

PUBLICATION

Spotlight on Ohio: By Change in Policy, Department of Taxation Will Now Accept Voluntary Disclosure Agreements for Commercial Activity Tax

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Beginning on July 1, 2005, Ohio imposed a controversial commercial activity tax (CAT) on the gross receipts of most types of entities doing business in Ohio. With its revised Information Release (IR) 2008-01 issued in May 2009, the Ohio Department of Taxation (Department) announced that it will now begin accepting Voluntary Disclosure Agreements (VDA) from businesses that are not in compliance with CAT.

Tax Jurisdiction, Receipts Sourcing, and Penalties

The CAT was designed in part to expand Ohio's tax base by imposing a gross receipts tax on businesses that have an "economic," although not physical, presence within Ohio. Many businesses that historically did not have Ohio tax return filing obligations prior to July 1, 2005 were caught by the CAT's expansive statutory tax jurisdiction and by the manner through which gross receipts are sourced for CAT purposes, particularly gross receipts from services. For example, any person with at least \$500,000 of gross receipts sourced to Ohio in any calendar taxable year is deemed subject to Ohio's CAT taxing jurisdiction. In general, gross receipts are sourced to Ohio if tangible personal property is sold to a customer in Ohio or if a service is received in Ohio. The CAT compliance burden is further complicated because of different filing methodologies, depending on whether taxable gross receipts exceed \$1 million and if a business is part of an affiliated group.

The failure to comply with these complex CAT requirements can result in penalties. For example, the failure to comply with the return filing requirements will result in a penalty of 10% of the CAT due. If additional CAT is owed, a 15% penalty is added. If a taxpayer fails to register within 60 days of notification by the Department, a penalty equal to 35% of the CAT due may be assessed.

Voluntary Disclosure Agreements

The Department originally issued IR 2008-01 in July 2008, in which the Department stated that a VDA was not offered for CAT because all "issues of non compliance are within the statutes of limitations for assessment." The revised IR 2008-01 issued last month reflects the Department's "change in policy for CAT voluntary disclosure agreements."

Non-compliant businesses now have an opportunity to enter into a VDA, pay CAT and interest due, and receive a waiver of any penalties that otherwise would be imposed. If a business decides to enter into a VDA, it must provide certain information to the Department, agree to register for CAT, agree to file past CAT returns and pay the tax for periods covered by the VDA, and execute a VDA with the Department. There are various other conditions which must also be satisfied, such as the business must enter into and execute the VDA prior to any contact by the Department "through any audit, compliance, or criminal investigation programs."

The Department may be approached on behalf of a taxpayer on an anonymous basis (i.e., the taxpayer's identity will not be known to the Department until the VDA is signed).

A VDA is a helpful compliance tool that can be used by businesses to close past tax years for which returns have not been filed, while mitigating penalty exposure. On occasion, the look-back period can be limited. If you

are interested in considering whether to participate in this VDA program for the Ohio CAT, please contact one of the attorneys in our Tax Department.