



LEXSEE 56 STATE TAX NOTES 953

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State Tax Notes Magazine

JUNE 21, 2010

**LENGTH:** 9020 words

**DEPARTMENT:** News, Commentary, and Analysis; Special Reports

**CITE:** State Tax Notes, June 21, 2010, p. 953;  
56 State Tax Notes 953 (June 21, 2010)

**HEADLINE:** 56 State Tax Notes 953 - THE CASE AGAINST TAX AMNESTIES. (Release Date: MAY 26, 2010)  
(Doc 2010-11292)

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**GEOGRAPHIC:** United States; Illinois; Maine; Louisiana; New Jersey

**REFERENCES:**

Subject Area:  
Compliance

**TEXT:**

The Case Against Tax Amnesties

Release Date: MAY 26, 2010

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\*\*\*\*\* Every individual's decision-making process is guided in some measure by the basic principle that with every decision comes a consequence. Generally speaking, actions that comply with the applicable laws of a particular state afford the complying individual the protections provided by the laws of that state, such as police protection, infrastructure maintenance, and public schooling for children. Conversely, failure to abide by the laws of a state generally results in punishment, ranging from fines to imprisonment. However, policymakers in most states are challenging that time-honored principle when they adopt and implement tax amnesty programs.

Under a state's tax amnesty program, delinquent taxpayers can pay their outstanding liabilities during the defined amnesty period in return for the state's agreement to waive a percentage of the penalties and interest previously assessed to the taxpayer and forgo criminal prosecution for the tax delinquency.<sup>1/</sup> To provide further incentive to participate in the program, some states impose higher penalties and interest on eligible participants who fail to take advantage of the program than the penalties and interest they faced before the amnesty program.<sup>2/</sup> Legislators across the nation have turned to state tax amnesties as a politically palatable method of increasing the government's revenue without raising

taxes on the citizenry.<sup>3/</sup>

State tax amnesty programs serve three main functions.<sup>4/</sup> Amnesties are "a temporary and quick-fix for a more severe problem in the state's efforts to balance its budget."<sup>5/</sup> They are also an effective way for states "to increase future tax revenue growth" by adding the names of non-filers to the state tax rolls."<sup>6/</sup> And state tax amnesty programs "improve compliance rates overall . . . by encouraging those who are not in compliance to come forward voluntarily in hopes that coming into current compliance will result in continued future compliance with state tax laws."<sup>7/</sup> States are increasingly turning to this revenue-raising tool to address the deficits that plague state budgets.<sup>8/</sup> However, this article will argue that the negatives associated with state tax amnesties outweigh their intended benefits.

In 1982 Arizona implemented the nation's first state tax amnesty program, bringing in \$ 6 million to the state's revenue office.<sup>9/</sup> Since then, 45 states and the District of Columbia have used some form of a tax amnesty program, and most of these jurisdictions have turned to amnesties more than once.<sup>10/</sup> The amnesty programs have succeeded in bringing in much-needed revenue for states; for example, Maine's amnesty recently hauled in 1.8 times its projected amount and New Jersey raked in a total of \$ 725 million last year.<sup>11/</sup> However, state policymakers should consider the broader, unintended effects of reliance on tax amnesties.

#### I. Analyzing Amnesties and

**General Principles of Sound Tax Policy** Tax analysts and policymakers generally agree that at least five basic principles should guide sound tax policy: raising adequate revenue, neutrality, fairness, ease of administration and compliance, and accountability.<sup>12/</sup> This section applies each principle to state tax amnesty programs to demonstrate that amnesty programs violate the basic principles of sound tax policy.

**A. Raising Adequate Revenue** Raising adequate revenue is more important than ever for states because the recent economic downturn and corresponding unemployment have decreased state revenue so that 48 states have addressed or face a budget shortfall totaling \$ 196 billion for fiscal 2010.<sup>13/</sup> Forty-two states have projected budget gaps for fiscal 2011 that total \$ 180 billion.<sup>14/</sup> Almost all states are required, either by their state constitution or by legislative mandate, to have a balanced state budget.<sup>15/</sup>

While the ultimate goal of tax amnesties is to raise adequate revenue, the amnesty programs violate all of the principles underlying that overarching goal. The whole purpose of the tax amnesties -- a one-time windfall to the state's coffers -- is inherently contrary to the principles of stability and certainty. It allows delinquent taxpayers to hedge their bets against the state's collection mechanism and wait for the inevitable amnesty period.<sup>16/</sup> Further, despite the implementation of amnesty programs, most of the states still face a significant budget shortfall in fiscal 2010 and fiscal 2011.<sup>17/</sup> Clearly, the amnesty programs do not satisfy the principle of sufficiency.

**B. The Principle of Neutrality** The central issue concerning tax amnesties and the principle of neutrality is whether the amnesty programs affect market decisions of taxpayers. Do some taxpayers maintain delinquent status in anticipation of the state declaring an amnesty program? Several commentators and practitioners answer that in the affirmative.<sup>18/</sup> State tax systems are generally seen as nonneutral to begin with because of policies such as incentives that states provide for businesses that maintain a headquarters in their jurisdiction, excise taxes designed to discourage tobacco and alcohol consumption, and sales tax holidays. The implementation of a program that encourages some taxpayers to maintain their delinquent status in anticipation of future amnesty serves only to increase the nonneutrality of state tax systems.

**C. The Principle of Fairness** "Fairness is essential to the system because it increases taxpayer morale and enhances voluntary compliance."<sup>19/</sup> State tax amnesties are inequitable because they treat similarly situated taxpayers differently by forgiving the illegal behavior of delinquent taxpayers.<sup>20/</sup> As one commentator said, "A tax amnesty, by excusing civil and criminal penalties for avoidance of tax obligations, effectively severs the relationship between crime and punishment and compromises the fairness of the tax system. To the extent that punishment is fair, amnesty is unfair."<sup>21/</sup>

The underlying concept of tax amnesties -- excusing illegal behavior -- blatantly violates the principle of fairness.

**D. The Principles of Ease of Administration and Compliance** Tax amnesties, by their nature, can only muddy up the

administration of, and compliance with, a state's tax code. Amnesty programs require state revenue offices to keep track of those delinquent taxpayers who take advantage of the amnesty period and those who do not. Administration is likely further complicated by future amnesties and the penalties they waive or do not waive in relation to previous amnesties. As Henchman said, the principle of ease of administration is compromised by multiple tax amnesties:

So, if you miss the tax amnesty and then you're caught later on, you have to pay not only the back taxes plus the interest plus the fine but the new post-amnesty penalty for not having taken advantage of the amnesty. I think Virginia had one of those previously, but they're now having another amnesty, so in this amnesty they're waiving the previous amnesty penalty, but if you miss this one, you will have to pay another amnesty penalty on top of the previous one. It gets kind of absurd, but it shows the problem associated with not just having a simple, neutral, transparent tax system and instead having to constantly be giving exemptions and waivers and, you know,

one-person-only deals for it.<sup>22/</sup> As for the principle of ease of compliance, amnesty programs are not always easy for the average taxpayer to understand. A Google search shows that many lawyers and certified public accountants offer their services to ensure compliance with amnesty programs. Compliance costs, such as hiring a lawyer or accountant, can only exacerbate the delinquent taxpayer's inability to pay his tax liability. Also, the implementation of tax amnesties brings into question whether taxpayers will just defer compliance with existing tax laws until the future. If a taxpayer is struggling economically, what incentive does he have to comply with this year's tax obligation if he can anticipate an amnesty program in the next couple of years? This perverse incentive that amnesties offer threatens the integrity of the state tax system as a whole.

Tax amnesties circumscribe the normal collections process and add additional administrative and compliance burdens on all parties involved. For those reasons, amnesties run against the principles of ease of administration and compliance. E. The Principle of Accountability The principle of accountability includes several aspects of the aforementioned principles -- efficient and fair administration of the tax laws, enforcement of the tax laws, open and transparent tax policy, and continual review and updating of state tax laws.

State tax amnesty programs are generally open and transparent because, to be successful in raising revenue, taxpayers need to know how to qualify. For example, Connecticut appropriated \$ 2 million for publicity of its 2002 amnesty program, which ultimately generated \$ 109 million in revenue for the state.<sup>23/</sup> However, for the reasons previously discussed, tax amnesties are inherently inefficient and unfair. First, tax amnesties require the state revenue offices to adopt a new, separate set of collection and enforcement mechanisms. Second, tax amnesties represent the government giving a free pass to people who break the law. Although amnesties are open and transparent, they certainly violate other aspects of the principle of accountability.

Overall, tax amnesty programs violate all of the foregoing principles of sound tax policy to some degree. Although they raise revenue, tax amnesties are unfair, complicated, and expensive for the taxpayer (compliance costs) and the state (administration costs); cause market distortions; and reward bad behavior. For those reasons, tax amnesties are the embodiment of bad tax policy and should be avoided.

II. The Constitutionality of Tax Amnesties In addition to being poor tax policy, tax amnesties violate constitutional protections afforded the citizens of the states, as extended through the 14th Amendment. The typical amnesty program waives penalties and a percentage of the interest due for taxpayers who take advantage of the program, but imposes a significant additional penalty on delinquent taxpayers who choose not to participate in the amnesty. In 2003 Illinois became the first state to adopt that heavy-handed stick to the carrot-and-stick approach of current tax amnesties.<sup>24/</sup> Although the sticks adopted by the Illinois General Assembly are harsher than those of most state amnesty programs, other state amnesty programs have since enacted the same terms as Illinois's.<sup>25/</sup> Therefore, the Illinois program will serve as the model to analyze the constitutionality of state tax amnesty programs in this article.

Illinois's Tax Delinquency Amnesty Act of 2003 abated all interest and penalties for delinquent taxpayers who took part in the state's amnesty program. The Illinois amnesty period ran from October 1, 2003, to November 15, 2003, during which time eligible participants could file their amnesty applications and pay their outstanding liability. It provided that the state would not pursue civil or criminal prosecution of taxpayers who participated in the program. Taxpayers who satisfied the following conditions were eligible to take advantage of the amnesty program:

(1) the taxpayer has outstanding tax liabilities due for a period or periods ending after June 30, 1983 and before July 1, 2002; (2) the taxpayer is not a party to a criminal investigation or does not have civil or criminal litigation pending in Illinois for nonpayment, delinquency, or fraud relating to a tax imposed by Illinois; and (3) the taxpayer pays in full all amnesty tax liabilities during the amnesty payment period.<sup>26/</sup> However, the Illinois statute provided substantial sticks to its carrot-and-stick approach.

Taxpayers who participated in the amnesty program were forced to relinquish their rights to file refund claims for taxes paid through the program.<sup>27/</sup> Even more significant, eligible taxpayers who did not participate in the amnesty program would be subject to double the penalties and interest assessed on their preamnesty tax liabilities.<sup>28/</sup> Further, eligible taxpayers who chose to challenge their assessed liabilities rather than participate in the amnesty program faced the same 200 percent penalty and interest sanctions as nonparticipating taxpayers if they lost their challenge.<sup>29/</sup> The Illinois amnesty program instituted a nearly 20-year lookback period -- back to June 30, 1983. As such, it raises significant questions as to its constitutionality.

A. Due Process Clause The due process clause of the U.S. Constitution applies to the states through the 14th Amendment, which says "nor shall any State deprive any person of life, liberty, or property, without due process of law."<sup>30/</sup> As applied to retroactive tax legislation, such as an amnesty program with a 20-year lookback period, the due process clause requires that taxpayers be provided with adequate notice; that the legislation not be harsh or oppressive; and that the legislation serve a legitimate purpose.<sup>31/</sup> The "actual notice" test is the most taxpayer-favorable argument, and will be the focus of this due process analysis.<sup>32/</sup>

Regarding adequate notice, the U.S. Supreme Court has said:

An elementary and fundamental requirement of due process in any proceeding [that will infringe on an individual's property interest] which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.<sup>33/</sup> The Illinois amnesty program provided taxpayers with a mere five months from the date of enactment until the close of the amnesty period in which to examine their tax returns for the 20-year lookback period and determine whether to participate.<sup>34/</sup> Further, the Illinois amnesty regulations placed the onus of participation on the taxpayer -- the Department of Revenue was not required to notify taxpayers who qualified for the amnesty program and a lack of notification by the DOR did not waive the imposition of 200 percent penalty and interest charges on nonparticipants.<sup>35/</sup>

States can satisfy the Supreme Court's requirements for due process by adopting one of the following safeguards: "(1) a pre-deprivation remedy, in which a taxpayer can challenge a tax before payment; (2) a post-deprivation remedy, in which a taxpayer can pay the disputed tax and sue for a refund; or (3) some combination of the two."<sup>36/</sup> As discussed above, the Illinois program did not provide a predeprivation remedy, but rather imposed the 200 percent sanction on any taxpayer who sought a predeprivation remedy and lost. The Illinois program also did not provide for a postdeprivation remedy -- taxpayers who participated in the program relinquished their right to seek a refund. As such, the state has not adopted an appropriate safeguard that ensures taxpayers are provided the due process required by the Constitution.

With the lengthy lookback period, significant penalties for nonparticipation, and forced relinquishment of rights to file

a refund claim, taxpayers hardly received fair and adequate notice before facing a potential deprivation property. Thus, the Illinois amnesty program violated of the due process clause of the 14th Amendment. Rodriguez said that constitutional challenges to the 2003 Illinois amnesty program are still ripe because "the double penalty provisions are open-ended and lack the statutory equivalent of a statute of limitations [and] because the [DOR] could determine, many years after the fact, that a taxpayer was eligible to participate in the amnesty program during the specified period but did not do so."/37/

B. Excessive Fines Clause American citizens are protected from excessive fines levied by the government through the Eighth Amendment to the Constitution, which reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."/38/ The Eighth Amendment applies to state governments through the 14th Amendment./39/ Although an excessive fines argument is not a common avenue for state tax challenges,/40/ as the forthcoming analysis will show, it nonetheless can serve as a viable argument against tax amnesty programs.

A "fine" is defined as "a payment to a sovereign as punishment for some offense."/41/ The Supreme Court has further explained that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term."/42/ To be constitutional under the Eighth Amendment, the fine must satisfy "the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."/43/ That proportionality test relies on these factors: "(1) whether the fine is larger than necessary to achieve deterrence, (2) the relative culpability of the taxpayer in relation to other potential violators, and (3) the harm caused by failing to follow the law."/44/

In light of the foregoing legal standards, a strong argument can be made that the Illinois amnesty program violates the excessive fines clause of the Eighth Amendment. First, payments are made to the Illinois DOR, thus constituting the civil sanction as a "fine." Second, the provisions of the statute that double the penalties and interest assessed for nonparticipation "serve a punitive purpose, intending to punish taxpayers who failed to participate in the Illinois Tax Delinquency Amnesty Program, in addition to the purportedly remedial purpose of compensating the state for investigation and audit costs."/45/ Third, the double penalties cannot survive the proportionality test. They were created and imposed after the tax liability accrued and therefore cannot serve any deterrence function./46/ The culpability of the taxpayer is a fact-based determination that must be made on a case-by-case basis, as undoubtedly some taxpayers inadvertently accrued a tax liability while others willfully violated the state's tax laws./47/ The harm caused to the state was a loss of revenue. If one considers the total amounts owed by all delinquent taxpayers, that is potentially a significant loss of revenue. But considering the amount owed by each individual taxpayer, the state has almost certainly been deprived of a negligible amount of money in terms of the overall state budget.

Given the foregoing analysis, the excessive fines clause can serve as a legitimate avenue for taxpayers to challenge the constitutionality of the Illinois amnesty program. As mentioned in the due process argument above, challenges to the Illinois amnesty program are theoretically still ripe, thus opening the door for taxpayers to make this argument.

C. Equal Protection Clause The equal protection clause of the 14th Amendment to the Constitution states, "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."/48/ Although often raised, equal protection challenges to retroactive state tax laws are largely unsuccessful./49/ Because the argument is often raised, however, a legal analysis of the Illinois amnesty program is warranted.

When a taxpayer challenges a retroactive tax law by invoking the equal protection clause, the state must merely show that the challenged classification of taxation "has [a] reasonable relation to a legitimate end of governmental action."/50/ The Supreme Court has laid out a two-prong test for assessing the validity of a retroactive state tax: "whether the thing taxed falls within a distinct class which may rationally be treated differently from other classes"/51/ and whether the tax's "purpose or effect is a hostile or oppressive discrimination against" the individuals burdened by the tax./52/

Under the Court's two-prong test, the tax amnesty program would not likely be struck down by a challenge brought under the equal protection clause. Because the individuals did not pay the tax when it was due, it is doubtful that a court

would determine the imposition of additional penalties and interest constitutes hostile or oppressive discrimination.

Indeed, some state courts have already addressed the issue of equal protection in the context of a state's amnesty program. An Illinois court struck down an equal protection clause challenge to the state's 1984 tax amnesty program that, like the 2003 program, prohibited taxpayers under civil or criminal investigation for tax evasion from taking part in the program.<sup>53/</sup> A New York court similarly denied a taxpayer's equal protection claim that the state's tax amnesty distinguished between "taxpayers whose delinquencies came to light before the effective date of the amnesty statute and those whose delinquencies were revealed only in exchange for amnesty."<sup>54/</sup> Thus, if the state was already investigating the taxpayer for delinquency, that taxpayer was ineligible for participation in the program.<sup>55/</sup> Those cases demonstrate that challenges to a state tax amnesty program brought under the equal protection clause will not typically prevail.

D. Summation of the Constitutionality Argument Although the foregoing analysis was viewed in light of the 2003 Illinois amnesty program, the legal principles apply to any retroactive tax dispute. State tax amnesty programs raise serious constitutional questions, particularly in challenges brought under the due process clause and the less-used excessive fines clause. It is unclear why, despite the scholarship written on that issue, constitutional challenges to state tax amnesty programs are not being raised more often. Presumably, those who are negatively affected by a state's eligibility requirements -- namely, those under criminal or civil investigation for tax delinquency -- do not want to bring attention to their predicament. Those who qualify and do participate, however, are unlikely to challenge the constitutionality of a law that lets them off the hook for violating state tax laws. It seems that the best class of citizens to challenge the law is the group who qualifies for the tax amnesty program, fails to take advantage of it, and then gets slapped with a 200 percent increase in penalties and interest. That group of people should have a legitimate argument that such a law -- with a long lookback period and no predeprivation or postdeprivation remedies -- is unconstitutional.

III. Amnesties in Action -- a Review of Three Recent Programs Although state tax amnesty programs are an example of bad tax policy and a strong argument can be made that they are unconstitutional, state legislatures are turning to tax amnesties as a way to address the massive shortfalls.<sup>56/</sup> Why? Every state except for Vermont has a balanced budget law.<sup>57/</sup> Therefore, state governments have closed the budget shortfalls "through a combination of spending cuts, withdrawals from reserves, revenue increases, and use of federal stimulus dollars."<sup>58/</sup> Politicians generally try to avoid raising taxes and cutting services to constituents; therefore, amnesty programs provide a politically palatable vehicle to generate a one-time infusion of revenue into the state's coffers. A review of three recent amnesty programs demonstrates their effectiveness in generating much-needed revenue, but also shows the often heated debate surrounding the implementation of tax amnesties.

A. Maine's 2009 Amnesty To collect the estimated \$ 257 million owed to the state in tax receivables from over 70,000 individuals and businesses, Maine's Tax Receivables Reduction Initiative provided a 90 percent reduction in penalties to delinquent taxpayers who paid all the interest and tax owed within the 90-day amnesty window.<sup>59/</sup> That program, which ran from September 1, 2009, to November 30, 2009, applied to "old debt of any type," ranging from individual and corporate income taxes to sales tax.<sup>60/</sup> Delinquent taxpayers whose cases had already been referred to the state's attorney general for prosecution or whose accounts had already been sent to the collections office were ineligible to participate.

The 2009 initiative, projected to raise \$ 9 million in revenue, injected \$ 16.2 million into the state's revenue account.<sup>61/</sup> Of the \$ 16.2 million, approximately \$ 7 million came from corporate accounts receivable, \$ 5 million from individuals, and the rest from a combination of the other eligible taxes.<sup>62/</sup> The success of the 2009 program follows the results of the state's previous amnesty programs -- the 2003 amnesty raised \$ 37.6 million, nearly double the estimate, and the 1990 amnesty raised \$ 29.6 million.<sup>63/</sup> However, the 2003 program waived all the penalties and 50 percent of the interest for those who participated, thus making it more attractive than the 2009 program.<sup>64/</sup> Regardless, the success of the 2009 program prompted the Legislature to consider holding another amnesty program just weeks after the previous initiative ended.<sup>65/</sup>

As it looks to close its current \$ 383 million budget gap, Maine will hold another amnesty program.<sup>66/</sup> The program will "waive 95 percent of the penalties on unpaid tax liabilities from July 1, 2005, until Dec. 31, 2009 . . . and 95 percent of penalties and 95 percent of interest" on liabilities assessed before June 30, 2005.<sup>67/</sup> Payment would have to

be made during the proposed window, which is September 1, 2010, to November 30, 2010./68/ Because of the differential treatment between the two liability periods, the latest amnesty has been called a two-tier amnesty./69/

Not all the key lawmakers were impressed with the idea of another amnesty so soon after the previous one concluded, nor is the two-tier approach necessarily popular. Sen. Joe Perry, a Democrat and the cochair of the Legislature's Taxation Committee, said, "It may be necessary, but this is not good tax policy that we would want to do year in and year out. . . . I don't like this two-part program. If we are going to do another one, we should do the same for all the [tax] receivables out there."/70/ The lone Republican on the Senate Taxation Committee, Richard Nass, agreed that the repeated amnesty is not necessarily good tax policy, saying, "I am one of those who bought into the arguments of the [Maine Revenue Services] that you don't want to do these very often," but conceded, "I guess you can't argue with success, and if this brings in some past-due revenue, that will help with the budget."/71/ Nass added, "We are in a crisis, and we will do things we would not do in other times."/72/ Those comments provide support for the proposition that while amnesties are bad tax policy, politicians prefer amnesty programs over raising taxes or decreasing state services.

B. 2009 Louisiana Amnesty Program The Louisiana Tax Delinquency Amnesty Act of 2009, signed into law by Gov. Bobby Jindal (R) on July 10, 2009, was an attempt by the state to recoup the \$ 473 million in outstanding taxes owed by approximately 242,000 individuals and businesses./73/ The state's rising unemployment and decreasing oil and natural gas prices had decreased its revenue by \$ 1.3 billion below earlier projections./74/

The amnesty period ran from September 1, 2009, through October 31, 2009, and applied to all taxes due except the motor fuel tax./75/ Taxpayers eligible to participate in the amnesty program included "those that have an existing tax liability, who did not file a required return, understated or omitted any tax liability on a return, or erroneously claimed credits or deductions on a return."/76/ Unlike the state's previous amnesty programs, even those taxpayers who were either undergoing audits by the Louisiana Department of Revenue or subject to civil litigation instituted by the DOR during the amnesty period were eligible to participate./77/ As in most amnesty programs, taxpayers involved in criminal investigation or litigation for their delinquent taxes were ineligible to participate./78/

The amnesty lookback period was eight years -- taxpayers could qualify for amnesty for taxes due and owing July 2001 through January 1, 2009./79/ To entice delinquent taxpayers to participate in the program, the state waived 100 percent of the penalties and 50 percent of the interest for approved applicants./80/ However, the taxpayer was required to pay the total tax liability and remaining interest during the amnesty period./81/ Payments made under the amnesty program were not eligible for refunds, even if paid under protest./82/ To encourage honesty among amnesty participants, the law authorized the DOR to conduct audits on participants, and if the DOR found a deficiency for a tax period for which amnesty was granted, the department was further authorized to "impose penalties, including a 20% collection penalty, and institute civil and criminal proceedings with respect to the difference between the amount shown on the amnesty application and the correct amount of tax due."/83/

The Louisiana program was successful in raising revenue./84/ The program raised twice as much revenue as anticipated, totaling \$ 303.7 million./85/ The state used \$ 90 million to "repay the state's coastal restoration and protection fund, which had been tapped to pay the state's share of emergency response costs for the 2008 Hurricanes Gustav and Ike."/86/ Another \$ 86 million went to the state's rainy day fund, which was the same amount given to state colleges and universities in the spring preceding the amnesty period./87/ The remaining amount will be allocated by the Legislature, although Jindal proposes to use it to "offset reductions in federal health-care financing currently slated for [this] year."/88/ The use of the funds will largely depend on how the state's revenue panel classifies the revenue -- either a "'one-time' windfall" or "a type of revenue expected to reoccur in the future."/89/ That is because the state imposes limitations on the amount of money that can be used as one-time revenue./90/ Therefore, the classification of the revenue could limit the amount that can be put toward the governor's suggested use./91/

The size of the response to the amnesty program reflects some broader problems with Louisiana's tax system. First, the state allowed nearly 250,000 of its citizens and businesses to become delinquent on their taxes. Second, the state chose to offer the staggering high number of delinquent taxpayers amnesty rather than pursue collections through the

established procedures of its DOR. Third, the state refrained from imposing higher penalties on those who did not take advantage of the program, unlike the Illinois program highlighted in Section II. Fourth, the state allowed those facing civil investigation and litigation from the DOR to participate. Therefore, the Louisiana tax system must be characterized as a failure. To create this type of amnesty program shows that a state has simply given up on the revenue-collection system it has in place.

C. 2009 New Jersey Amnesty Program In his report to the state's General Assembly Budget Committee, New Jersey Treasurer David Rousseau declared, "In [fiscal] 2010, we face the most daunting challenge of any budget in state history."<sup>92</sup> That daunting challenge included closing the state's \$ 9 million budget gap.<sup>93</sup> To help address that budget crisis, the State Legislature enacted a tax amnesty program with the goal of raising \$ 200 million.<sup>94</sup> One of the legislation's sponsors, Sen. Barbara Buono (D), viewed the amnesty proposal as "an appropriate [action] to help close our revenue shortfall while giving people a chance to do the right thing without fear of penalty or prosecution."<sup>95</sup> The amnesty program raised \$ 725 million in revenue.<sup>96</sup>

The state's amnesty period was similar to the other state amnesties discussed above. The state provided a window -- from May 4, 2009, to June 15, 2009 -- for delinquent taxpayers to pay their outstanding liabilities and half of the interest in exchange for a complete waiver of the penalties and the remaining interest assessed on their liabilities.<sup>97</sup> The lookback period ran from January 1, 2002, to February 1, 2009.<sup>98</sup> Participation in the program constituted "an express and absolute relinquishment of all administrative and judicial rights of appeal that have not run or otherwise expired as of the date payment is made."<sup>99</sup> Delinquent taxpayers under criminal investigation for tax evasion were ineligible to participate.<sup>100</sup> Failure to take advantage of the amnesty program resulted in a 5 percent increase in the eligible taxpayer's previously assessed penalties.<sup>101</sup>

Because of the large amount of revenue generated from the amnesty program, both supporters and critics were vocal about its merits. Then-Gov. Jon Corzine, in discussing the Legislature's decision to postpone the vote on the state's budget to consider what to do with the unexpected revenue, said, "We expected to pass the budget today. . . . This extraordinary development must be appropriately considered by the Legislature."<sup>102</sup> He further proclaimed, "This money belongs to the taxpayers, and we're going to give it back to them in property tax relief."<sup>103</sup>

His political opponent, now-Gov. Chris Christie (R), viewed it a bit differently:

\$ 700 million in one-time revenues came in from granting amnesty to tax cheats in another gimmick that was used to paper over problems. As usual, our government spent it all in one year, and built that much more spending into the budget for this coming year, with no way to pay for it now or in the future.<sup>104</sup> Another Republican, Assembly member Declan O'Scanlon Jr., also argued against the amnesty, saying, "We need to tighten our tax collection procedures to ensure that some people are not scamming the system, forcing honest, law-abiding citizens to pay higher taxes to make up for those not paying what they owe."<sup>105</sup>

Lawmakers and governors must find a politically palatable way to increase revenue to plug the budget gaps. Amnesties fit that description, but at what cost? The Legislature eventually reconvened to pass a fiscal 2011 budget that "increase[d] taxes by nearly \$ 1 billion, eliminate[d] property-tax deductions for the wealthiest residents and pare[d] billions from health care, higher education, and other programs."<sup>106</sup> It appears the amnesty program was not as successful at resolving budget problems as the numbers make it sound.

IV. The Case Against Tax Amnesties There is no question that tax amnesties generate much-needed revenue for state governments. In these trying times, why should states avoid this proven method of generating revenue without raising taxes on the citizens? Because all that glitters isn't gold.

According to Reagan Farr, the revenue commissioner of Tennessee, which is one of only five states that have never enacted a tax amnesty, amnesties are gimmicks and a bad tax policy that "weakens the overall tax system" by reducing public respect for tax laws.<sup>107</sup>



Oregon DOR spokesman Derrick Gasperini, cautioned, "There has been talk among the states, especially those that have done [an amnesty] before, that once you open this door, it's really hard to shut it." The Oregon Legislative Assembly apparently did not heed that warning, because it enacted the state's first tax amnesty program in 2009.<sup>/108/</sup>

New Mexico's 2009 amnesty bill came with a disclaimer attached as a fiscal note that stated, "Frequent amnesty periods may indirectly communicate a message to taxpayers that they do not need to comply with the Tax Administration Act because, potentially, another amnesty period may be approved. It is not known how frequent is too frequent."<sup>/109/</sup>

An academic study by LeAnn Luna et al. concluded that "the repercussions of more frequent amnesties are declining revenue and taxpayer anger."<sup>/110/</sup> The study noted that back-to-back amnesties in Massachusetts and Missouri resulted in "revenues from the second campaign [falling] far short of the first, and there was widespread criticism from law-abiding taxpayers that frequent amnesty programs unfairly reward tax evaders."<sup>/111/</sup> In a 2003 amnesty, Massachusetts raised approximately one-tenth of the revenue generated by its 2002 amnesty program.<sup>/112/</sup>

These comments from high-level state tax officials across the country, coupled with the academic study and results of consecutive amnesty programs, show that tax amnesties are not only bad tax policy, but also often end up with states relying on them for revenue. Reliance on amnesties is subject to the law of diminishing returns, with frequent amnesties bringing in less and less revenue. Further, amnesties annoy the vast majority of the states' citizens who pay their taxes on time. This course of action is not sustainable in the long term, and state legislators should abandon the tax amnesty as a tool to fix their budget problems.

V. Conclusion State tax amnesties are the embodiment of unsound tax policy of questionable constitutionality; they must be abandoned as a source of state revenue generation. Although generally thought of as a one-time quick fix for state budget woes, amnesties are being implemented with greater frequency across the country. Reliance on amnesties puts overall compliance with a state's tax laws in jeopardy because delinquent taxpayers become encouraged to hold out for an amnesty period. States must either return to the principle that noncompliance with tax laws will result in punishment or prepare for much bigger tax collection problems in the future.

FOOTNOTES <sup>/1/</sup> Leo P. Martinez, "Federal Tax Amnesty: Crime and Punishment Revisited," *10 Va. Tax Rev.* 535, 538 (1991). Tax amnesties often apply to a wide variety of taxes, including income, corporate, property, sales and use, and franchise taxes. Unless otherwise noted, the term "tax amnesty" throughout this article applies to all taxes levied by the jurisdiction in question.

<sup>/2/</sup> Jason A. Bremer and Belinda S. Morgan, "States Adopt a Profitable 'Carrot and Stick' Approach to Tax Amnesty," *J. Multistate Tax'n* 6, 8 (2004).

<sup>/3/</sup> Paul H. Frankel and Amy F. Nogid, "Hammers Disguised as Amnesties -- States Take a Wrong Turn," *State Tax Notes*, May 23, 2005, p. 609, Doc 2005-10730, or *2005 STT* 98-7.

<sup>/4/</sup> Brandee A. Tilman, "Federal and State Constitutional Challenges to State Tax Amnesty Programs," *11 St. & Loc. Tax Law.* 61, 62 (2006).

<sup>/5/</sup> Id.

<sup>/6/</sup> Id. (quoting Martinez).

<sup>/7/</sup> Tilman, *supra* note 4, at 62.

<sup>/8/</sup> Martinez, *supra* note 1, at 538.

/9/ Frankel and Nogid, *supra* note 3, at 609; Federation of Tax Administrators, "State Amnesty Programs -- 1982 to Present (2010)," available at <http://www.taxadmin.org/fta/rate/amnesty1.pdf>.

/10/ *Id.*

/11/ Douglas Rooks, "Maine's Tax Amnesty Exceeds Expectations," *State Tax Notes*, Dec. 14, 2009, p. 779, Doc 2009-26863, or *2009 STT 234-11*.

/12/ David Brunori, *State Tax Policy: A Political Perspective*, 13-24 (2nd ed., The Urban Institute Press 2005); National Conference of State Legislatures, "Principles of a High-Quality State Revenue System."

/13/ Elizabeth McNichol and Nicholas Johnson, Center on Budget and Policy Priorities, "Recession Continues to Batter State Budgets; State Responses Could Slow Recovery" (Feb. 25, 2010), available at <http://www.cbpp.org/files/9-8-08sfp.pdf>.

/14/ *Id.*

/15/ Brunori, *supra* note 12, at 13.

/16/ Joseph Henchman, remarks at Tax Analysts' Conference on the State Fiscal Crisis (Oct. 30, 2009), Doc 2009-24426 or *2009 STT 213-13* (saying that amnesties are "problematic, because they're essentially an exemption from the state's tax code to people that have broken it, and it sends the signal that, hey, you know, next time around you don't really need to pay anything because we'll set aside a time in which you can just cough it up and we'll call it even"); J.M. Ortega, "Ohio Senate Considers Tax Amnesty for Its Version of Budget Bill," *State Tax Notes*, May 16, 2005, p. 492, Doc 2005-10149, or *2005 STT 90-19*

/17/ See *supra* note 15.

/18/ Henchman, *supra* note 16; Karen Setze, "States Offering Amnesties in Wake of Fiscal Crisis, but at What Price?" *State Tax Notes*, Mar. 23, 2009, p. 908, Doc 2009-5833, or *2009 STT 50-1*.

/19/ Martinez, *supra* note 1, at 565.

/20/ Frankel and Nogid, *supra* note 3, at 611.

/21/ *Id.* at 565-566.

/22/ Henchman, *supra* note 16.

/23/ LeAnn Luna, Michael Brown, Katrina Mantzke, Ralph B. Tower, and Lorraine Wright, "State Tax Amnesties: Forgiveness Is Divine -- and Possibly Profitable," *State Tax Notes*, Aug. 21, 2006, p. 497, Doc 2006-13786, or *2006 STT 161-4*

/24/ Frankel and Nogid, *supra* note 3, at 611.

/25/ Jorge Rodriguez, "Examining the Constitutionality of State Tax Amnesties in Federal Court," *State Tax Notes*, May 25, 2009, p. 625, Doc 2009-8080, or *2009 STT 99-7* (noting that in 2008, Oklahoma adopted the same penalties on eligible delinquent taxpayers who did not participate in the state's amnesty program).

/26/ Tilman, *supra* note 4, at 68-69.

/27/ Rodriguez, *supra* note 25, at 628 (citing 86 Ill. Admin. Code section 521.105(c)).

/28/ 35 Ill. Comp. Stat. Ann. 735/3-2(f) (West 2010); 35 Ill. Comp. Stat. Ann. 735/3-3(i) (West 2010).

/29/ Rodriguez, *supra* note 25, at 628 (citing Illinois Department of Revenue 2004 Practitioner's Question and Answers Publication).

/30/ U.S. Const. Amend. XIV, section 1.

/31/ *Id.*

/32/ Tilman, *supra* note 4, at 73-77.

/33/ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

/34/ Rodriguez, *supra* note 25, at 634.

/35/ *Id.* at 633 (citing 86 Ill. Admin. Code section 521.105(a)).

/36/ Frankel and Nogid, *supra* note 3, at 612 (citing *Reich v. Collins*, 513 U.S. 106, 110-111 (1994); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, at 37 (1990)).

/37/ Rodriguez, *supra* note 25, at 638.

/38/ U.S. Const. Amend. VIII.

/39/ *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991) (citing *Robinson v. California*, 370 U.S. 660 (1962)).

/40/ Rodriguez, *supra* note 25, at 638.

/41/ *U.S. v. Bajakajian*, 524 U.S. 321, 327 (1998) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

/42/ *Austin v. U.S.*, 509 U.S. 602, 610 (1993) (quoting *U.S. v. Halper*, 490 U.S. 435, 448 (1989)).

/43/ *U.S. v. Bajakajian*, 524 U.S. 321, 334 (1998).

/44/ Tilman, *supra* note 4, at 101 (citing *United States v. Mackby*, 261 F.3d 821 (9th Cir. 2001); *United States v. Bajakajian*, 524 U.S. 321 (1998)).

/45/ *Id.* at 99.

/46/ *Id.*

/47/ *Id.* at 99-100.

/48/ U.S. Const. Amend. XIV, section 1.

/49/ Tilman, *supra* note 4, at 88.

/50/ *Welch v. Henry*, 305 U.S. 134, 144 (1938). This case involved a challenge to a Wisconsin law enacted in 1935 that imposed a tax on corporate dividends distributed in 1933 and 1934. The U.S. Supreme Court rejected the taxpayer's equal protection argument and upheld the imposition of the tax. In doing so, the Court said:

Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits. And the distribution of a tax burden by placing it in part on a special class which by reason of the taxing policy of the State has escaped all tax during the taxable period is not a denial of equal protection. . . . Nor is the tax any more a denial of equal protection because retroactive. /51/ *Id.* at 145.

/52/ *Id.* at 146.

/53/ *Snappy Car Rental, Chicago, Inc. v. Dep't of Revenue*, 497 N.E.2d 840 (Ill. App. Ct. 1986). This challenge was brought under the equal protection clauses of the state and federal constitutions. The court determined the classification at issue was taxpayers who paid taxes on time versus delinquent taxpayers, rather than the plaintiff's argument that the classification was those under criminal investigation versus those who were not. The court concluded that the state had a rational basis for treating delinquent taxpayers under criminal investigation differently than delinquent taxpayers who were not under criminal investigation. *Id.* at 842.

/54/ *People v. Christie*, 505 N.Y.S.2d 310 (N.Y. Sup. Ct. 1986).

/55/ *Id.* The court said:

While it may be true in the narrowest sense that these defendants were situated, with respect to the revenue raising purpose of the amnesty program, similarly to all other taxpayers who had not paid past taxes, they were not so situated with respect to other purposes of the tax laws. The state's interest in punishing those who wilfully [sic] avoid paying taxes is an equally significant and indeed necessary ancillary to the collection of revenue. *Id.* at 473.

/56/ Karen Setze, "More States Considering Tax Amnesties," State Tax Notes, Oct. 19, 2009, p. 155, Doc 2009-22790, or 2009 STT 198-1.

/57/ McNichol and Johnson, *supra* note 13, at 3.

/58/ *Id.*

/59/ Rooks, *supra* note 11; Mal Leary, "Tax Amnesty Brings in More Than Expected," Bangor Daily News, Dec. 8, 2009, available at <http://www.bangordailynews.com/detail/132392.html>.

/60/ Douglas Rooks, "Maine Governor Proposes Two-Tiered Amnesty Program," State Tax Notes, Jan. 4, 2010, p. 9, Doc 2009-28415, or 2009 STT 248-9.

/61/ *Id.*

/62/ *Id.*

/63/ Id.

/64/ Mal Leary, "Maine Tax Amnesty Collects \$ 8.5 Million," Bangor Daily News, Nov. 16, 2009, available at <http://www.bangordailynews.com/detail/129606.html>.

/65/ Leary, supra note 59.

/66/ Mal Leary, "State Tax Amnesty Programs Proposed," Bangor Daily News, Dec. 28, 2009, available at <http://www.bangordailynews.com/detail/133579.html>.

/67/ Id.

/68/ Id.

/69/ Rooks, supra note 60.

/70/ Leary, supra note 66.

/71/ Id.

/72/ Id.

/73/ Louisiana Department of Revenue, "Editorial: Tax Amnesty Is a Sensible Plan," Tax Topics, Sept. 2, 2009, available at <http://taxtopics.revenue.louisiana.gov/tag/louisiana-tax-delinquency-amnesty-a-ct-of-2009/>.

/74/ Id.

/75/ La. Admin. Code tit. 61 section 4912 (2009).

/76/ Baker Donelson, "Amnesty, Not Forgiveness, Is Likely for Certain Tax Indiscretions," May 19, 2009, <http://blik.com/Content.aspx?NodeID=200&PublicationID=613>.

/77/ Id.

/78/ La. Admin. Code tit. 61 section 4912 (2009).

/79/ Id.

/80/ Id.

/81/ Id.

/82/ Id.

/83/ Baker Donelson, supra note 76.

/84/ Robert Travis Scott, "Louisiana Tax Amnesty Program Exceeds Expectations With \$ 303.7 Million Collected So Far," Nola.com, Nov. 4, 2009, available at [http://www.nola.com/politics/index.ssf/2009/11/post\\_117.html](http://www.nola.com/politics/index.ssf/2009/11/post_117.html).

/85/ Id.; Federation of Tax Administrators, State Amnesty Programs, supra note 9.

/86/ Scott, *supra* note 84.

/87/ *Id.*

/88/ *Id.*

/89/ *Id.*

/90/ *Id.*

/91/ *Id.*

/92/ Nicola M. White, "Revised New Jersey Budget Would Eliminate Property Tax Rebates," *State Tax Notes*, May 25, 2009, p. 617, Doc 2009-11581, or *2009 STT 96-26*

/93/ "NJ Governor Touts New Jersey Tax Amnesty Program Successes," June 18, 2009, available at <http://www.allamericanpatriots.com/48753812-nj-governor-touts-new-jersey-tax-amnesty-program-successes>.

/94/ David Kocieniewski, "\$ 400 Million From Tax Amnesty Program Gives Trenton a Budget Breather," *The New York Times*, June 18, 2009, available at [http://www.nytimes.com/2009/06/19/nyregion/19njbudget.html?\\_r=2](http://www.nytimes.com/2009/06/19/nyregion/19njbudget.html?_r=2).

/95/ "Tax Amnesty Bill Clears Senate, Assembly Panels," *NJ.com*, Mar. 10, 2009, available at <http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-13/1236659205142630.xml&coll=1>.

/96/ Federation of Tax Administrators, *State Amnesty Programs*, *supra* note 9.

/97/ New Jersey Department of the Treasury's Division of Taxation, *New Jersey Tax Amnesty Program*, Mar. 20, 2009, available at <http://www.state.nj.us/treasury/taxation/amnesty2009.shtml>.

/98/ N.J. Stat. Ann. section 54:53-19 (2009).

/99/ *Id.*

/100/ *Id.*

/101/ *Id.*

/102/ Christopher Dela Cruz, "N.J. Legislature Postpones Budget Vote After State Gets Unexpected \$ 400M Windfall," *NJ.com*, June 18, 2009, available at [http://www.nj.com/news/index.ssf/2009/06/vote\\_on\\_state\\_budget\\_postponed.html](http://www.nj.com/news/index.ssf/2009/06/vote_on_state_budget_postponed.html).

/103/ Kocieniewski, *supra* note 94.

/104/ New Jersey Gov. Chris Christie, budget speech to Legislature, Mar. 16, 2010, available at [http://www.nj.com/politics/index.ssf/2010/03/text\\_of\\_gov\\_chris\\_christie\\_bud.html](http://www.nj.com/politics/index.ssf/2010/03/text_of_gov_chris_christie_bud.html).

/105/ Nicola M. White, "New Jersey Tax Amnesty Windfall Stirs Budget Debate About Extra Revenue," *State Tax Notes*, June 29, 2009, p. 1029, Doc 200-14180, or *2009 STT 118-19*.

/106/ David Chen, "New Jersey Passes Budget Fueled by \$ 1 Billion in Tax Increases," The New York Times, June 26, 2009, available at [http://www.nytimes.com/2009/06/26/nyregion/26jersey.html?\\_r=1](http://www.nytimes.com/2009/06/26/nyregion/26jersey.html?_r=1).

/107/ Setze, supra note 18.

/108/ Federation of Tax Administrators, State Amnesty Programs, supra note 9.

/109/ Id.

/110/ Id. (citing "State Tax Amnesties: Forgiveness Is Divine -- and Possibly Profitable," supra note 23).

/111/ Id.

/112/ Id.

END OF FOOTNOTES

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