
TAX - NEW HAMPSHIRE

Appeal of City of Berlin

Supreme Court of New Hampshire - January 12, 2022 - A.3d - 2022 WL 108571

City sought judicial review of order of Board of Tax and Land Appeals (BTLA) determining that city over-assessed taxpayer, an electric utility company, and challenged BTLA's decision to apply Department of Revenue Administration (DRA) median equalization ratio for intended tax year instead of prior tax year to determine proportionality of city's assessment of taxpayer's hydroelectric facility.

The Supreme Court held that BTLA's decision was unjust and unreasonable.

Board of Tax and Land Appeals' (BTLA) decision to apply Department of Revenue Administration (DRA) median equalization ratio for intended tax year instead of prior tax year to determine whether tax placed on hydroelectric facility was disproportionately higher in relation to its true value than to other property in general in city was unjust and unreasonable; when agreeing to admit taxpayer's exhibit showing DRA median equalization ratio, BTLA expressly noted that, standing alone, it did not establish propriety of particular ratio for city, and taxpayer failed to introduce any evidence regarding general level of assessment in city or supporting its preferred equalization ratio.

Private Letter Ruling Provides Extension for LLC to Self-Certify as QOF.

The Internal Revenue Service (IRS) last week released a private letter ruling granting an extension to a limited liability company to make a timely election to be certified as a qualified opportunity fund (QOF). PLR 202202009 determined that the failure of the LLC's accounting firm to file IRS Form 8996–which allows the self-certification as a QOF for the opportunity zones (OZ) incentive–was unintentional and the LLC acted reasonably and in good faith. The IRS also ruled that the government's interests are not prejudiced by providing an additional 45 days to file a Form 8996 to self-certify as an QOF. PLRs are directed only to the taxpayer requesting them and may not be used or cited as precedents.

A range of topics concerning OZs will be discussed at the Novogradac 2022 Spring Opportunity Zones Conference, April 21-22 in Long Beach, California.

Novogradac | Jan. 17

TAX - COLORADO

Bellock v. United States

United States District Court, D. Colorado - December 8, 2021 - F.Supp.3d - 2021 WL 5893982

"This case presents an issue of first impression on a question of the interplay between two different tax provisions: Rev. Proc. 92-29 and 26 U.S.C. § 103."

To construct the infrastructure for proposed residential subdivision, the developers (Developers) formed metropolitan districts (Metro Districts). The Metro Districts sought to pay for the necessary infrastructure through advances from Developers. The Developers invested a total of approximately $39 million for infrastructure in the various Metro Districts. In exchange for these payments, the Metro Districts issued the Developers bond anticipation notes (BANs). The Metro Districts intended to pay 8.5% interest on the BANs out of future property taxes levied on homeowners and businesses in the districts.

The Developers elected to treat their development costs pursuant to the Alternative Cost Method, set out in Rev. Proc. 92-29, 1992-1 C.B. 748. Under the Alternative Cost Method, upon the sale of a portion of property, a developer is entitled to take an allocable share of the estimated expenses for common improvements in computing the costs of goods sold with respect to the sold property. Costs of common improvement may include funds advanced to third parties, such as the advances made to the Metro Districts here. The Developers thus included the advances to the Metro Districts as costs of construction for purposes of determining the costs of goods sold. "There is no dispute that the Developers did not act improperly when using the Alternative Cost Method."

With regard to the interest from the Bond Anticipation Notes, the Developers used the "accrual basis," which required them to take income into account when earned, not necessarily when received. Each year, the Developers treated the repayment of principal on the BANs as ordinary income; the Developers separately took the interest accruals on the BANs in each year into income as tax exempt pursuant to 26 U.S.C. § 103. Pursuant to section 103, gross income does not include interest on any state or local bond.

The IRS audited the Developers' tax returns for 2010 to 2013. The IRS determined that it was permissible for the Developers to have treated their investments as development costs pursuant to the Alternative Cost Method. However, the IRS found that, having done so, the Developers were foreclosed from treating the interest accruals on the BANs as tax exempt. The IRS thus assessed increases in tax liability for the Developers.

Neither Party disputed that the interest paid on the bonds issued by the Metro Districts would ordinarily be tax-exempt and qualify for the section 103 exclusion. The United States instead argued that the Developers' application of the Alternative Cost Method transformed the underlying transaction, such that the section 103 exemption could no longer apply.

The Developers paid the assessed increases and sought a refund of their payments.

The United States District Court held that nothing in Rev. Proc. 92-29, or the Developers' application thereof, removed this transaction from the purview of section 103.

"The obligation at issue in this case is an obligation to repay the bonds issued by the Metro Districts — that is, to repay the principal on the bonds. The interest on that obligation reflects a promise to pay 8.5% for the right to defer payment on the bonds to allow the Metro Districts to pay out of future property taxes. Thus, regardless of whether the underlying obligation is characterized as a bond, a purchase of goods, etc., the interest on that obligation is distinct and remains tax-exempt under

section 103."

"The exemption in section 103 applies to the transaction here. The interest at issue in this case is interest on an obligation of a political subdivision and, as such, is tax-exempt. Neither the case law nor the general tax principles cited by the United States supports its argument that the Alternative Cost Method, set forth in Rev. Proc. 92-29, forecloses tax-exempt treatment under section 103. The IRS's assessment in this matter was thus erroneous."

IRS Updates Procedures for Determination Letter Requests.

The new procedures are outlined in Revenue Procedure (Rev. Proc.) 2022-04.

Rev. Proc. 2022-04 is a general update of Rev. Proc. 2021-4, published in Internal Revenue Bulletin 2021-01, which sets forth:

- general information about the types of advice provided by the IRS Employee Plans Office of Rulings and Agreements;
- general procedures for letter ruling and determination letter requests;
- specific procedures for determination letter requests; and
- user fees associated with advice requested from Employee Plans Rulings and Agreements.

In addition to minor non-substantive changes, including changes to dates, cross references and citations to other revenue procedures, the following substantive changes have been made to Rev. Proc. 2021-4.

Sections 5.01(4) and 8.01 are revised to provide that the procedures for obtaining an opinion letter regarding a 403(b) pre-approved plan's second six-year remedial amendment cycle beginning July 1, 2020 (and subsequent cycles) are set forth in Rev. Proc. 2021-37.

Sections 6.02 and 30.07 are revised to provide that Form 5300, Application for Determination for Employee Benefit Plan, may be submitted electronically beginning June 1, 2022, and must be submitted electronically beginning July 1, 2022, and to update the procedures for submitting Form 5300 and Form 5310, Application for Determination for Terminating Plan, including payment of the user fee.

Section 6.02(2)(a) is modified to delete "Trust Document" from the list of required documents that must be included as part of a determination letter submission.

Section 8.02 is modified to specify that a Form 5307, Application for Determination for Adopters of Modified Volume Submitter Plans, should be used in the case of a determination letter request for a standardized plan that is not a multiple employer plan if the employer requests a determination solely on overriding plan language added to satisfy Section 415 or 416.

Section 10.03 is modified to delete "trust documents" from the description of materials that must be submitted with a determination letter application.

Section 11.04 is modified to clarify that a plan sponsor of a dual-qualified plan must submit a restatement showing compliance with the Internal Revenue Code and applicable lists when submitting a determination letter application.

Sections 12.02, 12.03, and 12.04 are amended to clarify that an adopting employer of a standardized plan does not file a Form 5300 to request a determination related to overriding language necessary to coordinate (1) the application of the limitations of Section 415, or (2) the requirements of Section 416 because the employer maintains multiple plans.

Section 14.02 is modified to clarify the scope of reliance for a determination letter issued for a multiple employer plan.

Appendix A, Sections .01 and .05 are revised to update the user fees relating to letter ruling requests and opinion letters on pre-approved plans.

AMERICAN SOCIETY OF PENSION PROFESSIONALS & ACTUARIES

BY JOHN IEKEL

JANUARY 5, 2022

TAX - PENNSYLVANIA

O'Donnell v. Allegheny County North Tax Collection Committee

Supreme Court of Pennsylvania - December 27, 2021 - A.3d - 2021 WL 6111680

Taxpayer, who had received qui tam payment under False Claims Act (FCA), filed a petition for administrative appeal after tax servicer for the school district and the borough mailed him a notice that his local earned income tax was delinquent.

The Appeals Board of the Allegheny County North Tax Collection Committee denied the petition for administrative appeal, and taxpayer appealed. The Court of Common Pleas affirmed, and taxpayer appealed. The Commonwealth Court reversed, and school district and borough appealed.

The Supreme Court held that:

- Taxpayer's qui tam payment constituted "compensation" pursuant to Tax Reform Code's definition of "compensation" as including incentive payments; qui tam payment was taxpayer's incentive, and
- Taxpayer's qui tam payment was taxable as compensation under Tax Reform Code and, therefore, as earned income under the Local Tax Enabling Act (LTEA).

By the terms of the False Claims Act (FCA), taxpayer's qui tam payment was intended to incentivize whistleblowers like taxpayer to identify employer fraud, initiate the qui tam action, and provide valuable information to the federal government, and thus, taxpayer's qui tam payment constituted "compensation" pursuant to Tax Reform Code's definition of "compensation" as including incentive payments; qui tam payment was taxpayer's incentive.

Because taxpayer's qui tam payment under False Claims Act (FCA) was an incentive payment, it was taxable as compensation under the plain language of the Tax Reform Code and, therefore, as earned income under the Local Tax Enabling Act (LTEA), which authorized certain political subdivisions, such as school district, to impose a tax on the earned income of their residents.

While taxpayer's qui tam payment under False Claims Act (FCA) was categorized most aptly as a taxable incentive payment, it also met Tax Reform Code's definition of "compensation" for "similar remuneration for services rendered"; qui tam payment was rendered as remuneration for taxpayer's

services in providing useful information to the federal government about his employer's fraud and for initiating the qui tam action.

Revisions to Ohio Statute Governing Centralized Municipal Business Tax Collections to Take Effect for Tax Year 2022.

The Ohio General Assembly passed House Bill 228, which will change the way municipal net profits taxes are collected beginning January 1, 2022. The provisions also include removal of a 0.5% administrative fee that the Ohio Department of Taxation had previously withheld from distributions to municipalities, which the Ohio Supreme Court found to be unconstitutional as a result of a lawsuit brought by nearly 200 Ohio cities and villages. See *City of Athens v. Ohio Tax Commissioner*, Ohio Supreme Court, Case No. 2019-0693, 2019-0696.

On November 5, 2020, the Court held 4 to 3 that it is constitutional to give taxpayers the option of centralized collection of municipal net profits tax, but it is unconstitutional for the state to skim off a fee of 0.5%. Justices Michael Donnelly, Maureen O'Connor, Patrick Fischer, Melody Stewart in the majority. Justice Sharon Kennedy would have held both issues unconstitutional. Justices Pat DeWine and French dissent.

The revised notification process gives the state tax commissioner, rather than taxpayers, the responsibility to notify municipalities of the taxpaying business' election to use the state's centralized collection system. Under prior law, the taxpayer had to notify each municipality in which it conducted business, creating additional work for taxpayers and municipalities. Under the new law, the taxpayer notifies the tax commissioner of its election and where it does business. The tax commissioner is also required to provide quarterly reports to municipalities, streamlining communications and reducing opportunities for error.

H.B. 228 also requires the state to develop a new web portal for the secure exchange of information between the state department of taxation and municipalities. This provision does not set a deadline for the development of this portal. Lastly, the clean-up provisions eliminate the 0.5% fee that the state could withhold from municipal tax distributions under previous law. The Ohio Supreme Court held that this fee was unconstitutional because it was not encompassed within the state's authority to limit the municipal power to levy taxes. Aside from the immediate effect of keeping those municipal tax dollars for municipalities, this holding also prevents the State from increasing the fee in the future.

Municipal tax professionals and other municipal leaders should continue to track legislative proposals for changes to Chapter 718 and the centralized collection system, which will now be reliant entirely on the General Assembly for funding.

Frost Brown Todd LLC – Frank J. Reed, Jr. and Thaddeus M. Boggs

January 7 2022

TAX - COLORADO

Kerr v. Polis

United States Court of Appeals, Tenth Circuit - December 13, 2021 - F.4th - 2021 WL

5873156

Political subdivisions, elected officials, educators, and citizens brought action against governor challenging constitutionality of Taxpayer's Bill of Rights (TABOR), which limited revenue-raising power of state and local governments by requiring voter approval in advance for any new tax.

The United States District Court denied governor's motion to dismiss for lack of standing and certified its order for interlocutory appeal. The Court of Appeals accepted jurisdiction and affirmed. The United States Supreme Court granted petition for writ of certiorari, vacated, and remanded. The Court of Appeals vacated and remanded. On remand, the District Court dismissed complaint, and plaintiffs appealed. Rehearing en banc was granted.

The Court of Appeals held that:

- Subdivisions had standing to bring action;
- Guarantee Clause did not confer right on political subdivisions that they could enforce against their parent state; and
- Colorado's Enabling Act did not create cause of action permitting political subdivisions to challenge TABOR.

Political subdivisions had standing to bring action challenging constitutionality of Colorado's Taxpayer's Bill of Rights (TABOR), which limited revenue-raising power of state and local governments by requiring voter approval in advance for any new tax; subdivisions incurred costs and expenses necessary to present matters to voters for their decision, those costs were fairly traceable to TABOR's requirements, and, if TABOR were struck down, their injury would be redressed.

Colorado's Enabling Act did not create cause of action permitting political subdivisions to challenge Colorado's Taxpayer's Bill of Rights (TABOR) on ground that it violated Act's guarantee of "constitution republican in form"; clause promising constitution republican in form had no clear beneficiary, and, aside from references to common schools, references to other subordinate political entities were nowhere to be found in Act.

TAX - WISCONSIN

State ex rel. City of Waukesha v. City of Waukesha Board of Review

Supreme Court of Wisconsin - December 21, 2021 - N.W.2d - 2021 WL 6014968 - 2021 WI 89

City sought certiorari review of city board of review's determination of taxable value of particular piece of private property.

The Circuit Court granted writ and denied board's subsequent motion to quash. Board appealed. The Court of Appeals reversed and remanded. City petitioned for review.

The Supreme Court held that statute allowing certiorari review of board of review decision does not allow municipality to seek certiorari review of municipality's board of review.

In Case You Missed It: Last Week in Allyn Tax News

Arkansas: Use Tax Refund Claim for Computer Hardware Denied

A taxpayer requested a refund claim on use tax paid on purchases of computer hardware maintenance on services rendered outside of Arkansas. The Arkansas Department of Finance & Administration did not dispute the taxability of the services instead, the Department denied the request because the taxpayer failed to provide substantial documentation demonstrating that these were out-of-state services. It is the taxpayer's responsibility in this case to establish clear evidence for entitlement to a refund.

A reverse (tax) audit, sometimes called an overpayment review, is an optional review of a company's use tax accrued and/or sales tax paid on purchases for the purpose of identifying over-accruals or overpayments to states in the form of use tax or vendors in the form of sales tax. Ultimately, the goal is to obtain a tax refund from the state or locality of the sales or use tax it has overpaid. The review can be performed by a company itself or by a third-party tax professional skilled in the nuances of US state and local taxes.

Use Tax Due on Free Meal Provided to Employees in Illinois

Effective December 3, 2021, the Illinois Department of Revenue has increased the presumed average cost of free meals provided to employees for purposes of establishing employers' use tax liability from $.75 to $3.50. The amendments to Ill. Admin. Code §130.2050 requires that the use tax is to be paid at the rate that would have been imposed when the employer acquired the goods from the supplier.

Kentucky Sales and Use Tax Disaster Relief Refund Guidance

Kentucky Department of Revenue has released frequently asked questions about the sales and use tax disaster relief refund. Refunds on the sales and use tax paid on the purchase of building materials for restoration of an existing building or for construction to replace a destroyed building in a federally declared disaster area may be issued for legal building owners with damaged property from a disaster. For counties affected by severe storms, tornados, and flooding from December 10 to December 11, 2021, a disaster declaration has been issued. These counties have been determined as Caldwell, Fulton, Graves, Hopkins, Marshall, Muhlenberg, Taylor, and Warren. The refund consists of 100% of Kentucky sales and use tax paid for building materials, not including vendor's compensation, up to $6,000 for each building. The building materials must have been purchased on or after December 12, 2021, and the owner must file appropriate documentation within three years from the date the disaster area is declared. Separate refund applications must be submitted for each building. The appropriate documentation consists of an application for the Kentucky disaster relief sales and use tax refund (Form 51A600), all information providing agreements with contractors, vendors and other related parties (Form 51A601), an expenditure report with details of sales receipts and invoices (Form 51A602), any photographs or other documents evidencing the need for a refund, and either documentation that the legal building owner is eligible for assistance from the Federal Emergency Management Agency or a copy of the insurance claim filed for the damage or destruction of the building in the disaster area.

Sales of Security and Alarm Services in Arkansas: Taxable or Exempt?

In Arkansas, sales of security and alarm monitoring systems are included within taxable services. This resulted in a sales tax assessment against a taxpayer who provides security services to be sustained. While an exemption does exist for security services performed by permanent employees,

temporary employees, or leased employees of the buyer, the taxpayer did not prove that he met the requirements for this exemption.

The taxpayer did not maintain adequate records to show sales of invoices. Therefore, the assessor used the taxpayer's income tax returns and 1099-misc. forms to approximate the sales of security services, which were deemed taxable.

Car Sharing in Florida Subject to a Rental Car Surcharge

Beginning January 1, 2022, when a motor vehicle is rented through a peer-to-peer car sharing program, the peer-to-peer car-sharing program must collect and remit the applicable tax and rental car surcharge due in connection with the rental. A peer-to-peer car-sharing program is a business platform that enables peer-to-peer car sharing by connecting motor vehicle owners with drivers for financial consideration.

A peer-to-peer car sharing program is required to register to collect sales tax, discretionary sales surtax and the rental car surcharge applicable to motor vehicles rented through the peer-to-peer car sharing program. Peer-to-peer car-sharing programs are required to submit a registration application for each county in which business is located. A $1.00 per day rental car surcharge applies to the first 30 days of the agreement involving shared vehicles through peer-to-peer car-sharing programs. If the car-sharing period is less than 24 hours, the surcharge is $1.00 per use. The rental car surcharge should be separately stated on the sales invoice and is subject to sales tax and discretionary sales surtax. The surcharge applies to vehicles designed to carry fewer than nine passengers.

U.S. Supreme Court has ruled Ohio Billboard Tax is Unconstitutional

The U.S. Supreme Court was asked to review a case regarding the city of Cincinnati's excise tax on billboard signs on grounds of it being unconstitutional. The city requires an "advertising host," meaning the billboard company, to pay the greater of either 7% of gross receipts generated from a billboard, or an annual minimum amount. A selective tax like this is subject to analysis and will only continue to be enforced if the government defends the tax by demonstrating that it promotes a compelling government interest and is customized to achieve that interest. The issue of this tax is that it is imposed only on a small number of billboard companies, so it was thought of as violating the rights to freedom of speech and a free press which is protected by the First Amendment to the U.S. Constitution. Through definitions and exemptions with the City's municipal code, the burden falls mainly on only two billboard companies. These companies may not be singled out or targeted, since they are speakers and publishers of speech engaging in an act protected by the First Amendment. Even though the City has interest in raising money to support the local government, there are other sources of revenue it can pursue. Consequently, the tax was ruled unconstitutional.

Allyn International

December 28 2021

TAX - WISCONSIN

State ex rel. City of Waukesha v. City of Waukesha Board of Review

Supreme Court of Wisconsin - December 21, 2021 - N.W.2d - 2021 WL 6014968 - 2021 WI 89

City sought certiorari review of city board of review's determination of taxable value of particular piece of private property.

The Circuit Court granted writ and denied board's subsequent motion to quash. Board appealed. The Court of Appeals reversed and remanded. City petitioned for review.

The Supreme Court held that statute allowing certiorari review of board of review decision does not allow municipality to seek certiorari review of municipality's board of review.

Local Assessors Seek Federal Help to Make Property Taxes Fairer.

Municipal officials want information from Fannie and Freddie's appraisal database.

A group of municipal property-valuation officials from across the U.S. has asked President Joe Biden's administration for help in tapping national data about the condition and quality of millions of homes to address widespread unfairness in local property taxes.

The effort follows a series of Bloomberg News reports this year about how residential property taxes, which raise roughly $500 billion a year nationwide, are plagued by systemic flaws: Official assessments tend to overstate the taxable value of inexpensive homes while understating the value of expensive ones. As a result, working-class homeowners pay higher effective property tax rates than the wealthy do.

In Chicago, the problem is most acute "in the bottom third of prices," said Cook County Assessor Fritz Kaegi. "And we think this is due to things that we are not measuring" with available data, he said: "quality and condition of homes."

Kaegi has suggested that the Uniform Appraisal Database maintained by the federally chartered mortgage buyers Fannie Mae and Freddie Mac might help plug the gap. The UAD contains information on the condition and quality of millions of U.S. homes that were appraised for mortgages. Kaegi recruited 15 other tax officials from major urban areas — including Seattle, Miami, Philadelphia and Dallas — to join him in asking for access to that information.

Federal officials haven't committed to granting the request; one primary concern centers on the need to filter out private information, such as names of owners and lenders, while preserving useful data on homes' quality. But the local officials' group is scheduled to meet with representatives of the Federal Housing Financial Agency in January to discuss the proposal.

Residential property taxes are generally based on the fair market value of a home, as determined by local officials. Most assessments are based on recent sales. Generally, assessors use sales data to estimate values for all the homes in a jurisdiction. That process, known as mass appraisal, relies on computer models that calculate the average value of individual attributes, such as square footage of living space and number of bathrooms, and applies them to each residence.

But local assessors are barred from entering homes without permission, so they have no real data on each one's relative quality, including individual improvements or maintenance issues that might affect value. It's generally accepted that affluent homeowners are less likely to put off repairs, making high-priced housing stock more uniform and therefore easier to value. Experts say assessed values at the low end of the scale tend to vary more, contributing to inflated values.

Kaegi, who took office in 2018, says the UAD can provide the information assessors currently lack. He argues that because Fannie and Freddie are under federal conservatorship, administration officials can release the data to local assessors.

A former portfolio manager and neophyte politician, Kaegi won office by promising to bring fairness and accuracy to a deeply regressive system in Chicago. One study showed that inaccurate assessments in the area had shifted more than $2.2 billion in taxes from the highest-priced homes to the lowest over five years' time. Now three years into his four-year term and seeking re-election, Kaegi has upgraded the agency's valuation models — the new ones use machine learning — and expanded the data sources used to value properties. He boosted transparency by posting detailed statistical reports on assessments online, with explanations of the agency's methods. But while his staff has narrowed disparities in the county's valuations, Kaegi says, gaps remain, especially among the least valuable properties.

Moreover, his efforts to correct valuations that were inaccurate and unfair for years have drawn opposition from business groups and some homeowners, illustrating the political difficulty of overhauling property tax systems.

Critics complain that Kaegi used sketchy data to justify a roughly 10% Covid reduction for residential assessments in early 2020, just as most office buildings and some small businesses saw dramatic increases as assessors addressed chronic inaccuracies. Then, during the pandemic, residential property values boomed while downtown office buildings and businesses reeled, and Cook County saw just the kind of unwarranted tax shift Kaegi had said he'd end. Opponents say he was currying favor with homeowners. Kaegi says he used the best data sources he had at the time, primarily unemployment figures and information about the impact of Covid on real estate investment trusts.

"It was the opposite of fair and accurate," said Farzin Parang, executive director of the Building Owners and Managers Association of Chicago, an office building trade group, and staunch critic of Kaegi. "From our perspective, the entire thing was completely political."

Now Kaegi's trying to foster nationwide improvements.

Last March, after Bloomberg published a story that highlighted a new, nationwide study about widespread regressivity in property taxes, the University of Chicago professor who led the research met with White House staff members. Christopher Berry, a professor of public policy, walked the officials through his data analysis, which found unfair valuations in roughly nine out of every 10 U.S. counties it examined. Kaegi joined a follow-up meeting in April, where he pitched his request to use the UAD to gain insights about the condition and quality of homes.

In an interview, Berry said he thinks tapping the UAD is a good idea that would involve few costs for the federal government — but said it may lead to only marginal improvements. "That's the only way this thing is going to get better, small continuous improvements," he said.

Kaegi's analysts have estimated that missing information about a home's condition and quality could swing a valuation estimate up or down by tens of thousands of dollars. For homes at the lower end of the price scale — $100,000 or less in Chicago — that could result in highly unfair valuations.

In August, Kaegi and his 15 counterparts from across the country wrote to the White House for help in accessing the relevant UAD data. A senior administration official said a presidential task force that's examining racial equity in home-loan appraisals is also committed to exploring property-tax fairness, though federal officials have little authority over local taxes.

Sharing appraisal data from the UAD would be a good start, said King County Assessor John Wilson in Seattle. “The information is well worthwhile,” he said. “It would help us on some of the questions we’ve all had about whether there are some things inherently discriminatory in our assessments.”

Bloomberg Business

By Jason Grotto

December 23, 2021

U.S. Supreme Court Has Ruled Ohio Billboard Tax is Unconstitutional.

The U.S. Supreme Court was asked to review a case regarding the city of Cincinnati’s excise tax on billboard signs on grounds of it being unconstitutional. The city requires an “advertising host,” meaning the billboard company, to pay the greater of either 7% of gross receipts generated from a billboard, or an annual minimum amount. A selective tax like this is subject to analysis and will only continue to be enforced if the government defends the tax by demonstrating that it promotes a compelling government interest and is customized to achieve that interest. The issue of this tax is that it is imposed only on a small number of billboard companies, so it was thought of as violating the rights to freedom of speech and a free press which is protected by the First Amendment to the U.S. Constitution. Through definitions and exemptions with the City’s municipal code, the burden falls mainly on only two billboard companies. These companies may not be singled out or targeted, since they are speakers and publishers of speech engaging in an act protected by the First Amendment. Even though the City has interest in raising money to support the local government, there are other sources of revenue it can pursue. Consequently, the tax was ruled unconstitutional.

Allyn International

December 23 2021

TAX - CALIFORNIA

Lejins v. City of Long Beach

Court of Appeal, Second District, Division 1, California - December 1, 2021 - Cal.Rptr.3d - 2021 WL 5628744

Property owners petitioned for writ of mandate challenging surcharge municipality imposed on its water and sewer customers by embedding surcharge in rates water department charged its customers for service.

The Superior Court granted judgment for owners and awarded them attorney fees. Municipality appealed.

The Court of Appeal held that:

- Voter-approved surcharge had been imposed upon parcel or upon person as incident of property ownership within meaning of constitutional provision governing special taxes;
- Voters’ approval of surcharge did not prevent it from violating constitutional provision governing

special taxes; and
- Transfer or surcharge that was not in any way related to costs of providing water and sewer services was prohibited by Constitutional provision governing special taxes.

Ability of person to own real property without obtaining water or sewer service did not prevent voter-approved surcharge for water and sewer services that supported variety of municipal services, such as 9-1-1 emergency response, police-fire protection, street-pothole repairs, senior services, parks, and libraries from being imposed upon parcel or upon person as incident of property ownership within meaning of constitutional provision governing special taxes.

Surcharge for water and sewer services that supported variety of municipal services, such as 9-1-1 emergency response, police-fire protection, street-pothole repairs, senior services, parks, and libraries violated constitutional provision governing special taxes although it had been approved by voters.

Transfer or surcharge that was not in any way related to costs of providing water and sewer services was prohibited by Constitutional provision governing special taxes; although surcharge raised unrestricted revenue to support variety of municipal services, such as 9-1-1 emergency response, police-fire protection, street-pothole repairs, senior services, parks, and libraries, it did not reimburse municipality for costs associated with water department's use of its infrastructure.

TAX - WYOMING

Winney v. Hoback Ranches Property Owners Improvement and Service District

Supreme Court of Wyoming - November 24, 2021 - P.3d - 2021 WL 5504238 - 2021 WY 128

Landowners in rural residential subdivision brought action against neighbor and property owners improvement and service district, alleging violations of protective covenants and illegal imposition of property tax levies, and neighbor and district filed counterclaim alleging that landowners violated protective covenants.

The District Court granted summary judgment for district and, after a bench trial, entered judgment for neighbor on claim against him. Landowners appealed.

The Supreme Court held that:

- District's authority to levy taxes was not limited to eight mills as outlined in petition to form district;
- Protective covenant requiring buck and pole fencing applied to subdivision's perimeter fence on landowners' property;
- District's alternative argument as to inequities in enforcing covenant as to fencing was best left for a first determination on remand; and
- Neighbor's performance of road maintenance and snowplowing for subdivision did not violate covenant prohibiting commercial activity.

Authority of property owners improvement and service district, as a political subdivision of state, to levy taxes in rural residential subdivision in county was not limited to eight mills as outlined in petition to form district, where Improvement and Service District Act did not impose a mill levy or other cap on a district's authority to tax, Act specifically allowed a district to change amount or rate

it charged for use of improvements and services it provided, and landowners were on notice that any district that was formed would have authority to collect revenue and to “change the amount or rate thereof.

TAX - LOUISIANA

Calcasieu Parish School Board Sales & Use Department v. Nelson Industrial Steam Company

Supreme Court of Louisiana - December 10, 2021 - So.3d - 2021 WL 5860861 - 2021-00552 (La. 10/10/21)

School board sales and use department and administrator of the department filed suit against steam company for failure to pay use tax on its purchase of limestone.

The District Court granted summary judgment in favor of plaintiffs. and denied company’s exceptions, motion for summary judgment, and cross motion for summary judgment. Company appealed. The Court of Appeal reversed. The Supreme Court reversed and remanded. The Third Circuit Court of Appeal reversed. Application for review granted.

The Supreme Court held that amendment to use tax provision for materials further processed was new tax, within meaning of Tax Limitation Clause.

Amendment to use tax provision for materials further processed into a byproduct for sale, which included as taxable incidental byproducts that had previously been exempt from use tax as sales for further processing was “new tax,” within meaning of Tax Limitation Clause, requiring that any levy of a new tax or tax increase be approved by two-thirds of the state legislature.

TAX - OHIO

State ex rel. Pike County Convention and Visitor's Bureau v. Pike County Board of Commissioners

Supreme Court of Ohio - November 16, 2021 - N.E.3d - 2021 WL 5313119 - 2021-Ohio-4031

County convention and visitor’s bureau brought action against county board of commissioners and county auditor, seeking writ of mandamus compelling board and auditor to disburse to bureau the proceeds of a county-imposed sales tax on hotel lodging.

The Supreme Court held that:

- Bureau’s claim was cognizable in mandamus;
- Board had discretion to redirect the tax proceeds to new entity;
- Board did not abuse its discretion in redirecting tax proceeds to new entity; and
- Bureau failed to establish clear legal right to retrospective monetary relief.

County convention and visitor’s bureau’s claim against county board of commissioners and county auditor, seeking disbursement to bureau of proceeds of county-imposed sales tax on hotel lodging based on statute authorizing the tax, was cognizable in mandamus; bureau’s complaint sought to compel rather than prohibit official action, even though the requested relief would, in effect, prohibit the enforcement of certain resolutions of the board.

County board of commissioners, under statute authorizing tax on lodging, had discretion to redirect from county convention and visitor's bureau to another entity the proceeds of county-imposed sales tax on hotel lodging; other than prescribing a duty on board to earmark a residual percentage on tax proceeds for "the convention and visitors' bureau operating within the county," the statute said nothing more concerning the recipient of the funds, and the absence of statutory guidance concerning how an entity was designated to receive tax revenue was to be read as a grant of discretion on that point.

County board of commissioners did not abuse its discretion in redirecting from county convention and visitor's bureau to another entity the proceeds of county-imposed sales tax on hotel lodging, precluding bureau's claim for mandamus relief ordering board to disburse the proceeds to bureau prospectively; board explicitly enacted resolution redirecting the proceeds to new entity in response to documented findings of financial negligence by bureau, resolution referred to the findings as basis for the action taken, and period of more than a year between publication of the findings and passage of the resolution did not establish an arbitrary or unconscionable attitude on the part of the commissioners.

County convention and visitor's bureau failed to establish a clear legal right to retrospective monetary relief with respect to proceeds of county-imposed sales tax on hotel lodging allegedly withheld unlawfully or redirected by county, in bureau's mandamus action; resolution of county board of commissioners redirecting the proceeds to another entity was not an abuse of discretion under statute authorizing tax on lodging, and even if an earlier resolution of the board improperly withheld proceeds from the bureau, the bureau no longer qualified as entity designated to receive the proceeds under the statute in light of subsequent actions of the board.

Pot Taxes May Yield $12 Billion for States by 2030 Says Barclays.

- **Legal weed will blunt budget pain after federal aid runs out**
- **California raised about $1 billion in pot revenue in 9 months**

When U.S. states and municipalities burn through their federal coronavirus relief money, taxes on legal weed will help blunt the budget pain.

Cannabis tax revenue generated more than $2 billion in the U.S. last year and that could grow to $10 billion to $12 billion for states by 2030, exceeding tax revenue from alcohol, according to municipal-bond strategists at Barclays Plc. This year, five states–New York, New Jersey, Connecticut, Virginia and New Mexico legalized recreational pot, bringing to 18 the number of states enacting law to regulate and tax cannabis for adult use.

"We'll have some long lasting consequences of the pandemic and you'll need to make money up somewhere," said Mikhail Foux, Barclays head of municipal strategy.

For now, U.S. municipalities are swimming in cash. States and cities collected $350 billion from the Covid-19 stimulus package to spend on everything from subsides for low income renters to pay increases for teachers. They also plan to fund hundreds of millions of dollars on projects like broadband and water and sewer upgrades — and that's before they get another massive infusion of cash from the $550 billion infrastructure package approved last month.

Municipalities must commit the stimulus money by 2024, and spend it by 2026. And when the federal money's gone, municipalities will need to find new revenue to pay for ongoing programs they

funded with one-time aid.

Legal sales of cannabis totaled $17 billion in 2020 and should grow to as much as $27 billion this year, according to Barclays. By 2030 sales should reach about $80 billion, the London-based bank estimates.

California took in almost $1 billion in cannabis tax revenue in the first three quarters of 2021, a 21% increase over the same period the prior year. California may bring in $1.7 billion in cannabis revenue by 2026, while New York, New Jersey and Connecticut could generate as much as $2 billion, Barclays estimated.

There's more growth potential in populous states like Florida and Pennsylvania that haven't yet legalized recreational weed.

Bloomberg Politics

By Martin Z Braun

December 3, 2021

What Happens if Muni Bonds Stop Being Tax-Free?

The 2017 Tax Cuts and Jobs Act was a wake-up call, one analyst says

For decades, everything from sewer systems to schools to stadiums have been built by debt issued by state and local governments. Municipal bonds are a mainstay of the American economy: They level the playing field between tiny towns and massive state economies, letting every issuer reach investors who want a steady stream of income that's also tax-free.

But what if tax-free bonds stopped being tax-free?

One analyst thinks the market should be more prepared for such a shift. "I don't see an immediate threat," said Tom Kozlik, head of municipal research at HilltopSecurities, in an interview with MarketWatch. But in an era where deficit reduction may start to resonate more for lawmakers even as low taxes reign supreme, Kozlik says the muni market needs to be vigilant.

Continue reading.

MarketWatch

By Andrea Riquier

Dec. 2, 2021

Fitch: Home Price Increases Have Varied Effect on Property Taxes

Fitch Ratings-New York-03 December 2021: Local governments in some states are better positioned to benefit in the near to medium term from strong home price growth, says Fitch Ratings. The

potential revenue impact depends on a municipality's property tax regime, home price trends and the historical relationship between home price trends and property taxes, which reflects tax policy and government action. Fitch ranked states according to the possible tax revenue impact based on an index of these three factors.

Home price growth has surged in all states but has been uneven. Municipalities in states near the top of the ranking may see a boost to property taxes because of higher home price growth, the contribution of property taxes to total revenues and tax policies that capture this growth.

Property taxes are a smaller portion of overall tax revenues for municipalities in states ranked near the bottom. These states have had less exuberant home price growth, and there is little or no correlation between historic property taxes and house prices, partially due to atypical valuation cycles, rate limits and policy choices.

Continue reading.

IRS Sets Releases New Rules For Private Activity Municipal Bonds.

On November 10, 2021, the IRS released Rev. Proc. 2021-45 setting forth calendar year 2022 methodologies for establishing private activity bonds volume cap (state ceiling) as well as brokerage commissions on guaranteed investment contracts or investments purchased for a yield restricted defeasance escrows, such as those often used in housing and other community-oriented private activity bonds.

For calendar year 2022, the amounts used under § 146(d) of the Internal Revenue Code to calculate the state ceiling for the volume cap for private activity bonds is the greater of (1) $110 multiplied by the State population, or (2) $335,115,000. In addition, Rev. Proc. 2021-45 places limits on the issuance of agricultural bonds. For calendar year 2022, the loan limit amount on agricultural bonds under § 147(c)(2)(A) for first-time farmers is $575,400.

Rev. Proc. 2021-45 also set forth safe harbor rules for brokerage commissions on guaranteed investment contracts or investments purchased for a yield restricted defeasance escrow. For calendar year 2022, under § 1.148-5(e)(2)(iii)(B)(1), a broker's commission or similar fee for the acquisition of a guaranteed investment contract or investments purchased for a yield restricted defeasance escrow is reasonable if (1) the amount of the fee that the issuer treats as a qualified administrative cost does not exceed the lesser of (A) $43,000, and (B) 0.2 percent of the computational base (as defined in § 1.148-5(e)(2)(iii)(B)(2)) or, if more, $4,000; and (2) for any issue, the issuer does not treat more than $122,000 in brokers' commissions or similar fees as qualified administrative costs for all guaranteed investment contracts and investments for yield restricted defeasance escrows purchased with gross proceeds of the issue.

Taft Stettinius & Hollister LLP – Raymond Headen

November 23 2021

House Build Back Better Act: Details & Analysis of Tax Provisions in the

$1.75 Trillion Reconciliation Bill.

The House Build Back Better plan would result in an estimated net revenue increase of about $1 trillion, 107,000 fewer jobs, and on average less after-tax incomes for the top 80 percent of taxpayers over the long run.

Read more.

Tax Foundation

Links to State Tax-Exempt Bond Allocating Agencies: Novogradac

View the links.

2022 QAPs and Applications: Novogradac

View the 2022 QAPs and Applications.

TAX - RHODE ISLAND

Athena Providence Place v. Pare

Supreme Court of Rhode Island - November 10, 2021 - A.3d - 2021 WL 5226361

Taxpayers petitioned for relief from city's tax assessments of their dwelling units in residential condominium development following a revaluation of units upon expiration of tax stabilization agreement for development.

After a bench trial, the Superior Court entered judgments for taxpayers. Tax assessor appealed.

The Supreme Court held that revaluation was not a selective assessment.

City's revaluation of taxpayer's dwelling units in residential condominium development upon expiration of tax stabilization agreement for development was not a selective assessment, where city's normal practice was to revalue and reassess properties upon expiration of a tax stabilization agreement, and there was no evidence that similar properties in city were not subjected to revaluation.

Section 48D: A New Tax Credit for Electric Transmission Property - Foley & Lardner

The Biden Administration has proposed the creation of a new tax credit under the new Section 48D of the Code for qualifying electric power transmission property that is placed in service after December 31, 2021, but before January 1, 2032 (such credit, the "**Section 48D Credit**"). The

proposal would also allow a direct-pay option to elect a cash payment. The proposed credit would be for an amount equal to 6% of a to-be-determined eligible basis (the "**Base Rate**"), with a possible increase to 30% (the "**Bonus Rate**") if certain criteria are met.

Qualifying property would include overhead, submarine and underground transmission facilities meeting certain criteria, including a minimum voltage of 275 kV and a minimum transmission capacity of 500 MW, and any ancillary facilities and equipment necessary to operate such project. A qualifying electric transmission line may be a replacement, or upgrade, to an existing electric transmission line if the transmission capacity of such electric transmission line, as upgraded, increases to an amount equal to the existing capacity of such transmission line plus 500 MW. However, the basis allocable to the existing transmission line would not be eligible for the Section 48D Credit.

Certain property and projects already in process are not eligible for the Section 48D Credit if (i) a state or political subdivision thereof, any agency or instrumentality of the US, a public service or public utility commission or other similar body of any state or political subdivision, or the governing or rate-making body of an electric cooperative has, before the date of the enactment of these rules, selected such property for cost recovery, (ii) construction begins before January 1, 2022, or (iii) construction of any portion of the qualifying electric transmission line to which such property relates begins before January 1, 2022.

In addition to the technical requirements, to claim the credit at the Bonus Rate, the project must satisfy the new prevailing wage and apprenticeship requirements. To satisfy the prevailing wage requirement,any laborers and mechanics employed by contractors and subcontractors must be paid prevailing wages during the construction of such project and, in some cases, a defined period after. To satisfy the apprenticeship requirement, no less than the applicable percentage of total labor hours (5% for projects for which construction begins in 2022, 10% for projects beginning construction in 2023, and 15% thereafter) must be performed by qualified apprentices. Additionally, each contractor and subcontractor who employs four or more individuals to perform construction on an applicable project must also employ at least one qualified apprentice or, in the case of a lack of availability, show a good faith effort to do so. If a non-exempt project fails to meet the wage and apprenticeship requirements, but otherwise meets the technical requirements for the Section 48D Credit, such property will qualify for the Base Rate.

Finally, qualifying electric power transmission property is eligible for an increase to either the Base Rate or the Bonus Rate if such project meets the domestic content requirement, which requires the steel, iron, or other manufactured products that comprise the project be produced in the United States (i.e., at least 55% of the total cost of the components of such product is attributable to components that are mined, produced, or manufactured in the United States). Projects satisfying this requirement could be eligible for a 2% increase to the Base Rate or a 10% increase to the Bonus Rate.

Friday, October 15, 2021

Foley & Lardner LLP

TAX - GEORGIA

Executive Limousine Transportation, Inc. v. Curry

Court of Appeals of Georgia - October 26, 2021 - S.E.2d - 2021 WL 4979102

Licensed limousine carrier filed action challenging the decision of the commissioner of the department of revenue denying carrier's application for a refund of previously remitted state and local-option sales taxes as well as a declaration that owner would owe no such taxes in the future.

The Tax Tribunal granted summary judgment in favor of commissioner. Carrier appealed. The Superior Court affirmed. Application for discretionary review was granted.

The Court of Appeals, as a matter of first impression, held that Georgia Limousine Carrier Act did not prohibit local governments from imposing state or local-option sales taxes on for-hire limousine carriers.

Georgia Limousine Carrier Act, which barred local governments from imposing excise, license, and occupation taxes on limousine carriers, did not prohibit local governments from imposing state or local-option sales taxes on for-hire limousine carriers and their customers for the rental of limousines.

TAX - ILLINOIS

Guns Save Life, Inc. v. Ali

Supreme Court of Illinois - October 21, 2021 - N.E.3d - 2021 IL 126014 - 2021 WL 4898891

Gun rights organization, firearm supply retailer, and individual resident of county brought action against county and related defendants for declaratory judgment and injunctive relief challenging county ordinances imposing taxes on sale of firearms and certain types of ammunition.

Following order dismissing retailer and resident's challenges to firearms tax, the Circuit Court denied plaintiffs' motion for summary judgment and granted summary judgment in favor of defendants. Plaintiffs appealed, and Appellate Court affirmed. The Supreme Court allowed leave to appeal.

The Supreme Court held that tax ordinances were unconstitutional under the uniformity clause.

Relationship between tax classifications in county ordinances imposing taxes on sale of firearms and certain types of ammunition and use of tax proceeds was not sufficiently tied to the stated objective of ameliorating costs of gun violence, and thus tax ordinances were unconstitutional under the uniformity clause; revenue generated from the firearm taxes was not directed to any fund or program specifically related to curbing the cost of gun violence, and nothing in the ordinances indicated that the proceeds generated from the ammunition tax must be specifically directed to initiatives aimed at reducing gun violence.

TAX - GEORGIA

Executive Limousine Transportation, Inc. v. Curry

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Georgia Limousine Carrier Act, which barred local governments from imposing excise, license, and occupation taxes on limousine carriers, did not prohibit local governments from imposing state or local-option sales taxes on for-hire limousine carriers and their customers for the rental of limousines.

It's Long Overdue for Public Finance Scholars to Study Racism in the Tax Code.

In reckoning and renewed attention to issues of racial equity and justice. This long-overdue awakening led me to read extensively about racism and to think about interactions between race and tax policy. In a new paper, "Public finance and racism," I explore some of these links.

While I've studied tax policy for over 30 years, I'd not yet spent much time focusing on connections between race and tax issues that clearly exist.

Three observations, however, are abundantly clear. First, widespread and long-standing racial discrimination in the United States has had enormous, lasting, and deleterious economic effects on Black households. Second, tax policies and other government policies have contributed materially to this problem. Third, changes to the tax code, spending programs, or regulations can help ameliorate the effects of racism, but it is crucial to take into account the persistent effects of racism and the impact of past policies on Black households. Policies that some may view as race-blind may still cement the status quo and reinforce the ills of past and continuing racism.

Continue reading.

The Brookings Institution

by William G. Gale

November 4, 2021

S&P: Online Sales Tax Collections Continue To Grow; Helped Offset Pandemic Declines Last Year

Key Takeaways

- Since the South Dakota v. Wayfair, Inc. decision in June 2018, online sales tax collections have surged across the U.S. with the enactment of economic nexus laws, which consider remote sellers to have an economic presence in a state if they meet certain sales or revenue thresholds.
- All states with a sales tax have enacted marketplace facilitator collection laws. This requires online

marketplaces to collect taxes on behalf of their sellers, leading to more online sales being incorporated into governments' tax bases.
- Online sales tax collections helped mitigate pandemic-related declines in total sales tax collections for many U.S. cities in 2020 and we expect these collections will help support sales tax revenues as online sales proliferate the marketplace.

Continue reading.

28 Oct, 2021

TAX - NEW HAMPSHIRE

Shaw's Supermarkets, Inc. v. Town of Windham

Supreme Court of New Hampshire - October 20, 2021 - A.3d - 2021 WL 4888979

Commercial tenant appealed town's denial of its property tax abatement claim.

The Superior Court denied town's motion to dismiss for lack of standing, and the Court granted the tax abatement request. Town appealed.

The Supreme Court held that:

- Tenant had standing to maintain property tax abatement claim, and
- Tenant's appraisal was credible and thus supported determination of fair market value of the property.

Commercial tenant had standing to maintain property tax abatement claim, as it actually paid the allegedly disproportionate tax to the town on the landowner's behalf, and, under its lease, would have been required to reimburse the landowner for 100% of the tax paid if the landowner had made the payment itself.

Appraisal by commercial tenant's appraiser was credible and thus supported determination of fair market value of the property, even if it deviated from the uniform standards of professional appraisal practice; trial court addressed the deviations and determined that the appraiser's trial testimony sufficiently responded to the town's objections.

IRS Moves to Mandatory E-Filing of Forms for Direct Payment Bonds.

The Internal Revenue Service has moved to mandatory electronic filing of its Form 8038-CP, its form for returning credit payments to issuers of qualified bonds.

That and a number of other developments were announced during the IRS update as part of the Government Finance Officers Association's 3rd annual MiniMuni conference.

"The IRS is moving to e-filing of 8038-CP for those of you that want direct payments on your Build America Bonds," said Johanna Som de Cerff, senior technician reviewer, IRS Office of Chief Counsel Financial Institutions and Products Division Branch 5.

The IRS published its proposal for electronic filing in the federal register on July 23 requesting

comments and on Oct. 22, announced that they will officially be moving to electronic filing of these forms. Soon, electronic filing will be mandatory, despite not rolling the program out quite yet.

“New forms have been designed and those, even the paper form, needs to be used for the 2022 filing year,” Som de Cerff said.

She also urged panelists to subscribe to the IRS’s newsletter, where all related developments of this sort will be announced. “You’ll be getting detailed later as to when the electronic filing is actually going to be available,” she said.

This is part of a larger effort by the IRS to respond to the COVID-19 pandemic, in addition to wider modernization and restructuring efforts happening across the agency, with further updates for bond issuers coming down the line.

“We are going to update the revenue procedure on the recovery of rebate overpayments,” Som de Cerff said. She didn’t mention updates to Form 8038-R, which deals with this issue, by name, but mentioned that updates to the procedure for how to ask for those rebates will be centralized in one document.

“We don’t know if it’s exactly going to be this year, but it’s certainly one of our priorities that we’re working on,” she said.

The agency is also working on developing regulations for the transition from LIBOR.

“You saw proposed regulations a couple years ago, we had a revenue procedure on fallback rates,” Som de Cerff said. “But the final regulations are being worked on being very conscious of the fact that LIBOR and other IBORs may be disappearing fairly soon,” she added. “So that is a very active project as well.

The Bond Buyer

By Connor Hussey

October 22 2021

Hawkins Advisory: Revisions to IRS Form 8038-CP and Instructions for Issuers of Tax Credit Bonds

The Internal Revenue Service has released, in draft form, a new Form 8038-CP, Return for Credit Payments to Issuers of Qualified Bonds (the “Form”), and new Schedule A, Specific Tax Credit Bonds Interest Limit Computation (“Schedule A”). While the new Form and Schedule A are not yet final, and should not yet be used by issuers in their current form, the IRS’s objective in revising these documents is to facilitate electronic filing of the Form in 2022.

Attached, please find the Hawkins Advisory regarding the new Form 8038-CP and Schedule A.

Ending the State and Local Taxes (SALT) Deduction: Brookings Podcast

Millions of American taxpayers itemize their deductions, one of which is for state and local taxes, or the SALT deduction. Most of these filers are at the upper end of the income distribution and live in high-income urban areas. On this episode, Senior Fellow Richard Reeves, director of the Future of the Middle Class Initiative at Brookings, says the SALT deduction mostly benefits the wealthiest taxpayers, gives little or no benefit to the middle class, and should be eliminated entirely. He also talks about the unusual politics of the debate in Washington, where Democratic leaders are calling for repeal of the SALT deduction CAP put in place in the 2017 tax law, championed by congressional Republicans.

Listen to Podcast.

The Brookings Institution

Richard V. Reeves and Fred Dews

Friday, October 22, 2021

Illinois Supreme Court Strikes Down Cook County Tax on Guns as Unconstitutional.

Majority leaves door open for narrower tax language

The Illinois Supreme Court ruled Thursday that a Cook County tax on gun purchases is unconstitutional, but it left the door open for a more tailored tax that specifically goes toward mitigating gun violence and its effects.

The Cook County gun tax, which took effect in April 2013, imposed a $25 fee for retail gun purchases in the county, as well as a 5 cent fee per cartridge of centerfire ammunition and 1 cent per cartridge fee for rimfire ammunition.

The taxes were challenged by the trade group Guns Save Life Inc. in a lawsuit against the county.

The Supreme Court's Thursday opinion, written by Justice Mary Jane Theis, stated that, "While the taxes do not directly burden a law-abiding citizen's right to use a firearm for self-defense, they do directly burden a law-abiding citizen's right to acquire a firearm and the necessary ammunition for self-defense."

In the 14-page, 6-0 opinion, the Supreme Court reversed an appellate court ruling that would have allowed the taxes to stay in place. Chief Justice Anne Burke did not take part in the decision.

While the court rejected the tax, it did specifically note that the county's failure to earmark the revenue from the tax for gun violence prevention programs played a major role in the decision.

It gave particular scrutiny to the question of whether the tax violated the uniformity clause of the Illinois Constitution, which states: "In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly."

Citing previous court precedent related to that clause, the court wrote it had to determine whether the tax on guns "bears some reasonable relationship to the object of the legislation or to public

policy."

"Under the plain language of the ordinances, the revenue generated from the firearm tax is not directed to any fund or program specifically related to curbing the cost of gun violence," the court wrote. "Additionally, nothing in the ordinance indicates that the proceeds generated from the ammunition tax must be specifically directed to initiatives aimed at reducing gun violence. Thus, we hold the tax ordinances are unconstitutional under the uniformity clause."

Justice Michael Burke agreed with the opinion, but issued a four-page special concurrence disagreeing with the majority's analysis that the county's spending plans affected whether the tax was permissible.

"The majority's analysis is problematic because it leaves space for a municipality to enact a future tax — singling out guns and ammunition sales — that is more narrowly tailored to the purpose of ameliorating gun violence," Michael Burke wrote.

He argued the majority opinion is leading the county "down a road of futility," citing Article 1, Section 22 of the state constitution, which reads: "Subject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed."

"The only problem with the majority's approach — and the guidance it offers the county — is that such counsel, if followed, would still violate the provision of the Illinois Constitution noted above that plainly states that the right of the individual to keep and bear arms is subject only to the police power, not the power to tax," he wrote.

"Thus, the majority is leading the county down a road of futility," he added.

One major precedent cited by the court was from Boynton vs. Kusper, a 1986 Supreme Court ruling which struck down a $10 state tax on marriage licenses in certain counties that went to the Domestic Violence Shelter and Services fund.

The court said at the time the marriage license tax "directly impeded the exercise of the fundamental right to marry," and should be subject to greater scrutiny.

The court ruled in the Boynton case that even though the $10 fee was "de minimis," or small, if the court granted that authority, it would essentially mean "there is no limit on the amount of the tax that may be imposed," according to previous case law.

The same argument can be applied to the gun tax, the court wrote, noting that a stricter level of scrutiny is needed because the tax applies to a fundamental right.

Given that necessary scrutiny, the court ruled the gun taxes unconstitutional.

"In applying that standard to the firearm and ammunition taxes, we recognize that the uniformity clause was 'not designed as a straitjacket' for the county … and acknowledge the costs that gun violence imposes on society," the court wrote. "Nevertheless, the relationship between the tax classification and the use of the tax proceeds is not sufficiently tied to the stated objective of ameliorating those costs."

In a statement, a Cook County spokesperson noted shootings in Chicago are up nearly 10% over the last year with almost 2,900 shooting incidents this year, and said guns "have had a significant impact on the County's public safety, health and general expenditures."

The county intends to meet with its legal counsel and “determine any next steps that may be warranted,” according to the statement.

“Addressing societal costs of gun violence in Cook County is substantial and an important governmental objective,” the spokesperson said. “We continue to maintain that the cost of a bullet should reflect, even if just a little bit, the cost of the violence that ultimately is not possible without the bullet. We are committed to protecting County residents from the plague of gun violence with or without this tax.”

Capitol News Illinois

by Jerry Nowicki

Oct 22, 2021

Capitol News Illinois is a nonprofit, nonpartisan news service covering state government and distributed to more than 400 newspapers statewide. It is funded primarily by the Illinois Press Foundation and the Robert R. McCormick Foundation.

TAX - NEW HAMPSHIRE

Merrimack Premium Outlets, LLC v. Town of Merrimack

Supreme Court of New Hampshire - October 1, 2021 - A.3d - 2021 WL 4487259

Property owner and operator of retail outlet shopping mall, which leased property, brought action against town for declaratory judgment and injunctive relief challenging town’s reassessment of taxable property.

The Superior Court granted town’s motion to dismiss complaint for failure to state claim, to extent that it sought declaratory relief on basis that town lacked authority to change assessed value of property, and dismissed constitutional claim with prejudice as discovery sanction, and subsequently denied plaintiffs’ motion for reconsideration. Parties cross-appealed.

Holdings: The Supreme Court, Hicks, J., held that:

- Some “change” is a prerequisite to a municipality’s legal authority to adjust a property’s tax assessment under provision of statute which directs assessors and selectmen to annually adjust assessments to reflect changes;
- Extreme underassessment of property was not “change” that would allow town to adjust assessment the following year; and
- Reassessment of value of property was not necessary to ensure proportionality required by statute or state Constitution.

Town’s extreme underassessment of property on which retail outlet shopping mall was operated was not “change” that would allow town to adjust assessment under provision of statute which directed assessors and selectmen to annually adjust assessments to reflect changes; statute governing how property was appraised required assessors and selectmen to appraise all taxable property, other than certain types of property specifically excepted, “at its market value,” meaning property’s full and true value as the same would be appraised in payment of a just debt from a solvent debtor, and town’s acquisition of information bearing on property’s value, in connection with property’s use as collateral for loan, was not change in value itself.

Reassessment of value of property on which retail outlet shopping mall was operated to correct extreme underassessment of property the previous year was not necessary to ensure proportionality required by statute governing adjustment of assessments and state Constitution; under statute's plain language, annual adjustment so that all assessments were reasonably proportional within municipality had to occur "to reflect changes," and underassessment did not qualify as "change," current statutory scheme sought to ensure proportionality through municipality-wide reappraisals at least every five years and annual adjustments to assessments of properties that had changed in value, and town did not raise developed claim that statutory scheme violated Constitution.

A Tax Loophole for Greenwich.

The House Ways and Means bill includes a carve-out for munis.

The House Ways and Means Committee section of the $3.5 trillion tax and spending bill includes myriad tax carve-outs and credits for liberal special interests. Drawing particular attention from the wealthy in Greenwich and Silicon Valley is an exemption for municipal bonds from a 3% income-tax surcharge.

The proposed 3% surcharge applies to modified adjusted gross income (MAGI) above $5 million a year. A taxpayer's MAGI includes some deductions that are excluded from AGI such as tax-exempt interest for municipal bonds. The IRS uses MAGI rather than AGI to determine a taxpayer's eligibility for several deductions, including IRA contributions.

Democrats are applying the 3% surcharge to MAGI to capture more of high earners' income and limit tax arbitrage. So a taxpayer with an AGI well below $5 million could get soaked. Yet the bill carves out interest from muni debt from MAGI so that states and cities don't get caught in the backwash.

Many high earners use muni bonds to avoid taxes. Muni bonds are especially valuable in states with high income-tax rates like California and New York because they are also exempt from state and local taxes. Investors have poured into muni bond funds this year as Democrats have threatened enormous tax increases. This has pushed down muni-bond yields to record lows and reduced borrowing costs for states and cities. The S&P muni-bond index was yielding a mere 1.07% on Friday.

State and local governments raised alarms that the 3% surcharge, if applied to interest on municipal bonds, could reduce their value to investors and raise borrowing costs. Suddenly, California and New York might have to pay more to fund their bloated governments.

"We were concerned that this proposal, if implemented, could impact tax-exempt interest as well, and would be bearish for municipals," Citigroup explained in a research note last week. "However, based on feedback from tax experts and Ways and Means Committee staff, we now believe that the 3% surcharge will not apply to tax-exempt interest." Sighs of relief all around in Albany, Springfield—and the Goldman Sachs executive floor.

The surcharge will raise the top marginal income-tax rate to 46.4%, including the 3.8% net investment tax. Add state and local taxes and the wealthy in Silicon Valley and New York could pay some 60% of their income in taxes. But they will pay nothing on munis. Some tax avoidance schemes are apparently more equal than others.

The Wall Street Journal

By The Editorial Board

Sept. 27, 2021 6:45 pm ET

TAX - OHIO

Lamar Advantage GP Company, L.L.C. v. Cincinnati

Supreme Court of Ohio - September 16, 2021 - N.E.3d - 2021 WL 4201656 - 2021-Ohi--3155

Billboard operators filed suit against city challenging the constitutionality of an excise tax on billboards and moved for a permanent injunction to preclude the city from enforcing the tax.

After granting a preliminary injunction the Court of Common Pleas found the tax unconstitutional and granted permanent injunction. City appealed. The First District Court of Appeals affirmed in part, reversed in part, and remanded. Billboard operators appealed.

The Supreme Court held that City excise tax that fell predominantly on two billboard operators violated the First Amendment.

City excise tax on outdoor advertising signs, which was imposed solely upon two billboard operators, was a discriminatory tax that violated the rights to freedom of speech and free press protected by the First Amendment; tax liability was based on means of communication, was not generally applicable and did not even apply to all advertisers or all advertising signs, but rather, applied to signs that were leased to third parties and included so many exceptions that it targeted and fell upon two billboard operators, and it burdened First Amendment activities, as it required the two operators to remove almost 10% of their billboards, thereby limiting dissemination of protected content.

TAX - GEORGIA

Stanford v. City of Atlanta

Court of Appeals of Georgia - September 27, 2021 - S.E.2d - 2021 WL 4397479

Commercial property owner brought putative class action against city, alleging that city's assessment of annual frontage fees constituted an illegal tax as opposed to a reasonable fee for solid waste services.

The Superior Court granted city's motion to dismiss. Owner appealed.

The Court of Appeals held that:

- Plaintiff sufficiently pled the terms and provisions of city ordinances, so as to withstand motion to dismiss based on her failure to attach certified copies to the complaint, and
- Right for any reason doctrine did not apply to affirm trial court's grant of the motion to dismiss.

Commercial property owner sufficiently pled the terms and provisions of city ordinances that modified the city code section on frontage fees by increasing annual solid waste fees assessed on

commercial property owners and initiating a new mandatory multi-family unit fee to owners of multi-family units, even though she did not attach certified copies of city code or ordinances to her original or amended complaints, so as to withstand city's motion to dismiss in her putative class action alleging that the collection of the frontage fees constituted an illegal tax, where copies of the ordinances had been made part of the record after being introduced at a certification hearing by owner's predecessor-in-interest and owner demonstrated that a certified copy of the ordinances could be introduced at trial or during an evidentiary proceeding.

Right for any reason doctrine did not apply to affirm trial court's grant of city's motion to dismiss commercial property owner's putative class action alleging that city's assessment of solid waste and multi-family unit frontage fees constituted an illegal tax as opposed to a reasonable fee for solid waste services, where judicial economy would be maximized by returning the case to the trial court due to issues having been left undecided by the trial court, including owner's allegations that city had not engaged in collection of solid waste from owners of commercial properties despite collection of solid waste fees and that assessment of mandatory solid waste and multi-unit fees substantially exceeded the actual reasonable cost of the services.

TAX - DISTRICT OF COLUMBIA

Davis v. District of Columbia

District of Columbia Court of Appeals - September 16, 2021 - A.3d - 2021 WL 4203053

Former employee of District of Columbia Office of Tax and Revenue (OTR) brought action against District of Columbia, alleging that she was terminated for disclosing that method for appraising certain properties was wrong and perpetuating tax scam and seeking to hold District liable for her termination under the D.C. Whistleblower Protection Act.

The Superior Court granted summary judgment to District and denied former employee's motion to amend complaint. Former employee appealed.

The Court of Appeals held that:

- Disinterested observer could not have reasonably concluded that using cost method to assess commercial properties was gross mismanagement;
- Disinterested observer could not have reasonably concluded that using cost method was gross misuse or waste of public resources or funds; and
- Claim that former employee was wrongfully discharged in violation of public policy was futile.

Disinterested observer, with employee's knowledge of essential facts, could not have reasonably concluded that using cost method, rather than income method, to assess commercial properties in city was gross mismanagement, for purpose of determining whether disclosure by employee of District of Columbia Office of Tax and Revenue (OTR) that OTR's use of cost method to value property was wrong and costing District tax revenue was "protected disclosure" under D.C. Whistleblower Protection Act; employee did not identify authority that said cost approach could not appropriately be applied to properties that were fully depreciated but producing significant income, like those at issue, and evidence showed that valuations based on income approach were not much higher or more accurate predictors than cost-approach valuations.

Disinterested observer, with employee's knowledge of essential facts, could not have reasonably concluded that using cost method, rather than income method, to assess commercial properties in

city was gross misuse or waste of public resources or funds, for purpose of determining whether disclosure by employee of District of Columbia Office of Tax and Revenue (OTR) that OTR's use of cost method to value property, was wrong and costing District tax revenue was "protected disclosure" under D.C. Whistleblower Protection Act, even though employee argued that OTR's use of cost method grossly wasted public funds by costing District millions in tax revenue; yet-to-be collected revenue, which was not in District's coffers, was not public resource or fund.

TAX - NEW HAMPSHIRE

Appeal of Town of Chester

Supreme Court of New Hampshire - September 16, 2021 - A.3d - 2021 WL 4202532

Towns sought judicial review of an order of the Board of Tax and Land Appeals granting taxpayer, an electric utility company, abatements of taxes assessed against its property located in the towns.

The Supreme Court held that:

- Board had jurisdiction to grant abatements, and
- Board properly applied stipulated equalization ratios to aggregate fair market values of taxpayer's property.

Board of Tax and Land Appeals had jurisdiction to grant abatements of taxes assessed against electric utility company's fee simple land interests, where company submitted abatement requests to towns' assessors listing all of its property in each municipality for each relevant tax year, and company submitted the same list of properties as the subject of its appeals to the Board and responded "n/a" to application sections requesting information about company's other properties, so that the record showed that company challenged the proportionality of the towns' assessments of all of company's land interests.

Board of Tax and Land Appeals properly applied stipulated equalization ratios to the aggregate fair market values of electric utility company's taxable property as set forth in an expert's appraisal report to determine whether towns' assessments were proportionate, on appeal from towns' denial of company's abatement requests; both experts whose reports were considered by the Board opined that the final valuations of company's land interests set forth in their reports reflected the fair market value of those interests, not equalized assessed values, and the fact that both experts concluded that the assessed value of company's fee simple land interests represented the fair market value of those interests did not necessarily mean that the towns assessed those interests proportionately.

TAX - CONNECTICUT

Rainbow Housing Corporation v. Town of Cromwell

Supreme Court of Connecticut - September 1, 2021 - A.3d - 2021 WL 3918895

Taxpayers, which were tax-exempt charitable organizations, sought review of town board of assessment appeals' denial of charitable exemption for real property used for residential mental health treatment program.

The Superior Court granted summary judgment for taxpayers. Town appealed.

The Supreme Court held that:

- Parties' stipulation as to a "complete" tax exempt application was stipulation as to facts allowing finding of aggrievement for standing purposes, and
- Housing provided by treatment program was temporary housing under charitable exemption.

Taxpayers that were tax-exempt charitable organizations were aggrieved by town's denial of their application for charitable exemption for their real property used for a residential mental health treatment program, and thus taxpayers had standing for tax appeal, even if taxpayers did not provide assessor with information about average stay of residents at property, rents, amount of income received from rent, and existence of any rent subsidies by government, where parties stipulated that tax exemption application was complete.

Supreme Court would review town's unpreserved claim that taxpayers lacked aggrievement as a component of standing, since claim implicated trial court's subject matter jurisdiction, in tax appeal concerning denial of tax exemption for real property owned by a tax-exempt charitable organization and used exclusively for charitable purposes.

Housing provided by residential mental health treatment program of tax-exempt charitable organizations was "temporary housing" under charitable tax exemption pertaining to real property used for temporary housing, where housing was not permanent, furthered organizations' charitable purpose of providing treatment to men with severe mental health issues, and was designed to successfully transition residents into community.

Future Opportunity Zone Reform, With Mike Novogradac And John Sciarretti.

What tax policy changes may unfold soon, and how might Opportunity Zones be reformed later this year or in 2022? Mike Novogradac is the managing partner of Novogradac, a top 50 accounting firm founded in…

CONTINUE READING »

OpportunityDb

September 29, 2021

TAX - ARIZONA

Fann v. Arizona

Supreme Court of Arizona - August 19, 2021 - 51 Arizona Cases Digest 26 - 493 P.3d 246

Taxpayers brought action against State challenging constitutionality of a citizens' initiative imposing income tax surcharge on high-income taxpayers to provide direct funding to schools as violative of education expenditure and tax enactment clauses of State Constitution.

The Superior Court denied taxpayers' motion for preliminary injunction. Taxpayers appealed, and transfer was granted.

The Supreme Court held that:

- Case was ripe for decision;
- Initiative's provision stating that monies were not local revenues was facially unconstitutional under education expenditure clause;
- Initiative's allocation provision was unconstitutional to extent that the allocated revenues exceeded expenditure limits;
- Allocation provision could not be severed;
- Initiative's provision on revenue control limitations was unconstitutional to extent expenditures exceeded expenditure limits; and
- Initiative was not an "act" subject to requirements of tax enactment clause.

Direct funding to schools under a citizens' initiative imposing income tax surcharge on high-income taxpayers was not a "grant" under grant exception of education expenditure clause of State Constitution, which exempted grants from definition of local revenues, and therefore the initiative's local revenues provision, stating that monies from the initiative were not considered local revenues under the expenditure clause, was facially unconstitutional.

Allocation provision of citizens' initiative that imposed income tax surcharge on high-income taxpayers to provide direct funding to schools was unconstitutional to the extent that the allocated revenues exceeded expenditure limits set by education expenditure clause of State Constitution, under which the initiative's local revenues provision was facially unconstitutional in stating that monies from initiative were not local revenues for purposes of the education expenditure clause.

TAX - MARYLAND

Mayor and City Council of Ocean City v. Commissioners of Worcester County, Maryland

Court of Appeals of Maryland - August 5, 2021 - A.3d - 2021 WL 3417685

Municipality brought action seeking declaratory judgment that tax setoff laws were unconstitutional because they treated different municipalities differently.

The Circuit Court dismissed the action. Municipality appealed. The Court of Special Appeals affirmed. Municipality's petition for writ of certiorari was granted.

The Court of Appeals held that statutes providing for mandatory real property tax setoffs did not violate uniformity requirement in Constitution.

Statutes providing for mandatory real property tax setoffs did not regulate matters of purely local concern, and therefore they did not violate Constitutional provision requiring General Assembly to act in relation to government or affairs of any municipal corporation only by general laws that in their terms and in their effect applied uniformly, since tax setoff statutes strongly affected county residents who resided outside of municipality.

The requirement of the Constitutional provision requiring General Assembly to act in relation to government or affairs of any municipal corporation only by general laws that in their terms and in their effect apply uniformly does not apply to statutes providing for mandatory real property tax setoffs because those statutes do not relate to purely local affairs.

Sun Belt OZs vs. Midwest OZs, With Lawrence Jatsek.

What are some of the key similarities and differences between Sun Belt Opportunity Zone deals and Midwest Opportunity Zone deals?

CONTINUE READING »

September 22, 2021

TAX - PENNSYLVANIA

City of Erie v. Erie County Board of Assessment Appeals

Commonwealth Court of Pennsylvania - July 14, 2021 - Slip Copy - 2021 WL 2944364

City of Erie and Erie City School District (collectively, Taxing Authorities) appealed the order of the Erie County Court of Common Pleas granting the summary judgment motion of the Erie County Board of Assessment Appeals (Board) and Erie County Convention Center Authority (Convention Authority) and finding that the Sheraton (Sheraton) and Courtyard by Marriott (Courtyard) hotels (collectively, Hotels) and appurtenant parking garages owned by the Convention Authority are not subject to real estate taxation by the Taxing Authorities.

The Commonwealth Court affirmed.

The Convention Authority built the Bayfront Convention Center (BCC) located on the shoreline of Presque Isle Bay, which opened on August 2, 2007. At the same time, the Convention Authority constructed the 200-room Sheraton, which opened in 2008. The Convention Authority also constructed the 192-room Courtyard, which opened in 2015.

On September 28, 2016, the Board sent a "Notice of Change of Assessment" to the Convention Authority regarding the tax-exempt status of the hotel properties. The Board's action was premised on the fact that at least 63% of hotel occupancy was attributable to the general public, rather than to convention-related business.

The Commonwealth Court found that, "the commingling of the general public's use of the Sheraton and Courtyard hotel rooms with those used for BCC-related functions in no way affects the immunity of the Convention Authority's hotel properties herein. All such uses are a necessary and essential component of, and directly tied to, the Convention Authority's statutory purpose as set forth in the Act and the Alternative Act 'for the public purpose of promoting, attracting, stimulating, developing and expanding business, industry, commerce and tourism[,]' and 'of acquiring, holding, developing, designing, constructing, improving, maintaining, managing, operating, financing, furnishing, fixturing, equipping, repairing, … and owning convention center facilities, or parts thereof,' because the statutory definition of 'convention center facilities' specifically includes 'any land, improvement, structure, building, or part thereof, or property interest therein, … owned by … an authority, … and all facilities, furniture, fixtures and equipment necessary and incident thereto, including hotels ….'"

Environmentally Sustainable Workforce Housing in OZs.

Environmentally Sustainable Workforce Housing in OZs, With Majesty Gayle

How can Opportunity Zones be leveraged to create more affordable housing that has a commitment to sustainability? Majesty Gayle is…

CONTINUE READING »

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September 8, 2021

Coalition Building In Opportunity Zones.

Coalition Building In Opportunity Zones, With Bob Richardson

What are some of the biggest lessons learned from the first three years of the Opportunity Zones program? Bob Richardson…

CONTINUE READING »

opportunitydb.com

September 15, 2021

Cincinnati's Billboard Tax Declared Unconstitutional by Ohio Supreme Court Ruling.

The Ohio Supreme Court on Thursday blocked the city of Cincinnati’s tax on billboard advertising, saying it violates the billboard operator’s First Amendment rights.

The city enacted the tax on billboard advertising in 2018 to help close a $2.5 million budget gap.

Ohio Supreme Court Justice Sharon Kennedy wrote in the majority opinion that “a selective tax creates the intolerable potential of self-censorship by the press and abuse by governmental actors aimed to suppress, compel, or punish speech.”

The high court’s decision reverses a ruling by the First District Court of Appeals.

Cincinnati City Council imposed the billboard tax, which called for 7% on gross receipts generated by the billboard or an annual minimum fee based on the sign location and size. It was projected to raise $709,000 a year.

Lamar Advantage GP Co. and Norton Outdoor Advertising, which control 90% of Cincinnati’s billboard signs, sued to block the tax. The companies said it’d make it unsustainable to operate their least-profitable billboards and 70 to 80 of the 865 signs the companies operate in Cincinnati would

be removed.

So where does the First Amendment issue come in? Roughly 25% to 30% of the sign space is donated for public service announcements and the companies' own speech, such as tributes to notable public figures.

Kennedy said that the "press" includes not only newspapers, books, and magazines, but has been extended to many other media, including cable television.

by Laura A. Bischoff

September 16, 2021

Cincinnati Enquirer

Telephonic TEFRA Hearings are Now Available Through March 31, 2022: Squire Patton Boggs

On November 4, 2020, we all thought that the COVID-19 pandemic was going to be long over by now. We certainly did not think we were going to get so far down the Greek alphabet of variants of this virus. And, this author certainly did not think that she was going to have to keep looking up what the next letter of the Greek alphabet is. Now we are at mu, and there does not seem to be an end in sight.

It seems like when the IRS issued Revenue Procedure 2020-49, it thought that the COVID-19 pandemic was going to be over by now too. As a reminder, on November 4, 2020, the IRS issued Revenue Procedure 2020-49, which allowed telephonic TEFRA hearings to continue through September 30, 2021. Specifically, during this period, a governmental unit can meet the TEFRA requirement that the public hearing be held in a convenient location for affected residents by affording the general public access to the hearing by toll-free telephone call.[1]

With September 30th right around the corner, public finance tax attorneys were starting to get nervous[2] about whether these hearings were going to have to be in-person as cases are back on the rise. We can all breathe a sigh of relief because yesterday the IRS has further extended the period during which telephonic TEFRA hearings can be held in lieu of in-person TEFRA hearings until **March 31, 2022** through issued Revenue Procedure 2021-39.

Hopefully this will be the last extension that we need and we won't have variants that start sounding like sororities.

[1] The authors of this blog are still explaining to people what constitutes a toll-free number.

[2] More nervous than we usually are.

By Taylor Klavan on September 1, 2021

Squire Patton Boggs

Hawkins Advisory: Rev. Proc. 2021-39 - Extension of Ability to Hold Telephonic TEFRA Hearings

In response to the ongoing COVID-19 public health concerns and the continuation of local restrictions on public gatherings, the Internal Revenue Service has issued Revenue Procedure 2021-39, extending the period during which issuers may hold telephonic hearings to March 31, 2022.

Read the Hawkins Advisory.

TAX - CONNECTICUT

Boardwalk Realty Associates, LLC v. M & S Gateway Associates, LLC

Supreme Court of Connecticut - August 13, 2021 - A.3d - 2021 WL 3610351

Court-appointed receiver of rents brought action car dealership operators seeking to collect unpaid rent as well as use and occupancy payments as part of town's effort to collect unpaid property taxes on parcel of commercial property that was abandoned by its owner.

The Superior Court entered summary judgment for operators. Receiver appealed.

The Supreme Court held that as a matter of first impression, receiver did not have statutory authority to impose or collect rent or use and occupancy payments where the property had been abandoned prior to his appointment.

Receiver who was appointed under statute that permitted appointment of a receiver of rents when real property taxes due to a municipality were delinquent was not statutorily authorized to impose or collect rent or use and occupancy payments where the property had been abandoned by the owner prior to the appointment of the receiver and there was no existing obligation for the receiver to enforce

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Act Before Year End to Maximize Opportunity Zone Benefits.

If you are planning to acquire or build a senior living facility that is located in an opportunity zone, there are many tax benefits that are available to you. One of these benefits is that 10% of the capital gains that you defer when you make your investment in an opportunity zone will be forgiven, provided your investment is made by December 31, 2021, and held for at least 5 years.

Time is running out on when you can make your investment. However, while the investment must be made before year end, your acquisition can occur after this date if you properly structure your transaction to take advantage of the working capital safe harbor.

For a discussion of the tax benefits associated with opportunity zone investments and the requirements to qualify for them, download our brief primer.

If you cannot make your investment until after December 31, do not fret. You can still qualify for the other tax benefits available to opportunity zone investments. It is only the forgiveness of 10% of deferred gain that ceases to be available after year end.

Lowndes

August 27, 2021

Turbocharging OZ Returns with Historic Tax Credits, with John Blatchford.

Can opportunity zones be leveraged for historic renovation projects? How does the combination of historic tax credits and the opportunity…

CONTINUE READING »

OpportunityDb

September 1, 2021

Tax-Loss Selling and the January Effect Revisited: Evidence from Municipal Bond Closed-End Funds and Exchange-Traded Funds.

Abstract

We revisit the tax-loss selling hypothesis as a potential explanation of the well-known January effect in securities markets. We expand the empirical evidence from municipal bond closed-end funds (CEFs) by extending the sample period by almost 20 years and adding exchange-traded funds (ETFs) to the sample. Our updated sample covers the recent growth of municipal bond ETFs and a significant increase in municipal bond trading volume and liquidity. Both developments reduce arbitrage costs and thus are expected to increase tax loss selling in the funds and increase the transmission of price effects to the underlying bonds. We find that the January effect of municipal bond CEFs becomes stronger in more recent years, and show evidence that largely supports the tax-loss hypothesis. We also find some evidence indicating a smaller discrepancy between the abnormal returns of the funds and underlying bonds. For the municipal bond ETFs, we find a smaller January effect that cannot be explained by the tax-loss selling hypothesis.

Read the paper.

August 18, 2021

Senator Wyden Proposes Sweeping Housing Tax Credit Reforms.

Senate Finance Committee Chairman Ron Wyden (D-OR) proposes sweeping changes to affordable housing in the US, including expansions and improvements to the Low Income Housing Tax Credit (LIHTC) program.

On August 18, Senator Wyden released the Decent Affordable, Safe Housing for All (DASH) Act,

which implements sweeping reforms to affordable housing financing in an effort to combat homelessness and expand affordable housing access.

The legislation proposes to expand and improve the Low-Income Housing Tax Credit (LIHTC) program and make other fixes to the Housing Credit program. The bill also proposes reforms to local zoning and housing development practices, expands vouchers to combat homelessness, and includes a first-time homebuyer tax credit, a rental tax credit, and a Middle Income Housing Tax Credit.

As the chairman of the Senate Finance Committee, the bill represents a major show of support for affordable housing from a key Senate office. Specifically, Senator Wyden proposes a range of spending and tax policy reforms, including:

- Extending Housing Choice Vouchers to all families or individuals experiencing or at risk of homelessness
- Instituting reforms to local zoning and housing development practices
- Expanding and improving the Low-Income Housing Tax Credit;
- Repealing the qualified contract loophole;
- Modifying and clarifying the Section 42 nonprofit Right of First Refusal;
- Creating a tax credit for affordable housing supportive services;
- Establishing a Renter's Tax Credit;
- Creating a Middle Income Tax Credit; authorizing the Neighborhood Homes Investment Act; and
- Establishing a First-time Homebuyer Refundable Credit.

Combatting homelessness, expanding the supply of affordable housing (including through the Low-Income Housing Tax Credit program), expanding supportive services in affordable housing, and fixing the Right of First Refusal issue are key priorities for LeadingAge.

LOW-INCOME HOUSING TAX CREDIT PROGRAM: EXPANSION AND IMPROVEMENTS

The legislation also includes the Emergency Affordable Housing Act, which would strengthen the Low-Income Housing Tax Credit by preserving and protecting existing LIHTC properties, expanding production of affordable housing, and extending housing to people who earn extremely low incomes. Some of the main provisions of the EAHA would expand the 9% housing tax credit by 50% to house more families; provide a 50% basis boost to projects that prioritize extremely low-income renters; expand the 4% credit for rural areas; reduce the tax-exempt bond financing threshold for 4% credit projects from 50% to 25% for three years; and preserve tens of thousands of affordable housing units by closing a loophole. The EAHA is projected to produce nearly 1 million new affordable housing units over the next 10 years.

Some portions of the bill are expected to move through the Reconciliation process currently underway in Congress. LeadingAge supports key provisions of the bill and will work with the Senate office to advance the legislation.

AUGUST 18, 2021 | BY JULIANA BILOWICH

Capital Analysis of the Proposed Middle-Income Housing Tax Credit.

Novogradac conducted capital analysis at the request of Senate Finance Committee Chairman Ron Wyden that looks at the effect of enacting the proposed middle-income housing tax credit (MIHTC) on financing affordable rental housing for households earning just above the low-income housing tax

credit (LIHTC) income limits. In addition to a pool of tax credit authority allocated to states, this analysis also examines the potential of a separate pool of tax credits that would be generated by the allocation of tax-exempt private activity bonds (PABs) and could be used in conjunction with the 4% LIHTC.

Reducing the Need for Soft Financing
"Soft" subsidies are funds and grants that are available from government sources or other lenders used to fill the financing gap between what is needed to develop the property and what the property can receive in equity and supportable debt. This free report examines how enacting a MIHTC, to be used with LIHTC and PABs, would enable developers to finance properties in a variety of markets with less additional soft financing to fill the financing gaps, making it easier to address the severe affordable rental housing shortage in the United States.

Increasing the Amount of Affordable Housing
The proposed tax credit is intended to significantly jump-start affordable rental housing financing and reduce the tremendous deficit in the supply of affordable rental housing for more renters earning a little more than the traditional LIHTC income-targeting threshold nationwide.

Download the report.

Important Ohio Supreme Court Decision Clarifies Proper Method to Value "Big Box Stores."

The Ohio Supreme Court issued an important decision today clarifying the proper method under Ohio law to value big box stores—in this case, a Lowe's store.

The Ohio Supreme Court rejected the property owner's argument that an appraiser should presume that the property is vacant when appraising the property. Instead, the Court agreed with the school board and county that a property should be valued using market rent rather than the actual rent from an existing lease encumbering the property at the time of the sale and transfer.

The Court was called upon to interpret somewhat recent changes to R.C. 5713.03, which requires county auditors to value property based upon the value of the "fee simple estate, as if unencumbered." Rejecting the property owner's argument, the Court clarified that this statute invokes a market-lease rule, rather than a vacant-at-transfer rule. This decision, commonly referred to as *Rancho Cincinnati*, is the latest in a series of decisions in Ohio that affect the valuation of big box stores. The Court's decision will be perceived as more favorable to political subdivisions and taxing authorities; in contrast, the Court's decision will diminish the salience of appraisals that use a "go-dark" value of big box stores.

The *Rancho Cincinnati* decision was issued by the Ohio Supreme Court on August 18, 2021 and may be cited as *Rancho Cincinnati Rivers, LLC v. Warren County Board of Revision, et al.*, slip opinion no. 2021-Ohio-2798.

If you have questions about how this case impacts the valuation of properties located in your school district, please contact your legal counsel.

Bricker & Eckler LLP

August 19, 2021

Solving The Housing Crisis With OZs, With Riaz Capital.

In this webinar, Garrick Monaghan discusses the need for affordable housing in the Bay Area and the Riaz Capital Ozone Fund III.

Watch the webinar.

OPPORTUNITYDB

by JIMMY ATKINSON

AUGUST 13, 2021

Real Estate Technology And Opportunity Zones, with Steve Nson.

How does real estate innovation intersect with Opportunity Zones? How can Opportunity Zones catalyze business development and business investment in low income communities?

Steve Nson is founder of AnySizeDeals, a conference organizer with a focus on real estate innovation. Their upcoming AnySizeDeals Festival of Real Estate Innovation event will focus on the innovation that is transforming the real estate industry.

Listen to audio.

OPPORTUNITYDB

by JIMMY ATKINSON

AUGUST 18, 2021

Barring California Taxpayers from the Courts.

Big government interests – and by "big government interests" we mean elected officials, bureaucrats, public sector unions and private corporations that live off taxpayer dollars – do everything they can to erect barriers to taxpayers seeking to vindicate their rights.

As this column has previously addressed, those barriers include making it difficult to vindicate rights at the ballot box by consistently changing election laws – often in the middle of an election cycle – in a manner designed to protect the existing political power structure.

But there is an equally virulent set of hurdles placed before taxpayers consisting of procedural barriers to obtaining relief in the courts. Just a few examples are short statutes of limitations, requirements that taxpayers must "exhaust administrative remedies" before filing a legal action, requirements that taxpayers must first pay the disputed tax in full before filing suit, and severe restrictions on the use of class actions that preclude meaningful tax relief when entire communities are hurt by an illegal tax.

Another example is the requirement that challenges to certain tax increases be brought exclusively as “validation actions.” Such actions may be brought by government entities to “bulletproof” their tax or fee increases from any future legal attack. Typically, the lawsuit will be filed against “All Persons Interested” in the legality of a bond issuance or other public finance matter and, once filed, taxpayers have only a very limited time to respond.

The short time to respond to a validation action, however, isn’t the biggest headache for taxpayers. Specifically, if the government entity doesn’t file its own action, then the validation action must be filed by citizens (any “interested party”) within 60 days of the resolution authorizing a bond or tax. The citizens’ failure to do so results in the bond or tax becoming automatically “validated” through inaction, and forever insulated from judicial review. This puts the costs of litigation on the shoulders of those having to pay the tax. And those costs include the very expensive price tag of having to “publish” a summons in the local newspaper over several days.

Ordinary taxpayers rarely have the expertise or financial wherewithal to initiate a “validation” action in court and must rely on advocacy groups such as the Howard Jarvis Taxpayers Association, which has been involved in numerous such lawsuits. But even with that expertise, there remains much wrong with expanding the circumstances where the law requires that challenges must be brought as a validation action as opposed to more traditional legal actions such as taxpayer injunctions, declaratory relief or money damages.

Validation actions may make sense in the limited area of protecting municipal bonds from legal attack well after the bonds have been issued. There is arguably a public interest in protecting the “marketability” of public bonds so that government entities have access to capital markets in order to construct public projects such as schools.

However, a bill currently pending in the California Legislature, Senate Bill 323, would hijack the validation statutes and apply them to preclude ratepayers from challenging unlawfully high rates for water or sewer – essential public services that no one can live without.

Simply stated, this expansion of the validation statutes is an unfair denial of due process that can have the effect of cementing into law illegal government acts that are then insulated from judicial review. Even the state Supreme Court has taken notice, writing in City of Ontario v. Superior Court that some applications of the validation statutes are “of doubtful constitutionality.” Not surprisingly, the Howard Jarvis Taxpayer Association opposes all attempts to enlarge the universe of government actions that are subject to the validation statutes. And we are not alone.

Even a couple of water agencies in Orange County see a problem with this expansion. While generally supportive of the bill’s aims, they also recognize the importance of providing adequate notice to ratepayers “in recognition of public water and sewer agencies’ Constitutional responsibility to guarantee that ratepayers – particularly economically disadvantaged residents and marginalized communities – know their rights.”
What ratepayers should really know about their rights is how Senate Bill 323 takes them away. The validation statutes were never meant to insulate water, sewer, or other agency rates and fees from legal challenge. If such rates are imposed in a manner contrary to the constitutional protections guaranteed to taxpayers by Proposition 13 and other laws, ratepayers must not have the courthouse door slammed in their faces by a burdensome process that makes such challenges difficult, if not impossible.

PE.COM

By JON COUPAL

August 16, 2021

Jon Coupal is president of the Howard Jarvis Taxpayers Association.

TAX - MARYLAND

Mayor and City Council of Ocean City v. Commissioners of Worcester County, Maryland

Court of Appeals of Maryland - August 5, 2021 - A.3d - 2021 WL 3417685

Municipality brought action seeking declaratory judgment that tax setoff laws were unconstitutional because they treated different municipalities differently.

The Circuit Court dismissed the action. Municipality appealed. The Court of Special Appeals affirmed. Municipality's petition for writ of certiorari was granted.

The Court of Appeals held that statutes providing for mandatory real property tax setoffs did not violate uniformity requirement in Constitution.

Statutes providing for mandatory real property tax setoffs did not regulate matters of purely local concern, and therefore they did not violate Constitutional provision requiring General Assembly to act in relation to government or affairs of any municipal corporation only by general laws that in their terms and in their effect applied uniformly, since tax setoff statutes strongly affected county residents who resided outside of municipality.

The SALT Deduction Cap Makes it Harder for Communities to Recover.

To help our communities recover from the COVID-19 pandemic and its economic fallout, Congress has a historic opportunity to rebuild our economy and create a sustainable future for all Americans by enacting President Joe Biden's full Build Back Better agenda — an agenda that will improve the lives of everyday people by investing in well-paying jobs, health care, infrastructure, public schools, higher education, child care, elder care and more.

Congress should go one step further to incentivize communities to invest in themselves by reversing former President Donald Trump's cap on deductions for state income tax and local property taxes, the so-called SALT cap, which limits these governments' ability to invest tax revenue in public schools, higher education, public health, police, firefighting and emergency medical services.

Reviving the SALT deduction is especially important for our frontline workers — firefighters, teachers, and public health workers who have helped our country survive the pandemic, keeping our schools open, our hospitals running and our communities safe — and those they serve. SALT is not just another tax break for the wealthy, as some claim; it's an opportunity for many everyday people to offset the taxes they pay for the services our communities rely on.

Here's the math: An average two-income family with a firefighter and a teacher makes between $100,000 and $200,000 annually. If they claim the SALT deduction — which more than 85 percent of families in that tax bracket do — they receive an average tax break of $15,859. When the SALT deduction is capped, those same middle-class families see a tax increase of $5,000.

That means, even as they are paying more in taxes, the budgets for their schools, hospitals and firehouses are being cut.

The SALT deduction is a tax break you receive for supporting your community: providing schools the resources necessary to meet our children's needs; ensuring that our public health system can confront a deadly pandemic; keeping us from shutting down firehouses; preparing the next generation of adults for their careers without saddling them with debt, and supporting a safety net for when people experience job loss or homelessness. The deduction helps ensure the collective funding of these programs, making it easier for state and local governments to provide these services that benefit all of us. It effectively puts money in everyday taxpayers' pockets to help keep up with the rising costs of basics like gas and groceries.

Allowing taxpayers to deduct the full amount of their state and local taxes on their federal tax returns is one of the federal government's most powerful tools for incentivizing states and local governments to invest in critical public services. Lawmakers have long recognized this: The Revenue Act of 1913 introduced the federal income tax and provided a deduction for state, county, schools and municipal taxes. Years later, the Revenue Act of 1964 specified that real and personal property, income and general sales taxes could be deducted from federal taxes. As the Government Finance Officers Association pointed out in 2017:

"The SALT deduction reflects a partnership between the federal government and state and local governments. The deduction is fundamental to the way states and localities budget for and provide critical public services, and a cornerstone of the U.S system of fiscal federalism. It reflects a collaborative relationship between levels of government that has existed for over 100 years. Currently, the SALT deduction is an accepted part of the tax structure that is critical to the stability of state and local government finance."

As cities, towns and families continue to recover from the pandemic, Congress should be making things easier on state and local governments and the people who pay taxes to fund them. The American Rescue Plan, the American Jobs Plan and the American Families Plan are major steps in the right direction but reforming the SALT cap would go a long way toward helping working families access a more robust recovery.

THE HILL

BY RANDI WEINGARTEN AND EDWARD A. KELLY, OPINION CONTRIBUTORS — 08/09/21

Randi Weingarten is president of the American Federation of Teachers. Edward A. Kelly is general president of the International Association of Firefighters.

MSRB Research Paper on the Taxable Municipal Bond Market.

New MSRB research paper studies the evolution of the taxable municipal bond market over the last decade and reviews the market dynamics of two years when taxable municipal bond issuance was particularly high—2010 and 2020.

Read the MSRB research paper.

Opportunity Zone Redevelopment Areas Still Reaping Benefits Of National Home-Price Boom In Second Quarter 2021.

Median Values Again Rise Annually By At Least 15 Percent in Half of Zones; Opportunity Zone Price Spikes Remain on Par with Those Outside of Zones

IRVINE, Calif., Aug. 12, 2021 /PRNewswire/ — ATTOM, curator of the nation's premier property database, today released its second-quarter 2021 Opportunity Zones report analyzing qualified low-income zones established by Congress in the Tax Cuts and Jobs Act of 2017 (see full methodology below). In this report, ATTOM looked at 5,236 zones across the United States with sufficient sales data to analyze, meaning they had at least five home sales in the second quarter of 2021.

The report found that median single-family home prices increased from the second quarter of 2020 to the second quarter of 2021 in 75 percent of Opportunity Zones and rose by at least 15 percent in about half of them. Price patterns in Opportunity Zones continued to roughly track trends in other areas of the U.S., even surpassing them in some ways, much as they did in the first quarter of this year.

Home values in Opportunity Zones did continue to lag well behind the national median of $305,000 in the second quarter of 2021. About three-quarters of the zones with enough data to analyze had typical second-quarter prices below the national figure. Some 39 percent also still had median prices of less than $150,000 in the second quarter of this year. But that was down from 47 percent a year earlier as values inside some of the nation's poorest communities kept surging ahead with the broader national housing market, despite the Coronavirus pandemic remaining a threat to the U.S. economy.

Even as the national economy was gradually recovering during the Spring of 2021 from the economic damage that came after the pandemic hit early last year, the impact continued to hit hardest in lower-income communities that comprise most of the zones targeted for tax breaks designed to spur economic redevelopment. Nevertheless, Opportunity Zones largely kept pace with national home-price trends as increases roughly paralleled the nationwide boom now in its 10th year.

Opportunity Zones are defined in the Tax Act legislation as census tracts in or along side low-income neighborhoods that meet various criteria for redevelopment in all 50 states, the District of Columbia and U.S. territories. Census tracts, as defined by the U.S. Census Bureau, cover areas that have 1,200 to 8,000 residents, with an average of about 4,000 people.

"Housing markets kept chugging along in some of the nation's poorest neighborhoods during the second quarter of this year in another sign that the decade long home-price boom across the nation knows pretty much no boundaries. Values kept rising inside specially designated Opportunity Zones at around the same rate as they did in other areas even as the Coronavirus pandemic continued causing economic hardship," said Todd Teta, chief product officer with ATTOM. "For sure, property values in Opportunity Zones remain depressed. But the price spikes there not only suggest that those communities are a very viable option for households priced out of more-upscale neighborhoods. They also indicate the ongoing potential for the economic revival that underpins the Opportunity Zone tax breaks."

High-level findings from the report include:

- Median prices of single-family houses and condominiums rose from the second quarter of 2020 to the second quarter of 2021 in 2,901 (75 percent) of the Opportunity Zones with sufficient data to analyze and increased in 2,916 (64 percent) of the zones from the first quarter to the second quarter of this year. By comparison, median prices rose annually in 81 percent of census tracts outside of Opportunity Zones and quarterly in 70 percent of them. (Of the 5,236 Opportunity Zones included in the report, 3,850 had enough data to generate usable median prices in the second quarters of both 2020 and 2021; 4,577 had enough data to make comparisons between the first quarter of 2021 and the second quarter of 2021).
- Measured year over year, median home prices rose at least 15 percent in the second quarter of 2021 in 2,011 (52 percent) of Opportunity Zones with sufficient data. Prices rose that much during that time period in 51 percent of other census tracts throughout the country.
- Opportunity Zones did even better when comparing areas where prices rose at least 25 percent from the second quarter of 2020 to the second quarter of 2021. Measured year over year, median home prices rose by that level in 1,366 (35 percent) of Opportunity Zones but in only 30 percent of census tracts elsewhere in the country.
- Typical home values in four of every 10 Opportunity Zones increased annually in the second quarter of 2021 by more than the 22-percent increase in the overall national single-family median home price during that time period.
- Among states with at least 20 Opportunity Zones, those with the largest percentage of zones where median prices rose, year over year, during the second quarter of 2021 included New Hampshire (median prices up, year over year, in 95 percent of zones), Massachusetts (94 percent), Idaho (91 percent), Utah (90 percent) and Arizona (89 percent).
- Of all 5,236 zones in the report, 2,021 (39 percent) still had median prices in the second quarter of 2021 that were less than $150,000 and 914 (17 percent) had medians ranging from $150,000 to $199,999. The total percentage of zones with typical values below $200,000 was down from 65 percent in the second quarter of 2020 to 56 percent in the second quarter of 2021.
- Median values in the second quarter of 2021 ranged from $200,000 to $299,999 in 1,081 Opportunity Zones (21 percent) while they topped the national median of $305,000 in 1,183 (23 percent).
- The Midwest continued in the second quarter of 2021 to have the highest portion of Opportunity Zone tracts with a median home price of less than $150,000 (63 percent), followed by the South (45 percent), the Northeast (41 percent) and the West (6 percent).
- Median household incomes in 88 percent of Opportunity Zones were less than the medians in the counties where they were located. Median incomes were less than three-quarters of county-level figures in 56 percent of zones and less than half in 16 percent.

Report methodology

The ATTOM Opportunity Zones analysis is based on home sales price data derived from recorded sales deeds. Statistics for previous quarters are revised when each new report is issued as more deed data becomes available. ATTOM compared median home prices in census tracts designated as Opportunity Zones by the Internal Revenue Service. Except where noted, tracts were used for the analysis if they had at least five sales in the second quarter of 2021. Median household income data for tracts and counties comes from surveys taken the U.S. Census Bureau (www.census.gov) from 2015 through 2019. The list of designated Qualified Opportunity Zones is located at U.S. Department of the Treasury. Regions are based on designations by the Census Bureau. Hawaii and Alaska, which the bureau designates as part of the Pacific region, were included in the West region for this report.

About ATTOM

ATTOM provides premium property data to power products that improve transparency, innovation, efficiency and disruption in a data-driven economy. ATTOM multi-sources property tax, deed, mortgage, foreclosure, environmental risk, natural hazard, and neighborhood data for more than

155 million U.S. residential and commercial properties covering 99 percent of the nation's population. A rigorous data management process involving more than 20 steps validates, standardizes, and enhances the real estate data collected by ATTOM, assigning each property record with a persistent, unique ID — the ATTOM ID. The 20TB ATTOM Data Warehouse fuels innovation in many industries including mortgage, real estate, insurance, marketing, government and more through flexible data delivery solutions that include bulk file licenses, property data APIs, real estate market trends, and more. Also, introducing our latest solution, that offers immediate access and streamlines data management – ATTOM Cloud.

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U.S. 'Opportunity Zones' Use Tax Breaks for Developers to Help Poor Neighborhoods - But Are They Really Helping?

By most accounts, Beaverton, part of Oregon's Sunset Corridor, is a desirable American suburb. It's 15 minutes from downtown Portland, home to Nike headquarters and has a median household income of around US$50,000 range.

Why, then, are American taxpayers subsidizing developers to build in Beaverton, along with dozens of other economically robust communities just like it?

The answer lies in an ambitious public-private partnership initiative known as opportunity zones. Embedded in the U.S. Tax Cuts and Jobs Act of 2017, aimed at incentivizing private investors to develop real estate in low-income communities and spur local business growth, the program has attracted billions of dollars in projects from Beaverton to Boston.

Continue reading.

theconversation.com

August 12, 2021

QOFs Tracked by Novogradac Surpass $17.5 Billion in Equity Raised.

Qualified opportunity funds (QOFs) tracked by Novogradac raised $17.52 billion in equity as of midyear, according to the Novogradac Opportunity Zones Investment Report: Data Through June 30, 2021, which was released today. The semiannual report includes information on the geographic and investment-type focus of more than 1,000 QOFs and includes the top 20 states and top 40 cities for planned investment, as well as the number of QOFs in each of several ranges of equity raised. The report also features a historical section, where trends are examined over time. Michael Novogradac

published a blog post on the data and the report is the subject of today's Tax Credit Tuesday podcast.

The report will part of the discussion at the Novogradac 2021 Fall Opportunity Zones Conference, Oct. 21-22 in Cleveland.

August 10, 2021

Webinar: Driving Investment into Texas' Rural Opportunity Zones.

September 7, 2021 – 1:00 PM – 2:30 PM

Attracting investors to rural Opportunity Zones is a well-known challenge. Federal reserve data show that at least 60% of opportunity zones in Texas are at least partially in a rural census tract. In order to attract investment in these rural Opportunity Zones, local leaders must be able to identify priority projects and businesses and build a local investment strategy. During this webinar, expert panelists will provide best practices and tips for economic development practitioners on driving investments into rural Opportunity Zones in Texas.

Click here to learn more and to register.

The Infrastructure Plan Could Boost N.J.'s Opportunity Zones.

The U.S. Senate this week moved closer to passing President Biden's $1 trillion infrastructure bill — the biggest investment in America's rails, roads, broadband and electrical grid in decades. New Jersey political leaders hope the landmark legislation will help fund critical state projects like the Gateway Tunnel.

One of the hallmarks of the Infrastructure Investment and Jobs Act is channeling investments to under-served communities, including those in New Jersey, positioning them as hubs for next-generation jobs and innovation. The White House aims to "revitalize manufacturing, secure U.S. supply chains, invest in R&D, and train Americans for the jobs of the future." This goal has eluded presidential administrations for much of the 21st century. Yet a convergence of factors makes the next few days a particularly favorable window to make progress — though perhaps not in the way policymakers expected.

One way the Biden administration plans to pay for the infrastructure bill is by nearly doubling the tax rate wealthy Americans pay on profits from their sale of stock. This capital gains hike would have major financial impacts, and observers are debating what it would mean for economic fairness and federal revenue. The increase could also have a surprisingly powerful effect on jobs and business growth in low-income areas by pivoting investors toward Opportunity Zones.

Continue reading.

nj.com

By Charles Meyer

Aug 10, 2021

TAX - CALIFORNIA

City and County of San Francisco v. All Persons Interested in Matter of Proposition G

Court of Appeal, First District, Division 4, California - July 26, 2021 - Cal.Rptr.3d - 2021 WL 3140071 - 21 Cal. Daily Op. Serv. 7511

Following amendment to California Constitution, which required that any special tax adopted by a local government entity take effect only if approved by a two-thirds vote of the electorate, city and county brought action to establish that initiative measure entitled "Parcel Tax for San Francisco Unified School District," was validly enacted.

The Superior Court granted summary judgment in favor of city.

The Court of Appeal held that:

- Constitutional provision does not repeal or abridge by implication the people's power to raise taxes by initiative;
- Constitutional provision did not constrain initiative power;
- Constitutional provision cannot prevent the people, exercising their initiative power, from adopting an identical tax; and
- State initiative qualified for ballot measure through method in which voters could propose measure by initiative petition.

Although the constitutional provision requiring two-thirds vote of qualified electors to approve special taxes, requires governmental entities to gain approval of supermajority of voters before imposing a special tax, it does not repeal or otherwise abridge by implication the people's power to raise taxes by initiative, and to do so by majority vote; any such partial repeal by implication is not favored by law, which imposes a duty on courts to jealously guard, liberally construe and resolve all doubts in favor of exercise of the initiative power.

Constitutional provision requiring two-thirds vote of qualified electors to approve special taxes adopted by a "local government" did not constrain initiative power for the same reasons that supermajority vote requirements did not apply to citizens' initiatives; the text of the constitutional provision did not reach the electorate, as the electorate was not an "agency."

Just as the State Constitution does not prohibit local government from adopting a special parcel tax with voter approval, so it cannot prevent people, exercising their initiative power, from adopting an identical tax.

State initiative measure entitled "Parcel Tax for San Francisco Unified School District," qualified for ballot measure based on city charter recognizing two ways to put measures on the ballot, and specifically method in which voters could propose measure by initiative petition; city's evidence showed that initiative qualified for the ballot showing that initiative qualified for ballot, including evidence of a declaration from director of elections and copies of the material submitted to director by three citizen proponents of initiative.

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

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

We pick up our series as the Senate prepares for a final vote on a bipartisan infrastructure bill in the coming days. In the last post, we stated the general rule that a good piece of tax-advantaged bond legislation tells issuers how and when they can refund bonds issued under any new bond program. Here's an example in current law to illustrate the point.

In 2005, Congress created a new category of tax-exempt "exempt facility" private activity bonds for highway facilities and surface freight transfer facilities.[1] These bonds are exempt from the typical private activity bond volume cap[2] but are subject to a special volume cap administered by USDOT. Unlike the typical PAB volume cap (which is apportioned among the states annually based on population), the special volume cap for these bonds is a national $15 billion cap that is available indefinitely, although all of it has now been spoken for.[3]

Continue reading.

The Public Finance Tax Blog

By Johnny Hutchinson on August 6, 2021

Squire Patton Boggs

IRS Notice Provides Population Figures for Disaster-Zone LIHTC Allocation.

Internal Revenue Bulletin 2021-31 provides state and territory low-income housing tax credit (LIHTC) allocating agencies with population figures to calculate disaster LIHTCs they can allocate under the Taxpayer Certainty and Disaster Tax Relief Act of 2020. Notice 2021-45 identifies the counties and parishes eligible for the disaster LIHTCs along with their combined populations. The disaster LIHTCs are equal to the lesser of $3.50 multiplied by the population in the disaster zones or 65% of the state LIHTC ceiling for calendar year 2020. California's 23.1 million residents in disaster zones was the largest of the 11 states plus Puerto Rico eligible for the credits.

The 2021 edition of the Novogradac Low-Income Housing Tax Credit Handbook is an essential resource for affordable rental housing owners, developers, managers and investors.

Novogradac

Monday, August 2, 2021

OZ Exit Plans and Structural Risks: Podcast

What are the advantages of a Qualified Opportunity Fund that is structured as a REIT instead of a

partnership? How does the level of diversification in a fund impact its risk/return profile?

Peter Ciganik is Managing Director at GTIS Partners, a global real estate investment firm based in New York.

Episode Highlights

- How the REIT structure may be advantageous for real estate investments with extended holding periods.
- Why exit strategy planning is important in determining the bottom line returns that OZ investors realize.
- How opportunity zone funds are attracting investors to real estate as an asset class for the first time.
- The potential benefits of diversification when investing in real estate, and the risks associated with single-asset strategies.
- The structural regulatory benefits that come with multi-asset strategies.
- Why rising costs pose challenges for real estate development in the current environment.
- How the opportunity zone program is achieving its objective of catalyzing community investment.

Listent to audio.

OPPORTUNITYDB

by JIMMY ATKINSON

JULY 28, 2021

Tax Policy Changes & Opportunity Zones, an OZ Pitch Day Panel: Podcast

What changes to tax policy are likely coming under the Biden administration? If enacted, how will these changes impact the appeal of Opportunity Zone funds and the returns available to investors? Several Opportunity Zone experts provided their insights on a live panel recorded on July 27, 2021 during OZ Pitch Day, titled "Tax Policy Changes & Opportunity Zones."

Today's podcast episode is the audio version of that panel. Moderated by OpportunityDb founder Jimmy Atkinson, the panel featured Shay Hawkins of the Opportunity Funds Association, Kunal Merchant of CalOZ, and John Sciarretti of Novogradac.

Episode Highlights

- A crash course in Opportunity Zone basics.
- The tax policy changes that are likely coming down the pipeline, on both the regulatory and legislative sides.
- How the Opportunity Zone program is winning support in Congress, even among some of its one-time critics.
- The likelihood of changes to the Opportunity Zone program, including transparency and reporting requirements via the IMPACT Act.
- Why an increase in capital gains tax rates may do little to diminish the appeal of Opportunity Zone incentives.
- The potential to give preferential treatment to Opportunity Zone investments in any new tax

legislation.
- The role that Opportunity Zones can play in the economic recovery from COVID-19.
- How the trend towards increased state and local incentives may be a boon to projects located in Opportunity Zones.
- Why the rumored changes to 1031 exchanges may never materialize.
- What is likely to be included in a comprehensive Opportunity Zone expansion bill.
- The possible permutations of a reconciliation bill in the current Congress.
- Technical discussions of the tax advantages of different QOF structures.

Listen to audio.

OPPORTUNITYDB

by JIMMY ATKINSON

AUGUST 4, 2021

Buckle Your Seatbelts: Tax Ramifications of the LIBOR Transition - Arent Fox

Although this article is focused on tax-exempt debt, the tax ramifications of the LIBOR transition are not limited to the municipal finance world, and the elimination of LIBOR may also have a significant impact on taxable debt, interest swap transactions and other transactions utilizing LIBOR.

For Our Complete Archive of LIBOR Analysis Click Here

General

In connection with LIBOR's impending demise, it became clear to many tax lawyers that numerous tax-exempt bond transactions face the risk of adverse tax consequences because the documents under which they were issued do not contemplate this transition and, therefore, must be amended to provide for a replacement ("fallback") index. This risk arises as a result of a basic tax principle – when a debt instrument is modified in a significant manner after it is issued, the debt is deemed exchanged for a new debt instrument. This exchange, or 'reissuance,' can trigger a tax recognition event to the borrower or bondholder (sometimes a bank or other institutional lender) and, if certain facts are present, may cause tax-exempt debt to lose its tax-exempt treatment under the Internal Revenue Code.

IRS Rev. Proc. 2020-44

General

Following the announcement that LIBOR would be phased out, the Internal Revenue Service (IRS) issued Revenue Procedure 2020-44 aiming to: (1) facilitate the use of alternative reference rates recommended by (a) the Alternative Reference Rates Committee (ARRC) and (b) the International Swaps and Dealers Association (ISDA); and (2) provide that if adequate fallback language is used in loan agreements, the result will prevent a reissuance. The Rev. Proc. attempted to achieve this beneficial outcome by providing that the change in yield that results from the effectiveness of an appropriate alternative rate index would not itself be material, thus treating the effectiveness of such a fallback index as not a taxable exchange of property for other property differing materially in

kind or extent for purposes of Treasury Regulation §1.1001-1(a).

Substantially Equivalent Value Test

Tax-Exempt Bond Rule

For municipal bonds, under existing regulations, changes to the terms of a tax-exempt bond transaction are not in themselves considered significant enough to trigger a reissuance if they result in a change in the yield on the bonds of less than 25 basis points. Rev. Proc. 2020-44 increases the circumstances in which this safe harbor applies to certain changes made to accommodate the end of LIBOR.

General Debt Instruments

The general rule under Rev. Proc. 2020-44 is that implementation of certain provisions in documents to replace LIBOR with a new benchmark index will not, by itself, result in reissuance because of the resultant changes in yield without regard to the 25 basis point rule if the fair market value of the altered instrument is substantially equivalent to the fair market value of the unaltered instrument. Given that LIBOR will cease to exist and, thus, there will be no way to measure a replacement index against LIBOR, and given that SOFR and many other replacement indices have not been in existence for long enough to predict their relationship to LIBOR in all interest rate environments, it is unclear how this equivalence requirement can practically be satisfied.

Accordingly, in many transactions we have asked, on behalf of our borrower clients, that a substantially equivalent test be used in amendments to debt instruments contemplating the LIBOR transition. However, banks have been very resistant to this suggestion because of (i) market uncertainty, (ii) lack of history with SOFR and many other replacement indices, and (iii) bank desire to control the rate setting process in connection with the LIBOR transition.

Rev. Proc. 2020-44 attempts to address this problem since it provides that the fair market value may be determined by any reasonable valuation method so long as that method is applied consistently. The question will then be whether a bank's sole discretion in setting of the new interest rate is a reasonable valuation method even if it is done consistently by each bank and consistently within the financial industry.

Integrated Hedges

While Rev. Proc. 2020-44 gives some relief in municipal bond transactions, it is also important to consider how the end of LIBOR will impact transactions that utilize hedges and, specifically, 'integrated hedges.'A debt instrument may be 'integrated' with a hedge for purposes of determining the yield on an instrument for tax purposes, and the amount and timing of taxpayer income, deduction, gain or loss if certain procedures are followed. When amending debt instruments to address the elimination of LIBOR, if an integrated hedge is not simultaneously amended in the same manner, the change to the debt instrument could itself qualify for exclusion from the reissuance rule but the transaction could still lose the benefit of the integrated hedge, and thus be treated as reissued nonetheless. This could lead to potentially unfavorable tax consequences.

The key to avoiding this tax risk will be amending the debt instrument and the hedge in the same manner and at the same time to deal with the LIBOR transition. However, interest rate hedge transactions are generally governed by ISDA documentation, whereas the changes to a debt instrument are dictated by agreements of the parties to the debt instrument – typically the issuer/borrower and the bank/lender. Matching the provisions adopted in contemplation of the

phase-out of LIBOR in integrated transactions may be difficult, but may also be critical to avoid adverse tax consequences.

Dichotomy of Fallback Provisions

ARRC

No Recommended Benchmark

ARRC initially announced that the Secured Overnight Financing Rate (SOFR) would be its recommended new interest rate benchmark index for formerly LIBOR-based debt. However, ARRC subsequently announced that banks could utilize any interest rate benchmark they so choose. In the face of this revised ARRC announcement, most banks that we have dealt with that have confronted the LIBOR transition issue have, so far, proposed as a fallback solution that the bank would use a replacement index chosen in the bank's sole and absolute discretion, without any input from the borrower/issuer.

In most cases, under existing regulations and notwithstanding the Rev. Proc. 2020-44 safe harbor, when banks unilaterally choose the new benchmark in a variable rate financing prepayable at any time, a reissuance event could result. Thus, these unilateral pronouncements may fail to allow the lenders to take advantage of the favorable tax treatment (avoidance of reissuance) intended to be available under Rev. Proc. 2020-44 because, absent the safe harbor treatment offered by the Rev. Proc., it is impossible to predict whether the 25 basis point safe harbor will be met now for these benchmark replacement substitutions.

No Recommended Spread Adjustment

Even when SOFR (or an alternative benchmark) is utilized as a replacement index for LIBOR (thus securing Rev. Proc. 2020-44 safe harbor treatment), it is clear that a spread must be added to SOFR for it to yield effective interest rates similar to LIBOR prior to the transition. Although it has tried several times, ARRC has not developed a recommended spread adjustment. In light of this, and absent negotiations, bank transition documentation often state that the new recommended benchmark spread adjustment to equate LIBOR with the new benchmark is to be chosen in the bank's sole and absolute discretion, without any input from the borrower/issuer. This also will likely result in reissuance.

Fair Recommended Fallback Language

ARRC has published recommended fallback language to be used in loan agreements as well as in many other commercial agreements. However, our experience has shown that very few financial institutions are using the ARRC recommended fallback language.

ISDA

Required Fallback

For swaps and derivatives, ISDA has developed what some consider to be a more robust fallback language to specify the rate to be used upon a LIBOR cessation. Although the use of the ISDA fallback may be the scenario expected by the swap counterparties, it is not automatically effective in pre-existing swaps. Therefore, issuers and borrowers must either agree to adopt the ISDA fallback in existing swaps, or amend or replace existing swaps or other derivatives with other new bilateral agreements.

Required Response

In our view, entering into a new agreement or new amendment in the case of swaps facing the end of LIBOR without built-in fallbacks (currently, silence is the most common fact pattern), rather than just agreeing to the ISDA Protocol, is highly recommended, as the ISDA Protocol leaves, at the sole and absolute discretion of the bank: (i) the determination of the new benchmark index, and (ii) the timing of the LIBOR transition. In addition, the ISDA Protocol locks in the benchmark spread adjustment as of March 5, 2021, which may (or may not) be a fair spread adjustment today, much less a year from now. Further, the ISDA Protocol strips away certain existing legal rights of borrowers. Moreover, as noted above, harmonizing these changes with changes to the underlying debt instrument (and vice versa) may also be crucial.

Further Analyses

General

As noted, reissuance, with its potential adverse tax consequences, can be triggered by: (i) changes in the benchmark index referenced from LIBOR to SOFR (or another benchmark as the banks have not eagerly adopted SOFR) together with a benchmark spread adjustment that do not satisfy the requirements of Rev. Proc. 2020-44, and (ii) changes in the other fallback provisions (e.g., interest payment and calculation periods) which are innocuously referenced to as 'conforming changes.'

These changes could constitute an alteration of the terms of a debt instrument, be treated as a significant modification, trigger a tax realization event and, in some cases, result in a loss of tax exemption. Therefore, if borrowers and their lenders are to develop truly helpful LIBOR replacement fallback provisions, a main objective must be to avoid reissuance, which neither the ISDA nor the ARRC language achieves.

Associated Alterations

Rev. Proc. 2020-44 gives relatively broad protection from reissuance treatment for what are termed "associated alterations" done in connection with the change of the reference rate. It further permits, without causing reissuance, a one-time payment to correlate the old fair market value with the new fair market value, in the event an adjustment to the spread or to the rate is not enough to make the debt instruments economically substantially equivalent immediately prior to, and subsequent to, the LIBOR transition. Again, how this will be satisfied is not enumerated in the Rev. Proc. and remains unclear.

Conclusion

Accordingly, borrowers should take particular note of the tax risks summarized here and not merely accept bank proposed changes, particularly because in most bank documents, a change in taxes or regulatory requirements for a particular loan that have negative consequences to the bank are passed on to the borrower.

In a similar vein, in many transactions on behalf of our borrower clients, we have requested that negative implications to the end of LIBOR be retained by the bank, in no small part because (i) this LIBOR transition is taking place as a result of bank manipulations of LIBOR and not from any actions of borrowers and (ii) of the banks' insistence on unilateral decision-making on alternative index and spread selection causing tax risk not created by the borrower. As with other suggested changes to the 'industry-standard' documentation, this position has not been generally accepted by the banks, though it would keep the issuers/borrowers in a similar economic position pre- and post-LIBOR

transition.

Consequently, all LIBOR transition documentation should be carefully analyzed prior to execution, even if represented as 'industry-standard,' so as to avoid, among other things, adverse tax consequences borne by the borrower.

Arent Fox, LLP

by Alyssa Gould, Les Jacobowitz & Richard Newman

July 28, 2021

TAX - MAINE

Madison Paper Industries v. Town of Madison

Supreme Judicial Court of Maine - July 6, 2021 - A.3d - 2021 WL 2793717 - 2021 ME 35

Taxpayer, which owned paper mill and hydro-electric power plants, petitioned for review after State Board of Property Tax Review upheld denial by town board of assessors of taxpayer's request for property tax abatement.

The Superior Court affirmed decision. Taxpayer appealed.

The Supreme Judicial Court held that:

- Two of taxpayer's arguments were subject to review for clear error;
- Board's decision to uphold town's valuation of paper mill assets based on current use was warranted;
- Board did not improperly assess mill in determining highest and best use;
- Board's finding that assessment had not involved double-counting of value of energy produced by plants was consistent with evidence; and
- Board properly applied statute in determining that town's assessment and taxpayer's appraisal were within 10% of each other.

Arguments of taxpayer, operator of paper mill and hydro-electric power plants that sought property tax abatement, that State Board of Property Tax Review committed legal error by deciding that power plant assets should have been valued based on highest and best use, but that mill assets should have been valued based on current use, and that Board committed legal error in deciding that difference between assessed property value and taxpayer's asserted value was within range designated as accurate within reasonable limits of practicality raised primarily factual, not legal, challenges to Board's decisions, and thus such arguments were subject to review for clear error, even though operator proposed de novo standard of review.

Decision of State Board of Property Tax Review to uphold town's valuation of taxpayer's paper mill assets, which were located partially in town, based on assets' current use as operating mill, rather than based on assets' liquidation or salvage value, was warranted, even though taxpayer asserted that liquidation or salvage value was assets' highest and best use; Board pointed out that, at time of property tax assessment, mill was state-of-the-art facility that operated in the black, that its owners were not in financial difficulty, and that owners had announced mill's closure without communicating cooperatively with town, and Board found that mill had been closed and its equipment and machinery sold as scrap under restrictions because owners no longer wanted to

operate mill, but that owners' decisions should not have dictated mill's highest and best use.

State Board of Property Tax Review, in determining highest and best use of taxpayer's paper mill, for purpose of determining mill's just value, and thus proper property tax assessment, did not improperly assess mill; Board simply rejected taxpayer's appraisal of mill as incredible, starting with taxpayer's view of mill assets' highest and best use as being liquidation value, which was within Board's prerogative as fact-finder, and determined that taxpayer failed to prove that judgment of assessors was so irrational or unreasonable that property was substantially overvalued.

Finding of State Board of Property Tax Review that assessment of taxpayer's paper mill and hydro-electric power plants had not involved double-counting of value of energy produced by plants was consistent with evidence, even though taxpayer asserted that value had been counted once by including value of energy in valuation of plants as "merchant power plants" and again by attributing value of energy supplied to mill as "avoided cost"; while Board found that 40% of mill's energy requirement that plants provided constituted avoided cost to mill, such finding did not necessarily mean that town, in assessing property tax, factored avoided cost into assessment of mill assets, and individual who provided assessment calculations as guidance relied on cost approach, which did not count value of energy as avoided cost equivalent to income.

State Board of Property Tax Assessment properly applied statute indicating that, in proceedings related to protested assessment, it is sufficient defense of assessment that it is accurate within reasonable limits of practicality, except when proven deviation of at least 10% from relevant assessment ratio exists, in determining that town's assessment of value of portion of taxpayer's hydro-electric power plants that was within town and value offered in taxpayer's appraisal were within 10% of one another; while Board used town's valuation that excluded equipment that was exempt from taxation pursuant to Business Equipment Tax Exemption (BETE) program, such equipment was not included in protested assessment, and BETE statute required town to value and assess BETE-eligible assets only for purposes of reimbursement.

CDFA-TEDC Webinar: Driving Investment into Texas' Rural Opportunity Zones

September 7, 2021 | 1:00 – 2:30 PM Central

Click here to learn more and to register.

OZ Exit Plans and Structural Risks.

What are the advantages of a Qualified Opportunity Fund that is structured as a REIT instead of a partnership? How does the level of diversification in a fund impact its risk/return profile?

Peter Ciganik is Managing Director at GTIS Partners, a global real estate investment firm based in New York.

Episode Highlights

- How the REIT structure may be advantageous for real estate investments with extended holding

periods.
- Why exit strategy planning is important in determining the bottom line returns that OZ investors realize.
- How opportunity zone funds are attracting investors to real estate as an asset class for the first time.
- The potential benefits of diversification when investing in real estate, and the risks associated with single-asset strategies.
- The structural regulatory benefits that come with multi-asset strategies.
- Why rising costs pose challenges for real estate development in the current environment.
- How the opportunity zone program is achieving its objective of catalyzing community investment.

Listen to audio.

Opportunitydb.com

by JIMMY ATKINSON

JULY 28, 2021

Evolution of Tax Increment Financing: Indiana, Kentucky, Ohio, and West Virginia - Frost Brown Todd

Tax increment finance (TIF) legislation continues to evolve in many states within the Frost Brown Todd footprint. Below are summaries of recent legislative changes in Indiana, Kentucky, Ohio and West Virginia. These changes may provide additional opportunities for local governments or developers looking to utilize TIF to complete their capital stacks. In addition, the changes may provide additional financing opportunities for existing districts and projects.

Indiana

The General Assembly of the State of Indiana passed limited modifications to the TIF statutes and related provisions during this session. Some of the more relevant amendments to TIF and redevelopment commissions were included in House Bill 1271. The bill was the omnibus legislation for the Department of Local Government Finance (DLGF). It was signed into law by Governor Eric Holcomb on April 8, 2021, and included, among many other things, the following:

Negotiated Bond Sales – The bill extended the sunset provision permitting sales of general obligation, revenue (including tax increment revenue), or special tax bonds at negotiated sales until July 1, 2023.

Allocation Areas – There were several amendments providing that one parcel may not be included in multiple allocation areas. This provision, however, does not apply retroactively to parcels currently located in multiple allocation areas.

Annual Notification to DLGF – The bill shifted responsibility for annual notification to DLGF of the amount of excess tax increment revenue from the redevelopment commission of the local governmental unit to the county auditor.

The above is a short summation of some of the legislation passed by the General Assembly that affects TIF and redevelopment commissions. The 2022 General Assembly session will likely yield

more changes to Indiana's TIF statutes and related provisions.

Kentucky

During the 2021 legislative session, the Kentucky legislature passed an amendment to Section 65.7047 of the Kentucky Tax Increment Financing Act. The amendment, effective June 29, 2021, places certain preliminary requirements on cities and counties that are establishing or modifying local development areas over previously undeveloped land. The amendment requires the city or county to engage a "qualified independent outside consultant or financial adviser" to prepare a report that analyzes data related to the project and the proposed development area.

The component parts of the required report include:

1. the estimated approved public infrastructure costs;
2. an assessment of the feasibility of the project;
3. the estimated amount of local tax revenues that will be generated by the project over the term of the local development area;
4. the estimated amount of local tax revenues that will be displaced as a result of the project;
5. the estimated amount of old revenues that would have been generated in the local development area in the absence of the project; and
6. a determination that the project will not occur "but for" the existence of the local development area.

The amendment also addresses improvements to local development areas that will be financed through the issuance and sale of increment revenue bonds or "TIF bonds." Where such bonds will be issued and sold, the required report must also include projected financing costs as well as the relationship of the estimated revenues to the financing needs of the project.

Finally, with respect to the legislative approval of a local development area, the amendment provides that the ordinance approving the development area must include the estimated net positive fiscal impact as set forth in the required report.

Ohio

The Ohio General Assembly recently passed several bills that will impact the implementation and administration of TIF districts in Ohio. Below is a summary of key updates that will be of interest to local governments, developers, and other community stakeholders.

Amendments to Sections 5709.40 and 5709.41 of the Ohio Revised Code – The biennium budget bill, signed into law by Governor Mike DeWine on July 1, 2021, includes amendments to Sections 5709.40 and 5709.41 of the Ohio Revised Code, which are the tax increment provisions that govern the establishment of TIF districts in municipal corporations. The amendments incorporate the following updates:

- ***Off-Street Parking Facilities:*** A Section 5709.40(A)(8) amendment updates the definition of "public infrastructure improvement" to expressly include "off-street parking facilities" as a qualifying expenditure of TIF service payments. This update will give municipalities more certainty with respect to their participation in the financing of projects that incorporate structured parking.
- ***Exemption Period Commencement Flexibility Allowing Designated Tax Year or Value:*** A Section 5709.41(D) amendment gives municipalities greater latitude when designating the commencement date for a TIF exemption under an authorizing ordinance. Under the updated provision, municipalities may elect to have a TIF exemption commence with any tax year specified

in the TIF ordinance other than a tax year that precedes the effective date of the ordinance. Alternatively, the amendment permits municipalities to refrain from designating a tax year for the commencement of a TIF exemption and to instead utilize an improvement value as the basis for commencing a TIF exemption. For projects that incorporate multiple parcels, the amendment permits a municipality to establish different commencement dates for each parcel identified in the authorizing ordinance. These updates bring Section 5709.41 in alignment with the parallel provisions under Section 5709.40.

Minimum Service Payment Obligations Under Section 5709.91 – Substitute Senate Bill 57 was signed by Governor DeWine on April 27, 2021 and will be effective on August 3, 2021. This legislation approves several updates to Section 5709.91 of the Ohio Revised Code with respect to the status of "minimum service payment obligations" as they pertain to real property located in TIF districts. "Minimum service payment obligations" are payment obligations that supplement a property owner's obligation to make statutory service payments under Section 5709.42 and related provisions of the Ohio Revised Code. The updates to Section 5790.91, include the following changes pertaining to minimum service payment obligations:

- ***Covenant Running with the Land:*** Recorded agreements or instruments memorializing a property owner's consent to a minimum service payment obligation shall constitute a covenant running with the land and be binding against subsequent owners of the property;
- ***Insurable Interest****:* Minimum service payment obligations constitute an insurable interest for purposes of issuing title insurance in Ohio;
- ***Collected Like Property Taxes:*** Minimum service payment obligations may be certified to the county auditor and shall be collected in the same manner as real property taxes; and
- ***Security Mechanism for Financing:*** Minimum service payment obligations may be established to ensure sufficient funds to "finance expenditures" authorized under Chapters 725, 1728, and 5709. This update provides for broad authority to utilize "minimum service payment obligations" as compared to the prior provision which limited the use of "minimum service payment obligations" to ensuring sufficient funds to finance expenditures attributable to "public infrastructure improvements" and "housing renovations."

These changes provide greater flexibility and increased opportunity for local governments to incorporate the "minimum service payment obligations" into the financing of projects.

Payment Limitation on TIF District Extensions – Certain TIF districts in Ohio may be eligible for an extension of the exemption period. As a reminder, the ability to extend TIF districts in 2020 is gone, but TIF districts may still be extended in 2021 and beyond. For extensions after January 1, 2021, service payments may not exceed $1,500,000 for all calendar years prior to the calendar year immediately preceding the adoption of the extension amendment.

West Virginia

The West Virginia legislature continued passing amendments to the West Virginia Tax Increment Financing Act during the 2021 legislative session. The Act was previously amended during the 2004, 2014, 2016 and 2018 legislative sessions. The 2021 amendments primarily address:

1. extending the termination date of certain districts;
2. procedures to combine two districts;
3. the maturity date of certain refunding bonds; and
4. agreement for payments in lieu of taxes for properties within districts.

The amendments discussed below were effective on July 9, 2021.

Extension of Termination Date of Certain Districts – County commissions or municipalities may extend the termination date of certain districts for up to five years or to December 31, 2050, whichever is earlier. Only districts for which tax increment financing obligations were issued prior to December 31, 2020 may be extended. The extension of the term of a district may not occur simultaneously with the modification of the boundaries of the district. The local government proposing the extension is required to hold a public hearing, obtain the approval of the director of the West Virginia Department of Economic Development, and, if applicable, obtain the approval of any municipality in which a portion of a district is located.

Combining Districts – The amendments to the Act clarified: (i) the base assessed value of the property of a district resulting from the combination of two prior districts and (ii) the termination date of a combined district. The base assessed value of property in a combined district is the base assessed value of such property in each of the prior separate districts. The termination date of a combined district is the termination date of the district that had the latest termination date prior to the combination of the districts. This provides the opportunity to create a new district adjacent to an existing district, and following the combination of the two districts, the termination date would be nearly 30 years.

Payments in Lieu of Taxes – Prior to the most recent amendments to the Act, agreements for payments in lieu of taxes with respect to property in a district were required to have any such payments be equal to the property taxes that otherwise would have been due. The amendments permit agreements for payments in lieu of taxes to be negotiated among the public entity owning the property, the lessee of the property, and the applicable local levying bodies. These changes provide flexibility to provide property tax incentives for projects within a district. In addition, these changes provide for a written agreement to address the amount of property taxes to be deposited in the tax increment financing fund for the term of the agreement which eliminates assessment risk for any property covered by such an agreement.

Frost Brown Todd LLC – Carrie J. Cecil , Emmett M. Kelly, Emma H. Mulvaney, Donald L. Warner III and Beau F. Zoeller

July 28 2021

OZ Investing in the New Economy.

Do record stock market levels, the high inflation environment, and the new economy pose an opportunity for Opportunity Zone investors?

CONTINUE READING »

opportunitydb.com

July 21, 2021

IRS Extends Continuity Safe Harbor For ITC And PTC Projects.

Renewable energy developers breathed a sigh of relief Tuesday when the Internal Revenue Service

and Department of the Treasury issued guidance extending the safe harbor for wind and solar projects to qualify for the investment tax credit (ITC) and production tax credit (PTC).

Citing delays related to the COVID-19 pandemic, the extension provides relief to developers struggling with the interconnection delays, supplier backlogs, and contractor constraints that have been plaguing the industry. Notice 2021-41 extends the Continuity Safe Harbor for projects that began construction in 2016 through 2020 and clarifies the methods that taxpayers can use to satisfy the Continuity Requirement.

Under prior IRS guidance, taxpayers have two options to demonstrate that a project has begun construction under Section 45 or Section 48(a)(5) of the Internal Revenue Code – the Physical Work Test or the Five Percent Safe Harbor. Both methods require continuous progress toward completion of the facility once construction has begun (Continuity Requirement). The Continuity Requirement can be satisfied in two ways, either by (1) satisfying the test applicable to the method used to establish start of construction, or (2) satisfying the Continuity Safe Harbor.

Continuity Safe Harbor Extension

The Continuity Safe Harbor allows a facility to be deemed to have satisfied the Continuity Requirement if the facility is placed in service within a certain amount of time after start of construction is established.

Notice 2021-41 provides that for any qualified energy project that began construction under either the Physical Work Test or the Five Percent Safe Harbor, the timeline to achieve placed in service and still satisfy the Continuity Safe Harbor is extended, as follows:

- Projects that began construction in 2016, 2017, 2018, or 2019, the Continuity Safe Harbor is satisfied if the project is placed in service by the end of the calendar year that is six years after the year construction began.
- Projects that began construction in 2020, the Continuity Safe Harbor is satisfied if the project is placed in service by December 31, 2025.

Satisfaction of Continuity Requirement

Projects that fail to be placed in service within the timeline allowed to satisfy the Continuity Safe Harbor can nevertheless still satisfy the Continuity Requirement.

Prior IRS guidance allowed a taxpayer to satisfy the Continuity Requirement by establishing facts sufficient to demonstrate compliance with the test associated with the method that was used to establish start of construction. The Continuous Construction Test had to be satisfied if start of construction was established under the Physical Work Test, or, if start of construction was established under the Five Percent Safe Harbor, the taxpayer had to satisfy the Continuous Efforts Test. Notice 2021-41 revises prior guidance by clarifying that regardless of the method used to establish start of construction, if the taxpayer satisfies either the Continuous Construction Test or the Continuous Efforts Test, the Continuity Requirement has been satisfied.

Husch Blackwell LLP

July 1, 2021

S&P: U.S. Highway User Tax Bonds Prove Resilient

Key Takeaways

- Credit trends have been stable, despite variations in the price of fuel, temporarily lowered driving activity during the pandemic, increasingly restrictive federal gasoline mileage standards, and potential future loss of revenue due to electric vehicles (EVs), plug-in hybrid electric vehicles (PHEVs), hybrid electric vehicles (HEVs) and other technologies.
- Stable credit quality stems from strong debt service coverage and additional bonds tests, stable fuel consumption trends despite price swings, active management by states in raising tax rates when necessary, and a mix of pledged stable revenue sources beyond fuel taxes, such as license and registration fees.
- We believe states will find alternative sources of pledged revenue to the extent gas tax revenue flowing into state highway funds declines, such as by imposing vehicle mileage or other taxes, or by direct transfers of general tax revenue.
- Recent changes to highway user tax bond outlooks have been the result of the linkage to state general obligation credit quality under our priority lien criteria.

Continue reading.

14 Jul, 2021

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 »

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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 »

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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 »

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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The above article originally appeared as a post on the Fitch Wire credit market commentary page. The original article can be accessed at www.fitchratings.com. All opinions expressed are those of Fitch Ratings.

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…

CONTINUE READING »

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…

CONTINUE READING »

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…

CONTINUE READING »

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…

CONTINUE READING »

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…

CONTINUE READING »

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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…

CONTINUE READING »

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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

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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

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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

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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:

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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

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Author Information

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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

Novogradac Opportunity Zones Mapping Tool.

Now Identifying 2020 Census Tract Boundary Changes

About the Novogradac Opportunity Zone Mapping Tool

This tool displays designated qualified opportunity zones as published by the CDFI Fund as of June 15, 2018, as well as areas that may be eligible for OZ designation.

Designated opportunity zones displayed in the Novogradac Opportunity Zones Mapping tool are those that were nominated by those chief executive officers, and have been certified and designated by the Treasury Department. In addition, every low-income census tract in Puerto Rico was designated as an OZ in 2018 budget legislation. Once an OZ is designated, it remains a qualified OZ for a period of 10 years from the date of designation.

Launch the Novogradac Mapping Tool.

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

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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

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