Case Nos. 10-1333 (L), 10-1334, 10-1336

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VIRGINIA HISTORIC TAX CREDIT FUND 2001 LP;
VIRGINIA HISTORIC TAX CREDIT FUND 2001 LLC;
TAX MATTERS PARTNER, *et al.*,
Petitioners - Appellees,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent - Appellant.

ON APPEAL FROM THE DECISION OF
THE UNITED STATES TAX COURT

MOTION OF THE HISTORIC TAX CREDIT COALITION, NATIONAL TRUST FOR HISTORIC PRESERVATION, PRESERVATION ACTION, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, NATIONAL HOUSING & REHABILITATION ASSOCIATION, PRESERVATION VIRGINIA, AND HISTORIC PRESERVATION FOUNDATION OF NORTH CAROLINA, INC. FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF PETITIONERS-APPELLEES AND THE PETITION REHEARING WITH PETITION FOR REHEARING *EN BANC*

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May 13, 2011

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, and to assist the Court in resolving the issues in this case, the Historic Tax Credit Coalition, joined by the National Trust for Historic Preservation in the United States ("National Trust"), Preservation Action, National Conference of State Historic Preservation Officers, National Housing & Rehabilitation Association, Preservation Virginia, and Historic Preservation Foundation of North Carolina, Inc., respectfully move this Court for leave to participate as *amici curiae* in this case, and to file the accompanying brief in support of Petitioners-Appellees' Petition for Rehearing with Petition for Rehearing *En Banc*.[1] The issues addressed in the *amici*'s brief include, among other things, the implications of the Court's decision for state and national historic tax credit programs, and thus relate to the Court's disposition of the supported Petition.

I. INTERESTS OF *AMICI CURIAE*

As national and statewide nonprofit organizations with direct involvement in state and federal rehabilitation tax credit programs, each of the *amici* have an interest in the outcome of the pending Petition for Reconsideration with Petition

[1] Counsel for *amici* contacted counsel for all parties in this case to advise them of the interest in filing an *amici curiae* brief in support of the Petitioners-Appellees. Counsel for the Petitioners-Appellees consented to the *amici's* Motion. Counsel for the Respondent-Appellant advised that he declined to give consent.

for Rehearing *En Banc*. The Court's recent decision threatens to decrease the value of time-tested state historic tax credits, and to undermine the financing of landmark historic preservation projects nationwide. Specific interests of the *amici* are set forth below.

Historic Tax Credit Coalition

The Historic Tax Credit Coalition (HTCC) is an organization whose members are historic tax credit industry representatives who work together to help develop consensus on ways to promote, expand, and improve the federal historic rehabilitation tax credit and its state counterparts (such as Virginia). Its members are tax credit syndicators, investors, tax attorneys, accountants, preservation consultants, and real estate developers who are involved in the business of using the historic tax credit as a financing tool to promote economic development through the rehabilitation of historic properties. The HTCC's activities include research on the economic impact of the historic tax credit, the development of legislative and regulatory proposals to promote the simplification and greater use of the HTC, and efforts to foster greater communication between the National Park Service, the Internal Revenue Service, and the historic tax credit industry.

National Trust for Historic Preservation

The National Trust is a federally chartered nonprofit, charitable, and educational organization established by Congress in 1949 to further the historic

preservation policies of the United States and to "facilitate public participation" in the preservation of our nation's heritage. 16 U.S.C. §§ 468-468d.[2] The mission of the National Trust is to provide leadership, education, and advocacy to save America's diverse historic places and revitalize our communities. In addition to its headquarters in Washington, D.C., the National Trust operates nine regional and field offices. There are twenty-nine National Trust Historic Sites open to the public nationwide, of which three are in Virginia.

With the strong support of almost 200,000 members nationwide, including, as of this writing, almost 17,000 members and supporters in Virginia, the National Trust carries out a wide range of programs and activities in support of historic preservation, as provided under its federal charter. These activities include the promotion of public policies, legal tools, and tax incentives that support the preservation of America's heritage. In light of its interest, involvement, and expertise, the National Trust also frequently participates in judicial proceedings relating to the enforcement or application of laws that promote the preservation of historic places, both as *amicus curiae* and as a party.

The National Trust has a strong interest in ensuring the use, validity, and effectiveness of historic rehabilitation tax credit programs at the federal and state

[2] The Attorney General of the United States is a statutory *ex officio* member of the Board of Trustees of the National Trust, as is the Secretary of the Interior. 16 U.S.C. § 468b.

level, including Virginia's. Through its subsidiary, the National Trust Community Investment Corporation (NTCIC), the National Trust has developed extensive experience in investing in certified rehabilitation projects that qualify for federal and state historic tax credits. By providing equity to the rehabilitation of landmark commercial properties, NTCIC helps revitalize historic communities and individual landmarks nationwide. Net profits from NTCIC's operations support the programs of the National Trust.

Preservation Action

Preservation Action is a 501(c)(4) nonprofit organization created in 1974 to serve as the nation's preeminent Capitol Hill advocate for historic preservation. Preservation Action seeks to make historic preservation a national priority by advocating to all branches of the federal government for sound preservation policy and programs through a grassroots constituency empowered with information and training and through direct contact with elected representatives.

National Conference of State Historic Preservation Officers

The National Conference of State Historic Preservation Officers (NCSHPO) is the professional association of gubernatorially-appointed state government officials who coordinate federal and state policies and programs related to historic preservation, and who carry out the national historic preservation program as delegates of the U.S. Secretary of the Interior and the Advisory Council on Historic

Preservation, pursuant to the National Historic Preservation Act. The Act names the NCSHPO as the point of contact for the State Historic Preservation Officers (SHPOs). The NCSHPO is a 501(c)(3) corporation registered in the District of Columbia; its president serves as ex-officio member of the Advisory Council on Historic Preservation. 16 U.S.C. § 470i(a)(7). The NCSHPO has participated in the development of historic rehabilitation incentives through the income tax code both in legislation and regulation since the mid-1970s.

National Housing & Rehabilitation Association

The National Housing & Rehabilitation Association (NH&RA) is an association of professionals who are involved in affordable housing, historic rehabilitation, and New Markets Tax Credit development. NH&RA meets quarterly for discussions of significant issues affecting these industries, including federal and state tax credit programs. NH&RA also acts as a clearinghouse of information for industry leaders related to financing techniques, equity investment, deal structuring, asset management, subsidy allocations, project design, management operations, and new development opportunities.

Preservation Virginia

Preservation Virginia is a private, non-profit statewide historic preservation organization founded in 1889. It is dedicated to perpetuating and revitalizing Virginia's cultural, architectural, and historic heritage, thereby ensuring that

historic places are integral parts of the lives of present and future generations. Preservation Virginia's mission is directly consistent with and supports Article XI of the Constitution of Virginia, which establishes the Commonwealth's general policy of preservation and conservation of the state's historic and natural resources. Preservation Virginia provides leadership, experience, influence, and services to the public by saving, managing, and protecting historic places, and developing preservation policies, programs, and strategies with individuals, organizations, and local, state, and national partners. Preservation Virginia promotes and utilizes the Commonwealth's historic rehabilitation tax credit program as a valuable economic development tool to ensure investment in historic structures and districts that have the result of contributing to local economies and tax bases.

Historic Preservation Foundation of North Carolina, Inc.

Founded in 1939 and supported by a membership of over 4,000 members, the Historic Preservation Foundation of North Carolina, Inc., also known as Preservation North Carolina, is North Carolina's only private nonprofit statewide historic preservation organization. Its mission is to protect and promote buildings, landscapes, and sites important to the diverse heritage of North Carolina. Preservation North Carolina has been cited by the National Park Service as "the premier statewide preservation organization of the South, if not the Nation" and by

the National Trust for Historic Preservation as "the model organization of its kind." Through its award-winning Endangered Properties Program, Preservation North Carolina has saved more than 600 endangered historic properties, generating an estimated $200 million in private investment. It also assisted with the creation of rehabilitation tax credits by the North Carolina General Assembly in 1997. More than $1 billion has already been invested in historic buildings through this program. The program has since been expanded by the legislature to provide an enhanced incentive for the rehabilitation of vacant historic industrial and utility complexes.

II. IMPORTANCE OF AN AMICUS CURIAE BRIEF AND ITS RELEVANCE TO THE ISSUES BEFORE THE COURT

Because of their extensive experience in the area of historic preservation tax incentives and the legal and policy issues that support these incentives, the *amici* herein are able to provide national and statewide perspectives to assist the Court in evaluating the consequences and implications of the panel's decision to disallow Virginia's historic tax credit allocation at issue in this case. Consequently, the *amici* believe their participation would be useful to this Court in its consideration of whether to grant the Petitioners-Appellees' Petition for Rehearing with Petition for Rehearing *En Banc*.

Conclusion

For the reasons stated, the *amici* request that this Court grant this Motion for Leave to File the Accompanying Amicus Curiae brief in support of the Petitioners-Appellees.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 13, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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The national and statewide nonprofit organizations captioned above submit this Brief as *amici curiae* pursuant to Rule 29(a) of the Rules of this Court. The *amici*"s interests are stated in the Motion filed together with this Brief.

SUMMARY OF THE ARGUMENT

Because of the Court"s overly broad definition of "property," the Court"s decision discourages investments in all tax incentive partnerships, contrary to the clear intent of both Congress and all States that mandate or permit the allocation of tax credits as tax items. Moreover, when coupled with the misapplication of the Section 707 disguised sale rules, the definition of "property" adopted by the Court creates a conflict with existing precedent.

ARGUMENT

I. THE COURT APPLIED AN OVERLY BROAD DEFINITION OF "PROPERTY" IN CHARACTERIZING THE ALLOCATION OF TAX CREDITS AMONG PARTNERS PURSUANT TO VIRGINIA'S HISTORIC TAX CREDIT PROGRAM AS A SALE, THEREBY DISCOURAGING INVESTMENT IN ALL TAX INCENTIVE PARTNERSHIPS.

The Court"s decision calls into question the tax treatment of all syndicated policy-based tax credit transactions and will discourage investors from participating in historic rehabilitation projects, low-income housing tax credit projects, alternative energy projects, New Markets Tax Credit projects, and other projects that Congress and the States have encouraged through the enactment of such tax credits. State tax credit programs, like analogous federal tax credit

programs, are designed to encourage investments in these socially desirable areas, where the investment may not be economically feasible without the tax benefits.

The Court's holding, however, significantly impairs the use of allocated state credits to bridge funding gaps by reducing the after-tax dollars available for such purpose, thereby dramatically diminishing the effectiveness of such programs and frustrating the intent of Congress and the States. The mere threat of such a reduction in development funding caused by the uncertainty over the scope of the Court's opinion will impede the ability of developers to raise capital. The notion that *any* state (and perhaps even federal) tax credit allocated through a partnership structure may be treated as "property" is inconsistent with existing precedent and incorrect as a matter of law. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002); *Healthkeepers, Inc. v. Richmond Ambulance Authority*, No. 10-1508, 2011 WL 1535236, *4-5 (4th Cir. Apr. 25, 2011) (both noting importance of judicial deference to legislative enactments). Moreover, because the Court's holding jeopardizes the continued operation of Virginia's Historic Tax Credit Program by disallowing the allocation structure specifically chosen by Virginia's Legislature for this statutory program, the Court's decision contradicts its traditional "deep reluctance to interpret a statutory provision so as to render superfluous other provisions[.]" *Healthkeepers* at *5.

Twenty-two States—including all States within the Fourth Circuit—permit the allocation of tax credits by partnerships or other pass-through entities entitled to such credits.[1] Similarly, partnerships or other pass-through entities that are eligible for federal tax credits must allocate the credits to their partners. Federal tax credits in preservation (and other) development projects cannot be "bought" and "sold," but are typically allocated to project investors. The broad definition of "property" adopted by the Court for purposes of Section 707 has raised concerns about the potential application of disguised sale principles to countless existing and prospective syndicated policy-based tax credit transactions, many of which involve facts that differ significantly from those of the instant case.

In the text of its opinion, the Court holds that "we find that the transfer of tax credits from the Funds to investors *under the circumstances presented here* constituted a transfer of 'property.'" *Virginia Historic Tax Credit Fund 2001 LP v. Commissioner*, No. 10-1333, 2011 WL 1127056, *8 (4th Cir. Mar. 29, 2011) (emphasis added). In the accompanying footnote, however, the Court explains that "we are asked to decide only whether the transfer of tax credits acquired by a *non-developer partnership* to investors in exchange for money constituted 'a transfer of

[1] National Trust for Historic Preservation's Center for State and Local Policy, Harry K. Schwartz, *State Tax Credits for Historic Preservation*, http://www.preservationnation.org/issues/rehabilitation-tax-credits/additional-resources/nthp_state_tax_credits_model_policy.pdf (last visited May 13, 2011).

property" for purposes of § 707." *Id.* n.15 (emphasis added). In footnote 16, the Court again states that it is not holding that all tax credits constitute property, but immediately adds uncertainty by stating that "we are asked only to determine whether a party's decision to exchange its tax credits for money, rather than utilize them, means that the 'payment in cash' the party receives should be categorized as 'income.'" *Id.*

However, virtually all tax incentive partnerships contemplate that a party will "exchange its tax credits for money" by bringing into the partnership additional investors who thereby acquire a right to an allocation of tax credits as one of the partnership attributes. Indeed, the tax credit would be meaningless if it could not be allocated to investors. When considered in the context of the Court's nebulous definition of "property" for purposes of applying the disguised sale provisions of I.R.C. § 707, it is difficult to see how allocated tax credits and other tax incentives would not be considered "property" in any tax incentive partnership where, by definition, a partner who cannot use the credits or other tax benefits allocates them to the partners who provide investment capital for the activity that the credits or other tax benefits are designed to encourage. The decision, therefore, raises a cloud over all such programs at the State and Federal level.

II. THE COURT'S DECISION TO TREAT NON-TRANSFERABLE HISTORIC PRESERVATION TAX CREDITS AS PROPERTY CONFLICTS WITH EXISTING LAW.

Under the cases cited by the Court, virtually any federal or state tax credit—or other tax benefits, such as losses and depreciation—could be viewed as "property." Typically, federal tax incentives are realized through the use of partnerships or other pass-through entities. The Code and the Treasury Regulations are replete with provisions concerning how tax credits and other tax items are allocated by pass-through entities. *See, e.g.*, I.R.C. §§ 702 to 704; Treas. Reg. § 1.704-1(b). Nothing in the legislative history of these provisions indicates that Congress intended, or even contemplated, that tax credits or other tax items should be treated as "property" for tax purposes.

The cases cited by the Court to support its "property" characterization offer virtually no practical guidelines for analyzing a policy-based partnership transaction. For example, the Court cites the Supreme Court opinion in *United States v. Craft*, 535 U.S. 274 (2002), which identified the "right to use the property, to receive income produced by it, and to exclude others from it," as fundamental property rights. *Id.* at *8 (citing 535 U.S. at 283). Any taxpayer who is allocated a tax item has the "right to use it." A tax credit does not "produce income" unless any transaction in which an investor contributes capital to a venture in exchange, among other things, for tax benefits is somehow viewed as an income-producing event. Any taxpayer to whom a tax credit or other tax item is allocated can "exclude others from it," since by definition such benefit is

embedded in some form of ownership interest in the pass-through entity generating the tax benefit.

Similarly, the Court refers to the Supreme Court's emphasis in *Drye v. United States*, 528 U.S. 49 (2002), on the "breadth of the control the taxpayer can exercise over the 'property' and whether the right in question was 'valuable.'" *Id.* Again, any tax credit or tax benefit is by definition "controlled" by the taxpayer to whom it is allocated and always will have value to a taxpayer who can use it. The Court stated: "That the Fund's tax credits had pecuniary value is evidenced by the fact that the Funds used the credits to induce investors to contribute money." *Id.* This is true of all syndicated tax credit and other tax incentive investments, whether federal or state. Many investors in projects incentivized by tax credits are induced to contribute money solely because of the tax incentives; that is the reason the incentives were enacted by Congress or the States in the first place. Moreover, the Court found it relevant that the Funds exercised "proprietary control" over the tax credits, observing that "once the historic developers allocated to the Funds the rights to use or distribute these credits, the Funds could exclude others from utilizing the credits and were free to keep or pass along the credits to partners as they saw fit." *Id.* Yet the right to allocated interests in a partnership is a key characteristic of a partnership structure. Under the Court's approach, *any* tax item allocated through a partnership interest inherently is subject to the proprietary

control of the taxpayer to whom it is allocated. To treat this allocation right as an indicator of a property interest for tax purposes is, under any measure, too broad.

Prior to the decision in the instant case, the IRS consistently recognized that non-transferable state tax credits could be allocated and are not treated as property for federal tax purposes. *See, e.g.*, I.T.A. 2002-11042 (Feb. 5, 2002); Gen. Couns. Mem. 2004-45046 (Nov. 5, 2004); Priv. Ltr. Rul. 2003-48002 (Aug. 28, 2003); C.C.A. 2002-3804 (July 24, 2002); C.C.A. 2001-26005 (May 31, 2001); and Priv. Ltr. Rul. 1987-42010 (July 10, 1987). The Court has apparently changed that approach "under the circumstances of [this case]," but it is unclear under what other circumstances the change might apply.

In some cases, for example, an investor may be allocated the same percentage of federal and state credits and may remain in the partnership for a number of years. Nevertheless, the state tax credits have many of the characteristics of "property" articulated in the cases cited by the Court to support its opinion. That is, the investor has the right to use the credits and has "proprietary control" over the use of the credits (in the sense that the use of any tax item, whether federal or state, is vested in the taxpayer to whom it is allocated). The credits, like all federal and state tax benefits, have pecuniary value; that is the very reason for their existence. The investor can exclude others from using the credits. Although allocated credits technically are not transferable, the Court's

opinion concludes that, at least under the facts of the instant case, they were functionally transferable. If the Court means to suggest that any transaction involving allocated tax credits presumptively is a sale of property under Treas. Reg. § 1.707-3 that must be reported to the IRS under the provisions of Treas. Reg. § 1.707-8, then the Court"s position is not supported by any legislative, administrative, or judicial authority predating the Court"s opinion.

The application of the principles enumerated by the Court to federal tax credits is particularly problematic. Federal tax credits and other federal tax items are the product of a federal statute reflecting the explicit intent of Congress as to their use and characterization. Under the provisions of the Code, a partnership or other pass-through entity cannot transfer or sell such tax items, which must be allocated to the partners or members of such an entity. I.R.C. §§ 701 to 704; Treas. Reg. § 1.707-1(b). Similarly, unlike distributions of property, federal tax credits do not reduce the capital accounts of partners to whom such credits are allocated (except to the extent of adjustments to the adjusted tax basis of partnership property in respect of certain tax credits and tax credit recapture). This underscores the fact that tax credits do not constitute property for federal income tax purposes. *See* Treas. Reg. § 1.704-1(b)(4)(ii).

III. THE COURT'S DECISION TO TAX THE ALLOCATION OF HISTORIC PRESERVATION TAX CREDITS AMONG PARTNERS AS A SALE CONFUSES THE ISSUE OF WHAT CONSTITUTES PROPERTY WITH THE ISSUE OF WHAT CONSTITUTES A DISGUISED SALE.

In order for the provisions of Section 707(a)(2)(B) to apply, there must be "a direct or indirect transfer of money *or other property* by a partner to a partnership" and "a related direct or indirect transfer of money *or other property* by the partnership to such partner (or another partner)." (emphasis added). This provision, therefore, cannot apply in the absence of a direct or indirect transfer of "property." Although the decision purports to address the "property" issue separately from the disguised sale issue, the broad definition of "property" in the cases cited by the Court suggests that the Section 707 factors analyzed by the Court influenced the conclusion that, at least under the facts of the Virginia transaction, the credits should be treated as "property."

The application of the disguised sale factors listed in Treas. Reg. § 1.707-3 to determine the threshold issue of whether an allocation of tax items constitutes a transfer of property is circular, is not supported by any statutory or regulatory provisions or existing judicial precedent, and produces results that are inconsistent with the intent of both the States and Congress in enacting tax credit programs designed to incentivize socially desirable investments that would not be made in the absence of tax benefits.

At the outset, the Court appears to have been heavily influenced by the significant disparity between the interest of the Fund investors in federal tax items and their allocable share of state credits. All U.S. taxpayers benefit from federal credits, but only taxpayers in a particular state benefit from state tax credits. As a result many state tax credit statutes are drafted to permit state tax credits to be allocated differently than federal tax credits. Such provisions are designed to maximize the equity that can be raised for the activities generating the tax credits. For example, federal tax credits generally must be allocated to partners based either on their share of partnership profits or on their share of the underlying expenditures generating the credits. If state tax credits had to be allocated in the same manner, the state program would succeed only if the federal investor(s) also could use the state tax credits. Special allocations of tax items are commonplace in all types of partnership transactions and are explicitly sanctioned by Treasury Regulations. See Treas. Reg. § 1.704-1(b). There is no policy reason that a special allocation of state tax credits by a partnership should be relevant to the question of whether such credits constitute "property" for purposes of Section 707(b).

The other disguised sale factors in the Section 707 Regulations are equally inappropriate in addressing the issue of whether tax credits or other tax items constitute "property." For example, the Court noted that, in the case of the Virginia transaction, the "timing and amount" of the Virginia state tax credits to be

transferred to the investors were "determinable with reasonable certainty" at the time of their investment. *Virginia Historic Tax Credit Fund 2001 LP*, at *10. In the case of *any* tax incentive partnership, the amount of the credits or other tax benefits to be allocated to the investor generally will be determinable with some level of certainty at the time of the investment based on financial projections prepared in connection with the investment. While actual results may differ from projected results, and the investor will be protected by adjuster provisions, the lack of precision in the "determinable with reasonable certainty" factor creates a concern that the factor might be deemed to be present in a wide variety of different transactions.

Similarly, the partners in *any* partnership have a "legally enforceable right" to receive the allocation of tax items described in the partnership agreement. This is a fundamental principle of both partnership and contract law. With respect to the question of whether "the partner's right to receive the transfer of money or other consideration is secured in any manner," the investor in any tax incentive partnership will be protected against the loss of projected tax benefits through adjusters, indemnities, guaranties, and similar mechanisms; without such protections, the investment simply would not be made. See *Historic Boardwalk Hall, LLC v. C.I.R.,* 136 T.C. No. 1, 2011 WL 9078 (U.S.Tax Ct.):

> These side agreements and guaranties must be looked at in context: They were necessary to attract an equity investor. These provisions are meant to

> protect [the investor] from any unforeseen circumstances that could arise as a result of problems with the rehabilitation…the agreements were meant to prevent the transaction from having a larger impact than the parties had bargained for.

The Court also analyzed whether the investors in the Funds had "any obligation to return or repay the money or other consideration to the partnership," concluding that "[a]fter receiving the tax credits, the investors had no further obligations or relationship with the partnership. Instead, they were free to use the credits for their own benefit." *Virginia Historic Tax Credit Fund 2001 LP*, at *11. Any partner who has been allocated a share of tax credits or other tax items is "free to use" such credits or other tax items for its own benefit. In many tax incentive partnerships, the investors will remain as partners for many years and thus will continue to have "obligations" to and a "relationship" with the partnerships. In other such partnerships, investors may enter or depart the partnership under terms agreeable to the other partners: the right to use tax credits should not be converted to a purchase and sale solely because the partner has exited the partnership.

In the instant case, commenting on the Tax Court's decision to apply a general assessment of entrepreneurial risk rather than the specific factors listed in the Section 707 Regulations, this Court held that "[e]ven if the Tax Court's independent assessment of entrepreneurial risk was appropriate, . . . we believe its conclusions in that regard missed the mark." *Id*. The Court noted that there is no dispute that the "but for" test was satisfied in the Virginia transaction. However,

the Court"s use of the "but for" test does not clarify the question of whether and when a tax credit will be characterized as "property." It is always the case that a partner does not (and will not) receive an allocation of tax items or other benefits unless the partner agrees to make contributions of property or services to the partnership.

The Court went on to analyze the entrepreneurial risks cited by the Tax Court and concluded that "[u]pon closer examination, … these risks appear both speculative and circumscribed." *Id.* at *12. However, some of the factors cited by the Court are present, to some degree, in any tax incentive partnership and should not be relevant to the issue of whether "property" exists. For example, the investors in such a partnership typically are protected against the loss (or reduction in the amount) of projected tax benefits. Similarly, tax incentive partnerships frequently contemplate staged capital contributions contingent upon the satisfaction of specified conditions as well as repurchase obligations if certain adverse events occur. While the factors analyzed by the Court are appropriate for determining whether a distribution of property purportedly made to a partner in its capacity as a partner should be recharacterized as a sale, they are irrelevant to whether "property" is involved from a federal income tax standpoint.

Finally, the Court considered the transitory partner status of the investors in the Funds to be relevant to the disguised sale analysis. It is common for investors

in tax incentive partnerships to exit the transaction at some point after the negotiated tax benefits have been realized. One of the purposes of the "recapture" provisions in the Code and many state statutes is to ensure that investors maintain their interest for a specified period of time. This was explicitly recognized by the Tax Court in *Historic Boardwalk Hall*. In its decision there, the Tax Court acknowledged that "NJSEA and Pitney Bowes contemplated Pitney Bowes' disposing of its membership interest and leaving Historic Boardwalk Hall." *Historic Boardwalk Hall*, 136 T.C. No. 1 at 18.

In the instant case, the Virginia state credits were subject to recapture based on subsequent alterations to the historic buildings although not for an early disposition of the buildings (or of direct or indirect interests in the partnerships that owned the buildings). (In contrast, federal tax credits and many state tax credits *are* subject to recapture upon an early disposition of the property generating such credits.) As the *Historic Boardwalk Hall* decision suggests, the repurchase of an investor's interest in a tax incentive partnership after the applicable recapture period certainly should not be viewed as an adverse factor in the property characterization analysis. However, the Court did not consider this.

Conclusion

For the reasons stated, the *amici* request that this Court grant the Petition for Rehearing with Petition for Rehearing *En Banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,481 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in Times New Roman 14 point font.

CERTIFICATE OF SERVICE

I certify that on May 13, 2011, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS
AND OTHER INTERESTS

Nos. 10-1333(L), 10-1334, 10-1336 **Caption:** ***Virginia Historic Tax Credit Fund 2001 LP et al. v. Commissioner of Internal Revenue***

Pursuant to FRAP 26.1 and Local Rule 26.1, the Historic Tax Credit Coalition, National Trust for Historic Preservation, Preservation Action, National Conference of State Historic Preservation Officers, National Housing & Rehabilitation Association, Preservation Virginia, and Historic Preservation Foundation of North Carolina, Inc., who are *amici*, make the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity? NO
2. Does party/amicus have any parent corporations? NO
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? NO
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? NO
5. Is party a trade association? (*amici curiae* do not complete this question)
6. Does this case arise out of a bankruptcy proceeding? NO

Respectfully submitted,

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May 13, 2011

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