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After The Low Income Housing Tax Credits Are Done Investors Want More



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Taxes

I focus on the tax issues of individuals, businesses & more



Boston South End aerial view. Residential district near Columbus Avenue. GETTY

The Low Income Housing Tax Credit (Section 42) has generated very little in the way of conventional tax litigation, meaning IRS v taxpayer. Oddly part of Section 42, specifically 42(i)(7) - *Impact of tenant's right of 1st refusal to acquire property* - has blossomed into high stakes litigation across the country.

The litigation is about how much investors or successor investors can take out of projects after the fifteen years of tax benefits from credits and losses that they have been promised are done.

The recent federal district court decision that piqued my interest in this includes as parties on opposite sides [Tenants' Development Corporation \(TDC\)](#), a community development corporation (CDC) in Boston's South End (Don't confuse that with South Boston. Trust me.) and [Alden Torch Financial LLC](#), which describes itself as the largest affordable housing asset management platform in the industry.

The Parties

The dispute is over 185 units of scattered site housing in Boston's South End. The owner is Tenant's Development II Limited Partners (TDII). The general partner of TDII is Tenants' Development II Corporation (TDIIC). The special limited partner is Tax Credits Holdings III LLC and the investor limited partner is AMTAX Holdings 227 LLC (AMTAX).

TDC, the not-for profit sponsor, controls the general partner and Alden Torch controls the limited partners. TDC was in the picture from the beginning in 2002 and with the previous limited partnership that owned the property. There can be a kind of lather, rinse, repeat process with syndicated low income housing developments. Investors come and go, but the community based not for profit persists.

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I have not been able to nail down the exact details as to how and when and

have no clue as to for how much, but it is clear that Alden Torch did not acquire whatever interest it has in AMTAX until relatively recently. To make it easy to follow along, I frame this as a dispute between TDC and Alden Torch with Alden Torch channeling through AMTAX.

The Stakes

Both sides filed lawsuits on the same day, May 12, 2020 and the single decision concerns both of those suits. AMTAX had invested \$12,228,020 in TDII in 2003 and was entitled to 99.99% of the loss and credit allocations. According to a true-up that is included in the [AMTAX complaint](#), the benefit of \$12 million in losses and \$15 million in tax credits over the fifteen year compliance period provided AMTAX's investors with an internal rate of return of 11.94%.

In TDC's view that is what they bargained for, paid for and received. As TDC put it in [its complaint](#):

By the end of the Compliance Period, the project owner will have collected all of the Tax Credits, and other tax benefits, and is clear of any risk of recapture, thereby providing the investor limited partner or member with full realization of the economic benefits it bargained for and expected when negotiating admission to the project owner.

Alden Torch had requested TDC to put the property on the market, but retracted its request when it realized that TDC had a right of first refusal to buy the property for the amount of outstanding debt plus any taxes generated by the sale. TDC proceeded nonetheless.

Community Preservation Partners LLC offered \$51 million. With that offer in hand TDC attempted to exercise its right of first refusal to buy for the "debt and taxes" amount of \$17,108,380. Alden Torch through AMTAX blocked the sale. In its complaint AMTAX claims \$34,400,000.

Can't Make A Federal Case Out Of It For Now

Judge [Leo Sorkin](#) ended up dismissing both complaints. They both seem to have conceded that there was not diversity jurisdiction. The potential federal issue has to do with the interpretation of the right of first refusal provision in Section 42. A full discussion of that is beyond the scope of this particular post. I hope to take it up more thoroughly in a subsequent post, but I will give you a nutshell.

Unlike some state credits it is a fundamental principle that you cannot sell federal tax credits and the benefit of federal deductions. So in order for the tax deal to work AMTAX has to be a real partner. 42(i)(7) indicates that a right of first refusal on the part of a not for profit sponsor does not spoil that. On the AMTAX side, the argument is that once a ROFR effectively becomes an option, it is a different story and that the behavior of sponsors like TDC threatens the whole fabric of the program.

Judge Sorkin did not bite on that:

The parties' dispute centers primarily on whether TDC and TD II acted in accordance with the Agreement when they sought and received an outside offer to buy the properties and then purported to invoke the right of first refusal to allow TDC to buy the properties at the lower "debt and taxes" price. Whether the Agreement permitted this course of action does not depend on the meaning of 26 U.S.C. § 42. The only relevance of that statute is to determine whether, if TDC and TD II's actions accorded with the Agreement, the parties were entitled to the LIHDP tax credits they have received

That throws the dispute back into state court, which is not good for Alden Torch in Massachusetts where the Supreme Judicial Court ruled in favor of a not for profit sponsor in [Homeowner's Rehab Inc v Related Corporate V SLP](#) with similar, although not identical facts.

Alden Torch has prevailed in some other states as have the not for profit sponsors. I'll review that in a future post.

The Big Picture

I have been encouraged to take a kind of crusading approach to this story. The first half of my career in public accounting was heavily occupied with low income housing deals mostly with not for profit sponsors mostly in Boston. As a CPA, I was just handling the compliance work that these deals generate which is substantial.

I sometimes thought that the whole thing was a white collar jobs program, but then I got to know some of the people involved in tenant services and saw the benefit of not for profit sponsorship. Nonetheless, I resolve to cover this story objectively and not devote myself to rooting for my old team.

You can get the CDC side of the story from TDC's complaint:

Alden Torch is what is known as an “aggregator” in the LIHTC industry. An aggregator collects investor interests in LIHTC deals and then, among other things, challenges the contractual transfer rights for the LIHTC projects (such as those provided under ROR Agreement) after the Compliance Period has ended.

An aggregator's goal is to extract additional profits out of the LIHTC deal; profits that were neither negotiated for, expected, nor intended by the original participants in the transaction. Aggregators, like Alden Torch, use a variety of methods to achieve this goal, such as forcing protracted litigation and leveraging economies of scale in hopes of overwhelming their counterparts.

Gee, they talk about it like that would be a bad thing. Among the Ferengi, extracting additional profits is a sacred duty. [Rule 97 of the Rules of](#)

[Acquisition](#) - *Enough is never enough.*

On the other side I have something from Alden Torch:

“Since 2012, Alden Torch Financial LLC and its affiliates have represented the interests of investors who have collectively contributed hundreds of millions of dollars to the development of low-income housing throughout the nation,” said Alison Wadle, General Counsel of Alden Torch. “As part of its fiduciary duties to those investors, its obligations to the federal low-income housing tax credit program, as well as its long-term commitment to low-income housing, Alden Torch has a responsibility to ensure that the contractual obligations and entitlements of the parties are upheld and the requirements of the federal program are met.

“While the vast majority of developers and non-profits in the industry recognize the importance of honoring these fundamental obligations, a few of them have improperly attempted to change the nature of the program in ways that ignore the principles on which it was founded for their own benefit, thereby jeopardizing the benefits that everyone involved in the program enjoys,” Wadle said. “Alden Torch cannot simply stand by idly and allow that risk to the industry to go unchallenged.”

Other Coverage

There is a lot of material in the industry press on the larger dispute but it leans kind of technical so I will share that in a future post. [David Davenport](#) of Winthrop & Weinstine, who is representing TDC seems to be the go to lawyer for not for profits in this fight.

He refers to it as “year-15”, since that is when the compliance period ends and the interest of investors and not for profits are no longer as well aligned. He told me that he has given the story to three mainstream

reporters and they are having trouble figuring it out.

Brandon Duong has [Losing Nonprofit Control of Tax Credit Housing?](#) in *Shelterforce*.

For the past five years or so, dozens of nonprofits across the country have found themselves embroiled in costly litigation spawned from the ambiguity of the Low-Income Housing Tax Credit program's right of first refusal provision. At stake is whether they can, as is standard, take ownership of the properties and maintain their affordability as investors exit, without having to pay market prices.

The story gives a good summary of the issues. It leans toward the not for profit side of things, but they indicate that Alden Torch did not respond to their inquiries.

I will have more for you later in the month.

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