

State and Local Tax Bulletin

January 30, 2009



BRADLEY ARANT
BOULT CUMMINGS
LLP

Alabama Department of Revenue Announces New Amnesty Program

By Matthew S. Houser and Bruce P. Ely

Upcoming Seminars Involving Members Of Our SALT Practice Group

January 25 – 30, 2009

COST 2009 SALT Basics School, Georgia Tech Hotel & Conference Center, Atlanta, Georgia. Chris Grissom will be a co-panelist today in a presentation on preparing internal research memoranda and the interplay with the attorney-client privilege and work product doctrine. For more information, please visit the COST website: www.statetax.org.

February 23-25, 2009

COST Annual Sales Tax Conference, Amelia Island, Florida. Bruce Ely will be a co-panelist in a presentation entitled "Who's That Knocking on The Door? It's Not Just the IRS and the States. Local Governments Are Also Pounding To Get In." For more information, please visit the COST website: www.statetax.org.

March 3, 2009

Will Whistle and Bruce Ely will serve as co-panelists as part of the ABA-IPT's annual Advanced Sales and Use Tax Conference discussing the topic "State Administrative Procedure Acts: What Happens to your Assessment if the State DOR Didn't Comply?" Their presentation will be March 3 at the Ritz-Carlton Hotel in New Orleans. For more information, please visit ABA-IPT's website: <http://meetings.abanet.org/meeting/tax/IPT09/materials.cfm>.

Alabama Governor Bob Riley and Department of Revenue Commissioner Tim Russell on January 15 announced a temporary amnesty program for many Alabama taxpayers. For a limited time, taxpayers may avoid penalties and criminal prosecution if they voluntarily pay certain delinquent taxes due in the previous three years.

The "Operation Clean Slate" program begins February 1 and ends May 15. Governor Riley emphasized that this is a limited-time-only offer. "This is a brief window of opportunity for those who aren't paying their taxes to get right with the law," said Governor Riley. "Take advantage of this offer because it won't last long." The state's current and projected budgetary shortfalls are likely the prime reason for the roll-out of this new program.

While the state may not impose penalties for incorrect filings, we do not expect them to blindly accept every tax return submitted. According to recently-appointed Tax Policy Director Curtis Stewart, "[T]axpayers will be expected to pay the proper amount of tax and interest, so the returns and payments received as part of Operation Clean Slate could be subject to audit, and adjustments may be made to the tax amount reported."

When the program ends, the Alabama Department of Revenue (ADOR) announced that it will activate the Discovery Module of its new integrated tax system; this module will assist them in identifying unfiled returns and unpaid taxes as well as underreported taxes. The new \$26 million computer system replaces a system installed in the 1980s. Reportedly, it is also designed to pick up Alabama filers who were audited by the Internal Revenue Service and paid additional federal income tax, but who failed to notify ADOR of the audit changes. "[I]t is about to get a lot easier to catch [delinquent taxpayers]," stated Governor Riley. "The likelihood they will get caught is about to increase tremendously."

In addition to the initial press release announcing Operation Clean Slate, ADOR has also released a helpful Q&A document on its website (<http://www.ador.state.al.us/cleanslate.html>) outlining the general parameters of the program. Members of our firm have also conferred with ADOR officials to answer some additional questions. The guidelines of the program are discussed below.

What types of taxes are eligible? Operation Clean Slate will apply to "virtually all" taxes administered by ADOR. ADOR has specifically stated that individual and corporate income, business privilege, excise, severance, tobacco, gasoline, and consumer use tax will be covered. The program will also apply to withholding, sales, seller's use, and motor fuels taxes, but only for taxpayers who aren't currently

continued on page 2

registered for those taxes. ADOR officials say that the program “is not limited to” these taxes; for example, rental taxes reportedly will also be eligible. If you have questions about other Alabama taxes, you or your tax adviser should contact the Taxpayer Advocate Office at (334) 242-1055 or email cleanslate@revenue.alabama.gov.

Does the program apply only to taxpayers who have not previously filed returns? No. Unlike ADOR’s Voluntary Disclosure Program, Operation Clean Slate is available to taxpayers who have previously filed returns – with the exceptions mentioned above. Taxpayers who have previously filed withholding, sales, seller’s use, or motor fuel tax returns are not eligible for the program (for that specific tax; they would be eligible for other taxes). Amended returns for other taxes are encouraged under Operation Clean Slate.

Does the program apply to taxpayers currently under audit or being investigated by ADOR? The program does not apply to taxpayers who are “already under investigation” or “have been contacted by ADOR as to their proper liability.” ADOR has not further defined these terms, although ADOR officials have indicated to us that the mere receipt of a nexus questionnaire will *not* disqualify a taxpayer. Taxpayers with outstanding debts on ADOR’s records (e.g., a bill, assessment, collection action) or that have been scheduled for audit are not eligible.

What are the benefits of participating in Operation Clean Slate? ADOR will waive all applicable civil and criminal penalties, including penalties for fraud and negligence. ADOR will also not seek criminal prosecution for matters disclosed. In addition, the look-back period will be limited to three years in most cases. Although ADOR has not specifically taken a position on the matter yet, we are concerned that the penalty for underpayment of an estimated tax (see, e.g., Ala. Code §§ 40-18-80, -80.1) will *not* be waived, because ADOR has previously treated this penalty as an interest charge—and not a penalty—under its Voluntary Disclosure Program.

What about interest? Interest will not be waived. By statute, only the Taxpayer Advocate can waive interest and only in situations involving “undue delay” by ADOR personnel (following concurrence by either the Commissioner or Assistant Commissioner of Revenue). It is not necessary to calculate and pay interest when filing returns under Operation Clean Slate. ADOR will presumably contact the participant with a bill for interest, and interest must be paid to ADOR within 90

days of this bill or penalties and taxes for prior years may be imposed.

How should interested taxpayers proceed? Taxpayers must file delinquent and amended returns, with payment of the tax, by May 15. The returns and payment can be mailed to the Alabama Department of Revenue, Operation Clean Slate, P.O. Box 327010, Montgomery, Alabama 36132-7010. However, an informal contact with ADOR personnel, to confirm the applicability of this amnesty program to the particular taxpayer, may be advisable. In addition, “Operation Clean Slate” must be clearly labeled on the front page of every form. Do not send the forms to the address listed on the forms; they must be sent to the Operation Clean Slate P.O. Box.

How does the three-year look-back period work? For most taxes, ADOR will only require disclosure of past due liabilities for the most recent 3 years (or 36 months) that are past due as of February 1, 2009. For example, a taxpayer would need to file income tax returns for 2005, 2006, and 2007 (the 2008 return is not yet past due). For monthly returns (commonly due on the 20th of the following month), taxpayers would need to disclose for the period beginning January 2006 and forward. *ADOR states that they will not seek to collect tax, penalties or interest for prior tax periods.*

For all “trust fund” taxes (e.g., sales, seller’s use, motor fuels, withholding taxes), however, any tax that has been withheld from employees or collected from the customer must be disclosed and remitted, *regardless of when collected or withheld.*

How is Operation Clean Slate different from their Voluntary Disclosure Program? The ADOR has for several years offered a Voluntary Disclosure Program, and they assure us that it remains active. The primary differences between the two programs are summarized as follows:

1. Operation Clean Slate will apply to more types of state-level and ADOR-administered local taxes. Only corporate income, business privilege, withholding, and sales and use taxes are eligible for voluntary disclosure.
2. Operation Clean Slate will apply to taxpayers who have previously registered or filed returns with ADOR (except sales, seller’s use, motor fuels, and withholding taxes). Conversely, voluntary disclosure guidelines require the taxpayer not to have filed a return with the ADOR in the last seven years and do not allow amended returns.

3. Voluntary Disclosure is anonymous. A taxpayer's representative typically obtains a signed Voluntary Disclosure Agreement from ADOR before the taxpayer is identified. While this agreement is invalid if ADOR later discovers that the taxpayer was not eligible for the Voluntary Disclosure Program as defined in the agreement (and thus probably would not be eligible for Operation Clean Slate, either), some taxpayers may receive more comfort from relying on a signed VDA instead of a press release and a Q&A on the ADOR's website, which is all ADOR has issued so far for Operation Clean Slate.

The authors have requested an official pronouncement from ADOR on some of these issues, and we will update our readers as more details are provided. Please contact any member of our SALT Practice Group if we can assist you or your client.

Bradley Arant Boulton Cummings Office Locations:

ALABAMA

One Federal Place
1819 Fifth Avenue North
Birmingham, AL 35023
205.521.8000

200 Clinton Avenue West, Suite 900
Huntsville, AL 35801
256.517.5100

The Alabama Center for Commerce
401 Adams Avenue, Suite 780
Montgomery, AL 36104
334.956.7700

WASHINGTON, DC

1133 Connecticut Avenue NW, 12th Floor
Washington, DC 20036
202.393.7150

MISSISSIPPI

188 E. Capitol Street, Suite 450
Jackson, MS 39201
601.948.8000

NORTH CAROLINA

100 North Tryon Street, Suite 2690
Charlotte, NC 28202
704.338.6000

TENNESSEE

1600 Division Street, Suite 700
Nashville, TN 37203
615.244.2582

SALT Practice Group:

Bruce P. Ely, Chair
(205) 521-8366
bely@ba-boulton.com

Stuart J. Frenz
(205) 521-8216
sfrenz@ba-boulton.com

Joseph W. Gibbs
(615) 252-2317
jgibbs@ba-boulton.com

W. Stanley Gregory
(334) 956-7604
sgregory@ba-boulton.com

Christopher R. Grissom
(205) 521-8514
cgrissom@ba-boulton.com

K. Wood Herren
(205) 521-8505
wherren@ba-boulton.com

Matthew S. Houser
(205) 521-8680
mhouser@ba-boulton.com

James E. Long, Jr.
(205) 521-8626
jelong@ba-boulton.com

Scott E. Ludwig
(256) 517-5149
sludwig@ba-boulton.com

Patricia Head Moskal
(615) 252-2369
pmoskal@ba-boulton.com

Brian S. Shelton
(615) 252-2313
bshelton@ba-boulton.com

William T. Thistle, II
(205) 521-8985
wthistle@ba-boulton.com

Robert C. Walthall
(205) 521-8308
rwalthall@ba-boulton.com

Ashley G. White
(256) 517-5106
awhite@ba-boulton.com

www.ba-boulton.com

This newsletter is sent to our friends as a courtesy of Bradley Arant Boulton Cummings LLP. If you would prefer not to receive future emailings of this type, please email our practice group assistant, Sherry Barber, at sbarber@ba-boulton.com.

This newsletter is a periodic publication of Bradley Arant Boulton Cummings LLP and should not be construed as legal advice or legal opinions on any specific facts or circumstances. The contents are intended for general information only, and you are urged to consult your own lawyer or other tax advisor concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact your lawyer or any of the lawyers in our practice group.

The Alabama State Bar requires the following disclosure: "No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

©2009 Bradley Arant Boulton Cummings LLP