

SALT SHAKER

Shaking things up in state and local tax.



Click This!: New York Enacts Über Nexus Statute

Just days following the New York Court of Appeals' decision in *Overstock.com/Amazon.com*, which rejected a facial challenge to the state's click-through nexus statute, the New York Legislature took another step to expand its taxing jurisdiction. The amended statute clarifies that "any U.S. person who makes a sale of tangible personal property or services shall be presumed to have nexus with the State of New York." The New York Department of Taxation and Finance issued a statement claiming that this legislation is "clarifying" and reflects the long-standing views of some individuals within the Department.

Department insiders were quick to defend the new law, proclaiming that "taxpayers will now have the bright-line rule they have been clamoring for." Further, non-U.S. persons who are related to, transact business with, or establish a Facebook-friend relationship with a U.S. citizen are "deemed" U.S. persons. Colorado, still reeling from the U.S. District Court's ruling that its sales and use tax notice and reporting obligations violated the Commerce Clause, is rumored to be considering similar legislation.

Compact Litigation Fallout

The fallout from the Multistate Tax Compact election litigation continues. The California Court of Appeal's pronouncement in *Gillette* that an act of the Legislature is required to effectively repeal the Compact has created a referendum effort led by the cosmetics industry and California residents, particularly in the southern part of the state.

A new coalition, "Save Our Compacts" or SOC, has been formed, and is lobbying Sacramento for a constitutional amendment that would protect a Californian's right to "carry, use, and flaunt a small case containing a mirror, face powder, a puff, and sometimes rouge." SOC issued the following

statement: "Californians deserve the right to Compacts, and the Franchise Tax Board should not endanger this fundamental part of the California lifestyle."

Meanwhile, 2,310 miles away in Detroit, the Michigan Court of Appeals' ruling in IBM's MTC Compact litigation may have produce a similar response. However, a representative of the Michigan business community, who requested anonymity, said "I think the *IBM* decision doesn't affect makeup. Regardless, Californians are too caught up in those *Housewives* television programs."

Two States Expected to Join MTC Compact

In other Compact news, on the heels of California's withdrawal from the Compact, two states have expressed interest in joining. Nevada has announced it will adopt the Compact, effective retroactively. When asked about the relevance of joining the Compact despite the fact that Nevada does not impose a corporate income tax, a Department of Revenue official shrugged her shoulders,

saying "If California wants out of the Compact, then we want in. Nevada's membership in the Compact is yet another reason why California-based businesses should relocate to Nevada. Membership also furthers our state motto: 'All for Our Country.'" Wyoming, which also lacks a corporate income tax, is expected to follow suit.

Lesser-Known Tax Council Convenes in South Georgia

The Committee on Common Language Used in Tax Statutes (CCLUTS) held public hearings last week in Tifton, Georgia, to provide a forum by which tax professionals nationwide could offer feedback on the recently amended Uniform Definitions for Interpreting Common Terminology Act (UDICTA). The stated mission of CCLUTS is to provide taxpayers and state revenue officials with uniform definitions for words that are commonly used in everyday life, yet rendered impossible to comprehend when employed in tax statutes.

A scheduling snafu with the Multistate Tax Commission's public hearings in Washington, D.C. may have hampered turnout for CCLUTS's forum, but committee leaders were nevertheless encouraged by the progress made over the last several days. "We've really zeroed in on some hot-button

terms that are easily used by the general public but that somehow confound state legislatures when they attempt to write tax laws," stated CCLUTS chairman Webster Verbose. CCLUTS hopes to use the proposals generated by the hearings to get at least one state to adopt UDICTA by 2017.

Although Sutherland's Todd Lard, Prentiss Willson and Saabir Kapoor participated in the more heralded MTC hearings last week, CCLUTS says the folks who showed up in Tifton still provided great input. "We've got the definition for 'machine' pretty much nailed down, and tougher words like 'service,' 'business,' and 'products' are coming along nicely," boasted Verbose. However, when asked if the newest version of UDICTA made any headway on the terms "intangible" and "presence," Verbose quietly dropped his head and walked away.

U.S. Supreme Court Defines *De Minimis*: "You'll Know It When You Don't See It"

For the first time in more than 20 years since the *de minimis* concept was applied to P.L. 86-272, the U.S. Supreme Court has taken a case to define just what *de minimis* is. The ruling comes out of *Little Susie's Virginia Lemonade Stand v. Tennessee*, in which the Tennessee Department of Revenue sought to impose Tennessee income tax on a Bristol, Virginia, lemonade stand operator. The Department claimed that the seven-year-old Virginian lemonade stand operator had nexus with Tennessee because she had given lemonade to her pee-wee soccer teammates while celebrating an away-game victory in Bristol, Tennessee. Susie countered, claiming that the gesture was *de minimis* and created a perfect test case for U.S. Supreme Court review.

In *Wrigley*, Justice Scalia, writing for the majority, wrote that "[i]t would be especially unreasonable to abandon normal

application of the *de minimis* principle [i.e., *de minimis non curat lex* ('the law cares not for trifles')] in construing [P.L. 86-272] which operates in such stark, all-or-nothing fashion." States and non-resident companies have been battling ever since as to just what amount of activities, both quantitatively and qualitatively, constitute *de minimis*. Justice Clarence Thomas dominated *Little Susie's* oral arguments and issued the majority opinion, confirming: "You will know it when you don't see it."

The case has been remanded to Tennessee's state courts for a determination of whether the lemonade stand exceeded this new threshold. Department of Revenue staff said that they were satisfied with the ruling, while Little Susie said that she was looking forward to moving on and starting second grade.

Sutherland Announces New Column: "Beard of the Month"

After more than three years of publishing Sutherland SALT's most popular column—Pet of the Month—Sutherland SALT is pleased to introduce a new spin-off, "Beard of the Month." Inspired by hours of lunchtime conversation, Beard of the Month is your opportunity to vote on whether the beard should "stay or go" for your favorite SALT practitioner.

This month's column features New York and D.C. SALT associates, Andrew Appleby and Charlie Kearns. Andy decided to try facial hair while vacationing in the wilds of

Alaska and has named his beard "Big Papi" (after the slugger who plays for the future 2013 World Series Champion Red Sox). Much like the engineering services and the equipment in Florida's AT&T case, Charlie's beard has been "inextricably intertwined" with him for almost two decades. And unlike beard rookie Andy, Charlie has recently stepped up his beard "game" by purchasing "beard wash" and "beard conditioner." Vote here for your preference—smooth or rugged—and send us your nominations for our next edition!

Smooth Andy



**Vote for Smooth
Andy!**

Rugged Andy



**Vote for Rugged
Andy!**

Smooth Charlie



**Vote for Smooth
Charlie!**

Rugged Charlie



**Vote for Rugged
Charlie!**

SALT PET(S) OF THE MONTH

Saabir's Sea Monkeys

Sutherland SALT is proud to introduce its first aquatic Pet of the Month—

Saabir Kapoor's sea monkeys! Saabir, located in Sutherland's Washington, D.C. office, has been a longtime supporter and avid collector of everyone's favorite instant crustacean. Although Saabir first started collecting sea monkeys because he loves seafood, he has since found that they are the ideal pet because they require very little attention, do not aggravate his allergies, and are somewhat fungible.

Saabir became so attached to his brine shrimp menagerie that he started to name his favorites. For example, Nemo is a young, curious and mischievous monkey who likes to do things his own way, while Dori is a very cheerful and talkative monkey (though not the brightest in the

aquarium). Though brine shrimp may look the same to most of us, Saabir says that when you spend enough time with them, their individual personalities start to shine through.

Another plus for sea monkey owners is that the pets travel well and are not expressly prohibited from most venues. For example, they are one of the few pets allowed to come to work in Sutherland's D.C. office. "They said dogs and cats were not allowed, but there was no mention of sea monkeys. Having my monkeys at the office makes me feel like I am never alone." Saabir has also taken his portable friends on sight-seeing adventures since moving to D.C. "The National Zoo was first, of course, but they can't wait until the Washington Monument reopens!"



APRIL FOOLS!

The Sutherland SALT Team



Michele Borens
202.383.0936
michele.borens@sutherland.com



Jonathan A. Feldman
404.853.8189
jonathan.feldman@sutherland.com



Jeffrey A. Friedman
202.383.0718
jeff.friedman@sutherland.com



Todd A. Lard
202.383.0909
todd.lard@sutherland.com



Carley A. Roberts
916.241.0502
carley.roberts@sutherland.com



Marc A. Simonetti
212.389.5015
marc.simonetti@sutherland.com



Eric S. Tresh
404.853.8579
eric.tresh@sutherland.com



W. Scott Wright
404.853.8374
scott.wright@sutherland.com



Douglas Mo
916.241.0505
douglas.mo@sutherland.com



Prentiss Willson
916.241.0504
prentiss.willson@sutherland.com



Pilar Mata
202.383.0116
pilar.mata@sutherland.com



Jack Trachtenberg
212.389.5055
jack.trachtenberg@sutherland.com



Mary C. Alexander
202.383.0881
mary.alexander@sutherland.com



Andrew D. Appleby
212.389.5042
andrew.appleby@sutherland.com



Zachary T. Atkins
404.853.8312
zachary.atkins@sutherland.com



Madison J. Barnett
404.853.8191
madison.barnett@sutherland.com



Todd G. Betor
202.383.0855
todd.betor@sutherland.com



Scott A. Booth
202.383.0256
scott.booth@sutherland.com



Christopher N. Chang
212.389.5068
christopher.chang@sutherland.com



Miranda K. Davis
404.853.8242
miranda.davis@sutherland.com



Timothy A. Gustafson
916.241.0507
tim.gustafson@sutherland.com



Sahang-Hee Hahn
212.389.5028
sahang-hee.hahn@sutherland.com



Saabir Kapoor
202.383.0819
saabir.kapoor@sutherland.com



Charles C. Kearns
202.383.0864
charlie.kearns@sutherland.com



Jessica L. Kerner
212.389.5009
jessica.kerner@sutherland.com



Suzanne M. Palms
404.853.8074
suzanne.palms@sutherland.com



Kathryn Pittman
202.383.0836
kathryn.pittman@sutherland.com



David A. Pope
212.389.5048
david.pope@sutherland.com



Maria M. Todorova
404.853.8214
maria.todorova@sutherland.com