

Credit & Incentive Influx — Getting & Retaining What You Bargained For

John Amato
General Electric Company

Douglas S. Tyler
Deloitte Tax, LLP

Jeffrey M. Vesely
Pillsbury Winthrop Shaw Pittman, LLP



pillsbury

Deloitte.

Agenda

Credits & Incentives Foundations

Douglas S. Tyler

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John Amato

Litigation & “Clawbacks”

Jeffrey M. Vesely

Credits & Incentives 2014 Deals - Highlights

During the calendar year 2014, several exceptionally large incentives packages were announced:

- \$9 billion deal in the State of Washington
- \$1.3 billion deal in Nevada
- \$2 billion deal from Hillsboro County, Oregon
- \$330 million Film and TV credit in California
- \$630 million for businesses to relocate to Camden, NJ

Sources: Bloomberg, "Washington Treasurer Says Boeing Jobs Show State's Growth," *available at* <http://www.bloomberg.com/news/2014-01-09/washington-treasurer-says-boeing-jobs-show-state-s-growth.html>; Reuters, "Nevada Governor signs \$1.3 billion tax break package for electric car maker Tesla," *available at* <http://www.reuters.com/article/2014/09/12/us-usa-tesla-motors-nevada-idUSKBN0H704A20140912>; The Oregonian, "Intel's new tax deal is a whopper: \$100 billion investment, 30 years," *available at* http://www.oregonlive.com/silicon-forest/index.ssf/2014/08/intels_new_tax_deal_is_a_whopp.html; CA Film Commission, "California Film & Television Tax Credit Program" *available at* <http://www.film.ca.gov/Incentives.htm>; NJ.com, "Camden-bound companies set to receive \$630 million in state tax breaks," *available at* <http://www.nj.com/south/index.ssf/2014/12/camden-bound-companies-set-to-receive-630-million-in-state-tax-breaks.html>.

Credits & Incentives Trends

In order to secure Credits & Incentives benefits, understanding the current trends in how benefits are offered is critical to allow an organization to prepare and execute an effective approach:

- Statutory to discretionary
- Form driven to “contracted”
- Broader public policy purpose
- Evaluation of effectiveness and refinement of programs
- Responding to budgetary and political pressures
- Transparency

Types of Credits & Incentives

- Statutory credits/exemptions
 - Tax-based off-sets authorized by statute
 - Administered usually by a department of revenue
 - Based on investment or jobs and sometimes on place of business activities
- Discretionary/negotiated incentives
 - Tax and financial offsets offered by state and local jurisdictions
 - To entice business activity and gain economic benefit when competing with another jurisdiction for investments
- Employment Based Incentives
 - Cash or tax credit offsets offered by states and the federal government to employers for hiring/training

Defining the Opportunity

The New York Times reported that approximately \$80 billion are awarded from state and local jurisdictions per year to businesses:

State	Incentives NYT Analysis (1)	State GDP SFY 2013 (2)	Budget Surplus SFY 2013 (3)
California	\$4.17 billion	\$2.2 trillion	\$2.53 billion
Florida	\$3.98 billion	\$800 billion	\$2.89 billion
Massachusetts	\$2.26 billion	\$446 billion	\$1.87 billion
Michigan	\$6.65 billion	\$432 billion	\$1.19 billion
New York	\$4.06 billion	\$1.3 trillion	\$1.61 billion
Ohio	\$3.24 billions	\$565 billion	\$2.64 billion
Oklahoma	\$2.19 billion	\$182 billion	\$133 million
Pennsylvania	\$4.84 billion	\$644 billion	\$541 million
Texas	\$19.1 billion	\$1.5 trillion	\$5.51 billion
Washington	\$2.35 billion	\$408 billion	\$168 million

Sources: (1) NY Times, "United States of Subsidies," Dec. 1, 2012 *available at* <http://www.nytimes.com/interactive/2012/12/01/us/government-incentives.html#home>; (2) US Bureau of Economic Analysis; (3) National Association of State Budget Officers, Fiscal Survey of States: Fall 2014.

Credits and Incentives Triggers

- Real Estate Transactions
 - Relocation
 - Expansion
 - Consolidation
 - Rationalization
 - Lease expiration
 - Inbound international investments
 - IPO
 - M&A
- Employment Projections
 - Jobs creation
 - Jobs transfer
 - Jobs skill upgrade
- Sustainability Initiatives
 - Recycling
 - Pollution control
 - Green spend
- Capital Investments
 - Equipment expenditures
 - Research and development
 - Infrastructure improvement

Credits & Incentives Process

Old Process

- Credits established in tax law and typically income tax based
- Limited internal process
 - Tax Department
- Identification, calculation and claiming:
 - Initial data collecting
 - Prepare required credit forms
 - Defend under audit if needed

Credits & Incentives Process

New Process

- Opportunities based upon changes to the status quo
- Complex coordination:
 - Tax Department
 - Human Resources
 - Accounts Payable
 - Finance
 - Facilities & Real Estate
 - Corporate Executives and Division Leaders
- Identification, negotiation and implementation:
 - Data Collecting and modeling
 - Execute identified C&I, contracts, press, etc.
 - Accurate reporting and securing benefit
 - Audit process

Credits & Incentives Grantors

C&I are coordinated through public and quasi-public enterprises representing a breadth of organizations and interests:

- State/Commonwealth Entities
 - Economic Development Agencies
 - Department of Labor
 - Department of Revenue/Taxation
- County/Local Entities
 - Industrial Development Agencies
 - Economic Development Corporations
 - Department of Labor & Welfare Agencies
- Regional Organizations
 - Multiple cities (Hampton Roads, VA)
 - Multiple counties (Hudson Valley Econ. Development Corp., NY)

Proactive Approaches for Retention on Audit

Importance of Contemporaneous Documentation

- Consider data collection at the return preparation stage...or before
- R&D Credits
 - Base year value data and current information
 - Lab books
- Employment Credits
 - Vouchers
 - Other supporting documentation

Proactive Approaches for Retention on Audit

Streamline the Audit Process

- Take full advantage of sampling techniques
- Use knowledge gained from prior audits
- Extrapolate results from prior audits

Proactive Approaches for Retention on Audit

Provide a “Wow” Factor If Possible

- Plant tours
- Witness interviews
- Preparation critical

Proactive Approaches for Retention on Audit

Get Comfortable with Non-Tax Data

- Employment Credits
 - Make a friend in human resources
- R&D/Manufacturing Credits
 - Visit a plant and get to know the plant manager

Proactive Approaches for Retention on Audit

Incentivize the Business Producing the Credit

- Facilitates the retention of relevant documentation
- Will help to identify key potential witnesses
- Weigh in on record retention policies

Litigation

Tax Credits are Strictly Construed Against the Taxpayer

- Taxpayers must demonstrate their entitlement to the credit
 - Contemporaneous documentation
 - Credible witnesses
 - Reasonable estimates
 - Evidence from other years
- R&D Credit examples

Avoid “Clawbacks”

Legislation Has Been Enacted, Now What?

- Need to become involved in the implementation of the legislation
 - Return instructions
 - Administrative guidance
- Need to participate in public workshops
- California Competes Credit Example

Avoid “Clawbacks”

Legislative Amendments

- Need to stay on top of potential amendments to legislation allowing credits/incentives which restrict the ability to claim the same
- Need to be actively involved in legislative process
- San Francisco Business Tax Examples
 - Central Market Street and Tenderloin Area Exclusion
 - Community Benefit Agreement
 - Biotech Exclusion

Avoid “Clawbacks”

Regulations

- Legislatures like incentives; Departments of Revenue do not
- Departments of Revenue do not generally promulgate regulations which expand the ability to claim credits/incentives
- Must be actively involved in interested parties meetings
 - Weigh in early in the process
- Must be actively involved in the formal regulatory process

Avoid “Clawbacks”

Regulations May Not Alter or Enlarge the Underlying Statute

- If regulations place restrictions on claiming a credit which are not part of the legislation which enacted the credit, they should be challenged
- Appeal of Save Mart Supermarkets
 - California Manufacturers’ Investment Tax Credit
 - Regulation 23649-3 held invalid

Contact Information

John Amato

John.Amato@ge.com

Douglas S. Tyler

dtyler@deloitte.com

Jeffrey M. Vesely

jeffrey.vesely@pillsburylaw.com

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