



CELEBRATING
55 YEARS

nerej

Do you know how the Brownfields Tax Credit can be used as an instrument of reimbursement?

July 29, 2010 - Spotlights

As a developer, it is necessary to access all available sources of equity and capital to allow a development to be built. If you have conducted certain environmental remediation activities on a site for a release that occurred prior to your ownership or control of the site, but which you had to clean up pursuant to Mass. General Laws Chapter 21E (21E) and the Mass. Contingency Plan (MCP), this article may be helpful to you.

The Brownfields Tax Credit (BTC) may be fashioned to operate as an instrument of reimbursement for remediation expenses. This article will focus on how you can obtain and sell the BTC, thereby obtaining a cash reimbursement for a large part of your remediation expenses.

The Statutes

As you are aware 21E forces owners or operators of 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 (Brownfields Act), under certain conditions he or she can be absolved of liability, and, once the cleanup is completed M.G.L. Chapter 63 Â§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

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 Mass. Contingency Plan. The BTC Program acts as a direct or dollar-for-dollar credit against a taxpayer's tax liability to the Commonwealth of Mass. 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 Mass. Department of Revenue (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, a developer moves forward with the development of the site without consideration of the BTC. Hopefully, this article will help to change your thinking. To effectively obtain and utilize the BTC, a developer 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 Mass. 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.

Warren Kirshenbaum is a real estate attorney with Orsi Arone Rothenberg LLP, Needham, Mass.