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February 13, 1991

The Honorable Susan Gallinger
Director of Insurance
Abacus Towers
3030 North 3rd Street, Suite 1100
Phoenix, Arizona 85012

Re: I91-012 (R90-144)

Dear Ms. Gallinger:

You have asked whether the 1989 amendment to A.R.S. § 20-156, Laws 1989, Chapter 8, repealing insurance premium tax credits for examination fees, applies to existing credits, and if it does, whether accrued but as yet unused tax credits are vested rights which may not be divested by legislation. We conclude that the amendment abolishes all accrued but unused tax credits, and that insurers do not have a vested right to use those credits.

Before the 1989 amendment, A.R.S. § 20-156(E) provided that:

A domestic insurer is entitled to a credit for premium tax owed by the domestic insurer under section 20-224 for the amount paid by the domestic insurer for examinations conducted pursuant to this section. A foreign or alien insurer is entitled to a credit for the premium tax owed by the foreign or alien insurer pursuant to section 20-159 for examinations conducted pursuant to this section. The director shall credit:

1. One-third of the amount paid in the year paid.
2. One-third of the amount paid in the following calendar year.
3. One-third of the amount paid in the next calendar year.

A.R.S. § 20-156 has been amended several times regarding examination expenses. In 1973 the legislature authorized the Insurance Department to assess insurers for examination expenses without providing for tax credits. Laws 1973, Ch. 30, § 1. Tax credits for such expenses were first authorized in 1982 when the legislature amended § 20-156 to allow credits for domestic insurers, (Laws 1982, Ch. 245, § 1), and extended to foreign and alien insurers in 1985, (Laws 1985, Ch. 360, § 1), before being repealed in 1989.

Payment of premium taxes is a prerequisite for insurers to maintain their certificate of authority to do business in Arizona. A.R.S. § 20-225(B)^{1/} The premium tax is due on March 31 each year for domestic insurers, and on March 1 each year for other insurers and is based on total direct premium income including:

policy membership and other fees and all other considerations for insurance from all classes of business whether designated as a premium or otherwise received by it during the preceding calendar year on account of policies and contracts covering property, subjects or risks located, resident or to be performed in this state, after deducting from such total direct premium income applicable cancellations, returned premiums, the amount of reduction in or refund of premiums allowed to industrial life policyholders for payment of premiums direct to an office of the insurer, all policy dividends, refunds, savings coupons and other similar returns paid or credited to policyholders with this state and reapplied as premiums of new, additional or extended insurance. No deduction shall be made of the cash surrender values of policies or contracts. Consideration received on

^{1/}("The Director may refuse to renew the certificate of authority of any insurer failing to pay such tax on or before the date it is due. The director shall revoke the certificate of authority of any insurer failing to pay such tax for more than thirty days after it was due.")

annuity contracts, as well as the unabsorbed portion of any premium deposit, shall not be included in total direct premium income, and neither shall be subject to tax.

A.R.S. § 20-224(A). Consequently, an insurer's premium tax liability for a given year is uncertain since it is contingent on premiums collected less deductions, all of which may vary from year to year.

The 1989 amendment eliminated all accrued tax credits upon its effective date, because under A.R.S. § 1-245, a repealed statute has no force or effect, unless it is expressly continued in force. See Brown Wholesale Elec. v. H.S. Lastar Co., 152 Ariz. 90, 94, 730 P.2d 267, 268 (App. 1986); Olson v. State, 36 Ariz. 294, 285 P. 282 (1930). The legislation repealing the statute did not expressly preserve the right to use existing credits, resulting in their lapse with the repeal unless some principle of law prevents their elimination. We conclude that no principle saves the deductibility of accrued tax credits.

You have asked whether applying the repealer to eliminate accrued tax credits violates the limitations on retroactive statutes. We conclude that the repealer is not a retroactive statute, and consequently we need not discuss the limitations on retroactive legislation^{2/}.

² Although we conclude that the amendment does not apply retroactively, it should be noted that changes in tax laws can apply retroactively without violating the constitution, provided the changes are not harsh, arbitrary or unfair. Welch v. Henry, 305 U.S. 134, 146, 59 S.Ct. 121, 125, 83 L.Ed. 87 (1938). See also, United States v. Darusmont, 449 U.S. 292, 297-298, 101 S.Ct. 549, 553, 66 L.Ed.2d 513, 517-519 (1981); United States v. Hemme, 476 U.S. 558, 106 S.Ct. 2071, 90 L.Ed.2d 538 (1986). The rationale for this rule is that a taxpayer does not have a vested right to a specific rate or method of taxation.

A statute is not retroactive because it relates to antecedent facts such as accrued but unused tax credits. See Tower Plaza Investments, Limited v. Dewitt, 109 Ariz. 248, 250-51, 508 P.2d 324, 326-27 (1973). Tower Plaza concerned a transaction privilege tax imposed on the leasing of real property. Owners of shopping centers who had entered long-term leases before the enactment of the tax filed suit, claiming that the application of the tax to pre-existing real property leases violated the Arizona and Federal Constitutions because of its retroactive application to those leases. The supreme court rejected this argument, finding that the enactment of the tax did not apply to "transactions completed before its enactment It seeks to tax petitioners' occupation measured by that portion of petitioners' gross income from rental under the leases accruing during the taxable year and not from receipts or income realized before the passage of the act." 109 Ariz. at 252, 508 P.2d at 328. Like the statute in Tower Plaza, the amendment eliminating tax credits does not apply retroactively to require a recalculation of taxes for prior years, but applies only prospectively. It does not apply to completed transactions nor does it retroactively change the insurer's tax obligations. Rather, the amendment simply limits the deductions available to an insurer for its present and future obligations.

Moreover, any right conferred by statute may be taken away by the legislature before it vests. Hall v. A.N.R. Freight System Inc., 149 Ariz. 130, 717 P.2d 434 (1986). "[R]ights are not vested if they are qualified by contingencies." Brown Wholesale Elec. v. H.S. Laster Co., 152 Ariz. at 94, 730 P.2d at 271; State v. Estes Corp., 27 Ariz. App. 686, 688, 558 P.2d 714, 716 (1976). In Brown Wholesale, the court of appeals held that a supplier's right to recover against a contractor's surety bond lapsed with the repeal of the statute requiring such bonds. The supplier did not acquire a vested right to enforce the lien because the goods secured by the bond were not used until after repeal. The court reasoned that a vested right must be "more than a mere expectation based upon an anticipated continuance of the existing law." 152 Ariz. at 95, 730 P.2d at 271.

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The tax credits are not vested rights because insurers have no immediate fixed right to use them upon payment of examination expenses. The use of credits depended upon future and uncertain events, principally whether insurers would collect sufficient net premiums subject to taxation under A.R.S. § 20-220(A). The tax credits, created by statute, were thus merely an "expectation based on an anticipated continuance of the existing law". Brown Wholesale Elec. v. H.S. Laster Co., 152 Ariz. at 95, 730 P.2d at 267; People ex rel. Eitel v. Lindheimer. Since the legislature gratuitously enacted the tax credits, there is no rationale under the "vested rights" theory which prohibits the legislature from eliminating them. Insurers did not have a contractual right to the tax credits. Although the credits may have been an entitlement which the Director of Insurance could not have denied, the legislature retained its constitutional authority to eliminate them by repealing the statute which authorized them.^{3/} Hall v. A.N.R. Freight System Inc.; Brown Wholesale Elec. v. H.S. Laster Co., 152 Ariz. at 95, 730 P.2d at 267.

Nor does the Federal Constitution forbid the legislative elimination of statutorily authorized entitlements. While the executive branch may not arbitrarily abolish entitlements guaranteed by a statute, a state legislature is free to modify or eliminate them entirely, because "[i]n each case, the legislative determination provides

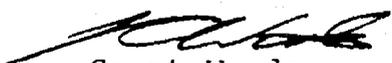
^{3/} You have expressed concern that the elimination of the tax credits is a taking of property without due process, citing Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972). That case does not prohibit the legislative taking of tax credits. That case concludes that the failure to rehire a non-tenured assistant professor without providing an opportunity for a hearing did not violate due process where there was no rule, policy or statute providing non-tenured teachers protected status. Roth deals with statutory rights which the executive may not take without holding a due process hearing, rather than a statutory preference which may be repealed by the legislature.

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all the process that is due" Logan v. Zimmerman Brush Co., 455 U.S. 422, 433, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982); Gattis v. Gravett, 806 F.2d 778 (8th Cir. 1986). See Jones v. Reagan, 748 F.2d 1331, 1338-39 (9th Cir. 1984), cert. denied, 472 U.S. 1029, 105 S.Ct. 3505, 87 L.Ed.2d 635 (1985) ("Property rights to public benefits are defined by the statutes or customs that create the benefits. . . . When . . . the statute authorizing the benefits is amended or repealed, the property right disappears.") (Citation omitted).

We conclude that no entitlement to unused tax credits exists and that the right to accrued but as yet unused tax credits never vested. Thus, as the legislature has done, these unused credits may be eliminated. Therefore, we conclude that with the passage of the Laws 1989, Ch. 8, all accrued but unused tax credits lapsed.

Sincerely yours,



Grant Woods
Attorney General

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