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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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Honorable Iva Nelson
City Clerk/Treasurer
City of Gadsden
Post Office Box 267
Gadsden, Alabama 35902

Ad Valorem Taxes – Exemptions – Abatements
– Municipalities – Etowah County

Retroactive modifications to tax abatement agreements, while permissible, may not violate existing law.

The City of Gadsden cannot, through the vehicle of a retroactive amendment to a Tax Abatement Agreement (“Agreement”), forgive ad valorem taxes that accrued as a fixed obligation prior to the date of the subject Agreement.

Dear Ms. Nelson:

This opinion of the Attorney General is issued in response to your request on behalf of the City of Gadsden.

QUESTION

Can the City of Gadsden amend its prior Tax Abatement Agreement with Wimbish Enterprises, Inc., (“Wimbish”) to provide that noneducational ad valorem taxes accruing on certain real property owned by Wimbish in the year prior to the effective date of said resolution may be brought under the aegis of said Agreement?

FACTS, LAW, AND ANALYSIS

On November 1, 2006, Wimbish applied for abatement of ad valorem and other taxes pursuant to the Tax Incentive Reform Act (section 40-9B-1, *et seq.*, of the Code of Alabama) ("TIRA"). Wimbish's request was granted in a formal Tax Abatement Agreement dated November 21, 2006. The Agreement was approved by Resolution No. R-474-06, which was duly adopted by the City Council of Gadsden on November 21, 2006. The Agreement is typical of tax incentives provided pursuant to TIRA and provides, in part, for abatement of "all state and local non-educational property taxes . . . for a period of ten years measured as provided in Section 40-9B-3(8) of the Act." *Id.* Unfortunately, the effective date of Resolution No. R-474-06 occurred after the "law day" for 2006-2007 ad valorem taxes; October 1, 2006. The "law day" is the determinative date for valuation and classification of all real property in Alabama. Opinion to Honorable Doster L. McMullen, Tuscaloosa County Tax Assessor, dated April 11, 2000, A.G. No. 2000-123.

According to statements contained in Resolution No. R-131-08, it was the intention of Wimbish, the Gadsden-Etowah Industrial Development Authority, and the City of Gadsden that the Agreement was to encompass noneducational ad valorem property taxes for 2006-2007. After the Agreement went into effect, the parties thereto apparently realized that their original intent had not been expressed in the Agreement, and they now seek authority to retroactively amend same. If the power to retroactively amend the Agreement exists, it rests solely with the City of Gadsden or the Industrial Development Authority, not the Department of Revenue or any other entity. *ABC Rail Products Corp. v. State of Ala.*, 1995 WL 150914 (Ala. Dept. Rev. Mar. 20, 1995).

It is abundantly clear from Resolution No. R-131-08 that the proper entities have determined that an amendment is justified and supported by the facts, including Wimbish's status as a private-use industrial property owner for the relevant tax year. This is their exclusive province under the procedural scheme of TIRA. The larger issue is whether legal authority exists permitting retroactive amendments to tax abatement agreements. Amendments to such agreements are not directly addressed in TIRA; however, section 40-9B-6 states that such agreements are "between the governing body and the private user. . . ." ALA. CODE § 40-9B-6 (2003).

In an opinion issued to Honorable Amanda G. Scott, Morgan County Revenue Commissioner, dated February 28, 2002, A.G. No. 2002-160, this Office has previously opined that this defined contractual agreement is subject to mutual modification upon agreement of the parties. This conclusion is also supported, as follows, by 17A Am. Jur. 2d *Contracts* §507 (2004):

A "modification of a contract" is a change in one or more respects, which introduces new elements into the details of the contract and cancels others but leaves the general purpose and effect undisturbed. Modification of a contract normally occurs when the parties agree to alter a contractual provision or to include additional obligations, while leaving intact the overall nature and obligations of the original agreement. . . . Parties to a contract are not forever locked into its terms. Accordingly, parties to an existing contract may, by mutual assent, modify it, *provided the modification does not violate the law or public policy.* . . .

Id. (emphasis added)

The principle of mutual modification of an executory contract was also approved by the Alabama Supreme Court in *Ala. Terminix Co. v. Howell*, 276 Ala. 59, 62, 158 So. 2d 915, 918 (1963): "Parties to an executory contract may, by mutual consent, modify it as to parties, terms or conditions. . . ." *Id.* *Terminix* even suggests that agreed modifications may waive a rule of law or a constitutional provision, but only where "no considerations of public policy or morals are involved." *Id.* In the current situation, however, the entire relationship between Wimbish and the city is uniquely a creature of laws embodying public policy. TIRA is a series of general statutes delegating power to local governments. These powers include the ability to grant exemptions to private business for the purposes of inducing relocation of industry to stimulate economic growth. *Crow v. Gen. Cable Corp.*, 223 Ala. 611, 137 So. 657 (1931). Thus, although broad and independent powers of tax abatement reside with municipal, county, or industrial boards (*ABC Rail Products*), these powers are not unlimited. The limitation of significance in this case arises, as follows, from the absolute prohibition contained in section 100 of the Constitution of Alabama:

No obligation or liability of any person, association, or corporation held or owned by this state, or by any county or other municipality thereof, shall ever be remitted, released, or postponed, or in any way diminished, by the legislature; nor shall such liability or obligation be extinguished except by payment thereof; . . .

ALA. CONST. art. IV, § 100.

Section 100 applies to counties, cities, their officers, and the Legislature. *Town of Camp Hill v. James*, 686 So. 2d 1208, 1212 (Ala. Civ. App. 1996). The ad valorem tax obligation for Wimbish became a fixed obligation on October 1, 2006. "After October 1st, the Legislature cannot relieve one, by classification of taxpayers, or otherwise, from the payment of ad valorem taxes for that year on property owned by him (on) October 1st. . . ." *In re Opinion of the Justices* No. 43, 234 Ala. 358, 175 So. 690 (1937).

Section 100 prohibits the Legislature from remitting any obligation or liability held by the state or county. Tax upon property is not only a personal charge against the taxpayer, but it must be paid by the one who owns the property at the beginning of the tax year, who is personally bound to pay it, whatever may occur as to its ownership thereafter or its physical status.

After it becomes an obligation fixed by those incidents, it cannot be remitted. Ownership on October 1st is the circumstance which fixes a liability for the succeeding years' assessment, though it may not then be assessed.

State v. Ala. Educ. Found., 231 Ala. 11, 163 So. 527 (Ala. 1935) (intervening citations omitted).

It is thus apparent that the proposed retroactive modification to the Wimbish Agreement would directly contravene section 100 of the Constitution of Alabama. Wimbish was the owner of the property on October 1, 2006; the Agreement did not go into effect until November 21, 2006; and any retroactive modification would, of necessity, arrive 18 months after the "law day."

CONCLUSION

Retroactive modifications to tax abatement agreements may be permissible, but they may not violate existing law. In this case, the City of Gadsden cannot, through a retroactive amendment to a Tax Abatement Agreement, forgive ad valorem taxes that accrued as a fixed obligation prior to the date of the subject Agreement.

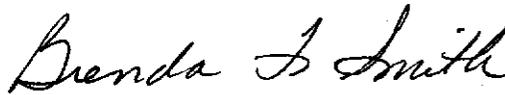
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I hope this opinion answers your question. If this Office can be of further assistance, please contact Lionel Williams, Legal Division, Department of Revenue.

Sincerely,

TROY KING
Attorney General

By:

A handwritten signature in cursive script that reads "Brenda F. Smith".

BRENDA F. SMITH
Chief, Opinions Division

TK/LW

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