

The Mechanics and Specifics of How LSP's can assist clients in monetizing Brownfields Tax Credits

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This article is intended to serve as a follow-up to an article that appeared in the February 2010 Newsletter in which Ned Abelson, a prominent Boston environmental attorney, discussed the Brownfields Tax Credit (the "BTC"), and detailed how the BTC may be helpful for LSPs and their clients. However, further explanation of how the BTC may be fashioned to operate as an instrument of reimbursement for remediation expenses becomes necessary once a client concentrates on exploring its eligibility for the BTC. This month's article will therefore focus on how your clients can obtain and sell the BTC, thereby obtaining a cash reimbursement for a large part of their remediation expenses.

The Statutes

As you are aware, Massachusetts General Laws Chapter 21E ("21E") forces clients that own or operate a site that has environmental contamination to clean up the site, which is a risky, time consuming, and very expensive process. The law generally considers the current owner or operator as one of the parties responsible for the cleanup, but if the current owner or operator is an "eligible person," as defined in Chapter 206 of the Acts of 1998 (the "Brownfields Act"), under certain conditions he or she can be absolved of liability, and, once the cleanup is completed M.G.L. Chapter 63 §38Q (i.e. the BTC) provides for a tax credit of 25% (for a site closed with an AUL or with ROS status) or 50% (for a site closed without the need for an AUL) of the eligible costs incurred to clean up the site. The owner can then monetize the credits by transfer to a buyer.

The Economic Environment

We are in an era in which more and more sites being considered by developers will be Brownfields sites, and in order to continue to foster economic growth, the creation of jobs, increase tax revenue by stimulating the production of housing, commercial, and retail spaces for our workforce and citizens, the Commonwealth has a decided interest in ensuring that Brownfields sites be remediated, and the BTC is an effective tool to achieve that goal. Since the 1986 Internal Revenue Code first created tax credits for low income housing, such tax based incentives have been utilized very effectively by government to outsource to the private sector a public function and allow the development of a competitive marketplace to fashion an economic solution to a societal need. Since 1986, government has created historic tax credits, new markets tax credits, renewable energy tax credits, motion picture tax credits, and the BTC.

Brownfields Tax Credits ("BTC")

The BTC is available to certain taxpayers in Economically Distressed Areas who commence and diligently pursue a response action and maintain a permanent solution or remedy operation status in compliance with 21E and the Massachusetts Contingency Plan. The BTC Program acts as a direct or dollar-for-dollar credit against a taxpayer's tax liability to the Commonwealth of Massachusetts. The tax credits may be used all at once in a given tax year, or the buyer can use as much as they can in the current year and then carry excess credits over to a subsequent tax year for a period of five (5) years. Because the tax credits are certificated (as opposed to other tax credits where a buyer needs to be part of the ownership entity), they are attractive to Buyers and may be transferred by application to the Massachusetts Department of Revenue (the "DOR"). Once issued, each certificate has a unique number and is associated with the certificate holder by tax identification number, so upon transfer the certificate is redeemed and a new certificate is reissued to the buyer. The buyer attaches the certificate to its tax return and claims the credit, or a part of it, for 5 years.

BTC Procedure

Many times, once a cleanup has been achieved and the LSP's engagement is concluded, the client moves forward with their development of the site without consideration of the BTC. To effectively obtain and utilize the BTC, a client will have to engage one or more firms to help apply for and obtain the BTC, secure a buyer for the BTC, and execute the purchase transaction. The risk of the RAO being invalidated by DEP is effectively a risk of recapture of the tax credits by the Dept of Revenue. A buyer will usually require that the seller indemnify the Buyer from this in the purchase agreement. Depending on the dollars involved, bonding against recapture is an option, but usually the indemnification will be based upon the seller's financial ability. In terms of the risk of recapture from this type of recurrence, it is actually very low.

The Buyers

The market for the BTC is growing and stabilizing, and, being a certificated tax credit, the BTC is attractive to an increasing pool of buyers due to its dollar-for-dollar credit against Massachusetts taxes, low risk of recapture by the DOR (as the environmental solution precedes the BTC's issuance), and the statutory language that allows buyers to not be affiliated or connected with the project in any manner whatsoever.

Conclusion

Philosophically, the BTC is no different from other tax credits, but practically speaking, it is a "certificated" credit which makes transfer more efficient, the risk of recapture is low, and there are no ongoing compliance and accounting requirements, all of which are elements that are prevalent in, and serve to complicate, other types of tax credits. As LSPs working on remediating Brownfields sites, expanding your focus to advocate that your clients utilize and take advantage of the BTC amounts to the performance of an important industry service. You will be assisting in

the development of an efficient marketplace, a market that can trade and monetize these credits, and you will be sustaining and assisting the development process which creates our employment opportunities, while allowing the field of environmental remediation to continue beyond LSP involvement, thereby raising the tide for all boats.

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