SALT Newsletter

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NORTH CAROLINA LEGISLATIVE CHANGES SOUTH CAROLINA LEGISLATIVE CHANGES RECENT FORCED COMBINATION LITIGATION NORTH CAROLINA RENEWABLE ENERGY TAX INCENTIVE CHANGES SOUTH CAROLINA SALES AND USE TAXES ON INTERNET PURCHASES

Welcome to the inaugural issue of our state and local tax ("SALT") newsletter. We will use this newsletter to highlight recent developments in North Carolina and South Carolina tax law that we think will be of primary interest to businesses with activities in either or both of these states. The state legislatures have been busy this year, so this first issue will focus on legislative developments, as well as recent litigation over forced combination cases. We hope you find this information to be useful. If you have any questions, please feel free to contact one of the attorneys on our tax team.

North Carolina Legislative Changes

The North Carolina General Assembly adjourned July 10, 2010 after promulgating and revising a broad range of tax statutes dealing with administrative, small businesses, renewable energy, economic incentives and other tax issues. The following is a summary of some of the more important law changes affecting businesses. A detailed explanation of all 2010 tax law changes can be found on the North Carolina Department of Revenue ("NCDOR") website at http://www.dor.state.nc.us/practitioner/law_changes_2010.html.

ADMINISTRATIVE ISSUES

Timely Filing - Session Law ("S.L.") 2010-95 (SB 1177) incorporates the "timely filing" rule under Internal Revenue Code § 7502 for a return, report, payment, or any other document that is mailed to the NCDOR. S.L. 2010-95 also provides that if a request for Departmental review is delivered by any method other than the U.S. mail, the request is considered filed when the NCDOR receives it.

Notice Of Revised Tax Interpretations -- Effective July 1, 2010, S.L. 2010-31 (SB 897) (the "Budget Bill") provides that an interpretation of law made by the Secretary of Revenue (the "Secretary") that revises a prior interpretation of law and expands the scope of a tax or otherwise increases the amount of a tax due may not become effective sooner than (1) the first day of a month that is at least 90 days after the date the revised interpretation is issued, for a tax that is payable on a monthly or quarterly basis; or (2) the first day of a tax year that begins after the date the revised interpretation is issued, for a tax that is payable on an annual basis.

Failure to Pay Penalties -- The Budget Bill attempts to provide more fairness to the assessment of the failure to pay when due penalty ("FTP penalty") and the negligence penalty. Under prior law, when the Secretary proposed a tax assessment (other than an assessment due to tax evasion), the statute required the Secretary to assess a 10% FTP penalty unless the taxpayer paid the tax due within 45 days after the date of the notice of proposed assessment.

The Budget Bill provides that the FTP penalty does not apply at the time the Secretary proposes an assessment for additional tax due, if the tax due is paid within 45 days after the later of (1) the date of the notice of proposed assessment of the tax (if no Departmental review is requested) and (2) the date the proposed assessment becomes collectible (if the taxpayer files a timely request for Departmental review).

The Budget Bill also provides that FTP penalties would not apply when the taxpayer files a consolidated or combined return at the request of the Secretary and the tax due is paid within 45 days after the later of (1) the date the return is filed, (2) the date of the notice of the proposed assessment based on the return (if no Departmental review is requested), and (3) the date the Departmental review of the tax ends (if the taxpayer files a timely request for Departmental review).

Negligence Penalties -- Corporations that are members of affiliated groups which elect to file Federal income tax returns on a consolidated basis are generally required to file North Carolina income and franchise tax returns on a separate company basis, rather than on a combined or consolidated basis, unless the Secretary notifies the corporation of its obligation to file such returns on a combined or consolidated basis. Under prior law, even if the corporation amended its return to comply with the Secretary's decision within 60 days of such notification, the Secretary still assessed negligence penalties on the additional tax due. The Budget Bill adds a new provision to the negligence penalty statute to provide that, with limited exceptions, the amount of tax shown as due on a consolidated or combined return filed at the request of the Secretary is not considered a deficiency.

The foregoing FTP and negligence penalty provisions are generally effective with respect to penalties and taxes that are assessed but unpaid as of July 1, 2010 and to penalties and taxes assessed on or after July 1, 2010.

Revised Rules for Filing Consolidated or Combined Returns -- Under prior law, corporations were ineligible to file consolidated North Carolina income tax returns unless the corporation was required to do so by the Secretary. Under the changed provisions which became effective July 1, 2010, a corporation electing to file a consolidated Federal income tax return may not file a consolidated or combined North Carolina income tax return unless:

(a) The Secretary directs the corporation in writing to file a consolidated or combined return;

(b) The corporation's facts and circumstances meet the facts and circumstances described in a permanent rule adopted by the Secretary and the corporation files a consolidated or combined return in accordance with that rule; or

(c) Pursuant to a written request from the corporation, the Secretary has provided written advice to the corporation stating that the Secretary will require a consolidated or combined return under the facts and circumstances set out in the corporation's request and the corporation files a consolidated or combined return in accordance with that written advice

The provisions described above that relate to the filing of consolidated or combined returns are effective with respect to penalties and taxes that are assessed but unpaid as of July 1, 2010 (except penalties and taxes that are the subject of pending litigation in a General Court of Justice on July 1, 2010) and to penalties and taxes assessed on or after July 1, 2010.

Alternative Apportionment -- Under, S.L. 2010-89 (HB 713), if a corporation signs a letter of commitment by September 15, 2010 with the Secretary of Commerce certifying that the corporation will invest at least $500 million in private funds to construct a facility in a development tier one area within five years after the time construction begins, the corporation may make a written request to the Secretary of Revenue for permission to use an alternative method of apportionment for its North Carolina income and franchise taxes if it believes the statutory apportionment method that otherwise applies to it subjects a greater portion of its income to tax than is attributable to its business in North Carolina. Such requests may apply to no more than 15 tax years.

SMALL BUSINESS PROVISIONS

Temporary Unemployment Insurance Refundable Tax Credit – Applicable for 2010 and 2011 tax years only, the Budget Bill creates a refundable tax credit for eligible small businesses that make contributions during the tax year to the State Unemployment Insurance Fund with respect to wages for employment in North Carolina. The tax credit equals 25% of the contributions made to the fund. Eligible small businesses are those whose cumulative gross receipts from business activity for the taxable year do not exceed $1 million. The North Carolina Chamber of Commerce anticipates that the budgeted $34 million in tax relief will affect approximately 125,000 North Carolina businesses.

ECONOMIC INCENTIVES

Extension of Article 3J Tax Credits – Generally, under Chapter 105, Article 3J, of the North Carolina General Statutes, a company qualifies for tax credits if the company (1) meets a minimum threshold of new fulltime jobs created during the taxable year, (2) makes an investment in tangible personal property that is placed in service during the taxable year or (3) invests at least $10 million in real property within a 3-year period in a tier one county and creates at least 200 new jobs within two years.

Credits may be combined to offset up to 50% of the taxpayer's North Carolina income and franchise tax liabilities. Unused credits may be carried forward for up to 5 years (a 15-year carryforward period applies to category (3) above and a 20-year carryforward period exists for taxpayers who invest at least $150 million over a 2-year period).

S.L. 2010-147 (HB 1973) extends eligibility to claim the Article 3J tax credits for two years, and such credits are now scheduled to expire effective for business activities occurring on or after January 1, 2013 (previously January 1, 2011).

Expansion of Tax Credits for Production Companies – Effective for tax years beginning on or after January 1, 2011, the tax credit for production companies is expanded to allow a production company to claim a refundable tax credit against its North Carolina income tax equal to 25% of "qualifying expenses" (up from 15% under prior law). The modification expands the definition of "qualifying expenses" to include the company's contribution to employee plans, such as health, pension and welfare plans, and includes expenditures for per diems, stipends and living allowances. The modification to the tax credit also eliminates the cap on compensation to any individual in excess of $1 million and increases the maximum credit allowable for each production from $7.5 million to $20 million.

Effective for tax years beginning on or after January 1, 2011, production companies are no longer entitled to claim the alternate credit for qualifying expenses of a production company. Under the alternate credit provisions, production companies were allowed a credit equal to 25% of the production company's qualifying expenses less the difference between the privilege tax on purchases qualifying as mill machinery (1% tax with an $80 per article maximum) and the tax that would have been due on such purchases at the general sales and use tax rate.

Tax Credit for Developing Interactive Digital Media – Effective for tax years beginning on or after January 1, 2011, S.L. 2010-147 (HB 1973) encourages the production of interactive digital media ("IDM") products or digital platforms or engines for use in IDM products, such as interactive games and simulations used for training by educators and the military, by providing for a tax credit that may be claimed against a taxpayer's North Carolina income or franchise taxes. The tax credit equals 15% of the taxpayer's qualifying expenses that exceed fifty thousand dollars ($50,000) (20% if paid to a participating community college or research university), with a tax credit cap of $7.5 million. To qualify as IDM, the product must (1) be produced for distribution on electronic media, including distribution by file download over the Internet, (2) contain a computer-controlled virtual universe with which an individual who uses the program may interact in order to achieve a goal, and (3) contain a significant amount of at least three of the following five types of data: animated images, fixed images, sound, text, and 3D geometry.

Extension of Sunset Date for Credit for Qualified Business Investment -- North Carolina provides for a 25% credit of the amount invested in equity securities or subordinated debt from a qualified business, subject to investment caps which depend upon the type of qualified business. The Budget Bill extended the expiration date of the qualified business investment credit to January 1, 2013 (previously January 1, 2011).

Industrial Facilities Sales and Use Tax Refunds – S.L. 2010-166 adds a new statute that allows an owner of an industrial facility that meets the business, minimum investment and industry-specific requirements set forth in the statute an annual refund of sales and use tax paid by it on building materials, building supplies, fixtures and equipment that are installed in the construction of the facility and that become part of the real property of the facility. Eligible businesses consist of (1) air courier services, (2) aircraft manufacturing, (3) bioprocessing, (4) financial services, securities operations and related systems development, (5) motor vehicle manufacturing, (6) pharmaceutical and medicine manufacturing and distribution of pharmaceuticals and medicines, (7) semiconductor manufacturing, and (8) solar electricity generating materials manufacturing.

The North Carolina Secretary of Commerce must certify that the owner of the facility will invest at least $50 million if the facility is in a tier one development area ($100 million if the facility is in a tier development area other than a tier one area). Other conditions apply to facilities engaged primarily in the financial services, securities operations and related systems activities, and wage standards apply to a facility engaged primarily in solar electricity generating materials manufacturing.

South Carolina Legislative Changes

During the 2010 South Carolina Legislative session which adjourned June 3, 2010, the South Carolina Legislature passed 165 acts, including a number of acts impacting South Carolina taxes and incentive provisions. The following are some of the more significant tax legislative changes. For a more detailed explanation of South Carolina tax legislative changes, see South Carolina Information Letter No. 10-9 issued September 14, 2010, by the South Carolina Department of Revenue ("SCDOR") available on the **SCDOR's website**.

Infrastructure Support – Act No. 150 (SB 4514) and Act No. 290 (HB 4478), effective 4/27/10, create a fund to be administered by the Coordinating Council for Economic Development (the "Council") for supporting public infrastructure improvements which directly support a project in which an S corporation engaged in manufacturing in South Carolina makes a new capital investment in a single site of at least $500 million and hires a minimum of 400 new employees.

Textile Mill Revitalization Credit – South Carolina's Textiles Communities Revitalization Act (the "TCRA") provides a credit for rehabilitation of abandoned textile mill sites in South Carolina. Among other revisions, the credit may be claimed against either: (1) income tax, corporate licenses fees or both or a credit against bank taxes or (2) real property taxes. Act No. 182 (SB 728), effective 5/28/10, modifies the TCRA (a) to deny credits to a taxpayer if the facility previously received textile mill credits, (b) to permit taxpayers to apply to the municipality or county in which their textile mill is located to receive certification of the site and to permit taxpayers to conclusively rely on such certification to claim the credit, (c) to permit taxpayers to claim the credit against insurance premium taxes, if applicable, (d) to limit the amount of credit to 50% of each of the taxpayer's liability for (i) income taxes or bank taxes, (ii) corporate license fees, or (iii) insurance premium taxes, and (e) to provide for an allocation of the credit by a partnership (or LLC) to any partner or member who was a partner (or member) at any time during the year in which the credit is allocated.

A textile mill completely placed in service before 2008 is governed by the provisions of the law in effect as of December 31, 2007; however, a textile mill that was partially placed in service before December 31, 2007 may elect to be treated as though the mill is partially governed by the law in effect as of December 31, 2007, or may elect to be treated as though the entire mill was placed in service after December 31, 2007.

Unemployment Compensation Changes – (SB 391), effective 1/1/11. For purposes of computing an employer's South Carolina unemployment tax liability, this act revises the method of determining the base rate of an employer eligible for a rate computation adjustment in order to meet solvency targets for the State's unemployment insurance fund. The act also imposes certain surcharges on employers which will be used to reduce the State's outstanding debt to the Federal government that the State incurred in years when the State's fund would otherwise have been insolvent.

Community Economic Development Act – At No. 248 (SB 915), effective 6/14/10, extends the provisions of the South Carolina Community Economic Development Act by extending eligibility for community development tax credits to June 30, 2015 (previously June 30, 2010). The credit allowed equals 33% of a taxpayer's investment in a community development corporation or community development financial institution (capped at $5 million for all taxpayers for the life of the credit; and at $1 million for any one calendar year).

Assessable Transfer of Real Property Interests – For ad valorem tax purposes, South Carolina law provides for an interim revaluation when a transfer of a real property interest occurs (i.e., an assessable transfer of interest or "ATI"). The law provides for ATI exceptions, including a conveyance to a trust in which the settlor and/or the settlor's spouse are the present beneficiaries. Act. No. 275 (HB 4174), effective 6/16/10, adds two new ATI exceptions for (1) transfers by a settlor and/or the settlor's spouse to a trust if the real property interest conveyed is subject to South Carolina's special 4% assessment ratio applicable to primary residences and the sole present beneficiaries of the trust are the child or children of the settlor and/or the settlor's spouse and (2) conveyances by distribution under a will or by intestate succession if (a) each distributee is a child of the decedent, (b) the decedent had no surviving spouse and (c) the property is subject to the special 4% assessment ratio applicable to primary residences. In both of these circumstances, subsequent conveyances by the child or children are not exempt from the reassessment provisions.

Act No. 275 also provides that certain transactions after 2009 are not ATIs, including certain transfers of undivided interests in property; a transfer between an owner and the owner's single member limited liability company; or a conveyance, assignment, release, or modification of an easement (including a conservation easement, a utility easement, or an easement for ingress, egress, or regress).

Pursuant to Act No. 275, penalties of $100 to $1,000 may be imposed by the assessor on business entities that fail to provide timely notice or accurate information on ATIs attributable to transfers of more than 50% ownership interests in a corporation, partnership, sole proprietorship, limited liability company, limited liability partnership or other legal entity.

Act No. 275 also clarifies that the limit on the increase in fair market value of real property attributable to the periodic county-wide appraisal and equalization program (15% within a 5-year period) must be calculated on the land and improvements as a whole.

Economic Development Competitiveness Act ("EDCA") – Act No. 290 (HB 4478) generally effective 1/1/11, adopts the provisions set forth below:

Capital Investment Tax Credit – The EDCA substantially amends the Economic Impact Zone Community Development Act of 1995, including an amendment to remove all references to "economic impact zones" and to provide a capital investment tax credit of the total aggregate bases of all qualifying manufacturing and productive equipment property of .5% for 3-year property, 1% for 5-year property, 1.5% for 7-year property, 2% for 10-year property, and 2.5% for 15-year property, effective 1/1/11.

Job Tax Credit – Effective 1/1/11, the EDCA changes county Tier rankings from five tiers to four tiers and provides a basic job tax credit for each new full time job created by qualifying businesses based on the new Tier rankings: $1,500 in a Tier I county, $2,750 in a Tier II county, $4,250 in a Tier III county, and $8,000 in a

Tier IV county (subject to a 50% reduction for certain companies claiming the small business job tax credit). The revision added "agribusiness operations" to the list of qualifying businesses and made other miscellaneous changes to the Job Tax Credit.

Job Development Credit – South Carolina provides a tax credit against employee withholding taxes for new or expanding businesses that make qualifying investments and create a minimum number of new jobs in the State and that enter into a revitalization credit with the Council. Effective 1/1/11, the EDCA amends the credit provisions (1) to codify existing Council guidelines for suspending the credit during any quarter in which the company fails to meet the minimum job requirements set forth in the agreement, (2) to clarify that the credits may not be claimed until after the Council's approval of the company's documentation that the targeted requirements have been met, (3) to clarify that a real property capital lease or operating lease with a duration of at least five years, if approved by the Council, will constitute a qualifying expenditure, and (4) to clarify which relocation expenditures constitute qualifying expenditures.

Fee-in-lieu-of-tax Provisions – Generally effective 5/12/10 and 6/23/10, the EDCA extends the duration of the fee period for "fee-in-lieu-of-tax" agreements under the Enterprise Zone Act to 15 years and adds qualified nuclear facilities to the list of projects eligible for fee in lieu of property tax agreements. The EDCA defines "qualified nuclear plant facility" as a nuclear electric power generating plant regulated by the Nuclear Regulatory Commission, with a minimum investment of $1 billion. The act also provides that a qualified nuclear plant facility has 5 years to enter into an initial lease agreement with a county, once it has been granted a license by the Nuclear Regulatory Commission to construct and operate a nuclear power plant and has 15 years after the initial lease agreement is executed to meet the minimum investment amount. The EDCA makes other significant changes to South Carolina's fee-in-lieu-of-tax agreement provisions with respect to South Carolina's "little fee," "big fee" and "simplified fee" agreements.

New Credit for Manufacturers of Renewable Energy Systems and Components – The EDCA establishes the South Carolina Renewable Energy Tax Incentive Program which provides for a new income tax credit applicable to the five-year period beginning 1/1/10 through 12/31/15 for businesses expanding or locating in South Carolina that (1) manufacture renewable energy systems and components for solar, wind, geothermal or other renewable energy uses; (2) for the year in which the credit is claimed, invest at least $500 million in a new qualifying plant and equipment and (3) meet certain payroll targets. A taxpayer who is certified by the State Energy Office is entitled to claim the credit which is equal to 10% of the cost of the company's total qualifying investment in plant and equipment in South Carolina for renewable energy operations (with a cap of $500,000 per year and $5 million in the aggregate for all tax years).

Life Sciences and Renewable Energy Manufacturing Facilities – Effective 6/23/2010, the EDCA expands provisions formerly applicable to life science facilities located in South Carolina to include a renewable energy manufacturing facility certified by the South Carolina Energy Office (i.e., (1) a business which manufactures qualifying machinery and equipment for use by solar and wind turbine energy producers or (2) a facility which manufactures qualifying advanced lithium ion, or other batteries for alternative energy motor vehicles (or for certain other certified vehicles)). A renewable energy manufacturing facility that invests at least $100 million in the project and meets certain payroll targets (a) is entitled to job development credit expense benefits for reimbursements for qualifying relocation expenses (7/1/10 to 6/30/14 only), (b) may be permitted to retain 95% of their job development credit upon Council approval (7/1/10 to 6/30/14 only), (c) may be permitted to enter into an agreement with the SCDOR to use a special allocation and apportionment method of income for a period of up to 15 years, and (d) is eligible for a 20% depreciation rate for ad valorem tax purposes.

Port Cargo Volume Increase Credit -- The EDCA increases tax credits for taxpayers engaged in manufacturing, warehousing or distribution that use a South Carolina port facility and that increase their port cargo volume at such facilities by at least 5% over the taxpayer's base year volume. Prior to the EDCA, the credit could be claimed against the taxpayer's South Carolina income tax. The EDCA now permits taxpayers to claim the credit against withholding taxes.

Alternative Fuels R&D Credit – Effective 1/1/11, the EDCA extended the 10% alternative fuels research and development credit to qualified expenditures for research and development for waste grease derived biodiesel.

Recent Forced Combination Litigation

Taxpayers in North Carolina and South Carolina should be aware of litigation and the related developments in both states that examine each respective Department of Revenue's authority to require combination of legal entities for purposes of determining a corporate taxpayer's income tax liability.

In the wake of the North Carolina Court of Appeals decision in the Wal-Mart1 forced combination litigation, North Carolina taxpayers should be aware of litigation seeking to further define the North Carolina Department of Revenue's ("NCDOR") ability to force combination to determine corporate income tax liability. In North Carolina Business Court, Delhaize America, Inc. ("Delhaize") is seeking a refund of approximately $ 6.9 million in taxes, interest and penalties as a result of the NCDOR's forced combination of Delhaize and FL Food Lion, Inc. Delhaize asserts, among other claims, that the NCDOR violated the statutes it relied upon to force the combination of Delhaize and FL Food Lion, Inc., that the NCDOR's actions violate the Commerce and Due Process clauses of the United States Constitution, and that the NCDOR's actions and policies (or lack of published policies) with regard to forced combination violated the North Carolina Administrative Procedures Act and administrative law policies. Both Delhaize and the NCDOR currently have Motions for Summary Judgment pending. A hearing on these motions was held on July 1, 2010 and the court is expected to rule shortly. Trial has been set for December 13, 2010.

In contrast to the NCDOR's position regarding its authority to force combination, the South Carolina Department of Revenue ("SCDOR") recently litigated *Media General Communications, Inc. et al. v. South Carolina Department of Revenue2*, in which the SCDOR took the position that the SCDOR does not have authority to require or allow combination, even in the face of stipulated unconstitutional distortion arising from utilizing the standard separate reporting and standard apportionment. On June 14, 2010, the South Carolina Supreme Court ("Supreme Court") issued its opinion holding that the SCDOR does have the authority to allow combination and specifically requiring combination in Media General's case.

The Supreme Court heard the case on appeal from the South Carolina Administrative Law Court (" Administrative Law Court"). The Administrative Law Court held that the plain language of the statute, allowing the use of "any other method to effectuate an equitable allocation and apportionment of the taxpayer's income" when the standard allocation and apportionment methods do not fairly represent the taxpayer's South Carolina business activities, authorizes use of the combined entity apportionment methodology.

The Supreme Court agreed with the Administrative Law Court that the plain language of the equitable apportionment statute authorizes the SCDOR to use/allow the combined entity apportionment method for determining a taxpayer's income. In addition, the Supreme Court emphasized that, as a general rule, the SCDOR is not required to automatically use the method requested by a taxpayer, and that the SCDOR has discretion to select an alternative method that fairly measures the taxpayer's South Carolina income.

We will continue to monitor developments in both states related to forced combination cases, including developments regarding the parameters of the NCDOR's ability to force combination and how the SCDOR utilizes its power to require/allow combination when the standard allocation and apportionment methods do not fairly represent the taxpayer's South Carolina business activities. See the separate article in this newsletter on recent North Carolina legislative changes regarding forced combination.

North Carolina Renewable Energy Tax Incentive Changes

A tax credit equal to 35 percent of the cost of certain renewable energy property is available under N.C. Gen. Stat. Section 105-129.16A. That section provides that no credit is available to the extent the cost of the property was provided with "public funds." The North Carolina Department of Revenue had ruled that federal grants under Section 1603 of the American Recovery and Reinvestment Tax Act of 2009 (which are in lieu of federal tax credits) constituted public funds. Senate Bill 388 (S.L. 2010-4) provides that such grants do not constitute public funds for purposes of the renewable energy credit, effective January 1, 2009, applicable to renewable energy property placed in service on or after that date.

House Bill 1829 (S.L. 2010-167) made other changes to the renewable energy tax credit effective for taxable years beginning on or after January 1, 2010. The definition of "cost" of property eligible for the renewable energy credit was changed to provide that, in the case of property that the taxpayer leases from another (in which case the lessor must certify that it is not claiming the credit so that the lessee may claim the credit), cost is determined under G.S. 105-130.4(j)(2) (based on 8 times net annual rent), unless the taxpayer claims the federal Section 48 energy credit or a federal grant in lieu of a credit and makes a lease pass-through election under the Code, in which case the cost for purposes of the NC credit is the cost under the Code.

In addition, H.B. 1829 adds a definition of "installation" for purposes of determining what constitutes a separate installation subject to the per installation ceilings on the dollar amount of the renewable energy tax credit. An installation is defined as "Renewable energy property that, standing alone or in combination with other machinery, equipment, or real property, is able to produce usable energy on its own."

The definition of renewable energy credit property was also changed to include certain combined heat or power system property and geothermal equipment. Furthermore, the various ceilings on the credit were changed to apply to property placed in service for business and nonbusiness purposes, rather than nonresidential and residential purposes. Property is "placed in service for a business purpose if the useful energy generated by the property is offered for sale or used on-site for a purpose other than providing energy to a residence."

Other changes in H.B. 1829 include (1) extending the sunset date for the biodiesel producer credit and renewable fuel facilities credit to taxable years beginning on or after January 1, 2013, and (2) reenacting and expanding the renewable energy property facility credit. The renewable energy property facility credit is available for taxpayers that place in service a commercial facility for the manufacture of renewable energy property or a major component subassembly for a solar array or a wind turbine. The credit is equal to 25 percent of the taxpayer's cost to construct and equip the facility or 25 percent of the cost to convert and equip an existing manufacturing facility. The credit is to be taken in five equal annual installments beginning with the taxable year in which the property is placed in service, and is effective only for the 2011 through 2013 taxable years.

South Carolina Sales and Use Taxes on Internet Purchases

It is a common misperception among South Carolina taxpayers that internet purchases are exempt from South Carolina sales and use tax. However, contrary to popular belief, it is clear under South Carolina law that internet purchases are subject to the sales and use tax. The South Carolina Department of Revenue (the "SCDOR") recently reiterated that position pursuant to its holding in SC Revenue Ruling #08-6. In contrast to retail purchases of tangible personal property over the internet, charges to access the internet are exempt from taxation pursuant to federal law. Additionally, such internet access charges do not constitute tangible personal property under current South Carolina law and, thus, are not subject to sales and use tax.

The sales tax applies to internet purchases from retailers in South Carolina, and the South Carolina use tax applies to internet purchases from retailers outside of South Carolina. Only the sales or use tax will apply to a transaction and never both of such taxes.

The South Carolina sales tax "is imposed upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." Thus, South Carolina sales tax applies if (1) a person is engaged or continuing in the business of selling; (2) the person is selling tangible personal property in South Carolina; and (3) the sale of tangible personal property is a retail sale.

In South Carolina, use tax "is imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State", and such use tax applies "regardless of whether the retailer is or is not engaged in business in this State." Thus, South Carolina use tax applies if (1) tangible personal property; (2) is purchased at retail; and (3) is stored, used, or consumed in South Carolina. A credit against the South Carolina use tax is permitted with regard to sales tax paid to another state if the taxpayer provides proof that such sales tax was paid to another state. The purchaser not the seller is required to remit the use tax to the SCDOR unless the out of state retailer has a "physical presence" in South Carolina.

Although there are numerous exclusions and exceptions to the South Carolina sales and use tax, none of such exclusions or exemptions apply to internet purchases which are otherwise subject to the sales and use tax as a result of such purchases being purchases of tangible personal property from a retailer. Thus, a purchase from an out of state retailer such as L.L. Bean will be subject to either sales or use tax regardless of whether such purchase is made in person, by telephone, or over the internet.