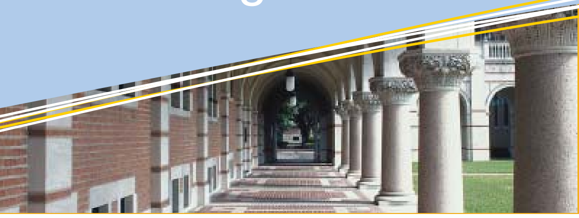
Tax Report

Institute for Professionals in Taxation
Excellence Through Tax Education
August 2011



Intermediate Personal Property Tax School
Atlanta, Georgia ~ October 16 - 21, 2011
Program Registration Hotel Reservation

Property Tax

After a Long Montana Winter, a Chill Remains: *Pacificorp v. Department of Revenue*

In *Pacificorp v. Department of Revenue,* the Supreme Court of Montana has upheld the use of industry-wide earnings-to-price ratios for the development of a capitalization rate for a regulated electric utility, determined that the Department of Revenue is not statutorily required independently to test for obsolescence, and approved reliance on a sale of stock in the taxpayer that did not occur until many months after the valuation date. These rulings were arguably not necessary to the ultimate disposition of the case, but are now likely to be given precedential effect.

Robert S. Goldman, Esq.
Madsen Goldman & Holcomb, LLP
Tallahassee, Florida
Phone: 850.523.0400
rgoldman@mgh-law.com

Article begins on page 10

Excerpt from *Elk Hills Power LLC* Amicus

Letter to California Supreme Court

IPT filed the attached amicus letter in this important case with the California Supreme Court. The lower court decision would wrongly allow the inclusion of intangibles values in the ad valorem taxation of personal property used in a going concern.

Mardiros H. Dakessian, Esq.
John Messenger, Esq.
Mike Shaikh, Esq.
Reed Smith LLP
Los Angeles, CA

Article begins on page 13

Credits and Incentives

Property Tax as an Economic Development Tool

This article describes the role of property tax abatements as a tool for steering economic development and describes a number of state and local abatement, credit and incentive programs now being used.

By Mary Faye LaFaver and Brandon Pyers

Article begins on page 4

Income Tax

No Customers? No Nexus? No Problem?

In the case of *Griffith, etc. v. ConAgra Brands, Inc.,* the West Virginia Supreme Court of Appeals will consider whether a physically-absent intangible holding company (IHC), licensing trademarks and trade names to both related and unrelated national consumer product manufacturers, none of which had retail customers or facilities in West Virginia, may still be subject to income and franchise tax there. The following article will discuss how, in seeking the reversal of a lower court ruling that the IHC was not taxable in the state, the West Virginia Department of Revenue has asserted that the IHC had substantial economic nexus with the state because its royalty income was measured by its licensees' sales of products, bearing those trademarks and trade names, to their customers which, in turn, sold some of those products in West Virginia.

Michael E. Caryl, Esq.
Bowles Rice McDavid Graff & Love LLP
Martinsburg, West Virginia
Phone: 304.264.4225
mcaryl@bowlesrice.com

Article begins on page 18

Income Tax

Outsourcing the Department's Discretionary Authority to Make Transfer Pricing Adjustments: Arbitrary and Capricious

States have recently started to use third party contract auditors to conduct transfer pricing audits of taxpayers. Such audits have resulted in large assessments made pursuant to the states' "discretionary authority" (i.e., the right to adjust taxpayer's income and other tax calculations to come up with a "fair" tax liability). This article discusses the use of third party contract auditors in the transfer pricing arena as well as some of the issues that arise during such audits.

Kendall L. Houghton, Esq. and Maryann H. Luongo, Esq.
Alston & Bird LLP
Washington, D.C.
Phone: 202.239.3300
Kendall.Houghton@alston.com
Maryann.Luongo@alston.com

Article begins on page 15

In this Issue

This publication is designed to provide accurate information for IPT members and other tax professionals. However, the Institute is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. Reprint permission for articles must be granted by authors and the Institute. Send address changes and inquiries to Institute for Professionals in Taxation, 1200 Abernathy Road, Northeast, Building 600 Suite L-2, Atlanta, Georgia 30328 Telephone (404) 240-2300. Fax (404) 240-2315.

Value Added Tax

The European Union and Remote Sellers – No *Quill* Required

While the US continues its long and (in)glorious legal war over nexus and remote sellers, many "Main Street" businesses are looking to Washington D.C. for solutions. At the heart of any federal solution is overturning *Quill* and removing the physical presence requirement. But before any solution is proffered by Congress, Main Street and Remote Sellers should study the European Union and how remote sales are taxed between the various Member States. While on the surface the EU rules appear to "level the playing field," the application may not support such a conclusion.

Kenneth W. Helms, CMI
Ryan, LLC
Atlanta, GA
Phone: 404.365.0922
Kenneth.helms@ryan.com

Article begins on page 22

Sales and Use Tax

The War in California Online Retailers Push Public Initiative

This article describes recent California legislation requiring online merchants to collect state use tax if they either make "click through" referral arrangements on a compensated basis with persons in California or have affiliates performing services related to tangible personal property they are selling into the state. It also describes a public referendum initiative commenced by Amazon that would let voters decide whether to repeal the law and the efforts of various mainstreet retailers that are physically present throughout the nation to require online sellers to collect tax on Internet sales.

Cass D. Vickers, CMI, Esq.
IPT Deputy Executive Director and
State Tax Counsel
Phone: 404.240.2300
cvickers@ipt.org

Article begins on page 26

Attention:
Authors and Authors in Waiting Tax Report Articles Sought

A lanky, unkempt rail-splitter from Illinois graced us with the compelling and memorable statement that our nation was "conceived in liberty, and dedicated to the proposition that all men are created equal." A Mississippi riverboat pilot gave us the wisdom that "a man cannot be comfortable without his own approval." "Forever is composed of nows," mused a reclusive Massachusetts poet who claimed the hills, the sundown and a dog as her only companions. An orphaned Bostonian intrigued us with the notion that "all that we see or seem is but a dream within a dream." In these and a thousand like instances, our lives were enriched because a writer shared of himself, his experience, his thoughts, his views. There is an author in each us, a voice ready to speak, with something to say from which others would benefit. Had we been around at the time, the IPT *Tax Report* might not have been fortunate enough to attract contributions from Lincoln, Twain, Dickinson or Poe–but we would have asked. As we ask you now to consider preparing an article discussing developments or issues in the profession you have chosen for your life's work. If your piece is not quite timeless, the effort will nonetheless be very much appreciated by your colleagues in and outside IPT–people whose daily lives turn to and on state and local tax matters. Become part of the SALT literati–contact Cass Vickers by email at cvickers@ipt.org and give us all a piece of your mind.

President's Corner

Linda A. Falcone, CMI
President June 2011-2012

I look forward to serving as your IPT President for the 2011-2012 term. Thank you for expressing your confidence in me by electing me to the position. It is a sincere pleasure to be part of this active, growing, and progressive group of tax professionals who are dedicated to the education and certification of its members, and to the professionalism of the state and local tax field.

Robert D. Butterbaugh, CMI, Immediate Past President, completes a very active term. In addition to continuing many initiatives already in place, Bob has led the Institute's expansion into the field of Credits & Incentives. Under his leadership, the first Credits & Incentives Symposium has been planned and will take place in November 2011. In addition, Bob put in place the first Signature Sponsorship. I look forward to working with Bob in the upcoming year and seeking his valuable insight.

Congratulations to Kyle Caruthers; William J. McConnell, CMI, CPA, Esq.; and Kenneth R. Marsh, CMI, who have been elected to serve on the Board of Governors for the next three years. I am fortunate to also have Paul A. Wilke, CMI, and Arlene M. Klika, CMI, to serve as First and Second Vice President, respectively. With returning Board members Gwendolyn S. Evans, CMI; Christopher S. Hall, CMI, CMA; Donna L. Jernigan, CMI, PE; Chris G. Muntifering, CMI; Kellianne M. Nagy, CAE; and Andrew P. Wagner, Esq., CPA, our Board continues to have a diverse and well represented leadership team. In addition, over the past several years, I have had the opportunity to work with Board member Janette M. Lohman, CMI, Esq., CPA, who recently concluded her service on the Board of Governors to whom we owe our sincere appreciation. I know that I will also be able to have the support and counsel of Past President Lee A. Zoeller, CMI, Esq. whose term of office on the Board also concluded in June.

The success of the organization is due, in large part, to the many Committees and the numerous committee members that provide the time and talent to further the work of IPT. The Committee Chair appointments have been made for the 2011-2012 term and the list of Committees can be found on the IPT website. For those of you that attended the Annual Conference, you had an opportunity to express your interest in joining a Committee at the Tuesday luncheon. The table sign-up sheets have been distributed to the Committee Chairs for follow up. In addition, I encourage those who have not already expressed an interest in joining a Committee, to contact the IPT office or the committee chair directly. The Intermediate Real Property Tax School Committee has expressed an immediate interest in obtaining new members.

My primary initiative in the upcoming year will be to encourage participation in IPT committees, and to coordinate the work of various committees to grow the organization and to increase its effectiveness. Gwendolyn S. Evans, CMI is chairing the newly-formed Mentoring Committee. The goal of this committee is to pair current IPT members with newer members. Berranthia Brown, CMI, Chair of the Social Networking Committee, will lead the Institute's initiative in joining Social Media. The Mentoring, Social Networking, Membership Promotion and Public Relations (Chuck Rewis – Chair), and Networking (Arlene Klika - Chair) Committees will be working very closely, as they have overlapping goals.

As part of the overall objectives for the coming year, I would like to continue to focus on strengthening the base of our core members in the Property, Sales and Income Tax areas. At the same time, I would also like to see additional growth in the Value Added Tax and in Credits and Incentives areas while maintaining all current IPT programs and services at the highest level of implementation. Any expansion of services or benefits is designed to make the Institute more purposefully oriented, forward-looking, as well as remaining responsive to the needs of the membership.

While the 35th Annual Conference recently took place, planning for the 2012 Conference in Indian Wells, California is already underway. Please mark your calendars now for June 24-27, 2012. Not only is this a very popular destination, but you will be able to participate in a program designed for all three tax disciplines. More information will be provided in future issues of the Report.

Although the calendar year is half over, the Institute has additional educational programs in all areas scheduled. Registration is currently open for the Michigan One-Day Tax Seminar, VAT Symposium, Sales Tax Symposium, Intermediate Personal Property Tax School, and the first Credits and Incentives Symposium. Please visit IPT's website for registration materials. Registration will begin shortly for the Property Tax and Income Tax Symposia and the Georgia One-Day Tax Seminar.

In closing my first President's Corner, I would like to remind you that this is your organization, and the Institute continues to hold to that basic premise. Please call on us if there is something that we have overlooked or if you have suggestions or recommendations on how to better serve the membership. I appreciate your continued commitment to the Institute and look forward to the year ahead.

Linda A. Falcone, CMI

President

Counsel's Corner

Credits and Incentives

Property Tax as an Economic Development Tool

By Mary Faye LaFaver and Brandon Pyers

Property tax implications, current and projected, are a major factor in the ongoing operating cost equation for companies that are making decisions around expansions and relocations. While residential property values have been in steep decline, property taxes on business property increased 1% this year, totaling US$249.5 billion in FY2010, which is equivalent to 40.3% of total state and local business taxes. Property taxes represent the top tax burden for business with sales and use taxes following at 20.1% and income tax representing only 5.3% of the overall tax burden on business. The property tax and a significant portion of sales taxes paid by business are taxes on capital invested within a state.[1] As declining residential property values in many parts of the country may shift additional property taxes to business, there are a variety of mechanisms throughout the country to help counter this trend and make communities more competitive for expansion and relocation projects.

Many state and local governments have found property tax abatements, rebates, or reductions an effective means to incent targeted investment behavior. These tools are used to attract a specific type of investment or to induce investment in comparatively undesirable areas that are more challenging to develop or redevelop. These are an effective inducement because the benefits are (1) an "above the line" savings to company financials making the value more immediate; (2) predictable and provide ongoing savings to the company for the term of the abatement; and (3) tend to have minimal "claw-backs" attached because they are performance-driven in that the company has to be

Continued on page 5

in business and paying property tax for the benefit to apply.

Types of Property Tax Benefits

Tax abatements are defined as a pre-approved reprieve from a tax obligation. The amount of the reduction varies from partial to complete according to the terms of the agreement that is reached between the taxing jurisdiction and the taxpayer. As a general rule, the governing body must adopt a resolution or enact legislation defining the conditions under which such consideration will be made for a taxpayer. Oftentimes, there must be enabling legislation enacted at the state level to allow the local jurisdictions to provide the benefit.

Interestingly, this specific incentive takes varying forms from one state to another. Property tax programs differ in the role of the local taxing jurisdiction, the participation or approval required by a state authority, and the use of increased revenue (rather than a reduction in revenue) to finance qualified investments in infrastructure. A common thread is that all incentives are intended to support the redevelopment of distressed and/or blighted property and create jobs to bring renewed economic vitality to underperforming properties, neighborhoods and communities.

Similar to the economic development approach of using property tax to induce job creation and capital investment in specific locations, many local jurisdictions also use property tax abatement programs to assist with broader economic development or environmental policy objectives. Most common of these objectives are the redevelopment of “brownfield” or environmentally challenged sites and energy efficiency and reduction programs.

The program design to secure property tax benefits varies and includes negotiated tax abatements, and tax increment financing which is a financing mechanism using all or a portion of property tax as a payment mechanism. There also are exemptions on specific types of property (e.g., pollution control, research and development, manufacturing, etc.). As a general rule, these are statutory exemptions and “as of right” instead of negotiated benefits with the potential exception of getting specific types of equipment involved in a project to meet the definitions.

Locally-Negotiated Property Tax Abatements

Texas

The Texas legislature does not have the constitutional authority to levy a state-level property tax. Thus, the only permissible property taxes are those levied by local jurisdictions. The property tax and the sales tax are the main sources of tax revenue for local governments. All privately owned property in Texas is subject to property taxation in the city, county and school district in which it is located, unless specifically exempted. In addition, depending on the location of the property, there are several special district property taxes that may apply, such as hospital and/or junior college district taxes.

Incorporated cities, counties and special districts are allowed to enter into tax abatement agreements pursuant to Chapter 312 of the Texas Tax Code; however, in general, school districts are not allowed to enter into abatements. School district taxes account for nearly half of a taxpayer’s overall property tax burden.

Texas consists of more than 250 counties and 1,000 incorporated cities. Each local taxing jurisdiction may have its own guidelines and criteria establishing minimum capital investment and job creation and/or retention thresholds in order to qualify for abatement of property taxes. In addition, some jurisdictions may require that the planned improvements must be in competition from other jurisdictions competing for the investment (i.e., competitively-sited) and require an application be filed prior to any public expression of a final location decision or any commitment to the proposed project, such as purchasing equipment or leasing property. Finally, most jurisdictions will allow abatement of taxes on real property improvements, but not all will grant abatement for tangible personal property taxes.

Massachusetts Tax Increment Financing

While not a “tax increment financing” (“TIF”) program in the traditional sense, Massachusetts’ version of a TIF refers to a local real estate tax exemption. The property benefit is determined by agreement between the investing company and the locality that all or part of the increased incremental value resulting from the

Continued on page 6

new construction or improvements to real property be exempted. The benefit ranges from five percent (5%) to 100 percent (100%) annually over an agreed-upon term. The tax exemption is highly negotiable and may last from five years to 20 years in duration[2].

A TIF requires approval by the municipality and ultimately, the Massachusetts Economic Assistance Coordinating Council – the state board responsible for the oversight and administration of discretionary tax credit awards. To receive a TIF a company must locate in one of the state's 214 Economic Target Area communities. Each community will negotiate the term and annual value of the tax abatement(s). Certain communities are significantly more aggressive than others.

TIF is usually coupled with the Massachusetts Economic Development Incentive Program (EDIP)[3]. Incentives offered under the EDIP include: investment tax credits on qualified property (up to 40% or $30,000 per job), an abandoned building tax deduction (if facility has been 75% vacant for two or more years), and a personal property exemption. Personal property was previously exempt from taxation under the MA EDIP program. But, as a result of statutory changes, the abatement of personal property tax is now a negotiated incentive.

Pennsylvania LERTA

In Pennsylvania, the Local Economic Revitalization Tax Assistance Act or "LERTA"[4] allows local taxing jurisdictions (city, school district and county) to provide a real property tax abatement incentive for commercial or industrial properties. Properties within an eligible district may receive an abatement for a period of five to ten years, based on the local ordinance. This real property tax abatement program applies to improvements, renovations and new construction that are completed by a private investor.

LERTA is a highly negotiated incentive, involving multiple local entities. Any county, city, borough, incorporated town, township, institutional district, or school district may participate in this program.

Geographic Specific Zone Incentives

New York Excelsior Program

The recently adopted New York Excelsior Program ("Excelsior") does not actually abate the property taxes associated with the new investment. Instead; it provides a state-based income tax credit equal to a declining portion of the taxes. So, it's a win-win situation for the municipality and the private sector investor. The company gets a benefit that effectively lowers its property tax expense but at the same time, the municipality does not lose out on the associated property tax revenue. The real property tax credit is based on the increased taxes paid on property over the year prior to certification. The value of the credit is equal to 50% in the first year, declining 10% annually for a five-year period.

Excelsior is a highly discretionary program that was enacted in 2010 and expanded / enhanced in 2011. Excelsior provides up to four different refundable tax credits relating to (a) job creation / retention, (b) capital improvements, (c) research and development activities, and (d) property tax payments if investing companies meet specific job creation and retention commitments (depending on industry and project type) and capital investment thresholds. In order to qualify and gain access to the credits, companies must apply to the New York State Department of Economic Development prior to undertaking a project, providing a detailed proposal and committing to specific job creation and capital investment levels over a five-year period. They also must demonstrate a need for the credits to induce the project (i.e., have a competitive alternative for the investment). The State reviews each proposal and determines whether an award will be made and, if so, the type and amount of credits to be awarded in each case. Project terms may range up to ten years, and tax credits will be provided in each year of the term if a company continues to comply with Excelsior requirements.

Assuming a company qualifies and is awarded credits under Excelsior, it may receive the Real Property Tax Credit under two scenarios: (1) locating in a defined Investment Zone (a designated region characterized by certain levels of economic distress), or (2) meeting the definition of a "Regionally Significant Project" and meeting higher job creation and investment thresholds. If available, the Real Property Tax Credit generally equals 50% of the real estate taxes on the property declining at a rate of 5% over a ten-year term.

Illinois Enterprise Zone Program

An enterprise zone is a specific geographic area designated by the State of Illinois[5]. Each zone is administered locally by a designated zone

Continued on page 7

administrator. Qualified improvements to industrial, commercial, or manufacturing property within the zones may be eligible to receive a property tax abatement on the assessed value of the improvements.

To receive the enterprise zone abatement, property owners must submit a project information form to the local zoning administrator before beginning construction. Industrial projects typically have a more generous exemption period or "term" than commercial projects. However, each zone has specific requirements regarding the term and percentage of tax to be abated. The annualized value of the abatement will vary from year-to-year according to assessed values placed on improvements and tax rates. To determine eligibility and receive this abatement, property owners must obtain a building permit and complete a Project Information Form describing the project.

Environmental or "Green" Property Tax Incentives

New Jersey Real Property Tax Exemption for Contaminated Real Property in Environmental Opportunity Zones

New Jersey has enabled the governing bodies of local municipalities to designate one or more qualified real properties as environmental opportunity zones. Real property can qualify when it meets the criteria of: 1) now being vacant or underutilized 2) in need of remediation due to discharge or threatened discharge of contaminant and 3) listed in the most recent Department of Environmental Protection publication of known hazardous discharge sites in New Jersey.

Tax exemptions were originally intended for ten years, with later extensions to 15-year terms under certain circumstances. Although titled an exemption, the property owner is still obligated to make payments in lieu of property taxes. These negotiated payment levels are phased-in over time, with payment in each subsequent year increasing as a percentage of taxes otherwise due until the difference between total of the payments in lieu and the property taxes otherwise due equal the total remediation costs for the property.

The developer or owner must file an application with the assessor of the municipality where the qualified real property is located, accompanied by an executed Memorandum of Agreement ("MOA") or administrative consent order as entered into with the New Jersey Department of Environmental Protection. Upon approval, a copy of the approved application must be filed with the State's Bureau of Land Management Services.

LEED Property Tax Incentives

The Leadership in Energy and Environmental Design (LEED) Green Building Rating System™ is a voluntary, consensus-based national standard for developing high-performance, sustainable buildings. LEED has become the basis of design for all federal buildings, most state buildings and many private buildings across the United States.

Members of the US Green Building Council (USGBC) developed LEED standards and rating systems for new construction, existing buildings, core and shell, and commercial interiors. LEED enables a building owner and operator to evaluate building performance characteristics and to define opportunities for improvement that will result in energy, resource and water efficiency while providing a better atmosphere for tenants and other building occupants. Through LEED certification, companies may experience lower operating costs, increased value of buildings and improved resale values.

Many states are adopting incentives for LEED certification as part of their efforts to increase the use of energy efficient technologies in new construction and building retrofits. Five states (Maryland, Nevada, Ohio, Texas, and Virginia) currently provide real property tax abatements for high-efficiency buildings. These states have passed legislation empowering local jurisdictions to abate a variable percentage of the assessed value of the property that has achieved specific LEED certification standards. The abatements have been structured by the states in two ways: 1) an abatement of the entire property, directly tied to the level of energy efficiency achieved (e.g., silver, gold, platinum, etc.); or 2) an abatement of property taxes on the incremental investment associated with obtaining LEED certification.

In addition, 35 states currently offer property tax exemptions for energy efficient systems. Beyond the property tax savings in these jurisdictions, there also are utility-based incentives that can be stacked with the property tax savings to improve the return on investment for some of these investments.

Continued on page 8

Crossroads of Property Tax and Public Finance

In certain states, there are legal provisions which do not allow private citizens or corporations to receive property tax abatements. In these specific cases, bond financing is used a mechanism to deliver the abatement to the company.

Bond Financing

The Georgia constitution prohibits communities from directly abating real and personal property taxes. In order to obtain property tax savings, a company must transfer the title of property associated with a project to a development authority with the company assuming the status of a lessee. Under this structure, the development authority issues an industrial development revenue bond to the company in exchange for title to the project. The lease structure is commonly used where the bonds provide real financing, as well as property tax savings. Since the development authority is not a taxable entity, the company's only payments typically are either nominal taxes on the leasehold interest (generally equal to the amount of the school portions of property taxes), or an agreed upon fee-in-lieu-of-taxes (also generally equal to school portions of property taxes). The company can obtain legal title to the project by paying a nominal fee at the end of the term or, if the company wished to obtain title earlier, it can do so by cancelling the bonds and paying a nominal fee.

For companies that may need access to capital, the bond financing provided the extra benefit of relatively low-cost financing which can, in certain cases, be guaranteed by the state.

Tax Increment Financing

Tax Increment Financing ("TIF") is a mechanism using the faith and credit of the state and/or local jurisdiction to provide front-end financing for an economic development project using the "incremental increase" in property tax as the revenue stream to retire the bonds. The incremental increase is the difference between the property tax on the real estate and/or personal property at the time the project is initiated and the projected tax due on real and/or personal property once the project is operational. TIF is a negotiated benefit and the bond repayment mechanism relies on all or part of the revenue stream for repayment. As a result, the associated project qualification and application process is likely to be more rigorous and time consuming than other traditional property tax programs. There also may be a local requirement for a special taxing district to be established such that any tax revenues from new projects in proximity to the initial project (i.e., within the TIF District) can be used to retire the initial bond offering.

All U.S. states, with the exception of Arizona have a public financing program similar to "Tax Increment Financing".

Impacts of the Economy on Property Tax

With the increasing demands on state and local governments and the sluggish economy causing lower tax collections, there are changes in the ability of some governmental authorities to continue to support economic development using property tax revenues. In some areas of the country, there is reluctance on the part of the education community (i.e., school districts) to contribute their portion of the property tax base for economic development purposes as a result of cuts in state-level aid to local district funding.

Governor Jan Brewer of Arizona vetoed a piece of legislation that would have provided a property tax benefit in addition to a state-level aid package she supported in February 2011.[1] However, the overall national trend appears to be that property tax abatements will continue to be a key economic development tool, despite the "scaling back" or elimination of other business incentive programs. Because property tax abatements are largely negotiated, locally administered and performance-based, they are a flexible tool that can be applied on a case-by-case basis to help the local community advance its unique economic development goals.

Undoubtedly, the financial pressure caused by state budget cuts to local aid will make every dollar associated with new investment more valuable. The impact of each individual project will be closely scrutinized as the net economic benefits of capital investment and job creation are weighed against the level of tax revenue abated.

Property tax abatements can be challenging when used as an economic development tool because of

1 http://www.bizjournals.com/phoenix/news/2011/05/02/veto-of-invest-arizona-bill-could-hurt.html

Continued on page 9

the delicate balance between using public sector resources to spur economic development activity and the associated increased demand and impacts on municipal services from the associated growth. State and local government work to achieve a positive outcome for all by evaluating projects for a positive return on investment for the taxpayer dollars; specifically, generating growth and increased revenues from the associated project for government while supporting the initial investment decision by the company.

In order to achieve the best possible result for all parties involved, consider the following when presenting an investment project to a target jurisdiction for property tax consideration:

1. Communicate with local stakeholders early in the process by providing a high level understanding of the project and economic benefits.
2. Research and utilize any statutory property tax benefits associated with the project (e.g., pollution control, energy efficiency equipment, etc.).
3. Develop a compelling scenario for why the property tax abatement is necessary. This can be a "but for" (i.e., but for the incentives, this project will happen elsewhere); or use of an economic impact analysis demonstrating the positive impact to tax revenues and/or the community. A heavy handed approach often alienates local stakeholders where an approach showing the "win-win" for both community and company is more readily received.
4. Especially in a recessionary environment, understand and appreciate the economic pressures the community is facing, including increased public services for facility, recent reductions in community services (police, fire) and impacts on school district funding.
5. Be mindful that nearly every variable of a tax abatement equation may differ based on the location under consideration. It is imperative that a company is proactive and familiar with the local taxing jurisdictions' abatement guidelines and requirements.
6. Be prepared to accept and fully understand the implications of specific performance benchmarks (e.g., job creation, capital investment, etc.) in agreements with localities in exchange for the investment of taxpayer dollars in the project. "Claw-back" provisions are likely to be a part of those agreements and knowing the triggers and level of recapture are critical before executing final documentation.

Mary Faye LaFaver

Mary Faye LaFaver is an Executive Director in the National Indirect Tax Practice of Ernst and Young with an emphasis in incentives and credits. She was the Mid-Atlantic Area practice leader for more than eight years. In her National role, she coordinates with the incentive practice leaders around the country to leverage their relationships in their respective territories to secure incentive and tax benefits for Ernst & Young clients that are expanding or making significant year-over-year capital investments. Prior to joining Ernst & Young in 1999, she held senior policy making positions in state economic development agencies for more than 17 years in Montana, Maine, and Kansas. The majority of that time was spent negotiating on behalf of the states she served on incentive packages with growing and expanding companies.

Brandon Pyers

Brandon Pyers is a Manager in the East Central Subarea practice for Ernst & Young in the Philadelphia office, specializing on negotiated incentives. Prior to joining Ernst & Young, Brandon was a Vice President at New Landmark Group, Inc. where he led a specialized consulting practice focused on helping companies identify, negotiate and secure public tax credit and incentive programs; and had previously held senior economic development positions, developing the international business attraction strategy for the Commonwealth of Massachusetts.

(Endnotes)

1. "Total state and local business taxes state-by-state estimates for fiscal year 2010", Ernst & Young LLP and Council on State Taxation, July 2011
2. M.G.L. 40 § 59
3. M.G.L. 23A § 3A – 3F
4. Article VIII, Section 2(b)(iii) of the Constitution of Pennsylvania
5. 35 ILCS § 201(F)

Property Tax

After a Long Montana Winter, a Chill Remains: *Pacificorp v. Department of Revenue*

Robert S. Goldman, Esq.
Madsen Goldman & Holcomb, LLP
Tallahassee, Florida
Phone: 850.523.0400
rgoldman@mgh-law.com

The snow has melted and on May 4, 2011 the Montana Supreme Court issued its decision in *Pacificorp v. Department of Revenue*, 360 Mont. 259, 253 P.3d 847 (2011). It provides an intriguing example of how appraisal principles can become confused with legal principles, how deference to an administrative body can be an obstacle to arriving at a proper appraisal for ad valorem tax purposes, and how courts sometimes cannot restrain themselves from addressing issues unnecessarily.

A regulated electric utility subject to central assessment in Montana, Pacificorp appealed its 2005 assessment to the State Tax Appeals Board (STAB), to the District Court, and ultimately to the Montana Supreme Court. Despite having prevailed on some of the issues at the STAB and the District Court, Pacificorp was afforded no relief in either tribunal or in the State's court of last resort. The issues presented during the course of these appeals were:

- Whether Department use of industry-wide earnings-to-price ratios to derive the capitalization rate for calculating the value indicator in the direct capitalization of income was proper, in particular, whether this was a "commonly accepted" methodology;
- Whether the Department had failed in its statutory duty to identify and adjust for obsolescence in the cost approach;
- Whether the Department and the lower tribunals could consider as probative of value a sale of the company's stock that was announced nearly six months after the valuation date and which closed nearly a year later.

These issues and the Montana courts' treatment of them are discussed in sequence below, with some commentary about lessons learned.

Earnings-to-price ratios

Montana Administrative Rule 42.22.111(1) requires the use of commonly accepted methods in the valuation process, and the parties devoted much of their litigation energy to this issue. With respect to whether the use of earnings-to-price (E-P) ratios was commonly accepted, the STAB agreed with the Department, the District Court agreed with the utility (but allowed no relief), and the Supreme Court deferred to the STAB. The actual arithmetic used to derive the capitalization rate from industry-wide data is not explained in the opinion. Also not mentioned is any consideration of rate base as a valuation benchmark.

There are two dimensions to the Montana Supreme Court's analysis of this issue. The first is a brief exposition suggesting that the Department was justified in using industry-wide E-P ratios to develop a capitalization rate because of the omission of needed information with the Pacificorp tax return. However, the opinion also implies there are no other sources of information that can be used to develop a rate, and that the industry-wide study used to derive the rate was not performed solely for the appraisal of Pacificorp. In view of the Court's remaining treatment of the issue, discussed next, these portions of the opinion seem odd and unnecessary to a determination of whether the use of E-P ratios was commonly accepted.

The second aspect is the Court's description of extensive expert testimony with respect to the "common acceptance" issue at the STAB. Department witnesses relied heavily on the Unit Valuation Standards of the National Conference of Unit Value States (NCUVS), which "promoted" use of earnings-to-price ratios. Additional testimony was introduced that such data is "used widely to appraise centrally assessed properties," that it is supported in several textbooks (that were not identified in the opinion), that it is also widely used by buyers and sellers. Pacificorp's witnesses testified that none of the other states in which it operates use an E-P ratios method "like that used by the Department…," and that several states "disfavor" the method.

With regard to the states that disfavor the use of E-P ratios, the Court drew a distinction based on what it perceived to be a feature of Montana law not present in the other states. Reading Montana Code sections 15-18-11 and 15-6-218 as requiring the Department to

Continued on page 11

"initially" assess the entire operating system, including intangibles, and then to deduct the intangibles, the Court observed that the laws of the other states did not mandate this process, and therefore might understandably not favor the E-P method. The Court thus read Montana statutes that require the exclusion of intangibles as though they were directing the sequence of steps in the valuation. This would be an extreme case of legislative micromanaging the appraisal process. The statutes are just as fairly read as an admonition that intangibles not be taxed.

Resolution of the conflict in testimony provides an appropriate and defensible basis for the Supreme Court's decision on the issue of common acceptance, without the need to interpret the statutes:

> STAB sat in the best position to draw a conclusion from conflicting evidence. [citation omitted] The District Court exceeded its scope of review and second-guessed STAB's decision. [citation omitted]. The Department's lay and expert witness testimony, expert reports, and trial exhibits comprise substantial evidence to uphold STAB's conclusion that the Department's earnings-to-price ratios method of valuation has been commonly accepted in the appraisal community.

253 P.3d at 853.

Examination of this issue might end here, but it merits a few additional observations. First is the obvious: it is extremely difficult on appeal to overturn a fact-finding tribunal's determination based on expert testimony. Second, the Court accepted without comment the proposition that the endorsement of an appraisal methodology by an organization of taxing states (NCUVS) is probative of "common acceptance." This is another version of affording deference in matters of valuation judgment to the taxing authorities that have a vested interest in the outcome.[1] A solution to this that might be considered is an increased emphasis on the benefits of appraisal independence in the arguments before courts and policymaking bodies.

1 The opinion also appears to have been influenced by the Court's understanding that the Department's practice of using E-P ratios was "longstanding."

Finally, it is difficult to discern from the Court's opinion whether Pacificorp's testimony was actually weak, or if the impression of weakness arises because the Court mentioned only limited excerpts from it. As both sides relied on appraisal literature, it is puzzling that there would be a dispute about the contents of the literature, a conundrum that the Court does not resolve.

Obsolescence

Montana Code Section 15-8-111(2)(b) requires the Department to "fully consider reduction in value caused by depreciation, whether through physical depreciation, functional obsolescence, or economic obsolescence" in performing the cost approach. The issue was largely framed in terms of whether the Department was required to undertake a study to determine if obsolescence existed. Again, the Court's opinion leaves some doubt as to what occurred. The Court states that Pacificorp did not, at an informal Department hearing, provide a figure for how much obsolescence had not been captured, and that the company "does not suggest on appeal that any additional obsolescence would have been found had further study been undertaken." However, the Court also observes that Pacificorp estimated at the STAB that there was $2.6 billion of unaccounted for obsolescence. The Court thus attributes to Pacificorp positions that are difficult to reconcile, and implies that the company abandoned its position with respect to the amount of obsolescence.

In the proceedings below, the STAB found that the Department had failed its statutory duty to fully consider obsolescence, but nevertheless determined that the Department's appraisal reasonably reflected the taxable value based on the evidence. The District Court upheld the STAB finding regarding the determination that the noncompliance was essentially harmless because the post-lien date sale of the company's stock demonstrated, to the satisfaction of the STAB and the District Court, that no additional obsolescence existed. The Supreme Court rejected the finding that the Department failed its statutory duty, and upheld the conclusion that there was no additional obsolescence.

Addressing the reliance on an affirmative Department duty to study depreciation (in particular, obsolescence), the Supreme Court noted that the company had filed FERC Form 1, which reported a deduction for depreciation that the Department had accepted. The Court also alluded to testimony that the federal definition of depreciation for FERC Form 1 purposes

Continued on page 12

includes obsolescence, and cited the definition to this effect in 18 C.F.R. Part 101. Therefore, in the Court's view, all depreciation had been taken into account. According to the Court, Pacificorp had the opportunity to present additional evidence of obsolescence and failed to do so.

The Supreme Court's opinion does not recite Pacificorp's response to the contention based on FERC Form 1. A question that might have been explored is whether it is common practice for utilities to measure obsolescence for purposes of filing such reports, notwithstanding the CFR definition. It may also be relevant that the rate base for regulatory purposes is generally net book value rather than market value. But without discussion of such matters, the Court essentially determined that reliance on the taxpayer's own FERC Form 1 data was sufficient to comply with the statute. The Department was not required to perform an independent analysis to ascertain the presence of obsolescence.

A concurring opinion criticizes the majority for addressing the issue of whether the Department failed to comply with its statutory duty. According the concurring opinion, the majority undertook to interpret the statute prescribing the Department's duty, an issue not presented in the appeal by either party. However, in both opinions it is difficult to distinguish the questions of what the statute requires and whether the Department complied with it. Although not expressed in this way, the focus of the concurrence may be the majority's conclusion that the Department has no obligation to look beyond the public filings of the taxpayer to satisfy the statutory requirement to consider obsolescence fully. Although it characterized the majority's action as "blindsiding" Pacificorp, the concurrence did not, however, disagree with the ultimate result that denied Pacificorp any relief.

Whether or not the assessed value of Pacificorp's property was excessive, the notion that a statutory duty to measure obsolescence can be avoided based on the taxpayer's actions is now a precedent that may have implications the Court did not intend. If the duty to assess is the duty to appraise, it cannot be the taxpayer's fault that obsolescence was not measured unless the taxpayer denied access to requested information. Reliance upon information filed for regulatory purposes, unconnected with appraisal or the market value standard, does not seem congruent with a legal mandate to detect and measure obsolescence for an appraisal.

It is also useful to think about what the obligations of the Department might have been in the absence of a statute specifically directing it to consider all forms of depreciation. If the legal valuation standard is market value, the requirement to consider all forms of depreciation in the cost approach is embodied in that standard even in the absence of a statute spelling that out. The statute may be a product of the common misconception among assessing officers that obsolescence is less important in the cost approach than other elements, or that they are justified in presuming it does not exist and imposing the burden on the taxpayer to identify and measure it. A statute of this kind makes clear that they have no such option. The Montana Court's decision thus dilutes a requirement that is both inherent in the valuation standard and specifically mandated by law.

The most solace other Montana taxpayers may derive from the opinion on this issue is its repeated assertions that Pacificorp failed to adduce evidence to support its case. This perception by the Court obviously affected its narrative, and led it to unnecessary pronouncements of statutory interpretation that weaken the valuation standard in Montana.

Sales price

The final issue was whether it was proper to consider the selling price of the company's stock several months after the statutory lien date. The STAB found it appropriate, the District Court disagreed, and the Supreme Court agreed with the STAB. Pacificorp adduced expert testimony that an appraiser generally may consider only information known or knowable at the lien date. The Court's response: "We disagree." In support of its disagreement, the Court cited a statute which provides that the actual selling price of the property may be considered. The statute makes no mention of considering the selling price of *stock* in the corporate owner of the property, nor does the opinion touch upon the relationship between the aggregate value of stock and the value of property owned by the company that issued the stock. Further, the opinion does not identify any testimony contrary to that of Pacificorp's expert.

Beyond this, the Court read the statute without regard for its context as a property tax valuation provision. One can as easily conclude that a sale even further distant in time than six months merits consideration. By the Court's reasoning, there would be no temporal limit. But appraisers do not have this freedom, and the objective of the property tax valuation exercise is appraisal. These considerations should circumscribe

Continued on page 13

the interpretation of the appraisal statute. It is not necessary to read it so as to conflict with the appraisal principles it is designed to implement. Again we have language that would seem unnecessary to the decision but that can be problematic in the future. The Court repeatedly stated that there was other evidence in the record to support the assessment. That being the case, the Court could have relied on that evidence without venturing into the appraisal discipline.

Conclusion

Based on the narrative in the Montana Supreme Court's decision is it not possible to discern whether the property of Pacificorp was overvalued. However, it is possible to conclude that the Court had ample grounds to sustain the assessment, without embracing deference to the assessing authority and without interpreting statutes that required no interpretation in the context of this case. A simple opinion, relying only on the evidence of record, could have achieved the same result. The exuberance brought by Spring has created an unfortunate precedent.

Property Tax

Excerpt from *Elk Hills Power LLC* Amicus

Letter to California Supreme Court

To the Honorable Chief Justice and Associate Justices:

The Institute for Professionals in Taxation ("IPT") hereby supports the petition for review of Elk Hills Power, LLC. The erroneous decision of the Court of Appeal creates a conflict among the appellate courts as to an important tax policy issue—the property tax treatment of intangible rights and privileges. As technology continues to rapidly evolve and with it our economy, the great harm that would befall California-based businesses—and small businesses in particular—based on the lower court's departure from established property tax principles renders this case worthy of this Court's review.

* * *

Review of this case is warranted because the lower court's decision has created a conflict in the law. The seminal case in this area is *Roehm v. Orange County* (1948) 32 Cal.2d 280, in which this Court prohibited the inclusion of the value of intangible assets and rights relating to the going concern value of a business in the value of taxable property. This Court stated, "only the intangibles enumerated [in the Constitution and Revenue and Taxation Code] are to be regarded as personal property for purposes of taxation." Thus, this Court held that liquor licenses must not be subject to the property tax because they were not enumerated in the Constitution or Revenue and Taxation Code. This decision was later codified in Revenue and Taxation Code section 110, forbidding the taxation of intangible property. Since 1948, taxpayers have been following the principles set forth in the *Roehm* decision.

After the *Roehm* decision, California courts continued to properly disallow the inclusion of the value of intangible assets in the property tax base. *GTE Sprint Comm. Corp. v. County of Alameda* (1st Dist. 1994) 26 Cal.App.4th 992. In that case, the First District followed the rule in *Roehm* and held that the Board's valuation of a telephone company's property was invalid because it did not satisfactorily remove from the tax base the value of intangible assets. In that case, the Board did not consider the taxpayer's evidence that the Board's

Continued on page 14

method resulted in the taxation of intangible assets. The court cited *Roehm* and its progeny of cases to determine that the existence of intangible assets may be taken into account when valuing property but may not be included in the valuation when they are excludible. Thus, the court struck down the Board's method of taxation.

Sections 110 and 212 were amended in 1995 to codify *GTE Sprint*. This amendment added Section 110(d), clarifying when intangible property cannot be included in the "fair market value" or "full cash value" of taxable property. The California courts continued to properly disallow the inclusion of the value of intangible assets in the property tax base under the principles of *Roehm* and consistent with an interpretation of Sections 110(e) and 212(c) that is consistent with legislative history and the Assessor's Handbook published by the California State Board of Equalization ("Board"). Simply stated, California courts consistently held that intangible assets are not subject to property taxation and, although their existence may be taken into account when valuing property as a going concern, the value of intangible assets may not be included in the value of the property. Thus, when intangible assets are capable of separate assessment, the value must be expressly excluded.

Other appellate decisions followed the same principles set forth in *Roehm*.[1] Even when the courts upheld an assessor's valuation methodology, they made clear that *Roehm* still governed. Courts also made clear that the interpretation of Sections 110 and 212 that is consistent with their legislative history and the Assessor's Handbook were also consistent with *Roehm* and, therefore, also governed.[2]

However, the Fourth Appellate District's decision in *Elk Hills* leads to a result that departs from *Roehm* and subsequent Court of Appeal cases. The Fourth District accepts the proposition of "taking into account the value added to the [taxpayer's] plant by the existence of the applied ERCs, when assessing the plant as a 'going concern.'" Thus, unlike the Courts before it, the Court of Appeal in *Elk Hills* has adopted an interpretation of Section 110(e) that makes a nullity of the remainder of Section 110 by refusing to consider relevant legislative intent as evidenced by legislative history and the Board guidance as set forth in the Assessor's Handbook. Thus, if *Elk Hills* is left unreviewed, it would necessarily lead to a lack of uniformity in decisions. As such, we request this Court to accept review of this case to avoid such a result.

* * *

In this case, whereas the Assessor's Handbook clearly states that Sections 110 and 212 do not authorize adding incremental value of taxable property to reflect the value of intangible assets, the Fourth District's decision would allow exactly that result. The Fourth District allows an assessor to take "into account the value added to the plant by the existence of the applied ERCs, when assessing the plant as a 'going concern.'" This clearly contradicts the Board's own manual.

The Board's own handbook must be given due consideration by this court, especially when it is in conflict with the Board's position in this case. The lower court wrongly refused to do so.

* * *

Accepting review in this case would settle an important question of law, which is a separate and independent ground for review. As this Court noted in *Roehm* with respect to the arguments concerning the assessment of intangibles for property tax purposes:

> These contentions therefore raise questions of public importance that involve numerous rights and privileges other than legal licenses, for the characteristics that it is claimed make legal licenses taxable as property would likewise make numerous other rights and privileges taxable as property.

Roehm v. County of Orange, 32 Cal. 2d 280, 283 (1948).

While the question of taxing intangibles was of great public importance at the time of the decision of *Roehm* in 1948, the issue is arguably more important today given the rapid advances in technology and the evolution of our economy. Almost all businesses have significant intangible property that make up a sizable portion of their properties. This decision would apply broadly beyond the taxability of the emissions reductions credits at issue in *Elk Hills* because as acknowledged by the trial court, the "characteristics that is claimed make" *Elk Hills* intangible property "taxable as property would likewise make numerous other rights and privileges taxable as property." The

Continued on page 15

1 *See Shubat v. Sutter County Assessment Appeals Bd.* (1993) 13 Cal.App.4th (upholding a decision by a county Assessment Appeals Board that ruled that the assessor's methodology included certain nontaxable intangibles).

2 *See American Sheds* (1998) 66 Cal.App.4th 384; *see also Watson Cogeneration Co. v. County of Los Angeles* (2002) 98 Cal. App.4th 1141.

appellate court's erroneous decision will have an unlawful impact on most California-based businesses.

Conclusion

In sum, the *Elk Hills* decision contradicts this Court's previous rulings and other appellate court interpretations of the relevant law and guidance involving the property tax treatment of intangibles. Its impact will be both far-reaching and disastrous for California businesses at a time when our economy can ill afford it. For all of the foregoing reasons, review must be granted.

Respectfully submitted,

Mardiros H. Dakessian, Esq.
John Messenger, Esq.
Mike Shaikh, Esq.
Reed Smith LLP
Los Angeles CA
Attorneys for Institute for Professionals in Taxation

Income Tax

Outsourcing the Department's Discretionary Authority to Make Transfer Pricing Adjustments: Arbitrary and Capricious

By Kendall L. Houghton, Esq. and
Maryann H. Luongo, Esq.[1]
Alston & Bird LLP
Washington, D.C.
Phone: 202.239.3300
Kendall.Houghton@alston.com
Maryann.Luongo@alston.com

Introduction

In 2005, a small firm filed a patent application with the United States Patent and Technology Office ("USPTO") for a "system and method" to "analyz[e] tax avoidance of a taxpaying entity." Abstract, Patent 7,716,104 B2. Application of the "computer-implemented method" was represented to identify entities that have "avoided" a state corporate income tax, based on comparison of the entity's return on assets, capital, sales, and/or operating expenses, as compared with corresponding ratios for related firms operating in a predefined industry. In May of this year, the USPTO awarded patent number 7,716,104 B2 to Chainbridge Software, Inc. ("Chainbridge"), albeit the firm had already deployed its software pursuant to indirect/direct contract arrangements[2] with several states in the interim, including Alabama, Louisiana, New Jersey, the District of Columbia, and more recently Kentucky.[3]

Section 482 of the Internal Revenue Code ("IRC") ("Section 482") authorizes the IRS Commissioner to

1 Ms. Houghton and Ms. Luongo practice in the areas of state tax as well as state unclaimed property/escheat law. Ms. Houghton recently discussed the subject of this article and related topics in her presentation, "What's Fair about the States' Use of Discretionary Authority?" at IPT's 2011 Annual Conference in San Antonio, Texas. Alston & Bird LLP was the 2011 Annual Conference Signature Sponsor.

2 Chainbridge has been a subcontractor on contracts between ACS State and Local Solutions, Inc. and various states.

3 Note that other states are considering laws to permit outsourcing of tax audits including Minnesota (*see* Minnesota HF0027, introduced July 19, 2011 and HF1219).

Continued on page 16

allocate income and/or deductions between or among related entities in order to clearly reflect income; the Section 482 regulations place a controlled taxpayer on parity with an uncontrolled taxpayer by determining, according to the arm's-length standard, the true taxable income of the uncontrolled taxpayer. Does application of patented software to a taxpayer's financial information without discussion or input from the taxpayer sound like a garden-variety/standard Section 482 transfer pricing audit to you? Perhaps at first glance, but the many taxpayers that have been subjected to Chainbridge Software, Inc.'s special "black box" method of establishing an assessed liability for state corporate income tax purposes do not find anything about this type of "audit" to be standard – nor do they find them to be transparent, legal or fair.

Discretionary Authority: One Big Stick

States' Discretionary Authority

State revenue commissioners wield broad powers to adjust the income, factors, deductions and expenses of taxpayers, in order to yield a "true" or "fair" tax liability. Of course, many states' delegations of discretionary authority require that before a commissioner uses his/her discretionary authority, the commissioner must prove a distortion or improper reflection of income to the state. However, once such discretionary authority is exercised, the courts' deference to the resulting adjustments is difficult to overcome. The taxpayer that challenges such adjustments faces two specific hurdles: (1) an assessment is generally treated by state law as constituting prima facie evidence of a tax liability, hence the taxpayer bears the burden of proof regarding its invalidity; and (2) most state trial courts employ a standard of review that is very high, for example reversal of a discretionary adjustment may occur only where the assessment was arbitrary and capricious, or constituted a manifest abuse of discretion.[4]

Traditional Controls Over Abuses of Discretion

As a consequence, the department's careful exercise of discretionary authority is the only way to ensure a perception of fairness and constitutionality in its treatment of taxpayers on audit. Still, there are certain strictures that govern the use of such discretion, particularly in the arena of transfer pricing. First, many states have a statutory taxpayer bill of rights that gives taxpayers the right to obtain information about the tax implications of any situation or transaction as well as how the taxpayer's liability was determined.[5] Second, taxpayers are also entitled to explanation of any adjustment proposed on audit as a matter of substantive and procedural due process – without such notice of the basis for adjustments, a taxpayer is denied both meaningful notice and an effective opportunity to protest. Third, specifically in the transfer pricing arena, most states conform to Section 482 through rolling or static conformity to the Internal Revenue Code as a whole, and generally also through adoption of line 28[6] of the federal corporate income tax return (Form 1120) as the starting point to determine state taxable income.

Enter Chainbridge/Exit Fairness

Rather than undertaking a careful exercise of their own discretionary authority, several states have turned to Chainbridge to prepare "economist's reports" (using the "black box") that serve as the basis for the state's transfer pricing adjustments. States understandably might feel intimidated by a highly technical and evolved area of tax law such as transfer pricing. However, where the state's own audit staff has not reviewed the taxpayer's transfer pricing, they are not able to answer detailed questions relating to the proposed assessments. The states in turn look to Chainbridge for a response. It is striking that a state revenue department would be unable, in such circumstances, to articulate or to "prove" the distortion/improper reflection of income upon which it has premised its exercise of discretionary authority to make transfer pricing adjustments, nor could it explain the nature of the adjustments that it proposes to correct the alleged distortion; in short, the prerequisite to exercise of discretionary authority is generally ignored, especially in situations where financial information is simply uploaded into a software program that spits out an assessment.

Chainbridge has jealously guarded its leverage by treating its software as "proprietary" and refusing to provide taxpayers with complete explanations of how its proposed adjustments have been generated and are justified. While purporting to apply Section 482 standards in its "audits" of taxpayers, the Chainbridge method appears to make a number of baseless assumptions, including that (i) the comparable profits method[7] ("CPM") is the best method to examine the

4 The North Carolina Superior Court went further in its recent decision in *Delhaize America, Inc. v. Hinton*, where it said that '[i]f the officer acted within the law and in good faith in the exercise of his best judgment, the court must decide to interfere even though it is convinced the official chose the wrong course of action." *Delhaize America, Inc. v. Hinton*, Wake County Super. Ct. Docket No. 07-CVS-020801 (Jan. 12, 2011).

5 *See, e.g.,* New Jersey Taxpayers Bill of Rights (P.L. 1992, c.175).

6 Line 28 of IRS Form 1120 sets forth federal taxable income before net operating loss and special deductions; this figure embodies the application of section 482 principles.

7 The section 482 regulations specify several different methods

Continued on page 17

degree of comparability between controlled and uncontrolled transactions, when in reality there are multiple methods that may be used; (ii) every dollar of income to a company results from transfer pricing; and (iii) all transactions engaged in by a participant in related-party transactions are controlled. Such assumptions are often inconsistent with or fail to satisfy the requirements of Section 482.

Defending Against a Chainbridge-Proposed Adjustment

Departments of Revenue ("DOR") have generally been highly deferential to Chainbridge in audits. As a result, taxpayers have been forced to try to educate state DOR staff on the principles of a Section 482 transfer pricing audit, while simultaneously pointing out the flaws in Chainbridge's proposed adjustments. These flaws, that must be demonstrated by reference to each taxpayer's specific facts, and have ranged from the failure to select true comparables, which is the cornerstone of a valid 482 transfer pricing examination, to the failure to apply audited financial income and balance sheet statements and to effectuate adjustments for comparability (especially when using the CPM), which are not only best practices but also required by the Section 482 regulations. Additional flaws that have been identified in select Chainbridge-issued reports include the failure to identify the related-party transactions that are being reviewed, and the failure to apply standard adjustments to improve comparability (e.g., accounting, asset intensity, level of the market, and foreign exchange adjustments).

Bridging the Gap in Perceptions

New Jersey taxpayers have by and large been able to reach mutually acceptable resolutions of audits by the New Jersey Division of Taxation (the "Division"), due to the Division representatives' interest in settling such disputes, and New Jersey has not renewed its outsourcing contract with Chainbridge. However, the District of Columbia is aggressively pursuing audits through its arrangement with Chainbridge/ACS.

"APAs and Beyond!" Chainbridge had at first hesitated to cross swords with taxpayers whose transfer pricing was "blessed" by virtue of an Advance Pricing Agreement[8] ("APA"), presumably in recognition that an APA is reviewed and approved by the IRS.[9] Therefore, if the IRS and taxpayer enter into an APA, and the taxpayer relies on the APA when completing its state return (i.e., a return that starts the calculation of tax with federal taxable income), can a state that conforms to the IRC, and more specifically Section 482, make an adjustment that violates the APA? It seems at the very least that states that have adopted Section 482 and its regulations should presume that the APA, which was implemented in compliance with such laws and regulations, produces an arm's-length result. Therefore, we believe the state should be bound by an APA if one is in place and the taxpayer complied with such APA in calculating its state taxable income. However, it has been our experience that Chainbridge now views taxpayers with APAs as being an appropriate subject of "black box" adjustments despite having an APA in place,[10] apparently on the theory that its patented system and method is not focused on related-party transactions per se, but on establishing a "fair profit" – a concept that is presented as being broader in scope than "just" a transfer pricing examination.

Published Guidance Clarifies Manner in Which NJ Transfer Pricing Discretion Can Be Exercised

Coming off of its recent wave of transfer pricing audit settlements, New Jersey has now issued Technical Advisory Memorandum TAM-17 (June 6, 2011), entitled "Intercompany Transfer Pricing and Advanced Pricing Agreements." The TAM states that "in most cases" the Division of Taxation will use Section 482 standards in audit and when adjusting items above line 28 in order to arrive at a "fair and reasonable" tax; and, where a

to determine the arm's-length nature of intercompany transactions, of which the comparable profits method is but one.

8 The IRS's APA program offers taxpayers the opportunity to reach agreement in advance of filing a tax return on the appropriate transfer pricing method to be applied to related-party transactions. Through the voluntary APA program, the IRS, the taxpayer, and the foreign tax jurisdiction (where relevant) agree on the appropriate transfer pricing of certain identified transactions. If an APA is in place, the IRS will not seek a transfer pricing adjustment for a covered transaction so long as the tax return that the taxpayer files for a covered year reflects the agreed-on transfer pricing method.

9 In fact, Amendment #1 to the contract between the District of Columbia and ACS/Chainbridge (CFOPD-07-R-058, "Audit of Parent/Subsidiary and Brother/Sister Corporations"), sets forth answers to questions raised by the District, including Question 17, which asks if ACS/Chainbridge will "defend its proposed adjustment amounts to the District if there is discrepancy between transfers pursuant to Advanced Pricing Agreement under IRC Section 482." In response to Question 17, ACS/Chainbridge states: "An IRS approved Advance Pricing Agreement (APA) will supersede adjustments proposed under IRC Section 482 to the extent that the taxpayer is following the agreement. Receipt of an APA will typically terminate any further CNIC analysis and should be provided as early in the process as possible."

10 Interestingly, the audit reports issued by Chainbridge look remarkably similar whether the taxpayer under audit has an APA, a transfer pricing study, or nothing in hand.

Continued on page 18

taxpayer demonstrates that it has met these standards: "Since an advance pricing agreement between the taxpayer and the Internal Revenue Service would be accepted by the Service based on Section 482 standards, and Section 482 standards are incorporated into N.J.A.C. 18:7-5.10 [the regulation outlining the Director's discretionary authority to make adjustments to correct distortions of entire net income], the Division will take into consideration an advance pricing agreement… in the evaluation of the appropriateness of intercompany pricing and determination of a 'fair and reasonable tax.'" Still the Division "reserves the right in particular instances to use other criteria besides an advance pricing agreement" because the statutory delegation of discretionary authority to make adjustments[11] "goes beyond the scope of Section 482, Section 482 is not the only provision that relates to audits of related taxpayers, and other issues may arise in a particular audit such as 'nexus' rules for affiliates." In an attempt to reassure taxpayers while putting this stake in the ground, the Division concludes with the statement that "[i]n general, [it] is pledged to 'apply equitable principles to prevent unjust situations from occurring.'"

Audit Arbitrage Runs the Risk of Yielding Arbitrary Results

Where taxpayers can have a dialogue with state tax administrators concerning their specific facts and circumstances, and the administrators are open to reaching mutually acceptable resolutions of disputes such as transfer pricing, reassurances such as those of the New Jersey Division of Taxation will ring true. However, when state tax administrators both outsource their discretionary authority to make such adjustments, and fail to understand the nature of the proposed adjustments or the taxpayer's objections thereto, this outsourcing exercise is much more likely to result in an arbitrary and capricious assessment – i.e., an abuse of discretion that courts of law will find offensive and subject to reversal. We continue to monitor the challenges to Chainbridge-generated transfer pricing adjustments in jurisdictions such as the District of Columbia, where it seems all but certain that the arbitrary nature of such adjustments will soon be under the judicial microscope.

11 N.J.S.A. 54:10A-10.

Income Tax

No Customers? No Nexus? No Problem?

Michael E. Caryl, Esq.
Bowles Rice McDavid Graff & Love LLP
Martinsburg, West Virginia
Phone: 304.264.4225
mcaryl@bowlesrice.com

As the SALT community awaits the United States Supreme Court's response to the petition for certiorari in KFC Corp. v. Iowa Dept. of Revenue,[1] what would be yet another major extension of the economic nexus principle is being pursued by the West Virginia Department of Revenue (the Department) in a case pending before that state's Supreme Court. If the Department is successful, out-of-state businesses could be subject to West Virginia corporation net income tax (CNIT) and business franchise tax (BFT) merely because they receive a measurable economic benefit due (regardless of entity affiliation) to the commercial activity of others in that state.[2]

In the case of Griffith, etc. v. ConAgra Brands, Inc. (No. 11-0252), the Department is seeking reversal of a lower court ruling that based, on the terms of the governing statutes, on the minimal contacts standard under the Due Process Clause and on the substantial nexus prong of Complete Auto,[3] an intangible holding company (IHC) was not taxable by West Virginia.[4]

1 KFC Corp. v. Iowa Dep't of Revenue, 792 N.W.2d 308 (Iowa 2010).

2 In advancing its theory, the Department relied on the West Virginia Court's holding in Tax Commr. v. MBNA American Bank, N.A, 220 W.Va. 163, 640 S.E.2d 226 (2006), cert. denied, 551 U.S. 1141, 127 S.Ct. 2997 (2007). Specifically, the Department cited, with obvious encouragement, what the KFC Court effectively characterized as the MBNA Court's groundbreaking decision that physically absent businesses, deriving income from their use of intangibles in a state, had the substantial nexus constitutionally required for that state to tax such income. KFC, 792 N.W.2d at 321-322. Of course, the Court in KFC also cautioned against reliance on other state court rulings "that expansively applied the 'substantial nexus test' of Complete Auto through economic impact analysis."

3 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

4 Due to space limitations, except to the extent that minimal contacts under Due Process is relevant to Complete Auto's sub-

Continued on page 19

Like the IHCs and other taxpayers in the recent series of state court cases involving the substantial economic nexus,[5] the taxpayer in ConAgra Brands (Brands) had no physical presence in the taxing state (West Virginia), and earned its income from allowing the use of its intangible personal property (trademarks and trade names) by others. Beyond those facts, the circumstances of ConAgra vary sharply from those surrounding the taxpayers in the other cases.

Specifically, Brands was organized by its parent, ConAgra Foods, Inc., for the purpose of more effectively managing and protecting the value of various consumer product trademarks and trade names. Brands was organized, not in Delaware, but in Nebraska, where it had offices and employees and paid substantial state income taxes. After acquiring the trademarks, trade names and related product recipes, formulae and processes, from its parent, other affiliates and unrelated entities, Brands licensed the use of that intellectual property back to both the related and unrelated parties.[6]

Under the licensing agreements, Brands allowed the licensees: (a) to use the recipes, etc. in making the products and (b) to affix reproduced images of the trademarks and trade names to containers of the products, all at facilities outside of West Virginia. In return, the licensees paid royalties to Brands measured by a percentage of their gross receipts from the sale of their products to wholesalers and distributors throughout the United States.

stantial nexus test, this article will be confined to a discussion of that latter aspect of the case.

5 Alphabetically listed, to-wit: A & F Trademark Inc. v. Tolson, 167 N.C. App. 150, 605 S.E.2d 187 (2004); Am. Dairy Queen Corp. v. Taxation & Revenue Dep't of N.M., 605 P.2d 251 (N.M. App. 1979); Geoffrey, Inc. v. S.C. Tax Comm'n, 437 S.E.2d 13 (S.C. 1993) (hereinafter, Geoffrey [SC]); Geoffrey, Inc. v. Okla. Tax Comm'n, 132 P.3d 632 (Okla. 2005) (hereinafter, Geoffrey [OK]); Geoffrey, Inc. v. Comm'r of Revenue, 899 N.E.2d 87 (Mass. 2009) (hereinafter, Geoffrey [MA]); KFC Corp. *supra.* note 1 ; Kmart Properties, Inc. v. Taxation & Revenue Dep't of N.M., 139 N.M. 177, 131 P.3d 27 (Ct. App. 2001); Lanco, Inc. v. Dir. Of Taxation, 879 A.2d 1234 (N.J. Super. 2005) and Sec'y, Dep't of Revenue, State of La. v. Gap (Apparel), Inc., 886 So. 2d 459 (La App. 1 Cir. 2004).

6 It is important to note that the Department's contention of Brands' taxability is not premised, in any manner, on the basis of common ownership that existed between it and some, but not all, of the licensees. Although the "unitary business" principle, which would consider such factors, was recently enacted for CNIT and BFT reporting purposes starting in 2009, it does not apply to the years in this case. W.Va. Code §11-24-13a(j), Acts 2007, Chapter 247. Moreover, no "unitary business" analysis was performed as to Brands' relationships with any of the licensees.

Further, the licensing agreements expressly gave the licensees, based on their superior knowledge of their products and markets, the exclusive control of the manner in which, and places where in the United States, they marketed and distributed their products bearing Brand's intellectual property. None of Brands' licensees had retail stores in West Virginia. Instead, the licensees sold their products to wholesalers and distributors who, in turn, sold those products to retailers in various states throughout the United States, including West Virginia.

Under the licensing agreements, the only influence Brands exercised over the licensees' processing of the products was limited to such quality control oversight of the licensees' operations as was needed to protect the value of its intellectual property. To the same end, Brands oversaw national advertising of its trademarks and trade names.

Despite the fact that Brands had neither physical presence, nor even customers, in West Virginia, the Department, based on an audit conducted by the Multi-State Tax Commission (MTC), issued CNIT and BFT assessments against Brands. After an administrative law judge upheld the assessments, Brands sought the judicial review that led to the assessments being set aside. In seeking relief from the lower court's ruling, the Department argued *inter alia* that Brands had the substantial nexus with West Virginia, required by the dormant Commerce Clause, to allow the state to impose its tax. In doing so, the Department advanced what is surely one of the most expansive views of substantial economic nexus asserted to date.

Specifically, the Department claims that the lower court erred by failing to correctly apply, to Brand's business activities, the "substantial economic presence test" recognized by the MBNA Court. In doing so, the Department effectively contends that the factual distinctions between MBNA and the ConAgra Brands case had no constitutional significance.

In MBNA, the taxpayer, an issuer and servicer of credit cards, "continuously and systematically engaged in direct mail and telephone solicitation and promotion in West Virginia."[7] That was the expressed factual basis for the MBNA Court's finding that the taxpayer there had the substantial economic presence in West Virginia required to satisfy that standard under controlling Commerce Clause jurisprudence and, thus, was taxable due to "its significant gross receipts attributable to its West Virginia customers."[8]

7 MBNA, 220 W.Va. 164, 172.

8 Id., (citing Complete Auto and Western Maryland Ry. Co. v.

Continued on page 20

In sharp contrast to the taxpayer in MBNA, Brands had no customers or contracting parties in West Virginia, nor was it a party to any contract any part of the performance of which occurred in the state. It did not engage in any solicitation of West Virginia customers, whether by direct mail, telephone or otherwise. Furthermore, the "mere foreseeability," that its licensees' products, bearing its trademarks and trade names, might end up being sold by others in West Virginia, is not even sufficient, under the Due Process minimal contacts standard, to find that Brands was doing business there.[9] That conclusion is, likewise, unaffected by Brands' national advertising activities.[10]

Nevertheless, the Department argued the negative that, if Brands were not "purposefully directing its trademarks to West Virginia," it should have excluded this state "as a potential market" for its licensees' products bearing its trademarks and trade names. However, that view overlooks the business rationales underlying Brands' licensing agreements, not to mention that it stands on its head the case law applying the "purposefully directed" standard under Due Process analysis.[11]

Specifically, given the express terms of its licensing agreements putting the licensees in exclusive control of such matters, Brands was legally and economically indifferent as to whether its licensees' customers did business in West Virginia or in any other particular state, *per se.* Rather, it was willing to rely on its licensees' own self-interest in promoting sales of the products in the markets wherever in the United States those interests took them..

As the lower court astutely observed, the same is true of the suppliers of the ingredients and packaging containers used by Brand's licensees (at facilities outside of West Virginia) to process and distribute their products. Nevertheless, the Department would impose an affirmative duty on Brands (and, effectively, on those suppliers of ingredients and containers) to prohibit the sale, by their customers (i.e. the licensees) and their customers' customers, of their products in West Virginia, in order to avoid the extraterritorial reach of that state's taxing power.

Moreover, in denying the constitutional significance of the differences between them, the Department also further claimed that, simply because both Brands and the taxpayer in MBNA depend for their income on the "sale of someone else's product" in West Virginia, they both were effectively doing business here. Thus, when the Department pointed out that "without a turkey to attach the Butterball trademark to, [Brands] receives no revenue," it also asserted, in effect, that an out-of-state farmer, who supplies the turkey to Brand's licensee, would automatically be taxable anywhere the turkey is sold. To the contrary, if the analysis employed by the MBNA Court is to be followed, it would, instead, focus on the fact that, unlike MBNA, which had customers in West Virginia, the Respondent and the farmer did not.

Thus, perhaps recognizing Brands' tenuous factual comparison with MBNA, the Department further argued that the MBNA Court's express rejection, of comparisons of the issues in that case to those in Geoffrey and the other IHC cases, somehow, implied the Court's embrace of the astounding view that the mere presence in a state of reproduced images of intellectual property "as providing a more substantial tax nexus [with the owner of such property] than that under review in MBNA." (Emphasis added). Rather, the MBNA Court rejected the Department's attempts, to justify the imposition of taxes on the taxpayer there, on the basis of the rulings in Geoffrey, etc., because the latter relied on the fact that physically absent taxpayers used their trade names in the taxing states to establish sufficient nexus for tax purposes.[12] Thus, the MBNA Court distinguished that case from the IHC cases because, instead of having reproduced images of its intellectual property in West Virginia affixed to the products of others, the taxpayer in MBNA had customers there.

In fact, neither Brand's position nor the lower court's ruling, rested, to any degree, on Brand's lack of physical presence in West Virginia.[13] Rather, Brand's position

Goodwin, 167 W.Va. 804, 282 S.E.2d 240 (1981).

9 Burger King Corp. v. Rudzewicz, 471 U.S. 462, at 474 (1985), (quoting World-Wide Volkswagen Corp., 444 U.S.286, at 295 (1980)).

10 See, e.g. Siemer v. Learjet Acquisition Corp., 966 F.2d 179, 183–84 (5th Cir. 1992) (advertisements in national journals, together with mailing information to Texas customers and Texas sales not sufficient for general *in personam* jurisdiction), cert. denied, 506 U.S. 1080 (1993).

11 Burger King, *surpa.* note 9. The purposefully directed requirement protects a defendant from being "haled into a jurisdiction 'solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts.'" Id., at 474-75 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984)).

12 MNBA, 220 W.Va. 163, 169, 640 S.E.2d 226, 232, note 11.

13 Indeed, it appears to be the Department's view that actual physical presence does not automatically establish substantial nexus if the physically present taxpayer does not "regularly, systematically and purposefully" direct its activities at West Virginia customers. W.Va. Tax Dept. Tech. Assist. Advisory 11-002, March 28, 2011 (holding that the mere presence in West Virginia of a taxpayer's inventory of materials for producing printed advertising circulars and catalogs, in the hands of its contract printer, and occasional visits to the printer's West Virginia facility by the taxpayer's personnel for quality control pur-

Continued on page 21

was that, based on settled constitutional jurisprudence, it did not have minimum, much less substantial, nexus with West Virginia because it was not the party using its trademarks and trade names to do business in this state.

Clearly, if Brands is held to have had "substantial nexus" with West Virginia — merely because its royalty income is measured by its licensees' sales (due solely to the latter's marketing decisions) of their own products, bearing Brands' trademarks and trade names, to wholesalers and distributors, who, in turn, sell such products to retailers in West Virginia — then the "Balkanization" of the United States economy is upon us and the restraints, intended by the Commerce Clause, have failed.

Thus, the Department's contention that, if Brands did not want to be exposed to the extraterritorial reach of West Virginia's taxing power, it should have prohibited, in its licensing agreements, the flow of its licensees' goods into this state. Of course, those agreements do not contain such a draconian provision, denying West Virginia customers in-state access to the wide variety of consumer products bearing Brands' trademarks and trade names, because, in entering into them, Brand relied on long-settled constitutional jurisprudence broadly defining the limits of state taxing power. Doubtless, the agreements between the licensees and their suppliers of product ingredients and packing containers are similarly void of any such prohibition for the same reason.

Nevertheless, in ConAgra Brands, the Department urged the Court to adopt a far more elastic concept of substantial nexus than heretofore judicially attributed to the Founders' vision of the workings of the Eighteenth Century marketplace when the Commerce Clause was authored. Thus, to the Department, substantial economic presence should, in today's far more complex, technology-driven economy, be based on nothing more than the measurable economic benefits accruing indirectly to a remote taxpayer as a result of "a sale of someone else's product."

That is necessary, the Department argued, because, given the intangible nature of property such as Brand's trademarks and trade names, the place of use by others, rather than where its owner is economically, much less physically, present, should be a jurisdiction where income from such use can be taxed. However, if such indirect economic benefit were to become the touchstone of taxation, the activities of not only second parties, but third, fourth and all parties beyond, could become relevant to the taxation, not only of the first party, but of each of the others.

Furthermore, there is nothing in the Department's theory of "indirect economic benefit" which confines its application to those dealing in intangible personal property or would preclude the tax from reaching any party anywhere their indirect, but measurable, economic benefits can be said to have accrued. Thus, this theory of taxation would apply, not only to those in the businesses of licensing the use of intellectual property, but to all other players in an integrated, dynamic market wherever the goods or services, they are providing at any stage of the entire raw material/container producing and supplying, product manufacturing, wholesaling, distributing and retailing continuum, may be used by others.

In reality, here, unlike MBNA, none of this expansive concept of the scope of state taxing authority is necessitated by the manner in which sophisticated modern business methods may have altered the fundamental nature of economic life. Rather, the essential processes and relationships found in the functioning of the farm-to-processor-to-wholesale-distributor-to-local-store-shelf continuum (including the labeling of products with protected trademarks and trade names) were at work when, and, indeed, long before, the rulings of the United States Supreme Court, establishing the current contours of the dormant Commerce Clause, were issued.[14] On those concepts, all participants in that continuum today have relied in arranging their business operations and in entering into their commercial obligations.

That is exactly what the Founders' vision, for a robust national, and even global, economy, grounded on free trade, contemplated when they adopted the principles, now embraced in our constitutional jurisprudence, recognizing how the dormant Commerce Clause principles limit the reach of state taxation. Now, however, subject to the clarifying potential intervention of the United States Supreme Court in KFC, the ruling of the West Virginia Court in ConAgra Brands will, once again, reveal whether that intent, and the wealth and human progress implementation of those principles has fostered, can be expected to retain their remaining vitality or, alternatively, will continue to be diminished by the inroads of a growing series of unreviewed and unfettered state court holdings.

poses, does not subject the taxpayer to CNIT or BFT, despite the fact that the printed advertising materials will be distributed throughout the U.S. including in West Virginia).

14 E.g., Complete Auto, *supra.* note 3.

Value Added Tax

The European Union and Remote Sellers – No *Quill* Required

Kenneth W. Helms, CMI
Manager – Value Added Tax
Ryan, LLC
Atlanta, GA
Phone: 404.365.0922
Kenneth.helms@ryan.com

As pressure to increase tax receipts grows, states are creating new and ever-more complicated laws and rules to capture perceived "losses" of tax receipts due to Internet commerce. Over the last three years, states such as New York and Colorado have passed so-called "click-through," i.e. "Amazon" laws, in an attempt to shore up their respective coffers. While New York has thus far been successful in defending its click-through provision, Colorado was not. Ultimately, if there is to be any definitive resolution to remote sale transactions in the U.S., the federal government must step in. However, before Congress attempts to overturn *Quill*, full consideration must be given to several critical issues.

First, if such legislation were to be enacted into law, how would such a law be consistently applied? Would the legislation capture all remote sellers regardless of volume or would it target only those above a mandated de minimis threshold? Would such an amount be consistent between all of the states or would the states be allowed to set the de minimis amount? If there is a threshold amount, how are transactions above and below that amount treated (taxed)? Finally, when is a remote seller required to register for another state's tax; after reaching the threshold amount or before? While answers to all of these questions are critical to successful compliance, the U.S has but to look "across the pond" to Europe for guidance.

The European Union

Background

Prior to the creation of the European Union ("EU"), the 27 countries that make up the EU maintained national borders for commerce between the several nations (similar to the U.S. under the Articles of Confederation) as well as national indirect tax laws and regulations. Under the old system, commerce between the nations was complicated and costly; both in tax cost (including national duties) and compliance. The creation of the EU "removed" these national borders for commerce. The effect was that each "Member State" eliminated import duties on intra-Community transactions ("ICT") as well as harmonized most of their tax laws and rules (similar to the SSTA). By doing so, the compliance costs and hurdles to commerce between the Member States were greatly reduced.

Indirect taxes in the EU are governed by the EU Directives. These Directives set out general definitions and rules on intra-Community commerce. Within certain Directives, the "main rule," or the specific Directive, has a "special rule" to control certain types of transactions covered by the main rule. These special rules may be found within the same Directive or may be covered under a separate Directive. Finally, some of the Directives allow for "derogations" (a deviation from a rule or law) at the national level for Member States. These derogations were created to allow for certain national customs and practices to be maintained by the Member State. Finally, like the U.S., the EU has an adjudication process (known as ECJ case law) to resolve challenges to both Directives and derogations. As such, when researching specific transactions, the hierarchy is ECJ case law, main rule, special rule then derogation.

Remote Selling/E-Commerce in the EU

In order to discuss EU rules concerning remote selling/e-commerce, a U.S. tax professional should understand the "terms of art" under the VAT Directives. These terms include:

EU Term	***US Term***
Supply of Goods	Sale
Taxable Person	Registered Retailer
Non-Taxable Person	Private Individual
Non-Taxable Legal Person	Exempt Legal Entity
New Means of Transport	New Motorized Land Vehicle, New Water Vessel, New Aircraft
Third Territories	Territories (not countries) That Form Part of the EU Customs Territory
Third Countries	Countries Outside the EU
Distance Sales	Remote Sales
Turnover Threshold	De minimis
Excise Duty	Certain Energy Products, Alcohol and Alcoholic Beverages and Manufactured Tobacco

Continued on page 23

In addition, a U.S. tax professional should understand that the EU does ***not*** consider supplies of services as subject to distance sales rules (only sales of goods). The EU also does not consider sales of goods from a taxable person located in a Member State to another taxable person located in another Member State as a distance sale. Rather, the EU considers sales that are:

- Between a taxable person and a non-taxable person
- The Seller and Buyer are located in different Member States
- The Seller delivers, or arranges for the delivery of, the goods supplied to be distance sales subject to distance sale rules. Further, a "non-taxable" person would include:
- Private individuals
- Some small businesses
- Businesses that cannot register for VAT because their activities are exempt
- Public bodies
- Charities

If a transaction encompasses these provisions, then the Seller falls under distance selling rules. Please note that if the Seller is outside the EU (and is not required to be registered for VAT), distance sale rules do not apply (as the sale is outside the scope of the EU VAT regime).

With this information in mind, the main rule for distance sales is found in Article 33 and Article 34 of the EU Directives as stated below:

> 33(1) By way of derogation from Article 32, the place of supply of goods dispatched or transported by or on behalf of the supplier from a Member State other than that in which dispatch or transport of the goods ends shall be deemed to be the place where the goods are located at the time when dispatch or transport of the goods to the customer ends, where the following conditions are met:
>
> (a) the supply of goods is carried out for a taxable person, or a non-taxable legal person, whose intra-Community acquisitions of goods are not subject to VAT pursuant to Article 3(1) or for any other non-taxable person;
>
> (b) the goods supplied are neither new means of transport nor goods supplied after assembly or installation, with or without a trial run, by or on behalf of the supplier.
>
> (2) Where the goods supplied are dispatched or transported from a third territory or a third country and imported by the supplier into a Member State other than that in which dispatch or transport of the goods to the customer ends, they shall be regarded as having been dispatched or transported from the Member State of importation.
>
> 34(1) Provided the following conditions are met, Article 33 shall not apply to supplies of goods all of which are dispatched or transported to the same Member State, where that Member State is the Member State in which dispatch or transport of the goods ends:
>
> (a) the goods supplied are not products subject to excise duty;
>
> (b) the total value, exclusive of VAT, of such supplies effected under the conditions laid down in Article 33 within that Member State does not in any one calendar year exceed EUR 100000 or the equivalent in national currency;
>
> (c) the total value, exclusive of VAT, of the supplies of goods, other than products subject to excise duty, effected under the conditions laid down in Article 33 within that Member State did not in the previous calendar year exceed EUR 100000 or the equivalent in national currency.
>
> (2) The Member State within the territory of which the goods are located at the time when their dispatch or transport to the customer ends may limit the threshold referred to in paragraph 1 to EUR 35000 or the equivalent in national currency, where that Member State fears that the threshold of EUR 100000 might cause serious distortion of competition.
>
> Member States which exercise the option under the first subparagraph shall take the measures necessary to inform accordingly the competent public authorities in the Member State in which dispatch or transport of the goods begins.

Continued on page 24

> (3) The Commission shall present to the Council at the earliest opportunity a report on the operation of the special EUR 35000 threshold referred to in paragraph 2, accompanied, if necessary, by appropriate proposals.
>
> (4) The Member State within the territory of which the goods are located at the time when their dispatch or transport begins shall grant those taxable persons who carry out supplies of goods eligible under paragraph 1 the right to opt for the place of supply to be determined in accordance with Article 33.
>
> The Member States concerned shall lay down the detailed rules governing the exercise of the option referred to in the first subparagraph, which shall in any event cover two calendar years.

Article 33 and 34 – EU "Nexus"

First and foremost, Article 33 outlines how the EU treats remote/distance sales. Unlike the U.S., sales that qualify as distance sales do not consider a physical presence as a requirement to impose a tax collection responsibility. Under Article 33(1), the place of supply, or where the sale is deemed to have occurred, is the delivery location of the customer. As such, the delivery jurisdiction determines how the transaction is taxed. However, Article 34 must be read in conjunction with Article 33 to properly determine whether or not a taxable person has a requirement to register in the delivery Member State. Under Article 34, the EU does provide protection to taxable persons by establishing a minimum amount of turnover, or threshold, required to trigger registration in other Member States.

Article 34 sets the threshold bar at €100000 or equivalent national currency (only 17 of the 27 Member States are part of the Eurozone) for any calendar year (not a trailing-12). If a taxable person surpasses the threshold in a calendar year, the taxable person is required to maintain the registration into the succeeding calendar year (see the last sentence of Article 34 above). However, Article 34(2) provides Member States the ability to reduce the threshold to €35000 per calendar year if the Member State feels that the €100000 amount materially distorts the competitive landscape of the Member State's market. U.S. tax professionals need to understand the differences between VAT and domestic indirect tax obligations to understand the necessity of Article 34(2).

A Buyer in the U.S. can be held responsible for domestic indirect tax (payable as a use tax to the asserting jurisdiction). Use tax can be asserted regardless of whether or not the Buyer is a registered taxpayer or private individual. Under EU ICT rules, if the Buyer is an individual or non-taxable person, there is no mechanism (or requirement) for the individual to self-assess and pay VAT. Under these circumstances, a taxable person that engages in distance selling can truly distort the competitive landscape as this seller has a pricing advantage of up to 25% compared to a taxable person registered in that Member State. So if a Member State has the ability to require registration once a certain threshold has been surpassed, how are distance sales below that amount taxed?

As counter-intuitive as it sounds, distance sales below the destination Member State's threshold are taxed at the origination Member State's rules and rates. As an example, assume a United Kingdom taxable person making a distance sale into Germany:

Distance Sales < Threshold Amount

UK Taxable Person

Goods	€100
VAT (UK - 20%)	€20
Total	€120

FR Non-Taxable Person

Now consider the same transaction but after the UK taxable person has surpassed the threshold amount for DE:

Distance Sales > Threshold Amount

UK Taxable Person

Goods	€100
VAT (DE - 19%)	€19
Total	€119

DE Non-Taxable Person

Continued on page 25

As the transaction on the previous page demonstrates, after a taxable person in another Member State surpasses the threshold amount, the taxable person is required to register and immediately begin charging and collecting the VAT of the delivery Member State. As such, it is imperative that the taxable person maintains accurate and up-to-date records so that the taxable person can maintain proper compliance.

A few final notes regarding EU VAT compliance – Member States outside the Eurozone can require that the VAT liability be charged in local currency or equivalents (with a conversion rate stated on the invoice). However, the VAT liability may be paid *only* in the Member State's currency, not equivalents. As such, a taxable person making distance sales into Member States outside the Eurozone can face FX exposure on top of significant costs to produce the delivery Member State's VAT return. For taxable persons that are not multi-lingual, please take heed that each Member State's VAT return is in the national language of the Member State.

Managing Registration Requirements

In a 2009 Memo by the European Commission ("EC"), the EC conducted a "secret-shopper" survey of the top 100 items purchased by citizens of the 27 EU Member States. The survey documented that only 39% of the attempted purchases could be attempted on websites located in a Member State other than the Member State of the purchaser. Of that 39%, the purchase would have failed 61% of the time either for the trader's refusal to serve the consumer's Member State or for other reasons. The other reasons included the inability to provide payment options in the delivery Member State's currency (VAT returns are payable in Euros or, if the Member State is not part of the Eurozone, the Member State's national currency. Ten EU Member States do not use the Euro as their currency). See IP/09/1564, European Commission, 22 October 2009.

The results of the memo stand in stark contrast to the ideal of the common market; that goods may cross borders freely within the market without restrictions based on borders. Unsurprisingly, the EC is proposing multiple solutions to remediate the survey findings. At the top of the list is a recommendation to further simplify the distance sale rules. The next proposal is an increase in the collection threshold to €150,000 and the removal of the provision that allows Member States to reduce the threshold. To date, none of the proposed changes have been implemented.

Conclusion

On the surface, the EU solution appears to solve the largest perceived inequality in the US between "Main Street" and remote retailers by eliminating the *Quill* requirement of physical presence. The EU solution also appears on the surface to protect "mom-and-pop" and small businesses by setting a material threshold for registration requirements. However, many remote sellers would argue that they are being punished, through additional compliance complexities and costs, simply because they have a successful business model. In addition, while there is some tangible linkage between being subjected to a jurisdiction's rules and a tangible benefit (such as police and infrastructure) received by the remote seller in the U.S., the distance sale rules in the EU rules seem to completely ignore a direct effect. Finally, and potentially most telling, the tax policy of the EU is adversely impacting the consumer's ability to make commercial choices as remote sellers affirmatively manage their tax compliance footprint by simply refusing to accept business outside certain Member States.

The War in California
Online Retailers Push Public Initiative

Cass D. Vickers, CMI, Esq.
IPT Deputy Executive Director and State Tax Counsel
Phone: 404.240.2300
Email: cvickers@ipt.org

California, so often in the forefront on emerging public policy issues, finds itself again on the front line in a battle with Amazon and other online retailers over the collection of California use tax. Readers are familiar with the U.S. Supreme Court's interpretation of the Commerce Clause as limiting state tax jurisdiction to activities that have a "substantial nexus" with the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). And they are familiar with the Court's celebrated holding, in *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), interpreting the "substantial nexus" requirement, in the context of sales and use taxation at least and arguably with other levies as well, as limiting the taxing authority to entities with a meaningful "physical presence" in the state. The ruling is predicated in part, on the substantial burdens that use tax collection on behalf of thousands of jurisdictions under divergent tax regimes would occasion to those doing business across state lines. The ensuing Streamlined Sales Tax Project was a response by a number of states, intended to reduce those burdens in hopes either of securing a reversal of *Quill* or authorization from Congress, under its affirmative Commerce Clause powers, to tax Internet merchants. We have previously reported on pending congressional proposals with that objective, such as the Main Street Tax Fairness Act. See IPT *Tax Report* (May 2009).

In the absence of resolution in either of those venues, the growth of online retailing and pinch of declining state and local tax collections have prompted a number of jurisdictions to enact more aggressive interpretations of the "physical presence" requirement, a development we have also covered at some length in prior issues of the IPT *Tax Report*. Joining the fray with a trailer bill, A.B. X1 28, to its 2011-2012 budget bill, California has substantially expanded its assertion nexus over online retailers. In particular, the bill redefines retailers "engaged in business in this state" (and so required to collect use tax from in-state purchasers) to include those with "click-through nexus" and those with defined associational or "affiliate nexus."

As to the first, retailers would be deemed to have substantial nexus with the state if "entering into an agreement or agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer potential customers of tangible personal property to the retailer, whether by an Internet-based link or an Internet Web site, or otherwise," provided the resulting sales exceed $10,000 in the preceding 12 months and the retailer has, during the same period, cumulative sales to persons in California exceeding $500,000. Amending s. 6203 of the Revenue and Taxation Code (RTC). The first part of the definitional change effectively asserts that such retailers are physically present in California through the persons referring business to them on the described Internet click-through link basis. The second part, limiting the nexus assertion to retailers with the specified levels of sales, is presumably included for the purpose of accommodating the Commerce Clause requirement that the required nexus be "substantial."

The other definitional change to retailers "engaged in business in this state" sweeps in all retailers that are "a member of a commonly controlled group [per s. 25105 of the RTC] and is a member of a combined reported group [per s. 25106.5 of Title 18 of the California Code of Regulations] that includes another member . . . that, pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection tangible personal property to be sold by the retailer," including design and development and/or solicitation services. This change effectively asserts that retailers are physically present in the state through described affiliates performing services in California that relate to the retailers' sales into the state.

The new law excludes from the nexus assertions the placement of advertisements with persons in the state to be delivered in print, by television or radio, Internet or other medium, unless the amounts paid for such advertising "consist of commissions or other consideration that is based upon sales of tangible personal property." Furthermore, Internet advertising would not come under the click through nexus provisions of s. 6203(5)(A) "unless the person entering into the agreement with the retailer also directly or indirectly solicits potential customers in this state through the use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking

Continued on page 27

sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state." The apparent effort here is to constrain the nexus assertion to advertising arrangements which go beyond the placement of advertising and reflect affirmative solicitation activities on the part of the putative "agent" or "representative" of the retailer with which the advertisement is placed. The act is said to address "the fiscal emergency declared [by Gov. Schwarzenegger] and reaffirmed [by Gov. Brown] on January 20, 2011" and is effective immediately as part of the Budget Bill (S.B. 87). Legal challenges are expected, based on *Quill*, and state constitutional provisions relating to tax measures.

Amazon and other online retail merchants have responded, by severing ties with California Web and backing a public initiative that would repeal that law and ban sales and use tax on Internet sales. Amazon has advised that the state Attorney General's office has approved its referendum petition. Tax officials have estimated Amazon's current year exposure at approximately $83 million and project the collections for all affected retailers roughly $200 million. Use tax for all Internet sales into the state is estimated to exceed $1 billion per year.

Supporters of the referendum, including former Rep. George Runner, now a member of the State Board of Equalization, maintain that A.B. X1 28 will cost California jobs and investment. Opponents, including retailers with physical presence in the state, such as WalMart and Target, see the recently-passed legislation as leveling the playing field, since online retailers would not be able to make sales free of the 7.25 percent state tax. They have formed the Alliance for Main Street Fairness which will oppose the referendum measure. That group is pushing measures in a dozen states that would require collection of tax on Internet sales by Amazon and similar companies. *Retailers Push Amazon on Taxes*, Wall Street Journal, Bustillo and Woo, March 17, 2011. The use tax on such purchases has always been due from purchasers, of course, but use tax obligations are widely disregarded by consumers and largely unenforced by taxing authorities, dealer collection on the state's behalf being considered the only cost-effective approach available.

Initiative supporters will need roughly 505,000 voter signatures, which are expected, and the measure could appear on the next statewide ballot in February 2012. The stakes are high, with one Harvard Business School professor, Nancy F. Koehn, calling Internet retailing "the fastest growing distribution channel in America." *Amazon Takes on California*, New York Times, Richtel and Kopytoff, July 13, 2011. The legal issues, divergence of business interests, and large financial interests—among retailers and on the part of states with pressing revenue needs—assures a vigorous and protracted battle.

CMI Candidate Connection

CMI Corner

Questions of the Month

What IPT schools will I be required to complete, and how are education points calculated?

Click on the appropriate link (**Income, Property, Sales**) to go to the online Orientation in your tax specialty for detailed information regarding the requirements to become an eligible candidate and for guidelines in calculating education points.

What if my application is reviewed and found to be short of education points?

You may submit additional education documentation to supplement your original application. Applicants are strongly encouraged to be liberal rather than conservative, when submitting education documentation for credit. Applicants **MUST SUBMIT DOCUMENTATION TO IPT** as they attend additional programs in order to update their eligibility status. This includes IPT programs. IPT program attendance is **NOT** automatically linked to CMI applications.

Can I submit education from training provided by my employer?

Yes, as long as it meets the requirements as described in the CMI Brochure, and proper documentation is provided.

Do you have a list of courses that are preapproved?

No, IPT reviews each course individually after a completed application is submitted.

More information on all of these announcements can be found on IPT's website at www.ipt.org.

Help Us - Help You!

Your CMI designation is important, both to you and to us. Each year, IPT staff monitors and contacts any CMI who might be in jeopardy of losing his or her CMI designation due a shortage of continuing education. CMIs that are in the last year of their term and who have not yet met CE requirements necessary to retain their designations receive several e-mails before their term expires, indicating the status of their designation and the requirements that must be met in order to retain their designation. It is important to make sure that IPT maintains your correct e-mail and contact information so that you will receive these timely e-mails.

Continuing Education submissions for non-IPT programs are processed within 4 weeks of receipt. Remember to attach the **Application for Continuing Education Credit** with each non-IPT course submitted. Each submission must be individually reviewed and coded before being entered into the CMI's status report. IPT does not verify receipt of individual CE submissions unless requested to do so. Every CMI receives a copy of his or her status report via e-mail at the beginning of each year (and may also request a copy at any time by e-mailing earcher@ipt.org or cwebb@ipt.org). The yearly report includes all CE that was received by December 31st of the calendar year just ended. Any unreported CE earned ***during the calendar year just ended*** must be submitted by March 15 in order for the credit hours to be added. CMIs who have met their required 60 hours of CE including 30 hours in their discipline with 12 hours earned at one IPT discipline-specific program and 5 ethics hours for the 5-year term, do not need to submit additional CE.

Any questions regarding the CMI Professional Designation can be addressed to Christina Webb, Manager of Education and Certification programs at cwebb@ipt.org or Emily Archer, Certification Specialist at earcher@ipt.org.

2011 Sales and Use Tax Symposium ~ September 25 - 28, 2011
Renaissance At SeaWorld®, Orlando, Florida

A topical outline of this year's program follows. Please note that there are five general sessions and 36 breakout sessions. Please go to IPT's website, www.ipt.org, for full program and registration materials. Early registration for both the program and hotel are encouraged.

General Sessions:

- Ethical Dilemmas in the Tax World
- Federal Limitations on Sales Taxation
- Nexus and Reporting: Where we have been, Where we are going
- State of the States
- Utilizing Your Memory

Breakout Sessions:

- Ask the Experts - FL, NC, SC, GA
- Ask the Experts - TX, CA, WA
- Ask the Experts - AR, KS, OK, MO
- Ask the Experts - PA, NJ, NY, MA, CT
- Ask the Experts - LA, MS, AL, CO, AZ
- Ask the Experts - WI, NE, IA, IL, IN, OH
- Audit Sampling: Avoiding the Wheels off Sample Audits
- Automating the Sales and Use Tax Function
- Bad Debt Refund Claims: Getting Some Bang for the Missing Bucks
- Beginner Basic
- Contracts and Other Transactions: How Can a Tax Professional Assist and Add Value?
- Credits and Incentives - Overview of and New Trends
- Don't be Denied - Exemption Certificate Validation
- Get in Control of the Managed Audit and Compliance Agreement Programs
- Google is not Synonymous for Tax Research: Research Tools and Tips
- Hot Topics - Top 10 Cases in Sales and Use Taxation
- How to Manage the Auditor: What is Required?
- Income Tax Applications to Sales Tax: Opportunities and Pitfalls
- Industry Discussions: Oil and Gas
- Industry Discussions: Leasing Issues
- Industry Discussions: Utilities
- Industry Discussions: Manufacturing
- Is the Sales Tax Simple in Streamline States? - A Review of the SST Process.
- Legislative Efforts to Expand the Reach of the Sales Tax
- Oh Canada! - Overview and What's New
- Old Tax Laws Applied to New Technologies
- Overcoming the Tax Language Barrier: Translating Income Tax for Sales Tax Professionals
- Property Tax for Sales Tax Professionals
- Refund Roadblocks
- Sourcing of Services: Service Versus TPP, Bundling, Allocating, Etc.
- State Trends in Auditing
- Taxing Service as Tangible Personal Property, Can the States Do It?
- This and That About VAT: A Comparison of US Sales and Use Tax Principles with VAT Principles.
- Unclaimed Property: New Trends
- VDA's and Amnesty Programs
- Where IT'S at: Software, Cloud Computing and Data Processing

IPT Property Tax Symposium

November 6-9, 2011 • Hyatt Regency Monterey • Monterey, California

Don't miss this opportunity to attend IPT's annual Property Tax Symposium. This year's Symposium promises to be another outstanding educational program. It will offer presentations on a number of property tax-related topics of importance to tax professionals functioning in today's changing environment. You will not find a more diverse, yet in-depth, program in the industry.

General Sessions:

- Common Misuses of Survey Publications for Cap Rates & Discount Rates
- Economy Presentation: Fast and Furious
- Ethics Presentation: Prominence to Prison: Why Smart People do Dumb Things
- Ten Categories of Detrimental Conditions
- The Nestlé and UTGR Decisions: Case Studies in Challenging & Litigating Assessments of Unique Properties

Breakout Sessions:

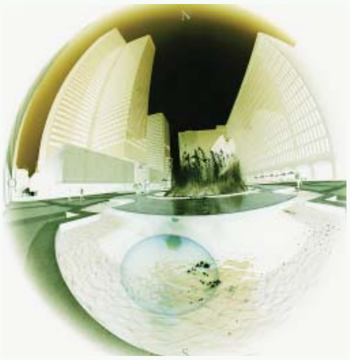
- CIP: Real & Personal Property Valuation Issues
- CMI Academy - Part I
- CMI Academy - Part II
- CMI Academy - Part III
- Commercial & Industrial Transactions Since the Crash, where do they go from here - Midwest
- Commercial & Industrial Transactions - Northeast
- Commercial & Industrial Transactions - Southeast
- Commercial & Industrial Transactions - West
- Commercial Real Estate
- Ethics in Negotiation
- Fee Simple vs. Leased Fee - The Battle Continues
- Hotel Valuation
- Implications of Commodity Prices on Industrial Property Tax Valuations
- Is the Green Movement Creating Functional Obsolescence?
- New Leased Accounting Rules & Implications for Property Tax Purposes
- Property Tax Incentives
- Property Tax Reform - Legislative & Case Law Update
- The Art of the Appeal: Practical Tips for Negotiating/Litigating Property Tax Appeals
- The Graying Property Tax Profession - What are we doing to bring new people in?
- Wind Energy Facilities Valuation and Taxation Issues

Industry Roundtable Discussion Sessions:

- Energy
- Hotel & Healthcare
- Industrial
- Personal Property
- Retail
- Telecom/High-Tech

If you are a CMI, you will find that the half-day Academy session, which has been especially designed for CMIs, offers a thought-provoking and interactive forum. This group format, whereby experienced tax professionals participate in formulating effective solutions to problematic issues, ensures that those solutions reflect a diversity of thought and analyses. All participants will have a hand in crafting the best practice answers.

You definitely don't want to miss this year's Symposium!



Value Added Tax Symposium

September 18 - 21, 2011
The Mason Inn Conference Center
George Mason University
Fairfax, Virginia

This two and one-half day program provides focused education on VAT and its impact on multi-national companies and cross-border transactions. The program encompasses the economics of VAT through the potential implementation of VAT in the US. Along the way, the program will also provide presentations and concentrated discussions on Regional Perspectives, Legal Standards, Compliance Automation and specific Industry Issues. Audience participation is strongly encouraged and while some working knowledge of VAT is suggested, the program is structured so that all attendees will gain valuable insights regarding VAT.

Brochure **Registration** **Hotel Reservation**

Intermediate Personal Property Tax School

October 16 - 21, 2011

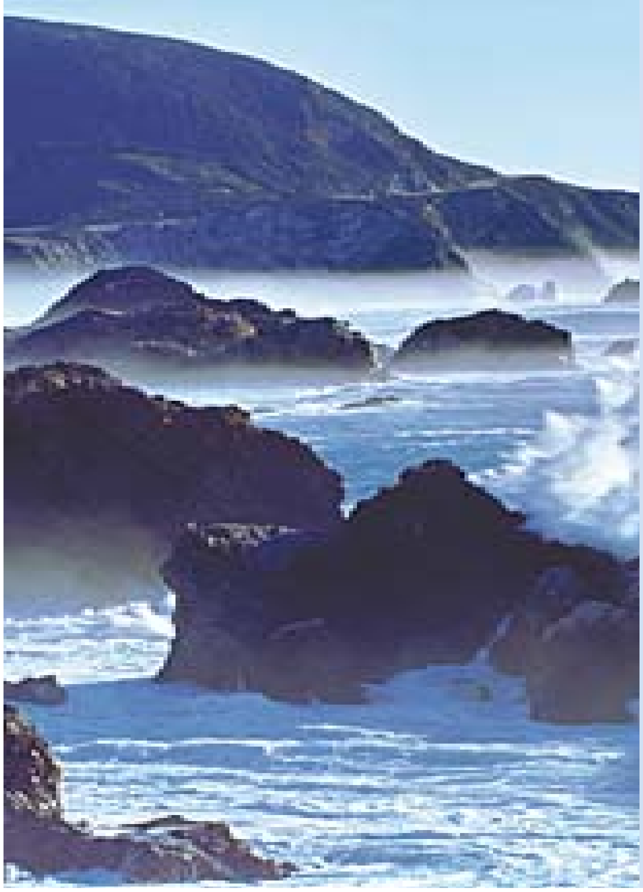
Georgia Tech Hotel & Conference Center
Atlanta, Georgia

This comprehensive course, which provides an in-depth investigation of personal property taxation, is for individuals who have a basic knowledge of property tax issues. Topics include classification of property, valuation and depreciation of personal property, audits, and appeals. Register now!

Prerequisites: Completion of the Institute's (basic) Property Tax School or three years of experience is recommended. Enrollment is limited to employees of member companies or government agencies.

Brochure **Registration** **Hotel Reservation**

Members may also register online.



Income Tax Symposium

November 6 - 9, 2011
Hyatt Regency Monterey Hotel
Monterey, California

This two and a half-day state and local income tax symposium features general presentations as well as specialized breakout sessions of timely interest to all state and local income tax professionals. The program, developed to emphasize practical applications of theories, techniques, and procedures to everyday situations, will be invaluable to state and local income tax representatives from all industries at all levels of experience.

Registration materials will soon be available on IPT's website.

Credits and Incentives Symposium

November 9 - 11, 2011
Hyatt Regency Monterey Hotel
Monterey, California

Identify Best Practices to help your business face today's economic challenges by wisely utilizing tax credits and incentives. This Symposium is the culmination of many dedicated efforts by experienced colleagues in the Credits and Incentives area to make this program effective, interesting, and, most importantly, informative. We hope you will make plans to attend and to join IPT in expanding and strengthening the educational opportunities for professionals in the credits and incentives field.

Brochure **Registration** **Hotel Reservation**

Property Tax Calendar September 2011

This information is provided by International Appraisal Company (IAC) and is provided for quick reference/reminder purposes only. Neither IPT or IAC makes any guarantee to completeness or accuracy and is not responsible for errors or omissions or for any results from the use of this information.

Dates vary; users should confirm dates for their jurisdiction.

Appeals Due:

FL* IL* NH RI* UT* WI*

CA* 9/15 - Counties that mail notices by 8/1

NY 9/1 Westchester (Court Appeals)

PA* All counties not already listed

UT 9/15

*Dates vary, check jurisdiction

Personal Property Filing Dates: None

Assessment Dates: None

Do you need CEC/CLE/CPE credit? (MAI, CPA, CMI, CAE, etc.)

Visit IPT's website to plan your Continuing Education schedule for the remainder of the year or refer to the IPT 2011 calendar of events on this page to see what is being offered. The Institute's programs are accepted by most organizations for continuing education purposes. Check with the administrator of your designation/certification.

CODE OF ETHICS CANON 11

IT IS UNETHICAL for a member, in the performance of a tax assignment, to fail to exercise independent judgment in advising and representing a client.

ONE-DAY TAX SEMINARS

Bringing Together Business Tax Professionals

MICHIGAN
September 9, 2011
Masco Corporation
Taylor, Michigan

Program   Registration

GEORGIA
November 18, 2011
Crowne Plaza Ravinia Hotel
Atlanta, GA

Program & Registration available soon on IPT's website

Careers

Please visit the Career Opportunities page on the IPT website for complete position descriptions and requirements.

Positions Available:

Tax Manager, Property Taxes and Unclaimed Property #5076 (Nashville, Tennessee) - HCA. For more information about HCA, a complete job description, and to apply for consideration, please click the following link: http://www.careersathca.com/. **Date Posted**: 7/26/2011 (IPT031)

SALT Tax Associate (New York, New York) - Geller & Company. Send resume to recruiter@gellerco.com. **Date Posted**: 7/26/2011 (IPT030)

SALT Tax Manager (New York, New York) - Geller & Company. Send resume to recruiter@gellerco.com. **Date Posted**: 7/26/2011 (IPT029)

Sales Tax Accounting Supervisor (Atlanta, Georgia) - Chick-fil-A, Inc. Qualified candidates please send resumes to betty.hoffman@chick-fil-a.com. **Date Posted**: 7/26/2011 (IPT028)

North America Payroll Tax and Compliance Manager (Seattle, Washington) - Amazon. Send resume to tiffanca@amazon.com **Date Posted**: 7/26/2011 (IPT027)

Tax Clerk (Bloomfield Hills, Michigan) - Macquarie Group. Please apply directly to our website via the link below: http://www.careers.macquarie.com/jobDetails. **Date Posted**: 7/26/2011 (IPT026)

Property Tax Analyst (Bloomfield Hills, Michigan) - Macquarie Group. Please apply directly to our website via the link below: http://www.careers.macquarie.com/jobDetails. **Date Posted**: 7/26/2011 (IPT025)

Property Tax Staff Position (Boca Raton, Florida) - Global Tower Partners. Send resume to Jason Raab at jraab@gtpsites.com. **Date Posted**: 7/26/2011 (IPT024)

Property Tax Supervisor (Tampa, Florida) - Pitney Bowes. Apply online at www.pb.com/careers **-** Job #111701 **-** Property Tax Supervisor. **Date Posted**: 7/22/2011 (IPT023)

Property Tax Accountant (Toledo, Ohio) - Pilkington North America, Inc. Send resume to Kimberly.Wisniewski@nsg.com. **Date Posted**: 7/21/2011 (IPT022)

Tax Accountant (Richmond, Virginia) - Dominion. Visit www.dom.com, click "About Us" and then refer to the "Careers at Dominion" heading. All applicants must apply online. **Date Posted**: 7/20/2011 (IPT021)

Corporate Tax Manager (Bradenton, Florida) - Robert Half Finance & Accounting. Send resume to brian.upshaw@roberthalf.com. **Date Posted**: 7/20/2011 (IPT020)

Property Tax Supervisor (Tampa Florida) - Robert Half Finance & Accounting. Send resume to brian.upshaw@roberthalf.com. **Date Posted**: 7/20/2011 (IPT019)

Middle Market Tax Consultants (Sparks, Maryland) - SC&H. Send resume to mparise@scandh.com. **Date Posted**: 7/19/2011 (IPT018)

Middle Market Tax Manager (Sparks, Maryland) - SC&H. Send resume to mparise@scandh.com. **Date Posted**: 7/19/2011 (IPT017)

Income Tax Manager (Irving, Texas) - Consolidated Electrical Distributors, Inc. To Apply, go to http://www.applicantstack.com/client/cedjobs/x/detail/a2x16ezo7zle/aaai. **Date Posted**: 7/18/2011 (IPT016)

State and Local Tax Analyst (Irving, Texas) - Consolidated Electrical Distributors, Inc. To Apply, go to http://www.applicantstack.com/client/cedjobs/x/detail/a2x16ezfchgq/aaai. **Date Posted**: 7/18/2011 (IPT015)

Manager, Sales and Use Tax (Overland Park, Kansas) - SALT Solutions. To apply, please send resume and salary requirements by Email to khileman@SALTSolutions.biz or Fax to 913.239.2417. EOE. **Date Posted**: 7/18/2011 (IPT014)

Continued on page 35

Sales/Use Tax Manager (Atlanta, Georgia) - The Wendy's Company. To apply, please send resume and salary requirements by Email to angela.marks@wendys.com. **Date Posted**: 7/18/2011 (IPT013)

National Property Tax Opportunity (San Francisco, California) - Ernst & Young, LLP. For consideration, send your resume directly to susan.dolan@ey.com.
Date Posted: 7/18/2011 (IPT012)

Tax Associate Analyst (Plano, Texas) - PepsiCo. Please send resume to eliane.fishkind@pepsico.com.
Date Posted: 7/18/2011 (IPT011)

Tax Manager State & Local Tax, Income & Franchise Tax - Grant Thornton LLP. Send resume to Allon.Hall@us.gt.com.
Date Posted: 7/12/2011 (IPT010)

Accountant II, Tax Audits (Boca Raton, Florida) - Office Depot. Qualified applicants should apply directly to our website through the following link: http://www.officedepot.com/companyinfo/careers/search.jsp?jobreqnbr=1076776.
Date Posted: 7/12/2011 (IPT009)

State Tax Analyst (Federal Way, Washington) - Tax Specialty: State Income Tax. Weyerhaeuser. To apply and submit resume, go to www.weyerhaeuser.com/careers, search for state tax analyst and select apply online.
Date Posted: 7/7/2011 (IPT008)

Regional Market Development Manager (New York, New York) - Paradigm Tax Group. For consideration for this position, please email resumes to odiaz@paradigmtax.com.
Date Posted: 7/6/2011 (IPT007)

Senior Managing Consultant/Managing Consultant Positions (New York, New York) - Paradigm Tax Group, Please send a resume to Oscar Diaz at odiaz@paradigmtax.com for consideration.
Date Posted: 7/6/2011 (IPT006)

To submit a position announcement, email Toby Miller at tmiller@ipt.org. Include the job title, city/state, and the Tax Specialty, i.e. Property/Sales/Income.

IPT 2011 CALENDAR OF EVENTS

Michigan One-Day Tax Seminar
Masco Corporation
Taylor, Michigan
September 9, 2011

Value Added Tax Symposium
The Mason Inn Conference Center & Hotel
George Mason University
Fairfax, Virginia
September 18 - 21, 2011

CMI - Sales Tax Exams
Renaissance Orlando at SeaWorld
Orlando, Florida
September 23 - 24, 2011

Sales Tax Symposium
Renaissance Orlando at SeaWorld
Orlando, Florida
September 25 - 28, 2011

Intermediate Personal Property Tax School
Georgia Tech Hotel & Conference Center
Atlanta, Georgia
October 16 - 21, 2011

CMI - Property Tax Exams
Hyatt Regency Monterey Hotel
Monterey, California
November 5, 2011

CMI - Income Tax Exams
Hyatt Regency Monterey Hotel
Monterey, California
November 5 - 6, 2011

Income Tax Symposium
Hyatt Regency Monterey Hotel
Monterey, California
November 6 - 9, 2011

Property Tax Symposium
Hyatt Regency Monterey Hotel
Monterey, California
November 6 - 9, 2011

Texas Taxpayers and Research Association (TTARA)
Hyatt Regency Austin
Austin, Texas
November 7 - 8, 2011

Credits & Incentives Symposium
Hyatt Regency Monterey Hotel
Monterey, California
November 9 - 11, 2011

Georgia One-Day Tax Seminar
Crowne Plaza Ravinia Hotel
Atlanta, GA
November 18, 2011

IPT 2012 CALENDAR OF EVENTS

Sales Tax School I:
Introduction to Sales & Use Taxes
Georgia Tech Hotel & Conference Center
Atlanta, Georgia
February 26 - March 2, 2012

ABA/IPT Income Tax Seminar
The Ritz-Carlton
New Orleans, Louisiana
March 19 - 20, 2012

ABA/IPT Sales Tax Seminar
The Ritz-Carlton
New Orleans, Louisiana
March 20 - 21, 2012

ABA/IPT Property Tax Seminar
The Ritz-Carlton
New Orleans, Louisiana
March 22 - 23, 2012

Sales Tax School II:
Theory & Practice for the Experienced Sales & Use Tax Professional
Marriott Kingsgate Conference Center
University of Cincinnati
Cincinnati, Ohio
April 22 - 27, 2012

Intermediate Real Property Tax School
Marriott Kingsgate Conference Center
University of Cincinnati
Cincinnati, Ohio
April 29 - May 4, 2012

Basic State Income Tax School
TBA
June 4 - 8, 2012

Advanced State Income Tax School
TBA
June 4 - 8, 2012

CMI - Income Tax Exams
Renaissance Esmeralda Resort
Indian Wells, California
June 22 - 23, 2012

CMI - Sales Tax Exams
Renaissance Esmeralda Resort
Indian Wells, California
June 22 - 23, 2012

CMI - Property Tax Exams
Renaissance Esmeralda Resort
Indian Wells, California
June 23, 2012

36th Annual Conference
Renaissance Esmeralda Resort
Indian Wells, California
June 24 - 27, 2012

Property Tax School
Georgia Tech Hotel & Conference Center
Atlanta, Georgia
August 12 - 16, 2012

CMI - Sales Tax Exams
Hyatt Regency Minneapolis
Minneapolis, Minnesota
September 28 - 29, 2012

Sales Tax Symposium
Hyatt Regency Minneapolis
Minneapolis, Minnesota
September 30 - October 3, 2012

Intermediate Personal Property Tax School
Georgia Tech Hotel & Conference Center
Atlanta, Georgia
October 14 - 19, 2012

Texas Taxpayers and Research Association (TTARA)
Hyatt Regency Austin
Austin, Texas
October 15 - 16, 2012

CMI - Income Tax Exams
Key Bridge Marriott
Arlington, Virginia
November 2 - 3, 2012

Income Tax Symposium
Key Bridge Marriott
Arlington, Virginia
November 4 - 7, 2012

Advanced Sales & Use Tax Academy
Key Bridge Marriott
Arlington, Virginia
November 4 - 7, 2012

CMI - Property Tax Exams
Tampa Marriott Waterside Hotel & Marina
Tampa, Florida
November 10, 2012

Property Tax Symposium
Tampa Marriott Waterside Hotel & Marina
Tampa, Florida
November 11 - 14, 2012

Please check IPT's online Calendar of Events for additional programs that may be added.