

Questions Related to Private, Non-Profit Organizations

August 29, 2005

Are private, non-profit organizations that take the land preservation tax credit also receiving a state appropriation grant?

- At this time, it does not appear that “double-dipping” is an issue.
- Only 4 private, non-profits have applied for tax credits, with a total tax credit value of \$3.7 million.
 - One organization, the Thomas Jefferson Foundation, Inc., generated over \$1.0 million of this tax credit value from placing an easement on property located near Monticello (reported in the press).
 - The state has not provided an appropriation grant to the Thomas Jefferson Foundation.
- While the remaining 3 organizations have not been identified because of tax confidentiality requirements; the low volume would imply that a problem does not exist at this time.
 - The lion's share of land conservation easements (90 percent) are held by the Virginia Outdoors Foundation (VOF), which has accepted 36 easements from private, non-profits since the tax credit was passed (only 1 has applied for a tax credit).
 - A small number of such easements are held by other land trusts/governmental agencies.
 - The Department of Historic Resources has accepted 34 historic preservation easements from private, non-profits since the tax credit was passed, about half of which were mandated easements related to an appropriation grant. None of these has applied for a tax credit.

Is there potential for “double-dipping” to occur?

- Yes. Private, non-profits are not statutorily precluded from receiving benefit from tax credits and state grants at the same time.
 - Organizations receiving historic preservation grants must provide an easement to the Department of Historic Resources, as a condition of receiving state funds. It could be argued that this precludes the organization from claiming the easement as a voluntary donation for purposes of claiming a tax credit.
 - However, this requirement applies to less than half of the grants to non-state entities.
 - The majority of state grants are to cultural and art organizations, recreational and community service groups, etc., that could place property they own in easement for the purpose of generating tax credits.

What other tax policy considerations have been raised relative to easements given by private, non-profits?

- The Tax Commissioner raised the question of “value” as follows:
 - What is the public “value” of placing property owned by a tax-exempt entity in easement for the purpose of generating tax credits, **if the property already is protected through the public service mission of the non-profit?**
- The Tax Department has received several inquiries about the potential for private, non-profits to participate in the land preservation tax credit.
 - This could signal heightened interest and activity in the future.

- A recent Tax Commissioner ruling (attached) attempts to clarify that property which is already protected by 501(c)(3) holders with a primary purpose to protect or preserve natural or open space or the historic, architectural or archeological aspects of real property would not qualify for the tax credit.
- Absent statutory clarification on legislative intent, the Commissioner may face challenges on what constitutes "primary purpose."

Rulings of the Tax Commissioner

Document Number: 05-125
Tax Type: Corporation Income Tax
Brief Description: Land Preservation Tax Credit
Topics: Credits
Date Issued: 07/26/2005

July 26, 2005

Re: Ruling Request: Land Preservation Tax Credit

Dear *****:

This is in response to your letter of May 4, 2004, in which you requested a ruling on the Land Preservation Tax Credit (the "Credit") for the ***** (the "Taxpayer"). I apologize for the delay in this response.

FACTS

The Taxpayer is a § 501(c)(3) corporation under the Internal Revenue Code. According to its Certificate of Incorporation, the purposes of the Taxpayer are to maintain and operate museums, parks and places of historical interest in Virginia; to promote and further the spiritual, mental, moral and cultural welfare of the people of Virginia; and to make voluntary donations to corporations, trusts or foundations or other organizations which are organized and operated exclusively for charitable, scientific, literary, education or other benevolent purposes. The Taxpayer is not eligible to hold conservation easements.

The Taxpayer currently owns three tracts of land in Virginia. The Taxpayer would like to give an open-space easement on two of these properties to an organization eligible to hold a conservation easement. The Taxpayer would like to earn Land Preservation Tax Credits from this gift and then sell these credits.

You are writing first to inquire whether the Taxpayer meets the requirements to be considered a taxpayer under the Virginia Land Conservation Incentives Act of 1999 (the

"Act"). You also ask if the proposed donation by the Taxpayer would qualify for Land Preservation Tax Credits and, if so, whether the Taxpayer may transfer or sell any credits that are earned.

RULING

In order to qualify for Land Preservation Tax Credits, a donation of land must be made by a "landowner/taxpayer." *Va. Code* § 58.1-512 A. Section 58.1-1 of the Code defines the term "taxpayer" as "every person, corporation, partnership, organization, trust or estate subject to taxation under the laws of the Commonwealth, or under the ordinances, resolutions or orders of any county, city, town or other political subdivision of this Commonwealth." In addition, the Attorney General has addressed the specific situation of eligibility under the Land Preservation Tax Credit. A November 2002 Opinion of the Attorney General states, "[a]ny person, corporation, partnership, organization, trust or estate falling into these categories could hold and transfer a tax credit. For example, a nonprofit corporation subject to sales tax, but not income tax, may transfer its credit to a taxpayer subject to income tax." Opinion of the Attorney General 02-094 (11/19/02).

The example offered by the Opinion of the Attorney General would seem to cover this situation. The Taxpayer is a nonprofit organization and is exempt from income taxes. The Taxpayer states, however, that it is subject to the retail sales and use tax and all state employer taxes. Thus, the Taxpayer would be considered a taxpayer for the purposes of the Act.

While the Taxpayer is an eligible taxpayer, it still must make a qualified donation in order to be eligible for Land Preservation Tax Credits. Under the Code, qualified donations include "the conveyance in perpetuity of a fee interest in real property or a less-than-fee interest in real property, such as a conservation restriction, preservation restriction, agricultural preservation restriction, or watershed preservation restriction, provided that such less-than-fee interest qualifies as a charitable deduction under § 170 (h) of the U.S. Internal Revenue Code" *Va. Code* 58.1-512 B 2. This section of the IRC requires among other things, that each contribution of a qualified real property interest be made exclusively for conservation purposes to a qualified organization. One such conservation purpose is for "the preservation of open space" IRC § 170(h)(4)(A)(iii).

The Taxpayer intends to donate an open-space easement for approximately one thousand fifty-two acres of land in two separate parcels to an organization eligible to hold a conservation easement. So long as this conveyance is in perpetuity and all of the other criteria of the Act and of IRC § 170(h) and its regulations are met, it appears that this donation would qualify for Land Preservation Tax Credits.

Please note that this outcome would be different if the Taxpayer itself was eligible to hold the conservation easement. This is because the purpose of the Act would be accomplished once ownership of the land is held by a conservation agency that is able ensure that the land is preserved. Any subsequent transfer of the land, or any interest in the land, to a similarly qualified organization would be redundant and would merely be done to gain tax credits. Because transferring land or an interest in land to obtain credits does not qualify as an approved purpose under the Act, Land Preservation Tax Credits would not be granted in that situation.

Finally, *Va. Code* § 58.1-513 C provides that, "[a]ny taxpayer holding a credit under this article may transfer unused but otherwise allowable credit for use by another taxpayer on Virginia income tax returns." Because the Taxpayer would obtain credits from its donation of land, it would hold credits that it could then transfer or sell. The only restriction on this is that the credits must be transferred or sold to another taxpayer who may actually use the credits on a Virginia income tax return. Thus, transferring or selling the credit to another nonprofit agency is not allowed.

I trust that this reply answers your ruling request. Copies of the Code of Virginia sections cited are included for reference purposes. These and other reference documents are also available on-line in the Tax Policy Library section of the Department of Taxation's web site located at www.tax.virginia.gov. If you should have any questions regarding this ruling, you may contact ***** in the Office of Policy and Administration, Policy Development, at *****.

Sincerely,

Kenneth W. Thorson
Tax Commissioner