

**MICHIGAN'S JUNE 2000
SINGLE BUSINESS TAX BROWNFIELD CREDIT LEGISLATION**

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**\$1 MILLION TO \$30 MILLION SBT CREDIT PER PROJECT - (2000 P.A. 143,
SBTA § 38g, MCL 208.38g).**

1. **P.A. 143 Sunsets in 2002.** - Currently, Single Business Tax ("SBT") Brownfield credits can be approved by the State of Michigan until December 31, 2002. Under P.A. 143, as passed by the Michigan Legislature in June 2000, the Michigan Department of Treasury and the Michigan Economic Growth Authority ("MEGA") have authority to issue "Preapproval Letters" (discussed below) until December 31, 2002. Since the SBT Brownfield credits are claimed in the year that a Brownfield project is completed, MEGA and the Department of Treasury will be dealing with SBT Brownfield credit issues and various required governmental approvals until at least the end of 2007.
 - a. **Definition of Qualified Taxpayer.** Under P.A. 143 a Qualified Taxpayer must own or lease eligible property, and must certify that the Department of Environmental Quality ("DEQ") has not sued or issued a unilateral order to the taxpayer to compel response activity on that property.

2. **SBT Brownfield Credit Applies to Brownfield Property and Some Blighted Property.** The pre-June 2000 SBT Brownfield credit was available only for eligible investments in property classified as contaminated under the Natural Resources and Environmental Protection Act ("NRHPA"). P. A. 143 expanded the credit to include projects involving "blighted" and "functionally obsolete" property, but the expanded credit is primarily available for use in certain specified urban communities (so called "Qualified Local Governmental Units").

3. **Per Project vs Per Taxpayer.**
 - a. Under the pre-June 2000 SBT Brownfield Credit, only one Brownfield credit was available per taxpayer for all tax years and was capped at \$1 million per taxpayer.

 - b. P. A. 143 allows one SBT Brownfield credit per "Project". Under P. A. 143, a taxpayer may claim more than one credit per year (but no more than one credit per project). The maximum amount of the SBT Brownfield credit is \$30 million per project. Up to 15 projects involving credits over \$1 million can be approved each calendar year and, of those, up to 3 projects can involve credits over \$10 million. Up to 3 of the 15 projects carrying credits of over \$1 million can be for projects outside of a

Qualified Local Governmental Unit if they involve investments at contaminated properties, and 1 of those could involve a credit in excess of \$10 million. There is a cap of \$30 million per year on credits of \$1 million or less.

4. **Definition of a Project.** A "Project" is the total of all "Eligible Investment" on an "Eligible Property." The pre-application process deals with the pre-approval of a Project. At the point when the Project is actually completed and a Certificate of Completion has been issued by the State, a credit may then be claimed by a taxpayer. According to the Department of Treasury, a Project is complete when it becomes "a viable community resource, capable of being occupied and used."
5. **Discretionary Approval By MEGA and/or Department of Treasury.** Generally speaking, if the SBT Brownfield credits for a project total \$1 million or less, the Department of Treasury has discretion to approve a credit up to 10% of the cost of the taxpayer's eligible investment. Generally speaking, if the SBT Brownfield credits total more than \$1 million, MEGA has discretion to approve a credit based on a percentage of the eligible investment, not to exceed 10%. For approval of a project carrying a Brownfield credit of over \$10 million, MEGA would have to determine that without the tax credit there would be no Project in Michigan.
6. **Application Process And "Pre-Approval Letter" Issued By Department of Treasury.** An application for a project with a cost of \$10 million or less (with a credit of \$1 million or less) must be approved by the Department of Treasury. An application for a project would have to be approved or denied within 45 days. If the Department fails to meet the 45-day deadline, the project is considered approved. If a project is approved (or not timely denied), the Department must issue a "Pre-Approval Letter" containing the maximum total Eligible Investment for the Project on which credits would be claimed. If an application is denied, the taxpayer can apply again for the same Project or another project. Generally, an application can be filed with the Department after a Project has already begun. An application cannot be amended once it is submitted to the Department or MEGA. A Pre-Approval Letter for the Project must be issued after 12/31/99 but before 1/1/2003, and the Project must be completed within 5 years of the date of the Pre-Approval Letter. The SBT credit must be claimed in the tax year in which a Certificate of Completion is issued (except for a Project with an SBT Brownfield credit greater than \$10 Million).
7. **Application process And Approval Letter By MEGA.** A project with a cost of over \$10 million (with an SBT Brownfield credit over \$1 million) must be approved by MEGA and the State Treasurer. MEGA must approve or disapprove an application for a project within 65 days of its receipt. If MEGA fails to meet the 65-day deadline, the application is sent to the State Treasurer, who then has 5

days to approve or deny it. If the State Treasurer fails to act by the 5-day deadline, the application is considered approved. If MEGA approves an application, MEGA must issue a Pre-Approval Letter stating the percentage of Eligible Investment for the Project and the maximum total Eligible Investment on which credits can be claimed. An applicant who was denied a credit can apply again to MEGA for the same Project or another project. An application can be filed with MEGA after a Project has already begun.

8. **Criteria For SBT Brownfield Credit Approval.** MEGA and the Department of Treasury must consider the following criteria to the extent applicable when approving a credit: (a) the overall benefit to the public; (b) the extent of reuse of vacant buildings and redevelopment of blighted property; (c) the creation of jobs, whether the eligible property was in an area of high unemployment; (e) the level and extent of contamination alleviated, to the extent known; (f) the level of private sector contribution; (g) the cost gap between the site and a similar greenfield site; (h) in cases in which the taxpayer is moving from one location to another within the State of Michigan, whether the move would create a brownfield; (i) the financial soundness of the taxpayer and the economic soundness of the Project; and (j) any other criteria determined by MEGA or the Department. The Department of Treasury and MEGA have discretion to deny any application.
9. **Certificate of Completion.** A taxpayer must claim the SBT Brownfield credit in the tax year in which a "Certificate of Completion" is issued, except that a credit of over \$10 million must be claimed over 10 years. A Certificate of Completion is issued to each Qualified Taxpayer when the Project's completion had been verified by the taxpayer by either the Department of Treasury or MEGA, depending on the size of the project. For MEGA verification, an on-site inspection by MEGA is required. A Project must be completed not more than five years after the issuance of the Preapproval Letter. The Certificate of Completion must state: (a) the total amount of all credits for the Project, not to exceed the maximum in the Pre-Approval Letter; (b) the total amount of the Project and the Eligible Investment of each Qualified Taxpayer; (c) the credit amount for each Qualified Taxpayer; and, (d) for a credit over \$10 million, the schedule on which the annual credit amount must be claimed.
10. **Definition of Eligible Investment.** "Eligible Investment" means demolition, construction, restoration, alteration, renovation, or improvement of buildings or site improvements on eligible property and the addition of machinery, equipment and fixtures. These activities must occur after the date that "Eligible Activities" on the property have begun pursuant to a Brownfield plan and after a Pre-Approval Letter has been issued. The maximum total Eligible Investment may not be amended (or increased) after the issuance of the Pre-Approval Letter, nor may an application be amended to add additional investments.

11. **Definition of Eligible Property and Eligible Activities.** "Eligible Property" means property for which "Eligible Activities" are identified in a Brownfield plan under Michigan's Brownfield Redevelopment Financing Act ("BRFA") that was used or is currently used for commercial, industrial, or residential purposes and is either a facility (environmentally contaminated property), functionally obsolete, or blighted. Functionally obsolete or blighted property must be located in a Qualified Local Governmental Unit in certain urban areas.
 - a. Eligible Property for the purpose of the Brownfield SBT credit is designated by the local Brownfield Redevelopment Financing Authority in an approved brownfield plan. A pre-June 2000 Brownfield plan may be amended to apply to additional parcels of Eligible Property. Under the pre-June 2000 SBT Brownfield Credit, the property had to be located in a Brownfield Redevelopment Zone. The "Zone" concept has been discontinued under P. A. 143.
 - b. "Eligible Activities" means baseline environmental assessment activities, due care activities, additional response activities and the relocation of public buildings or operations for economic development purposes. In a Qualified Local Governmental Unit in certain urban areas, "Eligible Activities" also includes infrastructure improvements (roads, sewers, etc.) that directly benefit Eligible Property, demolition of structures, lead or asbestos abatement and site preparation.
 - c. The cost of "Eligible Activities" may be paid for through the use of tax increment financing under the BRFA.

12. **Assignment of Credit to Lessees.** The addition of leased equipment, machinery or fixtures to a Project qualifies as Eligible Investment provided the lease has a minimum term of ten years or is for the expected useful life of the property. The cost of leased equipment is calculated by using the cost as if the property were purchased minus the lessor's estimate of the fair market value at the end of the lease determined at the time the lease is entered into. P. A. 143 allows all or a portion of the SBT Brownfield credit to be irrevocably transferred or assigned from a real property owner to a lessee of the property provided the real property is leased for a minimum term of ten years. If there is more than one lessee, the taxpayer can prorate the credit among each lessee. A lessee can not subsequently assign any portion of a credit assigned to the Lessee.
 - a. **"Unknown" Lessee Applicants.** - A joint pre-approval application must be submitted by all Qualified Taxpayers who will be making Eligible Investments on the Eligible Property. The application must also include the addition of machinery, equipment and fixtures by known and unknown

lessees if those investments are to be eligible for the credit. If a lessee is not known at the time the application for pre-approval is submitted, the application must include an estimate of the cost of the Eligible Investment reserved for "Unknown Lessees." The "Unknown Lessee" must meet the same eligibility requirements as the rest of the Qualified Taxpayers identified on the application.

13. **Assignment of Credit to Partners, Members And Certain Shareholders.** If the Qualified Taxpayer is a partnership, limited liability company or S corporation, the taxpayer can assign all or a portion of the SBT Brownfield credit to its partners, members, or shareholders based on their proportionate share of ownership of the taxpayer. A partner, member or shareholder that is an assignee can not subsequently assign any portion of the credit.
14. **Prohibited Projects.** An SBT Brownfield credit cannot be claimed based on investment related to: (a) the operation of a professional sports stadium, including a parking lot or retail store; (b) investment related to the operation of a casino, including a parking lot, hotel, motel, or retail store; or (c) investment in landfills. The prohibition against sports stadiums does not, however, apply to an already existing professional sports stadium not being used by a professional sports team on the date an application related to that stadium was filed (for example, Tiger Stadium or the Pontiac Silverdome).
15. **Accounting For Eligible Investments.** - The cost of Eligible Investments for which a credit may be claimed is the cost of work performed after the date that a Pre-Approval Letter for the Project has been issued. In general, the cost is considered to occur in the taxable year that the costs are recorded in the taxpayer's books and records. Permissible methods of accounting are the cash method and/or accrual methods consistent with the taxpayer's method of accounting used for federal income tax purposes.
16. **Overruns Where Amount of Eligible Investments Exceeds the Amount in the Pre-Approval Letter.** - The cost of eligible investment in excess of those included in the Pre-Approval Letter will not qualify for the SBT Brownfield credit. At the time an application is made for pre-approval of a Project, the joint applicants must designate one Qualified Taxpayer authorized to determine how cost overruns will be handled if cost overruns occur.
16. **Recapture of the SBT Brownfield Credit.** - The sale, disposal, or transfer to another location of personal property used to calculate the SBT credit will result in an addition to the tax liability of the Qualified Taxpayer who was originally awarded the credit in the year in which the sale, disposal or transfer occurs. This is true even if the credit was assigned to someone else (such as a Lessee, partner or shareholder of an S corporation). This additional SBT liability is calculated by

multiplying the same percentage as was used to calculate the credit (e.g. 10%) times the federal adjusted basis of the property used to calculate gain or loss as of the date of the sale, disposition or transfer.

CONCLUSION.

The wide spread use by businesses and individuals of limited liability companies, limited partnerships, S corporations and qualified subchapter S subsidiaries (“QSUBs”) present significant planning challenges and opportunities to taxpayers and their owners, lenders and tenants in connection with the financing, acquisition, remediation and disposition of Michigan Brownfield sites and other properties. While the authority of the Department and MEGA to issue “Preapproval Letters” will expire (under P.A. 143) on December 31, 2002, the Department and MEGA will continue to administer the SBT Brownfield credit program until at least the end of 2007. During this period of time both agencies will be issuing “Certificates of Completion” and certificates approving the assignments of (previously approved) SBT Brownfield credits to partners, S shareholders, members of LLC, and tenants. Unfortunately, as of the fall of 2002, the Department and MEGA have declined to issue written guidance regarding the legal standards that these agencies will apply in approving a “Qualified Taxpayer’s” assignment of its SBT Brownfield credits to partners, members, S shareholders or to a tenants. These (and other) issues will have to be resolved over the next several years.

Finally, in light of the fact that the SBT Brownfield credit was originally scheduled to expire or sunset at the end of year 2000, it is possible that the Michigan Legislature will (in the near future) again pass legislation extending the SBT Brownfield credit program beyond December 31, 2002.