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CREDITS & INCENTIVES TALK WITH DELOITTE

Credits and Incentives, Timing is Everything

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In many cases it's all or nothing. There's no in-between when it comes to obtaining or enhancing the benefits to be derived from credits and incentives ("C&I") because timing is everything and if it's not on your side, the results could be costly. Although good timing may involve a little luck, there are many ways to improve C&I potential, such as: utilizing C&I in the investment decision-making process with negotiated/discretionary incentives; completing employee screening and documentation requirements prior to the hire date; identifying and timely completing credit prerequisites and requirements; filing applications early, before allocated funds are depleted for first-come, first-serve C&I programs; and meeting compliance due dates and other requirements to avoid "clawback" provisions.[1]

Often, available C&I may involve a limited window of opportunity. If the sequence of events needed to secure or enhance a particular credit or incentive does not happen at the right time, the benefit can be substantially diminished or, worse yet, completely eliminated.

Incorporate C&I in the decision-making process

When a company is contemplating the various state and local jurisdictions in which to expand or relocate, it's important that C&I opportunities be part of the decision process. Potentially available opportunities may include both tax benefits (e.g., credits, abatements, and exemptions) and non-tax benefits (e.g., grants, loans, and streamlined permitting).

Competing states and "but-for" decisions: While a company, when considering a location, will generally look at a number of factors-including infrastructure, operating costs, and access to a suitable employee talent base-C&I benefits can be the final determining factor in a company's decision. Since the potential benefits may increase when states are competing against one another, it may be advantageous when a company is in a "but-for" situation, where a project would not move forward in a particular jurisdiction "but for" the availability of C&I benefits.

Since federal, state and local jurisdictions utilize C&I to induce private investment to generate economic growth, jurisdictions are motivated to provide incentives to those projects that involve "but-for" situations. Some states, in a further effort to secure desirable projects, have chosen to include "but-for" provisions in their C&I programs.

One example of a program that specifically incorporates the ability to address "but-for" situations is the California Competes Tax Credit ("CCTC"). The CCTC is an income tax credit available to businesses that want to locate, stay, or grow in California. This credit is awarded on a competitive basis, as applicants compete for a finite amount of available credits. The applications are submitted to the Governor's Office of Business and Economic Development ("GO-Biz") for tax credit allocation consideration.

GO-Biz applies a two-phase review process,[2] with Phase I involving a quantitative analysis[3] and Phase II focusing on qualitative factors.[4] However, GO-Biz may immediately move an application from Phase I to Phase II where an applicant presents a "but-for" scenario. Acceleration to Phase II may occur if the owner, president, chief executive officer, chief financial officer, or other equivalent person of the applicant certifies to GO-Biz that absent award of the credit, the applicant's project may occur in another state or the applicant may terminate or relocate to another state all or a portion of its California employees.[5]

Timing of expansion or relocation announcements and related C&I negotiations: Timing is of particular importance before a company publicly discusses its expansion or relocation plans. A company should negotiate with state and local jurisdictions well in advance of any public announcement regarding its intention to relocate or expand its facilities, commence hiring, or increase its existing headcount. A company that is contemplating expansion or relocation should also consider negotiating with two or more suitable state or local jurisdictions because this can create competition for the project.

When states or localities compete for business investment and job creation, there is leverage, and where leverage exists, there may also be the potential for improving the overall C&I benefit package. However, if a company announces its plans involving a particular jurisdiction before commencing negotiations, competition among jurisdictions may be undermined, and with it any potential leverage.

The timing of when to negotiate with a state or local jurisdiction is important. The preferred timing is generally well in advance of when the applicable governmental body is scheduled to meet to discuss the C&I package, so that there is ample time to modify terms before the next public hearing, board meeting, or similar event takes place. Since these meetings may be held at various intervals, perhaps monthly or less frequently, the timing of the final approvals is also important in relation to when the expansion or relocation project is announced and/or is started.

Preferably, the negotiated incentive agreement has been fully executed and has all of the required final approvals before the company makes a public announcement of its intentions, as well as before the relocation, expansion, and interviews/hiring take place. Additionally, the timing of applying for or receiving building or zoning permits may need to be taken into consideration.

Hiring credits can hinge on job offer, commencement, and termination dates

Timing is also a significant factor for certain hiring/jobs tax credits that have specific requirements associated with the hire or offer date. Additionally, the termination date can be important for certain hiring/jobs tax credits. A failure to satisfy these timing requirements could translate into unavailability of thousands of dollars of credit per employee.

As an example of the importance of timing, the federal Work Opportunity Tax Credit ("WOTC") requires that the screening for qualifying criteria be done on or before the date of the job offer.[6] Organizations will need to focus on making sure that the WOTC screening process is built into the employee recruiting process. In addition to having to screen employees on or before the date of the job offer, an organization has to submit documentation to the designated local agency for certification no later than the 28th day after the individual begins work for the employer.[7]

The provisions of the New York Hire a Veteran Credit illustrate the importance of the employment commencement date. New York provides a nonrefundable veteran hiring credit to employers that hire a qualified veteran who is employed for at least one year, for no less than 35 hours per week, for tax years beginning on or after January 1, 2015, and before January 1, 2017.

The available credit is 10% of the total amount of wages paid to the qualified veteran during the veteran's first year of employment, not to exceed $5,000.[8] In the case of a qualified disabled veteran, the available credit is 15% of the total amount of wages paid, not to exceed $15,000.[9] To claim the credit, the employer is required to have the qualified veteran complete the *Employee Affidavit for the Hire a Veteran Credit*, prior to the veteran's first day of work, where the veteran must certify that he or she meets the requirements of a qualified veteran.[10]

The requirements of the New Mexico High Wage Jobs Tax Credit also exemplify the importance of job commencement and termination timing. This credit is a refundable tax credit for each new high-wage, economic-based job created that is occupied during a qualified period beginning with the year the new job is created plus the next three consecutive "qualifying periods."[11]

The amount of the credit is 10% of wages and employer benefits paid or distributed to an eligible employee for a maximum credit of $12,000 per qualifying period. One of the requirements for a new job to qualify is that the position must be occupied for at least 48 weeks during a qualifying period.[12]

In some cases, the wage amount determined at the time of hire could significantly affect the availability of the credit. For example, one recently applicable requirement to qualify for the New Mexico High Wage Jobs Tax Credit is the creation of a new high-wage, economic-based job on or after July 1, 2015, for which an eligible employee is to be paid wages of either a minimum of $40,000 or a minimum of $60,000, depending upon the applicable jurisdiction, during a qualifying period based upon where the job is located.[13]

Sunset and repeal dates, program changes, and precertification and application timing

Potential applicants need to keep several details in mind, including the following:

Sunset and credit repeal dates: As with any deadline, a sunset date can be missed and, once this deadline has passed, the opportunity may be lost. Although a sunset date for a particular credit may be set in the applicable tax code, there could also be pending legislation that, if enacted, would change a sunset date. Therefore, it's important to be aware of legislation associated with tax credits, particularly if there are eligibility and pre-certification requirements.

For example, the California Enterprise Zone Hiring Credit was a state income tax credit for businesses hiring certain qualified individuals. A qualified business could earn tax credits, over a five-year period, for each eligible employee if a voucher certification was obtained from the local Enterprise Zone. The Enterprise Zone Program was repealed on January 1, 2014, but the law allowed for the issuance of voucher certifications through December 31, 2014.[14] However, the voucher certificates were issued by the local zone administrators, many of whom independently limited voucher submissions to a date *prior to* December 31, 2014.[15] This inconsistency may have created confusion for some businesses.

Eligibility and program changes: Eligibility requirements for certain credits and incentives may not always be clear. Sometimes certain requirements, such as those related to eligibility or incentive program revisions, may change very quickly and without notice. Whether they result from the discretionary nature of negotiated incentives, a recent court decision, budgetary issues, or even a policy change by a revenue agency, it's important to be aware of any updates to eligibility or precertification requirements.

For example, due to an anticipated budget deficit for the 2016 fiscal year, on June 2, 2015, the Illinois Governor's Office issued a press release that placed on hold certain future incentives for businesses. This resulted in the state suspending all new applications for the Economic Development for Growing Economy Tax Credit Program, Large Business Attraction Grants, Employer Training Investment Program Grants, and Prime Sites Grants.[16]

Pre-certification or application: Certain incentives may require precertification prior to application submission. In some instances, precertification may only be allowed during a specific time period prior to when an application is submitted. Adhering to the required timeline is crucial in order to qualify for certain incentives.

For example, the California Employment Training Panel ("ETP") provides funding for reimbursement of employee training costs. Once the ETP opens an application period, the applicant must register, complete an orientation, and submit a preliminary application before the actual application can be filed.[17] Further, the application due date may vary depending upon the ETP meeting schedule.[18]

First-come, first-serve programs

Incentive programs that are first-come, first-serve require not only a timely application but also insight as to when the application will actually be processed. For example, two programs that are slightly different in how they process applications are the Maryland Biotechnology Investment Incentive Tax Credit and the Pennsylvania Education Tax Credit. Maryland Biotechnology Investment Incentive Tax Credit applications are reviewed and approved on a first-come, first-serve basis, i.e., in the order in which they are received by the agency.[19] Applications for the Pennsylvania Education Tax Credit are also processed on a first-come, first-serve basis; however, all applications received on a specific day are processed on a random basis before moving on to the next day's applications.[20]

For competitive incentives, with a limited pool of funds to be awarded on a first-come, first-serve basis, it is extremely important to submit an application as soon as possible in order to increase the chances of obtaining a more favorable award.

What does timing have to *due* with it anyway?

After an incentive has been awarded, maintenance and other compliance requirements must be satisfied in order to monetize, utilize, and realize the benefit. These requirements may entail submitting forms, reports, or returns; responding to and participating in audits performed by the agency that granted the incentives; and performing various administrative tasks in order to track and substantiate fulfillment of requirements that are stipulated in the executed incentive agreement or under the program generally.

All of these tasks will have deadlines that are crucial in order to monetize benefits and avoid potential clawback provisions associated with different incentive packages. To satisfy the applicable compliance responsibilities within the specified deadlines, it is important that a company understand the reporting requirements, maintain a system that tracks the timing of all deadlines, and plan ahead, with an eye toward fulfilling the obligations in an orderly and timely manner.

Conclusion

When it comes to potential C&I opportunities, there's no time like the present to plan ahead. To capture available benefits, businesses should incorporate C&I into their expansion, relocation, investment, and hiring activities. And, because timing is critical throughout the entire process of obtaining, securing, and monetizing C&I benefits, businesses should keep in mind the deadlines that accompany the pre-certification, application, and ongoing compliance requirements.

[1] "Clawback" rules set forth compliance or other responsibilities that if not met may result in the recipient of a C&I benefit having to return some or all of the benefit to the granting authority.

[2] Cal. Code. Regs. tit. 10, § 8030(f).

[3] Cal. Code. Regs. tit. 10, § 8030(g)(1).

[4] *Id.*

[5] CCTC Application (February 2, 2015).

[6] 26 U.S.C. § 51(d)(13)(ii)(I).

[7] 26 U.S.C. § 51(d)(13)(ii)(II).

[8] N.Y. Tax Law § 210.23-a(d).

[9] *Id*.

[10] N.Y. St. Dept. of Tax. & Fin., Tech. Memo. No. TSB-M-13(9)C, (8)I (Dec. 30, 2013).

[11] "Qualifying Period" means the period of twelve months beginning on the day an eligible employee begins working in a new high-wage, economic-based job or the period of twelve months beginning on the anniversary of the day an eligible employee began working in a new high-wage, economic-based job. N.M. Stat. Ann. § 7-9G-1.M.(6).

[12] N.M. Stat. Ann. § 7-9G-1.M.(5).

[13] N.M. Stat. Ann. § 7-9G-1.M.(5)(a) and § 7-9G-1.M.(5)(b).

[14] A.B. 93, Sections 14 and 29, adding Cal. Rev. & Tax. Code § 17053.74(I)(1) (for individual taxpayers) and § 23622.7(I)(1) (for corporate taxpayers).

[15] https://www.ftb.ca.gov/professionals/taxnews/2014/March/Article_2.shtml.

[16] Press release, Illinois Governor's Office, (June 2, 2015), http://www3.illinois.gov/PressReleases/ShowPressRelease.cfm?SubjectID=3&RecNum=13115.

[17] https://www.etp.ca.gov/Process.cfm.

[18] https://www.etp.ca.gov/ProcessFY1516.cfm.

[19] Md. Code Ann., Tax-Gen. § 10-725(c)(3)(i).

[20] http://community.newpa.com/programs/educational-improvement-tax-credit-program-eitc/; and http://www.mlcc.org/news/2015/06/29/member-news/millions-available-in-state-tax-credits-on-a-first-come-first-serve-basis-as-of-july-1./.