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NEW YORK TAX INSIGHTS

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TRIBUNAL AFFIRMS DECISION SOURCING "OTHER BUSINESS RECEIPTS" TO WHERE THE WORK WAS PERFORMED

By Hollis L. Hyans

After three non-precedential Administrative Law Judge decisions—and well after the statute in question has been replaced by new apportionment rules—the New York State Tax Appeals Tribunal has issued a precedential decision holding that revenue earned by an online business is properly sourced to the location where the revenue-generating activity was performed, in this case entirely outside New York. *Matter of Catalyst Repository Systems, Inc.*, DTA No. 826545 (N.Y.S. Tax App. Trib., July 24, 2019). While it did not agree with the Administrative Law Judge's determination that the receipts were from services, finding that they were instead "other business receipts," the Tribunal nonetheless rejected the Department of Taxation and Finance's argument that, under the facts in this case, "other business receipts" should be sourced to the location of customers for years prior to New York's adoption of market sourcing for all businesses.

Facts. Catalyst Repository Systems, Inc. ("Catalyst") is a Colorado-based electronic data and document management company that provides litigation support services, including the use of proprietary software and technical personnel to acquire, store, sort, filter, and organize documents, generally used by clients needing to respond to discovery requests in litigation or regulatory proceedings. Catalyst licenses the use of its system to clients, for a designated case, on a month-to-month basis. The clients provide data to be hosted by Catalyst and then use the Internet to access Catalyst's system to search, review, and retrieve their own data. Catalyst organizes the data at its Colorado headquarters, where it maintains computer servers and storage facilities and where its employees develop, monitor, and maintain the necessary technology. Catalyst employs a large staff to keep the system operating and secure, assist clients in using the system, and build and maintain routers, servers, and other equipment. It charges its clients various forms of hosting fees, including monthly access fees, variable license fees, and base license fees.

The Issue. Catalyst treated its receipts as "service receipts" under Tax Law former § 210(3)(a)(2)(B) and sourced the receipts to the location where it maintained that the services were performed, outside of New York State. As an alternative, Catalyst argued that even if its receipts are classified as "other

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business receipts," under Tax Law former § 210(3)(a)(2)(D), they should still be sourced to Colorado because the activities and work that generated the receipts were performed there and not in New York.

The Tribunal . . . cited *Siemens Corp. v. Tax Appeals Trib.*, . . . in which the Court of Appeals held that other business receipts [were] earned in and properly sourced to the location of the work that resulted in the income.

The Department argued that Catalyst's receipts should be classified as payments for intangible assets and treated as other business receipts, as opposed to receipts derived from the performance of services, relying on the language in Catalyst's agreements with its customers that referred to the right to access and use Catalyst's software system, and also contending that "services" must be performed by humans and may not be wholly automated. Under Tax Law former § 210(3)(a)(2)(D), other business receipts are sourced to the location where they are earned, which the Department argued, relying in part on its own Advisory Opinions issued in cases involving what it claimed were analogous facts, is the location of the devices on which Catalyst's customers access the system.

ALJ Determination. An ALJ agreed with Catalyst that the receipts arose from services and found that, even though no employees or agents of Catalyst were involved in performing the transactions at the moment of sale, the company was performing a litigation support service, through extensive personnel and facilities. The ALJ then determined that the services were performed in Colorado where Catalyst's servers and computer infrastructure, as well as the majority of its employees, were located.

Tribunal Decision. While it upheld the ALJ's ultimate decision that the receipts were not properly sourced to New York, the Tribunal did so on a different theory. First, it agreed with the Department that the receipts were not properly characterized as from services, finding that Catalyst's agreements with its customers granted the customers a license to use, and access to, its system. The Tribunal found that the employees who operated and maintained the system provided those services to Catalyst and not to its customers and that any services provided by Catalyst's employees to customers were not part of the licensing revenue at issue. Therefore, the Tribunal found that the receipts were for the license of "the use of a technologically advanced tool" and were properly classified as "other business receipts."

The Tribunal then considered the provision in Tax Law former § 210(3)(a)(2)(D) requiring other business receipts to be sourced to the location where they were earned. It cited *Siemens Corp. v. Tax Appeals Trib.*, 89 N.Y.2d 1020, *rearg. denied*, 90 N.Y.2d 845 (1997), in which the Court of Appeals held that interest income, classified as other business receipts, was earned in and properly sourced to the location of the work that resulted in the income. Here, because virtually all of the work resulting in the receipts at issue—the development, monitoring, and maintenance of the system—occurred in Colorado, the receipts were not earned in, and could not be sourced to, New York.

The Tribunal acknowledged that the Department had issued four Advisory Opinions regarding the sourcing of receipts from digital transactions, including opinions dealing with digital access to data, digital sales of gift certificates and related products, and digital access to information, and that the Department has ruled that other business receipts should be sourced to the location of the purchasers' devices. However, as the Department conceded, Advisory Opinions are at most persuasive but are not precedential, and the Tribunal found that these Opinions are not persuasive, because they "offer no statutory or regulatory justification" for their conclusions; "they simply assert it." In the absence of authority for the position taken in the Advisory Opinions, the Tribunal rejected their conclusion and followed the Court of Appeals' holding in *Siemens*.

The Tribunal also noted, as had the ALJ below, that corporate tax reform, effective for taxable years beginning on or after January 1, 2015, provides for customer sourcing of other business receipts, and it is presumed that the amendments made a material change in the law. While the Department attempted to rebut this presumption by arguing that the "long-standing purpose" of the receipts factor had been to require customer-based sourcing, which tax reform was merely adopting, the Tribunal rejected this argument and found that the memorandum in support of tax reform actually reflected the contrary position, describing the modern shift to a service-based economy and expressly stating the new law would source a business's receipts to the location of its customers, thus removing "a previous disincentive to locating in New York."

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ADDITIONAL INSIGHTS

In addition to the ALJ decision in this case, two other ALJs had reached similar decisions in other cases, neither of which was appealed by the Department, leaving taxpayers with no precedential decision, and allowing both the Department and the New York City Department of Finance to continue to make audit adjustments sourcing receipts from transactions conducted electronically to the location of customers. This decision should make it clear that, even where such receipts are treated as other business receipts, for years prior to 2015 receipts similar to those earned by Catalyst must be sourced to the location where the underlying work was performed.

The decision also includes language that may be helpful to taxpayers in other contexts who are challenging positions the Department has taken in its Advisory Opinions. If, as here, the Advisory Opinions do not present statutory or regulatory support for their conclusions, the Tribunal is unlikely to find the Opinions persuasive.

TRIBUNAL HOLDS THAT CHARITABLE TRUST IS NOT EXEMPT FROM REAL ESTATE TRANSFER TAX

By Kara M. Kraman

The New York State Tax Appeals Tribunal, affirming the decision of an Administrative Law Judge, rejected a charitable trust's claim that it should be considered an agency or instrumentality of the government and, therefore, exempt from New York State real estate transfer tax on its sale of real property. *Matter of Robert J. Randell as Executor of the Estate of Phyllis Millstein & as Trustee of the Irving & Phyllis Millstein Charitable Trust for Animals*, DTA No. 827359 (N.Y.S. Tax App. Trib., July 24, 2019).

Facts. The Irving and Phyllis Millstein Charitable Trust for Animals (the "Trust") was established in 2001 under the last will and testament of Phyllis Millstein to provide "for the care of neglected and homeless animals and for the prevention of cruelty to animals, which may include public and private education, and research in connection therewith." The Trust was exempt from federal income tax under IRC § 501(c)(3) and was similarly granted New York State and local sales tax exempt status with regard to its purchases. One of the assets held by the Trust was title to real property situated at 22 East 81st Street in Manhattan (the "Property").

In 2015, the Trust sold the Property for $15.6 million. It filed transfer tax returns reporting the transaction, claiming an exemption from both New York State real estate transfer tax ("RETT") and New York City real property transfer tax ("RPTT"), and paying both taxes under protest. After initially rejecting the Trust's refund claim, New York City refunded the Trust's payment of RPTT, but New York State denied the refund claim. The Trust filed a Petition with the New York State Division of Tax Appeals protesting the refund denial.

> **"[T]he regulatory scheme set up by the federal and state governments to protect and safeguard against improper expenditure of charitable funds does not transform the Trust into a government agency or instrumentality."**

Law. Where either the State of New York or the United States (including any agency or instrumentality thereof) is a transferor of real property, it is exempt from the RETT. Tax Law § 1405(a).

ALJ Determination. ALJ upheld the Tax Department's denial of the Trust's refund claim and rejected the Trust's argument that it should be considered an agent or instrumentality of the government and, therefore, be exempt from RETT. The ALJ further noted that the fact that the trust is exempt from both New York State sales tax and federal income tax by reason of its charitable status does not concomitantly qualify it for any exemption under the RETT. The RETT law does not contain an exemption for IRC § 501(c)(3) organizations.

Tribunal Decision. The Tribunal upheld the determination of the ALJ and rejected the Trust's argument that it should be considered an agent of the government because, the Trust claimed, the goal of the Trust was aligned with the public policy of the State of New York and the United States and because the government exercised "extraordinary control and oversight over the Trust." The Tribunal explained that, in order to establish an agency relationship, the principal must expressly authorize the agent to act on its behalf as an agency or instrumentality and that

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there was no evidence of such authorization in this case. While it acknowledged the Trust was subject to various requirements at the state and federal level, the Tribunal found that these requirements were merely general regulations that apply to all charitable organizations similarly classified by the IRS and the State of New York. "Simply put, the regulatory scheme set up by the federal and state governments to protect and safeguard against improper expenditure of charitable funds does not transform the Trust into a government agency or instrumentality."

The Tribunal also rejected the Trust's argument that RETT should not apply because the government and general public directly benefited from the net proceeds of the sale of the Property since they were used to fund the Trust's charitable purposes. The Tribunal noted that the assets of the Trust were not federal or state money nor was there any evidence that the proceeds of the sale of the Property were distributed to state or federal governments or counted as state or federal revenue. Finally, the Tribunal also rejected the Trust's argument that imposing a tax on an otherwise tax-exempt entity that is engaged in furthering a public policy places an undue burden on the implementation of that public policy, holding that it could not construe a policy to protect animals as giving the Trust an exemption from RETT without express authorization from the Legislature.

ADDITIONAL INSIGHTS

In light of the narrow construction given to tax exemption provisions, the Tribunal's decision is not surprising. While New York State's RETT and New York City's RPTT are similar in many ways, and often apply to the same transactions, it is important to remember that they are not identical. For example, unlike the RETT, the RPTT exempts any transfer by or to a charitable organization (such as the Trust) from the transfer tax. Thus, and as was the case here, it is possible that a transaction may be exempt from one tax but subject to the other.

ALJ FINDS BUSINESS OWNER RESPONSIBLE FOR EMPLOYEE WITHHOLDING TAXES

By Matthew F. Cammarata

Establishing responsible officer liability for failure to withhold or remit employee withholding taxes has generally received less administrative and judicial attention than responsible officer liability in the sales tax context. Whether and how business owners may be determined to be responsible officers for employee withholding taxes are the subjects of a recent Administrative Law Judge determination. The ALJ held that a business owner was a responsible person for the collection and payment of employee withholding taxes, despite facts in the record tending to demonstrate that the individual did not exert complete control over the company's finances. *Matter of Christopher Black*, DTA No. 828015 (N.Y.S. Div. of Tax App., July 25, 2019).

Whether a person has a duty to collect and pay over withholding taxes is a factual inquiry that looks to "whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee."

Facts. Christopher Black was the president and majority owner of New England Construction Company, Inc. ("NECC"), a New York S corporation engaged in the construction business. Mr. Black began his career as an apprentice at a company called Nastasi White, which was engaged in the drywall and acoustical ceilings business. Several years after completing his apprenticeship, Mr. Black and his brother formed NECC, although Mr. Black still worked for Nastasi White, and Mr. Black's brother was responsible for handling NECC's finances.

Members of the Nastasi family later invested money in NECC in exchange for ownership interests. As a result

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of the investments, Mr. Black's ownership interest in NECC was reduced to 51%, and four members of the Nastasi family owned the remaining 49%. Anthony Nastasi, one of the investors, later became involved in the financial management of NECC. According to Mr. Black, Anthony and the Nastasi family handled "[e]verything inside the office" related to the payment of taxes and other liabilities, while Mr. Black was responsible for the construction field work. Following some additional ownership changes, Anthony Nastasi held a 44% interest in NECC during the periods at issue, while Mr. Black continued to hold 51%. A third-party investor owned the remaining 5%.

As a result of over $4 million in debt owed by NECC to a Nastasi family business, Mr. Black signed an agreement with Mr. Nastasi that required Mr. Black to resign his position as president of NECC. After all of NECC's outstanding debts were satisfied, Mr. Black would receive 25% of the company's remaining assets and would be reinstated as president, with the remaining 75% of the assets going to Mr. Nastasi and the other third-party owner.

Although the ALJ recognized that corporate officers may make a "reasonable delegation" of the responsibility to ensure the proper payment of taxes, the ALJ determined that Mr. Black's delegation of such responsibility was not reasonable in this case.

Both Mr. Black and Mr. Nastasi managed and exercised control over NECC. For example, NECC's checkbook was kept in Mr. Nastasi's office, which was not located in NECC's offices. Mr. Nastasi maintained a stamp of Mr. Black's signature at his office and would use it without consulting Mr. Black. NECC's bank signature cards displayed both Mr. Black and Mr. Nastasi's names, and one signature card stated explicitly that Mr. Black must approve withdrawals by Mr. Nastasi. Mr. Black also listed himself and Mr. Nastasi as responsible persons on NECC's application to register as a New York State sales tax vendor. The Department's internal records reflected that Mr. Black was NECC's designated contact person for any issues relating to New York State corporation tax, sales tax, and withholding tax.

NECC's combined withholding, wage reporting, and unemployment insurance returns for the periods at issue were signed either by Mr. Black or Mr. Nastasi. Although the returns reported amounts due, NECC only partially remitted some of the tax due for certain periods, and remitted no tax reported as due for other periods. Mr. Black claimed to have first become aware of NECC's tax delinquencies two years before the periods at issue. In negotiations with the State for an "unspecified New York State tax debt," Mr. Black completed a responsible person questionnaire indicating that he was responsible for managing the business, which he later claimed was inaccurate. The Department's records showed multiple contacts with Mr. Black to discuss the outstanding amounts due.

The Internal Revenue Service ("IRS") also sought to hold Mr. Black responsible for NECC's withholding tax liabilities, but ultimately determined that Mr. Black was not a responsible person. An affidavit executed by Mr. Nastasi that was submitted in the IRS proceeding, and was also received into evidence before the ALJ in this case, stated that Mr. Black did not control corporate disbursements or financial responsibilities, or have authority over the payment of tax liabilities, and that Mr. Nastasi controlled the payment of NECC's bills.

The Department issued three Notices of Deficiency to Mr. Black, asserting that he was a responsible person of NECC and therefore liable for the payment of approximately $380,000 in withholding taxes.

Determination. The ALJ found that Mr. Black was responsible for the collection and payment of employee withholding taxes on behalf of NECC. Pursuant to Tax Law § 685(g), a person required to collect and pay over withholding taxes who *willfully* fails to collect and pay over the tax is subject to a penalty equal to the sum of the amount of taxes that were not collected and paid over plus interest on that amount. Whether a person has a duty to collect and pay over withholding taxes is a factual inquiry that looks to "whether the individual had *or could have had* sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee." *Matter of Frank S. Constantino*, DTA No. 802335 (N.Y.S. Tax App. Trib., Sept. 27, 1990) (emphasis added). Factors to be considered include: whether the person is an officer, director, or shareholder; whether the person has authority to write checks on behalf of the entity; the person's knowledge of and control over the finances of the entity; the authorization to hire and fire employees; whether the individual signed

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tax returns for the company; and whether the person held himself out to third parties as a responsible person.

The ALJ first determined that Mr. Black was a responsible person due to his status as incorporator, president, CEO, director, and 51% shareholder of NECC. The ALJ reasoned that "absent compelling circumstances" demonstrating that he had no actual authority, Mr. Black was a responsible person pursuant to Tax Law § 685(g). The ALJ rejected the argument that Mr. Nastasi's control over the company precluded Mr. Black from exercising his fiduciary responsibilities, reasoning that Mr. Black could not escape responsibility merely because he, as a corporate officer, yielded his responsibilities and duties to another person. This conclusion was supported by the fact that Mr. Black continued to hold himself out to the Department and other New York State agencies as a responsible person while experiencing a financial benefit from the arrangement.

The ALJ then moved on to conclude that Mr. Black "willfully" failed to collect and pay over withholding taxes, making him liable for NECC's withholding taxes due pursuant to Tax Law § 685(g). Although the ALJ recognized that corporate officers may make a "reasonable delegation" of the responsibility to ensure the proper payment of taxes, the ALJ determined that Mr. Black's delegation of such responsibility was not reasonable in this case. According to the ALJ, Mr. Black's inaction in the face of multiple tax deficiency notices from both state and federal authorities amounted to a reckless disregard of his duties, not merely an "accidental nonpayment." The only relief provided to Mr. Black was the ALJ's conclusion that Mr. Black was not a responsible person for any periods after Mr. Nastasi exercised his rights to buy Mr. Black's ownership interest, which terminated Mr. Black's role as president of NECC.

ADDITIONAL INSIGHTS

The ALJ's determination is notable because it finds the responsible person test to be satisfied despite evidence in the record tending to demonstrate that Mr. Black did not exert actual control over the corporation's finances. Indeed, the IRS found that Mr. Black was not a responsible person under a similarly worded statute, and an affidavit from Mr. Nastasi supported Mr. Black's claims that he exercised no actual control over the corporation's finances or tax responsibilities. The ALJ's decision is also significant because it bases the finding of "willfulness" on Mr. Black's unreasonable delegation of responsibility for ensuring the timely payment of taxes. Although delegation of responsibility for tax matters is a common practice in corporations, the ALJ found that Mr. Black's inaction after becoming aware of serious tax delinquencies was sufficiently reckless to be considered willful.

FIVE FREQUENTLY ASKED QUESTIONS ABOUT REPORTING FEDERAL AND NYS CHANGES

By Irwin M. Slomka

We are often asked questions on the reporting of federal and New York State changes for New York State and New York City corporate tax purposes in a variety of contexts. Here are a few of the most frequently asked questions (and answers):

1. *What must be reported?*

   For New York State corporate tax purposes, taxpayers must report changes to "the amount of taxable income" as adjusted by the Internal Revenue Service ("IRS") within 90 days (120 days in the case of a taxpayer filing on the basis of a New York State combined return) after the "final determination of such change or correction." Tax Law § 211.3.

   For New York City corporate tax purposes, taxpayers must report changes to "the amount of taxable income, alternative minimum taxable income or other basis of tax" within 90 (or 120) days of the final determination by the IRS or the New York State Department of Taxation and Finance ("New York State"). Admin. Code § 11-605.3.

   It is important to keep in mind that this is a *reporting requirement only*, and that a taxpayer has the option when reporting the changes to either "conced[e] the accuracy of such determination or state wherein it is erroneous." When reporting changes but disputing their applicability or otherwise claiming that they are erroneous, care must be given to clearly state that the taxpayer disagrees with the changes in order to avoid the possibility of inadvertently consenting to them.

2. *Is there a prescribed form for reporting those changes?*

   No. While Form 3360 had for many years been prescribed for reporting federal or New York State changes, that form is no longer used, and both New York State and New York City now require that corporate taxpayers instead report final changes by filing amended State or City returns.

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One potentially confusing consequence of reporting changes using amended returns is that where a taxpayer takes the position that the changes are inapplicable or otherwise erroneous nothing is actually being "amended" on the return. *How do I report NYS and NYC a lump sum settlement to?*

3. *How do I report to NYS and NYC a lump sum settlement?*

   Where a taxpayer resolves an audit with the IRS or New York State based on a lump sum settlement, and does not receive IRS or State workpapers showing changes to "taxable income" (or other basis of tax), the question becomes whether the law requires that the lump sum settlement be reported to the State or City. The answer is not entirely clear. Under the statutory language, a corporate taxpayer is only required to report to the State and City final changes to "taxable income" (or, in the case of New York City, also changes to "alternative minimum taxable income or other basis of tax"). If there are no such changes made to income (or other basis of tax), the law does not appear to require that the lump sum settlement be reported. *See Matter of Bentley Blum*, DTA No. 825455 (N.Y.S. Div. of Tax Appeals, Apr. 16, 2015) (a non-precedential New York State ALJ determination under the personal income tax holding that a lump sum settlement with the IRS was not a statutorily enumerated federal change that must be reported to the State).

   However, the New York City Department of Finance, in *Finance Memorandum* 17-5 (revised October 10, 2018), takes the position that lump sum settlements made with the IRS must be reported to the City by "calculating the amount of additional federal taxable income that corresponds to the settlement." It is unclear whether that policy is supportable under the statute, and even if it is, whether for City corporate tax purposes it also applies to lump sum settlements made with New York State.

4. *The New York City corporate tax law was amended in 2015 to require that State changes to a corporate taxpayer's apportionment factor be reported to New York City, which re-opens an otherwise closed tax year with respect to those changes. Does the new law apply to all such State changes to the apportionment factor made in 2015 or thereafter?*

   No. Only State changes to the apportionment factor made for a corporate taxpayer's tax years beginning after 2014 fall into this category.

5. *When do federal changes to a corporate taxpayer's net operating losses for tax years prior to 2015 affect the taxpayer's New York State and City "prior net operating loss carryover" subtraction computation for tax years beginning after 2014?*

   Under New York State and City corporate tax reform, NOL carryovers generated in tax years beginning prior to January 1, 2015, cannot be carried forward for State and City purposes. They must instead be converted into a "prior NOL conversion subtraction'' (the "PNOLC subtraction"). New York State has released draft regulations which provide that adjustments to a corporation's PNOLC can only be made within three years from the filing of the taxpayer's State return in which it first claims a PNOLC subtraction. Therefore, under the draft regulation, federal changes for tax years begining prior to 2015 that are finalized after the three years have expired would not be considered and would have no impact on the PNOLC computation, whether the changes increase or decrease the taxpayer's pre-2015 NOLs. It should be noted, however, that the Department has cautioned that its draft regulations cannot be relied on until they become final.

INSIGHTS IN BRIEF

ALJ UPHOLDS COMPLETE DENIAL OF MARRIED COUPLE'S SCHEDULE C BUSINESS LOSSES

An ALJ has upheld the denial of a married couple's claimed business losses reported on two separate federal Schedule C's. *Matter of Eddie & Delbra Brown*, DTA No. 827952 (N.Y.S. Div. of Tax App., Aug. 1, 2019). The ALJ found that the taxpayers met their burden of proving that one of the two Schedule C activities (online advertising) had a profit-making objective to constitute a trade or business, but nonetheless found, "after [a] painstaking review of petitioners' disorganized and incomplete records," that they failed to substantiate their business revenue and therefore it was impossible to determine whether deducting their expenses resulted in a business loss. The ALJ concluded that the taxpayers did not establish a profit motive for the other Schedule C activity (relationship coach), and thus no deductions were allowed with respect to that activity either.

ASSIGNMENT OF RESTAURANT'S LEASE TO PURCHASER HELD TO CONSTITUTE A BULK SALE OF ASSETS FOR SALES TAX PURPOSES

The Tax Appeals Tribunal held that the assignment of a lease to the purchaser of a restaurant business was sufficient to constitute a bulk sale of assets, resulting in transferee liability for the seller's sales tax liability.

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Matter of Singh Restaurant, Inc., DTA No. 827456 (N.Y.S. Tax App. Trib., Aug. 15, 2019). In response to the purchaser's filing of a notice of bulk sale, the Department notified the purchaser of an existing sales tax liability and instructed it to place the purchase price in escrow pending a release, which the purchaser disregarded. The Tribunal rejected the purchaser's alternative contention that the sale of ancillary tangible property was *de minimis* and was therefore not a bulk sale, holding that, a bulk sale results from the transfer of *any* property used in the business, whether it makes up merely a part or the entirety of the seller's business assets.

LOCATION OF HOUSE, NOT THE FRONT YARD, GOVERNS FOR PERSONAL INCOME TAX RESIDENCY

The New York State Department of Taxation and Finance has determined that, for personal income tax purposes, the petitioners, a married couple, are residents of Yonkers, despite the fact that the couple's property straddles the Bronx/Yonkers border. *Advisory Opinion*, TSB-A-19(1)I, (N.Y.S. Dep't of Taxation & Fin., May 23, 2019). The petitioners established with a survey that the entire physical house is located in Yonkers, although the front yard, consisting of vacant residential land, is over the county line in the Bronx. The house was found to qualify as a "dwelling place of a permanent nature" that the petitioners established they intended to make their permanent home, and therefore the petitioners meet the definition of Yonkers residents and are subject to Yonkers personal income tax and not New York City's.

ADULT CLUB SCRIP FOUND SUBJECT TO SALES TAX BY TAX APPEALS TRIBUNAL

The Tax Appeals Tribunal has affirmed the determination of an ALJ that charges for scrip used at an adult entertainment club are subject to sales tax. *Matters of The Executive Club LLC & Robert Gans*, DTA Nos. 827313–827318 (N.Y.S. Tax App. Trib., July 24, 2019). The Tribunal rejected the club's argument that the scrip was intangible property similar to gift cards, characterizing the receipts as admission charges to a place of amusement, and finding that the club failed to prove the amount of the scrip that might have been for tips. The Tribunal also refused to remand the case to the ALJ to allow the club to submit additional evidence to prove the tip amounts, since the club's belief that it would be able to resolve the issue with the Department did not amount to sufficient "special circumstances" necessary to allow re-opening of the hearing record.

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