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Accounting for repeal

The Bay State's controversial tech tax is likely not long for this world... but that doesn't mean businesses are necessarily off the hook.

By Jay Fitzgerald - Sep 27, 2013

The initial legal and accounting confusion over the tech tax when it was first implemented last month was bad enough.

Now a different type of confusion has arisen since Gov. Deval Patrick and legislative leaders recently vowed to repeal the controversial sales tax on computer and software services: Should tech-service vendors keep charging the tax and should clients keep paying it until a repeal is officially passed?

There's another big question looming: How long will it take for tech vendors and clients to get refunds from the state if they've already paid a tax that's probably going to be retroactively repealed by lawmakers?

"It's become an even bigger mess now," bemoaned Scott Susko, a tax specialist at Boston's McDermott Will & Emery LLP. "This whole thing has been a mess."

Make no mistake: Most people involved in paying, collecting, recording or issuing advice about the tax are thrilled that Patrick and legislative leaders listened to them and have agreed to repeal the 6.25 percent sales tax on all sorts of computer and software services in Massachusetts.

The levy was part of a broader transportation bill that was supported earlier this year by lawmakers, Gov. Deval Patrick and business lobbyists alike.

Nonetheless, the tech industry, which was caught completely off guard by the new services tax that went into effect Aug. 1, and business groups effectively forced the hand of Beacon Hill lawmakers when they swiftly moved to get a tax-repeal question on the statewide election ballot in 2014 — a move that could spell doom for many incumbents who backed the tax.

Responding to the recent outcry over the tech tax, Patrick, Senate President Therese Murray and House Speaker Robert DeLeo all confirmed earlier this month that they would back a repeal vote at the State House, perhaps with votes by the end of this month or in October.

Responding to those announcements, the state Department of Revenue last week issued an order that delayed the filing of tech-tax revenues until Oct. 20, giving lawmakers time to approve an official repeal.

But the tax law is still on the books and technically enforceable until an official repeal occurs. Asked whether businesses should keep charging, paying and collecting the tax, a DOR spokeswoman would only say in a statement: "A business that chooses to stop collecting on the assumption that the legislature repeals the tax retroactively runs the risk of having to go back to customers to try and collect or pay the tax themselves in the event the repeal doesn't take place or is not retroactive."

That's left tech-services vendors and clients in a quandary: Keep collecting and paying the tax – or simply take the chance the tax will indeed by killed?

"It's really a tough call," said Scott Kaplowitch, an accountant and partner at Edelstein & Co. LLP in Boston. "One of my clients called and said, 'Should I keep paying it?' I really didn't know what to say. It's a real gray area."

No attorney or CPA contacted by the BBJ said they would or could ethically advise that people stop obeying the law, even a law that most people assume will be repealed.

Still, it's also difficult to advise someone to pay a tax that seems certain to be abolished in a matter of weeks, accountants and attorneys agree.

"It's a real dilemma," said John Bradley, a lawyer who works closely with technology clients at Prince Lobel Tye LLP in Boston. "As a lawyer, it's easy to say 'just follow the law.' But it's really not that simple in reality."

Privately, those who advise business clients said they assume many people will simply stop collecting and paying the tax, thus taking a big risk if it's not repealed.

But others probably won't want to take that risk, and that raises the question about refunds later if the tax is indeed repealed.

DOR didn't have numbers available about how many people have already paid the tax and how much money has been collected by the state.

But the state initially estimated that the tax would raise about $161 million a year, an average of $13.4 million a month. It is now estimated the loosely word tax law could actually raise as much as $500 million a year, or $41.6 million a month.

Under the state's tax rules, sales tax revenues of $101 to $1,200 per month are paid to the state on a quarterly basis, while sales tax revenues of $1,201 and higher must be paid on a monthly basis.

DOR said it doesn't expect many businesses to send in payments since it issued its order delaying tax payments until Oct. 20, a deadline that conceivably could be extended should repeal efforts drag into November.

Vendors who collected the tax and sent in money will have to file for an abatement and then return the money to clients, DOR said.

Kathleen King Parker, a tax-dispute attorney at Pierce Atwood LLP, said she anticipates confusion over a host of matters in coming weeks and months.

"There will be lingering problems," she said. "But at least the tax will have been repealed. That's the good news."