

## Treasury Decision 8731, IRC Sec(s). 42

**Agency:** Internal Revenue Service (IRS), Treasury.

**Action:** Final and temporary regulations.

**Summary:** This document contains final regulations with respect to the low-income housing tax credit relating to the application of section 42(d)(5) to certain rental assistance programs under section 42(g)(2)(B)(i). The regulations clarify that certain types of federal rental assistance payments do not result in a reduction in the eligible basis of a low-income housing building. DATES: These regulations are effective September 26, 1997.

**For Further Information Contact:** Christopher J. Wilson, (202) 622-3040 (not a toll-free call).

### Supplementary Information

#### *Background*

Temporary regulations (TD 8713) and a notice of proposed rulemaking cross-referencing the temporary regulations were published in the Federal Register for January 27, 1997 (62 FR 3792, 3848). Those regulations provide that certain federal rental assistance payments made to the owner of a building on behalf of low-income tenants are not federal grants with respect to a building or its operation that require a reduction in the building's eligible basis under section 42(d)(5) of the Internal Revenue Code (Code). These payments include rental assistance payments made under section 8 of the United States Housing Act of 1937 (Act) (42 U.S.C. 1437f), certain payments made under section 9 of the Act (42 U.S.C. 1437g), and payments made under such other programs or methods of rental assistance as may be designated in the Federal Register or the Internal Revenue Bulletin. The notice of proposed rulemaking indicated that comments would be considered on those areas addressed in the temporary regulations. Written comments responding to the notice of proposed rulemaking were received. There was no request for a public hearing, and no public hearing was held. After consideration of all the written comments, the proposed regulations have been adopted, without change, by this Treasury decision.

#### *Summary of Comments*

One commenter suggested that the final regulations provide additional guidance for state agencies to use in determining whether similar programs beyond those described in the regulations should be considered grants that cause a reduction in a building's eligible basis under section 42(d)(5) of the Code. The final regulations do not adopt this suggestion. The scope of this regulation is limited to specified rental assistance payments that are not grants requiring a reduction in a building's eligible basis and any additional payments the Secretary may designate in the future.

Another commenter suggested that section 1.42-16(c)(3) should be deleted if it is intended to impose conditions beyond the restrictions under section 9 of the Act, because the IRS is improperly infringing upon the Department of Housing and Urban Development's (HUD) authority to provide subsidies under section 9. The final

regulations do not adopt this suggestion. Section 1.42-16 does not interpret HUD's authority for paying subsidies under section 9; it describes the extent to which section 9 payments may be made without a reduction in a building's eligible basis under section 42(d)(5) of the Code. The conditions imposed on section 9 payments in section 1.42-16(c)(3) serve to differentiate section 9 assistance for operating expenses that function in a manner similar to rental assistance payments under section 8 of the Act from section 9 assistance that is applied to uses more closely associated with operational expenses requiring a reduction in a building's eligible basis under section 42(d)(5).

This commenter also suggested that if section 1.42-16(c)(3) were to be retained, it should be clarified to provide that actual operating costs be determined by HUD and/or the appropriate public housing agency. The commenter reasons that HUD is already making this determination in the context of deciding the proper amount of assistance to make under section 9 of the Act, and that precedent already exists for allowing HUD to make certain interpretations relating to the section 42 program. The final regulations do not adopt this suggestion. The IRS and Treasury believe they should retain the ability to determine what costs are appropriately characterized as operating costs that require a reduction in a building's eligible basis under section 42(d)(5) of the Code.

#### *Special Analyses*

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because these regulations do not impose on small entities a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

#### *Drafting Information*

The principal author of these regulations is Christopher J. Wilson, Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.