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NEW YORK TAX INSIGHTS

Volume 7, Issue 11, November 2016

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EDITORS

Hollis L. Hyans hhyans@mofo.com
Irwin M. Slomka islomka@mofo.com

NEW YORK STATE + LOCAL TAX GROUP

Craig B. Fields cfields@mofo.com
Paul H. Frankel pfrankel@mofo.com
Hollis L. Hyans hhyans@mofo.com
Mitchell A. Newmark mnewmark@mofo.com
R. Gregory Roberts rroberts@mofo.com
Irwin M. Slomka islomka@mofo.com
Michael A. Pearl mpearl@mofo.com
Rebecca M. Balinskas rbalinskas@mofo.com
Matthew F. Cammarata* mcammarata@mofo.com
Michael J. Hilkin mhilkin@mofo.com
Nicole L. Johnson njohnson@mofo.com
Kara M. Kraman kkraman@mofo.com
Eva Y. Niedbala eniedbala@mofo.com
Michael P. Penza mpenza@mofo.com

* Admitted only in Massachusetts

MORRISON FOERSTER

ALJ Permits Only Minimum Penalties for Failure to File Information Returns

By Hollis L. Hyans

A New York State Administrative Law Judge has rejected the maximum penalties imposed by the Department of Taxation and Finance on an alcoholic beverage wholesaler for failing to file information returns, finding that the Department failed to request records, that its use of an estimated method was improper, and that the company made great efforts to comply. *Matter of Flair Beverages Corporation*, DTA No. 826110 (N.Y.S. Div. of Tax App., Sept. 29, 2016).

Legal Background and Facts. Flair Beverages Corporation ("Flair") is a licensed alcoholic beverage wholesaler. Legislation enacted in 2009 required every alcoholic beverage wholesaler that is licensed to sell without collecting sales and use tax to file annual information returns. The information gathered from the wholesalers' information returns is used to analyze the sale of alcoholic beverages and determine the accuracy of income and sales tax returns filed by vendors who purchase from the wholesalers.

Paul Gagliardi, Flair's president, testified that after the 2009 legislation was enacted, he analyzed what would be required to complete the information returns. He estimated that Flair had approximately 300,000 sales transactions each year, handled by 12 cash registers, and that vendor information was accumulated on Flair's computer, but not by the cash registers. He sought assistance from Flair's CPA and determined that it would be necessary to manually enter all sales recorded by the sales registers into Flair's computer system, deducting soda, water, deposits, sales to exempt organizations, and sales to other wholesalers, since all the items appeared on the same sales receipt. Flair attempted to transcribe the necessary information and spent three months to compile one month's worth of information, which required six additional employees at a cost of $15,000. Mr. Gagliardi concluded it was physically impossible to continually report in the matter requested with his existing manual system and that it was so expensive that trying to electronically file complete returns might force the company out of business.

Issues. It was undisputed that Flair had failed to file the required reports for the tax periods ending in 2009 through 2013. A Notice

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Attorney Advertising

of Determination was issued, assessing penalties for $10,000 for each period. In the Notice, the Department stated that because Flair had not provided books and records, it was imposing the maximum penalty amount permitted by law.

Flair challenged the penalties, arguing that the statute was not only unfair but unconstitutional, and that the Department did not have the right to force a business to purchase a new computer system costing several hundred thousand dollars in order to provide information used for the Department's own policing purposes.

ALJ Determination. With regard to the claims of unconstitutionality, the ALJ noted first that statutes are assumed to be constitutional in administrative proceedings, and the Division of Tax Appeals lacks jurisdiction to consider whether a statute is constitutional on its face. While it may consider whether tax statutes are being applied unconstitutionally, the ALJ found that there was no evidence that Flair was being treated any differently than other similarly situated taxpayers, so there was no merit to the constitutional challenge.

Since the Department never requested, much less examined, Flair's records, the ALJ found that the use of an estimated method to determine penalties was "grossly improper."

However, despite the fact that the Notice of Determination estimating the penalties stated that it was premised upon Flair's failure to provide information "as requested," the ALJ found that that the auditor had in fact never requested or examined Flair's books and records, never made a determination of whether those records could have provided the information sought by the Department, and never attempted to compile the needed information from Flair's records.

The statute imposing penalties for failure to file the information returns, Tax Law § 1145(i), uses the same standard applicable under Article 28, the sales and use tax law. That standard, Tax Law § 1138(a)(1), provides that the Department must first request and examine the taxpayer's records, and only if those records are inadequate may an estimate or other external method be used. Since the Department never requested, much less examined, Flair's records, the ALJ found that the use of an estimated method to determine penalties was "grossly improper."

The ALJ further found that Flair had not ignored its obligations, but that after expending a great deal of effort had determined it simply could not present the information as requested. Therefore, the ALJ reduced the penalties to the minimum set forth in the statute, of $500 per return, for a total of $2,500.

Additional Insights

As the ALJ recognized, the amount of tax properly due—or, as in this case, penalties for failure to report—can be determined by the Department from the information available and can be estimated or based on external indices. However, the case law has clearly established that before estimation is permitted, the Department must request a taxpayer's records, and estimation may be used only if those records are inadequate. *See, e.g.*, *Matter of Your Own Choice, Inc.*, DTA No. 817104 (N.Y.S. Tax App. Trib., Feb. 20, 2003). Here, where no request was made for the taxpayer's books and records, resorting to any amount of estimated penalties, much less the maximum, was found to be unjustified. And, since Flair had taken careful action to try to comply, and found itself unable to do so without significant investment of time and money, the ALJ concluded that only minimum penalties were appropriate.

ALJ Holds That Husband Is Entitled to Innocent Spouse Relief

By Kara M. Kraman

A New York State Administrative Law Judge has held that a husband was entitled to innocent spouse relief in connection with a personal income tax assessment relating to the income from his wife's operation of a restaurant. *Matter of Peter Gerace, Sr.*, DTA No. 826468 (N.Y.S. Div. of Tax App., Sept. 29, 2016).

Mr. Gerace is a retiree whose income was limited to a fixed disability pension, fixed social security disability benefit income, and some gambling winnings. Mr. and Mrs. Gerace had separate bank accounts, and Mr. Gerace paid for the couple's living expenses from his pension income. Mrs. Gerace was a homemaker and had never been employed prior to her opening a restaurant in 2001 with money she received from a personal injury action. Although Mr. Gerace thought that opening a restaurant was "a terrible idea," and tried to discourage Mrs. Gerace from using her settlement money to open a restaurant, her sons encouraged her and she went forward. In May 2001, Mrs. Gerace opened her restaurant, Pietro's Ristorante, in East Amherst, New York. She operated the restaurant as an S corporation, in which she was the sole shareholder and officer.

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Mrs. Gerace held a variety of roles in the restaurant, and one of her sons served as a manager while another acted as a bartender. For his part, Mr. Gerace "wanted no part of" Pietro's and did not participate in the management, operations, or any other aspect of the restaurant, other than occasionally unlocking it for the chefs if Mrs. Gerace had had a particularly late night. Mr. Gerace had no ownership interest in the restaurant, did not loan money to the restaurant, and was not a creditor of the restaurant.

[T]he ALJ found that the fact that Mr. Gerace signed the joint tax returns prepared by his and Mrs. Gerace's accountant without making any investigation or raising any questions did not preclude him from receiving innocent spouse relief.

The restaurant was profitable in its first few years of operation, but eventually it was unable to keep up with its expenses. In an effort to keep the restaurant afloat, Mrs. Gerace borrowed money from her father and aunts. By early 2011, however, the restaurant did not have enough cash to continue operations and closed its doors.

In May 2011, the Department commenced a sales tax audit of the restaurant. After conducting a purchase mark-up audit, the Department concluded that the restaurant had additional gross taxable sales receipts on which sales tax was due. After Mrs. Gerace decided not to appeal the sales tax assessment beyond a conciliation conference, the sales tax audit led to an income audit in which the Department determined that the additional gross sales receipts constituted additional business income to Mrs. Gerace's S corporation, which Mrs. Gerace should have reported on her joint New York State personal income tax return. The Department subsequently issued an income tax assessment to Mr. and Mrs. Gerace on that basis, which the Geraces failed to timely protest, causing the assessment to become final. However, Mr. Gerace timely petitioned for innocent spouse relief.

Generally, spouses who file a joint personal income tax return are subject to joint and several liability for New York State personal income tax deficiencies. Tax Law § 651(b)(2). An innocent spouse may be relieved of joint liability, however, where (i) the innocent spouse establishes that in signing the return he or she did not know and had no reason to know that there was a substantial understatement of income; and (ii) under all of the facts and circumstances, it would be inequitable to hold the innocent spouse liable for the deficiency in tax attributable to such understatement. The regulations further provide that where a joint return contains a substantial understatement of income attributable to grossly erroneous items of one spouse, the other spouse will be relieved of liability by establishing that he or she did not know or have reason to know that there was a substantial understatement of income, and in taking into account all of the facts and circumstances, including whether or not the other spouse benefitted directly or indirectly from the grossly erroneous items, it would be inequitable to hold him or her liable for the deficiency. 20 NYCRR § 151.10(e)(1).

The ALJ determined that Mr. Gerace was entitled to innocent spouse relief. The ALJ found that the record clearly demonstrated that Mr. Gerace had no involvement with the restaurant and had no knowledge of, or reason to know of, any understatement of income as a result of the operation of that restaurant. The ALJ noted that, if anything, Mr. Gerace had had reason to believe the restaurant was operating at a loss based on his wife's borrowing of money from her relatives in an attempt to keep the restaurant afloat. The ALJ also found that there was no obvious change in lifestyle that benefitted Mr. Gerace or that would have alerted him to an increase in their income. The ALJ found that, to the contrary, the credible testimony of Mr. and Mrs. Gerace demonstrated that "their lives were consistently rather unremarkable." They took only one vacation during the three-year period at issue, which consisted of two days in Las Vegas and a few days afterwards visiting friends in Arizona, and lived in the same modest house they had lived in for years.

Moreover, the ALJ found that the fact that Mr. Gerace signed the joint tax returns prepared by his and Mrs. Gerace's accountant without making any investigation or raising any questions did not preclude him from receiving innocent spouse relief, since it was "extraordinarily unlikely" that Mr. Gerace could have discovered the possibility that additional income might be attributable to his spouse based on a sales tax audit of his spouse's restaurant even if he had conducted a more thorough review of those joint returns.

Finally, the ALJ concluded that holding Mr. Gerace responsible for the income tax deficiency resulting from the "imputed income" of the restaurant would be inequitable. In reaching this conclusion, the ALJ relied on the fact that Mr. Gerace was disabled, lived on a fixed income, was solely responsible for the Geraces' living expenses, and had not benefited in any way from the additional income that caused the deficiency.

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Additional Insights

It is well established that the innocent spouse provision in the Tax Law is not meant to apply to cases where a spouse remains willfully ignorant of the contents of a joint tax return. Indeed, the Appellate Division has held that "an innocent spouse is one who despite having made reasonable efforts to investigate the accuracy of the joint return remains ignorant of its illegitimacy." *Matter of Revere v. Comm'r of Taxation & Fin.*, 75 A.D.3d 860, 863 (3d Dep't 2010). The instant decision, although not precedential, is notable because the ALJ held that innocent spouse relief was appropriate even though Mr. Gerace admitted that he did not investigate or question the joint returns that he signed. The ALJ distinguished this case from *Revere* on the grounds that *Revere* stood for the principle that innocent spouse relief was not designed to protect willful blindness or intentional ignorance, neither of which was at issue in this case, and that Mr. Gerace's failure to investigate the returns could not be said to negate his innocence since he was never in a position to discover their inaccuracy.

Appellate Court Finds Fiber Optic Cables Not Subject to Real Property Tax

By Hollis L. Hyans

Reversing a decision of the trial court, the Appellate Division, Third Department, has held that fiber optic cable installations are not taxable real property because they do not "distribute" light, heat, or power within the meaning of the statute. *Level 3 Communications, LLC v. Clinton County et al.*, No. 522214 (App. Div. 3rd Dep't Oct. 20, 2016). However, a refund of taxes already paid was denied because no notice was given to the localities that the taxes were being paid under protest.

Facts and Decision Below. Level 3 is a telecommunications company that owns fiber optic cable installations. The fiber optic cables consisted of filaments of glass through which light beams are used to transport information and data from one point to another.

RPTL § 102(12)(f) provides that taxable real property includes "equipment for the distribution of heat, light, power, gases and liquids." The issue in dispute was whether the fiber optic cable installations involved the "distribution" of light within the meaning of the statute.

Level 3 had paid real property tax on the installations, but in May 2013, after a decision involving another taxpayer issued by the First Department ruling that fiber optic installations were not taxable by New York City, Level 3 filed applications for refunds and to have the properties removed from the tax rolls. The applications were denied, and Level 3 filed an action for a declaratory judgment seeking a refund of the taxes paid and a declaration that the property was not taxable.

The trial court upheld the denial, finding that the fiber optic cable installations were taxable real property under RPTL § 102(12)(f), and that Level 3 was precluded from recovering the requested refunds because it had paid the taxes voluntarily.

Appellate Division Decision. The Third Department reversed on the question of taxability, and found that Level 3's fiber optic installations were not subject to tax. First, the court noted the well-established rules that tax imposition statutes must be strictly construed, and that all doubts concerning scope are to be resolved in favor of the taxpayer. Since the RPTL did not define "distribution," the court looked to the "usual and commonly understood meaning" of the term and, citing cases and dictionary definitions, found that "distribute" generally means "to divide among several or many" or "to give out or deliver, especially to members of a group."

The court found that the fiber optic cables do not "distribute" light within those definitions. Instead, the lights signals transmitted over the cables terminate in an optical receiver that reads the light, decodes the signals and sends electronic signals to other sources such as computers, televisions, and telephones. While the cables were found to "undeniably transmit light . . . such transmission does not result in the 'distribution' of light." The court found that it was data, rather than light, that was being distributed. It also concluded that the lower court had erred in concluding there was no meaningful difference between the words "transmit" and "distribute," and noted both that the commonly understood meanings are different and that the two terms are independently used in the statute, indicating that different concepts were intended.

The court also found that, nearly 30 years after the general provisions in RPTL § 102(12)(f) were enacted in 1958, the legislature had enacted RPTL § 102(12)(i) to specifically address real property taxation of telecommunications equipment, and that the legislative history indicated the Legislature was aware at the time of fiber optic technology and chose to limit assessment under RPTL § 102(12)(i) to wire and other property used "for electrical conductors," which did not include fiber optic cables.

However, with regard to the claimed refunds, the Third Department sustained the lower court's denial, finding that Level 3 was required to "establish appropriate legal protest" prior to or at the time of payment in order to

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obtain a refund, so that government entities have notice of the possibility of refunds. Since there was no indication that the taxes were paid under protest, or that notice was otherwise given, the refund of taxes paid was denied.

Additional Insights

As the Third Department found, the First Department has already reviewed a similar issue and concluded in *Matter of RCN N.Y. Communications, LLC v. Tax Commission of the City of New York*, 95 A.D.3d 456 (1st Dep't 2012) that fiber optic installations do not constitute real property under RPTL § 102(12)(i), the more specific provision enacted in 1985 which imposes tax on lines and wires "for electrical conductors," since the fiber optic cables were not used as electrical conductors. The Third Department noted that this issue had also been raised below in *Level 3*, and the lower court had similarly ruled that Level 3's fiber optic cables did not constitute real property under RPTL § 102(12)(i), relying on *RCN N.Y. Communications*, and that issue was not raised on appeal. Given that both the First Department and the Third Department have now reached the same result under two different sections of the statute, the issue of RPTL taxation of fiber optic cables appears to be resolved, absent review by the Court of Appeals.

State Tax Department Releases Draft Article 9-A Apportionment Regulations

By Irwin M. Slomka

The New York State Department of Taxation and Finance has recently released draft Article 9-A regulation amendments under corporate tax reform pertaining to apportionment. *Corporate tax reform draft regulations: Apportionment*, N.Y.S. Dep't of Taxation and Fin., http://www.tax.ny.gov/bus/ct/corp_tax_reform_draft_regs.htm. The draft is a comprehensive overhaul of most of the existing apportionment regulations, principally to reflect apportionment rules under the new law that went into effect in 2015. The Department has previously released draft regulations dealing with the sourcing of digital products and other business receipts and discretionary adjustments to the apportionment factor.

Among the areas covered by the draft regulations are:

- *General apportionment rules*. The draft regulations introduce the definition of "business receipts" includable in the apportionment factor – a term not defined in the Tax Law – as constituting receipts received in the regular course of a corporation's business. Business receipts from sales of real, personal, or intangible property that "arise from unusual events" are not includable in the apportionment factor. Also new is a provision that the "reimbursement of expenses" is not considered business receipts, and therefore it is not included in the apportionment factor.

- One interesting new example provides that a corporation in the business of buying and selling stock investments, that sells stock to a third party at a gain, must include the gain from the sale in the apportionment factor, as determined under Tax Law § 210-A because the transaction "is not an unusual event." However, the statute provides that net gains from sales of stock are not included in the factor unless necessary "to properly reflect income." Tax Law § 210-A.5(a)(2)(G).

- *Apportionment on Combined Reports*. The overriding approach taken by the draft regulations, similar to the existing regulations, is that the apportionment factor is computed as though the corporations included in the combined return are a single corporation. Thus, all intercorporate business receipts, income, gains, and losses are eliminated in computing the combined group's apportionment factor.

- *Qualified Financial Instruments*. The draft regulations address the sourcing of receipts from qualified financial instruments ("QFI's"), generally defined as financial instruments that are marked to market. It makes clear that if a taxpayer has marked to market stock, then any other stock that has not been marked to market is also a QFI and similarly sourced. The draft also explains the taxpayer election to source QFI receipts to New York State using the 8% fixed percentage method. The draft regulations do not address the mandatory 8% sourcing provisions under the law, such as for net gains from sales of other financial instruments where the transaction is made through a licensed exchange.

- *Receipts from Loans*. Among other things, the draft regulations clarify that interest income from loans not secured by real property is sourced based on the borrower's location at the time the loan is originated.

- *Marked to Market Net Gains*. The draft regulations provide that marked to market net gains from stock and from partnership interests are not included in the apportionment factor unless necessary to properly reflect business income.

- *Receipts from Credit Cards and from Credit Card Processing*. The draft regulations go into some detail regarding the sourcing of receipts received by "credit card processors." For the most part, the draft sources such receipts to New York based on

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the percentage of the processor's "access points" in the State, which are defined as the physical location at which the processor's customers access the processor's network.

- *Receipts from the Sale of Advertising*. Advertising activities are defined to include "the sale of space on a Web page, regardless of the method of compensation paid by the advertiser." The draft regulations also provide for an "intended target fraction" to be used to source advertising receipts, the numerator of which is the number of intended targets of such advertising and the denominator of which is the total number of intended targets. This ratio is based primarily on statistics and information compiled or utilized as part of the taxpayer's market research and advertising strategy developed for its customer.

As with its prior releases of draft Article 9-A regulations, these draft regulations have not yet been formally proposed under the State Administrative Procedure Act. The Department is inviting comments by December 28, 2016.

"Personal or Individual" Sales Tax Exclusion Allowed for Certain Information Services Provided to Hotel Industry

By Irwin M. Slomka

The New York sales and use tax is imposed on the provision of information services but not where the information services are "personal or individual" in nature. The scope of that important exclusion as it pertains to Internet-based products provided to the hotel industry was the subject of a recently released Advisory Opinion issued by the Department of Taxation and Finance. *Advisory Opinion*, TSB-A-16(26)S (N.Y.S. Dep't of Taxation & Fin., Aug. 31, 2016, released Oct. 6, 2016).

Facts. The company in question is in the business of providing to clients in the hotel industry online access to a database maintained by the company, which is used by hotels to facilitate marketing and sales. The company asked the Department whether sales tax applied to the following products offered to its hotel clients:

Product A. Clients are provided with online access to a database consisting of hotel reviews pertaining to that hotel culled from over 60 hotel review websites. This online access to clients includes (i) average ratings given by guests in the hotel reviews; (ii) a comparison of the hotel's ratings with those of its competitors; (iii) numeric ratings provided by the company to such subjects as rooms, service, and cleanliness; and (iv) reports containing information taken from the reviews, along with tools for responding online to individual reviews.

Product B. Like Product A, clients are provided with online access to a database, but the information contained in the database is instead derived from survey questions prepared by the company and sent to the hotel's guests after they have completed their stay at the hotel.

Product C. This product is similar to Product B in that it involves the collection of survey information from a hotel's guests, but the survey information is obtained from guests using iPads provided by the hotel client to the guest.

Product D. This product includes each of the three above-described products.

Ruling. The Department first ruled that although each product has several components, their "predominant element" (*i.e.*, the "true object") is the creation of an information database pertinent to the customers' business. Since the company does this by collecting, processing, and analyzing information, the Department concluded that each product involves the furnishing of information services for sales tax purposes.

It was then necessary for the Department to determine whether the information services were "personal or individual in nature." The furnishing of information that is personal or individual in nature, and which may not be substantially incorporated in reports furnished to other persons, is excluded from sales tax under Tax Law § 1105(c)(1).

The Department ruled that Product A – which offered information derived from what were presumably publicly available websites – did not qualify as personal or individual in nature, and it was therefore subject to sales tax because it was derived from common and widely accessible sources. It did not matter to the Department that the reports, screens, and displays were tailored to the customer's specific needs or requests. The Department distinguished these facts from those in *Westwood Pharmaceuticals, Inc. v. Chu*, 164 A.D.2d 462 (4th Dep't 1990), where the Fourth Department held that marketing reports prepared by A.C. Nielsen Company for a health and beauty products manufacturer were personal or individual in nature, and thus they were not subject to sales tax. The Department noted that, in *Westwood Pharmaceuticals*, "most of the raw data" collected and used by A.C. Nielsen to provide information to the

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customer was derived from the customer itself, which the Department considered a material factual difference.

On the other hand, the Department concluded that Products B and C, which involved the furnishing of information obtained from surveys of the hotel's own guests, did qualify for the "personal or individual" exclusion from sales tax so long as the information collected for Products B and C is not provided to other customers or compiled for later use in providing information to other customers. As for Product D, which includes all three other products, both taxable and nontaxable, if the charges for each product are separately stated in the customer's statement and are reasonable in relation to the entire charge, then sales tax will only be imposed on the separately stated charge for Product A.

Additional Insights

The Advisory Opinion reflects the Department's consistent, but narrow, view regarding the scope of the personal or individual exclusion. The Department distinguished the *Westwood Pharmaceuticals* decision permitting the "personal or individual" exclusion on the basis that most of the raw data obtained by the vendor came from its clients. The Department did not address the Fourth Department's conclusion in *Westwood Pharmaceuticals* that the most important consideration was that the vendor had created a separate "sample frame" for each client that was never disclosed to any client or used in market reports furnished to other clients, and thus was "unique to each client," which consideration does not depend on the source of the information.

Recently, the scope of the personal or individual exclusion from sales tax was the subject of the Tax Appeals Tribunal decision in *Matter of Wegmans Food Markets, Inc.*, DTA No. 825347 (N.Y.S. Tax App. Trib., Mar. 10, 2016), which held that the furnishing of retail grocery store pricing information reports, although not made available to other clients, did not qualify as personal or individual in nature. Wegmans has filed an Article 78 petition with the Third Department contesting the Tribunal's decision, so further clarification of the scope of the exclusion may be forthcoming.

INSIGHTS IN BRIEF

Follow-up on Article on Unpublished Finance Letter Rulings

In the October 2016 issue of *NY Tax Insights*, we reported on various letter rulings issued by the New York City Department of Finance during 2015 and the first half of 2016, but that did not appear on the Department's web site. We are pleased to report that within days of our article, the Department belatedly posted the articles on its web site. We are also pleased to know that officials at the Department of Finance are reading *NY Tax Insights*.

Gambling Losses Only Permitted as Itemized Deductions and Cannot Be Directly Netted Against Gambling Winnings

A resident individual cannot net his or her casino slot machine gambling winnings with gambling losses in computing New York adjusted gross income for New York State and City income tax purposes. *Advisory Opinion*, TSB-A-16(5)I (N.Y.S. Dep't of Taxation & Fin., Aug. 31, 2016) (released Oct. 6, 2016). Similar to the federal income tax treatment, the individual must report the full gambling winnings as income, with gambling losses permitted only as itemized deductions up to the amount of the winnings. According to the Advisory Opinion, as is the case for other New York itemized deductions, gambling losses may be subject to reduction for higher income individuals.

Apartment Furnished to Individual by New Employer for Temporary Use Held to Constitute a Permanent Place of Abode

An individual's furnished apartment in New York City provided by her new employer for her exclusive temporary use constituted a permanent place of abode for New York statutory residency purposes. *Matter of Leslie Mays,* DTA No. 826546 (N.Y.S. Div. of Tax App., Oct. 6, 2016). According to a New York State Administrative Law Judge, the fact that the individual's occupancy was only intended to be temporary in nature, and that she did not own or lease the apartment, did not change this result. By occupying the apartment for four months of the year, and then occupying her own apartment for the remaining seven months of the year, the individual was found to have maintained a permanent place of abode in New York City for substantially all of the year. Since she was present in the City for more than 183 days, the ALJ held that she was taxable as a statutory resident.

Sales Tax Class Action Against Dunkin' Donuts Dismissed by Federal Court

A class action alleging that Dunkin' Donuts improperly collected and remitted sales tax on prepackaged coffee sold at New York City Dunkin' Donuts stores was dismissed by a Federal trial court, which found that a claim for refund of the tax through New York's administrative procedures is the exclusive remedy. *Estler v. Dunkin' Brands, Inc.*, 16 Civ. 932 (LGS) (S.D.N.Y., Oct. 3, 2016). The District Court rejected the plaintiff's attempt to recharacterize the tax that was allegedly improperly collected as a "surcharge," and also found that plaintiff's argument that customers should

not be required to submit refund requests because they do not know to do so and have only minimal amounts at issue does not affect the mandatory nature of Tax Law § 1139, which provides the exclusive remedy for the refund of any tax alleged to be improperly or illegally collected, and requires that a refund claim be made.

Late-Filed Petition to Contest Electronically Issued Statutory Notices Allowed to Proceed

A New York State Administrative Law Judge has held that a petition should not be dismissed as untimely, despite the fact that it was filed more than two years after notices of determination were issued electronically on May 1, 2014, because the Department of Taxation and Finance failed to prove that the taxpayer, allegedly responsible for unpaid sales and use tax, had authorized the electronic issuance of the statutory notices. *Matter of Miguel Urrego*, DTA No. 827558 (N.Y.S. Div. of Tax App., Oct. 6, 2016). While the Department had provided a copy of its "Online Services ("OLS") Account Terms and Conditions for Individuals," and evidence that the taxpayer had created an online account on September 16, 2011, the version of the OLS Account Terms relied upon by the Department was updated on July 16, 2015, long after the account was created and after the statutory notices were issued. Since there was no explanation of the nature of the July 2015 updates, or any statement that the OLS Account Terms were the same when the account was opened, the ALJ found that there were triable issues of fact concerning the taxpayer's authorization, if any, for the issuance of online statutory notices in 2011, and therefore that dismissal was unwarranted on the record presented.

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"PUT THEIR CLIENTS FIRST AND ARE ALWAYS AVAILABLE WHEN NEEDED."

CHAMBERS USA 2015

"THEY DO A TERRIFIC JOB, THEY'RE VERY INFORMED AND REALISTIC."

CHAMBERS USA 2014

"THEY BRING A SUPERIOR DEGREE OF FLEXIBILITY AND EFFICIENCY."

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STATE + LOCAL TAX

WHAT SEPARATES US FROM THE REST?

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

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

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

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

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

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