

**New York State Department of Taxation and Finance**  
**Office of Counsel**  
**Advisory Opinion Unit**

TSB-A-11(9)C  
Corporation Tax  
October 31, 2011

STATE OF NEW YORK  
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. C110316A

The petition of [REDACTED] (the Petitioner) requests an advisory opinion regarding the application of the brownfield redevelopment tax credit to certain facts set forth in the Petition. Petitioner asks whether, under Section 21 of the New York Tax Law (the "Brownfield Redevelopment Tax Credit"), the Petitioner may claim the credit for the cost of improvements placed in service prior to the date of issuance of a certificate of completion ("CoC") if the certificate is issued during the same taxable year that the improvements are placed in service. We conclude that Petitioner may claim the full amount of such credits.

**Facts**

The facts as presented in the Petition are as follows: The Petitioner is a Maryland corporation qualified to do business in New York State that owns a site (the "Site") in Nassau County on which it is constructing two buildings to be used as multiple residential units. The Site is a former industrial property that is contaminated with certain hazardous substances, commonly known as a "Brownfield." The Petitioner is a Volunteer under an amended Brownfield Cleanup Agreement ("BCA") with the New York State Department of Environmental Conservation ("DEC") effective October 18, 2007, under the New York State Brownfield Cleanup Program. On or about September 7, 2004, [REDACTED] submitted a certified application to DEC to enter the Brownfield Cleanup Program. [REDACTED] entered into a BCA with DEC as a Volunteer; the Agreement was effective on October 29, 2005. On or about August 23, 2007, Petitioner submitted a certified application to DEC to be added to the existing BCA as a Volunteer. The BCA was amended to include Petitioner as a Volunteer; the Amended Agreement was effective October 18, 2007.

The Amended BCA obligates Petitioner to clean up and remediate the Site, and contemplates the redevelopment of the Site by the construction of new residential buildings. Petitioner is expending all of the clean-up and construction funds with respect to the Site and is solely responsible for the design, construction, and financing of the two buildings to be constructed on the Site, which Petitioner intends to use for the commercial development of residential housing. One building, consisting of 210 residential units (the "North Building"), is scheduled to complete construction (including associated environmental remediation) and be ready for occupancy in June of 2011. While Petitioner has already submitted a remedial action plan for review, it is anticipated that Petitioner will not be able to procure a CoC for the Site until after the North Building is completed and ready for occupancy. However, it is anticipated that the CoC will be issued during the same taxable year that the improvements are placed in service.

## Analysis

The focus of the Petition is the tangible property credit component of the “Brownfield Redevelopment Tax Credit” which is set forth in Tax Law §21(a)(3). This credit is based on the cost or other basis, for Federal Income Tax purposes, of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property (“QTP”). QTP is defined in Tax Law §21(b)(3) as property which satisfies all of the following five requirements:

- (A) is depreciable pursuant to §167 of the Internal Revenue Code;
- (B) has a useful life of four years or more;
- (C) has been acquired by purchase as defined in §179(d) of the Internal Revenue Code;
- (D) has a situs on a qualified site in this State; and
- (E) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing).

Section §21(a)(3) of the Tax Law describes the tangible property credit component in part as follows:

The tangible property credit component shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property ... which constitute qualified tangible property. The credit component amount so determined shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer for up to ten taxable years after the date of the issuance of such certificate of completion.

The prerequisite for being allowed to claim the tangible property credit is placing the property in service on a qualified site where a CoC has been issued with respect to the site. “The period for depreciation of an asset shall begin when the asset is placed in service...” 26 CFR §1.167(a)-10. After a CoC has been issued, for purposes of the tangible property credit, a taxpayer has ten additional years to place “qualified tangible property” in service on the qualified site.

Under the statutory definition of “qualified site”, a site does not become a “qualified site” until after a CoC is issued. If the property does not have a situs on a “qualified site”, the property is not “qualified tangible property”, and therefore, the costs associated with the property are not eligible for the credit.

