

MEMORANDUM

To: Christy Vandevender, Chair, Nexus Committee

From: Richard Cram

Re: State Survey results on eligibility requirement that taxpayer not have prior contact with state concerning tax type for which voluntary disclosure relief is sought

Provided below are the survey questions presented to states participating in the MTC Nexus Program and their responses:

Currently the Procedures for the MTC Multistate Voluntary Disclosure Program (MVDP) provide as one of the eligibility criteria that the applicant not have any prior contact with the state tax department concerning the tax type that the applicant is seeking voluntary disclosure for. That prior contact could be registration, filing returns, remitting taxes, responding to a nexus questionnaire, receiving an audit notice, etc. We are finding that some states appear to be willing to accept and process voluntary disclosure applications even when the taxpayer has had prior contact with the state concerning the tax type applied for.

1. Would your state consider an application for voluntary disclosure that indicates the applicant had prior contact with the state tax department concerning the tax type for which that applicant is applying for voluntary disclosure relief?
  - a. No **AL CO IA ID KY MN MO OR RI SD TN TX VT WA WV (15)** \_\_\_\_
  - b. Yes **HI** \_\_\_\_
  - c. We would consider it on a case-by-case basis **GA HI KS MA MD ND NE UT (8)** \_\_\_\_ (please describe in the comment area below the prior contact circumstances making the applicant ineligible for voluntary disclosure and the prior contact circumstances where the applicant would still be considered eligible for voluntary disclosure in your state)

CO Comment: We have had cases where a taxpayer registered within the prior 60-90 days then approached us to join the program. We have been willing to work with these on a case by case basis, especially if they do not have any activity on their account yet.

GA Comment: Georgia currently accepts Voluntary Disclosure Agreement (VDA) applicants with prior contact concerning the tax type applied for if the contact

is: previous/current registration, previous/current return filing, or receiving a notice unrelated to the reason for the VDA (e.g., payment for a previously filed return). For example, Georgia accepts VDA applications from applicants that are registered and filing returns, but did not report or pay all tax that was due.

Georgia would not accept VDA applicants with prior contact concerning the tax type applied for if the contact is related to registering or filing of returns, an audit notice or nexus questionnaire, or any other contact from the Department regarding the reason for the VDA.

ND Comment: For income taxes, the current answer would be generally be “no” to a formal VDA agreement. However, based on the circumstances, we may agree to accept only 3 years and waive penalty, so the results are similar to a VDA, but just without the agreement. For sales taxes, we would consider the same if the company was previously registered or had a prior contact.

HI Comment: Hawaii would allow MTC VDAs (for taxpayers with prior contact with the State) for business activities that taxpayers can show reasonable cause for failure to pay the tax on a case by case basis.

KS Comment: If the applicant has been contacted by the MTC or by the Department regarding the tax to be disclosed the applicant would not be eligible. If the applicant has been contacted for an audit or is under audit, the applicant would not be eligible for the program, or if the failure to file is due to fraud or gross negligence on the applicant’s part.

MA Comment: We would consider an application for voluntary disclosure on a “case by case” basis where there has previously been contact with Massachusetts DOR. Two recent examples where we still accepted a VDA with prior contact are listed below. We feel strongly that any determination should be made on a case by case basis using the particular set of facts and circumstances as it relates to each taxpayer.

#### Example #1

Company A is a internet vendor with no physical presence in Massachusetts. They have no history of filing or paying sales tax in Massachusetts. During an internal review at the end of December 2021 they realize as a result of strong internet sales during the quarter that they may have exceeded the “economic nexus” threshold requiring them to collect sales tax in Massachusetts along with several other states. The previous nexus threshold of \$500,000 in sales to customers was reduced

to \$100,000 towards the end of 2019. Their accountant suggests that they immediately begin to file and collect sales tax once they discover they have met the nexus threshold for filing and that they will do an analysis for Massachusetts and each other state depending on their own nexus standards to see exactly if and when the thresholds were met. Massachusetts is notified in February 2022 that the company discovered they should have filed and remitted sales tax back to October of 2019 and requests waiver of late pay and late file penalties for all delinquent periods. In this case they discovered they had a filing responsibility December 2021 and began collecting sales tax. Further analysis revealed they also had a filing responsibility back to October 2019 and contacted us two months after registering and filing sales tax returns for January and February of 2021. Technically they do not meet the requirements for the voluntary disclosure program because of prior registration for sales tax. In this and similar cases, however, we have let them into the program and waived associated penalties for the lookback period. Two months after registration and subsequent to their analysis they realize that they met the filing threshold for years prior as well and have made a good faith effort to file for those delinquent back periods.

#### Example #2

Company B is organized in New Jersey and operated a small manufacturing operation in Massachusetts from 2008 until 2014. They had a physical presence in Massachusetts and filed corporation excise tax and withholding tax during that period. In 2015 they closed the Massachusetts location and cancelled their corporate excise and withholding registrations because they no longer had a filing responsibility with Massachusetts. This same New Jersey corporation (same FID) in 2021 realizes that they now have a corporate excise tax obligation with Massachusetts again starting in 2019 even though they closed up shop there in 2015. They no longer have a physical location in Massachusetts but because of recent legislation they now have “economic nexus” because sales made to customers located in the state have exceeded the \$500,000 threshold. They file their 2021 corporate excise return with Massachusetts and request that they be able to file their delinquent 2020 and 2019 returns through the VDA program. Once again, technically they would be disqualified from participating in the VDA program because of prior registration (2014) and they just filed a 2021 return. In this case based on the circumstances we would waive related late pay and late file penalties for 2019 and 2020 corporate excise tax returns.

MD Comment: As long as the taxpayer hasn’t been contacted for an audit or a bill has already been sent out or a letter has been mailed demanding a return be filed, etc. Basically anything that you would put a taxpayer in a work queue for audit or collections would disqualify them from a VDA. A prior contact such as registration,

filing returns, remitting taxes, responding to a nexus questionnaire would not be disqualifying acts. However, receiving an audit notice would be a disqualifying act.

NE Comment: Nebraska would consider any applicant ineligible for a voluntary disclosure if we have had prior contact for an audit or have sent them a nexus questionnaire. Any other type of prior contact would be judged based on the facts.

RI Comment: Rhode Island may offer a different program, such as the “Managed Audit” program, to an entity currently registered for a tax type, who does not qualify for voluntary disclosure.

TX Comment: Texas will not allow a taxpayer to come into a VDA if they were previously contacted. However, if a taxpayer came forward on their own to register and/or file returns and very quickly requested a VDA, then we would allow the VDA since they recently came forward on their own.

UT Comment: We would consider it on a case by case basis depending on what the contact was. However, if the contact was an audit or non-filing notices we would not accept the application.

2. Does your state support retaining the current requirement that an applicant for voluntary disclosure through the MTC MVDP must not have had prior contact (registration, filing returns, paying taxes, responding to a nexus questionnaire, receiving an audit notice, etc.) with the state concerning the tax type applied for?

A. Yes **AL CO IA ID KS KY MA MN MO OR RI SD TN TX UT VT WA WV (18)**\_\_

B. No **GA HI MD ND NE (5)**\_\_

3. If your answer to #2 was “no,” please state how your state would like to see this eligibility requirement modified:

GA Comment: We recognize that most states do not accept VDAs from applicants that have been registered or filed returns for the tax type of their VDA request. However, we would prefer if MTC could communicate that some states allow prior contact if the contact is completely unrelated to the reason for the VDA, and list the states that will consider VDA applicants with prior contact.

MD Comment: Prior contact is fine as long as it isn't the kind mentioned in response to question 1. We greatly appreciate all attempts by taxpayers to come into compliance with Maryland's tax laws and make payment for taxes due. A prior contact such as registration, filing returns, remitting taxes, responding to a nexus questionnaire would not be disqualifying acts. However, receiving an audit notice would be a disqualifying act.

ND Comment: We would be agreeable to modifying the restriction on previous registration or prior contact, or both. We are open to alternatives, but a case-by-case basis may be difficult to define within the MTC VDA program. But perhaps we could come up with a few bright-line tests that would allow for more applicants to be eligible.

Some of the case by case considerations we use are –

- Nature of in-state activity
- Years since prior contact
- Information provided pursuant to the prior contact
- Ownership changes
- Changes in the business' activities
- Relevant law or administrative changes

NE Comment: As outlined in #1 above, Nebraska would consider each VDA on a case-by-case basis.