MOFO
# NEW YORK TAX INSIGHTS

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# NEW YORK COURT GRANTS AIRBNB'S MOTION TO QUASH ATTORNEY GENERAL'S SUBPOENA

By Kara M. Kraman

A New York State Supreme Court judge has granted Airbnb, Inc.'s motion to quash the New York State Attorney General's subpoena for information on Airbnb's New York clients on the grounds that the subpoena was overly broad. *Airbnb Inc. v. Schneiderman*, Index No. 539313 (N.Y.S. Sup. Ct. May 13, 2014). The Attorney General, Eric T. Schneiderman, served a subpoena on Airbnb in connection with his investigation of short term rentals in New York and potential violations of the New York Multiple Dwelling Law and State and local occupancy tax laws.

New York law provides that in cities with a population of over 325,000, certain types of "Class A" multiple dwellings, such as apartment houses, may only be used for "permanent residence purposes." Multiple Dwelling Law, Art. 1, § 4.8(a). In addition, hotel rooms in New York City are subject to a 14.75% total tax, consisting of a New York City hotel room occupancy tax, and New York State and City sales and use tax on hotel room occupancies. New York State and local sales tax is due on room rentals outside New York City only if the building is considered a hotel and is regularly kept open for the lodging of guests. Tax Law § 1101(c); N.Y.C. Admin. Code § 11-2001(a).

The Attorney General ("AG") served a subpoena on Airbnb asking for the following information: the name, address, and contact information of each host; the address of the accommodation rented; dates, duration of stay, and rates charged for each rental; the method of payment to each host; the total gross revenue generated through Airbnb for each host; and "Documents sufficient to identify all tax-related communications" between Airbnb and each host. Airbnb objected to the subpoena on multiple grounds – that there was no factual basis for the issuance of the subpoena, that the investigation by the AG was based on laws that are unconstitutionally vague, that the subpoena was overbroad and unduly burdensome, and that the subpoena sought confidential private information from Airbnb's clients.

The judge held that the AG had demonstrated an adequate factual basis for the subpoena, and that the subpoena did not seek confidential information. He also held that Airbnb's objection to the subpoena on the grounds that the investigation was based on unconstitutionally vague laws was not ripe for review since no attempt had yet been made to enforce the laws at issue.

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However, the judge did find that the subpoena was overly broad. With respect to the Multiple Dwelling Law, the judge found that the subpoena was overly broad because it sought information for all of New York State, and was not limited to hosts that lived in cities (such as New York City) to which the Multiple Dwelling Law applied. With respect to the New York City hotel occupancy tax and sales tax, the judge found that the subpoena was overly broad because it was not limited to New York City hosts and did not take into account certain exceptions to the City hotel occupancy tax, *e.g.*, for rentals on fewer than three occasions during the year. Finally, with respect to the New York State sales tax, the judge found that the subpoena was overly broad because it was not limited to rooms rented by hotels. Accordingly, the judge granted Airbnb's motion to quash the subpoena.

### Additional Insights

The decision is a reminder that the government's subpoena power is not unlimited and may be successfully challenged, as it was here where the government sought information that went beyond the scope of its authority. Although Airbnb's motion to quash the subpoena was granted, reportedly the AG served another subpoena on Airbnb the next day, presumably narrower in scope. On May 21, 2014, Airbnb and the AG reached an agreement under which Airbnb will provide the AG with data about its hosts in New York, but that data will not include their names, addresses, or other personally identifiable information, unless there is an investigation or planned enforcement action directed to individuals.

## NEW YORK CITY UBT RULING ALLOWS BROKER-DEALER SOURCING FOR NON-REGISTERED BROKER-DEALERS

By Irwin M. Slomka

In an unpublished letter ruling, the New York City Department of Finance has ruled that a limited partnership engaged in the securities and commodities business qualifies for broker-dealer sourcing of certain receipts under the New York City unincorporated business tax ("UBT"), even though the partnership is not itself a "registered" broker-dealer. *Finance Letter Ruling*, N.Y.C. Dep't of Fin. (FLR 12-4934/UBT, Aug. 19, 2013).

*Facts*. The ruling involves two related limited partnerships: "Partnership," which manages various investment funds in securities and commodities on behalf of investors, and "Taxpayer Partnership," in which Partnership owns a 99% interest. Partnership receives asset-based management fees from investors in the securities and commodities that it manages. It is registered as a "broker-dealer" with the SEC and Financial Industry Regulatory Authority ("FINRA"), and it maintains a Central Registration Depository number.

Taxpayer Partnership is subject to the UBT. It solicits investors for Partnership's various investment funds. Taxpayer Partnership is not registered as a broker-dealer with the SEC. According to the letter ruling, Taxpayer Partnership "acts as a broker dealer," "performs all functions of a security broker or dealer, holds itself out to customers as a broker or dealer," and is a "broker and dealer under the 34 Act." Approximately 20 of its employees are "registered representatives" of Partnership.

The issue presented was whether Taxpayer Partnership qualified for broker-dealer sourcing under the UBT, despite the fact that it was not a "registered" broker-dealer. The Department ruled that it did qualify.

*Background*. Under the UBT, a taxpayer's business income is apportioned based on a three-factor business allocation percentage ("BAP") consisting of property, payroll, and receipts. For the receipts factor, most receipts derived from providing services are sourced based on where the services are performed. However, beginning in 2009, the UBT law (as well as the City general corporation tax law) was amended to provide customer-based sourcing rules for receipts from enumerated services performed by "registered securities or commodities brokers or dealers." Admin. Code § 11-508(e-3). Under those sourcing rules, designated receipts are sourced in the receipts factor based on the mailing address of the taxpayer's customers, rather than the address where the services are performed.

In order to qualify for this "registered broker-dealer" sourcing, however, the UBT law provides that the taxpayer must be a "broker or dealer *registered as such* by the Securities and Exchange Commission or the Commodities Futures Trading Commission." Admin. Code §11-508(e-3)(2) (emphasis added). The question presented was whether this language required that the taxpayer be formally registered with the SEC (or with the CFTC) as a broker or dealer in order to qualify for the special broker-dealer sourcing.

*Ruling*. The Department concluded that the phrase "registered as such by the [SEC]" does not require that a taxpayer actually register with the SEC. Instead, as long as the taxpayer complies with all of the requirements of the SEC to *act* as a broker-dealer in securities, it will qualify for broker-dealer sourcing. The ruling noted that the SEC provides exceptions to the broker-dealer registration requirement, which meant that certain persons can act as securities broker-dealers without having formally been registered as such with the SEC. According to the Department, to require that a


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taxpayer be formally registered with the SEC as a broker or dealer in order to qualify for special sourcing would result in inconsistent tax treatment among similarly situated taxpayers.

As for the comparable UBT "regist[ration] as such" requirement for brokers or dealers in *commodities*, the Department noted that the CFTC has no formal "broker-dealer" designation or registration for commodities brokers or dealers at all. According to the Department, a literal reading of the registration requirement in the UBT law with respect to broker-dealers in commodities would mean that no taxpayer could ever qualify as a commodities broker-dealer. Thus, the Department also ruled that to qualify for sourcing for commodities brokers or dealers under the UBT, it was sufficient that the taxpayer meet the CFTC requirements "to act" as a broker or dealer in commodities.

### Additional Insights

The letter ruling – which is not on the Department's website but was obtained under the Freedom of Information Law – takes a reasonable approach in applying substance over form in its interpretation of the UBT law. Presumably, the Department could have reached a similar result by exercising its discretionary authority to adjust the BAP under Administrative Code § 11-508(h). (Applying the Department's reasoning, a registered securities broker-dealer's income from its non-dealer trading activities should not constitute business income merely because of its formal registration as a broker-dealer.) As for the requirement in the UBT law that commodities broker-dealers be "registered as such" with the CFTC, the ruling notes that such registration does not even exist at the CFTC (which raises the question of why the provision appears in the law in the first place). The letter ruling is significant since the New York City UBT and general corporation tax sourcing rules – including the special broker-dealer sourcing rules – are likely to remain unchanged in 2015, despite the fact that Article 9-A will apply customer-based sourcing across the board beginning in 2015.

## ALJ DISMISSES ACTION AS UNTIMELY DUE TO LACK OF PROOF OF TIMELY MAILING

By Hollis L. Hyans

A New York State Administrative Law Judge has held that an action brought by Infusiondev Corporation to challenge alleged overpayment of withholding tax on behalf of its employees was time-barred. *Matter of Infusiondev Corporation*, DTA No. 825737 (N.Y.S. Div. of Tax App., May 1, 2014).

In April 2009, Infusiondev filed amended quarterly withholding tax returns seeking a refund of withholding tax that it allegedly overpaid. The request was denied by a letter dated June 3, 2009, additional information was submitted, and the refund was again denied in a letter dated October 23, 2009, which also advised that a request for a conciliation conference with the Bureau of Conciliation and Mediation Services ("BCMS") or a petition for a hearing before the Division of Tax Appeals had to be filed within two years. A request for a BCMS conference was filed, dated March 21, 2013, with a postage meter stamp bearing the same date. It was received by BCMS on May 9, 2013, and BCMS issued an Order on May 24, 2013 dismissing the request as untimely since it was not filed within two years of October 23, 2009, the date of the denial of the claim for refund.

Infusiondev then filed a petition with the Division of Tax Appeals, challenging the denial of its request for a conciliation conference. The petition was mailed using the U.S. Postal Service on June 26, 2013 and received on June 28, 2013.

**Because the request to BCMS … bore only a private postage meter stamp … the date on which the petition was received … is the governing date, and the postage meter date is disregarded.**

*Timeliness issues:* The ALJ dealt first with the issue of whether the Division of Tax Appeals lacked jurisdiction to hear the matter, since the Department had argued that the petition was untimely because it was filed more than 90 days after the notice of refund denial. This argument was quickly rejected, since Infusiondev challenged the refund denial not by going directly to the Division of Tax Appeals, but by filing a request with BCMS. Infusiondev then timely filed a petition challenging the BCMS Order, since the petition was filed well within the 90-day period for challenging an order from BCMS. Tax Law § 170[3-a][e].

However, notwithstanding the timeliness of the petition, on the question of the timeliness of the original request to BCMS, the ALJ found that the request was untimely, since it had been filed more than two years after the refund denial. Because the request to BCMS filed by Infusiondev bore only a private postage meter stamp of March 21, 2013, the date on which the petition was received – May 9, 2013 – is the governing date, and the postage meter date is disregarded. Since the BCMS request was not received until three and a half years after the notice of denial of refund, the Conciliation Order dismissing it as untimely was upheld.

### Additional Insights

While the ALJ's opinion focused on the method of mailing, in this case the mailing method was not actually determinative – because even the postage meter date was well after the two-year period for protesting a refund denial. Nevertheless, the case highlights the importance of carefully following New


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York's rules on methods of mailing jurisdictional documents. While New York generally follows the "timely mailing is timely filing" rule, the rule's application depends on how the document is mailed. If a document is sent by United States Postal Service – whether to BCMS or to the Division of Tax Appeals -- it will be considered timely mailed if the USPS postmark is within the statutory period, but the sender runs the risk of having an illegible postmark, or one that cannot be established. If the document is sent by registered mail, the date of the registration governs, and if it is sent by certified mail and the receipt is postmarked by the post office, the date of the postmark governs. The Department has also designated certain private delivery services, and certain specific delivery services they offer, identified in the Department's Publication 55, as having records that will be accepted as evidence of timely mailing. Publication 55 is updated from time to time, most recently in December 2013, and it is important to check the current version, since the designation of approved delivery services can change.

# INSIGHTS IN BRIEF

## Appellate Court Affirms Denial of QEZE Credit

The Appellate Division, Third Department, has sustained the decision of the Tax Appeals Tribunal that a qualified empire zone enterprise ("QEZE") may not claim a credit for payments made under a payments in lieu of taxes ("PILOT") agreement to which it was not a named party. *Matter of The Golub Corp. v. New York State Dep't of Taxation and Fin.*, No. 515402, 2014 NY Slip Op. 2638 (App. Div. 3d Dep't Apr. 17, 2014). Although the business entered into a written sublease obligating it to make the PILOT payments, and it did pay the PILOT amounts directly to the correct local taxing authorities, because it was not a party to the actual PILOT agreement, the court found that the arrangement did not meet the statutory requirement of a written agreement between the QEZE and a state or local authority. The court held it could not "essentially rewrite an unambiguous provision of a statute…no matter how equitable such a result may appear."

## Exemption Certificates Found Insufficient to Avoid Imposition of Sales Tax on Security Guard Services

An Administrative Law Judge has held that sales tax was properly assessed on security guard services provided at construction sites for contractors working on projects for the New York City School Construction Authority. *Matter of Crown Security, LLC*, DTA Nos. 824873, 824957 (N.Y.S. Div. of Tax App., May 1, 2014). In 2009, Crown Security had been advised by the Construction Authority and by the Department that its services were subject to tax, and security services are included within the enumerated services subject to New York sales tax under Tax Law § 1105(c)(8). The ALJ found that exemption certificates provided by the contractor customers could not be relied upon because they all indicated they were provided for the purchase of tangible personal property, rather than security services; some did not identify Crown Security or were undated; and those that were dated were prior to Crown Security having been advised that its services were subject to tax, so they could not have been relied upon in good faith, as is required under Sales Tax Reg. § 532.4(b)(2).

## Sole Shareholder of Defunct Restaurant Held Liable for Sales Tax as a "Responsible Person"

The Appellate Division has upheld a "responsible person" sales tax assessment against a sole shareholder who is the wife of the chief executive officer of a bankrupt Manhattan restaurant business. *Matter of Luongo v. Tax Appeals Trib.*, No. 515599 (3d Dep't May 22, 2014). Although the court found that Mrs. Luongo did not control the day-to-day operations of the business, sign checks, or assist in preparing tax returns, as the sole shareholder she retained considerable authority over the business, including the authority to remove her husband as the sole director and CEO. The Court noted in particular that she alone signed the application for registration as a sales tax vendor. Thus, the court found that there was substantial evidence to support a determination that she was a responsible person with a duty to collect and remit sales tax.

## Tribunal Upholds Denial of Couple's Casualty Loss Carryover Deduction

The Tax Appeals Tribunal has upheld the disallowance of a married couple's casualty loss deduction claimed on their 2005 New York State return, relating to a house fire that took place in 1997, because the record contained conflicting evidence regarding the loss amount and because the taxpayers did not show that a casualty loss carryover was permissible. *Matter of Richard A. and Christine L. Sperl*, DTA No. 824369 (N.Y.S. Tax App. Trib., May 8, 2014). The Tribunal also rejected the taxpayers' claim that all documents requested by the Department had already been furnished at an earlier conciliation conference. According to the Tribunal, "issues regarding whether certain documents were requested or provided at a Conciliation Conference, or whether the conferee improperly changed his or her rationale in denying a request are immaterial in Division of Tax Appeals proceedings."

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
Lorillard Licensing Company 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
Rent-A-Center 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
Thomson Reuters v. Michigan
Toys "R" Us-NYTEX, Inc. v. New York City
Union Carbide Corp. v. North Carolina
United States Tobacco v. California
UPS v. New Jersey
USV Pharmaceutical Corp. v. New York
USX Corp. v. Kentucky
Verizon Yellow Pages v. New York
Wendy's International, v. Illinois
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

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