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Kentucky's 2019 Updates to the Tax Code

Kentucky's 2018 Regular Session of the General Assembly brought sweeping changes to the state's overall tax structure, but the 2019 changes were not nearly so dramatic. Instead, the Kentucky General Assembly directed its efforts to tidying up several issues from the changes it made last year.

I. Sales and Use Taxes

Several sales and use tax changes were implemented by the General Assembly. In general, these changes go into effect on July 1, 2019.[1] One important change involves the resale of services. After 2018, it was unclear whether resale certificates, or the exemption in general, applied to newly taxable services. In 2019, the General Assembly clearly extended the resale exemption to the sale of services. [2] However, the resale exemption does not apply to services that were taxable prior to H.B. 487.[3]

The General Assembly also ended the highly unpopular taxation of admissions by charitable, nonprofit civic, governmental, and other nonprofit organizations. When the sales tax was expanded to include admissions, no provision was added to exempt admissions by ordinarily exempt organizations, and the Department of Revenue ("Department") took the position that such admissions were taxable, including, among others, admissions to middle school athletic games and fundraising galas. This position immediately drew outrage, and a bill was pre-filed to correct this long before the 2019 session even began. Ultimately, H.B. 354 amended the law to explicitly exempt these admissions.[4] It also exempts sales of property at fundraising events to help nonprofits.[5] Note that this exception does not apply to thrift stores, bookstores, surplus property auctions, recycle and reuse stores, or any ongoing operations in competition with for-profit retailers.[6] This provision is effective on March 26, 2019.[7]

Another unpopular consequence of the 2018 tax reform was that many small businesses were required to collect and remit sales tax,

which represented a huge compliance burden in comparison to the size of the business. One example of this advanced by the Department itself involved a teenager mowing lawns during the summer. The Department stated it would like to see the General Assembly add a de minimis threshold to the law to address this issue, and the General Assembly listened. Beginning on July 1, 2019, a de minimis threshold applies for services newly taxed under H.B. 487 if gross receipts were less than \$6,000 during calendar year 2018.[8] The \$6,000 threshold also applies for future years for small services providers.[9] However, this provision does not apply to a person who is also engaged in the business of selling tangible personal property, digital property, or excluded services.[10]

One of the biggest sales and use tax changes in 2018 involved the adoption of remote seller legislation. Definitions were tweaked in 2019 to give these provisions more teeth, such as the definition of “marketplace providers.”[11] The \$100,000 in gross receipts or 200 transactions in Kentucky in the current year or past calendar year threshold remains in place.[12]

II. Income Taxes

Income taxes also required clean-up efforts after last year’s switch to mandatory combined filing or elective consolidated filing was unpopular with many taxpayers, and while these provisions remain in place in 2019, there have been some changes. With respect to elective consolidated filing, and effective for taxable years beginning on or after January 1, 2019,[13] the new legislation shortens the mandatory election period from eight years to four years to match Kentucky’s statute of limitations and allows more flexibility for taxpayers in a rapidly changing economy.[14] Additionally, the following enhancements to the corporation income tax unitary business filing requirement became effective January 1, 2019:[15] (1) 50% ownership requirement for unitary group members provides clear guidance for taxpayers and the Department of Revenue;[16] (2) “tax haven” definition updated to exclude countries with a tax treaty with the United States;[17] (3) language clarifies that a waters-edge basis applies to unitary business group income;[18] (4) intercompany transactions are

eliminated from net income and receipts;[19] (5) net operating losses (NOLs) may be shared by a unitary group;[20] (6) unitary business members with more than 80% of their receipts from overseas are excluded from the unitary group in conformity with the waters-edge standard;[21] and (7) non-U.S. corporations with 20% or more of income from other group members are excluded from inclusion in a combined group if a tax treaty exists.[22]

Other changes were also made. Kentucky's individual income, corporation income, limited liability entity, and non-resident withholding estimated tax filing rules were aligned with those of the IRS.[23] Now, taxpayers will use the same set of rules for state estimated income tax payments as federal.[24] The new rules are effective January 1, 2019.[25]

Additionally, the General Assembly made several changes involving deductions and credits for businesses and individuals. For individuals, H.B. 354 permitted itemized deductions for investment interest paid to generate taxable income and gambling losses incurred to produce taxable gambling winnings.[26] This is effective January 1, 2019.[27] For small businesses, beginning January 1, 2019, the business may claim a greater deduction of major asset purchases by increasing the Section 179 expense deduction from \$25,000 to \$100,000 per year.[28] The General Assembly also authorized publicly traded companies (and affiliated corporations that participate in the filing of a publicly traded company's financial statement) to claim a tax deduction for the cost of financial statement reporting beginning in 2024.[29]

The General Assembly also updated the income tax recycling credit to attract major recycling projects to the Commonwealth.[30] It implements a lowered employment threshold which will allow projects investing more than \$500,000,000 to deduct a 25% recycling equipment credit over 30 years against up to 75% of the tax liability.[31] This becomes effective on January 1, 2021.[32] The Small Business Tax Credit program eligibility requirements were also amended to assist farmers selling active agricultural land and assets to a beginning farmer.[33] The credit is limited to \$25,000 per selling farmer in a calendar year.[34] This provision is effective March 26, 2019.[35]

III. Property Taxes

Several small changes were made involving property tax that will go into place in 2020. Micro-businesses and those participating in the “gig” economy will no longer need to file tangible personal property tax returns for property valued at \$1,000 or less.[36] Additionally, the tangible personal property tax statutes will treat heavy rental equipment the same as inventory since the industry sells the equipment similarly to a new or used equipment dealer.[37] Additionally, all property tax protests can now be filed up to 60 days after a tax assessment is issued or a refund is denied.[38]

IV. Bank Franchise Tax

Due to the state’s antiquated bank franchise tax, locally owned community banks throughout the Commonwealth are at a competitive disadvantage.[39] But, effective January 1, 2021, the bank franchise tax will no longer apply to financial institutions.[40] Instead, banks will be taxed similarly to other corporations in Kentucky.[41]

V. Open Records Request

While the 2019 legislative session involved far fewer sweeping changes than last year, it was still not without drama of its own. This was primarily seen in a surprise legislative enactment involving open records requests and a stunning reversal shortly thereafter.

Without any notice or debate,[42] language was added to the H.B. 354 that prohibited former and current Department employees from divulging unappealed final department rulings, requests for guidance, private letter rulings, and alternative apportionment requests and responses.[43] Even worse, H.B. 354 exempted all such information from the state Open Records Act.[44]

According to the bill’s sponsor, this language was added at the request of the Department in an effort to protect its personnel from potential criminal liability for divulging confidential taxpayer information. What the Department did not disclose, however, was

that this issue was, at that time, involved in litigation on the very issue of disclosure of unappealed final rulings, and that the Kentucky Supreme Court had, in November 2018, affirmed a decision requiring the Department to provide redacted unappealed final rulings. When the language was added to H.B. 354, the Kentucky Supreme Court was considering a Motion to Reconsider its decision. See *Court Rules in Favor of More Transparency for Kentucky Taxpayers* for more discussion on this issue.

When the General Assembly passed H.B. 354 and realized it shielded the Department letter rulings from open records requests, it reversed almost immediately by passing H.B. 458 which struck all the objectionable language from H.B. 354.[45] Governor Matt Bevin signed H.B. 458 into law just two weeks after the original bill was signed.

For more information, contact [Rachel High Chamberlain](#) or any member of Frost Brown Todd's [Tax team](#).

[1] H.B. 354, 2019 Gen. Assemb., Reg. Sess., §82, 2019 Ky. Laws 208 (2019), 2019 KY LEGIS 208 (Westlaw).

[2] *Id.* at §§ 20–23.

[3] *Id.*

[4] §§ 20, 28.

[5] § 29(2)(a)(2).

[6] *Id.*

[7] § 82.

[8] § 26(23)(a).

[9] § 26(23)(b).

[10] § 26(24)(b).

[11] § 18(22).

[12] § 18

[13] § 83.

[14] § 47.

[15] H.B. 458, 2019 Gen. Assemb., Reg. Sess., § 5(c)(1)–(9), 2019 Ky. Laws 209 (2019), 2019 KY LEGIS 209 (Westlaw).

[16] § 5(4)(c).

[17] § 5(8)(c).

[18] § 5(3)(a).

[19] § 5(8)(e).

[20] § 5(5)(a)(6)–(7).

[21] § 5(8)(a).

[22] § 5(8)(b).

[23] H.B. 354, 2019 Gen. Assemb., Reg. Sess., §§ 3, 4 2019 Ky. Laws 208 (2019), 2019 KY LEGIS 208 (Westlaw).

[24] §§ 3–4.

[25] § 80.

[26] § 37.

[27] § 83.

[28] §§ 36(16)(c), 83.

[29] H.B. 458, 2019 Gen. Assemb., Reg. Sess., § 4, 2019 Ky. Laws 208 (2019), 2019 KY LEGIS 208 (Westlaw).

[30] § 53.

[31] § 53(2)(a).

[32] §84.

[33] H.B. 246, 2019 Gen. Assemb., Reg. Sess., §§ 1–9, 2019 Ky. Laws 208 (2019), 2019 KY LEGIS 208 (Westlaw).

[34] § 5(1)(b).

[35] § 12.

[36] §§ 10(1)(b)(2), 81.

[37] §§ 7(28)–(29), 81.

[38] § 11(1).

[39] H.B. 354, 2019 Gen. Assemb., Reg. Sess., §§ 14, 35 2019 Ky. Laws 208 (2019), 2019 KY LEGIS 208 (Westlaw).

[40] §§ 14(1), 81.

[41] § 14(2).

[42] Bensenhaver, Amye “Kentucky’s open records law survives legislature, but watch out” Courier Journal (April 1, 2019 10:26 a.m.) (<https://www.courier-journal.com/story/opinion/2019/04/01/kentucky-open-records-law-exceptions-avoided-legislature/3316772002/>).

[43] H.B. 354, 2019 Gen. Assemb., Reg. Sess., §5(1)(a), 2019 Ky. Laws 208 (2019), 2019 KY LEGIS 208 (Westlaw).

[44] § 5(1)(b).

[45] H.B. 458, 2019 Gen. Assemb., Reg. Sess., §16, 2019 Ky. Laws 208 (2019), 2019 KY LEGIS 208 (Westlaw).

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