
TAX - OREGON

D.E. Shaw Renewable Investments, LLC v. Department of Revenue

Supreme Court of Oregon - October 5, 2023 - 371 Or. 384 - 537 P.3d 529

Taxpayers, which operated wind farms that were centrally assessed by the Department of Revenue and which had persuaded the Department that the valuation methodology that the Department had used to assess that property for a particular tax year had been flawed, appealed from the Department's refusal of their request that the Department use the corrected methodology to also reduce the assessed value of their property for two previous tax years.

The Tax Court entered summary judgment for the Department. Taxpayers appealed.

The Supreme Court held that the statute governing the correction of errors in the certified assessment roll precluded the Department from exercising its general statutory authority to reduce the assessed value of taxpayers' property for the two previous tax years at issue.

Statute governing the correction of errors in the certified assessment roll precluded the Department of Revenue from exercising its general statutory authority to reduce the assessed value of taxpayers' property—which consisted of wind farms that were centrally assessed by the Department—for two prior tax years, even though taxpayers had persuaded the Department that valuation methodology that it had used to assess their property for different, but more recent, prior tax year had been flawed; taxpayers did not request a conference with the Department's director to challenge the Department's valuation opinion before the tentative assessments for those two prior years became final, and statute governing correction of errors prohibited the director from correcting an error in the valuation judgment that was an error in the Department's opinion of the value of property.

TAX - MAINE

Cassidy Holdings, LLC v. Aroostook County Commissioners et al.

Supreme Judicial Court of Maine - November 9, 2023 - A.3d - 2023 WL 7393512 - 2023 ME 69

Taxpayer, the owner of a nonresidential property with equalized municipal valuation of $1 million or greater, appealed city board of assessor's decision denying its property tax abatement application to county commissioners.

The commissioners declined the appeal based on their conclusion they lacked subject matter jurisdiction.

Taxpayer appealed that decision to the Superior Court. The Superior Court granted the appeal and remanded the matter to county commissioners. County commissioners appealed.

The Supreme Judicial Court held that taxpayer was not required to pursue appeal before the State Board of Property Tax Review because the county commissioners and State Board had concurrent jurisdiction over appeals of a municipality's denial of an abatement application.

TAX - TEXAS

Harward v. City of Austin

United States Court of Appeals, Fifth Circuit - October 11, 2023 - 84 F.4th 319

Shoreline property owners brought action against city, seeking various declarations, injunctions, and writs of mandamus regarding claim that city's ordinance declaring that their properties were within city's full-purpose jurisdiction and subject to taxation constituted an illegal annexation attempt under federal and Texas law.

The United States District Court for the Western District of Texas adopted the report and recommendation of the United States Magistrate Judge and dismissed all claims. Property owners appealed.

The Court of Appeals held that:

- The Tax Injunction Act (TIA) did not preclude property owners' claims for a declaration that their properties were within city's extraterritorial or limited-purpose jurisdiction and for invalidation of city ordinance;
- TIA did not bar property owners' alternative claims for equal municipal services from city or just compensation for the taking of their properties' jurisdictional status;
- TIA barred property owners' request for a declaration that city's notices to appraisal district that the properties were within taxing-unit boundaries were invalid; and
- TIA barred property owners' request or a writ of mandamus directing city to instruct appraisal district and county assessor-collector that the properties were in city's extraterritorial or limited-purpose jurisdiction.

Whether the Tax Injunction Act (TIA) prevented the district court from exercising jurisdiction over shoreline property owners' action against city claiming that city's ordinance declaring that their properties were within city's full-purpose jurisdiction and subject to taxation constituted an illegal annexation attempt under federal and Texas law was a question of subject-matter jurisdiction, which the Court of Appeals would review de novo.

For the Tax Injunction Act (TIA) to apply, the requested relief must to some degree stop the assessment, levy, or collection of state taxes; however, such a finding is insufficient where the relief would do so only indirectly, and in such a scenario, a court must make a more exacting examination to determine from the face of the taxpayer's complaint whether the target of a requested injunction is a tax obligation, with considerations including whether the targeted law inflicts costs separate and apart from the tax, whether the targeted law bears a close relationship to the tax, and whether the relief attempts to circumvent a state's "pay-now-sue-later" tax scheme.

Tax Injunction Act (TIA) did not preclude shoreline property owners' claims for a declaration that their properties were within Texas city's extraterritorial or limited-purpose jurisdiction and for invalidation of city ordinance declaring that their properties were within city's full-purpose jurisdiction and subject to taxation; property owners were challenging a separate legal mandate as opposed to a tax, and the challenged ordinance imposed costs separate and apart from the property taxes in that it subjected the properties to the city's broad home-rule authority.

Tax Injunction Act (TIA) did not bar shoreline property owners' alternative claims for equal municipal services from Texas city or just compensation for the taking of their properties' jurisdictional status, which claims stemmed from challenge to city's ordinance declaring that the properties were within city's full-purpose jurisdiction and subject to taxation; the requests would not stop the assessment, levy, or collection of city taxes.

Tax Injunction Act (TIA) barred shoreline property owners' request for a declaration that Texas city's notices to appraisal district that the properties were within taxing-unit boundaries were invalid, which was a request made in action challenging city's ordinance declaring that their properties were within city's full-purpose jurisdiction and subject to taxation; the request went beyond the ordinance and directly challenged the state's taxing power by affirmatively precluding the appraisal district from assessment, levy, and collection of future taxes on the properties.

Tax Injunction Act (TIA) barred shoreline property owners' request for a writ of mandamus directing Texas city to instruct appraisal district and county assessor-collector that the properties were in city's extraterritorial or limited-purpose jurisdiction, which was a request made in action challenging city's ordinance declaring that their properties were within city's full-purpose jurisdiction and subject to taxation; the request went beyond the ordinance and directly challenged the state's taxing power by affirmatively precluding the appraisal district from assessment, levy, and collection of future taxes on the properties.

US State Tax Revenue Drops in Sign of Tough Budget Decisions Ahead.

- **Revenue fell 14th straight month in September: Urban Institute**
- **Fixes include spending cuts, tax hikes, using rainy-day funds**

US states' tax revenue is sliding broadly, raising the prospect of difficult budget decisions in coming years for officials as they spend through cash amassed during the pandemic.

Total state tax revenue sank in September for the 14th straight month on an inflation-adjusted basis, falling by 5.6% from a year earlier, according to a fresh analysis from the Washington-based Urban Institute. Of those that provided information, 34 of 46 states reported year-over-year declines.

Continue reading.

Bloomberg CityLab

By Tanaz Meghjani

November 10, 2023

TAX - PENNSYLVANIA

School District of Philadelphia v. Board of Revision of Taxes

Commonwealth Court of Pennsylvania - October 6, 2023 - A.3d - 2023 WL 6527784

Public school district appealed certain commercial property assessments to the local board of revision of taxes as part of district's policy to appeal assessments that, if successful, would yield at least $7,500 in revenue.

The board upheld the assessments "on the papers." District appealed. The Court of Common Pleas granted property owners' motions to quash the assessment appeals. District appealed. The Commonwealth Court vacated the trial court's decision and remanded the matter. On remand, the Court of Common Pleas again granted property owners' motions to quash. District appealed.

The Commonwealth Court held that the district's implementation of its appeal policy violated the tax-uniformity clause of the Pennsylvania Constitution.

Implementation of public school district's policy to target its tax appeals to assessments that, if successful, would yield at least $7,500 in revenue, violated the tax-uniformity clause of the Pennsylvania Constitution; although the appeal policy might have been facially neutral, its implementation tilted toward a selection of a sub-classification of properties, i.e., commercial and industrial, given that, among other things, real estate advisor retained by district randomly rejected 520,000 properties by "eyeballing" and also that at least 33 assessments of single-family residential properties met the monetary threshold but were not appealed.

[Love Me Tender [Bonds] – An Overview: Squire Patton Boggs]

The famous song, *Love Me Tender*, by Elvis Presley, includes lyrics such as "We'll never part" and about being together " 'Til the end of time." In contrast to Elvis' wish, the issuer of tax-exempt bonds that makes a tender offer is hoping the exact opposite happens to the relationship between the bondholder and tax-exempt bond. In other words, the issuer hopes that economics drive a wedge between the two.

A tender offer is an offer by an issuer of bonds made to its bondholders to repurchase its outstanding bonds at a specified price on a specific date. There are several common reasons why an issuer may want to make a tender offer to its bondholders. First, the outstanding bonds may be paying interest at a rate that is higher than the current market rate, but the outstanding bonds are not yet callable (and taxable advance refundings no longer produce savings). Second, the issuer's outstanding bonds may be trading on the open market for less than face value. Thus, the issuer can offer to repurchase its bonds by paying above fair market value, but below the face amount, possibly saving itself some money (depending upon the time-value-of-money factors). Third, an issuer may have cash on hand and would like to pay down some of its liabilities, but its bonds may not be currently callable (and taxable advance refundings no longer produce savings). An issuer may offer cash or new bonds in exchange for the outstanding bonds being tendered. In the alternative, the issuer may offer to adjust the terms of the outstanding bonds.

Continue reading.

By Cynthia Mog on October 31, 2023

The Public Finance Tax Blog

Squire Patton Boggs

TAX - PENNSYLVANIA

Downingtown Area School District v. Chester County Board of Assessment Appeals

Commonwealth Court of Pennsylvania - October 6, 2023 - A.3d - 2023 WL 6526193

School district appealed from county board of assessment appeals' denial of district's appeal of taxpayer's real property assessment.

The Court of Common Pleas granted district's tax assessment appeal, ordered that assessment of taxpayer's property be increased to comport with its new fair market value, and rejected taxpayer's constitutional challenges to district's tax assessment appeal policy. Taxpayer appealed.

The Commonwealth Court held that school district's tax assessment appeal policy, although facially neutral, created an unconstitutional lack of uniformity as applied randomly.

School district's tax assessment appeal policy, although facially neutral, created a lack of uniformity as applied, in violation of the Uniformity Clause of the Pennsylvania Constitution; district used a monetary threshold for identifying properties for tax assessment appeal, but did not even attempt to capture each and every assessment that would meet monetary threshold, and instead implemented its policy in an arbitrary fashion, creating a systematic and disparate treatment of taxpayers, both those overassessed and underassessed.

TAX - PENNSYLVANIA

School District of Philadelphia v. Board of Revision of Taxes

Commonwealth Court of Pennsylvania - October 6, 2023 - A.3d - 2023 WL 6527784

Public school district appealed certain commercial property assessments to the local board of revision of taxes as part of district's policy to appeal assessments that, if successful, would yield at least $7,500 in revenue.

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TAX - CALIFORNIA

One Technologies, LLC v. Franchise Tax Board

Court of Appeal, Second District, Division 1, California - October 23, 2023 - Cal.Rptr.3d - 2023 WL 6969230

Taxpayer, which was a Delaware limited-liability company (LLC) that did business nationwide, filed a complaint for refund against the Franchise Tax Board, which complaint alleged that voter-approved initiative measure that, in order to create a funding method for clean energy job creation, generally required multistate businesses to apportion their California taxable income based on the single factor of in-state sales was invalid.

The Superior Court sustained Board's demurrer. Taxpayer appealed.

The Court of Appeal held that the measure did not violate the California Constitution's single-subject requirement.

An initiative measure does not violate the California Constitution's single-subject requirement if, despite its varied collateral effects, all of its parts are reasonably germane to each other, and to the general purpose or object of the initiative; that "reasonably germane" standard is an accommodating and lenient manner so as not to unduly restrict the people's right to package provisions in a single bill or initiative.

Voter-approved initiative measure that, in order to create a funding method for clean energy job creation, generally required multistate businesses to apportion their California taxable income based on the single factor of in-state sales did not violate the California Constitution's single-subject requirement; measure's provisions were reasonably germane to its purpose since they provided the mechanisms to raise tax revenues and direct them to clean energy job creation, and despite arguments that the measure also allowed cable companies expending $250,000,000 or more in California to reduce their in-state sales figure by half for taxation purposes and that such a "cable company tax break" was not mentioned in the measure's findings and declarations, the official or proposed titles, or the Attorney General's summary, the whole of the measure was laid out in a 4 ½-page voter information guide.

TAX - GEORGIA

DeKalb County v. City of Chamblee

Court of Appeals of Georgia - October 18, 2023 - S.E.2d - 2023 WL 6859224

City brought declaratory judgment action against county and various county officials, alleging that county failed to properly assess and pay city occupational tax on leasehold interests at county-owned airport located within city and county.

The Trial court denied county's motion to dismiss. After obtaining certificate of immediate review from the trial court, county filed application for interlocutory appeal, which was granted.

The Court of Appeals held that:

- City failed to state a claim for declaratory relief under Declaratory Judgment Act;
- City failed to state a claim for collection of past taxes and appointment of an auditor;

- County was not liable for occupancy taxes because it was not a “business” under city code; and
- There was no final ruling to review on issue of city’s derivative claim for attorney fees.

City did not face any uncertainty as to any of its own future conduct but instead only sought an adjudication of issues that would impact the future conduct of county when it requested the court to determine that statute authorizing municipal airport owners to lease property required that county’s leasehold interests at county-owned airport located within city and county be treated as taxable estates, which would provide city with taxable revenue, and thus, it failed to state a claim for declaratory relief under the Declaratory Judgment Act against county; city sought to determine propriety of county’s actions, not its own, and so any judgment could not guide and protect city with regard to some future act.

City failed to point to any statutory provision authorizing its lawsuit against county for damages resulting from county’s alleged failure to assess ad valorem taxes for leasehold interests at county-owned airport located within city and county, and thus, city failed to state a claim for collection of past taxes and for appointment of an auditor; separation of powers doctrine required specific legislative empowerment for the judiciary to act regarding executive function in collection of a tax.

County was not liable for occupancy taxes for its leasehold interests at county-owned airport, located within city and county, under city code which provided in pertinent part that each person engaged in a business, trade, or profession or occupation with location within city shall pay an occupational tax for said business, trade, or profession or occupation, because county’s operation of the airport qualified as a governmental function, not a “business” under city’s code; county did not operate airport for purpose of raising revenue or producing income, but instead, it controlled the airport for public, government, and municipal purposes, as provided by statute authorizing political subdivisions to acquire airports for such purposes.

There was no final ruling by the trial court upon city’s derivative claim for attorney fees in city’s action against county seeking declaratory relief for county’s failure to pay occupancy taxes it allegedly owed city, and as such, there was nothing for Court of Appeals to review on appeal of trial court’s denial of county’s motion to dismiss the suit, where trial court expressly “reserved ruling” on city’s attorney fees claim.

TAX - VIRGINIA

McKeithen Trustee of Craig E. Caldwell Trust U/A Dated December 28, 2006 v. City of Richmond

Supreme Court of Virginia - October 19, 2023 - S.E.2d - 2023 WL 6884689

Judgment creditor, a junior lienholder, moved for payment of remaining, unclaimed portion of surplus proceeds from judicial sale of judgment debtor’s property to satisfy city’s tax lien.

The Richmond Circuit Court denied motion and denied reconsideration. Judgment creditor appealed.

The Supreme Court held that:

- Unclaimed surplus proceeds escheated to city pursuant to statute governing judicial tax sales, but
- Escheat provision of statute violated takings clause of the State Constitution as applied.

Under statute governing distribution of surplus proceeds after judicial sale of property to collect delinquent local real estate taxes, the unclaimed portion of surplus proceeds held in the court’s registry escheated to city after expiration of the two-year deadline for unknown lien beneficiaries to make a claim, even though city's tax lien had been fully satisfied.

Escheat provision of statute governing distribution of surplus proceeds after a judicial sale of property to collect delinquent local real estate taxes violated the takings clause of the State Constitution as applied to judgment creditor that unsuccessfully sought the remaining, unclaimed portion of surplus proceeds to satisfy its junior lien after city's tax lien had been fully satisfied and unknown senior lien beneficiaries did not make claim within two years of judicial confirmation of sale, where city laid claim to the unclaimed proceeds solely by operation of the mandatory statutory escheat, and city did not assert any specific public-use justification.

Blue and Red States Slash Taxes Despite Warnings of Hard Times Ahead.

Since 2021, half the states have cut personal income tax rates.

With a $750 million budget surplus on hand, there was little doubt whether North Dakota lawmakers would cut taxes earlier this year—the question was how much.

"The surplus was strong, and we believe it's going to be sustained into the future," said state Rep. Craig Headland. "So, it just made sense to cut taxes."

Headland was among the Republicans who negotiated terms of the legislature's $515 million tax cut this year—70% of which came from lowering personal income tax rates. The cuts leave North Dakota with the lowest tax rate among the states that collect income taxes.

In a special session this week, the legislature is considering more tax cuts that would exempt about 50,000 North Dakotans who earn $60,000 or less from income taxes. And Republicans, who control both chambers and the governor's office in North Dakota, plan to continue their march toward eliminating the state income tax; Headland said he plans to introduce such a bill when the legislature reconvenes in 2025.

Continue reading.

Route Fifty

By Kevin Hardy,
Stateline

OCTOBER 25, 2023

States Pitch Mileage Tax to Bridge Gap in Federal Highway Funding.

The main source of federal funding for highways and transit could run out of money by 2028, unless Congress finds a way to fix long-standing problems with the gas tax.

The primary federal account that provides funding to states for highways and transit could run out of money by 2028 unless Congress fixes long-standing problems, an expert told U.S. House members Wednesday.

Chad Shirley, an analyst for the Congressional Budget Office, said that the short-term influx of money from the 2021 infrastructure law would run out in five years, once again forcing Congress to decide whether to raise new transportation taxes, cut spending or use other federal money to make up for the transportation funding shortfall.

"If balances in the highway account or in the transit account go to zero, the federal government can't make its payments to state and local governments on a timely basis," Shirley testified during a hearing of the highways and transit subcommittee of the House Transportation and Infrastructure Committee.

Continue reading.

Route Fifty

By Daniel C. Vock

OCT 18, 2023

TAX - OREGON

D.E. Shaw Renewable Investments, LLC v. Department of Revenue

Supreme Court of Oregon - October 5, 2023 - P.3d - 371 Or. 384 - 2023 WL 6474466

Taxpayers, which operated wind farms that were centrally assessed by the Department of Revenue and which had persuaded the Department that the valuation methodology that the Department had used to assess that property for a particular tax year had been flawed, appealed from the Department's refusal of their request that the Department use the corrected methodology to also reduce the assessed value of their property for two previous tax years.

The Tax Court entered summary judgment for the Department. Taxpayers appealed.

The Supreme Court held that the statute governing the correction of errors in the certified assessment roll precluded the Department from exercising its general statutory authority to reduce the assessed value of taxpayers' property for the two previous tax years at issue.

Statute governing the correction of errors in the certified assessment roll precluded the Department of Revenue from exercising its general statutory authority to reduce the assessed value of taxpayers' property—which consisted of wind farms that were centrally assessed by the Department—for two prior tax years, even though taxpayers had persuaded the Department that valuation methodology that it had used to assess their property for different, but more recent, prior tax year had been flawed; taxpayers did not request a conference with the Department's director to challenge the Department's valuation opinion before the tentative assessments for those two prior years became final, and statute governing correction of errors prohibited the director from correcting an error in the valuation judgment that was an error in the Department's opinion of the value of property.

TAX - MAINE

Oakes v. Town of Richmond

Supreme Judicial Court of Maine - October 3, 2023 - A.3d - 2023 WL 6430640 - 2023 ME 65

Taxpayer filed two-count complaint for declaratory judgment and damages, alleging she did not have a taxable interest in property and seeking reimbursement for past paid taxes, interest, and a refund of purchase price.

The Superior Court granted town's motion to dismiss for failure to state a claim, and taxpayer appealed.

The Supreme Judicial Court held that:

- Abatement process is the exclusive process for pursuing a claim that a tax is discriminatorily excessive, a challenge to an assessment practice or methodology, and a true overvaluation claim, but exemption claims may be pursued through either the abatement process or a declaratory judgment action, and other challenges to a tax assessment may be pursued through either the abatement process or a declaratory judgment action; overruling *Talbot v. Town of Wesley*, 100 A. 937, and *Berry v. Daigle*, 322 A.2d 320;
- Taxpayer could use declaratory judgment method to challenge property tax on the ground that the town lacked the authority to impose the tax upon her because she did not own the land at issue; and
- Taxpayer could pursue compensation under statute allowing compensation based on a clerical error.

TAX - NEVADA

[Orbitz Worldwide, LLC v. Eighth Judicial District Court in and for County of Clark]

Supreme Court of Nevada - September 28, 2023 - P.3d - 2023 WL 6350110 - 139 Nev. Adv. Op. 40

Relators commenced private action on behalf of the state against online travel companies, asserting causes of action under the Nevada False Claims Act (NFCA), alleging that companies knowingly avoided obligations to pay transient-lodging taxes mandated by county and state law.

Following commencement of county's NFCA lawsuit against same companies, the companies moved for summary judgment in relators' suit on grounds of the government-action bar, triggered by county's NFCA case. The District Court denied the motion and then later denied companies' motion for reconsideration of that decision. Companies filed petition for writ of mandamus.

The Supreme Court held that:

- As a matter of first impression, government-action bar in NFCA contained no sequencing requirement, and so, when applicable, statute requires dismissal of a private NFCA action even if civil action on behalf of state or political subdivision was filed after the private action;
- As a matter of first impression, when a civil action under NFCA has been brought by or on behalf of a state governmental entity, the government-action bar presents no bar to a separate action on behalf of a different governmental authority, even if the two suits involve same allegations or transactions;
- Government-action bar did not require dismissal of relators' private action against online travel

companies; and

Failure to apply government-action bar did not interfere with Attorney General's control over private NFCA suits.

Supreme Court's exercise of discretion to entertain petition for writ of mandamus filed by online travel companies challenging district court's denial of its motion for summary judgment in relators' qui tam Nevada False Claims Act (NFCA) suit alleging that companies knowingly avoided paying transient-lodging taxes was warranted, where petition raised purely legal questions of first impression regarding effect of NFCA's government-action bar when a government entity files suit after the private qui tam action and the two suits involve two distinct governmental entities, the issues were of statewide importance, and moreover, the interpretation of the government-action bar at early stages of litigation furthered judicial economy.

Government-action bar in the Nevada False Claims Act (NFCA), stating that an NFCA action may not be maintained by a private plaintiff if the action is based upon allegations or transactions that are the subject of civil action or proceeding to which state or political subdivision is already a party, contains no sequencing requirement, and thus, when applicable, the statute requires dismissal of private qui tam NFCA action brought on behalf of the state even if civil action brought by state or political subdivision was filed after the private action.

When a civil action under the Nevada False Claims Act (NFCA) has been brought by or on behalf of a state governmental entity, the government-action bar presents no bar to a separate private action on behalf of a different governmental entity, even if the two suits involve same allegations or transactions.

Government-action bar in the Nevada False Claims Act (NFCA) did not require dismissal of relators' private action against online travel companies asserting that companies knowingly avoided obligations to pay transient-lodging taxes mandated by county code and state law by engaging in scheme to collect tax based on higher, retail room rate, but remitting tax based on lower, discounted room rate negotiated with hotels, even though county later filed own NFCA against same companies based on same allegations or transactions, where relators sought recovery of portion of transient-lodging tax to which the state, not county authorities, was entitled, and thus brought case only on their and that of the state, and state was not party to action brought by county.

Failure to apply government-action bar under the Nevada False Claims Act (NFCA) when private qui tam action was brought on behalf of the state against online travel companies for alleged scheme to avoid remitting full amount owed for transient-lodging taxes and county filed subsequent civil action on its own account against same companies did not interfere with Attorney General's control over private NFCA suits, as the Attorney General still had the right to intervene and use other procedural mechanisms to exercise a certain amount of control.

TAX - TEXAS

[Harward v. City of Austin]

United States Court of Appeals, Fifth Circuit - October 11, 2023 - F.4th - 2023 WL 6617932

Shoreline property owners brought action against city, seeking various declarations, injunctions, and writs of mandamus regarding claim that city’s ordinance declaring that their properties were within city’s full-purpose jurisdiction and subject to taxation constituted an illegal annexation attempt under federal and Texas law.

The United States District Court adopted the report and recommendation of United States Magistrate Judge and dismissed all claims. Property owners appealed.

The Court of Appeals held that:

- The Tax Injunction Act (TIA) did not preclude property owners’ claims for a declaration that their properties were within city’s extraterritorial or limited-purpose jurisdiction and for invalidation of city ordinance;
- TIA did not bar property owners’ alternative claims for equal municipal services from city or just compensation for the taking of their properties’ jurisdictional status;
- TIA barred property owners’ request for a declaration that city’s notices to appraisal district that the properties were within taxing-unit boundaries were invalid; and
- TIA barred property owners’ request or a writ of mandamus directing city to instruct appraisal district and county assessor-collector that the properties were in city’s extraterritorial or limited-purpose jurisdiction.

Tax Injunction Act (TIA) did not preclude shoreline property owners’ claims for a declaration that their properties were within Texas city’s extraterritorial or limited-purpose jurisdiction and for invalidation of city ordinance declaring that their properties were within city’s full-purpose jurisdiction and subject to taxation; property owners were challenging a separate legal mandate as opposed to a tax, and the challenged ordinance imposed costs separate and apart from the property taxes in that it subjected the properties to the city’s broad home-rule authority.

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The Superior Court granted town's motion to dismiss for failure to state a claim, and taxpayer appealed.

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- Taxpayer could use declaratory judgment method to challenge property tax on the ground that the town lacked the authority to impose the tax upon her because she did not own the land at issue; and
- Taxpayer could pursue compensation under statute allowing compensation based on a clerical error.

TAX - ILLINOIS

MB Financial Bank, N.A. v. Brophy

Supreme Court of Illinois - September 21, 2023 - N.E.3d - 2023 IL 128252 - 2023 WL 6153041

Taxpayers whose apartment-complex property had been taken by city in condemnation action brought declaratory judgment action against county treasurer seeking refund of property taxes paid between the date the city filed its condemnation complaint and the date it acquired taxpayers' property.

The Circuit Court dismissed action. Taxpayers appealed. The Appellate Court affirmed in part and reversed in part. Treasurer petitioned for leave to appeal, which was granted, and taxpayers sought cross-relief.

The Supreme Court held that city's title to property did not vest retroactively to date of filing of condemnation petition and thus did not relieve taxpayers from property tax liability for period between date of filing on condemnation complaint and date of payment of compensation; overruling *City of Chicago v. McCausland*, 379 Ill. 602, 41 N.E.2d 745.

Statute providing that property acquired for a use that is exempt from taxation shall be exempt on the date of the right of possession "except that property acquired by condemnation is exempt as of the date the condemnation petition is filed" does not render a condemning authority liable for property taxes from date a condemnation action is filed; rather, statute applies only if the relation-back rule is in effect to make the tax-exempt status of the property relate back to date condemnation action was filed.

Municipal Market Rolls Out Exemption Worry Tour Again.

The municipal market, may be the most sensitive areas of fixed income, knowing that our existence is a function of the tax-code. While the market has seen various attempts to remove or limit the exemption, the staying power of the asset class speaks volumes about the benefits which outweigh the costs to many.

Watch video.

Bloomberg

September 22nd, 2023

TAX - OHIO

State ex rel. Board of Education of Ottawa Hills Local School District v. Lucas County Board of Elections

Supreme Court of Ohio - September 15, 2023 - N.E.3d - 2023 WL 5992985 - 2023-Ohi--3286

School district's board of education sought writ of mandamus ordering county board of elections to place tax levy on ballot for general election.

The Supreme Court held that:

- Board of education lacked adequate remedy in ordinary course of law;
- Board of education did not strictly comply with its statutory obligations to place tax levy on ballot; and
- Board's errors were not technical errors, and, thus, board was not entitled to writ of mandamus.

Mandamus is an appropriate remedy to compel a board of elections to place a tax levy on the ballot.

As a general matter, if a taxing authority such as a board of education does not timely certify a resolution to proceed with a levy to the board of elections, the board of elections may not place the levy on the ballot.

Neither statute setting process for taxing authority to have tax levy placed on ballot and nor statute setting deadline for certification of issue to board of elections permit substantial compliance, and, thus, strict compliance with those statutes is generally required for a board of education to have a tax levy placed on the ballot.

School district's board of education did not strictly comply with its statutory obligations to place tax levy on ballot for general election, and, thus, board of education was not entitled to writ of mandamus to compel board of elections to place tax levy on ballot for general election, although board argued that incorrect estimate rate for levy for each $100,000 of property value was scrivener's error; board's resolution to proceed included rate for levy of 10.9 mills, not for approved levy of 12.9 mills, there was no evidence that error was scrivener's error, and board passed new resolution with correct levy rate seven days after certification deadline.

Errors by school district's board of education in including incorrect tax levy rate and by approving correct rate seven days after certification deadline were not technical errors that did not affect requirements of election statutes, and, thus, board was not entitled to writ of mandamus to compel board of elections to place levy on ballot for general election; by not passing correct levy rate until seven days after statutory certification deadline, board denied public its full statutory time to review levy, allowing certification of levy seven days after statutory deadline would create uncertainty in election administration, and inaccuracy in levy rate of $382 for each $100,000 of property value, instead of correct rate of $452 for each $100,000 of property value, was not de minimis.

TAX - MICHIGAN

Bate v. City of St. Clair Shores

Court of Appeals of Michigan - August 17, 2023 - N.W.2d - 2023 WL 5311528

Taxpayers brought putative class actions against cities for violation of Headlee Amendment, which prohibited levying any new tax or increasing any existing tax above authorized rates without approval of local governmental unit's electorate, alleging that Fire Fighters and Police Officers Retirement Act did not allow cities to impose tax to fund healthcare benefits.

The Circuit Court granted summary disposition in favor of cities. Taxpayers appealed, and appeals were consolidated.

The Court of Appeals held that:

- Under Act, municipalities are permitted to appropriate tax dollars to help pay for healthcare benefits to retired firefighters and police officers who are members of the retirement system and entitled to those benefits;
- Tax that cities imposed to fund healthcare benefits did not violate Headlee Amendment; and
- Consideration of extrinsic evidence, including legislative history and proposed amendments to Act, was unwarranted.

Headlee Amendment's exemption of taxes authorized by law when the section governing the exemption was ratified permits the levying of previously authorized taxes even where they were not being levied at the time Headlee Amendment was ratified and even though the circumstances making the tax or rate applicable did not exist before that date.

Fire Fighters and Police Officers Retirement Act's section providing that amount required by taxation to meet the appropriations to be made by municipalities under the Act shall be in addition to any tax limitation imposed upon tax rates in those municipalities by charter provisions or by state law requires municipalities to set aside tax dollars so they can fully pay benefits owed under the retirement system.

For purposes of Fire Fighters and Police Officers Retirement Act's section requiring municipalities to set aside tax dollars so it can fully pay pensions and other benefits payable under the retirement system, "other benefits payable" includes healthcare benefits, in the event the benefits must be paid, and thus municipalities are permitted to appropriate tax dollars to help pay for healthcare benefits to retired fire fighters and police officers who are members of the retirement system and entitled to those benefits.

Tax that cities imposed to fund healthcare benefits for retired fire fighters and police officers did not violate Headlee Amendment, which prohibited levying any new tax or increasing any existing tax above authorized rates without approval of local governmental unit's electorate, since tax was authorized under Fire Fighters and Police Officers Retirement Act before Headlee Amendment was ratified.

Consideration of extrinsic evidence, including legislative history and proposed amendments to Fire Fighters and Police Officers Retirement Act, was unwarranted when deciding taxpayers' claims that cities violated Headlee Amendment, which prohibited levying any new tax or increasing any existing tax above authorized rates without approval of local governmental unit's electorate, by imposing taxes to fund healthcare benefits for retired fire fighters and police officers; plain language of Amendment and Act was unambiguous, and no further judicial construction was permitted.

TAX - NEW MEXICO

Process Equipment & Service Company, Inc. v. New Mexico Taxation Revenue Department

Court of Appeals of New Mexico - July 25, 2023 - P.3d - 2023 WL 4874874

Taxation and Revenue Department (TRD) appealed decision from the Administrative Hearing Office (AHO), which, as part of taxpayer's administrative tax protest after Department denied taxpayer's applications for tax credit, concluded that taxpayer met requirements for a tax credit under the Technology Jobs and Research and Development Tax Credit Act.

The Court of Appeals held that:

- As a matter of first impression, "cost accounting method" for tax credit purposes is a method for capturing a company's total cost of production by assessing the variable costs at each step in production;
- Finding that taxpayer used a "cost accounting method" to allocate wages was grounded in a rational basis based on the record; and
- Substantial evidence supported finding that taxpayer's "cost accounting method" was informally used in its other business activities.

A "cost accounting method" within meaning of the Technology Jobs and Research and Development Tax Credit Act's definition of "qualified expense" is a method for capturing a company's total cost of production by assessing the variable costs at each step in production.

Finding by hearing officer of the Administrative Hearing Office (AHO) that taxpayer used "cost accounting method" to allocate wages, as required under the Technology Jobs and Research and Development Tax Credit Act's definition of "qualified expense," was grounded in a rational basis based on the record; officer found that taxpayer's accounting firm sent staff to inspect records, interview witnesses, and develop method to quantify and assess time and wage costs associated with taxpayer's research and development activities, found that firm determined which projects qualified for tax credit by reviewing drafting logs created contemporaneously during time work was performed, and found that taxpayer used same method to apply for state and federal tax credits and that method only accounted for finished projects.

Substantial evidence supported finding by hearing officer of the Administrative Hearing Office (AHO) that taxpayer's "cost accounting method" used to allocate wages, as required under the Technology Jobs and Research and Development Tax Credit Act's definition of "qualified expense," was also informally used in taxpayer's other business activities; officer found that taxpayer informally used same methodology to determine continuing viability of research and development project by comparing drafting time shown on drafting logs against potential results/outcome/viability of project, and when asked at hearing if taxpayer used cost accounting methodology designed by its accounting firm, vice president of engineering and chairman of taxpayer's board stated that taxpayer did use this method.

TAX - GEORGIA

Flat Creek Falls, LLC v. Labat

Court of Appeals of Georgia - August 25, 2023 - S.E.2d - 2023 WL 5496667

County sheriff filed two interpleader petitions for excess funds generated in tax sales of real property.

In the first case, the Superior Court entered order that city's demolition lien took priority over claim to the funds asserted by entity that ended up with fee simple title after the sale. In the second case, the Superior Court ordered release of the excess funds to city in partial payment for its demolition lien. Pre-tax sale owners of the properties appealed, and the appeals were consolidated.

The Court of Appeals held that the demolition liens, which applied only to real property, did not give city a right to the excess funds, which were personal property.

City's demolition liens against pieces of real property that ended up being sold at separate tax sales did not give city a right to excess funds produced by the sales; the excess funds were "personal property," and city's liens applied only to real property.

How De Minimis Fears Drive Illiquidity.

Kevin Bain, debt manager for Detroit, who got his start in the corporate taxable bond market, recalls being baffled by the obscure "de minimis" tax rule when he arrived at the city nearly three years ago.

The rule was one reason why, during a bond sale in 2021, the coupons needed to be set at 5% and 4% at the outset, to protect investors worried that the bonds would later tip into discount territory, Bain recalled. The rule also means the city has to parse issuance size versus par value when it asks voters for borrowing authorization.

"It's been around so long it's considered market practice to everyone who works with municipal bonds," said Bain. But the 5% standard seemed strange – especially in the low rate world of 2021 – compared to the corporate world, where par value tends to roughly equal issuance size and coupons roughly match yields.

That's "pretty straightforward," Bain said. "It's odd that municipal governments have the more complicated issue."

Investors in Detroit's 2021 deal proved correct about their concerns as a chunk of the 4% bonds are now trading at a discount, Bain said. When the city came back to market in July, amid a higher interest rate environment, it set coupons as high as 6% on some bonds.

The “market discount” de minimis rule carries a primary market impact for issuers like Detroit, but it is the rule’s significant impact on the secondary market that’s the focus of a paper from a quartet of muni market experts that was presented in July at the 2023 Brookings Municipal Finance Conference.

“Pushing Bonds Over the Edge: Investor Demand and Municipal Bond Liquidity” takes a deep dive into the de minimis rule’s impact on a secondary market dominated by mutual funds that tend to buy bonds at a premium to avoid de minimis risk. Funds will dump entire positions as they approach discount territory, activity that leads to “substantial illiquidity” and drives up trading costs and prompts other institutional investors to head for the exit, the paper found.

The study takes on more relevance in the rising interest rate environment, where even 5% coupons are now trading near the threshold. More than 30% of bonds in the secondary are currently circling discount territory, said one of the paper’s authors, Stefan Gissler, principal economist at the Board of Governors of the Federal Reserve System, who presented at the conference.

The so-called de minimis rule took effect in 1993 as part of the Omnibus Budget Reconciliation Act, which repealed the exemption of realized price appreciation – as opposed to interest payments – on municipal bonds from ordinary income taxes.

Under the rule, investors who buy municipal bonds at a discount from its face value at issuance will have to pay taxes on any realized price appreciation if the discount passes below the de minimis threshold, which is defined as one quarter of 1% of the stated bond price multiplied by the number of full years to maturity.

The rule has carried an outsized impact in the secondary market since mutual funds have started to dominate the buyer base, because mutual funds have strong incentives to avoid “discontinuous jumps in ordinary income taxes,” according to the paper, authored by Gissler as well as John Bagley, chief market structure officer at the Municipal Securities Rulemaking Board; Kent Hiteshew, a strategic advisor at Ernst & Young LLC who was formerly deputy associate director at the Federal Reserve Board’s Office of Financial Stability; and Ivan Ivanov, senior economist in the Research Division of the Federal Reserve Bank of Chicago.

Examining bond trading data from 2010 to 2022, the authors concluded that mutual funds are large net sellers of muni bonds above the de minimis threshold, with their selling peaking at four to five percentage points above the threshold, reaching nearly $500 billion quarterly.

Once below the level, the bonds become illiquid and trading becomes more costly, prompting other institutional investors like banks and property and casualty insurers to avoid them. Only life insurance companies, which tend to be buy-and-hold investors, showed more restraint around the threshold.

“These findings suggest that liquidity is not only the main driver of the trading dynamics around the de minimis threshold, but also has significant impact on trading costs,” the paper said.

The “exit of institutional investors such as mutual funds, insurance companies, and closed-end funds from the secondary market leads to significantly lower market quality and higher transactions costs?an important feature of this market even in ‘normal’ economic times,” the authors said.

The paper also notes that decisions by the Federal Reserve to hike interest rates “speeds up the path to illiquidity and higher transactions costs.”

During a period of monetary tightening, the bonds “underlying as much as a quarter of all secondary market transactions face significant probability of falling below the threshold," the paper said.

The conclusions are not surprising given the shrinking municipal buyer base over the years, said municipal strategist Vikram Rai.

Mutual funds are exposed to flows and need to sell during an outflow period, Rai said.

"When a mutual fund buys a higher-coupon bond, they're paying more for it but they need the liquidity; they don't want to be stuck where they want to raise money and don't have liquid paper to sell," Rai said.

Because mutual funds have such a large footprint, their actions reverberate across the market, he said.

"It's exacerbating illiquidity and it's exacerbating the discontinuity and volatility in prices," he said.

For Bain, who presented a response to the academic paper at the Brookings conference, the study helps explain a rule that he said remains unclear even to many of his issuer peers.

"It's a very confusing rule that most people in the industry don't know a lot about," Bain said. "It's really interesting to see the research on how big an impact it has on the market even though so few people are speaking about it and people have just come to accept it as the market standard."

By Caitlin Devitt

BY SOURCEMEDIA | MUNICIPAL | 09/07/23 02:24 PM EDT

TAX - CONNECTICUT

Cazenovia Creek Funding I, LLC v. White Eagle Society of Brotherly Help, Inc.

Appellate Court of Connecticut - August 1, 2023 - A.3d - 220 Conn.App. 770 - 2023 WL 4852104

Holder of municipal tax liens, which were originally assigned to holder's predecessor in interest by city collector of revenue, brought foreclosure action against owner of real property.

The Superior Court granted holder's motion for summary judgment as to liability. Another holder was substituted as plaintiff, and subsequent holder was later substituted as plaintiff. The Superior Court rendered a judgment of foreclosure by sale. Owner appealed.

The Appellate Court held that:

- Holder met prima facie burden of establishing ability to foreclose;
- Owner had burden of proof to establish assignment of liens was defective;
- Property owner's evidence did not create genuine issue of material fact as to whether assignment of liens was defective; and
- Holder met burden of proof that tax was properly assessed.

Owner of real property had burden of proof regarding its special defense that city's assignment of municipal tax liens to holder's predecessor in interest was defective, and thus holder did not have burden in lien foreclosure proceeding to prove that liens recorded by city were properly authorized by its legislative body prior to being assigned.

Property owner's submission of city council minutes that were from three different meetings and that failed to reflect approval of a resolution to assign real-property taxes for grand lists for years for which tax license were imposed did not create genuine issue of material fact as to whether city's assignment of tax liens to holder's predecessor in interest was defective and thus did not preclude summary judgment in favor of holder of tax liens in action to foreclose liens; there was no evidence that the three city council meetings were only city council meetings held between relevant dates, and property owner did not present any evidence to show liens assigned were not encompassed in city council's resolution to approve assignment of liens for subsequent year.

Holder of municipal tax liens met its burden of proof under rule governing foreclosures of municipal tax liens that tax or assessment was properly assessed, due, and payable on property and no part had been paid, and thus burden of proof shifted to property owner to allege and prove, as affirmative defense, claimed informality, irregularity, or invalidity in assessment or attempted collection of tax, or in lien filed; holder submitted copies of certificates of continuing lien showing unpaid taxes were assessed to property and due, holder submitted affidavit from its predecessor in interest that demand had been made but no payments made, and property owner did not rebut holder's evidence with any proof of payments made to either holder or predecessor in interest.

Fitch: Insurance Pullback Could Pressure CA and FL Tax Base Longer Term

Fitch Ratings-New York/San Francisco-05 September 2023: Rising premiums and reduced availability of homeowners' property insurance could drag on housing markets, development activity, overall economic growth and ultimately tax bases for certain California and Florida local governments over time, Fitch Ratings says. Insurers are re-evaluating their exposures to geographic areas with elevated catastrophe risk as they face greater losses and higher building and reinsurance costs. Insurance plays a key role in securing mortgages and enabling rebuilding following natural disasters.

There were 119 natural catastrophes in 2022 resulting in $98.8 billion in insured property losses, up from 103 catastrophes costing $93.3 billion in 2021, according to the Insurance Information Institute (Triple-I) and Aon. This compares with annual losses averaging $62.1 billion (adjusted for inflation) over the prior eight years. Average homeowners' insurance premiums in Florida were up 11% in 2020 from the year before, to $2165, the highest in the country, and were up 16% from 2018 in California, according to Triple-I.

State Farm, Allstate, and Farmers have announced they will cease issuing new home insurance policies in California, with AIG and Chubb also adjusting insurance coverage in the state. In Florida, some insurance companies have announced reduction or cessation of home and condo coverage, including Farmers and Allstate's Castle Key subsidiary, and seven entered liquidation in the last 18 months. The Florida Insurance Guaranty Association recently approved a 1% emergency assessment on all covered lines of business (other than auto) to cover claims owed by United Property & Casualty Insurance Company, one of the liquidated insurers.

Consumers who face insurance non-renewals may turn to the state insurers of last resort, California's Fair Access to Insurance Requirement (FAIR) Plan Association or Florida's state-owned Citizens Property Insurance Corporation (AA/Stable). The FAIR Plan is a syndicated insurance pool requiring the participation of all California-licensed property and casualty insurers, and its rates are notably more expensive on average than standard property insurance policies.

Citizens is the largest insurer in Florida with over 1.3 million policies in force, with policy count and exposure growing significantly over the last three years. Florida regulators recently asked Citizens to submit a new rate proposal following Citizens' proposed average rate increase of 12.6% for homeowners' multiperil policies.

Both Citizens and the Florida Hurricane Catastrophe Fund (AA/Stable), the state-sponsored reinsurer, can levy assessments, subject to a cap, on nearly every property and casualty insurance policy in the state in order to pay claims. Increased storm frequency and severity raises the likelihood of levies from both, placing an additional burden on the assessed base.

Recovery following natural disasters may be delayed or incomplete if there are greater numbers of those who are under-insured or uninsured due to affordability or non-renewal issues. High-risk areas could be left with a smaller tax base if hurricane or wildfire damage leads to permanent relocations, or if these areas find it difficult to attract new residents.

Fitch has not observed these effects playing out to date, as insurance is one of many factors in home purchase decisions. However, pressures on housing demand could be amplified with increasing natural disasters and insurance markets in which the insurers of last resort are costly or impose higher assessments to cover increased claims.

Policymakers have several tools to support property insurance market sustainability. Florida's legislature has passed a series of bills with the aim of reducing insurance litigation, improving claims and payout timing, and containing Florida Citizens' insured base. California's Department of Insurance is hosting discussions regarding insurance companies' potential use of catastrophe models to estimate potential losses and inform rate setting. The effectiveness of policy actions is increasingly important to support housing market and long-term economic growth prospects.

Texas Port's $55 Million Municipal Bonds Ruled Taxable by IRS.

- **Port didn't spend enough proceeds within 3 years, IRS Says**
- **Port says it complied with tax rules and will defend position**

The U.S. Internal Revenue Service has concluded that interest on $55 million of municipal bonds issued by a Texas port in 2017 is taxable because the issuer was too slow to spend money it raised, according to a securities filing.

The Port of Port Arthur Navigation District didn't comply with a section of the tax code that requires municipalities to spend 85% of tax-exempt bond proceeds within three years of the bonds being issued, according to the IRS, the filing said.

The port, which operates a shipping terminal on the Sabine Neches Waterway along the Gulf of Mexico, said it did comply with the federal tax code and intends to defend its position. After receiving a "proposed notice of adverse determination" an issuer has 30 days to request an administrative appeal of its case, according to the port's filing.

The section of the tax code in question is aimed at preventing state and local governments from issuing bonds when interest rates are low without any immediate need to use the the funds, resulting in excess debt that isn't subject to income tax.

Judy Bettis, Port of Port Arthur's chief financial officer, didn't immediately respond to a call and email seeking comment.

Bloomberg Markets

By Martin Z Braun

August 24, 2023

IRS Targets Port Arthur, Texas, Bond Issuance for Hedge Bond Violation – Is Your Bond Issue at Risk? - McNeese

The Internal Revenue Service recently issued a notice of proposed adverse tax determination in what might be a harbinger of additional enforcement actions targeting alleged hedge bonds. The Port of Port Arthur Navigation District of Jefferson County, Texas, issued tax-exempt bonds — according to a continuing disclosure filing made by the Port on Aug. 23, the IRS is alleging that those bonds are taxable "hedge bonds" due to noncompliance with the requirements of the Internal Revenue Code. The Port is contesting the taxability determination.

A taxability determination under Section 149(g) of the code comes down to one thing: you issued your bonds too early. This section is intended to prevent the issuance of tax-exempt bonds earlier than is reasonably necessary to accomplish the governmental purpose of the issue. Bonds issued too early means foregone tax revenue for the federal government, a result frowned upon by the IRS.

Avoiding taxable hedge bond status is fairly straightforward — the issuer must have a reasonable anticipation at the time of issuance that it will expend at least 85% of the proceeds of the issue within three years. The 85% test is based on "reasonable expectations," not actual results — an issuer could, in fact, fail to spend 85% of the proceeds in three years and avoid a taxability determination under the hedge bond rules.

Over the last year, the municipal bond market has seen a rapid rise in interest rates, coinciding with rapid increases in the Federal Funds Rate by the Federal Reserve to combat inflation. As rates began to rise, a municipality may have been tempted to borrow earlier than was needed to lock in a lower interest rate on its debt. Therefore, bonds issued over the last 12 to 18 months for new capital projects may be at risk of examination by the IRS.

If you issued bonds to finance new projects during this period, now is the time to check your files to ensure compliance with the hedge bond rules. Make sure your records from the time of issuance are in order to show support for having a "reasonable expectation" of spending the proceeds within three years. Meeting minutes, engineering studies and other documentation showing an imminent need to borrow for a project will be helpful evidence. If circumstances have changed since then, preserve documentation of what happened and, ideally, why it was not in the realm of possibility at the time the bonds were issued.

If your bond issue is targeted by the IRS for examination, consult with tax counsel before making any response. I have advised many clients over the years in connection with IRS examinations of tax-exempt bonds, including examinations involving application of the hedge bond rules.

by Timothy Horstmann

September 1, 2023

Top (Bottom?) Ten of Tax Headaches (Challenges) for Municipal Bond Issuers: Cozen O'Conner

Sometimes the first step to solving (or mitigating or avoiding) problems is to identify what the problem may be to, among other things, put time on one's side.

For issuers of tax-exempt municipal bonds, there tend to be certain types of situations that are more prone to creating tax-issues. The purpose of this article is to identify certain types of situations that are more likely to create tax headaches (or at least are better navigated with some advance planning) for purposes of the tax-exempt bond rules.

Please see full Article below for more information.

Continue reading.

by Mark Vacha

September 1, 2023

Cozen O'Conner

Municipal-Bond Investors Pay a Hefty Price for Not Being Taxed.

A new study suggests that 'investors overvalue the pleasure' of tax-exemption

Municipal-bond investors are paying a greater premium than should be expected for the "pleasure of not being taxed," a new study finds, often negating the bonds' benefit.

In a perfectly priced world, a muni bond would pay interest equivalent to a Treasury bond minus the investors' tax burden on the Treasury and adjusted for liquidity and credit quality of the issuing state or municipality.

But munis pay investors even less than that, according to the study, which appeared in a National Bureau of Economic Research working paper in June. On average, the study found, the yield of the muni bonds was nearly 15 basis points, or 0.15 percentage point, lower than what would be explained by their favorable tax status.

Continue reading.

The Wall Street Journal

By Daisy Maxey

Sept. 3, 2023

Taxing Remote Workers: “Convenience,” Conflict, And The Courts.

When your commute to work takes place within the confines of your home, where should you pay income taxes? The answer is complicated. For remote workers, it could mean more work when filing their taxes. State and local budgets can pay a price, too.

Not all jobs can be done remotely. But for people who have the option, an estimated 35 percent are working from home all of the time. A McKinsey & Company survey estimates that there are 92 million people in the US who can, at times, skip their commute to other cities—or even states. When they do, they don’t need the same tax-funded public services provided to people on the ground in those jurisdictions.

But communities need people, and their tax dollars, to thrive. States and cities with income taxes can simplify the way remote work is taxed, maintain fiscal balance, and better support their communities, but state-by-state responses could lead to conflicting guidance. Absent a coordinated response from state lawmakers–or intervention by Congress–these conflicts will be settled in the courts.

Continue reading.

Tax Policy Center

by Renu Zaretsky

August 2, 2023

Texas Port’s $55 Million Municipal Bonds Ruled Taxable by IRS.

- **Port didn’t spend enough proceeds within 3 years, IRS Says**
- **Port says it complied with tax rules and will defend position**

The U.S. Internal Revenue Service has concluded that interest on $55 million of municipal bonds issued by a Texas port in 2017 is taxable because the issuer was too slow to spend money it raised, according to a securities filing.

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The port, which operates a shipping terminal on the Sabine Neches Waterway along the Gulf of Mexico, said it did comply with the federal tax code and intends to defend its position. After receiving a “proposed notice of adverse determination” an issuer has 30 days to request an administrative appeal of its case, according to the port’s filing.

The section of the tax code in question is aimed at preventing state and local governments from issuing bonds when interest rates are low without any immediate need to use the the funds, resulting in excess debt that isn’t subject to income tax.

Judy Bettis, Port of Port Arthur’s chief financial officer, didn’t immediately respond to a call and email seeking comment.

Bloomberg Markets

By Martin Z Braun

August 24, 2023

IRS Targets High-Income Individuals Illegally Claiming Puerto Rico's Tax Benefits.

The Internal Revenue Service ("IRS") Commissioner Danny Werfel stated that the Agency is taking "swift and aggressive action" to strengthen enforcement efforts against high-income individuals. As part of these enforcement efforts, the IRS identified approximately 100 individuals, including crypto traders and fund managers suspected of illegally claiming Puerto Rico's tax benefits. According to the IRS, the enforcement efforts will include both civil audits and criminal investigations.

For taxpayers not in compliance with Puerto Rico Act 60 (formerly Acts 20 and 22) requirements, they must act swiftly to take corrective action. In July of this year, Puerto Rico's Secretary of Economic Development and Commerce stated he is actively cooperating with the IRS in their efforts to identify individuals that are abusing Puerto Rico's tax benefits.

On January 27, 2021, the IRS announced its compliance campaign that focused on Puerto Rico Act 60 ("Act 60"). Act 60 consolidated various tax decrees, incentives, subsidies, and benefits, including Acts 20 and 22. Acts 20 and 22 were intended to incentivize investment in Puerto Rico, promote the exportation of services from companies and individuals providing such services and attract high net-worth individuals to Puerto Rico.

Taxpayers that meet the requirements of Act 60 are eligible to receive significant tax savings. For example, Act 60 offers a corporate tax rate of 4% to Puerto Rico domiciled companies that export services performed in Puerto Rico to people or companies outside of the territory. Similarly, high net-worth individuals may qualify for a total exemption from Puerto Rico income taxes on all interest and dividends realized after the individual becomes a bona fide resident of Puerto Rico.

Puerto Rico is a United States territory (and generally subject to all US federal laws); however, for federal tax purposes, Puerto Rico is treated as a "foreign country." The Internal Revenue Code ("Code") states that US citizens and resident aliens are taxed on worldwide income; however, section 933 provides an exception to this general rule. Residents of Puerto Rico receive special tax treatment for Puerto Rico sourced income.

The IRS's new campaign targets taxpayers who have claimed benefits through Puerto Rico Act 60 without meeting the requirements of section 933, Residence and Source Rules Involving Possessions. Consequently, the IRS has identified certain individuals who may be excluding income subject to US tax on a filed US income tax return or failing to file and report income subject to US tax. As such, the IRS campaign will also address those individuals who have met the requirements of section 933 but may be erroneously reporting US source income as Puerto Rico source income in order to avoid US taxation.

To enhance voluntary compliance with the tax laws, the IRS partners with foreign jurisdictions, federal, state and municipal governmental agencies. These partnerships often involve some type of formal agreement such as a Memorandum of Understanding ("MOU") or Tax Coordination Agreement ("TCA") that allows for the exchange of taxpayer data. Article 4 of the TCA between the US and the Commonwealth of Puerto Rico allows for the exchange of information to administer and enforce the tax laws of the respective jurisdiction.

In this IRS campaign the IRS will utilize various methods to detect noncompliance, including examinations and outreach via soft letters. Consequently, it is reasonable to assume the IRS has started identifying those individuals who may fall under the scope of this audit campaign.

Taxpayers should review their reporting positions and, if appropriate, consider correcting past non-compliance before the IRS comes to their door. We have experience advising clients through a variety of IRS controversy matters including voluntary disclosures, civil audits and criminal investigations. Similarly, we are well versed in evaluating Puerto Rico-specific tax issues.

Meadows Collier Reed Cousins Crouch & Ungerman LLP – Michael A. Villa, Jr. and R. Damon Rowe

August 30 2023

[Fitch: State Tax Cut Wave Has Peaked with Modest Revenue Effects for Most States]

Fitch Ratings-New York-17 August 2023: Tax cuts enacted by US states in 2023 are not likely to have a meaningful effect on most states' revenues or affect credit ratings in the short term, says Fitch Ratings. We expect that states implementing the largest structural tax changes will adjust spending accordingly, though states that have underestimated the potential revenue impact of cuts made near the peak of the economic cycle may face fiscal deterioration and credit challenges.

The wave of tax cuts passed by U.S. states beginning in 2021 appears to have crested. Although 24 states adopted tax reduction measures of some kind in their fiscal 2024-25 budgets, the scope of changes narrowed versus prior years, with fewer states opting for major restructurings of tax brackets or deep cuts to tax rates.

For the most part, tax cuts enacted in 2023 will have more modest effects on revenues than cuts made in prior years, as most 2023 changes took the form of temporary rate reductions, tax holidays, or expanded tax credits. Tennessee's four-month sales tax holiday will reduce fiscal 2024 collections by $400 million, equal to 1.3% of state-source revenues. Wisconsin's permanent cuts to its two lower personal income tax (PIT) rates will reduce biennial general fund revenues by only 0.8% ($175 million). However, when combined with larger PIT cuts enacted in the last biennium, this will reduce collections by $2.2 billion, or about 2.5% of state revenues.

Continue reading.

[Save the Tax-Exemption, A Call to Action for U.S. Public Finance.]

- A convergence of risk has the potential to result in the elimination of new tax-exempt municipal bond issuance.

- For the public finance community this analysis is meant to be a call-to-action.
- This is a potential policy threat for investors to monitor, for now.
- The rising U.S. debt-to-GDP ratio along with climbing interest costs are among the leading reasons why there is an even greater threat to the municipal bond tax-exemption today compared to recent decades.
- Reinforcement of this increased threat was recently delivered in the form of Fitch Ratings' U.S. downgrade (August 1) and the CBO's July Monthly Budget Review (August 8).
- The public finance community should escalate support for tax-exempt bonds by educating and informing D.C. lawmakers now, even though we may experience a federal budget cycle or two and a Presidential election before the true threat is imminent. If an educational process does not begin soon, it could be too late to save the tax-exemption by the time potential deficit reduction measures are proposed.

Continue reading.

AdvisorHub

by Tom Kozlik, Hilltop Securities

August 18, 2023

TAX - WISCONSIN

Wisconsin Property Taxpayers, Inc. v. Town of Buchanan

Supreme Court of Wisconsin - June 29, 2023 - 408 Wis.2d 287 - 2023 WI 58 - 992 N.W.2d 100

Plaintiff brought action for declaratory and injunctive relief from "transportation utility fee" that town imposed to fund its transportation utility district.

The Circuit Court entered summary judgment for plaintiff, finding that the fee was a property tax subject to the town's levy limit, and permanently enjoining the town from levying, enforcing, or collecting the fee in any amount above its levy limit. Town appealed, and the parties filed a joint petition for bypass of the Court of Appeals, which the Supreme Court granted.

The Supreme Court held that:

- Pursuant to statute allowing the creation of utility districts, town could not base the fee on class of property and its commercial characteristics;
- State law precluded town from imposing the fee on tax-exempt properties; and
- The fee counted against town's levy limit as set by state law.

When imposing "transportation utility fee" to fund its transportation utility district, which was fee that constituted property tax, town could not base fee on class of property and its commercial characteristics; statute allowing certain municipalities to set up utility districts and to fund them through "taxation of property" did not authorize such taxation to be based on anything other than property value.

"Transportation utility fee" that town imposed to fund its transportation utility district, which fee constituted property tax, counted against town's levy limit as set by state law; despite argument that utility district had assumed responsibility for public improvement, town itself levied taxes to fund district.

Taxation of property funding utility district under statute allowing certain municipalities to set up utility districts is subject to municipal levy limits.

TAX - GEORGIA

Columbus, Georgia Board of Tax Assessors v. Medical Center Hospital Authority

Court of Appeals of Georgia - June 28, 2023 - S.E.2d - 2023 WL 4228280

Taxpayer, a hospital authority, brought action against board of tax assessors, seeking declaration that its leasehold interest in certain property, on which residential retirement community was operated, was exempt from ad valorem taxation.

The Superior Court granted summary judgment in favor of taxpayer, and the Court of Appeals affirmed. The Supreme Court granted certiorari, reversed decision, and remanded, and the trial court again entered summary judgment in favor of taxpayer. Board appealed.

The Court of Appeals held that leasehold interest was public property exempt from ad valorem taxation.

Leasehold interest of hospital authority taxpayer in continuing care residential retirement community, which taxpayer operated on land leased from property owner, was “public property,” and thus was exempt from ad valorem taxation; community, which provided elderly individuals with room and board and nursing care, addressed public need of identifiable class of citizens, bond validation proceedings established that taxpayer financed and paid for construction of community through revenue bonds issued in furtherance of public purpose for which taxpayer was established, community’s audited financial statements treated operating profits as those of taxpayer, and income derived from operating community was used to repay bonds.

Ohio Budget Bill Adopts Municipal Net Profits Tax Safe Harbor Statute.

Companies that have individuals (whether an employee or an owner) that work out of their home now have the choice of filing a net profits tax return with that individual’s city of residence. In brief, if the company chooses to not file a net profits tax return with that individual’s city of residence, then the company’s property, payroll and sales associated with that individual are assigned to the company’s office location. The statute is not a model of clarity, so companies are well advised to study the associated procedural rules very carefully. The statute is effective for tax years ending on or after December 31, 2023.

Vorys understands the General Assembly may amend this statute’s effective date to make it effective for tax years ending on or after January 1, 2022. Companies should monitor further legislative developments accordingly.

Vorys Sater Seymour and Pease LLP – David A. Froling

August 10 2023

[Lawmakers Probe Nonprofit Hospitals, Challenge Tax-Exempt Status.]

- **Grassley, Warren ask IRS, Treasury to investigate charity care**
- **Senators say they're concerned about abuse of tax exemption**

A bipartisan group of four US senators wants the Internal Revenue Service and Treasury Department to investigate whether nonprofit hospitals are abusing their tax-exempt status.

The lawmakers pointed to cases of nonprofit hospitals charging full price for services that should have been free or discounted. They also said some of these institutions pursued indigent patients for medical debt, including placing liens on their homes.

More than half of approximately 5,200 community hospitals in the US are nonprofit, and are supposed to provide charity care in return for their tax-exempt status.

"We are alarmed by reports that despite their tax-exempt status, certain nonprofit hospitals may be taking advantage of this overly broad definition of 'community benefit' and engaging in practices that are not in the best interest of the patient," senators including Elizabeth Warren of Massachusetts and Chuck Grassley of Iowa wrote in a letter this week. Bill Cassidy, a Republican from Louisiana, and Democrat Raphael Warnock of Georgia were also signatories.

There aren't explicit rules for what constitutes meeting charity-care guidelines. Lawmakers have previously said that disclosure requirements are vague, allowing institutions to duck their responsibilities. The hospital industry has disputed these findings.

In the Monday letter, the senators called for the government to update the forms hospitals file to disclose charity care. They also want to identify hospitals whose tax-exempt status was revoked, as well as those that were audited or deemed at risk for non-compliance.

Lawmakers had addressed this issue at a House Ways and Means hearing in April, calling for more clarity and consistency in how hospitals disclose and meet their charity contributions.

States and municipalities have also pushed back on nonprofit hospitals. Colorado has a new law requiring more extensive reporting on the community care these institutions provide. Pittsburgh has questioned the tax-exempt status of some of the property owned by the University of Pittsburgh's medical center, which has outlined its disagreement. And the New York City Council in June voted unanimously to establish an Office of Healthcare Accountability that would scrutinize the prices hospitals charge and the charity-care provisions they have in place.

More than three quarters of the 1,773 nonprofit hospitals examined by health-care think tank Lown Institute spent less on charity care and community investment than the estimated value of their tax break, according to the most recent Fair-Share Spending report. This created what Lown called a "fair-share deficit" of $14.2 billion in 2020.

Bloomberg Politics

By Lauren Coleman-Lochner

August 9, 2023

TAX - OHIO

Stingray Pressure Pumping, L.L.C. v. Harris

Supreme Court of Ohio - August 2, 2023 - N.E.3d - 2023 WL 4913160 - 2023-Ohio-2598

Taxpayer challenged decision of Ohio Board of Tax Appeals (BTA) concluding that some of taxpayer's equipment used in its fracking operations did not qualify for exemption from Ohio's sales and use tax for equipment used directly in the production of crude oil and natural gas.

The Supreme Court held that:

- Blender was exempt from sales and use tax;
- Hydration unit was exempt from sales and use tax;
- Chemical-additive unit was exempt from sales and use tax;
- Sand king was exempt from sales and use tax;
- T-belt was exempt from sales and use tax;
- Data van was not exempt from sales and use tax; and
- Equipment, aside from data van, was used directly in production of oil and gas.

Primary use of taxpayer's blender equipment was to mix together water, chemicals, and sand, notwithstanding blender's holding function, and thus blender was directly used in performing taxpayer's hydraulic fracking services for the production of crude oil and natural gas, and therefore blender qualified as a "thing transferred" directly in production of crude oil and natural gas for sale, such that blender was exempt from Ohio's sales and use tax; blender mixed critical ingredients in fracking recipe seconds before mixture was inserted into well.

Primary use of hydration unit was in mixing water and various chemicals, not storage, and thus hydration unit was directly used in performing hydraulic fracking services for the production of crude oil and natural gas, and therefore hydration unit qualified as a "thing transferred" directly in production of crude oil and natural gas for sale, and thus taxpayer's hydration unit equipment was exempt from Ohio's sales and use tax.

Taxpayer's chemical-additive unit was not primarily used for holding, but rather, primary function of unit was to provide chemicals to hydration unit and blender by way of hoses, and therefore chemical-additive unit was tangible personal property directly used in hydraulic fracking services, such that chemical-additive unit qualified as a "thing transferred" directly in production of crude oil and natural gas for sale, and thus chemical-additive unit was exempt from Ohio's sales and use tax.

Primary use of taxpayer's sand king equipment, which holds sand for a brief period before it is injected into pressurized mixture that is immediately injected into well, was to feed sand into blender, and thus sand king was tangible personal property directly used in hydraulic fracking services, such that sand king qualified as a "thing transferred" directly in production of crude oil and natural gas for sale, and therefore sand king was exempt from Ohio's sales and use tax.

Taxpayer's data van equipment, a motor vehicle containing various screens and monitoring devices did not act directly on fluid and material and did not control production equipment, and thus data van did not qualify as a "thing transferred" directly in production of crude oil and natural gas for sale, and therefore data van was not exempt from Ohio's sales and use tax.

Taxpayer's equipment used in taxpayer's fracking operations, including blenders, hydration units, chemical-additive units, sand kings, and t-belts, which was used in unison with manifold and pumps to create injection of mixture that was sent downhole to free oil and gas was used directly in production of oil and gas, and thus equipment qualified for exemption from Ohio's sales and use tax, even if equipment's use was preliminary and preparatory to production.

TAX - RHODE ISLAND

Apex Oil Company, Inc. v. State by and through Division of Taxation

Supreme Court of Rhode Island - July 14, 2023 - 297 A.3d 96

Oil trader brought two tax aggrievement actions challenging Division of Taxation's denial of trader's claim for a refund of $4,280,039.44 paid for Motor Fuel Tax assessed on the purchase and sale of 300,000 barrels of oil, as part of chain transaction in which oil trader was contractually responsible to its seller for the tax.

The Sixth Division District Court dismissed. Oil trader petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- Oil trader demonstrated it suffered injury in fact in order to establish standing to bring tax aggrievement action challenging
- Division's denial of trader's claim for a refund of Motor Fuel Tax;
- There was causal connection between Division's imposition of Motor Fuel Tax on trader's purchase of oil and trader's injury in fact, as required to establish standing to bring tax aggrievement actions challenging Division's denial of trader's claim for a refund of Motor Fuel Tax;
- Seller of oil's assignment of its rights to oil trader did not establish that they were in privity at time settlement was reached between seller and Division, and thus, claim preclusion did not apply to trader's challenge to Division's denial of claim for refund of Motor Fuel Tax; and
- Doctrine of administrative finality did not apply to bar trader's challenge to Division's denial of its claim for refund for Motor Fuel Tax.

Doctrine of administrative finality did not apply to bar oil trader's challenge to Division of Taxation's denial of trader's claim for a refund of $4,280,039.44 paid for Motor Fuel Tax assessed on purchase and sale of 300,000 barrels of oil as part of chain transaction in which oil trader was contractually responsible to its seller for the tax; seller's request for relief in the initial agency proceedings sought only penalty and interest abatement, while oil trader's request for relief requested a refund of the tax itself based upon its assertion that the tax was improperly imposed, thus, the two requests were not the same or substantially similar.

Fitch: U.S. Home Price Declines Concentrated in the West; Tax Effects Limited

Fitch Ratings-New York-10 August 2023: Significant home price declines from peak levels following the pandemic are concentrated in a dozen counties in western states, Fitch Rating says. The price drops have varied, but there are limited downside implications for property tax revenues in the impacted municipalities due to property tax formulas that smooth home price swings.

National home prices have begun to level off after declining from peaks during the pandemic, showing resilience amid constrained supply and relatively stable demand. Fitch expects U.S.

nominal home prices to fall between 0% and 5% in 2023 relative to 2022, per our Global Housing and Mortgage Outlook.

We expect broad property tax collections to remain healthy, as roughly half of U.S. counties have not seen home price declines in the post-pandemic period. Property valuations take roughly 18 months to two years to feed through to property tax assessments, and local governments have time to adjust tax rates and budgets in response to changes in property valuations. Aggregate U.S. property taxes are likely to grow to varying degrees in 2023 and 2024, reflecting high 2021 and 2022 home values.

Continue reading.

California Lawyers Association 2023 State and Local Tax Annual Meeting Roundup: Greenberg Traurig

Go-To Guide:

- California Lawyers Association's SALT Committee held its first fully in-person annual meeting since the start of the pandemic.
- California taxing agencies provided legislative, regulatory, and litigation updates of interest.

The Taxation Section of the California Lawyers Association held its annual State and Local Tax Meeting on July 27, 2023, at the Franchise Tax Board (FTB)'s Central Office in Rancho Cordova, California. This meeting provided practitioners and industry members an opportunity to hear from several leaders at the FTB, California Department of Tax and Fee Administration (CDTFA), California Board of Equalization (BOE), and the Office of Tax Appeals (OTA).

For those who missed the event or who want a double serving of tax, keep reading for the latest developments in California state and local tax.

Continue reading.

Greenberg Traurig LLP – Bradley R. Marsh, Shail P. Shah, James T. Smith and Jennifer A. Vincent

August 8 2023

TAX - NEW MEXICO

Process Equipment & Service Company, Inc. v. New Mexico Taxation Revenue Department

Court of Appeals of New Mexico - July 25, 2023 - P.3d - 2023 WL 4874874

Taxation and Revenue Department (TRD) appealed decision from the Administrative Hearing Office (AHO), Brian Van Denzen, Hearing Officer, which, as part of taxpayer's administrative tax protest after Department denied taxpayer's applications for tax credit, concluded that taxpayer met requirements for a tax credit under the Technology Jobs and Research and Development Tax Credit Act.

The Court of Appeals held that:

- As a matter of first impression, "cost accounting method" for tax credit purposes is a method for capturing a company's total cost of production by assessing the variable costs at each step in production;
- Finding that taxpayer used a "cost accounting method" to allocate wages was grounded in a rational basis based on the record; and
- Substantial evidence supported finding that taxpayer's "cost accounting method" was informally used in its other business activities.

A "cost accounting method" within meaning of the Technology Jobs and Research and Development Tax Credit Act's definition of "qualified expense" is a method for capturing a company's total cost of production by assessing the variable costs at each step in production.

Finding by hearing officer of the Administrative Hearing Office (AHO) that taxpayer used "cost accounting method" to allocate wages, as required under the Technology Jobs and Research and Development Tax Credit Act's definition of "qualified expense," was grounded in a rational basis based on the record; officer found that taxpayer's accounting firm sent staff to inspect records, interview witnesses, and develop method to quantify and assess time and wage costs associated with taxpayer's research and development activities, found that firm determined which projects qualified for tax credit by reviewing drafting logs created contemporaneously during time work was performed, and found that taxpayer used same method to apply for state and federal tax credits and that method only accounted for finished projects.

Substantial evidence supported finding by hearing officer of the Administrative Hearing Office (AHO) that taxpayer's "cost accounting method" used to allocate wages, as required under the Technology Jobs and Research and Development Tax Credit Act's definition of "qualified expense," was also informally used in taxpayer's other business activities; officer found that taxpayer informally used same methodology to determine continuing viability of research and development project by comparing drafting time shown on drafting logs against potential results/outcome/viability of project, and when asked at hearing if taxpayer used cost accounting methodology designed by its accounting firm, vice president of engineering and chairman of taxpayer's board stated that taxpayer did use this method.

IRS Seeks States' Input On Its Direct File Pilot.

States have until Sept. 4 to tell the IRS if they're interested in participating.

States will have the chance to collaborate with the IRS on how they may integrate with the agency's forthcoming direct file pilot.

In a July 16 letter to the Federation of Tax Administrators, which serves state tax collection agencies, IRS Commissioner Danny Werfel wrote that the tax agency is "interested in continuing to learn from states directly, and from [Federation of Tax Administrators], about the challenges they may face when integrating with a Direct File pilot, be they technological, policy-driven or other concerns."

States that want to be involved in the pilot have until Sept. 4 to tell the IRS, the letter states.

Continue reading.

Route Fifty

By Natalie Alms,
Staff Reporter, Nextgov/FCW

JULY 31, 2023

TAX - RHODE ISLAND

[Gunvor USA, LLC v. State by and through Division of Taxation]

Supreme Court of Rhode Island - July 14, 2023 - A.3d - 2023 WL 4536385

Oil trader brought a tax aggrievement case challenging Division of Taxation's imposition of motor fuel tax on sale 300,000 barrels of gasoline, by an alleged unregistered distributor, as part of a chain transaction involving six entities including oil trader as a later buyer that was contractually responsible to its seller for the tax.

The Sixth Division District Court dismissed. Oil trader petitioned for writ of certiorari, which was granted.

The Supreme Court held that futility exception to administrative exhaustion requirement applied.

Futility exception to administrative exhaustion requirement applied to oil trader's tax aggrievement case challenging Division of Taxation's imposition of motor fuel tax on sale of 300,000 barrels of gasoline, by an alleged unregistered distributor, as part of a chain transaction involving six entities including oil trader as a later buyer that was contractually responsible to its seller for the tax, where it was certain, or nearly so, that tax administrator would have denied oil trader's request for a refund of motor fuel tax, had one been made, based on Division's inflexible position in a similar case that only the entity that paid the tax had standing to challenge it.

Orrick: IRS Issues Direct Pay and Transferability Proposed Regulations

On June 14, 2023, the IRS and Treasury issued proposed regulations (the "Proposed Regulations") under two novel provisions of the Inflation Reduction Act of 2022 (the "IRA") designed to promote capital investment in renewable energy: (1) "direct pay," allowing certain tax-exempt, taxable and government entities to elect to receive cash payments from the federal government in lieu of energy tax credits and (2) "transferability," allowing the transfer of energy tax credits to unrelated parties in exchange for cash payments.[1] Important details in the Proposed Regulations are summarized below. The Proposed Regulations are of interest to anyone thinking about developing or financing a renewable project or anyone interested in acquiring tax credits from another renewable energy project. The IRS and Treasury also issued temporary regulations ("Temporary Regulations") with an immediate effective date.

The Direct Pay Rules

Overview

The direct pay rules permit certain entities to receive a direct payment of certain tax credits. Eligible entities include tax-exempt organizations, states, and political subdivisions such as local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley

Authority, rural electric co-operatives, U.S. territories and their political subdivisions. The Proposed Regulations clarify that agencies and instrumentalities are also eligible for direct pay.[2] These entities will find direct pay to be a particularly attractive financing mechanism.

The following twelve credits are eligible for direct pay:

1. The credit for alternative fuel vehicle refueling / recharging property (Section 30C);
2. The renewable electricity production credit (Section 45);
3. The carbon oxide sequestration credit (Section 45Q);
4. The zero-emission nuclear power production credit (Section 45U);
5. The clean hydrogen production credit (Section 45V);
6. The commercial clean vehicle credit (Section 45W);
7. The advanced manufacturing production credit (Section 45X);
8. The clean electricity production credit (Section 45Y);
9. The clean fuel production credit (Section 45Z);
10. The energy credit (Section 48);
11. The qualifying advanced energy project credit (Section 48C); and
12. The clean electricity investment credit (Section 48E).

Continue reading.

Orrick, Herrington & Sutcliffe LLP – Peter Connors, Christopher Moore, John Narducci, John Stanley, Eric Wall and Wolfram Pohl

July 21, 2023

TAX - CALIFORNIA

CSHV 1999 Harrison, LLC v. County of Alameda

Court of Appeal, First District, Division 1, California - May 31, 2023 - 92 Cal.App.5th 117 - 309 Cal.Rptr.3d 322 - 2023 Daily Journal D.A.R. 5222

Limited-liability companies (LLCs) that the California State Teachers’ Retirement System (CalSTRS) had created for the purpose of purchasing and holding title to two investment properties filed a petition for writ of mandate to obtain refunds of documentary-transfer taxes that they had paid to county and city, which was based on argument that they, like their sole member, CalSTRS, were “political subdivisions” of the state and therefore exempt from the taxes.

Following a bench trial, the Superior Court denied petition. LLCs appealed.

The Court of Appeal held that the LLCs were not exempt from having to pay the documentary-transfer taxes.

Limited-liability companies (LLCs) that the California State Teachers’ Retirement System (CalSTRS) had created for the purpose of purchasing and holding title to two investment properties were not exempt from having to pay documentary-transfer taxes to city and county.

TAX - MARYLAND

Comptroller of Maryland v. Comcast of California

Supreme Court of Maryland - July 12, 2023 - A.3d - 2023 WL 4482556

Communications companies, as taxpayers, sought declaratory judgment that digital advertising tax violated Commerce Clause and First Amendment, as well as Internet Tax Freedom Act.

The Circuit Court granted declaratory judgment for companies. Comptroller appealed. Certiorari was granted before decision in Appellate Court.

The Supreme Court held that:

- Special statutory administrative remedies were exclusive with respect to challenge to digital advertising gross revenues tax;
- Declaratory judgment declaring digital advertising gross revenues tax unlawful violated Tax-General Article generally prohibiting judicial remedies that would prevent assessment or collection of taxes;
- Constitutional exception to administrative exhaustion requirement was not applicable to dispute; and
- Taxpayers disputing digital advertising gross revenues tax were required to exhaust their administrative remedies.

Special statutory administrative remedies were exclusive with respect to challenge to digital advertising gross revenues tax, since Tax-General Article generally prohibited judicial remedies that would prevent assessment or collection of taxes and Courts and Judicial Proceedings Article specifically prohibited use of declaratory judgment action as end-run around special statutory administrative remedies.

Tax-General Article broadly prohibiting judicial action that would interfere with the assessment or collection of taxes and the Courts and Judicial Proceedings Article prohibiting the use of declaratory judgment actions as an end-run around special statutory administrative remedies establish a legislative intent that the special statutory administrative remedies provided for the resolution of tax disputes are exclusive.

Declaratory judgment declaring digital advertising gross revenues tax unlawful violated Tax-General Article generally prohibiting judicial remedies that would prevent assessment or collection of taxes, since only reason for declaratory judgment was expectation that it would prevent Comptroller from assessing or collecting that tax.

Constitutional exception to administrative exhaustion requirement was not applicable to dispute over digital advertising gross revenues tax, since applicable special statutory administrative remedies were exclusive with respect to challenge to that tax.

Constitutional exception to administrative exhaustion requirement was not applicable to dispute over digital advertising gross revenues tax, since applicable special statutory administrative remedies were exclusive with respect to challenge to that tax.

Taxpayers disputing digital advertising gross revenues tax were required to exhaust their administrative remedies, and therefore trial court did not have jurisdiction to entertain their declaratory judgment action, since Tax-General Article provided special statutory administrative remedies for taxpayers to pursue their challenge.

Keep Your Paws Off My Positive Arbitrage – "With the Same Power Comes More Responsibility" - Squire Patton Boggs

The time has come, friends. The Rebate Series ends with this post. At least for a little while. So far we've covered the basics of arbitrage and rebate and two key timing-based spending exceptions: the 6-Month Exception and the 18-Month Exception. This party bus now comes to a halt with the Two-Year Spending Exception, the last and longest of the timing-based exceptions to the rebate requirement. If you've made it this far, thank you. If this is your first rebate-related post, please read the previous posts setting the stage.

Episode 3: Rebate & Arbitrage 101 – Two-Year Spending Exception

Like its name suggests, the Two-Year Spending Exception provides an exception to the rebate requirement for certain *non-refunding* issues when net proceeds of such bonds are spent within two years of the issue date of the bonds. This exception is *only* available for: (1) governmental bonds, (2) qualified 501(c)(3) bonds, and (3) private activity bonds that finance property owned by a governmental unit or a 501(c)(3) organization.

Additionally, and unlike the 6- and 18-Month Exceptions, to qualify for the Two-Year Exception, an issuer must reasonably expect at least 75% of the "Available Construction Proceeds" of the issue will be used for construction expenditures. Construction expenditures are those capital expenditures allocable to the cost of real property or constructed personal property, which may include rehabilitation costs. Available Construction Proceeds are defined as…

Continue reading.

By Natalie Vicchio on July 3, 2023

The Public finance Tax Blog

Squire Patton Boggs

TAX - WISCONSIN

Wisconsin Property Taxpayers, Inc. v. Town of Buchanan

Supreme Court of Wisconsin - June 29, 2023 - N.W.2d - 2023 WI 58 - 2023 WL 4278324

Plaintiff brought action for declaratory and injunctive relief from "transportation utility fee" that town imposed to fund its transportation utility district.

The Circuit Court entered summary judgment for plaintiff, finding that the fee was a property tax subject to the town's levy limit, and permanently enjoining the town from levying, enforcing, or collecting the fee in any amount above its levy limit.

Town appealed, and the parties filed a joint petition for bypass of the Court of Appeals, which the Supreme Court granted.

The Supreme Court held that:

- Pursuant to statute allowing the creation of utility districts, town could not base the fee on class of

property and its commercial characteristics;
- State law precluded town from imposing the fee on tax-exempt properties; and
- The fee counted against town's levy limit as set by state law.

When imposing "transportation utility fee" to fund its transportation utility district, which was fee that constituted property tax, town could not base fee on class of property and its commercial characteristics; statute allowing certain municipalities to set up utility districts and to fund them through "taxation of property" did not authorize such taxation to be based on anything other than property value.

State property-tax law precluded town from imposing on tax-exempt properties its "transportation utility fee," which was fee that town used fund its transportation utility district and that constituted property tax.

"Transportation utility fee" that town imposed to fund its transportation utility district, which fee constituted property tax, counted against town's levy limit as set by state law; despite argument that utility district had assumed responsibility for public improvement, town itself levied taxes to fund district.

TAX - GEORGIA

Columbus, Georgia Board of Tax Assessors v. Medical Center Hospital Authority

Court of Appeals of Georgia - June 28, 2023 - S.E.2d - 2023 WL 4228280

Taxpayer, a hospital authority, brought action against board of tax assessors, seeking declaration that its leasehold interest in certain property, on which residential retirement community was operated, was exempt from ad valorem taxation.

The Superior Court granted summary judgment in favor of taxpayer, and the Court of Appeals affirmed. The Supreme Court granted certiorari, reversed decision, and remanded, and the trial court again entered summary judgment in favor of taxpayer. Board appealed.

The Court of Appeals held that leasehold interest was public property exempt from ad valorem taxation.

Leasehold interest of hospital authority taxpayer in continuing care residential retirement community, which taxpayer operated on land leased from property owner, was "public property," and thus was exempt from ad valorem taxation; community, which provided elderly individuals with room and board and nursing care, addressed public need of identifiable class of citizens, bond validation proceedings established that taxpayer financed and paid for construction of community through revenue bonds issued in furtherance of public purpose for which taxpayer was established, community's audited financial statements treated operating profits as those of taxpayer, and income derived from operating community was used to repay bonds.

Texas Legislative Update, 88th Legislature, Regular Session | Qualified Projects Under Texas Tax Code Chapter 351, Subchapter C.

Summary: The Texas Legislature enacted four bills that 1) expand the list of cities that can build qualified projects (i.e., hotel and convention center projects subject to certain specifications) under Texas Tax Code Chapter 351, Subchapter C; 2) establish a claw back mechanism if state tax revenue generated by a qualified project does not meet certain metrics, 3) require a biennial report from the Texas Comptroller of Public Accounts regarding qualified projects, and 4) clarify that the provisions in Subchapter C do not provide any additional mechanism for taking property for public purposes or economic development.

Continue reading.

by TL Fahring

29 June 2023

Freeman Law

Getting Started: New Elective Pay Option for Local Clean Energy Projects

On June 14, the Internal Revenue Service (IRS) released proposed regulations for elective pay, previously referred to as "direct pay," a provision of the Inflation Reduction Act (IRA). These proposed regulations provide tax-exempt entities such as municipalities the ability to monetize clean energy tax credits they would not otherwise be able to use because of their status as a tax-exempt entities. If a tax-exempt entity places a project in service that utilizes a clean energy credit from IRA, they will get refunded for the full amount of the credit by filing a tax form with the IRS.

Municipalities looking to take advantage of the elective pay provision have been waiting for these proposed regulations from the IRS to begin planning their clean energy projects. It is important to note that the regulations are not final – the IRS is accepting public comments through August 14, 2023. It is possible the final regulations could be out by the end of the year.

Below, we detail the four most important things local leaders need to know about these proposed regulations.

What are the steps to make a successful elective payment election?

There are several steps to making a successful elective payment election. Not all steps need to occur in the order displayed below.

- **Identify and pursue the qualifying project or activity.** You will need to know what applicable credit you intend to earn and use elective pay for. This NLC blog provides an overview of the clean energy investment and production tax credits eligible under elective pay and some project examples.
- **Determine your tax year, if not already known**. Your tax year will determine the due date for your tax return.
- **Complete pre-filing registration with the IRS.** This includes providing information about your municipality, which applicable credits your municipality intends to earn and each eligible project/property that will contribute to the applicable credit, among other information . Upon completing this process, the IRS will provide you with a registration number for each applicable credit property. Your municipality will need to provide that registration number on its tax return as part of making the elective pay election. Please note, you must complete pre-filing registration in

sufficient time to have a valid registration number at the time you file your tax return.
- **Satisfy all eligibility requirements for the tax credit and any applicable bonus credits, if applicable, for a given tax year.** For example, to claim an energy credit on a solar energy generating project, you would need to place the project in service before making an elective payment election. You will need the documentation necessary to properly substantiate any underlying tax credit, including if bonus amounts increased the credit. See additional links below for further guidance related to bonus credits.
- **File a timely return.**

How do I make an election to receive an elective payment from the federal government?

A municipality will make an election on its annual tax return. Municipalities do not typically file tax returns because they are tax-exempt entities but will need to in order to receive payment. The IRS will prescribe how the return is to be filed, along with what relevant forms will be needed and other additional information, including supporting calculations. This is a multi-step process as outlined above and requires completing the pre-filing registration process. Additional information and forms will be available from the IRS at a later date.

When is the tax form due and is there a deadline for claiming elective pay?

An elective pay election may only be made on the original tax return (including extensions). Elections are not allowed on amended returns and there is no relief under the Procedure of Administrative Regulations for an elective payment not filed timely. This means the deadline is the due date (including extensions of time) for the tax return for the taxable year for which the election is made. For most tax exempt and government entities, this is generally 4.5 months after the end of the entity's tax year.

What is the effect of choosing to make an elective payment election?

A municipality that makes an election is treated as having made a payment against federal income taxes for the taxable year with respect to which an applicable credit was determined, in the amount of such credit. Since a municipality has no tax liability, the municipality will receive a refund equal to the full amount of the applicable credit.

Additional Resources

The IRS has a number of resources available to local leaders, including FAQs and fact sheets that outline key information contained in the proposed guidance. The White House has more details available at cleanenergy.gov/directpay.

The IRS Inflation Reduction Act website includes links to the guidance documents for the bonus credit considerations under elective pay, including prevailing wage and apprenticeship, domestic content, low-income communities and energy communities.

The IRS will hold a stakeholder briefing on the proposed guidance for elective pay on **Thursday, June 29 at 3 pm ET/12 pm PT**. Register here.

NLC continues to review the proposed guidance. Local leaders should be on the lookout for additional resources.

National League of Cities

by Carolyn Berndt & Michael Gleeson

TAX - MISSISSIPPI

Board of Supervisors for Lowndes County v. Lowndes County School District By and Through Lowndes County School Board

Supreme Court of Mississippi - June 1, 2023 - So.3d - 2023 WL 3748109

School district brought action against county board of supervisors for declaratory relief on claim that board's decision to reject $3,350,000 of district's requested tax effort, which was an amount that the board calculated to represented ad valorem taxes on properties previously subject to an expired fee-in-lieu of ad valorem tax agreement (FILOT), was based on an improper determination that the requested effort violated state's statutory limit on increases in school property taxes.

The Chancery Court entered summary judgment for district, finding that the statutory limit did not apply to the properties for the fiscal year at issue. Board appealed.

The Supreme Court held that:

- Pursuant to statute governing appeals from a judgment or decision by municipal authorities, which required the filing of a timely notice of appeal in the circuit court, the chancery court lacked subject-matter jurisdiction;
- Board's representation in its meeting minutes that it would file its own declaratory-judgment action did not preclude the statute governing appeals from a judgment or decision by municipal authorities from being district's exclusive remedy; and
- The defense of lack of subject-matter jurisdiction cannot be waived.

Chancery court lacked subject-matter jurisdiction to enter declaratory judgment in school district's action against county board of supervisors for declaratory relief on claim that board's decision to reject $3,350,000 of district's requested tax effort, which was an amount that the board calculated to represented ad valorem taxes on properties previously subject to an expired fee-in-lieu of ad valorem tax agreement (FILOT), was based on an improper determination that the requested effort violated state's statutory limit on increases in school property taxes; district did not file a notice of appeal in the circuit court as required by statute governing appeals from a judgment or decision by municipal authorities, which provided for district's exclusive remedy.

Representation by county board of supervisors, as stated in meeting minutes, that it would file a declaratory action to determine whether it was lawful for it to reject $3,350,000 of school district's requested tax effort, which was an amount that represented ad valorem taxes on properties previously subject to an expired fee-in-lieu of ad valorem tax agreement (FILOT) and which was an amount that allegedly violated statutory limit on increases in school property taxes, did not preclude statute governing appeals from a judgment or decision by municipal authorities from being school district's exclusive remedy for board's rejection of the tax effort, and thus school district, in order to challenge the board's decision, had to follow the statutory requirement of timely filing a notice of appeal in the circuit court.

TAX - WISCONSIN

Greenwald Family Limited Partnership v. Village of Mukwonago

Supreme Court of Wisconsin - June 21, 2023 - N.W.2d - 2023 WI 53 - 2023 WL 4140327

Taxpayer brought challenge to village's special assessment against taxpayer's property in a newly created special-assessment district.

The Circuit Court granted village's motion to dismiss. Taxpayer appealed. The Court of Appeals affirmed in a summary disposition order. Taxpayer petitioned for review.

The Supreme Court held that:

- Taxpayer's service on village attorney did not constitute serving village clerk with required written notice of appeal of the special assessment, and
- Village attorney's admission of service of summons and complaint did not preclude taxpayer from having to comply with statutory requirement to serve village clerk with written notice of appeal.

Taxpayer's service on village attorney did not constitute serving village clerk with required written notice of appeal of village's special assessment against taxpayer's property in newly created special-assessment district; clerk was not "party" to appeal, and statute governing appeals from special assessments unambiguously required service of notice of appeal upon clerk, which meant that something had to be presented or delivered to clerk.

Village attorney's admission of service of summons and complaint did not preclude taxpayer from having to comply with statutory requirement to serve village clerk with written notice of appeal from special assessment; taxpayer's attorney had asked village attorney if he would accept service for village, village attorney accepted service of summons and complaint on behalf of village only, and village attorney never told taxpayer's attorney that he was accepting such service on behalf of village clerk as well.

TAX - CALIFORNIA

CSHV 1999 Harrison, LLC v. County of Alameda

Court of Appeal, First District, Division 1, California. - May 31, 2023 - Cal.Rptr.3d - 2023 WL 3735488

Limited-liability companies (LLCs) that the California State Teachers' Retirement System (CalSTRS) had created for the purpose of purchasing and holding title to two investment properties filed a petition for writ of mandate to obtain refunds of documentary-transfer taxes that they had paid to county and city, which was based on argument that they, like their sole member, CalSTRS, were "political subdivisions" of the state and therefore exempt from the taxes.

Following a bench trial, the Superior Court denied petition. LLCs appealed.

The Court of Appeal held that the LLCs were not exempt from having to pay the documentary-transfer taxes.

Limited-liability companies (LLCs) that the California State Teachers' Retirement System (CalSTRS) had created for the purpose of purchasing and holding title to two investment properties were not exempt from having to pay documentary-transfer taxes to city and county.

NABL Seeks Clarification From IRS.

Bond lawyer requests for clarifications on Internal Revenue Service rules affecting municipal finance are so far eliciting no answers from the IRS, leading the National Association of Bond Lawyers to send a letter to the agency requesting a response to some issues that date back to 2018.

The letter comes from NABL president Jodie Smith of Maynard Nexsen, who's halfway through his term leading the group. The bones of contention include defining two new categories of exempt facility bonds used for financing qualified broadband projects and qualified carbon dioxide capture facilities. There are also unanswered questions about when a qualified tender bond is treated as reissued, which is a question that dates back to 2019.

Concerns about Revenue Procedure 2018-26, which deals with remedial actions for improper uses of tax-exempt bond proceeds, trace back to a 2018 IRS regulation. Clarifications dating from 2015 Treasury rulings are still being sought on final regulations for private activity bonds. NABL is also requesting additional guidance on discrepancies between IRS Form 8038 and Form 8038-G, an e-filing form that the agency has been wrestling since the pandemic.

Although some of the issues have been waiting on decisions for five years, the letter represents business as usual.

"We submit comments to the IRS priority guidance plan every year," said Brian Egan, NABL's director of government affairs. "As practitioners, our members have valuable input that helps set the course for what guidance the market needs prioritized."

The reasons for the lack of response from the agency remain conjecture.

"It can mean many things," said Rich Moore, tax partner at Orrick, Herrington & Sutcliffe. "Sometimes, the IRS is actively working through a guidance project and trying to determine the details. Other times, the IRS has the intent to get to a project but doesn't have the bandwidth. Occasionally, NABL and the IRS won't see eye to eye as to whether guidance on a subject is needed."

The ongoing back and forth between the lawyers and the agents also comes with its own rules of engagement regarding what goes into the letters.

"This is not the time or place for new comments," said Moore. "It is viewed by many as inappropriate to put something on the list for which NABL has not already provided detailed suggestions. This is just an exercise in reinforcing that previously submitted comments are still a priority."

Streamlining dealings with the IRS was promised by an $80 billion funding infusion that was turned into a political football and then a bargaining chip used to partially pay for the Fiscal Responsibility Act of 2023. Repercussions from the defunding also remain unknown.

"We support the IRS getting whatever resources it needs to effectively carry out its mission," said Egan. "I cannot say with certainty what the claw back of funds provided under the Inflation Reduction Act will mean for tax-exempt municipal market participants, but it's worth noting the Service made investment and upgrades in relevant areas even before the passage of IRA."

By Scott Sowers

BY SOURCEMEDIA | MUNICIPAL | 06/08/23 01:28 PM EDT

TAX - COLORADO

[MJB Motels LLC v. County of Jefferson Board of Equalization]

Supreme Court of Colorado - May 30, 2023 - P.3d - 2023 WL 3706206 - 2023 CO 26

Taxpayers, which owned commercial real property in county, brought action against county board of equalization and county assessor, alleging that pandemic and related government orders amounted to "unusual conditions" that required board to lower assessor's property valuations and assessor to revalue properties.

The District Court dismissed complaint, and after the Court of Appeals moved for determination of jurisdiction, the Supreme Court granted motion and accepted jurisdiction.

The Supreme Court held that:

- COVID-19 pandemic was not "detrimental act of nature," and
- Public health orders issued in response to pandemic did not constitute "regulations restricting the use of the land."

COVID-19 pandemic was not "detrimental act of nature," for purposes of statute that instructed tax assessors to revalue property before assessment date when unusual conditions in or related to real property, including detrimental acts of nature, would result in increase or decrease in actual value; COVID-19 was respiratory disease caused by novel coronavirus, such that it did not resemble natural events, including earthquakes, floods, and tornadoes, that were considered "acts of nature," COVID-19 was not "in or related to real property," given that while it might have infected people on property, it did not infect property itself, and COVID-19 did not directly affect use or availability of real property, had worldwide impact, and had duration that spanned years.

Public health orders issued in response to COVID-19 pandemic did not constitute "regulations restricting the use of the land," and thus did not trigger revaluation of property pursuant to statute that instructed tax assessors to revalue property before assessment date where unusual conditions in or related to real property would result in increase or decrease in actual value; orders regulated operation of commercial activity on land, and not use of land itself, and examples provided in Assessors' Reference Library (ARL) of regulations that increased or decreased use of land all involved changes to categorization of land that were intended to be permanent until and unless land was subsequently recategorized, while health orders at issue were intended to be temporary.

[Fitch: Most U.S. State Gas Tax Bonds To Remain Stable Amid Changing Fuel Landscape]

Fitch Ratings-New York-08 June 2023: Ratings and Outlooks for most U.S. state transportation bonds backed by gas tax revenues will remain intact even as vehicle fuel efficiency improves and electric and hybrid vehicles' share of the market expands, according to Fitch Ratings in a new report.

"Improvements in fuel efficiency and the transition to electric vehicles threatens to accelerate weakening revenue growth prospects for state gas taxes over the long term," said Director Tammy Gamerman. "However, many state transportation bonds contain features that mitigate these concerns and enable the bonds to be highly rated."

Fitch currently rates 29 unique securities in 17 states that are fully or partially supported by state motor fuel taxes. Among these, 14 are rated 'AA+' while three Missouri securities have Fitch's highest rating of 'AAA'.
Amid flattening gas tax growth in many states and the prospects for outright declines as hybrid and electric vehicles (EVs) grab more of a foothold, most state gas tax bonds are likely to maintain credit rating stability. That said, securities with more dependence on fuel taxes and looser additional leverage requirements are more likely to see negative rating pressure over the medium term, particularly in states with weaker economic growth.

Motor fuel taxes are a key source of transportation funding, and regardless of a state's exposure to rating actions on transportation bonds, all states will need to explore alternative sources to address unmet long-term infrastructure liabilities.

"The Road Ahead for State Gas Taxes and Transportation Bonds" is available at www.fitchratings.com.

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TAX - NEW YORK

St. Lawrence County v. City of Ogdensburg

Court of Appeals of New York - May 23, 2023 - N.E.3d - 2023 WL 3587521 - 2023 N.Y. Slip Op. 02757

County commenced combined article 78 and declaratory judgment action against city, which had repealed prior local law that opted out of application of state tax law that outlined process for enforcement and collection of delinquent real property taxes, seeking declaratory judgment that local law that repealed prior law was not in accord with state law and impaired rights of county and county treasurer.

City moved to dismiss for failure to state cause of action, and the Supreme Court, St. Lawrence County, issued declaration in favor of city. The Appellate Division affirmed. County appealed.

The Court of Appeals held that:

- City’s passage of clarifying amendment to charter rendered moot cross-claim asserted by school district;
- City ceased to be tax district with respect to future liens;
- Local law that repealed prior law did not violate state tax law that authorized tax districts to make agreements with each other with respect to real property upon which they owned tax liens in regard to disposition of such liens and property; and
- Local law did not violate mandate in state constitution and municipal home rule law.

Passage by city, which had enacted local law that repealed prior law that had opted out of application of state tax law outlining process for enforcement and collection of delinquent real property taxes, of clarifying amendment to city charter that expressly affirmed city’s obligation to enforce delinquent taxes on behalf of school district, while appeal from declaration in favor of city in combined article 78 and declaratory judgment action brought by county was pending, rendered moot cross-claim asserted by school district.

City, which enacted local law that repealed prior law that had opted out of application of state tax law outlining process for enforcement and collection of delinquent real property taxes, and provided in charter for county to enforce city’s delinquent taxes, ceased to be tax district with respect to future liens, and thus absolved itself of ability and responsibility to appoint enforcing officer and enforce tax law, and instead county was responsible for tax enforcement and benefits or burdens attendant thereto; upon repeal of opt-out law, city became subject to state tax law that outlined process for enforcement and collection of taxes with respect to enforcement of taxes which had become liens on or after date repeal was effective.

City’s local law, which repealed prior law that opted out of application of state real property tax law that outlined process for enforcement and collection of delinquent real property taxes at local level, did not violate state tax law that authorized tax districts to make agreements with each other with respect to real property upon which they owned tax liens in regard to disposition of such liens and property, even though county argued city’s amendment of charter to repeal prior law circumvented purported mandate in such tax law that city negotiate agreement with county regarding tax enforcement processes; tax law did not require that localities reach agreement or follow particular procedure, and instead it only authorized tax districts to tax agreements with respect to real property.

City’s local law, which repealed prior local law that opted out of application of state real property tax law that outlined process for enforcement and collection of delinquent real property taxes at local level, did not violate mandate in state constitution and municipal home rule law that “local government shall not have power to adopt local laws which impair powers of local government or public corporation,” even though county argued local law prevented it from entering into type of agreement contemplated by state tax law and impaired its power by burdening it with financial liability for city’s delinquent tax obligations; legislature expressly permitted city to repeal local law, and that repeal may have imposed additional obligations on county was simply consequence of statutory structure outlined in tax law.

TAX - MAINE

Hurricane Island Foundation v. Town of Vinalhaven

Supreme Judicial Court of Maine - May 30, 2023 - A.3d - 2023 WL 3699098 - 2023 ME 33

Taxpayer, which was a nonprofit corporation that occupied most of an island pursuant to a 40-year lease, sought review under Maine Rules of Civil Procedure of town assessor's denial of its application for a local property tax exemption available to literary and scientific institutions.

The Superior Court entered final judgment that taxpayer was a scientific institution and modified assessor's decision to designate taxpayer as tax exempt. Town appealed.

The Supreme Judicial Court held that:

- Taxpayer's complaint could fairly be treated as a complaint for declaratory judgment, and thus the Superior Court had subject-matter jurisdiction, but
- Taxpayer failed to demonstrate that it was a scientific institution.

Even though complaint filed by taxpayer for review under the Maine Rules of Civil Procedure of town assessor's denial of its application for a local property tax exemption available to literary and scientific institutions could fairly be treated as a complaint for declaratory judgment, which would be a basis for the Superior Court to have subject-matter jurisdiction, the Supreme Court would not require the matter to be remanded to the Superior Court for the taxpayer to amend and label the complaint; if that happened, the Superior Court would be compelled to engage in the duplicative task of considering exactly the same arguments and exactly the same evidence and deciding exactly the same issue as it has already considered and decided in entering the judgment on appeal, i.e., dismissal would serve no purpose, would unjustifiably elevate form over substance, and would waste judicial resources as well as the resources of the parties.

Taxpayer, which was a nonprofit corporation, failed to demonstrate that it was a "scientific institution," and thus taxpayer did not show that it qualified for property tax exemption available to literary and scientific institutions; record showed that taxpayer's primary purpose was education, given that taxpayer's purpose was to promote character development, leadership skills and self-discovery through outdoor educational experiences beyond the traditional classroom, taxpayer's articles of incorporation further stated that its primary purpose was educational and listed other charitable or research purposes, and taxpayer's brochures primarily discussed education and applied sciences with some references to the sciences apart from education.

Keep Your Paws Off My Positive Arbitrage – "With Great Power Comes Some Responsibility" - Squire Patton Boggs

Our previous post kicked off our Rebate Series by introducing core concepts and terms. However, for every rule there is an exception. And, as you will learn shortly, for every exception there is an exception to that exception (except when there is not).

The next two episodes will focus on the so-called timing exceptions. In the rebate world, there are three: the 6-month, 18-month and two-year spending exceptions to the rebate requirement. Two general points to keep in mind: (1) each of these exceptions is independent of the others; so an issue could qualify under more than one, and (2) the spending exceptions are not automatically applied; so an issuer can choose NOT to apply them.

This post will cover the 6-month and 18-month spending exceptions, saving the best (or honestly, the most confusing) for last.

Continue reading.

By Natalie Vicchio on May 17, 2023

The Public Finance Tax Blog

Squire Patton Boggs

Local Governments Escape Ruling that Could Have Upended Property Tax Laws.

The Supreme Court ruled that cities and counties cannot keep surplus funds from the homes they sell after residents fail to pay property taxes. But local officials nationwide are breathing a sigh of relief that the court didn't go further.

A Minnesota county violated the Fifth Amendment when it sold and kept the excess proceeds from an elderly woman's home, the U.S. Supreme Court ruled Thursday in a unanimous decision.

"A taxpayer who loses her $40,000 house to the state to fulfill a $15,000 tax debt has made a far greater contribution to the public fisc than she owed," Chief Justice John Roberts wrote in the opinion. "The taxpayer must render unto Caesar what is Caesar's, but no more."

The case, *Tyler v. Hennepin County*, centered on how much autonomy state governments have regarding property that is seized lawfully from owners who are delinquent on their taxes. The Fifth Amendment specifies that governments cannot take private property without justly compensating its owner. So the question was whether Hennepin County improperly took the profits it made from selling the woman's house.

Continue reading.

Route Fifty

By Elizabeth Daigneau

May 25, 2023

TAX - TEXAS
Pecos County Appraisal District v. Iraan-Sheffield Independent School District
Supreme Court of Texas - May 19, 2023 - S.W.3d - 2023 WL 3556711

School district petitioned for review of decision of county appraisal review board (ARB) denying school district's challenge to valuation of taxpayer's mineral-interest real property, alleging that taxpayer's property was erroneously omitted from appraisal for certain tax years.

The 83rd District Court granted taxpayer's motion to show authority, concluding that school district's attorney lacked authority to represent district because he was engaged under an allegedly void contingent-fee contract for appraisal litigation, and granted taxpayer's plea to the jurisdiction, concluding that school district's petition was "void and of no effect" and that district had thus failed to timely appeal the ARB's decision. School district appealed. The El Paso Court of Appeals reversed and remanded. Taxpayer petitioned for review, which was granted.

The Supreme Court held that:

- Statute authorizing a 20 percent contingency fee for attorneys hired to enforce collection of delinquent taxes did not expressly authorize school district to retain attorney on contingent-fee basis for appraisal litigation;
- Attorney's authority to represent school district in appraisal litigation was not authorized by Education Code;
- Texas law did not authorize school district to retain attorney on a contingent-fee basis for appraisal litigation;
- Attorney could not show his authority to represent school district by pointing to contingent-fee contract; and
- Proper remedy for failure to show authority was to give school district a reasonable opportunity either to modify its agreement with attorney or to retain other counsel on terms that were within school district's lawful authority.

School district's lawsuit seeking to require county appraisal district to raise its valuation of taxpayer's mineral-interest real property so that taxpayer would owe additional taxes, which had not yet been imposed, was not a suit to enforce collection of delinquent taxes, and thus statute authorizing a 20 percent contingency fee for attorneys hired to enforce collection of delinquent taxes did not expressly authorize school district to retain attorney on contingent-fee basis to bring appraisal litigation; there had been no taxes imposed based on heightened valuation school district desired, so there were no delinquent taxes to collect.

Actions of attorney hired by school district on a contingent-fee basis for representation in lawsuit seeking to increase appraisal for taxpayer's mineral-interest real property so as to impose additional taxes on taxpayer was not to assess or collect school district's taxes, which could have only taken place if appraisals were in fact increased, and thus attorney's authority to represent school district in appraisal litigation was not authorized by section of Education Code providing that board of trustees of an independent school district may employ a person to assess or collect school district's taxes and may compensate the person as the board of trustees considers appropriate.

Texas law did not authorize school district to retain attorney on a contingent-fee basis for appraisal litigation seeking to increase valuation of taxpayer's mineral-interest real property; no authority could be implied from relevant statutes, and legislature had authorized taxing units to use contingent-fee agreements related to taxation in only one specific circumstance, to enforce collection of delinquent taxes, suggesting that law-making branch had not authorized taxing units to pursue appraisal litigation by engaging attorneys on a contingent-fee basis, but had not impliedly authorized such controversial contracts without saying so.

School district lacked power to retain attorneys on a contingent-fee basis to pursue appraisal litigation, and thus attorney hired by school district for appraisal litigation with respect to taxpayer's mineral-interest real property could not show his authority to represent school district by pointing to contingent-fee contract, which was an ultra vires act beyond school district's authority, on motion for attorney to show authority, in school district's challenge to valuation of taxpayer's property.

Proper remedy for failure to show authority by attorney hired by school district on contingent-fee contract for representation in appraisal litigation related to valuation of taxpayer's mineral-interest real property was not dismissal with prejudice of school district's claims challenging valuation, but rather was to give school district a reasonable opportunity either to modify its agreement with attorney or to retain other counsel on terms that were within school district's lawful authority; school district was not afforded a reasonable opportunity to hire another attorney or to adjust its arrangement with attorney, either of which would have cured problem identified by motion for attorney to show authority.

Legislation Creates Taxable Municipal Bonds to Boost Infrastructure Investments.

Bipartisan legislation recently re-introduced in the U.S. Senate would create a new class of "direct-pay" taxable municipal bonds intended to boost infrastructure investments and other public projects by providing affordable access to large taxable bonds.

The American Infrastructure Bonds Act would allow state and local governments to issue taxable bonds for any public expenditure that would be eligible to be financed by tax-exempt bonds.

American Infrastructure Bonds would be a "direct-pay" taxable bond with the U.S. Treasury paying a percentage of the bond's interest to the issuing entity to reduce costs for state and local governments. They would be issued for projects at 28 percent of the bond's interest.

The bonds could be used for a variety of infrastructure projects including bridges, broadband internet, roads, and water systems.

The bonds are modeled after the Build America Bonds issued after the 2008 financial crisis to attract more public infrastructure investment.

U.S. Sens. Michael Bennet (D-CO) and Roger Wicker (R-MS) re-introduced the bill.

"We have to continue to invest in 21st century American infrastructure to build an economy that grows for everyone," Bennet said. "The American Infrastructure Bonds Act is a bipartisan proposal to attract greater support for infrastructure projects across the country – especially in rural and underserved communities."

TRANSPORTATION TODAY

BY MELINA DRUGA | MAY 23, 2023

TAX - ILLINOIS

Harper v. Health Care Service Corporation

Appellate Court of Illinois, First District - May 4, 2023 - N.E.3d - 2023 IL App (1st) 220078 - 2023 WL 3238760

Purported taxpayer brought derivative action on behalf of city and county against city and administrator of city's employee health care plan, asserting various theories of recovery under the Municipal Code, state constitution, the Freedom of Information Act (FOIA), and Medical Practice Act, seeking return of taxpayer funds city used to pay administrator.

The Circuit Court granted administrator and city's motion to dismiss with respect to pleadings and motion for involuntary dismissal, and dismissed all of purported taxpayer's claims. Purported taxpayer appealed.

The Appellate Court held that:

- City was not required to comply with statute governing award of municipal contracts;
- City duly executed agreements with administrator under municipal ordinance;
- Purported taxpayer lacked standing to bring cause of action under the Medical Practice Act;
- Purported taxpayer could not recover taxpayer funds under theory of unjust enrichment;
- Administrator was not a "public body" within meaning of FOIA;
- Purported taxpayer failed to state cause of action that city and administrator violated the "prior appropriations doctrine"; and
- Order denying purported taxpayer's motion for partial summary judgment was appealable.

City, in exercising its home rule authority, was not required to comply with statute governing award of municipal contracts when city's mayor, comptroller, and purchasing agent's allegedly delayed signing agreements with administrator of city's employee health care plan until years after agreements' effective dates, in purported taxpayer's derivative action on behalf of city and county against city and administrator; absent any express statutory limitation or preemption of city's ability to contract for and administer health care coverage for its employees, city was free to exercise its home rule authority without being bound by requirements of the statute, including signing contracts after their effective dates, giving them retrospective effect, and providing for administrator's continuation of services in between contracts.

City, in exercising its home rule authority, duly executed contracts with administrator of city's employee health care plan for purposes of ordinance providing that no contract was binding on city unless it had been duly executed, in purported taxpayer's derivative action on behalf of city and county against city and administrator, alleging city's mayor, comptroller, and purchasing agent's delay in signing contracts with administrator until years after their effective dates rendered them null and void under statute governing award of municipal contracts, and thus were not binding under ordinance; under its home rule authority, city established its own procedures for executing contracts, which included signing them after their effective dates and giving them retrospective effect.

Purported taxpayer lacked standing to bring cause of action alleging that administrator of city's employee health care plan violated the Medical Practice Act by negotiating reduced fees from its third-party medical providers, in purported taxpayer's derivative action on behalf of city and county against administrator and city; far from redressing any injury to the city, a successful prosecution of purported taxpayer's claims would harm city by preventing administrator from negotiating reduced fees from its medical providers and then passing on some or all of those savings to the city.

Purported taxpayer failed to specifically plead that medical providers with whom administrator of city's employee health care plan negotiated contracts for reduced fees were subject to licensure requirements under the Medical Practice Act, in purported taxpayer's derivative action on behalf of city and county against administrator and city, where some of the providers about which purported taxpayer complained were pharmacists, who were licensed under the Pharmacy Practice Act and not the Medical Practice Act.

Purported taxpayer could not recover taxpayer funds city used to pay administrator of city's employee health care plan under a theory of unjust enrichment, in purported taxpayer's derivative action on behalf of city and county against administrator and city, where agreements between city and administrator for plan administration services were proper exercises of city's home rule authority and, as such, were valid and enforceable contracts.

Administrator of city's employee health care plan was not a "public body" within meaning of the Freedom of Information Act (FOIA), and therefore was not required to make its agreements with city for plan administration services available for public inspection under FOIA, in taxpayer's derivative action on behalf of city and county against administrator and city, where administrator was a mutual insurance company.

Purported taxpayer failed to state a cause of action that city and administrator of city's employee health care plan violated the "prior appropriations doctrine" by allegedly failing to identify administrator in city's annual appropriations ordinances and in failing to fully disclose and approve administrator's fees before it began performing under contracts for plan administration services, where purported taxpayer cited no statutory provisions or constitutional law to support her invocation of the doctrine.

Purported taxpayer forfeited on appeal issue of whether city and administrator of city's employee health care plan violated the "prior appropriations doctrine" by failing to comply with state constitutional provision requiring units of local government to make payments from public funds only as authorized by law and statute providing that a municipality cannot incur expenses unless an appropriation was previously made concerning that expense, where purported taxpayer did not allege her theory in her amended complaint, but raised it for the first time on appeal.

Involuntary dismissal of purported taxpayer's claim that city and administrator of city's employee health care plan violated the "prior appropriations doctrine" was warranted, where administrator attached city's answer to purported taxpayer's interrogatories, in which it explained how its annual appropriation ordinances appropriated monies to specific funds used to pay administrator's administration of the plan, and purported taxpayer failed to present any evidence that city and administrator's affirmative defense was unfounded or required resolution of an essential element of material fact.

Order denying purported taxpayer's motion for partial summary judgment, on theory that contracts between city and administrator of city's employee health care plan was void under statute governing award of municipal contracts and ordinance providing that no contract was binding on city unless it had been duly executed because they were signed by city's mayor years after their effective date, was appealable, where subsequent dismissal of purported taxpayer's amended complaint was final and appealable, and no trial or hearing had been conducted.

Bipartisan Senators Reintroduce Legislation to Restore Tax-Exempt Status of Advance Refunding Bonds.

- Sens. Roger Wicker (R-Miss.) and Debbie Stabenow (D-Mich.) re-introduced the bipartisan LOCAL Infrastructure Act, which would allow counties to advance refund municipal bonds on a tax-exempt basis
- The tax-exempt status of advance refunding municipal bonds has been unavailable to counties since 2017 as a result of a spending offset provision of the Tax Cuts and Jobs Act
- Counties have historically relied on tax-exempt advance refunding to lower borrowing costs, freeing up funds to be used for other important capital projects and minimizing costs to taxpayers

Continue reading.

NATIONAL ASSOCIATION OF COUNTIES

by MAXX SILVAN & PAIGE MELLERIO

MAY 17, 2023

Ken Paxton Raises Legal Concerns on Austin's Financial Model for Project Connect.

Texas Attorney General Ken Paxton says the unique financing model Austin established for Project Connect is likely illegal under state law, a position that could greatly hamper the city's efforts to build a transformational light rail system that voters approved more than two years ago.

Paxton's opinion, issued Saturday in connection to state legislation that seeks to undo the $7 billion transit investment, says Austin made "mistakes" in creating the fund and "misstatements to the voters" in the November 2020 election.

Voters approved two things that are at issue in Paxton's opinion: a 20% increase in the city portion of their property tax, and the establishment of a local government corporation to build the system, financed by debt backed by that tax revenue. That tax revenue transfer, according to a city resolution, is to continue indefinitely until funds are no longer required for "operations, maintenance, or state of good repair."

Continue reading.

by Ryan Autullo

May 21, 2023

Austin American-Statesman

TAX - NEW JERSEY

Levy v. City of Long Branch

Tax Court of New Jersey - May 5, 2023 - N.J.Tax - 2023 WL 3295416

Taxpayer applied for Freeze Act relief from increase in real property assessment based on Tax Court's final value judgment for a tax year that preceded the tax year which was subject of his county tax board case, following a global settlement for both tax years in question.

The Tax Court held that:

- Freeze Act waiver in county tax board case did not extend to Tax Court case due to global settlement;
- County tax board judgment did not negate vitality of Tax Court judgment as a base year under Freeze Act; and
- County tax board judgment was not proof of change in value that would negate application of Freeze Act.

Under the Freeze Act, which provides protection against an increase in assessed value of real property for the two years following a final value judgment of the Tax Court or a county board of taxation, the final value judgment amount for the tax year under appeal, known as the “base year,” is mechanically carried forward to each of the succeeding two years, known as the “freeze years.”

Taxpayer’s express waiver of Freeze Act protection, of freezing real property assessments for two years following entry of a final value judgment, in his county tax board case concerning second tax year did not extend to his Tax Court case concerning first tax year due to parties’ global settlement for both tax years in question, where stipulation of settlement in Tax Court case was silent as to Freeze Act, there was no condition in city’s offer in county tax board case that the Freeze Act be waived in Tax Court case, taxpayer did not know that he was expected to waive application of Freeze Act in Tax Court case due to his house being in county, and taxpayer should not have been aware of any expectation/implied waiver in Tax Court case.

Existence of global multi-year settlement involving Tax Court case for first tax year and a county tax board case for second tax year did not preclude first tax year from being the controlling base year for purposes of application of Freeze Act protection, of freezing real property assessments for two years following entry of a final value judgment, to third tax year, where main issue in dispute was whether taxpayer waived benefit of Freeze Act for third tax year based on global settlement, which involved separate stipulations of settlement and only one Freeze Act waiver in county tax board case, and there was no trial on valuation of multiple years before the court.

An “internal change” in value of real property, which negates application of Freeze Act protection of freezing property assessments for two years following entry of a final value judgment, refers to easily ascertainable physical improvements to the subject property such as added floors, whereas an “external change” in value, which also negates application of Freeze Act, include extreme economic changes within close proximity of the subject property or of immediate neighboring properties which increases the subject property’s value.

County tax board’s value judgment for second tax year, which was lower than Tax Court’s value judgment for first tax year, was not proof of a change in value of real property that would negate application of two-year Freeze Act protection for property assessments to third tax year, where parties stipulated to values for first and second tax years as part of their global settlement of both matters, even if market data submitted supported a reduction for second tax year and the assessment for third tax year was higher than the stipulated value for first and second tax years.

Evidence that the subject property’s alleged increased value is the result solely of general inflationary trends is not proof of an external change in value that negates application of Freeze Act protection of freezing real property assessments for two years following entry of a final value judgment.

Amid Economic Uncertainty, State Tax Revenues Decline.

If there’s good news in April’s numbers, though, it might be that most states were already planning for softer revenue growth in fiscal 2024 and many have robust rainy day funds to weather a potential downturn. Plus, more news to use from around the country in this week’s State and Local Roundup.

It’s Friday, May 12, and we’d like to welcome you to the weekly State and Local Roundup. There’s plenty to keep tabs on, with book bans in Indiana, high lead levels in the drinking water of Illinois public schools and the signing of an "enormous package" of green bills in Colorado. But first we'll start with state budgets.

We're starting to get a sense of how state revenues fared at the height of income tax collections in April, and the good times, it seems, are coming to an end.

Fitch Ratings issued a [report on state tax revenue]s from April. After two years of sometimes record-breaking surpluses, the bond rating agency found, revenues are coming in well below the prior year, "and in some cases below state projections."

Continue reading.

Route Fifty

By Elizabeth Daigneau,
Interim Executive Editor, Route Fifty

MAY 12, 2023

[The Real Impact of State Tax Cuts.]

COMMENTARY | The debate over tax cuts that's happening in statehouses across the country is about much more than revenues and spending. It's a fight over whether we will have an inclusive democracy where everyone—all races in all places—can thrive.

There's a troubling trend in state capitols across the country: Some lawmakers are pushing big, permanent tax cuts that primarily benefit the wealthy and using temporary budget surpluses to hide the cuts' true cost. Eight states have already significantly cut their income taxes this year, and debates over major tax changes continue in more than 20 states.

These tax cuts will deplete the funding available for schools, infrastructure, health care and other public services. They will worsen inequality by making state tax codes less equitable and enriching those at the very top of the income scale. Meanwhile, there will be cuts to public assets that are crucial for poor and middle-class families and less money for teachers in the classroom and for public safety personnel, which means longer wait times for emergency response.

Continue reading.

Route Fifty

By Aidan Davis and Wesley Tharpe

May 10, 2023

[Fitch: US States' Credit Resilient Despite Weaker April Income Tax Revenues]

Fitch Ratings-New York-11 May 2023: As widely anticipated, state income tax revenues for April have been coming in well below the prior year, and in some cases below state projections. However, most U.S. states are still on track to meet or exceed year-end budget forecasts due to a combination of conservative revenue forecasting and continued growth in other categories of state taxes, Fitch Ratings says. Many states used prior-year revenue surpluses to improve financial resilience by boosting reserves and paying down debt, supporting state ratings stability.

As states set their budgets for fiscal 2024, most are using cautious revenue forecasts that are generally in line with Fitch's expectation for a mild recession later in 2023. Those states implementing significant new spending plans or major tax policy changes could face additional budgetary pressure in the near and medium term, depending on the severity of revenue slowdowns.

April is a key month for states given the traditional mid-April income tax deadline. Last April's robust performance drove very large budget surpluses for many states. This year loomed particularly large given the anticipated drop-off in tax revenues due to slower overall economic growth and weak capital markets performance in calendar year 2022, which is an indicator for capital gains income. Based on data from early reporting states, this is playing out largely as expected.

Continue reading.

Thu 11 May, 2023

Economic Recovery Slows Across US States, Tax Revenue Growth Stalls in CA and NY.

Fitch Ratings-San Francisco/New York-08 May 2023: Despite the economy demonstrating more near-term resilience than anticipated, most U.S. States' GDP has slowed to pre-pandemic levels due in part to rising interest rates and tighter credit conditions, according to a new report from Fitch Ratings.

"The states with the strongest growth are characterized by fast population growth and highly diversified economies. States with the weakest recoveries are characterized by narrower and less diversified economies with high exposure to the tourism and energy sectors," said Olu Sonola, Head of U.S. Regional Economics.

State tax receipts have continued to expand at a healthy pace in fiscal 2023, but signs of a broad deceleration in revenue growth relative to the prior two years are clear. The median U.S. growth in state tax revenues was still solid at 11% yoy across all states through February; however, this compares to 24% yoy growth for the same period one year prior. California and New York were the only states to record yoy declines in tax revenue, reflecting broad based weakness in the equity markets and the technology sector.

As of March 2023, 15 states still had net job losses compared to February 2020, including the tourism-associated economy of Hawaii, as well as the natural resource-dependent economies of Alaska and North Dakota. Among the fastest growing states are Idaho, Utah and Florida, which have benefitted from significant domestic in-migration over the past three years.

Nominal personal income growth was positive across all states for the year ended in 4Q22 on the back of broad-based nominal private-sector wage growth, coupled with robust job growth. The gains were partially offset by decreased income from the roll-off of pandemic-era governmental support in all states.

For more information, a special report titled “U.S. States — Revenue and Economic Monitor 1H23” is available at www.fitchratings.com.

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The U.S. Supreme Court Could Upend Local Property Tax Laws.

The justices heard a case last week on a Minnesota county’s profit on a seized condo. A ruling could change property seizure programs nationwide.

Welcome back to the Public Finance Update! I’m Liz Farmer and this week I’m looking at a U.S. Supreme Court case that has financial implications for counties. The property tax and seizure case argued before the high court last week has led to some unlikely alliances—bringing together all parts of the ideological spectrum.

The case, Tyler v. Hennepin County, Minnesota, is about how much autonomy the U.S. Constitution allows state governments who have lawfully seized property from owners who are delinquent on their taxes. A ruling against Hennepin County in this case could limit how and when other local governments can execute a tax foreclosure and what they’re allowed to do with the sale proceeds.

The case concerns a one-bedroom condominium in Minneapolis that Geraldine Tyler, now 94 years old, purchased in 1999 and lived in for more than a decade. In 2010, according to her brief, “she left her home out of concern for her health and safety and moved to an apartment building for seniors in a safe and quiet neighborhood.” Although she continued to pay her property taxes on time for a while, she stopped paying them starting in 2011.

Continue reading.

ROUTE FIFTY

by LIZ FARMER

MAY 2, 2023

TAX - CALIFORNIA

Air 7, LLC v. County of Ventura

Court of Appeal, Second District, Division 6, California - April 19, 2023 - Cal.Rptr.3d - 2023 WL 2997853 - 2023 Daily Journal D.A.R. 3490

Aircraft owner brought action against county for refund of property taxes, statutory interest, and penalties county had imposed.

The Superior Court entered judgment for county. Aircraft owner appealed.

The Court of Appeal held that taxation of the aircraft violated due process because the aircraft was not “situated” or “habitually situated” in the state.

Aircraft was not “situated” or “habitually situated” in California because it was permanently removed from the state before the tax lien date with intent that such removal be permanent, and it never returned to the state, and thus, billing of $240,671.84 in property taxes and bond assessments by county of owner’s domicile pursuant to provision of state Constitution giving taxing agencies authority to assess taxes in the county, city, and district in which the property is situated violated the Due Process Clause of the federal Constitution, even if it did not remain in other states long enough for them to tax it.

Inflation Reduction Act of 2022: The Newly Added Renewable Electricity Production Tax Credit - Holland & Knight

The IRS is currently in the process of implementing the Inflation Reduction Act of 2022 (IRA), which addresses energy, tax and health policy. The IRA offers, among other incentives, tax credits to an array of organizations (e.g., businesses, nonprofits, educational institutions, and state, local and tribal governments). For additional background on the IRA as it relates to the real estate industry, see Holland & Knight’s previous blog posts, “Inflation Reduction Act Offers a Variety of Green Building Tax Incentives,” March 31, 2023, and “Inflation Reduction Act of 2022: Business Energy Investment Tax Credit,” April 6, 2023.

The Renewable Electricity Production Tax Credit (PTC) was added on April 4, 2023. According to the U.S. Environmental Protection Agency (EPA), “The PTC provides a corporate tax credit of up to 1.3 cents/kWh for electricity generated from landfill gas (LFG), open-loop biomass, municipal solid waste resources, and small irrigation power facilities, or up to 2.6 cents/kWh for electricity generated from wind, closed-loop biomass and geothermal resources. The credit is good for 10 years after the equipment is placed in service.”

For systems that exceed 1 megawatt (MW) in size, the tax credit starts at 0.5 cents/kilowatt hour (kWh), although projects may qualify for the the full credit by satisfying the labor-related qualifications. Projects of any size are eligible for two bonus credits. The first such credit may be obtained in connection with the use of domestic steel/iron materials. The second bonus credit is based on a project’s location within an “energy community:” a brownfield site – defined by the EPA as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contamination" – or an area with a high unemployment rate and an economy that has historically depended on coal, oil or natural gas extraction.

Projects less than 1 MW in size are eligible if construction began or begins after Dec. 31, 2021, and before Jan. 1, 2025. Projects 1 MW or larger are eligible if construction began or begins on or after Jan. 30, 2023, and no later than Jan. 1, 2025. According to the IRS, a project is "under construction" when "physical work of a significant nature has begun," or a minimum of 5 percent of the project's total cost has already been incurred.

To apply for the Renewable Electricity PTC, use Form 8835. Form 8835, instructions and additional information are available on the IRS website.

Holland & Knight LLP – Marcy Hart, Holly R. Camisa, Maria Z. Cortes and Olufunke Leroy

April 20 2023

TAX - CALIFORNIA

Palmer v. City of Anaheim

Court of Appeal, Fourth District, Division 3, California - April 17, 2023 - Cal.Rptr.3d - 2023 WL 2962115

City resident brought class action alleging that city violated state constitutional provision requiring voter approval for new or increased local taxes arising from city's approval of rate modification for city-owned electric utility on which city imposed a right-of-way fee and from which a portion of revenues were transferred to city's general fund.

The Superior Court granted summary judgment for city. Resident appealed.

The Court of Appeal held that:

- Parties' stipulation limiting issues for summary judgment applied on review of grant of summary judgment;
- Right-of-way fee was not a tax requiring voter approval; and
- Voters' approval of city charter amendment allowing general fund transfers satisfied voter-approval requirements.

Parties' stipulation limiting issues for summary judgment applied on appeal of grant of summary judgment for defendant city, where trial court did not misconstrue or misunderstand language of stipulation and plaintiff never sought to invalidate or withdraw from stipulation, in class action challenging city's approval of rate modification for city-owned electric utility as contrary to state constitutional voter-approval requirements for new or increased local taxes.

Right-of-way fee that city imposed on city-owned electric utility was not a "tax" under state constitutional provision requiring voter approval for new or increased local taxes, where utility had sufficient non-rate revenue to fully offset any impact that the right-of-way fee had on rates.

Cost-of-service provision in voter-approved city charter amendment allowing transfer of four percent of revenues of city-owned electric utility to city's general fund allowed city to charge ratepayers to fund the four percent transfer, and any such voter-approved charge could not be an overcharge in violation of state constitutional provision requiring voter approval for new or increased local taxes.

TAX - NEW HAMPSHIRE

[Clearview Realty Ventures, LLC v. City of Laconia]

Supreme Court of New Hampshire - April 18, 2023 - A.3d - 2023 WL 2977618

Owners of commercial real estate, on which they operated hotels, filed petitions against cities in applicable county superior courts, seeking abatement and proration of real estate taxes after cities either denied abatement applications or granted partial abatement.

Owners then filed assented-to motion for interlocutory transfer, which the Superior Court granted. Supreme Court accepted transferred questions.

The Supreme Court held that hotels were not "damaged" as result of COVID-19 pandemic, as necessary for owners to obtain prorated tax assessments.

Statute requiring assessing officials to prorate assessment of taxable building whenever building is damaged due to unintended fire or natural disaster to extent it renders building not able to be used for intended use offers streamlined recovery process and mandatory prorated calculation; tax reduction based on damage to building, pursuant to such statute, is therefore distinct from abatement, which concerns whether government has taxed plaintiff out of proportion to other property owners in taxing district.

Hotels on commercial property were not "damaged" by COVID-19 pandemic, as necessary for property owners to obtain prorated tax assessments for hotels pursuant to statute that required local officials to prorate assessments for taxable buildings whenever buildings were damaged due to unintended fire or natural disaster to extent it rendered building not able to be used for intended purpose, even though owners argued that, since they were not allowed to carry on business, hotels suffered significant decline in income, which negatively impacted fair market value of hotels; statute first required physical damage to buildings before considering any economic loss.

As Americans Kick the Smoking and Drinking Habit, Sin Tax Revenue Drops.

Taxes on marijuana and vaping could replace the shrinking revenue, but analysts caution against setting new taxes without considering how they will impact behavior.

With people drinking and smoking less, governments are getting less money from so-called sin taxes. But the good news for states and localities is that more people are using cannabis and vaping, creating new ways to raise money.

"As the tax base shrinks on traditional excise taxes," said a new report by the center-right Tax Foundation, "more and more products will be targeted for excise taxes."

But before going all in on a new tax, policymakers must consider how taxes will impact behavior, said the report's author, Adam Hoffer, the foundation's director of excise tax policy.

Continue reading.

ROUTE FIFTY

BY KERY MURAKAMI

APRIL 19, 2023

Keep Your Paws Off My Positive Arbitrage: Squire Patton Boggs

Reader's Note: As this is my first post on The Public Finance Tax Blog™ let me provide a necessary introduction. My name is Natalie, an associate with the Public Finance Tax Group here at Squire Patton Boggs. A little bit about me: I have the superhuman ability of not getting mosquito bites; I hate when people pronounce the "L" in salmon; and perhaps most relevant to you, if I can learn tax and finance concepts, so can you.

Additional Reader's Note: This post has gone through several iterations already. Not because the information missed the mark (a junior associate's worst nightmare, I promise you), but because I needed to "fun it up." When tax lawyers call you boring, it may be time to rethink most if not all life decisions. Short of quitting my job, changing my name and generally falling off the face of the planet, I suppose I'll start here. With this post. On Rebate. Naturally.

Episode 1: Rebate & Arbitrage 101 – Putting the Fun in Fundamentals

Because the fundamentals are the building blocks of fun, this post introduces the rebate requirement under Section 148 of the Internal Revenue Code and the key terms necessary for the episodes to come.

To understand rebate, you must understand arbitrage. And to understand arbitrage, well, you kind of just need to understand arbitrage. As discussed more thoroughly in a recent blog post, arbitrage occurs when securities purchased from one market are used for immediate resale in another to profit from the interest rate discrepancy. This is not a concept specific to tax-exempt or tax-advantaged bond financings, but the monitoring of arbitrage by the federal government occupies considerable space in our little corner of the public finance cosmos.

Continue reading.

By Natalie Vicchio on April 19, 2023

The Public Finance Tax Blog

Squire Patton Boggs

Tax Liens: U.S. Supreme Court Amicus Brief

Interest of Amici Curiae

This brief is submitted on behalf of the National Tax Lien Association (NTLA), the Arizona County Treasurers Association (ACTA), and the Tax Collectors & Treasurers Association of New Jersey (NJTCTA), which recommend that this Court affirm the United States Court of Appeals for the Eighth

Circuit.

The NTLA is the primary national organization advancing the legislative, regulatory, business, public relations, and educational interests of the tax lien and tax deed industry. The NTLA seeks to uphold high standards of ethical conduct and to operate in accordance with all applicable federal and state laws related to tax lien auctions and tax deed sales. The NTLA was incorporated in 1997 as a nonprofit business league to represent all industry participants—public and private. The NTLA's constituency includes tax lien bidders, tax collectors, lenders, and portfolio servicers, all of whom recognize the importance of properly collecting tax revenue. The NTLA monitors state legislation, engages in lobbying activity, and participates as amicus curiae in courts throughout the nation. Many state legislators, regulators, and tax collection officials nationwide consult the NTLA about laws and policies governing real property tax sales.

ACTA is a statewide association of Arizona's county tax collectors united to serve the public and safeguard funds generated from tax sales within the State. Its members represent all 15 Arizona counties. ACTA's purpose is to share in the exchange of ideas, experiences, and opinions among the various county treasurers; more efficiently serve Arizona's citizens and its counties through sharing best practices; and promote legislation supporting the position and duties of county treasurers. Through its membership and education efforts, ACTA enhances local governments' ability to collect delinquent property taxes through efficient notice and sale efforts, thus providing tax revenue required for Arizona's counties, fire districts, and school districts to meet their financial obligations.

NJTCTA consists of over 1,000 members from New Jersey's 565 municipalities. Many of the State's tax collectors, deputy collectors, treasurers, deputy treasurers, municipal finance officers, and utility collectors are members of the NJTCTA. Its members ensure all New Jersey property owners receive their tax bills promptly, notify taxpayers in the event of their failure to pay taxes due, and—as a remedy of last resort—conduct public sales of the various municipal liens to collect delinquent taxes. Under the aegis of Rutgers University, the NJTCTA conducts seminars and tests for those who desire to take the state examination to become tax collectors as required by state statute. NJTCTA also provides yearly seminars to help its members obtain the necessary continuing education credits to maintain the proper certification. NJTCTA is honored to ensure all tax collectors across the State can properly perform their duties according to law.

Continue reading.

Nelson Mullins Riley & Scarborough LLP

April 6 2023

TAX - CALIFORNIA

Olympic and Georgia Partners, LLC v. County of Los Angeles

Court of Appeal, Second District, Division 8, California - April 7, 2023 - Cal.Rptr.3d - 2023 WL 2821289

Taxpayer, which was a hotel owner, sought review of property-tax assessment, which stemmed from dispute as to whether calculation of hotel's value should have excluded the subsidy that city paid to hotel owner, the one-time payment of "key money," which effectively was the equivalent of a price discount, that hotel owner received from companies that it hired to manage the hotel, and intangible "hotel enterprise" assets of goodwill, the workforce, and restaurant operations.

After a bench trial, the Superior Court determined that the county's assessment appeals board was right to include the subsidy and the "key money" payment in its valuation, and remanded the issue of the "hotel enterprise" assets. Taxpayer and county appealed.

The Court of Appeal held that:

- Subsidy that city paid to taxpayer was not to be included when determining hotel's value;
- The "key money" payment was not to be included when determining hotel's value; and
- Taxpayer demonstrated that it was possible to put a valuation on the "hotel enterprise" assets.

Subsidy that city paid to taxpayer, which owned a hotel on the property, was not to be included when determining hotel's value for purposes of property tax; subsidy was an intangible asset, it was capable of valuation, and it was necessary since without it, the hotel would not have been built.

One-time payment of "key money" that hotel owner received from companies that it hired to manage the hotel was not to be included when determining hotel's value for purposes of property tax; the payment was a discount on income to the managers from the hotel and was not income to the hotel.

Taxpayer, which was a hotel owner, demonstrated that it was possible to put a valuation on intangible "hotel enterprise" assets of goodwill, the workforce, and restaurant operations, as required for the value of such assets to be excluded from calculation of hotel's value for purposes of property tax; taxpayer's expert on business valuation proposed credible value and backed up her estimates with 16 pages of analysis and exhibits.

Hawkins Advisory: The IRS Accepts Electronic Filing of Form 8038-CP

The IRS has released revised forms to be used by issuers of build America bonds, recovery zone economic development bonds, and specified tax credit bonds to facilitate electronic filing of requests for a direct payment from the Federal Government equal to a percentage of the interest payments on these bonds. The attached Hawkins Advisory includes copies of such forms and a link to an explanation of the revisions.

View the Hawkins Advisory.

TAX - CALIFORNIA

Cultiva La Salud v. State

Court of Appeal, Third District, California - March 27, 2023 - Cal.Rptr.3d - 2023 WL 2642948

Nonprofit organization and member of city council of charter city, in her individual capacity, brought action against state, the Department of Tax and Fee Administration, and the Department's director, alleging that statute that barred local governments, including charter cities, from imposing a tax on sodas and sugar-sweetened drinks and that penalized charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue unlawfully limited charter cities' authority under state constitution's home-rule provision, and seeking declaratory and injunctive relief and a writ of mandate directing the Department not to implement the statute's penalty provision.

The Superior Court entered judgment for plaintiffs. Defendants appealed.

The Court of Appeal held that:

- Plaintiffs' facial challenge was ripe for review;
- Challenged statute's penalty provision directed at charter cities was unconstitutional because it used the threat of crippling penalties to chill charter cities from exercising their rights under state constitution's home-rule provision; and
- Penalty provision was not severable.

Constitutional challenge by nonprofit organization and member of city council to statute that barred local governments, including charter cities, from imposing a tax on sugar-sweetened drinks and that penalized charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue was ripe for review, even though challenge did not involve an actual city tax on sugar-sweetened drinks, where the facts were sufficiently congealed to allow resolution of plaintiffs' facial challenge to statute, and given statute's crippling penalties, it was possible that no charter city would ever enact a tax on sugar-sweetened drinks, in which case statute would evade judicial review altogether if a facial challenge were not allowed.

Penalty provision directed at charter cities in statute barring local governments, including charter cities, from imposing a tax on sugar-sweetened drinks, and penalizing charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue, used the threat of crippling penalties to chill charter cities from exercising their constitutional rights and thus was unconstitutional, where provision served to penalize a charter city only when its imposition of a tax on sugar-sweetened drinks was a "valid exercise" of the city's constitutional home-rule authority.

Penalty provision directed at charter cities in statute barring local governments, including charter cities, from imposing a tax on sugar-sweetened drinks, and penalizing charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue, was not severable, even though statute contained a severance clause, where severing charter-city-specific provision would cause penalty provision to reach not just charter cities but also counties and general-law cities, the legislature had not considered a scheme in which such entities would be penalized for taxing sugar-sweetened drinks, and the appellate court could not say that the legislature would have adopted such a scheme.

Legislation Reintroduced to Restore the Tax-Exempt Status of Advance Refunding Bonds.

- **The bipartisan Investing in Our Communities Act has been reintroduced in the 118th Congress**
- **Counties support the restoration of the tax-exempt status of advance refunding for municipal bonds**

On March 28, Reps. Dutch Ruppersberger (D-Md.) and David Kustoff (R-Tenn.) reintroduced the bipartisan Investing in Our Communities Act to restore the tax-exempt status of advance refunding municipal bonds that ultimately save counties and our taxpayers money. Rep. Ruppersberger serves as the co-chair of the bipartisan House Municipal Finance Caucus and both he and Rep. Kustoff were original cosponsors of this bill in the 117th Congress. Counties support the reinstatement of the tax-exempt status of advance refunding bonds and NACo has again endorsed this legislation.

Tax-exempt municipal bonds are predominantly issued by state and local governments for governmental infrastructure and capital needs purposes, such as the construction or improvement of schools, streets, highways, hospitals, bridges, water and sewer systems, ports, airports and other public works.

Prior to 2017, advance refunding bonds were also tax-exempt and allowed counties to refinance municipal bonds once over the lifetime of the bond and more than 90 days prior to the refunded bonds redemption date. Advance refunding bonds, when tax-exempt, allow state and local governments to lower borrowing costs and take advantage of more favorable interest rates. This frees up resources to be used for other important capital projects and minimizes costs to taxpayers. Advance refunding bonds also allow localities to address problematic bond terms and conditions or to restructure debt service payments for budget flexibility.

The 2017 tax reform law (*Tax Cuts and Jobs Act*; P.L. 115-97) eliminated the tax-exempt status of advance refunding bonds as a spending offset, however prior to this elimination advance refunding bonds made up a third of the municipal bond marketplace. As counties continue to implement the American Rescue Plan Act and Bipartisan Infrastructure Law and invest federal funds in infrastructure projects, restoring this important financial management tool is critical to future capital investments.

Counties urge Congress to pass the *Investing in Our Communities Act* to restore the tax-exempt status of advance refunding.

NATIONAL ASSOCIATION OF COUNTIES

by PAIGE MELLERIO

APRIL 6, 2023

IRS Proposes Regulations for Energy Community Bonus Tax Credit.

View the IRS Regulations.

Apr. 4, 2023

TAX - WASHINGTON

Quinn v. State

Supreme Court of Washington, EN BANC - March 24, 2023 - P.3d - 2023 WL 2620080

Owners of capital assets brought action against State alleging that the state capital gains tax facially violated the uniformity and levy requirements of the State Constitution, the privileges and immunities clause of the State Constitution, and the dormant commerce clause.

After consolidation of cases and grant of motion to intervene, the Superior Court granted summary judgment for owners. Intervenors sought direct review, which was granted.

In a case of first impression, the Supreme Court held that:

- Capital gains tax was an excise tax and not a property tax on income;
- Capital gains tax did not violate the privileges and immunities clause; and
- Capital gains tax did not violate the dormant commerce clause.

State capital gains tax was an “excise tax” and not a “property tax” on income subject to the uniformity and levy limitations of the State Constitution; capital gains tax was tax on transactions involving capital assets and not a tax on the assets themselves or the income they generated.

State capital gains tax did not facially violate the privileges and immunities clause of the State Constitution; state residents did not have a fundamental right to enjoy the same tax exemptions enjoyed by all other state residents, and legislature’s express purpose in enacting the capital gains tax was to help meet the state’s paramount duty to amply fund public education without exacerbating existing inequities as between individuals by requiring the state’s wealthiest to pay a greater share of their overall income in state taxes.

A taxpayer’s in-state domicile provided a sufficient nexus between the state and capital gains derived from the sale or exchange of tangible property located out-of-state, as required for state capital gains tax to satisfy the dormant commerce clause; capital gains tax was levied on capital transactions and not on mere ownership of capital assets or gains, and a taxpayer’s exercise of power to dispose of capital assets was exercised in state in which the taxpayer was domiciled.

A taxpayer’s in-state domicile provided a sufficient nexus between the state and capital gains derived from the sale or exchange of intangible property, as required for state capital gains tax to satisfy the dormant commerce clause.

State capital gains tax was internally consistent, as needed to satisfy the fair apportionment requirement of the dormant commerce clause, where the allocations found in capital gains tax statute detailed when capital gains were attributed to state, and statute also included a tax credit to prevent any possible multiple taxation.

State capital gains tax was internally consistent, as needed to satisfy the fair apportionment requirement of the dormant commerce clause, even if another taxing jurisdiction could tax the capital transaction, where there was no showing of how the state’s capital gains tax would result in multiple taxation if all states adopted the same tax.

State capital gains tax was externally consistent, as needed to satisfy the fair apportionment requirement of the dormant commerce clause; State had a valid interest in taxing capital gains derived from sale or exchange of intangible property or personal property located out-of-state, the allocations found in capital gains tax statute detailed when capital gains were attributed to state, a statutory tax credit prevented any real risk of multiple taxation, and statute also permitted taxpayers to deduct from their state capital gains the amounts that the state was prohibited from taxing under the State and Federal Constitutions.

State capital gains tax did not facially discriminate against interstate commerce, and therefore it did not violate the dormant commerce clause; plain text of capital gains tax statute did not treat out-o--state individuals unfavorably, statute provided a method for allocating capital gains to state, and statute included a tax credit which removed any risk of actual multiple taxation.

TAX - CALIFORNIA

Cultiva La Salud v. State

Court of Appeal, Third District, California - March 27, 2023 - Cal.Rptr.3d - 2023 WL 2642948

Nonprofit organization and member of city council of charter city, in her individual capacity, brought action against state, the Department of Tax and Fee Administration, and the Department's director, alleging that statute that barred local governments, including charter cities, from imposing a tax on sodas and sugar-sweetened drinks and that penalized charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue unlawfully limited charter cities' authority under state constitution's home-rule provision, and seeking declaratory and injunctive relief and a writ of mandate directing the Department not to implement the statute's penalty provision.

The Superior Court, Sacramento County, entered judgment for plaintiffs. Defendants appealed.

The Court of Appeal held that:

- Plaintiffs' facial challenge was ripe for review;
- Challenged statute's penalty provision directed at charter cities was unconstitutional because it used the threat of crippling penalties to chill charter cities from exercising their rights under state constitution's home-rule provision; and
- Penalty provision was not severable.

Under the home-rule doctrine, a charter city's law is not preempted simply because it conflicts with state law, nor is it necessarily preempted even when the legislature explicitly intends preemption; it is instead preempted only when it conflicts with a state law, the state law covers a subject of statewide concern, and the state law is reasonably related to resolution of that concern and narrowly tailored to avoid unnecessary interference in local governance.

Constitutional challenge by nonprofit organization and member of city council to statute that barred local governments, including charter cities, from imposing a tax on sugar-sweetened drinks and that penalized charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue was ripe for review, even though challenge did not involve an actual city tax on sugar-sweetened drinks, where the facts were sufficiently congealed to allow resolution of plaintiffs' facial challenge to statute, and given statute's crippling penalties, it was possible that no charter city would ever enact a tax on sugar-sweetened drinks, in which case statute would evade judicial review altogether if a facial challenge were not allowed.

Penalty provision directed at charter cities in statute barring local governments, including charter cities, from imposing a tax on sugar-sweetened drinks, and penalizing charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue, used the threat of crippling penalties to chill charter cities from exercising their constitutional rights and thus was unconstitutional, where provision served to penalize a charter city only when its imposition of a tax on sugar-sweetened drinks was a "valid exercise" of the city's constitutional home-rule authority.

Penalty provision directed at charter cities in statute barring local governments, including charter cities, from imposing a tax on sugar-sweetened drinks, and penalizing charter cities for imposing such a tax by depriving them of all sales- and use-tax revenue, was not severable, even though statute contained a severance clause, where severing charter-city-specific provision would cause penalty provision to reach not just charter cities but also counties and general-law cities, the legislature had not considered a scheme in which such entities would be penalized for taxing sugar-sweetened drinks, and the appellate court could not say that the legislature would have adopted such a scheme.

TAX - ARKANSAS

Gibson v. Little Rock Downtown Neighborhood Association, Inc.

Supreme Court of Arkansas - March 16, 2023 - S.W.3d - 2023 Ark. 452023 WL 2531192

Neighborhood associations and others brought action against Arkansas Department of Transportation (ArDOT), its director, members of Arkansas State Highway Commission, and state officials for declaratory and injunctive relief and for an accounting, contending that defendants' spending of funds raised by temporary sales-and-use tax on highway projects other than "four-lane highway improvements" constituted illegal exaction unauthorized by constitutional amendments establishing and continuing tax.

Plaintiffs moved and defendants cross-moved for summary judgment. The Circuit Court granted motion and denied cross-motion. ArDOT, its director, and Commission members appealed.

The Supreme Court held that:

- Declaratory judgment claim presented justiciable controversy, but
- Tax-extension amendment did not limit use of revenue to four-lane highway improvement projects.

Neighborhood associations' claim against Arkansas Department of Transportation (ArDOT), its director, and members of Arkansas State Highway Commission for declaratory judgment, which rested on contention that expenditure of funds derived from constitutional amendment extending tax originally imposed for four-lane highway improvements would constitute illegal exaction, presented justiciable controversy, even though amendment had not yet taken effect; ArDOT had already committed $350 million of revenue from amendment to certain road and highway projects that did not involve four-lane highways, defendants did not express intent to change such plans, and collection of revenue pursuant to amendment was imminent.

Plain language of constitutional amendment extending temporary sales-and-use tax levied under previous amendment, which had been designated to fund highway improvement bonds for "four-lane highway improvements," so as to "provide special revenue for use of maintaining, repairing, and improving the state's system of highways, county roads, and city streets" after retirement of highway improvement bonds did not restrict use of taxes under tax-extension amendment to four-lane highway improvement projects; unlike prior amendment's repeated references to "four-lane highway," tax-extension amendment did not contain language indicating funds collected could only be used on four-lane highway improvements, but, rather, clearly stated funds were for "highways, county roads, and city streets."

TAX - NEW YORK

James B. Nutter & Company v. County of Saratoga

Court of Appeals of New York - March 21, 2023 - N.E.3d - 2023 WL 2575215 - 2023 N.Y. Slip Op. 01469

Mortgagee that had obtained judgment of foreclosure against property brought action against town, county, and purchaser of the property at prior tax sale, seeking to vacate prior default judgment of tax foreclosure entered in favor of county as well as deeds conveying the property to county and purchaser.

The Supreme Court denied mortgagee's motion for summary judgment, granted county's cross-motion for summary judgment, and dismissed complaint. Mortgagee appealed.

The Supreme Court, Appellate Division, affirmed. Mortgagee filed motion for leave to appeal, which was granted.

The Court of Appeals held that mortgagee was permitted to raise a material issue of fact regarding whether county had complied with statutory notice requirements for the tax foreclosure proceeding even though there was no evidence that both the certified and first class mailings of the notice to mortgagee had been returned.

On motions for summary judgment in mortgagee's action seeking to vacate prior default judgment of tax foreclosure in favor of county on the property at issue, mortgagee was permitted to raise a material issue of fact regarding whether county had complied with statutory notice requirements for the tax foreclosure proceeding even though there was no evidence that both the certified and first class mailings of the notice to mortgagee, as an interested party, had been returned; evidence that both mailings were returned was not the only means of creating an issue of fact on the matter of notice, and mortgagee could instead create a factual question regarding county's noncompliance with notice requirements through other evidence that the notices were not properly mailed.

An interested party in a tax foreclosure proceeding is permitted to establish that a taxing authority failed to comply with the statutory notice requirements for such a proceeding, even when the taxing authority submits proof that notice that was allegedly sent by both certified and first class mail is not returned.

State Revenue Forecasts Look Bleak as Revenue Boom Subsides.

States saw robust tax revenue growth in fiscal years 2021 and 2022, largely caused by federal and state policy actions. But forecasts now look much weaker, even as many states consider additional tax cuts.

Several states cut tax rates or provided rebates to taxpayers in 2021 and 2022, which are estimated to have reduced state tax revenues by $16 billion in fiscal year 2023. This is the largest estimated reduction on record resulting from legislative changes. Depending on how the tax cuts were structured, some states will face a bumpier fiscal path ahead.

Current revenue picture

Preliminary data for the first seven months of fiscal 2023 (July 2022 through January 2023) illustrate how much revenue growth has stalled. Overall, state tax revenues declined 0.2 percent in nominal terms in that period. Personal income tax revenues saw year-over-year declines of 9.3 percent while sales and corporate taxes fared better.

There is also significant variation across the states. California and New York are reporting large declines in overall revenues, whereas many states are still reporting growth in nominal terms – albeit much weaker compared to the prior two years.

State revenue forecasters are predicting weak revenues for both the current fiscal year and for fiscal year 2024. Besides recently enacted rebate payments and tax rate cuts, a stock market decline and an end to federal stimulus funds are playing a significant role.

Continue reading.

Tax Policy Center

by Lucy Dadayan

March 14, 2023

When Overburdening isn’t a Burden: Squire Patton Boggs

Cindy Mog recently reacquainted us with abusive arbitrage devices, including the factors that evidence overburdening of the tax-exempt bond market (issuing bonds too early, issuing too many bonds, and issuing bonds with an excessive weighted average maturity) and factors that countervail what would otherwise constitute overburdening (bona fide cost underruns, bona fide need to finance extraordinary working capital items, and an issuer’s long-term financial distress).

The IRS released a timely private letter ruling (PLR 202309014) on March 3 that analyzes the foregoing factors. This private letter ruling deals with whether an issue of long-term working capital (re)financing bonds was subject to the proceeds-spent-last rule and whether the issue overburdened the tax-exempt bond market. The IRS concluded that the issue was not subject to the proceeds-spent-last rule and did not overburden the tax-exempt bond market, because the issue refinanced extraordinary, nonrecurring working capital expenditures that were not covered by insurance or a reserve fund.

Perhaps if Cindy writes a post on tax-exempt advance refunding bonds, Congress will enact a law that restores them.

By Michael Cullers on March 16, 2023

The Public Finance Tax Blog

Squire Patton Boggs

TAX - MASSACHUSETTS

Reagan v. Commissioner of Revenue

Supreme Judicial Court of Massachusetts, Suffolk - March 10, 2023 - N.E.3d - 2023 WL 2437788

Taxpayer, a limited partner in limited partnerships that had owned, operated, and maintained tax-exempt urban redevelopment projects, appealed Commissioner of Revenue’s notice of assessment related to distributive share of capital gains from sales of such properties, denial of application for abatement.

The Appellate Tax Board upheld the assessment. Taxpayer appealed.

The Supreme Judicial Court, sua sponte transferred case from the Appeals Court and held that:

- Tax exemption for urban redevelopment projects extends to capital gain realized from sale of such

projects, and
- Conclusory statement in letter ruling was not entitled to deference.

Tax exemption for urban redevelopment projects extends to capital gain realized from sale of such projects as causally related to projects in connection with acquisition, construction, operation, and maintenance efforts, notwithstanding canon of statutory construction requiring courts to construe tax concessions narrowly; Legislature intended to provide a significant incentive to spur private investment to transform blighted areas and to build sorely needed low income housing to remedy a situation that had become a public exigency, which the Commonwealth's police powers alone could not solve and which was not being addressed by operation of the private marketplace in the absence of such an incentive, and legislative history evinced intent to spur private entities to invest in urban redevelopment projects by expanding the available tax exemption.

Conclusory statement in Commissioner of Revenue's letter ruling that sales proceeds from tax-exempt urban redevelopment projects are subject to tax under the general tax provisions of Massachusetts law, was not entitled to deference, absent citation to any authority or any rationale whatsoever, since statement conflicted with plain statutory language, statute as a whole, and legislative history.

TAX - OHIO

State ex rel. North Canton City Council v. Stark County Board of Elections

Supreme Court of Ohio - March 10, 2023 - N.E.3d - 2023 WL 2436806 - 2023-Ohio-726

City council brought expedited election action against county board of elections seeking writ of mandamus to order board to place two proposed tax levies on the primary-election ballot.

The Supreme Court held that:

- City council had statutory authority to bring suit against county board of elections for writ of mandamus;
- City council lacked adequate remedy in ordinary course of law; but
- City council's proposed tax levies were not imposed to supplement city's general fund, and, thus, city council was not entitled to writ of mandamus.

City council had statutory authority to bring suit against county board of elections for writ of mandamus to order county to place two proposed tax levies on primary-election ballot; city council had taxing authority to declare need to levy tax in excess of ten-mill limitation and to certify resolutions to that effect to board of elections for submission to city's voters, board's refusal to place levies on ballot made council the aggrieved party because its resolution for tax levy was not being carried into effect, and mandamus action was appropriate to effectuate council's resolutions.

City council lacked adequate remedy in ordinary course of law, as required for council to obtain writ of mandamus, in expedited election action to order county board of elections to place two proposed tax levies on primary-election ballot, given proximity of primary election.

City council's proposed tax levies were not imposed to supplement city's general fund, and, thus, council was not entitled to writ of mandamus ordering county board of elections to place levies on primary-election ballot; proposed levies were for city's roads and storm-sewer services and were to replace existing levies imposed for street maintenance and flood prevention and defense, existing levies were not imposed for purpose of supplementing city's general fund, all revenue from existing levies was to be credited to special funds related to purpose for each levy, and council did not show that revenue from existing levies was credited in way other than what was required by statute, and, thus, proposed levies did not qualify for exception to be placed on primary-election ballot.

Fitch: US State Tax Revenues Continue to Rise but Show Signs of Slowdown

Fitch Ratings-New York-07 March 2023: State coffers continue to benefit from a strong labor market and nominal growth in consumer spending, but signs are mounting that the unprecedented tax revenue growth of the past couple years will soon moderate, Fitch Ratings says. While last year's large tax surpluses are unlikely to be repeated this year, widespread state actions to date to build reserves and address long-term liabilities will protect US states' credit quality as revenue growth slows.

More than halfway through most state fiscal years, total tax revenues are up almost 6% on average over the prior year, based on Fitch's review of monthly revenue reports from the 18 largest states with available data for the seven months ending January 2023. In most states, solid revenue growth compares favorably to forecasts set nearly a year ago. According to the National Association of State Budget Officers (NASBO), enacted state budgets for FY23 forecasted a 3.1% revenue decline from preliminary FY22 actual collections, providing a substantial cushion in the current year. Texas, Michigan and New York have fiscal years that begin on Sept. 1, Oct. 1 and April 1, respectively.

Continue reading.

Abusive Arbitrage Devices – It's Time to Get Reacquainted (Episode 3 – What Happens to the Arbitrage Sinners and the Arbitrage Saints?) - Squire Patton Boggs

Episode 3 – What Happens to the Arbitrage Sinners and the Arbitrage Saints?

As you may remember, in Episode 1 we discussed some background regarding the prohibition against abusive arbitrage devices and the policy behind that prohibition – to encourage investment of tax-exempt bond proceeds in long-lived, tangible assets, while discouraging the generation of arbitrage on the investment of such proceeds. In Episode 2 we discussed the three factors the federal government examines to determine whether an issuer has overburdened the tax-exempt bond market, which results in an abusive arbitrage device if the issuer has also successfully exploited the difference between taxable and tax-exempt interest rates. In this episode, we will describe the penalties imposed upon rule-breakers and the rewards offered to rule-followers.

What happens if you have an abusive arbitrage device? The tax-exempt bonds become taxable arbitrage bonds. Thus, issuers of tax-exempt bonds will want to be mindful of the rules (i.e., the guardrails) set by the federal government to avoid an abusive arbitrage device. A more fun way to think about it is that, given the serious consequences of straying off of the envisioned path, issuers will want to drive the old-fashioned cars at the amusement park that keep you on track, rather than the Dodgems.

What happens if you follow the arbitrage rules? The tax-exempt bonds will remain tax-exempt (assuming, of course, that all non-arbitrage rules governing tax-exempt bonds are followed). As a bonus, the issuer may also qualify for an exception to rebate and be able to retain its positive arbitrage. For a detailed description of the various spending exceptions to rebate, please tune in to our spin-off rebate miniseries which will be coming soon to the Public Finance Tax Blog.

What is the moral of the arbitrage story for issuers? Know the basic rules. Invest and spend your tax-exempt bond proceeds wisely and efficiently while adhering to the rules, and you may end up with both tax-exempt bonds and arbitrage that you can keep.

The end.

The Public Finance Tax Blog

by Cynthia Mog

Sunday, March 12, 2023

Squire Patton Boggs

TAX - WISCONSIN

Citation Partners, LLC v. Wisconsin Department of Revenue

Supreme Court of Wisconsin - March 1, 2023 - N.W.2d - 2023 WL 2290355 - 2023 WI 16

Taxpayer, an aircraft-leasing company, sought review of Tax Appeals Commission's determination that sales tax applied to the total amount paid for an aircraft lease, even if portions of the lease payment were purportedly for engine and aircraft maintenance.

The Circuit Court reversed. Department of Revenue appealed. The Court of Appeals reversed and remanded with directions. Taxpayer petitioned for review.

The Supreme Court held that:

- Lease's charges attributed to aircraft maintenance or engine maintenance were "consideration";
- Sales-tax exemption for sale of parts used to modify or repair aircraft did not apply to lease's charges attributed to aircraft maintenance or engine maintenance;
- Sales-tax exemption for sale of repair, service, and maintenance of any aircraft or aircraft parts did not apply to lease's charges attributed to aircraft maintenance or engine maintenance;
- Lease's total charges were subject to sales tax; and
- Lessor was not lessee's "agent" when lessor purchased aircraft repairs and engine maintenance.

TAX - CONNECTICUT

Ah Min Holding, LLC v. City of Hartford

Appellate Court of Connecticut - February 14, 2023 - A.3d - 217 Conn.App. 574 - 2023 WL 1870935

Owner of rental properties brought action against city for breach of contract and unjust enrichment, alleging that parties entered into agreement whereby owner agreed to maintain and rent specified number of dwelling units for low and moderate income persons or families in order to receive tax abatement, that city terminated agreement, that owner sold properties and paid city $176,628.15 in property taxes, and that if agreement had not been terminated, owner would only have been liable to pay abated taxes in amount of $43,500.

Following trial to the court, the Superior Court entered judgment for city. Owner appealed.

The Appellate Court held that:

- Contractual term "maintain" unambiguously encompassed obligation to provide repairs and general upkeep to dwelling units, and
- Contract incorporated statutes and municipal ordinance requiring owner to maintain premises in habitable condition.

Term "maintain" in contract between owner of rental properties and city, in which owner agreed to maintain and rent specified number of dwelling units for low and moderate income persons or families in order to receive tax abatement, unambiguously encompassed obligation to provide repairs and general upkeep to dwelling units, where only reasonable interpretation of term, based on its ordinary meaning, encompassed duty of repair and upkeep, and other provisions of contract, such as provision specifying owner's duty to "improve the quality and design of such dwelling units" and to "provide necessary related facilities and services in such dwelling units[,]" supported use of term's plain meaning.

Contract between owner of rental properties and city, in which owner agreed to maintain and rent specified number of dwelling units for low and moderate income persons or families in order to receive tax abatement, incorporated statutes and municipal ordinance requiring owner to maintain premises in habitable condition; statutes and ordinance were in effect when contract was formed and were consistent with scope of owner's contractual obligation to maintain properties, contract did not explicitly excuse owner from compliance with statutes and ordinance, and although tax-abatement statute, which formed basis for contract, did not expressly require compliance with statutes or ordinance, tax statute's requirement that owner "provide necessary related facilities or services" supported incorporation.

TAX - MASSACHUSETTS

Murrow v. Board of Assessors of Boston

Appeals Court of Massachusetts, Suffolk - February 6, 2023 - N.E.3d - 102 Mass.App.Ct. 278 - 2023 WL 1769435

Taxpayer appealed from decision of the Appellate Tax Board, which affirmed decision of the city board of assessors, denying her application for abatement of tax assessed against her parking easement.

The Appeals Court held that:

- Taxpayer's in gross parking easement was a present interest in real estate subject to taxation, and
- Assessment of tax on parking easement owners did not amount to double taxation.

Taxpayer's in gross parking easement reserved by condominium developer in condominium's master deed, which was freely transferable and not appurtenant to any condominium unit, was a present interest in real estate subject to taxation; easement granted taxpayer the exclusive right to use the designated parking space at condominium, including right to exclude others from using the space, to collect rents from lease of space, and to sell her interest in the space and retain the profits therefrom.

Assessment of tax on parking easement owners for their nonpossessory easement interest in their respective parking spaces at condominium and assessment of tax on condominium unit owners for their possessory interest in their respective units was lawful taxation of two separate interests in real property and did not amount to double taxation.

An Introduction to Property Assessed Clean Energy Financing: Holland & Knight

Property Assessed Clean Energy (PACE) is a financing model that provides low-cost, long-term funding for eligible energy efficiency and renewable energy projects. PACE is a national initiative by the U.S. Department of Energy, but state legislation must be passed to authorize PACE programs at the local level. PACE-enabling legislation is active in 38 states and the District of Columbia, and PACE programs are now active (launched and operating) in 30 states and the District of Columbia.

Because PACE programs are established and operated at state or municipal levels, there is no uniformity in underwriting criteria, financing structures or program procedures, and property owners should pay careful attention to the particular processes and requirements of the applicable jurisdiction. Nevertheless, there are several elements that are consistent across programs.

Continue reading.

Holland & Knight LLP – Marcy Hart, Holly R. Camisa, Maria Z. Cortes and Olufunke Leroy

March 9 2023

Abusive Arbitrage Devices – It’s Time to Get Reacquainted Pt. II - Squire Patton Boggs

(Episode 2 – Overburdening (Generally) Not Allowed)

As you may remember, in the first episode, we discussed how the federal government’s primary goal in subsidizing tax-exempt bonds is to encourage investment by issuers in long-lived, tangible assets. We also discussed how the federal government has tried to keep issuers on the intended path by preventing them from exploiting the difference between the tax-exempt and taxable markets. Finally, we noted that bonds will generally be taxable arbitrage bonds if the issuer has successfully exploited the difference between tax-exempt and taxable interest rates and has also overburdened the tax-exempt bond market.

This episode will discuss the three rules intended to prevent the overburdening of the tax-exempt bond market – (1) You shall not issue too early; (2) You shall not issue too much; and (3) You shall not issue for too long.

Why would you issue too early? To take advantage of a low interest rate environment. For example, an issuer might not have a capital project for Year 1 when interest rates are low, but anticipates having a capital project in Year 3 when interest rates might be higher. The rule imposed by the federal government to prevent the issuer from issuing tax-exempt bonds too early is a requirement that the issuer reasonably expect on the issuance date of the tax-exempt bonds that it will spend at least 85% of the spendable proceeds within three years of the issuance date. Even though the test involves "reasonable expectations," remember that hindsight is always 20/20, and thus issuers should strive to actually meet this goal.

Continue reading.

By Cynthia Mog on February 26, 2023

The Public Finance Tax Blog

Squire Patton Boggs

TAX - WASHINGTON

Lakeside Industries, Inc. v. Washington State Department of Revenue

Supreme Court of Washington, En Banc - February 23, 2023 - P.3d - 2023 WL 2172112

Asphalt manufacturer petitioned for judicial review of Department of Revenue's (DOR) specific written instructions that manufacturer was required to utilize comparable sales instead of a "cost basis" method to calculate the amount of asphalt use-tax owed.

The Superior Court dismissed the petition for lack of subject matter jurisdiction and failure to state a claim, and manufacturer appealed. The Court of Appeals affirmed, and manufacturer petitioned for review.

The Supreme Court held that:

- Administrative Procedure Act's (APA) general review provisions did not apply to nonconstitutional tax challenge brought by asphalt manufacturer;
- Manufacturer was expressly authorized to seek de novo review of DOR's tax reporting instructions; and
- Manufacturer was entitled to seek judicial review of DOR specific written instructions, but manufacturer had to follow DOR's instructions, pay the disputed tax, and then seek de novo review.

Administrative Procedure Act's (APA) general review provisions did not apply to nonconstitutional tax challenge brought by asphalt manufacturer, challenging Department of Revenue's (DOR's) instructions requiring manufacturer to utilize comparable sales instead of a "cost basis" method to calculate the amount of asphalt use-tax owed.

Asphalt manufacturer was expressly authorized to seek de novo review of Department of Revenue's (DOR) tax reporting instructions, requiring manufacturer to utilize comparable sales instead of a "cost basis" method to calculate the amount of asphalt use-tax owed; asphalt manufacturer was a "person" and a "taxpayer," as those terms were used in statute providing that any person having paid any tax as required and feeling aggrieved by the amount of the tax could appeal to the superior court, and if manufacturer was aggrieved by DOR's instructions, then manufacturer was necessarily aggrieved by the amount of the tax that it would be required to pay pursuant to those instructions.

Asphalt manufacturer was required to follow Department of Revenue's (DOR) reporting instructions and pay its taxes before seeking judicial review, and although manufacturer alleged that it could not follow DOR's instructions to calculate its use tax by using the comparable sales method, based on its asphalt sales to third parties, because it disagreed that these third-party sales were comparable, this disagreement did not excuse manufacturer from complying with DOR's instructions that manufacturer utilize comparable sales instead of a "cost basis" method to calculate the amount of asphalt use-tax owed.

Tax Breaks Threaten Remote Work If Cities Start Enforcing Them.

Many tax incentives hinge on employees coming to the office. Officials are deciding whether to enforce them as downtowns bear the cost of hybrid work arrangements.

Despite pleas from big-city mayors to get employees out of their pajamas and back into downtowns, US cities and states have been left with relatively few levers to jump-start office turnout.

But there is one tool that's been in their arsenal since before the pandemic: tax breaks.

Of the billions in tax incentives granted to US companies every year by cities and states, many agreements require workers to come into the office some of the time, or at least live in the region. For companies receiving these incentives, relaxing in-office attendance could be costly.

Continue reading.

Bloomberg CityLab

By Jo Constantz and Sarah Holder

February 21, 2023

TAX - WISCONSIN

Lowe's Home Centers, LLC v. City of Delavan

Supreme Court of Wisconsin - February 16, 2023 - N.W.2d - 023 WL 2028779 - 2023 WI 8

Pursuant to statute allowing an action challenging the disallowance of a claim of excessive assessment, taxpayer, which owned property on which a home improvement store sat, brought action to recover the excess amount of property taxes that it believed that it had paid for two particular years, which claim the city board of review had disallowed.

After a bench trial, the Circuit Court entered judgment against taxpayer. Taxpayer appealed. The Court of Appeals affirmed. Taxpayer petitioned for review.

The Supreme Court held that taxpayer failed to demonstrate that assessments were excessive, despite argument that vacant "big box" retail locations should have been seen as comparable to taxpayer's property under "tier 2" analysis.

In action brought pursuant to statute allowing action challenging disallowance of claim of excessive assessment, taxpayer, which owned property on which home improvement store sat, failed to present significant contrary evidence to overcome presumption of correctness in property tax assessments, despite taxpayer's argument that vacant "big box" retail locations should have been seen as comparable to taxpayer's property under "tier 2" analysis; those vacant properties were not just vacant, but "dark," i.e., vacant beyond normal time period for commercial real estate, and Wisconsin Property Assessment Manual counseled against using such properties as comparable to properties that were not similarly "dark."

TAX - RHODE ISLAND

[Polseno Properties Management, LLC v. Keeble]

Supreme Court of Rhode Island - February 21, 2023 - A.3d - 2023 WL 2125824

Taxpayer brought declaratory judgment action challenging tax assessment on real property by town tax assessor. After hearing in proceeding which court characterized as one on cross-motions for summary judgment, the Providence Superior Court entered judgment in favor of assessor. Taxpayer appealed.

The Supreme Court held that:

- Statute authorizing cities and towns to tax any renewable energy resource "only" pursuant to rules established by energy resources office does not prohibit cities and towns from increasing the valuation of real property due to the presence of renewable energy projects;
- Assessor acted reasonably in considering existence of a solar energy development on property when assessing the fair market value of the underlying property; and
- Notation on assessment indicating assessment had been adjusted due to presence of solar energy development on property did not effectively create a new class of property for tax classification purposes which was outside permissible statutory classifications.

[E-Commerce Tax Deals Pit California Cities Against Each Other.]

California cities have made deals with retailers — like Best Buy, Apple, QVC and Walmart — to be the point of sale for e-commerce purchases statewide in exchange for a cut of the sales tax proceeds. But who really benefits?

Exit Highway 99 at Mountain View Avenue in California's Central Valley and drive east past the flat expanse of stone fruit and citrus orchards, fields of grapes that will become raisins, and the occasional packing house.

Nine miles ahead, the gray-and-blue Best Buy warehouse emerges out of nowhere at the Dinuba city limits. At slightly more than 1 million square feet, it dwarfs the nearby shopping center anchored by a Walmart Supercenter — at least five of which would fit inside the warehouse.

Best Buy has been in Dinuba for 17 years, employing around 370 workers, but seven years ago it became even more vital to this 25,000-population city. That's when the Dinuba facility was designated as Best Buy's sole point of e-commerce sales in California, meaning that any state resident making an online purchase would pay the local sales tax on their transaction to Dinuba, not the city where they live. That prompted Dinuba — facing a $1.9 million budget deficit — to enter into a 40-year agreement to share those tax proceeds with Best Buy.

Continue reading.

Bloomberg CityLab

By Laura Mahoney

February 23, 2023

How One County Fixed Its Broken Property Tax System.

Property taxes are considered the ultimate “fair” tax. But that fairness hinges on the assumption that homes are being assessed accurately, regularly and thoroughly.

Welcome back to Route Fifty’s Public Finance Update! I’m Liz Farmer and this week, I’m writing about why property taxes can be inequitable and what one county is doing about it.

Local governments collect roughly $500 billion per year in property taxes, which accounts for 47% of locally generated revenue and is the single-largest revenue source for cities, counties, towns and special districts.

To purists, property taxes are the ultimate “fair” tax. That’s largely because jurisdictions offer homeowners’ tax exemptions that give lower-value homes a bigger discount on their property taxes. For example, let’s say the homeowner’s tax exemption in a city is $50,000. That means that homes valued at $150,000 pay taxes on $100,000—a 33% discount off the assessed value. Homes valued at $500,000 pay taxes on $450,000 which works out to a 10% discount.

Continue reading.

ROUTE FIFTY

by LIZ FARMER

FEBRUARY 21, 2023

IRS Issues Guidance for Energy Tax Credits in Low-Income Communities – Notice 2023-17: McGuireWoods

The Inflation Reduction Act of 2022 (IRA) created several new tax incentives to encourage developing clean energy projects that would benefit underserved communities and individuals. Among these incentives, Congress included generous adders to the Section 48 investment tax credit (ITC) for qualified solar and wind facilities deployed in specified low-income communities or residential developments (low-income community benefit adders).

To receive these increased credit amounts, project owners need to apply for an allocation of the “environmental justice solar and wind capacity limitation” through a program jointly administered by the Treasury Department and the Department of Energy.

On Feb. 13, 2023, the IRS released Notice 2023-17 establishing the initial guidance on this capacity limitation program and the standards on which projects will be evaluated, and promising more guidance to come.

Continue reading.

McGuireWoods

February 16, 2023

How to Calculate Tax-Equivalent Yield (& Why Investors Should)

Bonds can provide passive income, some of which may be tax-free if you're investing in municipal bonds. The tax-equivalent yield formula can be a useful tool for comparing taxable and tax-free bond investments. Tax-equivalent yield tells you how much of a return a taxable bond would need to generate in order to equal the yield on a tax-exempt bond.

A financial advisor can help you create a balanced portfolio with a blend of bonds and other investment types.

What Is Tax-Equivalent Yield?

Tax-equivalent yield is a calculation that investors can use to compare taxable and tax-free bonds. To understand how it works, it first helps to know a little about bond yields.

Continue reading.

Yahoo Finance

Rebecca Lake, CEPF®

Wed, February 15, 2023

TAX - NEW YORK

Hetelekides v. County of Ontario

Court of Appeals of New York - February 14, 2023 - N.E.3d - 2023 WL 1973029 - 2023 N.Y. Slip Op. 00803

Property owner's widow, individually as the new property owner and as executor of husband's estate, brought action against county and county treasurer to recover damages from the allegedly improper tax foreclosure sale of the property, which had been owned by husband and to which widow had obtained title after paying the entire purchase price after the third party who had purchased the property at the sale had assigned the bid to her.

The Supreme Court denied defendants' motion to dismiss the complaint. Defendants appealed. The Supreme Court, Appellate Division, then affirmed. After a bench trial, the Supreme Court, Ontario County, rendered a verdict in widow's favor, except as to the federal statutory claims. Defendants appealed, and owner cross-appealed. The Supreme Court, Appellate Division, affirmed as modified. Owner appealed as of right on constitutional grounds and alternatively moved for leave to appeal. The Court of Appeals denied the motion for leave as unnecessary.

The Court of Appeals held that:

- County's bringing of the tax foreclosure proceeding after husband's death did not render the proceeding a nullity; abrogating *Matter of Foreclosure of Tax Liens (Goldman)*, 165 A.D.3d 1112, 87 N.Y.S.3d 262, and *Matter of City of Schenectady (Permaul)*, 201 A.D.3d 1, 158 N.Y.S.3d 279;
- Notices of tax foreclosure proceeding complied with statutory requirements;
- County officials' efforts to give notice of tax foreclosure proceeding complied with due process; and
- Property owner failed to establish that county government had an official policy or custom that caused a violation of her constitutional rights, and thus widow could not pursue *Monell* claim of federal civil rights violations.

County's bringing of in rem tax foreclosure proceeding against deceased owner did not render the proceeding a nullity; a tax foreclosure proceeding was in rem against the "res," i.e., the taxable real property, and not an action in personam commenced against individual to establish personal liability; abrogating *Matter of Foreclosure of Tax Liens (Goldman)*, 165 A.D.3d 1112, 87 N.Y.S.3d 262, and *Matter of City of Schenectady (Permaul)*, 201 A.D.3d 1, 158 N.Y.S.3d 279.

Abusive Arbitrage Devices – It's Time to Get Reacquainted - Squire Patton Boggs

Sometimes it is a good exercise to remind ourselves of some basic rules governing tax-exempt bonds. One such rule is that bonds are taxable arbitrage bonds if an "abusive arbitrage device" is used in connection with the bonds. An abusive arbitrage device is any action that has the effect of: (1) enabling the issuer to exploit the difference between tax-exempt and taxable interest rates to obtain a material financial advantage; and (2) overburdening the tax-exempt bond market.[1] (Keep in mind that an "abusive arbitrage device" is only one specific type of "arbitrage bond." We chose to cover abusive arbitrage devices because they are of renewed relevance and they touch on many arbitrage concepts.) The first element of an abusive arbitrage device has been difficult (to the point of impossibility) to satisfy since Mad Men first aired.[2] However, the Federal Reserve's hawkish monetary policy has now made it much easier to exploit the difference between tax-exempt and taxable interest rates. Thus, it's time to get reacquainted (or acquainted, depending on where you are in your career) with the concept of abusive arbitrage devices. The Public Finance Tax Blog is here to help, with a three-part mini-series of posts on this topic.

Episode 1 – Background and Arbitrage Basics

Background. Issuers are able to issue tax-exempt bonds at a lower interest rate than taxable bonds, because the interest on tax-exempt bonds is not subject to federal income tax. Because the federal government provides the subsidy for tax-exempt bonds, by foregoing the tax revenue on the interest earned, it has put in place various restrictions to ensure that the subsidy is used for its intended purpose. The federal government's primary goal in providing the subsidy, which allows issuers to borrow at a lower cost, is to promote investment by state and local governments, 501(c)(3) organizations, etc. in long-lived, tangible assets. Accordingly, the federal government is willing to provide the subsidy, but only with guardrails that steer the issuer in the right direction (of issuing bonds the proceeds of which are used to finance capital projects).

What is arbitrage? In the tax-exempt bond world, arbitrage is the difference between the yield of the tax-exempt bonds and the yield at which the issuer invests proceeds of those bonds in the taxable market. For example, an issuer of tax-exempt bonds with a 3% interest rate that invests the tax-exempt bond proceeds in taxable securities with a 5% rate of return has made a 2% profit (i.e., positive arbitrage).

Why is it bad? Because the federal government says arbitrage is bad. The exploitation of the difference between the tax-exempt and taxable markets generally does not advance the federal government's primary goal of encouraging investment in long-lived, tangible assets. In fact, if left unchecked, the ability of issuers to earn positive arbitrage could shift the entire cost of a capital project to the federal government. The primary rule that the federal government put in place to prevent issuers from exploiting the difference between these markets is the requirement that an issuer rebate any positive arbitrage to the federal government. Stated another way, the issuer generally cannot retain earnings from the investment of tax-exempt bond proceeds to the extent that those earnings exceed the yield of the tax-exempt bonds. Compliance with the rebate requirement will oftentimes preserve the tax-exempt status of interest on the bonds – but not always.

Preview of Episode 2 – Overburdening (Generally) Not Allowed.

Sometimes paying rebate will not suffice to keep the bonds tax-exempt. Where an issuer has exploited the difference between tax-exempt and taxable interest rates (i.e., earned positive arbitrage) and has also overburdened the tax-exempt bond market, the issuer's bonds will generally be taxable arbitrage bonds, a status that compliance with rebate will not rectify. So what constitutes overburdening?

Stay tuned . . .

[1] Treas. Reg. Section 1.148-10(a)(2).

[2] 2007.

By Cynthia Mog on February 5, 2023

The Public Finance Tax Blog

Squire Patton Boggs

States Are Scoring Millions in Tax Revenue from Sports Betting.

Ahead of this weekend's Super Bowl, a Route Fifty analysis shows the states where income from sports gambling was the highest.

A record 50.4 million adults in the U.S.—roughly 20% of the population—are expected to bet $16 billion on the Super Bowl this Sunday, according to an annual survey from the American Gaming Association.

The Super Bowl is increasingly a big deal for states, and that's because many of them stand to make money off of it.

In 2022, 27 states brought in a combined $1.5 billion from sports betting. Three of those states raked in more than $100 million in revenue: New York, Pennsylvania and Illinois.

Continue reading.

Route Fifty

By Elizabeth Daigneau

FEBRUARY 9, 2023

TAX - ILLINOIS

In re County Treasurer and Ex Officio County Collector of Lake County

Appellate Court of Illinois, Second District - December 28, 2022 - N.E.3d - 2022 IL App (2d) 210689 - 2022 WL 17971697

Financial company, as assignee of entity that had purchased property tax debtor's delinquent taxes, petitioned for a tax deed on the property. Debtor subsequently filed for bankruptcy.

After the bankruptcy court lifted the automatic stay on financial company's claim, the Circuit Court granted the petition, and denied debtor's motion to reconsider. Debtor appealed.

The Appellate Court held that:

- Debtor did not effectively redeem real property by tendering delinquent taxes to county clerk more than three years after the extended redemption deadline had passed, and
- Neither the automatic bankruptcy stay nor the confirmation of the bankruptcy plan tolled the redemption period.

Property tax debtor did not effectively redeem real property by tendering delinquent taxes to county clerk more than three years after the extended redemption deadline had passed, and receiving a redemption receipt that was backdated to the redemption deadline; the tax code did not permit the county clerk to unilaterally alter the redemption deadline, accept untimely tender of delinquent taxes, and backdate the receipt, and thus the attempted redemption was a nullity.

Neither the automatic stay triggered by property tax debtor's bankruptcy petition nor the confirmation of his Chapter 13 plan tolled his redemption period for payment of delinquent property taxes; the treatment of tax purchaser's claim in debtor's bankruptcy plan had no tolling effect on debtor's redemption period under property tax code which provided a firm deadline by which the property must be redeemed, and tax purchaser was free to ask the bankruptcy court to lift the stay so it could proceed on its tax-deed claim.

How One State Is Rolling Out an EV Charging Tax System.

Iowa got a head start four years ago when it passed a tax on kilowatt hours sold. Here's what they've learned so far.

While state lawmakers are currently debating new taxes for charging electric vehicles, Iowa is set to collect those taxes starting in July. Four years ago, when EVs were still rare on Iowa roads, legislators approved a law that taxes kilowatt hours sold.

Today, electric vehicles are still a small but growing share of the cars on the road. At the end of 2022, there were 4 million vehicles registered in the state overall. Of those, 6,000 were battery electric vehicles and 4,700 plug-in hybrids.

Route Fifty spoke with Stuart Anderson, the director of the transportation development division at the Iowa Department of Transportation, about the state's experience so far in preparing for the new tax. Here are five key takeaways from that conversation.

Continue reading.

ROUTE FIFTY

by DANIEL C. VOCK

FEBRUARY 2, 2023

TAX - FLORIDA

Solomon v. Shands Teaching Hospital and Clinics, Inc.

District Court of Appeal of Florida, First District - December 20, 2022 - So.3d - 2022 WL 17815601 - 48 Fla. L. Weekly D1

After unsuccessfully requesting a refund of ad valorem taxes paid on state university teaching hospital and clinics, corporations leasing, managing, and operating the teaching hospital and clinics and related faculty practice plan filed a complaint for declaratory judgment and related relief against county's property appraiser, county's tax collector, and executive director of Florida Department of Revenue, seeking a declaration that their properties were immune from taxation.

The Circuit Court granted corporations' motion for summary judgment, finding that the State was the equitable owner of the properties. County property appraiser and tax collector appealed.

The District Court of Appeal held that the State, through state university, was equitable owner of the properties, which were therefore immune from ad valorem taxation.

The State, through state university, was equitable owner of university teaching hospital and clinics, which were therefore immune from ad valorem taxation; owners were nonprofit corporations that implemented university's health affairs mission, properties were used for delivery of health care services, patient care, medical education, scientific research, and/or for charitable purposes in furtherance of that mission, owners were supervised by and their governance controlled by university, owners regularly provided financial support to university's health affairs mission and were recognized and relied upon by the State as virtually an arm of university, university controlled key property rights, and properties would revert to university's benefit in event of dissolution of either owner.

Taxes Done Right: New Analytics for Municipal Securities

The U.S. municipal securities market is a prominent part of the fixed income landscape, with municipal bonds (e.g., debt offered by states, counties, cities) and municipal fund securities (e.g., 529 and ABLE savings programs). With municipal bonds in particular, issuers usually enjoy special taxation status and, as a result, investors seeking tax-efficient investments might generally assume they're tax-free.

But this is not exactly true. When modeling municipal bonds, it becomes immediately clear that tax-exempt status is not absolute. The payments investors receive from the bonds are usually a mixture of tax-free interest and potentially taxable principal cash flows.

Therefore, investors may still be subject to taxation—in particular, to capital gains tax or even ordinary income tax due to the de minimis rule. This impacts investors' after-tax cash flows, thus changing the bonds' risk and return properties.

From an analytics perspective, it presents a problem since one cannot treat all cashflows equally and discount them with a tax-free discount curve that is normally used for the municipal market. So, what to do?

To avoid the proverbial apples and oranges conundrum, it is necessary to convert all cash flows to "after-tax" status; in other words, cash flows an investor receives after paying all taxes.

For the conversion, one can use the following expression to compute the tax due for all relevant cashflows.

Continue reading.

FactSet

By Rustem Shaikhutdinov | February 1, 2023

TAX - CALIFORNIA

Grosz v. California Department of Tax and Fee Administration

Court of Appeal, Second District, Division 1, California - January 9, 2023 - Cal.Rptr.3d - 2023 WL 128304 - 2023 Daily Journal D.A.R. 246

Taxpayer brought action seeking declaration that California Department of Tax and Fee Administration (DTFA) had a duty to collect sales and use tax from internet retailer for sales which were made by third-party merchants on retailer's website but which were fulfilled by retailer.

The Superior Court sustained DTFA's and retailers' demurrers without leave to amend, and taxpayer appealed.

The Court of Appeal held that DTFA determination as to whether internet retailer or third-party merchants was the "retailer" in any given transaction was a discretionary determination.

California Department of Tax and Fee Administration (DTFA) determination as to whether internet retailer or third-party merchants on retailer's website was the "retailer" in any given transaction in which merchants made sale which was fulfilled by retailer was a discretionary determination, and thus taxpayer did not have standing to bring action seeking declaration that DTFA was required to pursue internet retailer for the sales and use taxes related to those transactions; there was no statute or regulation that conclusively established which entity that the DTFA had to pursue for sales and use taxes related to the transactions, and statute indicated that there might be multiple “persons” who the DTFA could regard as “retailers” for the purposes of a single transaction.

TAX - MISSISSIPPI

Mississippi Hub, LLC v. Baldwin

Supreme Court of Mississippi - January 19, 2023 - So.3d - 2023 WL 311343

Taxpayer filed petition for declaratory judgment against county and its assessor and, in alternative, appealed county board of supervisors’ assessment of value of underground natural gas storage facility.

The Circuit Court entered summary judgment in favor of county and assessor. Taxpayer appealed.

The Supreme Court held that:

- Taxpayer timely filed appeal within 20 days after mailing of notice of Department of Revenue’s final approval of tax roll;
- Taxpayer was not limited to evidence it presented to county board of supervisors; and
- Opinion by taxpayer’s expert on economic obsolescence was admissible evidence sufficient to defeat summary judgment.

Deadline for taxpayer to appeal county’s assessment of value of underground natural gas storage facility was 20 days after mailing of notice of final approval of ad valorem tax roll by Department of Revenue, not 10 days after decision by county board as to assessment of taxes; reading statute with 20-day deadline as limited to situations in which board adjusted an assessment for purposes of equalization was not consistent with a subsection requiring notice to any taxpayer objecting to an assessment after final approval of the tax roll or statute referring to questioning the assessment’s validity after its final approval.

Taxpayer appealing assessment was not limited to evidence it presented to county board of supervisors when it objected to assessment for natural gas storage facility, but was entitled to trial de novo; statute required appeal “in the manner provided by law,” and another statute required issue of the assessment to be “tried anew.”

Opinion by taxpayer’s expert on economic obsolescence of natural gas storage facility was admissible evidence sufficient to defeat summary judgment for county in taxpayer’s declaratory judgment action and on taxpayer’s appeal of assessment; county failed to show that expert did not comply with the mandated approach.

Whether taxpayer’s expert departed from proper legal standard for determination of value in opinion on economic obsolescence was a question of law subject to de novo review by Supreme Court on taxpayer’s appeal of summary judgment for county in suit challenging assessment of natural gas storage facility.

[I Know It When I See It – What is a Capital Expenditure? - Squire Patton Boggs]

According to Wikipedia, the fount of all knowledge, the phrase "I know it when I see it" is a colloquial expression by which a speaker attempts to categorize an observable fact or event, although the category is subjective or lacks clearly defined parameters. This phrase was famously used in a U.S. Supreme Court decision to describe the threshold test for obscenity. (See *Jacobellis v. Ohio*, 378 U.S. 184 (1964)). Although this blog post will, unfortunately, likely not become as well known as the *Jacobellis* case, it will discuss, "What is a Capital Expenditure?" My guess is that a lot of tax-exempt bond advisors use intuition when determining that certain expenditures qualify as "capital expenditures" for tax-exempt bond purposes. In other words, they know a capital expenditure when they see one. However, the question as to what constitutes a "capital expenditure" under the tax-exempt bond rules may be difficult to answer at times.

Treas. Reg. Section 1.150-1(b) defines "capital expenditure" as:

> any cost of a type that is properly chargeable to capital account . . . under general Federal income tax principles. For example, costs incurred to acquire, construct, or improve land, buildings, and equipment generally are capital expenditures.

Without the example provided, I am not sure I would know what type of expenditure is "chargeable to capital account." Luckily, the example makes it clear that both the acquisition of a building and the construction of a building clearly qualify as capital expenditures. However, it becomes more difficult to determine whether an expenditure "improves" a building. For example, does a replacement of windows in a building "improve" a building or merely "maintain" the building under general Federal income tax principles? Does it matter if some of the old windows were cracked, or that the new windows are more energy efficient?

Continue reading.

By Cynthia Mog on January 23, 2023

The Public Finance Tax Blog

Squire Patton Boggs

[Empty Office Buildings May Sap San Francisco City Tax Revenues.]

Bond investors may be underestimating the financial challenges facing San Francisco, the wealthy West Coast tech citadel, in a work-from-home world.

Why it matters: The persistence of remote work in San Francisco shows how the COVID-driven restructuring of the American office can have broad and unexpected implications throughout the economy — even in the normally sleepy market for U.S. municipal bonds.

Driving the news: Vacancy rates in San Francisco's office sector soared to a record high 27% percent at the end of last year — and the city's downtown area has had the worst pandemic recovery in the country, according to the San Francisco Chronicle.

Continue reading.

Axios Markets

by Matt Phillips

Jan 24, 2023

TAX - MARYLAND
Al Czervik LLC v. Mayor & City Council of Baltimore
Appellate Court of Maryland - January 3, 2023 - A.3d - 2023 WL 18503

Tax sale purchasers brought consolidated actions seeking a declaratory judgment and enforcement of a judgment, challenging city's authority to impose a $125 fee to review proposed tax deeds before city executed and issued them.

The Circuit Court granted summary judgment for city and rejected both challenges. Tax sale purchasers appealed.

As matter of apparent first impression, the Appellate Court held that city had authority under tax sale statute to charge tax sale purchasers a deed review fee and to require its payment as a prerequisite to executing tax deed.

City had authority under tax sale statute to charge tax sale purchasers a deed review fee and to require purchasers to pay the fee as a prerequisite to executing tax deed, where statute provided that "all expenses" incident to preparation and execution of deed were required to be paid by the holder of the certificate of sale, and there was no dispute that city incurred expenses incident to reviewing and executing tax deeds.

TAX - CALIFORNIA
County of Santa Clara v. Superior Court of Santa Clara County
Court of Appeal, Sixth District, California - January 6, 2023 - Cal.Rptr.3d - 2023 WL 118623

Privately owned public utility companies brought property tax refund action against county, alleging that imposition of a higher debt-service tax rate on their property violated the California Constitution.

The Superior Court overruled county's demurrers. County petitioned for writ of mandate.

The Court of Appeal held that:

- Court would decline to take judicial notice of requested materials;
- Striking was not warranted for portion of county's reply brief;
- Constitutional provision mandating that property be subject to taxation to the same extent and in the same manner as other property was not clear and unambiguous;
- County's imposition of a higher debt-service tax rate on companies' property did not violate state Constitution;
- Conclusion that state Constitution did not preclude imposition of different tax rates on utility

property versus other property necessitated sustaining of county's demurrers; and
- Sustaining of county's demurrers without leave to amend was warranted.

Constitutional provision mandating that property be subject to taxation to the same extent and in the same manner as other property was not clear and unambiguous on its face without considering the broader context and legislative history, in property tax refund action challenging provision's constitutionality, even though proffered construction that phrase "to the same extent" meant "at the same tax rate" was a reasonable interpretation of the plain language; provision did not actually say "at the same rate," and if voters had intended for provision to mandate application of the same tax rate, court presumed that voters would have said so.

Court's conclusion that state Constitution did not preclude the imposition of different tax rates on public utility property versus other property necessitated sustaining of county's demurrers, in action by privately-held public utility companies alleging a single cause of action for property tax refunds, which was entirely predicated on allegation that county's imposition of higher tax rates on companies' utility property than on other property violated the state Constitution.

Resolution of legal issue that county's imposition of higher taxes on property owned by privately-held public utility companies did not violate state Constitution foreclosed possibility that companies could supply necessary factual allegations to support such claim, thus warranting the sustaining of county's demurrers without leave to amend companies' property tax refund claims.

New Jersey Superior Court Upholds Statute for Contribution in Lieu of Property Tax Payment for Hospitals: Day Pitney

In 2021, the New Jersey Legislature enacted L. 2021, c. 17, aka "Chapter 17," codified as portions of N.J.S.A. 54:4-3.6j(b) and N.J.S.A. 40:48J-1. This granted local property tax exemptions to nonprofit hospitals, even if areas of the hospitals are used by or leased to for-profit medical providers for medical purposes related to delivery of health care services directly to the hospital, provided that the portion of the hospital is used exclusively for hospital services, and it provided the hospital pay an annual community service contribution (the ACSC) to the municipality. Several plaintiffs, including four municipalities, challenged Chapter 17 in the Superior Court, Law Division, on the grounds that (1) it violates the uniformity clause of the New Jersey Constitution, (2) it violates the exemption clause of the New Jersey Constitution and invalidly permits the payment of an ACSC, (3) it constitutes special legislation, and (4) the retroactivity provision violates the plaintiffs' due process and equal protection rights. By its terms, Chapter 17 was applied retroactively and bars the imposition of omitted and regular assessments on such properties for tax years 2014 through 2020. The state of New Jersey moved to dismiss on the grounds that the complaint failed to state a cause of action for which relief could be granted.

The Superior Court sustained Chapter 17 in *Colacitti et al. v. Philip Murphy, et al.*, Docket No. MER-L-738-2021, which was decided on July 22, 2022, but that decision was only just approved for publication on January 9, 2023. The court explained that nonprofit hospitals, if they met the requirements under N.J.S.A. 54:4-3.6, were entirely or partially exempt from real property taxation. However, in 2015, the Tax Court, in *AHS Corp. v. Town of Morristown*, 28 N.J. Tax 456 (Tax Ct. 2015), held, among other things, that the hospital in that case entangled and commingled its activities with various for-profit entities and therefore impermissibly "operated and used its property for a profit-making purpose," and therefore the entire portion of the property used as a hospital did not qualify for a real property tax exemption under N.J.S.A. 54:4-3.6. In response to that decision, the Legislature enacted Chapter 17 in an attempt to mitigate its impact, despite the fact that for-profit medical services commonly were being provided at nonprofit hospitals. The Superior Court noted that Chapter 17 was intended to resolve the conflict between the for-profit and nonprofit complexities of modern hospitals by establishing a clear and predictable system in which complex modern hospitals make a reasonable contribution to their host communities, while providing these hospitals a measure of tax relief to help them continue to fulfill their nonprofit mission. Nonprofit hospitals, in lieu of paying property taxes, would pay municipalities the ACSC to offset the cost of municipal services that directly benefit the hospitals and their employees.

In upholding Chapter 17, the Superior Court held that because, *inter alia*, the ACSC is a fee and not a tax, it is not violative of the uniformity clause. The court also found that Chapter 17 did not violate the exemption clause because, among other things, the clause is not so rigid that the Legislature is without any authority or discretion in the clause's application. The court reasoned that the line of inquiry for the exemption has simply shifted to where the focus is not on the mere presence of for-profit medical providers at the premises of a nonprofit hospital but rather on whether such presence complies with Chapter 17's conditions. The court also held that Chapter 17 was not unconstitutional "special legislation" because the basis of the enactment of Chapter 17 was to continue the property tax exemption for nonprofit hospitals, and in so doing, it acknowledged the obvious, practical, real-world operations of modern hospitals. The court reasoned the Legislature's basis for Chapter 17 was "rational and promote[d] the legislative and constitutional intent" of a tax exemption for nonprofit hospitals. For similar reasons, the court found that Chapter 17's retroactivity clause was not manifestly unjust and did not violate any of the plaintiff's equal protection or due process rights.

The court's decision in this regard is helpful in that it settles for the time being the efficacy of Chapter 17 and the validity of current ACSC payments being made by hospitals to municipalities. As noted above, although just recently published, this case was decided in July 2022. The court's decision has not been appealed. However, there are several assessment appeals pending in the Tax Court on hospital properties from prior to the enactment of Chapter 17, and they are subject to its retroactivity provision; it remains to be seen how the enactment of Chapter 17 will affect the resolution or disposition of those matters.

Day Pitney LLP – Christopher John Stracco and Katharine A. Coffey

January 17 2023

Tax Credit and Grant Opportunities in the Inflation Reduction Act.

On Aug. 16, 2022, President Joe Biden signed the $750 billion Inflation Reduction Act (IRA) into law. Originally introduced as the Build Back Better Act in September of 2021, this cornerstone of the Biden legislative agenda was whittled down due to disagreements within the Democratic caucus. As recently as early July of last year, any deal was considered dead in the water. However, on July 27, 2022, a surprise deal was announced that involved numerous tax provisions, including $370 billion in energy security and climate investments, as well as $300 billion of tax increases set aside for deficit reduction.

While full guidance of all of the bill's provisions has not yet been released, now is the time for interested industry members to engage in the possible benefits, many of which will come in the form of tax credits.

Of the nearly $370 billion in climate-related incentives in the bill, $270 billion will be delivered to eligible entities through tax subsidies. Already, the Internal Revenue Service (IRS) has begun accepting comments on how to implement these provisions and has received a higher than normal number of submissions (to read more about some of these requests for comment, please see Brownstein's analysis here). This underscores how heavily the federal government will rely on industry and stakeholder feedback to carry out these new tax provisions, as many of the details that will inform how the clean energy credits should work are outside of the agency's usual scope and require industry-level knowledge.

Continue reading.

Brownstein Hyatt Farber Schreck LLP – Harold Hancock, William J. McGrath and Grace F. Saunders

January 10 2023

TAX - TEXAS

Hegar v. Sirius XM Radio, Inc.

Court of Appeals of Texas, Austin - November 10, 2022 - S.W.3d - 2022 WL 16858017

Taxpayer, a provider of subscription-based satellite radio programming, filed action against Comptroller of Public Accounts to recover state franchise taxes paid under protest.

Following a bench trial, the District Court signed judgment in favor of taxpayer. Comptroller appealed and taxpayer cross-appealed, and the Austin Court of Appeals reversed and rendered. Taxpayer petitioned for review, and the Supreme CourtPhrase "fair value," as used in former Comptroller's rule providing that if services are performed both inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas, means monetary worth of services at issue, based on objectively reasonable assessment. reversed and remanded.

On remand, the Court of Appeals held that:

- Phrase "fair value," as used in former Comptroller's rule means monetary worth of services at issue, based on objectively reasonable assessment;
- Former Comptroller's rule does not, as a matter of law, prohibit taxpayers from relying on cost-o--performance data to apportion its receipts for services performed in Texas; and
- Expert testimony was legally sufficient to support the trial court's judgment.

Phrase "fair value," as used in former Comptroller's rule providing that if services are performed both inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas, means monetary worth of services at issue, based on objectively reasonable assessment.

Former Comptroller's rule providing that if services are performed both inside and outside Texas, then such receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas does not, as a matter of law, prohibit taxpayers from relying on cost-of-performance data to apportion its receipts for services performed in Texas.

Expert testimony as to comparative cost of performance and opinion of the fair value of services performed in Texas by taxpayer, a provider of subscription-based satellite radio programming, relative to its services performed everywhere was probative evidence as to apportionment of taxpayer's business, and thus was legally sufficient to support the trial court's judgment for taxpayer, in action against Comptroller of Public Accounts to recover state franchise taxes paid under protest, where Comptroller did not object to the admission of the expert testimony at trial, and because challenge would require an evaluation of the foundational data and underlying methodology that expert relied on to draw his opinions, the Comptroller could not bring challenge on appeal.

TAX - VIRGINIA

County of Isle of Wight v. International Paper Company

Supreme Court of Virginia - December 29, 2022 - S.E.2d - 2022 WL 17982130

Corporate taxpayer, which had successfully obtained tax refund judgment for prior tax years, filed application for correction of new county machinery and tools tax assessment, claiming assessment was non-uniform, invalid, and illegal.

The Isle of Wight Circuit Court granted county's motion to strike at conclusion of taxpayer's evidence during bench trial. Taxpayer appealed. The Supreme Court affirmed in part, reversed in part, and remanded. On remand, the Circuit Court found tax scheme unconstitutional and ordered full refund. County appealed.

The Supreme Court held that:

- Higher tax rate in conjunction with tax relief program resulted in unconstitutional non-uniform taxation;
- Invalidating tax relief program while preserving higher tax rate was not appropriate remedy; and
- Constitutional provision requiring all property to be taxed did not render judgment invalid.

County's higher machinery and tools tax rate in conjunction with county's machinery and tools tax relief program were integrated and interwoven in manner resulting in unconstitutional non-uniform taxation; rate was increased for one year for purpose of closing budget gap caused by issuance of refunds for machinery and tools tax paid in prior tax years, tax relief program was available during same one year period to ensure no taxpayer experienced net machinery and tools tax increase that was greater than amount of machinery and tools tax refund taxpayer had received for prior tax years, and interaction of tax rate and relief program resulted in disparate tax rates for taxpayers.

Invalidating county's machinery and tools tax relief program while preserving county's higher machinery and tools tax rate was not appropriate remedy for unconstitutional non-uniform taxation; higher tax rate and relief program were enacted together to serve complementary purpose and operated in tandem with one another, and manifest intent of county board of supervisors was not simply to enact higher tax rate for purpose of closing budget gap caused by issuance of refunds for machinery and tools tax paid in prior tax years, but to impose higher rate of taxation which would then be mitigated through relief program.

County procedurally defaulted any argument that proper remedy for unconstitutional non-uniform taxation resulting from interaction of county's higher machinery and tools tax rate and machinery and tools tax relief program was that taxpayer should pay tax rate that applied prior to increase in tax rate, even though county invoked such possibly remedy at oral argument if trial court did not sever relief program from tax rate, where county did not advance such argument at trial, county did not articulate any good cause to consider defaulted argument, and county did not invoke ends of justice as reason to consider defaulted argument.

Constitutional provision requiring all property to be taxed did not render invalid circuit court judgment that resulted in taxpayer paying no machinery and tools tax for one year as remedy for unconstitutional non-uniform taxation due to interaction of county's higher machinery and tools tax rate and machinery and tools tax relief program; requirement that all property should be taxed presupposed lawful regime of taxation, and county had at its disposal alternative arguments for recovery of some machinery and tools tax if relief program was not severed from higher tax rate, but county did not advance such alternative arguments at trial.

Pennsylvania Commonwealth Court Finds Local Stormwater Charge Constitutes A Tax.

In a case which will have major implications throughout Pennsylvania, on January 4, 2023, the Pennsylvania Commonwealth Court ruled that the school system defendants, which are immune from taxation, were not required to pay the Borough of West Chester's stormwater charge because "the Stormwater Charge constitutes a local tax". *Borough of West Chester v. Pa. State System of Higher Education and West Chester University of Pa. of the State System of Higher Education*, No. 260 M.D. 2018 (Pa. Cmwlth. Jan. 4, 2023). The Court held that the stormwater charge constituted a tax and not a fee or special assessment because the charge provided benefits enjoyed by the general public, rather than individualized services provided to particular customers.

The Borough of West Chester (the "Borough") operates a small municipal separate storm sewer system ("MS4"). The Borough imposes a charge (the "Stormwater Charge") on owners of developed properties within the Borough that are benefitted by the MS4. The Borough then deposits these charges into a stormwater management fund for maintenance and improvement of stormwater projects as well as pollution remediation measures. The Pennsylvania State System of Higher Education and West Chester University of Pennsylvania (the "Schools") were assessed charges of about $132,000 annually which they refused to pay, arguing the Stormwater Charge constituted a tax and the Schools were immune from taxation. The Borough argued the Stormwater Charge constitutes a fee for service rather than a tax and filed a declaratory judgment petition in the Commonwealth Court. The Schools then filed a motion for summary relief.

The Court discussed the differences between a tax and a fee for service, holding that while a tax is imposed on many or all citizens, is contributed to a general fund, and is spent for the benefit of the entire community, a fee is paid to a public agency for bestowing a benefit not shared by general members of the community and is paid voluntarily. Additionally, the Court held "a charge is a tax rather than a fee for service if it is not reasonably proportional to the value or benefit received in return for its payments."

The Court held the Stormwater Charge was a tax, not a fee. The Court noted that the Borough Counsel Code expressly stated that "a comprehensive program of stormwater management is fundamental to the public health, safety, and general welfare of the residents of the Borough." The Court further noted that a Borough witness had testified that managing stormwater provides a general benefit to the community, and owners of both developed and undeveloped properties receive the same benefits from the projects funded by the Stormwater Charge. The Court found that the Borough had failed to "point to any evidence that [the Schools] receive discrete benefits through payment of the Stormwater Charge."

Additionally, the Schools argued that they did not benefit from the MS4 system because they had their own stormwater system in place, while the Borough argued that even though the Schools had their own stormwater system, they would incur expenses in the absence of the MS4 system and therefore benefitted from it. While the Borough argued there is a direct relationship between the amount of impervious surface area and the extent of stormwater related issues for a property, the Court found that there was no way to measure the Schools' purported use of the Stormwater System. The Court further agreed with the Schools that "the impervious surface area of a property does not correlate to the level of benefit accorded the owner of that property." The Court cited extensively to *DeKalb County, Georgia v. U.S.*, 108 Fed. Cl. 681 (Fed. Cl. 2013), in which a federal court found that a county ordinance that also imposed a charge based on impervious surface area of developed properties qualified as a tax. The Court cited *DeKalb* for its holding that a stormwater charge provides benefits enjoyed by the general public as opposed to individualized services provided to particular customers, as the benefit of the collection and diverting of stormwater runoff "is shared with nearly every other member of the community. In short, flood control is a public benefit, and charges to pay for that benefit are typically viewed as taxes." The Court further agreed with *DeKalb* that "[w]hile user fees are generally based on the quantum of services that are provided, the assessments in this case are not necessarily based on the benefits provided to each owner of the developed property [because] they are based not on the benefits derived by the payor, but [on] the anticipated burden that its property imposes on the stormwater system. However, the burden imposed on the system by the runoff from the property, and the benefits conferred upon that property by the system are not the same thing."

Finally, the Court held the Stormwater Charge is not a fee because it is not paid "by choice." Despite the existence of an appeals process through which owners could apply for credits, the Borough could not show it entered into "voluntary, contractual relationship[s]" with property owners subject to Stormwater Charge assessments.

The Court went on to similarly hold that the Stormwater Charge was not an assessment because the Stormwater Charge was not "subsidizing a particular project of limited duration." Rather, because the work funded by the Stormwater Charge yields a common benefit shared by Borough residents generally rather than benefit individual properties, the Stormwater Charge constituted a general tax. Accordingly, the Court granted the Schools' motion for summary relief.

This holding will have widespread implications. Similar stormwater charges will be vulnerable to challenges on multiple grounds, including whether the customer has been provided with a particular and/or proportional value in return for payment and if not, whether the authority imposing the charges has the necessary authority to levy taxes. While this decision will likely be appealed, in the meantime it will have substantial implications across Pennsylvania.

Manko Gold Katcher & Fox – Danielle N. Bagwell

January 5 2023

State Tax Changes Taking Effect January 1, 2023.

Most state tax changes take effect at the beginning of the calendar year (January 1) or at the beginning of the fiscal year (July 1 for most states).

On January 1, 2023, thirty-eight states have noteworthy tax changes taking effect. Most of these changes represent net tax reductions, the result of an unprecedented wave of rate reductions and other tax cuts in the past two years as states respond to burgeoning revenues, greater tax competition in an era of enhanced mobility, and the impact of high inflation on residents.

Continue reading.

The Tax Foundation

December 22, 2022

2023 State Business Tax Climate Index.

Executive Summary

The Tax Foundation's *State Business Tax Climate Index* enables business leaders, government policymakers, and taxpayers to gauge how their states' tax systems compare. While there are many ways to show how much is collected in taxes by state governments, the Index is designed to show how well states structure their tax systems and provides a road map for improvement.

View the Index.

Tax Foundation

October 25, 2022

TAX - MICHIGAN

Wells Fargo Rail Corp v. Department of Treasury

Court of Appeals of Michigan - December 1, 2022 - N.W.2d - 2022 WL 17365205

Taxpayer, which owned and leased railcars, brought action against State, Department of Treasury, and State Tax Commission for failing to apply tax credit for maintenance and improvement of railcars, alleging that credit would have resulted in a $0 tax liability, but that Department did not consider taxpayer's request for credit because taxpayer submitted request by mail instead of using online form, resulting in tax bill for $172,249.72.

Defendants moved for summary disposition, arguing that the Court of Claims lacked subject-matter jurisdiction and that, instead, the Michigan Tax Tribunal (MTT) had exclusive and original jurisdiction. The Court of Claims granted motion. Taxpayer appealed.

The Court of Appeals held that:

- Tax Tribunal Act (TTA), which granted MTT exclusive jurisdiction over property-tax issues, implicitly repealed statute giving Court of Claims subject-matter jurisdiction over property-tax protests; and
- Taxpayer's purported request for equitable relief did not divest MTT of subject-matter jurisdiction; but
- Taxpayer's timely-filed complaint in the Court of Claims and timely-filed appeal equitably tolled 35-

day limitations period for taxpayer to file complaint in MTT.

Tax Tribunal Act (TTA), which granted Michigan Tax Tribunal (MTT) exclusive jurisdiction over property-tax issues, implicitly repealed provision of Public Utility Tax Act (PUTA) allowing taxpayer to pay tax under protest and then sue State in the Court of Claims within 30 days for amount protested; acts irreconcilably conflicted with respect to their jurisdictional provisions, TTA was more enacted more recently than PUTA, and provisions of TTA indicated that Legislature intended to legislate entire field of tax disputes, giving MTT original and exclusive jurisdiction over such disputes.

Taxpayer’s request for order requiring State, Department of Treasury, and State Tax Commission to apply tax credit for maintenance and improvement of taxpayer’s railcars and issue corrected tax bill, conduct taxpayer contended was equitable in nature, did not divest Michigan Tax Tribunal (MTT) of subject-matter jurisdiction under Tax Tribunal Act (TTA); taxpayer’s requested relief did not require equitable authority, and even if it did, MTT still had authority to issue orders and directives related to taxpayer’s requested relief that could be enforced elsewhere.

Taxpayer’s timely-filed complaint in the Court of Claims, which complaint challenged Department of Treasury’s failure to apply tax credit for maintenance and improvement of taxpayer’s railcars and sought refund of partial payment made under protest, and timely-filed appeal equitably tolled 35-day limitations period for taxpayer to file complaint in Michigan Tax Tribunal (MTT), which was correct forum; at time of tax dispute, there were two ostensibly valid statutes, one placing jurisdiction in the Court of Claims and other placing jurisdiction in MTT, taxpayer reasonably relied on first statute to timely file its case with the Court of Claims, and parties had no way of knowing that the Court of Claims and Court of Appeals would conclude that first statute was implicitly repealed.

TAX - ALABAMA

Gulf Shores City Board of Education v. Mackey

Supreme Court of Alabama - December 22, 2022 - So.3d - 2022 WL 17843037

City board of education and individual taxpayer in city school district brought action against the Superintendent of the Alabama State Board of Education, county revenue commissioner, and county commissioners, all in their official capacities, for mandamus relief requiring that “local tax” proceeds from special county privilege license tax paralleling the state sales tax be apportioned to include city board of education as a recipient and/or for a judgment declaring that the corresponding local-tax act was unconstitutional.

After county board of education and community college were allowed to intervene and after county district attorney and presiding judge of county juvenile court were joined as defendants, plaintiffs filed an amended complaint, and the Circuit Court dismissed plaintiffs’ claims. Plaintiffs appealed.

The Supreme Court held that:

- Portion of taxes that were generated under the local-tax act and that were earmarked for the county board of education were not required or authorized by statute to be allocated to the city board of education;
- City board of education failed to demonstrate the likelihood that its alleged injury would be remedied by a declaration that the local act violated the Alabama Constitution’s prohibition on a local act being enacted in a case covered by a general law;

- Individual taxpayer's "equality of taxation" challenge to constitutionality of local act presented a justiciable controversy; but
- The local act did not violate the constitutional principle of equality of taxation.

Portion of taxes that were generated under a local-tax act authorizing a special county privilege license tax paralleling the state sales tax and that were earmarked for the county board of education were not required or authorized by statute to be allocated to a particular city board of education.

"Local tax" proceeds from special county privilege license tax paralleling the state sales tax were not collected for the purpose of participation in a certain state fund for public education, and thus statute governing disbursement of taxes collected for the purpose of participation in that fund could not be a basis to mandate that the "local tax" proceeds be apportioned to particular city board of education; the most recent amendment to the underlying local-tax act did not provide that the taxes were to be collected for such a purpose.

City board of education failed to demonstrate the likelihood that its alleged injury of not having received an appropriation of taxes generated by a local-tax act that authorized a special county privilege license tax paralleling the state sales tax would be redressed by a favorable decision on its claim that the act, which earmarked a portion of the taxes generated to the county board of education, violated the Alabama Constitution's prohibition on a local act being enacted in a case covered by a general law, and thus city board of education lacked standing to maintain the constitutionality challenge; if the act were declared unconstitutional, there would no longer be any tax proceeds generated under it, and despite argument that the act could be declared unconstitutional only insofar as it allocated proceeds for public education, that would be require the courts to rewrite the act, which the courts were prohibited from doing.

City school district resident's claim that local-tax act that provided for a special county privilege license tax paralleling the state sales tax, that earmarked a portion of the taxes generated to the county board of education, but that did not earmark a portion to a city board of education was unconstitutional since it imposed upon her and other district residents a tax whose proceeds were used completely outside the district presented a justiciable controversy, as required for resident to have standing to maintain constitutional challenge.

Local-tax act that provided for a special county privilege license tax paralleling the state sales tax, that earmarked a portion of the taxes generated to the county board of education, but that did not earmark a portion to a city board of education did not violate constitutional "equality of taxation" principle that prohibited the levying special taxes on citizens of a definite locality while expending the tax proceeds in some other locality; the tax also earmarked tax proceeds for the county juvenile court, the county district attorney's office, a community college, and the county general fund, which were entities that provided services on a countywide basis.

TAX - KENTUCKY

Century Aluminum of Kentucky, GP v. Department of Revenue

Court of Appeals of Kentucky - December 15, 2022 - S.W.3d - 2022 WL 17726276

Department of Revenue petitioned for review after Claims Commission determined that items purchased by taxpayer, an aluminum manufacturer, were exempt from sales and use tax.

The Circuit Court determined items were introduced to maintain, restore, mend, or repair machinery, and thus were subject to tax, and the Court of Appeals affirmed such determination. Taxpayer sought discretionary review, which was granted.

The Supreme Court held that substantial evidence supported Claims Commission's determination that items purchased by taxpayer constituted supplies exempt from sales and use tax.

Substantial evidence supported Claims Commission's determination that items purchased by taxpayer, an aluminum manufacturer, were tangible personal property consumed within manufacturing process and had useful life of less than one year, and thus constituted supplies exempt from sales and use tax; taxpayer's technical manager testified that anode stubs typically lasted less than year, and were valued at scrap price of steel when used up, that Inductotherm lining typically lasted around a month and had no value after it was used up and very little value for scrap, that welding wire lasted entire life cycle of stub and then its value after used up was scrap steel, that industrial gases lasted entire time weld was intact and then had zero value, and that thermocouples and tube assemblies lasted about a week, and had no value after being used up.

Why Most Suburbs Saw a Massive Boost in Sales Tax Revenue.

With the effects of the COVID-19 pandemic still fresh in their minds, Arlington Heights Finance Director Tom Kuehne and the rest of the village's budget team are used to playing it safe with revenue estimates.

"We always try to be really conservative with our revenue projections, especially right now, because we really can't be sure what's going to happen in the future," Kuehne said. "And we saw that uncertainty with sales taxes."

Illinois Department of Revenue records show Arlington Heights saw sales tax revenues climb 30% in one fiscal year. From July 2021 to June 2022, Arlington Heights received $5.7 million more in sales taxes than it did during those same 12 months a year prior.

Continue reading.

dailyherald.com

by Jake Griffin

1/1/2023

TAX - MISSOURI

Collector of Winchester v. Charter Communications, Inc.

Missouri Court of Appeals, Eastern District - December 13, 2022 - S.W.3d - 2022 WL 17587187

City brought putative class action against providers of voice over internet protocol (VoIP) telephone services through their broadband cable networks seeking declaratory judgment that proposed class members' municipal or county ordinances imposing business license tax on telephone service providers were applicable to providers' gross receipts generated by their telephone business in each jurisdiction, injunctive relief, and an accounting.

Following certification of five subclasses and bench trial, the Circuit Court entered final judgment in favor of class and ordered providers to pay $39,048,386 in damages consisting of unpaid taxes, pre-judgment interest, post-judgment interest, attorney fees, and legal expenses. Providers appealed.

The Court of Appeals held that:

- Telecommunications Act did not preempt ordinances;
- Cable Communications Policy Act did not preempt ordinances;
- Provider was “telephone company” providing “telephone service” subject to ordinances;
- Cities and county were entitled to back taxes based on all revenue generated by providers’ VoIP telephone services in each jurisdiction;
- Providers were not entitled to any exemptions when calculating back taxes owed;
- Circuit Court had jurisdiction over city’s class action; and
- County’s ordinance was not retroactively repealed by constitutional amendment that resulted in county no longer being first-class county, as used in tax-enabling statute.

Telecommunications Act did not preempt municipal and county ordinances imposing business license tax on telephone service providers, as applied to voice over internet protocol (VoIP) telephone services provided through broadband cable network, even if VoIP was “information service” rather than “telecommunications service” within meaning of Telecommunications Act, since there was no express preemption in Act for information services, and Act’s tax-savings clause rendered inapplicable any implied preemptive effect resulting from definitional distinctions between “telecommunication services” and “informational services.”

Business license taxes imposed by municipal and county ordinances on telephone service providers, as applied to providers of voice over internet protocol (VoIP) telephone services through a broadband cable network, were taxes of “general applicability,” within meaning of provision of Cable Communications Policy Act creating safe harbor for state or local taxes of general applicability from the Act’s preemption provision; ordinances imposed business license taxes on any entity providing telephone service to customers in each jurisdiction, and did not single out providers of VoIP services or unduly discriminate against providers based on their status as cable operators.

Provider of voice over internet protocol (VoIP) telephone services through a broadband cable network was “telephone company” providing “telephone service” subject to municipal and county ordinances imposing business license taxes on telephone service providers, although relevant license-tax-enabling statutes and ordinances did not define terms “telephone company,” “telephone,” or “telephone service” to specifically include VoIP-enabled telephone service; ordinances were intended to cover all telephone services, regardless of type of technology used, and provider stated in advertisements that its service was “regular telephone service” that happened to be “provided using a different technology” and was “functionally equivalent” to traditional wire-line service.

Cities and county were entitled to back taxes, pursuant to municipal and county ordinances imposing business license tax on telephone service providers, based on all revenue generated by providers’ voice over internet protocol (VoIP) telephone services in each jurisdiction, where ordinances did not expressly exclude any category of call, such as intrastate, interstate, local, or long distance.

Providers of voice over internet protocol (VoIP) telephone services were not entitled to any exemptions from business license tax imposed by municipal and county ordinances on telephone service providers, precluding reduction in providers’ tax base when calculating back taxes owed, where providers did not identify any discrepancy in amount owed, or include any documentation evidencing amounts they claimed should have been excluded from their tax base.

Circuit Court had jurisdiction over city's class action seeking declaratory judgment that municipal or county ordinances imposing business license tax on telephone service providers were applicable to gross receipts generated by providers' voice over internet protocol (VoIP) telephone services in each jurisdiction, even though action pertained to municipal tax ordinance violations, since Circuit Court was court of general jurisdiction, and a municipal corporation was "person" under Declaratory Judgment Act.

Constitutional amendment that resulted in county no longer being first-class county did not retroactively repeal county's ordinance imposing business license tax on telephone service providers that was enacted pursuant to tax-enabling statute granting first-class counties power to tax telephone service; county was first-class county at time it enacted ordinance, intent of constitutional amendment was that there would be no direct fiscal impact, and amendment was designed to maintain existing laws.

TAX - LOUISIANA

NAR Solutions, Inc. v. Kuhn

Supreme Court of Louisiana - December 9, 2022 - So.3d - 2022 WL 17546556 - 2022-00425 (La. 12/1/22)

Successor tax-sale purchaser of immovable property filed petition to confirm and quiet tax sale title and for declaratory judgment as to validity of sale.

The 24th Judicial District Court entered final default judgment declaring tax sale valid and declaring successor to be full owner of property. Pre-sale owner of property filed devolutive appeal. The Fifth Circuit Court of Appeal vacated and remanded. Successor's application for writ of certiorari was granted.

The Supreme Court held that successor was entitled to default judgment quieting title against 100% owner at time quiet title action was instituted.

Grantee of title following tax sale more than three years earlier was entitled to default judgment quieting title against 100% owner at time quiet title action was instituted, even though nothing indicated service of tax delinquency or sale upon his siblings who had inherited interests in the property and transferred their interest to owner; owner took no action within prescribed time period to annul the tax sale.

Since a certified copy of the tax sale certificate is prima facie evidence in a quiet title action of the regularity of all matters regarding the tax sale and the validity of the tax sale, the former property owner must then carry the burden of proving any defects in the tax adjudication proceedings.

Shrinking Office Building Values Are Becoming a Dilemma for City Budgets.

Office landlords appeal property-tax assessments, which could lead to reductions in jobs or programs in some jurisdictions

The sharp decline in office building values is likely to become a growing problem for the budgets of cities, schools and other jurisdictions that depend heavily on property taxes from these building owners.

Most municipal budgets haven't suffered much yet. For a variety of reasons, declines in property values typically take years before they are reflected in the real-estate assessments of most taxing jurisdictions.

But municipalities might soon start feeling pain, say lawyers and appraisers throughout the country. Property tax is the largest single expense for most office landlords. Many hope to reduce it to help offset lost revenue from the sluggish return of employees to their desks and the cascading damage it is causing to local businesses catering to these workers. More recently, job cuts in the tech sector are reducing demand for workspace.

Continue reading.

The Wall Street Journal

By Peter Grant

Dec. 13, 2022

Chicago Taps Brakes on Gentrification With a Tax on Teardowns.

With multi-unit dwellings giving way to single-unit homes, Logan Square leaders pushed for measures to keep the neighborhood's Latino population in place.

Right next to the California stop on Chicago's Blue Line, one-bedroom apartments in a new luxury building start north of $2,000 a month. Recently built single-family homes on adjacent streets frequently go for $1 million or more. Coffee shops and craft breweries have become neighborhood staples.

Scattered throughout: taquerias marked with a single dollar sign on Google Maps, and traditional duplexes and triplexes. These multi-unit dwellings have housed members of Logan Square's Latino population since a wave of immigration in the 1960s, but lately the flow has gone in the opposite direction. The Latino population in the neighborhood has diminished to 36% from 65% in 2000, according to the US Census Bureau, as wealthy, and often White, residents find appeal in the area's trendy businesses and proximity to The 606, a 2.7-mile railway-turned-walking and biking path that opened in 2015.

"Living in a gentrifying neighborhood is like living with a live and open wound," said Christian Diaz, who was born in Mexico but has called Logan Square home for most of his life. "It turns our streets into an emotional minefield because it just seems like our neighborhood is valuable now because White people want to live here. And it wasn't before, because it was predominantly Latinx."

Continue reading.

Bloomberg CityLab

By Mackenzie Hawkins

December 14, 2022

[BAB: The Only ETF In The Taxable Municipal Bond Sector]

Summary

- The Invesco Taxable Municipal Bond ETF is the only ETF I found that focuses on the taxable municipal segment of the US bond market.
- Unlike the three CEFs I covered in this segment, BAB gives investors a leverage-free option to invest in. I compare returns between these four, plus corporate bond ETF.
- Based on how BAB has performed against the CEFs and several long-term corporate bond ETFs, the best I can muster is a Hold. A good candidate for tax-loss swapping.

Continue reading.

Seeking Alpha

Dec. 16, 2022

Housing Tax Credit Bill Gains Bipartisan Support in Congress.

Dive Brief:

- There is bipartisan support in Congress for a bill that would provide tax credits to developers covering a portion of the cost of building or rehabilitating homes in struggling communities.
- The Neighborhood Homes Investment Act, which aims to produce 500,000 starter homes over the next decade, has garnered the support of 100 members of the U.S. House and 24 members of the U.S. Senate, according to the Neighborhood Homes Coalition. The bill, introduced last year, has been backed by the NHC, which represents various advocacy organizations and trade groups in housing and real estate.
- “The affordable housing crisis has touched every community in the country,” said U.S. Rep. Brian Higgins, D-N.Y., who authored the bill, in a press release. The bipartisan support for the bill “shows the desire for new tools to address the affordable housing shortage, invest in our neighborhoods, and create opportunities for first-time homeownership, especially among those who are historically left out,” Higgins added.

Continue reading.

Smart Cities Dive

by Danielle McLean

Published Nov. 30, 2022

[Ohio Tax Talk: One Step Closer To Telework Income Tax Clarity - Frost Brown Todd]

On Sept. 26, Ohio's Cuyahoga County Court of Common Pleas held in Morsy v. Dumas that the city of Cleveland, Ohio, must reimburse all local income tax withholdings or payments collected on Manal Morsy's income while she was working remotely from her home in Blue Bell, Pennsylvania. Cleveland appealed the decision. On Nov. 2, Ohio's Eighth District Court of Appeals granted a stay and abeyance, effectively placing a hold on the appeal until a similar case, Schaad v. Alder, is decided at the Ohio Supreme Court level.

Remote work policies are a significant area of contention as states and localities attempt to clarify withholding tax obligations in a post-COVID work environment.[1] The initial ruling in Morsy is significant as it demonstrates a victory for employees when it comes to telecommuting during the COVID-19 pandemic.[2]

Background

During the COVID-19 pandemic, many states, including Ohio, enacted legislation that offered employers an alternative to the existing income tax withholding mandate, which required employers to withhold municipal income taxes based on an employee's principal place of work.[3]

Continue reading.

Frost Brown Todd LLP – Raghav Agnihotri and Rachael High Chamberlain

December 6 2022

TAX - WASHINGTON

Moses Lake Irrigation and Rehabilitation District v. Pheasant

Court of Appeals of Washington, Division 3 - November 22, 2022 - P.3d - 2022 WL 17098311

Irrigation and rehabilitation district petitioned for a writ of mandamus directing county treasurer to send statements of district assessments on land and improvements to district residents.

The Superior Court granted treasurer's requests for declaratory and summary judgments. The district appealed.

The Court of Appeals held that:

- Portion of district's proposed assessments which relied on its authority as irrigation district to fix reasonable rates or tolls and charges was an invalid tax;
- Portion of district's proposed assessments which relied on its authority as an irrigation and rehabilitation district was not an invalid tax; and
- Term "land" in statutory chapter governing irrigation districts includes improvements.

The portion of irrigation and rehabilitation district's proposed assessments on district residents, which relied on its authority as an irrigation district to fix reasonable rates or tolls and charges, and to collect them from all persons for whom district service was made available for irrigation water, was an invalid tax; after legislature reduced amount district could assess for lake improvement and rehabilitation, and in light of its members' diminished need for irrigation service, district could have sought approval from its electors of higher rehabilitation assessment or taken other actions, but instead it ensured itself an undiminished revenue stream by ratcheting up a uniform "irrigation service" rate on assessed value and charging it to irrigation users and nonusers alike.

The portion of irrigation and rehabilitation district's proposed assessments of $0.25 per $1,000 in assessed value, which relied on its authority as an irrigation and rehabilitation district, was not an invalid tax, where the most significant part of district funds was being spent on rehabilitation rather than irrigation purposes.

As used in statutory chapter governing irrigation districts, but not as used in statute authorizing the directors of a rehabilitation and irrigation district to "specially assess land" for benefits, the term "land" includes improvements.

TAX - WASHINGTON

Petrogas Pacific LLC v. Xczar

Court of Appeals of Washington, Division 1 - November 28, 2022 - P.3d - 2022 WL 17246775

Taxpayer, the owner and operator of a liquefied petroleum gas terminal and wharf, petitioned for judicial review of decision of Board of Tax Appeals concerning property tax valuation.

The Superior Court certified the case for direct review and affirmed. Taxpayer appealed.

The Court of Appeals held that:

- Intangible personal property was required to be included in properties' taxable value;
- Aquatic lands lease would be considered when determining properties' market value; and
- Substantial evidence supported Board's decision to reject taxpayer's appraisal.

Intangible personal property was required to be included in taxable value of taxpayer's liquefied petroleum gas (LPG) terminal and wharf for property tax purposes, including an increased demand for LPG in Asian markets, properties' proximity to these markets, properties' uniqueness and scarcity as the only LPG export facility on the West Coast, and utility as an integrated unit since wharf would have had no ability to ship LPG via ocean-going vessels without terminal.

Aquatic lands lease pertaining directly to use of taxpayer's wharf, which directly contributed to business of taxpayer's liquefied petroleum gas (LPG) terminal, affected the highest and best use of taxpayer's properties, and thus lease would be considered when determining properties' market value for property tax purposes; terminal used wharf to ship LPG across the Pacific Ocean, lease allowed taxpayer to dock 48 ships at the pier per year, and value of wharf would have been diminished without this permitted use.

Substantial evidence supported decision of Board of Tax Appeals to reject taxpayer's appraisal that failed to account for sales of wharf and liquefied petroleum gas (LPG) terminal to taxpayer, which had occurred within five years of valuation, when determining properties' market value for property tax purposes; taxpayer's appraisal failed to consider intangible characteristics including proximity to Asian markets, scarcity of LPG facilities on the West Coast, aquatic lands lease, and the number of ships that could land at the wharf annually.

The Numbers Don't Lie: Challenges with the Property Tax - GFOA Webinar

December 7, 2022 – 3 p.m.-4 p.m. ET

Details:
Property tax is the most important source of revenue for local governments. Given that local governments are defined by their geographical boundaries, their property tax revenues are a function of the value of the land within their jurisdiction, and how it is used. Local governments need to take a closer look at how the land in their community is valued and if they are optimizing land usage so that property tax revenues align with the costs of development.

Local assessors are charged with determining the accuracy and fairness of a community's property tax. Property taxes are often regressive with lower priced properties assessed at a higher value relative to their sale price than more highly valued homes. This means that lower value properties bear a disproportionate burden on the owners of lower value homes. This webinar will explore potential explanations for this pattern as well as possible policy solutions. It will also delve into how local governments can rethink their current land usage patterns, especially ways in which land use planning and finances can be used to boost the revenue productivity of the tax base. Please join us to hear from Chris Berry about issues with the way property tax assessments create persistent inequities, as well as from Joe Minicozzi about the underlying structural problems in the way local governments align land usage and their revenue needs.

Learning Objectives:
Understand how land value assessments can impact the fairness and accuracy of property valuations and taxes
Explore an economic financial analysis of how the pricing structure works how this creates inherent inequities
Gain an understanding of how land usage patterns impact property tax revenue generation and how they can be improved

Click here to learn more and to register.

Property Taxes Fuel K-12 Budgets. How Well Does That Work?

Local property tax revenue covers more than a third of all of America's annual spending on K-12 public schools. But is that a best-case scenario, a necessary evil, or an outdated relic?

A new report from the Lincoln Institute for Land Policy, a nonprofit think tank based in Massachusetts, poses those questions by examining the landscape of school funding in five states. The authors conclude that it makes sense to continue using property taxes to pay for public education—but with some reforms to eliminate existing inequities.

Here's why this report matters. Property taxes are rising as home values soared during the pandemic and inflation puts the squeeze on consumers' wallets. Political fights over property taxes are a perennial fixture of election season. And the complexities of school funding may be opaque to educators, even as it undergirds their livelihood.

Continue reading.

Education Week

By Mark Lieberman — November 28, 2022

TAX - WISCONSIN

Saint John's Communities, Inc. v. City of Milwaukee

Supreme Court of Wisconsin - November 22, 2022 - N.W.2d - 2022 WL 17099914 - 2022 WI 69

Taxpayer, which was a nonprofit entity and a benevolent association, brought action against city under statute providing for recovery of unlawful taxes, arising from city's property-tax assessment on land containing a new high-rise tower.

The Circuit Court denied city's motion to dismiss for failure to state a claim and entered summary judgment for taxpayer. City appealed. The Court of Appeals reversed and remanded with direction to grant the city's motion to dismiss. Taxpayer petitioned for review, which was granted.

The Supreme Court held that statute providing for a taxpayer aggrieved by "the levy and collection of an unlawful tax" on property to file a claim against taxation district to recover the unlawful tax requires the taxpayer to pay the challenged tax prior to filing such claim.

Federal Watchdog Calls for National Online Sales Tax Standards.

Lawmakers on Capitol Hill have shown interest in the idea. But any plan along these lines is sure to draw skepticism from states and localities worried about ceding their power over tax policy.

The federal government's main watchdog agency is urging Congress to create nationwide standards for taxing the sale of goods, saying a U.S. Supreme Court ruling has led to a "complex patchwork" of state and local regulations that are burdensome and unfair to some businesses.

There's at least some support for the idea in Congress.

Senate Finance chairman Ron Wyden, who has proposed national standards along these lines, argues that trying to follow regulations that vary from state to state, and even city to city, is difficult, particularly for small businesses selling products online around the country. Notably, Wyden's home state of Oregon doesn't impose a general sales for online or brick-and-mortar transactions.

Continue reading.

Route Fifty

By Kery Murakami

NOVEMBER 22, 2022

With the Grand Hyatt Dead or Stalled, What Happens to its Tax Incentives?

The lingering fallout from the death of the Grand Hyatt at One Beale has repercussions for Downtown's hotel market and the city's convention business, but it also raises the issue of what happens to the project's tax incentives.

The One Beale development has a special 5% sales tax added to rooms and anything else sold at the site. The 5% tax, known as a Tourism Development Zone surcharge, was supposed to pay for the municipal bonds that would've been issued to pay for part of the Grand Hyatt.

The tax has been collected by the whole development since Hyatt Centric hotel opened in April 2021.

If the project doesn't happen, the money is returned to the city's general fund like it is any other local sales tax. That has not happened yet. And so, perhaps, there could be still some hope that the Grand Hyatt moves forward.

Dan Springer, the city's deputy chief operating officer, said of the surcharge, "That was approved specifically for the Grand Hyatt. If the project doesn't go forward, the incentive is revoked and unused money returned."

He said discussions between the city and the developer have not occurred.

Chance Carlisle, the project's primary developer, said "The 5.0% surcharge tax is a competitive disadvantage to our open hotels and restaurants and will stop being collected when all paths forward are no longer workable."

The return of the money, when and if it occurs, would be an awkward coda to a saga that has stretched for most of 2022 and had Carlisle and Memphis Mayor Jim Strickland sniping at one another through the media this fall.

The sniping and disappointment over the scuttled 350-room hotel is part of the city's yearslong effort to bring a new convention center hotel to Memphis. At present, the Renasant Convention Center, which was just renovated for $220-plus million, is served by the Downtown Sheraton.

The Grand Hyatt, One Beale's two existing hotels — the Caption by Hyatt and Hyatt Centric — and new convention space on the site would've helped fill the void of more hotel rooms to serve the convention center. Instead, the project stalled as bond yields rose and prices fell, lowering how much money could be generated from the sale of the municipal debt backed by the 5% tax.

The Strickland administration agreed to provide a $10 million loan to the project but when bond prices fell further and Carlisle asked for a $15 million loan instead, the city declined. That decision prompted Carlisle to say the hotel deal was dead.

Carlisle canceling the surcharge would be the final nail in the project's coffin. Until then, there's still a chance.

Memphis Commercial Appeal

by Samuel Hardiman

Nov 25, 2022

Samuel Hardiman covers Memphis city government and politics for The Commercial Appeal. He can be reached by email at samuel.hardiman@commercialappeal.com or followed on Twitter at @samhardiman.

Cities Like Vacancy Taxes, Despite Mixed Results.

Voters in San Francisco and Berkeley, Calif., approved new taxes on vacant dwellings. Meant to tame speculation and increase supply for renters, the measures have raised revenue in other cities but the impact on housing markets remains unclear.

The trend line on housing prices in San Francisco looks a lot like one of the city's famous hills: It only seems to climb higher and higher until it disappears into the fog. With the average price of a home now hovering at unattainable heights — $1.42 million last month, a small decrease from last year — it's increasingly impossible for typical wage earners to find anywhere to live.

So it's a galling experience, says Shanti Singh, the communications and legislative director for the advocacy group Tenants Together, to observe the same darkened windows in the same high-end condos night after night, and know that someone is making money from a San Francisco housing unit without even having to rent it out.

That's why Singh thinks she had such an unexpectedly easy time gathering signatures for Proposition M, a ballot measure to create a tax on vacant housing units in San Francisco. The tax is intended to discourage speculators from letting apartments go empty, and to raise money for housing programs from those that continue to do so.

Continue reading.

governing.com

by Jared Brey

Nov 18, 2022

Fitch: Leaning Into Tax Cuts Could Pressure Some U.S. States Over Time

Fitch Ratings-New York-31 October 2022: Most U.S. states will be able to absorb the short-term revenue effects brought on by more aggressive 2022 tax cuts even when confronted with a mild U.S. recession next year; however, a small number of states with more expansive tax reduction packages could experience budgetary pressure, according to a new report by Fitch Ratings.

A total of 31 U.S. states adopted tax cuts in some form during the 2022 legislative sessions, a dramatic increase over 18 states that cut taxes in 2021. Fitch expects the combination of rate reductions, tax holidays and tax exemptions adopted by states will translate into short-term revenue losses and a slowdown in the pace of revenue growth for a number of states. Fitch, however, expects the collective revenue effects will be small compared to the overall size of the budgets for most states that implemented tax cuts in 2022.

"Faster population growth generally translates into more rapid growth in tax collections, which will help states with more rapid population growth to better withstand the revenue declines, or in some cases slowdowns in the pace of new revenue formation, associated with tax cuts," said Director Michael D'Arcy. This is good news for states seeing rapid population growth such as South Carolina and Idaho.

Iowa and Nebraska, in particular, would face more risk in a severe downturn and could be forced to rely on reserves as a "bridging measure" to absorb shortfalls until the economy recovers. This is because Iowa and Nebraska have enacted several rounds of tax reductions since 2020 and their populations are growing at a rate below the US average. By contrast, Idaho and South Carolina, which have also enacted sizable tax cuts that don't include revenue triggers or other guardrails, may fare better given their strong job markets and rapidly growing populations.

Fitch's "States Lean into Tax Cuts as Revenue Surge Continues" is available at www.fitchratings.com.

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TAX - CALIFORNIA

Morgan v. Ygrene Energy Fund, Inc.

Court of Appeal, Fourth District, Division 1, California - November 1, 2022 - Cal.Rptr.3d - 2022 WL 16569194

Homeowners who had entered into Property Assessed Clean Energy (PACE) loans to finance energy and water conservation improvements to their properties brought actions against private companies that made loans, were assigned rights to payment, or administered PACE programs for municipalities for violations of Unfair Competition Law (UCL), seeking property tax refunds, injunction against future tax assessments, and removal of tax liens.

Defendants demurred on basis that homeowners failed to exhaust administrative remedies by seeking property tax refunds. The Superior Court sustained demurrers without leave to amend and dismissed action. Homeowners appealed. Appeals were consolidated.

The Court of Appeal held that:

- As a matter of apparent first impression, homeowners were required to exhaust administrative remedies since they sought relief from tax assessments;
- County boards of equalization could provide adequate remedy to homeowners;
- County boards of equalization had competence to resolve issues of loan validity;

- Doctrine of primary jurisdiction did not apply; and
- Merits of homeowners' claims were not properly before Court of Appeal.

Homeowners' claims under Unfair Competition Law (UCL) against private companies which made loans to homeowners under Property Assessed Clean Energy (PACE) program, were assigned rights to payment of PACE loans, or administered PACE loans for municipalities sought relief from special assessments and tax liens placed on homeowners' properties to repay loans, and, thus, homeowners were required to exhaust administrative remedies before bringing claims; homeowners sought tax refunds, injunction against future tax assessments, and removal of tax liens, determination that PACE loans were void due to defendants' UCL violations would negate sole basis of homeowners' liability for assessments and liens at issue, and administrative procedure existed to provide relief.

County boards of equalization could provide adequate remedy for homeowners' alleged injury, namely imposition and enforcement of special tax assessment on their properties resulting from Property Assessed Clean Energy (PACE) loans that homeowners contended were void due to lenders' and other private entities' violations of Unfair Competition Law (UCL), and, thus, inadequate-remedy exception to requirement of administrative exhaustion did not apply to homeowners' claims against private entities under UCL, by which homeowners sought property tax refunds, injunction against future tax assessments, and removal of tax liens, where statute required boards to refund property tax that was erroneously or illegally assessed, and homeowners contended assessments, which repaid loans, were illegal.

County boards of equalization had competence to resolve issues of loan validity raised by homeowners' complaints against private entities, including lenders, for violations of Unfair Competition Law (UCL), for which homeowners sought relief from property tax assessments imposed to repay loans under Property Assessed Clean Energy (PACE) program, and, thus, policies underlying nullity exception to administrative exhaustion rule did not permit homeowners to assert claims in court rather than exhausting remedies before boards, even though claims did not involve property valuation; board, with its quasi-judicial powers, could address factual issues such as whether lenders exercised high-pressure sales efforts, and applying exhaustion doctrine would serve interests of judicial economy.

Homeowners' claims against private lenders for violations of Unfair Competition Law (UCL), by which homeowners sought relief from tax assessments imposed to repay loans under Property Assessed Clean Energy (PACE) program, were not originally cognizable in court, and, thus, doctrine of primary jurisdiction did not permit homeowners to assert claims in court rather than before county boards of equalization, where homeowners had failed to satisfy administrative exhaustion requirement for claims for tax-related relief.

TAX - NEW JERSEY

Options Imagined v. Parsippany-Troy Hills Township

Tax Court of New Jersey - October 31, 2022 - N.J.Tax - 2022 WL 16584951

Taxpayer, a non-profit corporation, appealed after county tax board denied charitable property tax exemption for property at issue, which was located in township, for multiple years.

Township moved for summary judgment to dismiss appeals, and taxpayer cross-moved for summary judgment entreating Tax Court to grant exemption.

The Tax Court held that taxpayer's property was used in furtherance of organizational purpose.

Property of taxpayer, a non-profit corporation created to provide support services to adults with disabilities, was reasonably necessary for accomplishment, and integral part, of activities in pursuit of function forming basis for property tax exemption, and thus was used in furtherance of organizational purpose, as necessary for taxpayer to obtain property tax deduction; property was used to provide resident with housing and support services approved by Department of Human Services, Division of Development Disabilities (DDD), and was reasonably necessary and integral to care and well-being of resident, while sole resident was son of taxpayer's creator, additional resident was anticipated to reside in property and receive similar support services, and taxpayer absorbed some costs other taxpayers would otherwise have borne.

Fitch: US State Taxes, Credit Quality Remain Strong Ahead of Downturn

Fitch Ratings-New York-27 October 2022: Monthly state tax collections continue to show strong yoy gains through fiscal 1Q23 ended Sept. 30, 2022, but will slow as economic activity cools, Fitch Ratings says. Even with lower revenue growth, US states' credit quality will remain strong and ratings stable, given generally prudent budget management in recent years that has resulted in robust fiscal reserves.

Total tax revenues from July through September 2022 grew at a median rate of 7.6% yoy, with only California reporting a yoy decline, based on Fitch's review of the 15 largest states with available data. Sales tax and income tax revenues continued to grow at a healthy pace, driven by the strong labor market, consumer spending and inflation. Two of the states included in the analysis, New York and Texas, have fiscal years that begin on April 1 and Sept. 1, respectively.

Inflation is a key driver of revenue growth, given the fixed nature of most tax rates. Forecast lower inflation in 2023 will put downward pressure on revenue, although we expect tax revenues will continue to grow, albeit at a slower pace. Even on an inflation-adjusted basis, consumer spending is still increasing, suggesting continued near-term economic and revenue gains. Real personal consumption expenditures were up 0.1% for the month and 1.8% for the year in August, according to the US Bureau of Economic Analysis. However, with slower job growth and rising unemployment in 2023, inflation and rising rates will take a toll on consumer spending.

Continue reading.

Changes to Streaming Media Monetization Could Affect State Taxes.

As more streaming services start to offer lower-cost, ad-supported plans, there's been plenty of chatter about what these developments may mean from a competitive and product point of view. But this shift could also prompt changes on state and local taxes, says Avalara's Toby Bargar.

The last few months have ushered in a string of new developments around the changing landscape of streaming entertainment: mergers and bundling, rising availability of free alternative services, and—perhaps biggest of all—the imminent arrival of cheaper, ad-supported plans from some of the biggest names in the business. There has been no shortage of chatter about what these developments may mean from a competitive and product point of view. However, a significant and overlooked dimension to this area is what these shifts could mean for the tax purses of state and local governments.

New Streaming Models Are Upon Us

With economic uncertainty prominent in the news and customers emerging from pandemic lifestyles, streaming platforms are looking to make their offerings more financially attractive. Not only are streaming media companies having to compete again with outside entertainment like theaters, restaurants, and in-person concerts—there also is an ever-growing universe of competitors within the space.

The major brands are not sitting still. Most notably, Disney+ and Netflix are in the process of adding multiple pricing tiers with lower-cost, ad-supported plans. In theory, these cheaper offerings will help retain newly price-sensitive customers. Not to be outdone, several completely free, ad-supported services like Tubi and Amazon Freevee have stormed onto the scene. Peacock offers a free, ad-supported tier as the entry point, with an available buy up to a paid, ad-free service. This proliferation of free and lower-cost services has a hidden cost: State and local tax receipts stand to suffer as a result.

The Taxman Was Already Struggling to Keep Up

Cord-cutting and the overall move to streaming services has already shown a propensity to take a bite out of tax revenue. Cable television services have historically been subject to sales tax as well as a menu of alternative and additional communications or utility taxes, regulatory fees, economic activity taxes, and municipal franchise fees.

Tax authorities are struggling to keep up. Most streaming services are offered “over-the-top” of the customer’s internet connection, which poses a potential problem in relation to many of the various taxes and fees associated with cable. Utility taxes, regulatory, and franchise fees associated with pay TV are often imposed on the basis of public policy rationales around the actual physical cable lines using public rights of way and traditional communications infrastructure to reach the customer. Most streaming providers can avoid directly using any of this infrastructure and, in the process, sidestep the associated taxes and fees.

State and local authorities have not sat idly by while cable revenue shifted toward streaming. Florida has leaned into a generous definition of pay TV to assert that streaming services are subject to state and local communications taxes, which were historically collected from phone and cable companies. Chicago applies its historic amusement tax to streaming, and a raft of California cities have fought with streaming providers over whether the services are subject to municipal utility taxes. Perhaps most aggressively, a series of class-action lawsuits have been filed in various states on behalf of municipalities claiming that streaming companies should be subject to cable franchise fees due to their use of other companies’ physical internet infrastructure to reach the customer. These arguments may be eyebrow-raising, but if nothing else, they demonstrate the degree to which the changes in consumer spending have put municipal revenue streams under extreme pressure.

However, if consumers migrate toward ad-supported services that either are free or significantly cheaper, all of this maneuvering around extending taxability to cover retail streaming bills may be too little, too late. The math is pretty simple: At free or reduced cost, ad-supported services are likely to result in an even further reduction in the already stressed tax base.

So Where Do They Turn?

If free and reduced-cost streaming does take a bite out of retail receipts—and by extension, tax collections—state and local legislators may already have a model solution in front of them: tax the ads themselves. In February 2021, Maryland enacted a first-of-its-kind “digital ads tax” targeting the revenue of technology platforms that generate a substantial amount of receipts from advertising in the state.

The rollout of the digital ad tax in Maryland has still had some challenges. The state has faced a daunting amount of litigation over whether the tax is an unconstitutional violation of due process and commerce clause protections, as well as challenges over vagueness, sourcing, and implementation. In addition, it has been argued that the tax falls afoul of federal Internet Tax Freedom Act restrictions against discrimination. Nearly everything about the Maryland tax has been controversial and subject to dispute—not least of all, who is even subject to it. That said, the stakes for states and cities are high enough that this model likely cannot be ignored.

Major streaming companies like Netflix and Disney+ clearly are hoping to make up for any eroding growth in consumer receipts with ad revenue. Perhaps the litigation and controversy in Maryland would ordinarily scare legislators in other states away from the concept entirely. But can they really afford to ignore advertising receipts? Not only does a tax on advertising revenue match the direction the industry appears to be headed; it also offers the political benefit of being largely invisible to the consumer. Look for more news about more states tinkering with taxes aimed at advertising revenue in the future.

Bloomberg Tax

Toby Bargar

Oct. 13, 2022

This article does not necessarily reflect the opinion of The Bureau of National Affairs, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Toby Bargar is a senior communications tax strategist at Avalara. As part of Avalara’s Communications Business Unit, he has spent years assisting clients with complex transaction tax issues, particularly in the field of communications tax and regulatory cost surcharges.

Netflix, Hulu Beat Reno’s Bid to Tax Streaming at Ninth Circuit.

Netflix Inc. and Hulu LLC beat another proposed class action alleging municipalities can tax streaming services, as the Ninth Circuit ruled against an effort by the city of Reno, Nevada.

Nevada’s Video Service Law allows local governments to impose franchise fees that don’t exceed 5% of a video service provider’s gross annual revenue from subscribers within the jurisdiction. It doesn’t expressly provide a right of action for those localities to recover underpayment of the fees, though; it only allows the attorney general to file such a suit.

The US Court of Appeals for the Ninth Circuit rejected Reno’s argument that the act creates an implied right of action. “In vesting enforcement of the VSL in state agencies, the Legislature seems to have deprived local governments of enforcement powers intentionally,” the court ruled in an unsigned opinion Friday.

The court also rejected Reno’s argument that the federal Declaratory Judgment Act gives it the right to sue, finding Reno can't use the act to obtain affirmative relief when it lacks a cause of action under a separate statute.

The suit is one of more than a dozen class actions going after streaming services playing out across the country. Several municipalities saw early victories as state courts ruled their cases shouldn't be sent to federal court. But since then courts in at least eight states have dismissed cases after finding the broadband and cable laws relied on by the localities don't apply to services like Netflix and Hulu, or don't give the localities a basis to sue.

Judges Susan P. Graber, Michelle T. Friedland, and Lucy H. Koh joined the opinion.

Jason H. Kim of Schneider Wallace Cottrell Konecky LLP, who argued the case for Reno, Robert C. Collins of Latham & Watkins LLP, who argued for Netflix, and Victor Jih of Wilson Sonsini Goodrich & Rosati, who argued for Hulu, didn't immediately respond to requests for comment.

The case is *Reno v. Netflix, Inc.*, 9th Cir., No. 21-16560, 10/28/22.

Bloomberg Tax

by Perry Cooper

Oct. 28, 2022

To contact the reporter on this story: Perry Cooper in New Bern, N.C. at pcooper@bloomberglaw.com

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TAX - NEW HAMPSHIRE

Appeal of Porobic

Supreme Court of New Hampshire - October 18, 2022 - A.3d - 2022 WL 10208757

Taxpayer appealed from decision of the Board of Tax and Land Appeals (BTLA) granting her only a partial abatement of taxes assessed by town.

The Supreme Court held that taxpayer failed to demonstrate that BTLA's decision was unsupported by the evidence.

Taxpayer failed to demonstrate that Board of Tax and Land Appeals' (BTLA) decision granting her only a partial abatement of real estate property taxes assessed by town was unsupported by the evidence or the result of legal error; record contained reports of both parties' experts which in turn contained information from several comparable properties, and while the BTLA did not credit the experts' ultimate opinions of value, it had before it the raw data on comparable properties on which the experts based their opinions, and thus, the information and values ascribed to these similar properties provided basis for the BTLA's factual findings and its decision.

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The Supreme Court held that taxpayer failed to demonstrate that BTLA's decision was unsupported by the evidence.

Board of Tax and Land Appeals (BTLA) was free to consider town's assessment and other valuation evidence in determining real property's fair market value, as BTLA was not bound by the technical rules of evidence.

Taxpayer failed to demonstrate that Board of Tax and Land Appeals' (BTLA) decision granting her only a partial abatement of real estate property taxes assessed by town was unsupported by the evidence or the result of legal error; record contained reports of both parties' experts which in turn contained information from several comparable properties, and while the BTLA did not credit the experts' ultimate opinions of value, it had before it the raw data on comparable properties on which the experts based their opinions, and thus, the information and values ascribed to these similar properties provided basis for the BTLA's factual findings and its decision.

How to Escape State Taxes Without Leaving New York or California.

Municipal bonds are a relatively safe investment with tax-free interest that gives them an advantage over other fixed-income assets.

There's an easy way to hide from high taxes in states like New York and California that doesn't involve packing up a moving van to Florida or Texas.

US municipal bonds are offering the highest yields in more than a decade after a record-breaking selloff this year. What makes them unique relative to other fixed-income securities like Treasuries, corporate bonds or even bank certificates of deposit is they usually pay interest that's exempt from both state and federal taxes — a perk that can make a big difference.

Interest income from most bonds and ordinary dividends from stocks are taxed at the same rate as someone's salary. That means for every $1,000 collected, New York state residents in the highest tax bracket could end up with as little as $483 after accounting for all taxes, while those in California may be left with as little as $459. With in-state munis, none of the interest earned would be taxed.

Continue reading.

Bloomberg Wealth

By Amanda Albright and Claire Ballentine

October 20, 2022 at 6:13 AM PDT

Limitations on the Ability to Tax: Blank Rome

In the post-*Wayfair* age, the challenges to a jurisdiction's ability to tax have decreased. However, the pandemic brought a slew of new tax considerations and emergency rules and legislation, which have resulted in a steady uptick in challenges to a jurisdiction's ability to tax. One such successful challenge is the recent decision in *Morsy v. Dumas*, No. CV 21 946057 (Ohio Ct. Com. Pleas, Sept. 26, 2022).

The decision in *Morsy* examined Ohio's emergency legislation, which provided that if an employee provided personal services from home during the Stay at Home Executive Order, then the employee would be deemed to have provided those services at the employer's principal place of business. See H.B. 197. Dr. Morsy lived in Blue Bell, Pennsylvania, and commuted over six hours each way to work during the week in Cleveland, Ohio.

The Facts: From March 13, 2020, through December 31, 2020, Dr. Morsy worked from her home in Pennsylvania. Nevertheless, the City of Cleveland refused to refund the municipal income tax Dr. Morsy paid for that period as a result of the emergency legislation. Dr. Morsy challenged the refund denial. The City defended the tax, in part, on the basis that "the ability to continue performing her job duties through a virtual network connection with her employer, located in Cleveland, created a substantial nexus." The City argued that providing services and protections to the employer's offices (notably not to the employee though) and maintaining an infrastructure to allow Dr. Morsy to work from home was a sufficient basis for the imposition of the tax.

The Decision: The Court of Commons Pleas was not swayed by the City's expansive arguments. Instead, the court focused on the distinction between the two other Ohio cases on this issue and the current case—specifically that the other cases dealt with Ohio residents. See *Buckeye Institute v. Kilgore*, 2021-Ohio-4196 (Ct. App. Ohio, Nov. 30, 2021) and *Schaad v. Alder*, 2022-Ohio-340 (Ct. App. Ohio, February 7, 2022). The court held that the Ohio General Assembly "cannot create jurisdiction to levy a tax on the income of persons who are not residents of Ohio, and that was earned for work performed outside of the State of Ohio."

While this case focused on the emergency legislation enacted as a result of the pandemic, states that use a convenience of the employer test to assert taxing authority should be wary. In those states, tax is often imposed if the employee only worked one day in the state and spent the rest of the year working from home. This case serves as an important reminder that merely having a tenuous connection with a jurisdiction does not grant that jurisdiction the authority to impose tax over a nonresident's income.

Blank Rome LLP – Nicole L. Johnson

October 21 2022

A Bridge Too Far: Ohio Court of Common Pleas Finds Convenience Rule Unconstitutional

On September 26, 2022, the Ohio Court of Common Pleas in *Morsy v. Dumas*, held that Cleveland's municipal income tax on remote workers was unconstitutional on an "as applied" basis. The taxpayer lived in Pennsylvania and was employed by a company located in Cleveland, Ohio.

Prior to the COVID-19 pandemic, Morsy would stay in Cleveland Monday through Friday returning home for the weekend. In response to the pandemic, however, the Governor of Ohio declared a state of emergency and a stay-at-home order was issued. The Ohio legislature also passed a law that required Morsy's employer to treat days Morsy worked from home due to the pandemic as days worked at the employer's place of business in Cleveland. As a result, Morsy's employer continued to withhold municipal income tax from her wages even though Morsy was not physically located in Cleveland when performing her duties. Claiming that the deemed-work-from-Cleveland rule was unconstitutional, Morsy sought a refund of her withheld income tax.

The City of Cleveland argued that Morsy's physical presence in the City prior to the pandemic satisfied any due process jurisdictional concerns, and that "the ability to continue performing her job duties through a virtual network connection with her employer, located in Cleveland, created a substantial nexus" thereby satisfying the constitutional requirements for taxing remote workers.

Morsy countered that physical presence in the early part of 2020 did not give rise to ongoing personal jurisdiction for the entire year when she was not otherwise physically present. Citing case law that explained physical presence is necessary to a municipality's income tax jurisdiction, the taxpayer argued that there was no case law authorizing tax jurisdiction over an employee on the basis of a virtual connection with the employer's place of business.

The Court of Common Pleas agreed with Morsy. The court explained that "[t]raditional due process is a minimal requirement for acquiring jurisdiction to impose an income tax on an individual." Observing that "an employee enjoys the protections, opportunities and benefits" of a taxing authority when the employee is physically present, the court concluded that "[t]he ability of an employee to communicate virtually with her office and to perform her job duties from home does not create the fiscal relation required by the case law." As a result, the court held that the law requiring Morsy's work from home days be treated as work from Cleveland days was unconstitutional in the case at bar.

Eversheds Sutherland (US) LLP – Eric J. Coffill and Cyavash N. Ahmadi

October 10 2022

TAX - MASSACHUSETTS

Pelleverde Capital, LLC v. Board of Assessors of West Bridgewater

Appeals Court of Massachusetts, Suffolk - September 21, 2022 - N.E.3d - 101 Mass.App.Ct. 739 - 2022 WL 4360064

Owner of solar power facility sought judicial review of decision of Appellate Tax Board affirming decision of town's board of assessors denying owner abatement of personal property tax on its solar power facility under exemption from taxation for certain solar powered systems.

The Appeals Court held that:

- Owner was not entitled to exemption from personal property tax, and
- Municipal property held for a public use is not within the class of property taxable under tax statutes for purposes of tax exemption for solar facilities.

Owner of solar power facility that provided energy to town was not entitled to exemption from personal property tax for solar facilities that supplied energy needs of property taxable under

Commonwealth tax statutes, as output of solar facility went only to tax-exempt properties, where town used energy only at municipal properties held for public use.

Municipal property held for a public use is not within the class of property taxable under tax statutes as that phrase is used in statute providing property tax exemption for certain solar or wind powered systems supplying energy needs of property that is taxable under Commonwealth tax statutes.

IRS Asks for Comments on Upcoming Energy Guidance.

WASHINGTON — The Internal Revenue Service today issued six notices asking for comments on different aspects of extensions and enhancements of energy tax benefits in the Inflation Reduction Act.

The IRS anticipates that constructive comments from interested parties will aid the agency in drafting the guidance items most reflective of the needs of taxpayers entitled to claim energy credits.

- Notice 2022-46 requests comments on credits for clean vehicles.
- Notice 2022-47 requests comments on energy security tax credits for manufacturing.
- Notice 2022-48 requests comments on incentive provisions for improving the energy efficiency of residential and commercial buildings.
- Notice 2022-49 requests comments on certain energy generation incentives.
- Notice 2022-50 requests comments on elective payment of applicable credits and transfer of certain credits.
- Notice 2022-51 requests comments on prevailing wage, apprenticeship, domestic content, and energy communities requirements.The IRS is requesting that those interested in providing feedback to the questions in the notices follow the instructions in the notices to reply by November 4, 2022.

IR-2022-172, October 5, 2022

The Fighting Over Online Sales Taxes Isn’t Finished.

Deals worked out between local governments and companies before the Supreme Court cleared the way for taxing e-commerce are drawing increased scrutiny. If the agreements fall apart, it could blow a hole in some city budgets.

Welcome back to Route Fifty’s Public Finance Update! I’m Liz Farmer and this week I’m writing about sales taxes. More than four years after the U.S. Supreme Court issued its landmark decision clearing the way for states to collect taxes from online sales, there are still issues to work out. In this newsletter, I’ll explain one of them, which involves longstanding sales tax incentives, rule changes for remote sales and, in Texas and elsewhere, has pit cities against states.

Located in Central Texas just outside of Austin, the suburb of Round Rock is in the heart of one of the country’s fastest-growing regions. It’s home to major employers, like Amazon and UPS. Dell Technologies has been headquartered there since the mid-1990s. The sales taxes collected from those companies and others help pay for servicing the city’s rapid growth.

Continue reading.

Route Fifty

By Liz Farmer |

SEP 20, 2022

TAX - OHIO

Beachwood City School District Board of Education v. Warrensville Heights City School District Board of Education

Supreme Court of Ohio - September 6, 2022 - N.E.3d - 2022 WL 4074673 - 2022-Ohio-3071

Plaintiff school district filed complaint against defendant school district for promissory estoppel, unjust enrichment, conversion, fraud, and two counts of breach of contract, and sought monetary damages, declaratory judgment, and permanent injunction in relation to agreements between school districts under which they would share tax revenue from territory annexed by plaintiff's city.

The Court of Common Pleas granted defendant's motion for summary judgment. Plaintiff appealed. The Court of Appeals reversed and remanded. Defendant sought discretionary review.

The Supreme Court held that:

- Approval by state board of education was not required to validate agreement;
- Fiscal-certificate requirement of statute governing expenditures of political subdivisions did not apply; and
- Fiscal-certificate requirement of statute governing school district expenditures did not apply.

Approval by state board of education was not required to validate agreement between school districts to share tax revenue generated from nonresidential and nonagricultural property within territory annexed by city, pursuant to which agreement school district associated with city withdrew its request to transfer territory to itself, and thus agreement was enforceable; while prior version of statute charging state board of education with approving or disapproving transfers of territory required that a division of funds and "indebtedness incident thereto," for a transfer of school-district territory, be completed in manner prescribed by the statute, including obtaining board approval, a division of funds could not be incident to a nonexistent transfer of school-district territory.

Agreement between school districts to share tax revenue generated from nonresidential and nonagricultural property within territory annexed by city did not involve an "expenditure" of money within meaning of prior version of statute governing authority of political subdivisions to enter into contracts involving such expenditures, and thus statute's requirement that fiscal certificate be attached did not apply; agreement simply allocated collectable tax revenue between districts, and district's entitlement under agreement to collect 70% of tax revenue from relevant portions of territory did not require it to expend the other 30% to be diverted to other district, but instead county treasurer would pay agreed-on percentages of tax revenue directly to districts.

Prior version of statute governing school district expenditures and requiring that fiscal certificate be attached to contracts adopted by school district applied only to contracts involving expenditures of money, and thus certificate requirement did not apply to agreement between school districts to share tax revenue generated from nonresidential and nonagricultural property within territory annexed by city; certification addressed school district's ability to satisfy its financial commitments while maintaining adequate educational program, consequence for failing to attach certificate when required was that no payment under contract was to be made, and other actions for which certificate was required under statute involved commitments to spend money.

TAX - CONNECTICUT

Wind Colebrook South, LLC v. Town of Colebrook

Supreme Court of Connecticut - August 2, 2022 - 344 Conn. 150 - 278 A.3d 442

Taxpayer, which was a limited-liability company (LLC) that owned and operated a wind turbine facility, commenced a municipal property tax appeal after town board of assessment denied taxpayer's appeal of town's classification of the wind turbines and their associated equipment as real property for purposes of taxation.

The Superior Court entered judgment for taxpayer on claim that a late-filing penalty was improper but entered judgment for town in all other respects. Taxpayer appealed.

The Supreme Court held that:

- The turbines were "buildings" under statute on taxation of real property;
- The turbines were "structures" under statute on taxation of real property;
- Statute on equalization of assessments did not preclude classifying commercial wind turbines as real property for property-tax purposes;
- The turbines were not "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property; but
- The equipment associated with the turbines constituted "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property.

Commercial wind turbines used for the generation of electricity were "buildings" under statute on taxation of real property and thus were taxable as "real property" rather than "personal property"; turbines were virtually permanent and were suitable for occupancy or storage.

Commercial wind turbines used for the generation of electricity were "structures" under statute on taxation of real property and thus were taxable as "real property" rather than "personal property"; turbines were virtually permanent and were suitable for occupancy or storage.

Commercial wind turbines used for the generation of electricity were not "machines" so as to be taxable as "personal property"; even if the turbines had characteristics of machines, they did not constitute "machinery used in mills and factories," which the statute on filing tax declarations for personal property included in its definition of personal property.

Statute on equalization of assessments did not preclude classifying commercial wind turbines as real property for property-tax purposes, despite argument that the only other commercial wind turbine in the state was assessed as personal property; other turbine was in a different municipality, and statute required only that assessors equalize the assessments of property in the town.

Different property-tax classification of hydroelectricity generating turbine did not preclude classifying commercial wind turbines in different municipality as real property for property-tax purposes; unlike the wind turbines, the hydroelectric generating turbine was moveable and removed when not in use.

Commercial wind turbines were not "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property, and thus such an alleged status could not warrant classifying turbines as personal property as opposed to real property; unlike other articles that had been found to be fixtures, the turbines, as constructed, were not once chattels that only became real property through physical annexation to the land.

Equipment associated with commercial wind turbines constituted "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property, and thus equipment was "personal property" for property-tax purposes.

Statute on remedy for wrongful assessment of property was not a basis on which taxpayer, which was a limited-liability company (LLC) that owned and operated a wind turbine facility, could be entitled to relief in property-tax appeal of assessment of wind turbines and association equipment; although the equipment associated with the turbines was improperly was classified as real property, relief was not available under that statute in the absence of evidence of misfeasance or malfeasance.

Impact of the Inflation Reduction Act of 2022 on Renewable Energy Tax Credits: Stinson

On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 (Act) into law. The Act, while not as expansive as the previously proposed Build Back Better Act, addresses numerous areas of policy and law including health care, corporate taxation and energy. Two particular focuses for the energy community, in addition to incentives for domestic manufacturing of clean energy technology and developing technologies such as geothermal, carbon capture, clean hydrogen and biofuel, are the Act's 1) extension and modification of the production tax credit under Code Section 45 (PTC) and investment tax credit under Section 48 (ITC) and 2) creation of the new Clean Electricity Investment Credit (Clean ITC) under Section 48D and Clean Electricity Production Credit (Clean PTC) under Section 45Y.

NEW PTC AND ITC BASE RATES
Under the Act's modified tax credit program, certain renewable energy projects which place in service after December 31, 2021 will be eligible to receive the new base credit amount. Eligible wind, solar (which previously had expired), closed-loop biomass, open-loop biomass, geothermal, landfill gas, municipal solid waste, qualified hydropower and geothermal facilities would qualify for a PTC base credit amount of 0.3 cents per kWh (adjusted for inflation). Additionally, a new ITC base credit amount of 6% would be available to solar energy property, fuel cell property and waste energy recovery property, as well as the newly added energy storage technology, qualified biogas property and microgrid controllers, which begin construction by December 31, 2024. The 6% credit for energy property includes amounts paid or incurred for qualified interconnection property on projects with a nameplate capacity not greater than 5MWac.

CLEAN PTC AND CLEAN ITC
The Act also provides a new production tax credit and investment tax credit for projects generating electricity that place in service after December 31, 2024 and have a greenhouse gas emission rate of zero or less. An eligible project may receive either the Clean PTC or the Clean ITC but not both. The Clean PTC and Clean ITC will provide the same revised base credit rate available under the PTC and ITC. As with the ITC, costs incurred in connection with qualified interconnection property will qualify for the Clean ITC.

Both the Clean PTC and Clean ITC will have a phase-down period beginning on the later of 1) the year in which greenhouse gas emissions from the electric power sector are equal to or less than 25% of 2022 sector emission levels or 2) 2032 (Applicable Year). The credit will remain at 100% of the applicable credit percentage in the year following the Applicable Year and then decrease to 75% in the second year and 50% in the third year. After the third year, the credit will expire.

MULTIPLIER REQUIREMENTS

A taxpayer can increase a project's base credit amount by a multiplier of five (up to 1.5 cents per kWh for PTC or Clean PTC and up to 30% for ITC or Clean ITC) by satisfying certain prevailing wage rate and apprenticeship requirements (Multiplier Requirements). Under the prevailing wage requirements, laborers and mechanics employed by the taxpayer or any contractor or subcontractor during the construction, alteration or repair of the facility during the applicable credit period must be paid local prevailing wages as established by the Secretary of Labor (Secretary). A taxpayer can cure a failure to satisfy the prevailing wage requirements by paying underpaid laborers or mechanics the difference in pay, plus interest, as well as paying a $5,000 penalty per underpaid laborer or mechanic to the Secretary. Further guidance on the prevailing wage requirements will be issued by the Secretary.

The apprenticeship requirements establish a minimum number of labor hours on a project that must be completed by qualified apprentices participating in a registered apprenticeship program under Code Section 3131(e)(3)(B). These apprenticeship programs, as well as a project's requisite apprentice-to-journeyman ratios, are established by the Department of Labor or the applicable state apprenticeship agency. Projects beginning construction before January 1, 2023 need only 10% of total labor hours completed by a qualified apprentice. That percentage increases to 12.5% for projects beginning construction in 2023 and 15% for projects beginning construction on or after January 1, 2024. Additionally, each taxpayer, contractor or subcontractor which employs four or more individuals to perform construction, alteration or repair work on the project must employ at least one qualified apprentice. A taxpayer can cure a failure to satisfy the apprenticeship requirements if it 1) pays the Secretary of Labor a penalty equal to $50 per labor hour not in compliance (this amount increases to $500 if the failure is determined to have been intentional disregard) or 2) establishes a good faith effort to obtain apprentices which failed due to a denial or failure to respond by apprenticeship programs.

The Multiplier Requirements apply to projects that begin construction 60 days or more after the Secretary publishes guidance on the requirements. Projects that begin construction earlier, as well as facilities with a maximum net output of less than 1MWac, will automatically qualify for the tax credit multiplier without having to satisfy the Multiplier Requirements.

ADDITIONAL PERCENTAGE BOOSTS

The Act also provides that projects satisfying the Multiplier Requirements and Placed in Service after December 31, 2022 can receive an additional 10% credit increase for containing certain levels of steel, iron or manufactured products that are made in the United States. The taxpayer may certify that any steel or iron used in the project is produced in the U.S. but at least 40% of manufactured products used on a project (20% for offshore wind facilities) must be produced in the U.S. to qualify for the boost. However, a project that does not use projects produced in the U.S.can still receive the 10% boost if not enough materials were produced in the United States or if using U.S. made materials would increase the project cost more than 25%.

Similarly, a project that satisfies the Multiplier Requirements can receive a 10% credit boost for being located in specified energy communities. Such energy communities include brownfield sites, areas with certain employment related to coal, oil or natural gas experiencing unemployment above the national average, and areas with closed coal mines or coal-generating plants.

Regardless of whether the Multiplier Requirements are satisfied, solar and wind projects can also receive additional boosts for being involved in certain low-income policy goals. Projects located in low-income communities or on Indian Land are eligible for an additional 10% boost, and projects that are part of a low-income residential building project or economic benefit project can receive a 20%. The Act also establishes that energy credits under Section 48 will not apply for purposes of determining eligible basis for LIHTC under Section 42.

DIRECT PAY AND CREDIT TRANSFERABILITY
As many in the energy community anticipated, the Act includes provisions allowing eligible taxpayers to treat tax credits as a direct payment of taxes to the IRS (Direct Pay). Many renewable energy credits, including the PTC if placed in service by December 31, 2022, the ITC, the Clean PTC and the Clean ITC, are eligible for Direct Pay treatment. However, the Act only allows tax-exempt entities, states and political subdivisions, the Tennessee Valley Authority, Indian tribal governments, Alaska Native Corporations and rural electricity co-ops to use Direct Pay for these credits. Other taxpayers can only elect to use Direct Pay for clean hydrogen, carbon oxide sequestration and advanced manufacturing production for the first five years after the facility is placed in service. An election to use Direct Pay must be made no later than the due date for the tax return for the year in which the election is made. For the PTC and Clean PTC, the Direct Pay election will apply for a 10-year period beginning on the eligible facility's placed in service date.

While most taxpayers cannot use Direct Pay, the Act does permit taxpayers to transfer certain tax credits, including the PTC, ITC, Clean PTC and Clean ITC, to an unrelated party. Beginning in taxable year 2023, a tax credit may be transferred once and may not be transferred again. Such transfer must be made in cash, and any gain is not included in the seller's gross income or deducted by the buyer. In the case of a partnership, payment received for the transfer of credits will be treated as tax exempt income and would pass-through to the partners of the seller. Transfers of credits can begin in approximately mid-February 2023 and must be made no later than the tax return due date for the taxable year for which the credit is determined. Transferrable credits would also receive extended carryback and carryforward periods. The carryback period would be increased from one to three years and the carryforward period would increase from 20 to 22 years.

This alert spotlights just a few of the developments included in the 300-page Act. Stinson's Tax Credit & Impact Finance team will continue to monitor the Act's implementation and its potential impact on firm clients.

Stinson LLP

September 9, 2022

S&P: Most U.S. Hospitality Tax-Backed Ratings Have Remained Stable Despite The Pandemic

Key Takeaways

- Out of 93 hospitality tax-backed ratings, S&P Global Ratings has affirmed 81% since April 3, 2020, and now 84% have stable outlooks.
- We lowered 18 of our hospitality tax-backed ratings because of declining pledged revenues and debt service coverage (DSC) primarily in tourism-driven economies.
- Most issuers with these ratings recorded an increase in pledged revenues for fiscal 2021, with

stronger growth expected for fiscal 2022, although gains could be dampened by recessionary pressures.

Continue reading.

15 Sep, 2022

American Dream Bondholders Move to Challenge Mall's Tax Appeals.

- **Payments on $800 million of muni debt linked to assessed value**
- **Nuveen is biggest holder of American Dream's muni bonds**

American Dream, the super mall in New Jersey's Meadowlands, has appealed its tax assessment from the borough of East Rutherford for the last four years.

Mutual funds that hold the vast majority of the $800 million of municipal bonds that were issued for the mall and that are backed by property-tax-like payments are pushing back.

The trustee representing fund companies Nuveen LLC, Invesco Ltd. and Lord Abbett & Co. has moved to intervene in cases filed by America Dream in New Jersey Tax Court. The funds hold bonds backed by payments in lieu of taxes made by the project. Known as "Pilots," they were used to spur the development and are dictated by the annual assessed value of the venture, which was dealt a financial blow by the pandemic.

Continue reading.

Bloomberg Markets

By Martin Z Braun

September 14, 2022

TAX - PENNSYLVANIA

In re Coatesville Area School District

Commonwealth Court of Pennsylvania - August 19, 2022 - A.3d - 2022 WL 3567766

City and school district sought judicial review of county board of assessment's grant of a partial real estate tax exemption in separate actions, which was based on purported charitable purposes of tax-exempt taxpayer's property.

Following remand by the Commonwealth Court, the Court of Common Pleas issued two essentially identical, but differently captioned decisions and orders upholding the county board of assessment's grant of partial real estate tax exemption, the Commonwealth Court consolidated appeals and dismissed, holding that appeal of the trial court decision and order was precluded by unappealed essentially identical decision and order, which the Supreme CourT vacated and remanded for decision on the merits.

The Commonwealth Court held that:

- Trial court properly held that taxpayer’s purpose of preservation of historic resource constituted advancement of charitable purpose;
- Taxpayer’s service of preservation and maintenance of historic structure was rendered gratuitously;
- Trial court properly found that beneficiaries of taxpayer’s activities of preservation and conservation included the public at large
- Taxpayer’s maintenance and preservation of historic building had relieved Commonwealth of its assumed burden of preserving and maintaining historic structures;
- Revenue that taxpayer received from tenants occupying offices in historic building that taxpayer owned did not preclude taxpayer from receiving exemption from property taxes as a purely public charity; and
- Taxpayer was entitled to 100% exemption from property taxes.

Trial court properly held that taxpayer’s purpose of preservation of historic resource constituted advancement of charitable purpose, as supported finding that taxpayer was purely public charity exempt from property taxes under provision of state constitution and statute providing for real property tax exemption for purely public charities, although taxpayer was wholly-owned subsidiary of trust; deed restrictions on property required that it only be used as office building and for purposes consistent with preservation and conservation as historic structure, property had consistently been operated at loss with subsidization of shortfalls by trust, and preservation of historic and esthetic values was matter of express public policy.

Taxpayer’s service of preservation and maintenance of historic structure was rendered gratuitously, as weighed in favor of finding that taxpayer was purely public charity exempt from property taxes pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, although taxpayer had derived income from charging rents to occupants for renting out space in building; costs of preservation and maintenance of building had exceeded income derived from rents, and law did not require that gratuitous services rendered by entity seeking exemption had to provide a tangible benefit.

Trial court properly found that beneficiaries of taxpayer’s activities of preservation and conservation included the public at large, which enjoyed a historic resource it would otherwise lack, as supported finding that taxpayer was purely public charity exempt from property taxes pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, although property was not open to the public; preservation and maintenance of property would not be within resources of general public, property was accessible to general public through museum operated on site, and historic and architectural features of building could be publicly viewed and appreciated.

Taxpayer’s maintenance and preservation of historic building had relieved Commonwealth of its assumed burden of preserving and maintaining historic structures, as weighed in favor of finding that taxpayer was purely public charity exempt from property taxes pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, although Commonwealth was not statutorily required to preserve historic structures; Environmental Rights Amendment (ERA) to state constitution and statute declaring policy that Commonwealth was trustee for the preservation of the historic values of the environment vested Pennsylvania Historical and Museum Commission with duty to conserve and maintain historic structures.

Revenue that taxpayer received from tenants occupying offices in historic building that taxpayer owned did not preclude taxpayer from receiving exemption from property taxes as a purely public charity; property operated at substantial loss that was subsidized by taxpayer’s parent entity, and tenants benefited from taxpayer’s mission of preserving and maintaining the property as taxpayer provided heat, electricity, ventilation, air conditioning, basic janitorial services, repairs, and exterior maintenance to all tenants.

Taxpayer was entitled to 100% exemption from property taxes assessed by school district as a purely public charity pursuant to provision of state constitution and statute providing for real property tax exemption for purely public charities, where rents collected by property were used to support its charitable purpose of preserving and maintaining historic property by offsetting some of the expense to maintain it, and property had operated at a deficit.

[Inflation Reduction Act: Implications for Solar and Wind Tax Credit Equity Markets - Jones Walker]

President Biden signed into law the Inflation Reduction Act on August 16, 2022 (IRA). The IRA included a number of provisions to strengthen the investment tax credit (ITC) and production tax credit for wind projects (PTC).

Elimination of Phasedowns

Under prior law, the ITC and PTC were subject to a gradual, phased reductions of the applicable credit percentage, including elimination of the PTC for projects after 2021. For the PTC, projects that began construction after December 31, 2021, were ineligible for the PTC altogether, while projects that began construction after December 31, 2016, but before December 31, 2021, were allowed a “phased down” PTC, tied to the begun construction date.

Similarly, the ITC was set to phasedown from a 30% rate for projects that began construction before January 1, 2023, phasing down to a 22% rate for projects that began construction during 2023.

Under the IRA, solar projects beginning construction in 2022, 2023, and 2024 will be eligible for the full 30% ITC and will no longer be subject to the phasedowns described above.

For wind projects qualifying for the PTC, the IRA extends the construction commencement deadline to December 31, 2024.

It is important to note that for projects that were placed in service prior to 2022, the IRA does not retroactively change the credit rate available for those projects. Thus, projects placed in service in 2021 will remain subject to the phasedowns and will not qualify for additional credits. On the other hand, projects placed in service in 2022, including projects placed in service before passage and enactment of the IRA, may be able to take advantage of higher ITC and PTC rates and thus qualify for additional credits.

Eligibility of Interconnection Costs and Storage Property for ITC

Historically, the ITC was limited solely to costs (or, in a lease passthrough structure, value) associated with energy-producing equipment. Thus, interconnection costs have traditionally been ineligible for the ITC. However, the IRA expanded the definition of “energy property” eligible for the ITC, to include “amounts paid or incurred by the taxpayer for qualified interconnection property…”

“Qualified interconnection property” is defined by the IRA to mean tangible property (other than property associated with a qualified microgrid controller), which: (i) is part of an addition, modification, or upgrade to a transmission or distribution system which is required at or beyond the interconnection point; (ii) is either constructed, reconstructed, or erected by the taxpayer, or the cost of construction, reconstruction, or erection is paid or incurred by the taxpayer; and (iii) the original use of which commences with a utility pursuant to an interconnection agreement.

Additionally, batteries historically were only eligible for the ITC to the extent incorporated into an ITC project. Thus, standalone storage systems were traditionally ineligible for the ITC. However, the IRA amends the definition of "energy property" to now include certain "energy storage technologies," defined generally as property that receives, stores, and delivers energy for conversion to electricity.

Transferability of Credits

The IRA now permits a one-time transfer of tax credits to a taxpayer who is not related to the transferor (within the meaning of Section 267(b) or 707(b)(1) of the Code), beginning in 2023. IRA further provides that amounts received as consideration for such transfer shall be excluded from the transferor's gross income. A transferee may not further transfer the credits. Credits which are subject to a credit carryforward or credit carryback under Section 39 of the Code are not eligible for transfer.

Though the transferability rules provide for further flexibility, a number of significant questions remain, including the potential effects transferability may have on the tax equity market. For example, while the IRA clearly states that a credit may only be transferred once, presumably, this rule would not restrict a transferee that is a passthrough entity from further allocating the transferred credit to its partners or shareholders, but this issue is not specifically addressed in the IRA text.

While transferability provides additional flexibility in structuring investments and provides the potential to avoid exit costs associated with traditional tax equity investments, it is important to note that transferability may limit the amount of equity a project sponsor is able to raise. For example, pricing in the ITC space is driven, in large part, by the desire to monetize accelerated depreciation deductions. Thus, it is likely that traditional tax equity structures will remain prevalent in ITC transactions. On the other hand, the PTC, which is calculated based upon production rather than cost, is not dependent upon depreciation, and therefore is more likely to benefit from transferability.

Credit Carryforward/Carryback

IRA extends the existing one-year credit carryback period under Section 39 to three years, and the credit carryforward period from 20 years to 22 years. With respect to PTCs, this appears to apply only to qualified facilities placed in service after December 31, 2022.

New Sections 45Y and 48E

As noted above, the IRA extends the PTC until December 31, 2024, which effectively phases out the PTC beginning in 2025. The IRA similarly includes a phaseout for the ITC for projects that begin construction after 2024. However, the text of IRA includes new Code Sections 45Y (Clean Electricity Production Credit, or CEPTC) and 48E (Clean Electricity Investment Credit, or CEITC), which effectively replace the PTC and ITC beginning in 2025.

The CEPTC and CEITC each provide for a base credit along with an alternative rate if the project satisfies certain requirements.

By Nicholas James Irmen, Jonathan Katz & Shawn J. Daray

Jones Walker LLP

Thursday, September 1, 2022

TAX - NEW YORK

Eisenhauer v. Watertown City School District

Supreme Court, Appellate Division, Fourth Department, New York - August 4, 2022 - N.Y.S.3d - 2022 WL 3096652 - 2022 N.Y. Slip Op. 04832

Homeowners brought declaratory judgment and article 78 proceeding, seeking to annul results of school district election to extent that results enacted proposition for a tax on real property within school district for purposes of constructing a public library.

The Supreme Court granted city and school district's motion to dismiss. Homeowners appealed.

The Supreme Court, Appellate Division, held that:

- City was not a proper party to the proceeding;
- Homeowners were not required to exhaust their administrative remedies before filing suit;
- School district had authority to levy, collect, and appropriate taxes for construction of public library;
- School district's proposition did not violate equal protection clause; and
- Homeowners' due process rights were not violated.

City was not a proper party to homeowners' declaratory judgment and article 78 proceeding, seeking to annul results of school district election to extent that they enacted a proposition for tax on real property to fund construction of a public library, where homeowners failed to show city had any involvement in the approval, certification, or passage of the new tax, and homeowners did not seek specific relief against city.

Homeowners were not required to exhaust administrative remedies before they brought declaratory judgment and article 78 proceeding against school district and public library, seeking to annul results of school district election to extent that results enacted proposition to tax real property within school district to fund construction of a public library; validity of school district election was not at issue, rather, homeowners were challenging legality of school district's approval and certification of tax and validity of the proposed tax itself.

School district had authority to levy, collect, and appropriate taxes as part of proposition in school district election to tax real property within school district to fund construction of public library; provisions under Education Law did not foreclose other entities from providing public library with additional funding or preclude school district's ability to submit proposition to fund public library through taxes, and proposition did not unconstitutionally shift burden of cost to operate public library to taxpayers outside city limits as public library was not a governmental service or function of the city.

School district's proposition in school district election to tax real property within school district to fund construction of public library did not violate equal protection clause of the United States Constitution; although certain residents outside city and school district could use public library without directly supporting it by way of tax, that did not render tax an example of hostile and oppressive discrimination against homeowners, and homeowners did not demonstrate how school district’s proposition treated them disparately.

Homeowners’ due process rights were not violated by school district’s proposition in school district election to tax real property within school district to fund construction of a public library, where homeowners were afforded opportunity to vote in the school district election as eligible voters and school district residents.

TAX - MINNESOTA

Under the Rainbow Early Education Center v. County of Goodhue

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3641789

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, filed petition against county challenging county assessor’s denial of its application for a property tax exemption as a seminary of learning.

The Tax Court denied summary judgment to center and granted summary judgment to county. Center petitioned for certiorari.

The Supreme Court held that:

- Center was an educational institution, as required to be tax-exempt seminary of learning;
- Center provided a general education, as required to be tax-exempt seminary of learning; and
- Center provided a thorough and comprehensive education, as required to be tax-exempt seminary of learning.

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, was an “educational institution,” as required to be tax-exempt seminary of learning; to maintain its license with Department of Human Services (DHS), center followed program plan with goals to promote physical, intellectual, social, and emotional development of children in its care, it performed regular evaluations of the children and hosted regular conferences with parents, its staff had to meet educational requirements to qualify as teachers and assistant teachers, and DHS rating and certification program required that center teach a preapproved curriculum developed by independent childhood education professionals to foster early learning and development.

County forfeited argument before Supreme Court that, even if other portions of early childhood education center’s operations were tax-exempt, the programs caring for infants and school-age children did not qualify as tax-exempt seminary of learning because infants were too young to learn from formal teaching and standards used for center’s licensing and rating from Department of Human Services (DHS) were not relevant to school-age children, where county made no arguments before the tax court below about dividing center’s services into exempt and nonexempt portions, presented no evidence on the effect of education on infants, and presented no evidence that the educational standards governing center’s operations were inappropriate for school-age children.

The required showing for determining whether a program teaches a general curriculum, as required for an institution to qualify as a tax-exempt seminary of learning, is whether the program embraces a sufficient variety of academic subjects to give the student a general education.

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, provided a general education, as required to be tax-exempt seminary of learning; to maintain its license with Department of Human Services (DHS), center had to demonstrate that its educational programming provided daily learning opportunities in eight categories specified by rule, it performed child evaluations using comprehensive forms developed by DHS, and to maintain its four-star rating with DHS certification program, center used age-appropriate daily lesson plans for each child, followed current best practices for early education, and taught curriculum that was preapproved by the State, and that curriculum addressed emotional, physical, and intellectual development.

Early childhood education center, a licensed childcare facility for infants through children 12 years of age, provided a thorough and comprehensive education, as required to be tax-exempt seminary of learning; DHS regulations required that center's staff meet training and educational standards and that it limit the number of children each teacher could oversee, in order to ensure that children received individual attention and support, to maintain its rating with DHS certification program, center's staff had to complete more the minimum required professional development hours, and center had to implement a preapproved curriculum and be inspected and approved by state university's center for early education development.

TAX - KANSAS

Dodge City Cooperative Exchange v. Board of County Commissioners of Gray County

Court of Appeals of Kansas - July 22, 2022 - P.3d - 2022 WL 2898814

Taxpayer filed petition for judicial review of Board of Tax Appeals decision affirming county's determination that equipment associated with grain storage bins were taxable fixtures rather than personal property.

The District Court reversed, and county appealed.

The Court of Appeals held that:

- County continued to have burden to prove in trial de novo that tax classification was correct;
- Pieces of equipment attached to grain storage bins were not "fixtures" for tax classification purposes; and
- Taxpayer, which only challenged tax assessments for two years, was only entitled to refunds for those two years.

On trial de novo in the district court, county continued to have burden to prove that classification for tax purposes of various equipment associated with grain storage bins was correct; as county had burden before the Board of Tax Appeals, on trial de novo county retained that burden.

Various pieces of equipment attached to grain storage bins were not "fixtures" for tax classification purposes, although equipment was large and bolted to the storage bins, where equipment could be easily removed, and removal would not damage the bins and would not be unduly complicated or costly, and similar pieces of equipment had been removed and placed on different bins.

Taxpayer which challenged only two years of tax assessments, on grounds that pieces of equipment attached to grain storage bins were not fixtures, was only entitled to refunds for those two years and could not recover refunds for taxes collected after those years; at time of appeal to the Board of Tax Appeals, taxpayer could not challenge future assessments, and there was no indication that taxpayer attempted to challenge those future assessments when they were made by exhausting its administrative remedies.

[Why Is Chicago's Rail Extension Funding Considered Controversial?]

The Chicago Transit Authority is hoping to finally make good on a promise to expand a subway line to the southern edge of the city. First it needs the City Council to agree to a plan for raising billions of dollars to support the project.

By the end of the decade, Chicago's Red Line train could finally extend past its current terminus at 95th Street and into the far South Side, connecting some of the city's poorest communities to its sprawling transit network and fulfilling a mayoral promise made more than half a century ago.

The project, known as the Red Line Extension (RLE), has been in active planning by the Chicago Transit Authority since at least 2006. It would add four new stations and 5.6 miles of elevated and ground-level track to one of the busiest routes on Chicago's "L" system. It's an expansion of urban railway infrastructure on a rare scale in an age of funding crises and shrinking ridership for public transit agencies. But local leaders say it's a long-overdue investment that could cut travel time from the far South Side to the Loop by as much as 30 minutes while providing a host of economic benefits to underserved communities during and after construction.

The CTA completed the environmental review process for the project earlier this month, and is hoping to move into the engineering phase by next year. It's seeking more than $2 billion in federal funds, with the city and CTA required to put up about $1.6 billion of their own. To raise the local funds, the authority is proposing a new twist on an old tool called tax increment financing (TIF), which has been used extensively to fund economic development in Chicago. And despite some concerns about the proposal raised by several of the city's aldermen this summer, the project's planners say they're confident the Red Line Extension will move forward.

Continue reading.

governing.com

Aug. 25, 2022 • Jared Brey

[Fatally Flawed? Illinois Municipal League's Model Streaming Subscription Tax - McDermott Will & Emery]

The Illinois Municipal League (IML) represents the interests of 219 home rule municipalities in Illinois.[1] The IML recently released a revised draft model, "Municipal Streaming Tax Ordinance," (the model) for use by the home rule municipalities in imposing an "amusement tax" on, inter alia, music and video streaming services and online gaming.[2] If the subscriber's residential street address is within the corporate limits of the municipality, the subscription fee would be subject to the tax.[3] However, the tax proposed by the model has at least two fatal flaws: it is barred by the Internet Tax Freedom Act (ITFA) as a discriminatory tax on electronic commerce and is an unconstitutional extraterritorial tax under the home rule article of the Illinois Constitution.[4]

NATURE OF THE STREAMING TAX

The model proposes a tax on the privilege of viewing an amusement, including electronic amusements that either "take place within the" municipality or are delivered to subscribers "with a primary place of use within the jurisdictional boundaries of" the municipality.[5] The model incorporates the definition of "place of primary use" from the Illinois Mobile Telecommunications Sourcing Conformity Act.[6] That statute requires sourcing to the subscriber's "residential street address."[7] The streaming tax operates like a familiar sales tax in that it is imposed on the subscriber but collected by the streaming provider and remitted to the municipality.[8] The model tax would also be imposed on "paid television programming" (sat TV), but not paid radio programming (sat radio), transmitted by satellite.[9] The tax is not imposed on transactions that confer "the rights for permanent use of an electronic amusement" on the customer.[10]

[Continue reading.](#)

McDermott Will & Emery – Stephen P. Kranz, Mark Nebergall, Catherine A. Battin and Jonathan C. Hague

August 24 2022

[Public Finance Impact of the Inflation Reduction Act's New Corporate Alternative Minimum Tax: Holland & Knight](#)

President Joe Biden signed into law the Inflation Reduction Act (the IRA) on Aug. 16, 2022. The IRA (H.R. 5376, 117th Congress) includes a variety of legislation concerning energy, climate change, federal income tax, healthcare and deficit reduction matters. Notably for those in the public finance sector, the IRA includes a new limited corporate alternative minimum tax that is effective for tax years ending after Dec. 31, 2022, which could impact the demand for tax-exempt municipal bonds. The corporate alternative minimum tax had previously been repealed in 2017 as part of the Tax Cuts and Jobs Act.

The IRA creates a new revenue-generating 15 percent corporate alternative minimum tax (the Corporate AMT) (also known as the book minimum tax), which, when effective, applies to an "applicable corporation," namely, a domestic corporation with average "adjusted financial statement income" (AFSI) in excess of $1 billion over a three-taxable-year period or a foreign-parented corporation with a three-taxable-year average annual AFSI of $100 million or more if they are part of a foreign-parented multinational group with an average AFSI exceeding $1 billion. An applicable corporation does not include an S Corporation, a real estate investment trust or a regulated investment company. A corporation that is determined not to be an "applicable corporation" will remain exempt from the corporate alternative minimum tax consistent with its repeal in 2017 as part of the Tax Cuts and Jobs Act.

While the Corporate AMT is projected to generate $220 billion of tax revenue over 10 years, it is expected that the Corporate AMT, the applicability of which could be expanded in the future, will have very limited immediate impact in terms of the number of corporate taxpayers affected. The U.S. Congress Joint Committee on Taxation has estimated that 150 companies (most of which are in the manufacturing sector) will be affected by the new Corporate AMT. With regard to the public finance sector, the affected taxpayers are banks, insurance companies, and property and casualty insurers, which are often purchasers of tax-exempt municipal bonds. It is also expected that tax disclosure language in offering statements and tax opinion language will have to be revised in order to account for the enactment of the Corporate AMT. Further, bond purchase agreements should be reviewed to determine whether this change will affect any of the so-called "outs" under such agreements.

Holland & Knight attorneys are working with borrowers, issuers, underwriters and lenders to address the impact of the Corporate AMT. If you have any questions regarding this alert, please contact one of the bond attorneys on Holland & Knight's Public Finance Team.

For an in-depth summary of the full IRA legislation, see Holland & Knight's previous alert, "The Inflation Reduction Act: Summary of the Budget Reconciliation Act," Aug. 8, 2022.

Holland & Knight Alert

by Faust Bowerman | Michael L. Wiener | Vlad Popik

AUGUST 19, 2022

Inflation Reduction Act: Tax Implications for Public Finance Transactions - Kutak Rock

On August 16, 2022, President Biden signed into law the Inflation Reduction Act (H.R. 5376, 117th Congress) (the "IRA"). The enactment of the IRA caps a tumultuous period of many months of negotiations involving the original Build Back Better Act (the "BBBA") on which the IRA is based. The BBBA did not progress beyond approval in the House of Representatives in November 2021. The IRA is considered a "light" version of the BBBA with many original provisions scaled back significantly or removed altogether in an effort to ensure passage. Nevertheless, the IRA represents a significant federal investment to address climate change and curb inflation.

Key provisions of the IRA relate to energy (including tax credits), healthcare, tax reform and deficit reduction. *Unfortunately, the IRA falls short of including any tax-exempt financing tools.* Communities relying on public financing have been requesting, among other things: a provision to protect direct pay subsidy bonds from continued federal sequestration; an expansion of volume cap for exempt facility bonds especially to satisfy the demand for affordable low-income housing; a reduction in the 50% bond financing requirement to unlock 4% low-income housing tax credits; and an update and increase to the $10 million bank qualified provision for small issuers. *The IRA includes none of the requested provisions.*

Relevant to the public finance community, however, is the reintroduction by the IRA of a corporate alternative minimum tax (the "AMT"). As a reminder, the AMT for corporations had been eliminated by the 2017 legislation commonly referred to as the Tax Cuts and Jobs Act. The new corporate AMT imposes a 15% alternative minimum tax on annual adjusted financial statement income of "applicable corporations." Corporations that do not fall within the category of "applicable corporations" will continue to be exempt from the AMT altogether. "Applicable corporations" generally include domestic corporations (including banks but excluding Subchapter S corporations, regulated investment companies, real estate investment trusts, and businesses owned by private equity) with profits of more than $1 billion, and certain foreign-parented multinational corporations with profits of more than $100 million, over a specified three-year period, effective beginning in the 2023 taxable year.

From the perspective of tax-exempt legal documentation, the reintroduction (albeit in limited form) of the corporate AMT may require adjustments to offering statements, tax opinions and tax covenants going forward. We have already been working closely with our clients to discuss the new

AMT provision and draft necessary documentation changes, including revised tax disclosure for official statements.

Within Kutak Rock LLP, there are several working groups who are also assisting clients with the application of energy, tax credit and healthcare provisions of the IRA. The firm's National Public Finance Tax Group would be happy to assist with efforts to coordinate with these working groups.

Please also note that in certain cases the use of tax-exempt financing for IRA-assisted projects can impact the availability of IRA tax credits or subsidies for such projects.

Please reach out to any member of the Kutak Rock LLP National Public Finance Tax Group if you have questions about the IRA and its impact on tax exempt bond financings. Questions, comments or corrections to this client alert may be addressed to the attorneys listed below.

This client alert was prepared for the general informational use of the clients and attorneys of Kutak Rock LLP and reflects our understanding of the matters set forth herein as of the time of its release. The views on the topics presented may change as our experience with the matters discussed herein deepens.

August 16, 2022

Tax Implications of the Inflation Reduction Act: Cooley

On August 7, 2022, the US Senate passed the Inflation Reduction Act (House Resolution 5376), which contains tax, climate and healthcare provisions. The legislation is widely expected to be passed by the House of Representatives without changes and signed into law by President Joseph R. Biden shortly thereafter. The Inflation Reduction Act contains a number of revisions to the Internal Revenue Code (the "Code"), including a 15% corporate alternative minimum tax and a 1% excise tax on corporate stock repurchases. Despite earlier proposals, the legislation does not contain any changes to the tax treatment of carried interest or the cap on deductions for state and local taxes.

This alert highlights a few key provisions of the Inflation Reduction Act that may be applicable to Cooley clients.

Corporate alternative minimum tax

In tax years beginning after December 31, 2022, the Inflation Reduction Act imposes a 15% alternative minimum tax (the "Corporate AMT") on US corporations with financial accounting profits exceeding a certain threshold. This provision is expected to impact large corporations that have previously reported high income on their financial statements but have significantly reduced – or even eliminated – their cash tax liability as a result of certain attributes or book-tax differences, such as companies with significant stock-based compensation. Very few corporations are expected to be subject to the Corporate AMT as currently proposed. In an analysis of an earlier version of the proposal, the Joint Committee on Taxation estimated that about 150 taxpayers would be subject to the tax each year.

The Corporate AMT would generally apply to US corporations – excluding S corporations, regulated investment companies and real estate investment trusts – with an average of more than $1 billion of annual adjusted financial statement income (AFSI) during a three-year measurement period. The Corporate AMT would also apply to a US corporation (including, for these purposes, a trade or business engaged in by a foreign corporation within the US) in a foreign-parented multinational group if, over the three-year measurement period, the US corporation's average annual AFSI is at least $100 million and the multinational group's average annual AFSI exceeds $1 billion. A corporation's AFSI is the net income or loss set forth on the corporation's applicable financial statement (generally a Securities and Exchange Commission Form 10-K or other audited financial statement) for the taxable year, subject to certain adjustments to reflect accelerated tax depreciation and certain other items. The provision was amended with the intention that otherwise unrelated companies under common ownership of an investment fund will not have their AFSI aggregated for purposes of the $1 billion threshold.

In some cases, the Corporate AMT may simply accelerate taxes, as payments made under the Corporate AMT can be used as a credit in future years when a corporation's regular tax liability exceeds its liability under the Corporate AMT. In other cases, the Corporate AMT may permanently increase overall tax liability. For example, taxpayers with significant net operating losses from tax years prior to 2020 may realize a permanent increase in tax liability because the Inflation Reduction Act precludes carryforwards for financial statement net operating losses arising in such years.

Excise tax on corporate stock repurchases

For publicly traded US corporations and certain US subsidiaries of publicly traded non-US corporations, the Inflation Reduction Act imposes a 1% excise tax on the fair market value of any stock that is repurchased by the corporation or its "specified affiliate" (generally, corporations or partnerships of which the corporation owns more than 50%) during the tax year. The taxable amount is reduced by the fair market value of any stock issued by the repurchasing corporation during the taxable year, including the fair market value of any stock issued or provided to employees of the corporation or a specified affiliate. The excise tax is subject to several exceptions (the contours of which are uncertain), including carve-outs for repurchases that are part of a tax-free reorganization, contributions to employee retirement or stock ownership plans, repurchases that are treated as dividends, and corporations that repurchase stock with a total value of no more than $1 million during a taxable year. The excise tax applies to repurchases of stock after December 31, 2022.

While the excise tax only applies to repurchases of stock after December 31, 2022, corporations may already have shares outstanding that are subject to repurchase rights, including redeemable preferred stock and stock issued in the initial public offering of special purpose acquisition companies (SPACs). The excise tax could also be triggered in transactions not conventionally viewed as stock repurchases, including:

- Mergers or other reorganizations involving cash payments to the target's shareholders to the extent that such payments are funded with the target's cash or debt incurred or assumed by the target in the transaction.
- Payments of cash in lieu of fractional shares.
- Payments to dissenters.
- Divisive reorganizations that use a "split-off" structure.

In addition, the Secretary of the Treasury is authorized to define "repurchase" to include "economically similar" transactions. Unless the fair market value of stock treated as repurchased in a tax year is less than the fair market value of stock issued by the covered corporation in that tax year, or another exception applies, such transactions could expose a covered corporation to the excise tax.

Other tax provisions

Other notable tax-related provisions in the Inflation Reduction Act include:

- A two-year extension (to tax years beginning before January 1, 2029) of the loss limitation rules applicable to noncorporate taxpayers under Section 461(l) of the Internal Revenue Code.
- An increase in the research tax credit available to offset the payroll taxes of qualified small businesses under Section 41(h) of the Internal Revenue Code.
- An increase in IRS funding of approximately $80 billion over 10 years, with nearly $46 billion for enforcement efforts such as "digital asset monitoring and compliance activities."
- A new excise tax on drug producers who fail to comply with new drug pricing requirements.
- The reinstatement of a Superfund excise tax on crude oil and certain imported petroleum products at a rate of 16.4 cents per barrel (indexed to inflation) beginning January 1, 2023.
- The permanent extension of an excise tax on coal from US mines.
- Climate- and energy-related taxes, tax credits and other incentives.

Cooley Alert

August 11, 2022

Biden Signs Climate Bill With Transformative Changes to Clean Energy Tax Incentives: Latham & Watkins

Key Points:

- Wind and solar tax credits receive a multi-year extension at full rates, and solar projects are eligible for the production tax credit.
- New tax credits are available for emerging technologies, including energy storage and clean hydrogen.
- Carbon capture tax credit rules are simplified and expanded.
- New manufacturing tax credits are available to support and grow the clean energy supply chain in the US.
- Most tax credits may be converted to cash payments from the Treasury Department under a new direct pay program or sold in the market under new tax credit transfer procedures.

Continue reading.

Latham & Watkins LLP – James H. Cole, Enrique Rene de Vera, Eli M. Katz, Ben A. Cheatham, Andrea Herman, Michael J. Rowe and Michael Syku

August 16 2022

Wayfair: The Sequel - Baker McKenzie

A new lawsuit filed by Wayfair, LLC in Jefferson County Court (Colorado) seeks to address a question left open by the U.S. Supreme Court's landmark 2018 *Wayfair* decision that permits states to impose a sales or use tax collection obligation based on an economic nexus threshold: Does this decision apply to locally-administered sales or use taxes? While many localities have asserted that the same economic nexus standards should apply at the state and local levels, the devil is in the details as there are thousands of local taxing jurisdictions, many of which do not have uniform laws or centralized administration.

To briefly recap the *Wayfair* landscape, the U.S. Supreme Court blessed the brightline economic nexus standard used by South Dakota, stating that a tax "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). In concluding that South Dakota's law did not impose an undue burden on interstate commerce, the Court cited to three key features of the South Dakota tax system: (1) the economic nexus standard at issue included a safe harbor that required considerable business in the state; (2) the economic nexus standard was not applied retroactively; and (3) most notably, South Dakota had adopted the Streamlined Sales and Use Tax Agreement ("SSUTA"), which requires a single point of state-level administration for all state and local sales and use taxes along with other simplification measures. In this most recent Wayfair filing, Wayfair asks the court whether the City of Lakewood's locally administered sales tax should be invalidated because of its excessive burdens.

The taxpayer alleges that the City of Lakewood improperly assessed it roughly $600,000 in sales tax for the period May 2018 through June 2021, along with penalties and interest. As discussed in an earlier [SALT Savvy blog post](), Colorado state law provides for the local administration of local sales taxes in over 70 home-rule counties and municipalities. Further exacerbating the issue, the state has done little to require the simplification of theses local taxes. While the state offers a centralized single remittance portal that home-rule localities may use, the portal is optional and the City of Lakewood is not yet part of the program, though they have taken the preliminary step of signing the agreement to join the program. Due to this inaction, Wayfair's lawsuit also includes an affirmative claim against the Executive Director of the Colorado Department of Revenue alleging that the state failed to provide adequate safeguards and support to mitigate the burdens of Colorado's local tax system on out-of-state businesses.

Some within Colorado's state and local governments appear to recognize the compliance burdens and the concomitant litigation risk that could arise from them. For example, the Colorado Municipal League ("CML"), a non-profit, nonpartisan organization representing the cities and towns of Colorado stated that "part of the reason South Dakota did not overburden interstate commerce was due to an easy way for businesses to remit to all taxing jurisdictions." In response, the CML developed a Model Ordinance on Economic Nexus and Marketplace Facilitators ("Model Ordinance") with standardized definitions "as part of a sales tax simplification effort," because the CML acknowledged that "various home rule municipalities giving the same term different meanings is a source of complexity in our tax system for businesses that operate in multiple municipalities." However this standardized statutory language has not been adopted by all home rule jurisdictions in the state. As of the writing of this publication, 270 cities and towns of Colorado are members of the CML, out of a total of 272, indicating widespread local support for the organization's purpose. But as of 2021, only about 43 out of the 70 home rule jurisdictions had adopted the Model Ordinance.

As noted above, Colorado itself also established an optional single point of remittance portal with a uniform remittance form for use by home rule localities. Additionally, in April the state enacted a law that prohibits localities from imposing local license fees on retailers without a physical presence or with only an incidental physical presence within the locality as long as the retailer has a standard state retail license. Moreover, the bill summary states, "[t]he department is required to consult with local taxing jurisdictions when determining what information to collect and how to make the information collected available to local taxing jurisdictions and making and testing modifications. The department is also required to consult with retailers and address any reasonable concerns they may have." It remains to be seen if this positive step in the right direction will lead to changes sufficient to overcome the serious Commerce Clause concerns with respect to the administration and collection of local taxes in Colorado.

The situation in Colorado is analogous to the situation in Louisiana. In a November 2021 suit filed by Halstead Bead Inc. in the Eastern District of Louisiana, the taxpayer likewise alleged that Louisiana's decentralized sales tax system violates the Commerce Clause of the U.S. Constitution. However, that case was dismissed on procedural grounds.

As illustrated in prior U.S. Supreme Court precedent, *Pike v. Bruce Church*, and reaffirmed by the Court in *Wayfair*, navigating such complex, overlapping, and competing obligations between and amongst local jurisdictions can create an undue burden on and discriminates against interstate commerce, thereby violating the Commerce Clause of the U.S. Constitution. *Pike v. Bruce Church*, 90 S. Ct. 844 (1970). The Colorado complaint alleges that neither Lakewood, nor the Colorado Department of Revenue, took reasonable steps to mitigate such burdens and that therefore requiring Wayfair to collect and remit the local tax is unconstitutional.

The problems of decentralized tax collection are not unique to Colorado and Louisiana. Other states have recently placed themselves in similar situations through their economic nexus and/or marketplace facilitator laws that apply to general sales and use taxes or other locally administered taxes (e.g., hotel occupancy taxes). For example, North Carolina, West Virginia, and Wisconsin require marketplace facilitators to individually register with each locality in the state for certain tax types once that marketplace facilitator has met or exceeded the state-level economic nexus threshold. These requirements are subject to the same balancing test that will be reviewed in Colorado.

We will continue to monitor this lawsuit and further developments on this issue.

Baker McKenzie – Lindsay LaCava, Mike Shaikh, David Pope and Rob Galloway

August 16 2022

Collateral Damage: Inaccurate US Tax Reporting Can Give Rise to Customer Damages: Mayer Brown

Financial institutions, corporations, and other payors of income are keenly aware that the Internal Revenue Service ("IRS") will impose tax penalties on them if they issue inaccurate tax information returns to either the IRS or customers. A recent case, however, points out that inaccurate reporting may have another, less obvious, downside: liability to the customer who received the inaccurate information. On June 30, 2022, a United States district court in New Jersey allowed a brokerage customer to proceed to seek damages from a brokerage that provided inaccurate tax reporting to the customer.1 While the opinion did not decide whether the brokerage was liable for damages, it has allowed the customer to continue its lawsuit.

In Goodman, the brokerage customer (the "plaintiff") purchased a number of taxable municipal bonds at a premium to the face amount of the bonds. The plaintiff held the bonds in a brokerage account. When a taxpayer purchases bonds for an amount greater than their face value (i.e., at a premium), U.S. tax law permits the taxpayer to amortize the premium over the remaining life of the bond. The premium amortization reduces the taxpayer's taxable income.2 Treasury Regulations contain certain presumption rules relating to a broker's IRS Form 1099 reporting obligations when a customer holds instruments that were purchased at a premium in an account with that broker.3 In Goodman, the plaintiff alleged that the broker incorrectly reported the amount of amortized bond premium on the plaintiff's IRS Forms 1099 for tax years 2015 – 2018. The plaintiff alleged that the misreporting caused the plaintiff to overpay U.S. federal income taxes in those years. The plaintiff brought contract and tort claims on behalf of himself and similarly situated individuals. In response, the broker filed a motion to dismiss.

The court looked to the underlying agreements governing the relationship between the plaintiff and broker in determining whether the plaintiff had a claim against the broker. While nothing in the account agreements specifically addressed the broker's tax reporting policies related to municipal bonds, the agreements did contain provisions relating to specific tax forms, including, for example, the electronic delivery of IRS Forms 1099. The court further noted that the broker also has a Form 1099 guide that it provides to clients. The guide, consistent with the Treasury Regulations, stated that the broker would report a gross amount for both the interest paid to the holder and the premium amortization for the year unless a holder requests otherwise.

The broker sought to have the litigation dismissed. The court denied the broker's motion to dismiss based on the possibility that the client had two potentially viable claims: (i) breach of contract and (ii) negligence. The court found it plausible that the broker violated implied terms of the agreements, providing the plaintiff a breach of contract claim. The court held that the agreements clearly contemplate that the broker would provide the plaintiff with tax forms, including IRS Form 1099. The court explained a promise to provide the client with tax forms, to be meaningful, implies that the forms be accurate to the best of the broker's knowledge. Second, it implies the broker would follow its own stated policies (i.e., the Form 1099 guide) when providing tax forms, even if those stated policies were not themselves part of the account agreements.4

The court held, with respect to the negligence claim, the threshold question is whether the broker had a state law duty to accurately report tax information on the forms it provided to the plaintiff. The court, recognizing this is a fact-intensive inquiry, denied the broker's motion to dismiss and found it appropriate to allow the parties to proceed to discovery. (We note that this claim could be rejected in a future motion for summary judgment made by the broker.)

Takeaways

Tax reporting has never been as complicated as it is today. Basis reporting, wash sale reporting, and a host of other relatively new reporting requirements substantially increase the likelihood that payors inadvertently misreport information. The Goodman opinion highlights the need to carefully review existing client/customer documentation to see what, if anything, is agreed or promised to clients, customers, or payees in terms of information reporting. At the very least, taxpayers should consider whether such documentation should contain an acknowledgement by the client/customer/payee that the broker is not liable for inadvertent tax reporting errors.

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1 Goodman v. UBS Fin. Servs., Inc., No. Civ. No. 21-18123 (KM) (MAH), 2022 BL 228030 (D.N.J. June 30, 2022).

2 See Internal Revenue Code section 171.

3 Treasury Regulation section 1.6045-1(n)(5).

4 The court's opinion provided the following: "A client who wonders how his or her income will be reported would naturally look for answers in the materials provided by [the broker] and would expect [the broker] to follow those policies. Here, [the broker] 1099 Guide stated 'unless you notified [the broker] in writing in accordance with Regulations section 1.6045-1(n)(5) that you did not want to amortize the premium under section 171, we will report a gross amount for both the interest paid to you and the premium amortization for the year.' The contract implies, therefore, that the Form 1099 that [the broker] was contractually and legally obligated to provide to clients such as [the plaintiff] would 'report a gross amount for both the interest paid to you and the premium amortization for the year.' [The plaintiff] alleges that the Form 1099s provided to him did not report the premium amortization for that year and therefore has plausibly alleged a breach of contract."

Mayer Brown – Jared B. Goldberger, Mark H. Leeds and Amit S. Neuman

August 15 2022

TAX - CALIFORNIA

Zolly v. City of Oakland

Supreme Court of California - August 11, 2022 - P.3d - 2022 WL 3270058

Solid waste disposal customers brought action to challenge constitutionality of franchise fees which city charged waste management entities, a portion of which was redesignated as a solid waste management fee.

The Superior Court sustained city's demurrer, and taxpayers appealed. The First District Court of Appeal affirmed in part and reversed in part, holding, among other things, that customers adequately alleged city's challenged fees did not bear reasonable relationship to franchises' values. The Supreme Court granted city's petition for review.

The Supreme Court held that:

- Customers alleged adequate injury-in-fact to support standing;
- Voluntary franchise fees were levies, charges, or exactions "imposed by" city within meaning of constitutional definition of "tax";
- Customers adequately alleged that waste disposal franchise did not constitute local government property; and
- Customers adequately alleged that franchise fees did not constitute charges imposed for use of local government property.

Alleged economic injury caused to solid waste disposal customers by franchise fees which city charged to waste management entities constituted injury-in-fact that conferred standing upon customers to challenge city's fees under constitutional provision governing taxes, even though customers were not obligated to pay charges related to franchise fees directly to city, where customers alleged that fees caused their waste collection rates to increase every month.

Fees that city required waste management entities to pay in exchange for waste disposal franchise rights within city, pursuant to contractual negotiations, were levies, charges, or exactions imposed by local government, as necessary to constitute "tax" within meaning of California Constitution, even if negotiations were voluntary rather than coerced; term "impose" meant "establish," without any coercive connotation, as indicated by constitutional provision's use of term "imposed" in context of voluntary charges.

Waste disposal customers adequately alleged that solid waste disposal franchise did not constitute "local government property" within meaning of constitutional exemption from definition of "tax" for charges imposed to enter or use local government property or to purchase, rent, or lease local government property, supporting customers' claim against city for violation of constitutional requirements for approval of taxes; term "local government property" in constitutional article governing voter approval of local tax levies referred to physical objects under control of local government, such as streets, franchise did not exist as local government's property before it vested in franchise owner, and fees were not paid for city's property interest in antecedent right to grant franchise.

Waste disposal customers adequately alleged that fees franchisees paid to city for waste disposal franchises did not constitute "charges imposed for use of local government property" within meaning of Constitution's exemption of such charges from definition of "tax," as necessary to support customers' claim against city for violation of constitutional requirements for voter approval of special taxes, even though ordinances stated franchises included right to use public streets or other public places; entities did not pay fees in exchange for specific use of government property that they would not have otherwise enjoyed, and provision exempted only fees paid as consideration for specific use of government property, such as park entrance fee, as indicated by statutory language "imposed for."

TAX - CONNECTICUT

Wind Colebrook South, LLC v. Town of Colebrook

Supreme Court of Connecticut - August 2, 2022 - A.3d - 344 Conn. 150 - 2022 WL 3048353

Taxpayer, which was a limited-liability company (LLC) that owned and operated a wind turbine facility, commenced a municipal property tax appeal after town board of assessment denied taxpayer's appeal of town's classification of the wind turbines and their associated equipment as real property for purposes of taxation.

The Superior Court entered judgment for taxpayer on claim that a late-filing penalty was improper but entered judgment for town in all other respects. Taxpayer appealed.

The Supreme Court held that:

- The turbines were "buildings" under statute on taxation of real property;
- The turbines were "structures" under statute on taxation of real property;
- Statute on equalization of assessments did not preclude classifying commercial wind turbines as real property for property-tax purposes;
- The turbines were not "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property; but
- The equipment associated with the turbines constituted "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property.

Commercial wind turbines used for the generation of electricity were "structures" under statute on taxation of real property and thus were taxable as "real property" rather than "personal property"; turbines were virtually permanent and were suitable for occupancy or storage.

Commercial wind turbines used for the generation of electricity were not "machines" so as to be taxable as "personal property"; even if the turbines had characteristics of machines, they did not constitute "machinery used in mills and factories," which the statute on filing tax declarations for personal property included in its definition of personal property.

Statute on equalization of assessments did not preclude classifying commercial wind turbines as real property for property-tax purposes, despite argument that the only other commercial wind turbine in the state was assessed as personal property; other turbine was in a different municipality, and statute required only that assessors equalize the assessments of property in the town.

Different property-tax classification of hydroelectricity generating turbine did not preclude classifying commercial wind turbines in different municipality as real property for property-tax purposes; unlike the wind turbines, the hydroelectric generating turbine was moveable and removed when not in use.

Commercial wind turbines were not "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property, and thus such an alleged status could not warrant classifying turbines as personal property as opposed to real property; unlike other articles that had been found to be fixtures, the turbines, as constructed, were not once chattels that only became real property through physical annexation to the land.

Equipment associated with commercial wind turbines constituted "fixtures" of an electric company pursuant to definition of personal property in statute on filing of declarations for personal property, and thus equipment was "personal property" for property-tax purposes.

Statute on remedy for wrongful assessment of property was not a basis on which taxpayer, which was a limited-liability company (LLC) that owned and operated a wind turbine facility, could be entitled to relief in property-tax appeal of assessment of wind turbines and association equipment; although the equipment associated with the turbines was improperly was classified as real property, relief was not available under that statute in the absence of evidence of misfeasance or malfeasance.

TAX - COLORADO

Chronos Builders, LLC v. Department of Labor and Employment, Division of Family and Medical Leave Insurance

Supreme Court of Colorado - June 21, 2022 - 512 P.3d 101 - 2022 CO 29

Employer brought action challenging the constitutionality of collection of premiums from employers to fund the Paid Family and Medical Leave Insurance Act.

The District Court dismissed the action. Employer appealed. On parties' joint petition, certiorari review was granted.

The Supreme Court, as matter of apparent first impression, held that premiums collected to fund paid leave under Paid Family and Medical Leave Insurance Act did not amount to "added tax or surcharge" pertaining to income tax law.

Premiums collected from employers and employees to fund paid leave from employment under the Paid Family and Medical Leave Insurance Act did not amount to "added tax or surcharge" pertaining to income tax law that would be prohibited under State Constitution's Taxpayer's Bill of Rights (TABOR); unlike taxes, which were designed to raise revenues to defray general governmental expenses, the premiums were fees used “to defray the cost” of providing paid family and medical leave to employees.

TAX - MISSOURI

Johnson v. Springfield Solar 1, LLC

Supreme Court of Missouri, en banc - August 9, 2022 - S.W.3d - 2022 WL 3219292

County assessor filed petition seeking review of Missouri State Tax Commission’s decision that solar energy system was exempt from property taxes as a solar energy system not held for resale, or alternatively, for declaratory judgment that statute exempting solar energy systems not held for resale from property taxes violated constitutional provision limiting tax exemption to specifically-enumerated property.

County was joined as a plaintiff. Taxpayer filed counterclaim seeking declaratory judgment that prior tax assessments were void. The Circuit Court dismissed claim seeking judicial review of Commissioner’s decision, and entered declaratory judgment that exemption was constitutional and prior assessments were void. County and county assessor appealed.

The Supreme Court held that legislature did not have authority to enact statute exempting solar energy systems not held for resale from property taxes.

Constitutional provisions granting legislature authority to create subclasses of tangible personal property and fix tax rates for such subclasses did not implicitly permit legislature to enact statute exempting solar energy systems not held for resale from property taxes, since separate constitutional provision limited tax exemptions to specifically-enumerated property and explicitly stated that all non-enumerated exemptions were void, solar energy systems did not fall within any category of enumerated property, and permitting legislature to use its authority to fix tax rates to set 0% tax rate for any type of real or personal property would effectively create backdoor for tax exemptions not enumerated in constitution.

Mintz: Inflation Reduction Act Includes Expansive Tax Incentives for Clean Energy Investors and Developers

On July 27, 2022, Senator Joe Manchin and Senate Majority Leader Chuck Schumer reached an agreement on a budget reconciliation bill and released the “Inflation Reduction Act of 2022” (the “Act”). A significant part of the Act focuses on energy tax changes aimed at fighting climate change and promoting domestic energy security. To those ends, the Act extends and expands existing tax credits and adds several new energy tax credits for clean energy projects. The benefits of this historic legislation for investors and developers in the clean energy infrastructure space cannot be overstated.

Here are key highlights.[1]

- Extension of the production tax credit under I.R.C. Section 45 (the “PTC”)[2] for eligible wind, solar, geothermal, biomass, hydropower, municipal waste, and marine and hydrokinetic projects that start construction before January 1, 2025. The extension includes a renewal of the PTC for solar, which had previously expired.

- Extension of the Section 48 energy investment tax credit (the "ITC") for solar, combined heat and power, qualified fuel cell, microturbine, waste energy, small wind, biogas, storage technology, and microgrid controllers projects that start construction before January 1, 2025.
- For geothermal, the Act extends the ITC for projects that start construction before January 1, 2035.
- Significantly, the Act makes stand-alone storage eligible for the ITC. The inclusion of biogas and microgrid controllers as ITC-eligible property is also new. Further, for installations of energy property with a maximum net output not greater than 5 megawatts, the Act permits the ITC-eligible basis to include certain expenditures on upgrades to a utility's interconnection system.
- Subject to a new two-tier rate structure (discussed below), the Act restores the full ITC rate of 30 percent and full PTC rate of 1.5 cents per kWh (subject to inflationary adjustments).
- The Act, in effect, extends the ITC and PTC at full rates under new tax credits available for electricity produced by zero-emissions projects placed in service in 2025 or later, which start construction before 2033.
- Extension of the Section 45Q carbon capture credit for projects that start construction before January 1, 2033. In addition, the Act reduces the minimum carbon capture requirement and includes an enhanced credit for certain direct air capture facilities.
- The Act adds a new production tax credit for clean hydrogen produced after December 31, 2022 at a qualifying facility that starts construction before January 1, 2033. Taxpayers also have the option to elect to claim the ITC in lieu of the new production tax credit.
- The Act adds a new tax credit (the Advanced Manufacturing Production Credit) to incentivize domestic production and sale of components used in solar, wind, and storage projects (e.g., solar modules, solar-grade polysilicon, inverters, battery cells, blades, and towers) and critical minerals.
- The Act expands the Section 48C credit to include facilities that equip or expand certain manufacturing facilities in the clean energy sector.
- The Act also includes new tax credits for zero-emissions nuclear power production and transportation fuels with lower emissions rates.
- Under a new two-tier rate structure, the Act only permits projects that satisfy prevailing wage and apprenticeship requirements to claim the full credit. Otherwise, the credit rate is 20 percent of the full rate. For example, if an eligible solar project does not satisfy the requirements, the ITC rate would be 6 percent rather than 30 percent. The full rate applies until 60 days after the Secretary publishes regulations. This rate structure applies to the ITC, PTC, and most other energy tax credits.
- The Act makes available a 10 percent bonus credit when domestic content requirements are satisfied. In some cases, the Act provides a separate 10 percent bonus credit for qualifying facilities located in enhanced energy or low-income communities.
- Other positive changes for promoting clean energy include (i) transferability of most energy tax credits; (ii) a direct pay option generally available only to governmental agencies and certain other tax-exempt entities; and (iii) a 3-year carryback period for energy credits.

The Senate is expected to vote on the Act during the first week in August, just before its scheduled August recess. If passed by the Senate, the legislation would then go to the House for approval. The House is currently in recess.

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[1] These highlights do not address any tax incentives for individuals, residential properties, agriculture, or electric vehicles and charging stations.

[2] Unless otherwise stated, all capitalized Section references are to the Internal Revenue Code of 1986, as amended.

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TAX - NEW YORK

DP Fuller Family LP v. City of Canandaigua

Supreme Court, Appellate Division, Fourth Department, New York - July 8, 2022 - N.Y.S.3d - 2022 WL 2574326 - 2022 N.Y. Slip Op. 04497

Taxpayer, the owner of commercial property that was located within nonparty city school district, petitioned for review of taxing authorities' real property tax assessments for three different years.

The Supreme Court granted defendants' motion to dismiss and dismissed the petitions. Taxpayer appealed.

The Supreme Court, Appellate Division, held that:

- Taxing authorities had standing to seek dismissal of petitions for taxpayer's failure to comply with notice requirements;
- Motions to dismiss for taxpayer's failure to comply with notice requirements complied with amended scheduling order, and timing of motions was well within range of when such motions were routinely brought and entertained;
- Fact that taxpayer failed to adhere to notice requirements, proceeded with obtaining an appraisal anyway, and later faced appropriate motions to dismiss for failure to comply with notice requirements did not support denial of motions; and
- Taxpayer failed to establish good cause to excuse its failure to comply with notice requirements.

Taxpayer failed to establish good cause to excuse its failure to comply with requirement to provide notice of tax certiorari proceeding to school district and treasurer, even if taxpayer made a good faith effort to comply but simply made a mistake, and regardless of absence of prejudice to school district.

Mistake or omission of taxpayer's attorney, including a factual mistake during an attempt to provide notice of tax certiorari proceeding to school district or treasurer, does not constitute good cause shown so as to excuse a taxpayer's failure to comply with notice requirement.

[NJ Tax Court Clarifies Exemption from Non-Residential Development Fee: Day Pitney]

New Jersey's Non-Residential Development Fee (NRDF) is a fee paid by non-residential developers toward a municipality's affordable housing obligation. The fee can be substantial, but certain types of projects are exempt from payment of the NRDF under N.J.S.A. 40:55D-8.4(b). In a decision reported on July 29, the New Jersey Tax Court clarified the exemption provided for payment of the NRDF for projects located within a specifically delineated urban transit hub pursuant to N.J.S.A. 40:55D-8.4(b)(4).

In *Jaguar Land Rover North America v. Director, Division of Taxation et al.*, the Tax Court affirmed the director's denial of an exemption from the NRDF, holding that to be exempt from the NRDF, a project must be within a specifically delineated urban transit hub and must be located within a one-half-mile radius surrounding the midpoint of a New Jersey Transit Corp., Port Authority Transit Corp. or Port Authority Trans-Hudson Corp. rail station platform area. The taxpayer claimed that because the subject property was within one-half mile of a New Jersey Transit rail station platform (in Suffern, New York), it was exempt from payment of the NRDF on its project. The director ruled that it was not sufficient that the project be within a one-half-mile radius of a train station of one of the transit entities, but the project also had to be in an area that the New Jersey Economic Development Authority (NJEDA) named as an urban transit hub under the authority granted by N.J.S.A. 34:1B-209(e)(1). The taxpayer appealed, claiming the project could meet either one of these requirements to qualify for the exemption. The taxpayer conceded for purposes of the case that the municipality where the project was located was not a specifically delineated urban transit hub designated by the NJEDA. The Tax Court found that the plain language of N.J.S.A. 34:1B-208 (defining an urban transit hub) was unambiguous and that to meet the definition of an urban transit hub, a project needed to be both within a one-half-mile radius of a transit corporation rail platform and delineated by the NJEDA. The Tax Court therefore held that although the project was within a one-half-mile radius of the New Jersey Transit Corp. Suffern Station, it had not been specifically delineated by the NJEDA as an urban transit hub, and therefore it was not exempt from the NRDF. The Tax Court noted that the NJEDA provided a list of 10 large, urban New Jersey municipalities eligible for urban transit hub classification on its website, although the Tax Court indicated that the statutory definition under N.J.S.A. 34:1B-208 might include other municipalities.

The upshot of the Tax Court's decision is that a developer should not assume, simply because a project is being developed within one-half mile of a rail transit platform, that it will be exempt from payment of the NRDF. Further investigation at the municipal and the NJEDA levels is necessary to determine if a particular municipality in which a project is located has been designated as an urban transit hub pursuant to N.J.S.A. 34:1B-209(e)(1).

Day Pitney LLP – Christopher John Stracco and Katharine A. Coffey

August 3 2022

TAX - NEW JERSEY

[Galloway Education, LLC v. Township of Galloway]

Tax Court of New Jersey - June 24, 2022 - 2022 WL 2286327

The Atlantic Community Charter School, Inc. (ACCS), a New Jersey not-for-profit corporation, was issued a charter by the New Jersey Department of Education to operate a charter school pursuant to the Charter School Program Act of 1995.

ACCS sought to expand the school facilities. Comprehensive Recovery Services, Inc., a nonprofit corporation of the State of Colorado, established Galloway Education, LLC, a Delaware limited liability company. The sole member, which has all the interest in Galloway Education, is Comprehensive Recovery Services.

To fund the expansion project, bonds which totaled $11,165,000 were sold by Galloway Education to investors of Hamlin Capital Management, LLC, a for-profit investment firm located in New York. Hamlin is designated the Bondholder Representative so long as the majority of the outstanding bonds are owned by persons for whom Hamlin serves as an investment advisor. The proceeds of the bonds were utilized by Galloway Education to purchase the land and construct an addition to the school.

Galloway Education sought exemption from property taxes as a not-for-profit entity. Galloway sought the exemption under a 1931 amendment exempting properties utilized for the moral and mental improvement of men, women and children that are owned by a holding company.

The Tax Court noted that, although there exists a lease agreement between Galloway Education and ACCS, a closer review of the lease agreement shows that the Bondholder Representative exercises significant control as would a landlord. Even outside default, the Bondholder Representative has significant control over the property and also has a say over the operations of the school.

Essentially, the school is merely a tenant of the property under a lease and pledge agreement in which the Bondholder Representative has extensive control. The powers conferred to the Bondholder Representative ensure the flow of revenues from the school to the bondholders and that this situation is not much different than a for-profit entity directly leasing its property to the school.

"It is one thing for a lender or a Bondholder Representative to have a mortgage on a property owned by a non-profit, it is quite another thing for a profit-making entity to have the ability to seize and obtain full and unfettered control of the not-for-profit entity for its own purposes."

"Here, the structure of deal is plainly for the benefit of the bondholders represented by the Bondholder Representative. Control of the nominally not-for-profit Galloway Education can be transferred at the demand of the Bondholder Representative to a for-profit to protect the profits of the bondholders. The not-for-profit in this case exists to benefit a for-profit endeavor."

"There is nothing sinister or wrong with the Bondholder Representative ensuring that a profit is made. The court realizes that the avenues for financing would be limited without the potential for a profit. However, a tax exemption here would allow 'indirect taxpayer subsidization' of the bondholders. This would confer a competitive advantage upon the bondholders at the expense of the other taxpayers in the municipality."

Legacy Retailer Rebates Costing States Billions Under Scrutiny.

- **Illinois, Missouri consider reform to vendor discounts**
- **Retailers fight back pointing to sales tax complexity**

When states started levying sales taxes almost a century ago, some gave shopkeepers small rebates for manually collecting and submitting the money. Now those rebates cost states more than $1 billion a year, and critics say they make no sense in the age of automated tax systems.

Budget hawks in a handful of states are exploring options to either jettison or trim these "vendor discount" arrangements, which were intended to compensate sellers for serving as agents of state revenue departments. Illinois Gov. J.B. Pritzker (D) often refers to the programs as "corporate tax loopholes." And Missouri's state auditor, Nicole Galloway, worries that her state offers the most generous vendor discount in the country.

"Missouri's discount gives the biggest benefits to the wealthiest retailers just for turning over sales tax paid by consumers," Galloway said in a recent statement. "Ordinary citizens don't get a discount for paying taxes on time."

Continue reading.

Bloomberg Tax

by Michael J. Bologna

July 25, 2022,

KBRA Releases Research - EVs' Popularity Could Diminish State Gasoline Taxes for Transportation Funds

NEW YORK–(BUSINESS WIRE) — KBRA releases research that examines the dramatic growth in electric vehicles (EV) in recent years, with sales in 2022 up nearly 40% from the prior year. EV demand represents about 2.85% of total cars sold in the U.S. and is expected to increase to 6% by 2035.

Much of the recent growth has been supported by a favorable tax structure, including tax incentives to purchase EVs as well as lower taxes associated with their ownership compared to gasoline-powered cars. This favorable tax environment reflects the public policy goal to increase the use of EVs because of their lower carbon footprint. However, public policy will have to recognize the effects of lower tax revenues from gasoline taxes and consider implementing modifications to the tax laws. In this report, KBRA reviews the tax incentives for the purchase of electric vehicles and the longer-term revenue implications of the shift toward EVs, including the potential effects on outstanding municipal bonds.

Key Takeaways

- The demand growth for electric vehicles will reduce greenhouse gas emissions, but also gasoline taxes and related revenues. Lost tax revenues are already significant.
- Public policy will likely have to unwind the fiscal trade-off of encouraging EVs through incentives if the related reduction in revenues becomes more significant.
- The loss of gasoline-based revenues could pressure municipal bond issues that rely on them. That said, most major state borrowing programs that heavily rely on this revenue stream have room to adjust their tax structures if needed.

Click here to view the report.

July 18, 2022

[Legacy Retailer Rebates Costing States Billions Under Scrutiny.]

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Continue reading.

Bloomberg Tax

by Michael J. Bologna

July 25, 2022

No Room at the Inn? Prospects for the Lodging Tax.

Earlier this year a version of the headline, “Hotel vacancies are up, and so are hotel room rates” appeared in newspapers around the world. This seems to defy the basic laws of economics. If demand for hotel rooms is down, we would expect room rates to decrease. This trend, although quirky, could have a major impact on state and local finance. If local governments are to find a long-term, dependable solution to their structural revenue and expenditure imbalances, they need to become more intentional about making financially savvy land use decisions.

Download.

by Justin Marlowe

June 2022

Government Finance Officers of America

TAX - NEW YORK

DCH Auto v. Town of Mamaroneck

Court of Appeals of New York - June 16, 2022 - N.E.3d - 2022 WL 2162629 - 2022 N.Y. Slip Op. 03929

Net lessee, which was contractually obligated to pay real estate taxes on the leased parcel of real property on which it operated its car dealership, challenged tax assessments by town and village by filing grievance complaints with local board of assessment review and, after the board reviewed and denied the challenges, filed petitions for judicial review.

Town and village jointly moved to dismiss. The Supreme Court, Westchester County, dismissed petitions, and net lessee appealed. The Supreme Court, Appellate Division, affirmed. Leave to appeal was granted.

The Court of Appeal held that a net lessee who is contractually obligated to pay real estate taxes on the subject property is a "person whose property is assessed" within meaning of the Real Property Tax Law (RPTL) provision setting forth the requirements for initiating administrative review of a tax assessment, and so an initial administrative complaint filed with the assessor or board of assessment review by a net lessee satisfies the provision, such that the net lessee may properly commence a proceeding for judicial review upon rejection of its grievance, abrogating *Circulo Housing Development Fund Corp. v. Assessor of City of Long Beach*, 96 A.D.3d 1053, 947 N.Y.S.2d 559.

TAX - COLORADO

Chronos Builders, LLC v. Department of Labor and Employment, Division of Family and Medical Leave Insurance

Supreme Court of Colorado - June 21, 2022 - P.3d - 2022 WL 2207478 - 2022 CO 29

Employer brought action challenging the constitutionality of collection of premiums from employers to fund the Paid Family and Medical Leave Insurance Act.

The District Court dismissed the action. Employer appealed. On parties' joint petition, certiorari review was granted.

The Supreme Court held that as matter of apparent first impression, premiums collected to fund paid leave under Paid Family and Medical Leave Insurance Act did not amount to "added tax or surcharge" pertaining to income tax law.

Premiums collected from employers and employees to fund paid leave from employment under the Paid Family and Medical Leave Insurance Act did not amount to "added tax or surcharge" pertaining to income tax law that would be prohibited under State Constitution's Taxpayer's Bill of Rights (TABOR); unlike taxes, which were designed to raise revenues to defray general governmental expenses, the premiums were fees used "to defray the cost" of providing paid family and medical leave to employees.

TAX - MAINE

State Tax Assessor v. TracFone Wireless, Inc.

Supreme Judicial Court of Maine - June 23, 2022 - A.3d - 2022 WL 2252165 - 2022 ME 36

Tax Assessor and taxpayer, a provider of telecommunications services, both petitioned for review of decision of Board of Tax Appeals as to assessment of prepaid wireless fee and service-provider tax.

The Business and Consumer Court denied taxpayer's motion to compel release of information in discovery and granted summary judgment to Assessor. Taxpayer appealed.

The Supreme Judicial Court held that:

- Particular service offered by provider was not "paid for in advance" and thus was not a prepaid wireless telecommunications service that would be subject to prepaid wireless fee;
- Process by which provider operated such service was a "sale" that would trigger telecommunications service-provider tax; and
- Statute requiring Tax Assessor to publish notice of significant change in bureau policy or practice within 60 days of such change provides neither any defense for those who have been affected by the Assessor's actions, or lack thereof, nor any consequence for the Assessor should it fail to comply.

Service operated by telecommunications provider pursuant to Federal Communications Commission (FCC) program, through which low-income consumers received set number of telephone minutes each month for an amount which did not exceed subsidy received by provider from government, was not "paid for in advance" and thus was not a prepaid wireless telecommunications service that would be subject to prepaid wireless fee, even though service did not have monthly billing relationship with consumers, where there was no consistent practice of payment by government to provider in advance of provider's rendering the service.

Process by which telecommunications provider operated service under which low-income consumers received set number of telephone minutes per month was a "sale" that would trigger telecommunications service-provider tax, even if consumers themselves did not pay provider; process amounted to a consumer signing up for service and receiving minutes from provider, following which provider received payment from government.

Statute requiring Tax Assessor to publish notice of significant change in bureau policy or practice within 60 days of such change provides neither any defense for those who have been affected by the Assessor's actions, or lack thereof, nor any consequence for the Assessor should it fail to comply.

TAX - TEXAS

Jones v. Turner

Supreme Court of Texas - June 3, 2022 - S.W.3d - 2022 WL 1815031 - 65 Tex. Sup. Ct. J. 1324

City residents filed suit against city officials seeking a declaration that they must fund city drainage fund according to formula stated in city charter.

The 281st District Court denied the plea to the jurisdiction. City officials filed interlocutory appeal. The Houston Court of Appeals reversed and rendered judgment dismissing the case for want of jurisdiction due to residents' lack of standing. Residents' petition for review was granted.

The Supreme Court held that:

- Residents' allegations were sufficient to confer taxpayer standing, and

- Fact questions precluded grant of officials' plea to the jurisdiction.

City residents' allegations that officials were misallocating a considerable amount of tax revenue by spending it on other city services and not spending it exclusively for drainage and street maintenance in violation of city charter's express mandate were sufficient to confer taxpayer standing to assert their ultra vires claim against officials, even though residents did not specifically allege illegal expenditure of public funds; although city services to which funds were allocated were themselves lawful, the law required certain amount of money be directed to specific services, so that the allegedly unlawful act was officials' actions in budgeting and spending money that should have been allocated to those specific services.

Fact questions as to whether city officials calculated the allocation of ad valorem tax proceeds for drainage and street renewal fund in manner that conformed to city charter requirements and as to how they actually allocated the tax proceeds in fiscal year at issue precluded grant of officials' plea to the jurisdiction, on governmental immunity grounds, for city residents' claim that officials acted ultra vires in directing tax proceeds to other city services instead of allocating them to the drainage and street renewal fund.

TAX - TEXAS

Perez v. Turner

Supreme Court of Texas - June 10, 2022 - S.W.3d - 2022 WL 2080868 - 65 Tex. Sup. Ct. J. 1396

Taxpayer filed action against mayor, director of public works, and city, contesting city drainage fee ordinance.

The District Court entered order granting defendants' plea to the jurisdiction, and dismissing taxpayer's claims. Taxpayer appealed, and, on rehearing, the Houston Court of Appeals affirmed. Taxpayer petitioned for review, which was granted.

The Supreme Court held that:

- Taxpayer's claims for reimbursement for allegedly illegal drainage fees paid to city were ripe;
- Taxpayer had standing, as a taxpayer, to seek an injunction against city's expenditures of allegedly illegal drainage fees;
- Taxpayer had standing to bring her reimbursement claim against city to recover allegedly illegal drainage fees;
- City's drainage fee ordinance did not impermissibly conflict with the Municipal Drainage Utility Systems Act (MDUSA); and
- Taxpayer was entitled to the opportunity to replead on remand.

TAX - MISSOURI

State ex rel. City of Maryland Heights v. James

Missouri Court of Appeals, Eastern District - April 12, 2022 - 643 S.W.3d 896

City filed petition for writ of prohibition to void decision of city's tax increment financing (TIF) commission denying city's proposed TIF-financed redevelopment plan.

Commission filed motion for summary judgment, which the Circuit Court granted. City appealed.

The Court of Appeals held that:

- As matter of first impression, amended population savings statute applied to provision governing appointment of commission members for county's with population more than 1 million;
- Savings statute did not conflict with commission appointment provision;
- Savings statute did not impliedly repeal provision governing appointment of commission members for county's with population more than 90,000 but less than 1 million; and
- Application of amended population savings statute was not retroactive.

Amended population savings statute, which prevented political subdivisions from falling outside the operation of a previously applicable population-based statute, applied to provision of the Real Property Tax Increment Allocation Redevelopment Act establishing a procedure for appointing members of a tax increment financing (TIF) commission for counties with a population more than 1 million, in city's action for writ of prohibition to void decision of city's TIF commission denying city's proposed TIF-financed redevelopment plan.

Amended provision of population savings statute, which prevented political subdivisions from falling outside the operation of a previously applicable population-based statute, did not conflict with provision of the Real Property Tax Increment Allocation Redevelopment Act establishing a procedure for appointing members of a tax increment financing (TIF) commission for counties with a population more than 1 million, in city's action for writ of prohibition to void decision of city's TIF commission denying city's proposed TIF-financed redevelopment plan; savings provision clarified how to determine whether and when a county should be considered a county with a population exceeding 1 million under the Act.

Provision of the Real Property Tax Increment Allocation Redevelopment Act establishing a procedure for appointing members of a tax increment financing (TIF) commission for counties with a population more than 900,000, but less than 1 million was not impliedly repealed by the application of the amendment to population savings statute, which prevented political subdivisions from falling outside the operation of a previously applicable population-based statute; even though a county's population decline would be saved from falling out of Act provision governing counties with populations more than 1 million, that did not mean that no other political subdivision could ever come within the remit of provision governing subdivisions with less than 1 million inhabitants.

Application of amended provision of population savings statute, which prevented political subdivisions from falling outside the operation of a previously applicable population-based statute, was not retroactive, in city's action for writ of prohibition to void decision of city's tax increment financing (TIF) commission denying city's proposed TIF-financed redevelopment plan, alleging commission members were improperly appointed under provision of the Real Property Tax Increment Allocation Redevelopment Act establishing an appointment procedure for county's with a population more than 1 million; amendment was in effect when commission was constituted, and amendment did not impair vested rights or change the effect of past transactions.
