

Alabama: Tax Incentives Legislation: A Recap of the State's Productive 2011 Regular Session

By BRUCE P. ELY AND CHRISTOPHER R. GRISSOM
Bradley Arant Boult Cummings LLP
Birmingham, Alabama

Copyright © July 2011. Bruce P. Ely and Christopher R. Grissom. Members of the authors' firm were involved in drafting or amending several of the bills discussed herein. This article appears in and is reproduced with the permission of the Journal of Multistate Taxation and Incentives, Vol. 21, No. 5, August 2011. Published by Warren, Gorham & Lamont, an imprint of Thomson Reuters.

The Alabama Legislature adjourned *sine die* at midnight on 6/9/11, with final passage of the Education Fund and General Fund budgets and the remaining "Handshake with Alabama" bills offered by the Republican Caucus, thereby concluding what many are calling one of most prolific legislative sessions in recent history. Several important economic development proposals designed to encourage job creation and attract foreign investment in Alabama crossed the finish line during the last weeks of the session and have now been signed into law by Governor Robert Bentley (R).

This session may indeed be called one of the most productive in terms of passing major incentives legislation, largely due to a pro-incentives/pro-jobs governor and pro-business majorities in both the House and Senate, led by, respectively, Speaker Mike Hubbard and President Pro Tempore Del Marsh. Those bills are discussed below.

Small-business health care deduction. H.B. 61, 4/21/11 (Act No. 2011-155) amends Ala. Code §40-18-15.3 to increase the state income tax deductions for both qualifying employees' and employers' payments of health insurance premiums from 50% to 100% of the health insurance premiums paid. This deduction is in addition to any other Alabama income tax deduction to which the taxpayer may be entitled with respect to the payment of health insurance premiums.

A "qualifying employee" is an Alabama resident who (1) is employed by a qualifying employer, (2) earns no more than \$50,000 of annual wages, and (3) reports no more than \$75,000 of adjusted gross income (\$150,000 if married filing jointly) on the Alabama individual income tax return during the applicable tax year. A "qualifying employer" is one with less than 25 employees.

Full Employment Act. H.B. 230, 6/9/11 (Act No. 2011-551), created the Full Employment Act of 2011, effective for tax years beginning after 2010. As promised by Governor Bentley in his State of the State speech, this Act offers a one-time tax credit of \$1,000 for each new job created by "small businesses" (i.e., those having no more than 50 employees on the effective date of the Act). The credit may be claimed against either the "financial institution excise tax" (Title 40, ch. 16) or the income tax (Title 40, ch. 18), and is available in the tax year in which the new hire completes 12 months of consecutive employment.

To be eligible for the credit, the new employee must be hired after 6/9/11 (i.e., the date the Act was signed into law) and the wages for the new job must be more than \$10 per hour. In addition, the employer must have a net increase (1) in the total number of full-time employees in Alabama on the last day of each tax year during which employees are hired for which the employer claims a credit, over (2) the

number employed in Alabama as of the last day of the tax year immediately preceding the first employment year.

The credit is neither refundable nor transferrable, but it is available to owners of pass-through entities on a pro rata basis. Also, the credit may be combined with the deduction available for hiring unemployed workers under Alabama's Reemployment Act of 2010, which applies to tax years 2011 and 2012. (The Reemployment Act (H.B. 260, 4/22/10; Act No. 2010-557) was discussed in Ely and Long, "Alabama: Helpful Q&As Issued on New Hiring Incentives Legislation," 20 JMT 32 (September 2010) .)

Tariff Credit Act. Created by S.B. 477, 6/9/11 (Act No. 2011-648), the Tariff Credit Act of 2011 has a limited focus: it is designed to encourage foreign manufacturers to locate in Alabama by providing an income tax credit to companies investing in qualifying "projects" that meet certain requirements. A "project" is "any land, building, or other improvement, and all real and personal properties deemed necessary or useful in connection therewith, whether or not previously in existence, located or to be located in the state."

For a project to qualify, the predominant trade or business activity conducted must constitute industrial, warehousing, or research activity (as determined by descriptions published under the federal Office of Management and Budget's North American Industry Classification System). The capital investment for the project must be at least \$100 million and the project must create at least 100 new, full-time jobs, with an average hourly wage at least equal to Alabama's median individual income as determined by the U.S. Bureau of the Census.

An approved "investing company" would be eligible to receive a transferrable income tax credit for certain federal "tariff costs" imposed on the company. An "investing company" is "any corporation, partnership, limited liability company, proprietorship, trust, or other business entity, regardless of form, or a related party, making a qualifying investment."

The "tariff costs" are "all final and preliminary duties imposed ... pursuant to 19 U.S.C. Section 1671 19 U.S.C. Section 1671 through Section 1677(n) Section 1677(n) during the term of a qualified project ... for products to be produced by a qualifying project."

The tariff credit may not exceed the lesser of \$20 million or 25% of the investing company's total capital investment in the qualifying project. The total credit allowed to any one taxpayer is limited to \$50 million. An investing company is permitted a one-time transfer of all tariff credit to a transferee taxpayer; the transferee taxpayer may not transfer the credit. The credit may be applied against the investing company's state income tax liability or, if applicable, the transferee taxpayer's state income tax or financial institution excise tax liability for up to three years from the date of the Notice of Tariff Credit provided pursuant to the Act. Also, the Act provides for the availability of the credit to owners of pass-through entities.

Any project intending to seek the tariff credit must go through a recommendation process involving the Alabama Development Office, the Alabama Department of Revenue, and the governor's office. Upon the governor's approval of a tariff credit for the investing company, the Department issues a Notice of Tariff Credit to the company and specifies in writing the total available credit approved for the qualifying project and the rights and limitations for use of the tariff credit by the investing company or a transferee taxpayer.

The Tariff Credit Act is effective for tax periods beginning after 2010 but no tariff credits will be available for new qualifying projects after 2015, unless the legislature votes to continue or reinstate the credit.

Apportionment; market sourcing. Although not technically a tax incentives bill, H.B. 434, 6/9/11 (Act No. 2011-616) amends Article IV of Ala. Code §40-27-1, Alabama's version of the Multistate Tax Compact (MTC), to double-weight the sales factor in the currently equally weighted three-factor formula (property, payroll, and sales) used to apportion business income to Alabama. In addition,

the legislation amends Alabama's apportionment methodology by converting Alabama from a "cost of performance" state to a "market source" state for certain receipts from sales of intangibles or services, employing to some extent the language from the Multistate Tax Commission's regulation (Reg. IV.17) interpreting MTC Article IV and Uniform Division of Income for Tax Purposes Act (UDITPA) §17 (other than those authorities' continued use of "cost of performance").

This legislation provides that sales of services and other intangible property would be sourced to Alabama "if the taxpayer's market for the sale is in this state" (e.g., the customer receives the benefit of the service in Alabama, regardless of where the service is performed). It also contains a throw-out provision. This legislation is effective for tax years beginning on or after 12/31/10.

(For more on market sourcing generally, see, e.g., Sutton, Yesnowitz, Jones, and Conley, "The Nuances of Market-Based Sourcing of Service Revenue: Not All Markets Look the Same," 21 JMT 6 (May 2011) . For another state's view on this area, see Sutton, Yesnowitz, and Jones, "Nothing is Easy: California Changes Its Service Apportionment Rules—Yet Again," 20 JMT 14 (August 2010) .)

Tornado recovery protection. The Tornado Recovery Tax Incentive Protection Act of 2011 (S.B. 493, 6/14/11; Act No. 2011-709), provides that any tax abatement that may be otherwise granted pursuant to the state's Tax Incentives Reform Act of 1992 (TIRA) will not be lost solely because the underlying property or transaction relates to repairs or replacement (as opposed to new construction) of property damaged in the devastating tornado outbreaks in April 2011. This expansion of TIRA is effective for any property acquired or transactions entered into before 12/31/12.

In addition, ad valorem tax abatements in existence at the time the tornados hit will not be disallowed because of an interruption of a qualifying business activity at the site lasting through 10/1/11, and directly attributable to those tornados. The Act also provides that the wage and employment requirements for Alabama's capital credit are tolled for two years for otherwise qualifying projects that were damaged by the tornados.

(For more on TIRA, as well as the capital credit, see, e.g., Grissom and Long, "Alabama: Recent Changes in Tax Incentives Focus on Energy and Green Technologies," 20 JMT 36 (June 2010) ; "Alabama: State Enacts Improvements to Capital Credit," 12 JMT 40 (June 2002) .)

Entertainment industry incentives. S.B. 255, 6/14/11 (Act No. 2011-695) amends Ala. Code §§41-7A-43 and 41-7A-45 to make several technical corrections to the motion picture and television production incentives portion of the Entertainment Industry Incentives Act of 2009. The amendments include a clarification of the qualified expenditures applicable to a television series or series of commercials, and a provision that the production-expenditure related income tax credits are available for the tax year in which the production activity concludes. This legislation also clarifies that the sales, use, and lodging taxes exemption applies to only the state (not local) portion of these taxes, and provides that the exemption is not available beyond the first \$10 million of production expenditures incurred.

Incentives that almost became law—maybe next time. Two major incentives bills that died on the last night of the 2011 legislative session due to a Senate filibuster over some local Jefferson County bills, are expected to be reintroduced in the next session.

Better benefits for data centers. In order to encourage large data processing centers to locate in Alabama, H.B. 485, the Alabama Data Processing Center Economic Incentive Enhancement Bill (introduced 4/7/11; passed House 5/3/11; to Senate Committee on Fiscal Responsibility and Accountability, reported favorably 5/25/11), would extend the time period for TIRA abatements of certain "noneducational" sales, use, and property taxes (i.e., those not required to be used for educational purposes) from the current ten years to as long as 30 years, depending on the total capital investment, and would also allow abatements with regard to recurring capital investment in a data center during the

abatement period. This bill also would reduce the employment threshold for the data processing centers from a minimum of 50 new jobs to just 20.

Job retention and creation. Two virtually identical bills H.B. 478 (introduced 4/7/11; passed House 5/4/11; to Senate Committee on Fiscal Responsibility and Accountability, reported favorably 5/25/11) and S.B. 373 (introduced 4/7/11; passed Senate 4/26/11; to House Committee on Economic Development and Tourism, reported favorably with amendment 5/4/11), would allow Alabama companies and educational institutions that undertake certain qualifying projects, similar to those provided for under TIRA, to also qualify for "withholding incentives," which would allow the approved entity to retain a percentage of the state income taxes withheld from the wages of eligible employees. An eligible employee, of course, would be allowed a credit against state income taxes for 100% of the withholding incentives retained by the approved entity from the employee's wages during the tax year.

These incentives are designed to encourage the retention of existing jobs and the creation of new jobs by promoting the development and growth of industry within the state. The State Industrial Development Authority would determine whether a project qualifies for the withholding incentives. []

END OF DOCUMENT - © 2011 Thomson Reuters/RIA. All rights reserved.