ALAN WILSON
ATTORNEY GENERAL

June 1, 2021

Murrell Smith
Member
South Carolina House of Representatives
Post Office Box 580
Sumter, South Carolina 29151

Dear Representative Smith:

We received your letter requesting an Attorney General's opinion concerning the proper construction of the High Growth Small Business Job Creation Act of 2013. Specifically, you ask the following:

> The High Growth Investment Job Creation Act of 2013 provides that non-resident individuals may obtain nonrefundable income tax credits for qualifying investments so long as they are "subject to taxes imposed" by the South Carolina Income Tax Act. When is an individual "subject to taxes imposed" for purposes of qualifying for these tax credits?

Law/Analysis

The High Growth Investment Job Creation Act of 2013 (the "Act") is codified in chapter 44 of title 11 of the South Carolina Code. Section 11-44-40(A) of the South Carolina Code (Supp. 2020) entitles an angel investor to a "nonrefundable income tax credit of thirty-five percent of its qualified investment made pursuant to this chapter." Section 11-44-40(B) of the South Carolina Code (Supp. 2020) specifies:

> Fifty percent of the allowed credit may be applied to the angel investor's net income tax liability in the tax year during which the qualified investment is made, and fifty percent of the allowed credit may be applied to the angel investor's net income tax liability in the tax years after the qualified investment is made and may be carried forward for a period not to exceed ten years for these purposes as provided in Section 11-44-50.

Section 11-44-30(1) of the South Carolina Code (Supp. 2020) defines "angel investor" as

> an accredited investor as defined by the United States Securities and Exchange Commission, who is:

> (a) an individual person who is a resident of this State or a nonresident who is subject to taxes imposed by Chapter 6, Title 12; or
>
> (b) a pass-through entity which is formed for investment purposes, has no business operations, does not have committed capital under management exceeding five million dollars, and is not capitalized with funds raised or pooled through private placement memoranda directed to institutional investors. A venture capital fund or commodity fund with institutional investors or a hedge fund does not qualify as an angel investor.

(emphasis added).

You inquire as to the meaning of the phrase "is subject to taxes," as emphasized above. You informed us that the Department of Revenue (the "Department") "has indicated that it will not approve the credit for a non-resident individual who did not have any income tax liability in the preceding year . . . ." Thus, you question the Department's interpretation of the Act.

We begin with the understanding that courts "generally give[] deference to an administrative agency's interpretation of an applicable statute or its own regulation." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). Courts generally adhere to this principle unless the interpretation is "'arbitrary, capricious, or manifestly contrary to the statute.'" Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014)Id. at 34-35, 766 S.E.2d at 718 (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)). "The construction of a statute by an agency charged with its administration will be accorded most respectful consideration and will not be overruled absent compelling reasons." Jasper Cty. Tax Assessor v. Westvaco Corp., 305 S.C. 346, 348, 409 S.E.2d 333, 334 (1991). Accordingly, we give great deference to the Department's interpretation of the Act. However, to our knowledge, the Department has not issued any formal guidance interpreting the Act in regard to nonresident investors. Thus, we employ the rules of statutory interpretation to answer your request.

In interpreting the Act, the "usual rules of statutory construction apply to the interpretation of tax statutes." Greenville Baptist Ass'n v. Greenville Cty. Treasurer, 281 S.C. 325, 328, 315 S.E.2d 163, 165 (Ct. App. 1984). "Such statutes should be construed with a view to ascertaining and giving effect to the intent of the Legislature." Id. "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Starting with the text of the statute, we note the Legislature's use of present tense in the phrase "is subject to taxes." Courts generally associate the use of present tense with a "forward-looking

construction." See, e.g., Carr v. United States, 560 U.S. 438, 449 (2010); Schumacher v. Chapin, 228 S.C. 77, 84, 88 S.E.2d 874, 878 (1955). Based on the text of the statute, we believe the Legislature likely intended for nonresidents currently or prospectively subject to taxation in the state to qualify for the tax credit.

Furthermore, our Supreme Court's interpretation of similar language supports a finding that the Legislature intended for the taxation requirement to be based on current or prospective taxation. In Seward v. South Carolina Tax Commission, 269 S.C. 52, 57, 236 S.E.2d 198, 201 (1977), the Court equated the term "taxable" with being subject to tax.

> The term "taxable" as used in Section 65-279.6 of the Code, the sales factor of the apportionment formula, means subject to tax, whether or not actually taxed. That is, a transaction is "taxable" when the state in which the transaction takes place has the power to tax the transaction and it is irrelevant whether or not that state chooses to levy a tax.

Id. at 57, 236 S.E.2d at 201. According to the Court's interpretation, being subject to tax entails the ability to be tax as opposed to being subject to tax in the past. Section 12-6-1720 of the South Carolina Code (2014) requires nonresidents to report their South Carolina taxable income. As such and in accordance with Seward, a nonresident is subject to tax in any year they have South Carolina taxable income.

Moreover, we believe reading the taxation requirement prospectively furthers the legislative intent of the Act. Section 11-44-20 of the South Carolina Code (Supp. 2020) provides insight into the Legislature's intent, stating:

> The General Assembly desires to support the economic development goals of this State by improving the availability of early stage capital for emerging high-growth enterprises in South Carolina. To further these goals, this chapter is intended to:
>
> (1) encourage individual angel investors to invest in early stage, high-growth, job-creating businesses;
>
> (2) enlarge the number of high-quality, high-paying jobs within the State;
>
> (3) expand the economy of this State by enlarging its base of wealth-creating businesses; and
>
> (4) support businesses seeking to commercialize technology invented in this state's institutions of higher education.

S.C. Code Ann. § 11-44-20. The Act clearly seeks to incentivize capital investment in the state. By definition, the Legislature included nonresidents as eligible for tax credits under the Act, presumably to attract not only investment from within the state, but also from out of state. Therefore, we believe the Legislature intended for the provisions of the Act to apply to both residents and nonresidents alike.

We are also of the opinion that a prospective interpretation comports with other provisions in the Act. "In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable construction." Higgins v. State, 307 S.C. 446, 449, 415 S.E.2d 799, 801 (1992). Section 11-44-40(B) of the South Carolina Code, as quoted above, explains how to apply the tax credit, specifying fifty percent of the credit may be applied during the year the investment is made. Presumably, the Legislature structured the credit this way to incentivize investors to make an investment, knowing they immediately would be eligible for half of the credit in the first year of their investment. However, if a nonresident must wait to claim the tax credit until they report at least a year of taxable income, the incentive to make the investment is diminished. Therefore, construing section 11-44-40(B) in conjunction with the definition of an angel investor under section 11-44-20, we believe the Legislature intended to allow nonresidents to be eligible to receive the tax credit in the same year they become subject to tax in the state, thus allowing them to take advantage of the credit during their initial year of investment.

Despite indications that the taxation requirement for nonresidents should be applied prospectively, this interpretation poses challenges in applying the Act. The Legislature specifies only those nonresidents who are subject to taxation qualify for the credit. Practically, this requirement makes sense because an investor who does not have taxable income would not have a use for a nonrefundable tax credit.[1] An issue, however, arises in how an investor who never paid taxes in South Carolina demonstrates he or she is subject to taxation in this state. Furthermore, as we noted above, "statutes which are part of the same Act must be read together." Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Section 11-44-70 of the South Carolina Code (Supp. 2020) requires angel investors seeking to claim a tax credit to submit an application to the Department in the year the credit is claimed or allowed. This application is aimed to proving eligibility for the tax credit, which would include a nonresident demonstrating they are subject to taxes in South Carolina. Moreover, section 11-44-70 requires the Department to offer tentative approval by January 31 of the year following the application to those it deems eligible under the Act. If a nonresident has no history of paying taxes in South Carolina and we believe it is unlikely that an investor would file a return by the January 31 deadline, the determination of eligibility becomes difficult, if not impossible, for the Department.

While we believe the Legislature intended to allow nonresidents who currently are subject to taxation to be eligible for a tax credit under the Act, the Act as it is currently written needs additional clarification from the Legislature. It is our understanding the Legislature recently

[1] We acknowledge the Act allows for investors to sell and transfer their credits pursuant to section 11-44-50 of the South Carolina Code (Supp. 2020).

renewed the provisions of the Act, but they are set to expire on December 31, 2025. Thus, we suggest the Legislature either clarify that "subject to taxes" requires nonresident investors to be previously subject taxation or address the issues with determining eligibility of nonresidents when they do not have a history of taxation in South Carolina.

Conclusion

We began our analysis of section 11-44-30(1) by stating we generally defer to the Department's interpretation of the applicability of tax credits. However, as of the date of this opinion, we did not find any published guidance from the Department interpreting the Act as requiring nonresidents to have a prior taxable income before becoming eligible to receive tax credits under the Act. Should the Department issue such guidance, we certainly would defer to it unless it is arbitrary, capricious, or manifestly contrary to the statute.

With that being said, given the language used in section 11-44-30(1) and our understanding of the Legislature's intent, we believe nonresidents are eligible to receive nonrefundable tax credits under the Act in the year they become subject to tax in South Carolina. Accordingly, we do not believe a prior history of paying taxes in South Carolina is required for nonresidents to qualify for a tax credit under the Act.

Nonetheless, we are concerned as to the application of the "subject to taxes" requirement and how it impacts other requirements under the Act. Without a prior record of paying tax in South Carolina, it becomes difficult for nonresidents to demonstrate they are currently subject to tax South Carolina and even harder for the Department to make decisions on a nonresident's eligibility, both of which are required under the Act. As such, we suggest the Legislature clarify the law regarding these issues or make clear that a prior year tax liability is required.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General