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Contingent Fee Auditors Are Looking for Unclaimed Property - Are You Ready?

The State of Michigan is engaged in an aggressive auditing program for Unclaimed Property and has contracted with out-of-state third party auditors to perform these audits. A targeted list of Michigan domiciled businesses has been selected for review. Because these auditors are compensated on a contingency fee basis, aggressive auditing techniques may result in large assessments. Such assessments can be time consuming and costly to defend.

What Is Unclaimed Property?

Traditionally, unclaimed property was personal property issued or owing in the ordinary course of business that had remained unclaimed during a set dormancy period. Under the original escheat concept, one cannot keep that which belongs to someone else, and the State acts as a custodian while attempts are made to locate the missing owner and return the property. Traditional unclaimed property included uncashed payroll and vendor checks, certain gift cards and merchandise credits, as well as stocks, securities and dividends.

Recent Focus

Recently, the focus has turned to unidentified remittances and account receivable balances, including balances in inventory accounts. With sophisticated software, auditors can locate thousands of questionable journal entries and shift the burden of proof to the company to prove that either correcting journal entries have been made, or that the balances are not outstanding and owing. With Michigan's Unclaimed Property Act permitting the statute of limitations to stretch back over a decade, thousands of man-hours can be spent in proving that the company has not failed to turn over unclaimed amounts to the State. The methodology used in these three-party audits include broad extrapolations. Assessments in excess of one million dollars are not unusual.

Businesses need to be aware of their rights prior to the commencement of an audit and how to maximize their administrative remedies to prevent an assessment from occurring. Honigman's attorneys have experience in unclaimed audits and can assist businesses in reviewing their potential exposure, as well as preparing to defend a potential assessment.

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State Refuses to Issue New Pollution Control Exemption Certificates

Many states, including Michigan, exempt from property taxes facilities for which the primary purpose is to reduce water and air pollution. In Michigan, pollution control property becomes exempt only after the Michigan State Tax Commission (STC) issues an exemption certificate. The Department of Natural Resources and Environment (DNRE) has historically advised the STC as to whether specific facilities primarily reduce pollution under the definitions in Michigan law. However, recently the DNRE has refused to continue providing such advice to the STC. As a result, the STC is no longer issuing exemption certificates. This puts taxpayers in the position of having to file suit in order to force the government to act in accordance with Michigan law. At this time, Honigman is not aware of a taxpayer filing an action to obtain an exemption certificate. Honigman is prepared to consult with and assist taxpayers who face this issue.

Michigan Supreme Court Rejects Claim for Refund of Unauthorized Tax

The Michigan Supreme Court decided *Briggs Tax Service, LLC v Detroit Public Schools* by dismissing the Briggs appeal as untimely. In summary, an unauthorized 18 mill property tax was levied by the Detroit Public Schools (DPS) for tax years 2002-2004.¹ In 2005, the DPS published a notice which, for the first time, acknowledged that these levies were unauthorized. Within 30 days thereafter, Briggs filed actions seeking refunds of the unlawfully collected tax under a three-year statute of limitations requiring proof of a "mutual mistake of fact." The Michigan Court of Appeals agreed with Briggs that a "mutual mistake of fact" had occurred and, therefore, the action was timely.

The Michigan Supreme Court reversed the Court of Appeals and dismissed Briggs' claims as untimely. In so holding, the Court acknowledged that the tax was illegal and should not have been levied. However, the Court also held that there had been no "mutual mistake of fact." Thus, to be timely, Briggs' refund claim had to be brought within 30 days of the issuance of the illegal 2002, 2003 and 2004 tax bills, even though the illegality of the tax was not disclosed by the DPS until August 2005.

¹ Shortly after discovering its mistake the DPS obtained voter approval to levy the 2005 tax, effectively negating any possible recovery for 2005.