

NEW JERSEY ECONOMIC DEVELOPMENT AUTHORITY
BRRAG TAX CREDIT CERTIFICATE TRANSFER PROGRAM APPLICATION
(As authorized by the Business Retention and Relocation Assistance Act, P.L. 2004, c. 65)

BRRAG TAX CREDIT CERTIFICATE SELLING AGREEMENT [Form 4]

This BRRAG Tax Credit Certificate Selling Agreement (hereinafter "Agreement"), made as of ____ day of _____, 20____, by and between _____, ("Selling Company"), a company organized under the laws of the State of _____, having its principal offices at _____ and _____ _____ ("Buying Company"), a company organized under the laws of the State of _____, having its principal offices at _____, the above entities being hereinafter referred to as the "Parties."

WITNESSETH:

WHEREAS, pursuant to P.L. 2004, c. 65, the State of New Jersey created the Tax Credit Certificate Transfer program (the Program) to allow businesses in this State with unused amounts of BRRAG tax credit to surrender those tax credits to other businesses desiring such credits which in exchange will provide private financial assistance to assist in the funding of costs incurred by the relocating business; and

WHEREAS, the Division of Taxation has established the amount of tax benefits that the Selling Company can transfer over State Fiscal Year _____ to be \$ _____;

NOW, THEREFORE, in consideration of the mutual promises and covenants made herein, the Parties agree as follows:

ARTICLE I

1.01 Definitions:

"Act" means the Business Retention and Relocation Assistance Act, P.L. 2004, c. 65.

"Affiliated business" means an entity that directly or indirectly owns or controls five percent (5%) or more of the voting rights or five percent (5%) or more of the value of all classes of stock of both the selling and buying businesses.

"Application" means the application submitted to the New Jersey Economic Development Authority from the seller of BRRAG tax credits, for approval of the BRRAG tax credit transfer certificate.

"Board Members" means the Board Members for the New Jersey Economic Development Authority.

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“BRRAG Project agreement” means an agreement between a business and the New Jersey Economic Development Authority that sets the forecasted schedule for completion and occupancy of the project, the date the commitment duration shall commence, the amount of the applicable grant of tax credits, and other such provisions which further the purposes of P.L.1996, c.25 (C.34:1B-112 et seq.), as amended by P.L. 2004, c. 65 §§ 1-16 (C.34:1B-112 through 123).

“BRRAG program” means the tax credit grant program created pursuant to P.L. 1996, c. 25, as substantially amended by P.L. 2004, c. 65 §§ 1-16 (C.34:1B-112 through 123), and provided in N.J.A.C. 12A:2-1.

“BRRAG tax credit certificate transfer program” or “Program” means the Business Retention and Relocation Assistance Grant Tax Credit Transfer Program created pursuant to section 17 of the Act (N.J.S.A. 34:1B-120.2) and regulations thereunder at N.J.A.C. 12A:2A-1.1 et seq.

“Business” means an employer located in this State that has operated continuously in the State, in whole or in part, in its current form or as a predecessor entity for at least 10 years prior to filing an application to the program and which is subject to the provisions of N.J.S.A. 43:21-1 et seq. and may include a sole proprietorship, a partnership, or a corporation that has made an election under Subchapter S of Chapter One of Subtitle A of the Internal Revenue Code of 1986, or any other business entity through which income flows as a distributive share to its owners, limited liability company, nonprofit corporation, or any other form of business organization located either within or outside the State[.], such as a group of organizations under common control as defined in Section 414(b) or (c) of the Internal Revenue Code of 1986 and Federal Treasury regulations thereunder. For purposes of identifying full-time employees in eligible positions and retained State tax revenue, any such employees hired by or taxes paid by a professional employer organization (PEO) with which the business has entered into an employee leasing agreement shall be allocable to the business.

“Business retention or relocation grant of tax credits” or “grant of tax credits” means a grant which consists of the value of corporation business tax credits against the liability imposed pursuant to section 5 of P.L.1945, c.162 (C.54:10A-5) or credits against the taxes imposed on insurers pursuant to P.L.1945, c.132 (C.54:18A-1 et seq.), section 1 of P.L.1950, c.231 (C.17:32-15), and N.J.S.17B:23-5, provided to fund a portion of retention and relocation costs pursuant to P.L.1996, c.25 (C.34:1B-112 et seq.), as amended by P.L. 2004, c. 65, and pursuant to N.J.A.C. 12A:2-1.

“Business retention or relocation tax credit” or “BRRAG tax credit” means the tax credit that a business obtains through the BRRAG program.

“Buying business,” means a business with the financial ability to purchase the unused BRRAG tax credits from an unaffiliated selling business. For the purpose of this definition, the test of affiliation is whether the same entity directly or indirectly owns or controls five percent or more of the voting rights or five percent or more of the value of all classes of stock of both the selling and buying businesses.

“Buying Business Information Sheet” means the form that the Buying Business completes with information about the estimated value of the tax credits to be transferred, the selling price of the benefits to be transferred and other information required by the EDA.

“Certificate” or “BRRAG tax credit transfer certificate” or “Closing Certificate” means the certificate issued by the Division of Taxation certifying to the selling business amounts of unused BRRAG tax credit. The certificates are issued in the form of corporation business tax credit and insurance premiums tax credit transfer certificates.

“Director” means the Director of the Division of Taxation in the New Jersey Department of the Treasury.

“New business location” means the premises that the business has either purchased or built or for which the business has entered into a purchase agreement or a written lease for a period of no less than eight years from the date of relocation. A new business location may also include the premises from which the business moves on a temporary basis due to the rehabilitation of permanent premises that also qualifies as reconstruction as “reconstruction” is defined in the Uniform Construction Code, N.J.A.C. 5:23-6.3. In that case, the move to the permanent premises will trigger availability of the grant of tax credits.

“Private financial assistance” means the assistance that the buying business provides the selling business to assist in the funding of costs incurred by the relocating business.

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“Private Finance Assistance Form” means the form attached to this Agreement specifying how the Selling Business will expend the Private Financial Assistance for allowable expenditures for the expenses incurred by the Selling Business in connection with the operation of the Business in the State.

“Project” means the construction, renovation or expansion of facilities at the approved site as described in the project description in the application and the agreement that will become the business’s new business location.

“Selling business” means a business that has unused BRRAG tax credits issued under P.L. 1996, c. 25 (C.34:1B-112 et seq.), as amended by P.L. 2004, c. 65, and otherwise allowable which it wishes to “sell.”

“Selling Business Tax Benefit Identification Form” means the form that identifies the accumulated BRRAG tax credits, the amount intended to be sold, and the years that the BRRAG tax credits were incurred.

“Total allowable relocation costs” means \$1,500 times the number of retained full-time jobs. “Total allowable relocation costs” does not include the amount of any bonus award authorized pursuant to section 5 of P.L. 2004, c. 65 (C.34:1B-115.1).

ARTICLE II

Section 2.01 Compensation.

Subject to the conditions set forth in Section 2.02 hereof, within 10 days of Selling Company's notifying Buying Company that the EDA has received a Certificate from the Division of Taxation, Buying Company agrees to purchase the Certificate for a purchase price in the aggregate amount of \$_____ for the transfer of tax benefits in the amount of \$_____ for the years and amounts more fully set forth in the Selling Business Tax Benefit Identification Form, attached.

Section 2.02 Conditions to Purchase.

Buying Company's obligation to purchase is conditioned upon:

- a) preliminary approval by the EDA of Selling Company’s Application;
- b) approval by the EDA of this Agreement, the Buying Business Information Sheet, the Selling Business Tax Benefit Identification Form, and the Private Financial Assistance Form;
- c) a final determination by the Division of Taxation that the amount of the Certificate is equal to \$_____ as evidenced by issuance of the Certificate to the EDA.
- d) receipt of the EDA of the Seller's Closing Certificate satisfactory to the EDA, and final approval of the grant to transfer tax benefits;
- e) the Selling Company named in this Agreement agrees not to sell any tax benefit certificate in connection with the BRRAG Tax Credit Certificate Transfer Program Application to an Affiliated Business.

ARTICLE III

Section 3.01 Covenants of the Selling Company.

- a) the Selling Company has entered into a BRRAG Project Agreement pursuant to P.L. 1996, c. 25 (N.J.S.A. 34:1B-112 et seq.), as amended by P.L. 2004, c. 65 and N.J.A.C. 12:2A-1 and is not in default of that BRRAG Project Agreement.
- b) the Selling Company has unused amounts of BRRAG tax credits issued and otherwise allowable;
- c) the Selling Company certifies that, to the best of its knowledge, that it cannot use the BRRAG Tax Credits originally issued for the tax periods in which the credits are allowable.
- d) the Selling Company has incurred or will incur expenses in connection with the operation of the business in this State, including but not limited to, the expenses of fixed assets, such as the construction and acquisition and development of real estate, materials, start-up, tenant fit-out, working capital, salaries, research and development expenditures and any other expenses determined by the Secretary to be necessary to carry out the purposes of the Act.

Section 3.02 Covenants of the Buying Company.

- a) it shall not assign, sell or transfer the Certificate to any Affiliated Business of Selling Company.

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- b) if any representation made by Buying Company in this Agreement is willfully false or materially misleading or if Buying Company breaches the covenant set forth in Paragraph 3.02(a), the transfer of tax benefits contemplated by this Agreement shall be null and void.

Section 3.03 Representation by Selling Company.

The Selling Company represents to Buying Company, the EDA and the Division of Taxation that the Selling Company is not an Affiliated Business of Buying Company.

Section 3.04 Representation by Buying Company.

The Buying Company represents to Selling Company, the EDA and the Division of Taxation that the Buying Company is not an Affiliated Business of Selling Company.

ARTICLE IV

Section 4.01 Non-assignability.

The Buying Company may not assign or transfer the Certificate in any manner.

ARTICLE V

Section 5.01 Third Party Beneficiary.

The EDA shall be a third party beneficiary to this Agreement, with the authority to enforce the provisions hereof and to declare a default hereunder.

ARTICLE VI

Section 6.01 Default.

Failure by the Selling Company to comply with any covenant set forth under this Agreement shall constitute an event of default.

Section 6.02. Remedies upon Default.

Upon the existence of any events of default, the Buying Party or the EDA, as third party beneficiary to this Agreement may take any action legally available to it.

Section 6.03. Forbearance not a Waiver.

No act of forbearance or failure to insist on the prompt performance of the obligations pursuant to this Agreement, either expressed or implied, shall be construed as a waiver of any rights hereunder. In the event that any provision of this Agreement should be breached and the breach may thereafter be waived, such waiver shall be limited to the particular breach waived and shall not be deemed to waive any other breach.

ARTICLE VII

Section 7.01 Indemnification.

Selling Company covenants and agrees to indemnify and hold harmless, the EDA, the Division of Taxation, and the State of New Jersey and their respective members, agents, officers, employees and servants from all losses, claims, damages, liabilities, and costs whatsoever (including all costs, expenses and reasonable counsel fees incurred in investigating and defending such losses and claims, etc.), brought by any person or entity, and caused by, related to, arising or purportedly arising out of, or from any loss, damage or injury resulting from the expenditure of the proceeds received pursuant to this Agreement or from the performance by the parties hereto of the obligations set forth herein. The provisions of this Paragraph shall survive termination of this Agreement.

ARTICLE VIII

Section 8.01 Governing Law.

This Agreement shall be governed by, construed and interpreted in accordance with, the laws of the State of New Jersey.

Section 8.02 Forum and Venue.

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The forum and venue for all actions related to the matters which are the subject of this Agreement shall be a court of competent jurisdiction in the County of Mercer, State of New Jersey.

Section 8.03 Entire Agreement.

This Agreement, the Buying Business Information Sheet, the Selling Business Tax Benefit Identification Form, the Private Financial Form, the Seller's Closing Certificate, the application forms of the Selling Company and any documents referred to herein, constitute the complete understanding of the Parties and merge and supersede any and all other discussions, agreements and understandings, oral or written, between the parties with respect to the subject matter of this Agreement.

Section 8.04 Severability.

Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid pursuant to applicable law, but if any provision of this Agreement is held to be prohibited by or invalid under applicable law, such provisions shall be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provisions of this Agreement, unless Buying Company shall in its sole and absolute discretion deem the invalidated provision essential to the accomplishment of the public purposes served by this Agreement, in which case Buying Company has the right to terminate this Agreement and all benefits provided to Selling Company hereunder upon the giving of sixty (60) days prior notice as set forth in Paragraph 8.05 hereof.

Section 8.05 Notices.

All notices, consents, demands, requests and other communications which may be or are required to be given pursuant to any term of this Agreement shall be in writing and shall be deemed duly given when personally delivered or sent by United States mail, registered or certified, return receipt requested, postage prepaid, to the addresses set forth hereunder or to such other address as each party to this Agreement may hereafter designate in a written notice to the other party transmitted in accordance with this provision.

Selling Company Address:

Buying Company Address:

Section 8.06 Amendments or Modifications.

This Agreement may only be amended or modified in a writing executed by both Parties, for good cause shown. Such amendments or modifications shall become effective only upon execution of same by both parties and submission of the amendment or modification to the EDA and the Division of Taxation for approval.

Section 8.07 Headings.

Section headings contained in this Agreement are inserted for convenience only and shall not be deemed to be a part of this Agreement.

Section 8.08 Counterparts.

This Agreement may be executed in any number of counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 8.09 Successors and Assigns.

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This Agreement shall be binding upon the successors and assigns of the Parties hereto.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed
by their respective officers duly authorized as of the date and year first set forth above.

ATTEST:

SELLING COMPANY:

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____

ATTEST:

BUYING COMPANY:

BY: _____

BY: _____

NAME: _____

NAME: _____

TITLE: _____

TITLE: _____