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State and Local Tax Alert: Ohio Budget Bill Includes Changes to the Job Creation and Job Retention Tax Credits

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On June 30, 2015, Governor Kasich signed into law Amended Substitute House Bill 64 (HB 64), which contains several tax law changes. Included in HB 64 are numerous modifications to both the Ohio Job Creation Tax Credit (JCTC) and the Ohio Job Retention Tax Credit (JRTC). These changes are effective September 29, 2015, the 91st day after the bill was signed. The most significant changes are described in this Alert.

Tax Credit Base Change

Previously, both the JCTC and JRTC were calculated with respect to the amount of Ohio income taxes withheld by the taxpayer in a given year. HB 64 significantly modifies how the JCTC and JRTC are calculated, focusing instead on annual Ohio employee payroll.

Accordingly, all JCTC and JRTC agreements approved by the tax credit authority after the effective date of HB 64 will now utilize Ohio employee payroll as the basis for calculating the credit. JCTC agreements approved by the tax credit authority in 2014 or 2015 can be adjusted upon mutual agreement of the taxpayer and the Development Services Agency, with approval by the Ohio Tax Credit Authority (the Authority) to use payroll rather than Ohio income tax withholdings as the basis for calculating tax credits for years following the adjustment. JRTC agreements are not eligible for this adjustment, however.

Withholding Adjustment Factor

For JCTC and JRTC agreements approved by the tax credit authority on or before December 31, 2013, beginning in calendar year 2016 the Authority will annually compute a withholding adjustment factor. The factor is equal to the percentage by which Ohio income tax withholding rates have increased or decreased since June 29, 2013. The Authority will increase or decrease taxpayers' Ohio income tax withheld in accordance with this factor for purposes of calculating their tax credit. This withholding adjustment factor effectively restores taxpayers' expectations relative to credit agreements approved by the

tax credit authority prior to the income tax rate decreases enacted since June 29, 2013, as well as any future income tax rate increases or decreases. Importantly, the Authority will only make this adjustment for taxpayers that meet all of the commitments set forth in the agreement for the current year.

New “Clawback” Provisions

HB 64 adds several discretionary “clawback” provisions that allow the Authority to require taxpayers to repay a portion of previously-claimed tax credits under certain circumstances. For the JCTC, these provisions allow the Authority to recoup an amount determined in the Authority’s discretion should the taxpayer fail to substantially meet the job creation, payroll, or investment requirements on the annual metric evaluation date or fail to substantially maintain the number of new full-time equivalent employees or amount of payroll required at *any time* during the term of the agreement.

Likewise for the JRTC, these new provisions allow the Authority to recoup an amount determined in the Authority’s discretion should the taxpayer fail to substantially maintain both the number of full-time equivalent employees and the payroll required under the agreement at *any time* during the term of the agreement or the post-term reporting period.

Furthermore, should a taxpayer file for bankruptcy and either fail to maintain operations at the project site for the requisite time period or fail to meet its job creation, payroll, or investment requirements included in the agreement, a new provision allows the director of the Authority to commence an action to recover up to 100% of any credits claimed under existing JCTC or JRTC agreements. The director would not be required to give the taxpayer an opportunity to explain the noncompliance as the director would otherwise normally be required.

These enhanced clawback provisions apply to JCTC and JRTC agreements approved by the tax credit authority on or after January 1, 2014, as well as any amendments to JCTC agreements to conform to the new calculations enacted in HB 64 as discussed above.

JRTC Credit Now Non-refundable

In addition to the above changes, the Tax Credit Authority will no longer be authorized to approve refundable JRTCs. Under prior law, the Authority could approve refundable JRTCs in limited circumstances.

Vorys encourages you to review these changes and contact your Vorys attorney or advisor with questions or concerns about how these tax credit modifications may affect your business. Please feel free to contact any of the following Vorys attorneys: Scott J. Ziance, 614.464.8287, sjziance@vorys.com; John S. Petzinger, 614.464.5696, jspetzinger@vorys.com; Chris J. Clements, 614.464.5427, cjclements@vorys.com.