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MORRISON FOERSTER

RETROACTIVE APPLICATION OF 2010 STATUTORY AMENDMENT PERMITTED BY TRIBUNAL

By Hollis L. Hyans

Reversing the decision of an Administrative Law Judge, the New York State Tax Appeals Tribunal has upheld the constitutionality of retroactively applying to the 2008 tax year a 2010 statutory amendment to Tax Law § 632(a)(2) concerning the treatment of installment payments by nonresident shareholders of an S corporation. *Matter of Jeffrey M. and Melissa Luizza*, DTA No. 824932 (N.Y.S. Tax App. Trib., Mar. 29, 2016). Despite the fact that the taxpayers had reasonably relied on the then-current state of the law in structuring their 2008 transaction, the Tribunal found that the recent decision of the Court of Appeals in *Caprio v. New York State Dep't of Taxation and Fin. et al.*, 25 N.Y.3d 744 (2015), *reh'g denied*, 26 N.Y.3d 955 (2015), required it to apply the statutory amendment retroactively.

Facts. The petitioners, Mr. and Mrs. Luizza, were nonresidents of New York. Mr. Luizza owned 100% of the stock of an S corporation that did business in New York and other states, and in December 2007 he agreed to sell the company to an unrelated purchaser. At the purchaser's request, Mr. Luizza agreed to an election to treat the sale as a deemed sale of the company's assets pursuant to Internal Revenue Code ("IRC") § 338(h)(10), but only to the extent that there would be "no negative federal or state tax implications for the S corporation or himself individually," and requested that he be reimbursed for any such tax consequences. The purchaser requested instead that the tax consequences of the election be addressed up front, so Mr. Luizza and his accountants researched the federal and New York State tax implications, including the effects of Tax Law § 632(a)(2) and other New York State authority available in late 2007 and early 2008. Mr. Luizza was advised by his tax advisors that there would be no tax consequences in New York as a result of the election, and he therefore agreed not to require the purchaser to increase the purchase price or to provide indemnity when the sale closed in March 2008. The Department of Taxation and Finance stipulated that "Mr. Luizza reasonably relied on the New York law applicable at the time of the sale when he agreed not to require the [b]uyer to increase the purchase price nor to provide indemnity for any additional taxes arising as a result of the election."

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Mr. Luizza reported a capital gain of approximately $8 million on his 2008 New York nonresident income tax return, but did not include the gain as income attributable to New York sources.

Background to the 2010 Statutory Amendment. Mr. Luizza's research correctly stated the law at the time of the transaction. Furthermore, in 2009, the Tax Appeals Tribunal expressly held that, under Tax Law § 632(a)(2), nonresident shareholders did not have New York source income when they sold their stock in an S corporation where an election had been made under IRC § 338(h)(10). *Matter of Gabriel S. & Frances B. Baum*, DTA Nos. 820837 & 820838 (N.Y.S. Tax App. Trib. Feb. 12, 2009). A few months after *Baum*, an ALJ reached a similar conclusion in *Matter of Myron Mintz*, DTA Nos. 821806 & 821807 (N.Y.S. Div. of Tax App., June 4, 2009).

Having lost in litigation, the Department sought to change the statute. In August 2010, Tax Law § 632(a)(2) was amended to specifically provide that gain recognized by a nonresident shareholder of an S corporation will be treated as New York source income based on the S corporation's New York business allocation percentage for the year in which the assets were sold. The amendment was made retroactive to years beginning on or after January 1, 2007, that were open for assessment or refund, and was accompanied by legislative findings stating that the change was "necessary to correct a decision of the tax appeals tribunal and a determination of the division of tax appeals that erroneously overturned the longstanding policies of [the] department of taxation and finance . . . ."

In reliance on the statutory amendment, the Department took the position that the Luizzas had to allocate a portion of the capital gain to New York and issued a Notice of Deficiency for nearly $200,000, including tax and interest, but without penalty. The Luizzas argued that the retroactive application of the amended Tax Law § 632(a)(2), under the circumstances, violated their right to due process.

ALJ Decision. The ALJ agreed with the Luizzas. In deciding whether to apply the statute retroactively, he relied on an analysis that was set out by the Court of Appeals in *James Square Assocs. LP, et al. v. Mullen*, 21 N.Y.3d 233 (2013), which reviewed three factors: (1) the taxpayer's forewarning of a change and the reasonableness of reliance on the old law; (2) the length of the period of retroactivity; and (3) the public purpose for retroactive application.

With regard to the first factor, which has been held to be the "predominant" factor, the ALJ found that neither Mr. Luizza nor his advisers had any knowledge or reason to believe in 2008 that there would be a statutory change two years later, that Mr. Luizza reasonably relied on the law applicable at the time of the sale, and that Mr. Luizza was harmed by his reliance, since he did not have the opportunity to seek a higher purchase price or require an indemnity from the purchaser as he originally intended. With regard to the period of retroactivity, the ALJ relied on the "guidance" of the Appellate Division in an earlier level of the *Caprio* litigation, in a case involving the same set of statutory amendments but concerning the tax treatment of installment obligations rather than deemed asset sales, and found that the period of retroactivity was excessive. *Caprio v. New York State Dep't of Taxation and Fin. et al.*, 117 A.D.3d 168, 177 (1st Dep't 2014). The ALJ also noted the Appellate Division's conclusions in *Caprio* that there was no legislative history to support the Department's position that the amendment was correcting any specific defect, rather than changing the statute to adopt the position requested by the Department, and that there was no valid public purpose in correcting the "mistakes" of the Tribunal in *Baum* and an ALJ in *Mintz*, since the Appellate Division had clearly found that the purpose of the amendment was not corrective but to raise tax revenues by $30 million.

[T]he Tribunal found that the clear intention of the Court of Appeals in *Caprio* was to uphold the retroactivity of all of the 2010 amendments.

In 2015, after the ALJ's decision in *Luizza*, the Court of Appeals reversed the Appellate Division in *Caprio*, and, as discussed in the January issue of *New York Tax Insights*, held that the retroactive application of the portion of the 2010 statutory amendments applicable to the tax treatment of installment obligations did not violate the taxpayers' Due Process rights.

Tribunal Decision. In light of the reversal in *Caprio* by the Court of Appeals, the Tribunal found that it needed to decide, first, whether it was bound by the decision in *Caprio* to uphold the constitutionality of the 2010 amendments as they applied to the Luizzas' facts. While noting that it was "not without serious concerns as to the ramifications of this decision," the Tribunal held that *Caprio* must control.

Although the retroactivity of the deemed asset sale amendments was not directly before the Court of Appeals in *Caprio,* where the plaintiffs had limited

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their challenge to the retroactive application of the amendments concerning the tax treatment of installment obligations, the Tribunal found that the clear intention of the Court of Appeals in *Caprio* was to uphold the retroactivity of all of the 2010 amendments.

Next, the Tribunal considered whether fact differences distinguished the case from *Caprio*, since the Luizzas, unlike the plaintiffs in *Caprio*, had sought and relied upon professional advice and demonstrated that they would have adjusted the purchase price if they had any forewarning of the change in law, and the Department stipulated their reliance was reasonable. However, the Tribunal found that *Caprio* required it to conclude that "petitioner's reliance on the law cannot be held to be reasonable despite the stipulation signed by both parties and the additional facts that petitioners have proven . . . because, according to *Caprio*, petitioner should have been aware . . . of the long standing policies" of the Department. In reaching this conclusion, the Court of Appeals in *Caprio* had relied on the legislative findings, as well as an affidavit of an auditor concerning that policy. The Tribunal rejected the Luizzas' argument that the Department had submitted no evidence of any such long-standing policy in their case, stating that *Caprio* required the conclusion that the Department's policy made their reliance on their interpretation unreasonable and defeated their argument that they had no way of foreseeing the 2010 changes.

With regard to the period of retroactivity, the Tribunal found that, since *Caprio* had concluded the purpose of the 2010 amendments was curative or corrective, the two-and-a-half to three-year period of retroactivity was not unreasonable.

Finally, the Tribunal also rejected the Luizzas' attempt to distinguish their case from *Caprio* on the grounds that the actual issue in *Caprio* was the retroactive application of the installment obligation amendments, which had been ruled on only in the non-precedential *Mintz* ALJ decision, rather than the deemed asset sale amendments, which had been ruled on by the Tribunal in the precedential *Baum* decision. While noting that the legislature "cannot cure or correct a decision of this Tribunal that is final and irrevocable," the Tribunal found that the decision in *Caprio* about the "curative, rational public purposes" in the legislative findings overcame any arguments about the finality and continued effect of Tribunal decisions such as *Baum*.

Additional Insights

Given the decision in *Caprio*, the result in *Luizza* may not be surprising, but these two decisions taken together raise troubling questions about the administration of tax policy in New York State. The only evidence of the "curative" and "corrective" nature of the 2010 arguments found by the Court of Appeals was the legislative findings and an affidavit submitted by a Department auditor concerning the Department's internal policy—but no evidence that there had been any external statements of this policy that would have put taxpayers on actual notice. Indeed, the Department itself stipulated that the Luizzas had "reasonably relied" on the state of the law at the time they made a decision on whether or not to seek indemnity from the buyer. Both an ALJ and the Tribunal, in a precedential decision, had disagreed with the Department's interpretation of the original statute, regardless of the internal policy followed or arguments made by the Department in litigation. The combination of the *Caprio* decision and the *Luizza* Tribunal decision, if it is the last word on this case, seem to indicate that taxpayers rely on contemporaneous research and Tribunal decisions at their own peril. While the precise issue involved in these cases—the retroactive application of the 2010 statutory amendments—probably does not apply to many more cases by now, the underlying principles could end up having broader application whenever the Department seeks to reverse an unfavorable Tribunal decision via retroactive legislation.

As of this writing, it is not known whether further appeal will be sought in *Luizza*.

TRIBUNAL OVERTURNS ALJ AND HOLDS THAT BANK MUST APPLY NOLS IN YEAR TAXED ON NON-INCOME BASE

By Kara M. Kraman

The New York State Tax Appeals Tribunal has held that a taxpayer was required to use its net operating loss ("NOL") carryforward deduction to decrease its entire net income in a year in which its banking corporation tax liability was not measured by its entire net income. *Matter of TD Holdings II, Inc.*, DTA No. 825329 (N.Y.S. Tax App. Trib., Apr. 7, 2016). The Tribunal overturned the determination of the ALJ, who had held that the taxpayer was not required to use any portion of its NOL in a year in which its entire net income was already low enough to trigger the application of an alternative tax base.

During tax years 2005 through 2007, TD Holdings II, Inc. ("TD Holdings") was subject to the New York bank tax under former Article 32 and filed New York bank tax returns. In 2005, TD Holdings reported a

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loss of approximately $11.7 million for federal income tax purposes and approximately $9.2 million for New York bank tax purposes. In 2006, TD Holdings claimed approximately $3.7 million of its 2005 federal NOL carryforward on its federal return, but did not claim any of its 2005 New York NOL carryforward on its New York bank tax return because its 2006 entire net income was low enough that the alternative tax on assets was instead triggered. In 2007, TD Holdings claimed the remainder of its 2005 federal NOL carryforward on its federal return and claimed the remainder of its 2005 New York NOL carryforward on its New York bank tax return. On audit, the Department required TD Holdings to use its available New York NOL carryforward to offset its entire net income in 2006, even though it was not taxed on its entire net income in that year.

[T]here was no language in Tax Law former § 1453(k-1) which limited the application of an NOL carryforward to years in which the taxpayer measured its bank tax liability on its entire net income base.

During the years at issue, the New York bank tax was imposed on one of four alternate bases, whichever resulted in the highest tax: (i) entire net income; (ii) taxable assets; (iii) alternative entire net income; or (iv) a minimum tax. Tax Law former § 1455. The Tax Law also provided that the allowable New York NOL deduction was "presumably the same" as the federal NOL deduction claimed in the same year, and the New York NOL deduction could not exceed the maximum federal NOL deduction allowed for the same year. Tax Law former § 1453(k-1).

The ALJ had concluded that under the plain language of the statute, TD Holdings was not required "to hypothetically apply the 2005 New York NOL to an entire net income [base] that was already sufficiently low enough to cause use of an alternative tax base," and that while the statute provided that a taxpayer's New York NOL deduction could not *exceed* its federal NOL deduction, it did not provide that the deduction could not be *less* than its federal NOL deduction. In reaching his conclusion, the ALJ had relied heavily upon a Tax Appeals Tribunal decision holding that the similar corporate income tax statute that placed a ceiling on New York NOL deductions equal to allowable federal NOL deductions did not provide that a New York NOL deduction "can never be *less than* the [f]ederal deduction." *Matter of Brooke-Bond Group (U.S.), Inc.*, DTA No. 810951 (N.Y.S. Tax App. Trib., Dec. 28, 1995) (emphasis in original).

The Tribunal overturned the ALJ determination, noting at the outset that tax exemption and deduction statutes must be strictly construed against the taxpayer, and that the taxpayer must prove that the Department's interpretation of the statute is "irrational" and that the taxpayer's interpretation is the only reasonable construction. The Tribunal then held that the taxpayer failed to meet its burden to show that the Department's interpretation was unreasonable because there was no language in Tax Law former § 1453(k-1) which limited the application of an NOL carryforward to years in which the taxpayer measured its bank tax liability on its entire net income base. The Tribunal also found *Matter of Brooke-Bond* to be inapplicable, noting that the decision did not in any way tie the New York NOL deduction to the payment of New York tax on an alternative basis. Instead, it found that *Brooke-Bond* simply established that given the legislative intent to conform New York law to federal law with respect to NOLs, New York taxpayers should benefit from the federal rule that NOL deductions should be limited to an amount that brings a taxpayer's income to zero, even where such an amount results in a New York NOL deduction that is less than the federal NOL deduction.

The Tribunal also found that the New York State corporate tax reform legislation effective for tax years beginning on or after January 1, 2015, which expressly limits the maximum allowable NOL deduction in a year to "the amount that reduces the taxpayer's tax" on its income base to the higher of the other potentially applicable bases, also supported the Department's interpretation of the Tax Law in effect for tax years prior to 2015. The Tribunal reasoned that "when the Legislature amends a statute, it is presumed that the amendment was made to effect some purpose and make some change in the existing law."

Additional Insights

It is not known at this time whether TD Holdings will appeal the Tribunal's decision. Although the issue of NOL utilization is now clearly addressed under the new corporate tax reform legislation, if the Tribunal's decision is appealed and overturned, it could potentially create refund opportunities for both banks and non-banks that utilized NOL carryforward deductions in years when they were not subject to tax on the entire net income base. In particular, the ultimate resolution

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of this case will impact the computation of a taxpayer's prior NOL conversion subtraction (the device by which pre-2015 NOLs are calculated and carried forward for use in tax years beginning on or after January 1, 2015).

HIGHLIGHTS OF 2016–2017 NEW YORK STATE BUDGET

By Irwin M. Slomka

On April 13, 2016, Governor Andrew Cuomo signed into law the final 2016–2017 New York State Budget (S.6409-C, A.9009-C). Although not as wide-ranging with regard to taxes as other budget legislation in recent years, there are several key tax provisions:

- **Hotel Room Remarketers.** The new law provides an exemption from New York State sales tax and New York City hotel tax for hotel room remarketers for their purchases of hotel room occupancies that in turn are supplied to customers of the room remarketers. Previously, room remarketers were required to pay sales tax on hotel room purchases and then seek a credit or refund from New York State where sales tax and hotel tax was collected on the remarketed rooms. Part X.
- **Corporate Tax Reform Technical Corrections.** Technical corrections were made to the New York State and New York City corporate tax reform laws, including re-defining the "qualified financial instrument" definition to exclude stock that generates "other exempt income" and that is not marked-to-market. Part P.
- **Filing Deadlines.** Conform the New York State and City tax filing deadlines for corporations and partnerships to the new deadlines put in place for federal income tax purposes. Part Q.
- **Estate Tax.** The new law eliminates charitable contributions and activities as a factor in determining domicile for estate tax purposes, similar to the law under the personal income tax. Part Y.
- **Middle Class PIT Reduction.** Personal income tax rates were reduced for individuals with taxable income between $26,000 and $300,000 for tax after 2017. Part TT.

ALJ DECLINES TO APPLY "CONVENIENCE OF EMPLOYER" RULE IN DETERMINING NONRESIDENT'S NEW YORK SOURCE INCOME

By Irwin M. Slomka

The Department of Taxation and Finance's attempt to apply precedent under the "convenience of the employer" rule to treat a portion of a nonresident individual's salary as New York source income has been rejected by an Administrative Law Judge in *Matter of Carmelo and Marianna Giuffre*, DTA No. 826168 (N.Y.S. Div. of Tax App., Mar. 31, 2016)

Mr. Giuffre is a Florida domiciliary and the sole member and employee of his own consulting firm, Giuffre Management Consulting, LLC ("GMC"), located in Palm Beach, Florida. Prior to 2009, Mr. Giuffre was president of a family-owned business in Brooklyn comprised of car dealerships located in New York and New Jersey. The car dealerships were operated by family members, including his two sons.

Under an agreement entered into in November 2008 between GMC and the Brooklyn-based family auto dealership business, GMC provided management "consulting services" for the New York and New Jersey dealerships. The agreement specified that the services would be provided "via telephone or electronically." Mr. Giuffre provided unspecified management advice to the dealerships from GMC's Palm Beach offices. Although he did visit New York during 2009, and even visited the New York dealerships operated by his family members, those visits were personal in nature. He was not involved in the daily operations of those dealerships.

In 2009 (the tax year in issue), Mr. Giuffre earned a salary of $1.3 million from GMC. Although the decision does not so indicate, it is assumed that he did not report any of his salary as New York source income. The Department assessed personal income tax against Mr. Giuffre, treating a portion of his salary as being from New York sources. The Department sourced his $1.3 million salary to New York based on the ratio of the number of auto dealerships the family business operated in New York to the total number of auto dealerships it operated in New York and New Jersey, which came to 59%.

The issue presented was whether Mr. Giuffre had income derived from New York sources, where the facts (based on evidence which seems to have consisted principally of

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affidavits) indicated that he did not perform *any* services in New York State. The Department appears to have taken the position that Mr. Giuffre's income should be sourced to New York under *Matter of Speno v. Gallman*, 35 N.Y.2d 256 (1974), which held that nonresident individuals employed by a New York employer but who for their own convenience rather than necessity worked both within and outside the State had New York source income even for work performed outside the State — *i.e.*, the "convenience of the employer" rule.

[T]he ALJ rejected application of the convenience of the employer rule . . . since Mr. Giuffre was employed in Florida, not New York, and did not perform any services or have an office in New York.

A nonresident individual is subject to New York State personal income tax to the extent the individual derives income from New York sources. This includes income from a trade or business carried on in New York. Tax Law §§ 631(a) and (b). A trade or business is carried on in New York State where the taxpayer regularly and systematically carries on business at a location in the State. 20 NYCRR 132.4(a)(2). This is separate from the so-called "convenience of the employer" rule, which sources to New York State a nonresident employee's salary and other compensation earned outside the State for the employer's convenience. That rule typically is invoked in the case of nonresidents whose primary work location is at the employer's New York office, but who seek to source a portion of their salary outside the State.

Here, the ALJ rejected application of the convenience of the employer rule, as applied in *Speno*, since Mr. Giuffre was employed in Florida, not New York, and did not perform any services or have an office in New York. The ALJ distinguished the case from *Matter of Huckaby v. N.Y. State Div. of Tax Appeals*, 4 N.Y.3d 427 (2005), which upheld application of the convenience of the employer rule against a Tennessee resident who worked in Tennessee as a convenience to his New York-based employer. Having found no evidence here that Mr. Giuffre actually worked in New York State, despite having clients in the State, the ALJ concluded that he did not have New York source income with respect to his salary, and the ALJ directed that the assessment be cancelled.

Additional Insights

Under the limited facts presented, the ALJ's decision certainly seems correct, and any analogy to application of the convenience of the employer rule upheld in *Matter of Huckaby* would clearly be erroneous since Mr. Giuffre was employed by a Florida employer and did not perform any consulting services in the State. The decision does not address—possibly because the issue was not raised—the nature and extent of the consulting services that he performed. Indeed, the decision contains no description of those services. Had Mr. Giuffre's compensation represented not salary for his ongoing consulting services performed in Florida, but rather some form of deferred compensation from his former employment in New York, that compensation would have resulted in New York source income as arising from his prior in-State employment.

NEW YORK STATE RELEASES NEW CORPORATE TAX REFORM FAQS ON APPORTIONMENT

By Kara M. Kraman

The New York State Department of Taxation and Finance continues to provide guidance in the form of responses to frequently asked questions ("FAQs") regarding the corporate tax reform legislative amendments that took effect for taxable years beginning on or after January 1, 2015 on its website at http://www.tax.ny.gov/bus/ct/corp_tax_reform_faqs.htm. During the week of April 4, 2016, the Department published answers to three new FAQs relating to apportionment.

First, the Department addressed how interest income on funds deposited with the Federal Reserve (other than federal funds) is apportioned, and explained that such receipts are considered receipts from "other financial instruments," and are apportioned to the payor's location, which is the location of the Federal Reserve branch where the corporation made the deposit.

Second, it addressed how interest income on "deposits" is apportioned to New York, and explained that such receipts are also considered receipts from "other financial instruments," and are sourced to the payor's commercial domicile. It is not entirely clear from the FAQ what type of "deposits" the Department believes should be treated as "other financial instruments" under the Tax Law, although cash deposits with financial institutions would not appear to constitute "other financial instruments."

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Third, the Department addressed how interest income from a loan that is secured by property located inside and outside of New York is apportioned. A loan is considered a loan secured by real property if 50% or more of the fair market value of the collateral used to secure the loan consists of real property. The Department explained that where a loan is secured by real property located both inside and outside of New York State, the amount of interest income apportioned to New York is computed by multiplying the total interest income from the loan by a fraction, the numerator of which is the fair market value of real property located in New York used to secure the loan, and the denominator of which is the fair market value of all real property used to secure the loan. If the loan is not treated as a loan secured by real property because it does not meet the 50% threshold, the interest is apportioned to New York if the borrower is located in New York. The determination of the type of loan, fair market value of real property, and the borrower's location is made at the time the loan is entered into, but if the loan is refinanced, the type of loan, the amount of income to apportion to New York, and the borrower's location must be redetermined at the time of the refinancing.

Additional Insights

The new FAQs address issues of customer sourcing for various types of interest income, issues that did not exist under the former tax regime. While the Department's FAQs are useful as a source of general guidance on topics of interest to taxpayers, it is important to note that they are not binding on the Department and do not carry the force of law or even regulation. To reinforce this point, the Department itself states on its FAQ website that "taxpayers should be aware that subsequent changes in the Tax Law or its interpretation may affect the accuracy of an FAQ. The information provided in these FAQs does not cover every situation and is not intended to replace the law or change its meaning."

INSIGHTS IN BRIEF

Tribunal Upholds Constitutionality of N.Y.S. Driver's License Suspension Program for Unpaid Taxes

The Tax Appeals Tribunal has affirmed an ALJ summary determination upholding a 60-Day Notice of Proposed Driver License Suspension under Tax Law § 171-v. *Matter of Juan Kip Lenoir*, DTA No. 826389 (N.Y.S. Tax App. Trib., Mar. 18, 2016). Under that program, a taxpayer with more than $10,000 in unpaid tax assessments has only limited grounds to challenge the amounts assessed within 60 days of issuance of the Notice or else have his or her New York State driver's license suspended until the amounts are paid. In addressing the taxpayer's constitutional challenge to the law, the Tribunal concluded that a driver's license is not a "fundamental right." Therefore, a strict standard of review is not applicable, and the need to collect past-due liabilities provided a rational basis for suspending drivers' licenses of those with unpaid past-due tax liabilities in excess of $10,000.

Taxpayer Bound to Test Period Agreement for Sales Tax Audit

A New York State Administrative Law Judge has held that a pool service company that, through its former representative, previously consented to a sales and use tax test period audit could not, through its new representative, compel the Department's auditor to review all of the company's books and records for the entire audit period. *Matter of Crystal Clear Pool Service, Inc.*, DTA No. 826609 (N.Y.S. Div. of Tax App., Mar. 17, 2016). The ALJ found that the taxpayer offered no evidence to refute the various discrepancies identified by the auditor for the test period and concluded that the audit methodology selected was reasonably calculated to reflect the tax due for the audit period. The ALJ also "firmly rejected" the taxpayer's statement in its reply brief that the auditor gave "false testimony."

Tribunal Upholds Denial of Brownfield Credit

The New York State Tax Appeals Tribunal has upheld the decision of an Administrative Law Judge denying the site preparation credit component of a brownfield redevelopment tax credit because it found that the costs were not "chargeable to a capital account" as required by the statute. *Matter of Coltec Industries, Inc.*, DTA No. 825211 (N.Y.S. Tax App. Trib., Mar. 18, 2016). Coltec had claimed a brownfield redevelopment tax credit for remedial costs under Tax Law §§ 21(a) and (b), which defines creditable costs as "all amounts properly chargeable to a capital account . . . paid or incurred" in connection with a site's "qualification for a certificate of completion . . . ." Tax Law § 21(b)(2). The Tribunal held that the phrase "properly chargeable to a capital account" required that the costs must have been actually charged to such an account, and not merely capable of being so charged, so that once Coltec made an election under IRC § 198 to expense the costs, they were no longer "properly chargeable to a capital account" and became ineligible for the site preparation credit.

Sprint Challenges Withholding of Documents Under Tax Secrecy Laws in False Claims Act Litigation

In the False Claims Act case involving Sprint that is proceeding to trial after the Court of Appeals denied Sprint's motion to dismiss the case (*see* November

2015 issue of *New York Tax Insights*), Sprint requested production of any documents concerning the critical issue, which involves the Department's claim that Sprint improperly "unbundled" wireless package offerings to avoid collecting tax on fixed monthly charges for wireless telephone calls. Sprint requested internal documents and communications with third parties, such as other telecommunication companies, claiming the documents are directly relevant and that the Attorney General has put in issue the practices of other communications companies and their correspondence with the Department by alleging that Sprint's primary competitors collected and paid sales tax on the charges at issue. While the Department has claimed the documents are protected by the Tax Secrecy provisions of Tax Law § 1146, Sprint argues that the Tax Secrecy provisions only protect tax returns and materials disclosed in such returns, but do not extend to any documents that happen to contain information that also appears in a return, including the mere fact that a return was filed. *People of the State of New York v. Sprint Communications, Inc.*, Index No. 103917/2011, Memorandum of Law in Support of Defendants' Motion to Compel (filed Apr. 8, 2016). Separately, Sprint's petition for review, contending that the Court of Appeals decision conflicts with the Mobile Telecommunications Sourcing Act, 4 U.S.C. 123(b), is pending before the United States Supreme Court. *Sprint Nextel Corp. et al. v. State of New York, et al.*, Docket No. 15-1041 (filed Feb. 18, 2016).

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