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COURT OF APPEALS RULES THAT REVERSE VENDING MACHINES DO NOT QUALIFY FOR THE INDUSTRIAL PROCESSING EXEMPTIONS

In a published decision issued July 21, 2022, the Michigan Court of Appeals ruled that reverse vending machines (and related repair parts) sold and leased by TOMRA of North America, Inc. ("TOMRA") do not qualify for the "industrial processing" exemption under either the General Sales Tax Act (MCL 205.54t) or the Use Tax Act (MCL 205.94o). In affirming the lower court on all counts, the Court of Appeals held that the machines do not perform exempt "industrial processing" activities under either MCL 205.54t or MCL 205.94o, and also upheld the negligence penalty imposed against TOMRA. The Court of Claims' Opinions and Orders in this matter (Docket Nos. 14-000091-MT and 14-000185-MT) are discussed in the August 2021 issue of the Treasury Update.

In this appeal, TOMRA first argued that the machines perform various "industrial processing" activities under MCL 205.54t(3) and MCL 205.94o(3). First, TOMRA argued its activities were exempt because they constituted "inspection, quality control, or testing to determine whether particular units of materials or products or processes conform to specified parameters at any time before materials or products first come to rest in finished goods inventory storage." The Court of Appeals explained that the reference to "materials or products" refers to the "finished good" that is ultimately sold to the consumer such that the "inspection, quality control, or testing" activities "must be performed upon the objects that will be 'com[ing] to rest in finished goods inventory storage.'" As an example, the Court of Appeals referenced a lawnmower manufacturer performing "quality control" by inspecting the wiring on a particular lawnmower model. The Court of Appeals held that even though the machines assess various qualities of the returned containers (which may constitute "testing"), the activity does not constitute exempt testing of "materials or products" because the returned containers are akin to tested "raw materials" falling outside the scope of the statute.

In rejecting TOMRA's argument that the machines perform exempt "remanufacturing" under MCL 205.54t(3)(g) and MCL 205.94o(3)(g), the Court of Appeals noted that the Michigan Supreme Court had previously explained in TOMRA of North America, Inc v Dep't of Treasury, 505 Mich 333 (2020)("TOMRA III") that "TOMRA's machines simply facilitate the collection of raw materials" which the Court of Appeals determined was a "passive activity" falling short of "overhauling, retrofitting, fabricating, or repairing a product or its components" as required by the statute to establish exempt "remanufacturing" activities.

Furthermore, the Court of Appeals concluded that TOMRA's machines do not perform the exempt activity of "[r]ecycling of used materials for

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ultimate sale at retail or reuse" under MCL 205.54t(3)(i) and MCL 205.94o(3)(i) because for the exemption to apply, the alleged "recycling" must be performed upon "used materials for ultimate sale at retail or reuse." The Court of Appeals explained that the recycled materials "must themselves be sold at retail or reused" and that the evidence demonstrated that the returned containers were essentially "destroyed," subsequently used as "raw materials" for other products, and not sold at retail or reused.

The Court of Appeals also denied TOMRA's claims that the machines were involved in the exempt activities of "production material handling" under MCL 205.54t3(j) and MCL 205.94o(3)(j) and "storage of in-process materials" under MCL 205.54t(3)(k) and MCL 205.94o(3)(k). The Court of Appeals explained that the industrial processing exemption statutes distinguish between "raw materials" and "materials" that are subsequently otherwise used in the production process. Pointing to the Michigan Supreme Court's characterization of the activity of TOMRA's machines (e.g., facilitation of raw material collection) in TOMRA III, the Court of Appeals concluded that the machines do not perform the exempt activities of "production material handling" or "storage of in-process materials" under the statute.

Regarding TOMRA's argument that its machines satisfied the general definition of "industrial processing" under MCL 205.54t(7)(a) and MCL 205.94o(7)(a), the Court of Appeals reiterated that the Michigan Supreme Court in TOMRA III had already held that the machines perform a function prior to the beginning of the industrial process (i.e., movement of raw materials from raw materials storage to begin processing). However, TOMRA III also held that the exempt industrial processing activities specifically provided in MCL 205.54t(3) and MCL 205.94o(3) are eligible for the exemption even if performed before raw materials begin movement for processing. Having found that the machines do not perform exempt "industrial processing" activities, the Court of Appeals declined to decide whether TOMRA or its customers satisfy the definition of "industrial processor" under MCL 205.54t(7)(b) or MCL 205.94o(7)(b)or decide the issue of "unjust enrichment" under MCL 205.73(4).

Finally, the Court of Appeals affirmed the imposition of the negligence penalty due to TOMRA's "negligent record-keeping" which it found "complicated" Treasury's audit and otherwise "hindered" Treasury's performance of its duties related to this matter. The Court of Appeals also noted that TOMRA's failure to maintain consistent documents, despite the "relatively high amount of sales tax … at stake," demonstrated a "lack of due care" on the part of TOMRA.

As of this publication, the period for filing an application for leave to appeal this decision to the Michigan Supreme Court remains open.

SUPREME COURT UPHOLDS TRANSFER OF TAX CREDIT BETWEEN BANKING ENTITIES VIA MERGER

In *Comerica Inc. v Dep't of Treasury*, published opinion of the Michigan Supreme Court, Docket No. 161661, June 7, 2022, the Michigan Supreme Court affirmed the Court of Appeals' published decision dated April 16, 2020, that a statutory merger between financial institutions allows certain Single Business Tax (SBT) credits to transfer by operation of law even though the credits had previously been assigned and could not be further assigned.

The taxpayer, a financial institution, decided to convert Comerica-Michigan, a Michigan-chartered bank, into a Texas banking association. To accomplish this, in October 2007, it created a new entity, Comerica-Texas, into which it merged Comerica-Michigan, at which point Comerica-Michigan ceased to exist. On its 2008 Michigan Business Tax (MBT) return, the taxpayer claimed refunds based on Historic Preservation and Brownfield SBT credits that had previously belonged to Comerica-Michigan before the merger, taking the position that the credits now belonged to Comerica-Texas as a result of the merger. Treasury disallowed the taxpayer's claim for the credits because they had previously been assigned once already to Comerica-Michigan, and reassignment is statutorily prohibited.

In arriving at its decision upholding the taxpayer's claim for the credits, the Supreme Court distinguished the voluntary act of assignment, as reflected in the tax statute, from an automatic transfer effected by statute, i.e., "by operation of law," holding that the Banking Code in this case triggered a transfer without an assignment. The Court further held that application of the Banking Code made it unnecessary to determine whether the tax credits were vested property rights, which was the Court of Appeals' conclusion, or privileges. Regardless, the credits Comerica-Michigan possessed transferred "by operation of law" under the Banking Code.

Further, the Court rejected Treasury's position that the tax statute's allowance of only one assignment prohibited all other types of transfers, based on the statutory construction principle that the expression of one thing implies the exclusion of others similar things. The Court determined that the statutory construction principle was not applicable in this case, reasoning that the regulation of transfers by assignment suggested nothing about other types of transfers.

Treasury has filed a motion to clarify the Court of Appeals holding with the Court, which is currently pending review as of this publication.

ALL THINGS ADVOCATE

August 11, 2022

UPDATED Authorized Representative Declaration, Form 151

Under the Internal Revenue Code and the Revenue Act, Treasury employees and anyone acting on behalf of Treasury are required to protect the confidentiality of taxpayer information. Some examples of confidential taxpayer information are individual income or business tax returns, information and supporting schedules included with a tax return, disputes related to a tax return, and even the fact that a taxpayer did or did not file a tax return.

Treasury's Form 151 is one way a taxpayer may authorize Treasury to communicate confidential information with an individual or entity on their behalf, revoke prior authorizations, and/or to designate an individual or entity to receive copies of Treasury correspondence regarding a tax dispute.

Recently, Treasury released an update version of Form 151, including revisions to the instructions located on page 2 of the form, frequently asked questions (FAQs), and a new external video on how to complete the form. We encourage tax professionals and their clients to become familiar with the updated form and resources by going to www.michigan.gov/taxes and selecting "Authorized Representative Declaration: Form 151" under Popular Forms prior to submitting Form 151.

Taxpayers who have an 'accepted' Form 151 on file with Treasury are not required to submit an updated form unless the form on file has expired.

TAXATION OF DIGITAL CURRENCIES

Digital Currencies and Cryptocurrencies

Digital currencies such as Bitcoin have become a topic of heightened interest in the media in recent years, and you might even catch high-dollar advertisements for trading applications on mainstream television. Perhaps these catchy advertisements have piqued your interest. Unless you work in finance or technology, however, you might not have much information about these currencies, how they operate and, importantly, you may not realize that transactions involving digital currencies usually have tax consequences. This article will provide basic information regarding digital currencies, and then examine how these currencies are treated for tax purposes.

What are digital currencies? Simply put, digital currencies are forms of currency that are only available in digital or electronic form. You may also hear digital currencies referred to as electronic currency or cybercash. Because they exist only electronically or virtually, digital currencies are accessible only with computers, mobile telephones, or similar devices. Digital currencies have no actual physical attributes, in contrast to the paper dollars and minted coins most people are accustomed to using routinely. Transactions involving digital currencies are conducted using computers or electronic wallets connected to the internet or to designated networks, whereas transactions involving physical currencies can be conducted only when their holders have actual physical possession of these currencies. Accordingly, an advantage of digital currencies is that they enable seamless transfers of value, making transactions both cheaper and faster. For example, unsecured "flash loans" used in trading in the decentralized finance industry can be executed within seconds. However, digital currencies can also be volatile to trade and are susceptible to hacking, making them a popular tool with criminals for nefarious activities such as money laundering.

Currently, digital currencies are almost always decentralized, meaning that they are not issued by governments or other financial institutions. However, given certain key advantages of digital currencies and their rising popularity in our increasingly electronic world, many countries around the world are looking seriously at issuing virtual forms of their own paper currencies, which would be backed by the full faith and credit of the government and represent a claim on that country's central banking system, just as paper currency does. Government-issued digital currencies are known as CBDCs, or Central Bank Digital Currencies. In October of 2020, the Central Bank of the Bahamas issued the Sand Dollar, the world's first CBDC covering an entire country.

An important type of digital currency is cryptocurrency. A cryptocurrency is a digital currency in which transactions are verified and records are maintained by a decentralized system using cryptography, rather than by a centralized authority, such as a government or central bank. Specifically, a cryptocurrency is an encrypted data string that denotes a unit of currency. Because cryptocurrencies are secured by various encryption algorithms and cryptographic techniques that safeguard the entries, these currencies are nearly impossible to counterfeit or to double-spend. All cryptocurrencies are digital currencies, but not all digital currencies are cryptocurrencies.

A cryptocurrency is monitored and organized by a peer-to-peer network called a blockchain, which is a distributed ledger enforced by a disparate network of computers. A blockchain is essentially a set of connected "blocks," with each block containing a set of currency transactions that have been independently verified by each member of the network, making it almost impossible to forge transaction histories. Accordingly, the blockchain functions as the currency's secure ledger of all transactions, or its permanent record of all purchases, sales, and transfers. Cryptocurrencies are both created and secured through mining, which is the complex process by which the computer network validates individual transactions. The mining process incentivizes the "miners" who run the network by rewarding them with predetermined amounts of cryptocurrency. Because of the size of the networks, mining virtual currencies consumes enormous amounts of computer resources, and this is clearly one of the disadvantages of digital currencies. As of August 2021, it was estimated to take nine years of household-equivalent

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electricity to mine a single Bitcoin. Bitcoin is currently the most popular, most widely traded, and most valuable cryptocurrency.

Tax Treatment of Digital Currency Transactions

With respect to the taxation of digital currencies and cryptocurrencies, the treatment of these currencies for federal income tax purposes dictates their treatment at the state tax level. This is because each transaction made by a taxpayer involving Bitcoin or another virtual currency has federal income tax consequences, commonly increasing or sometimes decreasing the taxpayer's reported income, and ultimately affecting its adjusted gross income, or AGI. A taxpayer's AGI as reported on its federal income tax return is the starting point of the Michigan income tax return and the calculation of state income tax. While Michigan permits certain deductions and other adjustments to federal AGI, currently, Michigan does not have any rules or policies with respect to digital currency transactions that differ from the federal policies regarding such transactions.

Federal tax treatment of digital currency transactions is fairly straightforward. Although digital currencies were intended to be a form of money and remain largely unregulated, transactions involving these currencies are treated by the Internal Revenue Service (IRS) like transactions involving property or financial assets such as stocks. General tax principles applicable to property transactions apply to transactions using virtual currencies. Accordingly, digital assets that a taxpayer buys, sells, mines, or uses to pay for things are all subject to income tax, and could result in significant tax liability. Moreover, if a taxpayer is paid in digital currency by an employer or a client, that payment represents taxable income.

Because the IRS views digital currencies as property, it makes no difference in terms of tax liability whether a taxpayer sells the currency as an investment or transfers it to another party as payment for goods or services. Any difference between the taxpayer's cost of acquiring the digital asset and its value at the time of sale or transfer will be treated as a gain or loss, and taxed accordingly.

How digital currency is received or used may have an impact on an individual's tax liability. For example, successfully mining digital currency (recall that successful miners are rewarded with payment in the digital currency mined) creates an immediate taxable event. A taxpayer is required to calculate the fair market value of the digital currency on the day that it was mined, and federal taxes are owed on that amount. To determine the fair market value, the digital currency must be converted into U.S. dollars. Bitcoin and certain other digital currencies are called "convertible currencies" because they can easily be converted into U.S. dollars or other real currencies based on established exchange rates. The fair market value of a digital currency is whatever the currency's value was at the date and time the transaction was recorded on the distributed ledger.

A purchase made by a taxpayer using digital currency may also result in federal tax liability. If, for instance, a taxpayer purchased a car using Bitcoin, that individual would need to determine the fair market value of the Bitcoin on the day that the car was purchased, and compare that with the amount originally paid for the Bitcoin when it was acquired (the cost basis). Any difference will result in a gain or loss that the taxpayer will report when they file their tax return. If this seems confusing or unfair, think of it as the taxpayer selling the Bitcoin, but instead of getting money for it, they receive another item of value. Digital currency transactions that result in tax liability are further complicated by the fact that tracking tools are currently poor, and the institution where a taxpayer holds digital currency as an investment may not keep track of the cost basis of investors' transactions, or may not formally report it to investors if they do. For that reason, the IRS recommends that taxpayers keep careful records documenting all receipts, sales, exchanges, or other dispositions of digital currency, as well as the currency's fair market value at the time of each transaction.

Many people are unaware that they are liable for taxes on digital currency transactions, in part because brokerages generally do not send yearly statements to investors regarding digital currency transactions as they are required to do for transfers of other financial assets, such as stocks. The IRS, however, is unlikely to be sympathetic, even if the failure to report digital currency transactions was an honest mistake. In this regard, the 1040 tax return form has recently been updated, and taxpayers are now asked directly on-form whether they have ever received, sold, sent, exchanged, or otherwise acquired any cryptocurrency. Additionally, taxpayers should be aware that the IRS is continually increasing its tracking and scrutiny of digital currency investments.

Taxpayers engaging in transactions involving digital currencies such as Bitcoin may want to consult IRS Notice 2014-21, which gives guidance to individuals and businesses on the tax treatment of transactions using virtual currencies.

For information regarding the application of sales tax to digital and crypto currencies, see Volume 1, Issue 1, November 2015, of *Treasury Update*.

IS A GIFT CERTIFICATE TAXABLE?

Generally, the sale of gift certificates and gift cards (collectively, gift certificates in this article) are not subject to sales or use tax despite often being sold as tangible personal property in the form of a plastic card or a paper certificate. Instead, the gift certificate is treated as intangible property that represents a monetary value that may be redeemed at a specific business.

Charitable organizations often obtain gift certificates, sometimes as donations, to be sold or auctioned off to raise funds for the organization. Because gift certificates are not treated as tangible personal property, charitable organizations, like other sellers, are not liable for sales tax when they sell a gift certificate.

When a person redeems a gift certificate for taxable property, that is the point at which a taxable transaction occurs. The seller in that transaction must remit tax based on the monetary value exchanged. For instance, if a person redeems a gift certificate in exchange for prepared food, the transaction is taxable.

However, gift certificates don't always have a specified monetary value. For example, hotel and other accommodation providers may donate gift certificates that indicate a certain number of nights for which the certificate may be redeemed (hotel rooms and other accommodations are subject to use tax; see MCL 205.93a(1)(b)). When such a certificate is redeemed, the accommodation provider is liable for tax based on the value at that time of the rental (the "purchase price"). Because the value of a room rental at a hotel often varies, the hotel must pay use tax based on the value of the particular room rented for the particular night(s) rented. The hotel should use its published rate excluding any promotional discounts (sometimes referred to as the "rack rate").

COURT OF CLAIMS ADDRESSES ITS POWER TO REVIEW TAX APPEALS WHEN THE TAXPAYER DOESN'T PAY THE UNCONTESTED ASSESSMENT AMOUNTS

Section 22(1) of the Revenue Act, MCL 205.22(1), requires payment of any uncontested portion of a tax assessment by Treasury as a prerequisite to appeal the assessment to the Michigan Tax Tribunal or to the Court of Claims. The Court of Appeals has affirmed this precondition for appeal, noting that an aggrieved taxpayer must actually discharge the uncontested tax debt, by full payment to Treasury, before appealing the contested portion of the tax assessment. See *Toaz v Dept of Treasury*, 280 Mich App 457 (2008).

In two separate decisions issued on May 20, 2022, *MRB Enterprises v. Dep't of Treasury*, COC Dkt No 21-000181-MT, and *Ladouce Dental Laboratory, Inc v Dep't of Treasury*, COC Dkt No. 21-000194-MT, the Court of Claims addressed this prerequisite where 1) the audit assessments contained more than one unrelated adjustment, 2) the taxpayer's complaint purported to contest the <u>entire assessment</u> but only specifically pleaded a single type of adjustment, and 3) the taxpayer failed to pay the tax attributable to the uncontested adjustments prior to filing its appeal.

In *MRB*, a Treasury audit resulted in adjustments to the taxpayer's use tax liability in each of four tax years, generating an assessment for each of the tax years. In its complaint, MRB stated it was contesting all the assessments, but only alleged a specific portion of each of the four assessments was in error, making no mention of discrete additional adjustments known to MRB also to be part of each assessment. Treasury moved to dismiss on the grounds that the court lacked jurisdiction to hear the matter because the taxpayer failed to pay the uncontested amounts of the assessment relating to adjustments not plead in its complaint. The court held that based on the allegations in the complaint, the taxpayer had not actually disputed or challenged the entire amount of assessments at issue. Accordingly, because the taxpayer was only contesting a portion of each assessment and had not paid the uncontested portion before appealing, the court ruled that it lacked subject matter jurisdiction and dismissed the entire complaint.

In *Ladouce*, the court was presented with pleadings exhibiting the same defect identified in *MRB*, except that in this case the defect tainted only one of two sales tax assessments challenged in the complaint. While the court concluded dismissal was proper because the taxpayer clearly did not pay tax on the adjustments not contested through the pleadings, the court further reasoned that each assessment stands on its own and must be viewed independently for purposes of determining whether the taxpayer has met jurisdictional prerequisites under MCL 205.22(1). The court therefore dismissed the complaint only with respect to the assessment in which *Ladouce* had failed to pay the uncontested portion and retained jurisdiction of the untainted assessment. Thus, the analysis in *Ladouce* is consistent with the reasoning in MRB but concludes that a jurisdictional defect in only one of several assessments covered in a complaint may not taint the entire complaint.

Taken together, the decisions in *MRB* and *Ladouce* emphasize that a taxpayer contesting an entire assessment should identify in its complaint the basis for disputing each adjustment included in that assessment. Failure to do so may, if the taxpayer has not paid the tax attributable to the uncontested adjustments prior to filing its appeal, deprive the Tax Tribunal or Court of Claims subject matter jurisdiction to review the assessment.

COURT OF CLAIMS HOLDS RETAILER PROVIDING PROPERTY TO IN-STATE CUSTOMERS SUBJECT TO USE TAX

Zimmer US, Inc. is an out-of-state retailer that provides proprietary medical instruments to in-state customers for use in installing certain orthopedic implants sold by Zimmer. The instruments remain in the sole possession of its customers while in Michigan; however, Zimmer retains ownership of the instruments and the right to receive reimbursement for any loss or damages to those instruments. A 2020 opinion of the Court of Appeals upheld the denial of use tax refund claims made by Zimmer on the basis that the instruments were properly subject to use tax because Zimmer exercised control over the instruments in Michigan. Subsequently, Zimmer filed a new refund claim reasserting the same arguments for subsequent tax periods. The Department denied the refund claims and Zimmer filed suit in the Court of Claims contesting that denial. In an opinion dated June 13, 2022, the Court of Claims concluded these new refund claims were properly denied.

In upholding the refund denial, the court first concluded that Zimmer's claims were barred by the application of the doctrine of collateral estoppel. Collateral estoppel generally precludes a party from relitigating an issue when an earlier proceeding resulted in a valid final judgment of that issue based on identical facts. In this case, the material facts, parties, and substantive legal issues were virtually identical to those previously litigated in a proceeding which culminated in an unpublished opinion of the Court of Appeals. Finding that Zimmer was attempting to relitigate the issue from that prior decision, the court concluded the subsequent refund claims for these instruments must also be denied.

Even though that conclusion was sufficient to warrant dismissal, the Court of Claims nonetheless reached the merits of Zimmer's claims. The court — like the Court of Appeals before it — found that the instruments were "used" by Zimmer under the Use Tax Act. In determining a taxable use under that Act, "use" is defined, in relevant part, as "the exercise of a right or power over tangible personal property incident to the ownership of that property." MCL 205.92(b). While Zimmer argued it relinquished all control over the instruments upon delivery to common carriers outside of the state, the court found that certain contractual provisions belied that argument, as the delivery terms indicated Zimmer retained control until delivery to customers within Michigan and the reimbursement provisions placed conditions on the use of the instruments by customers within Michigan. The degree of control exercised through these contractual provisions accordingly distinguished Zimmer from an out-of-state distributor that would otherwise not be subject to use tax. In other words, the substantive analysis of the Court of Claims in this matter agreed with the prior opinion of the Court of Appeals.

ABOUT TREASURY UPDATE

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AUDIT WAIVERS AFTER PUBLIC ACT 3 OF 2014

Public Act 3 of 2014 ("PA 3"), amended – among other things – the statute of limitations (SOL) provisions in the Revenue Act (MCL 205.27a). Prior to the amendment, the SOL was suspended (tolled) by either written agreement or automatically through the period of an audit, which was not time-limited, and for 1 year after the audit. PA 3 eliminated automatic and indefinite tolling for Treasury audits. After PA 3, the Revenue Act allows the SOL to be extended for up to 1 year to complete fieldwork and provide a written preliminary audit determination (PAD) and for an additional 9 months after the PAD to issue a final assessment, unless the taxpayer requested reconsideration of the PAD or an informal conference.

The statute still allows the taxpayer and the state treasurer to agree to extend the SOL. In the context of an audit, such agreements are referred to as waivers. An auditor will typically request a waiver when the taxpayer's circumstances are such that completion of an audit within the normal statute of limitations would create a substantial burden. Historically, the Department's waivers specified a date upon which the waiver would "expire," meaning the date to which the statute of limitations was extended.

For audits to which the PA 3 extension provisions apply, waivers will still specify a date to which the limitations period is extended and by which a final assessment must be issued. But the PA 3 extension provisions present several questions. The following attempts to clarify the impact of PA 3 on current audit waivers:

1. Does the extension date in the waiver indicate when the Department must complete fieldwork and issue the PAD, in turn triggering an additional 9-month extension to issue a final assessment, or does the date indicate the date by which the Department must issue the final assessment?

   Answer: The extension date in a waiver indicates the date by which the Department must issue a final assessment.

2. How does a waiver of the original SOL affect the Department's obligation to complete fieldwork and issue a PAD within 1 year of the original SOL?

   Answer: An agreement to extend the SOL negates the Department's statutory obligation to complete fieldwork and issue a PAD within 1 year of the end of the original SOL. See MCL 205.21(6).

3. If the Department obtains a waiver but still issues a PAD within one year of the original SOL, and the waiver extension date is after the date the PAD was issued but before the 9-month date allowed under statute for the Department to issue its final assessment, which deadline controls—the extension date in the waiver or the later 9-month deadline to issue a final assessment?

   Answer: The statutory obligation to complete fieldwork within 1 year of the end of the original statute of limitations period is superseded by the agreement to extend, and therefore, the statutory obligation to issue a final assessment within 9 months of the PAD is also superseded by the agreement to extend. The new, extended SOL specified in the agreement controls when the Department must issue its final assessment, EXCEPT as to any audit periods which have an original SOL date after the extension date. In other words, an agreement to extend the SOL (usually most pertinent to the oldest period(s) within the audit period) does not shorten a period that – by statute – goes beyond the extension date.

4. If a waiver is used and a PAD is issued 9 months before the expiration of that waiver, what is the impact of a request for reconsideration or request for informal conference on the 9-month deadline to issue a final assessment and on the waiver extension date?

   Answer: If a waiver is used, there is no obligation to issue an assessment within 9 months of the issuance of the PAD. The final assessment deadline is controlled by the extension date in the waiver. However, requests for reconsideration or appeals (including informal conference requests) after the PAD has been issued have the same effect on the extended SOL in a waiver as they had on the original SOL – they permit the Department to delay the issuance of a final assessment. See MCL 205.27a(3). In the case of a waiver, it permits the Department to delay the issuance of a final assessment until sometime after the extension date.

Taxpayers may expect that when a waiver is requested it will include the estimated time the Department's auditors expect to complete the fieldwork and issue a PAD as well as the period of time it typically takes the Department to issue the final assessment. Notably, this period includes a 60-day notice period for the taxpayer to requests an informal conference after the Department issues an intent to assess. See MCL 205.21(2)(c).

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