonably expected that the building would continue to be operated as a qualified low-income building for the remaining compliance period and the owner selling the building, or interest therein, *timely posted* a bond equal to

¹ H.R. Conf. Rep. No. 481, 99th Cong., 2nd Sess. II-96 (1986)

² H.R. Conf. Rep. No. 481, 99th Cong., 2nd Sess. II-96 (1986)

the amount specified on Form 8693, Low-Income Housing Credit Disposition Bond. The IRS *approved* the bond when it was determined that the amount of the bond was correct and that the project was expected to remain in compliance for the balance of the initial compliance period; i.e., the new owner intended to maintain the building as low-income housing throughout the 15-year compliance period. The bond remained in effect until 58 months after the end of the 15-year compliance period.

As a practical matter, surety bonds were difficult and costly to obtain. Because of the amount of the bond needed and the inability of the seller to assure that the property would continue to comply (such power effectively being with the new owner), sureties were likely to require either full collateral or very high creditworthiness from the bonded party. IRS Revenue Procedure 99-11 established a collateral program as an alternative to providing a surety bond to avoid or defer recapture of low-income housing tax credits. Under this program, taxpayers pledged certain United States Treasury securities to the IRS as collateral.

The IRS could “call a bond” to recapture credit if it subsequently determined that the new owner did not continue to operate the building as a qualified low-income building for the remainder of the compliance period.

***Dispositions
after
July 30, 2008***

*For dispositions after July 30, 2008, owners are not required to recapture the accelerated portion of the credit if it is reasonably expected that the building will continue to be operated as a qualified low-income building for the remaining compliance period. Owners are not required to place a bond or pledge collateral at the time of the disposition, nor otherwise report the disposition to the IRS for purposes of IRC §42.

However, if there is any reduction in the qualified basis of a low-income building which results in an increase in tax under IRC §42(j) in the year of the disposition *or any subsequent tax year*, then the statutory period for assessing any deficiency with respect to such increase in tax shall not expire before the expiration of three years from the date the owner notifies the IRS of such reduction in qualified basis, notwithstanding any other law or rule of law that would otherwise prevent assessment.

Election to No Longer Maintain Surety Bond or Treasury Direct Account

If an owner disposed of an LIHC property (or interest therein) on or before July 30, 2008, and timely posted a bond (or Treasury Direct Account) equal to the amount specified on Form 8693, Low-Income Housing Credit Disposition Bond, the owner may elect to be treated as if the disposition took place after July 30, 2008, which will result in the cancellation of the bond or return of the funds held in Treasury Direct Accounts. Instructions for making the election are included in Revenue Procedure 2008-60.*

References

1. IRS Form 8609 instructions - Line 10(b) - Partnerships with 35 or more partners are treated as the taxpayer for purposes of recapture unless an election is made not to treat the partnership as the taxpayer. Check the “Yes” box if you do not want the partnership to be treated as the taxpayer for purposes of recapture.
2. IRC §42(j)(5).

3. IRC §42(j)(6).
4. Rev. Rul. 90-60, 1990-2 C.B. 3.
5. Rev. Proc. 99-11, 1999-2 I.R.B 14.
6. *Rev. Proc. 2008-60, 2008-43 I.R.B.1006.*