

**TENNESSEE DEPARTMENT OF REVENUE  
LETTER RULING # 13-23**

**Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This ruling is based on the particular facts and circumstances presented, and is an interpretation of the law at a specific point in time. The law may have changed since this ruling was issued, possibly rendering it obsolete. The presentation of this ruling in a redacted form is provided solely for informational purposes, and is not intended as a statement of Departmental policy. Taxpayers should consult with a tax professional before relying on any aspect of this ruling.**

**SUBJECT**

The application of the Tennessee franchise and excise tax job tax credit provisions under TENN. CODE ANN. § 67-4-2109(b) (Supp. 2010).

**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 the taxpayer's detriment.

**FACTS**

In [YEAR], [TAXPAYER] (the "Taxpayer"), [REDACTED], established a qualified headquarters facility (the "Facility") pursuant to TENN. CODE ANN. § 67-6-224. The Facility consists of one location in the [STATE OF TENNESSEE]. The Taxpayer provides a wide range of [SERVICES]. [CUSTOMERS] are serviced by [BUSINESS CENTERS] in [CITY],

Tennessee, [AND OTHER LOCATIONS OUTSIDE OF TENNESSEE]. The [BUSINESS CENTER] in [TENNESSEE] is a part of the Facility.

The Taxpayer plans to invest additional capital into the Facility, estimating a total capital investment between [DATE], and [DATE] (the “Investment Period”) of over \$50,000,000 (the “Investment”). This Investment will accomplish two goals. First, it will consolidate the operations of the Taxpayer’s [BUSINESS CENTERS] into one [BUSINESS CENTER] located in [CITY], Tennessee. The operations at the Taxpayer’s [BUSINESS CENTERS] in [LOCATIONS OUTSIDE OF TENNESSEE] will be shut down or downsized, and moved to [CITY IN TENNESSEE]. Second, the Investment will expand the Facility in [CITY IN TENNESSEE].

A significant portion of the Investment will consist of purchasing, leasing, or licensing computer software and hardware related to a new and expanded enterprise resource planning system (“ERP System”), as well as other information technology systems in connection with the expansion of the [TENNESSEE BUSINESS CENTER]. The Taxpayer will house the global ERP System software and hardware in its Facility located in [TENNESSEE]. The Taxpayer will also purchase, lease, or license HVAC equipment, communications equipment, furniture, fixtures, and labor as part of the Investment.

The Taxpayer predicts that it will retain the current job headcount of [NUMBER] at the Facility as of [THE DAY BEFORE THE INVESTMENT PERIOD BEGINS], and that it will create at least 100 net new full-time jobs during the Investment Period that pay at least 150% of Tennessee’s average occupational wage. These jobs will include full-time customer service positions, call center positions, administrative support positions, information technology positions, finance positions, and management and other professional positions.

[THE TAXPAYER FILED ITS APPLICATION AND INVESTMENT PLAN WITH THE DEPARTMENT OF REVENUE PRIOR TO JULY 1, 2011].

## **RULINGS**

1. For Tennessee franchise and excise tax purposes, is the Taxpayer eligible for the job tax credit provided in TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010)?

Ruling: The Taxpayer will qualify for the job tax credit if it exceeds the required \$500,000 investment threshold and creates at least twenty-five (25) qualified jobs within twelve (12) months of the effective date of its Business Plan. If the Taxpayer qualifies for the job tax credit under TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010), the credit will be in the amount of \$4,500 per qualified job created during the investment period, unless the Taxpayer also qualifies for the additional annual credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010), in which case the credit will be in the amount of \$5,000 per qualified job pursuant to TENN. CODE ANN. § 67-4-2109(b)(3)(A) (Supp. 2010).

2. For Tennessee franchise and excise tax purposes, is the Taxpayer eligible for the additional annual credit provided in TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010)?

Ruling: Assuming that the Taxpayer creates at least 100 qualified jobs that pay at least 150% of the state's average occupational wage for the month of January of the year in which the jobs are created and the Taxpayer's investment exceeds \$10 million, the Taxpayer will be eligible for the additional annual credit if the jobs it creates qualify as "headquarters staff employee" positions within the meaning of TENN. CODE ANN. § 67-6-224(b)(5) (Supp. 2010).

3. Will HVAC equipment, communications equipment, computer hardware, computer software, furniture, and fixtures purchased, leased, or licensed for the Facility during the Investment Period be included in the calculation of the "required capital investment" for purposes of the jobs tax credit provisions enumerated in TENN. CODE ANN. § 67-4-2109(b) (Supp. 2010)?

Ruling: Yes, provided the items are owned or leased in Tennessee.

4. Will HVAC equipment, communications equipment, computer hardware, computer software, furniture, and fixtures purchased, leased, or licensed for the Facility during the Investment Period be considered "exempt required capital investment" for purposes of exclusion from the Tennessee franchise tax base under TENN. CODE ANN. § 67-4-2108(a)(1), (a)(6)(a) (Supp. 2010)?

Ruling: Yes, provided that such items are purchased or leased for the Taxpayer's Facility during the Investment Period, are reported on the Tennessee Franchise, Excise Tax Return (Form FAE 170), Schedule G for that tax year, and the credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010) is allowed for that tax year.

5. What is the compensation requirement that must be met for each job, for purposes of the TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) additional annual credit?

Ruling: The compensation requirement for each qualified job created by the Taxpayer for purposes of the additional annual credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) is at least 150% of Tennessee's average occupational wage for the month of January of the year in which the job is created.

6. Will all W-2 wages, including bonuses, be included when determining whether an employee's wages meets the compensation requirements for purposes of TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010)?

Ruling: All compensation paid by the Taxpayer to an employee and of the type reported on the employer's Occupational Employment Report will be included in calculating whether that employee's wages meet the compensation requirements set forth in TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010).

7. If the Taxpayer hires an employee mid-year, will the employee's partial year wage be annualized for purposes of determining whether the compensation requirements are met for purposes of TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v)?

Ruling: Yes.

8. What is the starting point for determining newly created jobs during the Investment Period, for purposes of TENN. CODE ANN. § 67-4-2109(b)?

Ruling: The Taxpayer's full-time job headcount on December 31, 2010, is the starting point for determining newly created jobs during the Investment Period.

9. When will the Taxpayer be eligible to begin taking the job tax credit provided by TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) relating to its Investment?

Ruling: The Taxpayer will be eligible to begin taking the job tax credit provided by TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) in the tax year in which it made the required capital investment and created a total of 25 qualified jobs, provided that such investment is made and such jobs are created within twelve months of the effective date of its Business Plan. Provided that the Taxpayer has met the statutory requirements, the Taxpayer will be allowed to claim the \$5,000 additional annual credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010) for a period of three years beginning with the first tax year after the initial job tax credit is created.

10. In the event the Taxpayer is not able to create 100 net new full-time employee jobs at a wage level equal to 150 percent of the statewide average occupational wage, will the Taxpayer be allowed a prorated additional annual credit, as provided in TENN. CODE ANN. § 67-4-2109(b)(3)(I) (2013)?

Ruling: No.

## ANALYSIS

Tennessee imposes an excise tax at the rate of 6.5% on the net earnings of all persons doing business within Tennessee.<sup>1</sup> Tennessee also imposes a franchise tax at the rate of \$0.25 per \$100, or major fraction thereof, on the net worth of a person doing business in Tennessee.<sup>2</sup> Persons subject to the Tennessee franchise and excise taxes include, but are not limited to, corporations such as the Taxpayer.<sup>3</sup>

Tennessee also allows credits against a taxpayer's franchise and/or excise tax liability in certain circumstances. For example, TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) provides for a job tax credit when the statutory criteria are met. In addition, taxpayers qualifying for that job tax credit may also qualify for an additional annual job tax credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B). These credits, and the applicable criteria to qualify, are discussed below.<sup>4</sup>

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<sup>1</sup> TENN. CODE ANN. § 67-4-2007(a) (2013).

<sup>2</sup> TENN. CODE ANN. §§ 67-4-2105(a), -2106(a) (2013).

<sup>3</sup> See TENN. CODE ANN. § 67-4-2004(38) (2013).

<sup>4</sup> The General Assembly amended the job tax credit provisions in 2011. See, e.g., Act of May 21, 2011, ch. 508, § 16, 2011 Tenn. Pub. Acts (amending TENN. CODE ANN. § 67-4-2109(b)(1)(C) to require that qualified jobs be

## 1. JOB TAX CREDIT

The Taxpayer will qualify for the job tax credit provided in TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) if it has exceeded the \$500,000 investment threshold and has created at least twenty-five (25) qualified jobs within twelve (12) months of the effective date of its Business Plan. If the Taxpayer qualifies for the job tax credit, it will be in the amount of \$4,500 per qualified job created during the Investment Period, unless the Taxpayer also qualifies for the TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010) additional annual credit,<sup>5</sup> in which case the credit will be in the amount of \$5,000 per qualified job.

TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) provides that if certain statutory criteria are met, a taxpayer may take a job tax credit against its Tennessee franchise and excise tax liability. The credit is in the amount of \$4,500 for each qualified job created during the investment period.<sup>6</sup> TENN. CODE ANN. § 67-4-2109(b)(3)(A) (Supp. 2010) further provides that the \$4,500 credit allowed under TENN. CODE ANN. § 67-4-2109(b)(1) (Supp. 2010) will be increased to \$5,000 per job if the taxpayer qualifies for the additional annual credit allowed in TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010).<sup>7</sup>

To qualify for the job tax credit under TENN. CODE ANN. § 67-4-2109(b)(1)(A)-(C) (Supp. 2010), the taxpayer must: 1) be a qualified business enterprise; 2) file a business plan with the Department of Revenue; and, within twelve months of the effective date of the business plan: 3) make the required capital investment and 4) create at least twenty-five qualified jobs.

The first requirement is that the Taxpayer be a qualified business enterprise. A “qualified business enterprise” includes an enterprise where “the business has made the required capital investment necessary to permit the creation or expansion of . . . headquarters facilities, as defined in § 67-6-224(b).”<sup>8</sup> The Taxpayer has stated that it established its Facility as a qualified headquarters facility in [YEAR] pursuant to TENN. CODE ANN. § 67-6-224<sup>9</sup> in the [STATE OF

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created within the investment period rather than within twelve (12) months of the filing of the business plan). The amendments apply only to written proposals received by the Department of Revenue or the Department of Economic and Community Development after July 1, 2011. *See* Act of May 21, 2011, ch. 508, § 34, 2011 Tenn. Pub. Acts. Because the Taxpayer filed its application and investment plan with the Department of Revenue prior to July 1, 2011, the law in effect prior to the 2011 amendments governs.

<sup>5</sup> *See infra*, Question #2.

<sup>6</sup> TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010).

<sup>7</sup> *See infra*, Question #2.

<sup>8</sup> TENN. CODE ANN. § 67-4-2109(a)(5) (Supp. 2010).

<sup>9</sup> The General Assembly amended the qualified headquarters facility credit provisions and the qualified headquarters facility relocation expense credit provisions in 2011. The amendments apply only to written proposals received by the Department of Revenue or the Department of Economic and Community Development after July 1, 2011. *See* Tenn. Pub. Act of May 21, 2011, ch. 508, §§ 1, 8-9. Because the Taxpayer filed its application and investment plan with the Department of Revenue prior to July 1, 2011, the law in effect prior to the 2011 amendments governs.

TENNESSEE]. Having already qualified as a qualified headquarters facility, the Taxpayer is also properly considered a qualified business enterprise.

The Taxpayer has also stated that it filed a Business Plan with an Investment Period start date of [REDACTED], thereby meeting the second requirement.

The third requirement is that the Taxpayer make the required capital investment within twelve months of filing its Business Plan. The “required capital investment,” for any enterprise other than a convention or trade show enterprise, “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.”<sup>10</sup>

The Taxpayer has estimated that it will make a \$50,000,000 Investment during the Investment Period, but it does not state how much of that Investment will occur during the twelve months within the effective date of its Business Plan. Consequently, the Taxpayer will meet the third requirement only if at least \$500,000 of the Investment is made within twelve months of the effective date of its Business Plan.

The fourth requirement is that the Taxpayer create at least twenty-five qualified jobs within twelve months of the effective date of the Business Plan. A “qualified job” is one that meets 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) months to a person for at least thirty-seven and one half (37 ½) 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 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[.]<sup>11</sup>

The Taxpayer states that it will create at least 100 net new full-time jobs that pay at least 150% of Tennessee’s average occupational wage [REDACTED], in addition to keeping all of its employees as of [DATE]. The Taxpayer has not, however, stated when these new jobs will be created. The Taxpayer will therefore meet the fourth requirement only if it creates jobs that

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<sup>10</sup> TENN. CODE ANN. § 67-4-2109(a)(7) (Supp. 2010).

<sup>11</sup> TENN. CODE ANN. § 67-4-2109(a)(6) (Supp. 2010).

comply with the above referenced requirements within twelve months of the effective date of its Business Plan.

Consequently, the Taxpayer will qualify for the job tax credit provided in TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) only if its actual investment exceeds the \$500,000 investment threshold and it has created at least twenty-five (25) qualified jobs within twelve months of the effective date of its Business Plan. If the Taxpayer qualifies for the job tax credit, it will be in the amount of \$4,500 per qualified job created during the Investment Period, unless the Taxpayer also qualifies for the additional annual credit, in which case the credit will be in the amount of \$5,000 per qualified job.

## 2. ADDITIONAL ANNUAL CREDIT

The Taxpayer will qualify for the additional annual credit if the jobs it creates qualify as “headquarters staff employee” positions within the meaning of TENN. CODE ANN. § 67-6-224(b)(5) (Supp. 2010).

In addition to the job tax credit discussed above, an additional annual credit is allowed under TENN. CODE ANN. § 67-4-2109(b)(2) (Supp. 2010) in certain circumstances. For example, TENN. CODE ANN. § 67-4-2109(b)(2)(B)(vi) (Supp. 2010) states that an additional annual credit of \$5,000 per job will be allowed with respect to jobs described in TENN. CODE ANN. § 67-4-2109(b)(2)(B)(i)-(v), provided certain requirements are met.<sup>12</sup> In particular, TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) provides that

[i]f the investment exceeds ten million dollars (\$10,000,000) and at least one hundred (100) qualified jobs are created that also meet the definition of headquarters staff employees under [TENN. CODE ANN.] § 67-6-224 and pay at least one hundred fifty percent (150%) of the state’s average occupational wage for the month of January of the year in which the 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.

Thus, for the Taxpayer to be eligible for the additional annual credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010), the following requirements must be met: 1) the Taxpayer’s Investment must exceed \$10 million; 2) the Taxpayer must create at least 100 qualified jobs; 3) the qualified jobs must also meet the definition of “headquarters staff employees” under TENN. CODE ANN. § 67-6-224 (Supp. 2010); and 4) the qualified jobs must pay at least 150% of the state’s average occupational wage for the month of January of the year in which the jobs are created.

The Taxpayer has indicated that its Investment will total at least \$50 million with respect to the expansion of its Facility. The Taxpayer also states that its Investment will create at least 100

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<sup>12</sup> Note that the jobs must remain filled during the year in which the additional annual credit is being taken. TENN. CODE ANN. § 67-4-2109(b)(2)(B)(vi) (Supp. 2010).

additional new, full-time jobs that meet or exceed 150% of Tennessee’s average occupational wage, thus likely meeting the first, second and fourth requirements.

The third requirement is that the qualified jobs meet the TENN. CODE ANN. § 67-6-224 (Supp. 2010) definition of “headquarters staff employees,” which includes “executive,<sup>13</sup> administrative,<sup>14</sup> or professional workers<sup>15</sup> performing headquarters-related functions and services.”<sup>16</sup> “Headquarters related functions and services” in turn is defined to mean “those functions involving administrative, planning, research and development, marketing, personnel, legal, computer or telecommunications services performed by headquarters staff employees on an international, national, or regional basis.”<sup>17</sup> The definition of “headquarters related functions and services” specifically excludes, however, “functions involving . . . operating a call center.”<sup>18</sup>

The Taxpayer intends to create a number of employee positions that are enumerated in the statute, such as administrative and management positions. Other positions the Taxpayer intends to create also fall within the statute, though not named. Examples of those types of positions include finance and information technology jobs, which are executive and professional positions.

But some of the positions the Taxpayer intends to create are explicitly excluded from the definition of “headquarters staff employees.” By definition, call center employees cannot perform “headquarters related functions and services.”<sup>19</sup> Customer service positions are similarly excluded because they cannot be properly considered executive, administrative, or professional positions within the meaning of TENN. CODE ANN. § 67-6-224(b)(5) (Supp. 2010).

Consequently, only those jobs that qualify as “headquarters staff employees,” such as the full-time administrative support, information technology, finance, and management positions, count towards the 100 jobs requirement, but customer service and call center positions do not.

### 3. REQUIRED CAPITAL INVESTMENT

HVAC equipment, communications equipment, computer hardware, computer software, furniture, and fixtures purchased, leased, or licensed for the Facility during the Investment Period

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<sup>13</sup> “An executive employee is a full-time employee who is primarily engaged in the management of all or part of the enterprise.” TENN. CODE ANN. § 67-6-224(b)(5) (Supp. 2010).

<sup>14</sup> “An administrative employee is a full-time employee who is not primarily involved in manual work and whose work is directly related to management policies or general headquarters operations.” *Id.*

<sup>15</sup> “A professional employee is an employee whose primary duty is work requiring knowledge of an advanced type in a field of science or learning. This knowledge is characterized by a prolonged course of specialized study.” *Id.*

<sup>16</sup> TENN. CODE ANN. § 67-6-224(b)(5) (Supp. 2010) (footnotes added).

<sup>17</sup> TENN. CODE ANN. § 67-6-224(b)(4) (Supp. 2010).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*



will be included in the calculation of the “required investment capital” for purposes of the TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) job tax credit.

The “required capital investment” for purposes of the TENN. CODE ANN. § 67-4-2109(b)(1)(A) job tax credit includes “real property, tangible personal property or computer software owned or leased in this state valued according to generally accepted accounting principles.”<sup>20</sup> The required capital investment must be made within twelve months of the effective date of the Taxpayer’s Business Plan,<sup>21</sup> and for purposes of the job tax credit, a capital investment is “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.”<sup>22</sup>

HVAC equipment, communications equipment, computer hardware, computer software, furniture, and fixtures are all properly considered real property, tangible personal property, or computer software. Thus all of those items that the Taxpayer owns, leases, or licenses in Tennessee may be included in the Taxpayer’s required investment capital calculation, provided that they are purchased, leased, or licensed within twelve months of the effective date of the Taxpayer’s Business Plan.

#### 4. EXEMPT REQUIRED CAPITAL INVESTMENT

The Taxpayer’s HVAC equipment, communications equipment, computer hardware, computer software, furniture, and fixtures items are properly considered “exempt requirement capital investments” for purposes of TENN. CODE ANN. § 67-4-2108(a)(1) (Supp. 2010), provided that such items are purchased or leased for its Facility during the Investment Period, are reported on the Tennessee Franchise, Excise Tax Return (Form FAE 170), Schedule G, for that tax year, and the TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010) tax credit is allowed for that tax year.

As stated above, Tennessee imposes a franchise tax at the rate of \$0.25 per \$100, or major fraction thereof, on the net worth of a person doing business in Tennessee.<sup>23</sup> A taxpayer’s net worth is generally defined as “the difference between a taxpayer’s total assets less its total liabilities computed in accordance with generally accepted accounting principles.”<sup>24</sup>

TENN. CODE ANN. § 67-4-2108(a)(1) (Supp. 2010) provides, however, that “[t]he measure of the [franchise] tax 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*.”<sup>25</sup>

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<sup>20</sup> TENN. CODE ANN. § 67-4-2109(a)(7) (Supp. 2010).

<sup>21</sup> See TENN. CODE ANN. § 67-4-2109(b)(1)(C) (Supp. 2010).

<sup>22</sup> TENN. CODE ANN. § 67-4-2109(a)(7) (Supp. 2010).

<sup>23</sup> TENN. CODE ANN. §§ 67-4-2105(a), -2106(a) (2013).

<sup>24</sup> See TENN. CODE ANN. § 67-6-2106(b) (Supp. 2010).

<sup>25</sup> (Emphasis added).

TENN. CODE ANN. § 67-4-2108(a)(6)(G) (Supp. 2010) defines “exempt required capital investments” as “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).”

The “required capital investment” for purposes of the TENN. CODE ANN. § 67-4-2109(b)(1)(A) job tax credit (a prerequisite to receiving the TENN. CODE ANN. § 67-4-2109(b)(2)(B) additional annual credit) includes “real property, tangible personal property or computer software owned or leased in this state valued according to generally accepted accounting principles.”<sup>26</sup> In addition, those items must be capitalized and reflected on Schedule G of the Tennessee Franchise, Excise Tax Return (Form FAE 170) to be included in exempt required capital investments.<sup>27</sup>

Thus if the Taxpayer purchases or leases items in Tennessee that are properly considered real property, tangible personal property, or computer software as part of its Investment, then two thirds (2/3) of the value of such items may be considered exempt required capital investments if those items are reported as real and tangible property on Schedule G.

The Taxpayer’s HVAC equipment, communications equipment, computer hardware, computer software, furniture, and fixtures are all real property, tangible personal property, or computer software. Consequently, when such items are purchased or leased for its Facility during the Investment Period, are reported on its Tennessee Franchise, Excise Tax Return (Form FAE 170), Schedule G, for that tax year, and the TENN. CODE ANN. § 67-4-2109(b)(2)(B) tax credit is allowed for that tax year, the items are properly considered “exempt requirement capital investments” for purposes of TENN. CODE ANN. § 67-4-2108(a)(1) (Supp. 2010).

## 5. COMPENSATION REQUIREMENT

The compensation requirement for each qualified job created by the Taxpayer for purposes of the additional annual credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) is “at least 150% of Tennessee’s average occupational wage for the month of January of the year in which the job [is] created.”<sup>28</sup>

One must therefore determine Tennessee’s average occupational wage for the month of January of the year in which a particular job is created. TENN. CODE ANN. § 67-4-2004(3) defines “average occupational wage” as “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.”

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<sup>26</sup> TENN. CODE ANN. § 67-4-2109(a)(7) (Supp. 2010).

<sup>27</sup> If an item is treated as an expense rather than capitalized and depreciated, that item would not be considered part of the exempt required capital investment because to do so would allow a deduction on Schedule G for an item not reflected on Schedule G.

<sup>28</sup> TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010).

Information provided by the Tennessee Department of Labor and Workforce Development indicates that Tennessee's average occupational wage for 2010-2013 is as follows:<sup>29</sup>

Year	Average Occupational Wage	150% of Average Occupational Wage
2010	\$37,360	\$56,040
2011	\$38,325	\$57,488
2012	\$39,135	\$58,702
2013	\$39,320	\$58,980

A job will count toward the creation of at least 100 jobs for purposes of TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) if it meets the minimum compensation requirement for the year in which it was created.

#### 6. COMPENSATION CALCULATION

All compensation paid by the Taxpayer to an employee and of the type reported on the employer's Occupational Employment Report will be included in calculating whether that employee's wages meet the compensation requirements set forth in TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010).

To determine whether a job meets the compensation requirements for the additional annual credit, the job's compensation is measured in the same manner that the Tennessee Department of Labor and Workforce Development measures compensation in calculating the average occupational wage.

To calculate the average occupational wage, the Department of Labor and Workforce Development works in conjunction with the United States Department of Labor's Bureau of Labor Statistics to collect Occupational Employment Reports from Tennessee employers. These reports are forwarded to the Bureau of Labor Statistics for processing, and the results are then made available to the Tennessee Department of Labor and Workforce Development for development into the average occupational wage tables, among other things.<sup>30</sup> The instructions for the Occupational Employment Report form require employers to include as pay: the employee's base rate (annual salary or hourly wage if the employee does not work a standard 2,080 hours per year), commissions, tips, production bonuses, and incentive pay, among others.<sup>31</sup>

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<sup>29</sup> Information regarding the Tennessee average occupational wage is published on the Tennessee Department of Labor and Workforce Development's website, available at <http://www.state.tn.us/labor-wfd/wages/intro.htm> (last visited Oct. 29, 2013).

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., Occupational Employment Report Form, O.M.B. No. 1220-0042, Rev. Aug. 2013, available at [http://www.bls.gov/respondents/oes/pdf/forms/uuuuuu\\_fillable.pdf](http://www.bls.gov/respondents/oes/pdf/forms/uuuuuu_fillable.pdf) (last visited Nov. 14, 2013).

Thus, in order to maintain a consistent methodology, those wages paid to an employee and of the type that would be reported on the Taxpayer's Occupational Employment Report will be included as compensation for purposes of meeting the compensation requirements set forth in TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010).

#### 7. MID-YEAR HIRES

If the Taxpayer hires an employee mid-year, the employee's partial year wage will be annualized for purposes of determining whether the compensation requirements set forth in TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) are met.

As stated above, in order to count towards meeting the jobs requirement for the TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) additional annual credit, a job must "pay at least one hundred fifty percent (150%) of the state's average occupational wage for the month of January of the year in which the job[ is] created."<sup>32</sup>

The statute does not address the appropriate treatment of an employee's wages if he or she is hired in the middle of the year, but the Occupational Employment Report requires wages to be converted to an hourly wage rate that is then annualized for use on the occupational wage tables.<sup>33</sup> It follows from the fact that the occupational wage tables are based on annualized figures that a mid-year hire's wages should likewise be annualized.

If the Taxpayer hires an employee mid-year, that employee's partial year wage will therefore be annualized for purposes of determining whether the compensation requirements set forth in TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010).

#### 8. COUNTING NEWLY CREATED JOBS

The TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) additional annual credit is only available if "at least one hundred (100) qualified jobs are created."

For purposes of counting the number of jobs created, the base line is the Taxpayer's full-time headcount on the last day prior to the start of the Investment Period.

The Taxpayer's Business Plan specifies an Investment Period of [REDACTED]. Thus, the Taxpayer's full-time headcount on [THE DAY BEFORE THE INVESTMENT PERIOD BEGINS] (which the Taxpayer indicates is [NUMBER] employees), is the base line.

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<sup>32</sup> TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010).

<sup>33</sup> See Occupational Employment Report Form, O.M.B. No. 1220-0042, Rev. Aug. 2013, available at [http://www.bls.gov/respondents/oes/pdf/forms/uuuuuu\\_fillable.pdf](http://www.bls.gov/respondents/oes/pdf/forms/uuuuuu_fillable.pdf) (last visited Nov. 14, 2013); accord BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, *Occupational Employment Statistics*, available at [http://stats.bls.gov/oes/1999/oes\\_tn.htm#b23-0000](http://stats.bls.gov/oes/1999/oes_tn.htm#b23-0000) (last visited Oct. 29, 2013) ("Annual wages have been calculated by multiplying the hourly mean wage by a "year-round, full-time" hours figure of 2,080 hours.").

Consequently, the Taxpayer should count the headquarters staff jobs added beginning [FIRST DAY OF INVESTMENT PERIOD], to determine the number of “qualified jobs” created in Tennessee during the Investment Period.

#### 9. TIMING OF CLAIMING CREDITS

The Taxpayer will be eligible to begin claiming the TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) job tax credit in the taxable year in which it made the required capital investment and created a total of 25 qualified jobs, provided that such investment is made and such jobs are created within twelve months of the effective date of its Business Plan.

Provided that the Taxpayer has met the statutory requirements, the Taxpayer will be allowed to claim the \$5,000 additional annual credit under TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010) for a period of three years beginning with the first tax year after the initial job tax credit is created.

As noted above, TENN. CODE ANN. § 67-4-2109(b)(1)(A) (Supp. 2010) generally provides that, if certain conditions are met, a taxpayer may take the job tax credit against its Tennessee franchise and excise tax liability in the amount of \$4,500 for each qualified job created during the investment period. TENN. CODE ANN. § 67-4-2109(b)(3)(A) (Supp. 2010) provides that the \$4,500 credit allowed under TENN. CODE ANN. § 67-4-2109(b)(1) (Supp. 2010) will be increased to \$5,000 per job if the taxpayer qualifies for the additional annual credit allowed in TENN. CODE ANN. § 67-4-2109(b)(2)(B) (Supp. 2010). In order to qualify for the credit, the qualified business enterprise must, within twelve months of the effective date of the business plan, make the required capital investment and create at least 25 qualified jobs.<sup>34</sup>

An additional annual job tax credit is allowed under TENN. CODE ANN. § 67-4-2109(b)(2) (Supp. 2010). TENN. CODE ANN. § 67-4-2109(b)(2)(B)(vi) (Supp. 2010) states that an additional annual credit of \$5,000 per job will be allowed with respect to jobs described in TENN. CODE ANN. § 67-4-2109(b)(2)(B)(i)-(v) (Supp. 2010). In particular, TENN. CODE ANN. § 67-4-2109(b)(2)(B)(v) (Supp. 2010) provides that if

the investment exceeds ten million dollars (\$10,000,000) and at least one hundred (100) qualified jobs are created that also meet the definition of headquarters staff employees under § 67-6-224 and pay at least one hundred fifty percent (150%) of the state’s average occupational wage for the month of January of the year in which the 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.

Note that the qualified jobs must remain filled during the year in which the credit is being taken.<sup>35</sup>

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<sup>34</sup> TENN. CODE ANN. § 67-4-2109(b)(2)(C) (Supp. 2010).

<sup>35</sup> TENN. CODE ANN. § 67-4-2109(b)(2)(B)(vi) (Supp. 2010).

## 10. PRORATION OF CREDIT

In the event the Taxpayer is not able to fully comply with the requirements for the additional annual credit, the Taxpayer will not be allowed a prorated additional annual credit under TENN. CODE ANN. § 67-4-2109(b)(3)(I) (2013).

The provisions relevant to the job tax credits were amended effective July 1, 2011, to allow proration of the credit under certain circumstances.<sup>36</sup> However, the Taxpayer's Business Plan states that its Investment Period begins effective on [DATE]. As explained above,<sup>37</sup> the relevant law for purposes of the job tax credit is the law in effect at the time the Taxpayer's Business Plan became effective.

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APPROVED: Richard H. Roberts  
Commissioner of Revenue

DATE: December 20, 2013

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<sup>36</sup> See Tenn. Pub. Act of May 21, 2011, ch. 508, §§ 21 and 34 (codified at TENN. CODE ANN. § 67-4-2109(b)(3)(I) (2013)). The amended law, which does not apply retroactively, provides: "If determined to be in the best interests of the state, the commissioner of revenue and the commissioner of economic and community development are authorized to lower the number of jobs that must be created in order to qualify for the additional annual credit provided in subdivision (b)(2)(B); provided, however, that the amount of the credit shall also be reduced in direct proportion to the reduction in the job creation requirement. Under no circumstances, however, shall the job creation requirement be lowered by more than fifty percent (50%)."

<sup>37</sup> See *supra* note 4.