

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 07-11**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Whether the Taxpayers are exempt for Tennessee franchise and excise tax purposes as providers of affordable housing pursuant to Tenn. Code Ann. § 67-4-2008(a)(8).

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling and a retroactive revocation of the ruling must inure to his detriment.

FACTS

This letter ruling involves the following taxpayers: [NAMES OF ENTITIES]. Each Taxpayer is a Tennessee limited partnership organized exclusively for the purpose of providing affordable housing.

Between 1987 and 1989, each Taxpayer received an allocation of federal low-income housing credits pursuant to Section 42 of the Internal Revenue Code of 1986, as amended (“IRC § 42”).

In accordance with IRC § 42 as it was in effect at the time, Taxpayers did not enter into extended low-income housing commitments with the Tennessee Housing Development Agency (“THDA”) when they applied for allocations of federal low-income housing credits between 1987 and 1989. Instead, the deeds of trust to the Taxpayers’ real property contain certain restrictive use covenants. These covenants are not agreements entered into with THDA.

The Taxpayers have requested a letter ruling stating that they are exempt for Tennessee franchise and excise tax purposes pursuant to Tenn. Code Ann. § 67-4-2008(a)(8), despite the lack of an extended low-income housing commitment, because the commitment was not required when the Taxpayers received their allocations of federal credits.

QUESTION

Are the Taxpayers exempt for Tennessee franchise and excise tax purposes as providers of affordable housing, pursuant to Tenn. Code Ann. § 67-4-2008(a)(8)?

RULING

No. The Taxpayers are not exempt for Tennessee franchise and excise tax purposes pursuant to Tenn. Code Ann. § 67-4-2008(a)(8).

ANALYSIS

Tenn. Code Ann. § 67-4-2008(a)(8)¹ provides an exemption from the Tennessee excise tax for limited partnerships and limited liability companies that are organized exclusively for the purpose of providing affordable housing, provided they meet the following criteria: (1) the entity must have received an “allocation of low-income housing tax credits pursuant to Section 42 of the Internal Revenue Code of 1986, as amended;” and (2) an “extended low-income housing commitment as defined in Section 42(h)(6)(B) of the Internal Revenue Code of 1986, as amended, must be in effect with respect to each residential building owned by the entity for the period covered by the return.” Tenn. Code Ann. § 67-4-2105(a) exempts from the Tennessee franchise tax any entity that is exempt from the excise tax under Tenn. Code Ann. § 67-4-2008.

IRC § 42 provides a credit for federal income tax purposes to taxpayers that provide low-income housing and that satisfy a number of statutory requirements. The federal low-income housing credit is available only if an allocation of the credit is obtained from the housing agency of the state in which a project is located; in the Taxpayers’ case, the allocation must be obtained from THDA. Since 1990, IRC § 42(h)(6)(A) has required that an extended low-income housing commitment be in effect as of the end of the taxable year in which the federal credit is claimed.²

¹ Tenn. Code Ann. § 67-4-2008(a)(8) was enacted in 2004, and applies to all taxable years ending on or after June 30, 2003.

² IRC § 42(a), prior to its amendment in 1989, allowed a ten-year tax credit for investment in qualified low-income buildings placed in service after December 31, 1986, and, with certain limited exceptions, before January 1, 1990. As enacted, IRC § 42 allowed allocations in calendar years 1987, 1988, and 1989. The 1989 amendment extended the credit to allow allocations after 1989 and amended certain provisions of IRC § 42. Among the changes made by the 1989 amendment to IRC § 42 was the addition of IRC § 42(h)(6)(A), which provides that a building will be

Additionally, IRC § 42(h)(6)(B)(vi) requires that the extended low-income housing commitment be recorded as a restrictive covenant on the property that is the subject of the credit. Prior to 1990, however, IRC § 42 did not require taxpayers to enter into an extended low-income housing commitment or to record the commitment as a restrictive covenant to receive an allocation of federal credits. Because there was no such requirement, the Taxpayers did not enter into extended low-income housing commitments with THDA when they applied for allocations of federal low-income housing credits between 1987 and 1989. Instead, the deeds of trust to the Taxpayers' real property contain certain restrictive use covenants. These covenants are not agreements entered into with THDA.

Tenn. Code Ann. § 67-4-2008(a)(8)(B) clearly and unambiguously states that “an extended low-income housing commitment as defined in Section 42(h)(6)(B) of the Internal Revenue Code of 1986, as amended, must be in effect” for a taxpayer to qualify for the exemption. Because the requisite extended low-income housing commitments are not in effect in the Taxpayers' case, the Taxpayers do not qualify for the exemption under Tenn. Code Ann. § 67-4-2008(a)(8).

The suggestion has been made that, despite the clear and unambiguous requirement under Tenn. Code Ann. § 67-4-2008(a)(8)(B), the Tennessee legislature intended to provide an exemption to all entities that qualify for the federal low-income housing credit, including those that received allocations of credits prior to the enactment of the extended low-income housing commitment requirement in 1990. This assertion conflicts, however, with established rules of statutory construction that require one to ascertain legislative intent from the natural and ordinary meaning of the language used in the statute.

The Tennessee Supreme Court has stated that legislative intent is to be ascertained whenever possible “without forced or subtle construction that would limit or extend the meaning of the language.” *Boarman v. Jaynes*, 109 S.W.3d 286, 290-291 (Tenn. 2003). Similarly, the Tennessee Court of Appeals has stated that “courts must give effect to the ‘plain import of the language of the act’ and must not use the strict construction rule to thwart ‘the legislative intent to tax.’” *Saturn Corp. v. Johnson*, 197 S.W.3d 273, 276 (Tenn.Ct.App. 2006) (citing *International Harvester Co. v. Carr*, 466 S.W.2d 207, 214 (Tenn. 1971)). The plain and ordinary meaning of Tenn. Code Ann. § 67-4-2008(a)(8)(B) is that the taxpayer must have an extended low-income housing commitment in place to qualify for the exemption. To read an exception into this unambiguous language would be a forced construction that would improperly limit the statute's meaning. Moreover, an interpretation of Tenn. Code Ann. § 67-4-2008(a)(8)(B) that would apply the requirement only to taxpayers that received allocations of federal credits beginning in 1990 would simply contradict the plain language of the statute.

Additionally, the clear language of Tenn. Code Ann. § 67-4-2008(a)(8)(B) raises doubts that the Taxpayers are entitled to the exemption despite the lack of extended low-income housing commitments. Accordingly, the Taxpayers' claim of exemption must be denied because the Taxpayers have the burden of proving that they are entitled to the exemption under Tenn. Code

eligible for the credit only if the taxpayer and the housing credit agency enter into an extended low-income housing commitment, as defined in IRC § 42(h)(6)(B). See Rev. Rul. 92-79, 1992-2 C.B. 10.

Ann. § 67-4-2008(a)(8) despite the clear wording of the statute. The Tennessee Supreme Court has stated that “[a]lthough the rule is well-established that taxing legislation should be liberally construed in favor of the taxpayer and strictly construed against the taxing authority, it is an equally important principle of Tennessee tax law that ‘exemptions from taxation are construed against the taxpayer who must shoulder the heavy and exacting burden of proving the exemption.’” *American Airlines, Inc. v. Johnson*, 56 S.W.3d 502, 506 (Tenn.Ct.App. 2000) (quoting *Rogers Group, Inc. v. Huddleston*, 900 S.W.2d 34, 36 (Tenn.Ct.App. 1995)). The Tennessee Supreme Court has also stated that the burden is on the taxpayer to establish the exemption, and any well-founded doubt is sufficient to defeat a claimed exemption from taxation. *American Airlines, Inc. v. Johnson*, 56 S.W.3d at 506 (citing *Tibbals Flooring Co. v. Huddleston*, 891 S.W.2d 196, 198 (Tenn. 1994); *United Cannery, Inc. v. King*, 696 S.W.2d 525, 527 (Tenn. 1985)).

Accordingly, the Taxpayers are not exempt for Tennessee franchise and excise tax purposes as providers of affordable housing pursuant to Tenn. Code Ann. § 67-4-2008(a)(8).

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APPROVED: Reagan Farr
Commissioner of Revenue

DATE: 4/18/07