State + Local Tax Group

New York

Craig B. Fields	cfields@mofo.com
Paul H. Frankel	pfrankel@mofo.com
Hollis L. Hyans	hhyans@mofo.com
Mitchell A. Newmark	mnewmark@mofo.com
R. Gregory Roberts	rroberts@mofo.com
Irwin M. Slomka	islomka@mofo.com
Open Weaver Banks	obanks@mofo.com
Roberta Moseley Nero	rnero@mofo.com
Amy F. Nogid	anogid@mofo.com
Michael A. Pearl	mpearl@mofo.com
Richard C. Call	rcall@mofo.com
Ted W. Friedman	tfriedman@mofo.com
Nicole L. Johnson	njohnson@mofo.com
William T. Pardue	wpardue@mofo.com
Rebecca M. Ulich	rulich@mofo.com
Kara M. Kraman	kkraman@mofo.com
Cindy M. Levine	clevine@mofo.com

San Francisco

Thomas H. Steele	tsteele@mofo.com
Andres Vallejo	avallejo@mofo.com
Peter B. Kanter	pkanter@mofo.com
James P. Kratochvill	jkratochvill@mofo.com
Scott M. Reiber	sreiber@mofo.com
Kirsten Wolff	kwolff@mofo.com

Sacramento

Eric J. Coffill	ecoffill@mofo.com
Jenny Choi	jennychoi@mofo.com
Leslie J. Lao	llao@mofo.com

Washington, D.C.

Linda A. Arnsbarger	arnsbarger@mofo.com
Philip M. Tatarowicz	ptatarowicz@mofo.com

Denver

Thomas H. Steele	tsteele@mofo.com

State + Local Tax Insights

Sales Tax Nexus Developments in California and Beyond: A Year in Review[1]

By Thomas H. Steele and Kirsten Wolff

The battlelines have shifted once again in the disputes over sales tax nexus and we bring you this installment to cover the major developments in these issues over the past year. Our previous articles analyzed Amazon's and other online retailers' attempts to challenge the requirements for remote (largely Internet-based) sellers to collect the states' sales taxes.[2] In our last installment, we reported on Amazon's efforts to take California's affiliate nexus law to the voters, which the company ultimately abandoned after reaching an agreement with the State to delay the effective date for one year, permitting Amazon time to lobby for federal legislation on the subject.[3]

Now, the one-year grace period has come and gone, federal legislation is still pending and California's new sales tax nexus statutes have gone into effect, as of September 15, 2012. In addition, Amazon is planning to build two large

(Continued on page 2)

Inside This Month

Sales Tax Nexus Developments

distribution centers in California and several in other states in order to shorten its shipping times.

In this article, we review the requirements of California's new law and analyze the proposed regulations recently issued by the State Board of Equalization ("SBE"), as well as bring you up to date on other sales tax nexus developments around the country. In addition, we provide an update on the status of pending federal legislation on this issue. Finally, we offer a few thoughts on the new direction this battle over sales tax nexus seems to be taking and the implications it might have for states and taxpayers.

California

California's statute, as amended last year, expands the definition of a "retailer engaged in business in this state" to include both: (i) any retailer that is a member of a commonly controlled group, of which another member "pursuant to an agreement with or in cooperation with the retailer, performs services in this state in connection with tangible personal property to be sold by the retailer;" and (ii) any retailer that has an affiliate in the state, that is, the retailer has entered into "an agreement or agreements under which a person or persons in this state, for a commission or other consideration, directly or indirectly refer[s] potential purchasers of tangible personal property to the retailer, whether by an Internet-based link or an Internet Web site, or otherwise," if minimum thresholds are met for sales based on referrals from the agreement (*i.e.*, $10,000) and for total sales by the retailer (*i.e.*, $1 million).[4] The statute expressly provides that advertising, whether on television, on radio, in print or on the Internet, does not trigger nexus, unless the compensation for the advertising service is by commissions based on the sale of tangible personal property.[5] With respect to Internet advertisements, nexus is not triggered unless the person displaying the advertisement "also directly or indirectly solicits potential customers in this state through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation . . . ."[6]

THE SBE CLARIFIES THAT MUCH STANDARD INTERNET ADVERTISING WILL NOT TRIGGER NEXUS UNDER THE STATUTE

The SBE's proposed regulations track the new statutory provisions, define a few key terms and provide examples that interpret the new statute in a manner that creates a safe harbor for certain types of Internet advertising relationships. First, the regulations expand on the term "commission or other consideration" by noting that this means any "consideration that is based upon completed sales of tangible personal property, whether referred to as a commission, fee for advertising services, or otherwise . . . ."[7] Thus, "commission" does not, apparently, extend to fees paid to an advertiser based on the number of times viewers "click" on the advertisement or based on the number of times customers complete a sale through an affiliate referral.

Second, the regulations define "advertisement" as "a written, verbal, pictorial, graphic, etc. announcement of goods or services for sale, employing purchased space or time in print or electronic media, which is given to communicate such information to the general public."[8] In addition, the regulations specifically address Internet advertising, noting that "[o]nline advertising generated as a result of generic algorithmic functions that is anonymous and passive in nature, such as ads tied to Internet search engines, banner ads, click-through ads, Cost Per Action ads, links to retailers' websites, and similar online advertising services, are advertisements and not solicitations."[9] "Solicitation," on the other hand, is defined as "a direct or indirect communication to a specific person or specific persons done in a manner that is intended to and calculated to incite the person or persons to purchase tangible personal property from a specific retailer or retailers."[10] In addition to these definitions, the SBE clarifies that much standard Internet advertising will not trigger nexus under the statute. For example, the proposed regulations specifically mention "Cost Per Action ads," which are advertisements for which the advertiser is paid a fee based on the number of specified actions by the viewer of the advertisement, *e.g.*, clicks on the ad or sales made after clicking through the ad to the retailer's website. One could certainly interpret the SBE's definition of "solicitation" to extend to this type of advertisement. Indeed, if the "Cost Per Action" compensation arrangement were to trigger nexus under the statute, it would presumably bring much of the Internet advertising within the framework of affiliate nexus. However, the SBE is apparently not inclined to take that draconian approach and has, instead, created a safe harbor for a certain segment of the Internet advertising industry.

The regulations' examples confirm that the SBE does not consider click-through advertisements paid based on

THE SBE DOES NOT CONSIDER CLICK-THROUGH ADVERTISEMENTS PAID BASED ON COMMISSIONS FOR SALES TO TRIGGER NEXUS

Upcoming 2013 Speaking Engagements

January 28
Council On State Taxation (COST) Basics School
Atlanta, Georgia
- "Constitutional Restrictions" Andres Vallejo

January 29 – 30
Ohio Tax Conference
Columbus, Ohio
- "Advanced: Issues in Alternative Apportionment, the MTC's Three-Factor Formula & The Gillette Decision" Craig B. Fields
- "Combined Reporting Issues Panel" Mitchell A. Newmark
- "Nexus Developments . . . Is There Any Place Left to Hide?" Craig B. Fields
- "Best & Worst of State Tax Administration and Justice vs. Injustice" Craig B. Fields

February 8
The National Multistate Tax Symposium
Orlando, Florida
- "Hot Topics in Credits and Incentives" Craig B. Fields
- "Significant Developments in State and Local Taxation" Craig B. Fields
- "Mandatory Unitary Combined Reporting Regimes" Hollis L. Hyans

March 22
Tax Executives Institute (TEI) State & Local Tax Day Los Angeles Chapter
Los Angeles, California
- "SALT Developments" Jenny Choi, Eric J. Coffill, Thomas H. Steele, Scott M. Reiber, Andres Vallejo and Kirsten Wolff

March 28
The Practicing Law Institute
New York, New York
- "State Income Tax Primer" Hollis L. Hyans

June 6 – 7
Oregon State Bar Tax Institute
Portland, Oregon
- "SALT Developments" Thomas H. Steele

June 18
Council On State Taxation (COST) NYC Regional Meeting
New York, New York
- Craig B. Fields, Hollis L. Hyans, Mitchell A. Newmark, R. Gregory Roberts and Andres Vallejo

June 26
Tax Executives Institute (TEI)
Valley Forge, Pennsylvania
- "West Coast State and Local Tax Updates" Eric J. Coffill
- "East Coast State and Local Tax Updates" Hollis L. Hyans

Sales Tax Nexus Developments

commissions for sales to trigger nexus under the new statute. In one example, the regulations describe a remote seller that has an agreement with an in-state entity to place click-through advertisements or links on the in-state entity's website.[11] The remote seller pays the in-state entity "commissions based upon the retailers' completed sales made to customers who click-through the ads or links . . . ."[12] In addition, the in-state website posts reviews of the products sold by the remote-seller. However, the example notes that the in-state entity "does not engage in any solicitation activities in California that refer potential customers to the retailer . . . ."[13] According to the example, nexus is not triggered for the remote seller by this relationship with the in-state website.[14]

In addition, the proposed regulations adopt New York's model for administration by specifying that a remote seller can establish that it does not have nexus based on its affiliate relationships by including certain terms in its contracts with in-state affiliates and obtaining an annual certification from those affiliates.[15] In particular, the contract with the affiliate should prohibit the affiliate from "engaging in any solicitation activities in California that refer potential customers to the retailer including, but not limited to, distributing flyers, coupons, newsletters and other printed promotional materials or electronic equivalents, verbal soliciting (*e.g.*, in-person referrals), initiating telephone calls, and sending e-mails . . . ."[16] In addition, the affiliate's annual certification should provide that the affiliate has not engaged in any of the prohibited solicitation in California and must be signed under penalty of perjury.[17] The retailer must accept the certification in good faith and have no "reason to know that the certification . . . [is] false or fraudulent."[18]

Assuming the proposed regulatory definitions of advertising and solicitation, along with the examples, are adopted, Internet sellers will be able to enter into contracts for quite a broad variety of online advertising without concern that those contracts will create nexus for the seller in California. This is consistent

Sales Tax Nexus Developments

with our long standing view that basic advertising should not be enough contact with a state to trigger nexus.[19] However, the California regulations take this a step further by expressly permitting online advertising with click-through ads that is compensated based on commissions for sales. We are encouraged by this indication that California apparently intends to adopt a measured approach in its new statutory definition of nexus.

BASIC ADVERTISING SHOULD NOT BE ENOUGH CONTACT WITH A STATE TO TRIGGER NEXUS

We had previously noted our concern that California's new statute was broader in scope than other states, based on the fact that it bases nexus on agreements with any "persons" in the state, whereas other statutes are limited to agreements with "residents."[20] Indeed, the SBE staff rejected requests made by interested parties during the rulemaking process to define "person" for this purpose as "an individual that is a California resident or a business legal entity that is commercially domiciled or headquartered in California."[21] The SBE noted that "person" is broadly defined in the statute and that "an individual does not need to be a resident of California and a legal entity does not need to be headquartered or domiciled in California in order to perform services in this state."[22]

In addition, the proposed regulations specifically provide that the only activities of an affiliate that matter for the purpose of determining whether those activities create nexus for the remote seller are the activities that the affiliate undertakes *in California*.[23] The SBE expressly noted that the affiliate nexus provisions apply only "*when an individual solicits potential customers under the retailer's agreement while the individual is physically present within the boundaries of California* . . . ."[24] This resolves our concern that the statutory language could be construed more broadly to create nexus based on an agreement with an affiliate that has presence in California but did not necessarily conduct the marketing activities on behalf of the out-of-state seller in California.[25]

In sum, the SBE's proposed regulations on California's new sales tax nexus statutes seem to take a relatively moderate approach to reaching online retailers. As mentioned above, Amazon has begun collecting sales tax on its California sales. Overstock.com, by contrast, terminated its agreements with California affiliates to avoid its collection obligation, citing its position that California's law is unconstitutional.[26] However, given the safe harbor set up in the proposed regulations, Overstock.com might well be able to reinstate its affiliate contracts–at least in some form–assuming the regulations are adopted.

THE SBE'S PROPOSED REGULATIONS ON CALIFORNIA'S NEW SALES TAX NEXUS STATUTES SEEM TO TAKE A RELATIVELY MODERATE APPROACH TO REACHING ONLINE RETAILERS

MOFO ATTORNEY NEWS

WELCOME: Morrison & Foerster's State + Local Tax Group would like to welcome **WILLIAM T. PARDUE** and **CINDY M. LEVINE**. Mr. Pardue joins us as an associate in the New York office. Ms. Levine joins us as an attorney in the New York office.

Developments in Other States

There have been several interesting developments in litigation, legislation and settlements across the country since we last reported on these issues.

Let's first take a look at the major litigation matters: Amazon's lawsuit against New York's trail-blazing affiliate nexus statute is now on appeal before that State's highest court, the Court of Appeals.[27] The appeal relates to a decision by the intermediate appellate court (*i.e.*, the Appellate Division) that rejected Amazon's facial constitutional challenges to the statute, concluding that Amazon was unable to establish that there was "no set of circumstances" in which the law could be validly applied.[28] However, the Appellate Division also concluded that the record was insufficient to determine whether the law might be unconstitutional as applied to Amazon's facts and sent the case back to the trial court for a determination of the merits of the as-applied challenges.[29] After engaging in discovery for over a year, Amazon has now dropped its as-applied challenges in order to bring the facial challenge before the State's highest court.[30]

The cases brought by two marketing trade organizations met with initial successes. As we have previously reported, the Direct Marketing Association sued Colorado over its law that would have required out-of-state sellers to comply with certain notification and reporting requirements, including sending the State an annual list of Colorado customers and their purchases on which sales tax was not collected.[31] The trial court issued a preliminary injunction and has now made the injunction permanent.[32] The State has

Sales Tax Nexus Developments

appealed the decision.[33] Another trade organization, the Performance Marketing Association, sued Illinois over its affiliate nexus law and won in the trial court, which held that the law "fails the 'substantial nexus' requirement for state use tax collection and reporting obligations under the Commerce Clause . . . ."[34] The State is appealing directly to the Illinois Supreme Court on the grounds that the judgment declares the State statute invalid.[35]

The state legislatures have slowed a bit in introducing new affiliate nexus laws. For example, Minnesota's legislature introduced a new nexus statute, but it failed to pass before the conclusion of the legislative session and, therefore, is effectively dead.[36] This is the second year in a row in which a new nexus law was introduced, but not passed, in Minnesota.

Most of the recent legislative developments have involved agreements by the states to extend the effective date of new nexus provisions in exchange for Amazon's development of new distribution centers in those states. Amazon brokered the first of these agreements with Tennessee and South Carolina. Since then, Amazon has reached similar agreements with

THE STATE LEGISLATURES HAVE SLOWED A BIT IN INTRODUCING NEW AFFILIATE NEXUS LAWS

New Jersey, Texas, Nevada, Arizona, Indiana, Virginia, Pennsylvania and, of course, California, although the grace period under that agreement has already expired, as described above. Amazon's agreements with Texas and Arizona also settled assessments of back taxes by those States (for $269 million and $53 million, respectively).[37] As of the time of this writing, the press is reporting that Amazon has recently agreed to collect sales tax in Massachusetts beginning on November 1, 2013.[38]

ONE MIGHT WELL WONDER WHETHER *QUILL'S* PHYSICAL PRESENCE REQUIREMENT FOR CONSTITUTIONAL NEXUS CAN SURVIVE

National Legislation

Concurrent with its effort to negotiate with individual states regarding the terms on which it will begin to collect sales tax, Amazon has been lobbying for a uniform, national solution. There are currently three bills pending in Congress on this issue.[39] Each piece of legislation proposes a slightly different approach, but all three would authorize states to require out-of-state sellers to collect use taxes, even absent physical presence in the state, and effectively overrule the twenty-year old U.S. Supreme Court decision in *Quill*.[40]

The Main Street Fairness Act would require states to conform to the Streamlined Sales and Use Tax Agreement in order to obtain authorization to require use tax collection.[41]

The Marketplace Equity Act would give states collection authority with fewer simplification requirements and, thus, satisfy large states such as California.[42] If enacted, this bill would require states to have remote sellers file only one sales and use tax return per state. The bill would also give remote sellers the option of collecting sales tax based on one blended rate per state (rather than differing rates for each relevant locality), the maximum state rate imposed, or the rate in the locality into which the product is sold. The proposal would exempt from the collection requirement vendors with less than $1 million in annual remote sales or less than $100,000 in annual remote sales into any one state.

The third bill, the Marketplace Fairness Act, adopts a system of rules for sourcing transactions and also contemplates a system of consolidated certified service providers that will assume responsibility for sales and use tax collection and filing responsibilities for remote sellers on an aggregated basis.[43]

Reflections on the Shifting Battlelines

Notwithstanding victories in the lower courts in Illinois and Colorado, in challenges to those states' efforts to impose obligations on out-of-state sellers, the trend over the past several months has clearly been toward increased sales tax collection by online retailers, in particular, Amazon. Of course, Amazon's agreement to collect state sales and use taxes has been coupled with its increased physical presence in those states by way of many new distribution facilities. At least in California, Amazon has attempted to extract even more value from this change of strategy by negotiating agreements with the cities in which the new distribution centers will be located to obtain rebates of a portion of the sales tax revenue that will be generated by the cities as a result of those centers.[44] Amazon may get as much as 75-80% of the sales tax revenue for Patterson and San Bernardino for the first few years during which the distribution centers are operational.[45]

Although Amazon has apparently determined to work for uniform national collection responsibilities, other online retailers continue to oppose the federal legislative efforts. Notably, eBay and Overstock.com are lobbying against the recent legislation as part of the group NetChoice. This organization, along with another lobbying group of over 1,000 smaller companies called WE R HERE ("Web Enabled Retailers Helping Expand Retail Employment"), is focused on raising the annual sales threshold so that smaller retailers would be exempt from the collection requirements.[46]

Sales Tax Nexus Developments

THE INITIAL RESULTS INDICATE THAT ONLINE SHOPPERS HAVE NOT CURBED THEIR SPENDING DUE TO THE NEW ADDITION OF THAT SALES TAX CHARGE TO THE BILL

Thus, there now appears to be a divide over the *Quill* holding not only between Internet and brick and mortar sellers but also in the Internet seller community itself. In the face of these developments, one might well wonder whether *Quill*'*s* physical presence requirement for constitutional nexus can survive. Moreover, it seems that the online retail industry (represented, voluntarily or not, by Amazon) and states are now negotiating agreements in which remote sellers will collect sales and use taxes under certain circumstances typically following a physical expansion into the state combined with a safe harbor period to come into compliance. On the bright side, California's proposed regulations may be a harbinger of a new era in which the concept of solicitation that creates attributional nexus is clarified such that states will seek to force remote sellers to collect tax only when the in-state affiliates are truly soliciting sales. Only time will tell. In the meantime, the initial results indicate that online shoppers have not curbed their spending due to the new addition of that sales tax charge to the bill.[47] ■

1 The authors would like to thank Lauren Volkmann for her assistance with this article.

2 Thomas H. Steele and Kirsten Wolff, *Reflections on the Current State of "Attributional Nexus": When May a State Use the Presence of an In-State Entity to Claim Jurisdiction Over an Out-of-State Seller*, *in* University of Southern California Gould School of Law 61st Tax Institute – Major Tax Planning 2009 (Matthew Bender 2009); Thomas H. Steele and Kirsten Wolff, *Battle California! Sales Tax Nexus Gets Even More Interesting*, 61 State Tax Notes 699, (Sept. 12, 2011); Thomas H. Steele, Andres Vallejo and Kirsten Wolff, *No Solicitations: The "Amazon" Laws and the Perils of Affiliate Advertising*, 59 State Tax Notes 939 (Mar. 28, 2011).

3 Thomas H. Steele and Kirsten Wolff, *Battle California! Sales Tax Nexus Gets Even More Interesting*, 61 State Tax Notes 699 (Sept. 12, 2011).

4 Cal. Rev. & Tax. Code § 6203(c)(4), (c)(5)(A).

5 *Id.* § 6203(c)(5)(B).

6 *Id.* § 6203(c)(5)(C).

7 *Collection of Use Tax by Retailers*, Cal. Code Regs. tit. 18 § 1684(c)(3) (proposed Apr. 6, 2012).

8 *Id.* § 1684(c)(8)(A).

9 *Id.*

10 *Id.* § 1684(c)(8)(E).

11 *Id.* § 1684(c)(9)(A).

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* § 1684(c)(7)(B).

16 *Id.* § 1684(c)(7)(A)(i).

17 *Id.* § 1684(c)(7)(B).

18 *Id.* § 1684(c)(7)(C).

19 Thomas H. Steele and Kirsten Wolff, *Reflections on the Current State of "Attributional Nexus": When May a State Use the Presence of an In-State Entity to Claim Jurisdiction Over an Out-of-State Seller*, *in* University of Southern California Gould School of Law 61st Tax Institute – Major Tax Planning 2009 (Matthew Bender 2009); Thomas H. Steele and Kirsten Wolff, *Battle California! Sales Tax Nexus Gets Even More Interesting,* 61 State Tax Notes 699 (Sept. 12, 2011); Thomas H. Steele, Andres Vallejo and Kirsten Wolff, *No Solicitations: The "Amazon" Laws and the Perils of Affiliate Advertising*, 59 State Tax Notes 939 (Mar. 28, 2011).

20 Thomas H. Steele and Kirsten Wolff, *Battle California! Sales Tax Nexus Gets Even More Interesting*, 61 State Tax Notes 699, 702 (Sept. 12, 2011).

21 Cal. State Bd. of Equalization, Initial Statement of Reasons for Adoption of Proposed Amendments to California Code of Regulations, Title 18, Section 1684, *Collection of Use Tax by Retailers*, at 17 (Apr. 6, 2012).

22 *Id.*; *see* Cal. Rev. & Tax. Code § 6005.

23 *Collection of Use Tax by Retailers*, Cal. Code Regs. tit. 18 § 1684(c)(3) (proposed Apr. 6, 2012).

24 Cal. State Bd. of Equalization, Initial Statement of Reasons for Adoption of Proposed Amendments to California Code of Regulations, Title 18, Section 1684, *Collection of Use Tax by Retailers*, at 20 (Apr. 6, 2012) (emphasis added).

25 Thomas H. Steele and Kirsten Wolff, *Battle California! Sales Tax Nexus Gets Even More Interesting*, 61 State Tax Notes 609, 703 (Sept. 12, 2011).

26 Aarti Shahani, *California Online Sales Tax Faces Enforcement Hurdle*, National Public Radio (Sept. 14, 2012), http://www.npr.org/2012/09/14/161083090/california-online-sales-tax-faces-enforcement-hurdle.

27 *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 81 A.D.3d 183 (N.Y. App. Div. 2010), *appeal filed* (N.Y. Feb. 2012).

28 *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 81 A.D.3d 183, 194 (N.Y. App. Div. 2010) (discussing the standard for facial challenges in *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

29 *Amazon.com, LLC*, 81 A.D.3d at 207.

30 *Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 81 A.D.3d 183 (N.Y. App. Div. 2010), *appeal filed* (N.Y. Feb. 2012).

31 *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo. Mar. 30, 2012).

32 *Id.*

33 *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo. Mar. 30, 2012), *appeal docketed*, No. 12-1175 (10th Cir. Apr. 30, 2012).

34 *Performance Mktg. Ass'n, Inc. v. Hamer*, No. 2011 CH 26333 (Ill. Cir. Ct. May 7, 2012).

35 Ill. Sup. Ct., R. 302(a); *Performance Mktg. Ass'n, Inc. v. Hamer,* No. 2011 CH 26333 (Ill. Cir. Ct. May 7, 2012), *cert. granted*, No. 114496 (Ill. June 22, 2012).

36 S.F. 2391, 2011-2012 Leg., 87th Sess. (Minn. 2012); H.F. 1849, 2011-2012 Leg., 87th Sess. (Minn. 2012).

37 *See* Amazon.com, Inc. Form 10-Q, filed Oct. 27, 2012; Amazon.com, Inc. Form 10-Q, filed April 27, 2012.

38 Greg Bensinger, *Amazon, Massachusetts Strike Deal for Residents on Sales Tax*, The Wall Street Journal, Dec. 11, 2012, http://online.wsj.com/article/SB10001424127887324339204578173882410132440.html.

39 The Main Street Fairness Act, S. 1452, 112th Congress (2011), H.R. 2701, 112th Congress (2011); The Marketplace Equity Act, H.R. 3179, 112th Congress (2011); The Marketplace Fairness Act, S. 1832, 112th Congress (2011).

40 *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

41 S. 1452, 112th Congress (2011); H.R. 2701, 112th Congress (2011).

42 H.R. 3179, 112th Congress (2011).

43 S. 1832, 112th Congress (2011).

44 Marc Lifsher, *Amazon poised to get a cut of California sales taxes*, Los Angeles Times (May 19, 2012), http://articles.latimes.com/2012/may/19/business/la-fi-amazon-sales-taxes-20120520.

45 *Id.*

46 Paul Demery, *Small e-retailers mobilize to lobby against online sales tax collection*, Internet Retailer (Sept. 14, 2012), http://www.internetretailer.com/2012/09/14/small-e-retailers-mobilize-lobby-against-online-sales-tax.

47 Greg Bensinger, *The Sales-Tax Effect on Amazon: Nada*, The Wall Street Journal (Sept. 17, 2012), http://blogs.wsj.com/digits/2012/09/17/the-sales-tax-effect-on-amazon-nada/.

Recent MoFo State + Local Taxpayer Victories

The State + Local Tax Group diligently works throughout the year to favorably resolve our clients' tax disputes. Although we resolve the vast majority of matters before going to trial, the following are some of our recent published taxpayer victories:

1. ***EchoStar Satellite Corporation v. New York State Tax Appeals Tribunal***

   The New York Court of Appeals ruled that when a satellite television provider purchases equipment that is subsequently leased to its customers for a separately stated fee on which it collected and remitted sales tax, that purchase is exempt from the State's sales and use taxes. Read the decision here.

2. ***Reynolds Metals Co. v. Michigan Dep't of Treasury***

   The Michigan Court of Appeals agreed that the unitary business principle applies to the Single Business Tax and that a corporation's gain from the sale of its interest in a foreign joint venture was not includable in the tax base since none of the elements of a unitary business were present between the corporation and the joint venture. Read the decision here.

3. ***Scioto Insurance Co. v. Oklahoma Tax Comm'n***

   The Oklahoma Supreme Court decisively held that a company was not subject to Oklahoma's corporate net income tax as a result of receiving payments under a licensing contract that was not made in the State of Oklahoma and no part of which was to be performed in Oklahoma. Read the decision here.

4. ***GMRI, Inc. v. California***

   The California State Board of Equalization determined that sales tax is not due on gratuities that are included on checks of parties of eight or more when customers of Red Lobster and Olive Garden restaurants changed the gratuity from the amount suggested on the menu. See the decision here.

5. ***Powerex Corp. v. Oregon Dep't of Revenue***

   The Oregon Tax Court granted victory to the taxpayer and held that a corporation's sales of electricity were sales other than sales of tangible personal property. Accordingly, the revenue from the sales of electricity could not be sourced to Oregon for purposes of the corporation's Oregon sales factor. Read the decision here.

6. ***E.I. du Pont de Nemours & Co. v. Michigan Dep't of Treasury***

   The Michigan Court of Appeals held that a corporation was not required to include the capital gains from the sale of its interest in a partnership in its Single Business Tax base because the corporation did not operate a unitary business with the joint venture. The court also held that the corporation was entitled to include receipts from foreign exchange contracts in the denominator of its sales factor. Read the decision here.

WE HAVE ACHIEVED TAXPAYER VICTORIES AROUND THE COUNTRY INCLUDING IN: CALIFORNIA, MICHIGAN, NEW YORK AND OKLAHOMA

7. ***IGT v. Director, New Jersey Div. of Taxation***

   The New Jersey Tax Court rejected the Division of Taxation's attempt to deprive the taxpayer of nearly four years of interest. The court held that as N.J.S.A. 54:49-14a barred taxpayers from filing refund claims once an assessment has been challenged and, but for the Throw-Out issue, the corporation was otherwise due a refund, the refund interest runs from the date the protest was filed and not the date of the final determination. Read the decision here.

8. ***NIHC, Inc. v. Maryland Comptroller of the Treasury***

   The Maryland Circuit Court again granted victory to this corporation. The case involved a reportable gain under IRC Section 311(b), which the corporation was initially required to defer for federal tax purposes. The Circuit Court held that the deferred gain when reported on the federal consolidated return is not included in the Maryland income tax return because, under Maryland's separate company reporting regime, each member of a consolidated group reports its separate company income without regard to consolidation. Read the decision here.

9. ***Meredith Corporation v. New York State Tax Appeals Tribunal***

   The New York Appellate Division, Third Department, granted the corporation's request for refund of corporate franchise taxes. The court held that regardless of its mode of delivery–by satellite or via tangible media–certain programming acquired for broadcast at the corporation's television stations was tangible personal property for purposes of the property factor of the business allocation percentage. Read the decision here.

10. ***Wendy's Int'l, Inc. v. Virginia Dep't of Taxation***

    A Virginia Circuit Court held that a corporation was entitled to a refund of corporate income tax paid with respect to the addback of intangible expenses as Wendy's qualified for one of the "safe-harbor" exceptions to the addback. The Virginia Supreme Court refused the Department of Taxation's petition for appeal. Read the decision here.

Exploring the Subject to Tax Exception to Addback Statutes

By Craig B. Fields and Richard C. Call

Statutes requiring taxpayers to add back royalties or interest paid to related members have been around for two decades and have now been adopted by over 20 states. Audit issues with respect to addback statutes are common, but only a few courts have addressed these statutes despite their long existence. However, we are aware of several addback cases working their way through state administrative and judicial systems, including a recent taxpayer victory in Virginia.[1] Given this heightened activity, a discussion of addback statutes is appropriate.

Many of the states with addback statutes have some form of a "subject to tax" exception (*i.e.*, if the exception is applicable, the addback is not required). The basic premise of such an exception is that the related member recipient's taxability in a jurisdiction may justify the claiming of the interest or royalty expense deduction by the taxpayer that pays the expense. Beyond this simple premise, however, the states' laws and the applications and interpretations of such laws are varied. Questions raised by such exceptions include: (1) whether payments of tax to certain states qualify for the exception; (2) what rate of tax the recipient must pay to a jurisdiction to qualify for the exception; and (3) how net operating losses affect the subject to tax exception. This article examines some of the states' approaches and suggests ways to successfully claim the subject to tax exception.

Overview

Many states have codified the subject to tax exception.[2] Other states have adopted the subject to tax exception by regulation.[3] Importantly, a state's subject to tax exception may not apply to both interest and royalty addbacks or the exception may be applied differently by state taxing authorities depending on whether interest or royalties are involved.[4] Furthermore, although we will not address such issues in this article, taxpayers should be aware that some states incorporate a business purpose or economic substance requirement into their subject to tax exceptions.[5] Additionally, taxpayers that do not qualify for a state's subject to tax exception may qualify for other exceptions to addback statutes that are not addressed in this article.

What Jurisdictions Count?

Variations exist among the states as to which states count for the subject to tax exception. Some state laws or state taxing agencies allow the subject to tax exception only when the expense is paid to a related member that is a taxpayer in that state or is a taxpayer in a "separate entity" state as described below.

Same State

The New Jersey Division of Taxation's regulations and forms provide that the subject to tax exception for royalty payments is permitted if the related member recipient of the income is subject to tax in New Jersey (assuming certain tax rate requirements are met).[6] However, the exception is not granted for payments to other states.[7] By contrast, the New Jersey statutes permit the subject to tax exception for interest when the related member recipient is subject to tax in other states (as long as other conditions are also met).[8] As discussed below, the Division of Taxation's position that allows the subject to tax exception for royalty payments only when the related member is subject to tax in New Jersey may be facially discriminatory and should be extended to apply to the extent that related members are subject to tax in foreign jurisdictions or in states other than New Jersey.

Separate Entity v. Combined Reporting

Some states or state taxing agencies have taken the position that the subject to tax exception is not available when the related member is subject to tax in a combined reporting state.[9] Some state taxing authorities justify this approach by reasoning that the net effect of combined reporting purportedly results in a wash for tax purposes.[10] Such reasoning is flawed and combined reporting states should not be excluded from the states for which a state's subject to tax exception may apply. Consider, for example, a taxpayer that successfully claims the subject to tax exception in State Y for royalty payments made to a related member that was subject to tax in Massachusetts in 2008 when Massachusetts was a separate entity state. The taxpayer's and related member's operations did not change from 2008 through 2009. However, Massachusetts adopted combined reporting for 2009. The taxpayer would be unable to claim the deduction for the royalty payments for 2009 even though everything but the Massachusetts law remained unchanged.

Constitutionality?

Granting the subject to tax exception based on subjectivity to tax in one state but not in another state or jurisdiction raises Constitutional questions. The Commerce Clause of the U.S. Constitution prohibits state taxes that discriminate against interstate commerce by favoring activities conducted in some, but not all, other states. In *New Energy Co. of Indiana v. Limbach*, the U.S. Supreme Court struck down an Ohio tax statute that provided a tax credit for ethanol produced in some states but not in other states.[11] Specifically, the Ohio statute gave tax credits for ethanol produced in states that taxed

Subject to Tax Exception

ethanol in the same manner as Ohio (*i.e.*, granting tax credits for ethanol production). However, no credit was given to an ethanol producer that was located in a state that provided benefits to the ethanol industry through subsidies instead of through tax credits. Therefore, the credit mechanism discriminated against interstate commerce. Similarly, granting the subject to tax exception for activity conducted in states with a certain type of taxing regime (*i.e.*, separate entity) but not for the same activity conducted in other states (*i.e.*, combined reporting) discriminates against interstate commerce.

Statutory v. Effective Tax Rate Comparisons

Some states' subject to tax exceptions require that the related member pay tax at or above a certain rate of tax or tax rate as compared to the taxpayer's rate of tax or tax rate to satisfy the subject to tax exception.[12] Differing approaches exist as to how these comparisons are to be computed. The following paragraphs contrast two State taxing authorities' methods–New Jersey and Massachusetts–for making this comparison. Importantly, taxpayers may have avenues for claiming the subject to tax exception other than the methods described below.

New Jersey – Effective Tax Rate Compared to Effective Tax Rate

The New Jersey statutes allow the subject to tax exception for interest payments made to a related member when the related member is subject to tax in a state, the interest is included in the related member's measure of tax and "the rate of tax applied to the interest received by the related member is equal to or greater than a rate three percentage points less than the *rate of tax* applied to taxable interest by this State."[13] In *Beneficial New Jersey, Inc. v. Director, Division of Taxation*, the dispute was whether the phrase "rate of tax" means the statutory or effective tax rate (*i.e.*, whether the subject to tax exception was based on comparing the statutory tax rates of the taxpayer and the related member or the effective tax rates of the taxpayer and the related member).[14] The judge held that the exception was based on an effective tax rate comparison, which was the position adopted by the Division of Taxation ("Division") by regulation and in the mechanics of New Jersey's Schedule G-2.

Under an effective tax rate to effective tax rate comparison method, a taxpayer that has a high apportionment factor in New Jersey may have increased difficulty claiming the subject to tax exception because it would have a high New Jersey effective tax rate. By contrast, a taxpayer that has a low apportionment factor may be able to more easily qualify for the subject to tax exception. When a taxpayer's New Jersey apportionment factor is less than approximately 33.33%, any payment of tax by the related member recipient of the interest in another separate entity state should qualify for the subject to tax exception because the taxpayer's effective tax rate would be below 3% (33.33% apportionment factor * 9% tax rate = 3% effective tax rate). Therefore, any effective tax rate above 0% would be within three percentage points of the taxpayer's effective tax rate. Another interesting result of the Division's method is that if a related member recipient of the income is subject to tax in New Jersey at the same apportionment percentage as the taxpayer then the taxpayer should be permitted a full exception.

Massachusetts – Statutory Tax Rate Compared to Effective Tax Rate

The Massachusetts Department of Revenue ("Department") takes an approach different from the New Jersey Division. The Department promulgated a regulation applying both full and partial exceptions to the intangible and interest expense addback when the taxpayer establishes that the related member is taxed on the corresponding income.[15] A full exception (*i.e.*, full deduction of royalties paid) is allowed when the related member is taxed on the corresponding income at "an aggregate effective rate of tax that is within three percentage points of the taxpayer's statutory rate of tax" (*i.e.*, based on a comparison of the related member's effective tax rate and the taxpayer's statutory tax rate).[16] If a taxpayer is unable to satisfy the requirement for the full exception, a partial exception may be available. The partial exception to the addback is allowed *to the extent* that the interest or intangible expense is paid to a related member that is subject to tax.[17]

Under the Department's approach, if the related member recipient of the income was also a taxpayer in Massachusetts and had the same apportionment percentage as the payor, the payor would not be granted a full exception as a result of the related member's payment of tax to Massachusetts (unless, for example, the two entities' Massachusetts apportionment percentages were 100%).[18] This result seems illogical inasmuch as Massachusetts would not be deprived of any of the tax it would have received had the payor never paid the expense.

Net Operating Losses

Some state taxing authorities have taken the position that the subject to tax exception does not apply when a related member is subject to tax but is in a loss position for the tax year. For example, under the Connecticut statutes the subject to tax exception applies when:

> [T]he related member was subject to tax on its net income in [Connecticut] or another state or possession of the United States or a foreign nation; (ii) a measure of said tax included the interest received from the corporation; and (iii) the rate of tax applied to the interest received by the related member is no less than the statutory rate of tax applied

Subject to Tax Exception

> to the corporation under [the Connecticut statutes], minus three percentage points . . . .[19]

The Connecticut Department of Revenue Services has taken the position that this statute means a taxpayer may not claim this exception when the related party has a net operating loss.[20] However, the plain language of Connecticut's statute is silent with respect to net operating losses. Moreover, such an approach is improper because it bases the tax consequences of one taxpayer on the profitability of another, albeit related, corporation. Consider, for example, a taxpayer that successfully claims the subject to tax exception for royalties paid to a related member that is not in a loss position for years one through four. The taxpayer's operations do not materially change from years one through five. However, in year five the related member is in a loss position. Failing to grant the subject to tax exception would mean that the taxpayer's tax consequences change year to year despite the fact that its operations have not changed.

The "Reverse" Subject to Tax Exception

We have discussed above exceptions that allow a taxpayer to claim a deduction for amounts paid to a related member. Some states permit what might be termed the "reverse" subject to tax exception. In this scenario, the payor is required to add back the expense (*i.e.*, it does not ultimately deduct the payment) and the related member recipient of the income excludes the royalties received from the payor under certain circumstances. For instance, Maryland allows a royalty recipient to claim a deduction if the royalty payor added back the royalties in any state or foreign jurisdiction (if certain other conditions including a comparison of "aggregate effective tax rates" are satisfied).[21]

In some cases, the exclusion is allowed only when the royalty payor is subject to tax in the state in which the recipient seeks to exclude the income. For example, Connecticut now has an economic nexus statute the Department of Revenue Services may use to assert that a company deriving receipts from licensing in Connecticut is subject to tax in Connecticut.[22] However, in administrative guidance, the Department of Revenue Services has provided that a corporation with economic nexus is not required to include in its income those amounts added back for Connecticut tax purposes by a related member payor.[23]

Another interesting statute is the New York statute which provides that "a taxpayer shall be allowed to deduct royalty payments directly or indirectly received from a related member during the taxable year to the extent included in the taxpayer's federal taxable income unless such royalty payments would not be required to be added back under [the New York Tax Law]."[24] Presumably, this exception would allow related member recipients that are subject to tax in New York to deduct royalties received from related members that are New York taxpayers. Additionally, the statute's use of the phrase "*would* not be required to be added back" leaves open the possibility that a royalty recipient could deduct royalties received from a non-New York taxpayer so long as the payor would be required to add back the royalties if it were subject to tax in New York.[25]

Conclusion

Many variations exist in the statutes and regulations that implement the subject to tax exception to addbacks as well as the state taxing agencies' application of such laws. We have discussed above some of those variations. In our experience, each state's subject to tax exception presents different challenges and avenues for successfully claiming the subject to tax exception that taxpayers should consider in preparing returns and defending their positions on audit and in appeals. ■

1 In *Wendy's Int'l, Inc. v. Virginia Dep't of Taxation*, No. CL09-3757 (Va. Cir. Ct. Mar. 29, 2012), the court held that the taxpayer was entitled to a refund of corporate income tax paid with respect to the addback of royalties. Morrison & Foerster LLP represented Wendy's in this matter.

2 *See, e.g.*, Conn. Gen. Stat. § 12-218d(c) (only applies to interest addback); Ind. Code § 6-3-2-20(c)(2); Ohio Rev. Code Ann. § 5733.055; Va. Code Ann. § 58.1-402(B)(8)(a)(1).

3 *See, e.g.*, 830 Mass. Code Regs. § 63.31.1(4) (Massachusetts' rules provide the subject to tax exception under the "unreasonable" exception contained in Massachusetts General Laws chapter 63, Sections 31I(c) and 31J(a)); N.J. Admin. Code § 18:7-5.18(b)(3) (adopting a subject to tax exception for interest and royalties).

4 Connecticut's subject to tax exception is available for interest but not royalties. Conn. Gen. Stat. § 12-218c (intangible addback); *id.* § 12-218d(c) (relating to the interest addback).

5 *See, e.g.*, *id.* § 12-218d(c); N.J. Stat. Ann. § 54:10A-4(k)(2)(I)(i).

6 N.J. Admin. Code § 18:7-5.18(b)(3).

7 *Id.*

8 N.J. Stat. Ann. § 54:10A-4(k)(2)(I)(iii).

9 *See, e.g.*, N.J. Admin. Code § 18:7-5.18(a)(5), Example 5; Ohio Rev. Code Ann. § 5733.055(A)(2).

10 *See, e.g.*, N.J. Admin. Code § 18:7-5.18(a)(5), Example 5.

11 *New Energy Co. v. Limbach*, 486 U.S. 269 (1988).

12 *See, e.g.*, Mass. Gen. Laws ch. 63, § 31J(b)(iii)(c); N.J. Stat. Ann. § 54:10A-4(k)(2)(I); Wis. Stat. § 71.80(23)(a)(2).

13 N.J. Stat. Ann. § 54:10A-4(k)(2)(I) (emphasis added).

14 *Beneficial N.J., Inc. v. Director, Div. of Taxation,* No. 009886-2007 (N.J. Tax Ct. 2010) (not approved for publication).

15 830 Mass. Code Regs. § 63.31.1(4) (promulgated June 16, 2006).

16 *Id.* § 63.31.1(4)(a)(1).

17 *Id.* § 63.31.1(4)(b)(1).

18 The taxpayer may be able to deduct additional amounts paid to a related member as a result of the related member being subject to tax in other states in addition to Massachusetts.

19 Conn. Gen. Stat. § 12-218d(c). The statute also contains other requirements for the exception such as that "the interest is paid pursuant to a contract that reflects an arm's length rate of interest . . . ." *Id.*

20 Form CT-1120AB, p. 2 (Conn. Dep't of Revenue Servs., 2010). Connecticut also does not allow a subject to tax exception for combined returns.

21 Md. Code Ann., Tax-Gen. § 10-306.1(f).

22 Conn. Gen. Stat. § 12-216a; Info. Pub. 2010(29.1) (Conn. Dep't of Revenue Servs., Dec. 28, 2010).

23 Info. Pub. 2010(29.1) (Conn. Dep't of Revenue Servs., Dec. 28, 2010).

24 N.Y. Tax Law § 208(9)(iii)(o)(3).

25 *Id.* (emphasis added).

To Each Its Own: Procedural and Jurisdictional Considerations for Recently Enacted State Tax Tribunals

By Roberta Moseley Nero and Ted W. Friedman

Introduction

An increasing number of states have established independent tribunals designed to resolve tax disputes between taxpayers and the respective agency tasked with collecting and administering state taxes.[1] While the Model State Administrative Tax Tribunal Act ("Model Act"), adopted by the American Bar Association in August of 2006, has served as a template for some state legislatures, no two tax tribunals are identical. Accordingly, the increase in tax tribunals has brought with it a corresponding need to understand exactly how each of these forums functions and in what respects they differ.

Identifying, analyzing and comprehending the nuances of today's tax tribunals is crucial because, first and foremost, taxpayers and their counsel must be aware of whether pursuing an appeal to an independent tribunal is the only option available or whether there is also a court with concurrent jurisdiction that can hear an appeal. If there is a court with concurrent jurisdiction, a taxpayer must determine which procedural option is better under the facts and circumstances of the particular case.

In addition, the statutes and rules governing the various state tribunals will substantially impact the course of a taxpayer's proceedings, should a tribunal be utilized. For example, the timing of when an appeal must be filed with a tribunal can vary from state to state, as can the level of expertise of those hearing the appeal and the extent and scope of discovery permitted.

In this article, we examine the four most recently enacted state tax tribunals–in Georgia, Illinois, Maine and Mississippi–and highlight some of the significant provisions governing each, as well as the differences between them, with an eye towards raising issues that should be contemplated when working through a state tax appeal.

Newly Enacted Tribunals: Georgia, Illinois, Maine and Mississippi

Georgia Tax Tribunal

On April 19, 2012, Governor Nathan Deal approved the Georgia Tax Tribunal Act of 2012 ("Georgia Act"), which created the Georgia Tax Tribunal ("Georgia Tribunal"), an independent and autonomous division within the Office of State Administrative Hearings operating independently from the Georgia Department of Revenue ("Georgia DOR").[2]

Illinois Independent Tax Tribunal

On August 28, 2012, Governor Pat Quinn approved the Illinois Independent Tax Tribunal Act of 2012 ("Illinois Act"), which created the Illinois Independent Tax Tribunal ("Illinois Tribunal"), an independent agency separate and apart from the Illinois Department of Revenue ("Illinois DOR").[3]

Maine Board of Tax Appeals

On May 25, 2012, Governor Paul LePage signed into law an emergency measure that established the Maine Board of Tax Appeals ("Maine Tribunal") as of July 1, 2012.[4] The Maine Tribunal was established as an independent body within the Maine Department of Administrative and Financial Services, and is not subject to the supervision or control of Maine Revenue Services.[5]

Mississippi Board of Tax Appeals

On April 6, 2009, Governor Haley Barbour signed legislation that created the Mississippi Board of Tax Appeals ("Mississippi Tribunal") on July 1, 2010.[6] The Mississippi Tribunal was established as an independent agency, separate and apart from the supervision and control of the Mississippi Department of Revenue ("Mississippi DOR"). The Mississippi Tribunal hears administrative appeals from orders of the Mississippi Board of Review ("Mississippi BOR"), which is a division of the Mississippi DOR, and from other specific acts of the Mississippi DOR.[7]

Composition of Tribunals

In each of these four states, the governors are responsible for appointing tribunal judges, which appointments are subject to the consent of the state senate.[8] While the tribunals in Georgia and Illinois are not comprised of a specific number of persons, the tribunals in Maine and Mississippi are comprised of three members each. In addition, the four states vary in the background, political affiliation and level of expertise that they require of their tribunal judges, which may impact the course of proceedings and the ultimate resolution of a particular matter.[9]

Jurisdiction

The basic jurisdictional rules for these four recently enacted tribunals are demonstrative of the significant differences between tax tribunals across the country.

Choice of Forum

In Mississippi, a taxpayer generally does not have a judicial choice and must

State Tax Tribunals

proceed through the respective tribunal. The Mississippi Tribunal has exclusive jurisdiction to hear an appeal from a person who is aggrieved by an assessment of tax or the denial of a refund claim.[10] The Illinois Tribunal has original jurisdiction over all determinations of the Illinois DOR reflected on notices of deficiency, tax liability, claim denial or penalty liability issued pursuant to certain Illinois tax acts, including the Illinois Income Tax Act and the Use Tax Act.[11] However, a taxpayer has the right to pay an assessment under protest and pursue an action in circuit court under the Protest Monies Act.[12]

In Georgia and Maine, a taxpayer has a choice of filing an administrative or a judicial appeal. The Georgia Tribunal has concurrent jurisdiction with the Georgia superior courts to hear petitions regarding the denial of refunds and orders, rulings or findings of the commissioner of the Georgia DOR.[13] The Maine Tribunal has concurrent jurisdiction with the superior court to hear an appeal from any person who is subject to an assessment by the Maine Tax Assessor or "entitled by law to receive notice of a determination of the assessor" and who is aggrieved as a result, provided Maine's procedural requirements are met.[14]

Therefore, in Georgia, Illinois and Maine provide a taxpayer must make an affirmative decision as to whether to proceed through the courts or through the newly formed tribunals. Factors such as the discovery and hearing process and appellate options should be weighed in making such a decision.

Timing for Filing an Appeal with a Tribunal

Identifying and complying with the varying timeframes for filing an appeal is of the utmost importance. Quite simply, when deadlines are missed, tax tribunals and courts generally no longer have jurisdiction to consider an appeal. Timing requirements not only vary by state, but may also vary depending on the type of tax and the issue being appealed.[15]

In Illinois and Mississippi, taxpayers have 60 days from the date of the appealable actions of the respective departments to file a petition with the respective tribunals.[16]

In Georgia, like many states, timelines for filing appeals can vary depending on whether a taxpayer is appealing a claim for refund or appealing an assessment. For example, a Georgia taxpayer whose claim for refund is denied, or whose claim is not decided within one year from the date of filing the claim, has the right to bring an action for a refund in the Georgia Tribunal or in superior court.[17] A taxpayer's petition regarding a claim for refund must generally be filed before the later of: (i) the expiration of two years from the date the claim is denied or deemed denied; or (ii) if a valid protest is filed with the Georgia DOR, 30 days after the date of the department's notice of decision on the protest.[18] With respect to appealing assessments, a taxpayer must first file a written protest with the Georgia DOR within 30 days from the notice of the proposed assessment.[19] Following an adverse finding, a taxpayer must then commence an appeal by filing a petition with the Georgia Tribunal or in superior court within 30 days from the date of decision of the Georgia DOR.[20]

IDENTIFYING AND COMPLYING WITH THE VARYING TIMEFRAMES FOR FILING AN APPEAL IS OF THE UTMOST IMPORTANCE

In Maine, taxpayers have 60 days from the date of the appealable actions of Maine Revenue Services to appeal to the Maine Tribunal or the superior court.[21]

In that both Georgia and Maine provide the same amount of time to appeal to their respective tribunals or courts, there is generally no timing advantage to be gained by choosing one forum over the other.

The Discovery and Hearing Process

De Novo Proceedings and Burden of Proof

Providing a taxpayer with a de novo hearing before an independent tribunal is a vital element of taxpayer fairness and each of these four states provides for a de novo review when appealing to their respective tribunals.[22]

The four states vary, however, in the levels of clarity with which they set out a taxpayer's burden of proof. In Illinois, consistent with the Model Act, the taxpayer has the burden of persuasion by a preponderance of the evidence on a factual issue.[23] In Maine, a taxpayer has the burden of proving by a preponderance of the evidence that the assessor erred in applying or interpreting the relevant law.[24] Mississippi does not specify a burden of persuasion, but does state that the burden of proof is on the taxpayer to prove that the action of the Mississippi DOR is incorrect.[25] The Georgia Act does not identify a burden of persuasion.

Discovery

States also vary greatly with respect to the scope of discovery permitted in proceedings before their tribunals. In Illinois, the parties must comply with the Illinois Supreme Court Rules for Civil Proceedings in the Trial Court regarding discovery, requests for admission and pre-trial procedure, which allow for depositions, interrogatories, discovery of documents, etc.[26]

Mississippi provides only that any party may have the Mississippi Tribunal issue a subpoena to require the attendance of a witness at a hearing to give testimony and/or to produce and permit inspection of designated books, documents or other tangible things.[27] In addition, upon request or on its own initiative, the Mississippi Tribunal may require a party to provide the other party with a copy of all documents which the party intends to provide to the tribunal in the presentation of its case at the hearing.[28]

State Tax Tribunals

In Georgia, the provisions regarding discovery and depositions contained in Georgia's Civil Practice Act apply to proceedings before the Georgia Tribunal.[29] However, the parties are required to make efforts to conduct discovery by informal consultation or communication.[30] Furthermore, after the period for completing discovery has expired, or earlier as the parties may agree, the parties to a proceeding must stipulate all relevant and non-privileged matters to the fullest extent to which complete or qualified agreement can be reached or fairly should be reached.[31]

Maine's statutes do not provide rules regarding the extent of discovery permitted by the Maine Tribunal, but do provide that the appeals officer presiding over a conference at the Maine Tribunal has the authority to take testimony, hold hearings, summon witnesses and subpoena records, files and documents that the appeals officer considers necessary for carrying out the responsibilities of the Maine Tribunal.[32] At the superior court, however, a party generally may obtain discovery by taking depositions, written interrogatories, production of documents and requests for admission.[33]

With regard to Georgia, as the rules of discovery are virtually the same before the tribunal or the superior court, the issue of discovery will not impact the selection of an advantageous forum.[34] Maine, however, provides a taxpayer with a definitive choice between the explicit rules governing discovery applicable to the superior court and the more informal rules governing proceedings before the tribunal.

Rules of Evidence

The Model Act provides that tribunals are not bound by the rules of evidence and that all relevant evidence, including hearsay, is admissible.[35] The goal of the Model Act in this regard is to ensure that administrative proceedings be more informal than court proceedings. However, it appears that not all states have the same goal in mind.

The Illinois Tribunal utilizes the rules of evidence as applied in the trial of civil nonjury cases in the Illinois circuit courts.[36] In contrast, the Mississippi Rules of Evidence apply at hearings before the Mississippi Tribunal but are "relaxed."[37] Further, the presentation of evidence before the Mississippi Tribunal is not required to be by examination of witnesses and the parties may present evidence through an oral presentation, written presentation and/or by the introduction of documentary evidence.[38] In addition, relevant hearsay evidence may be presented to the Mississippi Tribunal unless the presiding board member determines that such evidence lacks trustworthiness.[39]

Like Illinois, the Georgia tribunal utilizes the rules of evidence as applied in the trial of civil nonjury cases in Georgia superior courts.[40] In stark contrast, appeals to the Maine Tribunal are not subject to the rules of evidence observed by the courts.[41]

As Georgia's evidentiary rules applicable to proceedings before the Georgia Tribunal are the same as those applicable to the superior court, taxpayers will not have to factor in the rules of evidence when making a forum selection. On the other hand, a taxpayer in Maine must give consideration to the potential value or drawbacks of proceeding without evidentiary rules, as the Maine Tribunal specifically provides that formal rules of evidence do not apply.

Time Allowed for Issuance of Decisions

Illinois Tribunal decisions must be rendered within 90 days after submission of the last brief filed subsequent to completion of a hearing.[42] If no briefs are submitted, the decision must be rendered no later than 90 days after completion of a hearing.[43] A decision becomes final 35 days after the issuance of a notice of decision.[44] In contrast, Mississippi does not specify the amount of time in which a decision must be rendered by the Mississippi Tribunal. However, a rather unusual provision explicitly permits the Mississippi Tribunal to verbally announce its decision at the end of the hearing or to take the matter under advisement for a decision at a later time.[45]

Like Mississippi, the Georgia Act does not specify the amount of time in which a decision must be rendered by the Georgia Tribunal. Maine's procedure, however, is quite different in that it utilizes a hear-and-recommend process.[46] In Maine, an appeals officer must prepare a recommended final decision in writing, containing findings of fact and conclusions of law, for consideration by the Maine Tribunal based upon the evidence and arguments presented to the appeals officer.[47] The Maine Tribunal is free to adopt, modify or reject the final decision of an appeals officer.[48] This type of hear-and-recommend procedure differs from the Model Act which provides that hearings occur before, and briefs are submitted directly to, the tribunal and the tribunal subsequently renders a decision.[49] With regard to timing, Maine's statutes do not specify the amount of time in which a decision must be rendered by an appeals officer, but do provide that the Maine Tribunal's review of an officer's recommended decision must be performed on a timely basis.[50]

As there are also no specific time limits for the issuance of decisions by the respective tribunals in Georgia and Maine, the timeframe in which a particular matter will be concluded will likely not have an impact on a choice of forum. However, unlike the Maine Tribunal that utilizes a hear-and-recommend process, in a proceeding before the superior court, the judge that hears the case will most likely be the one issuing the decision.

Appealing a Decision Rendered by a Tribunal

Who Can Appeal and What Steps Must Be Taken to Appeal?

State taxing authorities may not always be able to appeal a decision rendered in favor of a taxpayer. Currently, however, in all four states addressed herein, either

State Tax Tribunals

party may appeal a final judgment of the respective tax tribunal.[51] As either party may also appeal a superior court decision in Georgia or Maine, this issue also has no bearing on the choice of a forum.

However, it is important to be aware of the steps that must be taken before an appeal from a tribunal decision can be made. In Mississippi, for example, prior to appealing a decision of the Mississippi Tribunal affirming a tax assessment to the chancery court, a taxpayer must file a bond in an amount equal to half the amount in controversy.[52] In addition, a taxpayer must pay the amounts that it is not contesting prior to appealing a decision of the Mississippi Tribunal.[53] Failure of a taxpayer to timely pay the uncontested tax will bar a taxpayer from obtaining a reduction, abatement or refund of any contested tax in the appeal and will result in the taxpayer's appeal being dismissed with prejudice and with judgment being entered granting the Mississippi DOR the relief it requested.[54]

Furthermore, taxpayers should also take note of the obligations imposed on the state taxing authorities. For example, in an appeal involving a refund claim denial, if a judicial appeal is filed by the Mississippi DOR, it must refund or credit to the taxpayer the amount of any overpayment included in the refund claim which the Mississippi DOR does not contest.[55] If the Mississippi DOR fails to timely pay the uncontested overpayment, the Mississippi DOR's appeal will be dismissed with prejudice and judgment will enter granting the taxpayer its requested relief, excluding any request for attorney's fees.[56]

Record on Appeal and Standard of Review

In Georgia, a hearing or petition for judicial review from a tribunal decision is conducted by the superior court without a jury and is confined to the record.[57] The superior court cannot substitute its judgment for that of the Georgia Tribunal's as to the weight of the evidence on questions of fact.[58]

TIME AND RESOURCE ALLOCATION AND THE LIKELIHOOD OF SUCCESS AT THE RESPECTIVE TRIBUNAL SHOULD FACTOR HEAVILY INTO THE CHOICE OF FORUM

In Maine, by contrast, either party may raise on appeal in superior court facts, arguments or issues that relate to the tribunal decision, regardless of whether the facts, arguments or issues were raised during the proceeding being appealed, and the superior court will make its own determination as to all questions of fact or law.[59] Therefore, an appeal of a tribunal decision to the superior court effectively gives a taxpayer the chance at a second de novo proceeding. However, such a proceeding may come with similar resource commitments as the initial proceeding.

Consequently, time and resource allocation and the likelihood of success at the respective tribunal should factor heavily into the choice of forum, as should (in the case of a Georgia matter) the potential impact of being limited to the record established at the tribunal level.

Tribunal or Court

Georgia, Illinois and Maine provide a taxpayer with the option of protesting a tax determination either through an administrative tribunal or directly through the courts.[60]

Proceeding before the Georgia Tribunal requires conformance to the same or similar discovery procedures and rules of evidence that a taxpayer would be required to follow if the taxpayer were in superior court.[61] Nevertheless, the choice of forum should be carefully contemplated on a case by case basis as there may be a beneficial forum based on a variety of other factors, including the experience of a potential judge and the tendencies of the Georgia Tribunal and superior court regarding particular tax issues. Similarly, taxpayers and practitioners in Maine must consider on a case by case basis whether the use of the Maine Tribunal's informal discovery practices and lack of formal evidentiary rules will be advantageous or present a hindrance, and whether there are other benefits to be gained by a certain forum selection.

Conclusion

The increasing accessibility to independent tax tribunals or courts has been a significant step in the direction towards increasing both the perception and reality of state tax fairness. As more states contemplate moving in the direction of adopting independent tribunals, taxpayers and their representatives should feel confident that their chances of obtaining an impartial review of their tax matters are significantly increased.[62] However, navigating the intricacies of each tribunal is no easy task. Awareness of the many procedural issues on which state tribunals may differ is vital to presenting a particular case using the best procedural methods available and avoiding foot-faults that may prevent a substantive tax matter from being heard.

1 Tribunals may hear issues regarding whether or not a person is subject to a state's taxing jurisdiction and, thus, whether or not such a person should be a taxpayer. For ease of reference, however, the term "taxpayer" as used herein includes this set of potential taxpayers.

2 *See* Ga. Code Ann. §§ 50-13A-1, 50-13A-3 (enacted by 2012 Ga. Laws 609 § 15 (H.B. 100)). The Georgia Tribunal became operative as of January 1, 2013. Ga. Code Ann. § 50-13A-9.

The Georgia Tribunal was patterned after the Model Act but contains some notable divergences that are discussed herein. *Compare* Ga. Code Ann. §§ 50-13A-1-9 *with* Model Act. The Model Act was designed as a legislative template for an independent tax tribunal based on state tax court or tribunal "best practices." *See* Garland Allen and Craig B. Fields, *The Model State Administrative Tax Tribunal Act: Fairness for All Taxpayers*, 10 The State and Local Tax Lawyer 83 (2005).

3 2011 Ill. Laws 1129 (H.B. 5192). The Illinois Tribunal will begin exercising its jurisdiction on and after July 1, 2013. 35 Ill. Comp. Stat. 1005/5-5(b); 2011 Ill. Laws 1129 art. 1, §§ 1-15(a), (d).

State Tax Tribunals

Administrative proceedings commenced prior to July 1, 2013 that would otherwise be subject to the jurisdiction of the Illinois Tribunal may be conducted according to the procedures set forth in the Illinois Act if a taxpayer so elects. 2011 Ill. Laws 1129 art. 1, § 1-15(d). Such an election is irrevocable and may be made on or after July 1, 2013, but no later than 30 days after the date on which the taxpayer's protest was filed. *Id.*

Like the Georgia Tribunal, the Illinois Tribunal was patterned after the Model Act. *Compare* 2011 Ill. Laws 1129 *with* Model Act.

4 2011 Me. Laws 694 (House Proposal 1291).

5 Me. Rev. Stat. tit. 36, § 151-D(1).

6 2009 Miss. Laws 492 (S.B. No. 2712).

7 *See* Miss. Code Ann. § 27-4-1(1); 35 Miss. Admin. Code Pt. 101, Rs. 1.1, 3.3. Whereas the Georgia, Illinois and Maine Tribunals have yet to adopt their own sets of rules, extensive rules governing practice and procedure before the Mississippi Tribunal have been put in place. Miss. Code Ann. § 27-4-3(1)(a); *see* 35 Miss. Admin. Code Pt. 101, Rs. 1.1-6.6.

8 Ga. Code Ann. §§ 50-13A-5(b), (c); 2011 Ill. Laws 1129 art. 1, § 1-25(a); Me. Rev. Stat. tit. 36, § 151-D(2); Miss. Code Ann. § 27-4-1(2).

9 In Georgia, no person can be appointed as a tribunal judge unless he or she is an attorney licensed to practice in Georgia and has practiced primarily in the area of tax law for at least eight years. Ga. Code Ann. § 50-13A-5(c). Georgia's initial tribunal judges are appointed by the governor but do not need the consent of the senate. *Id.* § 50-13A-5(b). In Illinois, no person can be appointed as a tribunal judge unless he or she has been licensed to practice law in Illinois for a minimum of eight years and has substantial knowledge of state tax laws and the making of a record in a tax case suitable for judicial review. 2011 Ill. Laws 1129 art. 1, § 1-25(a). In Maine, no more than two members of the Maine Tribunal may be members of the same political party, at least one member must be an attorney but no more than two members may be attorneys, and each member must be selected on the basis of their knowledge of and experience in taxation. Me. Rev. Stat. tit. 36, § 151-D(2). In Mississippi, each member of the Mississippi Tribunal is required only to have a bachelor's degree from an accredited college or university and to possess a "special knowledge of taxation and revenue in the State of Mississippi." Miss. Code Ann. § 27-4-1(2).

10 Miss. Code Ann. § 27-77-5(4).

11 2011 Ill. Laws 1129 art. 1, §§ 1-45(a), (b). The Illinois Tribunal, however, does not have jurisdiction over assessments made under Illinois' property tax code or decisions relating to the issuance or denial of an exemption ruling regarding any tax imposed under the property tax code or any state tax administered by the Illinois DOR. *Id.* §§ 1-45(a), (e).

12 *See* 30 Ill. Comp. Stat. 230/1 et. seq.

13 Ga. Code Ann. §§ 50-13A-9(a), (b). This is a departure from the Model Act's provisions. *See* Model Act § 7.

14 Me. Rev. Stat. tit. 36, § 151(2)(C).

15 It should also be noted that there are varying procedures that must be met in each state before an appeal can be made to a tribunal or court. For example, before a taxpayer may file a petition for review with the Maine Tribunal or the superior court, it must first file a "petition for reconsideration" with the assessor. Me. Rev. Stat. tit. 36, § 151(1). Similarly, before a person can appeal to the Mississippi Tribunal, the person must first file an appeal to the Mississippi BOR. Miss. Code Ann. § 27-77-5(1). After the Mississippi BOR issues an order, an appeal can be made to the Mississippi Tribunal. Miss. Code Ann. § 27-77-5(4); 35 Miss. Admin Code Pt. 101, R. 4.10(A)(1).

16 35 Ill. Comp. Stats. 5/908(a) (eff. July 1, 2013); 35 Ill. Comp. Stat. 5/910(a) (eff. July 1, 2013); Miss. Code Ann. § 27-77-5(4); 35 Miss. Admin Code Pt. 101, R. 4.10(A)(1).

17 Ga. Code Ann. § 48-2-35(c)(4). No action or proceeding for the recovery of a refund can be commenced before the expiration of one year from the date of filing the claim for refund unless the Georgia DOR renders a decision on the claim. *Id.* § 48-2-35(c)(6).

18 *Id.* However, this 30 day deadline does not apply to all taxes. If a Georgia taxpayer's claim for refund of an intangible recording tax is denied, the taxpayer has 60 days from the date of the denial of the taxpayer's claim for refund by the Georgia DOR to bring an action in the superior court or in the Georgia Tribunal. *Id.* § 48-6-76(e). Georgia also has specific provisions for petitioning the Georgia Tribunal regarding taxes that have been erroneously or illegally collected by the clerk of superior court. *See id.* § 48-6-7.

19 *Id.* § 48-2-46.

20 *Id.* § 48-2-59(b). Georgia also has specific provisions for petitioning the Georgia Tribunal regarding taxes that have been erroneously or illegally collected by the clerk of superior court, protesting intangible recording taxes and requesting the use of an alternative apportionment formula. *See id.* §§ 48-6-7, 48-6-76, 48-7-31(d)(2)(C).

21 Me. Rev. Stat. tit. 36, § 151(2)(F).

22 Ga. Code Ann. § 50-13A-14(a); 2011 Ill. Laws 1129 art. 1, § 1-65(a); Me. Rev. Stat. tit. 36, § 151(2)(G); Miss. Admin Code § 35.101. 5.2(C).

23 2011 Ill. Laws 1129 art. 1, § 1-65(j); *see* Model Act § 12(g).

24 Me. Rev. Stat. tit. 36, § 151-D(10)(F).

25 35 Miss. Admin Code Pt. 101, R. 5.3.

26 2011 Ill. Laws 1129 art. 1, § 1-60(a). *See* Illinois Supreme Court Rules for Civil Proceedings in the Trial Court, Part E: Discovery, Requests for Admission and Pre-Trial Procedure (Rules 201-230).

27 35 Miss. Admin Code Pt. 101, R. 4.19.

28 *Id.* R. 4.20.

29 Ga. Code Ann. § 50-13A-13(a).

30 *Id.*

31 *Id.*

32 Me. Rev. Stat. tit. 36, § 151-D(10)(C).

33 *See* Me. R. Civ. P. 26(a).

34 *See* Ga. Code Ann. §§ 9-11-1, 9-11-26, 50-13A-13(a).

35 Model Act § 12(d).

36 2011 Ill. Laws 1129 art. 1, § 1-65(e).

37 Miss. Code Ann. § 27-77-5(4); 35 Miss. Admin Code Pt. 101, R. 5.2(C).

38 35 Miss. Admin Code Pt. 101, R. 5.2(A).

39 *Id.* R. 5.2(C).

40 Ga. Code Ann. § 50-13A-14(c).

41 Me. Rev. Stat. tit. 36, § 151-D(10)(E).

42 2011 Ill. Laws 1129 art. 1, §§ 1-70(b), (e). This differs from the Model Act which provides that a decision must be rendered within six months. Model Act § 13(b).

43 2011 Ill. Laws 1129 art. 1, §§ 1-70(b), (e).

44 *Id.*

45 35 Miss. Admin Code Pt. 101, R. 4.22(A).

46 *See* Me. Rev. Stat. tit. 36, § 151-D(10).

47 Me. Rev. Stat. tit. 36, § 151-D(10)(H).

48 *Id.* § 151-D(10)(I).

49 Model Act §§ 12-13.

50 Me. Rev. Stat. tit. 36, § 151-D(10)(I).

51 Ga. Code Ann. § 50-13A-17(a); 2011 Ill. Laws 1129 art. 1, § 1-75(a); Me. Rev. Stat. tit. 36, § 151-D(10)(I); Miss. Code Ann. § 27-77-7(1).

52 Miss. Code Ann. § 27-77-7(3).

53 *Id.*

54 *Id.*

55 *Id.* § 27-77-7(4).

56 *Id.* The time within which the Mississippi DOR must refund or credit an uncontested overpayment depends on whether an appeal from the Mississippi Tribunal is filed by the Mississippi DOR or the taxpayer. *Id.*

57 Ga. Code Ann. § 50-13A-17(f).

58 *Id.* § 50-13A-17(g).

59 Me. Rev. Stat. tit. 36, § 151-D(10)(I).

60 *See* Ga. Code Ann. §§ 9-11-1(a), (b); 2011 Ill. Laws 1129 art. 1, §§ 1-45(a), (b); 30 Ill. Comp. Stat. 230/1 et. seq.; Me. Rev. Stat. tit. 36, § 151(2)(C)(2).

61 *See* Ga. Code Ann. §§ 9-11-1, 9-11-26, 50-13A-13(a), 50-13A-14(c).

62 Legislation regarding the adoption of an independent tax tribunal has recently been considered in Alabama, Oklahoma and Vermont. *See* S.B. 549 (Ala. Apr. 19, 2012); S.B. 1297 (Okla. Feb. 6, 2012); H. 606 (Vt. Jan. 26, 2012).

ABB v. Missouri
Albany International Corp. v. Wisconsin
Allied-Signal, Inc. v. New Jersey
AE Outfitters Retail v. Indiana
American Power Conversion Corp. v. Rhode Island
Citicorp v. California
Citicorp v. Maryland
Clorox v. New Jersey
Colgate Palmolive Co. v. California
Consolidated Freightways v. California
Container Corp. v. California
Crestron v. New Jersey
Current, Inc. v. California
Deluxe Corp. v. California
DIRECTV, Inc. v. Indiana
DIRECTV, Inc. v. New Jersey
Dow Chemical Company v. Illinois
Dupont v. Michigan
EchoStar v. New York
Express, Inc. v. New York
Farmer Bros. v. California
General Motors v. Denver
GMRI, Inc. (Red Lobster, Olive Garden) v. California
GTE v. Kentucky
Hair Club of America v. New York
Hallmark v. New York
Hercules Inc. v. Illinois
Hercules Inc. v. Kansas
Hercules Inc. v. Maryland
Hercules Inc. v. Minnesota
Hoechst Celanese v. California
Home Depot v. California
Hunt-Wesson Inc. v. California
IGT v. New Jersey
Intel Corp. v. New Mexico
Kohl's v. Indiana
Kroger v. Colorado
Lanco, Inc. v. New Jersey
McGraw-Hill, Inc. v. New York
MCI Airsignal, Inc. v. California
McLane v. Colorado
Mead v. Illinois
Meredith v. New York
Nabisco v. Oregon
National Med, Inc. v. Modesto
Nerac, Inc. v. New York
NewChannels Corp. v. New York
OfficeMax v. New York
Osram v. Pennsylvania
Panhandle Eastern Pipeline Co. v. Kansas
Pier 39 v. San Francisco
Powerex Corp. v. Oregon
Reynolds Metals Company v. Michigan
Reynolds Metals Company v. New York
R.J. Reynolds Tobacco Co. v. New York
San Francisco Giants v. San Francisco
Science Applications International Corporation v. Maryland
Scioto Insurance Company v. Oklahoma
Sears, Roebuck and Co. v. New York
Shell Oil Company v. California
Sherwin-Williams v. Massachusetts
Sparks Nuggett v. Nevada
Sprint/Boost v. Los Angeles
Tate & Lyle v. Alabama
Toys "R" Us-NYTEX, Inc. v. New York City
Union Carbide Corp. v. North Carolina
United States Tobacco v. California
USV Pharmaceutical Corp. v. New York
USX Corp. v. Kentucky
Verizon Yellow Pages v. New York
Wendy's International v. Virginia
Whirlpool Properties v. New Jersey
W.R. Grace & Co.—Conn. v. Massachusetts
W.R. Grace & Co. v. Michigan
W.R. Grace & Co. v. New York
W.R. Grace & Co. v. Wisconsin

WHEN THESE COMPANIES HAD DIFFICULT STATE TAX CASES, THEY SOUGHT OUT MORRISON & FOERSTER LAWYERS.

SHOULDN'T YOU?

For more information, please contact
Craig B. Fields at (212) 468-8193

MORRISON | FOERSTER