FINAL PRIVATE LETTER RULING

REQUEST LETTER

09-015

June 11, 2009

Office of the Commissioner
Utah State Tax Commission
210 North 1950 West
Salt Lake City UT 84134

Re: COMPANY – Request for Expedited Advisory Opinion Regarding Allocation of Utah Low-Income Housing Tax Credits

Dear Sir or Madam:

On behalf of COMPANY, a public corporation of the State of Utah created in accordance with Sections 9-4-901 et seq. of the Utah Code ("COMPANY"), we respectfully request an advisory opinion regarding the allocation of State of Utah low-income housing tax credits ("Utah Tax Credits") which may be claimed pursuant to section 59-7-607 and Section 59-10-1010 of the Utah Code (the "Utah Low-Income Housing Tax Credits Law"). COMPANY is the designated agency for allocating federal and Utah Tax Credits in the State of Utah. The Utah Low-Income Housing Tax Credits Law was originally enacted by the Utah legislature in 1994 (as H.B. 205) to provide the private sector with additional incentives to develop affordable housing in the State of Utah. For ease of administration, the Utah Low-Income Housing Tax Credits Law "piggybacks" on the federal low-income housing tax credits program. COMPANY awards Utah Tax Credits to owners/developers of eligible projects. The award is normally based on a percentage, determined by COMPANY, of the amount of the federal tax credits to which the owner would be entitled in any given year during the period (i.e., normally 10 years) in which federal and Utah Tax Credits are available to an eligible project. As a result, neither the Utah State Tax Commission (the "Tax Commission" nor COMPANY is required to independently verify any aspect of the Utah Tax Credits program.

Following enactment of the Utah Low-Income Housing Tax Credits Law, it became apparent that there are many more potential investors for affordable housing projects with federal income tax liability but no Utah tax liability than potential investors with both federal and Utah tax liabilities. As a result, the potential pool of investors was restricted, leading to lower investments in Utah affordable housing projects than was desirable. To address this problem, COMPANY worked with the staff of the Tax Commission in 1999 to develop legislation amending the Utah Low-Income Housing tax Credits Law to allow some investors in an affordable housing project to obtain the benefits of the federal tax credits while other investors obtain the benefits of the Utah Tax Credits. The Utah legislature enacted that legislation by approving H.B. 309 which amended the Utah Low-Income Tax Credits Law to permit the

"housing sponsor" (e.g., the limited liability company owning the project) and the taxpayers entitled to the Utah Tax Credits (e.g., members of the limited liability company) to enter into an agreement which determines the allocation of available Utah Tax Credits as amongst themselves.

In order to provide amplification and assurance to potential investors in affordable housing projects that the Utah Low-Income Housing Tax Credits Law allowed investors to share the Utah Tax Credits in different percentages than the federal tax credits, the Tax Commission issued an advisory opinion to COMPANY (02-013) on September 4, 2002 (the "Prior Opinion"). The Prior Opinion confirmed that the housing sponsor and the taxpayers may, by agreement, determine the allocation of available Utah Tax Credits without restriction (i.e., the allocation need not be in proportion to the ownership interests and, in fact, all of the Utah Tax Credits may be allocated to a single member even though that member owns a minimal interest in the housing sponsor). For almost 10 years, COMPANY and investors in affordable housing programs in Utah have relied on the Prior Opinion.

In its 2009 General Session, the Utah legislature approved S.B. 23, Income Taxation of Pass-Through entities and Pass-Through Entity Taxpayers, which enacted Section 59-10-1404.5 and amended Section 59-10-1405 of the Utah Code (the "New Legislation") to, among other things, specify the manner in which credits are to be allocated to the taxpayers of the pass-through entity. In general, the new provision provides that credits which are not required to be taken into account separately for federal income tax purposes are to be allocated to the taxpayers in accordance with their ownership interests. The New Legislation is effective for tax years beginning on or after January 1, 2009.

The New Legislation did not amend the Utah Low-Income Tax Credits Law which still provides that the housing sponsor and the taxpayers, by agreement, determine the allocation of Utah Tax Credits. The Utah Low-Income Housing Tax Credits Law and the New Legislation appear to be inconsistent and in conflict. Recently, representatives of COMPANY and developers of affordable housing have contacted the Tax Commission and been advised that Utah tax Credits are subject to the New Legislation. However, it is a well recognized rule of statutory construction that when two statues are in apparent conflict with one another then the statute specifically dealing with the issues at hand governs over the more general statutory provisions. In this case involving Utah Tax Credits, the Utah Low-Income Housing Tax Law should take precedence over the New Legislation.

COMPANY respectfully requests that the Tax Commission issue an advisory opinion that the Utah Low-Income Housing Tax Credits Law continues to allow the housing sponsor and taxpayer to agree on the allocation of available Utah Tax Credits without restriction, notwithstanding the New Legislation, as described in the Tax Commission's Prior Opinion. In the event the Tax Commission is not willing to issue the requested advisor opinion, COMPANY requests a conference with Tax Commission representatives to discuss this matter. Further in the event the Tax Commission is not willing to issue the requested advisory opinion, COMPANY requests an advisory opinion with respect to the application of the New Legislation's January 1, 2009 effective date to existing affordable housing projects which have agreements in place, consistent with the Utah Low-Income Housing Tax Credits Law and the Prior Opinion, to allocate Utah Tax Credits differently than called for by the New Legislation. COMPANY

requests that the Tax Commission "grandfather" those agreements for the balance of the period (i.e., normally 10 years) over which the Utah Tax Credits are to be claimed with respect to the project, notwithstanding the New Legislation.

As indicated above, there are a few affordable housing projects that cannot proceed until the issue which is the subject of this request for an advisory opinion is resolved. The developer/owners are anxious for a resolution. Accordingly, if you could respond to this request on an expedited basis, it would be greatly appreciated. A response by June 30, 2009 would be ideal, if possible. If you have any questions or require any additional information, please contact the undersigned at your earliest convenience.

Very truly yours,

REPRESENTING COMPANY
NAME 1

Enclosure

NAME 2
NAME 3
NAME 4
NAME 5
NAME 6

RESPONSE LETTER

October 7, 2009

NAME
REPRESENTING COMPANY
ADDRESS

RE: Private Letter Ruling Request—Effect of S.B. 23 enacted in 2009 on the allocation of Utah Low-Income Housing Tax Credits

Dear NAME:

You requested a ruling on behalf of your client, the COMPANY, concerning the possible effect of S.B. 23 on the allocation of the Utah Low-Income Housing Tax Credits ("Credits").

Before the Legislature enacted S.B. 23 during the 2009 General Session, the Commission issued Private Letter Ruling 02-013 ("PLR 02-013") based on Utah Code Ann. §§ 59-7-607 and 59-10-1010.[1] In PLR 02-013, the Commission ruled that the Credits are allocated among the taxpayers according to the agreement between the housing sponsor and the taxpayers. You have expressed concern that S.B. 23 may have changed the prospective applicability of PLR 02-013.

Applicable Law

Utah Code Ann. §§ 59-7-607 and 59-10-1010 address the allocation of the Credits. Under § 59-7-607(2)(c)(ii)(B), "the percentage of a tax credit a taxpayer may claim [is] as provided in the agreement between the taxpayer and the housing sponsor." Under § 59-7-607(1)(d), a "housing sponsor" can be a C corporation, partnership, S corporation, or limited liability company ("LLC"). Under § 59-7-607(1)(g), "'Taxpayer' means a person that is allowed a tax credit in accordance with this section . . ." Taxpayers can be partners, shareholders, or members. § 59-7-607(1)(g).

Similarly, under § 59-10-1010(2)(c)(ii)(B), "the percentage of tax credit a claimant, estate, or trust may claim [is] as provided in the agreement between the claimant, estate, or trust and the housing sponsor." Under § 59-10-1010(1)(d), "housing sponsor" has the same meaning as provided in § 59-7-607(1)(d).

S.B. 23 enacted Utah Code Ann. § 59-10-1404.5 and amended Utah Code Ann. § 59-10-1405. Some provisions of §§ 59-10-1404.5 and 59-10-1405 were previously found in Utah Code Ann. §§ 59-10-1404 to1405 (2008). The prior versions of §§ 59-10-1404 to 1405 (2008) were Utah Code Ann. §§ 59-10-302 to 303 (2007), which were in effect when PLR 02-013 was issued.

[1] Section 59-10-1010 was previously Utah Code Ann. § 59-10-129, which the Commission cited in PLR 02-013.

Section 59-10-1404.5 states:

(1) In determining the taxable income of a resident pass-through entity taxpayer, an addition, subtraction, or adjustment that relates to an item of income, gain, loss, deduction, or credit of a pass-through entity shall be made in accordance with this section.
(2) For a resident pass-through entity taxpayer of a pass-through entity except for a pass-through entity that is an S corporation, the resident pass-through entity taxpayer's share of an addition, subtraction, or adjustment that relates to an item of income, gain, loss, deduction, or credit is:
    (a) if the item of income, gain, loss, deduction, or credit is required to be taken into account separately for federal income tax purposes, the resident pass-through entity taxpayer's distributive share of the item of income, gain, loss, deduction, or credit:
        (i) for federal income tax purposes; and
        (ii) determined under Section 704 et seq., Internal Revenue Code; or
    (b) if the item of income, gain, loss, deduction, or credit is not required to be taken into account separately for federal income tax purposes, determined in accordance with the resident pass-through entity taxpayer's distributive share of income, gain, loss, deduction, or credit:
        (i) relating to the pass-through entity generally;
        (ii) for federal income tax purposes; and
        (iii) under Section 704 et seq., Internal Revenue Code.
(3) For a resident pass-through entity taxpayer of a pass-through entity that is an S corporation, the resident pass-through entity taxpayer's share of an addition, subtraction, or adjustment that relates to an item of income, gain, loss, deduction, or credit is:
    (a) if the item of income, gain, loss, deduction, or credit is required to be taken into account separately for federal income tax purposes, the resident pass-through entity taxpayer's pro rata share of the item of income, gain, loss, deduction, or credit:
        (i) for federal income tax purposes; and
        (ii) determined under Section 1366 et seq., Internal Revenue Code; or
    (b) if the item of income, gain, loss, deduction, or credit is not required to be taken into account separately for federal income tax purposes, determined in accordance with the resident pass-through entity taxpayer's pro rata share of the item of income, gain, loss, deduction, or credit:
        (i) relating to the pass-through entity generally;
        (ii) for federal income tax purposes; and
        (iii) under Section 1366 et seq., Internal Revenue Code.

(Emphasis added.)

Section 59-10-1405 (enacted in 2009) applies to a "nonresident pass-through entity taxpayer" and contains language similar to that of § 59-10-1404.5. However, when items are not

required to be taken into account separately for federal income tax purposes, § 59-10-1405 adds a fourth condition: a taxpayer's share is determined in accordance with the taxpayer's distributive or pro rata share "derived from or connected with Utah sources." *See* §§ 59-10-1405(1)(b)(ii)(D) and 59-10-1405(1)(c)(ii)(D).

Prior law, § 59-10-302 (2002) states:

> (1) Each item of partnership income, gain, loss, or deduction has the same character for a partner under this chapter as it has for federal income tax purposes. When an item is not characterized for federal income tax purposes, it has the same character for a partner as if realized directly from the source from which realized by the partnership, or incurred in the same manner as incurred by the partnership.
> (2) In determining state taxable income of a resident partner any modification described in Section 59-10-114 which relates to an item of partnership income, gain, loss or deduction shall be made in accordance with the partner's distributive share, for federal income tax purposes, of the items to which the modification relates. Where a partner's distributive share of any such item is not required to be taken into account separately for federal income tax purposes, the partner's distributive share of such item shall be determined in accordance with his distributive share, for federal income tax purposes, of partnership income or loss generally.

(Emphasis added.)

Prior law, § 59-10-303 (2002) states:

> (1) In determining the adjusted gross income of a nonresident partner of any partnership, there shall be included only that part derived from or connected with sources in this state of the partner's distributive share of items of partnership income, gain, loss, and deduction entering into his federal adjusted gross income, as such part is determined under rules prescribed by the commission in accordance with the general rules in Section 59-10-116.
> (2) In determining the sources of a nonresident partner's income, no effect shall be given to a provision in the partnership agreement which:
> (a) characterizes payments to the partner as being for services or for the use of capital, or allocates to the partner, as income or gain from sources outside this state, a greater proportion of the partner's distributive share of partnership income or gain than the ratio of partnership income or gain from sources outside this state to partnership income or gain from all sources, except as authorized in Subsection (4);
> (b) allocates to the partner a greater proportion of a partnership item of loss or deduction connected with sources in this state than his proportionate share, for federal income tax purposes, of partnership loss or deduction generally, except as authorized in Subsection (4).

(3) Any modification described in Section 59-10-114 that relates to an item of partnership income, gain, loss, or deduction, shall be made in accordance with the partner's distributive share for federal income tax purposes of the item to which the modification relates, but limited to the portion of such item derived from or connected with sources in the state.
(4) The commission may, on application, authorize the use of such other methods of determining a nonresident partner's portion of partnership items derived from or connected with sources in this state, and the modifications related thereto, as may be appropriate and equitable, on such terms and conditions as it may require.
(5) A nonresident partner's distributive share of items of income, gain, loss, or deduction shall be determined under Subsection 59-10-302(2). The character of partnership items for a nonresident partner shall be determined under Subsection 59-10-302(1).

(Emphasis added.)

Analysis

As discussed below, the allocation of the Credits is unaffected by S.B. 23. These credits continue to be allocated among the taxpayers according to the agreement between the housing sponsor and the taxpayers.

Sections 59-7-607 and 59-10-1010 explicitly state that a Credit may be allocated according to the agreement between the housing authority and the taxpayers. Section 59-7-607(2)(c)(ii)(B) states, "the percentage of a tax credit a taxpayer may claim [is] as provided in the agreement between the taxpayer and the housing sponsor." Similarly, § 59-10-1010(2)(c)(ii)(B) states, "the percentage of tax credit a claimant, estate, or trust may claim [is] as provided in the agreement between the claimant, estate, or trust and the housing sponsor."

The allocation by agreement is allowed even if the taxpayers are shareholders. Under § 59-7-607(1)(d), the housing sponsor may be an S corporation, and under § 59-7-607(1)(g), the taxpayer may be a shareholder. Therefore, under § 59-7-607(2)(c)(ii)(B), the Credits are still allocable by agreement even when the housing sponsor is an S corporation and the taxpayer is a shareholder.

Normally, allocations of items of among shareholders must be made on a pro rata basis. For S corporations and their shareholders, § 59-10-1404.5(3)(b) provides that if an item of income, gain, loss, deduction, or credit is not required to be taken into account separately for federal income tax purposes, the allocation of the item is determined in accordance with the resident pass-through entity taxpayer's pro rata share of the item. Basically, § 59-10-1404.5(3)(b) requires that credits, like other items, be allocated on a pro rata basis only.

For S corporations, §§ 59-7-607(2)(c)(ii)(B) and 59-10-1404.5(3)(b) are in conflict and cannot both apply. Section 59-7-607(2)(c)(ii)(B) allows the Utah Low Income Housing Tax

Credit to be allocated by agreement, while § 59-10-1404.5(3)(b) requires all credits in general to be allocated on a pro rata basis.

To resolve this conflict, we look to the Utah Supreme Court for guidance. You correctly note in your letter that **it is a well recognized rule of statutory construction that when two statues are in apparent conflict with one another, the statute dealing with the specific issues at hand governs over general statutory provisions**. This principle was stated by the Court in *Dairyland Ins. Co, v. State Farm Mut. Auto. Ins. Co.*, 882 P.2d 1143, 1146 (Utah 1994), which in turn was cited in *Hercules Inc. v. Utah State Tax Comm'n.*, 21 P.3d 231, 232 n.3 (Utah Ct. App. 2000). Section 59-7-607(2)(c)(ii)(B) is narrowly drafted to specifically address the Utah Low Income Housing Tax Credit, while § 59-10-1404.5(3)(b) is broadly drafted to cover all items of income, gain, loss, deduction, or credit for an S corporation. Accordingly, the Commission finds that § 59-7-607(2)(c)(ii)(B) best reflects the intent of the Legislature for the Utah Low Income Housing Credit because of that statute's specificity and that it trumps § 59-10-1404.5(3)(b).

In addition, although § 59-10-1404.5(3)(b) was enacted subsequent to § 59-7-607(2)(c)(ii)(B), it did not substantively change the Low Income Housing Tax Credit. Section 59-10-1404.5(3)(b) was rewritten, in part, from § 59-10-1404 (2008). The Legislature also expanded § 59-10-1404.5 to cover credits and to specifically address S corporations. However, these changes are general in nature and do not directly address the Low Income Housing Credit.

The allocations of the Credit under § 59-7-607 are not limited by § 59-10-1404.5, regardless of whether the housing sponsors are S corporations, partnerships, or limited liability companies ("LLCs"). For allocation of the Credits, the Commission finds that all housing sponsors should be treated the same. Section 59-7-607 does not distinguish between housing sponsors that are S corporations from those that are partnerships or LLCs, and it does not distinguish between taxpayers that are shareholders from those that are partners or members. Therefore, all housing sponsors and taxpayers should be treated equally under § 59-7-607 and allowed to allocate the Credit based on their agreements. As we indicated previously in this ruling, the Commission found that § 59-10-1404.5 does not limit the allocation of the Credit by a housing sponsor that is an S corporation. To treat all housing sponsors equally, the Commission likewise finds here that § 59-10-1404.5 does not limit the allocation of the Credit by a housing sponsor that is a partnership or an LLC.

While this PLR analyzed §§ 59-7-607 and 59-10-1404.5 in detail, the same reasoning applies to the related sections §§ 59-10-1010 and 59-10-1405. Both §§ 59-7-607 and 59-10-1010 allow the allocation of the Credit to be made according to certain agreements, and both §§ 59-10-1404.5 and 59-10-1405 do not limit those allocations made by agreements.

This ruling is consistent with our prior ruling, PLR 02-013. The Commission again rules that the Credits are allocated among the taxpayers according to the agreement between the housing sponsor and the taxpayers. S.B. 23 has not changed the prospective applicability of PLR 02-013.

Conclusion

The Utah Low Income Housing Tax Credits may be allocated according to the agreements between the housing sponsors and taxpayers according §§ 59-7-607 and 59-10-1010. These allocations are not limited by §§ 59-10-1404.5 and 59-10-1405. Our conclusions are based on the facts as described. Should the facts be different, a different conclusion may be warranted. If you feel we have misunderstood the facts as you have presented them, if you have additional facts that may be relevant, or if you have any other questions, please contact us.

For the Commission,

Marc B. Johnson
Commissioner

MBJ/aln
09-015