Agricultural Commodity Processing Facility Investment Tax Credit Program

Program provisions

This document reflects changes made through the 2021 North Dakota Legislative Session, and generally applies to tax years, and to businesses certified or recertified, beginning on or after January 1, 2007. It is subject to changes in the law.

For provisions applicable to tax years beginning before January 1, 2007, contact the North Dakota Office of State Tax Commissioner.

Overview of program

Type of program	This program provides a nonrefundable income tax credit for making an investment in a business that is certified as a qualifying agricultural commodity processing facility ("qualified business") by the North Dakota Commerce Department's Division of Economic Development and Finance. See "Qualified business" and "Certification" below.
Purpose	This program provides an incentive to invest cash or real property in a new or existing business operating in North Dakota that either (1) adds value to an agricultural commodity raised in North Dakota or (2) is a livestock feeding, handling, milking, or holding operation that uses a byproduct of a biofuels production facility.
Legislative history	**Location in Code:** N.D.C.C. Chapter 57-38.6. **Created:** 2001 (Session Law 2001, chapter 527). **Amended:** 2005 (S.L. 2005, ch. 568), 2007 (S.L. 2007, chs. 18 and 527), 2009 (S.L. 2009, ch. 545), 2011 (S.L. 2011, ch. 460), and 2013 (S.L. 2013, ch. 443).

Law provision	Description
Qualified business	A "qualified business" is a business that the North Dakota Commerce Department's Division of Economic Development and Finance certifies (see "Certification of business" below) as meeting all of the following conditions: • It is a cooperative, corporation, partnership, or limited liability company. • It is incorporated or organized in North Dakota after December 31, 2000, for the primary purpose of either (1) employing knowledge and labor to add value to an agricultural commodity capable of being raised in North Dakota or (2) operating a livestock feeding, handling, milking, or holding business that utilizes in its operation a byproduct produced by a biofuels production facility. ○ "Biofuels production facility" means a corporation, limited liability company, partnership, individual, or association located in North Dakota engaged in producing diesel fuel containing at least 5% biodiesel or green diesel as defined under N.D.C.C. § 57-43.2-01, producing corn- or cellulose-based ethanol, or crushing soybeans or canola. • It has been certified by the North Dakota Securities Commissioner to be in compliance with North Dakota's securities laws. • It has an agricultural commodity processing facility, or intends to locate one, in North Dakota.

Certification of business	To participate in the program, a business must apply to the North Dakota Commerce Department's Division of Economic Development and Finance (Commerce Department) for certification as a qualified business. The Commerce Department must certify whether a business meets the statutory requirements to be a qualified business. If certified, a letter will be issued to the qualified business containing the beginning and ending dates of the certification period, which may not exceed four years. A qualified business may apply for recertification under the program, not to exceed four years. Only one four-year recertification is allowed per business. The application for recertification must be filed within 90 days before the original certification expires. No more than ten businesses may be certified in a calendar year. This does not include the *recertification* of a business. Questions about certification as a qualified business should be directed to the Commerce Department as follows— 1600 E. Boulevard Ave., Suite 2 P.O. Box 2057 Bismarck, ND 58503 Web site: http://www.commerce.nd.gov Phone: (701) 328-5300 E-mail: commerce@nd.gov ***Note:*** *This certification information applies to businesses certified or recertified on or after January 1, 2007.*
Use of investment monies by qualified business	The investment monies must be expended for plant, equipment, research and development, marketing and sales activity, or working capital.
Eligible taxpayer (investor)	The following are eligible taxpayers (investors) for purposes of the tax credit: • Individual (on Form ND-1) • Estate or trust (on Form 38)—*see* ***Note 2*** • Partnership (on Form 58)—*see* ***Note 1*** • C corporation (on Form 40) • S corporation (on Form 60)—*see* ***Note 1*** • Limited liability company—*see* ***Note 3*** ***Note 1:*** *If the taxpayer is a partnership, S corporation, or limited liability company (treated like a partnership or S corporation), the credit is determined at the passthrough entity level and passed through to the entity's owners in proportion to their ownership interests.* ***Note 2:*** *An estate or trust may either claim the tax credit or pass it through to its beneficiaries.* ***Note 3:*** *The type of form used by a limited liability company is dependent on how it files for federal income tax purposes—that is, as a partnership, corporation, etc.* **Angel fund certified before July 1, 2017 –** If a taxpayer is an angel fund that was certified under N.D.C.C. § 57-38-01.26 before July 1, 2017, it is treated like a passthrough entity—see ***Note 1*** above. If members (owners) of an angel fund claim the angel fund tax credit for investing in the fund, they are not allowed to claim the agricultural commodity processing facility tax credit. (Note: The members may claim the agricultural commodity processing facility tax credit only if they forego claiming the angel fund tax credit.) See "Ineligible taxpayers" below for an angel fund certified after June 30, 2017. **Ineligible taxpayers -** An eligible taxpayer ***does not*** include a government entity, tax-exempt organization, or an angel fund certified under N.D.C.C. § 57-38-10.26 after June 30, 2017.

Qualified investment	A "qualified investment" is one that satisfies all of the following conditions:
	• It must be made by an eligible taxpayer—see "Eligible taxpayer" above.
	• It must be made in cash or a transfer of a fee simple interest in real estate located in North Dakota. In the case of a fee simple interest in real estate, all of the following conditions apply:
	  ○ Personal property becoming a fixture to the real estate after the transfer is not a qualified investment.
	  ○ The value of the investment may not exceed the appraised value as established by an appraiser licensed or certified under N.D.C.C. §§ 43-23.3-04 through 43-23.3-12.
	  ○ The value of the investment must be approved by the governing body of the qualified business using the standards for valuing consideration for shares under N.D.C.C. § 10-19.1-63(3).
	  ○ The tax credit is allowed in the tax year in which the transfer is recorded with the registrar of deeds as provided under N.D.C.C. ch. 47-19.
	• It must be made on or after the date of certification and no later than the date the certification expires.
	• It must be in the form of a purchase of an ownership interest or the right to receive dividends.
	• It must be at risk in the qualified business for at least three years after the date of investment.
	  ○ For a cash investment, the date of investment is the date on which the qualified business receives and is able to use the monies in its operations.
	  ○ For a fee simple interest in real property, the date of investment is the date the transfer is recorded with the registrar of deeds.
	  ○ The cash or real property are at risk if they are available for use by the qualified business. Monies placed in escrow are not at risk and do not constitute an eligible investment. Monies placed in escrow become a qualified investment on the date the monies are released from escrow to the qualified business for use in its operations.
	
	A transfer of monies from a retirement plan to a qualified business is deemed to be an investment made by the retirement plan participant if a separate account is maintained for the participant, the participant directly controls where the account's assets are invested, and the plan's trustee makes the transfer to the qualified business.

Amount of tax credit	The tax credit is equal to 30% of the total qualified investments made during the tax year by the eligible taxpayer.
Maximum tax credit that may be claimed (used) in a tax year	No more than $50,000 of the total credit based on investments made in a tax year may be used in the tax year in which the investments were made or in any tax year to which an unused credit may be carried. ***Note:*** *This annual usage limit does not apply at the passthrough entity level in the case of a partnership, S corporation, or limited liability company treated like a passthrough entity, but applies at the owner level (provided the owner is not another passthrough entity).*
Carryover of unused tax credit by taxpayer	The credit must be claimed first in the tax year in which the date of investment falls. If the total credit allowed cannot be used because it exceeds the lesser of $50,000 (annual usage limit) or the taxpayer's tax liability, the unused portion of the total allowable credit may be carried over and used on subsequent tax years' returns for up to 10 tax years. ***Note:*** *This carryover provision does not apply at the passthrough entity level in the case of a partnership, S corporation, or limited liability company treated like a passthrough entity, but applies at the owner level (provided the owner is not another passthrough entity).*

Cumulative limit on tax credits allowed per taxpayer for all tax years	The total tax credits each taxpayer is allowed over any combination of tax years is limited to $250,000. ***Note:*** *A passthrough entity—partnership, S corporation, or limited liability company treated like a passthrough entity—and each of its owners are considered separate taxpayers for this purpose. A passthrough entity and each of its owners are allowed to up to $250,000 of credits over their respective lifetimes.*
Reporting requirements	For each qualified investment received, a qualified business must do the following: • Within 30 days after receiving the qualified investment, complete an investment reporting form prescribed by the Office of State Tax Commissioner. • Give a copy of the completed investment reporting form to the investor. • Submit a copy of the form to both the North Dakota Office of State Tax Commissioner and the North Dakota Commerce Department's Division of Economic Development and Finance. o For an investment of a fee simple interest in real property, the copy of the investment reporting form filed with the North Dakota Office of State Tax Commissioner must be accompanied by copies of the (1) appraisal, (2) governing body's resolution approving the value of the investment, and (3) statement of full consideration. See "Qualified investment for more details. ***Note:*** *The investment reporting form must not be completed nor filed for an investment that does not qualify for the tax credit—for example, an investment made by a tax exempt entity. See "Qualified investment" above.*
Tax credit recapture	The tax credit is disallowed and must be paid back with applicable penalty and interest by the taxpayer if the business has misrepresented anything in the application for certification, or if either the taxpayer or business fails to satisfy any condition of the law or any conditions consistent with the law set by the Office of State Tax Commissioner. If this applies, the taxpayer must file an amended North Dakota return for each tax year affected, and, in the case of a passthrough entity, amended North Dakota Schedule K-1s must be issued to the owners.