



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Tax TITLE-SERIES: 110-21C

RULE TYPE: Procedural Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: METHOD OF CLAIMING THE QUALIFIED
REHABILITATED BUILDINGS INVESTMENT
CREDIT

CITE STATUTORY AUTHORITY: W. Va. Code §§11-21-8a(a), 11-21-8e(b), 11-21-8h(e), and 11-24-23a(a)

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 11/27/2018 2:00 PM

COMMENTS MAY BE MAILED OR EMAILED TO:

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PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This rule provides the method of reporting the alternative method for distribution of the qualified rehabilitated buildings investment credit that is required by W. Va. Code § 11-21-8e(b); the method to sell, assign or transfer the credit pursuant to W. Va. Code §§ 11-21-8h or 11-24-23g, and requirements to claim the credit once transferred; the method to show good standing with the State Tax Division and local, municipal and county taxing authorities as required by W. Va. Code §§ 11-21-8a and 11-24-23a; and limitations on claiming the credit, including those set forth by House Bill 203, passed October 17, 2017.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

The initial scope of this rule addressed the alternative distribution method. Since House Bill 203 passed during 2017, it became necessary to promulgate rules that provide what information must accompany any claim for the tax credit for the determination that the taxpayer is not in arrears in the payment of any tax administered by the Tax Division, is not delinquent in the payment of any local or municipal tax, nor is the taxpayer delinquent in the payment of property taxes on the property containing the certified historic tax structure, and such other administrative requirements as the Tax Commissioner may specify. In addition, the transferability of the W. VA. CODE §11-21-8a credit changed during 2002, which is after the initial rules became effective on 9/15/2001.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

The proposed procedural rule provides methods to sell, assign or transfer the Qualified Rehabilitated Buildings Investment Credit and to show good standing and specifies the limitations on claiming the credit.

B. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

There should be no increase in costs or impact on revenues related to this procedural rule.

C. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2018 Increase/Decrease (use "-")	2019 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

D. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

There should be no increase in costs or impact on revenues related to this procedural rule.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Allen R Prunty -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 110
PROCEDURAL RULE
STATE TAX DEPARTMENT

SERIES 21C
**METHOD OF REPORTING THE ALTERNATIVE METHOD FOR DISTRIBUTION OF
CLAIMING THE QUALIFIED REHABILITATED BUILDINGS INVESTMENT CREDIT**

§ 110-21C-1. General.

1.1. Scope. – This rule provides the method of reporting the alternative method for distribution of qualified rehabilitated buildings investment credit that is required by W. Va. Code § 11-21-8e(b); ~~as amended by Senate Bill No. 174 (2001 Regular Session), effective July 1, 2001, for taxable years beginning on or after January 1, 2001, as well as procedures for implementing other changes made to the credit by Senate Bill No. 174.;~~ the method to sell, assign or transfer the credit pursuant to W. Va. Code §§11-21-8h or 11-24-23g, and requirements to claim the credit once transferred; the method to show good standing with the State Tax Division and local, municipal and county taxing authorities as required by W. Va. Code §§11-21-8a and 11-24-23a; and limitations on claiming the credit, including those set forth by House Bill 203, passed October 17, 2017.

1.2. Authority. – W. Va. Code §§11-21-8a(a), 11-21-8e(b), 11-21-8h(e), and 11-24-23a(a).

1.3. Filing Date. --

1.4. Effective Date. –

§ 110-21C-2. Definitions.

2.1. General Rule. -- Unless a specific definition is provided in subsection 2.2 of this section, or the context in which the term is used clearly requires a different meaning, the terms used in this rule have the definitions provided under W. Va. Code §§11-10-1 et seq., 11-21-1 et seq. and 11-24-1 et seq.

2.2. Terms defined.

2.2.1. “C corporation” means a corporation which is not an S corporation for federal income tax purposes.

2.2.2. “Corporation” means any entity taxed as a corporation for federal income tax purposes.

2.2.3. “Credit” means the tax credit for qualified rehabilitated building investment authorized by W. Va. Code §§11-21-8a, ~~or 11-24-23a, unless and~~ W. Va. Code § 11-21-8g, is specifically referenced.

2.2.4. “General partnership” means a partnership other than a “limited partnership” as defined in this subsection.

2.2.5. “General partner” means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and is named in the certificate of limited partnership as a general partner.;

2.2.6. "Limited liability company" means a limited liability company or foreign limited liability company as defined in W. Va. Code §31B-1-101 which is taxable as a partnership, and includes a professional limited liability company as defined in W. Va. Code § 31B-13-1301.

2.2.7. "Limited liability partnership" means a "registered limited liability partnership" or "foreign limited liability partnership" as defined in W. Va. Code §47B-1-1.

2.2.8. "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement.‡

2.2.9. "Limited partnership" means a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners.‡

2.2.10. "Multiple owners of property" or "owners" means persons (other than shareholders of a C corporation) having an ownership interest in a qualified rehabilitated building who are eligible to claim the credit for qualified rehabilitated buildings investment.

2.2.11. "Member" means a member of a limited liability company.

2.2.12. "Operating agreement" means the agreement described in W. Va. Code § 31B-1-103 concerning the relationship among the members, managers and limited liability company. "Operating agreement" includes amendments to the agreement pursuant to W. Va. Code § 31B-1-101(16).

~~2.2.12.~~ 2.2.13. "Partner" means a member of a partnership, including a limited partner or a general partner of a limited partnership.

~~2.2.13.~~ 2.2.14. "Partnership" means a partnership as defined in Section 761 of the Internal Revenue Code of 1986, as amended, and includes a general partnership, a limited partnership, and a limited liability partnership.

~~2.2.14.~~ 2.2.15. "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a partnership and the conduct of its business.‡

~~2.2.15.~~ 2.2.16. "Partnership interest" means a partner's share of the profits and losses of a partnership and the right to receive distributions of partnership asset.‡

~~2.2.16.~~ 2.2.17. "Shareholder" means a shareholder of an S corporation, and does not include a shareholder of a C corporation.

~~2.2.17.~~ 2.2.18. "S corporation" means a small business corporation for which a valid election under subchapter S of the Internal Revenue Code is in effect for the taxable period. All other corporations are C corporations.

2.2.19. "Taxpayer" means the person or entity who made the qualified rehabilitation expenditures eligible for credit under W. Va. Code §§11-21-8a, 11-21-8g, or 11-24-23a as well as the person or entity who acquires tax credits pursuant to W. Va. Code §§11-21-8h or 11-24-23g.

§ 110-21C-3. Methods for Certain Entities to Distribute Credit.

3.1. S corporations, partnerships, limited liability companies and other unincorporated groups such as multiple owners of property which would otherwise be eligible for the credit are not directly subject to income tax and thus are not able to claim the credit because they have no income tax against which to apply the credit. However, their shareholders, partners, members, and owners who are subject to income tax may be able to apply the credit to their income tax liability.

3.2. Unless an S corporation, partnership, limited liability company or other unincorporated group not subject to income tax elects the alternative distribution method set forth in subsection 3.3 of this rule, it shall allocate the qualified rehabilitated buildings investment credit allowed under W. Va. Code §§11-21-8a or 11-24-23a by using the pro rata method.

3.2.1. Under the pro rata method, the credit shall be allocated to the shareholders, members, partners or owners, as the case may be, either in proportion to their ownership interest in the S corporation, partnership, limited liability company or other unincorporated group, or using the same ratio used to divide profits and losses of the group.

3.3. If the group elects not to use the pro rata method of distribution, it may use an alternative method of its own devising, upon approval in writing by all of the shareholders, members, direct partners or owners and by the Tax Commissioner. The alternative method shall be in writing and shall describe how the credit is to be allocated in sufficient detail that the persons claiming the credit will be able to determine the amount of credit which they are entitled to claim when filing their return. Taxpayers claiming the credit shall file a written copy of the method with the credit Schedule RBIC which is filed with their income tax return.

3.4. No loss of credit shall occur as a result of a change in the type of entity by which a taxpayer conducts its business. Likewise, if a taxpayer subject to the tax imposed by W. Va. Code §11-24-1 et seq. is a partner or a member of an entity that has applied for and received the credit, its share of the credit may be applied against the tax imposed by W. Va. Code §11-24-1 et seq. This subsection does not apply to the credit set forth by W. Va. Code §11-21-8g.

§ 110-21C-4. Sale, Assignment or Other Transfer of Credit.

4.1. Pursuant to W. Va. Code §11-24-23g, a Corporation Net Income Tax taxpayer granted credit pursuant to W. Va. Code §11-24-23a may sell, assign or otherwise transfer some or all of its credit to another taxpayer, which may apply that credit to its Corporation Net Income Tax liability even though it would not be eligible for the credit pursuant to W. Va. Code §11-24-23a.

4.1.1. Corporation Net Income Tax taxpayers not eligible for credit to be granted to them pursuant to W. Va. Code §11-24-23a may not sell, assign or transfer any credit sold, assigned or transferred to them.

4.2. Pursuant to W. Va. Code § 11-21-8h, Personal Income Tax taxpayers eligible for credit to be granted pursuant to W. Va. Code §§11-21-8a or 11-21-8g are not authorized to may sell, assign or transfer their credit to another taxpayer, in accordance with the provisions of W. Va. Code §11-21-8h, as passed in 2002.

4.3. In the tax year in which credit is sold, assigned or otherwise transferred, the successor to the credit is entitled to claim all of the credit for that tax year and any subsequent tax year for which credit is available if both the transferor and the successor agree to that method in writing. Otherwise, in the absence of a statutory method of prorating transferred credit, pursuant to Brockway Glass Company v. Caryl, 183 W. Va. 122, 394 S.E.2d 524 (1990), if a taxpayer transfers credit in the absence of an agreement, the transferor is entitled to all of the credit for the year of the transfer, and the successor is entitled only to the remaining amount of credit for each year subsequent to the year of sale. The sale, assignment or transfer of the certified historic structure, absent the sale, assignment or transfer of the credit, does not entitle the purchaser, assignee or transferee of the structure to claim the credit that was certified for the structure. Further, no two parties may claim the credit for the same tax year.

4.4. In cases where the credit that was granted pursuant to W. Va. Code §§ 11-21-8a or 11-24-23a has been sold, assigned or otherwise transferred, the recipient of the credit is subject to the requirements set forth in W. Va. Code §§11-21-8a(a) or 11-24-23a(a), as amended in 2017.

4.4.a. Specifically, the transferee, purchaser, or assignee is not entitled to this credit if, on the date of transfer and throughout the time period within which the credit is claimed, the transferee, assignee, or purchaser is in arrears in the payment of any tax administered by the Tax Division or the transferee, assignee, or purchaser is delinquent in the payment of any local or municipal tax, or the transferee, assignee, or purchaser is delinquent in the payment of property taxes on the property containing the certified historic tax structure throughout the time period within which the credit is claimed.

4.4.b. Provided that the transferee, assignee, or purchaser will not lose eligibility to claim the credit when the property taxes on the property containing the certified historic tax structure are delinquent, if the transferee, assignee, or purchaser can demonstrate by documentation that he or she was not subject to the property tax on the property containing the certified historic tax structure during the tax period in which the credit is claimed.

4.5. Documentation of the transferor, assignor, or seller taxpayer's as well as the transferee, assignee, or purchaser taxpayer's good standing, as described in Section 5 of this rule, must be submitted to the State Historic Preservation Office along with the request for the Certificate of Approval, the requirement of which is set forth in W. Va. Code §11-21-8h(a). If this documentation is not submitted, then the request for Certificate of Approval will not be considered complete.

§ 110-21C-5. Method to demonstrate good standing with state, local, municipal and county taxing authorities.

5.1. Demonstration of good standing during the application process. – When requesting certification for the credits that are granted pursuant to W. Va. Code §§11-21-8a and 11-24-23a, the taxpayer must include documentation demonstrating the taxpayer's good standing in the following manner.

5.1.a. The documentation of good standing shall be submitted with the Request for Certification to the State Historic Preservation Office and must address the time period between the initial application for the Qualified Rehabilitated Building Credit through the end of the tax period immediately prior to the date of the Request for Certification. Prior tax arrearages and delinquencies must have been resolved prior to the time the documentation of good standing is issued.

5.1.b. The Request for Certification will not be complete without the documentation of good standing.

5.2. Demonstration of good standing during the period the tax credit is claimed. – When claiming the credits that are granted pursuant to W. Va. Code §§11-21-8a and 11-24-23a, the taxpayer must include documentation demonstrating the taxpayer’s good standing in the following manner.

5.2.a. Documentation of good standing shall be submitted with the Schedule RBIC and tax return to the State Tax Division. During the initial tax period during which the credit is claimed, the documentation of good standing must address the time period between the end of the tax period immediately preceding the Request for Certification through the end of the tax period ending immediately preceding the date of the request for credit. For subsequent tax periods in which the credit is claimed, the documentation of good standing must address the period immediately succeeding the most recent tax period addressed by the most recently- submitted documentation of good standing through the end of the tax period immediately preceding the request for good standing. Prior tax arrearages and delinquencies must have been resolved by the time the documentation of good standing is issued.

5.2.b. The request for credit will not be considered complete, and will not be granted, without this documentation of good standing. However, the return will be processed as if no claim for credit has been made.

5.3 The documentation of good standing described in Subsections 5.1 and 5.2. must be issued by the relevant taxing authority and the documentation of good standing may include a receipt, a letter of good standing, or other type of documentation that shows the date issued, the periods covered, the type of taxes, the taxpayer’s identity and address, the name and title of the official from the taxing authority issuing the documentation of good standing, and other such relevant information as the issuing taxing authority deems necessary.

5.4. Taxes that must be included in the documentation of good standing include the following –

5.4.a. Every tax to which the taxpayer is subject that is imposed in Chapter 8, Articles 13, 13A, and 13C of the Code of West Virginia, as well as any other lawfully-imposed local or municipal tax,

5.4.b. Every tax administered by the State Tax Division to which the taxpayer is subject that is imposed in Chapter Eleven of the Code of West Virginia, as well as any other lawfully-imposed tax, including but not limited to the municipal sales and use tax set forth by W. Va. Code §8-1-5a,

5.4.c. Property taxes to which the taxpayer is subject on the property containing the certified historic structure, except for the situation set forth by Subsection 4.4.b of these rules.

5.5. For purposes of this section, “good standing” means a taxpayer is not in arrears on the payment of and reporting on any tax administered by the State Tax Division; and is not delinquent on the payment of or reporting on any tax administered by a county, local or municipal authority, including the payment on and reporting of property taxes on the property containing the certified historic structure.

5.5.a. For purposes of this section, “in arrears on the payment of and reporting on any tax

administered by the State Tax Division” mean the requirements for timely filing and paying taxes as set forth in W. Va. Code §11-10-5f have not been met.

5.5.b. For purposes of this section, “delinquent on the payment on any tax administered by a local or municipal authority” means the taxpayer has not paid the relevant tax and filed the relevant return by the due date set forth in the municipality’s code.

5.5.c. For purposes of this section, “delinquent on the payment of property taxes on the property containing the certified historic tax structure” means that the taxpayer has not paid the property tax or submitted the return that included the property that contains the certified historic structure.

5.6. Whether documentation demonstrating good standing can be issued in any particular instance depends upon each taxing authority’s legal authority and internal policies. For example, one taxing authority may issue documentation of good standing if a taxpayer is currently in compliance with the terms of a payment plan, while another may not issue documentation of good standing under those circumstances, or even offer payment plans. Further, some tax authorities may only issue documentation of good standing for the current period if all prior periods are also in good standing. In those circumstances, the documentation of good standing will be accepted as covering all relevant periods.

5.7. Alternative method to demonstrate good standing. - In the event that a taxing authority lacks the ability to issue documentation of good standing, an invoice and cancelled check or electronic banking record that shows the tax was paid will be considered persuasive evidence of good standing. This alternative form of documentation must be accompanied by an affidavit from the taxpayer that attests what efforts were made by the taxpayer to obtain documentation of good standing from the taxing authority; that the corresponding return has been filed; and shows the date the affidavit was issued, the tax periods covered, the type(s) of taxes, the taxpayer’s identity and address, the name and title of the taxpayer representative completing the affidavit, and any other relevant information the taxpayer deems necessary. The alternative method to demonstrate good standing will not be considered complete without the affidavit.

5.8. Information requests. - The State Tax Division and State Historic Preservation Office have the authority to contact county, municipal and local taxing authorities, upon receipt of a Request for Certification, a request for Certificate of Approval, or request for credit, to make inquiries regarding a taxpayer’s status. The county, municipal and local taxing authority may respond within the limits of the legal authority establishing the county, municipal or local tax.

§ 110-21C-6. Limitations on claiming the credit.

6.1. The credits granted pursuant to W. Va. Code §§11-21-8a or 11-24-23a for qualified investment made after December 31, 2017, may not be used to offset tax liabilities arising prior to January 1, 2020. This prohibition does not apply to the credits granted pursuant to W. Va. Code § 11-21-8g.

6.2. No credit is allowed for qualified investments made after December 31, 2022, unless the Legislature of West Virginia amends W. Va. Code §§11-21-8a and 11-24-23a to change the December 31, 2022 termination date.

6.3. In cases where qualified investment is made before January 1, 2023, and the investment is

approved for credit pursuant to W. Va. Code §§ 11-21-8a or 11-24-23a prior to January 1, 2023, the unused portion of the credit may be carried forward for ten (10) years until it has been exhausted. However, this limitation date does not apply to the credit granted pursuant to W. Va. Code §11-21-8g.

6.4. In accordance with the provisions of W. Va. Code §11-24-23a, as amended in 2017, the aggregate value of credits authorized by the State Historic Preservation Officer pursuant to W. Va. Code §§11-21-8a and 11-24-23a may not exceed \$30 million per fiscal year. Further, no more than \$10 million may be allocated to any single certified rehabilitation granted pursuant to W. Va. Code §§11-21-8a or 11-24-23a. At least \$5 million of the \$30 million annual credits that may be granted pursuant to W. Va. Code §§11-21-8a and 11-24-23a must be set aside each year for small qualified rehabilitation projects that are eligible for a credit, not to exceed \$500,000 for each allocation.

6.5. The State Historic Preservation Office must approve all Qualified Rehabilitated Buildings Investment Tax Credits, as provided for in W. Va. Code §§11-24-23a and 11-21-8g.