Ohio Tax Talk: Amnesty Or Voluntary Disclosure?

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Authors:

Raghav Agnihotri
Rachael High Chamberlain

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On Jan. 6, Ohio Gov. Mike DeWine signed H.B. 45, a law that in part authorizes Ohio to operate a tax amnesty program that would provide taxpayers an opportunity to pay delinquent state and local taxes without penalty or prosecution.

Before the program can proceed, the law requires the director of the Ohio Office of Budget and Management to determine that the state requires projected revenue from the tax amnesty program to meet its general revenue fund obligations for the 2023 calendar year.[1] If the director makes this determination, the director is authorized to direct the state to proceed with the tax amnesty program.

Applicability

If it goes forward, the tax amnesty program will be available to both individuals and businesses, and apply to a wide range of delinquent taxes and fees, including:

- Commercial activity tax
- State and county sales and use taxes
- Income tax
- Alcoholic beverage taxes
- Cigarette/tobacco/vaping excise taxes
- Casino wagering tax
- Financial institutions tax
- Petroleum activity tax and motor fuel excise tax
- Horse racing taxes
- Kilowatt-hour tax
- Natural gas excise tax
- Public utility excise taxes

- Severance taxes
- Transit authority sales and use taxes
- Wireless 9-1-1 charges
- Tire fees[2]

The tax amnesty program would also apply to delinquent employer state income tax withholding remittances and certain fees administered by the Ohio Department of Taxation.

It would not apply, however, to local municipal income taxes. Nor would the program apply to any tax or fee for which a notice of assessment or audit has been issued, a bill has been issued, or an audit has been conducted or is currently pending.[3]

During the tax amnesty program, if a taxpayer pays the full amount of any above-listed delinquent taxes and fees, the tax commissioner is required to waive any penalties and accrued interest charged on the amounts outstanding. Moreover, a taxpayer that completes the tax amnesty program can no longer be assessed for and will be immune from criminal prosecution or civil action, and no assessment may be issued against the taxpayer with respect to the tax or fee paid.

Determination by Director of Budget and Management and Timing of Program

The director of Budget and Management has until Nov. 1 to determine whether to establish the state's tax amnesty program this year. If the director determines that the additional revenue is required to offset general revenue fund obligations for the 2023 calendar year, the director is authorized to direct the tax commissioner, the governor and leaders of the general assembly to proceed with administering the amnesty program.[4]

The tax commissioner has the responsibility for administering the program and determining a two-month period this calendar year during which the tax amnesty will run.

Though implementing a tax amnesty program may reduce state revenue from penalties and fees, it may provide incentive for taxpayers to come forward and pay tax liabilities that have not yet been detected but are owed. This may, in turn, increase the revenue collected by the state and certain political subdivisions in the case of local taxes.

Over the last two decades, Ohio has implemented four separate tax amnesty programs, with the most recent conducted in calendar year 2018,[5] yielding revenues of roughly $14.3 million.[6]

However, as noted by the Ohio Society of CPAs, the likelihood that the director will make the determination needed to establish the tax amnesty program may be slim, since tax collections for the first five months of the 2023 fiscal year total $11.62 billion —compared to an expected $11.14 billion —putting tax collections at a surplus of by $478.5 million or 4.3% above estimates.[7]

Given this surplus and the expenses of the program —administrative, lost interest and penalties, etc. —the director may determine the revenue that would be generated by the amnesty is not needed. Thus, although the amnesty program has been signed into law, it remains uncertain when or even if it will occur this year. If the program does not occur this year, it would need to be reauthorized by the general assembly.[8]

Potential Advantages and Disadvantages of the Program

Ohio's tax amnesty program, by eliminating interest, penalties and fees that are typically charged for failure to pay taxes due or for late filings, provides a unique opportunity for taxpayers to come into compliance with state and local tax laws without facing the severe penalties and potential criminal prosecution that can result from unpaid taxes.

The program offers its strongest benefits to taxpayers with large, lingering balances that are most likely to incur large interest and penalty payments.

It would also benefit taxpayers previously registered with the Ohio Department of Taxation who otherwise might not be eligible for participation in the voluntary disclosure program, or who have underreported or taken an uncertain filing position on previously filed returns.

Amnesty may also be a good option for taxpayers who may owe taxes for only a limited period of time and who would not need to maintain ongoing registrations with the state.

There are, however, disadvantages to the amnesty program, should it be enacted. One of the most obvious issues is that, unlike programs authorized in other states, such as Kentucky, a taxpayer is not eligible to participate in the program if an assessment has already been issued or conducted, an audit has been noticed, or a bill has been issued. Taxpayers with known tax issues that are not eligible to use the program to reduce potential liabilities would be hard-pressed to leverage the program in settlement discussions.

Another important potential disadvantage is that the program's timing remains uncertain. A taxpayer with a known issue who chooses not to participate in the voluntary disclosure program may also lose eligibility to participate in amnesty if the department issues certain notices before amnesty opens.

In the future, allowing taxpayers to essentially settle ongoing tax disputes through the amnesty program may be better. This would allow greater participation in the program, and help the department and the taxpayers avoid expensive audits and litigation.

The program could be time limited to narrow the impact, and the department could retain audit rights in the event areas of dispute remain. It is unlikely this would significantly affect the voluntary disclosure program, as voluntary disclosure is already available to taxpayers and amnesties do not occur on a regular schedule.

Ohio's Voluntary Disclosure Programs

For some taxpayers, a viable alternative to the tax amnesty program may be Ohio's voluntary disclosure programs, which are not restricted to a limited period. They apply to the following taxes:

- Individual income tax
- Commercial activity tax
- Employer withholding tax
- Financial institutions tax

- Pass-through entities tax
- Resort area gross receipts excise tax
- Sales and use taxes[9]

The voluntary disclosure programs are administered by the Ohio Department of Taxation to assist both individual and business taxpayers with tax compliance. Though the terms of the specific voluntary disclosure program depend on the type of tax, the programs generally require taxpayers to enter into and execute a voluntary disclosure agreement with the state prior to any contact from the Ohio Department of Taxation, including audit, compliance or criminal investigation programs.

The voluntary disclosure programs differ from the tax amnesty program in that entering into a voluntary disclosure agreement limits the examination look-back period to the previous three tax years. Moreover, signing a voluntary disclosure agreement generally waives a nonfiling taxpayer's right to a refund for the look-back period, and the taxpayer must pay all taxes and accrued interests when filing.

In exchange for the disclosure and filing, the Department of Taxation will waive all penalties for the previous three years, plus any tax years prior to the years covered by the agreement. Thus, entering into a voluntary disclosure agreement may be advisable in situations where taxpayers may have tax liabilities related to longer periods of time.

Also, in many cases a voluntary disclosure agreement can be requested on an anonymous basis, allowing a taxpayer to obtain certainty before disclosing their identity. Amnesty is unlikely to offer this option.

In summary, both the tax amnesty program and the voluntary disclosure programs are designed to encourage taxpayers to come into compliance with state and local tax laws. Utilizing either program is one of several strategies that can minimize the impact of large penalties and accrued interest charges from falling behind on tax obligations.

For more information, contact any attorney with Frost Brown Todd's Tax practice group.

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[1] Section 757.01(B), Am. Sub. H. B. No. 45, 134th G.A.
[2] Section 757.01(A)(1), Am. Sub. H. B. No. 45, 134th G.A.
[3] Section 757.01(A)(2), Am. Sub. H. B. No. 45, 134th G.A.
[4] Section 757.01(A)(2), Am. Sub. H. B. No. 45, 134th G.A.
[5] Section 757.110, H.B. 49, 132nd G.A.
[6] House Bill 45 Fiscal Note & Local Impact Statement, Ohio Legislature https://www.legislature.ohio.gov/download?key=20214&format=pdf
[7] Tax collections in November 2022 alone exceeded prior year figures by $212.6 million or 9.3%. FY23 surplus nears half billion after strong November tax collections, Ohio Society of CPAs (Nov. 26, 2022), https://ohiocpa.com/getinvolved/news/2022/12/09/fy23-surplus-nears-half-billion-after-strong-november-tax-collections.
[8] Section 601.01, 49, 132nd G.A.
[9] Voluntary Disclosure Program, Ohio Department of Taxation. https://tax.ohio.gov/business/resources/voluntary-disclosure.