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TRIBUNAL UPHOLDS PERSONAL LIABILITY OF LLC MEMBERS FOR SALES TAX

By Kara M. Kraman

The New York State Tax Appeals Tribunal has affirmed the determination of an Administrative Law Judge that a member of a limited liability company ("LLC") holding a minority interest in the LLC is liable for a portion of a sales and use tax assessment against the LLC itself. *Matter of Eugene Boissiere and Jason Krystal*, DTA Nos. 824467, *et al.* (N.Y.S. Tax App. Trib., July 28, 2015).

Eugene Boissiere and Jason Krystal held 14% and 13% membership interests, respectively, in an LLC. Neither individual had managerial responsibility, knowledge or control over the LLC's financial affairs, or authority to sign the LLC's tax returns. The New York State Department of Taxation and Finance performed a sales tax audit of the LLC, and assessed sales tax, plus interest, against the company for the period June 1, 2004 through May 31, 2009. The Department also issued separate Notices of Determination to Mr. Boissiere and Mr. Krystal, each assessing the full amount of the sales tax, plus penalty and interest, for the period during which each held a membership interest in the LLC. After negotiations between the Department and the taxpayers, and in keeping with the Department's policy as set forth in Technical Memorandum, TSB-M-11(17)S (N.Y.S. Dep't of Taxation & Fin., Sept. 19, 2011), the Department reduced the individuals' liability for the sales tax to reflect their percentage of ownership in the business, plus interest.

Tax Law § 1131(1) imposes strict personal liability for sales tax on "any member of a partnership or limited liability company," regardless of whether that person is under a duty to act on behalf of the company. In contrast, the New York Limited Liability Company Law provides that a member of an LLC cannot be held personally responsible for an LLC's liabilities "solely by reason of being such member." LLC Law § 609(a).

Messrs. Boissiere and Krystal challenged the assessments imposing personal liability for a portion of the LLC's sales tax. The ALJ upheld the Department's assessments, noting that the definition of "persons responsible to collect sales tax" under the plain language of Tax Law § 1131(1) is unambiguous and includes any member of an LLC.

Messrs. Boissiere and Krystal appealed the ALJ's decision to the Tribunal, arguing that the conflict between the Tax Law, which provides

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that LLC members are *per se* liable for an LLC's sales tax obligations, and the LLC law, which provides that LLC members may not be held liable for an LLC's obligations, was the result of a "mistake" by the drafters of the Tax Law. The Tribunal rejected the taxpayers' contentions that the Legislature made a mistake as "speculative," and affirmed the determination of the ALJ.

Like the ALJ, the Tribunal held that the plain and unambiguous language of the Tax Law provided for *per se* liability. In so holding, the Department noted that the Department's policy, as set forth in TSB-M-11(17)S, of limiting a member's liability to its percentage interest in the LLC, ameliorated any "harsh consequences" that might warrant a departure from the literal language of the statute. Moreover, the Tribunal did not find the Tax Law and the LLC Law to be inconsistent. Instead, the Tribunal found that the laws evidenced an intent by the Legislature that the limitation of liability for LLC members under the LLC Law should not extend to sales tax liability under the Tax Law.

Additional Insights

The Tribunal's decision upholding the LLC members' strict liability for the LLC's sales tax obligations is in keeping with its decision in *Matter of Santo*, DTA No. 821797 (N.Y.S. Tax App. Trib., Dec. 23, 2009). In *Matter of Santo*, the Tribunal upheld the imposition of strict liability on an LLC member for the full amount of the LLC's sales tax liability. After *Matter of Santo* was decided, the Department issued TSB-M-11(17)S in response to public concern that the application of strict liability might work a hardship to LLC members that have little or no involvement in the actual business of the LLC. While generally beneficial to taxpayers, TSB-M-11(17)S conditions limited liability on the LLC members' cooperation with the Department, including identifying to the Department other potentially responsible persons. In addition, the relief is limited to LLC members who hold less than a 50% interest in the LLC.

In this case, as in *Matter of Santo*, the Tribunal held that the Tax Law authorizes the Department to hold LLC members strictly liable for an LLC's sales tax liabilities. However, the Tribunal also noted that it saw no "unjust or unreasonable result in the assertion of *per se* liability against [taxpayers] to warrant a departure from the literal interpretation of the words used in [the] Tax Law," because the Department reduced the taxpayers' liabilities to reflect their ownership interests in the LLC in accordance with TSB-M-11(17)S. While the Tribunal concluded that imposition of strict liability — limited to the members' ownership interest percentages — did not produce an unjust or unreasonable result in this case, there may still be circumstances where the Tribunal would not uphold strict liability where the Department does not consent to limited liability if the member does not meet certain conditions under the TSB-M.

NYS ALJ FINDS LAWYER NOT SUBJECT TO NY TAX ON INCOME EARNED FROM FLORIDA LEGAL WORK

By Hollis L. Hyans

A New York State Administrative Law Judge held that a lawyer licensed in New York but practicing solely in Florida is not subject to New York personal income tax on income earned in a Florida matter. *Matter of Patrick J. Carr*, DTA No. 825989 (N.Y.S. Div. of Tax App., July 23, 2015). The ALJ rejected the Department's argument that, despite arising from work done entirely in Florida, the income was subject to New York tax because of the lawyer's license to practice in New York.

Facts and Audit Issues. Mr. Carr, a Florida domiciliary, had been admitted to the New York bar in 1964 and to the New Jersey bar in 1987, and both licenses remained valid during 2007 through 2009, the years at issue. In 2001, he was admitted to practice *pro hac vice* in Florida to represent a plaintiff in a matter in the Florida courts. He earned income from that representation during the years in issue, and reported it for federal income tax purposes on Schedule C. He reported a Florida home address on his federal returns, and did not file New York income tax returns for those years. He maintained an office in Florida during the years in issue, but no office or other place of business in New York.

The Department's audit of Mr. Carr began as a residency audit, during which the Department reviewed his change of domicile from New York to Florida, and eventually conceded that Mr. Carr had changed his domicile to Florida. However, the Department then argued that, since Mr. Carr was not licensed to practice law in Florida—despite his *pro hac* admission—all of his income was attributable to a "profession carried out in New York" because he maintained a license to practice law in New York. The Department relied on Tax Law § 631, which treats as New York source income any income earned by a nonresident from a business or profession carried on in New York. It also relied on two cases that it claimed supported its position, *Carpenter v. Chapman*, 276 A.D. 634 (3d Dep't 1950), and *Matter of Vigliano*, DTA No. 809303 (N.Y.S. Tax App. Trib., Jan. 20, 1994), both of which involved lawyers who had offices in New York but were seeking to apportion income outside the State.

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ALJ Decision. The ALJ readily concluded that the Department's position was baseless. First, she reviewed the statute, Tax Law § 631, and the regulations promulgated pursuant to the statute, and found no support in them for the Department's position. The regulations state that a business is carried on wholly within New York State when it is conducted solely within New York and no activities are carried on outside New York. 20 NYCRR § 132.12. A business is carried on partly in New York if activities are "systematically and regularly" conducted in New York and also outside New York. 20 NYCRR § 132.14, and when the business is carried on partly outside New York, income is apportioned both inside and outside New York by using one of a variety of apportionment methods. 20 NYCRR §§ 132.12, 132.15. Since Mr. Carr maintained no office or place of business whatsoever in New York, nothing in the regulations provided a basis for allocating 100% of Mr. Carr's income to New York without applying any method of apportionment.

The ALJ also reviewed the cases relied upon by the Department and found them inapplicable. In both *Carpenter v. Chapman* and *Matter of Vigiliano* the attorneys did not merely maintain a New York license, but had New York offices where they actually practiced, had no law offices outside the state and were not licensed in any other state. In both cases, the taxpayers were nonresidents during the years in issue, and argued they should be permitted to apportion outside New York income earned either while working at a non-New York residence (*Chapman*), or on projects that were taking place outside New York (*Vigliano*). The ALJ found those cases were inapposite because the taxpayers, unlike Mr. Carr, had maintained offices in New York, and had no offices outside New York. The ALJ explicitly found that "merely holding a license to practice law in New York is not the equivalent of carrying on a profession in New York State," in the absence of any evidence that activities were systematically and regularly carried out in New York "with a fair measure of permanence and continuity," and that the Department's position was inconsistent with its own regulations. In addition, the ALJ found no support in the record for the Department's contention that Mr. Carr's *pro hac vice* admission in Florida was solely based on his New York license, noting that the Florida rules require that an attorney seeking *pro hac vice* admission list all jurisdictions in which the attorney is licensed to practice, and Mr. Carr was licensed in both New York and New Jersey.

The ALJ also concluded that, although later found unconstitutional, during the years in issue, Judiciary Law § 470 required that nonresident attorneys who were licensed to practice in New York maintain a physical office in New York. Since Mr. Carr had no such office, the ALJ found he was not authorized to practice in New York under the Judiciary Law, yet another reason why his income could not be allocated entirely to New York.

Additional Insights

Based on the facts as set out in the decision, it is hard to understand what support there could possibly have been for the Department's arguments in this audit. Its own regulations deal with lawyers who maintain offices and regularly practice in New York, and appear to have no application to a lawyer with no office in New York at all. The cases on which it relied arose from very different facts and involved lawyers who were licensed only in New York, had active practices in New York and were seeking to apportion part of their income outside the state based on where work was physically done — a very different situation from Mr. Carr's, who had no office in New York and had been properly admitted *pro hac vice* in Florida to perform legal services in one matter.

As the ALJ noted, the "office" requirement in Judiciary Law § 470 was found unconstitutional by a federal district court after the years in issue in this matter. On appeal, the federal Court of Appeals asked New York State's highest court to interpret the statute and rule on what exactly was required under the statutory direction that a nonresident lawyer maintain "an office for the transaction of law businesses," as that term is used in Judiciary Law § 470. In response, the state Court of Appeals held that the statute required nonresident attorneys to maintain a physical law office within the State — further support for the ALJ's conclusion that, under Judiciary Law § 470, Mr. Carr would not have met the State's requirements for being authorized to practice law in New York, despite his bar admission. The question of the constitutionality of the statute is, as of this writing, still pending before the federal Court of Appeals.

STATE ISSUES GUIDANCE ON NEXUS FOR FOREIGN CORPORATE MEMBER OF DISREGARDED LLC INVESTMENT COMPANY

By Irwin M. Slomka

The New York State Tax Department has issued important guidance regarding the scope of the exemption from Article 9-A for non-U.S. corporations that use limited liability companies to engage in qualifying investment activities in New York. *Advisory Opinion*, TSB-A-15(5)C (N.Y.S. Dep't of Taxation & Fin., July 10, 2015).

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The facts presented are straightforward. A Swiss holding company is the sole member of a Delaware limited liability company ("LLC") that is treated as a disregarded entity for federal and state income tax purposes. The LLC is solely engaged in investing in securities in private equity funds, hedge funds and operating-companies for its own account. The LLC has an office in New Jersey, and has never owned or leased real property in New York. The Swiss holding company is not otherwise engaged in the conduct of a U.S. trade or business for federal income tax purposes, and thus does not have effectively connected income under IRC § 882.

[A]n alien (i.e., non U.S.) corporation that is not treated as a "domestic corporation" for federal purposes and that has no effectively connected income is not subject to Article 9-A.

Generally, under IRC § 864(b)(2), trading in securities or commodities by a non-dealer is not considered a trade or business within the United States for federal income tax purposes. Therefore, a foreign corporation engaged in those activities in the United States does not have effectively connected income.

The question presented was whether the Swiss holding company will become subject to Article 9-A if the LLC were to relocate its office from New Jersey to New York City. The Department ruled that so long as the LLC continues to engage solely in qualifying activities in New York within the meaning of IRC § 864(b)(2), and the Swiss holding company continues not to have effectively connected income, the holding company will not be subject to Article 9-A. This is based on the language of Tax Law § 209(2-a), which provides that an alien (i.e., non U.S.) corporation that is not treated as a "domestic corporation" for federal purposes and that has no effectively connected income is not subject to Article 9-A. Under corporate tax reform, alien corporations no longer have an annual franchise tax filing requirement.

In response to the question regarding what may be required to substantiate entitlement to the exemption, the Department would say only that it may be necessary to produce the alien corporation's books and records to confirm, for example, that the corporation's New York activities are limited to the investment or trading activities described in IRC § 864(b)(2).

Additional Insights

The Advisory Opinion specifies that it applies only to situations where the LLC's in-State activities are limited solely to investment activities prescribed under IRC § 864(b)(2). It does not address the consequences if the Swiss holding company has effectively connected income from some other activity conducted wholly outside the State. It also does not discuss the result if the holding company has other affiliates that do have effectively connected income in the United States. It should be noted that alien corporations that are not treated as "domestic corporations" and that do not have effectively connected income cannot be included in a New York combined return.

The Department provided this guidance as an Advisory Opinion, even though it has informally indicated that it would generally address interpretations under corporate tax reform through regulations and Corporate Tax Reform FAQs posted on its website, rather than through Advisory Opinions.

ONLINE AND REMOTE ACCESS COMPUTER OFFERINGS NOT SUBJECT TO SALES TAX OR TELECOMMUNICATION EXCISE TAX

By Michael J. Hilkin

The New York State Department of Taxation and Finance has issued an Advisory Opinion ruling that four different online and remote access computer offerings are not subject to New York sales tax or telecommunication excise tax. *Advisory Opinion*, TSB-A-15(28)S (N.Y.S. Dep't of Taxation & Fin., July 9, 2015).

The Advisory Opinion examined four different products (the "Products"). The first product, an "Online Meeting Product," allows subscribers to conduct multiparty conferences over the Internet for a monthly or annual fee. A user of the Online Meeting Product must download a Java applet that permits a secure connection between the user and the Online Meeting Product provider. However, the applet has no functionality without being connected to the Online Meeting Product provider's proprietary system over the Internet. Fees for usage of the Online Meeting Product are paid solely by the subscriber organizing an online meeting, and there is no charge for downloading the applet. A subscriber must pay other providers for telecommunication or Internet access service to the Online Meeting Product provider's service.

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The second product, a "Web Seminar Product," allows a subscriber to organize and hold seminars on the Internet with up to 1,000 attendees. The Web Seminar Product provider transfers data using end-to-end encryption with the aid of free-of-charge applets similar to those used to access the Online Meeting Product.

The third product, an "Online Remote Support Product," enables shared screen, mouse, text chat and keyboard control between computers, so that a subscriber's technicians may provide remote computer technical support over the Internet. In order to use the Online Remote Support Product, the subscriber's technicians and the computer user in need of remote support must download a free-of-charge applet similar to those required for the other Products. Subscribers are charged for the Online Remote Support Product on a monthly per-user basis or on a day-pass basis.

The final product, a "Remote Computer Access Product," provides remote computer access capability via the Internet. Using free-of-charge applets similar to those required for the other Products, a subscriber can access and use a host computer remotely from another computer.

Tax Law § 1105 imposes sales tax on retail sales of tangible personal property, including prewritten computer software and certain enumerated services, and specifically imposes sales tax on sales of intra-state "telephony and telegraphy and telephone and telegraph service[s]." The terms "telephony and telegraphy" are defined by regulation to include the "use or operation of any apparatus for transmission of sound, sound reproduction or coded or other signals." 20 NYCRR § 527.2(d)(2). Separately, Tax Law §186-e imposes an excise tax on certain telecommunication services by a telecommunication services provider. According to the Department, the sales tax and telecommunication excise tax "are to be construed together, given the overlap in their subject matter."

In the Advisory Opinion, the Department determined that none of the Products are telephone or telecommunication services for purposes of the sales tax or the telecommunications excise tax laws, and therefore are not subject to either tax. The Department described the Products as making a mere connection or "bridge" on the Product provider's communication server because the users of the Products must provide their own Internet connections to the Product provider's server, and relied on prior Advisory Opinions ruling that "bridging" services are not telephone or telecommunication services for sales tax or telecommunication excise tax purposes. Further, the Department concluded that none of the Products constituted the sale of prewritten software, which would be subject to sales tax, despite the provision of the applets, deciding that the applets provide "limited functionality" in the overall context of the services provided by the Products.

The Department described the Products as making a mere connection or "bridge" on the Product provider's communication server . . . and relied on prior Advisory Opinions ruling that "bridging" services are not telephone or telecommunication services for sales tax or telecommunication excise tax purposes.

Finally, the Advisory Opinion identified three previously released Advisory Opinions classifying the following services as telephony or telegraphy services subject to sales tax and/or telecommunications excise tax: (1) a consulting service that routed a customer's calls through a switch to gather information for purposes of optimizing the customer's use of long distance communications (*Advisory Opinion*, TSB-A-82(31)S (N.Y.S. Dep't of Taxation & Fin., Sept. 1, 1982)); (2) a voice messaging service for subscribing physicians to record messages for retrieval by patients via telephone (*Advisory Opinion*, TSB-A-04(16)S (N.Y.S. Dep't of Taxation & Fin., June 16, 2004)); and (3) a video switching service allowing customers to send video programming transmissions to one another (*Advisory Opinion*, TSB-A-10(41)S (N.Y.S. Dep't of Taxation & Fin., Sept. 22, 2010)). The Advisory Opinion stated that, to the extent that the determinations in those previously released Advisory Opinions are inconsistent with the current Advisory Opinion, those prior Advisory Opinions no longer reflect Department policy.

Additional Insights

The Tax Law classifies "pre-written computer software" as tangible personal property subject to sales tax "regardless of the medium by means of which such software is conveyed to a purchaser." Tax Law § 1101(b)(6). The Department has concluded in other Advisory Opinions that online services may constitute a transfer of pre-written software subject to sales tax, even when the purchaser of the service never downloaded or possessed any software from the service provider. Here, the Department implicitly accepted the provider's representation that it alone was the user of "proprietary software used to provide" the Products and

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that customers were charged for the Products, but not for the use of software. In concluding that the Products were not taxable, the Department implicitly accepted the provider's representation. A company providing services over the Internet to New York customers should consider whether it could similarly support a position that any software used in providing its online services was used solely by the company, rather than its customers, in order to demonstrate that no sales tax should apply.

Further, it is notable that the Products analyzed in the Advisory Opinion required users to download a Java applet in order to be functional. The Department classified the applets as "software," but nonetheless determined that the Products themselves are not prewritten software subject to sales tax because the applets had "limited functionality."

INSIGHTS IN BRIEF

Section 184 Tax is No Longer Applicable to Mobile Telecommunication Service Providers

The Department of Taxation & Finance has issued a technical memorandum regarding the Tax Law § 184 tax on telecommunications services. *Technical Memorandum*, "Application of Taxation Law Section 184 to Mobile Telecommunication Service Providers," TSB-M-15(6)C (N.Y.S. Dep't of Taxation & Fin., July 24, 2015). In an Advisory Opinion issued in the year 2000 (TSB-A-00(18)C), the Department had taken the position that wireless communications service providers that furnish intra-LATA and inter-LATA communications were conducting a local telephone business and were therefore subject to the § 184 tax. In the new TSB-M, the Department states that in light of changes to the telephone industry since 2000, the 2000 Advisory Opinion no longer represents the Department's position, and that mobile telecommunications service providers are not engaged in a local telephone business and are therefore not subject to the § 184 tax. Such providers may be entitled to refunds of tax to the extent that the statute of limitations for refund is still open.

Sales of CLE Self-Study Programs With CDs and DVDs Are Not Subject to Sales Tax if Accompanied by CLE Affirmation Form

Receipts from sales of CLE self-study programs offering CLE credit delivered on CDs and DVDs are receipts from the provision of an educational service that is not subject to State and local sales tax and are not for the sale of tangible personal property, provided the seller includes its CLE affirmation form for the customer to return to the CLE provider upon completing study of the program materials. *Advisory Opinion*, TSB-A-15(26)S (N.Y.S. Dep't of Taxation & Fin., July 10, 2015). However, receipts from such sales made without CLE credit, and from sales of books and reference materials on legal subjects, are subject to sales tax if delivered to customers at locations in this State.

State Tribunal Allows QEZE Credit for Real Estate Taxes

Reversing an Administrative Law Judge, the New York State Tax Appeals Tribunal has held that a Qualified Empire Zone ("QEZE") credit for real property tax was properly claimed for rent paid in 2007 under a lease agreement executed in 2008 but specifically dated "'as of' June 1, 2005." *Matter of William and Andrea McNeary*, DTA No. 825093 (N.Y.S. Tax App. Trib., Aug. 3, 2015). The Tribunal found that the lease clearly specified that it was intended to have been made as of June 2005, and identified its commencement date as June 1, 2005, despite that fact that it was not executed until 2008, and that the rent paid pursuant to the lease therefore met the QEZE credit requirement that it be paid under a written lease agreement executed or amended on or after June 1, 2005. The Tribunal found that New York law recognizes and enforces retroactive effective dates agreed to by parties to an agreement and that the cases relied upon by the ALJ were not relevant since they dealt with attempts to impose a liability against a third party, where in this case the McNearys were not seeking to impose any obligation, but only asking that their valid contract be recognized.

Department Rules That Receipts From Party Cruises Are Subject to Tax When Meal and Beverage Are Included

In an *Advisory Opinion*, TSB-A-15(30)S (N.Y.S. Dep't of Taxation & Fin., July 15, 2015), the New York State Department of Taxation and Finance has ruled that sales tax applies to tickets to a sightseeing cruise around New York Harbor when the charge for the cruise includes access to a catered meal and two alcoholic or nonalcoholic drinks served on board the vessel. Tax Law § 1105(d) imposes sales tax on the receipts from food and beverages sold by "establishments," and includes in taxable receipts any cover, minimum, entertainment or other charge unless the food and drink are "incidental." The Petitioner was found to be operating an establishment with receipts from food and drink, and the receipts were found not incidental to the boat cruise, since the Petitioner provided hot catered food in a separate dining area and paid the boat owner to serve drinks in a bar, and was required to maintain a liquor license to do so. However, if the price of the ticket did not entitle the passengers to food or drink, the receipts would not be subject to sales tax.

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