Kentucky Tax Talk: Trouble With the Incentive Oversight Bill

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In 2022, Kentucky saw tremendous growth and the announcement of record-breaking economic development projects. These include the largest economic development project in Kentucky history —Ford Motor Co.'s joint venture with SK Innovation to invest $5.8 billion and create 5000 new jobs constructing two electric vehicle battery manufacturing plants in Hardin County —and the largest distillery expansion in state history, announced by Sazerac Co. Inc. Sazerac's
project is one of several multimillion-dollar investments in the expansion of the state's bourbon industry.

With growing industries, both new and existing, comes increased pressure on Kentucky's various tax incentive programs used to lure new and expanding economic development to the state.

These programs are typically administered exclusively within the state's executive branch via the Kentucky Cabinet for Economic Development, or KCED, and its governing board, the Kentucky Economic Development Finance Authority, or KEDFA.

But the Kentucky General Assembly appears to be pushing —again —for increased transparency and involvement in the oversight of Kentucky tax incentives, presumably as a partial result of the record-breaking economic development projects announced in 2022.

Historically, Kentucky's General Assembly has been responsible for creating the statutory boundaries and appropriating funds for the various tax incentive programs used to entice business development in the commonwealth. Once created and given funding, these programs are then administered exclusively by the KCED and the KEDFA with assistance from other various agencies such as the Kentucky Department of Revenue.

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So, the General Assembly sets the budgeted parameters and the statutory framework for the programs, and the executive branch via the KCED and the KEDFA then have had sole discretion as to how those funds are spent. Meaning, if a business is considering expanding or locating in the commonwealth, it negotiates its specific economic incentives package exclusively with the KCED, which is then approved by the KEDFA, and with no direct involvement from the General Assembly.

While the General Assembly has not historically had a significant role in how the KCED and the KEDFA administer and monitor these programs, H.B. 45 introduced this session would give the General Assembly more oversight in the administration of these programs.

This bill proposes the creation of an expenditure and incentive review board that would "review, analyze, provide oversight, and make recommendations to the General Assembly" regarding the state's existing tax expenditures and economic development incentives as well as any expenditures or incentives created in the future.

The board would comprise members of the General Assembly, both House and Senate, and would meet monthly, in between sessions, beginning in August.

The goal of the board, as set forth in the legislation, would be to provide a comprehensive analysis of each economic development incentive program, including the goals, number of taxpayers affected and revenue impact of the programs. It would also research any issues associated with the programs, and create standardized reporting requirements and various other streamlined procedures for agencies administering the programs.

While the KCED and the KEDFA use certain objective criteria, such as a project's expected capital expenditure, number of jobs created and average hourly wages, to calculate the amount of tax credits to which a business will be entitled, the current programs still give ultimate discretion to the KCED and the KEDFA to determine the amount of tax incentives, with no review by the General Assembly after the fact. Thus, there is an inherent lack of transparency in how certain awards were determined.

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It can be assumed that H.B. 45 is the General Assembly's attempt to create more transparency, potentially push for more standardized incentive programs and, ultimately, increase General Assembly oversight of the various programs and awards.

This includes, potentially, previously-awarded incentives that the General Assembly could attempt to claw back —a possible nightmare for taxpayers that applied in good faith for, and were awarded, these incentives under Kentucky law in effect at that time.

Thus, this legislation could potentially be both beneficial or harmful for businesses looking to expand or locate in the commonwealth. On the one hand, flexibility for the KCED to administer the programs allows each program to be considered individually for its unique benefit to the state, without additional processes in place.

On the other hand, more transparency in how the programs and awards are administered could provide businesses with more negotiation leverage. Although, as the General Assembly currently comprises a Republican supermajority, legislative oversight of state tax incentive programs may look different if there is a party switch in the Legislature years from now.

However, this is not the first time such legislation has appeared before the General Assembly. Last year, during the 2022 regular session, Rep. Ken Fleming, R-Louisville, introduced a practically identical bill that did not move out of committee.

While H.B. 45 seemed to have more traction than its predecessor at the beginning of this year's regular session, there is plenty of time left before it moves through the chambers, even with a short session, or for it to be included in a later amended bill. Thus, it is something that the Kentucky business community continues to watch very closely.

For example, H.B. 45 could be inserted into other tax incentive-related legislation introduced this session, such as:

•H.B. 152 to create a taxpayer transplant program to encourage the recruiting of remote employees to the state;•H.B. 363 to increase annual maximum sales tax incentives that can be awarded through the Kentucky Enterprise Initiative Act program from a $20 million to

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$40;
•H.B. 303 to adding definitions and clarifications to several economic incentive programs; or
•H.B. 510 to create continuous film production incentives.

It could be added into any other bill for that matter. While H.B. 45 is still before the House Appropriations and Revenue Committee, it is an important bill to watch as it could affect businesses that have received economic incentive packages in recent years as well as future development in the state.

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