

108TH CONGRESS
1ST SESSION

S. 1936

To amend the Internal Revenue Code of 1986 to exclude from unrelated business taxable income the gain or loss on the sale or exchange of certain brownfield sites, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 24, 2003

Mr. BAUCUS (for himself, Mr. INHOFE, Mrs. DOLE, and Mr. ROCKEFELLER) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 to exclude from unrelated business taxable income the gain or loss on the sale or exchange of certain brownfield sites, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXCLUSION OF GAIN OR LOSS ON SALE OR EX-**
4 **CHANGE OF CERTAIN BROWNFIELD SITES**
5 **FROM UNRELATED BUSINESS TAXABLE IN-**
6 **COME.**

7 (a) IN GENERAL.—Subsection (b) of section 512 of
8 the Internal Revenue Code of 1986 (relating to unrelated

1 business taxable income) is amended by adding at the end
 2 the following new paragraph:

3 “(18) TREATMENT OF GAIN OR LOSS ON SALE
 4 OR EXCHANGE OF CERTAIN BROWNFIELD SITES.—

5 “(A) IN GENERAL.—Notwithstanding para-
 6 graph (5)(B), there shall be excluded any gain
 7 or loss from the qualified sale, exchange, or
 8 other disposition of any qualifying brownfield
 9 property by an eligible taxpayer.

10 “(B) ELIGIBLE TAXPAYER.—For purposes
 11 of this paragraph—

12 “(i) IN GENERAL.—The term ‘eligible
 13 taxpayer’ means, with respect to a prop-
 14 erty, any organization exempt from tax
 15 under section 501(a) which—

16 “(I) acquires from an unrelated
 17 person a qualifying brownfield prop-
 18 erty, and

19 “(II) pays or incurs eligible re-
 20 mediation expenditures with respect to
 21 such property in an amount which ex-
 22 ceeds the greater of \$550,000 or 12
 23 percent of the fair market value of the
 24 property at the time such property
 25 was acquired by the eligible taxpayer,

1 determined as if there was not a pres-
2 ence of a hazardous substance, pollut-
3 ant, or contaminant on the property
4 which is complicating the expansion,
5 redevelopment, or reuse of the prop-
6 erty.

7 “(ii) EXCEPTION.—Such term shall
8 not include any organization which is—

9 “(I) potentially liable under sec-
10 tion 107 of the Comprehensive Envi-
11 ronmental Response, Compensation,
12 and Liability Act of 1980 with respect
13 to the qualifying brownfield property,

14 “(II) affiliated with any other
15 person which is so potentially liable
16 through any direct or indirect familial
17 relationship or any contractual, cor-
18 porate, or financial relationship (other
19 than a contractual, corporate, or fi-
20 nancial relationship which is created
21 by the instruments by which title to
22 any qualifying brownfield property is
23 conveyed or financed or by a contract
24 of sale of goods or services), or

1 “(III) the result of a reorganiza-
2 tion of a business entity which was so
3 potentially liable.

4 “(C) QUALIFYING BROWNFIELD PROP-
5 ERTY.—For purposes of this paragraph—

6 “(i) IN GENERAL.—The term ‘quali-
7 fying brownfield property’ means any real
8 property which is certified, before the tax-
9 payer incurs any eligible remediation ex-
10 penditures (other than to obtain a Phase I
11 environmental site assessment), by an ap-
12 propriate State agency (within the mean-
13 ing of section 198(c)(4)) in the State in
14 which such property is located as a
15 brownfield site within the meaning of sec-
16 tion 101(39) of the Comprehensive Envi-
17 ronmental Response, Compensation, and
18 Liability Act of 1980 (as in effect on the
19 date of the enactment of this paragraph).

20 “(ii) REQUEST FOR CERTIFICATION.—
21 Any request by an eligible taxpayer for a
22 certification described in clause (i) shall in-
23 clude a sworn statement by the eligible
24 taxpayer and supporting documentation of
25 the presence of a hazardous substance, pol-

1 lutant, or contaminant on the property
2 which is complicating the expansion, rede-
3 velopment, or reuse of the property given
4 the property's reasonably anticipated fu-
5 ture land uses or capacity for uses of the
6 property (including a Phase I environ-
7 mental site assessment and, if applicable,
8 evidence of the property's presence on a
9 local, State, or Federal list of brownfields
10 or contaminated property) and other envi-
11 ronmental assessments prepared or ob-
12 tained by the taxpayer.

13 “(D) QUALIFIED SALE, EXCHANGE, OR
14 OTHER DISPOSITION.—For purposes of this
15 paragraph—

16 “(i) IN GENERAL.—A sale, exchange,
17 or other disposition of property shall be
18 considered as qualified if—

19 “(I) such property is transferred
20 by the eligible taxpayer to an unre-
21 lated person, and

22 “(II) within 1 year of such trans-
23 fer the eligible taxpayer has received a
24 certification from the Environmental
25 Protection Agency or an appropriate

1 State agency (within the meaning of
2 section 198(c)(4)) in the State in
3 which such property is located that, as
4 a result of the eligible taxpayer's re-
5 mediation actions, such property
6 would not be treated as a qualifying
7 brownfield property in the hands of
8 the transferee.

9 “(ii) REQUEST FOR CERTIFICATION.—

10 Any request by an eligible taxpayer for a
11 certification described in clause (i) shall be
12 made not later than the date of the trans-
13 fer and shall include a sworn statement by
14 the eligible taxpayer certifying the fol-
15 lowing:

16 “(I) Remedial actions which com-
17 ply with all applicable or relevant and
18 appropriate requirements (consistent
19 with section 121(d) of the Com-
20 prehensive Environmental Response,
21 Compensation, and Liability Act of
22 1980) have been substantially com-
23 pleted, such that there are no haz-
24 ardous substances, pollutants, or con-
25 taminants which complicate the ex-

1 pansion, redevelopment, or reuse of
2 the property given the property's rea-
3 sonably anticipated future land uses
4 or capacity for uses of the property.

5 “(II) The reasonably anticipated
6 future land uses or capacity for uses
7 of the property are more economically
8 productive or environmentally bene-
9 ficial than the uses of the property in
10 existence on the date of the certifi-
11 cation described in subparagraph
12 (C)(i). For purposes of the preceding
13 sentence, use of property as a landfill
14 or other hazardous waste facility shall
15 not be considered more economically
16 productive or environmentally bene-
17 ficial.

18 “(III) A remediation plan has
19 been implemented to bring the prop-
20 erty into compliance with all applica-
21 ble local, State, and Federal environ-
22 mental laws, regulations, and stand-
23 ards and to ensure that the remedi-
24 ation protects human health and the
25 environment.

1 “(IV) The remediation plan de-
2 scribed in subclause (III), including
3 any physical improvements required to
4 remediate the property, is either com-
5 plete or substantially complete, and, if
6 substantially complete, sufficient mon-
7 itoring, funding, institutional controls,
8 and financial assurances have been
9 put in place to ensure the complete
10 remediation of the property in accord-
11 ance with the remediation plan as
12 soon as is reasonably practicable after
13 the sale, exchange, or other disposi-
14 tion of such property.

15 “(V) Public notice that such re-
16 quest for certification would be made
17 was completed before the date of such
18 request. Such notice shall be in the
19 same form and manner as required
20 for public participation required under
21 section 117(a) of the Comprehensive
22 Environmental Response, Compensa-
23 tion, and Liability Act of 1980 (as in
24 effect on the date of the enactment of
25 this paragraph).

“(iii) ATTACHMENT TO TAX RETURNS.—A copy of each of the requests for certification described in clause (ii) of subparagraph (C) and this subparagraph shall be included in the tax return of the eligible taxpayer (and, where applicable, of the qualifying partnership) for the taxable year during which the transfer occurs.

“(E) ELIGIBLE REMEDIATION EXPENDITURES.—For purposes of this paragraph—

“(i) IN GENERAL.—The term ‘eligible remediation expenditures’ means, with respect to any qualifying brownfield property, any amount paid or incurred by the eligible taxpayer to an unrelated third person to obtain a Phase I environmental site assessment of the property, and any amount so paid or incurred after the date of the certification described in subparagraph (C)(i) for goods and services necessary to obtain a certification described in subparagraph (D)(i) with respect to such property, including expenditures—

“(I) to manage, remove, control, contain, abate, or otherwise remediate

1 a hazardous substance, pollutant, or
2 contaminant on the property,

3 “(II) to obtain a Phase II envi-
4 ronmental site assessment of the
5 property, including any expenditure to
6 monitor, sample, study, assess, or oth-
7 erwise evaluate the release, threat of
8 release, or presence of a hazardous
9 substance, pollutant, or contaminant
10 on the property,

11 “(III) to obtain environmental
12 regulatory certifications and approvals
13 required to manage the remediation
14 and monitoring of the hazardous sub-
15 stance, pollutant, or contaminant on
16 the property, and

17 “(IV) regardless of whether it is
18 necessary to obtain a certification de-
19 scribed in subparagraph (D)(i)(II), to
20 obtain remediation cost-cap or stop-
21 loss coverage, re-opener or regulatory
22 action coverage, or similar coverage
23 under environmental insurance poli-
24 cies, or financial guarantees required

1 to manage such remediation and mon-
2 itoring.

3 “(ii) EXCEPTIONS.—Such term shall
4 not include—

5 “(I) any portion of the purchase
6 price paid or incurred by the eligible
7 taxpayer to acquire the qualifying
8 brownfield property,

9 “(II) environmental insurance
10 costs paid or incurred to obtain legal
11 defense coverage, owner/operator li-
12 ability coverage, lender liability cov-
13 erage, professional liability coverage,
14 or similar types of coverage,

15 “(III) any amount paid or in-
16 curred to the extent such amount is
17 reimbursed, funded, or otherwise sub-
18 sidized by grants provided by the
19 United States, a State, or a political
20 subdivision of a State for use in con-
21 nection with the property, proceeds of
22 an issue of State or local government
23 obligations used to provide financing
24 for the property the interest of which
25 is exempt from tax under section 103,

1 or subsidized financing provided (di-
 2 rectly or indirectly) under a Federal,
 3 State, or local program provided in
 4 connection with the property, or

5 “(IV) any expenditure paid or in-
 6 curred before the date of the enact-
 7 ment of this paragraph.

8 For purposes of subclause (III), the Sec-
 9 retary may issue guidance regarding the
 10 treatment of government-provided funds
 11 for purposes of determining eligible reme-
 12 diation expenditures.

13 “(F) DETERMINATION OF GAIN OR
 14 LOSS.—For purposes of this paragraph, the de-
 15 termination of gain or loss shall not include an
 16 amount treated as gain which is ordinary in-
 17 come with respect to section 1245 or section
 18 1250 property, including amounts deducted as
 19 section 198 expenses which are subject to the
 20 recapture rules of section 198(e), if the tax-
 21 payer had deducted such amounts in the com-
 22 putation of its unrelated business taxable in-
 23 come.

24 “(G) SPECIAL RULES FOR PARTNER-
 25 SHIPS.—

1 “(i) IN GENERAL.—In the case of an
 2 eligible taxpayer which is a partner of a
 3 qualifying partnership which acquires, re-
 4 mediates, and sells, exchanges, or other-
 5 wise disposes of a qualifying brownfield
 6 property, this paragraph shall apply to the
 7 eligible taxpayer’s distributive share of the
 8 qualifying partnership’s gain or loss from
 9 the sale, exchange, or other disposition of
 10 such property.

11 “(ii) QUALIFYING PARTNERSHIP.—
 12 The term ‘qualifying partnership’ means a
 13 partnership which—

14 “(I) has a partnership agreement
 15 which satisfies the requirements of
 16 section 514(c)(9)(B)(vi) at all times
 17 beginning on the date of the first cer-
 18 tification received by the partnership
 19 under subparagraph (C)(i),

20 “(II) satisfies the requirements
 21 of subparagraphs (B)(i), (C), (D), and
 22 (E), if ‘qualified partnership’ is sub-
 23 stituted for ‘eligible taxpayer’ each
 24 place it appears therein (except sub-
 25 paragraph (D)(iii)), and

1 “(III) is not an organization
2 which would be prevented from consti-
3 tuting an eligible taxpayer by reason
4 of subparagraph (B)(ii).

5 “(iii) REQUIREMENT THAT TAX-EX-
6 EMPT PARTNER BE A PARTNER SINCE
7 FIRST CERTIFICATION.—This paragraph
8 shall apply with respect to any eligible tax-
9 payer which is a partner of a partnership
10 which acquires, remediates, and sells, ex-
11 changes, or otherwise disposes of a quali-
12 fying brownfield property only if such eligi-
13 ble taxpayer was a partner of the quali-
14 fying partnership at all times beginning on
15 the date of the first certification received
16 by the partnership under subparagraph
17 (C)(i) and ending on the date of the sale,
18 exchange, or other disposition of the prop-
19 erty by the partnership.

20 “(iv) REGULATIONS.—The Secretary
21 shall prescribe such regulations as are nec-
22 essary to prevent abuse of the require-
23 ments of this subparagraph, including
24 abuse through—

1 “(I) the use of special allocations
2 of gains or losses, or

3 “(II) changes in ownership of
4 partnership interests held by eligible
5 taxpayers.

6 “(H) SPECIAL RULES FOR MULTIPLE
7 PROPERTIES.—

8 “(i) IN GENERAL.—An eligible tax-
9 payer or a qualifying partnership of which
10 the eligible taxpayer is a partner may
11 make a 1-time election to apply this para-
12 graph to more than 1 qualifying brownfield
13 property by averaging the eligible remedi-
14 ation expenditures for all such properties
15 acquired during the election period. If the
16 eligible taxpayer or qualifying partnership
17 makes such an election, the election shall
18 apply to all qualified sales, exchanges, or
19 other dispositions of qualifying brownfield
20 properties the acquisition and transfer of
21 which occur during the period for which
22 the election remains in effect.

23 “(ii) ELECTION.—An election under
24 clause (i) shall be made with the eligible
25 taxpayer’s or qualifying partnership’s time-

1 ly filed tax return (including extensions)
2 for the first taxable year for which the tax-
3 payer or qualifying partnership intends to
4 have the election apply. An election under
5 clause (i) is effective for the period—

6 “(I) beginning on the date which
7 is the first day of the taxable year of
8 the return in which the election is in-
9 cluded or a later day in such taxable
10 year selected by the eligible taxpayer
11 or qualifying partnership, and

12 “(II) ending on the date which is
13 the earliest of a date of revocation se-
14 lected by the eligible taxpayer or
15 qualifying partnership, the date which
16 is 8 years after the date described in
17 subclause (I), or, in the case of an
18 election by a qualifying partnership of
19 which the eligible taxpayer is a part-
20 ner, the date of the termination of the
21 qualifying partnership.

22 “(iii) REVOCATION.—An eligible tax-
23 payer or qualifying partnership may revoke
24 an election under clause (i)(II) by filing a
25 statement of revocation with a timely filed

1 tax return (including extensions). A rev-
2 ocation is effective as of the first day of
3 the taxable year of the return in which the
4 revocation is included or a later day in
5 such taxable year selected by the eligible
6 taxpayer or qualifying partnership. Once
7 an eligible taxpayer or qualifying partner-
8 ship revokes the election, the eligible tax-
9 payer or qualifying partnership is ineligible
10 to make another election under clause (i)
11 with respect to any qualifying brownfield
12 property subject to the revoked election.

13 “(I) RECAPTURE.—If an eligible taxpayer
14 excludes gain or loss from a sale, exchange, or
15 other disposition of property to which an elec-
16 tion under subparagraph (H) applies, and such
17 property fails to satisfy the requirements of this
18 paragraph, the unrelated business taxable in-
19 come of the eligible taxpayer for the taxable
20 year in which such failure occurs shall be deter-
21 mined by including any previously excluded gain
22 or loss from such sale, exchange, or other dis-
23 position allocable to such taxpayer, and interest
24 shall be determined at the overpayment rate es-
25 tablished under section 6621 on any resulting

1 tax for the period beginning with the due date
 2 of the return for the taxable year during which
 3 such sale, exchange, or other disposition oc-
 4 curred, and ending on the date of payment of
 5 the tax.

6 “(J) RELATED PERSONS.—For purposes of
 7 this paragraph, a person shall be treated as re-
 8 lated to another person if—

9 “(i) such person bears a relationship
 10 to such other person described in section
 11 267(b) (determined without regard to
 12 paragraph (9) thereof), or section
 13 707(b)(1), determined by substituting ‘25
 14 percent’ for ‘50 percent’ each place it ap-
 15 pears therein, and

16 “(ii) in the case such other person is
 17 a nonprofit organization, if such person
 18 controls directly or indirectly more than 25
 19 percent of the governing body of such or-
 20 ganization.”

21 (b) EXCLUSION FROM DEFINITION OF DEBT-FI-
 22 NANCED PROPERTY.—Section 514(b)(1) of the Internal
 23 Revenue Code of 1986 (defining debt-financed property)
 24 is amended by striking “or” at the end of subparagraph
 25 (C), by striking the period at the end of subparagraph (D)

1 and inserting “; or”, and by inserting after subparagraph
2 (D) the following new subparagraph:

3 “(E) any property the gain or loss from
4 the sale, exchange, or other disposition of which
5 would be excluded by reason of the provisions
6 of section 512(b)(18) in computing the gross
7 income of any unrelated trade or business.”.

8 (c) EFFECTIVE DATE.—The amendments made by
9 this section shall apply to any gain or loss on the sale,
10 exchange, or other disposition of any property acquired by
11 the taxpayer after the date of the enactment of this Act.

○