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TIR 10-15: Certain Local Property Tax, Personal Income Tax, Corporate Excise, and Tax Administration Changes in "An Act Relative to Economic Development Reorganization"

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I. Introduction

On August 5, 2010, the Legislature enacted "An Act Relative to Economic Development Reorganization" ("The Act").^[1] This Technical Information Release ("TIR") explains changes in the Act relating to property tax, G.L. c. 59, personal income tax, G.L. c. 62, corporate excise, G.L. c. 63, and tax administration, G.L. c. 62C.

II. Local Property Tax; Disregarded LLCs And Manufacturing/R&D Property Tax Exemptions

Generally, under the local property tax, all property (other than real estate, poles and underground conduits, wires and pipes) owned by a manufacturing corporation or, by local option, a research and development corporation, is exempt from taxation.^[2] For this purpose, the definitions of "manufacturing corporation" and "research and development corporation" are found in G.L. c. 63, § 42B.

Effective for tax years beginning on or after January 1, 2011, the Act extends this exemption by local option to a limited liability company ("LLC") that (1) has its usual place of business in Massachusetts, (2) (a) is engaged in manufacturing in Massachusetts and whose sole member is a manufacturing corporation, or (b) is engaged in research and development in Massachusetts and whose sole member is an R&D corporation, and (3) is a disregarded entity.^[3] A "disregarded entity" is defined in G.L. c. 63, § 30(2).

The new law makes clear that in determining whether the sole member of the disregarded LLC is either a manufacturing corporation or an R&D corporation, the attributes and activities of the LLC are taken into account by the member along with the member's other attributes and activities.

Local Option. For purposes of (1) an R&D corporation, or (2) an LLC that is a disregarded entity whose sole member is either a manufacturing corporation or an R&D corporation, each provision takes effect only upon its acceptance by "the city or town in which the real estate, poles and underground conduits, wires and pipes are located."^[4]

III. Personal Income Tax; Qualified Small Business Stock

The Massachusetts tax rate applicable to capital gain income depends on the length of time that a

capital asset is held.^[5] Gain from the sale of a capital asset held for one year or less is taxed at 12%. In general, gain from the sale of a capital asset held for more than one year is taxed at 5.3%. However, gains from the sale of collectibles are taxed at 12% regardless of the holding period.^[6]

Federal Law. Section 1202 of the Internal Revenue Code provides a special exclusion for a portion of capital gains recognized on a sale or exchange of certain "qualified small business stock" issued after August 10, 1993, and held by a noncorporate taxpayer for more than five years.

Lower Capital Gains Tax Rate For Gains From The Sale Of Stock In Certain Massachusetts-Based Start-Up Corporations. Effective for tax years beginning on or after January 1, 2011, Section 111 of the Act provides that gains derived from the sale of investments which meet certain requirements are taxed at a rate of 3% instead of 5.3%.^[7] In order to qualify for the 3% rate, investments must have been made within five years of the corporation's date of incorporation and must be in stock that generally satisfies the definition of "qualified small business stock" under IRC § 1202 (c), other than the requirement that the stock be stock of a C corporation. In addition, the stock must be held for three years or more and the investments must be in a corporation which (a) is domiciled in Massachusetts, (b) is incorporated on or after January 1, 2011, (c) has less than \$50 million in assets at the time of investment, and (d) complies with certain of the "active business" requirements of § 1202 of the Internal Revenue Code, *i.e.*, § 1202 (e)(1), (e)(2), (e)(5), and (e)(6).

To be eligible as "qualified small business stock" under IRC § 1202(c), the stock must be acquired by the taxpayer at its original issue (directly or through an underwriter) in exchange for money, property, or as compensation for services provided to the corporation.^[8] During substantially all of the taxpayer's holding period, at least 80 percent of the value of the corporation's assets must be used in the active conduct of one or more qualified businesses.^[9]

Severability. The Act provides that "[t]he provisions of section 111 shall not be deemed severable. If any of its provisions shall be held to be invalid or unconstitutional by any court of competent jurisdiction, all of the provisions of this section shall be deemed to be void."^[10]

IV. Extension of Brownfields Credit

The Act extends the Brownfields tax credit, previously scheduled to expire on August 5, 2011, for two additional years.

In general, certain taxpayers and nonprofit organizations subject to tax under General Laws chapters 62 and 63 are allowed a Brownfields credit for incurring eligible costs to remediate a hazardous waste site on property used for business purposes and located within an economically distressed area.^[11] The tax credit is up to 50% of the "net response and removal costs" as that term is defined in G.L. c. 21E.

Under prior law, to qualify for a Brownfields credit, the work must have been started on or before August 5, 2011 and the net response and removal costs must be incurred between August 1, 1998 and January 1, 2012. Under the Act, the taxpayer must "commence and diligently pursue" the relevant environmental response action(s) on or before August 5, 2013.^[12] Also, under the Act, the net response and removal costs must be incurred between August 1, 1998 and January 1, 2014.^[13]

V. Low-Income Housing Credit Expansion

A low-income housing tax credit is available to eligible corporations, individuals and partnerships.^[14] The Department of Housing and Community Development allocates the low-income housing credit from a pool of available credits granted under section 42 of the Internal Revenue Code among qualified low-income housing projects.

Under prior law, the Massachusetts low-income housing tax credits were available only to taxpayers who had been allocated federal low-income housing tax credits.

Effective August 1, 2010, the Act allows the Department of Housing and Community Development to grant state low-income housing credits (within the existing \$10 million annual cap) to otherwise eligible projects that do not receive a federal low-income housing credit. [\[15\]](#)

VI. Revision of Economic Development Incentive Program Provisions

Certain taxpayers subject to tax under General Laws chapters 62 and 63 that participate in a certified project are allowed an economic development incentive program credit ("EDIPC"). [\[16\]](#) The credit is part of the Economic Development Incentive Program designed to foster job creation and stimulate business growth throughout the Commonwealth. The total amount of credit that may be authorized by the Economic Assistance Coordinating Council ("EACC") in a calendar year is capped at \$25 million. See TIR 10-1, *Economic Development Incentive Program Credit*. [\[17\]](#)

Pursuant to the Act, effective January 1, 2011, the credit provisions are amended as follows: (1) the \$25 million annual cap on the credit is reduced by both credits granted and credits carried forward pursuant to the newly established certified housing development tax credits authorized by G.L. c. 62, § 6(q) and c. 63, § 38BB; (2) the total amount that the EACC may award to manufacturing retention projects was increased from \$5 million to \$10 million; and (3) recapture rules are clarified so that the regularly scheduled expiration of a project certification period does not by itself trigger recapture. [\[18\]](#)

With regard to the amended recapture provision, to the extent that DOR Directive 09-4 is inconsistent with the amended statute, the statute supersedes the provisions in the directive.

VII. Certified Housing Development Credits

The Act creates a new Housing Development Incentive Program, G.L. c. 40V, that provides a tax credit component.

Effective January 1, 2011, the Act amends G.L. c. 62 § 6 by adding new subsection (q) and G.L. c. 63 by adding new section 38BB to authorize certified housing development tax credits. [\[19\]](#) To the extent awarded by the Department of Housing and Community Development, established pursuant to G.L. c. 23B, a credit is allowed against the tax liability for a "certified housing development project" as defined in G.L. c. 40V. The credit may be up to ten percent of the cost of qualified substantial rehabilitation expenditures of the market rate units within the projects as defined in G.L. c. 40V, § 1. The program has an annual cap of \$5 million on the amount of credit that may be awarded and that cap counts toward the \$25 million annual cap for the economic development incentive program credits (EDIPs) (discussed above).

The certified housing development credit will be explained in more detail in a forthcoming TIR.

VIII. Corporate Excise; Net Operating Losses of an Eligible Business Corporation

A business corporation subject to the corporate excise under G.L. c. 63, § 39 (referred to in this TIR as an "eligible business corporation") may claim one of two types of "carry forward" deductions for net operating losses ("NOLs") incurred in previous taxable years: (1) a start-up corporation NOL carry forward deduction during the first five taxable years of a corporation's existence pursuant to G.L. c. 63, § 30(5)(c), or (2) a general NOL carry forward deduction, as provided in G.L. c. 63, § 30(5)(b). A corporation that is subject to Massachusetts tax but that is not an eligible business corporation, such as a financial institution taxable under G.L. c. 63, § 2, or a utility taxable under G.L. c. 63, § 52A, is not eligible to claim a deduction for an NOL carry forward (or, in the instance where such ineligible corporation is subject to combined reporting, to share an NOL carry forward of another taxable group member). Massachusetts law does not permit any NOLs to be carried back to tax years prior to the tax year in which the NOL was incurred.

a) Expansion of General NOL Carry Forward Period from 5 to 20 Years. Prior to the Act, pursuant to the general NOL carry forward deduction at § 30(5)(b), an NOL sustained in a taxable year by an eligible business corporation could be carried forward for not more than the five

succeeding taxable years after the taxable year in which the loss was incurred and could not be carried back.^[20] This rule setting forth a five-year NOL carry forward period for eligible business corporations will continue to apply under the Act for losses sustained in taxable years beginning prior to January 1, 2010.

For newly-sustained losses, the Act broadens the potential use of an NOL carry forward by an eligible business corporation.^[21] Effective for a loss sustained in any taxable year beginning on or after January 1, 2010, any resulting NOL carry forward may be carried forward by an eligible business corporation for not more than 20 taxable years. As under prior law, it remains the case under the Act that an NOL may not be carried back to tax years prior to the tax year in which the loss was sustained. Further, as under prior law, it remains the case that a financial institution taxable under G.L. c. 63, § 2, or a utility taxable under G.L. c. 63, § 52A, is not eligible to claim a deduction for an NOL carry forward (or, in the instance where the financial institution or utility is subject to combined reporting, to share an NOL carry forward of another taxable group member).

b) Technical Changes to NOL Carry Forward Rules. The Act makes two technical changes to the NOL carry forward rules. First, the Act amends G.L. c. 63, § 30(5) to make it clear that whether an NOL carry forward deduction is claimed under the start-up corporation rules or the general NOL deduction rules, a business corporation that incurs a loss prior to becoming subject to tax liability in Massachusetts is not allowed to carry forward such loss.^[22]

Second, the Act changes the methodology for the calculation of an NOL carry forward from a pre-apportionment to a post-apportionment methodology. In particular, for tax years beginning prior to January 1, 2010, Massachusetts NOLs generally were to be carried forward by an eligible business corporation on a pre-apportionment basis.^[23] However, under the Act, this general rule has changed for tax years beginning on or after January 1, 2010. ^[24] For tax years beginning on or after January 1, 2010, all carry forward losses of an eligible business corporation are to be carried forward on a post-apportioned basis. Specifically, effective for NOL carry forwards determined or claimed as a deduction in tax years beginning on or after January 1, 2010, the Act provides that:

Notwithstanding any other provision of this section, when a corporation is allowed to carry forward net operating losses under this section, the loss shall be determined and carried forward by multiplying the loss by the corporation's apportionment percentage as determined under this chapter for the taxable year in which the loss is sustained, with respect to the business that generated the loss and is to be deducted by the corporation from its taxable net income allocated or apportioned to the commonwealth.^[25]

The Department will be issuing further guidance on this change.

IX. Combined Reporting; Water's Edge Income Inclusion/Exclusion Rules

Effective for tax years beginning on or after January 1, 2009, the Act amends the combined reporting statute to clarify that where a combined group determines its taxable income or loss on a water's edge basis, an item of income of a corporation organized outside of the United States is not included in the combined group's taxable income to the extent that the item is exempt from federal income tax due to a federal income tax treaty.^[26] Any items of expense and apportionment factors related to such item of exempt income will be excluded in the determination of taxable net income or loss.

This provision will be explained in more detail in a forthcoming TIR.

X. Tax Credit Transparency

Under legislation enacted earlier in 2010, chapter 62C of the General Laws was amended to include a provision that requires administering agency heads of refundable and transferable tax credit programs to submit an annual report, by May 15 of each year, to DOR for credits awarded or

claimed for the previous calendar year.^[27]

Effective for credits awarded or claimed on or after January 1, 2011, the tax credit transparency provisions apply to ten refundable or transferable tax credits: 1) Brownfields tax credit,^[28] 2) dairy farmer tax credit^[29] 3) U.S.F.D.A. user fees credit,^[30] 4) film tax credit,^[31] 5) historic rehabilitation tax credit,^[32] 6) life sciences investment tax credit,^[33] 7) low-income housing tax credit,^[34] 8) medical device tax credit,^[35] 9) refundable research credit,^[36] 10) economic development incentive program.^[37]

In addition, under the Act, G.L. c. 62C, § 89 was amended to include any transferable or refundable credits under chapters 62 and 63 established after July 1, 2010.^[38] As a result, the credit transparency provisions will also apply to the certified housing development credit contained within the Act.^[39]

For more information on tax credit transparency, see TIR 10-11, Administrative, Personal Income, Corporate, Tobacco, and Sales Tax Changes Contained in Chapter 131 of the Acts of 2010.

XI. Disclosure of Tax Information to Underground Economy Task Force

In general, G.L. c. 62C, § 21(a) prohibits Department employees or contractors from disclosing return information (as defined in 830 CMR 62C.21.1) to anyone but the taxpayer or his or her authorized representative. The principal exceptions to this provision are listed in G.L. c. 62C, § 21(b) and 830 CMR 62C.21.1.

The Act amends G.L. c. 62C, § 21(b) to permit the disclosure of certain information to members of the Joint Enforcement Task Force on the Underground Economy and Employee Misclassification, established by Executive Order 499. Specifically, the Act permits the disclosure of information relating to the classification by a business entity of individuals providing services to such business entity as employees or independent contractors, including but not limited to information relating to the business entity's withholding or failure to withhold personal income tax pursuant to chapter 62B with respect to payments to particular individuals and the amount of any such payments or withholding.^[40]

/s/Navjeet K. Bal

Navjeet K. Bal
Commissioner of Revenue

NKB:MTF:adh

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^[1] St. 2010, c. 240.

^[2] G.L. c. 59, § 5, cl. (16)(3).

^[3] St. 2010, c. 240, § 108, amending G.L. c. 59, § 5, cl. (16)(3). However, no property, except property entitled to a pollution control abatement or a cogeneration facility (30 megawatts or less in capacity), will be exempt if it is used in the manufacture or generation of electricity and it has not received a manufacturing classification effective on or before January 1, 1996.

^[4] *Id.*

^[5] See G.L. c. 62, § 4 (a), (c).

^[6] However, a 50% long-term gains deduction applies to collectibles held for more than one year.

^[7] St. 2010, c. 240, § 111, amending G.L. c. 62, § 4(b); Section 111 provides:

Section 4 of chapter 62 of the General Laws, as appearing in the 2008 Official Edition, is hereby amended by inserting after the words "paragraph(b)", in line 32, the following words: - , excepting Part C taxable income derived from the sale of investments which: (1) are in a corporation which is domiciled in the commonwealth with a date of incorporation on or after January 1, 2011 which has less than \$50 million in assets at the time of investment and complies with subsections (e)(1), (e)(2), (e)(5), and (e)(6) of Section 1202 of the Internal Revenue Service Code; and (2) are held for 3 years or more, which shall be taxed at a rate of 3 per cent; provided, however, that in order to qualify for the 3 per cent rate, such investments shall be made within 5 years of the date of incorporation and, to the extent consistent with the provisions of this subsection, shall be in stock in a corporation that satisfies the requirements for treatment as "qualified small business stock" under section 1202(c) of the federal Internal Revenue Code, without regard to the requirement that the corporation be a C corporation.

[\[8\]](#) IRC § 1202 (c) and (d).

[\[9\]](#) IRC § 1202(e).

[\[10\]](#) St. 2010, c. 240, § 193. See text of St. 2010, c. 240, § 111 in footnote 5, above.

[\[11\]](#) G.L. c. 62, § 6(j) and G.L. c. 63, § 38Q. See TIR 06-16.

[\[12\]](#) St. 2010, c. 240, § 113, amending G.L. c. 62, § 6(j)(1). St. 2010, c. 240, § 127, amending G.L. c. 63, § 38Q.

[\[13\]](#) St. 2010, c. 240, § 114, amending G.L. c. 62, § 6(j)(1). St. 2010, c. 240, § 128, amending G.L. c. 63, § 38Q.

[\[14\]](#) G.L. c. 62, § 6I; G.L. c. 63, § 31H.

[\[15\]](#) St. 2010, c. 240, §§ 116 and 117 amending G.L. c. 62, § 6I; St. 2010, c. 240, §§ 123 and 124 amending G.L. c. 63, § 31H.

[\[16\]](#) G.L. c. 62, § 6(g) and G.L. c. 63, § 38N; 830 CMR 63.38N.1.

[\[17\]](#) G.L. c. 62, § 6(g) and G.L. c. 63, § 38N were previously amended by St. 2009, c. 166, §§ 21 to 24 and 47. 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 January 1, 2010. For projects certified after January 1, 2010, the EDIPC is available only to the extent authorized by the EACC.

[\[18\]](#) St. 2010, c. 240, § 112 amending G.L. c. 62, § 6(g), and St. 2010, c. 240, § 126 amending G.L. c. 63, § 38N(a).

[\[19\]](#) St. 2010, c. 240, § 115 amending G.L. c. 62 by adding new subsection 6(q) and St. 2010, c. 240, § 129 amending G.L. c. 63 by adding new § 38BB.

[\[20\]](#) See 830 CMR 63.30.2(7)(a)(2).

[\[21\]](#) St. 2010, c. 240, § 120, amending G.L. c. 63, § 30(5)(b); St. 2010, c. 359, § 14 provided a technical correction further amending G.L. c. 63, § 30(5)(b).

[\[22\]](#) St. 2010, c. 240, §§ 121 and 122, amending G.L. c. 63, § 30(5) amending clause (c) and adding clause (d).

[\[23\]](#) The one exception was where a taxable corporation was subject to combined reporting under G.L. c. 63, § 32B, as applicable for tax years beginning on or after January 1, 2009. See 830 CMR 63.32B.2(8).

[\[24\]](#) St. 2010, c. 240, §§ 121 and 122, amending G.L. c. 63, § 30(5) adding clause (e).

[\[25\]](#) St. 2010, c. 240, § 122, amending G.L. c. 63, § 30(5) adding clause (e).

[\[26\]](#) St. 2010, c. 240, § 125 amending G.L. c. 63, § 32B(c)(3) by adding clause (iv).

[\[27\]](#) St. 2010, c. 131, §§ 37, 38, 39, and 47, amending G.L. c. 62C by amending § 1, and adding new § 89.

[\[28\]](#) G.L. c. 62, § 6(j) and G.L. c. 63, § 38Q.

[\[29\]](#) G.L. c. 62, § 6(o) and G.L. c. 63, § 38Z.

[\[30\]](#) G.L. c. 62, § 6(n) and G.L. c. 63, § 31M.

[\[31\]](#) G.L. c. 62, § 6(l) and G.L. c. 63, § 38X(b).

[\[32\]](#) G.L. c. 62, § 6J and G.L. c. 63, § 38R.

[\[33\]](#) G.L. c. 62, § 6(m) and G.L. c. 63, § 38U.

[\[34\]](#) G.L. c. 62, § 6l and G.L. c. 63, § 31H.

[\[35\]](#) G.L. c. 62, § 6 1/2 and G.L. c. 63, § 31L.

[\[36\]](#) G.L. c. 63, § 38M(j).

[\[37\]](#) G.L. c. 62, § 6(g) and G.L. c. 63, § 38N.

[\[38\]](#) St. 2010, c. 240, § 118, amending G.L. c. 62C, § 1.

[\[39\]](#) G.L. c. 62, § 6(q) and G.L. c. 63, § 38BB.

[\[40\]](#) St. 2010, c. 240, § 119, amending G.L. c. 62C, § 21(b) by adding clause 26.