ALASKA DEPARTMENT OF REVENUE, TAX DIVISION
ADVISORY BULLETIN 2009 - 02

Re: State Purchase of Transferable Tax Credit Certificates

A business in Alaska has requested an advisory bulletin[1] on the treatment of transferable tax credit certificates issued to a company that later merges with or is acquired by another company. The assumed facts and scenarios described by the requester are as follows:

Facts:

- Company A is an independent explorer in the State of Alaska.
- Company A has earned and was issued transferable tax credit certificates ("*tax credit certificates*" hereafter) based on past qualifying exploration activity and qualifying expenditures[2].
- Company A does not have current oil or gas production within the state, but is currently conducting exploration in the state.
- Company B is an independent explorer in the State of Alaska.
- Company B has earned and was issued its own tax credit certificates based on past qualifying exploration activity and qualifying expenditures.
- Company B does not have current oil or gas production within the state and is not currently conducting exploration in the state.
- Company C is a new independent explorer in the State of Alaska with no prior business activity.

Scenario One: Company A merges with or acquires Company B. Company B is dissolved and all assets -- including the tax credit certificates -- obligations, and liabilities are merged into Company A, the surviving company.

The questions asked regarding Scenario One are:

1. Can Company A treat the tax credit certificates previously earned and held by Company B as if they were earned by Company A?

2. Can Company A apply to the State for the State to purchase those acquired tax credit certificates for cash under AS 43.55.028 [3] based on exploration expenditures made by Company A?

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[1] AS 43.55.110(g) provides: "Notwithstanding AS 44.62, the department may issue, for the information and guidance of producers, explorers, and other interested persons, advisory bulletins stating the department's interpretation of provisions of this chapter and of regulations adopted under this chapter. Unless otherwise provided by the department by regulations, interpretations stated in advisory bulletins are not binding on the department or others."

[2] Under AS 43.55.023(d) a person that is entitled to take a tax credit that wishes to transfer the unused credit to another person or to obtain a cash payment under AS 43.55.028 may apply to the department for transferable tax credit certificates.

Scenario Two: *Company C merges with or acquires Company B. Company B is dissolved and all assets -- including the tax credit certificates -- obligations, and liabilities are merged into Company C, the surviving company.*

The questions asked regarding Scenario Two are:

1. Can Company C treat the tax credit certificates previously earned and held by Company B as if they were earned by Company C?

2. May Company C apply to the State for the State to purchase the acquired tax credit certificates for cash under AS 43.55.028 based on exploration expenditures made by Company C?

The issues raised in these scenarios may be restated as follows:

1. May the surviving company, Company A or Company C in the above scenarios, substitute its own qualifying capital expenditures or successful bids for those that would have been required of Company B, in order to meet the requirement of AS 43.55.028(e)(2)?[4]

2. Is the surviving company considered the "person to whom a transferable tax credit certificate has been issued" for purposes of the conditions and requirements of AS 43.55.028(e)?

3. Is the surviving company considered the "applicant" for purposes of the Department's ability to later audit and adjust a tax credit claim to which the certificate relates or to adjust the tax liability, with interest, of the applicant if the credit exceeds the amount to which it was entitled?[5]

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[3] AS 43.55.028 sets forth the authority, conditions and requirements under which the State of Alaska may purchase for cash certain transferable tax credit certificates and production tax credit certificates from applicants meeting those conditions and requirements

[4] AS 43.55.028(e)(2) requires that within 24 months after applying for the transferable tax credit certificate or filing a claim for the production tax credit certificate, the applicant incurred a qualified capital expenditure or was the successful bidder on a bid submitted for a lease on state land under AS 38.05.180(f).

[5] AS 43.55.023(g) provides: "The issuance of a transferable tax credit certificate under (d) of this section or the purchase of a certificate under AS 43.55.028 does not limit the department's ability to later audit a tax credit claim to which the certificate relates or to adjust the claim if the department determines, as a result of the audit, that the applicant was not entitled to the amount of the credit for which the certificate was issued. The tax liability of the applicant under AS 43.55.011(e) and 43.55.017 – 43.55.180 is increased by the amount of the credit that exceeds that to which the applicant was entitled, or the applicant's available valid outstanding credits applicable against the tax levied by AS 43.55.011(e) are reduced by that amount. If the applicant's tax liability is increased under this subsection, the increase bears interest under AS 43.05.225 from the date the transferable tax credit certificate was issued. For purposes of this subsection, an applicant that is an explorer is considered a producer subject to the tax levied by AS 43.55.011(e)."

Discussion:

In both scenarios, Company B is assumed to have been issued a transferable tax credit certificate under AS 43.55.023(d). Generally speaking, Company B is free to transfer such transferable tax credit certificates[6] to any other party if Company B follows the reporting procedures for the transfer of tax credit certificates administered by the Department of Revenue.

The proposed scenarios are not simply transfers of tax credit certificates, but the indirect acquisition of tax credit certificates through a merger with or the acquisition of another company to which the certificates were originally issued, and subsequent dissolution of the acquired or merged company.

Opinion:

The surviving company, Company A or Company C, respectively, in Scenarios One and Two, may be considered to stand in the shoes of Company B for purposes of eligibility to apply for the cash purchase by the State of the acquired tax credit certificates if the following conditions and requirements are met :

1. The surviving company fulfills, or satisfies as the applicant all the conditions and requirements, including timing and production limitations, of AS 43.55.028(e);

2. Neither Company B nor the surviving company may have an outstanding tax liability to the state for unpaid delinquent taxes under Title 43 of the Alaska Statutes[7];

3. The surviving company must make the qualified capital expenditure or successful bid on a state lease under this section within the 24 months after the date Company B applied for the transferable tax credit;

4. The 50,000 BTU equivalent barrel limit under AS 43.55.028(e)(6) applies to the surviving company's production during the calendar year preceding the calendar year in which the application is made *combined with* Company B's production during the calendar year preceding the calendar year in which the application is made;

5. The surviving company retains and makes available to the Department upon request, all books, records and data necessary to conduct the audit of the original tax credit claims by Company B, including if applicable all necessary data sets required to be made available to, or provided to, the Department of Natural Resources;

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[6] AS 43.55.023(e).
[7] AS 43.55.028(e)(4).

6. The surviving company is liable for any tax liability and interest resulting from an adjustment of the original tax credit claim under AS 43.55.023(g);

7. The surviving company is not considered a transferee under AS 43.55.023(e) of the tax credit certificates acquired through the merger with or acquisition of Company B;

8. All other pertinent provisions of AS 43.55.023 and AS 43.55.028 apply to the surviving company after the merger or acquisition and dissolution of Company B, as if the surviving company were the original applicant or claimant of the tax credit certificates issued to Company B;

9. The surviving company is subject to all other obligations under AS 43.05 and AS 43.55 that Company B would have in connection with the tax credit certificates in the absence of the merger or acquisition and dissolution;

10. The acquired tax credit certificates must be surrendered by the surviving company *and* written application for replacement tax credit certificates must be made to the Department by the surviving company. Replacement tax credit certificates, if meeting the conditions herein, will be issued and plainly state: "[Name of surviving company], as successor in interest to Company B." Supporting documentation of the merger with or acquisition of and dissolution of Company B must be retained and made available to the department upon request. The application for replacement certificates may be made at the same time the application is made for the purchase for cash by the State of the acquired certificates using Form 0405-325(03/09) Application for Cash Purchase of Alaska Oil and Gas Production Tax Credit Certificate and Form 0405-325.1(03/09), Schedule A, copies attached[8] . In addition the application must contain a written certification that:

- the surviving company has, through merger or acquisition, assumed all the debts, liabilities, and obligations of Company B;
- Company B is dissolved and ceases to exist prior to application for the cash purchase by the State of the acquired tax credit certificates; and
- the surviving company accepts full liability for adjustment of the amount of the tax credit certificate or tax credit and interest, if any, from the date of the issuance of the original tax credit certificate to Company B, upon audit by the Department under AS 43.55.023(g).

[8] This form is available online at www.tax.alaska.gov

This advisory bulletin is strictly limited to the proposed conditions as presented above interpreted in accordance with existing Alaska production tax law. This bulletin does not apply to the transfer, re-assignment or acquisition of tax credit certificates pursuant to a bankruptcy proceeding or other court-ordered or court-supervised liquidation or reorganization. This bulletin does not address other possible effects under other tax types or other tax laws, or with other laws of other relevant state agencies. The interpretation expressed in this bulletin may change if the proposed conditions or facts change or are supplemented or there are statutory changes.

Marcia Davis Deputy Commissioner

Jonathan E. Iversen,
Director

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