

"Shaking things up in state and local tax"

SUTHERLAND



SALT SHAKER

FORECAST
State budget deficits continue to increase; aggressive enforcement and legislative expansion of the tax base expected.

VOL. 1, NO. 1

TUESDAY, JANUARY 19, 2010

FREE

Sutherland Launches "SALT Shaker"

Welcome to the inaugural edition of the *Sutherland SALT Shaker*! The *Shaker* will be different from what you are used to seeing from us. Rather than providing an in-depth analysis of a recent state and local tax development (see *Sutherland Legal Alerts*) or a new perspective on a state and local tax trend (see *Sutherland's A Pinch of SALT*), the *Shaker* will be an "easy read" – briefly noting the state tax developments and issues that we think are most important to your business.

In addition to providing you information on tax developments, the *Shaker* will keep you apprised of our comings and goings. For those of you who know *Sutherland's* State and Local Tax folks well, we hope you get a kick out of hearing what we are up to. For those of you who do not (yet) know us well, we hope that the *Shaker* will give us an opportunity to introduce ourselves. We will let you know where we will be (and have been) speaking. We will tell you a little about the individual members of our practice (and our pets!). And, we will share our reactions as to what we are hearing. The State and Local Tax community is close-knit – it is our hope that the *Shaker* serves to connect us even more.

We welcome you to join the conversation. E-mail us your thoughts and comments.

MTC Drafts Model Statute for Wage Withholding on Mobile Workers

The Multistate Tax Commission (MTC) Income and Franchise Tax Uniformity Subcommittee is considering a "Draft Model Mobile Workforce Statute." This model state statute would govern nonresident employee withholding. The model withholding statute is the MTC's attempt to fend off federal legislation (H.R. 2110, the Mobile Workforce State Income Tax Fairness and Simplification Act).

The MTC draft and the federal legislation adopt a different threshold number of days that a nonresident employee must work in a state before his or her employer must withhold. The federal legislation requires at least 30 days of in-state service during the calendar year (a reduction from 60 days in the original draft bill), while the MTC draft requires 20 days. The MTC draft also includes two requirements not included in the federal legislation: (1) the nonresident has no other in-state income; and (2) the nonresident's state of residence provides a "substantially similar" exclusion from wage withholding. However, both proposals provide that nonresident wages excluded for withholding

purposes are also excluded for purposes of determining the nonresident's personal income tax obligations (thus, both the employer and the employee are off the hook).

The MTC's draft and the federal bill also differ as to what constitutes a "day" for purposes of the respective thresholds (you guessed it, the MTC says one minute in the state is an entire day in the state). In contrast, the federal legislation adopts a much more reasonable "preponderance" of a day test to allocate wages to a state. For a more detailed analysis of the states' withholding requirements, please contact a member of the *Sutherland SALT* team.

The MTC draft will likely be expedited for approval in light of the looming federal bill and could be finalized as early as March 2010 for consideration at the MTC's July 2010 meeting. The Subcommittee will hold a conference call on January 22 to discuss the current draft. We live for MTC meetings and will be watching (and reporting) on future developments.

Oregon Considering Tax Rate Hikes That Would Apply Retroactively

With the U.S. Supreme Court expected to consider a petition for certiorari involving the constitutionality of retroactive tax law changes (see *Miller v. Johnson Controls*, 296 S.W.3d 392 (Ky. 2009)), other states are also trying their hand at retroactive tax increases. The Supreme Court has stated that the retroactive application of a statute satisfies procedural due process if it is: (1) supported by a legitimate legislative purpose; and (2) furthered by rational means, which includes an appropriate modesty (retroactivity) period. *United States v. Carlton*, 512 U.S. 26, 28 (1994). Given its growing state budget gap, Oregon is looking to raise last year's

(2009) individual and corporate income tax rates. The Oregon Department of Revenue is asking corporate and individual taxpayers to hold off filing their 2009 income tax returns until after a January 26 special election in which Oregon taxpayers will vote on Measure 67, which would raise the minimum corporate income tax, increase the corporate income tax rate (by 1.3%), and increase the top personal income tax rate. Although a retroactive period of only one year may satisfy due process concerns, retroactive rate changes is like rubbing salt in a wound of a tax professional responsible for financial reporting. Check back for further updates.

Upcoming California FTB Interested Parties Meetings on New Income Tax Provisions

The California Franchise Tax Board will conduct two interested parties meetings over the next few weeks to discuss proposed regulations addressing the single sales factor election and market sourcing rules that will become effective January 1, 2011. The meetings are intended to allow for public input on the content of the proposed regulations on these issues. Because both the single sales factor election and market sourcing rules establish new taxing positions for California, there is expected to be much discussion and debate on how these provisions are applied. The interested parties meetings will be held on January 28 (single sales factor) and February 10 (market sourcing).

Sutherland Elects Two to SALT Practice Partnership

The Sutherland SALT Practice is pleased to announce that Michele Borens and Marc A. Simonetti have been elected to the firm partnership effective January 1, 2010. Michele and Marc join SALT partners Jeff Friedman, Steve Kranz, Eric Tresh and Scott Wright.



BORENS

Michele Borens assists clients with all areas of multistate tax planning and controversy matters. She represents Fortune 100 companies in many of the critical state and local tax issues facing businesses today, and has developed extensive experience in attributional nexus and the taxation of In-

ternet businesses, income tax apportionment issues, and Maryland/Virginia/Washington, D.C., tax issues. Michele is resident in our Washington office.



SIMONETTI

Marc A. Simonetti represents clients in all areas of multistate tax planning, litigation and legislative analysis. He has developed a national reputation advising clients on the financial statement impact of state tax issues (including the requirements of FIN 48 and FAS 5) and assisting clients with New Jersey and New York state tax controversies. Marc is resident in our New York office.

Recently Seen and Heard

December 2, 2009

Tax Executives Institute (TEI) Rochester Chapter SALT Conference

Pilar Mata and Charlie Kearns on Non-Income Taxes: Past, Present and Future

Pilar Mata and Richard Call on Latest and Greatest State Tax Litigation

Marc Simonetti and Charlie Kearns on Combined Reporting
Marc Simonetti and Matthew Hedstrom on Unclaimed Property

December 10, 2009

TEI New York Chapter - 46th Annual Tax Symposium

Marc Simonetti on Tax Accounting Update: Best Practices for FIN 48/FAS 5/ Privilege

Continued on Page 3

SALT PET OF THE MONTH Pilar's Lucky Penny



Penny, a Tibetan terrier, made the move from California to Washington, D.C., one year ago to become a Sutherland SALT pet. Penny enjoys an active social life, with daily visits from her walker, Charlie, and weekly walks with her play group around Dupont Circle. Pilar notes that Penny is the smartest and most playful dog she has ever owned (and she is *not* Pilar's first dog): "I often see her sizing me up, trying to decide whether she really needs to cooperate with my requests — most often she refuses, but in a very sweet and mischievous way. You can't help but laugh." Although she is not eligible for frequent flyer miles, Penny is an expert traveler, having logged roughly 75,000 miles on United with trips to visit family and friends before settling down in D.C.

Continued from Page 2

Recently Seen and Heard

December 10, 2009

NCSL Fall Forum

Steve Kranz on Streamlined Sales and Use Tax Update and Benefits of Streamlined Sales and Use Tax versus Affiliate Nexus Approach

December 15, 2009

NYU's 28th Institute on State and Local Taxation

Jeff Friedman and Diann Smith on Penalties – How to Avoid Them, How to Contest Them

Marc Simonetti on What's Happening Everywhere Today?

December 21, 2009

Council On State Taxation (COST) Mid-Atlantic Regional Tax Seminar

Jeff Friedman and Michele Borens on State Tax Planning – Even More Important Now and on State Tax Penalties – Ouch & Likely Getting More Painful

Pilar Mata on Discussion of the Latest and Greatest in State Tax Litigation

Michele Borens and Marc Simonetti on State Tax Policy and Combined Reporting Updates

January 12, 2010

TEI Webinar Learning Network

Jeff Friedman and Pilar Mata on State and Local Tax Developments – The Dangers of Unreliable Intercompany Accounting in Separate Company States

U.S. Supreme Court State Tax Updates

Textron, Inc., has filed a petition for certiorari seeking review by the U.S. Supreme Court of the First Circuit's *en banc* decision in *United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009). The First Circuit held that Textron's tax accrual workpapers were not protected under the work product privilege because the documents were routinely required for non-litigation business reasons and were not "prepared for use in" litigation. In its certiorari petition, Textron emphasizes the split among the circuit courts as to the proper test to apply in determining whether documents are prepared "in anticipation of litigation" under Federal Rule of Civil Procedure 26(b)(3), with some circuits looking to whether the documents were prepared "because of litigation" and others looking to whether the "primary motivating purpose" of the document was to assist in litigation. We will continue to monitor this case, and we invite you to contact us for more information on the work product doctrine as applied by the States.

The U.S. Supreme Court agreed to hear (who hoo!) *Levin v. Commerce Energy*, Docket No. 09-223, which involves the question of federal jurisdiction over state controversies. The Ohio Department of Revenue has asked the Court to determine whether a federal court's jurisdiction over a state tax case, which arguably is not barred by the Tax Injunction Act, should nevertheless be barred based on the principle of "comity." The comity doctrine, which the Tax Injunction Act reflects, generally prohibits federal court jurisdiction over cases that unduly intrude into state sovereignty interests. In an earlier case, *Hibbs v. Winn*, 542 U.S. 88 (2004), the Court held that the Tax Injunction Act's bar did not apply to a challenge to a state tax credit, because the taxpayer was seeking only to bring more money into state coffers rather than interfering with state tax collections. In *Levin*, the U.S. Court of Appeals for the Sixth Circuit applied the same principle to a federal court challenge to Ohio's allegedly discriminatory sales tax exemption favoring local gas distribution companies over interstate marketers. In so doing,

the Court of Appeals rejected the views of other U.S. Courts of Appeals that the comity doctrine nevertheless bars federal court jurisdiction as an inappropriate intrusion into state tax controversies, even if the Tax Injunction Act does not bar the action under *Hibbs v. Winn*. The Court granted certiorari to resolve this conflict. Amicus briefs in support of the state were filed by the Multistate Tax Commission and by a number of states. Oral Argument is scheduled for March 22, 2010. If you are coming to town for the argument, let us know.

A taxpayer has asked the Court to determine whether the Due Process Clause barred a state court from limiting the application of its decision in favor of the taxpayer on a state law issue on prospective only basis. *Exelon Corp. v. Illinois Department of Revenue*, Docket No. 09-759, Cert. Petition filed December 22, 2009; response due January 28, 2010. The Illinois Supreme Court held that the taxpayer was entitled to investment tax credits, based on its determination (long denied by the Department of Revenue) that electricity was tangible personal property. After a request by the Department for a rehearing, and without affording the taxpayer an opportunity to respond, the state court modified its initial decision to apply its interpretation on a prospective basis only; therefore, depriving the taxpayer of any "backward looking relief." The result was to deny the taxpayer the right to \$80 million of credits to which (with the benefit of hindsight) it was entitled for a fourteen-year period. This case raises important issues associated with states limiting (or eliminating) refunds of illegally collected taxes, including the question whether the Supreme Court's decision in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932), holding that state court prospective-only decisions on state law issues do not implicate the Due Process Clause can be reconciled with U.S. Supreme Court decisions holding that retroactive legislation can violate substantive due process principles. See *United States v. Carlton*, 512 U.S. 26 (1994).

Pennsylvania Amnesty Program

The Pennsylvania Department of Revenue has issued guidelines for the 2010 Tax Amnesty Program. The Amnesty Program runs from April 26, 2010, through June 18, 2010, and covers all taxes administered by the Department of Revenue and owed to the state as of June 30, 2009. However, if a taxpayer has been contacted by the Department concerning the liability, the delinquency is not eligible for Amnesty. All penalties and one-half of the interest due will be waived for those who participate in the Amnesty. At the close of the Amnesty period, a 5% nonparticipation penalty will be imposed on all unpaid tax, penalty and interest that was not paid during the Amnesty period. Contact one of your friendly Sutherland SALT attorneys for more details on how and whether to participate.

Maryland Court of Special Appeals Issues *Classics* Decision

On January 4, 2010, the Maryland Court of Special Appeals issued a decision in the appeal of *In the Classics Chicago, Inc. v. Comptroller of the Treasury*, No. 2047 (Md. Ct. of Special Appeals, Jan. 4, 2010). Affirming the decision of the Circuit Court in favor of the Comptroller, the court held that Classics, an out-of-state subsidiary of Talbots with no physical presence in Maryland, had substantial nexus with Maryland sufficient to allow Maryland to impose its income tax. The court went on further to state that the proper test for determining substantial nexus is not a “two-prong sham transaction” test that was suggested to have been adopted by the court in *SYL*. Instead, the economic presence of the taxpayer should be sufficient to justify taxation.

Come See Us

January 24-29, 2010

COST 2010 Basics School

Georgia Tech Hotel and Conference Center – Atlanta, GA

Eric Tresh on Jurisdiction to Tax

Charlie Kearns on Streamlined Sales Tax – Changing the Landscape

January 26, 2010

TechAmerica State Government Affairs 2010 Winter Meeting

W Hotel – San Francisco, CA

Steve Kranz on State Taxation

January 28-29, 2010

19th Annual Ohio Tax Conference

Greater Columbus Convention Center - Columbus, OH

Eric Tresh on Multistate Sales and Use Taxation of Outsourced Services With Technology Components

January 29, 2010

National Conference of State Legislatures Task Force on State and Local Taxation of Communications and Electronic Commerce

Westin Savannah Hotel – Savannah, GA

Steve Kranz on Taxation of Digital Products, Streamlined Sales and Use Tax Governing Board Update, and Main Street Fairness Act

February 3, 2010

Governing Outlook in the States

National Press Club – Washington, DC

Steve Kranz on Taxing Business

February 4-5, 2010

National Multistate Tax Symposium

Disney's Grand Floridian Resort & Spa – Lake Buena Vista, FL

Marc Simonetti on “Sales Factor” With Regard to State Apportionment Issues

Jeff Friedman on Pending State Tax Legislation

February 5, 2010

Tax Analysts Conference on State Taxes on Internet Sales: Are “Amazon” Laws the Answer?

National Press Club – Washington, D.C.

Steve Kranz will participate in a discussion on the tax policies and constitutionality of state laws intended to tax Internet vendors

February 10, 2010

TEI Westchester/Fairfield Chapter Boot Camp

Marc Simonetti on State Combined Reporting

February 22, 2010

COST Sales Tax Conference and Audit Session

Westin Gaslamp – San Diego, CA

Steve Kranz on Electronic Commerce and the Taxation of Digital Products

February 24, 2010

TEI New York Chapter -- State and Local Tax Chapter Meeting

New York, NY

Jeff Friedman on recent expansion of combined and unitary reporting legislation by states and optional versus mandatory filing methods

Michele Borens and **Mark Yopp** on recent affiliate, attributional, and economic nexus developments and trends, including electronic commerce, and planning techniques to minimize nexus exposure

Marc Simonetti on trends in state tax audits and revenue enhancement at a time when taxpayers are trying to do more with less and general trends in appeals

Pilar Mata on recent tax legislation and trends in New York State

March 8-10, 2010

2010 Unclaimed Property Professionals Organization (UPPO) Annual Conference

Hyatt Regency Orange County - Orange County, CA

Diann Smith on when to bring in counsel or other experts in unclaimed property matters

Matthew Hedstrom on business to business exemptions, other exemptions, and when to use them

March 24, 2010

American Bar Association/Institute for Professionals in Taxation Advanced Sales and Use Tax Seminar

The Ritz-Carlton – New Orleans, LA

Steve Kranz on state tax treatment of bad debts and limitation of remedies

The Sutherland SALT Team



Michele Borens
202.383.0936
michele.borens@sutherland.com



Jeffrey A. Friedman
202.383.0718
jeff.friedman@sutherland.com



Stephen P. Kranz
202.383.0267
steve.kranz@sutherland.com



Marc A. Simonetti
212.389.5015
marc.simonetti@sutherland.com



Eric S. Tresh
404.853.8579
eric.tresh@sutherland.com



W. Scott Wright
404.853.8374
scott.wright@sutherland.com



Diann L. Smith
212.389.5016
diann.smith@sutherland.com



Richard C. Call
212.389.5031
richard.call@sutherland.com



Miranda K. Davis
404.853.8242
miranda.davis@sutherland.com



Jonathan A. Feldman
404.853.8189
jonathan.feldman@sutherland.com



Lisbeth A. Freeman
202.383.0251
beth.freeman@sutherland.com



Natanyah Ganz
202.383.0275
natanyah.ganz@sutherland.com



Matthew P. Hedstrom
212.389.5033
matthew.hedstrom@sutherland.com



Charles C. Kearns
404.853.8005
charlie.kearns@sutherland.com



Jessica L. Kerner
212.389.5009
jessica.kerner@sutherland.com



Pilar Mata
202.383.0116
pilar.mata@sutherland.com



J. Page Scully
202.383.0224
page.scully@sutherland.com



Jolie A. Sims
404.853.8057
jolie.sims@sutherland.com



Maria M. Todorova
404.853.8214
maria.todorova@sutherland.com



Mark W. Yopp
212.389.5028
mark.yopp@sutherland.com