

ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 01-013

THIS DOCUMENT MAY NOT BE USED OR CITED AS PRECEDENT. §40-2A-5(a), CODE OF ALABAMA 1975.

TO:

FROM: Cynthia Underwood
Commissioner, Alabama Department of Revenue

DATE: April 17, 2002

RE:

FACTS

The facts as stated in your ruling request are as follows:

“ABC Corporation (“ABC”) is engaged in the manufacturing of products. ABC is a calendar year taxpayer. ABC recently formed a wholly-owned limited liability company, ABC Alabama, L.L.C. (“LLC/Buyer”). LLC/Buyer is a single-member limited liability company and as such is a disregarded entity for federal income tax purposes.

LLC/Buyer and XYZ Company, L.L.C. (herein “LLC/Seller” or “Target”), signed an asset purchase agreement, whereby LLC/Buyer agreed to purchase substantially all the assets of LLC/Seller. A copy of the agreement is attached hereto as Exhibit A. LLC/Seller is a Delaware limited liability company which has three members, all of whom are unrelated to ABC. LLC/Seller operated a mill in Alabama. Production at the Alabama facility began in 1997. On March 22, 2001, LLC/Seller ceased operations and on March 27, 2001, it filed a voluntary petition for reorganization under Chapter 11 (“Chapter 11”) of the Federal Bankruptcy Code (“Bankruptcy Code”) in the United States Bankruptcy Court (“the Court”). LLC/Seller currently employs only a skeletal staff in order to maintain and guard its assets at the Alabama facility. LLC/Seller manages its assets as a debtor-in-possession subject to Court approval. On November 16, 2001, ABC, on behalf of LLC/Buyer, wired to the transaction's escrow agent a sum of money as a deposit for its purchase of the LLC/Seller assets. The closing of the asset purchase transaction will occur upon approval of the transaction by all relevant governmental authorities and by the Court.

ABC currently operates a plant at its facility in Alabama.”

ISSUES

1. Whether or not the sale of LLC/Seller's assets to LLC/Buyer will be deemed a casual sale and, therefore, exempt from sales and use tax?
2. Whether or not a single-member limited liability company is disregarded for Alabama income and sales and use tax purposes?
3. Whether or not LLC/Buyer will succeed to the capital credit of LLC/Seller upon the same conditions applicable to LLC/Seller?
4. Whether or not the transfer of real property from LLC/Seller to LLC/Buyer, pursuant to a Chapter 11 bankruptcy plan, will be exempt from deed recording tax?
5. Whether or not mortgage recording tax will be due if LLC/Buyer purchases LLC/Seller's assets, including an option to purchase real property currently owned by the Industrial Development Board?
6. Whether or not deed recording tax will be due with respect to a deed granted by the Industrial Development Board to LLC/Buyer upon LLC/Buyer's exercise of an option to purchase real property?
7. Whether or not LLC/Buyer may enter into a new abatement agreement with the Industrial Development Board for a new ten-year abatement period concerning non-educational ad valorem taxes?

ANALYSIS

1. Whether or not the sale of LLC Seller's assets to LLC/Buyer will be deemed a casual sale and, therefore, exempt from sales and use tax?

Section 40-23-2(1), Code of Alabama 1975, levies a sales tax "[u]pon every person, firm, or corporation, ... engaged or continuing within this state, in the business of selling at retail any tangible personal property whatsoever...." Department Regulation 810-6-1-.33 provides as follows:

Casual Sales.

- (1) Other than the exception noted in (3) below, casual or isolated sales by persons not engaged in the business of selling are not required to be reported to the Department of Revenue by the provisions of the Sales Tax Law.

(2) Other than the exception noted in (3) below, tangible personal property purchased outside Alabama from a person not engaged in the business of selling is not subject to use tax when brought into this state for use, storage, or consumption.

(3) Casual sales of automotive vehicles, motorboats, truck trailers, trailers, semitrailers, travel trailers, and manufactured homes are subject to sales or use taxes pursuant to the provisions of Section 40-23-100, et. seq., Code of Alabama 1975. See Sales and Use Tax Rule 810-6-5-.11.05. (Readopted through APA effective October 1, 1982, amended February 23, 1988, amended October 30, 1993, amended October 4, 1994)

LLC/Seller's sale of its assets to LLC/Buyer will be exempt from sales tax as a casual sale, with the exceptions noted in the previously-quoted regulation.

2. Whether or not a single-member limited liability company is disregarded for Alabama income and sales and use tax purposes?

Section 10-12-8(b), Code of Alabama 1975, states that, "for purposes of taxation, other than Chapter 14A of Title 40, a domestic or foreign limited liability company shall be treated as a partnership unless it is classified otherwise for federal income tax purposes, in which case it shall be classified in the same manner as it is for federal income tax purposes." Pursuant to this section, the Department issued Revenue Procedure 98-001, which provides that single-member and multiple-member LLCs "will be classified as they are classified for federal income tax purposes under the Internal Revenue Service's 'check-the-box' regulations." Therefore, for Alabama tax purposes, LLC/Buyer will be classified as it is classified for federal purposes; i.e., as a disregarded entity.

3. Whether or not LLC/Buyer will succeed to the capital credit of LLC/Seller upon the same conditions applicable to LLC/Seller?

Alabama law provides for a tax credit known as a "capital credit" for certain new businesses and expansions. Section 40-18-193(c) states the following:

A change of ownership or assignment of interest in any qualifying project shall not qualify the qualifying project or any taxpayer to receive any additional capital credits, and the purchaser, assignee, or successor of the qualifying project or interests therein shall be entitled to the capital credit upon the same conditions and for the same period as the investing company or companies originally entitled to the capital credit.

LLC/Buyer, as a "purchaser, assignee, or successor of the qualifying project", will succeed to the remainder of the capital credit of LLC/Seller upon the same conditions and for the same period applicable to LLC/Seller, as long as LLC/Buyer complies with the statutory

and regulatory requirements concerning the capital credit. LLC/Buyer shall not be entitled to any additional capital credit, however. Id.

As discussed in the response to Question 2, a single-member LLC is classified for state tax purposes as it has elected to be classified for federal tax purposes. Therefore, LLC/Buyer, as a single-member LLC, will be disregarded for state tax purposes because of its election pursuant to the federal check-the-box regulations. Any capital credit of LLC/Seller to which LLC/Buyer succeeds must be passed on to ABC, as the only member of LLC/Buyer.

4. Whether or not the transfer of real property from LLC/Seller to LLC/Buyer, pursuant to a Chapter 11 bankruptcy plan, will be exempt from deed recording tax?

Title 11, §1146(c), United States Code, states the following: "The issuance, transfer, or exchange of a security, or the making or delivery of an instrument of transfer under a plan confirmed under section 1129 of this title, may not be taxed under any law imposing a stamp tax or similar tax."

Alabama's recording taxes are found in §40-22-1 and §40-22-2, Code of Alabama 1975. These taxes are included within the phrase "stamp tax or similar tax", as that phrase is used in 11 U.S.C. §1146(c). Therefore, the recording of instruments executed between LLC/Seller and LLC/Buyer will be exempt from Alabama's recording taxes, pursuant to §1146(c), so long as these instruments issue, transfer, or exchange a security, or transfer property, and so long as these instruments arise from a bankruptcy plan confirmed by the appropriate bankruptcy court pursuant to §1129 of Title 11. A copy of the plan confirmation should be presented with the instruments to be recorded.

5. Whether or not mortgage recording tax will be due if LLC/Buyer purchases LLC/Seller's assets, including an option to purchase real property currently owned by the Industrial Development Board?

LLC/Buyer proposes to purchase LLC/Seller's assets, subject to LLC/Seller's obligations to the Industrial Development Board ("IDB") with respect to certain tax-exempt bonds issued by the IDB. Concerning these bonds, a mortgage was rendered by the IDB to a bank, as trustee for the bondholders. Your question is premised upon a scenario in which LLC/Buyer, upon its purchase of LLC/Seller's assets, will become the obligor in this mortgage, but will not record a new mortgage.

Alabama's recording taxes, found in §40-22-1 and §40-22-2, are levied upon the act of recording certain instruments. Therefore, no recording tax will be due upon LLC/Buyer's purchase of LLC/Seller's assets, even if LLC/Buyer becomes obligated pursuant to the mortgage, unless there is a recording of a deed, mortgage, or similar instrument. Any subsequent abatement of recording taxes must comport with the requirements of §40-9B-1, et seq.

6. Whether or not deed recording tax will be due with respect to a deed granted by the Industrial Development Board to LLC/Buyer upon LLC/Buyer's exercise of an option to purchase real property?

Section 40-9B-6, Code of Alabama 1975, provides for an application process for the granting of abatements. Here, there is no indication that LLC/Buyer has been given an abatement of recording taxes by the IDB. Therefore, the recording by LLC/Buyer of a deed from the IDB to LLC/Buyer, upon LLC/Buyer's exercise of its option to purchase, will be subject to deed recording tax, unless LLC/Buyer receives an abatement of recording tax from the IDB, pursuant to the provisions of §40-9B-1, et seq.

7. Whether or not LLC/Buyer may enter into a new abatement agreement with the Industrial Development Board for a new ten-year abatement period concerning non-educational ad valorem taxes?

Section 40-9B-4(b), Code of Alabama 1975, states the following:

No abatement of noneducational ad valorem taxes may exceed the maximum exemption period. No further abatement with respect to the same private use industrial property may be granted unless there is a major addition to the property, in which event abatement may be granted only with respect to the noneducational ad valorem taxes on the major addition by complying with the procedures set forth in this chapter.

Department Regulation 810-4-3-.03 states the following:

(7) Change of ownership or assignment of interest of the property of a nonoperating industrial or research enterprise to an unrelated party shall qualify the property for a new abatement if the new owner or private user otherwise qualifies for an abatement as though a new industrial or research enterprise was established in the state.

a. A nonoperating industrial or research facility will be considered one that has ceased operation for a period of six consecutive calendar months.

Because the validity of this regulation is in question, I decline to issue a ruling concerning Question 7.

CYNTHIA UNDERWOOD
Commissioner, Alabama Department of Revenue

CU:jp:pj

