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County Commissions – Gasoline Tax –
Motor Fuels Tax – Excise Tax – Alabama
Terminal Excise Tax Act

The purposes for which a county is authorized to use the proceeds of the \$.07 per-gallon gasoline excise tax levied by section 40-17-325(a)(1) of the Alabama Terminal Excise Tax Act are not limited to the purposes described in section 40-17-362(b) of the Code of Alabama.

Dear Mr. Harcrow:

This opinion of the Attorney General is issued in response to your request on behalf of the DeKalb County Commission (“Commission”).

QUESTION

Under the Alabama Terminal Excise Act, effective October 1, 2012, will the Commission’s use of the proceeds of the \$.07 per-gallon gasoline excise tax levied by section 40-17-325(a)(1) be restricted to the purposes described in section 40-17-362(b)?

FACTS AND ANALYSIS

Under current law, the levy, collection, reporting, and distribution of the proceeds of excise taxes imposed on gasoline and other motor fuels is governed by numerous statutory provisions set forth in articles 1, 2, 3, 6, 7, 8, 10, and 11 of chapter 17 of title 40 of the Code of Alabama (“Revenue Code”). Effective

October 1, 2012, with the exception of the Motor Carrier Fuel Tax levied by article 3 of chapter 17, Act 2011-565 repeals these provisions and enacts, in their stead, chapter 17 of article 12 of the Alabama Terminal Excise Tax Act ("ATETA"). The provisions of ATETA are codified in sections 40-17-320 through 40-17-363 of the Code of Alabama (effective October 1, 2012).

Under ATETA, an excise tax is levied on all "motor fuels" at the rates set forth in section 40-17-325. As used in ATETA, the term "motor fuel" means gasoline, blended fuel, aviation fuel, and diesel fuel. ALA. CODE § 40-17-322(33) (2011).

With regard to gasoline, other than aviation gasoline sold to licensed purchasers of aviation fuel, section 40-17-325(a)(1) levies a tax at a rate of \$.16 per gallon ("highway gasoline tax"). The highway gasoline tax "is comprised of a \$.07 excise tax, a supplemental \$.05 excise tax, and an additional \$.04 excise tax." ALA. CODE § 40-17-325(a)(1) (2011).

The \$.07 excise tax and the supplemental \$.05 excise tax levied by section 40-17-325(a)(1) currently are levied by section 40-17-31 (effective until October 1, 2012). The additional \$.04 excise tax currently is levied by section 40-17-220 (effective until October 1, 2012). The revenue derived from the collection of the highway gasoline tax is allocated and distributed to the state, counties, and municipalities in accordance with the provisions of section 40-17-359.

Your question regarding the purposes for which the Commission may use the proceeds of highway gasoline tax attributable to the levy of the \$.07 excise tax arises from the provisions of section 40-17-362 of ATETA, entitled "Use of tax proceeds for highway purposes." More particularly, your inquiry arises from the Legislature's use of the term "article" in describing the tax proceeds to which this section applies.

Subsection (b) of section 40-17-362 provides as follows:

(b) It is the intent of the Legislature that the proceeds of the tax collected on motor fuel and gasoline under the provisions of this article shall be used in the following manner:

....

(2) Where the use is by a county, the use shall be for the resurfacing, restoration, and

rehabilitation of the paved county roads and bridges or bridge replacement on the county road system. These funds shall not be used for new construction unless 90 percent of the county's paved road system has achieved a grade of 85 percent based on the State of Alabama Department of Transportation's annual maintenance report of county roads and bridges. These funds shall not be used for the purchase of equipment. The net tax proceeds distributed to the county shall not be commingled with other funds of the county, including any other gasoline tax revenues, and shall be kept and disbursed by the county from a special fund only for the purposes herein provided.

ALA. CODE § 40-17-362 (2011).

According to the historical notes accompanying section 40-17-362, this section is derived from section 40-17-224. Section 40-17-224 sets forth the uses authorized for "the proceeds of the tax collected on motor fuel, gasoline, and lubricating oil under the provisions of this *article*" ALA. CODE § 40-17-224(b) (2011) (emphasis added). As used in section 40-17-224, the term "article" clearly refers to article 6 of chapter 17, which currently imposes "in addition to all other taxes of every kind now imposed by law an excise tax on gasoline and lubricating oil of \$.04 per gallon" ALA. CODE § 40-17-220(a) (2011). As noted previously, effective October 1, 2012, the \$.04 additional excise tax levied by section 40-17-220 will instead be levied by section 40-17-325(a)(1).

In enacting section 40-17-362, however, the Legislature did not expressly state that the uses authorized by this section applied only to the proceeds of this additional \$.04 excise tax on gasoline. Instead, in section 40-17-362(b), the Legislature simply reiterated the language of section 40-17-224, stating that "the proceeds of the tax collected on motor fuel and gasoline under the provisions of this article shall be used" [ALA. CODE § 40-17-362(b) (2011)] for the purposes described in this subsection.

Considered in isolation, the Legislature's use of the term "article" in this context would appear to indicate its intent that the proceeds of any tax imposed by ATETA, including the \$.07 gasoline excise tax, are to be used only for the purposes described in section 40-17-362(b). Despite, however, the seemingly

broad import of the language used in this section, longstanding rules of statutory construction do not support such an expansive interpretation.

“[T]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the Legislature in enacting a statute.” *Chism v. Jefferson County*, 954 So. 2d 1058, 1070 (Ala. 2006). If possible, this intent should be gathered from the language of the statute itself. *Id.*

It often happens[, however,] that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, . . . [t]he legislative intention, as collected from an examination of the whole as well as the separate parts of a statute, will prevail over the literal import of particular terms, and will control the strict letter of the statute, where an adherence to such strict letter would lead to injustice, to absurdity, or contradictory provisions.

Paterson v. Wisener, 218 Ala. 137, 139, 117 So. 663, 664 (1928). Such contradictions are to be avoided, if possible, particularly when interpreting statutory provisions originally constituting a single act. Instead, such provisions “should be construed together to ascertain the meaning and intent of each [and] should be resolved in favor of each other to form one harmonious plan and give uniformity to the law.” *League of Women Voters v. Renfro*, 292 Ala. 128, 131, 290 So. 2d 167, 169 (1974).

Applying the foregoing rules of statutory construction, it is clear that the meaning and scope of section 40-17-362(b) cannot be determined in isolation, but instead must be derived with reference to other provisions of ATETA. In particular, reference must be made to other provisions of ATETA in which the Legislature has specifically addressed the permissible or mandatory uses of the proceeds of the highway gasoline tax.

Most pertinent to the question in issue are the provisions of section 40-17-359. Subsection (b) of section 40-17-359 expressly authorizes and, in part mandates, significantly more expansive uses of the proceeds of the \$.07 gasoline excise tax and the supplemental \$.05 excise tax than would be allowable under section 40-17-362(b). Subdivision (1) of section 40-17-359(b) mandates that 1.23 percent of the revenues derived from these taxes be used “to provide for the programs and activities of the Marine Police, Marine Resources, and Wildlife and Freshwater Fisheries Divisions of the Department of Conservation

and Natural Resources in this state” ALA. CODE § 40-17-359(b)(1) (2011). Section 40-17-359(b)(2) provides that the remaining revenues arising from the \$.07 gasoline excise tax imposed by section 40-17-325(a)(1) “shall not be used for any purpose other than for the construction, improvement, maintenance, and supervision of highways, bridges, and streets, including the retirement of bonds for the payment of which such revenues have been or may hereafter be pledged.” ALA. CODE § 40-17-359(b)(2) (2011).

With regard to the counties, this subdivision continues by stating that “[t]he payment of the per diem and mileage of members of county governing bodies when engaged in supervising the construction, improvement, and maintenance of highways, bridges, and streets shall be construed as used in supervision.” *Id.* Section 40-17-359(b)(2) further provides that “[t]he governing body of each county may expend an amount not to exceed one third of the total amount of such revenue that may be received by such county in the payment of any debt that may have been incurred by such county for the construction or maintenance of roads or bridges.” *Id.*

Subsection (d) of section 40-17-359 provides that 55 percent of the “net tax proceeds” of the gasoline tax are to be “allocated and appropriated to be used for highway purposes by the counties and municipalities” ALA. CODE § 40-17-359(d) (2011). As used in ATETA, the term “net tax proceeds” means the following:

The entire proceeds from the highway gasoline tax, except the proceeds from the supplemental excise tax of five cents (\$.05) per gallon and additional four cents (\$.04) imposed by subdivision (1) of subsection (a) of section 40-17-325, less the cost of collection and less any refunds pursuant to the provisions of this article.

ALA. CODE § 40-17-359(a)(9) (2011). Net tax proceeds are thus comprised solely of the \$.07 per-gallon gasoline excise tax imposed by section 40-17-325(a)(1).

In defining what constitutes the use of net tax proceeds for “highway purposes,” section 40-17-359(d) expressly authorize uses outside of the parameters set forth in section 40-17-362(b). With regard to counties, this section states that such use

. . . shall be for transportation planning, the construction, reconstruction, maintenance, widening,

alteration, and improvement of public roads and bridges as is now or may hereafter be provided by law, including the payment of the principal of and interest on any securities at any time issued by the county pursuant to law for payment of which all or any of the net tax proceeds were or may be lawfully pledged

ALA. CODE § 40-17-359(j)(2) (2011). By reference to section 40-17-359(g), section 40-17-359(j) further authorizes counties in which the members of the county governing bodies are compensated on a salary basis to pay a portion of these salaries out of net tax proceeds.

Subsection (f) of section 40-17-359 specifically addresses the purposes for which the counties may use “supplemental net tax proceeds.” As used in ATETA, the term “supplemental net tax proceeds” means the following:

That portion of the highway gasoline tax remaining after the net tax proceeds and additional four cents (\$.04) and applicable costs of collection and refunds have been deducted, less the cost of collection and less any refunds of the highway gasoline tax applicable to the supplemental gasoline excise tax imposed in subdivision (1) of subsection (a) of Section 40-17-325.

ALA. CODE § 40-17-359(a)(13) (2011). Thus, as the term suggests, “supplemental net tax proceeds” are comprised solely of the supplemental \$.05 excise tax levied by section 40-17-325(a)(1).

Section 40-17-359(f) provides that two-fifths of the supplemental net tax proceeds are to be distributed to the state, counties, and municipalities and that this revenue “shall be used for the same purposes and deposited in the same state, county, and municipal funds as provided by Section 40-17-362.” ALA. CODE § 40-17-359(f) (2011). Where, however, the use is by a county, section 40-17-359(f) specifically provides that counties may use supplemental net tax proceeds as follows:

[T]o match federal aid on any projects that meet the requirements for federal funding and . . . for new construction without regard to the provision that 90 percent of the county’s paved road system has achieved a grade of 85 percent based on the State of Alabama

Department of Transportation's annual maintenance report of county roads and bridges.

Id. As a result, section 40-17-359(f) expressly contemplates the use of supplemental net tax proceeds for purposes and under circumstances not authorized by section 40-17-362(b).

Finally, subsections (k) and (l) of section 40-17-359 provide that the counties may use the proceeds of the gasoline tax levied by section 40-17-325 "for the construction and maintenance of streets within the corporate limits of any municipality located within the county" [ALA. CODE § 40-17-359(k) (2011)] and "for the construction, reconstruction, maintenance, and repair of public highways and traffic control areas located on public school property or state school property within the county" [ALA. CODE § 40-17-359(l) (2011)]. In contrast, section 40-17-362(b) would limit the use of such proceeds to the "resurfacing, restoration, and rehabilitation of the paved **county roads . . . on the county road system.**" ALA. CODE § 40-17-362(b)(2) (2011) (emphasis added).

As demonstrated above, the more expansive uses expressly authorized by section 40-17-359 for the proceeds of the highway gasoline tax, particularly the proceeds of the \$.07 excise tax and the supplemental \$.05 excise tax, cannot be reconciled with an interpretation of section 40-17-362 that would strictly limit the use of these proceeds to the relatively narrow set of purposes described in this section. In interpreting these provisions, this conflict must be resolved, if possible, "in favor of each other to form one harmonious plan and give uniformity to the law." *Renfro*, 292 Ala. at 131, 290 So. 2d at 169.

Furthermore, this resolution must be effected with the presumption that "every . . . provision [of ATETA] was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used." *Surtees v. VFJ Ventures, Inc.*, 8 So. 3d 950, 970 (Ala. Civ. App. 2008), *aff'd sub nom. Ex parte VFJ Ventures, Inc.*, 8 So. 3d 983 (Ala. 2008) (citations and internal quotation marks omitted) (brackets added). The intended purpose and effect of these provisions may be gleaned from "the reason and necessity for the act, and the purpose sought to be obtained by its passage." *Chism*, 954 at 1069-70 (citation and internal quotation marks omitted).

The Legislature's stated purpose in enacting ATETA was:

[t]o establish an efficient, uniform, motor fuel tax collection and enforcement system, to increase

conformity and compatibility with federal motor fuel laws, and to position the state to take advantage of advances in highway enforcement systems and technology in order to more effectively deter motor fuel tax evasion emanating from sources within and without this state.

2011 Ala. Acts No. 2011-565, Sect. 2. Nothing in this stated purpose suggests an intent to make any substantive changes to the taxes currently levied on motor fuels or the purposes for the proceeds of these taxes may or must be used by counties or other governmental entities. Moreover, a comparison of the provisions of ATETA with those of existing statutory provisions related to these issues compels the conclusion that no such substantive changes were intended.

With regard to the excise taxes imposed on gasoline by ATETA, as noted above, the \$.07 excise tax and the supplemental \$.05 excise tax currently are levied by section 40-17-31. The additional \$.04 excise tax on gasoline currently is levied under section 40-17-220. The authorized or mandatory uses of the \$.07 excise tax and supplemental \$.05 excise tax currently levied by section 40-17-31 are set forth in section 40-17-31(c). In enacting ATETA, the Legislature enacted, without change, the substantive provisions of section 40-17-31(c) as subsection (b) of section 40-17-359.

As to the use of "net tax proceeds," as in the context of ATETA under current law, "net tax proceeds" of the tax levied by section 40-17-31 are comprised solely of the proceeds of the \$.07 excise tax. *See* ALA. CODE § 40-17-70(9) (2011) (defining "net tax proceeds" of the gasoline excise tax levied by section 40-17-31 as "[t]he entire proceeds from the highway gasoline tax, except the proceeds from the supplemental excise tax of \$.05 per gallon imposed by section 40-17-31, less the cost of collection and less any refunds of the said proceeds"). Under current law, the purposes for which the counties are authorized to use net tax proceeds are set forth in sections 40-17-73, 40-17-75, 40-17-78, 40-17-79, and 40-17-80.

In the context of ATETA, the Legislature has reenacted these provisions without substantive change as sections 40-17-359(d), (g), (j), (k), and (l), respectively. As to the "supplemental net tax proceeds" of the tax levied by section 40-17-31, again as in the context of ATETA, these proceeds are comprised solely of the supplemental \$.05 tax levied by this section. *See* ALA. CODE § 40-17-70(13) (2011) (defining "supplemental net tax proceeds" as "[t]hat portion of the highway gasoline tax remaining after the net tax proceeds and applicable costs of collection and refunds have been deducted, less the cost

of collection and less any refunds of the highway gasoline tax applicable to the supplemental gasoline excise tax imposed in Section 40-17-31”).

Under current law, sections 40-17-74.1 and 40-17-224 set forth uses for which net tax proceeds may and may not be used. The uses authorized by these provisions are identical to the uses of the supplemental net tax proceeds of the highway gasoline tax authorized by sections 40-17-359(f) and 40-17-362(b) of ATETA.

In contrast to the continuity between current law and the provisions of ATETA regarding authorized uses of the \$.07 excise tax and the supplemental \$.05 excise taxes, no provision of ATETA expressly addresses the use of the additional \$.04 excise tax levied by section 40-17-325(a)(1). As noted above, under current law, the counties’ use of the additional \$.04 excise tax levied by section 40-17-220 of article 6 is expressly limited to the purposes set forth in section 40-17-224.

Given that section 40-17-362(b) was derived from section 40-17-224, it might be reasonable to conclude that, instead of stating in section 40-17-362 that the “proceeds of the tax collected on motor fuel and gasoline under the provisions of this article shall be used in the following manner” [ALA. CODE § 40-17-362(b) (2011)], the Legislature intended to state that the *proceeds of the additional \$.04 excise tax levied by section 40-17-325(a)(1) shall be so used*. In interpreting this provision, however, it is improper to rewrite the language used by the Legislature to achieve the result thought to be intended. *DeKalb County LP Gas Co. v. Suburban Gas, Inc.*, 729 So. 2d 270, 276 (Ala. 1998). Moreover, in resolving what would otherwise constitute a conflict between the provisions of sections 40-17-362(b) and 40-17-359, undertaking this course is unnecessary.

When viewed as part of the overall taxation scheme effected by ATETA, sections 40-17-362(b) and 40-17-359 both purport to govern the uses of the highway gasoline tax levied by section 40-17-325(a)(1). By its own terms, the provisions of section 40-17-362(b) are generally applicable to all of the “proceeds of the tax collected on motor fuel and gasoline under the provisions of this article. . . .” ALA. CODE § 40-17-362(b) (2011).

In contrast, the provisions of section 40-17-359 expressly and more specifically set forth the uses for which the counties and other governmental entities may expend the proceeds of the \$.07 excise tax, as well as the proceeds of the supplemental \$.05 excise. As such, it is the opinion of this Office that, to the extent that the use of the proceeds of these taxes that are specifically authorized by section 40-17-359 are in conflict with the provisions of section

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40-17-362(b), the more specific provisions of section 40-17-359 prevail. *See Ex parte Jones Mfg. Co., Inc.*, 589 So. 2d 208, 211 (Ala. 1991) (“[i]n the event of a conflict between two statutes, a specific statute relating to a specific subject is regarded as an exception to, and will prevail over, a general statute relating to a broad subject”).

CONCLUSION

The purposes for which a county is authorized to use the proceeds of the \$.07 per-gallon gasoline excise tax levied by section 40-17-325(a)(1) of the Alabama Terminal Excise Tax Act are not limited to the purposes described in section 40-17-362(b) of the Code.

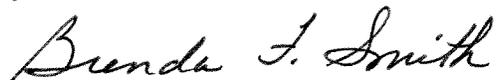
I hope this opinion answers your question. If this Office can be of further assistance, please contact Kelley Gillikin, Legal Division, Alabama Department of Revenue.

Sincerely,

LUTHER STRANGE

Attorney General

By:



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