



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

November 02, 2009

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UIL: 61.00-00; 118.00-00

Mr. Tim Stebbins

2106 Alyssa Jade Drive
Henderson, NV 89052

Dear Mr. Stebbins:

Comment: This IRS Hqs letter responded to our October 5, 2009 letter (attached). This is a relatively rare example of where the IRS Office of the Chief Counsel quickly responded to a layperson's request for guidance on Revenue Ruling 70-604. It clearly and unambiguously confirms the arguments made by Stebbins, Briggs and Frank since 2008 concerning the legal requirement to "return" (refund or credit against next year's member assessments) all accumulated assessment surpluses. No other options exist. Surpluses can not be spent or saved for another day without risking audit and having to pay taxes, penalties and interest.

This letter responds to your request for information dated **October 05, 2009**. In particular, you ask for clarification of Rev. Rul. 70-604, 1970-2 C.B. 9, and whether a condominium management association must recognize income attributable to excess assessments collected during the taxable year if the assessments are accumulated in a working capital reserve.

Except as provided under section 528 of the Internal Revenue Code, a condominium management association that is classified as a corporation for federal income tax purposes has taxable income to the extent its income exceeds its expenses. Thus, **income attributable to excess assessments is generally taxable.**

Rev. Rul. 70-604 concerns the issue of whether a particular condominium management corporation is taxable on excess assessments that are applied against the following year's assessments. The revenue ruling states that the **sole authorized activity of the condominium management corporation is the assessment of its stockholder-owners for the purposes of managing, operating, maintaining and replacing the common elements of the condominium property.** The stockholder-owners of the corporation hold a meeting each year to decide whether to **return any excess assessments to themselves** or to have the excess applied against the following year's assessments. The ruling concludes that **the corporation is not taxable on the excess assessments because the excess has been returned, in effect, to the stockholder-owners (whether in the form of cash or in the form of a credit against next year's assessment).**

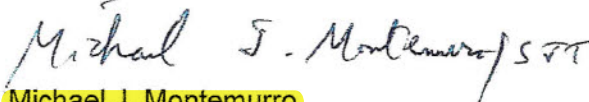
Rev. Rul. 70-604 does not provide that a condominium management corporation may avoid recognizing taxable income attributable to excess assessments by accumulating the excess amount in a working capital reserve.

There are two subsequent rulings that deal with **special** assessments. Rev. Rul. 75-370, 1975-2 C.B. 25, provides that special assessments for roof and elevator replacements collected by a condominium management corporation and held in a separate bank

account are not taxable to the corporation because it acts merely as an agent for the homeowners in receiving the special assessments (i.e., the corporation has a fiduciary obligation to expend the funds as specifically approved by the owner-stockholders). For another situation, Rev. Rul. 75-371, 1975-2 C.B. 52, provides that Section 118 excludes special assessments for replacing outdoor furniture from income.

This letter has called your attention to certain general principles of the law. It is intended for informational purposes only and does not constitute a ruling. See Rev. Proc. 2009-1, §2.04, 2009-1 I.R.B. 7 (Jan. 5, 2009). If you have any additional questions, please contact our office at (202) 622-4920.

Sincerely,



Michael J. Montemurro

Branch Chief

Office of Associate Chief Counsel

(Income Tax & Accounting)

October 5, 2009

Michael Montemurro

Branch 4

ITA

Department of the Treasury

Internal Revenue Service

1111 Constitution Avenue

Washington, DC 20224

Dear Sir,

IRS personnel in Washington have informed us you are the person to whom this letter requesting guidance should be directed. The matter concerns the proper application of Revenue Ruling 70-604. We are seeking general guidance such as an Information Letter, or other manner deemed suitable by your office, covering our questions.

We are stockholder-owners in a homeowner association of senior citizens called Sun City Anthem in Henderson Nevada. There is a significant difference of opinion between our board of directors and us concerning two aspects of how excess assessments collected by our Association are to be treated under Revenue Ruling 70-604 in order to be non-taxable. Our questions are:

1. Just who is to decide the distribution method: return excess assessments to the stockholder-owners or have them applied against the following year's assessments?
2. Can the distribution of the excess assessments be withheld so as to build up a reserve of tax free "working capital"?

We are of the opinion the stockholder-owners are to vote at a meeting of stockholder-owners each year to decide on the distribution method for excess assessments collected. Also all of the excess assessments are to be distributed to the stockholder-owners in one form or the other in the year following the collection of the excess assessments.

Our board of directors seem of the opinion the stockholder-owners are not to be permitted to decide the distribution method, rather the board of directors unilaterally and exclusively will decide the distribution method at a board meeting of their choice. Also, rather than any form of total or partial distribution, excess assessments may be accumulated year after year to build a tax-free cash reserve they call "equity".

The principal parties involved are the undersigned stockholder-owners and:

Board of Directors

Sun City Anthem Community Association, Inc.

2450 Hampton Road

Henderson, NV 89052

And very likely their professional advisors:

1. Association Auditor and tax preparer: Gary Lien, CPA
Hilburn & Lien
5520 South Fort Apache Road
Las Vegas, NV

2. Association Attorney: **John Leach**
Leach, Johnson, Song and Gruchow
5495 South Rainbow Boulevard
Las Vegas, NV

The **Association Treasurer** sent a letter to at least one stockholder-owner stating there is no IRS requirement for stockholder-owners to decide the distribution of excess assessments; insisting the **board of directors alone** is to make the decision. We do not wish to speculate beyond that as to what the actual position of the board of directors is or the basis for their position.

To assure all positions are reviewed we have requested that one or more of the Association directors join with us in making this request for guidance to your office on the matter and to make their position known in writing for inclusion with this letter.

The following page presents our view on the two questions. We have also included any communication received from any Association directors.

Please accept our thanks for your prompt attention to this matter and for your guidance on our two questions.

Person to whom the response should be directed ► **Tim Stebbins**
2106 Alyssa Jade Drive
Henderson, NV 89052
(702) 492-1024
tstebbins1@cox.net

Colonel Robert E. Frank, USAF (Ret.)
2384 Sandstone Cliffs Drive
Henderson, NV 89044

Norman McCullough
2620 Peoria Avenue
Henderson, NV 89052

Enclosures: Views on proper application of RR 70-604, Exhibit #1

Question 1: Just who is to decide the distribution method: return excess assessments to the stockholder-owners or have them applied against the following year's assessments?

Our View: The decision is to be made by stockholder-owners.

Revenue Ruling 70-604 seems clear on this point stating "A meeting is held each year by the stockholder owners of the corporation, at which they decide what is to be done with any excess assessments not actually used for the purposes described above, i.e., they decide either to return the excess to themselves or to have the excess applied to the following year's assessments". That position has also been stated in IRS Information Letter INFO 2001-0176 that states "The stockholder-owners hold a meeting each year to decide whether to return an excess assessments to themselves or to have the excess applied against the following year's assessments." and IRS Information Letter INFO 2004-0231 that states "Revenue Ruling 70-604 provides guidance regarding the application of excess assessments to future assessments. The Revenue Ruling provides that this treatment must be elected at a meeting of the shareholder-owners."

Our Association operates a fiscal year January 1 through December 31. The Association normally chooses the tax filing date extension and files a Form 1120 tax return on or before September 15 each year.

Our Association holds two (2) meetings of stockholder-owners each year; one in latter November, shortly before the close of our fiscal year on December 31 and another late April or early May for our annual election of directors. It is very easy for stockholder-owners to make the decision of how the excess assessments are to be distributed at either meeting. Our Association is very large with over 7,000 stockholder-owners and the practical way for stockholder-owners to vote the decision is by ballot.

Current Status: Stockholder-owners in our Association have never been allowed to decide the distribution method. The board of directors simply adopts a resolution; typically at a board meeting in latter August shortly before the tax form is filed, to hold the excess revenue from the previous year over to the current year. The Association Treasurer and the Tax Preparer, Mr. Gary Lien, then sign the Form 1120 attesting the excess assessments are not taxable because RR 70-604 has been adhered to.

Question 2: Can the distribution of the excess assessments be withheld so as to build up a reserve of tax free "working capital"?

Our View: No, all of the excess assessments are to be distributed to the stockholder-owners in one form or the other in the following year. We are a community of senior citizens; many on fixed incomes and we want and deserve the return of our untaxed money.

This position has been made clear in IRS Information Letter INFO 2001-0176; which states: "The revenue ruling (70-604) was not intended to permit a condominium management association to build a reserve."

Current Status: The board of directors has failed to distribute much if any of the excess assessments to the stockholder-owners in any manner over the last five years.

Our Association transitioned from developer control to stockholder-owner control as of June 1, 2005. Note Exhibit #1 from a recent board workshop that shows our stockholder-owner controlled board of directors had a total of \$2,348,000 in undistributed and untaxed surplus income at the end of 2005 – a combination of whatever funds the developer transferred to the Association at transition plus excess assessments collected that year. Then note how most or all of the undistributed and untaxed surplus income was retained by the board of directors every following year and now totals \$4,755,000 as of the end of our last fiscal year, December 31, 2008.