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[State Online Services](#)

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For
Individuals and Families

For
Businesses

For
Local Officials

For
Tax Professionals

[Home](#) > [Businesses](#) > [Help & Resources](#) > [Legal Library](#) > [Technical Information Releases](#) > [TIRs - By Year\(s\)](#) > [2010 Releases](#) >

TIR 10-1: Economic Development Incentive Program Credit

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Select an area to search

Search

I. Introduction

Sections 21 to 24 and 47 of chapter 166 of the Acts of 2009 made significant changes to the Economic Development Incentive Program (EDIP) established pursuant to G.L. c. 23A, including the tax credit provided in G.L. c. 62, § 6(g) and G.L. c. 63, § 38N which is a key component of the EDIP. The changes became effective for tax years beginning on or after January 1, 2010. This Technical Information Release (TIR) explains the significant changes.

II. Prior Law – EOA Credit

General Laws chapter 62, section 6(g) and chapter 63, section 38N previously authorized a credit against the tax imposed by those chapters to taxpayers that participated in a certified project in a economic opportunity area (EOA) as defined in G.L. c. 23A, § 3A. The credit has been commonly referred to as the economic opportunity area credit (EOAC). The credit was generally available with respect to qualifying purchases by certified projects. Apart from the project certification process, no specific administrative authorization was required from the Economic Assistance Coordination Council (EACC), established pursuant to G.L. c. 23A, to claim the credit.

Under prior law, the EOAC allowed was an amount equal to five percent of the cost of any property that qualified for the investment tax credit (ITC) allowed by G.L. c. 63, § 31A. G.L. c. 62, § 6(g)(1); G.L. c. 63, § 38N(a). The maximum amount of the credit allowed in any one taxable year could not exceed fifty percent of the excise imposed under chapter 62 or chapter 63. G.L. c. 62, § 6(g)(1); G.L. c. 63, § 32C; G.L. c. 63, § 38N(b); 830 CMR 63.38N.1(7)(a).^[1] Moreover, the credit could not be applied to reduce the excise to an amount less than the minimum excise imposed under any provision of G.L. c. 63. G.L. c. 63, § 38N(c); 830 CMR 63.38N.1(7)(b).

Previously, any EOAC not used because it exceeded the excise for the current taxable year or because of limitations could be carried over to subsequent taxable years. G.L. c. 62, § 6(g)(2); G.L. c. 63, § 38N(d). Credit not used because of the minimum excise limitation or because the credit exceeded the taxpayer's excise for its current taxable year could be carried over for ten years. *Id.* Credit not used because of the fifty percent limitation could be carried over indefinitely. G.L. c. 63, § 32C; G.L. c. 63, § 38N(b); 830 CMR 63.38N.1(10)(a)1. However, under no circumstance could the credit be carried over for more than five years after a project ceased to be certified. G.L. c. 62, § 6(g)(2); G.L. c. 63, § 38N(d); 830 CMR 63.38N.1(10)(a)3.

If property that qualified for the EOAC was disposed of or ceased to be in qualified use within the meaning of G.L. c. 63, § 31A or if such property ceased to be used exclusively in a certified project within an economic opportunity area before the end of its useful life, the recapture provisions of G.L. c. 63, § 31A(e) applied. G.L. c. 62, § 6(g)(1); G.L. c. 63, § 38N(a); 830 CMR 63.38N.1(11); DOR Directive 09-4.

Except as specified in this TIR, projects certified prior to January 1, 2010 will remain subject to the statutory and regulatory rules in effect prior to January 1 2010. In particular, in the case of projects certified before January 1, 2010, EACC approval is not required for otherwise allowable credit claims in 2010 or later years. However, these credit claims that relate to projects certified prior to January 1, 2010 are considered for purposes of the new \$25 million statutory cap described below.

III. The Recent Legislative Changes

Pursuant to the recent amendments to G.L. c. 62, § 6(g) and G.L. c. 63, § 38N, the credits thereunder must be awarded by the EACC and those credits are no longer limited to five percent. Further, it is no longer required that certain certified projects within the meaning of those sections be in an economic opportunity area. Due to these statutory changes as described further below the Department of Revenue (DOR) will henceforth refer to the credit as the economic development incentive program credit (EDIPC) and no longer as the economic opportunity area credit (EOAC).

A. Changes to the Definition of Certified Project

The term “certified project” is defined in G.L. c. 23A, § 3A as an “expansion project”, an “enhanced expansion project”, or a “manufacturing retention project” that has been approved by the EACC for participation in the EDIP. The statute also states that:

1. An expansion project must be located in an “economic opportunity area;”
2. An enhanced expansion project may be located anywhere in Massachusetts; and
3. A manufacturing retention project must be in a “gateway municipality” as that term is defined in chapter 23A.

St. 2009, c. 166, §§ 1, 2.

B. Changes to the Amount of Credit Available to a Taxpayer

The EDIPC is available to a taxpayer only to the extent awarded by the EACC. St. 2009, c. 166, §§ 21, 23. For certified expansion projects and certified enhanced expansion projects, the credit awarded may be up to ten percent of the cost of qualifying property. *Id.* For certified manufacturing retention projects, the credit awarded may be as high as forty percent of the cost of such property. *Id.*

An EDIPC allowed to a certified manufacturing retention project, to the extent allowed by the EACC, is refundable to the taxpayer for the taxable year in which the qualifying property for which the credit has been claimed is placed in service.^[2] St. 2009, c. 166, §§ 22, 23. Upon filing a return and complying with any additional procedures required by the DOR, any credit that exceeds the excise for the taxable year will be refunded to the taxpayer.

The EACC may, in consultation with the DOR, limit (but not expand) the credit to a specific dollar amount or time duration or in any other manner deemed appropriate by the EACC. St. 2009, c. 166, §18. For example, the EACC may limit the credit available with respect to a particular project to a specific dollar maximum, even if the actual dollar amount of the qualifying purchases would otherwise generate a higher credit amount. Similarly, the EACC may limit the otherwise applicable credit carry forward period provided by G.L. c. 62, § 6(g) and G.L. c. 63, § 38N(d).

C. Cap on the Total Amount of Credit Awarded by the EACC Annually

The total dollar amount of EDIPCs that may be awarded by the EACC in a calendar year pursuant to G.L. c. 62, § 6(g) and G.L. c. 63, § 38N is \$25 million and includes:

- Refundable credits granted during the year;
- Nonrefundable credits granted during the year, including claims that relate to projects certified prior to January 1, 2010, to the extent that such nonrefundable credits are estimated by the

- Commissioner to offset tax liabilities during the year; and
- Carry forwards of credits from prior years to the extent that such credit carry forwards are estimated by the Commissioner to offset tax liabilities for the year.

St. 2009, c. 166, §§ 21, 23. Any portion of the \$25 million annual cap not awarded by the EACC in a calendar year shall not be applied to awards in a subsequent tax year.

Of the \$25 million in allowable credits, the EACC may award not more than \$5 million in a calendar year for certified enhanced expansion projects and not more than \$5 million in a calendar year for certified manufacturing retention projects. St. 2009, c. 166, §§ 21, 23. The EACC shall provide the Commissioner of Revenue with such documentation as the Commissioner determines is necessary to confirm compliance with the annual cap, and the Commissioner shall provide a report confirming compliance with the annual cap to the Secretary of Administration and Finance and the Secretary of Housing and Economic Development.

D. Changes Pertaining to the Fifty Percent Limitation

The amendment to G.L. c. § 38N added a provision that “a corporation subject to tax under chapter 63 may, to the extent awarded by the EACC, take the credit against its excise in an amount not to exceed fifty percent of its tax liability in a taxable year.” St. 2009, c. 166, § 23. For tax years beginning on or after January 1, 2010, without regard to the date on which the project was certified, this fifty percent limitation applies to all taxpayers taking the credit pursuant to chapter 63.^[3] Similar language in G.L. c. 62, § 6(g) imposes a fifty percent limitation on taxpayers subject to tax under chapter 62. The fifty percent limitation does not apply in instances where the credit is refunded. St. 2009, c. 166, §§ 22, 23.

E. Changes to Carry Forward

Any EDIPC not used because it exceeds the excise for the current taxable year or because of other limitations may be carried over to subsequent taxable years. G.L. c. 62, § 6(g)(2); G.L. c. 63, § 38N(d). Credit not used because of the minimum excise limitation, because of the fifty percent limitation, or because it exceeded the excise for the current taxable year may be carried over for ten years. *Id.* For tax years beginning on or after January 1, 2010, without regard to the date the project was certified, credit not used because of the fifty percent limitation may no longer be carried over indefinitely.^[4] For tax years beginning before January 1, 2010, credit not used because of the fifty percent limitation may still be carried over indefinitely. However, under no circumstance may the credit be carried over for more than five years after a project ceases to be certified. 62, § 6(g)(2); G.L. c. 63, § 38N(d). The credit carry forward provisions do not apply to any portion of the credit that is refunded. St. 2009, c. 166, §§ 22, 23.

Pursuant to the authority granted to the EACC to limit the credit in any manner deemed appropriate, the EACC may, as part of the project certification process, limit the EDIPC carry forward available to a taxpayer. The EACC’s authority to limit the credit is applicable to projects certified on or after January 1, 2010 and not projects certified before that date.

F. Changes to the Availability of the Credit to the Lessee

The EDIPC provisions were amended to make the credit, to the extent awarded by the EACC, available to a lessee for qualifying real property leased pursuant to an operating lease. St. 2009, c. 166, §§ 21, 23. This provision applies to projects certified for tax years beginning on or after January 1, 2010. Credits with respect to leased real property are not available as to projects certified before January 1, 2010. The rules used to calculate the credit for leased real estate will be the same rules used to calculate the credit for leased tangible personal property set out in Regulation 830 CMR 63.38N.1(6)(b).

G. Interaction with the Life Science ITC

If a taxpayer is awarded the EDIPC for property for which the taxpayer has also been awarded the life sciences ITC, the taxpayer may take the EDIPC only to the extent of two percent of the cost of

the qualifying property. G. L. c. 63, § 38U(b). The two percent limitation does not apply if the two credits are not awarded for the same property. The EDIPC shall not be awarded with respect to property upon which a taxpayer is taking the investment tax credit (ITC) pursuant to G.L. c. 63, § 31A or the low income housing credit pursuant to G.L. c. 63, § 31H. St. 2009, c. 166, § 23. In no circumstance may the EDIPC and ITC both be taken with respect to the same property.

H. Recapture

The recapture provisions in G.L. c. 62, § 6(g) and G.L. c. 63, § 38N have not been amended. However, G.L. c. 23A, § 3F(2) has been amended to provide that, upon revocation of a project's certification, the Commonwealth and the municipality in which the project is located shall have a cause of action against the controlling business for the value of any economic benefit received by the controlling business prior to or subsequent to the revocation.^[5]

IV. Effective Date

The amendments to G.L. c. 62, § 6(g) and G.L. c. 63, § 38N are generally effective for tax years beginning on or after on January 1, 2010. St. 2009, c. 166, § 47. For projects certified after January 1, 2010, the EDIPC is available only to the extent authorized by the EACC.

To the extent that any of the provisions in Regulation 830 CMR 63.38N.1 are inconsistent with the amended statute, the statute supersedes the provisions in the regulation. The regulation will subsequently be amended to reflect the new law.

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:lbr

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TIR 10-1

[1] Cf. *The Manufacturer's Life Insurance Company, Inc. v. Commissioner of Revenue*, ATB 2009 (Docket Nos. C276919, C276920; C282740; C287495).

[2] The term "placed in service" shall have the same meaning as set forth in Treas. Reg. § 1.167(a)-11(e)(1)(i).

[3] The credit allowed pursuant to G.L. c. 63, § 38N is no longer subject to the provisions of G.L. c. 63, § 32C. General Laws chapter 63, § 32C provides:

[n]otwithstanding the provisions of section 31A and thirty-eight E and section 11 of the chapter seven hundred and fifty-two of the acts of nineteen hundred and seventy-three, the maximum amount of credits, otherwise allowable in any one taxable year to a corporation shall not exceed fifty percent of its excise imposed by section thirty-two or thirty-nine. Any corporation may carry over and apply to its excise for any subsequent taxable year the portion of those credits, as reduced from year to year, which were not allowed by this section.

Id. For tax years beginning before January 1, 2010, the provisions in G.L. c. 63, § 32C are still applicable.

[4] Because the credit is no longer subject to section 32C, unlimited carry forward as provided for in that section will not be applicable to the credit.

[5] For projects certified before January 1, 2010, revocation does not revoke any benefits due to

projects that relate to years prior to the year in which the revocation determination is made.