TSB-A-11(9)C Corporation Tax October 31, 2011

## STATE OF NEW YORK COMMISSIONER OF TAXATION AND FINANCE

## ADVISORY OPINION <u>PETITION NO. C110316A</u>

The petition of **Constitution** (the Petitioner) requests an advisory opinion regarding the application of the brownfield redevelopment tax credit to certain facts set forth in the Petition. Petitioner asks whether, under Section 21 of the New York Tax Law (the "Brownfield Redevelopment Tax Credit"), the Petitioner may claim the credit for the cost of improvements placed in service prior to the date of issuance of a certificate of completion ("CoC") if the certificate is issued during the same taxable year that the improvements are placed in service. We conclude that Petitioner may claim the full amount of such credits.

## Facts

The facts as presented in the Petition are as follows: The Petitioner is a Maryland corporation qualified to do business in New York State that owns a site (the "Site") in Nassau County on which it is constructing two buildings to be used as multiple residential units. The Site is a former industrial property that is contaminated with certain hazardous substances, commonly known as a "Brownfield." The Petitioner is a Volunteer under an amended Brownfield Cleanup Agreement ("BCA") with the New York State Department of Environmental Conservation ("DEC") effective October 18, 2007, under the New York State Brownfield Cleanup Program. On or about September 7, 2004, submitted a certified application to DEC to enter the Brownfield Cleanup Program. Centered entered into a BCA with DEC as a Volunteer; the Agreement was effective on October 29, 2005. On or about August 23, 2007, Petitioner submitted a certified application to DEC to be added to the existing BCA as a Volunteer. The BCA was amended to include Petitioner as a Volunteer; the Amended Agreement was effective October 18, 2007.

The Amended BCA obligates Petitioner to clean up and remediate the Site, and contemplates the redevelopment of the Site by the construction of new residential buildings. Petitioner is expending all of the clean-up and construction funds with respect to the Site and is solely responsible for the design, construction, and financing of the two buildings to be constructed on the Site, which Petitioner intends to use for the commercial development of residential housing. One building, consisting of 210 residential units (the "North Building"), is scheduled to complete construction (including associated environmental remediation) and be ready for occupancy in June of 2011. While Petitioner has already submitted a remedial action plan for review, it is anticipated that Petitioner will not be able to procure a CoC for the Site until after the North Building is completed and ready for occupancy. However, it is anticipated that the improvements are placed in service.

## Analysis

The focus of the Petition is the tangible property credit component of the "Brownfield Redevelopment Tax Credit" which is set forth in Tax Law \$21(a)(3). This credit is based on the cost or other basis, for Federal Income Tax purposes, of tangible personal property and other tangible property, including buildings and structural components of buildings, which constitute qualified tangible property ("QTP"). QTP is defined in Tax Law \$21(b)(3) as property which satisfies all of the following five requirements:

- (A) is depreciable pursuant to §167 of the Internal Revenue Code;
- (B) has a useful life of four years or more;
- (C) has been acquired by purchase as defined in §179(d) of the Internal Revenue Code;
- (D) has a situs on a qualified site in this State; and
- (E) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes (including the commercial development of residential housing).

Section \$21(a)(3) of the Tax Law describes the tangible property credit component in part as follows:

The tangible property credit component shall be equal to the applicable percentage of the cost or other basis for federal income tax purposes of tangible personal property and other tangible property ... which constitute qualified tangible property. The credit component amount so determined shall be allowed for the taxable year in which such qualified tangible property is placed in service on a qualified site with respect to which a certificate of completion has been issued to the taxpayer for up to ten taxable years after the date of the issuance of such certificate of completion.

The prerequisite for being allowed to claim the tangible property credit is placing the property in service on a qualified site where a CoC has been issued with respect to the site. "The period for depreciation of an asset shall begin when the asset is placed in service..." 26 CFR 1.167(a)-10. After a CoC has been issued, for purposes of the tangible property credit, a taxpayer has ten additional years to place "qualified tangible property" in service on the qualified site.

Under the statutory definition of "qualified site", a site does not become a "qualified site" until after a CoC is issued. If the property does not have a situs on a "qualified site", the property is not "qualified tangible property", and therefore, the costs associated with the property are not eligible for the credit.

In this case, it is expected that the improvements will be placed in service in the same taxable year the CoC is issued. The placed in service date, however, will precede the date of issuance. The issuance of a CoC is under the sole control of the DEC. While the issuance of the CoC is pending, economic circumstances may require the taxpayer to place the property in service. The purpose of the Brownfield Cleanup Program is to encourage persons to clean up and develop contaminated sites that are not economically viable. The tax credits serve as an incentive to clean up such brownfield sites and place improvements on the site. The language in the statute that describes the time period during which the credit is allowed uses taxable years as the standard. It is a reasonable interpretation of the Law and consistent with the Legislative purpose of the BCP to conclude that the improvements here that are placed in service during the taxable year in which the CoC is issued qualify for the tangible property credit component. We do not construe the statute to limit the credit solely to improvements placed in service after the date the CoC has been issued. The credit will be allowed as long as property is placed in service in the same taxable year that the CoC is issued.

DATED: October 31, 2011

/S/ DEBORAH R. LIEBMAN Deputy Counsel

NOTE: An Advisory Opinion is issued at the request of a person or entity. It is limited to the facts set forth therein and is binding on the Department only with respect to the person or entity to whom it is issued and only if the person or entity fully and accurately describes all relevant facts. An Advisory Opinion is based on the law, regulations, and Department policies in effect as of the date the Opinion is issued or for the specific time period at issue in the Opinion.