
Delaware Gross Receipts Tax

By Mark D. Olson and Vincent C. Thomas

Mark Olson and Vincent Thomas summarize the concepts and recent developments associated with Delaware's gross receipts tax.

Delaware's comprehensive license taxes are applicable to taxpayers doing business within the state.¹ The license taxation scheme has two components: the taxpayer must pay: (1) a flat annual fee for its business license; and (2) a variable tax based on its total gross receipts. For convenience, in the balance of this article these two components are referred to as the "annual fee" and the "gross receipts tax," respectively. While the concept of license taxation is fairly consistent for all taxpayers, both the amount of the annual fee and the gross receipts tax rate² vary depending upon the type of business.

The license tax statutes generally provide for four broad license categories with specific businesses being covered within each category. The four broad categories are³: (1) Occupational License Tax,⁴ (2) Contractors' License Tax,⁵ (3) Manufactures' License Tax,⁶ and (4) Retail and Wholesale Merchants' License Taxes⁷ (the foregoing sometimes collectively referred to herein as the "License Categories").⁸

The annual fee is generally a modest amount, currently \$75 in most cases. Some taxpayers, however, are subject to a more substantial annual fee but exempt from any gross receipts tax.⁹ In general the license period is one calendar year but the taxpayer may elect to renew a license for a three-year period.¹⁰ If the initial license year is less than 12 months, the license fee will be prorated based on the short license year.¹¹ Failure to obtain a license may result in a \$3,000 fine, imprisonment for up to two years, or both.¹² In addition, in some circumstances the Director of Revenue may revoke or decline to renew a license, effectively preventing a person from carrying on business within the State of Delaware.¹³

The gross receipts tax imposed upon all taxpayers doing business within the state is more complex and

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is the focus of the balance of this article. But the discussion which follows is a general summary of the concepts, with the expectation that the reader will understand that the important specifics such as the tax rate and the deduction amount vary depending upon the type of license.

While the definition of gross receipts varies within the License Categories, except for the specific statutory deductions provided below, the statutory term "gross receipts" generally includes all gross receipts of a taxpayer from goods sold or delivered or services rendered within the State of Delaware without deduction for the "cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, federal or state taxes or any other expense whatsoever paid or accrued or losses..."¹⁴ The gross receipts tax is due either monthly or quarterly depending upon the taxpayer's business type and the amount of the taxpayer's gross receipts during the "lookback period."¹⁵

Two statutory deductions provided in the Delaware Code include a flat deduction which varies depending upon the type of license and a deduction for receipts from related entities. For example, a wholesaler's flat deduction is generally \$80,000 per month, while a general manufacturer is allowed a flat deduction of \$1 million per month.¹⁶ 30 *Del. C.* § 2120(b) defines related entities to mean either of the following: (i) entities in which eighty percent of the value of the interests in each entity are owned, directly or indirectly, by the same five or fewer individuals; or (ii) entities in which 100 percent of each entity is owned by members of the same family.¹⁷

Delaware also offers gross receipt tax phase-ins for particular License Categories. For example, 30 *Del. C.* § 2012 offers a 120 month phase-in for taxpayers making a \$200,000 qualified investment in a qualified facility employing five or more qualified employees. In addition, phase-in will occur over 180 months if the qualified facility is in certain targeted areas and the rules are even more liberal if the qualified facility is located in a brownfield.

Recent Developments

Two recent cases provide guidance on the expansive scope of Delaware's gross receipts taxes. In *Director of Revenue v. Dial*,¹⁸ and *Ford Motor Company v. Director of Revenue*,¹⁹ the Delaware Supreme Court found that *physical delivery* of goods in the State of Delaware subjected Dial and Ford to the wholesaler gross receipts tax despite the fact that *title* to the goods passed outside the State of Delaware. Among other things, Dial and Ford claimed that such application of the gross receipts tax violated the "dormant" aspect of the Commerce Clause of the U.S. Constitution "that denies the States the power to exact more than their fair share from interstate commerce than would be commensurate with the burden imposed by that activity."²⁰ In both cases, the Delaware Supreme Court, citing the U.S. Supreme Court case of *Tyler Pipe Industries v. Washington State Department of Revenue*,²¹ found the Delaware gross receipts tax to satisfy the requirements of the Commerce Clause.²²

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Notably, Ford has petitioned the U.S. Supreme Court for a *writ of certiorari* which remains pending.²³

Delaware has also recently adopted a Voluntary Tax Compliance Initiative (VTCI) which applies to gross receipts taxes as well as other taxes.²⁴ Under the VTCI, penalties and interest will be waived for taxpayers who voluntarily file returns between September 1, 2009 and October 30, 2009 or who pay eligible taxes the assessment of which is final before September 1, 2009 or enter into payment plans to pay such eligible taxes before June 30, 2010. In addition, the Director of Revenue will not assess any tax, interest, or penalty for any voluntary tax return reporting eligible taxes under the VTCI for tax periods before January 1, 2004.

The VTCI could be beneficial for taxpayers who have not previously filed gross receipts tax returns. The addition of penalties and interest,²⁵ and Delaware's position on assessing to the year in which the tax was enacted, can convert even a modest gross receipts tax liability, into a substantial obligation.²⁶

Taxpayers with outstanding gross receipts tax exposure should consider the VTCI to prevent assessment for periods prior to January 1, 2004.

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businesses when dealing with bad or missing taxpayer identification numbers. It is estimated this requirement of improved compliance will result in an annual revenue gain of \$26 million.

Budget Bill Provisions

Franchise Tax Board

- Reduces by \$4.8 million and 69 positions the FTB's budget to reflect the suspension of the Senior Citizens' and Disabled Homeowners and Renters Assistance Program. Funding for payments under the program was vetoed in the current year and was not included in the 2009 Budget Act. This reduction recognizes administrative savings due to program suspension.
- Adds \$354,000 to implement backup withholding to conform to federal practice.

State Board of Equalization

- Adds \$9.6 million (General Fund) to register non-retail businesses in order to increase compliance by businesses with the use tax.

Still on the horizon is the report of the so-called Tax Commission (The Commission on the Economy in the 21st Century), which will call for a major restructuring of the California tax system, as well as the Governor's proposal to create a Department of Revenue. In a release on the reforms achieved as part of the budget agreement, the Governor and legislative leaders have committed to completing several

reorganizations of state government, including a DOR "to reduce duplicative entities."

Unfortunately, it is unclear how long this new budget agreement will keep the state budget balanced because it includes a number of deferrals, one-time measures, and rosy revenue assumptions. With a continuing decrease in state tax revenues, there is likely another shortfall to be addressed before the end of this calendar year. As a result, it is likely the Legislature will be called into another special session in November.

Temporary Help

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formal representations from DOR staff, we anticipate that an appeal will be filed. It is our understanding that the DOR policy has not changed relating to assessing sales and use tax on these services. In the meantime, taxpayers that have remitted use tax on temporary help services should look to secure or preserve refunds.

ENDNOTES

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¹ *Manpower, Inc. v. Wisconsin Dept. of Revenue*, Wisconsin Tax Appeals Commission, Docket No. 05-S-046, Aug. 12, 2009.

² Wis. STAT. §77.52(1).

³ Wis. STAT. §77.52(2).

⁴ Wis. STAT. §77.52(2)(a)7.

⁵ Wis. STAT. §77.52(2)(a)20.

⁶ Wis. STAT. §77.52(2)(a)5m.

⁷ Wis. STAT. §77.52(2)(a)10.

⁸ Wis. ADMIN. CODE § 11.67(2)(c).

⁹ *Wisconsin Dept. of Revenue v. Milwaukee Refining Corp.*, 256 N.W.2d 855 (Wis. 1977).

¹⁰ Wis. STAT. §990.01(1).

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¹ Delaware's license taxes apply only to organizations conducting business within the state. Merely forming a corporation, limited liability company or other business entity under Delaware law will not subject the organization to Delaware license taxes.

² The rates range from .096 to 1.92 percent of total gross receipts with most rates being under one percent. For example, the current general rate of tax for wholesalers is 0.384 percent (scheduled to increase to 0.4147 percent on January 1, 2010) and for retailers is 0.72 percent (scheduled to