MOFO NEW YORK TAX INSIGHTS

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NYS TRIBUNAL REVERSES ALJ AND HOLDS THAT BOND RATING AGENCY IS ENTITLED TO REFUND OF SALES TAX

By Kara M. Kraman

The New York State Tax Appeals Tribunal reversed the determination of an Administrative Law Judge and held that a securities rating agency was entitled to a refund of erroneously remitted sales tax. *Matter of Kroll Bond Rating Agency, Inc.*, DTA Nos. 826900 & 827411 (N.Y.S. Tax App. Trib., Oct. 1, 2018). In ruling for the rating agency, the Tribunal concluded that the agency had established that it, and not its customers, had paid the sales tax for which a refund was sought.

Facts. Kroll Bond Rating Agency, Inc. ("Kroll") is a small securities rating agency that was formed in 2010 to compete with larger rating agencies like Standard & Poor's and Fitch. Kroll negotiated its fees for its rating services individually for each customer, and memorialized those fees in an engagement agreement. The engagement agreements did not contain any mention of sales tax. Although it understood that the industry practice was not to collect New York sales tax on rating services, Kroll was nevertheless unsure whether the services it provided were properly subject to sales tax. Therefore, in March 2012, Kroll requested an Advisory Opinion from the New York State Department of Taxation and Finance.

Beginning in October 2011, and during the period its Advisory Opinion request was pending, Kroll's invoices to customers included the statement "includes any applicable sales taxes." Kroll remitted sales tax to the Department on the portion of the total invoice amounts that it believed could be taxable, that is, on the portion representing rating services fees. The total amount on each invoice was the amount paid by the customer, which was the same as the amount reflected in each engagement agreement.

On September 9, 2013, 18 months after submitting its Advisory Opinion request, Kroll received the Advisory Opinion, which concluded that its securities rating service was not subject to State sales tax under Tax Law § 1105(c)(1), but was subject to New York City sales tax under Tax Law § 1212-A if the service was delivered in New York City.

At the time the Advisory Opinion was issued, industry groups expressed concern that the Department was changing its historical position that securities rating services were not subject to either State or City sales tax. After discussions with the industry, the Department issued a Technical Memorandum providing a safe harbor period for City sales tax for affected rating agencies until September 1, 2015.

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Technical Memorandum, "New York City Local Sales Tax on Credit Rating Services," TSB-M-15(4)S (N.Y.S. Dep't of Taxation & Fin., July 24, 2015).

After receiving the Advisory Opinion, Kroll submitted refund claims for the State sales taxes it remitted on its sales of rating services, totaling approximately $1.3 million. Kroll later filed a second refund claim for a portion of the local sales tax paid, totaling nearly $1 million. The Department denied both refund claims on the grounds that Kroll had not provided any documentation indicating that it had refunded the overpaid sales tax to its customers. Kroll filed two petitions with the Division of Tax Appeals, asserting that it did not collect any sales tax from its customers, so there was nothing to refund, but rather that it paid the tax on behalf of its customers.

While noting that "no single criterion is controlling," the Tribunal found that Kroll met its burden of proving that it did not include sales tax in its fees for services, and instead bore the cost of the sales tax itself.

Law. Tax Law § 1139(a) provides that the Department may refund any sales tax erroneously collected or paid if timely application is made, but no refund will be made of sales tax collected from customers unless the vendor "has repaid such tax to the customer." If the words "tax included" or similar words are included on a sales slip, then "the entire amount charged is deemed the sales price" subject to sales tax. 20 NYCRR § 532.1(b)(3). The taxpayer bears the burden of proof to show that it is entitled to the refund requested. 20 NYCRR § 3000.15(d)(5).

ALJ Determination. The ALJ found that Kroll failed to demonstrate that it paid the sales tax on behalf of its customers. Accordingly, the ALJ held that Kroll's refund claims were properly denied because Kroll did not prove that it had first refunded those amounts to its customers who paid the sales tax. The ALJ's determination relied in part on the fact that Kroll's invoices contained the phrase "includes any applicable sales taxes." Kroll appealed the determination to the Tribunal, maintaining that Kroll, not its customers, paid the sales tax.

Tribunal Decision. The Tribunal acknowledged that sales tax that was collected from a customer could not be refunded until the vendor first established that it had repaid the tax to the customer. However, the Tribunal found that neither the Tax Law nor the regulations set forth specific requirements to demonstrate *whether* sales tax has been collected from a customer. The Tribunal therefore relied on its decision in *Matter of Merit Oil Corp.*, DTA No. 809049 (N.Y.S. Tax App. Trib., Mar. 10, 1994), which addressed the issue of what a taxpayer must prove to establish that it bore the cost of an excise tax for purposes of proving entitlement to a refund of New York City gasoline tax.

In *Merit Oil*, the Tribunal looked to the federal law in ascertaining factors that should be considered in determining who bore the cost of an excise tax. Those factors included: (i) whether the taxpayer sets its price based on the prices of its competitors, and if so, if its competitors' prices included sales tax; and (ii) the existence of negotiated contracts that do not include sales tax. In this case, the Tribunal found that Kroll had established that its prices were based on the prices of its competitors, which did not include sales tax, and that the contracts it negotiated with its customers did not include any mention of sales tax. The Tribunal also found credible Kroll's explanation that the inclusion of the phrase "includes any applicable sales taxes" on its invoices was meant to assure its customers that it would not seek any additional tax later, and did not represent that the invoice price included sales tax. While noting that "no single criterion is controlling," the Tribunal found that Kroll met its burden of proving that it did not include sales tax in its fees for services, and instead bore the cost of the sales tax itself. As a result, the Tribunal reversed the ALJ determination and held that the Department improperly denied Kroll's refund claims.

ADDITIONAL INSIGHTS

The Tribunal's decision makes clear that a thorough analysis of the facts and circumstances in each case is necessary in order to determine whether a taxpayer or its customers paid the sales tax in a particular instance. After undertaking such an analysis in this case, the Tribunal correctly concluded that Kroll, and not its customers, paid the sales tax. Although not addressed by the Tribunal, Kroll had also argued that allowing the Department to retain the sales tax erroneously paid during the period that the Department did not timely issue its Advisory Opinion resulted in "unjust enrichment" to the State compelling a refund on equitable grounds. Resolution of that issue will need to await another case.

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NYS TRIBUNAL REJECTS DEPARTMENT'S MOTIONS TO REARGUE ALIEN INSURANCE COMPANY DECISIONS

By Irwin M. Slomka

The New York State Tax Appeals Tribunal has denied motions for reargument made by the State Tax Department seeking reconsideration of two Tribunal decisions that held that the Department's use of an alternative apportionment formula for State insurance franchise tax purposes impermissibly discriminated against two German insurance companies in violation of the U.S.-Germany Tax Treaty. *Matter of Bayerische Beamtenkrankenkasse AG*, DTA No. 824762 (N.Y.S. Tax App. Trib., Sept. 25, 2018); *Matter of Landschaftliche Brandkasse Hannover*, DTA No. 825517 (N.Y.S. Tax App. Trib., Sept. 25, 2018). The Tribunal's Orders provide important guidance on the standards for motions for reargument.

Background. Briefly, the cases involved two German non-life insurance companies that were classified as "unauthorized insurance corporations" under the New York State Tax Law. Their activities in the United States and New York were limited to holding interests in two partnerships that owned and managed real property. Neither insurance company wrote insurance premiums in the United States, and for federal income tax purposes their income consisted principally of their distributive shares of partnership income.

Both insurance companies filed New York State non-life insurance corporation franchise tax returns and paid the minimum tax. The Department disagreed, first subjecting them to tax under Tax Law § 1501 (which is imposed on the higher of four alternative bases, including tax on allocated net income) and then, in the absence of the companies having any New York premiums, exercising the discretionary authority to disregard the prescribed apportionment formula (90% of which is based on premiums) and instead applying a non-premiums-based formula (based on Article 9-A allocation factors) to the companies' distributive shares of partnership income.

In its 2017 decisions, the Tribunal found that as unauthorized non-life insurers, the companies were taxable on their allocated entire net income base, and that the Department properly exercised its discretion in applying an alternative apportionment method because, in the absence of a premiums factor, application of a "truncated statutory formula" was "out of all appropriate proportion" (citation omitted) to the taxpayers' business in New York.

The Tribunal also addressed a legal issue raised for the first time by the companies on exception: whether the Department's alternative apportionment impermissibly discriminated against them based on their status as alien corporations in violation of the U.S.-Germany Tax Treaty. The Department had maintained that the Tribunal was without jurisdiction to review a claim under the tax treaty, but the Tribunal found that the treaty itself did not preclude review by the Tribunal.

[T]here must be compelling reasons for reconsideration of [Tribunal] decisions, and . . . a motion to reargue is not intended to allow an unsuccessful party to reargue issues or present arguments different from those originally asserted.

The Tribunal proceeded to compare a German insurance company to a hypothetical U.S. insurance company that also had no New York premium income or premium income elsewhere in the United States, but (like the two insurance companies) had worldwide premium income. The Tribunal held that the hypothetical U.S. corporation, unlike the companies here, could compute a premiums factor because its total premium income—not subject to the federal "effectively connected" income limitations under IRC § 861—would be greater than zero. The existence of a premiums factor would permit the U.S. insurance company to use the statutory apportionment formula, whereas the German insurance company could not do so. The Tribunal concluded that this different tax treatment contravened the U.S.-Germany Tax Treaty, and it canceled the deficiencies.

State's Motions to Reargue. The Tax Law precludes the Department from appealing an adverse Tribunal decision, so instead the Department filed motions for reargument. The Department asserted in its motions that the Tribunal misapplied a controlling principle of law applicable to U.S. tax treaties—that domestic corporations and nonresident alien corporations are never in the same circumstances—and that the Tribunal misapprehended the facts and misapplied case law by concluding that

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the two German insurers were similarly situated to a non-New York corporation because, the Department claimed, their businesses were not unitary.

Tribunal Order. The Tribunal denied the Department's motions for reargument. The Tribunal began by emphasizing that there must be compelling reasons for reconsideration of its decisions, and that a motion to reargue is not intended to allow an unsuccessful party to reargue issues or present arguments different from those originally asserted. The Tribunal noted that the Department had previously claimed only that the Tribunal did not have the authority to adjudicate a claim under the treaty, but had not put forth any of the arguments made in its motions to reargue. Therefore, the Department was attempting to make new legal arguments not made in the initial proceedings.

The Tribunal also rejected the Department's claim that the Tribunal had "misapplied a controlling principle of law," noting that the various interpretations being presented did not amount to a "controlling principle of law" compelling reconsideration of the Tribunal's decisions. As for the Department's claim that the Tribunal had "misapprehended the relevant facts," the Tribunal pointed out that, during the initial Tribunal proceedings, the Department never claimed that the companies were raising a new factual issue after the hearing was concluded, so this issue should not have been considered by the Tribunal on exception.

ADDITIONAL INSIGHTS

The Tribunal's analysis regarding the heavy burden imposed on a party seeking reconsideration of a decision certainly seems correct, regardless of the fact that rarely have disputes arising under a treaty been adjudicated by a state administrative body like the Tribunal. The Tribunal's two 2017 decisions were among the reasons that the Governor referenced as a basis for including in his 2018-2019 Executive Budget a legislative proposal to give the Department the right to appeal adverse Tribunal decisions. The Memorandum in Support of that proposed legislation specifically discussed the two decisions, stating that "the Department is currently powerless to have this significant issue of international law reviewed by a Court." The Governor's proposal was not, however, enacted into law in the final 2018-2019 Budget Bill.

While the Tribunal's decisions are now final, and are binding precedent, the Department presumably has the ability to raise in other cases the new legal issues it raised in its motions for reargument here.

STATE TRIBUNAL RELIES ON FORM OF ENTITIES TO DENY QEZE CREDITS

By Hollis L. Hyans

The New York State Tax Appeals Tribunal has reversed the decision of an Administrative Law Judge and found that Qualified Empire Zone Enterprise ("QEZE") credits for real property taxes were not available because the QEZE failed to demonstrate that it, rather than an affiliate, was the employer of a manager overseeing the development project, and therefore that its employment had increased as required by the statute. *Matter of Forest City Enterprises, Inc.*, DTA No. 825917 (N.Y.S. Tax App. Trib., Oct. 1, 2018).

Background. Forest City Enterprises, Inc. ("Forest City") is a developer and operator of real estate projects, and conducted project development activities in New York State. A wholly owned subsidiary, Forest City Rental Properties Corporation, owned FC Member, Inc. ("FC Member"). FC Member entered into an operating agreement with another related company, RRG Yonkers, LLC ("RRG Yonkers"), to form FC Yonkers Associates, LLC ("FC Yonkers), to own and develop the Ridge Hill project (the "Project") on an 80-acre parcel of land in the City of Yonkers, NY. FC Member and RRG Yonkers owned 70% and 30%, respectively, of FC Yonkers, and RRG Yonkers was the managing member. The Project involved the construction of approximately one million square feet of new retail space, as well as residential parcels and a hotel site. It created extensive jobs, including the hiring of hundreds of construction workers in 2009 through 2010. FC Yonkers became certified under the Empire Zones Program as a New York State QEZE entitled to claim Empire Zone benefits in connection with the Project.

FC Yonkers entered into a "Tax Benefit Leaseback Agreement" on August 2, 2007, with the City of Yonkers Industrial Development Agency ("YIDA"), in which FC Yonkers conveyed a leasehold interest in the real property, buildings, and equipment at the Project (the "Facility") to YIDA, YIDA leased the Facility back to FC Yonkers for rent of $1.00 per year, and FC Yonkers agreed to make certain specified real property tax payments. YIDA issued an invoice to FC Yonkers for $185,784.96 in taxes and utility charges, which FC Yonkers paid in September 2009 as a payment in lieu of taxes ("PILOT"). FC Yonkers also made dozens of other payments, detailed over 15 pages of the Tribunal's decision, to various cities and counties for sewer valuation taxes, frontage taxes, and waste disposal taxes.

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Forest City Ratner Companies, LLC ("FCRC"), located in Brooklyn, NY, and wholly owned by Forest City, is an overhead management company that provides centralized services, including accounting and legal services, payroll, medical, dental, and disability services, and a 401(k) plan, for the Forest City entities that own and develop real estate projects, including FC Yonkers. FCRC bills each related entity for a site management fee, and the fee billed by FCRC to FC Yonkers included recovery of the wages and benefits of the personnel dedicated to the Project. These included salary and benefit costs for an employee named Theron Russell, who had been hired by Robert Sanna, a Vice President of RRG Yonkers and officer of all the related entities, including FC Yonkers, with responsibility for supervising the project managers who were working for FC Yonkers on the Project. Mr. Sanna had responsibility for signing and entering into the contracts between FC Yonkers as the Project owner and the individual contractor entities, and did so in his capacity as an officer of the managing member of FC Yonkers. Mr. Russell was originally hired in 2003 to work on a project in Philadelphia, and then was assigned to work for FC Yonkers on the Project in 2005. Mr. Russell was given express authority to approve and act on behalf of FC Yonkers as the owner of the Project, and had the responsibility to approve and sign change orders for the Project, interview prospective contractors, solicit the bids, and award contracts on behalf of FC Yonkers. He approved payments, had an office in a building at the Project site, routinely attended job and progress meetings at the site representing FC Yonkers as the owner, and inspected work being performed on the site.

Mr. Russell was issued a Form W-2 for 2009 that listed FCRC as his employer. FC Yonkers did not report wages earned by any employees in New York State in 2009 on its Withholding, Wage Reporting, and Unemployment returns; instead, FCRC reported wages earned by Mr. Russell in New York for the period 2004 through 2010 (even though Mr. Russell actually worked in Pennsylvania during 2004).

For 2009, FC Yonkers claimed a QEZE Credit for Real Property Taxes of $327,866, and a refund of unused credits in the amount of approximately $4 million. FC Yonkers reported a test year employment number of zero, and a current tax year employment number of one.

The Law and the Audit. The QEZE credit for real property tax is determined by computing the product of "the benefit period factor, . . . the employment increase factor and . . . the eligible real property taxes paid or incurred by the QEZE during the taxable year." Tax Law § 15(b)(1). The critical issue was whether FC Yonkers, which had no employees in its test year, had an "employment number," as defined in Tax Law § 14(g), of at least one for 2009, so that it would have an "employment increase factor" greater than zero. Mr. Russell's employment, if by FC Yonkers, would allow it to meet that test. In its audit, the Department of Taxation and Finance questioned whether Mr. Russell was actually an employee of FC Yonkers, since his W-2 listed him as an employee of FCRC. Another disputed issue was whether the various payments to the City of Yonkers and other localities for PILOT and waste disposal taxes, sewer valuation taxes, and frontage taxes satisfied the statutory definition of "eligible real property taxes."

The Tribunal reversed the ALJ's conclusion that Mr. Russell was employed by FC Yonkers, finding that "it is the form here that controls rather than which entity may have ultimately borne the cost of Mr. Russell's wages and benefits."

The ALJ Decision. The ALJ concluded that Mr. Russell qualified as an employee of FC Yonkers, relying on the common law test for employment, which considers such factors as the authority to direct and control the work of the employee, the right to hire and fire, and the payment of wages. She also found that although Mr. Russell had been employed by FCRC from February 2004 through January 2009, he had actually been a common law employee of another related real estate development entity in Pennsylvania until he transferred to the Project in 2005, so he was not disqualified as having been employed by a related party within the preceding 60 months.

With regard to the various tax payments, the ALJ found that the PILOT payments made pursuant to the leaseback agreement and the waste disposal taxes qualify as eligible real property taxes, but that the sewer valuation taxes and frontage taxes did not.

Both parties appealed to the Tax Appeals Tribunal, with the Department arguing that the ALJ incorrectly found Mr. Russell to be an employee of FC Yonkers and disagreeing with the treatment of the waste disposal taxes (although no longer arguing over the PILOT payment), and Forest City claiming the sewer valuation taxes and frontage taxes were eligible.

Tribunal Decision. The Tribunal reversed the ALJ's conclusion that Mr. Russell was employed by FC Yonkers, finding that "it is the form here that controls rather than which entity may have ultimately borne the cost of Mr. Russell's wages and benefits." The Tribunal noted that FC Yonkers reported no wages of any employees in 2009 to the Department, while FCRC did report Mr. Russell's wages; that it was FCRC that made the formal offer of employment to Mr. Russell; and that Mr. Russell submitted his expenses to FCRC rather than FC Yonkers. Although the Tribunal acknowledged that several factors relied on by the ALJ supported the conclusion that Mr. Russell was a common-law employee of FC Yonkers, including the fact that FCRC billed FC Yonkers for a monthly site management fee and was reimbursed for that fee, thereby evidencing an employment relationship, the Tribunal concluded that Forest City had failed to show by clear and convincing evidence that Mr. Russell was an employee of FC Yonkers and not FCRC. That determination alone disqualified Forest City from obtaining the QEZE credit, but the Tribunal nonetheless went on to review the separate taxes for which Forest City had claimed credit, affirming the ALJ's conclusion that the sewer valuation taxes and frontage taxes would not qualify as eligible real property taxes, but that the waste disposal taxes would qualify.

ADDITIONAL INSIGHTS

Although the ALJ had reviewed the factual evidence carefully, and as the Tribunal itself noted, determined that the record supported the conclusion that Mr. Russell was a common-law employee of FC Yonkers, the Tribunal gave much greater weight to the documentary evidence, including the employment tax returns listing no employees for FC Yonkers and a written offer of employment from FC Yonkers. The Tribunal expressly found that "where a tax benefit is concerned, it is the form chosen by the taxpayer that controls." This is an important point to bear in mind when setting up relationships among related entities, even when, as the Tribunal noted here, it may be more economical and practical to keep employees on one central payroll and provide reimbursement for costs related to employment.

It is not yet known whether Forest City will seek review by the Appellate Division.

NYS RELEASES DRAFT CORPORATE TAX REGULATIONS ON ESTIMATED TAXES AND TAX COLLECTION

By Irwin M. Slomka

On October 5, 2018, the New York State Department of Taxation and Finance released draft Article 9-A regulation amendments addressing several technical issues regarding estimated taxes and mandatory first installments of estimated tax, as well as rules regarding the duration of corporate tax liens and the procedure for obtaining the release of those liens. *Payment of Tax, Declaration and Payment of Estimated Tax, and Collection* (N.Y.S. Dep't of Taxation & Fin., Oct. 5, 2018). Although appearing on the Department's website as part of its draft corporate tax reform regulations, the draft amendments also address some issues that do not relate to corporate tax reform.

The draft amendments address several issues, including the following:

- The draft amendments incorporate 2016 New York State legislation regarding mandatory first installments of estimated tax. For C corporations, the mandatory first installment is either 25% or 40% of the "second preceding year's tax" (depending on whether the tax exceeded $100,000). The reference to the "second preceding year's tax" is to the tax imposed for the tax year preceding the immediately preceding tax year. S corporations, however, compute the mandatory first installment based on the "immediately preceding year's tax." The draft also provides that the mandatory first installment must be paid for tax years of any length, including short taxable years.

- The draft amendments provide that corporate tax liens generally expire 20 years from the date they became due and payable (i.e., the date the tax return is due). The draft amendments also set out detailed rules for obtaining a release of lien from the Department.

Like the other draft corporate tax reform regulations released by the Department since 2015—none of which have yet been formally promulgated pursuant to the State Administrative Procedure Act—these, too, are draft amendments subject to change. The Department is inviting comments by January 4, 2019.

STATE TAX DEPARTMENT ADVISES THAT TAXPAYERS CAN BE REQUIRED TO FORFEIT LOSSES AS A CONDITION OF AN OFFER IN COMPROMISE

By Hollis L. Hyans

The New York State Department of Taxation and Finance has issued an Advisory Opinion finding that it was legal and valid for the Department to require that a taxpayer seeking an Offer in Compromise agree to forfeit any current capital losses or net operating losses. *Advisory Opinion*, TSB-A-18(2)I (N.Y.S. Dep't of Taxation & Fin., July 11, 2018).

The Petitioner asked the Department for the legal basis for Condition 5G on NYS Form DTF-4.1, Offer in Compromise for Fixed and Final Liabilities, which requires the taxpayer to agree to forfeit the use of any current capital losses or net operating losses on any future New York State tax return as a condition of acceptance by the Department of the Offer in Compromise. The Petitioner also asked for a definition of the terms "any current capital loss," "net operating loss," and "any future New York State Return," and whether the forfeiture is limited to losses from the tax period sought to be compromised or extends to losses accrued after the tax period for which the compromise is being sought and to losses based on future tax returns.

Legality of Requirement. The Department ruled that its requirement that the losses be forfeited was valid. First, it noted that the statute, Tax Law § 171(15), authorizes the Commissioner to compromise any taxes or other impositions administered by the Commissioner, and that the Commissioner may not accept offers in compromise that "would undermine tax compliance or that would be adverse to the best interests of the State." Pursuant to regulations implementing the statute, a number of conditions must be met for a taxpayer to qualify, and the regulations give the Department authority to require the taxpayer to agree to any other conditions "which may be necessary to effectuate a just offer in compromise." The Department also cited *Jacobi v. Tax Appeals Trib.*, 156 A.D.3d 1154, 1158 (3d Dep't, 2017), *leave to appeal denied and appeal dismissed*, 31 N.Y.3d 1061 (2018), *petition for cert. filed sub nom*, *Jacobi v. N.Y. Tax Appeals Trib.*, No. 18-367 (U.S., Aug. 1, 2018), for the proposition that the Commissioner has broad discretion in deciding whether to accept an Offer in Compromise.

Since the Department has broad discretion, and has expressly set forth in Form DTF-4.1, the standard agreement that taxpayers must use to request an Offer in Compromise, the requirement of forfeiture of losses, the Department concluded that its requirement was valid.

Definition of Terms. With regard to the request for clarification of the terms, the Department found they were not ambiguous. The terms "capital loss" and "net operating loss" have the same meaning under the New York State income tax law as under the Internal Revenue Code. *See* Tax Law § 607; IRC §§ 172 (net operating loss), 165(f) (capital losses). Loss carryforward amounts available to the taxpayer as of the date the Offer in Compromise is accepted are the "current" loss credits that must be forfeited. Therefore, any capital or net operating losses or carryforwards accrued after the acceptance date would not be impacted. Finally, "any future New York State Return" means any New York State tax return filed or amended after the Offer in Compromise is accepted.

ADDITIONAL INSIGHTS

It is hardly surprising that the Department upheld its authority to impose the conditions on an Offer in Compromise that have been included in its own official form. And, while the court case cited by the Department does indeed contain the language that the Commissioner has broad discretion in deciding whether to accept an Offer in Compromise, the statement was made in the context of a complaint that a petitioner was deprived of due process because the Commissioner failed to consider her Offer in Compromise before a license suspension was proposed to take effect, and not in the context of reviewing whether any particular condition imposed by the Department should be upheld. A policy argument could be made that, since inability to pay is a condition of obtaining an Offer in Compromise, which may have been caused by the very losses otherwise available to be carried forward, requiring forfeiture of those losses will only exacerbate the financial difficulties of the applicant in later years. Nonetheless, as the Department pointed out in the Advisory Opinion, the Offer in Compromise program is voluntary, and the requirement for forfeiture of losses should be considered by applicants in framing their offers and considering whether the deal is acceptable.

INSIGHTS IN BRIEF

SALES TAX APPLIES TO LEASE OF A VEHICLE AT THE FULL ORIGINAL LEASE PRICE EVEN WHERE THE LEASE IS ASSUMED BY A THIRD PARTY

An ALJ has upheld the Department's denial of a refund of sales tax paid on the lease of a car where a car was leased in New York on May 15, 2014, and then, on July 6, 2015, the lease was assumed by and transferred to a third party. *Matter of Michael Greenfield*, DTA No. 827851 (N.Y.S. Div. of Tax App., Sept. 27, 2018). The ALJ relied on Tax Law § 1111(i), which, since 1990, has explicitly required that all sales tax due on certain leases of motor vehicles for one year or more are due as of the first payment, and on Tribunal cases that have upheld the tax under similar circumstances. The ALJ rejected arguments that there was a potential for double taxation, although the tax would be imposed again in connection with the second lease, since the sales tax is a "transaction tax" and the liability occurs at the time of each transaction.

FIVE-CENT FEE FOR CARRYOUT BAGS NOT SUBJECT TO SALES TAX

The New York State Department of Taxation and Finance has issued an Advisory Opinion ruling that a Suffolk County law imposing a five-cent bag fee for each carryout bag provided by retail stores is not subject to sales tax. *Advisory Opinion*, TSB-A-18(3)S (N.Y.S. Dep't of Taxation & Fin., July 25, 2018). The Department found that the fee, intended to encourage the use of reusable bags, does not constitute the sale of tangible personal property for sales tax purposes.

ALJ HOLDS TAXPAYERS FAILED TO ESTABLISH FILING OF INCOME TAX RETURN

A New York State Administrative Law Judge held that the taxpayers failed to clearly and convincingly demonstrate that they had filed their 2009 personal income tax return, and therefore were not entitled to a carryforward credit to their 2012 personal income tax return. *Matter of Abraham & Renee Fruchthandler*, DTA No. 827600 (N.Y.S. Div. of Tax App., Oct. 11, 2018). In the absence of evidence of certified or registered mail as proof of delivery to the Department, the ALJ found that speculative testimony by the taxpayer's witness about the mailing of the return, however sincere, was not enough to establish that the return was filed. The ALJ further noted that the Tribunal has held that "proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing" (citation omitted) and that where a taxpayer uses ordinary mail, the taxpayer bears the risk that the document may not be delivered.

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WHAT SEPARATES US FROM THE REST?

OUR EXPERIENCE. We've been doing it longer, have more experience and published decisions, and have obtained a greater number of favorable settlements for our clients than the rest.

OUR TRACK RECORD OF PROVEN SUCCESS. We've successfully litigated matters in nearly every state, and have resolved the vast majority of matters without the necessity of trial.

OUR NATIONAL PERSPECTIVE. We approach state and local tax issues from a nationwide perspective, taking into account the similarities and differences of SALT systems throughout the United States.

OUR DEPTH. Our team is comprised of a unique blend of public and private backgrounds with experience spanning various industries. We're nationally recognized as a leading practice for tax law and tax controversy by *Chambers*, *Legal 500* and *Law360*. In fact, we've been referred to as "one of the best national firms in the area of state income taxation" by *Legal 500 US* and were rated Law Firm of the Year for Litigation – Tax by the 2016 "Best Law Firms" Edition of *U.S. News & World Report – Best Lawyers*.

For more information about Morrison & Foerster's State + Local Tax Group, visit www.mofo.com/salt or contact Craig B. Fields at (212) 468-8193 or cfields@mofo.com.