

Reproduced with permission from Daily Environment Report, 172 DEN A-13, 9/5/14. Copyright © 2014 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

## *Brownfields*

### **Denied Brownfields Tax Credit Eligibility, Taxpayers Challenge Massachusetts Policy**

**F**our Massachusetts taxpayers are challenging what they call a fundamental policy change by the state Department of Revenue related to the use of tax credits associated with the cleanup of environmental contamination (*Northeastern Univ. v. Mass. Comm'r of Revenue*, Mass. Super. Ct., No. 14-2617, *complaint filed* 8/18/14; *131 Willow Ave. v. Comm'r of Revenue*, Mass. Super. Ct., No. 14-2603, *complaint filed* 8/15/14).

Three universities and a private property owner have filed a pair of lawsuits in Massachusetts Superior Court appealing DOR decisions to deny their eligibility for tax credits under the state's Brownfields Act, enacted in 1998 and amended in 2006.

Boston University, Northeastern University and Wellesley College filed suit Aug. 18 against the Massachusetts Commissioner of Revenue claiming that they are eligible as nonprofit institutions for DOR brownfields credit certificates in connection with the costs they incurred in remediating environmental hazards that existed on property they owned or leased.

Under state statute (G.L. c. 62, § 6(j) and G.L. c. 63, § 38Q), individuals and businesses are allowed a credit against their state personal income tax or corporate excise liability for a percentage of the costs incurred for an environmental response action that results in either a permanent solution or remedy operation status in compliance with G.L. c. 21E.

The law's 2006 amendments allowed nonprofits to claim the credits and for all taxpayers to be able to transfer the credits. The Legislature also adopted numerous amendments over the years extending the period during which eligible remediation costs may be incurred.

**Universities' Challenge.** The three universities charge in their complaint that a directive issued by the DOR in 2013 (Directive 13-4), "Guidance with Respect to Brownfields Tax Credit Applications," effected a "fundamental, retroactive change in the Department's interpretation and administration" of the brownfields credit in several critical respects.

The changes included positions related to exactly when a credit is generated and thus properly claimed, and the eligibility of a nonprofit to apply for and to transfer credits for costs incurred prior to June 24, 2006.

The three colleges, which had all completed environmental restoration work, had their applications for the tax credits denied, according to the complaint, because the cleanup costs were incurred prior to the 2006 amendment allowing nonprofit entities to claim the credit. They were also denied the right to transfer the credits.

The colleges said they are aware of numerous instances in which the DOR had granted credits to nonprofit corporations for remediation costs incurred prior to June 24, 2006, and had permitted the transfer of such credits. The colleges argue that Directive 13-4, on which the DOR's decision is based, contravenes the state statute and "effects an unlawful retroactive change in long-standing Department policy."

In a separate suit filed Aug. 15 in Massachusetts Superior Court in Suffolk County, a for-profit corporation, 131 Willow Ave. LLC, challenged the DOR's ruling that the corporation is not eligible to transfer its credit as allowed under the 2006 amendment because certain documentation related to the action was submitted to the state Department of Environmental Protection before June 24, 2006.

The DOR specifically cited Directive 13-4 in denying that credit transfer.

**Improper Retroactive Change.** Harold Davis, a partner with Davis, Malm & D'Agostine in Boston, told Bloomberg BNA Sept. 4 that he is aware of several other taxpayers whose requests related to tax credit applications for brownfields expenditures have also been denied, but who have not challenged those rulings at this time.

Davis, who is not a party to the two lawsuits, said the two suits argue that Directive 13-4 is contrary to the language of the statute and amounts to an improper retroactive change in the law that exceeds the DOR's authority. He said a similar finding was made by the Massachusetts Supreme Judicial Court in *Commissioner of Revenue v. BayBank Middlesex* (421 Mass. 736) in 1996.

A spokeswoman for the state tax agency said Sept. 2 that the DOR does not comment on matters currently in litigation.

Boston University spokesman Colin Riley told Bloomberg BNA in an e-mail Sept. 4 that the school's position is that "the Massachusetts Legislature established the tax credit and amended the statute to allow non-profits to apply for and receive the tax credit. Bos-

ton University incurred substantial expense in cleaning up environmental contamination and believes it is eligible for the tax credit."

The owners of the for-profit 131 Willow Ave. are represented by Terry Klein with Henshon Klein LLP in Boston, who told Bloomberg BNA he was not aware of other suits beyond these two that have been filed challenging the DOR on this topic.

A spokesman for the Massachusetts Appellate Tax Board told Bloomberg BNA Sept. 4 he is not aware of any challenges to the brownfields tax credit program currently pending before the board.

BY MARTHA KESSLER

To contact the reporter on this story: Martha Kessler in Boston at [mkessler@bna.com](mailto:mkessler@bna.com)

To contact the editor responsible for this story: Cheryl Saenz at [csaenz@bna.com](mailto:csaenz@bna.com)

---

*The colleges' complaint is available at <http://op.bna.com/der.nsf/r?Open=klan-9nm spa>.*

*The 131 Willow Ave. complaint is available at <http://op.bna.com/der.nsf/r?Open=klan-9nmsqt>.*