

Illinois Adopts Change to “Retaliatory Tax” Law

February 6, 2015

Overview

Illinois Governor Bruce Rauner recently signed into law Senate Bill 3366 (Public Act 98-1169, “P.A. 98-1169”).¹ The new law, effective January 9, 2015, was adopted in response to the Appellate Court of Illinois’ 2014 decision in *United States Liability Insurance Company v. Department of Insurance*.² The case involved a dispute over how insurance companies incorporated or organized outside Illinois (“foreign insurance companies”) but doing business in Illinois should treat their Illinois income tax for purposes of the Illinois “Retaliatory Tax.” In this Tax Alert we summarize the Retaliatory Tax, the decision in *Liability Insurance*, and the effects of P.A. 98-1169.

Retaliatory Tax

The Illinois Insurance Code requires foreign insurance companies to pay a Retaliatory Tax.³ The tax is based on a comparison of the burdens imposed by Illinois and the hypothetical burdens that would be imposed on the foreign insurance company’s Illinois activities by the state where the insurance company is incorporated or organized.⁴ The Illinois burdens are calculated based on “[T]he penalties, fees, charges, or taxes required in the aggregate for like purposes by this Code or any other law of this State.”⁵ Prior to the amendments contained in P.S. 98-1169, the Illinois burdens were deemed to include, among other items, “taxes collected under State law” and the “Illinois corporate income taxes imposed” under the Illinois Income Tax Act, including the personal property tax replacement income tax.⁶

Liability Insurance

Prior to 2013, the Illinois Department of Insurance (“Department”) took the position that income tax under the meaning presented in the Illinois Insurance Code should be considered on a cash basis when calculating the Retaliatory Tax. On May 9, 2014, the Illinois Appellate Court held in *Liability Insurance* that the Department’s position was inconsistent with the statute and that the income tax should be considered on an accrual basis.⁷

P.A. 98-1169

In response to *Liability Insurance*, Senate Bill 3366 was proposed to amend the statute to reflect the Department’s pre-2013 position that income tax should be considered on a cash basis. The legislation was passed and signed into law as P.A. 98-1169, effective January 9, 2015. The amended law clarifies that “penalties, fees, charges, or taxes” includes “taxes collected on a cash basis.”⁸

Considerations

The Illinois Appellate Court decision in *Liability Insurance* was not controlling law for a sufficient period of time to require foreign insurance companies currently subject to the Retaliatory Tax to consider income tax on an accrual basis. Accordingly, and in light of the January 9, 2015, effective date of P.A. 98-1169, for Retaliatory Tax purposes foreign insurance companies should continue to calculate their income tax under the meaning presented in the Illinois Insurance Code using the cash method as previously deemed appropriate by the Department.

¹ P.A. 98-1169; Senate Bill 3366, 99th Gen. Assem.; signed by Governor Rauner on Jan. 9, 2015.

² *United States Liability Insurance Company v. Department of Insurance*, 2014 Ill. App. 4th 121125 (May 9, 2014).

³ 215 Ill. Comp. Stat. § 5/444 (1).

⁴ *Id.*

⁵ *Id.*

⁶ 215 Ill. Comp. Stat. § 5/444 (3).

⁷ *Liability Insurance*, 2014 Ill. App. 4th 121125, at 9-10.

⁸ P.A. 98-1169, amending 215 Ill. Comp. Stat. § 5/444 (3).

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