ALABAMA DEPARTMENT OF REVENUE
REVENUE RULING 97-015

This document may not be used or cited as precedent. Ala. Code §40-2A-5(a) (1993 Replacement Volume).

TO: Company A

FROM: Commissioner of Revenue
Alabama Department of Revenue

DATE: October 17, 1997

RE: Whether the acquisition of an Approved Company will allow the acquiring company to be eligible to continue receiving the benefits of Ala. Code §40-10-44.8.

FACTS

Company A is a newly-formed Alabama corporation wholly-owned by Parent. Company A was formed for the purpose of acquiring substantially all of the assets and business, and assuming substantially all of the obligations and liabilities, of Company B and Company C, both Alabama corporations.

Company B is in the business of designing, manufacturing, selling, distributing and servicing air and hydraulic cylinders. In connection with the expansion of its activities, Company B applied to become and was approved as an Approved Company under Act 93-851 (the "Act"). Pursuant to the provisions of the Act, the State Industrial Development Authority ("SIDA") issued its bonds and lent the proceeds thereof to Company B pursuant to a Loan Agreement between SIDA and Company B. Pursuant to Alabama Code Section 41-10-44.8, Company B has been receiving a corporate income tax credit and collecting job development fees from its employees in amounts needed to pay its debt service obligations under the Loan Agreement.

Company A has entered into negotiations for the acquisition of Company B and Company C, with a final agreement and closing anticipated on or before the end of 1997. While the definitive Asset Purchase Agreement is not yet finalized and executed, the parties anticipate that Company A will purchase substantially all of the assets and assume substantially all of the liabilities of Company B.

Company A anticipates that it will continue the present operations in Alabama, will retain substantially the same employees, manufacture substantially the same products, sell to the same customers, and in all other respects succeed to the business and goodwill of Company B. In addition, Company A will be assigned all Company B's rights in and will assume all Company B's liabilities under the Loan Agreement with SIDA (including providing a Substitute Letter of Credit) and will assume substantially all of Company B's liabilities for bank debt, trade accounts payable, and accrued liabilities.

ISSUE

Whether Company A will succeed to Company B's status as an Approved Company under the Act eligible to continue receiving the benefits of Ala. Code §41-10-44.8

ANALYSIS

Act 93-851 is codified in Sections 40-10-44.1 to 40-10-44.15 of the Alabama Code. Section 40-10-44.1 sets forth the legislative purposes of the Act.

> The legislature has found and determined that the economic well-being of the citizens of the State of Alabama will be enhanced by the increased development and growth of industry within the state and that it is in the best interests of the state to induce the location or expansion of industrial and research facilities within the state in order to promote the public purpose of creating new jobs within the state.

The section concludes by stating that "This article shall be liberally construed in conformity with the intentions of the Legislature expressed above."

The Alabama Code is silent as to whether an Approved Company (as defined in Section 41-10-44.2 of the Code) may assign its rights to take advantage of the incentives provided by the Act in conjunction with the sale of a Project or the transfer of a Project as part of a sale of substantially all of the assets of the Approved Company.

The Alabama Court of Civil Appeals faced a similar issue regarding the transfer of tax incentives in *International Paper Company v. Broadhead*, 662 So.2d (Ala. Civ App 1995). In *International Paper*, the court reversed the lower court and held that certain tax incentives (franchise tax credits in that case) granted a corporation survived the merger of the corporation into another corporation despite language in the incentive agreement with the Department of Revenue prohibiting assignment or transfer of the agreement without the consent of the state (which had not been obtained). After reviewing the relevant corporate law, the court held that a merger was not a transfer or assignment for purposes of prohibiting the survival of the tax incentives. The court went on to support its decision by stating:

> The purpose of §40-14-41(d)(2)(d) was to increase jobs in Alabama counties in which the unemployment rate was above the national average. This statute was created to induce foreign corporations to invest heavily in certain economically depressed counties of Alabama during 1985-1990. The objective of this statute could not have been merely to bring temporary jobs to these counties, but also to continue, if not increase, these employment opportunities. Hammermill Penn invested $107 million in Dallas County in order to qualify for the credit. It is undisputed that PCO subsequently took over all of Hammermill Paper Company's assets and assumed its liabilities, as well as its work force. The objective of the statute would clearly be thwarted if IPCO is denied the right of its predecessor's statutory credit.

While this ruling request presents a somewhat analogous situation, *International Paper* is not dispositive of this question. While for business reasons the parties have not structured the acquisition as a statutory merger, Company A is succeeding to Company B's assets, assuming Company B's liabilities, and assuming Company B's work force.

In contrast to *International Paper,* the relevant documents including the Preliminary Agreement, and the Loan between Company B and the SIDA do not prohibit assignment. In fact, Company B and Company A have represented that they are obtaining all necessary consents and approvals set forth in Sections 4.01(1) and 5.02(d) of the Loan Agreement to have Company A assume Company B's liabilities and obtain Company B's rights under the Loan Agreement. Since the loan agreement contemplates assignment and the statute granting benefits to an Approved Company is silent as to transfers, one must assume that the benefits can be transferred as long as the business remains substantially the same as when it qualified.

In this instance, the form of the transaction, an asset purchase, has been chosen for business reasons unrelated to the tax incentives now enjoyed by Company B and the increased investment and jobs enjoyed by the citizens of Alabama. As related to the legislative intent to increase investment and create jobs in Alabama, the instant transaction does not represent any substantive change. Company A will continue Company B's capital investment and will continue to provide the jobs that the Legislature intended to encourage.

CONCLUSION

Based on the facts and all discussed above, Company A is entitled to succeed to Company B's status as an Approved Company under Ala. Code §41-10-44.2 and to receive the related tax incentives under Ala. Code §41-10-44.8.

H. E. "GENE" MONROE, JR.

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