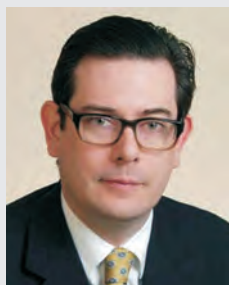


Massachusetts Amnesty Offers Opportunities For Taxpayers and the DOR

by Matthew A. Morris



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In this article, Morris explains a pending Massachusetts tax amnesty and argues that the program should be extended to include individual and other non-trustee business taxes.

A tax amnesty bill signed by Gov. Deval Patrick (D) on July 11 will provide Massachusetts taxpayers with a two-month window for reporting and paying their state tax liabilities.¹ The fiscal 2015 tax amnesty, which forms part of the governor's fiscal 2015 budget, is anticipated to raise \$35 million.² The Department of Revenue recently announced that the amnesty will be held in September and October.³

Although the amnesty's terms have yet to be determined by the revenue commissioner, early signs suggest that the fiscal 2015 program will limit participation "by invitation only" to (1) business taxpayers with previously assessed

business "trustee" tax liabilities such as sales and use tax and income tax withholding and (2) individual taxpayers with previously assessed individual tax liabilities. To maximize the revenue-generating potential of the fiscal 2015 program and to open the window for compliance to the broadest range of taxpayers, the commissioner should consider adopting a broad-based, open-door amnesty similar to the fiscal 2003 program that was open to individual and business taxpayers with previously assessed unreported or under-reported income, and trustee tax liabilities.⁴

I. Prior Tax Amnesty Programs

Massachusetts has offered three tax amnesties in the past 12 years.⁵ The fiscal 2003 tax amnesty was the broadest of the three, offering businesses and individuals an opportunity to comply with their tax obligations through an open-door rather than an invitation-only structure.⁶ The fiscal 2003 program was also significantly broader than the later amnesties by offering taxpayers with both individual and corporate income tax liabilities the opportunity to participate.⁷ According to House Minority Leader Brad Jones (R), the fiscal 2003 program generated over \$100 million.⁸

⁴The DOR has announced that individual income tax will be included in the scope of eligible tax types, but has not, at this point, indicated that corporate income tax will be included. *See id.* The DOR is expected to release a taxpayer information release (TIR) within the next several weeks that will provide full details regarding the tax amnesty program. *Id.*

⁵Massachusetts Budget and Policy Center, *supra* note 2, at "Tax Amnesty Program."

⁶*See* Massachusetts DOR, TIR 02-14: Amnesty Program, section III.1 ("Eligible Taxpayers"). The fiscal 2003 program was open to any taxpayer with unfiled returns for the eligible tax types who "files all required returns . . . pays the full amount of tax and interest due for all such taxable years and properly and timely files a Request for Amnesty." *Id.* Thus, the fiscal 2003 program adopted an open-door rather than an invitation-only policy.

⁷*Id.*

⁸*See* "Lawmakers Give Nod to Tax Amnesty Program," *The Washington Times*, Apr. 28, 2014; *see also* Colleen Quinn, "House GOP Hopes Timing Is Right for Tax Amnesty Program," *Worcester Business Journal Online*, Apr. 24, 2014, which reported that the fiscal 2003 program generated \$102.8 million.

¹*See generally* 188th Massachusetts General Court, Senate Ways and Means FY 2015 Budget Amendment regarding Tax Amnesty, section 122A, adopted by RC #305.

²*See* Massachusetts Budget and Policy Center, "Analyzing the Legislature's Budget for FY 2015," at "Tax Amnesty Program" (July 2, 2014). This projection for fiscal 2015 is based on the success of prior amnesties. For example, the fiscal 2010 tax amnesty raised \$32.6 million. *See* Massachusetts Department of Revenue, Amnesty Report — September 2010, at 3 ("Overall Results"). According to House Minority Leader Brad Jones (R), \$5 million of the total revenue generated from the fiscal 2015 program is earmarked for the Massachusetts Substance Abuse Services Fund; the remainder will be distributed through the Commonwealth's General Fund. *See* "Mass. Approves 2-Month Tax Amnesty Program," *The Boston Globe*, July 13, 2014.

³*See* Massachusetts DOR, "What You Need to Know About the Tax Amnesty Program."

The fiscal 2009 and fiscal 2010 tax amnesties were more narrowly focused and generated less revenue than the fiscal 2003 program. The fiscal 2009 tax amnesty was limited to individual taxpayers by invitation only, which means that only individual taxpayers with previously assessed and unpaid income tax and personal sales and use tax liabilities who received special tax amnesty bills were eligible to participate;⁹ this program generated \$32 million.¹⁰ The fiscal 2010 amnesty, also by invitation only, was limited to business taxpayers with previously assessed business trustee tax liabilities such as sales and use tax, meals tax, income withholding, and cigarette excise tax;¹¹ this program generated \$32.6 million.¹²

II. The Basic Terms of the Fiscal 2015 Amnesty

Although the DOR will — as it has with previously announced amnesties¹³ — release guidance that will clarify the exact scope of the program, the amnesty will have a basic structure.¹⁴

A. It will be held in September and October 2014.

The DOR has already announced that the tax amnesty program will be held in September and October 2014,¹⁵ although it could have chosen any two consecutive months in fiscal 2015.

B. The DOR will announce the eligible tax types.

The DOR will announce the eligible tax types when it releases its guidance on the amnesty program, although the bill states that the amnesty program shall include at least the following tax types:

- sales and use taxes (including materialman sales taxes and sales taxes on telecommunications services, boats, and recreational vehicles);
- meals taxes (including local options);
- withholding income;
- performer withholdings;
- passthrough entity withholdings;
- lottery annuity withholdings;
- room occupancy excises (including local options);

- some convention center financing fees and financing surcharges;
- deeds excises;
- cigarette, cigar, and smoking tobacco excises;
- club alcoholic beverages excises; and
- gasoline and special fuels excises (including local options).¹⁶

The DOR has announced on its “What You Need to Know About the Tax Amnesty Program” Web page that individual income tax will be included in the amnesty.¹⁷ However, there is no indication on the DOR website that corporate income tax will be included. Further, the information on that page is subject to change; the DOR is reviewing the scope of eligible tax types (in addition to the minimum list of tax types listed above), and it is only when a taxpayer information release on the amnesty program is published that taxpayers and practitioners will have a complete and final list of eligible tax types.

C. The amnesty will be by invitation only.

The DOR announced that “tax amnesty notices showing the tax and interest due, along with the penalties to be waived, will be mailed on September 2, 2014 to taxpayers who qualify.”¹⁸ The DOR also announced that the amnesty will be available only to taxpayers who have been assessed tax and penalties before July 1, 2014.¹⁹ This means that the two-month amnesty is not an open-door invitation for taxpayers to come forward to disclose their underreported tax liabilities in a manner similar to the fiscal 2003 program.²⁰ Rather, the DOR has indicated that it will narrow the program’s scope to those taxpayers with previously assessed but currently unpaid tax liabilities.

D. The DOR will waive all penalties for failure to file, failure to pay, and failure to make proper estimated tax payments.

The revenue commissioner shall waive these penalties “without the need for any showing by the taxpayer of reasonable cause or the absence of willful neglect.”

E. All required payments must be made on or before October 31, 2014.²¹

Affected taxpayers will need to propose lump sum (or very short-term installment) payments of their liabilities before the end of the two-month amnesty period. Any payments not made before October 31, 2014, will not be eligible for amnesty, which means that failure-to-file and failure-to-pay penalties may be imposed on the unpaid portion of the liability.

⁹See Massachusetts DOR press release, “An Estimated 159,000 Taxpayers to Receive Amnesty Tax Offer,” Feb. 23, 2009.

¹⁰See “House GOP Hopes Timing Is Right,” *supra* note 8.

¹¹See DOR Amnesty Report — September 2010, *supra* note 2, at 2-3.

¹²*Id.* at 3 (“Overall Results”).

¹³See, e.g., TIR 02-14, *supra* note 6.

¹⁴Each of the following program terms — except as noted — is described in detail in the fiscal 2015 tax amnesty bill, *supra* note 1. The DOR has released some early guidance on the amnesty on its “What You Need to Know About the Tax Amnesty Program” Web page, *supra* note 3, but it has not yet released a TIR with final guidance on the program.

¹⁵*Supra* note 3.

¹⁶See fiscal 2015 tax amnesty bill, *supra* note 1, section 122(a).

¹⁷*Supra* note 3.

¹⁸*Id.*

¹⁹*Id.*

²⁰*Supra* note 6.

²¹*Supra* note 3.

F. Taxpayers under criminal investigation or who have “delivered or disclosed any false or fraudulent application, document, return or other statement” are ineligible to participate.

This caveat gives the DOR the right to deny eligibility to those taxpayers who are currently the subject of a criminal investigation or who willfully submitted a fraudulent application, return, or statement to the department (against whom a criminal investigation has not yet been initiated or will never be initiated).

G. Taxpayers who submit false or fraudulent information to the DOR in connection with the amnesty application will be subject to additional penalties.

A taxpayer who “delivers or discloses any false or fraudulent application, document, return or other statement” to the DOR in connection with the amnesty application will be subject to the greater of (1) the tax penalties imposed under chapter 62C of the Massachusetts General Laws or (2) a penalty not to exceed \$10,000, which will be added to “and become part of” the tax due.

H. Taxpayers who are contesting a tax liability and want to participate in the amnesty must agree to pay the tax and interest thereon in full before proceeding with their administrative appeal rights.

In other words, a taxpayer who is appealing a tax liability through a Form CA-6 or petition to the Appellate Tax Board cannot simultaneously obtain the benefits of penalty abatement under the amnesty and the stay of collections under chapter 62C, section 32(e) of the Massachusetts General Laws. Taxpayers who want the benefits of penalty abatement under the amnesty must agree to pay the tax and interest assessment immediately on issuance of a revised notice of assessment before proceeding with the appeals process.

I. The commissioner must prepare and file a report detailing the scope and success of the program with the legislature no later than September 1, 2015.

J. The amnesty will not include penalties that the commissioner “would not have the sole authority to waive.”

For example, the commissioner does not have the authority to waive penalties on fuels taxes imposed under the International Fuel Tax Agreement or under local options.

K. Participating taxpayers will not be eligible for another tax amnesty for a 10-year period.

Taxpayers who come forward under the fiscal 2015 program are ineligible to participate in any future DOR amnesty for a 10-year period.

III. Opportunities and Dangers For Noncompliant Taxpayers

Taxpayers with outstanding tax assessments of any type set forth in Section II.B, above, should consider retaining qualified tax counsel to represent them in the fiscal 2015 tax

amnesty. The fiscal 2015 amnesty offers an opportunity for taxpayers with unpaid tax liabilities to comply with their payment obligations without penalties for failure to file, failure to pay, or failure to make proper estimated tax payments.

To minimize legal and professional fees, many taxpayers will choose to represent themselves in the tax amnesty instead of hiring a qualified tax attorney or accountant to guide them through the process. This approach may reduce short-term costs, but may result in higher long-term overall costs for at least three reasons:

A. The DOR’s tax assessments need a second look.

Taxpayers eligible to participate in the amnesty should retain a qualified tax attorney or CPA to ensure that the DOR’s tax assessments are accurate and, if necessary, to prepare original or amended returns that show a tax due that is lower than the DOR’s assessments. When offered the opportunity for a “no questions asked” abatement of penalties, many taxpayers will choose to simply pay the amnesty bill without questioning their underlying liability. What initially appears to be a taxpayer-favorable penalty abatement might, on closer inspection, result in a significant overpayment of tax to the DOR.

B. Some businesses lack appropriate internal bookkeeping or accounting controls.

For most companies that owe delinquent trustee taxes such as sales and use taxes, generating true, correct, and complete tax returns requires more than plugging data into software programs. These companies often will need an outside representative with the knowledge and experience to trace a business’s liabilities over a span of prior tax years, taking into account changes in law and circumstances. A qualified outside attorney or CPA can help these businesses take advantage of every available tax benefit under the law applicable to that particular tax type.

C. Eligible taxpayers may want to retain a tax attorney to review their exposures to criminal liability or civil penalties before applying for amnesty.

As discussed in Section II.G, above, a taxpayer who submits a false statement in connection with the amnesty application will be subject to, in addition to the underlying tax and interest, the greater of (a) the full range of penalties under section 62C of the Massachusetts General Laws — including but not limited to penalties for failure to file (section 34), failure to pay (section 32), negligence or substantial understatement (section 35A), civil fraud (section 28), and criminal tax evasion (section 73) — or (b) a penalty of up to \$10,000. Although early signs suggest that participation in the fiscal 2015 amnesty will be by invitation only rather than through an application process,²² taxpayers who

²²See *supra* Section II.C.

think they might be exposing themselves to criminal liability or civil penalties by participating in the amnesty should consider retaining a qualified tax attorney.

IV. Opportunities for the DOR

The only tax types that must be included in the fiscal 2015 amnesty are the business trustee taxes enumerated in Section II.B above. However, the commissioner would be entitled under the fiscal 2015 budget bill to expand the scope of eligible taxpayers to include individuals²³ and the scope of eligible tax types to include corporate and individual income tax in addition to trustee taxes.²⁴ Further, the DOR could replicate the success of the fiscal 2003 program by opening the doors to taxpayers with previously unfiled returns and underreported liabilities.²⁵ By expanding the program's scope to taxpayers with unfiled returns and underreported liabilities and the scope of eligible tax types to include income tax (both corporate and individual), the DOR may be able to maximize revenue and the number of newly compliant taxpayers.

Based on the revenue generated by the fiscal 2003 amnesty (which was open to businesses and individuals) compared with the revenue generated by the fiscal 2010 program (which was limited to businesses), the DOR could more than triple its revenue by abandoning the invitation-only model and including individuals as well as businesses.²⁶ By loosening the structure of the amnesty, the DOR should be able to broaden the scope of taxpayers eligible to come into compliance by a significant multiple of the 35,000 business taxpayers invited to participate in the fiscal 2010 program.²⁷

²³See *supra* note 4, which indicates that individual income tax may be included in the scope of eligible tax types.

²⁴See the fiscal 2015 tax amnesty bill, *supra* note 1, at section 122A(a): "The scope of the program, including the particular tax types and periods covered, including any limited look-back period for unfiled returns, shall be determined by the commissioner."

²⁵See *supra* note 6, which describes the open-door policy of the fiscal 2003 amnesty.

²⁶Compare the \$102.8 million generated by the fiscal 2003 amnesty with the \$32.6 million generated by the fiscal 2010 program. See *supra* notes 2 (fiscal 2010 program) and 8 (fiscal 2003 program).

²⁷Compare the approximately 35,000 business taxpayers invited to participate under the fiscal 2010 program with the 159,000 individual taxpayers invited to participate in the fiscal 2009 program. See *supra* notes 9 (fiscal 2009 program) and 11 (fiscal 2010 program).

Moreover, there is evidence to suggest that offering repeated tax amnesties will undercut short-term revenue and magnify revenue losses associated with long-term compliance incentives.²⁸ By structuring the fiscal 2015 amnesty as broadly as possible, the DOR could avoid the need for another individual income amnesty within the next few years. The more comprehensive the current program, the less likely taxpayers will adopt a wait-and-see attitude regarding their tax compliance problems.

V. Conclusion

The fiscal 2015 tax amnesty offers Massachusetts taxpayers the chance to resolve their outstanding liabilities with the DOR without failure-to-file and failure-to-pay penalties and without the time and expense associated with appealing those penalties. The drawbacks of the fiscal 2015 program for taxpayers are:

- that the early signs suggest that the program will be by invitation only, meaning that only those taxpayers who receive special amnesty bills will be eligible to participate; and
- that the taxes and interest must be paid in full by October 31, 2014, which leaves taxpayers little time to arrange for full payment of their liabilities.

The revenue commissioner should not miss an opportunity to maximize revenue production and compliance through a broad-based, open-door amnesty offered to both individuals with outstanding income taxes and businesses with outstanding income and trustee taxes. Further, the scope of the amnesty should be expanded to include all corporate and individual taxpayers with unpaid liabilities, regardless of whether those liabilities were previously assessed. Although administering a broad-based amnesty would be more expensive than administering a limited program, both the DOR and taxpayers caught in the compliance gap should benefit from a more inclusive approach. The alternative would mean a series of short-term amnesties that are limited in scope and that may undercut incentives for long-term tax compliance. ☆

²⁸See Hari Sharan Luitel and Russell S. Sobel, Abstract, "The Revenue Impact of Repeated Tax Amnesties," St. Cloud State University (2005) ("We find that these additional tax amnesties generate less short-run revenue than predecessors and tend to magnify revenue losses associated with disincentives for long-run tax compliance").