Bethany Boyd *Legislative Service Commission*

Sub. S.B. 200

124th General Assembly
(As Reported by H. Ways & Means)

Sens. **Spada, Amstutz, Carnes, Harris**

Reps. **Olman, Niehaus, Coates, Hartnett, S. Smith, Brown, Hoops, McGregor, Latta**

BILL SUMMARY

- Establishes a general procedure for refunding various taxes and fees.
- Creates a general assessment correction procedure for various taxes and fees.
- Modifies requirements relating to the service of orders and the form of and method of serving assessment notices.
- Makes various changes in the administration of motor fuel and fuel use taxes.
- Makes various changes in the administration of sales and use taxes.
- Modifies provisions of the corporation franchise tax law relating to delinquency penalties and interest on estimated tax payments, the carryover period for net operating losses, and the value of stock for determining tax liability.
- Simplifies the procedure for recapturing excess state aid paid to school districts when public utility property is undervalued.
- Changes the period on which annual inflation adjustments are based when indexing various income amounts, tax credits, and exemptions.
- Makes other miscellaneous changes in tax administration laws, such as removing obsolete language and clarifying existing law.

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CONTENT AND OPERATION

Overview

Generally, the bill makes numerous changes in the laws governing the administration of various taxes. The bill also clarifies existing law, removes language that has become obsolete, and makes a variety of technical changes.

Tax refund procedure

(sec. 5703.70)

Current law does not specifically authorize a hearing before the Tax Commissioner when an application for a refund of a tax is denied in whole or in part, although the Commissioner does allow such hearings. The bill establishes a refund hearing procedure in cases where the Commissioner determines that the refund amount to which the taxpayer is entitled is less than the amount claimed by the taxpayer in the refund application. In those cases, the bill requires the Commissioner to notify the taxpayer by ordinary mail of the refund amount. The taxpayer has 60 days from the date of mailing of the notice to provide additional information to the Commissioner, request a hearing, or both.

If the taxpayer neither requests a hearing nor provides additional information, the Commissioner will take no further action and the refund amount denied becomes final. If the taxpayer does not request a hearing but provides additional information, the Commissioner must review the information, make adjustments to the refund amount as proper, and issue a final determination on the refund.

If the taxpayer timely requests a hearing, the Commissioner must assign a time and place for it and notify the taxpayer. The Commissioner may continue the hearing from time to time as necessary. After the hearing, the Commissioner may make adjustments to the refund and must issue and serve on the taxpayer a copy of the final determination, which may be appealed under existing law to the Board of Tax Appeals. The Commissioner must certify to the Director of Budget and Management and the Treasurer of State the amounts to be refunded.

The fees and taxes subject to the refund procedure are the replacement tire fee (sec. 3734.905), alcoholic beverage tax (secs. 4307.05 and 4307.07), natural gas gross receipts tax (sec. 5727.28), kilowatt hour and MCF tax (sec. 5727.91), fuel use tax (sec. 5728.061), corporation franchise tax (sec. 5733.12), motor fuel tax (secs. 5735.122, 5735.13, 5735.14, 5735.141, 5735.142, and 5735.18), sales tax (secs. 5739.07 and 5739.071), resort area tax (sec. 5739.104), use tax (sec. 5741.10), cigarette and other tobacco products tax (secs. 5743.05 and 5743.53), and natural resources severance tax (sec. 5749.08). The municipal income tax on electric light companies is subject to a limited version of the refund procedure, whereby the Commissioner must certify to each municipal corporation, to which an overpayment was made, the amount to be refunded (sec. 5745.11).

Assessment correction procedure

(secs. 5703.60 and 5717.02)

Continuing laws authorize the Tax Commissioner to make assessments on taxpayers for failure to pay various taxes, but the Commissioner is not expressly authorized to modify assessments prior to a hearing, simply upon the receipt of additional information from a taxpayer. The bill authorizes one opportunity for the Tax Commissioner to correct an assessment before a hearing is held or the assessment becomes final. Under the bill, if a petition for reassessment has been properly filed under a law that specifies that the new reassessment procedure applies, or if the Commissioner decides on his or her own motion that a corrected assessment is warranted where a petition was **not** properly filed, the Commissioner may issue a corrected assessment that reduces or increases the previous one, and must mail it to the taxpayer by ordinary mail. (The Commissioner's mailing of the corrected assessment is considered to be timely made and issued, notwithstanding any time limitation imposed by law.)

The corrected assessment becomes final and is due and payable, unless the taxpayer files a new petition for reassessment within 60 days after the Commissioner mails the first corrected assessment. If a new petition is timely filed, the Commissioner may cancel the assessment by issuing a corrected assessment or a final determination, **or** may review the assessment or corrected assessment petition that is still pending (cancellation of an assessment by the Commissioner is not subject to further administrative review or appeal).

A corrected assessment may be issued on the Commissioner's own motion only if the original assessment has not been certified to the Attorney General for collection under existing law, or is not under appeal to the Board of Tax Appeals. A corrected assessment made on the Commissioner's own motion cannot increase the amount of tax, penalty, or additional charge if the statute of limitations to issue a new assessment for the increase has expired.

If the Commissioner does not issue a corrected assessment or final determination, or if the taxpayer timely files a new petition for reassessment, the Commissioner must review the assessment or corrected assessment petition, and the taxpayer may request a hearing. If a hearing is requested, the Commissioner must assign a time and place for it and notify the taxpayer, but the Commissioner may continue the hearing from time to time.

After a hearing, if requested by the taxpayer, the Commissioner must either **cancel** the assessment or corrected assessment by issuing a corrected assessment or final determination (a cancelled assessment would not be subject to further administrative review or appeal) or **issue a final determination** that reduces, affirms, or increases the assessment or corrected assessment. If the latter occurs, a copy of it must be served on the taxpayer in the manner provided under "***Form and service of assessment notices, and service of orders***," below, and the taxpayer may appeal the final determination to the Board of Tax Appeals under existing law.

If the Commissioner issues a corrected assessment or final determination that reduces an assessment below the amount the taxpayer paid toward the assessment, and the reduction is made at the written request of the taxpayer, either through the filing of a proper petition for reassessment or otherwise, the Commissioner must certify any overpayment as a refund due only to the extent a refund could have been timely claimed when the request was made. If the reduction is made on the Commissioner's own motion, the Commissioner is required to certify any overpayment as a refund due only to the extent a refund could have been timely claimed at the time the reduction was made.

The bill provides that the Commissioner cannot use either the procedure of issuing a corrected assessment (where the petition for reassessment has been

properly filed), or correcting it on the Commissioner's own motion (where the petition for reassessment was not properly filed), after the party assessed has requested in writing that the Commissioner not use that procedure.

The new assessment correction procedure applies to taxes or fees on: replacement tires (sec. 3734.907), horse racing (sec. 3769.088), alcoholic beverages (sec. 4305.131), natural gas gross receipts (sec. 5727.26), kilowatt hour and natural gas distribution (secs. 5727.89 and 5727.93), fuel use (sec. 5728.10), corporations (sec. 5733.11), motor fuel (sec. 5735.12), sales (sec. 5739.13), cigarettes and other related tobacco products (secs. 5743.081 and 5743.56), the municipal income of electric light companies (sec. 5745.12), personal and school district income (sec. 5747.13), and natural resources severance (sec. 5749.07).

Form and service of assessment notices, and service of orders

(sec. 5703.37)

Continuing law requires that the Tax Commissioner give a person written notice of an assessment. The bill requires that the Commissioner include with the notice instructions on how to petition for reassessment and request a hearing on the petition. This notice provision applies to all of the tax or fee assessments listed immediately above that are subject to the new assessment correction procedure, and also applies to public utility excise tax assessments (sec. 5727.47) and use tax assessments (sec. 5741.13). The bill also imposes the same notice requirement on assessors (county auditors or the Tax Commissioner) of personal property (sec. 5711.31) and public utility property (sec. 5727.47).

The bill requires that notices and orders of the Department of Taxation generally be served by personal service or certified mail. But it allows a taxpayer who is required by an order to notify the Department of acceptance of the order's terms to respond by personal service, certified mail, or a delivery service authorized by the Commissioner under existing law (sec. 5703.056, not in the bill).

Fuel use and motor fuel taxes

In addition to the assessment correction and refund procedure changes discussed above, the bill makes various changes to the motor fuel tax and highway use tax laws to reflect the consolidation of the former highway use (or "axle-mile") tax statutes and the existing fuel use tax statutes. These changes are the result of Ohio joining the International Registration Plan in 1991, adding a 3¢ per gallon surcharge to the fuel use tax, and effectively repealing the highway use tax by setting the rate at zero. Throughout Chapter 5728., the bill eliminates references to the highway use tax and other obsolete language (secs. 5728.02, 5728.03,

5728.04, 5728.05, 5728.061, 5728.08, 5728.09, 5735.11, and 5735.122). The bill also:

- Expands the definition of "public highway" to include land and lots over which the public has a right to pass even though the land or lots are temporarily closed by public authorities for construction, reconstruction, maintenance, or repair (for example, rest areas) (sec. 5728.01). Persons operating commercial cars and tractors on public highways must apply for a fuel use permit and pay the fuel use tax.

- Authorizes the Tax Commissioner to provide information, identifying taxpayers and the status of their accounts necessary for the administration and enforcement of the motor fuel tax, to persons who collect that information for the purpose of providing it to other persons responsible for the administration and enforcement of motor vehicle or tax laws (current sec. 5735.11, renumbered 5728.05).

- Simplifies record-keeping requirements for commercial vehicles by eliminating the requirement to keep records of the number of axles used and the permit number of each vehicle, and clarifies that records must be kept for four years from the date the fuel use tax return was due or filed, whichever is later (sec. 5728.07).

- Changes the statute of limitations for assessments for unpaid fuel use taxes from December 31 of the fourth year after the tax was due, to the later of four years after the return date for the period for which the tax was due **or** four years after the return was filed (sec. 5728.10).

- Requires the Tax Commissioner to wait 60 rather than 30 days before suspending a fuel use permit following service of an assessment, and leaves it to the Commissioner's discretion whether the permit holder must surrender the permit and identification device (sec. 5728.11).

- Exempts other states and their subdivisions from the fuel use tax if those states grant a like exemption to vehicles owned and operated by Ohio (sec. 5728.13).

- Specifies that sales of motor fuel on which the tax has already been paid do not constitute "use" of the fuel and that any tax paid on such fuel, therefore, is not refundable (sec. 5735.14).

- Allows a refund to be made directly to the United States government or any of its agencies, if the seller has not already applied for a refund on their behalf. Refund applications filed by the government or its

agencies must be supported by an invoice or similar fuel purchase document issued by the seller of the fuel. (Sec. 5735.18.)

Sales and use taxes

Mobile telecommunications services

(secs. 5739.01(B)(3)(f) and (p), (AA), and (VV), and 5739.033)

In 2000, the federal Mobile Telecommunications Sourcing Act, 4 U.S.C.A. 116-126, was enacted, which explicitly preempted state sourcing law for mobile telecommunications services, effective August 1, 2002. The Act determines how states and local governments are to treat charges for mobile telecommunications services, where such services are deemed to have occurred, and which taxing jurisdictions may tax those services. Am. Sub. S.B. 143 of the 124th General Assembly, which is awaiting the Governor's signature, implements a sales tax sourcing provision to comply with the federal act.

Other changes in sales and use tax law

The bill also makes the following changes to the sales and use tax laws:

- Allows Tax Department agents to divulge information regarding the name, account number, or business address of a holder of a vendor's license, direct payment permit, or a seller having a use tax account maintained under existing registration law, or information regarding the active or inactive status of such license, permit, or account. Allows county auditors or their employees, or employees of a county board of revision or the Commissioner to divulge the name and business address of a vendor, a vendor's license number, or information regarding the active or inactive status of a vendor's license issued by the auditor. (Secs. 5703.21, 5715.49, and 5715.50.)

- Clarifies that fuel consumed in producing electricity for manufacturing operations is not subject to the sales tax (sec. 5739.011).

- Exempts from the sales tax all magazines delivered by mail, not just those delivered by second-class mail (sec. 5739.02(B)(4)).

- Clarifies that the aggregate county sales and use tax levied under R.C. 5739.026 and 5741.023 may not exceed ½%, and allows the board of county commissioners to reduce the tax rate by resolution if the tax is levied for the county's general fund. The reduction becomes effective on the first day of the month specified in the resolution, but not sooner than the first day of the month next following the 30th day after

certification of the resolution to the Tax Commissioner. (Sec. 5739.026.)

- Expands the Commissioner's authority to issue direct payment permits to consumers, which allows them to pay the sales tax directly to the state, rather than having the vendor or seller collect the tax, if direct payment would improve compliance and make administration of the tax more efficient. The Commissioner may adopt rules establishing criteria for the issuance of these permits. (Sec. 5739.031.)

- Provides that a direct payment permit holder's records which, under existing law, must be kept for four years, may have to be kept longer if, pursuant to existing law, the four-year statute of limitations on assessments is waived (sec. 5739.031).

- Modifies the conditions under which the Commissioner may authorize a vendor to pay state and local sales taxes on a predetermined basis, if granting the authority would improve compliance and increase tax administration efficiency. The person receiving prepay authorization must post a notice, if required by the Commissioner, at the location where the product is offered for sale, stating that the tax is included in the selling price. The Commissioner may adopt rules to administer prepayment procedures. Under current law, tax prepayment is permitted only if not allowing prepayment would impose an unreasonable burden on the vendor. The Tax Commissioner may require a prepaying vendor to file some form of security. And, in lieu of a posted notice, the vendor must print on each item sold a notice that the tax has been prepaid and is included in the item's price. (Sec. 5739.05.)

- Eliminates a provision that requires the Commissioner to employ a sufficient number of auditors of not less than one auditor for each 1,000 vendors' certificates (sec. 5739.05(D)).

- Revises the circumstances under which refunds of erroneously paid sales or use taxes may be made directly to the consumer rather than through the vendor or seller. Currently, refunds may be issued directly to the consumer only if either (1) the consumer cannot obtain a refund from the vendor because the vendor has gone out of business or is in bankruptcy, or (2) the consumer received a refund of the purchase price from the manufacturer (e.g., because the consumer returned an item directly to the manufacturer). Under the bill, a refund may be made directly to the consumer only if either (1) the consumer paid the tax directly to the state, and not through a vendor, (2) the consumer paid the tax to a vendor, but the tax was not refunded to the vendor and the

vendor has not refunded the tax to the consumer, or (3) the consumer paid the tax to a vendor, but received a refund of the purchase price (but not the tax) from the manufacturer or another person. Refunds may be made to the vendor, but only if the vendor remitted the tax to the state and either (1) the vendor has already refunded the tax to the consumer or (2) the vendor billed the consumer for the tax but has not yet collected the tax from the consumer. Currently, the tax may be refunded to the vendor only if the vendor "has not been reimbursed from the consumer." (Secs. 5739.07 and 5741.10.)

- Expressly requires vending machine operators, persons who sell at temporary exhibitions, shows, fairs, flea markets, and similar events, and persons who effectuate leases of motor vehicles, watercraft, outboard motors, and aircraft to obtain transient vendor licenses (sec. 5739.17).

- Eliminates obsolete references to limited vendors. That license class was eliminated by H.B. 612 of the 123rd General Assembly (secs. 5739.31 and 5739.99).

- Modifies the conditions under which a person is prohibited from making sales and is subject to a penalty, from when a license has been revoked or suspended, to the condition of when a license has been suspended (secs. 5739.31 and 5739.99).

- Specifies that any benefit gained by a person from rounding the person's sales or use tax liability to the nearest whole dollar (as allowed under existing law) is not a prohibited benefit. Current sales and use tax law prohibits anyone other than the state--particularly vendors--from benefiting from the collection of the tax. (Secs. 5739.01(H) and 5741.01(G).)

- Removes the requirement that, in order to qualify as a tax-exempt "casual sale" (i.e., items sold at a yard sale), the item must originally have been purchased for use in Ohio (sec. 5739.01(L)).

- Permits the Commissioner to audit a representative sample of a seller's sales to determine the per cent of exempt or taxable transactions or the effective tax rate, if information in the Commissioner's possession indicates that the use tax amount required to be collected or paid is greater than the amount remitted by the seller. The Commissioner may issue an assessment based on the audit, but must make a good faith effort to reach agreement with the seller in selecting a representative

sample. Currently, a similar sampling is authorized for consumers, but not sellers. (Sec. 5741.13.)

Corporation franchise tax

Delinquency penalties and interest on estimated tax payments

(secs. 5733.021 and 5733.28)

Continuing law allows each taxpayer that is subject to the corporation franchise tax that does not file a January report and pay the taxes to file before January 31 an estimated tax report and pay estimated taxes according to a schedule in existing law. If those payments are not timely made, existing law establishes penalties and interest that may be assessed on the unpaid amount. The bill changes the penalty on delinquent estimated taxes (and for any delinquent franchise tax payment) from not more than double the federal short-term interest rate to not more than 15% of the delinquent payment. Existing law provides that the interest rate for unpaid taxes is the federal short-term rate plus 3%, which for 2002 is 7% (secs. 5703.47 and 5733.26, not in the bill).

The bill establishes a "safe harbor," consistent with Internal Revenue Code § 6655, for taxpayers to avoid penalties if they make estimated tax payments equal to 100% of the previous year's liability or 90% of the current year's liability. The bill generally provides that for any period of delinquency ending **prior** to June 1 of the tax year, penalties may, and interest must, be imposed on only the delinquent portion of the estimated tax payments that were due by January 31 and March 31 (if estimated taxes are paid in increments of 1/3 and 2/3, or increments of 1/3, 1/3, and 1/3). If the taxpayer was not subject to tax for the immediately preceding tax year, the estimated tax to which the penalty and interest applies is 90% of the "qualifying net tax" for the current tax year. If the taxpayer was subject to the tax for the immediately preceding tax year, the estimated tax is the lesser of 100% of the "qualifying net tax" for the immediately preceding tax year or 90% of the "qualifying net tax" for the current tax year.

The bill defines "qualifying net tax" in two ways, based on the taxpayer's filing status:

(1) If the taxpayer did not file a tax report for the tax year or failed to prepare and file the report in good faith for the tax year, the "qualifying net tax" is the total of the corporation franchise taxes, litter taxes, and recycling and litter prevention taxes imposed for the tax year, reduced by tax credits. If the credits exceed the total tax, the qualifying net tax is zero.

(2) Otherwise, "qualifying net tax" means the **lesser** of:

(a) The total of the corporation franchise taxes, litter taxes, and recycling and litter prevention taxes imposed for the tax year, reduced by tax credits; **or**

(b) The tax shown on the report, reduced by the credits shown on that report, **or** the tax shown on an amended report prepared and filed in good faith, reduced by the credits shown on that amended report, **whichever is less**. If the credits shown exceed the total tax shown, the qualifying net tax is zero.

The bill provides that for any period of delinquency **commencing on** June 1 and concluding on the due date for filing a report when an extension is granted under existing law, penalties may only be imposed on one-third of the estimated tax that was due by May 31 (i.e., only on the amount that was due by May 31 from a taxpayer that paid estimated taxes in three installments due January 31, March 31, and May 31). Interest must be imposed on the delinquent portion of the amount, as calculated under (1), above. The estimated tax for this period of delinquency is 90% of the qualifying net tax for the current tax year.

Increase in carryover period for net operating losses

(sec. 5733.04)

Under continuing law, net operating losses are deducted from a taxpayer's taxable income to determine net income. Current law provides that for net operating losses incurred in taxable years ending on or after January 1, 1982, the carryover period for such losses is 15 consecutive taxable years after the taxable year in which the net operating loss occurs. The bill changes the carryover period to 20 years for net operating losses incurred in taxable years beginning on or after August 6, 1997.

Computing tax base

(sec. 5733.05)

The value of a taxpayer's issued and outstanding shares of stock is used in calculating corporation franchise tax liability. This value is computed in one of three ways: one way for financial institutions, and one of two other ways for corporations that are not financial institutions--either on the basis of net income or on the basis of the net worth.

The bill specifies that when the value is computed for financial institutions or computed on the basis of net worth, amounts treated as liabilities under generally accepted accounting principles are not to be included.

Deadline for refund claims

(sec. 5733.11)

Under current law, claims for refunds of overpaid corporation franchise taxes must be filed within three years after the date the tax was overpaid. If the refund filing deadline was extended because the statute of limitations on assessments was waived, or if an amended tax report was filed, then the refund filing deadline is extended.

The bill provides that the refund filing deadline (whether three years or extended) begins on the date the tax payment was due, rather than the date on which the payment was made, if the tax was paid before the due date.

Aid to schools

(secs. 3317.026, 5727.47(E), and 5727.471)

Under current law, if a public utility believes that the valuation of its property, as assessed by the Tax Commissioner, is too high, it may pay taxes based on the figure it claims to be correct while it appeals the Commissioner's valuation. State aid to affected school districts is based on the lower figure, pending the outcome of the appeal. (That is, state aid increases because district tax revenue is down due to the lower valuation.) If the higher valuation is affirmed, the state recaptures the excess aid paid to the school districts. To effect the recapture, the Commissioner notifies the county auditor of the overpayment; the county auditor notifies the county treasurer; and the county treasurer withholds the amount of the overpayment plus interest from the tax proceeds payable to the district and pays the total to the state.

The bill simplifies the recapture procedure by requiring the Commissioner, not later than June 1 of each year, to certify to the Department of Education for each school district the total of the increases in the taxable value of utility property over the value on which the utility paid its taxes, as determined in the preceding calendar year. The Department, in turn, must increase the total taxable value of the district in computing state aid and supplements to state aid for the next fiscal year. The bill eliminates the county as the "middleman."

Indexing inflation

The bill changes how annual inflation adjustments are determined for the homestead exemption (secs. 323.152 and 4503.065), medical savings account deduction (sec. 3924.66), residential energy subsidy program (sec. 5117.071), telephone company tax credit for eligible 9-1-1 charges (sec. 5727.39), and personal income tax exemption (sec. 5747.025). The bill requires that the Tax

Commissioner make the inflation adjustment in September of each year using indexes measuring inflation over the preceding calendar year (in current law, the period is usually July 1 through June 30, or no period is specified).

Personal income tax

Under current law, if an employer does not withhold Ohio or school district income tax from an employee's compensation, or withholds the tax but does not remit it to the state, the employee still has legal liability for the tax.

Under the bill, if an employer withholds the tax but does not remit it, the employee continues to be liable if the Tax Commissioner ascertains that the employee colluded with the employer in not remitting the tax to the state. (Sec. 5747.06.)

The bill also provides that a pass-through entity may use an identifying number other than a social security number, on an income tax return filed on behalf of one or more of the entity's investors (sec. 5747.08). Pass-through entities (e.g., S corporations, partnerships, limited liability companies) currently may file a single return on behalf of their investors, who may be subject to income tax on their respective shares of the entity's income.

Miscellaneous

The bill makes changes to various laws that deal with specific taxes or tax-related matters, as follows:

- Authorizes the Tax Commissioner to issue jeopardy assessments against electric light companies if the Commissioner believes they are necessary to ensure collection of the municipal income taxes imposed on such companies. The total amount assessed is immediately due and payable, unless the taxpayer assessed files a petition for reassessment and provides security in a form satisfactory to the Commissioner and in an amount sufficient to satisfy the unpaid balance of the assessment. (Sec. 5745.12.)

- Repeals a provision in the income tax law that requires the Commissioner to prepare an annual report of state revenues and expenditures and furnish copies of it to the public (repeal of sec. 5747.181).

- Defines "peace officer" to include employees of the Department of Taxation having certain investigative powers delegated to them, which increases the penalty for felonious or aggravated

assaults on such employees, prohibits law enforcement and court employees from disclosing their home addresses during a criminal case, and prohibits making false allegations against such employees (sec. 2935.01).

- Under the Tax Commissioner's current duty to maintain a journal containing records of all actions taken relating to assessments and the reasons therefor, provides that the journal must instead contain a record of all final determinations (sec. 5703.05).

- Increases from 30 to 60 days the period in which a taxpayer may pay a personal property tax assessment before it is certified to the Attorney General for collection, which must be indicated in the written description the Tax Commissioner or county auditor is required to provide to the taxpayer with or before the issuance of the assessment (sec. 5703.51).

- Corrects a citation in the motor fuel law (sec. 5735.06).

HISTORY

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Introduced	12-05-01	pp.	1240-1241
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