
TAX - NEW YORK

In re Brookdale Physicians' Dialysis Associates, Inc.

Supreme Court, Appellate Division, First Department, New York - December 3, 2019 - 178 A.D.3d 443 - 113 N.Y.S.3d 691 - 2019 N.Y. Slip Op. 08636

Building owner, which was a not-for-profit healthcare fund, and for-profit healthcare provider brought article 78 petition to annul determination by city department of finance denying application for exemption from real property taxation.

The Supreme Court, New York County, found building qualified for tax-exempt status and granted petition, denying finance department's cross-motion to dismiss petition. Finance department appealed.

The Supreme Court, Appellate Division, held that use of nonprofit healthcare fund's building by for-profit lessee for dialysis was reasonably incident to fund's purpose.

Use of building owned by not-for-profit healthcare fund and leased to for-profit healthcare provider was reasonably incident to fund's purpose of funding its affiliated hospital and nursing institute, and, thus, building qualified for tax-exempt status, where for-profit provider provided dialysis services in building to patients of hospital and nursing institute at little to no direct cost to not-for-profit healthcare affiliates, dialysis provider was staffed exclusively by employees of hospital, majority of dialysis patients were referred by hospital and nursing institute, and fund placed profits from rent receipts back into healthcare affiliates.

TAX - INDIANA

Square 74 Associates LLC v. Marion County Assessor

Tax Court of Indiana - December 3, 2019 - N.E.3d - 2019 WL 6696247

Tenant of five commercial spaces appealed from determination by Indiana Board of Tax Review granting county assessor's motion to dismiss tenant's petitions for correction of errors in tax assessments, based on finding that purported errors in determination of leasehold interest were not objective errors that could be corrected in such proceeding.

The Tax Court held that:

- Lease did not objectively exclude land underneath ground-floor commercial spaces from leasehold;
- Statute governing assessment of leased, tax-exempt real property did not require exclusion of underlying land from assessment of leasehold; and
- Regulation governing assessment of improvements on leased ground did not require assessment of leasehold estates to exclude underlying land.

Lease defining tenant spaces, real estate taxes, and respective responsibilities of lessee and lessor did not objectively exclude land underneath ground-floor commercial spaces from leasehold, and, thus, county assessor's purported errors in assessing taxes against tenant based on land underneath commercial spaces could not be fixed by means of administrative process for correction of objective errors; lease did not directly state land was excluded or clarify whether land was among those "structural components" of overhead parking garage that were excluded from tenant's responsibilities.

Tax statute providing that when real property that is exempt from property taxation is leased to an entity that is not entitled to a property tax exemption, the leasehold estate is to be assessed and taxed as if the lessee owns the real property did not dictate conditions of lease creating leasehold estate, and, thus, did not require assessment of commercial leasehold of ground-floor spaces, which were owned by city, to exclude land beneath spaces; statute treated leasehold estate as synonymous with term "real property," such that it could include assessed value of land itself, building or fixture on land, appurtenance, or certain mining rights or mineral interests.

Regulation providing procedures for assessing improvements located on leased ground did not create per se rule that assessment of leasehold estates excludes the underlying land.

The OZ Regulatory Process: Behind the Scenes at Treasury, with Dan Kowalski.

What are the five most impactful changes in the final IRS regulations on Opportunity Zones? And what's the true story behind the Opportunity Zone designation in Storey County, NV? Daniel Kowalski is counselor to Treasury Secretary Steven Mnuchin and led the Treasury Department's efforts in issuing regulations on Qualified Opportunity Funds. Click the play button below to listen to my conversation with Dan.

Continue reading.

Opportunity Db

January 22, 2020

New Law Repeals Parking Tax for Tax-Exempt Organizations.

Good news for tax-exempt organizations! The "Further Consolidated Appropriations Act, 2020" (H.R. 1865 — 116th Congress (2019-2020)) (the "Act") signed into law on December 20, 2019, retroactively repealed Section 512(a)(7) of the Internal Revenue Code of 1986, often referred to as the "parking tax."

Section 512(a)(7) was enacted under the Tax Cuts and Jobs Act of 2017 and generally required tax-exempt organizations to include as unrelated business taxable income amounts paid for employee parking and/or qualified transportation fringe benefits (e.g., transit passes). Section 512(a)(7) was widely criticized not only for the tax and administrative burden it imposed on tax-exempt organizations, but also for its lack of clarity and uncertain application.

Because the Act retroactively repealed Section 512(a)(7), tax-exempt organizations may be entitled to file an amended Internal Revenue Service Form 990-T to claim a refund for any parking taxes paid.

Thursday, January 16, 2020

Low Bond Yields Are Killing Muni Tax Breaks.

Don't expect to reap much of a tax break from municipal bonds anymore.

Investors have flooded into muni bond funds, expecting to reap savings by owning nontaxable bonds issued by states, municipalities and other local-government entities. But bond prices have risen so much, pushing yields down, that the savings are getting tougher to find.

"For most taxpayers, there's no longer a significant yield advantage for muni funds after you take taxes into account," Amy Arnott, a portfolio strategist at Morningstar, writes in an article posted Tuesday on Morningstar.com.

Continue reading.

Barron's

By Daren Fonda

Updated Jan. 15, 2020

Financing Affordable Housing and Small Businesses through Opportunity Zones.

Abstract

The Opportunity Zones tax incentive, created by the Tax Cuts and Jobs Act of 2017, was designed to spur investment in low-income and undercapitalized communities. How can stakeholders use the program to support affordable housing, finance small businesses, and boost job creation? The experiences of investors, developers, government officials, and business representatives show how the incentive is playing out nationally and locally in Cuyahoga County, Ohio.

Download pdf.

The Urban Institute

by Jorge González & Brett Theodos

January 14, 2020

The Obscure Reason Banks Will Finally Embrace Opportunity Zones.

Looming changes to 1970s-era law could open the lending floodgates

Banks may soon have the incentive they need to sink huge amounts of money into Opportunity Zones, the controversial Trump administration tax abatement program that has seen tepid investment levels to date.

The federal government plans to give commercial banks credit for issuing loans in low-income communities as part of a larger reform to a 1970s-era law called the Community Reinvestment Act. This is the first direct regulatory incentive for banks to lend in Opportunity Zones and could be a game-changer for the program, according to some experts.

"CRA is a big motivator for inter-activities at banks," said Steve Glickman, one of the architects of the Opportunity Zone initiative, which gives massive tax deferments and tax breaks to those who invest in projects in designated low-income neighborhoods across the country. "They are going to have institutional interest in all of this."

Glickman, who founded and runs Opportunity Zone consultancy firm Develop LLC, said that the reformation of the CRA and the recent finalization of the program's rules should spur banks to direct investor money into qualifying projects. Banks' own asset management arms could begin to deploy more money into Opportunity Zones as well, he said.

For banks, lending in Opportunity Zones would allow them to fulfill elements of a government mandate that they lend in poor communities.

Although many bankers and developers believe the combination of expected CRA reforms and finalized Opportunity Zone regulations could lead to substantial investment in poor communities, finance watchdogs are wary about the types of projects that qualify.

What the CRA is and why it matters

The CRA was crafted in 1977 under President Jimmy Carter and was designed to incentivize banks to lend in low income communities and prevent redlining, or the practice of not lending to minority communities.

A poor rating on the CRA can prevent a bank from opening new branches or completing a merger. It also invites heavier scrutiny from regulators if a bank has a bad rating.

But some bankers argue the law is out of date, especially in the age of digital banking and the lack of brick and mortar branches. Under a more banker-friendly Trump administration, two regulators, the Office of the Comptroller of the Currency and the FDIC, are now looking to revamp the rule and change how the CRA looks at geographic areas where the banks take in deposits. The regulators are also looking to combine Opportunity Zones into the CRA rules under a proposal released by the OCC and the FDIC.

This inclusion of Opportunity Zones in the revamp, however, has also drawn the most criticism from those who are skeptical of the proposed CRA changes.

One section of the proposed regulation mentions that banks can receive credit for lending to athletic facilities in Opportunity Zones. In other words, a bank could potentially receive credit on their CRA exam for financing the proposal to build the Tampa Bay Rays stadium in Ybor City, Florida, that was estimated to cost nearly $900 million.

"The Baltimore Ravens Stadium would qualify as a credit. We have got to look at the large scale projects that might not have localized community impact," said Nikitra Bailey, the executive vice president of the Center for Responsible Lending.

Giving credit to sports stadiums in Opportunity Zone projects amplifies the argument of critics who claim that the program is effectively a tax break for wealthy developers masquerading as a benefit for the poor. Critics have pointed to Richard LeFrak's $4 billion mixed-use project Sole Mia in an Opportunity Zone in North Miami as well as Kushner Companies plans to build a 1,100 unit-luxury apartment building in Miami's Edgewater neighborhood.

Opportunity Zones developers have largely focused on building projects in gentrifying areas and in projects that were already planned before the Opportunity Zone legislation was released. The Department of Housing and Urban Development under Sec. Ben Carson said the agency is giving preferences on certain credits for developers who build affordable housing in Opportunity Zones. But so far, large-scale investment in affordable development in these areas has yet to materialize.

Lending in the land of OZ

The Opportunity Zone program became the arguably most talked about program in the real estate world over the last two years. Tucked away in President Trump's tax plan, it offers developers and investors the ability to defer or forgo paying capital gains taxes for investment in one of the more than 8,700 federal Opportunity Zones across the country. Treasury Secretary Steven Mnuchin even said it could result in $100 billion in private investment.

Despite the hype, investor interest in hasn't quite materialized.

Many funds have had trouble raising capital. Of a sampling of 103 Opportunity Zone funds that sought to raise $22.7 billion, only $3 billion was raised, according to an October report by accounting firm Novogradac & Co. One notable pullback is Anthony Scaramucci's SkyBridge Capital, which first sought to raise $3 billion, but is now seeking just $300 million.

But there are signs that the finalization of program rules has already contributed to an uptick in investment. At least $2.3 billion was put into Opportunity Zone Funds between early December through early January, according to a survey from Novogradac, a 51 percent increase over the prior month. (It should be noted that investors had to commit their capital by the end of 2019 to receive the full benefit of the program, which is likely a bigger reason for the increase in investment.)

Brett Forman of Trez Forman, a nonbank lender based out of Boynton Beach, said he is skeptical of some of the proposed projects in Opportunity Zones. So far, some of the borrowers that have approached him are less experienced in real estate development and are sometimes ones that wouldn't be able to land bank financing.

"They think that a nonbank lender will jump on it," said Forman.

Avra Jain, a Miami-based Opportunity Zone developer, however, has previously told The Real Deal that the program makes financing for certain projects more accessible, such as her group's 15-story office building in Miami's Midtown neighborhood.

Shane Neman, who purchased a cold-storage facility in an Opportunity Zone in Miami's Allapattah neighborhood, said he is now considering refinancing the property. Neman said the property's position in an Opportunity Zone makes it more attractive for getting financing from lenders.

"I even have private lenders and funds that are coming to me with loans that are beating the terms of regional banks, which usually give the best deals," said Neman.

Some banks have already started investing in Opportunity Zones themselves, such as PNC Bank which has established an Opportunity Zone fund to invest in affordable housing, economic development and revitalization projects. In July, the bank provided $15 million in funding to repurpose a vacant, nearly century-old office building into workforce housing in downtown Birmingham, Alabama.

There's also Woodforest National Bank, of Woodlands, Texas, partnered with a Community Development Financial Institution (CDFI) and a commercial real estate group to create a $20 million Opportunity Zone fund.

John Hope Bryant, an entrepreneur and the founder of the economic empowerment nonprofit Operation HOPE has been pushing for CRA reform. He recently went on a five-city tour over the summer with Comptroller of the Currency Joseph Otting to discuss potential changes. Bryant said that adding Opportunity Zones to the CRA modernization can only help encourage lending in low-income communities.

"You are creating a magnet and pointing capital and equity there and saying, 'Go and invest there.'"

The Real Deal

By Keith Larsen

January 13, 2020

[How Foreign Taxpayers Can Invest in Opportunity Zones, with Steve Christiano.]

What types of foreign investors may be ideal candidates for Opportunity Zone investing? And is there an opportunity for OZ fund sponsors to raise capital overseas? Stephen Christiano is an associate tax director of Frank Hirth's business tax group, specializing in U.S. business taxation and Opportunity Zones. Click the play button below to listen to my conversation with Steve. Note: This podcast interview was recorded…

[Read More »]

Opportunity Db

January 15, 2020

TAX - NEW JERSEY

[City of Plainfield v. Borough of Middlesex]

Tax Court of New Jersey - December 24, 2019 - N.J.Tax - 2019 WL 7421958

City brought action against borough, seeking order declaring that real property owned by city and located in borough was exempt from local property tax.

The Superior Court transferred the case to the Tax Court, and city moved for summary judgment.

The Tax Court held that city's land was tax-exempt.

Property owned by city and located within borough's taxing district was used actually and exclusively for public purposes, and thus, was subject to local property tax exemption for government-owned lands used for a public purpose, even though a portion of the land was retained in its natural, heavily wooded state; there was public, and only public use of the property, as other portions of the land were used to store borough's construction equipment and vehicles, as a public walking path, and for a sewer line and sewer equipment.

TAX - NEW HAMPSHIRE

Ventas Realty Limited Partnership v. City of Dover

Supreme Court of New Hampshire - January 10, 2020 - A.3d - 2020 WL 122713

Taxpayer sought abatement of real property taxes regarding parcel that contained skilled nursing facility, two garages, and parking lot, alleging that city had unlawfully taxed property in excess of its fair market value.

Following a bench trial, the Superior Court denied abatement request. Taxpayer appealed.

The Supreme Court held that:

- Evidence supported trial court's determination that appraisal of taxpayer's expert did not result in credible opinion of fair market value, and
- Trial court was entitled to rely on taxpayer's use of city's property tax assessment for transfer tax purposes when assessing taxpayer's credibility.

Evidence supported trial court's determination that appraisal of taxpayer's expert using income capitalization method did not result in credible opinion of fair market value of taxpayer's property, which contained skilled nursing facility, two garages, and parking lot, in proceeding seeking abatement of property taxes; evidence indicated that expert failed to analyze how property would perform on open market during relevant tax year, expert failed to utilize comparable properties as evidence of market projections, and expert's analysis of income compared two figures from roughly the same period of time rather than figures from separate consecutive years.

Trial court was entitled to rely on taxpayer's use of city's property tax assessment for purposes of transfer tax arising from transfer of ownership of property in subsequent year when assessing credibility of taxpayer in proceeding to abate property tax; use of city's assessment for transfer tax purposes cast doubt on taxpayer's position that it was paying disproportionate amount of property taxes.

TAX - ARKANSAS

Blakely v. Arkansas Children's Hospital

Court of Appeals of Arkansas - December 4, 2019 - S.W.3d - 2019 Ark. App. 568 - 2019 WL 6520026

Financial records requestor brought action against hospital, seeking declaration that public children's hospital was subject to the Freedom of Information Act (FOIA) and order directing compliance with FOIA requests, as well as claim against county for illegal exaction.

The Circuit Court dismissed requestor's claims. Requestor appealed.

The Court of Appeals held that:

- Requestor's argument on appeal that hospital was subject to FOIA was too conclusory for consideration, and
- County ordinance providing for tax for the maintenance, operation, and support of hospital in county did not restrict use of tax to treatment of residents within county and so did not prohibit hospital's treatment of children from outside county; and
- Evidence was sufficient to support finding that no illegal exaction occurred when county treasurer sent funds from hospital, raised by county's maintenance tax, to the state to be used to obtain matching Medicaid funds from federal government, even though constitution provided for proceeds of a hospital tax to be paid directly to hospital treasurer.

Lawmaker Sees State Rainy Day Fund as Lifeline For Localities Battling Big-Box Stores Over Taxes.

The Indiana legislation could assist local governments dealing with "dark-store theory" property tax appeals.

Big-box retailers and other businesses around the U.S. in recent years have been battling with local governments to get the assessed value of their stores lowered so that they can pay less in property taxes.

In some cases, where their appeals are successful, cities and counties can end up owing the companies sizable tax refunds. The localities are also forced to grapple with the long-term effects of the lost revenue, which can mean shifting tax burdens onto others or service cuts.

Earlier this week, an Indiana lawmaker filed a bill intended to provide short-term relief for some places in situations like this. Rep. Lisa Beck's legislation would allow cities and school districts access to loans from the state rainy day fund to pay these sorts of property tax refunds.

An important caveat with the bill is that, as it's now written, it would only apply to local governments that meet certain criteria in Lake County, which is located in Beck's district. But it's easy to see how the legislation could be amended so its framework applies more broadly.

The loans would be zero- or low-interest (up to 1%) and could be up to $8 million. Borrowers would have 12 years to pay them back, with no payments required in the first two years.

Indiana has in the past offered low-interest loans to local governments in other types of difficult financial situations, so Beck's bill is to some extent a variation on an existing practice. The state's current rainy day fund balance is fairly robust at around $519 million.

"Indiana's not unique in being one of the states that have had multiple ongoing lawsuits related to the big-box stores," Beck noted during an interview on Friday. She said she hopes her bill will spark further discussion about how to assist places affected by the tax appeals.

“We hope it’s not the final help that we’re going to give to these communities,” she added.

The issues that the legislation seeks to address arise from a tax-avoidance strategy that some people refer to as “dark-store theory.”

In a nutshell, this involves retailers and others appealing property tax assessments on the grounds that their active stores should be valued in line with similar property that is vacant.

The thinking goes that even though a big-box store may be valuable to its current owner, it’s worth far less on the resale market.

Among the reasons that this argument can gain traction is that the stores are often built for a business’ specific needs and aren’t easily repurposed, and because there’s a growing abundance of empty retail space available around the country.

In other words, a Home Depot, Best Buy or Walmart shouldn’t be taxed based on it’s value as an operational store, but instead by factoring in what it would be worth as a vacant hulk.

Clashes over assessed value have played out in Lake County with a large mall and a nearby Kohl’s building. The current draft of Beck’s bill appears geared toward these specific circumstances.

For a locality to access a loan under the bill, it would need to have an estimated drop in tax revenue of at least $1 million—one that stems from a court judgement requiring Lake County to refund property taxes to a taxpayer whose property in the county is worth $100 million or more. So, for now at least, the bill is narrowly tailored.

“We’re not looking at making anybody the bad guy here,” Beck said. “We’re not out against any of these box stores.” But she also said that she thinks the strategy that retailers are pursuing to lower their local property tax bills is unfair to the communities where they’re located.

“We cannot run our communities, with the police service, fire service and all the other amenities that we’ve been able to provide, with the proposed amount of tax assessments,” she added.

If a local government in Indiana takes a hit to its revenues when a retail property owner wins a tax appeal, state property tax caps make it difficult to simply offset the loss by raising taxes on other taxpayers. This ups the odds that cuts will be needed to balance the budget.

While rainy day fund loans do not promise a permanent way to backfill the losses from the appeals, they would at least provide localities with some breathing room to rework their finances.

A different bill dealing with retail store tax assessments passed out of Indiana’s state Senate last year, but later stalled.

That legislation would have created a way for local governments to ask the state to assess the value of retail properties in certain cases, and outlined guidelines for those appraisals that factor in a building’s costs. Beck said Friday that she’d heard the sponsor of that Senate bill was planning to introduce legislation on the topic again this year.

But even if the state, instead of local governments, conducts the assessments, businesses could still choose to challenge them.

Route Fifty

By Bill Lucia,

JANUARY 10, 2020

TAX - MAINE

Bolton v. Town of Scarborough

Supreme Judicial Court of Maine - December 23, 2019 - A.3d - 2019 WL 7044988 - 2019 ME 172

Taxpayers brought action challenging town board of assessment review's denial of their abatement requests based on claim that abutting lot program caused inequitable tax treatment.

The Business and Consumer Court denied appeal. The Supreme Judicial Court vacated and remanded to board. Following remand, the Superior Court vacated board's remedial abatement and remanded to board. Following remand, the Superior Court affirmed board's second abatement calculation. Taxpayers appealed and town filed cross-appeal.

The Supreme Judicial Court held that:

- Court would not require board to extend benefit of abutting lot program to appealing taxpayers, and
- Taxpayers would be made whole by abatements that refunded the difference between what they paid in taxes and what they would have paid had properties in the abutting lot program been assessed at just value.

Court would not require town board of assessment review to extend benefit of abutting lot program, in which it permitted any owner of two separate but abutting parcels to request that those parcels be valued as a single lot to attain a lower overall assessment, to taxpayers who requested an abatement due to discriminatory nature of abutting lot program; appealing taxpayers suffered no greater harm than every other taxpayer in town given that all taxpayers paid slightly higher taxes as a result of improper discounts provided by program, and extending benefit to appealing taxpayers would have increased the negative effect of program on nonappealing taxpayers by several magnitudes and magnified the discriminatory effect.

Taxpayers seeking an abatement due to discriminatory nature of town's abutting lot program, in which it permitted any owner of two separate but abutting parcels to request that those parcels be valued as a single lot to attain a lower overall assessment, would be made whole by abatements that refunded the difference between what they paid in taxes and what they would have paid had properties in the abutting lot program been assessed at just value; such remedy would correct equal protection violation by putting appealing taxpayers in position they would have occupied had all taxpayers been treated equally.

Opportunity Zones Explained: A Helpful Solar Incentive

Federal opportunity zones, which offer tax benefits to qualifying businesses, are little known and not always well understood. But they can offer important advantages to solar companies, adding to solar tax benefits such as the federal Investment Tax Credit (ITC).

Opportunity zones were created to promote economic development in low-income communities by allowing companies to defer capital gains taxes, said Roman Petra, attorney for Nelson Mullins who specializes in commercial real estate transactions.

"The zones offer tremendous value for solar," said Jim Spano, a managing partner of Spano Partner Holdings, who has been involved in the development of more than 300 MW of solar. "Having a tax break in areas where economics don't support solar can provide lower cost of capital and opportunities for projects to pencil out."

Continue reading.

Solar Power World

By Lisa Cohn | January 8, 2020

Is Your Real Estate Wholesaling Business Embracing Opportunity Zones?

Despite temporary setbacks, wholesalers and investors shouldn't be so quick to overlook opportunity zone properties. Investors, specifically, can make use of any assets they've been sitting on, getting more bang for their buck without shouldering a tax burden or penalty. And being open to canvassing these zones for potential deals creates a palpable ripple effect.

The Tax Cuts and Jobs Act of 2017 opened up real estate wholesaling and investment opportunities more than two years ago, but it remains relatively unknown. The legislation establishes opportunity zones where investors can put investment returns from outside investments into properties instead of paying capital gains taxes on them — as long as they do so within 180 days of cashing in the outside investment.

According to researchers from the Economic Innovation Group, more than $6 trillion could be freed up to purchase real estate in these zones because of the act. But even wholesalers and investors who learn more about their choices with opportunity zones can be reluctant to jump in headfirst. What are their main concerns? For some, finding properties in designated zones seems tough. And even those who know of properties may worry that the risks will outweigh the potential benefits.

Continue reading.

Born2Invest

By David Lecko

January 7, 2020

U.S. Department of Transportation Releases New Interactive Opportunity Zones Map.

This interactive map provides information about the location and characteristics of significant transportation related facilities that are located in or near Opportunity Zones.

U.S. Department of Transportation | Jan. 8

How One Opportunity Zone Fund Hopes to Set an Example for Others.

As a managing partner at Catalyst Opportunity Funds, Jeremy Keele is rejecting around a dozen deals a week that come across his inbox, from developers looking to use the Opportunity Zone tax break to find investors for their projects.

“We’re not going to do luxury condos with a rooftop pool,” Keele says. “We’re just not gonna do that.”

Specific projects, developers and investors have drawn scrutiny around Opportunity Zones for taking advantage of the tax break to support projects that don’t need extra help, or for projects in neighborhoods that are already seeing a lot of investment. But there are also hundreds of Opportunity Zone funds that have formed over the past two years specifically to pool dollars from wealthy investors and make multiple investments on their behalf using the Opportunity Zone tax break.

Continue reading.

NEXT CITY

by OSCAR PERRY ABELLO | JANUARY 9, 2020

How CDFIs Can Help Raise Opportunity Zone Capital.

What is a Community Development Financial Institution, or CDFI? And how can Opportunity Zone fund sponsors, real estate developers, and QOZB business owners leverage their local CDFIs as a capital raising resource? Ruben Alonso is president of AltCap, a CDFI headquartered in Kansas City. Emily Lecuyer is managing director of Equity², an affiliate of AltCap. Click the play button below to listen to my conversation

Read More »

Opportunity Db

January 8, 2020

A New Tool Can Help Assess Opportunity Zone Investments’ Social Impacts.

The Opportunity Zone (OZ) tax incentive is intended to encourage private investment in real estate and businesses in high-poverty or low-to-moderate-income neighborhoods. The Urban Institute’s early research on Opportunity Zones revealed the promise of the incentive, as well as the risk that it could fail to make a difference in many regions and cities.

Opportunity Zones are disproportionately located in communities of color and tend to have higher poverty rates than the national average. There is also a tremendous diversity in OZs, and thus, there is a risk that investors will invest only in the most economically robust zones. The federal regulations governing the incentive allow for a broad range of uses and do not require that investments actually benefit residents.

Recognizing these shortcomings, some cities are enacting policies to help align investments with existing neighborhood plans and mitigate the potential harms of investments in Opportunity Zones, and federal legislators are considering imposing new reporting requirements.

Whether the incentive helps or harms OZ communities depends on where investments occur and the types of investments made. In response, we created a new tool to assess the potential social impacts of Opportunity Zone investments.

How the tool works

The tool begins with a “community goals and priorities” section, where users answer questions about how they engaged the community in project design and decisionmaking.

Next, users rank six impact areas (accessible and high-quality jobs; community wealth building; affordable and accessible housing; environment and open spaces; health, social services, and cultural amenities; and transportation and connectivity) based on their understanding of community priorities. This ranking determines the weight each impact area receives in the final scoring and is meant to underscore that investments should respond to community needs. For example, as valuable as it is, a project which creates affordable housing in a zone where job creation is ranked as the first priority will likely not achieve a top score.

After completing questions about the project in each of the six impact areas, users receive a scorecard that assigns a score scaled from 0 to 100. Projects receiving a high score are expected to provide strong social benefits aligned with community priorities, whereas those that receive a low score are unlikely to provide social benefits and may conflict with or undermine community priorities.

We developed and refined the questions in the tool through an iterative process that included a scan of existing impact tools, interviews with local stakeholders, a workshop with national experts working on Opportunity Zones, and testing with local leaders in five markets across the country.

The tool is currently in beta. Although we tried to account for a wide variety of community priorities and community types, it’s possible that some communities may have priorities that aren’t included in this version or that the tool’s questions don’t adequately reflect all community types. As such, we will use this version to collect information from users to improve the tool.

Who might use the tool

We designed the tool for a wide variety of stakeholders, including project sponsors, investors, community-based organizations, policymakers, local community advocates, and others interested in assessing the community impact of a local project. The tool can serve several purposes:

- Project scores can help direct incentives, support, and funding to projects with potential to advance community priorities, positively affect local residents, and promote inclusive growth in their communities.
- The tool can inform local debate about the best use of public subsidies and other support for projects, especially if stakeholders with different perspectives (e.g., neighborhood advocates, project sponsors, and public leaders) assess the same project and get differing results. Identifying

disagreement about community impacts could be the basis for useful dialogue.
- Project sponsors can determine how their project might positively affect the community and where there may be room for improvement.

We hope the tool will spark conversations about how Opportunity Zone investments can support community goals and priorities and increase the ability of residents to shape their communities. Though it should not be the final word on what a good project is, our desire is that, together with other community-led decisionmaking processes, it can be a source for discussion and accountability as communities seek to attract investment to the places that need it most.

TAX - MISSOURI

City of Chesterfield v. State

Supreme Court of Missouri, en banc - December 24, 2019 - S.W.3d - 2019 WL 7161282

City and its mayor brought action against State of Missouri, seeking declaration that statutes governing collection and distribution of countywide sales tax are constitutionally invalid special laws.

The Circuit Court entered summary judgment for State. City and mayor appealed.

The Supreme Court of Missouri held that:

- Statute governing collection of sales tax in any first class county "having a charter form of government and having a population of nine hundred thousand or more" was supported by rational basis and, thus, statute was not special law violative of Missouri Constitution, and
- Statute governing distribution of countywide sales tax was supported by rational basis and, thus, statute was not special law violative of Missouri Constitution.

Statute governing collection of sales tax in any first class county "having a charter form of government and having a population of nine hundred thousand or more" was supported by rational basis and, thus, statute was not special law violative of Missouri Constitution when applied to only county within state subjected to statute; county had large population, lacked a central city, had 90 separate municipalities within its borders, had large, unincorporated area, and county was responsible for providing municipal-type services such as police, street maintenance and zoning to unincorporated areas while simultaneously providing county-type services, including court systems, jails and roads to county as a whole.

Statute governing distribution of countywide sales tax was supported by rational basis of providing stable revenue sources and discouraging opportunistic annexations and, thus, statute was not special law violative of Missouri Constitution; classifications in statute governing tax distribution addressed need for predictable and sound revenue streams that benefited the residents of cities, towns and villages within county that did not have city sales tax at time countywide tax became effective, provided significant percentages of funding for services and benefited all county residents, and scheme discouraged opportunistic behavior such as annexations or gerrymandering that were primarily or solely motivated by sales tax distribution formulas in effect at a particular time.

Final Opportunity Zone Regulations Provide Some Much-Needed Clarity.

Section 1400Z-2, added by Public Law 115-97 (the Tax Cuts and Jobs Act), provides tax incentives for investors to make equity investments in qualified opportunity funds (QOFs) that will in turn invest in qualified opportunity zone business property (QOZ Business Property), either directly or indirectly through qualified opportunity zone businesses (QOZ Businesses) operating in qualified opportunity zones (QOZs).

On December 19, the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) released the final regulations governing the tax benefits from investing in qualified opportunity zones (QOZs). The package is 544 pages and finalizes two different sets of proposed regulations—one issued on October 29, 2018 (October 2018 proposed regulations) and the other issued on May 1, 2019 (May 2019 proposed regulations). More than 300 comments were filed in response to the two sets of proposed regulations.

The final regulations largely finalize the rules contained in the proposed regulations and also add several new rules, many of which are taxpayer-favorable rules that had been requested by commenters. Among the new rules contained in the final regulations are rules providing: (1) "gross" 1231 gains are gains eligible for investment upon the recognition of such gains; (2) expansion of additional events involving QOF interests that are inclusion events; (3) clarification on the amount of an investor's basis in its interest in a QOF; (4) at exit, exclusion from gain for all sales of assets by a QOF or QOZ business, including hot assets but excluding inventory; (5) aggregation of the basis of assets for the substantial improvement requirement; (6) reduction of the number of years of vacancy required for property to qualify as original use; (7) expansion of the real property straddles rule to the 70% use test; (8) clarification that the working capital safe harbor can apply up to 62 months and covered tangible property qualifies as QOZ business property; (9) examples of activities that are and are not subject to the anti-abuse rule; and (10) rules providing for including QOFs in a consolidated group.

I. Provisions Relating to Initial Investment in a QOF

The final regulations made a number of changes affecting which gains are eligible for deferral under the QOZ rules.

1. Section 1231 Gains

Section 1231 gains arise when a taxpayer sells or exchanges "section 1231 property," which generally means depreciable or real property that is used in a taxpayer's trade or business and held for more than one year. Under general tax rules, a taxpayer calculates net section 1231 gain or loss at the end of the year. If there is a net section 1231 gain, all of such gains or losses are taxed at capital gains rates; if there is a net section 1231 loss, all of such gains or losses are taxed at ordinary rates.

Under the May 2019 proposed regulations, only net section 1231 gain was treated as eligible gain under the QOZ rules. As a result, a taxpayer's 180-day period for investment into a QOF did not begin until the end of the year when the amount of net section 1231 gain could be determined.

Several commenters requested that the final regulations permit a taxpayer with section 1231 gains to elect a 180-day period starting from the date of the underlying sale or exchange, rather than the end of the year. Commenters also requested that a taxpayer with net section 1231 gains for a given year be permitted to treat all section 1231 gains as eligible gains for that year.

The final regulations adopt a taxpayer-favorable “gross approach” to section 1231 gains whereby eligible gains include the gross amount of eligible section 1231 gains unreduced by section 1231 losses. Furthermore, eligible section 1231 gains are not limited to the net section 1231 gains for a taxable year. As a result, it is not necessary for an investor to wait until the end of the taxable year to determine whether any eligible section 1231 gains are eligible gains, so the final regulations start the 180-day period on the date of the sale or exchange that gives rise to the eligible section 1231 gain.

2. Gains from Sales to, or Exchanges of Property with, a QOF or QOZ Business

In general, to qualify for QOZ tax benefits, an investor must invest an eligible gain into a QOF, which requires a capital gain from the sale to an unrelated party. In addition, to qualify as QOZ Business Property, the property must be acquired by the QOF or QOZ Business by purchase from an unrelated party. As a result, neither property that is purchased by a QOF from a related party, nor property that is contributed to a QOF in a transfer under section 351 or 721 may qualify as QOZ Business Property. Commenters requested Treasury and the IRS to clarify the treatment of transactions in which a taxpayer sells property to, or exchanges property with, a QOF or a QOZ Business and then contributes the proceeds of such sale or exchange to the QOF.

The preamble to the final regulations provides some guidance on this kind of transaction. The preamble notes that generally applicable federal income tax principles may require, depending on the circumstances, that this kind of transaction be recharacterized, for tax purposes, as a contribution of the property to the QOF (potentially followed by a further contribution by the QOF to the QOZ Business). If the transaction is recharacterized in this way, then the investor generally would not be treated as investing an eligible gain, and the property generally would not be QOZ Business Property in the hands of the QOF or QOZ Business.

Because the preamble frames its analysis in terms of generally applicable federal income tax principles, such as the step transaction doctrine and circular cash flow principles, the application of these rules requires a careful analysis that takes into account all of the relevant facts and circumstances. Depending on the facts and circumstances, some sales of property to a QOF or QOZ Business followed by a contribution to the QOF may or may not be recharacterized as a contribution of property.

3. Offsetting-Positions Transactions and Straddles

The October 2018 proposed regulations included rules limiting the ability of taxpayers to treat gains from certain “offsetting-positions transactions” as eligible gains under the QOZ rules. Under the proposed regulations, these rules applied to a broader set of transactions than the existing tax rules regarding so-called “straddles.” Based on concerns from commenters, the final regulations do not include the provisions that applied to offsetting-positions transactions that are not straddles and made a number of other changes to streamline and reduce the burden of these rules.

B. 180-Day Investment Period

The final regulations include a number of changes and clarifications relating to the 180-day investment period. First, as described above, the final regulations provide that the 180-day investment period for eligible section 1231 gains begins on the date of the underlying sale or exchange, rather than the end of the year.

Many investors with section 1231 gains relied on the delayed 180-day period for section 1231 gains that was included in the proposed regulations. Under the final regulations, these investors may find that the 180-day period for these gains has now expired. However, as described below, the final regulations provide that the rules contained therein are applicable for tax years beginning 60 days after the date the final regulations are published in the Federal Register. For dates prior to that time, taxpayers may choose to either rely on the final regulations or the proposed regulations, but taxpayers must choose to apply either the final or proposed regulations for each section of the regulations and cannot apply parts of both the final and proposed regulations for a particular section.

Second, the final regulations provide that the 180-day period for real estate investment trust (REIT) and regulated investment company (RIC) capital gain dividends generally begins at the close of the shareholder's taxable year in which the capital gain dividend would otherwise be recognized. This rule is intended to facilitate the ability of RIC and REIT shareholders to make qualifying investments in QOFs even when they do not have the same taxable year as the RIC or REIT.

Third, the final regulations provide additional flexibility for qualified investment of capital gains recognized in an installment sale by allowing taxpayers to elect to choose the 180-day investment period to begin on either: (i) the date a payment under the installment sale is received, or (ii) the last day of the year the eligible gain under the installment method would otherwise be recognized.

Fourth, the final regulations modify the election for choosing a 180-day investment period for a partner's distributive share of eligible gains earned by a partnership. Under the proposed regulations, partners could elect to either use the same 180-day period as the partnership or to use the 180-day period beginning on the last day of the taxpayer's taxable year. Under the final regulations, the second option is changed to the 180-day period beginning on the due date for the partnership's tax return, without extensions. This change should provide partners with additional time to receive Schedules K-1, which provide partners with necessary information about the amount of their distributive share of eligible gain.

C. Investments By Non-US Investors

The final regulations contain a number of new rules regarding the treatment of investments into a QOF by non-US investors. The final regulations clarify that deferral of a gain generally is available only for capital gain that would otherwise be subject to US federal income tax but for the making of a valid deferral election. As a result, in order to make a qualifying investment, a non-US investor must have an eligible gain that ordinarily would be subject to US federal income tax, such as a gain that is effectively connected with a US trade or business and is not exempt from tax under an applicable income tax treaty. To prevent non-US investors from benefitting from inconsistent positions, the final regulations provide that a non-US eligible taxpayer cannot make a deferral election under the QOZ rules unless the investor irrevocably waives any treaty benefits that would exempt that gain from US federal income tax at the time of inclusion pursuant to an applicable tax treaty. Although the final regulations provide an exception to the requirement that eligible gains must otherwise be subject to US federal income tax, an anti-abuse rule prevents investors from forming or availing of a partnership with a significant purpose of avoiding the requirement.

The preamble also includes a discussion of withholding under the Foreign Investment Real Property Tax Act (FIRPTA), which generally provides special rules for the US tax treatment of non-US persons investing in US real property. The preamble notes that commenters requested an exemption or other special rule for FIRPTA withholding on eligible gains from US real property investments that are deferred under the QOZ rules. The preamble states that Treasury and the IRS continue to consider these comments and other matters related to the mechanics of applying the QOZ rules in the context of a sale subject to FIRPTA withholding.

D. Rules for Carried Interests

The May 2019 proposed regulations provided that so-called "carried interests," i.e., profits interests in a partnership that are received in exchange for services, must be treated as nonqualifying investments under the QOZ rules. In addition, the proposed regulations included rules for determining the "allocation percentage" of a partner's qualifying and nonqualifying interests when a partner made a qualifying capital investment and also received a nonqualifying carried interest. Under the proposed regulations, the allocation percentage for a carried interest was "based on the highest share of residual profits" the partner would receive with respect to the carried interest.

The final regulations generally retain the treatment of carried interests from the proposed regulations. However, they modify the rule for calculating the allocation percentage for a carried interest, instead basing the percentage "on the share of residual profits the mixed-funds partner would receive with respect to that interest, disregarding any allocation of residual profits for which there is not a reasonable likelihood of application." This change appears to be intended to better capture the economics of typical private-equity waterfalls—including waterfalls where a carried interest is subject to a "catch-up" provision—while preventing partnerships from artificially lowering the percentage allocation of a carried interest by including residual allocations that do not have a reasonable likelihood of actually applying.

II. Provisions Relating to Inclusion Events

The final regulations include a number of modifications and clarifications to the rules relating to "inclusion events," i.e., events that result in an investor recognizing all or a part of their deferred gain. For example, the final regulations clarify how the inclusion event rules for QOF C corporations, S corporations, partnerships, and trusts interact with generally applicable tax rules for these kinds of entities.

A. Additional Inclusion Events

The final regulations clarified that certain additional events beyond those listed in the May 2019 proposed regulations will be treated as inclusion events, including the loss of a QOF's status as a QOF (either through voluntary self-decertification or involuntary decertification), an entity classification change of a QOF under the check-the-box rules (i.e., a change in tax status from a partnership to a corporation or from a corporation to a partnership), and a transfer to a spouse incident to divorce.

B. Rules for QOF C Corporations

The final regulations clarify when redemptions and distributions from C corporations, as well as corporate reorganizations, will be treated as inclusion events. With respect to redemptions, the final regulations retain the proposed rule that dividend-equivalent redemptions are inclusion events with respect to the entire amount of the distribution, with an exception for wholly owned corporations. The final regulations add an exception for pro rata redemptions if the QOF corporation has one class of stock outstanding.

With respect to distributions, the final regulations retain the rule that stock distributions described in section 305(a) are not inclusion events and clarify that the stock received in the distribution is qualifying QOF stock. In addition, the final regulations clarify that extraordinary distributions taxed as gain under section 1059(a)(2) are inclusion events.

Finally, the final regulations simplified the rules regarding reorganizations. In general, reorganizations are treated as inclusion events to the extent of any boot received, including recapitalizations and section 1036 exchanges. Under the May 2019 proposed regulations, recapitalizations and section 1036 exchanges were subject to different rules, and boot was treated differently depending on whether gain or loss was recognized.

C. Rules for QOF Partnerships

The final regulations clarify when distributions and mergers of QOF partnerships will be treated as inclusions events. However, the final regulations declined to adopt a general rule excluding divisions of QOF partnerships as inclusion events, as had been requested by some commenters. The final regulations also declined to adopt changes to the special rule for partnerships calculating the amount includible for partnerships and S corporations that commenters had requested to facilitate low-income housing tax credit investments made by QOF partnerships.

D. Rules for QOF S Corporations

The final regulations eliminate a special proposed rule from the May 2019 proposed regulations that would have treated an S corporation's qualifying investment in a QOF as disposed of if there were a greater-than-25% aggregate change in ownership of the S corporation. The final regulations further confirm that conversion from a qualified subchapter S trust (QSST) to an electing small business trust (ESBT), or vice versa, generally is not an inclusion event.

E. Basis Adjustments

The QOZ statute and May 2019 proposed regulations provided that a taxpayer's basis in its qualifying investment is increased by the amount of gain recognized in an inclusion event. The final regulations provide a number of clarifications regarding how these basis adjustments will be made, including clarifications to how these adjustments are made when a shareholder in a QOF corporation disposes of less than all of its qualifying QOF stock. Specifically, the basis adjustments are made only to the shares that are sold.

The final regulations clarify that the five-year and seven-year basis step-up for QOF partnerships and QOF S corporations will be treated as basis for all purposes, including for purposes of using suspended losses. The election to apply the 10-year basis step-up is generally not available for QOF interests with respect to which an inclusion event has occurred. However, the final regulations clarify that inclusion events resulting from distributions (e.g., under section 301(c)(3) or 731) do not preclude a subsequent 10-year basis step-up, as long as the investor continues to own the QOF interests.

The preamble states that Treasury and the IRS have determined that the section 1014 basis step-up upon death does not apply to adjust the basis of an inherited qualifying investment to its market value as of the deceased owner's death (though it does apply to the basis of non-qualifying investments). This rule will complicate estate planning for QOF investors.

F. Applicable Tax Rate

The final regulations clarify that gain recognized in an inclusion event is subject to taxation at the applicable federal income tax rates for the year of inclusion, not the year of deferral.

III. Provisions Relating to Exit

The QOZ statute anticipated that investors will exit from an investment in a QOF by selling their interest in the QOF. However, this is not how exits from an investment fund are typically structured.

Instead, the typical investment fund disposes of all or a portion of its assets (either by selling equity interests in a portfolio company or causing the portfolio company to sell its assets) and distributes the proceeds to its investors.

Recognizing this, the May 2019 proposed regulations provided some flexibility to structure exits as sales at the QOF level. The proposed regulations provided relief by allowing a QOF investor who has held its investment in a QOF for at least 10 years to make an election to exclude from gross income capital gain from the sale or disposition of QOZ Property by the QOF that is reported on the investor's Schedule K-1 (the "K-1 Rule"). Just as important, the K-1 Rule preserved the investor's increase in the basis of its QOF interest from such gain, which would prevent a subsequent distribution of the sales proceeds from generating additional gain to the investor.

The May 2019 proposed regulations also mitigated the potential negative consequences of the so-called "hot asset" rules. In general, the hot asset rules require recognition of ordinary income instead of capital gain upon the sale of a partner's interest to the extent the amount received is attributable to hot assets of the partnership. Hot assets are generally assets of a partnership that would generate ordinary income, including inventory, unrealized receivables, and depreciation recapture. Under the QOZ statute, there was a concern that, even if there would be no gain on exit from a QOF partnership in the absence of the hot asset rules, an investor still would recognize its share of ordinary income on any hot asset and would be deemed to have an offsetting capital loss. The application of the hot asset rules to the sale of a QOF interest or QOZ Property could undermine the benefit of the 10-year basis step-up rule, because many taxpayers cannot make current use of the offsetting capital loss, effectively leaving them with full or partial inclusion of the 10-year appreciation. The May 2019 proposed regulations addressed this issue by providing that, when an investor sells a qualifying investment in a QOF partnership after the 10-year holding period, a special deemed adjustment is made to the inside basis of QOF partnership assets immediately before the sale so as to mimic a cash purchase of the investment when a section 754 election is in effect, with the result that ordinary income is not triggered (the "Deemed Section 754 Election").

However, several significant questions remained unanswered, including: (1) how sales of property by QOZ Businesses after the 10-year holding period are treated under the K-1 Rule; (2) whether the Deemed Section 754 Election applies to the sale of a QOF interest if the hot assets are held at the QOZ Business level; and (3) whether ordinary income from hot assets sold by the QOF or QOZ Business could be excluded by the investor under either the K-1 Rule or the Deemed Section 754 Election.

In addition, the May 2019 proposed regulations provided that, when a QOF partner's basis in a qualifying QOF partnership interest is adjusted under section 1400Z-2(c), the basis of the partnership interest is adjusted to an "amount equal to the fair market value of the interest, including debt." Commenters also requested that the final regulations clarify that the phrase "including debt" in results in a step-up in basis of the full amount realized by an investor (including the investor's share of partnership debts) so that no gain or loss would be recognized on exit based upon a reduction in an investor's share of partnership debt.

The changes in the final regulations appear to address many of the recommendations made by commenters seeking to improve the flexibility of investors and QOFs to structure exits from investments after 10 years without reducing or eliminating QOZ tax benefits.

A. Expansion of Proposed Rules for Asset Sales by QOFs and QOZ Businesses

The final regulations significantly expand the proposed rules for gain exclusion for asset sales by QOFs and QOZ Businesses. In particular, the final regulations permit a taxpayer that invests in a

QOF partnership or QOF S corporation to make an election for each taxable year to exclude a QOF's gains and losses from all sales or exchanges in the taxable year, rather than just capital gains or losses. The only exception is for gains or losses from the sale of inventory by the QOF in the ordinary course of business.

This expanded rule generally should permit investors in a QOF partnership or QOF S corporation to structure exits as asset sales at the QOZ Business level without reducing the benefit of the 10-year basis step-up. In addition, this expanded rule generally should prevent the hot-asset rules from reducing the QOZ tax benefits for exits structured in this way.

In order to prevent the duplication of the tax benefits provided by the 10-year basis step-up, the final regulations treat—solely for the purposes of determining the amount of an investor's qualifying investment and non-qualifying investment—QOFs and investors electing to take advantage of this rule as making a deemed distribution and recontribution of net proceeds from the asset sales on the last day of the QOF's taxable year.

B. Clarification and Enhancement of Deemed Section 754 Election

The final regulations also clarify that the Deemed Section 754 Election generally applies to the sale of a QOF interest even with respect to hot assets held at the QOZ Business level. Furthermore, the preamble states that the 10-year basis step-up "is designed to result in no gain or loss to the transferor QOF partner." To ensure this result, the final regulations provide that, to the extent existing rules for basis adjustments operate in a manner that results in recognition of gain or loss on a sale of a QOF partnership interest after 10-years, basis adjustments will be made to the extent necessary to eliminate any such gain or loss.

C. Clarification of "Including Debt"

The final regulations include a rule that more clearly states that the basis of a QOF partnership interest will be adjusted to an amount equal to the net fair market value of the interest, plus the partner's share of partnership debt. This clarification should prevent a reduction in an investor's share of partnership debt upon selling a QOF partnership interest from reducing the QOZ tax benefits provided by the 10-year basis step-up.

D. Exits After December 31, 2047

The October 2018 proposed regulations preserved the ability of taxpayers to make an election under the 10-year basis step-up rule until December 31, 2047. Although the final regulations do not make any changes to this rule, the preamble notes that Treasury and the IRS will continue to consider whether an automatic basis-step up to fair market value should be made immediately before the end of 2047 if a QOF interest is not sold and how best to value investments absent a sale to an unrelated person.

IV. Provisions Relating to QOF Requirements

A. Certification

The final regulations generally retain the rules for self-certification of a QOF from the proposed regulations. In particular, the final regulations do not adopt recommendations to require fund managers or sponsors to make a "clean hands" certification or to provide anti-abuse safe harbors for QOFs that apply for and receive an independent third-party certification. The preamble explains that Treasury and the IRS considered a variety of suggestions from commenters to make the certification process more robust but believed that the proposed regulations strike an appropriate balance between providing taxpayers with a flexible and efficient process for organizing QOFs, while ensuring that investments in such vehicles will be properly directed toward the economic development of low-income communities.

B. Decertification

The October 2018 proposed regulations announced an intention to publish additional guidance regarding QOF decertification. The final regulations include a voluntary self-decertification process. Furthermore, the preamble states that Treasury and the IRS continue to consider the circumstances under which involuntary decertification of a QOF would be warranted, but the final regulations themselves reserve on this issue. However, the final regulations provide an example under the anti-abuse rule that recharacterizes an entity as not a QOF if it fails the 90% test year after year. This is effectively a decertification.

C. 90 Percent Investment Standard

The QOZ statute provides that a QOF must maintain an average of 90% of its assets in QOZ property, measured on specified semiannual testing dates. The proposed regulation provided that, to meet this 90% investment standard, a QOF may value its assets on a semiannual basis using (i) the values listed on an applicable financial statement (AFS) if the QOF has one, or (ii) an alternative valuation method based on the basis of assets.

The final regulations clarify that a QOF may determine whether the 90% investment standard is satisfied by valuing its assets on the semiannual testing dates specified in the statute. In addition, the final regulations provide that the alternative valuation method may be used to value only assets owned by a QOF that are acquired by purchase or constructed for fair market value. The final regulations also provide some clarifications to the rules for valuing leased property.

The final regulations generally retain the proposed rules permitting a QOF to disregard recently contributed property for purposes of the 90% investment standard, expressly rejecting any change to avoid an undefined mathematical result if all of the QOF's property were being disregarded under this rule. The final regulations provide that a QOF has until the fifth business day after a contribution of property to exchange such property into cash, cash equivalents, or short-term debt in order to qualify for the rules. Treasury and the IRS declined to adopt recommendations to expand this rule from six months to 12 months, at least during a QOF's initial start-up period, and also declined to adopt recommendations to provide a wind-down period safe harbor for applying the 90% investment standard.

V. Provisions Relating to QOZ Business Property Requirements

1. Buildings

The final regulations provide aggregation rules for the substantial improvement requirement. Buildings on a single deeded property may be treated as a single property. Buildings on contiguous parcels of land may be treated as a single property as long as they are:

- Operated exclusively by the QOF or QOZ Business,
- Share business resource elements (e.g., accounting or other back office functions) or employees, and
- Are operated in coordination with one or more of the trades or businesses (e.g., supply chain interdependencies or mixed-use facilities).

For two or more buildings treated as a single property, the amount of basis required to be added will be the total basis of each building.

2. Operating Assets

With respect to other assets, the aggregation rules look at the functionality of the aggregated assets. The cost of purchased property that qualifies as QOZ Business Property (i.e., original use property) may be added to the basis of purchased non-original use assets to meet the substantial improvement requirement for the non-original use assets, if the original use property:

- Is used in the same trade or business in the QOZ (or contiguous QOZ) in which the non-original use asset is used, and
- It improves the functionality of the non-original use asset in the same QOZ or contiguous QOZ.

The final regulations provide an example of a QOF that purchases an existing, non-original use hotel. The QOF may count the basis of purchased original use items such as mattresses, gym equipment, and furniture as well as renovations of the in-hotel restaurant towards the substantial improvement of the hotel property. However, improvements made to an apartment building that is not used in conjunction with the hotel do not count towards the substantial improvement of the hotel.

The final regulations also clarify that any costs that are added to the basis of property will count for purposes of substantial improvement, including equipment installed in a building, demolition costs, capitalized fees for development, required permits, necessary infrastructure, brownfield site remediation, professional fees, and site preparation costs.

3. Land

The final regulations retain the rule that land is not required to be substantially improved. However, the regulations also retain the rule that land should be improved by more than an insubstantial amount. Treasury and the IRS declined to assign a specific percentage for "more than insubstantial" because it is a fact intensive inquiry. When applying the functionality aggregation rule to non-original use land, the original use property must improve the land by a more than insubstantial amount.

Improvements to the land, including grading, clearing of the land, remediation of contaminated land, or acquisition of related QOZ Business Property that facilitates the use of the land in a trade or business of the eligible entity, will be taken into account in determining whether the land was improved by more than an insubstantial amount. The preamble gives an example of an irrigation system for a farming business that is more than an insubstantial amount of improvement.

4. Substantial Improvement Period

The final regulations clarify that during the 30-month substantial improvement period, property in the process of being improved is treated as meeting the substantial improvement requirement for the 90% asset test.

B. Self-Constructed Property

In general, the QOZ statute requires tangible property owned by a QOF or QOZ Business to have been acquired by purchase from an unrelated party after December 31, 2017. Prior to the issuance of the final regulations, it was unclear how this rule was meant to apply to self-constructed property.

The final regulations include rules for self-constructed property similar to those previously adopted under section 168. Treasury and the IRS concluded that tangible property is not disqualified from constituting QOZ Business Property solely because it is manufactured, constructed, or produced, rather than purchased, by a QOF or QOZ Business. However, to qualify as QOZ Business Property, the property must be constructed with the intent to use the property in a trade or business in a QOZ, and the materials and supplies used in construction must be QOZ Business Property.

The final regulations also provide rules for determining the date on which self-constructed property is treated as purchased. The final regulations provide that self-constructed property will be treated as acquired on the date physical work of a significant nature begins. Physical work of a significant nature does not include preliminary activities such as planning or designing, securing financing, exploring, or researching. The final regulations provide a safe harbor under which a QOF or QOZ Business may choose the date on which it paid or incurred more than 10% of the total cost of the property—excluding the cost of any land and preliminary activities.

C. Original Use Requirement

1. No Rule for "Overwhelmingly Improved" Property

The preamble to the May 2019 proposed regulations noted that Treasury is studying circumstances under which property has not been purchased but has been "overwhelmingly improved" by a QOF or a QOZ Business may be treated as satisfying the original use requirement. Commenters recommended that Treasury consider adopting a rule similar to the so-called "80-20 Rule" from renewable energy tax credit guidance for this purpose. In particular, commenters recommended that tangible property owned by a QOF or QOZ Business should be treated as QOZ Business Property meeting the purchase and original use requirements even though it incorporates some nonqualifying property, provided the fair market value of such nonqualifying property is not more than 20% of the tangible property's total value (the additions to basis of the new property plus the value of the nonqualifying property). However, Treasury and the IRS declined to adopt any rules permitting overwhelmingly improved property to be treated as satisfying the original use requirement.

2. Newly Constructed Buildings

Commenters sought clarity that a building that was newly constructed and purchased by the QOF or QOZ Business prior to being placed in service in the QOZ would satisfy the original use requirement. The final regulations add an example clarifying this.

3. Vacant Property and Brownfield Sites

The May 2019 proposed regulations provided that, where a building or other structure has been vacant for at least five years prior to being purchased by a QOF or QOZ Business, the purchased building or structure will satisfy the original use requirement. The final regulations make several taxpayer-favorable changes to this proposed rule. First, with respect to property that was vacant on the designation date of a QOZ through the date on which the QOF or QOZ Business purchased the property, only a one-year vacancy period will be required. Second, a three-year vacancy period is required for property that was not vacant at the time of the QOZ designation. Third, the final regulations provide that real property is considered to be vacant if it is "significantly unused." A building or land will be considered significantly unused if more than 80% of the square footage of usable space is not being used. Fourth, the final regulations provide that a QOF or QOZ Business that purchases real property from a local government that the local government holds as the result of an involuntary transfer (including through abandonment, bankruptcy, foreclosure, or receivership) may treat all property composing the real property (including the land and structures thereon) as satisfying the original use requirement.

The final regulations also provide special rules for buildings located on "brownfield sites" under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA). In particular, the final regulations provide that all real property composing a brownfield site, including land and structures located thereon, will be treated as satisfying the original use requirement. The QOF or QOZ Business must make investments in the brownfield site to ensure that the site meets basic safety standards for human health and environment.

D. Rules for Leased Property

The final regulations include some modifications to the proposed rules for leased tangible property. For example, the final regulations exempt State and local government, as well as Indian tribal governments, from the market-rate requirement for leased tangible property. The final regulations also include a rebuttable presumption that leases between unrelated parties satisfy the market-rate requirement. The final regulations also contain additional examples to clarify the application of the leased property rules.

E. Inventory

The final regulations include several taxpayer-favorable changes to the rules for inventory. First, the final regulations extend the rule that permits QOFs or QOZ Businesses to treat inventory in transit as used in the QOZ for purposes of the substantially all of the use requirement to the 90% investment standard at the QOF level and the 70% assets test at the QOZ Business level. For purposes of these tests, the final regulations provide that a QOF or QOZ Business may choose to either: (i) include inventory in both the numerator and denominator; or (ii) exclude inventory entirely from both the numerator and denominator. In addition, the final regulations clarify that the distance traveled in the course of transit and the fact that inventory is briefly warehoused while in transit will not affect the application of the inventory transit safe harbor included in the May 2019 proposed regulations. Finally, the final regulations provide that inventory is deemed to satisfy the original use and substantial improvement requirements.

F. "Substantially All" Requirements

1. 70 and 90 Percent Thresholds

The final regulations retain the 70% and 90% thresholds established by the May 2019 proposed regulations for the various "substantially all" requirements in the QOZ statute. Treasury and the IRS specifically rejected comments to increase the 70% threshold to 90%, because they believed that the 70% standard achieves an appropriate balance between providing proper flexibility to potential investors in QOZs and limiting the potential for abuse. They also rejected comments to adopt a higher threshold for real estate, because different rules for different businesses would be burdensome.

The final regulations added specific rules clarifying the application of the 70% use test. The final regulations provide that use of tangible property in a trade or business is determined based on the amount of time during which the property is (i) located within the geographic borders of a QOZ, and (ii) in connection with the ordinary conduct of the trade or business, utilized in the QOZ in the performance of an activity of the trade or business that contributes to the generation of gross income for the trade or business.

For mobile tangible property, the final regulations provide a couple of safe harbors, which are intended to strike an appropriate balance between allowing flexibility for business development and ensuring that such business development primarily benefits low-income communities in QOZs. One safe harbor permits up to 20% of the tangible property of a trade or business to be treated as satisfying the 70% tangible property standard if (i) the tangible property is utilized in activities both inside and outside of the QOZ, (ii) the trade or business has an office or other fixed location located within a QOZ, (iii) the tangible property is operated by employees of the trade or business who regularly use the office and are actively managed by one or more employees at the office, and (iv) the tangible property must not be operated exclusively outside of the geographic borders of a QOZ for a period longer than 14 consecutive days. A second safe harbor is provided for short-term leases of tangible property by a trade or business located within the QOZ to a lessee that utilizes the tangible property outside of a QOZ, if (i) the tangible property is parked or otherwise stored at a location within a QOZ when the tangible property is not subject to a lease, and (ii) the lease duration (including any extensions) must not exceed 30 consecutive days.

The final regulations also clarify that the 70% use test is determined on an aggregate basis when tangible property is used in multiple QOZs. However, Treasury and the IRS declined to adopt recommendations to add a separate 90% threshold for the location of real property.

2. 90-Percent Holding Periods

The final regulations provide that the determination of whether the 90% holding period requirement is satisfied is made on a semiannual basis, based on the cumulative amount of time the QOF or QOZ Business has held the property. Similarly, stock or partnership interests will satisfy the 90% holding period requirement if during 90% of the QOF's holding period for the stock or partnership interest, beginning on the date that its self-certification as a QOF is effective and ending on the relevant semiannual testing date, the corporation or partnership qualified as a QOZ Business. The final regulations acknowledge that taxpayers may encounter difficulties when a QOF's semiannual testing date falls before the end of the entity's taxable year and provide a safe harbor testing period that starts with the beginning of the QOF's status as a QOF and lasts until the last day of the entity's latest taxable year and ends on or before the relevant testing date.

3. Cure Period for QOF Investing in an Entity that Fails to Meet QOZ Business Requirements

Commenters noted that, under the proposed regulations, no relief was available to a QOF that discovered that the entity in which it invested failed to qualify as a QOZ Business. In response to these comments, the final regulations adopt a six-month cure period for an entity in which a QOF has invested to cure a defect that caused the entity to fail to qualify as a QOZ Business. The preamble notes that, in addition to this six-month cure period, a QOF can assert a defense of reasonable cause if the QOF becomes subject to a penalty for failure to satisfy the 90% investment standard.

G. Real Property Straddles

The final regulations expanded the real property straddling rule to be applicable for determining whether property qualifies as QOZ Business Property. The May 2019 proposed regulations only applied this rule for the safe harbors of the gross income test. The final regulations provide that real property that straddles contiguous QOZ and non-QOZ tracts and is substantially located in a QOZ tract qualifies for purposes of the 70% use test. Property is treated as substantially within a QOZ if the amount of property within the QOZ is greater than the amount of the property located in the non-QOZ tract. The final regulations provide that for purposes of determining whether property is substantially located within a QOZ, the QOF or QOZ business may use either the square footage or the unadjusted cost basis of the property.

H. “Sponsor-Like” Arrangements

The final regulations added rules to address the qualification of property purchased in certain “sponsor-like” arrangements as QOZ Business Property. In particular, the final regulations provide that, in the case of real property that is purchased by a QOF or QOZ Business, if at the time of the purchase there was a plan, intent, or expectation for the real property to be repurchased by the seller of the real property for an amount of consideration other than the fair market value of the real property, the purchased real property is not QOZ Business Property. Under this rule, the “fair market value of the real property” refers to the fair market value of that property at the time of the repurchase by the seller. It is unclear how this rule will apply to situations where there is a plan to repurchase real property based on a formula that is intended to act as a proxy for fair market value, such as a repurchase at a multiple of a specified financial ratio.

VI. Provisions Relating to QOZ Business Requirements

A. Gross Income Test

Commenters requested clarification that the gross income test could be met through income arising from more than one QOZ. Consistent with this, the final regulations include rules to aggregate the income from activities in all QOZs for purposes of meeting the gross income test.

Commenters also requested that Treasury apply the gross income test to activities conducted directly as the QOF level. Treasury and the IRS declined to do so, noting that the section 1397C requirements apply only at the QOZ Business level.

For the safe harbors of the gross income test that look to the performance of services or amounts paid, the final regulations provide that hours worked by or amounts paid to a partner of the partnership qualify to the extent the amounts paid would constitute guaranteed payments within the meaning of section 707(c).

B. Intangible Property

The final regulations provide clarification on meeting requirements for the use of intangible property. Intangible property will be treated as used in the active conduct of a trade or business if:

The use of the intangible property is normal, usual, or customary in the conduct of the trade or business, and
The intangible property is used in the QOZ in the performance of an activity of the trade or business that generates gross income for the business.

C. Working Capital Safe Harbor

While the May 2019 proposed regulations permitted multiple, overlapping 31-month safe harbor periods, it was not clear whether the QOZ Business was required to be engaged in an active trade or business at the end of the first 31-month period. This lack of clarity presented issues for start-up businesses as well as for very large, transformational projects

The final regulations retain the rule from the May 2019 proposed regulations that a single business can have multiple sequential or overlapping 31-month safe harbor periods. However, the final regulations provide that a single unit of tangible property may only benefit from two such periods for a total of 62 months. Tangible property that is purchased, leased, or improved during this 62-month period will count towards the 70% tangible property test, and intangible property purchased or licensed during that period will count towards the 40% intangible property use test.

The May 2019 proposed regulations provided for an allowable delay in meeting the working capital safe harbor resulting from waiting for government action on a permit application. Commenters requested an expansion of the events that can delay meeting the working capital safe harbor to other events outside of the taxpayer's control. The final regulations provided a modest expansion of the scope of events that will delay the safe harbor. If the QOZ business is located in a QOZ designated as part of a federally declared disaster area, the QOZ business may receive an additional 24 months to consume its working capital assets.

D. Active Conduct

The May 2019 proposed regulations provided that "merely" entering into a triple-net lease is not the conduct of an active trade or business. Commenters requested clarification as to whether any activity involving triple-net leases may rise to the level of an active trade or business. The final regulations provide an example showing that a business can have some activity with triple net leases and still be an active trade or business. The example demonstrates that having one triple net lease and other active leases will not disqualify a business. However, the regulations do not answer the question of whether multiple triple-net leases may rise to the level of a trade or business.

E. Sin Businesses

Commenters recommended that final regulations provide that sin businesses may not be operated directly by QOFs. Treasury and the IRS declined to adopt this recommendation, noting that the statutory language is explicit in prohibiting QOZ Businesses from operating sin businesses, but does not prevent operation of sin businesses by QOFs. The final regulations do adopt recommendations to prevent businesses from leasing to sin businesses as well as recommendations to adopt a de minimis exception, providing that a QOZ Business cannot lease more than five percent of its real property to a sin business.

F. Investment in Subsidiaries

Commenters requested an exception to the non-qualified financial property limitation to allow QOZ Businesses to hold interests in subsidiary businesses. Treasury and the IRS declined to adopt this recommendation, noting that the statutory definition of non-qualified financial property explicitly includes stock and partnership interests.

VII. Provisions Relating to the 90 Percent Penalty and Anti-Abuse Rules

A. 90 Percent Test Penalty

If a QOF fails to meet the 90% asset test, the QOF must pay the penalty described in section 1400Z-2(f) for each month that it fails to meet the 90% test, subject to a reasonable cause exception. Commenters requested Treasury to provide factors to consider in determining whether a QOF has reasonable cause for failure to meet the 90% test. Treasury and the IRS declined to do so, reasoning that there are appropriate standards for reasonable cause in Internal Revenue Manual section 20.1. Treasury will consider whether guidance on the 90% penalty or the reasonable cause exception is necessary in the future.

B. Anti-Abuse Rules

Commenters requested that Treasury provide a statement of the general purpose of section 1400Z-2 and examples to illustrate what behavior is considered abusive and not abusive. The final regulations provide such a statement—that the purposes of the statute of encouraging making longer-term investment of new capital into QOZs and increasing the economic growth of QOZs. The preamble to the regulations states that holding land for speculative purposes does not further the purposes of section 1400Z-2.

The final regulations also provide several examples to illustrate the anti-abuse rule. To illustrate the level of improvement needed for land, the following examples are provided:

- A parking lot and small structures are constructed on land. This is subject to the anti-abuse rule and constitutes a speculative investment activity in land.
- Farmland is acquired with a significant investment of capital and labor to convert from pig and hog farming into goat and sheep farming. This is a sufficient QOZ business and is not subject to the anti-abuse rule.

The final regulations also add an anti-abuse rule for using partnerships to create eligible gains and circumvent the rule that eligible gains must be subject to income tax. This rule provides an example of a partner not subject to tax contributing property to partnership to have the partnership make the deferral election. This is deemed to violate the anti-abuse rule and the partnership is disregarded for purposes of the statute.

Treasury and the IRS declined to follow recommendations to provide a good faith safe harbor from the anti-abuse rule, reasoning that the purposes of section 1400Z-2 are not so "elusive" that a good faith attempt to comply with the rules could be subject to the anti-abuse rule. Treasury and the IRS also declined to adopt an independent certification standard.

Commenters requested that Treasury implement a robust reporting regime. In the preamble, Treasury and the IRS noted that reporting was outside of the scope of these regulations but will continue to be studied. We note that the IRS updated its forms to make them more robust. Form 8996, Qualified Opportunity Fund, must be filed by QOFs, and Form 8997, Initial and Annual Statement of Qualified Opportunity Fund (QOF) Investments, must be filed by investors. The regulations did add a "penalty" for failure to file Form 8997 relating to how much deferred gain remains deferred, in the form of a rebuttable presumption that the investor suffered an inclusion event.

VIII. Provisions Relating to Consolidated Groups

The May 2019 proposed regulations declined to permit a QOF C corporation to be a subsidiary member of a consolidated group, although it could be a common parent. This was because Treasury and the IRS believed that the consolidated return regulations are incompatible in many respects with the rules of section 1400Z-2, and special rules would be necessary to harmonize them. In response to comments, the final regulations allow subsidiary QOF C corporations to join in the filing of consolidated returns, and the regulations provide rules to harmonize the consolidated return and QOZ rules. The consolidated group member that makes the direct investment in the QOF member must generally maintain a direct equity investment in the QOF, and all QOF investor members must be wholly owned, directly or indirectly, by the common parent of the consolidated group. The final regulations also provide that the basis rules of section 1400Z-2 generally trump the basis adjustment rules of Treas. Reg. § 1.1502-32. To deal with negative basis issues, the final rules provide that the investor member must take into account its excess loss account pursuant to Treas. Reg. § 1.1502-19 before its basis in the QOF member stock is adjusted to fair market value under section 1400Z-2(c). The final regulations also provide rules regarding the deconsolidation of QOF members.

Under the May 2019 proposed regulations, the requirements in section 1400Z-2 applied separately to each member of a consolidated group. Thus, the same member of the consolidated group must both sell the capital asset giving rise to eligible gain and timely invest the proceeds in a qualifying investment. In response to comments, the final regulations include an election to treat the investment by one member as a qualifying investment by another member. If the consolidated group makes this election, for all Federal income tax purposes, the first member is treated as making an investment in the QOF and immediately selling the qualifying investment to the second member for fair market value, subject to the rules of Treas. Reg. § 1.1502-13.

IX. Applicability Dates and Effective Dates

The final regulations provide that the rules contained therein are applicable for tax years beginning 60 days after the date the final regulations are published in the Federal Register.[1] For dates prior to that time, taxpayers may choose to either rely on the final regulations or the proposed regulations, but taxpayers must choose to apply either the final or proposed regulations for each section of the regulations and cannot apply parts of both the final and proposed regulations for a particular section.

Steptoe & Johnson LLP – Lisa M. Zarlenga, John Cobb and Caitlin R. Tharp

December 27 2019

Milken Institute Issues Call for Vignettes Aimed at Resilient Infrastructure and OZ Financing.

Read the Press Release.

The Milken Institute | Jan. 3

TAX - ILLINOIS

Iwan Ries & Co. v. City of Chicago

Supreme Court of Illinois - December 19, 2019 - N.E.3d - 2019 IL 124469 - 2019 WL 6907322

Tobacco industry entities brought action against city for declaratory and injunctive relief, alleging city's tax on certain tobacco products was preempted by state law.

The Circuit Court granted summary judgment to industry entities. City appealed and the Appellate Court reversed. Industry entities filed petition for leave to appeal, which was granted.

The Supreme Court held that statute permitting home rule taxes on sales of cigarettes and other tobacco products, but stating that a home rule municipality that had not imposed a tax based on the number of units of cigarettes or tobacco products before specified date "shall not impose such a tax after that date," allows only those municipal taxes on cigarettes or other tobacco products enacted prior to specified date, rather than grandfathering in certain municipalities which previous imposed any of a broad category of taxes on any product containing tobacco.

[New Markets Tax Credit Receives One-Year, $5 Billion Extension.]

Spending Bill Signed Into Law Today Authorizes $1.5 Billion Increase in Allocation

WASHINGTON, Dec. 20, 2019 /PRNewswire/ — The Fiscal Year 2020 appropriations bill , H.R. 1865, signed into law today by President Trump, includes a one-year, $5 billion extension of the New Markets Tax Credit (NMTC). The NMTC, which faced expiration on December 31, instead received a $1.5 billion increase in allocation that will go far to meet the demand for this important resource that revitalizes communities, creates jobs, increases economic opportunity and improves lives.

The projected impact of $5 billion in New Markets Tax Credits includes an estimated 138 manufacturing and industrial projects, 55 mixed-use projects, 51 health care projects and 115 community facility projects. It will also generate an estimated 118,000 jobs.

Established in 2000 in the Community Renewal Tax Relief Act (P.L.106-554), the New Markets Tax Credit is a bipartisan effort to stimulate investment and economic growth in low-income urban neighborhoods and rural communities. Since then, the New Markets Tax Credit has financed more than 6,000 projects and created over one million jobs in all 50 states, the District of Columbia and Puerto Rico. The NMTC was provided a five-year authorization in The PATH Act. (P.L. 114-113) in December 2015.

“As we celebrate the 20th anniversary of the New Markets Tax Credit in 2020, this extension and additional allocation for the next year is vital for many of America’s urban neighborhoods and rural communities, providing access to billions of dollars for high-impact, community revitalization projects,” said Bob Rapoza, spokesperson for the [NMTC Coalition]. “No other the federal tax incentive is generally available to economically distressed rural and urban communities to promote economic revitalization. We appreciate our champions in Congress who worked to introduce the extension into the spending package, including Sens. Roy Blunt (R-MO) and Ben Cardin (D-MD) and Reps. Terri Sewell (D-AL), Tom Reed (R-NY), who introduced legislation last February to make the NMTC permanent. We also are grateful to Ways and Means Committee Chairman Richard Neal (D-MA) who is a longtime supporter of NMTC.”

The NMTC works by providing a shallow federal tax credit of 39 percent, taken over seven years, for investments made in census tracts where the individual poverty rate is at least 20 percent or where median family income does not exceed 80 percent of the area median. In 2019, more than 80 percent of all NMTC investments were in communities exhibiting severe economic distress with extremely low-incomes, high unemployment, or high poverty.

“The NMTC, despite its impressive track record in revitalizing communities, has been set at $3.5 billion since 2007, resulting in a 30 percent decrease in buying power. The $5 billion authorization is not only an increase above the current rate for NMTC from $3.5 billion, but also an increase above inflation of over $500 million,” adds Rapoza. “This much needed increase will go far to meet the exceptionally high demand, with is four to five times the availability on average.”

The Coalition notes that communities have come to count on the NMTC as a source of low-cost capital for challenging projects that would not have been possible but-for the NMTC. Since its inception, the Credit has delivered well over $100 billion in flexible capital to farming towns and urban neighborhoods left outside the economic mainstream.

For examples of how the NMTC is making an impact in each state, see the NMTC Coalition’s [State Impact Map] or check out its [Project Database].

New Markets Tax Credit Coalition

Dec 20, 2019, 23:17 ET

About New Markets Tax Credit Program

The New Markets Tax Credit (NMTC) was enacted in 2000 in an effort to stimulate private investment and economic growth in low-income urban neighborhoods and rural communities that lack access to the patient capital needed to support and grow businesses, create jobs, and sustain healthy local economies. Since its inception, the NMTC has generated more than one million jobs. Today due to NMTC, more than $100 billion is hard at work in underserved communities in all 50 states, the District of Columbia, and Puerto Rico. For more information, visit www.NMTCCoalition.org.

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Senate Passes Tax Extenders Deal That Includes Extension of Renewable Energy Incentives.

The US Senate yesterday passed a package of tax extenders as part of the year-end appropriations act that the US House of Representatives passed on December 17, 2019. President Trump is expected to sign the legislation before the end of the today to avoid a government shutdown. The package includes a one-year extension of the production tax credit (PTC) under section 45 for wind and other technologies. It also includes limited extension of other energy tax incentives that were set to expire and a retroactive extension for some credits that had already expired in 2018. Most of the credits will now expire at the end of 2020, setting up the prospect of a broader tax extenders deal during lame duck session after the 2020 election. The bill also included a one-year extension through 2020 of the new markets tax credit under Section 45D at $5 billion.

Extension of Energy Tax Credits

Many energy tax credits and incentives are scheduled to expire or begin to phase out at the end of 2019 or have already expired. The Further Consolidated Appropriations Act will extend the expiration date to the end of 2020 for many credits. The package did not include an extension or expansion of the Investment Tax Credit (ITC), disappointing the solar industry. The extenders package also did not include the proposed expansion of the ITC for energy storage technology or the extension of energy credits for offshore wind facilities.

Production Tax Credit

The PTC provides a credit for each kilowatt hour of energy production for qualified renewable energy facilities. The PTC expired for non-wind technologies at the end of 2017, while a reduced credit of 40% was available for wind facilities through the end of 2019, expiring for years 2020 and beyond. As we reported previously in House Passes PTC, NMTC Extension, under the tax extenders package, projects that begin construction in year 2019 are eligible for the 40% credit, and projects that begin construction in 2020 will be eligible for a 60% credit. This potentially leaves taxpayers in a frustrating position to the extent they already took steps to begin construction on a wind project in 2019 to take advantage of the 40% credit in anticipation of its expiration at the end of 2019.

Taxpayers seeking the increased 60% PTC for wind projects will need careful planning to ensure any work done in 2019 does not attach to the 2020 project, thus dropping the credit to 40%.

Additionally, the full PTC would be retroactively revived and extended through 2020 for:

- Closed loop biomass
- Open loop biomass
- Geothermal plants
- Landfill gas (municipal solid waste)
- Trash (municipal solid waste)
- Qualified hydropower
- Marine and hydrokinetic renewable energy facilities

Under current law, those technologies are generally only eligible for the PTC to the extent construction began before 2018 (other than certain closed-loop biomass and qualified hydropower technologies, which must be placed in service before 2018). Under the extenders package, those dates would all be extended out to the end of 2020.

Investment Tax Credit

The Investment Tax Credit (ITC) allows taxpayers to claim a credit for the cost of investment in qualified energy property. The ITC for solar is scheduled to phase down from a 30% credit where construction begins before December 31, 2019, to a 26% credit where construction begins in 2020, and a 22% credit where construction begins in 2021. The ITC drops to 10% where construction begins before January 1, 2022, and the project is not placed in service before January 1, 2024. A similar phase down applies to fiber-optic solar equipment, fuel cell property, micro-turbine property, combined heat and power property, and certain small wind projects, although those projects are ineligible for any ITC if not placed in service by January 1, 2024.

The tax extenders proposal extends the ITC in lieu of the PTC for wind facilities where construction begins in 2020. Those projects would be eligible for 60% of the ITC (mirroring the phase down to 40% then up again to 60% for wind PTC). Otherwise, the extenders package does not affect the ITC.

December 20, 2019

McDermott Will & Emery

Cities and States Look to Tap More Tax Revenue From Expensive Real Estate Sales.

"It basically allows for luxury housing to pay for affordable housing," said a Boston city council member describing a "transfer" tax proposal there.

Taxes targeting big-dollar and speculative real estate deals are proving to be attractive for politicians in a number of states and cities, offering them a way to generate additional tax revenue when luxury homes and office buildings change hands.

These "transfer" or "mansion" taxes—which are kind of like sales taxes on property transactions—are not a new concept and are on the books in various forms in about three dozen states. But some city and state leaders, particularly in places with hot real estate markets, are now looking to make changes in how the taxes are structured and used.

Policymakers are eyeing the taxes not only to fill budget holes, but also to address issues they see as tied to rising income inequality. In the Boston area, for example, politicians are seeking to tap the revenue stream from these taxes to address the challenges associated with skyrocketing housing costs, like the lack of affordable rentals.

Continue reading.

Route Fifty

by Bill Lucia

DECEMBER 21, 2019

State Tax Changes as of January 1, 2020.

Key Findings

- Thirty-four states have major tax changes taking effect on January 1, 2020.
- Arkansas, Tennessee, and Massachusetts will each see reductions in their individual income tax rates.
- Five states (Iowa, Kansas, Maine, North Carolina, and Ohio) will see notable changes to their individual income tax bases.
- Corporate income, capital stock, franchise, or similar taxes on businesses or financial institutions will decrease or be eliminated in six states (Connecticut, Florida, Illinois, Indiana, Missouri, and Mississippi) but will increase in two states (New Jersey and Washington).
- Oregon will implement a new Corporate Activity Tax (CAT), which is a modified gross receipts tax (GRT).
- Florida is the lone state with a general sales tax rate change (a reduction).
- Five states will see changes to their estate taxes. Connecticut, Minnesota, Vermont, and New York will see increases in their estate tax exemptions (taxpayer-friendly provisions), while Hawaii's estate tax will become more burdensome.
- Two states (Illinois and Louisiana) will implement new excise taxes on cannabis products.
- Three states (Maine, Nevada, and New Hampshire) will begin applying excise taxes to vapor products.
- Four states (Hawaii, Illinois, Michigan, and Wisconsin) will begin requiring marketplace facilitators to collect sales taxes.
- Three states (Arizona, Georgia, and Washington) will modify the economic nexus threshold in their remote sales tax collection requirements.
- Two states (Hawaii and Pennsylvania) will begin using Wayfair-like standards to determine economic nexus for income tax purposes.
- Two states (Connecticut and Virginia) will see notable changes to their sales tax base. (Connecticut's sales tax base will broaden to additional consumer goods and services, while Virginia's base will become narrower.)
- Six states (Arkansas, Maryland, Missouri, New Hampshire, New Mexico, and Tennessee) will see various changes to their corporate income tax base or apportionment formulas.
- Various road user taxes and fees will change in Kansas and Nevada.

Continue reading.

Tax Foundation

Katherine Loughead

December 20, 2019

Wind PTCs Get One-Year Extension, Other Tax Extenders Signed Into Law.

On Dec. 20, 2019, President Trump signed into law the Further Consolidated Appropriations Act of 2020, which extended or renewed certain expired or expiring tax credits and other tax incentives. Of importance in this act is a one-year extension to the production tax credit (PTC) for wind projects under Section 45 of the Internal Revenue Code.

Notably, wind projects that begin construction in 2020 are eligible for 60 percent of PTCs, whereas wind projects that began construction in 2019 are eligible only for 40 percent of PTCs. As enacted, the PTC schedule is as follows:

- Projects that began construction before the end of 2016 – 100 percent
- Projects that began construction in 2017 – 80 percent
- Projects that began construction in 2018 – 60 percent
- Projects that began construction in 2019 – 40 percent
- Projects that begin construction in 2020 – 60 percent

The IRS "begin construction" rules would still apply, including the four-year continuity safe harbor to place a project in service after construction has begun.

The act also revived PTCs for certain orphaned technologies that lost qualification at the end of 2017 if those projects had not already begun construction. The following electrical facilities once again qualify for PTCs so long as they "begin construction" before the end of 2020:

- Closed-loop biomass
- Open-loop biomass
- Geothermal energy
- Landfill gas
- Municipal solid waste
- Incremental hydropower
- Marine and hydrokinetic renewable energy

McGuireWoods LLP – Durham C. McCormick Jr., Marvin L. Rogers, Ashlin C. Aldinger, Emily J. S. Winbigler, Daniel M. Chung and James E. Gross

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Congress Passes FY 2020 Funding Bill with Tax Benefits for Energy, Health Care, and Retirement Plans.

In a rare display of bipartisanship, after intense last minute negotiations between congressional leadership and the Executive Branch, President Donald Trump today signed into law legislation passed this week by Congress to appropriate US$1.4 trillion in spending for Fiscal Year 2020.

Included along with the funding legislation was a package of tax provisions that represented wins for the health care industry, retirement planners and energy companies. Among the items in the tax package were:

Complete repeal of three health care taxes from the 2010 Affordable Care Act:

1. The Medical Device Tax (which had been deferred through the end of 2019)
2. The "Cadillac" Health Plan Tax (which also had been deferred through the end of 2019)
3. The Health Insurance Industry Fee (repeal effective in 2021)

The Secure Act, including many changes to retirement related tax laws, such as:

1. Changes to the minimum distribution rules, including limits on "stretch" IRAs
2. Enhanced ability to offer annuities in 401(k) plans
3. Repeal of the maximum age for traditional IRA contributions
4. Allowing long-term part-time workers to participate in 401(k) plans

A tax extenders package, extending a host of tax incentives – in particular for alternative energy technologies – that had expired in 2017 or are expiring in 2019. These included (extensions to the end of 2020 unless otherwise noted):

1. Biodiesel and renewable diesel credits (extended to 2022)
2. Alternative vehicle fuels – excise tax credits
3. Refueling/Recharging property credit
4. Wind PTC – One additional year (to end of 2020) to begin construction and qualify for 10 years of the production tax credit at 60 percent of full credit value (under construction in 2019 is at 40 percent of full credit value)
5. Production Tax Credits for electricity produced from:

- – Biomass
- – Geothermal
- – Landfill gas
- – Municipal waste
- – Hydropower, and
- – Marine and hydrokinetic

6. Short line rail maintenance credit (extended to 2022)

7. Empowerment zone tax incentives

8. New markets tax credits

9. Work opportunity credit

10. Reduction in beer, wine excise taxes

11. CFC look-through

- Two corrections to mistakes in the Tax Cut and Jobs Act: a fix to benefit electric cooperatives and a repeal of the taxability of fringe benefits for 501(c)(3) organizations (the so called 'church parking tax')

Among notable items that did not make it into the final bill:

- No expansions for solar electricity credits
- No expansions for electric vehicle credits
- No technical corrections to the Tax Cut and Jobs Act, other than the two mentioned above
- No new investment tax credit for energy storage

For medical device manufacturers, health insurance companies and employers with self-insured plans, the repeal of the three major ACA taxes represent major victories as this eliminates the risk of significant future taxes on them. We do not expect these taxes to re-enacted any time in the near future.

For the retirement industry and retirement savers, the Secure Act is also significant in providing – for the most part – greater flexibility of retirement options.

For alternative energy technologies, in particular the biodiesel and renewable diesel industry, and wind and other renewable electricity providers benefitting from the production tax credit (other than solar), this bill represents a positive holiday surprise, as many in Washington doubted the ability of Congress to compromise and pass the extensions of these incentives (notably, in many cases reinstated retroactive to the beginning of 2018).

The enactment of this bill also makes clear that even in the midst of what could be called the most polarized U.S. Government since the Civil War, compromise is still possible, and tax extenders can still find their way to enactment, year after year.

As many tax items were left on the cutting room floor, however, we expect a strong push by many in Washington to move yet another tax bill in early 2020. Stay tuned.

Hogan Lovells – James Wickett and Kurt L.P. Lawson

December 20 2019

How Opportunity Zones Can Help Solve the Climate Crisis, with Jack Sullivan.

Does the climate change mitigation industry pose a huge OZ business opportunity? Jack Sullivan is founder and CEO of RedCarbon, a Qualified Opportunity Zone Business that focuses on carbon sequestration technologies and processes. Click the play button below to listen to my conversation with Jack. Episode Highlights Marrying the Opportunity Zone law with one of the greatest challenges that humanity has ever faced. A brief …

Read More »

Opportunity Db

December 23, 2019

IRS Final Regulations on Opportunity Zones, with Tony Nitti.

Final regulations on Opportunity Zones have been issued by the IRS. What are the most meaningful changes and additions to be aware of? Tony Nitti is an Aspen-based real estate tax law expert, CPA, and tax services partner at RubinBrown. He serves on the editorial advisory board for The Tax Adviser. He's also a regular contributor at Forbes.com, where his latest article breaks down Opportunity

[Read More »]

Opportunity Db

December 26, 2019

[Opportunity Zone Regulations: Putting It All Together.]

Ah…opportunity zones. Not since my private message pursuit of Kristen Bell have I invested so much time and effort into something only to receive nothing in return.

To be honest, the whole opportunity zone thing has been a bit of a phenomenon. Once an overlooked eight pages of sloppily-written text buried deep within the Tax Cuts and Jobs Act, over the last two years, the opportunity zone tax break – or at least talking about the opportunity zone tax break – has become big business. Not a week goes by that there isn't an conference or three on the topic somewhere in the country. Over the summer, I arrived home from work one day to find the inaugural issue of *Opportunity Zones Magazine* in my mailbox. And to top it all off, in the past year, I've been interviewed by two opportunity zone podcasts, which is worthy of note only because it establishes that there are multiple opportunity zone podcasts.

I've gotten caught up in the excitement as much as anyone. This is now the sixth time I've published an article detailing the tax benefits afforded by Section 1400Z-2, and I've taught the topic more times than I can count. But rather than explain from my own perspective why this time has proved fruitless, allow me to share the words of a guy who stood – yes stood – in the back of my four hour workshop on opportunity zones for the AICPA this past November. About two hours into my class, as I explained the critical differences between QOZB, QOZP, and QOZBP, he'd finally heard enough. His hand shot up, and I asked if he had a question. He did.

[Continue reading.]

Forbes

by Tony Nitti

[How OZ Funds Are Adhering to Policy Intent, with Greg Genovese and Steve Sego.]

Are Qualified Opportunity Funds living up to the spirit and intent of the Opportunity Zone initiative? And how should social impact reporting be conducted? Greg Genovese is president of Sound West Realty Capital, a real estate development group based in the Seattle area. Steve Sego is president of the Waterman Group, a community redevelopment, investment, and mitigation company. Click the play button below to listen.

Read More »

Opportunity Db

December 11, 2019

Filing Frenzy Shows Companies Lining Up for Opportunity Zones.

There wouldn't be much of an economy in Center, Texas, without Tyson Foods Inc. The company has a sprawling chicken-processing plant in town and employs about 1,600 people in a city of slightly more than 5,000 near the Louisiana border.

So, when Tyson signaled two years ago that it wanted to build a $50 million feed mill, Center's economic development director, Jim Gibson, was eager to find a location and suggest tax abatements.

Before long, Tyson keyed in on a new benefit: a tax break signed into law by President Donald Trump, aimed at luring new investments to thousands of low-income areas across the country dubbed "opportunity zones." Center and most of the surrounding area sat squarely in one.

"One of the people from Tyson said, 'I think we're going to make a run at doing these,'" Mr. Gibson recalled.

That was in private. Tyson — the country's biggest meat processor, with roughly $40 billion in annual revenue — announced its plans for the feed mill in February as it began to seek a separate local tax abatement. News reports and minutes from two county meetings where the project was addressed make no mention of opportunity zones.

The company wasn't required to say anything publicly about its plans to use the federal subsidy. But like scores of businesses and investors in recent months, Tyson left a faint paper trail. It beat a path to Delaware — where more than two-thirds of Fortune 500 companies have a legal home — to lay the groundwork for claiming one of the most controversial and generous benefits in Trump's 2017 tax overhaul.

Once heralded as a novel way to help distressed parts of the U.S., opportunity zones are now being slammed as a government boondoggle. The perks are being used to juice investments in luxury developments from Florida to Oregon. And several reports have shown how politically connected investors influenced the selection of zones to benefit themselves.

While Tyson's feed mill fits more squarely with what lawmakers intended, it still highlights the lack of comprehensive data on who's claiming the benefits. Congress is now calling for changes to the legislation to boost transparency.

In the meantime, supporters can point to anecdotal evidence that the benefits are spurring development in areas that really need it, and detractors can cite examples of waste.

An analysis of almost 400,000 Delaware Division of Corporations records since the start of 2018 provides a fresh glimpse into what's going on. After starting slowly last year — as states selected zones and the U.S. Treasury Department wrote regulations — the number of filings referencing opportunity zones accelerated dramatically. There were at least 356 entities containing acronyms or phrases associated with the tax breaks in June alone, and more than 1,800 through the end of September.

Paper trail

Real estate investors and developers, a group that gravitated to the tax breaks early, make up a big portion of the list. But the records show that the appeal is broader, extending to previously unreported efforts by Tyson, AT&T and NextEra Energy. Billionaire hedge fund managers Steve Cohen and Bill Ackman have also made filings.

Tyson said it weighs a variety of factors when looking to expand, including the availability of workers and infrastructure. Government incentives often play a role, too, and were part of the equation for the new feed mill, said Derek Burleson, a spokesman for the Springdale, Ark.-based company.

"Opportunity zones were created to help spur private development in economically challenged areas, and we believe this project will do just that," Mr. Burleson said in an email. "We see this as a significant investment in the community that will create new jobs with great benefits and make a positive impact on the local economy."

A spokeswoman for AT&T, which changed the names of two entities after an inquiry from Bloomberg News in July, scrubbing references to opportunity zones, said the company is evaluating programs to invest in the areas. NextEra, the world's largest utility company by market value, declined to comment, as did spokesmen for Ackman and Cohen.

Lack of transparency

The filings underscore the lack of transparency surrounding a federal subsidy that could cost billions of dollars, said Brett Theodos, a senior researcher at the Urban Institute who has studied opportunity zones. And it shows why the government should gather more information both about individual projects and the impact on communities as a whole.

"These are the exact types of investments that we will never learn about, absent more disclosure," Mr. Theodos said. "We should know how the government is spending our money, and it shouldn't fall to investigative journalists to figure this out."

That there's any record owes in part to jargon Congress used when drafting the law. Taxpayers who want to claim the benefits must hold their investments in a "qualified opportunity fund," a corporation or partnership that has most of its assets in "qualified opportunity zone" property.

Keeping track

Lawyers often use shorthand such as QOF or QOZ in naming the entities, even though it's not required, said Jessica Millett, head of the tax practice at Duval & Stachenfeld LLP in New York who has structured dozens of opportunity zone deals.

"It just helps you remember what's what," she said, adding that Delaware was probably seeing a large share of the filings because of its longstanding reputation for being business-friendly.

Even so, the filings are just clues to what's going on, often giving little more than a name and date of formation. Many entities have names that are too generic or opaque to scrutinize, such as SM QOZB 3 LLC, created in September. Owners couldn't be identified in such cases.

Among those that can be are prominent developers or their projects. More than four dozen entities are tied to Starwood Capital Group, Brookfield Asset Management or RXR Realty, which are raising hundreds of millions of dollars to build in the zones.

Socially minded investors are also represented, including a $200 million effort started by retired Tennessee Titans linebacker Derrick Morgan and another called Arctaris Impact, which has pledged to report publicly on its investments and pursue projects that benefit poor communities.

But, so too, are entities that likely stretch what lawmakers intended for the tax breaks. In July, someone used the Corporation Trust Co., a registered agent that handles many Delaware filings and can help obscure the identities of filers, to create a business called QOZ ART STORAGE QOF 2019, LLC.

Creating the companies or partnerships is no guarantee that a taxpayer will claim the incentives. Both Messrs. Cohen and Ackman formed entities in June that were intended to allow them to invest in the zones, but neither has done so yet, according to people familiar with the filings who asked not to be identified discussing the hedge fund managers' plans.

Just because investors and corporations aren't broadcasting their plans doesn't mean they're doing something untoward, said John Lettieri, chief executive officer of the Economic Innovation Group, a Washington non-profit that helped conceive of and promote opportunity zones. Companies often hold back information for competitive reasons, he added, and sometimes even philanthropic efforts are undertaken anonymously.

Effectiveness of incentives

"On its face, it doesn't concern me," Mr. Lettieri said. "When you make a charitable contribution, you can choose to get your name plastered on a building or choose not to." Even so, he added, the government needs to be gathering more information about investments in the zones so that it can better evaluate whether the incentives are effective.

In October, the Treasury Department and the Internal Revenue Service released new forms that will require funds to say in which opportunity zones they have property and declare the value of those assets. Treasury Secretary Steven Mnuchin called it an "important step toward a thorough evaluation" of the incentives.

But researchers were quick to point out the shortcomings of the forms, which won't provide information such as the types of projects being funded or their precise locations. And because the disclosure is part of a tax return, the data may never be made public, said Samantha Jacoby, a senior tax law analyst at the Center on Budget and Policy Priorities.

Legislation

Both Democrats and Republicans in Congress are advancing measures to gather more information. Among them is a bill introduced last month by Sen. Ron Wyden, D-Ore., that would bar certain kinds of investments, including stadiums, and require funds to file detailed public reports each year.

More transparency would allow the public to determine whether the incentives actually work as intended and discourage bad actors, Mr. Wyden said.

"This is kind of Sunshine 101," he said. "What I keep coming back to is: Are the investment dollars largely benefiting those who are well-off in affluent communities? Or are they to support new projects in truly low-income communities?"

Center is the kind of place that could use the money. The poverty rate hovers around 30% in the Census tract where it sits, making it a shoo-in for the opportunity zone designation. But investors haven't exactly been beating down the doors.

"It's just not the happening spot in Texas right now," said Mr. Gibson, the economic development director.

The community lacks the skilled workforce that attracts businesses and real estate development to bigger cities, he said, adding that he couldn't think of an opportunity zone project in the area, other than the Tyson feed mill.

Construction of the facility on a site outside town and adjacent to a rail line has already begun, according to Mr. Gibson. When it opens in 2021, it will churn out chicken feed for nearby poultry farms. About 40 people will work there, with an annual payroll of about $3 million.

In addition to the opportunity zone benefits, Tyson is getting a five-year break on its county taxes for the mill. But the company decided to forgo another program that would have allowed it to cut payments to the local school district, Mr. Gibson said.

"It'll be really good for the schools," Mr. Gibson said. But, in the end, the number of jobs is pretty minimal, compared with the size of the investment, he added. "It's not one of those transformational game-changers."

Bloomberg

December 12, 2019 09:13 AM

Expiring Tax Breaks Set Off Year-End Scramble.

Industry groups are pressing lawmakers to include their tax priorities in year-end legislation, setting off a last-minute scramble.

A number of tax breaks, particularly in the energy sector, have already expired or are set to expire at the end of this year, and groups want Congress to renew or update those tax preferences.

The pressure goes beyond expiring tax breaks. Industry groups are also urging Congress to add other tax provisions to legislation, such as a bipartisan retirement bill that has already passed the House, and to repeal or delay ObamaCare taxes.

But it still remains to be seen whether any year-end tax package comes together this year, since Democrats and Republicans have some differing priorities and there's little time remaining to put together a deal.

It's not uncommon for Congress to pass a tax package at the end of the year, taking action to renew expired and expiring tax breaks known as "tax extenders." But Congress hasn't passed extenders legislation since early 2018, and some tax breaks, including in the renewable energy area, have been expired since the end of 2017. Other tax breaks are set to expire at the end of this year, including a couple of provisions created by President Trump's tax-cut law.

But the pressure this year from industry groups for action is intense, with many offering dire warnings that companies could go out of business without extensions.

For the energy industry, the tax breaks that expired at the end of 2017 include incentives for energy efficiency improvements and biodiesel. A tax credit for wind energy is slated to go away at the end of the year, and a tax credit for investment in solar energy is slated to be reduced next year.

“One thing Congress can do before the end of the year to help rural economies and provide some policy stability is extend the expired biodiesel and renewable diesel tax incentive,” a group of biodiesel and agricultural groups wrote in a letter to House and Senate leaders earlier this month.

Some groups are arguing that extensions of their tax incentives would be a way for Congress to help tackle climate change.

“Energy efficiency is the most effective solution we have for climate change,” said Ben Evans, vice president of government affairs at the Alliance to Save Energy. “It’s a huge hole in the tax code that we don’t currently have any energy efficiency incentives.”

Alcohol industry groups, meanwhile, are pushing Congress to extend tax relief for brewers, winemakers and distillers that was included in the 2017 tax law but is slated to expire at the end of the year. Groups held a day of action last week to mobilize people to contact Congress on the issue.

“We could see businesses shutting down as a result of this not being passed,” said Chris Swonger, president and CEO of Distilled Spirits Council.

Tax extenders, though, are only one item on the docket as the legislative year draws to a close and groups seek a host of other changes.

The House in May passed a bipartisan bill with a host of provisions aimed at boosting retirement savings that also included a fix to an area of Trump’s tax law that had the unintended consequence of raising taxes on certain income received by children, such as survivor benefits for the children of deceased military members and first responders. The bill has stalled in the Senate, but it has bipartisan support in the chamber and retirement-industry groups want it to become law by the end of the year.

“If anything has a good chance of passing in spite of the clock, it’s this bill for everyday Americans,” said Susan Neely, president and CEO of American Council of Life Insurers.

Groups are also pushing for the repeal or further delay of several taxes created by ObamaCare, including the repeal of the “Cadillac tax” on high-cost health plans.

“This tax does not hit ‘overly-generous’ plans,” said James A. Klein, president of the American Benefits Council, which is pushing for repeal of the Cadillac tax. “It disproportionately affects health plans that are expensive because they cover large numbers of older workers, women, and families with chronic or catastrophic health conditions. Congress must act now!”

Many of these priorities have support among at least some lawmakers in Congress, and a number of them — including repeal of the Cadillac tax, passage of the retirement bill and extension of the alcohol excise tax relief — have bipartisan backing.

Earlier this week, a group of Senate Democrats wrote a letter to the chamber’s leaders urging them to prioritize clean energy tax extenders in any tax bill.

But it’s not clear whether there will be any year-end tax legislation this year, and some lawmakers and observers think that a package is unlikely.

“If I had to handicap the prospects for an end-of-year tax deal right now, I would be more pessimistic than optimistic,” said Todd Metcalf, a former aide to Democrats on the Senate Finance Committee and now at PricewaterhouseCoopers.

Tax legislation would likely move along with a spending bill that isn’t just a short-term stopgap measure, Metcalf said. Lawmakers are still negotiating on spending bills ahead of a Dec. 20 deadline.

Metcalf also said that some of the tax provisions that used to motivate Congress to pass end-of-year tax extenders are now permanent. The remaining temporary tax provisions “don’t have the same kind of political juice,” he said.

And the parties have their own priorities. House Democrats are interested in pairing a renewal of tax breaks benefiting businesses with expansions of refundable tax credits that benefit low- and middle-income families, such as the earned income tax credit and the child tax credit. But that’s a tough ask for Republicans, and any year-end tax package would need to be bipartisan to be enacted.

House Ways and Means Committee Chairman Richard Neal (D-Mass.) on Wednesday reiterated his interest in expanding the tax credits and said he thinks there’s room to reach an agreement with Republicans.

“I think that the extenders bill ought to include an expansion of the earned income tax credit and a more robust child credit,” he told reporters.

The top Republican on the Ways and Means Committee, Rep. Kevin Brady (R-Texas), told reporters Wednesday that Democrats and Republicans are trading offers to try to reach a consensus but don’t have a deal yet. He said that if talks fall through, he doesn’t think there will be a package to simply extend expired provisions.

Brady said that the sizable refundable tax credit expansions Democrats are seeking are a “non-starter.”

“We continue to have concerns about the fraud within those programs,” he said, adding that the amount of spending Democrats are seeking is “not realistic.”

As the clock ticks down, industry groups are remaining upbeat about the chances their priorities will be addressed.

Jim McGreevy, president and CEO of the Beer Institute, said he feels that there is energy at the end of the year for Congress to tackle a number of items.

“I hope extenders is one of them,” he said.

THE HILL

BY NAOMI JAGODA – 12/11/19

Repealing "SALT" Cap Would Be Regressive and Proposed Offset Would Use up Needed Progressive Revenues.

A bill from House Ways and Means Chairman Richard Neal and others would modify and then repeal for two years the 2017 tax law's cap on the federal deduction for state and local taxes (SALT) and offset the cost over ten years by returning the top individual tax rate to 39.6 percent. By itself, repealing the SALT cap would overwhelmingly benefit high-income households, since most low- and middle-income taxpayers don't face the SALT cap. In addition, paying for repeal by raising the top rate would use up a source of progressive revenue that would no longer be available to fund other, more critical priorities.

As a result, the Ways and Means bill would not address two central flaws of the 2017 tax law overall: its steep cost and its heavy tilt toward wealthy individuals and profitable corporations. Chairman Neal and the Ways and Means Committee have separately advanced legislation, the Economic Mobility Act, that would expand refundable tax credits to help low- and moderate-income families, as a down payment on beginning to restructure the 2017 law.[1] Given the steep cost of full repeal of the SALT cap, however, more modest proposals to modify the SALT cap offer a superior approach; such proposals can be designed to exempt the vast share of taxpayers from the cap and at far less cost.

The 2017 tax law imposed a $10,000 cap on the state and local taxes that filers can deduct on their federal tax returns. The Ways and Means bill would raise the cap in 2019, to $20,000 for married couples, and repeal it altogether in 2020 and 2021; the bill would offset the cost by reversing the 2017 tax law's reduction in the top income tax rate from 39.6 percent to 37 percent.[2]

Continue reading.

CBPP

BY CHUCK MARR KATHLEEN BRYANT MICHAEL LEACHMAN

DECEMBER 10, 2019

IRS Issues Private Letter Ruling Allowing Tax Equity Financing with a Regulated Utility Taxpayer.

In Private Letter Ruling 201946007, the Internal Revenue Service (IRS) allowed a tax equity investor to participate with a regulated utility in a tax equity financing arrangement for wind investments without being subject to the tax normalization rules.

In Depth

Investments in renewable energy facilities can reduce reliance on fossil fuels, boost energy security and provide tax benefits, such as accelerated depreciation, the investment tax credit (ITC) under IRC § 48 and the production tax credit (PTC) under IRC § 45. The PTC incentivizes certain wind and other renewable energy projects by granting a per kilowatt-hour tax credit based on the amount of electricity produced; and the ITC provides a tax credit based on the amount of investment in solar facilities. Accelerated depreciation allows for greater tax deductions in the earlier years of a project's lifecycle at a faster pace than depreciation under regulatory or financial accounting standards. For many years, tax equity investors have partnered with non-regulated energy producers to obtain these tax attributes. Under a safe harbor established by Revenue Procedure 2007-65, a tax equity investor and an energy producer may enter into a partnership that holds renewable energy assets, and they can share the PTCs, depreciation deductions, any other tax items and cash that may be generated by the assets.

Before PLR 201946007, there was significant uncertainty as to whether a tax equity investor could enjoy the full benefit of accelerated depreciation from an investment partnership with a regulated utility due to the possible application of the tax normalization rules. The Code provides that tax normalization rules apply to utilities that can recover costs through rates set by a public utility commission. The tax normalization rules provide that, for purposes of recovering costs from customers, depreciation of public utility property cannot be recovered more rapidly than depreciation allowable for accounting purposes. ITCs are also subject to the tax normalization rules. The normalization rules allow a regulated utility to enjoy the full benefit of depreciation deductions and the ITC without having to immediately pass the benefits on to its ratepayers. The regulated utility can take these benefits over the useful life of the asset for regulatory purposes. If a regulated utility is not permitted by its public utility commission to use a normalized method of accounting, the utility is ineligible for accelerated depreciation and ITCs.

If a regulated utility partner entered into a tax equity partnership, it was unclear whether the partnership's wind assets would be public utility property, and therefore whether the tax equity investor could take accelerated depreciation. Because of this uncertainty, regulated utilities have generally not participated in tax equity structures.

In PLR 201946007, the Service addressed whether a new wind generation facility would be public utility property for purposes of determining whether the depreciation deductions from the facility would be subject to the normalization rules. The taxpayer planned to form a joint venture with an independent tax equity investor to invest in a wind facility. The joint venture would sell the electricity generated by the wind facility to a disregarded affiliate of the taxpayer (Affiliate), a regulated utility, pursuant to a wholesale power purchase agreement (PPA). Affiliate would then sell the electricity to its customers. Rates under the PPA would be determined based on a competitive bidding process and market-based method, and not on a rate-of-return or cost basis. The taxpayer requested a ruling that the wind facility would not be Public Utility Property, so that the normalization rules would not apply.

The IRS looked at the rules under section 168(i)(10) and related regulations, which provide that a facility will only be treated as public utility property if the following three factors are met:

1. The facility must be predominately used in the trade or business of the furnishing or sale of electric energy;
2. The rates for such sale must be established or approved by one of the enumerated agencies or instrumentalities; and
3. The rates set by that agency or instrumentality must be established or approved on a rate-o--return basis.

In the ruling, the IRS analyzed the factors at the partnership level. The wind facility clearly met the first two factors, but failed to satisfy the third because the PPA's rates were set on a market basis, and not a rate-of-return basis. As a result, the IRS ruled that the wind facility would not be public utility property. Therefore, the tax normalization rules will not apply.

This ruling is significant because it confirms that the normalization rules will not apply to wind generation facilities held by a partnership where the electricity is sold to the regulated utility investor at market rates, even though the utility sells the power at regulated cost-of-service or rate-of-return rates.

Practice Point: Regulated utilities can participate in tax equity structures, generating accelerated depreciation for tax equity investors.

Practice Point: Because the normalization rules also apply to the ITC, the IRS's letter ruling presents a road map for structuring solar investments with regulated utilities to fully maximize tax benefits.

McDermott Perspective: McDermott submitted the above ruling request on behalf of a Firm client.

December 3, 2019

McDermott Will & Emery

Leveraging Opportunity Zones to Boost Affordability in Hot Markets.

Abstract

The Opportunity Zones tax incentive, created by the Tax Cuts and Jobs Act of 2017, was designed to spur investment in low-income and undercapitalized communities. How can stakeholders use the program to benefit disinvested neighborhoods and expand access to affordable housing? The experiences of investors, developers, government officials, and philanthropy representatives show how the incentive is working at the national and local level in King County, Washington.

Download article.

The Urban Institute

by Brett Theodos & Jorge González

December 4, 2019

Treasury Submits Updated Opportunity Zones Rules to OIRA.

Read the Updated Rules.

Office of Information and Regulatory Affairs | *Dec. 9*

Sens. Scott, Grassley, Colleagues Introduce Expanded Bill on Opportunity Zone Reporting Requirements

Read the Expanded Bill.

U.S. Senate | *Dec. 6*

Over $3.9 Billion Raised by Opportunity Zone Funds, with Michael Novogradac.

Are Opportunity Zone funds having success raising enough capital? Will capital raising reach federal government estimates? Find out why one prominent tax accountant thinks so. Michael Novogradac is managing partner of Novogradac, a top 50 accounting firm and thought leader in the Opportunity Zone industry. Click the play button below to listen to my conversation with Michael. Note: This is Part 1 of my two-part…

Read More

Opportunity Db

December 4, 2019

Pairing Tax Credits with the Opportunity Zone Tax Incentive, with Michael Novogradac

How can different real estate tax credits (New Markets, Low Income Housing, Renewable Energy, and Historic) be paired with the Opportunity Zones tax incentive? Michael Novogradac is managing partner of Novogradac, a top 50 accounting firm and thought leader in the Opportunity Zone industry. Click the play button below to listen to my conversation with Michael. Note: This is Part 2 of my two-part conversation…

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Opportunity Db

December 4, 2019

Key Dates & Deadlines for Opportunity Zone Investing.

As 2019 winds down and the full benefit of the Opportunity Zones tax incentive expires, here are some key dates for investing in Opportunity Zones — past and future. Note: as IRS regulations are not yet finalized, these dates are subject to change. February 2, 2017: The Investing in Opportunity Act is introduced in the Senate and House. December 22, 2017: The Tax Cuts and …

Read More »

Opportunity Db

November 27, 2019

Taxing Online Sales Won't Save Cities From the Retail Apocalypse.

The Supreme Court's year-old Wayfair decision allows most U.S. states to collect sales tax from online shopping. Can cities expect a revenue bump?

As the holiday shopping season approaches, more governments than ever will reap the benefits of all that spending. That's because in 2018, the U.S. Supreme Court overturned the ban on governments taxing online sales. More than a year after the South Dakota v. Wayfair decision, states have now started collecting, and some have already seen a slight boost in sales tax revenue. That bump could be even greater as the Black Friday/Cyber Monday shop-a-thons kick off the end-of-year spending spree.

But it's unlikely that cities will see much of it.

States saw a 7 percent bump in sales tax revenue between June and September of this year over the corresponding period in 2018, according to data compiled by the Urban Institute's State and Local Finance Initiative. That's a few percentage points higher than average, and the Institute's Lucy Dadayan says it's most likely due to the increased collections from online sales.

Continue reading.

CITY LAB

by LIZ FARMER

NOVEMBER 26, 2019

TAX - PENNSYLVANIA

City of Philadelphia v. Jones

Commonwealth Court of Pennsylvania - November 20, 2019 - A.3d - 2019 WL 6138376

Property owner filed a petition to open, strike, stay or set aside sheriff's sale and deed arising from tax sale.

The Court of Common Pleas affirmed the tax sale. Property owner appealed.

The Commonwealth Court held that:

- Trial court lacked jurisdiction to consider property holder's petition;
- City strictly complied with notice provisions of Municipal Claims and Tax Liens Act (MCTLA); and
- Property owner lacked standing to challenge notice of tax sale.

Can An Unfinished But 'Usable' Basement Space Be Taxed? Berkeley Says 'Yes' And The Courts Have Agreed.

A group of Berkeley property owners has taken to emails, phone calls, social media and even the courts to challenge the way the city calculates special, voter-approved taxes.

The property owners — it's hard to know how many, but at least several — question the accuracy and legality of the city finance department's way of measuring square footage, which is the basis of the city' special taxes, used for such services as the library, parks, and emergency medical serves, and the schools.

They claim they're being overtaxed to the tune of thousands of dollars a year.

There is "potential for the city to be forced to issue a large amount of refunds (perhaps in the millions) and have reduced tax collections going forward," said David Kellogg, a tax-questioning property owner who is asking the city to reimburse him for back taxes.

Continue reading.

Berkeleyside

By Kate Darby Rauch

Nov. 27, 2019, 11 a.m.

When Summer Reading and Public Finance Tax Intersect – Tax-Exempt Bonds, Pop Culture, and the Town of Windthorst

Early in my career, I learned to dread telling people that I was a lawyer because when I explained the niche practice of public finance tax law, their eyes started to get sleepy, then their eyes started to glaze over. That was usually when I would blurt out "I help finance airports, hospitals, schools, and infrastructure across the country." So when I came across the *D Magazine* article, The Tiny Town Bankrolling Texas Institutions during my summer beach reading,[1] I nearly spilled my Aperol Spritz[2] all over my Excel spreadsheets.

Continue Reading

By Taylor Klavan on November 25, 2019

The Public Finance Tax Blog

Squire Patton Boggs

MSRB Investor Guide to ABLE Programs.

Read the MSRB's new investor guide for a better understanding of how ABLE programs work.

State Tax Debates Could Use Some (Customized) State Economic Data.

Politicians love to make claims about tax policy. This tax cut will create jobs! That one forced the school district to fire teachers!

But too often such claims are not supported with evidence. So the State and Local Finance Initiative made an interactive tool that gives you—whether you're a policymaker, journalist, researcher, or voter—the power of data. The updated State Economic Monitor lets users graph, analyze, and share statistics on state employment, earnings, gross domestic product (GDP), and housing—and for just the states you're interested in.

Before you take it out for a spin, I'll show you how the updated tool can provide evidence for three tax policy issues. Hopefully, you'll then use it to make customized graphs for your next memo, presentation, or tweet about state tax policy.

Continue reading.

Tax Policy Center

by Richard C. Auxier

November 12, 2019

TAX . - VIRGINIA

Virginia International Gateway, Inc. v. City of Portsmouth

Supreme Court of Virginia - October 31, 2019 - S.E.2d - 2019 WL 5607827

Taxpayer, believing that assessments for its real and personal property were above fair market value, filed separate applications to correct the real estate and personal property assessments.

City filed counterclaim to the real property application, contending that fair market value was actually several hundred thousand dollars more than the assessment. The trial court consolidated the two cases for trial. The Circuit Court dismissed both of taxpayer's applications, as well as the city's counterclaim, and taxpayer appealed.

The Supreme Court held that:

- Trial court abused its discretion when it excluded real estate appraiser's expert testimony, and
- Taxpayer did not rebut presumption of correctness of city's valuation of taxpayer's personal property.

In taxpayer's action, contesting city's real estate and personal property assessments, trial court abused its discretion when it excluded real estate appraiser's expert testimony; appraiser held active New York real estate appraisal license, he secured temporary Virginia appraisal license, and during this period of active licensure, he updated his initial valuation and brought it into compliance with standards governing real estate appraisals in Virginia, he completed his final appraisal report within period of active licensure, and his testimony addressed only the appraisal for which he was licensed.

There was sufficient evidence to support trial court's ruling that taxpayer did not rebut the presumption of correctness of city's valuation of taxpayer's personal property, and accordingly, trial court did not err in declining to adjust the personal property assessment; city assessed taxpayer's personal property at 50% of original value, city not only came forward with evidence of the assessment's correctness in the form of expert's independent appraisal, it also presented evidence that taxpayer's appraisal of the property was flawed, and city put on evidence that taxpayer's methodology was flawed because of its failure to adhere to recognized valuation approaches.

IRS Publishes 2020 Pension Plan Limitations: Day Pitney

IRS recently announced the cost-of-living adjustments applicable to certain dollar limitations for employee pension benefit plans for 2020. The resulting dollar limits are as follows:

- The annual benefit limit for defined benefit plans is increased from $225,000 to $230,000.
- The annual addition limit for defined contribution plans is increased from $56,000 to $57,000.
- The annual limit with respect to the exclusion for elective deferrals to a 401(k), 403(b) or 457(b) plan is increased from $19,000 to $19,500.
- The limit on annual contributions to an individual retirement arrangement (IRA) remains unchanged at $6,000. The dollar limit for an additional catch-up contribution to an IRA for individuals age 50 or older remains unchanged at $1,000.
- The annual limit on compensation that can be taken into account under a qualified retirement plan is increased from $280,000 to $285,000.
- The dollar limit for defining key employees in a top-heavy plan is increased from $180,000 to $185,000.
- The dollar amount for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period is increased from $1.105 million to $1.150 million. The dollar amount used to determine the lengthening of the five-year distribution period is increased from $225,000 to $230,000.
- The dollar limit for catch-up contributions for 401(k) plans for individuals age 50 or older is increased from $6,000 to $6,500. In addition, the dollar limit under SIMPLE plans and SIMPLE IRAs for catch-up contributions for participants who are age 50 or older remains unchanged at $3,000.
- The limitation used in the definition of “highly compensated employee” is increased from $125,000 to $130,000.

A complete list of applicable pension plan limitations can be found here.

If you have any questions about the cost-of-living adjustments or any other employee benefits or executive compensation matter, please contact a member of Day Pitney’s Employee Benefits and Executive Compensation practice group.

Publisher: Day Pitney Alert

Day Pitney Author(s) David P. DoyleKathy A. LawlerLiza J. HechtThomas F.J. O’Mullane

November 7, 2019

EIG Opportunity Zones Activity Map.

View the map.

The Biggest Misconceptions About Opportunity Zones.

What are some of the biggest misconceptions, inconsistencies, and disconnects surrounding the

Opportunity Zone tax incentive? Bob Richardson is managing partner of Blue Cardinal Capital, a real estate private equity firm with Opportunity Zone projects in upstate New York. Click the play button below to listen to my conversation with Bob. Episode Highlights The key differences between tax credits and the Opportunity Zone tax incentive.…

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Opportunity Db

November 20, 2019

How OZ Communities, Sponsors, and Investors Can Connect, with The Opportunity Exchange.

Can an Opportunity Zone marketplace connect communities, OZ project sponsors, and investors to advance capital deployment and community impact? Peter Truog is founder of The Opportunity Exchange — a marketplace that connects impactful Opportunity Zone projects to capital sources. Also joining today's podcast episode from The Opportunity Exchange are Leo Peña and Ayat Amin. Click the play button below to listen to my conversation with…

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Opportunity Db

November 13, 2019

Federal Tax Bulletin: Key Timing Issues for Qualified Opportunity Fund Investments

Time is running out to clearly maximize the tax benefits available under the qualified opportunity zone (QOZ) program. Under current guidance, it seems that you must invest in a "qualified opportunity fund" (QOF) by December 31, 2019 to be eligible for all possible QOZ tax benefits (though most QOZ tax benefits will still be available for QOF investments made after 2019). Additionally, if your capital gain this year is from the sale of property used in a trade or business, you must wait to make the related QOF investment until the last day of the taxable year (which for most taxpayers is December 31, 2019). These two critical timing requirements are woven into the QOZ rules, which are discussed in more detail below.

BASIC QOZ RULES AND BENEFITS

Under QOZ program, QOZ tax benefits are available to a taxpayer who recognizes capital gain on the sale of property to an unrelated buyer, makes a qualifying equity investment in a QOF up to the amount of that capital gain, and holds the QOF equity interest for a certain specified period of time. Such a taxpayer has the ability to defer and partially eliminate federal tax on that capital gain, as well as to avoid all federal tax on the taxpayer's eventual sale of their QOF equity interest.

A QOF is an investment vehicle created to invest in QOZs. Any corporation or partnership (including an LLC treated as a corporation or partnership for tax purposes) can be a QOF, so long as it follows the applicable QOZ rules and self-certifies by filing a Form 8996 with its federal income tax return. The QOZ requirements (which are beyond the scope of this Bulletin) primarily are designed to ensure that QOF investments result in new or significantly refurbished assets deployed and used in QOZs.

There are 3 potential tax benefits available to taxpayers who make qualifying QOF investments. A taxpayer's eligibility for 1 or more of these benefits depends on when the taxpayer invests in a QOF, and how long the taxpayer holds their QOF equity interest. These 3 tax benefits include:

1. Deferral of Capital Gain Recognition. A taxpayer who invests capital gain into a QOF in compliance with the QOZ rules is not subject to immediate tax on that capital gain. Rather, taxation of that capital gain is deferred, and no federal income tax is required to be paid on the gain until the end of 2026 (or upon the investor's disposition of the QOF equity interest, if earlier).
2. Reduction of the Deferred Capital Gain. When a taxpayer is required to pay federal tax on their deferred capital gain, if they have held their QOF equity interest long enough by that point, a portion of the deferred tax will be eliminated. Specifically, if the QOF interest has been held at least 5 years, then 10% of the deferred tax liability will be eliminated, and if the interest has been held at least 7 years, an additional 5% of the deferred tax liability will be eliminated. Thus, the maximum reduction of the deferred federal tax liability is 15%.
3. No Federal Tax on Ultimate Sale of QOF Equity Interest. Any increase in value of a QOF equity interest that a taxpayer holds for at least 10 years prior to disposition is not subject to federal tax upon the sale of that QOF equity interest.

180-DAY QOF INVESTMENT WINDOW: WHEN DOES IT BEGIN?

When a taxpayer recognizes capital gain in a qualifying sale, the taxpayer has a 180-day window in which to make a corresponding equity investment in a QOF. Generally, that 180-day window begins on the day of the sale; however, there are exceptions to this rule.

1. Sale of Business Property. If the capital gain that you wish to invest in a QOF resulted from the sale of property used in a trade or business, special rules apply. Firstly, only your net capital gain for the year from sales of business property is eligible for QOF investment. Secondly, because that net gain amount cannot be determined until the end of the year, the 180-day QOF investment window for this gain does not begin until the last day of the year. Although this delay in the start of the 180-day window can be a benefit to many taxpayers by providing a later deadline for investment in a QOF, it can also be a potential trap. If a taxpayer were to recognize gain from the sale of business property and unwittingly make a QOF investment before year-end, that investment would not be eligible for any QOZ tax benefits.
2. Flow-Through Entities. When capital gain is recognized by a flow-through entity (e.g., an entity taxed as a partnership or an S corporation), either the entity itself may invest that capital gain in a QOF, or (in the event that the entity elects not to so invest) the entity's owners may directly invest their respective shares of the capital gain in QOFs. Where a flow-through entity invests in a QOF, normal rules relating to the 180-day window apply. Where an owner invests, however, their 180-day window begins on the last day of the flow-through entity's taxable year (though an owner may make an election to use the 180-day window of the flow-through entity).

THE SIGNIFICANCE OF DECEMBER 31, 2019

As stated above, in order to obtain the maximum 15% elimination of federal tax on deferred capital gain, a taxpayer must have held their QOF interest for 7 years by the time they are required to pay federal tax on that gain. The latest date that any taxpayer can defer tax on capital gain is December 31, 2026. Only QOF interests acquired on or before December 31, 2019 will satisfy the 7-year holding period on December 31, 2026. Therefore, under current guidance, it seems that taxpayers must invest in a QOF no later than December 31, 2019 to be eligible for the total maximum 15% federal tax elimination.

Taxpayers making QOF investments on or before December 31, 2021 would still be eligible for the 10% federal tax exclusion. Additionally, QOF investments made on or before December 31, 2028 will be eligible for the permanent exclusion from tax on the sale of those QOF interests, described above.

The foregoing rules create a tight timetable for most taxpayers hoping to maximize their QOZ benefits from the sale of business property this year. Those taxpayers have just one day—December 31, 2019—to achieve their desired tax results. Happy New Year's Eve!

11/13/19

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Note that the above discussion is based upon QOZ rules currently described in proposed regulations, which may be modified when released in final form. Until such time, the Treasury Department has indicated that taxpayers may rely on these proposed regulations. If you have any questions about these QOZ rules or the QOZ program generally, please contact your Vorys tax attorney.

What You Need to Know About the New Opportunity Investment Draft Form.

In October, the U.S. Treasury Department released a draft form designed to help it and the IRS collect information about how opportunity zone investments — a concept established by the 2017 Trump tax cuts — are affecting the economy. If implemented, it will gather data about whether these investments are living up to the project's original goal, which is to spur economic development in undercapitalized American communities.

What Are Opportunity Zones?

The opportunity zone concept comes from the Trump tax cuts — introduced in Congress as the Tax Cuts and Jobs Act (or TCJA) — passed in December of 2017. The zones are designed to encourage investment in areas that are federally certified as economically distressed.

Investors can sell stocks or other investments and assets and delay the capital gains tax they would normally pay on those investments, so long as they invest the proceeds into an opportunity zone. Profits made from projects in these zones can be written off entirely and results in reduced or no federal tax. These projects can include stock or partnership interests held in local businesses, as well as direct ownership of companies in opportunity zones.

The first set of opportunity zones, designated shortly after the passage of the tax breaks, only covered 18 states. Now, there are more than 8,700 opportunity zones across all 50 states — roughly 12 percent of all census tracts.

The opportunity zone investment idea was one of the few components of the tax cuts that were met with bipartisan support.

However, even the idea's supporters were concerns that the concept didn't have much in the way of guidelines. As the legislation was written, the IRS and Treasury were not required to collect information on where the opportunity zone investment money was going. It was not clear what sorts of projects were being constructed as a result of the tax break.

Treasury outlined new regulations on opportunity investment since the spring. There has also been pressure from Congress. The draft form comes after a bipartisan group of lawmakers — including presidential candidate Cory Booker — introduced legislation that would require the IRS to collect information about opportunity zone investment. It's not clear when the bill will be voted on, but the Treasury has already moved to start collecting information about opportunity zone investments.

Breakdown of the Opportunity Investment Draft Form

The draft form is designed for the 2019 tax year, but it's not clear when Treasury will begin requiring taxpayers to disclose this additional information about their opportunity zone investments. The form primarily requires corporations and partnerships to do so.

Under the form, corporations and partnerships would be required to report employer identification numbers for each business in which they hold stock or partnership interest. They would also be required to report the census tract number the investment is in, as well as its overall value.

The form would also collect information about businesses in which corporations and partnerships hold a direct stake.

Because no instructions have been published for the form yet, it's not clear what noncompliance will mean for taxpayers. The IRS may [leverage a penalty or fine] if a corporation or partnership fails to properly disclose all its opportunity zone investments.

Treasury noted that the information collected as a result of the draft form would be available to lawmakers.

What Investors Need to Know About Opportunity Zones

It's not clear when the IRS will begin requiring taxpayers to report additional information about their opportunity zone investments. The draft form is designed for the 2019 tax year, but taxpayers may not have to worry about providing more details just yet.

Lawmakers, in the meantime, will likely continue to push for stricter regulations on opportunity zones and look to pass laws that require the IRS and Treasury to ensure compliance with the provisions established under TCJA.

Tech Bullion

By Kayla Matthews

November 14, 2019

TAX . - GEORGIA

B.C. Grand, LLC v. FIG, LLC

Court of Appeals of Georgia - October 29, 2019 - S.E.2d - 2019 WL 5558651

Property owner filed action against purchasers of tax executions for delinquent ad valorem taxes on property, asserting claims for negligence, unjust enrichment, conversion, and conspiracy, alleging that purchasers bought tax executions on property to collect higher interest amounts and penalties than were due because executions were based on initial tax assessments that were later reduced.

The trial court granted purchasers' motions to dismiss for failure to state claim. Property owner appealed.

The Court of Appeals held that:

- Tax executions were validly issued, and
- Property owner failed to establish that purchasers were not authorized to levy executions and demand payment.

Tax executions for delinquent ad valorem taxes on property were validly issued by County Tax Commissioner, where property owner failed to pay taxes after 30-day notice period while pursuing appeal of assessment and awaiting refund.

Property owner failed to establish that purchasers of validly issued tax executions for delinquent ad valorem taxes were not authorized to levy executions and demand payment, in property owner's action against purchasers, asserting negligence and other claims; property owner failed to allege that County Tax Commissioner cancelled tax executions, or that tax executions were void as a matter of law based on post-issuance reduction in tax assessment.

This Tax-Free 5.1% Dividend Is Hiding In Plain Sight.

I'm going to show you my favorite (perfectly legal) way to pay *0%* tax on your dividend income.

To show you the big savings this could mean, let's look at two fictional investors who are nearing retirement: Jane and Janet.

We'll assume both are single, are earning $50,000 per year and live in a state with no income taxes. Now let's assume Janet has taken the so-called "right" path, as suggested by her financial advisor, while Jane has steered her own course. A quick look at both will show how that "right" path can create a hefty tax problem.

Let's say Janet put a million dollars in the Vanguard S&P 500 ETF (VOO) because she's been told that a low-cost index fund is best for retirement. VOO is giving her $14,100 in annual dividends as a result, but because Janet is still working, she'll have to give Uncle Sam $1,864 in taxes on her dividends for just one year—and that doesn't include tax she'll pay when she eventually sells her shares.

Over to Jane. Instead of following the herd and buying VOO, she's put her million in a lesser-known fund called the Nuveen Municipal High Income Opportunity Fund (NMZ), which pays a 5% dividend yield, giving her an income stream of $50,000 from her investment. Not only is her nest egg now *entirely* replacing her work income, but she's also getting *all* of it.

That's right. Of that $50,000 a year NMZ is giving Jane, zero is going to Uncle Sam. And it doesn't matter if she gets a promotion at work and makes more, or if NMZ starts paying her more (which it did for its shareholders at the start of the year; more on that later).

She will not have to pay *any* of her income from this fund to the tax man.

Of course, the more Janet gets paid, the more taxes she'll have to pay out. If her work pay rises 20%, for instance, the tax on her dividends will climb to $2,115 per year, meaning her tax burden has gone up by almost as much as her raise!

Municipal Bonds: Your Tax-Free Income Option

Municipal bonds, the investments NMZ holds, are popular because they're one of the few ways Americans can legally get paid without having to pay taxes. It's all thanks to a 1913 law exempting municipal bonds from federal income tax. Since then, investors have been using "muni" bonds to generate a high income stream—and keep all of it.

Dispelling the Biggest Muni Myth

How popular are muni bonds? Right now, the market is worth nearly $4 trillion in the US, which is about 13% of the size of the total stock market. Considering municipalities aren't in the business of making a profit, it's surprising that muni bonds are as big as they are.

While many muni bonds are gobbled up by wealthy investors looking to cut out the tax man, the middle class often ignores them. One reason why is fear: headlines about municipalities going bankrupt and leaving investors in the cold result in paranoia—and many bad investment decisions.

Here are the facts: according to Moody's, the total default rate of muni bonds since 1970 is 0.09%. In other words, for every 10,000 muni bonds issued, nine go into default. Put another way, you're 1,442 times more likely to get in a car crash than to hold a muni bond that defaults.

The Power of Diversification

Here's another crucial point: when a municipality defaults, it doesn't mean investors get nothing. In reality, municipalities will restructure their debts on new terms, which could mean a small loss for bondholders. But one way to limit this risk even further is to hold a fund like NMZ.

With $1.5 billion in assets, NMZ can diversify across many bonds (it currently holds 598 of them) to slash the risk of being exposed to a default.

This doesn't just make NMZ safer, it's also made the fund's returns impressive. Thanks to NMZ's unique market access and expertise, it's crushed a muni-bond index fund like the iShares National Muni Bond ETF (MUB).

It's rare to get superior returns *and* greater safety, but NMZ delivers both.

Finally, a Word on Rates

There's one last reason why Jane would be smart to buy NMZ: the Federal Reserve.

In 2019, the Fed cut interest rates three times, which has had two effects on muni bonds. The first is that they're more attractive to investors than before. From 2015 to the start of 2019, when the Fed was raising interest rates, muni bonds were struggling to make headway.

There are two reasons why munis stalled in this period: first, many investors thought they could get higher income streams elsewhere as rates rose. Second, and more important, bonds fall in value as interest rates go up, which meant the resale value of these bonds dropped with the Fed's aggressive rate-hike cycle.

Fortunately, the opposite is also true: lower rates mean muni bonds go *up*, which is why you see that huge hockey stick at the end of the chart above. It's also why NMZ raised its dividend earlier in 2019, and why it may raise it again. The Fed's aggressive rate cuts have been a blessing for munis this year, and with the central bank likely to continue lowering rates, that hockey stick will get bigger.

Forbes

by Michael Foster

Nov 12, 2019

Michael Foster is the Lead Research Analyst for Contrarian Outlook. For more great income ideas, click here for our latest report "Indestructible Income: 5 Bargain Funds with Safe 8.5% Dividends."

Are Taxable Advance Refundings Leaving Money On The Table?

The 5% non-callable-10 structure, which has been the standard for municipal bonds, was tailor-made for advance refunding. Prior to 2018, borrowers could demonstrate substantial savings by advance refunding them immediately after issuance (See The Allure of 5% Bonds: Coupon Levitation Creates Magical Savings). Not surprisingly, most 5% NC-10 bonds were advance refunded well before they were actually called in Year 10.

With the elimination of advance refunding, the churning came to a brief halt — today only a single tax-exempt issue can support a qualifying project. However, there is still a huge amount of high-coupon not-yet-callable bonds outstanding. In fact, 5% NC-10s continue to be issued almost daily. With interest rates being at historical lows, there is an opportunity to realize savings by advance refunding high-coupon tax-exempts with taxable bonds.

Let's take a closer look at the economics of advance refunding a $100 million 5% muni with 22 years to maturity and two years to call, with a 22-year 2.80% taxable bond sold at par. The proceeds of the refunding issue are invested in an escrow portfolio of Treasuries yielding 1.5%, structured to pay the debt service of the refunded bond through the call date.

The reported savings are impressive — assuming a 1% issuance cost, they amount to $29.8 million in present value terms over 22 years. Of course, nobody expects 5% bonds to remain outstanding beyond the call date, and our analysis should incorporate this. By advance refunding today, the issuer forfeits the valuable option to call the bond in the future. But how valuable is this option?

The value of the option of the outstanding bond, based on the issuer's current tax-exempt 5% NC-10 yields — 1.60% for 10 years, 2.10% for 20 years, etc., is $36 million. Thus the efficiency of the taxable advance refunding is only 83% ($29.8 million/$36 million). Looking at this from a different angle, $6.2 million of the option value has been wasted, at the expense of the municipality's constituents. We leave it to the readers to figure out who was the beneficiary of the lost option value.

Let's discuss the practical ramifications of this result. A refunding efficiency below 100% signals that waiting is preferable to acting now. The alternative to refunding today with a taxable 2.80%

bond is to wait for two years, and then call and refund with a tax-exempt bond. For a specified shift of the borrower's yield curve, we can determine the savings from calling, in today's dollars. To break even with today's $29.8 million savings, the yield curve would have to increase 75 basis points. In that case, the yield of a 5% 20-year 5% NC-10 bond would rise from its current 02.10% to 2.85%. As long as the yield curve does not rise more than 75 basis points, waiting would be preferable taxable advance refunding today.

Direct comparison of a 5% NC-10 muni to an essentially non-callable taxable bond is complicated. For an apples-to-apples comparison, we have to estimate the issuer's non-callable 20-year par rate. Today, when the 20-year 5% NC-10 yield is 2.10%, the rate of a 20-year muni bullet is roughly 2.49%. If the 5% NC-10 yield curve increases by 75 basis points to the break-even point, the bullet rate rises 42 basis points, to 2.91%. Callable yields and optionless rates don't move in tandem — the former are yields to the 10-year call, the latter are yields-to-maturity.

Although finance theory cannot predict where the muni yield curve will be two years from now, it can help you play the odds. By advance refunding with taxable bonds, you are making a bet that within two years the tax-exempt curve will rise more than 75 basis points.

It is interesting to contemplate what the possibilities are when advance refunded bonds are redeemed on their call date. Could the borrower economically refund the taxable bonds, at the make-whole price, with the proceeds of a new tax-exempt issue? A topic for another day.

By Andy Kalotay

BY SOURCEMEDIA | MUNICIPAL | 11/08/19 01:21 PM EST

[Raising Opportunity Zone Capital for Business Investment, with Len Mills.]

For business owners, what are some tips for approaching investors and raising Opportunity Zone capital? Len Mills is CEO of Verte OZ, a venture capital Opportunity Zone fund launched in September 2019 that invests in high-growth disruptive businesses. Click the play button below to listen to my conversation with Len. Episode Highlights The characteristics that make the Verte OZ Fund unique among Opportunity Zone funds.

Read More »

Opportunity Db

November 6, 2019

IRS Opportunity Zone Form Doesn't Quell Transparency Concerns.

- **Unclear how much information Treasury, IRS can make public**
- **Transparency advocates look to Congress to address data gap**

A new draft tax form for investors taking advantage of opportunity zone incentives affirms the need for Congress to bolster reporting requirements for the perks, according to those advising on and studying them.

The incentives, part of the 2017 tax act, were meant to spark economic development in nearly 9,000 mostly low-income census tracts across the U.S. by offering investors the ability to defer and reduce capital gains taxes. The tax law didn't include any data reporting requirements, which advocates say are needed to paint a more holistic and objective picture of whether the tax breaks are helping communities or accelerating gentrification to the benefit of wealthy investors.

The IRS Oct. 31 released a proposed Form 8996 that would require opportunity funds to disclose the employer identification numbers, census tract numbers, and assets of the businesses in which they invest, as well as the funds' own structures and assets. The IRS went about as far as many observes expected: The form would give the agency enough information to ensure investors are following the program's rules, but doesn't require more granular information, like job creation and poverty alleviation data requested by numerous organizations.

"This will be unlikely to satisfy many of us who are just looking for a more comprehensive data regime," said John Lettieri, president of the Economic Innovation Group, which helped develop the incentives.

IRS Authority
The data the IRS is seeking makes sense in light of the authority the IRS has and its ability to enforce the tax law and its opportunity zone regulations, according to Michael Novogradac, managing partner of Novogradac & Co. LLP. The San Francisco-based accounting and advisory firm focuses on real estate and affordable housing.

"This demonstrates what information is needed to assess compliance," Novogradac said.

The original opportunity zones legislation, authored by Sens. Cory Booker (D-N.J.) and Tim Scott (R-S.C.), included data reporting requirements for investors. However that language wasn't included in the 2017 tax law in order to ensure the package complied with the Senate's procedural rules.

The new form was released days after House lawmakers met to discuss ways to improve the opportunity zones program through congressional action. There is some interest in Congress of adding those requirements to the tax code. Booker and Scott introduced a bill (S. 1344) to establish opportunity zone reporting requirements, while a House companion (H.R. 2593) was introduced by Reps. Ron Kind (D-Wis.) and Mike Kelly (R-Pa.).

Lettieri, who attended the congressional meeting to discuss improvements to the program, said that the IRS document could help inform any related legislation Congress considers.

There may not be much information to collect just yet, as the pool of funds using the capital gains tax breaks is still small and growing, said Steve Glickman, who helped create the incentives and now advises investors as CEO of Develop LLC.

"We're still very much in the early days here," he said. "There's always going to be anecdotal investments that don't meet the spirit and intent of the program."

Will Public See Data?
Absent congressional action, transparency advocates are concerned that the public may not ever get to see the data collected by the Internal Revenue Service and Treasury Department because the federal government is prohibited from publicly disclosing tax return information under tax code Section 6103.

"I worry this information won't ever be shared with the general public," said Brett Theodos, a senior fellow at the Urban Institute who has researched the incentives and requested detailed data collection and disclosure on them. “We need more data. I would like additional detail to be able to evaluate the program.”

A Treasury spokesperson said the department “intends to publish all of the Opportunity Zone data that it gathers through this form as soon as possible in a manner consistent with the law.”

Booker, in an Oct. 31 statement, emphasized the need for public disclosure of more detailed data.

“For starters, this information needs to be public, not available only to the Treasury Department,” he said. “Additionally, there needs to be transaction-level reporting so that we can properly evaluate the impact of the program and ensure that investments are being effectively allocated to low-income communities.”

There may also be concerns of taxpayer privacy and identity theft when it comes to employer identification numbers, said Lisa Zarlenga, a partner at Steptoe & Johnson LLP and a former Treasury official. Even publicizing the number of funds investing in a particular census tract could lead to privacy problems if there are only one or two in that area, she said.

And while the IRS is likely reluctant to make these kinds of public disclosures on its own, the issue could be a thorny one for lawmakers to navigate as they seek to boost the incentives’ transparency.

“It’s a hard thing to balance,” Zarlenga said. “I don’t envy the lawmakers trying to figure this out.”

Bloomberg Tax

by Lydia O’Neal

Oct. 31, 2019, 1:39 PM; Updated: Nov. 1, 2019, 6:46 AM

To contact the reporter on this story: Lydia O’Neal in Washington at loneal@bloombergtax.com

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Bill Introduced in Senate to Require QOF Reporting, Change Designation of Some OZs.

Read the Detailed Summary.

Tearing Down Tax Walls Pitched as Way to Spur Green Muni Bonds.

- **Ramirez banker says creating national market would cut costs**
- **Plan would involve extending tax breaks to out-of-state debt**

Banker Alfredo Quintero just finished working on the New York subway operator’s first green-bond sale when he considered the paradox that’s kept environmentally minded investing from taking off in the $3.8 trillion municipal-securities market.

States and cities routinely sell debt for mass-transit systems, water-treatment plants and other projects that do good for the environment, so they would seem like the perfect pipeline to feed the latest fixed-income trend. Yet they rarely go through the steps to market their bonds as green for a good reason: it doesn't seem to save them money.

But those savings could emerge, Quintero realized, if one could tear down the tax-law barriers that largely keep the $400 billion of municipal bonds sold each year in their home states. So the senior managing director at investment bank Samuel A. Ramirez & Co. has been pitching California officials on a plan to extend the state's tax exemption to New York's green bonds, and vice versa, marking a first step toward creating a national market that could vastly increase demand and cut the yields governments pay.

Continue reading.

Bloomberg Markets

By Romy Varghese

October 29, 2019, 10:30 AM PDT

How to Form Your Own Opportunity Zone Fund.

How can you form your own Opportunity Zone fund? What are the most important considerations when structuring your entity, and what are some best practices for regulatory compliance? Opportunity Zones Podcast host Jimmy Atkinson and OZ Consultants CEO Ashley Tison have teamed up to create OZ Pros — Qualified Opportunity Fund and Qualified Opportunity Zone Business entity formation made easy. Click the play button below…

Read More »

Opportunity Db

October 29, 2019

How to Form Your Own Qualified Opportunity Zone Business (QOZB).

Are you considering starting your own Qualified Opportunity Zone Business or converting an existing business into a QOZB? Or perhaps you need a QOZB for your Qualified Opportunity Fund? In today's episode, we highlight some of the most important considerations when structuring your QOZB entity, and best practices for regulatory compliance. Opportunity Zones Podcast host Jimmy Atkinson and OZ Consultants CEO Ashley Tison have teamed…

Read More »

Opportunity Db

October 31, 2019

Big Opportunities in Indian Country: How Tribal Nations Can Leverage Opportunity Zones for Economic Growth

The Opportunity Zone (OZ) program, a community development program created out of the Tax Cuts and Jobs Act of 2017, presents the largest potential capital equity infusion into tribal nations in the history of the United States. With an estimated $6 trillion of unrealized capital gains in the U.S. stock market, the legislation could transform development in these designated areas. Consider that almost 8,700 census tracts have been approved as designated Opportunity Zones, more than 300 of which are in Indian Country, according to the Native American Finance Officers Association (NAFOA).

The OZ program presents tribal nations with the opportunity to attract investors who may have never otherwise considered projects within those spaces. It could also encourage financial institutions that have solely worked on debt financings to also consider equity investments in Indian Country. While there are some concerns about the negative aspects of unchecked development, I believe that with smart planning and strategic thinking, the opportunities this program presents for tribal communities far outweigh the risks.

To take full advantage of the legislation, tribal nations need to develop strategic project plans that range in scale from large master-planned concepts down to neighborhood-level community investments. As part of that strategic effort, tribal nations will need to combine three actions to optimize potential OZ deal offerings that will attract investors:

Continue reading.

Faegre Baker Daniels

October 28, 2019

A Tailored Opportunity Zone Incentive Could Bring Greater Benefits to Distressed Communities and Less Cost to the Federal Government.

Abstract

Brett Theodos, senior fellow, testified before a subcommittee of the US House Committee on Small Business about Opportunity Zones and how the OZ incentives could be tailored to provide greater benefits to distressed communities at less cost to the federal government. His testimony noted the promising aspects of Opportunity Zones and detailed the limitations and challenges to the program as it currently exists. He also provided options for both the Congress and Administration to act to help redefine Opportunity Zone incentives to bring clearer investments to communities.

Download PDF.

The Urban Institute

Brett Theodos

October 17, 2019

CityLab University: Tax Increment Financing

Behind the dry-as-dust name is a powerful (and controversial) tool for financing urban redevelopment. Here's a quick guide to understanding TIF.

It's time again for CityLab University, a resource for understanding some of the most important concepts related to cities and urban policy. If you have constructive feedback or would like to see a similar explainer on other topics, drop us a line at editors@citylab.com.

Urban development professionals, neighborhood activists, and diligent readers of local newspapers have very likely come across the term "Tax Increment Financing" (TIF). Whether all of these groups understand what it means is another matter.

This mechanism for financing redevelopment is a powerful and controversial force in American urbanism. Every state except Arizona currently allows it, as does the District of Columbia, and it has become the most popular incentive tool for economic development in the United States as the federal government has decreased its urban development spending. TIF plays a role in megaprojects such as Chicago's Lincoln Yards and Amazon's HQ2 in Arlington, Virginia, as well as in smaller-scale neighborhood improvements, affordable housing, and transit projects.

Continue reading.

CITY LAB

BENJAMIN SCHNEIDER

OCT 24, 2019

TAX . - OKLAHOMA

Shadid v. City of Oklahoma City

Supreme Court of Oklahoma - October 14, 2019 - P.3d - 2019 WL 5106715 - 2019 OK 65

Objector brought action, seeking assumption of original jurisdiction, for declaratory and injunctive relief, challenging constitutionality of ordinance creating temporary term of excise tax.

The Supreme Court held that:

- Supreme Court would exercise discretion to assume original jurisdiction over action, and
- Even if contents of resolution of intent which accompanied ordinance set out projects that were not of same subject, this did not render ordinance in violation of constitutional or statutory single subject mandate.

Supreme Court would exercise its discretion to assume original jurisdiction over objector's action for declaratory and injunctive relief, challenging constitutionality of excise tax ordinance; decision could significantly affect municipal finance statewide, and matter was urgent as special election was set for just a few months from filing of objector's petition.

Even if contents of resolution of intent, which accompanied ordinance creating temporary excise tax, set out projects that were not of same subject, this did not render ordinance in violation of constitutional or statutory single subject mandate, where subject matter contained in ordinance itself was clearly germane to excise tax.

TAX . - FLORIDA

Joiner v. Pinellas County

District Court of Appeal of Florida, Second District - September 25, 2019 - So.3d - 2019 WL 4666376 - 44 Fla. L. Weekly D2397

County brought action against appraiser for a second county seeking declaratory and injunctive relief concerning first county's immunity from paying ad valorem taxes on its ranch property situated in second county and reimbursement of previous years' tax payments.

The Circuit Court granted first county's motion for summary judgment. Appraiser appealed.

As a matter of first impression, the District Court of Appeal held that first county's ranch property was not immune from taxation by second county.

County's ranch property situated in another county was not immune from taxation by the other county; a county's immunity from taxation in its sovereignty did not eliminate its obligation to pay taxes on property in another political entity's jurisdiction.

The First Venture Capital Opportunity Zone Fund.

It's been nearly six months since the IRS issued its second tranche of regulatory guidance on Qualified Opportunity Funds. How are business Opportunity Zone funds proceeding? Brian Phillips is managing partner of The Pearl Fund, the first Opportunity Zone fund to focus exclusively on business, using a venture capital model. Click the play button below to listen to my conversation with Brian. Episode Highlights Advantages…

Read more.

Opportunity Db

October 9, 2019

TAX - CALIFORNIA

Tesoro Logistic Operations, LLC v. City of Rialto

Court of Appeal, Fourth District, Division 2, California - October 2, 2019 - Cal.Rptr.3d - 2019 WL 4853124 - 2019 Daily Journal D.A.R. 9493

Liquid fuel wholesalers, after administrative appeals and refund claims regarding tax paid were denied, brought actions against city, seeking judgment that tax on wholesale liquid fuel storage facilities, calculated based on storage capacity by volume, was unconstitutional real property tax and unlawfully amended voter-adopted ordinance.

Wholesalers moved for judgments on the pleadings, summary judgment, and summary adjudication, and city cross-moved for judgments on the pleadings. The Superior Court denied wholesalers' motions and entered judgment on pleadings in favor of city on ground that tax was valid business license tax. Wholesalers appealed. Appeals were consolidated.

The Court of AppeaL held that:

- City guidelines unlawfully amended voter-adopted ordinance;
- Voter-adopted ordinance imposed tax on real property; and
- Voter-adopted ordinance was unconstitutional.

City guidelines purporting to implement voter-adopted ordinance imposing tax on operators and owners of wholesale liquid fuel storage facilities unlawfully amended voter-adopted ordinance, where guidelines changed scope and effect of ordinance by limiting application of tax to only those persons operating storage facilities where liquid fuel was actually stored during a calendar year, rather than any persons engaged in the business of owning, operating, leasing, supplying, or providing storage facilities regardless of whether fuel was actually stored, as required under ordinance, changed effect of ordinance from taxing storage capacity, as intended by voters, to taxing business operations, and ordinance did not provide that city could amend or repeal ordinance.

Tax on storage capacity of liquid fuel storage tanks was tax on real property, not excise tax; storage tanks were fixtures or improvements to real property, such that they themselves constituted real property, tax was based on volume of tanks regardless of whether tanks were used in business or how much fuel was stored in them, and mere act of owning fuel storage facility, rather than any incident of ownership such as use of tanks to store fuel or privilege of storing fuel in tanks, triggered liability for tax.

Language in voter-adopted ordinance describing tax imposed on owners and operators of liquid fuel storage facilities based on storage capacity as "business license tax" was incompatible with meaning and effect of ordinance as a whole, and, thus, did not reflect voters' intent that tax be a business license tax instead of a property tax, where ordinance as a whole taxed volume of storage tanks, which were fixtures or improvements to real property, regardless of whether tanks were used in any business, and mere ownership of tanks triggered tax liability.

Voter-adopted ordinance imposing tax on owners and operators of liquid fuel storage tanks violated constitutional provision restricting real property taxes, where tax was assessed based on storage capacity of tanks, which were fixtures or improvements to real property, regardless of their use, mere ownership triggered tax liability, and tax did not come within constitutional exceptions to general prohibition on property taxes.

TAX . - ILLINOIS

Trilisky v. City of Chicago

Appellate Court of Illinois, First District, Fourth Division - September 26, 2019 - N.E.3d - 2019 IL App (1st) 182189 - 2019 WL 4696926

Taxpayer, individually and on behalf of others similarly situated, brought action against city, claiming city had been improperly collecting transfer tax on sales to and from Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac).

The Circuit Court granted city's motion to dismiss. Taxpayer appealed.

The Appellate Court held that:

- Taxpayer's notice of appeal was not sufficient to confer appellate jurisdiction over second taxpayer's case;
- Taxpayer was not required to exhaust administrative remedies prior to filing complaint;
- Fannie Mae and Freddie Mac were not governmental bodies for purpose of municipal code exempting transfers involving "real property acquired by or from any governmental body" from city's real property transfer tax;
- Federal Housing Finance Agency's placement of Fannie Mae and Freddie Mac into conservatorship did not turn entities into governmental bodies; and
- Provision of public functions by Fannie Mae and Freddie Mac did not turn entities into governmental bodies.

A Tailored Opportunity Zone Incentive Could Bring Greater Benefits to Distressed Communities and Less Cost to the Federal Government.

Abstract

Brett Theodos, senior fellow, testified before a subcommittee of the US House Committee on Small Business about Opportunity Zones and how the OZ incentives could be tailored to provide greater benefits to distressed communities at less cost to the federal government. His testimony noted the promising aspects of Opportunity Zones and detailed the limitations and challenges to the program as it currently exists. He also provided options for both the Congress and Administration to act to help redefine Opportunity Zone incentives to bring clearer investments to communities.

Continue reading.

The Urban Institute

Brett Theodos

October 17, 2019

How Governors Are Shaping the Opportunity Zone Landscape.

Over the past two years, Opportunity Zones (OZs) have become the most discussed piece of federal economic development policy. Now, as the policy rolls out in earnest, the focus once again shifts to the nation's governors. Given the open-ended nature and limited federal accountability written into the law, state-level policymaking has significant power to shape how Opportunity Zones play out in practice.

Governors must decide whether and how Opportunity Zones fit into their priorities. Given competing demands for state funds, it is critical that governors consider the benefits of creating and modifying programs and policies against their costs to ensure they are worthwhile.

We don't recommend states jump on the OZ bandwagon without carefully considering what they want the incentive to accomplish and how their supports will encourage that.

To this end, we've proposed a five-step process governors can use to maximize the potential benefits of Opportunity Zones for their state's communities and minimize unintended harms.

1. select state-level guiding principles for making decisions about OZs
2. create support and accountability systems for OZ projects and investments
3. assist aspiring Opportunity Fund managers
4. engage with Opportunity Fund investors
5. recruit other mission-driven financial actors

But what have governors actually done so far?

A handful of states have taken concerted action to support local community-planning efforts and project matchmaking. Additionally, there are several noteworthy state-level, OZ-paired incentives either recently enacted or currently under consideration.

Continue reading.

The Urban Institute

by Brett Theodos & Brady Meixell

October 7, 2019

OZ Lessons from Opportunity Alabama, with Alex Flachsbart.

How can Opportunity Zones ignite a place-based economic development revolution in one of the nation's poorest states? Alex Flachsbart is president and CEO of Opportunity Alabama, the nation's first nonprofit organization to create a marketplace for Opportunity Zone investment in a particular state. Click the play button below to listen to my conversation with Alex. Episode Highlights Alabama's capital gap and how Opportunity Zones can…

Read More »

Opportunity Db

October 16, 2019

IRS TE/GE FY 2019 Program Letter.

Read the Program Letter.

New Private Delivery/Express Mail Address for Exempt Organizations Submissions (Forms 1023, 1024, 1024A, 1028, 8940 and Group Exemption Requests)

Use the following address for private delivery or express mail for the forms shown above:

Internal Revenue Service
Mail Stop 31A: Team 105
7940 Kentucky Drive
Florence, KY 41042

The P.O. Box address for regular mail remains the same:

Internal Revenue Service
P.O. Box 12192
Covington, KY 41012-0192

If you recently submitted an item to another address, it will be forwarded. You do not have to resubmit.

Help for Victims of Hurricane Dorian
IRS is providing tax relief to those affected by Hurricane Dorian. Visit the Hurricane Dorian page for the latest updates, videos and resources for clients who are victims of Hurricane Dorian.

The IRS offers online training for charitable organizations that assist with disaster relief. Disaster Relief – Parts I and II discuss how charities may provide disaster relief, tax law, deductibility of contributions and tax treatment of relief recipients. Organizational leadership and volunteers should attend the Tax-Exempt Organization Workshop for important information on the benefits, limitations and expectations of tax-exempt organizations.

Taxable Muni-Bond Sales Surge as Window Opens for Refinancings.

- **Muni issuers sold $11 billion of refunding bonds in September**
- **'The numbers just work right now' to sell taxable muni bonds**

A window of opportunity has led state and local governments to flood the muni-bond market with refinancings.

State and local governments issued $11 billion of refunding bonds in September, nearly matching the $12.9 billion sold in August when rates fell to record lows. More than a third of the sales during the past two months were taxable debt, showing that rates have fallen so much that states and cities can still capture lower borrowing costs even though President Donald Trump's tax cut law bars sales of tax-exempt debt for a key type of refinancing.

It's unusual for state and local governments to issue taxable bonds to replace tax-exempt debt, which cost them less, but "the numbers just work right now," said Ben Barber, head of municipals at Goldman Sachs Asset Management. "What's happened is that the rates have come down so much, that issuers are able to sell taxable munis at much lower rates than they were a year ago," he said.

Taxable Muni-Bond Sales Surge as Window Opens for Refinancings
By Danielle Moran
October 1, 2019, 10:23 AM PDT
Muni issuers sold $11 billion of refunding bonds in September
'The numbers just work right now' to sell taxable muni bonds

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Continue reading.

Bloomberg Markets

By Danielle Moran

October 1, 2019, 10:23 AM PDT

White House Opportunity and Revitalization Council Introduces OpportunityZones.gov.

New website will serve as comprehensive tool for the Opportunity Zones initiative

Secretary Ben Carson, on behalf of the White House Opportunity and Revitalization Council, announced a new website that will serve as a hub of information for the array of audiences that work with the Opportunity Zones initiative. Visit the Opportunity Zones website.

Opportunity Zone residents, State and local leaders, investors, and entrepreneurs can all utilize the website to get the latest information about the initiative and the actions of President Trump's White House Opportunity and Revitalization Council. Secretary Ben Carson serves as chairman of the Council, which is led by Executive Director Scott Turner.

The Opportunity Zones website includes an interactive map of the 8,764 Opportunity Zones nationwide; links to the Opportunity Zone-focused website of each State and Territory; comprehensive Federal tools and resources that support Opportunity Zone residents and complement Qualified Opportunity Fund investments; and the completed action items of each White House Opportunity and Revitalization Council member agency.

"Working together, we are unleashing a wave of investment, innovation, and revitalization into economically distressed areas, many of which have suffered from a lack of opportunity for decades," Secretary Ben Carson said.

"We are proud to launch OpportunityZones.gov and look forward to continuing to spread the positive message of opportunity and revitalization in the underserved communities of America," said Scott Turner, Executive Director of the Council.

Since President Trump signed an Executive Order creating it, the White House Opportunity and Revitalization Council has taken nearly 170 actions to align existing Federal resources, policies, and programs to Opportunity Zones. To date, the Council has traveled to more than 40 urban, rural, and Tribal areas designated as Opportunity Zones throughout the country to listen to stakeholders about how the initiative can enhance the economic opportunity in their communities.

Multihousing Pro

October 1, 201

D.C. Gears Up to Guide Opportunity Zone Investments.

Opportunity Zones aren't for everyone.

For starters, the new federal tax break is only available to 7.3 percent of taxpayers. In 2016, that percentage represented 11 million individual and corporate tax returns with positive capital gains income totaling $634 billion. Those billions would be eligible for a tax break under the Opportunity Zone provision of the Tax Cuts and Jobs Act of 2017.

If you're one of the estimated 35 million United States residents of designated Opportunity Zone census tracts — 60 percent are people of color — the projects and businesses financed through the new Opportunity Zone tax break may create jobs or new amenities or new housing for you, or they may drive up rents or property taxes or otherwise push you out of your neighborhood. As others are reporting, the tax break is already subsidizing projects that probably didn't need it and won't do much to help poor communities, though it's early days yet and cities still have a chance to sway the incoming dollars into projects that will be more beneficial for more people.

A lot will depend on what your city does (or fails to do) in response to the tax break. Some have already done quite a lot, including Washington, D.C. While all other local U.S. governments had to make suggestions to a governor's office, D.C. Mayor Muriel Bowser submitted D.C.'s Opportunity Zone census tract designations to the U.S. Department of the Treasury in mid-2018.

Continue reading.

NEXT CITY

by OSCAR PERRY ABELLO

OCTOBER 1, 2019

How America's Poorest ZIP Code is Attracting Opportunity Zone Capital.

Erie, Pennsylvania is home to the nation's poorest ZIP code, and the nation's first organization dedicated to promoting a municipality's Opportunity Zones. Erie Downtown Development Corporation is led by CEO John Persinger and VP for finance and development Matt Wachter. Click the play button below to listen to my conversation with John and Matt. Episode Highlights How Erie's Opportunity Zone Investment Prospectus has helped enable

Read More »

Opportunity Db

October 2, 2019

TAX - OHIO

Village of Georgetown v. Brown County Board of Elections

Supreme Court of Ohio - September 26, 2019 - N.E.3d - 2019 WL 4686730 - 2019 -Ohio-3915

Village sought writ of prohibition to prevent county board of elections from placing a tax-lev--reduction measure on an upcoming general-election ballot.

The Supreme Court held that:

- Board properly determined that printed signatures submitted in support of measure were genuine, and
- Tax levy was proper subject of reduction via ballot measure.

County board of elections did not abuse its discretion in reversing its prior decision to invalidate 12 printed signatures submitted in support of petition proposing a ballot measure to reduce tax levy that paid for equipment and personnel relating to firefighting and emergency medical services; there was no longer a requirement that signatures be in cursive, discrepancies between cursive signatures on voter-registration forms and printed petition signatures could be resolved by evidence that the printed signatures were authentic, and a signed declaration attesting that the signatures were authentic was the only evidence in the record on the issue.

Tax levy of 9.5 mills that paid for equipment and personnel relating to firefighting and emergency medical services was proper subject of reduction in a proposed ballot measure seeking to reduce the levy to 2.5 mills; ballot measure did not seek to reduce the tax rate to zero, as was otherwise impermissible under statute governing decreases of levies by voters of a subdivision, and, while the levy had not been increased, as required for a levy to be decreased under the statute, a separate statute permitted voters to decrease any levy approved for firefighting and emergency medical services, even if the levy had not previously been increased.

Taxable Advance Refunding Bonds and the World's Most Boring Ice Cream Cone: Squire Patton Boggs

Taxable debt tempts us to put the Internal Revenue Code back on the library shelf and the tax lawyers back into their pen. But if you use taxable debt to refund tax-exempt debt, or if you might ever refund that taxable debt with tax-exempt debt, then we regret to inform you that we ought to be involved. In a series of posts, we're going to take a look at some of the questions and complications that arise when issuers and borrowers incorporate straight taxable debt into the same lineage as tax-exempt debt. First up: a taxable advance refunding of tax-exempt bonds.

It might seem odd that an issuer would consider issuing taxable debt, which generally has a higher interest rate than tax-exempt debt, to fund a long-term escrow at the low reinvestment rates that have prevailed for the past 15 years (what fancy folks call "negative arbitrage") to retire tax-exempt debt. In certain rate environments, such as the present, where shorter-term interest rates applicable to refunding escrow securities are almost equal to the longer-term interest rates that apply to the refunding bonds, it can make sense. The prohibition against the issuance of tax-exempt debt to advance refund tax-exempt bonds enhances the incentive to issue taxable advance refunding bonds in this type of interest rate market.

When you're assembling the working group to issue the taxable advance refunding bonds, you might be tempted to ignore the tax-exempt bond rules and the public finance tax lawyers on your team. Don't. Let's discuss why.[1]

Continue Reading

By Johnny Hutchinson and Michael Cullers on September 25, 2019

The Public Finance Tax Blog

Squire Patton Boggs

Options for Existing Opportunity Zone Property Owners (Podcast Listener Questions)

You've got Opportunity Zone questions. We've got Opportunity Zone answers. This is the inaugural edition of Opportunity Zones Podcast Listener Questions. Today's listener questions deal with options for existing Opportunity Zone property owners, incentives for Opportunity Zone businesses, and more. If you'd like to submit your own question or comment, leave a voicemail on the Opportunity Zones Podcast hotline — call (682) 800-1505.

Read More »

Opportunity Db

September 25, 2019

TAX - COLORADO

Griswold v. National Federation of Independent Business

Supreme Court of Colorado - September 23, 2019 - P.3d - 2019 WL 4581487 - 2019 CO 79

Organization that represented interests of small business owners brought action against state of Colorado and its Secretary of State, alleging that funding mechanism whereby Colorado's Department of State charged for some of its services to then fund its general operations was unconstitutional under the Taxpayer's Bill of Rights (TABOR).

The District Court granted summary judgment in favor of state. Organization appealed. The Court of Appeals reversed and remanded. Parties filed cross-petitions for certiorari.

The Supreme Court held that:

- Court of Appeals erred in remanding for further development of factual record, and
- Funding mechanism was not unconstitutional under TABOR.

Court of Appeals erred in remanding for further development of factual record, on appeal from trial court's grant of summary judgment in favor of state of Colorado and its Secretary of State, in action brought by organization that represented interests of small business, alleging that funding mechanism whereby Colorado's Department of State charged for some of its services to then fund its general operations was unconstitutional under Taxpayer's Bill of Rights (TABOR), where the Court mistook absence of evidence as to whether post-TABOR increase in revenues collected by Department resulted from any government action to support organization's case for genuine dispute of material fact, even though parties stipulated to facts and denied there was genuine dispute of material fact.

Funding mechanism whereby Colorado's Department of State charged for some of its services to then fund its general operations was not unconstitutional under the Taxpayer's Bill of Rights (TABOR), absent showing that post-TABOR adjustments to the charges constituted new tax, tax rate increase, or tax policy change.

TAX - LOUISIANA

Downtown Development District of City of New Orleans v. City of New Orleans

Court of Appeal of Louisiana, Fourth Circuit - May 8, 2019 - 272 So.3d 917 - 2018-0726 (La.App. 4 Cir. 5/8/19)

Special taxing district located within city brought claims alleging city illegally withheld money from tax assessed to benefit district.

The District Court granted district's request for preliminary injunction and denied district's request for writ of mandamus. City appealed.

The Court of Appeal held that:

- District was political subdivision of State and a separate juridical entity from city;
- City's obligations to district were not extinguished under doctrine of confusion;
- District stated cause of action against city;
- District was entitled to injunctive relief without the requisite showing of irreparable injury;
- City could not use proceeds of special tax to fund state retirement systems;
- Preliminary injunction was not vague or overly broad; and
- District was not entitled to writ of mandamus.

Special taxing district contained within city was political subdivision of State and a separate juridical entity with capacity to sue city; district had separate source of tax revenue used for enhanced services to district's geographic area, district board had hiring and employment authority, power to enter into contracts with city, and authority to acquire and dispose of property, and district did not appear in charter of city.

City's obligations to special taxing district were not extinguished under doctrine of confusion, even though city collected special tax in same manner as other ad valorem taxes, where the special tax proceeds were to be turned over to district and used exclusively to benefit district, and thus did not become city funds.

Special taxing district did not need city council approval to bring action against city for illegally withheld money from tax assessed to benefit district, where district's enabling statute did not require city council approval to hire attorneys or file suit.

Unlawful conduct exception applied, entitling special taxing district to injunctive relief without the requisite showing of irreparable injury in its action against city for illegally withholding money from tax assessed to benefit district, where city's act of withholding portion of dedicated special tax to defray city's pension obligations violated district's enabling statute, and the preliminary injunction issued by the district court restrained city conduct and thus was not a mandatory injunction.

City could not use proceeds of special tax to fund state retirement systems, where enabling statute of special tax district prohibited city from using dedicated special taxes for purposes other than to benefit district.

Preliminary injunction issued by district court enjoining city from withholding proceeds of special tax dedicated for exclusive benefit of special tax district was not vague or overly broad; the parties to the injunction were identified and the acts enjoined, restraining city from withholding more than a two percent collection fee from the special tax, were sufficiently described.

Special taxing district was not entitled to writ of mandamus in its action against city for illegally withholding money from tax assessed to benefit district, where district acknowledged another remedy was available; district combined its request for mandamus with alternative claims for declaratory judgment and damages through which district could seek relief through ordinary procedure.

Opportunity Zone Deal Packaging and Capital Raising.

What are some best practices for packaging an Opportunity Zone real estate deal and raising capital from investors? What are some examples of good deals and bad deals? Gabriel Fernandez is a real estate investment manager in Brooklyn, NY. Click the play button below to listen to my conversation with Gabriel. Episode Highlights Reaction to the recent New York Times article on Opportunity Zones.

Continue reading.

Opportunity Db

September 18, 2019

Georgia Opportunity Zones: Driving Peach State Investment (2019)

October 10, 2019 | Atlanta, GA

Join the Georgia Opportunity Zones: Driving Peach State Investment conference, in partnership with GEDA, on October 10, 2019 for a special one-day conference hosted at the offices of Seyfarth Shaw LLP in Atlanta. This event will feature a number of economic development finance experts from around the state discussing Opportunity Zones and the development finance tools, authorities, resources and approaches, and how these can affect the Georgia economy going forward.

Register today to reserve your spot at the Georgia Opportunity Zones: Driving Peach State Investment conference.

Register

New York & New Jersey: Opportunity Zones & Beyond (2019)

October 3, 2019 | New York, NY

oin the New York & New Jersey: Opportunity Zones & Beyond conference on October 3, 2019 for a special one-day event hosted at the offices of BNY Mellon in New York City. This event will feature a number of economic development finance experts from around the state discussing Opportunity Zones and the development finance tools, authorities, resources and approaches, and how these can affect the New York/New Jersey economy going forward.

Register today to reserve your spot at the New York & New Jersey: Opportunity Zones & Beyond conference.

Register

Catalyzing Opportunity Zone Investments in New England (2019)

October 22, 2019 | Boston, MA

Join CDFA for the Catalyzing Opportunity Zone Investments conference in New England on October 22, 2019 for a special one-day event hosted at the Federal Reserve Bank of Boston. This event will feature a number of economic development finance experts from Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont discussing Opportunity Zones and the development finance tools, authorities, resources and approaches, and how these can affect the New England economies going forward.

Register today to reserve your spot at the Catalyzing Opportunity Zone Investments in New England conference.

Register

TAX - MASSACHUSETTS

Veolia Energy Boston, Inc. v. Board of Assessors of Boston

Supreme Judicial Court of Massachusetts, Suffolk - September 11, 2019 - N.E.3d - 2019 WL 4282265

City board of assessors applied for direct appellate review of decision of Appellate Tax Board abating taxes on certain personal property, specifically, pipes used to produce, store, and deliver steam, owned by and assessed to taxpayer for certain fiscal year, and application was granted.

The Supreme Judicial Court held that Appellate Tax Board's decision was based on both substantial evidence and correct application of the law.

Appellate Tax Board's decision abating taxes on pipes taxpayer used to produce, store, and deliver steam was based on both substantial evidence and correct application of the law, where energy system operations expert offered extensive testimony that taxpayer's pipes and appurtenant equipment formed essential part of single integrated machine.

Opportunity Zones Knock Where They're Needed Least.

Places like Chapel Hill are poor areas on paper because they're filled with jobless college kids.

If you stroll down Franklin Street, the main drag here in this wealthy college town, you aren't likely to think you've landed in a disadvantaged place. Just a few blocks from the main campus of the University of North Carolina, groups of happy-looking young people crowd the sidewalks and patronize businesses including Starbucks, Chipotle, Cold Stone Creamery, several national bank branches, a bike shop, a craft-beer brewery and a wine bar.

But like many commercial areas adjacent to major colleges, this section of Chapel Hill is primed to attract millions of additional dollars in new investment thanks to changes that were part of the 2017 tax law. Investors around the country are racing to take advantage of one of the hottest tax-planning strategies in wealth management: sticking money into "opportunity zones."

The program allows investors to reduce and defer paying capital-gains taxes until 2026 by investing in high-poverty communities. But because of the way the federal government wrote the rules, some census tracts—including Chapel Hill's—appear on paper to be high-poverty areas but are actually populated by college students with no income. As a result, a tax benefit intended to help poor areas is channeling money to places that are already relatively well-off.

It's true that Chapel Hill's opportunity zone has a poverty rate of 47%, three times the state average. But the zone's median age is 22, 99.8% of residents have high-school diplomas and 49% say they've moved in the past year. The tract has a lot of apartments and rental units—including nearly a dozen fraternity and sorority houses—but the median value of owner-occupied housing is $500,000, or triple the state average.

Money is already pouring in. In April a Charlotte-based real-estate firm spent $23.5 million to buy a 119,000-square-foot Franklin Street office building with a ground-level CVS pharmacy and adjacent parking lot. "It is a bit of a head-scratcher why it is an opportunity zone," the company's vice president admitted to the Raleigh News & Observer, which noted: "Most people aren't likely to think of Franklin Street as a disadvantaged area." The company plans a $12 million renovation to refresh the offices and to convert them to a technology hub. It might include a co-working space.

Many of the country's 8,700 opportunity zones are in legitimately distressed communities in need of revitalization. Still, as investors have begun announcing deals taking advantage of the tax breaks, some of the projects in opportunity zones appear to fall short of the goal of spurring new investment that lifts up struggling areas.

Developers broke ground in Kentucky last year on a $50 million, 10-story apartment building near the University of Louisville that offers “a unique, unobstructed view of race track Churchill Downs,” according to the trade publication of the National Apartment Association. The developer said: “We planned to build at University of Louisville, anyway, and this financing certainly made that decision even easier.”

In Florida, a Fort Lauderdale developer broke ground this spring on a $40 million apartment building located in an opportunity zone. Monthly rents are expected to go for as much as $1,900. “A lot of these people who are going to live there have a high income,” the developer confessed to a local business publication. The complex will feature amenities including a dog park, a fitness center with a yoga and cycling studio, a full-time concierge and a fourth-floor pool with cabanas.

A Pittsburgh-based real-estate investment firm announced in May that it purchased and plans to upgrade a student-housing community across a pedestrian bridge from the University of Louisiana at Lafayette. The complex already “features a 24-hour fitness center, swimming pool with LED lighting, cybercafe with free printing and a host of other amenities,” the company said in a news release.

A study last year by the Brookings Institution identified 33 college towns with opportunity zones in which more than 85% of residents are college students. The top three were the University of Southern California, Indiana University of Pennsylvania and Illinois State University—each of which has nearby opportunity zones composed of 99% college students.

“There were some obvious flaws in the way this was designed,” Brookings economist Adam Looney says. “You can build anything for any purpose and get the tax break.” He says he has heard of opportunity-zone projects that include building self-storage facilities and solar-power generation, both of which—like renovating luxury student housing—have tenuous connections to community revitalization.

In Chapel Hill, the town’s economic development officer, Dwight Bassett, says the opportunity zone is leading other investors to sniff around the college town—a development he welcomes. Asked if he’d describe the area as impoverished, he says, “No, I wouldn’t.” He adds, however, that a North Carolina Commerce Department official told him last year that the town had two census tracts eligible to become opportunity zones. The official asked Mr. Bassett to recommend one. “We looked where we could get the most economic benefit out of it,” he says, “and that’s the one we nominated.”

The Wall Street Journal

By Tony Mecia

Sept. 13, 2019 6:10 pm ET

Mr. Mecia is editor of the Charlotte Ledger, a business publication in Charlotte, N.C.

OZ Criticisms and How to Strengthen Local Communities (Weekly News Roundup)

Here are five of the most intriguing Opportunity Zones articles from the past week or so. Several articles, notably the big New York Times piece from August 31, were critical of the OZ program and how little it has helped low-income communities so far.

Read More »

Opportunity Db

September 10, 2019

Is There a Big Problem With the Opportunity Zones Program?

Is there a big problem with the Opportunity Zones program?

Thomas Morgan is a real estate developer, broker, and investor who specializes in impact investing and 1031 exchange strategies. On today's episode, we discuss the recent New York Times article and the challenges of raising Opportunity Zone capital for projects in blighted locations.

Read More »

TAX - COLORADO

Rare Air Limited, LLC v. Property Tax Administrator

Colorado Court of Appeals, Division II - August 29, 2019 - P.3d - 2019 WL 4064961 - 2019 COA 134

Taxpayer, a lessee of land owned by political subdivision of State, appealed order of the Board of Assessment Appeals (BAA) upholding tax assessment on aircraft hanger facility which taxpayer had constructed on the land.

The Court of Appeals held that:

- Lessee possessed a taxable ownership interest in the hanger facility;
- Lessee's possessory interest in hanger facility was subject to taxation; and
- Unit assessment rule did not apply to lessee's ownership of hanger facility.

Lessee of land owned by airport authority, a political subdivision of State, upon which lessee constructed an aircraft hanger facility at its own expense, possessed a taxable ownership interest in the hanger facility, where lease vested in lessee significant benefits of ownership in the facility, including exclusive use of the facility, right to all depreciation and tax advantages, retention of all profits generated, and rights to encumber improvements and assign or transfer them with proper authorization, lessee also had duty to maintain the facility at its own expense, to pay any assessed taxes pursuant to the terms, and to insure the facility at its own expense, and lessee held title to the facility.

Lessee's possessory interest in aircraft hanger facility on land owned by airport authority, a political subdivision of State, was subject to taxation; lessee owned a significant interest in the property from which it derived profits for private benefit, and lessee had exclusive right of possession to the property.

The Great Tax Break Heist.

The many, many fiascos of policy by tax cut.

Tax scams are the tribute policy vice pays to policy virtue.

A few days ago The Times reported on widespread abuse of a provision in the 2017 Trump tax cut that was supposed to help struggling urban workers. The provision created a tax break for investment in so-called "opportunity zones," which would supposedly help create jobs in low-income areas. In reality the tax break has been used to support high-end hotels and apartment buildings, warehouses that employ hardly any people and so on. And it has made a handful of wealthy, well-connected investors — including the family of Jared Kushner, Donald Trump's son-in-law — even wealthier.

It's quite a story. But it should be seen in a broader context, as a symptom of the Republican Party's unwillingness to perform the basic functions of government.

Continue reading.

The New York Times

By Paul Krugman

Sep. 20, 2019

Developing OZ Owner Occupied Housing on a Massive Scale, with NeighborBuilt.

Is the development of owner occupied housing on a massive scale achievable in blighted Opportunity Zone neighborhoods? First, you have…

Read More »

Opportunity Db

September 4, 2019

Review of Department of Commerce Policy in Opportunity Zones.

Read the review.

CDFI Fund Opens CY 2019 Round of New Markets Tax Credit Program.

The U.S. Department of the Treasury's Community Development Financial Institutions Fund (CDFI

Fund) released today the Notice of Allocation Availability (NOAA) for the calendar year (CY) 2019 round of the New Markets Tax Credit Program (NMTC Program). The NOAA makes up to $3.5 billion in tax credit allocation authority available for the CY 2019 round. The CDFI Fund provided the NOAA on its website in anticipation of its publication in the Federal Register on September 6, 2019.

The NMTC Program spurs investment of private sector capital into distressed communities by providing a tax credit to corporate or individual taxpayers who make Qualified Equity Investments (QEIs) in designated Community Development Entities (CDEs). The CDEs, in turn, invest the capital raised into businesses in low-income communities. The credit provided to the investor totals 39 percent of the investment in a CDE and is claimed over a seven-year credit allowance period.

The CDFI Fund has made 1,178 awards—totaling $57.5 billion in tax credit allocation authority—to CDEs through the NMTC Program since the program's inception. More information about the NMTC Program can be found on the program's webpage, www.cdfifund.gov/nmtc, or in the program's fact sheet.

Continue reading.

Wednesday, September 4, 2019

TAX - INDIANA

City of Lawrenceburg v. Franklin County

Court of Appeals of Indiana - August 28, 2019 - N.E.3d - 2019 WL 4050295

County brought action against city for breach of contract, stemming from city's alleged failure to make payments to county under agreement to share gaming tax revenue.

The Superior Court entered summary judgment in favor of county. City appealed.

The Court of Appeals held that:

- City did not waive its argument that agreement was void by statute, and
- City's agreement with county was void by statute.

City did not waive its argument that agreement to share gaming tax revenue was void by statute, in county's breach of contract action against city, though city did not assert that agreement was void by statute in its answer and raised argument for the first time in summary judgment proceedings; county had ample time to respond and did respond to city's arguments made at summary judgment, county designated no evidence showing prejudice from timing of city's arguments, and argument was a purely legal argument that did not necessitate a fully developed factual record to address.

City's agreement to share gaming tax revenue with county was void by statute, in county's breach of contract action against city, though revenue sharing statute allowed city to share its gambling revenue with county without county having to provide actual consideration; statute governing obligations of city beyond amount of money appropriated required city to appropriate all necessary funds to fulfill agreement at time it was executed, and city did not appropriate any money to fulfill agreement at time it was executed.

San Francisco Assessor Sues Over Ballpark Tax Win.

(TNS) — San Francisco Assessor Carmen Chu is suing both the San Francisco Giants and the city's own Assessment Appeals Board over a multimillion-dollar property tax assessment break granted to the team's Oracle Park.

At issue is the assessed taxable value of the 42,000-seat waterfront stadium, which sits on land leased from the Port of San Francisco.

Chu set the park's assessment at $415 million for 2015, $421 million for 2016 and $430 million for 2017.

The Giants countered with an estimate of $309 million for 2015, $306 million for 2016 and $298 million for 2017.

Why the difference? The assessor's office argues the ballpark is like a house or office building — its value has risen during the real estate boom. But the Giants argue that the ballpark may need to be upgraded in the future — so it was less valuable.

After hearing both sides, the Assessment Appeals Board, which is independent of the Assessor-Recorder's Office, decided the park's value had risen, but at a far slower rate than set by the assessor. The board set the park's value at $385 million for 2015, $405 million for 2016 and $437 million for 2017.

The difference would mean San Francisco losing out on about $543,000 in property taxes over the three years in dispute.

The taxes for 2018 are still under appeal.

"A single legal error in the board's analysis caused a reduction of approximately $185 million each year," the assessor states in the lawsuit, filed Friday in San Francisco Superior Court.

"The single error is that they double counted the current depreciation of the ballpark and gave credit for future depreciations that may or may occur in the future," said Vivian Po, spokeswoman for the assessor. "We don't want the Giants to get property tax deductions that nobody else can get."

Assessment Appeals Board Administrator Dawn Duran stands by the decision.

"The board handles all of the large conflicts, including the big hotels and office buildings and the three who heard the (ballpark) case are all seasoned board members," Duran said. "I really don't have a comment, as I have yet to see the lawsuit," she added.

The Giants didn't respond immediately to a request for comment.

As for the oddity of one city office filing suit against another, Duran said, "It's rare but it does happen. The assessor has the right to file suit, just as any taxpayer has the right to take (the board) to court."

It's not the first tax go-round among the assessor, the Giants and the appeals board. Since Oracle Park opened in 2000 as Pac Bell Park, the Giants have consistently challenged the city's annual tax assessments.

For example, Chu set the 2014 value of the ballpark at almost $407 million, while the Giants pegged it at more like $158 million and then upped the estimate to $254 million just before the hearing.

The Assessment Appeals Board eventually ruled that the ballpark's value was about $365 million, way below the assessor's estimate, earning the Giants at $548,343 refund.

Oracle Park isn't the only stadium where different parties see the tax valuations differently.

Santa Clara County Assessor Larry Stone sued his county Assessment Appeals Board in late May for its assessment of the 49ers' Levi's Stadium in Santa Clara.

That board ruled the 49ers were responsible only for half of the assessed value on the $1.2 billion Levi's Stadium, because the football season is only half the year long.

Stone argued that the 49ers use the facility year-round for concerts and other sporting events "that have a value that the Assessment Appeals Board is ignoring."

The board didn't buy the argument and, as a result, the 49ers got a one-time, $36 million tax refund and a $6 million tax cut in their annual taxes.

Meanwhile, the Santa Clara suit is making its way through Superior Court.

"These sports stadium tax deals are quite complex, and teams all across the nation are paying significant attention to these cases," Stone said.

Triple play: It was a good night for San Francisco Mayor London Breed and a bad night for the progressives at the Democratic County Central Committee Wednesday evening.

Not only did the committee vote to back Breed's re-election this November, it also voted to endorse Breed's hand-picked replacement on the Board of Supervisors, Vallie Brown, over Democratic socialist Dean Preston.

Preston's campaign manager, Jen Snyder, reacted by flipping the DCCC members the bird.

"That was me, an uppity, outspoken Democratic socialist who shows her mind when the DCCC endorses a candidate backed by the real estate industry," Snyder said.

Former prosecutor, Suzy Loftus, Breed's pick in the district attorney's race, also got the nod from the panel.

Park it: San Francisco Recreation and Park Department General Manager Phil Ginsburg has been tapped by Gov. Gavin Newsom for a seat on the California State Park and Recreation Commission.

Ginsburg has been general manager of Rec and Park since 2009. He also served as chief of staff for a spell when Newsom was mayor.

During Ginsburg's tenure, San Francisco has raised more than $150 million in private donations to help fund scholarships, renovate soccer fields, playgrounds and parks, and the Golden Gate Park Tennis Center

He also has been a key player in bringing big concerts, like the Outside Lands music festival, to San Francisco's Golden Gate Park and Paul McCartney to Candlestick Park for its final event. But Ginsburg said he had no plans to push for big festivals at state parks.

When asked if Newsom had given him any mandate, Ginsburs said “yes, to show up at the meetings.”

The job pays $100 a meeting.

SEPTEMBER 6, 2019 AT 3:05 AM

TAX - NEW JERSEY

Reservoir v. Township

Superior Court of New Jersey, Appellate Division - August 22, 2019 - A.3d - 2019 WL 3949208

Taxpayer which operated a reservoir brought multiple actions challenging township’s assessment of property taxes.

After trial, the Tax Court affirmed the assessments but also awarded taxpayer a functional obsolescence deduction. Taxpayer appealed and township cross appealed.

The Superior Court held that:

- Tax Court could use trended cost analysis to value the reservoir;
- Tax Court’s could trend construction-related costs; and
- Evidence supported Tax Court’s award of a functional obsolescence deduction.

Original construction costs of a reservoir were reliable for purposes of ascertaining true value of taxpayer’s reservoir, and thus Tax Court could use trended cost analysis to determine value in taxpayer’s action challenging tax assessments; the reservoir constituted special purpose property, there were detailed cost compilations available regarding reservoir’s construction, and employee responsible for estimating the original construction costs testified as to these costs.

Soft or indirect costs such as engineering and architect’s charges, environmental site planning, interior design, the expenses of a landscape architect, the cost of bringing utilities to the site, project supervision, a traffic consultant, financing charges, interest and taxes during construction, insurance and legal fees are all properly included in the cost of improvements for the purpose of establishing real property’s true value.

Tax Court’s choice to trend under trended cost analysis the costs incurred by taxpayer in settling claims with a contractor, public relations, and installation and maintenance of a bubble for continuation of construction work on taxpayer’s reservoir during the winter did not constitute reversible error reservoir in taxpayer’s action challenging property tax assessments; as a matter of law, the Court could consider public relations a reasonable expense incidental to construction of a controversial project such as the reservoir and record showed that the construction-related costs were those that any prudent person replacing the reservoir would have payed.

Evidence was sufficient to establish that the original costs incurred by taxpayer in constructing a reservoir were reasonable and reliable, supporting Tax Court’s decision to award taxpayer a deduction for functional obsolescence based on increased construction costs; although the project stayed within budget, the record showed that bad weather and a poorly performing project manager imposed additional expenses on taxpayer.

The Multi-Asset QOZB that Combines Entertainment and Real Estate.

How can real estate and a unique entertainment product combine into a Qualified Opportunity Zone Business to deliver long-lasting social

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Opportunity Db

August 28, 2019

Mobile Sports Betting Is the Moneymaker as More States Legalize.

Some states that disallow mobile wagers, like Mississippi, have brought in less tax revenue than expected from sports gambling

Bets placed via smartphones have rapidly brought New Jersey neck-and-neck with Nevada in the race to be the nation's biggest sports-betting market.

Limits in other states, though, could hamper the nascent industry's growth.

Online gamblers now account for about 80% of all legal wagers on games in New Jersey, which surpassed Nevada for the first time in May in monthly sports bets, according to figures released by the two states. New Jersey legalized sports betting last year, following a Supreme Court ruling that allowed such moves by individual states.

Continue reading.

The Wall Street Journal

By Katherine Sayre

Sept. 2, 2019 1:34 pm ET

TAX - PENNSYLVANIA

School District of Philadelphia v. Board of Revision of Taxes

Commonwealth Court of Pennsylvania - August 22, 2019 - A.3d - 2019 WL 3948895

City school district sought review of determination by city board of revision of taxes concerning tax assessments of commercial properties. Taxpayers filed motion to quash.

The Court of Common Pleas granted taxpayers' motion to quash. School district appealed.

The Commonwealth Court held that:

- Purported fact that there were non-commercial or residential properties in city whose tax assessments city school district could have chosen to appeal was not generally known fact and, thus, could not be established by judicial notice;
- School district's statements explaining its selection process did not constitute incontrovertible admissions and, thus, did not rise to level of judicial admissions; and
- Evidentiary hearing was required to resolve disputed fact of issue whether school district used monetary threshold that effectively eliminated residential properties from its selection policy.

The Record High Price of Some Muni Bonds Erases the Tax Breaks.

- **One-year Treasuries have better after-tax yield, firm says**
- **Those muni yields last week hit new low against Treasuries**

Investors who are paying near record-high prices for the shortest-dated state and local government bonds may think the tax break makes it worthwhile.

It doesn't.

U.S. Treasuries that mature in one year are providing bigger after-tax yields than traditional municipal debt, AllianceBernstein Holding LP said in its weekly note. That's because the price run up pushed the yields on one-year tax exempt debt to about 0.91% by Friday's close, or about 55% of those on Treasuries.

Steep drop in yields wipes out tax advantage of municipal bonds
That measure of relative value is only slightly above what it was earlier last week, when it hit the the lowest since at least 2001, according to data compiled by Bloomberg. The lower the ratio drops, the more pricey the municipal securities are in comparison.

The mutual-fund company said it's very unusual for the tax advantage of state and local government debt to be non-existent, and it suggested that investors shift some of their cash into short-term Treasuries instead. They said the federal government securities also provide a "modest amount" of recession insurance because that have historically outperformed during economic contractions.

Bloomberg Markets

By Martin Z Braun

August 19, 2019, 9:17 AM PDT

TAX - CALIFORNIA

Mass v. Franchise Tax Board

Court of Appeal, Second District, Division 3, California - August 15, 2019 - Cal.Rptr.3d - 2019 WL 3823675 - 19 Cal. Daily Op. Serv. 8154

Taxpayers filed a complaint for refund of taxes paid on interest dividends that they received as a result of holding shares in a regulated investment company that received 12.41% of its interest income from its holdings in California municipal bonds, which were interest dividends that, taxpayers contended, were exempt from taxation under the state constitution.

The Superior Court determined that the interest dividends were taxable. Taxpayers appealed.

The Court of Appeal held that the statute pursuant to which the interest dividends were taxed did not run afoul of state constitutional provision that interest on bonds issued by the state or local government in the state was exempt from taxes on income.

State statute taxing interest dividends that taxpayers received as a result of holding shares in a regulated investment company that received 12.41% of its interest income from its holdings in California municipal bonds did not run afoul of state constitutional provision that interest on bonds issued by the state or local government in the state was exempt from taxes on income.

Sanity Check for Qualified Opportunity Zone Investments.

A deadline is looming to maximize the stepped-up basis afforded to realized capital gains invested in qualified opportunity zone properties and businesses.

To get the full 15 percent step-up in basis, investment must be made by the end of 2019. There has been a corresponding surge of offerings, primarily real estate investment trust-like investments in commercial and residential properties, offered by the same firms that have offered such private offerings in the past and through the same channels. The difference is that these funds are being promoted to individuals who are inexperienced in investing as a limited partner or minority shareholder in a private REIT, or a private equity fund, which could be a disaster both for those advising such investors and those who are managing qualified opportunity zone funds. To avoid making mistakes, here is a sanity check to see if investing in a QOZ property or business makes any sense.

The opportunity zone concept has been around since the Clinton administration; the qualified opportunity zones, however, are new, having been formed in 2018 (based on 2010 census data) by the 2017 Tax Reform Act. The rationale is that private investments, now held in highly appreciated assets, will help economically distressed locations if those private investors: 1) sell their existing assets, and 2) reinvest the proceeds into new or newly renovated properties and new businesses in those locations. To encourage this sale and reinvestment, a deferral of the tax on realized capital gains for up to seven years, a stepped-up basis of up to 15 percent and the exclusion from capital gains of any appreciation on the QOZ investments held for more than 10 years is offered. The details of how a QOZ fund or investment must be managed are too complex to go into here. Suffice it to say, that qualification depends on strict compliance with the new, and sometimes ambiguous, regulations.

Private investors, individuals or institutions have not sold appreciated assets to invest in distressed communities in the past. Indeed, 75 percent of all private equity investments goes to just three states: Massachusetts, California and New York. This is because they believe they will not get a greater than market rate of return for their investment at equal or lower relative levels of risk by investing in such communities and properties relative to the high tech and biomedical investments that have proven to be such good investments in the past. By offering a significant financial incentive for such an investment, the government is boosting the implied rate of return on the reinvestment of realized gains by allowing the investor to use the amount otherwise needed to pay the tax (anywhere from 15 to 28 percent, plus the 3.8 percent investment tax) for up to seven years, and, if kept in the QOZ investment for more than 10 years, excluding the appreciation on that investment.

What is uncertain is whether any experienced investor will find these financial incentives sufficient to change the way they allocate their investment dollars. What is certain is that many inexperienced investors will be pitched the QOZ funds as a way of deferring capital gains taxes.

1. What are the investor's objectives?

Success is achieving an investor's objectives. The selection of a specific property or business investment as a limited partner or minority equity owner means the investors have a common objective in making the investment. Saving taxes is not an objective; it is just one way of reducing the friction incurred when making an investment. Other objectives include return on investment, security both in withdrawing funds during the 10 years and exiting the fund after 10 years, and the satisfactory results in short and long term.

Whether a QOZ is worth it depends on the specific situation. Since it is so new, QOZ funds are uncertain and may be costly. The advisor must weigh the net benefit to the investor of deferring capital gains against the likely costs and risks of such an investment and educate the investor of those risks and costs. Said a different way, is it worth spending $20,000 in fees over 10 years to save $20,000 of capital gains taxes on a $100,000 gain today, with only a 50/50 chance of getting a positive return on your investment?

2. Is investing in new or rehabilitated property, or growth of a private business, the best way to achieve the Investor's objectives?

To qualify, investments must be realized capital gains that are equity investments in new or rehabilitated property or the growth of a business (sufficient to double the cost basis of the rehab property or growth of the existing business) in the QOZ. Deploying new investment capital into new or existing properties and businesses is not as simple as buying the stock of a publicly traded growth company. The management of the fund and the management of the property or business must work hard together to not waste time and money, and getting that experience and expertise is not cheap. The private investment landscape is littered with the wreckage of properties and businesses that failed less because they were a bad idea, but rather because too much new money came into the firm and not enough talent to deploy it.

3. Does the investor have the right team of professionals?

Because the QOZ program was created by recent legislation, both understanding and complying with the regulations is critical. For example, the calculations in Forms 8949 and 8996 seem straightforward, but failure to correctly prepare and file these forms in a timely manner is fatal to qualifying for the tax deferral. Additionally, the tax deferral only works to achieve the client's goals if that deferral is leveraged with the rest of the client's planning and administration. The client needs to have access to a financial advisor, a real estate investment advisor, a private equity investment advisor, a CPA and an attorney with corporate and estate planning experience — all of whom are familiar with the requirements and effects of investing in a QOZ fund or business. Relying on just one professional leaves the client open to that professional's blind spots: their natural bias to do what they already know how to do. This includes going with 1031 exchanges for the real estate investment advisor, the promoted QOZ funds for the financial advisor and so on.

4. Is QOZ investment even necessary to achieve the investor's objectives?

There are alternatives to QOZ for deferring realized capital gains, so the client needs to examine whether the QOZ investment is really necessary to achieve their goals. As mentioned above, the 1031 like-kind exchange remains available for real estate investments, but there are other alternatives, including charitable remainder trusts, charitable lead trusts, deferred sales trusts, et al. Each has their own advantages and their own drawbacks, but each should be considered a way of achieving the client's objectives as they may make investing in a QOZ unnecessary.

5. Is what the promoters claim even possible, considering this has never been done before?

Any passive investment in a private equity fund or REIT will be promoted. The claims of the promoters need to be verified as being possible since the newness of this program means that any claims made in their promotional materials is even less likely to be true than the usual "puffing" that goes with promoting a new venture. This is doubly so for QOZ investments. This requires a more detailed investigation into the structure of the fund, the underlying assets, the periodic liquidity and exit strategy, who the managers of the fund or business are, as well as the focus, strategy and terms of the investment and so forth. Even if the offerings comply with the SEC regulations, most commonly Reg A and Reg D, it is very likely that a passive investor will give up most, if not all, control over their investments in the QOZ funds. Before you invest is the time to have second thoughts.

6. Is a QOZ investment currently viable?

Considering the uncertainty of the actual implementation and management of QOZ investments, and the hostility many of the Democratic candidates have toward the 2017 tax cuts in general, is a long-term investment in a QOZ a viable strategy anyway? This depends on the client's objectives, but the viability of QOZ tax deferral in the future needs to be considered. Even if the underlying legislation does not come under attack, the capital gains rates could be changed so that in 2026, when tax on 85 percent of the realized gains invested in the QOZ fund are due, the net tax is greater than if the client has paid the capital gains tax at the 2019 rates to begin with.

The corollary to this question is what will be "Plan B" if the QOZ deferral is no longer a viable option?

7. Is the investor ready to deal with the worst possible outcome?

Is your client really ready to deal with the worst possible outcome? For some, it is the loss of the entire value of the invested gains in the first seven years of the investment. For others, it is being caught up in the social and political blame of gentrification of low-income neighborhoods. Whichever it may be, have you informed your clients of the possible downsides of passively investing in an equity position in a property or business located in economically distressed locations? Do they understand the risks?

Qualified opportunity zone investments are an important strategy for experienced private investors to leverage their investments in real estate properties and direct equity investments in new and growing businesses. They will need to be as skeptical of the promoted investments as they always should be when making a long-term investment in private equity funds and REITs. For clients who are new to passive or direct investing in such properties and businesses, who suddenly find themselves holding significant realized gains from the liquidation of their business, real estate holdings, or even such things as artwork and other tangible property, investing in a QOZ fund or business is perilous. Expect that QOZ funds, especially the REIT model funds, will be promoted heavily between now and the end of the year to these inexperienced investors. If you are an advisor, these questions will help your clients avoid a mistake. For fund managers, these questions will help you avoid getting saddled with minority investors who turn out to be more trouble than they are worth.

Matthew Erskine Managing partner, Erskine & Erskine LLC

August 16, 2019, 2:45 p.m. EDT

How Opportunity Zones and Co-Working Spaces Joined Forces.

The combination of opportunity zones and shared office space is creating incubators of start-ups and investors in underserved markets.

“There’s a lot of interesting stuff happening around Fort Wayne, but it was all happening within silos,” said Jeff Kingsbury, chief connectivity officer at Ancora, a private real estate firm based in Durham, N.C., that is backing Electric Works. “By creating that kind of center of gravity, we achieve a density, coupled with amenities, that really helps to draw innovation.”

Construction on Electric Works is scheduled to start in the first quarter of 2020, and is expected to take at least 18 months. The co-working component echoes a larger trend that is drawing more entrepreneurs to opportunity zones.

The opportunity zone program, enacted as part of the federal tax overhaul in December 2017, was created to stimulate private investment in economically distressed communities in exchange for a break on the capital gains tax. There are now more than 8,700 such zones nationwide.

Continue reading.

The New York Times

By Tom Acitelli

Published Aug. 20, 2019

Chris Rawley: Agriculture Investing in Opportunity Zones

How can agribusiness capitalize on the Opportunity Zones program? Chris Rawley is founder and CEO of Fort Worth, TX-based Harvest…

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Opportunity Db

August 21, 2019

TAX - NEW JERSEY
NJ DEP/UFT v. Township of Upper Freehold
Tax Court of New Jersey - July 26, 2019 - N.J.Tax - 2019 WL 3406316

For-profit company sought a local property tax exemption for state-owned golf course and restaurant that it operated.

Company moved for summary judgment.

The Tax Court held that:

- Golf course was exempt from local property tax, and
- Restaurant was exempt from local property tax.

Restaurant on state-owned golf course property operated by for-profit company was exempt from local property tax, where provision of food and beverages was an expected amenity to golf course, restaurant was necessary to success of golf course, restaurant was located directly adjacent to the golf course and received a large percentage of patronage from golfers, and golf course furthered public purpose by providing recreational activity.

Leasing documents between government and for-profit company operating golf course and restaurant on state-owned property did not preclude application for tax-exempt status, even though the lease directed company to "pay all property taxes assessed," where documents also directed payment of taxes "if applicable," and no language in documents expressly precluded application for exemption.

Leaning on the Land.

More and more communities are considering reviving an old tax idea that's been tried in only a few places.

The Market-Frankford rail line curves past an empty lot in Millbourne, Pa., a piece of land that marks both the rise and fall of the small borough just west of Philadelphia.

A Sears store once stood on the lot. Taxes collected from the store's real estate enriched the treasury of the borough for more than 60 years. The store's tax payments were the single largest source of revenue for Millbourne, enough for its 1,200 residents to have their own full-time police force. But in 1989, Sears decamped from Millbourne, moving one town over to the much larger and more affluent Upper Darby.

Like most municipalities, Millbourne relied heavily on property taxes. The city taxed land and the buildings on top of the land at the same rate, which is typical for cities across the country. And the Sears store was the largest structure in town on the largest parcel—17 acres. "For many years," says Millbourne Mayor Tom Kramer, "that area of land was the meat and potatoes of the borough." But when Sears closed and the building was demolished, Millbourne's property tax revenue all but evaporated.

Millbourne fell into financial ruin. Five years after the store closed, the borough was designated as financially distressed by the state. That made it eligible for additional financial support and debt restructuring, but it was no help to the community's reputation or self-image. The mark would remain on Millbourne's back for 21 years.

The town was unable to lure in new development with tax breaks, so to avoid financial ruin, it leaned on its homeowners to fill the gap in municipal finances. Tax bills skyrocketed between 1993 and 2014. But city leaders ultimately realized the long-term vitality of Millbourne could not be financed by single-family homeowners. High taxes would eventually chase residents away. At the very least, continued increases to property taxes could spark a tax revolt like those that challenged high property rates in California in the 1970s and, closer to home, costly reassessments in Pittsburgh in 2001.

Where Sears once stood, weeds and wildlife have taken over. And from the train platform, the empty lot remains an eyesore in Millbourne. But the gash in the borough's finances has been mended. The town turned to an old yet radical idea to raise revenue. It enacted a land value tax, levying high rates on the land itself and none at all on the structures built there. The tax burden was shifted. Homeowners saw their tax bills cut nearly by a third. Meanwhile, the Sears property, which still swallows up more than a third of the land in the city, saw its tax bill double.

The land value tax, a 19th-century idea, not only raised necessary funds to keep the city afloat financially, but, as intended, forced landowners to make more productive use of other large properties. A former car dealership and a bowling alley, the second and third largest parcels in Millbourne, are now under development. "It's sort of a stick-and-carrot approach," Kramer says.

It's not an approach that many cities are using at the moment. But it's an idea that quite a few local governments, most but not all of them in Pennsylvania, are starting to think about.

Property taxes have been levied since the Middle Ages, but generally not in the most efficient manner. Medieval European kings sent tax collectors out to count the number of hearths in private homes, assuming the tally was the best approximation of how many people lived in the house. In 17th-century England, tax collectors counted windows. The idea was that the more windows a property had, the more valuable the property. This clumsy assessment was easily evaded. Property owners simply bricked their windows up. The legacy of this practice can still be seen in London and other industrial centers in England. It had detrimental health implications when the Industrial Revolution drew thousands from the country into the city, where they were often forced to live in windowless buildings with poor circulation.

Meanwhile in the United States, land acquisition was making even some of the Founding Fathers extremely wealthy. George Washington amassed a huge fortune through land speculation across colonies and frontiers. "Tax policy has always encouraged land speculators," says Ed Dodson, a former market analyst with Fannie Mae and professor at Temple University. "It makes it easy for speculators to acquire and hold land and wait for public-private partnerships to come along with funds to pay them their profit for speculating."

In 1879, the journalist and political economist Henry George wrote Progress and Poverty, a book challenging the notion that land speculation should reap such large profits. George suggested levying high taxes on land itself, and freeing improvements on the land from taxation. The land taxes would be high enough that an owner would either convert the land into a profit-making enterprise or sell it to someone who would. "The economic value of bare land does not derive from the actions of the owner," says Joan Youngman, a senior fellow at the Lincoln Institute of Land Policy. "A piece of bare land has value because of the growth of society and the activities around it." Large landowners, she says, are actually engaging in a form of rent-seeking, buying and sitting on a piece of land at virtually no cost to themselves and waiting for the opportune time to sell after making little or no investment.

George wanted to break that cycle, and his theory was put to the test in the early 20th century in Pennsylvania, when it was used in an effort to break up large undeveloped tracts of land owned by the state's steel barons, notably Andrew Carnegie and Henry Clay Frick. The state adopted legislation allowing its cities to adopt a land value tax. A handful of them did. Most of them weren't the pure Henry George variety, under which developed structures escaped any taxation at all. They tended to be two-tiered systems, with buildings taxed but at a much lower rate than land.

Pittsburgh was one of the early adopters. The result was the development of affordable homes for many of the workers in Carnegie's steel mills. Land value taxes grew in popularity in Pennsylvania well into the mid-1900s. But there was a serious problem. Municipalities seldom bothered to reassess the value of the land. Pittsburgh had to scrap the tax in 2001 after a backlash against land value reassessments sparked outrage from homeowners. "Pittsburgh went too long without revaluing," Youngman says. "If you fail to revalue, you'll have a revolt because you get sticker shock."

And even though the city had a land value tax system from 1913 to 2001, Pittsburgh still saw the gradual decline of its industrial base in the second half of the 20th century. Steel mills slowed their output after their postwar boom. The accompanying decline in tax revenue wasn't so much a failure of the land tax system as a failure of local industries to keep pace with foreign competitors as steel-making advanced. Some critics felt the land tax was unjustly blamed for the economic collapse.

The land value tax didn't fail Pittsburgh as much as the political system did. For decades, city leaders balked at tax assessments, which had been lagging behind the real value of land since the 1940s. Rather than adjust the land assessments to match property values, the city instituted a property tax in 1954 to fill gaps in the budget. As residents continued to leave the city, its tax base continued to dwindle. Yet Pittsburgh's leaders could not muster the political will to reassess land values. By the mid-1990s, though, the city was forced to reassess property values to help pay for services. When the assessments for 2000-2001 came back, land value taxes jumped 81 percent and taxes on buildings by 43 percent. The new valuations were in line with the actual appreciation of the land. But affluent Pittsburgh residents angered by the steep increases rejected them and filed thousands of tax appeals. The city scrapped its land value tax. "The 2001 abandonment of the split-rate in Pittsburgh," University of Pennsylvania professor Mark A. Hughes wrote in 2005, "is a compelling example of the limited role that evidence often plays in policy decisions."

But Pittsburgh didn't abandon the tax idea completely. Since 1997, the city has used a pure land value tax to assess property within the confines of its central business district. After the Great Recession, downtown construction picked up. In the last 10 years, $8.5 billion in development has either been constructed or planned, according to a report by the Pittsburgh Downtown Partnership.

Meanwhile, California was confronting some of the same problems, but with a different outcome. As the state boomed after World War II, its population tripled. With that rapid growth came a housing crunch that led to rapidly increasing residential property taxes. A tax revolt broke out in the 1970s, and in 1978, voters approved Proposition 13, a ballot measure that rewrote the property tax system in the state. Property taxes were assessed at no more than 1 percent of residential or commercial building value and could only increase 2 percent per year.

Had the property tax reductions been accompanied by a significant land tax, George's theories might have been given a meaningful test. But land taxes were also kept low, which didn't promote the best use of property. With property taxes strictly limited, municipalities scrambled to attract car dealers, shopping malls and even parking lots to produce sales tax receipts. Improvements to the land were minimal, and the land itself brought in very little. One of the biggest losers was the state treasury.

But the biggest victim of all was the state's school system. Prop. 13 constricted the main source for school revenue. The largest state in the nation, with by far the largest economy, fell to 41st in per pupil spending. Recently, some school districts in the state have turned to a revenue scheme almost akin to George's land value tax. They are placing a flat tax on each parcel of land within a school district boundary, regardless of the improvements made on the land. The city of Oakland began imposing a vacant land tax earlier this year. It taxes owners of vacant lots $6,000 per year, and vacant condominiums $3,000 per year. The money will be used to address affordable housing and homelessness.

While California was struggling with its property tax system, some Pennsylvania cities still depended on a land tax. Harrisburg, the state capital, was using the land tax as a way of revitalizing its economy. In 1975, as industrial decline and white flight gripped Pennsylvania's rust belt, Harrisburg adopted its two-tiered land value tax. It took some time, but city leaders insisted that taxing vacant land rather than development would revitalize the downtown. There's some evidence they were right. Between the early 1980s and the early 2000s, the number of vacant buildings declined from more than 4,000 to about 500, and the number of businesses increased more than fourfold. Other Pennsylvania cities have followed Harrisburg's lead.

Aliquippa is one of them. A small working-class town west of Pittsburgh along the Ohio River, it was once home to Jones and Laughlin Steel. The J&L plant supported the town and its residents until it shuttered in the 1980s, leaving many of the workers without jobs and the town short on resources. Overnight, the city lost 30 percent of its tax revenue. "The amount of vacant land from the demolition of steel plants," says Joshua Vincent, president of the Center for the Study of Economics, "put extra pressure on out-of-work steel workers and businesses on Main Street." In 1988, Aliquippa adopted a land value tax. From that point on, land was taxed at more than seven times the rate of buildings. The impact was immediate. Tax revenue from land alone jumped from less than one-fifth of city tax revenues to more than 80 percent. It was so successful that the school district followed suit in 1993.

Tom Kramer became mayor of Millbourne in 2009, as the town was slowly emerging from economic distress. He had seen the community's decline first-hand, arriving just as the Sears facility had closed. It was a chance meeting with Dodson, the Temple University professor, that convinced him that a land value tax would be the right fit for Millbourne. Kramer was open to any ideas that would generate the revenue necessary to save the town fiscally, without placing any more burden on single-family homeowners. "The most important thing we needed to do," Kramer says, "was cut the residents' taxes."

Kramer faced strong headwinds from real estate interests. Even when the local political climate supports a land value tax, adoption is difficult. In Pennsylvania, as in most states, state law severely limits the ability of a municipality to make major changes to how it collects taxes. But Pennsylvania may be a straw in the wind.

Cities in most of the country have been forced for decades to compete with each other in offering lucrative tax breaks to lure in developers and businesses. Those schemes leave local governments short on cash to build and maintain infrastructure and services needed for commerce. "Giving these picayune tax breaks makes no sense," Vincent says. In the end, he believes, cities are repeating the mistakes of decades past. "The thing that cities want is someone to build the homes and offices," he says. "And the city is taxing the good part, the building itself." What it needs to tax, in his view, as in George's view more than a century ago, is the fundamental value of the land.

GOVERNING.COM

BY J. BRIAN CHARLES | SEPTEMBER 2019

White House OZ Council Releases List of Federal Programs Favoring OZs.

Click here to read the list.

Senate Carbon Capture Bill Gains a House Companion: Squire Patton Boggs

Earlier this month, we described Senate Bill 1763, which would authorize a new type of exempt facility bond to be issued for "qualified carbon capture facilities." Well, on July 19, 2019, freshman House Republican Tim Burchett of Tennessee proposed the Carbon Capture Improvement Act, H.R. 3861, the text of which is identical to the Senate Bill.[1] However, unlike the Senate Bill that has bipartisan sponsorship, Burchett is (for now) the sole sponsor of the companion House Bill.

This isn't the only carbon capture-related bill with both Senate and House support. The Senate has already passed the Utilizing Significant Emissions with Innovated Technologies Act, nicknamed the "USE IT Act." The USE IT Act supports the development of carbon capture technology through the establishment of: technology prizes, research and development programs to promote existing and new technologies for the transformation of carbon dioxide generated by industrial processes, a carbon capture, utilization and sequestration report, permitting guidance, and regional permitting task force, among other things, research into carbon dioxide utilization and direct air capture, to facilitate the permitting and development of carbon capture, utilization, and sequestration projects and carbon dioxide pipelines. The USE IT Act similarly has a House counterpart, H.R. 1166, which has been referred to the House Subcommittee on Water, Oceans, and Wildlife. With carbon capture technology on Congress' mind, and companion bills for tax-exempt bonds for carbon capture facilities pending in the House and Senate, the chances for a legislative change seem to be growing stronger.

[1] If you're one of those people needs to see it to believe it, click here to see a blackline of the House Bill against the Senate Bill.

The Public Finance Tax Blog

By Taylor Klavan on August 13, 2019

Squire Patton Boggs

Opportunity Zones Could Provide Major Boost for Clean Energy, Sustainable Development.

When Darren Walker, president of the Ford Foundation, a $13 billion foundation guided by a vision for social justice, and Steve Mnuchin, President Donald Trump's treasury secretary, agree that the Opportunity Zones program is the biggest economic development opportunity in 50 years, it's worth taking a closer look.

A provision of the Tax Cuts and Jobs Act of 2017, the Opportunity Zones (OZone) program seeks to spur investment of patient capital in low- and moderate-income communities across the United States. The program allows investors to delay or avoid paying capital gains taxes if they invest in

Qualified Opportunity Funds that then invest within Census tracts designated as Opportunity Zones.

Market watchers are predicting $200 to $300 billion in investment in the nation's 8,700-plus OZones. And federal rules have made it clear that green economy projects — such as local power generation, microgrids, EV charging stations and energy storage — are eligible for OZone investment.

Continue reading.

greenbiz.com

by Julia Parzen and Graham Richard

Wednesday, August 14, 2019 – 1:28am

Local Income Taxes in 2019.

Key Findings

- Local income taxes are imposed by 4,964 taxing jurisdictions across 17 states, with a heavy concentration in Rust Belt states, particularly Ohio and Pennsylvania.
- Depending on the state, local income taxes may be levied by counties, municipalities, school districts, or special districts, with most levied by municipalities (3,816) and school districts (954).
- Six states rely on income taxes for more than 10 percent of local tax collections, while the local income taxes in five states capture more than 1 percent of adjusted gross income.
- Nonresidents are sometimes subject to a lower rate than residents, or not taxed at all, in recognition that they receive fewer benefits than do residents.
- In different states, local income taxes are levied on all income, earned income, or interest and dividend income. Some jurisdictions impose payroll taxes or dollar-denominated employment or occupational privilege taxes in lieu of a traditional income tax.
- While most local income taxes are low, they often have broad bases and are difficult to avoid, which can discourage economic activity or drive out mobile workers or businesses. Officials should also be careful not to impose excessive compliance costs through complexities within their local tax regimes.

Continue reading.

Tax Foundation

by Jared Walczak

July 30, 2019

Nick Andrews: Renewable Energy Production in Opportunity Zones

Can Opportunity Zones be leveraged for biorefinery development and renewable fuel production? Nick Andrews is founder and CEO of Scottsdale,

Read More »

Opportunity Db

August 14, 2019

TAX - ILLINOIS

In re County Treasurer

Appellate Court of Illinois, Second District - July 24, 2019 - N.E.3d - 2019 IL App (2d) 180727 - 2019 WL 3409680

Purchaser of property at tax sale filed petition for issuance of tax deed and finding of sale in error.

The Circuit Court granted petition. County treasurer appealed.

The Appellate Court held that:

- Purchaser of property at tax sale was not entitled to sale in error, and
- Water sanitation district was not municipality that could be incorporated into municipal-lien provision of statute providing for sale in error remedy.

Purchaser of property at tax sale was not entitled to sale in error pursuant to water sanitation district's lien on property; statutory municipal-lien provision limited sale in error remedy to county, city, village or incorporated town liens, not liens from special district, and lien stemmed from unpaid usage fees owed by former property owner, not from public funds advanced to take care of abandoned or hazardous property or to promote safety and welfare of community at large.

Water sanitation district was not municipality that could be incorporated into municipal-lien provision of statute providing for sale in error remedy to purchaser of tax-sale property; water sanitation district provided singular service, wastewater-treatment services, to community, and did not have broad police and welfare powers characteristic of counties, cities, villages or incorporated towns, entities which were specifically listed in statute.

TAX - PENNSYLVANIA

In re Coatesville Area School District

Commonwealth Court of Pennsylvania - August 7, 2019 - A.3d - 2019 WL 3642979

City school district and city sought judicial review of county board of assessment's grant of a partial real estate tax exemption in separate actions.

After the trial court issued identical orders under separate docket numbers affirming the board's decision, city, school district, and owner of the property appealed. Following remand by the Commonwealth Court, the Court of Common Pleas issued two essentially identical, but differently captioned decisions and orders. The district and property owner appealed one decision, but neither city nor property owner appealed the other decision.

The Commonwealth Court held that appeal of the trial court decision was precluded by the unappealed essentially identical decision.

Appeal of trial court decision regarding a property tax exemption was precluded by an unappealed essentially identical trial court decision, even though one action had been commenced by a city and the other by city school district, where the district had intervened in the city's case, fully participated in a joint trial, the issue in city's case was identical to the district's case, no party appealed the action brought by the city, and only one tax assessment was permitted on the property.

End-of-Year Tax Planning for LIHTC Properties.

With five months remaining in the year, it is time to start thinking about tax-planning strategies, especially for owners of low-income housing tax credit (LIHTC) properties. Outlined below are some items to consider as 2020 approaches.

Bonus Depreciation

Internal Revenue Code (IRC) Section 168(k) governs bonus depreciation for qualified property, which is property with a recovery period of 20 years or less. For LIHTC property owners, site improvements and personal property are the most common examples. Per the Tax Cuts and Jobs Act (TCJA) passed at the end of 2017, 100 percent of the depreciable basis of qualifying property placed in service after Sept. 27, 2017, and before Jan. 1, 2023, can now be expensed.

It should be noted that there is still property subject to the old bonus depreciation rules. Per IRC Section 168(k)(8), qualified property acquired before Sept. 28, 2017, and placed in service after Sept. 27, 2017, can be expensed up to the following applicable percentages:

- In service in 2018: 40 percent
- In service in 2019: 30 percent
- In service after 2019: 0 percent

Owners should ensure that qualifying property is in service before the end of 2019. By doing so, 100 percent of the property can be expensed, or 30 percent if the property is subject to the old rules. Additionally, if the qualifying property is expected to be placed in service near the end of the year, measures can be taken so that the property is in fact placed in service before year-end in order to take advantage of the accelerated deduction in 2019 rather than having to wait until 2020. For property under the old rules, this will allow a 30 percent deduction instead of no bonus deprecation whatsoever.

Cost-Segregation Study

Related to bonus depreciation is the matter of cost-segregation studies. A cost-segregation study is performed by a specialist who reviews architectural drawings, plans and other such documentation to identify assets that might typically be grouped with buildings and reclassifies them as different asset classes. The advantage of doing so is the identification of assets with shorter depreciable lives and thus a benefit from accelerated depreciation.

For example, if a LIHTC property owner obtains a cost-segregation study in the same year in which the property is placed in service, then the owner may be able to use shorter depreciable lives, including the possibility of using bonus depreciation on the qualified property identified in the study. However, cost segregation is not necessarily required when an owner acquires or constructs new property; it also applies to previously acquired or constructed property. A caveat to this is that if too much time has elapsed from when the property was placed in service, there may not be enough remaining adjusted basis of the assets to warrant a study–i.e., the cost of the study would exceed the benefit of any additional depreciation deductions.

Tenant Lease-Up

Per IRC Section 42(f)(2), the first-year tax credit is calculated by determining the average applicable fraction using the applicable fractions at the close of each month of the first year of the credit period. To maximize the first-year tax credits, two important items should be considered: meeting the minimum set-aside, otherwise no credits can be claimed; and meeting the target applicable fraction to ensure that the credits promised to the investor are delivered.

Consider a hypothetical building comprised of 100 percent LIHTC units in the first year of its credit period. All units are of equal floor space, thus the applicable fraction is equivalent for both the unit and floor space fractions. Furthermore, the 40-at-60 minimum set-aside has been elected and the property reached its target applicable fraction (100 percent) in December with an average applicable fraction of 67.5 percent for the year. The minimum set-aside has been met, therefore, credits can be claimed for the first year. Additionally, 67.5 percent of the annual credit allocation can be claimed for the first year, but the investor requires 70 percent of the annual allocation in the first year of the credit period. In this scenario, the investor may apply a "downward timing adjuster" and reduce the next equity contribution to account for the late delivery of credits.

To avoid this situation, an owner should ensure that units are leased up as early as possible. Furthermore, units not leased up by Dec. 31 cannot count toward the calculation of the first-year credits. These units could trigger "two-thirds credits" (i.e., "15-year credits"). Now the owner may need to consider electing to defer the start of the credit period to the following year on Form 8609.

The timing of placing the building in service should also be considered. Per Revenue Ruling 2004-82, a LIHTC unit must be in service for a full month, even though the unit only needs to have been initially qualified as low-income by the last day of the month. If a unit is not in service on the first day of the month, then it cannot generate credits for that month. To illustrate, if construction on a building is completed Dec. 3 and despite the fact that every unit is occupied by a qualified household before Dec. 31, none of the units would be qualified for the month of December. The minimum set-aside would not be met; LIHTCs cannot be claimed and the start of the credit period would need to be deferred. This would have been avoided if the building was placed in service Dec. 1.

The 2018 Consolidated Appropriations Act created a new minimum set-aside on Form 8609, which is known as the average-income test or income averaging. This set-aside requires that 40 percent or more of the residential units in a property must be both rent restricted and occupied by households whose income does not exceed the limitation designated by the owner. Additionally, the average of the income limitation designations must not be more than 60 percent of the area median income (AMI) using 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent or 80 percent designations. For example, if an owner designates a unit at 80 percent, then the unit must be occupied by a household whose income at initial occupancy is no greater than 80 percent of AMI and is charged rent at or below the applicable rent limit for the 80 percent AMI level. However, an owner must ensure that the average-income test is passed before the end of the first year of the credit period. If a property places in service late in the year, the owner may need to consider deferring the start of the credit period to allow enough time to pass the average-income test. Otherwise, there is the risk of not being able to claim credits at all.

Casualty Loss

When a unit is damaged by a casualty loss (e.g., fire or flood) rendering it uninhabitable, IRC Section

42(j)(4)(E) provides a reprieve from tax credit recapture as long as the damage is repaired within a reasonable period. However, per IRC Section 42(c)(1), the qualified basis of a building for any year is equal to product of the applicable fraction at the end of the year and the eligible basis. If a fire occurs in a unit Dec. 25 and if the unit is not repaired/restored before Jan. 1, then the unit will not generate any credits for the entire year because it is excluded from the building's qualified basis at Dec. 31. The owner of a LIHTC property damaged by a casualty loss must repair any damaged units and place them back in service before the end of the year to avoid a loss of credits for the year.

Electing Real Property Trade or Business

With the passing of the TCJA, entities taxed as partnerships are now subject to the business interest expense limitation imposed by IRC Section 163(j). That is, business interest expense can be deducted up to only 30 percent of adjusted taxable income. However, by electing to be treated as a real property trade or business (RPTOB), a LIHTC partnership can avoid this limitation in exchange for depreciating its buildings using the alternative depreciation system (ADS). For buildings placed in service before Jan. 1, 2018, the depreciable life is 40 years versus 27.5 years under the general depreciation system. For buildings placed in service after Dec. 31, 2017, the ADS life is 30 years in lieu of 40.

Once the RPTOB election is made, it is irrevocable, but the election can be deferred until a future year. In this situation, tax planning becomes extremely important. A LIHTC property owner should confer with its investor and tax professional on whether making the election for the upcoming year will yield the best tax benefits or if forgoing the election is still the most optimal position.

What has been discussed above is by no means an exhaustive list. LIHTC property owners should seek out the advice of their tax professionals to ensure that they get the most out of their investments in LIHTC properties.

Novogradac

Published by Scot Keller on Tuesday, August 6, 2019

Which Places Pay the Most in Property Taxes?

Property taxes are an important tool to help finance state and local governments. In fiscal year 2016, property taxes comprised 31.5 percent of total state and local tax collections in the United States, more than any other source of tax revenue. In that same year, property taxes accounted for 46 percent of localities' revenue from their own sources, and 27 percent of overall local government revenue.[1]

Median property taxes paid vary widely among the 50 states. The lowest bills in the country are in 13 counties with median property taxes of less than $200 a year. This group is made up of three counties in Alaska (Aleutians East Borough, Kusivlak Census Area, and Southeast Fairbanks Census Area), seven parishes in Louisiana (Allen, Avoyelles, Bienville, East Feliciana, Madison, Red River, and Winn), Alabama's Choctaw County, New Mexico's Harding County, and Kenedy County in Texas. The next-lowest median property tax is $215 in Lamar County, Alabama, near the Mississippi border and about halfway up the state.

The five counties with the highest median property tax payments all have bills exceeding $10,000—Bergen and Essex Counties in New Jersey, and Nassau, Rockland, and Westchester Counties in New

York. All five of these counties are located near New York City.

[Continue reading.](#)

The Tax Foundation

Janelle Cammenga

August 7, 2019

[Opportunity Zone Fund Tax Accounting Considerations.](#)

What are some of the most important tax accounting considerations when forming and managing an Opportunity Zone Fund?

Valerie Grunduski is a real estate tax accounting specialist and leads Plante Moran's Opportunity Zones practice.

Click the play button below to listen to my conversation with Valerie.

Episode Highlights

- Tax considerations when creating a Qualified Opportunity Fund.
- Accounting firm services that fund managers should consider when forming and managing an Opportunity Zone fund.
- Mistakes that QOFs sometimes make in projecting IRRs in Opportunity Zones.
- The right and wrong way to structure debt, and the consequences of improperly structured debt.
- Why OZ funds that don't require debt financing may want to consider it anyway.
- The importance of having a 31-month safe harbor business plan.
- How Section 1231 gains are treated in Opportunity Zone investing.
- Exit considerations for multi-asset funds.

[Play](#)

Opportunity Db

By Jimmy Atkinson

August 7, 2019

[Tribunal Upholds Tax Department's Denial of Sales Tax Exemption on Hotel Developer's Excess Purchases for IDA Project.](#)

The New York State Tax Appeals Tribunal has affirmed a determination that a hotel developer, acting as a designated agent of a New York State industrial development agency ("IDA"), was not entitled to a sales and use tax exemption for purchases it made to construct a hotel at a cost in excess of the amounts it had estimated in its application for IDA tax benefits. Matter of Jefferson Hotel Associates LLC, DTA No. 827618 (N.Y.S. Tax App. Trib., June 27, 2019). The Tribunal's decision makes clear that a developer that incurs costs beyond the estimates in its IDA application must amend its application in order to claim the excess sales tax exemption amounts.

Background. In June 2012, Jefferson Hotel Associates LLC ("Jefferson Associates") applied for financial assistance through an upstate New York IDA to construct a hotel in Monroe County, New York. As is common for IDA projects, the application sought a real property tax abatement, a mortgage recording tax exemption and, as relevant to the dispute, a sales and use tax exemption.

The application required that Jefferson Associates estimate the costs of construction to determine the amount of the anticipated sales tax exemption. Jefferson Associates provided the IDA with an estimated sales tax benefit of approximately $223,000. The IDA accepted the application, approving the appointment of Jefferson Associates as the IDA's agent for purposes of the hotel project and issuing a letter authorizing Jefferson Associates to make purchases free of sales tax. That letter also stated that the "[t]otal costs of the project cannot exceed the project costs" that Jefferson Associates estimated in its IDA application.

The IDA agent letter was thereafter extended twice (in December 2012 and February 2014), with each extension containing the same $223,000 estimated sales tax exemption amount. Subsequently, Jefferson Associates filed with the Department of Taxation and Finance reports of IDA sales tax exemptions, but now reported a total sales tax exemption of approximately $253,000, about $30,000 more than it had previously estimated.

In February 2015, the IDA issued a Demand Letter to Jefferson Associates seeking repayment of the excess $30,000 in sales tax. Subsequently, in November 2015, the Department itself issued a Notice and Demand seeking payment of the $30,000, plus interest. Jefferson Associates paid the amount sought and, following the Department's denial of its refund request, filed a Petition with the Division of Tax Appeals.

Relevant statutory amendments. Directly relevant to the dispute were amendments to the New York General Municipal Law, effective March 28, 2013, that significantly changed the way IDAs could allow sales tax exemption benefits. Under those amendments, IDAs were now required to recapture sales tax exemption benefits "in excess of the amounts authorized" and to remit those amounts to the Department. In addition, the amendments authorized the Department to assess tax, penalties, and interest if the excess amounts were not paid over to the IDA. The new law applied to any amendment of a project made on or after March 28, 2013, that involved "additional funds or benefits." Gen. Mun. Law § 875. The developer argued that the new law was inapplicable because there were no amendments of the hotel project after March 28, 2013, and that, even if the new law did apply, it did not limit the sales tax exemption to the estimate in its application.

ALJ determination. An ALJ held that the excess sales tax amount was properly subject to repayment and that the new law applied because the February 2014 project extension was an amendment that conferred additional benefits after the effective date of the new law. The ALJ also concluded that the extensions of the sales tax exemption letter issued by the IDA, made after March 28, 2013, specifically identified the lower $223,000 exemption amount, which capped the allowable exemption amount.

Tribunal decision. The Tribunal affirmed the ALJ determination in its entirety. It noted that each of the IDA letters stated that the total project costs "cannot exceed" the estimated project costs, and found that it was reasonable to limit the benefit to the estimated sales tax exemption amount. It also concluded that the new law that imposed the limitation was applicable, finding that the extension of the developer's IDA agency appointment through June 30, 2014, was "an amendment . . . involving additional funds or benefits" to the hotel project under the new law.

ADDITIONAL INSIGHTS

The developer had pointed out that limiting the sales tax exemption was inconsistent with the IDA's broad authorization for the developer to make all necessary purchases for the project. However, the Tribunal noted that the 2013 amendments to the General Municipal Law were put in place to enable the IDA to control the costs of a project. The Tribunal also stated that the developer's recourse would have been to "amend the [IDA] project," which the developer did not do. The Tribunal found that the 2014 extension of the IDA agency was "an amendment . . . involving additional funds or benefits," with the alleged "benefit" being the extension of the time for the developer to make purchases free of sales tax. The decision does not address whether the legislative history for the General Municipal Law amendments indicated an intent to treat an extension of an IDA project as an "additional benefit" within the meaning of the new law.

by Irwin M. Slomka

August 5 2019

Morrison & Foerster LLP

TAX - LOUISIANA

Community Associates, Inc. v. Taylor

Court of Appeal of Louisiana, Fourth Circuit - July 31, 2019 - So.3d - 2019 WL 3470941 - 2019-0242 (La.App. 4 Cir. 7/31/19)

Former owner filed petition to annul tax sales of multiple lots, and tax sale purchaser filed reconventional demand to quiet tax title of all lots.

The Civil District Court entered judgment confirming tax sales, and order granting purchaser's ex parte motion to amend judgment, requesting correction of municipal addresses of property. Former owner appealed.

The Court of Appeal held that:

- Amended judgment was a nullity;
- Post-tax sale notice was sufficient to satisfy due process rights of former owner as to sale of certain lots;
- Evidence was insufficient to conclude that notice was sufficient to satisfy due process rights of former owner as to tax sale of certain lots; and
- Amended judgment did not accurately reflect purchaser's ownership interest in certain lots.

Amended judgment, providing that original judgment confirming tax sales of several lots listed incorrect municipal addresses for lots, was a nullity, in action by former owner of lots against tax sale purchaser, seeking to annul tax sales of lots, even though amended judgment only sought to correct a clerical error, where trial court signed amended judgment ex parte, without consent of former owner.

Post-tax sale notice was sufficient to satisfy due process rights of former owner as to sale of certain lots, where notice was sent within three-years of filing and recording of tax deed for such lots.

Evidence was insufficient to conclude that notice was sufficient to satisfy due process rights of former owner as to tax sale of certain lots, in action by former owner of lots against tax sale purchaser, seeking to annul tax sales, where record lacked documentation of any pre-tax sale or post-tax sale notice as to such lots.

Amended judgment, declaring that tax sale purchaser was sole heir of certain lots, did not accurately reflect purchaser's ownership interest, in action by former owner of lots against purchaser, seeking annulment of tax sales, where tax sale deed conveyed 75 percent interest in such lots to purchaser.

TAX - TEXAS

Odyssey 2020 Academy, Inc. v. Galveston Central Appraisal District

Court of Appeals of Texas, Houston (14th Dist.) - July 23, 2019 - S.W.3d - 2019 WL 3294991

Open-enrollment charter school that had leased a property for its campus from a private entity sought judicial review of the decision of appraisal district's administrative review board denying school's request for ad valorem tax exemption.

The District Court granted board's motion for summary judgment. School appealed.

The Court of Appeals held that:

- Property owned by private entity and leased to school was not public property, and
- Statute governing seizure of charter school property purchased or leased with funds received by a charter holder upon revocation of charter, did not apply to school's request tax exemption.

Property owned by private entity and leased to open-enrollment public charter school using it exclusively as a public school was not "public property," as required for exemption from ad valorem property taxation; the property was privately owned, the private owners possessed legal title, school signed a sublease agreement knowing the property was privately owned, and school agreed to pay all ad valorem taxes assessed on the privately-owned property.

Statute governing seizure of charter school property purchased or leased with funds received by a charter holder upon revocation of charter did not apply to open-enrollment charter school's request for ad valorem tax exemption related to property it was leasing from private entity and using exclusively as a public school, since the statute did not speak to tax exemptions as to leased real property during the period a charter remains active, it did not establish that the State or a political subdivision owned the property for tax-exemption purposes, and school's interest in the property was limited to its leasehold.

New Tax Laws Drive More Americans Into Muni Bonds.

High earners hit hardest by overhaul seek to generate tax-free income

Investors in high-tax states like New York and California are piling into municipal bonds this year, fueled in part by the 2017 tax overhaul that raised tax burdens for some high-income households.

The purchases are driven by taxpayers' desire to generate tax-free income, and this year's buying surge started right as taxpayers were seeing the full impact of the new law.

Mutual and exchange-traded funds containing California, New York and New Jersey munis have received a combined total of $6.5 billion in inflows this year through the end of July. The inflows marked the most of any seven-month period since at least 2014, according to Lipper. People started completing the first tax returns under the new law in late January and February.

Continue reading.

The Wall Street Journal

By Heather Gillers and Richard Rubin

Aug. 7, 2019 5:30 am ET

Jonathan Miller: Fees You Can Expect to Pay When Investing in Opportunity Zone Funds

What are the different layers of fees that Opportunity Zone investors should be aware of? And how much can investors

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Opportunity Db

July 31, 2019

SLGs Window to Reopen! And Another Change: Squire Patton Boggs

Treasury has announced that, after what seemed like a forever long hiatus, effective August 5, 2019, at 12:00 noon eastern, it will reopen the SLGs window. Treasury can reopen the SLGS window because of the enactment of the Bipartisan Budget Act of 2019, which suspends the application of the federal debt ceiling until July 31, 2021.

But as usual, Congress giveth, and it also taketh away. Although the sequestration of federal subsidy payments on direct pay obligations, such as Build America Bonds, was supposed to end on September 30, 2027, the Bipartisan Budget Act of 2019 extends it by another two years until September 30, 2029.

As a reminder, the sequestration rate changes each federal fiscal year. Since sequestration began in 2013, the sequestration reduction rate that applies to subsidy payments on direct pay bonds has followed a more or less downward trajectory. It started at 8.7% for the federal fiscal year ending in 2013, but for issuers requesting subsidies for direct pay obligations during the federal FYE 9/30/2020, the sequestration rate is 5.9 percent.

By Taylor Klavan on August 4, 2019

The Public Finance Tax Blog

Squire Patton Boggs

A Lesson Plan in Linguistics and Statistics for Well-Endowed Private Universities.

Contrary to its name, The Tax Cuts and Jobs Act resulted in a tax increase for certain entities. For example, certain well-endowed private universities and colleges are now subject to a 1.4% excise tax on their net investment income. This tax increase is set forth in Section 4968 of the Internal Revenue Code, and it generally applies to private universities that at the end of their prior taxable year (a) had at least 500 full-time, tuition paying students, and (b) whose endowment (i.e., assets not used for the university's exempt purposes) had a fair market value that equaled at least $500,000 per student of the university. In addition, Section 4968 only applies if more than 50% of the tuition-paying students at the private university are located in the United States. Since Section 4968 is a brand-new statute, private universities had many unanswered questions regarding which universities are subject to the new excise tax and how to calculate it. Accordingly, the Treasury Department recently released proposed regulations that provide some guidance on these matters.

Continue Reading

By Cynthia Mog on July 25, 2019

Squire Patton Boggs

TAX - PENNSYLVANIA

S & H Transport, Inc. v. City of York

Supreme Court of Pennsylvania - July 17, 2019 - A.3d - 2019 WL 3219261

Taxpayer that rendered freight-brokerage services sought review of city's imposition of business-privilege tax.

The Court of Common Pleas found taxpayer exempt. The Commonwealth Court reversed. Allocatur was granted. The Supreme Court affirmed and remanded to the trial court to determine the amount of tax owed. The Court of Common Pleas found taxpayer entitled to deduct freight delivery charges from its gross receipts before calculating tax due. City appealed. The Commonwealth Court reversed. Taxpayer appealed. The Supreme Court affirmed and remanded. On remand, the Court of Common Pleas found taxpayer entitled to deduct freight delivery charges from its gross receipts before calculating tax due. City appealed. The Commonwealth Court reversed. Taxpayer appealed.

The Supreme Court held that taxpayer that rendered freight-brokerage services was entitled under Local Tax Enabling Act (LTEA) to deduct freight delivery charges from its gross receipts before calculating business-privilege tax due to city.

Taxpayer that rendered freight-brokerage services was entitled under Local Tax Enabling Act (LTEA) to deduct freight delivery charges from its gross receipts before calculating business-privilege tax due to city, even though taxpayer was not a freight carrier, did not transport anything, and did not sell or buy anything transported; the class of gross receipts excluded from taxation by the city's business privilege and mercantile tax regulation was broader than that excluded by the LTEA, excluded all freight delivery charges "paid" by a seller for the purchaser, whereas the LTEA specifically restricted the application of the exclusion to only those shipping costs "advanced" by a seller to a purchaser pursuant to the terms of a contract of sale, and thus, the BPT regulation allowed exclusion of all shipping costs paid by a seller for a purchaser at any time, while the LTEA exclusion required that a seller advance the costs of shipping to a purchaser according to the provisions of a contract of sale, which meant that those costs be paid prior to the shipping taking place.

Now's the Opportunity for Cities to Work on Their Zone Defense.

Investors are already lining up with billions of dollars committed to use the new Opportunity Zone tax break, and developers are already starting to strike some early deals for Opportunity Zone investments. But by design, there is no centralized process for Opportunity Zones; and there are no requirements that these investments create affordable housing, homeownership, living wage jobs or anything of benefit to current Opportunity Zone residents and businesses. The current legislation includes no federal requirements to disclose who's using it and where. Nor is there any dollar limit on how much investment the tax break can support.

With few exceptions, right now the only meaningful limits on what developers can build using Opportunity Zone tax breaks are developers' own ability to convince investors of the returns their projects might deliver — and zoning.

A new study from the Urban Institute, published today, looks at three different cities — Washington, D.C., Cleveland, and Fresno, California — to examine the question of whether the zoning inside their Opportunity Zones already reflects the needs of residents and businesses in those areas.

Continue reading.

NEXT CITY

OSCAR PERRY ABELLO

JULY 25, 2019

SEC, NASAA Issue Staff Guidance on Opportunity Zone Investing.

The staffs of the Securities and Exchange Commission and the North American Securities Administrators Association (NASAA) have issued preliminary guidance…

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July 24, 2019

Emerald Coast OZ: Strategies for Collaborative Rural & Tribal Investment

Much of rural America has been left behind in the economic recovery that has transpired since the

Great Recession. Can …

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July 24, 2019

Muni-Bond End Run Around Trump Tax Law May Pick Up as Rates Fall.

- **Bonds delivered later reopen path to tactic targeted in law**
- **Barclays analysts predict sales of such debt will rise**

The slide in interest rates may spur more American states and cities to make a bond-market end run around the federal government.

After President Donald Trump's tax-cut law effectively pulled the subsidies from advance refundings — a once frequently used tactic that allowed governments to refinance debt well before it could be bought back from investors — Wall Street banks concocted a way to accomplish the same objective. Municipalities could sell bonds now, allowing them to lock in current interest rates, and deliver them months or even years later when the outstanding securities can be called back.

That strategy has so far been slow to take off, with only about $1 billion of such bonds sold over the past six months, according to Barclays Plc. That's a far cry from the tens of billions of dollars that were issued every year for advance refundings.

But Barclays analysts Mikhail Foux and Mayur Patel, who track the municipal market for the bank, said in a note Thursday that the sale of bonds with forward delivery dates may accelerate. That's because widespread anticipation that the Federal Reserve will lower interest rates is pushing down yields, reducing the extra payouts investors demand to compensate for the risk of accepting today's yields on securities that won't be delivered for months.

"If they want to realize immediate savings this is a tool that they can use," said Foux. "In this environment, you don't pay as much given you add the forward premium to current yields. It still makes present savings more attractive."

The uptick would be welcomed by Wall Street banks, whose underwriting departments have been hurt by the steep drop in debt sales since the 2017 tax law rolled back the ability of states and cities to refinance their debts.

Brandeis University is among municipal-bond market borrowers that have used the refinancing tactic.

"The forward delivery worked well for us," said Sam Solomon, chief financial officer at the school, which sold tax-exempt muni bonds through the Massachusetts Development Finance Agency in January that weren't delivered until this month. "Of course hindsight is 20/20, but we were able to lock in the savings so we could plan our debt service and use those savings to issue new money bonds, which funded projects we were able to start sooner."

Bloomberg Markets

By Danielle Moran

July 18, 2019, 10:31 AM PDT

States Again Sue IRS Over Federal Tax Law.

Connecticut, New Jersey, New York and a local government coalition allege that a new IRS rule unlawfully puts an end to their tax reform workarounds.

Three states and a coalition of local governments are suing the IRS and Treasury Secretary Steven Mnuchin over new regulations that block them from circumventing limits on tax deductions imposed by the 2017 federal tax overhaul.

Two separate lawsuits were filed Wednesday over IRS regulations finalized last month that ban residents from fully deducting their charitable contributions if they receive tax credits in return. Three Democratically controlled states, Connecticut, New Jersey and New York, have filed a joint lawsuit over the rules. A separate suit has been filed by the Coalition for the Charitable Contribution Deduction, a New York coalition of localities, school districts and professional organizations.

The lawsuits allege that the IRS overreached its authority when it closed states' charitable deduction loopholes. That's because the ban applies to long-established state-run trusts that give out tax credits in exchange for donations for things like environmental preservation and charter schools. Dozens of states — not just high-tax states or those controlled by Democrats — have these trusts.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | JULY 17, 2019 AT 5:00 PM

TAX - ILLINOIS

Peterson Plaza Preservation, L.P. v. City of Chicago Department of Finance

Appellate Court of Illinois, First District, Fifth Division - June 21, 2019 - N.E.3d - 2019 IL App (1st) 181502 - 2019 WL 2588724

Taxpayers filed claims for refunds with city department of finance, based on municipal code section providing exemption for transfers of title to real property.

ALJ granted summary judgment in favor of department of finance, upholding denial of taxpayers' refunds. After actions were consolidated, the Circuit Court upheld the administrative decision denying taxpayers' refunds. Taxpayers appealed.

The Appellate Court held that:

- Taxpayers' use of its enterprise zone property to provide residential housing to low-income families was not primarily commercial purpose;
- Municipal tax ruling was not unconstitutionally vague; and
- Taxpayers failed to show there was no reasonable distinction, under uniformity clause, between

hotels and motels and taxpayers' federally subsidized residential apartment buildings.

Taxpayers' use of its enterprise zone property to provide residential housing to low-income families under federal program designed to aid low-income families was not primarily commercial purpose within meaning of municipal code section providing transfer tax exemption for enterprise zone property used primarily for commercial or industrial purposes; although taxpayers provided free services to tenants, such as general education development (GED) classes, literacy programs, health screenings and job training, and taxpayers had intended to establish on-site leasing offices from which they would conduct business of owning, leasing, managing, improving, and maintaining residential apartments, taxpayers primarily used rental units inside enterprise zones to provide residential housing for low-income families, and had dedicated between 87% to 100% of each of their properties to tenant living space, instead of for sale or provision of goods and services.

City's tax ruling, which provided that more than 50% of property in enterprise zone must be used for commercial purposes as to qualify for municipal code exemption from transfer taxation, was not unconstitutionally vague as applied to taxpayers' action alleging their properties consisting of residential and commercial use should qualify for exemption, where amount of space devoted to residential versus commercial use in properties had been quantified, each of taxpayers' properties had allocated between 87% and 100% of its space to residential use for low-income families, and taxpayers did not need to guess at meaning of tax ruling to determine exemption did not apply.

Taxpayers failed to show there was no reasonable distinction, under uniformity clause of Illinois Constitution, between hotels and motels that were classified as properties primarily used for commercial purposes and thereby exempted from transfer taxation, and taxpayers' federally subsidized residential apartment buildings, where taxpayers provided no evidence that their federally funded housing developments for low-income residences inside enterprise zones would have same direct impact on business growth and local economy as hotels and motels, which encourage additional traffic and draw constant influx of visitors, including tourists and out-of-town guests, that patronize businesses and inject money into local economy.

TAX - NEW YORK

Sleepy Hollow Lake, Inc. v. McBride

Supreme Court, Appellate Division, Third Department, New York - July 3, 2019 - N.Y.S.3d - 2019 WL 2817487 - 2019 N.Y. Slip Op. 05371

Homeowners association (HOA) commenced proceedings to challenge municipalities' tax assessments for common areas within development.

The Supreme Court, Greene County, granted HOA's motion for summary judgment, and municipalities appealed.

The Supreme Court, Appellate Division, held that genuine issues of material fact precluded summary judgment.

Genuine issues of material fact concerning whether individual lot owners were granted a license or an easement to common areas, whether property values of individual lot owners included enhanced value or premium sufficient to cover or offset the value of common area parcels, and whether common areas had any value or beneficial property interest for homeowners association (HOA) precluded summary judgment on HOA's petition to reduce tax assessments of the common areas to zero.

Taylor Lembi: How OZs Can Address the Housing Crisis

Can Opportunity Zones help address the nation's housing crisis? Taylor Lembi is founder and CEO at San Francisco-based real estate

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Opportunity Db

July 18, 2019

Multistate Review of Property Tax Decisions and Developments.

Since the last edition of The Evaluator, there have been several notable decisions from courts and tax boards; and legislative developments in jurisdictions across the country.

Valuation

THE KANSAS BOARD OF TAX APPEALS REDUCES ASSESSED VALUES FOR 11 WALMART PROPERTIES BY MORE THAN $120 MILLION

In the Matter of the Equalization Appeals of Wal-Mart Stores, Inc. for the Year 2016 in Johnson County, Kansas, Docket Nos. 2016-2691-EQ et al. (2019).

The Kansas Board of Tax Appeals has decided in favor of Walmart in recent tax appeals initiated by the retailer against Johnson County, KS for eleven of their stores.

To support their tax assessments of the eleven properties, Johnson County had compiled cost and income approaches for the properties and obtained appraisals from nationally recognized appraisers. Walmart's appraiser performed all three recognized valuation approaches for his appraisals but he placed primary emphasis on the sales comparison approach for the ten owner-occupied properties, and primary emphasis on the income approach for the one leased property. For the appraisals of the ten owner-occupied properties, the appraiser focused on analyzing fee simple sales in his sales comparison approach, and avoided utilizing sale/leaseback and build-to-suit sales.

After the examining the evidence, arguments, and valuation methodologies of the parties, the Board concluded that the income capitalization approach methodology utilized by Walmart's appraiser gave the best indication of the market value for all of the properties. The Board found that the appraiser's "selection and review of pertinent income approach inputs was supported and highly effective at distilling the market value of the subject real property." After slightly modifying the capitalization rates used by Walmart's appraiser in his income capitalization approaches for each property, the total assessed values for the properties were reduced by over $120,000,000 for the two tax years at issue.

KENTUCKY CLAIMS COMMISSION DETERMINES THAT FAIR CASH VALUE FOR A LEASED WALMART PROPERTY IS MOST CLEARLY REPRESENTED BY INCOME APPROACH

UTILIZING CONTRACT RENT

Agree Hazard KY, LLC dba Walmart v. Perry County PVA, et al.; KY Claims Commission, File No. K17-S-163, May 22, 2019.

The Kentucky Claims Commission (KCC) recently reversed a decision from the Perry County Board of Assessment Appeals for the tax assessment for a big box property that is leased by Walmart. The KCC determined that the fair cash value of the property was most closely represented by the income valuation of the leased fee estate. This valuation approach utilizes the actual contract rent paid by Walmart as the income. After applying market expenses and appropriate capitalization rates to the contract rent paid by Walmart, the Commission determined that the fair cash value of the leased fee estate was $23,250,000 as of January 1, 2017, and was $22,500,000 as of January 1, 2018.

TENNESSEE STATE BOARD OF EQUALIZATION UPHOLDS COUNTY'S VALUATION FOR OWNER-OCCUPIED LOWE'S STORE DUE TO LACK OF RELEVANT COMPARABLE SALES

In re: Lowe's Home Centers, Inc., Tenn. SBE, Dkt. No. 106409, (June 18, 2019).

The Tennessee State Board of Equalization recently upheld the Shelby County Assessor's valuation for a big-box Lowe's store.

As the appellant, Lowe's had the burden to prove that the Assessor's value should be reduced to the valuation opinion reached by its appraiser. Lowe's primary appraisal expert utilized all three recognized valuation approaches to value the property but he placed almost all of his weight on the sales comparison approach. All but one of his comparable sales were located outside of Tennessee and all were vacant at the time of sale. Lowe's appraiser used comparable big-box sales from Illinois, Michigan, Minnesota, Washington, Georgia, Colorado, and Florida. The appraiser had only personally visited the one comparable that was located in Tennessee, and he did not make adjustments to any of his comparables to account for their location compared to the subject property.

After considering the evidence put forth by the taxpayer and the critique of that evidence offered by the Assessor, the judge determined that the location of a property, vacant or not vacant, is of "paramount importance." The judge found that the appraiser's lack of adjustments to account for the "city, area of the city, and economic viability of a particular area" was fatal to his analysis. Since the judge found that Lowe's evidence did not support a reduction in value, the Assessor's value for the property was retained.

INDIANA TAX COURT REVERSES BOARD OF TAX REVIEW'S DECISION FOR SHOPPING CENTER DUE TO IMPROPER CAPITALIZATION RATE DETERMINATION

Madison County Assessor v. SEDD Realty Co. (May 22, 2019), Indiana Tax Court No. 18T-TA-00012.

This case stands for the proposition that a reviewing tribunal must be able to support its decision with the evidence on the record. The parties in this matter contested the value of a retail strip center in Anderson, Indiana. While both the county assessor and the owner agreed that the original 2009-2012 values were too high, they disagreed as to the extent of the reduction. Before the Indiana Board of Tax Review, both parties submitted appraisals, which were primarily based on the income approach to value. The Assessor's expert utilized a capitalization rate of 11.25%, while the owner used a capitalization rate of 14%. Upon review of the two approaches, the Board determined that the owner's expert "essentially valued a leased fee interest" rather than a fee simple interest and therefore rejected the conclusions of value. The Board did adopt the net operating income determined by the Assessor's expert. However, the Board then concluded that the capitalization rate the Assessor's expert used was inappropriate because the sales used to calculate the rate had significantly higher occupancy than the subject. The Board next reviewed the sales used by the owner in calculating its capitalization rate and chose three of the 13 comparable sales to determine the Board's own capitalization rate of 12%. The Board then applied this 12% to the assessor's net operating income to find value.

On appeal, the Indiana Tax Court reversed the Board's decision to use the 12% capitalization rate. The Court reasoned that the Board, in developing its own unique capitalization rate, failed to explain how it reached its decision. The Court noted that the 12% was neither the average nor the median of the rates set forth in the owner's report, which had rates between 10.9% and 16.24%. The Court further noted that the report had additional rate data that was not explained by the Board. Thus, the Court concluded that the Board's 12% capitalization rate was "unsupported by any evidence on the record and thus, arbitrary and capricious – little more than throwing a dart at the board." The Court reversed and remanded the matter to the Board with instructions to use the assessor's capitalization rate, as it was the "only probative evidence" in the record.

MINNESOTA TAX COURT FINDS THAT THE COMMISSIONER OVERSTATED THE VALUE OF A NATURAL GAS PIPELINE

Northern Natural Gas Co. v. Commissioner of Revenue, Minn. Tax Ct., Amended Findings of Fact, Conclusions of Law, and Order for Judgement, Dkt. Nos. 8864-R; 8976-R, June 4, 2019.

Northern Natural Gas Company operates a 14,700 mile-long interstate natural gas transmission pipeline, portions of which cross 60 of Minnesota's 87 counties. In valuing the pipeline, the Commissioner's appraisers relied upon stock sales, which included all of the acquired property's property – both tangible and tangible assets to assess the pipeline in Minnesota.

The Commissioner had valued the pipeline at $2,250,081,300 for tax year 2015 and $2,466,132,200 for 2016 within Minnesota. The Minnesota Tax Court held that the taxpayer had established by a preponderance of the evidence that the value should be reduced based upon obsolescence as a result of mandated governmental regulations, even though the Commissioner argued that external obsolescence should not apply claiming that these factors were within the taxpayer's control. However the Tax Court found that the taxpayer established that changes in the supply of natural gas was a cause of economic and external obsolescence, and also actually affected the utility and salability of the pipeline on the valuation dates. The Court found that the value should be $1,879,381,400 for 2015 and $1,848,039,200 for 2016 within Minnesota, properly apportioned among the affected counties.

OHIO APPEALS COURT AFFIRMS BOARD OF TAX APPEALS DECISION TO VALUE ASSISTED LIVING FACILITY AT SALE PRICE

Plain Local Schools Bd. of Edn. v. Stark Cty. Bd. of Revision, 2019-Ohio-1746.

Canton OH Senior Property, LLC ("Canton Senior") purchased a 76-unit assisted living facility. The purchase included the real estate and the on-going business. The conveyance fee statement filed at the time of the sale listed total consideration of $13,750,000, with $2,450,000 paid for items other than realty and $11,300,000 for real estate.

For tax year 2015, Stark County valued the property at $3,583,400. The Plain Local Schools ("Plain

Local") filed a complaint seeking a value of $11,300,000. Plain Local submitted evidence of the sale and Canton Senior submitted an appraisal that opined to a value of the real estate at $5,530,000. The Stark County Board of Revision found value consistent with the appraisal and Plain Local appealed.

The Ohio Board of Tax Appeals ("BTA") found that the sale at $11,300,000 as allocated was the best evidence of value for tax purposes finding that Canton Senior failed to meet its burden to show that the sale was not the best evidence of value for the property. On review, the Court affirmed the BTA finding that the BTA properly analyzed the evidence before it, including the appraisal submitted by Canton Senior, along with the allocation made on the conveyance, and properly determined that the allocation made at the time of sale was not rebutted by the appraisal.

NEW JERSEY TAX COURT FINDS SIGNIFICANT REDUCTION WARRANTED FOR FORMER MERILL LYNCH CORPORATE CAMPUS

ML Plainsboro Ltd. Prntshp/Gomez v. Township of Plainsboro, Case Nos. 002348-2005 & 001620-2006(unpublished) May 29, 2019.

In a nice win for the taxpayer, the Tax Court found that the taxpayer overcame the presumption of the validity of the assessment after an 18-day trial.

The property is a 698,722 square foot office building, originally designed as a corporate campus for Merrill Lynch, which included a hotel and conference center. In 2004, just before the commencement of the appeal, the hotel and conference center was sold to another owner, but due to its configuration a number of easements and agreements were needed. Both the taxpayer and township retained appraisers to opine to the value for tax years 2005 and 2006. During an eighteen day trial, the parties presented their opinions of value. The difference in the value conclusions was considerable because the appraisers differed on the highest and best use determination for the property. The taxpayer's appraiser determined that the highest and best use was to be rented as corporate office space to a single tenant due to the property's configuration and utilized the income approach to find value. In contrast, the township's appraiser opined that the highest and best use was as a special purpose, owner occupied corporate campus for which the cost approach to value was the most appropriate method to find value. The Court determined that the taxpayer's highest and best use was more credible because although the property was originally constructed as a corporate campus for Merrill Lynch, over time the property's use changed, and as of the valuation dates the property was more similar to typical office space than a corporate campus.

Based upon its analysis, the Court determined that for 2005 the value should be $99MM, consistent with the taxpayer's appraisal evidence, as opposed to $214.5MM opined to by the township's appraiser. For tax year 2006, the Court found value at $107.5MM. This case is a good example of the need for appraisers to formulate full opinions and ensure they have properly considered all approaches to value, especially in light of a difference of opinion on highest and best use.

INDIANA TAX COURT UPHOLDS SPECIAL PROPERTY'S ASSESSMENT BASED ON ITS MARKET VALUE-IN-USE

Wigwam Holdings LLC v. Madison Cty. Assessor, Indiana Tax Court, 18-TA-00015 (May 8, 2019).

The owner of a former school building asked the Indiana Tax Court (the "Court") to overturn the state Board of Tax Review's (the "Board's") classification and valuation of the 220,000 square foot building, claiming that the special purpose property's highest and best use was vacant land.

The owner challenged the Board's recent reclassification of the entire property as utility/storage and its resulting assessment of the property. On appeal, the owner cited to the appraisal report it had submitted to the Board, claiming that because it had presented a compliant appraisal and the county assessor had not presented any rebuttal evidence, the owner had met its burden of proof. The appraisal stated that the subject property's highest and best use was as vacant land because the building was functionally and economically obsolete.

The Court disagreed with the owner, stating that merely presenting an appraisal does not establish a prima facie case for a reduction. The Court confirmed that the Board must find such an appraisal to be probative evidence of value, and agreed with the Board that the appraisal in the instant case was not probative. Specifically, the Court held that the appraisal was not probative because it provided an estimate of the subject property's market value rather than its market value-in-use. In so holding, the Court noted that while the market value-in-use for most properties is often equivalent to market value, special purpose properties like the subject are a rare exception. Because a special purpose property's current use is inconsistent with its highest and best use, its market value-in-use does not equal market value because a sales price will not reflect the property's utility. As a result, the owner's appraisal did not constitute probative evidence of the subject property's market value-i--use.

The Court also rejected the owner's argument that the current assessment failed to account for abnormal obsolescence. Because the owner did not affirmatively identify the causes of the obsolescence or quantify the amount of the obsolescence, the Court declined to overturn the Board's decision on this basis.

OHIO'S EIGHTH DISTRICT COURT OF APPEALS FINDS BOARD OF TAX APPEALS ACTED UNLAWFULLY AND UNREASONABLY WHEN IT FAILED TO CONSIDER APPRAISAL EVIDENCE OFFERED TO REBUT LEASED FEE SALE

Spirit Master Funding IX, LLC, et al. v. Cuyahoga County Bd. of Revision, et al., 8th Dist. Cuyahoga No. 107382, 2019-Ohio-1394.

The owner of a restaurant property filed an appeal of the decision of the Ohio Board of Tax Appeals ("BTA") on the grounds that the BTA failed to consider the property owner's appraisal report. The subject property sold in two leased fee transactions: one in August 2014 and one in December 2014. The property owner filed a complaint seeking a decrease in the value of the subject property for tax year 2014 and tax year 2015. In connection with the 2014 case, the Board of Revision ("BOR") adopted the August 2014 leased fee sale price.

In support of its decrease complaint, the restaurant provided an appraisal report and testimony of the appraiser. The BTA retained the BOR's valuation and declined to consider the property owner's appraisal report. The property owner appealed the BTA's 2014 decision to the Ohio Supreme Court. The Ohio Supreme Court held that the BTA acted improperly when it failed to consider the appraisal report in connection with the 2014 case and remanded the matter to the BTA with instructions to consider the appraisal report.

The property owner presented the same evidence in connection with the tax year 2015 case. The BOR increased the value of the subject property to the December 2014 sale price finding that it was the best evidence of value. The property owner appealed the BOR's decision to the BTA, which again declined to consider the property owner's appraisal report.

The appellate court determined that the BTA erred again in the 2015 case when it refused to consider the appraisal report. The appellate court specifically noted that given the Ohio Supreme

Court's decision in the 2014 case, the BTA erred when it ruled that the appraiser's testimony about the sales and sale price was hearsay. Following Terraza 8, LLC v. Franklin Cty. Bd. of Revision, 150 Ohio St. 3d 527, 2017-Ohio-4415, 83 N.E.3d 916, the appellate court also reiterated that the BTA was to consider not only the sale price, but any other evidence the parties present that is relevant to the value of the unencumbered fee simple estate. Therefore, the BTA acted unreasonably and unlawfully when it failed to consider the appraisal report.

OHIO BOARD OF TAX APPEALS FINDS PROPERTY OWNER'S APPRAISAL NOT RELIABLE EVIDENCE AND DID NOT REBUT PRESUMPTION OF LEASED FEE SALE THAT OCCURRED AFTER SALE/LEASEBACK TRANSACTION

QCA-Parma, LLC v. Cuyahoga Cty. Bd. of Revision, BTA No. 2017-2169, (June 19, 2019).

The property owner appealed a decision of the Board of Revision increasing the value of the subject property based on a November 2016 leased fee sale. The November 2016 transaction was a sale/leaseback transaction, which the property owner argued was not good for setting value under the Ohio Supreme Court's decision in Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision, 151 Ohio St.3d 100, 2017-Ohio-7578 ("State Farm"). While the case was pending at the Board of Tax Appeals ("BTA"), the subject property was transferred again in a May 2017 leased fee transaction.

At the BTA, the property owner argued that the May 2017 sale was subject to an above-market lease, negotiated in context of a prior sale/leaseback transaction and therefore not indicative of fair market value. The property owner provided an appraisal report opining to a value of $1,400,000 as of tax lien date using the sales and income capitalization approaches to value. The BTA determined that based on the evidence, the November 2016 transaction was a sale/leaseback transaction because the same person signed as the agent of the seller and the agent of the lessee. Notably, however, the BTA rejected any reliance on the appraiser's statements about the circumstances of the November 2016 sale as hearsay.

The BTA stopped short of holding that the May 2017 sale following the sale/leaseback transaction would also not be an arm's length sale. The BTA rejected the property owner's argument that the fact that the lease was negotiated in the context of a sale/leaseback negated the utility of the sale in valuing the property as of tax lien date. The BTA also noted that no one personally involved with the property owner or the tenant testified about the details of the lease. Moreover, the BTA criticized the property owner because the only record of the actual lease is the Memorandum of Lease which contains the lease term, but no lease rate, and the only evidence of the lease rate was provided by the appraiser. The BTA also commented that the appraiser considered vacant "dark" properties in his sales comparison reports rather than those sold subject to a lease.

The BTA found that the appraisal report was not probative of the property's value and concluded that the May 2017 leased fee sale was the best evidence of value for the property.

PENNSYLVANIA COURT UPHOLDS DISMISSALS OF PROPERTY OWNER'S CLASS ACTION COMPLAINT CONTESTING INCREASE COMPLAINTS FILED BY TAXING AUTHORITY

Joseph Nissim Martel and Ester Martel, husband and wife, on behalf of themselves and all others similarly situated v. Allegheny County, City of Pittsburgh, Pittsburgh Public Schools, and Allegheny County Board of Assessment Appeals and Review, No. 568 C.D. 2018, 2019 Pa.Commw. LEXIS 468 (May 22, 2019).

Residential property owners filed a class action complaint in equity on behalf of themselves and other property owners in the Allegheny County Court of Common Pleas. In their complaint, the property owners sought class wide relief from property assessments which were based on assessment appeals brought by the school district, County, and City.

The property owners contended that the Allegheny County Assessment Review Board (the "Board") erred by increasing their real property assessments based solely upon improperly submitted evidence of the sales prices for the subject property. The property owners contended that the Administrative Code precluded the Board from increasing the base year assessment value of a property absent physical changes or improvements to the property and that these appeals resulted in "'de facto' spot reassessments." By using evidence of current market value, rather than the base year assessment system, the property owners argued that the County violated the uniformity clause and due process clauses of the federal and state constitutions.

The trial court dismissed the property owner's class action complaint as legally insufficient. In essence, the Court of Common Pleas determined that the Administrative Code and Board Rule that the property owners relied upon were invalid because they conflicted with the authority granted to the Taxing Authority.

The appellate court ruled that the trial court properly dismissed the class action complaint but concluded that the trial court should have dismissed the complaint on the grounds that the property owners failed to exhaust the remedies available to them pursuant to the Assessment Law. Because the legislature provided a statutory remedy for challenging assessments, the Board was the property authority to hear all issues related to an assessment appeal.

OHIO APPEALS COURT UPHOLDS DISMISSAL OF OWNER'S APPEAL AS UNTIMELY

M&F Lexington, LLC v. Franklin Cty. Bd. of Revision, 2019-Ohio-2022.

An Ohio appeals court recently had occasion to interpret and apply certain statutory filing requirements governing appeals to the state's Board of Tax Appeals (the "Board"), upholding the Board's dismissal of a property owner's valuation appeal as untimely. The property owner asked the Court to overturn the Board's decision and to consider its appeal filed as of the date it mailed the appeal to the county Board of Revision (the "BOR").

The filing requirements for appeals of BOR decisions are governed by statute; notices of appeal must be filed with both the Board and the county BOR within 30 days after the mailing of the BOR decision. What is deemed "filed" is also set by statute, and depends on the method of delivery. In the instant case, the property owner filed its notice with the BTA electronically and via mail to the BOR. The property owner mailed the notice on the filing deadline, but the BOR did not actually receive it until several days after the 30-day deadline.

The property owner claimed that it had timely filed its notice with the BOR because it mailed the notice before the appeal window closed. However, the property owner failed to specify what method of delivery was actually used, and presented no evidence that it had used one of the statutorily-permissible methods (certified mail, express mail, or authorized delivery service). Though the property owner submitted affidavits from its representative and the BOR clerk, the Court noted that the affidavits were irrelevant without a sender's receipt showing the date of mailing by an appropriate method. Without such evidence, the Court deemed the date the BOR received the appeal as the date of filing. Because that filing date was five days after the 30-day deadline, the Court agreed with the Board that the appeal was untimely, and affirmed its dismissal.

INDIANA TAX COURT REAFFIRMS DISMISSAL OF TAX APPEAL FOR HOTEL DUE TO LACK

OF SUBJECT MATTER JURISDICTION

Convention Headquarters Hotel, LLC v. Marion County Assessor (May 22, 2019), Indiana Tax Court No. 19T-TA-6.

In the last edition of the Evaluator, we reviewed an Indiana Tax Court decision regarding the ability of a taxpayer to appeal a real property tax valuation question to the Indiana Tax Court when the lower tribunal, the County Property Tax Assessment Board of Appeals, has failed to rule on an appeal. The Court held that a Board of Review must issue its determination within one-year of the filing of a petition; this is the "maximum time" afforded by statute. Failure to meet this one-year deadline permits the petitioner to invoke the Jurisdiction of the Tax Court over the valuation question. However, because the appeal at issue was filed before the one-year "maximum time" granted to the Board, the appeal was premature and had to be dismissed. Convention Headquarters Hotels, LLC v. Marion County Assessor (Jan. 25, 2019), Indiana Tax Court No. 18T-TA-00014. ("Convention Headquarters I")

The current decision follows from the Court's dismissal in Convention Headquarters I. The matter returned to the Assessment Board of Appeals for hearing, which was set for March 1, 2019. However, that very morning, the property owner again filed an appeal to the Indiana Tax Court, claiming that the March 1 hearing date was after the close of the "maximum time" granted to the Board for its review. Before the Court, the county assessor moved for dismissal, claiming that the board had until March 3 to finish its review. The Tax Court agreed with the county and dismissed the appeal as premature. The Court noted that it had set forth in Convention Headquarters I the proper calculation for determining the maximum time in which the board could act. This deadline was March 3. However, the property owner explicitly rejected the Court's calculation, substituting its own calculation of the maximum time based on other factors. This led the owner to file before the statutory time had elapsed.

Exemption

ARIZONA AMENDS LOW-INCOME HOUSING EXEMPTION STATUTE TO BROADEN ENTITIES ELIGIBLE TO APPLY FOR EXEMPTION

Arizona has passed a law amending the existing exemption for low income housing projects. L. 2019, S1300 will be effective on the 91st day following adjournment of the legislative session.

In the prior version of the statute, affordable housing pursuant to IRS Code Section 42 or subject to a similar restrictive covenant was exempt from property tax only if the property was not used or held for profit. The statute further required that the property be owned by a charitable fund, foundation, or other charitable corporation to qualify for the exemption. Typically, the only types of affordable housing that received the exemption were for low income housing for the elderly or assisted living facilities.

This new law now permits the property to be owned by a 501(c)(3) or 501(c)(4) corporation or a limited partnership or LLC in which the general partner is an eligible non-profit. It may also be a single purpose entity that is wholly owned by one or more eligible non profits. This amendment is a positive development that will allow for low-income housing or LIHTC developments to receive the tax exemption on a much broader basis.

COLORADO MODIFIES EXEMPTION FOR LOW INCOME-HOUSING

L. 2019 H.1319 (effective on Sept. 1, 2019).

Colorado has updated its low-income housing exemption statute to eliminate a draconian penalty following revocation of exemption. Colorado law requires that a low-income exemption will be revoked if the partnership that owns the property distributes income, has income available for distribution, or sells the property. Under the former version of the exemption statute, if an exemption was revoked, the property tax administrator was required to levy and collect property taxes against the property from the date the exemption was initially granted plus interest. The new law provides that the administrator will instead terminate the exemption as of the date the property is transferred or the date income became available.

This is a helpful change to a disproportionate consequence for non-compliance.

IDAHO DENIES EXEMPTION FOR LOW INCOME HOUSING BECAUSE PROPERTY NOT DEDICATED TO PROVIDING HOUSING TO QUALIFIED TENANTS

Aspen Park, Inc. v. Bonneville Co., Idaho S. Ct Dkt No. 45679, (July 10, 2019).

The Idaho Supreme Court held that a low-income housing project did not qualify for exemption because the taxpayer had non-qualifying tenants renting units in the low income housing project.

The taxpayer owned a 72-unit low-income housing project. In 2016, the taxpayer leased 13 units to individuals that did not qualify as low-income because their income was exceeded 60% of the county median income level. The taxpayer argued that because of chronic vacancy in the apartment complex, it was permitted under the law to lease to higher-income individuals while some units remained vacant and available.

The taxpayer asserted that the word "dedicated" did not mean that units dedicated for lease to tenants with income not exceeding 60% of the county's median income level could not be leased to non-qualifying tenants if qualifying tenants were not applying for lease. Idaho law requires all of the non-profit organization's apartment units to be leased to qualifying tenants, except for a manager's unit. The Court held that the term "dedicated" requires all of the apartment units to be set apart for a complying use to qualify for exemption.

OHIO BOARD OF TAX APPEALS DENIES CHARITABLE EXEMPTION FOR CITY-OWNED AIRPORT LEASED TO AVIATION EDUCATION ORGANIZATION

City of Toledo v. McClain, BTA No. 2017-956 (June 24, 2019).

The Ohio Board of Tax Appeals (the "Board") recently affirmed the state tax commissioner's denial of the City of Toledo's application for exemption from real property taxation for a hangar located within the Toledo Executive Airport. The City, which leased the subject property to the local chapter of a national aviation organization, claimed that the property was entitled to a charitable exemption because it was used to educate the general public about aviation and the science of flight.

The City argued on appeal that the organization's activities and use of the subject property qualified the property for an exemption. The Board cited the relevant charitable exemption statute, noting that a property owned by a municipal corporation like the City can only qualify for exemption if it is used exclusively for either accommodation or support of the poor, or is leased to the state or other political subdivision for public purposes. Because the subject property was not used for either of these uses, the Board found that it did not qualify for exemption.

The Board also noted that its jurisdiction was limited to a review of only the statutory sections under which the City had sought exemption. Because the City had only applied under the charitable section, the Board could not consider whether the subject property would qualify for any other exemptions, including the public property exemption.

by Kenneth R. West, Andrew E. DeBord, Megan Savage Knox, Nicholas M.J. Ray, Karen H. Bauernschmidt, David M. Aldous, Lauren M. Johnson, Lindsay Doss Spillman, Hilary J. Houston, Steven L. Smiseck, Anthony L. Ehler, David A. Froling and Scott J. Ziance

July 17 2019

Vorys Sater Seymour and Pease LLP

SEC Staff Statement on Opportunity Zones: Federal and State Securities Laws Considerations

The adoption of the Tax Cuts and Jobs Act[1] in December 2017 established the "opportunity zone" program to provide tax incentives for long-term investing in designated economically distressed communities. The program allows taxpayers to defer and reduce taxes on capital gains by reinvesting gains in "qualified opportunity funds" that are required to have at least 90 percent of their assets in designated low-income zones.

The staffs of the Securities and Exchange Commission (SEC) and the North American Securities Administrators Association (NASAA) are providing this summary of the opportunity zone program that briefly discusses the program and describes the compliance implications for opportunity funds under federal and state securities laws.[2]

Continue reading.

Anu Varadharajan & Michelle Thompson: Academia's Role in Opportunity Zones

Are colleges and universities an untapped resource for Opportunity Zone development? Anu Varadharajan is a tax professor at Tulane University.

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Opportunity Db

July 16, 2019

HUD Bets on Tech Innovation for Opportunity Zones.

The U.S. Department of Housing and Urban Development (HUD) has announced that it will co-lead an Opportunity Zone-focused workforce challenge of the U.S. Census Bureau's "The Opportunity Project (TOP)" initiative. TOP is an accelerator program that matches tech companies, universities, government, and communities together to create useful digital products for the public.

For this challenge, HUD said that it will collaborate with the private sector so that stakeholders in opportunity zones, including communities and investors, can use technology to strengthen investments in underserved areas.

"HUD is pleased that leading innovators from across the country are directly taking on the challenge of developing products to help people invest in Opportunity Zones," said Ben Carson, Secretary HUD. "We also want to thank the Census Bureau and the other agencies participating in this summer's Opportunity Project. Working together, we collaborate with the private sector to solve some of the most pressing issues facing Americans in economically distressed areas. This project will help ensure that Opportunity Zone stakeholders have access to the best data, innovation, and expertise as investment continues to flow into these underserved areas."

The Census Bureau's Opportunity Project utilizes the expertise of professionals from across government, the technology sector, and private business to focus on a specific challenge during designated 'sprints.' The final products for the summer challenge will be shared in Washington, D.C. in December 2019, HUD said in a statement.

"Government, the technology industry, and the communities that comprise Opportunity Zones all have a significant role to play in establishing new products and services that can benefit the Americans who need them most," said Scott Turner, Executive Director of the White House Opportunity and Revitalization Council.

HUD said that the Opportunity Challenge was part of the work being undertaken by Carson as the Chair of the White House Opportunity and Revitalization Council. The Council's 16 Federal member agencies and Federal-State partnerships are engaging with governments at all levels—state, local, tribal, and territorial—and the private sector on ways to more effectively use taxpayer dollars to revitalize low-income communities.

DS News

by Radhika Ojha

7/9/19

Expansion of PABs Proposed for Zero Emission Charging Stations.

The use of tax-exempt private activity bonds would be expanded to include financing for new charging stations for zero-emission vehicles under a bill proposed by Sen. Catherine Cortez Masto, D-Nev.

The bill, S. 2039, has two other original cosponsors, Democratic Sens. Kirsten Gillibrand of New York and Tina Smith of Minnesota.

The bill has no House sponsors but it is among several in both chambers that have been filed in recent weeks with targeted ways to expand the use of PABs.

Among those bills is a proposal in both the House and Senate that would raise the federal cap on PABsfor surface transportation and freight improvement projects by $5.8 billion. The current $15 billion volume cap has just over $2.5 billion in authorization remaining.

Transportation and freight PABs are among 22 eligible PABs that are subject to varying federal rules, according to the nonpartisan Congressional Research Service.

Another bill to expand the use of PABs is the Move America Bonds Act, which would leverage $8 billion in federal investment into $226 billion worth of bond authority over the next 10 years or up to $56 billion over 10 years in tax credits, according to an estimate by the nonpartisan congressional Joint Committee on Taxation.

Another PABs bill is the bipartisan Public Buildings Renewal Act that would authorize $5 billion in private activity bonds for the construction or rehabilitation government-owned buildings.

This latest proposal to create a category of PABs for zero-emission charging stations is timely because the use of electric vehicles, often referred to as EVs, has been on the rise, spurred by a $7,500 tax credit available to the purchasers of new vehicles.

The U.S. Energy Information Administration estimates there are 990,000 EVs on the road this year and that number will grow to 1.5 million next year and 2.17 million in 2021.

EV use is expected to reach 8.29 million in 2029.

Another type of zero emissions vehicle operates on fuel cells powered by hydrogen, producing only water vapor and warm air through its tailpipe.

The use of hydrogen fuel cell vehicles, meanwhile, is not expected to reach 100,000 until 2024.

But the public infrastructure for EVs has been limited.

The U.S. Department of Energyestimates there currently are 22,059 public charging stations across the nation for electric vehicles, boasting 65,565 outlets.

Only four states have more than 1,000 public charging stations for EVs. California tops the list with 5,258 followed by New York with 1,386, Florida with 1,214 and Texas with 1,155.

There only are 46 charging stations for hydrogen power vehicles with 41 of them located in California.

In comparison, there were 114,474 gasoline stations in the U.S. according to the last decennial Economic Census in 2012. Gas stations almost always have multiple pumps and in some cases have two dozen or more.

Former Vice President Joe Biden, one of the 23 Democrats seeking their party’s 2020 nomination for president, said last month during a televised candidate debate that if he’s elected to the White House he would build 500,000 EV charging stations.

By Brian Tumulty

BY SOURCEMEDIA | MUNICIPAL | 07/08/19 02:32 PM EDT

U.S. Not-For-Profit Health Care Pensions: 2018 Funded Ratios Remain Solid

And Benefit From The Increase To Bond Rate

The U.S. not-for-profit health care sector has benefited from an increase in the median funded status of its pension plans in fiscal 2018. This boost is primarily due to an increase in the discount rate used to measure pension liabilities, which reduced those liabilities.

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Jul. 11, 2019

Carbon Capture Legislation – Potential for a New Type of Exempt Facility Bond: Squire Patton Boggs

On June 10, 2019, Senators Michael Bennet (D-CO) and Rob Portman (R-OH) introduced Senate Bill 1763 (the "Carbon Capture Bill"), which, if passed, would allow the issuance of exempt facility bonds for "qualified carbon dioxide capture facilities." The Carbon Capture Bill has bipartisan support as this bill encourages continued use of carbon-generating natural resources by providing a new tax-exempt financing option for capital expenditures related to a green countermeasure – carbon capture and sequestration. If this sounds like Groundhog Day, that is because it is – this bill was also proposed in 2017. During its last time at bat, the bill was up for consideration while tax-exempt private activity bonds were also on the chopping block – so it was highly unlikely that it was going to pass. Now, with infrastructure and climate change on Congress' mind, the Carbon Capture Bill seems like it might be a viable candidate. For more on how this would work, read on.

Continue Reading

By Taylor Klavan on July 10, 2019

The Public Finance Tax Blog

Squire Patton Boggs

Multi-Asset Funds, Aggregating, Gentrification And Abuse: IRS Still Has A Lot On Its OZ Regs Plate.

The second and likely final public hearing for the opportunity zone program showed that the program's staunchest advocates are still hoping the federal government makes some changes to the rules before they are finalized.

The program allows investors to place capital gains into a qualified opportunity fund — referred to during Tuesday's hearing as QOFs and pronounced like "quaffs" — and avoid paying taxes on that money if it is invested into a property or business in an opportunity zone.

Across the country there are more than 8,000 opportunity zones, census tracts encompassing or adjacent to distressed communities, chosen by each state's governor and Washington, D.C.'s mayor.

While the regulations were written as part of the Tax Cuts and Jobs Act of 2017 to incentivize investors to pour their money into developments and businesses in underprivileged areas, speakers at the hearing outlined ways the current language has helped keep investors on the sidelines.

The most recent draft was released in April, after a previous public hearing in February. This week's hearing, held in the New Carrollton Federal Building in Lanham, Maryland, featured 19 speakers, none of whom represented any state or local government entity, a change from the last hearing.

Instead, the group was made up largely of attorneys, accountants and developers who are trying to make use of the program. Many of them testified that some of the language in the last set of regulations is slowing them down.

"Investors are extremely reluctant to commit dollars today without having certainty of the rules that apply at the end of their investment," Javelin 19 President Jill Homan said at the hearing.

Homan has already raised and deployed money from a QOF.

One of the main issues still at hand is the exit strategy for a QOF that has invested in multiple assets. One of the hiccups, speakers said, is the regulations state that the only way to achieve the full tax benefit is if the entire QOF is sold after the 10-year investment timeline. If property owned by a QOF is sold, but the QOF doesn't trade — in other words, if there is a typical real estate deal — it has a smaller tax benefit.

What's more, most QOFs — as is typical in a real estate transaction — establish LLCs that operate as Qualified Opportunity Zone Businesses. If that LLC sells after 10 years, it is treated with a third type of tax benefit.

"This incredibly important point is lost on many investors," Homan told *Bisnow* after the hearing. "The consensus in the industry is you don't get the OZ tax benefits if you just sell the real estate. If you sell the property LLC, you get some but not all of the tax benefits.

"We need to synthesize these three different outcomes," Homan added. "Most investors think this is a great tax incentive and want to take advantage of it, and this nuance is completely lost on them."

Most sections of the most recent IRS guidance told investors that they could use the regulations to make investment decisions with confidence that the rules wouldn't change. When it came to exits from multi-asset funds, Develop LLC founder Steve Glickman said, the IRS stipulated that investors shouldn't consider the language final.

"What I've been told in private conversations with the IRS is the reason they did that is to give themselves flexibility to create a better framework, if they wanted to, around those exits because the exits wouldn't happen for years," Glickman told *Bisnow* after the hearing.

"Any type of funds, investors and fund managers ask right now, 'How are we going to exit out of these vehicles?' … That's holding up some of the market, more of the risk-averse network of investors and wealth managers who want to see that become final."

If that piece of the regulation is not changed, it could significantly depress the overall impact of the program, Glickman said. Billions of dollars in multi-asset opportunity funds have already been raised, but those funds would have to be restructured or sold all at once.

"The status quo concern was the only way to exit from a multi-asset fund is you have to sell the whole portfolio. That depresses the price because it's harder to find someone to buy it," Glickman said. "It's also going to depress these communities, because it's going to decrease the value of the asset appreciating. It makes it less likely for people to invest because of those reasons."

Another issue that was repeatedly raised was the language in the regulations implying that property had to be substantially improved to realize the tax benefits of an opportunity zone. The issue potential investors have with the current regulations — it is unclear when they will be finalized — is that each improvement appears measured on an asset-by-asset basis.

"The whole industry of opportunity zones has been evolving. And we've been learning together," Homan said. "A lot of that learning comes through fact patterns. It's through all these fact patterns that you realize, 'Whoa, now what do we do?' Is the expenditure for the substantial improvement, can you aggregate it or do you have to substantially improve every asset?"

Essentially, if a developer improves an apartment building, builds amenities and adds some shops, rather than measuring the overall benefit to the entire property of the apartment building, each asset would have its benefit assessed differently, and not all would qualify for the tax break, Homan said.

"That's called aggregating, and that's not considered a substantial improvement," Homan said. "I have to only substantially improve the residential and I get no credit for the other stuff."

The panel that listened and asked questions of the speakers was led by Treasury Associate Tax Legislative Counsel Michael Novey and IRS Special Counsel Julie Hanlon Bolton. While Congress passed the bill with the opportunity zone program, their teams are the ones receiving input and tweaking the regulations to implement the law as intended.

Novey was receptive to the comments on the aggregation and multi-asset exit issues, and pressed most of the speakers to propose fixes, rather than just point out the problems.

More than one speaker stated concern over the program's potential to be an accelerant for gentrification in neighborhoods that are already seeing displacement and active development.

"We're concerned about the negative externalities that a program like this will impose on black and brown people," said William Cunningham, the first speaker of the day.

Cunningham is an economist, the founder of Creative Investment Research and an adjunct professor at Georgetown University.

Novey said later in the hearing that he is conscious of the fact that more money will be going into the more affluent opportunity zones.

"A lot of people have criticized designations by governors of census tracts that are already gentrified," Novey said.

While it is not definite that Tuesday's hearing was the last the IRS and Treasury will hold on the topic, the only next steps being publicly discussed are the final changes that will be made to the regulations after the hearing and thousands of pages of testimony submitted online or by mail.

"It may or may not be the last hearing on opportunity zones, it depends on whether the IRS wants to do a third round," said Glickman, who was an architect of the program and has worked with the agencies in crafting the regulations. "Some people have suggested they might do that around abuse prevention and penalties and safe harbors and other aspects of the compliance and enforcement side. They've indicated publicly that they expect this to be their last round."

The U.S. Impact Investing Alliance Executive Director Fran Seegull asked the panel to more clearly state penalties for abuse, as well as ways to track data to measure the program's impact. Novey pushed back on whether the IRS or Treasury could collect the data based on the law, but seemed intrigued by the abuse issue.

"It would help for you to give us some examples of abuses you think we ought to write into the regs and what the consequences of those abuses should be for the investors," Novey told Seegull. "We need some help."

Bisnow

by Ethan Rothstein

July 10, 2019

[Complete recap of the July 9 IRS Public Hearing on Opportunity Zones.]

On Tuesday, July 9, approximately 100 people attended the auditorium at the IRS New Carrollton Federal Building just outside of…

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Opportunity Db

July 11, 2019

[July 9 IRS Hearing: Podcast Episode Recap.]

Who spoke at the July 9 IRS public hearing on Investing in Qualified Opportunity Funds? And what are some of…

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Opportunity Db

July 12, 2019

[Capital Square Launches New Opportunity Zone Platform.]

RICHMOND, Va., July 10, 2019 /PRNewswire/ — Capital Square, a leading sponsor of tax-advantaged real estate investments, announced today its launch of a new opportunity zone platform that specializes in the sponsorship of project-specific qualified opportunity zone funds. To lead its opportunity zone developments, the company has hired seasoned veterans Adam Stifel and Jake Baum.

Opportunity zone funds are designed for investors seeking a reduction or permanent elimination of taxes on capital gains from an investment in a qualified opportunity zone. The company will initially focus on project specific-funds throughout the Mid-Atlantic region and Washington, D.C.

"As a leading sponsor of Delaware statutory trusts and a national commercial property manager with more than $1.3 billion in transaction volume, Capital Square's expansion into tax-advantaged opportunity zone funds is a natural progression," said Louis Rogers, founder and chief executive officer. "As one of the most active buyers of multifamily properties in the Mid-Atlantic, it is logical for Capital Square to develop communities in the region as well. The substantial tax benefits for investing and developing in opportunity zones is the icing on the cake."

Rogers added, "I am thrilled to welcome Adam Stifel and Jake Baum to Capital Square as we expand into commercial real estate development and add to our broad range of real estate services. The duo's comprehensive development knowledge and in-depth understanding of the marketplace will serve our projects well."

Stifel will lead Capital Square's development team as executive vice president. Prior to joining the firm, he founded CAS Riegler Companies (now known as May Riegler Companies) and Hook Properties, both full-service real estate development and asset management companies. Since 2009, Stifel has sponsored more than $500 million in multifamily development and retail and commercial office acquisitions. He brings experience in developing Class A and B, market-rate apartments and condominium projects as well as the creation and syndication of low-income housing tax credits (LIHTC) and historic tax credits (HTC).

Baum will serve as development manager at Capital Square, responsible for leading all aspects of the development process from acquisition through stabilization. Prior to joining Capital Square, he served as development manager at Hook Properties, where he developed multifamily projects in the Mid-Atlantic. Baum also worked with Stifel at CAS Riegler Companies and ComfortSystems USA in construction management, where he completed a range of projects from infill multifamily and mixed-use to institutional laboratory and classroom buildings. An active member of the Urban Land Institute (ULI), Baum earned a bachelor's degree in mechanical engineering from the University of Virginia and a master's degree in real estate from Georgetown University.

Opportunity zones were created to stimulate long-term private investments in low-income urban and rural communities nationwide. Conceived as part of the Tax Cuts and Jobs Act of 2017, opportunity zone fund investments seek to foster economic growth in distressed areas by providing tax benefits to incentivize private investments in designated opportunity zones.

S&P: Marijuana Taxes Are Unlikely To Be A Long-Term Fiscal Solution For U.S. States.

More and more U.S. states are considering legalizing marijuana, whether it be for medical or recreational purposes. Currently, 11 states have fully legalized marijuana use, while 34 have legalized it in some capacity. Support for marijuana legalization crosses party lines at both the state and federal levels.

Continue Reading

Jul. 2, 2019

[Activists Try to Stop a Huge Chicago Development Over $1.3 Billion in Tax Incentives.]

Site of former steel mill wedged between wealthy neighborhoods isn't 'blighted,' they say

CHICAGO—The site of a former steel mill on the city's prosperous North Side has become a battleground over an economic development tool critics say is reinforcing the city's economic divide and robbing the treasury of hundreds of millions of dollars a year.

Activists are suing the city to stop developer Sterling Bay from proceeding with its Lincoln Yards development, one of the largest urban mixed-use projects in the country. They argue the city improperly handed out $1.3 billion in tax incentives as part of the deal.

The lawsuit is playing out amid increased scrutiny of tax-incentive packages for businesses, such as the billions offered to Amazon.com Inc. in its second- headquarters search and a giant planned development for Apple Inc. supplier Foxconn Technology Group in Wisconsin. The Chicago dispute highlights problems with a popular economic development tool known as tax increment financing, or TIF. It allows cities to use future property tax revenue—generated by increased assessments as the area improves—to help developers finance a project.

Continue reading.

The Wall Street Journal

By Shayndi Raice

Updated July 11, 2019 5:19 pm ET

The Education Opportunity in Opportunity Zones.

Can incentivized investment in distressed communities close the prosperity gap?

More than 8,700 newly created Opportunity Zones are now racing to attract a portion of the $6 trillion in capital that may flow under a provision of the new tax law enacted in 2017. The law uses a package of tax incentives to jumpstart economic development in distressed communities by financing local startups, building small businesses, or developing properties—but there are also opportunities for education institutions and workforce-development programs.

A lack of investment in distressed communities

A growing body of research has revealed geographic prosperity gaps across the United States. Recent economic growth is concentrated in large, metropolitan areas with populations of over 1 million, which have experienced 72 percent of the nation's job growth since the financial crisis. Nearly half of the net increase in business establishments from 2007 to 2016 took place in just two cities: Washington, D.C., and New York City.

Millions of Americans now live in distressed communities characterized by higher rates of poverty and lower levels of income, educational attainment, and workforce participation. Pockets of the country also struggle with higher rates of "deaths of despair" due to suicide, drugs, and alcohol—symptomatic of a larger sense of lost opportunity.

Continue reading.

Education Next

By John Bailey 07/02/2019

LISC, CDFA, and the Ford Foundation Collaborate on Community OZ Playbook.

Opportunity Zones promise to drive billions—even trillions—of dollars in long-term investment into low-income urban and rural census tracts across the country. The goal of this new incentive, part of the 2017 Tax Reform and Jobs Act, is to achieve a double bottom line: fueling inclusive local economies in communities that benefit the people who live and work there, and providing a solid return to investors.

But to make that happen, community stakeholders, state and local government leaders, investors and developers must work together to engage responsibly with this powerful but untested tool, and to help create the kinds of communities that benefit residents and the U.S. economy as a whole. For community stakeholders, that engagement demands careful, collaborative and inclusive planning, establishing incentives and guardrails for investment, collecting metrics on community impact, and reporting on outcomes in a transparent and accessible manner.

This playbook, targeted to community partners, is the first in a LISC series that aims to lay out possible trajectories and best practices for the range of Opportunity Zone (OZ) actors.

We are grateful for the support of the Council of Development Finance Agencies (CDFA), who lent their insight and experience to assembling the playbook.

And we are indebted to the Ford Foundation for their support of this work.

Read the playbook.

Unanswered Questions from the April Regulatory Guidance on Opportunity Zones: Pepper Hamilton.

Qualified Opportunity Zones: Additional Regulatory Guidance – TAX UPDATE Volume 2019, Issue 3

In April, the Department of the Treasury released the much-anticipated second round of Treasury Regulations under section 1400Z-2 of the Internal Revenue Code (April Regulations). This article provides certain highlights of the regulations and notes some questions that remain unanswered.

In general, the benefits of investing in a Qualified Opportunity Fund (QOF) are available to an investor that (1) recognizes capital gain from the sale of property to an unrelated person, (2) timely invests in a QOF in an amount equal to or lesser than the amount of the gain (generally within 180 days recognizing the gain), and (3) makes a timely election with respect to its investment in the QOF, thus making a “Qualifying Investment” in the QOF. The tax benefits available with respect to a Qualifying Investment are (1) deferral of tax on the amount of the capital gain invested until December 31, 2026 (unless there is an earlier triggering event); (2) if an investor holds its interest in the QOF for at least five or seven years, 10 percent or 15 percent, respectively, of the gain invested in the QOF is permanently excluded from income; and (3) if an investor holds its interest in the QOF for at least 10 years, any gain on the appreciation of its investment in the QOF generally will not be subject to U.S. federal income tax upon the disposition of the investment.

Exiting QOFs and ‘Churning’

In the April Regulations, one of the most important changes provides that taxpayers that invest in a QOF that is a partnership and that have held their interests for at least 10 years may make an election to exclude from income a certain amount of the capital gain that is realized by the partnership from the disposition of qualified opportunity zone property (QOZP) and reported on the investors’ Schedule K-1 of the QOF. An additional benefit is that, in specific circumstances, although the income for which the election is made is excluded, the taxpayer will still receive a basis “step-up” corresponding to the amount of gain. This ensures that, if the cash proceeds of the sale are distributed to investors in the QOF, there typically will be no additional tax.1

This election is important because it may eliminate the need for single-asset QOFs by allowing the QOF to dispose of a variety of assets directly, after the investors have held their interests for more than 10 years. It also affords investors in a QOF the flexibility to dispose of their interests in the QOZP (through the QOF) while recognizing the 10-year appreciation exclusion without having to sell their interest in the QOF.

If a partnership QOF or partnership subsidiary qualified as an opportunity zone business (QOZB) disposes of QOZP before the investors have held their interests for 10 years, the income from that sale would flow through to the investors and would be subject to tax under the normal partnership rules. The preamble to the April Regulations noted that the Treasury Department and the IRS were not able to find authority to issue regulations permitting QOFs or their investors to avoid recognizing gain on the sale or disposition of QOZP if the investors had not held their interests for more than 10 years. Comments were requested in that regard. This means that QOFs likely will be incentivized to hold large investment assets (e.g., real estate) for more than 10 years if investors are hoping to recognize the full QOF tax benefits.

In addition, although the gain from a disposition of QOZP must be realized by investors if they have not held their interests for more than 10 years, the proceeds of that sale generally will not be treated as a “bad” asset for the purposes of the QOF’s 90 percent asset test if they are retained by the QOF as cash or certain listed cash equivalents.

Working Capital Safe Harbor for Operating Businesses

Under the April Regulations, the working capital safe harbor still can only be used by a QOZB. Thus, it is likely that QOFs may seek to retain a multiple-tier structure. The safe harbor has now been expanded to include cash designated in writing for the development of a trade or business in a qualified opportunity zone, in addition to the existing acquisition, construction and/or substantial improvement of tangible property in such a zone. This provision accommodates operating businesses. The proposed regulations also clarify that delays due to waiting for government action (e.g., zoning approval) will not cause a failure of the safe harbor if the relevant applications to the government are complete. Further, although the level of detail necessary in a written plan is not specified in the April Regulations, an example in the regulations suggests that a general business plan, without identification of a site of the business, may be sufficient to meet the requirement.

QOF Interests Received for Services

Prior regulations left the door open to the possibility that an investor that invested capital gain in exchange for an interest and also provided services in exchange for an interest might be able to treat their entire interest in the QOF as a Qualifying Investment. The April Regulations clarify that, if an investor receives an investment in a QOF in exchange for both services rendered to the QOF and capital gain contributions, then the interest in the QOF that the investor/service provider receives in exchange for services is not a Qualifying Investment.

All Uses of the Term 'Substantially All' Defined

For property to be qualified opportunity zone business property (QOZBP), during **substantially all** of the QOF's holding period for such property, **substantially all** of the use of such property must be in a qualified opportunity zone. The April Regulations tell us that "substantially all" for purposes of the holding period means 90 percent and for use means 70 percent.

The 90 percent holding period requirement also applies to the requirement that, during **substantially all** of the QOF's holding period for QOZB stock or partnership interests, the corporation or partnership must qualify as a QOZB. It is not clear, however, how this 90 percent holding period requirement for QOZBs interacts with the 90 percent asset test at the QOF level. The IRS has informally suggested that the 90 percent holding period requirement is applied on a year-b--year basis (testing whether the QOZB qualified as such for 90 percent of each taxable year). However, the April Regulations suggest that the 90 percent holding period should only be evaluated either once the complete holding period for the interest in the QOZB is known or based on the holding period on a relevant testing date.

Pepper Perspective

Although the April Regulations offer further guidance with respect to investments in QOFs, certain questions remain unanswered. The timing and extent of additional guidance that may be forthcoming from the IRS is not clear. Thus, investors should work with their tax advisors to develop the required structures and follow the appropriate procedures to invest in a QOF in a way most likely to allow them to qualify for the tax benefits associated with a Qualifying Investment.

Endnotes

1 This is because the basis step-up in an investor's interest in the QOF still applies with respect to the gain excluded; distributions from a partnership are generally tax-free to the extent of an investor's tax basis in its partnership interest.

by Thomas Phelan

July 1, 2019

Pepper Hamilton LLP

[Quinn Palomino: The First Opportunity Zone Fund, One Year Later]

It’s been one year since Virtua Partners launched the very first Qualified Opportunity Fund. Since then, they have raised $100….

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Opportunity Db

July 2, 2019

TAX - GEORGIA

City of Dublin School District v. MMT Holdings, LLC

Court of Appeals of Georgia - June 26, 2019 - S.E.2d - 2019 WL 2610349

Taxpayer brought putative class action against city and school district, seeking refund and claiming that ad valorem tax was not authorized.

The grant of partial summary judgment to taxpayer was reversed on appeal. On remand, the trial court granted summary judgment to school district, but denied school district’s motion to disburse tax proceeds collected by city. School district appealed.

The Court of Appeals held that the trial court’s order was not appealable.

Order granting summary judgment to school district on basis of sovereign immunity was not a final order in taxpayer’s action against school district and city challenging validity of ad valorem taxes, and thus order was not appealable as final judgment; taxpayer’s claim against city was still pending, as trial court had granted taxpayer’s request for class certification and was required to adjudicate any claims by class once requisite notice period had passed, and court had not yet entered permanent injunction or final order directing city to disburse funds to taxpayer or any other class members.

GASB Proposes Guidance On Internal Revenue Code Section 457 Deferred Compensation Plans.

Norwalk, CT, June 28, 2019 — The Governmental Accounting Standards Board (GASB) has proposed new accounting and financial reporting guidance on Internal Revenue Code Section 457 deferred compensation plans (Section 457 plans).

The Exposure Draft, *Internal Revenue Code Section 457 Deferred Compensation Plans That Meet the Definition of a Pension Plan and Supersession of GASB Statement 32*, proposes that if a Section 457 plan meets the definition of a pension plan in GASB guidance, the appropriate GASB pension standards should be applied to the financial reporting for that plan and for the benefits provided through that plan. Under existing guidance, Section 457 plans are explicitly excluded from the pension standards.

The Exposure Draft would enhance the relevance, consistency, and comparability of accounting and financial reporting by pension plans, including Section 457 plans, and by the governments that provide benefits through those plans.

The proposed Statement also would supersede the remaining provisions of Statement No. 32, *Accounting and Financial Reporting for Internal Revenue Code Section 457 Deferred Compensation Plans*, as amended, regarding investment valuation requirements for Section 457 plans. The proposal would require investments of all Section 457 plans to be valued as of the end of the plan's reporting period in all circumstances, as is required for all other postemployment benefit plans.

Provisions of the proposed Statement would be effective for fiscal years beginning after December 15, 2020, and all reporting periods thereafter. Early application would be encouraged.

The Exposure Draft is available on the GASB website, www.gasb.org. The GASB invites stakeholders to review the proposal and provide comments by September 27, 2019.

SALT Cap Sparks Debate Over Which Party Cares About the Middle Class.

- **Republicans say repealing cap would help wealthy taxpayers**
- **Democrats say the tax law is harming schools, smaller cities**

The debate about the cap on federal deductions for state and local taxes has flipped the tables for lawmakers: Democrats are advocating for a large cut that would primarily benefit the wealthy. Republicans say no way.

The partisan squabbles over the SALT deduction put Republicans in a different position than they were for much of the past two years as they crafted, debated and defended their 2017 tax overhaul. Democrats say — and polls show that many people also believe — that the law did too much to benefit corporations and the wealthy.

Democrats are now pushing to undo the law's $10,000 cap on SALT deductions. More than half the benefit of removing that cap would go to those making $1 million, totaling a collective $40.4 billion annual windfall, according to numbers released Monday by the Joint Committee on Taxation.

"It's just fascinating to me that the folks on the other side of the aisle have painted this picture that they're for the working guy, they're for the downtrodden," Representative Tom Rice, a South Carolina Republican, said at a House Ways and Means panel hearing Tuesday. "But they put their boots on their neck. It's ridiculous.''

Democrats defended their desire to lift the cap, saying it unfairly hurts their residents in states where tax rates, home values and incomes tend to be higher.

House Ways and Means Democrats presented small-town mayors, local school administrators and a firefighter as witnesses who said that the deduction is pressuring their municipalities and states to cut taxes — and services.

"There are those who say SALT is for the rich. I say that is 100% poppycock," Representative Bill Pascrell, a New Jersey Democrat said. "I've never seen such punitive tax policy since I've been on this Earth."

The 2017 tax law limited the SALT deduction to pay for other cuts, leaving many people with state and local levies that they can't write-off on their federal returns.

Before the law, the deduction was technically unlimited. But other provisions to the tax code, such as the alternative minimum tax, mean that people can now deduct some of their SALT bill that they couldn't before.

Representative John Larson, a Connecticut Democrat, said the average SALT bill in his district is about $19,000, meaning that the average taxpayer can only deduct a little bit more than half of their total levy. A firefighter and school teacher married to each other could easily make more than $100,000, he said.

But the SALT issue has been one that has been tricky for Democrats to balance. Outside of pricey cities, there are fewer middle-class workers who have SALT bills beyond the $10,000 cap. The cost of fully restoring the deduction — $668 billion, according to the JCT — means Democrats would have to raise taxes on other groups to offset the SALT break.

Despite that, House Democrats are considering legislation that would remove the cap or make the deduction more generous, but leaders in the Republican-controlled Senate have already said any bill would be dead upon arrival.

"I think this hearing today is simply a stalemate,'' Rice said.

Bloomberg Politics

By Laura Davison

June 25, 2019, 11:08 AM PDT

'There Are No Yachts in Falls Church': Debate Over State and Local Tax Deduction Flares.

GOP House members say Democrats' claim that eliminating the deduction has hurt ordinary taxpayers is a "false narrative."

Local government officials made a case to U.S. House lawmakers on Tuesday that the recently imposed cap on a federal deduction for state and local taxes is hurting their communities.

These claims elicited pushback from Republicans, who countered that restoring the so-called SALT deduction in full would mainly be a boon to wealthier Americans. The GOP lawmakers also suggested lower state and local taxes might help alleviate pain for taxpayers.

The local officials testified on Capitol Hill a day after the nonpartisan Joint Committee on Taxation released estimates showing that if the cap were repealed, about $40 billion of the $77 billion in reduced tax liability in 2019 would benefit people earning $1 million or more.

Continue reading.

Route Fifty

By Bill Lucia,

JUNE 25, 2019

TAX - CALIFORNIA

City and County of San Francisco v. Regents of University of California

Supreme Court of California - June 20, 2019 - P.3d - 2019 WL 2529253 - 19 Cal. Daily Op. Serv. 5742 - 2019 Daily Journal D.A.R. 5440

City petitioned for writ of mandate to compel state universities to collect and remit city taxes from users of universities' parking lots.

The Superior Court denied petition. City appealed, and the Court of Appeal affirmed. The Supreme Court granted review.

The Supreme Court held that:

- Parking tax ordinance was not invalid as applied to drivers who park in paid university parking lots, and
- Parking tax ordinance did not violate principles of state sovereignty embodied in the State Constitution.

Parking tax ordinance, which imposed tax on drivers who parked their cars in paid parking lots, was not invalid as applied to drivers who parked in paid state university parking lots, although the tax would have secondary effects on the universities' ability to provide accessible parking; parking accessibility was not a sufficient basis for setting aside a nondiscriminatory municipal tax.

Parking tax ordinance, which imposed tax on drivers who parked their cars in paid parking lots, as applied to state universities, did not violate principles of state sovereignty embodied in the State Constitution, although universities were responsible for collecting and remitting the parking tax, where universities maintained the autonomy to manage their property as they wished, and burden of collecting the tax was minimal.

TAX - ILLINOIS

McIntosh v. Walgreens Boots Alliance, Inc.

Supreme Court of Illinois - June 20, 2019 - N.E.3d - 2019 IL 123626 - 2019 WL 2536882

Customer brought class action against retailer alleging violation of Consumer Fraud and Deceptive Practices Act by unlawfully collecting city's bottled water tax on retail sales of beverages that were exempt from the tax.

The Circuit Court dismissed. Customer appealed. The Appellate Court reversed and remanded. Retailer appealed.

The Supreme Court held that:

- Statutory consumer fraud claims are not categorically exempt from the voluntary payment doctrine, overruling *Nava v. Sears, Roebuck & Co.*, 374 Ill.Dec. 164, 995 N.E.2d 303 and *Ramirez v. Smart Corp.*, 371 Ill.App.3d 797, 309 Ill.Dec. 168, 863 N.E.2d 800, and
- The fraud exception to voluntary payment doctrine did not apply.

PACE Equity Deal First in Nation to Combine PACE Funding and an Opportunity Zone Fund.

MILWAUKEE, June 27, 2019 /PRNewswire/ — PACE Equity recently completed funding $4.3 million for the construction of a new Hyatt House hotel in Rochester, Minnesota. It is notably the first Opportunity Zone fund project in the nation to include PACE funding to date. The new federal Opportunity Zone program, part of the December 2017 Tax Cuts and Jobs Act, was established to spark development in federally designated areas by offering investors generous tax incentives.

The 175-key extended-stay hotel will be located at 315 First Ave., near Mayo Clinic's downtown campus. The property was the site of the former American Legion Post 92, where Mayo Clinic founders William J. Mayo and Dr. Charles H. Mayo were members in the early 1900s. The new Hyatt House will serve the patients and clients of Mayo Clinic, filling a great need in the area.

The developers, California-based EKN Development Group and their co-developer, initially did their own energy study which qualified them for only $400,000, 10 percent of the $4.3 million they desired to utilize PACE for. They then turned to PACE Equity, whose engineering and regulatory expertise enabled them to commit up front – and ultimately fund – the full $4.3 million. The remainder of the capital stack was provided by a construction loan of $29.7 million and $14.4 million equity.

"Using PACE Equity's funding to replace more expensive preferred equity to complete our capital stack was a game changer for us," said Ebbie Nakhjavani, the chief executive officer of EKN Development Group. "PACE Equity's capital not only boosted our overall returns, but their turnkey process and engineering prowess made working with them an easy choice."

PACE Equity's diligent preliminary analysis and up-front commitment are standard components of their turnkey service, which also includes a proprietary energy engineering study during their process. PACE Equity excels in pairing their capital with innovative and complex forms of financing such as historic and new markets tax credits, municipal ground lease structures and tax abatements.

"We are grateful for being able to participate in this project that represents another solid milestone for the industry. PACE Equity continues to hone its skills in complex real estate transactions having done the first commercial PACE projects with tax increment financing, new market tax credits, historic tax credits, and now an Opportunity Zone fund investment," said Beau Engman, PACE Equity founder.

By investing in an Opportunity Zone with PACE Equity funding, EKN and the co-developer were able to reduce their federal tax load and increase their investor return rate significantly. The developers can also take advantage of the additional perks the program offers, such as minimal limits on the types of properties or business investments that qualify and exemption from certain employment requirements.

Ground was broken for the Rochester Hyatt House Hotel on April 11, 2019, and the hotel is expected to be complete in summer 2020.

"For us to be part of the process with two quality developers has been a great opportunity. More importantly, to contribute to a project that is transformative in terms of growing Mayo Clinic's health care campus is very fulfilling. We look forward to many more," said PACE Equity Vice President of Hospitality Ron Adachi.

PACE Equity LLC

Jun 27, 2019

About PACE Equity
PACE Equity is the leading Property Assessed Clean Energy (PACE) funder of commercial real estate development projects in the U.S. PACE Equity is a resourceful addition to the capital stack to boost return on investment while making commercial buildings more sustainable through clean energy efficiencies. PACE Equity has unmatched expertise utilizing PACE in complex and innovative ways, having pioneered the use of PACE funding for projects in new construction, Opportunity Zones, historic and new markets tax credits, brownfield and those receiving a TIF. PACE Equity has a local presence in 20 markets and can fund projects on a national basis.

The Long Odds of Getting Opportunity Zone Capital to Opportunity Zone Businesses.

Della Clark has been working against long odds for basically her entire life. For the past three decades, she's been president and CEO of The Enterprise Center, a nonprofit that supports small and mid-sized businesses in low-income communities throughout the Philadelphia region — a region where, despite 41 percent of the population being black, only 2.5 percent of businesses are black-owned.

Opportunity Zones, the new federal tax break for investing in areas defined as economically distressed, have been billed as a way to shorten the odds for businesses in low-income communities. When the U.S. Treasury confirmed the map of 8,762 census tracts designated as Opportunity Zones last year, Clark found many of her organizations' clients in the Philly region were already located in those tracts. But it was far from certain that the new investors drawn by the Opportunity Zone designation would care about any of the thousands of small and mid-sized business owners who have walked through The Enterprise Center's doors in West Philadelphia over the past 30 years.

Continue reading.

NEXT CITY

by OSCAR PERRY ABELLO

JUNE 25, 2019

Opportunity Zone Fundraising and Public Comment Update for 2019: McGuireWoods

The advent of Opportunity Zones (OZ) offers players in the private finance and real estate communities a new way to enjoy tax incentives while helping economically distressed areas. Recently, the IRS and the Treasury Department provided new guidance impacting investments into Opportunity Zones, and requested public comment by July 1.

Enacted as part of the Tax Cuts and Jobs Act at the end of 2017, the OZ tax benefit was designed to facilitate capital investment by qualified opportunity funds (QOFs) into low-income and distressed areas designated as opportunity zones. Taxpayers that invest in QOFs are permitted to defer (and in some cases, reduce or eliminate) capital gains tax liability.

McGuireWoods' research, based on SEC filings and related public disclosures, shows fundraising with respect to investments in OZs has reached $6.9 billion for the first five months of 2019.

Our dedicated OZ team guides clients on the specific details and helps them work through vital decisions for initial investments into qualified opportunity funds, as well as the execution of the funds into development projects. Recent guidance from April 2019 provided the needed framework and path forward for increased investments into these qualified opportunity funds, as demonstrated by increased fundraising through the end of May 2019.

Although there can be no certainty that all of these dollars will be deployed, the OZ team at McGuireWoods is dedicated to keeping clients advised of new legislative and business developments as they occur.

Public Comment Period

The IRS and Treasury Department have requested public comment on further specifics of the OZ tax benefit, qualified opportunity zone funds and businesses, reporting requirements, further guidance on the anti-abuse rules, and the original use requirement. Such comments must be submitted no later than July 1, 2019. While some narrower questions remain, the outlined regulations from April 2019 alleviated many of the concerns presented to the investment community and have provided sufficient guidance for investors, developers and funds to continue moving forward with OZ-eligible projects. McGuireWoods' OZ team will provide updates on any new guidance developing from the public comment process.

by Mark A. Kromkowski, Douglas E. Lamb, Dennis W. Mensi, Jon G. Neal, Gregory A. Riegle and Carmelo Chimera

June 28, 2019

McGuireWoods LLP

Justin Wolk: The Biggest Problem with Opportunity Zones

What is the biggest problem in the Opportunity Zone space today? And why is there pushback from potential investors with...

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June 25, 2019

[Reid Thomas: Third-Party Administration for OZ Funds]

Should Qualified Opportunity Funds best practices include third-party administration? And what are some Opportunity Zone trends being noticed by the…

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June 27, 2019

Appleton Partners Announces New Municipal Opportunity Zone Credit Strategy.

Tax-Exempt Bond Offering Allows Investors to Benefit from Economic Opportunity Zones

BOSTON–(BUSINESS WIRE)–Appleton Partners, a $10.4 billion investment advisor, has launched a unique separate-account strategy designed to help investors benefit from the anticipated positive economic impact of Opportunity Zones, a tax-incentivized development initiative of the US Tax Cuts and Jobs Act of 2017. The liquid, investment-grade, fixed-income strategy invests in select tax-exempt bonds offered by municipal bond issuers that may be poised for credit upgrades and price appreciation sparked by increased capital investment in real estate and businesses within census tracts designated as Opportunity Zones.

"The creation of Opportunity Zones is unleashing new development potential in locations around the country where it is most needed," said Nathan Harris, CFA, Senior Vice President and Co-Director, Municipal Research at Appleton Partners. "While attention to date has largely focused on direct investment in these census tracts, we created the Municipal Opportunity Zone Credit strategy because we believe the economic dynamic generated by the Opportunity Zone initiative may also benefit select tax-exempt bond issuers."

The Municipal Opportunity Zone Credit strategy targets municipal bonds nationwide where Appleton's research has identified both underlying fundamental value and the potential for positive credit catalysts driven by increased business activity within Opportunity Zones. The strategy represents a new dimension for tax-exempt investing, capitalizing on the considerable potential originating from the Opportunity Zone program for municipalities with areas of economic need.

The new strategy is available to high net worth investors seeking tax-advantaged strategies with the potential to generate higher yields and greater capital appreciation than traditional investment grade portfolios. This focused strategy can complement or replace a core municipal bond portfolio and is accessible through registered investment advisors, family offices, private banks and other wealth management platforms.

About Appleton Partners
Appleton Partners manages $10.4 billion (as of 6/20/19) in separately managed and private client accounts. The firm's expertise in municipal fixed-income management includes short, intermediate, long, crossover and laddered strategies. With an emphasis on customization for individual clients, Appleton Partners invests in high-quality, liquid securities identified through rigorous proprietary

research. For more information, please see www.appletonpartners.com.

June 24, 2019 11:15 AM Eastern Daylight Time

Ashley Tison: Operating Business OZ Fund Strategies

The second tranche of regulations that were published two months ago clarified many questions regarding opportunity zone businesses. What are…

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June 17, 2019

Jessica Millett: QOF Formation Legal Considerations

What are some of the most important legal considerations when forming an Opportunity Zone Fund? What are some of the

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Opportunity Db

June 19, 2019

A Year After Online Sales Tax Ruling, Are States Reaping More Revenues?

Almost every state has jumped at the opportunity to tax online purchases.

One year after the U.S. Supreme Court overturned a decades-old ban on states collecting sales taxes from online sellers, nearly every state has instituted a tax.

The swift and relatively painless transition has been a strong rebuke to the argument that requiring online sellers to remit sales taxes to 40-some states would be too cumbersome for states and sellers. "It's absolutely amazing that just one year in, we've seen that kind of widespread geographic coverage," says Charles Maniace, vice president of regulatory analysis for the consulting firm Sovos.

As of this week, the District of Columbia and 42 of the 45 states with a sales tax have enacted laws or regulations requiring remote sellers to remit a sales tax. The remaining three states — Florida, Kansas and Missouri — have already proposed bills, "and it is only a matter of time before they are enacted," says the Urban Institute's Lucy Dadayan.

The action comes in response to the court's ruling in South Dakota v. Wayfair, issued one year ago today, calling the old precedent "flawed" and a "tax shelter for businesses." The 5-4 decision did away with the notion that governments can only collect sales taxes on purchases made from retailers with a physical presence in their state. In doing so, the court overturned two previous rulings that predated the world of e-commerce.

In addition to enacting laws for direct sellers, 32 states and Washington, D.C., have passed laws or regulations requiring marketplace facilitators to collect sales taxes on behalf of their sellers, according to the National Conference of State Legislatures. Marketplace facilitators are online brokers, such as Amazon or Ebay, that sell a third party's goods and services. More states are expected to take similar action in the coming year.

Has the Ruling Helped State Budgets?

Prior to the Wayfair ruling, some observers estimated that states were collectively missing out on anywhere from $13 billion to $23 billion a year in potential online sales tax revenue. It's too early to know whether those estimates are accurate.

For one, it's nearly impossible to separate out the impact of the ruling from economic growth that would have occurred anyway over the last year. Furthermore, the data for this year is incomplete because states began officially collecting online sales taxes at different points throughout the past 12 months — some will start collecting them later this year.

Still, there are signs that the new taxes are helping state budgets.

For starters, sales tax growth over the past fiscal year, which for most states will end on June 30, has exceeded expectations. According to the latest data from the National Association of State Budget Officers (NASBO), 32 states are collecting more than they anticipated. The tax is outperforming budget forecasts by 1.4 percent, or $3.6 billion. That's better than the income tax, which is exceeding forecasts by 0.6 percent.

In total, sales tax revenue is projected to grow by 3.5 percent in fiscal 2019, an increase NASBO attributes at least in part to the uptick in online sales tax collections.

And with more states implementing a tax over the coming year, states collectively are projecting even stronger growth — 4.8 percent in 2020. Among those, California is projecting $616 million in additional sales tax revenue, and New York is projecting $346 million more.

Still, Dadayan warns, the revenue boosts "might be more modest than expected if the economy slows down and if consumer spending declines."

What's Next?

With a tax in place, most states are now looking at how to make their process for collecting online sales taxes more efficient.

The main way they're doing that is by defining how much business an online retailer needs to do for it to be worthwhile for the state to tax. This threshold is referred to as "economic nexus" in tax circles.

In most places, that means a retailer has to either sell more than $100,000 in goods or services, or conduct more than 200 transactions in a certain state over the course of a year to qualify as having an economic nexus. But that nexus doesn't make sense for all states.

After it enacted its sales tax legislation this year, for example, California bumped up its nexus to $500,000 and got rid of the transaction minimum. The higher threshold makes more sense for a state with the fifth-largest economy in the world.

Other states are taking similar action to redefine what their threshold is, according to Sovos. So far, Colorado, Iowa, North Dakota and Washington have done away with their minimum transaction requirement but kept their $100,000 threshold.

Meanwhile, the threats to ban online sales taxes that emerged in the months following the Wayfair decision appear to have subsided. And while a bill still lingers in Congress that would create a federal sales tax standard for online sellers, it doesn't appear to be heading anywhere.

States' swift action to implement their own standards, plus their work with technology companies and vendors, has done a lot to quiet any concerns, says Sovos' Maniace.

"There was a bit of 'the world would come to an end' reaction on the idea that governments would impose a sales tax on all these small businesses," he says. "I think we've found that states have been pretty reasonable about things, and the technology is there to provide management and compliance in a way that's affordable."

GOVERNING.COM

BY LIZ FARMER | JUNE 21, 2019 AT 4:00 AM

Appellate Division Reverses Tax Court On Kean University Restaurant Tax Exemption.

In a case of first impression, New Jersey's Appellate Division reversed the Tax Court's decision in *Gourmet Dining, LLC v. Union Township*, 30 N.J. Tax 381 (Tax Ct. 2018), which denied a property tax exemption to a restaurant on Kean University's campus. Kean contracted, through a management agreement, with Gourmet Dining, LLC, for the "exclusive right to operate, manage and control" the restaurant in question for a 10-year period, wherein Gourmet was designated the "exclusive manager" for that period of time. The agreement required the annual payment by Gourmet to Kean of $250,000 for the first nine years and $500,000 for the 10th year. Gourmet also agreed to pay Kean's operating foundation 12.5 percent of the gross revenues derived from the restaurant. Revenue generated by the restaurant and paid to Kean was slated to fund scholarship programs, and since its opening the restaurant generated more than $377,000 for such programs. Moreover, more than 85 percent of the restaurant's employees were students of Kean.

The Tax Court denied the exemption on the ground that the restaurant was not used for public purposes, which is a statutory requirement for tax exemptions pursuant to N.J.S.A. 54:4-3.3 and N.J.S.A. 54:4-3.6. The Appellate Division disagreed, noting, "We are convinced … that the [tax] court took an unduly narrow view of the facts." The Appellate Division noted that "the restaurant is unique because it is located on-campus. The record shows that the University's students and their parents regularly dine at the restaurants. Moreover, the University views the restaurant as an important recruiting tool for students and faculty." The Appellate Division also concluded that the restaurant "provides students, other members of the University community, and visitors to the campus an alternative dining experience." Additional facts that weighed in favor of its public purpose were that the restaurant "provides revenues that are specifically earmarked for scholarships for University students," that "approximately eighty-five percent of the restaurant's employees are University students," and that "the restaurant will use produce grown on the University's property and will provide compostable waste for the University's science program, where it will be used for research by faculty and students."

The Appellate Division also emphasized "the concept of public purpose 'must expand when necessary to encompass changing public needs of a modern dynamic society.'" The court held that "when all of the relationships between the restaurant and the University are considered, they warrant the conclusion that the subject property is being used for a public purpose."

The Tax Court also denied the exemption on the grounds that the restaurant's management agreement was "functionally a lease" to a for-profit organization under N.J.S.A. 54:4-2.3 and N.J.S.A. 54:4-3.6, which also deprived the restaurant of an exemption. The Appellate Division again disagreed. In that regard, the Appellate Division noted, a lease is a possessory interest in land. The management agreement gave Gourmet the "exclusive right to operate, manage and control the restaurant, not the property," and was therefore more akin to a license which permits use, rather than a possessory interest in land. Therefore, the Appellate Division held that Gourmet was not subject to local property taxation under either N.J.S.A. 54:4-2.3 or N.J.S.A. 54:4-3.6. This holding has a much broader implication since N.J.S.A. 54:4-2.3 and N.J.S.A. 54:4-3.6 typically exclude from exempt status the leased portion of property if the lessees are not themselves nonprofit or nonexempt entities. Under the Tax Court's rationale, a license or a management agreement was the equivalent of a lease, which could deprive a property of exempt status. The Appellate Division has settled the issue and permits exemptions under management or similar agreements provided there is a continuum of the public use of the property.

Publisher: Day Pitney Advisory

Day Pitney Author(s) Christopher John Stracco Katharine A. Coffey

June 18, 2019

TAX - ALASKA

Kelley v. Municipality of Anchorage, Board of Equalization

Supreme Court of Alaska - May 31, 2019 - P.3d - 2019 WL 2314083

Landowner sought review of municipality's tax valuation of property.

The Superior Court affirmed. Landowner appealed.

The Supreme Court held that:

- Municipal board of equalization acted within its discretion in refusing to admit, on timeliness grounds, landowner's offered documentary evidence of other lots' values;
- Board was not required to find that landowner's sale of different lot in same subdivision for particular amount was definitive evidence of value of lot at issue; and
- Board was not required to find that landowner's payment of particular amount for lot was definitive evidence of its value.

Municipal board of equalization was not required to find that landowner's sale of different lot in same subdivision for particular amount was definitive evidence of value of lot for which landowner disputed assessed value for taxation purposes; assessor testified that because other lot had not been listed on central listing service, there was no assurance that lot had actually been exposed to the open market.

Final IRS Rules Leave States Few Options for Evading the SALT Cap.

"There is something to upset everyone in the IRS rule."

The IRS has officially blocked one of the ways that high-tax, Democratic states are letting residents circumvent limits on tax deductions.

The 2017 federal tax overhaul imposed a $10,000 cap on state and local tax (SALT) deductions, which can increase what some owe in federal taxes. In response, some states changed their rules to let people "pay" some of their state and local taxes into a state or local charitable trust because federal tax reform did not cap the deductiblity of charitable contributions.

This week, the IRS closed the charitable deduction loophole — and did so in a way that charities say will have a far-reaching impact.

"Wherever you are in the country or on the political spectrum, there is something to upset everyone in the IRS rule," says the National Council of Nonprofits' David L. Thompson.

Furthermore, it might be the first of several moves the federal government makes to end federal tax workarounds.

Other Workarounds

Earlier this year, the IRS indicated that it was "likely" to issue additional regulations to address other efforts by high-tax states to help residents avoid the SALT cap.

So far, only Connecticut and New York have passed other workarounds — both of which are aimed at shifting more of the tax burden to businesses, which are not subject to the cap.

New York created a payroll tax that allows employers to shield their employees from the cap. An employer would reduce an employee's taxable wages while not reducing net take-home pay. Connecticut implemented a similar tax-shifting system for LLCs, which are businesses that file taxes as individuals.

Neither of the workarounds have had much employer participation, largely because they're complicated and require significant understanding and buy-in from employees.

Still, "from the IRS perspective, the workarounds certainly have not gone unnoticed," said Scott Dinwiddie of the IRS Income Tax and Accounting Division at an event in Washington, D.C., earlier this year.

The federal agency hasn't given any indication about when it might issue more crackdowns, but the Tax Foundation's Jared Walczak told Governing this week that the IRS certainly has legal standing to do so.

"With those payroll taxes, there is a legal question," he says. "That is, whether the business is simply remitting income tax on behalf of their employees."

In other words, all this shifting around of who's paying the tax doesn't change the fact that it started out as an income tax and that is basically still what it is. The packaging may have changed, but the contents remain the same.

In legalese, this is known as the substance-over-form doctrine. It says a taxpayer is bound by the economic substance of a transaction (in this case, the substance is the income tax) even if the substance varies from its legal form (who’s remitting the tax).

What the New Rules Do

That doctrine and another called “quid pro quo” are the basis for the new rules the IRS issued this week.

The IRS essentially expanded the quid pro quo doctrine to tax credits. For example, if someone donates to a charity and receives a tote bag in return, she is supposed to subtract the value of that bag from her charitable contribution when claiming it on tax forms. For residents receiving a tax credit when donating to a charitable trust, they have to now deduct the value of that credit from their contribution. It effectively blocks residents from claiming their entire payment to a state or local trust as tax-deductible.

The new IRS rule squashes charitable-trust-loophole laws passed by Connecticut, New Jersey, New York and Oregon. Similar proposals are pending in California and Illinois.

But the IRS language is so broad that it also applies to long-established state-run trusts (for things like environmental preservation and charter schools), which give out tax credits in exchange for donations. Dozens of states — not just high-tax or Democratically controlled ones — have these trusts. The rule applies to any donation from an individual who has already hit the state and local tax deduction cap.

Plan B and Plan C

State and local governments have two other options: fight the cap in court — or be patient.

A lawsuit filed last July by Connecticut, Maryland, New Jersey and New York argues that the cap violates the U.S. Constitution’s Equal Protection Clause and the 10th Amendment, which protects states’ rights. The suit accuses the federal government of meddling in state taxation and fiscal policies by making it more politically difficult for states to raise revenue.

Many experts say the suit is a longshot.

But New York Assemblywoman Amy Paulin, who represents a New York coalition of localities, school districts and professional organizations, says her group is pushing for the issue to be settled in the courtroom.

“We fully plan to turn to the courts to continue to press the case that this regulation is arbitrary, capricious, unfair and should not be allowed to stand,” she said in a response this week to the IRS ruling.

The other option? Wait it out.

The SALT cap is temporary. It expires in 2025. There’s also a proposal in Congress that would repeal the cap, but it’s not expected to go anywhere. Some argue that states should simply wait to see if the politics on Capitol Hill shift in a way that diminishes support for keeping the cap.

GOVERNING.COM

BY LIZ FARMER | JUNE 13, 2019 AT 4:20 PM

US Opportunity Zone Legislation Is Moving Capital.

The buzz surrounding U.S. opportunity zones keeps growing as the list of investors piling into these vehicles lengthens. Is it all buzz though, or is the program having a palpable impact on capital flows to low-income areas?

Looking at variation in sales activity between opportunity zones and areas that were not selected, there are signs that the program is making a difference.

In business and economics there are few experiments available to show us that a policy goal is having an impact. Measuring capital flows based on tax changes is difficult because there are so many other variables which are not always observable.

The U.S. opportunity zone program, however, provides a natural experiment to gauge the impact of new policy. For every low-income census tract that was selected for the opportunity zone designation, another three or so were left behind. These tracts that were not given the designation we are terming “Also Rans”.

Continue reading.

RC Analytics

By Jim Costello on June 4th, 2019

Opportunity Zone Investing: Is It for You?

A new type of fund that invests in low-income communities gives some investors a tax break, but it’s not for everyone.

The prospect of investing in dilapidated inner-city neighborhoods or tumbleweed-ridden rural towns may not excite most investors. But a program embedded in the 2017 Tax Cuts and Jobs Act offers investors a tax incentive to do just that. As a result, a new type of fund that invests in low-income communities has popped up, and investors and institutions alike are starting to take notice. You’ve probably heard of opportunity zones. If you’re wealthy enough, you may have received a pitch to invest in an opportunity zone fund. These new investments sound appealing, but they’re not for everyone.

The new OZ funds pool money from multiple investors and invest in businesses and real estate development projects located in economically distressed communities that the federal government has designated as in need of investment. The more than 8,700 opportunity zones include parts of nearly every major American city, including Chicago and Los Angeles, as well as all of Puerto Rico and remote towns in Alaska. Investors who put money in OZ funds can defer and eventually reduce taxable capital gains, depending on how long they stay invested.

Triple tax break. The tax benefits apply only to capital gains, but it's a threefold incentive. First, you can defer federal capital gains tax on money you have earned from another investment by putting it into an OZ fund. Say you sell shares in a stock and realize a $100,000 capital gain (though a gain on almost any kind of investment qualifies). If, within 180 days, you roll over the $100,000 gain into an OZ fund, you can defer paying capital gains tax on it until you sell your stake in the fund or until December 31, 2026, whichever comes first. (The idea is to encourage investors to sell existing investments and invest the proceeds in an OZ fund.)

Second, the longer you hold your investment in the fund, the more you can reduce the amount of rolled-over gain that will be subject to tax. Investors who hold the fund for five years get a 10% reduction on the gain they'll owe taxes on; hold for seven years, and you'll get another 5% reduction. For example, an investor who rolls $100,000 of capital gains from a previous investment into an OZ fund in 2019 would owe capital gains tax on only $90,000 if she sold after five years and on only $85,000 after seven years.

No matter when you invest, however, "the December 2026 date is set in stone," says Frazer Rice, senior wealth strategist at Calamos Wealth Management. For the 2026 tax year, whether you sell or hold your investment in the OZ fund, you must pay any federal capital gains tax you owe on the profits you rolled into the OZ fund.

Hold for 10 years or more and a third benefit kicks in: Any gain in your investment in the fund is tax-free—as long as your outlay was made with capital gains from a prior investment. Some funds require that you hold for 10 years, but the vast majority allow you to sell at any time.

Since the tax act passed, 130 qualified OZ funds have opened, according to the National Council of State Housing Agencies, a nonprofit group focused on affordable housing (it maintains a directory of OZ funds on its website, www.ncsha.org). The funds, which range in asset size from less than $1 million to $3 billion, are run mostly by money-management firms and real estate developers.

A fund from the developer HHKirby Real Estate Ventures, for example, aims to transform a former cotton mill in Burlington, N.C., into a complex with a live event center, restaurants and sports facilities. The North Country Opportunity Zone Fund, run by American Ag Energy, a company that builds greenhouses, invests in agricultural facilities in Berlin, N.H.

As interest ramps up, high net worth investors may see OZ funds offered at bigger money-management firms, such as Charles Schwab or Merrill Lynch, says Tim Steffen, of Baird Private Wealth Management.

But not everyone can buy in. With most OZ funds, you must be an accredited investor—that is, you must have a net worth of $1 million, excluding your primary residence, or have two consecutive years of at least $200,000 in annual income if you're a single tax filer ($300,000 for married filers). Most funds come with a six-figure investment minimum, too.

Fee structures tend to mimic those of hedge funds and private-equity investments: Investors pay an annual fee of 1.5% to 2.0% in expenses and, when they sell, fork over another 20% of any excess return a fund earns above an amount promised to the investor. The typical promised rate of return is between 6% and 10% for funds with diversified portfolios, and more for funds that invest in a single project, says Quinn Palomino, CEO of Virtua Partners, a private equity real estate development firm that offers opportunity zone funds.

Not ready for prime time. It's too early to say what kind of gains, if any, these OZ funds will deliver, or which OZ funds are worthy investments. In fact, the rules on what an OZ fund can invest in and how it should operate are still evolving. That can pose a problem: An OZ fund must comply with myriad IRS guidelines. If it doesn't, it may have to pay a penalty or, worse, the fund's investors won't be eligible for the capital gains tax breaks.

In general, an OZ fund must invest at least 90% of its assets in businesses located within a qualified opportunity zone. Many kinds of businesses qualify under the current guidelines, but a few, including golf courses, massage parlors, casinos and liquor stores, are excluded. Even so, real estate development projects, such as single- or multifamily housing and commercial real estate, are typical investments, says Neil Faden, a partner at Manatt, Phelps & Phillips, a law firm that advises OZ fund managers.

If you qualify and you want to invest in an OZ fund, first consider whether the investment is a good one, regardless of the potential tax benefit. "Don't let the tax tail wag the investment dog," says Bill Smith, a managing director at CBIZ MHM, an accounting and consulting firm.

Understand, too, that distressed real estate deals are inherently risky. "There isn't a lot of beachfront property in Malibu in these funds. You're buying into an area that people otherwise weren't willing to invest in," says Steffen.

The bigger concern, however, is whether the manager is new or inexperienced. Many OZ fund managers, it turns out, are untried, according to a survey from alternative investment research firm Preqin.

Some research is also required on the contractors and developers who will execute the investment projects. Ideally, you want to see that an OZ fund is working with established developers that have experience in the kinds of planned projects laid out in the fund's documents. "Maybe a developer has experience in hotels but not in multifamily homes. If you can ask about these things before you invest, you can help mitigate some of the risks," says Rice.

But with little track record, inexperienced managers, high fees and a high hurdle to entry, OZ funds are not right for retirement savings or money you can't stand to lose or lock up for the required holding periods. They're geared more for deep-pocketed, savvy investors than mom-and-pop savers. "If you've never invested in private equity or a closely held investment in which you're a minority investor," says Smith, "these probably aren't for you."

Kiplinger's Personal Finance

By Ryan Ermey

June 5, 2019

EDA Prioritizes Applications for Projects Located in Opportunity Zones.

Today, U.S. Assistant Secretary of Commerce for Economic Development Dr. John C. Fleming announced that EDA has added Opportunity Zones as an Investment Priority. This new Investment Priority will significantly increase the number of catalytic Opportunity Zone-related projects that EDA can fund to spur greater public investment in these areas.

"Opportunity Zones were created under President Trump's 2017 Tax Cuts and Jobs Act to stimulate economic development and job creation by incentivizing long-term investments in low-income and underserved neighborhoods across the country," said Dr. Fleming. "By making Opportunity Zones an EDA investment priority, we are better able to align our work to advance this important Trump Administration priority."

EDA's investment priorities guide the agency's investment portfolio to ensure its investments make the strongest impact on sustainable regional economic growth and diversification.

Through its competitive grant process, EDA evaluates all project applications to determine the extent to which they:

- Align with EDA's investment priorities,
- Effectively address the creation and/or retention of high-quality jobs,
- Document that the applicant can or will leverage other resources, both public and private,
- Demonstrate the applicant's capacity to commence the proposed project promptly, to use funds quickly and effectively,
- Provide a clear scope of work that includes a description of specific, measureable project outputs.

EDA has previously taken steps in its 2018 Notice of Funding Opportunity for Public Works and Economic Adjustment Assistance Programs to make eligible entities within qualified Opportunity Zones generally eligible for EDA funds.

With today's announcement, the Opportunity Zone Investment Priority immediately applies to most existing EDA funding notices.

The full list of EDA Investment Priorities can be found here.

To date, EDA has invested close to $30 million in 40 projects in designated Opportunity Zones to help communities and regions across the country build the capacity for economic development.

To learn more about the Opportunity Zone program, see the Treasury Department resources page here. To learn more about the Department's work in Opportunity Zones, read our blog post.

U.S. Economic Development Administration sent this bulletin at 06/12/2019 12:04 PM EDT

CDFA, LISC, and Ford Foundation Collaborate on Community OZ Playbook.

Navigating the Opportunity Zones.

Opportunity Zones promise to drive billions—even trillions—of dollars in long-term investment into low-income urban and rural census tracts across the country. The goal of this new incentive, part of the 2017 Tax Reform and Jobs Act, is to achieve a double bottom line: fueling inclusive local economies in communities that benefit the people who live and work there, and providing a solid return to investors.

But to make that happen, community stakeholders, state and local government leaders, investors and developers must work together to engage responsibly with this powerful but untested tool, and to help create the kinds of communities that benefit residents and the U.S. economy as a whole. For community stakeholders, that engagement demands careful, collaborative and inclusive planning, establishing incentives and guardrails for investment, collecting metrics on community impact, and reporting on outcomes in a transparent and accessible manner.

This playbook, targeted to community partners, is the first in a LISC series that aims to lay out possible trajectories and best practices for the range of Opportunity Zone (OZ) actors.

Continue reading.

LISC | Jun. 13

Opportunity Zones: Second Round of Proposed Regulations Are Helpful for Agribusiness and Forestry, but Refinements Are Needed to Support Revitalization of OZs in Farm and Timber Country

The Opportunity Zones ("OZ") incentive created in the 2017 Tax Cuts and Jobs Act (the "TCJA") can be a powerful tool for many industries, as we discussed soon after the TCJA became law. The first set of proposed regulations interpreting the complicated statutory provisions governing the incentive were released in October 2018 (the "First Round Regulations"), which are discussed in an alert we released at that time.

As we discussed in a subsequent alert, the OZ incentive can be beneficial for small farmers and big agribusiness for a number of reasons, including financing new infrastructure and large assets. However, we and many members of the agribusiness community have been waiting for valuable clarifications to the rules. On April 17, 2019, our patience was rewarded with a 169 page release (the "Second Round Regulations") from the Department of the Treasury ("Treasury") that lays the groundwork for many more ways to use the OZ incentive in farm country, including through the use of leased assets and, potentially, conversion of land to a new type of crop.

As helpful as the Second Round Regulations are, there are several points that should be clarified, as discussed below. Taxpayer comments would be valuable for Treasury to recognize the importance of these points to many rural industries so they can be taken into account when the Second Round Regulations are finalized. Taxpayers may comment on the Second Round Regulations through July 1, 2019.

What is the OZ incentive?

The OZ incentive consists of three tax benefits for investors.

1. U.S. federal income taxes on capital gains invested in a qualified opportunity fund ("OZ Fund") may be deferred until the earlier of the day on which the taxpayer disposes of its interest in the OZ Fund or December 31, 2026. The amount ultimately recognized may also be reduced if the fair market value of the taxpayer's OZ Fund interest is lower than the capital gain that the taxpayer deferred by investing in the OZ Fund.

2. If the taxpayer holds the OZ Fund investment for at least five years, the basis of the taxpayer's OZ Fund interest may be increased by up to 10 percent of the gain the taxpayer deferred by investing in the OZ Fund. The taxpayer's basis will be increased by up to another 5 percent of that gain if the taxpayer holds the OZ Fund investment for at least seven years.

3. If the taxpayer holds the OZ Fund investment for at least 10 years, capital gains realized upon disposition of the investment are free from federal income tax due to a step up in basis of the investment to its fair market value at the time of disposition.

Any U.S. or non-U.S. person with capital gains subject to U.S. federal income tax can invest in an OZ Fund and use the OZ incentive. This includes individuals, corporations, partnerships, and trusts. Partners investing capital gains from a partnership can choose to have a longer window to invest in an OZ Fund than the partnership would.

An OZ Fund is a partnership or corporation that acquires qualifying tangible property or an equity interest in a second partnership or corporation that is a qualified OZ business (an "OZ Business") and uses those assets in a trade or business other than several "sin" businesses listed in the law. Both the OZ Fund and any OZ Business must meet several requirements concerning, among other things, where they use the tangible assets they own or lease and how much of their assets are intangibles, cash, cash equivalents, and short-term debt.

Does the OZ incentive matter only for people who pay tax or have capital gains to invest?

No. While only people who pay U.S. federal income tax and have capital gains to invest can receive the tax benefits of the OZ incentive, tax-exempts and taxpayers who do not have capital gains to invest should pay attention.

First, the value of property located in or near an OZ is already increasing and is expected to continue to increase as more OZ Funds deploy capital in OZs. Therefore, tax-exempt and nontaxable organizations should expect more competition for investments located in OZs and should also consider whether they should demand a premium for assets they own in OZs when it is time to exit.

In addition, due to the nature of the OZ incentive and certain other tax-incentive programs, we also anticipate that there will continue to be a place in OZs for tax-exempts and taxpayers that do not have capital gains to invest. For example, many OZ Funds and OZ Businesses will need to borrow to fund operations and cash distributions and Non-OZ investor taxpayers may be able to use other tax incentives generated by OZ Businesses that cannot be efficiently used by OZ investors. In addition, some of the most attractive infrastructure projects require more capital than can be efficiently raised or deployed by many OZ Funds or require non-OZ capital for portions of a project located outside of an OZ.

In all of these cases, tax-exempts and taxpayers without capital gains to invest will need to consider and understand the unique effects that the OZ incentives have on the market and their counterparties.

How do the Second Round Regulations help the agribusiness community?

1. The range of assets that should qualify for the OZ incentive is now clearer, but additional clarification is needed.

One of the key requirements of the OZ incentive is that an OZ Fund or OZ Business act as the person that puts tangible property to "original use" in an OZ or substantially improves tangible property that has been previously used in an OZ. The concept of tangible property is very broad and clearly includes many assets used in agribusiness and forestry, e.g., barns, processing and packing lines, farm equipment, mills, pellet plants, and biomass facilities. The First Round Regulations indicated that substantial improvement means that an OZ Fund or OZ Business must at least double its investment in used tangible property (not land) that the OZ Fund or OZ Business acquires by improving it. However, the concept of original use was not defined in Section 1400Z-2 of the Internal Revenue Code of 1986, as amended (the "Code"), or the First Round Regulations.

Particularly in this regard, clarification is needed regarding the definition of "tangible property." In defining original use, the Second Round Regulations expressly state that the OZ Fund or OZ Business, as applicable, must be the first person to use the relevant tangible property in an OZ in a manner in which the property may be depreciated or amortized. The reference to depreciation clearly indicates that property such as permanent crops (e.g., grape vines and orchard trees) and pumping stations, canals, tiling, and certain other water infrastructure improvements should also be treated as qualified OZ property. However, it is problematic because the reference to depreciation appears to exclude newly planted timber, which is not depreciated (rather, depletion deductions may be available), but requires extensive capital investment and can materially contribute to increased economic activity in rural OZs. Agribusiness would benefit from another clarification from Treasury. Specifically, in the Second Round Regulations, Treasury expressed a concern about "land banking," stating that land will not be treated as qualified OZ property if the land is "unimproved or minimally improved" and the OZ Fund or OZ Business does not intend or expect to "improve the land by more than an insubstantial amount within 30 months" after its acquisition. However, Treasury did not indicate what constitutes an improvement, let alone an "insubstantial amount" of improvements. This raises questions, for example, about whether non-depreciable, but very expensive improvements such as precision grading would be substantial or insubstantial. It also raises a question about whether conversion of property from one type of agribusiness application (e.g., pastureland), to another (e.g., commodity crops) would be sufficiently substantial without constructing a building, even if there is a material increase in workforce or value per acre as a result.

2. OZ investors can participate in leasing structures.

The Second Round Regulations state that tangible assets that are leased from another person and used by an OZ Fund or OZ Business may be qualified property for purposes of the asset tests applicable to OZ Funds and OZ Businesses. There are several important points to raise in this respect:

New and used property can be qualified OZ property, provided that the OZ Fund or OZ Business entered into the lease after 2017, and the lessee and lessor are not related (generally, 20% or more common ownership or one entity owns more than 20% of the other entity). In this scenario, lease prepayments are not limited by the OZ rules, but generally applicable tax law still applies. For example, the lease must otherwise qualify as a lease for U.S. federal income tax purposes.

Used property that is leased by an OZ Fund or OZ Business from a person that is related (as described above) to the OZ Fund or OZ Business will still be qualified OZ property if, within 30 months after the lessee takes possession of the leased property under the lease, the lessee purchases a sufficient amount of additional property that is used in the same or a substantially overlapping OZ. Thus, it should generally be possible for an OZ Fund to lease from a related person an operating farm, equipment, or other buildings, and then purchase and place in service additional property, e.g., a new packing line or new orchard trees, provided that the OZ Fund spends enough money purchasing the additional property. In this scenario, no more than 12 months of lease payments may be prepaid.

Tangible assets that an OZ Fund or OZ Business leases to another person also may be qualified property for purposes of the asset tests. Put another way, an OZ Fund or OZ Business may be in the equipment financing business if certain requirements are met (for example, equipment must be substantially used in an OZ and the lessor is treated as the owner of the leased property under generally applicable U.S. federal income tax law). In addition, because of the rules above, a lessee in an equipment financing arrangement structured as a sale leaseback could be an OZ investor.

These rules increase the monetization opportunities for owners of agribusiness assets and the ways in which OZ capital can be effectively and efficiently deployed to improve the economy in OZs. Nonetheless, care should be taken to ensure that the leases or leasing activity satisfy the restrictions applicable to OZ investments as well as tax rules that are generally applicable to leasing activities. In addition, the Second Round Regulations also include a generally applicable anti-abuse rule that permits the government to recharacterize a transaction if it is determined, based on all applicable facts and circumstances, that a significant purpose of the transaction is to achieve a result that is inconsistent with the purpose of the OZ incentive.

3. It is now easier to use OZ Fund structures to invest in operating businesses.

The statute established several criteria that required that an OZ Fund or OZ Business must operate a "trade or business," but was unclear about how an OZ Fund or OZ Business could satisfy these rules. The Second Round Regulations provide significant clarification in this regard by stating that the standard for trade or business activities is Code Section 162, a well-established and extensively explored provision of existing law that generally indicates that a trade or business is any activity that is continuously and regularly carried on primarily for the purpose of earning income (as opposed to benefiting from a mere increase in value of property). The Second Round Regulations also provide a special rule for operating (and leasing) real property.

In addition, the Second Round Regulations provide several safe harbors for establishing whether at least 50% of an OZ Business's income is properly sourced to an OZ (the "Operating Safe Harbors"). These safe harbors refer to different factors, including hours worked by employees and independent contractors, amounts paid to employees and independent contractors, and a combination of location of management and tangible assets and their contribution to the business. Further, there is now also a facts and circumstances based category to determine the source of income earned by an OZ Business. This array gives OZ Businesses many options and should allow properly structured businesses to meet the 50% test.

Another initial concern under the statute and First Round Regulations was that it appeared that an OZ Fund investment had to be "frozen" for at least 10 years in order to reap the full benefits of the OZ incentive. This made many investors cautious of investing in certain types of activities, including venture stage and operating businesses that may be hampered by remaining in an OZ or avoiding ordinary course business combinations. The Second Round Regulations ease these concerns somewhat by providing that many – though not all – types of reorganizations that are tax-free under generally applicable tax law can be completed by an OZ Fund investor, OZ Fund, or OZ Business without triggering tax and while retaining OZ benefits. In addition, if these reorganizations are completed properly, the OZ Fund investor's holding period will be preserved so that the investor can still avoid taxation on capital gain recognized on an exit that occurs 10 years or later after the investor's initial OZ Fund investment, assuming, of course, that all otherwise applicable requirements are met.

4. It also is easier now to manage investor privacy (including certain regulatory disclosures) and exits from an OZ Fund structure.

One of the concerns with the statute and the First Round Regulations was that they made it seem that an OZ Fund structure had to be very flat, specifically that taxpayers seeking to defer capital gain had to directly invest in an OZ Fund. This would have created many problems ranging from privacy to massive logistical headaches for accomplishing an exit, which under previously released rules had to be done by disposing of OZ Fund interests. Thankfully, through a few clarifications about the consequences of an OZ Fund's disposition of qualified OZ property and transfers of a partnership OZ Fund interest, the Second Round Regulations make it possible to create a multi-asset investment fund that can look and feel a lot more like a traditional investment fund.

For example, the Second Round Regulations specify that an OZ investor may exchange its interest in an OZ Fund for an interest in a partnership without accelerating recognition of deferred capital gain if the OZ investor's beneficial interest in the OZ Fund is not reduced and certain other criteria are met. In addition, an OZ investor will be permitted to elect to increase its indirect basis in an OZ Fund's assets after holding an OZ Fund interest for at least 10 years. Therefore, an OZ investor also would not recognize capital gain as a result of an OZ Fund's disposition of its assets after the OZ investor has held an interest in the OZ Fund for at least 10 years. In addition, although the relevant proposed regulation is not as clear as could be hoped, there are arguments that a direct or indirect disposition of depreciable property held by an OZ Fund treated as a partnership would not result in recapture of depreciation deductions.

The rule discussed in the immediately preceding paragraph is very useful for many OZ Funds, but it is not clear whether a taxpayer may also benefit from its 10-year holding period in respect of a sale of assets by an OZ Business. However, a failure to permit a taxpayer benefit on a sale of assets held by an OZ Business unfairly disfavors structures that include an investment in an OZ Business (which would include, among other things, most investments in the operating businesses that have the most potential to bring jobs to OZs). In addition, depreciation recapture is a very material tax consequence for many taxpayers, including those active in the agribusiness industry, when it is time to dispose of equipment and real property. Finally, these clarifications are in line with generally applicable partnership tax principles. Thus, clarifications of the Second Round Regulations to reflect these points are not only important (and very valuable) to the agribusiness industry, but would also rationalize the OZ provisions with generally applicable law. Here again, taxpayer comments are needed to accomplish these clarifications.

5. There is additional hope for projects that straddle OZ boundaries.

A new rule provided in the context of the Operating Safe Harbors discussed above provides that activities that occur on real property that lies partly within and partly outside an OZ may be treated as sufficient for an OZ Business to meet the Operating Safe Harbors. However, this rule does not address the location of tangible property (for example, solar panels, substations, and batteries) for purposes of determining whether at least 70% of an OZ Business's tangible property are qualified OZ property.

Interestingly, Treasury requested comments regarding whether a similar "straddle" rule should be applied to other portions of Code Section 1400Z-2. Adding this type of straddle rule to the 70% standard for location of tangible property of an OZ Business would reconcile the business goal of finding the optimal location of an operating business without creating false incentives to site 70% of a facility on one side of an imaginary line that divides a discrete parcel or contiguous parcels of property. This would be particularly beneficial to the agribusiness industry and many other industries that can bring jobs and wealth to rural areas, including resort hospitality, large manufacturing, and renewable energy. Moreover, there already are established concepts in the tax law that can function as anti-abuse mechanisms by specific inclusion in the final regulations.

6. OZ investors can use the five- and seven-year basis increases to claim accumulated depreciation or withdraw accumulated cash tax-free.

An OZ investor's initial basis in an OZ Fund is zero to the extent of the OZ investor's investment of qualified capital gains. In the case of an OZ Fund that is a partnership, the investor's zero basis limits the investor's ability to claim U.S. federal income tax credits and depreciation deductions in respect of the OZ Fund's property. It can also limit the investor's ability to withdraw cash from the structure. An investor's basis can be increased by causing a partnership OZ Fund or OZ Business to borrow. Basis is also increased when net income (that is, income after expenses and deductions) is earned by the OZ Fund and allocated to the OZ investor. As noted earlier, Code Section 1400Z-2, which authorizes the OZ incentive, indicates that an OZ investor that holds its OZ Fund interest for at least seven years prior to recognizing deferred gain could also increase its basis in its OZ Fund interest by up to 15%.

The Second Round Regulations clarify that the basis increases available after a five- or seven-year holding period are available only before deferred gain is recognized, which will occur upon the earlier of a disposition of the OZ Fund interest or the 2026 tax year. (However, while we anticipate additional legislation will be proposed to give investors an additional year to meet these holding periods, the chances of enactment are unclear.) Importantly, the Second Round Regulations also clarify that these basis increases can be used for any purpose under the Code. Therefore, they can be used to absorb depreciation deductions and cash that have accumulated in a partnership OZ Fund as a consequence of the investor's low basis and related legal limitations. Moreover, cash withdrawals to the extent of the basis increase would not be subject to tax or accelerate recognition of deferred capital gain to the extent that the withdrawals did not exceed the investor's basis at the time of the withdrawal (see below).

What's the catch?

Aside from the limitations discussed above and some other restrictions, there are a few points in the Second Round Regulations that must be carefully navigated.

1. Managers will have hard choices to make about distributing cash or property from an OZ Fund.

A partnership OZ Fund can make a distribution in excess of an investor's basis in its OZ Fund interest. While it has always been the case that a cash distribution in excess of basis would be subject to taxation as a capital gain, the Second Round Regulations go a step further and require that distributions from a partnership OZ Fund constitute an acceleration of recognition of deferred capital gain to the extent the fair market value of the distribution exceeds the investor's basis in its OZ Fund interest. It is important to note that the investor will not be taxed twice, that is, under the Second Round Regulations and the general rule regarding distributions in excess of basis.

The result above is troubling for a number of reasons. First, a similar rule applies to corporate distributions, but it is more favorable to investors than the partnership rule discussed above. Partnerships, however, are more widely used in project finance and real estate. More worrisome is that partnerships with depreciation deductions that exceed income will find it difficult to distribute operating cash. This concern is particularly acute for project finance, e.g., large investments in new processing and packing facilities, and also for operating businesses using 100% expensing of capital investments, which was also enacted in the TCJA. While an investor's basis can be increased if the OZ Fund borrows, borrowing solely to support cash withdrawals may not be aligned with sensible business goals or, in some cases, with applicable tax law. In addition, there are restrictions on the amount of cash that may be retained in the OZ Fund structure.

Thus, if a business does not, in the ordinary course, need to spend or invest excess cash, the business manager will have to make a very difficult choice that essentially boils down to how she will choose to harm her investors. For example, does she choose to trigger a taxable distribution or pay penalties for causing the OZ Fund to hold too much cash?

Given the seriousness of the consequences to taxpayers and reasonable options to favorably address them, this rule may be a good topic for Treasury to reconsider when preparing final regulations. Taxpayer comments would help to shed light on this issue for Treasury.

2. Certain direct and indirect transfers of OZ Fund interests or qualified OZ property can trigger early recognition of deferred capital gain.

As in the case of the Investment Tax Credit ("ITC") and certain other U.S. federal incentives, certain direct and indirect transfers of an interest in an OZ Fund or qualified OZ property will trigger taxation. In the case of the ITC, there is recapture of a credit. In the case of the OZ incentive, there is an acceleration of taxation of the capital gain that was deferred by investing in an OZ Fund. While this type of restriction was generally expected, there are a few surprising exceptions. For example, certain liquidations of a corporate OZ Fund are not inclusion events, and an investor's death is not treated as a disposition event, nor is a transfer of an OZ Fund interest by an investor's estate to an heir. However, most gifts of an OZ Fund interest (including charitable gifts) and certain kinds of reorganizations that would otherwise be tax-free will trigger taxation under the OZ rules.

3. Some of the more novel arrangements used in agribusiness require further study for compatibility with the OZ incentive.

Many types of legal arrangements are unique to modern agribusiness (e.g., plant trait licensing) or unique legacies from historical agribusiness practices (e.g., crop sharing). In addition, some of the assets required for agribusiness operations are owned or distributed in ways that are dictated by local law, for example, the many ways in which water rights can be structured and water can become personal property. In addition, given the use of seasonal labor in some areas and geographic dispersal of many integrated farming, packing, and processing operations, it is important to carefully calculate the various thresholds applicable under the OZ incentive. While there is potential for many of these types of arrangements to be useful in the OZ context, they are highly specific and must be carefully considered under the facts applicable to a particular operation.

Please contact the K&L Gates OZ team for assistance in implementing any aspect of the OZ incentive or if you wish to provide comments, input and ideas to the White House, Treasury and Congress. (Comments regarding the Second Round Regulations are due on July 1, 2019.) For more information, please contact the authors or visit our website.

By Elizabeth Crouse, Mary Burke Baker, Marisa Bocci

12 June 2019

K&L Gates

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Sasha Favelukis: Using Shipping Containers for OZ Business Incubation (Podcast Episode #34)

How can incubating local businesses in shipping containers achieve Opportunity Zone community activation and gentrification without displacement? Sasha Favelukis is …

[Read More »]

June 10, 2019

[Shay Hawkins: The OZ Fund Trade Group Aiming to Renew the Program (Podcast Episode #35)]

Why does a trade association for Qualified Opportunity Funds want more data collection and reporting? And could the Opportunity Zone…

[Read More »]

June 12, 2019

[IRS Notice 2019-39: Corrected!]

On May 22, 2019, the IRS issued [IRS Notice 2019-39] (the "Original Notice"), which sought to bring efficiency and uniformity to guidance on the current refunding of certain bonds issued under current and future "targeted" tax-exempt bond programs. While the Original Notice set forth helpful guidance on the tax-exempt current refunding of bonds issued under a targeted bond program, it also created some confusion regarding the tax-exempt current refunding of build America bonds (which everyone was already doing), as Mike and Cindy [noted] last week.

The Original Notice included build America bonds within the scope of its guidance, which seemed odd because build America bonds were not subject to volume cap, although similar to the targeted bond programs, there was a deadline for issuing build America bonds on December 31, 2010. Additionally, because build America bonds already were required to satisfy the requirements for issuance of tax-exempt bonds, no ambiguity existed regarding the ability to currently refund build America bonds with tax-exempt bonds. This guidance seemed unnecessary and, if read in a certain light, could have led to absurd results.

After what the author suspects to be mild bond community uproar (comparatively mild, that is; even the most uproarious bond community uproar might seem tame to the layperson), the IRS went back, double-checked its answers, and corrected the Original Notice (as corrected, the "Corrected Notice") found [here]. The IRS revised the sentence that mentions build America bonds to include the bracketed phrase as follows:

> "In addition, the references in this notice to "original bonds" or "original Qualified Bonds" include [Tribal Economic Development Bonds[1] issued as] tax-advantaged build America bonds under former § 54AA."

This change makes it clear(er) that the reference to build America bonds in the Original Notice was not intended to refer to build America bonds generally, but rather to Tribal Economic Development Bonds that happened to have been issued under Section 7871(f) as build America bonds. You may recall that the American Recovery and Reinvestment Act (P.L. 111-5) created the Tribal Economic

Development Bond as a type of bond that relaxed some of the restrictions that normally apply to Native American tribal governments when they want to issue tax-exempt bonds. Tribal Economic Development Bonds could also be issued as build America bonds as long as they met the additional requirements in Section 54AA. Tribal Economic Development Bonds issued as build America bonds were subject to volume cap and there was a deadline for this type of issuance (December 31, 2010), so the current refunding guidance in the Corrected Notice is helpful for these bonds.

Now that the IRS has corrected this notice, all can be right enough with the bond universe for the time being – although more guidance on spiking the subsidy on build America bonds and other direct pay bonds would always be welcome.

[1] It is interesting to note that in using initial capitals for "Tribal Economic Development Bonds" in the Notice the IRS did not hew to the capitalization convention in the statute, which they've religiously done in spelling out BABs as "build America bonds" and not "Build America Bonds."

By Taylor Klavan on June 3, 2019

The Public Finance Tax Blog

Squire Patton Boggs

[5 Credits and Incentives That Can Boost the Value of Qualified Opportunity Zone Projects.]

Federal tax reform enacted in 2017 resulted in a program called qualified opportunity zones (QOZs) which enables tax savings through investment in distressed areas. But, did you know that projects and businesses receiving opportunity zone fund investment aren't precluded from seeking other credits and incentives?

In fact, state and local economic development agencies may be more likely to direct public dollars toward QOZ projects or businesses in the form of income tax incentives, hiring incentives, non-tax incentives, or property tax reductions.

Here are a few state, local, and federal tax credits and incentives businesses should consider when investing in QOZs.

[Continue reading.]

Orlando Business Journal

By Rob Calafell, Principal Tax Services and Debbie Singer, Senior Manager – RSM

Jun 2, 2019

[Novogradac State Tax Credit News Briefs – June 2019]

Maryland Gov. Larry Hogan signed legislation April 2 that expanded state tax incentives to opportunity zones (OZs) and extends the state historic tax credit program through 2024. S.B. 581

makes qualifying businesses and property in OZs eligible for the More Jobs for Marylanders program and certain tax credits. The bill also allows local jurisdictions to offer property tax credits for vacant OZ properties that are put back into use and makes other credits available through the Department of Commerce.

***

A bill to conform Hawaii to the Internal Revenue Code for investments in federal OZs in the state was enrolled by Gov. David Ige April 18. S.B. 1130 would be effective for taxable years beginning Jan. 1, 2019, and the OZ provisions would apply only to investments in Hawaii's OZs.

***

Legislation in Texas to create a 25 percent tax credit for investments in OZs and rural areas passed the House and was read before the state Senate April 17. H.B. 1000 would allow up to $35 million annually in insurance tax credits–Texas has no state income tax–to qualified opportunity funds (QOFs) that are registered as rural and opportunity funds. To be registered, QOFs must have invested at least $100 million in nonpublic companies located in either OZs or rural cities and counties that have created or retained a certain number of jobs. The bill would be effective Sept. 1.

Novogradac Journal of Tax Credits Volume 10 Issue 6

Tuesday, June 4, 2019

[IRS Says Special Program Bonds Including Tribal Development Bonds May Be Current Refunded.]

While the advance refunding of tax-advantaged bonds remains a thing of the past, the Internal Revenue Service (IRS) issued guidance on May 22, [Notice 2019-39], expanding the realm of current refundings to permit the current refunding of all existing and future tax-exempt bond programs that impose bond volume cap, issuance time deadlines, or both, for which the statute under which such programs operate does not address the permissibility of current refunding bonds.

Background

Over the years, Congress has enacted several targeted tax-exempt bond programs, often to provide disaster relief or promote economic development in underserved areas. Such bonds include "GO Zone Bonds" under former Section 1400N of the Internal Revenue Code of 1986, as amended (the Code), Midwest Disaster and Hurricane Ike Disaster Bonds under Code Sections 702(d)(1) and 704(a) of the Heartland Disaster Relief Act, Recovery Zone Facility Bonds under former Code Section 1400U-3, and Tribal Economic Development Bonds issued under Code Section 7871(f).

Unlike other tax-advantaged bonds, these targeted programs were authorized under statutory provisions that did not address whether an issuer could current refund such bonds. The Treasury and IRS have addressed on a piecemeal basis the ability to current refund certain of these programs. See, e.g., Notice 2012-3, 2012-3 I.R.B. 289 (GO Zone, Midwest, and Hurricane Ike Disaster Bonds); Notice 2014-39, 2014-5 I.R.B. 455 (Recovery Zone Facility Bonds); and Notice 2003-40, 2003-2 C.B. 20 (New York Liberty Bonds).

Notice 2019-39

Notice 2019-39 provides uniform guidance allowing the current refunding (directly or indirectly in a series of current refunding issues) of original bonds in existing and future tax-exempt bond programs that impose volume caps, issuance time deadlines, or both, on the original bonds and operate under statutory parameters that do not address the ability to current refund such bonds. The Notice uses the term “Qualified Bonds” to refer to bonds issued in these tax-exempt bond programs. The Notice, as corrected on May 31, provides that the phrase “original bonds” or “original Qualified Bonds” includes Tribal Economic Development Bonds issued as tax-advantaged build America bonds under former Code Section 54AA.

Notice 2019-39 permits current refunding (including indirect refunding in a series of current refunding issues) of the original Qualified Bonds without regard to bond volume cap or issuance time deadline requirements if the following conditions are met:

1. The original Qualified Bonds met any volume cap and deadline for issuance requirement;
2. The issue price of the current refunding issue is not greater than the outstanding stated principal amount of the original Qualified Bonds (with a special rule for refunded bonds issued with more than a de minimis amount of original issue discount or premium); and
3. The refunding bonds meet all applicable requirements for the Qualified Bonds.

Effective Date

Notice 2019-39 applies to current refunding issues issued on or after May 22, 2019, and may be applied to current refunding issues issued before that date.

by Rebecca L. Harrigal

Tuesday, June 4, 2019

TAX - COLORADO

City of Golden v. Sodexo America, LLC

Supreme Court of Colorado - May 20, 2019 - P.3d - 2019 WL 2167903 - 2019 CO 38

Taxpayer, a food service provider for a college, sought review of municipal finance department’s issuance of sales and use tax assessment.

The District Court granted summary judgment to municipality. Taxpayer appealed. The Court of Appeals reversed and remanded. Municipality petitioned for certiorari review, which was granted.

The Supreme Court held that:

- Sale of meals from taxpayer to college students occurred when the students paid college for their meal plans, rather than when students swiped meal plan cards and physically obtained the meals, and
- College’s payment of taxpayer was a wholesale sales transaction and thus exempt from sales tax under municipal code; overruling *City of Golden v. Aramark Educational Services*, LLC, 310 P.3d 262.

Sale of meals from food service provider to college students, as would constitute the taxable event in determining whether sales tax applied under municipal code, occurred when the students paid college for their meal plans as part of students' residence hall contracts, rather than when students swiped meal plan cards and physically obtained the meals; students did not provide any consideration to provider for the meals but rather promised to pay college for the meals through residence hall contracts' meal plans, and swipe of meal plan card functioned as nothing more than accounting mechanism that allowed college to track number of meals that a student had used.

College's payment of food service provider, which purchased, prepared, and served food to students, under monthly invoice was a wholesale sales transaction and thus exempt from sales tax under municipal code, where it was college that sold the prepared food to students pursuant to students' residence hall contracts and their incorporated meal plans, and college sold food to students at a higher price than what college paid to provider; overruling City of Golden v. Aramark Educational Services, LLC, 310 P.3d 262.

TAX - CONNECTICUT

Tuohy v. Town of Groton

Supreme Court of Connecticut - May 28, 2019 - A.3d - 331 Conn. 745 - 2019 WL 2203731

Taxpayers, who owned real, residential property in certain neighborhood, brought action against town and town assessor, challenging assessed value of their properties following revaluation conducted by town and seeking reduction of assessments.

Taxpayers moved for class certification. The Superior Court granted motion. Action was thereafter transferred, and following trial to the court, the Superior Court entered judgment for town and assessor. Taxpayers appealed.

The Supreme Court held that:

- Assessor's use of 1.35 adjustment factor to compensate for patterns of undervaluation of properties in neighborhood was not illegal, and
- Taxpayers failed to present any credible evidence of property values, as required to prove that valuation was manifestly excessive.

Town assessor's use, during mass-appraisal process for revaluation of real property, of 1.35 adjustment factor to compensate for patterns of undervaluation of properties in certain neighborhood relative to other neighborhoods in town was not illegal; use of ratio studies and direct equalization via application of adjustment factors was established component of mass-appraisal practice under uniform standards of professional appraisal practice and was specifically embraced by body that promulgated standards, and, further, assessor's methodology was consistent with regulations promulgated by Office of Policy and Management, and Office itself ultimately certified results of appraisal.

Taxpayers, who owned real property in certain neighborhood and who challenged property values assessed during town's revaluation, failed to present any credible evidence of property values, as required to prove that valuation was manifestly excessive for purposes of statute providing remedy when property was wrongfully assessed, although one taxpayer testified that neighborhood experienced 25% decrease in home-sale prices in two years prior to revaluation, where town assessor testified that application of 1.35 adjustment factor to properties in neighborhood was necessary to bring median assessment-to-sales ratio for neighborhood in line with other neighborhoods in town and to keep properties in neighborhood from being undervalued, and therefore undertaxed, relative to rest of town.

Enacting a Phased-in 50 Percent LIHTC Allocation Increase Could Create More Than 384,000 Affordable Rental Homes.

One of the most important provisions of the Affordable Housing Credit Improvement Act (AHCIA) of 2019 is the proposal to increase 9 percent allocations. This provision is justified by the tremendous unmet need for more affordable rental housing production. More than 11 million renter households pay more than 50 percent of their income on rent, according to Harvard's Joint Center on Housing Studies. This dramatically affects these households' ability to pay for other necessary expenses, such as transportation, health care, nutritious food, education, among others. The United States has a shortage of more than 7 million rental homes that are affordable and available to extremely low-income households, according to the National Low Income Housing Coalition.

The temporary 12.5 percent allocation increase was an important first step, bringing back approximately 28,000 more affordable rental homes over 10 years. But the temporary increase did not fully restore lost production from tax reform, nor did it increase production to significantly help close the gap in unmet need for affordable rental housing.

To that end, section 101 of AHCIA would increase the LIHTC by 50 percent from the post fiscal year 2018 omnibus appropriations baseline phased in from 2020 through 2024. Using recent data from the National Council of State Housing Agencies (NCSHA), Novogradac estimates this provision would create more than 384,000 additional affordable rental homes from 2020 through 2029.

Continue reading.

Published by Dirk Wallace, Michael Novogradac, Peter Lawrence on Wednesday, June 5, 2019 – 12:00am

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The Trump Administration Said These Tax breaks Would Help Distressed Neighborhoods. Who's Actually Benefiting?

Part of the Tax Cuts and Jobs Act of 2017 was a provision known as Opportunity Zones that was designed to significantly boost the fortunes of low-income communities. Like many previous government tax-incentive efforts to spark investment in distressed areas, the provision offers tax benefits to those who invest in these neighborhoods. Some experts say it will significantly boost their fortunes, but others aren't as enthusiastic.

Governors in all 50 states and five U.S. territories have designated opportunity zones — more than 8,700 in total. The size of the program has the potential to dwarf earlier attempts to encourage investment in poor neighborhoods, such as the enterprise zone programs begun in the 1980s.

"The sheer size of it is transformative," says John Bailey, a visiting fellow at the American Enterprise Institute.

Continue reading.

The Washington Post

By Dan Weil

June 6

[Clint Myers: Rise of the Rest and OZ Office Real Estate (Podcast Episode #33)]

Will office real estate be the driver for much of the economic growth across the nation's Opportunity Zones? Clint Myers…

Read More »

June 5, 2019

IRS Provides Guidance on Refinancings of Tribal Economic Development Bonds - Refinancings of TEDs and Other Targeted Bond Programs Allowed Without Additional Volume Cap Allocation: Holland & Knight

The Internal Revenue Service (IRS) on May 22, 2019, issued much awaited guidance in Notice 2019-39. This Notice allows for refinancings or refundings by Native American tribal governments of Tribal Economic Development bonds and loans (TEDs) without needing to obtain additional allocation of TED volume cap. The new Notice represents an important step in allowing tribes to currently refinance or refund outstanding TEDs without using any of the dwindling amount of TED volume cap from the U.S. Department of Treasury and IRS.

The Notice also applies similar rules to other targeted bond programs such as Gulf Opportunity Zone (GO Zone), Midwestern Disaster Area, Hurricane Ike Disaster Area and Recovery Zone Facility bonds. The Notice was issued in part to eliminate the need for separate program-by-program guidance regarding the volume cap exception for certain current refunding bonds (bonds issued to refund or refinance bonds of a prior issue not more than 90 days before the last expenditure of any proceeds of the refunding issue to pay principal or interest on the prior issue).

Purpose of Tribal Economic Development Bonds

In 2009, Congress enacted a special tax code provision for Tribal Economic Development Bonds – Code Section 7871(f) – to give Native American tribal governments "greater flexibility" to finance economic development projects. The only other opportunity for tribes to seek tax-exempt financing was, and continues to be, Code Section 7871(c), which imposes a restrictive "essential governmental function" test on tribal debt financing. Under the TED program, tribal governments may apply with the Treasury Department and IRS for a TED volume cap allocation to finance on-reservation, nongaming economic development projects with tax-exempt debt. Many tribes have used TEDs to finance such projects and have achieved a lower cost of borrowing since interest on TEDs is federally tax-exempt for the holder of such debt.

Congress limited TEDs to $2 billion worth of debt and gave the Treasury Department the authority to allocate the $2 billion volume cap among Native American tribal governments as deemed appropriate by Treasury in consultation with the U.S. Department of the Interior. As of April 1, 2019, no tribe may receive more than $100 million of TED volume cap, i.e., the greater of 1) 20 percent of the amount of available volume cap of $182,605,445.95 determined as described in IRS Notice 2012-48, or 2) $100 million. Tribal governments have been concerned for several years as the available volume cap of TEDs has dwindled with no Congressional relief in sight.

Why the Notice Was Issued

The IRS acknowledged that previously issued guidance for targeted bond programs, such as TEDs and disaster relief bond programs, with volume cap limitations and time restraints, did not address how refundings and refinancings fit within those programs' limitations. Prior notices relating to TEDs did not address the permissibility of issuing new TEDs in current refunding issues to refund or refinance outstanding TEDs.

As a result, questions have arisen regarding whether original TEDs may be refinanced in current refunding issues without the tribal government seeking additional TED allocation. Under Section 146(i) of the Code, the general rule for tax-exempt private activity bonds subject to volume cap is that current refundings of such bonds are exempt from volume cap to the extent that the amount of the refunding bonds does not exceed the outstanding amount of the refunded bonds. Because no such exception is specifically provided for TEDs, this created an ambiguity that prevented many bond lawyers from opining that TEDs could be refinanced on a tax-exempt basis without a new allocation of volume cap. Further, since TED volume cap is now very limited, many outstanding TEDs would have had to been paid at maturity or refinanced on a taxable basis.

What Does the Notice Say?

Specifically, Notice 2019-39 states that any current refunding issue the proceeds of which are used (directly or indirectly in a series of current refunding issues) to refund original TEDs qualifies for issuance as an issue of tax-exempt TEDs without regard to any bond volume cap or issuance time deadline for the original TEDs if all of the following requirements are met:

1. the original TEDs were issued with any required bond volume cap allocation and before any applicable time deadline for issuance of the original TEDs
2. the issue price of the new TEDs is no greater than the outstanding stated principal amount of the outstanding TEDs (with certain exceptions for existing TEDs previously issued with more than a de
3. minimus amount of original issue discount or premium)
   the current refunding issue meets all applicable requirements for the issuance of TEDs

Considerations for Tribal Governments

In summary, Notice 2019-39 clarifies that tribal governments need not seek an additional TED allocation to refinance or refund existing TEDs on a tax-exempt basis. The new Notice is welcome in light of the dwindling amount of nationwide TED bond allocation remaining. Native American tribes should review the Notice carefully as it represents an important opportunity for Native American tribal governments.

May 24, 2019

Holland & Knight LLP

Is Anyone Actually Investing in Opportunity Zone Funds?

"Opportunity zones are like high school sex," said Brett Messing, president of Skybridge Capital, by phone. "Everyone is talking about it, but nobody is doing it."

Whether the Tax Cuts & Jobs Act would close the so-called carried interest loophole when it passed in the fall of 2017, few seemed to notice back then that the law also created a new measure — one that has since become the financial buzzword du jour.

Investment firms are scrambling to take advantage of that program, which offers tax incentives to encourage investment in what the law calls opportunity zones, or low-income areas. But whether these investments offer more than tax incentives to allocators is up for debate.

David Schawel — chief investment officer of Family Management Corp., a registered investment adviser and broker-dealer serving wealthy individuals — offered his opinion on the structure on Twitter on Monday.

Continue reading.

Institutional Investor

By Alicia McElhaney

May 23, 2019

Advisors Must Weigh Benefits and Real Dangers Before Offering This Hot New Tax Play.

KEY POINTS

- The Tax Cuts and Jobs Act of 2017 introduced opportunity funds. They invest in economically distressed areas and offer a tax break for participants.
- Invest capital gains into a qualified opportunity zone fund and hold it for at least five years to get a tax advantage.
- Robert W. Baird & Co. will soon offer access to such a fund on its platform, but investors must be qualified purchasers with at least $5 million in investible net worth.

Continue reading.

CNBC

by Darla Mercado

MAY 28 2019 8:44 AM EDT

Opportunity Zones Give Big Law 'Pop-Up' Teams Plenty of Work.

- **2017 tax law provides tax incentives for investors in designated low-income zones**
- **Law firms use multidisciplinary teams to help current clients, and woo new ones**

The 2017 tax law created tax incentives for investors in certain economically distressed communities in the U.S., and it's keeping more than just tax lawyers busy.

A number of Big Law firms have created "pop up" working groups of tax, real estate, and private funds lawyers to advise clients looking to jump in on the investment action.

The law set 8,764 opportunity zones in mostly low-income tracts designated for tax breaks. The law allows investors, including banks and real estate developers, to delay or even reduce their taxes on profits from stocks and other assets if they invest in those areas.

As it turns out, these opportunity zones can be a boon for Big Law firms and smaller firms with a strong emphasis on multidisciplinary practices.

The opportunity zone teams are intended to exist only for limited time because investors must act by Dec. 31, 2026, and the pop-up teams tackle thorny issues relating to the new law, which attorneys call unusually broad.

For instance, there's no limitation on the amount of gain an investor can shelter, and there are very few restrictions on types of businesses that can operate in an opportunity zone, said Mark S. Edelstein, the chair of Morrison Foerster's global real estate group in New York. Edelstein is part of the firm's informal opportunity zone team of about 25 attorneys from their tax, real estate, and private funds practices that is trying to spin its varied expertise into new work and new clients.

The only businesses not allowed are "sin" businesses, he said, which traditionally include casinos, liquor stores, and massage parlors.

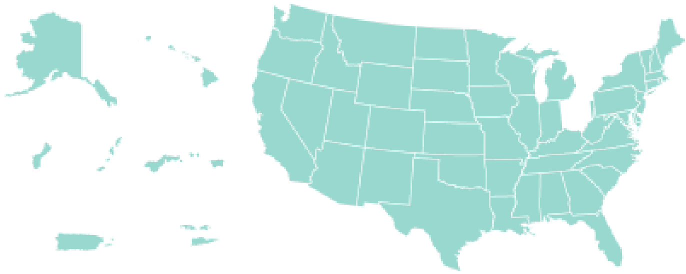
The teams are trying to capitalize on this new client service by figuring out how to advise clients on it and how to get hired, Edelstein said.

Clients include investors in opportunity zone funds, banks, real estate developers, business owners, and those who want to structure the funds.

"That's what law firms do. We provide services and get paid," he said.

Opportunity Zones

8,764 opportunity zones across U.S.
(50 states, D.C., five U.S. territories)



Big Law firms with opportunity zone teams include

- Ballard Spahr LLP
- K&L GATES
- McGUIREWOODS
- DuaneMorris
- Katten (Katten Muchin Rosenman LLP)
- Morgan Lewis
- NIXON PEABODY
- POLSINELLI
- SEYFARTH SHAW
- MORRISON FOERSTER

Key opportunity zone events

12/22/17
Tax Cuts and Jobs Act of 2017 signed into law

4/9/18
First set of opportunity zones designated in 18 states

10/29/18
IRS releases 1st tranche of opportunity zones guidance

4/17/19
IRS releases 2nd tranche of guidance

12/31/19
Last day to invest in opportunity zones fund to exclude 15% of gain invested from capital gains tax

12/31/26
Opportunity zones fund investment deadline

New Frontier

But opportunity zone teams aren't for every firm. The tax provisions are "broad," "complicated," and, of course, new. Firms need that tax expertise but also a broad bench of attorneys in other areas.

Those with strong real estate and capital markets groups with a "talented and entrepreneurial" tax group are "very-well positioned" to effectively guide their clients in navigating the opportunity zone rules, Seyfarth Shaw's Steven R. Meier said. Meier, who's located in Chicago, is chair of Seyfarth's corporate department and co-chair of the firm's tax practice, as well a member of the firm's opportunity zones team.

It's still a "new frontier" in investment, said Jay Blaivas, a partner with Morrison & Foerster's tax group in New York and Edelstein's colleague on the opportunity zone team.

Lawyers can add a lot of value because these aren't necessarily deals where investors have "tried and true" experience, like an M&A sponsor who's done 100 such deals before, said Adam J. Tejeda, a partner in K&L Gates' New York office and a member of its opportunity zones team.

"It's a new product and we need to be proactive, ahead of the curve," Morrison & Foerster's Edelstein said.

And for a number of firms with opportunity zone teams, the approach—using an ad hoc, multidisciplinary group to tackle an issue—is familiar territory.

McGuire Woods has groups working on projects like public private partnerships, new markets, and energy project development, said Douglas E. Lamb, a partner in the firm's Richmond office and a member of its opportunity zones team.

Seyfarth's multidisciplinary teams also work on EB-5 immigration issues for foreign investors, fintech, and cannabis challenges, Meier said.

Work Is Coming

Opportunity zone work has been steady since the IRS released its first set of clarifying regulations in October. Big Law partners who spoke with Bloomberg Law business has increased since the second set was released in mid-April and will continue to pick up steam until the end of the year.

"We see more activity starting to happen," Edelstein said. And with the newest set of regulations, there will be more deals, he said. The pop-up team will have to identify for clients the risks and benefits and how to navigate between them, he said.

As for investors, the moment is now, said Gregory A. Riegle, a partner with McGuire Woods' real estate practice in Tyson's Corner, Va., and a member of its opportunity zones team.

Those who invest any profits made on stocks or other assets in an opportunity zone fund within 180 days of the sale of the assets and before Dec. 31, 2019, can cut the profit subject to tax by 15 percent if they keep their money in that fund for seven years.

The percentage drops to 10 for investments made after 2019 and that are kept in the fund for at least five years. A qualified opportunity fund is an investment vehicle for investing in eligible property located in a qualified opportunity zone.

Although clients will get the maximum benefit by investing by the end of this year, opportunity zone work for law firms has a "longer shelf life than you'd think," said Mary Burke Baker, a government affairs counselor with K&L Gates in Washington and a member of the firm's opportunity zones team.

Investors can sink money into a fund until the end of 2026 and still get the biggest benefit: the tax-free treatment of capital gains that they have when they sell their interest in the opportunity fund, she said. To take advantage of this benefit, the money must remain in the fund for at least 10 years.

And while law firms anticipate an increase in work as deals accelerate, there's the potential for even more down the road—and it's work with which they're quite familiar.

"We suspect there are going to be a lot of lawsuits coming out of this," Edelstein said.

Bloomberg Tax

by Melissa Heelan Stanzione

Posted May 28, 2019, 1:50 AM

– With assistance from Lydia O'Neal

Opportunity Zones' Biggest Myths.

America's corporate tax rate is no longer the most controversial part of the Tax Cuts and Jobs Act of 2017. A then-little-known provision establishing tax incentives for investment in Opportunity Zones – legally designated, economically-distressed census tracts – has generated debate nationwide. Within many of the designated areas, the prospect of fresh capital has been greeted with enthusiasm. Opportunity Alabama CEO and Founder Alex Flachsbart, for example, attests that "this small part of a bipartisan tax act has done more in the last 15 months to mobilize investors and communities across the state than any other federal tax incentive in the last 15 years."

Opponents of the legislation, however, argue that Opportunity Zones will benefit investors more than communities and pour fuel on to the flames of gentrification. To resolve some of this discrepancy between local excitement and national concern, let's address some of the most common misconceptions about Opportunity Zones.

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Forbes

by Sorenson Impact
Contributor

May 29, 2019, 10:11am

Scott Turner: The White House's Vision for Opportunity Zones (Podcast Episode #31)

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June 3, 2019

TAX - NEW YORK

VCP One Park REIT LLC v. New York City Tax Appeals Tribunal

Supreme Court, Appellate Division, First Department, New York - April 25, 2019 - N.Y.S.3d - 171 A.D.3d 632 - 2019 WL 1798261 - 2019 N.Y. Slip Op. 03149

Article 78 proceeding was brought to review determination of the New York City Tax Appeals Tribunal that transfer of economic interest in real property was not entitled to the reduced New York City Real Property Transfer Tax (RPTT) rate applicable to real estate investment trust (REIT) transfers.

The Supreme Court, Appellate Division, held that Administrative Code provision making taxable consideration equal to estimated market value as determined for property tax purposes did not apply.

In determining whether transfer of an economic interest in real property was entitled to the reduced New York City Real Property Transfer Tax (RPTT) rate applicable to real estate investment trust (REIT) transfers, Administrative Code provision making taxable consideration equal to estimated market value as determined for property tax purposes did not supersede Code's 40% test, requiring that the value of the ownership interests in the REIT received by the grantor as consideration for the transfer be at least 40% of the value of the equity interest in the real property or economic interest therein.

TAX - OHIO

City of Upper Arlington v. McClain

Supreme Court of Ohio - May 9, 2019 - N.E.3d - 2019 WL 2034681 - 2019 -Ohio- 1726

Taxpayer appealed from decision of the Board of Tax Appeals denying its claim for property-tax exemption for several properties. City and city board of education moved to dismiss for lack of jurisdiction.

The Supreme Court held that taxpayer was not required to initiate certified-mail service of notice of appeal within 30-day period for filing notice of appeal, and thus dismissal on that ground was not warranted.

Taxpayer was not required to initiate certified-mail service of notice of appeal within 30-day period for filing notice of appeal of decision by Board of Tax Appeals that denied its property-tax exemption for several properties, under statute requiring notice of appeal to be served upon all appellees by certified mail, and thus city and school board were not entitled to have appeal dismissed for lack of jurisdiction based on failure to timely perfect appeal; statute did not state timeline for certified-mail service of notice of appeal, and taxpayer served notice of appeal on city and school board by certified mail.

DEDICATION - LOUISIANA

Jefferson Parish School Board v. TimBrian LLC

Court of Appeal of Louisiana, Fifth Circuit - May 9, 2019 - So.3d - 2019 WL 2052336 - 18-349 (La.App. 5 Cir. 5/9/19)

School board filed action against business owner, seeking to annul tax sale of property business owner had acquired in tax sale, and filed supplemental and amending petition adding parish as defendant.

The District Court granted summary judgment to parish and denied business owner’s motion for summary judgment. Following dismissal of initial appeal, business owner appealed.

The Court of Appeal held that:

- School board sufficiently alleged cause of action, and
- Genuine issues of material fact precluded summary judgment.

School board sufficiently alleged cause of action against business owners who purchased property adjacent to school in tax sale; although school board acknowledged it was not owner of property, it asserted various property interests including servitudes of use, passage, right of way and usufruct resulting from its actual possession of the property, and thus had a legal interest in the subject matter of the litigation.

Genuine issues of material fact as to whether property the school used as a playground had been donated for public use as “then North Metairie Road” by the original owner in 1837 precluded summary judgment in action brought by school district to invalidate purchase of property by business owners at tax sale; expert reports differed on whether “North Metairie Road” existed, or whether the 1837 Act of Deposit was a formal, statutory or implied dedication.
