

Reminder! 3/31/10 Deadline for Constitutional Challenges Under Michigan MBT

March 30, 2010

A deadline is approaching March 31, 2010, for calendar-year companies to file claims for refund on constitutional grounds in connection with the Michigan Business Tax (MBT). Companies that fully extended their 2008 return have 90 days after the extended due date of 12/31/09 for filing amended returns based on the constitutionality of the MBT under the Michigan Revenue Act.

A controversial aspect of the MBT is the economic nexus standard, which asserts nexus over taxpayers that engage in "active solicitation" of sales even in the absence of a physical presence, such as through internet, telephone, or mail order solicitation. Also, many taxpayers immune from the income tax base of the MBT under PL 86-272 are subject to the modified gross receipts (MGR) tax base of the MBT under Michigan's view that the two tax bases are divisible in applying PL 86-272 and that the MGR is not an income tax within the scope of the federal law's immunity. Claims for refund based on a challenge to this position are also within the scope of the 90-day limitation period since claims arising under federal laws are also subject to this shortened statute of limitations.

As 2008 was the first tax year that the MBT was effective, there may also be other constitutional issues that taxpayers wish to raise with respect to other aspects of the MBT. Michigan's short 90-day statute of limitations on constitutional challenges was designed as an "early warning system" to put the state on notice regarding potential refund exposures, and with a new and untested tax like the MBT it has been anticipated that challenges would arise. Every aspect of the tax beyond its nexus standard, including its apportionment, credits, and unitary provisions are open to constitutional scrutiny. Though the MBT contains several other ambiguities that could be the subject of refund claims or audit controversies, the general four-year limitation period would apply to those that are not based on a constitutional challenge.

The policy of the short limitation period in some ways invites constitutional challenges, since it essentially says, "speak now, or we forever hold your tax." The 90-day limitation period has withstood due process and equal protection challenges in Michigan courts.

For more information, contact Greg Nowak or one of our State and Local Tax attorneys.

Gregory A. Nowak
313.496.7963