

PUBLICATION

Spotlight on Georgia: Conservation Tax Credits Can Be Transferred

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Georgia law was amended this year to allow the transfer of conservation tax credits from the taxpayer awarded the credit to a third-party purchaser. This 2011 legislation, HB 346 which was signed by the Governor on May 11, 2011, is effective for the transfer of credits on or after January 1, 2012 and generally represents the first time that the state has authorized the transfer of conservation credits.

Background

Since 2007, Georgia has allowed taxpayers who make a qualified donation of land or conservation easements to qualified conservation organizations to take a credit against Georgia income taxes. Similar to requirements of the Internal Revenue Code and other state statutes which permit credits for conservation purposes, a qualified donation means the fee simple conveyance of 100 percent of the entire interest in property or a conservation easement meeting certain requirements, to a governmental entity or bona fide charitable organization.

A conservation easement is a non-possessory property interest imposing limitations or affirmative obligations, the purposes of which include retaining or protecting natural, scenic or open space values of real property; assuring the availability of such real property for agricultural, forest, recreational or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological or cultural aspects of the property.

Governmental entities do not accept grants of easements. Georgia law as well as the Internal Revenue Code permits an easement to be granted to a qualified conservation organization, the charitable purpose of which includes retaining or protecting the natural, scenic or open-space values of real property; assuring the availability of real property for agricultural, forest, recreational or open-space use; protecting natural resources; maintaining or enhancing air or water quality; or preserving the historical, architectural, archeological or cultural aspects of real property.

Donations

The Georgia Department of Natural Resources (DNR) is responsible for certifying that donated property meets the stated conservation purposes and is being donated to a qualified organization. DNR maintains a list of approved organizations.

The value of the property (or conservation easement) must be determined by an appraisal, which in turn must be approved by DNR. In general, the standards applicable to the qualification of a donation under the Internal Revenue Code are equally applicable for purposes of the Georgia credit. In the case of a conservation easement, the value to be taken into account is the value of the entire property prior to the donation less the value after the donation.

Except in the case of a donation by a partnership, the amount to be taken into account with respect to any single donation is limited to the lesser of (i) \$500,000, (ii) 25 percent of the value of the donated property or (iii)

25 percent of the difference between the value and the amount paid to the donor, in the case of a sale for less than fair market value.

In the case of the donation by a partnership, the aggregate amount allowed to all partners is \$1 million subject to the same 25 percent limits referenced above.

The total amount allowed to an individual in any year is limited to \$250,000. A corporation (including an S corporation) is allowed up to \$500,000.

Credit Transfers

In the case of all taxpayers, unused credits may be carried forward to the taxpayer's succeeding 10 years' tax liability but may not be carried back to a year prior to the year in which the right to the credit was acquired. Given that many donors do not have sufficient income to utilize the conservation credit or do not pay taxes at all to the state wherein the property is located, several states (New Mexico, Virginia, South Carolina, Virginia and Colorado) have enacted laws permitting the transfer of conservation credits to other taxpayers who can use them.

The 2011 enactment in Georgia permits the transfer of credits to another Georgia taxpayer, effective for transfers of credits occurring on or after January 1, 2012. The credit allowed cannot exceed the taxpayer's liability for a year (i.e., it is non-refundable). It would not be unexpected for the regulations to require that a credit be transferred prior to the end of the taxable year in order to be used in that year.

The acquirer of a transferred credit under this new Georgia law only has rights that the original transferor would have possessed. For example, the time in which the credit can be used is not extended as a result of the transfer.

In most, if not all of the states which have previously enacted laws permitting the transfer of conservation credits, exchanges have been created by private interests to facilitate the transfer of credits. These conservation credit exchanges operate similarly to the exchanges that facilitate the transfer of film production credits. The market for film production credits is considerably larger than the market for conservation tax credits. Typically, the private purchaser of a film production credit will pay approximately 80 cents, or more, of the face value of the credit. If a state supported exchange for conservation credits is not created in Georgia (see our [May 11, 2011 Tax Alert](#) regarding Louisiana's involvement in purchasing motion picture incentive tax credits), then we would expect an exchange promoted by private interests to surface in this state.

Summary

This new Georgia law could potentially increase qualified donations and also provide an opportunity for the transferring taxpayer to realize monetary value for the credit -- especially where that taxpayer could not otherwise utilize the credit due to his or her financial situation.

Should you have questions regarding this new Georgia law, or wish to discuss any matters pertaining to conservation credits, please contact any of the attorneys in the Firm's Tax Department.