

TIR 15-6: Historic Rehabilitation Tax Credit –Transferring Awards, Multi-Phased Projects, and Recapture

I. Introduction

On August 13, 2014, the Commonwealth adopted St. 2014, c. 287, *An Act Promoting Economic Growth Across the Commonwealth* (“the Act”). Section 53 of the Act amended the personal income tax statute relating to the historic rehabilitation tax credit (“HRTC”), G.L. c. 62, § 6(J)(b)(1)(i), to allow the Massachusetts Historical Commission (“MHC”), subject to certain criteria, to transfer HRTC awards to taxpayers subject to the personal income tax imposed by c. 62 that acquire a qualified historic structure. Section 53 further provided that in the case of a multi-phased project the MHC is allowed to transfer HRTC awards for any phase that meets the criteria.^[1]

The purpose of this TIR is to describe the statutory amendment to the c. 62 HRTC statute, pursuant to the Act, and to explain how the amendment affects the recapture provisions in that statute in the context of multi-phased projects. Additionally, this TIR explains the effect of the amendment on taxpayer confidentiality.

II. Discussion

A. Statutory Amendment Authorizing the Transfer of HRTC Awards

The Act amended the c. 62 HRTC statute to authorize the MHC to transfer HRTC awards to taxpayers taxable under c. 62 that acquire a qualified historic structure subject to certain criteria as outlined in the following language:

. . .the Massachusetts historical commission shall ensure the award of tax credits pursuant to this section [and] shall allow a taxpayer that acquires a qualified historic structure to receive any tax credits for qualified rehabilitation expenditures previously awarded to the transferor of the qualified historic structure if: (A) the rehabilitation was not placed in service by the transferor; (B) no credit has been claimed by anyone other than the acquiring taxpayer as verified by the department of revenue to the commission; (C) the taxpayer completes the rehabilitation and obtains certification as provided in this section; and (D) the taxpayer conforms with all other requirements of [the statute]....^[2]

The Act also provided that in the context of a multi-phased project the MHC may authorize the transfer of HRTC awards for any phase that meets the criteria in subclauses (A) to (D), inclusive.^[3]

B. Multi-Phased Projects

The MHC administers, allocates, and determines eligibility for the HRTC through an application process and criteria set forth in the HRTC regulation, 830 CMR 63.38R.1. Under the HRTC statutes a credit is authorized for up to 20% of qualified rehabilitation expenditures made by a taxpayer with respect to a qualified historic structure which has received final certification from the MHC and has been placed in service.^[4] M.G.L. c. 62, § 6(J)(b)(1)(ii); c. 63, § 38R(b)(1)(ii).

The MHC has discretion to determine during the application process that a project may be completed in phases “. . . as set forth in architectural plans and specifications completed before the rehabilitation begins....” See M.G.L. c. 62, § 6J(a); c. 63, § 38R(a). Each phase of a project may separately meet the final certification and placed-in-service requirements and thereby receive a credit specific to that particular phase.^[5]

In authorizing the transfer of HRTC awards in the case of a multi-phased project, the MHC has discretion to allocate such awards to any particular phase of the project and will do so on a case-by-case basis.

C. Recapture

Under the HRTC statutes, recapture is required “[i]f, before the end of the 5 year period beginning on the date on which the qualified historic structure received final certification and was placed in service, the taxpayer disposes of the taxpayer’s interest in the structure....” M.G.L. c. 62, § 6J(g)(1); c. 63, § 38R(g)(1). The recapture amount is the credit taken or transferred by the taxpayer minus the credit allowed for ownership. “The credit allowed for ownership shall be the product of the amount of credit allowed multiplied by a ratio, the numerator of which is the number of months the rehabilitated structure is owned by the taxpayer, and the denominator of which is 60.” M.G.L. c. 62, § 6J(g)(2); c. 63, § 38R(g)(2). In the case of a partial disposition of the taxpayer’s ownership interest in the project the recapture amount is pro-rated. See 830 CMR 63.38R.1(12)(d). In the case of a multi-phased project, because each phase of a project may separately meet the final certification and placed-in-service requirements, recapture is triggered for the disposition of the taxpayer’s interest in a particular phase of a multi-phased project only with respect to that phase of a project that has received final certification and been placed in service.

D. HRTC Awards and Their Impact on Recapture

A transfer of HRTC awards to a taxpayer acquiring a qualified historic structure that has not received final certification and been placed in service does not trigger the recapture provisions. Those recapture provisions only come into play after a qualified historic structure receives final certification and has been placed into service. However, the transfer of HRTC awards to a taxpayer that acquires a multi-phased project, any phase of which has been completed and placed in service and for which a final certificate has been issued, will trigger the recapture provisions with respect to that phase as discussed in the Examples below.

Example 1: The owner of a 3-phase historic rehabilitation project received \$300,000 in HRTC awards for the project, to be divided equally among the 3 phases. In year 1 the owner meets the final certification and placed-in-service requirements for phase 1 and receives a \$100,000 credit and credit certificate for that phase from the MHC. In year 2 the owner sells phases 2 and 3 of the project and applies to the MHC to transfer the outstanding \$200,000 of HRTC awards to the buyer who would like to allocate all of the \$200,000 of awards to phase 2. The MHC, in its exercise of discretion, disallows that allocation and requires the buyer to allocate the \$200,000 in HRTC awards equally between phases 2 and 3.

None of the owner's \$100,000 credit issued for phase 1 of the project is subject to recapture as the owner is not disposing of his interest in phase 1. Likewise, none of the \$200,000 in HRTC awards transferred to the buyer acquiring phases 2 and 3 of the project is subject to recapture as neither phase has received a final certification or been placed in service.

Example 2: Same facts as in Example 1 except that the owner sells all three phases in year two, twelve months after the date the phase 1 \$100,000 credit certificate was received. In such a case, the \$100,000 credit issued for phase 1 of the project is subject to recapture as follows. The credit allowed for ownership is \$20,000 ($12/60 \times \$100,000$). Subtracting the \$20,000 credit allowed for ownership from the \$100,000 credit, \$80,000 of the credit is subject to recapture. None of the \$200,000 in HRTC awards transferred to the buyer acquiring phases 2 and 3 of the project is subject to recapture as neither phase has received a final certification or been placed in service.

Example 3: Same facts as in Example 2 except that the owner sells 50% of his ownership interest in phase 1 and 100% of his ownership interest in phases 2 and 3 of the project to the buyer. Given that the owner made a partial disposition of his ownership interest in phase 1, the recapture amount is \$40,000 (\$80,000 pro-rated by 50%). None of the \$200,000 in HRTC awards transferred to the buyer acquiring phases 2 and 3 of the project is subject to recapture as neither phase has received a final certification or been placed in service.

E. Taxpayer Confidentiality

Under the amendment of the HRTC statute pursuant to the Act, the MHC may allow the transfer of MHTC awards so long as certain criteria are met. One of the criteria is that "...no credit has been claimed by anyone other than the acquiring taxpayer as verified by the department of revenue to the commission..."^[6] In complying with this provision, an application to the MHC requesting the transfer of a MHTC award must include the transferor's and acquiring taxpayer's limited waiver of confidentiality under M.G.L. c. 62C, § 21, granting to the Commissioner of Revenue or the Commissioner's duly authorized representative permission to discuss information related to the application with the MHC.

/s/Mark Nunnelly

Mark Nunnelly

Commissioner of Revenue

MN:RHF:pls

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^[1] The Act did not amend the corporate excise HRTC statute, G.L. c.63, § 38R. Therefore, taxpayers subject to an excise imposed by c. 63 are not eligible to receive a transfer of HRTC awards upon acquiring a qualified historic structure or a phase thereof. Additionally, in the case of an acquisition by a pass-through entity such as a partnership or LLC taxed as a partnership, the transfer of HRTC awards is allowed to the extent they are passed through to persons or entities designated as partners, members, or owners taxable under c. 62. Transferors of HRTC awards may be either a c. 62 or c. 63 taxpayer, however, as transferors are not addressed by the amendment.

^[2] St. 2014, c. 287, §53, *amending* M.G.L. c. 62, § 6(J)(b)(1)(i).

^[3] *Id.*

^[4] The date on which the qualified historic structure receives final certification is the date on the credit certificate issued by the MHC.

^[5] See DOR Directive 08-9, *Historic Rehabilitation Tax Credit Phased-In Projects*, for further details regarding phased-in projects.

^[6] See *infra* footnote 1.