

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING # 11- 08**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is information only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Eligibility and job creation requirements for the franchise, excise tax job tax credits provided by Tenn. Code Ann. § 67-4-2109 with regard to the expansion of a qualified headquarters facility.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling and a retroactive revocation of the ruling must inure to his detriment.

FACTS

In [YEAR], the [TAXPAYER], established a Tennessee “qualified headquarters facility” (the “Facility”), as the term is defined in Tenn. Code Ann. § 67-6-224(b)(9). The Facility consisted of two separate locations in the [TENNESSEE CITY] Metropolitan Statistical Area. The first location is a production facility (the “Production Facility”) [REDACTED

INFORMATION]. The second location is a back-up facility (the “Back-up Facility”), which [REDACTED INFORMATION]. The Production Facility and the Back-up Facility are treated as a single location for purposes of the “qualified headquarters facility” credit provided by Tenn. Code Ann. § 67-6-224. This investment is designated as “Investment 1.”

In [YEAR], [TAXPAYER] announced a plan to significantly increase capacity following a merger with [COMPANY X]. Under the plan, the Production Facility would handle all production for [TAXPAYER]. [REDACTED INFORMATION]. In connection with its application as a “qualified data center” (“QDC”), as the term is defined in Tenn. Code Ann. § 67-6-102(76), [TAXPAYER] announced plans to spend [DOLLAR AMOUNT – TOTAL INVESTMENTS ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] in capital improvements in Tennessee. The majority of this expenditure related to servers, computer software and other hardware. [TAXPAYER] also committed to create at least [NUMBER – NUMBER OF JOBS CREATED ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] new jobs in connection with the investment. This investment is hereafter referred to as “Investment 2.”

In connection with Investment 2, [TAXPAYER] made capital improvements at its Production Facility including [REDACTED INFORMATION]. All administrative services, previously located at the Production Facility, were moved to office space off [HIGHWAY NAME] in [TENNESSEE CITY] (the “Administrative Facility”).

Also in connection with Investment 2, [TAXPAYER] submitted its Business Plan for Job Tax Credits and received a letter dated [DATE] from the Department of Revenue (the “Department”) tentatively approving its Business Plan for the investment period starting with the fiscal year ended [DATE]. In connection with Investment 2, [TAXPAYER] qualified for the job tax credit, the industrial machinery exemption for sales and use tax purposes pursuant to Tenn. Code Ann. §§ 67-6-206(a) and 67-6-102(42)(K)(2008 supp.), and the industrial machinery credit provided by Tenn. Code Ann. § 67-4-2009(4)(A). [TAXPAYER], was granted an industrial machinery exemption for sales tax purposes effective [DATE].

On [DATE], the Department issued Letter Ruling [NUMBER] which ruled that the Production Facility, Back-up Facility, and Administrative Facility will be treated as a single location for purposes of the job tax credit provided by Tenn. Code Ann. § 67-4-2109(c)(2)(A)(2008 supp.)

Pursuant to Letter Ruling [NUMBER], [TAXPAYER]’s full-time Tennessee job count of [NUMBER] was deemed to be the starting point for determining net new full-time jobs required to be a QDC and meet the requirements in connection with Investment 2. As of [DATE], [TAXPAYER] had [NUMBER] filled full-time positions in Tennessee.

[TAXPAYER] posts a requisition (the “Requisition”) when a position is available to be filled. The Requisition may be filled by an existing [TAXPAYER] employee that desires

to move into another job, by any qualified individual not currently employed by [TAXPAYER], or by a contract employee.

If a contract employee occupies a newly-created position or the position vacated by a [TAXPAYER] employee who moved into a newly-created position, the position is occupied in 95% of cases by the contract employee on a temporary basis for a period generally not exceeding 90 days.

During this 90 day period, the individual will have interviews with multiple levels of [TAXPAYER] management and must pass all of the normal drug and background checks of a regular employee. In addition, the contract employee is trained and supervised just as if he or she were a permanent employee until recommended for permanent placement or release.

If at any time within this 90 day period, either the temporary employee or [TAXPAYER] management no longer desires to continue the relationship, it is terminated at that time. If the contract employee is still in the position after 90 days, in almost all cases the individual is hired as a permanent employee of [TAXPAYER]. This arrangement operates much like a probationary or trial employment period.

In [YEAR] [TAXPAYER] announced plans to increase investment in one of its U.S. facilities [REDACTED INFORMATION]. In connection with the new investment, [TAXPAYER], plans to spend at least spend [DOLLAR AMOUNT – TOTAL INVESTMENTS ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] in capital improvements and create at least [NUMBER – NUMBER OF JOBS CREATED ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] new full-time jobs.

[REDACTED INFORMATION]. The potential new investment is referred to hereafter as “Investment 3.”

If Tennessee is chosen as the site for Investment 3, [TAXPAYER] will file a Business Plan for Job Tax Credit for Investment 3 with a start date of [DATE]. In connection with Investment 3, [TAXPAYER] will also seek to be designated as a “qualified headquarters facility,” as the term is defined in Tenn. Code Ann. § 67-6-224(b)(9).

QUESTIONS PRESENTED

1. Will [TAXPAYER] be eligible for the standard job tax credit provided by Tenn. Code Ann. § 67-4-2109(b)(1)(A) and the enhanced additional annual job tax credit available under Tenn. Code Ann. § 67-4-2109(b)(2)(B)?
2. Will prewritten and custom computer software be included in the calculation of the required capital investment for purposes of the job tax credit provisions of Tenn. Code Ann. § 67-4-2109(b) and for purposes of exclusion from the franchise tax minimum measure requirements of Tenn. Code Ann. § 67-4-2108(a)(1)?

3. What is the compensation requirement that must be met for each job for purposes of the enhanced additional annual job tax credit, and at what point in time must the salary requirements be met?
4. Will the [TAXPAYER] full-time job headcount as of [DATE], be the starting point for determining newly created jobs during the investment period for purposes of Tenn. Code Ann. § 67-4-2109(b)?
5. Will job requisitions be included in the calculation of “qualified jobs” for purposes of the job tax credit provided in Tenn. Code Ann. § 67-4-2109(b)?
6. Will [TAXPAYER] be able to include jobs created and capital investments made at the Production Facility, the Back-up Facility, and the Administrative Facility in determining its qualification for the job tax credits provided in Tenn. Code Ann. § 67-4-2109(b)?
7. When will [TAXPAYER] be eligible to begin taking the \$5,000 per new full-time job tax credit provided by Tenn. Code Ann. § 67-4-2109(b) in connection with its new investment?
8. What percentage of franchise, excise tax will [TAXPAYER] be allowed to offset in connection with its qualified headquarters facility investment?

RULINGS

1. Yes, the proposed investment and job creations described in the facts presented will qualify [TAXPAYER] for the standard job tax credit provided by Tenn. Code Ann. § 67-4-2109(b)(1) and will also qualify [TAXPAYER] for the enhanced annual job tax credit provided in Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iv), provided that [TAXPAYER] meets all applicable statutory requirements.
2. Yes. However, computer software that is expensed and is not included in the franchise tax minimum measure in accordance with generally accepted accounting principles does not qualify for the exclusion from the franchise tax minimum measure requirements of Tenn. Code Ann. § 67-4-2108(a)(1). Investments made in connection with the previous Facility creation (Investment 1) and its subsequent expansion (Investment 2) will be treated separately and will not count toward the new required capital investment (Investment 3).

[TAXPAYER] will need to certify the purpose and use of any purchases proposed to be counted in the new capital investment requirement and show the Department documentation with regard to which of the qualifying jobs were created in connection with its prior creation of the Facility under Investment 1 and its subsequent expansion under Investment 2 and which were created in connection with its new Investment 3.

3. The compensation requirement for each job that qualifies for the additional annual franchise, excise job tax credit is \$[DOLLAR AMOUNT] for qualifying jobs created in [YEAR], which is 100% of the state's average occupational wage for [YEAR] as published by the Tennessee Department of Labor and Workforce Development.
4. If the effective date of [TAXPAYER]'s Business Plan for the job tax credit is [DATE], the starting point for determining newly created jobs during the investment period in connection with Investment 3 for purposes of Tenn. Code Ann. § 67-4-2109(b) will be [DATE]. For purposes of counting new jobs qualifying for the franchise, excise tax job tax credit, the starting point for the count will be the [NUMBER] qualifying job.
5. For purposes of the franchise, excise tax job tax credit provided by Tenn. Code Ann. § 67-4-2109(b), Requisitions, including Requisitions that are temporarily filled by contract employees, will be included in the calculation of "qualified jobs," as defined by Tenn. Code Ann. § 67-4-2109 for purposes of the job tax credit, provided that such employees meet all applicable statutory requirements, such as the minimum health care coverage required by Tenn. Code Ann. § 67-4-2109(a)(6)A) and the requirement provided by Tenn. Code Ann. § 67-4-2109(a)(6)(C) that filled job positions that become vacant must be refilled within 90 days, and all other applicable statutory requirements are met. Jobs created in connection with the previous Facility creation (Investment 1) and its subsequent expansion (Investment 2) will be treated separately and will not count toward the new jobs required (Investment 3).

[TAXPAYER] will need to certify the purpose and use of any purchases proposed to be counted in the new capital investment requirement and show the Department documentation with regard to which of the qualifying jobs were created in connection with its prior creation of the Facility under Investment 1 and its subsequent expansion under Investment 2 and which were created in connection with its new Investment 3.

6. Yes, [TAXPAYER] will be able to include jobs created and capital investments made at the Production Facility, the Back-up Facility, and the Administrative Facility in determining its qualification for the job tax credits provided in Tenn. Code Ann. § 67-4-2109(b), provided that all statutory requirements are met.
7. If [TAXPAYER]'s Business Plan for franchise, excise tax job tax credits in connection with Investment 3 provides for a capital investment in excess of \$100 million and the creation of at least 100 new qualified jobs within the investment period, [TAXPAYER] will be eligible to take the standard job tax credit of \$5,000 for each qualifying job created as a result of Investment 3 at the point that its capital investment reaches \$500,000 and 25 qualifying new jobs are created. In accordance with Tenn. Code Ann. § 67-4-2109(b)(1)(C), the qualified business enterprise must, within twelve (12) months of the effective date of the business plan, make the required capital investment and create at least twenty-five (25) qualified jobs. In addition, [TAXPAYER] will be eligible for, but not required to take,

the enhanced additional annual franchise, excise tax job tax credit in the tax year after the initial job tax credit is created, provided that all applicable statutory requirements for the enhanced additional job tax credit are met. Although not required to take job tax credits for which it is eligible, job tax credits must be taken in consecutive tax years.

8. Assuming that [TAXPAYER] is able to meet all applicable statutory requirements to qualify for the franchise, excise job tax credits, [TAXPAYER] will be entitled to offset 100% of its franchise, excise tax liability by the amount of additional annual credits earned and utilized pursuant to Tenn. Code Ann. 67-4-2109(b)(2). Any additional annual credit that remains unused during the tax year in which the credit is taken will not be carried forward beyond that tax year.

The standard job tax credit under Tenn. Code Ann. § 67-4-2109(b)(1) can be used to offset up to 50% of the taxpayer's franchise, excise tax liability for a given year, with any unused portion being carried forward for up to fifteen years pursuant to Tenn. Code Ann. § 67-4-2109(b)(1)(D).

ANALYSIS

1. [TAXPAYER] Will Qualify for the Standard Job Tax Credit Provided by Tenn. Code Ann. § 67-4-2109(b)(1)(A) and the Enhanced Job Tax Credit Available Under Tenn. Code Ann. § 67-4-2109(b)(2)(B)

The following provisions are contained in Tenn. Code Ann. § 67-4-2109(b)(1) with regard to the standard job tax credit:

- (A) Subject to the requirements set forth in this subsection (b), there shall be allowed to any qualified business enterprise that makes the required capital investment a credit equal to four thousand five hundred dollars (\$4,500) for each qualified job created during the investment period.
- (B) The qualified business enterprise shall file a business plan with the commissioner in order to qualify for the credit provided by this subsection (b). The business plan shall be filed in a manner prescribed by the commissioner and shall describe the investment to be made, the number of jobs the investment will create, the expected dates the jobs will be filled and the effective date of the plan.
- (C) In order to qualify for the credit, the qualified business enterprise must, within twelve (12) months of the effective date of the business plan, make the required capital investment and create at least twenty-five (25) qualified jobs.

For this purpose, a "qualified business enterprise" is defined by Tenn. Code Ann. § 67-4-2109(a)(5), as an enterprise:

- (A) In which the business has made the required capital investment necessary to permit the creation or expansion of manufacturing, warehousing and distribution, processing tangible personal property, research and development, computer services, call centers, headquarters facilities, as defined in § 67-6-224(b), or convention or trade show facilities;
- (B) In which the business has made the required capital investment necessary to permit the creation or expansion of a repair service facility primarily engaged in providing repairs for aircraft owned by unrelated commercial, governmental or foreign persons; or
- (C) That promotes high-skill, high-wage jobs in high-technology areas, emerging occupations or skilled manufacturing jobs in which the business has made the required capital investment necessary to permit an increase in the number of qualified jobs in that county and that receives an approval from the commissioner of revenue and the commissioner of economic and community development in a manner prescribed by the department of revenue[.]

Tenn. Code Ann. § 67-4-2109(b)(3)(A) provides for an increase in the job tax credit from \$4,500 to \$5,000 per job when a “qualified business enterprise,” as defined by Tenn. Code Ann. § 67-4-2109(a)(5), is eligible for the additional annual job tax credit provided by Tenn. Code Ann. § 67-4-2109(b)(2)(B).

Tenn. Code Ann. § 67-4-2109(b)(2)(B) sets forth the following eligibility requirements for an additional annual job tax credit. The credit amounts are dependant on the level of job creation and “required capital investment,” as defined by Tenn. Code Ann. § 67-4-2109(a)(7). Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iv), set forth below, applies to Investment 3 proposed by [TAXPAYER]:

If the investment exceeds one hundred million dollars (\$100,000,000) and at least one hundred (100) industrial wage jobs are created, the additional annual credit shall be allowed for a period of three (3) years beginning with the first tax year after the initial job tax credit is created[.]

The Facts presented state that [TAXPAYER] has announced that [TAXPAYER]’s proposed plan for expansion of its facilities in Tennessee will result in expenditures totaling at least [DOLLAR AMOUNT – TOTAL INVESTMENTS ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] and the creation of at least [NUMBER – NUMBER OF JOBS CREATED ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] new full-time jobs. Such an investment will qualify for the standard job tax credit provided by Tenn. Code Ann. § 67-4-2109(b)(1) and will also qualify for the enhanced annual job tax credit provided in Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iv), provided that [TAXPAYER] meets all applicable statutory requirements.

2. Both Prewritten and Custom Computer Software, Valued in Accordance with

Generally Accepted Accounting Principles (“GAAP”), Will be Included in the Calculation of the Required Capital Investment for Purposes of the Job Tax Credit And Will be Excluded from the Franchise Tax Base as “Exempt Required Capital Investments” Under the Provisions of Tenn. Code Ann. § 67-4-2108(a)(1)

For purposes of the franchise, excise tax job tax credit, Tenn. Code Ann. § 67-4-2109(a)(7), set forth in pertinent part below, defines the “required capital investment” that must be made to qualify for the franchise, excise tax job tax credit:

“Required capital investment” . . . means an investment of five hundred thousand dollars (\$500,000) in real property, tangible personal property or computer software owned or leased in this state valued in accordance with generally accepted accounting principles. . . . A capital investment shall be deemed to have been made as of the date of payment or the date the business enterprise enters into a legally binding commitment or contract for purchase or construction.

The statute was amended by Section 1 of Chapter 530 of the Public Acts of 2009 to include all computer software in the “required capital investment” definition. The amendment was effective June 25, 2009 but is applicable to all business plans filed on or after July 1, 2009. By using the term “computer software” without making any distinction as to different types of computer software, it appears that the Tennessee legislature intended for all types of computer software, whether prewritten computer software or custom computer software, to be included in the calculation of the “required capital investment” for purposes of the franchise, excise tax job tax credit.

Tenn. Code Ann. § 67-4-2108(a)(1) defines the minimum measure of the Tennessee franchise tax as follows:

The measure of the tax levied by this part shall in no case be less than the actual value of the real or tangible property owned or used in Tennessee, excluding exempt inventory and exempt required capital investments.

For this purpose, Tenn. Code Ann. § 67-4-2108(a)(6)(G) defines “exempt required capital investments” as follows:

“Exempt required capital investments” means two thirds (2/3) in value of all capital investments that are the basis for a taxpayer's entitlement to credits under § 67-4-2109(b)(2)(B); provided, however, that the investments shall qualify as “exempt required capital investments” only in those tax years in which the additional annual credit is actually allowed under § 67-4-2109(b)(2)(B).

Since the legislature specified that 2/3 of the “. . . capital investments that are the basis for a taxpayer's entitlement to credits under § 67-4-2109(b)(2)(B) . . . ” are to be excluded from the franchise tax minimum measure, it necessarily follows that the legislature intended that all such capital investments, including investments in computer software, be included in the franchise tax minimum measure.

This conclusion is consistent with the fact that the legislature used the same language with regard to the valuation of property included in the franchise tax minimum measure and computer software included in the calculation of the required capital investment. Tenn. Code Ann. § 67-4-2108(a)(3) states that, for purposes of the franchise tax minimum measure, “. . . ‘property’ shall be valued . . . in accordance with generally accepted accounting principles . . .” and the similar language is used in Tenn. Code Ann. § 67-4-2109(a)(7) which states that computer software included in the calculation of a “required capital investment” shall be “. . . valued in accordance with generally accepted accounting principles. . . .”

Accordingly, computer software that is not expensed is required to be included in the franchise tax minimum measure valued in accordance with generally accepted accounting principles. When used to calculate the “required capital investment” for purposes of the job tax credits available under Tenn. Code Ann. § 67-4-2109(b)(2)(B), two thirds of such computer software qualifies as “exempt required capital investments” under the provisions of Tenn. Code Ann. § 67-4-2108(a)(6)(G) and may be excluded from the franchise tax minimum measure under the provisions of Tenn. Code Ann. § 67-4-2108(a)(1) in those tax years in which the additional annual credit is actually allowed under § 67-4-2109(b)(2)(B). Computer software that is expensed and not included in the franchise tax minimum measure in accordance with generally accepted accounting principles does not qualify for exclusion from the franchise tax minimum measure requirements of Tenn. Code Ann. § 67-4-2108(a)(1). Investments made in connection with the previous Facility creation (Investment 1) and its subsequent expansion (Investment 2) will be treated separately and will not count toward the new required capital investment (Investment 3).

[TAXPAYER] will need to certify the purpose and use of any purchases proposed to be counted in the new capital investment requirement and show the Department documentation with regard to which of the qualifying expenditures were made in connection with its prior creation of the Facility under Investment 1 and its subsequent expansion under Investment 2 and which where made in connection with its new Investment 3.

3. The Compensation Requirement for each Job that Qualifies for the Additional Annual Franchise, Excise Job Tax Credit is \$[DOLLAR AMOUNT] for Qualifying Jobs Created in [YEAR]

The Facts presented state Investment 3 will involve at least [DOLLAR AMOUNT – TOTAL INVESTMENTS ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] in new capital improvements and the creation of at least [NUMBER – NUMBER OF JOBS CREATED ARE SUFFICIENT TO QUALIFY FOR TAX INCENTIVES SOUGHT] new full time jobs.

With regard to the required capital investment and job creation necessary to qualify for the enhanced job tax credit provisions set forth in Tenn. Code Ann. § 67-4-2109(b)(2)(B), Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iii) and (iv) state that:

- (iii) If the investment exceeds two hundred fifty million dollars, (\$250,000,000) and at least two hundred fifty (250) industrial wage jobs are created, the additional annual credit shall be allowed for a period of six (6) years beginning with the first tax year after the initial job tax credit is created. An integrated supplier or integrated customer, as defined in § 67-4-2004, shall qualify for the credit provided in this subdivision (b)(2)(B)(iii), regardless of the level of its capital investment or the number of jobs created;
- (iv) If the investment exceeds one hundred million dollars (\$100,000,000) and at least one hundred (100) industrial wage jobs are created, the additional annual credit shall be allowed for a period of three (3) years beginning with the first tax year after the initial job tax credit is created[.]

For purposes of the franchise, excise tax job tax credit, Tenn. Code Ann. § 67-4-2109(a)(6) defines a “qualified job” without wage criteria. However, Tenn. Code Ann. § 67-4-2109(a)(3) states that an “industrial wage job” means “. . . a qualified job with wages equal to or greater than the state’s average occupational wage, as defined in § 67-4-2004, for the month of January of the year during which the job was created[.]” For this purpose, “average occupational wage” is defined by Tenn. Code Ann. § 67-4-2004(3) as follows:

“Average occupational wage” means the average wage for all industries as reported by the department of labor and workforce development in the most recent annual quarterly census of employment and wages super sector data for the state, aggregate of all ownerships.

The Tennessee Department of Labor and Workforce Development has published the average occupational wage for [YEAR], which is applicable to jobs created in [YEAR], to be \$[DOLLAR AMOUNT]. Therefore, this is the minimal compensation level for industrial wage jobs created in connection with Investment 3 for qualification for the enhanced additional job tax credit available under Tenn. Code Ann. § 67-4-2109(b)(2).

4. Provided that the Effective Date of [TAXPAYER]’s Business Plan is [DATE], the Starting Point for Determining Newly Created Jobs for the Investment Period in Connection with Investment 3 will be [DATE] and the Job Count Will Begin with the [NUMBER] Qualifying Job

Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iii) and (iv) state that the “. . . annual credit shall be allowed . . . beginning with the first tax year after the initial job tax credit is created.” If Tennessee is chosen for Investment 3, [TAXPAYER] will file its Business Plan to establish its qualification for the franchise, excise tax job tax credit in connection with Investment 3 with a starting effective date of [DATE]. The Facts presented state that on

[DATE] [TAXPAYER] had [NUMBER] filled full-time positions in Tennessee in connection with Investment 2.

If the effective date of [TAXPAYER]'s Business Plan for the job tax credit is [DATE], the starting point for determining newly created jobs during the investment period in connection with Investment 3 for purposes of Tenn. Code Ann. § 67-4-2109(b) will be [DATE] and the job count will begin with the [NUMBER] qualifying job.

5. Requisitions, Including Requisitions that are Temporarily Filled by Contract Employees, Will be Included in the Calculation of New "Qualified Jobs" for Purposes of the Franchise, Excise Tax Job Tax Credit, Provided that all Statutory Requirements are Met

The Facts presented state that [TAXPAYER] posts a Requisition when a position is available to be filled. The Requisition may be filled by an existing [TAXPAYER] employee that desires to move into another job, by any qualified individual not currently employed by [TAXPAYER], or by a contract employee.

If a contract employee occupies a newly-created position or the position vacated by a [TAXPAYER] employee who moved into a newly-created position, the position is occupied in 95% of cases by the contract employee on a temporary basis for a period generally not exceeding 90 days.

During this 90 day period, the individual will have interviews with multiple levels of [TAXPAYER] management and must pass all of the normal drug and background checks of a regular employee. In addition, the contract employee is trained and supervised just as if he or she were a permanent employee until recommended for permanent placement or release.

If at any time within this 90 day period, either the temporary employee or [TAXPAYER] management no longer desires to continue the relationship, it is terminated at that time. If the contract employee is still in the position after 90 days, in almost all cases the individual is hired as a permanent employee of [TAXPAYER]. This arrangement operates much like a probationary or trial employment period.

Tenn. Code Ann. § 67-4-2109(a)(6), set forth below, provides the criteria for the creation of a "qualified job" for purposes of the standard franchise, excise tax job tax credit:

"Qualified job" means a job that meets all of the following criteria:

- (A) The job position is a permanent, rather than seasonal or part-time, employment position providing employment in a qualified business enterprise for at least twelve (12) consecutive months to a person for at least thirty-seven and one half (37 1/2) hours per week with minimum health care, as described in title 56, chapter 7, part 22;

- (B) The job position is newly created in this state and, for at least ninety (90) days prior to being filled by the taxpayer, did not exist in this state as a job position of the taxpayer or of another business entity;
- (C) The job position is filled; provided, however, that a position will be deemed filled if it subsequently becomes vacant but is refilled within a period of not more than ninety (90) days; and
- (D) The job position is filled prior to January 1, 2016[.]

The Facts presented describe [TAXPAYER]'s Requisition procedure and state that the procedure is similar in operation to a probationary or trial employment period. Tenn. Code Ann. § 67-4-2109(a)(6)(C) states that a job position will be considered filled if it subsequently becomes vacant but is refilled within not more than 90 days. The fact that an employee may not, or does not, survive his probationary or trial employment period does not mean that the employee's position is not a permanent, rather than seasonal or part-time employment position as is required by Tenn. Code Ann. § 67-4-2109(a)(6)(A), as long as the position is refilled within not more than 90 days.

Requisitions, including Requisitions that are temporarily filled by contract employees, will be included in the calculation of "qualified jobs," as defined by Tenn. Code Ann. § 67-4-2109 for purposes of the job tax credit, provided that such employees meet all applicable statutory requirements, such as the minimum health care coverage required by Tenn. Code Ann. § 67-4-2109(a)(6)(A) and the requirement provided by Tenn. Code Ann. § 67-4-2109(a)(6)(C) that filled job positions that become vacant must be refilled within 90 days, and all other applicable statutory requirements are met. Jobs created in connection with the previous Facility creation (Investment 1) and its subsequent expansion (Investment 2) will be treated separately and will not count toward the new jobs required (Investment 3).

[TAXPAYER] will need to certify the purpose and use of any purchases proposed to be counted in the new capital investment requirement and show the Department documentation with regard to which of the qualifying jobs were created in connection with its prior creation of the Facility under Investment 1 and its subsequent expansion under Investment 2 and which were created in connection with its new Investment 3.

Under the circumstances described with regard to [TAXPAYER]'s Requisition procedure, Requisitions, including Requisitions that are temporarily filled by contract employees, will be included in the calculation of "qualified jobs," as defined by Tenn. Code Ann. § 67-4-2109 for purposes of the job tax credit, provided that such employees meet all applicable statutory requirements, or if terminated, the job position is refilled within 90 days and all other applicable statutory requirements are met.

6. [TAXPAYER] Will be Able to Include Jobs Created and Capital Investments Made at the Production Facility, the Back-up Facility, and the Administrative Facility in Determining Its Qualification for the Job Tax Credits Provided in

Tenn. Code Ann. § 67-4-2109(b)

In Letter Ruling [NUMBER] issued [DATE], the Department ruled that net new qualifying Tennessee jobs created at all of [TAXPAYER]'s Production Facility, Back-Up Facility and Administrative Facility will be counted for purposes of the franchise, excise tax job tax credit in connection with Investment 2.

[TAXPAYER]'s proposed expansion of the Production Facility, Back-Up Facility and Administrative Facility will involve capital investment and the creation of new jobs at each of these facilities, all of which will continue to operate as a part of the same "qualified business enterprise," as defined in Tenn. Code Ann. § 67-4-2109(a)(5) for purposes of the franchise, excise job tax credit. Accordingly, for the same reasons given in Letter Ruling [NUMBER], [TAXPAYER] will be able to include jobs created and capital investments made in connection with Investment 3 involving the expansion of its Production Facility, Back-Up Facility and Administrative Facility in determining franchise, excise tax job tax credits provided in Tenn. Code Ann. § 67-4-2109(b), provided that all applicable statutory requirements are met.

7. If [TAXPAYER]'s Business Plan in Connection with Investment 3 Provides for a Capital Investment in Excess of \$100 Million and the Creation of 100 New Qualified Jobs Within The Investment Period, [TAXPAYER] will be Eligible for the Standard Job Tax Credit at the Point its Capital Investment Reaches \$500,000 and 25 Qualifying New Jobs are Created. A Qualified Business Enterprise Must, Within Twelve (12) Months of the Effective Date of the Business Plan, Make the Required Capital Investment and Create at Least 25 qualified Jobs. In Addition, [TAXPAYER] Will be Eligible to Take the Enhanced Additional Job Tax Credit in The Tax Year Following the Year in which the Standard Job Tax Credit is Created, Provided that all Applicable Statutory Requirements are Met

Provided that all other applicable statutory requirements are met, Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iv) states that an investment in excess of \$100,000,000 and the creation of at least 100 industrial wage jobs will qualify for the additional annual franchise, excise job tax credit that is available under the provisions of Tenn. Code Ann. § 67-4-2109(b)(2). Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iv) states that the enhanced additional annual job tax credit ". . . shall be allowed for a period of three years beginning with the first tax year after the initial job tax credit is created. Since the standard job tax credit provided by Tenn. Code Ann. § 67-4-2109(b)(1) contains the minimum qualification requirements for a job tax credit, it is apparent that the term "initial job tax credit" used in Tenn. Code Ann. § 67-4-2109(b)(2)(B)(iv) refers to the standard job tax credit provided by Tenn. Code Ann. § 67-4-2109(b)(1).

The standard job tax credit provided by Tenn. Code Ann. § 67-4-2109(b)(1)(C) requires a \$500,000 capital investment to be made ". . . within twelve(12) months of the effective date of the business plan. . ." and the creation of ". . . at least twenty-five (25) qualified jobs." Tenn. Code Annotated § 67-4-2109(b)(2)(B)(vii) provides that the investment period during which a capital investment qualifying under Tenn. Code Annotated § 67-4-

2109(b)(2)(B) may be made can be extended under certain circumstances, and [TAXPAYER]'s investment period has been extended from 3 to 5 years with regard to Investment 3. No statute requires any taxpayer to take a job tax credit for which it is eligible. However, job tax credits must be taken in consecutive tax years.

If [TAXPAYER]'s Business Plan for franchise, excise tax job tax credits in connection with Investment 3 provides for a capital investment in excess of \$100 million and the creation of at least 100 new qualified jobs within the investment period, [TAXPAYER] will be eligible to take the standard job tax credit of \$5,000 for each qualifying job created as a result of the Investment 3 at the point that its capital investment reaches \$500,000 and 25 qualifying new jobs are created. In addition, [TAXPAYER] will be eligible for, but not required to take, the enhanced additional annual franchise, excise tax job tax credit in the tax year following the year in which the standard job tax credit is created, provided that all statutory requirements for the enhanced additional job tax credit are met. However, as noted above, job tax credits must be taken in consecutive tax years.

8. [TAXPAYER] May Offset 50% of its Franchise, Excise Tax Liability by the Standard Job Tax Credit and 100% of the Enhanced Additional Job Tax Credit Related to its Tennessee Facility Expansion, Provided that All Applicable Statutory Requirements are Met.

Assuming that [TAXPAYER] is able to meet all applicable statutory requirements to qualify for the franchise, excise job tax credits, [TAXPAYER] will be entitled to offset 100% of its franchise, excise tax liability by the amount of additional annual credits earned and utilized pursuant to Tenn. Code Ann. 67-4-2109(b)(2). Any additional annual credit that remains unused during the tax year in which the credit is taken will not be carried forward beyond that tax year. Tenn. Code Ann. § 67-4-2109(b)(12)(vi).

The standard job tax credit under Tenn. Code Ann. § 67-4-2109(b)(1) can be used to offset up to 50% of the taxpayer's franchise, excise tax liability for a given year, with any unused portion being carried forward for up to fifteen years pursuant to Tenn. Code Ann. § 67-4-2109(b)(1)(D).

Arnold B. Clapp
Special Counsel to the Commissioner

APPROVED: _____
Richard H. Roberts, Commissioner

DATE: _____ 3-15-11 _____