**New York State Department of Taxation and Finance**
**Office of Counsel**

TSB-A-18(1)I
Income Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. I151104A

The Department of Taxation and Finance received a Petition for an Advisory Opinion from [redacted] ("Petitioner"). Petitioner requests guidance on issues involving the Brownfield Redevelopment Tax Credit under Tax Law § 21, which consists of three components: site preparation, tangible property, and on-site groundwater remediation. Petitioner is specifically inquiring about the first two components.

First, Petitioner asks when tangible property is considered "placed in service" given that the project site involves the redevelopment of an approximately 140,000 sq. ft. building and certain portions of the building will: (1) remain in use while remediation and redevelopment are conducted on other portions of the site and building; and (2) be redeveloped, receive Certificates of Occupancy from local officials, and be occupied and used by Petitioner or another tenant while other portions of the building are still undergoing redevelopment and remain uninhabitable. A portion of the building may also be redeveloped and occupied by Petitioner prior to the issuance of a Certificate of Completion ("CoC"), and Petitioner asks what affect this will have upon its eligibility for certain components of the brownfield redevelopment credit. We conclude that tangible property will be considered "placed in service" when any one of the separately occupied portions of the site is "available to serve its assigned function." However, as relates to point (1), set forth above, tangible property will not be considered to have been "placed in service" if a limited portion of the building is occupied and used during the pendency of remediation and/or redevelopment of other portions of the site so long as no tangible personal property associated with the occupied portion is placed in service. In the event that tangible property on the site is placed in service prior to the issuance of a CoC, that property will remain eligible for the tangible property component only if it is placed in service within the same year that the CoC is issued.

Second, Petitioner asks whether costs incurred for certain activities will qualify for the site preparation component. Specifically, Petitioner asks whether the costs associated with the following activities are eligible: (1) excavation and removal of contaminated soil; (2) placement of one foot or more of site cover; (3) ongoing soil vapor intrusion investigation; (4) placement of an environmental easement on the property; (5) development of a site management plan; (6) submission of periodic review reports; (7) installation of a sub-slab depressurization system; (8) asbestos removal; (9) demolition and removal of dilapidated buildings on the site; (10) conversion of building space from warehouse to office space; and (11) the modification and renovation of existing fire suppression, plumbing, HVAC and electrical systems. We conclude that the costs associated with the activities listed above, except for the conversion of warehouse space to office space and the modification and renovation of

existing fire suppression, plumbing, HVAC and electrical systems, are eligible for the site preparation component as long as they: (A) are properly chargeable to a capital account, and; (B) are paid or incurred in connection with the site's qualification for a CoC, or are otherwise paid or incurred in connection with preparing the site for the erection of a building or building component or to establish the site as usable for its industrial or commercial purpose. We further conclude that costs associated with the conversion from warehouse to office space and the modification and renovation of existing fire suppression, plumbing, HVAC and electrical systems may be eligible as costs included the tangible property component as long as: (A) they are not treated as site preparation costs; and (B) the property to which these costs relate meets the requirements as tangible property pursuant to Tax Law § 21(b)(3).

**Facts**[1]

Petitioner is one of several lessees of a brownfield site (the "Site" or "Property"), and has an option to purchase the Property. On December 10, 2014, Petitioner entered into a Brownfield Site Cleanup Agreement ("BCA") with the Department of Environmental Conservation ("DEC") under Environmental Conservation Law § 27-1409 A Remedial Action Work Plan was accepted by the DEC in September of 2015, but a CoC has not yet been issued.

Petitioner intends to exercise its option to purchase the Property, redevelop the existing building being utilized on the Site, and consolidate the two separate parcels that comprise the Property. However, the existing contamination on the site must be remediated before Petitioner is willing to exercise its option. The existing building utilized on the Site is comprised of nearly 140,000 sq. ft. that is used as manufacturing, office, and warehouse space. The building is presently occupied by at least three different tenants.

Petitioner has already commenced site remediation by conducting asbestos removal and demolishing/removing two dilapidated buildings that were located on the Site. As additional remediation work progresses, the various tenants will be constructively evicted from large portions of the Site as remediation and redevelopment work begins on their occupied portion of the building. Once the Site has been remediated, Petitioner intends to exercise its option to purchase the property and commence the redevelopment and modification of the 140,000 sq. ft. building. The redevelopment phase of the project will also require that tenants be constructively evicted from their leased portion of the building as that portion of the building is redeveloped or modified. The local building department has indicated that, as specific portions of the building are redeveloped or modified, Certificates of Occupancy will be issued only to those specific portions of the building so that they may be occupied and used without requiring that all work on the entire 140,000 sq. ft. building first be completed. It is also anticipated that

[1] The site was accepted into the Brownfield Clean-up Program ("BCP) on December 10, 2014, and Petitioner anticipates receiving a CoC in 2016. Therefore, the amendments to the Brownfield Redevelopment Tax Credit signed into law on April 13, 2015, L.2015, c.56, Part BB, are likely inapplicable. L.2015, c.56, Part BB, § 32. However, if a CoC has not been issued for the site by December 31, 2019, the site will be eligible for the Brownfield Redevelopment Tax Credit under Tax Law § 21 as if the site was accepted into the BCP on or after July 1, 2015, i.e. the April 13, 2015, amendments will apply. L.2015, c.56, Part BB, § 33. The analysis and conclusions contained within this opinion assumes that Petitioner will receive a CoC prior to December 31, 2019.

a portion of the building will continue to be occupied and used while other portions of the building undergo remediation and redevelopment. This will allow for some continued use of the building as the project proceeds.

Petitioner anticipates that remediation of the Site will be complete, and a CoC issued, in 2016. Petitioner intends to claim the site preparation component at that time, and also intends to claim the tangible property component for those portions of the building that are redeveloped or modified in the year that those portions receive a Certificate of Occupancy and are again occupied and used. While it is Petitioner's intention that no tangible property on the Site be "placed in service" prior to the issuance of the CoC, it is possible that tangible property will be placed in service on portions of the Site and those portions of the Site will receive Certificates of Occupancy and have tangible property placed in service prior to the CoC being issued.

**Analysis**

The brownfield redevelopment tax credit is comprised of several discrete components authorized by Tax Law § 21. The main issues here involve the timing of tangible property being "placed into service" and the implications of that timing on Petitioner's eligibility for two components of the Brownfield Redevelopment Tax Credit. Specifically: (1) will tangible property be considered to have been placed in service if a portion of the Site continues to be occupied and used while other portions of the Site undergo remediation and redevelopment; (2) will tangible property be considered to have been placed in service if certain portions of the Site are occupied and used after remediation and redevelopment occurs on those portions, while other portions of the Site are still undergoing redevelopment or modification; and (3) if tangible property is placed in service on a portion of the Site prior to the issuance of the CoC, will eligibility for the tangible property component be affected. Petitioner also seeks confirmation that costs incurred for certain activities will be eligible for either the site preparation or tangible property components.

The tangible property credit component "…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." Tax Law § 21(a)(3). An advisory opinion of the Department of Taxation and Finance, TSB-A-11(9)C, October 31, 2011, clarifies that, when tangible property is placed in service prior to the issuance of a CoC, a taxpayer can still claim the tangible property component as long as the CoC is issued in the same year that the tangible property is placed in service.

The phrase "placed in service" is not defined by New York State statute, regulation, or case law, but is found in the Internal Revenue Code ("IRC") and federal regulations addressing depreciation. Although New York is not bound by federal interpretation of similar provisions, in the absence of clear legislative intent or compelling reasons to the contrary, it is appropriate to look to federal authority for guidance in interpreting similar or analogous State tax

provisions. *See Matter of John Grace & Co.*, Tax Appeals Tribunal, May 10, 1990; *Matter of Accessories By Pearl*, Tax Appeals Tribunal, February 24, 1989.

Pursuant to federal regulations regarding depreciation, 26 CFR 1.167(a)-11(e)(1):

> Property is first placed in service when first placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business, in the production of income, in a tax-exempt activity, or in a personal activity…. In the case of a building which is intended to house machinery and equipment and which is constructed, reconstructed, or erected by or for the taxpayer and for the taxpayer's use, the building will ordinarily be placed in service on the date such construction, reconstruction, or erection is substantially complete and the building is in a condition or state of readiness and availability. Thus, for example, in the case of a factory building, such readiness and availability shall be determined without regard to whether the machinery or equipment which the building houses, or is intended to house, has been placed in service.

There are several federal court decisions that interpret and apply the IRC regulations in determining whether property has been placed in service for purposes of depreciation and eligibility for tax credits. *See, e.g., Brown v. C.I.R.*, TC Memo 2013-275 (December 3, 2013) (an airplane was not placed in service until a conference table and enhanced display screens were installed because, even though the airplane could fly, the plane was not ready for its specifically assigned function until it was affixed with the conference table and enhanced display screens required by the owner); *Podraza v. C.I.R.*, TC Summ. Op. 2015-67 (November 19, 2015) (a car was not ready and available for full operation on a regular basis for its specifically assigned function, and therefore was not placed in service, where the car had not yet been delivered to the taxpayers, making it impossible for the vehicle to be available for use until that date); *Consumers Power Company v. C.I.R.*, 89 TC 710 (September 30, 1987) (a hydroelectric power plant with 6 power generating units was not placed in service where only one unit was operated during the tax year for pre-operational testing, and the amount of electrical power generated was insufficient to establish the plant as available for full operation on a regular basis); *c.f. Armstrong World Industries, Inc. v. C.I.R.*, 974 F2d 422 (3rd Cir. 1992) ("…courts appear to agree that individual components will be considered as a single property for tax purposes when the component parts are functionally interdependent - when each component is essential to the operation of the project as a whole and cannot be used separately to any effect. The converse, thus, should be equally valid in this case. Accordingly, if a project has component parts which can function as planned in a wholly *independent* manner, then a court may find that each component is a 'property ... placed in a condition or state of readiness and availability for a specifically assigned function.'")

As is evidenced by the Petitioner's desire to have certain portions of the Site occupied and used while other portions are still undergoing remediation or redevelopment, there are multiple projects on the Site for which the components may apply. The Site first will be considered to have been placed in service when renovations to the first of the separately occupied and used portions of the building are substantially complete and that separately occupied portion of the building is ready for its specifically assigned function. In the event that the Site is placed in service prior to the issuance of the CoC, the CoC must be issued in the same taxable year that the Site is placed in service for the Petitioner to be eligible for the tangible property component for the costs incurred prior to issuance of the CoC. *See* Tax Law § 21(b)(3)(A) (qualified tangible property must have a situs on a qualified site in New York State); Tax Law § 21(b)(1) (a "qualified site" is a site with respect to which a CoC has been issued).

After the CoC is issued and the first part of the Site is placed in service, the taxpayer may be eligible to claim additional tangible property components when the other separately occupied portions of the Site are placed in service, during the ten taxable years after the Coc is issued.

Site preparation costs are defined as all amounts properly chargeable to a capital account: (1) that are paid or incurred in connection with a site's qualification for a CoC; and (2) all other site preparation costs paid or incurred in connection with preparing a site for the erection of a building or a component of a building, or otherwise to establish a site as usable for its industrial, commercial (including the commercial development of residential housing), recreational or conservation purposes. Tax Law § 21(b)(2). Site preparation costs include work such as excavation, temporary electric wiring, scaffolding, demolition, fencing, and security. *Id*.

Qualified tangible property is defined, in relevant part, as property which: (1) is depreciable pursuant to IRC § 167; (2) has a useful life of four years or more; (3) has been acquired by purchase as defined in IRC § 179(d); (4) has a situs on a qualified site in New York State; and (5) is principally used by the taxpayer for industrial, commercial, recreational or environmental conservation purposes. Tax Law § 21(b)(3)(A).

Costs incurred that are associated with the following activities will fall within the definition of "site preparation costs" if they are paid or incurred in connection with the Site's qualification for the CoC or to establish the Site as usable for its industrial and/or commercial purpose: (1) excavation and removal of contaminated soil; (2) placement of one foot or more of site cover; (3) ongoing soil vapor intrusion investigation; (4) preparation of an environmental easement on the property; (5) preparation of a site management plan; (6) preparation of periodic review reports; (7) installation of a sub-slab depressurization system; (8) asbestos removal; and (9) demolition and removal of dilapidated buildings on the Site.

Costs incurred for the conversion of building space from warehouse to office space, and for the modification and renovation of existing fire suppression, plumbing, HVAC and

electrical systems, may qualify for the tangible property credit component if they are costs included in the cost or basis for federal income tax purposes of the tangible property that meets the requirements set forth in Tax Law § 21(b)(3)(A).

DATED: March 7, 2018

/S/
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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. The information provided in this document does not cover every situation and is not intended to replace the law or change its meaning.