

Client Alert: Expanded Data Center Sales and Use Tax Exemption in House Bill 59

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On June 30, 2013, Governor Kasich signed Am. Sub House Bill 59 (H.B. 59), which is the operating budget bill for state fiscal year 2014. H.B. 59 expands upon the scope of the sales and use tax exemption for purchases of certain tangible personal property that will be used at an eligible computer data center (the Data Center Exemption). The purpose of this client alert is to summarize the changes to the Data Center Exemption made in H.B. 59.

Eligibility Requirements

Under prior law, a business qualified for the Data Center Exemption if it agreed to (1) invest at least \$100 million in computer data center equipment and (2) maintain at least \$5 million in annual payroll at the data center. To receive the exemption, the business was required to submit an application and enter into an agreement with the Ohio Tax Credit Authority (the Authority). In addition, in order for a business to qualify for the Data Center Exemption under prior law, the business itself was required to provide "electronic information services."

H.B. 59 makes three significant eligibility changes to the Data Center Exemption. First, H.B. 59 allows for the submission of one exemption application by an applicant business on behalf of itself and other businesses operating a data center at the facility, and the total capital investment and payroll levels of all businesses in the same facility are combined toward meeting the exemption eligibility guidelines. Second, H.B. 59 lowers the annual payroll requirement from \$5 million to \$1.5 million, and specifies that exemption recipients are not required to meet this threshold until the third year of the exemption agreement. Third, under H.B. 59, a business may still receive the Data Center Exemption if the business leases the data center to other businesses, and does not itself provide "electronic information services."

Exemption Application Requirement

Under prior law, the Authority was authorized to enter into an agreement for a Data Center Exemption only if it determined that (1) the capital investment would increase payroll and Ohio income taxes withheld from employees at the data center, (2) the applicant had the ability to complete the proposed project, (3) the business had the ability to maintain operations at the facility throughout the term of the agreement, and (4) the receipt of the Data Center Exemption was a major factor in the decision to begin, continue or complete the project. H.B. 59 specifies that for agreements executed by multiple businesses at the same location, requirements (2), (3) and (4) above only need to be met by the business that submits the application. The requirement listed in (1) applies to the combined investment and payroll increases of all businesses at the facility.

Agreement Provisions

Prior law required the agreement for the Data Center Exemption to contain certain specific terms (e.g., description of the project, exemption percentage and term, anticipated payroll and income taxes withheld, etc.). Under H.B. 59, these requirements apply to all businesses that are subject to the agreement. In addition, prior law required the business to maintain operations at the data center for the term of the agreement. H.B. 59 applies this requirement only to the business that submitted the exemption application, and also allows the applicant to cease operations at the data center for up to 18 months, so long as no business claims a Data Center Exemption during that period. H.B. 59 also allows a business to be made a party to an existing Data Center Exemption agreement. In such a case, the business is entitled to all benefits and bound by all obligations and requirements of the agreement.

Agreement Compliance

Under prior law, the Authority had the ability to terminate a Data Center Exemption agreement if the business did not meet the investment and payroll requirements contained in the agreement. The Authority also had the ability to require businesses to repay all or a portion of the exempted sales and use taxes. Under H.B. 59, the Authority has the ability to seek repayment from each of the businesses located in the data center, but the Authority may consider each business' responsibility for the noncompliance in determining whether to require such a repayment.

The provisions in H.B. 59 related to the Data Center Exemption are expected to become effective 90 days after H.B. 59 is signed by Governor Kasich, or approximately September 28, 2013. If you have any questions about the issues discussed in this client alert, please contact Scott J. Ziance – (614) 464-8287, sziance@vorys.com – or Chris L. Connelly – (614) 464-8244, clconnelly@vorys.com.