

MICHIGAN'S SINGLE BUSINESS TAX BROWNFIELD CREDIT (as amended by December 2002 Legislation)

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Introduction. Eligible taxpayers may claim a Michigan Single Business Tax (“SBT”) Brownfield Credit (the “State Brownfield Tax Credit”) under the SBT Act for a percentage of certain eligible investment in a Brownfield redevelopment project. Under SBT Act 38g(1), as amended in December 2002 by 2002 P.A. 726, to be eligible, a taxpayer must have a preapproval letter for a Brownfield project issued after December 31, 1999 and before January 1, 2008 and the project must be completed within five years after the preapproval letter is issued.

The State Brownfield Tax Credit is applied for by filing an SBT Brownfield Redevelopment Credit Project Preapproval Application (Form 3660) with either the Michigan Department of Treasury (the “Department”) or with the Michigan Economic Development Corporation. The State Brownfield Tax Credit is equal to the following: (1) if the total of all credits for a project is \$1 million or less, the credit is 10% of the cost of the qualified taxpayer's eligible investment; or (2) if the total of all credits for a project exceeds \$1 million but is \$30 million or less, the credit is a percentage of the cost of eligible investment as determined by the Michigan Economic Growth Authority (“MEGA”), but not to exceed 10% of the cost of the eligible investment. Under SBT Act 38g(1)(a) and (b), if the eligible investment exceeds the amount stated in the preapproval letter for that project, the total of all credits for the project cannot exceed the total of all credits on the certificate of completion.

Project. Under SBT Act 38g(33)(k), a “project” is the total of all eligible investment of an eligible property.

Qualified Taxpayer. Pursuant to SBT Act 38g(33)(m), a “qualified taxpayer” is a taxpayer that owns or leases eligible property and certifies that the Michigan Department of Environmental Quality has not sued or issued a unilateral order to the taxpayer to compel response activity on or to the eligible property, or has expended any state funds for response activity on or to the eligible property and demanded reimbursement for those expenditures from the qualified taxpayer.

Eligible Investment. Under SBT Act Section 39g(33)(e), “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 to eligible property after the date that eligible activities on the property have started under a brownfield plan under the Brownfield Redevelopment Financing Act, 1996 P.A. 381, as amended, and after a preapproval letter is issued. The addition of leased machinery, equipment or fixtures to eligible property by a lessee of the machinery, equipment or fixtures is eligible investment if the lease has a minimum term

of ten years or is for the expected useful life of the machinery, equipment or fixtures, and if the owner of the machinery, equipment or fixtures is not the qualified taxpayer with regard to that machinery or equipment. Environmental response activities, including environmental assessment activities, due care plans, and remediation costs, are not eligible investments. Reimbursed costs and land costs are also not eligible investments. Investment attributable or related to the operation of, or associated or affiliated with the operation of, a sports stadium or a casino is not eligible for the State Brownfield Tax Credit. Also, eligible investment does not include investment attributable or related to the construction or expansion of a landfill. SBT Act 38g(27), (28) and (29).

Eligible Property. Under SBT Act Section 38g(33)(d), “eligible property” means property for which eligible activities are identified in a brownfield plan under the Brownfield Redevelopment Financing Act, that was used or is currently used for commercial, industrial or residential purposes and is either a facility, functionally obsolete or blighted. Eligible property must be designated by the local Brownfield Redevelopment Financing Authority in an approved brownfield plan.

Eligible Activities. “Eligible activities” mean baseline environmental assessment activities, due care activities, additional response activities and relocation of public buildings or operations for economic development purposes under the Brownfield Redevelopment Financing Act. See, SBT Act 38g(33)(d). In a qualified governmental unit, eligible activities also includes infrastructure improvements that directly benefit eligible property, demolition of structures, lead or asbestos abatement, and site preparation.

Multiphase Projects. Under 2002 PA 726 (SBT Act 38g(32)), commencing January 1, 2003, a multiphase project is a project for which the total of all credits is \$1 million or less for a project that has more than one component, each of which components can be completed separately. A multiphase project must be an industrial or manufacturing project. The credit for multiphase projects is claimed after a component completion certificate is issued by the Department.

Amending Projects After Issuance of Preapproval Letters. Under SBT Act, 38g(31), if, after a qualified taxpayer's project has been approved and such taxpayer has received a preapproval letter but before the project is completed, the qualified taxpayer determines that the project cannot be completed as preapproved, the qualified taxpayer may petition the Department or MEGA, as applicable, to amend the project. The total of eligible investment for the project as amended cannot exceed the amount allowed in the preapproval letter for that project.

Claiming the State Brownfield Tax Credit. Under SBT Act Section 38g(8), when a project is completed, the taxpayer must submit documentation to that effect, an accounting of the cost of the project, and the eligible investment of each taxpayer if there is more than one taxpayer eligible for a State Brownfield Tax Credit for the project, and, if the taxpayer is not the owner or lessee of the eligible property on which the eligible investment was made at the time the project is completed, that the taxpayer was the

owner or lessee of that eligible property when all eligible investment of the taxpayer was made. The Department or MEGA, as applicable, must verify that the project is completed. If a project is approved by MEGA, then an on-site inspection must be made as part of the verification process. Except as stated below, when the project's completion is verified a certificate of completion should be issued to each qualified taxpayer that has made eligible investment on that eligible property. The certificate of completion should state the total amount of all credits for the project and that total cannot exceed the maximum total of all State Brownfield Tax Credits listed in the preapproval letter for the project. Except for multiphase projects and projects with a credit greater than \$10 million, the credit is claimed in the tax year when the certificate of completion is issued. Each qualified taxpayer and assignee claiming a credit must attach a copy of the certificate of completion and, if the State Brownfield Tax Credit was assigned, a copy of the assignment form to the taxpayer's annual single business tax return.

Assignment of State Brownfield Tax Credit. Under SBT Act 38g(18), a qualified taxpayer that is a partnership, S corporation or limited liability company may assign all or a portion of its State Brownfield Tax Credit to its partners, members or shareholders based on such partners', members' or shareholders' proportionate share of ownership of the partnership, limited liability company or S corporation or based on an alternative assignment method approved by the Department. Once made, the assignment of the credit is irrevocable and, except for a credit greater than \$10 million and an assignment based on a multiphase project, must be made in the tax year when the certificate of completion is issued. The assignment must be made on a form prescribed by the Department. Currently, the Department uses Form 3693 (Single Business Tax Brownfield Redevelopment Credit Assignment). The total State Brownfield Tax Credits claimed by a qualified taxpayer that is a partnership, limited liability company or S corporation and each assignee partner, member or shareholder cannot exceed the credit amount stated on the certificate of completion. The assignor partnership, limited liability company or S corporation must send the completed assignment form to the Department in the tax year during which the certificate of completion is issued. The assignee partner, member or shareholder must attach a copy of the assignment form to its annual single business tax return.

Under SBT Act 38g(17)(a) and (b), the following additional requirements apply if the total of all credits for a project is more than \$10 million: (a) the credit must be assigned based on the schedule contained in the certificate of completion; (b) if the qualified taxpayer assigns all or a portion of the credit amount, the qualified taxpayer must assign the annual credit amount for each tax year separately; (c) more than one annual credit amount may be assigned to any one assignee and the qualified taxpayer may assign all or a portion of each annual credit amount to any assignee; and (d) the qualified taxpayer cannot assign more than the annual credit amount for each tax year.

Under SBT Act Section 38g(17), if a qualified taxpayer pays or accrues eligible investment on or to an eligible property that is leased for a minimum term of ten years or, under 2002 P.A. 726 effective January 1, 2003, sold to another taxpayer for use in a business activity, the qualified taxpayer may assign all or a portion of the State

Brownfield Tax Credit based on that eligible investment to the lessee or purchaser of that eligible property. Effective January 1, 2003, such a credit assignment can only be made to a taxpayer that when the assignment is complete will be a qualified taxpayer. Such credit assignments are irrevocable and, except as stated previously, must be made in the tax year in which the certificate of completion is issued, unless the assignee is an unknown lessee. If a lessee is unknown in the year that the certificate of completion is issued, the qualified taxpayer may delay claiming and assigning the credit until the tax year in which the lessee is known. A qualified taxpayer may claim a portion of the State Brownfield Tax Credit and assign the remaining amount of the credit. Except as previously stated, if the qualified taxpayer both claims and assigns portions of the credit, the qualified taxpayer must claim the portion it claims in the tax year in which the certificate of completion is issued. If a qualified taxpayer assigns all or a portion of the State Brownfield Tax Credit and the eligible property is leased to more than one taxpayer, the qualified taxpayer must determine the amount of credit assigned to each lessee. A lessee cannot subsequently assign a credit or any portion of a State Brownfield Tax Credit assigned to it.

Priority and Carry-Forward of State Brownfield Tax Credits. Generally, the State Brownfield Tax Credit must be calculated after all other SBT credits, except the SBT credits allowed under SBT Act 38c, 37d, and 38g(20). Under SBT Act 38g(15), if the State Brownfield Tax Credit allowed for the tax year and any unused carry forward of the credit exceed the taxpayer's or assignee's tax liability for the tax year, the excess is not refunded but may be carried forward up to ten years, or until used up, whichever occurs first. Generally, the maximum time allowed under this carryover provision starts with the tax year when the certificate of completion is issued to the qualified taxpayer. If a qualified taxpayer assigns all or part of its State Brownfield Tax Credit, the maximum time allowed to carry forward the credit for an assignee begins to run with the tax year when the assignment is made and the assignee first claims a credit, which must be the same tax year. The maximum time allowed to carry forward an annual credit amount of a MEGA approved State Brownfield Tax Credit begins to run in the tax year for which the annual credit amount is designated on the certificate of completion.

Recapture of the State Brownfield Tax Credit. Under SBT Act Section 38g(16), if personal property used to calculate a State Brownfield Tax Credit is sold, disposed of, or transferred from the eligible property to another location, the qualified taxpayer that sold, disposed of, or transferred the personal property must recapture all or a portion of the credit in the year when the sale, disposal or transfer occurs. Recapture of the credit by the qualified taxpayer occurs if all or a portion of the credit was assigned to an assignee. The qualified taxpayer's additional single business tax liability is calculated by multiplying the same percentage that is used to calculate the State Brownfield Tax Credit times the federal income tax adjusted basis of the personal property used to calculate gain or loss as of the date of sale, disposition or transfer of the personal property. Under SBT Act 38g(16), the amount otherwise added to the qualified taxpayer's single business tax liability may also be used to reduce any carry-forward of the State Brownfield Tax Credits available to the qualified taxpayer.

SBT Rate and Repeal of the SBT Act. Finally, under 1999 P.A. 115, as amended, provided certain financial reserves are annually maintained in the Michigan countercyclical budget and economic stabilization fund created by the Management And Budget Act (1984 P.A. 431, as amended), the Michigan single business tax rate is to be reduced by .01% each year until the tax is completely phased-out. Under 2002 P.A. 531, the single business tax Act will be repealed for tax years that begin after December 31, 2009. Beginning on January 1, 2003, the Michigan SBT is generally imposed at the rate of 1.9% on a taxpayer's adjusted tax base apportioned to Michigan.

As stated previously, under the SBT Act unused State Brownfield Tax Credits can be carried forwarded for up to ten years. Since, under 2002 P.A. 531, the SBT Act is presently scheduled to be repealed for tax years that begin after December 31, 2009, any SBT credit or credit carry-forward, including the State Brownfield Tax Credit, to a tax year that begins after December 31, 2009 will not result any single business tax benefit or savings to the taxpayer since the SBT Act will have expired.

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