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Volume 10, Issue 1 | January 2019

NEW YORK TAX INSIGHTS

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THE TOP 10 NEW YORK TAX HIGHLIGHTS OF 2018

By Irwin M. Slomka

Once again, we present our annual list of what we considered the Top 10 New York tax highlights of 2018.

1. **Court of Appeals Agrees to Hear Tax Department's Appeal Involving Sales Taxation of Information Services.** In June 2018, the New York Court of Appeals (New York's highest court) granted the Tax Department's motion for leave to appeal an Appellate Division decision that held that the furnishing of grocery store pricing information to the Wegmans supermarket chain qualified for the New York sales tax exclusion for information services that are "personal or individual in nature." *Wegmans Food Mkts., Inc. v. Tax Appeals Trib.*, 155 A.D.3d 1352 (3d Dep't 2017), *leave to appeal granted*, 31 N.Y.3d 908. The Appellate Division, reversing a Tax Appeals Tribunal decision, had rejected the Department's narrow interpretation of the "personal or individual" exclusion and found that the pricing information furnished to Wegmans, while publically available information, was not derived from a widely accessible common source or database as the exclusion had previously been applied by the courts. Briefing has concluded, but, as of this writing, oral argument before the Court of Appeals has not yet been scheduled.

2. **NYS Tribunal Remands $106 Million Sales Tax Refund Case to ALJ.** In what appears to have been the final step toward the granting of a $106 million sales tax refund to New Cingular Wireless, the NYS Tribunal – which had earlier denied the refund – remanded the case back to an Administrative Law Judge ("ALJ") to consider evidence of the funding of a pre-refund escrow account. *Matter of New Cingular Wireless PCS LLC*, DTA No. 825318 (N.Y.S. Tax App. Trib., Mar. 8, 2018). That action followed a 2017 reversal by the Appellate Division, Third Department, which held that it was an abuse of discretion for the Tribunal to have declined to reopen the evidentiary record to admit evidence that the wireless carrier had funded a pre-refund escrow account established to facilitate repayment to customers of improperly collected sales tax. The Third Department had been troubled that the denial of refunds would result in a "windfall" to New York State.

3. **NYS Tribunal Holds That Bond Rating Agency Paid Sales Tax on Behalf of Its Customers and Was Entitled to Refunds.** The issue of whether a seller paid sales tax on behalf of its customers, thus obviating the need to first refund it to those customers as a condition to obtaining a refund on the erroneously remitted sales tax, was addressed by the NYS Tribunal

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in *Matter of Kroll Bond Rating Agency, Inc.*, DTA Nos. 826900 & 827411 (N.Y.S. Tax App. Trib., Oct. 1, 2018). Reversing an ALJ determination, the Tribunal concluded that a securities rating agency had in fact established that it paid the sales tax, in part by showing that its charges to customers were similar to what its competitors charged, and thus the requirement that sales tax first be repaid to customers did not apply.

4. **Optional Employer Payroll Tax Enacted as SALT Deduction Limitation Workaround.** In 2018, a first-of-its-kind optional "employer compensation expense" tax was enacted by the New York State legislature, creating a payroll tax as a workaround to the new federal $10,000 SALT deduction limitation. An electing employer would become subject to a new State payroll tax for its employees earning more than $40,000 annually, beginning in 2019. The stated purpose for the optional tax was to convert employees' nondeductible State income taxes into payroll taxes that would be deductible by the employer. The election for 2019 needed to be made by December 1, 2018. It was recently reported that only approximately 260 businesses had elected to be subject to the payroll tax, which, given the complexities of the tax, is not surprising. It is also unlikely that the electing businesses include many large New York State employers.

5. **"Discussion Draft" State UBT Bill Released by State Tax Department.** In May 2018, in another intended workaround to the federal SALT deduction cap, the New York State Tax Department released a discussion draft of a bill that, if enacted into law, would create a 5% New York State unincorporated business tax on most pass-through entities. Unlike the employer payroll tax, this was not presented as optional. The purpose would be to convert nondeductible State income taxes on non-wage income to a State UBT that would be deductible by pass-through entities, such as partnerships and LLCs taxable as partnerships, and provide a corresponding tax credit for individual and corporate partners of those entities. (In May 2018, Connecticut enacted its own "Pass-Through Entity Tax" as a workaround to the federal SALT deduction cap.) The Tax Department has not provided any official updates on the status of the draft UBT bill, and it would not be surprising to see some form of the bill included in the Governor's proposed Executive Budget to be released later this month.

6. **Taxpayers Lose Post-*Wynne* Constitutional Challenges to State Residency Scheme, but Will Court of Appeals Hear an Appeal?** In 2015, the U.S. Supreme Court in *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015), held that Maryland's resident income tax credit regime violated the internal consistency test under the dormant Commerce Clause. Two separate declaratory judgment actions were brought by individuals who were domiciled outside the State but were New York statutory residents because they maintained a permanent place of abode in the State and were present in the State for more than 183 days during the year. The taxpayers claimed that by failing to provide a credit for taxes paid to their domiciliary states on their investment and intangible income, the New York statutory residency regime was internally inconsistent under *Wynne*. In 2018, the Third and First Departments of the Appellate Division rejected those constitutional challenges. *Chamberlain v. N.Y.S. Dep't of Taxation & Fin.*, No. 525967, 2018 NY Slip Op. 07383 (3d Dep't, Nov. 1, 2018); *Edelman v. N.Y.S. Dep't of Taxation & Fin.*, 162 A.D. 3d 574 (1st Dep't, 2018). Both cases are now poised for motions for leave to appeal to the Court of Appeals on whether *Wynne* requires that the internal consistency test of the Commerce Clause should be applied to the State income tax.

7. **What Will the Legislature Do in Response to the 2018 U.S. Supreme Court Decision in *South Dakota v. Wayfair, Inc.*?** In June 2018, in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), the U.S. Supreme Court overturned longstanding precedent by overruling its decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), which held that imposing a use tax collection obligation on a party that was not physically present in a state violated the Commerce Clause of the U.S. Constitution. States have begun to respond to *Wayfair*, and it seems inevitable that New York State will as well. The Governor's proposed Executive Budget for the upcoming 2019-20 New York State fiscal year may be the first sign of New York's response to *Wayfair*.

8. **NYC Tribunal Applies Its Own Sourcing Methodology for Corporation's Receipts From Services.** In an unusual development involving the New York City corporate tax sales factor, the NYC Tribunal applied its own sourcing methodology, which was *not* the methodology that had been advanced by either the taxpayer or the Finance Department. *Matter of Gerson Lehrman Group, Inc.*, TAT(E) 08-79 (GC), *et al.* (N.Y.C Tax App. Trib., Dec. 28, 2017, released Jan. 24, 2018). The NYC Tribunal viewed its role as being the same as the Department's – to determine the proper tax – and stated that it was not limited to selecting among the legal positions advanced by the parties themselves, an approach that could have significant consequences to taxpayers that bear the burden of proof. An appeal is pending before the Appellate Division, First Department.

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9. **State Appellate Court Holds That Corporation Must Apply Its NOL Carryforward in a Year When It Was Taxed on a Non-Income Base.** In 2018, the Appellate Division, Third Department, held that a bank was required to utilize its net operating loss ("NOL") carryforward in a year in which its New York State tax was computed on an alternative non-income base. *Toronto Dominion Holdings (USA), Inc. v. Tax Appeals Trib.*, 162 AD3d 1255 (3d Dep't), *leave to appeal denied*, 32 N.Y.3d 907 (2018). The Tax Department had required that the bank utilize its NOL up to the amount of its entire net income. The bank argued that it should not be required to apply its NOL carryforward against its entire net income when it was not taxed on an income base. In October 2018, the Court of Appeals denied the bank's motion for leave to appeal, and the case is now final. Although the New York State law regarding NOL carryovers has changed starting in 2015, the decision may nonetheless have continued relevance in its effect on the prior NOL conversion subtraction, which is based on a corporation's pre-2015 NOLs.

10. **NYS Tribunal Denies Tax Department's Motion for Reargument in Decisions Holding That U.S. Tax Treaty Precluded State's Assessment Against Foreign Insurance Companies.** The NYS Tribunal rejected a motion for reargument made by the State Tax Department seeking reconsideration of two Tribunal decisions issued in 2017, which held that the Department's use of an alternative apportionment formula for 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 concluded that "[a] motion to reargue is not . . . intended to 'afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.'" Since the law prohibits the Tax Department from appealing adverse Tribunal decisions, the decisions are now final. The earlier Tribunal decisions were among the reasons cited in the Governor's memorandum in support of a legislative proposal made last year – which was not enacted into law – that would have given the Tax Department the right to appeal Tribunal decisions.

Finally, there is a cautionary note for 2019: there may be far-reaching consequences from last November's State-wide elections, which resulted in Democratic party control over both houses of the New York State Legislature (previously, the State Senate, which was Republican-controlled, was generally considered more "business friendly" than the State Assembly and often blocked tax increase legislation, such as last year's "carried interest fairness fee" and "marketplace providers" tax proposals). This legislative changeover goes into effect this month and could portend tax increases for businesses and higher tax rates for higher-income individuals this coming year.

GOVERNOR CUOMO ANNOUNCES NOMINATION FOR NYS TAX COMMISSIONER

On January 6, 2019, Governor Cuomo announced that Michael Schmidt will be nominated as Commissioner of the New York State Department of Taxation and Finance. Most recently, Mr. Schmidt was the Senior Economic Advisor to Governor Cuomo, in which role he led the State's policy response to the federal Tax Cut and Jobs Act of 2017. Prior to working for New York State, Mr. Schmidt was also an economic policy advisor to Hillary Clinton, and a policy analyst in the Office of Domestic Finance at the United States Department of the Treasury. His nomination must now be submitted to the Legislature.

NEW YORK'S $100 MILLION OPIOID SURCHARGE DECLARED UNCONSTITUTIONAL BY FEDERAL COURT

By Hollis L. Hyans

A federal District Court judge has declared unconstitutional the annual $100 million surcharge enacted in April 2018 by the Opioid Stewardship Act ("OSA") and imposed on manufacturers and distributors that send opioid drugs into New York State. *HDA v. Zucker*, Nos. 18 Civ. 6168 (KPF), 18 Civ. 8180 (KPF), 18 Civ. 9830 (KPF) (S.D.N.Y., Dec. 19, 2018). The court found that the OSA surcharge was not a "tax" – and therefore federal court jurisdiction was not barred by the Tax Injunction Act – and that the surcharge violated the Commerce Clause of the United States Constitution, because it could result in extraterritorial taxation and discrimination against out-of-state purchasers.

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The Opioid Surcharge. Effective July 1, 2018, the OSA provides that all manufacturers and distributors that are licensed to sell or distribute opioids in New York State are responsible for a "ratable share" of an annual opioid stewardship payment totaling $100 million per year, for six years, to be deposited into a newly established "opioid stewardship fund." Pub. Health Law § 3323. The OSA requires each manufacturer and distributor to provide an annual report to the New York Department of Health ("DOH") detailing all opioids sold or distributed by them in New York State. *Id.* at (4), (4-a)(a). The initial August 1, 2018 report was based on sales made during the 2017 calendar year, with April 1 reports due thereafter for each calendar year. *Id.* at (4-a)(a). Each manufacturer's or distributor's share of the total payment was then computed by the DOH, and payments were due quarterly to the DOH beginning on January 1, 2019. *Id.* at (5), (6).

[T]he court found that the surcharge lacked the "principal identifying characteristic" of a tax, since it did not serve general revenue-raising purposes but instead created revenue placed in a segregated fund directed to specific purposes . . . .

In a statutory provision that turned out to be critical, the OSA prohibits manufacturers and distributors from passing on the cost of their ratable shares to a purchaser, "including the ultimate user of the opioid," and imposes a harsh penalty of up to $1 million per incident on entities that improperly pass the payments through to a purchaser. *Id.* at (2), (10)(c). The term "purchaser" is not defined in the statute.

The Lawsuits. In July 2018, the Healthcare Distribution Alliance ("HDA"), an industry organization representing pharmaceutical wholesale distributors, sued the DOH and the New York Attorney General in federal court claiming that the OSA is unconstitutional on several grounds, including that it violates the dormant Commerce Clause by discriminating against out of-state entities, regulating extraterritorial commerce and placing an undue burden on interstate commerce. HDA moved for summary judgment and an injunction preventing the DOH from collecting the surcharge. Shortly after HDA's challenge was filed, two other lawsuits followed. In *SpecGX LLC v. Underwood*, No. 18 Civ. 9830 (KPF) (S.D.N.Y., filed Oct. 24, 2018), the plaintiff, a manufacturer of generic pharmaceuticals, including opioid medications, also raised challenges under the Commerce Clause and challenged the OSA on the additional grounds that it violates the Supremacy Clause because it conflicts with federal statutes, including various statutes regulating the pharmaceutical industry. A third lawsuit, *Association for Accessible Medicines v. Underwood,* No. 18 Civ. 8180 (KPF) (S.D.N.Y, filed Sept. 7, 2018), was brought by an association representing manufacturers and distributors of generic and biosimilar medicines, and it challenged only the anti-pass-through provisions of the OSA as unconstitutional and invalid.

The New York Attorney General opposed all three actions and moved to dismiss, primarily on the grounds that the opioid surcharge is a "tax" for purposes of the Tax Injunction Act ("TIA"), which prohibits federal lawsuits seeking to enjoin state tax laws where there is a "plain, speedy and efficient" state court remedy. The Attorney General also claimed that the doctrines of comity and abstention should preclude federal court jurisdiction, and, on the merits, argued that the surcharge is constitutional and can be interpreted in a way that would not fall more heavily on out-of-state operations.

Decision. With payments due to the DOH beginning January 1, 2019, the District Court acted quickly. Consolidated arguments in all three cases were held on December 10, and on December 19, the court issued an opinion ruling in favor of the plaintiffs. The court carefully reviewed the claims that the TIA or other doctrines deprived it of jurisdiction and rejected all the Attorney General's arguments. Most importantly, the court found that the surcharge lacked the "principal identifying characteristic" of a tax, since it did not serve general revenue-raising purposes but instead created revenue placed in a segregated fund directed to specific purposes that were closely intertwined with the industry regulated by the DOH. The court also relied on the fact that the surcharge is collected by the DOH, rather than the Department of Taxation and Finance; that the class of entities subject to the surcharge is a specific and defined group that could do nothing to change a preexisting and retroactively imposed liability; and that nowhere in the OSA is the surcharge described as a "tax." The court also found that, even if the surcharge itself were a tax, the pass-through provision cannot be a tax. Finally, on the jurisdictional issues, the court held that the doctrine of comity did not bar the suits, because it does not apply to suits regarding regulatory fees or penalties like those created by the OSA, and the doctrine of federal court abstention did not apply, because there could be no "plausible reading" of the OSA that would make the statute constitutional, so there was no need for the federal court to abstain and to defer to the New York courts.

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On the merits, the court held that the prohibition against passing through the surcharge violates the dormant Commerce Clause. It found that if the provision were given its most natural reading, it could apply to wholly out-of-state transactions, noting that "[a]n opioid manufacturer based in Maine that wished to pass on the surcharge it paid on New York transactions by selling opioids at a markup to a pharmacy in New Mexico could face a million-dollar penalty from New York State," which would clearly violate the Commerce Clause's ban on extraterritorial state legislation. And even if the pass-through prohibition were limited by the DOH in application only to in-state purchasers, it would still be unconstitutional because it would discriminate against out-of-state purchasers. Specifically, the court found that "New York opioid customers would be protected from any price increases in their purchases, and New York would receive a source of funding subsidized by the out-of-state purchasers of opioids . . . [while] no New York-based business or taxpayer would face a higher cost."

The court next found that the pass-through provision was not severable from the rest of the statute, because enforcing the rest of the OSA without the pass-through prohibition would "pervert" the statute, since the legislative history clearly showed the State's desire to place the surcharge directly on distributors and manufacturers, and even the Attorney General conceded that the Legislature would have to pass additional legislation to ensure its goals were met if the prohibition were struck.

Since the court found the OSA unconstitutional as violating the dormant Commerce Clause, it did not address any of the parties' other arguments. It granted summary judgment to HDA and permanently enjoined the State from enforcing the OSA.

ADDITIONAL INSIGHTS

It is rare that challenges to state revenue-raising provisions can be sustained in federal court, because of the TIA's broad prohibition against federal court actions brought by taxpayers seeking to enjoin state taxes when the state itself offers a remedy for the challenge. Here, however, the statute itself never referred to the surcharge as a "tax," the funds were not collected by the Department of Taxation and Finance, but rather by the DOH, and the funds were dedicated to the specific regulatory purpose of addressing the opioid crisis, the factor that has been held most important by the Second Circuit Court of Appeals.

Once the court decided that it had jurisdiction, the unconstitutionality of the pass-through provision was quite evident, since under any interpretation argued for by the Attorney General, the dormant Commerce Clause was violated. As the court found, "while the animating concerns of the OSA are plainly valid, the method by which the Act extracts payments from opioid manufacturers and distributors to redress those concerns violates the Dormant Commerce Clause of the United States Constitution."

As of this time, there has been no word on whether the Attorney General and the DOH will file an appeal and/or resort to a legislative fix.

DRAFT AMENDMENTS TO CORPORATE TAX REGULATIONS ON INCOME AND CAPITAL RELEASED

by Kara M. Kraman

On December 5, 2018, the New York State Department of Taxation and Finance released draft amendments to its Article 9-A regulations principally to reflect the changes made by corporate tax reform legislation enacted in 2014 and 2015 in several broad areas: (1) Tax Bases (Subpart 3 1); (2) General Rules (Subpart 3-2); (3) Entire Net Income (Subpart 3-3); (4) Investment Capital, Investment Income, and Other Exempt Income (Subpart 3-4); (5) Business Capital and Business Income (Subpart 3-5); and (6) Examples of Income and Capital (Subpart 3-6). This article provides a broad overview of certain key aspects of the draft amendments. The Department has requested comments on the draft by March 5, 2019.

The draft regulations cover the following topics:

Subpart 3-1 – Tax Bases

The existing regulations provide that a corporation calculates its tax on the highest of four pre-2015 bases: the entire net income base; the capital base; the minimum taxable income base; and the fixed-dollar minimum tax base. Draft Subpart 3-1 provides that a corporation calculates its tax based on whichever of the three post-2014 tax bases – the business income base, the capital base, or the fixed-dollar minimum tax – results in the highest tax. The draft regulations provide that the business income base is the taxpayer's total business income, apportioned within the State, minus any net operating loss deduction and the prior net operating loss subtraction (resulting from net operating losses incurred prior to 2015). Draft Subpart 3-1.2.

Subpart 3-2 – General Rules

Draft Subpart 3-2 provides general rules regarding: (1) correcting distortions of income or capital;

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(2) adjusting tax bases to period covered by the report; (3) fair market value; (4) average value; and (5) use of dollar amounts in computing tax. They are substantially the same as the existing regulations in these areas.

Subpart 3-3 – Entire Net Income

Draft Subpart 3-3 provides detailed rules regarding the definition and calculation of entire net income ("ENI"). As under the existing regulations, they provide that the starting point for ENI is federal taxable income. Draft Subpart 3-3.1(a)(1). The draft regulations discuss the special subtraction modifications for community banks and thrifts (Draft Subpart 3 3.3) and the calculation of the royalty add back (for royalties directly or indirectly paid) for taxpayers not included in a combined return with a related member (Draft Subpart 3-3.4).

Subpart 3-4 – Investment Capital, Investment Income, and Other Exempt Income

The draft regulations divide investment capital into three categories: "actual investment capital;" "presumed investment capital;" and "constitutionally protected investment capital." Draft Subpart 3-4.1(a)(1)-(3).

Actual investment capital. "Actual investment capital" generally refers to investments that meet the statutory definition of investment capital. Draft Subpart 3-4.1(a)(1).

Presumed investment capital. "Presumed investment capital" refers to stock that meets the requirements of actual investment capital, except that the corporation has held the stock for one year or less at the time it files its original tax return and the stock is "still held at such time." Draft Subpart 3-4.1(a)(2). If the one-year holding period is ultimately not met, the draft regulations allow a corporation to file an amended return for the taxable year in which the stock was presumed investment capital to properly classify the capital and income as business capital and income. Draft Subpart 3-4.5. This is an expansion of the sole option provided under the statute, which is to increase the taxpayer's business capital and income in the subsequent taxable year.

Constitutionally protected investment capital. "Constitutionally protected investment capital" refers to certain stocks, debt obligations, and other securities held by a corporation incorporated and commercially domiciled outside New York State, the income or gain from which cannot be apportioned to New York under the United States Constitution. Draft Subpart 3-4.1(a)(3). The Department has expressly requested comments on whether the determination of whether a corporation has "constitutionally protected investment capital" should be made on an entity-by-entity basis, or by treating the combined group as a single corporation.

The draft regulations also set out the standard for determining whether an item is "constitutionally protected investment capital," explaining that income from an intangible asset is apportionable (and not constitutionally protected) "(1) where the underlying activities of the recipient of the intangible income and the source of the income constitute a unitary business; or (2) where the intangible asset or the income from the intangible asset serves an operational function in the taxpayer's business." Draft Subpart 3-4.3. This approach is consistent with prevailing United States Supreme Court precedent in this area.

Corporate Partners. The draft regulations provide that when a corporate partner uses the aggregate method to compute its tax, its proportional share of stock owned by the partnership may qualify as investment capital where the corporation and partnership are not unitary with the corporate issuer. Draft Subpart 3-4.1(c).

Investment income limitation. The draft regulations address the statutory gross investment income limitation, which limits the amount to the greater of income from "constitutionally protected investment capital" or eight percent of the corporation's entire net income. Draft Subpart 3-4.6.

Other exempt income. The draft regulations reflect amendments to the Tax Law contained in the 2018-19 Budget Bill providing that repatriated foreign income under IRC § 965 constitutes Exempt CFC Income. Draft Subpart 3-4.7.

Subpart 3-5 – Business Capital and Business Income

Business capital. The draft regulations restate the statutory definition of business capital and then set out a non-exclusive list of items of business capital, including:

(A) cash (which includes shares in a money market mutual fund);

(B) controlled foreign corporation stock (except to the extend such stock qualifies as investment capital);

(C) cross-article corporation stock;

(D) other unitary corporation stock;

(E) reverse repurchase agreements and securities borrowing agreements, as well as the securities underlying those agreements and repurchase agreements and securities lending agreements;

(F) real property;

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(G) tangible personal property; and

(H) investments in a federal reserve bank or a federal home loan bank.

Draft Subpart 3-5.1(a)(2)

Business income. The draft regulations restate the Tax Law definition of business income, which is entire net income minus other exempt income and investment income. They further provide that business income includes:

(1) interest deductions directly or indirectly attributable to gross investment income or investment capital that exceed the amount of gross investment income; and (2) interest deductions directly or indirectly attributable to gross other exempt income that exceed the amount of gross other exempt income. Draft Subpart 3 5.2(a).

Subpart 3-6 – Examples of Income and Capital

Draft Subpart 3-6 provides examples illustrating the principles set out in the other parts of the regulation.

ADDITIONAL INSIGHTS

These new draft regulations are 64 pages long and provide comprehensive rules and examples relating to the covered topics, which may be useful to corporations and practitioners seeking guidance in these areas. However, the Department advises that these regulations may not be relied upon by taxpayers until they are finalized and adopted, although the Department has not provided a timetable for their adoption. For New York City business corporation tax purposes, the New York City Department of Finance has indicated on its FAQ page that it intends to issue rules that correspond to the regulations issued by New York State under Article 9-A where the underlying statutes themselves correspond, and that corporations may rely on draft regulations posted on the New York State Department of Taxation and Finance's website until such time as the City Finance Department issues its own regulations.

INSIGHTS IN BRIEF

COURT OF APPEALS UPHOLDS REAL PROPERTY TAXATION OF CELLULAR TRANSMISSION EQUIPMENT AFFIXED TO BUILDINGS

The New York Court of Appeals held that T-Mobile's cellular transmission equipment (base transceiver stations, antennas, and coaxial and fiber optic cables) that it affixed to buildings in Westchester County pursuant to leases with building owners constituted taxable real property. *T-Mobile Northeast, LLC v. DeBellis*, No. 140, 2018 NY Slip Op. 08539 (Dec. 13, 2018). T-Mobile claimed that the property had been phased out from taxation in 1987 or else constituted "station connections" excepted from real property taxation. The court concluded that the equipment installation was taxable under the plain language of the real property tax law and found that (i) the 1987 phase-out from tax pertained only to transmission and switching equipment and (ii) the exception from tax for "station connections" applied only to wiring that physically connected customer telephones to telephone poles.

THIRD DEPARTMENT UPHOLDS TRIBUNAL DECISION REDUCING QEZE CREDITS

The Appellate Division, Third Department, has upheld the decision of the New York State Tax Appeals Tribunal that had reversed the determination of an ALJ and held that the Qualified Empire Zone Enterprise ("QEZE") tax reduction credit allowed to a New York resident may be reduced by applying the business allocation percentage of the Subchapter S corporation giving rise to the income. *Purcell v. N.Y.S. Tax Appeals Trib.*, No. 524632, 2018 NY Slip Op. 08388 (3d Dep't, Dec. 6, 2018). The dispute concerned the proper interpretation of the tax factor, one of the four factors used to determine QEZE tax reduction credits, and the Third Department agreed with the Department that the reference to an S corporation shareholder's income "from the S corporation allocated within the state" required limiting the factor to the amount allocated to New York at the level of the S corporation, based on the S corporation's business allocation factor, which substantially reduced the credit, since the S corporation in this case earned significant income outside New York. The Third Department did not address the argument made by the S corporation shareholder below that the statute as applied by the Department unconstitutionally differentiated between resident and nonresident shareholders.

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STATE + LOCAL TAX

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.

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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.

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