



Private Letter Ruling
Redacted Version
No. 07-017

Corporation Income Tax and Franchise Tax and Individual Income Tax
Credit for the Rehabilitation of Historic Structures in Downtown Development Districts
November 8, 2007

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 is syndicating the acquisition and redevelopment of land and building in New Orleans, Louisiana (the “Project”) situated within the New Orleans Downtown Development District (the “District”).
- (2) The building (the “Structure”) is located at XXX Street, New Orleans, Louisiana.
- (3) Developer has submitted an application pursuant to LA. REV. STAT. 47:6019A(2)(a), to the Louisiana Division of Historic Preservation (“DHP”) for a certification that the Structure contributes to the historical significance of the District, and DHP 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. REV. STAT. 47:6019A(1)(a)) incurred during the rehabilitation of the Structure, the amount of Historic Tax Credits generated by such rehabilitation are expected to exceed \$5 million.
- (5) Company A, LLC, Company B, LLC, Company C LP (the “Investor Entities”) will each make equity investments in Developer, acquire ownership of limited partnership interests in Developer, and become parties to Developer’s written partnership agreement (the “Partnership Agreement”).
- (6) Each of the Investor Entities is a separate taxpayer and none of the Investor Entities is affiliated with each other in any way, because:
 - (a) none of these three entities owns any direct or indirect interest in either of the other two entities;
 - (b) none of these three entities exercises, directly or indirectly, any degree of control over either of the other two entities;
 - (c) none of these three entities has any of the same officers, directors,

managers, members, or partners as either of the two other entities;

(d) none of these three entities has any power to vote for the election of officers, directors, managers or management of either of the two other entities or otherwise to influence the management, policies, or activities of either of the two other entities; and

(e) other than their investments in the Project, these three entities have no other joint business activities.

(7) The Historic Tax Credits generated pursuant to LA. REV. STAT. 47:6019A.(2)(a) will be allocated among the three Investor Entities in accordance with Developer's Partnership Agreement. Such allocations will be disproportionate to the respective equity contributions and ownership interests of each Investor Entity in Developer. No Investor Entity will be allocated more than \$5 million of Historic Tax Credits.

(8) Company SG is a limited liability company that is classified as a "partnership" for federal tax purposes.

(9) In exchange for negotiated consideration, each of the Investor Entities intends to sell and transfer to Company SG all of the Historic Tax Credits allocated to such Investor Entity pursuant to Developer's Partnership Agreement, and therefore, Company SG will own Historic Tax Credits generated by the rehabilitation of the Structure in excess of \$5 million. Company SG will not use any of the Historic Tax Credits that are sold and transferred to it by the Investor Entities; rather, Company SG intends to sell and transfer such Historic Tax Credits to taxpayers with Louisiana income and/or corporation franchise tax liability ("Taxpayers"). Thus, the Historic Tax Credits generated in connection with the rehabilitation of the Structure will have been sold and transferred twice once in possession of the Taxpayers.

(10) Taxpayers will utilize the Historic Tax Credits to offset their respective liabilities for Louisiana income and/or corporation franchise taxes.

STATEMENT OF LAW:

INTRODUCTION

(1) The original version of LA. REV. STAT. 47:6019 was originally enacted in 2002 as LA. REV. STAT. 47:6016.¹ As originally enacted, the statute provided that the credit "shall be limited to one credit per historic structure rehabilitated" and that "[t]his credit shall be equal to or less than two hundred fifty thousand dollars."

(2) When LA. REV. STAT. 47:6019 was amended in 2005,² the per-structure limitation was eliminated and in its place a "cap" of \$5 million per taxpayer per downtown development district ("DDD") was put in place.

(3) LA. REV. STAT. 47:6019, as amended and as currently in force, provides that: "[n]o taxpayer, or any entity affiliated with such taxpayer, shall receive more than \$5 million of credit for any number of structures rehabilitated within a particular downtown

¹ LA. REV. STAT. 47:6019 was originally enacted by La. Acts 2002, No. 60, §1, eff. July 1, 2002 as LA. REV. STAT. 47:6016, and was redesignated as LA. REV. STAT. 47:6019 pursuant to the statutory revision authority of the Louisiana State Law Institute.

² LA. REV. STAT. 47:6019 was amended by La. Acts. 2005, No. 439, §1, eff. July 11, 2005

development district.” LA. REV. STAT. 47:6019.A.(1)(a).

(4) With the 2005 amendment, the Louisiana Legislature clearly intended to encourage rehabilitation of historic structures by expanding the availability of credits and, in so doing, determined to remove the “per-structure” limitation in favor of a limitation that would allow multiple taxpayers to invest in a project or projects within a single DDD, so long as no single taxpayer, or any entity affiliated with such taxpayer, receives more than \$5 million of credit for any number of structures rehabilitated within any particular DDD.

DISCUSSION OF “AFFILIATED”

(5) The legislature did not define the term “affiliated” in either the original or the amended versions of LA. REV. STAT. 47:6019. In the 2005 amendment, however, the legislature did add the following provision:

“Federal law terms. Except as otherwise provided for or clearly appearing from the context, any term used in this Section shall have the same meaning as when used in a comparable federal law.”

(6) While there does not appear to be a federal tax credit law directly comparable to LA. REV. STAT. 47:6019, the Internal Revenue Code (“IRC”) does provide definitions of “affiliates” and “related taxpayers” in a wide variety of contexts. In every instance, the test of affiliation depends on whether one person or entity controls another, directly or indirectly, either through ownership or voting control.

(7) Section 168(h)(4)(B) of the IRC deems entities to be “affiliated” if the entities have either “(i) significant common purposes and substantial common membership, or (ii) directly or indirectly substantial common direction or control.”

(8) Section 1504 of the IRC defines an “affiliated group” for purposes of determining whether corporations must file consolidated tax returns. Here again, the IRC determines “affiliation” by reference to percentage of ownership of one corporation by another corporation.

(9) Section 482 of the IRC permits the IRS to allocate income and deductions among related taxpayers if they are “owned or controlled directly or indirectly by the same interests.”

(10) Section 267(a) of the IRC disallows deductions in respect of losses from the sale or exchange of property between related taxpayers. These “relationships” or affiliations are defined in Section 267(b) of the IRC. For example, two corporations are deemed to be “related” if they are part of the same “controlled group.”³ For these purposes, a “controlled group” is one in which corporations have a common parent, or are part of a brother-sister controlled group. Control is measured in terms of voting power.

(11) Section 1239 of the IRC, dealing with the recognition of gain in sales or exchanges of property between “related persons,” uses a test based on direct or indirect stock ownership to determine whether taxpayers are related.

³ See 26 U.S.C. Section 267(f)(1)(A) and (B).

(12) Accordingly, for federal tax law purposes, the standard test for determining whether parties are “related” or “affiliated” turns on the issue of whether or not they are under common control, through ownership or the power to control through voting power.

(13) For these reasons, none of the Investor Entities can be deemed to be an “affiliate” of the others under La. REV. STAT. 47:6019 because they are not under common control through ownership, voting power, or otherwise.

(14) The same result obtains if one looks to the definitions of “affiliate” under Louisiana statutes and regulations.

(15) The terms “affiliate” and “affiliated” are defined in numerous places in the Louisiana Revised Statutes and the Louisiana Administrative Code.

(16) The Revenue and Taxation title of the Louisiana Administrative Code defines “affiliated corporation” as “any corporation which through (a) stock ownership, (b) directorate control, or (c) any other means, substantially influences policy of some other corporation or is influenced through the same channels by some other corporation.” LA. ADMIN. CODE tit. 61, pt. I, §303.

(17) Louisiana Revised Statute 47:603, which pertains to borrowed capital for corporation franchise tax purposes, defines “affiliated corporation” as “any corporation which through stock ownership, directorate control, or other means substantially influences policy of some other corporation or is influenced through the same channels by some other corporation.”

(18) Under the title related to financial institutions and consumer credit, the Louisiana Administrative Code defines “affiliate” as “a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.” LA. ADMIN. CODE tit. 10, pt. XIII, §103.

(19) The Insurance Regulations set forth in the Louisiana Administrative Code similarly define “affiliate” as “any person that controls, is controlled by or is under common control with another company,” under LA. ADMIN. CODE tit. 37, pt. XIII, §9909.

(20) The Louisiana Gaming Regulations define “affiliate” as “any person who directly or indirectly controls, or is controlled by, or is under common control of another person.” LA. ADMIN. CODE tit. 42, pt. VII, §1701.

(21) LA. REV. STAT. 6:532 defines “affiliate” in terms of interstate banking, as “any company that controls, is controlled by, or is under common control with another company.”

(22) The Louisiana Trust Code, LA. REV. STAT. 9:1725, defines “affiliate” as “a person directly or indirectly controlling or controlled by another person, or a person under direct or indirect common control with another person.”

(23) The Louisiana Consumer Credit Law, LA. REV. STAT. 9:3516, defines “affiliate” as “a specific person who is directly or indirectly, through one or more intermediaries, controlled by, or controls, or is under common control with the person specified.”

(24) Regulations promulgated under the Louisiana Securities Law define the terms

“affiliate” or “person affiliated with” to mean, when used with reference to a specified person, “a person who directly or indirectly through one or more intermediaries controls or is controlled by or is under common control with the person specified.” LA. ADMIN. CODE tit. 51, pt. X, §702.

DISPROPORTIONATE ALLOCATIONS

(25) LA. Rev. Stat. 47:1675F.(1) provides that “[u]nless otherwise provided in the statute granting the credit, if an entity not subject to Louisiana income tax or corporation franchise tax acquires an income or franchise tax credit, the credit shall flow through to the partners or members as provided in the operating agreement of the entity.” LA. Rev. Stat. 47:1675F.(1) further provides that “[i]n the absence of an operating agreement, the credit shall flow through to each partner or member in accordance to the partner’s or member’s ownership interest in the entity.” Thus, the written operating agreement of an entity that is not subject to Louisiana income tax or corporation franchise tax may provide for allocations of Historic Tax Credits to its partners or members in a manner that is disproportionate to such partners’ or members’ respective equity contributions and ownership interests.

SPECIFIC RULINGS REQUESTED:

Based on the foregoing Statement of Facts and on behalf of the Requesting Parties, we hereby request each of the following specific rulings:

(1) For purposes of LA. Rev. Stat. 47:6019A.(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 Equity Investors pursuant to the Partnership Agreement, and in accordance with LA. Rev. Stat. 47:1675F.(1), such Historic Tax Credits may be allocated among the Equity Investors in a manner that may be disproportionate to their respective equity contributions and ownership percentages in Developer.

(3) The members or partners of Equity Investors to whom the Historic Tax Credits are ultimately allocated by the terms of the partnership agreements or LLC operating agreements of the Equity Investors or by the partnership or operating agreements of their respective members shall be deemed to have been originally awarded such Historic Tax Credits and to have “received” such Historic Tax Credits for purposes of La. Rev. Stat. 47:6019A.(1)(a).

(4) As set forth in the forgoing Statement of Law, federal tax law, as well as Louisiana statutory and administrative law (both in the tax arena and other areas of the law), consistently define an “affiliate” relationship as one in which one entity controls, is controlled by, or is under common control with another entity. Accordingly, none of the Investor Entities is “affiliated” with either of the other Investor Entities for purposes of LA. REV. STAT. 47:6019A.(1)(a).

(5) Each member or partner of the Equity Investors to whom the Historic Tax Credits are ultimately allocated by the terms of the partnership agreements or LLC operating agreements of the respective Equity Investors or by the partnership or operating agreements of their respective members 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.

(6) The Investor Entities may sell and transfer to Company SG the Historic Tax Credits received by and originally awarded to them. Company SG is entitled to acquire, by transfer, from the Investor Entities an amount of Historic Tax Credits generated in connection with the rehabilitation of the Structure that exceeds \$5 million, in the aggregate.

(7) Company SG is entitled to sell and transfer to one or more Taxpayers, and such Taxpayers shall be entitled to utilize, an amount of Historic Tax Credits generated in connection with the rehabilitation of the Structure that exceeds \$5 million, in the aggregate. No Taxpayer to whom Company SG sells and transfers Historic Tax Credits shall be entitled to subsequently sell such Historic Tax Credits as the sale and transfer from Company SG to such Taxpayer shall have exhausted the number of permissible sales permitted by LA. REV. STAT. 47:6019A(3)(b)(i)(aa).

RULINGS

(1) The tax credit for the rehabilitation of historic structures found in R.S. 47:6019 is granted for eligible costs and expenses associated with the rehabilitation of residential 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 R.S. 47:6019 means qualified rehabilitation expenditures as defined in Section 47c(2)(A) of the Internal Revenue Code of 1986, as amended.

(2) 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. R.S. 47:6019 does not provide an alternative manner in which to allocate the credits. Therefore assuming the partnership agreement of Developer allows 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.

(3) For the reasons outlined in Ruling (5), we agree.

(4) 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 R.S. 47:6019.

(5) The language of R.S. 47:6019(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 Historic Tax Credits and wanted to sell the credits. The credit was made transferable in 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. . .”

Since the public entity was not a taxpaying entity, the question arose as to whether or not the entity could sell its Historic Tax 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. The term “taxpayer” as used in R.S. 47:6019(A)(1)(a) does not limit the pass-through partnerships or limited liability companies who originally earn or are allocated the credits to five million dollars per downtown development district. Rather, R.S. 47:6019(A)(1)(a) limits the members or partners of such pass-through partnerships or limited liability companies that are actually Louisiana taxpayers to five million dollars per downtown development district.

Based on the facts given above, each member or partner of the Equity Investors to whom the Historic Tax Credits are ultimately allocated by the terms of the partnership agreements or LLC operating agreements of the respective Equity Investors or by the partnership or operating agreements of their respective members 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. In the case of a provision of an operating or partnership agreement that does not allow allocation of the credit to the members or partners, any credits not allocated under the operating or partnership agreement will be deemed to be allocated to the members or partners in proportion to their ownership interest.

(6) R.S. 47:6019 allows “persons who are awarded [historic] tax credits in excess of their tax liabilities for a given year [to] elect to sell their unused credits to taxpayers with a Louisiana tax liability.” 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 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.

Based on the facts presented, (1) Company SG is entitled to acquire, by transfer, from the Investor Entities an amount of Historic Tax Credits generated in connection with the rehabilitation of the Structure in excess of \$5 million, in the aggregate; (2) Company SG is entitled to sell and transfer all of such Historic Tax Credits to one or more Taxpayers, and (3) any such Taxpayer shall be entitled to utilize these Historic Tax Credits, even if more than \$5 million.

(7) While the statute does allow for a person awarded a Historic Tax Credit to sell any unused portion of the credit, the Historic Tax Credit can only be sold twice. Therefore, if the Investor Entities sell the credits to Company SG and Company SG subsequently sells the credits to taxpayers with Louisiana tax liabilities, the taxpayers with Louisiana tax liabilities will not be allowed to sell the credit again.

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

Sincerely,

Cynthia Bridges
Secretary

By

Danielle B. Clapinski
Attorney
Policy Services

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