

December 20, 2005

Economic Development Tax Incentives -- Use of Credits by a Unitary Group. THE CREDITS EARNED BY A CORPORATION MAY BE USED BY THE UNITARY GROUP THAT INCLUDES THE CORPORATION EVEN WHEN THE CORPORATION IS NOT A PART OF THE CORPORATE TAXPAYER.

Advice has been requested as to whether the credits earned under the Nebraska Advantage Act (Act) by a corporation that is a member of a unitary group can be used by the other members of the group when the corporation earning the credits is not a member of the corporate taxpayer or is not allowed to be included on a corporate income tax return with the rest of the unitary group.

A corporation has filed an application for an agreement under the Act. The corporation is a member of a unitary group of corporations, but under Nebraska law the corporation cannot be included in the combined income tax return filed by the unitary group.

Section 77-2734.04(3), R.R.S. 2003, provides in part that:

Corporate taxpayer shall not include any corporation that has a valid election under subchapter S . . . or any financial institution as defined in section 77-3801;

Section 77-2734.04(13), R.R.S. 2003, provides in part that:

Unitary business shall mean a business that is conducted . . . by one or more corporations with common ownership . . . that contribute to the single economic unit.

Section 77-2734.04(14), R.R.S. 2003, provides that:

Unitary group shall mean the group of corporations that are conducting a unitary business.

Section 77-2734.09, R.R.S. 2003, provides in part that:

Any member of a unitary group that is required or permitted to use an apportionment formula other than one prescribed by section 77-2734.05 shall be included in a return only with other corporations using the same apportionment formula. . . .

Section 77-5719, R.S.Supp. 2005, provides in part that:

Taxpayer means any person subject to sales and use taxes . . . and subject to withholding . . . and any corporation . . . that is . . . a member of the same unitary group that is subject to such . . . taxes . . . ;

Section 77-5726(1), R.S.Supp. 2005, provides in part that:

The credits may be used . . . to reduce the taxpayer's income tax liability. . . . The credits may be used to obtain a refund of sales and use taxes . . . on purchases, including rentals, for use at the project.

A financial institution or an S corporation is excluded from the definition of corporate taxpayer for corporate income tax purposes. An insurance company is required to use a special apportionment formula and can only be included on a corporate income tax return with other insurance companies.

All of the other members of the unitary group are included in the term "taxpayer" under the Act. The incentives under the Act are available to the taxpayer. The unitary group is not limited in its use of the incentives to just the corporation that is primarily responsible for the project.

Even though a corporation is not included in the income tax return with the rest of the unitary group, the credits received under the Act which were created by the activities of that member of the unitary group are available to reduce the tax liability shown on the income tax return of the rest for the unitary group.

The Act also allows for the use of compensation credits for the retention of withholding by the taxpayer. However, the withholding must be attributable to new employees at the project.

The Act further allows the use of credits to obtain a refund of sales and use taxes paid on purchases by the taxpayer that are for use at the project. The refunds for otherwise qualifying purchases will be allowed regardless of which member of the unitary group actually made the purchase from an unrelated third-party.

APPROVED:

A handwritten signature in black ink, appearing to read 'MJE', with a long horizontal stroke extending to the right.

Mary Jane Egr  
State Tax Commissioner

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