North Carolina Department of Revenue

Beverly Eaves Perdue
Governor

David W. Hoyle
Secretary

February 17, 2012

[redacted]

Re: Private Letter Ruling Request
[redacted]
FID: [redacted]

Dear [redacted]:

This letter is in response to your letter dated [redacted], wherein you requested that the North Carolina Department of Revenue ("Department") issue a private letter ruling stating your client, [redacted] will not be denied William S. Lee (Article 3A) and the Article 3J tax credits (hereinafter referred to collectively as ("Credits"), due to a Notice of Violation issued from the North Carolina Department of Environment and Natural Resources ("DENR') dated [redacted].

The statement of facts submitted for the Department's consideration is as follows:

[redacted] owns and operates a [redacted] on [redacted] in [redacted]. The same [redacted] was previously owned and operated by [redacted] and originally by [redacted]. On land adjacent to the [redacted], [redacted] has owned and operated a [redacted]. [redacted] property was previously owned and operated by [redacted] who purchased the property from [redacted].

On [redacted], [redacted] entered into a General Service Contract with [redacted] pursuant to which [redacted] accepted [redacted] wastewater:

> [redacted] will allow [redacted] to discharge [redacted] to [redacted]'s wastewater treatment system. No other water streams, with the exception of rainfall, shall be discharged by [redacted] to [redacted]'s property….The cost of the initial

> [redacted] line and of future [redacted] facilities and lines, if necessary, shall be borne by [redacted]. Title to those facilities installed on [redacted]'s land shall pass to [redacted]. [redacted] **shall maintain** the [redacted] system on [redacted]'s property. [redacted] will also so construct, operate, and maintain this system so as to prevent excessive erosion, and/or flow of waste into any area other than [redacted]'s wastewater system at the point designated by [redacted]. [redacted] will operate its plant so as to minimize the amount of suspended and dissolved solids discharged. [redacted], on this basis, will be obligated to put forth its best efforts to obtain North Carolina waste discharge permits including [redacted] wastewater. [redacted] shall not be liable whether for negligence of its personnel or otherwise, as a result of this service, and [redacted] will hold [redacted] harmless and indemnify [redacted] against any claim, cost and expense, including attorney fees, arising there from. Acceptance of the [redacted] and any [redacted] by [redacted] shall be contingent upon the approval of all regulatory agencies involved, and the inclusion of such streams in [redacted]'s wastewater treatment and discharge permits. [emphasis added]

As part of [redacted]'s agreement to allow [redacted] to use its wastewater treatment system, [redacted] took responsibility for maintaining the system and keeping the treatment within regulatory compliance standards.

On [redacted], [redacted] (successor to [redacted]) applied for a discharge permit. On [redacted] DENR issued a discharge permit to [redacted]. In the Supplement to Permit Cover Sheet, DENR stated:

> [redacted] is hereby authorized to (1) Continue to discharge non-contact [redacted] ([redacted]) and continue to operate a [redacted] million gallon unlined pond consisting of [redacted] runoff and [redacted] with final treatment provided by the [redacted] lagoon system located at [redacted], and (2) Discharge from said treatment works at the location specified on the attached map into [redacted] which is classified [redacted]. [emphasis added]

In [redacted], [redacted] began construction of a new landfill at its [redacted] at the site of a former wastewater treatment basis. Construction preparation included sludge removal and pumping water from the basin to a primary clarifier, through the [redacted]'s treatment system, and ultimately discharging to [redacted]. To ensure efficiency, daily samples were taken from the channel downstream of the primary clarifier ([redacted]

) and at point of discharge to . Through its sampling, identified elevated mercury levels.

On , contacted , the North Carolina Division of Water Quality ("NC DWQ") Regional Water Quality Supervisor, to report the elevated mercury levels from , and inform him of the likely cause. requested and provided additional results with the monthly discharge monitoring report on , which stated:

> The daily mercury limit was exceeded January 2 through January 10. The weekly average mercury limit was exceeded for the week and for the week . As our discussed with , the elevated mercury concentrations appear to be due to the activities associated with our new landfill cell construction. Once realized, actions were taken to minimize any solids carryover from these dewatering activities and the mercury concentrations returned to the normal <0.2 ug/l.

Mercury was a key component for 's plant operations and the plant historically discharged wastewater into the former wastewater basin. The plant also discharged contaminated storm water drainage, which led to the discharge of mercury into the wastewater basin. The plant was a known source of mercury contamination. concluded that the presence of mercury was a remnant of 's adjacent .

On , NC DWQ issued a notice of violation ("NOV") and assessment of civil penalty to . On , paid the fine of (civil penalty + of enforcement costs.) chose not to contest the NOV because acknowledged that mercury was, in fact, discharged from its water treatment plant, the fine was minimal, and it did not appear DENR would consider the incident "significant" since 's only direction was that additional test results should be provided.

did not receive any notice or indication from the Department that the NOV issued in was significant or that it would prohibit from being eligible for tax credit generation in tax years until after significant amounts of credit were generated.

Issue:

Whether or not the Department considers the incident (i.e. the discharge of mercury from Taxpayer's water treatment plant in) as not "significant" as defined in North Carolina General Statute 105-129.4(b3) such that Taxpayer is eligible to utilize Credits generated in the 2003-2008 tax years.

Department's Response:

North Carolina General Statutes, Chapter 105, Article 3A provided various tax credits for new and expanding businesses in the State.[1] Prior to its repeal, in order to qualify for an Article 3A tax credit, a business was required to satisfy all of the general eligibility requirements of G.S. § 105-129.4 and the requirements of each tax credit. Pursuant to G.S. § 105-129.7, the burden was placed on the taxpayer to prove its eligibility for claiming Article 3A tax credits.

One of the general eligibility requirements appeared in G.S. § 105-129.4(b3) and denied tax credits if the taxpayer had a significant violation of any program implemented by the North Carolina Department of Environment and Natural Resources ("DENR"). Specifically, a taxpayer was considered "eligible" for tax credits only if the taxpayer certified that, at the time the taxpayer first claimed the credit, the taxpayer had no pending administrative, civil, or criminal enforcement action based on alleged significant violations of any program implemented by DENR and had no final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by DENR within the last five years.

On [redacted], DENR issued a "Notice of Violation and Assessment of Civil Penalty" ("NOV") to Taxpayer for violations concerning "discharge limitations and/or monitoring requirements found in [redacted]." According to DENR, the violations occurred at Taxpayer's [redacted] facility in [redacted]. Taxpayer did not contest the NOV, but instead, paid the civil penalty. DENR closed the enforcement case.

Pursuant to G.S. § 105-129.4(b3), the Department received annual notification from DENR of persons that had pending administrative, civil, or criminal enforcement action based on an alleged significant violation of any program implemented by DENR, and had a final determination of responsibility for any significant administrative, civil, or criminal violation of any program implemented by an agency of DENR within the last five years. Because of the [redacted] violation, Taxpayer's name was included on the DENR report. The Department used the DENR report in determining Taxpayer's eligibility for Article 3A tax credits.

Although you contend that Taxpayer's [redacted] violation "[did] not rise to the level of 'significant'", DENR is the State agency responsible for administering environmental regulations and is the authority on what constitutes a "significant violation". Since DENR included Taxpayer's name on its list of environmental violations for tax year [redacted], Taxpayer did not satisfy all of the general eligibility requirements needed to qualify for Article 3A tax credits. As such, the Department finds that Taxpayer is not eligible to utilize Article 3A tax credits generated in the 2003 through 2006 tax years.

[1] Article 3A was, with certain exceptions set out in G.S. 105-129.2A, repealed for business activities occurring in taxable years beginning on or after January 1, 2007 (section 1.3 of S.L. 06-252, as amended by section 5 of S.L. 07-515).

As you know, effective for taxable years beginning on or after January 1, 2007, the General Assembly created Article 3J tax credits. Article 3J tax credits effectively replaced Article 3A tax credits. As was with Article 3A tax credits, taxpayers must satisfy general eligibility requirements, including having a good environmental record.[2]

During the 2010 legislative session, the General Assembly rewrote G.S. § 105-129.83(e), to modify the circumstances under which a taxpayer becomes ineligible for Article 3J tax credits due to violations of programs administered by DENR. Specifically, effective for tax credits claimed for taxable years beginning on or after January 1, 2007, a taxpayer becomes ineligible for Article 3J tax credits if there had been a final determination unfavorable to the taxpayer with respect to an environmental disqualifying event as defined in G.S. § 105-129.81.

G.S. § 105-129.81 defines an "environmental disqualifying event" as any of the following occurrences:

a. During the tax year in which the activity occurred for which a credit is being claimed, a civil penalty was assessed against the taxpayer by the Department of Environment and Natural Resources for failure to comply with an order issued by an agency of [DENR] to abate or remediate a violation of any program administered by the agency.
b. During the tax year in which the activity occurred for which a credit is being claimed or in the prior two tax years, any of the following:
    1. A finding by the Department of Environment and Natural Resources that the taxpayer, knowingly and willfully committed a violation of any program implemented by the Department of Environment and Natural Resources.
    2. An assessment for damages to fish or wildlife was made against the taxpayer.
    3. A judicial order for injunctive relief was issued against the taxpayer in connection with a violation of any program implemented by an agency of the Department of Environment and Natural Resources.
c. During the tax year in which the activity occurred for which a credit is being claimed or in the prior four tax years, a criminal penalty was imposed on the taxpayer in connection with a violation of any program

[2] G.S. 105-129.83(e) **Environmental Impact**.

implemented by an agency of the Department of Environment and Natural Resources.

Based on the information supplied by you in your letter, Taxpayer may be eligible for Article 3J tax credits for qualifying investments made in tax years 2007 and 2008 if Taxpayer satisfies all the general eligibility requirements of G.S. § 105-129.83 and the requirements of each specific Article 3J tax credit.

Finally, we note your contention that "it would be contrary to public policy to treat taxpayers incurring penalties prior to the revision of [G.S.] § 105-129.81 and 105-129.83 differently than those incurring penalties after the revision." However, the Department does not have the statutory authority to retroactively apply the 2010 legislative changes made to G.S. § 105-129.83 (Article 3J tax credits) to G.S. § 105-129.4 (Article 3A tax credits).

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if there are other facts that were not disclosed that might cause the Department to reach a different conclusion, then the taxpayer requesting this ruling may not rely on it. A letter ruling is not equivalent to a Technical Advice Directive that generally affects a large number of taxpayers. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Sincerely,

[redacted]

[redacted]