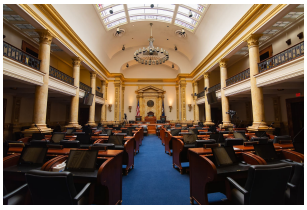

The 2024 General Assembly: Light on Changes, Heavy on Constitutional Issues

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In recent years, Kentucky's legislative sessions have been either a wealth of tax-related reforms or limited to cleanup measures, with little in between. Although significant tax reform was not anticipated in 2024 given the General Assembly's focus on developing the next budget, there was initially some thought that local tax reform, a repeal of the limited liability entity tax, and another shot at amnesty could still occur. Ultimately, Kentuckians were largely left wanting.

Limited Changes

Most of Kentucky's tax changes in 2024 originate from H.B. 8. This so-called revenue bill morphed from an 11-page bill when introduced to a 124-page bill when favorably voted out of the House, 73 to 11, on March 25, and finally to a 198-page bill when passed by the Senate, 87 to 9, on March 28. Despite this, only limited tax measures were included.

One change that has the potential to affect all Kentuckians is another modification to the fiscal triggers that must be met before additional decreases in the individual income tax rate can occur. While Kentucky easily met these triggers initially, there was a narrow miss for the 2025 tax year reduction. These technical changes may make it easier for future rate reductions to occur.

Another change coming from the 2024 General Assembly involves the delay of a corporate income tax deduction. Previously, it had authorized an income tax deduction for corporate taxpayers negatively affected by the commonwealth's move from mandatory nexus consolidated return filing to mandatory unitary or elected consolidated filing beginning in 2019. This deduction was initially to be available for tax years beginning on or after January 1. However, it

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has now been delayed until tax year 2026.

There were also minor modifications to the sales and use tax laws. Following the expansion of the sales and use tax base to include additional services, a de minimis threshold was introduced that allowed those subject to the tax as a result of the newly taxable services to avoid collection requirements when the sales of those services were less than $6,000 annually. Beginning in 2025, this threshold will increase to $12,000 annually.

In a positive change for taxpayers, the Department of Revenue is now required to publish all administrative writings, redacted as necessary, on its website. This includes final rulings, manuals, private letter rulings, technical advice memoranda, and so forth. Each of these writings must be published within 120 days of issuance/finalization, which is consistent with most other states that already publish these writings. This move should lead to greater transparency regarding tax administration.

Separate from H.B. 8, H.B. 122, which originally contained the administrative writings publication language, was modified to statutorily classify mains, pipes, pipelines, and conduits used for heat, steam, water, sewage, natural or manufactured gas, or electricity to or for the public as real property instead of tangible personal property. This appears to be in response to the DOR's initial administrative position following *Marathon Pipe Line*, in which the Kentucky Court of Appeals determined that Marathon Pipe Line LLC's petroleum trunk line should be classified as tangible personal property. The DOR initially maintained that all pipelines, regardless of their individual characteristics, should thus be classified as tangible personal property, which in general is taxed at a much higher rate. This legislation partially walks back the department's position, largely restoring the status quo. Importantly, however, the legislation did not change the classification of oil or petroleum pipelines, such as the one involved in the *Marathon* decision.

Unsuccessful Efforts of Note

After the "success" of H.B. 475 in 2022, which would have placed a constitutional amendment on the ballot that would allow for

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changes in local taxation, namely the implementation of local option sales tax, many were optimistic that the Republican supermajority could push similar legislation through in 2024. Ultimately, two bills were introduced: H.B. 14 and H.B. 724. H.B. 14 managed to receive a second reading in committee but failed to leave committee to be passed by the House. H.B. 724 never received a reading. Given that neither bill was as successful as H.B. 475, it seems that the push for local tax reform may be slowing. Nonetheless, Kentucky's overall shift away from production taxes will likely eventually necessitate this change.

Two other potentially failed efforts of note may be setting the stage for future legal battles in the state. The first was yet another attempt at establishing an amnesty in Kentucky. In 2022 the General Assembly passed a tax amnesty bill. Under this bill, a tax amnesty period was to occur in the fall of 2022, to be administered by a third party. If a third party could not be procured to run the amnesty program, amnesty would instead occur in the fall of 2023, with the DOR administering the program. Unfortunately for taxpayers, the DOR never implemented amnesty, citing a lack of funding from the General Assembly. The DOR also noted that it faces
staffing challenges and significant work to implement new and much-needed software throughout the department.

H.B. 8 again included an amnesty program, updating the dates to reflect the two-year lag time and once again opting to have a third party administer amnesty if possible. Much like in 2022, the General Assembly failed to appropriate funds for the administration of this program, leading Gov. Andy Beshear (D) to line-item veto the measure. As discussed below, the General Assembly chose not to override this veto, despite the Republican supermajority.

Another failed measure was an attempt to provide a sales and use tax exemption to sales of gold bullion, usually in gold or silver bar form. Big-box retailers have begun selling these gold bars, making the bullion more accessible to the general public. Arguing that purchases of bullion are essentially an investment, a measure was introduced to exempt the sales from tax, similar to other investments such as stock. However, the governor vetoed this

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portion of the legislation, arguing that if a person can afford to purchase gold, they can afford to pay sales tax on it. Rather than viewing the purchase as an investment, Beshear classified the property as collectible goods, which are otherwise taxed in the commonwealth. Again, the General Assembly chose not to override this veto.

A Legal Battle Looming?

H.B. 8, as a revenue bill, is associated with, but not part of, the annual budget bill. The Kentucky Constitution authorizes a line-item veto for the budget bill to the sitting governor under executive powers for reviewing legislation. This is an important distinction, because if H.B. 8 is in fact a revenue bill, line-item vetoes are ineffective.

Operating as though H.B. 8 was a budget bill, Beshear line-item vetoed both the new amnesty provisions and the sales and use tax exemption for bullion. The General Assembly, however, believed that H.B. 8 was a revenue bill. While it could have easily overridden this veto, as it had done numerous times before, the General Assembly simply ignored the veto and ordered that H.B. 8 be sent to the Kentucky secretary of state for purposes of enrollment as law. It is believed that the General Assembly did not want to set a precedent for overriding this type of line item veto 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.

While the issue presented is interesting from a constitutional law perspective, the practical impacts of this dispute are real for taxpayers. While many taxpayers have made planning decisions based on the perceived availability of amnesty, the impact to retailers and consumers involved in the buying and selling of bullion is actually more pressing.

H.B. 8's gold bullion exemption provision is effective for purchases made on or after August1. While it is possible that some sort of administrative guidance comes out of the DOR addressing this situation before that date, the legality of the veto would still need to

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be addressed. Thus, retailers are faced with the dilemma of (1) imposing and collecting the 6% sales and use tax, or (2) not charging, collecting, and remitting it.

If the DOR follows the governor's lead, a failure to collect puts a business at risk for uncollected sales taxes and related penalties and interest. However, if it does collect, it raises the specter of potential consumer-type actions brought against it. Notwithstanding Kentucky's prohibition of class action suits for overcollection of sales tax, there are other theories that could be used to bring an action against a retailer for an alleged overcollection of Kentucky sales and use tax.

Given this uncertainty, it seems likely that this issue will eventually make its way through the courts. While gold bullion isn't an item bought and sold by many businesses and individuals, the constitutional questions brought about by the distinction between a revenue bill and a budget bill have the potential to affect Kentucky taxpayers in multiple ways. Time will tell when and if this issue is resolved.

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

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