BOARD OF TAX APPEALS
STATE OF LOUISIANA

TAMMIE AND BRIAN DUFRENE,
PETITIONERS

V. DOCKET NO. 12481C

LOUISIANA DEPARTMENT OF REVENUE,
RESPONDENT

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JUDGMENT AND REASONS

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This matter came before the Board for a hearing on the merits on March 10, 2022. Presiding at the hearing were Francis J. "Jay" Lobrano, Chairman, Vice-Chairman Cade R. Cole, and Judge Lisa Woodruff-White (Ret.). Present before the Board were Miranda Scroggins, attorney for the Louisiana Department of Revenue ("Department"), and Robert C. Barrett, Jr., attorney for Tammie and Brian Dufrene ("Taxpayers"). At the conclusion of the hearing, the Board took the matter under advisement. The Board now issues Judgment in accordance with the attached written reasons:

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the Taxpayers and against the Department and that the Assessment appealed from is hereby overturned.

JUDGMENT RENDERED AND SIGNED at Baton Rouge, Louisiana, this 4th day of May, 2023.

FOR THE BOARD:

Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals

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REASONS FOR JUDGMENT

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Facts

Taxpayers filed their 2016 Louisiana Individual Income Tax Return with the Department on or about July 5, 2019. On their Return, Taxpayers claimed the Motion Picture Investment Tax Credit ("MPITC") under La. R.S. 47:6007. The Department disallowed the MPITC, determined a tax liability, and issued a Notice of Assessment for tax, penalties, and interest. On September 9, 2020, Taxpayers filed the instant Petition. At the hearing in this matter, counsel represented to the Board that the MPITC was the only remaining item in dispute. Counsel further asserted that their disagreement on the MPITC was purely a legal issue.

As represented by counsel, the underlying facts are not in dispute. In 2014, a pass-through entity identified as Butcher Associates II allocated a $14,000.00 share of the MPITC to Taxpayers. The MPITC was earned from a production described as "Miss USA Pageant." Taxpayers claimed a less than their entire share of the MPITC, $11,221.00, on their 2014 Tax Return. Taxpayers claimed the remaining $2,779.00 on their 2016 Return.

The Department's position is that the disallowance of the MPITC claim on Taxpayers' 2016 Amended Return was proper because the credit was not transferred to the Taxpayers prior to the due date of their 2016 Return, as required by 2016 Act 661. The Department recognizes May 14, 2019, as the date of that the MPITC was transferred to the Taxpayers. The Department further represented that Taxpayers are still permitted to claim the MPITC on return for a tax year after the transfer and within the carryforward period, or in the alternative, Taxpayers may apply the MPITC as a payment of tax (but not penalties and interest). Taxpayers argue that they do not have to comply with Act 661 because they received ownership of the MPITC by allocation in 2014, prior to Act 661's effective date.

Discussion

The requirements enacted by Act 661 are codified in La. R.S. 47:1675(H)(e). La. R.S. 47:1675 establishes generally applicable rules for the administration of income tax credits. As amended by Act 661, La. R.S. 47:1675(H)(e) provides:

> To claim a credit on a tax return, either:
>
> (i) The effective date of transfer shall be on or before the due date of the return, without regard to the granting of any extension; or
>
> (ii) On or before the due date of the return, without regard to the granting of any extension, the transferor and transferee shall have executed a binding agreement to transfer the credit. The agreement shall be on a form approved by the secretary. The specific project from which the credit shall be generated, specific type of transferable credit, and the exact amount of credit to be transferred shall not be required terms of the agreement.
>
> (iii) For purposes of this Paragraph, "effective date of transfer" means the date of transfer as reflected in the Tax Credit Registry pursuant to R.S. 47:1524.
>
> (iv) A credit acquired through transfer can be applied to any allowable tax liability that is due for the year the credit was originally earned or to any year due afterward until the applicable carryforward period is over.

Act 661 is applicable to income tax periods beginning on and after January 1, 2016. Therefore, Act 661 applies to the 2016 Tax Period that is at issue in this case.

The statute treats credits acquired through transfer differently from how it treats credits received by flow through. Credits that a person "acquires . . . through transfer" are "property." La. R.S. 47:1675(H)(c). Credits that a person "earns . . . or receives . . . by flow through" are not property, they are "treated as tax items." La. R.S. 47:1675(H)(b). As tax items, earned and flowed-through credits may not be used to pay penalties and interest. *Id.* However transferred credits, as property, can be used to pay any tax liability as well as related penalties and interest.

La. R.S. 47:1675(H)(b),(c). Thus, for purposes of La. R.S. 47:1675(H), a flow-through credit is treated in the same manner as though the recipient had actually earned the credit themselves.

In related statutes, the term "transfer" does not implicitly include flow-through or allocation. To the contrary, the legislature intended to treat an allocation as a transfer, it did so explicitly. The statute authorizing the MPITC states, "[f]or the purpose of reporting transfer prices, the term "transfer" shall include **allocations** . . . ." [emphasis added]. La. R.S. 47:6007(C)(4)(b). In addition, allocations are distinguished from sales in La. R.S. 47:6007(C)(3)(d). The statute provides that, "[i]n order to prevent disguised sales of the credits, allocations of credits through partnership and membership agreements shall not be recognized unless they have 'substantial economic effect' as that term is defined by 26 U.S.C. 704 and the federal regulations thereunder." Under 26 U.S.C. 704, an invalid partnership agreement will be disregarded, and the partner's distributive share of tax items will be re-allocated in accordance with their interest in the partnership. Furthermore, in the definitions section of Tax Credit Registry Act, "transfer" is defined as an "assignment, disposition, **transfer, or allocation** of tax credits." La. R.S. 47:1524(B)(6) [emphasis added].

The credit at issue in this case is the remainder of the very same credit allocated to the Taxpayers for the 2014 Tax Year. La. R.S. 47:1675(H) treats this credit as if the Taxpayers had earned it themselves. La. R.S. 47:1675(H)(e)(i)-(iv) restricts the use of transferred credits. Since, the credit at issue is not a transferred credit, the Department's reliance on La. R.S. 47:1675(H)(e)(i)-(iv).

Counsel framed this case as a purely legal dispute over the effect of Act 661. The Department does not challenge the Taxpayers' qualifications to claim the MPITC in any other respect. As explained in the foregoing reasons, the Board rules in favor of the Taxpayers on the legal question presented. Accordingly, the Taxpayers are entitled to apply the MPITC to their liability for 2016 individual income tax and the related penalties, and interest. The result of applying the MPITC in this manner is that amount shown on the Assessment is reduced to zero. Accordingly, the Assessment will be overturned and Judgment will be rendered in the Taxpayers' favor.

Baton Rouge, Louisiana, this 4th day of May, 2023.

FOR THE BOARD:

Francis J. "Jay" Lobrano, Chairman
Louisiana Board of Tax Appeals