

# DEPARTMENT OF TAXATION

## 2012 Fiscal Impact Statement

1. **Patron** R. Creigh Deeds

2. **Bill Number** SB 352

3. **Committee** Senate Finance

**House of Origin:**

  X   **Introduced**

       **Substitute**

       **Engrossed**

4. **Title** Land Preservation Tax Credit; transfer in the event of death

**Second House:**

       **In Committee**

       **Substitute**

       **Enrolled**

### 5. **Summary/Purpose:**

This bill would allow credits to survive if a taxpayer dies holding any unused but otherwise allowable Land Preservation Tax Credit. The executor or administrator of an estate or the trustee of a revocable living trust of the deceased taxpayer would be permitted to transfer the credit for use by another taxpayer on Virginia income tax returns. This bill would require that the executor, administrator, or trustee file a notification of the transfer with the Department in accordance with the Department's procedures for Land Preservation Tax Credit transfers.

This bill would also provide that such transfers by an executor, administrator, or trustee to a beneficiary of an estate or trust would not be subject to the two percent transfer fee.

The effective date of this bill is not specified.

6. **Budget amendment necessary:** No.

7. **Fiscal Impact Estimates are:** Not available. (See Line 8.)

### 8. **Fiscal implications:**

#### Administrative Costs

The Department of Taxation ("the Department") considers implementation of this bill as routine, and does not require additional funding.

#### Revenue Impact

This bill would have an unknown, but likely small, negative impact on General Fund revenues.

### 9. **Specific agency or political subdivisions affected:**

Department of Taxation

**10. Technical amendment necessary:** No.

**11. Other comments:**

Background

The Land Preservation Tax Credit is equal to forty percent of the fair market value of land or interest in land located in Virginia which is conveyed for the purpose of agricultural and forestal use, open space, natural resource, and/or biodiversity conservation, or land, agricultural, watershed and/or historic preservation, as an unconditional donation by the taxpayer to a public or private conservation agency.

Beginning in calendar year 2007, the aggregate amount of Land Preservation Tax Credits that may be issued in any one year is subject to a cap. For 2007, the cap amount was \$100 million. Since calendar year 2008, the \$100 million cap has been increased annually. For 2012, the cap is \$111,054,000.

Any taxpayer holding a Land Preservation Tax Credit may transfer the unused otherwise allowable credits for use by another taxpayer. The taxpayer transferring the credit must notify the Department of the transfer. A two percent fee is imposed upon the transfer arising from the sale of credits. This fee is also applied when pass-through entities, including estates and trusts, distribute the credit to members, managers, partners, shareholders or beneficiaries. The transfer fee is not imposed on lifetime gifts of credits made by individual taxpayers.

Revenues generated by the transfer fee are used to recover the costs incurred by the Department and DCR for the administration of the Land Preservation Tax Credit. The amount of revenues used to recover the costs incurred by the Department and DCR cannot exceed 50 percent of the annual revenue generated by the fee. The remainder of the amount generated by the fee is transferred to the Virginia Land Conservation Fund for annual distribution to the public or private agencies or organizations that are responsible for enforcing the conservation and preservation purposes of the donated interests.

The amount of the credit that may be claimed by each taxpayer is limited to \$50,000 for the 2009, 2010, and 2011 taxable years, and \$100,000 for the 2012 taxable year and for each taxable year thereafter. Any unused portion of a credit issued to a taxpayer may be carried forward for a maximum of 10 years. For taxpayers affected by the credit reduction for taxable years 2009, 2010, and 2011, any unused portion of a credit issued to a taxpayer may be carried forward for a maximum of 13 years.

For taxpayers to whom a credit has been transferred, any unused portion may be carried forward for a maximum of 11 years after the credit was originally issued. For taxpayers affected by the credit reduction for taxable years 2009, 2010, and 2011, any portion of a transferred credit may be carried forward for a maximum of 14 years after the credit was originally issued.

Nothing in the law prohibits a trust from transferring credits that were transferred to the trust during the grantor's lifetime, whether the trust was revocable or irrevocable at the

time of the transfer. Tax credits that are still held by a taxpayer upon death cannot be transferred by the estate to any trust or beneficiary. As explained in Public Document 05-170 (December 5, 2005) this is because the law requires that the taxpayer who wishes to transfer a credit be the person to transfer the credit and file a notification with the Department.

### Proposal

This bill would allow credits to survive if a taxpayer dies holding any unused but otherwise allowable Land Preservation Tax Credit. The executor or administrator of an estate would be permitted to transfer the credit for use by another taxpayer on Virginia income tax returns. The two percent transfer fee would be waived if the estate transfers the credits to the beneficiaries of the estate or to a trustee since, under current law, no transfer fee would have been imposed on the decedent had he made gifts to such recipients before death. However, transfers by the estate pursuant to a sale of the credits would be subject to the transfer fee.

The bill would also allow the trustee of a trust that was a revocable living trust before death to transfer any credits received from the estate of the decedent. While no transfer fee would be imposed on the estate's transfer of credits to the trust, the fee would be owed on any subsequent transfers by the trustee.

This bill would require that the executor, administrator, or trustee file a notification of the transfer with the Department in accordance with the Department's procedures for Land Preservation Tax Credit transfers.

In 2011, the introduced version of House Bill 1820 included a similar provision that would have allowed the executor or administrator of an estate of a deceased taxpayer to transfer unused Land Preservation Tax Credits. During the 2011 session, the issue was raised that inheritability of a state income tax credit may create enough of a property right to allow the IRS to invoke the quid pro quo doctrine and deny a charitable contribution deduction. Under this doctrine, charitable contribution deductions are disallowed for the portion of a contribution made in consideration for goods or services provided to the donor.

In several unofficial memoranda, the IRS has opined that the transfer of a state tax credit is not generally sufficient to result in the denial of a charitable contribution deduction. However, if the attributes of a tax credit are such that it is deemed property received in exchange for a donation, the quid pro quo doctrine may be invoked. Inheritability is one of several factors to be considered in determining whether a tax attribute is property sufficient for the denial of the charitable contribution deduction. Because the IRS has not provided official guidance, this issue remains unresolved.

The effective date of this bill is not specified.

### Similar Legislation

**House Bill 336** would exclude federal government entities from the list of donees entitled to receive a portion of the Land Preservation Tax Credit transfer fee.

**House Bill 908** would allow donors to apply for Land Preservation Tax Credits prior to making any donation of land.

**House Bill 1268** would extend the \$50,000 limitation on the amount of Land Preservation Tax Credits that may be claimed on income tax returns through Taxable Year 2012.

**Senate Bill 355** would require the Department to annually publish certain information about Land Preservation Tax Credits.

**Senate Bill 403** would increase the amount of the Land Preservation Tax Credit for working farmers.

cc : Secretary of Finance

Date: 1/23/2012 KLC  
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