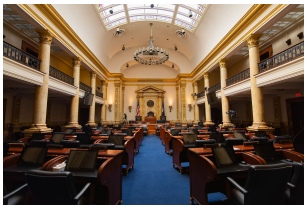

Kentucky Tax Talk: Important Bills To Watch This Session

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Authors:

Mark F. Sommer
Daniel G. Mudd
Elizabeth M. Ethington

With a shorter than usual legislative session, an outstanding budget for the 2022 fiscal year, and shifted priorities in the wake of the COVID-19 pandemic, many did not anticipate tax legislation being at the top of the Kentucky General Assembly's to-do list for 2021.

Despite these considerations and Kentucky's budget director recently announcing that the general fund receipts for January set a record with a total of $1.076 billion — an almost 7% increase over January 2020 — there are still several tax initiatives that could exponentially affect taxpayers.

Passed Legislation

S.B. 120 is an important piece of legislation that passed both houses and was signed into law by Gov. Andy Beshear on Feb. 22. The bill expanded legal pari-mutuel gaming to include slot machine-like historical horse racing.

After the Kentucky Supreme Court held last September in Family Trust Foundation of Kentucky Inc. v. Kentucky Horse Racing Commission[1] that the statute did not encompass historical horse racing, forcing the temporary closing of such operations at multiple horse racing facilities and threatening the future of many of these facilities, S.B. 120 moved quickly through the Legislature.

While the legislation was subject to controversy from many advocacy groups in the state, the revenue that historical horse racing brought to these facilities, the purses for races and the significant need for commonwealth tax revenue was too much to ignore a legislative fix.

Another bill that will have ripple effects for many Kentucky taxpayers is H.B. 3. On the surface, it does not appear to be legislation affecting taxpayers specifically, but it requires any litigant challenging the constitutionality of a state statute, executive order, administrative regulation or cabinet order to file in the circuit court in the county in which the plaintiff resides.

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Historically many tax cases, including constitutional challenges, were to be appealed to the Franklin Circuit Court. Now, for taxpayers who are Kentucky residents or doing business in Kentucky, the question will be where to file challenges.

Many county circuit court judges who have rarely been presented with tax litigation may very well begin to be confronted with constitutional tax issues in the years to come.

Pending Legislation

As the COVID-19 pandemic hit in the middle of the 2020 legislative session, the General Assembly passed only a one-year budget with the intention of passing a 2022 budget during the shortened 2021 session. House Bills 191, 192, 193, 194 and 195 are currently pending before the conference committee but are anticipated to pass before the General Assembly adjourns.

H.B. 135, a pending tax-related bill, is flying under the radar but could potentially result in a large tax increase for Kentucky businesses. This bill would amend the property assessment governing statutes to require that property be assessed for ad valorem tax purposes based on the highest and best use to yield the highest assessment.

Those assessments could result in a significant effect — read: increase — to the proposed real property tax values of retailers and other commercial properties in Kentucky in the future. This highest and best use standard also appears to be contrary to the commonwealth's constitutional fair cash value standard as developed by Kentucky case law over the years.

Another important bill to Kentucky taxpayers is H.B. 278. The bill would amend the income tax statutes to conform with recent federal legislation allowing businesses to deduct expenses paid using Paycheck Protection Program loans. H.B. 278 would bring the income tax statutes in line with many other states also permitting such deductions, including neighboring Indiana.

Other tax-related pending bills include:

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- H.B. 85, which applies vapor products tax to open vaping systems;
- H.B. 372, providing a sales and use tax exemption for large-scale data centers;
- H.B. 230, explicitly exempting energy used or consumed in commercial mining of cryptocurrency at industrial-sized facilities; and
- H.B. 344, which expands the historic tax credit cap from $5 million to $30 million annually, allows a 30% credit for qualified expended for property located in rural areas as defined by the statute, and increases the maximum annual credit that can be claimed for property that is nonowner occupied residential from $400,000 to $5 million.

If you didn't think that Kentucky's tax appeals agency or process could change any more than it has over the past few years, enter pending bill H.B. 540. This bill upholds the governor's previous reorganization, via executive order, of the Public Protection Cabinet.

It would abolish the Kentucky Claims Commission and reinstate the Kentucky Board of Tax Appeals but remove the controversial tax appeal bond requirement. That requirement allows local tax disputes to be bought before the KBTA, and makes several important changes to the requirements for KBTA members, including who must appoint the KBTA members and that all members must be attorneys with the qualifications of a circuit judge candidate with either a tax or business background.

Lastly, H.B. 330 requires the Kentucky Department of Revenue to publish any administrative writings, including final rulings, manuals, training procedures, presentations, technical advice memoranda, general information letters and private letter rulings redacted to protect taxpayer privacy.

As the department has not published any guidance in nine months despite prior legislation and Kentucky case law requiring it to do so for increased transparency purposes, this bill would require publication of any created administrative writing no less than every 120 days. New Administrative Guidance Additionally, in December 2020 the department published its sales tax facts bulletin, which

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shed new light on the department's position regarding various tech industries. Prior to this publication, the department had never publicly taken a formal position as to the taxation of software as a service, cloud computing or blockchain technology.

However, the department expressed that software as a service is not delivered into Kentucky, but rather is accessed exclusively via the cloud or online via the selling entity's server and is not subject to Kentucky sales and use tax.

As for blockchain technology, the department made a blanket statement that it believes traditional manufacturing exemptions do not extend to blockchain production; however, Kentucky's manufacturing-related exemptions are very broad in nature, have continued to include more advanced manufacturing and industrial processes over the years and thus could arguably include such blockchain processes, too, despite the department administrative guidance to the contrary.

Lastly, the department recently released a new regulation that will affect all taxpayers. It requires electronic filing and payments for nearly every tax type via Title 103 of the Kentucky Administrative Regulations Section 1:160.

This applies to individual income taxes, corporate income taxes, limited liability pass-through entities taxes, employer income tax withholding, general sales and use tax as well as sales and excise tax for tobacco produces, license fees and applications, commercial mobile radio service fees, gas and special fuels excise taxes, multichannel video programming and communications services excise tax, transient room tax, tire fees, and utility gross receipts license tax.

The regulation is not yet final. It is still subject to a public hearing on March 25. Any taxpayers wishing to raise concerns or provide comments to the same can be heard.

***Note:** This article was originally published by Law360 (March 1, 2021)*

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[1] Family Tr. Found. of Ky., Inc. v. Ky. Horse Racing Comm'n, No. 2018-SC-0630-TG, 2020 Ky. LEXIS 302 (Sep. 24, 2020).

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