Kentucky Tax Talk: Speeding Up Public Service Co. Protests

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In a legislative session in which the Kentucky General Assembly enacted legislation to phase out the Kentucky individual income tax and expanded the state's sales and use tax base to include 37 new taxable services, some of what seemed to be less influential tax reform items fell under the radar.

One such lesser publicized legislative change was the new requirement that the Kentucky Department of Revenue must act on public service company, or PSC, tax protests within one year. This change could potentially apply retroactively to protests already in the PSC protest queue at the department.

More specifically, one provision in the above-referenced comprehensive tax reform legislation of H.B. 8 amended Kentucky's taxpayer protest rights statute, KRS 131.110, to provide that if a taxpayer timely protests its PSC tax assessment and does not receive either (1) a fully executed settlement agreement to resolve the protest; (2) a final ruling; or (3) resolution and closure of the protest within one year, the department must issue a final ruling that accepts the taxpayer's grounds for protest, including the value asserted by the taxpayer in its protest.[1]

In essence, the legislation gives the department a one-year ticking clock from the time of protest to resolve the matter, either through a final ruling, settlement or some other resolution; otherwise the taxpayer wins by default.

Who does this affect?

Kentucky imposes a property tax on all public service companies with property located in the state, which includes companies providing railway, telecommunications services, multichannel video programming services, gas, water, bridges, electric power companies, including wind and solar generating companies, commercial aircraft, pipelines, privately owned sewers, bus lines,

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trucking, and taxicabs.

Thus, from airline companies to transportation companies, the amendment by H.B. 8 will affect a wide array of entities doing business in Kentucky, and the rights of those PSCs already in the protest stages.

The way that the PSC tax operates is akin to Kentucky's taxation of tangible personal property.

First, the PSC files its PSC tax return with the department in the spring. The department then takes the data needed from all the PSC returns and subsequently issues notices of assessment to each PSC taxpayer, alerting it to how much PSC tax it owes for the given tax year.

However, the department is only statutorily required to issue notices every five years. At this point the taxpayer may pay the tax assessed against it, or it may challenge its assessment by filing a written protest with the department within 60 days.

After the taxpayer files its protest, the ball is in the department's court. The taxpayer is entitled to a protest conference with the department, or it may provide a settlement offer, but the department is under no legal obligation to move a matter forward. Meaning once a taxpayer files its protest, it is up to the department as to when it will be processed, and given the COVID-19 pandemic, staffing issues, etc., it may take well over a year to even get started or obtain a conference.

While some taxpayers may never appeal their PSC assessments from the department, some taxpayers routinely or even annually challenge the department's assessment of PSC tax due — and this new provision added to KRS 131.110 was presumably the General Assembly's way of pushing the department to clear its deck, so to speak, in terms of PSC tax protests that have been piling up over the last several years.

While this change is important for tax practitioners and PSCs for compliance and tax planning purposes moving forward, it is also important to note some ambiguity in the legislation that could assist PSCs that currently have protests pending before the

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department.

H.B. 8 is not clear as to when the one-year clock from the time of protest is to begin running. Does the one-year limit only apply to protests filed after the amendment becomes effective? Or for protests filed prior to H.B. 8, which are still pending, does the one year begin to run when the amendment becomes effective — which begins on July 14?

Or if there are PSC protests currently pending at the department that were filed over a year ago, must the department automatically issue final rulings in favor of the taxpayer when the amendment becomes effective?

The answer is not clear based on the legislation; however, Kentucky case law seems to support the position that procedural legislative amendments, such as arguably the one at issue here via H.B. 8, are to be applied retroactively so long as substantive rights, meaning rights a party possessed when the action occurred — here, the protests filed — are not impaired, and no new substantive rights are given — e.g., giving a PSC or the department a new cause of action.

All PSCs with Kentucky tax liability should consider these relatively groundbreaking changes made to the protest procedure and their protest rights under Kentucky law. But just as importantly, PSCs that currently have protests pending before the department may want to consider whether this amendment can help expedite movement from the department, and put a full-court press on the ball that is still in the department's court.

For more information, contact a member of Frost Brown Todd's Tax practice group.

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[1] KRS 131.110.

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