



State of Alabama Department of Revenue

Montgomery, Alabama 36132

GEORGE E. MINGLEDORFF III
Assistant Commissioner

LEWIS A. EASTERLY
Secretary

RALPH P. EAGERTON, JR.
Commissioner

ALABAMA DEPARTMENT OF REVENUE REVENUE RULING 95-003

This document may not be used or cited as precedent. Code of Alabama 1975, §40-2A-5(a).

TO:

FROM: Commissioner of Revenue
Alabama Department of Revenue

DATE: April 6, 1995

RE: Revenue Ruling 95-003

FACTS

The proposed transaction which constitutes the subject of this ruling consists of the construction and operation of a new Alabama-based manufacturing facility (the "Facility"). The pertinent parties include "LLC", "Corporation A", "Corporation X", and the State Industrial Development Authority ("SIDA"). The Facility will be owned by or leased to LLC, a Delaware limited liability company. LLC will not own any assets or conduct any business operations other than those related to its interest in the Facility. LLC will be owned, in part, by Corporation A, which will hold a 50% membership interest in LLC. (The remaining membership interest in LLC will be held by corporations which are not discussed in this ruling.) Corporation A, a Delaware corporation, is a wholly-owned, special-purpose subsidiary of Corporation X. Corporation A will hold no assets and will conduct no business, other than its interest in the Facility, which will be attributable to Corporation A via its membership interest in LLC.

Corporation A and LLC applied separately with SIDA for status as an "approved company," pursuant to §41-10-44.4, Code of Ala. 1975 (1994 Cum. Supp.), and each has been so designated by SIDA. LLC has been structured so as to classify as a partnership in accordance with Treasury Regulation § 301.7701-2, and Corporation A will be classified as an association for purposes of that same regulation. Due to the ownership of the stock of Corporation A by Corporation X, Corporation A will be ineligible to make an S election pursuant to § 1362 of the Internal Revenue Code of 1986, as amended.

Corporation A has committed to enter into one or more "financing agreements" with SIDA, as that term is defined in §41-10-44.2, Code of Ala. 1975 (1994 Cum. Supp.). SIDA will issue bonds (constituting "project obligations," as that term is defined in §41-10-44.2) to finance a portion of the cost of the Facility, pursuant to §§41-10-44.6 and -44.7, and will loan a portion of the net proceeds of the bonds to Corporation A. The portion of the proceeds to be loaned by SIDA to Corporation A will correspond to Corporation A's 50% membership interest in LLC. The financing agreements between Corporation A and SIDA will provide that certain capital expenditure and employment level requirements established by SIDA will be met by LLC. Pursuant to these financing agreements, SIDA will issue its bonds, payable solely from the amounts received by SIDA pursuant to separate notes executed to SIDA from each of the members of LLC, including Corporation A. This will result in Corporation A agreeing to repay the debt service on that portion of the bonds issued by SIDA which corresponds to Corporation A's membership interest in LLC.

Corporation A will lend to LLC the proceeds of Corporation A's borrowing from SIDA. The loan agreement between Corporation A and LLC will provide for the direct transfer of all of these proceeds to a master construction fund to be used exclusively and in its entirety by LLC to construct the Facility and to pay a portion of the "project costs," as that term is defined in §41-10-44.2. LLC will enter into a master financing arrangement, contemplating the financing agreements and the issuance of debt by LLC and SIDA, as well as any mortgages or other security arrangements necessary to secure the debt of LLC and SIDA to third parties. To facilitate certain financing arrangements, all or a substantial portion of the Facility may be owned by the Industrial Development Board ("Board") of a city, or some other state or local agency. In such event, the Board will lease the Facility (or the portion owned by it) to LLC.

As required by current Alabama Department of Revenue regulations, Corporation A will enter into a separate written agreement with the Department of Revenue regarding the method or methods to be used to determine the income generated by or arising from the Facility project with respect to Corporation A. It is contemplated by Corporation A that this agreement will provide that 100% of the income of LLC will constitute income generated by or arising from the Facility project, since LLC plans to conduct no business operations other than the Facility. If LLC documents to the Department of Revenue that the Internal Revenue Service classifies LLC as a limited liability company for tax purposes, the members of LLC, including Corporation A, will be liable for income tax only in their individual capacities, pursuant to §40-18-24, Code of Ala. 1975. Corporation A will file annual corporate income tax returns in Alabama and, if applicable, will include its

distributive share of net income attributable to Corporation A's membership interest in LLC.

Corporation A will not employ any workers at the Facility; all such workers will be employed and paid by LLC. Therefore, Corporation A does not plan to be eligible to withhold and retain job development fees, as provided in §41-10-44.8(a)(2) and -44.8(b). LLC does not plan to issue bonds or to make any debt service payments directly to SIDA pursuant to any financing agreement.

ISSUE

Whether or not Corporation A will be entitled to receive credits against its Alabama corporate income tax liability, pursuant to §41-10-44.8(a)(1), Code of Ala. 1975 (1994 Cum. Supp.), with respect to Corporation A's share of income generated by or arising from the Facility project?

ANALYSIS

Pursuant to §41-10-44.4, Code of Ala. 1975 (1994 Cum. Supp.), SIDA has the power to designate an applicant as an "approved company" and to authorize the undertaking of the approved company's "project." The term "project" is defined as "any land, building or other improvement . . . which shall be located in the state and shall be acquired, constructed, expanded or installed for use by an approved company as an industrial or research enterprise." Section 41-10-44.2. To provide financing for a project, SIDA is authorized to issue "project obligations," pursuant to §41-10-44.6; with that term being defined in §41-10-44.2 as any bond, note, debenture, or other form of indebtedness.

Once SIDA issues its project obligations to finance a project for an approved company, the approved company shall receive a corporate income tax credit, if applicable, and may elect to withhold and retain certain job development fees. Section 41-10-44.8. The tax credit authorized in §41-10-44.8(a)(1) would apply against an approved company's corporate income tax on its income generated by or arising from the project. Such credit could not exceed the lesser of (i) the amount due in tax, or (ii) the amount paid by an approved company in that tax year, pursuant to a financing agreement, which amount corresponds to debt service on the project obligations.

Section 41-10-44.8(a) states that the tax credit incentive "shall be available to an approved company whose project is financed by the authority's project obligations. . . ." (Emphasis added.) Therefore, these incentives are available only to an approved company that owns (or has an undivided interest in) a project.

Here, all SIDA debt proceeds will be transferred to a master construction fund to be used exclusively and in its entirety by LLC to construct the Facility and to pay a portion of the "project costs." Also, LLC will execute a master financing arrangement, which will contemplate the financing agreements and the issuance of debt by LLC and SIDA, as well as any mortgages or other security arrangements necessary to secure the debt of LLC and SIDA to third parties. Furthermore, LLC will own (or lease) and operate the Facility, and all Facility workers will be employed and paid by LLC. Clearly, LLC is the approved company which owns the Facility project for purposes of §41-10-44.8(a).

The question then becomes whether or not Corporation A can claim ownership of the Facility project through its membership in LLC. Section 10-12-23(a) and (b), Code of Ala. 1975, states the following:

(a) Property may be acquired, held, and conveyed in the name of the limited liability company. Any estate in real property may be acquired in the name of the limited liability company and title to any estate so acquired shall vest in the limited liability company itself rather than in the members individually.

(b) All property originally contributed to the limited liability company or subsequently acquired by a limited liability company by purchase or otherwise is limited liability company property. A member has no interest in specific limited liability company property.

(Emphasis added.) In this respect, the characteristic of a limited liability company differs completely from that of a partnership. (See §§10-8-70 through -72, Code of Ala. 1975, where the property rights of a partner include that partner's rights in specific partnership property, which is considered to be co-owned by the partners.) Such distinctions are acknowledged, however, in the Alabama Limited Liability Company Act. Section 10-12-8, Code of Ala. 1975, states that "[t]he terms 'partnership' and 'limited partnership,' when used in any chapter or title other than this chapter, the Alabama Partnership Act [including §§10-8-70 through -72, as referenced earlier], and the Alabama Limited Partnership Act of 1983 . . . include a limited liability company" (Emphasis added.)

Since Corporation A neither owns nor has such an interest in the Facility, the tax credit of §41-10-44.8(a)(1) will not be available directly to Corporation A. Unlike property ownership, however, a limited liability company is treated as a partnership for tax purposes. Therefore, a limited liability company's income, deductions, and tax credits are allowed to pass directly to its members. §40-18-24. The question then becomes whether or not the tax credit authorized in §41-10-44.8(a)(1) will be

allowed for LLC. If so, then this credit will pass from LLC to Corporation A.

As stated earlier, the tax credit authorized in §41-10-44.8(a)(1) is a credit against the corporate income tax levied by §40-18-31. Since LLC presumably will be treated as a partnership for tax purposes, LLC will not be subject to the tax of §40-18-31. Therefore, LLC can not generate the tax credit in question; consequently, there will be no such credit to pass to Corporation A.

Based on the foregoing, Corporation A will not be entitled to receive credits against its Alabama corporate income tax liability, pursuant to §41-10-44.8(a)(1), Code of Ala. 1975 (1994 Cum. Supp.), with respect to Corporation A's share of income generated by or arising from the Facility project.

Ralph P. Eagerton, Jr., Commissioner
Alabama Department of Revenue

RPE:JP:pj232A