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ALERT: STATE LEGISLATURE ENACTS
2015-16 NEW YORK STATE BUDGET

In the early morning hours of April 1, 2015, the New York State Legislature enacted the final 2015-2016 New York State Budget. Among the key tax components are the enactment of New York City corporate tax reform (S. 4610, A. 6721, Part D), various technical changes to Article 9-A (S. 2009-B, A. 3009-B, Part T), including substantive changes to the definition of “investment capital,” and a new cap on the sales and use tax imposed on vessels (S. 2009-B, A. 3009-B, Part SS). Significantly, the final legislation does not include the controversial “marketplace provider” and sales tax “loophole” closer provisions that had been proposed by Governor Cuomo in his Executive Budget. We will provide additional details about the new law in the next issue of *NY Tax Insights*.

STATE TRIBUNAL AFFIRMS
DECISION IMPOSING SALES TAX
ON INFORMATION SERVICES

By [Irwin M. Slomka](#)

The New York State Tax Appeals Tribunal has affirmed an ALJ decision holding that certain data analysis services performed for members of the financial services industry constituted the furnishing of a taxable information service for sales tax purposes. The decision sheds light on the scope of the important sales tax exclusion for information that is “personal or individual in nature.” *Matter of SunGard Securities Fin. LLC*, DTA No. 824336 (N.Y.S. Tax App. Trib., Mar. 16, 2015).

Facts. SunGard Securities Finance LLC (“SunGard”) provides consulting and related data processing services to securities broker-dealers, banks, and other financial institutions. The primary focus of the appeal concerned SunGard’s “Lending Pit” service, in which SunGard obtains, compiles, analyzes, processes, and maintains customer trade data on a daily basis. Customers can view their own current data compared to their historical data over a secure Internet connection using SunGard’s proprietary web-based application. Customers also have the ability to view how their data compares with benchmarks formulated by SunGard using data obtained from all SunGard’s customers. The Lending Pit service also incorporates market data from public sources to allow SunGard’s customers to

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compare their own data to the market data. Data reports are delivered to customers over the Internet, based substantially on the customer's own data, which is confidential, and those reports are never sold or marketed to other parties. A customer cannot access confidential individual data of other SunGard customers.

SunGard also furnishes to customers an ancillary "Board Reporting" service, which involves the periodic furnishing of a written report to management evaluating the customer's own lending program, including a comparison with market performance benchmarks. Another component of SunGard's Lending Pit service, "Performance Analytics," involves the furnishing of a written report showing customer earnings results compared with the results of other securities lenders in the industry.

The Tribunal acknowledged that the reports furnished to clients are based substantially on the customer's own data, but found that those reports also contained substantial amounts of other information.

ALJ decision. The sales tax is imposed on the furnishing of information services, but not on information that is personal or individual in nature and which may not be substantially incorporated in reports furnished to other customers (the "personal or individual" exclusion). Tax Law § 1105(c)(1). In dispute was whether SunGard was furnishing taxable information services for the period December 1, 2006 through May 31, 2009. At the administrative hearing level, SunGard argued that it was not providing an information service, but that even if it was, the information qualified for the "personal or individual" exclusion. The ALJ held for the Department, concluding that the primary purpose for the Lending Pit service was the furnishing of information, which made it an information service. The ALJ went on to hold that the information did not qualify for the "personal or individual" exclusion because it was available to other customers in aggregate form or through inclusion in various reports. On appeal to the Tribunal, SunGard did not contest that it was providing an information service, but continued to claim that the service qualified for the "personal or individual" exclusion. (The ALJ also held that SunGard's Smart Loan Service did not involve the

taxable sale or licensing of proprietary software, an issue that the Department did not appeal.)

Tribunal decision. The Tribunal affirmed the ALJ's decision that none of SunGard's services qualified for the "personal or individual" exclusion for information services. Although SunGard argued that the essential element of the Lending Pit reports was the analysis of each individual client's portfolio, using the customer's own data, the Tribunal found that the record contained contradictory evidence, including a SunGard Subscriber Agreement that allowed SunGard to use client data in the aggregate to analyze and distribute information. The Tribunal acknowledged that the reports furnished to clients are based substantially on the customer's own data, but found that those reports also contained substantial amounts of other information. Moreover, the Tribunal concluded that much of the information in those reports came from SunGard's own database that SunGard also used to prepare reports for other customers. The Tribunal was even more emphatic regarding the Board Reporting and Performance Analytics services, finding that the evidence indicated that those services involved the furnishing of an analysis based on comparisons to market data generated by SunGard's own database.

Additional Insights

In its appeal to the Tribunal, SunGard did not dispute that it was providing an information service so that the Tribunal's focus was on whether SunGard had demonstrated that its customers were only allowed access to their own data. The Tribunal found, however, that SunGard's customers were also given access to other data, albeit in aggregate form so as not to identify any customer's individual data in isolation. The Tribunal noted that SunGard did not submit documents into evidence or present testimony that might have explained any discrepancies in the record, although it is not clear that this had a significant impact on the outcome of the case.

Aside from any evidentiary shortcomings, the underpinning of the Tribunal's decision suggests that the Tribunal will view as taxable the furnishing of financial analysis services that also contain aggregate financial industry information as a yardstick, which would seemingly be a component of any financial analysis. Although not addressed by the Tribunal, the threshold question for similarly-situated taxpayers will continue to be whether the primary function of what is being furnished is an information service or more in the nature of a nontaxable advisory or consulting-type service.

APPELLATE DIVISION UPHOLDS APPLICABILITY OF SALES TAX TO ENVIRONMENTAL TESTING AND MONITORING SERVICES

By [Kara M. Kraman](#)

The Appellate Division, Third Department has affirmed the decision of the State Tax Appeals Tribunal, holding that certain pre- and post-remediation environmental testing and monitoring services related to petroleum spills are subject to New York State and local sales tax. *Matter of Exxon Mobil Corp.*, 2015 N.Y. Slip Op. 01840 (App. Div. 3d Dep't, Mar. 5, 2015). At issue was whether the services related to “maintaining, servicing and repairing” real property or land.

Exxon Mobil owned and operated retail gas stations in New York. Under New York law and regulations, if a petroleum discharge was discovered at one of the properties, Exxon Mobil was required to comply with New York State Department of Environmental Conservation (“DEC”) rules for the investigation, cleanup, and removal of the petroleum discharge at the site in question. The required process consisted of three general steps: (1) the performance of an environmental investigation to determine the adverse effects on adjacent properties and whether remediation of the site was required; (2) remediation of the property, if required; and (3) post-remediation sampling, testing, and monitoring of the site for a period of time. In most cases, Exxon Mobil hired the same consultant to investigate, remediate, and monitor the site post-remediation.

Exxon Mobil did not pay sales tax on charges for testing and monitoring services that were either (i) performed as part of the investigation to determine whether any remediation was necessary (whether or not remediation was ultimately deemed to be necessary); or (ii) performed after remediation was completed. It did pay sales tax on the payments for the remediation of the property itself. Exxon Mobil disputed the imposition of sales tax on the monitoring and testing services, arguing that those services did not alter the condition of the property, and that the testing and monitoring were separate and distinct from the actual remediation services.

Tax Law § 1105(c)(5) imposes sales tax on “[m]aintaining, servicing or repairing real property.” The sales tax

regulations define “[m]aintaining, servicing or repairing” as covering “all activities that relate to keeping real property in a condition of fitness, efficiency, readiness or safety or restoring it to such condition.” 20 NYCRR 527.7(a)(1).

The Tribunal held that monitoring and testing services, whether performed before or after remediation work, if any, would be taxable as standalone services because they were necessary for the properties to be in compliance with DEC clean up procedures, and therefore fell under the regulatory definition of keeping property “in a condition of fitness, efficiency, readiness or safety.” The Third Department upheld the Tribunal decision, finding that there was “nothing irrational” in the Tribunal’s determination that “the monitoring and testing services at issue constituted an ‘integral part of the’ taxable remediation efforts, even if they were billed separately.” As a result, the Third Department concluded, as did the Tribunal, that the monitoring and testing services were taxable services under Tax Law § 1105(c)(5) because they were “activities that relate to keep real property in a condition of fitness, efficiency, readiness or safety.”

Additional Insights

Under the Tribunal’s holding, which has now been affirmed by the Appellate Division, environmental monitoring and testing services in connection with the actual or potential hazardous contamination of real property are subject to sales tax, regardless of whether they are performed pursuant to a separate contract and separately billed, and regardless of whether any remediation work is ultimately performed. It remains to be seen whether Exxon Mobil will seek leave to appeal to the Court of Appeals.

BULK SALE LIABILITY FOR SALES TAX UPHOLD BASED ON TRANSFER OF INTANGIBLE ASSETS

By [Irwin M. Slomka](#)

Among the traps for the unwary are the bulk sale provisions under the New York State sales tax. They provide that a bulk sale purchaser notify the Department in advance of a “bulk sale” and withhold from the purchase price the amount of any sales tax that the Department claims that the seller owes. Failure to adhere to those procedures can result in personal liability by the purchaser for the seller’s pre-existing sales tax liabilities. A recent Administrative Law Judge decision is a reminder that sometimes it may not be apparent that a bulk sale of

assets has even taken place. *Matter of Werner Boys, Inc., d/b/a Werner Boys Glass & Mirror*, DTA No. 825530 (N.Y.S. Div. of Tax App., Feb. 19, 2015).

Facts. Until January 2009, Werner Glass, a closely-held corporation owned by William O. Werner, Sr., operated a glass and mirror installation business in St. James, New York. Another company, Werner Boys, Inc. (the “Purchaser”), a closely-held corporation owned by William Werner Jr., the son of William Sr., conducted a similar glass business in Lake Grove, New York.

Werner Glass discontinued its business and dissolved on December 31, 2008. In or about January 2009, Purchaser moved into the business premises formerly occupied by Werner Glass, even taking the same phone number. The following month, two motor vehicles owned by Werner Glass were transferred to the Purchaser. Several former employees of Werner Glass became employees of the Purchaser. The Purchaser’s sales tax receipts rose dramatically beginning in 2009.

Following its dissolution, Werner Glass was audited by the Department, resulting in an assessment of additional sales tax due for the period March 1, 1998 through February 28, 2009, which appears to have become a final assessment against the defunct corporation. In February 2012, after requesting but not receiving a notification of bulk sale, the Department issued a Notice of Claim to the Purchaser for sales tax owed by Werner Glass. After concluding that a bulk sale of assets had occurred, the Department assessed Purchaser as a bulk sale purchaser for the outstanding sales tax liabilities of Werner Glass.

Bulk sale provisions. Generally, the purchaser of business assets in a bulk sale transaction must notify the Department of the sale at least 10 days before taking possession or making payment to the seller. The Department then must timely inform the purchaser of any sales tax that may be owed by the seller of the business. If the purchaser fails to withhold funds from the seller sufficient to pay the seller’s sales tax liabilities, the purchaser can be personally liable for those liabilities, limited to the greater of the purchase price or the fair market value of the business sold or transferred.

The term “bulk sale” is defined as “any sale, transfer or assignment in bulk of any part of the whole of business assets, other than in the ordinary course of business . . .” 20 NYCRR 537.1(a)(1). It includes a transfer by gift (20 NYCRR 537.1(a)(3)) or the assumption of indebtedness. The term “business assets” includes “any assets of a business pertaining directly to the conduct of the business, whether such assets are intangible,

tangible or real property,” and any assets owned by a corporation. 20 NYCRR 537.1(b).

Issues. The first issue in dispute was whether there was a bulk sale of business assets in the first place. Purchaser claimed that no bulk sale had occurred, contending that the only assets transferred were two vehicles. The Department maintained that, since the same glass installation business continued, simply moving over to the Purchaser in a transaction that was not conducted at arm’s length, the burden of proof was on the taxpayer to prove that a bulk sale did not occur and to prove the valuation of the business assets purchased. If a bulk sale had occurred, the issue then became whether the Purchaser limited its transferee liability by proving that the fair market value of the assets transferred was less than the sales tax liability being asserted.

When a purchaser acquires or otherwise takes over another business even a business with minimal tangible business assets - it may be acquiring valuable *intangible* business assets, and the transfer of those intangible assets can also constitute a bulk sale under the sales tax.

ALJ Decision. The ALJ held that a bulk sale had occurred and that, in the absence of proof regarding the fair market value of the assets transferred or the actual purchase price for the business, Purchaser was liable as a bulk sale purchaser for the full amount of the seller’s sales tax liabilities. The ALJ found that not only two vehicles were transferred to the Purchaser, but other business assets were transferred as well, including the seller’s customer base and goodwill. This was apparent because Purchaser’s sales tax receipts rose dramatically after Werner Glass dissolved, which suggested that Purchaser had acquired Werner Glass’ customer base, an intangible business asset. The fact that there was no contract of sale or money exchanged for the assets transferred between the related parties was not relevant in determining whether a bulk sale took place.

While the Purchaser sought to limit its liability based on the value of the assets transferred, it provided no third-party information regarding the value of the vehicles or any evidence of the value of the customer lists and goodwill. The ALJ also noted that the seller

and purchaser were related parties, suggesting that for all practical purposes the Purchaser was merely a continuation of the business of Werner Glass. The ALJ held that the burden of proof was on the Purchaser to prove that no business assets had been transferred and to prove the valuation of the business assets found to have been transferred, and concluded that the Purchaser had failed to meet that burden. Accordingly, it was held liable for the seller's sales tax liabilities.

Additional Insights

The decision highlights the fact that when a purchaser acquires or otherwise takes over another business — even a business with minimal tangible business assets — it may be acquiring valuable *intangible* business assets, and the transfer of those intangible assets can also constitute a bulk sale under the sales tax. This may not always be apparent to the purchaser of a business, making it incumbent on the purchaser seeking to limit its sales tax exposure to err on the side of caution by filing a notification of a bulk sale with the Department. The decision is also a reminder that the limitation on the bulk sale purchaser's liability is the greater of the purchase price for the business assets or the fair market value of those assets. In this case, once it was determined that business assets had been transferred, the burden remained on the Purchaser to prove the value of those assets in order to limit its liability. Admittedly, this case engendered heightened scrutiny since the transaction was between related parties, and the Purchaser appeared to have continued the seller's business after the asset transfers.

ALJ ALLOWS PERSONAL INCOME TAXPAYERS TO CLAIM LOSSES RELATED TO INACTIVE BUSINESS

By [Michael J. Hilkin](#)

In *Matter of Anthony and Renata Conte*, DTA No. 825454 (N.Y.S. Div. of Tax App., Mar. 12, 2015), a New York State Administrative Law Judge concluded that personal income taxpayers validly claimed losses on their New York State and City return because the claimed losses were related to a business carried on for a profit and not related to a hobby.

Background. In 1999, Mr. Conte formed I Media Corporation (the "Corporation") for the purpose of publishing a television listings guide and shopping periodical, *TV Time Magazine*. Separately, in 2003, Mr. Conte also formed I Media Company (the "Company"), a sole proprietorship, to develop, print, distribute, and market *TV Time Magazine*. It is unclear

from the decision how the Corporation and the Company interacted with one another.

In November 2004, the Corporation began printing and distributing *TV Time Magazine* on a weekly basis on Long Island. *TV Time Magazine* was provided at no charge, as the Corporation intended to make money by selling advertising space and receiving payments from distributors for address lists and carrier route maps. In 2005, Mr. Conte hired a full-time advertising sales director who was delegated most of the advertising sales and marketing functions. In 2004 to 2005, the Corporation entered into contracts with 60 different distributors, and by 2005, *TV Time Magazine* reached a weekly distribution of 200,000 copies. However, after what Mr. Conte claimed was the interference of employees of Nassau County, the Nassau County District Attorney's Office (the "DA's Office") and Newsday, Inc. (the publisher of a Long Island newspaper), route distributors refused to distribute *TV Time Magazine*, and the Corporation was unable to continue in business.

Mr. Conte received a letter from the Department in December 2005, informing him that the Corporation was administratively dissolved, and Mr. Conte then began to wind up the affairs of the Corporation. In 2006, the Corporation assigned all of its claims, rights, property interests, goodwill, and legal causes of action to Mr. Conte, and Mr. Conte subsequently sued the parties he believed had wrongfully interfered with his business. He was awarded approximately \$1.4 million in compensatory and punitive damages against three individuals who performed services for the DA's Office based on a tortious interference with contracts claim; that award was on appeal at the time of the hearing.

Mr. Conte and his wife filed a joint New York State personal income tax return. The Contes included a Schedule C "Profit or Loss From Business (Sole Proprietorship)" for the Company with their 2010 return, which reported that the Company did not receive any revenue and incurred a net loss of \$47,923.00. After auditing the Contes on a number of issues related to their 2010 return, the Department, among other things, disallowed the Company's losses because it did not consider the business of the Company to be carried on for profit. The Department reached its conclusion on the basis that the Company did not have any income in three of the previous five years. The Department never asked the Contes to provide substantiation for the amount of the claimed losses.

The law. For New York State personal income tax purposes, the calculation of taxable income starts with a taxpayer's federal adjusted gross income. Under Internal Revenue Code ("IRC") § 162(a), a taxpayer may

deduct “all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.” However, if an activity is “not engaged in for profit,” deductions may be taken only to the extent of income from such activity. IRC § 183(b)(2). Treasury Regulation § 1.183-2(b) provides nine factors to be considered in determining whether activities are engaged in for a profit: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities (i.e., in turning a business from unprofitable to profitable); (6) the taxpayer’s history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, that are earned; (8) the financial status of the taxpayer (i.e., whether the taxpayer has substantial income from other activities); and (9) the elements of personal pleasure or recreation involved in the activity.

The decision. After swiftly dismissing the Contes’ other challenges to the Department’s audit, the ALJ agreed that the Contes were entitled to the losses claimed on Schedule C because they were related to Mr. Conte’s business of publishing and circulating *TV Time Magazine*, and such business “was engaged in for profit and not as a hobby.”

The ALJ said that to determine whether a business’s activities are carried on for profit, one must “focus upon the entire history of the enterprise and not just the year in issue.”

In reaching his decision, the ALJ first rejected the Department’s argument that the Contes failed to provide evidence substantiating the amount of the losses claimed on Schedule C. The ALJ explained that the Department only raised the issue of substantiation after the ALJ hearing and concluded that such a factual issue may not be raised for the first time in the Department’s brief because doing so would deprive the Contes of the opportunity to offer evidence on the issue. Second, while recognizing the confusion created by the separate existence of the Corporation and the Company, the ALJ nonetheless accepted that, if the Corporation could be characterized as having been carried out for profit, such losses were properly claimed on the Contes’ tax return.

Finally, the ALJ applied the factors of Treasury Regulation § 1.183-2(b) to conclude that the business of the Corporation was carried out for profit. Among other

things, the ALJ identified Mr. Conte’s prior experience in the distribution of periodicals for a supermarket chain, the time and effort required for *TV Time Magazine* to reach its weekly distribution at its height, the “inappropriate interference” with the business that caused its demise, and the lack of any recreational or diversionary purpose for having carried out the business of the Corporation. Further, the ALJ rejected the Department’s claim that there was no business engaged in for profit because the business was inactive in 2010. Instead, the ALJ said that to determine whether a business’s activities are carried on for profit, one must “focus upon the entire history of the enterprise and not just the year in issue.”

Additional Insights

The Tax Appeals Tribunal has consistently relied upon the factors listed in Treasury Regulation § 1.183-2(b) for determining whether a business is engaged in with the objective of making a profit. These determinations are necessarily highly fact-specific. This case reaffirms that an unsuccessful business venture may have been engaged in for purposes of making a profit, and that losses of inactive businesses may still be deductible as business losses.

Separately, this case highlights the Division of Tax Appeals rules that require all factual issues to be raised by both parties at or before the hearing. This rule is often invoked against a petitioner that belatedly tries to add new facts to the record. Here, because the Department did not raise the issue of substantiation until it filed its post-hearing brief, after the record had closed, it was foreclosed from challenging the evidence supporting the losses.

NYC ALJ AGREES BROKER-DEALER FLOOR CLERK IS EMPLOYEE AND NOT SUBJECT TO UBT

By [Hollis L. Hyans](#)

A New York City Administrative Law Judge has found that a floor clerk working for a broker-dealer at the American Stock Exchange in 2005 was an employee, not an independent contractor, and therefore was not required to pay the City Unincorporated Business Tax (“UBT”). *Matter of Timothy J. Young*, TAT(H) 12-19 (UB) (N.Y.C Tax App. Trib., Admin. Law Judge Div., Feb. 4, 2015).

Facts. Mr. Young began working for William J. Buckley Associates, Inc. (“Associates”) in 2002 as a wire clerk,

and during 2005 he held the position of floor clerk. Associates was a broker-dealer member of the American Stock Exchange (“Exchange”). It executed stock and option orders for broker-dealer clients through floor brokerage but did not deal directly with the public nor trade for its own account. Mr. William J. Buckley, Associates’ sole principal, was a broker, and he employed several individuals as clerks who took orders that he executed.

Mr. Young worked on the Exchange weekdays from 8:30 a.m. until 4:00 p.m. Associates had obtained a floor clerk badge from the Exchange for him, paid the Floor Clerk Fee, and provided him with a clerk’s jacket identifying him as an employee of the firm. Mr. Young worked at the booth that Associates leased from the Exchange, which was equipped with telephones and computers purchased by the firm, which also subscribed to financial data and news services available to Associates’ employees at the booth. Pursuant to Supervisory Procedures established by Associates, Mr. Young attested that he was an employee subject to supervision by Mr. Buckley.

Mr. Young’s responsibilities included receiving telephone orders from Associates’ clients, recording the orders and transmitting them to Mr. Buckley by headset or telephone; Mr. Buckley then executed the orders on the Exchange floor. Mr. Young also entered some orders himself, but he was not permitted to work on the Exchange floor without Mr. Buckley’s permission.

Associates also employed two assistants to Mr. Young, who primarily answered telephone calls and occasionally called in orders to Mr. Buckley. Summer interns were also hired to perform administrative work. Associates purchased health insurance for Mr. Young, paid workers’ compensation for him, and provided him with a paid vacation.

During 2005, Mr. Young began looking toward a future partnership with Mr. Buckley. He established a limited liability company, TJY Brokerage LLC (“TJY”), and entered into arrangements with two unrelated corporations, with Mr. Buckley’s approval. He performed no services for one of them, and he earned a minor amount of dividends from an account he set up with the other. He created a home office and deducted expenses from business income for this office, as well as for meals and entertainment of clients, on Schedule C, and these expenses were not reimbursed by Associates. During 2005, Mr. Young’s method of compensation changed, from a fixed salary, payable directly to him, to payment of commissions, made to TJY, for work done for Associates.

Legal Standard. Under the UBT Rules, 19 RCNY § 28-02(e)(3), the standard to be applied in determining

whether an individual is an employee is “[w]hether there is sufficient direction and control which results in the relationship of employer and employee...”

An independent contractor, unlike an employee, is subject to control only with regard to the results to be accomplished and not to the “means and methods for accomplishing the result.” 19 RCNY 28-02(e)(2)(ii). The relevant factors include whether the individual is required to work stated times, is provided equipment and furnished a worksite, is covered by unemployment insurance, receives fringe benefits, and has income tax withheld. 19 RCNY 28-02(e)(2)(i) and (3).

In this case, the City was arguing that, in 2005, Mr. Young was an independent contractor engaged in the securities business, and that the business income he earned was subject to the UBT.

ALJ Decision. The ALJ decided that Mr. Young was an employee and not subject to the UBT. She concluded that Mr. Buckley controlled the Exchange worksite and provided Mr. Young with the necessary equipment to perform his responsibilities. Mr. Young was required to be at the Exchange daily for specified hours, needed Mr. Buckley’s permission to conduct any unrelated business, and actually performed very little such unrelated activity. All of Mr. Young’s 2005 income was attributable to his work for Associates, and he did not hold himself out to the public as an independent broker. Although his method of compensation changed in 2005 from a fixed salary to commission payments, the ALJ found that Mr. Young’s duties and responsibilities were no different thereafter. Therefore, under the UBT Rules, which requires an examination of all the facts and circumstances, the ALJ held that Mr. Young was an employee and not an independent contractor subject to UBT.

Additional Insights

Disputes over whether individuals are employees or independent contractors more commonly arise in the context of workers’ compensation issues or unemployment compensation claims, with individuals arguing that they were employees entitled to various benefits under state law. Here, the issue was treatment as an independent contractor for purposes of subjecting the individual’s income to an additional tax under New York City’s unincorporated business tax. Although the facts did include some minor elements favorable to the argument that Mr. Young was subject to UBT – such as the creation of an LLC and work, although minimal, for others – the facts as reviewed by the ALJ appear to lean strongly in favor of finding Mr. Young an employee.

No appeal has been filed by the City.

INSIGHTS IN BRIEF

New York's Refundable EZ Tax Credit Payments Must be Included in Federal Taxable Income

In *Maines v. Commissioner*, 144 T.C. No. 8 (U.S. Tax Ct., Mar. 11, 2015), the U.S. Tax Court held that New York's Economic Development Zones Act incentives ("EZ credits") were taxable accessions to wealth and includible in federal adjusted gross income. The Tax Court rejected the argument that it was bound by New York's characterization of the payments, which it called a "bountiful harvest," as credits, and found that because the EZ Investment Credit and the EZ Wage Credit did not depend on any past tax payments, they were not refunds of past "overpayments" but were similar to subsidies and taxable. The Real Property Credit, because it did depend on past property credits, was treated as if it was a refund of a past tax overpayment and also included in taxable income.

NYS ALJ Finds Claimed Losses Arose from "Abusive Tax Avoidance Transactions"

A New York State Administrative Law Judge has disallowed losses arising from investments in oil and gas exploration partnerships, finding that the ventures had tax avoidance as their primary motive and had no economic substance apart from the tax benefits. *Matter of Joseph and Nancy Francoforte*, DTA No. 825390 (N.Y.S. Div. of Tax App., Feb. 19, 2015). The ALJ noted that the offering materials reflect "an exhaustive discussion" of the tax benefits but provided little or no information on locations or names of the wells to be drilled, the anticipated oil or gas production, or the revenues to be derived. Also, because the transactions were found to be abusive tax avoidance transactions, the extended six-year statute of limitations applied under Tax Law § 683(c)(11)(B), and the notices of deficiency were found timely, despite having been issued beyond the normal three-year statute of limitations.

Tax Department Issues Guidance for Corporations Transitioning Under Article 9-A Corporate Tax Reform Legislation

The New York State Department of Taxation & Finance has issued guidance explaining various transitional filing positions for Article 32 and Article 9-A taxpayers affected by the corporate tax reform legislation that became effective for tax years beginning on or after January 1, 2015. *Transitional Filing Provisions for*

Taxpayers Affected by Corporate Tax Reform Legislation, TSB-M-15(2)C (N.Y.S. Dep't of Taxation & Fin., Feb. 26, 2015). For example, the technical memorandum provides that continuing Article 9-A taxpayers must use new 2015 tax forms, and cautions that returns submitted using prior-year forms will not be processed and will not be considered timely filed. Another example is that the mandatory first installment of estimated tax for 2015 should be based on the tax or properly estimated tax shown on the taxpayer's 2014 return and should not reflect the 2015 corporate tax reform changes. However, those tax reform changes do have to be taken into account for the second, third, and fourth installments of estimated tax.



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Allied-Signal, Inc. v. New Jersey
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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
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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
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IGT v. New Jersey
Intel Corp. v. New Mexico
Kohl's v. Indiana
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MCI Airsignal, Inc. v. California
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Nabisco v. Oregon
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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
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Thomson Reuters v. Michigan
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USV Pharmaceutical Corp. v. New York
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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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