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IN THIS ISSUE

APPELLATE COURT DISMISSES CONSTITUTIONAL CHALLENGE TO NEW YORK'S STATUTORY RESIDENCY SCHEME
Page 1

NEW YORK STATE BRINGS LAWSUIT CHALLENGING FEDERAL $10,000 CAP ON SALT DEDUCTION
Page 2

TRIBUNAL ALLOWS RETROACTIVE APPLICATION OF APRIL 2009 STATUTORY AMENDMENTS TO BEGINNING OF 2009
Page 4

TRIBUNAL HOLDS THAT FULL AMOUNT OF SALES TAX ASSESSMENT MUST BE PAID BEFORE A REFUND CLAIM MAY BE GRANTED
Page 6

INSIGHTS IN BRIEF
Page 7

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APPELLATE COURT DISMISSES CONSTITUTIONAL CHALLENGE TO NEW YORK'S STATUTORY RESIDENCY SCHEME

By Michael J. Hilkin

The New York Appellate Division, First Department, finding that the U.S. Supreme Court's 2015 decision in *Comptroller of the Treasury v. Wynne*, does not render New York's statutory residency scheme unconstitutional, upheld the dismissal of a declaratory judgment action brought by a married couple domiciled in Connecticut. *Edelman v. N.Y.S. Dep't of Taxation & Fin.*, Nos. 156415/16, 6970, 6971, 2018 NY Slip Op. 04672 (1st Dep't, June 26, 2018).

Background of New York's Statutory Residency Scheme. Under New York's personal income tax laws, individuals who are domiciled outside New York nevertheless may be treated as "statutory residents" of New York—and be subject to New York's personal income tax on all of their income—if they maintain a permanent place of abode in New York and are present in New York for more than 183 full or partial days during a year. Tax Law § 605(b). Thus, those individuals having a domicile outside New York while also satisfying New York's statutory residency requirements risk being subject to tax on all of their income in more than one state.

The risk of multiple taxation is especially acute in the case of intangible and/or investment income. Many states, including New York, offer a tax credit for income taxes paid by their residents to other states, as long as the taxes paid relate to income "derived" from (*i.e.*, earned within) another state. This type of credit is generally not available for intangible or investment income because such income is usually not treated as having been directly derived from any specific state.

Nevertheless, in 1998, the New York Court of Appeals (the State's highest court) rejected a constitutional challenge to New York's statutory residency scheme. *Tamagni v. Tax Appeals Trib.*, 91 N.Y.2d 530 (1998). The plaintiffs in that case, who were domiciliaries of New Jersey and statutory residents of New York, asserted that the potential for multiple taxation inherent in New York's statutory residency scheme discriminates against interstate commerce in violation of the dormant Commerce Clause. The *Tamagni* court concluded that the dormant Commerce Clause was not applicable to the income taxation of state resident individuals, and quoted the U.S. Supreme Court case *Goldberg v. Sweet*, 488 U.S. 252, 266 (1989) for the proposition that, even if the dormant

continued on page 2

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Commerce Clause was generally applicable, it would not apply to the plaintiffs because it does not "protect state residents from their own state taxes."

However, a recent U.S. Supreme Court case, *Wynne*, 135 S. Ct. 1787 (2015), not only held that the residency credit scheme outlined in Maryland's personal income tax laws was unconstitutionally discriminatory under the dormant Commerce Clause, but also explicitly repudiated the statement in *Goldberg* that was relied on in *Tamagni*. In the *Wynne* decision, the U.S. Supreme Court concluded that Maryland's residency credit scheme violated the "internal consistency" test under the dormant Commerce Clause, which requires a tax to be structured so that if every state were to impose an identical tax, no multiple taxation would result.

The U.S. Supreme Court's decision in *Wynne* strongly suggests that the *Tamagni* dissenting opinion correctly concluded that the internal consistency test must be applied to determine the constitutionality of New York's statutory residency scheme.

Current Case. Plaintiffs Samuel and Louise Edelman, who are domiciled in Connecticut and have statutory residency in New York, earn investment and intangible income. In 2016, they brought a declaratory judgment action in a New York trial court, alleging that New York's statutory residency scheme violates the dormant Commerce Clause because the scheme fails to provide a credit for taxes they paid to other states on investment and intangible income. While the Edelmans argued in their declaratory judgment complaint that *Tamagni* was no longer good law, the trial court disagreed and dismissed the Edelmans' challenge primarily on the basis that the Court of Appeals' holding in *Tamagni* was controlling.

On appeal, the Appellate Division upheld the determination of the trial court judge, concluding that the holding in *Tamagni* was not abrogated by *Wynne*. According to the Appellate Division, *Wynne* was distinguishable from *Tamagni* because the individuals in *Wynne* did not face double taxation by virtue of being domiciliaries of one state and statutory residents of another, and the income under analysis in *Wynne* was business income traceable to an out of state source, rather than intangible investment income untraceable to any particular jurisdiction. Further, the Appellate Division ruled that *Wynne* did not nullify *Tamagni*'s "core holding" that it was not necessary to apply the internal consistency test to determine the constitutionality of New York's statutory residency scheme because the scheme "does not affect interstate commerce."

ADDITIONAL INSIGHTS

A dissenting opinion in *Tamagni* concluded that New York's statutory residency scheme was unconstitutional on the basis that the scheme failed the internal consistency test, the same test relied upon by the U.S. Supreme Court in *Wynne*. According to the *Tamagni* dissent, "[i]f New York's tax law applied in all States, an individual who spent a portion of over 183 days in three States and maintained a residence in each of these three States would have to pay tax on their income from intangible assets in all three."

The U.S. Supreme Court's decision in *Wynne* strongly suggests that the *Tamagni* dissenting opinion correctly concluded that the internal consistency test must be applied to determine the constitutionality of New York's statutory residency scheme. The Court of Appeals may ultimately have to reconsider this issue, as well as a potential remedy, either on an appeal by the Edelmans or in another case involving similar legal issues that is currently on appeal at the Third Department of the Appellate Division. *Chamberlain v. N.Y.S. Dep't of Taxation & Fin.*, No. 525967 (3d Dep't, argument scheduled for Sept. 14, 2018).

NEW YORK STATE BRINGS LAWSUIT CHALLENGING FEDERAL $10,000 CAP ON SALT DEDUCTION

By Irwin M. Slomka

New York State, together with the states of New Jersey, Connecticut, and Maryland, has brought suit in Federal District Court seeking to invalidate on constitutional grounds the $10,000 cap on state and local tax ("SALT") deductions enacted as part of the Federal Tax Cuts and Jobs Act of 2017. *New York v. Mnuchin*, Civil Action No. 18-cv-6427 (S.D.N.Y., filed July 17, 2018). This unusual action is the first direct attempt by states to invalidate the federal SALT deduction limitation. Based on the Complaint, and the very limited judicial precedent cited, the Plaintiff States may face considerable hurdles in pursuing this case.

Background. The federal legislation limits to $10,000 the federal itemized deduction for individuals for the aggregate of both state and local property taxes and

continued on page 3

income taxes. The legislation substantially increased the standard deduction, in the case of married individuals filing jointly to $24,000.

This past April 2018, Governor Cuomo sought and obtained State legislation as a partial workaround to the SALT limitation in the form of an optional New York State employer payroll tax, effective for tax years beginning after 2018, imposed on electing businesses. This tax would presumably be fully deductible by the employer for federal purposes, while covered employees are provided with a credit against their State personal income tax for equivalent amounts. The Governor is also considering a 5% State unincorporated business tax on partnerships and LLCs to further mitigate the effects of the SALT limitation with respect to non-wage income.

The suit is a constitutional challenge to the [federal] SALT deduction limitation, including an injunction against its enforcement . . . .

States' Constitutional Challenge. The lawsuit was brought in the Southern District of New York by the New York State Attorney General, and was joined by the nearby states of New Jersey, Connecticut, and Maryland, all of which are recognized as high state income tax jurisdictions. The suit is a constitutional challenge to the SALT deduction limitation, including an injunction against its enforcement (although it is not clear what IRS enforcement needs to be enjoined at this time).

The thrust of New York's and the other states' constitutional arguments is threefold:

1. *Tenth Amendment and "Sovereign Authority"*: The states claim that the SALT deduction limitation interferes with the states' "sovereign authority" to determine their own tax and fiscal policies, and is therefore prohibited under the Tenth Amendment of the U.S. Constitution. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") The Complaint notes that state sovereign authority was an explicit concern of the Founders of the U.S. Constitution. The fact that SALT deductions have been substantially permitted since the first federal income tax was enacted in 1861 is allegedly "strong evidence that the federal government lacks constitutional authority to drastically curtail the deduction."

2. *Legislative History of Enactment of the Sixteenth Amendment*: The SALT deduction limitation also allegedly violates the Sixteenth Amendment of the U.S. Constitution, which is the source of the federal income tax that went into effect in 1913 ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration"). According to the Complaint, the SALT limitation violates the Sixteenth Amendment because, when ratified in 1913, "it was widely understood that, to the extent the federal government taxed income, it would provide a deduction *for all or a significant portion of state and local taxes*." (Emphasis added.) The source for this claim is largely based on "assurances" provided by several U.S. Senators at the time that the imposition of a federal income tax in the early 1900s would not "encroach on the States' . . . ability to impose their own state tax regimes free from federal interference." Prior limitations of the SALT deduction—such as the removal of the state and local sales tax deduction in 1986 and limiting the deduction for higher income taxpayers—are dismissed in the Complaint as "incidental limitations."

3. "*Coercion*" *Claim*: The lawsuit also alleges that various officials—"President Trump, Secretary Mnuchin, and numerous Republican legislators"—"made clear [that] their intention was to injure the Plaintiff States and thereby coerce them into changing their tax policies." Referring to "the coercion here [as] unprecedented and unlawful," the Complaint cites *United States v. Butler*, 297 U.S. 1 (1936), where the U.S. Supreme Court struck down the imposition of a federal tax on cotton, finding that the power to regulate agriculture was reserved to the states under the Constitution. That case has rarely been cited by the Supreme Court in recent years.

In sum, the Plaintiff States' lawsuit is largely based on the claims of federalism rooted in the Constitution. However, it is also clear that the Complaint is by and large a political document that faces a difficult road ahead in the courts.

continued on page 4

TRIBUNAL ALLOWS RETROACTIVE APPLICATION OF APRIL 2009 STATUTORY AMENDMENTS TO BEGINNING OF 2009

By Hollis L. Hyans

The New York State Tax Appeals Tribunal affirmed the decision of an Administrative Law Judge denying a Qualified Empire Zone Enterprise ("QEZE") tax credit, agreeing that statutory amendments enacted in April 2009 narrowing the credit could be retroactively applied to the tax year beginning January 1, 2009. *Matter of Clayton H. Hale, Jr. & Patricia H. Hale, et al.*, DTA Nos. 827149 et al. (N.Y.S. Tax App. Trib., June 14, 2018). The Tribunal, although disagreeing with the ALJ's conclusion that there was no retroactive application involved, found that the brief period of retroactive application was not a violation of the petitioners' rights under the Due Process Clause of the U.S. Constitution.

Facts. Clayton and Patricia Hale, and approximately 18 other petitioners, were all partners or spouses of partners (the "Partners") of Mackenzie Hughes, LLP ("MH"), a New York limited liability partnership, during 2009. MH, a law firm, was formed out of a predecessor law firm, Mackenzie, Smith, Lewis, Michell & Hughes, LLP ("MSLMH").

Prior to March 1, 2001, MSLMH leased real property in Syracuse (the "Property"), where its offices had been located for at least 50 years. Its lease was set to expire in 2001, and representatives of the City of Syracuse encouraged it to remain in downtown Syracuse, noting that if it located in an Economic Development Zone ("Empire Zone") and became certified as a QEZE, it would qualify to receive significant tax benefits. In considering whether to relocate, MSLMH reviewed a comparison of potential properties prepared by a broker identifying locations that could potentially entitle MSLMH to Empire Zone tax credits, and received a letter from another consultant stating that MSLMH would not be eligible for QEZE tax reduction benefits because, as then constituted, it would not meet the "employment test," which generally requires that the number of employees in a year for which the tax reduction is claimed must equal or exceed the number of employees in a "test period." *See* Tax Law §§ 14 (a), (b). On May 18, 2001, MSLMH entered into a 15-year lease for real property located at the Property. MSLMH was not qualified as a QEZE at the time of the lease, or at any other time.

Due to the decline in MSLMH's work for a former bank client, and reductions in income from certain insurance clients, MSLMH experienced a significant decline in revenue. While some members wanted to expand into new areas of practice, others were concerned that doing so would create risk to the firm's uncollected long-term receivables. To address this concern, a new partnership, MH, was created going forward, while MSLMH was kept in existence to segregate the existing booked receivables from new business. In addition, creation of the new partnership allowed the new entity to meet the QEZE employment test going forward. MH was created on or about May 20, 2002, and acquired the assets of MSLMH, including the lease. It was certified as a QEZE on March 10, 2003, effective as of June 14, 2002.

On or about May 18, 2009, MH was notified that its QEZE certification could be revoked due to new amendments to the law and, on or about June 29, 2009, it was notified that its status was indeed officially revoked. The Partners challenged the revocation, but it was upheld by the Empire Zone Designation Board, which oversees the QEZE program.

On either their original or amended 2009 returns, the Partners claimed QEZE tax credits by virtue of their partnership interests in MH. The refunds were issued, but the Department of Taxation and Finance subsequently issued notices of deficiency to reclaim the amounts previously refunded.

Background on the QEZE credits and amendments. On April 7, 2009, the statute creating the QEZE credits was amended to impose new criteria for continued certification under the Empire Zones program (the "2009 Amendments"). The change was intended to prevent a perceived abuse caused by existing businesses reincorporating or transferring employees among related entities to create the appearance of having created new jobs or made new investments. In 2010, the statute was further amended (the "2010 Amendments") to explicitly provide that the 2009 Amendments were retroactive to years beginning on or after January 1, 2008.

In 2013, the New York Court of Appeals held that retroactive application of the 2009 Amendments to the year beginning January 1, 2008, violated the Due Process Clause and was unconstitutional. *James Square Assocs. LP v. Mullen*, 21 N.Y.3d 233 (2013). Applying a three-factor test, the Court of Appeals found that the taxpayers had not been forewarned of the legislative change, but were instead being "punished . . . more harshly for behavior that already occurred and that they could not alter"; that the period of retroactivity was excessive; and that the retroactive application did not serve an important public purpose.

continued on page 5

In reliance on *James Square Assocs.*, the Partners challenged the revocation of MH's QEZE status as of January 1, 2009, claiming an unconstitutional retroactive application of the statute, and requested an allowance of credits pro-rated up to the time that they were notified of MH's decertification in 2009. They also claimed that the period of retroactivity involved was longer than the first few months of 2009, because it was the 2010 Amendments that made the 2009 Amendments retroactive to January 1, 2009.

The Tribunal, although disagreeing with the ALJ's conclusion that there was no retroactive application involved, found that the brief period of retroactive application was not a violation of the petitioners' rights under the Due Process Clause of the U.S. Constitution.

ALJ Determination. The ALJ rejected the Partners' arguments, finding that application of statutory changes enacted in 2009 to the 2009 tax year itself was not a retroactive application of the law. The ALJ also concluded that, even if there were a retroactive application, there was no violation of the Partners' due process rights because the period of retroactivity was very short, taxpayers such as the Partners were aware of the likely changes and had an opportunity to make provisions to pay for the possible additional liability, and the 2009 amendments were enacted with the "clearly acceptable" public purposes of curtailing abuses of the Empire Zones program and achieving budget savings.

Tribunal Decision. The Tribunal upheld the ALJ's determination that the retroactivity was constitutionally permissible. It found, first, that the 2010 Amendments had "little practical effect," since the law already provided that revocations of certifications to participate in the Empire Zones program be deemed effective as of the first day of the taxable year in which the revocation occurred, so that the Legislature's intent to clarify this rule in the 2010 Amendments was "superfluous."

Next, the Tribunal disagreed with the ALJ's determination that no retroactive application of a statute had occurred. Just as it had done earlier this year in *Matter of NRG Energy, Inc.*, DTA No. 826921 (N.Y.S. Tax App. Trib., Mar. 14, 2018), the Tribunal found that "there is no rule" that a statute adopted during an open tax year and made effective as of the beginning of the year "automatically is determined not to have a retroactive effect." Here, application of the 2009 Amendments attached "new legal consequences" to actions that occurred prior to their enactment, and therefore constituted retroactive application of the statute, which must be analyzed to determine whether it was constitutional.

The Tribunal then examined the constitutionality of the retroactive application under the factors set forth most recently in *James Square Assocs.* and in *Replan Development, Inc. v. Department of Housing Preservation & Development*, 70 N.Y.2d 451 (1987), *appeal dismissed*, 485 U.S. 950 (1988). The Tribunal concluded that the first factor, whether the taxpayers had reasonable reliance on the old law or had been forewarned of the change, should not be accorded any weight, since the relevant actions were taken in 2001 and 2002, when MSLMH executed a new lease and MH was formed to continue the law practice of MSLMH. There was no action that MH or the Partners could have taken in 2008 or 2009 to alter the result of MH's certification being revoked. The second factor, the length of the retroactive period, was found to weigh in favor of the law's constitutionality, since the 97-day period involved was relatively short.

Finally, the Tribunal acknowledged that the issue of the public purpose for the retroactivity had already been resolved by the Court of Appeals in *James Square Assocs.*, where the Court found that retroactive application of the statute would do nothing to "spur investment, to create jobs, or to prevent prior [abuse]," but only served to punish participants more harshly for behavior that it was too late to alter.

After weighing all of the factors, and noting that tax legislation retroactive to the beginning of the year of enactment has "routinely" been upheld against due process challenges, the Tribunal concluded that the extremely short period of retroactivity "outweighs the lack of a public purpose" and held that the application of the 2009 Amendments retroactive to January 1, 2009 did not violate the Partners' constitutional rights.

ADDITIONAL INSIGHTS

The Tribunal's decision in this case joins a long line of cases that have upheld retroactive application of legislative changes to tax laws. While New York's highest court did find unconstitutional the retroactive application of the 2009 Amendments to 2008 in *James Square Assocs.*, the same court rejected due process challenges to the retroactive application of a 2010 statutory amendment that changed the treatment of gains recognized by a nonresident on the sale of S corporation stock in *Burton v. N.Y.S Dep't of Taxation & Fin.*, 25 N.Y.3d 732 (2015), and *Caprio v. N.Y.S Dep't of Taxation & Fin.*, 25 N.Y.3d 744 (2015).

continued on page 6

Nevertheless, here the Court of Appeals has already found there was no valid "public purpose" supporting retroactive application of the 2009 Amendments, so it would not be surprising if the petitioners in *Hale* seek further review of the Tribunal's decision by the Appellate Division.

TRIBUNAL HOLDS THAT FULL AMOUNT OF SALES TAX ASSESSMENT MUST BE PAID BEFORE A REFUND CLAIM MAY BE GRANTED

By Kara M. Kraman

The New York State Tax Appeals Tribunal has held that a taxpayer is required to pay the full amount of the sales tax liability asserted in a notice of determination before a refund of any part of the assessment may be granted. *Matter of Mario Pugliese*, DTA No. 827843 (N.Y.S. Tax App. Trib., July 12, 2018). Although it held that the taxpayer was precluded from making a refund claim because he had failed to pay the full amount of the assessment, the Tribunal rejected the Department's contention that the taxpayer's refund claim should be denied simply because he failed to timely protest the notice of determination.

Background. In June 2014, the Department issued a notice of determination to Mr. Pugliese assessing sales and use tax, and imposing fraud penalties, for the period March 1, 2005 through August 31, 2009 in the amount of $58,800.11. Mr. Pugliese did not timely request a conciliation conference or file a petition with the Division of Tax Appeals protesting the notice, which, in the case of fraud penalties, must be filed within 30 days of the notice of determination.

In January 2016, Mr. Pugliese paid $212.82, which was the amount assessed against him for the sales tax quarter ending August 31, 2009 included in the notice. He did not pay any other part of the assessment. Mr. Pugliese subsequently filed a refund claim requesting a refund of the amount he paid. The Department denied the claim on the grounds that he failed to timely protest the assessment.

Mr. Pugliese filed a petition with the Division of Tax Appeals protesting the denial. The ALJ determined that Mr. Pugliese was not entitled to a hearing on the denial of his refund claim because he did not pay the full amount of the tax assessed by the notice and granted summary determination in favor of the Department. This appeal followed.

Tribunal Decision. The Tribunal affirmed the ALJ's determination and upheld the denial of Mr. Pugliese's sales tax refund claim. In reaching its decision, the Tribunal first rejected the Department's reliance on the former sales tax refund statutory scheme, which provided that no refunds would be allowed unless the taxpayer had timely protested the notice of determination assessing the tax, noting that those provisions had been amended in 1996 to permit challenges by first paying the assessed amount and protesting the denial of the resulting refund claim. Tax Law former §§ 1138(a)(1), 1139(c) (1995). However, the Tribunal agreed with the Department's alternative argument that a taxpayer's right to a refund following the issuance of a notice of determination first requires that the taxpayer pay the full amount assessed.

[T]he entire amount of the [sales tax] assessment must be reviewed, and paid, before a refund of any part of the assessment can be granted.

Specifically, the Tribunal found that the statutory language contained in Tax Law § 1139(c), which requires that a notice of determination be found to be "erroneous, illegal or unconstitutional or otherwise improper" before a refund can be made, recognized that a refund claim is necessarily a protest of that assessment. Therefore, the entire amount of the assessment must be reviewed, and paid, before a refund of any part of the assessment can be granted.

The Tribunal found Mr. Pugliese's argument, that payment of tax for one period within an assessment period entitled a taxpayer to an administrative hearing on that one period, to be contrary to the statute, which requires full payment. In addition, the Tribunal noted that the legislative history of the current version of Tax Law § 1139(c) clearly indicated that full payment of the assessment would be required before a refund could be granted.

Finally, the Tribunal also noted that its interpretation of Tax Law § 1139(c) was consistent with the treatment of a taxpayer that consents to a notice of determination or proposed determination pursuant to Tax Law § 1138(c). Such a taxpayer must pay the full amount of the assessment in order to make a refund claim for all or part of the amount, and the Tribunal found no policy reason for granting a taxpayer that fails to protest a notice the "significant advantage of permitting a partial payment." Accordingly, the Tribunal granted the Department's motion for summary determination.

continued on page 7

ADDITIONAL INSIGHTS

The amount of the refund sought by the taxpayer in this case was $212.82. At first glance, this amount would not seem to justify the time and expense of a hearing and appeal. However, the taxpayer was apparently attempting to use his partial payment and subsequent refund claim as a way to protest the entire notice without having to first make full payment. The ALJ had clearly rejected this strategy, and the taxpayer does not appear to have made this same argument before the Tribunal.

At the Tribunal, the taxpayer instead appears to have sought a hearing on the merits solely for the period for which he paid the tax, in other words for the period in which only $212.82 was at issue. Presumably, the taxpayer hoped that if he prevailed on this smaller refund claim, he could then pay the rest of the assessment and be assured of a successful refund claim for the larger amount as well. The Tribunal expressly rejected this approach, noting that permitting a taxpayer to protest the assessment using such a "piecemeal approach" was contrary to the statute.

INSIGHTS IN BRIEF

TRIBUNAL AFFIRMS DENIAL OF CLAIMED REAL ESTATE LOSSES

An individual who claimed losses from real estate rental activities failed to establish that he qualified as a real estate professional and therefore was not entitled to deduct the losses for New York State personal income tax purposes. *Matter of Michael Strachan*, DTA No. 826530 (N.Y.S. Tax App. Trib., June 28, 2018). The petitioner was employed full time as a lead architect for a company for which he worked 1,950 hours, but claimed that his job allowed him enough time to spend more than 750 hours performing real estate services, one of the requirements for qualifying as a real estate professional under federal tax law. The Tribunal affirmed the ALJ's determination that the work logs on which the petitioner relied were unreliable and inconsistent, and accepted the ALJ's conclusion that the petitioner's testimony was not credible, agreeing with the ALJ that the petitioner failed to prove that he met the requirements to qualify as a real estate professional by "clear and convincing" evidence.

APPELLATE DIVISION REJECTS CONSTITUTIONAL CHALLENGE TO DRIVER'S LICENSE SUSPENSION LAW

The Appellate Division, First Department, has unanimously affirmed a New York County judge's order that rejected a constitutional challenge to the New York State Driver's License Suspension Law (Tax Law § 171-v), which authorizes the suspension of an individual's driver's license for unpaid New York State tax assessments of $10,000 or more. *Berry v. N.Y.S. Dep't of Taxation & Fin.*, Nos. 158919/16, 7013, 7014, 2018 NY Slip Op. 04843 (1st Dep't, June 28, 2018). The First Department rejected the plaintiff's claim that a driver's license was a "fundamental right" that merited particular scrutiny under U.S. Supreme Court precedent, and found the State's interest in tax collection to constitute a rational basis for the law.

SALE OF RESTAURANT'S FURNITURE TOGETHER WITH ASSIGNMENT OF LEASE CONSTITUTES BULK SALE FOR SALES TAX PURPOSES

A New York State Administrative Law Judge has determined that the sale of substantially all of a restaurant's assets, which consisted mainly of furniture, along with the assignment of the restaurant's lease, constituted a bulk sale for sales tax purposes. *Matter of Singh Restaurant, Inc.*, DTA No. 827456 (N.Y.S. Div. of Tax App., June 21, 2018). As a result, the ALJ concluded that the purchaser was liable for sales and use tax due from the seller to the extent of the purchase price. In reaching her determination, the ALJ noted that the assignment of the lease alone would be sufficient to constitute a bulk sale of business assets, but in this case the transfer of additional tangible business assets clearly indicated a bulk sale.

CHARITABLE TRUST NOT EXEMPT FROM N.Y.S. REAL ESTATE TRANSFER TAX AS AGENT OR INSTRUMENTALITY OF THE GOVERNMENT

A New York State Administrative Law Judge rejected a charitable trust's argument that it should be considered an agent or instrumentality of the government for real estate transfer tax purposes (and therefore exempt from the tax) because, in carrying out its mission of providing for the welfare of animals, the trust alleviates a financial burden that would otherwise be borne by the government. *Matter of Robert J. Randell as Executor of the Estate of Phyllis Millstein & as Trustee of the Irving & Phyllis Millstein Charitable Trust for Animals*, DTA No. 827359 (N.Y.S. Div. of Tax App., June 28, 2018). The ALJ further noted that the fact that the trust is exempt from sales tax and income tax by reason of its charitable status does not concomitantly qualify it for any exemption under the real estate transfer tax. The ALJ also rejected the trust's "implicit argument" that the State transfer tax treatment should follow the New York City real property transfer tax treatment, which exempts from tax any transfer by or to a charitable organization, noting that the State transfer tax law does not provide the same exemption.

continued on page 8

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