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COMMUNITY DEVELOPMENT FINANCE ALERT | NIXON PEABODY LLP

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## New IRS rule on amended returns can affect LIHTC partnerships

By Forrest Milder

In a world of non-stop coronavirus talk, we'd like to redirect you for a minute to the Bipartisan Budget Act of 2015 (BBA). It changed the audit and amended return rules for many partnerships.

You may be wondering: Why are we discussing the 2015 BBA rules in 2020? And what does this have to do with affordable housing? And, last but not least, does this have something to do with the coronavirus (COVID-19)?

Alas, the answer to all these questions requires more words than you might have expected. But we promise it's worth reading!

Let's start with some special tax credit requirements that apply to affordable housing. Partnerships that invest in LIHTC projects rely on getting a Form 8609 from the operating partnership evidencing the amount of credits to which they are entitled. While IRS rules require the 8609 in order to claim the credits, experienced investors know that the 8609 is sometimes delayed. In response, they either file their tax returns based on estimates, or wait to claim the credits, anticipating that they can ultimately amend the first year's returns, and still be entitled to the LIHTC for the initial year anyway.

And here's where the BBA rules kick in. First, while the BBA became law in 2015, its new audit and amended return rules only applied starting with the 2018 tax year. This explains why you are hearing much more about them in the past few months. Second, the rules eliminate "amended returns" in favor of "administrative adjustment requests" (AARs) that require IRS approval. And, third, any favorable tax adjustment that comes from an AAR is recognized in the year that the AAR is filed, **not** the year that is the subject of the amended return.

In other words, under the **old** (before the BBA) rules, if an investment partnership claimed the LIHTCs without an 8609, and it later got an 8609 that was consistent with what it claimed, or it simply waited until it got the 8609 and then filed an amended return, it would still get the benefit of the adjustment in the "real" first year of the credit period. But under the **new BBA** rules, the application of the credit might actually be delayed by a year or two.

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For example, suppose a taxpayer expected \$1M of LIHTCs for 2018, but it didn't yet have an 8609, and it filed its 2018 return in April 2019, without claiming the credits. In December 2019, it gets an 8609 supporting a \$1M 2018 tax credit. In January 2020, it files with the IRS claiming the \$1M of 2018 credits. Under the **old** law, it would have filed an amended return, and gotten the \$1M benefit on its amended **2018** return. Under the **new** law, it files an AAR, it has to get IRS approval, and then it will get the \$1M benefit on its **2020** return. In other words, under the new law, it will get no credits for 2018, and extra credits for 2020.

It won't surprise you that many industry associations are lobbying the Congress and writing to the IRS asking for a change to this rule to assure that first year credits can be taken in the first year of the credit period, not at some later date. Still, the rules associated with claiming LIHTCs and filing amended returns are a pretty specialized area, and while the IRS is seriously thinking about this issue, it's easy to imagine it being lost among the hundreds of constituencies affected by the current coronavirus-affected state of the economy.

And, you are probably still wondering what motivated us to send an alert in April, 2020, about this five-year old law, which went into effect two years ago. The answer to that inquiry **is** related to the coronavirus, although it will take a moment to see how.

We start with the 2020 Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). It provides certain benefits associated with claiming net operating loss (NOL) carrybacks from 2018 through 2020 to earlier years. Of course, this has nothing to do with LIHTCs and 8609s, but we'll get to that.

Unfortunately, the BBA's amended return rules that I described above delay a partnership's ability to claim these NOLs as soon as possible. This is because a partnership with carryback NOLs could no longer apply the old, pre-BBA law, file **amended returns**, and claim the tax benefit in a prior year or years. Instead, under the BBA, our partnership would have to file **AARs** under the new law, and claim the benefit in the later year of filing. For 2020, that will be a return filed in 2021. But Congress didn't want such a delay; it wanted to make these new NOL carryback rules work as soon as possible.

With that in mind, the IRS has just published Rev. Proc. 2020-23, giving partnerships subject to the BBA rules until September 30, 2020, to file an amended partnership return (instead of an AAR) for 2018 and/or 2019, greatly speeding up the refund process.

Based on the new revenue procedure, you will see many alerts and articles observing that Rev. Proc. 2020-23 was issued to enable partnerships to take advantage of the CARES Act NOL provisions, and as I wrote above, it certainly was. Indeed, even the IRS used the heading "COVID-19 relief for partnerships with NOLs" in describing the new revenue procedure.

**However**, the revenue procedure goes farther than that, stating "The amended returns may take into account tax changes brought about by the CARES Act **as well as any other tax attributes to which the partnership is entitled by law.**"

So, having nothing to do with the CARES Act, if a partnership desired to file an amended return for 2018 so as to attach its late-received Form 8609, the new revenue procedure applies, and it can claim the LIHTC on an amended return **for that earlier tax year**. Indeed, the same rule can benefit 2019 tax returns, too, but remember that the partnership could have gotten an extension to file the original return until September 15 anyway. As a result, the ability to file an amended 2019 return

only benefits partnerships that filed their 2019 return earlier in 2020. Partnerships that haven't filed their 2019 returns yet can simply get an extension to September 15, 2020. Of course, the revenue procedure would get them an extra 15 days to September 30, provided they are prepared to go through the effort of filing both an original and then an amended return. Finally, the revenue procedure only applies to allow amended returns for 2018 and 2019. For 2020 and later tax years, partnerships subject to the BBA continue to be subject to the new AAR process.

And remember: the LIHTC industry is seeking some longer-lasting relief from the new AAR rules, so be on the lookout for updates!

For more information on the content of this alert, please contact our [Coronavirus Response Team](#), your Nixon Peabody attorney, or:

- Nathan Bernard at [nbernard@nixonpeabody.com](mailto:nbernard@nixonpeabody.com) or 617-345-1236
- Thomas Giblin at [tgiblin@nixonpeabody.com](mailto:tgiblin@nixonpeabody.com) or 617-345-1102
- Richard Goldstein at [rgoldstein@nixonpeabody.com](mailto:rgoldstein@nixonpeabody.com) or 202-585-8730
- Roger Holmes at [rholmes@nixonpeabody.com](mailto:rholmes@nixonpeabody.com) or 617-345-1227
- David Kavanaugh at [dkavanaugh@nixonpeabody.com](mailto:dkavanaugh@nixonpeabody.com) or 617-345-1134
- John Marti at [jmarti@nixonpeabody.com](mailto:jmarti@nixonpeabody.com) or 617-345-1012
- Forrest Milder at [fmilder@nixonpeabody.com](mailto:fmilder@nixonpeabody.com) or 617-345-1055
- Matthew Mullen at [mmullen@nixonpeabody.com](mailto:mmullen@nixonpeabody.com) or 202-585-8128
- Richard Price at [rprice@nixonpeabody.com](mailto:rprice@nixonpeabody.com) or 202-585-8716
- Andrew Tripp at [ahtripp@nixonpeabody.com](mailto:ahtripp@nixonpeabody.com) or 312-977-4374