



Protecting Kentucky Taxpayer Rights Is Trending

Introduction

Oct 30, 2019

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Tax legislation enacted this Spring and last in Kentucky is but the latest enhancement to Taxpayer's rights and protections. These are just the latest examples of a several year effort and positive trend in Kentucky of increasing and improving the rights of its taxpayers and ensuring transparency in its tax regime.

Beyond the legislation, these changes have included the introduction of formal guidance from the Department of Revenue ("Department") regarding tax questions and procedures, and a significant overhaul in the Department's website, such as the inclusion of easy-to-access answers to pertinent tax-related questions and a description of changes to state and federal tax law over the past year. Finally, the Department has become substantially more transparent in its process for assessing protests of tax assessments and tax refund denials, as evidenced in its changes to 103 KAR 1:010, and by way of judicial order.

These pro-taxpayer changes are the result of a several years' initiative on the part of the Department, the Kentucky Chamber of Commerce, and the Kentucky Society of CPAs. Over five years ago, thought leaders in Taxation within the Chamber and the Society commenced formal efforts with Department leadership. While the pace of progress ebbed and flowed, at times the pace accelerated. Over this multi-year period, several items of legislation were introduced in an attempt to legislatively resolve some of the problem areas. Designed to update Kentucky's 1992 original "Taxpayer Bill of Rights," unfortunately, the legislation could not get the needed traction. Enter the administration of Governor Matt Bevin, in place in January 2016 and the November 2016 election, with the House of Representatives changing control to Republican for the first time in 100 years. And many pro-taxpayer rights and policies have been implemented since.

Power of Attorney Requirements

In August 2017, the Department began to require the filing of a declaration of representative/power of attorney (“POA”) form to authorize individuals to represent a Kentucky taxpayer in certain tax-related matters. This change was one of policy, rather than law, and the objective was to protect taxpayers from unauthorized individuals obtaining the taxpayer’s private information. New Kentucky Form 20A100 requires the taxpayer and its representative to provide their personal information, such as their names, addresses, and phone numbers. The Form also allows taxpayers to limit the types of matters and authorized acts in which their representative has authority.^[1] As an alternative, a taxpayer may instead choose to file IRS Form 2848 to designate a representative for income tax purposes only.

While the Department’s new POA requirement may seem like a small change and an additional obstacle for those seeking tax representation, it is solid example of Kentucky’s positive trend in enhancing and protecting the interests of its taxpayer customers.

Guidance from the Department of Revenue

In 2017, the Kentucky General Assembly amended KRS 131.130(8) to allow the Department to assist taxpayers in “understanding and interpreting the tax laws....”^[2] The result has been the impetus for significant release of guidance materials authored by the Department to aid taxpayers in their substantive and procedural questions. This guidance does not have the same binding effect as regulations otherwise issued by the Department pursuant to KRS Chapter 13A, and will only be issued under the Commissioner’s discretion. The formal guidance will generally remain in effect until it is withdrawn, superseded, or modified by a change in statute, regulation, case law, or other Department guidance.^[3] Furthermore, Department guidance cannot be appealed to the Kentucky Claims Commission (“KCC”), nor may a taxpayer file a protest based on adverse Department guidance.

Pursuant to this effort, the Department is authorized to issue the following types of guidance:

- Technical Advice Memorandums (“TAMs”);
- Revenue Procedures;
- Private Letter Rulings (“PLRs”); and
- General Information Letters (“GILs”).[\[4\]](#)

Each type of guidance has its own unique objective or purpose, and the intended audience ranges from a single taxpayer to every taxpayer.

The broadest form of possible guidance is the TAM, which provides advice to the public at large and to Department personnel. The Department will issue a TAM when it determines that its personnel need direction on how to treat a particular issue, or if the request for guidance from an individual taxpayer involves a common issue that will affect a significant number of other taxpayers. The Department does not intend for TAMs to address hypothetical situations or situations that concern only one taxpayer.[\[5\]](#)

Revenue Procedures, on the other hand, provide *procedural* guidance to the public and Department personnel. Rather than the individual taxpayer requesting guidance, the Department typically publishes Revenue Procedures at its own discretion when it feels Department personnel need to adhere to a more uniform procedure. The Department may also publish a Revenue Procedure if it believes that it will assist taxpayers in meeting their tax obligations. Similar to a TAM, the Department will not publish a Revenue Procedure where a matter would only concern one taxpayer.[\[6\]](#)

A PLR, however, is meant to provide guidance to a specific taxpayer under a particular set of facts. The process requires a taxpayer to request guidance from the Department, after which the Department will apply the law to the set of facts provided to them. The opinion set forth in the PLR is *binding* on agency personnel in regard to the taxpayer that requested the guidance, so therefore a request for a PLR cannot be made anonymously and will not be issued for a hypothetical set of facts.[\[7\]](#)

GILs differ from PLRs in that they are *nonbinding* guidance issued to a taxpayer who has chosen to remain anonymous. GILs are not considered Department rulings and should not be relied upon by

other taxpayers, even those with a substantially similar factual situation. Furthermore, GILs will not be issued for purely hypothetical situations.^[8]

The Department's published guidance can be viewed on its website.^[9] In theory, the ability of the Department to publish guidance on difficult tax and procedural issues should result in an increase in taxpayer compliance with applicable tax laws and regulations. Since KRS 131.130(8) was amended on June 29, 2017, as of this writing the Department published three Revenue Procedures^[10] and nine TAMs.^[11] Therefore, while the law has changed to allow the Department to publish formal guidance to benefit Kentucky taxpayers, it is not clear to what extent the Department will utilize that change in all these ways, but the multiple TAMs is a positive trend.

Training Materials for Tax Professionals

Since 2017, the Department has made available several training materials that tax professionals can utilize in understanding the Department's recommended practice on policy and compliance. The materials primarily consist of the Department's presentations at various statewide tax conferences, along with a series of slide decks detailing changes in Kentucky tax law and the Department's structure.^[12]

The addition of these training materials to the Department's website have proven to be particularly helpful following the passage of 2018 House Bill 487^[13] (discussed below). For example, the Department has published presentations detailing, with great specificity, the changes to Kentucky's tax regime over the past year.^[14] While the intended audience for these presentations and slide decks are tax professionals, the materials are freely accessible to the general public, and are great resources for individuals seeking a comprehensive list of tax-related changes in Kentucky.

2018 House Bill 487

The passage of House Bill 487 in 2018 constituted a significant change in Kentucky's tax regime, with adjustments to the corporate

income tax formula, an increase in services subject to the sales tax, and a cap on applicable credits, among other changes.^[15] House Bill 487 also contained a significant number of positive developments to Kentucky taxpayer rights. One prominent change is that taxpayers are no longer required to fully pay a contested tax or post a supersedeas bond in order to appeal an order sustaining a tax assessment, which should relieve the burden on taxpayers wishing to challenge a tax assessment by the Department.^[16]

House Bill 487 also changed significant deadlines for protesting a tax assessment or filing changes due to a federal audit. The time for taxpayers to file a protest has been extended from 45 days to 60 days, which could increase the number of potential protests brought by taxpayers each year.^[17] House Bill 487 also extended the deadline to submit a final determination of a federal audit (so-called RAR Amendments) from 30 days to 180 days.^[18]

In addition to the pre-existing provision in KRS 131.081(13) which prohibited the Department from evaluating individual officers or employees on the basis of taxes assessed or collected, House Bill 487 has further barred the Department from entering into a contract or arrangement for *any* service where compensation for that service is contingent on the amount of tax, interest, fee, or penalty assessed against a taxpayer.^[19] This change will likely continue to disincentivize those working on behalf of the Department to assess taxes or penalties against Kentucky taxpayers with a non-pure motive.

Another change relates to causes of action brought against the Department for violations of the Taxpayer Bill of Rights. KRS 131.081(14) for nearly 30 years provided for an incredibly narrow, nearly impossible standard to meet. Now, a taxpayer may bring a damages claim for violations of TBOR if the damage traces to “willful, reckless or intentional disregard of rights of the taxpayer; previously, the standard was “willful, reckless and intentional disregard.” Helpful indeed.

House Bill 487 has made beneficial changes to Kentucky’s electronic income tax return filing system. For example, the bill now requires corporations to file their annual withholding statements

electronically if they issue more than 25 each year, rather than the 100 statement minimum under the previous law.^[20] Beginning on January 1, 2019, electronic filing will also be required for corporations or pass-through entities with gross receipts of \$1 million or more.^[21] This continuing shift towards an electronic filing system has the benefit of increasing the speed in which businesses can file their tax returns, along with general convenience and practicality.

Transparency

Changes have also been occurring on the subject of transparency in Kentucky tax matters. In Dep't of Revenue v. Sommer,^[22] an Open Records Act case, Mark Sommer and Tax Analysts sought redacted copies of Final Rulings that had been issued by the Department pursuant to KRS 131.110. Specifically at issue were Final Rulings issued but not appealed to the Kentucky Board of Tax Appeals (now, the Kentucky Claims Commission). A Final Ruling is the Department's final administrative position on a matter in dispute with a taxpayer – audit, refund claim, etc.

The Department's position has been that these *unappealed* Final Rulings (i.e., not made public by a taxpayer seeking KCC review) constitute confidential information that it is forbidden, even if properly redacted, from disclosing by KRS 131.190(1)(a), citing KRS 131.081(15); 131.990(2); 61.878(1)(k) and (1); Maysville Transit Co. v. Ort, 177 S.W.2d 369 (1943). Sommer and Tax Analysts asserted that the Department is required under Kentucky Open Records Act to provide properly redacted Final Rulings, and that proper redaction preserves taxpayer rights. In a published (i.e., binding/precedential) decision, the Court of Appeals affirmed the Trial Court and ruled that these must be divulged by KDOR after suitable redactions are made. The redacted final determinations in the record persuaded the Court of Appeals as was the Trial Court that the information could be made public without jeopardizing the privacy protections of the Kentucky Taxpayer's Bill of Rights. Based on this evidence, the Kentucky Court of Appeals concluded that the information sought, the Department's final administrative determinations, was not protected by any provision of law and thereby required to be

produced under the Kentucky Open Records Act.

On discretionary appeal, the Kentucky Supreme Court^[23] upheld the Kentucky Court of Appeals decision that found that the Department's argument was undermined by the Department providing redacted final determinations in evidence at the trial court level. Ruling in a split 3-3 review, under Supreme Court rules the Court of Appeals decision was affirmed. Thereafter, the Department moved for a rehearing of the Supreme Court's Order. On April 17, 2019, the Supreme Court unanimously denied the Department's Motion for Rehearing.

While the Department's Motion was pending, in a startling legislative move, the General Assembly as a part of another major piece of tax legislation, legislated several tax-related exceptions to the Open Records Act and Kentucky tax law.

In 2019 HB 354,^[24] the General Assembly specifically barred from any release, via Open Records, discovery in litigation or court order, the following writings in any form:

- Unappealed final rulings;
- Requests for guidance under KRS 131.130(8);
- Private letter rulings; and
- Alternative apportionment requests under KRS 141.120(12)(a) and responses thereto.

However, only a week later the Legislature promptly reversed course after Gov. Bevin had signed HB 354 into law. This reversal followed several public comments from Legislative leaders that the true intent of the Department of Revenue's request for the legislation had not been explained.^[25] Via 2019 HB 458,^[26] these anti-transparency provisions were repealed. The repeal came upon public comments by Legislative leaders in both the Senate and House of Representatives that the General Assembly was not provided sufficient information by the Department as to the reasons for the anti-transparency amendments. Sunshine still exists in Kentucky tax matters.

[TaxAnswers.Ky.gov](https://taxanswers.ky.gov)

An alternative to the more formal guidance that may be issued by the Department is the information it now provides on TaxAnswers.ky.gov. The website was established by the Department on May 31, 2018, in an effort to educate and inform Kentucky taxpayers on tax changes made by the General Assembly in House Bill 487.^[27] It is being continuously updated and includes easy-to-access information regarding legislative changes to Kentucky's tax regime. The website has been divided into three sections, with each section providing general information on changes contained in House Bill 487 along with an extensive series of answers to frequently asked questions.

The FAQs are straightforward and helpful to those taxpayers that just need a quick answer to a common question. For example, one of the questions asks: "Am I allowed to deduct my health insurance premiums paid on my Kentucky tax return?" The answer was concise, and states: "No, you can no longer deduct health insurance premiums paid for tax year 2018 and thereafter."^[28] As of this writing, there are approximately 13 FAQs that have been answered and published on the website for sales and use tax alone.

The first general section in TaxAnswers is entitled "Income Taxes," where the Department provides the public with a list of changes made in 2018 to the individual income tax, corporation and pass-through entity taxes, and to rules regarding withholding tax.^[29] Kentucky taxpayers can find summaries of changes made to income tax rates, deductions, credits, and apportionment in this section.

The second section concerns changes to Kentucky's sales and excise taxes. Information in this section includes whether a business needs to register for a Sales and Use Tax account, along with how alcohol and cigarette taxes should be delivered to the Department.^[30] More importantly, this section contains a list of those industries that are now required to charge sales tax on their services, such as veterinarians, limousine services, and dry cleaners.^[31]

The third, and final, section contains information on miscellaneous changes that do not fit into the other two sections. Information in this section includes changes to tax administration, property taxes,

and tax incentive programs.[\[32\]](#)

Overall, TaxAnswers appears to be very helpful to the individual taxpayer in assessing how House Bill 487 will affect them or their business. While TaxAnswers was implemented by the Department as a means of providing answers for changes resulting from House Bill 487, it will be interesting to see whether the Department will extend the life of TaxAnswers beyond 2018.

Protest Procedural Changes

Another significant change in Kentucky taxpayer rights occurred when the Department amended 103 KAR 1:010 (the “Regulation”) effective on May 4, 2018. While closely following the passage of House Bill 487,[\[33\]](#) this re-write has been in the works for several years through the collaboration between the Department, the Kentucky Chamber of Commerce and the KyCPA Society. The Regulation governs the necessary steps of a taxpayer’s protest in relation to a tax assessment or a denial of a tax refund. A prominent addition to the Regulation was Section 6, which states that failure by the Department to meet any of the deadlines contained in 103 KAR 1:010 may justify a waiver of any potential penalties to the taxpayer. Therefore, the Regulation now contains a provision to protect a taxpayer from unwarranted delays by the Department, while also creating an incentive for the Department to resolve issues within the timeframes stated in KRS 131.110 and 103 KAR 1:010. However, a failure by the Department to follow its required deadlines will not result in the reduction of any outstanding tax, interest, or fees that would otherwise be assessed.[\[34\]](#)

Another beneficial change is that the Regulation has formally recognized that the protest period for tax assessments and tax refund denials has been extended from 45 days from the date of notice to 60 days.[\[35\]](#) However, the majority of changes to the Regulation concerns strict procedural adjustments to the protest process. For example, the Regulation now delineates *how* a written protest may be delivered to the Department: it can be delivered by hand, through mail (either the postal service or express mail), or electronically via email.[\[36\]](#)

The Regulation also clearly states how the Department will determine whether a protest was timely filed. If the protest was hand delivered, then the Department will use the date stamped onto the document at the time it was originally received by the Department. If it was mailed, then the Department will look to the postmark date from the U.S. post office or the delivery confirmation date if an express mail service was used. Finally, the Department will use the electronic date and time received if the protest was filed via email.[\[37\]](#) The Regulation also requires the Department to acknowledge receipt of the taxpayer's protest, in writing, within 90 days.[\[38\]](#)

The Regulation has also made changes specific to the process of protesting tax refund denials. The Department must now include with each notice of denial references to all applicable statutes and regulations that constituted the basis for the denial, along with the date by which the taxpayer must protest the denial.[\[39\]](#)

Furthermore, if a taxpayer has not received a determination by the Department for their refund request within 180 days from the date the request was submitted, then the taxpayer may proceed with the protest process as if the request had been denied.[\[40\]](#)

Interest Rate for Overpayments and Underpayments

For years, there has been a discrepancy between the amount of interest a Kentucky taxpayer owes the state on unpaid taxes, and the amount the state owes a taxpayer for overpaid taxes. KRS 131.183 requires taxpayers who have underpaid their taxes to pay at an interest rate based on the federal prime interest rate, *plus* two percent. However, if the taxpayer has overpaid their tax assessment, the state will only have to pay the taxpayer at an interest rate based on the federal prime interest rate, *minus* two percent.[\[41\]](#) In 2017, the federal prime interest rate, rounded to the nearest whole number, was four percent. Therefore, the interest rate for underpayments was six percent, while the interest rate for overpayments was two percent. This 4%/400 basis points discrepancy clearly benefits the state, while burdening the taxpayer.

Efforts have been made over the past few years to remedy the discrepancy between the overpayment interest rate and the underpayment interest rate. In fact, multiple bills have been introduced in the General Assembly seeking to equalize the interest rates.^[42] Despite those efforts, the calculation of the overpayment and underpayment interest rate has remained unchanged, and there is currently no bill in either the House or Senate that would amend their calculation. However, prominent thought leaders in Taxation are pushing the General Assembly to address the issue, and considering Kentucky's trend in protecting taxpayer rights, it is possible that a change could come over the next few years.

Conclusion

Over the past five years, thought leaders in Kentucky taxation have been working with the Kentucky General Assembly and the Department to address concerns in transparency and taxpayer rights. For the most part, those efforts gained minimal traction. Positive changes in taxpayer rights began to occur with great progress made during 2017, 2018 and 2019. Look for more action in this space as time marches on.

^[1] Ky Form 20A100, *Declaration of a Representative*, <https://revenue.ky.gov/Forms/20A100%20Power%20of%20Attorney.pdf>.

^[2] Ky. Rev. Stat. Ann. § 131.130(8) (West 2018).

^[3] KY-RP-17-01 (2017).

^[4] *Id.*

^[5] *Id.* at 3.

^[6] *Id.*

^[7] *Id.* at 4.

^[8] *Id.*

^[9] Ky. Dep't of Revenue, <https://revenue.ky.gov/Pages/index.aspx> (last visited July 18, 2018).

^[10] www.revenue.ky.gov/TaxProfessionals/Pages/Guidance.aspx.

[11] *Id.*

[12] *Training Materials*, Ky. Dep't of Revenue, <https://revenue.ky.gov/TaxProfessionals/Pages/Training-Manuals.aspx>.

[13] H.B. 361, 2015 Gen. Assemb., Reg. Sess. (Ky. 2015); H.B. 342, 2016 Gen. Assemb., Reg. Sess. (Ky. 2016); H.B.

[14] See, e.g., *Tax Executives Institute*, Ky. Dep't of Revenue (April 26, 2018),

[https://revenue.ky.gov/TaxProfessionals/PublishingImages/Pages/Training-Manuals/TEI%202018%20Presentation%20\(Final%20Draft\)%205-1-18.pdf](https://revenue.ky.gov/TaxProfessionals/PublishingImages/Pages/Training-Manuals/TEI%202018%20Presentation%20(Final%20Draft)%205-1-18.pdf); *2018 Kentucky Tax Changes*, Ky. Dep't of Revenue,

[https://revenue.ky.gov/TaxProfessionals/PublishingImages/Pages/Training-Manuals/2018%20Council%20on%20State%20Taxation%20\(COST\)%20Presenta](https://revenue.ky.gov/TaxProfessionals/PublishingImages/Pages/Training-Manuals/2018%20Council%20on%20State%20Taxation%20(COST)%20Presenta)

[15] *Kentucky Passes Significant Tax Reform*, BKD: Indus. Insights (May 2018) <http://www.bkd.com/articles/2018/kentucky-passes-significant-tax-reform.htm>.

[16] H.B. 487, 2018 Gen. Assemb., Reg. Sess., § 101(2), 2018 Ky. Laws 207 (2018), 2018 KY LEGIS 207 (Westlaw) (adopting the rulings in *Dep't of Revenue v. Chegg, Inc.*, 497 S.W.3d 771 (Ky. Ct. App. 2016)).

[17] *Id.* at § 106(1).

[18] *Id.* at § 114(4)(b).

[19] *Id.* at § 100(13)(b).

[20] *Id.* at § 117(2)(e).

[21] *Id.* at § 117(2)(g).

[22] 2015-CA-001128 (Ky. Ct. App. Jan. 13, 2017).

[23] *Department of Revenue v. Mark F. Sommer and Tax Analysts*, 2017-SC-00041 (Ky. 2018).

[24] 2019 Ky. Acts. Ch. 151.

[25] As Kentucky Senate President Robert Stivers told the Lexington Herald-Leader,

"See, we were unaware of that. We didn't know that was anything related to this case," Stivers said. "The way it was explained to us,

the impact of it, was that there would be occasions, because of some issues that had arisen, where they wanted to make sure their personnel were protected from any kind of criminal liability.”

John Cheves, *Kentucky Lawmakers Secretly Approved a Loophole to Hide Tax Documents from the Public*, Lexington Herald-Leader, Mar. 14, 2019.

Representative Steven Rudy, Chair of House Appropriations and Revenue, echoed that statement on the House floor when he explained that HB 458 “addresses the confidential document issue that we quite frankly were misled on.” Paul Williams, *In Reversal, Ky Legislators Vote to Make Tax Rulings Public*, Law360, Mar. 29, 2019. That article quoted Chairman Rudy’s spokesman, Matt Smith, as blaming the Department for not disclosing the repeal provisions of HB 354. In particular, he stated:

“The Kentucky Department of Revenue originally brought the language to lawmakers with the intention of protecting personnel from potential liability from exposing private taxpayer information, without mentioning that there is a potential lawsuit relating to some of the very documents they wanted exempted.... For that reason, the open records exemption was repealed last night in H.B. 458.”

[26] 2019 Ky. Acts. Ch. 196.

[27] *DOR Launches TaxAnswers.ky.gov to Provide Information on HB 487*, Ky. Dep’t of Revenue: News (May 31, 2018), <https://revenue.ky.gov/News/Pages/TaxAnswers.ky.gov-to-Provide-Information-on-HB-487.aspx>.

[28] *Individual Income Tax Frequently Asked Questions*, Ky. Dep’t of Revenue: TaxAnswers, <https://taxanswers.ky.gov/Income-Taxes/Pages/Individual-Income-Tax-FAQs.aspx>.

[29] *Income Taxes*, Ky. Dep’t of Revenue: TaxAnswers, <https://taxanswers.ky.gov/Income-Taxes/Pages/default.aspx>.

[30] *Sales and Excise Taxes*, *supra* note 32.

[31] *Id.*

[32] *Other Changes*, Ky. Dep’t of Revenue: TaxAnswers, <https://taxanswers.ky.gov/Other-Changes/Pages/default.aspx>.

[\[33\]](#) 103 Ky. Admin. Regs. 1:010 (2018).

[\[34\]](#) *Id.* at § 6.

[\[35\]](#) Ky. Rev. Stat. Ann. § 131.130 (West 2018); 103 Ky. Admin. Regs. 1:010 § 2(2).

[\[36\]](#) 103 Ky. Admin. Regs. 1:010 § 2(3).

[\[37\]](#) *Id.* at § 2(4).

[\[38\]](#) *Id.* at § 2(5).

[\[39\]](#) *Id.* at § 3(2).

[\[40\]](#) *Id.* at § 3(4).

[\[41\]](#) Ky. Rev. Stat. Ann. § 131.183 (West 2018).

[\[42\]](#) H.B. 345, 2014 Gen. Assemb., Reg. Sess., § 1 (Ky. 2014); H.B. 324, 2016 Gen. Assemb., Reg. Sess., § 2 (Ky. 2016).

**Note: This article originally appeared in the Fall 2019 Journal of State Taxation Published by Wolters Kluwer. It has been reprinted with permission from Wolters Kluwer.*

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