February 2016

Credits & Incentives talk with Deloitte

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Deloitte Tax LLP

Journal of Multistate Taxation and Incentives (Thomson Reuters/Tax & Accounting)
Volume 25, Number 10, February 2016

CREDITS & INCENTIVES TALK WITH DELOITTE

Arkansas Proposes Constitutional Amendment to Encourage Economic Development

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Economic incentives are offered throughout the country by state and local jurisdictions to promote and compete for economic development projects. These projects enable communities to incentivize growth and investment in their jurisdictions. Whether and how states and localities incentivize a project, however, may be limited by a state's constitution.

For example, economic incentives in Arkansas have been bumping up against the state's constitutional limitations for decades. In the upcoming 2016 election, Arkansas voters will be asked to amend their constitution again to help encourage economic development.

State Uniformity Clause limitations upon property tax incentives

Arkansas' constitution prohibits local government from abating or waiving property tax to induce industry to locate within an Arkansas county.[1] More than 20 years ago, the Arkansas Attorney General issued an opinion that county property tax waivers violated the constitutional requirement of equal and uniform property taxation throughout the state.[2]

Arkansas, however, allows for a Payment in Lieu of Tax (PILOT) program, which effectively provides the benefits of a partial property tax abatement through the lease or sale of tax exempt city or county property to a for-profit entity.[3] Under a PILOT arrangement, the for-profit entity that leases or purchases tax exempt property agrees to pay at least 35 percent of the aggregate amount of property taxes that would be paid if the property were on the tax rolls, with certain exceptions.[4]

Arkansas is not alone. According to the Lincoln Institute of Land Policy, an estimated 39 state constitutions have uniformity clauses, with qualifications varying by state.[5] To Arkansas' east, Tennessee's Constitution provides that "all property, real, personal or missed shall be subject to taxation."[6] While this generally requires uniform taxation of similar properties, Tennessee's Constitution does allow for exemptions for property held by state and local governments, as well as by charitable, religious, scientific, and educational organizations.[7]

To Arkansas's north, Missouri's Constitution requires that taxes levied shall "be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax."[8] Communities across both Tennessee and Missouri use PILOTs and other programs to help incentivize projects.

Prohibition on funding chambers of commerce with sales tax revenue

Under current Arkansas law, local governments may levy a voter-approved sales and use tax for certain economic development projects, including public infrastructure improvements or the establishment and operation of local economic development programs.[9] State law also allows this Economic Development Tax (EDT) revenue to support a public corporation for economic development, as well as the contracting of services with community-based not-for-profits, such as a chamber of commerce and industrial development corporations.[10] Across the state, a number of communities have used the EDT to fund private regional economic development agencies.

Other states also leverage local revenue sources to support economic development projects. Chapter 380 of Texas's Local Government Code, for example, provides statutory authority for municipalities to establish economic development programs using local sales tax revenues for making loans and grants, providing municipal services, and promoting state and local economic development.[11]

In 2015, a Pulaski, Arkansas circuit court judge issued a summary judgment enjoining Little Rock and North Little Rock from making payments to regional chambers of commerce for economic development services.[12] The payments were viewed as a violation of the Arkansas Constitution, which currently prohibits counties, cities, towns and any other municipal agencies from appropriating money for-or loaning its credit to-corporations, associations, institutions or individuals.[13]

Shortly thereafter, the State Attorney General declined to provide an opinion on the City of Russelville's EDT payments to the Arkansas Valley Alliance for Economic Development, Inc., whose staff members were also employed by the Russellville Chamber of Commerce.[14]

Arkansas proposed constitutional amendment

On April 9, 2015, Arkansas Governor Hutchinson signed Senate Joint Resolution 16 (SJR 16), a proposed constitutional amendment on economic development that will go before voters for consideration on the November 8, 2016 ballot.[15] The stated purpose of this proposed amendment is to overcome constitutional barriers to economic development. If adopted into law, SJR 16 would:

- authorize communities to obtain and appropriate money through voter-approved bonds,
- explicitly define the types of permissible economic development services and projects, and
- repeal the existing limitation of state bonds of no more than five percent of state generated revenue.

The proposed constitutional amendment SJR 16 would address the prohibition noted previously regarding certain municipal appropriations, and allow for appropriating money to corporations, associations, institutions or individuals for economic development projects or economic development services.[16] SJR 16 also proposes to align and expand the definition of economic development projects and services, as referenced throughout the state constitution.

Under the new definition, economic development projects would include land, buildings, furnishings, equipment, infrastructure and improvements for development, retention or expansion projects across eight types of facilities such as manufacturing, R&D, distribution and warehouses, call centers, job training facilities and regional or national corporate headquarters.[17] Economic development services would include planning, marketing and strategic services for workforce development, supervision and operation of industrial parks, and negotiation of contracts for the sale or lease of industrial parks or other types of property.[18] Further, the proposed amendment would give the Arkansas General Assembly the flexibility to amend these definitions with a three-fourths vote of each house.

Remove limitations on economic development bonds

SJR 16 would also remove limitations on the amount of bonds allowed to incentivize economic development under Amendment 82, originally passed by Arkansas voters in 2004 after Arkansas lost a project to a neighboring state for a $750 million Toyota truck plant.[19] Amendment 82 allowed for the issuance of bonds to support large economic development projects.[20]

The total bonds allowed were limited to five percent of state general revenues collected during the most recent fiscal year, with additional thresholds requiring qualified projects to invest at least $500 million and create at least 500 new jobs. In 2007, Arkansas also established a $50 million reserve for a Governor's Quick Action Fund.[21] However, no Amendment 82 projects came to fruition and, in 2010, voters modified Amendment 82 to eliminate the investment and job requirements.

Three years later Arkansas issued its first Amendment 82 bond financing. In 2013, Arkansas won a $1.1 billion project near Osceola, projected at the time to create 500 jobs with an average annual pay of $75,000.[22] A total of $125 million in Amendment 82 financing was committed, including a $50 million loan, a $50 million grant for site preparation, a $20 million grant for subsurface stabilization and pilings, and $5 million for bond issuance costs.[23] Additional state and local incentives were also offered to help secure the project.[24]

Corporate welfare or golden opportunity?

SJR 16 has drawn some opposition. At the time of SJR 16's passage, *Arkansas Times* columnist, and former editor, Max Brantley, criticized SJR 16 as "corporate welfare." As expressed by Brantley: "[SJR 16] takes the cap off the amount of bonds that the state can issue to provide corporate welfare money to lure industries . . . . [It] overrides a recent court case that declared local governments have for years been unconstitutionally giving tax dollars to local chambers of commerce in the name of economic development [which] are nothing more than taxpayer subsidies of political lobbies that would be doing the same work on the fees of the corporations they served . . . ."[25]

Supporters of the constitutional amendment argue, however, that the proposed amendments provide the state with the flexibility it needs to win economic development projects. In May 2015, Arkansas Governor Hutchinson called a special session to pass $87.1 million in Amendment 82 bond obligations to support a large governmental bid to produce the new Joint Light Tactical Vehicle at an East Camden manufacturing facility.[26]

Under the proposed project, $125 million would have been invested, 589 jobs would have been created, and 556 existing jobs would have been retained.[27] In turn, the company would have received an $83 million grant to help offset the costs for construction, infrastructure improvements and equipment. In addition, Arkansas would have invested $1.6 million to construct and equip a training facility at Southern Arkansas University Tech, and expend $2.5 million in bond transaction costs.[28]

Deemed a "golden opportunity" by Governor Hutchinson, the special legislation was approved 30-2 in the Senate and 90-0 in the House.[29] However, in late August 2015, Arkansas and the company involved lost the governmental bid to a competing project in Wisconsin.[30]

It should be noted that Arkansas' future Amendment 82 bond financing options may have been limited had the company won the bid. For fiscal year 2015, Arkansas forecasted nearly $5.2 billion in general revenue, which would have limited total bond obligations to approximately $260 million.[31] Nearly half of Amendment 82's bond authority had been allocated to the Osceola project described earlier, with an additional $87.1 million potentially allocated for the Joint Light Tactical Vehicle project.

Will Arkansas use SJR 16 to double down on Amendment 82 by removing the limitation on bond financings and giving more flexibility to municipalities in funding private economic development groups and economic development projects? Or, will voters reject the amendment as "corporate welfare"? Only time will tell. But for those interested in growing their business in Arkansas-or growing the Arkansas economy-it will be an issue to watch closely.

[1] Ark. Const. of 1874, Art. XVI, §§ 5, 6.

[2] Op. Ark. Att'y Gen. No. 140 (1995).

[3] Ark. Code Ann. § 14-164-703.

[4] 006-05-049 Ark. Code R. (2015).

[5] Daphne A. Kenyon, Adam H. Langley and Bethany P. Paquin, *Rethinking Property Tax Incentives for Business,* Lincoln Institute of Land Policy (June 2012), http://www.lincolninst.edu/pubs/2024_Rethinking-Property-Tax-Incentives-for-Business.

[6] Tenn. Const. Art. II, § 28.

[7] *Id*.

[8] Mo. Const. Art. X, § 3.

[9] Ark. Code Ann. § 14-174-104.

[10] Ark. Code Ann. §§ 14-174-107,14-174-109.

[11] Tex. Loc. Gov't Code Ann., art. XIIa, § 380.

[12] *Lynch v. Stodola,* No. 60-CV-13-360. Pulaski County Circuit Court, Sixth Judicial Circuit, Seventeenth Division, filed Jan. 24, 2013.

[13] Ark. Const. of 1874, Art. XII, § 5.

[14] Op. Ark. Att'y Gen. No. 005 (2015).

[15] Ark. Senate Joint Resolution XVI (2015), http://www.arkleg.state.ar.us/assembly/2015/2015R/Pages/BillInformation.aspx?measureno=SJR16.

[16] *Id.*

[17] *Id*.

[18] *Id*.

[19] Rob Moritz, *Amendment 82 Gives State Flexibility to Seal Super Deal,* Arkansas News (Jan. 21, 2013), http://arkansasnews.com/sections/news/arkansas/amendment-82-gives-state-flexibility-seal-super-deal.html.

[20] Ark. Const. of 1874, amd. LXII.

[21] *Id*.

[22] Rob Moritz*, Senators Briefed on $1.1 billion Steel Mill Project; ATRS Invests $60 million*, Arkansas News (Feb. 4, 2013), http://arkansasnews.com/sections/news/senators-briefed-11-billion-steel-mill-project-atrs-invests-60-million.html.

[23] *Id.;* Arkansas Development Finance Authority. *CY2014DF004 State of Arkansas General Obligation Amendment 82 Bonds Series 2014* (June 30, 2014), http://www.state.ar.us/adfa/Act%2036%20Reports/DF004%20-%20GO%20Bonds%20-%20Big%20River%20Steel%20FINAL.pdf.

[24] Construction began in September 2014 and the Osceola facility is projected to be opened in March 2016. As of August 2015, the project had created 650 construction jobs, with the job count projected to grow to nearly 2,000. Michael Wikey, *New Big River Steel CEO Gives Promising Sales Report to Lawmakers in Osceola,* TBP The City Wire (Aug. 26, 2015), http://talkbusiness.net/2015/08/new-big-river-steel-ceo-gives-promising-sales-report-to-lawmakers-in-osceola/.

[25] Max Brantley, *Yes, There Will be Constitutional Amendments, Chiefly to Provide Corporate Welfare*, Arkansas Times (Apr. 2, 2015), http://www.arktimes.com/ArkansasBlog/archives/2015/04/02/yes-there-will-be-constitutional-amendments-chiefly-to-provide-corporate-welfare.

[26] Gavin Lesnick, *Hutchinson: . . . . . Project a 'Golden Opportunity' for State*, Northwest Arkansas Democrat Gazette (May 26, 2015).

[27] Dale Ellis, *Arkansas Legislature Wraps Up Special Session*, Arkansas News (May 28, 2015), http://arkansasnews.com/news/arkansas/lawmakers-wrap-special-session.

[28] *Id*.

[29] *Id*.

[30] Brian Fanney, *State Loses Out on Bid to Build Army Vehicles*, Arkansas Online *(*Aug. 26, 2015), http://www.arkansasonline.com/news/2015/aug/26/state-loses-out-bid-army-vehicles-20150826/?f=latest.

[31] State of Arkansas Department of Finance and Administration, *Letter to Senator Hester and Representative Dotson,* Larry W. Walther, Director (May 6, 2015).