



Private Letter Ruling
Redacted Version
No. 08-023

Corporation Income Tax and Franchise Tax and Individual Income Tax
Credit for the Rehabilitation of Historic Structures in Downtown Development Districts
November 5, 2008

This is in reply to your request for a private letter ruling regarding the Downtown Development District Historic Structure Rehabilitation Tax Credit (the "Historic Tax Credit") authorized by La. R.S. 47:6019.

Factual Scenario

You provided these facts.

STATEMENT OF FACTS:

- (1) Developer, a Louisiana limited liability company, is syndicating the acquisition and redevelopment of land and a building in a city in Louisiana (the "Project") situated within the Louisiana Downtown Development District (the "District").
- (2) The building (the "Structure") was originally constructed in 19XX, with subsequent additions.
- (3) Pursuant to La. R.S. 47:6019A(2)(a), Developer has submitted an application to the Louisiana Division of Historic Preservation ("DHP") for a certification that the Structure contributes to the historical significance of the District, and DHP has approved such application as evidenced by its execution and approval of Parts 1 and 2 of Developer's Historic Preservation Certification Application with respect to the Structure.
- (4) Based on the amount of "eligible costs and expenses" (within the meaning of La. R.S. 47:6019A(1)(a)) incurred during the rehabilitation of the Structure, the amount of Historic Tax Credits generated by such rehabilitation is expected to exceed \$5 million, but will not exceed \$12 million.
- (5) The Structure is not expected to be completed and ready to be placed in service until at least November 2008. Consequently, Developer has not yet submitted Part 3 of its application, by which Developer will officially declare all or part of the rehabilitation project complete. DHP will not be in a position to determine the total amount of qualified rehabilitation expenditures until it has received Part 3 and conducted a review thereof. Only after doing so will DHP issue an official certificate specifying the amount of Historic Tax Credits that have been earned. Because DHP's official certification is unlikely to be issued for any portion of the project prior to the end of calendar year 2008, the Requesting Parties will not know during 2008 the amount of Historic Tax Credits that may properly be allocated to any of them.
- (6) Company A, a Louisiana limited

liability company whose managing member is Company B, L.L.C. (“Fund Manager”), will make an equity investment in Developer, acquire ownership of a limited liability company membership in Developer, and become a party to Developer’s written limited liability company operating agreement (the “Developer Operating Agreement”).

(7) One hundred percent (100%) of the Historic Tax Credits generated pursuant to La. R.S. 47:6019A.(2)(a) in connection with the rehabilitation of the Structure will initially be allocated to Company A pursuant to the terms of the Developer Operating Agreement. This allocation will be disproportionate to Developer’s members’ respective equity contributions, ownership interests, and profits and loss interests in Developer.

(8) Although Company A will initially be allocated more than \$5 million of Historic Tax Credits, Company A is a pass-through entity that will itself have no Louisiana income or franchise tax liability.

(9) In addition to Fund Manager, Company A will have as members Fund 2008, L.L.C. (“Fund 2008”), Fund 2009, L.L.C. (“Fund 2009”), and Fund 2010, L.L.C. (the “Numbered Funds”) and other entities.

(10) Each of the Numbered Funds is a Louisiana limited liability company whose managing member is Fund Manager.

(11) Each of the Numbered Funds will make an equity investment in Company A, acquire ownership of a limited liability company membership in Company A, and become a party to Company A’s written limited liability company operating agreement (the “Company A Operating Agreement”).

(12) Each of the Numbered Funds is a pass-through entity that will itself have no Louisiana income or franchise tax liability.

(13) Neither Fund Manager nor any of the Numbered Funds will utilize any of the Historic Tax Credits. All such credits will be allocated to Taxpayer-members of the Numbered Funds.

(14) In no event will the amount of Historic Tax Credits earned in connection with the Project exceed \$12 million.

(15) Pursuant to the terms of the Company A Operating Agreement, Fund Manager will allocate to Fund 2008 all of those Historic Tax Credits that may be utilized with respect to tax year 2008, will allocate to Fund 2009 all of those Historic Tax Credits that may be utilized with respect to tax year 2009, and will allocate to Fund 2010 all of those Historic Tax Credits that may be utilized with respect to tax year 2010. The Company A Operating Agreement provides, however, that Fund Manager is not required to allocate any Historic Tax Credits to the Numbered Funds until Fund Manager has received all equity contributions from all of the Numbered Funds, such that certain amounts of Historic Tax Credits may be “warehoused” in Company A beyond the end of the year in which the Historic Tax Credits are earned.

(16) In 2009 and subsequent years, Louisiana taxpayers (“Taxpayers”) will make equity investments in one or more of the Numbered Funds and will become parties to the written limited liability company operating agreement of each Numbered Fund in which they invest (the “Numbered Fund Operating Agreements”).

(17) Each of the Numbered Fund Operating Agreements provides that no Taxpayer-member (or any of its affiliates) may receive allocations of more than \$5 million, in the aggregate, of Historic Tax Credits earned in connection with the Project, regardless of whether such taxpayer invests in one or more of the Numbered Funds.

(18) Moreover, each of the Numbered Fund Operating Agreements provides that no Taxpayer-Member or its affiliates may be awarded more than an aggregate of \$5 million of Historic Tax Credits through investment in the Project or through investment in any other project for the rehabilitation of any other historic structure located in the New Orleans Downtown Development District.

(19) Pursuant to the terms of the Numbered Fund Operating Agreements, each Taxpayer who invests in a Numbered Fund will receive an allocation of Historic Tax Credits from that Numbered Fund in the year during which the Taxpayer invests in that Numbered Fund. Because multiple Taxpayers are expected to invest in each Numbered Fund in a given year, such allocations will usually be made by a Numbered Fund effective as of December 31 of that year in order to determine the Taxpayers' precise allocated percentages.

(20) One hundred percent (100%) of the Historic Tax Credits allocated by Company A to the Numbered Funds will ultimately be allocated to Taxpayer-members of the Numbered Funds pursuant to the terms of the Numbered Fund Operating Agreements. In the case of each Taxpayer, the allocation to it will be disproportionate to its equity contribution, ownership interest, and other profits and loss interests in the Numbered Fund in which the Taxpayer invests.

(21) Pursuant to the Company A Operating Agreement and the Numbered Fund Operating Agreements, no allocation of Historic Tax Credits to members will become effective before December 31 of the year for which the Historic Tax Credits are earned.

(22) The terms of the Company A Operating Agreement and the Numbered Fund Operating Agreements reserve to Fund Manager the rights and powers: (a) to allocate to their members, in any given year, less than all of the Historic Tax Credits that have been earned for a given year; (b) to "warehouse" Historic Tax Credits that have been initially allocated to Company A or the Numbered Funds, for allocation to members in a subsequent year; and (c) to allocate such "warehoused" and unallocated Historic Tax Credits to Taxpayer-members of the Numbered Funds, including Taxpayers who invest in and become members of the Numbered Funds in a subsequent year.

(23) Any Historic Tax Credits that are not allocated to a specific Taxpayer-member of a Numbered Fund as of December 31 of the year during which the Structure is placed in service will be allocated in subsequent tax years to Taxpayers who make equity contributions to a Numbered Fund and become members of a Numbered Fund in a year or years subsequent to the year in which the Structure is placed in service.

(24) Each of the Taxpayer-members of the Numbered Funds will be a separate taxpayer and none of them will be affiliated with any of the other Taxpayers in any way, because:

(a) none of Taxpayers will own any direct or indirect interest in any of the other Taxpayers;

(b) none of the Taxpayers will exercise, directly or indirectly, any degree of control over any of the other Taxpayers;

(c) none of the Taxpayers will have any of the same officers, directors, managers,

members, or partners as any of the other Taxpayers;

(d) none of the Taxpayers will have any power to vote for the election of officers, directors, managers or management of any of the other Taxpayers or otherwise to influence or control the management, policies, or activities of any of the other Taxpayers; and

(e) other than their investments in the Numbered Funds, the Taxpayers will have no other joint business activities.

(25) No Taxpayer will be allocated more than \$5 million of the Historic Tax Credits that are earned by the Project.

(26) The Taxpayers will utilize the Historic Tax Credits to offset their respective liabilities for Louisiana income and/or corporation franchise taxes, but Taxpayers who are allocated credits in excess of their tax liabilities for a given year may elect to sell their unused credits to taxpayers with a Louisiana tax liability.

SPECIFIC RULINGS REQUESTED

Based on the foregoing Statement of Facts and on behalf of the Requesting Parties, you have requested each of the following specific rulings:

(1) For purposes of La. R.S. 47:6019(A)(1)(a), Historic Tax Credits are generated as a result of Developer's eligible costs and expenses incurred during the rehabilitation of the Structure.

(2) Any such Historic Tax Credits may then be allocated among Developer's members pursuant to the Developer Operating Agreement, and in accordance with La. R.S. 47:1675(F)(1), such Historic Tax Credits may be allocated among Developer's members in a manner that is disproportionate to their respective equity contributions, ownership percentages, and profits and loss interests in Developer. In particular, one hundred percent (100%) of such Historic Tax Credits may be allocated to Company A, as a member of Developer. Because Company A is a pass-through entity that will not itself utilize any of the Historic Tax Credits, Company A is entitled to acquire, by allocation from the Developer, an amount of Historic Tax Credits generated in connection with the rehabilitation of the Structure that exceeds \$5 million, in the aggregate.

(3) Any such Historic Tax Credits may then be allocated among the Numbered Funds, as Company A's members, pursuant to the Company A Operating Agreement, and in accordance with La. R.S. 47:1675(F)(1) such Historic Tax Credits may be allocated among the Numbered Funds in a manner that is disproportionate to their respective equity contributions, ownership percentages, and profits and loss interests in Company A. In particular, one hundred percent (100%) of such Historic Tax Credits may be allocated to the Numbered Funds, as members of Company A, and no Historic Tax Credits need be allocated to Fund Manager. Because each Numbered Fund is a pass-through entity that will not itself utilize any of the Historic Tax Credits, each Numbered Fund is entitled to acquire, by allocation from Company A, an amount of Historic Tax Credits generated in connection with the rehabilitation of the Structure that exceeds \$5 million, in the aggregate.

(4) Because the Numbered Fund Operating Agreements provide that no Taxpayer-member of any of the Numbered Funds may receive an allocation of more than \$5 million, in the aggregate, of Historic Tax Credits generated by the Project, the \$5 million "cap" set forth in La. R.S. 47:6019(A)(1)(a) will not have been exceeded.

(5) Any such Historic Tax Credits may be allocated among the Numbered Funds' Taxpayer-

members pursuant to the Numbered Fund Operating Agreements, and in accordance with La. R.S. 47:1675(F)(1) such Historic Tax Credits may be allocated among the Numbered Funds' Taxpayer-members in a manner that is disproportionate to their respective equity contributions, ownership percentages and profit and loss interests in the Numbered Funds. In particular, one hundred percent (100%) of such Historic Tax Credits may be allocated to Taxpayer-members of the Numbered Funds, as members of the Numbered Funds, and no Historic Tax Credits need be allocated to Fund Manager.

(6) The allocation of Historic Tax Credits among Company A's and the Numbered Funds' members may be made effective as of December 31 of the calendar year in which the Structure is placed in service or in subsequent years, rather than upon the date on which the Structure is placed in service or during the year in which the Structure is placed in service.

(7) It is not necessary that any of the Historic Tax Credits allocated to the Numbered Funds be allocated to Taxpayer-members of the Numbered Funds during the year in which the Structure is placed in service; such allocations may be made in subsequent tax years, provided, however, that the postponement of such allocations to a subsequent tax year or years shall not extend the five-year carry-forward period set forth in La. R.S. 47:6019(A)(3)(a).

(8) Historic Tax Credits need not be allocated to any specific Taxpayer-member of a Numbered Fund during the year in which the Structure is placed in service. All Historic Tax Credits may be allocated in subsequent tax years to Taxpayers who were either members of a Numbered Fund during the year in which the Structure is placed in service or who subsequently make equity contributions to one or more Numbered Funds and become members of one or more Numbered Funds in such subsequent tax year or years. Allocations of Historic Tax Credits made by a Numbered Fund to its Taxpayer-members during a given year may be made effective as of December 31 of that year.

(9) The Taxpayer-members of the Numbered Funds to whom the Historic Tax Credits are ultimately allocated by the terms of the Numbered Fund Operating Agreements shall be deemed to have been originally "awarded" such Historic Tax Credits for purposes of La. R.S. 47:6019(A)(3)(b)(i)(aa) and to have "received" such Historic Tax Credits for purposes of La. R.S. 47:6019(A)(1)(a).

(10) As set forth in the forgoing Statement of Law, federal tax law consistently defines an "affiliate" relationship as one in which one entity controls, is controlled by, or is under common control with another entity. Accordingly, as set forth in the forgoing Statement of Facts, because the Taxpayer-members of the Numbered Funds will not meet the 50% common ownership test taking into account the attribution rules of I.R.C. Section 318(a), none of the Taxpayer-members of any of the Numbered Funds will be "affiliated" with any of the other Taxpayer-members of any of the Numbered Funds for purposes of La. R.S. 47:6019(A)(1)(a).

(11) Each Taxpayer-member of a Numbered Fund to whom the Historic Tax Credits are ultimately allocated by the terms of a Numbered Fund Operating Agreement is entitled to receive an allocation of up to \$5 million of Historic Tax Credits generated in connection with the rehabilitation of the Structure, even if the total amount of Historic Tax Credits generated in connection with such rehabilitation exceeds \$5 million.

(12) The Taxpayer-Members of each Numbered Fund to whom Historic Tax Credits are

ultimately allocated may sell and transfer to other Louisiana taxpayers the Historic Tax Credits originally received by and originally awarded to them, subject to the two-sale limitation on permissible sales set forth in La. R.S. 47:6019(A)(3)(b)(i)(aa).

(13) For purposes of sales of Historic Tax Credits by Taxpayer-members to whom they are originally allocated and awarded, La. R.S. 47:6019 does not limit the amount of Historic Tax Credits that a taxpayer may purchase from either (i) the rehabilitation of a single structure or (ii) a particular downtown development district. Therefore, a taxpayer can purchase from Taxpayer-members of the Numbered Funds as many Historic Tax Credits that have been earned in connection with a particular structure or earned in a particular downtown development district as it would like, irrespective of the amount of Historic Tax Credits such taxpayer has purchased, or may purchase, with respect to such structure or such downtown development district.

V. RULINGS

(1) The tax credit for the rehabilitation of historic structures found in La. R.S. 47:6019 is granted for eligible costs and expenses associated with the rehabilitation of nonresidential real property or residential rental property of a structure listed on the National Register of Historic Places or a structure that has been certified by the state historic preservation office as contributing to the historic significance of the district located in a downtown development district. Eligible costs and expenses as used in La. R.S. 47:6019 means qualified rehabilitation expenditures as defined in Section 47c(2)(A) of the Internal Revenue Code.

(2) - (3) Louisiana Revised Statute 47:204 states that a partner's distributive share of any tax item i.e. income, loss, etc. shall be determined in accordance with the partner's percentage of ownership or equity interest if either: 1) the partnership agreement does not provide for the partner's distributive share of such tax item or 2) the principal purpose of the provision of the partnership agreement related to partnership distribution of tax items is the avoidance or evasion of income tax. Additionally, La. R.S. 47:1675(F)(1) allows entities not subject to Louisiana income or corporation franchise tax who acquire an income or franchise tax credit to allocate the credit to its partners or members as provided for in the operating agreement of the entity unless otherwise provided in the statute granting the credit. Louisiana Revised Statute 47:6019 does not provide an alternative manner in which to allocate the credits.

Under the facts presented in this PLR request, the operating agreements of Developer and Company A both allow for credits to be allocated in a manner that is disproportionate to the partners' respective equity contributions and ownership percentages and the principal purpose of the allocation method does not appear to be the avoidance or evasion of Louisiana state income tax; therefore, the allocation will be valid. While the Louisiana Department of Revenue may accept Developer and Company A's disproportionate allocations of items of income, gain, loss, etc., the department makes no representation that the disproportionate allocations will be respected for federal income tax purposes.

(4) If the Numbered Fund Operating Agreements provide that no Taxpayer-member of any of the Numbered Funds may receive an allocation of more than \$5 million, in the aggregate, of Historic Tax Credits generated by the Project, the \$5 million "cap" set forth in LA. R.S. 47:6019(A)(1)(a) will not have been exceeded so long as the Taxpayer-member has not received credits from another project in the District that would, when added to allocated credit amount from this project, exceed \$5 million.

(5) Louisiana Revised Statute 47:1675(F)(1) allows entities not subject to Louisiana income or corporation franchise tax who acquire an income or franchise tax credit to allocate the credit to its partners or members as provided for in the operating agreement of the entity unless otherwise provided in the statute granting the credit. Louisiana Revised Statute 47:6019 does not provide an alternative manner in which to allocate the credits. Therefore assuming the operating agreements of the Numbered Funds allow for credits to be allocated in a manner that is disproportionate to the partners' respective equity contributions and ownership percentages, the allocation will be valid.

(6) - (8) Neither La. R.S. 47:6019 nor La. R.S. 47:1675 provide when a tax credit must be allocated for a historic rehabilitation project. Therefore, the credits associated with this project do not have to be allocated on the date the property is placed in service but instead may be done on a later date or in later year provided it is not done after the five year carry forward period. Additionally, the allocations may be made to taxpayers who become members of the Numbered Funds after the property was placed in service.

(9) We agree with your analysis of the statute as applied to the facts in question and so rule.

(10) After a careful review of various federal definitions of the term "affiliate" or "affiliation" the Department of Revenue has found none that is truly used in a "comparable context" as is required by the statute because none deal with credits or limitation on amounts of credits particular parties can receive. However, most of the federal provisions reviewed use a fifty percent (50%) common ownership test that the Department finds reasonable to apply to the rehabilitation of historic structures credit. In addition to the 50% common ownership test, the Department will utilize the attribution rules found in Internal Revenue Code Section 318(a) dealing with constructive ownership of stock except that the Department of Revenue will apply the attribution rules to ownership interests in other entities besides corporations including partnerships and limited liability companies. Assuming the entities in question do not meet the 50% common ownership test taking into account the attribution rules of I.R.C. Section 318(a), they are not considered affiliates for purposes of La. R.S. 47:6019.

(11) The language of La. R.S. 47:6019(A)(3)(b)(i)(aa) was amended by Act No. 439 of the 2005 Regular Session of the Legislature in response to an issue that arose in the Department of Revenue's Private Letter Ruling 06-001 in which a public entity, not subject to tax, earned Louisiana historic rehabilitation credits and wanted to sell the credits. The credit was made transferable in La. R.S. 47:6019(A)(3)(b)(i)(aa) which originally provided that:

"[t]axpayers who are awarded tax credits in excess of their tax liabilities for a given year may elect to sell their unused tax credits to taxpayers with a Louisiana tax liability provided the unused credits are sold for a minimum of seventy-five percent of the value of the tax benefits."

Since the public entity was not a taxpaying entity, the question arose as to whether or not the entity could sell their historic rehabilitation credits. To avoid this potential problem, the legislature changed the word "taxpayers" to the word "persons". This change proves that the legislature understood the difference in these two terms and each term's implications for tax purposes. Therefore in saying that ". . . no taxpayer, or any entity affiliated with such taxpayer, shall receive more than five million dollars of credit for any number of structures rehabilitated within a particular downtown development district," the legislature explicitly exempted partnerships and pass-through entities from the restriction of earning or receiving no more than five million dollars of credit for

rehabilitated structures within a particular downtown development district. In this particular case, the term “taxpayer” as used in La. R.S. 47:6019(A)(1)(a) limits the ultimate tax-paying recipients which may claim the State Tax Credits to satisfy their tax liability to five million dollars per downtown development district and not the limited liability companies who originally earn or are allocated the credits.

Based on the facts given above, Each Taxpayer-member or Taxpayer-partner of the Numbered Funds who receives the Historic Tax Credits by the terms of the partnership agreements or LLC operating agreements is entitled to receive an allocation of up to \$5 million of Historic Tax Credits generated in connection with the rehabilitation of the Structure, even if the total amount of Historic Tax Credits generated connection with such rehabilitation exceeds \$5 million, assuming the taxpayer has not previously received an allocation of Historic Tax Credits from a rehabilitation in the same District. Thus, if the taxpayer has previously received an allocation of Historic Tax Credits from a rehabilitation in the same District, the amount of Historic Tax Credits it could receive from this project would be \$5 million, less the amount it had previously received from the other rehabilitation.

(12) Louisiana Revised Statute 47:6019(A)(3)(b) allows persons “who are awarded tax credits in excess of their liabilities for a given year to sell their unused credits to taxpayers with Louisiana tax liabilities.” Therefore, if a taxpayer receives a historic rehabilitation tax credit in 2007, the credit must be applied against that taxpayer's 2007 income tax liability and, if the taxpayer is a corporation, the 2008 franchise tax liability before selling or otherwise transferring the credits. After applying the credit against 2007 income and 2008 franchise tax liabilities, the Taxpayer-members of each Numbered-Fund may sell or transfer the credits to other Louisiana taxpayers, subject to the two-sale limitation as set out in La. R.S. 47:6019.

(13) We agree with your analysis and so rule. Additionally, the term “receive” as used in La. R.S. 47:6019(A)(1)(a) means receipt through allocation and does not refer to the sale of credits from historical rehabilitations in downtown development districts or cultural product districts.

If you have any questions or need additional information, please call Leonore Heavey, Senior Policy Consultant or Danielle B. Clapinski, Attorney, Policy Services Division, at 219-2780.

Sincerely,

Cynthia Bridges
Secretary

By: Danielle B. Clapinski
Attorney
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This correspondence constitutes a private letter ruling (PLR) by the Louisiana Department of Revenue, as provided for by section 61:III.101 of the Louisiana Administrative Code. A PLR provides guidance to a specific taxpayer at the taxpayer's request. It is a written statement that applies principles of law to a specific set of facts or a particular tax situation. A PLR does not have the force and effect of law, and is not binding on the person who requested it or on any other taxpayer. This PLR is binding on the department only as to the taxpayer to whom it is addressed, and only if the facts presented were truthful and complete and the transaction was carried out as proposed. It continues as authority for the department's position unless a subsequent declaratory ruling, rule, court case, or statute supersedes it.