

Revisions to Brownfield Cleanup and Remediation Program

Chapter 390 of the Laws of 2008 amended the brownfield redevelopment tax credit allowed under section 21 of the Tax Law and made other technical amendments to the Brownfield Cleanup and Remediation Program under the Environmental Conservation Law.

Brownfield redevelopment tax credit

The brownfield redevelopment tax credit is a credit allowed against the New York State taxes imposed on corporate taxpayers under Article 9, sections 183, 184, or 185, or Article 9-A, 32, or 33 and on individual taxpayers under Article 22 of the Tax Law. To qualify for the credit, a taxpayer must be a party to a Brownfield Cleanup Agreement with the Department of Environmental Conservation (DEC) and have been issued a Certificate of Completion (COC) by the Commissioner of Environmental Conservation. Also, a taxpayer may be eligible for the credit if the COC was transferred to the taxpayer as a result of a sale or transfer of a qualified site. The credit is the sum of the following three separate and distinct credit components, computed each tax year, for eligible costs incurred in the remediation or redevelopment of a qualified site:

- the site preparation credit component,
- the tangible property credit component, and
- the on-site groundwater remediation credit component.

The amount of the credit is a percentage of the eligible costs paid or incurred to clean up and redevelop a qualified site. A greater percentage is allowed for sites that are cleaned up to a level that requires no restrictions on use, sites located in designated environmental zones, and sites located in brownfield opportunity areas (BOA).

Upon completion of the required remediation, DEC will issue a written COC to the remedial party. The COC will include an acknowledgement that the requirements of the remedial program were satisfied, a description of the site information (including the site boundaries or by other means sufficient to identify site location), any restrictions for the use of the site, the date of the brownfield site agreement, and the applicable percentages used to determine the amount of the credit.

Chapter 390 amended the credit to change the applicable percentages used to compute the credit components and to impose a limitation on the amount of the tangible property credit component allowed to be claimed for each qualified site. The amendments also provide for an adjustment in the basis of tangible property if the brownfield redevelopment tax credit was allowable to another taxpayer for the same property. Lastly, all developers who have executed a

Brownfield Cleanup Agreement with DEC are now required to file an annual report with the Department of Taxation and Finance.

Tangible property credit component amendments

Limitation imposed on the tangible property credit component

The tangible property credit component for a qualified site is now limited to the lesser of \$35 million or three times the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component. However, for a qualified site that will be used primarily for manufacturing activities, the credit available is limited to the lesser of \$45 million or six times the costs included in the calculation of the site preparation credit component and the on-site groundwater remediation credit component.

Manufacturing activities means the production of goods by manufacturing, processing, assembling, refining, mining, extracting, farming, agriculture, horticulture, floriculture, viticulture, or commercial fishing. It also includes the activities of a qualified emerging technology company. However, the generation and distribution of electricity, the distribution of natural gas, and the production of steam associated with the generation of electricity do not constitute manufacturing activities.

A qualified emerging technology company is a company located in New York State: (1) whose primary products or services are classified as emerging technologies, or (2) that has research and development activities in New York State and has a ratio of research and development funds to net sales that equals or exceeds the average ratio for all surveyed companies classified as determined by the National Science Foundation in the most recent published results from its Survey of Industry Research and Development (or in any comparable successor survey as determined by the Department of Taxation and Finance), and has annual product sales of ten million dollars or less.

This provision is effective for qualified sites with respect to which the taxpayer has been notified by DEC of acceptance into the Brownfield Cleanup Program on or after June 23, 2008.

Basis adjustments for certain qualified tangible property

In determining the cost or other basis of the qualified property for purposes of the tangible property credit component, the acquisition cost of any item of property with respect to which a brownfield redevelopment tax credit was allowable to another taxpayer must be excluded.

A taxpayer who has received a COC may transfer the benefits and burdens of the COC that run with the land to the taxpayer's successors or assigns upon transfer or sale of all or any

portion of an interest or estate in the qualified site. However, the taxpayer to whom the COC's benefits and burdens are transferred cannot include the cost of acquiring all or any portion of an interest or estate in the site and amounts included in the cost or other basis for federal income tax purposes of the qualified tangible property already claimed by another taxpayer.

These provisions are effective for taxable years beginning on or after April 1, 2005.

Applicable percentages for tangible property credit component have been enhanced

The amendments provide an additional two percent to be added to the applicable percentage used in the calculation of the tangible property credit component where it is determined by the secretary of state that a qualifying site located in a BOA has been developed in conformance with the goals and priorities established for the BOA.

The method of computing the tangible property credit component has not changed as a result of the amendments made to the brownfield redevelopment tax credit. The credit component is the product of the cost (or other basis of the property, as computed for federal income tax purposes) of qualified tangible property multiplied by the applicable percentage. For corporate taxpayers, including corporate partners, subject to tax under Article 9, sections 183, 184, or 185, or Article 9-A, 32, or 33, the applicable percentage is the sum of the following:

- For a qualified site, the base percentage is 12%.
- If the qualified site is remediated to Track 1 (a cleanup level that allows for the site to be used for any purpose without restriction), an additional 2% is allowed.
- If at least 50% of the qualified site is located in an Environmental Zone (EN-Zone), an additional 8% is allowed.
- If the qualified site is located in a BOA, an additional 2% is allowed.

For taxpayers subject to tax under Article 22 (the personal income tax), including partners in partnerships, shareholders in New York S corporations, and individual members of LLCs treated as partnerships, the applicable percentage is the sum of the following:

- For a qualified site, the base percentage is 10%.
- If the qualified site is remediated to Track 1 (a cleanup level that allows for the site to be used for any purpose without restriction), an additional 2% is allowed.
- If at least 50% of the qualified site is located in an EN-Zone, an additional 8% is allowed.

- If the qualified site is located in a BOA, an additional 2% is allowed.

This provision is effective for qualified sites with respect to which the taxpayer has been notified by DEC of acceptance into the Brownfield Cleanup Program on or after June 23, 2008.

Disclosure of information

In order to properly administer the tangible property credit component, the Department of Taxation and Finance may disclose information about the calculation and the amounts of the credits claimed on the taxpayer's tax return to DEC and to other taxpayers claiming a brownfield redevelopment tax credit with respect to the same qualifying site.

Site preparation credit component and on-site groundwater remediation credit component amended

Chapter 390 also changed the applicable percentages used to compute the site preparation credit component and on-site groundwater remediation credit component.

New applicable percentages apply with respect to qualified sites for which the taxpayer has been notified of acceptance for participation in the Brownfield Cleanup Program from DEC after June 23, 2008. Any sites for which a taxpayer was notified of acceptance into the program on or before June 23, 2008, are subject to the applicable percentages in effect prior to these amendments.

Applicable percentages

For purposes of calculating the site preparation credit component and the on-site groundwater remediation credit component for qualified sites accepted into the Brownfield Cleanup Program after June 23, 2008, the applicable percentages are:

- 50% for sites that are approved for unrestricted use;
- 40% for sites that are approved for residential use (except those remediated to Track 4);
- 28% for sites that are approved for residential use and remediated to Track 4;
- 33% for sites that are approved for commercial use (except those remediated to Track 4);
- 25% for sites that are approved for commercial use and remediated to Track 4;

- 27% for sites that are approved for industrial use (except those remediated to Track 4);
and
- 22% for sites that are approved for industrial use and remediated to Track 4.

Reporting requirements for developers

New section 171-s of the Tax Law requires all developers who have executed a Brownfield Cleanup Agreement with DEC to file Form DTF-70, Brownfield Redevelopment Report. The report must contain amounts of state and local taxes generated by the activities of the businesses and employees operating on the brownfield sites. If the actual amounts are unavailable, a developer may provide estimates. A developer must compile the required information from any lessees and other developers and combine the information with its own to produce a report. The first report is due by December 31 of the year in which the Brownfield Cleanup Agreement is executed, and will cover taxes generated from the execution date through November 30 of that year. Subsequent reports (for each of the following 11 years) will be due on December 31, and will cover taxes generated from December 1 of the prior year through November 30 of that year. The taxes that are required to be reported to the Department of Taxation and Finance are:

- Article 9 - Corporation Taxes;
- Article 9-A - Franchise Tax on Business Corporations;
- Article 11 - Mortgage Recording Tax;
- Article 13 - Unrelated Business Income Tax;
- Article 22 - Personal Income Tax;
- Article 30 - New York City Personal Income Tax;
- Articles 28 and 29 - Sales and Use Tax;
- Article 31 - Real Estate Transfer Tax;
- Article 32 - Franchise Tax on Banking Corporations;
- Article 33 - Franchise Tax on Insurance Corporations;
- Article 33-A - Tax on Independently Procured Insurance;

- Article 33-B - Tax on Real Estate Transfers in Towns;
- All real property taxes paid on or on behalf of the qualified site; and
- Certain taxes paid to the city of New York must also be reported. Those taxes include the unincorporated business tax, New York City business taxes, New York City real property transfer taxes, and New York City mortgage taxes.

NOTE: A TSB-M is an informational statement of existing department policies or of changes to the law, regulations, or department policies. It is accurate on the date issued. Subsequent changes in the law or regulations, judicial decisions, Tax Appeals Tribunal decisions, or changes in department policies could affect the validity of the information presented in a TSB-M.