"Shaking things up in state and local tax"

SUTHERLAND SALT SHAKER

FORECAST
Clear skies, slight chance of tax reform.

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Oregon Court Holds That Internet Access Services Are Not Telecommunications, Are Protected by the Internet Tax Freedom Act

In *City of Eugene v. Comcast of Oregon II, Inc.*, Case No. 16-08-03280, the Oregon Circuit Court reversed its earlier ruling that the City of Eugene's registration and license fees imposed on cable Internet access services are preempted by the Internet Tax Freedom Act (ITFA), and that the fees violated the Uniformity Clause of the Oregon Constitution.

This case arose when the City of Eugene filed an action to collect a registration fee and license fee imposed under City Ordinance 20083 from a cable Internet access provider. The registration fee requires each entity engaging in telecommunications activities to register and pay a 2% annual fee on gross revenues derived from providing telecommunications services within the City's public rights of way. The license fee requires each entity using the City's right-of-way to provide telecommunications services to pay a license fee of 7% of its gross revenues derived from providing telecommunications services in the city. In an earlier ruling, the Court found that cable modem services (Internet access services delivered using a cable modem) were subject to both the registration fee and the license fee. Upon reconsideration, the Court determined cable modem service was not a telecommunications service under the Ordinance.

Continued on Page 2

Fair or Unfair? Main Street Fairness Act Faces Opposition

The goal of the recently introduced Main Street Fairness Act (H.R. 5660) is to establish fairness by treating similar sales transactions equally for purposes of sales and use tax. Opponents of the Bill, however, believe that if it becomes law, the result will be far from fair. The Bill authorizes "member states" of the Streamlined Sales and Use Tax Agreement to impose a use tax collection obligation on remote sellers even though they have not established a physical presence. Those opposing the Bill contend that it will result in extremely burdensome and costly compliance requirements on small, online retailers.

On July 29, 2010, Representative Paul W. Hodes (D-NH) issued House Resolution 1570, stating that any federal legislation that would upset the strong online retail market would "effectively put an end to the robust e-commerce marketplace." One online auction site established an online petition opposing the Bill, characterizing it as a new Internet tax. The concerns being expressed reflect the potential impact the Bill will have on small online retailers that do not have to collect and remit sales and use tax for states where they do not have physical presence. The petition opposing the Bill raises questions about the Agreement's level of simplification, calling it "remarkably un-simplified."

Anticipating the criticism of the Bill, the drafters have included two provisions intended to lessen the burden on small retailers. First, the Bill includes a "small seller" exception, which would exempt certain remote sellers from collection requirements. The Bill, however, does not include a definition of a "small seller." Second, the Bill includes language that would require states to pay reasonable vendor compensation to cover the costs imposed on businesses to collect sales and use tax. The Bill, however, does not define what constitutes reasonable compensation. It is unclear whether the definitions, which are under development by the Governing Board, will adequately address the concerns being raised by the online vendor community.

Oregon Tax Court Strikes Again: Gain on the Sale of Stock Constitutes Business Income

Less than a month after its decision in *Crystal Communications, Inc. v. Oregon Dep't of Revenue*, No. TC 4769 (Or. T.C. July 19, 2010) (see August SALT Shaker, p.5), the Oregon Tax Court held that gain from the sale of stock of a subsidiary was business income. *Centurytel, Inc. v. Dep't of Revenue*, No. TC 4826 (Or. T.C. August 9, 2010). In *Centurytel*, the taxpayer, a telecommunications corporation, sold all of the outstanding shares of its wireless subsidiary to an unrelated buyer. The sale resulted in the liquidation of its wireless operations. Both the taxpayer and the purchaser filed elections under I.R.C. § 338(h)(10) to treat the stock transaction as an asset sale. The taxpayer used the proceeds from the sale to finance the acquisition of additional assets and to repay existing debt.

Under Oregon law, gain from the disposition of assets is business income if it meets either the transactional test or the functional test. In *Centurytel*, the court noted that the taxpayer had conceded that the assets deemed sold in the transaction had been employed in a unitary business operating within and without Oregon. The taxpayer filed an Oregon consolidated income tax return. Re-

Continued on Page 2

Continued from Page 1

Oregon Court Holds That Internet Access Services Are Not Telecommunications, Are Protected by the Internet Tax Freedom Act cont'd

The Court also held that the registration fee is a discriminatory tax on electronic commerce under ITFA. ITFA prohibits states and municipalities from imposing a tax on Internet access unless the tax was "generally imposed and actually enforced prior to October 1, 1998." The City claimed it met an exception to ITFA, commonly referred to as the Grandfather Clause. The Court found that the City bore the burden to prove it meets the exception and establish that it "generally imposed and actually enforced" the tax prior to October 1, 1998. The City did not present sufficient evidence to establish that the tax was generally collected from the appropriate class of registrants prior to October 1, 1998.

The Court found the City violated Article 1, section 32 of the Oregon Constitution, which requires that "all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax." The Court ruled that the City's attempt to exact a fee only from the defendant and not from similarly situated providers of Internet access service within its class was a violation of Oregon's uniformity clause. The City's subsequent attempts to enforce the Ordinance on other providers of Internet access service did not cure the constitutional defect.

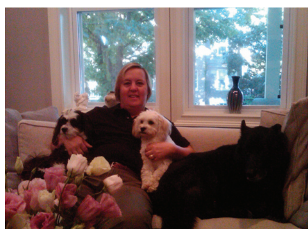
Continued from Page 1

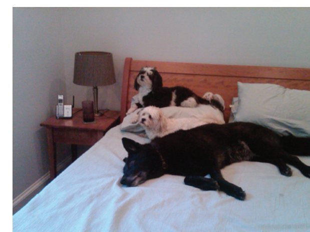
lying on the analysis in *Crystal Communications*, where the Tax Court determined that the gain from the sale of an FCC license was business income under the functional test, the *Centurytel* Court held that the gain recognized by the taxpayer constituted apportionable business income. The *Centurytel* Court stated that the two transactions should be analyzed similarly because the § 338 election deemed taxpayer to be selling assets. The *Centurytel* Court further explained that even if it were to recognize a "liquidation exception" to the functional test under Oregon law, this exception does not apply because the taxpayer continued its wireless business operations and used the proceeds from the liquidating sale to purchase additional wireless assets, expand its operations, and pay down debt.

This case highlights that a § 338(h)(10) election may alter the characterization of income as business or nonbusiness income. Because the court followed the fiction created by the § 338 election as a deemed asset sale, taxpayers should consider the potential consequences of the election.

SALT PET(S) OF THE MONTH

Sophie, Alee and Kami





Sophie, Alee and Kami are the quirky pack members of Washington, DC, associate Beth Freeman. Sophie, a shepherd mix of some sort, was rescued from a shelter twelve years ago and is the matriarch of the group. As a younger pup, she was quite the athlete, requiring Beth to build ever-higher fences to prevent her from bounding out of the yard to chase deer. Nowadays, Sophie is content to take long naps, watch TV, and gently keeps her two younger pack-mates in line with a single flash of her wolf-like yellow eyes.

Alee and Kami are Havanese – and thus sporty little dogs that like to do tricks, chase squirrels, and play rough with much bigger dogs (like Sophie). Alee is five and is an expert at rolling over, pouting, doing figure-eights around her humans' legs. She has trained her parents equally well to provide her with treats on demand, using her unusually large vocabulary of whines, barks, scratches and nibbles.

Kami (aka "Dennis the Menace") is the baby of the family at four years old, and excels at looking cute, eating lots of food and getting into trouble. She is an avid climber, which enables her to get food off any table or counter despite her diminutive size – and she is frequently found snoozing on the breakfast bar following these accomplishments. Not surprisingly, her favorite activity of the day is sitting on a barstool to watch dinner being prepared.

Recent transplants from Burlington, Vermont, Sophie, Alee and Kami are getting to know the District, including the neighborhood's feral cats, on their long walks. With their Vermont roots, these three Sutherland SALT pets will be well prepared for next winter's Snowpocalypse!

SALT Pet of the Month: It's Your Turn!!

In response to many requests, the Sutherland SALT practice invites you to submit your pet (or pets) as candidates for SALT Pet of the Month. Please send us a short description of why your pet is worthy of such an honor, along with a picture or two. Submissions should be directed to Andrea Christman at andrea.christman@sutherland.com.

Former Dell Executives Manipulated Tax Reserves, Says SEC

On August 27, 2010, the SEC charged two former Dell executives with fraud for their alleged misconduct relating to the use of the company's excess tax reserves. *SEC v. Davis*, Docket No. 1:10-cv-01464 (D.D.C.); *SEC v. Imhoff*, Docket No. 1:10-cv-01465 (D.D.C.). The SEC's complaint alleges that Dell improperly used "cookie jar" reserves to meet consensus earnings targets, which caused it to materially misstate its operating income, operating expenses, and certain other financial metrics.

The complaint alleges that Dell improperly used $17 million in an excess Japanese consumption tax reserve that it had decided was unnecessary. Under Generally Accepted Accounting Principles (GAAP), the SEC argues, Dell should have released the entire reserve by the end of the 2003 fiscal year. Instead, Dell allegedly released only $5 million of the reserve to its income statement at the end of the fiscal year 2003 and transferred the remaining $12 million to another account. The SEC alleges that Dell then released $7.1 million of the $12 million to soften the 2004 fiscal year earnings impact of an unrelated $9.3 million litigation settlement for which Dell had not created a reserve. In addition, it is alleged that Dell released the remaining $5 million to its income statement to prop up its fiscal year 2004 operating figures.

The SEC's complaint is particularly troubling given the relatively small amounts at issue. While many companies extensively document the establishment of tax reserves, the SEC's complaint may spur companies to enhance their documentation surrounding the release and maintenance of financial statement tax reserves.

Illinois Amnesty: Double Interest, Double Penalties and a Double Edged-Sword

Illinois recently enacted a tax amnesty program that provides a carrot – but carries a big stick. Taxpayers who participate in the program are able to eliminate interest and double penalties for any eligible tax liabilities. However, taxpayers that do not participate in the program will be subject to double interest and penalties on any eligible liability. Ouch! Taxpayers must analyze the pros and cons of the amnesty program and decide quickly because it will run for only a very brief time – from October 1 through November 8, 2010.

Illinois law defines eligibility for the amnesty program on the basis of a tax liability, not on the basis of the taxable year or the status of the taxpayer. The legislation defines an "eligible tax liability" as any tax owed for the period from June 30, 2002, through July 1, 2009, that is collected by the Department of Revenue (which excludes the Illinois franchise tax collected by the secretary of state). A tax liability is ineligible for the amnesty program if the liability is pending in any civil or criminal litigation in an Illinois court. However, liabilities pending in any administrative forum – such as the Informal Conference Board or Office of Administrative Hearings – are eligible for the program, and will be subject to double interest and double penalties if the taxpayer does not participate.

Participation in the amnesty program will also significantly limit refunds. Taxpayers participating in the program will be eligible to claim refunds of overpayments unrelated to the amnesty tax issues and overpayments associated with federal changes. This refund policy means taxpayers' estimated payments are generally final, even if a taxpayer's position is subsequently upheld. In contrast, the 2003 Illinois program allowed refunds only for computational errors, but it credited the taxpayer for all other overpayments.

Due to potentially exorbitant interest and penalties, taxpayers with eligible tax liabilities should quickly and carefully consider their options. Taxpayers can estimate their tax liability and pay that amount under the amnesty program to avoid the double interest and penalties on such tax liability. However, this imperfect option could subject a taxpayer to double interest and penalties (for a low estimate) and foregoing refunds (for a high estimate). Alternatively, taxpayers with uncertain liabilities pending in an administrative forum may want to consider changing forum to an Illinois court to escape the amnesty penalty provisions.

Recently Seen and Heard

August 13, 2010
Manufacturers' Education Council 2010 Annual Ohio Tax Course
Cherry Valley Lodge – Granville, OH
Diann Smith on Major Trends & Multistate Tax Issues Including Aggressive State Tax Actions

August 17, 2010
Stafford Webinar
Pilar Mata on Corporate Income Tax: Compiling and Maintaining Audit Files

DMA Lawsuit: Twists and Turns Continue

The Direct Marketing Association (DMA) filed a motion for preliminary injunction in the U.S. District Court for the District of Colorado on August 13 in an effort to stop Colorado from enforcing the recently enacted – and highly controversial – sales tax notice and reporting obligations on remote retailers. Arguing that "affected DMA members will suffer irreparable harm to their businesses" without an injunction, the motion seeks to relieve remote retailers of the burdens of Colorado H.B. 1193 until the substantive issues in the lawsuit are resolved. The parties have attempted to narrow and expedite discovery on the Commerce Clause claims and to consolidate the preliminary injunction proceedings with a trial on the merits on those claims. It appears that the parties agree that resolution of these issues prior to enforcement of the end-of-year reporting requirements is beneficial to both the state and taxpayers.

DMA's amended complaint, filed in federal court on July 23, alleges constitutional violations under the Commerce Clause, the First Amendment right to free speech of businesses and consumers, the right to privacy of Colorado residents, and the deprivation of the value of proprietary customer lists without due process or fair compensation. Not surprisingly, Colorado quickly filed a motion to dismiss challenging whether DMA has standing to file such a suit on behalf of its members and on behalf of third parties (consumers).

Interestingly, Colorado did not assert a jurisdictional challenge based upon the Tax Injunction Act (TIA) in its motion to dismiss. This is important because the TIA generally prevents a taxpayer from challenging a state or local tax in a federal court. A primary argument in the DMA lawsuit is that the physical presence standard of *Quill v. North Dakota*, 508 U.S. 294 (1992), should apply to this statute because it imposes a sales tax on interstate commerce. If Colorado had asserted the TIA as a means of having

Continued on Page 5

City of Philadelphia Loses TIA Challenge

The U.S. District Court (E.D. Pa.) remanded a case to Pennsylvania's state courts in a suit challenging a local improvement district's assessment scheme on the grounds that the federal courts lacked jurisdiction over the action based upon the Tax Injunction Act (TIA). *Nigro v. City of Philadelphia*, No. 10-987 (E.D. Pa. Aug. 25, 2010). The TIA generally prohibits federal courts from entertaining cases regarding state and local "taxes" if the parties have a "plain, speedy and efficient remedy" available in state court. Taxing jurisdictions frequently raise the TIA as a basis for dismissing cases filed by taxpayers in federal court. However, in this case, after the taxpayer filed suit in state court, the City removed it to federal court and the taxpayer was seeking to have the case remanded back to state court pursuant to the TIA.

To determine whether the federal court was barred by the TIA from exercising jurisdiction, the court conducted a two-step inquiry examining (1) whether the assessment at issue was a "tax" versus a "fee," and (2) whether the state court system provided a "plain, speedy and efficient remedy." The court easily found that the district's assessment qualified as a "tax" because the assessment was imposed upon all property owners in a certain area, was not tied to the owners receiving a benefit for payment, and the funds were used to benefit the public generally.

The court then grappled with the question of whether the parties had a sufficient remedy in state court. Ironically, the City claimed that the taxpayer lacked an adequate remedy in state court because the taxpayer would not be permitted to maintain the class action lawsuit it had filed. The court found that the class procedure might be available in state court if the taxpayer could show that failure to maintain the class action would result in a multiplicity of duplicative lawsuits. The court found that even if the taxpayer could not assert claims on behalf of the class, the taxpayer's legal remedy was sufficient to repair any harm that the taxpayer suffered as an individual, and thus provided the taxpayer with an adequate remedy. The court thus remanded the case to the Pennsylvania Court of Common Pleas on the grounds that the case was barred by the TIA.

Let the Blogger (and Bagel Eater) Beware

When the going gets tough, the tax collector gets creative – or so it would seem, given two recent developments that border on the bizarre.

Amateur bloggers are suddenly discovering that, unbeknownst to them, they have been running a business – and the City of Philadelphia wants its cut. The City has informed a number of bloggers that they owe $300 for business privilege licenses, as well as wage tax, business privilege tax, and of course taxes on any profits their sites bring in. The concept seems logical when applied to high-trafficked, well-known blogs, but the application of the business license tax – due to the provision that a license is required whether or not the business actually makes a profit – has angered some people who blog for fun, not profit, and earn only negligible amounts of cash in the process. One Philadelphian was required to purchase a license and pay tax on a blog that had made $11 in two years, another for a blog that made $50 in three. The City's argument is that selling advertising space in hopes of profit qualifies a blog as a business, regardless of whether it succeeds and even if the author views the blog as merely a hobby. But one can reasonably question the propriety of forcing bloggers to pay the City $300 for the privilege of earning $11.

Similarly, New York State is using its imagination to help ease Albany's financial pain. The State has recently begun to enforce an obscure provision that levies the State sales tax on "sliced or prepared bagels (with cream cheese or other toppings)." The tax also applies to any bagel eaten in a store, even if the bagel maintains its bodily integrity and stays topping-free. The tax does not,

Continued on Page 5

Continued from Page 4

DMA Lawsuit: Twists and Turns Continue cont'd

this case dismissed from federal court, it would seemingly be conceding that the Colorado reporting law is, indeed, a sales tax collection statute that would fall under the nexus standard espoused by *Quill*.

The parties have requested a hearing on the substantive issues on or before January 14, 2011, in advance of the deadline for taxpayers to prepare and send year-end reports of consumer purchases – which are due January 31.

Continued from Page 4

Let the Blogger (and Bagel Eater) Beware cont'd

however, apply to unprepared bagels purchased to go. Thus far, only Bruegger's Bagels (a national chain that operates in upstate New York) has received an audit, but there may be more to come. Meanwhile, franchise owners and customers alike are a little baffled. That the tax applies to sliced bagels but not to other sliced bread products is perplexing. To help mitigate this problem, at least one franchise owner has posted signs in his stores explaining that the new tax is a result of a government mandate, not a decision by Bruegger's to charge for slicing services. The sign also hints at the owner's frustration with Albany, informing customers that the stores "apologize for this change and share in your frustration on this additional tax."

So to slice, or not to slice? Whether it is worth incurring the additional charge is up to the New York consumer; just don't blog about it in Philly.

The CAT Takes a Swat at *Quill*

On August 10, the Ohio Department of Taxation issued a decision upholding the Commercial Activities Tax's (CAT) statutory "bright-line presence" nexus test and concluded that L.L. Bean had substantial nexus with the state solely based upon the volume of its sales to Ohio customers. This is the first known ruling addressing a taxpayer's challenge to the constitutionality of Ohio's statutory bright-line imposition.

The CAT's bright-line test is similar to the model rule adopted by the Multistate Tax Commission and provides that taxpayers are subject to the CAT if they meet any one of the following thresholds: (1) at least $50,000 of property in the state; (2) at least $50,000 of payroll in the state; (3) at least $500,000 of sales to customers in the state; (4) 25 percent or more of its total property, payroll and receipts in the state, or (5) the taxpayer is domiciled in the state. O.R.C. 5751.01(I). L.L. Bean contended that this test violates the physical presence requirement for substantial Commerce Clause nexus as set forth in *National Bellas Hess v. Ill. Rev. Dep't,* 386 U.S. 753 (1967) and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

Although the Department lacks jurisdiction to determine the constitutionality of statutes, it addressed L.L. Bean's challenge to the statutory bright-line test on the merits. The Department concluded that *Quill*'s

Continued on Page 6

Texas Margins Tax Roundup: Comptroller Provides Additional Margins Tax Guidance

In a continuing effort to clarify certain Texas Margins Tax issues, the Texas Comptroller of Public Accounts (Comptroller) issued *Tax Policy News* in July 2010, which provides additional guidance on the Texas Margins Tax costs of goods sold computation; apportionment; and margin tax recovery fees. Texas statutes and regulations do not provide significant guidance on how these provisions should be applied.

Regarding the costs of goods sold deduction, the Comptroller clarified that this deduction may only be taken by taxpayers that produce "goods," i.e., real property, tangible personal property, and specifically enumerated services related to video and radio programming. To the extent a taxpayer sells "mixed transactions" – transactions containing elements of both a "good" and a service – the taxpayer may only subtract as costs of goods sold those costs "in relation to" the good. However, a taxpayer may nonetheless deduct as costs of goods sold up to 4% of its back-office ("indirect or administrative overhead") costs allocable to "the acquisition or production of goods."

For apportionment purposes, the Comptroller also indicated that taxpayers must use the single-sales factor formula specified in Texas Tax Code § 171.105 when apportioning gross receipts for margin tax purposes. Although Texas has adopted the Multistate Tax Compact (see Texas Tax Code § 141.001), the Comptroller stated that Texas will not permit taxpayers to elect the Compact's three-factor apportionment formula in lieu of the single-sales factor formula. Though the *Tax Policy News* letter states no basis for this conclusion, the statement is likely based on the Comptroller's position that the Texas Margins Tax is not an income tax.

Lastly, the Comptroller stated that a taxpayer may choose to charge customers a separately stated fee as a way to recover its margins tax cost. Texas Comptroller of Public Accounts, STAR Doc. No. 201008847L (Aug. 6, 2010). The Comptroller determined that a "recovery fee" is permissible if the taxpayer: (i) explains to its customers that the charge is to recoup money paid by the company for margins tax imposed on the taxpayer; (ii) does not represent the charge as a tax imposed directly on the customer; (iii) ensures the line-item for the recovery charge does not appear in the "government fees and taxes" (or similar section) of the customer's bill, invoice or contract; and (iv) discloses that the recovery charge is not a tax the company is required to collect from its customers by law. If these factors are not met, then the taxpayer must remit any charges it collects from the customer to the state. The taxpayer may not describe the fee charged as a "reimbursement," "fee," or "tax." Finally, of note, any so-called "recovery fee" will be part of the total "sales price" of a taxable item sold by the company. As such, the recovery fee will be subject to sales tax in the same manner as the item sold.

Continued from Page 5

physical presence requirement applies only to sales taxes and does not extend to other taxes, such as income taxes or gross receipts taxes. The Department further concluded that the CAT is not functionally equivalent to a sales tax, referencing the Supreme Court of Ohio's decision in *Ohio Grocers Ass'n v. Levin*, 123 Ohio St.3d 303 (2009), which held that the CAT was not an excise tax on the sale or purchase of food. Finally, the Department concluded that L.L. Bean met the "substantial nexus" requirement of the Commerce Clause because of its "continuous, systematic, and significant exploitation" of the Ohio marketplace, pointing to L.L. Bean's continuous catalog deliveries and advertising in the state and its more than $100 million in Ohio sales during the three-year assessment period.

Taxpayers challenging CAT nexus decisions can appeal final determinations of the Tax Commissioner directly to the Supreme Court of Ohio. O.R.C. 5751.31. The issue of whether the CAT is subject to *Quill's* physical presence requirement or the economic presence standard set forth in Ohio's bright-line rule is likely to draw much national attention, particularly because the CAT in many ways resembles a sales tax. Notwithstanding the uniqueness of the CAT, the outcome of this potential appeal will likely affect other challenges to similar "bright-line" nexus rules.

Filling the Coffers: Kansas Is Yet Another State to Enact an Amnesty Program With a Few Twists

On September 1, Kansas will kick off its third tax amnesty program since 1984. Kansas enacted the amnesty program as part of Senate Bill 572, which the Kansas legislature passed on May 27, 2010. The program will run from September 1, 2010, to October 15, 2010. Unlike some other states' amnesty programs, Kansas's amnesty program allows eligible, participating taxpayers to receive abatement of both penalties and interest. However, in return, taxpayers must give up all refund claims related to amounts paid under the program. For taxpayers that have accrued significant penalties or interest on past due claims, but may have reasonable positions with respect to such unpaid claims, participating in the Kansas program may not be advisable.

In order to participate in the Kansas amnesty program, taxpayers must meet the following requirements:

- have delinquent tax liabilities for tax periods ending on or before December 31, 2008—whether as a filer or non-filer;
- the liabilities must relate to a privilege, estate, income (corporate and personal), withholding, tobacco, retailer's sales, compensating use, local sales and use, liquor, mineral severance, homestead, or franchise tax;
- pay all past due taxes in full during the amnesty period;
- not have received notice of the commencement of an audit, or be currently undergoing an audit, or have already received a notice of assessment, or are in litigation relating to the tax liability; and
- not be in bankruptcy or involved in a criminal investigation.

Taxpayers that have Kansas tax liabilities but have not filed returns can participate in the program. However, because there is no limitation on the lookback period that would limit the liability of a non-filer, the program may not be attractive. Often a state's voluntary disclosure program can be a better option than a state's amnesty program for these taxpayers.

Finally, taxpayers that choose to participate in Kansas's amnesty program will be required to relinquish all appeal rights and will not be able to pursue a refund claim for taxes paid under the amnesty program.

More and more states have recently enacted amnesty programs to bandage budget deficits and shore-up revenue shortfalls. However, these amnesty programs' penalties and harsh refund prohibitions greatly reduce the attractiveness of these programs, and may significantly decrease participation.

California FTB to Hold Meeting on Intercompany Transactions, DISA Reporting

The California Franchise Tax Board (FTB) will hold its second interested parties meeting on September 22, 2010, at 1:00 p.m. PDT to discuss revisions to Regulation 25106.5-1, which addresses intercompany transactions. The meeting will address comments and proposed amendments submitted after the first interested parties meeting held in April of this year.

The purpose of the regulation is to provide rules for reporting intercompany transactions in order to clearly reflect the taxable income, apportionment factors, and tax liability for members of a combined reporting group. Generally, gains or losses between combined group members are deferred in order to produce the effect of transactions between divisions of a single corporation. The FTB is considering revisions to three components of the regulation:

- The first issue is to clarify the proper apportionment treatment of intercompany transactions using the simplifying rules of Regulation 25106.5-1(e), which permits taxpayers to elect to be treated as separate entities. The FTB has indicated its intention to clarify that this election does not permit companies to include receipts from intercompany transactions in the sales factor denominator in the year of the election, as such inclusion would double count receipts when the intercompany items are ultimately sold to third parties. The FTB has indicated that this clarification will be applied retroactively.
- Second, the FTB is proposing clarifications with respect to Deferred Intercompany Stock Accounts (DISAs), which are created when non-dividend distributions are made in excess of earnings and profits and stock basis. The proposed amendments will specify that stock redemptions will cause a DISA to be taken into account as income or gain; mergers between members of a combined group will not cause a DISA to be taken into account as income or gain if the majority of stock for each is owned by other members of the combined group; and that when the same distribution is made through various tiers of stock ownership, the DISA that might result from the initial distribution will be treated as earnings and profits for purposes of determining the DISA that might result from the subsequent distribution.
- Lastly, the FTB is proposing to amend Regulation 25106.5-1(a)(2) to bring it into conformity with the most recently enacted provisions of Treasury Regulation 1.1502-13.

Sutherland will be reporting on the results in future editions of the Shaker.

Come See Us

September 20-21, 2010
Broadband Tax Institute 2010 Annual Conference
Park Hyatt – Beaver Creek, CO
Michele Borens on State Income Tax: Update – Audit, Reform, COP, Unitary/Combined
Jeff Friedman on Significant Decisions Impacting Our Industry
Steve Kranz on Role of Congress in State Taxation; MTC and Nexus: Click-Through Bills and the States' Efforts to Get Around Nexus; State Transaction Tax: Digital Goods Update
Eric Tresh on State Taxes: How to Get Your Fair Day in Court; The Eye of the Storm: Preparing for Next Year and How to Get Reform Without Higher Taxes

September 23, 2010
IPT Wisconsin One-Day Tax Seminar
Monona Terrace – Madison, WI
Jeff Friedman on Multistate Tax Update: Digital and Other Difficult Tax Issues

September 23-25, 2010
ABA Section of Taxation Fall Meeting
Sheraton Centre Toronto Hotel – Toronto, Ontario, Canada
Steve Kranz on New Breed of Amazon "Taxes" – Colorado's Clever Twist

September 26-28, 2010
Northeastern States Tax Officials Association Annual Conference
Park Plaza Hotel & Towers – Boston, MA
Steve Kranz on Alternative Approaches to Remote Sales Transactions

September 26-29, 2010
IPT Sales and Use Tax Symposium
Renaissance Esmeralda Resort and Spa – Indian Wells, CA
Michele Borens on Join the Penny Pinchers – Learn How to Lower Your Tax Costs Through Proper Contracting Language
Steve Kranz on The Organized Chaos of State Tax Legislation

September 26-29, 2010
The Tax Foundation National Taxpayers Conference
One Washington Circle Hotel – Washington, DC
Charlie Kearns on in-the-news tax issues and on current state fiscal policy developments, pending federal legislation on state tax issues, SSTP developments, and their potential impacts on states and taxpayers

October 5, 2010
TEI Dallas Chapter State Tax Luncheon
City Club – Dallas, TX
Marc Simonetti on State Tax Nexus

October 14, 2010
Wireless Tax Group Meeting
Burlington, VT
Steve Kranz on Spotlight on Digital Goods – Federal and State Legislative Activity; Compliance Issues

October 19-22, 2010
COST 41st Annual Meeting
Sheraton Wild Horse Pass – Phoenix, AZ
Jeff Friedman on Attributional Nexus Developments for State Income, Sales/Use and Gross Receipts Taxes – Reconciling Bellas Hess and Quill with Scripto and Tyler Pipe
Steve Kranz on Contingent Fee and Contract Audits: Addressing a Troubling Trend
Diann Smith on Emerging Issues With Abandoned & Unclaimed Property: It's Not a Tax, But You Own the Audit

October 24-27, 2010
TEI 65th Annual Conference
Sheraton Chicago Hotel – Chicago, IL
Eric Tresh and **Pilar Mata** on Dangers of Unreliable Intercompany Accounting Issues in State Taxes

November 1-5, 2010
MACPA & MSBA 2010 Advanced Tax Institute
Martin's West – Baltimore, MD
Jeff Friedman on National Developments and Trends in State Taxes

November 3, 2010
STARTUP State Tax Roundtable for Utilities and Power
Richmond Falls, VA
Jeff Friedman and **Eric Tresh** on Jurisdiction to Tax

November 4-6, 2010
The State Bar of California 2010 California Tax Policy Conference
Loews Coronado Bay – San Diego, CA
Pilar Mata on State Tax Issues in a Global Economy

November 8-11, 2010
IPT Advanced Sales and Use Tax Academy
Doral Hotel – Miami, FL
Charlie Kearns on SSTA Implementation: Top to Bottom; Digital Goods

November 9, 2010
Paul J. Hartman State and Local Tax Forum
Loews Vanderbilt Hotel – Nashville, TN
Michele Borens on Hot Topics – Virginia
Steve Kranz on Streamlined Sales Tax Project Versus Amazon Laws and Other Techniques Designed to Increase the Reach of State Sales and Use Taxes to Remote Sellers
Pilar Mata on Expense Addbacks and Exceptions
Diann Smith on Tax Accrual Work Papers: Work Product, Textron, Privilege, IRS Notice 2010-9 – Are the IRS and, by Extension, State Taxing Authorities Trying to Convert Taxpayers and Tax Practitioners Into "Free Auditors" or Tattletales?

November 9, 2010
TEI Carolinas Chapter Meeting
Research Triangle Park, NC
Marc Simonetti on State Amnesty & Penalties

November 12, 2010
TEI Connecticut Valley Chapter Meeting
Farmington, CT
Michele Borens and **Marc Simonetti** on SALT Policy

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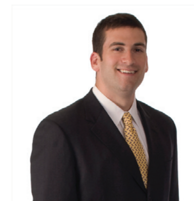
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