STATE OF ARKANSAS
Department of Finance and Administration

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[redacted]

RE: Arkansas Historic Rehabilitation Income Tax Credit Act
Opinion No. 20190507

Dear [redacted],

This is in response to your email dated, May 6, 2019, seeking the issuance of a legal opinion from the Arkansas Department of Finance and Administration (DFA). Your request states:

> As discussed, the [redacted], a division of [redacted], has questions regarding the Arkansas Historic Rehabilitation Income Tax Credit Act as codified at Ark. Code Ann. § 26-51-2207, et seq. [redacted] is having difficulty framing their questions, so the questions raised below are my attempt at paraphrasing them. The context of the questions is a church with a structure that is designated as a historic structure on the National Historic Register.
>
> First, and perhaps dispositive to all other questions, is the proper interpretation of the definition of the income tax credit at §26-51-2203(1). Said definition in its entirety is as follows:
>
> > (1) "Arkansas historic rehabilitation income tax credit" means an income tax credit imposed by the Income Tax Act of 1929, § 26-51-101 et seq., and the premium tax levied under §§ 26-57-601 – 26-57-605 that includes:
> >
> > (A) An income tax credit for an income-producing property that qualifies for a federal rehabilitation tax credit; and
> >
> > (B) An income tax credit for a nonincome-producing property.
>
> In the above definition, I have highlighted the word "and" twice in red.
> Are these to be interpreted in the conjunctive or disjunctive sense?

In other words, and in regard to the first highlighted "and", can the income tax credit be used to offset either the income tax liability under the Income Tax Act or the income tax liability under the premium tax?
I presume the income tax credit can be used for offset when both types of tax liability are triggered.

If the first highlighted word "and" can be used in the disjunctive sense, then (A) and (B) would only apply in the context of the premium tax?

I presume the second highlighted word "and" is to be used in the disjunctive sense as I don't know that a property can be both income producing and nonincome producing.

Based on the foregoing questions and your responses, might the church qualify for an income tax credit when it pays an Arkansas income tax while at the same time not qualifying for the premium tax credit because neither (A) nor (B) applies?

RESPONSE

The Arkansas Historic Rehabilitation Income Tax Credit was enacted by Act 498 of 2009 and codified at Ark. Code Ann. §§ 26-51-2201 through 2207. It specifically allows a tax credit to property owners who undertake historic rehabilitation of buildings or properties in the State of Arkansas. Ark. Code Ann. § 26-51-2204. Your questions concern matters of statutory interpretation regarding the application of offsetting either income tax liability under the Income Tax Act or the income tax liability under the premium tax. The Arkansas Supreme Court has stated with regard to statutory interpretation, as follows:

> 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. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003). 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. *Ozark Gas Pipeline Corp. v. Arkansas Pub. Serv. Comm'n.*, 342 Ark. 591, 29 S.W.3d 730 (2000). When the language of the statute is plain and unambiguous, there is no need to resort to rules of statutory construction. *Weiss v. McFadden*, supra. 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. Id.

Macsteel, Parnell Consultants v. Ar. Ok. Gas Corp., 363 Ark. 22, 210 S.W.3d 878 (2005); *see also* Ops. Att'y Gen. 2005-072 & 2004-339. The court has also held that "it does not engage in interpretations that defy common sense and produce absurd results," and that "in construing statutes ... we look to the language under discussion in the context of the statute as a whole." *Green v. Mills*, 339 Ark. 200, 205, 4 S.W.3d (1999) (citing *Haase v. Starnes*, 323 Ark. 262, 915 S.W.2d 675 (1996)); *see also Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005)); *Steward v. McDonald*, 330 Ark. 837, 958 S.W.2d 297 (1997); and *Burcham v. City of Van Buren*, 330 Ark. 451, 954 S.W.2d 266 (1997).

The interpretation of an administrative agency charged with the enforcement of a statute is highly persuasive, and will be upheld unless "clearly wrong." *See Macsteel*, 363 Ark. 22; *see also McClane Co., Inc. v. Davis*, 353 Ark. 539, 110 S.W.3d 251 (2003); *Arkansas State Medical Board v. Bolding*, 324 Ark. 238, 920 S.W.2d 825 (1996); and Op. Att'y Gen. 2005-124. It has also been stated that "A court will not attempt to substitute its judgment for that of the administrative agency. [Citations omitted.] 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 your request for a legal opinion, you specifically stated, "In other words, and in regard to the first highlighted "and", can the income tax credit be used to offset either the income tax liability under the Income Tax Act or the income tax liability under the premium tax?"

Yes, a taxpayer is only eligible for one deduction. A taxpayer may elect the appropriate deduction—either the income tax credit imposed by the Income Tax Act of 1929, § 26-51-101 et seq., **OR** the premium tax levied under §§ 26-57-601 – 26-57-605. In determining legislative intent, it is significant to note that income derived from insurance premiums, subject to the premium tax, is not subject to the income tax. *See State ex rel. Holt v. New York Life Ins. Co*., 198 Ark. 820, 131 S.W.2d 639 (1939).

Second, you stated, "I presume the second highlighted word "and" is to be used in the disjunctive sense as I don't know that a property can be both income producing and nonincome producing."

Correct. A property cannot be both income and non-income producing. Additional definitions that may be helpful regarding the requirements to be designated either an income-producing property or a non-income producing property are found in the DAH Rules addressing the Historic Rehabilitation Credit as follows:

> ***Eligible property*** means property that is located in Arkansas that is:
>
> A. Income-producing property that:
> 1. Qualifies as a certified historic structure under 26 U.S.C. § 47 as it existed on January 1, 2009; or
> 2. Will qualify as a certified historic structure following certified rehabilitation; and
>
> B. Non-income-producing property that is:
> 1. Listed in the National Register of Historic Places;
> 2. Designated as contributing to a district listed in the National Register of Historic Places; or
> 3. Eligible for designation as contributing to a district listed in the National Register of Historic Places following certified rehabilitation.

Your question, from the facts presented, would appear to be how the church would benefit from the [redacted]. As stated above, the tax credit may be used to offset either

Income tax or Premium tax, but not both. It is unlikely that a church would be eligible for either because it likely does not pay income tax and only insurance companies pay premium tax. However, because a church would most likely be a non-income producing property and would be eligible for an income tax credit, said church could freely transfer that credit to its benefit. It is worth noting that income received from the sale of the credit is not taxable income. Ark. Code Ann. § 26-51-2409.

This opinion is based upon my understanding of the facts as set out in your inquiry and as current law and rules apply to those facts. Any changes in the facts or law could result in a different opinion. You may rely on this opinion for three years pursuant to Arkansas Gross Receipts Tax Rules GR-75(B).

Sincerely,

Michelle Bridges-Bell
Attorney
Office of Revenue Legal Counsel