



STATE OF ARKANSAS
**Department of Finance
 and Administration**

Commissioner of Revenue

1816 West Seventh Street, Suite 2440
 Post Office Box 1272
 Little Rock, Arkansas 72203-1272
 Phone: (501) 682-7000
 Fax: (501) 682-7599

October 17, 2018

The Honorable Jim Hendren, Co-Chair
 The Honorable Lane Jean, Co-Chair
 Arkansas Tax Reform and Relief Legislative Task Force

Re: Task Force Inquiries September 26-27, 2018

Chairman Hendren and Chairman Jean,

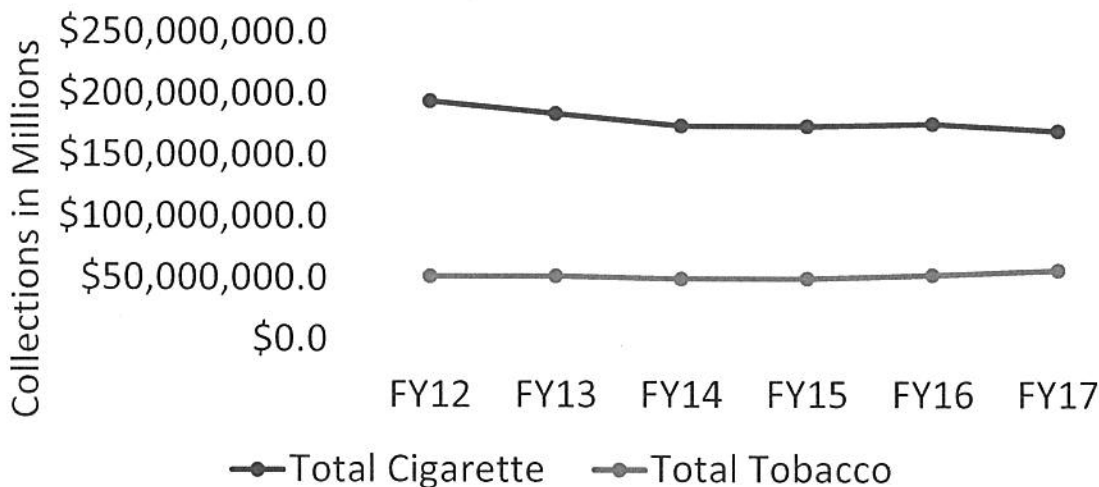
Several questions and clarifications were requested from the Department during the September 26-27 meeting of the Tax Reform and Relief Legislative Task Force. This letter will serve as the formal response to these inquiries for the Task Force.

I. Levy of Gross Receipts Tax on Specified Services

Initially, while there was an overhaul to the list of services specified as subject to the Arkansas Gross Receipts Tax in 2003, there have been services subject to the Gross Receipts Tax prior to Act 107 of the Second Extraordinary Session of 2003.

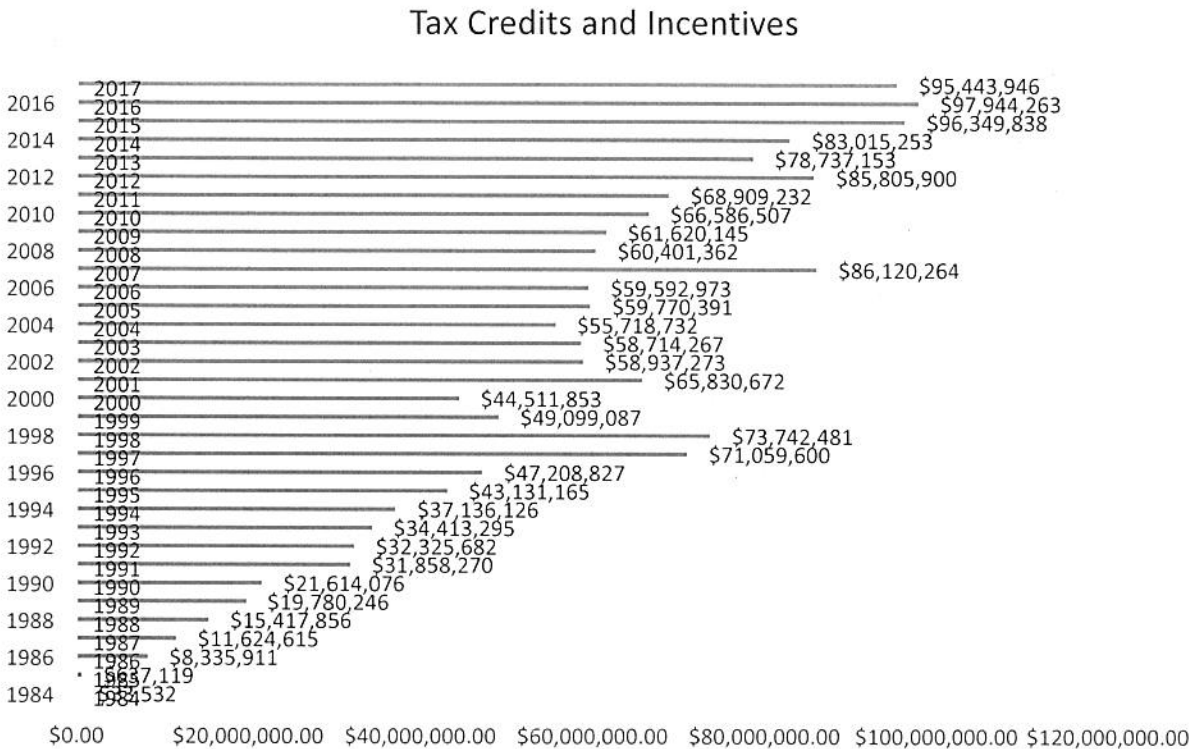
II. Historical Tobacco Tax Revenue Collections

Regarding Sen. Elliott’s inquiry, please see the thumbnail below of the historical tobacco plus cigarette collections over the past 5 years:



III. Incentive Tax Expenditure Data for Year over Year

Regarding Rep. Pitsch’s question of the annualized rate of assorted credit expenditure data, please see the attached chart. A thumbnail is provided here:



This chart is also attached separately.

Additional questions were asked concerning whether there were comparable expenditures being provided by other States and surrounding states. The Department and AEDC are attempting to identify reliable sources of information regarding the amount of similar credits or expenditures in other States as well as a qualitative description of those credits or incentives.

IV. New Market Jobs Act – How much is left in this credit and for how long?

There were two questions that were asked regarding the New Market Jobs Act of 2013. The first is how much credit is outstanding for the New Market Jobs Act and over how long does the law provide for that credit to be taken. The New Market Jobs Act provided for a maximum amount of qualified investment to be certified as \$166,000,000 with insurance premium tax credits equaling a total of 58% of that investment, or \$96,000,000. Consultation with AEDC has identified approximately \$36,000,000 of credits that have been earned under Ark. Code Ann. § 15-4-3603(a) but that have not been issued for use because of the stepped in issuance of the tax

credit under Ark. Code Ann. § 15-4-3603(b). These credits are issued to taxpayers in the third through the seventh years after the investment that qualified is made with a carryforward of 9 years if the credits are not used. All the investments were made prior to 2014, which means that credits of approximately \$18-19,000,000 will be issued each calendar year 2018, 2019, and 2020 which may be carried forward up to 9 additional years if the credit is not fully used to reduce the insurance premium tax of the taxpayer.

A second question related to these outstanding credit amounts and was premised on whether the State has any obligation to continue to honor the credits as the law was enacted. Simply put, the investments that were the underlying qualifying action for the eligibility of the credits has already occurred. The way that this Act was structured, there are specific opinions that have been issued by AEDC that state that the New Market Jobs Act credits are vested in the company that has provided this investment. Specifically, Ark. Code Ann. § 15-4-3603(a) expressly states that the taxpayer has “earn[ed] a vested right to a tax credit against state premium tax liability” when the qualified investment is made and confirmed by AEDC. Generally, once an interest or right is vested, laws will not be interpreted to impair the vested right. Laws are presumed to apply prospectively and this is described as a strict rule of construction. *See McMickle v. Griffin*, 369 Ark. 318, 254 S.W.3d 729 (2007). This rule does not apply to a remedial statute that does not disturb a vested right. *Id.* Additionally, Article 2, § 17 of the Arkansas Constitution prohibits the laws that impair the obligations of contracts, as well as ex post facto laws. Because the New Market Tax Credits may include equity investments with qualified community development organizations, an analysis on the prohibition on the impairment of contracts would be required if any changes were made to the New Market Tax Jobs Act of 2013 that changed the status or utility of the tax credits to which a taxpayer has a vested right.

Additionally, there are provisions to “recapture” an issued credit under Ark. Code Ann. § 15-4-3607, however there are no current records demonstrating that any of the conditions that would trigger a recapture of an issued credit have been met. Furthermore, any affected Taxpayer is provided a 6-month cure period prior to recapture under Ark. Code Ann. § 15-4-3608.

V. Administrative Costs of the Historic Rehabilitation Tax Credit

The Department has been in contact with the Department of Arkansas Heritage who will have representatives present for the October meeting to provide greater details and information on this matter. Generally, there is no limit to the number of times that a Historic Rehabilitation Tax Credit may be transferred, but the Department’s records do not show any credits being transferred more than three times.

Regarding the administrative costs to administer the credit, the Department has only marginal administrative costs to administer the transferability portion of the tax credit. The Department receives copies of the transfer documents from the Department of Arkansas Heritage which is then recorded in our system and database. There is not a significant administrative cost to tracking the transferability for the Department under the credit’s current structure.

VI. Credit Usage – Taxpayer Identity and Amount of Credits

Additional information was requested regarding the specific identities of the taxpayers who make use of the tax credits discussed in the September 26-27 meeting of the Task Force and the amounts earned or used for each of those taxpayers. Generally, the Department is unable to provide specific information regarding the identities of the tax credits claimed or earned by taxpayers because of the Tax Procedure Act's strong confidentiality provisions. There are certain specific exemptions to this confidentiality provision as it relates to tax credits which I will explain before noting whether the information may be disclosed for each of the credits that the Department presented.

The Department is subject to the Arkansas Tax Procedure Act, Ark. Code Ann. §§ 26-18-101 through -1006 ("TPA"). The TPA generally provides for the confidentiality of tax records. Regarding the confidentiality of tax records, the Tax Procedure Act provides in pertinent part:

(a)(1) The Director of the Department of Finance and Administration is the official custodian of all records and files required by any state tax law to be filed with the Director of the Department of Finance and Administration and is required to take all steps necessary to maintain their confidentiality.

(2)(A)(i) Except as otherwise provided by this chapter, the records and files of the Director of the Department of Finance and Administration concerning the administration of any state tax law are confidential and privileged.

(ii) These records and files and any information obtained from these records or files or from any examination or inspection of the premises or property of any taxpayer shall not be divulged or disclosed by the Director of the Department of Finance and Administration or any other person who may have obtained these records and files.

(B) It is the specific intent of this chapter that all tax returns, audit reports, and information pertaining to any tax returns, whether filed by individuals, corporations, partnerships, or fiduciaries, shall not be subject to the provisions of the Freedom of Information Act of 1967, § 25-19-101 et seq.

(b) The provisions against disclosures shall not apply to the following:

* * *

(11) Disclosure of the name of any taxpayer and the amount of any tax credit, tax rebate, tax discount, or commission for the collection of a tax received by such taxpayer from the following tax incentive provisions:

- (A) Discount for prompt payment, § 26-52-503;
- (B) Economic Investment Tax Credit Act, § 26-52-701 et seq.;
- (C) Steel Mill Tax Incentives, §§ 26-52-901 — 26-52-903;
- (D) Motor fuel shrinkage allowance, § 26-55-230(a)(1)(F);
- (E) Commission for sale of stamps for cigarettes and the collection of cigarette taxes, § 26-57-236(f);
- (F) Motion Picture Incentive Act of 1983, § 26-4-201 et seq.;
- (G) Credit on severance tax of oil producer, § 26-58-204;
- (H) Credit on severance tax of gas producer, § 26-58-205;
- (I) Refund of motor fuel tax by municipal buses, § 26-55-401 et seq.;
- (J) Refund of distillate special fuel tax to interstate users, §§ 26-56-214 and 26-56-215;
- (K) Credit against severance tax for the discovery of a commercial oil pool, § 15-72-706;
- (L) Native wines — Subsidies, § 3-5-1001 et seq.;
- (M) Native wines — Incentive grants, § 3-5-901 et seq.;
- (N) Native wines export incentives, § 3-5-607 [repeled];
- (O) Consolidated Incentive Act of 2003, § 15-4-2701 et seq.; and
- (P)(i) Any other tax incentive program enacted after January 1, 1991, that provides a tax credit, tax rebate, tax discount, or commission for the collection of a tax, with the exception of any benefits under the income tax laws of this state.
- (ii) However, information that is subject to disclosure under the provisions of this subdivision (b)(11) shall not be disclosed if such information would give an advantage to competitors or bidders or if such information is exempt from disclosure under any other provision of law that exempts specified information from disclosure under any such law[.]

* * *

(c) The provisions of this section **shall be strictly interpreted and shall not permit any other disclosure of tax information concerning a taxpayer**, whether the taxpayer is an individual, a corporation, a partnership, or a fiduciary, that is contained in the records and files of the director relating to income tax or any other state tax administered under this chapter.

When analyzing Ark. Code Ann. § 26-18-303(b)(11)(P)(ii), the Department refers to the FOIA and the analogous provision in Ark. Code Ann. § 25-19-105(b)(9)(A). The decision to redact information or decline to provide information pursuant to Ark. Code Ann. § 25-19-105(b)(9)(A) is guided by the decisions of the Arkansas Supreme Court and the guidance of the Arkansas Attorney General's Office. Specifically, the Attorney General described this exemption as follows:

As noted by two recognized commentators on the FOIA, the Arkansas Supreme Court has since said that "the exemption [under subsection 25-19-105(b)(9)(A)] may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position." Watkins and Peltz, *THE ARKANSAS FREEDOM OF INFORMATION ACT* (4th ed. m & m Press 2004) at 160-61 and accompanying footnotes (citing *Arkansas Dep't of Fin. & Admin. v. Pharmacy Assocs.*, 333 Ark. 451, 458, 970 S.W.2d 217 (1998), and noting that "[p]rior to the *Pharmacy Associates* case, the Attorney General had followed the federal precedent on this point. *E.g.*, Ark. Op. Att'y Gen. Nos. 97-071, 94-015, 93-254, 87-473.") The Arkansas Supreme Court has further observed that subsection 25-19-105(b)(9)(A) was "clearly intended to prevent competitors from obtaining information about others seeking the same type of work or furnishing material to the state." *Arkansas Highway & Transp. Dep't v. Hope Brick Works, Inc.*, 294 Ark. 490, 496, 744 S.W.2d 711 (1988).

Op. Ark. Att'y Gen. 2008-099 at 3. *See also* Op. Ark. Att'y Gen. 2004-109.

Generally, Chapter 51 of Title 26 contains the Income Tax laws of the state and the Department interprets Ark. Code Ann. § 26-18-303(b)(11)(P)(i) to prohibit disclosure of information regarding tax credits or incentives in this chapter of the Arkansas Code. Prior to publication or release of records which would be responsive, the Department has a procedure established in DFA Rule 1991-7 Disclosable Tax Information to meet the requirements of Ark. Code Ann. § 26-18-303(b)(11)(P)(ii) which requires notifying the taxpayer of the request and the information to be released. After seven (7) days, the information will be released under the Tax Procedure Act assuming that the limitations in Ark. Code Ann. § 26-18-303(b)(11)(ii) do not exempt the release.

A. Waste Reduction & Recycling Equipment Credit

These credits are earned and administered under Ark. Code Ann. § 26-51-506 and are therefore part of the income tax laws of the state and further disclosure is prohibited.

B. Tourism Development Act

The Tourism Development Act provides for credits that are taken against income tax, but it is created and administered pursuant to Ark. Code Ann. § 15-11-501 *et seq.* Therefore, this credit requires that the Department provide notice prior to disclosure of the credit amounts as described above.

C. Equity Investment Incentive Act

Similarly, the Equity Investment Incentive Credit provides a credit against income tax, but is administered under Ark. Code Ann. § 15-4-3301. Therefore, this credit requires that the Department provide notice prior to disclosure of the credit amounts as described above.

D. Historic Rehabilitation Tax Credit

The Arkansas Historic Rehabilitation Tax Credit is governed by Ark. Code Ann. § 26-51-2201 *et seq.* and is therefore part of the income tax laws of the state and further disclosure is prohibited.

E. Water Resource Conservation Tax Credit

The Water Resource and Conservation credits are governed by Ark. Code Ann. § 26-51-1001 *et seq.* and are therefore part of the income tax laws of the state and further disclosure is prohibited.

F. Low Income Housing Credit

The Low-Income Housing Credit is governed by Ark. Code Ann. § 26-51-1702 and is therefore part of the income tax laws of the state and further disclosure is prohibited.

Whether any of these credits provide sufficient incentive for a business to relocate to or remain in Arkansas is a question beyond DFA's expertise. Testimony from other stakeholders including AEDC, Legislative Audit, nongovernmental organizations such as ITEP and the Tax Foundation, and trade associations of the affected industries may be helpful to the Task Force on this issue.

The Department will provide an update regarding the two credits for which information may be provided after the required publication deadlines are met.

Sincerely,



Walter Anger
Commissioner of Revenue

