



Private Letter Ruling

Redacted Version

No. 03-014

December 17, 2003

Corporation Income Tax and Individual Income Tax

Transferability and Application of the Motion Picture Investor Tax Credit

This is in reply to your request for a private letter ruling concerning the application and transfer of the Louisiana motion picture investor tax credit to the transactions proposed by your client.

Facts

You provided the following facts:

Company A will form a holding company, LLC, which will then buy [motion picture investor tax credits] ITCs directly from producers or other holders thereof (the "Producers"). LLC will then resell such ITCs to Louisiana taxpayers. LLC may purchase ITCs in one particular calendar year and then resell such ITCs in subsequent years. Sales of ITCs by LLC may be made in one or more transactions. One transaction may (i) involve one or more transferees, and (ii) contain different terms according to which the various transferees will acquire the credits. Since LLC is limited to 3 sales of each series of ITCs acquired by it, if LLC has already made two sales and does not reasonably expect to sell the remaining ITCs within such series in one last sale, LLC will form a new limited liability company, which new company will acquire the remaining ITCs from LLC and then resell them in up to three separate sales. This process may be repeated as necessary. It is contemplated that Company A's taxpayer clients will purchase the ITCs from LLC (or its transferee) in order to offset income tax liability for the year in which such ITCs are purchased, for subsequent years, or for prior years.

Ruling Request

You asked the following questions:

General

1. Please confirm that the transferees of ITCs from LLC (or its transferee), will be entitled to use any ITCs they receive to offset Louisiana income tax liability, regardless of whether or not they are residents or domiciliaries of the State of Louisiana.

Subsequent Transfers

2. Please confirm that LLC can acquire ITCs in any given year and resell them in subsequent years, provided that such ITCs have not previously expired, as provided for pursuant to the Incentive Act.
3. Please confirm that ITCs that were earned prior to the passage of the Amendment can nevertheless be transferred under the provisions of the Amendment.

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4. The Incentive Act provides that no taxpayer may make more than three transfers or sales of tax credits during any calendar year, provided, however, a single transfer or sale may involve one or more transferees. Please confirm that LLC can sell credits in up to three transactions, but to any number of transferees, and that in the event LLC makes three transfers, any of such transferees, even if organized solely for the purpose of transferring credits, could itself undertake three transfers.
5. Please confirm that one sale to multiple transferees may provide for different terms, such as purchase price, for each transferee.

Recapture

6. Are credits that have been certified by the Department of Economic Development and the Governor's Office of Film and Television Development still subject to recapture, or does certification by these entities absolutely eliminate the possibility of recapture?
7. For uncertified ITCs, or if the answer to the preceding paragraph is that even certified ITCs can be recaptured, then for all ITCs, please confirm that if the Department of Revenue seeks to recapture ITCs due to the failure to expend the necessary funds, and the Department of Economic Development and the Governor's Office of Film and Television Development have agreed to only look to a third party, such as a producer, for failure to make such expenditures and not to recapture ITCs sold to taxpayers (See, Attorney General Opinion 03-0046 1/30/03, a copy of which is attached hereto), then the Department of Revenue will not recapture such credits.

Past Taxes

8. Please confirm that ITCs can be used to offset taxes that became due in prior years, but which remain overdue and payable? Additionally, please confirm that ITCs can be used to offset penalties and interest on overdue taxes?
9. Alternatively, please confirm that a taxpayer may acquire ITCs from LLC in any given year and use such credits against income tax liability for such year or for prior years, as long as the ITCs themselves were earned either (i) in the year in which the income tax liability sought to be offset was incurred by the taxpayer, or (ii) in any prior year, provided that such ITCs have not previously expired, as provided for pursuant to the Incentive Act.

Discussion

To be able to earn the investor credit, a taxpayer must be domiciled in the state of Louisiana and must invest a minimum three hundred thousand dollars in a state-certified production. See La. Rev. Stat. § 47:6007(C). To qualify as a state-certified production, the production must meet several tests that are set forth in the definition section of La. Rev. Stat. § 47:6007(B). Paragraph (C) of La. Rev. Stat. § 47:6007 was amended in the 2003 Regular Session of the Louisiana Legislature by Act 1240 to, among other things, make the investor credits transferable. For purposes of this private letter ruling, it will be assumed that properly acquired the motion picture investor tax credits under discussion.

In your first request you ask if the transferees of ITCs will be entitled to use any ITCs they receive to offset Louisiana income tax liability, regardless of whether or not they are residents or domiciliaries of the State of Louisiana. Louisiana Revised Statutes § 47:6007(C)(4), which provides for the transfer of the ITCs states that the credits can be sold to a Louisiana taxpayer. No mention is made of the taxpayer's domicile or residence, therefore transferees of ITCs will be

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entitled to use any ITCs they receive to offset Louisiana income tax liability, regardless of their state of residency or domicile.

In your second request you ask if LLC can acquire ITCs in one year and resell them in subsequent years, provided that such ITCs have not previously expired. Louisiana Revised Statutes § 47:6007(C)(4), provides that taxpayers who have not previously claimed their ITCs may transfer them subject to various conditions. Louisiana Revised Statutes § 47:6007(C)(4)(a) allows purchasers of the credits to resell them subject to the conditions of La. Rev. Stat. § 47:6007(C)(4). The transferability provisions do not specifically address whether or not the credits must all be resold in the year they are purchased. However, La. Rev. Stat. § 47:6007(C)(4)(a) limits transfers of the credit to three “during any calendar year” suggest that additional transfers of the ITCs can be made in subsequent years. Therefore, LLC can acquire ITCs in one year and resell them in subsequent years, provided that such ITCs have not previously expired and have not been claimed by LLC.

Your third request asks for confirmation that ITCs that were earned prior to the passage of the amendment can nevertheless be transferred under the provisions of the amendment. Paragraph (C) of La. Rev. Stat. § 47:6007 was amended in the 2003 Regular Session of the Louisiana Legislature by Act 1240 to, among other things, make the investor credits transferable. Louisiana Revised Statutes § 47:6007(C)(4), provides that “any” motion picture investor credits that have not previously been claimed may be transferred by the person who owns them. “Any tax credits” appears to refer to pre-existing ITCs, therefore ITCs that were earned prior to the enactment of the transferability provisions may be transferred.

In your fourth request, you ask for confirmation that if LLC sells credits in up to three transactions in one calendar year, but to any number of transferees, that any of such transferees, even if organized solely for the purpose of transferring credits, could itself undertake three transfers. Louisiana Revised Statutes § 47:6007(C)(4)(a) allows purchasers of the credits to resell them subject to the conditions of La. Rev. Stat. § 47:6007(C)(4). Therefore, transferees of ITCs currently owned by LLC may resell the transferred ITCs, subject to the statutory conditions, regardless of the purpose for which the transferee is formed.

Your fifth request asks if one sale to multiple transferees may provide for different terms, such as purchase price, for each transferee. Louisiana Revised Statutes § 47:6007(C)(4)(a) provides that a single transfer of ITCs may involve multiple transferees. Louisiana Civil Code Article 1787 allows one obligation to include separate performances for multiple obligees and separate performances for multiple obligors. Therefore, one transfer may include multiple transferees and a different purchase price for each transferee.

In your sixth request you ask if credits that have been certified by the Louisiana Department of Economic Development (LED) and the Governor’s Office of Film and Television Development (Film Commission) are still subject to recapture, or if certification by these entities absolutely eliminates the possibility of recapture. Louisiana Revised Statutes § 47:6007(E) addresses recapture of the credit. An ITC may be recaptured if “funds for which an investor received credits according to this Section are not invested in and expended with respect to a state-certified production within twenty-four months of the date that such credits are earned”. The statute provides for recapture “with respect to a state-certified production”, therefore the credits may be recaptured even after the credit has been certified by LED and the Film Commission.

In your seventh request you ask for confirmation that if the Department of Revenue seeks to recapture ITCs due to the failure to expend the necessary funds, and the LED and the Film

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Commission have agreed to only look to a third party, such as a producer, for failure to make such expenditures and not to recapture ITCs sold to taxpayers then the Department of Revenue will not recapture such credits. Louisiana Revised Statutes § 6007(C)(4)(e) provides that:

A transferee shall have only such rights to claim and use the credit that were available to the transferor at the time of the transfer. To the extent that the transferor did not have rights to claim or use the credit at the time of the transfer, the Department of Revenue shall either disallow the credit claimed by the transferee or recapture the credit from the transferee through any collection method authorized by R.S. 47:1561. The transferee's recourse is against the transferor.

Therefore, if the transferor was not entitled to the credit due to the failure to expend the necessary funds, the Department of Revenue's recourse is against the transferee. The Department of Revenue must either deny the credit claimed by the transferee, or recapture the credit from the transferee if the credit has already been claimed, regardless of any agreement among the taxpayer that earned the credit, LED and the Film Commission. The transferee of the credit will then have to look to the transferor for recourse.

In the first part of your eighth request you ask if ITCs can be used to offset taxes that became due in prior years, but which remain overdue and payable. Louisiana Revised Statutes § 47:6007(C)(1) which creates the credit authorizes "a tax credit against state income tax". Louisiana Revised Statutes § 47:6007(C)(2) provides for a carry forward of the credit if "the entire credit cannot be used in the year earned". The statute does not require that the income tax against which the credit is used be the tax liability that arose during the year the credit is earned. This distinguishes the motion picture investor credit from almost every other Louisiana income tax credit most of which clearly state that the credit can only be used against tax liabilities that arose during the year in which the credit was earned or for any allowable carry forward period if there is additional credit remaining. For example, La. Rev. Stat. § 47:6004, the Employer Credit, which has a five year carry-forward, provides that the credit "shall be allowed against the income tax for the taxable period during which the new employee has completed one year of full-time service with the taxpayer and/or against the corporation franchise tax for the taxable period following the taxable period during which the new employee has completed one year of full-time service with the taxpayer." There is no such limiting language in La. Rev. Stat. § 47:6007. Louisiana Revised Statutes § 47:6007(A) states that "[t]he primary objective of this Section is to encourage development in Louisiana of a strong capital base for motion picture film, videotape, and television program productions, in order to achieve a more independent, self-supporting industry." Allowing the credit to be used to offset prior years taxes that have not yet been paid would enhance the marketability of the credit and make the incentive more attractive, which is in keeping with the stated purpose of the statute. ITCs can be used to offset taxes that became due in prior years, but which remain overdue and payable because there is no limiting language in La. Rev. Stat. § 47:6007, the lack of limiting language is rare in Louisiana credit statutes, and because allowing ITCs to be used to offset taxes from prior years will further the stated purpose of the statute.

In the second part of your eighth request you ask if ITCs can be used to offset penalties and interest on overdue taxes. In support of this request you offered the following analysis:

In addition, interest and penalties should be able to be offset by the ITCs as well. Interest and penalties on overdue taxes are consistently regarded as, and are

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included in the description of, "taxes." See, La. R.S. 47:6 (the term "tax" includes penalties and interest); La. R.S. 47:293(5) ("tax" means liability for *all* amounts owing by an individual to the State)(emphasis added); La. R.S. 47:1601 ("The interest provided for [on unpaid taxes] shall be an obligation to be collected and accounted for in the same manner as if it were a part of the tax due ..."); and La. R.S. 47:1602(B) ("The penalties provided for by this Section shall be an obligation to be collected and accounted for in the same manner as if it were part of the tax due ..."). Thus, as long as the ITCs can be used to offset "taxes," they should also be capable of offsetting penalties and interest due on such taxes.

Louisiana Revised Statutes § 47:293(5) provides that "[t]ax' or 'tax liability' means the liability for all amounts owing by an individual to the state of Louisiana under this Part." The Part referred to is Part III of Chapter 1 of Subtitle II of Title 47 of the Louisiana Revised Statutes of 1950, as amended, which contained the provisions for individuals and is comprised of La. Rev. Stat. § 47:290-299. The subject Part does not include any interest or penalty provisions. Louisiana Revised Statutes § 47:6 provides that "[t]he term "tax" or "taxes" as used in R.S. 47:3 through 47:5 shall include (1) any and all penalties lawfully imposed pursuant to a taxing statute, and (2) interest charges lawfully added to the tax liability." Louisiana Revised Statutes § 47:3 addresses the jurisdiction of Louisiana courts in suits for taxes by other states, La. Rev. Stat. § 47:4 addresses the determination of the proper party to represent the tax collector of another state, and La. Rev. Stat. § 47:5 addresses which Louisiana state official is the proper party to sue for collection of taxes. Therefore, La. Rev. Stat. § 47:293(5) and La. Rev. Stat. § 47:6 are not applicable to the facts under discussion.

Louisiana Revised Statutes § 47:1602(B) does provide that the delinquent return penalty is to be collected and accounted for in the same manner as if it were part of the tax due and La. Rev. Stat. § 47:1601(A) provides that any interest associated with the late payment of tax is also to be collected and accounted for in the same manner as if it were part of the tax due. However, penalties and interest are not tax. Louisiana Revised Statutes § 47:1601 and 1602 also provide that interest and penalties may be collected in an action separate from the collection of the tax. Therefore, ITCs cannot be used to offset penalties and interest on overdue taxes.

In your ninth and final request you ask for confirmation that a taxpayer may acquire ITCs from LLC in any given year and use such credits against income tax liability for such year or for prior years, as long as the ITCs themselves were earned either (i) in the year in which the income tax liability sought to be offset was incurred by the taxpayer, or (ii) in any prior year, provided that such ITCs have not previously expired, as provided for pursuant to the Incentive Act. Louisiana Revised Statutes § 47:6007(C)(4)(e) provides that "[a] transferee shall have only such rights to claim and use the credit that were available to the transferor at the time of the transfer." Louisiana Revised Statutes § 47:6007(C)(5) provides that "[t]he transferee shall apply such credits in the same manner and against the same taxes as the taxpayer originally awarded the credit." When taken together, these provisions suggest that the transferee essentially steps into the shoes of the transferor with respect to claiming and using the credit. Therefore, a transferee that acquires an ITC from LLC may use the ITC against income taxes for the year of acquisition or for a prior year if the ITC acquired was originally earned either (i) in the year in which the income tax liability sought to be offset was incurred by the taxpayer, or (ii) in any prior year, provided that such ITCs have not previously expired.

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Ruling

Based upon the facts provided and the assumptions set forth, for purposes of the motion picture incentive tax credits authorized by La. Rev. Stat. §§ 47:6007:

1. Transferees of ITCs will be entitled to use any ITCs they receive to offset Louisiana income tax liability, regardless of their state of residency or domicile.
2. LLC can acquire ITCs in one year and resell them in subsequent years, provided that such ITCs have not previously expired and have not been claimed by LLC.
3. Motion picture investor tax credits that were earned prior to the enactment of the transferability provisions may be transferred.
4. Transferees of ITCs currently owned by LLC may resell the transferred ITCs, subject to the statutory conditions, regardless of the purpose for which the transferee is formed.
5. One transfer may include multiple transferees and a different purchase price for each transferee.
6. The ITCs may be recaptured even if the credit has been certified by LED and the Film Commission.
7. If the transferor was not entitled to the credit due to the failure to expend the necessary funds, the Department of Revenue must either deny the credit claimed by the transferee or recapture the credit from the transferee if the credit has already been claimed.
8. ITCs can be used to offset taxes that became due in prior years, but which remain overdue and payable. However, the ITCs cannot be used to offset penalties and interest on overdue taxes.
9. A transferee that acquires an ITC from LLC may use the ITC against income taxes for the year of acquisition or for a prior year if the ITC acquired was originally earned either (i) in the year in which the income tax liability sought to be offset was incurred by the taxpayer, or (ii) in any prior year, provided that such ITCs have not previously expired.

If you have any questions or need additional information, please call Michael Pearson, Senior Policy Consultant, or Leonore Heavey, Attorney, Policy Services Division, at 225-219-2780.

Sincerely

Cynthia Bridges

Secretary

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This correspondence constitutes a private letter ruling (PLR) by the Louisiana Department of Revenue, as provided for by section 61:III.101 of the Louisiana Administrative Code. A PLR provides guidance to a specific taxpayer at the taxpayer's request. It is a written statement that applies principles of law to a specific set of facts or a particular tax situation. A PLR does not have the force and effect of law, and is not binding on the person who requested it or on any other taxpayer. This PLR is binding on the department only as to the taxpayer to whom it is addressed, and only if the facts presented were truthful and complete and the transaction was carried out as proposed. It continues as authority for the department's position unless a subsequent declaratory ruling, rule, court case, or statute supersedes it.