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NEW YORK TAX INSIGHTS

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NYC TRIBUNAL IMPOSES ITS OWN SOURCING METHODOLOGY FOR RECEIPTS FROM SERVICES

By Irwin M. Slomka

In a case involving the sourcing of lump sum payments for the performance of services, the New York City Tax Appeals Tribunal took the unusual step of rejecting not only the respective sourcing methods being urged by the taxpayer and the Department of Finance, but also the methodology adopted by an Administrative Law Judge, and determined on its own a receipts factor based on a methodology that was not advanced by either party. *Matter of Gerson Lehrman Group, Inc.*, TAT(E) 08-79 (GC) (N.Y.C. Tax App. Trib., Dec. 28, 2017, released Jan. 24, 2018). The decision serves as an important reminder of the scope of the City Tribunal's authority.

Facts. Gerson Lehrman Group, Inc. ("GLG"), has its headquarters and major sales office in New York City and also has offices worldwide. It enters into subscription agreements with clients, largely in the financial services industry, in which GLG provides access to a network of independent contractor expert consultants (termed "Council Members") in a variety of fields. In the vast majority of cases, clients access Council Members through telephone conference calls, in which clients typically pose questions developed with the assistance of GLG's Research Manager employees. The subscription agreements provide, however, that GLG is "not responsible for the content of consultations and Projects arranged by [GLG]." Clients pay GLG a fixed upfront fee, which varies based on the scope of the topics and industries sought by each client.

GLG employs Research Managers to identify appropriate Council Members for clients and to assist clients in formulating questions for the Council Members. GLG also employs Consulting Managers to locate the industry experts and recruit them as Council Members. It also employs salespeople to solicit client sales and renewals, and to manage the overall client relationship. It is the services of these salespeople, the vast majority of whom worked in New York City, that were the main source of dispute in the case.

GCT Filings and Audit. The case spanned an eight-year period (2003 through 2010) during which, for New York City general corporation tax ("GCT") purposes, GLG changed the way it sourced its client fees. In its originally filed GCT returns for the 2003 and 2004 tax years, GLG sourced its receipts based solely on the office locations of its salespeople. This resulted in receipts factors of 96% (in 2003) and 77% (in 2004). Later, GLG filed amended GCT returns for those years using a different sourcing method, this time based primarily on the

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locations of the Council Members, and to a lesser extent on the locations of its Research Managers, Consulting Managers and IT personnel, but not including its salespeople at all. This reduced its receipts factor to approximately 40% in each year, and resulted in refund claims. For the years 2005 through 2010, GLG filed its original returns using the methodology employed in its amended returns for 2003 and 2004.

The City Tribunal concluded that GLG's services resulted from the combined efforts of its employees (including its salespeople), as well as the third-party Council Members [and]. . . concluded that [the salespeople's] activities must also be reflected in the receipts factor.

Following an audit, the Department issued a Notice of Disallowance of refund claim and issued Notices of Determination using GLG's original sourcing methodology based on the location of GLG's salespeople. GLG had presented the auditor with alternative sourcing methods, but in its appeal to the City Tribunal, it advanced only one method: sourcing the receipts based solely on the location of the Council Members and its Research Managers and not taking into account the location of its salespeople.

The case proceeded to hearing before an ALJ. The Department maintained that the service being provided by GLG was to find, engage and manage the Council Members and not to provide the information that the Council Members furnished to clients. Therefore, the Department asserted that GLG's receipts should be allocated based on the activities of its employees, primarily its salespeople, who worked out of GLG's New York City sales office. In contrast, the taxpayer argued that the receipts should be sourced based on the activities of the Council Members and Research Managers, and not by the sales solicitation activities of the salespeople. Critical to the outcome was determining the nature of the service that GLG was providing to its clients.

ALJ Determination. After a hearing, the ALJ concluded that GLG was providing the service of "expert knowledge, analysis and views," which it rendered through the Council Members, with the assistance of GLG's Research Managers. Accordingly, the ALJ held that GLG's receipts should be sourced based on the locations of the Council Members and the Research Managers and not on the location of the salaried salespeople, noting that the GCT regulations only discuss sourcing relating to the activities of *commissioned* sales agents. The ALJ held that the Notices of Determination should be cancelled but rejected most of GLG's refund claims, based largely on a failure of proof.

Positions on appeal. The GCT rules provide that lump sum payments for services are sourced based on the relative values of, or time spent in the performance of, the services, "or by some other reasonable method." 19 RCNY § 11-65(b)(3). The Department filed an exception, maintaining that the services should be sourced primarily based on the locations of the salespeople, pointing out that the subscription agreements provided that GLG was not responsible for the advice rendered by the Council Members. The taxpayer filed a cross-exception to appeal the ALJ's disallowance of its refund claims.

Holding. The City Tribunal modified the ALJ determination. First, it rejected the Department's characterization of GLG's services as being in the nature of an intermediary that merely matched clients with the appropriate Council Members. But it also rejected GLG's position that only the activities of the Council Members and Research Managers, and not those of the salespeople, should be taken into account, noting that GLG is not strictly a consulting firm, but provides a service consisting of research, professional services, and a network of experts. In that regard, the Tribunal also disagreed with the ALJ's conclusion that GLG was simply furnishing clients with information provided by the Council Members with the assistance of the Research Managers, stating that "GLG's clients do not pay for specific information but for an opportunity to speak to Petitioner's proprietary network" of experts.

The City Tribunal concluded that GLG's services resulted from the combined efforts of its employees (including its salespeople), as well as the third-party Council Members. Since the salespeople "play an integral role in generating [GLG's] service receipts," the Tribunal concluded that their activities must also be reflected in the receipts factor.

Citing City Charter § 168(a), the City Tribunal concluded that it had the same authority as the Department to determine "a reasonable method" of allocating the subject receipts. It then stated that it found the methodologies advanced by the Department, the taxpayer and the ALJ all to be incorrect and proceeded to set out its own "reasonable method" for allocating a "lump sum . . . payment for services" under GCT Rule § 11-65(b)(3). The Tribunal calculated a receipts factor for each year, based on the limited evidence in the record, taking into account the activities of the Council Members, Research Managers, and, critically, the salespeople. This resulted in a receipts

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factor ranging from 23% to 54% over the eight-year period. The Tribunal then remanded the case to the ALJ Division for the sole purpose of recalculating the resulting GCT liability using the Tribunal's recalculated receipts factors.

ADDITIONAL INSIGHTS

The City Tribunal held that, due to the nature of the services being provided, and the fact that the taxpayer was not strictly furnishing a consulting-type service, the "integral" role of the salespeople in generating the receipts must be reflected in the apportionment factor. However, a more far-reaching aspect of the decision is that the Tribunal considers the City Charter as giving it the same power and authority as the Department to determine the proper tax, and that the Tribunal is not limited to selecting among the legal positions advanced by the parties; indeed, here the Tribunal carved its own path different from that of the parties and the ALJ.

Also significant is that, after determining what it considered a "reasonable method" of allocating the receipts, and despite the ALJ having found insufficient evidence to support the taxpayers refund claims, the City Tribunal proceeded to find evidence in the record, some of it indirect, on which it computed a receipts factor for each year. While understandable, such an approach could put additional burdens on the parties, most often on the taxpayer that bears the burden of proof, to anticipate what factual evidence needs to be adduced to address legal positions that may not have been presented by the parties themselves or determined by the ALJ.

GOVERNOR ADDS SIGNIFICANT NEW TAX PROVISIONS TO THE NYS EXECUTIVE BUDGET

By Kara M. Kraman

On February 15, 2018, Governor Cuomo announced the release of the 30-day amendments to the 2018-2019 Executive Budget. While in most cases the 30-day amendments predominately contain technical changes, in this case they contain significant new tax proposals. The Governor describes the proposals as "advancing further reforms . . . to safeguard our competitiveness and help protect residents from this federal economic assault." They include the creation of an optional employer payroll tax system, the creation of state and local charitable funds with corresponding credits allowed against state and local taxes for donations, and the decoupling from several provisions of the federal tax code:

1. *Implementation of a new optional payroll-based Employer Compensation Expense Tax.*

   In the most ambitious proposed amendment, beginning on January 1, 2019, and phased in over three years, employers in New York may elect to be subject to a new payroll-based Employer Compensation Expense Tax ("ECET"). The ECET would subject the employer, after the phase-in is completed, to a 5% tax on all annual payroll expenses in excess of $40,000 per employee. The tax is expected to be deductible by the employer for federal income tax purposes. For employees, the personal income tax would remain in effect, but they would receive a prescribed tax credit against that tax.

2. *Creation of two state-operated charitable funds, and authorization of the creation of additional charitable funds at the local level.*

   The proposed legislation would create two new State-operated charitable funds for the purposes of improving healthcare and education in New York. An individual taxpayer who makes donations to the funds could claim a state tax credit of up to 85% of the donation for the tax year after the donation is made. In addition, individuals who itemize deductions could claim the charitable contributions as deductions on their state tax returns and, the Governor assumes, on their federal returns. However, it is unclear whether the IRS would allow a charitable deduction for the full amount of the contribution, at least to the extent the taxpayer is receiving a dollar-for-dollar State tax credit for 85% of the amount.

   The proposed legislation would authorize school districts, counties, towns, cities, and villages to create similar charitable funds.

3. *Decoupling from certain federal income tax provisions.*

   The proposed legislation includes several provisions decoupling from federal tax law with the stated purpose of protecting individuals who would otherwise face tax increases. These changes include:

   - Decouple from the $10,000 federal cap for deductions of state and local taxes. Because under New York law State itemized deductions start with federal itemized deductions, the federal cap on

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SALT deductions could otherwise lower the amount of itemized deductions available at the State level.

- Eliminate the requirement that taxpayers may only itemize deductions on their New York return if they itemize on their federal return, and decouple from the other changes to federal itemized deductions imposed by the new law.

- Maintain the State standard deduction for single filers by amending existing language in the Tax Law to remove the reference to federal exemption amount.

4. *Decoupling from partial federal deduction for repatriated foreign income.*

   For corporate taxpayers, the amendments clarify that taxpayers must add back the partial federal deduction for repatriated foreign income since that income is already exempt from New York taxation as "other exempt income." Otherwise, taxpayers would reap a windfall by deducting amounts that New York State does not tax.

5. *Exempting from estimated tax underpayment penalties disallowed interest expenses attributable to exempt CFC income.*

   The proposed legislation exempts from underpayment of estimated tax penalties disallowed interest expenses attributable to exempt controlled foreign corporation ("CFC") income or to the 40% reduction of such exempt income in lieu of interest expense attribution. The exemption applies to interest expenses attributable to the one-time repatriation of foreign income, and is only applicable for tax years beginning on or after January 1, 2017, and before January 1, 2018.

The deadline for enactment of the New York State budget is April 1, 2018. While it is possible that the Governor will propose additional executive budget modifications before that date, they would require the Legislature's consent.

TRIBUNAL UPHOLDS SALES TAX ON TRANSFERS BETWEEN RELATED PARTIES

By Irwin M. Slomka

The New York State Tax Appeals Tribunal has affirmed a decision holding that the transfers of motor vehicles between related parties were retail sales subject to New York State sales tax, even though no cash consideration was actually paid to the transferors. *Matter of CLM Associates, LLC*, DTA No. 826735 (N.Y.S. Tax App. Trib., Feb. 12, 2018).

Facts. CLM Associates ("CLM"), a single member LLC located in Westchester County, was part of a group of related auto dealerships, each of which was also a single-member LLC owned by the same closely held parent. Following a restructuring, CLM ceased to be a dealership and instead became the administrative entity for the group of dealerships.

The tax dispute concerned "loaner cars" that dealerships offer to customers who service their vehicles at the dealerships. As part of the restructuring, the loaner cars, which had been acquired and then used exclusively by the dealership entities, thereafter were to be titled and insured in CLM's name. This was done for various business reasons, including limiting potential liability of any one dealership in the event of an accident involving a loaner car.

To effectuate the transfers of the loaner cars to CLM, each dealership created an invoice or bill of sale designating CLM as the purchaser. No amounts were paid by CLM to the dealerships for the loaner cars and, although sales tax was often shown on the invoice, no sales tax was ever actually paid. The loaner cars were then registered with the Department of Motor Vehicles in CLM's name.

During the course of an audit of a related entity, the Department became aware of the intercompany loaner car transfers, and a sales and use tax audit of CLM was commenced. The auditor examined all loaner car transfers made during a test period, including the bills of sale, and concluded that the loaner car transfers constituted taxable sales of tangible personal property, apparently based on the purchase price reflected in the bills of sale. However, since CLM often traded in used loaner cars to the dealerships when it received a new loaner car (which were then sold by the dealerships as

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used vehicles), the auditor allowed CLM a credit for trade-ins that were either identified in the invoices or, if not identified, were shown to have been traded in on the same day as CLM acquired a new loaner car. The auditor then extrapolated the results over the entire audit period, and the Department issued a Notice of Determination for sales tax of approximately $1.1 million, plus interest.

The Tribunal pointed to the "form petitioner chose to conduct its business" and "the record of the accounting entries created for the transfers" as sufficient evidence that "consideration was exchanged" [for the transfers] . . . .

ALJ Determination. After a hearing, the Administrative Law Judge held that the intercompany loaner car transfers were retail sales of tangible personal property and subject to sales tax. The ALJ rejected CLM's claim that there was no consideration for the transfers, noting that CLM provided consideration to the dealerships by, among other things, becoming jointly and severally liable for losses that could arise from use of the loaner cars and becoming jointly and severally liable on the financing for their initial acquisitions by the dealerships. The ALJ also held that CLM was not entitled to a credit for use tax that the dealerships paid on certain long-term loaner cars, concluding that use tax paid by one entity could not be credited against the sales tax liability of a different entity. CLM appealed the ALJ determination.

Tribunal Decision. The Tribunal upheld the ALJ's determination that the intercompany transfers of the loaner cars constituted taxable sales, rejecting CLM's contention that there was no consideration for the transfers. The Tribunal agreed with the ALJ "that the spreading of liability and the benefit of administrative convenience in managing the combined loaner fleet constituted the consideration required to qualify the transfer of the loaner titles to petitioner as retail sales." The Tribunal pointed to the "form petitioner chose to conduct its business" and "the record of the accounting entries created for the transfers" as sufficient evidence that "consideration was exchanged," citing *Matter of Hygrade Casket Corp.*, DTA No. 809681 (N.Y.S. Tax App. Trib., Dec. 16, 1993), *aff'd*, 212 A.D.2d 843 (3d Dep't, 1995). Under the sales tax regulations, transfers between related corporations are "taxable to the extent of the consideration paid, or the fair market value, if the consideration paid is not an adequate indication of the true value of the property transferred." 20 NYCRR § 526.6(d)(8)(i).

However, the Tribunal agreed with CLM that it was entitled to a credit for use tax paid on the loaners by the individual dealerships. The Tribunal noted that the ALJ found that the auditor did allow a credit for sales tax paid by dealerships on certain long-term loaner cars. Since the Department conceded at the hearing that the *sales* tax paid by the dealerships could be credited against CLM's sales tax liability, "[u]nder these specific facts," the Tribunal saw no reason to deny CLM a credit for *use* tax paid by the dealerships on the loaner cars.

ADDITIONAL INSIGHTS

The sales tax largely remains a form-driven tax, and the fact that the related parties documented the transfers of the loaner cars as actual sales for consideration, evidenced by actual invoices and bills of sale, and created intercompany receivables and payables in connection with the transfers, was sufficient to find that the intercompany transfers were taxable sales. Although sales tax is imposed on the "consideration" for the transfer of tangible property, sales tax regulation § 526.6(d)(8)(i) provides that tax can be imposed on the property's "fair market value" in certain instances, creating uncertainty as to when tax will be imposed on intercompany transfers. Unfortunately, since it can be assumed that many, if not most, intercompany transfers provide benefits to the parties in question, the fact that there is no actual payment of cash consideration does not, under *Matter of CLM Associates*, shield such intercompany transfers from sales tax.

TRIBUNAL AFFIRMS DENIAL OF SALES TAX REFUND AFTER CONSENT SIGNED

By Hollis L. Hyans

The New York State Tax Appeals Tribunal has affirmed the decision of an Administrative Law Judge that a company operating a sports bar was not entitled to a refund of sales and use tax paid pursuant to a consent agreement that had resolved an audit of the years in issue. *Matter of RJB Slick's, Inc. N/K/A RKB Ventures, Inc.*, DTA No. 825079 (N.Y.S. Tax App. Trib., Feb. 8, 2018).

Facts and Audit. Petitioner RJB Slick's, Inc. ("Slick's") operated a sports bar known as Slick Willie's in Tonawanda, New York. The Department audited Slick's for the period March 1, 2004, through February 28, 2007, and requested all books and records. In response, Slick's produced records that included "z tape summaries," daily records of free

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drinks, incomplete bank statements, and incomplete purchase invoices. The auditor also visited the bar and obtained completed audit questionnaires and bar fact forms from Rudolph Bersani, the sole owner of Slick's who was involved in all operations of the bar. The auditor determined the records were inadequate to conduct a complete audit, and therefore he reviewed purchases of beer and liquor for a test period of September 1, 2008, through November 30, 2008; computed a markup percentage using a bar price list of December 4, 2006; and applied the percentage to purchases. The initial audit findings were sent to the company's representative in February 2008 and were then adjusted based on additional information provided by the representative. Eventually, in a letter dated October 31, 2008, the representative stated that Slick's was in agreement with the audit findings as long as penalties were abated, and the Department mailed a statement of proposed audit changes for execution by Slick's for the agreed-upon amount without penalties. When the statement was not returned, the auditor met Mr. Bersani at the bar, where the statement, including the language that Slick's consented to the assessment, was executed. Payment was made on November 19, 2008, accompanied by a letter from the company's representative.

On November 17, 2010, an application for refund was filed by Slick's, now claiming that the audit method that was the subject of the consent was unreasonable. The original auditor was assigned to review the refund claim, and he found that no new records or information had been submitted and that an alternative analysis conducted by the auditor using the company's own records resulted in a higher tax liability than that determined on audit. The Department denied the refund.

ALJ Hearing and Determination. In its petition to the Division of Tax Appeals, Slick's alleged that the statement of proposed audit change had been executed by Mr. Bersani under duress and that he was misled by the Department. It also claimed that the Department's use of a test period mark-up method was improper because the company's records were sufficient to conduct an audit and that the audit methodology used by the Department was unreasonable.

At the hearing, the auditor testified to the inadequacies and discrepancies in the records, noting the absence of complete sales records, and to his review of affidavits from bartenders, which he found were unsubstantiated and contradicted by information provided during the audit. The auditor described the negotiations and adjustments to the original audit calculations to which he had previously agreed and the circumstances surrounding the execution of the statement of proposed audit change. The manager of the business testified that she was the exclusive programmer of pricing details for the cash registers and that she had never been asked by Mr. Bersani or the company's representative to produce documents relating to the cash registers. She testified about specials offered during the audit period, but did not present evidence that verified the quantity sold or per drink cost. Slick's also presented the testimony of a sales tax consultant, who performed his own analysis using an alternative markup method, but acknowledged that he relied on estimates as a starting point.

[T]he Tribunal found that, because a consent had been executed, the rational basis for the assessment was deemed established, and "petitioner has effectively conceded the reasonableness of the audit method . . . ."

The ALJ found that the audit had a rational basis because of the company's consent to the proposed assessment and that, in light of that consent, Slick's had the burden to prove its correct sales tax liability, which it had not done.

Tribunal Decision. The Tribunal affirmed the ALJ's determination. First, it reviewed the facts and circumstances surrounding Mr. Bersani's execution of the statement of proposed audit changes and found that the company's then-representatives, both attorneys, had sought a negotiated settlement and that the terms they requested were contained in the final statement, which had been the result of negotiations during which both the Department and Slick's agreed to certain adjustments. The letter from the company's representatives, according to the Tribunal, "plainly expresses agreement with the terms of the consent," and the final letter enclosing payment on November 19, 2008, raised no issue about Mr. Bersani having been induced to sign a consent involuntarily but instead indicated satisfaction with the audit process. The Tribunal agreed with the ALJ that any conflicting evidence in the record regarding whether the check had been given to the auditor by Mr. Bersani rather than mailed with the November 19 letter was insignificant and that there was insufficient evidence to support Mr. Bersani's claim that he had been told by the auditor that a tax warrant would be filed if the consent were not signed.

The Tribunal then acknowledged that Slick's did retain the right to file a refund and to contest denial of that refund in the Division of Tax Appeals, even though it signed the consent. However, the Tribunal found that, because a consent had been executed, the rational basis for the assessment was deemed established, and "petitioner has effectively conceded the reasonableness of the audit method and audit computations." In order to contest the

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assessment, therefore, Slick's had to prove by clear and convincing evidence that its actual liability was less than the amount to which it had consented, by producing records sufficient to substantiate its taxable sales. The Tribunal found that Slick's failed to meet that burden, since it had not offered computation of the amounts it contended were correct but merely challenged the method used by the Department. Furthermore, the Tribunal found that, even if the reasonableness of the audit method were properly in dispute, Slick's had failed to demonstrate that its records were sufficient for a detailed audit or to establish any error in the method used.

ADDITIONAL INSIGHTS

It is common for audits to be resolved through the use of a statement of proposed audit changes that is signed by the taxpayer and often results from a negotiation process in which both the taxpayer and the Department agree to concede certain issues and arrive at an acceptable computation for purposes of wrapping up an audit. While a taxpayer retains the ability to pay the amount of the audit changes and thereafter seek a refund, this case highlights the risk incurred in such a process. The Tribunal has made it clear that, by signing the consent, the taxpayer will be deemed to have conceded the reasonableness of the audit method and will have a high burden to come forward with clear and convincing evidence to demonstrate what it contends is its true taxable sales and use tax liability. Taxpayers should carefully consider the pros and cons of signing a consent, and their representatives need to make sure taxpayers understand the potential risks, if they are contemplating further challenges to the audit.

NEW CORPORATE REFORM FAQ ON COMMONLY OWNED GROUP ELECTION

By Irwin M. Slomka

A new Frequently Asked Question ("FAQ") on corporate tax reform has been added to the New York State Department of Taxation and Finance website that provides an important reminder on the scope of the commonly owned group election to file a combined return under Article 9-A. Dep't of Taxation & Fin., *Corporate Tax Reform FAQs*, https://www.tax.ny.gov/bus/ct/corp_tax_reform_faqs.htm. Under that election – which is made on an original timely filed return and is binding and irrevocable for seven years – all corporations that meet the more-than-50% ownership requirement for combination with any taxpayer in the group must be included in the Article 9-A combined return, regardless of whether they are engaged in a unitary business. Corporations that are not subject to combination – such as most alien corporations that do not have federal effectively connected income – are not covered by the election. The election can only be made by the group's "designated agent."

Significantly, the FAQ points out that the corporations required to be included in the commonly owned group Article 9-A return are not limited to entities included in the designated agent's federal consolidated group return under IRC § 1504. In other words, the 50% ownership test is applied to all qualifying corporations. The FAQ contains a useful example illustrating the consequences of making the election, which can result in the inclusion of corporations that file as part of a different federal affiliated group return. Particularly since the election is irrevocable for seven years, taxpayers and practitioners should carefully consider these potential consequences before making the election.

COMPLAINT UNSEALED IN FALSE CLAIMS ACT CASE INVOLVING THE ESTATE TAX

By Matthew F. Cammarata

On January 19, 2018, a False Claims Act ("FCA") amended complaint originally filed in 2014 was unsealed in *State ex rel. Light v. Melamed*, No. 101451/2014 (Sup. Ct. N.Y. Cnty., filed Jan. 19, 2018). The suit alleges that a complex, years-long series of coordinated actions on the part of a named decedent, his estate, and his family members were designed to fraudulently deprive the State of income and estate taxes in violation of the FCA. The New York State Attorney General declined to intervene in the action.

Facts. The decedent, Dr. Myron R. Melamed, was a prominent pathologist, who had served in various executive roles at Memorial Sloan Kettering Hospital Center, New York Medical College, and Westchester Medical Center and was also a professor of pathology at Cornell University. Dr. Melamed also founded and operated University Pathology, P.C. ("University Pathology") to provide medical analysis of specimens from patients treated at Westchester Medical Center and other New York facilities.

The *qui tam* plaintiff, Doreen L. Light ("Plaintiff"), alleges in the complaint that she worked with Dr. Melamed for over 20 years, serving as the Administrator of University Pathology from 1991 – 2012 and holding various other

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roles at New York Medical College, where Dr. Melamed also worked.

Plaintiff alleges that Dr. Melamed, his sons, and University Pathology engaged in a series of actions designed to fraudulently conceal Dr. Melamed's true residency, income, and net worth for tax purposes, with the explicit purpose of avoiding income and estate tax in New York State. For example, the complaint alleges that Dr. Melamed was at all relevant times a resident of Westchester County, New York, working full-time in New York, and that both New York and federal law required all of Dr. Melamed's work for University Pathology to be conducted at specific sites in New York that were licensed by and subject to the supervision of a regulatory authority.

As the first unsealed estate tax claim made under the FCA, [this action] serves as a reminder that taxpayers face risk under New York's expansive FCA for taxes other than the corporate franchise tax, sales and use tax, and personal income tax . . . .

Plaintiff claims that Dr. Melamed purchased a condominium in Florida "for the express purpose of avoiding New York State estate and income taxes" and allegedly provided Plaintiff with documents demonstrating that his New York State estate taxes could be reduced by a minimum of $1,500,000 if he claimed Florida residency.

In furtherance of these alleged tax avoidance efforts, Plaintiff claims that, for example, Dr. Melamed placed his home into a Qualified Personal Residence Trust ("QPRT"), pursuant to which the Westchester County residence would remain his personal residence for a period of nine years, when ownership of the property would transfer from the trust to his sons. The complaint alleges that Dr. Melamed and his sons fraudulently failed to abide by the explicit time limitation of the QPRT, falsely backdated a deed, and, contrary to his claims of Florida residency, permitted Dr. Melamed to continue to live in the house until it was ultimately sold in 2013.

The complaint also alleges that Dr. Melamed went to great lengths to conceal the fact that he only used his Florida condo as an occasional vacation home, visiting for no "more than a few days at a time." Such efforts allegedly included (1) using Plaintiff's personal checking account to pay bills associated with Dr. Melamed's Westchester County home in order to hide the fact that he still resided there; (2) opening an E-ZPass account in Plaintiff's name to hide Dr. Melamed's Westchester County residency; (3) failing to pay rent to his sons after they acquired legal title to the Westchester County residence from the QPRT; and (4) making false statements to New York State officials, including during the course of a personal income tax audit conducted by the New York State Department of Taxation and Finance.

The complaint alleges that, at the time of his death, Dr. Melamed's net worth was approximately $15.1 million and that his New York State estate tax liability would have been "at least $1,773,398.00." However, Plaintiff alleges that neither Dr. Melamed's sons nor his estate filed an estate tax return.

Causes of Action. Plaintiff brings five causes of action under the FCA. Two arise under FCA § 189(1)(d), which creates liability if a person "has possession, custody, or control of property or money used, or to be used, by the state . . . government and knowingly delivers, or causes to be delivered, less than all of that money or property." Two other causes of action raise claims under FCA § 189(1)(g), which creates liability if a person "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government." Finally, one cause of action was brought under FCA § 189(1)(c), which creates liability where a person "conspires to commit a violation" of certain provisions of the FCA.

ADDITIONAL INSIGHTS

At this very early stage in litigation, only the complaint has been unsealed, and there has been no public disclosure of facts other than what is in the complaint. However, the complaint is significant for two principal reasons. As the first unsealed estate tax claim made under the FCA, it serves as a reminder that taxpayers face risk under New York's expansive FCA for taxes other than the corporate franchise tax, sales and use tax, and personal income taxes, which have been the subject of previous unsealed complaints. This matter also demonstrates that a *qui tam* plaintiff can file a complaint even when the plaintiff may have played a significant role in the alleged wrongful conduct. While the FCA permits recovery by plaintiffs who were involved in the conduct that led to the FCA claim, a court may, in its discretion, reduce the amount of the recovery the plaintiff would otherwise be entitled to receive under the FCA. FCA §190(8).

The defendants generally have 20 days from the service of the complaint to file an answer or a notice of appearance, after which the parties will engage in motion practice or commence discovery.

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INSIGHTS IN BRIEF

ADMISSION CHARGES FOR HAUNTED ATTRACTIONS SUBJECT TO SALES TAX

A New York State Administrative Law Justice held that the admission charges to walk through free-standing haunted attractions, featuring actors and special effects equipment, were subject to sales tax as charges for access to a "place of amusement" and were not nontaxable charges for the use of "amusement devices." *Matter of Ronald J. Doherty, Jr. d/b/a Eerie Productions*, DTA No. 826909 (N.Y.S. Div. of Tax App., Jan. 18, 2018). The ALJ distinguished the haunted attractions from amusement devices that have been held to not constitute places of amusement, which are more analogous to coin-operated amusement devices like automatic phonographs and bowling games. The ALJ also declined to abate penalties, noting that the taxpayer had requested an advisory opinion from the Department on the issue, but then ignored the Department's directive to collect sales tax at his own peril.

ALJ VACATES DEPARTMENT'S DEMAND FOR BILL OF PARTICULARS

A New York State Administrative Law Judge has granted the motion of a petitioner to vacate a demand for a bill of particulars sought by the Department of Taxation and Finance in a case involving whether the petitioner properly reported gain from a 2009 transaction on her New York State and City personal income tax returns. *Matter of Andrea Woodner*, DTA No. 827878 (N.Y.S. Div. of Tax App., Jan. 25, 2018). The Demand requested particularization of the petitioner's assertions in her reply to the Department's answer that she had a substantial business purpose for various aspects of the 2009 transaction. The ALJ found that two of the paragraphs specified by the Department did not concern substantial business purpose, so the Demand was inappropriate in regard to those paragraphs, and, even in regard to the paragraphs that did concern business purpose, the Demand should be struck because it went beyond seeking clarifying information and was seeking evidentiary detail, an inappropriate use of a demand for a bill of particulars, which may not be used "to probe into an adversary's legal interpretations or to obtain disclosure of evidence."

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