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PENALTY WAIVER UNDER TREASURY'S TAXPAYER INITIATED DISCLOSURE PROGRAM

Many taxpayers and practitioners are familiar with Treasury's Voluntary Disclosure program, where non-filers can come forward voluntarily and obtain a penalty waiver with respect to delinquent taxes owed as well as a reduced lookback period. Participants must meet all of the program's eligibility requirements, and must sign a document formally agreeing to file past and future tax returns. Voluntary Disclosure Agreements are specifically authorized by the Revenue Act (MCL 205.30c). Because the program is based in statute, it is restrictive in nature.

However, a person that does not qualify for the Voluntary Disclosure program may be eligible for a penalty waiver under Treasury's Taxpayer Initiated Disclosure program. This administrative program permits a person to voluntarily disclose and pay a tax deficiency without imposition of penalties by Treasury. The most important difference between Voluntary Disclosure (authorized by statute) and Taxpayer Initiated Disclosure (administrative) is that reductions to the lookback period are not permitted under Taxpayer Initiated Disclosure – the taxpayer must file returns and pay the tax owed for all filing periods.

Under Taxpayer Initiated Disclosure, a person (either a non-filer or a current taxpayer) may disclose and pay any prior period tax deficiency, provided that there has been no previous contact by Treasury. An initial letter of inquiry from Treasury is not considered a previous contact. However, a person will not qualify for the penalty waiver after receiving a final letter of inquiry.

Specifically, no penalty will be applied to tax deficiencies disclosed on and paid with amended tax returns under Taxpayer Initiated Disclosure, provided that:

- There has been no previous contact by Treasury.
- The taxpayer is not under audit or investigation by Treasury for the tax period involved, and
- The taxpayer or agent pays the tax deficiency and interest in full without further action by Treasury.

Similarly, no penalty will be applied to tax deficiencies disclosed on and paid with the filing of delinquent returns under Taxpayer Initiated Disclosure, provided that:

- There has been no previous contact by Treasury.
- The taxpayer is not under audit or investigation by Treasury.
- The tax period of the return(s) includes the taxpayer's first filing period for that tax, and
- The taxpayer or agent pays the tax deficiency and interest in full without further action by Treasury.

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Whether the person is a current taxpayer or was previously a non-filer, it is necessary to submit a written request to be considered for the Taxpayer Initiated Disclosure program and obtain the penalty waiver; it is not automatic. Participants must complete and submit all of the following:

- A letter that includes full contact information (name, mailing address, phone number, and email address), and clearly attests that the person meets each of the specific qualifications outlined above.
- All appropriate tax returns or worksheets. This is dependent upon the type of tax being disclosed. If the disclosure is for Michigan Business Tax, Corporate Income Tax, Individual Income Tax, or Composite Individual Income Tax, tax returns must be completed and submitted for all tax years. Composite returns require copies of federal tax returns. If the disclosure is for Sales, Use, or Withholding Tax, please see the detailed filing instructions on Treasury's website.
- Full payment of all tax and interest is required. To compute interest, use Treasury's online Penalty and Interest Calculator; simply disregard the penalty calculation. The full amount of tax and interest due may be remitted by check payable to the State of Michigan and/or by separate payments made via MTO (Michigan Treasury Online), a web portal to many business taxes.
- The letter, tax returns or worksheets, and payment (if by check) should be mailed to:

  Discovery and Tax Enforcement Division
  P.O. Box 30140
  Lansing, MI 48909
- The Discovery and Tax Enforcement Division will send a notice acknowledging receipt of all materials received.

For additional information regarding either the Voluntary Disclosure program or the Taxpayer Initiated Disclosure program, please contact Treasury's Discovery and Tax Enforcement Division at P.O. Box 30140, Lansing, MI 48909, or call 517-636-4120.

ALL THINGS ADVOCATE COLUMN

The federal American Rescue Plan Act (ARPA) of 2021 excluded up to $10,200 in unemployment benefit payments received in 2020 from income for those within certain income brackets. Individuals who filed their income tax return(s) prior to the signing of the ARPA, included all unemployment benefit payments as income received in 2020, and have yet to adjust their 2020 state individual income tax return are encouraged to file their amended Michigan return as soon as possible. An amended state tax return may result in an income tax refund or reduce the amount of tax owed.

The following must be submitted with any amended return:

- If the taxpayer has received it, proof that the IRS has adjusted the federal return due to the unemployment exclusion such as, for example, a copy of a federal adjustment letter.
- Schedule AMD, *Amended Return Explanation of Changes* (Form 5530), and all forms and schedules submitted with the original return.
- A copy of the 1099-G that reports unemployment compensation.

Taxpayers should note that the direct deposit of a refund is only available on an original return, so refunds for amended returns will be sent as a paper check in the mail. Please ensure the correct address is on the amended return.

Wishing you all a Happy & Healthy New Year!

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, contact your tax professional.

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SECOND *MAPLE MANOR* CASE AGAINST TREASURY DISMISSED

In July 2020, the Michigan Court of Appeals affirmed the Court of Claims' grant of summary disposition in favor of Treasury in the case of *Maple Manor Rehab Center, LLC, et al. v Dep't of Treasury and Dep't of Health and Human Services*. Now referred to as *Maple Manor I*, that case is discussed in detail in the September 2020 Treasury Update. *Maple Manor I* involved a refund request made by *Maple Manor*, an operator of nursing homes, to recover certain claimed overpayments of a tax known as the Medicaid Long-Term Care Quality Assurance Assessment (QAA). The QAA, which is assessed and administered by the Department of Health and Human Services (DHHS), is part of Michigan's Public Health Code and helps provide funding for state Medicaid programs and services.

In *Maple Manor I*, the Court of Appeals determined that the lower court had lacked subject matter jurisdiction to hear Maple Manor's challenge because Treasury did not issue an appealable adverse decision with respect to Maple Manor's refund request. It further found that the QAA is not subject to the Revenue Act's refund procedures, meaning that Treasury's refusal to process the refund request was similarly not an appealable "decision" under the Revenue Act under which Maple Manor could seek appellate review. The Michigan Supreme Court denied Maple Manor's application for leave to appeal the decision by order dated October 6, 2021.

Pending the Michigan Supreme Court's review of the *Maple Manor I* decision, on May 15, 2021, a second, similar action was brought in the Court of Claims by affiliated plaintiffs, challenging the QAA as well as a closely related tax, the Quality Measure Initiative (QMI), also administered by DHHS. The claims asserted in this second lawsuit, known as *Maple Manor II*, related to the period October 1, 2018, through March 31, 2019. The facts in *Maple Manor II* were only slightly different than those in *Maple Manor I*. DHHS assessed the plaintiffs in *Maple Manor II* for the QAA and QMI in December 2018, after having made protracted efforts to obtain certain information needed to calculate the assessments, information which was not forthcoming. Because DHHS uses calculated assessments to determine state-wide QAA and QMI rates for the following year, and those rates must be federally approved, taxpayers are permitted only a 10-day window to report any discrepancies or otherwise complain about the assessments; any response after the 10-day period results in changes being made on a prospective basis only. Plaintiffs failed to respond within the 10-day period and consequently DHHS sent invoices covering the time periods at issue on January 11, 2019, and again on February 5, 2019.

Shortly after the February invoices were sent, Plaintiffs asserted in a letter to DHHS that the QAA and QMI amounts had been inaccurately calculated for the period at issue. DHHS responded by again requesting the information it had asked for previously. After finally receiving the information, in April 2019, DHHS sent a corrected QAA assessment to Plaintiffs, reiterating that adjustments were made on a prospective basis only, and that the assessment for the period at issue could not be adjusted. Following an unsuccessful administrative appeal, Plaintiffs eventually filed a lawsuit in the Court of Claims, asking the court to declare the non-adjusted amounts assessed by DHHS invalid, and adding Treasury as a defendant based on Plaintiffs' purported right to appeal under the provisions of the Revenue Act.

Both Treasury and DHHS promptly filed motions for summary disposition. Treasury argued that, even more clearly than in *Maple Manor I*, it never made a "decision" with respect to Plaintiffs' claims and accordingly, there was no basis upon which the court could exercise subject-matter jurisdiction over Treasury. On October 20, 2021, the court agreed, holding that Treasury did not issue an appealable adverse decision as to Plaintiffs' claims regarding the contested QAA and QMI amounts, and that, in any case, the assessments at issue are not subject to the refund provisions of the Revenue Act. The court concluded: "Stated otherwise, there is no basis for plaintiffs to petition Treasury for relief with respect to the QAA and QMI. Treasury does not administer the assessments, nor does it have the authority to issue the relief plaintiffs have requested." In granting Treasury's summary disposition motion and dismissing the claims against Treasury, the court further noted that Plaintiffs were attempting to undermine the earlier *Maple Manor I* decision. The court emphasized that *Maple Manor I* remains good law, and that, it was required to apply the Court of Appeals' earlier holding in that case.

The court also dismissed all claims against DHHS, holding that Plaintiffs did not comply with the Court of Claims Act's strict requirements to give notice of an intention to file a claim against the state within one year after the claim at issue has accrued. The court held that the "harm" against Plaintiffs, the event that marks the accrual of the claim, occurred on December 22, 2018, at the expiration of the 10-day appeal period provided by DHHS. The court found the Plaintiffs' attempts to use April 15, 2019, as the date of claim accrual unconvincing and ineffective. Accordingly, the Court of Claims granted both Treasury's and DHHS's motions for summary disposition.

The *Maple Manor II* Plaintiffs recently appealed the matter to the Court of Appeals.

PUBLIC ACT 102 OF 2021 REMOVES THE NOVEMBER 1, 2021, SUNSET OF THE TOBACCO PRODUCTS TAX ACT'S RATE-CAP ON CIGARS

The Tobacco Products Tax Act tax rate of 32% of the wholesale price for cigars was capped at 50 cents per cigar. That 50 cents per cigar cap was set to expire on October 31, 2021, which, effective November 1, 2021, would have resulted in a significant increase in the tax on many cigars, especially premium cigars. For example, the tax of 50 cents on a premium cigar selling for $17.00 per cigar wholesale on October 31, 2021, would have jumped to $5.44 on November 1, 2021. Public Act 102 of 2021 removed the sunset on the 50-cent cap. Consequently, the tax on cigars will continue to be capped at 50 cents per cigar, and Treasury will continue to administer the tax at the capped rate.

COURT OF CLAIMS HOLDS THAT TREASURY'S EVIDENCE OF CERTIFIED MAILING TO TAXPAYER SATISFIED STATUTORY NOTICE REQUIREMENT

On November 12, 2021, the Michigan Court of Claims in *Fleetcor Technologies Operating Co, LLC v Dep't of Treasury*, (Docket No. 21-000173-MT) held that the taxpayer failed to timely file a complaint to appeal underlying sales tax assessments under Section 22 of the Revenue Act , MCL 205.22, and thus the Court was without jurisdiction to hear any challenge to Treasury's assessment. The taxpayer had argued that Treasury had not met the requirements of the Revenue Act in issuing the assessments, and, therefore, the time period for any appeal under MCL 205.22(1) had never commenced. Treasury proved through its certified mail log, the affidavit of the records custodian, and the delivery receipt, however, that it had timely mailed the assessments to the taxpayer's last known address. Treasury also established that it had provided the taxpayer's Treasurer copies of the assessment notices upon his request, thus providing actual notice, and that the taxpayer had still allowed the 90-day period of limitations to file an appeal under MCL 205.22(1) to expire.

The court noted the Michigan Supreme Court's ruling in *Fradco Inc v Dep't of Treasury*, 495 Mich 104, 113 (2014), that the period for appealing an assessment under the Revenue Act does not occur until the "'issuance of an assessment' occurs," which in turn does not occur unless Treasury complies with the Revenue Act's notice requirements. Section 28(1)(a) of the Revenue Act, MCL 205.28(1)(a), requires that notice "must be given either by personal service or by certified mail addressed to the last known address of the taxpayer." The court, citing to *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403 (2011), found that Treasury's production of its certified mail log demonstrating that the assessments were in fact sent by certified mail to the taxpayer's last known address was sufficient evidence to satisfy the statute's demands. The Court further held that taxpayer's claim of non-receipt was irrelevant, again noting the decision in *PIC Maintenance* that lack of receipt "does not change the outcome" once certified mailing to the taxpayer's last known address had been established. The court also noted that even if the taxpayer was correct that evidence of not receiving the assessments relevant and had rebutted Treasury's evidence regarding their issuance, the taxpayer's appeal would still be untimely under the Revenue Act because evidence produced showed that the taxpayer received actual notice of the assessments via a subsequent email from Treasury and the taxpayer still failed to file its appeal within the required 90 days after receiving that actual notice to have invoked the court's jurisdiction to hear the merits of taxpayer's challenge.

The taxpayer has appealed the decision to the Court of Appeals.

RECENTLY ISSUED GUIDANCE FROM TREASURY

Revenue Administrative Bulletins

RAB 2021-17 - Estimated Payments for Individuals and Fiduciaries Under the Michigan Income Tax Act (Issued November 22, 2021)

RAB 2021-18 - Sales and Use Tax Exemption Claim Procedures and Formats (Issued November 22, 2021)

RAB 2021-19 - Part 1 of the Michigan Income Tax Act: Treatment of Alimony and Separate Maintenance Payments

Notices

- Notice to Taxpayers Regarding Sales and Use Tax Exemptions for Feminine Hygiene Products (Issued December 14, 2021)

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TAX EXEMPTION FOR FEMININE HYGIENE PRODUCTS TO TAKE EFFECT IN EARLY 2022

Public Acts 108 and 109 of 2021 amend the General Sales Tax Act and the Use Tax Act, respectively, to exempt the sale of feminine hygiene products from tax. "Feminine hygiene products" is defined in both amendments to mean "tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal property designed for feminine hygiene in connection with the human menstrual cycle." The amendments take effect 90 days after enactment, a measure designed to ensure that retailers have sufficient time to update their point-of-sale systems to designate feminine hygiene products as exempt from tax. Accordingly, the new tax exemptions will take effect on February 3, 2022.

In recent years, there has been robust discussion both in Michigan and nationally about eliminating the so-called "tampon tax" – a comprehensive moniker for state sales taxes imposed on feminine hygiene products. In Michigan, retail sales of feminine hygiene products have long been subject to the state's 6% sales tax and 6% use tax since those products were tangible personal property not exempt by statute. Around the country, however, 22 states have in recent years passed laws eliminating state taxes on feminine hygiene products.

Last year, several women brought a lawsuit against the state of Michigan, alleging that the tax on feminine hygiene products constitutes "sex-based discrimination." Earlier this year, the Michigan Court of Claims denied the women's claims, holding that the taxation of these products is not unconstitutional discrimination and stating that "only the Legislature may impose tax or exempt items from taxation."

As noted, the specific products to be exempt from tax include tampons, panty liners, menstrual cups, sanitary napkins, and "other similar tangible personal property" designed for use in connection with the human menstrual cycle. Treasury expects to publish guidance in the near future defining the term "other similar tangible personal property" for purposes of the new legislation.

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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 nonacquiescence with respect to each. "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.

Continental Rental, Inc v Dep't of Treasury, Michigan Ct of Claims Dkt No. 20-000163-MT (June 17, 2021). Treasury acquiesces in the decision, but only as to cases involving rental-purchase agreements that adhere strictly to the provisions of the Rental-Purchase Agreement Act, MCL 445.951 through 445.970.

ALTERNATIVE DISPUTE RESOLUTION OPTION FOR SETTLING TAX DISPUTES ENTERS 5TH YEAR

Public Act 215 of 2017 amended section 22 of the Revenue Act to allow taxpayers and Treasury to resolve tax disputes without litigation through Alternative Dispute Resolution (ADR). Section 21(2)(e) of the Revenue Act (MCL 205.21(2)(e)) provides, "After a timely request for an informal conference has been made…the taxpayer and the department may seek to settle any or all issues in dispute by submitting a written settlement offer to the other party…."

The ADR program, which is an option under Treasury's informal conference process, is entering its 5th year and has already been used by taxpayers and Treasury to efficiently resolve millions of dollars in tax disputes. While ADR is available for both factual and legal disputes, the process primarily involves a desk review, so factual disputes are often more efficiently resolved through the conduct of the traditional informal conference. The best candidates for ADR tend to be disputes that involve:

- close legal questions with established facts,
- reasonable, specific, and well-developed legal arguments based on statutory interpretation, court cases, Treasury guidance, etc., and
- settlement offers that reasonably reflect the likely litigation risk to each party.

There are specific conditional requirements that must be met for a taxpayer seeking ADR, which include:

- The taxpayer (or Treasury) must make a timely request for an informal conference under section 21 of the Revenue Act and submit its written ADR settlement offer after such request, but no more than 21 days after the informal conference was held.
- The settlement offer must identify:
  - the issues in dispute to be settled,
  - the amount of the settlement offer, and
  - the factual and legal bases supporting the settlement offer (and include any supporting documents).
- A settlement offer presented by a taxpayer must be signed by the taxpayer and not by a third-party representative.

Only matters involving the following taxes may be settled through ADR:

- Single Business Tax
- Michigan Business Tax
- Corporate Income Tax
- Individual Income Tax
- Sales Tax
- Use Tax
- Motor Fuel Tax
- Motor Carrier Fuel Tax (IFTA)
- Severance Tax
- Equalization Tax.

Doubt as to collectability of a tax assessment or debt is not a valid basis for settlement under ADR.

The state treasurer or the state treasurer's designee reviews all requests for ADR that satisfy the program criteria. Taxpayer settlement offers may be accepted, rejected, or countered. If Treasury rejects or counters a taxpayer offer, it must provide the taxpayer written notification, including the factual and legal bases for the rejection or counteroffer. Accepted offers or counteroffers will result in a written agreement between the taxpayer and Treasury outlining the terms of the settlement. If a settlement offer is rejected or the taxpayer and the Treasury cannot resolve through the requested ADR process, the taxpayer may still proceed through the informal conference process. Depending upon the complexity of the issues in dispute, Treasury typically completes its review of an ADR offer and provides its response within 60 days of the date of the request.

Specific guidelines for the ADR program may be found on Treasury's ADR page here: Taxes - Guidelines for Alternative Dispute Resolution Process (michigan.gov), along with the ADR application form and the latest report on executed settlements under the program.

Michigan Department of TREASURY

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

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