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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13564

TENANTS' DEVELOPMENT CORPORATION and
TENANTS' DEVELOPMENT II CORPORATION

Plaintiffs-Appellants / Cross-Appellees

v.

AMTAX HOLDINGS 227, LLC and ALDEN TORCH FINANCIAL, LLC

Defendants-Appellees / Cross-Appellants

and

TENANTS' DEVELOPMENT II, L.P.

Nominal Defendant.

On Appeal from the Superior Court Department of the Trial Court
Business Litigation Session, Civil Action No. 2084CV01260-BLS1

BRIEF OF AMICI CURIAE THE COMMUNITY BUILDERS, INC., THE COUNCIL OF LARGE PUBLIC HOUSING AUTHORITIES, HOMEOWNER'S REHAB., INC., PRESERVATION OF AFFORDABLE HOUSING, INC., 2LIFE COMMUNITIES INC., NATIONAL HOUSING TRUST, LEADINGAGE, STEWARDS OF AFFORDABLE HOUSING FOR THE FUTURE, THE BROCKMANN LAW FIRM, P.C., GOLDSTEIN HALL PLLC, GUBB & BARSHAY LLP, BLANCO TACKABERY & MATAMOROS, P.A., REGIONAL HOUSING LEGAL SERVICES, COMMUNITY DEVELOPMENT NETWORK OF MARYLAND, INCORPORATED, HOUSING ASSOCIATION OF NONPROFIT DEVELOPERS (HAND), RROZEN ASSOCIATES, NATIONAL HOUSING LAW PROJECT, AND THE LOCAL DEVELOPMENT CORPORATION OF CROWN HEIGHTS, INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, The Community Builders, Inc., the Council of Large Public Housing Authorities, Homeowner's Rehab., Inc., Preservation of Affordable Housing, Inc., 2Life Communities Inc., National Housing Trust, LeadingAge, Stewards of Affordable Housing for the Future, The Brockmann Law Firm, P.C., Goldstein Hall PLLC, Gubb & Barshay LLP, Blanco Tackabery & Matamoros, P.A., Regional Housing Legal Services, Community Development Network of Maryland, Incorporated, Housing Association of Nonprofit Developers (HAND), RRozen Associates, National Housing Law Project, and The Local Development Corporation of Crown Heights, Inc. (collectively, "Amici Curiae"), by and through their undersigned counsel, state that Amici Curiae have no parent corporation and no publicly held corporation owns 10% or more of stock of any individual Amici Curiae.

Dated: August 19, 2024

Respectfully submitted,

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae are mission-driven nonprofit organizations, along with legal counsel to organizations furthering affordable housing, formed for the purpose of fostering affordable housing for low-income households. The Low-Income Housing Tax Credit ("LIHTC") program seeks to ensure long-term affordability of projects by utilizing a special contractual privilege to allow nonprofit partners to secure long-term control of projects through a statutory right of first refusal at a below-market minimum purchase price. At the heart of this appeal is the proper interpretation of the minimum purchase price of the statutory right of first refusal ("ROFR").

The Superior Court's decision threatens the interests of Amici Curiae and other nonprofit affordable housing organizations by including an investor limited partner's exit taxes in the calculation of the minimum purchase price under the statutory ROFR. The Court's decision frustrates the intent of the LIHTC program to maintain long-term affordability by artificially inflating the cost a nonprofit housing developer must pay to acquire a project. Often, inclusion of an investor limited partner's exit taxes causes the minimum purchase price to exceed the fair market value of the property. The actual income taxes attributable to the sale of a project, by contrast, are entirely separate and distinct from an investor limited partner's exit taxes, which arise and can only be calculated when such partnership interest is completely liquidated upon final distribution of assets to the partner. If allowed to

stand, the lower court decision is likely to reduce the nationwide inventory of long-term affordable housing by imposing onerous investor related transfer costs not consistent with the intent of the LIHTC program on Amici Curiae and other similarly situated mission-driven nonprofit organizations.

DECLARATION BY AMICI CURIAE

Pursuant to Mass. R. App. P. 17(c)(5), the undersigned does hereby declare that: (A) neither a party nor a party's counsel authored the brief in whole or in part; (B) no party, no party's counsel, nor any other person or entity, other than the Amici Curiae, their members, or their counsel, contributed money that was intended to fund the preparation or submission of the brief; and (C) neither the Amici Curiae nor their counsel have represented one of the parties to the present appeal in a proceeding involving similar issues, nor were they a party nor represented a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF ARGUMENT

The Commonwealth of Massachusetts Supreme Judicial Court (the "Court") solicited amicus briefs on this issue: Are taxes resulting from a limited partner's **exit** from a partnership created for purposes of owning and operating a LIHTC property pursuant to 26 U.S.C. § 42 et seq. considered "attributable to" the partnership's **sale** of the property in connection with the exercise of a statutory ROFR under 26 U.S.C.

§42(i)(7)(B)), which requires that the minimum purchase price must include "all Federal, State, and local taxes attributable to such sale." 26 U.S.C. §42(i)(7)(B)(ii).).

The Superior Court's decision to include an investor limited partner's exit taxes as part of the ROFR minimum purchase price under 26 U.S.C. §42(i)(7)(B) has the perverse effect of providing financial benefits (i.e., beyond a 10-year stream of LIHTCs and tax benefits related to depreciation) to investors that extend beyond the parties' initial agreement. If the lower court's decision were to stand, inclusion of the limited partner's exit taxes as part of the ROFR minimum purchase price would, in many instances, become the primary driver of the cost to purchase LIHTC projects. This would artificially inflate the ROFR minimum purchase price and elevate it above the fair market value of the property.

Unlike conventional real estate investments, which attract investors primarily on the basis of cash flow from a project, investors in LIHTC projects bargain for tax benefits (including depreciation losses to offset income) as their primary motivation for investing. LIHTC investors typically realize millions of dollars of tax benefits of their investments through the LIHTCs and other tax items (i.e., losses) that are received, and with the understanding that the investor will exit partnerships after the risk that the tax credits might be recaptured ends at the conclusion of the 15-year compliance period. By including the statutory ROFR under 26 U.S.C. §42(i)(7), Congress enabled the long-term preservation of these affordable housing

developments by allowing for the transfer of LIHTC projects by a partnership to a non-profit or governmental owner at the end of the 15-year compliance period as a means of facilitating long-term operation of the development as affordable housing.

Upon an exit from any partnership, limited partners may incur exit taxes if their losses (for which the investor limited partners receive corresponding tax benefits over their investment) exceed the total amount of their capital investments during the term of the investment. It is important to note that investor limited partners have a choice of whether to continue to take losses while their capital accounts are negative and therefore incur exit taxes, or suspend those losses and avoid exit taxes. Furthermore, such losses have no relation to the value of the property sold and effectively create an incentive for investors to force non-profits to indemnify investors when the investors themselves have already received their bargained for tax benefits through tax credits and depreciation losses. It is inequitable to allow an exiting investor limited partner to shift its tax burden to the non-profit purchaser seeking to exercise its statutory ROFR rights by choosing to continue to accrue losses. This is especially the case since such losses have no relation to the limited partner's actual contributions or the value of the property sold.

Upon the exercise of the ROFR, the taxable gain or loss related to the sale of the property is calculated and included in the calculation of the minimum purchase price under 26 U.S.C. §42(i)(7)(B)(ii) because they are considered "attributable to"

or directly related to the sale of the property. On the other hand, a partner's exit taxes are separate and distinct from taxes (gain or loss) incurred upon the sale of the property. For Federal tax purposes, a partnership that carries on business activities (after the sale of property) through a winding up period is not considered to have ceased business or terminated until it renders its final distribution of cash to the partners. A partner's exit tax liability is calculated following the complete winding up and termination of the partnership after the sale has occurred. The sale of the property predates completion of the winding up process. Therefore, the investor limited partner's exit taxes – an amount that cannot legally be determined at the time of sale – should not be included in the ROFR minimum purchase price.

This case is part of a growing trend by investors seeking to extract back-end profit from LIHTC projects beyond the original bargain with project ownership. *See SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.,* 33 F.4th 872 (6th Cir. 2022) at *881 (citations omitted) ("The purpose of the Partnership arrangement was for SunAmerica to reap the benefits from the housing tax credits, not from the Property's long-term appreciation gains. That purpose is further evidenced by the fact that SunAmerica's role in the Partnership was meant to be entirely passive. By gaining the tax credit, SunAmerica received its benefit of the bargain."). The back-end profit seeking will deter a growing number of non-profits from exercising their transfer rights and jeopardize the long-term affordability of LIHTC projects. *See*

Washington State Housing Finance Commission, *Nonprofit Transfer Disputes in the Low Income Housing Tax Credit Program: An Emerging Threat to Affordable Housing*, at 102 (September 2019).

In addition to undermining the policy goals of the LIHTC program, the decision to include an investor limited partner's exit taxes as part of the ROFR minimum purchase price under 26 U.S.C. §42(i)(7)(B)) is inconsistent with Tax Court precedent, the Internal Revenue Code of 1986, as amended (the "Code"), Internal Revenue Service ("IRS") guidance, and the Massachusetts Uniform Partnership Act. Rather than relying on these authorities, the lower court's decision rests on an interpretation of secondary source materials that are not issued by the IRS and/or outdated.

ARGUMENT

I. INCLUSION OF EXIT TAXES AS PART OF THE 26. U.S.C. §42(i)(7) RIGHT OF FIRST REFUSAL MINIMUM PURCHASE PRICE IS CONTRARY TO THE POLICY OF THE LOW-INCOME HOUSING TAX CREDIT PROGRAM

As discussed in Appellants Principal Brief, the ROFR provision under 26 U.S.C. §42(i)(7) was always intended to enable nonprofit affordable housing developers and for-profit investors to establish a partnership to enable ownership of a LIHTC property to be transferred to the nonprofit at a cost below the fair market value of the property after the end of the 15-year compliance period, while, at the same time, allowing the investor to fully benefit from the tax credits. Report Of The

Mitchell-Danforth Task Force On The Low-Income Housing Tax Credit at 19 (Jan. 1989). The interpretation offered by the Appellees/Cross-Appellants frustrates this intent.

As discussed below, consideration of an investor limited partner's exit taxes is entirely separate from the costs and taxes attributable to the partnership's sale of property. Inclusion of such exit taxes upon the separate event of a nonprofit's exercise of the ROFR would artificially inflate the minimum purchase price by adding losses taken by the limited partner that exceed its capital contribution. Inflation of the ROFR purchase price is especially egregious and inappropriate because such additional costs have no relationship to the limited partner's capital contribution or the value of the property sold.

II. FOR FEDERAL TAX PURPOSES, EXIT TAXES ARE NOT ATTRIBUTABLE TO A SALE

A. Termination of a Partnership is Governed by Federal Law.

The "termination" of a partnership for Federal tax purposes is governed by Federal tax law. *See* 26 U.S.C. §301.7701-1(a); *Chef's Choice Produce Ltd.v. Comm'r*, 95 T.C. 388 (1990). Section 708 of the Internal Revenue Code of 1986, as amended (the "Code") provides that a partnership continues unless it is terminated. 26 U.S.C. §708(a). The Tax Court has held that, "[w]hile the dissolution of a partnership is governed by State law, the termination of a partnership for Federal tax

purposes is controlled by Federal law." *Harbor Cove Marina Partners P'ship v. Comm'r*, 123 T.C. 64, 80-85 (2004). The Tax Court further elaborated by stating "[a] termination of a partnership for Federal tax purposes may be different from its termination, dissolution, or winding-up under State law, and a partnership may continue to exist for federal tax purposes, even though State law provides that the partnership has terminated, dissolved, or wound-up. *Id*. Further, a partnership is considered terminated only if no part of any business, financial operation, or venture continues to be carried on by any partner. 26 CFR §1.708-1(b)(3)(i).

The minimum purchase price under 26 U.S.C. §42(i)(7)(B)(ii) includes "all Federal, State and local taxes *attributable to such sale*." (emphasis added). The language of §42(i)(7)(B)(ii) does not say "attributable to such sale and any subsequent event related to the partnership that occurs thereafter." The taxes to be included in the minimum purchase price are determined at a specific point in time – the time of the sale of the property. There is no statutory language that allows for the inclusion of taxes that may be assessed at some future date as a result of wind-up of the partnership, or any other event downstream from the sale.

26 U.S.C. §1231 pertains to the taxable gains and losses related to the sale of certain property that are used in a taxpayer's trade or business ("1231 Assets"). A taxpayer will either recognize gain or loss upon the sale of a 1231 Asset. If the amount realized from the sale of a 1231 Asset is more than the taxpayer's adjusted

basis in the 1231 Asset, then the taxpayer will have gain on the sale of such 1231 Asset and may owe taxes on such gain.

Exit taxes are distinct and separate from taxes attributable to the sale of 1231 Assets because the sale of 1231 Assets relates to the sale of the physical property, while exit taxes relate to the specific partner. Exit taxes arise if the cumulative losses allocated to a partner over the term of the partner's investment in the partnership exceed the capital contributions made by such partner to the partnership. In such instances, the partner would have a negative basis in the partner's partnership interest. In other words, the partner has a negative capital account representing excess benefits relative to the partner's investment in the partnership, which ultimately results in taxable income to the partner upon its termination from the partnership.

Appellees/Cross-Appellants argue that Commonwealth law governs a partnership's termination. Specifically, Appellees/Cross-Appellants point to Mass G.L. c. 109, § 44, which provides that a "limited partnership is dissolved and its affairs shall be closed…(2) upon the happening of events specified in writing in the partnership agreement." Mass G.L. c. 109, §44. Relying on an erroneous application of Mass G.L. c. 109, §44, Appellees/Cross-Appellants conclude that language in the governing partnership agreement provides for termination upon the sale. Appellees/Cross-Appellants argument further ignores that Mass G.L. c. 109 §46

provides for winding up of partnership affairs following dissolution. Since a Massachusetts limited partnership is able to conduct business after its dissolution, it does not cease to exist (terminate) until some time after its dissolution.

In fact, the Uniform Partnership Act, which has been adopted by the Commonwealth, expressly states that "on dissolution the partnership is not terminated, but continues until the winding up of the partnership affairs." Mass G.L. c. 108a, § 30. This plain language, conclusively shows that dissolution is a distinct event from termination and that a partnership is not considered to be terminated until the final distribution has been made. The Court has held that "[w]inding up" is a

> "term of art under the Uniform Partnership Act, although it is not defined in the statute itself. Federal cases provide some guidance, stating that 'winding up'… describes the process that occurs *during the period following dissolution and preceding termination*, during the course of which work in process is completed, partnership assets are sold, creditors are paid, and the business of the partnership is brought to an orderly close."

See Anastos v. Sable, 819 N.E.2d 587, 592 (Mass. 2004) (quoting *Adams v. United States,* 218 F.3d 383, 388 (5th Cir. 2000) (emphasis added). ("We do not regard dissolution as immediately and necessarily moving the partnership into the stage of winding up, although winding up is certainly necessary before the partnership is ultimately terminated.").

Appellees/Cross-Appellants' arguments with respect to termination of the partnership are also incompatible with several Tax Court rulings, the Code, and IRS

guidance. Tax Court decisions are unequivocal that regardless of State law determinations, for Federal tax purposes, a partnership is not automatically terminated upon dissolution and may continue to exist until it is fully wound up. *See 7050, Ltd. V. Comm'r*, 95 T.C.M. (CCH) 1413 (T.C. 2008); *Harbor Cove*, 123 T.C. 64; *Foxman v. Comm'r*, 41 T.C. 535, 1964, aff'd 352 F.2d 466 (3d Cir. 1965); *see also Baker Commodities, Inc. v. Comm'r*, 415 F.2d 519 (9th Cir. 1969). Tax Courts have consistently held that termination of a partnership is distinct from a mere dissolution of a partnership. *Id*. 26 CFR §1.708-1(b)(3)(i) provides that a partnership generally should not be treated as terminated until the winding up of the partnership's affairs is completed.

26 U.S.C. §736 and 26 U.S.C. §761 also support the notion that a partnership interest is not terminated until the partnership's last distribution is made. For example, 26 CFR §1.761-1(d) provides that liquidation of a partner's interest entails the termination of a partner's entire interest in the partnership through a distribution, or series of distributions, by the partnership to the partner. The Code specifically provides "[w]here a partner's interest is to be liquidated by a series of distributions, the interest will not be considered as liquidated until the final distribution has been made." Pursuant to 26 CFR §1.736-1(a)(6), a two-party partnership is not terminated until the exiting partner's entire interest is liquidated.

Accordingly, the Massachusetts Uniform Partnership Act, the Tax Court, the Code, and IRS guidance, in plain language, all confirm that partnership dissolution is a distinct event from termination. Even if state law was not consistent with this conclusion, Federal law supersedes state law in assessing the termination of a partnership, and partnerships are not considered to be terminated until the final distribution has been made. Therefore, Mass G.L. c. 109, §44 and consequently, the partnership agreement provision referenced by Appellees/Cross-Appellants (i.e., the Partnership "shall be dissolved" upon the "sale of all or substantially all the assets of the Partnership"), do not trigger a termination of the partnership for Federal tax purposes, and accordingly, the investor limited partner's exit taxes are not attributable to the partnership's sale of the property.

B. Termination of the Partnership does not occur upon the Sale of the Property such that a Limited Partner's Exit Taxes are Attributable to the Sale of the Property

As noted above, the statutory and regulatory framework for partnership termination under 26 U.S.C. § 708 provide that a partnership continues unless it is affirmatively terminated. According to 26 U.S.C. § 708(b)(1), a partnership is considered terminated only if no part of any business, financial operation, or venture continues to be carried on by any partner. 26 CFR §1.708-1(b)(1) further provides the following example:

> "[W]here partners DEF agree on April 30, 1957, to dissolve their partnership, but carry on the business

> through a winding up period ending September 30, 1957, when all remaining assets, consisting only of cash, are distributed to the partners, the partnership does not terminate because of cessation of business until September 30, 1957."

The correct interpretation of all the aforementioned statutes and authorities is that a partnership is not considered terminated until the winding up period has ended and all distributions have been made. To this point, in *Harbor Cove*, the Tax Court held that a partnership was not terminated until all distributions were finalized, emphasizing that even minimal business activities prevented termination. *Harbor Cove v. Comm'r*, 123 T.C. at 81. The Tax Court reasoned that the partnership's affairs were not completed because all distributions had not been rendered, and the subject lawsuit could "reasonably lead to the partnership reporting in a subsequent year of significant income, credit, gain, loss, or deduction." *Id* at 83.

For Federal tax purposes, the gain on the sale of property by a partnership engaged in the trade or business of operating low-income housing projects is governed by 26 U.S.C. §1231. Since taxable gain or loss related to the sale of a 1231 Asset is determined at the time of the sale of the low-income housing property, any such taxes related to the sale would be properly attributable at the time of the actual sale of the property. Thus, only taxes directly related to gain from the sale of property (e.g., 1231 Asset) are properly includable in the calculation of the minimum purchase price under 26 U.S.C. §42(i)(7)(B)(ii).

A limited partner's exit taxes, on the other hand, are separate and distinct from taxes attributable to the partnership's sale of the low-income housing property. Exit tax liability is calculated based on the complete winding up and the actual termination of the partnership. As established above, the winding up and termination of the partnership for purposes of Federal income taxes is a separate event that is distinct from the sale of property and occurs only after the partnership has made the final distributions to the partner. In accordance with 26 U.S.C. §761(d), liquidation distributions are the distributions that terminate a partner's entire interest in a partnership, and may be made in a single allocation or as a series of distributions. 26 U.S.C. §761(d); 26 CFR §1.731-1(a)(1)(i); 26 CFR §1.761-1(d).

Liquidating distributions are not made in connection with the liquidation of the partnership, but instead are made to terminate the interest of a partner. *See* Ryan J. Dobens, *Partnerships – Current and Liquidating Distributions; Death or Retirement of a Partner*, 716-3rd TAX MGMT. PORT. (BNA) 147 (2024). In fact, there is no concept of "liquidation" of a partnership in the Code.[1] *See* Amanda Ferguson Wilson, *Partnerships – Disposition of Partnership Interests or Partnership Business; Partnership Termination*, 718-3rd TAX MGMT. PORT. (BNA)

[1] Although there is no concept of liquidation of a partnership in the Code, we note 26 CFR §1.704-1(b)(2)(ii)(g) does define liquidation of a partnership for the sole purpose of determining allocations of tax items in accordance with Code §704.

124 (2024). ("Confusion is sometimes created for non-partnership tax specialists by use of the term "liquidation" of a partnership. There is no such concept in subchapter K. There is, however, the concept of a liquidation of a partner's interest in the partnership under §§731 and 736 [of the Code], but technically not a liquidation of a partnership."). Pursuant to 26 CFR §1.761-1(d), a partner's interest in a partnership is not liquidated until the final distribution is made. Therefore, it cannot be the case that exit taxes would be attributable to the sale of the low-income property because the sale of the low-income property precedes, and is a separate and distinct event from, the partnership's termination.

The foregoing is consistent with several other Tax Court decisions. For example, the Tax Court held that continued use of a partnership's bank account prevents the partnership's termination because business activities have not ceased. *See Sargent v. Comm'r*, 29 T.C.M. (CCH) 941 (T.C. 1970). Similarly, an inactive currency account was sufficient for the Tax Court to find that a partnership was not terminated, reasoning that an inactive currency account is "quite similar to the kinds of minimal activity that we've already found were enough to keep a partnership unterminated." *See 7050, Ltd.,* 95 T.C.M. (CCH) 1314.

While courts have on occasion taken a more flexible approach in determining partnership termination, these cases are distinguishable. For example, in *Goulder v. United States* the Sixth Circuit found in favor of a partnership termination before all

funds were distributed because such funds were retained to satisfy ministerial security-deposit requirements. *See Goulder v. United States*, 64 F.3d 663 (6th Cir. 1995). The Sixth Circuit reasoned that although funds were retained because the parties stipulated that the partnership did not operate or carry on “any business, financial operation or venture” after the year when the termination was deemed to occur, the partnership was effectively terminated. *Id*. The Sixth Circuit’s decision, in large part, was based on a voluntary stipulation, which the court found to be binding on both parties. In the current matter, the parties did not stipulate to any arrangements regarding the business activity that would determine when termination occurred.

Additionally, I.R.S. PLR 201244004 (Nov. 2, 2012) (the “2012 PLR”), states “[t]he regulations interpreting [26 U.S.C. §708(b)(1)(A)] establish a liberal approach to finding of a business nexus sufficient to maintain a partnership. Citing the Tax Court decisions, the 2012 PLR states “a partnership continues to exist even when its operations are substantially changed or reduced in a period of winding up, and even when its sole asset during that period is cash.” I.R.S. PLR 201244004 (Nov. 2, 2012).

In 2012 PLR, a partnership sold all of its assets and subsequently organized a trust to hold cash for the sole purpose of resolving unknown contingent liabilities (“Contingent Liabilities”). *Id* at 2-3. Significantly, the trust was established solely for the purpose of resolving the Contingent Liabilities, invest the trust’s assets in

short-term investments (subject to several limitations), and perform administrative tasks. *Id* at 3. Similar to the stipulation in *Goulder*, the trust agreement explicitly stated the trustee was "prohibited from engaging in any business, from making investments other than short-term cash equivalents, from retaining cash in excess of an amount reasonably necessary to provide for the Contingent Liabilities, and from holding assets such as publicly-traded stock or partnership interests." *Id*. The term of the trust was three years and upon termination of the trust, the remaining assets would be distributed to the beneficiaries. *Id*. The partnership placed an amount of cash into the trust based on a reasonable estimate of the maximum potential Contingent Liabilities payable, and the remainder of the cash from the sale of the partnership's assets was distributed to the partners. *Id*. Moreover, the limited partners of the partnership were offered a "buy-out" option to sell their beneficial interests in the trust to ensure the limited partners were not "unduly inconvenienced" by being unable to receive all of their respective cash proceeds at the time of the sale. *Id.* The IRS concluded that the trust was a "liquidating trust" within the meaning of 26 CFR §301.7701-4(d). *Id* at 4-6. The IRS ruled the partnership was terminated because all of its assets (cash and beneficial interests in the trust) had been distributed to the partners.

Both *Goulder* and the 2012 PLR acknowledged explicitly via written stipulation and the trust agreement that business operations would cease and/or were

prohibited following the sale of partnership assets. In the current case, Section 2.5 of the operative partnership agreement provides:

> "the Partnership shall continue in full force and effect until December 31, 2054 except that the Partnership shall be *dissolved* prior to such date upon the happening of any of the following events: (i) The sale or other disposition of all or substantially all the assets of the Partnership…" RA.III.88.[2]. (Emphasis added).

Appellees/Cross-Appellants argue that the language of the partnership agreement stating that the Partnership "shall be dissolved" upon the happening of certain events, including, the "sale or other disposition of all or substantially all the assets of the Partnership" is clear and unambiguous and should be enforced accordingly. Brief of Appellees and Cross-Appellants, Amtax Holdings 227, LLC, Alden Torch Financial, LLC and Tax Credit Holdings III, LLC, at 40, *Tenants' Development Corporation and Tenants' Development II Corporation v. Amtax Holdings 227, LLC, Alden Torch Financial LLC, and Tax Credit Holdings III, LLC*, Mass (SJC-13564 (Apr. 10, 2024). Appellees/Cross-Appellants then reference Mass G.L. c. 109, §44, to suggest that exit taxes "arise upon, and because of the sale" because the plain language of the partnership agreement provides that the Partnership dissolves and its affairs are closed upon the sale. *Id* at 41. As explained

[2] Citations to the Record Appendix will be in the following form: "(RA.[Vol.].[Page].").

above, these arguments conflict with the Code, Internal Revenue Service Guidance and Tax Court holdings.

For Federal tax purposes, regardless of whether a partnership's principal asset is sold, where a partnership's tax liability is uncertain or minimal business activities continue to be conducted, the partnership is not terminated absent a written stipulation to cease business operations (as was the case in *Goulder* and the 2012 PLR). The instructions in the LPA to dissolve the partnership contradict Appellees/Cross-Appellants' argument because those instructions trigger a subsequent series of events that are separate, apart and distant in time from the sale of the property. As a result, the consideration and inclusion of exit taxes is inapplicable because exit taxes cannot be determined until the partner receives its final distribution from the partnership as part of the dissolution process.

CONCLUSION

For the reasons stated herein, it is respectfully requested that the Court reverse the Superior Court's judgment declaring that exit taxes must be included as part of the ROFR minimum purchase price and judgment as a matter of law that exit taxes shall not be included.

Dated: August 19, 2024 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17(c)(9) of the Massachusetts Rules of Appellate Procedure, undersigned counsel hereby certifies that the foregoing **Brief of Amici Curiae The Community Builders, Inc., the Council of Large Public Housing Authorities, Homeowner's Rehab., Inc., Preservation of Affordable Housing, Inc., 2Life Communities Inc., National Housing Trust, LeadingAge, Stewards of Affordable Housing for the Future, The Brockmann Law Firm, P.C., Goldstein Hall PLLC, Gubb & Barshay LLP, Blanco Tackabery & Matamoros, P.A., Regional Housing Legal Services, Community Development Network of Maryland, Incorporated, Housing Association of Nonprofit Developers (HAND), RRozen Associates, National Housing Law Project, and The Local Development Corporation of Crown Heights, Inc. in Support of Plaintiffs-Appellants and Reversal** complies with the rules of court that pertain to the filing of amicus briefs, including, but not limited to:

Mass. R. App. P. 16 (e) (references to the record);
Mass. R. App. P. 17(c) (cover, length, and content);
Mass. R. App. P. 20 (form and length of brief); and
Mass. R. App. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the proportional Times New Roman font at size 14 point and contains 5,769 total non-excluded words as counted using the word count feature of Microsoft Word.

Dated: August 19, 2024

Respectfully submitted,

/s/ Stephen I. Holmquist

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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-13564

TENANTS' DEVELOPMENT CORPORATION and
TENANTS' DEVELOPMENT II CORPORATION

Plaintiffs-Appellants / Cross-Appellees

v.

AMTAX HOLDINGS 227, LLC and ALDEN TORCH FINANCIAL, LLC

Defendants-Appellees / Cross-Appellants

and

TENANTS' DEVELOPMENT II, L.P.

Nominal Defendant.

CERTIFICATE OF SERVICE

Pursuant to Mass. R. App. P. 13(e), I hereby certify, under the penalties of perjury, that on August 19, 2024, I have made service of a copy of the foregoing **Brief of Amici Curiae The Community Builders, Inc., the Council of Large Public Housing Authorities, Homeowner's Rehab., Inc., Preservation of Affordable Housing, Inc., 2Life Communities Inc., National Housing Trust, LeadingAge, Stewards of Affordable Housing for the Future, The Brockmann Law Firm, P.C., Goldstein Hall PLLC, Gubb & Barshay LLP, Blanco Tackabery & Matamoros, P.A., Regional Housing Legal Services, Community Development Network of Maryland, Incorporated, Housing Association of Nonprofit Developers (HAND), RRozen Associates, National Housing Law Project, and The Local Development Corporation of Crown Heights, Inc. in Support of Plaintiffs-Appellants and Reversal** in the above-captioned case upon all attorneys of record by electronic service through eFileMA.

Dated: August 19, 2024

Respectfully submitted,

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