TAX

MICHIGAN ENACTS CHANGES TO ADMINISTRATIVE TAX PROVISIONS AFFECTING AUDITS AND ASSESSMENTS

by Tom Hammerschmidt and Eric Gregory

Michigan has enacted legislation that clarifies and streamlines a number of important tax administrative provisions. The changes affect the Department of Treasury's ability to pursue and collect unpaid taxes from company owners and officers, successors who purchase a business having unpaid taxes, and the Department's audit procedures. Many of these changes are significant and are generally favorable to taxpayers.

Owner and Officer Personal Liability

Prior to this legislation, if a business liable for Michigan taxes did not file required returns or pay taxes due, any of its officers, members, managers or partners who the Michigan Department of Treasury ("Department") determined had control or supervision of, or responsibility for, making the returns or payments were personally liable for the tax. The reason for the liability—whether willful or not—was irrelevant. This led to circumstances where a non-controlling officer with only limited administrative responsibilities could be held liable by the Department. In many cases, officers were assessed years after leaving employment with a company or long after a company completed a bankruptcy reorganization or liquidation.

The new legislation provides that an officer is only liable if he or she is a "responsible person." A responsible person is an officer, member, manager of a manager-managed limited liability company or partner for the business who controlled, supervised or was responsible for the filing of returns or payment of tax during the time period of default *and* who, during the time period of default, willfully failed to file a return or pay the tax due. The legislation requires the Department to provide notice to any responsible person and prohibits the Department from assessing a responsible person more than four years after the date of the assessment issued to the business.

Under the new legislation, a responsible person can challenge the assessment of a tax. The Department has the burden of establishing that a person meets the requirements of a responsible person. Further, a responsible person may bring a separate proceeding against other responsible persons to recover a proportionate amount of an assessment.

Previously, any tax administered under the Revenue Act could be collected from a responsible person. Assessments issued after January 1, 2014 will be limited to "trust fund-type" taxes (e.g., general sales tax, the tobacco products tax, motor fuel tax, and use taxes collected from or on behalf of another person).

Successor Liability

Under prior law, a person who purchased a going or closed business was required to escrow enough money to cover the amount of the seller's unpaid Michigan taxes, interest and penalties until the former owner produced a receipt from the Department showing that the taxes were paid. Upon the owner's written waiver of confidentiality, the Department—at its discretion—could release to a purchaser the known tax liability for establishing an escrow account. The typical negotiations in a business purchase transaction regarding indemnification, holdbacks or escrows, and the lengthy process of obtaining information from the Department, often left the buyer with significant exposure for the seller's unpaid taxes.

As amended, the new law allows the Department to estimate tax liability and requires it, within 60 days, to release to the purchaser the known or estimated tax liability for establishing an escrow account. If the purchaser complies with the escrow requirements, the purchaser will not be held liable for more than the known or estimated tax liability. Further, the purchaser will not be held liable for the unpaid taxes if the Department fails to provide the information within 60 days.

Audit Procedures

Beginning September 30, 2014, the Department must complete fieldwork and provide a written preliminary audit determination for any tax period within one year after the general statute of limitations period. The limitation does not apply to any period in which the taxpayer has agreed to extend the statute of limitations.

Going Forward

Given that the Department has powerful tools for collecting taxes and is often aggressive in pursuing individuals and successors for a business' unpaid taxes, these new limitations and guidelines will generally benefit taxpayers. The existing system regarding successor tax liability and tax clearance created problems regarding a lack of information and timeliness, and these changes will address those issues.

It is not clear how the Department will implement some of these changes. It is uncertain whether the timing parameters within the audit will have any practical effect, given that deadlines may be waived upon agreement with the taxpayer and the Department.

Dickinson Wright's tax practice team will continue to follow developments in this area. Please contact the authors of this Alert, any member of the tax practice team or your Dickinson Wright counsel contact(s) for guidance.

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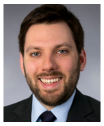

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