

Ohio has enacted two tax amnesties: Significant tax savings are available

Ohio's budget bill provides taxpayers with tremendous tax savings opportunities!

By including two "tax amnesty" provisions in the biennial budget bill, Governor John Kasich and the Ohio General Assembly have provided thousands of Ohio businesses and individuals a unique opportunity to effectively eliminate multiple years of Ohio consumer use tax liability, as well as avoid penalties and interest on many other types of delinquent state taxes. Amended Substitute House Bill 153 (the Budget Bill) included a General Tax Amnesty program and a Consumer Use Tax Amnesty program, as well as a new time limitation on Ohio consumer use tax assessments.

While these programs contain various technical prerequisites, they offer taxpayers a unique opportunity to come clean with the Ohio Department of Taxation (ODT) and avoid penalties and interest and, in some situations, completely eliminate years of tax exposure.

We have already started working with clients to analyze the potential benefits of these new programs and to assist them in considering the benefits of their participation. However, we have also identified many pitfalls that exist and could create significant problems for taxpayers that participate in these programs. Below, we summarize the tax amnesty programs, the effect of the new time limit for assessing consumer use tax, and the considerations every business and individual should evaluate and weigh before participating in these new programs.

General Tax Amnesty

When:

May 1, 2012 to June 15, 2012.

Taxes eligible for General Tax Amnesty:

- Sales tax
- Commercial activity tax
- Personal income tax
- Seller's use tax (out of state vendors collecting Ohio sales tax)
- School district income tax
- Motor fuel tax
- Dealer in intangibles tax
- Corporation franchise tax
- Estate tax
- Cigarette tax
- Natural gas excise tax

However, the General Tax Amnesty is not available on such taxes for which:

- A notice of assessment has been issued
- A notice of audit has been issued
- A tax bill has been issued
- An audit has been conducted
- An audit is currently being conducted

Payment requirements:

- The participant must pay the full amount of the delinquent tax and one half of the interest between May 1, 2012 and June 15, 2012.

McDonald Hopkins Observation: *While not a requirement for participation, we suggest that participants be up-to-date on any taxes due or payable after May 1, 2011. If that is a problem, other options may be available to the taxpayer.*

Tax periods covered and benefits of participation:

The General Tax Amnesty covers taxes due and payable as of May 1, 2011, which were unreported, underreported, and remain unpaid. Participants will be required to fully pay all delinquent taxes due for all periods prior to May 1, 2011 in order to obtain the benefits of the program. The benefits include:

- The taxpayer need only pay one half of the interest that would otherwise be due on such prior delinquent taxes—the other one half of the interest is abated.
- Any penalties on delinquent taxes paid under this program are fully abated.
- Participants cannot be criminally prosecuted.
- No assessments may be issued by ODT with respect to any tax paid under the General Tax Amnesty program.

How to participate in the General Tax Amnesty program:

- ODT has not yet issued guidance on participation and forms that may be required. Once this guidance is available, we will issue an update.

Consumer Use Tax Amnesty

What is consumer use tax?

- As we detailed in a previous Alert, "**Does your business have an Ohio use tax account?**" Ohio use tax is imposed, in part, on purchases of taxable products or taxable services in cases where the seller did not collect the Ohio sales tax when the product or service was purchased. The use tax applies to both businesses and individuals. Many businesses and most individuals are unaware of the use tax, which serves as a complement to the Ohio sales tax. The use tax is intended, in part, to protect Ohio retailers and vendors by prohibiting consumer from avoiding Ohio sales tax by merely purchasing items from another state and then importing the taxable products or services to Ohio.

When:

- October 1, 2011 to May 1, 2013.

Taxes eligible for the Consumer Use Tax Amnesty:

The Consumer Use Tax Amnesty program is not available for any consumer against which ODT has issued a use tax assessment prior to September 29, 2011.

McDonald Hopkins Observation: *We believe that taxpayers currently under a consumer use tax audit will be permitted to participate in this program. It is also our understanding that ODT will delay assessment of any taxpayer currently under a consumer use tax audit.*

Tax periods covered and benefits of participation:

The Consumer Use Tax Amnesty program categorizes potential participants into two groups:

1. Those participants that were registered with ODT to pay consumer use tax as of June 1, 2011.
2. Those that were not registered with ODT to pay consumer use tax as of June 1, 2011.

For those consumers that were registered with ODT for consumer use tax as of June 1, 2011:

- Consumer use tax due for periods from January 1, 2009 through May 1, 2011 must be paid by the participant.
- No tax, penalty or interest for periods prior to January 1, 2009 will be assessed.
- The participant is responsible for interest and penalty (if any) on the delinquent consumer use tax paid under this amnesty program (i.e., for January 1, 2009 and forward).
- No criminal prosecution for those who participate.

For those consumers that were not registered with ODT for consumer use tax as of June 1, 2011:

- Consumer use tax due for periods from January 1, 2009 through May 1, 2011 must be paid by the participant.
- No tax, penalty or interest for periods prior to January 1, 2009 will be assessed.
- Penalty and interest will be fully abated for the consumer use tax paid under this program.
- No criminal prosecution for those who participate.

McDonald Hopkins Observation: *Those businesses and individuals that have been properly registered with ODT do not get as favorable benefits as those participants that either did not know about their use tax responsibility or chose to ignore that responsibility. This treatment can only be justified if the purpose of the use tax amnesty program is to identify those taxpayers that simply do not know about Ohio's consumer use tax (which became effective in 1935).*

Consumers that do not participate in the Consumer Use Tax Amnesty program will be subject to audit by ODT, and ODT will be permitted to assess tax, interest and penalties for any consumer use tax due on or after January 1, 2008.

Payment requirements:

- The participant must pay the full amount of consumer use tax for which the participant has outstanding liability sometime between October 1, 2011 and May 1, 2013. If the participant makes an application, ODT may enter into an interest free payment plan for the delinquent use tax. The payment plan may be up to seven years. If the participant fails to comply with the terms of the payment plan, then interest will be due on the unpaid amounts.

How to participate in the Consumer Use Tax Amnesty program:

- Because the law was only recently enacted, ODT has not yet issued guidance on participation and forms that may be required. Once this guidance is available, we will issue an update.

Limitation on consumer use tax assessments

The Budget Bill also enacted a limitation on ODT's ability to assess outstanding consumer use tax. Under the new limitation, ODT may not assess consumer use tax for any period prior to January 1, 2008.

McDonald Hopkins Observation: *This limitation creates significant opportunities for taxpayers that are currently under audit or that have years of exposure for consumer use tax. For taxpayers that have accrued liabilities on their balance sheet under Statement of Financial Accounting Standards No. 5, Accounting for Contingencies, for prior year exposure or for uncertain use tax positions, such liabilities might be reversible in the third calendar quarter because the Budget Bill becomes effective on September 29, 2011.*

What action businesses and individuals should take -- Special considerations

Voluntary Disclosure Agreements (VDAs) and other options might be more appropriate.

While Ohio's two new tax amnesty programs and the limitation on consumer use tax assessments offer important potential benefits, businesses and individuals should fully evaluate their situation and options before jumping into any amnesty program and simply assuming this is a dream come true. The full benefits of Ohio's two new amnesty programs still raise some questions that can only be answered by careful analysis of each potential participant's factual situation and the guidance to be issued by the ODT.

Voluntary Disclosure Agreements. Other options for dealing with potential tax exposure may be more favorable to some taxpayers. For example, Ohio's VDA Program may offer more valuable benefits in certain situations.

Uncertain tax positions: Participation in the amnesty program requires that all delinquent taxes be paid. Taxpayers should carefully examine their exposure for delinquent tax liabilities. While the Budget Bill offers a unique opportunity, a taxpayer should not rush to judgment as to its tax exposure—exemptions, exclusions, interpretations, or case law may be available that could reduce any contingent tax liability. As is often the case, the "correct" amount of tax due is often uncertain and open to interpretation. For example, ODT's audit policy on the treatment of many tax issues is certainly subject to alternative interpretation and legal challenge. Yet, participation in these amnesty programs appears to require taxpayers to waive their right to appeal these areas of interpretation. A more cost-effective approach for many taxpayers in this position would be to separately negotiate a written settlement with regard to such questionable legal interpretations by the ODT. This alternative to tax amnesty programs could result in significantly less tax being due.

Confidential review: Our Multistate Tax Practice Group is experienced in evaluating creative options to mitigate tax liabilities and exposures. Further, as attorneys, our discussion and analysis of your situation will be confidential, thus ensuring a frank and complete analysis of your current tax situation.

Why act now? Although the Consumer Use Tax Amnesty lasts until May 1, 2013 and the General Tax Amnesty doesn't start until May 1, 2012, taxpayers should not wait to evaluate their situation. Working quickly will provide needed time to identify options to reduce exposure before the amnesty window closes, as well as mitigate exposure for taxes due after May 1, 2011. Such analysis often takes significant time and waiting means losing potential opportunities.

If you would like to discuss how these amnesty opportunities could help you, please contact:

Stephen K. Hall
614.458.0026
shall@mcdonaldhopkins.com

Thomas M. Zaino
614.458.0030
tzaino@mcdonaldhopkins.com

Richard C. Farrin
614.458.0035
rfarrin@mcdonaldhopkins.com



or any of our multistate tax attorneys by clicking on the Multistate Tax Practice link below:

Multistate Tax Practice

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