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Dear Curt and Craig,

Thank you both again for taking the time to meet with us on September 23rd and for assembling the team that will be working on the issues related to Section 50(d) income. We thought it was a productive conversation. At the meeting, we committed to giving you feedback on two issues -- proposed effective date language for any prospective guidance, and our research on how other tax structures, including consolidated corporate returns, treat 50(d) income. Through this letter, the Historic Tax Credit Coalition (HTCC) is providing a Historic Tax Credit industry consensus.

The HTCC believes very strongly that any 50(d) guidance should be prospective only and applied going forward as suggested by our effective date language below. If the Internal Revenue Service and Department of the Treasury intend to offer a new interpretation of existing law and regulations related to 50(d), we urge that you not apply this guidance retroactively through the audit process on closed transactions. This would seem to be a matter of taxpayer fairness given that the IRS and Treasury are starting from a "clean slate" on 50(d) as expressed in our meeting.

Other Tax Structures

At our meeting, we indicated our belief that the use of a partnership as the lessee in a master tenant transaction involving a Section 50(d) election did not provide a benefit that would be unavailable if another type of entity were used. We wanted to follow up briefly on that point. As you know, most investors in historic tax credit transactions are corporations. If a corporation formed a subsidiary to act as the lessee in such a transaction, with a developer entity serving as a non-member manager, and the subsidiary was part of a consolidated group filing a consolidated return, the basis of the subsidiary's stock would be increased by its share of taxable income under Treas. Reg. § 1.1502-32. As is the case with a partnership, there currently is no statutory exclusion for 50(d) income. The same result would occur under Code § 1367(a)(1)(A) in the case of an S corporation. The legislative "fix" in response to the Gitlitz case does not change this result since it is limited to income excluded under Code § 108(a).

Potential Effective Date Language

Additionally, we took the liberty of drafting possible language on the effective date of any prospective guidance to ensure it applies going forward and picks a point in time that is reasonable for transactions closed but not placed in service. We have included below both language to be included in a Notice of Proposed Rulemaking and in the rule itself.

Language to be included in the Notice of Proposed Rulemaking (and the Treasury Decision publishing the final regulations):

> The IRS and Treasury Department have considered long standing industry practices with respect to buildings making use of the "pass through" of rehabilitation credits to a lessee of a rehabilitated property pursuant to Section 50(d)(5) of the Internal Revenue Code where the tenant being allocated the credit is taxed as a partnership. In these situations, pursuant to Section 50(d)(5) of the current Internal Revenue Code, taxpayers who are partners of such partnerships have generally included their share of the income described in Section 48(d)(5) of the Internal Revenue Code, as in effect on the day of the enactment of the Revenue Reconciliation Act of 1990 ("50(d) income"), in computing their basis in their partnership interest. In the interest of the fair and efficient application of the tax laws, the IRS has concluded that these regulations, *and the principles on which they are based,* should be applied on a prospective basis. Accordingly, except in limited situations, in the case of Excepted Property, as that term is defined in Section (e)(2) of these regulations, the IRS will not dispute the treatment of the timing of the recognition, and the inclusion in the basis of a taxpayer's partnership interest, of 50(d) income allocated to such taxpayer by a partnership of which the taxpayer is a partner. The limited situations to which this rule would not apply are those **involving tax avoidance, such as where** the taxpayers participating in a transaction generating 50(d) income take inconsistent positions, or in which some or all of the 50(d) income is not recognized by any taxpayer. For example, the IRS would review any transaction in which a pass through lease was terminated, and there was unamortized 50(d) income at that time which was not recognized by any of the partners **or former partners** of the tenant partnership. The IRS would generally not review **the tax treatment of the allocation of 50(d) income** if the interests of the partners in the partnership are modified after the recapture period that applies to the rehabilitation credit, **or if the partner that claimed the credit withdraws from the partnership, provided** the pass through lease continues, with the **continuing** partners being allocated the 50(d) income in the modified ratios in effect at that time, unless such modification was done for a tax avoidance purpose.

Effective date language to be included in the regulations (this assumes that the operative sections of the regulations are (a) through (d):

> (e) Effective Date
>
> (1) General Rule. Except as provided in this subsection (e), *[subsections (a) through (d)]* of

these regulations shall apply with respect to any partnership and its partners in the case of any property leased to such partnership in a lease to which Section 50(d)(5) of the Internal Revenue Code applies, and which is placed in service after [*the date that final regulations are published in the federal register*].

(2) <u>Exception</u>. (A) Except as provided in subsection (e)(2)(D), these regulations shall not apply with respect to any Excepted Property. (B) For purposes of this section, the term *Excepted Property* means any property of a partnership which is described in subsection (e)(1), which is placed in service not later than December 31, 2016, and for which one or more partners are subject to a Binding Obligation to make a Substantial Capital Contribution to the partnership that is the tenant of such property. (C) For purposes of this subsection, the term *Binding Obligation* means a contractual obligation made not later than [*the date that proposed regulations are published in the federal register*] that obligates one or more partners to make Substantial Capital Contributions in the aggregate to such a partnership with respect to such a property not later than December 31, 2016, and the term *Substantial Capital Contribution* means the greater of $200,000 or twenty (20%) percent of the total contribution that the partners are reasonably expected to make to such partnership, determined at the time the property is placed in service. (D) Notwithstanding subsection (e)(2)(A), a person may elect to apply *[subsections (a) through (d)]* of these regulations to an Excepted Property in accordance with rules prescribed by the Secretary.

Lastly I wanted to let you know that the HTCC has drafted a Revenue Procedure 2014-12 "Recommended Practices" article that will appear in one of the weekly BNA publications in January. We hope this article will set a high standard for industry compliance.

Again, we want to thank you for your time and attention to the matters affecting use of the Historic Tax Credit. Our research shows that the program continues to have the economic and cultural impacts Congress intended for it. With your help, through the issuance of 50(d) guidance, we hope to build on the renewed investor confidence that resulted from the issuance of the Procedure.

Sincerely,

John Leith-Tetrault
Chairman
Historic Tax Credit Coalition