

## ALABAMA TAX LEGISLATIVE SUMMARY: 2017 REGULAR SESSION, AND SOME UNOFFICIAL PREDICTIONS FOR UPCOMING SESSION(S)

Firm Alert - 6/19/2017

AUTHOR(S) **BRUCE P. ELY, CHRISTOPHER R. GRISSOM, JAMES E. LONG JR., WILLIAM T. THISTLE II**

The Alabama Legislature adjourned late Friday, May 19, with several tax bills crossing the finish line during the final week (and many on the last day). Both the Education Trust Fund and General Fund budgets were passed by the Legislature during the regular session (unlike last year) and signed by Gov. Ivey. However, there is an outside possibility that a special session could be called to reconsider either the gas tax proposals to fund infrastructure improvements or prison construction. Looking further ahead to the 2018 Regular Session, the budgets (especially the General Fund) may present more fiscal challenges that require legislators to consider either a reduction in spending, reallocation of revenues, or tax increases to address the revenue shortfall.

The following discussion generally focuses on bills of statewide importance that passed and were signed into law by Gov. Ivey, or that we expect to see again soon.

### I. INCOME TAXES/ECONOMIC DEVELOPMENT INCENTIVES

#### A. BILLS THAT WERE SIGNED INTO LAW

**Extension of Jobs Act Incentives to December 31, 2020 – Act 2017-314 (H.B. 574):** This act extended the sunset date of the Jobs Act incentives (investment credit and jobs credit) from December 31, 2019, to December 31, 2020, unless further extended by the Legislature. The act also revised the cap on the outstanding balance of these incentives to \$300 million on an annual basis (as opposed to an aggregate limit). Finally, the act also provides that the Jobs Act incentives will only be available if at least 80 percent of the new jobs created by the project are full time.

**Reinstatement of Alabama Historic Tax Credit (HTC) – Act 2017-380 (H.B. 345):** This act reinstates Alabama's HTC program by authorizing \$20 million in refundable income tax credits per year for five years, beginning January 1, 2018. While the Act is similar to the predecessor program, there are several important changes, including the refundable nature of the credit and the manner in which projects are selected for an HTC allocation, which are further summarized [here](#).

**Apportionment Formula for Financial Institution Excise Tax - Act 2017-165 (H.B. 263):** This act reinstates the inclusion of loans and credit card receivables in calculating the property factor for the financial institution excise tax, which would not have been included under the proposed department rule that takes effect later this year. However, this bill simplifies the sourcing of such loans by adopting the same sourcing methods as used to allocate and apportion the interest receipts from loans and credit card receivables to the state. Gov. Ivey signed the bill into law on April 20, 2017. The act is retroactively applicable for all tax years beginning on or after January 1, 2017.

**Increased Standard Deduction – Act 2017-405 (H.B. 346):** This act creates a new income tax return form, Form 40EZ, through which certain Alabama filers would be able to voluntarily claim a greater standard deduction against Alabama income tax in exchange for foregoing deductions and credits based on federal taxes paid, including the federal income tax deduction, as currently provided in Ala. Code § 40-18-15. To qualify for the optional increased deduction, an Alabama resident must have less than \$100,000 in Alabama gross income, with none of the income accruing from non-wage sources. Also, the option is only available to filers claiming no deductions or expenses based on dependents, nor claiming itemized deductions. The increased standard deduction for single filers would be at minimum \$2,250, with a minimum standard deduction for married taxpayers filing jointly of \$4,500. In each case, the personal exemption as provided in Ala. Code § 40-18-19 is preserved.

**Expanded Agricultural Irrigation Systems Tax Credit – Act 2017-66 (S.B. 257):** For tax years beginning after December 31, 2017, and through December 31, 2022, this act increases the income tax credit for the cost of the purchase and installation related to irrigation systems or the development of irrigation reservoirs and water wells, as well as certain conversion costs, to the greater of 20 percent of the

\* Note: The authors and other members of Bradley Arant Boult Cummings LLP were involved in many of the items of legislation discussed herein. Any opinions expressed herein are those of the authors and not necessarily those of their law firm, clients, or organizations with which they are involved.

qualifying costs not to exceed \$10,000 or 10 percent of the qualifying costs not to exceed \$50,000, whichever is greater. The increased cap of \$50,000 will sunset on December 31, 2022, unless extended by the Legislature.

## B. BILLS THAT DIDN'T PASS BUT WE WILL LIKELY SEE AGAIN

**S.B. 67 – Mandatory Unitary Combined Reporting (MUCR):** This perennial bill would repeal portions of the Alabama corporate income tax code that permit separate entity reporting and consolidated tax returns and required all corporate groups with at least one member doing business in Alabama to begin filing a unitary combined return, effective for tax years beginning after December 31, 2017. A public hearing before the Senate Fiscal Responsibility and Economic Development Committee was held on Wednesday, April 5, and several interested parties submitted well-reasoned and comprehensive testimony in opposition to the bill. The vote was 12-2 against this bill.

The bill would have essentially adopted the MTC's Proposed Model Statute of Combined Reporting, except that it does not provide any common ownership threshold in determining whether an entity is included in the unitary group. Almost all other states that impose MUCR (as well as the MTC's model MUCR regulations) require at least 50 percent common ownership. Consistent with prior MUCR proposals, this bill specifically restricts the use of tax credits, net operating losses (NOLs) and other post-apportionment deductions solely to the member that generated the attribute. In other words and despite the label "combined" report, all NOLs and other enumerated tax attributes could only be used by the individual member that generated such attribute and couldn't be used to offset the income or liability of other members of the unitary group.

The bill did *not* repeal either (a) Alabama's add-back statute that disallows certain intangible and interest expenses incurred between related parties (which will severely increase the risk of double taxation on these transactions), or (b) the relatively unproven restrictions on intercompany transfer pricing that largely parallel I.R.C. section 482.

**S.B. 123 – Credits for Donations to Scholarship Granting Organizations (SGOs) under the Alabama Accountability Act:** This bill amends the Alabama Accountability Act by providing income tax credits to participating trusts and estates and clarifies that corporations may offset their quarterly estimated income tax payments by the credit. Additionally, the bill expands the credit to include utility gross receipts tax liability. The bill also increases the cap on income tax credits for donations to scholarship-granting organizations such as the Alabama Opportunity Scholarship Fund (AOSF).

**H.B. 23 – Defined Contribution Compensation Plans:** This bill alters the state income tax treatment of benefits from defined contribution (e.g., profit-sharing and Section 401(k)) retirement plans. If enacted, H.B. 23 would exempt 20 percent of any defined contribution plan income from Alabama income tax for the year 2018, with the exemption increasing by 20 percent each year thereafter until the year 2022, and then 90 percent of such income would be exempt from state income tax annually.

**Conformity to Bipartisan Budget Act of 2015 Amendments allowing audits/assessments of Subchapter K Entities at the entity-level?**

**Conformity to U.S. Treasury Department's proposed debt-equity reclassification regulations?**

## II. TRANSACTIONAL TAXES

### A. BILLS THAT WERE SIGNED INTO LAW

**Reporting Requirements for Sellers; Simplified Seller's Use Tax Program Amended – Act 2017-82 (S.B. 86):** This Act authorizes, effective July 1, 2017, the Alabama Department of Revenue (ADOR) to require reporting of retail sales and customer notification if the seller does not collect either sales, use, or simplified sellers use tax. The Act subjects noncompliance with these reporting requirements to penalties, but leaves all the details to be fleshed out by ADOR regulations. With respect to the Simplified Seller's Use Tax Program, the Act expands the definition of an "eligible seller" to remove the condition that would have prohibited an otherwise qualifying participant from establishing physical presence for at least six months after entering the program and removed the requirement that the invoice contain the eligible seller's Alabama account number. The Act also permits ADOR to disclose the name of eligible sellers, the date they began participating in the program, and the date they ceased participating (if applicable).

**Tax Exemption Reform Act of 2017 – Act 2017-149 (S.B. 181):** This act repeals certain language related to "community chests" and "united appeal funds" and substitutes a defined term for "United Way," including its member agencies. Existing (usually church-related) united appeal funds are grandfathered, provided they continue to maintain their annual exemption certificate issued by ADOR.

**Sales/Use Tax Exemption for Southern Research Institute – Act 2017-386 (S.B. 75):** One of the few tax exemption bills that passed this session, this act exempts the Southern Research Institute from paying any state, county, and municipal sales and use taxes. In accordance with the reporting requirements enacted in 2015, the Southern Research Institute is required to file an annual informational report with ADOR. However, the information on such reports is not subject to Alabama's statutory confidentiality provisions and must be provided to the Legislative Fiscal Office on an annual basis.

**Professional Photography Services Sales/Use Tax Exemption – Act 2017-397 (H.B. 290):** This act comes in the wake of last year's landmark Alabama Court of Civil Appeals ruling in *Ala. Dep't of Revenue v. Omni Studio, LLC*, and codifies a sales and use tax exemption for services provided by photographers, such as sitting fees and consultation fees, even when provided as part of a transaction ultimately involving the sale of photographs, provided that the exempt services are separately stated to the customer on the bill of sale, invoice or similar receipt. Additionally, the bill prohibits ADOR and localities from seeking payment for uncollected sales tax or unremitting use tax on these services *prior to October 1, 2017*. The provisions of the bill "shall apply retroactively to all open tax years and tax periods for which a preliminary assessment or final assessment could be entered," but also prohibits the filing of any refund claims for periods prior to May 26, 2017.

**Equalization of Local Interest Rates and Expanded Delivery License Exception – Act 2017-415 (S.B. 316):** This act equalizes state and local interest rates on delinquent sales, use, lodging and rental taxes (tied to the federal underpayment rate), and thus would prohibit self-administered municipalities and counties from charging 1 percent per month (12 percent annually). This act also exempts any business who delivers tangible personal property into a municipality in an amount less than \$10,000 annually from the requirement to purchase a business license if it otherwise lacks physical presence in that jurisdiction.

**Montgomery County Rental Tax Authorized – Act 2017-465 (H.B. 594):** This act authorizes the Montgomery County Commission to levy a rental tax on the leasing or rental of tangible personal property within the county, of up to 2 percent (or 0.75 percent for the leasing or renting of any automotive vehicle, truck trailer, semi-trailer, or house trailer). However, the rental or passenger vehicles and trucks are not subject to the rental tax (which are subject to the state-level rental tax).

## B. BILLS THAT DIDN'T PASS BUT WE WILL LIKELY SEE AGAIN

**H.B. 392 – Lodgings Tax Exemption:** In response to the Alabama Tax Tribunal's decision in *Stone Bridge Farms, LLC v. Ala. Dep't of Revenue*, this bill would stipulate that any portion of a hotel, inn, tourist camp or cabin, or any other place which regularly furnishes rooms, lodgings, or accommodations to transients, which is not used as temporary living quarters, is not subject to state lodgings tax. Echoing the Tax Tribunal's decision in *Stone Bridge Farms*, the bill specifically exempts convention facilities, banquet halls, and meeting rooms in a facility from state lodgings tax. Additionally, this bill prevents any such rentals from being classified as "amusements" for sales/amusement tax purposes.

**S.B. 216 – Reliance on ADOR's Website for Correct Local Tax Rate a/k/a "Retailer's Hold Harmless Bill":** S.B. 216 would relieve taxpayers of any liability for collecting and charging the incorrect sales, use, rental, or lodgings tax rate if they relied on the rate published on the ADOR's website, including relief from any penalties or interest as under current law.

## H.B. 487 – Increased Gasoline Taxes for Infrastructure Improvements

## III. MISCELLANEOUS TAXES/PROCEDURAL MATTERS

### A. BILLS THAT WERE SIGNED INTO LAW

**Excess Funds from Real Estate Tax Sales – Act 2017-130 (S.B. 95):** This act clarifies that the process for calculating, distributing and retaining any excess proceeds from the sale of real estate for taxes (including interest on such proceeds) shall be governed by Ala. Code § 40-10-28, regardless of when the tax sale occurred. Further, any prior actions made in good faith reliance on 2014 amendments to this section, regardless of when the sale occurred, are ratified, validated and affirmed.

**Tax Preparer Requirement / Business Privilege Tax Return Date – Act 2017-363 (H.B. 46):** This bill seeks to (1) require tax return preparers located within the state to provide federal preparer identification numbers on all Alabama tax returns prepared; (2) synchronize the Alabama business privilege tax return due date with the corresponding date for federal returns, while linking the return date for financial institutions to the same date for excise tax returns; and (3) effectuate a title change of the position of Taxpayer Advocate to "Taxpayer Assistance Officer."

**Forest Products Severance and Manufacturer Taxes – Act 2017-301 (H.B. 313):** This act overhauls and simplifies the statutory language concerning Alabama's antiquated forest products severance taxes. Notable changes implemented by the bill include allowing and requiring all taxpayers to collect and report the severance taxes due based on weight (as opposed to volume), providing that the former processors (now referred to as manufacturers) tax is only imposed on in-state manufacturers, and also allowing users of pulpwood chips to substantiate their severance tax exemption by obtaining a certificate from the licensed seller. The bill also creates a new exemption for "fuel chips" that are produced at the site of severance to encourage the use of renewable energy. Finally, the bill also clarifies under various scenarios where forest products should not be subject to double taxation, and provides that these clarifications "shall apply retroactively to all open tax periods and all periods for which a preliminary or final assessment of tax could be or was entered."

**Combatting Identity Theft-Related Refund Fraud – Act 2017-227 (H.B. 87):** This act authorizes the ADOR to partner with other state agencies, federal and private sector programs designed to reduce or eliminate identity theft-related refund fraud. This act also amends the Electronic Tax Filing Act to require ADOR to standardize the method of filing returns, methods of payment and license application, whenever feasible. Finally, this act includes electronic payments to the "bad check" penalty in the amount of 10 percent of the payment (or \$10 if less than \$500).

**Alabama Tax Tribunal Will Not Hear Abandoned Motor Vehicle Appeals or Contested Case Proceedings – Act 2017-441 (H.B. 234):** This act makes one jurisdictional change and one technical correction to the Alabama Taxpayer Fairness Act of 2014 (ATFA) that established the Alabama Tax Tribunal. The first is to remove the option to appeal the pending sale of an abandoned motor vehicle and thus require that these appeals be filed in the circuit court of the county where the sale is to occur. The technical change is to clarify that the Alabama Tax Tribunal shall not be subject to declaratory judgment, declaratory ruling or contested case provisions of the Alabama Administrative Procedure Act, and thus appeals from a final order of the Tax Tribunal continue to be governed by provisions of ATFA.



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