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***TAX ADVISORY***

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**ARKANSAS STATE TAX UPDATE**  
**2009 LEGISLATIVE SESSION**

The 87th General Assembly— 2009 Regular Session convened January 12, 2009, and adjourned on May 1, 2009. Notwithstanding the present dismal economic conditions, it has been observed that Arkansas may be the only state in the union to adopt significant tax reductions in 2009, in the form of the reduced rates for groceries and for electricity and natural gas used in manufacturing, both taking effect July 1, 2009. These were balanced by major increases in tobacco taxes to fund healthcare policy initiatives, and selective tightening and expanding of economic development incentives. Several other changes of interest to business and industry were adopted, including procedural changes that should “level the playing field” for taxpayers that are forced into tax litigation. Over 50 other tax acts of varying scope were also adopted.

The following summaries are taken in part from descriptions compiled by the Office of Revenue Legal Counsel, with appreciation for use of these materials. Unless a specific date is noted, new acts are effective 90 days following adjournment (July 31, 2009), and in the case of income tax acts, apply to tax years beginning on or after January 1, 2009.

**A. INCOME TAX.**

**Act 211.** Creates a check-off for individual income tax filers to designate a portion or all of their state income tax refund to be contributed to an Arkansas Tax Deferred Tuition Savings Program account. The program is a Section 529 tuition savings trust fund.

**Act 237.** Amends Arkansas law to define the diagnosis of developmental disability.

**Act 238 (2/25/09).** Amends Ark. Code Ann. §26-18-306 to extend the statute of limitations to file a claim for refund of income tax paid based on a claim for exemption for military disability pay to one year after the determination is made by the Secretary of Veterans Affairs.

**Act 360 (7/1/09).** Redefines “noncompliant taxpayer” for purposes of business closure authority to include businesses that do not file employee withholding returns for two months during a 24-month period.

**Act 372.** Updates the reference dates for portions of the Internal Revenue Code adopted by reference to reflect technical changes since the last legislative session. Also adopts certain additional provisions by reference and makes the following technical changes to the Arkansas Income Tax laws:

- Extends the reporting date to April 15 for pass through entities to report their distributions to shareholders;
- Amends Arkansas law related to annuities, retirement savings, and employee benefit plans to adopt recent federal changes related to benefits paid to active military personnel and veterans;
- Amends Arkansas law regarding limitations on deductions arising from certain leasing transactions;
- Amends Arkansas law regarding employee benefits excluded from gross income to include qualified transportation fringe benefits;
- Amends Arkansas law regarding allowable deductions for expenses incurred in conducting a business or trade to limit the deductible amount of executive compensation of a company participating in the troubled asset relief program;
- Amends Arkansas law regarding allowable deductions for the costs paid for the cleanup of certain hazardous substances to extend the deduction for expenses paid prior to January 1, 2010;
- Amends Arkansas law regarding the exclusion from gross income of gain resulting from an involuntary conversion of a taxpayer's property to allow an exclusion for an involuntary conversion as a result of a "federally declared disaster";
- Denies the dividends paid deduction to captive real estate investment trusts (REITs);
- Amends current Arkansas law to provide that political organizations that are exempt from filing a federal income tax return because they have no taxable income shall also be exempt from filing an Arkansas income tax return.

**Act 373.**

- Establishes a definite period of time for a taxpayer to file an amended return following the receipt of notice by the Internal Revenue Service (IRS) of a correction that results in an overpayment of state tax;
- Clarifies under what conditions and for what period of time following an IRS correction notice that the Department of Finance may assess additional tax to the taxpayer that results from the IRS correction; and
- Clarifies that neither assessment nor refund applies if the change in taxable income involves an issue or a tax year not included in the notice and the time is more than 3 years from the time the original return was filed or 2 years from the time the tax was paid.

**Act 425 (7/1/09).** Exempts from income tax the lump-sum benefits paid to an active member of the Arkansas Teacher Retirement System who dies in service before retirement.

**Act 713.** Authorizes DFA to setoff a taxpayer's state income tax refunds to satisfy a past-due and legally enforceable debt to the Internal Revenue Service and creates a procedure for a taxpayer to request relief when a joint return is subject to setoff.

**Act 1323 (7/1/09).** Clarifies that the lump-sum payment to designated survivors of certain deceased members of the Arkansas Teacher Retirement System is exempt from income tax.

**Act 1500 (Contingent).** Provides an income tax credit equal to 20% of the purchase price of a cigarette receptacle that is purchased by a business with 50 or fewer employees and placed in service during the taxable year. This credit may be claimed only once by the taxpayer. The Act is also contingent on an unusual provision to the effect that it will only be available if the Chief Fiscal Officer of the State certifies that sufficient revenues are available from other funding sources to replace the general revenue cost of the program.

## **B. LEGAL AND PROCEDURAL.**

**Act 272.** Exempts from confidentiality and allows disclosure of whether a taxpayer has filed state tax returns for four years prior to the filing of the bankruptcy petition to standing chapter 13 bankruptcy trustees.

**Act 504.** Waives the confidentiality of tax records to allow the Department of Finance and Administration and The Department of Workforce Services to share information regarding withholding tax information and unemployment insurance contribution information, respectively.

**Act 655.** Makes formatting and clarifying changes to Title 26 (Taxation) of the Arkansas Code.

**Act 755 (4/1/09).** Changes the standard of proof for tax exemptions, deductions, or credits to clear and convincing evidence and provides that presumption of correctness will not attach to a determination of the director in an appeal to circuit court.

**Act 814.** Amends various code sections related to service of process on business entities. One significant change concerns service of process on certain entities that either have not appointed custodians or agents for service of process or no longer have custodians or agents for service or process. The act allows the plaintiff to serve the entity directly by registered or certified mail rather than to serve the Secretary of State.

**Act 1182.** Amends the procedures regarding subpoenas issued by certain boards and commissions that issue licenses.

**Act 1209.** Allows a clerk to scan a judgment and save it on a searchable electronic system in-lieu-of maintaining a judgment book.

**Act 1302.** Requires every state agency to publish on the Internet at [www.arkansas.gov](http://www.arkansas.gov) not less than 3 days prior to a meeting or hearing the date, time and location of all meetings and hearings that are open to the public.

## **C. MISCELLANEOUS TAXES.**

**Act 294 (3/3/09).** Increases various permit fees for the licensed manufacture, sale and distribution of alcoholic beverages; provides changes for the hours of operation that are allowed for permitted businesses; creates temporary permits for sales of alcoholic beverages and creates certain new permit types; increases certain permit fees; and amends penalty provisions related to alcoholic beverages.

**Acts 605 and 606 (3/25/2009).** Create the Arkansas Scholarship Lottery.

**Act 737.** Exempts woody biomass grown for use in biofuel production from the severance tax. Currently, severance taxes on timber are levied based on weight of the timber prior to undergoing first processing and are reported by the primary processor. Conversion factors based on type of wood product are provided for the timber if it is unable to be weighed prior to processing.

#### **D. SALES, USE AND OTHER EXCISE TAXES.**

**Act 145.** Changes the due date of the natural gas severance tax report to the 25th day of the **second** month following the month covered by the report. Both producers and purchasers of natural gas are required to file reports, provided that a purchaser is not liable for the tax if the gas is purchased from a licensed producer and the purchaser files a report containing required information, including the name and permit number of each licensed producer from whom the purchaser purchased gas.

**Act 180 (3/1/09).**

- Increases the tax rate on cigarettes by fifty-six cents (56¢) per package of 20 cigarettes from 59¢ per package to \$1.15 per package;
- Increases the tax rate for other tobacco products (excluding cigarettes and moist snuff) by nineteen percent (19%) from 32 % to 51 % of the manufacturer's selling price to the wholesaler; Provides for a stamp deputy allowance to be paid to cigarette wholesale distributors in the amount of 3% of the total aggregate cigarette tax collected.

**Act 298.** Allows a county to delay the effective date of a sales and use tax levy for up to 36 months beyond what is allowed under current law. The effective date must be stated in the ordinance levying the tax and must occur on the first day of the first month of a calendar quarter. This applies only to taxes levied under Title 26, Chapter 74, Subchapters 2 and 3.

**Act 382.** Allows a city that levied a local sales and use tax to extend the expiration date of the tax. The city must refer the change in the expiration date to the voters. If the extension is approved by the voters, the city must notify DFA of the new expiration date at least 90 days before the current expiration date and after publication of the proclamation of the election results. A proposed expiration date must be the last day of the last month of a calendar quarter. If the voters do not approve the change, the original expiration date for the tax levy will continue in effect.

**Act 383.** Same provisions as described with respect to Act 382 (above) also apply to counties.

**Act 384 (3/10/09).** Amends sales and use tax provisions to be consistent with the Streamlined Sales and Use Tax Agreement and provides that sales tax is levied on the withdrawal of goods from the stock of an established business.

**Act 436 (7/1/09).** Reduces the state sales and use tax rate on food and food ingredients from the existing 3% rate to a 2% rate beginning July 1, 2009. The 2% rate consists of the reduced statutory levy of 1.875% plus the constitutional levy of .125%, which continues to apply. City and county local sales taxes will continue to be collected on food and food ingredients.

**Act 499 (3/24/09).** Reduces the rate of excise tax on the sale of a bingo face by a licensed distribution to three-tenths of one cent (\$.003) and repeals the excise tax at the rate of 10% on the sale of bingo equipment. The act also increases the prize limit that can be given away in a one-time raffle for a cash prize to \$5,000 from the current \$500.

**Act 682 (10/1/09).** Repeals the requirement for displaying a decal on heavy equipment as proof that sales and use taxes have been paid, and substitutes a requirement that heavy equipment dealers file a quarterly report listing sales of equipment that are exempt.

**Act 691 & 695 (7/1/09).** Reduces the state sales tax rate on natural gas and electricity used in a manufacturing process from the previous 4% rate to 3.25%. The 3.25% rate consists of a reduced statutory levy of 3.125% plus the constitutional levy of .125%, which continues to apply. The act provides that the total tax savings for eligible manufacturers will be capped at twenty seven million dollars (\$27,000,000) per fiscal year. When the revenue loss approaches this threshold, DFA is required to suspend any further processing of refund requests for the remainder of the fiscal year. Those taxpayers who did not receive refunds will be first to receive a refund in the next fiscal year.

**Act 975 (7/1/09).** Exempts the purchase of thermal imaging equipment purchased by a county government for use by law enforcement aircraft from sales and use tax.

**Act 840.** Amends certain local tax code provisions to allow tax collected on aviation fuel levied by a county or a city to be remitted directly to a publicly owned airport where the aviation fuel was sold.

**ACT 940 (4/6/09).** Allows a city or incorporated town to tax sales of cigarettes at the same rate as an Arkansas border city if the corporate limits of the city or incorporated town adjoin the corporate limits of the Arkansas border city (i.e. a border city of a border city). An “Arkansas border city” is a city that is entitled to the border zone cigarette tax rate and is separated by a navigable river from a city in the other state that is located in a metropolitan statistical area designated by the U.S. Census Bureau with a population of at least one million.

**Act 941 (10/1/09).** Provides a rebate of the local tax paid on amounts in excess of \$2,500 on the purchase of a trailer.

**Act 957.** Allows a municipality to delay the effective date of a sales and use tax levied under Subchapters 2 and 3 of Title 26, Chapter 75 for 36 months after the effective date provided in current law. The delayed effective date must be stated in the levying ordinance or petition.

**Act 1176 (10/1/09).** Exempts the Arkansas Search Dog Association, Inc. from sales and use tax.

**Act 1205 (4/7/09).** Exempts the sale of raw products that are produced and sold by the producer at a farmer’s market from sales tax.

**Act 1208 (4/7/09).** Clarifies or expands current sales and use tax code provisions related to the exemptions granted to manufacturers for machinery and equipment used directly in the manufacturing process to include:

- Molds, frames, cavities, and forms that determine the physical characteristics of the finished product;
- Dies, tools, and devices attached to or a part of machinery that determine the physical characteristics of the finished product or its packaging; and
- Testing equipment that measures the quality of the finished product at any stage of the manufacturing process.

**Act 1274 (7/1/11).** Repeals the tax on mini warehouse and self storage rental services effective July 1, 2011. The services remain taxable until July 1, 2011.

**Act 1405 (4/9/09).** Provides for the closure of any retailer that fails to timely remit lottery proceeds 3 times within a consecutive 24 month period, by direction from the Director of the Arkansas

Lottery Commission to the DFA Director.

**Act 1459.** Allows a small brewery to obtain an ABC license and make retail sales of its beer and beer of other small breweries.

#### **E. PROPERTY TAXES.**

**Act 151 (1/1/08).** Provides that the homestead of a person who is disabled or at least 65 years of age is assessed property tax on the lower of the assessed value of the property at the time the taxpayer qualified for property tax relief under Amendment 79, or at a later assessment date.

**Act 276.** Prohibits county equalization boards from adjusting any property assessment other than the assessment made during the year the board meets to consider the application for adjustment.

**Act 277 (2010 and after).** Provides that for property tax purposes tangible personal property is to be assessed at its market value as of January 1 of the year of assessment, or if acquired from January 2 through May 31 on the date of acquisition.

**Act 278 (2010 and after).** Deletes personal property from the requirement that taxpayers receive notice of the original valuation of newly constructed real property on or before July 1 of the assessment year.

**Act 400.** Requires the Commissioner of State lands to transmit to each county, from the proceeds of a sale of tax-delinquent land, an amount equal to the delinquent personal property taxes, plus penalty, owed by the owners of the land.

**Act 421.** Provides that a nonproducing mineral right has zero value for property tax assessment purposes.

**Act 555.** Authorizes and prescribes requirements for the county collector to distrain goods or chattels of persons for delinquent personal property taxes on personal property owned by or used in a business.

#### **F. TAX CREDITS AND INCENTIVES.**

**Act 349 (3/10/09 effective for income tax years beginning 1/1/09).** Amends the Delta Geotourism Incentive Act to expand the opportunities to claim a geotourism tax credit, allows transfer of credits and allows carry forward of unused credits for up to 5 years.

**Act 351.** Amends the income tax credit for the restoration of wetlands and riparian zones to include the donation of wetlands and riparian zones for conservation, and sets the credit at 50% of the appraised value, not to exceed \$50,000. The combined tax credit allowed per tax year is limited to the lesser of the income tax due or \$5,000 and any unused tax credit may be carried forward for 9 tax years. Arkansas Soil and Water Conservation Commission must approve taxpayer participation and issue certification which will be attached to taxpayer's income tax return.

**Act 498.** Provides an Arkansas historic rehabilitation income tax credit equal to 25% of the total qualified rehabilitation expenses up to the first \$500,000 for income producing property or \$100,000 for non-income producing property. The Department of Arkansas Heritage will issue the tax credit and is limited to issuing \$4 million per fiscal year. A holder of the tax credit may offset 100% of the holder's income or premium tax liability and any unused tax credit may be carried forward 5 tax years. A holder may transfer, sell or assign part of all of the remaining tax credit any number of times within the 5 year carry forward period. The owner or holder of the tax credit shall perfect the transfer by notifying the DAH and appropriate tax authority within 30 days of transfer.

**Act 625.** Amends the Consolidated Incentive Act of 2003 to provide that businesses participating in an incentive agreement that provides for payroll based rebate incentives must file for benefits on an annual basis. If a business fails to file for the benefits within twelve (12) months from the end of the tax year in which the rebate was earned, the rebate amount will be reduced 10%. A business that fails to file its claim within 24 months from the end of the tax year in which the rebate was earned will forfeit 100% of the rebate amount.

**Act 672 (3/31/09).** Extends the deadline from April 1, 2009 to April 1, 2011 for the Arkansas Economic Development Commission to designate a lodging facility as an approved company for purposes of undertaking a tourism attraction project and qualifying for a sales tax credit provided to a qualified tourism attraction.

**Act 716.** Repeals the Biotechnology Development and Training Act, Ark. Code Ann. § 2-8-101 et. seq. and the Arkansas Emerging Technology Development Act, Ark. Code Ann. § 15-4-2101 et seq. and amends various provisions of the Consolidated Incentive Act, as follows:

- Amends the definition of "average hourly wage" to simplify the computation;
- Provides that incentives granted for "in-house research" may include contractual agreements with colleges, universities and other research organizations;
- Provides clarifying definitions and language for eligible "regional corporate headquarters" and requires the region include Arkansas and at least one contiguous state;
- Requires businesses qualifying for job-creation tax credits to pay wages that must be equal to or greater than the lowest county average hourly wage in Arkansas;
- Reduces the required minimum equity investment to \$250,000 from \$400,000 for qualifying targeted businesses eligible for sales tax refunds and special payroll incentives; and
- Provides that companies may no longer combine benefits for the same project under the Advantage Arkansas job creation income tax credit program and the Create Rebate payroll rebate program, or the ArkPlus income tax credit program and the TaxBack sales and use tax refund program.

**Act 736 (tax years beginning on or after 1/1/08).** Amends the income tax incentives for windmill blade and windmill component manufacturers as follows:

- Changes the time within which the \$150 million dollar expenditure must occur from 4 to 6 years of signing an agreement with Arkansas Economic Development Commission (AEDC) in order for the manufacturer to be exempt from income tax until 12-31-2033;
- Repeals the requirement that the manufacturer hire a minimum of 500 employees in the state within 2 years of signing the agreement with AEDC, and changes the time within which the manufacturer must hire a minimum of 1,000 employees from 4 to 6 years of signing an agreement with AEDC in order to qualify for the income tax exemption expiring 12-31-2033; and
- Adds an additional income tax exemption for a windmill blade or windmill component manufacturer

that locates in the state after 1-1-08 (for which an incentive agreement was signed with AEDC after 1-1-08) that employs a formula (using investment, job creation, tier status, and wage factors) to determine the number of years of income tax exemption entitlement.

**Act 795.** Amends the Nonprofit Incentive Act to include additional definitions for qualifying nonprofit organizations [§501( c )(6) and § 501( c )(9)]; reduces the payroll threshold from \$1 million to \$500,000; and reduces the Sales and Use Tax refund expenditure threshold from \$500,000 to \$250,000.

**Act 816 (4/3/09).** Repeals the Motion Picture Incentive Act of 1997, Ark. Code Ann. § 2-8-101 et seq. and establishes a new incentive program, the Digital Product and Motion Picture Industry Development Act of 2009 to promote the film industry in Arkansas. The program will provide the following incentives and rebates:

- A rebate of 15% on all qualified production costs in connection with the production of a state-certified film project;
- A rebate of 15% on all qualified production costs in connection with the post-production of a state-certified film project; and
- A rebate of 10% for the payroll of certain employees involved with the motion picture production. Actors, directors, producers and writers are specifically excluded from this provision.
- The rebates provided in this act will expire June 30, 2019.

**Act 1192.** Increases the proximity within which a geotourism supporting business must exist from 5 to 30 miles of a national scenic byway.

Mike Parker is co-author of the American Bar Association's annual Sales and Use Tax Desk Book, and the Council on State Taxation's (COST's) Audit Session Notebooks, is a frequent speaker on state and local tax issues, and is listed in Best Lawyers in America - Tax. Mr. Parker is an ex-officio member of the Board of Directors of the Arkansas State Chamber of Commerce/Associated Industries of Arkansas and serves as special tax counsel for the organizations.

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