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Will Historic Boardwalk Guidance Restrict Last-Minute Investor Involvement?

Last-minute investor involvement in section 47 historic rehabilitation tax credit deals is “something that I think we need to take into account” in a coming safe harbor revenue procedure, Curtis Wilson, IRS associate chief counsel (passthroughs and special industries), said November 6.

Investors who come in at the last minute to limit their downside risk in such deals are anxiously awaiting the guidance, which the IRS plans to issue in response to the Third Circuit’s decision in *Historic Boardwalk Hall LLC v. Commissioner*, No. 11-1832 (3d Cir. 2012).

Speaking at the American Institute of Certified Public Accountants’ Fall Tax Division meeting in National Harbor, Md., William P. O’Shea of Deloitte Tax LLP said he has heard rumors that the government is considering restricting availability of the credit when the tax equity investor is brought in right before the project is placed in service. That restriction is not a good idea, he said.

O’Shea added that he believed that at the American Bar Association Section of Taxation meeting in San Francisco, Craig Gerson, attorney-adviser, Treasury Office of Tax Legislative Counsel, indicated that the coming section 47 safe harbor would focus on upside rather than downside.

“There’s recognition that an entirely legitimate deal might not have a lot of downside risk, because the credits themselves are going to give you a cushion in terms of a return of your investment,” said Wilson, who spoke on his own behalf. “It’s probably true that in terms of the balance of things, you need some downside risk, but upside risk is probably more of our focus this time.”

Management Fee Waivers

Wilson said the IRS is working on guidance on management fee waivers. He noted that while some waivers are hardwired to occur at partnership formation, others occur at the election of the partner before earning the fee.

“Most [partners] do it annually, but I understand there are some that do it quarterly. Rumor has it that there are some that even do it monthly. That’s creating perhaps some concerns that these waivers aren’t necessarily appropriate,” Wilson said.

Noel Brock, a professor at West Virginia University, asked whether the IRS’s guidance will alter the tax treatment of the fee waiver based on when the waiver occurs.

Wilson said the IRS is considering the timing — “basically, how genuine is it” that the partner is exposed to not earning the fee. “We’re relatively early on this one. We’ve given some thought to some approaches, but we’ve been focusing on some other things,” he said.

Publicly Traded Partnership Qualifying Income

O’Shea said he thought the IRS has been issuing more generous private letter rulings than it has in

the past on what constitutes qualifying income under section 7704 for publicly traded partnerships.

“That depends on the perspective,” Wilson said. “We’ve given some rulings in the past and tried to be consistent. Every time you do something in a little bit different fact situation, it starts looking similar to something else.”

Wilson added that the IRS has several pending section 7704 letter rulings. “And you don’t always see them because [taxpayers] withdraw, but we’ve turned down a number, too,” he said.

O’Shea questioned whether the IRS might consider making public the type of circumstances that have been denied rulings. “Maybe that’s a situation where we need to do a little guidance that puts some parameters around what we think is good and what’s bad,” Wilson said.

He also announced that his office’s phone number will change from 202-622-3000 to 202-317-3100 in the coming weeks.

by Amy S. Elliott