Gloves Are Off: The Fight Over Kentucky Tax Amnesty Goes to Round 3

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Muhammad Ali may be the most famous heavyweight champion to come out of the Bluegrass State, but with the continuous blows between the Democratic governor's administration and the Republican-controlled legislative branch, the Kentucky state government seems to be emulating its hometown hero. Most recently, during the 2024 Kentucky legislative session, the General Assembly stepped back into the ring against the governor, with tax amnesty at the center of the action.

The 2024 regular session was mostly drama- free regarding significant tax changes, as the General Assembly was primarily focused on passing the two-year budget. However, one tax bill that has been passed into law has now escalated an ongoing fight between the legislative and executive branches by enacting another tax amnesty program to occur in the fall of 2025 or 2026. While tax amnesty programs are typically a noncontroversial topic and a win-win for both the executive and legislative branches, Kentucky tax amnesty has been wrought with controversy over the last several years, as a similar amnesty program was legislated in 2022 but never occurred.

Now, is the long-awaited amnesty program on the ropes, down for the count, or getting back up for the next round?

For context, for the first time in 10 years, the General Assembly passed legislation calling for a tax amnesty program during the 2022 legislative session. House Bill 176 proposed an amnesty program that, as in prior amnesties, allowed taxpayers the opportunity to generally clean up any outstanding Kentucky tax matters with full waiver of fees and penalties and a 50 percent reduction in interest. The program was intended to apply to a broad range of situations, as taxpayers that are nonfilers or have underreported, and even those currently under audit or that have received a bill, notice, or demand of payment from the Kentucky Department of Revenue, could apply for the amnesty. Statutorily, if the department were able to procure a third party to administer the program, the proposed amnesty period was to begin on October 1, 2022, and end on November 29, 2022, for tax periods October 1, 2011, through December 1, 2021. However, if the department could not procure a third party, the amnesty program was to occur during the 2023 calendar year instead.

The 2022 amnesty program also included many of the hallmarks of past Kentucky amnesties, including:

- a general 60-day amnesty period to complete all returns and pay all tax due;
- penalty and interest waivers;
- a refund claim bar for taxes paid through amnesty or protest of any assessments associated with the amnesty amounts;
- the power to revoke amnesty status and demand back payment of interest and penalties if the taxpayer does not stay compliant; and
- the power to impose additional penalty fees if a taxpayer has outstanding tax due for the applicable periods and did not come forward through the amnesty program.

The 2022 amnesty program that began in H.B. 176 eventually was enacted through Kentucky's 2022 comprehensive tax reform bill, H.B. 8.[1] In addition to the amnesty program, H.B. 8 included several other significant tax provisions, including imposing sales tax on over 30 additional services and continuing to cut the personal income tax rate. As a result, while H.B. 8 was passed by both chambers of the General Assembly, Gov. Andy Beshear (D) threw a punch at the General Assembly and vetoed the entire bill through the release of a scathing April 8, 2022, press release.[2] Nevertheless, H.B. 8 still became law after the General Assembly easily shook off the blow and overrode the veto a few days later through its Republican supermajority — a precursor for what was to come next.

For all other prior amnesty programs, any controversy surrounding a program generally ends once it becomes law; however, when it came to the 2022 amnesty, legislating the program was just round one.

Despite the statutory requirement to have an amnesty program either in the fall of 2022 (or 2023 at the latest if the department had to administer it itself), when the bell rang, the amnesty program never got close to getting up from its corner. For example, leading up to what should have been the start of a fall 2022 amnesty program, the department issued a request for proposal (RFP) looking to procure a third party to administer the program, but the RFP was bare bones at best regarding details of the program and, most importantly, no funds were associated with the RFP to pay the vendor. Thus, no third party was procured in 2022, and the effort was viewed by most as half-hearted and pointless, which Beshear predicted in a June 8, 2022, letter to the General Assembly.[3]

One year later, leading up to what should have been an amnesty program in the fall of 2023 administered by the department itself, the department brazenly ignored its statutory duty and did not administer an amnesty program itself in 2023. The General Assembly privately and publicly criticized the department for such actions, which then led to a finger-pointing standoff between the two. The department continued to blame the General Assembly's lack of additional funds to either procure a third party or hire additional staff and implement a new system to administer the program internally, given its stretched resources following the COVID-19 pandemic. While they ended 2023 quiet on the topic of amnesty, it was assumed that neither party had hung up their gloves.

Despite this standoff, the General Assembly reentered the ring in 2024 by again legislating an amnesty program, seemingly to again force the hand of the executive branch (which houses the Department of Revenue). With the same substantive standards and parameters as the 2022 legislation, 2024 H.B. 8 again requires the department to procure a third party to administer an amnesty program to occur in the fall of 2024; should the department be unable to procure a third party, it must administer an amnesty program internally in the fall of 2025. However, as a one-two punch, the General Assembly still did not appropriate any additional funds to the department to administer the program.

As a result, the governor fought back through a line-item veto of the amnesty provisions and another tax provision of 2024 H.B. 8 (rather than vetoing the whole bill), claiming that until funds are appropriated to do so, no amnesty can be had in the commonwealth. Taking another unprecedented turn, despite the governor's veto of these provisions, the General Assembly decided not to override the veto, as has become its common practice with governor vetoes, but instead simply ignored the governor's actions as being unauthorized and unconstitutional, and sent the bill on for filing with the secretary of state to become law.[4]

Even though the General Assembly, having a Republican supermajority, had the power and ability to override the governor's veto, it maintained that the bill was a "revenue" bill, not an "appropriations" bill, and thus, the governor was not within his power to line-item veto any portion of the bill. Thus, the General Assembly instead ignored the governor's actions, rather than overriding and risking admission that such veto power was authorized.

This has not been the first time in the ring for the governor's administration and General Assembly when it comes to Kentucky lawmaking and administrating over the last five years; however, it wouldn't have been most people's bet that a tax amnesty program (or an H.B. 8 sales tax exemption for gold bullion that was also "vetoed" by the governor) would be at the center of their next matchup.

While it has been anticipated that litigation over the proper procedural path for this issue could be looming, the fight recently moved to the next round with the Kentucky attorney general entering the fray. On May 20, 2024, by request of House Speaker David Osborne (R) and Senate President Robert Stivers (R), Kentucky Attorney General Russell Coleman (R) issued a formal opinion concluding that the governor's actions regarding H.B. 8 were not in conformity with his constitutional veto powers.[5]

In particular, the AG found that H.B. 8 was not an appropriations bill, but rather a "revenue raising" bill, and that the governor's actions were outside his constitutional vetoing powers. Thus, the involved provisions of H.B. 8 did in fact become Kentucky law on the stated effective date, and the AG found that the compiler of the Kentucky statutes is statutorily obligated to include the purported line-item-vetoed language in the Kentucky revised statutes.

Despite H.B. 8 being enacted into law with the tax amnesty included, and the AG's recent opinion, as of the date of this article, the department's public position on its own website is still that the line-item vetoes were authorized, and thus no tax amnesty is to occur (and gold bullion is now subject to sales tax).[6]

Further litigation on this provision remains a possibility. In the meantime, what are taxpayers to do and what is truly the fight prize from potential amnesty revenue?

In early 2022, it was forecasted that the likely revenue from the tax amnesty program would be north of $100 million, potentially as high as $150 million. With the General Assembly's continued push for cutting individual income tax rates, and the legislative mechanism used to determine whether there is sufficient budget surplus to implement respective (future) rate cuts, this shortfall of $100 million to $150 million brought about by the department not implementing tax amnesty could prevent future rounds of individual income tax cuts.

Beyond that impact, other serious questions exist as well. For example, Ky. Rev. Stat. Ann. section 131.440 mandates an additional penalty for taxpayers that are found to owe taxes for the amnesty periods but did not come forward — but what is the impact on these penalties if amnesty never happened? And more to the point, how does an administrative agency simply ignore clear statutory directives, and what kind of precedent does this set for future statutory directives for administrative agencies?

At this point, it is unclear if a knockout punch is on the horizon or whether the two sides will end amnesty in a draw. But as we approach fall 2024, Kentucky taxpayers should be keeping a close eye on whether the commonwealth will add another amnesty championship belt to its collection. We continue to monitor the development of tax amnesty in Kentucky.

[1] See 2022 Ky. Acts Ch. 212.
[2] Kentucky Office of the Governor, H.B. 8 veto press release (Apr. 8, 2022).
[3] Kentucky Office of the Governor, letter from Gov. Andy Beshear to Kentucky General Assembly.
[4] *See, e.g.,* Sylvia Goodman and Joe Sonka, "GOP-Led Kentucky Legislature Quickly Dispatches Beshear Vetoes," Kentucky Public Radio (Apr. 12, 2024).
[5] Kentucky Office of the Attorney General, OAG-24-06 (May 20, 2024).
[6] *See* Kentucky Department of Revenue, "Notice of Governor's Veto of Sales Tax Exemption for Bullion and Tax Amnesty Provisions" (last visited July 11, 2024).