

Legislative Analysis



MBT CERTIFICATED CREDITS AFTER MERGER

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House Bill 5557 (reported from committee as H-1)
Sponsor: Rep. Jeff Farrington

Analysis available at
<http://www.legislature.mi.gov>

House Bill 5558 (reported from committee as H-3)
Sponsor: Rep. Robert L. Kosowski

Committee: Tax Policy
Complete to 5-24-16

BRIEF SUMMARY: Generally speaking, these bills address circumstances where a business firm acquires another firm through a merger, and the firm being acquired has been approved to receive, or has been assigned, a certificated credit under the Michigan Business Tax (MBT). In such cases, the acquiring firm could elect to file under and pay the MBT instead of the Corporate Income Tax (CIT). The bills allow an acquiring firm that had already filed under the CIT prior to the enactment of these bills to file an amended return under the CIT and an original return under the MBT.

FISCAL IMPACT: Based on information provided by the Department of Treasury and MEDC, the bills would permit an estimated \$50 million to \$60 million of existing certificated credits to be claimed over roughly the next 20 years that would have otherwise been ineligible under the CIT. Thus, although it may not be a direct loss of revenue, it reflects an implicit loss relative to current law. This estimate does not include the potential for any subsequent mergers that might occur in the future, in which case the implicit revenue loss would be larger.

THE APPARENT PROBLEM:

In 2011, the Michigan Business Tax was replaced by a new Corporate Income Tax. However, businesses that had been approved for, received, or assigned certain "certificated credits" under the MBT prior to January 1, 2012, (the start of the CIT) were allowed elect to continue to file and pay the MBT rather than the CIT in order to continue claiming those certificated credits, until such time that the credits (and any carryforwards) are fully exhausted. Once the last credit or carryforward based on a credit has been claimed, the MBT will be fully repealed.

An issue regarding these "certificated credits" has arisen as a result of AK Steel Corporation's acquisition in 2014 of the Severstal Dearborn LLC steelmaking operations (the former Rouge Steel). At the time of the acquisition, AK Steel believed that it had, as a matter of course, also acquired the rights to the credits against the Michigan Business Tax that had been granted to Severstal, a MEGA credit in 2005 (totaling \$55-60 million over 20 years) and Brownfield credits in 2011 (totaling \$40 million). However, as currently written, the relevant tax statutes are understood not to permit AK Steel to continue to receiving these credits. The date for the one-time election to continue to pay the old

MBT rather than the new CIT (an election that Severstal made) has passed, and a firm paying the CIT (as AK Steel does) is not now able to elect to pay the MBT instead. Legislation has been introduced to allow, in limited cases, acquiring companies to continue to claim credits award to the companies that have been acquired.

THE CONTENT OF THE BILL:

House Bill 5557 would amend the Income Tax Act, which contains the CIT. (MCL 206.680). House Bill 5558 would amend the Michigan Business Tax Act (MCL 208.1117 et al.) The two bills are tie-barred, meaning neither could take effect unless both are enacted.

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House Bills 5557 and 5558 each contain similar provisions, and specify the following:

- If a taxpayer under the CIT acquires by merger all rights, privileges, and liabilities of another firm or member of a unitary business group,
- And the firm being acquired has (1) been approved to receive, has received, or has been assigned a certificated credit under the MBT that has not been fully claimed or paid prior to the date of the merger, and (2) has filed a return or has been included in a combined return and paid the MBT in lieu of the CIT in order to claim the credit,
- Then the acquiring business could, for the first year ending after the acquisition and the assignment of the credit only, elect to pay the MBT in lieu of the CIT.

Such a taxpayer electing to file under the MBT for tax years ending prior to the enactment of these bills that had already filed under the CIT would file an amended CIT return for that tax year (and each tax year thereafter) and file an original return under the MBT. This election would continue until the certificated credit and any carryforward is used up. The taxpayer would have to notify the Department of Treasury of the election and file an annual return within four months after making the election and include a copy of the corresponding amended returns under the CIT.

The terms, conditions, and amount of a certificated credit attributable to the entity whose existence was terminated by merger would continue and could not be expanded in any manner that would increase the net amount of the credit a result of an election made under the bills.

A taxpayer electing to file also could claim any other certificated credit for which the firm whose existence was terminated as a result of the merger was eligible, but not any certificated credit that would have accrued in any year before the election allowed for in the bills.

The taxpayer making the election to file the CIT (the acquiring company) would not be eligible to claim any other certificated credit for which an election could have been made for the first tax year ending after December 31, 2011.

Once the certificated credit that was the basis for the election was extinguished, the taxpayer would no longer be eligible to pay the MBT and claim any other remaining certificated credit.

ARGUMENTS:

For:

As noted earlier, these bills will allow credits that have already been awarded by state and local government, to promote economic development, to stay in place when the firm that was awarded the credits is acquired by merger by another company. In the case of AK Steel, which brought this issue to the fore, company officials say they had assumed that such credits would be part of the acquisition. The company says it is committed to its Michigan steel operations (despite the financial challenges facing the flat-rolled carbon steel industry), which not only provides over 1,500 direct jobs at the Dearborn operations, but also numerous indirect jobs, including those that rely on the purchasing of ore from Michigan U.P. mining operations. The bills would, say company officials, enable "[the] MEDC to honor commitments it made to the hard working men and women of Dearborn Works."¹ The bills have a narrow focus. As reported from committee, they would only apply to previously approved credits, and such a credit could not be expanded so as to increase its net value.

Against:

A representative of the Michigan Environmental Council testified that, with these bills, "[F]or all practical purposes the legislature is reissuing these credits and can place on them any conditions they deem reasonable. A minimum requirement should be a requirement that the facility remain a good neighbor by remaining in compliance with Michigan environmental laws."² Citizen representatives seconded this sentiment in a letter to the committee, noting the facility in question has been the subject of numerous citizen complaints of air pollution and violation notices in an area where residents are surrounded by factories and refineries.³

¹ <https://session.mihouse.mi.gov/sessiondocs/2015-2016/testimony/Committee347-4-20-2016.pdf>

² <https://session.mihouse.mi.gov/sessiondocs/2015-2016/testimony/Committee347-4-20-2016-1.pdf>

³ <https://session.mihouse.mi.gov/sessiondocs/2015-2016/testimony/Committee347-4-27-2016-2.pdf>

POSITIONS:

The following indicated support for the bills:

- AK Steel.
- The Michigan Department of Treasury
- The Michigan Department of Talent and Economic Development
- The Michigan Manufacturers Association
- The Michigan Chamber of Commerce

The following indicated opposition to the bills:

- The Michigan League of Conservation Voters
- The Michigan Environmental Council
- The Sierra Club, Michigan Chapter

Legislative Analyst: Chris Couch

Fiscal Analyst: Jim Stansell

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.