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ALABAMA DEPARTMENT OF REVENUE REVENUE RULING 95-001

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TO:

FROM: Commissioner of Revenue
Alabama Department of Revenue

DATE: January 13, 1995

RE: Will income and job development fee tax credits be available to an "approved company" after 1997 and 1999 if the State Legislature fails to reaffirm the tax incentives of Act 93-851, Acts of Alabama 1993, 1st Ex Sess?

FACTS

The Alabama Legislature passed two statutes that allow the State Industrial Development Authority ("Authority") to issue bonds and to loan the proceeds of such bonds to "approved companies" to finance such developments. The statutes provide incentives to induce companies to locate in Alabama by granting tax credits matched to and limited by the annual debt service paid on the project bonds. Act 93-851, Acts of Alabama 1993, 1st Ex. Sess., codified at §41-10-44.1, et seq., Code of Alabama 1975, empowered the Authority to issue bonds for the purpose of funding industrial development projects and granted the income and job development fee tax credits. Act 93-852, Acts of Alabama 1993, 1st Ex. Sess. adds the tax credit provisions to Title 40 of the Alabama Code. Act 93-851 has a sunset provision that is triggered in 1997 or 1999 if the Legislature does not reaffirm the incentive program. Act 93-852 does not contain a sunset provision.

The taxpayer, Company A entered into an agreement, under which the Authority issued a bond to Bank and loaned the proceeds to Company A for the construction of a qualifying project. Company A will be liable for the payment of principal and interest on the bond. The term of the bond will extend beyond 1999. Accordingly, the cost-benefit analysis provided to the Authority by Company A projected tax credits beyond 1999.

ISSUE

Whether income and job development fee tax credits will be available to Company A after 1997 and 1999 if the State Legislature fails to reaffirm the tax incentives of Act 93-851.

LAW AND ANALYSIS

Section 4 of Act 93-851 includes the following sunset provision:

[T]here shall be a moratorium on the grant of any future tax incentives under the provisions of this act if the Legislature does not enact a Joint Resolution with recorded vote to continue the provisions of this act by the end of the 1997 Regular Session of the Legislature. The Legislature must enact a Joint Resolution with recorded vote to affirm the tax incentive provisions of this act by the end of the 1999 Regular Session and by the end of the Regular Session every two years thereafter or the tax incentive provisions of this act shall become null and void.

Act 93-851's sunset provision will not abrogate income and job development fee tax credits for Company A with respect to tax years after the 1997 and 1999 "sunset" dates for three reasons: First, the intent of the Legislature was for the credits to continue beyond the termination of Act 93-851's tax incentives in 1997 or 1999. Second, regardless of the fate of Act 93-851, Act 93-852's status as a "reference statute" shields the tax credits it provides in Title 40 from the effect of Act 93-851's sunset provision. Third, Act 93-851's sunset provision should not operate retrospectively because Company A will have a vested contract right to credits after 1997 or 1999.

First, the intent of the Legislature, as evidenced by the language of Act 93-851 as a whole, was for the credits to continue beyond the termination of Act 93-851's tax incentives in 1997 or 1999. This intent must be determined by interpreting Act 93-851 as a consistent whole. See Gulf Coast Media, Inc. v. Mobile Press Register, Inc., 470 So.2d 1211, 1213 (Ala. 1985); Norandal USA, Inc. v. State Department of Revenue, 545 So.2d 792, 793 (Ala. Civ. App. 1989). The Legislature clearly expressed its intent that Act 93-851 "induce the location or expansion of industrial and research facilities within the State in order to promote the public purpose of creating new jobs." See §41-10-44.1. Act 93-851 provides for the establishment of tax increment funds for the retirement of bonds issued to pay for approved projects. See §41-10-44.9 (providing that an approved company may pay amounts equal to the income and job development fee tax credits into the fund instead of retaining such amounts). The Legislature authorized the payment of these tax credits into the tax increment fund on an annual basis over

the term of the bonds. Further, the Legislature authorized approved companies to make the annual tax credit payments into tax increment funds for up to twenty-five years and authorized the issuance of bonds "payable solely or in part from the monies in any such Tax Increment Fund. . . .". See §41-10-44.8. Thus, the Legislature clearly intended a stream of tax credit payments sufficient to support the sale of long-term tax increment bonds secured by the cumulative credits to which the bondholders would have sole recourse. Consequently, the Legislature could not have intended Act 93-851's sunset provision to terminate tax credits after 1997 or 1999 for companies whose projects were financed before 1997 or 1999, as applicable, because such an interpretation would presume that the Legislature, with its right hand, granted the power to issue tax increment bonds and, with its left hand, snatched away the realistic possibility of doing so by abrogating the sole security of the bondholders. Accordingly, Company A should continue to receive tax credits with respect to debt service payments after 1997 or 1999.

Second, regardless of the fate of Act 93-851, Act 93-852's status as a "reference statute" shields the credits it provides in Title 40 from the effect of Act 93-851's sunset provision. Traditionally, if one statute refers to another statute by specific or descriptive words, the adopting statute is deemed to have incorporated the referenced statute as of the time the adopting statute was enacted such that subsequent modification or repeal of the referenced statute will not affect the adopting statute. See R.J. Fox, Annotation, Effect of Modification or Repeal of Constitutional or Statutory Provision adopted by Reference in Another Provision, 168 A.L.R. 627, 632 (1947). In contrast, if the adopting statute refers to the law generally on a particular subject, the adopting statute is deemed to incorporate subsequent changes to such general law. Id. Act 93-852's addition to Title 40 of the Code specifically references the sections added to Title 41 of the Code by Act 93-851. See §40-18-38(b)(1) Code of Alabama 1975, (Supp. 1994). Thus, the specific reference construction applies and dictates that the 1997 or 1999 expiration or repeal of Act 93-851 would not alter or affect the tax credits to Company A.

Third, Act 93-851's sunset provision will not abrogate the credits accruing to Company A because Company A will have a vested contract right in tax credits extending beyond 1999. Generally, the expiration or repeal of a statute divests all rights accruing thereunder except vested rights. Bryson v. Central Electric Co., 402 So.2d 922, 923-24 (Ala. 1981) (quoting 1A J. Sutherland, Statutes and Statutory Construction, §23.34 (Sands ed. 1972)). The contract between Company A and the Authority includes all the documents executed by the Authority and Company A pursuant to Acts 93-851 and 93-852, including the cost-benefit analysis and its reference to the use of the income and job development fee tax credits as the inducement which prompted Company A to construct and operate the qualifying project in Alabama. Company A has fulfilled its

obligation by irrevocably agreeing to pay principal and interest on the twenty-five year bond issued by the Authority to finance the project. Thus, Company A's right to future credits have vested and the subsequent expiration or repeal of Act 93-851 will not divest Company A of its right to credits for the remaining term of the bond, including the periods after 1997 and 1999.

RULING

Company A will be entitled to income and job development fee tax credits after 1997 or 1999 even if the Legislature does not reaffirm the incentive program.

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