

PUBLICATION

Amnesty, Not Forgiveness, Is Likely for Certain Tax Indiscretions

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As of the date of this Spotlight, the "Louisiana Tax Delinquency Amnesty Act of 2009" (HB No. 720) (the 2009 Amnesty Program) continues its path through the Louisiana Legislature, where it recently was unanimously passed by the House of Representatives and is currently under consideration by the Senate Revenue and Fiscal Affairs Committee. In its current form, the 2009 Amnesty Program mandates the Louisiana Department of Revenue (the LDR) to develop and implement a two-month tax amnesty program at any time between July 1, 2009 and June 30, 2010. The actual dates for amnesty have yet to be determined by the LDR.

The 2009 Amnesty Program would be available to all eligible corporate and individual taxpayers with outstanding tax liabilities, regardless of their gross income levels. The LDR is authorized under the 2009 Amnesty Program to abate 100% of the accrued penalties owed on unpaid taxes and 50% of the interest, but the taxpayer must pay 100% of the unpaid taxes owed and 50% of the accrued interest.

Scope of Proposed Amnesty

As currently proposed, the 2009 Amnesty Program would apply to taxable periods and taxes that became due on or after July 1, 2001 and before January 1, 2009 and taxable periods and taxes that became due before July 1, 2001, if the taxpayer was unable to participate in the 2001 Amnesty Program (discussed below) because that matter was in civil litigation.

The 2009 Amnesty Program would apply to individuals, C corporations, S corporations, general partnerships, limited partnerships, limited liability companies (LLCs), registered limited liability partnerships (LLPs), and estates and trusts. Virtually all taxes administered by the LDR would be covered by the 2009 Amnesty Program, including personal individual income tax, corporate income tax, corporate franchise tax, withholding taxes, Louisiana sales, use and lease taxes, severance taxes, excise taxes, inheritance taxes, gasoline taxes, alcohol beverage taxes, soft drink taxes, utilities taxes, insurance gross premium taxes and any other tax imposed by the State of Louisiana and collected by the LDR, with the exception of motor fuel taxes and penalties for failure to submit information reports that are not based on underpayments of tax.

Eligibility for Proposed Amnesty

Eligible individuals and businesses under the 2009 Amnesty Program would be those that have an existing tax liability, who did not file a required return, understated or omitted any tax liability on a return, or erroneously claimed credits or deductions on a return. Unlike any of its predecessor programs, the 2009 Amnesty Program would be available to taxpayers currently involved in field audits and/or civil tax litigation with the LDR, regardless of whether the taxpayer was sued in state court by the LDR for collection of a tax, the taxpayer paid the taxes under protest and filed suit to recover in state court, or the taxpayer's lawsuit was pending in the Louisiana Board of Tax Appeals. It is interesting to note that all four of the prior tax amnesty programs enacted in Louisiana specifically excluded taxpayers that were involved in an ongoing field audit or civil tax litigation from participating in the prior amnesty programs.

As a condition to amnesty under the 2009 Amnesty Program, the taxpayer must agree to abide by the LDR's interpretation of the law with respect to the issues involved in the audit or litigation for all taxable periods

beginning in 2010, 2011 and 2012. Failure to abide by the LDR's interpretation of law for those periods would subject the taxpayer to a 5% negligence penalty. The amnesty application for taxpayers involved in field audits or litigation would include all issues and all eligible periods involved in the audit or litigation. In addition, taxpayers involved in litigation who elect to participate in the 2009 Amnesty Program would be required to pay their own costs of litigation and all applicable 10% outside attorney fees, pursuant to La. R.S. § 47:1512.

Taxpayers who have paid under protest and filed suit to recover those funds must agree that upon approval of the amnesty application, the LDR will release their payment from escrow and apply it in accordance with the grant of amnesty. In addition, amnesty would be available even if a lien exists on the taxpayer's property, or if the LDR has initiated proceedings under the assessment and distraint procedure, so long as the taxpayer agrees to pay all taxes due and 50% of the accrued interest plus any and all lien fees associated with the amnesty tax periods.

Not surprisingly, taxpayers who are a party to any criminal investigation, presumably federal or Louisiana, or criminal litigation that is pending in any U.S. or Louisiana court for nonpayment, delinquency or fraud in relation to any state tax administered by the LDR would be ineligible to participate in the 2009 Amnesty Program. In addition, a taxpayer who delivers or discloses any false or fraudulent application, document, return, or other statement to the LDR in connection with a 2009 Amnesty Program application would be ineligible for the program and would be subject to the fraud penalty under current law or a penalty of \$10,000, whichever is greater.

Proposed Amnesty Application Procedures

Once enacted into law, a taxpayer seeking amnesty under the 2009 Amnesty Program must timely apply on forms prescribed by the LDR. Such taxpayer must pay 100% of the tax, all fees and costs and 50% of the interest due upon filing the amnesty application. The LDR would not be authorized to enter into installment agreements for tax periods that are approved for amnesty. Moreover, for taxpayers involved in field audits or litigation, the amnesty application must include all issues and all eligible periods involved in the audit or litigation. In addition, the LDR may require taxpayers to file tax returns with the amnesty application. If amnesty is approved under the 2009 Amnesty Program, the LDR must waive 100% of the penalties and 50% of the interest due. Amnesty applications would include a written waiver of all of the taxpayer's rights, restrictions and delays with respect to the assessment, collection and protesting, and such amnesty filing would make the tax and interest immediately due and payable.

Post-Amnesty Compliance and Collection

Pursuant to the 2009 Amnesty Program, the LDR would have the right to audit a taxpayer for any period for which amnesty would be granted by the LDR. If the LDR would issue a deficiency assessment for a tax period for which amnesty was granted, the LDR would be authorized to impose penalties, including a 20% collection penalty, and institute civil and criminal proceedings with respect to the difference between the amount shown on the amnesty application and the correct amount of tax due.

In other words, amnesty would not "close" those tax periods for which the amnesty was granted. However, the LDR would be prohibited from imposing this penalty if the additional deficiency results from an adjustment made by the Internal Revenue Service (IRS) to the taxpayer's federal income tax and the taxpayer provides notice to the LDR within 60 days of receipt of the adjustment from the IRS or if the taxpayer's application for amnesty was based on a proposed assessment or notice of assessment. In addition, the LDR would be authorized to waive the 20% collection penalty, in whole or in part, if it were later demonstrated that any part (or all) of the deficiency was not due to negligence, intentional disregard of the rules or regulations, or fraud.

If a participating taxpayer were to fail to comply with any payment or filing provision administered by the LDR between the taxable periods beginning on or after January 1, 2010, and before December 31, 2015, the taxpayer potentially would become subject to the greater of the 5% negligence penalty under La. R.S. § 47:1604.1 or \$100.

2001 Amnesty Program

The 2009 Amnesty Program would not be the first time that Louisiana has provided amnesty to taxpayers with outstanding Louisiana tax liabilities. Since 1985, Louisiana has implemented four tax amnesty programs. The most recent prior amnesty program was conducted from September 1, 2001 through October 30, 2001 (the 2001 Amnesty Program). The 2001 Amnesty Program differed dramatically from the proposed 2009 Amnesty Program in several critical aspects.

First, under the 2001 Amnesty Program, all penalties and interest were waived. Contrast that to the 2009 Amnesty Program in which all penalties and only 50% of the accrued interest would be waived.

Secondly, taxpayers who were a party to any civil tax litigation pending in the Louisiana courts and taxpayers involved in an ongoing or unresolved audit were not eligible to participate in the 2001 Amnesty Program. The proposed 2009 Amnesty Program opens the door to these taxpayers. Amnesty under the proposed 2009 Amnesty Program would, however, come at a cost. In return for amnesty, and as stated above, the taxpayer must agree to abide by the LDR's interpretation of the law with respect to the issues involved in the audit or litigation for all taxable periods beginning in 2010, 2011 and 2012. Furthermore, a taxpayer's failure to abide by the LDR's interpretation of law for those periods would subject the taxpayer to a 5% negligence penalty.

Thirdly, and as also stated above, amnesty under the 2009 Amnesty Program does not "close" the tax period in which amnesty was granted, nor does it foreclose the LDR's right to assess a deficiency for the period covered by the amnesty agreement. Under the 2009 Amnesty Program, the LDR would be authorized to assess a deficiency and institute civil and criminal proceedings for the periods covered by the amnesty, if it were later to determine that additional taxes would be due for the amnesty period. In addition to the normal penalties, the LDR would be authorized to impose an additional 20% collection penalty. Under the 2001 Amnesty Program, the LDR was prohibited from seeking interest or penalties from the taxpayer, or instituting civil prosecution or criminal prosecution against the taxpayer for tax periods covered by the amnesty.

Finally, under the 2001 Amnesty Program, taxpayers who previously had been sued by the LDR for nonpayment, delinquency or fraud in relation to any Louisiana tax expressly were prohibited from participating in the 2001 Program. This limitation would be removed from the 2009 Amnesty Program. Under the 2009 Amnesty Program, the fact that a taxpayer may have been sued by the LDR in the past for nonpayment, delinquency or fraud in relation to a tax administered by the LDR would not preclude that taxpayer from seeking amnesty. Only those taxpayers currently involved in a criminal investigation or criminal litigation in any court in the U.S. or Louisiana for nonpayment, delinquency, or fraud in relation to any state tax administered by the LDR would be ineligible to participate in the 2009 Amnesty Program.

Conclusion

The proposed 2009 Amnesty Program offers tremendous opportunities both to the State of Louisiana and to taxpayers with pending or anticipated Louisiana tax liabilities. However, taxpayers will have a limited amount of time to take advantage of these opportunities, after the 2009 Amnesty Program is enacted into law and implemented by the LDR. Taxpayers will need to act quickly to determine their eligibility and if their participation would be an appropriate means to resolve their outstanding Louisiana tax issues.

Finally, although this 2009 Amnesty Program has not yet been enacted into Louisiana law, as of the date of this Spotlight, all indications are that it will be enacted into law and signed by Governor Jindal.

Taxpayers who have outstanding Louisiana tax claims, issues, litigation and audit carefully should consider whether the 2009 Amnesty Program would provide them sufficient relief. Such taxpayers should begin the planning process by contacting one of the attorneys listed below to discuss their eligibility, the application process and potential relief that would be achieved from applying for and receiving Louisiana tax amnesty.