



LOUISIANA TAX DELINQUENCY AMNESTY ACT OF 2009

The Louisiana Tax Delinquency Amnesty Act of 2009 (the “Act”), or House Bill 720, was recently introduced by Representative Jane Smith. The bill was pre-filed on April 17, 2009, and will be heard in the Regular Session of the Louisiana legislature that begins April 27th.

Under the Act, taxpayers may seek amnesty for all taxes administered by the Department of Revenue (the “Department”), with the exception of motor fuel taxes. For taxpayers taking advantage of the amnesty, the legislation provides a waiver of 50% of the interest and 100% of the penalty. A taxpayer will qualify for amnesty if the taxes became due on or after July 1, 2001, and before January 1, 2009, *or* if a proposed assessment, notice of assessment, or bill was received on or after July 1, 2001, and before January 1, 2009. Taxpayers with matters under field audit or in litigation may participate in the amnesty program if they agree to abide by the Department’s interpretation of the law with respect to all of the issues involved in the audit or lawsuit for the 2010, 2011, and 2012 taxable periods. Taxpayers not agreeing to abide by the Department’s interpretation for these periods will be charged the 5% negligence penalty under R.S. 47:1604.1. Additionally, taxpayers with matters in litigation must agree to pay attorney fees under R.S. 47:1512 if the matter has been assigned to outside counsel. Taxpayers who are parties to criminal investigations or criminal litigation for nonpayment, delinquency, or fraud with respect to taxes owed to the State of Louisiana are not eligible to participate in the amnesty program.

Differences from 2001 Amnesty Program

Taxpayers who participated in the Amnesty Program of 2001 should be aware of some notable differences between that program and the provisions of House Bill 720. The 2001 Amnesty Program provided for a waiver of 100% of the interest and penalty, whereas House Bill 720 is limited to a 50% interest waiver along with a 100% penalty waiver. In 2001, taxpayers in litigation and those with ongoing or unresolved field examinations were not eligible for amnesty. Those taxpayers can qualify for amnesty in 2009 if they adhere to the guidelines for eligibility.

Participation Has Risks

In several respects, the proposed legislation in its present form raises more questions than it answers. And the proposed legislation is not without potential traps. Participation is conditioned upon the agreement of the taxpayer to waive the right to protest or otherwise contest any *tax period* for which amnesty is granted. This waiver, however, does not appear to be limited by tax type. Under this broad language, a taxpayer could enter into amnesty for corporate income and franchise tax, for example, and be precluded from protesting an assessment of sales tax for periods covered by amnesty. Furthermore, the current language in the legislation is unclear as to whether a taxpayer receiving a deficiency assessment after participating in amnesty has any right to appeal the later assessment of taxes over and above the amounts paid under amnesty. For instance, an unaudited taxpayer may voluntarily pay under amnesty. If after a post-amnesty audit the Department finds a deficiency, it appears that the legislation would prohibit the taxpayer from protesting or otherwise appealing any additional assessment by that Department for periods for which amnesty was granted. If amnesty is applied



for but not granted, is the taxpayer entitled to a refund of the payment made with the amnesty application or does the Department get to keep the money? How would the payment be applied?

Taxpayers involved in litigation that elect to participate in amnesty must agree to pay all applicable attorney fees pursuant to La. R.S. 47:1512 *before* applying for amnesty. Revised Statutes 47:1512 authorizes the Department to employ private counsel to assist in the collection of any taxes, penalties, or interest. If any taxes, penalties, or interest due are referred to an attorney at law for collection, an additional charge of up to 10% of the taxes, penalties and interest due must be paid by the taxpayer. Because these fees must be agreed to *before* applying for amnesty, the penalties and 50% interest would not yet be waived. An open question exists, therefore, as to whether the 10% attorneys' fee applies to the full amount of tax, interest, and penalties, *or* to the amount that would be due under amnesty (100% tax, 50% interest, and no penalties). Furthermore, Louisiana courts have historically limited attorneys' fees awarded under R.S. 47:1512 to those fees deemed reasonable. By making an agreement with outside counsel a prerequisite to applying for amnesty, outside counsel may effectively bar an otherwise eligible taxpayer from participating in the amnesty program by refusing to accept less than the full statutory amount for attorneys' fees, despite the actual amount of work counsel has performed on behalf of the Department. This component of the legislation could essentially do away with the requirement that attorneys fees be reasonable, at least with respect to taxpayers participating in the amnesty program. In addition, it seems to give the Department's outside counsel a veto power over a taxpayer's right to pursue amnesty, at least in cases where attorneys' fees at the full statutory rate are not justified. The outside counsel could unilaterally refuse to agree to any reduction of the statutory attorneys fees and, in effect, usurp the taxpayer's right to seek amnesty.

Taxpayers who are involved in field audits or litigation and apply for amnesty must agree to abide by the Department's interpretation of the law with respect to the issues involved in the audit or litigation for all periods beginning in 2010 through 2012 or be charged a negligence penalty. This provision expressly pertains only to taxpayers in *field audits* or *litigation*; however, neither of these terms is defined in the proposed legislation. Will a matter pending before the Board of Tax Appeals, an administrative body, be considered "litigation?" Is the term "field audits" intended to include taxpayers in other stages of the audit or assessment process? Are taxpayers involved in a desk audit eligible for amnesty but not bound by the Department's interpretation of the law with respect to issues involved in the audit? Hopefully, the legislature will clarify these questions.

Some Ineligible for Amnesty

Under the proposed legislation, a taxpayer who willfully delivers any false or fraudulent application, return or other statement is ineligible for amnesty and subject to a fraud penalty. This provision may violate a taxpayer's due process rights, however, as it appears that the Department can unilaterally determine that a taxpayer has engaged in fraud, deny amnesty, and impose a penalty. The taxpayer would be left with no recourse to challenge this "finding," having previously waived its appeal rights upon participating in amnesty.

The proposed legislation also gives the Department the authority to provide for a 20% collection penalty if a taxpayer takes advantage of amnesty and is later audited and determined to owe additional taxes over and above the tax amount



paid with the amnesty application. The intent of this provision appears to be that the 20% collection penalty is due only with respect to any additional deficiency that later is determined to be due for an amnesty period. Although the language is not clear on this point, it appears that the 20% penalty would not apply to a taxpayer that chooses not to take advantage of amnesty and is later hit with a deficiency by the Department. This point needs to be clarified in the proposed legislation.

Questions Remain

The proposed legislation does not provide any guidance on how matters in which a taxpayer has made a payment under protest will be treated. Will the payment under protest suffice as the payment required to be made with the amnesty application? Will it be necessary for the taxpayer to allow the Department to release the tax amount and 50% interest from the escrow account into the general fund to be eligible for amnesty? Will taxpayers be entitled to judicial interest on any refund amount? The proposed legislation needs to address payment under protest matters.

The Amnesty Program of 2001 was the most successful amnesty program in the history of Louisiana, taking in just under \$192 million. By comparison, a 1989 amnesty program collected \$1.6 million; a 1987 program collected \$279,000; and a 1985 program collected \$1.2 million. Given the impending state budget deficit, this new 2009 Amnesty Program could provide relief for both the State of Louisiana and Louisiana taxpayers who wish to resolve their obligations under Louisiana's tax laws. But first, the legislature needs to clarify the language to eliminate as many uncertainties as possible. Then, taxpayers should carefully consider the benefits and risks of taking part in the amnesty program or walking away from it. Everyone knows that the bayous in Louisiana are filled with alligators and other critters and traps. Taxpayers need to be well advised and guided before taking a plunge into this new amnesty program.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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