

Legal Alerts

New Administrative Rule Clarifies Gray Areas of Oregon's Tax Amnesty Program

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Garvey Schubert Barer Legal Update, November 16, 2009.

The Oregon Department of Revenue (the Department) recently issued Administrative Rule 150-305.100-(C), which clarifies several gray areas surrounding Oregon's new tax amnesty program.

Overview of Amnesty Program

During the 2009 legislative session, the Oregon Legislature passed SB 880, which authorizes the Department to administer Oregon's first tax amnesty program. The program begins on October 1, 2009 and ends November 19, 2009. To participate, taxpayers must file an application with the Department, file all required returns and/or amended returns within 60 days thereafter, and either pay in full all taxes due, plus one half of the interest otherwise owing, or apply for an installment agreement for such amounts. All payments under any installment agreement must be made by May 31, 2011.

The amnesty program works on a "carrot and stick" approach. The "carrot" is the abatement of all penalties (including criminal evasion penalties under ORS 314.075 and 314.991(1)) and one-half of the interest otherwise due with respect to previously unpaid taxes or unfiled returns, including interest on the underpayment of estimated taxes. The "stick" takes the form of an additional 25 percent penalty for taxpayers who otherwise qualify for amnesty but fail to apply, or who apply but are later determined to have under-reported / underpaid under the program. The 25 percent penalty is in addition to any other applicable penalties.

OAR 150-305.100-(C)

Oregon Administrative Rule 150-305.100-(C) clarifies several aspects of Oregon's new tax amnesty program and the 25 percent post-amnesty penalty. Under the amnesty program, if a taxpayer fails to comply with the terms of any installment agreement without reasonable cause, all penalties and interest waived under the program become immediately due and payable.

Reasonable Cause

The new administrative rule defines "reasonable cause" as the exercise of "ordinary care and prudence in abiding by the terms of the installment agreement" but being unable to comply "due to the participant's individual circumstances." The administrative rule lists the following factors the Department will consider in determining if reasonable cause exists:

- The participant's reasons for failing to comply;
- The length of time between the event causing the noncompliance and the noncomplying payment; and
- Whether the participant could have anticipated the event causing the noncompliance and taken reasonable steps to avoid it.

The rule sets forth the following nonexclusive list of circumstances when reasonable cause may exist:

- The death or serious illness of the participant or a family member;
- Destruction by fire, disaster, or casualty of the participant's home or business;
- Unavoidable and unforeseen absence of the participant from the state prior to the missed payment;
- An unplanned significant change in the participant's financial circumstances, through no fault of the participant, such that the participant demonstrates the inability to meet reasonably necessary living expenses and the terms of the agreement; or
- Erroneous written information from the Department which caused the participant's failure to comply.

The rule expressly provides reasonable cause does not exist under the following circumstances:

- Reliance on an employee or tax professional to pay on time; or
- Inability of, or failure or oversight by, the participant to pay the liability.

Closing Agreements

To ensure the amnesty program is administered efficiently and equitably, OAR 150-305.100-(C) also allows the Department to enter into closing agreements with taxpayers, and waive penalties and interest with respect to periods immediately prior to or during the amnesty period. One-half the interest otherwise due may be waived for "good and sufficient cause," which is deemed to exist if the Department determines that entry into a closing agreement will result in equity or efficiency by providing a streamlined alternative filing mechanism for taxpayers. Penalties may be also waived if such a waiver will enhance the long-term effectiveness, efficiency or administration of the tax system.

Application of 25 Percent Post-Amnesty Penalty

OAR 150-305.100-(C) also provides clearer guidance on the application of the 25 percent post-amnesty penalty. SB 880 had no provision to abate the 25 percent penalty for taxpayers who make inadvertent filing errors which are later identified and adjusted. Testimony in the Oregon Legislature made it clear that the intent of SB 880 was to increase participation and long-term compliance, not penalize taxpayers for unintentional errors.

The 25 percent penalty will generally be applied to any unpaid tax otherwise due for any period for which amnesty could be sought and for which:

- The taxpayer failed to apply for amnesty; or
- The taxpayer filed for amnesty and underreported his/her tax liability on the amnesty return.

The penalty will not generally be imposed when an adjustment to a return occurs:

- Based on an arithmetical or typographical error;
- Based on an inadvertent error made in calculating depreciation deductions;
- Based on an error or omission resulting in a *de minimis* amount of additional tax; or
- Due to an IRS audit, unless the IRS has imposed accuracy, fraud, or evasion penalties under IRC 6662, 6662A, 6663, or 7201.

The 25 percent post-amnesty penalty will generally be imposed if a subsequent penalty is imposed for:

- Substantial understatement of income;
- Failure to file a report or return with the intent to evade tax due;
- Abusive tax avoidance transactions;
- Evasion related penalties under ORS 314.075;
- Filing false returns or reports;
- Failure to file returns or reports; or
- Accuracy, fraud, or evasion penalties finally imposed under IRC 6662, 6662A, 6663, or 7201.

Conclusion

OAR 150-305.100-(C) provides important guidance on several gray areas under the amnesty program.

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