Gold Bullion and Kentucky Sales Tax – The Ghost of Ceasar Haunts

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Last week, the Kentucky General Assembly during its 2024 Regular Session enacted H.B. 8, one provision of which exempts gold bullion from the 6% Kentucky sales and use tax. But, did it?

Kentucky's sales and use tax applies to purchases and/or use of non-exempt tangible personal property, which to date has included sales of gold bullion. While this topic may seem somewhat obtuse in that retail sales of gold bullion are not nearly as common as most other "consumer-type" items, given recent Big Box retailer's online and instore offerings of gold bullion in bar format, the issue is much more in the forefront today than ever before. As of today, gold bullion is selling at a market price of roughly $2,400 per ounce (99.99% pure), and with Kentucky sales and use tax layered on it, an additional $144 tax burden, the cost would be $2,544 all in.[1]

There is a question surrounding H.B. 8 and this provision, and true to Kentucky political form, some drama. H.B. 8 is what is known as a "Revenue Bill," associated with but not part of the annual "Budget Bill." Kentucky's Constitution authorizes a line item veto for the "Budget Bill" to the sitting Governor under executive powers as to reviewing legislation. Governor Andy Beshear (D) took a line item veto to the gold bullion provision and asserted as follows:

I am vetoing this part because if you own gold, you can afford to pay sales tax. Tangible goods are the primary basis of the sales tax. Other collectible goods are taxed as tangible personal property.

Kentucky's Republican-dominated Legislature *did not* receive this too kindly.

With super majorities in each Chamber, the Republican leadership has an effective batting average of 1,000% in overrides of legislated vetoes issued by this Governor. How did the General Assembly react to his attempted line item veto of a non-Budget Bill provision, the General Assembly simply ignored it, did not attempt to override

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the veto (which it clearly could have done in a matter of minutes), and ordered the Bill sent to the Kentucky Secretary of State for purposes of "enrollment" as law. Word on the street is that the General Assembly did not want to set a precedent for overriding this type of activity because it could be construed as accepting the Governor's ability to veto a Revenue Bill not formally part of the Budget Bill. Research suggests this dynamic has never before occurred.

Where Does that Leave Taxpayers, Retailers and Consumers?

H.B. 8's gold bullion exemption provision is effective for purchases made on or after August 1, 2024. So, perhaps over the next 3+ months, some sort of administrative guidance comes out of the Department of Revenue addressing this situation.

In the event that no guidance issues, retailers are faced with the dilemma of (i) imposing and collecting the 6% sales and use tax, or (ii) not charging, collecting and remitting it.

A failure to collect, if the Department of Revenue takes a position consistent with the Governor's, puts the business at risk for uncollected sales taxes and obviously penalties and interest thereon. But if it does collect, it raises the specter of potential consumer-type actions brought against it. Notwithstanding Kentucky's no class-action for over-collection of sales tax provisions, there are other theories which could potentially be used to bring an action against a retailer for an alleged over-collection of Kentucky sales and use tax.

With the ever-increasing consumer opportunities via internet-based purchases, coupled with the movement by some Big Box retailers into this space, the chance to acquire gold bullion for safe keeping in a personal home has never been greater. The retailers' dilemma is a theoretical one for now, but in 3+ months it will become a real one.

For more information, please contact Mark Sommer or any attorney in Frost Brown Todd's Tax Practice Group. For up-to-date information on tax-related issues, visit our Tax Law Defined Blog.

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[1] Additionally, the current position of the Kentucky Department of Revenue is that “precious metals” in the form of gold bullion bars are fully taxable to an individual for the annual tangible personal property tax. The burden on this? If you lived in Metro Louisville, the annual tax at today’s price would be roughly $32.00 (all state and local agencies included). And even though Kentucky’s Constitution exempts household goods of a person used in their home, the Department’s position is that gold bullion bars do not fall in this constitutionally mandated exemption provision.

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