ALASKA DEPARTMENT OF REVENUE, TAX DIVISION
ADVISORY BULLETIN 2016-01

Re: Applicability of transferable tax credit certificates under AS 43.55.023 and production tax credit certificates under AS 43.55.025 towards a production tax liability of a transferee and application of the "80% rule" under AS 43.55.023(e).

A taxpayer has raised questions with the Department of Revenue (Department) regarding the calendar year(s) in which tax credit certificates under AS 43.55.023 and 43.55.025 that have been transferred to another party can be applied against the tax liability of a transferee. Following are the Department's responses to the questions raised:

1. <u>Can a tax credit certificate that has been transferred be used towards the payment of a liability that becomes due in the calendar year of the effective date of the transfer of the tax credit certificate?</u>

In order to respond to the question, the Department believes it is important to first make a distinction between when an oil and gas production tax liability "becomes due" versus "becomes known." A tax liability "becomes due" on March 31 of the year following the calendar year during which the oil and gas subject to taxes levied by AS 43.55.011(e) was produced, regardless of the date when the need for an amended return becomes known or is determined.

A transferable tax credit certificate (TTCC) issued under AS 43.55.023(d) or a production tax credit certificate (PTCC) issued under AS 43.55.025 that has been transferred from the party to whom the tax credit certificate was issued to another party may be applied only against a tax liability due under AS 43.55.011(e)[1] for calendar years that begin on or after the year in which the effective date the transfer of the tax credit certificate occurs.

Neither the TTCC under AS 43.55.023, nor the PTCC under AS 43.55.025 contain any express provisions that either credit may be carried-back to reduce the tax liability of a prior period by applying the tax credit certificate to a year that is prior to the effective date of transfer for a tax credit certificate issued by the Department. However, both sections of the statutes do include the express provisions that "any unused credit or portion of a credit not used under this subsection may be applied in a later calendar year,"[2] or "an amount of the production tax credit in excess of the amount that may be applied for a calendar year under this subsection may be carried forward and applied against the taxpayer's tax liability under AS 43.55.011(e) in one or more later calendar years."[3]

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[1] And, subject to 15 AAC 55.305(b) and 55.335(g) may also be applied against the minimum tax under AS 43.55.011(f).
[2] AS 43.55.023(c)
[3] AS 43.55.025(i)(2)

The Department's regulation, 15 AAC 55.365, addresses the transfer of both transferable tax credit certificates issued under AS 43.55.023(d) and production tax credit certificates issued under AS 43.55.025. 15 AAC 55.365(b) provides that "Transfer of a tax credit certificate is effective on the date the department sends notice to the transferor that the certificate has been transferred." Accordingly, the transferee of a tax credit certificate may apply the tax credits against the tax, or any installment payments of the estimated tax, levied by AS 43.55.011(e) for the calendar year in which the effective date of the transfer of the certificate occurs.

Further, 15 AAC 55.370 makes a clear distinction regarding the time periods for which a PTCC may be applied by a party that *incurred the exploration expenditures* and to whom the tax credit certificate was issued, versus a party that is merely a transferee of the PTCC:

- "the earliest calendar year for which a production tax credit under AS 43.55.025 may be applied against the tax liability *of the producer that incurred the exploration expenditure* on which the tax credit is based is the calendar year in which the exploration expenditure was incurred;"[4] [Emphasis supplied.]

- "The earliest calendar year for which a production tax credit certificate under AS 43.55.025 may be applied against the tax liability *of a transferee* of the production tax certificate is the *calendar year* in which the *effective date of the transfer* of the certificate occurs."[5] [Emphasis supplied.]

The Department, in evaluating the regulations and as applied to the request for an Advisory Bulletin, believes that some weight must be given to this distinction and that it would be inappropriate for a transferee to receive a greater benefit from a tax credit certificate that has been transferred than would be realized by the person to whom the tax credit certificate was issued. Therefore, the Department interprets the regulation to mean that, for a transferee, the PTCC may not be carried back to apply the credit to calendar years prior to "the calendar year in which the effective date of the transfer of the certificate occurs," and, in any case, not prior to the calendar year in which the exploration expenditures were incurred by the party to whom the tax credit certificate was issued. Additionally, and for further clarification, the Department interprets, "may be applied against the tax liability" to mean the calendar year for which the tax liability was originally incurred and not the year in which any amended filing might be made. For example, an amendment made in Year X4 to Year X1 is still the "tax liability" of Year X1. Accordingly, any amendments made or required by a taxpayer subsequent to that taxpayer's originally filed return are still applicable to, and considered to be a part of, the tax liability for the calendar year during which the oil or gas was produced.

[4] 15 AAC 55.370(c)(1)
[5] 15 AAC 55.370(d)(2)

Although 15 AAC 55.370 addresses PTCCs issued under AS 43.55.025 the Department does not believe that a TTCC under AS 43.55.023 should be treated any differently than a production tax credit certificate under AS 43.55.025 that has been transferred to another party. And, in fact, the Department's course of dealing with respect to both types of tax credit certificates has been consistent in that the Department has no history of allowing the carry-back of a tax credit certificate to reduce the tax liability of a period prior to the effective date of the transfer by either a person to whom the tax credit certificate was issued, or has been transferred to another party.

2. <u>When a taxpayer is required to file amended returns, as defined by statute, can a taxpayer apply a transferred tax credit certificate with an effective date during the calendar year in which the amended returns are required to be filed, and the liability is due and payable, towards payment of the liability?</u>

The Department does not agree that a "liability is due and payable" in any year that an amendment might be required or filed. A liability for oil and gas production tax is "due and payable" on March 31 of the year following the calendar year during which oil or gas was produced, regardless of when, or the type of, any additional liability that becomes known to the taxpayer.

Consider the following example which illustrates the Department's interpretation of 15 AAC 55.370(d)(2) for a PTCC received by a transferee of the tax credit certificate:

> A taxpayer receives a decision by a regulatory agency, court, or other body with authority to resolve disputes that results in a change to the production tax value (PTV) or the amount of tax credits applied.[6]
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> In this scenario, an amended filing would be required in order to reflect the change in PTV. For this example, assume that the tax was due and the original filing was made on March 31 of the year following calendar Year X1 and that an amended filing is made in Year X3.
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> If the taxpayer was a transferee of a PTCC and the effective date of the transfer of the certificate was Year X1, the transferred PTCC could be applied toward payment of the amended tax liability under AS 43.55.011(e). However, if the effective date of the

[6] Other examples of where an amended return is required would include, for example, audit assessments of the Department that result in a change to the PTV or the amounts of tax credits applied, or adoption of regulations that result in a change to the PTV or the amount of tax credits applied. In each of these situations the result is unchanged, that is, a tax credit certificate that has been transferred may not be applied to reduce the tax liability of a transferee to a calendar year that is prior to the effective date of the transfer of the certificate.

transfer of the certificate was Year X2, or later, the certificate may not be applied toward the amended return for Year X1.

3. The taxpayer has also asked how the "80% rule" of AS 43.55.023(e) is to be applied:

In the case of a TTCC under AS 43.55.023(d), and subject to subsection (e), the TTCC "may not be applied to reduce a transferee's *total tax liability* under AS 43.55.011(e) for oil and gas produced *during a calendar year* to less than 80 percent of the tax that would otherwise be due without applying that credit."[7] Additionally, the "80 percent rule" as applied to "total tax liability" means the sum of the tax liability due on March 31 of the year following the calendar year of production, plus or minus any amended or required liability subsequently determined to be due or owed for that calendar year of production, less any other credits that have been applied, prior to application of the credit under AS 43.55.023(e). PTCCs issued under AS 43.55.025 do not have this limitation. [Emphasis supplied.]

Scope and non-binding nature of this bulletin: This advisory bulletin is issued for the information and guidance of producers, explorers, and other interested persons. Opinions expressed here are strictly limited to the proposed conditions as presented above interpreted in accordance with existing Alaska oil and gas production tax law. These interpretations do not address other possible effects under other scenarios or types of tax laws, and as provided in AS 43.55.110(g), interpretations stated in this advisory bulletin are not binding on the Department or others. The interpretations stated herein apply to all producers and explorers subject to AS 43.55 and should not be considered specific to any one producer or explorer, nor do the interpretations in this bulletin constitute an appealable action under AS 43.05.240 or other provision of Title 43.

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Department of Revenue

[7] AS 43.55.023(e)