

Q&A With Morrison & Foerster's Mitch Newmark

Law360, New York (November 27, 2013, 3:18 PM ET) -- Mitchell A. Newmark is a partner at Morrison & Foerster LLP and is concentrated on state and local tax litigation and appeals before administrative and judicial bodies around the country. Newmark also advises companies and individuals with respect to sophisticated transactional matters involving the potential consequences of complex restructurings, planning transactions, and energy-industry financing transactions regarding all state and local taxes. He has written extensively in the area of state and local taxation and is also a frequent lecturer concerning state and local taxes.

Newmark is a member of the New Jersey Supreme Court Committee on the Tax Court. He is chairman of, and a member of the executive committee of, the Tax Section of the New Jersey Bar Association, and is a co-chairman of the State Practice, Procedure and Liaison Committee of the Tax Section of the New Jersey Bar Association. Prior to joining Morrison & Foerster, Newmark was a deputy attorney general of the New Jersey Attorney General's Office.

Q: What is the most interesting or challenging tax problem you've worked on to date?

A: Although confidentiality or pending litigation prohibits discussing many of the issues, an interesting and challenging issue arose when I assisted a company with relocating its supply chain.

The non-U.S. company marketed its products outside the U.S. However, it determined that storing a substantial portion of its inventory in the U.S. was imperative for its business operations. The amount and certainty of supply chain costs — which includes taxes — for the foreseeable future were paramount.

I worked with the company to select several states for potential locations that would fit its supply chain needs, including proximity to ports and availability and costs of warehouses and labor. We analyzed the potentially applicable taxes in those states and relevant localities and narrowed the list to the more promising states. When we asked such state revenue departments whether they would provide certainty that their interpretations of state tax laws would remain consistent, responses included open arms and willingness to commit, refusal to commit — one state's officials stated that they could change their mind the day after the company invested in the state — and a lack of time to determine whether it would commit. We worked through the challenges and choices and the company found homes for its supply chain that fit its goals.

Q: Currently, what is a pressing tax concern for your clients and how are you addressing it?

A: The perceived lack of fairness in tax proceedings is a real problem for my clients. A perception of

unfairness is just as detrimental to the system as is actual unfairness inasmuch as the existence of either will deter participants from engaging in the system.

When I was interviewed prior to becoming a New Jersey Deputy Attorney General, I was told by a senior official that: “We are the government. We always take the high road. We win because we are right and if we are not right we should not win.” Although I am in private practice now, I believe that governments should behave in that manner and I consider myself lucky that most government folks with and against whom I have worked also believe in similarly noble behavior.

The current pressure against states raising taxes has pushed revenue departments to raise revenue without changing laws, which creates stretched edges of the legal envelope. Still other revenue departments have imposed collection quotas. A state auditor told me that my client was right but he “has a quota” and would “write up” the company, although the company “would likely win on appeal.” There is simply no way to have perceived fairness by requiring a company to pay counsel to appeal an issue for which the state agrees it is in the wrong.

Further, the tensions of the burden of proof and the constitutional guarantees of due process of law (i.e., the protections from governmental deprivations of life, liberty and property) create obstacles to the perception of fairness. Taking a taxpayer’s money is one of the greatest deprivations of property.

Due process is our protection against an overreaching government and governments need to do more to demonstrate fairness in their tax systems. Sir Winston Churchill was reported to have implored that we “Never, never never give in except to convictions of honour and good sense.” And as to fairness, I will never give in. I address the issues every day through dialogue and, if need be, resort to the courts to press the case for fair proceedings and to combat overreaching.

Q: What do you anticipate being the biggest regulatory challenge in your practice in the coming year and why?

A: Apportionment and states’ assertions on audit that an alternative apportionment formula should be applied to a corporation’s income lead to troubling ambiguity for taxpayers.

After it is determined that a state has a sufficient connection with a foreign corporation that conducts a multistate business to subject it to an income tax we must determine the amount of the corporation’s income that is attributable to the state for tax purposes. One aspect of that attribution is apportionment. The U.S. Supreme Court stated that it will not mandate a formula for states to use. However, it instructs that under the U.S. Constitution the formula must be fair and not discriminate against interstate commerce.

Statutory apportionment formulas set states’ normal rules. Many states’ statutes allow an alternative formula, an exception to the rule, to be used when the normal formula does not fairly reflect the corporation’s in-state activity. During the past century, a three factor formula that reflects the ratios of labor (payroll), capital (property) and market (sales) activity in the state versus such activities everywhere has become the benchmark normal formula.

A recent trend is for states to evermore hyperweight the sales fraction in the normal formula or to alter the definition or location of a sale. Some states have attempted to do so under the guise of alternative apportionment. A single fraction formula often fails to reflect a reasonable sense of how the income is generated — which is an aspect of fairness required by the U.S. Supreme Court.

Some tax administrators fail to heed the unfairness and discrimination that can be present in normal formulas, even more so in single faction formulas, and abuse the formulas. Further, it is becoming more common for tax administrators to assert that the normal formula does not raise sufficient revenue from a taxpayer and that an “alternative” formula is the more correct answer simply because it raises more revenue from the taxpayer.

Taxpayers will be forced to more frequently seek judicial or legislative intervention.

Q: Outside of your own firm, who is an attorney in your practice area whom you admire and what is the story of how s/he impressed you?

A: The Honorable Lawrence L. Lasser, P.J.T.C., who retired in 1995, was one of the leading lights in private tax practice in New Jersey and became the first presiding judge of the Tax Court of New Jersey.

Prior to 1979, New Jersey’s tax appeal procedure was housed under the revenue department. That is, the person who oversaw the issuance of the state tax assessment against you also oversaw the ruling on your appeal. The combined prosecutor and judge system was perceived to be unfair to taxpayers.

In 1979, New Jersey rectified its state tax system. It moved the tax appeal process to the courts when it formed the Tax Court of New Jersey as an independent court to hear any action of the revenue department, to make the record of facts and decide all tax issues of fact and law anew on the record. As the court’s history explains, objectives of the court included expeditious and equitable judicial review of tax issues and developing a consistent and uniform body of law that was accessible to taxpayers.

Judge Lasser was the first person appointed to the new court and became its presiding judge. Under Judge Lasser’s leadership of more than a decade, the court became a model of fairness and independent thought in tax proceedings, for which the court receives national respect.

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