

ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 97-011

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

TO:

FROM: Commissioner, Alabama Department of Revenue

DATE: September 19, 1997

RE: Employees of non-investing company

FACTS

L.L.C., an Alabama limited liability company, is planning to construct a facility (the "Facility") in Alabama (the "Project Site"). In addition to the main product, the Facility will generate other products, with each of these products being sold to numerous entities. (The entirety of the land, buildings, and all real or personal property used in connection with the Facility is referred to in this ruling as the "Project.")

Corporation "X" will operate and maintain the Project for an initial term of 15 years. The projected number of employees who will work at the Project Site not later than one year after the Facility is placed in service is 35. Of these, 27 employees will be on the payroll of Corporation "X" and 8 will be on the payroll of L.L.C. Corporation "X" will be reimbursed by L.L.C. for all compensation and payroll-related expenses which will be associated with the Corporation "X" employees located at the Project Site. For purposes of the Project and the "capital credit" provisions of Act 95-187, Corporation "X" is not an "investing company."

Previously, L.L.C. was designated as an "approved company" by the State Industrial Development Authority for purposes of Act 93-851. It has elected, however, to claim the capital credit provided in Act 95-187, in lieu of the tax incentives in the 1993 Act. To this end, L.L.C. has filed a Report of Intent to

Invest in Project (Form INT) for the Project.

ISSUE

Whether or not the number of employees who are employed by Corporation "X" and who will work at the Project Site may be counted by L.L.C. toward its minimum number of jobs for new employees required by §40-18-190, et seq., Code of Alabama 1975?

ANALYSIS

Act 95-187 provides for an income tax credit against an Alabama income tax liability with respect to income generated by certain "qualifying projects." This income tax credit is an annual percentage of the "capital costs" of such "qualifying projects" and commonly is referred to as the "capital credit." The 1995 Act has been codified as §40-18-190, et seq., Code of Ala. 1975 (1996 Cum. Supp.), and recently was amended by Act 97-446.

Section 40-18-193(a)(1) provides that a prerequisite to receiving a capital credit is that "[n]ot less than 20 jobs for new employees at a qualifying project other than a small business addition be provided" As quoted in L.L.C.'s ruling request, subsection (b) of §193 states the following:

The Legislature recognizes that one or more entities may enter into a joint venture in the form of a limited liability company, partnership, or other form of business entity in connection with a qualifying project. It is the intent of this article that the requirements of this article respecting minimum capital costs and employment be applied to the qualifying project and that the capital credit be available and granted to those entities liable for or against which the state income tax is allocated or assessed with respect to the income generated by or arising out of the qualifying project. It shall not be a requirement of this article that the entity employing any new employees be the same entity entitled to receive the capital credit so long as the requirements of capital costs and new employees are implemented and maintained with respect to the qualifying project.

Based on this language, L.L.C. argues that the identity of the employer is not relevant in determining whether or not an investing company has reached the minimum requirement of 20 jobs for new employees. Specifically, L.L.C. states that "[t]his statute squarely addresses the issue posed by [L.L.C.], a limited liability company. Although the capital credit will be received by and allocated

among the investing companies of L.L.C., a majority of the new employees at the Project Site will be employed by an entity that is not an investing company."

Such a reading by L.L.C. constitutes a misconstruction of §40-18-193(b). First, it is clear from the first sentence of that subsection that (b) applies to joint ventures. Here, L.L.C. does not claim that Corporation "X" is a joint venturer in the Project, nor is Corporation "X" an investing company. Second, as quoted earlier, the third sentence in §193(b) states the following: "It shall not be a requirement of this article that the entity employing any new employees be the same entity entitled to receive the capital credit" In this sentence, the double use of the word "entity" is a direct reference to the "entities" which form a joint venture, as referenced in the first sentence of §193(b). In other words, if a qualifying project is undertaken by joint venturers, then the joint venture entity which employs the new employees does not have to be the same joint venture entity which receives the capital credit.

Here, however, L.L.C. is attempting to have another company provide employees toward L.L.C.'s "new employee" minimum requirement when that other company is not a joint venturer or an investing company in the Project. The capital credit law does not authorize such a practice.

For example, §40-18-193(f), as provided by Act 97-446, states the following concerning continued compliance with the capital credit's employment and wage requirements: "Any investing company that meets the employment and wage requirements of this section by a date which is not later than one year after the date on which the qualifying project is placed in service, but fails to meet such requirements in any subsequent Compliance Year, may still claim the capital credit for each Compliance Year in which such investing company again meets the employment and wage requirements of this section." As stated expressly, it is the investing company (here, L.L.C.) which must meet the employment and wage requirements in order to claim the capital credit. L.L.C. may not count the employees of Corporation "X" toward L.L.C.'s minimum requirements. Similar language concerning the responsibility of the investing company to comply with the employment and wage criteria is found in §40-18-197 and §40-18-198.

CONCLUSION

The provisions of §40-18-190, et seq., Code of Ala. 1975 (1996 Cum. Supp.) (as amended by Act 97-446), authorize the receipt of a capital credit by an entity other than the entity employing new employees only when the qualifying project is undertaken as a joint venture. Section 40-18-193. In such a case, the new employees still must be employed by a joint venture entity.

Here, the 27 Corporation "X" employees at issue will be employed by a company which is not a joint venturer or an investing company in the Project. Consequently, L.L.C. may not count the 27 Corporation "X" employees toward L.L.C.'s required total of 20 jobs for new employees. Hopefully, this ruling sufficiently answers your request.

H. E. "Gene" Monroe, Jr.
Commissioner, Alabama Department of Revenue

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