

# **Maryland Biotechnology Investment Tax Credit General Guidance for Investors**

In response to requests for guidance from participants in the Maryland Biotechnology Investment Tax Credit (the “Tax Credit”), the Tech Council has gathered the following summary of background information from various members. PLEASE NOTE THAT EACH PARTICIPANT IS RESPONSIBLE FOR ITS OWN TAX FILINGS AND SHOULD CAREFULLY REVIEW ITS TAX POSITIONS WITH ITS INDIVIDUAL TAX ADVISOR. THIS SUMMARY OF INFORMATION IS NOT INTENDED TO SUPPORT THE APPROPRIATENESS OF ANY TAX POSITION OR THE RESPONSE FROM ANY TAX AUTHORITY AND MAY NOT BE COMPREHENSIVE FOR YOUR PARTICULAR SITUATION. Certain tax filing issues have not been definitively resolved by the relevant authorities (Maryland’s Department of Business & Economic Development (“DBED”) and the Maryland Comptroller’s office). The Tech Council will endeavor to provide further background as relevant information becomes available, but cannot ensure that this guidance contains current information regarding the Tax Credit.

## **Qualifying for the Tax Credit:**

To claim the Tax Credit, each participant should have received an initial tax credit certificate from DBED indicating that the participant would receive an allocation of tax incentive funds. Each participant then should have made an investment within 30 calendar days of the date of the initial tax credit certificate and provided notice of the investment to DBED within 10 calendar days of making the investment. Each participant also should have received a final certificate from DBED indicating the amount of the Tax Credit allocated to the participant’s planned investment.

## **Documentation to be Filed:**

Filing for the Tax Credit requires the following:

- (1) Completed standard Maryland Tax Return Form
  - a. Individual Maryland Resident – Form 502
  - b. Individual Non-Maryland Resident - Form 505
  - c. Pass Through Entity (“PTE” – S Corp, LLC, etc., regardless of residency) – Form 510
  - d. Corporation (regardless of residency) – Form 500
- (2) Form 500CR completed showing the total credit the filer is eligible for (see Exhibit A)
- (3) Copy of the final tax credit certificate that you received from DBED (It has been suggested that the initial tax credit certificate from DBED also be included); and
- (4) Completed and executed Affidavit (see Exhibit B)

### **Treatment of the Tax Credit for Federal Income Tax Purposes**

Recently, the Comptroller's office made a determination that it was not required to include the refundable Tax Credit in a Form 1099 issued to Tax Credit recipients. The Comptroller's office already had sent out incorrect 1099's to some investors prior to this determination, but it has or will issue corrected 1099's that do not include the credit amount. In future years, the Comptroller will not include the refund in 1099's.

The Comptroller's office has not taken any position as to whether the Tax Credit is taxable on a federal or state level. The state tax treatment of the tax refund depends on how the investor elects to treat the Tax Credit for federal purposes since the Maryland forms flow from the Federal Form 1040. The IRS and Treasury Department have not issued formal guidance on the tax treatment of refundable state tax credits such as the Maryland Tax Credit, but non-precedential letters issued by the IRS for other refundable state tax credits do take a position that they are federally taxable as income. Therefore, investors should carefully consider whether to treat the Tax Credit refund as income or a reduction in basis in consultation with their tax professional.

### **Required Affidavit**

There is a recapture provision in the Tax Credit legislation which provides for return of some credit funds if, within 2 years after the close of the tax year in which the certificate was issued (1) the investor sells, transfers or disposes of the purchased shares, or (2) the company ceases operating as an active business with its headquarters in Maryland. The affidavit (see Exhibit B) obligates the investor to report events that might trigger the recapture. Generally, the recapture is 100% of the Tax Credit if the recapture is in the year of the investment, 2/3rds if in the following year and 1/3<sup>rd</sup> if in the year after that.

### **LLC Investors**

Tax filing for the Tax Credit for LLC investors is somewhat more complex than for other filers. The Comptroller of Maryland has provided an extensive response to an inquiry regarding LLC filers which is reproduced as Exhibit C below.

**Exhibit A**  
**Form 500CR**  
(see separately attached document)

**Exhibit B**  
**Recapture Affidavit for Maryland Biotechnology Incentive Tax Credit**

State of \_\_\_\_\_

County of \_\_\_\_\_

I, \_\_\_\_\_, Managing Member  
of \_\_\_\_\_, (the  
"Company"), a [limited liability] company formed under the laws of  
\_\_\_\_\_, Federal Employer Identification Number  
\_\_\_\_\_, being duly

sworn, do swear and stipulate, under penalties of perjury, that if, within 2 years after the  
close of the tax year in which the Company's final certificate was issued by the Maryland  
Department of Business and Economic Development, the Company sells, transfers or  
disposes of its ownership interest in \_\_\_\_\_  
\_\_\_\_\_, for which its Maryland Biotechnology Incentive Tax Credit  
was certified, then the Company shall give notice to the Comptroller of the State of  
Maryland by reporting the applicable recapture amount on a Maryland income tax return  
for the tax year in which the event causing the recapture occurred.

In addition, I acknowledge that the Company's Maryland Biotechnology Incentive Tax  
Credit may be subject to recapture if the Company's certificate is rescinded by the  
Maryland Department of Business and Economic Development (DBED), due to the  
Company failing to provide the required notice to DBED of having made the investment,  
or if DBED revokes the final certificate due to false representations made in connection  
with the Company's application for the certification.

[signature block shown is for LLC, and should be modified if for individual or other  
entity]

\_\_\_\_\_  
[Name of Limited Liability Company]

By: \_\_\_\_\_  
[Signature of Managing Member]

\_\_\_\_\_  
[Print Name of Managing Member]

Managing Member \_\_\_\_\_  
Title

Sworn to and subscribed before me this the

\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

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NOTARY PUBLIC

My Commission Expires: \_\_\_\_\_

**Exhibit C**  
**Guidance for LLC Filers from Comptroller**

-----Original Message-----

From: GRIFFITH HUBBARD [<mailto:g Hubbard@comp.state.md.us>]

I am writing in response to your e-mail below, in which you ask about the proper Maryland income tax forms for one of your investors to file in order to claim the Biotechnology Investment Incentive Tax Credit, which is a refundable business tax credit. All of the forms that I refer to in my answer below are available on the Comptroller's website at:

<http://business.marylandtaxes.com/taxforms/08forms.asp> and

<http://individuals.marylandtaxes.com/taxforms/08forms.asp>

except for the affidavit form, which I have attached to this e-mail as a Word document for your convenience.

Because your investor is a limited liability company (LLC), it has to file a Maryland Form 510 Pass-through Entity Income Tax Return. As explained on page 2 of the Form 510 instructions:

"Business Tax Credits: Form 500CR must be completed and attached to Form 510 if the PTE has generated a business tax credit. Such credits are not taken on the Form 510, but are allocated to the members of the PTE."

As explained on page 5 of the Form 500CR instructions:

"Pass-through Entities: If the credit is earned by an investor that is a PTE, the members of the PTE may claim the pro rata or distributive shares of the credit amount subject to the \$250,000 limitation. A PTE that earned the Biotechnology Investment Incentive Tax Credit must file the Maryland Form 510, Form 500CR and all other required attachments in order for the members to be permitted to claim the credit."

"Specific Requirements: ... Both the final certificate received from DBED and a statement of affidavit as prepared by the investor are required to be attached to the 500CR in order for the Biotechnology Investment Incentive Tax Credit to be allowed."

Therefore, as explained in the instructions quoted above, the LLC must file:

- (1) Completed Form 510;
- (2) Form 500CR completed by the LLC showing the total credit it is eligible for;
- (3) Copy of the final certificate received from DBED; and
- (4) Affidavit (which is attached to this e-mail).

The LLC issues a Schedule K-1 to each of its members, showing that member's allocated share of the credit. Each member of the LLC who

is an individual then files a Maryland income tax return to claim the credit. An individual who is a Maryland resident must file a Maryland Form 502 Resident Income Tax Return; a nonresident individual must file a Maryland Form 505 Nonresident Income Tax Return, and also a Maryland Form 505NR Nonresident Income Tax Calculation if the individual has Maryland taxable income.

The resident or nonresident income tax return must be filed with a completed Maryland Form 502CR Income Tax Credits for Individuals as an attachment. The individual's allocated share of the credit is entered on line 3 of Part H of the Form 502CR.

In addition to the Form 502CR, in order for the credit to be allowed, four other attachments are also required to be filed with the individual's Maryland income tax return, as explained on page 5 of the Form 500CR instructions:

"In order for a member of the PTE to be allowed the credit, the member must attach to the filed Maryland return the following: a completed Form 500CR; copies of the final certification from DBED and statement of affidavit; and Schedule K-1 or other statement showing the allocated share of credit amount."

The required copy of the affidavit, referred to in the instruction concerning the individual return attachments quoted above, is a photocopy of the one original affidavit executed by the LLC that was filed as an attachment to the LLC's Maryland Form 510. The LLC should send each member a photocopy of that affidavit.

The Form 500CR, referred to in the instruction concerning the individual return attachments quoted above, is completed by the individual, who enters his or her name and Social Security number at the top of page 1 of the form. Then the individual must, as explained on page 1 of the Form 500CR instructions:

"Credits received from PTEs: Check the box on page 1 of Form 500CR to indicate that the credits are from a PTE and enter the PTE's federal employer identification number."

The individual then enters his or her allocated share of the credit, as reported on the Schedule K-1 issued to the individual, on line 4 of Part L of the Form 500CR, leaving lines 1 - 3 of Part L blank, and completes lines 5 and 6. Line 6 of Part L instructs the individual to take the figure on line 6 and also enter it on line 2 of Part V of the Form 500CR.

Therefore, as explained above, the individual must file:

- (1) Completed Form 502, or Form 505, or Form 505 and Form 505NR, as appropriate;
- (2) Completed Form 502CR;
- (3) Form 500CR completed by the individual showing his allocated share of the credit;

- (4) Copy of the final certificate received by the LLC from DBED;
- (5) Copy of the affidavit executed by the LLC and filed with the LLC's Form 510; and
- (6) Schedule K-1 issued by the LLC showing his allocated share of the credit.

Should you have any questions, or if I may be of further assistance, please call me at (410) 260-7982.

Sincerely,

G. Evans Hubbard, Esq.  
Tax Consultant, Legal Services  
Comptroller of Maryland  
Revenue Administration Division  
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