

PUBLICATION

Tax Refund Process and Related Points Resulting from Constitutional Issue with Franchise Tax

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May 01, 2024

A compromise version of House Bill 1893/Senate Bill 2103 was passed by both Legislative Chambers on April 25, 2024 (the Bill). Subject to Governor Lee signing the Bill into law (which is expected to occur), the following is our understanding of the refund process and certain related points based on the Bill's provisions and based on comments made by the Commissioner of Revenue in previous interviews:

- **Refund Possibility** – Under the Bill, taxpayers will have the potential for a franchise tax refund if the tax was reported to the Department on a Franchise and Excise Tax Return filed on or after January 1, 2021, covering a tax period that ended on or after March 31, 2020 – essentially covering the tax year 2020, 2021, 2022 and 2023 – where the franchise tax was computed based upon Schedule G (the alternative minimum measure using the taxpayer's real and tangible property values) and such computation exceeds the franchise tax that would have otherwise been paid if the taxpayer had utilized Schedule F (which computes the tax using the taxpayer's net worth).
- **2023 Tax Year** – As to the 2023 year, the Commissioner has stated that taxpayers must continue to file their F&E Tax Returns for that year using the higher tax base as between Schedule F and G, and pay the resulting tax to the Department for the year. This applies to returns that have been extended as well as returns that were filed by the due date. Afterwards, and assuming Schedule G is the higher tax base on the filed 2023 Return, the taxpayer must file an amended Return using only Schedule F, and then file with the Department the Special Refund Claim form as discussed in more detail below.
- **Amended Returns Required** – Before a taxpayer can file the Special Refund Claim form with the Department, the Commissioner has previously noted that the taxpayer will be required to amend the F&E Tax Return for each of those four years in which the taxpayer will be seeking a franchise tax refund. The amended Return will compute the franchise tax using only Schedule F.
- **Chronological Filing of Amended Returns** – According to the Commissioner, the Department wants the amended F&E Returns to be filed in chronological order with the amended Return for the earliest year filed first.
- **Amend Returns Only for Impacted Years** – In the event that a taxpayer paid the franchise tax based upon Schedule G for only a few of those four years, the taxpayer would amend F&E Tax Returns just for those particular years using Schedule F.
- **Waiting Period After Amending a Return** – After the taxpayer has filed an amended Return, the Commissioner has noted that the taxpayer must wait at least overnight before filing the corresponding Special Refund Claim so as to allow the Department's computer system to process the amended Return.

- **Special Refund Claim Form** – A refund claim must be filed on a Special Refund Claim form to be prescribed by the Department exclusively for the purposes of seeking a franchise tax refund pursuant to the Bill and must not include a claim for refund on any other basis. The Bill provides that this special refund claim form must include a waiver by the taxpayer of any claim or the right to file suit alleging the franchise tax is unconstitutional by failing the internal consistency test.
- **Attachment Required for Special Refund Claim** – The Special Refund Claim form must be filed with the Department together with the Report of Debts. Additionally, and at the taxpayer's option, a balance sheet on which the net worth for that year is computed can be attached to the Special Refund Claim. The Commissioner has acknowledged that even though the Department already has Schedule F that was filed with the Return, a separate balance sheet will be helpful with the Special Refund Claim form so as to reconfirm the computation of the Schedule F net worth on which the franchise tax is being computed in support of the requested refund. If a balance sheet is not attached to the Special Refund Claim form, the Department may ask for such sheet as part of the refund review process. Further, and if a balance sheet is not provided with the Special Refund Claim, review of that claim could be slowed.
- **Notices From Department** – The Department has a list of all taxpayers that have filed F&E Tax Returns for those years on which the franchise tax was based upon Schedule G, and the Department intends to send an electronic notice and perhaps also a paper notice to those taxpayers alerting them to the fact that amended Returns must be first filed and then the Special Refund Claim must be thereafter filed as referenced above. The Commissioner has also stated that a notice may also be included on the taxpayer's account online setting forth this information.
- **Limited Period to File Special Refund Claim** – The general refund procedures under Tenn. Code Ann. Section 67-1-1802 would not apply to this franchise tax refund initiative, including that the normal time periods to file refund claims would not apply. As proposed for this franchise tax refund initiative, Taxpayers would have from May 15, 2024, through November 30, 2024, within which to file the Special Refund Claim. We understand that the purpose of that relatively short time frame is for the State to quickly know the outside dollar amount that is exposed to being refunded.
- **When is a "Claim" Filed** – Once an amended Return has been filed for a particular year and thereafter the corresponding Special Refund Claim form has also been timely filed for that year, the Commissioner has stated that the taxpayer has then met the requirements of filing a refund claim even if the Special Refund Claim has some minor deficiencies such as not including the Report of Debts. The Commissioner has noted that the Department intends to contact taxpayers in those situations so as to obtain the necessary information that was omitted from the Special Refund Claim form, but that the Department does not intend in those situations to contest the actual timely filing of the claim.
- **Tax Credits** – Where the taxpayer utilized tax credits to pay for part of the tax liability on the F&E return, the Commissioner noted that any credits not utilized on the amended return as a result in the overall decrease in tax liability will be reinstated and available for future use subject to the standard credit carryover provisions.
- **Taxpayer Disclosure** – As a condition to being issued a franchise tax refund, the name of each taxpayer issued such a refund and the "applicable range" corresponding to the total amount refunded to the taxpayer will be published on the Department's website "only for the period from May 31, 2025, through June 30, 2025." The applicable ranges are: (i) \$750 or less; (ii) more than \$750 but less than or equal to \$10,000; and (iii) more than \$10,000. Additionally, if the taxpayer has filed a refund claim

but has not been issued a refund by May 31, 2025, the name of the taxpayer will be published with the range being omitted and designated as "pending."

- **No Legal Fees** – Attorney fees cannot be added to the amount of the refund due.
- **Interest** – Interest will not be added to any refund paid within 90 days from the filing of the Special Refund Claim with proper proof. Any interest that is payable will be calculated based on the federal short-term rate plus 0.5 percent (currently 5.5 percent).
- **Election to Continue Using Schedule G** – Separately, the Bill also provides that if the application of the Bill's provisions results in a lower tax base than the minimum tax measure under Tenn. Code Ann. § 67-4-2108, as that Section existed prior to the effective date of the provisions within the Bill, and as it applied to taxpayers ending before December 31, 2023, then a taxpayer may annually elect to use the minimum tax base in § 67-4-2108 as it applied to tax periods ending before December 31, 2023; provided, however, that the election must result in a higher tax levied for the tax period under § 67-4-2106, and the taxpayer waives any claim that the minimum tax base under § 67-4-2108 is unconstitutional by failing the internal consistency test.
- **Litigation** – A taxpayer wishing to file suit to challenge the denial or deemed denial of a claim for refund under the provisions of this Bill must file such suit in the Chancery Court of Sumner County; and the complaint must be signed by the taxpayer under penalties of perjury, affirming that the taxpayer or affiant believes that the Department's denial of the refund being challenged is unjust, illegal, or incorrect and that the suit is brought in good faith. Further, and notwithstanding any other law to the contrary, a suit that contains a claim or allegation that the franchise tax under Chapter 4, Part 21 of Title 67, or any provision of that Part, including § 67-4-2108 as that Section existed prior to the effective date of the provisions within this Bill, is unconstitutional by failing the internal consistency test must be filed on or before November 30, 2024.
- **2024 Tax Year and After** – The Bill deletes the alternative minimum measure for the franchise tax effective upon the Bill becoming law, "and apply to tax years ending on or after January 1, 2024."

Again, some of the foregoing is based upon commentary by the Commissioner. **The actual interpretation and administration of the Bill, once enacted into law, could be different in certain respects from such commentary. Additionally, this alert does not cover all of the provisions within the Bill, so please be aware that other provisions within the Bill may also affect you.** We will strive to keep you advised as material developments occur.

Our attorneys and our dedicated State Public Policy Advocacy Group will be monitoring developments and can offer assistance to clients who desire to engage or be heard as part of the legislative process.

Additionally, please do not hesitate to contact [Carl E. Hartley](#), [William H.D. Fones, Jr.](#), [Steven K. Wood](#), [Jacob D. Baggett](#), or your counsel at Baker Donelson, to address matters particular to your facts and circumstances.