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MISSISSIPPI TAX BULLETIN

SUMMARY OF THE 2014 MISSISSIPPI TAXPAYER FAIRNESS ACT

This omnibus tax legislation, House Bill No. 799, was signed into law by Governor Phil Bryant on April 11, 2014, after passing the House of Representatives by a unanimous vote 121-0, and by a Senate vote of 40-9. This document provides a summary of the new law (the "Act") and lists most of the Mississippi Code sections that were amended or added.

Allocation & Apportionment and Forced Combinations

- The Act added language to clarify that the business income of multistate companies is to be allocated and apportioned pursuant to regulations prescribed by the Mississippi Department of Revenue ("DOR"). This seemingly minor change will make it clear that DOR cannot merely rely on its informal policies and past practice in this area. Rather, it must go through the formal process of adopting a regulation addressing allocation or apportionment before it will be binding on multistate companies. (Code § 27-7-23(c)(2)(A))

- Multistate companies and certain financial institutions may request, or DOR may require, an alternative apportionment method if the apportionment and allocation provisions and regulations do not fairly represent the taxpayer's Mississippi business activity. This special alternative apportionment authority is only intended to be used in "limited and unique, nonrecurring circumstances." The party seeking to make the change must show by a preponderance of evidence that the proposed alternative apportionment method fairly represents the taxpayer's business activity. Thus, this changes the burden of proof standard that the Mississippi Supreme Court sanctioned in the much discussed case of *Equifax, Inc. et al v. Miss. Dep't of Revenue*, 125 So.2d 36 (Miss. 2013). In *Equifax*, the Court held that the taxpayer had the burden of proving not only that DOR's use of alternative apportionment was wrong, but that it was also "arbitrary and capricious." (Code § 27-7-23(c)(2)(C); § 27-7-24(4)(d) for financial institutions)

- The Act requires DOR to (a) establish by preponderance of the evidence that corporations should be required to file a "forced combined" income tax return, and (b) adopt regulations identifying the specific criteria that support the requirement to file such a return due to the improper shifting of taxable income. (Code § 27-7-37(2)(a)(ii) & (iii))

Provisions Affecting Administrative and Judicial Appeals

- The Act eliminates the mandatory posting of a surety bond in the amount of one-half of the amount in controversy in order to perfect an appeal of a Board of Tax Appeals (the "BTA") order to chancery court (the so-called "pay to play" provision). (Prior law provided that alternatively, prior to petitioning the court, the taxpayer could pay the full amount of the assessment under protest). Thus, after this change becomes effective taxpayers will be able to go to court without having to first post any kind of bond or security unless the following exception applies. (Code § 27-77-7(3))

- The Act provides that after the taxpayer's petition or cross-appeal is filed in court, if DOR believes its ability to collect the assessment is jeopardized by the filing or that the appeal was made for the purpose of delaying payment of the assessment, it can move the chancery court to require a bond. If the court agrees that a bond is appropriate, the ordered bond amount must be posted within 60 days of the court's order. If a taxpayer desires to avoid the accrual of additional penalties and interest while the case is pending, he may, prior to filing the petition, pay the assessment ordered by the BTA under protest and seek a refund in his appeal. (Code § 27-77-7(3))

- The chancery court standard of review provisions were substantially modified by the Act in order to codify the legislative intent that the court try the case as a true *de novo* proceeding by undertaking a full evidentiary judicial hearing. The Legislative leadership approved these changes with the expressed intention of overruling the contrary holding in the *Equifax* case. Accordingly, the Act clarifies that the court shall hear all factual and legal issues raised by the taxpayer pertinent to the case. More importantly, the Act provides that the court shall give *no deference* to the decision below of DOR, the Board of Review or the BTA. However, the court shall give deference to DOR's interpretation and application of the statutes to the extent reflected in duly enacted regulations and other officially adopted publications. Another key passage specifies that the court is "expressly prohibited" from trying tax cases using the limited standard of review under which the court can only consider the record made before the BTA (essentially prohibiting use of an "arbitrary and capricious" or "abuse of discretion" standard). (Code § 27-77-7(5))

- The Act clarifies that the chancery court has full authority to decide tax credit and tax incentive questions, issues involving other actions of DOR pertinent to the case, and to make penalty and interest determinations. Also, if a taxpayer appeals the chancery court's order, any bond or other security that had been required by the court is to remain in place until a final decision is rendered in the case. (Code § 27-77-7(5))

- The Act clarifies that a taxpayer who is denied tax credits or incentives (such as Advantage Jobs Incentive Payments) may appeal DOR's action to the Board of Review. (Code § 27-77-5(1))

- The Act provides that if the Board of Review fails to issue an order within 6 months, the taxpayer can consider this a denial of the relief requested and appeal the case to the BTA. This is optional for the taxpayer, not mandatory, and does not prejudice a taxpayer's right to otherwise file an appeal with the BTA if the Board of Review issues an adverse order later than 6 months after its hearing. (Code § 27-77-5(4))

- With respect to BTA hearings, the Act clarifies that the BTA should hear all issues raised by the taxpayer which address the substantive and procedural propriety of DOR's actions. The upshot of the language is to provide that the BTA is to make an independent decision and to give no deference to the Board of Review. However, the Act specifically states that the BTA shall give deference to DOR's interpretation and application of the statutes to the extent reflected in regulations and other official publications. Clarifying language was added to note that the BTA's jurisdiction includes authority to impose penalties and interest to the extent it deems appropriate. (Code § 27-77-5(6)(a) & (b))

- New language provides that if the BTA order reflects an overpayment and DOR has not appealed the order, DOR shall, within 60 days from the date the order was mailed, refund or credit the overpayment to the taxpayer. (Code § 27-77-5(7))

- The Act provides that if the BTA fails to issue an order within 9 months, the taxpayer can consider this a denial of the relief requested and appeal the case to chancery court. This is optional for the taxpayer, not mandatory, and does not prejudice a taxpayer's right to otherwise file an appeal with the court if the BTA issues an adverse order later than 9 months after its hearing. (Code § 27-77-5(6)(e))

- In connection with the withdrawal of appeals, language was added to provide that the action from which the appeal was taken does not become final when the issue is whether a taxpayer's actions or inactions constituted a failure by the taxpayer to prosecute his appeal. (Code § 27-77-5(8))

- The Act clarifies that when in a chancery court action a taxpayer seeks a refund or credit relating to *any tax other than individual or corporate income tax or franchise tax*, he must state in his petition or answer, as the case may be, that he alone bore the burden of the tax sought to be refunded or credited--i.e., the tax was not collected from another party. (This must also be proven at trial). However, this statement does not have to be made if the case involves a claim for incentives based on payroll withholding or other incentives, rebates or other economic benefits that are calculated based on taxes withheld or paid. (Code § 27-77-7(1); § 27-77-7(5))

- Language was added to provide that failure of the taxpayer to timely pay any uncontested tax shall not bar him from obtaining relief with respect to any contested tax in an appeal, nor will it result in the taxpayer's appeal being dismissed or delayed, or judgment automatically being entered in favor of DOR. (Code § 27-77-7(3))

Interest & Penalty Provisions

- The Act gradually reduces the interest rate on assessments and refunds from 12% to 6% annually. The reduction begins January 1, 2015 and is phased in over a five year period.

- The Act prohibits the imposition of penalties in alternative apportionment situations unless the taxpayer had no reasonable basis for its method or ignored existing law or regulations. This provision makes it more difficult for DOR to penalize taxpayers like Equifax, which filed its returns according to an apportionment method specifically permitted under existing law and regulations but was nevertheless penalized for underpayment. (Code § 27-7-23(c)(2)(D); § 27-7-24(5) for financial institutions))

- Similarly, the Act prohibits DOR from assessing penalties in forced combination situations, except under specific circumstances. (Code § 27-7-37(2)(a)(iv))

- The Act makes the addition of interest discretionary with DOR rather than mandatory in the following situations:

  - When the taxpayer voluntarily amends a Mississippi return and pays any additional tax based on a change made by the IRS to the taxpayer's federal return. (Code § 27-7-51(4))
  - In cases of income tax underpayments described in Code § 27-7-53(a)
  - In cases of sales tax deficiencies or delinquencies (Code § 27-65-39)
  - In cases of franchise tax deficiencies or delinquencies (Code § 27-13-23(3)(a))
    Note: Code § 27-7-51(2) already provides this discretion in certain income tax contexts.

- The Act also provides that where all or part of an assessment pursuant to a BTA order is upheld by the chancery court, the addition of interest at the statutory rate is discretionary with the court rather than mandatory. (Code § 27-7-51(5))

- The Act makes the assessment of the following penalties discretionary with DOR rather than mandatory as under current law:

  - The 50% intentional disregard/fraud penalty (the "50% penalty") in the sales tax law. (Code § 27-65-39)
  - Franchise tax failure to file and failure to pay penalties. (Code § 27-13-23(4 & (5)).
    Note: Code §§ 27-7-51(3), 27-7-53(4) & 27-7-53(5) already provide this discretion in the income tax context.

- The Act provides that penalties for failure to (a) file income or franchise tax returns, and (b) pay income or franchise tax are only assessed on the net amount owed rather than the gross liability shown on the return. This clarifies that the taxpayer gets the benefit of any estimated taxes that have been previously paid or any amount of credit which applies against the liability. (Code § 27-7-53(4) & (5); § 27-13-23(4) & (5))

- The Act amends the franchise tax law to provide that any interest is calculated only on the tax deficiency or delinquency amount. (Code § 27-13-23(3)(a))

- In the sales tax law, the Act provides that neither the 50% penalty nor interest will be assessed if the taxpayer's negligence or failure to comply was due to reasonable cause. Moreover, a taxpayer's disregard of informal or unofficial instructions given by a DOR auditor cannot be the basis for the 50% penalty. (Code § 27-65-39)

- Existing law imposes an additional 300% penalty in cases where the taxpayer/seller collects trust fund monies on behalf of the State, but fails to remit such funds. The Act provides that this 300% penalty may not be imposed based on a presumption of collection from the purchaser. Instead, DOR must prove by a preponderance of the evidence that the taxpayer actually collected the trust fund monies and knowingly and intentionally failed to remit them. (Code § 27-65-31)

Administrative & Procedural Provisions

- The Act provides that the period to pay an assessment or appeal certain action of the DOR (such as denial of a tax incentive), a Board of Review order, or a BTA order, commences from the date such notice or order was mailed (or hand delivered by DOR under certain provisions). Mail is to be by regular first class mail. Under prior law, the payment or appeal period generally began from the date of the notice or order. (Code §§ 27-7-51, 27-7-53, 27-77-5 & 27-77-7(1))

- If a taxpayer does not file an appeal based on DOR's deemed denial of a refund claim, this inaction will not adversely affect the taxpayer's right to appeal a subsequent formal denial by DOR. The Act adds "any other form of claim for refund" to the category of filings that may generate a refund to which interest may be added if the refund is not made within 90 days. It also provides that the date on which the BTA or a court determines a refund to be due in certain situations triggers the 90 day waiting period. (Code § 27-7-315)

- Existing law provides that where the taxpayer fails to file a sales tax return and DOR makes an assessment from any available information, DOR must give written notice to the taxpayer. The Act requires DOR to give such notice by mail or personal delivery. The Act also expounds on who can receive personal delivery for individuals, partnerships, corporations, limited liability companies, joint ventures, etc. (Code § 27-65-35)

- The Act provides that sales tax assessment notices and payment demands must be sent by first class mail or hand delivered. The Act again expounds on who can receive personal delivery of these communications on behalf of various kinds of taxpayers. (Code § 27-65-37(2))

- The Act adds new provisions to address the timeliness of administrative appeals and filings, including electronic filings. The timeliness of electronic filings will be determined based on the time zone of the recipient. Also addressed are situations where the due date for any administrative appeal or filing falls on a weekend day, official State holiday or other day on which DOR or the BTA is closed. (Code § 27-77-5(10))

Effective Date and Transition Rules

- The general effective date of the Act, which was a subject of much debate during the drafting process, is from and after January 1, 2015, subject to certain "savings clauses" or transition rules that are fairly confusing and which will probably result in incongruous outcomes for taxpayers across multiple years.

- First, Section 18 of the Act appears to have intended for the new provisions (other than the changes to the appellate sections and the interest reduction provisions) to be applicable to refund claims, assessments, appeals, suits or causes of action (collectively, "Actions") which begin or are filed on or after January 1, 2015. However, the language in this section seems to contain a drafting error by saying that nothing in the Act shall affect or defeat any Actions "for taxes due or accrued under the laws of this state before the date on which this act becomes effective, whether such [Actions] have been begun or filed before the date on which this act becomes effective or are begun or filed thereafter;…" A possible technical correction to the quoted language to reflect what appears to be the legislative intent could read along these lines: "[N]othing in Sections 1 through 14 of this act shall affect or defeat any [Actions] for taxes due or accrued under the laws of this state before the date on which this act becomes effective, provided such [Actions] began or were filed before the date on which this act becomes effective;…."

- Second, Section 19 of the Act provides that the new appeals language in Sections 15, 16 and 17 will apply to any assessments or claims made on or after January 1, 2015. This means that with respect to appeals of assessments or claims made through the end of 2014, the prior law (as to burden of proof and standard of review matters) as interpreted by the Mississippi Supreme Court in *Equifax* will still be applicable. Thus, a taxpayer under audit by DOR for multiple years and who ends up with assessments made both before and after January 1, 2015, will have to appeal and possibly litigate under two vastly different processes and standards, and could very likely have two different outcomes under similar facts. It will be interesting to see if DOR will rush to make as many assessments as possible in order to have such cases appealed under the more DOR-friendly *Equifax* appellate rules.

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