

830 CMR 63.38N.1 Economic Opportunity Area Credit

830 CMR: DEPARTMENT OF REVENUE

830 CMR 63.00: TAXATION OF CORPORATIONS

830 CMR 63.38N.1: Economic Opportunity Area Credit

(1) Statement of Purpose, Effective Date.

(a) Purpose of Regulation. This regulation explains the calculation of the economic opportunity area credit allowed by M.G.L. c. 62, § 6(g) and M.G.L. c. 63, §38N.

(b) Effective Date. This regulation takes effect upon promulgation and applies to costs incurred on or after January 1, 1993.

(2) Definitions. For purposes of this regulation the following terms shall have the following meanings:

Certified Project, a project that has been approved by the Economic Assistance Coordinating Council for participation in the economic development incentive program pursuant to the provisions of M.G.L. c. 23A, §3F.

Code, the Internal Revenue Code of the United States, as amended and in effect for the taxable year, unless otherwise specified.

Commissioner, the Commissioner of Revenue or the Commissioner's duly authorized representative.

Corporations, all entities taxable under M.G.L. c. 63.

Department, the Department of Revenue.

Economic Assistance Coordinating Council, the council established pursuant to M.G.L. c. 23A, § 3B.

Economic Opportunity Area, an area of Massachusetts which is designated by the Economic Assistance Coordinating Council as an economic opportunity area pursuant to M.G.L. c. 23A, §3E.

Investment Tax Credit, the credit allowed by M.G.L. c. 63, §31A.

Lease, any transfer of use or possession of real and tangible personal property for consideration, including licenses and subleases.

Participants, any person or corporation which as owner, lessor, or lessee of eligible property incurs costs or makes expenditures in connection with the purchase or lease of such eligible property in a certified project. A person or corporation does not qualify as a participant solely by virtue of providing financing to participants in connection with a certified project.

Persons, individuals and entities taxable under M.G.L. c. 62.

(3) Taxpayers Eligible for the Credit.

(a) Corporations. The credit may be applied against any excise imposed by M.G.L. c. 63.

(b) Persons. The credit may be applied against the income tax imposed by M.G.L. c. 62.

(4) Eligible Property. Eligible property includes tangible personal property and other tangible property, including buildings and structural components of buildings, acquired, constructed, reconstructed or erected during the taxable year and used exclusively in a certified project in an economic opportunity area in Massachusetts and tangible personal property leased pursuant to an operating lease and used exclusively by the lessee in Massachusetts in a certified project in an economic opportunity area throughout the entire lease term, subject to the following requirements:

(a) the property must not be taxable under M.G.L. c. 60A (relating to motor vehicles);

(b) the property must be depreciable under Section 167 of the Code and have a useful life of four years or more; and

(c) Buildings and structural components of buildings must be acquired by purchase as defined under Section 179(d) of the Code.

(5) Availability of the Credit.

(a) Owner. The credit is available to the owner of eligible property. Where more than one taxpayer participates in a certified project, the credit is available to each participant only for eligible property owned by the participant. If eligible property is owned by two or more participants, the credit shall be available to each participant in proportion to its ownership interest in such property. For purposes of this Regulation, an owner of eligible property is the taxpayer who, under section 167 of the Code, is entitled to take a depreciation deduction with respect to the eligible property.

1. If property is leased to a taxpayer pursuant to a capital lease, the taxpayer shall be treated as the owner of the property. A capital lease is any transaction which the taxpayer properly treats as a purchase for federal income tax purposes.

2. A lessee leasing eligible property from a regional business development corporation or authority authorized under M.G.L. c. 40D or a regional business development corporation organized as a non-profit corporation under any special act shall be deemed to be the owner of the property.

(b) Lessor. The credit is generally not available to the lessor of eligible property. However, the credit is available to a lessor for eligible property, other than tangible personal property, leased to a lessee provided the relationship between the lessor and the lessee is:

1. an individual and a corporation if such individual owns, directly or indirectly, 100 percent of the outstanding stock in the corporation;
2. a corporation and a partnership if the same persons own, directly or indirectly, 100 percent of the outstanding stock in the corporation and 100 percent of the capital interest or profit interest in the partnership;
3. a corporation and another corporation if the same persons own, directly or indirectly, 100 percent of the outstanding stock in each corporation;
4. the fiduciary of the trust that holds the leased property and the sole grantor of the trust;
5. the fiduciary of the trust that holds the leased property and the fiduciary of another trust if the same person is the sole grantor of both trusts;
6. the fiduciary of the trust that holds the leased property and the sole beneficiary of such property;
7. the fiduciary of the trust that holds the leased property and a corporation if the trust, the sole grantor of the trust, or the sole beneficiary of the trust owns, directly or indirectly, 100 percent of the outstanding stock in the corporation.

(c) Owner Leasing a Portion of Eligible Property. If an owner, as lessor, leases a portion of eligible property, the credit is available to the owner only with respect to that portion of the property that is not leased. If the owner claims a credit with respect to property and subsequently leases a portion of the property to another, the lease shall be treated as a disposition triggering the recapture rules under 830 CMR 63.38N.1(11) with respect to the portion of the property leased unless the relationship between the lessor and the lessee is described in 830 CMR 63.38N.1(5)(b)1-7.

(d) Lessee. The credit is available to a lessee of tangible personal property leased pursuant to an operating lease. The credit is not available to a lessee for real property leased pursuant to an operating lease. An operating lease is any transaction which the taxpayer properly treats as a lease for federal income tax purposes.

1. Limitation on Credit Available to Lessee. The credit is not available to a lessee if the lessor has previously received an economic opportunity area credit or the investment tax credit with respect to the property, except as follows:

a. if a lessor, who has previously received an economic opportunity area credit with respect to tangible personal property, subsequently leases the property to another pursuant to an operating lease,

the lease shall be treated as a disposition triggering the recapture rules under 830 CMR 63.38N.1(11) with respect to the property leased. The lessee will be allowed credits which cumulatively shall not exceed the amount the lessor was required to, and did in fact, recapture pursuant to 830 CMR 63.38N.1(11).

b. if a lessor, who has previously received an investment tax credit with respect to tangible personal property, subsequently leases the property to another pursuant to an operating lease, the lease shall be treated as a disposition triggering recapture of the investment tax credit with respect to the property leased. The lessee will be allowed credits calculated pursuant to 830 CMR 63.38N.1(6)(b), below.

2. Documentation. The lessor and lessee must maintain documentation adequate to substantiate the credit claimed by the lessee. Without limitation, such documentation shall include a written statement signed by the lessor and stating the following:

a. the lessor's adjusted tax basis in the leased property at the beginning of the lease term;

b. the useful life of the property being used by the lessor for depreciation purposes and the remaining useful life at the commencement of the lease;

c. that the lessor has not claimed an economic opportunity area credit or investment tax credit with respect to the leased property, or if it has done so, the dollar amount of tax that it has recaptured (or will recapture in the tax year in which the lease commences) with respect to the leased property.

(6) Calculation of the Credit.

(a) Computation of Credit for Owner. The credit shall be equal to five percent of the basis of the property for federal tax purposes after deduction therefrom of any federally authorized tax credit taken with respect to such property acquired, constructed, reconstructed, or erected. In instances where multiple parties are entitled to the credit with respect to the same property, the total amount of credit generated with respect to any property shall not exceed five percent of the cost of such property.

If a portion of eligible property is leased pursuant to an operating lease, the cost attributed to the portion of property not under lease shall be the basis of property for federal tax purposes (after deduction therefrom of any federally authorized tax credit taken with respect to such property) minus the adjusted basis of the portion of property which is leased pursuant to an operating lease (after deduction therefrom for any portion of any federally authorized tax credit attributed to that portion of property).

(b) Computation of Credit for lessee. The lessee's credit for tangible personal property shall be five percent of the lessor's adjusted basis for federal tax purposes at the beginning of the taxable year, multiplied by a fraction, the numerator of which is the number of days of the taxable year during which the lessee leases the tangible personal property and the denominator of which is the number of days remaining in the useful life of such property at the beginning of the taxable year. Such useful life is the same as that used by the lessor for depreciation purposes when computing federal income tax liability. The maximum cumulative

credit shall not exceed five percent of the lessor's adjusted basis for federal tax purposes at the beginning of the lease term. The lessee calculates and claims the credit annually during the term of the operating lease.

(c) Eligible Cost. For purposes of computing the credit for owners and lessees, the credit available with respect to a particular project is limited to:

1. the cost incurred on or after the date the project is certified pursuant to the provisions of M.G.L. c. 23A, § 3F or

2. the cost incurred prior to the date a project is certified but only cost incurred on or after the date the taxpayer has notified the municipality in writing of its intention to have the project certified. Eligible cost does not include any cost incurred prior to the date of written notice to the municipality. The requirement in 830 CMR 63.38N.1(6)(c)2 that the notice be in writing is effective prospectively on July 13, 2007.

(d) Accounting Rules. For purposes of this regulation, in determining when a cost is incurred, the method of accounting used by the taxpayer taking the credit shall be the same method of accounting properly used by that taxpayer for federal income tax purposes.

(7) Limitations on the Credit.

(a) Fifty Percent Limitation. The maximum amount of credits otherwise allowable in any taxable year shall not exceed fifty percent of the excise imposed by M.G.L. c. 62 or c. 63. For purposes of applying the fifty percent limitation, excise liability is determined before the application of any credits. For corporations subject to tax under M.G.L. c. 63, § 32 or §39, the corporate excise liability includes amounts due under both the income and non-income measures of the corporate excise.

(b) Minimum Excise Limitation. Notwithstanding the fifty percent limitation set forth in 830 CMR 63.38N.1(7)(a), above, the credit may not be applied to reduce the minimum excise imposed under any provision of M.G.L. c. 63.

(8) Interaction with Investment Tax Credit. The economic opportunity area credit may not be taken for any property if the investment tax credit has been taken with respect to the same property.

(9) Ordering. Taxpayers that can claim both the economic opportunity area credit and any other credit for a taxable year may apply the economic opportunity area credit in any order they desire with respect to such other allowable credits.

(10) Carry Over of Unused Credit.

(a) General. A taxpayer that does not use the full amount of the credit generated in a taxable year may carry over the unused amount of the credit as follows:

1. Unlimited Carry Over. Credits that are not used in a taxable year because of the fifty percent limitation described by 830 CMR 63.38N.1(7)(a), above, may be carried over to any succeeding taxable year, subject to the provision contained in 830 CMR 63.38N.1(10)(a)3, below.

2. Ten Year Carry Over.

a. Credits that are not used in a taxable year because they exceed the taxpayers tax liability for the taxable year may be carried over to the next taxable year for a maximum of ten successive taxable years, subject to the provision contained in 830 CMR 63.38N.1(10)(a)3, below.

b. Credits that are not used in a taxable year because of the minimum excise limitation described by 830 CMR 63.38N.1(7)(b), above may be carried over to the next taxable year for a maximum of ten successive taxable years, subject to the provision contained in 830 CMR 63.38N.1(10)(a)3, below.

3. Five Year Limitation. No credit can be carried over to a taxable year beginning more than five years after the certified project or economic opportunity area ceases to qualify as such under provisions of M.G.L. c. 23A.

(b) Accounting for Unused Credit. Taxpayers must keep records distinguishing amounts of unused credit eligible for unlimited carry over from amounts of the credit eligible for ten year carry over. In addition, taxpayers must keep records of the amount of the credit eligible for carry over generated in each previous taxable year and the amount of such credit that was carried over and used in succeeding taxable years.

(c) Effect of Merger on Credit Carry Over. In the event of a merger of two or more corporations or corporate trusts, the surviving entity retains any amount of credit carry over, determined under 830 CMR 63.38N.1(10), above, that is separately generated by the surviving entity before the merger. All of the credit carry over generated by an entity absorbed in the merger is lost. The surviving entity may not apply or carry over any amount of credit generated by the entity that it absorbs. Transactions affecting a single corporation or corporate trust that do not terminate the existence of the entity for Massachusetts tax purposes shall not be considered mergers for purposes of this section, 830 CMR 63.38N.1(10)(c). Such transactions include mere changes in identity, form, or place of organization of one corporation under Section 368(a)(1)(F) of the Code, and the recapitalization of a single corporation under Section 368(a)(1)(E) of the Code.

(11) Recapture or Reduction of Credit Carry Over.

(a) General. If eligible property is disposed of or ceases to be used exclusively in a certified project in an economic opportunity area before the end of its useful life portions of the credit taken in any prior year that exceed the allowable credit must be recaptured and repaid as additional tax due in the year the property is disposed of or ceases to be used exclusively in a certified project within an economic opportunity area. To the extent that any credit carried over pursuant to 830 CMR 63.38N.1(10) that has not been taken exceeds the portion of the allowable credit, the carried over credit must be reduced. The Commissioner may assess additional tax under M.G.L. c. 62C on account of recapture of the economic opportunity area

credit. No recapture or reduction in carry over is necessary if the property has been used exclusively in a certified project within an economic opportunity area for more than twelve consecutive years.

(b) Allowable credit. If property is disposed of or ceases to be used exclusively in a certified project in an economic opportunity area before the end of its useful life, the original credit amount generated must be recalculated to determine the allowable credit. The allowable credit is calculated by multiplying the original credit generated with respect to the property by the following fraction. The numerator is the number of months that the taxpayer owned the property and used it exclusively in a certified project within an economic opportunity area. The denominator is the total number of months of useful life of the property at the time the property was first used.

(c) Amount of Recapture or Carry Over Reduction. If the amount of credit taken in prior years exceeds the allowable credit, the excess must be recaptured and paid as additional tax. If the full amount of the allowable credit has been taken, the entire amount of any carry over must be eliminated. If only a portion of the allowable credit has been taken, any carry over credit that exceeds the portion of the allowable credit must be eliminated. Any remaining credit may continue to be carried over.

Example 1: Taxpayer files a return for 2002 on 9/15/03 stating that it generated \$10,000 of credit on 5-year property costing \$200,000 and placed in service on 1/1/02. The taxpayer uses \$7,000 of credit and carries over the remaining \$3,000 of credit. As of 4/1/03, the taxpayer ceases to use the property in its certified project.

Under the rules above, the taxpayer is allowed credit from 1/1/02 – 4/1/03, which is 15 months. The allowable credit is \$2,500 ($\$10,000 \times 15/60$).

Of the \$7,000 of credit previously taken, \$4,500 of it will have to be recaptured as additional tax in tax year 2003. The \$3,000 of carry over will be eliminated as of 2003.

(d) Special Recapture Rule for Corporations with Property also Eligible for the Investment Tax Credit. It is a condition for taking the EOA credit that the taxpayer not take the 3% Massachusetts investment tax credit ("ITC") with respect to the same property. 830 CMR 63.38N.1(8). If a corporation eligible for the ITC allowed under M.G.L. c. 63, § 31A is required to recapture EOA credit because eligible property is no longer used exclusively in a certified project in an economic opportunity area, but the property continues to be in qualified use for purposes of the ITC, the taxpayer may either (1) apply the recapture rules set forth in 830 CMR 63.38N.1(11)(a)-(c) to the 5% EOA credit; or (2) recapture the entire amount of the EOA credit and eliminate any EOA credit carry over, but apply the ITC rules as if the EOA credit had not been taken. In the latter case, the Commissioner will require the corporation to recapture the EOA credit and reduce its EOA credit carry over by only the net difference between the amount of the EOA credit generated with respect to the property and the amount of the ITC that the corporation would have been eligible to claim with respect to the property had it not claimed the EOA credit.

Example 2: Same facts as in Example 1, except the taxpayer is a manufacturing corporation eligible for the ITC that would have been eligible to claim \$6,000 ($\$200,000 \times 3\%$) of ITC with respect to the

property had it not claimed the EOA credit, and when the taxpayer ceases to use the property in its certified project it continues to use it in Massachusetts in its manufacturing business.

Under the ordinary recapture rules above, $\frac{3}{4}$ of the \$10,000 or \$7,500 would be subject to recapture/carry over elimination. The taxpayer may choose, however, to recapture and reduce its carry over by \$4,000 – the difference between the 5% EOA credit and the 3% ITC. Accordingly, if it so chooses, \$1,000 of EOA credit taken will be recaptured as additional tax and the \$3,000 of credit carry over will be eliminated.

(12) Unincorporated Flow-through Entities. Unincorporated flow-through entities, such as partnerships and joint ventures, shall be treated as flow-through entities for purposes of determining the credit. All amounts relevant calculating the credit shall be attributed to the owners of the entities in accordance with Section 704 of the Code, as defined in M.G.L. c. 62, §1, and shall be taken into account in determining the credit for the taxable year during which the taxable year of the unincorporated flow-through entity ends. If recapture is required, the owners of the flow-through entities must recapture.

(13) S Corporation Rules. Either the S corporation or its shareholders may take the credit with respect to any property, but not both.

(a) The credit may be applied against either or both the non-income or income (if applicable) measure of the S corporation's corporate excise subject to the limitations in 830 CMR 63.38N.1(7).

(b) Alternatively, the credit can be applied against the shareholders' income tax imposed by M.G.L. c. 62. In this case, all amounts relevant to the calculation of the credit are attributed to the shareholders of the S corporation and are taken into account in determining the shareholders' credit for the taxable year during which the taxable year of the S corporation ends.

(c) Shareholders cannot take the economic opportunity area credit if the S corporation is taking or has taken the investment tax credit with respect to the same property.

(d) If the shareholders of the S corporation take the credit with respect to any property, the S corporation must maintain adequate records to specifically identify that property and to distinguish it from property with respect to which the S corporation has taken the credit.

(e) If the S corporation takes the credit and does not use the full amount of the credit generated in a taxable year, the S corporation may carry over the unused amount of the credit to succeeding taxable years. Amounts carried over by the S corporation may be applied only to offset the S corporation's corporate excise liability. If recapture is required, the S corporation must recapture.

(f) If the shareholders of the S corporation take the credit and do not use the full amount of the credit generated in a taxable year, the shareholders may carry over the unused amount of the credit to succeeding taxable years. Amounts carried over by a shareholder may be applied only to offset the shareholder's tax liability. If recapture is required, the shareholders must recapture.

(14) Controlled Groups and Entities under Common Control. For purposes of determining whether a taxpayer has acquired or disposed of tangible personal property, corporations that are members of the same controlled group as defined in Section 41(f) of the Code and all entities, whether or not incorporated, under common control as defined in Section 41(f) of the Code shall be treated as a single taxpayer. Transfers of tangible personal property between members of the same controlled group or between entities under common control will be disregarded for purposes of generating a credit or triggering recapture of a credit already taken with regard to transferred property.

(15) Combined Groups.

(a) General. The amount of the credit shall be determined separately, under the provisions of this regulation, for each corporation that is a member of a combined group, as defined at 830 CMR 63.32B.1(2).

(b) Limitations on the Credit. The limitations on the amount of the credit that a corporation may claim for a taxable year, described at 830 CMR 63.38N.1(7), above, shall apply to each member of a combined group separately. In applying those limitations, the corporate excise liability of each member of the combined group is the member's separately computed excise determined under 830 CMR 63.32B.1(8)(a).

(c) Sharing the Credit. A member of a combined group must use the amount of the credit available to it for a taxable year first to offset its own separately determined corporate excise liability for the taxable year. Where a member of a combined group cannot use the full amount of the credit available for a taxable year that member may share the amount of the credit that it cannot use with other members of the combined group to the extent that such other members can apply the credit to their separately determined corporate excise liabilities for the taxable year under the limitations described by 830 CMR 63.38N.1(7), above. Members of combined groups may share the credit in the manner described above regardless of whether the group filed a combined return for the taxable year in which the credit was generated.

(d) Carry Over. Subject to the carry over provisions of 830 CMR 63.38N.1(10), above, each member of a combined group may carry over any unexpired amounts of the credit that have not been used to reduce the corporate excise liability of any member of the combined group. Each member of a combined group may carry over amounts of unused, unexpired, credit only to the extent that such amounts are generated by the member itself. The combined group, therefore, has no credit or carry over of its own.

REGULATORY HISTORY

830 CMR 63.38N.1: M.G.L. c. 14, § 6(1); M.G.L. c. 62C, § 3.

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