

State and Local Tax Bulletin

June 30, 2011

Tennessee Edition



2011 Tennessee Legislative Wrap-Up

By Joe Gibbs, Pat Moskal, Brett Carter and Brian Shelton



Over the past few years, the administration packaged the bulk of its proposed tax legislation and amendments into an omnibus "Technical Corrections bill," which typically was introduced late in the legislative session. In 2011, the new administration abandoned that practice and introduced proposed tax legislation through more individualized bills throughout the legislative session. We reported on several new tax laws passed by the General Assembly during 2011 in prior issues of our *SALT Bulletin: Tennessee Edition* dated [April 21](#) and [May 19](#), 2011. During the waning days of the legislative session, which adjourned May 21, 2011, the General Assembly passed several additional tax bills amending Tennessee's franchise/excise tax laws, tax incentives and credits, and property tax laws, among others. The following are highlights of the changes adopted in the legislative session.

Tax Incentives and Credits

Job Tax Credit and Additional Job Tax Credits

- Commissioners' discretion to reduce job-creation criteria modified. Public Chapter 508 revised Tenn. Code Ann. § 67-4-2109(b)(3)(I) to allow the Commissioners of Revenue and Economic and Community Development to lower the job thresholds for purposes of the additional annual job tax credit. Accordingly, the creation of as few as 50 new jobs (rather than the minimum of 100 jobs) may qualify for the additional annual job tax credits. The amendment requires, however, that if the job threshold is reduced, the amount of the credit also is reduced proportionately. The amendment also eliminates the Commissioners' discretion to lower wage and investment criteria and eliminates the requirement that the taxpayer be located in a central business district or economic recovery zone to be eligible for the reduced job thresholds.
- First year in which job tax credits may be claimed. Prior to the adoption of Public Chapter 508, at least 25 jobs were required to be created within one year following the effective date of the business plan to claim the job tax credit. Public Chapter 508 amends Tenn. Code Ann. § 67-4-2109(b) to provide that at least 25 qualified jobs must be created within the investment period, rather than one year following the effective date of the business plan. The credit first applies in the tax year in which the taxpayer first satisfies the capital investment and job creation requirements and in subsequent tax years within the investment period in which there is a net increase in qualified jobs. The amendment also provides that the additional annual job tax credit (also called the job tax super credit) may be taken beginning in the year in which the taxpayer qualifies for the job tax credit, at the taxpayer's election, but no later than the year following the end of the investment period. See Tenn. Code Ann. §§ 67-4-2109(b)(1)(C); 67-4-2109(b)(2)(C), as amended by Public Chapter 508.
- Taxpayers prevented from claiming multiple job tax credits. Public Chapter 508 clarifies that a taxpayer is not entitled to both the additional annual job tax credit for the tier 2 and tier 3 enhancement counties and the additional annual job tax credits for the capital investment and jobs creation thresholds. The enhancement county additional credits are 3 years for tier 2 counties and 5 years for tier 3 counties. The additional credits for the expenditure and job creation thresholds are 3 years for capital investments of at least \$10,000,000 up to 20 years for capital investments of \$1 billion or more. See Tenn. Code Ann. § 67-4-2109(b)(2)(D), as amended by Public Chapter 508.

Headquarters Relocation Credit Extended to Existing Tennessee Headquarters

Prior law provided a relocation credit to a taxpayer establishing a new headquarters facility in Tennessee. Public Chapter 508 amends Tenn. Code Ann. § 67-4-2109(h)(2) to allow the relocation credit for remodeled or expanded headquarters facilities already located in Tennessee. See Tenn. Code Ann. § 67-4-2109(h)(2), as amended by Public Chapter 508. The

definitions applicable to the Headquarters Relocation Expense Credit, as set forth in Tenn. Code Ann. § 67-6-224, also were revised, as described below. Other changes to the Headquarters Relocation Expense Credit are as follows:

- Commissioners granted discretion to reduce job creation threshold for credit. Similar to the job tax credits referenced above, Public Chapter 508 amends Tenn. Code Ann. § 67-4-2109(h)(9) to allow the Commissioners of Revenue and Economic and Community Development to lower the job thresholds for purposes of the headquarters relocation credit. Similar limitations described above apply to the reduced job threshold. See Tenn. Code Ann. § 67-4-2109(h)(9), as amended by Public Chapter 508.
- Period that facility must be used as headquarters modified. The period for which the taxpayer must use the headquarters facility to avoid recapturing the credit is measured from the end of the investment period rather than from substantial completion of the facility. See Tenn. Code Ann. § 67-4-2109(h)(5), as amended by Public Chapter 508.

Credit and Net Operating Loss Carryforward Amendments

Prior to the adoption of Public Chapter 508, the 15-year carryforward limitation on the industrial machinery credit, job tax credits and net operating losses was waived for taxpayers making a capital investment in excess of \$1 billion (and in some instances investments of \$100,000,000), provided that the Commissioners of Revenue and Economic and Community Development determined that the allowance of the additional carryforward was in the best interest of the state. Public Chapter 508 amends the current law to curtail the unlimited carryforward, and provides that it only applies to applications received and approved by the Commissioners on or before January 1, 2011. See Tenn. Code Ann. §§ 67-4-2006(c)(6) – (7); 67-4-2009(4)(C), as amended by Public Chapter 508.

Headquarters Sales Tax Credit

Public Chapter 508 amends Tenn. Code Ann. § 67-6-224 to allow the headquarters sales tax credit for remodeled or expanded headquarters facilities. Under prior law, the headquarters sales tax credit was available only in conjunction with the initial establishment of a headquarters facility. Public Chapter 508 also makes changes to the job and investment criteria and further defines the expenditures that qualify for the credit. Those amendments revised several of the definitions, including the definition of “qualified headquarters facility,” and “full-time employee job,” and limited the

Commissioners’ discretion to reduce the job creation threshold. Other changes include the following:

- Definition of “qualified headquarters facility” now includes requirement for job creation. Public Chapter 508 revises the definition of a “qualified headquarters facility” in Tenn. Code Ann. § 67-6-224, which also applies to the relocation expense credit under Tenn. Code Ann. § 67-4-2109(h). Under this amended definition, the taxpayer must make (i) the required capital investment, and (ii) create the required number of jobs. The minimum capital investment is \$10,000,000 and a minimum of 100 new full-time jobs must be created, in conjunction with the construction, expansion or remodeling of the headquarters facility. Under prior law, the taxpayer could meet the definition of a “qualified headquarters facility” by making a capital expenditure of at least \$50,000,000 without the requirement that the taxpayer create a required number of jobs. Now, the jobs threshold must be satisfied regardless of the amount of the capital expenditure. See Tenn. Code Ann. § 67-6-224, as amended by Public Chapter 508.
- Definition of “full-time employee job” revised. Public Chapter 508 revises the definition of “full-time employee jobs” in Tenn. Code Ann. § 67-6-224(b) (2), which also applies to the relocation expense credit under Tenn. Code Ann. § 67-4-2109(h) to provide that the jobs created must pay at least 150% of Tennessee’s average occupational wage to be counted toward the jobs thresholds in qualifying for the credit.
- Commissioners granted discretion to reduce job-creation threshold for credit. Similar to the headquarters relocation expense credit, Public Chapter 508 adds Tenn. Code Ann. § 67-6-224(e) to allow the Commissioners of Revenue and Economic and Community Development to lower the job thresholds for purposes of the headquarters relocation credit. Similar limitations described above apply to the reduced job threshold.
- To qualify for credit, jobs created by existing headquarters must be new jobs. Consistent with allowing the credit for expanded or remodeled facilities, the jobs threshold requires a net increase in employment above the level immediately preceding the beginning of the investment period (one year before the commencement of construction). See Tenn. Code Ann. § 67-6-224(b) (8), as amended by Public Chapter 508.
- Definition of qualified tangible personal property expanded. The definition of qualified tangible

personal property with respect to which the sales tax credit is allowed is further defined to be "property that is directly related to the creation of the new full-time employee jobs." It is not clear what personal property qualifies under the revised definition, but it appears to include any personal property necessary to construct, remodel or expand the headquarters facility and any furniture, fixtures and equipment used in the headquarters facility to perform headquarters functions. See Tenn. Code Ann. § 67-6-224(b)(11), as amended by Public Chapter 508.

Effective Dates for Tax Incentives and Credits

The foregoing amendments are effective July 1, 2011; provided that those provisions apply to "any written proposal by the department of economic and community development or the department of revenue on or after [July 1, 2011]." The effective date section appears to mean that the provisions allowing the commissioners to (i) extend the net operating loss carryforward provisions, (ii) extend the industrial machinery credit carryforward provision, and (iii) extend the carryforward provisions for the additional job tax credit only if an application is made on or before January 1, 2011 do not apply to taxpayers to which the department of revenue or department of economic and community development made a written proposal before July 1, 2011.

Other Tax Legislation

Refund Periods May Be Extended

Under prior law, Tennessee's taxpayer's refund statutes provided that a suit challenging the denial or deemed denial of a claim for refund must be filed within one year from the date the claim for refund was filed with the Commissioner of Revenue. Public Chapter 343 amends this provision and authorizes the Commissioner and the taxpayer to extend the one year period by agreement. See Tenn. Code Ann. § 67-1-1802(c), as amended by Public Chapter 343.

Expedited Letter Rulings

A welcome amendment to taxpayers requesting letter rulings, Public Chapter 449 amends the letter ruling process to allow taxpayers the option of requesting expedited letter rulings from the Commissioner of Revenue. The fee for expedited rulings shall not exceed \$10,000, and upon request, the Commissioner shall either issue the ruling within sixty (60) days from the date of the request or deny the expedited request and return the fee within seven (7) days after the request was submitted. The fee for all other letter ruling requests was increased from \$200 to \$500. See Tenn. Code Ann.

§§ 67-1-102(b)(9); 67-1-102(d)-(f), as amended by Public Chapter 449.

Gain on the Sale of Goodwill

Public Chapter 467 amends Tenn. Code Ann. §§ 67-4-2012 and 2111 to exclude from the numerator and denominator of the receipts factor of the apportionment formula gain on the sale of goodwill that is a Class VII asset as defined in the regulations promulgated under I.R.C. 338. The effect of the amendment is to exclude gain allocable to a sale of goodwill from the apportionment formula, which for out-of-state companies could have been included in the denominator but wholly excluded from the Tennessee factor, because under the cost of performance test the services that created the goodwill were performed outside Tennessee.

"Shares Tax" Repealed

Effective January 1, 2011, Public Chapter 438 repeals Tenn. Code Ann. § 67-5-1101 *et seq.*, known as the "shares tax," which imposed a property tax on the intangible value of loan companies, investment companies, and cemeteries. The tax had been on the books since 1907 but, after the tax was repealed as to banks in the 1970s, was not enforced uniformly, if at all. Beginning in 2008, certain counties began to assess the tax. Public Chapter 438 repeals the shares tax in its entirety. It also amends the excise tax statutes to provide that a portion of the excise tax paid by financial institutions, including loan or trust companies, and a portion of the excise tax paid by regulated investment companies, is to be paid to the local governments in replacement of the "shares tax."

Other Bills of Interest That Did Not Pass

"Tennessee Small Business Protection Act," Senate Bill 1614, House Bill 1914

Legislation that would have required combined reporting for unitary businesses and would have also made other changes to the definition of business earnings under Tennessee's excise tax failed to make it out of the House and Senate tax subcommittees.

"Out of State Sales Tax Act," Senate Bill 1489, House Bill 1912

A bill similar to the New York bill known as the Amazon.com bill was introduced again in Tennessee in 2011. It proposed to establish a rebuttable presumption that out-of-state internet retailers are subject to Tennessee's sales tax jurisdiction if the retailer receives potential customer referrals from Tennessee residents, whether by a link on an Internet website or otherwise, and the retailer's cumulative gross receipts through such referrals are in excess of \$4,800 for four consecutive quarterly periods. This bill did not pass.

U.S. News & World Report Ranking

Bradley Arant Boulton Cummings LLP has received the fourth highest number of top-tier rankings in the country in the inaugural U.S. News & World Report – Best Lawyers list of top U.S. law firms. As it has done for many years for hospitals and colleges, this year U.S. News, working with the attorney ranking company Best Lawyers in America, ranked U.S. law firms based on a number of criteria, including client satisfaction. We are pleased to note that each member of our SALT Practice Group who is a partner in the firm was also included in Best Lawyers in America this year, and in many cases has been included for many years prior as well.



4TH HIGHEST IN THE NATION

For more information, please contact Joe Gibbs, Pat Moskal, Brett Carter, or Brian Shelton at the numbers listed below.

Joseph W. Gibbs
(615) 252-2317
jgibbs@babac.com

Patricia Head Moskal
(615) 252-2369
pmoskal@babac.com

Brett R. Carter
(615) 252-2383
bcarter@babac.com

Brian S. Shelton
(615) 252-2313
bshelton@babac.com

Bradley Arant Boulton Cummings LLP Office Locations:

ALABAMA

One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35203
(205) 521-8000

200 Clinton Avenue West, Suite 900
Huntsville, AL 35801
(256) 517-5100

The Alabama Center for Commerce
401 Adams Avenue, Suite 780
Montgomery, AL 36104
(334) 956-7700

MISSISSIPPI

188 E. Capitol Street, Suite 400
Jackson, MS 39201
(601) 948-8000

NORTH CAROLINA

100 North Tryon Street, Suite 2690
Charlotte, NC 28202
(704) 332-8842

TENNESSEE

1600 Division Street, Suite 700
Nashville, TN 37203
(615) 244-2582

WASHINGTON, DC

1615 L Street, N.W., Suite 1350
Washington, DC 20036
(202) 393-7150

This newsletter is sent to our friends as a courtesy of Bradley Arant Boulton Cummings LLP. If you would prefer not to receive future emails of this type, please contact our practice group assistant Sherry Barber, at sbarber@babac.com.

This newsletter is a periodic publication of Bradley Arant Boulton Cummings LLP and should not be construed as legal advice or legal opinions on any specific facts or circumstances. The contents are intended for general information only, and you are urged to consult your own lawyer or other tax advisor concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our practice group.

The Alabama State Bar requires the following disclosure: "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."

©2011 Bradley Arant Boulton Cummings LLP

SALT Practice Group:

Bruce P. Ely, Chair
(205) 521-8366
bely@babac.com

Brett R. Carter
(615) 252-2383
bcarter@babac.com

Joseph W. Gibbs
(615) 252-2317
jgibbs@babac.com

W. Stanley Gregory
(334) 956-7604
sgregory@babac.com

Christopher R. Grissom
(205) 521-8514
cgrissom@babac.com

K. Wood Herren
(205) 521-8505
wherren@babac.com

Emil Hirsch
(202) 719-8211
ehirsch@babac.com

James E. Long, Jr.
(205) 521-8626
jelong@babac.com

Patricia Head Moskal
(615) 252-2369
pmoskal@babac.com

Brian S. Shelton
(615) 252-2313
bshelton@babac.com

William T. Thistle, II
(205) 521-8985
wthistle@babac.com

Robert D. Thorington
(334) 956-7609
rthorington@babac.com

Robert C. Walthall
(205) 521-8308
rwalthall@babac.com

Stephen M. Wilson
(601) 592-9957
swilson@babac.com

