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July 8, 1996

The Honorable Richard Carey
P.O. Box 474
Belgrade, ME 04917

Dear Senator Carey:

In your request of June 4, 1996, you inquire whether a potential purchaser of the Hathaway plant in Waterville could qualify for reimbursement under the newly-enacted Maine Employment Tax Increment Financing Act (P.L. 1995, c. 669, § 5, enacting 36 M.R.S.A. § 6751 et seq.) by employing persons currently employed at that plant, thereby effectively continuing their employment. For the reasons described below, this Department concludes that such an arrangement would not qualify for E-TIF benefits.

The Act provides that qualified businesses may receive partial reimbursement of state income withholding taxes for qualified employers for up to 10 years. 36 M.R.S.A. § 6754. 36 M.R.S.A. § 6753(11), insofar as relevant, defines "qualified business" as

> . . . any for-profit business[1] in this State . . . that adds 15 or more qualified employees above its base level of employment in this State within any 2-year period commencing on or after January 1, 1996 and that meets one of the following criteria [relating to whether the business engages in retailing and, if so, the nature of the retail operation].

[1] The term "business," as used in the Act, appears to refer to a legal entity engaged in a business.

(emphasis and footnote added) Section 6753(12), in turn, defines "qualified employees," insofar as relevant, as

> . . . **new**, full-time **employees hired** in this State **by a qualified business** and for whom a retirement program . . . and group health insurance are provided, and whose income, calculated on a calendar year basis is greater than the average annual per capita income in the labor market area in which the qualified employee is employed and whose state income withholding taxes are subject to reimbursement to the qualified business under [the Act]. . . .

(emphasis added) The relevant base level of employment appears to be that of the prospective employer in the case you present. In addition, "new . . . employees hired . . . by a qualified business" is reasonably read to mean employees new to that prospective employer.

However, the "employment tax increment," upon which the reimbursement depends, calls for adjustment of incremental state income withholding taxes to account for shifts in employment by "affiliated businesses." 36 M.R.S.A. § 6757. Thus, it is necessary to determine whether the current owner of the Hathaway plant and its hypothetical successor in operating that plant fall within the definition of "affiliated businesses." 36 M.R.S.A. § 6753(1) provides that

> "[a]ffiliated businesses" means 2 or more businesses exhibiting either of the following relationships:
>
> A. **One business** owns 50% or more of the stock of the other business or **owns a controlling interest in the other**; or
>
> B. Fifty percent or more of the stock or **a controlling interest is** directly or indirectly **owned** or acquired by a common owner or owners following approval by the commissioner, whether **by acquisition of substantially all of the assets**, 50% or more of the stock or through a merger, consolidation or reorganization.

(emphasis added) Although the terms "affiliated businesses" and "controlling interest" do not ordinarily apply to corporations that are not related through common ownership, the definition in section 6753(1) appears to contemplate that the concept of a "controlling interest" includes the purchase of substantially all (or presumably all) the assets of one corporation by another corporation. At the very least, therefore, this language creates an ambiguity as to whether a corporation that buys the assets of another corporation and the corporation selling those assets must be treated as "affiliated businesses" for purposes of the Act.

Since the definition of "affiliated businesses" is arguably ambiguous, recourse to legislative history of the Act is appropriate. That history makes it clear that a successor corporation such as you have described was not intended to benefit from the E-TIF program. The program originated with Legislative Document 1797, "An Act to Implement the Recommendations of the Task Force on Tax Increment Financing." The final report of that task force stated that "[t]he proposed law would contain protection against benefits being awarded for . . . jobs created through purchases of . . . other Maine businesses. The test is whether the new quality jobs are **net new** jobs on a state-wide basis." (emphasis in original). Task Force on Tax Increment Financing, Final Report to 117th Legislature at 3 (Jan. 31, 1996). This goal of "**net** new quality jobs" (emphasis added) is also stated in Section 6752, the declaration of the Act's public purpose.

In the view of this Department, the present and prospective owners of the Hathaway plant constitute "affiliated businesses," whether by the plain language of the Sections 6753(1) or by reference to legislative history to clarify a perceived ambiguity. Therefore, Section 6757 must be applied to adjust the "employment tax increment."[2] Section 6757 provides, insofar as relevant:

> The State Tax Assessor shall calculate the employment tax increment for a particular program by removing from the gross employment tax increment[3] the revenues attributed to business activity shifted from affiliated businesses to the applicant. This adjustment is calculated by comparing the current year's income withholding tax revenues for the applicant business that is a member of an affiliated group with revenues for the group as a whole. . . . If the growth in income withholding tax revenue for the affiliated group is less than the growth in income withholding tax revenue for the applicant, the difference is presumed to have been shifted from affiliated businesses to the applicant and the gross employment tax increment for the applicant business is reduced by the difference. . . .

(footnote added) When this adjustment is made, there is no "employment tax increment" in the scenario you describe. For example, if the employees of H (the current owner) paid $1 million in Maine withholding taxes in 1995 and $500,000 in

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[2] "'Employment tax increment' means that level of employment, payroll and state income withholding taxes attributed to qualified employees employed by a qualified business above the base level for the qualified business, adjusted pursuant to Section 6757 for shifts in employment by affiliated businesses." 36 M.R.S.A. § 6753(7).

[3] "'Gross employment tax increment' means that level of employment, payroll and State income tax withholding taxes attributed to qualified employees employed by a qualified business that is greater than the base level for the qualified business." 36 M.R.S.A. § 6253(9).

the first half of 1996 and those same individuals paid $500,000 in Maine withholding taxes for the second half of 1996 as employees of M (the prospective buyer), M would have a "gross employment tax increment" of $500,000 for 1996 ($500,000 for 1996 as compared to zero for 1995). However, when the Section 6757 adjustment is made, M would have no "employment tax increment." The $1 million withholding of taxes by the affiliated businesses in 1996 ($500,000 by H and $500,000 by M) represents no growth over the amount of taxes withheld in 1995 ($1 million by H). Therefore, the difference between M's growth of $500,000 in 1996 and the affiliated businesses' growth of zero must be deducted from M's gross employment tax increment, thereby reducing M's employment tax increment in 1996 to zero. Accordingly, this Department concludes that the prospective owner you describe is not entitled to E-TIF benefits.

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely,

Andrew Ketterer

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Attorney General

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