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MEMORANDUM

TO: MIKE MASON AND RICHARD HENNINGER
CC: COMM. SURTEES, ASST. COMM. UNDERWOOD, AND JOE GARRETT
FROM: HENRY CHAPPELL, CHIEF COUNSEL 
RE: LEGAL OPINION---ALABAMA ESTATE TAX RETURNS

A legal opinion on the above subject was requested by the Income Tax Division (Ronnie Bedsole) through Mike Mason, Tax Policy, on July 18 2005, concerning two questions which are rephrased below with responsive answers by the Legal Division, followed by a summary opinion and explanatory commentary.

- 1. Question:** In the light of recent Federal Estate Tax law amendments, is it necessary for Alabama to continue to require estates that file Form 706 (Federal Estate Tax Return) with the IRS to file an informational copy with Alabama as the estate's Alabama Estate and Inheritance Tax Return? **Answer: NO.**
- 2. Question:** If there is no longer an estate tax liability in Alabama for decedents who die after 12/31/05, should Alabama still issue Estate Tax Waivers and/or require a copy of the Affidavit of Estate Tax, when negotiable assets are transferred from the name of a decedent to the name of a beneficiary? **Answer: NO.**

SUMMARY OPINION: Effective January 1, 2005, Federal tax laws applicable to Federal Estate Tax returns have been amended so as to eliminate the "credit" for state estate or inheritance taxes paid and have, instead, provided for the treatment of such state estate or inheritance taxes paid as a "deduction" from the Federally reported estate tax base. As a result of that Federal statutory amendment, there is no longer any field of operation for Alabama imposed estate taxes because of the manner in which Alabama's estate tax levy is linked with Federal estate tax "credits." Consequently unless and until § 40-15-2, *Code of Alabama* 1975, and the enabling provision of Amendment 23, *Constitution of Alabama 1901*, are amended so as to provide for an Alabama Estate and Inheritance Tax ("EIT") imposed in a manner different from the present EIT structure or the "credit" for state EIT is re-instituted as a matter of Federal estate tax law, no Alabama estate tax will be payable with respect to persons dying after December 31, 2004.

EXPLANATORY COMMENTARY: The Alabama EIT is imposed by Chapter 15, Title 40, *Code*, supra. However the EIT so imposed is limited by the provision of Amendment 23, *Constitution*, supra, which authorizes enforcement of the Alabama EIT only to the extent that the Alabama EIT is allowed as a

credit against the Federal estate tax of a decedent's estate. Amendment 23 repealed Section 219 of Article XXI, which had had the effect of preventing the imposition of an EIT, as follows:

“Article XXI. Section 219 of the present Constitution is hereby annulled and set aside and hereafter the legislature of Alabama may provide for the assessment, levy and collection of a tax upon inheritances and for the levying of estate taxes **not to exceed in the aggregate the amounts which may by any law of the United States be allowed to be credited against or deducted from any similar tax upon inheritances or taxes on estates assessed or levied by the United States** on the same subject. The legislature shall have the power to levy such inheritance or estate taxes in the state of Alabama only so long as and during the time an inheritance or estate tax is enforced by the United States against Alabama inheritances or estate, **and shall only be exercised or enforced to the extent of absorbing the amount of any deduction or credit which may be permitted by the laws of the United States** now existing or hereafter enacted to be claimed by reason thereof as deduction or credit against such similar tax of the United States applicable to Alabama inheritances or estates.” (Emphasis supplied).

Amendment 23 links the imposition of an Alabama EIT to amounts which are allowed to be “credited against or deducted from” Federally imposed estate taxes. A plain reading of the descriptive phrases “credited against” and “deducted from” renders it manifestly clear that these are but alternative expressions referring to a single subtraction to be made from a like Federal estate tax obligation. The latter phrase, “deducted from,” therefore clearly does not have reference to the Alabama EIT being measured by an amount allowed by the recent Federal enactment as a “deduction” from the tax base which constitutes the starting point for deriving the ultimately calculated Federal estate tax obligation.

As previously stated, for decedents dying after December 31, 2004, the Federal estate tax no longer allows a credit for a state imposed estate or inheritance tax which has been paid. Because the Alabama EIT (which is inextricably linked to and measured by its allowance as a Federal estate tax credit) is no longer allowed as a credit against the Federal Estate Tax, it is the legal opinion of undersigned counsel that the Department can no longer enforce the Alabama EIT and, accordingly, can no longer require the filing of an Alabama EIT return. Likewise, there is no longer a legal basis for or need to issue Estate Tax Waivers and/or to require the filing of an Affidavit of Estate Tax, when negotiable assets are transferred from the name of a decedent to the name of a beneficiary.