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Are You Getting All of Your Brownfields Tax Credits?

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While Massachusetts first created a Brownfields tax credit in 1998 to encourage the redevelopment of Brownfields sites, until recently, this very useful tax credit was in danger of becoming history. Fortunately, with the finalization of the Housing Bond Bill at the end of last month, the credit is now available for an additional five years to certain taxpayers who clean up qualifying sites in Massachusetts. The tax credit can be up to 50% of the net cost of the work.

Based on the most recent statutory amendments, the work must be started on or before August 5, 2023. These recent statutory amendments also extended until January 1, 2024 the date by when the relevant costs must be incurred.

This Advisory provides a brief summary of the Massachusetts Brownfields tax credit, as well as several of the requirements to obtain it. Based on our experience, you should be sure to take full advantage of the available opportunities.

The Massachusetts Brownfields Tax Credits

The 1998 Massachusetts Brownfields bill provided certain taxpayers with the ability to obtain tax credits against their Massachusetts income tax liability as an incentive to clean up Massachusetts Brownfields sites. In 2000, 2003, 2006, 2010, 2013 and again last month, the statute concerning these tax credits (the "Statute") was amended. In addition, the Massachusetts Department of Revenue (the "DOR") has issued several Technical Information Releases concerning the Statute and its amendments. Based on these materials, described below are several factors to consider in evaluating whether the Massachusetts Brownfields tax credits are available for a particular project. Some of the terms that are used below have the meaning given to them in the Massachusetts Contingency Plan (the "MCP"), which is the Massachusetts regulatory program concerning the cleanup of contaminated sites.

The taxpayer must "commence and diligently pursue" the relevant environmental response action(s) on or before August 5, 2023. This language is fairly self-explanatory, particularly in comparison to much of the techno-speak often encountered in environmental and tax regulations. In light of the complicated ownership structures associated with some real estate projects, however, it is important to be sure that the party performing the relevant response actions (i.e., the party entitled to the credits) will also be the party with Massachusetts income tax liability against which the credits may be offset. Entities that are disregarded for tax purposes are also relevant here.

A Permanent Solution or Remedy Operation Status for the site must be achieved and maintained in compliance with the MCP. What this means in English is that the cleanup must for the most part be completed before the tax credits are available. Under the MCP, a Permanent Solution means that the active cleanup of the site is done. Remedy Operation Status applies to sites where a remedial system that relies on active operation and maintenance (the definition of which is broader than you might expect) is being implemented for the purpose of achieving site closure.

If an Activity and Use Limitation is used to close out a site under the MCP, then a credit of 25% of the net response and removal costs is permitted. If no Activity and Use Limitation is used, then the credit increases to 50% of the net response and removal costs.

An Activity and Use Limitation (an "AUL") is a title document created by the MCP, which allows a land owner to voluntarily restrict the future use of the subject property as part of achieving site closure. Using an AUL may result in cost savings in achieving MCP site closure. One interesting question is what happens if an AUL is used for only part of the relevant property. The Statute and the associated DOR guidance materials do not seem to anticipate this possibility.

The net response and removal costs must be incurred between August 1, 1998 and January 1, 2024. These dates are clear, but in some cases the question of what are "net response and removal costs" that have been "incurred" can be challenging. For example, to what extent do support of excavation ("SOE") costs count if they were incurred as part of a remedial excavation, where an underground parking garage will be built as part of the redevelopment?

The relevant property must be owned or leased by the taxpayer for business purposes, and the property must be located within an "economically distressed area." The term "economically distressed area" is defined in the Statute. The most recent list of these areas that we have been able to obtain is dated November 13, 2015.

The net response and removal costs must be no less than (i.e., equal to or greater than) 15% of the assessed value of the property prior to "response action on or before remediation." This one sounds easy, but often is not. First, be sure to know the assessed value of the property prior to response action/remediation, and be sure to know when the response action/remediation began. A second critical factor is what does the term "property" mean. Often, the relevant tax parcel (i.e., the property for which an assessed valuation is known) is not the same as the relevant MCP site (i.e., the property in connection with which the relevant "net response and removal costs" have been incurred). As a result, interesting valuation and allocation questions can and do arise.

The taxpayer must be an Eligible Person, as defined by Chapter 21E. An Eligible Person is defined by Chapter 21E, in part, as an owner or operator of a site who (a) would be liable under Chapter 21E solely because that party currently owns or operates the site, (b) did not cause or contribute to the contamination at the site, and (c) did not own or operate the site at the time of the contamination. In other words, only innocent owners or tenants of the site can qualify for the Brownfields tax credit, and those parties must not have owned or operated the site at the time the relevant contamination was released. This approach is consistent with two of the original goals of

the Statute, namely that new parties be encouraged by the tax credits to take on Brownfields sites, and that parties who initially caused the contamination not be allowed the benefit of these credits.

The maximum amount of the credit allowed in any taxable year cannot exceed 50% of the tax owed by the taxpayer.

A taxpayer may carryover any unused portion of the credits from one tax year for up to five taxable years. Some types of unused tax credits may be carried forward for use in any subsequent taxable year. However, the Statute specifically limits the carry-forward period for the Brownfields tax credits to five years.

The amount of any state funds received from the Massachusetts Redevelopment Access to Capital Program and/or the Massachusetts Brownfields Redevelopment Fund is deducted from the expense base for which the credit is available. This is so even Eligible Persons do not get a double benefit in connection with cleaning up a particular site.

There are additional requirements in the Statute concerning what happens if the taxpayer is subject to enforcement action under the MCP, and if MCP closure is no longer maintained at the relevant site. There are also a number of other details in the Statute that need to be considered when evaluating whether the Massachusetts Brownfields tax credits are available for a particular site.

The Brownfields Tax Credit is transferable. The 2006 amendments revised the statutory language so that all or any portion of the Massachusetts tax credits may be "transferred, sold or assigned…." This change has been remarkably helpful in increasing the usefulness of these tax credits, particularly for non-profit organizations. In addition, a number of taxpayers who were not able to use all of the credits they generated have now transferred and sold their unused credits, for which there continues to be quite a strong market.

Unaddressed and Open Issues

Neither the Brownfields bill as amended nor the guidance issued by the DOR (the "Guidance") directly address the possibility that more than one MCP site may be present at a particular property. Thus, neither the Statute nor the Guidance specifically say whether the credits may be claimed for individual MCP sites at a particular property for which MCP closure has been achieved, even though MCP closure may not have been achieved for: (a) the property as a whole; or (b) all of the MCP sites at that property.

Conversely, because neither the Statute nor the Guidance address the possibility of more than one MCP site at a particular property, those materials do not provide specific guidance regarding whether costs associated with more than one MCP site can be added together or "stacked," so that the cumulative total of those costs can be taken into account when calculating the amount of the tax credit for a particular property. Our experience indicates that the answer to this question is yes.

Conclusion

Although the requirements to qualify for the Massachusetts Brownfields tax credit are many in number and sometimes are quite complicated, if you have spent the money and you qualify, then you should make sure to get the credits you deserve.

If you have questions about whether you or your project qualify for the Massachusetts Brownfields tax credit, please contact your usual Goulston & Storrs attorney or:

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