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A Bump in the Road But Not a Dead End: Overcoming the Challenges of *Historic Boardwalk* in Financing Real Estate Development

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In this article, the authors discuss the stringent partnership standard set forth in Historic Boardwalk, the implications of that decision and a couple of other recent partnership decisions for structuring the monetization of historic rehabilitation tax credit, and alternative structures to secure the full benefits of the tax credits.

Financing for real estate development projects is sometimes challenging to obtain in the current cautious lending environment.[1] As such, many real estate developers employ a mixture of strategies to raise capital for real estate development projects including traditional construction lending, mezzanine financing, preferred equity investments, EB-5 financing and historic rehabilitation tax credit ("HRTC") investments to fund their projects. On August 27, 2012, a Third Circuit Court decision in *Historic Boardwalk Hall, LLC, et al. v. Commissioner of Internal Revenue*,[2] upheld a challenge by the Internal Revenue Service (the "IRS") to a structure employed to take advantage of HRTCs. Moreover, the strict liability tax penalty accompanying the recent codification of the judicial doctrine requiring economic substance in transactions and contractual arrangements raises the stakes for developers seeking to capture the benefits of HRTCs arising from their projects. Nevertheless, through careful planning, we believe that developers can continue to utilize the value of HRTCs as part of their financing.

The Internal Revenue Code of 1986, as amended (the "Code"), states that a taxpayer is eligible for a tax credit equal to 20% of the qualified rehabilitation expenditures with respect to any certified historic structure.[3] HRTCs are only available to the owner of a property (or the lessee at the lessor's election), and the Code does not permit the sale of HRTCs.[4] However, each partner in a partnership that owns such property may generally take its share of the HRTC.[5]

HRTCs are an important tool in the real estate finance toolbox, as they have been used in connection with over 38,000 projects[6] and benefit high profile venues such as the Boston Red Sox's Fenway Park.[7] The widespread use of HRTCs is beneficial from a public policy standpoint as they create jobs and allow for the rehabilitation, development

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and preservation of historic sites. However, developers are frequently unable to fully utilize the benefits of HRTCs, because they either don't have sufficient taxable income or are tax exempt.[8] As a result, many developers place their rehabilitation projects into partnerships or other structures, the tax equity investors in which are more able to fully utilize the HRTCs and other tax attributes that the project generates.

Despite Congress's intent to encourage investment in the rehabilitation, development and preservation of historic sites with the HRTC, the IRS is increasingly scrutinizing tax motivated partnerships, particularly if they have the appearance of tax shelters.[9] In the *Historic Boardwalk* decision, for example, the Third Circuit denied a developer's strategy to capture the full value of HRTCs by transferring them through a partnership structure to a fully taxable investor. The Court held that an investor in a partnership shall not be entitled to the partnership's HRTCs if the true intent of the investment is not to share in the success or failure of the partnership but instead is merely intended to facilitate a HRTC sale. Historic Boardwalk Hall, LLC petitioned the Court for rehearing, but its petition was denied.[10] A petition for writ of certiorari was filed on January 17, 2013.[11]

This article will (1) discuss the stringent partnership standard set forth in *Historic Boardwalk*; (2) the implications of that decision and a couple of other recent partnership decisions for structuring the monetization of HRTCs; and (3) explore alternative structures to secure the full benefits of HRTCs.

Background

Facts

The New Jersey Sports and Exposition Authority ("NJSEA"), a state agency, owned a leasehold interest in the famed Historic Boardwalk Hall ("East Hall") in Atlantic City and was tasked with renovating it for use as a special events facility. In order to capitalize on the market for HRTCs, NJSEA formed Historic Boardwalk Hall, LLC ("HBH"). Then, NJSEA transferred its interests in East Hall to HBH, sold a 99.9% membership interest in HBH to a wholly-owned subsidiary of Pitney Bowes Inc. ("PB") and retained a 0.1% managing member interest in HBH. In exchange for PB's anticipated investment of $18,195,797 in HBH, PB would receive a purported 3% preferred return on its capital account (without reduction for tax credits received) and 99.9% of the projected $19,412,173 in HRTCs that would be generated from a renovation of East Hall.[12] NJSEA received a call option exercisable in year five, and PB a put option exercisable in year seven, for the sale of PB's membership interest to NJSEA priced at the greater of (a) 99.9% of the fair market value of all the membership interests in HBH and (b) any accrued and unpaid preferred return due to PB. Further, NJSEA had a "consent option" exercisable under certain circumstances to purchase PB's interest at "the then-present value of any yet-to-be realized projected tax benefits and cash distributions due to PB through the end of the five-year tax credit recapture period."[13] Thus, PB was not anticipated to receive repayment of its capital investment in HBH (except insofar as such investment would be effectively repaid through its receipt of the HRTCs).[14] After an audit, the IRS allocated the tax credits away from PB to NJSEA because, in part, "PB had no meaningful stake in the success or failure of HBH" and thus the IRS did not consider HBH to be a bona fide partnership.

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Guideposts

The Code does not include a definition of partnership.[16] Accordingly, the legal analysis whether a purported partnership qualifies as a partnership for federal income tax purposes generally begins with the case law, and with *Commissioner v. Culbertson* in particular. *Culbertson* holds that a partnership exists when two or more "parties in good faith and acting with a business purpose intend[] to join together in the present conduct of the enterprise."[17] Simply put, the question is whether the purported partners are actual investors in the underlying business venture, or do their partnership interests merely serve to disguise a loan, a purchase, or other transaction. The determination whether an organization qualifies as a partnership and the closely related question whether a particular purported partner qualifies as a partner for federal income tax purposes has received significant recent attention in the courts. That attention has arisen in tax shelter contexts, in which purported partnerships are used to transfer and thereby "monetize" valuable tax attributes that one partner cannot take advantage of.

Historic Boardwalk comes on the heels of two other important appellate court decisions disregarding a purported partnership. In *Virginia Historic Tax Credit Fund*, the Fourth Circuit evaluated a purported partnership's allocation of Virginia historic rehabilitation tax credits to its investors.[18] Investors contributed cash to the partnership, which used such cash to either purchase tax credits outright from developers (and passed through a deduction for such expenses) or acquired tax credits through contributions to lower-tier partnerships with developers. Partners were told that they "should expect to receive no material amounts of partnership income or loss" aside from their share of tax credits, and the partnership had the option to buy each partner's interest for its fair market value.[19] Although the Fourth Circuit did not disregard the partnership *per se*, it held that the transfer of tax credits to investors was a disguised sale.[20] The Fourth Circuit supported its decision on the basis that the investors faced no entrepreneurial risk: they were promised a fixed rate of return, they received no material allocations of partnership income, and they were secured against any risk of loss.[21]

In *Castle Harbour*, the Second Circuit disregarded a purported partnership, even though the district court had correctly found that the transaction had economic substance and was motivated in part by non-tax business purposes, because, under the *Culbertson* facts-and-circumstances analysis, the transaction was in the nature of a secured loan and not a partnership.[22] GE had contributed a fleet of fully-depreciated aircraft and certain foreign banks had contributed cash to form Castle Harbour.[23] The partnership agreement provided that all "operating income" would be allocated to the foreign banks, which were not subject to U.S. taxation.[24] Because Castle Harbour's book depreciation greatly exceeded the tax depreciation (because GE had already depreciated the aircraft for tax purposes), substantially more taxable income than economic income was allocated to the foreign banks.[25] The Second Circuit disregarded the partnership because GE had effectively guaranteed to the foreign banks a minimum return and had the power to limit the foreign banks' return beyond this minimum return, and thus the foreign banks retained no entrepreneurial interest in the partnership's business.[26] The emerging line of precedent suggests that courts are testing the status of purported

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partners in tax-intensive transactions more stringently than had been generally anticipated by taxpayers. The vitality of the classical definition of partnership status and the qualification of purported partners as partners for federal income tax purposes may be being limited in these contexts.

Not A True Partnership?

The *Historic Boardwalk* Court (the "Court") noted that while HBH maintained all of the formalities of a partnership, its true intent was to facilitate a sale of tax credits to PB, and therefore based on *Culbertson*, *Virginia Historic Tax Credit Fund*, and *Castle Harbour*, HBH should not be treated as a *bona fide* partnership under the Code.

The Third Circuit found it essential for partners to bear meaningful risk in order for a true partnership to exist. With regards to PB, the Court highlighted the presence of comprehensive guaranties, which nullified downside partnership risk, including an operating deficit guaranty, completion guaranty, tax benefits guaranty, and environmental guaranty. The Court also noted a lack of meaningful upside potential as HBH was known to be a money-losing enterprise and only through creative financial projections was it made to appear to have profit making potential.[28] Further, the Court found that even if there were an upside, NJSEA had the right to exercise a consent option that would "cut PB out by paying a purchase price unrelated to any fair market value."[29] Finally, the Court scrutinized the documentation used to promote and implement the partnership, and determined that NJSEA's intent was to sell HRTCs rather than form a true partnership.[30] For example, the Court noted that NJSEA received advice that since it was a tax exempt entity, it would have no use for the 20% federal tax credit and therefore should solicit a sale of these tax credits to a Fortune 500 company with substantial federal income tax liabilities.[31]

One question presented by the *Historic Boardwalk* decision is the scope of the decision for other HRTC monetization transactions. Put another way, to what extent did the transaction presented in that case depart from customary structure, and to what extent was it more aggressive as a matter of federal income tax law? In oral arguments, Judge Kent Jordan questioned the government on the fairness of denying a tax credit when parties form a partnership, and understandably try to limit their risk, for the purpose of engaging in rehabilitation projects that Congress intended to encourage. Arthur T. Catterall of the Justice Department's Tax Division responded that:

> what Congress wanted was equity investments in rehabilitation projects . . .. You're going to have an upside potential if you're a true partner. You're not going to have a three percent return that is funded out of part of your own capital contribution that goes to a guaranteed investment contract sized to pay off the three percent return.

Judge Jordan continued to press Mr. Catterall, asking "if the government is not willing to come in and give guidance [on tax credit partnerships] as it does in so many things, why should the axe fall here?"

> This particular case is particularly egregious, and I think that the number one thing is this guaranteed investment contract . . . they took three point three million dollars of one of the capital contributions that went directly to a guaranteed investment contract sized to pay off the three percent return. That is not an equity interest . . ..

This colloquy suggests that a partnership structure with true upside and downside potential for the tax equity investor would satisfy the IRS's concerns. Each transaction presents its own facts and nuances, of

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course. Mr. Catterall argued that *Historic Boardwalk* presented a more extreme or abusive case than other structures and transactions in the market. Nevertheless, in our experience, the transaction described by the court in *Historic Boardwalk* was pretty squarely within the mainstream of HRTC monetization strategies that have been employed by many developers and equity investors.[32] So the court holding likely implicates not only the benefits claimed in that transaction but the existing HRTC monetization market practices more generally. Accordingly there may be incentives for developers putting together projects eligible for HRTCs to rethink the structures used to permit developers to take full advantage of those credits. One natural place to look is to the structures that have increasingly been used to take full advantage of green energy credits.

The Code provides an array of tax credits and other incentives designed to spur the development and use of renewable energy in the United States. Many developers in the energy sector face the same constraints on their ability to take full advantage of such tax credits as do real estate developers with respect to qualified historic rehabilitation projects. The legal technology employed in the energy sector, while very different from that historically used with respect to HRTCs, is well established and likely more robust as a legal matter. Many of those techniques have been considered favorably both by the IRS and by tax equity investors.

Alternatives for Utilizing the HRTC

Developers and investors should not think that *Historic Boardwalk* signals an end to the sharing of HRTCs in real estate financing transactions. It remains possible for a careful advisor to structure real estate transactions to share HRTCs and other tax benefits without falling into the *Historic Boardwalk* traps, so long as the tax equity investor retains the requisite exposure to the entrepreneurial risks, and benefits, of ownership. Three common financing structures used in the green energy space for allocating the renewable electricity production credits to tax equity investors can also apply to real estate transactions involving the HRTC: the Partnership Flip, the Sale-Leaseback, and the Lease Pass-Through.

Partnership Flip

In the Partnership Flip, the tax equity investor starts with a substantial allocation of the partnership profits in a partnership with the developer that holds the historic property, for example, 99% to the tax equity investor and 1% to the developer. Because HRTCs are generated when the qualified rehabilitated building is placed in service, which would generally occur during the first few years of the partnership, the tax equity investor would receive 99% of the HRTCs.[33] Once the tax equity investor has achieved a pre-determined post-tax internal rate of return, the partnership allocations flip to 5% to the tax equity investor and 95% to the developer. In addition, after a certain time period, the developer has the ability to purchase the tax equity investor's 5% interest for its fair market value. Such an allocation would appear to introduce more substance into the partnership and more substance into the HRTC investor's economic investment in the partnership than the transaction described in *Historic Boardwalk* or other structures classically used to monetize HRTCs.

The IRS has established a safe harbor for such a partnership's allocation of wind

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energy production credits.[34] The safe harbor generally provides that tax equity investors need to realize their return from both the allocation of tax credits and operating income. The safe harbor further provides for minimum partnership interests (for both the developer and the tax equity investor), minimum unconditional investment, limitations on call and put rights, a ban on guarantees on any tax equity investor's receipt of tax credits, and certain other requirements. These requirements essentially ensure that the tax equity investors hold a true equity interest in the partnership.

Although this safe harbor, by its terms, applies only to wind energy production credits, and the Service has effectively declined to extend it to solar energy credits or to issue parallel guidance, the question naturally arises whether a partnership modeled on the wind energy credit safe harbor would be commercially feasible with respect to HRTCs, and whether such structures would be sustained. As previously mentioned, HRTCs are generally generated when the rehabilitated property is placed in service, which would generally occur early in the partnership's existence, whereas production tax credits are generally generated over a 10 year period. However, the safe harbor may be useful to ensure that the tax equity investor in such a Partnership Flip has sufficient rights to the upside potential in, and exposure to the downside risks of, the historic property to ensure a true partnership exists. To the extent that an HRTC partnership transaction employs a flip that falls within the economic parameters of the wind safe harbor, the allocations of the partnership should have substantial economic effect under Section 704(b) and should likely also withstand IRS scrutiny under other doctrines, such as the recently codified economic substance doctrine.[35]

Sale-Leaseback

In the Sale-Leaseback structure, the developer sells the historic property to the tax equity investor shortly after placing the renovated property in service, and the tax equity investor leases such property back to the developer. The tax equity investor, as the owner of the property, takes tax credits and depreciation with respect to the property. At the end of the lease, the developer has an option to purchase the property back at its fair market value. In this structure, the developer achieves 100% financing (subject to any effective reduction as a result of the required prepayment of rent by the developer lessee) and retains any upside generated by the subject property during the lease period beyond the fixed rental payments,[36] but the lease-back must be respected as a lease for U.S. federal income purposes.

To this end, the IRS has provided guidance with respect to leveraged lease transactions.[37] Generally, the term of the lease cannot exceed 80% of the property's useful life, the lessee's call option cannot be less than the fair market value of the property, the lessor cannot have a put option, and certain other limitations. These requirements essentially ensure that the tax equity investor retains the benefits and burdens of ownership of the historic property. The prohibition on fixed price purchase options in the IRS ruling guidelines goes further than the parallel requirement with respect to purchase options in the partnership flip guidance. If required, it would impose an important economic limitation on developers' ability to take full advantage of HRTCs. Fortunately, that requirement in the advanced ruling guidance is not mirrored in the sale-leaseback case law. Instead, that law takes a position like that outlined in the partnership flip guidance.

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That is, fixed price purchase options are permissible if they have a strike price at or above the expected fair market value of the subject property.

Unlike with the safe harbor for wind energy product credits, the IRS has not limited its guidance with respect to leveraged lease transactions to energy transactions. So long as a tax equity investor was willing to accept certain of the benefits and burdens of owning an historic property, a Sale-Leaseback may be a feasible structure for the transfer of HRTCs to tax equity investors. As in the case of the partnership flip structure, a properly structure sale-leaseback transaction ought to satisfy the requirements of the codified economic substance doctrine, too.

Lease Pass-Through

In the Lease Pass-Through, the tax equity investor leases the historic property (generally a pre-paid lease) from the developer and collects any income on the property, such as from leases to unrelated third parties. The Code generally allows the lessor of property to elect to treat the lessee as the purchaser of such property for purposes of the HRTC.[38] The developer claims any depreciation with respect to the property, and the tax equity investor claims the HRTCs and rental deductions in lieu of depreciation. At the end of the lease term, the property automatically reverts back to the developer. Like in the Sale-Leaseback structure, the lease must be structured as a true lease for U.S. federal income tax purposes.

The Lease Pass-Through is another viable option for utilizing HRTCs in real estate financings, although this may require the most care in structuring. Because the tax equity investor would likely lease the property to a third party, advisors should ensure that the tax equity investor is not merely a conduit for the flow of lease payments from the ultimate user to the owner of the historic property. Nevertheless, with sufficient exposure to upside potential and downside risk, a Lease Pass-Through remains an option for using HRTCs in real estate financings.

Concluding Thoughts

Each of the three tax equity structures above require careful tailoring of the transaction agreements to provide for the investment objectives of the tax equity investor while ensuring the structure is respected for U.S. federal income tax purposes. Careful attention to the details and knowledge of the potential pitfalls are required for the successful implementation of these structures in real estate financing transactions. Yet, it remains possible for developers to continue to utilize tax equity financing that takes full advantage of the HRTC.

NOTES:

[1]*Bank Data Show Cautious Lending Climate,* Financial Times, March 23, 2012 (http://www.ft.com/cms/s/0/85a3571a-74d6-11e1-a98b-00144feab49a.html#axzz26BDCaS7r); *Are Mortgage Credit Standards Loosening (Hint: No)*, Wall Street Journal Blog, April 4, 2012 (http://blogs.wsj.com/developments/2012/04/04/are-mortgage-credit-standards-loosening-hint-no/).

[2]*Historic Boardwalk Hall, LLC v. C.I.R.*, 694 F.3d 425, 2012-2 U.S. Tax Cas. (CCH) P 50538, 110 A.F.T.R.2d 2012-5710 (3d Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3431 (U.S. Jan. 17, 2013).

[3]I.R.C. § 47(a)(2). The HRTC is a component of the Investment Credit under section 46 of the Code, which is a component of the General Business Credit under section 38 of the Code.

[4]*See generally*, I.R.C. § 47; Treas. Reg. § 1.48-12. Purchasers of recently rehabilitated property may claim the HRTC subject to certain limitations, Treas. Reg. § 1.48-12(c)(3)(ii), and lessors may elect to treat certain lessees as the purchasers of such property. Treas. Reg. §§ 1.48-4; 1.48-12(f). Former section 48(g)(4) of the Code provided that the portion of the basis of qualified rehabilitation property which is attributable to qualified rehabilitation expenditures is considered "new"

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section 38 property.

[5]Treas. Reg. § 1.46-3(f).

[6]*Sports Authority Court Battle May Have Broad Implications*, NJBiz, August 29, 2012 (http://www.njbiz.com/article/20120829/NJBIZ01/120829815/Sports-authority-court-battle-may-have-broad-implications).

[7]*Boston Red Sox's Fenway Park Put on National Register of Historic Places*, Bloomberg, March 8, 2012 (http://www.bloomberg.com/news/2012-03-08/boston-red-sox-s-fenway-park-put-on-national-register-of-historic-places.html).

[8]Tax credits offset income tax liability on a dollar for dollar basis. As a rough approximation, to fully utilize $100 of tax credits, a taxpayer needs $300 of otherwise taxable income after taking into account any other deductions and other tax benefits the taxpayer is entitled to.

[9]*Historic Boardwalk Hall, LLC v. C.I.R.*, 694 F.3d 425, 2012-2 U.S. Tax Cas. (CCH) P 50538, 110 A.F.T.R.2d 2012-5710 (3d Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3431 (U.S. Jan. 17, 2013); *see also Virginia Historic Tax Credit Fund 2001 LP v. C.I.R.*, 639 F.3d 129, 2011-1 U.S. Tax Cas. (CCH) P 50308, 107 A.F.T.R.2d 2011-1523 (4th Cir. 2011) (treating a partner's contribution to a partnership and receipt of Virginia tax credits as a disguised sale of property); *TIFD III-E, Inc. v. U.S.*, 459 F.3d 220, 2006-2 U.S. Tax Cas. (CCH) P 50442, 98 A.F.T.R.2d 2006-5616 (2d Cir. 2006) (hereinafter "*Castle Harbour*") (treating a purported partnership interest as in substance a loan); *Pritired 1, LLC v. U.S.*, 816 F. Supp. 2d 693, 2011-2 U.S. Tax Cas. (CCH) P 50654, 108 A.F.T.R.2d 2011-6605 (S.D. Iowa 2011) (holding a partnership failed form over substance analysis because the partnership interest was in substance a loan).

[10]*Historic Boardwalk Hall, LLC v. C.I.R., 136 T.C. 1, Tax Ct. Rep. (CCH) 58501, Tax Ct. Rep. Dec. (RIA) 136.1, 2011 WL 9078 (2011)*, rev'd and remanded, 694 F.3d 425, 2012-2 U.S. Tax Cas. (CCH) P 50538, 110 A.F.T.R.2d 2012-5710 (3d Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3431 (U.S. Jan. 17, 2013).

[11]Historic Boardwalk Hall, LLC v. Comm'r, No. 12-901 (U.S. petition for cert. filed Jan. 17, 2013).

[12]*Historic Boardwalk Hall, LLC v. C.I.R.*, 694 F.3d 425, 2012-2 U.S. Tax Cas. (CCH) P 50538, 110 A.F.T.R.2d 2012-5710 (3d Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3431 (U.S. Jan. 17, 2013).

[13]As of December 2011, none of the options had been exercised and HBH continued to operate with PB and NJSEA as its only members. Brief for Petitioner-Appellee, *Historic Boardwalk Hall, LLC v. C.I.R.*, 694 F.3d 425, 2012-2 U.S. Tax Cas. (CCH) P 50538, 110 A.F.T.R.2d 2012-5710 (3d Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3431 (U.S. Jan. 17, 2013).

[14]NJSEA was required to obtain a guaranteed investment contract to secure its obligations under PB's put option.

[16]I.R.C. § 761(a) merely recites a litany of forms of organization that may qualify as partnerships. Similarly, Section 7701(a)(2) provides that "[t]he term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation . . .." Regulations provide that a partnership is a business entity that is not a corporation and that has at least two members. Treas. Reg. § 301.7701-2(c)(1). A business entity is any entity recognized for federal tax purposes that is not properly classified as a trust or otherwise subject to special treatment under the Code. Treas. Reg. § 301.7701-2(a).

[17]*C. I. R. v. Culbertson*, 1949-2 C.B. 5, 337 U.S. 733, 69 S. Ct. 1210, 93 L. Ed. 1659, 37 A.F.T.R. (P-H) P 1391 (1949) (hereinafter "*Culbertson*"); *see also C.I.R. v. Tower*, 1946-1 C.B. 11, 327 U.S. 280, 286–87, 66 S. Ct. 532, 90 L. Ed. 670, 46-1 U.S. Tax Cas. (CCH) P 9189, 34 A.F.T.R. (P-H) P 799, 164 A.L.R. 1135 (1946) ("When the existence of an alleged partnership arrangement is challenged by outsiders, the question arises whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both."); *Southgate Master Fund, L.L.C. ex rel. Montgomery Capital Advisors, LLC v. U.S.*, 659 F.3d 466, 488, 2011-2 U.S. Tax Cas. (CCH) P 50648, 108 A.F.T.R.2d 2011-6488 (5th Cir. 2011) ("The *sine qua non* of a partnership is an intent to join together for the purpose of sharing in the profits and losses of a genuine business.").

[18]639 F.3d at 133–35.

[19]*Virginia Historic Tax Credit Fund 2001 LP*, 639 F.3d at 133–35.

[20]*Virginia Historic Tax Credit Fund 2001 LP*, 639 F.3d at 143–46. If a partner receives property from a partnership in exchange for a partnership contribution and is not acting in his capacity as a partner, such transaction may be recharacterized as a sale. *See* Treas. Reg. § 1.707-3.

[21]639 F.3d at 145.

[22]459 F.3d at 241. The court held that the partnership was "overwhelmingly in the nature of a secured lender's interest, which would neither be harmed by poor performance of the partnership nor significantly enhanced by extraordinary profits." *TIFD III-E, Inc.*, at 231.

[23]*TIFD III-E, Inc.*, at 225–27.

[24]*TIFD III-E, Inc.*, at 225–27.

[25]*TIFD III-E, Inc.*, at 225–27.

[26]*TIFD III-E, Inc.*, at 240–41.

[28]*Id.* at 78.

[29]*Id.* at 80.

[30]*Id* at 22.

[31]*Id.* at 18.

[32]The developer's support for the HRTCs to be received by the investor and the use of a guaranteed investment contract to mitigate credit risk in the partnership may have been somewhat unusual features, but it is not clear that they were fatal flaws for the deal.

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[33]The timing of HRTCs is different than with production tax credits, which are the subject of the revenue procedure discussed *infra* note 33; production tax credits are generally generated over a period of 10 years.

[34]Rev. Proc. 2007-65, 2007-45 I.R.B. 967.

[35]See generally Section 7701(o).

[36]Upside here refers to any profits from leasing to a third party or other business use during the lease period. The developer does, however, give up any appreciation of the subject property, which the tax equity investor retains.

[37]Rev. Proc. 2001-28, 2001-19 I.R.B. 1156

[38]See Treas. Reg. §§ 1.48-4; 1.48-12(f).

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