



August 4, 2009

New Assessment on Contractors Performing Commercial Construction Jobs in Alabama

By Bruce P. Ely and Christopher R. Grissom

Several clients and friends of the firm have inquired, usually in response to a form notice they received from the Alabama Department of Revenue (ADOR) last week, regarding new tax legislation enacted during the 2009 Regular Session of the Alabama Legislature that applies to many general contractors and subcontractors. Act 2009-561, sponsored by Rep. John Knight and many others, was signed into law by Governor Riley on May 18 and became effective July 1. The Act imposes a new “fee” on general contractors and subcontractors performing or supervising commercial construction jobs in Alabama, based on the in-state wages they pay to their skilled “employees” (as broadly defined). This tax will be administered by the ADOR and is designed to fund a new program providing for the recruitment and training of skilled construction workers in the State.

The one-page notice from the ADOR is somewhat vague in its explanation of the new Act and this Bulletin is designed to fill in some of the gaps. The tax is paid quarterly and is based on the preceding calendar quarter’s Alabama wages, at a rate equal to nine one-hundredths of one percent (.09%) of those wages, with the first taxable quarter being July 1 through September 30, 2009 and *the first payment due October 31, 2009*. That rate will continue for five quarters and then will be adjusted upward or downward so that net collections will equal \$1.75 million for the Recruitment and Training Promotion Fund. A last minute amendment sunsets the Act four years after its effective date unless the Legislature, in the meantime, passes an amendment to the Act that extends its term.

For construction companies with substantial work in Alabama, this fee could be significant. And it is imposed directly on the employer (that is, on the prime contractors and their subcontractors), not the employees or independent contractor-laborers assigned to the project.

First, an “employee” is defined broadly as any full-time or part-time individual providing services to a covered employer in Alabama and seems to include individuals classified as independent contractor-laborers who are providing services on a “contractual basis.” Secondly, the taxable wage base for these “employees” is defined as their gross earnings paid by a covered employer, including not only salaries, wages and independent contractor payments, but “dismissal pay, bonuses, and vacation and sick leave pay...” Deductions or exclusions for such items as Social Security contributions, withholding taxes, health insurance premiums, union dues, etc. are not allowed.

The tax base is then narrowed, however, to include only “wages” paid for “skilled labor” of these employees. That definition includes only labor or services performed by “payroll workers directly engaged in construction operations...” at the Alabama job site and specifically *excludes* “labor or services performed by supervisory employees above the working foreman level.”

There are several exceptions or exclusions from the definition of a covered “employer,” including a general contractor or subcontractor who receives 5% or less of its “primary business” from business described in either North American Industry Classification System (NAICS) Codes 237 (Heavy and Civil Engineering Construction) or 238 (Specialty Trade Contractors). Also excluded are contractors or subcontractors engaged in residential homebuilding and licensed residential homebuilders, and any contractor or subcontractor “where the cost of the undertaking is or is expected to be . . .” less than \$50,000.

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Thankfully, the ADOR is working on proposed regulations, a set of frequently asked questions (FAQs) to post on its website, and the necessary forms/instructions. We have urged them to promptly issue the FAQs and forms/instructions since this tax must be e-filed through the ADOR's website and the first quarterly "fee" is due October 31.

According to one of the Birmingham partners in our firm's Construction Practice Group, Joel Brown, this new legislation serves as a reminder that contract documents should address responsibility for increased costs of performance related to events beyond the control of the parties, including new taxes imposed after contract execution. Additionally, the parties should address the appropriate flow-down of responsibility to comply with changed conditions (including new taxes or fees) and ultimate responsibility for the cost of compliance with changed conditions. The cost of performance may increase not only because of new laws, but also because of new interpretations of existing laws or regulations, and even new or different enforcement or performance of government functions (such as permitting). For example, if a government office were unable to process your permit applications as quickly as planned, who would be responsible for the increased time and costs associated with the permitting delay? We recommend that you review your contract documents carefully to ensure that risks associated with changes such as increased or new taxes, or changes related to other government activities, are adequately addressed, and if you are unsure, contact your counsel for assistance.

Hartman SALT Forum Program Announced

by Joseph W. Gibbs and Bruce P. Ely

The Professor Paul J. Hartman Memorial State and Local Tax Forum, sponsored in conjunction with the Vanderbilt University Law School, announced its list of topics and speakers for its 16th annual forum, set for September 23-25 at the Loews Vanderbilt Hotel in Nashville. The agenda is outstanding.

The Forum offers two half-day sessions on Wednesday and full-day sessions on Thursday and Friday. One half-day session focuses on the economic downturn, including "Corporate America's Reaction to the Economic Downturn," "Corporate Tax Planning in Recessionary Times," and "Promises Made/Promises Broken – Planning for State and Local Tax Incentives in Recessionary Times." The alternate half-day session focuses on "Hot Topics in Sales/Use Taxes."

The full-day sessions are on Thursday and Friday, September 24 and 25. The Thursday topics include "State Taxation of Flow-Through Entities and their Owners," "Ethical Considerations in Taxpayer/Department of Revenue Interaction," "Alternative Apportionment," combined reporting and add-back issues, "Unique Litigation Options," and a timely discussion of the practical approaches to the likely GAAP – IFRS conversion. The Friday session begins with the indefatigable Paul Frankel and Professor Rick Pomp, followed by an important new topic focusing on "State Tax Settlement Agreements – including Voluntary Disclosures." One of the most popular topics, a review of the top ten state tax cases in the country, will be presented again this year, along with Maryann Gall's and June Summers Haas' always extensive survey of recent and pending nexus cases.

This year's Moot Court presentation will be the controversial Massachusetts ruling in *Town Fair Tire Center*, which is now on appeal to the Massachusetts Supreme Judicial Court. The ruling has generated a renewed border war between Massachusetts and New Hampshire over Massachusetts' attempt to require New Hampshire automotive tire dealers to collect Massachusetts use tax on sales closed (and tires installed) in New Hampshire.

The Forum closes with the Southeast Roundtable, featuring a panel of SALT practitioners from each of the southeastern states who will review recent legislative and judicial developments in their respective states. The Southeast Roundtable speakers' state-specific outlines are valuable and timely reference sources.

This year's Forum looks to be one of the best ever. We hope you will make plans to attend. Mr. Gibbs is a Trustee and Mr. Ely is a member of the Advisory Board of the Hartman SALT Forum. For more details, please visit <http://www.hartmansaltforum.org/>.

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No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers. Contact: John B. Grenier, Esq., 1819 Fifth Avenue North, Birmingham, Alabama 35203.

