TAX - NEW JERSEY

Winberry Realty Partnership v. Borough of Rutherford

Supreme Court of New Jersey - June 28, 2021 - A.3d - 2021 WL 2639787

Taxpayers brought action under § 1983 and state Civil Rights Act against borough and borough's tax collector alleging violation of right of redemption arising from tax collector's refusal of taxpayers' attempt to redeem tax sale certificate before entry of final foreclosure judgment on their home.

The Superior Court granted summary judgment for borough and tax collector. Taxpayers appealed. The Superior Court, Appellate Division, affirmed in part and reversed in part. Parties filed petition and cross-petition for certification, which were granted.

The Supreme Court held that:

- Tax collector was not entitled to qualified immunity, and
- Borough had potential municipal liability for tax collector's conduct.

Borough's tax collector did not act in an objectively reasonable manner and thus was not entitled to qualified immunity from taxpayers' civil rights suit alleging violation of right of redemption arising from tax collector's refusal of taxpayers' attempt to redeem tax sale certificate before entry of final foreclosure judgment on their home, where tax collector withheld, or made no effort to secure, the information necessary for taxpayers to vindicate their substantive right to reclaim home under Tax Sale Law, apparently due to taxpayers' noncompliance with tax collector's policy requiring a written redemption request, and tax collector flatly refused to accept redemption payment at a point when right to redeem tax sale certificate had not been cut off.

Borough's tax collector had final policymaking authority on matters relating to redemption of tax sale certificates such that borough could be liable under § 1983 and state Civil Rights Act for her conduct that allegedly violated civil rights of taxpayers in refusing their attempt to redeem tax sale certificate before entry of final foreclosure judgment on their home; Tax Sale Law identified a tax collector as sole person with authority to accept payment to redeem a tax sale certificate and, by her own account, tax collector implemented unwritten policies and procedures governing redemption during her tenure as tax collector including requirement of written redemption calculation requests before that practice was directly authorized by statute.

Opportunity Zones and the Return to Cities, with Riaz Taplin

Are there misperceptions in the market? Do investors overreact to sentiment? And is there an opportunity for level-headed contrarian view Opportunity Zone investors?

Riaz Taplin is principal and founder of Riaz Capital, an Oakland, California based real estate

management firm focused on developing workforce housing in California's urban Opportunity Zones.

Click here to my conversation with Riaz.

Episode Highlights

- The investment thesis behind creating workforce housing in urban markets.
- Real estate market fundamentals and misperceptions, particularly in the California Bay Area.
- Early indicators of a return to urban areas: how 250,000 people returning to the Bay Area over a very short period may coincide with a collapse in supply, leading to a price spike.
- The impact that tax reform may have on the Opportunity Zones marketplace.
- How the Opportunity Zone incentive may be ideally suited to capitalize on ongoing demographic macro trends.
- Highlights of Opportunity Zone projects that Riaz Capital is developing and why they appeal to investors.

OPPORTUNITYDB

JIMMY ATKINSON

JULY 14, 2021

Factors Influencing Capital Inflows For Tax-Exempt Municipal Bond Funds.

Summary

- Tax-exempt municipal bond funds (including both conventional funds and ETFs) have recorded 19 straight weeks of estimated net inflows.
- Money market funds attracted $23.6 billion over that Lipper fund-flows week, and the VIX ended at 28.43 (currently around 17.01)-safe to say uncertainty was more abundant in the market at the time.
- The first week in March aside, tax-exempt municipal bond funds have recorded weekly inflows of more than $1 billion in 70.4% of the weeks this year.

Continue reading.

Seeking Alpha

Jul. 16, 2021

Tax-Increase Talk Prompts Wealthy to Splurge on Muni Bonds.

Municipal bond investments hit new highs in 2021 as Democrats consider proposals to raise taxes

Wealthy Americans eyeing potential tax increases are helping drive record amounts of money into municipal bond funds.

In the first six months of 2021, U.S. municipal bond funds attracted an estimated $56.9 billion in net new money—the most for any first half of the year going back to 1992, according to data from Refinitiv Lipper.

Advisers to high-income investors say the potential for higher taxes has been a focus of conversation in recent months, drawing attention to munis.

Continue reading.

The Wall Street Journal

By Karen Langley

July 19, 2021

TAX - OHIO

O'Keeffe v. McClain

Supreme Court of Ohio - June 30, 2021 - N.E.3d - 2021 WL 2671329 - 2021-Ohio-2186

Property owner sought judicial review of a decision of the Board of Tax Appeals affirming tax commissioner's denial of owner's complaint challenging an exemption from property taxation for parcel on which state university operated a full-service airport.

The Supreme Court held that:

- University had burden of proving its entitlement to exemption;
- Exemption could be predicated on operational relationship between use of airport and university's activities;
- University established its right to exemption; and
- Hangars and offices leased for private use did not have to be split-listed as taxable.

State university had the burden of proving its entitlement to an exemption from property taxation for parcel on which the university operated a full-service airport, in action challenging the exemption brought by another property owner.

State university could predicate an exemption from property taxation for parcel on which the university operated a full-service airport on the operational relationship between the use of the airport and the university's activities, subject to a primary-use test.

State university established its right to an exemption from property taxation for parcel on which the university operated a full-service airport; student flight education, course in airport management, and course in airport planning and design were examples of how university's operating a public airport directly served educational purposes, of the approximately 100 employees who maintained airport operations, 35 were student employees, and there were two research facilities on the property, namely, a gas-turbine lab and an aerospace-research center.

Hangars and offices leased for private use on parcel on which state university operated a full-service airport did not have to be split-listed as taxable; statute governing exemption from taxation for property of a state university did not say that property had to be used exclusively in an operational relationship with university activities, but instead the statute used the phrase "used for the support

of" the university, which encompassed the receipt of income from ancillary activities on the property.

TAX - GEORGIA

Jones v. City of Atlanta

Court of Appeals of Georgia - June 25, 2021 - S.E.2d - 2021 WL 2621445

Water and sewer customer, on behalf of a class similarly situated, sought review of decision of appeals board for the city department of watershed management finding that it lacked jurisdiction to rule on legality of city ordinances authorizing department to impose a franchise fee and a payment in lieu of taxes (PILOT), which customer alleged were illegal taxes for which he and similarly situated customers were entitled to a refund.

The Superior Court granted city's motion to dismiss, finding that it lacked subject matter jurisdiction over customer's claims due to customer's failure to meet 30-day deadline for applying for a writ of certiorari, and, alternatively, granted city's motion for judgment on the pleadings, concluding that the fees were not illegal taxes. Customer appealed.

On transfer from the Supreme Court, the Court of Appeals held that:

- Limitation period in statute governing refunds of erroneously or illegally assessed taxes, rather than 30-day limitation period for seeking a writ of certiorari, applied to customer's suit seeking review of appeal board's decision, and
- Customer exhausted his administrative remedies.

Limitation periods in statute governing refunds of erroneously or illegally assessed taxes, providing that "no suit may be commenced until the earlier of the governing authority's denial of the request for refund or the expiration of 90 days from the date of filing the claim" and "under no circumstances may a suit for refund be commenced more than five years from the date of the payment of taxes or fees at issue," rather than 30-day limitation period for applying for writ of certiorari, applied to suit seeking review of agency's decision on water and sewer customer's claim for refund of franchise fee and payment in lieu of taxes (PILOT) paid to city department of watershed management; tax refund statute did not reference certiorari procedure or its 30-day limitation period.

Water and sewer customer, who claimed that franchise fee and a payment in lieu of taxes (PILOT) paid to city department of watershed management were illegal taxes for which he was entitled to a refund, exhausted his administrative remedies, where customer received a final decision from appeals board for department, pretermitting whether department was proper "governing authority" with whom to challenge tax, and customer's remaining course of action was to seek judicial review of appeal board's decision.

A "Good" Tax-Advantaged Bond Bill Tells Issuers Whether They Can Refund: Squire Patton Boggs

This is the first in a series of posts about neutral principles that make for "good" tax-advantaged bond legislation.

A good muni bond tax bill deals with refundings. For new programs, it provides the terms and conditions under which the new bonds may be refunded.

Over the long life of a project and the bonds that finance it, prevailing market interest rates are almost certain to be more favorable at some point than they were when the bonds were issued.[1] Refinancing transactions thus have always been a part of life in our corner of the world. And so the clock will begin to tick as soon as the bonds under a new bond program are issued, and once the issuer can call the bonds, our phones will begin to ring with the question: Can we refund?

A good tax-advantaged bond program will tell issuers in clear language whether and how they can refund bonds under the program.

Continue Reading

By Johnny Hutchinson on July 1, 2021

The Public Finance Tax Blog

Squire Patton Boggs

CDFA Publishes New Private Activity Bond Volume Cap Data and Resource Center.

The CDFA Volume Cap Resource Center allows users to search, sort, and compare comprehensive private activity bond volume cap data from all 50 states and the District of Columbia dating back to 2005. As a leader in the development finance industry, CDFA serves as the principal source for private activity bond volume cap data, reporting, and trends.

CDFA collects and analyzes the best available national volume cap data as reported by managing state agencies by surveying and interviewing representatives from each state's volume cap allocating and issuing authorities. The data represents the best available figures as reported by each state to CDFA.

The CDFA Annual Volume Cap Report contains information critical to understanding and evaluating the efficiencies, effectiveness, costs, and benefits of private activity bonds.

Click here for Volume Cap Data.

Opportunity Zone Marketplace Roundtable, an ADISA Conference Panel.

Are Opportunity Zones being underutilized? And what's in store for the Opportunity Zone marketplace as we come out of the…

CONTINUE READING »

opportunitydb.com

June 23, 2021

The Upcoming Inflection Point for Opportunity Zones, with Nick Parrish.

With impending tax policy changes and upcoming investing deadlines, is the Opportunity Zones marketplace nearing a critical inflection point? Nick...

CONTINUE READING »

opportunitydb.com

June 30, 2021

TAX - COLORADO

In Re Interrogatory on House Bill 21-1164 Submitted by Colorado General Assembly

Supreme Court of Colorado - May 24, 2021 - P.3d - 2021 WL 2069700 - 2021 CO 34

General Assembly submitted interrogatory asking whether it could require school districts to gradually eliminate temporary property tax credits without obtaining voter approval.

The Supreme Court held that:

- Supreme Court would exercise original jurisdiction;
- Legislation did not need statewide voter approval; and
- As a matter of first impression, General Assembly was not required to obtain further voter approval before passing the legislation.

Supreme Court would exercise original jurisdiction to consider the General Assembly's petition asking whether it could require school districts to gradually eliminate temporary property tax credits without obtaining voter approval, as interrogatory at issue was connected with pending legislation and directly related to the constitutionality of that legislation, and the legislation presented important questions upon a solemn occasion; absent guidance, state and local school districts will lack certainty as to the appropriate level of school districts' total program mill levies, school districts would risk the costs and delays of legal action and potentially substantial refund obligations under Taxpayer's Bill of Rights (TABOR) if the increases in total program mill levies were ultimately found to be unconstitutional, and individual lawsuits would create substantial unnecessary costs and confusion.

General Assembly's incremental elimination of temporary property tax credits, which were granted to mitigate the effect of the correction of Department of Education's improper advisement that school districts calculate the mill levied in accordance with the Taxpayer's Bill of Rights (TABOR) notwithstanding voter waiver of TABOR requirements, did not need statewide voter approval; districts were responsible for tax rates and increases and were the only entities with the authority to change tax policy within the meaning of TABOR.

General Assembly, consistent with Taxpayer's Bill of Rights (TABOR) requirements, was not required

to obtain further voter approval before passing legislation which gradually eliminated temporary property tax credits adopted in prior legislation to mitigate impact of reversal of Colorado Department of Education guidance which advised local school districts to calculate mill levies in accordance with TABOR's growth-plus-inflation limits despite voter waivers of those limits; district voters had validly waived TABOR's revenue limits and necessarily approved the mill levies in effect at the time they voted, and legislation simply effectuated what the voters had already approved and did not permit mill levies above that level.

TAX - TEXAS

Odyssey 2020 Academy, Inc. v. Galveston Central Appraisal District

Supreme Court of Texas - June 11, 2021 - S.W.3d - 2021 WL 2386137 - 64 Tex. Sup. Ct. J. 1304

Taxpayer, a public open-enrollment charter school, sought review of county appraisal district's denial of ad valorem exemption from county taxes for private property that taxpayer leased with contractual agreement for taxpayer to pay property owners' ad valorem taxes.

The District Court granted summary judgment for appraisal district. Taxpayer appealed. The Court of Appeals affirmed. Taxpayer petitioned for review, which was granted.

The Supreme Court held that:

- Taxpayer was not entitled to ad valorem exemption for public property, and
- Taxpayer was not entitled to exemption for school property.

Taxpayer, a public open-enrollment charter school, was not entitled to ad valorem tax exemption from county taxes under public property clause of State Constitution or under state constitutional section providing exemption for property of counties, cities, and towns owned and held for public purposes, for private property that taxpayer leased with contractual agreement for taxpayer to pay property owners' ad valorem taxes, even if property was characterized as public property under statute governing a charter school's lease of property with state funds, where there was no actual public ownership of property.

Issue of whether taxpayer, a public open-enrollment charter school, was entitled to ad valorem tax exemption from county taxes for leased private property under constitutional section providing exemption for property of counties, cities, and towns owned and held for public purposes was not properly before Supreme Court, where taxpayer did not ask county appraisal district for exemption, taxpayer did not raise exemption in trial court, taxpayer did not assign the failure to grant exemption as error in Court of Appeals, taxpayer did not mention exemption in its petition seeking Supreme Court's review, and taxpayer raised exemption for first time in its merits brief after it was addressed in an amicus brief.

Taxpayer, a public open-enrollment charter school, was not entitled to ad valorem tax exemption from county taxes under school property clause of State Constitution authorizing exemptions for school buildings and furniture used for school purposes, for private property that taxpayer leased with contractual agreement for taxpayer to pay property owners' ad valorem taxes, where property owners and taxpayer, as school operator, where not same people or entities.

What Makes a “Good” Muni Bond Tax Bill? - Squire Patton Boggs

Do you feel it? Good vibes for tax-advantaged bond legislation permeate the air around us. White smoke emerged from the White House on June 24, signifying that the President and key Senate leaders had reached a deal on an infrastructure bill. The deal includes “public private partnerships, private activity bonds, direct pay bonds and asset recycling for infrastructure investment.” Hey, that’s us![1]

It feels downright 2009ish. The prospect of new bond legislation has us thinking: Is there a right or wrong way to write a tax-advantaged bond bill?

Continue Reading

By Johnny Hutchinson on June 24, 2021

The Public Finance Tax Blog

Squire Patton Boggs

State Pass-Through Entity Taxes Let Some Residents Avoid the SALT Cap at No Cost to The States.

This week, Colorado became the 14th state to either require or allow some pass-through businesses such as partnerships to pay state income taxes at the entity level rather than on their personal income tax returns.

Why does this matter? It’s an increasingly popular way for states to give some residents relief from the 2017 Tax Cuts and Jobs Act’s (TCJA) $10,000 cap on the state and local tax (SALT) deduction without lowering state tax revenue by a dime.

Continue reading.

Tax Policy Center

by Kim S. Rueben

June 24, 2021

How It Works: When Mayors Use TIFs To Steer Investment Dollars

Millennium Park, Lincoln Yards and INVEST South/West are three signature projects from Daley, Emanuel and Lightfoot. But what’s really going on?

This story is part of the Re-Imagine Chicago project, a collaboration between the University of Chicago’s Center for Effective Government and WBEZ’s Reset, investigating how city government, community investment, public safety and schools could work better.

In March 2018, former Mayor Rahm Emanuel tweeted a 90-second video. It begins with the melancholy call of a single horn against an otherwise dark screen. As swirls of white form ribbons of light, the words “Amazon Makes Its Second City The Second City” come into focus.

A few seconds later, William Shatner, known for his role as Captain Kirk on Star Trek, tells the viewer that Chicago is a modest but resilient place, one with a story that parallels Amazon’s own humble origins. “Really the press release writes itself,” Shatner intones.

The video was released on the heels of Emanuel’s bid for the corporate behemoth’s second headquarters, a move that secured Chicago a spot on Jeff Bezos’s shortlist. During his tenure, Emanuel spent much of his time wooing large companies to the city. He was successful, too.

Continue reading.

wbez.org

By Elly Fishman

June 28, 2021

TAX - GEORGIA

Love v. Fulton County Board of Tax Assessors

Supreme Court of Georgia - June 1, 2021 - S.E.2d - 2021 WL 2194523

Citizens, who own real property and pay ad valorem taxes in county, filed petition for writ of mandamus and other relief against county board of tax assessors, individual tax board members, and board’s chief appraiser, alleging that board failed to exercise its duty to diligently investigate and determine whether stadium lessee was subject to ad valorem property taxation, and seeking temporary and permanent injunctive relief, to enjoin defendants from recognizing stadium property as tax exempt, and declaration that taxable leasehold interest, rather than non-taxable usufruct, had been transferred to lessee.

The Superior Court granted defendants’ motion to dismiss for failure to state a claim. Citizens appealed. The Court of Appeals affirmed in part and reversed in part. On remand, the Superior Court dismissed citizens’ claims for mandamus, declaratory and injunctive relief, and refund of taxes paid. Citizens appealed.

The Supreme Court held that:

- Citizens failed to state claim for mandamus;
- Permanent injunction prohibiting board members from continuing to implement board’s exemption decision was not warranted; and
- Citizens failed to show they were in position of uncertainty as to an alleged right, as required to obtain declaratory judgment.

Citizens failed to state claim for mandamus, in action against county board of tax appraisers, individual tax board members, and board’s chief appraiser, alleging that board failed to exercise its duty to diligently investigate and determine whether stadium lessee was subject to ad valorem property taxation, where their petition and attached exhibits disclosed with certainty that board investigated taxability of lessee’s interest and reached decision on that question.

Permanent injunction prohibiting members of county board of tax assessors, in their individual capacities, from continuing to implement board's decision that lessee's interest in football stadium was exempt from ad valorem property taxation was not warranted, in citizen's action to enjoin board members from recognizing stadium property as tax exempt, where petition and attached exhibits showed that board members' exemption decision was founded on evidence that lessee's interest was non-taxable usufruct, that board members did not exercise their discretion in unreasonable, arbitrary, or capricious manner that would constitute gross abuse of duty, and that stadium license and management agreement did not materially change nature of lessee's interest in stadium.

Citizens, who owned real property and paid ad valorem taxes in county, failed to show they were in position of uncertainty as to an alleged right, as required to obtain judgment declaring that taxable leasehold interest, rather than non-taxable usufruct, had been transferred to lessee of football stadium.

Ohio Supreme Court Denies Village of Obetz Attempt to Reinstate Expired TIF Exemption.

A recent decision by the Ohio Supreme Court addressed whether a municipality can retroactively reinstate an expired TIF exemption by amending the legislation that authorized the original exemption. The case arose from a TIF ordinance passed by the Village of Obetz in April 1997, which enacted a TIF arrangement related to the development of a warehouse located in the Village. The TIF ordinance provided for a 25 percent exemption of the increase in true value from the improvements for a period of 16 years. However, when the tax commissioner granted the exemption in October 1999, the commissioner inexplicably ordered a 100 percent exemption to last for the shorter of *30 years* or the end of the obligation to make service payments. In 2017, after being notified that the 16-year exemption had expired in 2015, the Village attempted to pass another ordinance, this time seeking to amend the original 1997 legislation. The Village's latest ordinance sought to extend the exemption from 16 to 30 years and increase the exemption from 25 percent to 100 percent, effectively trying to effectuate the tax commissioner's erroneous determination through 2017. The tax commissioner denied the Village's application, reasoning that retroactively approving this exemption would violate Ohio's TIF laws.

The Supreme Court agreed with the tax commissioner's denial, finding that retroactively applying the exemption would have violated Section 5709.40(G) of the Ohio Revised Code, which states that "[a]n exemption from taxation […] commences with the tax year specified in the ordinance so long as the year specified in the ordinance commences *after* the effective date of the ordinance." The Court reasoned that despite the tax commissioner's error in 1999, the plain language of the 1997 ordinance specified that the exemption would expire after 16 years, period. Accordingly, the Village's 2017 ordinance would have effectively created a new exemption. And under R.C. 5709.40(G), this new exemption could not commence until the year after the ordinance's effective date. In other words, because the ordinance was passed in 2017, the earliest the TIF exemption could commence was 2018. Thus, the Court denied the Village's attempt to extend its earlier TIF and rejected any application of the exemption retroactively to 2015, 2016 and 2017.

Bricker & Eckler LLP

June 8, 2021

S&P: U.S. Big Box Retailers' 'Dark Store' Practices Continue To Pressure Some Local Governments' Finances

Key Takeaways

- E-commerce continues to pressure traditional brick-and-mortar retail as online sales account for an ever-greater share of total U.S. retail sales.
- Big box and other retail chains are expanding their use of the "dark store" tactics to appeal assessed valuations and reduce their property taxes.
- In some states, these appeals can have a fiscal impact on local governments, resulting in significant devaluation of retail properties and sometimes large tax settlements.
- The widespread use of dark store appeals has spawned calls for legislative reform in many states as local governments push back at the threat of losing much-needed tax revenue.

Continue reading.

8 Jun, 2021

TAX - OHIO

Willacy v. Cleveland Board of Income Tax Review

Supreme Court of Ohio - May 25, 2021 - N.E.3d - 2021 WL 2093284 - 2021-Ohio-1734

Taxpayer appealed determination of the Board of Tax Appeals affirming city board of income tax review's denial of her claim for refund of income tax on value of stock options she exercised as a nonresident but received as compensation during her prior employment in city.

The Supreme Court granted taxpayer's petition to transfer appeal.

Holdings: The Supreme Court held that:

- Ordinance's three-year limitations period for city to make a tax assessment of stock options income ran from the date taxpayer exercised her stock options, and
- Res judicata did not preclude city from assessing income tax on value of stock options taxpayer exercised after she retired from employment with employer in city.

Ordinance's three-year limitations period for city to make a tax assessment of stock options income, which prohibited city from making an assessment more than three years "from the time the city income tax was due or the city income tax return was filed, whichever is later," ran from the date taxpayer exercised her stock options, not from the date she was granted the stock options by her employer.

The change to regulation, which provided, as amended, that an employer was not required to withhold municipal income tax with respect to an individual's disqualifying disposition of an incentive stock option if, at the time of the disqualifying disposition, the individual was not an employee of either the corporation with respect to whose stock option has been issued or of such corporation's successor entity, did not apply to taxpayer's challenge to city's refusal to refund her income tax assessed on value of stock options she exercised; regulation just relieved an employer of the duty to withhold a tax obligation, it did not render the income nontaxable.

Res judicata did not preclude city from assessing income tax on value of stock options taxpayer exercised after she retired from employment with employer in city, even though city had refunded amounts employer had withheld when taxpayer received stock-option income in prior years when she was still employed by employer; taxpayer failed to show there were any court or administrative proceedings concerning the prior tax years or that city issued the refunds in response to a judgment or adjudication.

TAX - WISCONSIN

State ex rel. Collison v. City of Milwaukee Board of Review

Supreme Court of Wisconsin - June 2, 2021 - N.W.2d - 2021 WL 2216215 - 2021 WI 48

Taxpayer, proceeding pro se, sought review of city board of review's decision upholding the assessment of taxpayer's real property.

The Circuit Court affirmed. Taxpayer appealed. The Court of Appeals affirmed. Taxpayer petitioned for certiorari review.

The Supreme Court held that the assessor, by valuing the property according to its highest and best use as a parking lot, properly considered the impairment of the property's value due to contamination.

Preparing Opportunity Zone Investors For Higher Capital Gains.

Will clients who've taken advantage of recent tax breaks for economic development soon regret their decision?

Qualified opportunity zones (QOZs) were established as part of 2017's tax reform. A key attraction of investments in this program is deferred capital gains taxes. President Joe Biden's proposed tax changes could increase the latter significantly—meaning investors might pay more tax when the deferment ends.

The recent American Families Plan bumps up taxes for wealthy taxpayers—including increasing the tax rate on long-term capital gains from the current 20% for households making more than $1 million. QOZs provide tax incentives for long-term investments in certain low-income communities, the biggest being deferment of recognized capital gains until the end of 2026.

Taxpayers with these deferred capital gains might, however, then face the 2026 rate, which under Biden's proposal could be 39.6% for wealthy taxpayers. It's unknown now if the Biden proposal will grandfather in QOZ investors at the current lower capital gains rates.

But advisors still advantages to these investments.

"Overall, we expect Opportunity Zone investments—and other tax-advantaged investments—will be more attractive in a higher-rate environment, since the tax savings they yield will be more meaningful," said Chris Catarino, CPA and shareholder at Drucker & Scaccetti in Philadelphia. "It is possible that investments into QOZs could temporarily freeze up until the higher tax rates go into effect."

“We actually think that the tax increase may enhance the attractiveness of QOZ investments,” added Aaron Brachman, Washington, D.C.-based managing director, wealth manager and founding partner at Washington Wealth Group at Steward Partners.

Biden’s proposal could hurt capital gains deferment, Brachman admitted, but enhance the program’s other two main benefits:

• Appreciation of the new property is exempt from capital gains if held in accordance with all QOZ guidelines. If the property sees appreciation, this is the most powerful benefit by far. It is further enhanced if the capital gains rate is near 40%.

• Investors can depreciate properties to offset the income received to the investor. If the property is, again, held in accordance with all QOZ guidelines “they should not see any depreciation recapture upon sale,” Brachman said. “This essentially provides a highly tax efficient stream of income that won’t be penalized with recapture upon sale.”

An often-overlooked aspect of the Biden plan is the proposed elimination of IRC Section 1031 “like-kind” exchanges. And “most qualified opportunity funds today invest in real estate projects and plan to use this provision of the code to cycle through a handful of different projects during their 10-year life without incurring any tax friction,” Catarino said. “Elimination of 1031 exchanges would prevent these funds from executing this plan.

“It will be interesting to see if the Biden administration proposes increased reporting requirements on Opportunity Zone funds to monitor and evaluate the program’s impact on the communities,” he added. “The reporting requirements have been fairly minimal in comparison to the tax benefits.”

The year 2026 is also after the next presidential election. “Even if the income tax rates on capital gains go up under President Biden, it’s possible the rates could come down under the next administration,” Catarino said.

An investing plan to realize a few years’ return on the money for the eventual tax bill—should capital gains rise as much as proposed—is one strategy. Also, advise patience to clients who invested in QOZs and who fear tax changes, advisors say.

“The most significant tax benefit of QOZ investing is that capital gains realized on the sale of an investment held 10 years or more are essentially tax-free due to a basis step-up,” Catarino said. “Investors should be taking the long-view. Maybe they will have to pay more tax in 2026 from a rate swing, but the payoff even further down the line could be far more beneficial.”

FINANCIAL ADVISOR

JUNE 7, 2021 • JEFF STIMPSON

Biden Administration Proposes Increase in PAB Limits Amongst Other Potential Tax Changes.

The Biden Administration has released its annual “Green Book,” which includes a plethora of proposed tax changes for the coming fiscal year. While many changes proposed in the Treasury document are historically ignored on Capitol Hill, these documents can be used as a road map for where the Administration’s priorities lie.

Bond Components

The "Green Book" included several bond provisions, including some BDA and MBFA priorities. While the tax document did not include key priorities such as the reinstatement of tax-exempt advance refundings, Congressional Leadership remains priorities.

The Administration is calling for an increase in the PAB limit for transportation infrastructure, doubling the limit to 30 billion dollars. The plan also calls for the authorization of a new direct-pay bond, Qualified School Infrastructure Bonds. According to the Green Book, the QSIB's would:

- Have a total national QSIB limitation of $50 billion $16.7 billion each for 2022, 2023, and 2024.
- Interest on QSIBs would be taxable and either the bondholders' interest would take the form of a tax credit equal to 100% of the interest on a QSIB of or the bondholders would receive cash from the bond issuer, and the Federal Government would make corresponding direct payments to the bond issuer.
- Each State would have to use no less than 0.5 percent of its total QSIB allocation for outlying areas.

We will continue to provide updates as they become available.

Bond Dealers of America

June 1, 2021

TAX - LOUISIANA

Comeaux v. Louisiana Tax Commission

Supreme Court of Louisiana - May 20, 2021 - So.3d - 2021 WL 2023073 - 2020-01037 (La. 5/20/21)

Parish assessor filed petition for declaratory judgment, asserting that statute governing changes or corrections of assessments by tax was unconstitutional as applied by Tax Commission.

The District Court declared statute unconstitutional as applied. Taxpayers appealed.

The Supreme Court held that:

- Repeal of related regulation, also challenged by assessor, did not render action moot, and
- Statute, as applied by Commission to docket taxpayers' appeal of assessment, issue a rule to show cause, hold a hearing to review correctness of assessment, and correct assessment outside of an ordinary tax appeal, violated constitutional provision requiring an assessment to be first subject to review by board of review and then by Commission.

Repeal of regulation which provided that a decision by Tax Commission determining fair market value of a property would be applied until reappraisal absent change in condition of property did not render moot parish assessor's declaratory judgment action challenging constitutionality of statute governing correction of assessment outside of ordinary tax appeal process, in which action assessor also challenged validity and constitutionality of regulation; Commission's sudden switch in position was more indicative of attempt to create technical mootness than of genuine change of heart, and it was significant that statute had not been repealed or amended.

Statute governing correction of assessment outside of ordinary tax appeal process, as applied by Tax Commission to docket taxpayers' appeal of assessment, issue a rule to show cause, hold a hearing to review correctness of assessment, and correct assessment outside of an ordinary tax appeal, violated constitutional provision requiring an assessment to be first subject to review by board of review and then by Commission; Commission's actions were not merely enforcement but rather of review.

TAX - GEORGIA

City of Hapeville v. Sylvan Airport Parking, LLC

Court of Appeals of Georgia - May 17, 2021 - S.E.2d - 2021 WL 1960195

Owner of real property brought action against city, mayor, and city council members, seeking declaratory and injunctive relief regarding city's threatened enforcement of occupational tax ordinance to prevent it from operating parking facility on parcel of land.

The trial court denied defendants' motion to dismiss, and defendant sought interlocutory review.

The Court of Appeals held that:

- Sovereign immunity was waived for purposes of property owner's claim for declaratory judgment against city and mayor and council members in their official capacities;
- Sovereign immunity barred claims for injunctive relief against city and mayor and council members in their official capacities;
- Sovereign immunity did not bar individual capacity claims against mayor and council members;
- Property owner stated claim for declaratory and injunctive relief against city's mayor and members of its council in their individual capacities; and
- Trial court did not err in failing to make factual findings in ruling on motion to dismiss based on sovereign immunity.

City's sovereign immunity, and that of mayor and city council members in their official capacities, was waived for purposes of property owner's claim for declaratory judgment with regard to the validity of city's occupational tax ordinance; statutory provision providing that, in any proceeding involving validity of municipal ordinance, municipality "shall be made a party" constituted waiver of sovereign immunity.

Sovereign immunity barred property owner's claims against city, and official capacity claims against mayor and city council members, to enjoin defendants from enforcing provision of city's occupational tax ordinance against it; statutory waiver of sovereign immunity did not apply because property owner did not seek to impose liability on municipal defendants.

Sovereign immunity did not bar property owner's claims against mayor and city council members in their individual capacities, seeking declaratory and injunctive relief regarding city's threatened enforcement of occupational tax ordinance to prevent it from operating parking facility on parcel of land; individual municipal defendants' contention that they were not real parties in interest had no merit, because relief sought be property owner would not alter title, possession, or usage of any real property of city or interfere with any city contracts.

Owner of real property stated claim for declaratory and injunctive relief against city's mayor and members of its council in their individual capacities, in which property owner challenged validity and threatened enforcement of city's occupational tax ordinance to prevent it from operating parking facility on parcel of land, where property owner alleged that city council was governing

authority of city and was empowered to enact and implement land use regulations.

Trial court did not err in failing to make factual findings in ruling on motion to dismiss based on sovereign immunity, in property owner's action against city, and mayor and city council members in their official capacities, where resolution of sovereign immunity claims did not involve any factual disputes.

TAX - OHIO

Obetz v. McClain

Supreme Court of Ohio - May 20, 2021 - N.E.3d ----2021 WL 2004808 - 2021-Ohio-1706

After expiration of ordinance providing for a property tax exemption under a tax-increment-financing (TIF) arrangement, village applied for a tax-incentive-program exemption.

The tax commissioner denied the exemption for tax years 2015, 2016, and 2017 and the Board of Tax Appeals affirmed. Village appealed.

The Supreme Court held that:

- Village adequately preserved for appellate review its claim that the 2017 amendment to 1997 ordinance would permit an extension of the original property tax exemption under the 1997 ordinance from 16 to 30 years;
- Tax commissioner's entry did not extend the original property tax exemption once ordinance granting exemption had expired; and
- County auditor had the authority to retroactively remove property from the exempt list, and return the property to the tax list.

Village adequately preserved for appellate review its claim that the 2017 amendment to 1997 ordinance would permit an extension of the original property tax exemption under the 1997 ordinance from 16 to 30 years because the tax commissioner's 1999 entry had authorized a maximum 30-year exemption, even though village failed to specifically refer to the 1999 entry in its notice of appeal to the Board of Tax Appeals (BTA); amendment eliminated the requirement to "specify the errors," and village's notice of appeal, which contested the commissioner's finding that the 2017 ordinance created a new tax increment financing (TIF) exemption rather than amending the TIF exemption created by village in 1997 ordinance, gave fair notice of the issue on appeal.

The tax commissioner's entry, which granted property tax exemption based on tax-incremen--financing (TIF) arrangement and provided that the exemption would continue for 30 years, even though ordinance stated the exemption would last for 16 years, did not extend the original property tax exemption once ordinance granting exemption had expired; the tax commissioner's entry granted the exemption "in accordance with the provisions of the municipal ordinance," the commissioner's entry did not permit village to retroactively reinstate exemption after it had expired.

County auditor had the authority to retroactively remove property from the exempt list, and return the property to the tax list, for tax years 2015 – 2017 at the tax commissioner's directive, even though the property was originally maintained it on the exempt list for 2015, 2016, and 2017; statute permitted the tax commissioner to revise at any time the list of exempt property in every county so no property was improperly or illegally exempted from taxation.

The tax commissioner was not estopped from denying the extension of the tax-increment-financing

(TIF) property tax exemption for tax years 2015 – 2017; tax commissioner's entry initially granting TIF exemption in 1999 stated the exemption ended "on the earlier of thirty years from such date of passage or the date on which the City can no longer require semiannual service payments in lieu of taxes," and 1997 ordinance expressly provided that the exemption expired after 16 years.

Novogradac Low-Income Housing Tax Credit Handbook

2020 Edition– SOLD OUT

The 2020 edition of this title is sold out. Novogradac will publish the 2021 edition in June.

The 2020 edition of the Low-Income Housing Tax Credit Handbook is an essential resource for affordable rental housing owners, developers, managers and investors–and the professionals who counsel them. This authoritative guide provides a clear explanation of Internal Revenue Code Section 42 and examples of model transactions to illustrate complex concepts.

The 2020 edition features information and discussions on the fiscal year 2020 appropriations bills, including additional LIHTC allocations. It also includes new sections on calculating the average-income designation income limits and on contract sales of real estate assets and property management.

This edition includes updated sections about the Community Reinvestment Act, verification of tenant income and assets, managing re-syndicated LIHTC properties, certification and review provisions in monitoring compliance, and more.

The 2020 edition of the Low-Income Housing Tax Credit Handbook is an essential resource for every active participant in the LIHTC market.

Click here to learn more and to preorder.

Treasury Department Releases 2022 Green Book.

Green Book—Treasury's explanation of tax proposals in FY 2022 budgetU.S. Treasury Department released the "Green Book"

The U.S. Treasury Department this afternoon released the "Green Book"—a 114-page explanation of the tax proposals in the Biden Administration's FY 2022 budget.

The title of the Green Book is "General Explanations of the Administration's Fiscal Year 2022 Revenue Proposals."

May 28, 2021

Senate Finance Committee Advances Energy Tax Credit Overhaul Bill Amid

Partisan Deadlock.

Dive Brief:

- Members of the Senate Finance Committee vied on Wednesday to add and preserve resource-specific tax credits to the Clean Energy for America Act, a bill intended to replace some 40 individual tax incentives with broader and more uniform tax credits tied to carbon emissions reductions.
- Committee Chairman Ron Wyden, D-Ore., announced that he planned to place the Clean Energy for America Act directly onto the Senate calendar without further committee hearings after a vote on the amended bill ended in a tie split along party lines.
- Democratic members of the committee generally supported the bill, arguing that it would allow renewable energy and fossil fuels to compete in a free-market system, and would reduce carbon emissions. Republicans rejected the final version, saying what started as an effort to level the playing field between energy resources ultimately ended up as a bill that would promote renewable energy at the expense of fossil fuels.

Continue reading.

Utility Dive

By Emma Penrod

May 27, 2021

Applying Opportunity Zones to Oil and Gas Investments, with Matt Iak.

How can the Opportunity Zone incentive be applied to energy investments in the oil and gas sector? Matthew Iak is…

CONTINUE READING »

opportunitydb.com

May 26, 2021

TAX - MINNESOTA

Mayo Clinic v. United States

United States Court of Appeals, Eighth Circuit - May 13, 2021 - F.3d - 2021 WL 1916000

Taxpayer, a Minnesota nonprofit corporation and tax-exempt organization that was the parent organization of several hospitals, clinics, and a college of medicine and science comprised of five distinct medical schools that offered M.D., Ph.D., and other degrees, as well as residencies, fellowships, and continuing medical education, brought tax refund suit against the government, alleging that it qualified as an educational organization and thus was entitled to a tax exemption for certain passive income.

The United States District Court for the District of Minnesota granted summary judgment for

taxpayer. Government appealed.

The Court of Appeals held that:

- Taxpayer had to be educational organization, i.e. tax-exempt organization whose primary activity was education, to be eligible for unrelated business income tax (UBIT) exemption, and
- Factual issue existed as to whether taxpayer qualified as educational organization, and thus was entitled to tax refund for taxes paid on certain passive income.

Merely carrying on charitable or educational purposes is not enough to qualify as an educational organization, and thus be entitled to a tax exemption for certain passive income, given the faculty, curriculum, students, and place requirements in the governing statute; the taxpayer still must meet the essential statutory elements, even if its primary function need not be presentation of formal instruction.

Genuine issue of material fact existed as to whether taxpayer qualified as educational organization, and thus was entitled to tax refund for taxes paid on certain passive income, precluding summary judgment in tax refund suit against government alleging that it qualified as educational organization and thus was entitled to unrelated business income tax (UBIT) exemption.

A taxpayer is not disqualified from being an educational organization on the basis that some of its educational purposes and functions also fall within other charitable categories, and vice versa, but the presence of a single non-educational purpose, if substantial in nature, will destroy the unrelated business income tax (UBIT) exemption regardless of the number or importance of truly educational purposes.

TAX - ALABAMA

Barnett v. Jones

Supreme Court of Alabama - May 14, 2021 - So.3d - 2021 WL 1937259

Local education officials and other public-education-related plaintiffs, after the Morgan County Commissioners refused to comply with requirements of local law that appropriated a portion of Morgan County's proceeds from the Simplified Sellers Use Tax (SSUT) to the county and city boards of education in Morgan County, brought action against the Commissioners, both in the Commissioners' individual and official capacities, for a judgment declaring that the local law was constitutional.

The Circuit Court entered judgment upholding the local law. Commissioners appealed.

The Supreme Court held that the local law did not violate Alabama Constitution's provision prohibiting local laws that pertained to matters covered by a general law.

Local law that appropriated portion of Morgan County's proceeds from Simplified Sellers Use Tax (SSUT) to county and city boards of education in Morgan County did not violate Alabama Constitution's provision prohibiting local laws that pertained to matters covered by general law; despite argument that local act covered same matter provided for by SSUT Act or Budget Control Act, SSUT Act only provided that each county's portion of SSUT proceeds was to be deposited into their general funds, local act covered how Morgan County's proceeds were to be spent once received, and Budget Control Act manifested Legislature's authority to direct county commissions as to how funds allocated to them by Legislature had to be spent.

JCT Report: Qualified Opportunity Funds Invested $24 Billion Through 2019

The Joint Committee on Taxation issued a report which found that according to tax return data, Qualified Opportunity Funds have made roughly $24 billion in total investments as of the end of 2019. Over 92 percent of these investments went into low-income Opportunity Zone communities, and about six percent went to Opportunity Zones contiguous to low-income communities. To put this into perspective, about $3.5 billion annually has been awarded to qualifying organizations in New Market Tax Credits program.

Last week, Wilmington, Delaware-based Second Chances Farm announced their second Opportunity Zone location. Their expansion into the Philadelphia market enables the indoor vertical farm startup to continue its social mission of enabling returning citizens to become entrepreneurs.

On the deal front, GTIS Partners announced a joint venture with Baker Development Corporation and Foundation Capital Partners to develop a 490,000 square-foot logistics center in a Goodyear, Arizona Opportunity Zone. This $45 million project, Yuma|143, will address the e-commerce needs of fast-growing consumer populations within the Phoenix metropolitan area.

Continue reading.

OPPORTUNITYDB

by JILL HOMAN

MAY 24, 202

IRS Releases Reference Prices for Energy Production Credits.

SUMMARY BY TAX ANALYSTS

The IRS has published (Notice 2021-32, 2021-21 IRB 1159) the inflation adjustment factors and reference prices used to determine the availability of the renewable electricity production credit, the refined coal production credit, and the Indian coal production credit for calendar year 2021.

Continue reading.

How Much Does Your State Collect in Property Taxes Per Capita?

Property taxes are an important source of revenue for local and state governments. In fiscal year (FY) 2018 (the most recent year of data available), property taxes generated 31.1 percent of total U.S. state and local tax collections and 71.7 percent of local tax collections. Local governments rely heavily on property taxes to fund schools, roads, police departments, and fire and emergency medical services, as well as other services associated with residency or property ownership.

On average, state and local governments collected $1,675 per capita in property taxes nationwide in FY 2018, but collections vary widely from state to state. The highest state and local property tax

collections per capita are found in the District of Columbia ($3,740), followed by New Jersey ($3,378), New Hampshire ($3,362), Connecticut ($3,107), New York ($3,025), and Vermont ($2,738). The lowest collections per capita are found in Alabama ($598), Oklahoma ($771), Arkansas ($776), Tennessee ($799), and New Mexico ($832).

Continue reading.

Tax Foundation

by Janelle Cammenga

May 19, 2021

Why Is Opportunity Zone Deal Flow Increasing, And By How Much?

Chris Loeffler is co-founder and CEO of Caliber, an asset management and real estate services firm headquartered in Scottsdale, Arizona. Caliber Funds is currently offering a $500 million mixed-asset Qualified Opportunity Fund geographically focused in the greater southwest region of the United States.

Listen to the podcast.

Leveraging Opportunity Zones for Infrastructure Investment.

Read the report.

Joint Committee on Taxation | May. 18

Qualified Opportunity Zone Investing: A Life Saver For Tax Reform

The Biden tax reform proposals target many tax benefits associated with real estate investing. If adopted, the ability to do tax free like kind exchanges may be eliminated and the maximum long term capital gains rates on sale may rise from 20% to 43.4% (marginal rate of 39.6% plus NIIT of 3.8%). Also, the ability to step-up the tax basis of assets at death may be eliminated. If all or any portion of this new tax landscape is adopted, investing in qualified opportunity zone funds (“QOFs”) may become of greater value and should be explored by all real estate investors.

Taxpayers facing higher taxes on capital gains can defer taxation of those gains until 2026 if they timely invest those gains into a QOF. If that investment is made before the end of this year, ten percent of that gain would be forgiven. While that still leaves 90% of the gain to be taxed in 2026, the QOF offers the ability to avoid paying any tax on a sale of the interest in the QOF or its underlying investments after holding it for at least ten years. Unlike LKEs, elimination of gain does not require finding a suitable replacement property and the need to invest all the sales proceeds to acquire that property. The cash from sale can be used for any purpose.

Use of leverage by a QOF substantially magnifies the tax savings. If investors contribute $2M to a QOF that incurs $8M of debt to buy and improve the real estate, and that $10M investment grows in value by only six percent per year then after 10 years, the real estate will be worth more than $17.9M. On sale, the $7.9M economic gain will not be taxed. Each year, depreciation deductions can be taken to shelter from taxation rental income from the property. While those deductions reduce the tax basis of the property and increase the taxable gain realized on sale, none of that added depreciation recapture income is taxed on sale after holding the investment for 10 years. If a taxpayer passes away before ten years, their heirs can step into their shoes and eliminate tax on a sale ten years or more after the investment was made.

Some investors may believe that a QOF must be structured as a traditional investment fund created by an investment manager and others who may charge fees that can reduce their economic yield. However, a QOF includes any partnership formed between two or more investors to invest in an opportunity zone. Two investors or a family group can pool their resources to invest in an opportunity zone as long as they have competent advisers who can ensure they comply with the technical qualification requirements that apply throughout the life of the fund.

Some investors may believe that investments can only be made in economically blighted areas where the chance for economic reward from operations and sale may be remote. However, there are more than 8,760 opportunity zones around the nation, and many have already started the transition to highly promising and profitable sites.

Some investors may think the technical requirements for operating a QOF can become overwhelming. However, in principle, a fund that buys existing real estate must improve it by investing cash greater than the purchase price of the building over a 30-month period, which gives them time to complete their project. The QOF will usually form a subsidiary partnership to acquire the real estate and construct the improvements to allow it to retain cash for working capital, but the added burden of having a second partnership and an added tax filing is usually manageable with the right set of tax accountants.

Some investors may fear that opportunity zone benefits may also be scrapped by Congress. However, no proposal has yet been made to eliminate them. While some criticism has been leveled as to whether the QOF program is producing as much new jobs as expected, the program’s focus on aiding communities in need makes the chance of elimination seem small especially compared to other more visible targets such as LKEs and capital gain preferential taxation.

The bottom line is that the closer we get to tax reform becoming a reality, the more prices may climb in opportunity zones. As a result, now is the time to start considering investing in a QOF, whether formed by an investment manager or a small group of investors.

by Philip Hirschfeld

May 17, 2021

Cole Schotz

How Panama City Is Using OZs to Rebuild after Hurricane, with Mark McQueen.

Panama City, Florida suffered massive damage from Hurricane Michael in 2018. How is the city

using Opportunity Zones to rebuild?

Mark McQueen is a former two-star general of the U.S. Army and current city manager for the City of Panama City.

Listen to audio.

OPPORTUNITYDB

by JIMMY ATKINSON

APRIL 28, 2021

Tax Considerations for Municipal Bond Investors.

To combat low yields, fixed income investors can opt for taxable municipal bonds via ETFs like the Invesco Taxable Municipal Bond ETF (BAB).

Getting taxable municipal bonds might seem counterintuitive given that one of the main reasons investors gravitate to munis is because of their tax advantages. However, investors can also get higher yield in lieu of these tax benefits.

BAB seeks to track the investment results of the ICE BofAML US Taxable Municipal Securities Plus Index. The fund generally will invest at least 80% of its total assets in securities that comprise the index. ICE Data Indices, LLC, oversees the underlying index, which is designed to measure the performance of U.S. dollar-denominated taxable municipal debt publicly issued by U.S. states and territories, and their political subdivisions, in the U.S. market.

Continue reading.

NASDAQ

MAY 24, 2021

S&P: A New Dawn For Shuttered U.S. Nonprofits In 2021

Key Takeaways

- The pandemic brought disruption and uncertainty to a historically stable sector, and with it pressure on ratings.
- A return to stability is likely for many entities given slow but steady re-openings, quick responses from management on expense savings and mitigation, and generally good market returns.
- Uncertainty remains because no one knows what the “new normal” will be and investments are always subject to market volatility.

Continue reading.

13 May, 2021

TAX - IOWA

StateLine Cooperative v. Iowa Property Assessment Appeal Board

Supreme Court of Iowa - April 30, 2021 - N.W.2d - 2021 WL 1702891

Taxpayer, an agricultural cooperative, petitioned for review of Property Assessment Appeal Board's (PAAB) decision upholding county's denial of property tax exemption for stand-alone corn silos and overhead ingredient bins within taxpayer's feed manufacturing facility.

The District Court affirmed. Taxpayer appealed. The Court of Appeals affirmed in part. PAAB and county applied for further review, which was granted.

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

- Corn silos were not tax-exempt machinery used in a manufacturing establishment;
- Overhead ingredient bins were tax-exempt machinery; and
- PAAB acted unreasonably, arbitrarily, and capriciously in attributing no value to ingredient bins for exemption purposes.

Supreme Court would decline to give deference to Property Assessment Appeal Board's (PAAB) interpretation of statute providing for property tax exemption for machinery used in manufacturing establishments, since Iowa Code did not expressly confer interpretive authority on PAAB, and the term "machinery" was not a substantive term within PAAB's special expertise.

Stand-alone corn silos that were connected to feed manufacturing facility of taxpayer, which was an agricultural cooperative, by underground conveyor were not "machinery" used in a manufacturing establishment, and thus did not qualify for a property tax exemption, where no processing or manufacturing occurred at silos themselves.

Customized overhead ingredient bins within feed manufacturing facility of taxpayer that was an agricultural cooperative were "machinery" used in a manufacturing establishment, and thus qualified for a property tax exemption; bins constituted, essentially, part of a continuous piece of machinery within that building.

Property Assessment Appeal Board (PAAB) acted unreasonably, arbitrarily, and capriciously in attributing no value to customized overhead ingredient bins within taxpayer's feed manufacturing facility for purposes of bins' exemption from property tax as machinery used in a manufacturing establishment, where county's own expert valued bins at $778,240.

A remand to Property Assessment Appeal Board (PAAB) for a determination of value of tax-exempt ingredient bins in taxpayer's feed manufacturing facility was warranted upon Court of Appeals' reversal of denial of property tax exemption, where there was conflicting evidence as to appropriate exemption amount, even though there was sufficient evidence in record for Court to reach values of claimed exemptions.

IRS Confirms Qualified OZ Boundaries Unaffected by 2020 Decennial Census Changes, Not Subject to Change.

The Internal Revenue Service (IRS) today issued Announcement 2021-10, confirming that the

boundaries of designated qualified opportunity zones (OZs) were established at the time they were designated, are unaffected by 2020 decennial census changes and are not subject to change.

Find more information about designated qualified OZs with the Novogradac Opportunity Zone Mapping Tool.

Friday, May 14, 2021

How a Tax Rate Increase May Impact Opportunity Zone Investors, with Alex Bhathal.

Tax rates could be on the rise under the Biden administration. What impact would a huge capital gains tax increase…

CONTINUE READING »

OppportunityDb

May 5, 2021

"Biden Unveils Script for The American Jobs Plan and a Leading Role Goes to Infrastructure – What Does It Mean to the Transportation Industry?" RECORDING NOW AVAILABLE

Was your schedule incredibly busy on April 8th? Was your schedule so busy that you missed the Squire Patton Boggs webinar on what President Biden's American Jobs Plan and what it means for the transportation industry? If it was, and you're disappointed that you missed former Secretary of Transportation Rodney E. Slater, former Republican Congressman and former Chairman of the House Transportation and Infrastructure Committee Bill Shuster, the former Chairman of the House Democratic Caucus Joe Crowley, and former Vice-Chairman of the House Republic Conference Jack Kingston discuss their insights and perspectives on President Biden's American Jobs Plan and how it could affect the transportation industry with Jane Garvey, North America Chairman of Meridiam Infrastructure, Robert (Bob) Poole, Director of Transportation Policy, Reason Foundation, and Robert (Rob) Puentes, President and CEO of the Eno Center for Transportation we have some good news! You can watch the recording of the webinar here!

During the webinar a Wall Street Journal article regarding how the private section is helping fund infrastructure developments through Public-Private Partnerships (P3) financing is discussed. We are including the article here for your reference as you watch!

By Taylor Klavan on May 12, 2021

Squire Patton Boggs

Modernizing Rental Car and Peer-to-Peer Car Sharing Taxes for a Post-Pandemic Future.

Key Findings

- As the travel and hospitality industries recover from the coronavirus pandemic, policymakers have an opportunity to reevaluate and repeal discriminatory excise taxes imposed on rental car transactions.
- Unlike other excise taxes, rental car excise taxes are not imposed to reduce a harm or ensure drivers are paying for infrastructure. Rather, the revenue is used for unrelated purposes and the taxes create a byzantine structure of taxes and fees that dissuade travelers from using rental cars. States relying on these taxes experience lower economic growth when travelers adjust their behavior to avoid the tax.
- Efforts to impose rental car excise taxes onto peer-to-peer car sharing arrangements increases the harm of these taxes and will make it harder for the travel industry to recover from the pandemic.
- Rather than extending rental car excise taxes, policymakers should ensure rental car and peer-t--peer car sharing services are within the state and local sales tax base and refine ways to reimburse sales tax paid on a vehicle purchased for personal use but also used for business purposes, such as car sharing or ridesharing.

Continue reading.

Tax Foundation

by Garrett Watson

April 22, 2021

Industrial Development Coming to Mesa, Arizona Opportunity Zone.

Last week, Los Angeles-based development firm Banyan Residential, in partnership with Indianapolis-based firm, Milhaus, broke ground on Banyan Beckley, a…

CONTINUE READING »

OpportunityDb

May 10, 2021

SLGS Window Likely to Close in August.

The Treasury is expected to suspend the sale of State and Local Government Series securities at the beginning of August if there is no congressional deal to raise the debt limit.

Suspension of SLGS sales is used by the Treasury as it takes extraordinary measures to prevent breaching the nation?s debt ceiling.

Susan Gaffney, spokeswoman for the National Association of Municipal Advisors, said in an email, “If

it comes to that, hopefully the Treasury will provide adequate notice so that issuers and their financing team can smoothly execute alternative arrangements."

Sam Gruer, managing director of Blue Rose Capital Advisors in Millburn, N.J., said that making the adjustment would be a "nonevent."

"We have seen SLGS underperform the open market for all but the smallest escrows," Gruer said. "Where you are going to see the SLGS window closure cost issuers is for the really small borrowers, the $5 million to $7 million or smaller escrow. And that's because of the fees involved."

SLGS are typically used by state and local governments and other entities that issue tax-exempt municipal bonds because of yield restrictions and arbitrage rebate requirements under the Internal Revenue Code.

For the month ended April 2021 there were 19,893 SLGs valued at $123.7 billion, up from 16,069 in May 2020 valued at $88.6 billion.

The likelihood of Congress not reaching a deal on the debt limit prior to July 31 appears high given that the Biden administration is committed — at least for now — to negotiating with congressional Republicans on infrastructure legislation.

The SLGS window has been closed 14 times since 1995, the most recent lasting just over five months from March 1 through August 5, 2019.

The two times immediately prior to that were Dec. 8, 2017 through Feb. 12, 2018 and March 15 through Sept. 11, 2017.

The SLGS program began in 1972 to assist state and local government entities in complying with IRS arbitrage regulations. The securities are not available to the general public.

One of the reasons why a closing of the SLGS window is likely this year is the Biden administration also has not yet released its full 2022 proposed budget, which will include a Treasury Department Green Book of detailed tax proposals.

Officials in the public finance sector are hoping the Green Book will contain numerous changes favorable to the muni market, including a restoration of tax-exempt advance refundings.

The role of SLGS has been significantly diminished by the termination of tax-exempt advance refundings under the 2017 Tax Cuts and Jobs Act.

There still are three uses for SLGS. First, they are sometimes used for escrows in current refundings. Second, they also are sometimes used for equity defeasance escrows which are yield restricted. The third use is for longstanding advance refunding escrows.

The Treasury on Monday announced that it is "assuming a cash balance of approximately $450 billion at the expiration of the debt limit suspension on July 31."

That estimate is "based on expected outflows under its cash management policies and consistent with its authorities and obligations," Treasury said.

Congress suspended the debt limit through July 31 of this year as part of a two-year budget agreement as part of the Bipartisan Budget Act of 2019.

The Bipartisan Policy Center on Thursday said its updated model of when the nation's debt limit might be breached will arrive in the fall of this year if Congress set a new limit or extend the suspension of the ceiling.

Shai Akabas, director of economic policy at BPC, issued a statement estimating the so-called "X-date" when the ceiling might be breached as sometime after the Oct. 1 start of the new fiscal year.

"That would realistically allow Congress to address the debt limit as part of an appropriations package and potentially pair that move with a longer-term reform of the statute to eliminate financial risk from these recurring episodes," Akabas said.

By Brian Tumulty

BY SOURCEMEDIA | MUNICIPAL | 05/07/21 02:10 PM EDT

TAX - MAINE

City of Old Town v. Expera Old Town, LLC

Supreme Judicial Court of Maine - April 20, 2021 - A.3d - 2021 WL 1538226 - 2021 ME 23

Owner of wood pulp and paper mill appealed decision of the State Board of Property Tax Review which denied tax abatement requests for the mill.

The Superior Court vacated and remanded. On remand, the Board granted the tax abatement requests. City appealed, and the Superior Court affirmed. City appealed.

The Supreme Judicial Court held that evidence supported determinations that prior bankruptcy and liquidation sales of wood pulp and paper mill were not accurate representations of fair market value.

Evidence supported State Board of Property Tax Review determinations that prior bankruptcy and liquidation sales of wood pulp and paper mill were not accurate representations of fair market value for property tax assessment purposes, even if they were arms-length transactions; at time of bankruptcy sale, mill's owner was facing an involuntary creditors' petition in the bankruptcy court, mill was no longer operating, the sale occurred after a truncated marketing period, the seller performed only a very limited due diligence, and the sale price ultimately included items not directly related to the fair market value of real and personal property assets, while two years later, mill was sold at liquidation sale with the understanding it would be scrapped.

Fitch: State Tax Changes May Have Uncertain Post-Recovery Effects

Fitch Ratings-New York-06 May 2021: Fifteen state legislatures are considering or have implemented tax policy revisions, including changes to tax rates and tax rebates, as part of FY 2022 budget negotiations coming out of the pandemic, says Fitch Ratings. Most of the tax changes are a small percentage of total revenues and would have a negligible effect on states' operating funds. We do not expect any near-term rating changes as a result of enacted or proposed tax changes.

States that introduced substantial tax cuts, including Idaho, Iowa, Nebraska and Oklahoma, have healthy reserves and strong budgetary flexibility, which should enable them to adapt to any revenue

stresses that may emerge in the near to medium term.

However, changes that affect future tax revenue in an environment of heightened economic and revenue uncertainty may have unintended budgetary consequences in the out-years. The greater the policy shift, the larger and more challenging the future budget-adjustment measures could be if revenues do not perform as anticipated.

Tax collections for FY 2021 for most US states are tracking well above initial projections, with further solid growth likely for FY 2022. Direct aid of $195.3 billion to states under the American Rescue Plan provides a significant one-time revenue boost that states must use by YE 2024.

Major shifts in business and consumer spending in response to the federal stimulus and the aftermath of the pandemic, however, could lead to material short-term swings in tax receipts. Sales taxes, for example, which generally outperformed in 2020 as consumers spent a large portion of discretionary income on tangible goods, could decline in FY 2022 and FY 2023 as spending shifts away from goods to services, which are less likely to be taxed.

Tax policy changes are mixed in terms of their likely fiscal effect. Oklahoma, Iowa, Idaho, Utah and Tennessee have all proposed a mix of income, sales and property tax cuts and/or credits, with Georgia and Nebraska recently signing personal income tax (PIT) cuts into law. The size of the cuts is less significant as a percentage of budget for Georgia, Tennessee and Utah but are more sweeping and material for Iowa and Nebraska.

Iowa seeks to accelerate previously-enacted tax cuts by scrapping required revenue triggers. This would result in a $1.3 billion decline in tax revenues over four years, with a FY 2027 decline equal to 4.7% of general fund (GF) revenues. Iowa's measure faces considerable resistance in the state house of representatives and is unlikely to be fully implemented.

Nebraska's measure will substantially expand existing income and property tax credits, reducing state revenues by $770 million over the next biennium, an annualized amount equal to 7.5% of budgeted FY 2022 GF revenues. Both Iowa and Nebraska possess healthy rainy-day reserves and substantial cash balances, which will cushion any short-term negative revenue effects that may emerge.

Other states have either proposed or implemented noteworthy tax increases. New York's April 2021 temporary increase to the top marginal tax rate, along with a smaller temporary surcharge to the corporate tax rate, will raise substantial revenue, with the PIT surcharge alone estimated to raise $2.8 billion in FY 2022. Risks include a potentially slower recovery from the pandemic resulting from lower consumer spending due to the tax increase.

Hawaii's legislature has likewise proposed raising the highest income tax rate to 16% from 11% along with higher capital gains and corporate income taxes (CIT) but the chances of full adoption are unclear. Minnesota's legislature has pushed back against the governor's proposed CIT increase and other tax changes that would raise total GF revenues by more than 3%, causing the governor to modify his plan.

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TIGTA Summarizes TE/GE Statistical Trends.

SUMMARY BY TAX ANALYSTS

The IRS Tax-Exempt and Government Entities Division is composed of seven functions and serves entities that employ nearly 25 percent of the American workforce, the Treasury Inspector General for Tax Administration said in a report dated May 3.

In May 2017 TE/GE realigned various processes that were embedded in five of its functions, and the reorganization affected these functions' staffing, budget, and processes, the report said. Also, TE/GE established five new compliance groups in October 2018 that completed 4,863 compliance checks for three of the functions in fiscal 2019, resulting in a 72 percent change rate.

The Tax Cuts and Jobs Act and the Taxpayer First Act significantly affected TE/GE's operations from 2015 to 2019, TIGTA said. Further, TE/GE experienced inventory backlogs in processing tax-exempt status applications and completing compliance cases because of the federal lapse in appropriations from December 2018 to January 2019. Mitigation actions such as temporary overtime were taken, according to the report.

TIGTA noted that TE/GE's budget decreased by over $22.5 million from fiscal 2015 to 2019, although there was an increase in the fiscal 2019 budget over the previous year. TE/GE's staffing also decreased by 12 percent over the same time period. By the end of fiscal 2019, TE/GE had 1,500 employees, which was 2 percent of the IRS's total staffing level, according to the report.

TIGTA made no recommendations because the report was made to provide statistical information.

DATED MAY 3, 2021

Fitch Ratings Updates U.S. Public Finance Tax-Supported Rating Criteria.

Fitch Ratings-New York-04 May 2021: Fitch Ratings has published the following report: "U.S. Public Finance Tax-Supported Rating Criteria." It updates and replaces the prior report published on March 27, 2020. The key criteria elements remain consistent with those of the prior report, and the

limited changes to the report will have no impact on outstanding ratings. Previous versions of the criteria have been retired.

Changes include addition of a forward-looking metric to enhance the evaluation of the impact of carrying costs on expenditure flexibility, additional guidance about rating through periods of economic stress and incorporating the use of GDP as an alternative to personal income in the evaluation of a state's long-term liability burden when appropriate.

The full report is available at www.fitchratings.com.

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Additional information is available on www.fitchratings.com

How a Tax Rate Increase May Impact Opportunity Zone Investors, with Alex Bhathal.

Tax rates could be on the rise under the Biden administration. What impact would a huge capital gains tax increase…

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Opportunity Db

May 5, 2021

TAX - ARIZONA

State v. Arizona Board of Regents

Court of Appeals of Arizona, Division 1 - April 20, 2021 - P.3d - 2021 WL 1540961

Attorney General's Office sued Arizona Board of Regents (ABOR) and vice president of state university, seeking injunctive relief and relief under quo warranto statute related to an agreement between ABOR and operator of hotels to build and operate hotel and conference center on ABOR's property.

Attorney General's Office later amended complaint to allege that agreement violated state constitution's gift clause and constituted illegal payment of public money. The Superior Court granted ABOR's motion for summary judgment on claim under gift clause, granted ABOR's motions to dismiss remaining counts, entered judgment for ABOR and vice president, and awarded ABOR and vice president attorney fees and costs. Attorney General's Office appealed.

The Court of Appeals held that:

- Provision of statute governing actions brought to recover state monies illegally paid that requires any suit brought by Attorney General's Office to be filed five years or less after illegal payment was ordered is not a statute of limitations but rather is a statute of repose;
- Claim that agreement violated gift clause accrued, and one-year limitations period began to run, when attorneys from Attorney General's Office circulated internal legal memorandum and opinion editorial on the topic and one of the attorneys specifically called transaction "pretty suspicious";
- Trial court did not abuse its discretion when it denied discovery request to access ABOR's entire file, including deal drafts and communications, pertaining to agreement;
- Count alleging violation of gift clause and illegal payment of public money did not relate back to filing of original complaint;
- Attorney General's Office lacked authority under statute authorizing it to enforce payment of taxes to bring claim that ABOR abused its tax-exempt status and improperly diverted property tax revenues;
- Attorney General's Office lacked authority under quo warranto statute to bring action based on claims that ABOR made conveyance to evade taxes and exceeded its authority to enter into leases; and
- Attorney General's Office failed to meet its burden to establish that attorney fees requested by ABOR were unreasonable.

TAX - MISSOURI

City of Crestwood v. Affton Fire Protection District

Supreme Court of Missouri, en banc - April 20, 2021 - S.W.3d - 2021 WL 1554743

City and taxpayers brought action against fire protection district, the Governor, and the Attorney General, alleging that statutes governing the provision of and payment for fire protection services in certain annexed areas were unconstitutional.

The Circuit Court granted judgment on the pleadings for defendants, and city and taxpayers appealed.

The Supreme Court held that:

- Fire district funding statutes were not improper special laws;
- Fire protection service fee imposed upon city which annexed land served by fire district was not a tax on city residents; and
- Statute did not create an unfunded mandate in violation of the Hancock Amendment.

Economic viability of fire protection districts in particular county was a plausible reason for statutory classification, and interrelated exclusion, requiring annexing cities to pay fire protection districts which continue to provide services to the annexed areas what the districts would have collected in tax revenue within the annexed areas, and thus there was a rational basis for the classification scheme and the statutes were not improper special laws.

Statutory fire protection service fee imposed upon city which annexed land served by fire district was not a tax on city residents, and thus did not violate constitutional due process or taxation provisions; statute did not impose a financial obligation upon city residents, and no city resident paid money to the district.

Statute requiring annexing cities in county to pay fire protection districts which continue to provide services to the annexed areas what the districts would have collected in tax revenue within the annexed areas did not create an unfunded mandate in violation of the Hancock Amendment; city voluntarily annexed the unincorporated area within the district, and statute did not shift responsibility for financing fire protection services from the state to a local political subdivision, but rather shifted it between political subdivisions.

Why a $10,000 Tax Deduction Could Hold Up Trillions in Stimulus Funds.

The fight over SALT is a case study in the age-old conflict between constituent politics and national policy.

In 2017, congressional Republicans capped a tax break that benefits America's highest-earning households and people with multimillion-dollar homes. Coastal Democrats have been trying to get it back ever since.

The break, the state and local tax deduction, known to policy wonks as SALT, does what it says it does. It allows people to deduct payments like state income and local property taxes from their federal tax bills. The deduction, previously unlimited, was capped at $10,000 as part of the 2017 tax bill, which was President Donald J. Trump's main domestic achievement.

Republicans added the cap to reduce the cost of a tax package that gave more than $1 trillion in breaks to corporations and wealthy families, while increasing the federal deficit despite claims that the cuts would pay for themselves. But the move also struck many Democrats as punitive, because its greatest impact was felt by a very specific kind of taxpayer: People who live in heavily Democratic areas.

Continue reading.

The New York Times

By Conor Dougherty

May 1, 2021

How Panama City Is Using OZs to Rebuild after Hurricane, with Mark McQueen.

Panama City, Florida suffered massive damage from Hurricane Michael in 2018. How is the city using Opportunity Zones to rebuild?

CONTINUE READING »

April 28, 2021

Construction Underway for Multifamily Development in North Tempe, Arizona Opportunity Zone.

In contrast to New York where legislators are making their state less attractive for Opportunity Zone investment and investors, Alabama's…

CONTINUE READING »

April 26, 2021

TAX - MARYLAND

Comptroller of Maryland v. Broadway Services, Inc.

Court of Special Appeals of Maryland - March 31, 2021 - A.3d - 2021 WL 1206643

Comptroller of Maryland denied property management company's application for an offset credit and refund for sales tax as a "reseller" of the cleaning supplies used at three non-profit hospitals, and assessed the company unpaid sales and use taxes.

Company appealed to the tax court, which ruled for the company on the alternative ground that it acted as an agent of the hospitals. The Circuit Court denied Comptroller's petition for judicial review and affirmed the decision of the tax court. Comptroller appealed.

The Court of Special Appeals held that:

- Company had arms-length relationship with hospitals;
- Company did not have the power to alter hospitals' legal relationships;
- Hospitals did not control company's purchase of cleaning supplies;
- Company had no duty to act primarily for benefit of hospitals; and
- Company was not precluded on remand from seeking juridical review of Tax Court's rejection of its "reseller" theory.

For-profit property management company had arms-length relationship with non-profit hospitals for purpose of determining whether company acted as agent of hospitals for sales tax purposes when purchasing cleaning supplies, although company was a subsidiary of a corporation co-owned by hospital and its affiliated university, where contracts between company and hospitals was based on template used by national independent competitors, company made independent decisions regarding what cleaning supplies to provide to hospitals and how to procure them, company bore the financial

risk of increased price of cleaning supplies, and contracts contained integration clause and “no oral modifications” clause that precluded assumption of any duties not therein expressed.

Property management company did not have the power to alter non-profit hospitals’ legal relationships, as element in determining whether company acted as agent of hospitals for sales tax purposes when purchasing cleaning supplies, although company was a subsidiary of a corporation co-owned by hospital and its affiliated university; company was solely liable for the purchase of any cleaning supplies and its vendors had no recourse against hospitals.

on-profit hospitals did not control property management company’s purchase of cleaning supplies, as element in determining whether company acted as agent of hospitals for sales tax purposes when purchasing supplies, although hospital required supplies to comply with its infectious disease policies; hospital could not require company to use a particular product.

For-profit property management company had no duty to act primarily for benefit of non-profit hospitals when purchasing cleaning supplies, as element in determining whether company acted as agent of hospitals for sales tax purposes when purchasing the supplies, although hospital had ownership interest in company; contract between company and hospitals did not create a fiduciary duty, and there was no evidence that company accepted such a duty through parties’ course of performance.

Hospitals’ contractual requirement that property management company provide cleaning supplies that complied with their infectious disease control guidelines and their legal obligations did not establish an agency relationship between hospital and company; the choice of supplies was left to company.

The Court of Special Appeals could not review Tax Court’s rejection of property management company’s theory that it was not liable for sales tax on the purchase of cleaning supplies for hospitals because it was a “reseller” of the supplies, where Tax Court ruled for company on other grounds and company did not petition for review of the issue, and Court of Special Appeals could affirm solely on the grounds and reasons stated by the Tax Court.

Property management company was not precluded on remand from seeking juridical review of Tax Court’s rejection of its theory that it was not liable for sales tax on the purchase of cleaning supplies for hospitals because it was a “reseller” of the supplies, although company did not appeal this issue following Tax Court’s decision in their favor on other grounds; whether company was required to cross-petition for judicial review on this issue following Comptroller’s appeal of Tax Court decision was a novel issue that had not been briefed.

Why Struggling Cities Should Cut Property Taxes.

It’s the perfect time to reboot urban economies and help the country’s poorest homeowners.

As the pandemic recedes, cities and towns are feeling the budget pinch. Many will be tempted to raise property taxes to fill the gaps. They should cut them instead. This isn’t only sound economics—it’s also an antidote to a regressive taxation scheme whose costs fall unfairly on the country’s poorest homeowners, many of them minority residents of struggling cities.

The traditional case against high property tax rates is that they deter investment, chase people out

of cities, and make it harder to attract new residents. Growing empirical evidence from across the country shows that property taxes are also inequitable, saddling low-income homeowners with a lopsided share of municipal tax burdens.

On the surface, it isn't intuitive why property taxes are unfair. They are calculated, after all, as a fixed percentage of a home's assessed value. The problem is that houses in poor neighborhoods generally sell for less than the assessment values used to calculate their property taxes, while expensive homes in affluent communities reliably sell for more than their assessed values. Tax assessors systematically undervalue America's priciest homes and consistently overvalue the country's least expensive homes. Affluent homeowners may be paying less in taxes than they should, and poorer homeowners have been paying more than they should.

Take Baltimore. According to data from a recent University of Chicago study, more than 75% of the city's least valuable homes sold between 2007 and 2018 yielded prices that were lower than the assessment value used for property taxes. The exact opposite is true when it comes to Baltimore's most lavish homes. During that same period those residences sold on average for more than twice the value used to compute property taxes.

This absurdity is amplified by Baltimore's high property tax rate, which is twice that of neighboring counties, even as the city hemorrhages people. Baltimore has fewer residents in 2020 than it had in 1920. In return for paying the highest property taxes in the state, city dwellers get a stew of the worst services and outcomes in the U.S.: Municipal ineptitude leading to uncollected water bills, potholes pockmarking every other street, alleys strewn with trash. Many of Baltimore's public school buildings lack heat or drinkable water, and the city's homicide, drug-overdose, illiteracy and lead-poisoning rates are among the highest in America.

What an injustice that the residents most directly affected by this dysfunction are often the same homeowners who, because of inflated assessments, pay a higher share of the city's property taxes. Baltimore isn't alone in this regard. The same cruel irony persists in Detroit, Atlanta, St. Louis and other cities caught in the quicksand of exorbitant taxes.

Because of the myopia caused by the current crisis, leaders in cities like Baltimore may be unwilling to cut taxes. To reverse decades of decline and inequity, however, this is exactly what they must do. And they need to start now because U.S. cities are about to enter a fierce contest for capital as the economy emerges from pandemic-related strictures. How we work and where we live will never be the same, and unrivaled investments will accompany this transformation. Relief dollars from Washington will be dwarfed by pent-up private capital spilling into markets as American consumers begin to spend money again. This could be the biggest infusion of federal capital into the economy since the New Deal and the largest introduction of private investment ever.

Those investments won't be distributed evenly, however, and cities will need to set themselves apart, conspicuously and fast. In the scramble to grab a share of this gold rush, there's no time to lose. Cities should pledge to cut property taxes immediately because investment decisions are being made now.

The economic upside of cutting property taxes is evident in the academic literature. A 1999 school-finance reform in New Hampshire resulted in property-tax cuts across the Granite State. In low-density areas, economists found an 11% to 22% jump in residential construction; in southern New Hampshire, where housing concentration was already high, tax cuts drove up home prices instead. Both results—a surge in construction and higher home values—materialized in Boston and San Francisco too. Many forget that before they were two of America's darling coastal cities, both were in steep decline, with substantial population loss between 1950 and 1980. Critical to their

turnaround were statewide ballot measures in California (1978) and Massachusetts (1980), which slashed taxes. San Francisco's property-tax rate plunged 57% practically overnight. Over the course of two years, Boston's property-tax rate fell 75%.

These are lessons with renewed importance today. A modern cataclysm sparked by disease could give way to a renaissance of smart and righteous reform. In cutting property taxes, cities have a chance to reboot their economies and dismantle hidebound tax policies that have hurt poor homeowners the most. Leaders who seize this moment will see their cities surge ahead. Those who don't will fall further behind.

The Wall Street Journal

By Thiru Vignarajah

April 16, 2021 5:58 pm ET

Mr. Vignarajah, a fellow with the Institute for Corporate Governance and Finance at New York University School of Law, previously served as deputy attorney general of Maryland.

OZ: NY Moves to Reduce Certain State Opportunity Zone Benefits for NY deals - Smart, Necessary or Something Else?

New York legislators have moved forward in their 2021 budget process to **limit some of the state Opportunity Zone benefits** that had previously applied in New York. Some commentators have pointed to the budget process reduction of benefits as a "left wing" reaction to former President Trump's support of the federal OZ program (which applies in all 50 states and the US Virgin Islands and Puerto Rico). Others have stated that it is a necessary move to reduce benefits for deals that should not be receiving federal and state benefits.

If the budget is approved, and the provisions become operative, New York will no longer offer some of the state tax benefits to real estate investors funding Opportunity Zone projects in New York, placing New York deals at a disadvantage to New Jersey, Connecticut, Ohio and other adjacent states that have approved and will retain their state benefits.

The OZ program is a Federal program that was enacted in 2017 and which became operative in 2018. Governors of all 50 states, including New York, were asked to review census data provided by the federal government which focused the Opportunity Zone program on low income areas throughout the US as identified in HUD census data from 2010. The Governors of all 50 states were then given 3 months to choose from within the potential applicable opportunity zones in their state which zones should become Opportunity Zones. Thereafter, once these zones were selected by the various governors, they were sent to Treasury for final approval, all of which selected zones were ultimately approved.

This process occurred during early 2018. Thereafter, the majority of states also "followed form" and permitted zones that the states had previously selected to be OZs to also be eligible for state benefits which would be the same as the federal benefits that existed under the program (i.e., (1) **deferral** of capital gains until 12-31-2026 (the "**Deferral Benefit**"); (2) potential **reduction of the amount that is subject to tax** by 15% if gain eligible dollars were invested into a qualified opportunity zone fund in 2018 or 2019, or 10% if gain eligible dollars were invested into a qualified opportunity zone fund in 2020 or 2021 (the "**Reduction Benefit**"); and, (3) if the investor followed

the rules of the OZ Program and invested an amount of gain eligible dollars into a QOF (the "fund") and left its investment in the QOF for 10 years or more, and, thereafter the QOF sold the property or the business it owned after the 10 year period but before 12-31-2047, then all gain on the sale of the business or real estate would NOT be subject to federal capital gains tax (the "**Exclusion Benefit**"). By electing to follow form, the states that did so, elected to have the Deferral Benefit, the Reduction Benefit and the Exclusion Benefit also apply at the state level on gains that would have otherwise been payable to the state; meaning the applicable states would also permit investments in their applicable OZ areas to obtain a state level Deferral Benefit, Reduction Benefit and the Exclusion Benefit.

New York, like all of its adjacent neighboring states, was one of the states that enacted legislation to incent Opportunity Zone investments by permitted such OZ benefits at the state level (i.e., the Deferral Benefit, the Reduction Benefit and the Exclusion Benefit at the New York level).

Under the 2021 New York budget proposal, the **New York Deferral Benefit and the New York Reduction Benefits** at the New York level would **NO LONGER** be applicable. The result of this change is that investors in New York businesses in the New York OZs and in real estate in the New York OZ, will no longer receive the same benefits as neighboring states, which could result in investors looking at these other adjacent states first or in a more meaningful way, given that the state level OZ incentives exist there rather than in New York.

While some commentators have stated this will "deal[] another blow to the program and developers taking advantage of it", my personal view is that the benefits being eliminated in the budget process (i.e., deferral of capital gains payments until 12-31-2026 and reduction of the amount subject to tax by 10% if investment was made in 2020 or 2021), are not the real driver of the OZ program and the massive amount of investment that has occurred in the low and moderate income opportunity zones nationally since the enactment of the OZ program – rather, it is the **Exclusion Benefit, which is NOT being eliminated in New York**, that is the main driver of behavior in the OZs.

Even with the New York budget modifications, New York's 514 census tracts included in the program will still qualify for federal tax incentives for investing in these distressed areas and the **New York Exclusion Benefit will still apply**.

Follow The Yellow Brick Road: So, has New York cut off its nose to spite its face? Slightly, as some investors who are seeking both federal and state benefits to justify a more difficult project will likely look elsewhere. That said, the real driver of transactions in the OZ space as noted above is the Exclusion Benefit which applies once one has been invested in the applicable opportunity zone for 10 years or more, and this benefit, notwithstanding the New York change, will still exist at BOTH the federal and New York state level. On balance, while the budget change sounds like a big move and strikes a blow for anti-Trump sentiment, in reality, the real opportunity of the OZ program in hopefully creating jobs for local residents will remain and the Exclusion Benefit driver will remain in tact and continue to provide a reinforcer for this type of behavior.

Brad A. Molotsky

April 19 2021

Duane Morris LLP

Novogradac-Tracked QOF Investment Grows $1 Billion Since End of 2020.

Qualified opportunity funds (QOFs) tracked by Novogradac reported an increase of more than $1 billion in investment since the end of 2020. QOFs tracked by Novogradac reported an equity raise of $16.34 billion for investment in opportunity zones (OZs) as of April 12, up from $15.16 billion reported at the end of 2020. Novogradac is now tracking 1,002 QOFs, of which 708 reported a dollar amount of equity raised. A blogpost by Michael Novogradac looks deeper at the most recent data, including the average equity raise and the types of investment that are most common.

The updated QOF investment figures, as well as discussions of the state of the OZ incentive, the OZ marketplace and more will be the focus at the Novogradac 2021 Spring Opportunity Zones Virtual Conference, Thursday and Friday. Registration is still open.

April 21, 2021

How to Invest in Opportunity Zones, an OZ Pitch Day Panel.

What should an investor consider before investing in a Qualified Opportunity Fund? Several Opportunity Zone experts provided their insights on…

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OpportunityDb

April 21, 2021

New York State Decouples from Opportunity Zone Tax Incentive.

This week, the New York state $212 billion budget passed by lawmakers included a provision decoupling the state and New…..

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OpportunityDb

April 20, 2021

IRS Guidance Provides Flexibility for Disaster-Related Extension of OZ Working Capital Safe Harbor.

The Internal Revenue Service (IRS) will publish in Wednesday's Federal Register a notice of proposed rulemaking for the opportunity zones (OZ) incentive that provides flexibility in the 24-month extension of the working capital safe harbor in the case of federally declared disaster areas. The proposed rule would allow qualified OZ businesses to revise or replace the original written designation and written plan and remain eligible for the safe harbor, provided that the remaining

working capital assets are expended within the original 31-month period, increased by the 24 additional months provided. Taxpayers may rely on those changes for taxable years beginning after Dec. 31, 2019. The notice also provides guidance on standards certain foreign persons and foreign-owned partnerships must meet to receive federal tax benefits from the OZ incentive and regulations to reduce or eliminate withholding on transfers that create certain gain.

Monday, April 12, 2021

Yard 56 Opens in Baltimore, Maryland Opportunity Zone.

Baltimore-based developer and MCB Real Estate President, David Bramble, opened Yard 56 earlier this week, a mixed-use project seven years…

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OpportunityDb

April 12, 2021

Lessons Learned from Seven Successful OZ Deal Closings.

Jackson Dearborn Partners is on their eighth Opportunity Zone deal in less than three years. What were some of the…

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OpportunityDb

April 14, 2021

American Rescue Plan Act Provides Critical, Permanent Tax Relief to Puerto Rico.

The newly enacted American Rescue Plan Act extended to Puerto Rico substantial amounts[1] of funding, to aid both the territory's short-term recovery from the COVID-19 pandemic and its long-term recovery from a decade-long recession and recent natural disasters. For instance, the Rescue Plan features more than $4 billion in fiscal relief funding for Puerto Rico and its municipalities to mitigate the fiscal effects stemming from COVID-19, and $3 billion in education assistance to ensure the safety of schools and students during the pandemic.

On the long-term track, the Rescue Plan included two crucial, permanent provisions: one extends the Child Tax Credit to families of all sizes in Puerto Rico, and the other provides funding to substantially expand Puerto Rico's local Earned Income Tax Credit (EITC). These measures combined are estimated to provide north of $1 billion annually in critical benefits to hundreds of thousands of low- and moderate-income working people and families in Puerto Rico, thereby helping

to tackle the territory's acute poverty and low labor force participation.

Continue reading.

CENTER ON BUDGET AND POLICY PROPOSALS

APRIL 16, 2021 | BY JAVIER BALMACEDA

IRS Guidance Provides Flexibility for Disaster-Related Extension of OZ Working Capital Safe Harbor.

The Internal Revenue Service (IRS) will publish in Wednesday's Federal Register a notice of proposed rulemaking for the opportunity zones (OZ) incentive that provides flexibility in the 24-month extension of the working capital safe harbor in the case of federally declared disaster areas. The proposed rule would allow qualified OZ businesses to revise or replace the original written designation and written plan and remain eligible for the safe harbor, provided that the remaining working capital assets are expended within the original 31-month period, increased by the 24 additional months provided. Taxpayers may rely on those changes for taxable years beginning after Dec. 31, 2019. The notice also provides guidance on standards certain foreign persons and foreign-owned partnerships must meet to receive federal tax benefits from the OZ incentive and regulations to reduce or eliminate withholding on transfers that create certain gain.

This and other guidance will be discussed at the Novogradac 2021 Spring Opportunity Zones Virtual Conference, **April 22-23**.

April 12, 2021

One Key Difference Between San Diego's Measure C and the Others Courts OK'd.

The San Diego City Council this week took a monumental step that could forever change our understanding of municipal finance. The city's own words, though, may trip it up.

The San Diego City Council this week took a monumental step that could forever change our understanding of municipal finance and what exactly can be achieved here with special tax increases.

The city's own words, though, may trip it up.

First, key background: The city decided to argue that Measure C, the initiative to raise the hotel room tax to fund an expansion of the Convention Center, homeless services and road repairs, actually passed when voters marked their ballots in March 2020.

While it did get more than 65 percent of the vote, it did not get two-thirds of the vote.

To raise taxes for special purposes, like expanding the Convention Center or building a stadium, cities have traditionally needed two-thirds of voter support. But a court ruling five years ago threw

that all up in the air. It paved the way for a theory that citizens' initiatives do not ever need two-thirds of the vote to pass. Only tax increases put on the ballot by an actual government need two-thirds, the theory went.

Three tax increases since then have used this approach: Two in San Francisco and one in Fresno, were put on the ballot with special citizens' petitions and got more than half the vote but less than two-thirds. All three have since been validated by courts.

Supporters of San Diego's Measure C specifically, intentionally, set it up as a citizens' initiative precisely to take advantage of this legal ruling should it come up short of the two thirds.

What happened this week: The City Council decided to embrace that legal argument. The city had already decided not to take a stand on whether C had passed or failed at the ballot. But now, for the first time, the city will assert that the measure did pass even without winning two-thirds of the vote.

Critics of the move, though, have seized on one major inconvenience: The city itself told voters, in the official ballot summary, that the measure would require two-thirds of the vote to pass.

It didn't just say it once, either. It said it twice. At the top of the ballot summary, the city said this: "Passage of this measure requires the affirmative vote of two-thirds of those qualified electors voting on the matter."

Then, farther down, it says this: "The measure authorizes a special tax, meaning the additional revenue is designated for specific purposes, and thus requires a two-thirds vote for approval."

One thing San Francisco and Fresno did not do when they tried to pass these taxes without two-thirds of the vote is tell voters that the measures needed a two-thirds vote.

San Francisco's Measure C, in November 2018, told voters in the official summary that "This measure requires 50%+1 affirmative votes to pass." On another tax hike in June 2019, the city summarized the requirement the same way.

Fresno had a bit less moxie but gave itself wiggle room: "passage of this measure requires approval by two thirds (2/3) vote, unless otherwise required by law."

Councilwoman Vivian Moreno and other critics of the Measure C push seized on San Diego's own wording.

"The ballot materials informed the voters that passage of Measure C required a two-thirds vote and the voters depend on that information being accurate and reliable," she wrote.

All of that led to the question: Why?

Why did the city of San Diego describe it like this? Former Mayor Kevin Faulconer and the supporters of Measure C went through so many hoops and burned through more than $2 million just to make sure it could take advantage of this historical legal loophole. How did they fail to convince City Attorney Mara Elliott to at least leave some room in how she described the measure to voters?

I asked Elliott's office if she had any perspective on it.

In a written statement, spokeswoman Hilary Nemchik said that legal thinkers across the state were genuinely split, for years, about how this would turn out. The city attorney's office asked the Supreme Court to clarify what it meant but it never did. And since then it has declined to consider

challenges to the San Francisco and Fresno tax hikes that will now be implemented even without a two-thirds vote. So the city attorney "relied on traditional interpretations requiring a two-thirds vote."

Nemchik said the city preserved its ability to revisit the matter when it declined to decide one way or another whether Measure C had passed last year.

"No matter what language the City Clerk had used for Measure C, it is hard to imagine the issue was not going to be litigated post-election," she wrote.

Moreno's colleague, Councilman Sean Elo-Rivera, voted against declaring the measure passed, he said, because it wasn't the city's role. If it were truly a citizens' initiative, then the citizens behind the measure should have to get a court to force the city to implement it with this legal theory.

The mayor and most of the rest of the City Council were not moved by this point, further muddying the lines of where citizens' initiatives end and city initiatives begin. But the only thing really different about the Fresno and San Francisco measures that have now gotten the de facto OK from the courts to become real tax hikes and what San Diego is now trying to do is the city's own language.

What is certain is these tax increases via citizens' initiatives are only getting started. You can bet the city attorney will describe future ones differently.

Voice of San Diego

by Scott Lewis

April 9, 2021

Opportunity Zone Firms Combining Cryptocurrency, Blockchain, and OZs.

Will the Opportunity Zone tax incentive be extended? Congressmen Tim Burchett (R-TN) and Henry Cuellar (D-TX) hope so, and early…

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April 5, 2021

From the NBA to Opportunity Zones, with Josh Childress.

How is a former NBA player leveraging Opportunity Zones to create impactful change? Josh Childress is CEO of LandSpire Group…

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April 7, 2021

N.Y. Bonds Keep Bargain Level as Millionaire Tax Hike Nears.

- **Risk spread on key bonds near where they were last April**
- **NYC may have highest tax rate, boosting value of tax-free debt**

New York is about to test a bedrock principle on Wall Street — that higher taxes drive up the value of municipal bonds.

Governor Andrew Cuomo and lawmakers struck a tentative deal Monday to raise taxes on some of the richest New Yorkers to the highest in the U.S., promising to make the tax-shelter provided by the securities more valuable.

But the slow moving municipal-debt market, a haven dominated by buy-and-hold investors, has yet to react. Despite the impending tax hike, the gradual reopening of New York City's economy and almost $24 billion in aid to the state and its localities from President Joe Biden's stimulus package, New York state bonds backed by income-tax revenue are trading at roughly the same risk premium as last April, when New York was the epicenter of the coronavirus pandemic.

Nine-year state personal-income-tax debt rated AA+ traded Tuesday at an average yield of 1.25%, or 29 basis points more than point more than AAA rated bonds — roughly the same level where similar maturity bonds were trading a year ago, according to data compiled by Bloomberg. When the state sold $1.9 billion of bonds last month, nine-year debt was priced at 51 basis points higher than top-rated debt, a 30 basis-points jump since before the pandemic.

"Spreads are still way too wide for what are very, very stable, if not strong credits," said Andrew Clinton, chief executive officer of Clinton Investment Management, who has made New York state and local muni debt the largest position in client portfolios. "Investors currently have not priced in any of the risk of potentially higher taxes, either at the federal level and certainly not at the state level."

New York's income-tax rates would temporarily increase to 9.65% from 8.82% for single filers earning more than $1 million, according to agreement announced Tuesday after it was worked out by Cuomo and the Democratic leaders of the Senate and the Assembly, Andrea Stewart-Cousins and Carl Heastie. Those making $5 million or more would be taxed at 10.3%, and income for those earning over $25 million would be taxed at 10.9%. The new rates would expire in 2027.

When combined with the New York City's top income-tax rate of 3.88%, city residents with income over that threshold will pay between 13.5% and 14.8%. That compares with 13.3% on income over $1 million in California, currently the highest in the nation.

California general-obligation debt maturing in 10 years yields about 11 basis points more than top-rated bonds, according to data compiled by Bloomberg. That's less than the yields on New York's income-tax bonds even though the California debt is rated one level lower by Fitch Ratings and two levels lower by S&P Global Ratings.

Clinton said technical factors — including a flood of new debt sales last month and a cautious buyer base — is keeping New York's risk premiums wider. New York state and cities issued $7.5 billion bonds in March, almost $5 billion more than March 2020, according to data compiled by Bloomberg.

Yet the fundamentals in New York are improving. New York City's economy, the engine of the state, is gradually reopening as vaccinations continue apace. The city has administered 4.2 million vaccine does as of April 2, more per capita than most other cities that publish timely data, according to city comptroller Scott Stringer.

Private employment in the city rose by 21,000 in February, led by 10,000 jobs in the leisure and hospitality sector as travel picked up and indoor dining expanded, according to Stringer's office. Broadway is reopening after Labor Day and the city's tourism promotion agency is forecasting the number of visitors will increase to 38 million this year, up from about 23 million in 2020.

And Wall Street is booming, too. Securities firms earned $38 billion in the first three quarters of 2020, the highest since 2009, according to Stringer.

Still private sector jobs have declined by more than 640,000 since February 2020, or a 16% drop, and higher taxes could push some of the rich, who pay a large share of state income taxes, to leave, said Clinton.

As of 2018, about 54,571 state residents with incomes of $1 million or more paid about 40% of total income taxes, according to E.J. McMahon, senior fellow at the Empire Center for Public Policy, a research group that advocates for less government spending and lower taxes.

"At the end of the day, there will be enough people who remain that will support the outstanding debt," said Clinton, whose firm oversees $1.26 billion of municipal debt. "You're not going to rip your kids out of school and ruin their relationships, just because you're saving eight or nine percent."

Bloomberg Markets

By Martin Z Braun

April 6, 2021, 12:03 PM MDT Updated on April 6, 2021, 3:32 PM MDT

MSRB: Understanding Taxable Municipal Bonds

Introduction

Taxable municipal bonds are a growing segment of the municipal bond market. Consider using this publication to learn a bit about them before you approach an investment professional and tax advisor to find out more.

Learn:

The meaning of "taxable" in taxable municipal bonds
Reasons why taxable municipal bonds are less common than tax-exempt bonds
Ways to use the free Electronic Municipal Market Access (EMMA®) website to locate and research public taxable municipal bonds

Get started:

- Taxable Municipal Bond 101 for Investors
- The Taxable Municipal Bond Market

- Locating New Taxable Municipal Bonds
- Locating Disclosures for Taxable Municipal Bonds
- Locating Trading Information for Taxable Municipal Bonds
- Appendix: EMMA Resources List

Continue reading.

New IRS Priorities Include Student Loan Bonds, Form 8038-G.

The Internal Revenue Service on Monday announced new compliance priorities for tax-exempt bonds involving student loan bonds and yield restrictions on Form 8038-G for government-issued municipal bonds.

Monday's announcement came at the halfway mark of fiscal 2021 after only one other priority — arbitrage violations — had been announced since the Oct. 1 start of the federal fiscal year.

The strategy for focusing on student loan bonds will determine if the Internal Revenue Code Section 144(b) requirements are met, the IRS said.

"Failure to satisfy these requirements could result in the interest on the bonds being taxable to the bondholders," the service said. "The treatment stream for this strategy is examinations."

The decision by the IRS to return to auditing student loans after focusing on that area years ago was described as an "interesting" by Christie Martin of Mintz Levin in Boston, chair of the National Association of Bond Lawyers tax law committee.

Matthias M. Edrich, a partner at Kutak Rock in Denver and another member of the NABL tax law committee, also said he was surprised "since this segment already went through an audit focus not too many years ago."

"Yield restriction and arbitrage rebate matters that might relate to student loans would presumably already be incorporated in the yield restriction and arbitrage rebate focus points," Edrich said. "Is the IRS intending to examine other student loan aspects now, beyond the arbitrage bond rules?"

The IRS said its audits of Form 8038-G will "review bond proceeds yield restrictions after the statutory temporary period to determine whether proceeds are restricted to the yield of the issue."

"If the issuer fails to yield-restrict the investments after the temporary period, the bonds will be deemed arbitrage bonds and taxable," the service said. "Additionally, the interest paid to the bondholders will be taxable."

Late last year the IRS said its initial fiscal 2021 focus involved potential arbitrage violations of Internal Revenue Code Section 148 by the investment of bond proceeds in higher-yielding investments beyond the allowable temporary period under Treasury Regulation (Treas. Reg.)1.148-2(e).

At that time, the IRS said other priorities for tax compliance and enforcement involving municipal bonds would be released in quarterly updates on the webpage of the Tax Exempt and Government Entities Division-Compliance Programs and Priorities.

Edrich recalled that he was disappointed last November when the IRS released its fiscal year 2021 program letter with the only reference to tax-exempt bonds contained in the accompanying TE/GE strategic goals publication.

“At the time I remember being disappointed with the lack of details concerning tax-exempt bonds, compared to program letters from prior years,” he said. “I think it is useful that the IRS has now published additional information about its bond-related examination focus.”

The IRS also said Monday that it would continue its fiscal 2020 IRS enforcement and compliance priorities, which were public safety and jail bonds, sinking fund overfunding, and variable rate bonds.

In regard to public safety bonds, the IRS is determining whether federal government use and management contracts cause excessive private business use that adversely affects the tax-exempt status of public safety bonds.

Last last month the Santa Cruz County Jail District in Arizona filed a public notice that the IRS has made a preliminary determination that its 2017 tax-exempt refunding bonds should be treated as retroactively taxable.

The March 10 IRS letter said the jail refunding bonds meet the private business use and private payments test because part of the facility is under contract to house federal prisoners.

In regard to sinking fund over-funding, the IRS is focusing on whether over-funding caused the bonds to be arbitrage bonds, which negatively impacts their qualification as Tax Credit Bonds.

And for variable-rate bonds, the IRS is determining whether the issuances complied with the rebate and yield restriction rules under IRC Section 148, the bond and investment yields were properly computed and rebate or yield reduction liability (if any) was correctly determined.

The IRS audits involving the fair market value of open market securities are determining arbitrage violations under IRC Section 148, specifically as to the fair market value requirements for yield restricted defeasance escrows under Treasury Regulation 1.148-5(d)(6).

The Internal Revenue Service Tax-Exempt Bonds unit closed around 200 fewer examinations in fiscal 2020 than had been expected because of the interruption caused by the pandemic.

New examinations were suspended between March 2020 and last July because of COVID-19.

As a result, the TEB unit closed nearly 300 cases instead of attaining its earlier goal of around 500 cases.

The earlier goal had been cited in a presentation to the National Association of Bond Lawyers more than in 2019 but was not mentioned when the IRS announced its 2020 achievements earlier this year.

The exams that TEB did close involved a combination of “compliance strategies and referrals, claims and other casework,” the IRS said in the February summary published by Edward Killen, the acting commissioner for Tax Exempt & Government Entities group.

The majority of those cases — 170 — involved compliance strategies that “resulted in a written advisory to the bond issuer, including issues such as private business use and issuance costs,” the February statement said.

By Brian Tumulty

April 05, 2021

SOURCEMEDIA

IRS Tax Exempt & Government Entities – Compliance Program and Priorities

The Tax Exempt and Government Entities (TE/GE) Fiscal Year 2021 Program Letter lists our priorities and how those align with the IRS Strategic Goals.

In fiscal year 2021, we'll continue to pursue our compliance program described in our FY 2020 Program Letter, and use this webpage to share information about other compliance program initiatives at the end of each quarter during the fiscal year. We will also share our findings from recently completed compliance program initiatives.

Here in TE/GE, we protect the public interest by applying the tax law with integrity and fairness to all. We continue to move toward issue-based examinations and a compliance program that focuses on high risk issues using one or multiple treatment streams. A treatment stream is a single or a combination of compliance actions that we will implement to achieve an initiative's goal. The idea is to respond with the right treatment stream to maintain high compliance across the TE/GE filing population. This approach makes efficient use of IRS knowledge and deploys the right resources to address noncompliance issues.

Our compliance program involves a thorough analysis of data to support the identification and evaluation of a compliance issue, a deliberate consideration of potential treatment streams, decisions about the resources to be deployed, identification of training, and tools needed, as well as a robust feedback mechanism to ensure all elements of an initiative are continuously improved. Our compliance program consists of six components that work together to promote tax law compliance by tax-exempt and government entities.

Read more.

TAX - IDAHO

Hoffman v. City of Boise

Supreme Court of Idaho, Boise, January 2021 Term - March 23, 2021 - P.3d - 2021 WL 1093947

Taxpayers brought action challenging city ordinances allocating tax increment financing (TIF) revenues for city urban renewal agency's use in urban renewal districts.

The Fourth Judicial District Court dismissed complaint, and taxpayer appealed.

The Supreme Court held that ordinances did not violate state constitution.

Provision of state constitution prohibiting political subdivisions from incurring debts for which they have not funds to pay, unless voters approve otherwise, is primarily designed to protect taxpayers and citizens of political subdivisions who would bear consequences of subdivision incurring

excessive indebtedness.

City ordinances allocating tax increment financing (TIF) revenues for city urban renewal agency's use for urban renewal projects authorized by Idaho Local Economic Development Act (LEDA) did not violate state constitution provision prohibiting political subdivisions from incurring debts for which they lacked funds to pay, even if it was possible that expenditures might require city to raise taxes in future; ordinances did not entitle agency to any TIF revenues unless (1) combined property values for year were assessed within renewal districts, (2) levy rate for year was applied to that value, and (3) revenue collected by levy exceeded revenue that would have been collected by levy on base assessment value.

TAX - NEW YORK

Herkimer County Industrial Development Agency v. Herkimer

Court of Appeals of New York - March 25, 2021 - N.E.3d - 2021 WL 1132175 - 2021 N.Y. Slip Op. 01835

County industrial development agency brought action seeking declaration that real property taxes levied against it by village to collect unpaid water rents were void.

Village counterclaimed, seeking judgment declaring that agency was personally liable to village for certain unpaid water rents incurred by manufacturer that was agency's tenant pursuant to bond financing sale-and-leaseback transactions.

The Supreme Court, Herkimer County, granted village's motion to dismiss. Agency appealed. The Supreme Court, Appellate Division, affirmed as modified, and agency appealed.

The Court of Appeals held that agency was not liable to village for unpaid water rents.

County industrial development agency was not liable to village for unpaid water rents incurred by manufacturer that was agency's tenant pursuant to bond financing sale-and-leaseback transactions, where law applicable to subject property provided for a lien upon the real property, and not personal liability by the owner, and contrary to village's argument, village rule regulating how water meters were used to register consumption did not impose an additional remedy for nonpayment.

TAX - CALIFORNIA

City of Torrance v. Southern California Edison Company

Court of Appeal, Second District, Division 3, California - March 17, 2021 - Cal.Rptr.3d - 2021 WL 1015875 - 21 Cal. Daily Op. Serv. 2447 - 2021 Daily Journal D.A.R. 2433

City brought action against electrical utility, alleging that utility miscalculated municipal tax on electrical usage by applying annual credit relating to state-wide greenhouse gas emissions policy to reduce consumers' tax base, and seeking declaratory relief and an order compelling utility to comply with the electricity tax ordinance.

The Superior Court sustained utility's demurrer without leave to amend and entered judgment of dismissal, and city appealed.

The Court of Appeal held that:

- Credit was not subject to deduction from tax base;
- Utility was not liable to city for users' unpaid taxes; and
- City was entitled to opportunity to amend complaint to assert claim for unpaid taxes against any consumer that had underpaid its tax.

Municipal electricity users' tax imposed on the "charges made for such energy" was imposed on amount utility charged for electricity consumed and any ancillary services, and thus annual IA credit relating to state-wide greenhouse gas emissions policy did not affect the electricity users' tax base and utility could not deduct that credit before applying the tax; ordinance defined "charges" to include "charges made for 1) metered energy, and 2) minimum charges for service, including customer charges, service charges, demand charges, standby charges and annual and monthly charges," and did not include any deduction for credits.

Electric utility was not liable to city for municipal electricity users' taxes that had not been paid by its consumers due to utility's collection of the tax after mistakenly applying annual IA credit relating to state-wide greenhouse gas emissions policy to users' accounts; city ordinance stated that while any such tax collected from a service user which has not been remitted is a debt owed to the city by the person required to collect and remit, the tax itself was a debt owed by the service user.

City, which brought action against electrical utility regarding collection of municipal tax on electrical usage, was entitled to opportunity to amend complaint to assert claim for unpaid taxes against any consumer that had underpaid its electricity user's tax due to utility's incorrect tax base calculations, as well as any other viable claims or defenses.

House Bill Would Restore Advance Refunding Bonds.

Legislation that would bring back a type of tax-exempt bond popular with state and local governments has been reintroduced in the House.

The Investing in Our Communities Act, introduced March 29 by Reps. C.A. Dutch Ruppersberger, D-Md., and Steve Stivers, R-Ohio, would restore advance refunding bonds, which states and local governments use to pay for community projects. Advance refunding bonds were eliminated by the Tax Cuts and Jobs Act.

Ruppersberger and Stivers have introduced legislation to restore advance refunding bonds before. The most recent bill has 21 cosponsors.

"County and state governments have served on the frontlines of the COVID-19 pandemic, facing historic revenue losses amid unforeseen costs, while still cutting paychecks to our teachers, law enforcement and public health workers," Ruppersberger said in a release. "We must do everything we can to help them invest in projects that improve our communities, create jobs and, ultimately, reduce the need to raise taxes."

"Municipal financing makes so much of daily life possible; from highways to telecommunications towers, municipal bonds allow for the delivery of services and connections for millions of Americans," Stivers said. "By enhancing the status of tax-exempt bonds, we're empowering state and local governments, and saving taxpayer money along the way."

Ruppersberger and Stivers co-chair the House Municipal Finance Caucus.

The Lifting Our Communities Through Advance Liquidity for Infrastructure (LOCAL Infrastructure) Act (S. 479), introduced February 25 by Sen. Roger F. Wicker, R-Miss., and Senate Finance Committee member Debbie Stabenow, D-Mich., would also restore advance refunding bonds.

Reviving the bonds has been a priority of municipal finance groups.

In testimony submitted recently to the House Ways and Means Select Revenue Measures Subcommittee, the Municipal Bonds for America Council, organized by the Bond Dealers of America, explained that advance refunding allows state and local government issuers to refinance — and consequently benefit from lower interest rates — when the outstanding bonds aren't currently callable.

TAX ANALYSTS

by FRED STOKELD

POSTED ON MAR. 30, 2021

Two New Hotels Open Their Doors in Opportunity Zones.

This week, two new hotels opened their doors in Opportunity Zones. Hyatt House extended-stay hotel opened for business in downtown…

CONTINUE READING »

OpportunityDb

March 30, 2021

Post-COVID Opportunity Zone Investing, with Greg Genovese.

What can Opportunity Zone investors expect from post-COVID market conditions? And how have Qualified Opportunity Funds evolved since program inception?

CONTINUE READING »

OpportunityDb

March 31, 2021

GFOA Publishes Best Practices on Issuing Taxable Debt: Arent Fox

The Government Finance Officers Association's (GFOA) Executive Board approved several best practices and advisories this month, including GFOA's Best Practice on Issuing

Taxable Debt.

A link to the best practices is here.

The GFOA Taxable Debt Best Practice cites the globalization of the capital markets, the elimination of tax-exempt advance refunding in the Tax Cuts and Jobs Act of 2017, and tax-exempt financing tax rules, including restrictions on private business use of bond-financed facilities as having led to increased taxable municipal debt issuances.

The Best Practices contains good, common-sense advice, including:

- Evaluate applicable federal, state, and local debt issuance legal requirements, particularly, if applicable, "lending of credit" restrictions if private entities are expected to use the bond-financed facility;
- Know the market for taxable debt, including types of investors, structural features, and size requirements needed to attract investor interest;
- Consider structural features that may provide long-term benefits, such as hyper-amortization and early call provisions;
- And, if refunding an outstanding bond issuance, weigh the advantages and potential costs of a taxable advance refunding if in a low-interest-rate environment versus waiting to currently refund the issue on a tax-exempt basis, including the uncertainty of the future interest rate environment.

The GFOA Taxable Debt Best Practice is a quick read and a good basic framework for issuers to start from when considering issuing taxable debt. It bears noting that many municipal bond professionals are cautiously optimistic that a Federal infrastructure bill will include various bond-friendly provisions, including reinstating tax-exempt advance refundings. If such a provision were enacted, issuers would not only be able to advance refund bonds in a low interest rate environment, but depending on the facts, might once again be able to do so on a tax-exempt basis.

March 25, 2021

TAX - FLORIDA

Clay v. Commissioner of Internal Revenue

United States Court of Appeals, Eleventh Circuit - March 16, 2021 - F.3d - 2021 WL 968621

Taxpayers, who were members of Miccosukee Native American tribe, appealed after the United States Tax Court sustained income tax deficiency determination that had been issued against them, arising from unreported income received from per capita tribal casino revenue payments.

The Court of Appeals held that:

- Miccosukee Settlement Act did not exempt payments from taxation, and
- Payments were not exempt as land lease payments.

Miccosukee Settlement Act, which provided that none of the moneys paid or land conveyed to tribe under Act or settlement agreement with United States would be taxable under federal or state law, did not exempt from income taxation per capita tribal casino revenue payments that taxpayers, who were members of Miccosukee Native American tribe, received from tribe, even though taxpayers

interpreted Act to empower tribe to collect and distribute money to members without members including it in taxable income determination; Act unambiguously exempted from taxation only "moneys paid" and "land conveyed" under particular section of agreement, and even if Act were interpreted as providing indefinite tax exemption for lands conveyed under it or agreement, casino's land was not conveyed under Act or agreement.

Per capita tribal casino revenue payments that taxpayers, who were members of Miccosukee Native American tribe, received from tribe were not exempt from income taxation as land lease payments, even though taxpayers argued payments stemmed from lease for use of tribe's lands; no lease ever existed, and casino's financial statements specifically confirmed that "no rental payment [was] currently required for use of" tribe's land, and while taxpayers asserted that revenue from leasing of undeveloped tribal lands had always been considered tax exempt, they did not identify any statutory exemption for lease payments, and instead cited only to revenue rulings that were either unrelated to leases or mentioned "rentals" in irrelevant context.

Differentiating Approaches and Delivering Value in Opportunity Zones, with Jon White.

Why are shovel-ready projects so crucial to a multi-asset Qualified Opportunity Fund strategy? And how can a fund be structured in order to allow investment from self-directed QOFs at the project level?

Jon White is president and managing director at Larson Capital, a real estate-focused private equity firm headquartered in St. Louis.

Continue reading.

OpportunityDb

By Jimmy Atkinson

March 22, 2021

TAX - LOUISIANA

Balbesi v. Lafayette-City Parish Consolidated Government

Court of Appeal of Louisiana, Third Circuit - December 30, 2020 - So.3d - 2020 WL 7768414 - 2020-61 (La.App. 3 Cir. 12/30/20)

Utilities customers brought a class action petition for declaratory judgment and damages against city-parish consolidated government and Lafayette Utilities System (LUS), challenging the constitutionality of annual transfers of utility's revenues to the government known as in-lieu-of-tax (ILOT) payments.

The District Court granted summary judgment in favor of defendants dismissing customer's claims. Customers appealed.

The Court of Appeal held that:

- LUS was a revenue-producing public utility that was exempt from ad valorem taxes, and
- ILOT payments were not de facto ad valorem taxes.

The Lafayette Utilities System (LUS) was a revenue-producing public utility that was exempt from ad valorem taxes as contemplated by the state constitution, because it operated to provide a public service.

In-lieu-of-tax (ILOT) payments made by Lafayette Utilities System (LUS) to city-parish consolidated government were not de facto ad valorem taxes, even though the ILOT transfers were referred to in bond ordinances as payments-in-lieu-of tax, and/or because they were placed into the City General Fund along with other tax revenue; payments were made from revenue generated by the utility, and payments were in no way related to the value of any property.

TAX - CALIFORNIA

LA Live Properties, LLC v. County of Los Angeles

Court of Appeal, Second District, Division 3, California - February 26, 2021 - Cal.Rptr.3d - 2021 WL 752539 - 21 Cal. Daily Op. Serv. 1930 - 2021 Daily Journal D.A.R. 1937

Corporate taxpayer brought action against county, seeking refund of property taxes that were paid on escape assessments allegedly levied by county without proper notice.

The Superior Court entered judgment for county. Taxpayer appealed.

The Court of Appeal held that county's failure to comply with statutory procedural notice requirement did not render the tax a legal nullity that would excuse taxpayer from administrative remedy exhaustion requirement.

County assessor's failure to comply with statutory procedural requirement of issuing notice of proposed escape assessment for property taxes 10 days before enrolling the escape assessments, by mailing the notices just five days before enrolling the escape assessments on real property owned by corporate taxpayer, did not render the escape assessments legally null, and therefore, taxpayer was not excused from requirement that it exhaust its administrative remedies before filing action in court for a tax refund; county's apparent failure to timely comply with notice requirement could have been reversed through prescribed administrative channels, and taxpayer was not entitled to reversal when it had not made use of those channels.

Maryland's Digital Ad Tax Under Pressure from Big Tech.

As expected, the Maryland law that created an online advertising tax is facing legal opposition from lobbying groups backed by Amazon, Google and Facebook. The groups argue the law violates the commerce clause.

After overriding a veto from Gov. Larry Hogan in February, the Maryland Legislature enacted a bill that would make Maryland the first state to tax digital advertising. A little less than a month later, lobbying groups backed by tech giants, including Amazon, Google and Facebook, are suing the state to strike down the bill.

The tax, which applies to revenue from digital ads displayed inside the state, is based on companies' ad sales. These ads include banner advertisements, search engine advertisements, interstitial advertisements and other advertising services.

Companies like Google, Amazon and Facebook, according to a report by Sidley Law Firm, would be impacted as follows:

Continue reading.

KATYA MARURI, GOVERNMENT TECHNOLOGY | MARCH 18, 2021

With Veto Override, Maryland Becomes First U.S. State to Enact Digital Advertising Tax.

Amidst significant economic and legal concerns, on February 12, 2021, the Maryland Senate joined the House in voting to override Republican Gov. Larry Hogan's veto of House Bill 732 (HB 732) to adopt a Digital Advertising Gross Revenues Tax (Tax), the nation's first tax targeting digital advertising. The override was successful despite significant pushback from a coalition of more than 200 businesses and Republican legislators who sought to sustain the veto. HB 732 is intended to provide significant revenues to support education reforms in the state.

The Tax is likely to affect large technology-based and online companies that derive revenue from advertisements on their websites and platforms (rather than companies deriving their revenues entirely from subscription services). Thus such companies, as well as their owners and sponsors, should carefully consider the information below and the impact of the Tax on their business models.

The Tax

The Tax is not a net income tax; rather, it is imposed on the "annual *gross revenues* of a person derived from digital advertising services in the state."1 "Digital advertising services" include "advertisement services on a digital interface, including advertisements in the form of banner advertising, search engine advertising, interstitial advertising, and other comparable advertising services."2 The determination of annual gross revenues derived from services in Maryland ultimately subject to the Tax is calculated based on a fraction that compares the annual gross revenues derived from digital advertising services in Maryland to the annual gross revenues derived from digital advertising services in the United States.3

The Tax is imposed on a graduated rate scale, based on the taxpayer's *global* annual gross revenues, as follows:

- 2.5% for companies with global annual gross revenues of $100 million through $1 billion
- 5% for companies with global annual gross revenues greater than $1 billion through $5 billion
- 7.5% for companies with global annual gross revenues greater than $5 billion through $15 billion
- 10% for companies with global annual gross revenues exceeding $15 billion4

Initial Observations and Considerations

Despite the passage of HB 732 by the Maryland General Assembly, a number of significant questions have been raised as to the legality and economic impact of the Tax

- Because the Tax is imposed only on *digital* advertising activities and not traditional advertising activities that take place in print, over the radio, or on TV, it has been asserted that the Tax violates the federal Internet Tax Freedom Act and is therefore void.
- Because the Tax is imposed only on digital *advertising* activities, it has also been asserted that the Tax violates several federal Constitutional provisions, including the Commerce Clause, the Supremacy Clause, the Equal Protection Clause and the First Amendment.5
- Opponents of HB 732 argue that the Tax will be ultimately borne by the customers of the vendors on whom the Tax is imposed, as nothing in the current legislation prevents the taxpayer from passing the cost of the Tax onto its customers. While the General Assembly is considering a proposal to revise the legislation to prohibit passing on the Tax to customers, it is expected that the taxpayers subject to this Tax will still account for the Tax in determining their pricing for digital advertisement sales (which pricing is generally dynamic and individualized).
- The Tax is imposed based on U.S.-based revenue from "digital advertising services" as apportioned to Maryland, but the tax rates are based on a company's global (i.e., worldwide) annual revenues. There is no guidance on how intercompany revenues between members of an affiliated group will be considered for either of these calculations.
- The statute does not define when digital advertising services take place "in the state"; instead, the General Assembly delegated this authority to the Comptroller, which may be an unlawful delegation of authority that is likely to invite challenge.
- The Tax is to be effective for all taxable years beginning after December 31, 2020. HB 732 includes a general effective date of July 1, 2020. However, under Maryland law, bills that are enacted via legislative override of the Governor's veto generally take effect 30 days after the override, which would be March 14, 2021. It is unclear how the purported retroactivity and concomitant Due Process issues, legislative delay, and veto override process will ultimately affect implementation of the Tax.
- Other states have taken notice of Maryland's efforts. Jurisdictions that have recently considered or are considering a digital advertising services tax include Connecticut, the District of Columbia, Montana, Nebraska, and New York.6

The Tax is intended to apply to large technology-based and online companies with advertising-based revenue models (as opposed to companies with subscription-based revenue models). Thus, pending the outcome of expected legal challenges, such companies, as well as their owners and sponsors, will need to consider the impact of the Tax on their business models and their potential tax obligations to Maryland, while at the same time protecting any and all refund opportunities should any of the expected legal challenges that have been and likely will be filed against the Tax in the coming weeks and months prove successful.

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1 Md. Code, Tax-Gen. § 7.5-102(a). Citations are to the sections as proposed in HB 732.
2 Md. Code, Tax-Gen. § 7.5-101(d).
3 Md. Code, Tax-Gen. § 7.5-102(b).
4 Md. Code, Tax-Gen. § 7.5-103.
5 On February 18, 2021, the U.S. Chamber of Commerce, the Internet Association, NetChoice, and the Computer and Communications Industry Association filed suit in federal court in Maryland, asserting that the Tax is "illegal in myriad ways and should be declared unlawful and enjoined."
6 The potential proliferation of digital advertising taxes at the state level is especially interesting considering the recent conflict between the United States and France over France's digital services tax, as well as the calls for global negotiations to create a uniform system governing taxation of digital services.

February 19, 2021

New Hampshire v. Massachusetts: Potential for Remote Working Tax Uniformity - K&L Gates

As the coronavirus (COVID-19) pandemic wears on, many companies that adopted emergency work-from-home or work-from-anywhere policies are considering allowing employees to work remotely permanently, even after the threat of the pandemic has subsided. Many states addressed the personal income tax implications for employees who commuted across state lines pre-pandemic by adopting temporary COVID-19 tax policies; however, states generally have not yet announced how they will treat for tax purposes the expected shift to a post-pandemic remote workforce.

Some states' temporary COVID-19 policies provided that employees would continue to have personal income tax obligations where their offices are located (Office States), even if they worked exclusively from a different state during the pandemic (Work State) and even if they were forced to do so pursuant to lockdown orders. However, many of these measures were adopted on an emergency basis with no expectation that the restrictions on employees' ability to commute would last so long or that the pandemic would provide the final push in some sectors toward long-term work-fro--anywhere policies. As a result, it now appears that some of these measures may create significant future challenges: (1) arguably, policies like these violate constitutional principles by imposing tax obligations on nonresidents who are no longer performing services in the Office State; (2) from a policy perspective, these kinds of policies run the risk of double-taxing nonresidents (i.e., by subjecting them to income tax on the same income—in both the Office State and the Work State); and (3) the Work State could lose certain benefits to which it may be entitled because of the Office State's policies, resulting in possible harm to the Work State's economy or robbing the Work State of tax revenue that may rightly be due to the Work State.

In an attempt to seek definitive guidance on the constitutionality of certain taxes on remote workers, New Hampshire filed a claim in the Supreme Court of the United States (SCOTUS) to challenge Massachusetts' COVID-19 policy of imposing Massachusetts income tax on New Hampshire residents who worked at offices in Massachusetts pre-pandemic but have been working remotely in New Hampshire during the pandemic.1 New Hampshire asserts that SCOTUS has original jurisdiction over the dispute.2 Although SCOTUS has not yet agreed to hear the case, SCOTUS requested a brief from the U.S. Solicitor General.3 If SCOTUS exercises original jurisdiction over the case, the decision could address the constitutionality of "convenience of the employer" rules (COTE rules) that certain states implemented prior to the COVID-19 pandemic.

NEW HAMPSHIRE V. MASSACHUSETTS

In mid-October, Massachusetts adopted an emergency regulation setting forth its COVID-19 tax policies regarding remote workers.4 The regulation features a "status quo" approach designed not to impose new tax obligations on employers or employees solely as a result of COVID-19 remote work policies but to continue enforcing the same obligations on both employers and employees as existed pre-pandemic.5 Though some may view Massachusetts' "status quo" formulation as a simple solution for employers and employees, New Hampshire asserts that Massachusetts' policy is unconstitutional even as an emergency regulation and would have ongoing detrimental impacts on New Hampshire and its residents if Massachusetts adopts the approach permanently.6

New Hampshire argues that Massachusetts' emergency regulation violates both the Commerce Clause and the Due Process Clause of the U.S. Constitution.7 Further, New Hampshire asserts that the emergency regulation harms the state of New Hampshire because New Hampshire does not impose an income tax on its residents.8 Rather, New Hampshire explains that it derives certain benefits from not imposing an income tax on its residents, which include "on average, higher per capita income, lower unemployment, and a competitive edge in attracting new businesses and residents."9 Not surprisingly, Massachusetts rejects New Hampshire's claims that Massachusetts' emergency regulation is unconstitutional. Massachusetts argues that it maintained the status quo regarding tax obligations and thereby avoided uncertainty and spared employers the additional compliance burdens that would have come from deciphering complicated new requirements in the midst of the pandemic.10 Further, the emergency regulation explicitly states that Massachusetts does not adopt its policies permanently.11

Several amicus briefs have been filed on behalf of New Hampshire supporting both its substantive claims as well as its request that SCOTUS exercise original jurisdiction in the case.12

CONVENIENCE OF THE EMPLOYER RULES

If SCOTUS decides to rule on the substantive issues in New Hampshire v. Massachusetts, its ruling may have implications not only on Massachusetts' emergency regulation but also on states that have implemented COTE rules.13 States that have adopted such rules generally impose income tax on nonresidents who would be subject to the state's income tax if working from their employer's office but who are instead working remotely, such as at a Work State, for convenience rather than out of necessity.14 Although COTE rules existed in several states prior to the COVID-19 pandemic, the practical effect of COTE rules may cause increasing concern in light of the challenges and the paradigm shift toward remote work that the pandemic has caused, particularly in respect of the impact such rules can have on their neighboring states.15

New Jersey, Connecticut, Hawaii, and Iowa, in an amicus brief, generally agree with New Hampshire's position that Massachusetts' emergency regulation is unconstitutional. Further, they assert that such emergency regulation essentially emulates a COTE rule, which they argue is also unconstitutional because imposing COTE rules may cause a Work State to either (1) lose significant revenue streams as a result of granting a credit for its residents against taxes paid to other states (including Office States), or (2) force the Work State to double-tax the same income to avoid losing tax revenue to which the Work State is entitled.16 Thus, such aggressive policies impact not only Work States that, like New Hampshire, do not impose income taxes on their residents, but also Work States that do impose income taxes and that stand to lose revenue to neighboring Office States.17

Tuesday, March 9, 2021

Footnotes

1 *See generally* New Hampshire v. Massachusetts, No. 22O154 (U.S. filed Oct. 19, 2020).

2 *See id.,* Bill of Complaint for Plaintiff at 5.

3 *See id.* (indicating that SCOTUS invited the acting Solicitor General "to file a brief in this case expressing the views of the United States").

4 The Massachusetts' emergency regulation is effective until 90 days after the state of emergency in Massachusetts is lifted. As of the date of expiration, the guidance indicates that the policies adopted in light of the pandemic will cease to be in effect and "the presence of an employee in Massachusetts, even if due solely to a Pandemic-Related Circumstance … will trigger the same tax consequences as under Massachusetts law more generally." *See* Mass. Dep't of Rev., TIR-20-15: Revised Guidance on the Massachusetts Tax Implications of an Employee Working Remotely due to the COVID-19 Pandemic (Dec. 8, 2020); see also 830 MASS. CODE REGS. § 62.5A.3.

5 *See* 830 MASS. CODE REGS. § 62.5A.3 (providing the following example of sourcing nonresident income while working from home in another state: "[f]or example, if a non-resident employee is working from home full-time due to a pandemic-related circumstance but during the period January 1 through February 29, 2020 the employee worked five days a week, two of those days from an office in Boston and three of those days from home [in another state], 40 percent of the employee's wages would continue to be Massachusetts source income").

6 Though Massachusetts' emergency regulation indicates that the regulation will expire 90 days after the state of emergency is lifted, New Hampshire fears that Massachusetts may continue to extend its policies and may eventually make such policies permanent. See Bill of Complaint for Plaintiff at 4, *New Hampshire*, No. 22O154.

7 *See id.,* Bill of Complaint for Plaintiff at 25–32 (indicating that (1) Massachusetts' emergency regulation fails all four Commerce Clause prongs that require that a state tax be (a) applied to an activity with a substantial nexus with the taxing state, (b) fairly apportioned, (c) nondiscriminatory to interstate commerce, and (d) fairly related to the services provided by the state; and (2) Massachusetts' emergency regulation violates the fundamental requirements of due process, including because there is no connection between Massachusetts and the nonresidents on whom it imposes Massachusetts income tax other than the address of the nonresident's employer).

8 *See id.* at 1 (asserting that "[t]he Commonwealth of Massachusetts has launched a direct attack on a defining feature of the State of New Hampshire's sovereignty").

9 *See id.*

10 *See id.,* Brief in Opposition to Motion for Leave to File Complaint at 3.

11 *See* discussion supra note 4; but see discussion supra note 6.

12 *See generally New Hampshire*, No. 22O154 (Amicus briefs have been filed by Professor Edward A. Zelinsky, the Southeastern Legal Foundation, the Buckeye Institute, various states, and various taxpayer organizations.).

13 Certain states, including New York, Pennsylvania, Nebraska, Delaware, and Arkansas, tax nonresident income earned remotely due to COTE rules. *See id.*, Brief of Profession Edward A. Zelinsky as *Amicus Curiae* in Support of Plaintiff's Motion for Leave to File Bill of Complaint at 2;

see generally id., Amicus Curiae Brief for States of New Jersey, Connecticut, Hawaii, and Iowa (indicating that the states lose significant amounts of revenue when neighboring states employ COTE rules).

14 *See, e.g.*, 20 N.Y. COMP. CODES R. & REGS. § 132.18(a) (sourcing nonresident income to New York for days in which an employee worked out of state for convenience as opposed to necessity).

15 *See generally New Hampshire*, No. 22O154, Amicus Curiae Brief for States of New Jersey, Connecticut, Hawaii, and Iowa.

16 *See id.* at 18 (indicating that "[w]hen a State unconstitutionally taxes nonresidents working from home, it forces … [neighboring] States to choose between losing billions of dollars of revenue by allowing credits to offset such taxes, or double taxing their residents").

17 *See id.*

NABL Suggests User Fee Structure to Reduce Costs for Governments.

SUMMARY BY TAX ANALYSTS

The National Association of Bond Lawyers has offered alternatives to significantly increasing the cost of user fees for private letter rulings, suggesting that state and local governments be charged a lower fee in general or that they pay a lower fee for routine ruling requests, such as those made under sections 103 and 141-150.

FULL TEXT PUBLISHED BY TAX ANALYSTS

March 1, 2021

William M. Paul
Acting Chief Counsel
Internal Revenue Service
1111 Constitution Avenue
Washington, DC 20224

Dear Mr. Paul,

Recently, the Internal Revenue Service issued Revenue Procedure 2021-1, 2021-1 I.R.B. 1 (January 4, 2021), setting forth the procedures and fees for private letter ruling requests and significantly increasing the general fee for private letter rulings from $30,000 to $38,000. At the same time that Rev. Proc. 2021-1 was released, the IRS issued a *Counsel Statement and Invitation for Public Comment on PLR User Fee Increase* (the "Counsel Statement"). The Counsel Statement explains that the increase in the PLR user fee was driven by a combination of the costing method, a decline in the number of overall rulings issued (which the IRS acknowledges may, in part, be a result of past increases in user fees) and an increase in the relative complexity of the rulings that are requested1. The Counsel Statement recognizes the critical role that private letter rulings play in the tax administration process and solicits public input on how the fee structure might better match the specific rulings requested.

The National Association of Bond Lawyers ("NABL") fully agrees that the private letter ruling

process plays a significant role in tax administration but observes that the significant size of the user fee, even before the recent increase, has discouraged taxpayers from seeking private letter rulings. In a letter dated November 4, 2019, and subsequent letters dated March 4, 2020, and September 18, 2020 (collectively, the "Prior Letters"), NABL suggested that the significant increase of the user fee over the years has resulted in a meaningful drop in the number of PLRs issued to state and local governments (a point consistent with the Counsel Statement). NABL further provided reasons why state and local governments should be a specific category of taxpayers that are subject to a lower user fee and recommended that the Internal Revenue Service reduce the user fee that is charged to state and local governments for PLRs. Copies of the Prior Letters are enclosed with this letter. NABL asks that this letter and the Prior Letters be considered as part of the comments submitted in response to the Counsel Statement.

If the Internal Revenue Service cannot agree to lower user fees generally for ruling requests for state and local governments, we urge that lower user fees be available for routine ruling requests. Examples of routine requests under Sections 103 and 141-150 of the Internal Revenue Code of 1986 would include all requests relating to extensions of deadlines or correction of inadvertent errors in filings and documentation and requests relating to tax elections not otherwise covered by the reduced user fee for certain requests under Treasury Regulations Section 301.9100. We observe that Chief Counsel attorneys in Branch 5 would be in a position to provide useful feedback regarding rulings provided in past years that have required fewer resources and should be eligible for reduced ruling fees.

These supplemental comments were prepared by an ad hoc task force comprising the individuals listed on Appendix A and were approved by the NABL Board of Directors. If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux, Director of Governmental Affairs, in our Washington DC office, at (518) 469-1565 or at jgiroux@nabl.org.

Sincerely,

Teri M. Guarnaccia
President, National Association of Bond Lawyers
Washington, DC

CC:
Allyson Belsome, Senior Manager, Tax-Exempt Bonds, Internal Revenue Service
Ursula S. Gillis, Chief Financial Officer, Internal Revenue Service
Helen M. Hubbard, Associate Chief Counsel, Financial Institutions and Products, Internal Revenue Service
Edward Killen, Acting Commissioner, Tax Exempt and Government Entities Division, Internal Revenue Service
Johanna Som de Cerff, Acting Branch Chief of Branch 5, Financial Institutions and Products, Internal Revenue Service
Kathryn Zuba, Associate Chief Counsel, Procedure and Administration, Internal Revenue Service

Enclosures:
NABL Letter to the IRS dated September 18, 2020
NABL Letter to the IRS dated March 4, 2020
NABL Letter to the IRS dated November 4, 2019

APPENDIX A
NABL AD HOC TASK FORCE

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FOOTNOTES

1Arguably, the higher concentration of complex rulings is also a function, at least in part, of past increases in user fees. An increase in the costs necessary to obtain a private letter ruling may raise the threshold below which a taxpayer is willing to take a position without a private letter ruling, leaving only the more complex questions submitted for ruling requests.

END FOOTNOTES

TAX - PENNSYLVANIA

In re Coatesville Area School District

Supreme Court of Pennsylvania - January 20, 2021 - 244 A.3d 373

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 charitable purposes of tax-exempt taxpayer's property.

After the trial court issued identical orders under separate docket numbers affirming the board's decision, city, school district, and taxpayer cross-appealed, school district filed a notice of intervention in city's case, and appeals were consolidated.

Following remand by the Commonwealth Court, the Court of Common Pleas issued two essentially identical, but differently captioned decisions and orders. School district and taxpayer cross-appealed as to the ruling in district's case, but not as to the identical simultaneous ruling with contained the city's docket number.

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. School district and taxpayer appealed.

The Supreme Court held that:

- Res judicata did not bar school district's appeal;
- Collateral estoppel did not bar school district's appeal; and
- Appellate review in school district's case would not have impermissibly created an irreconcilable conflict from any ruling other than an affirmance.

Res judicata did not bar school district's appeal following intervention in city's parallel contemporaneous appeal with a different docket number of trial court's determination that tax-exempt taxpayer's property was entitled to a partial exemption from taxation based on property's charitable purposes, even though subject matter and sole issue of appeals were identical and deemed consolidated for disposition only, where appeal was not a recasting of an original cause of action to get a second bite at the apple, it was not clear that final judgment in city's case was a prior judgment as required for application of res judicata, and claim preclusion would have served no salutary purpose.

Collateral estoppel did not bar school district's appeal following intervention in city's parallel contemporaneous appeal with a different docket number of trial court's determination that tax-exempt taxpayer's property was entitled to a partial exemption from taxation based on property's charitable purposes; there was no discrete subset issue within taxing districts' overall claim that should have been foreclosed from resolution, but rather claim and legal issue were the same, whether property was correctly accorded 72 percent tax-exempt status.

Review of school district's appeal following intervention in city's parallel contemporaneous appeal with a different docket number of trial court's determination that tax-exempt taxpayer's property was entitled to a partial exemption from taxation based on property's charitable purposes would not have impermissibly created an irreconcilable conflict from any ruling other than an affirmance of trial court's order, notwithstanding conflict, if any, with earlier final order in city's case, which affirmed board's assessment, since assessment figure ultimately reached in school district's appeal would have been mandatory in relation to county assessment office.

Qualified Opportunity Zones: Delayed Timelines and Tracking Changes.

The opportunity zone program and its investors have not escaped the uncertainties and upheaval

brought on by the pandemic. Christopher Hanewald of CBIZ & Mayer Hoffman McCann P.C. sorts out the guidance and outlines remaining questions.

During the past year, world events, including those in our country and even within our own neighborhoods, have led to an endless barrage of changes requiring near-constant adaptation.

Businesses across all industries have been presented with the perfect storm of challenges: chasing rapid shifts in consumer behavior while untangling a web of new legislation enacted to blunt the economic impact of the Covid-19 pandemic.

While each industry faces its own unique challenges, real estate owners, investors, and managers have seen demographic trends reverse course overnight as a new work-from-home culture allows workers to leave high-priced city centers in favor of spacious suburbs or even across state lines. More specifically within the industry, opportunity zone organizers and investors have been left to reassess projects at all stages of development. Following creation of the qualified opportunity zone (QOZ) program in the Tax Cuts and Jobs Act, interested parties waited nearly two years before regulations were finalized by the Treasury and the IRS. As QOZ projects across the country sought to move forward with this new-founded clarity in 2020, most aspects of business were put on an indefinite delay as the pandemic took hold. Now, after 500 pages of final regulations, multiple IRS notices, and deadline delays in the last 15 months, it is time to take stock of what we know, what has changed, and finally review what we still wonder about.

Starting with the easy part—what we know. Except for changes implemented by the notices discussed below, the original QOZ framework remains mostly intact. Eligible gains (i.e., a gain treated as capital by the Internal Revenue Code) must be reinvested into a qualified opportunity fund (QOF) within 180 days. Exceptions do apply to the 180-day window for gains recognized by partners in a partnership.

Upon receipt of investor funds, the QOF must then turn its attention to its first applicable 90% testing date. While the timing of such testing date has been subject to changes, the manner in which a QOF satisfies the test remains the same: (1) invest at least 90% of the QOFs assets in qualified opportunity business property (QOZBP); or (2) invest at least 90% of the QOFs assets in stock or partnership interests of a qualified opportunity zone business (QOZB). The former requires a QOF to directly operate a trade or business while the latter permits a QOF to simply hold interests in a lower tier trade or business that satisfies QOZB requirements. QOFs must test their capital deployment on the last day of the first six-month period of the tax year and again on the last day of the tax year—reporting the results of those two tests on Form 8996 which is attached to the QOF's tax return. Regardless of structure, the trade or business operated by the QOF or QOZB must meet tax code Section 162 trade or business requirements as supplemented by the QOZ final regulations—be wary of triple-net lease "businesses."

QOZBs, on the other hand, are subject to the so-called 70% test, which requires a QOZB to have at least 70% of all its tangible property qualify as QOZBP. For property to qualify as QOZBP, such property must be: (1) acquired by purchase or lease after Dec. 31, 2017; (2) the original use of the property in the QOZ must have commenced with the QOZB or the QOZB must substantially improve the property; and (3) during 90% of the QOZB's holding period of the tangible property, 70% of the use of the tangible property must have been in a QOZ. As a result of the lower testing threshold applicable to a QOZB, businesses are incentivized to utilize a two-tier operating structure in order to avail themselves of the 70% testing standard rather than operate an investment directly out of a QOF.

While the above only scratches the surface of QOZ operational requirements, it provides a baseline to begin discussing the changes implemented below:

- Notice 2020-23—On April 9, 2020, this notice was issued to provide broad relief in the form of deadline delays for taxpayers concerning a number of items. As it relates to QOZs, the notice extended the 180-day window for individual taxpayers to invest eligible gains in a QOF. Essentially, for any taxpayer whose 180-day investment window would have terminated on a date on or after April 1, 2020, such date was automatically extended to July 15, 2020.
- Notice 2020-39—On June 4, 2020, the IRS issued Notice 2020-39, which expanded upon the preceding notice to further delay the applicable deadlines. Specifically, this notice provided that if a taxpayer's 180-day investment window was to expire between April 1, 2020, and Dec. 31, 2020, the taxpayer's deadline was automatically extended to Dec. 31, 2020. Moreover, the notice introduced a reasonable cause exception for QOFs that exempted any QOF from statutory penalties for failure to meet the 90% test for any semiannual testing dates falling between April 1, 2020, and Dec. 31, 2020. Additionally, the notice suspended working capital safe harbor and substantial improvement timelines—the former of which provided for QOZBs to be eligible for not more than an additional 24 months to expend working capital assets.
- Notice 2021-10—Finally, on Jan. 19, 2021, the IRS issued this notice which further extended relief granted previously. For individuals, Notice 2021-10 again extended the 180-day investment window for any taxpayer whose ability to reinvest gains was supposed to expire between April 1, 2020, through March 31, 2021. Thus, a taxpayer with eligible gains from the latter part of 2019 will have the ability to potentially reinvest those gains up until March 31, 2021. Following suit with the previous Notice, a reasonable cause exception was provided for QOFs concerning the 90% test. Any failure to satisfy the 90% test between April 1, 2020, and June 30, 2021, will automatically be deemed to be due to reasonable cause with no penalty imposed. Furthermore, this notice provided additional time for any property being substantially improved—now allowing for up to 42 months for substantial improvement. As for working capital safe harbor plans, the notice is not clear whether all QOZBs utilizing such a plan automatically receive an additional 24 months or whether some evidence of actual delay must be presented.

The above mixture of delays and extensions is extremely taxpayer friendly. The extended 180-day investment window means that a taxpayer who recognized a capital gain realization event on or after Oct. 4, 2019, still can reinvest those eligible gains until March 31, 2021. Moreover, the reasonable cause delays for QOF testing requirements means that any QOF which was certified and accepted initial investments from taxpayers on or after June 30, 2019, will not be required to satisfy its first 90% test until Dec. 31, 2021. While these changes are certainly welcome, the constant stream of updates is increasing the complexity for a program that already has been deemed too complicated for some.

Now, a look ahead to identify what many QOZ organizers and advisors continue to wonder about. Despite more than $15 Billion of inflows to QOFs since the legislation's inception, there is still a surprising amount of uncertainty in a number of areas. At the outset, the barebones legislation and first round of proposed regulations strongly favored the real estate industry. Definitions related to substantial improvement and working capital safe harbor plans enabled real estate developments to begin moving dirt early in 2019; whereas investors interested in operating businesses were left speculating about how regulations apply to them. The questions below represent a sampling of areas for which more guidance can be expected:

- What is the impact of remote workers to the 50% income test required for QOZBs? Will reasonable cause exemptions be enacted for workforces disrupted by the pandemic?
- The applicability of 31-month working capital safe harbor plans in the context of developing a

trade or business. Is this only applicable to real estate development and startups?
- Will going-concern businesses relocated to a QOZ be able to avail themselves of the safe harbor?
- Will further perimeters or limitations be implemented concerning QOF reinvestment of gains upon a sale at the QOZB level? Will a limit be instituted for how many times a QOF can fail the 90% test?

The above is by no means an exhaustive list of questions; however, they do represent areas in which significant uncertainty still exists. In addition to those questions, investors face external headwinds with the potential to alter the cost-benefit analysis of a potential QOZ investment. A new presidential administration brings with it the potential for an increase in capital gains rates—a drag on future investment returns as it relates to the initial eligible gain. Proposed legislation may seek to increase administrative reporting requirements for managers of QOFs, as the government makes a push to quantify the effect and benefits of the QOZ program. Finally, investors desiring a 10% basis step-up as a result of their investment will need to deploy capital before Dec. 31, 2021, in order to satisfy the 5-year holding requirements prior to the 2026 deadline when taxes on the original eligible gains are due. Interested parties will need to continue to monitor developments and work with their tax advisors to understand and navigate the ever-shifting landscape.

Bloomberg Law

March 12, 2021

This column does not necessarily reflect the opinion of The Bureau of National Affairs, Inc. or its owners.

Author Information

Christopher Hanewald is a strategic tax advisor with CBIZ & Mayer Hoffman McCann P.C.

COVID-19 Relief for New Markets Tax Credit Program and Opportunity Zone Program: Butler Snow

Five-Year Extension of New Markets Tax Credit Program

As we have all seen, the COVID-19 pandemic has created economic suffering for each and every one of our communities. However, for those severely distressed, low-income communities which were already struggling to entice new capital investment, the setback is even more severe. That said, the government has made efforts to support those areas most in need through a set of tax provisions attached to the Consolidated Appropriations Act of 2021 (Act). The Act, signed into law on December 27, 2020, includes a five-year, $25 billion extension of the New Markets Tax Credit (NMTC) program, which is the largest extension in the program's history. Prior to this extension, the NMTC program was set to expire on December 31, 2020, after 20 years of success stories and strong bi-partisan support. Under the Act, the NMTC program will expire on December 31, 2025*.

The Act's extension and enhancement of the NMTC program are a welcome response to the immediate economic crisis brought on by the pandemic. The additional $25 billion in credit allocation over the next five years will deliver vital resources to low-income and rural communities, supporting and growing businesses, creating jobs and increasing economic opportunity at a time when our underserved communities need it the most. According to the NMTC Coalition, the projected impact includes an estimated 255 new or improved healthcare facilities; 690 new manufacturing businesses; 275 mixed-use projects; and 775 investments in community facilities,

including non-profits, Boys and Girls Clubs, and daycare centers. It is also expected that such significant backing to the NMTC program will generate nearly 600,000 jobs.

The NMTC program is designed to encourage capital investment in low-income areas that have traditionally had inadequate access to capital. Established by Congress in 2000, the NMTC program permits institutional investors to receive a credit against federal income taxes for making equity investments in financial intermediaries known as Community Development Entities (CDEs). For every $1 invested into a CDE, a 39% tax credit is generated over a seven-year period. CDEs that receive NMTC allocation authority use the capital raised to make investments in, or loans to, businesses located in low-income and marginalized communities. The resulting subsidy to a project generated from the monetized NMTCs can amount to as much as 20% – 25% of the total project costs.

The NMTC program has proven to be an effective means of rebuilding economically distressed communities by targeting projects that support job creation, drive economic growth or provide essential services. The five-year extension will only further the economic development impact of the NMTC program and help sustain and rebuild those communities devastated by the effects of COVID-19. Any developers that are considering constructing a new project or rehabilitating an existing project in a low-income area should consider pursuing NMTCs given the significant amount of allocation that will become available over the next five years.

*Last week, members of Congress introduced House and Senate versions of the New Markets Tax Credit Extension Act of 2021 (H.R. 1321/S. 456). If passed, the legislation would make the NMTC program permanent at $5 billion in credit allocation a year.

COVID-19 Relief Extension for Opportunity Zones

The ongoing pandemic has impacted all facets of the economy, including Opportunity Zones (OZs). The resulting uncertainty weighs on investors, qualified opportunity funds (QOFs) and qualified opportunity zone businesses (QOZBs) alike. Thankfully, the Internal Revenue Service recently issued guidance providing additional relief for QOZBs, QOFs and investors due to the COVID-19 pandemic. Notice 2021-10 generally extends the relief already in effect pursuant to Notice 2020-39, which expired on December 31, 2020. Details of the relief provisions included in Notice 2021-10 are outlined below.

- *180-day investment requirement for QOF investors* – 180-day deadline postponed to March 31, 2021 for any taxpayer whose last day of their 180-day window to invest capital gains in a QOF falls on or after April 1, 2020, and before March 31, 2021.
- *30-month substantial improvement period for QOFs* – Allows a QOF to disregard the period between April 1, 2020 and March 31, 2021 when calculating the 30-month period.
- *90% investment standard for QOFs* – A QOF's failure to satisfy the 90% investment standard is considered reasonable if the last day of its first six-month period of a taxable year or last day of a taxable year falls between April 1, 2020 and June 30, 2021, and the QOF meets other requirements.
- *Working capital safe harbor for QOZBs* – Any QOZB holding working capital assets intended to be covered by the working capital safe harbor before June 30, 2021 will receive up to an additional 24 months.
- *12-month reinvestment period for QOFs* – If a QOF's 12-month reinvestment period includes June 30, 2020, then the QOF will receive up to an additional 12 months to reinvest.

The OZ program, established by the Tax Cuts and Jobs Act of 2017, is a community development program aimed at stimulating economic development and job creation by providing tax incentives

for long-term investments in low-income communities across the United States. There are three main tax incentives used to encourage investment in OZs: (i) deferral of taxes on capital gains if such capital gains, or portion thereof, are reinvested in a QOF; (ii) elimination of taxes on a portion of capital gains if such capital gains remain invested in a QOF for a specified period of time; and (iii) elimination of taxes on post-acquisition appreciation with respect to investments in QOFs held for at least 10 years. OZ investors who may have initially been intimidated by the timelines for deployment and development of an active trade or business may now wish to reconsider given the additional time made available by this relief.

Butler Snow LLP

by Anna Watson

March 5, 2021

Opportunity Zones: The Early Evidence - Brookings Podcast

In an effort to spur economic development in distressed and left-behind communities, the 2017 Tax Cuts and Jobs Act created more than 8,700 Opportunity Zones across the country and offered favorable capital gains tax treatment to investments in those low-incomes communities. Although Opportunity Zones are still young, they are already stimulating rigorous research.

To share, discuss, and critique that work, the Hutchins Center on Fiscal and Monetary Policy at Brookings convened a virtual conference on Wednesday, February 24. Ed Glaeser of Harvard gave opening remarks, followed by a presentation from Kenan Fikri of the Economic Innovation Group. There were then four sessions, organized by topic, each containing several paper presentations and discussant responses.

Listen to the podcast.

OZworks Group, a Community for OZ Stakeholders, with Chris Cooley.

Can an online membership platform bring different Opportunity Zone stakeholders together and help make the OZ initiative a bigger success?

Chris Cooley is director and lead connector at OZworks Group. He has extensive experience consulting in the collaborative workspace industry, both nationally and internationally.

Listen to my conversation with Chris.

OpportunityDb

By Jimmy Atkinson

March 17, 2021

SIFMA: Tax Tools to Help Local Governments

SUMMARY

Submission for the Record by SIFMA before the House Ways & Means Select Revenue Measures Subcommittee in the hearing: “Tax Tools to Help Local Governments.”

SIFMA and its member firms strongly support increased investment in this country’s infrastructure, which will help spur job creation and economic growth. To that end, we believe it is critical to support the great work states and localities do in building and maintaining our infrastructure.

Download PDF.

States Expected Covid-19 to Bring Widespread Tax Shortfalls. It Didn’t Happen.

Tax revenues came in only slightly lower for U.S. states, contrary to projections for major declines

States have avoided a Great Depression-scale cash crisis.

Despite the pandemic’s crushing toll on the economy, total state tax revenues were roughly flat in 2020 from the year before, according to the State and Local Finance Initiative at the Urban Institute, a Washington, D.C., think tank.

Last spring, stores shut down to contain the spread of Covid-19 and unemployment skyrocketed. People spent less money on everything from shoes to restaurants to salons. Sales tax collections fell billions of dollars short of forecasts.

But widespread federal intervention buoyed households, businesses and financial markets and helped avert analysts’ doomsday projections for state revenues. The stable employment environment for the country’s most affluent workers also brought in stronger than expected tax revenue.

Continue reading.

The Wall Street Journal

By Heather Gillers and Peter Santilli

March 10, 2021

Ways and Means Holds Hearing on State and Local Tax Tools.

MBFA to Submit Comments in Support of Muni Priorities

The House Committee on Ways and Means today hosted a hearing titled, “Tax Tools to Help State

and Local Governments." The hearing featured witnesses from all levels of state and local government, representing a swath of the Public Finance Network (PFN) in which the BDA participates, and focused on municipal bonds in the context of infrastructure financing and investment.

This hearing is the first in an expected series of hearings this spring leading up to the introduction of an infrastructure package.

The Municipal Bonds for America Council (MBFA) plans to submit a statement for the record in the coming days.

BDA and MBFA Priorities Featured

While the hearing covered many state and local tax issues, municipal bonds were the centerpiece of the discussion. The Committee, while acknowledging their jurisdiction may be limited in the broader infrastructure debates, focused on many tax issues including a deep dive on municipal bonds provisions laid out in the 116th Congress H.R. 2 the Moving Forward Act.

Many BDA and MBFA priories were discussed.

These include:

- Restoration of tax-exempt Advanced Refundings (ARs);
- Expand the use of tax-exempt Private Activity Bonds (PABs);
- Raise the Bank Qualified Debt limit from $10 million to $30 million and tie to inflation; and
- Create a direct pay bond similar to the former Build America Bond (BAB) program exempt from sequestration.

Bond Dealers of America

March 12, 2021

TAX - FLORIDA

Emerson v. Hillsborough County

Supreme Court of Florida - February 25, 2021 - So.3d - 2021 WL 732664

Opponents brought declaratory judgment action, seeking to invalidate amendment to county charter that enacted a one percent sales transportation surtax and directives for allocating the tax proceeds.

The County Court invalidated portions of the charter related to the allocation and use of tax proceeds, but upheld the validity of the surtax itself. Both the county and the opponents appealed.

The Supreme Court held that:

- Provisions of county charter amendment that clashed with surtax statute were unconstitutional;
- Statutory provision that authorized charter limitations on the broad general legislative powers granted to county commissions did not operate to defeat specific provisions of the surtax statute that assigned to county commissions authority to direct the application of surtax revenues to permitted uses; and
- One percent tax levy in amendment to county charter could not be severed from the otherwise

unconstitutional provisions that clashed with the surtax statute.

Core provisions of county charter amendment that established both a transportation surtax and directives for allocating the tax proceeds directly clashed with surtax statute's assignment to county commissions of authority to direct the application of surtax revenues to various permitted uses, and thus, were unconstitutional.

Statutory provision that authorized charter limitations on the broad general legislative powers granted to county commissions did not operate to defeat specific provisions of the surtax statute that assigned to county commissions authority to direct the application of surtax revenues to permitted uses; the power to allocate the proceeds of the surtax did not fall within the scope of unenumerated powers of local self-government, but rather, was a specific power conferred directly on the county commission, as distinct from the county, in a statute that authorized the enactment of the surtax, but not the allocation of funds, by charter amendment.

One percent tax levy in amendment to county charter could not be severed from the otherwise unconstitutional provisions that clashed with the surtax statute's assignment of authority to county commissions to direct the application of surtax revenues, and thus, the charter provision was unconstitutional in its entirety; the portions of the amendment that violated the authority of the county commission under the surtax statute was not functionally independent from the portion of the amendment that imposed a transportation surtax, and thus, the unconstitutional provisions were not merely ancillary to the surtax, but were integral to the overall purpose of the surtax initiative.

TAX - NEW JERSEY

Washington Shopping Center, Inc. v. Washington Township

Tax Court of New Jersey - March 2, 2021 - N.J.Tax - 2021 WL 816739

Landowner filed property tax appeal, challenging township's tax assessments on its improved shopping center property for three tax years.

The Tax Court held that:

- Township's election not to offer testimony from its proposed testifying expert did not warrant inference that expert would have offered testimony favorable or supportive of the value conclusions and opinions of landowner's expert
- Expert's conclusion that highest and best use of property was to demolish former grocery store was flawed and not credible;
- Expert's conclusion that shopping center property's highest and best use, as vacant, was for "commercial use" was not supported by meaningful testimony or analysis;
- Court could not determine value of shopping center property's excess or surplus land;
- Court could not discern the subject property's estimated fair market value; and
- In light of insufficient credible information to allow a reliable independent finding of shopping center property's value, court would affirm the local property tax assessments.

The Wayfair Case and Covid Sparked a State Sales Tax Bonanza.

A boom in online commerce and a favorable court decision combine to fill depleted

treasuries.

Rachel Ramos, who sells graphic T-shirts on Etsy from her home in Fort Worth, was considering closing her shop before she saw business unexpectedly boom last May. The shop brought her $25,000 from May through December, compared with $11,000 the entire previous year. She's saving that money to buy a house for her and her two children. "This kept me from having to struggle as a single mother," she says.

A less obvious, indirect recipient of her windfall: the states where her customers live, which can use taxes on her T-shirt sales to help plug the holes in their budgets.

When much of the country went into quarantine last year, Americans holed up at home took to their laptops to buy just about everything online, from groceries to home goods to electronics. As they drove a surge in online retail, shoppers were also unknowingly helping to keep their state finances afloat—thanks to a 2018 Supreme Court decision in *South Dakota v. Wayfair.*

Continue reading.

Bloomberg Businessweek

By Danielle Moran

March 5, 2021

TAX - LOUISIANA

Crescent City Property Redevelopment Association, LLC v. Muniz

Court of Appeal of Louisiana, Fourth Circuit - February 10, 2021 - So.3d - 2021 WL 501092 - 2020-0421 (La.App. 4 Cir. 2/10/21)

Tax sale purchaser filed petition to quiet title and annul tax sales against city and record owners which included prior and subsequent tax sale purchasers, seeking a judgment of absolute unconditional ownership.

The District Court granted motions for partial summary judgment. Tax purchaser appealed.

The Court of Appeal held that:

- Tax sale deed was facially defective for lack of proper pre-sale tax notice by advertisement;
- Tax sale deed was facially defective for failure to list record owners and record lienholders;
- Subsequent tax sales precluded tax purchaser from claiming just title;
- Record owner, as summary judgment movant, made prima facie showing of invalidity of tax sale thus shifting burden to tax purchaser; and
- Summary judgment affidavit about provision of pre-tax sale notice was conclusory.

TAX - FLORIDA

PBT Real Estate, LLC v. Town of Palm Beach

United States Court of Appeals, Eleventh Circuit - February 22, 2021 - F.3d - 2021 WL 671583

Condominium owner brought § 1983 action in state court against town, alleging that special property tax assessments imposed on real property owners to fund town's relocation of electrical, telephone, and cable television utilities underground violated the Due Process Clause, and the Equal Protection Clause, and asserting claims under Florida law.

Action was removed to federal court. The United States District Court dismissed the state-law claims, and granted summary judgment in favor of town on the remaining claims. Owner appealed.

The Court of Appeals held that:

- Town's assessment resolution, authorizing special assessment to fund town's relocation of electrical, telephone, and cable television utilities underground, did not violate due process;
- Imposition of assessment did not violate condominium owner's equal protection rights;
- Condominium owner stated plausible claim for unconstitutional tax in violation of Florida constitution and Florida tax laws;
- Florida constitution's Takings Clause did not apply to town's special assessment; and
- Testimony did not support motion for reconsideration.

Town's property tax assessment resolution, authorizing special assessment to fund town's relocation of electrical, telephone, and cable television utilities underground was not arbitrary and capricious and was rationally related to town's legitimate purpose of improving safety, reliability, and aesthetics of all property in special assessment area, and thus, did not violate substantive due process rights of condominium owner, notwithstanding that utilities servicing area where condominium was located had been undergrounded years earlier, which was financed privately.

Town's imposition of special property tax assessment to fund town's relocation of electrical, telephone, and cable television utilities underground, which exempted real property owners who had previously been subject to special assessments for undergrounding utilities, did not violate condominium owner's equal protection rights; although utilities servicing area where condominium was located had already been undergrounded through private financing, exempted owners were not similarly situated to condominium owner because their utility lines were undergrounded pursuant to project funded by special assessments, not private funding.

Condominium owner stated plausible claim for unconstitutional tax in violation of Florida constitution and Florida tax laws based on allegations that town imposed special property tax assessment on condominium owner and other real property owners to fund town's relocation of electrical, telephone, and cable television utilities underground, but that the assessment conferred no special benefit to condominium owner because utilities servicing area where condominium was located had already been undergrounded, where complaint also incorporated general allegations, which included citations to the Florida constitution and tax laws.

Who Benefits from Federal Housing Tax Credit Changes?

On Dec, 21, 2020, Congress passed the Consolidated Appropriations Act, a year-end measure that includes a $1.4 trillion omnibus spending bill and a $900 billion Covid-19 relief bill.

Among many other things, the act fixed the 4% low-income housing tax credit (LIHTC) applicable percentage at a minimum of 4%. This comes after years of advocacy by LIHTC stakeholders and is expected to generate millions more in equity investments for affordable housing and lead to the production and preservation of tens of thousands more affordable units, with some estimating that

an additional 126,000 affordable rental homes will be created or preserved over the next decade as a result of 4% fixed rate.

Before the act, the rate had always floated and was tied to the federal borrowing rate. During the 2020 fiscal year, the rate dropped as low as 3.07% as a result of cuts to the federal borrowing rate in response to the pandemic.

Fixing the LIHTC rate to 4% has positive implications for the growth of the affordable housing market. Given that historically the floating rate was lower than 4%, the higher fixed rate creates an added incentive for equity investors to invest in LIHTC projects.

But what does this mean for developers and existing projects that have secured LIHTC bond funding in 2020, but have drawdowns carrying over to 2021? Will those projects benefit from this new rate floor?

According to the act, whether a project will benefit from the new fixed 4% rate is based on several factors:

- For bond-financed projects that rely on 2021 bonds and are entirely placed in service after Dec. 31, 2020, the 4% fixed rate will apply.
- For non-bond-financed projects, the 4% fixed rate applies to acquisitions of used buildings provided the credits were allocated after Dec. 31, 2020.

It is unclear how the IRS will handle projects with undisbursed 2020 bond proceeds and whether those projects can quality for the 4% fixed rate.

Further guidance from the IRS and Congress will be needed on this issue in the form of a statement from the IRS or a "Blue Book" report from the Joint Committee on Taxation. However, this could take some time — "Blue Book" reports, for example, have taken between nine months and two years to be issued in the past. So, what should project sponsors and developers do in the interim?

The answer to how treat tax-exempt bonds that were allocated in 2020 with undisbursed proceeds in 2021 may come down to the how the IRS chooses to define "issuance."

In the past, the IRS has defined "issuance" to mean when the proceeds were drawn down. This definition was designed in part to foil the efforts of projects that rushed to secure bond financing ahead of enactment of impending laws that would have unfavorable effects on tax-exempt bonds.

If the IRS retains this definition of "issuance," bonds issued at a floating rate below 4% in 2020 that carried undrawn funds into 2021 could be considered "issued" in 2021 and would technically be considered eligible for the 4% fixed rate. But it's hard to say whether the IRS will take the same position it did in light of the more favorable effects of the current act.

If, instead, it were to ascribe the traditional meaning to the word "issuance," then the fixed rate would only apply to bonds that are literally sold in 2021. Alternatively, the IRS could take a hybrid approach to defining "issuance," allowing for a 4% fixed rate to apply to bonds that were issued in 2020 but were drawn down exclusively in 2021.

Given the uncertainty of the IRS's approach, Sheehan Phinney is not issuing any opinions on whether 2020 bonds qualify for the 4% floor rate without further guidance from the IRS or Congress.

Another consideration is found in Section 42(m)(2)(d) of the Internal Revenue Code, which

requires that the governmental unit issuing the bonds make a determination that the project financed with tax-exempt bonds meets the requirements of the state's Qualified Allocation Plan, and that only the amount of tax credits needed for project feasibility will be applied to the project.

Essentially, the state agency issuing the bonds needs to find that the project needs the credits. So, what would happen if the parties to a project had closed a deal at a 2020 floating rate and then went back to the state to request a 4% rate?

Theoretically, the parties would need to re-evaluate the sources of financing and the state agency would need to revise its assessment of how much credit authority is needed.

The best solution seems to be that the project sponsor must take a position to either ask the state agency to reevaluate the project at a 4% fixed rate and leave it up to the state agency or to stick with the floating rate it was awarded previously.

Peter Beach and Jaclyn Fisher | February 19, 2021

Michigan Court Upholds Tax Exemption for Fitness Center Management.

SUMMARY BY TAX ANALYSTS

The Michigan Court of Appeals determined that a company hired to manage a nonprofit foundation's fitness center was not liable for the state lessee-user tax, because the foundation retained final control of the center's operations and the management company acted only as the foundation's agent.

FULL TEXT PUBLISHED BY TAX ANALYSTS

POWER WELLNESS MANAGEMENT, LLC,
Petitioner-Appellee,
and
CHELSEA HEALTH & WELLNESS FOUNDATION,
doing business as 5 HEALTHY TOWNS FOUNDATION,
Intervenor-Appellee,
v.
CITY OF DEXTER,
Respondent-Appellant.

STATE OF MICHIGAN
COURT OF APPEALS

March 4, 2021

Tax Tribunal
LC No. 18-001383-TT

Before: SWARTZLE, P.J., and RONAYNE KRAUSE and RICK, JJ.

PER CURIAM.

Respondent, City of Dexter, appeals as of right the Michigan Tax Tribunal's order granting summary

disposition under MCR 2.116(C)(10) in favor of petitioner, Power Wellness Management, LLC (the management company), and intervenor, Chelsea Health and Wellness Foundation (the foundation).1 Respondent asserts that the lessee-user tax imposed by MCL 211.181(1) should apply to the management company because it operates an otherwise tax-exempt fitness center under a management agreement with the foundation. The tax tribunal ruled that the lessee-user tax was inapplicable. We affirm.

I. PERTINENT FACTS

The subject property, the Dexter Wellness Center (the center) is owned by the foundation and is used as a fitness center. A panel of this Court previously determined that the center was exempt from ad valorem property tax2 under MCL 211.7o. *Chelsea Health & Wellness Foundation v Scio Twp*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2017 (Docket No. 332483). The foundation hired the management company to manage the operations of the fitness center. The management company is in the business of operating fitness centers, providing this service to 28 locations, 90 to 95% of which are owned by nonprofit entities like the foundation. The relationship between the foundation and the management company is governed by a Management Agreement. The Management Agreement provides that the management company operates essentially all aspects of the fitness center in exchange for a fee. The management company cannot profit from any revenue generated by the center and is not exposed to any potential losses. Although a portion of the management company's fee is subject to reduction if it fails to meet certain performance standards, the fee can never exceed the agreed-upon amount. The foundation also reimburses the management company for all costs incurred in the operation of the center. The Management Agreement does not provide for any payment of rent, money, or other consideration by the management company to the foundation. The foundation retains oversight of all the management company's activities, has access to the fitness center at all times, and can terminate the Management Agreement at any time.

Respondent assessed the lessee-user tax under MCL 211.181(1) to the management company for 2018, asserting that it used the fitness center for its business purposes. Petitioners appealed to the tax tribunal. The tax tribunal granted petitioners' motion for summary disposition under MCR 2.116(C)(10), finding that no issue of material fact existed and concluding that the management company was not subject to the lessee-user tax. On appeal, respondent argues that the tax tribunal erred by granting summary disposition to petitioners because the foundation has made the center available to the management company to use in connection for a business conducted for profit, an arrangement that should create liability under the lessee-user tax, MCL 211.181(1). We disagree.

II. STANDARD OF REVIEW

This Court's review of tax tribunal decisions "is limited to deciding if the tribunal's factual findings are supported by competent, material, and substantial evidence." *Kalamazoo v Richland Twp,* 221 Mich App 531, 535; 562 NW2d 237 (1997). "Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Barak v Oakland Co Drain Comm'r*, 246 Mich App 591, 597; 633 NW2d 489 (2001) (quotation marks and citation omitted). "In the absence of fraud, this Court reviews the [tax tribunal's] decisions to determine whether the tribunal erred in applying the law or adopted the wrong principle." *Kalamazoo*, 221 Mich App at 535. Summary disposition is permitted under MCR 2.116(C)(10) when, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." *Radtke v Everett,* 442 Mich 368, 374; 501 NW2d 155 (1993) (brackets omitted). "A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit

of any reasonable doubt to the opposing party." *Kalamazoo*, 221 Mich App at 536. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe,* 282 Mich App 1, 5; 763 NW2d 1 (2008).

III. ANALYSIS

The lessee-user tax imposed by MCL 211.181(1) is assessed in lieu of the general ad valorem property tax provided for under the *General Property Tax Act. Nomads, Inc v Romulus*, 154 Mich App 46, 52; 397 NW2d 210 (1986)3; see also MCL 211.1 et seq. As indicated, a panel of this Court previously held that the property at issue was not subject to ad valorem property tax.4 As a result, the taxing authority sought to impose the lessee-user tax. The lessee-user tax is not an ad valorem tax on realty, but instead is a specific or excise tax5 on the lessee or user. *Nomads, Inc,* 154 Mich App at 53. "It is intended to ensure that lessees of tax-exempt property will not receive an unfair advantage over lessees of privately[-]owned property." Id. (quotation marks and citation omitted). MCL 211.181(1) provides:

Except as provided in this section, if real property exempt for any reason from ad valorem property taxation is leased, loaned, or otherwise made available to and used by a private individual, association, or corporation in connection with a business conducted for profit, the lessee or user of the real property is subject to taxation in the same amount and to the same extent as though the lessee or user owned the real property. [Emphasis added.]

This Court has had several previous occasions to address the interpretation and application of MCL 211.181. In *Nomads, Inc,* 154 Mich App at 49, the petitioner operated a travel club, which was organized as a nonprofit corporation under state law, and was granted tax-exempt status by the Internal Revenue Service. The travel club leased land from the Wayne County Road Commission and constructed an aircraft hangar, an office, and maintenance facilities on this land. Id. The travel club owned and operated an airplane for use by club members. Id. at 50. The respondent assessed the lessee-user tax under MCL 211.181. Id. The tax tribunal upheld respondent's assessment, reasoning:

Petitioner (the club) does not take a profit, but that is because it is a cooperative operation [sic] whereby the savings inure to the direct benefit of Petitioner's members. This is, in our opinion, a form of profit which the members individually enjoy by virtue of the operation of our business. [Id. at 54 (alteration in original; quotation marks omitted).]

We reversed the tax tribunal's decision, determining that the rules of statutory construction required the phrase "business conducted for profit" to be construed narrowly. Id. at 54-55. Regarding the phrase "business conducted for profit," we observed the following:

The qualifying language is not an exemption; rather it defines the taxpayers on whom the lessee-user tax is imposed, i.e. lessees of tax-exempt property used in connection with business conducted for profit. . . . [T]he pertinent language set forth in subsection (1), i.e., "business conducted for profit," must be strictly construed in favor of the petitioner taxpayer. We conclude that the Tax Tribunal erred in giving the language in question a broad interpretation. We therefore conclude, resolving the uncertainty in the language in favor of petitioner, that petitioner is not subject to the lessee-user tax. [Id. at 55.]

This statutory language was also at issue in *Kalamazoo*, 221 Mich App at 532. In *Kalamazoo*, the petitioner formed an entity, the Kalamazoo Municipal Golf Association (KMGA), to operate and maintain a golf course on land that was owned by the City of Kalamazoo, but situated in Richland Township. Id. The land was exempt from taxation under MCL 211.7m. Id. at 533. Richland Township assessed a tax liability to KMGA under the lessee-user statute, MCL 211.181(1). Id. The Richland

Township Board of Review determined that the management agreement between KMGA and the City of Kalamazoo — which provided that KMGA and its employees were independent from the City of Kalamazoo and indemnified the city for claims made involving the golf course — subjected KMGA to taxation under the lessee-user statute. Id. The tax tribunal agreed that KMGA was a private association operating the golf course for profit and held that the lessee-user tax applied. Id. at 533-534. On appeal, we determined that the tax tribunal erred as a matter of law when it found that the golf course was used in connection with a "business conducted for profit." Id. at 536-537.6 We concluded that the terms of the agreements were not inconsistent with KMGA's nonprofit status. Id. at 537. Accordingly, the tax tribunal's finding "that the KMGA operated a for-profit business was not supported by competent, material, and substantial evidence." Id. We reasoned:

[T]he agreements required the KMGA to provide to the general public open golf, league, and tournaments at reasonable times, to operate food and golf-equipment concessions, and to maintain the golf course to a specified standard. In addition, . . . the agreements provided Kalamazoo with extensive oversight of the KMGA's operation of Eastern Hills. . . .

[T]he obligations of the KMGA were reasonably related to public purposes. The broader purpose of the lessee-user tax is to eliminate the unfair advantage that private-sector users of tax-exempt property would otherwise wield over their competitors leasing privately owned property. [Id. at 539.]

Importantly, in Kalamazoo, the city did not merely privatize the operation of the golf course. Id. Rather, it maintained an agreement with KMGA that retained substantial oversight over the operations, with the purpose of ensuring that affordable golf services were made available to the general public. Id. Therefore, we held that KMGA was not operating a "business conducted for profit." Id.

In the instant case, the tax tribunal's finding that the fitness center was not leased, loaned to, or made available to the management company and used in connection with a for-profit business is supported by substantial, material, and competent evidence. The foundation retained final control of the operation of the fitness center and the management company acted only as the foundation's agent. The management company was paid a fee for its services. Although the fee could have been reduced if it failed to meet certain performance benchmarks, it was not possible for the management company to participate in any revenue or profit sharing. Likewise, the management company did not have any exposure to losses. Despite the comprehensive nature of the services that the management company provided, the boundaries of the Management Agreement made clear that the management company could not exercise autonomy over the operations of the fitness center. Further, despite respondent's claim to the contrary, the management company's access to the facility was not exclusive. The Management Agreement clearly stated that the foundation could access the facility at any time and the management company was required to obtain permission from the foundation to allow any outside groups to use the facility.

Given the facts of this case, there is no reason to believe that this arrangement implicated the purpose behind the lessee-user statute, i.e., preventing a for-profit enterprise from using exempt property to gain an unfair advantage over competitors. See id. In conclusion, the tax tribunal's finding that the fitness center was not leased, loaned to, or made available to the management company and used in connection with a for-profit business was supported by substantial, material, and competent evidence. Therefore, the tax tribunal did not err by determining that the lessee-user tax imposed by MCL 211.181(1) was not applicable or by granting petitioners' motion for summary disposition under MCR 2.116(C)(10).

Respondent also argues that the management agreement was in substance a lease of the facility. Because respondent failed to identify this issue in its statement of questions presented, it is waived

and we need not consider it. See MCR 7.212(C)(5); *Busch v Holmes,* 256 Mich App 4, 12; 662 NW2d 64 (2003). However, even if the issue were properly before this Court, it fails on the merits. Christopher Renius, the assessor for the City of Dexter, testified in his deposition that there was no lease between Power Wellness and Chelsea Health. There is no evidence that Power Wellness made any payments to Chelsea Health. The taxing authority has the burden of proving that a tax statute applies. *Kalamazoo,* 221 Mich App at 536-538. Consequently, in order to avoid summary disposition, respondent needed to present evidence indicating that there was a lease. *Radtke*, 442 Mich at 374. Because respondent did not present such evidence, it has failed to meet its burden of proof, so its argument that there was a lease fails to avoid summary disposition. Petitioner, being the prevailing party, may tax costs pursuant to MCR 7.219.

Affirmed.

Brock A. Swartzle

Amy Ronayne Krause

Michelle M. Rick

FOOTNOTES

1This case is part of an ongoing dispute between the parties involving the City of Dexter's (and previously Scio Township's) efforts to assess tax on the subject property. This dispute has been before this Court on two previous occasions. See *Chelsea Health & Wellness Foundation v Scio Twp*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2017 (Docket No. 332483), and *Dexter v Chelsea Health & Wellness Foundation and Power Wellness Management LLC,* unpublished per curiam opinion of the Court of Appeals, issued December 29, 2018 (Docket No. 342364).

2"Ad valorem" means "proportional to the value of the thing taxed." Black's Law Dictionary (11th Ed).

3This case was decided before November 1, 1990, and, therefore, it is "not binding precedent, MCR 7.215(J)(1), [but it] can be considered persuasive authority," *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012).

4See *Chelsea Health & Wellness Foundation,* unpub op, p 18.

5An excise tax is "[a] tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." Black's Law Dictionary (11th ed). A specific tax is "[a] tax imposed as a fixed sum on each article or item of property of a given class or kind without regard to its value." Black's Law Dictionary (11th ed).

6Although we concluded that the tax tribunal incorrectly found that the property was being used in connection for a business purpose, we ultimately affirmed the tax tribunal's decision because it reached the correct result, that KMGA was exempt from taxation, for the wrong reason. *Kalamazoo,* 221 Mich App at 537-538.

END FOOTNOTES

California Court Rules Against Church in Special Property Tax Case.

DATED FEB. 26, 2021

Citations: *Valley Baptist Church v. City of San Rafael; A156171; Marin County Super. Ct.* No. CIV1703328

SUMMARY BY TAX ANALYSTS

In *Valley Baptist Church v. City of San Rafael*, the California Court of Appeal, First Appellate District, reversed a superior court's judgment in favor of Valley Baptist Church, finding that a religious exemption authorized by article XIII, section 3(f) of the California Constitution does not apply to non-ad-valorem special property taxes such as San Rafael's Paramedic Services Special Tax that was approved by the city's voters.

FULL TEXT PUBLISHED BY TAX ANALYSTS

VALLEY BAPTIST CHURCH,
Plaintiff and Respondent,
v.
CITY OF SAN RAFAEL,
Defendant and Appellant.

Filed 2/26/21

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

(Marin County Super. Ct. No. CIV1703328)

Trial Judge: The Honorable Stephen P. Freccero

Counsel:
Colantuono, Highsmith &Whatley, Michael G. Colantuono, Jon R. di Cristina, Conor W. Harkins; City of San Rafael, Robert F. Epstein and Lisa A. Goldfien for Defendant and Appellant.

Pacific Justice Institute, Ray D. Hacke, Kevin T. Snider for Plaintiff and Respondent.

The voters of the City of San Rafael approved by a two-thirds vote of the electorate a Paramedic Services Special Tax (Paramedic Tax) in 2010 to defray the cost of paramedic services within city boundaries. In September 2017, Valley Baptist Church (Valley Baptist) filed the instant action challenging the constitutionality of the Paramedic Tax as applied to a place of worship. Specifically, Valley Baptist argued that it is exempted from payment of all property taxes under article XIII, section 3(f) of the California Constitution, including the Paramedic Tax. This appeal presents a novel question of constitutional interpretation: whether the religious exemption authorized by article XIII, section 3(f) extends to non ad valorem special property taxes such as the Paramedic Tax.1 We conclude that it does not, and therefore reverse the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts relevant to this matter are not meaningfully in dispute. On November 2, 2010, voters of the City of San Rafael (City) enacted Ballot Measure I, a measure imposing an annual special tax up to a maximum of 14 cents per square foot on all nonresidential structures in the City to fund paramedic services. (San Rafael Ord. Nos. 1891 & 1958; see also San Rafael Mun. Code, §3.28.040.) An annual special tax up to a maximum of $108 on each residential unit in the City was also raised for similar reasons. (San Rafael Ord. No. 1891; see also San Rafael Mun. Code, § 3.28.050.) The stated purpose of Measure I was to "fully fund" the City's paramedic service program. (San Rafael Ord. No. 1891; see also San Rafael Mun. Code, §§ 3.28.020, 3.28.040, 3.28.050.)

Originally approved by City voters in 1979, the Paramedic Tax applied only to residential property. In 1988, the voters extended the Paramedic Tax to cover nonresidential structures as well. The rationale for this change was explained by then-Fire Chief Robert Marcucci as follows: "Many of our calls for service are attributed to non-residential occupancies, but they are not funding any portion of the Paramedic Budget. It could be stated that residential units are subsidizing Paramedic calls which occur in non-residential occupancies. Though some non-residential occupancies generate monies for the City in the form of Business License Fees and Sales Tax, these funds basically support the Fire Department and other City Departments, not the Paramedic Program."

In 2015-2016, the City examined its tax rolls and determined that nonresidential properties that were designated as "subject to exemption" by the Assessor had been inadvertently omitted from the Paramedic Tax assessment, even though residential properties similarly designated were being charged. City officials rectified this oversight prospectively and sought to collect a portion of the Paramedic Tax that had gone unpaid. One of the property owners which received notice of the Paramedic Tax levy was Valley Baptist.

Valley Baptist is a nonprofit religious organization that operates a church on property within city boundaries. The two buildings on the property are used by Valley Baptist exclusively for religious worship. In October 2016, Valley Baptist received a letter from the City indicating that Valley Baptist had not been correctly assessed for the Paramedic Tax. The City requested payment of past due special taxes for fiscal years 2013-2014, 2014-2015, and 2015-2016 in the amount of $13,644. Valley Baptist objected to the City's request, arguing that as a religious institution it was exempted from payment of the Paramedic Tax under the California Constitution. (See art. XIII, § 3(f) [exempting "[b]uildings, land on which they are situated, and equipment used exclusively for religious worship" from "property taxation"].) Valley Baptist eventually paid the amount due under protest.

In September 2017, Valley Baptist filed the instant action for declaratory relief and damages in Marin County Superior Court. The complaint sought a declaration that the Paramedic Tax was unconstitutional as applied to Valley Baptist and that Valley Baptist was therefore exempt from payment of the special tax. The complaint additionally sought a refund of any monies paid by Valley Baptist under the Paramedic Tax.

The City filed a motion for judgment on the pleadings in March 2018, which, after briefing and hearing, the trial court denied. In reaching its decision, the trial court explained: "The parties have not cited (and the court has been unable to find) any case which has addressed the issue of whether constitutional religious exemptions from property taxation apply to special taxes. In this case, the court discerns no legal basis for concluding that the special tax at issue is not a form of property taxation." The matter proceeded to a bench trial.

Valley Baptist renewed its argument that the trial court should declare that the Paramedic Tax was unconstitutionally applied to the church and that Valley Baptist is exempt from paying the tax. The City maintained that the Paramedic Tax is an excise tax imposed on property owners to fund a service they require and is therefore not subject to the constitutional exemption from property

taxation. The City additionally asserted that Valley Baptist is not exempt under the state constitution from non-ad valorem special property taxes.2

The trial court issued a tentative statement of decision in which it determined that Valley Baptist was constitutionally exempt from payment of the Paramedic Tax. The trial court began by considering at length whether the Paramedic Tax should be deemed a property tax or an excise tax, concluding it was best described as a property tax because it "is imposed upon the mere ownership, and not the use, of property." It reasoned that "[a]lthough the tax is clearly meant to fund a city service, it is imposed on owners regardless [of] whether they use those services" or whether the structure is occupied or used by a tenant.3

The trial court then rejected the City's argument that the religious exemption from property taxation, found in article XIII, section 3(f), is limited to ad valorem property taxes. The court determined that "[a] special tax 'assessed by any agency upon any parcel of property or upon any person as an incident of property ownership' (art. [XIII D], § 3(a)(2)), such as the Paramedic Tax, falls within the plain meaning of 'property taxation'" for purposes of the article XIII exemptions. The court observed that article XIII D, added by the voters under Proposition 218 in November 1996, "'allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge.'" (quoting *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1307). Had the Legislature intended the exemption "'from property taxation'" to apply only to ad valorem property taxes, the court reasoned, "it could have made that clear when it added the provision for special taxes or when it added section 3(a) of article XIII D." It therefore found the Paramedic Tax invalid as applied to Valley Baptist and determined that Valley Baptist was entitled to a refund, with applicable interest, of the special taxes that had already been paid.

The trial court adopted its statement of decision on November 7, 2018 and issued a related judgment. On November 21, 2018, the City filed notice of its intention to move for a new trial and/or to vacate the judgment. While the City's post-trial motions were pending, the City adopted an amendment to the Paramedic Tax on December 3, 2018 (Ordinance). The Ordinance, which states that it is "declaratory of existing law," codified the City's process for exempting taxpayers from all or a portion of the Paramedic Tax based on low or non-occupancy of the property in question.

The City's post-trial motions challenged the trial court's two legal conclusions in the case — that the Paramedic Tax is a property tax and that the religious exemption under article XIII, section 3(f) applies to special property taxes. The City additionally urged the court to reconsider its conclusion that the Paramedic Tax is a property tax based on the Ordinance, which expressly allows for avoidance or reduction of the Paramedic Tax for vacant or otherwise underutilized structures. The trial court rejected the City's arguments and denied its post-trial motions on January 4, 2019. This appeal followed.

II. DISCUSSION

A. Standards of Review and Constitutional Interpretation

The trial court's determination that Valley Baptist is exempt from a duly enacted special property tax under article XIII, section 3(f) was based upon its "plain meaning" review of that exemption and other taxation articles added by later initiative measures. We review such questions of law and constitutional interpretation de novo. (*Crawley v. Alameda County Waste Management Authority* (2015) 243 Cal.App.4th 396, 403 (*Crawley*); see *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2001) 24 Cal.4th 830, 839 (Apartment Assn.).)

Our task on appeal is "to determine and effectuate the intent of those who enacted the constitutional

provision at issue." (*Crawley*, supra, 243 Cal.App.4th at pp. 409-410.) "'The principles of constitutional interpretation are similar to those governing statutory construction.'" (*Richmond v. Shasta Community Services Dist*. (2004) 32 Cal.4th 409, 418; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 (*Lungren*).) "[W]e begin by examining the constitutional text, giving the words their ordinary meanings." (*Crawley*, at pp. 409-410; see *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 379 (*Berti*); *Lungren*, supra, 45 Cal.3d at p. 735.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) or of the voters (in the case of a provision adopted by the voters)." (*Lungren*, at p. 735.) But "[l]iteral construction should not prevail if it is contrary to the legislative intent apparent in the statute." (Ibid.) Moreover, when "'the language permits more than one reasonable interpretation, . . . the court looks "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." '" (*Berti*, at p. 379.)

When the language of an initiative measure is ambiguous, "'we refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.'" (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) In addition, "[a]pparent ambiguities in a constitutional provision 'frequently may be resolved by the contemporaneous construction of the Legislature or of the administrative agencies charged with implementing the new enactment.'" (*Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 488 (*Heckendorn*).)

Our consideration of Valley Baptist's tax exemption claim is also guided by the long-established principle that "[c]onstitutional provisions and statutes granting exemption from taxation are strictly construed to the end that such concession will be neither enlarged nor extended beyond the plain meaning of the language employed." (*Cedars of Lebanon Hosp. v. County of Los Angeles, et al.* (1950) 35 Cal.2d 729, 734 (*Cedars of Lebanon*); see also *Alpha Therapeutic Corp. v. Franchise Tax Bd*. (2000) 84 Cal.App.4th 1, 5 (*Alpha Therapeutic*) ["'Statutes granting exemption from taxation must be reasonably, but nevertheless strictly, construed against the taxpayer.'"].) Taxpayers have the burden of showing that they clearly come within the exemption. (*Alpha Therapeutic*, at p. 5; *Cedars of Lebanon,* at p. 734.) Thus, "'[a]n exemption will not be inferred from doubtful statutory language.'" (*Alpha Therapeutic*, at p. 5; see ibid. ["[a]ny doubt must be resolved against the right to the exemption."].)

B. Article XIII

In the November 1974 election, voters approved revisions to article XIII of the California Constitution, which dealt with the taxing powers of state and local government. (Prop. 8, as approved by voters, Gen. Elec. (Nov. 5, 1974); see 1 Flavin, Taxing Cal. Property (4th ed. 2019), § 6:3 (Taxing California Property).). Section 1 provides in relevant part: "Unless otherwise provided by this Constitution or the laws of the United States . . . [¶] . . . [a]ll property is taxable and shall be assessed at the same percentage of fair market value." (Art. XIII, § 1, subds. (a) & (b) ["All property so assessed shall be taxed in proportion to its full value."]. Section 1 establishes the principle of uniform assessment and taxation and confirms the Legislature's power to tax all forms of property.4 (See Grodin et al., The California State Constitution (2d ed. 2016) at p. 312 (Grodin).).

Article XIII, section 3 exempts from "property taxation" various forms of property, including "[b]uildings, land on which they are situated, and equipment used exclusively for religious worship." (Art. XIII, § 3(f); see Rev. & Tax. Code, § 206.) In addition, section 4 permits the Legislature to exempt from "property taxation" other kinds of property, including "[p]roperty used exclusively for religious, hospital, or charitable purposes" by nonprofit organizations. (Art. XIII, § 4, subd. (b).) The Legislature has adopted a statutory welfare exemption in accordance with this authorization. (See

Rev. & Tax. Code, § 214.)

Article XIII does not disclose whether places of worship are exempted from special property taxes under section 3(f). There is no mention of a "special property tax" in article XIII because, as we explain below, such category of taxation did not come into existence until the passage of Proposition 13 in 1978. We must therefore look to other extrinsic aids, including the ballot materials and history of article XIII and its legislative antecedents, to determine if the voters intended to exempt places of worship from this type of taxation. We begin with the historical context in which the religious exemption arose.

i. History of the Religious Exemption in California

"California's first constitution, adopted in 1849, broadly stated that 'Taxation shall be equal and uniform . . .' California's first Legislature nevertheless exempted property used for churches, cemeteries, libraries, and scientific institutions." (*Property Tax Exemptions* at pp. 944-945, footnotes omitted.) In 1868, the California Supreme Court struck down these exemptions, concluding that they conflicted with the state constitutional requirement that all taxation be equal and uniform. (*People v. McCreery* (1868) 34 Cal.432 (*McCreery*).)

The constitutional provision at issue stated: "'Taxation shall be equal and uniform throughout the State. All property in this State shall be taxed in proportion to its value, to be ascertained as directed by law.'" (*McCreery*, supra, 34 Cal. at p. 448.) Noting that "the section, as adopted, limited a property tax to an ad valorem tax on all property" (id. at p. 452, italics omitted), the *McCreery* court determined that the Legislature was without power to create exemptions for certain types of property (id. at pp. 453-459): "If the power exists in the Legislature to exempt growing crops, mining claims and other property mentioned, the exemption may be carried still further, until property of one class is made to bear the whole burden of taxation. The exemption, so far as it includes private property, is in plain violation of the command of the Constitution." (Id. at p. 457).

The state constitution was amended in 1879, omitting the "equal and uniform" requirement for ad valorem taxation and exempting growing crops, public schools, and government-owned property. (*Property Tax Exemptions* at p. 945.) Further amendment to the constitution in 1894 exempted public libraries, free museums, fruit and nut-bearing trees, and grapevines. (Ibid.) "This began an ever-expanding series of constitutional amendments and legislative enactments to exempt or exclude property from taxation. Early in this century additional exemptions were added for churches in 1900, veterans in 1911, vessels and colleges in 1914, orphanages in 1920, and immature trees and cemeteries in 1926." (Ibid.) While the constitutional exemption was self-executing, the Supreme Court concluded that the Legislature had the power to enact legislation providing reasonable regulations for its exercise. (*Chesney v. Byram* (1940) 15 Cal.2d 460, 463-472.)

In 1944, the voters approved a constitutional amendment permitting the Legislature to exempt from taxation all or any portion of property used exclusively for religious, hospital or charitable purposes if certain conditions were met. (*Property Tax Exemptions* at p. 946; see art. XIII, § 4, subd. (b).) The Legislature did so. (See Rev. & Tax. Code, § 214 [statutory welfare exemption].) In *Cedars of Lebanon*, supra, 35 Cal.2d 729, the Supreme Court considered the scope of the welfare exemption in a case involving several nonprofit hospitals seeking a refund of property taxes levied against certain buildings used to support their hospital operations. (Id. at pp. 731-733.) The court held that property used for a nursing school and to house essential hospital staff qualified for the tax exemption. (Id. at pp. 738-740.)

Cedars of Lebanon also considered whether the hospitals should be exempt from a levy under the Los Angeles County Flood Control Act. Although denominated a "tax," a long line of cases reaching

back to 1917 had concluded that the levy was actually a special assessment "against the real property of the district on the basis of benefits to be received." (*Cedars of Lebanon*, supra, 35 Cal.2d at p. 747.) The Supreme Court concluded: "It is well settled that exemptions of private property from taxation do not extend to special assessments, levied upon the basis of equivalent benefit, unless specifically so provided." (*Cedars of Lebanon*, at p. 747.) It rejected the hospitals' argument that the flood control levy was a "tax" for purposes of the welfare exemption because it was calculated on an ad valorem basis, explaining: "the character of a levy as a tax or an assessment depends upon whether it is exacted in compensation for a benefit to the property upon which it is made a charge, and its classification is not affected by the method adopted for collection." (Id. at p. 748.) Thus, *Cedars of Lebanon* established that certain property-related exactions such as special "assessments" are not property taxes subject to exemption by religious or nonprofit organizations.5

In *Estate of Simpson* (1954) 43 Cal.2d 594 (*Estate of Simpson*), the Supreme Court reaffirmed the longstanding principle that "[t]he constitutional exemptions from taxation refer only to property taxes," and not other forms of taxation such as local assessments or excise taxes. (Id. at pp. 597-598.) The court addressed whether certain death benefits paid out by a county retirement system were exempt from the inheritance tax. A statutory exemption provided that such benefits were "'exempt from taxation, whether state, county, municipal, or district.'" (Id. at p. 596.) The Supreme Court determined the exemption did not apply, concluding "[t]he inheritance tax is not a tax on the property itself, but is an excise imposed on the privilege of succeeding to property upon the death of the owner." (Id. at p. 597-598; see also *Ingels v. Riley* (1936) 5 Cal.2d 154, 159-160, 163 [holding that a motor vehicle license fee was an excise tax charged for use of vehicles on highways, and not a property tax subject to the constitutional exemption for veterans].)

The *Simpson* court explained that "[o]ur constitutional requirement of uniformity and equality of taxation has always been construed to apply to direct property taxes (now art. XIII, § 1) and to have no bearing upon an excise or privilege tax . . . or license fees assessed for the right to carry on certain businesses." (*Estate of Simpson,* supra, 43 Cal.2d at p. 597.) In addition, "[l]ocal assessments do not come within the meaning of the word 'tax' as used in the constitutional provision exempting lands of the state from taxation." (Ibid.) Rather, "[t]he constitutional exemptions from taxation refer only to property taxes" such as "property used for religious, hospital and charitable purposes" and "church property." (Id. at pp. 597-598.)6

The settled principle that a tax exemption provision must be strictly construed against the taxpayer also mandated this result. Because "principles of statutory construction require any doubt be resolved against the right to the exemption," the Supreme Court concluded it "would not be justified in holding the exemption from taxation clause to apply beyond the limits of property taxation, and if further extension is deemed appropriate so as to include excise or privilege taxes, such as the state inheritance tax, the act should be so clarified by the Legislature in unmistakably clear language." (Id. at pp. 602-603.)

Several principles can be gleaned from the foregoing history. First, constitutional exemptions to property taxation applied only to direct property taxes and not to other forms of taxation such as an excise or use tax. Second, since the first state constitution of 1849, the only form of "property taxation" was the ad valorem property tax, a general tax levied in proportion to the assessed value of property. Third, although certain exactions may be property-related, such as a special assessment for flood control improvement, long-standing precedent established that these exactions were not "property taxes" subject to exemption by religious or nonprofit organizations. Finally, exemptions from property taxation must be strictly construed against the right to the benefit, and any intent to extend the tax exemption must be conveyed in "unmistakably clear language." (*Estate of Simpson*, supra, 43 Cal.2d at p. 603.) Against this backdrop, we examine article XIII's ballot materials to

determine if the voters expressed a clear intent to extend the religious exemption to a species of taxation that had not yet been devised — the non-ad valorem special property tax.

ii. Proposition 8

Proposition 8 was placed on the ballot by the Legislature for the express purpose of "amending, adding, and repealing various articles and sections" of the state Constitution, including article XIII. (Ballot Pamp., Gen. Elec. (Nov. 5, 1974), text of Prop. 8, preamble, p. 72.) No argument was offered in opposition to Proposition 8. The argument in favor described the proposal as follows: "Proposition 8 revises article XIII of our Constitution. . . . [I]t makes only technical changes in the Constitution and clarifies the meaning of existing sections. [¶] . . . This measure originated in the Constitution Revision Commission. The Commission's recommendations were further refined by a blue ribbon 'task force' made up of staff from both Houses of the Legislature, the Department of Finance, and a group of outside experts. The result was this non-controversial measure which was adopted by both Houses of the Legislature with only one dissenting vote. [¶] The purpose of this amendment is not to make a change in our present tax structure, but to make the Constitution more readable and workable. . . . This means that the essence of the article is retained, but made more understandable." (Ballot Pamp., Gen. Elec. (Nov. 5, 1974), argument in favor of Prop. 8, p. 31.)7

In contrast, the analysis by the Legislative Analyst set forth in the ballot materials did acknowledge that some changes were made by the proposal. As relevant here, it identified among the "more significant" differences the following: "The present Constitution exempts from property taxation churches and other places of religious worship, except that if the church pays rent to the owner of the property, the exemption does not apply. This proposition changes this rule so that the exemption will apply to a place of religious worship whether it is rented or owned." (Ballot Pamp., Gen. Elec. (Nov. 5, 1974), analysis of Prop. 8 by Legis. Analyst, p. 30.) The authorized legislative history for Proposition 8 confirms that this was the only change to the religious exemption, which was otherwise "retained." (Constitutional Revision Task Force, Proposed Revision of Article XIII California Const., Assem. J. (May 16, 1974) Appen. at p. 13246 (Task Force Report); see also 1 Taxing Cal. Property § 6:3 [noting Legislature adopted the Task Force Report "'as part of the public record and as a statement of legislative intent'"], citing Stats. 1974, ch. 870, § 78.) Similarly, the "substance" of the constitutional authorization for the welfare exemption was also "retained," with only minor changes. (Task Force Report at p. 13255 [noting only that specific types of owners were "broadened to the more generic categories of nonprofit corporations and charitable trusts"].)

The thrust of this legislative history is that, as a general matter, Proposition 8 was not intended to make significant substantive alterations to California's property tax structure, and more specifically, the religious exemption remained largely unchanged from its pre-1974 incarnations. "In the absence of evidence of a contrary legislative or popular intent, terms used in a constitutional amendment are normally construed in light of existing statutory definitions or judicial interpretations in effect at the time of the amendment's adoption." (*Heckendorn*, supra, 42 Cal.3d at p. 487.) Given the history and judicial interpretation of the religious exemption detailed above, it seems clear that the religious exemption from "property taxation" as adopted in 1974 was intended to apply solely to general ad valorem property taxes.

Indeed, Valley Baptist concedes the point that when article XIII was enacted in 1974, the only mode of property taxation extant in California was the ad valorem property tax. This conclusion is further supported by the structure of the 1974 revision of article XIII. As stated above, section 1 of article XIII broadly declares that " [a]ll property is taxable and shall be assessed at the same percentage of . . . full value" — i.e., on an ad valorem basis. (See also Rev. & Tax. Code, § 2202 ["'Ad valorem property taxation' means any source of revenue derived from applying a property tax rate to the assessed value of property."].) By adopting exemptions from "property taxation" several sections

later in the same article, one may reasonably conclude that the voters intended to provide exemptions solely from ad valorem property taxation. Accordingly, were we construing sections 3 and 4 of article XIII shortly after their adoption in 1974, we might very well have concluded that the intent of the Legislature and the electorate to create exemptions from ad valorem property taxation was apparent on the face of the provision and consistent with the plain meaning of the term "property taxation."

Moreover, since its adoption in 1974, article XIII has only been amended twice, and not in any way relevant to the religious exemption. For example, section 3 of article XIII exempts up to $1000 of the assessed value of property from "property taxation" if the owner is an active or honorably discharged member of the armed forces, or the parent or unmarried spouse of a deceased veteran. (Art. XIII, § 3(o), (p) & (q).) Proposition 93, a legislatively referred constitutional amendment approved by the voters on November 8, 1988, deleted certain residency requirements for the veterans' property tax exemption which conflicted with recent United States Supreme Court precedent. (Ballot Pamp., Gen. Elec. (Nov. 8, 1988), analysis of Prop. 93 by Legis. Analyst, pp. 60-61 & p. 123 [text of provision]; Art. XIII, § 3(o), (p) & (q).) The amendments enacted by Proposition 93 did not impact the scope of the religious exemption or redefine the term "property taxation."

The second amendment to article XIII was adopted under Proposition 160 on November 3, 1992 as a legislatively referred constitutional amendment. Proposition 160 amended section 4(a) of article XIII, permitting the Legislature to expand the state's disabled veterans' exemption to include the homes of unmarried surviving spouses of persons who died while on active military duty as a result of a service-related injury or disease. (Ballot Pamp., Gen. Elec. (Nov. 3, 1992), analysis of Prop. 160 by Legis. Analyst and arguments for and against, pp. 28-31, p. 68 [text of provision]; art. XIII, § 4(a).) No alteration was made to the scope of the religious exemption or to the definition of "property taxation."

In short, there is nothing in article XIII — either in the text of the article itself or in ballot materials adopting or revising its provisions — that indicates the religious exemption under section 3(f) was intended to cover special property taxes. Nevertheless, the trial court here concluded that a special property tax "falls within the plain meaning" of property taxation for purposes of article XIII, section 3. The trial court reached this conclusion after analyzing the religious exemption in view of later-enacted voter initiatives — most predominately Propositions 13 and 218 — whose constitutional provisions have extensively altered property-related taxation in this state.

We thus turn to an examination of Propositions 13 and 218 to determine if the constitutional articles added by these initiative measures evince a clear intent by the electorate to extend the scope of article XIII exemptions to special property taxes. Indeed, Valley Baptist urges us to adopt this approach, arguing that the passage of Propositions 13 and 218 "present the sort of changed conditions" we must account for "in construing article XIII, § 3(f)."

C. Later-Enacted Tax Initiative Measures

Over the course of several decades, voters have enacted a series of constitutional initiative measures aimed at increasing voter control over the ability of state and local government to raise revenue. (See *Wilde v. City of Dunsmuir* (2020) 9 Cal.5th 1105, 1112.) "The series of reforms began with Proposition 13, a ballot initiative passed in 1978 to cap increases in property taxes and assessments, as well as other state and local taxes. Then, in 1996, voters passed Proposition 218, which further curbed state and local government authority to generate revenue through taxes and other exactions. Finally, in 2010, voters approved Proposition 26, which expanded the reach of these limitations by broadening the definition of 'tax' to cover 'any levy, charge, or exaction of any kind imposed by a local government,' subject to several specified exceptions." (Ibid.)

i. Proposition 13

Article XIII A, adopted in June 1978 as an initiative measure popularly known as Proposition 13, "significantly altered the system of real property taxation in this state." (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 857.) Proposition 13 added article XIII A to the California Constitution "'to assure effective real property tax relief by means of an "interlocking 'package'" ' of four provisions. [Citation.] The first provision capped the ad valorem real property tax rate at 1 percent (art. XIII A, § 1); the second limited annual increases in real property assessments to 2 percent (art. XIII A, § 2); the third required that any increase in statewide taxes be approved by two-thirds of both houses of the Legislature (art. XIII A, § 3); and the fourth required that any special tax imposed by a local government entity be approved by two-thirds of the qualified electors (art. XIII A, § 4)." (*Citizens for Fair REU Rates v. City of Redding* (2018) 6 Cal.5th 1, 10 (*Citizens for Fair REU Rates*).)

Section 4 of article XIII A provides in full: "Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district." (Art. XIII A, § 4, italics added.) Section 4 thus "prohibits the imposition of a special tax that is an ad valorem tax on real property." (*Heckendorn*, supra, 42 Cal.3d at pp. 486, 489; see *City of Camarillo v. County of Ventura* (1994) 26 Cal.App.4th 1351, 1355 ["Special taxes are not ad valorem property taxes."].)

Following the passage of Proposition 13, a new type of constitutionally authorized property-related taxation was recognized — the non-ad valorem special property tax. In *Heckendorn*, supra, 42 Cal.3d 481, the Supreme Court upheld a special tax to fund police and fire protection based on parcel size which had been approved by the requisite two-thirds vote. (Id., at pp. 483-484, 486-489.) Significantly, the high court concluded that the special parcel tax at issue was not an ad valorem property tax and was therefore authorized under article XIII A, section 4. (Id., at pp. 486-487; see also *Digre*, supra, 205 Cal.App.3d at p. 110 ["the non-ad valorem special property tax appears as a new entity in *Heckendorn*"].) Thereafter, in *Neilson*, supra, 133 Cal.App.4th 1296, the Court of Appeal upheld the constitutionality of a flat-rate special parcel tax enacted by a two-thirds vote to fund several specific municipal objectives. (Id. at p. 1310.) After finding that the parcel tax was a special rather than a general tax, the *Neilson* court rejected the claim that taxes imposed on the basis of property ownership must be levied as an ad valorem tax. The court held: "[T]he California Constitution does not prohibit a tax on the mere ownership of real property if the tax is a special tax and not an ad valorem tax." (Id. at pp. 1301, 1308, citing art. XIII D, § 3.)

Article XIII A does not reference the article XIII exemptions from property taxation, including the religious exemption. Nor was any mention made of religious exemptions to property taxation in the official title and summary to Proposition 13 or in the analysis prepared by the Legislative Analyst. (Ballot Pamp., Primary Elec. (June 6, 1978) pp. 56-60.) While proponents of Proposition 13 argued to the voters that the measure "DOES NOT remove tax exemptions for churches or charities" (Id. at p. 58), nothing about this statement suggests that these existing tax exemptions would be extended to include the new special taxes authorized by section 4 of article XIII A.

On the contrary, the ballot materials seem to describe special taxes as distinct from the ad valorem "property taxes" subject to exemption. For example, according to the statement of the Legislative Analyst, Proposition 13 "would: (1) place a limit on the amount of property taxes that could be collected by local governments, (2) restrict the growth in the assessed value of property subject to taxation, (3) require a two-thirds vote of the Legislature to increase state tax revenues, and (4) authorize local governments to impose certain nonproperty taxes if two-thirds of the voters give their approval in a local election." (Id. at p. 56, italics added.) Similarly, the proponents of the ballot

measure stated that the initiative "[l]imits property tax to 1% of market value . . . and requires all other tax raises to be approved by the people." (Id. at p. 58.)

The Supreme Court also drew a distinction between "property taxation" and special taxes in several opinions following the enactment of Proposition 13. For example, in upholding the constitutionality of Proposition 13, the Supreme Court described the four provisions of article XIII A as an interrelated package intended "to assure effective real property tax relief," stating: "Since the total real property tax is a function of both rate and assessment, sections 1 and 2 unite to assure that both variables in the property tax equation are subject to control. Moreover, since any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies of other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes." (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 231, some italics added; see also *Rider v. County of San Diego* (1991) 1 Cal.4th 1, 7 [quoting *Amador Valley*]; *Huntington Park Redevelopment Agency v. Martin* (1985) 38 Cal.3d 100, 105 ["The purpose of section 4 is to prevent the government from recouping its losses from decreased property taxes by imposing or increasing other taxes," italics added]; *Heckendorn*, supra, 42 Cal.3d at pp. 488-489 [quoting *Huntington Park*].) Thus, judicial construction of the terms "property tax" and "special tax" did not regard these concepts as overlapping (at least until the passage of Proposition 218, discussed below).

If special taxes under Proposition 13 were intended for inclusion under the religious exemption provisions of article XIII, it was not made apparent by the text of article XIII A or its accompanying ballot materials. "'We cannot presume that . . . the voters intended the initiative to effect a change in law that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.'" (*People v. Valencia* (2017) 3 Cal.5th 347, 364.) Proposition 13 therefore does not supply the basis for extending the religious exemption to special property taxes.

ii. Proposition 218

California's voters approved Proposition 218 in 1996, adding articles XIII C and XIII D to the California Constitution. Proposition 218 "was aimed at the perceived abuses committed by local governments in their attempts to raise revenue in the aftermath of Proposition 13. Article XIII D is particularly aimed at special benefits assessments and other levies incident to property ownership, which levies are not considered taxes and thus are not limited by section 4 of Article XIII A." (*Grodin*, at p. 405.) Article XIII C was intended to settle litigation over the definition of a "special tax" and to require voter approval before any tax was passed by local government. (Id. at pp. 398-399.)

"As enacted, article XIII C provided that '[a]ll taxes imposed by any local government shall be deemed to be either general taxes or special taxes.' (Art. XIII C, § 2, subd. (a).) Local governments may not impose, increase, or extend: (1) any general tax, unless approved by a majority vote at a general election; or (2) any special tax, unless approved by a two-thirds vote. (Art. XIII C, § 2, subds. (b), (d).)." (*Citizens for Fair REU Rates*, supra, 6 Cal.5th at p. 10-11.) Article XIII C defines a special tax as "any tax imposed for specific purposes, including a tax imposed for specific purposes, which is placed into a general fund." (Art. XIII, § 1, subd. (d).)8

Article XIII D circumscribes the ability of local governments to impose or increase property-related taxes, assessments or fees. Pursuant to article XIII D, "[n]o tax, assessment, fee, or charge shall be assessed by any agency upon any parcel of property or upon any person as an incident of property ownership except: (1) [t]he ad valorem property tax imposed pursuant to Article XIII and Article XIII A[;] [¶] (2) [a]ny special tax receiving a two-thirds vote pursuant to Section 4 of Article XIII A[;] [¶]

(3) [a]ssessments as provided by this article[; and] [¶] (4) [f]ees or charges for property related services as provided by this article." (Art. XIII D, § 3, subd. (a).)

Thus, Proposition 218 confirmed that local government can impose a non-ad valorem special tax "upon any parcel of property or upon any person as an incident of property ownership" if the tax is approved by a two-thirds vote of the electorate. (See art. XIII A, § 4 [permitting non-ad valorem special taxes subject to a two-thirds vote]; art. XIII D, § 3, subd. (a)(2) [permitting special taxes imposed as an incident of property ownership if adopted pursuant to section 4 of article XIII A]; *Neilson*, supra, 133 Cal.App.4th at p. 1308.) Stated another way, Proposition 218 confirmed that a non-ad valorem special tax is a "property tax" when it is based on the mere ownership of real property.

Because section 3(a) of article XIII D permits the adoption of a special property tax, the trial court below concluded that such tax falls within the plain meaning of "property taxation" for purposes of the article XIII exemptions. However, both the text of Proposition 218 and the ballot materials are silent on the question of property tax exemptions, including the religious exemption. (See *Ballot Pamp., Gen. Elec.* (Nov. 5, 1996), analysis by Legis. Analyst, pp. 72-75, 108-109; see generally art. XIII C & art. XIII D.) Absent from the constitutional text or the legislative materials is any indication that the voters intended to expand the scope of article XIII's religious exemption to cover a new form of property taxation recognized in Proposition 218. While the trial court's reading of these constitutional provisions is certainly plausible, it is by no means apparent from a "plain reading" of article XIII D that it was intended to effectuate a sweeping change of article XIII's religious exemption.

On the contrary, Proposition 218 did alter another longstanding exemption, one exempting state and local governments from payment of special assessments. Under prior law, "publicly owned and used property that is exempt from property taxation [was] impliedly exempt from special assessments." (*Loyola Marymount Univ. v. L.A. Unified School Dist*. (1996) 45 Cal.App.4th 1256, 1268.) "The rationale behind a public entity's exemption from property taxes and special assessments [was] to prevent one tax-supported entity from siphoning tax money from another such entity". (San Marcos, supra, 42 Cal.3d at p. 161; see also *Inglewood v. County of Los Angeles* (1929) 207 Cal. 697, 703 [holding there is an implied exception of public property from special assessments].)

Proposition 218 severely curtailed this implied constitutional exemption, doing so expressly. (See art. XIII D, § 4, subd. (a) ["Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit." (italics added)]; see Ballot Pamp., Gen. Elec. (Nov. 5, 1996), analysis of Legis. Analyst, p. 74 [under the measure "local governments must charge schools and other public agencies their share of assessments. Currently, public agencies generally do not pay assessments."].) Thus, the drafters of Proposition 218 understood how to alter the scope of an exemption in "unmistakably clear language." (See *Estate of Simpson*, supra, 43 Cal.2d at p. 603.)

The trial court below reasoned that if Proposition 218 had intended the exemption from "property taxation" to apply only to ad valorem property taxes, "it could have made that clear when [adding] the provision for special taxes or when [adding] section 3(a) of article XIII D." But that turns the rule of strict construction on its head. An intent to extend the benefits of a constitutional or statutory tax exemption must be clearly expressed or strongly implied by the text of the provision or its legislative materials, and any doubt must be resolved against the assertion of the tax exemption. (*Cedars of Lebanon*, supra, 35 Cal.2d at p. 734; *Alpha Therapeutic*, supra, 84 Cal.App.4th at p. 5.) Here, Valley Baptist has failed to meet its burden of showing that the limitations imposed under article XIII D, section 3 for the imposition of taxes, charges, and assessments also impliedly exempted places of

worship from paying special property taxes.9 In sum, nothing in Proposition 218 evinces an intent by the electorate to affect the scope of the religious exemption in section 3(f) of article XIII.

D. Other Indicia of Constitutional Intent

i. Legislative Interpretation

Contemporaneous interpretation by the Legislature provides further support for the conclusion that the article XIII exemptions from property taxation apply solely to ad valorem taxes. (See *Heckendorn*, supra, 42 Cal.3d at p. 488 ["[a]pparent ambiguities in a constitutional provision 'frequently may be resolved by the contemporaneous construction of the Legislature"]; see also *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal.4th 277, 290-291 (*Greene*) ["[W]hen the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. . . . the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision'" and is subject to "'significant weight and deference'"].) Shortly after the passage of Proposition 13, the Legislature adopted Government Code section 53978, which expressly authorized a special tax for police and fire protection. (See Stats. 1979, ch. 397, § 1.)

The statute provides in pertinent part: "Any local agency which provides fire protection or prevention services . . . or which provides police protection services, may, by ordinance, determine and propose for adoption a special tax for fire protection and prevention provided by the local agency, or a special tax for police protection services provided by the local agency, or both of such special taxes if both such services are provided by the local agency, other than ad valorem property taxes, pursuant to this section . . . Such proposition shall be submitted to the voters of the affected area or zone, or of the district, and shall take effect upon approval of two– thirds of the voters voting upon such proposition. The local agency which fixes such a special tax shall not, however, impose such tax upon a federal or state governmental agency or another local agency." (Gov. Code, § 53978, subd. (a), italics added.) Moreover, the special tax authorized by the statute "shall be levied on a parcel, class of improvement to property, or use of property basis, or a combination thereof." (Id., subd. (b).)

Through its enactment of Government Code section 53978, the Legislature not only authorized a special property tax, it also expressly exempted public agencies from payment of the tax. But public agencies are already exempted from "property taxation" under article XIII. (See art. XIII, subd. 3(a) & (b).). That the Legislature felt it necessary to exempt those agencies from the special tax authorized by Government Code section 53978 is highly persuasive evidence that it continued to view the exemptions from property taxation in article XIII as limited to ad valorem property taxes. (Compare *Heckendorn*, supra, 42 Cal.3d at p. 488 [finding the Legislative construction of special tax in Government Code section 53978 of "'very persuasive significance'" when concluding that a parcel tax adopted pursuant to that statute was a permissible special property tax]; see also Greene, supra, 49 Cal.4th at p. 291 [finding Government Code section 53753, enacted specifically to address the balloting scheme for assessments adopted under article XIII D, section 4, was persuasive on the question whether such ballots must be voted on in secret in accordance with article II, section 7].) In short, if public agencies were already exempt from special taxes under article XIII, section 3(f), there would have been no need to include the specific exemption in Government Code section 53978. (See *People v. Leiva* (2013) 56 Cal.4th 498, 506 ["[W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage."].)

ii. Agency Construction

The State Board of Equalization (SBE) reached the same conclusion forty years ago, opining that the City of Palmdale was not required to exempt a church from paying a special tax levied pursuant to

Government Code section 53978 to finance fire protection services. (State Bd. of Equalization, legal opn. of counsel, Hope Lutheran Church — Exemption from Special Tax Oct. 17, 1980 (SBE Opinion).)10 The SBE Opinion cited long-standing precedent in concluding that, while the state could grant a church exemption without running afoul of the Establishment Clause (*Walz v. Tax Commission* (1970) 397 U.S. 664 (*Walz)*), "[t]here is no requirement that state or local government exempt churches from paying taxes under the Free Exercise Clause of the United States Constitution or the California Constitution." (SBE Opinion at p. 1.) Rather, "[c]hurches may be required to bear their fair share of a tax so long as the tax or fee is not exacted for the privilege of exercising their religion." (Id. at p. 2, citing *Watchtower Bible and Tract Society Inc., v. County of Los Angeles, et al.*, (1947) 30 Cal.2d 426 (*Watchtower*).) Noting that statutes granting tax exemptions must be strictly construed and that the authorizing statute exempted only governmental agencies from the special tax, the SBE opinion concluded that such a special tax could be levied against church property. (Ibid.)

Implicit in the SBE opinion is the conclusion discussed above that the article XIII exemptions do not extend to special property taxes. Thus, any exemptions from such special taxes are limited to those expressly authorized elsewhere. The related Tax Annotation makes this inference explicit, stating: "The church exemption applies to ad valorem property taxes and does not prevent collection by a local governmental agency of a special tax imposed for fire protection or prevention services." (Property Tax Annotations, Annotation 230.0040, Special Taxes (Oct. 17, 1980).) The trial court here dismissed the SBE opinion, finding it distinguishable because the tax at issue in that case was authorized by a statute providing only a single exemption for public agencies. But that is precisely the point. If section 3(f) of article XIII exempts churches from non-ad valorem property taxes, the church in the SBE opinion would have been exempt from the Government Code section 53978 special tax regardless of the specific exemptions otherwise contained in the statute. It was not.

Of course, "[c]ourts must . . . independently judge the text of the statute [or constitutional provision]." (*Yamaha*, supra, 19 Cal.4th at p. 7.) However, the SBE has special expertise in the area of property taxation, and thus its interpretation of the meaning and legal effect of related statutes and constitutional provisions "'is entitled to consideration and respect by the courts.'" (See *California State Teachers' Retirement System v. County of Los Angeles* (2013) 216 Cal.App.4th 41, 52, fn.3, quoting *Yamaha*.) This is especially true in the present case because the SBE adopted its special tax guidance in 1980, shortly after Proposition 13 added section 4 of article XIII A to the California Constitution, and the Legislature adopted Government Code section 53978. (See Yamaha, at p. 13 [increased deference warranted where "the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted"].) Even more persuasive is the fact that the SBE has consistently maintained its position with respect to the constitutional provisions here at issue for four decades. (Ibid. [greater weight to be given where "the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing'"].) Under the circumstances, we conclude that the SBE's special tax interpretation is entitled to deference.

"Yet another factor we may consider is the fact that courts should apply a presumption that the Legislature is aware of a consistent and very long-standing administrative interpretation, and thus, the reenactment of the statute being interpreted with no modification designed to make it clear that the agency's interpretation is wrong is a strong indication that the administrative practice was, and is, consistent with underlying legislative intent." (*Yamaha Corp. of America v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 353; accord *In re Dannenberg* (2005) 34 Cal.4th 1061, 1082.) The SBE issued its special tax exemption opinion and related annotation in 1980.

As discussed above, the Legislature amended section 3 of article XIII eight years later in 1988 to revise the veterans' tax exemption from "property taxation," and this legislatively referred

constitutional amendment was subsequently approved by the voters as Proposition 93. (See art. XIII, § 3; (Ballot Pamp., Gen. Elec. (Nov. 8, 1988), analysis of Prop. 93 and arguments thereto, pp. 60-61). Similarly, Proposition 160 amended section 4(a) of article XIII in 1992, permitting the Legislature to expand the state's disabled veterans' exemption from "property taxation" to include the homes of unmarried surviving spouses of persons who died while on active military duty as a result of a service-related injury or disease. (Ballot Pamp., Gen. Elec. (Nov. 3, 1992), analysis of Prop. 160 and arguments thereto, pp. 28-31; art. XIII, § 4(a).) Yet the Legislature did nothing in these amendments to overturn the SBE's conclusion that the term "property taxation" does not include special taxes such as the one at issue here.

Indeed, Proposition 218 — adopted by the electorate 16 years after the SBE issued its special tax opinion — also did nothing to displace this longstanding administrative interpretation. This inaction lends strong support to our conclusion that the Legislature's intent in adopting and maintaining the article XIII tax exemptions was to limit them to ad valorem property taxation. And nothing in Propositions 13 and 218 has altered this view. Absent any clarification by the Legislature or the voters in "unmistakably clear" terms of their intent to expand the religious exemption to encompass duly enacted special taxes, we conclude that the religious exemptions from property taxation set forth in article XIII, sections 3 and 4, apply only to ad valorem property taxation and therefore do not exempt Valley Baptist from payment of the Paramedic Tax. (Estate of Simpson, supra, 43 Cal.2d at pp. 602-603.)11

E. Free Exercise Challenge

Valley Baptist argues on appeal that even if the Paramedic Tax is an excise tax and not a tax incident to property ownership, the tax is unconstitutionally applied against the church because it infringes on Valley Baptist's free exercise of religion. We need not resolve this relatively undeveloped claim because Valley Baptist chose to forego any free exercise challenge to the Paramedic Tax in the trial court proceedings.

In argument below, Valley Baptist made several concessions worth highlighting. Valley Baptist agreed that if the trial court characterized the Paramedic Tax as an excise tax rather than a property tax, Valley Baptist would not be exempt from it. Valley Baptist acknowledged that the article XIII exemptions from "property taxation" do not apply to assessments or fees. It also agreed that the determinative issue was the interpretation of the term "property taxation" and if the City's interpretation were adopted, "the church would be responsible" for the Paramedic Tax.

Most notably, Valley Baptist agreed in argument before the trial court that it was not raising a free exercise challenge. When counsel for Valley Baptist mentioned the federal constitutional issue in a discussion about its right to use its buildings for religious worship, the trial court cut counsel off, stating: "But that's a different analysis altogether, right? I mean, that's a different challenge, if you say an otherwise lawful tax has the effect of — is a governmental attempt to limit or constrict the free exercise of religion. That's a completely different argument, which doesn't seem, to me, placed here. [¶] The dispute between the parties that's been proffered to me that I have to resolve in order to provide declaratory relief, again, is very straightforward: Whether the California Constitution, whether the exemption — and I didn't — I haven't heard any dispute that the Valley Baptist Church is entitled to a constitutional exemption as a religious organization. [¶] The only dispute is whether the exemption applies to this specific special tax promulgated by the voters of San Rafael." Counsel for Valley Baptist replied: "That is correct, Your Honor. That is correct."

In argument on the City's new trial motion, counsel for Valley Baptist reiterated this position. The trial court stated: "But at the end of the day, I don't need to be informed by the larger federal constitutional principles that animate the treatment of religious organizations because I'm dealing with a very specific state constitutional provision. And no one has challenged that by saying that

somehow it's inconsistent with or contravenes the federal Constitution." Counsel for Valley Baptist responded: "Right, you are correct on that." Given these concessions by counsel, Valley Baptist has forfeited any free exercise challenge on appeal. (See *People v. Rudd* (1998) 63 Cal.App.4th 620, 628 ["constitutional objections must be interposed before the trial judge in order to preserve such contentions for appeal," citing cases].)

While we may overlook the forfeiture of a claim and reach the merits on appeal (see *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061), we decline to do so here. Valley Baptist raises an as applied challenge to the constitutionality of the Paramedic Tax. Yet there has been no development in the record of its assertion on appeal that the Paramedic Tax has handicapped the church's free exercise of religion. Valley Baptist's belated free exercise claim raises many questions that defy resolution on this limited factual record. In what way has the Paramedic Tax impeded its ability to conduct worship services? Does Valley Baptist claim that it is exempt only from funding paramedic services, or from other city services as well such as water, sewage, electricity, or garbage collection? How has the City exhibited "hostility" toward Valley Baptist? Because this claim was not properly presented or developed below, we have no occasion to weigh these matters for the first time on appeal.

III. DISPOSITION

The judgment is reversed, and the matter is remanded for further proceedings consistent with this opinion. The City is entitled to its costs on appeal.

Sanchez, J.

WE CONCUR:

Humes, P. J.

Banke, J.

FOOTNOTES

1 All article references are to the California Constitution. We use the terms "non-ad valorem special property tax" and "special property tax" interchangeably to refer to a special tax assessed by an agency upon a parcel of property or as an incident of property ownership under the requirements set forth in article XIII A, section 4. (See art. XIII D, § 3(a)(2).)

2 The ad valorem property tax imposed under section 1 of article XIII and permitted by article XIII D, is, as its name suggests, a general tax based upon the value of the property assessed. (See Rev. & Tax. Code, § 2202 ["'Ad valorem property taxation' means any source of revenue derived from applying a property tax rate to the assessed value of property."].) Special taxes authorized by section 4 of article XIII A, in contrast, cannot be ad valorem taxes. (Art. XIII A, § 4(b) ["Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district," italics added].)

3 As this court earlier explained: "At the most general level, a property tax is a tax whose imposition is triggered merely by the ownership of property. [Citation.] An excise tax, by contrast, is a tax whose imposition is triggered not by ownership but by some particular use of the property or privilege associated with ownership, such as the transfer of the parcel to a new owner. . . . Excise taxes are not subject to the California constitutional provisions restricting imposition of property taxes." (*Thomas v. City of East Palo Alto* (1997) 53 Cal.App.4th 1084, 1088-1089 (*Thomas*); see also

City of Oakland v. Digre (1988) 205 Cal.App.3d 99, 104-109 (*Digre*).)

4 Section 2 addresses the taxation of personal property, granting the Legislature broad authority to "classify such personal property for differential taxation or for exemption." Most forms of personal property have been exempted from taxation by the Legislature pursuant to this power. (Pope & Goodrich, California Property Tax Exemptions, Exclusions, Immunities, and Restrictions on Fair Market Valuation — Or, Whatever Became of Full Value Assessment? (1987) 18 Pacific L.J. 943, 945-946 (Property Tax Exemptions).)

5 The distinction between a property tax and an assessment remains unaltered today. Article XIII C, section 1 excludes from the definition of a "tax" any "assessments and property-related fees imposed in accordance with the provisions of article XIII D." (Art. XIII C, § 1(e)(7).) Article XIII D defines an "[a]ssessment" as "any levy or charge upon real property by an agency for a special benefit conferred upon the real property." (Id., § 2, subd. (b); see also *San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 162 (*San Marcos*) [a special assessment is "a charge imposed on particular real property for a local public improvement of direct benefit to that property, as for example a street improvement, lighting improvement, irrigation improvement, sewer connection, drainage improvement, or flood control improvement"], superseded by statute on other grounds as recognized in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 353.) While a special benefit assessment is not a tax, article XIII D, section 4 sets forth a series of procedures and requirements for the levy of an assessment.

6 The respondent in *Estate of Simpson* argued that because no state property tax existed at the time the statutory exemption was enacted, the exemption clause would be rendered meaningless if it did not apply to inheritance, gift, and income taxes as well. (*Estate of Simpson*, supra, 43 Cal.2d at p. 601-602.) The court disagreed, noting that prior to 1910, "taxes for state purposes were raised in the same manner as county taxes, that is, by ad valorem levy upon all taxable property in the state." (Id. at p. 602.) "Thus in the event that the Legislature should determine in any year to adopt some plan of ad valorem taxation for state purposes (art. XIII, § 1), [the exemption statute] would serve to exempt the rights, benefits and money in the retirement fund from such taxation." (Id. at p. 602.) It is apparent from this exchange that "property taxation" is synonymous with the ad valorem property tax.

7 By order dated May 6, 2019, we granted City's request that we take judicial notice of the ballot materials for Propositions 8, 13, and 218. On our own motion, we additionally take judicial notice of the ballot materials for Propositions 93 and 160. (See Evid. Code, §§ 452, subd. (c), 459, subd. (a); *St. John's Well Child & Family Center v. Schwarzenegger* (2010) 50 Cal.4th 960, 967, fn. 5; *Kidd v. State of California* (1988) 62 Cal.App.4th 386, 407, fn. 7.) We deny the remainder of the City's judicial notice request — which was deferred until consideration of the merits of this appeal — as unnecessary to our decision.

8 Proposition 218 did not define the term "tax." That definition was provided with the passage of Proposition 26 in 2010, which added subdivision (e) to section 1 of article XIII. (*Citizens for Fair REU Rates*, supra, 6 Cal.5th at p. 11.) Proposition 26 broadly defined "tax" to include "any levy, charge, or exaction of any kind imposed by a local government," subject to various listed exceptions for charges, fines, and fees. (Art. XIII C, § 1, subd. (e).) A charge that satisfies an exception is, by definition, not a tax, and includes charges imposed for government services or benefits conferred on the payor, charges to recoup the costs of regulatory enforcement, and special assessments and other property-related fees governed by article XIII D. (Ibid.)

9 Post-Proposition 218 case law tends to use the phrase "local property taxes" loosely when discussing article XIII D. (See *Apartment Assn.*, supra, 24 Cal.4th at p. 830, 837 ["Proposition 218

allows only four types of local property taxes: (1) an ad valorem property tax; (2) a special tax; (3) an assessment; and (4) a fee or charge."]; see also *Plantier v. Ramona Municipal Water Dist.* (2019) 7 Cal.5th 372, 381 [citing *Apartment Assn.*]; *Crawley*, supra, 243 Cal.App.4th at p. 404 [same language]; *Neilson*, supra, 133 Cal.App.4th at p. 1307 [same].) These cases, which appear to equate "local property taxes" with a wide variety of property-related exactions, are not altogether helpful in construing the exemption from "property taxation" set forth in article XIII, as it is clear that many property-related fees and assessments are not "property taxes" under the Constitution. (See art. XIII C, § 1(e), (7) [excluding from the definition of "tax" any "assessments and property-related fees imposed in accordance with the provisions of article XIII D"]; Art. XIII D, § 2(e) [defining a "fee" or "charge" as "any levy other than an ad valorem tax, a special tax, or an assessment, imposed by an agency upon a parcel or upon a person as an incident of property ownership, including a user fee or charge for a property related service."].)

10 A legal ruling of counsel in this context is "a legal opinion written and signed by the Chief Counsel or an attorney who is the Chief Counsel's designee, addressing a specific tax application inquiry from a taxpayer or taxpayer representative, a local government agency, or board staff." (Cal. Code Regs., tit. 18, § 5700, subd. (a)(2).) Annotations, in contrast, "are summaries of the conclusions reached in selected legal rulings of counsel. Annotations do not embellish or interpret the legal rulings of counsel which they summarize and do not have the force and effect of law." (Id., subd. (a)(1); see also *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 4-7 (*Yamaha*).)

11 Given the rule of strict construction we must apply, Valley Baptist's reliance on first amendment precedent to argue for an expansive reading of "property taxation" in line with "changed conditions" is misplaced. Because we conclude that the religious exemption from property taxation applies solely to ad valorem property taxation, we need not consider or resolve the parties' disagreement over the proper characterization of the Paramedic Tax as a property tax or an excise tax.

END FOOTNOTES

The Three Best Capital Sources for OZ Deals, with Hall Labs.

What are the three different classes of investors that are the most likely capital sources for Opportunity Zone funds or deals? And what are some tips for approaching and pitching to them?

Dave Kunz is managing partner and general manager of Hall Venture Partners. Will Walker is a private equity veteran and advisor to Hall Labs and HVP.

Continue reading.

OpportunityDb

By Jimmy Atkinson

March 3, 2021

Advance Refunding Bill Introduced in the Senate.

On February 25, Senator Roger Wicker (R-MS) introduced legislation reinstating advance refunding to the tax code. Senator Wicker has been a steadfast ally in support of bringing the provision back, citing the value the statute brings to local leaders as a financial management tool.

Learn more.

H.R. 451 Would Increase Highway Bond Limitation

SUMMARY BY TAX ANALYSTS

H.R. 451, the Building United States Infrastructure and Leveraging Development (BUILD) Act, introduced by House Ways and Means Committee member Earl Blumenauer, D-Ore., would double the national limitation amount for highway or surface freight transfer facility bonds.

Citations: H.R. 451; Building United States Infrastructure and Leveraging Development (BUILD) Act

FULL TEXT PUBLISHED BY TAX ANALYSTS

117TH CONGRESS
1ST SESSION

H.R. 451

To amend the Internal Revenue Code of 1986
to increase the national limitation amount for qualified highway
or surface freight transfer facility bonds.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 25, 2021

Mr. BLUMENAUER (for himself and Mr. RODNEY DAVIS of Illinois)
introduced the following bill; which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1986 to increase the national limitation amount for qualified highway or surface freight transfer facility bonds.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Building United States Infrastructure and Leveraging Development Act" or the "BUILD Act".

SEC. 2. INCREASE NATIONAL LIMITATION AMOUNT FOR QUALIFIED HIGHWAY OR SURFACE FREIGHT TRANSFER FACILITY BONDS.

(a) IN GENERAL. — Section 142(m)(2)(A) of the Internal Revenue Code of 1986 is amended by striking "$15,000,000,000" and inserting "$30,000,000,000".

(b) APPLICATION OF DAVIS-BACON ACT REQUIREMENTS. — Section 142(m) is amended by adding at the end the following new paragraph:

"(5) APPLICATION OF DAVIS-BACON ACT REQUIREMENTS. — If any proceeds of any issue are used for construction, alteration, or repair of any facility otherwise described in paragraph (15) of subsection (a), such facility shall be treated for purposes of subsection (a) as described in such paragraph only if each entity that receives such proceeds to conduct such construction, alteration, or repair agrees to comply with the provisions of subchapter IV of chapter 31 of title 40, United States Code with respect to such construction, alteration, or repair.".

(c) EFFECTIVE DATE. — The amendments made by this section shall apply to bonds issued after the date of the enactment of this Act.

DATED JAN. 25, 2021

TAX - SOUTH CAROLINA

South Carolina Public Interest Foundation v. Calhoun County Council

Supreme Court of South Carolina - February 10, 2021 - S.E.2d - 2021 WL 479824

Advocacy group and taxpayers brought action against county council seeking declaratory judgment that projects funded by referendum imposing one percent sales and use tax exceeded Capital Project Sales Tax Act's scope, and thus were invalid.

The Circuit Court entered summary judgment in county council's favor, and plaintiffs appealed.

The Supreme Court held that Act's 30-day limitations period applied to claim that projects funded by referendum exceeded Act's scope.

Capital Project Sales Tax Act's 30-day limitations period applied to claim that projects funded by

county referendum imposing one percent sales and use tax exceeded Act's scope, even though claim was substantive, rather than procedural, challenge; Act did not contain any express language limiting challenges to "the results of the referendum" to only procedural aspects.

TAX - SOUTH DAKOTA

Wings as Eagles Ministries, Inc. v. Oglala Lakota County

Supreme Court of South Dakota - February 10, 2021 - N.W.2d - 2021 WL 501428 - 2021 S.D. 8

Taxpayer appealed county commission's denial of property tax abatement request for two tax years, contending that property should have remained under charitable property tax exemption.

The Circuit Court affirmed, and taxpayer appealed.

The Supreme Court held that taxpayer was required to show that property was tax exempt during tax years to obtain property tax abatement, rather than show that it should have been exempt.

Taxpayer was required to show that property was tax exempt during tax years to obtain property tax abatement, rather than show that it should have been exempt, and could not litigate anew whether property was entitled to charitable tax exemption; county board of equalization had denied applications for property tax exemption, and taxpayer did not timely appeal those denials.

New Jersey Enacts Legislation Imposing Annual Community Service Contributions on Nonprofit Hospitals.

On February 22, 2021, New Jersey Governor Phil Murphy signed into law new legislation (A1135/S357) that clarifies and preserves the statutory property tax-exemption historically afforded to nonprofit hospitals under N.J.S.A. 54:4–3.6 while also securing from nonprofit hospitals a yearly contribution to their host municipality to help defray the costs of the municipal services they utilize. The new law takes immediate effect.

Background

The new law is New Jersey lawmakers' legislative remedy to the New Jersey Tax Court's 2015 landmark decision in *AHS Hospital Corp. v. Town of Morristown*. In that case, the Tax Court held that a nonprofit hospital in Morristown was not entitled to property tax exemption because it operated too similarly to a for-profit business. The Tax Court determined that there were insufficient proofs to draw a distinction between the for-profit and nonprofit activities conducted on the hospital property. The Tax Court also found that if other nonprofit hospitals operated in the same manner, their nonprofit status was a legal fiction because of the level of for-profit activity shown to exist at the Morristown hospital. With this decision, the Tax Court kicked the ball squarely to the New Jersey Legislature to address the modern nonprofit hospital and its entitlement, if any, to a real property tax exemption going forward.

The 2015 Tax Court decision led to a flurry of lawsuits by host municipalities against local hospitals to revoke their municipal property tax exemptions and assess real estate taxes based on the value of the hospital's real estate. In response, Bill S3299 was introduced in late 2015, seeking to require

certain nonprofit hospitals that were otherwise exempt from payment of real estate taxes to pay a community service contribution to cover the costs of providing public safety and other municipal services. The bill was left unsigned by then-Governor Chris Christie and failed to become law.

Annual Community Service Contribution

Likewise, under the recently enacted legislation certain nonprofit hospitals (as defined by the law) that are exempt from real property taxation are now required to make an annual community service contribution to the host municipality. The community service contribution for tax year 2021 equals $3 a day for each licensed bed at the nonprofit hospital as of January 1, 2020. For example, a hospital with 500 licensed beds will be assessed a community service contribution in the amount of $547,500 for tax year 2021.

The law also provides for a community service contribution for satellite emergency care facilities, which equals $300 for each day in the prior tax year. For each tax year thereafter, the per day contributions for both nonprofit hospitals and satellite emergency care facilities will increase by 2%. The community service contributions will be due and payable in equal quarterly installments, and 5% of the contribution will be shared with the county government. If any quarterly installment is not paid when due, the unpaid amount constitutes a lien after 30 days and may be enforced in the same manner as unpaid real estate taxes.

Exemption

The new law provides for an exemption from remitting the community service contribution if the owner certifies to the New Jersey Department of Health that, in the prior year, the hospital did not bill any patient for inpatient or outpatient professional or technical services rendered at the hospital, and that the hospital has provided community benefit over the preceding three years for which the hospital has filed such forms averaging at least 12% of the hospital's total expenses as documented on IRS Form 990, Schedule H, part 1, column F. The hospital must file a copy of the documentation with the municipal tax assessor on or before December 1 of the pre-tax year. Upon receipt of the documentation, the tax assessor is required to notify the hospital, on or before December 31, that it is exempt from payment of the community service contribution for the new tax year.

Nonprofit Hospital Community Service Contribution Study Commission

Lastly, the new law establishes a permanent commission known as the Nonprofit Hospital Community Service Contribution Study Commission to study the system created under the legislation. The Commission will issue reports every three years to the Governor and Legislature.

Greenbaum, Rowe, Smith & Davis LLP – Thomas J. Denitzio, Jr., James A. Robertson and Hunain Sarwar

March 1 2021

New Jersey Reinstates Property Tax Exemption for Nonprofit Hospitals: Ballard Spahr

Summary

New Jersey Gov. Phil Murphy signed into law legislation that restores property tax exemptions for

nonprofit hospitals. However, the law requires New Jersey nonprofit hospitals to make a community service contribution.

The Upshot

- The change stemmed from a 2015 New Jersey Tax Court decision, where the court found a tax-exempt nonprofit corporation liable for property taxes.
- The new law addresses the 2015 decision by exempting nonprofit hospitals and satellite emergency care facilities from property tax.
- Hospitals and satellite emergency care facilities that are exempt from property tax will be assessed a "community service contribution" to the municipality in which they are located.

The Bottom Line

The change begins with tax year 2021, so hospitals and health systems should put plans in place to comply.

FULL ALERT

On February 22, 2021, New Jersey Gov. Phil Murphy signed into law legislation that restores property tax exemptions for nonprofit hospitals. However, the law requires New Jersey nonprofit hospitals to make a community service contribution, beginning in tax year 2021, to municipalities in which the facilities operate.

Previously, the New Jersey Tax Court found Morristown Medical Center, a tax-exempt New Jersey nonprofit corporation, liable for property taxes for years 2006 through 2008. The court concluded that the hospital failed to meet the legal standard for a nonprofit, charitable organization under New Jersey law due to its "entangled infrastructure" of for-profit and nonprofit activities.

The new law addresses the 2015 Tax Court decision by exempting nonprofit hospitals and satellite emergency care facilities from property tax. However, any portion of the hospital or emergency care facility leased to a profit-making organization or used for purposes that are not exempt from taxation shall be subject to property tax.

Additionally, hospitals and satellite emergency care facilities that are exempt from property tax will be assessed a "community service contribution" to the municipality in which they are located.

The annual community service contribution for hospitals will be "$3 a day for each licensed bed at the hospital in the prior tax year." And, for satellite emergency care facilities, "$300 for each day in the prior tax year." The amount of the contributions will increase by 2% each year.

A hospital may be exempt from making annual contributions if, in the previous year, the hospital did not bill any patient for inpatient or outpatient professional or technical services rendered at the hospital and the hospital has provided community benefit over the preceding three years averaging at least 12% of the hospital's total expenses. Additionally, facilities may offset required contributions by any amounts paid to municipalities pursuant to voluntary agreements.

Ballard Spahr attorneys represent hospitals and health systems, as well as other clients across the health care industry in New Jersey and throughout the nation. Our attorneys are available to assist clients with navigating this developing New Jersey law.

February 26, 2021

OZ Investing in Puerto Rican Tourism, with Lifeafar Capital

What are some of the factors that may make Puerto Rico a compelling destination for Opportunity Zone investment, particularly in…

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February 24, 2021

Tax Advantage on Muni Bonds Disappears as Prices Hit Record High.

- **After-tax, Treasuries yield more than some muni bonds**
- **Influx of cash breaks usual pattern in $3.9 trillion market**

Municipal-bond prices have risen so much that the tax breaks that typically lure investors are washing away.

The yields on top-rated five year state and local government securities are hovering around 0.2%, about one-quarter of what they were a year ago. Even after factoring in the federal tax exemption, that's the equivalent of about 0.3% for the highest-income investors — less than what one would earn on comparable Treasuries. The same goes for benchmark 10-year bonds.

The phenomenon shows how much the $3.9 trillion market has broken from its historic patterns as investors plow billions of dollars into mutual funds focused on state and local government bonds, keeping yields little changed even as those on Treasuries rise. Last week, such funds picked up $3.5 billion of new cash, the most since at least 2007, according to figures from the Investment Company Institute.

The influx is fueling demand for tax-exempt bonds — which are scarcer with interest rates so low that governments are frequently selling taxable bonds to avoid the regulations tied to federally

subsidized debt.

Those factors have helped hold municipal-bond yields at record lows against Treasuries, indicating that valuations are at an all time high. With the tax advantages effectively erased when it comes to the safest securities, some money managers have been shifting into taxable bonds instead.

Terry Goode, a senior portfolio manager at Wells Capital Management, said that he's seeing "intense demand" for taxable securities.

"Tax exempt munis are at record rich levels all along the curve and in most rating categories, so if you're able to buy taxable munis, you should be buying taxable munis," Goode said. "Even on an after-tax basis it still makes sense."

Bloomberg Markets

By Danielle Moran

February 17, 2021, 10:30 AM PST

— *With assistance by Romy Varghese*

IRS PLR: IRS Grants Extension of Expenditure Period for Bond Proceeds

The IRS granted an authority an extension of the expenditure period for available project proceeds of qualified school construction bonds after determining that the authority had reasonable cause for its failure to spend all the proceeds and that the remainder will be spent for qualified purposes with due diligence.

LTR 202106002

February 12, 2021

TAX - NEW JERSEY

City of Newark v. Township of Jefferson

Superior Court of New Jersey, Appellate Division - January 29, 2021 - A.3d - 2021 WL 297824

Taxpayer, a city, sought review of local property tax assessment on taxpayer's watershed land located in township.

After a bench trial, the Tax Court affirmed. Taxpayer appealed.

The Superior Court, Appellate Division, held that:

- Value of land was not nominal by virtue of sale of development rights to State as part of land conservation and moratorium on development;
- Assessment at amount believed by assessor to be agreed-amount from settlement negotiations was not discriminatory; but

- Assessment was defective as having no basis in fact.

Value of city's watershed land in township was not nominal for purposes of local property tax assessment by virtue of sale of development rights to State as part of land conservation and the moratorium on development by virtue of land's status as watershed property; even city's expert asserted that property's assessed value should be based on $1500 per acre.

Local property tax assessment on city's watershed land in township did not result in discrimination against city, even if assessments increased on city's land but were otherwise reduced township-wide, where assessment was primarily based on assessor's settlement negotiations with city's counsel, which assessor believed resulted in an assessment of $5000 per acre.

Local property tax assessment on city's watershed land in township had no basis in fact and thus was defective, where assessment was primarily based on assessor's settlement discussion with city's counsel rather than value of land, which was subject to unique restrictions due to sale of development rights to State as part of land conservation and the moratorium on development by virtue of land's status as watershed property, assessor relied on another sale that he failed to verify, and trial judge made no findings regarding validity of assessment methodology.

The Evolution of the OZ Marketplace, with Peter Truog.

How has the Opportunity Zone marketplace evolved over the past 2+ years and how will it continue to evolve going…

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February 17, 2021

TAX - CALIFORNIA

Howard Jarvis Taxpayers Association v. City and County of San Francisco

Court of Appeal, First District, Division 5, California - January 27, 2021 - Cal.Rptr.3d - 2021 WL 265412 - 21 Cal. Daily Op. Serv. 995 - 2021 Daily Journal D.A.R. 948

Organizations representing taxpayers and business owners brought action seeking to invalidate municipal ballot initiative imposing additional tax on commercial rents to fund early childcare and education on ground that it was passed by simple majority of voters, rather than two-thirds supermajority.

The Superior Court granted summary judgment in favor of city. Organizations appealed.

The Court of Appeal held that initiative imposing additional tax on commercial rents to fund city's early childcare and education program was valid and enforceable after being passed by simple majority of voters.

Municipal ballot initiative imposing additional tax on commercial rents to fund city's early childcare and education program was valid and enforceable after being passed by simple majority of voters,

and did not require two-thirds supermajority of voters for passage.

Maryland Approves Country's First Tax on Big Tech's Ad Revenue.

Analysts estimate that the tax will generate up to $250 million for schools in the state in the first year. It will also probably face fierce legal challenges.

State politicians, struggling with yawning budget gaps from the pandemic, have made no secret about their interest in getting a bigger piece of the tech industry's riches.

Now, Maryland's lawmakers are taking a new slice, with the nation's first tax on the revenue from digital advertisements sold by companies like Facebook, Google and Amazon.

The State Senate voted on Friday to override the governor's veto of the measure, following in the footsteps of the state's House of Delegates, which gave its approval on Thursday. The tax will generate as much as an estimated $250 million in the first year after enactment, with the money going to schools.

The approval signals the arrival in the United States of a policy pioneered by European countries, and it is likely to set off a fierce legal fight over how far communities can go to tax the tech companies.

Other states are pursuing similar efforts. Lawmakers in Connecticut and Indiana, for example, have already introduced bills to tax the social media giants. Several other states, like West Virginia and New York, fell short of passing new taxes on the tech giants last year, but their proponents may renew their push after Maryland's success.

The moves are part of an escalating debate about the economic power of the tech giants as the companies have grown, become gatekeepers for communication and culture and started to collect reams of data from their users. In the United States, law enforcement agencies brought multiple antitrust cases against Google and Facebook last year. Members of Congress have proposed laws to check their market power, encourage them to moderate speech more carefully and protect their users' privacy.

Maryland's tax also reflects the collision of two economic trends during the pandemic: The largest tech companies have had milestone financial performances as social distancing moved work, play and commerce further online. But cities and states saw their tax revenues plummet as the need for their social services grew.

"They're really getting squeezed," said Ruth Mason, a professor at the University of Virginia's law school. "And this is a huge way to target a tax to the winners of the pandemic."

Lobbying groups for Silicon Valley companies like Google and Facebook joined other opponents of the law — including Maryland Republicans, telecom companies and local media outlets — in arguing that the cost of the tax would be passed along to small businesses that buy ads and their customers. Doug Mayer, a former aide to Gov. Larry Hogan who now leads a coalition backed by industry opponents of the tax, said at a news conference last week that the law's supporters were "using this bill to take a swing at out-of-state, faceless big corporations."

"But they're swinging and missing and hitting their own constituents in the mouth," he said.

The Maryland tax, which applies to revenue from digital ads that are displayed inside the state, is based on the ad sales a company generates. A company that makes at least $100 million a year in global revenue but no more than $1 billion a year will face a 2.5 percent tax on its ads. Companies that make more than $15 billion a year will pay a 10 percent tax. Facebook's and Google's global revenues far exceed $15 billion.

Bill Ferguson, a Baltimore Democrat who is president of the State Senate, was a main driver behind the bill. He said he was inspired by an Op-Ed essay from the economist Paul Romer proposing taxing targeted ads to encourage the companies to change their business models.

"This idea that one outsider can exploit and use the personal data of another area and pay nothing for its use, that doesn't work in the long run," Mr. Ferguson said.

Maryland's Democratic-controlled legislature passed the tax with veto-proof majorities last March. But Mr. Hogan, a moderate Republican, vetoed the measure in May.

"With our state in the midst of a global pandemic and economic crash, and just beginning on our road to recovery, it would be unconscionable to raise taxes and fees now," Mr. Hogan said in a letter explaining his reasoning.

Late last year, industry groups helped to form a lobbying organization to try to stop the legislature from overriding Mr. Hogan's veto.

For months, the organization, Marylanders for Tax Fairness, backed by some of Silicon Valley's top lobbying groups, has warned Maryland lawmakers in spots on cable news and local radio that a proposed tax on digital advertisements is a "bad idea" at a "bad time."

The New York Times

By David McCabe

Feb. 12, 2021

IRS Provides Guidance on Electronic Signatures to Form 8038: Squire Patton Boggs

Remember back in the day when we would all gather for a transaction closing to get documents signed and enjoy a nice meal out at a restaurant together? Me neither. In fact, in-person closings were starting to fade long before the pandemic.

Now that we have been closing transactions from the comfort [sic] of our homes for almost a year, in-person closings may become extinct altogether. With that comes the complicated logistics of getting documents signed, shipped, and overnighted to the respective parties where electronic signatures cannot, for one reason or another, be used. Electronic signatures have saved transaction closings during the pandemic, but specific IRS forms, such as the family of Form 8038s, still required a wet signature.

Continue reading.

By Alexis Chandler on February 9, 2021

The Public Finance Tax Blog

Squire Patton Boggs

Snowy Owls and Constituted Authorities: Squire Patton Boggs

On January 27, 2021, a snowy owl was seen in New York City's Central Park for the first time in 130 years. Nine days later, on February 5, 2021, something almost as rare occurred – the Internal Revenue Service released a private letter ruling dealing with Section 103 of the Internal Revenue Code.[1] In PLR 202105007, the IRS determined that a nonprofit corporation that amended its articles of incorporation to change its purposes and come under the control of a city became a "constituted authority," within the meaning of Treas. Reg. 1.103-1(b), of the city that could issue tax-exempt bonds on behalf of the city.

The coincidence of these infrequent events involving ornithology and quasi-governmental entities calls to mind the field guide Johnny Hutchinson prepared on the tax classifications of various species of the latter, which was an homage to Roger Tory Peterson's Field Guide to Birds, a seminal work in the canon of the former. February is a good time to brush up on both.

[1] of 1986, as amended.

By Michael Cullers on February 7, 2021

The Public Finance Tax Blog

Squire Patton Boggs

In Support of the Fiscal Pleasure Restoration Act of 2021: Squire Patton Boggs

Our own Mike Cullers was quoted in Law360 on Wednesday in an article about renewed hope for a full restoration of tax-exempt advance refundings of tax-advantaged bonds after their repeal by the TCJA. The article describes the renewed optimism in the muni bond community that tax-exempt advance refundings can be restored, precipitated by the confirmation of Mayor Pete as Transportation Secretary.

As you have probably seen by now, Mr. Buttigieg made clear in his Senate confirmation hearing that he, like Brother Cullers, is a man of refined taste who appreciates the great pleasures of life (fine scotch, advance refundings for debt service savings, etc.). (Other similarities: neither man is a cat.)

Continue reading.

By Johnny Hutchinson on February 11, 2021

The Public Finance Tax Blog

Squire Patton Boggs

TAX INCREMENT FINANCING - ILLINOIS

Grassroots Collaborative v. City of Chicago

Appellate Court of Illinois, First District, Second Division - December 15, 2020 - N.E.3d - 2020 IL App (1st) 192099 - 2020 WL 7352740

Nonprofit organizations brought complaint against city, alleging that city, for over 30 years, had illegally administered tax increment financing program in a racially and ethnically discriminatory manner.

The Circuit Court dismissed complaint based on lack of standing. Organizations appealed.

The Appellate Court held that:

- Organizations did not establish injury sufficient to confer standing to bring action, and
- Organizations forfeited any argument that they should have been afforded an opportunity to allege a viable injury in an amended complaint.

Nonprofit organizations did not establish injury sufficient to confer standing to bring action against city based on city's allegedly illegal administration of tax increment financing program under Tax Increment Allocation Redevelopment Act in racially and ethnically discriminatory manner, even if organizations had diverted resources from their other, usual advocacy efforts to engage in advocacy efforts to counter city's action; organizations had for years engaged in advocacy in an effort to achieve their respective ideological goals, and their expenditure of resources to advocate against city's actions, at most, simply represented a shift in the target of their advocacy efforts.

Nonprofit organizations forfeited, for purposes of appeal, any argument that they should have been afforded an opportunity to allege a viable injury in an amended complaint, following trial court's dismissal for lack of standing of their complaint against city based on city's allegedly illegal administration of tax increment financing program under Tax Increment Allocation Redevelopment Act in racially and ethnically discriminatory manner; organizations never asked to amend complaint during trial court proceedings, and elected to forego that request by stating at dismissal hearing that they believed complaint as filed included sufficient facts establishing standing.

Creating Impact with Essential Housing in Opportunity Zones, with Clark Spencer.

After raising over $200 million for Qualified Opportunity Zone investment, how is one OZ fund creating impact with essential housing?

CONTINUE READING »

opportunitydb.com

February 10, 2021

Illinois Department of Revenue Issues Guidance on Marketplace Tax Collection Duties.

In February 2021, the Illinois Department of Revenue issued a Compliance Alert on the tax remittance obligations of remote retailers, marketplace sellers, and marketplace facilitators. It concluded that remote retailers and marketplace facilitators must collect and remit state and local retailers' occupation taxes (ROT) administered by the Illinois Department of Revenue – including the Chicago Home Rule Municipal Soft Drink ROT. However, marketplace facilitators are not required to collect and remit other (non-ROT) taxes administered by the Department on sales made by marketplace sellers over the marketplace and remote retailers, including the Prepaid Wireless E911 Surcharge, Illinois Telecommunications Access Corporation Assessment, and Tire User Fee.

In another Compliance Alert, the Department clarified that the Metropolitan Pier and Exposition Authority Food and Beverage Retailers' Occupation Tax– imposed on certain persons engaged in the business of selling food, alcoholic beverages, or soft drinks – must continue to be remitted by the restaurants. Marketplaces, including food delivery services, should not remit the MPEA Food and Beverage Tax.

Eversheds Sutherland (US) LLP – Jonathan A. Feldman, Chris Lee and Charles C. Capouet

February 11 2021

TAX - LOUISIANA

Balbesi v. Lafayette-City Parish Consolidated Government

Court of Appeal of Louisiana, Third Circuit - December 30, 2020 - So.3d - 2020 WL 7768414 - 2020-61 (La.App. 3 Cir. 12/30/20)

Utilities customers brought a class action petition for declaratory judgment and damages against city-parish consolidated government and Lafayette Utilities System (LUS), challenging the constitutionality of annual transfers of utility's revenues to the government known as in-lieu-of-tax (ILOT) payments.

The District Court granted summary judgment in favor of defendants dismissing customer's claims. Customers appealed.

The Court of Appeal held that:

- LUS was a revenue-producing public utility that was exempt from ad valorem taxes, and
- ILOT payments were not de facto ad valorem taxes.

The Lafayette Utilities System (LUS) was a revenue-producing public utility that was exempt from ad valorem taxes as contemplated by the state constitution, because it operated to provide a public service.

In-lieu-of-tax (ILOT) payments made by Lafayette Utilities System (LUS) to city-parish consolidated government were not de facto ad valorem taxes, even though the ILOT transfers were referred to in bond ordinances as payments-in-lieu-of tax, and/or because they were placed into the City General Fund along with other tax revenue; payments were a made from revenue generated by the utility, and payments were in no way related to the value of any property.

TAX - PENNSYLVANIA

In re Coatesville Area School District

Supreme Court of Pennsylvania - January 20, 2021 - A.3d - 2021 WL 190862

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 charitable purposes of tax-exempt taxpayer's property.

After the trial court issued identical orders under separate docket numbers affirming the board's decision, city, school district, and taxpayer cross-appealed, school district filed a notice of intervention in city's case, and appeals were consolidated.

Following remand by the Commonwealth Court, the Court of Common Pleas issued two essentially identical, but differently captioned decisions and orders. School district and taxpayer cross-appealed as to the ruling in district's case, but not as to the identical simultaneous ruling with contained the city's docket number. 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. School district and taxpayer appealed.

The Supreme Court held that:

- Res judicata did not bar school district's appeal;
- Collateral estoppel did not bar school district's appeal; and
- Appellate review in school district's case would not have impermissibly created an irreconcilable conflict from any ruling other than an affirmance.

Res judicata did not bar school district's appeal following intervention in city's parallel contemporaneous appeal with a different docket number of trial court's determination that tax-exempt taxpayer's property was entitled to a partial exemption from taxation based on property's charitable purposes, even though subject matter and sole issue of appeals were identical and deemed consolidated for disposition only, where appeal was not a recasting of an original cause of action to get a second bite at the apple, it was not clear that final judgment in city's case was a prior judgment as required for application of res judicata, and claim preclusion would have served no salutary purpose.

Collateral estoppel did not bar school district's appeal following intervention in city's parallel contemporaneous appeal with a different docket number of trial court's determination that tax-exempt taxpayer's property was entitled to a partial exemption from taxation based on property's charitable purposes; there was no discrete subset issue within taxing districts' overall claim that should have been foreclosed from resolution, but rather claim and legal issue were the same, whether property was correctly accorded 72 percent tax-exempt status.

Review of school district's appeal following intervention in city's parallel contemporaneous appeal with a different docket number of trial court's determination that tax-exempt taxpayer's property was entitled to a partial exemption from taxation based on property's charitable purposes would not have impermissibly created an irreconcilable conflict from any ruling other than an affirmance of trial court's order, notwithstanding conflict, if any, with earlier final order in city's case, which affirmed board's assessment, since assessment figure ultimately reached in school district's appeal would have been mandatory in relation to county assessment office.

S&P: Massachusetts And New York State Could Lose Billions Of Income Tax Dollars If Lawsuit Challenging Remote Work Succeeds

NEW YORK (S&P Global Ratings) Jan. 22, 2021–S&P Global Ratings believes a pending U.S. Supreme Court case, New Hampshire v. Massachusetts, could result in the reallocation of billions of income tax dollars between certain states. New York and Massachusetts in particular could potentially lose significant amounts of income tax, while New Jersey and Connecticut could gain revenue.

The case considers whether Massachusetts may impose income tax on New Hampshire residents who are teleworking from home for employers with primary offices in Massachusetts. New Hampshire argues the Massachusetts tax violates its state sovereignty (that is, only New Hampshire has the authority to tax its residents' income). Massachusetts argues that the COVID-19 pandemic is temporary, and ultimately those New Hampshire residents will go back to work at their offices in Massachusetts where the tax is valid. More broadly, the lawsuit could clarify the allocation among the states of taxable personal income generated from teleworking. A decision as to whether the U.S. Supreme Court (SCOTUS) will accept the case should be forthcoming. If SCOTUS declines to take up the case, we expect similar challenges to reappear.

The Pandemic Prompted The New Hampshire v. Massachusetts Dispute, But The Issue Is Not New Or Unique To These Two States

Massachusetts' tax was in response to the COVID-19 pandemic, which prompted many companies to require employees to work from home. Nevertheless, a small number of states have imposed income taxes on out-of-state telecommuters for some time, such as New York. Connecticut or New Jersey residents telecommuting for a New York City-based company have historically paid income tax to New York State regardless of whether or not they worked in New York City or worked remotely from their homes. While New York City levies a local income tax, its city income tax applies only to residents and not commuters. New Jersey and Connecticut have had to enact income tax credits to residents for income taxes paid to New York to avoid double taxing their residents. New York State has defended its tax on the theory that as long as a company does not require workers to telecommute from a specific out-of-state location, telecommuting out of state was at the convenience of the employee and that income should be attributed to the home office of the company, unless telecommuting was "deemed necessary" by the employer. But in light of COVID-19, many companies are requiring their workers to telecommute. Furthermore, as New Jersey argues, in an amicus curiae brief supporting New Hampshire's position in the case, the threshold of "deemed necessary" may not be the appropriate standard any longer given that technology has all but eliminated the need for many employees to be physically present at the employer's location.

A win for New Hampshire would benefit states with a large number of residents commuting out of state to work, such as New Jersey, Connecticut, Hawaii, and Iowa

The credit impact of the case for New Hampshire is not immediately significant because New Hampshire doesn't levy a personal income tax. Nevertheless, the state estimates approximately 300,000 of its residents stand to benefit because they would avoid paying Massachusetts tax on approximately $6.04 billion of their collective income. Other states, New Jersey and Connecticut among them, with a significant number of residents commuting out of state to work, where income tax collections have gone to the state of employment, could also benefit if New Hampshire prevails against Massachusetts. Since the filing of the original New Hampshire lawsuit on Oct. 19, 2020, New Jersey, Connecticut, Hawaii, and Iowa have filed amicus briefs supporting New Hampshire's

position.

New Jersey estimates in its amicus brief that 400,000 state residents commuted to jobs in New York City before the pandemic, while Connecticut estimates 78,000 of its residents did. New Jersey calculates that in 2018 it credited more than $2 billion to resident taxpayers who worked for out-o--state employers, virtually all of which is attributable to New York City employers, and of which $100 million-$400 million of the credit was for work performed by New Jersey residents working remotely. Once the pandemic began, New Jersey estimates the work-from-home rates ranged from 44% to 58%, indicating a loss of tax revenue of $928.7 million-$1.2 billion to New York for the 12-month period beginning March 2020. The potential new revenue from a favorable ruling could be significant compared with the $36 billion of 12-month operating revenue New Jersey has budgeted for fiscal 2021. Using a similar analysis, Connecticut estimates it will lose $339.0 million-$444.5 million of 2020 income tax revenue to New York State.

On the other hand, a win for New Hampshire could reduce revenue for some states with large employment centers–New York, Arkansas, Delaware, Massachusetts, Nebraska, and Pennsylvania

Potential tax losers could include states with large employment centers on the other side of the state line, with New York State of particular importance because of the large number of high-income Connecticut and New Jersey residents who work in New York City. The amicus brief identifies six states–Arkansas, Delaware, Massachusetts, Nebraska, New York, and Pennsylvania–that tax out-o--state residents for income earned working from home.

New York State stands to lose $1.27 billion-$1.64 billion of tax revenue in New Hampshire were to prevail, compared to its budgeted general fund tax receipts of $62 billion in fiscal 2021. New Hampshire's amicus brief does not estimate Massachusetts' potential tax loss, although a separate analysis by New Hampshire's economic advisor estimates up to $1.2 billion of earnings are attributable to New Hampshire residents who work remotely but are employed by an organization located in Massachusetts. The New Jersey amicus brief estimates Massachusetts could also lose about $3.2 million-$4.2 million to New Jersey alone. Taxes on out-of-state residents tend to be popular with the state imposing them and will likely not disappear without an adverse ruling from SCOTUS.

22 Jan, 2021

This report does not constitute a rating action.

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Mike Cullers on New Hampshire v. Massachusetts: Squire Patton Boggs

In a complaint filed directly with the U.S. Supreme Court under its original jurisdiction,[1] New Hampshire has sued Massachusetts for attempting to tax residents of the Granite State who

normally work in Massachusetts but are working at home during the pandemic.

Continue reading.

The Public Finance Tax Blog

By Johnny Hutchinson on January 29, 2021

Squire Patton Boggs

Biden Tax Changes a Possible Boost for Munis, Western Asset's Amodeo Says.

Robert Amodeo, Western Asset Management head of municipals, says the Biden administration's stimulus aid and potential tax code changes could be positive for the municipal bond market. He speaks with Bloomberg's Taylor Riggs on "Bloomberg Markets: The Close."

Watch video.

Bloomberg Markets

January 26th, 2021, 1:21 PM MST

Tax Windfalls Drive States to Unlikely Role in U.S. Recovery.

- **Revenue beats dire forecasts on stock gains, working from home**
- **Fleeting chance to soften pandemic hit on businesses, the poor**

America's governors aren't waiting for Washington to stimulate their economies.

Faced with unexpected budget surpluses after tax revenue held up better than anticipated during the pandemic, governors in more than half a dozen states are taking steps to help small businesses or provide cash to residents thrown out of work.

In Maryland, Republican Governor Larry Hogan is pushing for a $1 billion stimulus package that would provide one-time checks of as much as $750 to lower-income families. Michigan's Gretchen Whitmer, a Democrat, is seeking to provide $225 million to small businesses. And in California, Governor Gavin Newsom has proposed using part of a $15 billion windfall to pay for $600 checks for some residents and $4.5 billion of grants and tax credits to businesses hurt by virus shutdowns.

The plans reflect a surprising way the pandemic has rippled through the nation's economy. Initially confronted with the deepest contraction since World War II, states braced for a steep drop in revenue. But with higher-income Americans still able to work from home, strong consumer spending, and the stock market surging last year as Congress enacted measures to revive the economy, tax collections are rising — or at least not falling nearly as much as expected. That's given states unexpected influxes of cash that can be used to soften the blows of the pandemic.

"The fact that some states have additional revenue gives them the opportunity to stimulate their own economy or help their residents," said Karen Krop, a senior director at Fitch Ratings. "They can take

that additional money and say, ‘What is our highest priority right now?’ And in most cases it is to stimulate their economy and help their citizens.”

The measures are small compared with the $1.9 trillion economic stimulus proposed by President Joe Biden, and big budget gaps are likely to reappear as states put together spending plans for the coming fiscal year since the surpluses are largely the result of pessimistic forecasts.

Overall state tax revenue still fell 3.2% between March and November from a year earlier, according to preliminary data from 46 tracked by the Urban Institute, causing states to eliminate 373,000 jobs, more than were lost during the last downturn. Former Federal Reserve Chair Janet Yellen, Biden’s pick to head the Treasury Department, said last week that she’s concerned state and local budget cutting could stall the economic recovery as it did after the last recession, underscoring the administration’s plan to provide some $350 billion in aid.

For now, though, confronted with an unprecedented crisis, some governors are plowing short-term surpluses back into their economies.

Colorado has already provided $375 stimulus checks for some residents and lawmakers are considering other one-time measures like financing infrastructure projects. In Maryland, a wealthy state where income-tax revenue is rising despite the pandemic, Hogan is proposing to send checks to an estimated 400,000 residents. California, reaping a surge in capital gains taxes from the state’s highest earners, may send similar payouts to some 4 million people.

“It’s in each state’s interest to be as supportive, as they’re financially able, to help their tax base and tax generators to survive and come out stronger on the other side of Covid,” said Ty Schoback, senior municipal research analyst at Columbia Threadneedle Investments. States have “been able to take a little more of a scalpel approach and be a lot more intentional.”

Michigan’s Whitmer last week released a plan that would help businesses, unemployed residents and renters. In January, state leaders revised revenue forecasts for fiscal 2021 up by about $1.2 billion from an estimate in August, though the revenue is still less than what the state was expecting before the pandemic.

Minnesota lawmakers were among the first to act. In December, they passed a $216 million relief package that includes direct payments to restaurants, bars and gyms. The state’s revenue department said that it helped nearly 3,900 businesses though the middle of this month.

Robert Doty, commissioner of the Minnesota Department of Revenue, said the aid is the “right thing to do” and will trickle down to business owners and employees, which is ultimately supportive for the state’s coffers as well. “Anything we can do to help is pretty cool,” he said.

South Carolina Governor Henry McMaster, a Republican, is incorporating small business relief as part of a budget proposal released this month that would provide $123 million in grants to supplement federal aid. South Carolina’s total general-fund revenue is about $248.4 million higher than expected for the July to November period, according to figures released in December.

The governor has also proposed putting $500 million in reserve. The pandemic has been a reminder of the importance of preparing for the unexpected, said Brian Symmes, a spokesman for McMaster. “It can change at the drop of the hat,” he said.

Bloomberg Economics

By Amanda Albright and Danielle Moran

January 25, 2021, 5:00 AM MST

— With assistance by Romy Varghese

NABL Connect Launches a New Tax Law Community.

NABL is excited to launch a new Tax Law community on NABL Connect, a private members-only (excluding Federal regulators) online discussion forum. The Tax Law community will enable NABL members to stay informed about new developments in Federal tax law related to municipal bonds, share tax resources, and discuss new regulations and interpretations of existing regulations and Code sections.

This new community is intended to facilitate dialogue among members, but is not intended to supplant the need to consult with competent tax attorneys regarding particular situations.

To sign up for NABL Connect, click here.

Democrats Aim for SALT Write-Off Expansion in Stimulus Bill.

- **New Jersey lawmakers unified on repealing tax break limits**
- **Yellen has said SALT write-off impact warrants more study**

Two New Jersey Democrats are leading an effort to expand a valuable tax break for state and local levies in the next virus-relief package, a long-shot effort as lawmakers continue to squabble over the size and scope of the next round of stimulus.

Representatives Josh Gottheimer and Bill Pascrell, both Democrats representing northern New Jersey districts, are calling on House Speaker Nancy Pelosi, Senate Majority Leader Chuck Schumer and Treasury Secretary Janet Yellen to include a full repeal of the $10,000 limit on deductions for state and local taxes, or SALT, that was part of the tax law former President Donald Trump signed in 2017.

“This is key to the health of our economy, key to keeping our state strong,” Gottheimer said at a press conference in Paterson, New Jersey, on Wednesday. “It’s essential to hardworking middle class families who have been crushed by this pandemic and crushed by the SALT cap.”

The effort is likely to be a hard sell, at least in the short run, as Democrats and Republicans struggle to agree on an economic stimulus package that goes beyond more vaccine funding. Democrats are already making moves that would allow them to use the budget reconciliation process, a fast-track procedure to pass some economic relief with only Democratic votes.

Even then, SALT could be controversial because the benefits largely flow to higher-income households in high-tax states, while the pandemic’s toll has been concentrated on lower earners. Yellen said at her confirmation hearing this month that the SALT cap’s impact on municipal governments and residents warrants more study before taking action.

Yellen has appeared to downplay the possibility that a repeal of limit on the SALT deduction could be included in the upcoming stimulus bill. In follow-up answers to Senate questions after her

confirmation hearing, she said Biden's rescue plan does not include a proposal to expand the SALT deduction.

Repealing the SALT cap is a costly proposition. To allow unlimited deductions just in 2021 would cost $88.7 billion, according to Congress's non-partisan scorekeeper the Joint Committee on Taxation. Permanently repealing the limitation, as Gottheimer and Pascrell are proposing, would cost many multiples of that.

All 12 of New Jersey's House members, including the state's two Republican Representatives — Chris Smith and Jeff Van Drew — support a fully restored SALT deduction, Gottheimer said. However, it's unclear whether the Republicans would sign onto a broader stimulus bill that included the SALT cap repeal.

Still, with Democrats now in control in Washington, this is the first plausible opportunity lawmakers from high tax states like New Jersey have had to reclaim one of their favorite tax breaks. House efforts to expand the SALT tax break failed to gain any traction when the Senate was under Republican leader Mitch McConnell's control.

Why Are They Moving?

Representatives from states where residents were more likely to claim the SALT deduction, like New York and California, say the loss of the tax break has caused some of their residents to leave. Gottheimer pointed to data that show New Jersey residents leaving the state since the SALT cap has been in place.

Nearly half – 49.2% — of the United Van Lines LLC customers who booked moves out of New Jersey in 2020 reported earning more than $150,000 a year. But many of those people might have left even if the SALT deduction had been instated — 32.3% said they were leaving to retire, whereas only 19% reported moving for "lifestyle" reasons.

AMERCO's U-Haul says that New Jersey, Illinois and California, all relatively high tax states, are their bottom ranking states for migration growth, based on their truck rental data.

Bloomberg Markets

By Laura Davison

January 27, 2021, 12:15 PM MST Updated on January 27, 2021, 7:07 PM MST

TAX - NEW JERSEY

Eagle Rock Convalescent Center v. Township of West Caldwell

Tax Court of New Jersey - January 6, 2021 - 32 N.J.Tax 122

Taxpayer filed action seeking to lower the local property tax assessments on property, a skilled nursing facility which depended on Medicaid for income.

The Tax Court held that:

- Income approach used by taxpayer's expert was not a reliable indication of property's value;
- Cost approach which utilized an automated valuation software to generate cost estimates was not

a valid or reliable approach for determination of property's value;
- Township's assessments as to years for which there was no evidence of value of property were affirmed due to a failure of proofs;
- There was no evidence of economic obsolescence;
- Conclusion of taxpayer's expert as to five percent depreciation for curable functional obsolescence was based on credible testimony;
- There was no evidence that property suffered from incurable functional obsolescence; and
- Opinion of township's expert regarding effective age of property in determining physical depreciation was well founded and supported by permits.

Income approach relied upon by taxpayer's expert was not a reliable indication of value of real property subject to property tax assessment, a skilled nursing facility; there was no attempt to separately allocate value among the realty versus the value of the business operation, properties offered as comparables were not located within competitive market, there were more differences than similarities when attempting to align comparable properties with the subject property, and record provided inadequate support to find property's actual income was stable and consistent with the market.

Cost approach which utilized automated valuation software to generate cost estimates was not a valid or reliable approach to determine value of real property subject to property tax assessment, a skilled nursing facility, where inputs and additional data used by software were not provided to court for review, and experts did not authenticate and explain calculations used by automated valuation software, were not knowledgeable about the workings of software or how program performed cost calculations, and did not produce evidence to confirm validity of results through manual calculation or through production of actual construction costs to compare experts' conclusions reached using software.

There was no evidence from which the court could determine value of real property subject to property tax assessment, a skilled nursing facility, as to certain tax years, and thus township's assessments as to those years were affirmed due to a failure of proofs.

There was no evidence to support claim of economic obsolescence in determining value of real property subject to tax assessment, a skilled nursing facility that received substantial income from Medicaid; there was no evidence that rules establishing the Medicaid reimbursement rate for nursing home patient care, in any manner governed, restricted, or limited the transfer and ownership of the land or that receipt of Medicaid revenue equated to a public policy that should have been shared by the taxpayers in form of reduced property taxes for nursing homes.

Conclusion of taxpayer's expert as to five percent depreciation for curable functional obsolescence in determining value of real property subject to tax assessment, a skilled nursing facility, was based on credible testimony that expert relied on national cost index with local building costs defined by zip-codes or local cost multipliers for the cost of the items, including installation, and converted the figure to a percentage.

There was no evidence that real property subject to property tax assessment, a skilled nursing facility, suffered from incurable functional obsolescence; there was no proof connecting property's vacancy to the real estate versus operation of the business or evidence of statewide vacancy rates, and Certificate of Need for 180 beds continued at property unchanged year to year for more than 20 years.

Opinion of township's expert regarding effective age of real property subject to tax assessment, a skilled nursing facility, in determining physical depreciation, that the general maintenance of

property over the years was very good, was well founded and supported by permits taken out on property; permits dated during ten years prior to and after valuation dates elicited a pattern of maintenance, upgrades, and repairs at property demonstrating a propensity for taxpayer to maintain and upgrade the property in a manner which would likely have reduced its effective age.

TAX - CALIFORNIA

Letterman Digital Arts Ltd. v. City and County of San Francisco

Court of Appeal, First District, Division 4, California - December 30, 2020 - Cal.Rptr.3d - 2020 WL 7767276 - 21 Cal. Daily Op. Serv. 140 - 2021 Daily Journal D.A.R. 62

Lessee of property within national park that was established at site of a former military base in the city of San Francisco brought action against city for refunds of gross receipts taxes it paid on rents it had collected pursuant to sublease that was authorized by terms of its commercial lease with federally owned trust that managed the park.

The Superior Court sustained city's demurrer without leave to amend. Lessee appealed.

The Court of Appeal, held that federal tax exemption on local property taxation of "interests" created under leases of park property did not exempt lessee from payment of gross receipts tax on rents collected under its sublease.

Rental income collected by lessee of property within national park that was established at site of a former military base in the city of San Francisco, under sublease authorized by terms of lessee's commercial lease with federally-owned trust that managed the historic and financial aspects of the park, did not constitute an "interest" within meaning of federal tax exemption embodied in the Presidio Trust Act, which prohibited local property taxation of "all interests created under leases associated with properties" in the park, and therefore, lessor was not exempt from payment of city's gross receipts tax on rents collected; lessee's property interest in the park was not same as its rights conveyed by that interest.

Finding Opportunity Zone Investors in 2021, with Will Walker & Jeffrey Maganis.

What are some of the best ways to find Opportunity Zone investors in 2021?

Jeffrey Maganis is co-founder of Crowdcreate, a digital marketing company that focuses on investor outreach for private equity funds. Will Walker is Crowdcreate's director of business development.

Continue reading.

Opportunity Db

By Jimmy Atkinson

January 20, 2021

Key Opportunity Zone Deadlines for 2021, with Ashley Tison.

Why is 2021 expected to be a big year for Opportunity Zones and what are some of the key deadlines that investors and fund issuers should be aware of?

Ashley Tison is an Opportunity Zone consultant and attorney based in Charlotte, North Carolina. Along with Jimmy Atkinson, he is co-founder of OZ Pros, an Opportunity Zone advisory firm.

Continue reading.

Opportunity Db

By Jimmy Atkinson

January 27, 2021

TAX - NEW JERSEY

Township of Freehold v. CentraState Healthcare Services, Inc.

Tax Court of New Jersey - January 5, 2021 - 32 N.J.Tax 103

Township appealed county board of taxation's dismissal of its petitions to impose omitted assessments and to revoke property tax exemptions given to taxpayer.

The Tax Court granted township's motions for partial summary judgment on reconsideration. Taxpayer moved for reconsideration and sought dismissal of township's omitted assessment complaints.

The Tax Court held that:

- Restoring tax-exempt property which ceases to be exempt to the tax rolls is governed by the exemption cessation statutory scheme;
- 20-day time limit for filing motion for reconsideration did not apply;
- Taxpayer did not state reason for reconsideration of the grant of partial summary judgment;
- The Tax Court would treat taxpayer's motions as if they had been filed as motions seeking dismissal of township's complaints; and
- Township could not resort to the general omitted assessment law to revoke assessor's grant of property tax exemption.

S&P: Massachusetts And New York State Could Lose Billions Of Income Tax Dollars If Lawsuit Challenging Remote Work Succeeds

NEW YORK (S&P Global Ratings) Jan. 22, 2021–S&P Global Ratings believes a pending U.S. Supreme Court case, New Hampshire v. Massachusetts, could result in the reallocation of billions of income tax dollars between certain states. New York and Massachusetts in particular could potentially lose significant amounts of income tax, while New Jersey and Connecticut could gain revenue.

The case considers whether Massachusetts may impose income tax on New Hampshire residents who are teleworking from home for employers with primary offices in Massachusetts. New Hampshire argues the Massachusetts tax violates its state sovereignty (that is, only New Hampshire has the authority to tax its residents' income). Massachusetts argues that the COVID-19 pandemic is temporary, and ultimately those New Hampshire residents will go back to work at their offices in Massachusetts where the tax is valid. More broadly, the lawsuit could clarify the allocation among the states of taxable personal income generated from teleworking. A decision as to whether the U.S. Supreme Court (SCOTUS) will accept the case should be forthcoming. If SCOTUS declines to take up the case, we expect similar challenges to reappear.

The Pandemic Prompted The New Hampshire v. Massachusetts Dispute, But The Issue Is Not New Or Unique To These Two States

Massachusetts' tax was in response to the COVID-19 pandemic, which prompted many companies to require employees to work from home. Nevertheless, a small number of states have imposed income taxes on out-of-state telecommuters for some time, such as New York. Connecticut or New Jersey residents telecommuting for a New York City-based company have historically paid income tax to New York State regardless of whether or not they worked in New York City or worked remotely from their homes. While New York City levies a local income tax, its city income tax applies only to residents and not commuters. New Jersey and Connecticut have had to enact income tax credits to residents for income taxes paid to New York to avoid double taxing their residents. New York State has defended its tax on the theory that as long as a company does not require workers to telecommute from a specific out-of-state location, telecommuting out of state was at the convenience of the employee and that income should be attributed to the home office of the company, unless telecommuting was "deemed necessary" by the employer. But in light of COVID-19, many companies are requiring their workers to telecommute. Furthermore, as New Jersey argues, in an amicus curiae brief supporting New Hampshire's position in the case, the threshold of "deemed necessary" may not be the appropriate standard any longer given that technology has all but eliminated the need for many employees to be physically present at the employer's location.

A win for New Hampshire would benefit states with a large number of residents commuting out of state to work, such as New Jersey, Connecticut, Hawaii, and Iowa

The credit impact of the case for New Hampshire is not immediately significant because New Hampshire doesn't levy a personal income tax. Nevertheless, the state estimates approximately 300,000 of its residents stand to benefit because they would avoid paying Massachusetts tax on approximately $6.04 billion of their collective income. Other states, New Jersey and Connecticut among them, with a significant number of residents commuting out of state to work, where income tax collections have gone to the state of employment, could also benefit if New Hampshire prevails against Massachusetts. Since the filing of the original New Hampshire lawsuit on Oct. 19, 2020, New Jersey, Connecticut, Hawaii, and Iowa have filed amicus briefs supporting New Hampshire's position.

New Jersey estimates in its amicus brief that 400,000 state residents commuted to jobs in New York City before the pandemic, while Connecticut estimates 78,000 of its residents did. New Jersey calculates that in 2018 it credited more than $2 billion to resident taxpayers who worked for out-o--state employers, virtually all of which is attributable to New York City employers, and of which $100 million-$400 million of the credit was for work performed by New Jersey residents working remotely. Once the pandemic began, New Jersey estimates the work-from-home rates ranged from 44% to 58%, indicating a loss of tax revenue of $928.7 million-$1.2 billion to New York for the 12-month period beginning March 2020. The potential new revenue from a favorable ruling could be significant compared with the $36 billion of 12-month operating revenue New Jersey has budgeted

for fiscal 2021. Using a similar analysis, Connecticut estimates it will lose $339.0 million-$444.5 million of 2020 income tax revenue to New York State.

On the other hand, a win for New Hampshire could reduce revenue for some states with large employment centers–New York, Arkansas, Delaware, Massachusetts, Nebraska, and Pennsylvania Potential tax losers could include states with large employment centers on the other side of the state line, with New York State of particular importance because of the large number of high-income Connecticut and New Jersey residents who work in New York City. The amicus brief identifies six states–Arkansas, Delaware, Massachusetts, Nebraska, New York, and Pennsylvania–that tax out-o--state residents for income earned working from home.

New York State stands to lose $1.27 billion-$1.64 billion of tax revenue in New Hampshire were to prevail, compared to its budgeted general fund tax receipts of $62 billion in fiscal 2021. New Hampshire's amicus brief does not estimate Massachusetts' potential tax loss, although a separate analysis by New Hampshire's economic advisor estimates up to $1.2 billion of earnings are attributable to New Hampshire residents who work remotely but are employed by an organization located in Massachusetts. The New Jersey amicus brief estimates Massachusetts could also lose about $3.2 million-$4.2 million to New Jersey alone. Taxes on out-of-state residents tend to be popular with the state imposing them and will likely not disappear without an adverse ruling from SCOTUS.

This report does not constitute a rating action.

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22 Jan, 2021

IRS Notice Provides COVID-19 Relief to QOFs, OZ Investors, OZ Businesses: Novogradac

The Internal Revenue Service (IRS) today issued a notice providing relief to qualified opportunity funds (QOFs) and their investors due to the COVID-19 pandemic, extending opportunity zones (OZ) relief provided by an earlier notice. Notice 2021-10 provides relief for the 180-day investment requirement, the 30-month substantial improvement period, 90% investment standard for QOFs, working capital safe harbor for OZ businesses and 12-month reinvestment period for QOFs. The relief largely extends relief provided earlier in Notice 2020-39.

For all taxpayers' whose last day of their 180-day window to invest capital gains was from April 1, 2020, to March 31, 2021, the 180-day deadline is now March 31. The 30-month substantial improvement period is now tolled from April 1, 2020, through March 31, 2021. A failure by a QOF to satisfy the 90% investment standard is considered reasonable if the last day of its first six-month period of a taxable year or last day of a taxable year falls from April 1, 2020, through June 30, 2021, and the QOF meets other requirements. All OZ businesses holding working capital assets intended

to be covered by the working capital safe harbor before June 30, 2021, receive up to an additional 24 months. If a QOF's 12-month reinvestment period includes June 30, 2020, the QOF receives up to an additional 12 months to reinvest.

The notice addresses many of the issues included in an Opportunity Zones Working Group letter sent to the IRS Dec. 23, 2020. "Treasury's guidance provides relief that opportunity zones stakeholders have sought and will enable the incentive to continue to provide capital in areas of need during our nation's recovery from the COVID-19 pandemic," said Michael J. Novogradac, CPA, managing partner at Novogradac.

January 19, 2021

Stock Market Rally Spurs Investment in New Tax-Saving Funds.

- Bridge has raised almost $2 billion for U.S. opportunity zones Tax breaks are controversial, but enjoy bipartisan support
- The stock market's strong rebound last year after pandemic lockdowns was a boon for a new type of fund that taps Trump-era tax breaks.

Bridge Investment Group said its strategy of developing real estate in designated "opportunity zones" hauled in almost $2 billion from investors by the end of last year. That's roughly double the amount the Salt Lake City-based firm had raised through 2019.

"We actually turned away capital," said Bridge Executive Chairman Robert Morse, adding that he expects to bring in about $1 billion to invest in the zones this year.

Bridge has emerged as one of the money managers deploying the most capital in the nation's roughly 8,800 opportunity zones. Created as a part of the 2017 Republican tax overhaul signed into law by President Donald Trump, the program is aimed at encouraging investment in poor communities. Investors are eligible for a suite of generous tax breaks for starting businesses and developing real estate in the zones.

Under the policy, capital gains earned elsewhere — say, by selling stocks — get parlayed into an opportunity zone fund. Taxes owed on the initial gain are deferred through 2026, but a sweeter benefit comes later: Returns on projects in the zones are exempt from capital-gains taxes if they're held for at least a decade.

While the incentives enjoy broad bipartisan support, some early efforts claiming the breaks have stoked controversy. Plans have been announced for luxury projects from Florida to Oregon. And a proposal in Norfolk, Virginia, involves razing public housing to make way for new mixed-income development.

'Spirit of the Law'

Bridge has been using the program largely to develop multifamily housing in cities such as Sacramento, California; Austin, Texas; and Phoenix, where population growth is driving demand. Overall, the company said it manages more than $25 billion in real estate assets, including multifamily, senior housing and suburban office properties.

"As a company, we're embarrassed by the abuses that others have committed" in opportunity zones,

Morse said. “We spend a lot of time making sure we are observing both the letter and the spirit of the law.”

As financial markets swooned earlier this year amid a worsening pandemic, some backers of opportunity zones worried that interest in the program would wane. But money continued to pour into funds targeting the zones, reaching more than $12 billion by the end of August, the most recent data from tax adviser Novogradac shows.

President-elect Joe Biden has signaled that he supports the opportunity zone incentives, but favors changes so investments create social benefits. The new administration and Democrat-controlled Congress may also look to increase the country’s capital-gains tax rate.

Were that to happen, “the appeal of an opportunity zone investment, somewhat counterintuitively,” goes up because of the tax breaks available for investments in the zones after 10 years, said Morse. “We’ve done a lot of relatively sophisticated math about that.”

Bloomberg Markets

By Noah Buhayar

January 15, 2021, 9:00 AM MST Updated on January 15, 2021, 9:47 AM MST

Finding Opportunity Zone Investors in 2021, with Will Walker & Jeffrey Maganis.

What are some of the best ways to find Opportunity Zone investors in 2021? Jeffrey Maganis is co-founder of Crowdcreate, ….

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January 20, 2021

New IRS Notice Extends Several Opportunity Zone Deadlines.

Taxpayers who recognized a gain in 2019 may now have until March 31, 2021 to invest in a Qualified Opportunity…

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January 19, 2021

Reviewing Opportunity Zones With Steve Glickman and Ira Weinstein.

The two experts share insights and perspectives on the program's performance.

The Opportunity Zones program has been around for more than three years now. Throughout this period a lot has happened, including last year's health crisis and culminating with the 2020 presidential elections, which appeared to mark the passage to a new economic cycle. Multi-Housing News asked two Opportunity Zone experts to share their thoughts on the program's performance so far and how it will function in the future, considering the current state of affairs on a global scale.

Ira Weinstein is a managing principal at CohnReznick and an Opportunity Zone practice leader, while Steve Glickman is the CEO of Develop LLC, an advisory firm dedicated to building and supporting Opportunity Zone funds. Glickman, an adviser to former President Barack Obama, was one of the co-founders of the Economic Innovation Group that built the Qualified Opportunity Zones program. Recently, the two co-authored a book—"The Guide to Making Opportunity Zones Work"—aiming to help investors benefit from this federal program's incentives.

Continue reading.

Multi-Housing News

By Anca Gagiuc

JAN 05, 2021

After Rocky Start, Opportunity Zones Could Boom In 2021.

President-elect Joe Biden and his administration are keen to undo much of what their predecessors did. Yet when it comes to one flagging Trump initiative— the opportunity zone program— Biden and the Democrat-controlled Congress could actually provide a big boost.

The unique program, which offers a complicated and multipart capital gains tax breaks on funds invested into certain lower income zip codes (as identified by local officials and blessed by the Treasury) was created by the Tax Cuts and Jobs Act of 2017 (a.k.a the Trump tax cuts), which passed without any Democratic support. Yet the opportunity zone idea has bipartisan roots.

That crucial cross-aisle appeal, combined with the potential for increased regulatory clarity, possible tax rate increases, the massive gains of the unprecedented bull market of the last decade-plus and the economic devastation in cities from Covid-19 have all set the stage for what could be a long-anticipated rush to opportunity zones.

Continue reading.

Forbes

by Jason Bisnoff

Jan 15, 2021

Louisiana Board Vacates Local Tax Assessment on School Meals.

SUMMARY BY TAX ANALYSTS

In *Healthy Course LLC v. City of New Orleans*, the Louisiana Board of Tax Appeals vacated a local sales tax assessment against a catering company in connection with meals furnished to the students of a private school, finding that the city's home rule charter, which would have required taxation of the meals, did not override the applicable exemption under state statute.

Citations: Healthy Course LLC v. City of New Orleans; No. L00807

DATED JAN. 13, 2021

Dems Likely Claw Back SALT In Stages: Bloomberg Radio

MUNIS in FOCUS: Eric Kazatsky, Senior U.S. Municipals Strategist for Bloomberg Intelligence: Biden stimulus, SALT, and taxable munis. Hosted by Paul Sweeney and Vonnie Quinn.

Listen to audio.

Bloomberg Radio

January 15, 2021

Congress Can Help State and Local Governments Prepare for a Rainy Day Without Repealing the SALT Cap.

With Joe Biden in the White House and narrow control of the Congress, Democrats are likely to try to restore the full state and local tax (SALT) deduction, capped through 2025 at $10,000 per year. But if lawmakers really want to assist state and local governments, rather than cutting federal income taxes for mostly high-income households, we suggest a SALT substitute.

Although we have disagreed on the value of the SALT deduction, we agree on an alternative. We'd use the roughly $80 billion annual cost of restoring the full deduction to instead create a special insurance fund that would help states and localities weather recessions without mass layoffs and cuts in essential services. Repealing the SALT deduction completely could obviously fund an even larger program.

Creating a fund along these lines, which we call the State Macroeconomic Insurance Fund (SMIF), would help individual states during economic downturns and lessen the severity and duration of recessions for the whole country.

How the SALT deduction works

The Tax Cuts and Jobs Act of 2017 (TCJA) limited to $10,000 the amount of state and local taxes that households can deduct each year from their federal income tax. By also doubling the standard

deduction, the TCJA dramatically reduced the number of itemizers. These provisions, like almost all of those affecting the individual income tax, are scheduled to expire after 2025.

Today, only about 11 percent of households take the SALT deduction, and most of the benefit goes to high-income households. For top-bracket taxpayers, the deduction amounts to a 37 percent federal tax subsidy for up to $10,000 of state and local taxes paid. President-elect Biden has proposed to limit the value of itemized deductions to 28 percent, but 28 percent of an uncapped SALT deduction would be worth far more than the $10,000 capped deduction for most taxpayers.

Pros and cons of the SALT deduction

There's a huge partisan divide on the SALT deduction. Most Republicans claim that it's a "blue state subsidy," that largely benefits big spending, rich states with lots of high-income taxpayers. Democrats argue that the subsidy makes it easier for states and localities to raise taxes to pay for essential public services.

They're both a bit right. The evidence suggests deductibility does make high-income people more tolerant of high state taxes. But, it's unclear how much of those higher state and local taxes are used to pay for services that benefit vulnerable populations.

Bigger problems

State and local governments are subject to a well-known one-two punch in recessions: just as revenues are falling, demand goes up for the safety net programs they provide.

Yet, because most states and localities are required to balance their books over each budget cycle, they are forced to slash spending or raise taxes during economic downturns. For instance, state and local governments have cut 1.4 million positions since the onset of the COVID-19 pandemic. Spending cuts can harm not only vulnerable populations but also the larger economy.

Rainy day funds can help, but both amassing those funds and withdrawing them can be politically risky. Managing these types of funds is complicated and the economics of how much to save during a year and when to withdraw money are far from straightforward.

Congress sometimes fills part of this fiscal gap, but not always. For example, it provided about $240 billion in state and local fiscal relief in March, but declined to include further unrestricted aid in the 11th hour compromise bill that was passed last month.

A proposal

Our alternative would use the federal revenue that would otherwise go to reinstating the full SALT deduction to create a State Macroeconomic Insurance Fund (SMIF). Accrued over nine years (the average length of the last four economic expansions) and with interest earnings, such a fund could provide nearly $1 trillion to states and local governments during a downturn.

In addition, states could be encouraged to supplement the fund by making additional premium payments to the SMIF. This might let them save beyond current political limits and help standardize rainy day fund rules. States that declined to pay these additional premiums could still participate in the SMIF but would get the smaller baseline insurance payout.

To prevent states from gaming the program, both expected contributions and recession-generated payouts would be determined by a formula with factors outside of a governor's control, such as state unemployment rates.

To prevent federal policymakers from raiding the SMIF – as they have routinely done to the Social Security trust fund – it would be treated as a "non-budgetary account" or "deposit fund." Contributions would be considered to generate outlays at the time they are made rather than when state and local government payments are dispersed. Premiums would be considered receipts and would generate an offsetting outlay for the contribution to the fund, with no net budgetary effect. This is generally the way the federal government accounts for loan guarantee programs.

Winners and losers

The SMIF would help states maintain current services in a recession and boost the economy by funding new investments in infrastructure and other projects. Some states may perceive that a program along these lines would provide less benefit than an unrestricted SALT deduction. But if the last 10 months have taught us anything, it's the value of insurance.

taxpolicycenter.org

January 14, 2021

Bond Market Tax Haven Shrinks as Corporate-Style Munis Surge.

- **Taxable muni sales jump to highest in decade on refinancings**
- **CreditSights says tax-exempt debt sales may keep falling**

America's municipal-bond market is becoming less of a tax haven.

Interest rates have sunk so low that states and local governments have been flooding the market with bonds that aren't tax-exempt, allowing them to revive a refinancing tactic that was stripped of its subsidies by President Donald Trump's 2017 tax-cut law or sidestep federal rules on how the proceeds can be spent.

The volume of taxable municipal-debt sales more than doubled last year to about $140 billion, the most since the Obama administration's Build America Bond program picked up part of the interest bills on state and local securities to stoke the economy after the recession. At the same time, tax-exempt bond sales declined about 8% to $315 billion, according to data compiled by Bloomberg.

Wall Street analysts anticipate that the surge will continue, with CreditSights analyst Patrick Luby forecasting that the pace of tax-free bond sales will drop this year to a more than two-decade low.

The shift has been a boon to the tax-exempt market, where cash has continued to flood in, by reducing the supply. The increase in taxable debt sales has also provided an opportunity for investors hunting for safe, higher-yielding securities at a time when interest rates are negative or near zero in much of the world.

"It's going to be stronger than it was than 2019," said Adam Stern, co-head of research at Breckinridge, who added that it would also be bigger than 2020. "With the amount of sheer negative yielding debt around, if you're a big institution, whether you're a foreign buyer or a pension fund, it's a nice fit."

One of the major drivers of the increase in taxable sales was the 2017 law that prevents governments from selling tax-exempt bonds for so-called advance refundings, a tactic that allows

governments to refinance debt that can't yet be bought back from investors.

The Democratic control of Congress and the White House once Joe Biden is sworn in could have an impact on the trend if the subsidy is revived, allowing governments to sell lower-cost tax-exempt bonds instead. "You would see tax exempt issuance go up, and you would see taxable issuance decrease significantly," said Timothy Heaney, senior managing director and senior portfolio manager at Newfleet Asset Management.

Yet other elements could be supportive of more taxable municipal-bond sales. It's possible a Biden administration could revive a version of the Build America Bond program to pump more money into infrastructure projects, something that Democrats have sought periodically since the program lapsed a decade ago, only to be stymied by Republican opposition.

"That is actually bullish for taxables, despite the high supply, because there is a lot of pent up demand," said Citigroup Inc. municipal-bond analyst Vikram Rai, speaking in a call with clients last week.

Bloomberg Markets

By Nic Querolo

January 11, 2021, 10:40 AM PST Updated on January 12, 2021, 8:21 AM PST

— With assistance by Danielle Moran

The Most Popular OZ Podcast Episodes of 2020.

The Opportunity Zones Podcast will return next week with new episodes for 2021. But in the meantime, here are the most popular episodes of the show in 2020 (presented in reverse chronological order).

Highlights include interviews with Opportunity Zone experts across several industries, including Ashley Tison, Tony Nitti, Dan Kowalski, Jim Sorenson, Erik Hayden, Travis Steffens, Emily Lavery, Garth Everhart, Clem Turner, Mike Novogradac, Riaz Taplin, and more.

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opportunitydb.com

By Jimmy Atkinson

January 13, 2021

TAX - NEW JERSEY

Township of Freehold v. CentraState Healthcare Services, Inc.

Tax Court of New Jersey - January 5, 2021 - N.J.Tax - 2021 WL 47389

Township appealed county board of taxation's dismissal of its petitions to impose omitted

assessments and to revoke property tax exemptions given to taxpayer.

The Tax Court granted township's motions for partial summary judgment on reconsideration. Taxpayer moved for reconsideration and sought dismissal of township's omitted assessment complaints.

The Tax Court held that:

- Restoring tax-exempt property which ceases to be exempt to the tax rolls is governed by the exemption cessation statutory scheme;
- 20-day time limit for filing motion for reconsideration did not apply;
- Taxpayer did not state reason for reconsideration of the grant of partial summary judgment;
- The Tax Court would treat taxpayer's motions as if they had been filed as motions seeking dismissal of township's complaints; and
- Township could not resort to the general omitted assessment law to revoke assessor's grant of property tax exemption.

IRS Extends Temporary Relief for Qualified Low-Income Housing Projects: NABL

Today, the Internal Revenue Service (IRS) issued Notice 2021-12 extending the temporary relief from certain requirements under § 42 for qualified low-income housing projects and under §§ 142(d) and 147(d) for qualified residential rental projects that was provided in Notice 2020-53, 2020-30 I.R.B. 151 in response to the continuing COVID-19 pandemic. The notice also provides relief for additional § 42 requirements not previously addressed in Notice 2020-53.

Of note:

- For purposes of section 5.02 of Rev. Proc. 2004-39, the last day of a 12-month transition period for a qualified residential rental project that ends on or after April 1, 2020, and before September 30, 2021, is postponed to September 30, 2021.
- If a bond is used to provide a qualified residential rental project and if the § 147(d) 2-year rehabilitation expenditure period for the bond ends on or after April 1, 2020, and before September 30, 2021, then the last day of that period is postponed to the earlier of one year from the original due date or September 30, 2021.

On December 2, 2020, NABL submitted a letter to the U.S. Department of the Treasury and IRS requesting an extension of IRS Notice 2020-53 through December 31, 2022. Notice 2020-53 provided relief to bond issuers, operators, owners and tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state agencies that have jurisdiction over these projects, from otherwise-applicable federal tax law compliance requirements. Read NABL's letter here.

Notice 2021-12 will be in IRB: 2021-6, dated February 8, 2021.

Ohio Tax Board Affirms Denial of Property Tax Exemption for Church's

Parcel.

SUMMARY BY TAX ANALYSTS

In Greater Fellowship Assembly Outreach v. McClain, the Ohio Board of Tax Appeals found that a church failed to prove that a vacant lot qualified for a real property tax exemption, affirming the Ohio tax commissioner's denial of an exemption for the parcel.

Continue reading.

First, Do No Harm: States Can Preserve Revenue by Decoupling From CARES Act Tax Breaks for Business Losses.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted in March 2020, included several costly federal tax breaks for businesses that will also reduce many states' personal and corporate income tax revenues because their tax codes are tied to the federal code. Several of these tax breaks allow businesses to get refunds of taxes they owed for the 2018 and 2019 tax years, before the pandemic hit. Five states — Colorado, Georgia, Hawaii, New York, and North Carolina — have already "decoupled" their tax laws from these provisions to avoid having to give back revenue they have already collected; other states should do the same.[1]

Some of these tax breaks have questionable merit at the federal level and make even less sense for states, which must balance their budgets each year — an extremely challenging task given their sharp revenue declines since the pandemic hit. States will need to increase tax revenues during the next several years to minimize cuts in education, health care, child care, infrastructure, and other critical services, which would disproportionately harm low-income people and people of color. Their immediate priority must be to preserve existing revenue sources by avoiding unnecessary and unwarranted tax cuts.

About half the states have probably lost some revenue already because their tax codes are linked to current provisions of the Internal Revenue Code (IRC). These "rolling conformity" states need to decouple from the CARES Act provisions as early as possible in their 2021 legislative sessions to prevent additional revenue losses and minimize the number of taxpayers that will have to file amended tax returns and pay taxes that were previously refunded.

Continue reading.

CENTER ON BUDGET AND POLICY PRIORITIES

BY MICHAEL MAZEROV

JANUARY 4, 2021

TAX - NEW YORK

Town of Irondequoit v. County of Monroe

Court of Appeals of New York - December 22, 2020 - N.E.3d - 2020 WL 7497940 - 2020 N.Y. Slip Op. 07689

Towns brought hybrid Article 78 proceeding and declaratory judgment action against county and several of its officials, alleging that county was required to credit towns for amount of unpaid maintenance charges, or to guarantee those amounts, that towns assessed against individual properties, for performing services such as cutting grass or removing weeds following property owners' failure to maintain their property themselves.

The Supreme Court, Monroe County, granted towns' petition and denied county and officials' motion to dismiss. County and officials appealed. The Supreme Court, Appellate Division, reversed. Towns appealed.

The Court of Appeals held that counties were required to guarantee and credit towns in connection with certain "unpaid delinquent taxes" assessed by towns.

Democrats Get Clout Needed for Risky Bid to End Trump's SALT Cap.

- **A popular blue state tax break could be revived under Biden**
- **Some economists dismiss the idea as a handout to the richest**

Democrats will soon have the balance of power required to repeal President Donald Trump's limitation on a prized tax deduction, but doing so will likely require a tricky procedural process and a politically fraught vote.

There are few issues that have riled certain segments of the Democratic Party more than Trump's cap on write-offs of state and local tax, or SALT. Repealing it, however, would require Democrats to vote for something widely seen as a tax cut for the rich at the same time the party is proposing tax increases to make the Internal Revenue Service code more progressive.

Democrats have been trying to restore unlimited SALT deductions since the 2017 tax law capped the benefit at $10,000. Lawmakers from high-tax states, including New York, California and New Jersey, where the tax break is particularly valuable, decried the move saying it was punishing their voters to pay for Trump's $1.5 trillion tax cut for corporations and the wealthy.

Senator Chuck Schumer of New York, who will become the chamber's majority leader thanks to the victories of Raphael Warnock and Jon Ossoff in this week's Senate runoff elections in Georgia, said last year that abolishing the SALT deduction cap would be among his top priorities.

"When we get in the majority we'll do it permanently," Schumer said at a press conference on Long Island in July. His office didn't immediately respond to a request to comment.

Senator Ron Wyden, an Oregon Democrat poised to control the Finance Committee, said in a statement that he would be looking to lift the SALT cap as part of a broader tax agenda.

The politics are easy for lawmakers from high-tax states where many residents saw their deductions decline following the 2017 tax overhaul, but it's a harder sell for Democrats in low-tax states where few constituents owe more than $10,000 in state income and property taxes.

It's even trickier because allowing taxpayers to write off their full SALT bills largely benefits the wealthiest Americans. About 52% of the benefit from repealing the cap flows to households earning at least $1 million a year, according to the the non-partisan Joint Committee on Taxation.

Because of that, it's earned a reputation among Washington economists and policy wonks across the political spectrum for being a dumb idea. Jason Furman, a former economic adviser to President Barack Obama has called restoring the full tax break a "waste of money."

"At best, the SALT deduction is a warped way to do social policy; at worst it is a politically motivated handout to the richest people in the richest places," two Brookings Institution researchers wrote in a report last year. "Either way, it is bad policy — especially at a time of rising inequality."

Still, Democrats are jazzed over the chance to restore a tax break that they say was included in the 2017 law by Republicans to hurt taxpayers in Democratic-leaning districts, including middle-income earners in areas where housing is expensive and taxes are high. Liberals see the cap as part of a broader strategy by conservatives to undermine support for progressive agendas.

"With Democrats in complete control of the federal government, and New York's senior senator in charge of the Senate agenda, our chances for giving tax relief to middle class New Jerseyans have never been better," Representative Bill Pascrell said in a statement. "I'm already working with my colleagues in the delegation who are chomping at the bit to restore the SALT deductions Republicans stole from our neighbors in their 2017 tax scam."

Representative Tom Suozzi, a New York Democrat, is among the legislators leading the charge to repeal the cap. He said he wants it repealed in its entirety.

"The SALT deduction is based upon basic fairness," Suozzi said. "You shouldn't be taxed on taxes you have already paid."

"The second part of the fairness issue is that state and local governments have been operating under this paradigm for a hundred years," he added.

Shepherding the vote through the House and Senate will require the slim Democratic majorities in both chambers to stay united on what is likely to be a complex and sweeping economic policy bill.

The SALT repeal would likely be bundled with dozens of other tax and spending provisions in what's known as a budget reconciliation bill, a fast-tracked process to pass legislation with a simple Senate majority — rather than the normal 60-vote threshold.

That way, the chamber's 50 Democrats, combined with a tie-breaking vote from soon-to-be Vice President Kamala Harris, could pass the legislation without needing any Republicans to sign on.

Democrats have a long trail of defeats trying to get rid of the SALT cap. New York Governor Andrew Cuomo went to court to invalidate the law. Governors of Democratic-led states, including Cuomo, then tried to use the judicial system to throw out regulations regarding the cap. So far, both efforts have failed.

House Democrats successfully passed a short-term repeal of the SALT cap in 2019, but the Senate didn't consider it.

It's an expensive proposition to fully repeal the SALT cap. Restoring the tax break would cost about $620 billion over a decade, according to an estimate from the Urban-Brookings Tax Policy Center. That's about twice the cost the $1,200 stimulus payments Congress approved in March for most Americans. However, the Tax Policy Center projects that most benefits would fall to top earners, leaving middle-income households with an average tax cut of $10.

Democrats could opt to do something short of a full restoration of the SALT tax break that would

blunt the disproportionate share going to the richest earners, said Seth Hanlon, a senior fellow at the Center for American Progress.

“For example, the cap could be raised but not eliminated, or Congress could extend cap relief only to households under a certain income level,” he said. “These options would cost a fraction of the revenue of total SALT cap elimination, and would be targeted at middle-class families.”

A more generous SALT break could also be coupled with tax increases on top earners that would cut into some of the savings they would receive.

A reversal of the SALT cap could also have an unintended consequence for state and local government coffers, another concern for Democrats. When the cap went into effect, it spurred a record municipal bond buying spree with investors turning to the tax-free securities as a tool to shrink their tax bills. Unwinding the cap risks doing the opposite — imposing a slight dampening effect on markets with high taxes like New York and California.

Reversal would be a slight positive at the local level, and negative for states, both of which are struggling with economic fallout from the coronavirus pandemic, said Barclays Plc strategist Mikhail Foux.

Bloomberg Politics

By Laura Davison and Kaustuv Basu

January 7, 2021, 11:00 PM PST Updated on January 8, 2021, 8:49 AM PST

— With assistance by Nic Querolo

Tax Credits in the Housing Authority World: Opportunities and Challenges

The low-income housing tax credit (LIHTC) has been critical to public housing authorities (PHAs) to address preservation, development and redevelopment goals.

To achieve these goals, LIHTCs complement other programs created by Congress and administered by the U.S. Department of Housing and Urban Development (HUD), including Moving to Work (MTW), the Choice Neighborhoods Initiative (CNI) and the Rental Assistance Demonstration (RAD). PHAs use these programs and LIHTCs to address a variety of objectives:

- preservation of existing public housing through recapitalization,
- demolition and redevelopment where needs extend beyond rehabilitation,
- neighborhood revitalization if needs extend beyond a public housing site,
- demolition and production of replacement housing at alternative locations, and
- production of special needs housing.

Continue reading.

Novogradac

Published by Arlene Conn on Thursday, January 7, 2021

State and Local Sales Tax Rates, 2021.

Key Findings

- Forty-five states and the District of Columbia collect statewide sales taxes.
- Local sales taxes are collected in 38 states. In some cases, they can rival or even exceed state rates.
- The five states with the highest average combined state and local sales tax rates are Tennessee (9.55 percent), Louisiana (9.52 percent), Arkansas (9.51 percent), Washington (9.23 percent), and Alabama (9.22 percent).
- No state rates have changed since Utah increased the state-collected share of its sales tax from 5.95 percent to 6.1 percent in April 2019.
- Sales tax rates differ by state, but sales tax bases also impact how much revenue is collected from a tax and how the tax affects the economy.
- Sales tax rate differentials can induce consumers to shop across borders or buy products online.

Continue reading.

Tax Foundation

by Janelle Cammenga

January 6, 2021

IRS Issues Procedures for Appealing Adverse Bond Determinations.

SUMMARY BY TAX ANALYSTS

The IRS has issued procedures (Rev. Proc. 2021-10) for an issuer of tax-advantaged bonds to request an administrative appeal to the Independent Office of Appeals of a proposed adverse determination made by the Office of Tax Exempt Bonds (TEB Examination Office) regarding issues within the scope of the guidance.

The IRS is required to allow bond issuers to contest a proposed adverse determination to a senior officer in Appeals before the agency proceeds to tax bondholders. Rev. Proc. 2006-40 sets forth procedures for an issuer of bonds to appeal a proposed adverse determination regarding the qualification of an issue of bonds as tax-exempt bonds or a claim for recovery of asserted overpayments of arbitrage rebate under section 148. However, the procedures in Rev. Proc. 2006-40 do not apply to an appeal of a proposed adverse determination regarding the qualification of other types of tax-advantaged bonds, such as tax credit bonds. Rev. Proc. 2021-10 describes the circumstances and procedures under which an issuer may request that specified adverse determinations by the TEB Examination Office be reviewed by Appeals.

An issuer of bonds is eligible to request an appeal under Rev. Proc. 2021-10 after receiving from the TEB Examination Office (1) a proposed adverse determination that the issuer fails to qualify for the exclusion of the interest on the bonds from the gross income of the bondholders under section 103; (2) a proposed adverse determination that the issuer fails to qualify for the tax credits for the bondholders or direct payments to the issuer regarding the bonds under provisions of the tax code

applicable to tax-advantaged bonds; or (3) a proposed adverse determination that denies a claim for recovery of an asserted overpayment of arbitrage rebate under section 148 regarding tax-exempt bonds or under section 148 as modified by relevant provisions of the tax code regarding other tax-advantaged bonds.

A bond issuer's appeal request must be submitted in writing to the TEB Examination Office within 30 days of the date of the proposed adverse bond determination or arbitrage rebate claim denial and must include the information specified in Rev. Proc. 2021-10. The TEB Examination Office may extend the 30-day period if the issuer submits a written request justifying the extension before the 30-day period expires. Upon receipt of an appeal request, the TEB Examination Office will review the request to determine whether it meets the requirements of the revenue procedure. If it does not, the issuer will have 30 days from the date of the notification to correct the deficiencies. If the request meets the requirements and contains no new information or analysis of the taxpayer's position, the TEB Examination Office will transfer the case file to Appeals.

If an issuer does not submit a written appeal request in the manner and within the time periods described in the revenue procedure, the proposed adverse bond determination or arbitrage rebate claim denial will become final. If a proposed adverse bond determination becomes final, then, depending on the type of bond that was issued (1) the interest on those bonds will no longer be treated as excludable from gross income under section 103; (2) holders will not be allowed any credit against income tax for interest on those bonds; or (3) issuers will not be allowed a direct payment. The IRS may also initiate procedures to impose tax on interest on the bonds, disallow the tax credits, or if it has not already done so, disallow direct payments regarding the interest on the bonds. Moreover, a notice of deficiency may be issued to recover overpayments of direct payments.

Modifies Rev. Proc. 2006-4

SECTION 1. PURPOSE

This revenue procedure provides procedures for an issuer of tax-advantaged bonds (as defined in § 1.150-1(b) of the Income Tax Regulations (Regulations)) to request an administrative appeal to the Independent Office of Appeals (Appeals) within the Internal Revenue Service (IRS) of a proposed adverse determination made by the office that is responsible for examinations of tax-advantaged bonds, presently the Office of Tax Exempt Bonds (and including any successor IRS office performing such examinations, the TEB Examination Office), with respect to issues within the scope of this revenue procedure.

SECTION 2. BACKGROUND

.01 Appeals jurisdiction. Section 3105 of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, 112 Stat. 685 (1998 IRS Restructuring Act), directed the IRS to modify its administrative procedures to allow issuers an expeditious appeal of a proposed adverse determination by the IRS with respect to a bond issue to a senior officer in Appeals before the IRS proceeds to tax bondholders.

.02 Bond appeals guidance. Rev. Proc. 2006-40, 2006-2 C.B. 691, sets forth procedures for an issuer of bonds to appeal a proposed adverse determination regarding the qualification of an issue of bonds as tax-exempt bonds (as defined in § 150(a)(6) of the Internal Revenue Code (Code)) or a claim

for recovery of asserted overpayments of arbitrage rebate under § 148. However, the procedures in Rev. Proc. 2006-40 do not apply to an appeal of a proposed adverse determination regarding the qualification of other types of tax-advantaged bonds, such as tax-credit bonds.

.03 Other applicable appeals procedures. Procedures under § 601.106 et seq. of the Statement of Procedural Rules, including those governing submissions and taxpayer conferences, apply to appeals regarding bond issues, bondholders, and arbitrage rebate. A bondholder's appeal rights under § 601.106 of the Statement of Procedural Rules are independent and separate from an issuer's appeal rights under this revenue procedure. Section 1.148-3(i)(3)(iii) of the Regulations also applies to appeals concerning an Arbitrage Rebate Claim Denial (as defined in section 4.02 of this revenue procedure).

.04 Issuers as taxpayers. To conduct an examination (including any related administrative appeal) of a tax-advantaged bond expeditiously, the IRS generally treats an issuer as the taxpayer for the bond issue under examination.

.05 Conduit borrowers as taxpayers. In appropriate circumstances, Appeals may consider, concurrently with an issuer's appeal, issues relating to those raised in a Proposed Adverse Bond Determination (as defined in section 4.02 of this revenue procedure) that affect the tax liability (other than any potential penalties) of the borrower of bond proceeds of a conduit financing issue. Appeals will consider an issue relating to the borrower's tax liability only if the borrower is under examination with respect to the issue, the resolution of that issue is affected by the Proposed Adverse Bond Determination (for example, issues under § 150(b) or 168(g)), and the borrower agrees to resolve the issue concurrently with the issuer's appeal under this revenue procedure. See § 601.106 of the Statement of Procedural Rules for procedures applicable to the borrower.

.06 Technical advice. An issuer may submit a request to the TEB Examination Office or Appeals for referral of a tax matter to the IRS Office of Chief Counsel for technical advice while a tax-advantaged bond issue is under the jurisdiction of the TEB Examination Office or Appeals, respectively. See Rev. Proc. 2021-2, 2021-01 I.R.B. 116, or annual successor revenue procedure.

.07 Alternative dispute resolution programs. Alternative dispute resolution methods permit Appeals officers to mediate, facilitate, or propose settlements in the resolution of matters identified during the course of an examination prior to the issuance of a Proposed Adverse Bond Determination or an Arbitrage Rebate Claim Denial. Alternative dispute resolution methods within Appeals applicable to bonds currently include TE/GE Fast Track Settlement (FTS) (Announcement 2012-34, 2012-36 I.R.B 334), Post Appeals Mediation (Rev. Proc. 2014-63, 2014-53 I.R.B. 1014), and Early Referral (Rev. Proc. 99-28, 1999-2 C.B. 109).

SECTION 3. SCOPE

This revenue procedure applies to Proposed Adverse Bond Determinations and Arbitrage Rebate Claim Denials as defined in section 4.02 of this revenue procedure.

SECTION 4. INITIATING THE APPEAL PROCESS

.01 In general. Section 4.02 through 4.06 of this revenue procedure set forth the circumstances and procedures under which an issuer may request that certain adverse determinations by the TEB Examination Office be reviewed by Appeals.

.02 Availability of appeal request to issuer. An issuer is eligible to request an appeal under this revenue procedure upon the receipt from the TEB Examination Office of a: (1) proposed adverse

determination that an issue of bonds fails to qualify for the exclusion of the interest on the bonds from the gross income of the bondholders under § 103 (a Proposed Adverse Bond Determination); (2) proposed adverse determination that an issue of bonds fails to qualify for the tax credits for the bondholders or direct payments to the issuer with respect to the bonds under provisions of the Code applicable to tax-advantaged bonds, such as former §§ 54, 54A, 54AA, 1397E, and 6431 (also a Proposed Adverse Bond Determination); or (3) proposed adverse determination that denies a claim for recovery of an asserted overpayment of arbitrage rebate under § 148 with respect to tax-exempt bonds or under § 148 as modified by relevant provisions of the Code with respect to other tax-advantaged bonds (an Arbitrage Rebate Claim Denial). Except as provided in alternate dispute resolution programs, including any applicable programs referenced in section 2.07 of this revenue procedure or in any subsequently issued published guidance, appeal rights are not available to an issuer prior to the receipt of a Proposed Adverse Bond Determination or an Arbitrage Rebate Claim Denial.

.03 Requesting an appeal. An issuer's appeal request must be submitted in writing to the TEB Examination Office within 30 days of the date of the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial. The appeal request must include the information listed in section 4.04 of this revenue procedure. The TEB Examination Office may extend this 30-day submission period based on an issuer's written request to the TEB Examination Office within the 30-day submission period that justifies such extension.

.04 Required information and signature. An appeal request made under this revenue procedure must include the information listed in this section 4.04.

(1) A detailed written response to the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial, including a detailed explanation of the issuer's position regarding each issue in dispute.

(2) A declaration in the following form: "Under penalties of perjury, I declare that I have examined this request for an appeal, including accompanying documents, and that, to the best of my knowledge and belief, the facts presented are true, correct, and complete."

(3) The issuer or the issuer's authorized representative must sign an appeal request. An issuer may designate an authorized representative by submitting a duly executed Form 2848, Power of Attorney and Declaration of Representative, when making an appeal request under this revenue procedure.

.05 Response to an appeal request. Upon receipt of an appeal request, the TEB Examination Office will review the request to determine whether it meets the requirements of this revenue procedure. If the request does not meet such requirements, the TEB Examination Office will notify the issuer in writing of the request's deficiencies and the issuer will have 30 days from the date of the notification to correct the deficiencies. If the request meets the requirements of this revenue procedure and contains no new information or analysis of the taxpayer's position, the TEB Examination Office will transfer the case file to Appeals. If the request meets the requirements of this revenue procedure and contains new information or analysis of the taxpayer's position, the TEB Examination Office will notify the issuer that such new information or analysis may change the case's outcome and requires the TEB Examination Office's further consideration prior to transfer of the case file to Appeals.

.06 Failure to make appeal request. If an issuer does not submit a written appeal request in the manner and within the time periods described in section 4.03 through 4.05 of this revenue procedure, the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial will become final.

.07 Jurisdiction over tax matters. Once the TEB Examination Office sends the case file to Appeals, jurisdiction over the issues raised in the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial will transfer from the TEB Examination Office to Appeals. Except for matters considered by Appeals under section 2.05 of this revenue procedure (relating to the tax liability of the conduit borrower of the bond proceeds), the TEB Examination Office will retain jurisdiction over all tax matters related to the bond issue under examination that are not specifically raised as an issue in the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial.

.08 Notification to issuer. Simultaneously with the transfer of the case file to Appeals, the TEB Examination Office will furnish to the issuer a copy of the TEB Examination Office's transmittal letter and response, if any, to the issuer's positions stated in its appeal request.

SECTION 5. ARBITRAGE REBATE CLAIM DENIAL FOR TIMELINES

When an appeal of a claim described in either § 1.148-3(i)(3)(iii)(A) or (B) of the Regulations (regarding timeliness) is determined in favor of the issuer, Appeals will release jurisdiction and return the case to the TEB Examination Office for further consideration of the substance of the claim.

SECTION 6. EFFECT OF CERTAIN FINAL ADVERSE BOND DETERMINATIONS OR FINAL ARBITRAGE REBATE CLAIM DENIALS

.01 Final Adverse Bond Determination. If a Proposed Adverse Bond Determination becomes final under section 4.06 of this revenue procedure or because Appeals sustains the Proposed Adverse Bond Determination without entering into a closing agreement with the issuer, then, depending on the type of bond that was issued: (i) the interest on those bonds will no longer be treated as excludable from gross income under § 103 of the Code, (ii) holders will not be allowed any credit against income tax with respect to interest on those bonds, or (iii) issuers will not be allowed a direct payment. In addition, IRS functions other than Appeals may initiate procedures with respect to open years to, respectively, (i) impose tax on interest on the bonds, (ii) disallow the tax credits, or (iii) if it has not already done so, disallow direct payments with respect to the interest on the bonds. Further, a notice of deficiency may be issued to recover overpayments of direct payments.

.02 Final Arbitrage Rebate Claim Denial. If an Arbitrage Rebate Claim Denial becomes final under section 4.06 of this revenue procedure or Appeals sustains the Arbitrage Rebate Claim Denial in full, the IRS will notify the issuer of the final determination and the issuer's right to bring suit for recovery.

SECTION 7. NO USER FEE

No user fee applies to either a request for an appeal pursuant to this revenue procedure or a closing agreement resulting from the appeal.

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2006-40 is modified and superseded.

SECTION 9. EFFECTIVE DATE

This revenue procedure applies to Proposed Adverse Bond Determinations or Arbitrage Rebate Claim Denials issued by the TEB Examination Office on or after February 4, 2021.

SECTION 10. DRAFTING INFORMATION

The principal authors of this revenue procedure are B. Darrell Smelcer, Office of Tax-Exempt Bonds (Technical), and Lewis Bell, Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Mr. Smelcer at 470-639-2425 (not a toll-free call).

DATED JAN. 5, 2021

How to Appeal Adverse Determinations from the IRS for Tax-Advantaged Bonds: New Guidance - Squire Patton Boggs

The IRS has had a busy start to 2021! Guidance continues to pour forth as the change in Administration approaches. On January 4, the IRS released Revenue Procedure 2021-10, which provides issuers with updated procedures for obtaining review from the IRS Office of Appeals of proposed adverse determinations and rebate refund rejections by the IRS Office of Tax-Exempt Bonds. Rev. Proc. 2021-10 supplements and supersedes Rev. Proc. 2006-40, which previously set forth the procedures for getting to Appeals. Rev. Proc. 2006-40 predated the advent of tax credit and direct pay bonds, and therefore applied only to tax-exempt bonds. As many of you may have experienced, the IRS has applied the logic of Rev. Proc. 2006-40 to tax-advantaged bonds that were not tax-exempt bonds (e.g., BABs) in audits of those bonds. Rev. Proc. 2021-10 adopts this practice.

Specifically, Rev. Proc. 2021-10 provides that an issuer is eligible to request an appeal once the issuer receives (1) a proposed adverse determination that interest on the bonds is not tax-exempt; (2) a proposed adverse determination that an issue of bonds fails to qualify for the tax credits to the bondholders or direct payments to the issuer with respect to the bonds under provisions of the Code applicable to tax-advantaged bonds, such as former §§ 54, 54A, 54AA, 1397E, and 6431; or (3) a proposed adverse determination that denies a claim for a rebate refund. These items are, in effect, your "ticket to Appeals." On items (1) and (2), recall that the "proposed adverse determination" is the final step in the audit process, coming after the "Notice of Proposed Issue" (often referred to as the "30-day letter"). In most bond issues subject to a continuing disclosure undertaking, the receipt of that Notice of Proposed Issue triggers the requirement for the issuer to disclose the audit to the market, although many issuers may choose to disclose before they reach that point.

In addition, Rev. Proc. 2021-10 modifies Rev. Proc. 2006-40 by explicitly giving the issuer 30 days to correct any deficiencies in the appeal that deviate from the requirements in Rev. Proc. 2021-10. (Given the ambiguity in Rev. Proc. 2006-40 on this point, it probably depends on the situation whether this is a positive or negative change.) The new guidance also notes that the TEB Examination Office will furnish to the issuer a copy of the TEB Examination Office's transmittal letter and response, if any, to the issuer's positions stated in its appeal request.

The mechanics of the appeal will continue to be handled under Section 8.7.8 of the Internal Revenue Manual.

There remains no user fee for an appeals request, which is comforting after the IRS recently[1] hiked the user fee for a tax-advantaged bond private letter ruling from $30,000 to $38,000,[2] notwithstanding NABL's recent request to provide for reduced user fees for tax-exempt bonds.

The new procedures apply to proposed adverse determinations for tax-advantaged bonds or denials of rebate refund claims issued by the TEB Examination Office on or after February 4, 2021.

[1] We would say “inexplicably,” but there’s a pretty clear, if unpalatable, explanation.

[2] And that’s just the cover charge.

Squire Patton Boggs

The Public Finance Tax Blog

By Alexis Chandler on January 7, 2021

IRS Procedures Revised for Issuing Letter Rulings.

The IRS has published (Rev. Proc. 2021-1, 2021-1 IRB 1) revised procedures for issuing letter rulings, determination letters, and information letters on specified issues. Rev. Proc. 2020-1 is superseded.

1/4/21

TAX - ARKANSAS

City of Little Rock v. Ward

Supreme Court of Arkansas - December 3, 2020 - S.W.3d - 2020 Ark. 399 - 2020 WL 7134991

City and municipal airport commission sought review of county assessor’s denial of tax exemption for unleased airport-owned properties that airport purchased as a buffer or used to store historical plane and equipment used for clearing runways during snow and ice events.

The Pulaski County Court ruled in favor of city and commission. Assessor appealed. The Circuit Court granted assessor’s motion for summary judgment. City and commission appealed.

The Supreme Court held that:

- Assessor’s failure to file answer within 30 days in compliance with rule governing appeals from county court to circuit court was not a jurisdictional error;
- Public-purpose tax exemption applied to unleased property that was used for storage; and
- Public-purpose tax exemption applied to unleased property that airport purchased as a buffer.

County assessor’s failure to timely file answer within 30 days in compliance with rule governing appeals from county court to circuit court was a procedural error, not a jurisdictional one, and thus it did not deprive circuit court of jurisdiction over assessor’s appeal of county court’s determination that unleased real property of municipal airport was exempt from taxation.

Municipal airport’s unleased real property located within secure airfield, comprised of an office building and five hangars, was used exclusively for public purposes when it was unleased, and thus property was exempt from taxation under State Constitution during that time, where airport used property to store historical plane owned by airport, to house offices for city police department, and to store and stage equipment such as snow brooms, bulldozers, and trucks used for clearing runways during snow and ice events.

Municipal airport's unleased real property that airport purchased to maintain buffer around airport was used exclusively for public purposes, and thus property was exempt from taxation under State Constitution; buffer adhered to Federal Aviation Administration (FAA) regulations and furthered aeronautical activities and safety by preventing height enhancements, radio interference, and glares that would have disrupted aeronautical activities of airport.

Opportunity Zone Group Requests Deadline Relief.

SUMMARY BY TAX ANALYSTS

The Novogradac Opportunity Zones Working Group has asked Treasury and the IRS for several forms of relief that focus principally on the postponement of deadlines related to the Opportunity Zone incentive during the COVID-19 pandemic.

FULL TEXT PUBLISHED BY TAX ANALYSTS

December 23, 2020

Office of Associate Chief Counsel (Income Tax and Accounting)
Attention: Erika C. Reigle and Kyle C. Griffin
Internal Revenue Service (IRS)
1111 Constitution Avenue, NW
Washington, D.C. 20224

CC:PA:LPD:PR
(IRS Review of Regulatory Relief)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Opportunity Zones Compliance Relief Requested due to Continuing COVID-19 Impact

Dear Ms. Reigle and Mr. Griffin:

The Novogradac Opportunity Zones Working Group (OZ Working Group) is writing to request further relief from certain provisions under Internal Revenue Code (IRC) Section 1400Z-2 and the regulations thereunder due to ongoing and future business impacts of the current COVID-19 pandemic.

The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) have broad authority under IRC Section 7508A to postpone certain deadlines by reason of Presidentially Declared Disaster. The previously issued IRS Notice 2020-39 extended certain opportunity zones-(OZ-) related deadlines to Dec. 31, 2020. As of the date of this letter, the Presidential Disaster Declarations issues due to the COVID-19 pandemic remain ongoing and are expected to continue into 2021. We believe additional extensions of the relief provided in Notice 2020-39 are within the scope of the agencies' regulatory authority.

The OZ Working Group includes various participants in community development finance: investors,

lenders, for-profit and nonprofit developers, community development financial institutions, trade organizations and other related professionals. Our request represents collective input from these stakeholders as to how to make OZ incentive more impactful to low-income communities.

The OZ Working Group appreciates your consideration of issues related to OZ compliance as investors, qualified opportunity fund sponsors, OZ businesses and other organizations struggle with the national impact of COVID-19. We note that the IRS has broad regulatory authority under IRC Section 7508A and robust disaster relief provisions in Rev. Proc. 2018-58. We believe this authority has been triggered by the President's declaration of a national emergency on March 13, 2020, which included his instruction to the Secretary of Treasury to provide relief from tax deadlines under Section 7508A and encouraged requests for a declaration of a major disaster. In response to this declaration, the IRS issued Notice 2020-23 and Notice 2020-39, which extended certain deadlines and provided other relief to taxpayers affected by COVID-19. As we remain under a state of national emergency, we request that the IRS and Treasury further postpone these deadlines and provide other relief related to the OZ incentive.

Notwithstanding the authority the IRS and the Treasury have with respect to disaster relief, the OZ Working Group is requesting the following additional relief:

- IRS Notice 2020-23 provided relief whereby if the last day of a taxpayer's 180-day investment period within which a taxpayer must make an investment into a qualified opportunity fund (QOF) falls on or after April 1, 2020, and before July 15, 2020, were postponed to July 15, 2020. IRS Notice 2020-39 extended this postponement from July 15, 2020, to Dec. 31, 2020. We are requesting that this postponement be extended to June 30, 2021.
- IRS Notice 2020-39 provided relief for QOFs whose last day of the first six-month period of the taxable year or last day of the taxable year falls within the period beginning on April 1, 2020, and ending on Dec. 31, 2020, by waiving penalties for failure of the QOF's 90% investment standard by establishing that the failure is due to reasonable cause under Section 1400Z-2(f)(3). We are requesting that this relief be extended to any 90% investment standard testing dates occurring through June 30, 2021.
- IRS Notice 2020-39 provided relief for QOFs and qualified OZ businesses by disregarding the period beginning on April 1, 2020, and ending on Dec. 31, 2020, in determining any 30-month substantial improvement period. We are requesting that this disregarded period be extended to June 30, 2021.
- As a result of the federally declared disaster for purposes of IRC Section 165(i)(5)A), all qualified OZ businesses holding working capital assets intended to be covered by the working capital safe harbor before Dec. 31, 2020, receive not more than an additional 24 months to expend the working capital assets of the qualified OZ business, as long as the qualified OZ business otherwise meets the requirements to qualify for the working capital safe harbor. Treasury regulation 1.1400Z2(d)-1(d)(3)(v)(D) provides that a qualified OZ business may receive up to an additional 24 months for a total of 55 months to consume its working capital assets under the working capital safe harbor if the QOZB is located in a qualified opportunity zone within a Federally declared disaster area. We are requesting that the potential additional 24 months to expend working capital assets rule be extended to working capital assets intended to be covered by the working capital safe harbor before June 30, 2021.
- IRS Notice 2020-39 provided relief by extending a QOF's normal 12-month reinvestment period to reinvest the proceeds received by the QOF from the return of capital or the sale or disposition of some or all of the QOF's qualified OZ property to up to an additional 12 months provided that the 12-month period included Jan. 20, 2020, and that the QOF satisfies the requirements of Section 1.1400Z2(f)-1(b)(1) and invests the proceeds in the manner originally intended before Jan. 20, 2020. We are requesting that any QOF's reinvestment period that includes any day that falls within

the period beginning Jan. 20, 2020, through Dec. 31, 2020, receives up to an additional 12 months to reinvest and that the period beginning Jan. 20, 2020, through Dec. 31, 2020, is disregarded.
- Provide relief to businesses by confirming that qualified OZ businesses that are forced to rework or dramatically alter their plans for the development of a trade or business and, as a consequence, their written plans and schedules, as a result of the impact of a federally declared disaster, are not considered to fail the working capital safe harbor requirement to use working capital assets in a manner substantially consistent with their written plan and schedule.

As we remain under a state of national emergency, we request that the IRS and Treasury further postpone the above deadlines related to OZs as investors, QOF sponsors, OZ businesses and other organizations struggle to recover from the national impact of COVID-19.

Thank you for your consideration of these requests. Please contact us if you have any comments or questions regarding the matters discussed above.

Very truly yours,

By Michael J. Novogradac, Managing Partner

John S. Sciarretti, Partner

Novogradac & Company LLP
Dover, OH

CC:
Michael Novey, Office of Tax Policy, Treasury
Julie Hanlon-Bolton, ITA, IRS
Scott Dinwiddie, Associate Chief Counsel

State Tax and Economic Review, 2020 Quarter 2.

States Saw Freefall Drop in Revenues in the Second Quarter; Partly Offset in the Third Quarter but Still Depressed from Pandemic

Abstract

States saw steep declines in revenues in the second quarter of 2020, though some of this was caused by shifting revenues into the next quarter and next fiscal year. Consequently, most states ended fiscal year 2020 uncertain about their fiscal bottom line. Many states cut spending, laid off or furloughed workers, or used federal aid or rainy-day funds, while they waited to see what their revenues would be after the July 15 income tax filing deadline.

States are still facing unprecedented fiscal uncertainties because of the pandemic which has substantially weakened the economy since March. The recent surge in infection rates mean depressed business activity for a wide range of businesses and services across virtually all states, possibly less consumer spending, and less sales tax revenues for states. Although COVID vaccines are on the horizon, it will take a long time for business activity to return to pre-pandemic levels, with some activities and industries facing a very slow recovery.

View the full report.

The Urban Institute

by Lucy Dadayan

December 24, 2020

TAX - INDIANA

Millikan v. City of Noblesville

Court of Appeals of Indiana - December 7, 2020 - N.E.3d - 2020 WL 7134869

Property owners filed complaint against the city to quiet title to property they claimed to have acquired title to through adverse possession.

Parties both filed motions for summary judgment and, after a hearing granted the city's motion. Thereafter, the trial court denied property owners' motion to correct error. Property owners appealed.

The Court of Appeals held that property owners substantially complied with the statutory tax payment requirement for establishing title by adverse possession.

Property owners, who filed complaint against the city to quiet title to tract of land that they claimed to own under the doctrine of adverse possession, did preserve for appellate review the argument that because they had openly maintained exclusive possession and control of the disputed property for 27 years prior to any special assessments being due they had satisfied the statutory tax payment requirement for establishing title by adverse possession; although they could have raised the issue more clearly in their motion to correct error, property owners did raise the issue in their summary judgment motion when they asserted that they satisfied the statutory requirements prior the city's assertion of drainage assessments on disputed property.

How to Be a Shrewd Opportunity Zone Investor.

What does it take to be a shrewd Opportunity Zone investor? Several Opportunity Zone experts provided their insights on a live panel recorded on November 17, 2020 during OZ Pitch Day, titled "Being a Shrewd Opportunity Zone Investor."

Today's podcast episode is the audio version of that panel. Moderated by OpportunityDb founder Jimmy Atkinson, the panel featured Dave Kunz of Hall Venture Partners, Rocco Forino of DealConnectHub, Jeffrey Maganis of Crowdcreate, Chris Cooley of OZworks Group, and Gerry Reihsen of Coasis Coalition.

Click the play button below to listen to the audio recording of the panel.

Listen to audio.

Opportunity Db

By Jimmy Atkinson

December 23, 2020

CRE Pros Laud Biden's Proposed Changes to Opportunity Zone Program.

Biden and his team contend that the program has fallen short of its promise of bolstering communities of color, small businesses and homeowners.

The federal Tax Cuts and Jobs Act of 2017 created the Opportunity Zone program, an initiative touted by the Trump administration as a vehicle for spurring investment in economically distressed pockets of the country. Today, more than 8,700 of these zones have been designated. As of the end of 2019, Opportunity Zone funds had collected more than $75 billion in private capital for an array of real estate projects.

The Trump administration hails the Opportunity Zone program as a success. A report released in August by the White House Council of Economic Advisers promoted the potential of these zones "to further prosperity and self-sufficiency in those areas that most lack it."

Continue reading.

National Real Estate Investor

John Egan | Dec 07, 2020

New Jersey Appellate Division Holds No Reimbursement of Municipal Taxes for Undisclosed Conservation Easement.

In a decision approved for publication, the New Jersey Appellate Division recently held that the holder of a tax lien who, upon attempting to foreclose on the property, learns that it is encumbered by a previously undisclosed conservation easement, is unable to recoup municipal taxes paid on the property in the absence of bad faith on the part of the Township. *Garden State Investment & Isadore H. May v. Township of Brick*, 2020 WL 7250904 (N.J. Super. Ct. App. Div. Dec. 10, 2020).

Plaintiffs were the purchasers of tax sale certificates on vacant lots in Brick Township. Before purchasing the certificates, the parties "physically inspected the properties and examined the assessment records and tax map," but did not obtain a title search. When the Plaintiffs commenced a tax foreclosure, they discovered that the properties were encumbered by a conservation easement arising out of a 2001 settlement with the Department of Environmental Protection. This easement prevented the "disturbance," and thus, the development, of the property. A deed recording this easement was recorded in the Ocean County Clerk's Office, but the Township's Tax Collector never received notice of the easement, nor was the easement ever indicated on the tax assessment card, nor reflected by a reduction in the encumbered lots' assessed values. Plaintiffs then filed suit "seeking recession of their tax sale certificate purchases and reimbursement of taxes they paid on the properties." On cross-motions for summary judgment, the trial court held that Plaintiffs were not entitled to equitable relief concerning the taxes paid and denied recession of the purchases.

The Appellate Division affirmed. In holding that plaintiffs had no right to rescission of the tax sale purchases, nor the refunding of any municipal taxes paid between the tax sale purchase and the

foreclosure action, the Court stated that "[t]he township tax assessor was unaware of the conservation easement. While its existence was ascertainable to all – since deeds containing the easement had been recorded in the County Clerk's Office – plaintiffs, by engaging in this form of investment, had a greater interest in learning of any limitations on the property than the township did." In doing so, the Appellate Division distinguished this case from *Township of Middletown v. Simon*, 193 N.J. 228 (2008), affirming in part, 387 N.J. Super. 65 (App. Div. 2006). In *Middletown*, the Appellate Division allowed the rescission of a tax sale purchase upon a municipality's belated declaration that the property was intended for public use. The New Jersey Supreme Court affirmed and allowed equitable relief as again, the Township filed an action to have the lot dedicated for public use and adopted an ordinance accepting the lot for public use. In Garden State, however, the Township did not "[play] an active role in seeking to deprive [buyer] of his investment." Additionally, "plaintiffs had every reason to uncover all material circumstances about their investments," and their "failure to act more diligently in ascertaining any defects in or limitations on their investments bars their claim for equitable relief, particularly against the township, which acted passively and innocently throughout."

This case is important because it illustrates that the purchase of a tax sale certificate requires some minimum due diligence, and that a title search may be advisable before purchasing any tax sale certificate for a substantial sum. Here, although the encumbrance rendered the property non-developable, and was not disclosed in the municipal tax records, the lack of wrongdoing on the part of the township, as well as the court's judgment of the lienholders as failing to do proper due diligence on their investment, left the certificate holder with a worthless property for its investment.

Riker Danzig Scherer Hyland & Perretti LLP – Michael Crowley, Michael R. O'Donnell and Andrew Raimondi

December 18 2020

TAX - MICHIGAN

City of Grand Rapids v. Brookstone Capital, LLC

Court of Appeals of Michigan - October 29, 2020 - N.W.2d - 2020 WL 6370351

City brought action against housing project developer and housing association limited partnerships, who were otherwise exempt from ad valorem property taxes, for breaches of agreements for payments of a service charge in lieu of taxes and unjust enrichment for defendants' failure to pay the amount of charges billed as required under city's payments in lieu of taxes ordinance.

The Circuit Court granted city's motion for summary disposition on grounds of no genuine issue as to any material fact and denied defendants' motion for summary disposition on ground the opposing party was entitled to judgment. Defendants appealed.

The Court of Appeals held that:

- Michigan State Housing Development Authority (MSHDA) Act preempted subject portion ordinance;
- Doctrine of in pari materia did not apply, and could not reconcile, ordinance and Michigan State Housing Development Authority (MSHDA) Act; and
- Defendants breached contracts between themselves and city.

Section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions

and payment of service charges for housing projects requires that plaintiff impose an annual payment of a service charge in lieu of taxes charge to be paid by defendant owners of a subject low-income housing projects calculated for the units occupied by low-income persons or families either pursuant to the default amounts set by subpart of statute, or the amount plaintiff established by ordinance as permitted under the subpart.

Section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions and payment of service charges for housing projects requires that plaintiff impose an annual payment of a service charge in lieu of taxes charge respecting all portions of the subject projects occupied by "other than low income persons or families" equal to the full amount of the ad valorem taxes that would have been required if the projects were not tax exempt, to be paid by defendant owners of the subject projects.

A direct conflict existed between section of Michigan State Housing Development Authority Act (MSHDA) governing tax exemptions and payment of service charges for housing projects and portion of city's payment of a service charge in lieu of taxes ordinance, and thus MSHDA Act preempted subject portion of ordinance, where ordinance required payment in lieu of taxes by a housing project owner in the amount of 4% of annual shelter rent which was defined as the total collections from all occupants of a housing project exclusive of charges for utilities provided to them, but MSHDA Act commanded city to charge fees in lieu of taxes equal to the ad valorem tax for portions of projects occupied by "other than low income persons and families."

Doctrine of in pari materia did not apply, and could not reconcile, city's payments in lieu of taxes ordinance and section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions and payment of service charges for housing projects, which otherwise preempted the ordinance, since the ordinance, which required payments in lieu of taxes by a housing project owner in the amount of 4% of annual total collections from all occupants of housing project exclusive of charges for utilities, and the MSHDA section, which commanded city to charge fees in lieu of taxes equal to the ad valorem tax for portions of projects occupied by "other than low income persons and families," both lacked ambiguity.

Housing project developer and housing association limited partnerships breached contracts between themselves and city, which provided developer and housing associations the benefits of tax exemption for the low-income housing projects pursuant to section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions and payment of service charges for housing projects in exchange for payment of a service charge in lieu of taxes pursuant to subject section of MSHDA Act, where when billed pursuant to the parties' contracts, developer and housing associations refused to pay the contractually defined amounts required by city.

Bond Lawyers Seek Further Relief for Low-Income Housing Projects.

SUMMARY BY TAX ANALYSTS

The National Association of Bond Lawyers has requested that the timing relief provided in guidance (Notice 2020-53) for qualified low-income housing projects and qualified residential rental projects be extended through December 31, 2022.

FULL TEXT PUBLISHED BY TAX ANALYSTS

December 2, 2020

David J. Kautter
Assistant Secretary
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Michael J. Desmond
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Krishna Vallabhaneni
Tax Legislative Counsel
United States Department of the Treasury
1500 Pennsylvania Avenue, NW, Room 3044
Washington, DC 20220

Re: IRS Review of Regulatory and Other Relief to Support Economic Recovery

Messrs. Kautter, Desmond and Vallabhaneni:

On July 1, 2020, in response to the ongoing outbreak of the novel coronavirus disease (the "COVID-19 Outbreak"), the Internal Revenue Service released Notice 2020-53 to provide relief to bond issuers, operators, owners and tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state agencies that have jurisdiction over these projects, from otherwise-applicable federal tax law compliance requirements. On behalf of the National Association of Bond Lawyers ("NABL"), I am writing to request that the time-limited relief set forth in IRS Notice 2020-53 be extended through December 31, 2022, as more specifically set forth below.1

This letter was prepared by an ad hoc task force comprising the individuals listed in Appendix A and was approved by the NABL Board of Directors. NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 2,500 members and is headquartered in Washington, DC.

If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux, Director of Governmental Affairs in our Washington DC office, at (518) 469-1565 or at jgiroux@nabl.org.

Sincerely,

Teri M. Guarnaccia
President, National Association of Bond Lawyers
Washington, DC

Enclosure:
NABL's April 9, 2020 Letter to Congress and the Treasury

cc:
Helen M. Hubbard, Associate Chief Counsel, Financial Institutions & Products, Internal Revenue Service

Melissa Moye, Director, Office of State and Local Finance, U.S. Department of the Treasury
Johanna Som de Cerff, Acting Branch Chief, Internal Revenue Service
Zoran Stojanovic, Assistant to the Branch Chief, Internal Revenue Service
Timothy Jones, Office of the Associate Chief Counsel, Financial Institutions & Products, Internal Revenue Service
David White, Office of the Associate Chief Counsel, Financial Institutions & Products, Internal Revenue Service
Brett York, Acting Deputy Tax Legislative Counsel, U.S. Department of the Treasury

Background Relating to Tax-Exempt Bond Provisions of IRS Notice 2020-53

Section 142(d) of the Internal Revenue Code of 1986 (the "Code") generally requires as a condition for tax-exempt bond financing that a qualified residential rental project provide for the set-aside of either (i) 20% of its units for tenants with income that does not exceed 50% of area median income or (ii) 40% of its units for tenants with income that does not exceed 60% of area median income (the "Set-Aside Requirement").

Section 147(d) of the Code generally requires that the proceeds of certain types of tax-exempt qualified private activity bonds, including bonds that finance qualified residential rental projects, may only be spent to acquire an existing building if a minimum amount of money is spent on rehabilitation of the building within two years of the later of (i) the date of bond issuance or (ii) the date the building was acquired (the "Rehabilitation Requirement").

As NABL noted in its April 9, 2020 submission to federal policymakers recommending guidance with respect to the tax-exempt bond provisions of the Code in response to the COVID-19 Outbreak,2 if proceeds of bonds issued pursuant to Section 142(d) of the Code are used to acquire an existing, rented-up residential rental project, the tenant mix at the time of bond issuance and/or acquisition may not satisfy the Set-Aside Requirement. Unless all or a significant portion of existing tenants are evicted immediately, it may take some time until the Set-Aside Requirement is satisfied. Since 2004, with the release of Revenue Procedure 2004-39, the Department of Treasury and the Internal Revenue Service have recognized and addressed this problem by providing a "transition period" of up to one year to comply with the Set-Aside Requirement for bond-financed acquisitions of residential rental projects. NABL's April 2020 submission went on to report that, at that time, residential leasing activities had stopped around much of the country as a result of the COVID-19 Outbreak, and that, in addition, supply chains had been disrupted, which in turn suggested that satisfaction of the Rehabilitation Requirement on a timely basis would be more difficult.

Accordingly, in its April 2020 submission, NABL requested an extension of the "transition period" set forth in Revenue Procedure 2004-39, as well as an extension of time to satisfy the Rehabilitation Requirement.

IRS Notice 2020-53 responded to these concerns, providing relief with respect to acquired qualified residential rental projects that, pursuant to Section 5.02 of Revenue Procedure 2004-39, would have a "transition period" ending on or after April 1, 2020 and before December 31, 2020, postponing the last date of the "transition period" for all such projects to December 31, 2020. The same relief is provided in IRS Notice 2020-53 for purposes of satisfying the Rehabilitation Requirement.3

Recommendation

NABL applauds the Internal Revenue Service and the Department of Treasury for promulgating IRS Notice 2020-53, which has provided much-needed timing relief to bond issuers, to residential rental project owners and operators and to other affected parties. As of the date of submission of this

request, however, it is apparent that the timing relief in IRS Notice 2020-53 should be extended beyond the end of 2020.

As you know, there is consistent, broad-based reporting today that the public health challenges presented by the COVID-19 Outbreak are continuing at the end of 2020, at levels that are even higher than they were in April, and that in many jurisdictions around the country, shut-down orders of varying degrees are being imposed or reimposed. In recent weeks, NABL members have reported that owners and operators of residential rental projects described in IRS Notice 2020-53 continue to face severe challenges with respect to achieving compliance with the Set-Aside Requirement and the Rehabilitation Requirement. For example, owners and operators have reported that State or local shut-down conditions have made it extremely difficult or even impossible in some cases to show vacant apartment units and to conduct in-person diligence with respect to the income eligibility of prospective tenants. Moreover, there have been many reports in the press about the scarcity of construction materials and building trades labor to complete construction projects of all kinds.

In light of COVID-19 Outbreak conditions that continue to prevail around the country, we request that the Internal Revenue Service publish guidance supplementing, amplifying or superseding IRS Notice 2020-53, providing that:

1. For purposes of Section 5.02 of Revenue Procedure 2004-39, the last day of a 12-month transition period for a qualified residential rental project that ends on or after April 1, 2020 and before December 31, 2021 is postponed to December 31, 2022; and

2. If a bond is used to provide a qualified residential rental project and if the two-year rehabilitation expenditure period for the bond under Section 147(d) of the Code ends on or after April 1, 2020, and before December 31, 2021, the last day of that period is postponed to December 31, 2022.

We respectfully submit that time is of the essence with regard to the compliance matters set forth in this submission, and we therefore additionally request that that the Internal Revenue Service publish the guidance requested herein on or before December 31, 2020.

APPENDIX A
NABL AD HOC TASKFORCE MEMBERS

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FOOTNOTES

1This request is being submitted in part in response to the November 5, 2020 solicitation of Sunita Lough, Deputy Commission of Internal Revenue, Services and Enforcement, inviting comments from the public regarding regulations and other requirements that can be rescinded, modified or waived to assist business and individual taxpayers with the ongoing economic recovery from the COVID-19 Outbreak. See 85 Fed. Reg. 73252 (November 17, 2020).

2A copy of NABL's April 9, 2020 submission is enclosed for reference; see page 16 of that submission for a discussion of these issues.

3Although the focus of this submission is concentrated on the tax-exempt bond aspects of IRS Notice 2020-53, affecting compliance under Sections 142(d) and 147(d) of the Code, we observe that IRS Notice 2020-53 also provides relief with respect to a number of compliance matters under Section 42(d) of the Code. For example, IRS Notice 2020-53 states that, between April 1, 2020 and December 31, 2020, owners of "qualified low-income housing projects" (as such term is defined in Section 42(d) of the Code) are not required to perform certain income re-certifications or reduce the eligible basis in a building because of the temporary closure of an amenity or common area due to the COVID-19 Outbreak and that state agencies that have jurisdiction over such projects are not required to conduct compliance-monitoring. Additionally, pursuant to IRS Notice 2020-53, between April 1, 2020 and December 31, 2020, owners and operators of qualified low-income housing projects, bond issuers and state agencies are permitted to treat medical personnel and other essential workers providing services during the COVID-19 Outbreak as if they were "displaced individuals" within the meaning of Revenue Procedures 2014-49 and 2014-50, which in turn facilitates the use of qualified low-income housing projects to provide emergency housing for such essential personnel.

END FOOTNOTES

Bond Lawyers Seek COVID-19 Relief Extension.

Public finance attorneys are seeking an extension of pandemic-related economic relief provided by the IRS earlier this year regarding qualified low-income housing projects.

The National Association of Bond Lawyers (NABL), which originally sought COVID-19 relief in April, is asking for an extension of IRS Notice 2020-53, 2020-30 IRB 151, issued July 1.

The notice provides relief to bond issuers, operators, owners, tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state

agencies with jurisdiction over those projects from otherwise applicable federal tax law compliance requirements, NABL noted in a December 2 letter to the IRS and Treasury.

Although the guidance has provided much-needed relief, the ongoing pandemic makes clear the relief should continue beyond 2020, according to the letter.

“As you know, there is consistent, broad-based reporting today that the public health challenges presented by the COVID-19 Outbreak are continuing at the end of 2020, at levels that are even higher than they were in April, and that in many jurisdictions around the country, shut-down orders of varying degrees are being imposed or reimposed,” NABL said.

The group said that owners and operators of residential rental projects described in the notice are still finding it difficult to comply with the set-aside and rehabilitation requirements.

That’s why “time is of the essence” in extending the notice, NABL said.

The last day of a 12-month transition period for a qualified residential rental project ending on or after April 1, 2020, and before December 31, 2021, should be postponed to December 31, 2022, NABL said.

If a bond is used to provide a qualified residential rental project, and if the two-year rehabilitation expenditure period for the bond ends on or after April 1, 2020, and before December 31, 2021, the last day of that period should be postponed to December 31, 2022, NABL added.

TAX ANALYSTS

by FRED STOKELD

POSTED ON DEC. 9, 2020

Rich States Uncover Tax Windfall, Undercutting Push for Aid.

- **The pandemic hit states and cities but not as much as feared**
- **People with jobs kept spending online and pocketed stock gains**

It was a shocking, and seemingly improbable, figure.

Eight months into the pandemic — and the brutal economic collapse it triggered — California’s budget watchdog said the state was poised to pocket a windfall of some $26 billion. Just as New York and Connecticut had revealed weeks earlier, tax revenue was coming in at a clip no one expected, thanks in part to the booming stock market.

And so it has largely played out across the country this year, albeit to a smaller extent in many of the less well-to-do states. The fiscal apocalypse expected to blow massive holes in state budgets hasn’t come — at least not yet.

This in turn is providing fuel to the argument made by some Republicans that additional federal aid for states and municipalities can wait until next year instead of being settled in the relief package that’s being heatedly debated in Washington now. Top leaders from both sides in Congress are near a deal for Covid relief of less than $900 billion, including direct stimulus payments but leaving out state and local aid, according to two people familiar with negotiations. That relief has been one of

the key sticking points.

“In some ways, U.S. taxpayers have saved some money by the stimulus package being delayed so that they could really get their arms around what revenues look like,” said Jennifer Johnston, director of research for Franklin Templeton Fixed Income’s municipal bond team.

There are several important caveats to this somewhat rosy picture, to be clear.

For one, many states and cities are still facing large deficits, just not as big as initially forecast. Also, the spike in Covid-19 cases could trigger more economic shutdowns, potentially reversing the nascent recovery that local governments have seen so far. Most of California is back under a stay-a--home order, and New York could be headed toward one. And because of the lag in collecting taxes, states historically struggle with big deficits well after recessions end.

Financial forecasts have improved considerably in recent months, though. In the spring, congressional Democrats had sought $1 trillion in aid for states and municipalities. Back then, states were expected to report total budget shortfalls of $650 billion through fiscal 2022; now that number is forecast at about $400 billion, according to the Center on Budget and Policy Priorities. And Democrats more recently were pushing for just $160 billion as a first step.

The muni bond market, buoyed by rock-bottom benchmark interest rates, also shows investors are unconcerned about a looming fiscal crisis. States including Pennsylvania, Michigan and California can all borrow for 10 years at rates well below 1%, a historically low threshold. Even a benchmark of near-junk Illinois debt yields just 2.76%, around the level reserved for only the highest-rated borrowers as little as two years ago.

State bond yields retreat to pre-pandemic lows

California is a prime example of the turnaround in fiscal accounts. In May, it girded for a two-year $54 billion gap. It now projects only a $5 billion deficit next year after it reaped a $26 billion windfall from raking in more tax revenue and spending less than expected. New York City, once the epicenter of the coronavirus crisis, collected $985 million more revenue than forecast for the first four months of its fiscal year thanks to a banner year on Wall Street.

The surprise underscores the disproportionate impacts of the outbreak and business shutdown. Lower-income workers for such face-to-face industries as restaurants are losing their jobs, while wealthier individuals work from home, buy goods online and sell stock — all generating the income that states rely on to balance their books.

Stock markets have thrived — both because of the Federal Reserve’s rate cuts and prospects for an economic rebound in 2021 — and initial public offerings have minted a new class of wealthy Americans, a boost to states such as New York and California that have progressive tax systems.

In California, which gets almost half of its personal income tax collections from the top 1% of earners, three former Stanford University students became billionaires from the IPO of their San Francisco-based food-delivery company DoorDash Inc.

“For those fortunate to maintain employment and income during this pandemic, their financial situation is better than before,” economists at UCLA Anderson said in a December report. “These households have been able to accumulate at least an additional $1.6 trillion in savings.”

Internet Sales

And many have continued to spend. Because states are permitted to tax internet sales from businesses outside their borders, municipal governments have benefited from people shopping at home. Texas, which garners its largest source of revenue from sales taxes, saw the biggest gains over the past 12 months from the $1.25 billion of collections from online retailers, Comptroller Glenn Hegar said last month. In California, home to some of the most sweeping Covid restrictions nationwide on businesses, sales tax revenue stands at about the same so far as it was in the previous year.

Regions have gone through different experiences given the variance in public health restrictions, with some only now beginning to feel the pain, said Irma Esparza Diggs, director of federal advocacy for the National League of Cities. “This pandemic hasn’t hit our state and local governments the same way at every point in time, which has been the difficulty in conveying to Congress this is how much we’re losing,” she said.

The group in December released a survey that found on average, cities have seen revenues decline by 21% since the beginning of the pandemic, while additional expenditures such as protective equipment have jumped 17% over the same time period. Chicago closed an $800 million gap in its 2020 budget that was caused by Covid-19 and an even bigger $1.2 billion hole in 2021, 65% of which was related to the pandemic.

The virus has decimated the finances of transit agencies. New York’s Metropolitan Transportation Authority, the nation’s largest mass transit system, said it will have to slash subways and buses by 40% and chop commuter rail service by half if aid doesn’t come from Washington.

And some states have needed to take unusual action to balance their books. New Jersey last month sold $3.7 billion of general-obligation bonds to cover its revenue shortfall. Illinois has tapped the Federal Reserve’s emergency lending program.

“Even though the prospects of a vaccine are promising, it’s going to take at least a year or two before things go back to some kind of normalcy,” said Lucy Dadayan, a senior research associate with the Urban-Brookings Tax Policy Center.

Bloomberg Politics

By Romy Varghese and Amanda Albright

December 15, 2020, 3:53 PM PST Updated on December 16, 2020, 7:34 AM PST

— With assistance by Martin Z Braun, Danielle Moran, Michelle Kaske, Shruti Singh, Laura Litvan, Erik Wasson, and William Selway

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Understanding A Path To Boosting Lower-Income Communities: Qualified Opportunity Zones

Anyone involved in any type of commercial real estate endeavor has by now heard of the qualified opportunity zone program. For those who haven’t, the qualified opportunity zone (QOZ) came out of the bipartisan Investing in Opportunities Act of 2017 as a means for investors to defer paying taxes on capital gains after the sale of assets. Eventually, it found its way into the Tax Cuts and Jobs Act of 2017 and was rolled out soon after. In all the pro-and-con media hype around the program, many forget that its underlying purpose was to funnel financial resources toward in-need lower-income

communities.

Though the program is still in its early days – it is, after all, a long-term initiative – the following issues should be considered when discussing QOZs: the program's impact on lower-income areas, how qualified opportunity funds (QOFs) can boost economic development and how investors can ensure gains are directed to areas in need. With that said, there are still questions as to whether this community revitalization program is actually being utilized to revitalize communities.

QOZs: A Background

The QOZ program's foundation is found in "Unlocking Private Capital to Facilitate Economic Growth in Distressed Areas," a 2015 report released by the Economic Innovation Group (EIG).

Continue reading.

Forbes

by David Wieland

Dec 1, 2020

Leveraging Development Finance Tools to Attract Opportunity Zone Investment.

Read the CDFA document.

How to Make Communities Part of the Opportunity Zone Equation.

Three years ago, the federal government created Opportunity Zones as a way to encourage private investors to bring an influx of money to struggling urban and rural neighborhoods through tax incentives. The promise of Opportunity Zones to communities? Add affordable housing, boost small businesses owned by Black entrepreneurs and other people of color, and bring solid jobs to local residents, many of whom are living below the poverty level.

But last year, when Angeline Johnson arrived in Wichita, Kansas, as a FUSE executive fellow tasked by the City Manager's Office with encouraging equitable investment in Opportunity Zones (OZs), she discovered that some residents in northeast Wichita had mobilized to share concerns about their OZ designation.

"There was a legitimate fear of gentrification and displacement," Johnson said.

Continue reading.

NEXT CITY

EMILY NONKO DECEMBER 17, 2020

Workforce Housing in Opportunity Zones, with Riaz Taplin.

Why should investors consider workforce housing as a stable Opportunity Zone investment strategy? Riaz Taplin is principal and founder of …

CONTINUE READING »

Opportunity Db

December 16, 2020

TAX - ALABAMA

Jefferson County Board of Education v. City of Irondale

Supreme Court of Alabama - October 23, 2020 - So.3d - 2020 WL 6235733

County board of education and several public-school employees, who worked either as public-school teachers or support staff, sought to avoid application of an occupational tax imposed by city.

The Circuit Court entered summary judgment for city. County board of education and public-school employees appealed.

The Supreme Court held that:

- Nature of services performed by employees of county board of education was not an adequate basis for excluding them from having to pay city's occupational tax;
- State-agent immunity was not a basis to find that employees of county board of education were exempt from city's occupational tax; and
- City's occupational tax neither violated statutorily mandated salary schedule for employees of local boards of education nor failed to ensure equitable pay for such employees.

Nature of services performed by public-school employees, who worked either as teachers or support workers, was not an adequate basis for excluding them from having to pay city's occupational tax; ordinance applied to all employees working in the city limits, regardless of the person's employer or place of residence, and occupational tax did not create a new or additional requirement for gaining or maintaining employment by the county board of education.

State-agent immunity was not a basis to find that employees of county board of education were exempt from occupational tax imposed by city; ordinance did not affect any government function of the county board of education, payment of the occupational tax was not related to a board employee's government responsibilities, and if the county board of education was unwilling to withhold the occupational tax for its employees, the ordinance provided a procedure for employees to independently comply with the requirements of the ordinance.

Occupational tax imposed by city ordinance neither violated statutorily mandated salary schedule for employees of local boards of education nor failed to ensure equitable pay for such employees so as to preclude occupational tax from being applied to employees of county board of education; despite argument that a difference in net wages occurred based on where employees of county board of education provided services within county, nothing in ordinance prohibited county board of

education from paying employees gross wages exactly as required under the mandated salary schedule, and statute in question did not state that employees of local boards of education were otherwise exempt from local, state, or federal taxes.

Understanding A Path To Boosting Lower-Income Communities: Qualified Opportunity Zones.

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Though the program is still in its early days – it is, after all, a long-term initiative – the following issues should be considered when discussing QOZs: the program's impact on lower-income areas, how qualified opportunity funds (QOFs) can boost economic development and how investors can ensure gains are directed to areas in need. With that said, there are still questions as to whether this community revitalization program is actually being utilized to revitalize communities.

Continue reading.

Forbes

by David Wieland

Dec 1, 2020

Despite Challenges, Opportunity Zones Provide Much-Needed Capital.

The program has been criticized for a lack of transparency and for being used as a tax dodge, but developers say it is "a great tool to have in the toolbox."

Following a slow rollout of rules governing opportunity zones, a program Congress approved three years ago to encourage investment in low-income neighborhoods, developers have pumped billions of dollars into the zones nationwide, even in the midst of the pandemic.

The program has drawn myriad detractors, including critics who charge investors are using it simply to avoid paying taxes. Others point to a lack of transparency that makes it tough to gauge whether the investments are making a real impact on communities.

The Trump administration has resisted providing much federal reporting or oversight, but some states and cities are using the initiative to help steer investment into their underserved neighborhoods and track how much residents are benefiting from it.

Continue reading.

The New York Times

By Joe Gose

Nov. 24, 2020

Opportunity Zones Working Group Prepares to Provide Feedback on OZ Legislation, Oversight.

The OZ Working Group provides a platform for OZ stakeholders to work together to create consensus solutions to technical OZ incentive issues and to provide recommendations to the government to make the OZ incentive more efficient in delivering benefits to low-income communities.

During the run-up to the election, President-elect Joe Biden released his Build Back Better plan, which included several proposed modifications to the OZ incentive. These proposed changes have since been included in the Biden-Harris transition plan for racial equity and include:

- Incentivizing qualified opportunity funds (QOFs) to partner with nonprofit or community-oriented organizations, and jointly produce a community-benefit plan for each investment, with a focus on creating jobs for low-income residents and otherwise providing a direct financial impact to households within the OZs.
- Directing that OZ benefits be reviewed by the Department of Treasury to ensure these tax benefits are only being allowed where there are clear economic, social, and environmental benefits to a community, and not just high returns–such as those from luxury apartments or luxury hotels–to investors.
- Introducing transparency by requiring recipients of the OZ tax break to provide detailed reporting and public disclosure on their OZ investments and the impact on local residents, including poverty status, housing affordability and job creation.

Additionally, there has been a bipartisan call for data collection and transparency intended to enhance efforts to evaluate OZ policy and guard against abuse. Legislation introduced during the 116th Congress includes:

- S. 2994: Improving and Reinstating the Monitoring, Prevention, Accountability, Certification and Transparency Provisions of Opportunity Zones, introduced by Sen. Tim Scott, R-S.C.
- S. 2787: Opportunity Zone Reporting and Reform Act, introduced by Sen. Ron Wyden, D-Ore.
- H.R. 4999: Opportunity Zone Fairness and Inclusion, introduced by Rep. Henry Johnson, D-Ga.
- H.R. 5011: Opportunity Zone Accountability and Transparency Act, introduced by Rep. Ron Kind, D-Wis.

During 2021, the OZ Working Group will continue to foster opportunities for its members and continue to provide a platform where industry stakeholders can discover how best to implement the OZ incentive into their business strategy. The group will also continue to maintain a leadership role within the OZ industry by keeping abreast of emerging issues and providing input for shaping proposed legislation and rulemaking. With the likely change in administration, the group will turn its immediate focus to the following regulatory and legislative initiatives:

Administration Oversight

- Revisiting the final OZ regulations and identifying ways the regulations could be improved to enable the OZ incentive to better meet policy objectives, such as additional incentives to encourage affordable housing and other mission-driven investments.
- Reviewing and commenting on policy recommendations for data collection and transparency, including ways in which Treasury can use the Community Development Financial Institutions (CDFI) Fund to help carry out its policy objectives.
- Reviewing the impact of the 2020 U.S. Census and making recommendations on how modifications to census tracts should affect or not affect OZs.
- Reviewing and commenting on proposed rules under the Community Reinvestment Act (CRA) to ensure that CRA serves as a robust incentive to invest in OZs.

Legislative Activity

- Commenting on legislative efforts to provide greater community impact that use targeted incentives or disincentives for specific types of business that create more jobs or meet other policy goals.
- Reviewing and making recommendations for fair transition rules should some higher income or contiguous census tracts be determined to be ineligible as OZs.
- Providing recommendations on the types of information that should be collected from QOFs, qualified OZ businesses and investors to enable Treasury the ability to assess the OZ incentive's impact on community outcomes while at the same time protecting taxpayer privacy.

Conclusion

The leadership of the OZ Working Group has contributed greatly to the success of the OZ incentive during the first three years of implementation and there is still more work to do to successfully transition the incentive under a new administration and to maximize its potential to transform distressed communities. The OZ Working Group is excited to flip the calendar to a new year where we will continue our work of helping to shape the implementation of the OZ incentive toward the maximum efficiency and effectiveness in transforming communities. Parties interested in joining the OZ Working Group can contact John Sciarretti at John.Sciarretti@novoco.com.

Novogradac

Published by Jason Watkins, John Sciarretti on Wednesday, December 2, 2020

Last-Minute Opportunity Zone Strategies for 2020, with Ashley Tison.

With just a few weeks left in the year, what are some last-minute strategies and options to keep in mind for Opportunity Zone investors?

Ashley Tison is an Opportunity Zone consultant and attorney based in Charlotte, North Carolina. Along with Jimmy Atkinson, he is co-founder of OZ Pros, an Opportunity Zone advisory firm.

Click the play button below to listen to my conversation with Ashley.

Opportunity Db

By Jimmy Atkinson

December 9, 2020

TAX - NEW JERSEY

Metz Family Ltd. Partnership v. Township of Freehold

Tax Court of New Jersey - October 20, 2020 - 32 N.J.Tax 69

Taxpayer appealed township's assessment of its local retail shopping center with warehouse component to the rear.

Township filed motions seeking orders for joinder of county board of taxation and Director of the Division of Taxation.

As matter of first impression, the Tax Court held that joinder of board and Director, as parties, was warranted.

Joinder of county board of taxation and Director of the Division of Taxation, as parties, was warranted in taxpayer's appeal from township's property tax assessments, where board and Director approved assessor's initial application to perform annual reassessment, allegedly monitored assessor's progress, and apparently verified assessment as qualifying on Director's list for implementation of Revaluation/Reassessment; board and Directors should explain and defend their process and explain why there was no average ratio for assessments, for only they could provide such information.

TAX - VIRGINIA

International Paper Company v. County of Isle of Wight

Supreme Court of Virginia - September 17, 2020 - 847 S.E.2d 507

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

The Isle of Wight Circuit Court granted county's motion to strike, and taxpayer appealed.

The Supreme Court held that:

- Machinery and tools tax plan did not improperly interfere with corporate taxpayer's vested right to tax refund judgment;
- County had the statutory and constitutional authority to impose taxes on corporate taxpayer's machinery and tools property as well as authority to execute tax relief program;
- Taxpayer provided prima facie evidence sufficient to show that tax relief program payments were integrated into the taxation process and had the same effect as partial tax exemptions; and
- Taxpayer provided prima facie evidence that county machinery and tools tax assessment was non-uniform, invalid, and illegal.

County's machinery and tools tax plan did not improperly interfere with corporate taxpayer's vested right to tax refund judgment, although tax plan may have "clawed back" the money paid to taxpayer under refund judgment, where taxpayer received the money it had a vested right to receive, county

had authority to increase the tax rate, and tax increase did not retroactively alter the prior tax rates or interfere with the paid judgment.

County had the statutory and constitutional authority to impose taxes on corporate taxpayer's machinery and tools property as well as authority to execute tax relief program, even if the practical effect was to "claw back" tax refunds paid to taxpayer for prior years; county did not revise previous assessments, but instead increased tax rate for subsequent years, and tax relief program was to help businesses negatively impacted by the adjustment to the tax rate.

Corporate taxpayer's assertion that county's machinery and tools tax "assessment is otherwise invalid or illegal" because it is not uniform was sufficient to state a constitutional uniformity claim.

Corporate taxpayer provided prima facie evidence sufficient to show that county machinery and tools tax relief program payments were integrated into the taxation process and had the same effect as partial tax exemptions, and thus that taxpayer's machinery and tools tax assessment was non-uniform, invalid, and illegal, as required to survive motion to strike; stated purpose of tax relief program was to relieve liability for tax rate increase for certain class of taxpayers whom county deemed to be "harmed" by the rate increase, county structured the program to directly exempt certain tax liability and payments from the program directly offset tax liability, program factually correlated with tax rate increase and was funded predominantly by the tax rate increase, and relief payments were calculated by using tax figures.

Corporate taxpayer provided prima facie evidence that county machinery and tools tax assessment was non-uniform, invalid, and illegal; tax relief formula treated taxpayers differently based upon whether the county had lawfully owed that taxpayer a refund on taxes overpaid in prior years, which created a sub-class of taxpayers, refund and relief payment were negatively correlated, only taxpayers who had received a refund were required to pay the tax assessment increase, and net tax rates paid by taxpayers, given the payments made to some taxpayers by the tax relief program, were not uniform

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NABL Submits Letter to Treasury and IRS.

On Wednesday, December 3, 2020, the National Association of Bond Lawyers (NABL) submitted a letter to the U.S. Department of the Treasury ("Treasury") and Internal Revenue Service (IRS) requesting an extension of IRS Notice 2020-53 through December 31, 2022. The notice, released on July 1, 2020, in response to the coronavirus pandemic provides relief relief to bond issuers, operators, owners and tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state agencies that have jurisdiction over these projects, from otherwise-applicable federal tax law compliance requirements.

Read the full letter here.

Hawkins Advisory re: Rev. Proc. 2020-49 - Extension of Ability to Hold Telephonic TEFRA Hearings.

In consideration of the ongoing Covid-19 pandemic, Treasury and the Internal Revenue Service have extended the temporary guidance originally provided in Rev. Proc. 2020-21, published in May of

2020. The temporary guidance allows issuers of private activity bonds to hold the public hearings required by the TEFRA rules by teleconference until December 31, 2020. The release on November 4, 2020 of Rev. Proc. 2020-49 extends the period during which issuers may hold telephonic hearings to September 30, 2021.

Read the Hawkins Advisory describing Rev. Proc. 2020-49.

Opportunity Zones: Past, Present, and Future, with Rachel Reilly.

With a new President taking office next month, what does the future hold for Opportunity Zones? And what policy reforms under a Biden-Harris administration would improve the policy such that it more closely adheres to legislative intent?

Rachel Reilly is former director of impact strategy at Economic Innovation Group, a bipartisan public policy organization that helped to create the Opportunity Zone legislation.

Continue reading.

Opportunity Db

By Jimmy Atkinson

December 2, 2020

TAX - NEW YORK

Wells Fargo Bank, N.A. as Trustee for Carrington Mortgage Loan Trust, Series 2006–NC2 Asset- Backed Pass-Through Certificates v. Budram

Supreme Court, Appellate Division, Third Department, New York - November 5, 2020 - N.Y.S.3d - 2020 WL 6493824 - 2020 N.Y. Slip Op. 06323

In action by mortgagee to enforce its mortgage after taxpayer-mortgagors reacquired property from city following tax foreclosure sale, the Supreme Court entered order dismissing complaint and, upon reargument, adhered to its prior decision dismissing complaint.

The Supreme Court, Appellate Division, held that any transfer of real property from city back to taxpayers, after the city had acquired a fee simple interest therein by a deed issued following tax foreclosure sale, could not be considered a redemption of the property or a rescission of the tax foreclosure, and did not restore mortgage lien.

Any transfer of real property from city back to taxpayers, after the city had acquired a fee simple interest therein by a deed issued following tax foreclosure sale, could not be considered a redemption of the property or a rescission of the tax foreclosure, and did not have effect of restoring mortgage lien which had been extinguished upon city's acquisition of fee simple interest in property by the issuance of deed following expiration of taxpayer-mortgagors' right of redemption; mortgagee, having made no attempt to protect its mortgage interest in tax foreclosure proceeding, could not attempt to enforce its mortgage once taxpayer-mortgagors reacquired the property from city.

IRS Releases UBTI Calculation Regs for Exempt Orgs.

Treasury and the IRS have released final regulations on calculating the unrelated business taxable income of tax-exempt organizations.

The final regs (T.D. 9933) issued November 19 address section 512(a)(6), a Tax Cuts and Jobs Act provision that requires exempt organizations with more than one unrelated trade or business to calculate UBTI separately for each one. The regs provide guidelines for identifying separate UBTI and explain when EOs can treat investment activities as one unrelated trade or business when computing UBTI.

The final guidance adopted some clarifications provided in the proposed regs (REG-106864-18) without change. Those clarifications involve the section 513(b) definition of unrelated trade or business applying to individual retirement accounts and the inclusions of subpart F and global intangible low-taxed income being treated in the same manner as dividends when determining UBTI.

UBTI Calculation Regs Reflect Public Input.

Guidance from the IRS and Treasury to help tax-exempt organizations calculate unrelated business taxable income if they have more than one unrelated trade or business adopts many suggestions offered in public comments.

The final regulations (T.D. 9933), released November 19 ahead of official publication in the Federal Register, address section 512(a)(6), a Tax Cuts and Jobs Act provision that requires exempt organizations with multiple unrelated trades or businesses — silos — to calculate UBTI separately for each one.

The final regs explain how an EO can determine if it has more than one unrelated trade or business and, if it does, how to calculate its UBTI.

“The IRS should be commended for its speedy efforts in issuing final guidance on 512(a)(6), along with their level of consideration given to the 17 comments submitted in response to the proposed regulations,” Meghan R. Biss of Caplin & Drysdale Chtd. told Tax Notes.

The preamble to the final regs discusses reducing the administrative burden on organizations and the IRS by adopting bright-line rules, Biss noted.

“In doing so, I believe that the IRS is taking into account how it will enforce these rules,” Biss said. “To me, the rejection of facts and circumstances is an indication that they want agents to avoid the enforcement difficulties posed in other EO areas that rely solely on a facts and circumstances test.”

NAICS Codes
The final regs retain the proposed regs’ (REG-106864-18) provision requiring an EO to identify each of its separate unrelated trades or businesses by using the first two digits of the North American Industry Classification System (NAICS) code that most accurately describes the unrelated trade or business.

The determination is based on the more specific NAICS code that describes the organization’s

activity, and the descriptions in the current NAICS manual of trades or businesses using more than two digits of the NAICS codes are relevant in making that determination, according to the preamble.

In response to comments, the final rulemaking incorporates a NAICS rule for identifying particular industries and provides that when there are sales of goods both online and in shops, the separate unrelated trade or business is identified by the goods sold in shops if the same goods generally are sold online and in stores.

If an EO concludes that its trade or business activities would be most accurately described by different NAICS two-digit codes, the activities should be identified that way and treated as separate unrelated trades or businesses, according to the final regs.

Like the proposed rulemaking, the final regs say the NAICS two-digit code has to identify the separate unrelated trade or business in which the EO directly or indirectly engages. It may not describe activities substantially related to accomplishing the organization's exempt purpose.

The final regs, in response to comments, eliminate the restriction on changing NAICS two-digit codes. An organization that changes the identification of a separate unrelated trade or business must report the modification in the tax year of the change in accordance with forms and instructions.

IRAs, Subpart F Income

The final regs adopt the proposed rulemaking's clarification that the definition of unrelated trade or business applies to IRAs.

Likewise, the proposed regs' clarification that inclusions of subpart F income and global intangible low-taxed income are treated the same way as dividends for purposes of determining UBTI is retained in the final rulemaking.

Net Operating Losses

An EO with more than one unrelated trade or business will determine the net operating loss deduction separately for each of its unrelated trades or businesses, according to the final regs. They also provide that reg. section 1.512(b)-1(e), which addresses the application of section 172 in the context of UBIT, applies separately for each such unrelated trade or business.

The final regs say an organization with losses in a tax year beginning before January 1, 2018, and in a tax year starting after December 31, 2017, will deduct its pre-2018 NOLs from total UBTI before deducting any post-2017 NOLs regarding a separate unrelated trade or business against the UBTI from such trade or business. The IRS and Treasury rejected a commentator's request to permit an EO to choose the order in which it uses pre-2018 and post-2017 NOLs based on its own facts and circumstances.

The final regs clarify that pre-2018 NOLs are taken against the total UBTI in a way that allows for maximum use of post-2017 NOLs, rather than pre-2018 NOLs, in a tax year.

"For example, the final regulations further clarify that an exempt organization may allocate all of its pre-2018 NOLs to one of its separate unrelated trades or businesses or it may allocate its pre-2018 NOLs ratably among its separate unrelated trades or businesses, whichever results in the greater utilization of the post-2017 NOLs in that taxable year," the preamble explains.

The final rulemaking also provides that after offsetting any gain from terminating, selling, exchanging, or otherwise disposing of a separate unrelated trade or business, any remaining NOL is suspended.

But the suspended NOLs may be used if the previous separate unrelated trade or business later resumes or if a new unrelated trade or business that is accurately identified using the same NAICS two-digit code as the previous separate unrelated trade or business begins or is acquired in a future tax year, according to the preamble.

In response to six commentators, the final regs provide that for purposes of section 512(a)(6), a separate unrelated trade or business that changes identification is treated as if the originally identified separate unrelated trade or business is terminated and a new separate unrelated trade or business begins.

Therefore, none of the NOLs from the previously identified separate unrelated trade or business will be carried over to the newly identified separate unrelated trade or business, the preamble explains.

The change in identification may apply to all or a part of the originally identified separate unrelated trade or business. If the change applies to the originally identified separate trade or business entirely, any NOLs attributable to that separate unrelated trade or business are suspended, the final regs say.

If the change in identification applies to the originally identified separate unrelated trade or business in part, the originally identified separate unrelated trade or business that remains unchanged keeps the entire NOLs attributable to it, including the part for which the identification is changing.

Investment Activities

Despite pleas from some commentators, the final regs, like the proposed version, treat an EO's investment activities that are subject to UBIT as a separate unrelated trade or business for purposes of section 512(a)(6).

Regarding specified payments from controlled entities, the IRS and Treasury adopted the language in the proposed regs without change, rejecting the suggestion that all specified payments be treated as one unrelated trade or business for purposes of section 512(a)(6).

Qualified Partnership Interest

The final regs rejected commentators' recommendations of alternative or additional methods for identifying a qualified partnership interest (QPI).

The rulemaking adopts the proposed regs' position that once an organization designates a partnership interest as a QPI, it can't subsequently identify the trades or businesses conducted by the partnership that are unrelated trades or businesses regarding the EO using NAICS two-digit codes unless and until the partnership interest stops being a QPI.

In response to a commentator, the final regulations clarify that if an organization whose interest must be considered when determining the EO's percentage interest for purposes of the first prong of the control test is a general partner in a partnership in which an EO holds an interest, that interest is not a QPI.

Regarding the first prong of the control test, the final regs keep the 20 percent capital interest threshold of the proposed regs. However, they make clear that the EO must satisfy the percentage interest requirement for its tax year with which or in which the partnership's tax year concludes.

TAX ANALYSTS

by FRED STOKELD

POSTED ON NOV. 20, 2020

IRS PLR: City's Geographic Boundaries Constitute Qualified Service Area

The IRS ruled that the entire geographic area of a city is a qualified service area of its public utilities commission within the meaning of section 141(d)(3)(B)(i) but expressed no opinion on whether the interest on bonds used to finance the city's plan to provide retail electric service will be tax-exempt.

Read the IRS Private Letter Ruling.

Citations: LTR 202046004

IRS PLR: Renewable Energy Facility Is Not Public Utility Property

The IRS ruled that the portion of a public utility's photovoltaic array built on a customer's land that is the dedicated renewable energy facility serving that customer will not be public utility property within the meaning of section 168(i)(10) and former section 46(f)(5).

Read the IRS Private Letter Ruling.

Citations: LTR 202047004

IRS Attacks Impact Investing With Flawed Logic: A Critical Review of the IRS Argument

On October 9th, the Internal Revenue Service released Private Letter Ruling 202041009 (the "Ruling"), which, in what many in the nonprofit community would have expected to be a relatively straight-forward exemption approval for a new 501(c)(3) nonprofit organization (the "Nonprofit"), resulted in not just a denial of the Nonprofit's tax-exempt status, but, in some respects, a repudiation of impact investing as a whole, including program related investments (PRIs). While private letter rulings are only legally binding on the taxpayer that requested the ruling (in this case, the Nonprofit), these rulings are used by practitioners as a guide to IRS's position on the application of the tax law. Thus, a negative IRS ruling is generally viewed as a warning to all others in similar circumstances. All is not necessarily lost for the Nonprofit in the Ruling. The Nonprofit still has a variety of options to consider taking to continue its fight, which the authors of this article hope it will vigorously do. As the goal of this article is not to review all of the legal strategies one could take in the exemption process, we note that there are various options so readers know that this story may not be over.

Ruling Overview

The Ruling was prompted by the Nonprofit seeking a Determination Letter from IRS confirming that it qualifies for exemption as an organization described in Section 501(c)(3) of the Internal Revenue Code. According to the Ruling (which is heavily redacted to preserve the confidentiality of the actual applicant), the Nonprofit was formed: Exclusively for charitable purposes, including, for such

purposes, increasing the capital available to organizations that develop and/or operate (i) long term affordable housing for the economically and physically disadvantaged, (ii) community facilities such as schools and community health centers, (iii) businesses providing access to healthy foods, (iv) sustainable energy projects, (v) commercial real estate, and (vi) other projects that may increase social welfare.

The exempt purpose of the Nonprofit, more generally, is to "deploy capital into projects that promote a social good and that otherwise struggle to find financing in normal capital markets" in low income and underserved communities. Capital for the Nonprofit's work comes from impact investors, specifically in the form of equity investments in pooled investment funds organized by the Nonprofit. The Ruling describes impact investors as "individuals and institutions who want to see that their funds accomplish positive social and environmental objectives and as a concomitant objective to earn financial returns and utilize capital to finance projects and organizations in line with the investors' dual objectives". While we recognize there are many different views on how to define an impact investor, this is the version used in the Ruling. Unlike many determination requests from applicants in the exemption process, the Nonprofit had already begun conducting activities prior to making its request for an IRS determination. Thus, the Ruling provides actual examples of activities undertaken by the Nonprofit, namely two funds that were already organized. The first was a loan fund focusing on preventative healthcare and social service investments in an effort to reduce costly acute care interventions. The initial projects included the provision of housing and social services for the chronically homeless and for individuals exiting incarceration to reduce recidivism and the prison population. The second loan fund targeted small-scale energy efficiency and clean energy project finance. In this case, initial projects included efficiency upgrades in non-profit affordable housing units and at a non-profit senior living facility. Both projects focused on lowering operating and utility costs. The Ruling describes the funds' projects as "not commercially financeable". In fact, in characterizing all of the investments made to date by the Nonprofit, the Ruling states:

These kinds of activities are not well supported by traditional capital markets. The activities are too niche, too small scale, or too low-return to draw the attention and resources of banks, venture capital and private equity funds, and public stock and bond markets.

The Ruling also describes, in brief detail, the manner in which the Nonprofit selects projects for investment, which includes both somewhat traditional investment due diligence considering both risk and return, as well as social and environmental impact screens. In order for the Nonprofit to become sustainable it charges a "substantially below market" management fee for its services to the investment funds it manages. To the extent the Nonprofit earns any funds in excess of its costs, which it endeavors to keep low by sharing space and services with its parent organization 501(c)(3) nonprofit organization, such excess is either invested into one or more of the funds or contributed to its parent. Some other facts describing the Nonprofit's activities include that: (a) it will likely be required to register with the Securities and Exchange Commission (SEC) as an investment advisor at some point, (b) no guarantees are made to investors that they will receive a "fair market return", (c) "as of a couple of years ago" the Nonprofit was already managing assets, (d) no charitable deductions are offered to investors in the Nonprofit's funds, despite the Nonprofit's management activities being conducted in furtherance of its charitable mission, and (e) the Nonprofit's model is projected to be successful, with substantial excess revenue over expenses by its third year of operations. Questionable Application of Legal Precedent In reviewing the law governing qualification for exemption in the Ruling, IRS relies on a variety of Treasury Regulations articulating both the "organizational test" and the "operational test".

The former requires that an organization be organized in a manner that qualifies for exemption; in

other words, the governing documents must meet the literal requirements for exemption. The latter test, being the more complex of the two, requires that the organization engage primarily in activities that accomplish one or more of the organization's exempt purposes. The Ruling then proceeds to recite a series of Revenue Rulings from the late 1960s through the mid-1970s, as well as a number of court cases dating back to 1945. After analyzing the precedent, IRS ultimately determined that the Nonprofit fails to qualify for tax-exempt status because it fails to satisfy the operational test for exemption, more specifically, that a substantial portion of the Nonprofit's activities consists of managing funds for a fee that provide a market or near-market return for investors. In other words, more than an insubstantial amount of the Nonprofit's activities further non-exempt purposes. As IRS characterizes the Nonprofit's activities, the funds are open to any interested investors who expect market or near-market returns while also capitalizing on activities with a public purpose. Ultimately, IRS believes the Nonprofit's "charitable objectives or results are incidental to [its] business purposes of maximizing returns for [its] investors." While some of the authority underlying the IRS conclusion is on point, a number of the citations referenced may best be described as misguided or, at worst, far from applicable to the Nonprofit's activities. For example, IRS compares the Nonprofit to an organization denied exemption in Revenue Ruling 69-528, where the organization provided investment services for a fee to other nonprofits in a manner similar to what is considered an unrelated trade or business when operated by a nonprofit organization. In contrast, the Nonprofit charged below-market fees for investments not made in common stocks, but in specifically curated projects that not only advance the Nonprofit's exempt purposes but that would not otherwise be funded without the Nonprofit's actions. IRS seemingly ignores the fact that the Nonprofit's purposes were advanced by its investment in those projects, which were charitable. IRS similarly cites Revenue Ruling 72-369 for the proposition that offering services at cost is not enough to qualify an activity as charitable.

However, the Nonprofit is not providing general managerial and consulting services at cost like the organization in Revenue Ruling 72-369, but is rather providing below-market rates for its investment services as part of a package meant to increase the desirability of investment in exempt purpose projects that would not be funded otherwise. Again, these are projects that were otherwise not commercially financeable. In Revenue Ruling 74-587, a nonprofit invests in economically depressed areas with loans tailored to business needs based on a primary goal of advancing charitable goals, as opposed to amassing profit. While some individuals and businesses receiving financial assistance from the organization may not qualify for charitable assistance, they are "merely instruments" in effectuating the organization's exempt purposes. IRS contrasts this organization with the Nonprofit, stating that because the Nonprofit screens potential investments for both financial feasibility/risk and social/environmental impact, as well as charging fees and benefitting investors, the Nonprofit is primarily concerned with the rate of return. On the other hand, the Nonprofit will only invest if the exempt purposes screen is met, so the assertion that the Nonprofit's investments are "first and foremost concerned with the risk and return potential" seems an unfair characterization based simply on the order of operations of the Nonprofit's vetting methodology; IRS said form counts more than substance. Additionally, the activities of the organization in Revenue Ruling 74-587 are not without private benefit (to the individuals/businesses). There is no indication the loans are interest-free and there clearly is no requirement that the recipients qualify for charitable assistance.

The cases cited by IRS in the Ruling highlight the impact of the commerciality doctrine on the exemption analysis, which is somewhat murky in practice but basically equates to the fact that substantial commercial activity, as defined based on all relevant facts and circumstances, must be in furtherance of a nonprofit's exempt purposes in order to be acceptable. Various court cases over time have enumerated different facts and circumstances to be weighed, but a few commonly cited examples include whether the activity competes with for-profit enterprises, as well as how the activity is priced, advertised and funded. IRS believes the Nonprofit's activities are like those

typically operated by commercial ventures, with funding solely from management fees and resulting in a high financial reserve advising against a finding of exemption. However, a comparison to B.S.W. Group, Inc. v Commissioner, 70 T.C. 352 (1978), for example, is not directly on point as the Nonprofit is not offering consulting services for high fees, but instead charges below-market rates and eschews a carried interest typical of fund managers, all designed to not generate a profit for the Nonprofit. It is operating to provide investments that otherwise are not offered in the market because they could not attract capital, even if there is the potential for market or near market returns. The lack of competition is, in a way, the reason the Nonprofit created the funds in the first place and is the basis of its exempt purpose. Other cases are cited by IRS, including Airlie Foundation v. Commissioner (283 F. Supp 2d 58 (D.D.C., 2003) and Living Faith, Inc. v. Commissioner, 950 F.2d 365 (7th Cir. 1991), in order to continue the competition argument, as well as to point to revenue from investment fees (as opposed to donations) and a projected high financial reserve as counseling against exemption. However, the Nonprofit invests any reserve back into its exempt projects or donates the funds to its parent 501(c)(3) organization. Additionally, based on the facts provided in the Ruling, it is a bit of a stretch to compare the Nonprofit's "promotional efforts," described as a publicly available brochure and offering documents accompanying the private funds that would be required by securities laws, with the wide-spread advertising and "commercial catch phrases" used to promote the restaurants and health food stores run by Living Faith, Inc.

Ultimately, the facts and circumstances of the Nonprofit's activities do not fit neatly with the precedents cited by IRS, which means there seems to be a significant basis for challenging the legal foundation for the position taken by IRS to deny the Nonprofit's exemption.

Tensions with Established Impact Investing Practices

In addition to applying flawed logic to the facts as presented, the Ruling seems to indicate a discomfort with the very types of activities that drive impact investing, including programrelated investments (PRIs) made by private foundations. The Ruling provides a definition of impact investing that highlights dual objectives of positive social and/or environmental good and financial returns, such that the investment is not exclusively about generating profit. Nonprofits have long engaged in impact investing, sometimes termed "mission related investments (MRIs)" and IRS has declined to penalize nonprofit organizations for investments made with a charitable mission in mind that may offer lower returns than standard investment alternatives. The tax law explicitly blesses PRIs, on the other hand, with private foundations authorized to treat amounts expended in connection with PRIs as part of their required 5% minimum distribution requirements and without being considered imprudent from an investment perspective. The Treasury Regulations define PRIs as investments characterized by a primary purpose to advance exempt purposes, without a significant purpose of production of income or appreciation of property. The actual production of significant income or appreciation, however, is not, in and of itself, considered evidence of a significant purpose involving the production of income. In fact, an investment is considered to be made primarily to accomplish exempt purposes if it significantly furthers the accomplishment of the nonprofit organization's exempt activities and if the investment would not have been made but for such relationship between the investment and the accomplishment of the exempt activities. A relevant consideration is whether investors solely focused on profit would make the investment on the same terms.

The Ruling stands in stark tension with PRIs and the larger impact investing environment, as the PRI criteria seem to directly echo the facts in the Ruling. The Nonprofit created "not commercially financeable" funds in furtherance of its exempt purposes, as typical capital markets were not an option due to the "niche," "small-scale," and "low-return" nature of the investments. In short, the investments further the Nonprofit's purposes and would not have been made but for the Nonprofit's efforts. While the Nonprofit was able to provide market or near-market returns to its investors, in

the PRI context, the mere creation of profit is not enough to villainize the investment itself. IRS makes much of the Nonprofit's costsaving efforts, which again, are not enough to make profit the primary motive. Similarly, evaluating potential investments for both risk and social impact does not automatically mean a PRI is not in furtherance of exempt purposes, nor should the assumption be made about the Nonprofit's activities simply because the possibility of a return is considered. While the investors in the Nonprofit's funds may have entertained any number of reasons for investing in the Nonprofit's projects, the Nonprofit offers no promises or expectations to investors about market returns and focuses instead on furthering its exempt purposes in innovative ways. Additionally, there is no requirement that a PRI, or for that matter, charitable activities, only benefit a recipient that would otherwise qualify for charitable assistance, though IRS cites this as a reason against exemption. Lastly, as noted, PRIs are not considered to have a primary profit motive simply because they happen to be a good investment with market or near-market returns. Characterizing the Nonprofit's activities as "trying to secure the highest returns possible for your clients" misses the greater context in which the Nonprofit is operating, namely in a space where projects in furtherance of exempt social and environmental purposes would not otherwise get done. IRS is also uneasy about the fact that investors, including the general public as opposed to simply exempt organizations, can (and are) benefitting from the Nonprofit's investments. However, in the PRI context, the private enterprises that receive support are most certainly benefitted, but so are exempt purposes furthered. On the other hand, PRI returns are required to be recycled by the investing private foundation for charitable purposes. Perhaps the decision in the Ruling would have come out differently had the Nonprofit's management activities been funded through donations as opposed to below-market fees, but the arguments made by IRS strain against the backdrop of established PRI regulations.

The Ruling may result in the curbing of creative fundraising of third-party dollars by nonprofit organizations striving to provide much-needed capital for exempt-purpose facilities and services when facing a dearth of traditional funding options. One of many dangers with this approach is a reduced ability for nonprofits to court or work with outside funding that is not a charitable donation, grant or loan, which, in turn, will reduce the probability that many difficult-to-fund projects with immense social good will ever be started. While IRS may have legitimate arguments in favor of such restrictions, the reasoning provided in the Ruling is not altogether convincing.

Thursday, October 22, 2020

Treasury Releases Priority Guidance Plan.

On November 17, 2020, the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) announced the release of the 2020-2021 Priority Guidance Plan. The 2020-2021 Priority Guidance Plan sets forth guidance priorities for the Treasury and the IRS. Each year, the Treasury Department's Office of Tax Policy and the IRS use the Guidance Priority List to identify and prioritize that tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance. The Guidance Priority List focuses resources on guidance items that are most important to taxpayers and tax administration. Published guidance plays an important role in increasing voluntary compliance by helping to clarify ambiguous areas of the tax law.

You can find the 2020-2021 priority guidance plan here.

TAX - OHIO

Athens v. McClain

Supreme Court of Ohio - November 5, 2020 - N.E.3d - 2020 WL 6494232 - 2020 -Ohio- 5146

Municipalities brought action against Tax Commissioner challenging constitutionality of statutes governing state collection and administration of municipal net profit taxes.

The Court of Common Pleas entered judgment for Tax Commissioner. Municipalities appealed. The Court of Appeals affirmed. Municipalities appealed.

The Supreme Court held that:

- General Assembly's authority to limit municipal power to levy taxes includes administrative acts that the enactment requires;
- General Assembly acted within its authority when it enacted centralized administration system for municipal net profit taxes;
- Statute providing for state's retention of a one-half percent of municipal net profits taxes as part of centralized administration exceeded General Assembly's authority; and
- The unconstitutional retention provision could be severed.

General Assembly acted within its authority when it enacted centralized administration system for municipal net profit taxes; laws did not take over a municipality's own internal operations but instead made administration of municipal net profit tax, for those taxpayers that elected centralized administration, an operation of the state tax department, with the state thereby becoming a fiduciary for the municipalities whose taxes it collected.

Statute directing State Treasurer to retain one-half percent of municipal net profit taxes for collection and administration services, as part of centralized administration, rather crediting amount to fund that distributed funds to municipalities, exceeded General Assembly's general power to legislate, since municipalities exercising home-rule authority were not persons "subject to" the state's regulation.

TAX - SOUTH DAKOTA

Flandreau Santee Sioux Tribe v. Terwilliger

United States District Court, D. South Dakota, Southern Division - October 21, 2020 - Slip Copy - 2020 WL 6158920

Flandreau Santee Sioux Tribe, filed action seeking a judicial declaration that, under federal law, the State of South Dakota did not have the authority to impose the South Dakota excise tax in connection with services performed by non-Indian contractors on the Tribe's on-reservation construction project.

The District Court held that:

- The contractor's excise tax is not expressly preempted by federal law.
- The case turns on whether the imposition of the State contractor's excise tax on Henry Carlson Company, a non-Indian contractor, for construction services performed on-reservation is preempted under the Bracker balancing test.

- The federal government has a strong interest in the construction, renovation, maintenance, and safety of Indian gaming facilities and the extent of federal regulation and control weighs against imposition of the State excise tax.
- Federal interests weigh against the imposition of the State excise tax.
- The State excise tax interferes with the Tribe's interests in tribal self-sufficiency, self-determination, and sovereignty.
- The State failed to establish that the use of State services funded by the State general fund sufficient to justify the imposition of the State excise tax.
- The State's interest in being reimbursed for State services is minimal, and does not weigh in favor of imposition of the excise tax.
- The loss of the Tribe's excise tax would have a small impact to the State's budget, and more importantly, State agencies' budgets funded by the State general fund from a loss of the Tribe's excise tax.
- The State's general interest in raising revenue cannot justify the substantial burden on federal and tribal interests and weighs against imposition of the excise tax.
- The State's general regulation of the construction industry does not outweigh the tribal and federal interests in Indian gaming revenue.
- The State's interest in uniform application of the contractor's excise tax is minimal and weighs against imposition of the excise tax.
- The term "trade" as used in the Indian Trader Statutes includes the sale of construction materials and services to Indians on-reservation. Thus, the Indian Trader Statutes expressly preempt the State contractor's excise tax at issue here.
- Based on the discussion of federal and tribal interests discussed, and incorporating the federal and tribal interests under IGRA that coincide with the federal and tribal interests under the Indian Trader Statutes, the federal and tribal interests weigh against imposition of the State excise tax.

"In conclusion, the court finds that under a Bracker analysis, the State of South Dakota's interest in imposing the contractor's excise tax does not outweigh the tribal and federal interests in promoting tribal self-sufficiency and self-governance, ensuring the Tribe is the primary beneficiary of gaming, protecting gaming as a means of general tribal revenue, and securing tribal economic development. Considering all the Bracker factors, the evidence presented at trial demonstrated: (1) a strong historical backdrop of tribal sovereignty and sovereignty in the field of Indian gaming; (2) the federal regulatory scheme of IGRA is extensive; (3) there is a strong federal interest in the construction and maintenance of Indian gaming to protect the environment and public health and safety of Indian gaming facilities and patrons while simultaneously promoting tribal self-sufficiency and strong tribal government as evidenced by the statutory structure of IGRA; (4) the Tribe's own regulation of gaming, gaming revenue and on-reservation construction is extensive; (5) the economic burden of the State excise tax falls directly on the Tribe; (6) the State excise tax places a substantial burden on the Tribe's ability to generate gaming revenue and provide essential tribal governmental programs through the Tribe's budget; (7) there is no nexus between the services or regulations funded by the State general fund and provided by the State to the Tribe, tribal members, or Henry Carlson Company and the Casino renovation project; (8) any State services provided to the Tribe, tribal members, the Casino, or Henry Carlson Company off-reservation are not connected to the Casino renovation project and minimal; (9) the State does not uniformly apply the contractor's excise tax or its Department procedures for Indian country tax exemptions; and (10) the State provides little government services funded from the general fund to the Tribe, tribal members, the Casino, or Henry Carlson Company; the State does not uniformly apply the tax; and as a result, the State can only demonstrate a general interest in raising revenue."

"The South Dakota contractor's excise tax on Henry Carlson Company's gross receipts derived from the on-reservation construction and renovation of the Royal River Casino is not per se invalid nor

expressly preempted under IGRA. After considering the federal, tribal, and state interests under the Bracker balancing test, the court finds that the tax interferes with federal and tribal interests reflected in IGRA. This outweighs the State's minimal interests. Thus, the State tax is preempted under IGRA."

"Additionally, because Congress has not said otherwise, Indian Trader Statutes expressly preempt the contractor's excise tax. In the alternative, even if the Indian Trader Statutes do not expressly preempt the State tax, after considering the federal, tribal, and state interests under the Bracker balancing test, the court finds that the tax interferes with federal and tribal interests reflected in the Indian Trader Statutes. This outweighs the State's minimal interests. Thus, the State tax is preempted under the Indian Trader Statutes. Because the State's interests do not outweigh the strong federal and tribal interests under IGRA or the Indian Trader Statutes, the State contractor's excise tax is preempted under federal law."

Biggest Source of Tax Revenue in Every State.

Stacker used survey data from Pew Charitable Trusts, which analyzed tax revenue for U.S. states for the 2019 financial year. For each state, it found the biggest source of tax revenue from the following categories—personal income, corporate, general sales, selective sales, severance, licenses, and property. The data was released in June 2020.

The 50 states have carved out their own ways to collect taxes from their residents and businesses. Those states rich in natural resources collect severance taxes on oil and natural gas extraction, while Delaware trains its tax eye on corporations. Most stick to more typical personal income and sales taxes.

Nearly every state employs progressive ways of taxing the rich more than the poor, although several use flat-rate income taxes that take a much bigger relative bite out of low incomes than of big salaries. And in many states, sales taxes, the most regressive levy of all, comprise the biggest source of public revenue.

The size of tax revenues range from the enormous $188 billion collected last year by the state of California to the far more modest $1.78 billion pocketed by the state of Alaska.

People everywhere love to complain about the taxes they pay, but a survey taken this year found 48% of people thought the amount of taxes they paid were about right, and more than the 46% who thought their taxes were too high. Another 3% thought the taxes they paid were too low.

Check out the list to see what kinds of tax dollars your state collects, and how it compares with the rest of the country.

View the list.

dbrnews.com

Ellen Dewitt | Nov 13, 2020

States Go After Small Businesses on Amazon - and Sometimes Amazon - for Millions in Back Sales Taxes

The Supreme Court in 2018 gave states the power to make new rules for collecting sales taxes online. But back taxes on products sold by small businesses on Amazon's marketplace are still a major point of dispute.

Amazon is one of the nation's largest retailers in part because of its rapidly growing online marketplace, which allows small business owners to sell their products to a vastly larger group of consumers. In fact, Amazon's marketplace sales more than doubled in just three years, climbing to about $230 billion in 2019, accounting for more than half of the online giant's business.

But up until last year, many of those sales weren't taxed because the legal requirement to do so was murky. Now, some state governments are trying to recoup those taxes. But whether they're going after Amazon or small business owners themselves for that money depends upon the state.

In California, a state agency is trying to collect back taxes from Fulfilled-By-Amazon (FBA) sellers from as far back as 2012, when Amazon first opened warehouses and fulfillment centers there.

Earlier this year, Philadelphia-based FBA seller Brian Freifelder received a notice from the California Department of Tax & Fee Administration (CDTFA) warning that he could owe California up to $1.6 million in back sales tax, plus penalties and interest. (After the story made national news, the CDTFA admitted the $1.6 million estimate was "higher than it should have been," but did not let Freifelder off the hook.)

The CDTFA argues that a business owner's inventory stored for sale in California amounts to having a physical presence there, and therefore triggered the eligibility for those sales to be taxed. The action by the agency has sparked at least two lawsuits, the most recent one filed in September by the trade organization Online Merchants Guild. The guild, which represents FBA sellers, says those sales taxes should have been collected by Amazon in the first place because Amazon was the retailer. In the marketplace format, it argues, merchants are the equivalent of suppliers because they don't have control over where their products are shipped or sold.

"They [the CDTFA] have no more discretion to go after Amazon sellers than they do Black & Decker for their sales within Home Depot," said Paul Rafelson, executive director of the guild.

But California isn't alone in trying to directly collect from sellers, with Massachusetts, Minnesota, Washington and Wisconsin also sending demands for back taxes in recent years.

In South Carolina, however, the state is targeting Amazon itself. It sued the company for $12.5 million in unpaid sales tax, interest, and penalties for the first quarter of 2016 alone. An administrative law judge sided with South Carolina, but that ruling is under appeal. The state says Amazon is liable for remitting sales tax for third-party marketplace sales because customers are using Amazon's website and fulfillment services for the purchase.

Amazon said last year the ruling was without merit and hinted at the scale of the potential financial hit if other states followed this tack. "If South Carolina or other states were successfully to seek additional adjustments of a similar nature, we could be subject to significant additional tax liabilities."

Most states sought to clarify the responsibility for collecting taxes after the landmark 2018 Supreme Court ruling that allowed states to collect sales taxes from online sellers, no matter where those

merchants are located. In enacting their own sales tax laws, many governments made a distinction between businesses doing direct sales to in-state consumers and those done via online marketplaces such as Amazon or Ebay.

These marketplace facilitator laws, which have been passed in 33 of the 45 sales tax states, make clear that the marketplace platform is responsible for collecting sales taxes—not the merchant who is providing the product. The intent was to keep in place protections for small business owners for whom it may be cost prohibitive to comply with dozens of different sales tax laws. For example, California's law that took effect in 2019 says that remote retailers must register to collect and remit sales tax once their annual sales into the state exceed $500,000.

But far from clearing things up, those facilitator laws have in some cases added to the confusion. In California, State Treasurer Fiona Ma criticized the CDFTA's approach, calling it "a wrong-headed and retroactive administration of the state's tax law." She argued in a letter to Gov. Gavin Newsom that the state's policy was unfair to small businesses without the ability to comply, while possibly forcing them out of business. Since then, the legislature passed another law that limited the state's look-back period to 2016 for collecting marketplace sales taxes, but that still targets sellers.

Scott Peterson, Avalara's vice president of U.S. tax policy, said that state legislatures can potentially step in to protect marketplace sellers from past tax liability. But in California, that ship has likely sailed.

"They could have let the past be the past," he said. "But instead they doubled down."

Route Fifty

By Liz Farmer

NOVEMBER 12, 2020

Results of 2020 State and Local Tax Ballot Measures.

Read the Tax Analysts report.

November 3, 2020
