Long-Awaited Publishing of Kentucky Department of Revenue Administrative Writings – Will They or Won't They?

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While the 2024 Kentucky Legislative Session was pretty quiet on the tax reform front, there was one item that flew under the radar for many but that could have a significant impact on Kentucky taxpayers as well as tax professionals in the longstanding quest for more tax transparency and guidance.

As a part of a larger appropriations bill, 2024 House Bill (H.B.) 8 amended KRS 131.190 and corollary statutes to require the Kentucky Department of Revenue to "publish administrative writings on its official website." Such legislation was intended to further compel the Department to contemporaneously publish a wider array of past and ongoing guidance for taxpayers after many would say it has continued to drag its feet in publishing administrative guidance after prior legislative and judicial directives.

Specifically, the legislation amended KRS 131.010 to provide that the administrative writings that the Department must now publish on its website include final rulings, manuals and training procedures, presentations, technical advice memoranda, general information letters, and private letter rulings. While the legislation provides that all such writings should be redacted to the degree necessary to protect taxpayer confidentiality, importantly, it also requires that the writings be published on the Department's website *no later than 120 days after the writing's date of issuance or finalization*.

As noted, this is not the first legislative effort for more tax transparency in the Commonwealth. H.B. 8's provisions as to the Department's administrative writings are but another step in a string of legislative and judicial efforts made over the last several years to chip away at the Department's historically guarded administrative guidance. In 2017, the Kentucky General Assembly amended the Kentucky Taxpayer Bill of Rights [KRS 131.130(1), *et. seq*

.] to require the Department to publish its administrative writings to assist taxpayers in "understanding and interpreting the tax laws…" [KRS 131.130(8)]. However, despite this statutory directive and further legislation passed in 2018 to expand taxpayer rights generally,[1] only minimal writings have been published.

It was this lack of transparency following the adoption of the Taxpayer Bill of Rights in the 1990s that led to litigation thereafter challenging the Department's lack of transparency. In *Dep't of Revenue v. Mark Sommer*,[2] an action was brought against the Department when it refused to turn over redacted versions of its final rulings issued, both appealed and not appealed to the Kentucky Board of Tax Appeals, in response to the taxpayer's open records request. While the Department argued that its duty to maintain taxpayer confidentiality prohibited it from producing these rulings, even if redacted, the Kentucky judiciary disagreed. The Courts ruled that the Department's duty to maintain taxpayer confidentiality, when presented with the ability to redact such writings, did not outweigh its duty of transparency. Therein, the Department was ordered to respond to the taxpayer's open records request and release the requested final rulings (in a redacted format as was requested in the initial request). This followed a similar decision in which the Kentucky Court of Appeals affirmed the decision of the lower court to order the release of certain administrative writings relating to taxpayers subject to the Utility License Tax pursuant to the Kentucky Open Records Act. *Dep't of Revenue v. Timothy J. Eifler*.[3]

As further indicia of the Department's narrow interpretation of transparency, just after the on-going appeal in the *Sommer* case, in 2019 the Department went to the General Assembly to change the Kentucky Open Records Act to prohibit it from producing unappealed final rulings, requests for guidance under the Taxpayer Bill of Rights, private letter rulings, and requests for alternative apportionment.[4] While this legislation was signed into law by the Governor, just a week later, the legislative leaders made several public comments that the true intent of the Department's request for the legislation had not been explained, and consequently the General Assembly legislatively repealed its weeks old open records bar concerning tax transparency.

In the years since the *Sommer* decision, the Department has continued this trend of slow-walking transparency efforts in Kentucky despite the previously mentioned expansion of Kentucky's Taxpayer Bill of Rights in 2017 and the 2019 legislation. While the litigation and past legislative efforts did lead to some further publishing of guidance by the Department, it is not in an easily searchable format on its website, and it does not appear that any new final rulings or guidance have been posted since that time (with 2016 being the most recent final ruling, 2021 the most recent TAM and PLR, and 2019 the most recent GIL and Training Manuals published on its website).

Enough was enough according to the General Assembly, and so H.B. 8 was intended to make it even clearer that not only does the Department have a statutory duty to publish needed guidance for taxpayers and the tax community in furtherance of transparency, but it is also required to promptly and consistently publish same on its website—now within 120 days. This includes all current tax forms and instructions.

However, the question now is when will the Department start adhering to this statutory requirement?

The above portions became effective beginning July 15, 2024—yet, no new administrative writings appear to have been published to date by the Department. The 120-day window since the effective date of H.B. 8 runs on November 15, 2024. Presumably, all administrative writings that had already become final within 120 days prior to the effective date should have been published shortly after the effective date. However, no public statement as to the timing of when taxpayers can expect administrative writings to be published has been made by the Department.

Is it just administrative backlog and such guidance will be coming any day, or will the Department refuse to carry-out this portion of H.B. 8 as it is currently doing with certain other tax provisions enacted by H.B. 8,[5] involving tax amnesty and precious metals like gold bullion being exempt from sales tax? Its recent track record seems to indicate the latter, but only time will tell. And with each day it does not publish such critical guidance, the more it is ignoring the General Assembly's directives, and the further out-of-line

Kentucky moves in regard to being a fair, transparent and business friendly state compared to its peer states.

All seven states that border Kentucky have much more robust tax transparency. Publishing administrative guidance on its website is par for the course for most state taxing agencies. In several of Kentucky's neighboring states, for instance, contemporaneous website publication of various guidance from the departments of revenue has been happening for many years. For example, in Indiana items such as information bulletins, letters of finding, revenue rulings, and audit manuals are virtually simultaneously with issue date posted on its website, and regularly updated, to assist taxpayers and tax professionals on a variety of important state and local tax issues. Similarly, the Tennessee Department of Revenue freely publishes tax manuals, tax rulings, notices, articles, conference summaries, legislative summaries, and archived resources. Thus, for many years now, Kentucky has been behind the curve in terms of taxing authority transparency.

As reiterated by the Kentucky Supreme Court in *Sommer*, transparency for taxpayers should be a highly respected and adhered to policy by the Department. It is past time for the Department to do so, but until it does, all that can be done is to continue to monitor the Department's website and help push for Kentucky to be a more transparent taxing authority. For more information regarding Kentucky taxation, visit FBT's Tax Law Defined Blog.

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[1] *See* 2018 H.B. 487.

[2] *Department of Revenue v. Mark F. Sommer and Tax Analysts (Intervenor)*, Civil Action No. 13-CI-00029 (Franklin. Cir. Ct. 2014), *aff'd* No. 2015-CA-001128-MR, 2017 WL 127730 (Ky. App. 2017), *aff'd* 2017-SC-00041 (Ky. 2018).

[3] No. 2012-CA-000302 (Ky. App. 2013), *motion for discretionary review denied* No. 2013-SC-737-D (Ky. 2014), *aff'g* Civil Action No. 10-CI-01640 (Franklin Cir. Ct. Jan. 23, 2012).

[4] *See* 2019 H.B. 354.

[5] *See* Kentucky Tax Amnesty After All?