

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
APEX PLACE HOUSING DEVELOPMENT FUND CORPORATION	:	DETERMINATION DTA NO. 829857
for Review of a Denial, Suspension, Cancellation or Revocation of a License, Permit or Registration under Articles 28 and 29 of the Tax Law.	:	

Petitioner, Apex Place Housing Development Fund Corporation, filed a petition for review of a denial, suspension, cancellation or revocation of a license, permit or registration under articles 28 and 29 of the Tax Law.

An expedited virtual hearing was held before Jessica DiFiore, Administrative Law Judge, on June 15, 2020, at 9:00 a.m., with briefs submitted by July 24, 2020, which date began the period for issuance of this determination.¹ Petitioner appeared by Bousquet Holstein PLLC (Paul Predmore, Esq. and Cecilia Cannon, Esq., of counsel). The Division of Taxation appeared by Amanda Hiller, Esq. (Stephanie Scalzo, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioner’s application for an exempt organization certificate pursuant to Tax Law § 1116 (a).

FINDINGS OF FACT

The parties entered into a stipulation of facts, which is included in relevant part, below.

¹ Due to the COVID-19 pandemic, the parties agreed to hold this hearing electronically in the presence of a court stenographer.

1. Petitioner, Apex Place Housing Development Fund Corporation is a housing development fund corporation formed pursuant to Article XI of the Private Housing Finance Law (PHFL) and the Not-For-Profit Corporation Law (N-PCL).

2. The sole member of petitioner is Phipps Houses, a New York not-for-profit corporation that is an exempt organization pursuant to Internal Revenue Code (IRC) § 501 (c) (4).

3. Petitioner filed its Certificate of Incorporation (COI) with the New York Department of State on January 4, 2019. Petitioner's COI states in its section entitled "Type and Purpose" as follows:

"[Petitioner] is a corporation as defined in N-PCL §102(a)(5). [Petitioner] is a charitable not-for-profit corporation organized pursuant to N-PCL §201 and PHFL §573 exclusively for the purpose of developing and operating a housing project for Persons Of Low Income. In furtherance of such purpose, the Corporation shall lessen the burdens of government and provide social welfare by lessening neighborhood tensions and combating community deterioration. [Petitioner] is organized exclusively for such purpose for the promotion of social welfare in accordance with §501(c)(4) of the Internal Revenue Code of 1986, as amended ("IRC") and shall not carry on any activities not permitted to be carried on by a corporation exempt from federal income tax under IRC §501(c)(4) or corresponding provisions of any subsequent federal tax laws."

"Persons Of Low Income" is defined in the COI as a household that has an annual income that is not more than the lesser of 165 percent of "AMI" as defined in the COI, or such lower amount as set by an agreement with the Department of Housing Preservation and Development of the City of New York (HPD). "AMI" is the indicator used to determine who qualifies for low-income housing.

4. The COI also expressly empowers the corporation as follows:

"The Corporation is empowered to do and perform all lawful acts necessary to accomplish the corporate purpose in accordance with this Certificate, the PHFL, and the N-PCL, including, but not limited to (i) purchasing or leasing the real property identified in this Certificate and constructing one or more new multiple

dwellings thereon (ii) the execution of such instruments and undertakings as may be required by any governmental body providing financial assistance to the Corporation.”

5. The COI also provides that all income and earnings shall be used exclusively for corporate purposes, and that no part of the net income or net earnings of petitioner will inure to the benefit of any private individual, firm, corporation or association. Additionally, the COI states that no member, trustee, officer or any private individual is entitled to a share in the distribution of any of petitioner’s assets on dissolution.

6. The COI prohibits petitioner from carrying on propaganda or otherwise attempting to influence legislation and from participating in or intervening in any political campaign on behalf of a candidate for public office.

7. The COI provides that upon the dissolution of the corporation, no property or assets of petitioner will be received by any member, director, trustee, officer or employee of the corporation or any organization created or operated for profit or an individual other than for payment of a debt. It further states that the balance of the property, or assets of petitioner, if any, will be distributed to the HPD or one or more housing development fund companies engaged in activities substantially similar to those of petitioner.

8. Petitioner is one of several entities formed in connection with the development of a housing project in the Forest Hills neighborhood of New York City (Project). At least ten entities are involved in the Project: Apex Place LIHTC Associates LLC, Apex Place LIHTC Management Corp., Apex Place Associates, L.P., Apex Place Management Corp., Apex Place PH LLC, Apex Place Developer LLC, Phipps Apex CG LLC, Phipps Houses Services, Inc., Wells Fargo Affordable Housing Community Development Corporation (Wells Fargo), and petitioner.

9. Phipps Houses is the sole shareholder of Apex Place LIHTC Management Corp., Apex Place PH LLC and Apex Place Management Corp. Apex Place Management Corp. and Apex Place PH LLC are the partners of Apex Place Associates, L.P., Apex Place LIHTC Management Corp. and Wells Fargo are the members of Apex Place LIHTC Associates LLC.

10. The Project consists of four structures, three of which will be buildings containing a total of 442 apartment units and a community facility, and the fourth structure will be a parking garage. Units will be leased to households earning no greater than 40 percent to 110 percent of the AMI. Half of the apartments in the Project are reserved for tenants at or below 80 percent of the AMI and 30 percent of the apartments are reserved for tenants at or below 50 percent of the AMI.

11. The Project is financed with loans from the New York City Housing Development Corporation (HDC), HPD, Phipps Houses and Wells Fargo. Phipps Houses provided a construction and permanent subordinate mortgage loan at a rate of 8 percent annually until certain conditions are met, at which time it would be reduced to a 0 percent interest rate for a term of 30 years.

12. The Project is subject to the terms and conditions of a Declaration of Interest and Nominee Agreement (Nominee Agreement), dated June 27, 2019, by and among petitioner, Apex Place Associates L.P., and Apex Place LIHTC Associates LLC. Pursuant to the Nominee Agreement, petitioner transferred all beneficial and equitable interest in the Project to Apex Place Associates, L.P. Such beneficial and equitable interest includes, among other rights, the following: (i) the unconditional right to receive all economic benefits associated with the Project, including the right to retain all the net proceeds from any sale or refinancing of the Project; (ii) the unconditional obligation to keep the Project in good condition and repair; (iii) the

unconditional and exclusive right to possession of the Project; (iv) the unconditional and exclusive right to receive rental and any other income from the operation and/or ownership of the Project; (v) the unconditional right to include all income earned from the operation of the Project and claim all depreciation deductions and credits generated with respect to the Project; and (vi) the unconditional right to develop residential and non-residential units in the Project and operate and manage the Project.

The parties expressly agreed in the Nominee Agreement that petitioner does not have any personal or beneficial interest of any kind in the Project. The Nominee Agreement states that petitioner “shall not do any act with respect to the Project without the prior written consent of [Apex Place Associates, L.P.]” The Nominee Agreement also provides that petitioner shall comply with all directions given to it by Apex Place Associates, L.P.

Despite the allocation of all beneficial interests in the Project, record title to the Project remains in petitioner’s name. The parties expressly agreed “that [petitioner] will hold legal title to the Project solely as nominee on behalf of [Apex Place Associates, L.P.]” Petitioner agreed to convey title to the Project to Apex Place Associates, L.P., or its designee, by bargain and sale deed at any time. Petitioner also agreed that so long as it shall hold legal title to the Project, Apex Place Associates, L.P. “shall have complete and exclusive possession and control of the Project and [petitioner] shall not have any right to possess or control the Project.”

The Nominee Agreement also provides that Apex Place LIHTC Associates LLC, Apex Place Associates, L.P. and petitioner will enter into loans with HDC, the City of New York acting by and through HPD and Wells Fargo, to obtain funding to construct, develop and operate the Project. The Nominee Agreement also states that Apex Place LIHTC Associates LLC will lease the low income housing tax units pursuant to a Master Lease from petitioner and Apex

Place Associates, L.P. until the earlier of the completion of the development of the Project or 55 years from the date of the Nominee Agreement, at which point Apex Place Associates, L.P. will transfer its equitable and beneficial interest in the low income housing units to Apex Place LIHTC Associates LLC. When the development of the Project is completed, petitioner will retain record title to the remainder of the Project as nominee for Apex Place Associates, L.P. In connection with the loans and to ensure the rental of the apartment units to low-income and moderate-income individuals, petitioner, Apex Place Associates, L.P and Apex Place LIHTC Associates LLC entered into a Regulatory Agreement with HDC and HPD on the same day they entered the Nominee Agreement.

The Nominee Agreement cannot be amended or revoked without the prior written consent of Wells Fargo so long as it is a member of Apex Place Associates, L.P.

13. The Regulatory Agreement provides that in order for the Project to benefit from financing from HDC and the low income housing tax credits, HDC and HPD require petitioner and Apex Place Associates, L.P. to agree to operate the Project pursuant to the terms of the Regulatory Agreement and that the restrictions in the Agreement run with the Project. The Regulatory Agreement sets forth certain occupancy requirements for the Project which are based upon varying percentages of AMI for different condominium units in the Project for the New York metropolitan area.

14. Michael Wadman signed both the Regulatory Agreement and the Nominee Agreement as the Vice President of Apex Place Associates, L.P., Apex Place LIHTC Associates LLC and petitioner.

15. Apex Place LIHTC Management Corp., as managing member and Wells Fargo, as the investor member, entered into an amended and restated operating agreement for Apex Place

LIHTC Associates, LLC. Under the agreement, Apex Place LIHTC Associates LLC is the tenant and, upon completion of the construction of the Project, the beneficial owner of the low-income housing units provided as part of the Project. The purpose of Apex Place LIHTC Associates LLC, is to acquire the beneficial ownership interest in the Project to, among other things, acquire, maintain, operate, sublease and sell its ownership interest in a manner so as to qualify for the low-income housing tax credit allowable pursuant to IRC § 42.

Under the agreement, Wells Fargo agreed to make capital contributions to Apex Place LIHTC Associates LLC in five installments. At least a portion of these installments were to be used for payment of “base rent.” The agreement defined base rent pursuant to the master lease for the Project. However, the master lease is not a part of this record.

16. The Amended and Restated Agreement of Limited Partnership of Apex Place Associates, L.P. provides that its purpose is to develop, finance, own, maintain, improve, lease, manage and operate the Project. Once the ownership interest in the low-income housing units is transferred to Apex Place LIHTC Associates LLC, Apex Place Associates, L.P. will have the same purposes for the remainder of the Project improvements. The agreement also provides that Apex Place Associates, L.P. will maintain and operate the Project, including the hiring of the Management Agent. The Management Agent, as defined therein, is Phipps Houses Services, Inc.

17. Petitioner, Apex Place Associates, L.P., and Apex Place LIHTC Associates LLC, entered into an AIA Construction Contract with Monadnock Construction, Inc., as General Contractor, on June 27, 2019 for construction of the Project. Michael Wadman executed this contract as Vice President of all three Apex entities.

18. By application dated June 30, 2019, petitioner submitted an Application for an Exempt Organization Certificate, form ST-119.2, seeking an exemption from sales and use taxes

under Tax Law § 1116 (a) (4) as a charitable organization. With its application, petitioner also provided its COI that was filed with the New York Department of State, its bylaws, and a Statement of Activities.

19. The Statement of Activities provides that petitioner is “participating in the development of three multifamily, residential buildings . . . community facility space, and a parking garage” It also states that “[petitioner] has not previously engaged in any other business operations, has no historical earnings and has no assets other than its interest in [the buildings listed above].”

20. The Statement of Activities explains that once petitioner takes ownership of the property for the Project, petitioner will transfer all equitable and beneficial interest in the Project to Apex Place Associates, L.P. It further provides that Apex Place Associates, L.P. will master lease the portion of the Project consisting of the low-income housing units to a “to be formed” New York limited liability company (ultimately, Apex Place LIHTC Associates LLC). The Statement of Activities reflects the terms of the Nominee Agreement, stating that upon completed development of the Project, the master lease will terminate and the beneficial and equitable interest in the low-income housing units will be transferred to the limited liability company. It also affirms that portion of the Nominee Agreement that provides that Apex Place Associates, L.P. and Apex Place LIHTC Associates LLC will receive all mortgage proceeds and all other income generated by the Project and that petitioner will not receive any of the proceeds.

The Statement of Activities explains that while petitioner will retain legal ownership of the Project, Apex Place Associates, L.P. and Apex Place LIHTC Associates LLC will be responsible for any liabilities involved with acquiring, constructing, equipping leasing and owning the Project.

21. By letter dated November 6, 2019, the Division of Taxation (Division) denied petitioner's application for failing to meet both the organizational and operational criteria for exemption. The Division found that petitioner was "not organized exclusively for charitable purposes because your organizing documents do not limit your purposes to charitable or other exempt purposes." The Division also stated as follows:

"[Apex does] not meet the operational test for exemption. You do not operate exclusively for charitable or other exempt purposes because the project does not exclusively benefit a charitable class. Further, you engage in more than an insubstantial part of activities that are in furtherance of non-exempt purposes, including leasing garage space. There are also no restrictions on the use of at least part of your net earnings consistent with an exempt purpose."

The Division also noted that the sole member of petitioner received a federal exemption under Internal Revenue Code (IRC) § 501 (c) (4), as a social welfare organization, not IRC § 501 (c) (3), which is the section of the IRC on which Tax Law § 1116 (a) (4) is modeled. The Division concluded by stating that because petitioner was not organized and operated exclusively for one or more of the purposes provided in Tax Law § 1116 (a) (4), it did not qualify for a sales tax exemption.

22. A petition commencing this proceeding was mailed on February 20, 2020 and acknowledged to be in proper form by the Division of Tax Appeals on February 24, 2020. A hearing was scheduled for March 4, 2020 but was ultimately adjourned on February 26, 2020 at petitioner's request.

23. At the hearing, Petitioner submitted a proposed Certificate of Amendment of its COI (COA). The COA proposed, among other things, to delete from the section of the COI entitled "Type And Purpose" that petitioner "is organized exclusively for such purpose for the promotion of social welfare in accordance with § 501(c)(4) of the Internal Revenue Code . . . and shall not

carry on any activities not permitted to be carried on by a corporation exempt from federal income tax under IRC §501(c)(4)”

24. At hearing, petitioner’s chief executive, Adam Weinstein, testified that petitioner is a party to the construction contract for the Project and that it, along with other Apex entities, was purchasing the goods and services needed for the construction. Mr. Weinstein testified that once the Project was operational, petitioner would be hiring employees to maintain the property, including cleaning buildings, maintaining equipment, maintaining fixtures in the apartments and the grounds.

Mr. Weinstein also testified that Phipps Houses Services is a subsidiary of Phipps Houses, and that it provides property management services.

POSITIONS OF THE PARTIES

25. Petitioner contends that it has met the organizational and operational requirements of Tax Law § 1116 (a) (4), qualifying it to be an exempt organization. Petitioner argues that the organizational test is determined solely based on the provisions of petitioner’s organizational documents, and that the language of petitioner’s organizational documents provides that petitioner is established exclusively for the charitable purpose of developing and operating housing for low-income individuals. Petitioner asserts that it is an organization designed to relieve the poor, distressed and underprivileged, and that such purpose will have the effect of lessening the burdens of government, promoting social welfare, lessening neighborhood tensions, and combating community deterioration.

Petitioner also argues that there is no basis for the Division to deny petitioner exempt status under Tax Law § 1116 simply because a federal exemption could be based on Internal Revenue Code § 501 (c) (4). Petitioner asserts that the Treasury Regulations establish that the

definition of “charitable” provided therein may serve as a basis for tax exempt status under both IRC § 501 (c) (3) and IRC § 501 (c) (4). Petitioner alleges that potential status under IRC § 501 (c) (4) does not disqualify an organization from exemption under Tax Law § 1116. Petitioner concludes that the reference to IRC § 501 (c) (4) in petitioner’s purpose clause does not negate or expand petitioner’s charitable purpose and it also does not provide a basis to conclude petitioner has not satisfied the organizational test.

26. Petitioner argues it has satisfied the operational test because petitioner’s purpose of developing and operating affordable housing provides relief to the poor, distressed and underprivileged, petitioner’s activities are in furtherance of owning and operating affordable housing, and petitioner’s activities lessen the burdens of government. Petitioner asserts that providing affordable housing provides relief to the poor by providing housing based on below-market amounts that qualifying individuals can afford. Petitioner asserts that its activities, which are in furtherance of the charitable purpose of providing affordable housing, are as follows: (i) purchasing and owning the real property on which the Project is being built and the improvements that make up the Project; (ii) entering into a construction agreement to build the improvements included in the Project; (iii) entering into the Regulatory Agreement wherein it agreed to limit the use of its property and improvements exclusively to affordable housing; (iv) paying for the goods and services to build the Project; (v) acquiring capital to fund the development of affordable housing; and (vi) once the Project is complete, employing the people who will be providing services to the tenants. Petitioner also argues that its activities lessen the burdens of government because the government considers providing housing to persons of low income to be its burden and petitioner’s activities lessen the government burden by providing affordable housing.

Petitioner argues that obtaining capital from private investors is a means to achieve a charitable purpose and is not the purpose itself. In exchange for its capital contribution, the for-profit investor receives low-income housing tax credits, or “LIHTCs”, and the pass-through of other tax items such as losses and depreciation deductions. The purpose of the LIHTC program is to incentivize investors to invest in projects that might otherwise be unfunded.

Petitioner also asserts that the Division’s statement in its denial letter that “There are also no restrictions on the use of at least part of your net earnings consistent with an exempt purpose” is false. Petitioner contends that the Division’s statement is in direct contradiction with petitioner’s COI, which states that all income and earnings will be used exclusively for corporate purposes and that no part of the net income of petitioner will inure to the benefit of any private individual. Petitioner also claims no net earnings will be realized by operation of the Project.

27. The Division agrees that the organizational test is confined to a review of the entity’s organizing documents. The Division then argues that petitioner fails to meet the organizational test because petitioner entered into the Nominee Agreement, transferring all beneficial and equitable interest to a for-profit partnership and a for-profit limited liability company. The Division argues that petitioner is organized as a virtual shell, with no resources to carry out a charitable purpose and no employees, and it conducts no activities.

The Division also asserts that Petitioner cannot meet the organizational test as a result of statements or other evidence that its sole member has a strong incentive to ensure petitioner is operated for the provision of affordable housing because its sole member’s mission is to construct, own, and operate affordable housing.

28. The Division argues petitioner fails to meet the operational test because the tax credit benefit given to a for-profit entity is a private inurement and negates any charitable purpose. The

Division asserts petitioner's affiliation with the for-profit parties taints it with a substantial commercial purpose, and the ultimate beneficiaries of petitioner's activities are the for-profit parties. The Division also claims that petitioner operates as a real estate holding company, and that such an activity is not charitable within the meaning of Tax Law § 1116, regardless of how any income derived from its property is ultimately used.

29. In its reply, petitioner asserts that the Division erroneously conflates the operational and organizational test, extensively discussing certain operational components in support of its argument that petitioner failed the organizational test. Petitioner also asserts the Division erroneously treats the Nominee Agreement as an organizational document.

Petitioner also contends that the Division incorrectly focuses on the nature of the activities rather than their purpose when concluding petitioner fails the operational test. Petitioner alleges that enabling for-profit investors to obtain tax benefits to finance an affordable housing project is simply a means to achieve a charitable end and such tax benefits do not negate petitioner's charitable purpose. Petitioner contends that under the private benefit test, incidental economic benefits that occur as a consequence of the charitable organization pursuing its charitable purpose do not cause the charitable organization to fail the private benefit test. Petitioner claims that the Division asserts that any tax credit benefit is a prohibited private benefit, but that this position is inapposite to the guidance issued by the Internal Revenue Service regarding charitable organizations and tax credit benefits. Petitioner argues that any economic benefit is insubstantial and temporary.

CONCLUSIONS OF LAW

A. Tax Law § 1116 (a) (4) provides an exemption from the sales and compensating use taxes imposed under article 28 on any sale to a corporation that is organized and operated

exclusively for “religious, charitable, scientific, testing for public safety, literary or educational purposes . . .” This exemption is provided as long as the net earnings of the corporation are not for the benefit of a private shareholder or individual, no substantial part of the activities of the corporation is for propaganda or otherwise attempting to influence legislation, and such corporation does not participate or intervene in any political campaign of a candidate for public office (*see* Tax Law § 1116 [a] [4]; 20 NYCRR 529.7 [a]).

B. “Charitable” is defined as follows:

“relief of the poor, distressed, or underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or to lessen neighborhood tensions, to eliminate prejudice and discrimination; to defend human and civil rights secured by law; or to combat community deterioration and juvenile delinquency” (*see* 20 NYCRR 529.7 [e] [1] [ii]).

C. Statutes and regulations authorizing exemptions from taxation are to be strictly and narrowly construed (*see International Bar Assn. v Tax Appeals Tribunal*, 210 AD2d 819 [3d Dept 1994], *lv denied* 85 NY2d 806 [1995]). It is the taxpayer’s burden to prove any exemption from taxation (*see 677 New Loudon Corp. v Tax Appeals Tribunal*, 19 NY3d 1058, 1060 [2012]).

D. An organization will be deemed not to be organized or operated for one or more exempt purposes unless it serves the public rather than a private interest (*see* 20 NYCRR 529.7 [e] [2]). An organization must prove that it is not organized or operated for the benefit of private interests (*see id.*).

E. An organization will establish its exempt status if it files a completed application and proves that the organization meets the statutory requirements (*see* 20 NYCRR 529.7 [a] [2]). To qualify for an exemption, an organization must be formally organized and must demonstrate that

it is organized and operated exclusively for one or more exempt purposes (*see* 20 NYCRR 529.7 [b] [2]). To show that it is formally organized, an organization must have an organizing document defining its purpose and activities and a code of regulations establishing how it will function and elect officers with the authority to act on its behalf (*see* 20 NYCRR 529.7 [b] [1]). Evidence of a formal organization includes a certificate of incorporation and bylaws (*see id.*).

F. The provisions of the organizing documents of the organization determine whether an organization is organized exclusively for one or more of the enumerated exempt purposes (*see* 20 NYCRR 529.7 [c] [1]). The documents must limit the purposes of the organization to one or more exempt purposes and cannot expressly empower the organization to participate, other than as an insubstantial part of its activities, in activities that are not in furtherance of one or more exempt purposes (*see* 20 NYCRR 529.7 [c] [1] [i]). An organization will not be found to be organized exclusively for one or more exempt purposes if the organizing documents provide that the purposes of the organization are broader than the purposes provided in Tax Law § 1116 (a) (4) (*see* 20 NYCRR 529.7 [c] [1] [ii]). An organization will also not be found to be organized exclusively for one or more exempt purposes if its articles expressly empower it to carry on, other than as an insubstantial part of its activities, activities which are not in furtherance of one or more exempt purposes, regardless of whether such organization's terms state it is created for purposes specified in Tax Law § 1116 (a) (4) (*see* 20 NYCRR 529.7 [c] [1] [iii]).

G. Here, petitioner has established it is formally organized by submitting its COI that was filed with New York State (*see* findings of fact 3 and 18) and its bylaws. Petitioner's COI provides that it is a charitable not-for-profit organized exclusively for the purpose of "developing and operating a housing project for Persons of Low Income" (*see* finding of fact 3). One issue to

be addressed is whether petitioner's purpose of providing housing to low-income individuals is a charitable purpose within the meaning of Tax Law § 1116 (a) (4).

H. When analyzing state statutes modeled after federal statutes, it is proper to look to federal law for guidance (*see Delese v Tax Appeals Tribunal*, 3 AD3d 612, 613 [3d Dept 2004]; *Marx v Bragalini*, 6 NY2d 322, 333 [1959]). The principle of federal conformity holds that courts should follow the federal construction of tax provisions where New York and federal provisions are substantially similar (*see id.*).

I. Housing, although not of itself a charitable purpose, may qualify for exemption under IRC § 501 (c) (3) if conducted in a charitable manner (*see Revenue Ruling 70-585*, 1970-2 C.B. 115). Revenue Ruling 70-585 provides that nonprofit housing organizations may qualify for exemption under IRC § 501 (c) (3) where they are created to help low- and moderate-income families by lessening neighborhood tensions, eliminating prejudice and discrimination, and combating community deterioration. Additionally, Rev. Proc. 96-32, 1996-1 C.B. 717, sets forth a safe harbor under which organizations that provide low-income housing are considered charitable as relieving the poor and distressed, and a facts and circumstances test that applies in determining whether organizations that fall outside the safe harbor relieve the poor and distressed. Because organizations that provide low-income housing may qualify for exemption under IRC § 501 (c) (3) as a charitable organization, and petitioner's COI states that it is a charitable not-for-profit organized exclusively for the purpose of developing and operating a housing project for low-income individuals, petitioner's organizing documents limit the purpose of petitioner to one or more exempt purposes (*see 20 NYCRR 529.7 [b], [c] [1]*).

J. Despite the fact that petitioner's COI limits the purpose of petitioner to an exempt purpose, it fails the organizational test because the COI merely prohibits it from carrying on

activities that are not to be permitted to be carried on by a corporation found to be exempt pursuant to IRC § 501 (c) (4) (*see* finding of fact 4). Accordingly, the COI permits petitioner to carry on all activities permitted by IRC § 501 (c) (4), with no language requiring that such activities be insubstantial or stating that such activities must be in furtherance of an exempt purpose within the meaning of IRC § 501 (c) (3) (*see id.*).

K. The IRC makes a distinction between corporations organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes (*see* IRC § 501 [c] [3]) and those civic organizations not organized for profit but operated exclusively for the promotion of social welfare pursuant to IRC § 501 (c) (4) (*see Rockwood Park Concerned Residents, Inc.*, State Tax Commn, August 28, 1987). Petitioner argues that the Treasury Regulations establish that if an entity is a charitable organization, that can serve as a basis for exemption under both IRC § 501 (c) (3) and IRC § 501 (c) (4). Such argument is rejected. Pursuant to Treas. Reg. § 1.501 (c) (4)-1, a social welfare organization will qualify for exemption as a charitable organization pursuant to IRC § 501 (c) (3) if it meets the definition of “charitable” provided in Treas. Reg. § 1.501 (c) (3) -1 and is not an action organization as described therein. Accordingly, a social welfare organization can qualify for exemption pursuant to IRC § 501 (c) (3) if it is also a charitable organization, but an organization will not qualify for exemption under IRC § 501 (c) (4) if it is a charitable organization, only if it is a social welfare organization (*see* Treas. Reg. § 1.501 [c] [4] -1; *Matter of National Federation of Italian-American Societies, Inc.*, Tax Appeals Tribunal, June 20, 1991; *Matter of Rockwood Park Concerned Residents, Inc.*).

The activities permitted pursuant to IRC § 501 (c) (4) are for the promotion of social welfare generally, by promoting the common good and general welfare of the people of the

community. This purpose is broader than the exempt purposes provided in IRC § 501 (c) (3), and its state counterpart, Tax Law § 1116 (a) (4). Petitioner's articles expressly empower it to carry on, other than as an insubstantial part of its activities, activities which are broader than, and not in furtherance of, one or more of the exempt purposes specified in Tax Law § 1116 (a) (*see International Bar Assn.*, 210 AD2d at 820). Accordingly, petitioner does not meet the organizational test.

L. Petitioner asserts that its original COI clearly satisfied the organizational test, but to assuage the concerns of the Division, petitioner offered to amend its COI to remove the reference to IRC 501 (c) (4) in petitioner's purpose clause (*see* finding of fact 23). Petitioner adds that the offer was never accepted by the Division. This statement is misleading. Pursuant to 20 NYCRR 529.7 (g), if an organization changes its purposes, activities or organizational structure, an applicant must submit a copy of the amended organizing documents or statement of activities and the Division will again review the organization's exempt status. The evidence in the record does not show that petitioner filed an amended COI and resubmitted such COI to the Division for review. Accordingly, the proposed amendments to the current COI are irrelevant and will not be considered.

M. In determining whether the organization is operated exclusively for one or more exempt purposes, the focus is on the organization's activities (*see* 20 NYCRR 529.7 [d] [1]). Nearly all of its activities must accomplish one or more of the exempt purposes provided in Tax Law § 1116 (a) (4) (*see* 20 NYCRR 529.7 [d] [2]). If more than an insubstantial part of an organization's activities is not in furtherance of an exempt purpose, it will not be considered to be operated exclusively for an exempt purpose (*see id.*). Even if an organization performs charitable functions, it will not qualify as an exempt organization if its activities substantially

further private, profit-seeking interests (*see St. David's Health Care System v United States*, 349 F3d 232, 237 [5th Cir. 2003]).

N. The structure and management of an organization can determine whether an organization furthers non-charitable purposes (*see id.* at 238). When a non-profit organization cedes control to a for-profit entity, there is a presumption that the non-profit's activities substantially further the for-profit's interest (*see id.*) Accordingly, the non-profit's activities will not be found to be exclusively or primarily in furtherance of a charitable purpose and the non-profit will not be entitled to a tax exemption (*see id.*). When a non-profit organization cedes control to a for-profit entity it should lose its tax-exempt status (*see id.* at 239).

O. The mere fact that an organization requesting an exemption enters into an agreement with one or more private parties that receive returns on their capital investments does not prove that the organization has impermissibly given a private benefit (*see Redlands Surgical Services v C.I.R.*, 113 T.C. 74-75 [1999] *aff'd* 242 F3d 904 [9th Cir 2001]; *Plumstead Theatre Society, Inc. v Commissioner of Internal Revenue*, 74 T.C. 1324, 1333 [1980] *aff'd* 675 F2d 244 [9th Cir 1982]). The issue is whether the organization has a substantial nonexempt purpose that serves private interests (*see Redlands Surgical Services*, 113 T.C. at 75). Where an organization cedes control to a for-profit party that has an independent economic interest in the same activity but does not have any obligation to put charitable purposes ahead of its profit-making objectives, there is no guarantee that the organization will be operated in furtherance of charitable purposes (*see id.* at 78). When there can be no guarantee that the organization will be operated in furtherance of charitable purposes, such organization is not operated exclusively for charitable purposes (*see id.*). Where an organization cedes effective control over its operations to for-profit parties, such organization impermissibly serves private interests (*see id.*).

P. Here, petitioner has ceded all control of its operations to Apex Place Associates, L.P. (*see* finding of fact 12). Petitioner cannot take any actions without the prior written consent of Apex Place Associates, L.P., and Apex Place LIHTC Associates LLC, and has no beneficial interest in the Project (*see id.*). Petitioner lists several activities it was involved in to show that its activities are in furtherance of a charitable purpose. These activities include purchasing and owning the real property and improvements on such real property constituting the Project. While petitioner may be the title holder to the real property and improvements, pursuant to the Nominee Agreement, petitioner has absolutely no control over either (*see id.*). Additionally, petitioner asserts that it entered into a construction agreement for the Project and is paying for the goods and services to build the Project (*see* finding of fact 24). Petitioner also claims that once the project is built, petitioner will employ the people who will be providing services to the tenants of the Project (*see id.*). However, the Amended and Restated Agreement of Limited Partnership of Apex Place Associates, L.P. makes clear that Apex Place Associates, L.P. is the entity that will be developing, maintain and operating the Project, including the hiring of the Management Agent, Phipps Houses Services, Inc. (*see* findings of fact 16 and 24). Moreover, petitioner has no discretion regarding purchases for the Project because it cannot make purchases without permission from Apex Place Associates, L.P. (*see* finding of fact 12). Even aside from the express relinquishment of control pursuant to the terms of the Nominee Agreement, the same person signed the Nominee Agreement, and other agreements, on behalf of all of the parties thereto (*see* findings of fact 14 and 17). This shows that petitioner has no independent operation and cannot be found to be conducting any activities.

Petitioner is neither a partner in Apex Place Associates, L.P. nor a member of Apex Place LIHTC Associates LLC (*see* findings of fact 9 and 15). The purpose of both of these entities is

to operate the Project in a manner that will satisfy the requirements of IRC § 42 so as to qualify for the tax credits (*see* findings of fact 15 and 16). However, neither IRC § 42 nor the Nominee Agreement require that charitable purposes be met. Without any control, petitioner cannot ensure the furtherance of a charitable purpose and impermissibly serves private interests (*see Redlands Surgical Services*, 113 T.C. 47).

The impermissible private interests served is evidenced through the loan Phipps Houses made to petitioner at an interest rate of 8% (*see* finding of fact 11). Phipps Houses is the sole member of petitioner (*see* finding of fact 2) and also the ultimate owner of Apex Place Associates, L.P. (*see* finding of fact 9). Because petitioner has no independent control over its operations, petitioner could not act independently to determine whether it could secure a lower interest rate loan, impermissibly serving private interests. Accordingly, petitioner fails the operational test.

Q. Applications for exemption are determined only on an individual organization basis (*see* 20 NYCRR 529.7 [a] [3]). While the overall objective of providing affordable housing to low-income individuals may be achieved upon the completion of the Project, that is through the activities and operations of multiple organizations, including many for-profit organizations. Without any interest in the Project other than being the fee owner, petitioner has no activities that could be found to accomplish or be in furtherance of a charitable purpose. Its mere existence is insufficient (*see Matter of Homsite Holding Co., Inc.*, State Tax Commn, February 13, 1987).

R. The Division asserts that petitioner fails the operational test because its net earnings inure to the benefit of private shareholders or individuals (*see* 20 NYCRR 529.7 [d] [3]). However, as all of the beneficial and equitable interest in the Project, including the right to receive income or profits, inures to the benefit of Apex Place Associates, L.P., and Apex Place

LIHTC Associates, LLC pursuant to the Nominee Agreement, and not to any individual whose relationship with petitioner would give him or her an opportunity to make use of petitioner's income or assets for personal gain, this argument is without merit (*see United Cancer Council, Inc. v CIR*, 165 F3d 1171, 1176 [7th Cir 1999]).

S. The petition of Apex Place Housing Development Fund Corporation is denied and the Division's notice denying petitioner an exempt organization certificate is sustained.

DATED: Albany, New York
August 20, 2020

/s/ Jessica Difiore
ADMINISTRATIVE LAW JUDGE