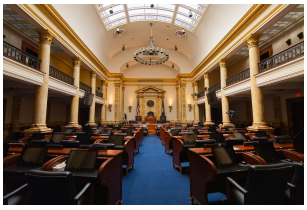

Kentucky Tax Talk: What's On Next Year's Legislative Agenda

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State legislatures, like the rest of us, could never have predicted how 2020 would unfold. Kentucky had just elected a new governor and was anticipating possible changes to state law in the areas of expanded taxation on gaming and marijuana legalization. Those anticipated changes were tabled when the COVID-19 pandemic hit halfway through the 2020 General Assembly. As the Legislature gears up for its 2021 session starting Jan. 5, it appears there are still several anticipated alterations to state and local taxation to come in the commonwealth despite the changes caused by the pandemic.

Property Tax Assessment Changes

In terms of state taxation, the most substantial prefiled bill is Bill Request 897. This bill proposes amending Kentucky Revised Statutes Section 132.191 to include a method of property tax assessment in which the Kentucky Department of Revenue and all 120 elected county property valuation administrators must value property for tax assessment purposes at the property's highest and best use. The bill proposes a definition for "highest and best use" to mean "the reasonable and probable use of property that provides the highest assessment valuation when the use is legally permissible, physically possible and financially feasible." It is generally understood that this amendment targets what is often referred to as "dark stores." This amendment would allow large retailers that leave a space vacant an assessment of the property as if the business is still located in the space. This could be problematic not only considering the current economic climate, but also the general trend toward online marketplaces.

Section 172 of the Kentucky Constitution requires that all property not exempt from taxation to be assessed at 100% of its fair cash value, which is the "estimated price that the property would bring at a fair voluntary sale." Case law further elaborates that requiring an assessment based on the highest value of what is physically possible for a property could cause big problems. Such a broad

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requirement could be contrary to a variety of sections of the state's constitution. Thus, taxpayers, specifically large retailers, will want to keep an eye on this legislation.

Tobacco and Vaping Taxation

While tobacco and vaping taxation was a focus for the Legislature this time last year, and expansion of tobacco taxation of many vapor products in 2020 was successful, prefiled Bill 425 proposes to amend Kentucky Revised Statutes Section 138.140.

It would apply the vapor products tax to an open vaping system when the actual price includes both the components and the liquid solution. This is targeted at retailers that sell these products separately and thus do not fall subject to the tax as it is currently written. This would become effective July 1, 2021.

Open Records Amendments

While not an amendment to a tax statute, prefiled Bill Request 196 could positively affect taxpayers submitting open records requests on behalf of themselves or through counsel. This bill would amend Kentucky Revised Statutes Section 61.882, relating to open records, to require the award of costs and attorney fees if a court finds there was an absence of a good faith basis to believe the requested records were exempt from disclosure.

The bill would require an award of costs if the agency did not have a good faith basis to believe the records were exempt. Currently the requester can be awarded costs if the agency willfully withheld records.

There has historically been a push and pull between the Department of Revenue and taxpayers regarding releasing tax related administrative guidance through open records requests, [1] this amendment provides additional support for taxpayers seeking such information. There is a fine line between protecting taxpayer privacy and ensuring administrative transparency.

This amendment may provide less of a shelter for the department, and all state agencies, to hide behind to claim taxpayer privacy

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prohibits disclosure as all the taxpayer would need to show is a lack of good faith basis rather than willful withholding.

Sector Tax Breaks

There have also been several targeted prefiled bills providing tax breaks for certain sectors of the population.

Prefiled Bill Request 153 would expand exempt veteran service organizations from property taxation if over 50% of their annual net income is expended on behalf of veterans or other charitable causes.

Prefiled Bill Request 159 would provide a refundable income tax credit for certain volunteer firefighters.

Prefiled Bill Request 226 proposes to amend Section 170 of the Kentucky Constitution to include in the homestead exemption for owners who are 65 years of age or older any increase in ad valorem taxes that are assessed after the later of the year that the owner turned 65, the year the owner purchased the property or the date this provision was ratified by the voters. The General Assembly must approve this bill for it to be included on the next election ballot for voters.

Prefiled Bill Request 241 would exclude military retiree pensions from state income tax from Jan. 1, 2021, until Jan. 1, 2025.

Prefiled Bill Request 329 would exempt prescription incontinence products from sales and use tax when sold to a person with a medical diagnosis of incontinence and a prescription for the product.

Prefiled Bill Request 819 would exempt from sales and use tax the sale or purchase of feminine hygiene products beginning on July 1, 2021. Restructuring Lastly, with the governor's dismantling of the Kentucky Claims Commission and reinstatement of the Kentucky Board of Tax Appeals, along with two other adjudicative boards, the General Assembly must approve this restructure in the 2021 Legislative Session.

It is anticipated that the governor's restructure will face opposition overall, but specifically because it reinstates an appeal bonding

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requirement for taxpayers seeking to appeal an adverse order from the Board of Tax Appeals. Kentucky courts have held that Kentucky statutory authority does not require a bond to appeal an order sustaining a tax assessment, suggesting this provision of the governor's executive order reinstating the board will likely not pass the General Assembly. [2] It is anticipated that several other tax related prefiled bill will be processed before the end of the year.

For more information, contact Mark Sommer, Daniel Mudd, Elizabeth Moseley or any member of Frost Brown Todd's Tax Practice.

***Note:** This article was originally published by Law360 (December 17, 2020)*

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[1] See Dept. of Revenue v. Sommer, No. 2015-CA-001128-MR (Ky. App. 2017), aff'd 2017-SC-00041 (Ky. 2018). [2] For more information regarding the Governor's restructure of the Public Protection Cabinet as it related to the KBTA see Kentucky Tax Talk: What Appeals Board Reinstatement Means, Tax Law Defined Blog (Oct. 21, 2020).

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