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ATTORNEYS, PLLC



## 2009 Industry-Environment Conference

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*Workshop 3: Brownfield Cleanup Program  
Using BCP Tax Credits in Project Finance*

Presented By  
Philip S. Bousquet, Esq.

October 15, 2009



# Discussion Topics

- BCP Credit Refresher
- 2008 Law Changes
- Alerts and Red Flags



# BCP Credit Refresher

- NYS Tax Credits
  - Available to Article 9, 9-A, 22, 32, and 33 taxpayers
  - Claimed on a New York State income or franchise tax return
  - Claim BCP credits when a “trigger event” occurs in the tax year
  - Refundable credits – treated like you overpaid your taxes
- Trigger Events
  - Certificate of Completion (CoC) is issued
    - Threshold for all three credits
  - Property is placed in service
  - Eligible Real Property Taxes are paid after CoC issued
  - Environmental Remediation Insurance Premiums are paid



## BCP Credit Refresher

- Three Credits
  - Redevelopment Credit – a percentage of capitalized costs for:
    - “Site preparation” costs
    - On-site groundwater remediation
    - “Qualified tangible property”
  - Credit based on property taxes
  - Credit based on qualified policies of environmental remediation insurance
- “Applicable Percentage” varies based on the kind of taxpayer, location of the site, and extent of the cleanup



## 2008 BCP Reform

### **Tax Credit Changes:**

- BOA Bump-up (2% for post 23-Jun-08 BCP applicants only)
- Tangible Property Credit Component caps (soft/hard caps)
- New percentages for Site Prep and OSGW (*slide in materials*)
- Certificate of Completion transfers addressed

### **Other Items:**

- Brownfield Development Report (Form DTF-70)
- Brownfield Credit Report (Tax Dep't)
- Brownfield Cleanup Program Report (NYSDEC)
- New York Brownfields Advisory Board



## Tangible Property Credit Component Limits

STEP ONE: Calculate the credit the same way as always, plus 2% BOA enhancement (if applicable)

STEP TWO: Apply the new limits:

- The new law establishes two alternative limitations on the amount of the tangible property credit component:
  - “hard” cap (\$35M or \$45M)
  - “soft” cap (3X or 6X costs used for site prep component)

The TPCC equals the lowest of the credit, the hard cap, or the soft cap.



## TPCC Limits (cont'd)

- Soft cap (3X or 6X) was intended to apply to projects where cleanup (SP & OSGW) costs are low relative to the buildout
  - ex. \$20M building, \$400,000 cleanup – cleanup cost is 2% of buildout
- Rules of Thumb (soft cap):
  - Safe zone: cleanup costs above 10% of buildout
  - Definitely capped: cleanup costs are below 3% of buildout
  - Further review required: between 3% and 10% (depending on the applicable percentage)
- ***Some illustrations in printed materials***



## Brownfield Development Report (DTF-70)

- Annual report due from the developer to the Commissioner of Taxation and Finance
- First report due one year after execution of a BCA and for 11 years thereafter
- Based on actual or estimated amounts of state and local taxes generated at the site (including activities of tenants and employees on the site)
  - Timing: first report will be due **31-Dec-09**
  - Report taxes for period **1-Dec-08** through **30-Nov-09**

Source: Tax Law § 171-s



## Brownfield Development Report (cont'd)

- Timing concerns
  - Most development projects maintain books on calendar year basis
  - 12/1 – 11/30 reporting period would create needless cost, and yield less reliable information (most #s will be estimates)
    - Developers can request alternate reporting period.
  - Solution: report information on the developer's fiscal year, after tax returns are filed, using actual data
- Consequences of failure to file?
- By statute, the Developer report may be attached to DTF's Brownfield Credit Report

Source: Tax Law § 171-s



## Tax Department's Brownfield Credit Report

- DTF prepares it annually – 1<sup>st</sup> report issued January 31, 2009
  - Shows credits claimed on returns filed during the prior calendar year
- Annual report includes:
  - Name of taxpayer claiming credit (pass-through owners not disclosed)
  - Amount of each credit claimed on the return
  - Information identifying the project (site name, taxpayer name, municipality & county)
  - Amount of credits by credit type
    - By site, DEC region, and all of NYS
    - Average amount of each credit type in every county, BOA, and En-Zone
  - Requires inclusion of information from developers' reports
- 2008 report is on-line – see site referenced in materials

Source: Tax Law § 171-r



## New Twists and Red Flags

- Different applicable percentages now effectively create two separate redevelopment credits:
  - Site Preparation/ Groundwater Remediation Credit (new %)
  - Tangible Property Credit (old % + BOA bump s/t CAPS)
- Planning Point: “Site Preparation Costs” have two uses:
  - Calculate the Site Preparation credit component
  - Calculate the CAP on the Tangible Property component



## New Twists and Red Flags

- The '*tweeners*: sites above the soft cap (3X or 6X) and below the hard cap (\$35M or \$45M)
  - Soft cap creates an incentive to spend more money on site preparation (including clean up) to boost Tangible Property Credit
    - Non-manufacturing (3X sites): **\$1** of cleanup =
      - up to **\$.50** of Site Preparation Credit
      - **\$3.00** of Tangible Property Credit
    - Manufacturing (6X sites) : **\$1** of cleanup =
      - up to **\$.50** of Site Preparation Credit
      - **\$6.00** of Tangible Property Credit
  - Until the hard cap is reached



## New Twists and Red Flags

- **§198 elections**

- Federal tax code section 198 allows write off (deduction) of qualified remediation expenditures (which can be site prep costs)
- DTF takes position that you can't claim site prep credit for costs deducted under section 198
- Soft cap is based on “amounts **used to calculate** the site preparation credit component”
- DTF interprets the “soft cap” language to mean that taxpayers must ***actually claim*** the site preparation credit component in order for those to costs to count for purposes of the soft cap
- This will effectively eliminate the use of §198 on Brownfield sites



## Special Alert: DTF Position on Condos

- DTF Position on Desk Audit of Condo Projects: “SOFT COSTS” don’t count for TPCC on residential condo projects
  - “Soft costs” include design, engineering, legal, interest, insurance, taxes, etc. – all of which **MUST** be capitalized into the federal basis of the building under federal law
  - On audit, DTF has **DISALLOWED** the tangible property credit component to the extent is it calculated using project “soft costs”
  - DTF argues that soft costs do not become “part” of a dwelling – as if one could construct a building without incurring soft costs



## Claiming the BCP Credits

- Return will be assigned for review and processing within a few weeks after filing
- Large credit claims will be flagged to desk audit
  - 4-8 weeks for initial desk audit review (maybe more)
  - Desk Audit Bureau will review and may seek explanation and/or substantiation of line items on the return
  - Desk audit letter will go out to taxpayer and/or its designated representative
- Returns claiming large refund checks will rise through several layers of review and approval
  - Very large refunds may take many months to process – **12 to 15** months depending on the return and quality of supporting information provided to DTF



## Summary

- Credits still in effect and still a much-needed incentive for NYS
- Brownfield Redevelopment Report (DTF-70) – 31-Dec-09
- Watch out for the red flags
- Stay tuned for updates



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**THANK YOU**

**Philip S. Bousquet**

110 West Fayette Street, Suite 900

Syracuse, New York 13202

**phil@gslaw.com**

(315) 422-1391

[www.GSLAW.com](http://www.GSLAW.com)