Michigan Department of TREASURY UPDATE

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Archives of Treasury Update can be found on the website at **Michigan.gov/Treasury** *under the* ***Reports and Legal Resources*** *tab.*

Alternative Dispute Resolution Coming Soon to a Dispute Near You

On December 20, 2017, 2017 PA 215 ("PA 215") was signed into law by Governor Snyder. This new legislation amends Sections 21 and 28 of the Revenue Act (MCL 205.21 and 205.28) to provide for a new, non-judicial dispute resolution process for certain tax disputes. Prior to the passage of PA 215, Treasury was able to resolve disputes with taxpayers through negotiated settlement only within the confines of the judicial process; that is, after the taxpayer had timely appealed a contested matter to the Michigan Tax Tribunal or to the Michigan Court of Claims. Under the provisions of the new legislation, Treasury has the authority to settle tax disputes with taxpayers by accepting less than the full amount of tax in dispute, or increasing the amount of a taxpayer's refund, prior to the commencement of litigation.

The new alternative dispute resolution process is available to taxpayers who have made a timely request for informal conference pursuant to MCL 205.21(2)(c). A taxpayer may make a settlement proposal at almost any time during the informal conference process. The only timing restriction is that a taxpayer may not request settlement consideration of its dispute more than 21 days after the date the informal conference was held. After that point, settlement may not be requested as part of the informal litigation conference process, and may only be pursued through the traditional route.

Settlement under the new procedure is discretionary, and the statute does not state specific criteria Treasury must use when reviewing and evaluating settlement proposals submitted by taxpayers. In general, Treasury may consider settling a dispute with a taxpayer if, after taking into consideration the factual and legal issues involved, it is in the State's best interests to accept a lesser amount of tax than Treasury previously determined was owed or to increase the taxpayer's previously determined refund amount. It is important to note doubt as to the taxpayer's ability to pay or Treasury's ability to collect the determined tax may not be used as a basis for settlement. Treasury is developing an application form and written guidelines for taxpayers who intend to take advantage of the new alternative dispute resolution procedure. The application form and guidelines are expected to be published on Treasury's website soon. These

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Recently Issued Guidance from Treasury

Revenue Administrative Bulletins

RAB 2017-25
Individual Income Tax – Tax Treatment of Retirement Income From IRC 403(b) Plans

RAB 2017-26
Tax Base for the Transfer of a Vehicle, ORV, Manufactured Home, Aircraft, Snowmobile, or Watercraft

RAB 2018-2
Marihuana Provisioning Center Tax and Sales and Use Tax Treatment of Marihuana

Notice to Taxpayers Regarding Alternate Dispute Resolution

Notice to Taxpayers Regarding Direct Pay Authoritization Letters

Notice to Taxpayers Regarding Dental Prosthesis

Revenue Administrative Bulletins (RAB) can be found on the website at **Michigan.gov/Treasury** *under the* ***Reports and Legal Resources*** *tab.*

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comprehensive materials will help guide taxpayers through the process that must be followed to submit a valid settlement proposal in accordance with PA 215.

In general, the process outlined in the new legislation requires any settlement offer submitted to Treasury by a taxpayer be in writing and specifically identify (i) the issues in dispute to be settled, (ii) the amount of the settlement offer, and (iii) a statement of the factual and legal bases supporting the taxpayer's settlement offer. The taxpayer must also include any documentation supporting its settlement proposal. The forthcoming guidelines will explain the statutory requirements in more detail.

Treasury will decide whether to accept, reject, or counter each settlement offer that is submitted, and the taxpayer will be notified of Treasury's decision in writing. If the taxpayer's proposal is rejected at the outset for failure to meet the statutory requirements, Treasury will notify the taxpayer and specify the reason or reasons the proposal failed to meet the statutory requirements. This will enable the taxpayer to submit a new settlement proposal that satisfies the required elements, should the taxpayer determine to do so. If a settlement offer is not accepted for substantive reasons Treasury will include in the written notification to the taxpayer the factual and legal bases for Treasury's rejection or counter-offer. A counter-offer made by Treasury may be accepted, rejected, or further countered by the taxpayer.

A settlement proposal may also be initiated by Treasury with respect to any matter pending in the informal conference process. If Treasury determines to pursue settlement in a particular matter, the taxpayer will be notified in writing of Treasury's settlement offer.

If a settlement offer does not ultimately result in a settlement, or if only some of the pending issues are settled, the informal conference process will proceed as provided in MCL 205.21(2), unless the taxpayer files a written notice of withdrawal. If Treasury accepts the taxpayer's settlement offer or counter-offer, or the taxpayer accepts Treasury's settlement offer or counter-offer, the parties will execute a written agreement outlining the terms of the settlement. The settlement agreement will be prepared by Treasury. Depending upon the terms of the settlement, Treasury will then issue a final assessment or a refund to the taxpayer that reflects the agreed-upon amount of liability (or refund) as to the settled issues.

One of the most important things for taxpayers to understand about the new alternative dispute resolution procedure is that a settlement constitutes a final resolution of a disputed matter. A final assessment or refund issued pursuant to a settlement offer that is accepted

under the new procedure is not subject to any further challenge or appeal under the Revenue Act, nor is it reviewable in any court by mandamus, appeal, or other method of direct or collateral attack. In other words, settlement extinguishes the taxpayer's right to appeal the settled issues to the Michigan Tax Tribunal, the Michigan Court of Claims, or any other court. This restriction will be clearly reflected in the settlement agreement executed by the parties.

Another key aspect of the alternative dispute resolution procedure is that it is strictly confined by the statute to matters for which the taxpayer has timely submitted a request for informal conference pursuant to MCL 205.21(2)(c). Taxpayers have 60 days after the issuance of an intent to assess, a credit audit, or a refund denial to request an informal conference. Accordingly, taxpayers wishing to take advantage of the new procedure should be especially careful not to let their right to administrative appeal lapse. Timeliness will be confirmed by the acknowledgement of the taxpayer's request for informal conference by the Hearings Division. The circumscription of the alternative dispute resolution procedure to the informal conference process means that settlement proposals or offers to negotiate tax liability will not be entertained at any time prior to the start of the informal conference process, such as during audit.

Finally, settlement offers, counter-offers, responses, settlement agreements, and the disposition of any settlement offer or counter-offer, may not be offered by any party in litigation as proof of the validity of Treasury's position, or of the proper amount of the taxpayer's tax liability. All such documents are also exempt from disclosure under the Freedom of Information Act, and may not be obtained through discovery in any proceeding.

Unitary Business Groups Claiming the Small Business Alternative Credit Under the MBT not Subject to Certain Disqualifiers

In *D'Agostini Land Company, LLC v Dep't of Treasury*, ___ Mich App ___ (2018), the Michigan Court of Appeals determined that the income/distributive share disqualifiers of the small business alternative credit do not apply to a unitary business group (UBG) claiming the credit under the Michigan Business Tax (MBT) Act. The published decision rejects Treasury's published guidance in MBT Frequently Asked Question C41, which indicates that when the income/distributive share of an officer or shareholder of any one member of a UBG exceeds the disqualifying threshold of $180,000, the disqualification applies to the entire UBG.

The UBG, represented by its designated member, the D'Agostini Land

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About *Treasury Update*

***Treasury Update** is a periodic publication of the Tax Policy Division of the Michigan Department of Treasury.*

It is distributed for general information purposes only and discusses topics of broad applicability. It is not intended to constitute legal, tax or other advice. For information or advice regarding your specific tax situation, please contact your tax professional.

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Statement of Acquiescence/ Non-Acquiescence Regarding Certain Court Decisions

In each issue of the quarterly Treasury Update, Treasury will publish a list of final (unappealed), non-binding, adverse decisions issued by the Court of Appeals, the Court of Claims and the Michigan Tax Tribunal, and state its acquiescence or non-acquiescence with respect to each. The current quarterly list applying Treasury's acquiescence policy appears below. "Acquiescence" means that Treasury accepts the holding of the court in that case and will follow it in similar cases with the same controlling facts. However, "acquiescence" does not necessarily indicate Treasury's approval of the reasoning used by the court in that decision. "Non-acquiescence" means that Treasury disagrees with the holding of the court and will not follow the decision in similar matters involving other taxpayers.

ACQUIESCENCE:
No cases this quarter

NON-ACQUIESCENCE:
No cases this quarter

Unitary Business Groups continued from page 3

Company, LLC, had gross receipts and adjusted business income below the statutory thresholds of $20,000,000 and $1,300,000, respectively and was therefore eligible to claim the credit. Treasury disallowed the credit, however, because one of the UBG's member entities paid its entire adjusted business income, which exceeded $180,000, entirely to its sole officer, breaching the distributive share disqualifier.

The Court of Appeals reasoned that the income/distributive share disqualifiers of the MBT do not apply to UBGs because sections 1417(a) and (b) of the MBT Act specifically identify the entity types subject to the disqualifiers but omit UBGs from the list. In so holding, the Court of Appeals rejected the policy argument that the Legislature could not have intended a UBG to benefit from a tax credit designed for small businesses when one of its members would not qualify filing individually.

The published decision affects UBG taxpayers under the MBT only. The CIT expressly identifies UBGs as subject to the income/distributive share disqualifiers. The Department has not yet decided whether to seek leave to appeal.

Change in SUW Filing Frequency

The General Sales Tax Act (GSTA) requires taxpayers to file a return and remit sales tax on a monthly basis. MCL 205.56(1). However, the GSTA also gives Treasury the authority to require filing of returns and remittance of tax on a basis other than monthly if it is necessary to "provide a more efficient administration" of the GSTA. MCL 205.56(4). Treasury has exercised this authority by requiring taxpayers under certain tax liability thresholds to file a quarterly or annual return, rather than a monthly return. Treasury has not updated the filing thresholds in recent years, however, Treasury is currently reviewing the thresholds and is adjusting them on an ongoing basis as needed to more efficiently administer the GSTA. Changes to filing frequency for a taxpayer will be prospective only. Treasury will notify taxpayers if their filing frequency has changed. Taxpayers should continue filing based on the frequency Treasury has previously required unless Treasury notifies the taxpayer of a change.

Prime Time Int'l Distrib, Inc v Dep't of Treasury

Appeals court rules that circuit courts have exclusive jurisdiction to hear appeals involving seizures of contraband under the Tobacco Products Tax Act

In a published opinion issued November 16, 2017, *Prime Time Int'l Distrib, Inc v Dep't of Treasury,* ___ Mich App ___ (Docket No. 335913), the Michigan Court of Appeals affirmed the Court of Claims and held that the circuit courts have exclusive jurisdiction to hear appeals involving seizures of contraband under the Tobacco Products Tax Act ("TPTA") notwithstanding the 2013 amendments to the Revised Judicature Act ("RJA"). The interplay between the following three statutory provisions was at issue:.

Section 9(4) of the TPTA, MCL 205.429(4): "If a person is aggrieved by the decision of the department, that person may appeal to the circuit court of the county where the seizure was made to obtain a judicial determination of the lawfulness of the seizure and forfeiture…."

Section 6419(1)(a) of the RJA, MCL 600.6419(1)(a): Except as provided in sections 6421 and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, is exclusive….Except as otherwise provided in this section, the court has the following power and jurisdiction: To hear and determine any claim or demand, statutory or constitutional, … or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers notwithstanding another law that confers jurisdiction of the case in the circuit court."

Section 6419(1)(5) of the RJA, MCL 600.6419(5): "This chapter does not deprive the circuit court of exclusive jurisdiction over appeals from the district court and administrative agencies as authorized by law."

Citing to the "plain and clear language" in MCL 205.429(4), the Court of Appeals held that appeals regarding seizures of contraband were to be made in the applicable circuit court and not in "an appellate court, to the Court of Claims, or any other judicial body." In reaching this conclusion, the Court of Appeals determined MCL 600.6419(5) applied because MCL 205.429(4) vested "exclusive" jurisdiction over these appeals in the circuit courts.

As a published opinion, this decision by the Court of Appeals constitutes binding precedent. Treasury will update the applicable appeal rights language in its correspondence consistent with this decision.

Direct Pay Authorization Letters No Longer Required Upon Purchase

Direct payment authorization, also known as a "direct pay permit," is a discretionary authorization granted by Treasury that permits a taxpayer to self-accrue and directly remit to the Department use tax due on purchases or leases of tangible personal property or services. MCL 205.98. Approved taxpayers receive an authorization letter from Treasury, which includes information such as the types of property excluded from the direct pay authorization. A corresponding provision in the General Sales Tax Act exempts a seller from sales tax on a sale to a direct pay permit holder claiming "direct pay" exemption. MCL 205.54a(1)(n).

In order to make a claim under a direct pay authorization, at the time of purchase or lease of eligible property, a direct pay permit holder has historically been required to provide a copy of its authorization letter to a seller or lessor in addition to an exemption certificate and its account number. See RAB 2016-14, Sales and Use Tax Exemption Claim Procedures and Formats. Pursuant to the Department's 'notice' a direct pay permit holder is no longer

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Direct Pay Authorization continued from page 5

required to provide a copy of its authorization letter to a seller or lessor. All other applicable exemption requirements still apply to sellers, and all other conditions set forth in an authorization letter must be honored by permit holders.

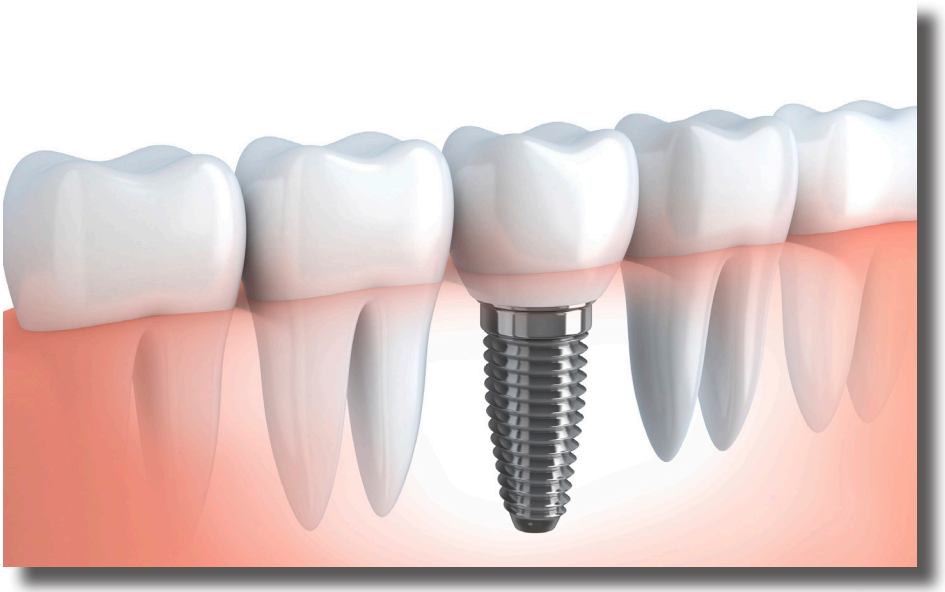
Except for the sections that require a copy of an authorization letter to be provided to a seller, RAB 2000-3, Sales and Use Tax Direct Pay Requirements remains in effect. Additional Treasury guidance will be reviewed and revised to reflect the change in policy.

Dental Prostheses Now Exempt

In the June 2017 issue of Michigan Department of *Treasury Update*, Treasury revoked Letter Ruling 1985-20 due to changes in law made by 2004 Public Acts 172 and 173. Prior to its revocation, LR 85-20 provided that dental labs that sold dental prostheses were engaging in a nontaxable service rather than the sale of tangible personal property. LR 85-20 also concluded that because there was no retail sale of tangible personal property, dental labs were not eligible for the industrial processing exemption.

Michigan recently enacted 2017 Public Acts 218, 219, 220, and 221 (Acts). The Acts exempt "dental prostheses" from sales and use tax. The Acts define "dental prosthesis" as a "bridge, crown, denture, or other similar artificial device used to repair or replace intraoral defects such as missing teeth, missing parts of teeth, and missing soft or hard structures of the jaw or palate." Unlike the sale of other exempt devices, such as durable medical equipment or other types of prosthetic devices, this is a per se exemption. Therefore, there is no requirement that dental prostheses be dispensed pursuant to a prescription.

For more information regarding the Acts, see Treasury's Notice Regarding Dental Prosthesis Exemption, available on Treasury's website.



Efforts to Collect Unpaid Sales Tax from Out of State Sellers

States and local governments lost an estimated $26 billion in 2015 from uncollected sales and use taxes from out-of-state sellers, (Nat'l Conf of State Legislators, "Remote Sales Tax Collection", www.ncsl.org). The inability of States to collect this money is tied to the 1992 U.S. Supreme Court decision *Quill Corp v North Dakota,* 504 U.S. 298 (1992), which held that States cannot require out-of-state sellers to collect and remit tax on sales to consumers within a State unless the out-of-state seller has a physical presence in the State. In today's digital economy, the *Quill* decision poses a real threat for States that depend on these tax revenues to fund roads and schools. The decision also puts traditional brick-and-mortar retailers—businesses that create jobs within the states and localities—at a disadvantage because these local retailers do not have a choice to comply with state tax laws.

In response to *Quill*, states have enacted various legislative fixes to attempt to collect the billions of dollars of sales and use taxes owed to them by out-of-state sellers. In 2016, South Dakota enacted legislation requiring out-of-state retailers to collect and remit sales and use tax if they annually conduct with South Dakota residents either $100,000 worth of business, or 200 separate transactions. This type of statute is

referred to as an economic presence statute.
The South Dakota legislation was designed as a direct response to U.S. Supreme Court Justice Kennedy's concurring opinion in 2015 in *Direct Marketing Association v Brohl,* 575 US___ (2015), where he stated:

"The Internet has caused far-reaching systemic and structural changes in the economy, and, indeed, in many other societal dimensions. Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront…Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term. Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier."

Shortly after South Dakota enacted its economic presence statute, litigation ensued. Wayfair, Overstock.com, and Newegg contested the new statute and the South Dakota Supreme Court found the remote sellers law unconstitutional.

South Dakota petitioned the U.S. Supreme Court to appeal the decision asking the Court to hear the case and to set aside the *Quill* physical presence rule. Fifteen organizations have filed amicus briefs supporting South Dakota, including the National Association of Wholesalers and the National Retail Federation. On January 12, 2018, the U.S. Supreme Court granted South Dakota's petition. Oral arguments are scheduled for April 17, 2018.

All Things Advocate: Whats New?

Treasury has made some notable changes in how taxpayers and practitioners will file amended returns for the 2017 tax year. Below, we've highlighted some that deserve your attention:

Amending MI-1040 Returns: Check the Box & Complete the New Schedule

Beginning with tax year 2017 there is a new way to file amended Individual Income Tax (IIT) returns. If you find the need to amend your client's 2017 return you will need to complete and file a new MI-1040 form, check the Amended Return box on the top of page 1, complete the newly added Line 31, and complete and file the new Michigan Amended Return Explanation of Changes (Schedule AMD). As always, it is important that you also include all applicable schedules and supporting documentation with the amended return. The new Schedule AMD can be found here.

E-Filing Amended Michigan & Amended Detroit IIT Returns

Tax year 2017 is the first year in Treasury's history that taxpayers and practitioners will be able to e-file both Michigan and Detroit amended IIT returns. To learn more about e-filing go to www.mifastfile.org

Amending Homestead Property Tax or Home Heating Credit

Taxpayers or practitioners amending only a homestead property tax or home heating credit, must file a new MI-1040CR, MI-1040CR-2, or MI-1040CR-7 and check the Amended Return box on the top of page 1 of each credit claim. Do not file a new MI-1040 or Schedule AMD. Credit only returns are not eligible to be e-filed.

Amending Tax Years 2012 – 2016

Taxpayers and practitioners needing to amend tax years 2012 through 2016 must continue to use the MI-1040X-12 form which cannot be e-filed. The MI-1040X-12 can be found here.

Lastly, taxpayers and practitioners will want to take note that all Michigan IIT returns must be e-filed or postmarked by **Tuesday, April 17, 2018** (rather than the traditional April 15).