

Ohio's Tax Amnesty Programs Offer Rare Tax Savings Opportunity

If you have questions regarding Ohio's tax amnesty programs, please contact one of the following:

Anthony L. Ehler

tlehler@vorys.com

614.464.8282

Steven L. Smiseck

slsmiseck@vorys.com

614.464.5438

On June 30, 2011, Governor Kasich signed into law Am. Sub. H.B. 153, Ohio's 2012-2013 budget bill. That legislation included "Temporary Tax Amnesty" that, under the right set of circumstances, could provide significant tax savings. The details of the two amnesty programs are highly technical. However, if the procedures established are properly followed, the programs could reduce or, in some cases, eliminate tax liability. This short review is designed to offer some basic facts about the two tax amnesty programs being implemented.

General Tax Amnesty

- **When may taxpayers participate?**
 - The general amnesty program shall be conducted between May 1, 2012 and June 15, 2012.
- **What taxes are covered under the program?**
 - The program applies to the following taxes: a) personal income tax, b) vendor's sales tax, c) seller's use tax, d) corporate franchise tax, e) county and transit authority sales tax, f) school district income tax, g) estate tax, h) motor fuel tax, i) cigarette tax, j) commercial activity tax, k) natural gas company excise tax, and l) dealer in intangibles tax. Also included are income and school district income taxes required to be withheld by an employer.
- **What tax periods are covered under the program?**
 - The program applies only to taxes that were due and payable as of May 1, 2011, which were unreported, underreported or remain unpaid. Thus, there is a year gap between the tax period covered by amnesty and the beginning of the amnesty program.
- **Are there any restrictions?**
 - The program is not available on any tax for which: a) a notice of assessment has been issued, b) a notice of an audit has been issued, c) a tax bill has been issued, d) an audit has been conducted, e) an audit is currently being conducted, or f) pertains to a tax period that ends after the effective date of the legislation. It is not entirely clear what date is intended to control this restriction; however, a logical reading of the statute as a whole would be the date the taxpayer seeks to enroll in the amnesty program.
- **What will I have to pay?**
 - If a taxpayer pays the full amount of tax owed and one-half of any interest that has accrued on the tax, the Tax Commissioner must waive or abate all applicable penalties and the other one-half of interest due, i.e., the taxpayer pays only half the usual amount of interest due in addition to the tax itself.

- **When must payment be made?**

- The taxpayer must make the required payment within the May 1, 2012 to June 15, 2012 amnesty period in order to qualify for the reduced liability.

- **Are there any other advantages to participating?**

- In addition to the reduced amounts owed, anyone who participates in the amnesty program is immune from criminal prosecution or civil actions with respect to the taxes paid through the program. Moreover, no assessment may be issued against a person with respect to a tax paid as part of the program.

- **How do I enroll in the program?**

- The Department of Taxation has not yet released any information about how a taxpayer initiates its participation in the amnesty program. Regardless of what other processes are put into place, the Tax Commissioner may still require a person to file all applicable returns and reports, including amended returns and reports.

Consumer Use Tax Amnesty Program

Although the seller's use tax is included in the general amnesty program, the consumer use tax (use tax on purchases made) is not. Those who may have an outstanding consumer use tax liability, including holders of a direct pay permit, must participate in the "Consumer Use Tax Amnesty Program," which is to be conducted "independently" of the general amnesty program. The consumer use tax amnesty program is summarized below:

- **When may taxpayers participate?**

- The consumer use tax amnesty program runs from October 1, 2011 through May 1, 2013.

- **What tax periods are covered under the program?**

- A consumer that successfully enrolls and participates in the program is responsible for any unpaid consumer use tax on transactions made from January 1, 2009 forward. Any consumer use tax liability that exists for periods prior to January 1, 2009 is forgiven.

- **Are there any restrictions?**

- The program is not available to any consumer against whom the Tax Commissioner has issued an assessment, where the assessment has been issued on or before the effective date of the legislation. This restriction is significant because, as it is written, it seems to preclude taxpayer participation if the taxpayer has ever been assessed use tax.
- However, we believe that this broadly worded restriction will be narrowly applied by the Ohio Department of Taxation. Specifically, we believe it will be applied only to open periods, provided the assessment is issued prior to October 1, 2011. The past issuance of an assessment for periods now closed for audit and assessment purposes will not preclude a consumer for participating in the use tax amnesty program. Our analysis and conclusions are based upon conversations with officials in the Department of Taxation.

- **What will I have to pay?**

- Generally, a consumer must pay the full amount of unpaid consumer use tax owed on a liability arising on or after January 1, 2009. In exchange for the payment of the tax, the Tax Commissioner will waive or abate the interest and penalties normally due on the unpaid tax, i.e., you pay tax only. In addition, any consumer use tax liability (tax, penalties and interest) that exists for periods prior to January 1, 2009 is forgiven.
- However, if you are a consumer that was registered with the Tax Commissioner on or before June 1, 2011 for consumer use tax purposes, you must pay the full amount of the liability (tax, penalty and interest) paid as allowed under the program. The legislation suggests (but does not expressly say) that any consumer use tax liability that exists for periods prior to January 1, 2009 would still be forgiven.

- **When must payment be made?**

- Generally, payment must be made during the amnesty period. However, a consumer may request an installment payment plan from the Tax Commissioner. If an installment payment plan is granted, a consumer may have up to seven years to pay the tax. The actual length of the payment plan may be shorter and will be based upon individual circumstances.

- **What if I fail to keep up with my payment plan?**

- If a consumer fails to make the required payments under an installment plan, interest will be added to the amount of use tax owed and payable. The Tax Commissioner may certify the delinquent account to the Attorney General for immediate collection.

- **Are there any other advantages to participating?**

- Any consumer who makes the required payments under the consumer use tax amnesty program is immune from criminal prosecution or civil actions with respect to the tax paid through the program. Moreover, no assessment may be issued against a consumer with respect to a tax paid as part of the program.
- Although participation in the use tax amnesty program prohibits the Tax Commissioner from assessing consumer use tax for periods prior to January 1, 2009, there is nothing in the legislation to prohibit a taxpayer from seeking a refund for any overpayment made in any open year, both before and after January 1, 2009. The amnesty period during which potential assessments are precluded will not prohibit potential tax refunds. Consequently, at this moment, refunds could be requested on overpayments made between mid-2007 and mid-2011. As with some other conclusions in this release, our interpretation is based upon conversations with sources in the Department of Taxation.

- **How do I enroll in the program?**

- The Department of Taxation has not yet released any information about how a consumer initiates its participation in the use tax amnesty program.

Other Taxpayer Relief

In addition to the amnesty provisions outlined above, the General Assembly has reduced the period in which the Tax Commissioner may generally issue a use tax assessment for taxpayers who have failed to file returns from ten years to seven years from the date the tax was due but not reported and paid. A further limitation has been

placed on the ability of the Tax Commissioner to issue a consumer use tax assessment. The Tax Commissioner may audit and assess tax, penalties and interest against any consumer that does not participate in the consumer use tax amnesty program. However, the assessment may not include any liability for unpaid consumer use tax that was due prior to January 1, 2008. In other words, liability is limited to consumer use tax liabilities owed from January 1, 2008 forward. Hence, at this moment, there is a three and one-half year statute of limitations in place for all taxpayers.

Conclusion

Ohio's new tax amnesty legislation creates a rare opportunity for taxpayers to assess current tax risks, exposures and liabilities to determine whether amnesty is in their best interest. This requires a careful weighing of the advantages and disadvantages of entering into amnesty with Ohio. In addition, many questions remain because the administrative details are not provided for in the legislation itself. As the Ohio Tax Commissioner determines how to implement the amnesty programs, further questions and issues will emerge. We will continue to monitor the situation and address issues as they develop. We recommend seeking the advice of experienced counsel before entering into any legally binding agreement or exposing potential liability to tax authorities. Taxpayers should be advised of and consider all options to legally minimize tax risks and liabilities.

This client alert is for general information purposes and should not be regarded as legal advice.