"Shaking things up in state and local tax"

SUTHERLAND SALT SHAKER

FORECAST
Legislative storms subsiding; cool breeze expected.

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Michigan Legislation "Fixes" Single Member LLC Filing Concerns

On March 31, 2010, Michigan Public Act 38 (HB 5937) was signed into law alleviating much of the concern regarding the tax treatment of single member limited liability companies ("SMLLCs") under the prior Michigan Single Business Tax ("SBT"). In our March 10, 2010 *Sutherland SALT Shaker*, we described a Notice issued by the Michigan Department of Treasury ("Department") retroactively applying the SBT to SMLLCs that are disregarded for federal tax purposes. This Notice was promulgated in light of *Kmart Michigan Prop. Servs LLC v. Dep't of Treasury*, 283 Mich. App. 647 (Mich. Ct. App. 2009), *appeal denied*, 772 N.W.2d 421 (Mich. 2009) where the court found that a SMLLC was a taxable "person" for purposes of the SBT.

HB 5937 rescinds the Notice's retroactive application of the *Kmart* ruling and provides the following treatment to taxpayers that filed SBT returns that included their SMLLCs: (1) the Department will not assess the taxpayer an additional tax or reduce an overpayment because the disregarded SMLLC was included in its return; and (2) the Department shall not require SMLLCs to file a separate return for any prior period. The act is curative, may be retroactively applied, and according to the enacting section of the legislation, is specifically "intended to correct any misinterpretation" concerning the treatment of disregarded SMLLCs caused by the *Kmart* decision. Finally, the legislation does not apply to the successful plaintiff in the *Kmart* case or other taxpayers in similar litigation.

Georgia's Contingency-Fee Tax Collectors

On March 26, 2010, the Georgia Senate overwhelmingly passed S.B. 512, which provides the State Revenue Commissioner with the discretion to engage contractors on a contingency-fee basis to collect sales and use taxes. Specifically, the bill authorizes the Commissioner "to provide for the collection of uncollected sales and use taxes that businesses may otherwise not be obligated to collect and remit which have not been previously collected or remitted." Under the bill, such "bounty hunter" contractors may only be compensated on a commission or contingency-fee basis.

Thus far, this bill has flown under the radar, which is somewhat curious given that the House recently passed H.B. 1221, which incorporates many of the provisions from the Streamlined Sales and Use Tax Agreement, including a provision allowing out-of-state catalog and Internet retailers to comply voluntarily with sales and use tax collection. It becomes even more curious considering the prior statements by the current Commissioner and the prior ruling of the Georgia Supreme Court regarding contingency-fee auditors. The State Revenue Commissioner, Bart Graham, has been outspoken about contingency-fee auditors and has written several letters to the editor of *The Atlanta Journal-Constitution*, including a September 2009 letter rejecting the idea of using contingency-fee auditors. Specifically, Commissioner Graham stated that "allowing collection based upon a profit motive rather than sound tax law and regulation would ensure that taxpayers would be disadvantaged." Additionally in 1991, the Georgia Supreme Court held that a contract with a contingency-fee auditor was void as against public policy because of the contingency scheme of compensation for those services. *Sears, Roebuck and Co. v. Parsons*, 401 S.E.2d 4 (Ga. 1991). The bill is currently under consideration in the House Ways and Means Committee.

New Jersey's Telecommuter Nexus

As if New Jersey did not already have enough of an image problem, it can now add annoyed telecommuters, and the businesses that employ them, to the list of reasons for the state's less than stellar reputation. (Note to our readers: our Jersey Boy Jeff Friedman tried to remove this lead-in sentence, but he was overruled.) On March 24, the New Jersey Tax Court granted summary judgment to the Division of Taxation with respect to a Corporation Business Tax assessment against an out-of-state corporation due to the presence of a single employee telecommuting from a home office in the Garden State. The Tax Court upheld the Division's determination that a foreign corporation that regularly and consistently permits its employee to work each business day at a New Jersey residence is "doing business" in the state and therefore is required to file a Corporation Business Tax return.

The telecommuting employee had worked at the taxpayer's Maryland headquarters before relocating to New Jersey. After relocating, the employee continued her employment from her home and was provided with a laptop (which the employee later replaced with her own personal laptop). The employee received daily work assignments (which mostly consisted of writing software) via email or telephone from her out-of-state project manager. Significantly, the employee did not solicit

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Wisconsin Tax Appeals Commission Addresses Sham Transaction Doctrine

In *Hormel Foods Corp. v. Wisconsin Dep't of Revenue*, No. 07-I-17 (Mar. 29, 2010), the Wisconsin Tax Appeals Commission determined that Hormel's subsidiary, Foods LLC, lacked economic substance and business purpose and was formed primarily for state tax savings purposes. Consequently, the Commission held that under the sham transaction doctrine, the Department of Revenue properly disallowed Hormel's royalty deductions paid to Foods LLC.

The Commission noted that Foods LLC did not receive royalty payments from third parties and that there was a circular flow of cash from Hormel to Foods LLC back to Hormel. Unlike some holding company arrangements, Foods LLC not only owned intangible property, it also conducted the research and development associated with its intangibles. The Commission, however, placed weight on the fact that Hormel continued to control decisions related to the intellectual property and that Foods LLC had no other source of income other than the royalty payments from Hormel. Finally, the Commission's opinion repeatedly referenced Hormel's documentation from a Big 4 accounting firm that suggested that the structure was engineered to save state taxes.

Wisconsin has adopted combined reporting effective for tax years beginning on or after January 1, 2009. Taxpayers that have a demonstrated, non-tax business purpose related to a holding company structure may be able to distinguish themselves from the taxpayer in *Hormel* and avoid a similar fate.

New Jersey's Telecommuter Nexus *(cont.)*

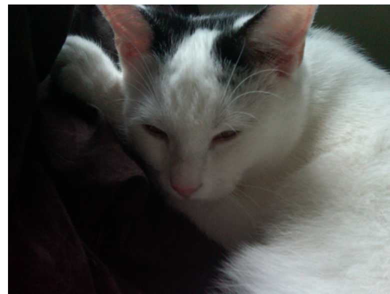
customers or perform any sales-related activities. While the taxpayer did withhold New Jersey tax on the employee's income, it did not file a New Jersey Corporate Business Tax return.

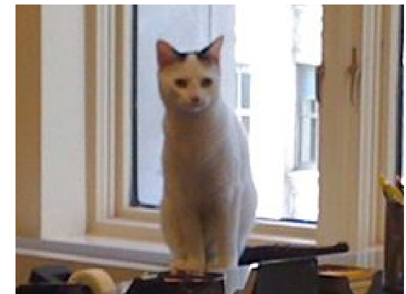
The New Jersey Tax Court held that the taxpayer was "doing business" in New Jersey based on the employee's in-state activity and the ownership of in-state property (*i.e.*, one laptop). The Tax Court also held that neither the Due Process Clause nor the Commerce Clause was violated because: the taxpayer had fair warning that its employment relationship might subject it to state tax due to the regular employment and supervision of the employee in the state; and the presence of the employee in the state created a substantial nexus.

The increasing amount of telecommuting should be encouraged, not discouraged, by states. New Jersey, which has some challenges with its traffic and pollution, would be well-advised to reconsider its stance that a single, remote employee not soliciting sales within the state creates nexus.

SALT PET OF THE MONTH

Diann's "Twin"





When Twin moved in with Diann Smith on September 24, 2009, he was six months old and had been picked up by New York City's Animal Care and Control in Brooklyn. His intake card listed him as "fearful."

Today, Twin is more aptly described as funny and devoted. He has quickly taken on important responsibilities associated with being a Sutherland SALT pet: deftly pushing the pages back into the printer so Diann can practice fixing paper jams, walking on the computer keyboard to add complexity to Diann's documents, and sleeping on the computer to protect it with his furry little body. Twin recently worked with Diann at Sutherland's DC office (we hope firm management is not reading this edition of the Shaker…) while his pet sitter was on spring break (see above photo).

When Twin is not "working," he is a vibrant little guy who loves to play fetch, chasing his toys as if his life depended on it. To encourage Diann to play when she is sleeping, he dunks his fluffy mouse toy in his water bowl and then drops it on Diann's head. Such ingenuity makes Diann wonder how she ever lived without him.

Recently Seen and Heard

March 8-10, 2010
2010 Unclaimed Property Professionals Organization (UPPO) Annual Conference
Hyatt Regency Orange County – Orange County, CA
Diann Smith on when to bring in counsel or other experts in unclaimed property matters
Matthew Hedstrom on business-to-business exemptions, other exemptions, and when to use them

March 24, 2010
American Bar Association/ Institute for Professionals in Taxation Advanced Sales and Use Tax Seminar
The Ritz-Carlton – New Orleans, LA
Diann Smith on State Tax Treatment of Bad Debts and Limitation of Remedies

March 25-27, 2010
The Tax Council 2010 Annual Spring Tax Conference
The Breakers – Palm Beach, FL
Jeff Friedman on State Taxation and International Operations Trends and Dangers

April 8-9, 2010
DC Bar 2010 Judicial and Bar Conference
Ronald Reagan Building – Washington, DC
Steve Kranz on Don't Get Lost: Navigating an Income or Sales Tax Dispute Through the DC Administration and Courts

Think Twice Before You R.S.V.P. to this Invitation: Massachusetts Limited Amnesty Program

The Massachusetts Department of Revenue has unveiled the details of a two-month amnesty initiative available only to taxpayers with outstanding business tax liabilities that have been invited to participate. Technical Information Release 10-5, Massachusetts Dep't of Revenue (Mar. 12, 2010). The amnesty program, which was approved by the Legislature last year (Ch. 166 (H.B. 4359), Laws 2009), has strict limitations and even contains a penalty provision.

Running from April 1, 2010, through June 1, 2010, and applying to tax periods ending on or before December 31, 2009, the amnesty program is limited to the following existing business tax liabilities: (1) sales and use tax; (2) sales tax on telecommunications services; (3) meals tax; (4) materialman sales tax; (5) payroll withholding taxes; (6) room occupancy tax; (7) certain local convention center financing fees and surcharges; (8) certain excise taxes, including cigarette, tobacco, club alcohol beverage, gasoline and fuels; and (9) boat and recreational vehicle sales tax.

The program is open to taxpayers that have received a "Tax Amnesty Notice" and either (1) have an unpaid and previously self-assessed tax liability for an eligible tax type; (2) have been previously assessed a tax liability for an eligible tax type by the Commissioner and are properly disputing the unpaid liability; or (3) are delinquent in paying the liability. Taxpayers that have entered into a payment agreement with the Department of Revenue prior to April 1, 2010, or that have appeals pending are eligible to participate in the amnesty program so long as they have been issued a "Tax Amnesty Notice." The program does not extend to taxpayers that (1) are subject to a tax-related criminal prosecution or investigation prior to April 1, 2010; (2) have signed a settlement agreement with the Commissioner; or (3) have paid all tax and interest due relating to an outstanding assessment but that, as of April 1, 2010, still owe or are properly disputing penalties with regard to that assessment.

If a taxpayer qualifies for amnesty, the Commissioner will waive all unpaid penalties and interest directly attributable to those penalties upon full payment of all tax and interest due under the program. Interest on the unpaid tax liability cannot be waived. Amnesty payments are due on June 1, 2010, and will be considered timely if they are received by the Department of Revenue by or postmarked on or before June 1 at 5:00 p.m. Contrary to the purpose of most amnesty programs, which is to encourage taxpayers to settle cases and avoid penalties, Massachusetts imposes an amnesty penalty of up to $500 if the full outstanding balance of tax and interest is not timely paid.

California Interested Parties Meeting

The California Franchise Tax Board ("FTB") has scheduled an interested parties meeting for April 21, 2010 at 1:00 p.m. PDT to discuss updating Regulation 25106.5-1, which relates to the treatment of intercompany transactions. Issues to be discussed include the effect on the sales factor when companies make a separate entity election and the effect of various transactions on Deferred Intercompany Stock Accounts ("DISA").

Income or loss from intercompany transactions between members of the combined group generally is deferred until there is a triggering event, such as a sale to a third party. Regulation 25106.5-1(e) permits taxpayers to elect to treat members of the combined group as separate entities in certain circumstances, thus accelerating the recognition of income or loss to the year of the intercompany transaction. The FTB staff proposes to amend Regulation 25106.5-1(e) so that intercompany receipts will not be included in the sales factor during the year of the intercompany transaction, and instead will be included during the year involving transactions with third parties.

A DISA, a regime that is unique to California, is created by non-dividend distributions that exceed earnings and profits and basis. Specifically, the FTB is requesting input on (1) whether a merger should trigger the recognition of a DISA, (2) whether a subsequent capital contribution should reduce or eliminate a DISA, and (3) whether more than one DISA should be created, if the same distribution is effectively made through various tiers of stock ownership. For more information on California's DISA reporting requirements, see Sutherland Legal Alert: What Is DISA All About? We will keep you posted on the results of the meeting and further developments with Regulation 25106.5-1.

California and Tennessee Consider Onerous Reporting

In the wake of the enactment of CO HB 1193, which imposes onerous reporting requirements on out-of-state retailers, two state legislatures are considering similar legislation. In rapid-fire succession, Tennessee and California entered into this highly controversial fray over imposing burdensome collection and reporting regimes on companies that are not subject to sales and use tax collection under well-established U.S. Supreme Court precedent. As explored in Sutherland's recent A Pinch of SALT: Colorado's End Run - Clever, Coercive, and Unconstitutional, several constitutional challenges are likely because companies should not be coerced into collecting sales and use taxes. The full text of TN SB 1741/HB 1947 is here, and CA AB 2078 can be found here.

Maine Goes *Finnigan*

On March 31, 2010, Maine Governor John Baldacci signed L.D. 1761 (HP 1183), a budget bill that adopts the *Finnigan* rule for calculating the sales factor. The law is effective for tax years beginning on or after January 1, 2010. Under the enacted *Finnigan* rule, a taxpayer includes the Maine sourced sales of all unitary entities regardless of whether the entity has stand-alone nexus with Maine. Maine asserts nexus over any entity conducting business or deriving apportionable income from Maine. 18-125 Me. Code R. § 808. Maine's adoption of this bill continues the trend of a move towards the *Finnigan* rule in combined reporting jurisdictions such as Massachusetts and Wisconsin.

The bill also modifies Maine's recently adopted throwout rule to clarify that the throwout rule does not apply if any member of an affiliated group with which the taxpayer conducts a unitary business is taxable in the destination state. The rule renders irrelevant the holding of *Great Northern Nekoosa Corp. v. State Tax Assessor*, 675 A.2d 963 (1996) which applied a *Joyce* standard to hold that the throwback rule applied to a taxpayer where another member of a unitary group was taxable in the destination state in which the taxpayer was not itself taxable. "A taxpayer is taxable in another state if in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether in fact, the state does or does not." Me. Rev. Stat. Ann. § 5211.

Come See Us

April 15, 2010
Strafford CPE/CLE Webinar
Eric Tresh on Apportioning Service Revenue in Corporate Tax Compliance – Navigating the Latest State Laws and Regulations

April 22, 2010
New York State Bar Association 2010 New York State and City Tax Institute
Princeton Club – New York, NY
Marc Simonetti on Disclosure Developments

April 22, 2010
DC Bar Taxation Section/State and Local Tax Committee Program
DC Bar Conference Center – Washington, DC
Pilar Mata on State and Local Tax Trends Every Practitioner Should Know

April 25-29, 2010
COST Intermediate/Advanced State Income Tax School
Georgia Tech Hotel & Conference Center – Atlanta, GA
Jeff Friedman on Determining the Corporate Income Tax Base

April 26, 2010
TEI Cincinnati Chapter Meeting
Cincinnati, OH
Diann Smith on Ohio CAT and Michigan SBT Developments
Pilar Mata on Nexus Evolution: Legislation, Regulation and Litigation, and The Dangers of Unreliable Intercompany Accounting
Maria Todorova on State Tax Legislation and Litigation Update

April 28, 2010
STARTUP Spring 2010 State Tax Roundtable for Utilities and Power
Charlotte, NC
Jeff Friedman and **Eric Tresh**

April 29, 2010
TEI Nashville Chapter Spring Seminar
Nashville, TN
Jeff Friedman and **Pilar Mata** on The Dangers of Unreliable Intercompany Accounting in Separate Company States and Other Issues

May 16-19, 2010
COST Spring Audit Session/Income Tax Conference
Four Seasons Hotel – Austin, TX
Jeff Friedman on To Do or Not To Do: Participating in Amnesties and VDAs

May 18-19, 2010
Telestrategies Communications Taxation 2010
Chicago, IL
Steve Kranz on Fighting the Good Fight – Communication Industry Efforts to Ensure Sound Tax Policy in a Deficit Environment
Eric Tresh on Send Lawyers, Guns and Money – A Review of This Year's Significant State and Local Tax Controversies and What Taxpayers Are Doing to Fight Back

May 18-19, 2010
TEI 2010 IRS Audits & Appeals Seminar
Westin O'Hare Hotel – Rosemont, IL
Marc Simonetti on State Tax Consequences of Federal Tax Controversies

May 21, 2010
Georgetown Law CLE State and Local Tax Institute
Georgetown University Law Center – Washington, DC
Marc Simonetti on The Troubled Economy: Losses, Debt Restructuring, Cancellation of Indebtedness Income, Conformity – A State and Local Tax Perspective

California Court of Appeal Once Again Rejects "Heads I Win, Tails You Lose" Refund Scheme

The *TracFone Wireless* decision is the most recent taxpayer victory in cases concerning the scope of California local utility user taxes that are generally based on the Federal excise tax ("FET"). In 2005 and 2006, five federal circuit courts held that the FET did not apply to long distance telephone service billed on the basis of the duration (but not the distance) of the call. The IRS conceded this issue in 2006; however, many California local taxing jurisdictions whose utility user taxes were tied to the FET calculation continue to dispute the scope of their local tax bases and have sought to bar taxpayer refunds.

The *TracFone* decision is significant for many reasons. Most importantly, the decision acknowledges that the City of Los Angeles' ("City") proposed application of the Municipal Code section requiring vendors to refund the tax to their customers before seeking refunds in court violated TracFone's right to due process. Under the City's interpretation, Tracfone was required to pay the City $180,482 in tax and "refund" $180,482 in tax to its customers – for a total of $360,914 – before it could file a claim for a refund of $180,482 from the City. If TracFone won, it would nonetheless be

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In Alabama, Transfer of Legal Title Alone Does Not a Taxable Retail Sale Make

On February 24, 2010, an Alabama Administrative Law Judge ("ALJ") held that a supplier of automobile parts that transferred title to equipment to its customer, and subsequently leased the equipment back for a nominal amount of money, was not subject to sales tax. *Mercedes-Benz US Int'l, Inc. v. State of Alabama Dep't of Revenue*, No. S. 09-519 (Ala. A.L.J. Feb. 24, 2010).

Mercedes-Benz and its suppliers entered into agreements whereby the suppliers were required to purchase required tooling equipment, transfer title to the tooling to Mercedes-Benz, and lease the tooling back from Mercedes-Benz for $1.00. An addendum to the written agreement stated that title would pass to Mercedes-Benz when the tooling equipment vendor delivered the tooling to the supplier. At the hearing, it was acknowledged that the sole reason for transferring title from the supplier to Mercedes-Benz was to protect the tooling equipment from the supplier's creditors in the event of the supplier's bankruptcy or other financial difficulties. Despite holding legal title, Mercedes-Benz never possessed or used the tooling equipment; its suppliers did. Because it did not enter into a retail sale for the tooling equipment for Alabama sales tax purposes, Mercedes-Benz argued that it was not liable for the sales tax. Consequently, it argued that the suppliers were liable for Alabama use tax on the tooling equipment.

The suppliers had exclusive possession and use of the tooling equipment in Alabama. In addition, they were not in the business of selling tooling at retail. Therefore, the ALJ concluded that the transactions between Mercedes-Benz and its suppliers did not involve taxable retail sales. This case represents an example of courts looking at the substance, rather than the form, of transactions for sales and use tax purposes. While form is still relevant (and important), courts more frequently are examining the form of the transaction to determine sales and use tax consequences.

Multistate Tax Commission Wrap-up

The Multistate Tax Commission ("MTC") Executive Committee met April 7, 2010, to discuss various projects currently underway. Notably, the Committee recommended further action on (1) the model mobile workforce withholding statute, and (2) the proposed amendment to its Section 18(a) (alternative apportionment) regulation.

Model Mobile Workforce Withholding

The Committee recommended that the draft model withholding statute advance to the next step in MTC's approval process – a public hearing. The model withholding statute is MTC's attempt to fend off proposed federal legislation, H.R. 2110, the Mobile Workforce State Income Tax Fairness and Simplification Act. (See January *SALT Shaker*.)

The MTC proposal creates a floor for personal income tax reporting – an employee would not be subject to personal income tax in a state solely as a result of working in that state for 20 days or less during a year. A corresponding withholding floor is placed on employers. The statute exempts high income earners, such as professional athletes, entertainers, construction workers, and top company executives, from the 20-day rule. The two biggest debates (and criticisms) about the statute are: (1) whether

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California Court of Appeal Once Again Rejects "Heads I Win, Tails You Lose" Refund Scheme *(cont.)*

out $180,482 because it is unlikely that it would be able to obtain refunds from its customers. If TracFone lost, it would be out $360,914 because it would have paid $180,482 to the City and $180,482 to its customers. The court held that this "heads I win, tails you lose" construction of the Municipal Code did not provide TracFone with a "meaningful opportunity to secure post-payment relief for taxes already paid," as required by the Due Process Clause in *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. 18 (1990).

The *TracFone* case has been closely watched. Sutherland filed an *amicus curiae* brief on behalf of the Broadband Tax Institute in support of TracFone. The California Taxpayers' Association and CTIA – The Wireless Association also filed briefs in support of the taxpayer, and the League of California Cities, the California State Association of Counties, and the California Special Districts Association filed *amicus* briefs in support of the City.

Mutistate Tax Commission Wrap-up *(cont.)*

the provision exempting individuals from filing should be included in the proposal or, alternatively, whether the model statute should be amended so that it only addresses employer withholding; and (2) amending the days threshold with proposals ranging from 10 to 90 days. A public hearing will be set for the draft statute, and time will be granted for the public to provide written comments on the proposal.

After the public hearing, the draft will likely return quickly to the Executive Committee, which will survey MTC Member States before sending it to MTC members for final approval.

Proposed Section 18 Regulation Amendment

The Executive Committee recommended (pursuant to MTC Bylaw 7) a polling of the MTC Member States to ensure that a majority of the States would consider adoption of the draft of a proposed amendment to amend Section 18 of MTC's model income tax regulations. This provision applies to the use of equitable apportionment when the standard apportionment formula does not fairly reflect the taxpayer's activities in the state. The survey is one of the last stages for a proposed regulation before adoption but does not determine whether states will adopt the proposal. If the majority of the affected Member States indicate they would consider adopting the proposal, the proposal is referred to the full Commission for possible adoption as a uniformity recommendation.

The proposal will liberalize the availability of Section 18, which reads:

> Article IV.18. permits a departure from the allocation and apportionment provisions of Article IV only in limited and specific cases where the apportionment and allocation provisions contained in Article IV produce incongruous results.

This new language is intended to remove an argument asserted by some taxpayers seeking to avoid the application of Section 18: equitable apportionment should not apply because the apportionment result is not due to a unique transaction, but rather something that occurs frequently. However, for every taxpayer that is seeking to avoid the application of Section 18, there is (at least) one taxpayer seeking to qualify for Section 18. This amendment will lighten the burden of taxpayers in arguing for alternative apportionment.

Sutherland has been involved in the amendment process, arguing that it should be postponed pending the MTC project to amend the Uniform Division of Income for Tax Purposes Act ("UDITPA"). Sutherland also argued that the proposed regulation should contain: (1) a provision specifying that the burden of proof is on the moving party; (2) a statement that the requisite distortion necessary is less than the Constitutional "gross distortion" standard; and (3) a limitation on the provision prohibiting a taxpayer from specific adjustment that varies from the fundamental sourcing theory adopted in the statute.

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