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## Private Letter Ruling 8440020

This is in reply to your letter dated November 2, 1983, submitted on behalf of the above-captioned Taxpayer, requesting a ruling that the Taxpayer can pass through to its shareholders the full extent of its losses for the year pursuant to section 1366 of the Internal Revenue Code, providing that taxpayer qualifies as a subchapter S corporation under section 1361.

Taxpayer is incorporated in the State and filed as a Cooperative Apartment Corporation on form 1120 for its initial tax year ending December 31, 1982. It plans to also file as such for its tax year ending December 31, 1983. Taxpayer purchased its building on A and as of B all C of its units were occupied. Only D of the units were owned by investors who are not tenant shareholders.

Taxpayer would like to file its tax returns and be taxed as a subchapter S corporation, passing through to its shareholders their proportionate share of the Taxpayer's profit or loss.

Section 280A(a) of the Code provides generally that except as otherwise provided in this section, in the case of a taxpayer who is an individual or an electing small business corporation, no deduction otherwise allowable under this chapter shall be allowed with respect to the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence.

Section 280A(d)(2)(A) of the Code provides, in part, that for purposes of this section, the taxpayer shall be deemed to have used a dwelling unit for personal purposes for a day if, for any part of such day, the unit is used for personal purposes by the taxpayer or any other person who has an interest in such unit, or by any member of the family (as defined in section 267(c)(4) of the taxpayer or such other person.

Section 280A(f)(1)(A) of the code states, generally, that for purposes of this section the term "dwelling unit" includes a house, apartment, condominium, mobile home, boat, or similar property, and all structures or other property appurtenant to such dwelling unit.

Section 280A(f)(2) of the Code provides that in the case of an electing small business corporation, subparagraphs (A) and (B) of subsection (d)(2) shall be applied by substituting "any shareholder of the electing small business corporation" for "the taxpayer" each place it appears.

If the Taxpayer in this case becomes a subchapter S corporation, then section 280A(f)(2) of the Code would apply in interpreting sections 280A(d)(2)(A) and (B). Therefore, section 280A(d)(2)(A) provides that the taxpayer, (the subchapter S corporation), shall be deemed to have used the dwelling unit for personal purposes for any day, if any part of such day, the unit is used (A) for personal purposes by any shareholder of the subchapter S corporation who has an interest in such unit, or by any member of the family of such shareholder.

Section 216 of the Code generally allows a deduction of taxes, interest, and business depreciation by a cooperative housing corporation tenant-stockholder.

Section 277(a) of the Code provides generally that in the case of a social club or other membership organization which is operated primarily to furnish services or goods to members and which is not exempt from taxation, deductions for the taxable year attributable to furnishing

services, insurance, goods, or other items of value to members shall be allowed only to the extent of income derived during such year from members or transactions with members. If for any taxable year such deductions exceed such income, the excess shall be treated as a deduction attributable to furnishing services, insurance, goods, or other items of value to members paid or incurred in the succeeding taxable year.

Section 277 of the Code will limit the amount of the corporate level depreciation deduction allowable under section 216(c). Thus, any depreciation deduction not disallowed to a subchapter S corporation by virtue of the section 280A personal use provisions would be limited by section 277 to an amount not in excess of the income qualifying as tenant-stockholder (member) income. Any depreciation in excess of such member income for a taxable year would, pursuant to section 277(a) be carried over and treated as a deduction attributable to furnishing services, insurance, goods, or other items of value to members paid or incurred in the succeeding taxable year.

Therefore, to the extent of any income from the D units ("Income") received by the Taxpayer in the subject case, Taxpayer would be allowed to offset such Income with the allowable portion of the corporate level depreciation deduction pursuant to section 216(c) of the Code. The depreciation deduction in excess of such Income, however, would be disallowed at the S corporation level under section 277, and thus there would be no excess depreciation expense to pass through in the form of losses to the tenant-stockholders of the S corporation.

Accordingly, after careful consideration of the facts in this case, we conclude that the units of the apartment building occupied by tenant shareholders are being used for purposes described in section 280A(d)(2)(A) of the Code, and that Taxpayer is using these units for personal purposes and may not pass through to its shareholders its losses for these units, for any year, pursuant to section 1366, in the event that Taxpayer qualifies as a subchapter S corporation under section 1361.

Also, a depreciation deduction will be allowable to Taxpayer for the D units owned by investors. However, such deduction will be limited to the S corporation's Income pursuant to section 277 of the Code.

Except as specifically ruled upon above, no opinion is expressed as to the federal income tax consequences of the above-described proposed transaction under any other provision of the Code.

This ruling is addressed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent.

This ruling is directed only to the taxpayer who requested it. Section 6110(j)(3) of the Code provides that it may not be used or cited as precedent. Temporary or final regulations pertaining to one or more of the issues addressed in this ruling have not yet been adopted. Therefore, this ruling may be modified or revoked if the adopted temporary or final regulations are inconsistent with any conclusion in the ruling. See section 17 of Rev. Proc. 84-1, 1984-1 I.R.B. 10. However, when the criteria in section 17.05 of Rev. Proc. 84-1 are satisfied, a ruling is not revoked or modified retroactively, except in rare or unusual circumstances.