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LOUISIANA GOVERNOR "REJECTS" DEPARTMENT OF REVENUE'S EMERGENCY RULE ON ALTERNATIVE FUEL TAX CREDIT … BUT NEW CLAIMS REGARDING "FLEX FUEL" VEHICLES MAY STILL QUALIFY FOR CREDIT

On June 14, 2012, Louisiana Gov. Bobby Jindal issued a letter notifying the former Secretary of the Louisiana Department of Revenue ("the Department"), Cynthia Bridges, that the Governor rejected the Department's recently-promulgated emergency rule regarding implementation of Louisiana's Alternative Fuel Tax Credit statute. A subsequent statement from the Department released on June 19, 2012 confirms that the Governor has indeed rescinded the emergency rule. However, the June 19 statement clarifies that the Department will honor any refunds already paid and, with respect to the credit, will grant refund requests postmarked on or before June 14, 2012, the date the emergency rule was rescinded. In addition, the Department stated that it will address questions about future claims for refunds relating to the credit after a thorough rule-making process is completed.

Despite the Governor's rejection of the Department's emergency rule, new claims regarding certain "Flex Fuel" vehicles (including future purchases of "Flex Fuel" vehicles) may still qualify for the credit under the plain language of the statute. A Department rule or regulation, while binding on the Department and informative of the State's interpretation of the statute, is not itself the law. While a properly promulgated "rule" has the force and effect of law in Louisiana, such a rule or regulation is invalid if it improperly exceeds or narrows the scope of the statute upon which it is based.

The statute at issue, La R.S. 47:6035, provides an income tax credit for (1) the purchase of new vehicles which use alternative fuels, or (2) the conversion of vehicles to alternative fuel use. The statute defines "alternative fuel" as any fuel that results in emissions "comparably lower" than those from gasoline or diesel, and specifically includes compressed natural gas, liquefied natural gas, liquefied petroleum gas, biofuel, biodiesel, methanol, ethanol, and electricity. According to the statute, a taxpayer may claim a 50 percent credit for the exact cost of the purchased "qualified clean-burning motor vehicle fuel property" necessary to operate on the alternative fuel. As an alternative to attempting to calculate the actual cost of such property included in a new alternative fuel vehicle, the statute provides that taxpayers who purchase a new vehicle containing "qualified clean-burning motor vehicle fuel property" may simply take a credit equal to 10 percent of the cost of the motor vehicle or $3,000, whichever is less.

The Department promulgated the now-rescinded emergency rule on April 30, 2012 to provide guidance related to the Alternative Fuel Tax Credit, and explained that the credit was available for a vehicle operating on an alternative fuel as defined by the U.S. Department of Energy. The emergency rule explained that the credit was available for (1) the cost of equipment purchased to convert a gasoline or diesel motor vehicle to a vehicle that runs on alternative fuel, as well as (2) the cost of a new vehicle "that its original and only use is to operate on an alternative fuel." However, the emergency rule also contained a list of approximately 100 vehicles that were

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presumed by the Department to qualify for the credit, including the "Flex Fuel" versions of certain popular models such as the Ford F-150, GMC Yukon, Chevrolet Tahoe, Chevrolet Malibu, Ford Fusion, Chrysler 200 and 300, Dodge Charger, and Chevrolet Silverado, all of which run on either gasoline or E85 ethanol.

On May 3, 2012, the Department issued Revenue Information Bulletin 12-025 ("RIB 12-025"), which clarified that certain "Flex Fuel" vehicles do in fact qualify for the Alternative Fuel Tax Credit based on the plain language of the statute. Specifically, the Department explained that the statute does not prohibit a vehicle that can run on either gasoline or alternative fuel from qualifying for the credit. Rather, the statute simply provides that the incremental cost of the equipment that is related to the capability of using an alternative fuel qualifies for the credit, and the cost that is related to using gasoline does not qualify. Further, the statute allows a taxpayer who is unable to, or who elects not to, calculate the exact cost attributable to the "qualified clean-burning motor vehicle fuel property" installed by a manufacturer in a newly-purchased motor vehicle to simply take a credit equal to 10 percent of the cost of the motor vehicle, with a cap of $3,000.

In his "rejection" letter to former Secretary Bridges, the Governor requested that the Department withdraw the emergency rule, explaining that the Department had not properly justified its use of the applicable emergency rule-making procedures because the Department did not state a description of facts and circumstances that would constitute an "imminent peril to the public health, safety, or welfare" of the State or the people that would require adoption of the rule upon shorter notice than that provided under the standard rule-making statutory provisions. The Governor also explained that "legal questions" raised by RIB 12-025 need to be resolved prior to promulgating a new rule. According to the Governor's letter, after all legal issues are resolved, rules may be promulgated according to authorized rule-making procedures.

Notwithstanding the fact that Governor Jindal has rejected the Department's emergency rule, it appears from the plain language of the Alternative Fuel Tax Credit statute itself, which is still valid law, that "Flex Fuel" vehicles able to run on either gasoline or alternative fuel may very well qualify for the credit. Although the emergency rule has been rejected, the reasoning articulated in the rule and RIB 12-025 remains a sound interpretation of the statute itself. The plain language of the statute does not seem to exclude a vehicle from qualifying for the credit simply because it can operate on gasoline and alternative fuel. Rather, the statute simply provides that the incremental cost of the equipment that is related to the capability of using an alternative fuel qualifies for the credit. The statute also specifically allows a taxpayer the option to choose to calculate the applicable credit on a newly-purchased vehicle by simply taking an amount equal to 10 percent of the cost of the motor vehicle or $3,000, whichever is less.

Thus, it is imperative that taxpayers who have purchased "Flex Fuel" vehicles after January 1, 2009, and wish to pursue credits for those purchases properly protect their claims within the time periods allowed by law by filing the appropriate amended returns or refund claims reflecting such credits. This is especially important for any purchases made during the 2009 tax year, as the deadline for claiming a credit/refund on those purchases is December 31, 2013.

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Also, taxpayers should keep in mind that this credit may very well be available for future purchases of "Flex Fuel" vehicles that will be registered in Louisiana. Thus, taxpayers who plan to make future purchases of "Flex Fuel" vehicles, and who wish to pursue credits for those future purchases, should claim the credits on the income tax returns for the taxable periods in which the "Flex Fuel" vehicles are purchased.

As an additional note, the day after Governor Jindal issued the "rejection" letter, Secretary Bridges notified the Governor that she was resigning from her position as Secretary of the Department. Deputy Secretary Jane Smith has been appointed by the Governor to serve as Interim Secretary of the Department.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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