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Tax Amnesty Update

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We return to this space to update you on the ever-changing world of tax amnesty. The economic challenges of today have resulted in unprecedented attempts by states to raise money through nontraditional means.

As we reported recently,¹ state and local activity in the amnesty area has been increasing during the past year, largely due to the significant budget deficits states are facing in the current economic environment. This article brings us up to speed on the status of the enacted amnesty programs and discusses additional states to watch, where amnesty may be enacted in the near future.

What Is Tax Amnesty?

A tax amnesty program is a state-enacted program that allows a taxpayer to come forward and pay certain back taxes without being faced with penalties or, in some instances, interest. The particular provisions of each amnesty program vary by state. In some instances, the benefit may be minimal (e.g., the waiver or partial waiver of penalties that may have been waived even without the amnesty program), while other states provide significant cost savings for taxpayers through the waiver of interest² or a limited lookback period.³

While these programs may seem to be favorable to taxpayers in general, taxpayers who decide not to participate need to beware. Many states have adopted significant failure-to-participate penalties that are imposed on taxpayers who are later determined to have unpaid liabilities but did not participate in the amnesty program during the relevant period.

¹ "Alert: State Tax Amnesty Programs," Jones Day (April 2009), reprinted at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S6179. To receive email Alerts, contact us at statetaxreturn@jonesday.com.

² For example, Connecticut has agreed to waive 25 percent of the interest due as part of its amnesty program, while Hawaii, Maryland, and Virginia have agreed to waive 50 percent of interest.

³ On May 15, 2009, Alabama completed its "Operation Clean Slate" program, which allowed taxpayers to come forward and pay back taxes with a limited three-year lookback period.

Although the amnesty programs adopted by several states have already closed for 2009,⁴ there are still many states with pending programs. Further, new programs are constantly being enacted, proposed, or considered, so the amnesty landscape is constantly changing. Currently, six states offer tax amnesty programs or have adopted programs that will be effective within the next few months. An additional four states have proposed legislation that if passed will result in the adoption of a tax amnesty program. Taxpayers with potential liabilities in these states should stay tuned to ensure that no opportunities are missed.

Enacted Amnesty Programs

Six states have adopted amnesty programs that either are pending or will become effective soon. The programs adopted by Connecticut and Hawaii will be the first to expire, ending later this month, while the Maryland, Maine, Vermont, and Virginia programs will go into effect later this year. Taxpayers having potential tax liabilities in any of these states need to act quickly to determine whether their liabilities qualify for amnesty and whether it makes sense to file under the protective umbrella of amnesty. Most of these programs provide only a short window to submit returns and pay any liabilities. If the deadlines are missed, the opportunity for amnesty is gone, and in some instances a failure-to-participate penalty will be imposed.

Connecticut: Expires June 25!

The 2009 Connecticut Tax Amnesty Program⁵ will expire on June 25, 2009. It provides a waiver of penalties and reduction of interest to 0.75 percent per month for any taxpayer owing Connecticut tax as a result of failing to file or underreporting tax for any taxable period ending on or before November 30, 2008.

The program applies to all taxes administered by the Connecticut Department of Revenue Services (“DRS”), which includes corporation business tax, sales and use tax, withholding tax, business entity tax, and composite income tax, among other taxes. The program does not apply to taxes and fees not administered or collected by the DRS, such as local property taxes, motor carrier road tax, and payroll tax.

Taxpayers are ineligible to participate in the program if they: (1) are under audit; (2) have already been billed for a tax liability, to the extent of the amount billed; (3) are currently obligated under a payment plan with the DRS; (4) are subject to a criminal investigation by the DRS; or (5) are party to civil or criminal litigation involving the DRS, pending on November 25. The program also does not apply to taxes in dispute in the DRS appellate process.

⁴ Alabama, Arizona, Massachusetts, and New Jersey adopted amnesty programs earlier this year for which the period for coming forward has already expired.

⁵ 2008 Conn. Pub. Acts 1, § 8 (Nov. 24, 2008, Spec. Sess.).

Hawaii: Expires June 26!

Despite the fact that similar legislation did not pass during the 2009 legislative session, the Hawaii Department of Taxation adopted a tax amnesty program⁶ that is set to expire on June 26, 2009. Referred to as the “Tax Fresh Start Program,” the program allows taxpayers who have past-due tax liabilities for any period ending on or before December 31, 2007, to come forward and pay back taxes, and receive a waiver of penalties and 50 percent of the interest due.

Amnesty applies to taxpayers who failed to report or underreported any taxes administered by the Department of Taxation, including the general excise tax, use tax, income tax, bank franchise tax, and withholding tax. Amnesty will not be available for the insurance premiums tax, real property tax, conveyance tax, or payroll taxes paid to the Department of Labor.

Taxpayers will not be eligible to participate in the amnesty program if the taxpayer: (1) is currently under audit or criminal investigation; (2) is a party to any civil or criminal litigation pending on May 27, 2009; (3) is currently in the Department’s collection program; (4) has been contacted by the Department concerning a return for any reason; (5) is under audit by the federal government or has been notified of such examination; or (6) has been criminally prosecuted by the criminal investigation unit or is currently under court jurisdiction.

Maryland: September 1, 2009, through October 30, 2009

On May 7, 2009, Governor O’Malley signed into law legislation⁷ requiring the Comptroller to declare an amnesty period for delinquent taxpayers from September 1, 2009, through October 30, 2009. The legislation provides for an amnesty period applicable to individual income tax, corporate income tax, withholding taxes, sales and use taxes, and admissions and amusement taxes required to be paid on or before December 31, 2008. The Comptroller will waive all civil penalties and 50 percent of the interest imposed. The waiver will apply to the nonreporting of a tax liability, the underreporting of a tax liability, and the nonpayment of a tax liability.

Unlike most other states, the Maryland tax amnesty program is limited to certain taxpayers. A taxpayer may not take advantage of the amnesty if: (1) the taxpayer has more than 500 employees in the United States or is a member of a corporate group that has more than 500 employees in the United States as of September 1, 2009;⁸ (2) the taxpayer was granted amnesty under the 2001 Maryland tax amnesty program; or (3) the taxpayer was eligible for the July 1, 2004, through November 1, 2004,

⁶ Details of the program are set forth on the Department of Taxation’s web site, http://www6.hawaii.gov/tax/media/2009-05-27-freshstart_overview.pdf.

⁷ S.B. 552, 2009 Gen. Assem., Reg. Sess. (Md. 2009).

⁸ A “corporate group” for purposes of the tax amnesty is defined as an affiliated group or controlled group of corporations under § 1504 or § 1563 of the Internal Revenue Code.

Settlement Period relating to intangible holding companies, whether or not the taxpayer participated in the Settlement Period.

Maine: September 1, 2009, through November 30, 2009

Maine has adopted a tax amnesty program⁹ that is scheduled to begin September 1, 2009, and end November 30, 2009. Referred to as the “2009 Tax Receivables Reduction Initiative,” the program will allow taxpayers with tax liabilities that are assessed as of September 1, 2009, to receive a waiver of 90 percent of the penalties that would otherwise be due.

Taxpayers may participate in the amnesty program without regard to whether the amount due is subject to a pending administrative or judicial proceeding. Taxpayers will not be permitted to participate if they are involved with a criminal prosecution arising from the violation of state tax law. To participate, the taxpayer must waive its right to protest the amount of tax due or request a refund.

Vermont: July 20, 2009, through August 31, 2009

After repeated attempts, Vermont adopted a tax amnesty program¹⁰ that will begin July 20, 2009, and end August 31, 2009. During the program, the tax commissioner will waive all tax penalties without the need to show reasonable cause or the absence of willful neglect. The amnesty program will apply to any tax liability of any type for any period for which the due date of the return was before January 26, 2009.

The Vermont Department of Taxes has indicated that it plans to follow the amnesty period with increased compliance efforts. The Department plans to hire nine new employees in fiscal year 2010, six in 2011, and five in 2012 to assist with increased compliance efforts.

Virginia: Dates to Be Determined

As previously reported, Virginia has enacted legislation establishing a tax amnesty program¹¹ that will run for a 60- to 75-day period during the July 1, 2009, through June 30, 2010, fiscal year. The exact dates of the program are yet to be determined. The program will provide a full waiver of all civil or criminal penalties assessed or assessable and a waiver of 50 percent of the interest assessed or assessable, resulting from nonpayment, underpayment, nonreporting, or underreporting of tax liabilities. The program will apply to taxable years beginning on or before January 1, 2008.

Any taxpayer eligible for amnesty who retains an outstanding balance after the close of the program because of the nonpayment, underpayment, nonreporting, or

⁹ L.D. 353, 124th Leg., 1st Reg. Sess. (Me. 2009).

¹⁰ H.441, 2009–2010 Leg., Reg. Sess. (Vt. 2009).

¹¹ S.B. 1120, 2009 Gen. Assem., Reg. Sess. (Va. 2009).

underreporting of any tax liability who qualified for amnesty but has not paid will be subject to a 20 percent failure-to-participate penalty on the unpaid tax. This penalty is in addition to all other penalties that may apply.

States to Watch

In addition to those states discussed above, several jurisdictions (some described below) have proposed legislation that if passed will lead to a tax amnesty program in the future. Taxpayers should keep an eye on these states – tax amnesty may be adopted in the coming months.

District of Columbia

The District of Columbia City Council is considering legislation that would provide for a tax amnesty program.¹² The legislation authorizes the Chief Financial Officer to establish a program to provide amnesty to a taxpayer liable for the payment of certain taxes for returns required for tax periods ending prior to January 1, 2009. The specific taxes and dates for the period of relief are to be determined by the Chief Financial Officer. Eligible taxpayers will receive amnesty from certain fees, fines, and other civil and criminal penalties imposed by the District for failure to file a report or pay tax due.

Louisiana

Tax amnesty legislation¹³ that was pre-filed by Governor Jindal prior to the commencement of the 2009 legislative session has made significant headway in the Louisiana Legislature. The legislation passed the House and is currently being considered by the Senate.

Referred to as the “Louisiana Tax Delinquency Act,” the legislation requires the Louisiana Department of Revenue (“LDOR”) to establish a two-month-long tax amnesty program during the fiscal year ending June 30, 2010. The specific amnesty dates are yet to be determined. The tax amnesty applies to all taxes administered by the LDOR and all tax periods since 2001, the date of Louisiana’s last tax amnesty program. The state will waive all penalties and 50 percent of the interest due.

The Louisiana Tax Delinquency Act provides that if, following the termination of the amnesty, the LDOR issues a deficiency assessment for a period for which the taxpayer had claimed amnesty, the LDOR will have the authority to impose penalties and institute civil or criminal proceedings, but only with respect to the difference between the amount shown on the amnesty application and the correct amount of tax due. However, there will be a presumption against the waiver of any penalty or the abatement or reduction of any interest for those taxpayers who are eligible to participate in the amnesty program but fail to do so. Further, the LDOR is authorized to adopt a regulation imposing a 20 percent “cost of collection” penalty on any deficiency assessed after the amnesty period

¹² B18-0203, Period 18, D.C. Council (D.C. 2009).

¹³ H.B. 720, 2009 Leg., Reg. Sess. (L.A. 2009).

for any taxable period due on or after July 1, 2001, and ending before January 1, 2009. This penalty will be in addition to all other applicable penalties, fees, or costs.

Michigan

Legislation proposed in Michigan provides for a tax amnesty program¹⁴ that lasts from 30 to 60 days and ends before September 30, 2009. During this period the state treasurer will waive all criminal and civil penalties for failure to file a return, failure to pay tax, or making an excessive claim for refund. This legislation is currently pending in the Committee on Tax Policy.

Oregon

Oregon has amended what began as a very limited amnesty program to apply more broadly to corporate income taxpayers.¹⁵ As introduced, the legislation was limited to personal income taxes, but it was expanded while in committee to include corporate taxpayers. Participating taxpayers are eligible for a waiver of penalties and 50 percent of the interest that would otherwise be due. Those taxpayers who do not participate are subject to a 25 percent failure-to-participate penalty if tax is later assessed. The bill is currently pending in the Senate Subcommittee on General Government.

Pennsylvania

Pennsylvania recently proposed a tax amnesty program¹⁶ that if enacted will run for a period of 90 days during the fiscal year ending June 30, 2010. The governor will determine when this 90-day amnesty period will begin. The amnesty program provides for a waiver of penalties for any tax imposed by the Commonwealth for deposit in the General Fund that is delinquent as of June 1, 2009. The program is not available to those taxpayers who participated in the prior amnesty program. Those taxpayers who do not participate in the program but are later determined to be liable for tax are subject to a 15 percent failure-to-participate penalty, in addition to other penalties imposed by law.

Conclusion

Tax amnesty programs vary widely by state and often present taxpayers with challenges for correct and timely participation. With the creation or planned creation of amnesty programs by so many states, taxpayers with unpaid tax liabilities have many more opportunities to pay delinquent taxes and at the same time possibly avoid interest and the risk of civil or criminal penalties. Due to the limited duration of these programs, taxpayers need to act quickly to identify the amnesty programs that may benefit them.

¹⁴ H.B. 4149, 95th Leg., Reg. Sess. (Mich. 2009).

¹⁵ S.B. 880, 75th Gen. Assem., Reg. Sess. (Or. 2009).

¹⁶ H.B. 1627, 2009 Gen. Assem., Reg. Sess. (Pa. 2009).



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