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Client Alert: Ohio Consumer Use Tax Update: Period Open to Assessment Disputed Under New Law

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CLIENT ALERT | 8.25.2011

If your business is under a consumer use tax audit that includes any period prior to January 1, 2008, you should be aware that the Ohio Department of Taxation has taken the position that a recent change in the law limiting the department's ability to assess tax due for periods prior to January 1, 2008 does not apply when the taxpayer signed a waiver extending the statute of limitations for that pre-2008 period.

On June 30, 2011, Governor Kasich signed into law Am. Sub. H.B. 153, Ohio's 2012-2013 budget bill. That legislation included two changes impacting consumer use tax liabilities. First, the General Assembly created a consumer use tax amnesty program, which provides that a consumer that successfully enrolls and participates in the program is responsible for any unpaid consumer use tax on transactions made from January 1, 2009 forward. However, the program is not available to any consumer against whom the tax commissioner issued an assessment prior to the effective date of the amnesty legislation.

The second change concerns a general limitation on consumer use tax assessments. Under H.B. 153, the tax commissioner may audit and assess tax, penalties and interest against any consumer who does not participate in the consumer use tax amnesty program. However, the assessment may not include any liability for unpaid consumer use tax that was due prior to January 1, 2008. In other words, liability seems to be limited to consumer use tax liabilities owed from January 1, 2008 forward. There are no qualification requirements for this express limitation period.

Nevertheless, the department has taken the informal position that this express limitation provision does not apply when the taxpayer has signed a waiver of the usual statute of limitations. As a result, the department has stepped-up efforts to complete audits and issue consumer use tax assessments. Even taxpayers who may have been advised previously that the department would cease its review of periods prior to January 1, 2008 may find themselves faced with renewed efforts to bring those periods to assessment.

Despite the department's position, we believe that there are strong legal arguments that support limiting the commissioner's authority to assess only periods after January 1, 2008. The language contained in H.B. 153 does not make an exception for instances where an audit has already begun. Rather, the law plainly states that the tax commissioner "shall not make or issue an assessment" on any consumer use tax due prior to January 1, 2008.

We continue to engage the department in a dialogue regarding H.B. 153's language in an effort to defend taxpayers from assessments that are outside of the tax commissioner's authority to issue. We are encouraged by the department's willingness to engage in informal discussions and believe there are ways to resolve the dispute on pre-January 2008 consumer use tax liabilities.

If you are currently under a consumer use tax audit and have signed a statute of limitations waiver covering any period prior to January 1, 2008, we recommend seeking the advice of experienced counsel before the department issues any assessment. Taxpayers should consider all options to legally minimize tax risks and liabilities.

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