No. 12-901

In the Supreme Court of the United States

HISTORIC BOARDWALK HALL, LLC, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that for federal income tax purposes, PB Historic Renovation, LLC, was not a bona fide partner in Historic Boardwalk Hall, LLC.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-79a) is reported at 694 F.3d 425. The opinion of the Tax Court (Pet. App. 80a-138a) is reported at 136 T.C. 1.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2012. A petition for rehearing was denied on October 22, 2012 (Pet. App. 139a-140a). The petition for a writ of certiorari was filed on January 17, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Section 47 of the Internal Revenue Code (United States Code Title 26) provides a tax credit equal to 20% of the qualified rehabilitation expenditures with respect to any certified historic structure. 26 U.S.C. 47(a)(2). Because the availability of the credit is generally limited to owners or certain long-term lessees of such structures, an owner of a historic building who has no use for the credit—such as a tax-exempt entity—may not defray the cost of rehabilitating the building by selling the attendant tax credits to those who do. See 26 U.S.C. 47 (2006 & Supp. V 2011); Pet. App. 4a. Such an owner may, however, secure needed capital for a rehabilitation project by transferring ownership of the building to a bona fide partnership entered into with outside investors who, under the terms of the partnership agreement, receive allocations of the tax credits earned by the partnership. See Mark Primoli, Internal Revenue Service (IRS), *Tax Aspects of Historic Preservation* 1, 8 (Oct. 2000), http://www.irs.gov/pub/irs-utl/faqrehab.pdf. Consistent with general principles of federal tax law, any such arrangement must involve an entity that is a partnership in economic substance as well as in form. See Pet. App. 8a-9a. That requirement is the subject of this litigation.

1. a. Petitioner New Jersey Sports and Exposition Authority is a tax-exempt instrumentality of the State of New Jersey. Petitioner obtained a long-term leasehold interest in the Historic Boardwalk Hall in Atlantic City, New Jersey (the Hall or East Hall) in order to undertake an extensive renovation of the Hall. Pet. App. 10a. The projected $90.6 million cost of the renovation was to be funded entirely from the proceeds of a $49.9 million bond issuance and grants from the New Jersey Casino Reinvestment Development Authority. *Id.* at 11a-12a.

In August 1998, a few months before renovations began, petitioner was approached by Sovereign Capital Resources, LLC (Sovereign), with a proposal for "the sale of the historic rehabilitation tax credits expected to be generated" by the East Hall renovations. Pet. App. 12a. Sovereign explained that, because the credits "cannot be transferred after the fact," the transaction would be cast in the form of a partnership arrangement between petitioner and a taxable entity seeking to purchase the credits. *Id.* at 13a. In essence, petitioner would contribute its interest in the East Hall to the partnership; the purchaser would contribute cash in an amount very nearly equal to the total credits expected to be generated; the purchaser would receive a 99% interest in the partnership; and the partnership would allocate to the purchaser substantially all of the tax credits earned through the construction project. Petitioner would then have the right to buy out the purchaser after the expiration of the five-year "recapture" period to which the credits were subject. *Id.* at 13a-14a, 24a & n.20. The purchaser would also be entitled to a 3% return on its "capital contribution." *Id.* at 18a.

In March 2000, after petitioner retained Sovereign to "market the tax credits" and recruit a purchaser, Pet. App. 15a, Sovereign drafted a "confidential information memorandum" for potential investors, *id.* at 17a. The memorandum confirmed that petitioner would fund the entire expected construction cost of more than $90 million, with such expenditures to be treated as capital contributions to the proposed partnership. *Id.* at 17a-18a. The projected "capital contribution" of the tax-credit purchaser—$16,354,000—was based on the prediction that the project would generate approximately $17.6 million in tax credits, 99.9% of which would be allocated to the purchaser, resulting in a purchase price of $.93 per allocated dollar of credit. *Id.* at 17a; C.A. App. 1032. The $16,354,000 would not be treated as a source of construction financing. Rather, it would be used to pay petitioner a "developer's fee" and to pay fees relating to the tax-credit transaction—neither of which would have been incurred absent the transaction. Pet. App. 17a-18a, 29a.

b. Petitioner ultimately chose to pursue the transaction with a Pitney Bowes affiliate, PB Historic Renovation, LLC (Pitney). Pet. App. 2a-3a & n.2, 19a. As relevant here, the parties entered into an agreement that followed the basic outline of the terms proposed by Sovereign: Pitney would receive a 99.9% ownership interest in the new entity (Historic Boardwalk Hall, LLC, or HBH), and 99.9% of the tax credits would be allocated to Pitney, in return for "capital contributions" of more than $18 million. *Id.* at 19a-20a, 22a. Pitney would also receive an annual 3% "preferred return" on its "capital contributions." *Id.* at 23a-24a.

The parties altered the proposed transaction in one significant respect. At Pitney's request, petitioner agreed to fund the $90 million cost of the project through long-term "acquisition" and "construction" loans to HBH, rather than through "capital contributions." See Pet. App. 18a-19a. Because that change in the financing method undermined Sovereign's ability "to reasonably show that [the partnership] is a going concern" that should be respected for tax purposes, *id.* at 16a, Sovereign requested that the project accountants revise the financial projections by increasing HBH's expected revenues, *id.* at 20a.

The parties' agreement also provided that after five years, petitioner would have a "call" option to purchase Pitney's 99.9% interest in HBH for an amount equal to the greater of (1) the fair market value of that interest, or (2) any accrued and unpaid preferred return. Pet.

App. 29a-30a. In the event petitioner failed to exercise its call option, Pitney had a corresponding "put" option to sell its interest to petitioner at a price calculated using the same formula. *Id.* at 30a. In light of the significant debt incurred by HBH, however, neither party expected Pitney's interest to have any market value for the foreseeable future, meaning that the purchase price of Pitney's interest was effectively limited to any accrued and unpaid preferred return. See *id.* at 72a n.63. The financial projections, moreover, forecast that there would be no residual cash flow (after debt service) available for distribution to Pitney—*i.e.*, above and beyond its 3% annual preferred return—through 2042. *Id.* at 72a. Accordingly, Pitney's "upside" was effectively capped at 3%.[1]

Other aspects of the transaction limited Pitney's downside risk. HBH and Pitney entered into a tax benefits guaranty agreement, the "ultimate purpose" of which "was to require [petitioner] to make [Pitney] whole should any part of the tax benefits be successfully challenged by the IRS." Pet. App. 30a-31a, 102a-103a. Under that agreement, petitioner was to reimburse Pitney for the cash equivalent of any disallowed tax credits or disallowed tax losses. Petitioner was also required to obtain a guaranteed investment contract to secure the payment of the purchase price under the put and call options, thereby effectively guaranteeing that

[1] Petitioner also had the right to purchase Pitney's interest at any time under certain circumstances. Pet. App. 24a. The purchase price under this "consent option" was tied to any unrealized projected tax benefits and unpaid preferred return through the end of the five-year recapture period, rather than to the fair market value of Pitney's interest. *Ibid.*; *id.* at 73a-74a & n.64.

Pitney would ultimately receive its 3% preferred return. *Id.* at 25a-26a.

c. After the parties formed HBH, Pitney made periodic "capital contributions" commensurate with the tax credits that the project had generated to that point. Pet. App. 63a. When the project generated more tax credits than anticipated, Pitney's "required aggregate capital contribution" was increased accordingly. *Id.* at 34a-35a. Pitney made its third and largest capital contribution—more than $10 million—in October 2002, a year after construction was completed. *Id.* at 35a.

In connection with that contribution, the project accountants prepared revised financial projections for HBH. Although HBH had already suffered significant net operating losses between 2000 and 2002, the accountants did not alter their projections of significant income over the next five years. In actuality, however, HBH experienced an aggregate loss of $10 million during that period. Pet. App. 36a. Accounting documents prepared in connection with HBH's financial statements explained that HBH "was not structured to provide operating cash flow" and that petitioner had "the ability to fund the deficits as a result of the luxury and other taxes" collected by the State. *Id.* at 37a.

2. Following an audit of HBH's 2000-2002 tax returns, the IRS issued a notice of final partnership administrative adjustment reflecting its determination that all items allocated to Pitney on those returns—including approximately $108.9 million of qualified rehabilitation expenditures and approximately $17 million of losses—should be reallocated to petitioner. Pet. App. 38a-39a. As relevant here, the IRS concluded that "[Pitney's] claimed partnership interest in HBH was not, based on the totality of the circumstances, a bona fide

partnership participation because [Pitney] had no meaningful stake in the success or failure of HBH." *Id.* at 39a-40a.

Petitioner, in its capacity as the tax matters partner of HBH, challenged the IRS's determinations by filing a petition in the United States Tax Court. Pet. App. 40a. Following a trial, the Tax Court held that HBH was a bona fide partnership and that Pitney's interest in the enterprise was that of a bona fide partner. *Id.* at 40a-41a, 121a-126a. The court rejected the IRS's argument that Pitney lacked a meaningful stake in the risks and rewards of the HBH enterprise. The court concluded that Pitney and petitioner "intended to join together in a rehabilitation of the East Hall," and that Pitney was "not guaranteed to receive a 3-percent return every year" if there was not sufficient cash flow to pay it annually. *Id.* at 124a-126a.

3. The court of appeals reversed. Pet. App. 1a-79a. Applying the "totality of the circumstances" test for determining whether a bona fide partnership exists, see *Commissioner* v. *Culbertson*, 337 U.S. 733, 742 (1949), the court of appeals concluded that Pitney was not a bona fide partner in HBH. Pet. App. 48a; *id.* at 46a-49a. The court explained that, in determining whether the parties "intended to join together in the present conduct of the enterprise," *Culbertson*, 337 U.S. at 742, the key inquiry is whether the purported partner had a meaningful stake in the enterprise's success or failure. Pet. App. 49a, 60a; see *TIFD III-E, Inc.* v. *United States*, 459 F.3d 220, 231 (2d Cir. 2006) (*Castle Harbour*). The court concluded that Pitney's interest in HBH entailed no meaningful downside risk because Pitney was effectively guaranteed to recoup its investment in the form of the projected tax credits (or their cash equivalent),

plus a 3% annual preferred return. Pet. App. 63a-71a. Although Pitney was not assured of receiving the 3% return on an annual basis, the put and call options together—the purchase prices of which were secured by a guaranteed investment contract—ensured that Pitney would ultimately receive any accrued and unpaid return when it exited the HBH arrangement. *Id.* at 69a. The court also concluded that Pitney lacked any meaningful upside potential *vis-à-vis* the renovation and operation of the East Hall because Pitney's return was effectively capped at 3% and petitioner could buy out Pitney's interest for a purchase price unrelated to the fair market value of the interest. *Id.* at 71a-74a. In light of these economic realities, the court of appeals rejected petitioner's reliance on various formal aspects of the transaction, including the fact that HBH was formally organized under New Jersey law and that Pitney had made a substantial investment in HBH. *Id.* at 74a-78a.

In concluding that HBH was not a bona fide partnership, the court of appeals emphasized that it was "mindful of Congress's goal of encouraging rehabilitation of historic buildings." Pet. App. 78a (citing *Virginia Historic Tax Credit Fund 2001 LP* v. *Commissioner*, 639 F.3d 129, 146 n.20 (4th Cir. 2011)). The court observed that "[i]t is the prohibited sale of tax credits, not the tax credit provision itself, that the IRS has challenged." *Id.* at 79a.

ARGUMENT

Petitioner contends (Pet. 14-27) that the court of appeals erred in holding that Pitney was not a bona fide partner in HBH. The court of appeals' decision, which rests on a fact-bound examination of the agreements between the parties, is correct. The decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. a. In determining whether HBH was a bona fide partnership, the court of appeals properly applied the framework set forth in *Commissioner* v. *Culbertson*, 337 U.S. 733 (1949). Pet. App. 48a. Under *Culbertson*, the overarching question is whether the "parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise." *Culbertson*, 337 U.S. at 742. Because sharing the risks and potential rewards of an enterprise is a central feature of partnership arrangements, the substance of the arrangement must "truly reflect an intent to share in the profits or losses of an enterprise," such that each party has a "meaningful stake" in the business's success or failure. Pet. App. 49a (quoting *TIFD III-E, Inc.* v. *United States*, 459 F.3d 220, 231 (2d Cir. 2006)); see *Commissioner* v. *Tower*, 327 U.S. 280, 287 (1946) (stating that the operative question is "whether the [purported] partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both").

Petitioner acknowledges that the *Culbertson* standard applies here and that "[t]he question that *Culbertson* asks is simply whether under all the facts the parties intended to conduct a business together and share in the profits and losses therefrom." Pet. 16. Petitioner therefore challenges only the court of appeals' application of the *Culbertson* framework to the "totality of the facts and circumstances" of the arrangement between petitioner and Pitney. *Ibid.* That fact-specific challenge does not warrant this Court's review.

b. Applying the *Culbertson* test, the court of appeals correctly held that petitioner and Pitney did not enter into a bona fide partnership because the transaction as a whole insulated Pitney from "any meaningful downside risk or any meaningful upside potential in HBH." Pet. App. 62a. With respect to downside risk, Pitney was assured of recovering its investment in the form of the contemplated tax credits, or their cash equivalent if the credits themselves did not materialize. *Id.* at 63a-71a. As the court explained, Pitney was not subject to investment, audit, or project risk. Pitney was not required to make installment contributions to HBH until petitioner had generated tax credits in an amount at least equal to Pitney's cumulative contributions, *id.* at 63a; petitioner agreed to reimburse Pitney for any tax credits to which its contributions entitled it if those credits did not materialize or were disallowed by the IRS, *id.* at 64a; and the construction project was already fully funded before Pitney agreed to provide any contributions, *id.* at 65a.

Nor was Pitney's 3% annual return on its capital contribution subject to any risk. Rather, the agreement was structured to ensure that Pitney would receive the 3% return regardless of HBH's profits or losses. Pitney could require petitioner to buy out its interest, and petitioner could require Pitney to sell its interest, for a purchase price that was "effectively measured by [Pitney's] accrued and unpaid Preferred Return" and was secured by a guaranteed investment contract. Pet. App. 69a. Thus, while an expected return on investment might give a partner a meaningful economic stake in a business if the return were dependent on the fortunes of the enterprise, here Pitney was effectively guaranteed to receive the return regardless of HBH's profits or losses.

Pitney also had no meaningful prospect of sharing in any potential upside. Although Pitney held a 99.9%

interest in HBH's residual cash flow, the court of appeals correctly concluded that any possibility of receiving residual returns was illusory in light of the significant debt that HBH was required to repay before any residual cash flow could materialize. Pet. App. 71a-72a. Indeed, even HBH's financial projections forecast that there would be no residual cash flow available for distribution. *Id.* at 72a. And if HBH proved to be more profitable than anticipated, petitioner could prevent Pitney from receiving any potential upside by exercising its option to buy out Pitney's interest at "a purchase price unrelated to any fair market value." *Id.* at 73a-74a. In sum, because the parties' arrangement shielded Pitney from the risks and benefits of the enterprise, that arrangement was not a bona fide partnership.

2. Petitioner contends (Pet. 15-20) that the court of appeals erred in concluding that Pitney's capital contribution was not at risk. In petitioner's view, "the only relevant inquiry" (Pet. 20) under *Culbertson* is whether Pitney was assured of recovering its "capital contribution" in the form of cash distributions from HBH (as opposed to receiving dollar-for-dollar allocations of tax credits, their cash equivalent, or some combination thereof).

Contrary to petitioner's argument, *Culbertson* does not require that any particular formal attribute be present or absent before an arrangement is found not to be a bona fide partnership. Rather, the *Culbertson* analysis "consider[s] all the facts" surrounding a particular transaction to determine whether the parties intended to enter into business together and share the risks and rewards of the enterprise. 337 U.S. at 742; Pet. App. 48a-49a. Here, the dispositive point is that the parties agreed to shield Pitney from any risk that it would lose its "capital contribution" by agreeing that Pitney would receive the dollar-for-dollar equivalent of its investment in the form of tax credits or cash reimbursement. That guaranteed benefit served as a proxy for the guaranteed return of Pitney's purported "capital contribution." See Pet. App. 63a-71a. It is therefore immaterial that, as petitioner notes, the tax credits were allocated to Pitney "by *operation of law*"—as a result of its formal status as part owner of HBH—rather than "owned" by HBH and formally "paid" to Pitney as a "*repayment of capital*" (Pet. 19).

Petitioner also suggests that the decision below conflicts with the Second Circuit's decision in *Castle Harbour* because the Second Circuit concluded that the parties there "were not partners because the partnership agreement required *the partnership* to repay the capital to the banks." Pet. 18. But the *Castle Harbour* court did not suggest that the *Culbertson* analysis looks only to whether the partnership was required to repay the putative partner's investment. To the contrary, the Second Circuit, like the court below, recognized that *Culbertson* set forth a "totality-of-the-circumstances" test that considers all of the "underlying economic realities" of the transaction at issue, *Castle Harbour*, 459 F.3d at 230-231, including whether "the funds were advanced with reasonable expectations of repayment regardless of the success of the venture or were placed at the risk of the business," *id*. at 233; see Pet. App. 48a-49a, 63a. The *Castle Harbour* court applied that standard to the "facts of the partnership agreement" before it and concluded that the putative partners' absolute right to repayment from the partnership demonstrated that they had not become bona fide partners. 459 F.3d at 227-229, 231, 237-238.

3. Petitioner contends (Pet. 20-24) that the court of appeals erred by failing to consider whether the tax credits constituted "property for federal income tax purposes." Pet. 21. Petitioner is incorrect. The *Culbertson* analysis does not turn on whether the benefit provided to the alleged partner takes the form of "property" that is "transferred" (in the strict sense of those words) by the alleged partnership. The relevant question is whether, in order to obtain the tax credits, Pitney entered into a bona fide partnership with petitioner. Whether the tax credits are "property" in any particular sense is not relevant to that analysis, and the court of appeals therefore had no occasion to consider that question.

Petitioner contends (Pet. 21) that the decision below conflicts with *Virginia Historic Tax Credit Fund 2001 LP* v. *Commissioner*, 639 F.3d 129 (4th Cir. 2011) (*Virginia Historic*), because the court in that case analyzed whether the state tax credits at issue constituted "property" for purposes of the disguised-sale rules set forth in 26 U.S.C. 707. But as the court below recognized, Pet. App. 61a n.54, *Virginia Historic* concerned a question distinct from that at issue here: whether a "disguised sale" had taken place because investors' contributions to a partnership were in substance payments for state tax credits rather than capital contributions to the partnership. 639 F.3d at 135-136. Because the disguised-sale regulations require a transfer of "property" in return for consideration, see Treas. Reg. 1.707-3(b)(1), the Fourth Circuit examined whether the state tax credits constituted "property," and concluded that they did. 639 F.3d at 140-142. By contrast, the *Culbertson* bona fide partnership analysis does not similarly turn on whether a transfer of "property" has occurred. The court below therefore had no occasion to determine whether the tax credits at issue here are "property."

Petitioner is also wrong in suggesting (Pet. 20-21) that the court of appeals "strayed" from the *Culbertson* analysis by relying on *Virginia Historic*. To the contrary, the court below acknowledged that *Virginia Historic* concerned a distinct question, but correctly observed that "many of the principles espoused in *Virginia Historic* are applicable here." Pet. App. 61a n.54. In particular, both the disguised-sale inquiry in *Virginia Historic* and the bona fide partnership inquiry at issue here concern whether a transaction cloaked in the form of a partnership is in substance an exchange for consideration between parties who do not meaningfully share in the risks and benefits of the partnership. See *ibid.*; *Virginia Historic*, 639 F.3d at 144-146 (considering, in accordance with factors set forth in disguised-sale regulations, whether the transaction was "not dependent on the entrepreneurial risks of partnership operations").

Petitioner also contends (Pet. 24) that the decision below conflicts with *Randall* v. *Loftsgaarden*, 478 U.S. 647 (1986), but that decision is inapposite. There, this Court construed 15 U.S.C. 77*l*(2) (1982), which provides that an investor who purchases a security based on fraudulent representations may recover the purchase price, less any "income received thereon." The Court held that "tax benefits received pursuant to a tax shelter investment" did not constitute "income" that was required to be offset against the rescissory remedy provided by Section 77*l*(2). *Randall*, 478 U.S. at 656-660. *Randall* does not speak to the question whether Pitney meaningfully assumed any of the risks and benefits of HBH's operations.

4. Petitioner argues (Pet. 25-27) that the court of appeals erred in taking into account Pitney's entitlement to the tax credits or their cash equivalent in analyzing the substance of the arrangement between the parties. Petitioner contends that the court should not have "assumed that [Pitney] was entitled to the tax credits in order to determine that [Pitney] was *not* entitled to the credits." Pet. 27. But the court of appeals did not base its conclusion that the parties had not entered into a bona fide partnership on the fact that the parties had agreed that 99.9% of the tax credits should be allocated to Pitney. That allocation would have been proper if Pitney's 99.9% interest in HBH had reflected its interest in a bona fide partnership. Rather, in concluding that no bona fide partnership existed, the court of appeals correctly relied on the parties' elimination of any risk that Pitney would not enjoy the benefit of those credits, as well as their agreement that Pitney would neither bear any other risks nor share in any potential upside of the enterprise. Pet. App. 63a-74a.

To the extent petitioner suggests that the court of appeals should have analyzed the transaction as though it made no provision for allocating the tax credits, such a counterfactual analysis would have ignored both the economics of the transaction and the parties' intent. The parties anticipated that Pitney would eventually exit the alleged partnership in exchange for a payment equal to any accrued but unpaid preferred return on its "capital." See Pet. App. 72a n.63. Absent some other benefit, however, no rational investor would agree to accept an exit payment limited to a 3% *return* on its capital—thereby forfeiting the capital itself—in exchange for its partnership interest. Pitney was willing to do so because it was assured of recovering the economic value of its "capital contribution" in the form of tax credits, cash payments under the tax benefits guaranty agreement, or a combination of the two. *Id*. at 63a.

Finally, petitioner is incorrect in arguing (Pet. 26-27) that the parties' transaction furthered Congress's intent in enacting the historic rehabilitation tax credit provision, and that the court of appeals' decision threatens that regime. Although Congress intended the rehabilitation tax credit regime to encourage historic rehabilitation projects, it was also "mindful of how the tax incentives it had offered might be abused." Pet. App. 8a. As the Joint Committee on Taxation recently recognized in the context of the codification of the economic-substance doctrine, see 26 U.S.C. 7701(*o*), tax credits should be allowed only in "transaction[s] pursuant to which, *in form and substance*, a taxpayer makes the type of investment or undertakes the type of activity that the credit was intended to encourage." See Staff of J. Comm. on Taxation, 111th Cong., *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as amended, in combination with the "Patient Protection and Affordable Care Act"* 152 n.344 (Comm. Print 2010) (emphasis added); see also Pet. App. 8a-9a. Here, the court of appeals correctly determined that Pitney was a partner in HBH only in form.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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