STATE OF ARKANSAS
Department of Finance and Administration

REVENUE LEGAL COUNSEL
Post Office Box 1272, Room 2380
Little Rock, Arkansas 72203-1272
Phone: (501) 682-7030
Fax: (501) 682-7599
http://www.arkansas.gov/dfa

October 14, 2019

[redacted]

RE: Individual Income Tax- Arkansas Historic Rehabilitation Income Tax Credit
Opinion No. 20190728

Dear [redacted]:

I am writing in response to your July 25, 2019 request for a revenue legal opinion:

> As the owner of otherwise eligible non-income producing property located at [redacted], I previously used the historic rehabilitation income tax credit law (Ark. Code 26-51-2201 – 2208) in 2011. Subsequent to that year, I have undertaken and completed rehabilitation projects to my home (on the National Historic Register) beginning in 2015, 2017, 2018 and 2019 for which an inquiry was made to the Arkansas Historic Preservation Program about utilizing the tax credit program again.
>
> I thought my property and projects were now eligible due to the passage of Act 470 of 2019 which amended minimum investment in non-income producing property from $25,000.00 to $5,000.00.
>
> However, by phone conversation on July 24, 2019, I was advised that the opinion of the Historic Preservation Program was that section 2 of Act 470 of 2019 states that the act is effective for tax years beginning January 1, 2019. The program further stated the opinion that the effective date of January 1, 2019 applied not only to the tax year in which a tax credit may be claimed but, that only rehabilitation projects beginning after January 1, 2019 may qualify with the lower minimum investment of $5,000.00. (For the record, my investments are currently [redacted] with only [redacted] invested after January 1, 2019.)
>
> My question is how does this opinion, or how does the Department of Finance and Administration, reconcile the current language of Ark. Code 26-51-2204(d), unchanged by Act 470 of 2019, stating the historic rehabilitation income tax credit is available to an owner of an eligible property that completes a certified rehabilitation that is placed in service after January 1, 2009, with the effective tax year date of January 1, 2019 in section 2 of Act 470 of 2019?

I do not see new language in Act 470 changing the placed in service date of certified rehabilitations.

I would finally add that Ark. Code 26-51-2208 says this subchapter is effective for tax years beginning January 1, 2009 and ending December 31, 2027. That language is consistent with the place in service date in 26-51-2204(d) of January 1, 2009.

RESPONSE

Summary

Under a plain reading of Act 470 of 2019, the $5,000 minimum investment threshold only applies to rehabilitation projects initiated on or after January 1, 2019.

Discussion

Arkansas Code Annotated §§ 26-51-2201 to -2207, the Arkansas Historic Rehabilitation Income Tax Credit Act, creates a tax credit for property owners who undertake historic rehabilitation of buildings or properties in the State of Arkansas. Ark. Code Ann. § 26-51-2204 (Supp. 2017). As stated in your letter, the General Assembly amended the Act in 2019 to lower the minimum investment threshold for non-income producing properties. Specifically, Act 470 of 2019 made the following amendments to Ark. Code Ann. § 26-51-2204(d):

> (d) The Arkansas historic rehabilitation income tax credit ~~shall be~~ is available to an owner of an eligible property that:
>
> (1) Completes a certified rehabilitation that is placed in service after January 1, 2009;
>
> (2) Has a minimum investment of ~~twenty-five~~:
>
> (A) Twenty-five thousand dollars ($25,000) in qualified rehabilitation expenses on income-producing properties; or
>
> (B) Five thousand dollars ($5,000) in qualified rehabilitation expenses on nonincome-producing properties; and
>
> (3) Is not receiving a tax credit under any other state law for the same eligible property.

Act 470 also provides that the amendments are effective for tax years beginning on or after January 1, 2019.

The interpretation of an administrative agency charged with the enforcement of a statute is highly persuasive, and will be upheld unless "clearly wrong." *Macsteel*, 363 Ark. at 30, 210 S.W.3d at 883. "A court will not attempt to substitute its judgment for that of the administrative agency. A rule is not invalid simply because it may work a hardship, create inconveniences, or because an evil intended to be regulated does not exist in a particular case." *Arkansas Health Services Commission v. Regional Care Facilities, Inc.*, 351 Ark. 331, 338, 93 S.W.3d 672 (2002); *cf. Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286

(1974) (courts should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned[.]").

In this instance, the Arkansas Historic Preservation Program, an agency of the Division[1] of Arkansas Heritage (DAH), has the authority to certify rehabilitation projects as eligible for the tax credit. Ark. Code Ann. § 26-51-2203(3) (Supp. 2017); Arkansas Historic Rehabilitation Income Tax Credit Rule 12.02.8-V. Thus, absent a clearly erroneous interpretation, a court likely would uphold DAH's interpretation. *See Macsteel*, 363 Ark. at 30, 210 S.W.3d at 883.[2] The DAH has posted information on its website regarding the minimum investment threshold for nonincome-producing property that is consistent with the conversation that you describe in your request: "For private residential project[s] that are starting after January 1, 2019, the minimum investment has been lowered from $25,000 to $5,000 of eligible expenses."[3]

Your request raises issues of statutory interpretation regarding the Arkansas Income Tax Act of 1929. The answer requires consideration of the general rules of statutory interpretation recognized by the Arkansas Supreme Court, the specific rules for interpreting tax statutes under the Arkansas Tax Procedure Act, and the Arkansas Supreme Court's rulings regarding retroactive application of statutory amendments.

The Arkansas Supreme Court has recognized the following rules of statutory interpretation:

> The first rule in considering the meaning and effect of a statute is to construe it just as it reads, giving the words their ordinary meaning and usually accepted meaning in common language. We construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible. When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction. When the meaning is not clear, we look to the language of the statute, the subject matter, the object to be accomplished, the purpose to be served, the remedy provided, the legislative history, and other appropriate means that shed light on the subject.

Macsteel, Parnell Consultants v. Ar. Ok. Gas Corp., 363 Ark. 22, 30, 210 S.W.3d 878, 883 (2005) (citations omitted). The court also has held that "it does not engage in interpretations that defy common sense and produce absurd results," and that "in construing statutes ... we look to

[1] The Transformation and Efficiencies Act of 2019, Act 910 of 2019 (HB1763), reorganized the executive branch of state government into fifteen (15) cabinet-level executive agencies and transferred the activities of current executive branch departments to the appropriate cabinet-level agency. Among other changes, the Act reclassified the Department of Arkansas Heritage as the Division of Heritage, a division of the Arkansas Department of Parks, Heritage, and Tourism.

[2] Arkansas Code Annotated § 26-51-2207(a) (Supp. 2017) authorizes the DAH to promulgate rules to implement the statute. The DAH's rules provide, "Any certification made by the State Historic Preservation Officer pursuant to the Act or these rules shall not be considered as binding upon the Department of Finance and Administration and Insurance Department with respect to tax consequences." Arkansas Historic Rehabilitation Income Tax Credit Rule 12.02.8-IV(B).

[3] *See* *https://www.arkansaspreservation.com/Preservation-Services/rehabilitation-tax-credits*, last visited on September 23, 2019.

the language under discussion in the context of the statute as a whole." *Green v. Mills*, 339 Ark. 200, 205, 4 S.W.3d 493, 496 (1999).

With respect to tax statutes specifically, the Arkansas Tax Procedure Act provides that statutes imposing a tax or providing a tax exemption, deduction, or credit must be reasonably and strictly construed in limitation of their application, giving the words their plain and ordinary meaning. Ark. Code Ann. § 26-18-313(a), (b), and (e) (Supp. 2017). If a well-founded doubt exists with respect to the meaning of a statute imposing a tax or providing a tax exemption, deduction, or credit, the doubt must be resolved against the application of the tax, exemption, deduction, or credit. *Id*. § 26-18-313(f)(2).

Finally, the Arkansas Supreme Court has recognized a strict rule of statutory construction against the retroactive operation of new legislation. Courts will presume that the General Assembly intended statutory amendments to operate prospectively only and not retroactively. *See, e.g., Bean v. Office of Child Support Enf't*, 340 Ark. 286, 296, 9 S.W.3d 520, 526 (2000). The rule of prospectivity applies unless "the intention of the legislature to make the statute retroactive is stated in express terms, or is clearly, explicitly, positively, unequivocally, unmistakably, and unambiguously shown by necessary implication or by terms which permit no other meaning to be annexed to them, and which preclude all question in regard thereto, and leave no reasonable doubt thereof." *Estate of Wood v. Ark. Dep't of Human Servs.*, 319 Ark. 697, 700–01, 894 S.W.2d 573, 575 (1995). This rule does not ordinarily apply to legislation that is solely procedural or remedial in character. *Bean*, 340 at 296, 9 S.W.3d at 526.

Here, Act 470 states that the amendment lowering the minimum threshold to $5000.00 for nonincome-producing property is effective for tax years beginning on or after January 1, 2019. Under a plain language reading of the statute, the new, lowered rehabilitation investment threshold for nonincome-producing properties only applies to rehabilitation projects initiated on or after January 1, 2019. Further, because Act 470 is an amendment to a statute that provides for a tax credit, the Arkansas Tax Procedure Act requires strict construction in limitation of the credit. *See* Ark. Code Ann. § 26-18-313(b) (Supp. 2017). This further supports the conclusion that the lowered investment threshold only applies to rehabilitation projects initiated on or after January 1, 2019.

You suggest that subsection (d)(1), which provides that the tax credit shall be available to an owner of an eligible property that "[c]ompletes a certified rehabilitation that is placed in service after January 1, 2009," makes the statutory amendments under Act 470 retroactive to any rehabilitation project "placed in service" after January 1, 2009.[4] The General Assembly did not include any language in Act 470 that clearly expresses an intent to legislate retroactively.

[4] Specifically, you ask, "[H]ow does the Department of Finance and Administration, reconcile the current language of Ark. Code 26-51-2204(d), unchanged by Act 470 of 2019, stating the historic rehabilitation income tax credit is available to an owner of an eligible property that completes a certified rehabilitation that is placed in service after January 1, 2009, with the effective tax year date of January 1, 2019 in section 2 of Act 470 of 2019?" Under a plain reading of the statute as amended by Act 470, it would be possible for an owner of an eligible property both to initiate a rehabilitation project after January 1, 2019 and, after certification, to place that rehabilitation project into service after January 1, 2019 (a date that is after January 1, 2009). In contrast, without giving retroactive effect to Act 470, it would not be possible for an owner of a nonincome-producing property to obtain a rehabilitation income tax credit for a pre-January 1, 2019 investment of less than $25,000.

Therefore, unless Act 470 is a procedural statute or remedial statute, the Arkansas Supreme Court's rule of strict construction against retroactive legislation would apply.

Act 470 is not a statute that merely effects procedure. *Compare Barnett v. Arkansas Trans. Co., Inc.*, 330 Ark. 491, 497-98, 798 S.W.2d 79, 83-84 (1990) (applying retroactive application to statute allowing court to tax attorneys' fees as costs). Nor is it a remedial statute that does not disturb vested rights or create new obligations but only supplies a new or more appropriate remedy to enforce an existing right or obligation. *See Steward v. Statler*, 371 Ark. 351, 354, 266 S.W.3d 710, 713 (2007). Therefore, it does not appear that a court would construe Act 470 retroactively as a procedural or remedial statute.

You also point out that Ark. Code Ann. § 26-51-2208 (Supp. 2017) provides that the Arkansas Historic Rehabilitation Income Tax Credit Act is effective for tax years beginning on or after January 1, 2009 and ending on or before December 31, 2027. This section, which predates Act 470, merely states the tax years for which the rehabilitation income tax credit is available. Nothing in this section suggests a legislative intent to make future amendments retroactive to January 1, 2009.

This opinion is based upon my understanding of the facts as set out in your inquiry and as current Arkansas laws and rules govern those facts. Any changes in the facts or law could result in a different opinion. Only the requestor may rely on this opinion, and, pursuant to Arkansas Gross Receipts Tax Rule GR-75(B), this opinion only will be binding upon the Department for three (3) years from the date of issuance.

Sincerely,

Brad Young, Attorney
Revenue Legal Counsel