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FISCAL IMPACT REPORT

ORIGINAL DATE 01/29/21
 SPONSOR Chandler LAST UPDATED 02/10/21 HB 90/aHTRC
 SHORT TITLE Tax Penalties and Remedies SB _____
 ANALYST Graeser

REVENUE (dollars in thousands)

Estimated Revenue					Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23	FY24	FY25		
	Unknown - Positive				Recurring	Section 2: General Fund PIT and GRT - fraud on zappers and phantomware
	Unknown - Positive				Recurring	Section 2: Local Governments GRT - fraud on zappers and phantomware

Parenthesis () indicate revenue decreases

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$5.1			\$5.1	Nonrecurring	TRD Operating
	Unknown, but positive				Recurring	TRD – Legal Services Bureau savings due to fewer protests

Parenthesis () indicate expenditure decreases

SOURCES OF INFORMATION

LFC Files

Responses Received From

Taxation and Revenue Department (TRD)

SUMMARY

Synopsis of HTRC Amendment

The House Taxation and Revenue Committee amendment makes two clarifying changes in the definition of tax fraud relative to sales suppression software. The subsection would read:

“A person is guilty of tax fraud if the person: ... (6) ~~knowingly~~ with intent to evade or defeat the payment or collections of any tax, or, knowing that the probable consequences of the person’s act will be to evade or defeat the payment or collection of any tax sells, licenses, purchases, installs, transfers, sells as a service, manufactures, develops or possesses any sales suppression software. ~~with the purpose to defeat or evade the payment or collection of any tax.”~~

Synopsis of Original Bill

(Note: TRD has provided the bulk of this analysis. Unless otherwise noted, the text is copied from the TRD Agency Analysis). House Bill 90 is proposed on behalf of the Taxation and Revenue Department and was endorsed by the Revenue Stabilization and Tax Policy Committee, the Tax Policy Advisory Committee, and the Tax Practitioner Advisory Committee. This bill provides several technical clean-ups throughout the New Mexico tax code to further the tax policy principles of efficiency, fairness, consistency, simplicity, and transparency. The bill contains the following provisions:

Section 1: Section 7-1-29.2 is amended to improve the tax credit application process. It provides that a taxpayer’s tax credit application must be complete before TRD’s timeline to review and approve/deny the credit begins. Because TRD will have a complete application for its entire review period, the bill also reduces TRD’s review time from 180 to 120 days.

Section 2: Section 7-1-73 NMSA 1978 is amended to incorporate newer fraud technologies into New Mexico’s criminal tax fraud statute. Electronic sales suppression devices called “zappers” and software called “phantomware” can be used to falsify records of a cash register or point-of-sale device to artificially lower a business’ sales to evade taxation, and this bill provides that tax fraud includes the intent to evade or defeat tax by knowingly selling, licensing, purchasing, installing, transferring, manufacturing, developing or possessing these devices and software.

Sections 3, 4, 5, 6, and 7: This bill amends Sections 7-38-21, 7-38-21.1, 7-38-22, 7-38-28, and creates two new sections to address and clarify procedures for property tax owners, county assessors, and TRD to protest classification and valuation of property, including election of remedies and appeals.

Section 3– Section 7-38-21 NMSA 1978 is amended to clarify that protests of property valued by county assessors are heard before the county protest board.

Section 4 – Section 7-38-21.1 NMSA 1978 is new material added to specify that protests of property valued by TRD’s Property Tax Division go to the Administrative Hearing Office (AHO) or to a district court if a refund is sought. This sets out the procedure if TRD and the property owner cannot resolve the classification or valuation of the property informally.

Section 5 – Section 7-38-22 NMSA 1978 is amended to allow for property owners who did not report their properties to TRD, but who were subsequently valued by TRD’s Property Tax Division (omitted property) to have the same protest rights as taxpayers who reported their property. These same rights apply whether the protest is before the AHO or in district court.

Sections 6 and 7 - This amendment and new material clarify that appeals of county-assessed property go to the district court. Appeals of state-assessed property by either the property owner

or TRD to go to the Court of Appeals. This will make the appeal process for TRD uniform with the appeal process under the Tax Administration Act for all other taxes administered by TRD.

The effective date of this legislation is July 1, 2021

FISCAL IMPLICATIONS

TRD discusses the Estimated Revenue Impact:

Section 2: The potential loss of government revenue from “zappers” and “phantomware” is unknown. Incorporating those technologies in New Mexico’s tax fraud statute may potentially increase GRT received by the state and local governments. The IRS and other financial investigative entities have identified use of such software throughout the state.

SIGNIFICANT ISSUES

Section 1: Regarding amendments to the tax credit application process in Section 7-1-29.2, current law provides that if a taxpayer applies for a tax credit, the credit is deemed approved if the taxpayer does not receive an approval or denial within 180 days from applying for the credit with TRD. Because current law provides no requirements that ensure a taxpayer’s credit application is complete, TRD may spend some or all of its 180-day review period attempting to obtain a complete credit application that gives TRD all the information needed to approve or deny the credit. This bill will ensure TRD has its entire statutory window to consider a complete application, and as a result, the statutory review time can be reduced from 180 to 120 days. This bill provides details on what must be submitted to start the timeline so that the clock only begins to run when TRD has a complete application.

Section 2: Regarding amendment of Section 7-1-73 (tax fraud) to include sales suppression devices such as “zappers” and “phantomware”, these technologies allow fraudulently recorded sales transactions to appear as perfectly normal sales transactions. Customers receive accurate receipts of goods or services during the normal day of business; however, at the end of the day, a portable USB device is plugged into the electronic Point-Of-Sale (POS) system to remove given dollar amounts in sales from the day’s receipts. The zipper re-totals and recalculates the receipts to reduce tax liabilities that the business owner is legally obligated to pay. The business keeps two sets of books: one set of books is prepared for the tax authorities, while the other set is for the business owner to show the real earnings of the business. The bill clarifies the implications of a person knowingly purchasing, possessing, installing, using, selling, licensing, transferring, manufacturing or developing sales suppression device or software or zappers or phantomware to strengthen New Mexico’s ability to prosecute such crimes. Other states, including Arizona and Texas, have enacted similar legislation. Based on suspicious activity reports and dialogue with the IRS, TRD believes this software is likely currently being utilized in New Mexico although at this juncture, the Department has not investigated a tax evasion case that has used this software. By expanding the statute to disallow the use of sales suppression devices, TRD’s Tax Fraud Investigation Division (TFID) can criminally charge taxpayers found using these devices to alter taxable income and receipts.

Sections 3 and 4: Section 3 clarifies that protest of property valued by the county assessor shall be brought before the county protest board. Conversely, Section 4 provides that when property is classified and valued by TRD's Property Tax Division, if the property owner and PTD cannot resolve the protest informally, the property owner may protest the valuation of state-assessed

property by filing a petition of protest with the AHO, or paying the property tax due and filing a claim for refund in a district court.

Section 5: Provides clarification around how to protest PTD’s valuation of omitted assets (assets that were not reported by the owner). Current statute is silent on protests of state-assessed omitted property. This proposal would set out the avenues a property owner has available to protest valuation and classification of omitted state-assessed property. This change ensures that valuation protests of state-assessed property — whether reported or omitted— are treated consistently.

Under Section 7-38-76 NMSA 1978, county assessors, treasurers and TRD have the authority and the duty to bill for and collect the property taxes for property that was subject to property taxation but were omitted (i.e. not reported by the property owner) from property tax schedules. Properties omitted from property tax schedules are referred to as omitted property.

In classifying and valuing property, TRD has exclusive jurisdiction over state-assessed property, as defined under Section 7-36-2(B) and (C) NMSA 1978. This jurisdiction includes the authority to issue notices of valuation for omitted assets.

Sections 6 and 7: This change will allow for clarification and allow for TRD to be guaranteed the ability to appeal an adverse decision TRD may receive from the AHO on property tax matters. These changes allow the owners of residential and commercial property assessed by county assessors the statutory right to appeal a decision to the county protest boards and appeal any adverse decision to a district court under Section 7-38-28 NMSA 1978. The change allows for either the property owner or TRD to appeal the classification or valuation of property determined by either the AHO or a district court to the court of appeals. Currently, in the event of an adverse AHO decision and order, TRD has no statutory right of appeal but must seek a writ of certiorari in a district court.

ADMINISTRATIVE IMPLICATIONS

TRD indicates modest administrative issues:

Provisions of the bill amending the credit application process in Section 7-1-29.2 will reduce confusion on the part of taxpayers and greatly enhance TRD’s ability to administer credit applications in a fair and timely manner. This is also expected to decrease the volume of protests of tax credit denials that were never fully supported by the taxpayer, which will decrease TRD staff time responding to those protests. The Information Technology Division (ITD) will implement changes into GenTax, the tax system of record, for the change in review time from 180 to 120 days. This will require approximately 100 hours of effort or approximately 1 month for an estimated \$5,164 of staff workloads cost.

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