Economic Development News

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2011 Regular Session and Recent Developments

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The following is a summary of a recent decision by the Alabama Court of Civil Appeals involving a taxpayer's attempt to retroactively claim certain property tax abatements, as well as legislation introduced in the recently-ended regular session affecting tax incentives and related economic development matters in Alabama. The Alabama bills discussed in this newsletter are posted on our firm's website.

Representative Greg Canfield Named Director of the Alabama Development Office

On July 6, Governor Bentley announced the appointment of Rep. Greg Canfield as the new director of the Alabama Development Office. With a background in business as well as public service, Canfield has been an instrumental policymaker and proactive supporter in the economic development of Alabama. As a municipal leader in Vestavia Hills, Canfield has been integral to the community's growth, recruiting investors in commercial properties and businesses, and creating the first long-range economic and land use plan. "He knows both large and small business, having worked for Fortune 500 companies and started a small business from the ground up," said Governor Bentley, "Greg has been deeply involved in significant job recruitment efforts at both the state and local level. I am pleased that he is willing to serve in this important role." Canfield expressed that he was simply eager to "build on Alabama's legacy as one of the most desirable states in which to locate business and industry…Now, more than ever, we must elevate Alabama as the preeminent state for business and job creation."

Dunn v. Sequa Corp. – Be Sure to Notify Tax Assessor of Any Abatements

In Dunn v. Sequa Corp., ___ So. 3d ___ (Ala. Civ. App. Jun. 24, 2011), the Alabama Court of Civil Appeals awarded a refund of certain property taxes that Sequa Corp. ("Sequa") erroneously paid on abated property in 2007, 2008, and 2009. In May 2005, the Industrial Development Board of the City of Hueytown and Sequa entered into a tax abatement agreement under TIRA to which Sequa was granted an abatement of certain noneducational property taxes. In 2007 and 2008, Sequa did not reference its tax abatements on its personal property tax returns, nor, despite instructions to do so from the ADOR, did Sequa notify the Jefferson County Tax Assessor of the abatements. Accordingly, Sequa paid real and personal property taxes based on a millage rate that did not take into account the tax abatements.

In December 2009, Sequa filed a petition for refund of the noneducational portion of property taxes it paid with the Jefferson County Probate Court pursuant to Ala. Code § 40-10-160, which provides refunds for taxes paid "through any mistake…or by any error in the assessment or collection of taxes." Although the taxing authorities argued that Sequa lost the right to its abatements by failing to notify the tax assessor, the Court

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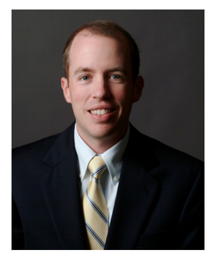

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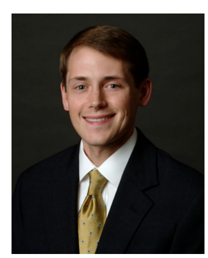

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concluded Sequa's failure was an inadvertent error for which a refund was available. The Court held that while a taxpayer is generally required to notify the tax assessor of an exemption, an exception to that general rule exists where the taxpayer's failure was a mistake or error. Therefore, the Court granted Sequa's refund petition because nothing in the record indicated that Sequa intentionally chose to reject the tax exemptions to which it was entitled by virtue of the tax abatement agreement.

2011 Regular Session – What Passed

Act 2011-155 (HB 61) – Small Business Health Care Deduction: effectively increases the state income tax deductions for both qualifying employees' and employers' (*i.e.,* those with less than 25 employees) payment of health insurance premiums to 200 percent of the health insurance premiums. A qualifying employee must be employed by a qualifying employer, earn no more than $50,000 in annual wages, and report no more than $75,000 in adjusted gross income ($150,000 if married filing jointly) during the applicable tax year.

Act 2011-551 (HB 230) – The Full Employment Act of 2011: This bill, promised by Governor Bentley in his State of the State speech, is designed to help small businesses (*i.e.*, no more than than 50 employees as of January 1, 2011) create new jobs by offering a one-time income or financial institution excise tax credit of $1,000 for each new job created. To be eligible for the credit, wages for the new employee must exceed $10 per hour. The credit is available in the tax year in which the new hire completes 12 months of consecutive employment, provided that the employer has a net increase in the total number of full-time employees in Alabama on the last day of such tax year. The credit may be claimed for any qualifying employee that is hired after June 9, 2011. The credit is not refundable or transferrable, but it is available to owners of pass-through entities on a pro rata basis. The credit may also be combined with the deduction available for hiring unemployed workers under the Reemployment Act of 2010, which also applies to tax year 2012.

Act 2011-648 (SB 477) – The Tariff Credit Act of 2011: is designed to encourage manufacturers to locate in Alabama by providing an income tax credit to companies investing in qualifying projects that meet certain minimum requirements. The minimum capital investment in order to qualify is $100 million, and the activities that qualify are similar to the industrial, warehousing, and research activities that qualify under the Capital Credit Act. In addition, the project must create at least 100 new jobs with a base wage of not less than the state's individual median income, and maintain the minimum employment level for at least eight years. Any project seeking the credit must go through a recommendation process involving the Alabama Development Office ("ADO"), the Alabama Department of Revenue ("ADOR"), and the Governor's office.

Approved investing companies would be eligible to receive a one-time transferrable income tax credit for a portion of their federal tariff costs during the term of the qualifying project, but the amount of the credit shall not exceed the lesser of $20 million or 20 percent of the total amount of the company's capital investment in the project. The total tariff credit allowed to any taxpayer (either the project owner or the transferee) is limited to $50 million, and the credit can be carried forward for up to three years. The credit is also available to owners of pass-through entities, trusts, and estates that invest in qualifying projects. The Act is scheduled to sunset on December 31, 2015, unless the Legislature votes to continue the credit.

Act 2011-616 (HB 434) – Double-Weighted Sales Factor and Market Sourcing: amends Article IV of Alabama Code § 40-27-1 (*i.e.*, Alabama's version of the Multistate Tax Compact) to double-weight the sales factor in the currently equally-weighted three-factor formula used to apportion business income to Alabama. By reducing the weight given to Alabama property and payroll, businesses with a physical presence in Alabama and sales in other states should be able reduce their Alabama apportionment factor, thereby reducing their Alabama income tax liability. In addition, the bill would amend Alabama's apportionment methodology by converting Alabama from a "cost of performance" state to a "market source" state for certain receipts from intangibles or services. This bill provides that sales of services and other intangible property would be sourced to Alabama if the taxpayer's market for the sales is in Alabama (*e.g.*, the customer receives the benefit of the service in Alabama, regardless of where the service is performed). Thus, sales to customers outside of Alabama would not be sourced to Alabama, thereby reducing a taxpayer's Alabama taxable income. According to officials from the ADOR, the market sourcing rule in this bill closely tracks the Multistate Tax Commission's model provision, including the "throw-out" feature.

Act 2011-216 (SB 77): provides that if the State of Alabama makes a commitment to a company to provide economic development funds as an incentive to build or expand in Alabama, the State and the company must enter into a mutually acceptable written agreement within five years after the date of the commitment in order for the commitment to be valid.

SB 493: Tornado Recovery Tax Incentive Protection Act of 2011: provides that any sales, use, or property tax abatements that may be otherwise granted pursuant to the Tax Incentives Reform Act of 1992 ("TIRA") shall not be subject to disqualification solely because the underlying property or transaction relates to repairs or replacement of property damaged during this Spring's devastating tornado outbreaks, as opposed to new construction. This expansion of TIRA is effective for any property acquired or transactions entered into before December 31, 2012. The Act also provides that the wage and employment requirements for Alabama's capital credit are tolled for two years for otherwise qualifying projects that were damaged by the tornadoes.

SB 255: makes several technical corrections to the film incentives portion of the Entertainment Industry Incentive Act of 2009, including clarifying the qualified expenditures applicable to a television series or commercial, and providing that the income tax credits are available in the year in which the production activity concludes. This bill also clarifies that the sales, use, and lodgings tax exemption only applies to the *state* portion of these taxes, and provides maximum expended amounts beyond which rebates and exemptions are not allowed.

Tax Legislation Likely to Be Introduced Next Session

We expect the following 2011 bills or similar proposals to be re-introduced, perhaps with amendments, next session:

HB 485 – Alabama Data Processing Center Economic Incentive Enhancement Act of 2011: In order to encourage large data centers to locate in Alabama, this bill would extend the time period for abatements of certain noneducational sales, use, and property taxes from the current 10 years to as long as 30 years, depending on the total capital investment, and would also allow abatements for recurring capital investment in a data center during the abatement period. Thus, if the aggregate capital investment in a data center is more than $100 million during the 10 years after it is completed, the abatement period would be extended from 10 to 20 years. If the aggregate capital investment in the data center is more than $300 million during the 20 years after it is completed, the abatement period would be extended to 30 years. This bill would also reduce the employment threshold from 50 new jobs to a minimum of 20 new jobs in order for a data center to qualify for sales, use, and property tax abatements, as well as capital credits.

HB 478 and SB 373 – Jobs Creation and Retention Act: would allow companies that undertake certain qualifying projects, similar to those listed in TIRA, to also qualify to receive "withholding incentives." If passed, new businesses would be entitled to retain up to 90 percent of the state income taxes withheld from the wages of its eligible employees and existing businesses could retain up to 75 percent. The incentives are designed to encourage the retention of existing jobs and create new jobs by increasing development and growth of industry within the state. Several competitor states offer these. The State Industrial Development Authority, the Governor, the ADO, and the ADOR would determine whether a project qualifies for the withholding incentives.

SB 15 and SB 50 – Tax Incentives for Companies that Create Jobs: These bills would provide a variety of tax incentives to Alabama companies that hire new employees if certain requirements are met. For instance, depending on the county in which the business is located, a job tax credit of between $1,500 and $8,000 per new employee would be available to taxpayers that increase employment by 10 or more full-time jobs and maintain that employment level. Moreover, if the employer has 99 or fewer employees, a job tax credit of between $750 and $4,000 per new employee is allowed if the employer increases employment by two or more full-time jobs, but only if the gross wages paid to the new employee are equal to or exceed 120 percent of the county's or state's average per capita income. Additional income tax credits would be available to taxpayers that employ persons who meet certain criteria prior to employment (*e.g.*, recipients of welfare benefits, unemployed disabled veterans, disabled persons, persons with felony convictions, and recipients of SSI).

Upcoming Conferences and Events

Please mark your calendars for the following upcoming conferences:

Economic Development Association of Alabama 2011 Summer Conference will be held August 7 - 10 at Perdido Beach Resort in Orange Beach, Alabama. For more information, please visit the EDAA website: www.edaa.org.

North Alabama Industrial Development Association Annual Conference to be held September 13-14 at the Westin in Huntsville, Alabama. For more information, please contact Cindy Burns at 256.353.9450.

SB 150: would allow a taxpayer that has operated an existing manufacturing, shipping, receiving, telecommunications, or support facility in Alabama for the previous three years to obtain a sales and use tax credit in an amount equal to five percent of the cost of all qualified investment property purchased or acquired by the taxpayer during the year. However, the sales and use tax credit would equal eight percent if the property purchased was recycling machinery or equipment, or pollution control or prevention equipment or machinery. To qualify for the sales and use tax credit, the purchase of the qualified investment property must occur after January 1, 2012; the aggregate cost of the property must exceed $50,000; and the purchase must not result in the loss of jobs at the location where the qualified investment property will be used. In addition, this bill would provide nonrefundable tax credits (presumably against the income tax, although the legislation does not specify) to employers that provide or sponsor one or more re-training programs approved by the Alabama Technology Network. The tax credit per employee would equal the lesser of one-half of the per employee cost of re-training or $500, subject to other limitations.

SB 126 – R&D Credit: would allow a nonrefundable research and development income or financial institution excise tax credit for qualified research expenses ("QREs") (as defined in I.R.C. § 41) that occur within the State of Alabama. The credit would be equal to 6.5 percent of the QREs, or 15 percent of the QREs that are incurred pursuant to written contracts with chartered universities within the state that provide the R&D. The R&D tax credit would also flow through to owners of pass-through entities, such as LLCs and S corporations, which qualify for the credit. Any unused credits may be carried forward for up to 10 years.

Please contact Chris Grissom, Jimmy Long, or Will Thistle of our Economic Development Practice Group to discuss any questions that you may have regarding these or any other matters that may impact your business.

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