Ohio Tax Talk: Tax Amendments in Operating Budget Proposal

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H.B. 33 establishes the state of Ohio's operating budget for the biennium beginning July 1, 2023, and ending June 30, 2025. During the Ohio General Assembly's biennial session, state legislators review hundreds of bills, but none are more crucial to the state government's operation than those comprising the state budget. These bills, including H.B. 33, enable the General Assembly to allocate financial resources among competing spending priorities since Article II, Section 22 of the Ohio Constitution mandates that a specific appropriation made by law is required to spend state funds.

While much of the legislation's focus is on establishing school district and local government funding, the bill also purports to amend various aspects of the Ohio Revised Code, including several significant modifications to the state's sales and use, income, and commercial activity tax, or CAT, provisions. It is common for budget bills to include tax-related items to support the funding of state initiatives, but these items are often overlooked as they are viewed as abstract and complex, making them less accessible and more difficult for the general public to understand. As a result, these provisions may not receive the same level of scrutiny or debate as spending provisions during the budget process.

This article focuses on key tax provisions outlined in H.B. 33 that Ohio individuals and businesses alike should monitor.

Sales and Use Tax Vendor License Suspensions

Ohio law requires all retail vendors to acquire and maintain an active vendor's license from the Ohio Department of Taxation or a county auditor, and to collect and remit state and local sales taxes. If a vendor repeatedly fails to file sales tax returns or remit taxes on time, the department may suspend their license.[1] During this suspension period, the vendor is not allowed to obtain another

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vendor's license from the department or the county auditor. H.B. 33 clarifies that this prohibition also applies to licenses obtained from any county auditor, not just a specific one. Moreover, H.B. 33 grants the Ohio Department of Taxation the authority to cancel any duplicate vendor's license obtained during the suspension period or obtained by a person who has violated the prohibition on making retail sales without a vendor's license more than once.[2] These changes aim to ensure that Ohio vendors comply with tax regulations and to prevent them from obtaining multiple licenses during their suspension period.

Criminal Penalties for Sales and Use Tax Offenses

A pivotal change to the current sales tax legislation in Ohio is the penalty section of the sales and use tax, which classifies several sales tax violations as misdemeanors or felonies based on the mental state of an offender.[3] Generally, under current law if no mental state is specified —as is in current legislation —recklessness is considered the default. A person acts recklessly when an offender disregards a substantial and unjustifiable risk, with heedless indifference to the consequences, and his or her conduct is likely to cause a certain result or is likely to be of a certain nature.[4] For the offenses listed in the chart below, H.B. 33 lowers the requisite culpable mental state from recklessness to negligence —i.e., due to a substantial lapse from due care, the offender fails to perceive or avoid a risk that the offender's conduct may cause a certain result or may be of a certain nature.[5][6]

Offense	Current Penalty	Classification and Penalty under H.B. 33

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Failure to pay or collect sales or use tax, or providing a false tax exemption certificate	Fine between $25-$100 for first offense; for each subsequent offense, a fine between $100-$500 (corporations) or between $25-$100 and imprisonment of up to 60 days (individuals).	Minor misdemeanor of the first offense (up to $150 fine); for each subsequent offense, a misdemeanor of the third degree (fine of up to $500 or imprisonment of up to 60 days).
Failing to file a sales or use tax return or filing a fraudulent return	Fine between $100-$1,000 or imprisonment of up to 60 days.	Misdemeanor of the third degree.
Making retail sales without a vendor's license	Fine between $25-$100 for the first offense, and a felony of the fourth degree; for each subsequent offense (fine of up to $5,000 or imprisonment of 6-18 months).	Minor misdemeanor for the first offense; misdemeanor of the first degree for the second offense (fine of up to $1,000 or imprisonment of up to 180 days); felony of the fourth degree for each subsequent offense.
Making retail sales as a transient vendor operation without a license	Fine between $100-$500 or imprisonment of up to 10 days for the first offense; for each subsequent offense, a fine of between $1,000-$2,500 or imprisonment of up to 30 days.	Minor misdemeanor for the first offense; misdemeanor of the fourth degree for each subsequent offense (fine of up to $250 or imprisonment of up to 30 days).

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Making retail sales with a suspended license	Felony of the fourth degree.	Misdemeanor of the first degree for the first offense; felony of the fourth degree for each subsequent offense.

As shown in the chart above, it seems that both the monetary penalties and criminal penalties for sales and use tax violations have increased when compared to current law. The change to a lower culpable mental state for the above sales and use tax offenses from recklessness to negligence is likely to cause a host of unintended consequences and potential criminal liability for business owners and individuals alike. Based on the initial draft of H.B. 33, it seems that the change to negligence as the requisite mental culpability is limited to sales and use tax offenses, which may also lead to confusion regarding penalties for different types of tax violations.

Key Takeaways

H.B. 33, as proposed, would grant the state's Department of Taxation the authority to suspend the vendor's license of retail vendors who repeatedly fail to file sales tax returns or remit taxes on time, preventing them from obtaining another license during the suspension period. The bill also clarifies that the prohibition on obtaining vendor licenses during the suspension period applies to all county auditors, and the department can cancel any duplicate vendor's license obtained during this period. Additionally, H.B. 33 reduces the culpable mental state for several sales and use tax offenses from recklessness to negligence, potentially exposing business owners and individuals to increased monetary and criminal penalties. It is crucial to comply with tax regulations and understand the potential consequences of failing to do so.

Income Tax Employer Withholding —Elimination of Quarterly Reconciliation Return

H.B. 33 revises the requirement for employers that currently withhold and remit employee income taxes on a partial weekly basis to file quarterly withholding reconciliation returns. Instead, starting on Jan. 1, these businesses will only need to file the annual

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reconciliation return, as required for all other employers.[7] This will simplify the process for these employers and reduce their administrative burden. It is important for businesses to be aware of this change in order to plan accordingly and comply with the new requirements. Employers are mandated by existing legislation to submit employee withholding on a partial weekly basis if they withhold and accumulate a substantial amount of withheld funds. For those with lower withholding amounts, employers may choose to remit monthly or quarterly instead.[8]

Municipal Income Tax —Net Operating Loss Deduction

The bill purports to correct a mistake of restricting businesses to only being able to deduct 50% of their net operating losses, or NOLs, from their taxable net profits. Starting in 2023, the limit will be removed, and businesses can deduct the full amount of their NOLs. H.B. 33 clarifies that this change will go into effect in 2023 and requires municipalities that have an income tax to update their tax ordinances to reflect this change for taxable years beginning that year.[9] This change will allow businesses to potentially lower their tax liability and may provide more flexibility for businesses to manage their finances.

Municipal Income Tax —Net Profits Tax Reporting and Notifications

Currently, businesses that operate in multiple municipalities in Ohio, and thus are subject to multiple municipal income taxes, can elect to have the state Department of Taxation serve as the sole administrator for those taxes, as opposed to dealing with various localities. For taxpayers that make such an election, a single municipal net profit tax return is required to be filed through the Ohio Business Gateway and the state's Department of Taxation is responsible for billing, assessment, collections, audits and appeals. H.B. 33 modifies the current reporting and notification requirements associated with this state-administered municipal net profits tax by requiring the department to provide information to municipalities twice a year —in May and in November —on any businesses that had net profits apportioned to the municipality —and therefore subject to the municipality's income tax —in the preceding in the

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preceding six months.[10] Under current law, this twice-a-year notification is required to list information for businesses that had net profits apportioned to the municipality in any prior year. The change to a semiannual reporting period applies to reports required to be filed after the H.B. 33's 90-day effective date. Under continuing law, a municipality that levies an income tax must certify that rate to the department by Jan. 31 of each year. If a municipality chooses to increase or decrease its rate after Jan. 31, the bill requires the municipality to notify the state's Department of Taxation at least 60 days prior to the change going into effect. The change in reporting and notification requirements aims to provide more accurate and timely information to municipalities and the department, as well as simplify the reporting process for businesses operating in multiple municipalities. By providing information on businesses with net profits apportioned to the municipality only in the preceding six months, municipalities can better track and collect their owed taxes. The requirement for municipalities to notify the department of any changes in their municipal income tax rate —including decreases —is important as it ensures that the state's Department of Taxation is aware of any changes and can update their systems accordingly, allowing for a smoother tax administration process for businesses.

Key Takeaways

H.B. 33 proposes several changes to employer withholding, municipal income tax NOL deduction, and net profits tax reporting and notifications. Employers that withhold employee income taxes on a partial weekly basis will no longer be required to file quarterly withholding reconciliation returns, simplifying the process and reducing administrative burden. Additionally, removing the restriction that businesses can only deduct 50% of their NOLs from taxable net profits provides greater flexibility for managing finances and potentially lowers tax liability. Finally, modifications to the reporting and notification requirements for state-administered municipal net profits tax aim to provide more accurate and timely information to municipalities and the Ohio Department of Taxation, as well as simplify the reporting process for businesses operating in

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multiple municipalities.

CAT Tax Credit for Prior Corporate Franchise Tax NOLs

H.B. 33 delays the date on which a CAT credit for certain NOLs accrued under the now-defunct corporation franchise tax become refundable. When the corporation franchise tax was repealed in 2005, the CAT was implemented in substitute. At that time, corporations were allowed a tax credit to offset some of the immediate financial statement effects of losing the ability to deduct NOLs and certain other deferred tax items on the business's corporate franchise tax returns. This credit, which allows a corporation to claim NOLs against a corporation's CAT liability, is currently nonrefundable until 2030. However, H.B. 33 delays this date to calendar year 2040.[11] The delay in the refundable date of this credit is important to note for business owners as it will delay the date by which these taxpayers can claim the tax credit and potentially receive a refund.

Situsing of Transportation Services

The proposed bill aims to clarify an existing provision under the CAT related to the allocation or situsing of gross receipts from transportation and delivery services to Ohio. Specifically, H.B. 33 requires that the provision of transportation services applies to services provided by common carriers, rather than just motor carriers.[12] The term "motor carriers" applies only to transportation or delivery by motor vehicle, while the phrase "common carriers" includes transportation by other means, such as trains and aircraft. This change is intended to be remedial in nature and to clarify the law as it existed before the terminology was changed in 2012 as a part of a larger overhaul of motor carrier legislation. This clarification is important for businesses in the transportation and delivery industry to ensure compliance with Ohio tax laws.

Key Takeaways

H.B. 33 delays the refundable date of a nonrefundable CAT credit for NOLs accrued under the now-defunct corporate franchise tax

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from 2030 to 2040. This credit originally allowed corporations to claim NOLs against their CAT liability and potentially receive a refund and the delay in the refundable date may affect claiming the credit and potentially receiving a refund. H.B. 33 aims to clarify an existing provision under the CAT related to the allocation of gross receipts from transportation and delivery services to Ohio. This clarification will affect businesses in the transportation and delivery industry, as it requires that the provision of transportation services applies to services provided by common carriers, rather than just motor carriers.

Conclusion

H.B. 33, as proposed by the Ohio House of Representatives, is crucial for Ohio taxpayers to monitor, as it establishes the state's operating budget for the next biennium and aims to amend various sales and use, income, and CAT provisions. The changes introduced by the bill could have a significant impact on taxpayers and it is important to stay updated on any developments as it progresses through the legislative process. As the proposed bill is currently with the Ohio House Finance and Appropriations Committee, it is expected that further changes will be made, making it all the more important for taxpayers to stay informed and engaged with the process.

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[1] R.C. 5739.30(B)(2).
[2] R.C. 5739.31.
[3] R.C. 5739.99.
[4] R.C. 2901.21(C)(1).
[5] R.C. 2901.22.
[6] Legislative Budget Office, H.B. 33 – 135th General Assembly – Bill Analysis, Ohio Legislative Service Commission (Feb. 15, 2023), https://www.legislature.ohio.gov/download?key=20391&format=pdf.
[7] R.C. 5747.07 and 5747.072.
[8] Section 803.60.
[9] R.C. 718.01; Section 803.10.
[10] R.C. 718.80 and 718.84; Section 803.80.
[11] R.C. 5751.53 and 5751.98.

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[12] R.C. 5751.033; Section 803.30.

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