Louisiana Board Vacates Local Tax Assessment on School Meals.

SUMMARY BY TAX ANALYSTS

In *Healthy Course LLC v. City of New Orleans*, the Louisiana Board of Tax Appeals vacated a local sales tax assessment against a catering company in connection with meals furnished to the students of a private school, finding that the city's home rule charter, which would have required taxation of the meals, did not override the applicable exemption under state statute.

Citations: Healthy Course LLC v. City of New Orleans; No. L00807

DATED JAN. 13, 2021

Dems Likely Claw Back SALT In Stages: Bloomberg Radio

MUNIS in FOCUS: Eric Kazatsky, Senior U.S. Municipals Strategist for Bloomberg Intelligence: Biden stimulus, SALT, and taxable munis. Hosted by Paul Sweeney and Vonnie Quinn.

Listen to audio.

Bloomberg Radio

January 15, 2021

Congress Can Help State and Local Governments Prepare for a Rainy Day Without Repealing the SALT Cap.

With Joe Biden in the White House and narrow control of the Congress, Democrats are likely to try to restore the full state and local tax (SALT) deduction, capped through 2025 at $10,000 per year. But if lawmakers really want to assist state and local governments, rather than cutting federal income taxes for mostly high-income households, we suggest a SALT substitute.

Although we have disagreed on the value of the SALT deduction, we agree on an alternative. We'd use the roughly $80 billion annual cost of restoring the full deduction to instead create a special insurance fund that would help states and localities weather recessions without mass layoffs and cuts in essential services. Repealing the SALT deduction completely could obviously fund an even larger program.

Creating a fund along these lines, which we call the State Macroeconomic Insurance Fund (SMIF), would help individual states during economic downturns and lessen the severity and duration of recessions for the whole country.

How the SALT deduction works

The Tax Cuts and Jobs Act of 2017 (TCJA) limited to $10,000 the amount of state and local taxes that households can deduct each year from their federal income tax. By also doubling the standard deduction, the TCJA dramatically reduced the number of itemizers. These provisions, like almost all of those affecting the individual income tax, are scheduled to expire after 2025.

Today, only about 11 percent of households take the SALT deduction, and most of the benefit goes to high-income households. For top-bracket taxpayers, the deduction amounts to a 37 percent federal tax subsidy for up to $10,000 of state and local taxes paid. President-elect Biden has proposed to limit the value of itemized deductions to 28 percent, but 28 percent of an uncapped SALT deduction would be worth far more than the $10,000 capped deduction for most taxpayers.

Pros and cons of the SALT deduction

There's a huge partisan divide on the SALT deduction. Most Republicans claim that it's a "blue state subsidy," that largely benefits big spending, rich states with lots of high-income taxpayers. Democrats argue that the subsidy makes it easier for states and localities to raise taxes to pay for essential public services.

They're both a bit right. The evidence suggests deductibility does make high-income people more tolerant of high state taxes. But, it's unclear how much of those higher state and local taxes are used to pay for services that benefit vulnerable populations.

Bigger problems

State and local governments are subject to a well-known one-two punch in recessions: just as revenues are falling, demand goes up for the safety net programs they provide.

Yet, because most states and localities are required to balance their books over each budget cycle, they are forced to slash spending or raise taxes during economic downturns. For instance, state and local governments have cut 1.4 million positions since the onset of the COVID-19 pandemic. Spending cuts can harm not only vulnerable populations but also the larger economy.

Rainy day funds can help, but both amassing those funds and withdrawing them can be politically risky. Managing these types of funds is complicated and the economics of how much to save during a year and when to withdraw money are far from straightforward.

Congress sometimes fills part of this fiscal gap, but not always. For example, it provided about $240 billion in state and local fiscal relief in March, but declined to include further unrestricted aid in the 11th hour compromise bill that was passed last month.

A proposal

Our alternative would use the federal revenue that would otherwise go to reinstating the full SALT deduction to create a State Macroeconomic Insurance Fund (SMIF). Accrued over nine years (the average length of the last four economic expansions) and with interest earnings, such a fund could provide nearly $1 trillion to states and local governments during a downturn.

In addition, states could be encouraged to supplement the fund by making additional premium payments to the SMIF. This might let them save beyond current political limits and help standardize rainy day fund rules. States that declined to pay these additional premiums could still participate in the SMIF but would get the smaller baseline insurance payout.

To prevent states from gaming the program, both expected contributions and recession-generated payouts would be determined by a formula with factors outside of a governor's control, such as state unemployment rates.

To prevent federal policymakers from raiding the SMIF – as they have routinely done to the Social Security trust fund – it would be treated as a "non-budgetary account" or "deposit fund." Contributions would be considered to generate outlays at the time they are made rather than when state and local government payments are dispersed. Premiums would be considered receipts and would generate an offsetting outlay for the contribution to the fund, with no net budgetary effect. This is generally the way the federal government accounts for loan guarantee programs.

Winners and losers

The SMIF would help states maintain current services in a recession and boost the economy by funding new investments in infrastructure and other projects. Some states may perceive that a program along these lines would provide less benefit than an unrestricted SALT deduction. But if the last 10 months have taught us anything, it's the value of insurance.

taxpolicycenter.org

January 14, 2021

Bond Market Tax Haven Shrinks as Corporate-Style Munis Surge.

- **Taxable muni sales jump to highest in decade on refinancings**
- **CreditSights says tax-exempt debt sales may keep falling**

America's municipal-bond market is becoming less of a tax haven.

Interest rates have sunk so low that states and local governments have been flooding the market with bonds that aren't tax-exempt, allowing them to revive a refinancing tactic that was stripped of its subsidies by President Donald Trump's 2017 tax-cut law or sidestep federal rules on how the proceeds can be spent.

The volume of taxable municipal-debt sales more than doubled last year to about $140 billion, the most since the Obama administration's Build America Bond program picked up part of the interest bills on state and local securities to stoke the economy after the recession. At the same time, tax-exempt bond sales declined about 8% to $315 billion, according to data compiled by Bloomberg.

Wall Street analysts anticipate that the surge will continue, with CreditSights analyst Patrick Luby forecasting that the pace of tax-free bond sales will drop this year to a more than two-decade low.

The shift has been a boon to the tax-exempt market, where cash has continued to flood in, by reducing the supply. The increase in taxable debt sales has also provided an opportunity for investors hunting for safe, higher-yielding securities at a time when interest rates are negative or near zero in much of the world.

“It’s going to be stronger than it was than 2019,” said Adam Stern, co-head of research at Breckinridge, who added that it would also be bigger than 2020. “With the amount of sheer negative yielding debt around, if you’re a big institution, whether you’re a foreign buyer or a pension fund, it’s a nice fit.”

One of the major drivers of the increase in taxable sales was the 2017 law that prevents governments from selling tax-exempt bonds for so-called advance refundings, a tactic that allows governments to refinance debt that can’t yet be bought back from investors.

The Democratic control of Congress and the White House once Joe Biden is sworn in could have an impact on the trend if the subsidy is revived, allowing governments to sell lower-cost tax-exempt bonds instead. “You would see tax exempt issuance go up, and you would see taxable issuance decrease significantly,” said Timothy Heaney, senior managing director and senior portfolio manager at Newfleet Asset Management.

Yet other elements could be supportive of more taxable municipal-bond sales. It’s possible a Biden administration could revive a version of the Build America Bond program to pump more money into infrastructure projects, something that Democrats have sought periodically since the program lapsed a decade ago, only to be stymied by Republican opposition.

“That is actually bullish for taxables, despite the high supply, because there is a lot of pent up demand,” said Citigroup Inc. municipal-bond analyst Vikram Rai, speaking in a call with clients last week.

Bloomberg Markets

By Nic Querolo

January 11, 2021, 10:40 AM PST Updated on January 12, 2021, 8:21 AM PST

— With assistance by Danielle Moran

The Most Popular OZ Podcast Episodes of 2020.

The Opportunity Zones Podcast will return next week with new episodes for 2021. But in the meantime, here are the most popular episodes of the show in 2020 (presented in reverse chronological order).

Highlights include interviews with Opportunity Zone experts across several industries, including Ashley Tison, Tony Nitti, Dan Kowalski, Jim Sorenson, Erik Hayden, Travis Steffens, Emily Lavery, Garth Everhart, Clem Turner, Mike Novogradac, Riaz Taplin, and more.

CONTINUE READING »

opportunitydb.com

By Jimmy Atkinson

January 13, 2021

TAX - NEW JERSEY

Township of Freehold v. CentraState Healthcare Services, Inc.

Tax Court of New Jersey - January 5, 2021 - N.J.Tax - 2021 WL 47389

Township appealed county board of taxation's dismissal of its petitions to impose omitted assessments and to revoke property tax exemptions given to taxpayer.

The Tax Court granted township's motions for partial summary judgment on reconsideration. Taxpayer moved for reconsideration and sought dismissal of township's omitted assessment complaints.

The Tax Court held that:

- Restoring tax-exempt property which ceases to be exempt to the tax rolls is governed by the exemption cessation statutory scheme;
- 20-day time limit for filing motion for reconsideration did not apply;
- Taxpayer did not state reason for reconsideration of the grant of partial summary judgment;
- The Tax Court would treat taxpayer's motions as if they had been filed as motions seeking dismissal of township's complaints; and
- Township could not resort to the general omitted assessment law to revoke assessor's grant of property tax exemption.

IRS Extends Temporary Relief for Qualified Low-Income Housing Projects: NABL

Today, the Internal Revenue Service (IRS) issued Notice 2021-12 extending the temporary relief from certain requirements under § 42 for qualified low-income housing projects and under §§ 142(d) and 147(d) for qualified residential rental projects that was provided in Notice 2020-53, 2020-30 I.R.B. 151 in response to the continuing COVID-19 pandemic. The notice also provides relief for additional § 42 requirements not previously addressed in Notice 2020-53.

Of note:

- For purposes of section 5.02 of Rev. Proc. 2004-39, the last day of a 12-month transition period for a qualified residential rental project that ends on or after April 1, 2020, and before September 30, 2021, is postponed to September 30, 2021.
- If a bond is used to provide a qualified residential rental project and if the § 147(d) 2-year rehabilitation expenditure period for the bond ends on or after April 1, 2020, and before September 30, 2021, then the last day of that period is postponed to the earlier of one year from the original due date or September 30, 2021.

On December 2, 2020, NABL submitted a letter to the U.S. Department of the Treasury and IRS requesting an extension of IRS Notice 2020-53 through December 31, 2022. Notice 2020-53 provided relief to bond issuers, operators, owners and tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state agencies that have jurisdiction over these projects, from otherwise-applicable federal tax law compliance requirements. Read NABL's letter here.

Notice 2021-12 will be in IRB: 2021-6, dated February 8, 2021.

Ohio Tax Board Affirms Denial of Property Tax Exemption for Church's Parcel.

SUMMARY BY TAX ANALYSTS

In Greater Fellowship Assembly Outreach v. McClain, the Ohio Board of Tax Appeals found that a church failed to prove that a vacant lot qualified for a real property tax exemption, affirming the Ohio tax commissioner's denial of an exemption for the parcel.

Continue reading.

First, Do No Harm: States Can Preserve Revenue by Decoupling From CARES Act Tax Breaks for Business Losses.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, enacted in March 2020, included several costly federal tax breaks for businesses that will also reduce many states' personal and corporate income tax revenues because their tax codes are tied to the federal code. Several of these tax breaks allow businesses to get refunds of taxes they owed for the 2018 and 2019 tax years, before the pandemic hit. Five states — Colorado, Georgia, Hawaii, New York, and North Carolina — have already "decoupled" their tax laws from these provisions to avoid having to give back revenue they have already collected; other states should do the same.[1]

Some of these tax breaks have questionable merit at the federal level and make even less sense for states, which must balance their budgets each year — an extremely challenging task given their sharp revenue declines since the pandemic hit. States will need to increase tax revenues during the next several years to minimize cuts in education, health care, child care, infrastructure, and other critical services, which would disproportionately harm low-income people and people of color. Their immediate priority must be to preserve existing revenue sources by avoiding unnecessary and unwarranted tax cuts.

About half the states have probably lost some revenue already because their tax codes are linked to current provisions of the Internal Revenue Code (IRC). These "rolling conformity" states need to decouple from the CARES Act provisions as early as possible in their 2021 legislative sessions to prevent additional revenue losses and minimize the number of taxpayers that will have to file amended tax returns and pay taxes that were previously refunded.

Continue reading.

CENTER ON BUDGET AND POLICY PRIORITIES

BY MICHAEL MAZEROV

JANUARY 4, 2021

TAX - NEW YORK

[Town of Irondequoit v. County of Monroe]

Court of Appeals of New York - December 22, 2020 - N.E.3d - 2020 WL 7497940 - 2020 N.Y. Slip Op. 07689

Towns brought hybrid Article 78 proceeding and declaratory judgment action against county and several of its officials, alleging that county was required to credit towns for amount of unpaid maintenance charges, or to guarantee those amounts, that towns assessed against individual properties, for performing services such as cutting grass or removing weeds following property owners' failure to maintain their property themselves.

The Supreme Court, Monroe County, granted towns' petition and denied county and officials' motion to dismiss. County and officials appealed. The Supreme Court, Appellate Division, reversed. Towns appealed.

The Court of Appeals held that counties were required to guarantee and credit towns in connection with certain "unpaid delinquent taxes" assessed by towns.

[Democrats Get Clout Needed for Risky Bid to End Trump's SALT Cap.]

- **A popular blue state tax break could be revived under Biden**
- **Some economists dismiss the idea as a handout to the richest**

Democrats will soon have the balance of power required to repeal President Donald Trump's limitation on a prized tax deduction, but doing so will likely require a tricky procedural process and a politically fraught vote.

There are few issues that have riled certain segments of the Democratic Party more than Trump's cap on write-offs of state and local tax, or SALT. Repealing it, however, would require Democrats to vote for something widely seen as a tax cut for the rich at the same time the party is proposing tax increases to make the Internal Revenue Service code more progressive.

Democrats have been trying to restore unlimited SALT deductions since the 2017 tax law capped the benefit at $10,000. Lawmakers from high-tax states, including New York, California and New Jersey, where the tax break is particularly valuable, decried the move saying it was punishing their voters to pay for Trump's $1.5 trillion tax cut for corporations and the wealthy.

Senator Chuck Schumer of New York, who will become the chamber's majority leader thanks to the victories of Raphael Warnock and Jon Ossoff in this week's Senate runoff elections in Georgia, said last year that abolishing the SALT deduction cap would be among his top priorities.

"When we get in the majority we'll do it permanently," Schumer said at a press conference on Long Island in July. His office didn't immediately respond to a request to comment.

Senator Ron Wyden, an Oregon Democrat poised to control the Finance Committee, said in a statement that he would be looking to lift the SALT cap as part of a broader tax agenda.

The politics are easy for lawmakers from high-tax states where many residents saw their deductions decline following the 2017 tax overhaul, but it's a harder sell for Democrats in low-tax states where few constituents owe more than $10,000 in state income and property taxes.

It's even trickier because allowing taxpayers to write off their full SALT bills largely benefits the wealthiest Americans. About 52% of the benefit from repealing the cap flows to households earning at least $1 million a year, according to the the non-partisan Joint Committee on Taxation.

Because of that, it's earned a reputation among Washington economists and policy wonks across the political spectrum for being a dumb idea. Jason Furman, a former economic adviser to President Barack Obama has called restoring the full tax break a "waste of money."

"At best, the SALT deduction is a warped way to do social policy; at worst it is a politically motivated handout to the richest people in the richest places," two Brookings Institution researchers wrote in a report last year. "Either way, it is bad policy — especially at a time of rising inequality."

Still, Democrats are jazzed over the chance to restore a tax break that they say was included in the 2017 law by Republicans to hurt taxpayers in Democratic-leaning districts, including middle-income earners in areas where housing is expensive and taxes are high. Liberals see the cap as part of a broader strategy by conservatives to undermine support for progressive agendas.

"With Democrats in complete control of the federal government, and New York's senior senator in charge of the Senate agenda, our chances for giving tax relief to middle class New Jerseyans have never been better," Representative Bill Pascrell said in a statement. "I'm already working with my colleagues in the delegation who are chomping at the bit to restore the SALT deductions Republicans stole from our neighbors in their 2017 tax scam."

Representative Tom Suozzi, a New York Democrat, is among the legislators leading the charge to repeal the cap. He said he wants it repealed in its entirety.

"The SALT deduction is based upon basic fairness," Suozzi said. "You shouldn't be taxed on taxes you have already paid."

"The second part of the fairness issue is that state and local governments have been operating under this paradigm for a hundred years," he added.

Shepherding the vote through the House and Senate will require the slim Democratic majorities in both chambers to stay united on what is likely to be a complex and sweeping economic policy bill.

The SALT repeal would likely be bundled with dozens of other tax and spending provisions in what's known as a budget reconciliation bill, a fast-tracked process to pass legislation with a simple Senate majority — rather than the normal 60-vote threshold.

That way, the chamber's 50 Democrats, combined with a tie-breaking vote from soon-to-be Vice President Kamala Harris, could pass the legislation without needing any Republicans to sign on.

Democrats have a long trail of defeats trying to get rid of the SALT cap. New York Governor Andrew Cuomo went to court to invalidate the law. Governors of Democratic-led states, including Cuomo, then tried to use the judicial system to throw out regulations regarding the cap. So far, both efforts have failed.

House Democrats successfully passed a short-term repeal of the SALT cap in 2019, but the Senate didn't consider it.

It's an expensive proposition to fully repeal the SALT cap. Restoring the tax break would cost about

$620 billion over a decade, according to an estimate from the Urban-Brookings Tax Policy Center. That's about twice the cost the $1,200 stimulus payments Congress approved in March for most Americans. However, the Tax Policy Center projects that most benefits would fall to top earners, leaving middle-income households with an average tax cut of $10.

Democrats could opt to do something short of a full restoration of the SALT tax break that would blunt the disproportionate share going to the richest earners, said Seth Hanlon, a senior fellow at the Center for American Progress.

"For example, the cap could be raised but not eliminated, or Congress could extend cap relief only to households under a certain income level," he said. "These options would cost a fraction of the revenue of total SALT cap elimination, and would be targeted at middle-class families."

A more generous SALT break could also be coupled with tax increases on top earners that would cut into some of the savings they would receive.

A reversal of the SALT cap could also have an unintended consequence for state and local government coffers, another concern for Democrats. When the cap went into effect, it spurred a record municipal bond buying spree with investors turning to the tax-free securities as a tool to shrink their tax bills. Unwinding the cap risks doing the opposite — imposing a slight dampening effect on markets with high taxes like New York and California.

Reversal would be a slight positive at the local level, and negative for states, both of which are struggling with economic fallout from the coronavirus pandemic, said Barclays Plc strategist Mikhail Foux.

Bloomberg Politics

By Laura Davison and Kaustuv Basu

January 7, 2021, 11:00 PM PST Updated on January 8, 2021, 8:49 AM PST

— With assistance by Nic Querolo

Tax Credits in the Housing Authority World: Opportunities and Challenges

The low-income housing tax credit (LIHTC) has been critical to public housing authorities (PHAs) to address preservation, development and redevelopment goals.

To achieve these goals, LIHTCs complement other programs created by Congress and administered by the U.S. Department of Housing and Urban Development (HUD), including Moving to Work (MTW), the Choice Neighborhoods Initiative (CNI) and the Rental Assistance Demonstration (RAD). PHAs use these programs and LIHTCs to address a variety of objectives:

- preservation of existing public housing through recapitalization,
- demolition and redevelopment where needs extend beyond rehabilitation,
- neighborhood revitalization if needs extend beyond a public housing site,
- demolition and production of replacement housing at alternative locations, and
- production of special needs housing.

[Continue reading.](#)

Novogradac

Published by Arlene Conn on Thursday, January 7, 2021

[State and Local Sales Tax Rates, 2021.](#)

Key Findings

- Forty-five states and the District of Columbia collect statewide sales taxes.
- Local sales taxes are collected in 38 states. In some cases, they can rival or even exceed state rates.
- The five states with the highest average combined state and local sales tax rates are Tennessee (9.55 percent), Louisiana (9.52 percent), Arkansas (9.51 percent), Washington (9.23 percent), and Alabama (9.22 percent).
- No state rates have changed since Utah increased the state-collected share of its sales tax from 5.95 percent to 6.1 percent in April 2019.
- Sales tax rates differ by state, but sales tax bases also impact how much revenue is collected from a tax and how the tax affects the economy.
- Sales tax rate differentials can induce consumers to shop across borders or buy products online.

[Continue reading.](#)

Tax Foundation

by Janelle Cammenga

January 6, 2021

[IRS Issues Procedures for Appealing Adverse Bond Determinations.](#)

SUMMARY BY TAX ANALYSTS

The IRS has issued procedures (Rev. Proc. 2021-10) for an issuer of tax-advantaged bonds to request an administrative appeal to the Independent Office of Appeals of a proposed adverse determination made by the Office of Tax Exempt Bonds (TEB Examination Office) regarding issues within the scope of the guidance.

The IRS is required to allow bond issuers to contest a proposed adverse determination to a senior officer in Appeals before the agency proceeds to tax bondholders. [Rev. Proc. 2006-40](#) sets forth procedures for an issuer of bonds to appeal a proposed adverse determination regarding the qualification of an issue of bonds as tax-exempt bonds or a claim for recovery of asserted overpayments of arbitrage rebate under [section 148](#). However, the procedures in Rev. Proc. 2006-40 do not apply to an appeal of a proposed adverse determination regarding the qualification of other types of tax-advantaged bonds, such as tax credit bonds. Rev. Proc. 2021-10 describes the circumstances and procedures under which an issuer may request that specified adverse determinations by the TEB Examination Office be reviewed by Appeals.

An issuer of bonds is eligible to request an appeal under Rev. Proc. 2021-10 after receiving from the TEB Examination Office (1) a proposed adverse determination that the issuer fails to qualify for the exclusion of the interest on the bonds from the gross income of the bondholders under section 103; (2) a proposed adverse determination that the issuer fails to qualify for the tax credits for the bondholders or direct payments to the issuer regarding the bonds under provisions of the tax code applicable to tax-advantaged bonds; or (3) a proposed adverse determination that denies a claim for recovery of an asserted overpayment of arbitrage rebate under section 148 regarding tax-exempt bonds or under section 148 as modified by relevant provisions of the tax code regarding other tax-advantaged bonds.

A bond issuer's appeal request must be submitted in writing to the TEB Examination Office within 30 days of the date of the proposed adverse bond determination or arbitrage rebate claim denial and must include the information specified in Rev. Proc. 2021-10. The TEB Examination Office may extend the 30-day period if the issuer submits a written request justifying the extension before the 30-day period expires. Upon receipt of an appeal request, the TEB Examination Office will review the request to determine whether it meets the requirements of the revenue procedure. If it does not, the issuer will have 30 days from the date of the notification to correct the deficiencies. If the request meets the requirements and contains no new information or analysis of the taxpayer's position, the TEB Examination Office will transfer the case file to Appeals.

If an issuer does not submit a written appeal request in the manner and within the time periods described in the revenue procedure, the proposed adverse bond determination or arbitrage rebate claim denial will become final. If a proposed adverse bond determination becomes final, then, depending on the type of bond that was issued (1) the interest on those bonds will no longer be treated as excludable from gross income under section 103; (2) holders will not be allowed any credit against income tax for interest on those bonds; or (3) issuers will not be allowed a direct payment. The IRS may also initiate procedures to impose tax on interest on the bonds, disallow the tax credits, or if it has not already done so, disallow direct payments regarding the interest on the bonds. Moreover, a notice of deficiency may be issued to recover overpayments of direct payments.

FULL TEXT PUBLISHED BY TAX ANALYSTS

Modifies Rev. Proc. 2006-4

SECTION 1. PURPOSE

This revenue procedure provides procedures for an issuer of tax-advantaged bonds (as defined in § 1.150-1(b) of the Income Tax Regulations (Regulations)) to request an administrative appeal to the Independent Office of Appeals (Appeals) within the Internal Revenue Service (IRS) of a proposed adverse determination made by the office that is responsible for examinations of tax-advantaged bonds, presently the Office of Tax Exempt Bonds (and including any successor IRS office performing such examinations, the TEB Examination Office), with respect to issues within the scope of this revenue procedure.

SECTION 2. BACKGROUND

.01 Appeals jurisdiction. Section 3105 of the Internal Revenue Service Restructuring and Reform Act of 1998, P.L. 105-206, 112 Stat. 685 (1998 IRS Restructuring Act), directed the IRS to modify its administrative procedures to allow issuers an expeditious appeal of a proposed adverse determination by the IRS with respect to a bond issue to a senior officer in Appeals before the IRS proceeds to tax bondholders.

.02 Bond appeals guidance. Rev. Proc. 2006-40, 2006-2 C.B. 691, sets forth procedures for an issuer of bonds to appeal a proposed adverse determination regarding the qualification of an issue of bonds as tax-exempt bonds (as defined in § 150(a)(6) of the Internal Revenue Code (Code)) or a claim for recovery of asserted overpayments of arbitrage rebate under § 148. However, the procedures in Rev. Proc. 2006-40 do not apply to an appeal of a proposed adverse determination regarding the qualification of other types of tax-advantaged bonds, such as tax-credit bonds.

.03 Other applicable appeals procedures. Procedures under § 601.106 et seq. of the Statement of Procedural Rules, including those governing submissions and taxpayer conferences, apply to appeals regarding bond issues, bondholders, and arbitrage rebate. A bondholder's appeal rights under § 601.106 of the Statement of Procedural Rules are independent and separate from an issuer's appeal rights under this revenue procedure. Section 1.148-3(i)(3)(iii) of the Regulations also applies to appeals concerning an Arbitrage Rebate Claim Denial (as defined in section 4.02 of this revenue procedure).

.04 Issuers as taxpayers. To conduct an examination (including any related administrative appeal) of a tax-advantaged bond expeditiously, the IRS generally treats an issuer as the taxpayer for the bond issue under examination.

.05 Conduit borrowers as taxpayers. In appropriate circumstances, Appeals may consider, concurrently with an issuer's appeal, issues relating to those raised in a Proposed Adverse Bond Determination (as defined in section 4.02 of this revenue procedure) that affect the tax liability (other than any potential penalties) of the borrower of bond proceeds of a conduit financing issue. Appeals will consider an issue relating to the borrower's tax liability only if the borrower is under examination with respect to the issue, the resolution of that issue is affected by the Proposed Adverse Bond Determination (for example, issues under § 150(b) or 168(g)), and the borrower agrees to resolve the issue concurrently with the issuer's appeal under this revenue procedure. See § 601.106 of the Statement of Procedural Rules for procedures applicable to the borrower.

.06 Technical advice. An issuer may submit a request to the TEB Examination Office or Appeals for referral of a tax matter to the IRS Office of Chief Counsel for technical advice while a tax-advantaged bond issue is under the jurisdiction of the TEB Examination Office or Appeals, respectively. See Rev. Proc. 2021-2, 2021-01 I.R.B. 116, or annual successor revenue procedure.

.07 Alternative dispute resolution programs. Alternative dispute resolution methods permit Appeals officers to mediate, facilitate, or propose settlements in the resolution of matters identified during the course of an examination prior to the issuance of a Proposed Adverse Bond Determination or an Arbitrage Rebate Claim Denial. Alternative dispute resolution methods within Appeals applicable to bonds currently include TE/GE Fast Track Settlement (FTS) (Announcement 2012-34, 2012-36 I.R.B 334), Post Appeals Mediation (Rev. Proc. 2014-63, 2014-53 I.R.B. 1014), and Early Referral (Rev. Proc. 99-28, 1999-2 C.B. 109).

SECTION 3. SCOPE

This revenue procedure applies to Proposed Adverse Bond Determinations and Arbitrage Rebate Claim Denials as defined in section 4.02 of this revenue procedure.

SECTION 4. INITIATING THE APPEAL PROCESS

.01 In general. Section 4.02 through 4.06 of this revenue procedure set forth the circumstances and procedures under which an issuer may request that certain adverse determinations by the TEB Examination Office be reviewed by Appeals.

.02 Availability of appeal request to issuer. An issuer is eligible to request an appeal under this revenue procedure upon the receipt from the TEB Examination Office of a: (1) proposed adverse determination that an issue of bonds fails to qualify for the exclusion of the interest on the bonds from the gross income of the bondholders under § 103 (a Proposed Adverse Bond Determination); (2) proposed adverse determination that an issue of bonds fails to qualify for the tax credits for the bondholders or direct payments to the issuer with respect to the bonds under provisions of the Code applicable to tax-advantaged bonds, such as former §§ 54, 54A, 54AA, 1397E, and 6431 (also a Proposed Adverse Bond Determination); or (3) proposed adverse determination that denies a claim for recovery of an asserted overpayment of arbitrage rebate under § 148 with respect to tax-exempt bonds or under § 148 as modified by relevant provisions of the Code with respect to other tax-advantaged bonds (an Arbitrage Rebate Claim Denial). Except as provided in alternate dispute resolution programs, including any applicable programs referenced in section 2.07 of this revenue procedure or in any subsequently issued published guidance, appeal rights are not available to an issuer prior to the receipt of a Proposed Adverse Bond Determination or an Arbitrage Rebate Claim Denial.

.03 Requesting an appeal. An issuer's appeal request must be submitted in writing to the TEB Examination Office within 30 days of the date of the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial. The appeal request must include the information listed in section 4.04 of this revenue procedure. The TEB Examination Office may extend this 30-day submission period based on an issuer's written request to the TEB Examination Office within the 30-day submission period that justifies such extension.

.04 Required information and signature. An appeal request made under this revenue procedure must include the information listed in this section 4.04.

(1) A detailed written response to the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial, including a detailed explanation of the issuer's position regarding each issue in dispute.

(2) A declaration in the following form: "Under penalties of perjury, I declare that I have examined this request for an appeal, including accompanying documents, and that, to the best of my knowledge and belief, the facts presented are true, correct, and complete."

(3) The issuer or the issuer's authorized representative must sign an appeal request. An issuer may designate an authorized representative by submitting a duly executed Form 2848, Power of Attorney and Declaration of Representative, when making an appeal request under this revenue procedure.

.05 Response to an appeal request. Upon receipt of an appeal request, the TEB Examination Office will review the request to determine whether it meets the requirements of this revenue procedure. If the request does not meet such requirements, the TEB Examination Office will notify the issuer in writing of the request's deficiencies and the issuer will have 30 days from the date of the notification to correct the deficiencies. If the request meets the requirements of this revenue procedure and contains no new information or analysis of the taxpayer's position, the TEB Examination Office will transfer the case file to Appeals. If the request meets the requirements of this revenue procedure and contains new information or analysis of the taxpayer's position, the TEB Examination Office will notify the issuer that such new information or analysis may change the case's outcome and requires the TEB Examination Office's further consideration prior to transfer of the case file to Appeals.

.06 Failure to make appeal request. If an issuer does not submit a written appeal request in the manner and within the time periods described in section 4.03 through 4.05 of this revenue procedure, the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial will become final.

.07 Jurisdiction over tax matters. Once the TEB Examination Office sends the case file to Appeals, jurisdiction over the issues raised in the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial will transfer from the TEB Examination Office to Appeals. Except for matters considered by Appeals under section 2.05 of this revenue procedure (relating to the tax liability of the conduit borrower of the bond proceeds), the TEB Examination Office will retain jurisdiction over all tax matters related to the bond issue under examination that are not specifically raised as an issue in the Proposed Adverse Bond Determination or Arbitrage Rebate Claim Denial.

.08 Notification to issuer. Simultaneously with the transfer of the case file to Appeals, the TEB Examination Office will furnish to the issuer a copy of the TEB Examination Office's transmittal letter and response, if any, to the issuer's positions stated in its appeal request.

SECTION 5. ARBITRAGE REBATE CLAIM DENIAL FOR TIMELINES

When an appeal of a claim described in either § 1.148-3(i)(3)(iii)(A) or (B) of the Regulations (regarding timeliness) is determined in favor of the issuer, Appeals will release jurisdiction and return the case to the TEB Examination Office for further consideration of the substance of the claim.

SECTION 6. EFFECT OF CERTAIN FINAL ADVERSE BOND DETERMINATIONS OR FINAL ARBITRAGE REBATE CLAIM DENIALS

.01 Final Adverse Bond Determination. If a Proposed Adverse Bond Determination becomes final under section 4.06 of this revenue procedure or because Appeals sustains the Proposed Adverse Bond Determination without entering into a closing agreement with the issuer, then, depending on the type of bond that was issued: (i) the interest on those bonds will no longer be treated as excludable from gross income under § 103 of the Code, (ii) holders will not be allowed any credit against income tax with respect to interest on those bonds, or (iii) issuers will not be allowed a direct payment. In addition, IRS functions other than Appeals may initiate procedures with respect to open years to, respectively, (i) impose tax on interest on the bonds, (ii) disallow the tax credits, or (iii) if it has not already done so, disallow direct payments with respect to the interest on the bonds. Further, a notice of deficiency may be issued to recover overpayments of direct payments.

.02 Final Arbitrage Rebate Claim Denial. If an Arbitrage Rebate Claim Denial becomes final under section 4.06 of this revenue procedure or Appeals sustains the Arbitrage Rebate Claim Denial in full, the IRS will notify the issuer of the final determination and the issuer's right to bring suit for recovery.

SECTION 7. NO USER FEE

No user fee applies to either a request for an appeal pursuant to this revenue procedure or a closing agreement resulting from the appeal.

SECTION 8. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2006-40 is modified and superseded.

SECTION 9. EFFECTIVE DATE

This revenue procedure applies to Proposed Adverse Bond Determinations or Arbitrage Rebate Claim Denials issued by the TEB Examination Office on or after February 4, 2021.

SECTION 10. DRAFTING INFORMATION

The principal authors of this revenue procedure are B. Darrell Smelcer, Office of Tax-Exempt Bonds (Technical), and Lewis Bell, Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this revenue procedure, contact Mr. Smelcer at 470-639-2425 (not a toll-free call).

DATED JAN. 5, 2021

How to Appeal Adverse Determinations from the IRS for Tax-Advantaged Bonds: New Guidance - Squire Patton Boggs

The IRS has had a busy start to 2021! Guidance continues to pour forth as the change in Administration approaches. On January 4, the IRS released Revenue Procedure 2021-10, which provides issuers with updated procedures for obtaining review from the IRS Office of Appeals of proposed adverse determinations and rebate refund rejections by the IRS Office of Tax-Exempt Bonds. Rev. Proc. 2021-10 supplements and supersedes Rev. Proc. 2006-40, which previously set forth the procedures for getting to Appeals. Rev. Proc. 2006-40 predated the advent of tax credit and direct pay bonds, and therefore applied only to tax-exempt bonds. As many of you may have experienced, the IRS has applied the logic of Rev. Proc. 2006-40 to tax-advantaged bonds that were not tax-exempt bonds (e.g., BABs) in audits of those bonds. Rev. Proc. 2021-10 adopts this practice.

Specifically, Rev. Proc. 2021-10 provides that an issuer is eligible to request an appeal once the issuer receives (1) a proposed adverse determination that interest on the bonds is not tax-exempt; (2) a proposed adverse determination that an issue of bonds fails to qualify for the tax credits to the bondholders or direct payments to the issuer with respect to the bonds under provisions of the Code applicable to tax-advantaged bonds, such as former §§ 54, 54A, 54AA, 1397E, and 6431; or (3) a proposed adverse determination that denies a claim for a rebate refund. These items are, in effect, your "ticket to Appeals." On items (1) and (2), recall that the "proposed adverse determination" is the final step in the audit process, coming after the "Notice of Proposed Issue" (often referred to as the "30-day letter"). In most bond issues subject to a continuing disclosure undertaking, the receipt of that Notice of Proposed Issue triggers the requirement for the issuer to disclose the audit to the market, although many issuers may choose to disclose before they reach that point.

In addition, Rev. Proc. 2021-10 modifies Rev. Proc. 2006-40 by explicitly giving the issuer 30 days to correct any deficiencies in the appeal that deviate from the requirements in Rev. Proc. 2021-10. (Given the ambiguity in Rev. Proc. 2006-40 on this point, it probably depends on the situation whether this is a positive or negative change.) The new guidance also notes that the TEB Examination Office will furnish to the issuer a copy of the TEB Examination Office's transmittal letter and response, if any, to the issuer's positions stated in its appeal request.

The mechanics of the appeal will continue to be handled under Section 8.7.8 of the Internal Revenue Manual.

There remains no user fee for an appeals request, which is comforting after the IRS recently[1] hiked the user fee for a tax-advantaged bond private letter ruling from $30,000 to $38,000,[2] notwithstanding NABL's recent request to provide for reduced user fees for tax-exempt bonds.

The new procedures apply to proposed adverse determinations for tax-advantaged bonds or denials of rebate refund claims issued by the TEB Examination Office on or after February 4, 2021.

[1] We would say "inexplicably," but there's a pretty clear, if unpalatable, explanation.

[2] And that's just the cover charge.

Squire Patton Boggs

The Public Finance Tax Blog

By Alexis Chandler on January 7, 2021

IRS Procedures Revised for Issuing Letter Rulings.

The IRS has published (Rev. Proc. 2021-1, 2021-1 IRB 1) revised procedures for issuing letter rulings, determination letters, and information letters on specified issues. Rev. Proc. 2020-1 is superseded.

1/4/21

TAX - ARKANSAS

City of Little Rock v. Ward

Supreme Court of Arkansas - December 3, 2020 - S.W.3d - 2020 Ark. 399 - 2020 WL 7134991

City and municipal airport commission sought review of county assessor's denial of tax exemption for unleased airport-owned properties that airport purchased as a buffer or used to store historical plane and equipment used for clearing runways during snow and ice events.

The Pulaski County Court ruled in favor of city and commission. Assessor appealed. The Circuit Court granted assessor's motion for summary judgment. City and commission appealed.

The Supreme Court held that:

- Assessor's failure to file answer within 30 days in compliance with rule governing appeals from county court to circuit court was not a jurisdictional error;
- Public-purpose tax exemption applied to unleased property that was used for storage; and
- Public-purpose tax exemption applied to unleased property that airport purchased as a buffer.

County assessor's failure to timely file answer within 30 days in compliance with rule governing appeals from county court to circuit court was a procedural error, not a jurisdictional one, and thus it did not deprive circuit court of jurisdiction over assessor's appeal of county court's determination that unleased real property of municipal airport was exempt from taxation.

Municipal airport's unleased real property located within secure airfield, comprised of an office building and five hangars, was used exclusively for public purposes when it was unleased, and thus property was exempt from taxation under State Constitution during that time, where airport used property to store historical plane owned by airport, to house offices for city police department, and to store and stage equipment such as snow brooms, bulldozers, and trucks used for clearing runways during snow and ice events.

Municipal airport's unleased real property that airport purchased to maintain buffer around airport was used exclusively for public purposes, and thus property was exempt from taxation under State Constitution; buffer adhered to Federal Aviation Administration (FAA) regulations and furthered aeronautical activities and safety by preventing height enhancements, radio interference, and glares that would have disrupted aeronautical activities of airport.

Opportunity Zone Group Requests Deadline Relief.

SUMMARY BY TAX ANALYSTS

The Novogradac Opportunity Zones Working Group has asked Treasury and the IRS for several forms of relief that focus principally on the postponement of deadlines related to the Opportunity Zone incentive during the COVID-19 pandemic.

FULL TEXT PUBLISHED BY TAX ANALYSTS

December 23, 2020

Office of Associate Chief Counsel (Income Tax and Accounting)
Attention: Erika C. Reigle and Kyle C. Griffin
Internal Revenue Service (IRS)
1111 Constitution Avenue, NW
Washington, D.C. 20224

CC:PA:LPD:PR
(IRS Review of Regulatory Relief)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Opportunity Zones Compliance Relief Requested due to Continuing COVID-19 Impact

Dear Ms. Reigle and Mr. Griffin:

The Novogradac Opportunity Zones Working Group (OZ Working Group) is writing to request further relief from certain provisions under Internal Revenue Code (IRC) Section 1400Z-2 and the regulations thereunder due to ongoing and future business impacts of the current COVID-19 pandemic.

The Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) have broad authority under IRC Section 7508A to postpone certain deadlines by reason of Presidentially Declared Disaster. The previously issued IRS Notice 2020-39 extended certain opportunity zones-

(OZ-) related deadlines to Dec. 31, 2020. As of the date of this letter, the Presidential Disaster Declarations issues due to the COVID-19 pandemic remain ongoing and are expected to continue into 2021. We believe additional extensions of the relief provided in Notice 2020-39 are within the scope of the agencies' regulatory authority.

The OZ Working Group includes various participants in community development finance: investors, lenders, for-profit and nonprofit developers, community development financial institutions, trade organizations and other related professionals. Our request represents collective input from these stakeholders as to how to make OZ incentive more impactful to low-income communities.

The OZ Working Group appreciates your consideration of issues related to OZ compliance as investors, qualified opportunity fund sponsors, OZ businesses and other organizations struggle with the national impact of COVID-19. We note that the IRS has broad regulatory authority under IRC Section 7508A and robust disaster relief provisions in Rev. Proc. 2018-58. We believe this authority has been triggered by the President's declaration of a national emergency on March 13, 2020, which included his instruction to the Secretary of Treasury to provide relief from tax deadlines under Section 7508A and encouraged requests for a declaration of a major disaster. In response to this declaration, the IRS issued Notice 2020-23 and Notice 2020-39, which extended certain deadlines and provided other relief to taxpayers affected by COVID-19. As we remain under a state of national emergency, we request that the IRS and Treasury further postpone these deadlines and provide other relief related to the OZ incentive.

Notwithstanding the authority the IRS and the Treasury have with respect to disaster relief, the OZ Working Group is requesting the following additional relief:

- IRS Notice 2020-23 provided relief whereby if the last day of a taxpayer's 180-day investment period within which a taxpayer must make an investment into a qualified opportunity fund (QOF) falls on or after April 1, 2020, and before July 15, 2020, were postponed to July 15, 2020. IRS Notice 2020-39 extended this postponement from July 15, 2020, to Dec. 31, 2020. We are requesting that this postponement be extended to June 30, 2021.
- IRS Notice 2020-39 provided relief for QOFs whose last day of the first six-month period of the taxable year or last day of the taxable year falls within the period beginning on April 1, 2020, and ending on Dec. 31, 2020, by waiving penalties for failure of the QOF's 90% investment standard by establishing that the failure is due to reasonable cause under Section 1400Z-2(f)(3). We are requesting that this relief be extended to any 90% investment standard testing dates occurring through June 30, 2021.
- IRS Notice 2020-39 provided relief for QOFs and qualified OZ businesses by disregarding the period beginning on April 1, 2020, and ending on Dec. 31, 2020, in determining any 30-month substantial improvement period. We are requesting that this disregarded period be extended to June 30, 2021.
- As a result of the federally declared disaster for purposes of IRC Section 165(i)(5)A), all qualified OZ businesses holding working capital assets intended to be covered by the working capital safe harbor before Dec. 31, 2020, receive not more than an additional 24 months to expend the working capital assets of the qualified OZ business, as long as the qualified OZ business otherwise meets the requirements to qualify for the working capital safe harbor. Treasury regulation 1.1400Z2(d)-1(d)(3)(v)(D) provides that a qualified OZ business may receive up to an additional 24 months for a total of 55 months to consume its working capital assets under the working capital safe harbor if the QOZB is located in a qualified opportunity zone within a Federally declared disaster area. We are requesting that the potential additional 24 months to expend working capital assets rule be extended to working capital assets intended to be covered by the working capital safe harbor before June 30, 2021.

- IRS Notice 2020-39 provided relief by extending a QOF's normal 12-month reinvestment period to reinvest the proceeds received by the QOF from the return of capital or the sale or disposition of some or all of the QOF's qualified OZ property to up to an additional 12 months provided that the 12-month period included Jan. 20, 2020, and that the QOF satisfies the requirements of Section 1.1400Z2(f)-1(b)(1) and invests the proceeds in the manner originally intended before Jan. 20, 2020. We are requesting that any QOF's reinvestment period that includes any day that falls within the period beginning Jan. 20, 2020, through Dec. 31, 2020, receives up to an additional 12 months to reinvest and that the period beginning Jan. 20, 2020, through Dec. 31, 2020, is disregarded.
- Provide relief to businesses by confirming that qualified OZ businesses that are forced to rework or dramatically alter their plans for the development of a trade or business and, as a consequence, their written plans and schedules, as a result of the impact of a federally declared disaster, are not considered to fail the working capital safe harbor requirement to use working capital assets in a manner substantially consistent with their written plan and schedule.

As we remain under a state of national emergency, we request that the IRS and Treasury further postpone the above deadlines related to OZs as investors, QOF sponsors, OZ businesses and other organizations struggle to recover from the national impact of COVID-19.

Thank you for your consideration of these requests. Please contact us if you have any comments or questions regarding the matters discussed above.

Very truly yours,

By Michael J. Novogradac, Managing Partner

John S. Sciarretti, Partner

Novogradac & Company LLP
Dover, OH

CC:
Michael Novey, Office of Tax Policy, Treasury
Julie Hanlon-Bolton, ITA, IRS
Scott Dinwiddie, Associate Chief Counsel

State Tax and Economic Review, 2020 Quarter 2.

States Saw Freefall Drop in Revenues in the Second Quarter; Partly Offset in the Third Quarter but Still Depressed from Pandemic

Abstract

States saw steep declines in revenues in the second quarter of 2020, though some of this was caused by shifting revenues into the next quarter and next fiscal year. Consequently, most states ended fiscal year 2020 uncertain about their fiscal bottom line. Many states cut spending, laid off or furloughed workers, or used federal aid or rainy-day funds, while they waited to see what their revenues would be after the July 15 income tax filing deadline.

States are still facing unprecedented fiscal uncertainties because of the pandemic which has substantially weakened the economy since March. The recent surge in infection rates mean

depressed business activity for a wide range of businesses and services across virtually all states, possibly less consumer spending, and less sales tax revenues for states. Although COVID vaccines are on the horizon, it will take a long time for business activity to return to pre-pandemic levels, with some activities and industries facing a very slow recovery.

View the full report.

The Urban Institute

by Lucy Dadayan

December 24, 2020

TAX - INDIANA
Millikan v. City of Noblesville
Court of Appeals of Indiana - December 7, 2020 - N.E.3d - 2020 WL 7134869

Property owners filed complaint against the city to quiet title to property they claimed to have acquired title to through adverse possession.

Parties both filed motions for summary judgment and, after a hearing granted the city's motion. Thereafter, the trial court denied property owners' motion to correct error. Property owners appealed.

The Court of Appeals held that property owners substantially complied with the statutory tax payment requirement for establishing title by adverse possession.

Property owners, who filed complaint against the city to quiet title to tract of land that they claimed to own under the doctrine of adverse possession, did preserve for appellate review the argument that because they had openly maintained exclusive possession and control of the disputed property for 27 years prior to any special assessments being due they had satisfied the statutory tax payment requirement for establishing title by adverse possession; although they could have raised the issue more clearly in their motion to correct error, property owners did raise the issue in their summary judgment motion when they asserted that they satisfied the statutory requirements prior the city's assertion of drainage assessments on disputed property.

How to Be a Shrewd Opportunity Zone Investor.

What does it take to be a shrewd Opportunity Zone investor? Several Opportunity Zone experts provided their insights on a live panel recorded on November 17, 2020 during OZ Pitch Day, titled "Being a Shrewd Opportunity Zone Investor."

Today's podcast episode is the audio version of that panel. Moderated by OpportunityDb founder Jimmy Atkinson, the panel featured Dave Kunz of Hall Venture Partners, Rocco Forino of DealConnectHub, Jeffrey Maganis of Crowdcreate, Chris Cooley of OZworks Group, and Gerry Reihsen of Coasis Coalition.

Click the play button below to listen to the audio recording of the panel.

[Listen to audio.]

Opportunity Db

By Jimmy Atkinson

December 23, 2020

[CRE Pros Laud Biden's Proposed Changes to Opportunity Zone Program.]

Biden and his team contend that the program has fallen short of its promise of bolstering communities of color, small businesses and homeowners.

The federal Tax Cuts and Jobs Act of 2017 created the Opportunity Zone program, an initiative touted by the Trump administration as a vehicle for spurring investment in economically distressed pockets of the country. Today, more than 8,700 of these zones have been designated. As of the end of 2019, Opportunity Zone funds had collected more than $75 billion in private capital for an array of real estate projects.

The Trump administration hails the Opportunity Zone program as a success. A report released in August by the White House Council of Economic Advisers promoted the potential of these zones "to further prosperity and self-sufficiency in those areas that most lack it."

[Continue reading.]

National Real Estate Investor

John Egan | Dec 07, 2020

[New Jersey Appellate Division Holds No Reimbursement of Municipal Taxes for Undisclosed Conservation Easement.]

In a decision approved for publication, the New Jersey Appellate Division recently held that the holder of a tax lien who, upon attempting to foreclose on the property, learns that it is encumbered by a previously undisclosed conservation easement, is unable to recoup municipal taxes paid on the property in the absence of bad faith on the part of the Township. *Garden State Investment & Isadore H. May v. Township of Brick*, 2020 WL 7250904 (N.J. Super. Ct. App. Div. Dec. 10, 2020).

Plaintiffs were the purchasers of tax sale certificates on vacant lots in Brick Township. Before purchasing the certificates, the parties "physically inspected the properties and examined the assessment records and tax map," but did not obtain a title search. When the Plaintiffs commenced a tax foreclosure, they discovered that the properties were encumbered by a conservation easement arising out of a 2001 settlement with the Department of Environmental Protection. This easement prevented the "disturbance," and thus, the development, of the property. A deed recording this easement was recorded in the Ocean County Clerk's Office, but the Township's Tax Collector never received notice of the easement, nor was the easement ever indicated on the tax assessment card, nor reflected by a reduction in the encumbered lots' assessed values. Plaintiffs then filed suit “seeking recession of their tax sale certificate purchases and reimbursement of taxes they paid on the properties.” On cross-motions for summary judgment, the trial court held that Plaintiffs were not entitled to equitable relief concerning the taxes paid and denied recession of the purchases.

The Appellate Division affirmed. In holding that plaintiffs had no right to rescission of the tax sale purchases, nor the refunding of any municipal taxes paid between the tax sale purchase and the foreclosure action, the Court stated that “[t]he township tax assessor was unaware of the conservation easement. While its existence was ascertainable to all – since deeds containing the easement had been recorded in the County Clerk’s Office – plaintiffs, by engaging in this form of investment, had a greater interest in learning of any limitations on the property than the township did.” In doing so, the Appellate Division distinguished this case from *Township of Middletown v. Simon*, 193 N.J. 228 (2008), affirming in part, 387 N.J. Super. 65 (App. Div. 2006). In *Middletown*, the Appellate Division allowed the rescission of a tax sale purchase upon a municipality’s belated declaration that the property was intended for public use. The New Jersey Supreme Court affirmed and allowed equitable relief as again, the Township filed an action to have the lot dedicated for public use and adopted an ordinance accepting the lot for public use. In Garden State, however, the Township did not “[play] an active role in seeking to deprive [buyer] of his investment.” Additionally, “plaintiffs had every reason to uncover all material circumstances about their investments,” and their “failure to act more diligently in ascertaining any defects in or limitations on their investments bars their claim for equitable relief, particularly against the township, which acted passively and innocently throughout.”

This case is important because it illustrates that the purchase of a tax sale certificate requires some minimum due diligence, and that a title search may be advisable before purchasing any tax sale certificate for a substantial sum. Here, although the encumbrance rendered the property non-developable, and was not disclosed in the municipal tax records, the lack of wrongdoing on the part of the township, as well as the court’s judgment of the lienholders as failing to do proper due diligence on their investment, left the certificate holder with a worthless property for its investment.

Riker Danzig Scherer Hyland & Perretti LLP – Michael Crowley, Michael R. O’Donnell and Andrew Raimondi

December 18 2020

TAX - MICHIGAN

City of Grand Rapids v. Brookstone Capital, LLC

Court of Appeals of Michigan - October 29, 2020 - N.W.2d - 2020 WL 6370351

City brought action against housing project developer and housing association limited partnerships, who were otherwise exempt from ad valorem property taxes, for breaches of agreements for payments of a service charge in lieu of taxes and unjust enrichment for defendants’ failure to pay the amount of charges billed as required under city’s payments in lieu of taxes ordinance.

The Circuit Court granted city’s motion for summary disposition on grounds of no genuine issue as to any material fact and denied defendants’ motion for summary disposition on ground the opposing party was entitled to judgment. Defendants appealed.

The Court of Appeals held that:

- Michigan State Housing Development Authority (MSHDA) Act preempted subject portion

ordinance;
- Doctrine of in pari materia did not apply, and could not reconcile, ordinance and Michigan State Housing Development Authority (MSHDA) Act; and
- Defendants breached contracts between themselves and city.

Section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions and payment of service charges for housing projects requires that plaintiff impose an annual payment of a service charge in lieu of taxes charge to be paid by defendant owners of a subject low-income housing projects calculated for the units occupied by low-income persons or families either pursuant to the default amounts set by subpart of statute, or the amount plaintiff established by ordinance as permitted under the subpart.

Section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions and payment of service charges for housing projects requires that plaintiff impose an annual payment of a service charge in lieu of taxes charge respecting all portions of the subject projects occupied by “other than low income persons or families” equal to the full amount of the ad valorem taxes that would have been required if the projects were not tax exempt, to be paid by defendant owners of the subject projects.

A direct conflict existed between section of Michigan State Housing Development Authority Act (MSHDA) governing tax exemptions and payment of service charges for housing projects and portion of city’s payment of a service charge in lieu of taxes ordinance, and thus MSHDA Act preempted subject portion of ordinance, where ordinance required payment in lieu of taxes by a housing project owner in the amount of 4% of annual shelter rent which was defined as the total collections from all occupants of a housing project exclusive of charges for utilities provided to them, but MSHDA Act commanded city to charge fees in lieu of taxes equal to the ad valorem tax for portions of projects occupied by “other than low income persons and families.”

Doctrine of in pari materia did not apply, and could not reconcile, city’s payments in lieu of taxes ordinance and section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions and payment of service charges for housing projects, which otherwise preempted the ordinance, since the ordinance, which required payments in lieu of taxes by a housing project owner in the amount of 4% of annual total collections from all occupants of housing project exclusive of charges for utilities, and the MSHDA section, which commanded city to charge fees in lieu of taxes equal to the ad valorem tax for portions of projects occupied by “other than low income persons and families,” both lacked ambiguity.

Housing project developer and housing association limited partnerships breached contracts between themselves and city, which provided developer and housing associations the benefits of tax exemption for the low-income housing projects pursuant to section of Michigan State Housing Development Authority (MSHDA) Act governing tax exemptions and payment of service charges for housing projects in exchange for payment of a service charge in lieu of taxes pursuant to subject section of MSHDA Act, where when billed pursuant to the parties’ contracts, developer and housing associations refused to pay the contractually defined amounts required by city.

Bond Lawyers Seek Further Relief for Low-Income Housing Projects.

SUMMARY BY TAX ANALYSTS

The National Association of Bond Lawyers has requested that the timing relief provided in guidance (Notice 2020-53) for qualified low-income housing projects and qualified residential rental projects be extended through December 31, 2022.

FULL TEXT PUBLISHED BY TAX ANALYSTS

December 2, 2020

David J. Kautter
Assistant Secretary
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Michael J. Desmond
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Krishna Vallabhaneni
Tax Legislative Counsel
United States Department of the Treasury
1500 Pennsylvania Avenue, NW, Room 3044
Washington, DC 20220

Re: IRS Review of Regulatory and Other Relief to Support Economic Recovery

Messrs. Kautter, Desmond and Vallabhaneni:

On July 1, 2020, in response to the ongoing outbreak of the novel coronavirus disease (the "COVID-19 Outbreak"), the Internal Revenue Service released Notice 2020-53 to provide relief to bond issuers, operators, owners and tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state agencies that have jurisdiction over these projects, from otherwise-applicable federal tax law compliance requirements. On behalf of the National Association of Bond Lawyers ("NABL"), I am writing to request that the time-limited relief set forth in IRS Notice 2020-53 be extended through December 31, 2022, as more specifically set forth below.1

This letter was prepared by an ad hoc task force comprising the individuals listed in Appendix A and was approved by the NABL Board of Directors. NABL exists to promote the integrity of the municipal market by advancing the understanding of and compliance with the law affecting public finance. A professional association incorporated in 1979, NABL has approximately 2,500 members and is headquartered in Washington, DC.

If NABL can provide further assistance, please do not hesitate to contact Jessica Giroux, Director of Governmental Affairs in our Washington DC office, at (518) 469-1565 or at jgiroux@nabl.org.

Sincerely,

Teri M. Guarnaccia
President, National Association of Bond Lawyers

Washington, DC

Enclosure:
NABL's April 9, 2020 Letter to Congress and the Treasury

cc:
Helen M. Hubbard, Associate Chief Counsel, Financial Institutions & Products, Internal Revenue Service
Melissa Moye, Director, Office of State and Local Finance, U.S. Department of the Treasury
Johanna Som de Cerff, Acting Branch Chief, Internal Revenue Service
Zoran Stojanovic, Assistant to the Branch Chief, Internal Revenue Service
Timothy Jones, Office of the Associate Chief Counsel, Financial Institutions & Products, Internal Revenue Service
David White, Office of the Associate Chief Counsel, Financial Institutions & Products, Internal Revenue Service
Brett York, Acting Deputy Tax Legislative Counsel, U.S. Department of the Treasury

Background Relating to Tax-Exempt Bond Provisions of IRS Notice 2020-53

Section 142(d) of the Internal Revenue Code of 1986 (the "Code") generally requires as a condition for tax-exempt bond financing that a qualified residential rental project provide for the set-aside of either (i) 20% of its units for tenants with income that does not exceed 50% of area median income or (ii) 40% of its units for tenants with income that does not exceed 60% of area median income (the "Set-Aside Requirement").

Section 147(d) of the Code generally requires that the proceeds of certain types of tax-exempt qualified private activity bonds, including bonds that finance qualified residential rental projects, may only be spent to acquire an existing building if a minimum amount of money is spent on rehabilitation of the building within two years of the later of (i) the date of bond issuance or (ii) the date the building was acquired (the "Rehabilitation Requirement").

As NABL noted in its April 9, 2020 submission to federal policymakers recommending guidance with respect to the tax-exempt bond provisions of the Code in response to the COVID-19 Outbreak,2 if proceeds of bonds issued pursuant to Section 142(d) of the Code are used to acquire an existing, rented-up residential rental project, the tenant mix at the time of bond issuance and/or acquisition may not satisfy the Set-Aside Requirement. Unless all or a significant portion of existing tenants are evicted immediately, it may take some time until the Set-Aside Requirement is satisfied. Since 2004, with the release of Revenue Procedure 2004-39, the Department of Treasury and the Internal Revenue Service have recognized and addressed this problem by providing a "transition period" of up to one year to comply with the Set-Aside Requirement for bond-financed acquisitions of residential rental projects. NABL's April 2020 submission went on to report that, at that time, residential leasing activities had stopped around much of the country as a result of the COVID-19 Outbreak, and that, in addition, supply chains had been disrupted, which in turn suggested that satisfaction of the Rehabilitation Requirement on a timely basis would be more difficult.

Accordingly, in its April 2020 submission, NABL requested an extension of the "transition period" set forth in Revenue Procedure 2004-39, as well as an extension of time to satisfy the Rehabilitation Requirement.

IRS Notice 2020-53 responded to these concerns, providing relief with respect to acquired qualified residential rental projects that, pursuant to Section 5.02 of Revenue Procedure 2004-39, would have a "transition period" ending on or after April 1, 2020 and before December 31, 2020, postponing the last date of the “transition period” for all such projects to December 31, 2020. The same relief is provided in IRS Notice 2020-53 for purposes of satisfying the Rehabilitation Requirement.3

Recommendation

NABL applauds the Internal Revenue Service and the Department of Treasury for promulgating IRS Notice 2020-53, which has provided much-needed timing relief to bond issuers, to residential rental project owners and operators and to other affected parties. As of the date of submission of this request, however, it is apparent that the timing relief in IRS Notice 2020-53 should be extended beyond the end of 2020.

As you know, there is consistent, broad-based reporting today that the public health challenges presented by the COVID-19 Outbreak are continuing at the end of 2020, at levels that are even higher than they were in April, and that in many jurisdictions around the country, shut-down orders of varying degrees are being imposed or reimposed. In recent weeks, NABL members have reported that owners and operators of residential rental projects described in IRS Notice 2020-53 continue to face severe challenges with respect to achieving compliance with the Set-Aside Requirement and the Rehabilitation Requirement. For example, owners and operators have reported that State or local shut-down conditions have made it extremely difficult or even impossible in some cases to show vacant apartment units and to conduct in-person diligence with respect to the income eligibility of prospective tenants. Moreover, there have been many reports in the press about the scarcity of construction materials and building trades labor to complete construction projects of all kinds.

In light of COVID-19 Outbreak conditions that continue to prevail around the country, we request that the Internal Revenue Service publish guidance supplementing, amplifying or superseding IRS Notice 2020-53, providing that:

1. For purposes of Section 5.02 of Revenue Procedure 2004-39, the last day of a 12-month transition period for a qualified residential rental project that ends on or after April 1, 2020 and before December 31, 2021 is postponed to December 31, 2022; and

2. If a bond is used to provide a qualified residential rental project and if the two-year rehabilitation expenditure period for the bond under Section 147(d) of the Code ends on or after April 1, 2020, and before December 31, 2021, the last day of that period is postponed to December 31, 2022.

We respectfully submit that time is of the essence with regard to the compliance matters set forth in this submission, and we therefore additionally request that that the Internal Revenue Service publish the guidance requested herein on or before December 31, 2020.

APPENDIX A
NABL AD HOC TASKFORCE MEMBERS
Antonio D. Martini, Chair
Hinckley, Allen & Snyder LLP
28 State Street
Boston, MA 02109-1775
Telephone: 617-378-4136
Email: amartini@hinckleyallen.com

Christie L. Martin
Mintz Levin Cohn Ferris Glovsky and Popeo P.C.
1 Financial Center
Boston, MA 02111-2621

Telephone: 617-348-1769
Email: clmartin@mintz.com

Brian P. Teaff
Bracewell LLP
711 Louisiana Street
Suite 2300
Houston, TX 77002-2770
Telephone: 713-221-1367
Email: brian.teaff@bracewell.com

Matthias M. Edrich
Kutak Rock LLP
1801 California Street
Suite 3000
Denver, CO 80202-2626
Telephone: 303-292-7887
Email: matthias.edrich@kutakrock.com

FOOTNOTES

1This request is being submitted in part in response to the November 5, 2020 solicitation of Sunita Lough, Deputy Commission of Internal Revenue, Services and Enforcement, inviting comments from the public regarding regulations and other requirements that can be rescinded, modified or waived to assist business and individual taxpayers with the ongoing economic recovery from the COVID-19 Outbreak. See 85 Fed. Reg. 73252 (November 17, 2020).

2A copy of NABL's April 9, 2020 submission is enclosed for reference; see page 16 of that submission for a discussion of these issues.

3Although the focus of this submission is concentrated on the tax-exempt bond aspects of IRS Notice 2020-53, affecting compliance under Sections 142(d) and 147(d) of the Code, we observe that IRS Notice 2020-53 also provides relief with respect to a number of compliance matters under Section 42(d) of the Code. For example, IRS Notice 2020-53 states that, between April 1, 2020 and December 31, 2020, owners of "qualified low-income housing projects" (as such term is defined in Section 42(d) of the Code) are not required to perform certain income re-certifications or reduce the eligible basis in a building because of the temporary closure of an amenity or common area due to the COVID-19 Outbreak and that state agencies that have jurisdiction over such projects are not required to conduct compliance-monitoring. Additionally, pursuant to IRS Notice 2020-53, between April 1, 2020 and December 31, 2020, owners and operators of qualified low-income housing projects, bond issuers and state agencies are permitted to treat medical personnel and other essential workers providing services during the COVID-19 Outbreak as if they were "displaced individuals" within the meaning of Revenue Procedures 2014-49 and 2014-50, which in turn facilitates the use of qualified low-income housing projects to provide emergency housing for such essential personnel.

END FOOTNOTES

Bond Lawyers Seek COVID-19 Relief Extension.

Public finance attorneys are seeking an extension of pandemic-related economic relief provided by the IRS earlier this year regarding qualified low-income housing projects.

The National Association of Bond Lawyers (NABL), which originally sought COVID-19 relief in April, is asking for an extension of IRS Notice 2020-53, 2020-30 IRB 151, issued July 1.

The notice provides relief to bond issuers, operators, owners, tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state agencies with jurisdiction over those projects from otherwise applicable federal tax law compliance requirements, NABL noted in a December 2 letter to the IRS and Treasury.

Although the guidance has provided much-needed relief, the ongoing pandemic makes clear the relief should continue beyond 2020, according to the letter.

"As you know, there is consistent, broad-based reporting today that the public health challenges presented by the COVID-19 Outbreak are continuing at the end of 2020, at levels that are even higher than they were in April, and that in many jurisdictions around the country, shut-down orders of varying degrees are being imposed or reimposed," NABL said.

The group said that owners and operators of residential rental projects described in the notice are still finding it difficult to comply with the set-aside and rehabilitation requirements.

That's why "time is of the essence" in extending the notice, NABL said.

The last day of a 12-month transition period for a qualified residential rental project ending on or after April 1, 2020, and before December 31, 2021, should be postponed to December 31, 2022, NABL said.

If a bond is used to provide a qualified residential rental project, and if the two-year rehabilitation expenditure period for the bond ends on or after April 1, 2020, and before December 31, 2021, the last day of that period should be postponed to December 31, 2022, NABL added.

TAX ANALYSTS

by FRED STOKELD

POSTED ON DEC. 9, 2020

Rich States Uncover Tax Windfall, Undercutting Push for Aid.

- **The pandemic hit states and cities but not as much as feared**
- **People with jobs kept spending online and pocketed stock gains**

It was a shocking, and seemingly improbable, figure.

Eight months into the pandemic — and the brutal economic collapse it triggered — California's budget watchdog said the state was poised to pocket a windfall of some $26 billion. Just as New York and Connecticut had revealed weeks earlier, tax revenue was coming in at a clip no one expected, thanks in part to the booming stock market.

And so it has largely played out across the country this year, albeit to a smaller extent in many of the less well-to-do states. The fiscal apocalypse expected to blow massive holes in state budgets hasn't come — at least not yet.

This in turn is providing fuel to the argument made by some Republicans that additional federal aid for states and municipalities can wait until next year instead of being settled in the relief package that's being heatedly debated in Washington now. Top leaders from both sides in Congress are near a deal for Covid relief of less than $900 billion, including direct stimulus payments but leaving out state and local aid, according to two people familiar with negotiations. That relief has been one of the key sticking points.

"In some ways, U.S. taxpayers have saved some money by the stimulus package being delayed so that they could really get their arms around what revenues look like," said Jennifer Johnston, director of research for Franklin Templeton Fixed Income's municipal bond team.

There are several important caveats to this somewhat rosy picture, to be clear.

For one, many states and cities are still facing large deficits, just not as big as initially forecast. Also, the spike in Covid-19 cases could trigger more economic shutdowns, potentially reversing the nascent recovery that local governments have seen so far. Most of California is back under a stay-a--home order, and New York could be headed toward one. And because of the lag in collecting taxes, states historically struggle with big deficits well after recessions end.

Financial forecasts have improved considerably in recent months, though. In the spring, congressional Democrats had sought $1 trillion in aid for states and municipalities. Back then, states were expected to report total budget shortfalls of $650 billion through fiscal 2022; now that number is forecast at about $400 billion, according to the Center on Budget and Policy Priorities. And Democrats more recently were pushing for just $160 billion as a first step.

The muni bond market, buoyed by rock-bottom benchmark interest rates, also shows investors are unconcerned about a looming fiscal crisis. States including Pennsylvania, Michigan and California can all borrow for 10 years at rates well below 1%, a historically low threshold. Even a benchmark of near-junk Illinois debt yields just 2.76%, around the level reserved for only the highest-rated borrowers as little as two years ago.

State bond yields retreat to pre-pandemic lows

California is a prime example of the turnaround in fiscal accounts. In May, it girded for a two-year $54 billion gap. It now projects only a $5 billion deficit next year after it reaped a $26 billion windfall from raking in more tax revenue and spending less than expected. New York City, once the epicenter of the coronavirus crisis, collected $985 million more revenue than forecast for the first four months of its fiscal year thanks to a banner year on Wall Street.

The surprise underscores the disproportionate impacts of the outbreak and business shutdown. Lower-income workers for such face-to-face industries as restaurants are losing their jobs, while wealthier individuals work from home, buy goods online and sell stock — all generating the income that states rely on to balance their books.

Stock markets have thrived — both because of the Federal Reserve's rate cuts and prospects for an economic rebound in 2021 — and initial public offerings have minted a new class of wealthy Americans, a boost to states such as New York and California that have progressive tax systems.

In California, which gets almost half of its personal income tax collections from the top 1% of earners, three former Stanford University students became billionaires from the IPO of their San Francisco-based food-delivery company DoorDash Inc.

“For those fortunate to maintain employment and income during this pandemic, their financial situation is better than before,” economists at UCLA Anderson said in a December report. “These households have been able to accumulate at least an additional $1.6 trillion in savings.”

Internet Sales

And many have continued to spend. Because states are permitted to tax internet sales from businesses outside their borders, municipal governments have benefited from people shopping at home. Texas, which garners its largest source of revenue from sales taxes, saw the biggest gains over the past 12 months from the $1.25 billion of collections from online retailers, Comptroller Glenn Hegar said last month. In California, home to some of the most sweeping Covid restrictions nationwide on businesses, sales tax revenue stands at about the same so far as it was in the previous year.

Regions have gone through different experiences given the variance in public health restrictions, with some only now beginning to feel the pain, said Irma Esparza Diggs, director of federal advocacy for the National League of Cities. “This pandemic hasn’t hit our state and local governments the same way at every point in time, which has been the difficulty in conveying to Congress this is how much we’re losing,” she said.

The group in December released a survey that found on average, cities have seen revenues decline by 21% since the beginning of the pandemic, while additional expenditures such as protective equipment have jumped 17% over the same time period. Chicago closed an $800 million gap in its 2020 budget that was caused by Covid-19 and an even bigger $1.2 billion hole in 2021, 65% of which was related to the pandemic.

The virus has decimated the finances of transit agencies. New York’s Metropolitan Transportation Authority, the nation’s largest mass transit system, said it will have to slash subways and buses by 40% and chop commuter rail service by half if aid doesn’t come from Washington.

And some states have needed to take unusual action to balance their books. New Jersey last month sold $3.7 billion of general-obligation bonds to cover its revenue shortfall. Illinois has tapped the Federal Reserve’s emergency lending program.

“Even though the prospects of a vaccine are promising, it’s going to take at least a year or two before things go back to some kind of normalcy,” said Lucy Dadayan, a senior research associate with the Urban-Brookings Tax Policy Center.

Bloomberg Politics

By Romy Varghese and Amanda Albright

December 15, 2020, 3:53 PM PST Updated on December 16, 2020, 7:34 AM PST

— With assistance by Martin Z Braun, Danielle Moran, Michelle Kaske, Shruti Singh, Laura Litvan, Erik Wasson, and William Selway

---

Understanding A Path To Boosting Lower-Income Communities: Qualified Opportunity Zones

Anyone involved in any type of commercial real estate endeavor has by now heard of the qualified opportunity zone program. For those who haven't, the qualified opportunity zone (QOZ) came out of the bipartisan Investing in Opportunities Act of 2017 as a means for investors to defer paying taxes on capital gains after the sale of assets. Eventually, it found its way into the Tax Cuts and Jobs Act of 2017 and was rolled out soon after. In all the pro-and-con media hype around the program, many forget that its underlying purpose was to funnel financial resources toward in-need lower-income communities.

Though the program is still in its early days – it is, after all, a long-term initiative – the following issues should be considered when discussing QOZs: the program's impact on lower-income areas, how qualified opportunity funds (QOFs) can boost economic development and how investors can ensure gains are directed to areas in need. With that said, there are still questions as to whether this community revitalization program is actually being utilized to revitalize communities.

QOZs: A Background

The QOZ program's foundation is found in "Unlocking Private Capital to Facilitate Economic Growth in Distressed Areas," a 2015 report released by the Economic Innovation Group (EIG).

Continue reading.

Forbes

by David Wieland

Dec 1, 2020

Leveraging Development Finance Tools to Attract Opportunity Zone Investment.

Read the CDFA document.

How to Make Communities Part of the Opportunity Zone Equation.

Three years ago, the federal government created Opportunity Zones as a way to encourage private investors to bring an influx of money to struggling urban and rural neighborhoods through tax incentives. The promise of Opportunity Zones to communities? Add affordable housing, boost small businesses owned by Black entrepreneurs and other people of color, and bring solid jobs to local residents, many of whom are living below the poverty level.

But last year, when Angeline Johnson arrived in Wichita, Kansas, as a FUSE executive fellow tasked by the City Manager's Office with encouraging equitable investment in Opportunity Zones (OZs), she discovered that some residents in northeast Wichita had mobilized to share concerns about their OZ designation.

“There was a legitimate fear of gentrification and displacement,” Johnson said.

Continue reading.

NEXT CITY

EMILY NONKO DECEMBER 17, 2020

Workforce Housing in Opportunity Zones, with Riaz Taplin.

Why should investors consider workforce housing as a stable Opportunity Zone investment strategy? Riaz Taplin is principal and founder of …

CONTINUE READING »

Opportunity Db

December 16, 2020

TAX - ALABAMA

Jefferson County Board of Education v. City of Irondale

Supreme Court of Alabama - October 23, 2020 - So.3d - 2020 WL 6235733

County board of education and several public-school employees, who worked either as public-school teachers or support staff, sought to avoid application of an occupational tax imposed by city.

The Circuit Court entered summary judgment for city. County board of education and public-school employees appealed.

The Supreme Court held that:

- Nature of services performed by employees of county board of education was not an adequate basis for excluding them from having to pay city’s occupational tax;
- State-agent immunity was not a basis to find that employees of county board of education were exempt from city’s occupational tax; and
- City’s occupational tax neither violated statutorily mandated salary schedule for employees of local boards of education nor failed to ensure equitable pay for such employees.

Nature of services performed by public-school employees, who worked either as teachers or support workers, was not an adequate basis for excluding them from having to pay city’s occupational tax; ordinance applied to all employees working in the city limits, regardless of the person’s employer or place of residence, and occupational tax did not create a new or additional requirement for gaining or maintaining employment by the county board of education.

State-agent immunity was not a basis to find that employees of county board of education were exempt from occupational tax imposed by city; ordinance did not affect any government function of the county board of education, payment of the occupational tax was not related to a board employee’s government responsibilities, and if the county board of education was unwilling to withhold the occupational tax for its employees, the ordinance provided a procedure for employees to independently comply with the requirements of the ordinance.

Occupational tax imposed by city ordinance neither violated statutorily mandated salary schedule for employees of local boards of education nor failed to ensure equitable pay for such employees so as to preclude occupational tax from being applied to employees of county board of education; despite argument that a difference in net wages occurred based on where employees of county board of education provided services within county, nothing in ordinance prohibited county board of education from paying employees gross wages exactly as required under the mandated salary schedule, and statute in question did not state that employees of local boards of education were otherwise exempt from local, state, or federal taxes.

Understanding A Path To Boosting Lower-Income Communities: Qualified Opportunity Zones.

Anyone involved in any type of commercial real estate endeavor has by now heard of the qualified opportunity zone program. For those who haven't, the qualified opportunity zone (QOZ) came out of the bipartisan Investing in Opportunities Act of 2017 as a means for investors to defer paying taxes on capital gains after the sale of assets. Eventually, it found its way into the Tax Cuts and Jobs Act of 2017 and was rolled out soon after. In all the pro-and-con media hype around the program, many forget that its underlying purpose was to funnel financial resources toward in-need lower-income communities.

Though the program is still in its early days – it is, after all, a long-term initiative – the following issues should be considered when discussing QOZs: the program's impact on lower-income areas, how qualified opportunity funds (QOFs) can boost economic development and how investors can ensure gains are directed to areas in need. With that said, there are still questions as to whether this community revitalization program is actually being utilized to revitalize communities.

Continue reading.

Forbes

by David Wieland

Dec 1, 2020

Despite Challenges, Opportunity Zones Provide Much-Needed Capital.

The program has been criticized for a lack of transparency and for being used as a tax dodge, but developers say it is "a great tool to have in the toolbox."

Following a slow rollout of rules governing opportunity zones, a program Congress approved three years ago to encourage investment in low-income neighborhoods, developers have pumped billions of dollars into the zones nationwide, even in the midst of the pandemic.

The program has drawn myriad detractors, including critics who charge investors are using it simply to avoid paying taxes. Others point to a lack of transparency that makes it tough to gauge whether the investments are making a real impact on communities.

The Trump administration has resisted providing much federal reporting or oversight, but some states and cities are using the initiative to help steer investment into their underserved neighborhoods and track how much residents are benefiting from it.

Continue reading.

The New York Times

By Joe Gose

Nov. 24, 2020

Opportunity Zones Working Group Prepares to Provide Feedback on OZ Legislation, Oversight.

The OZ Working Group provides a platform for OZ stakeholders to work together to create consensus solutions to technical OZ incentive issues and to provide recommendations to the government to make the OZ incentive more efficient in delivering benefits to low-income communities.

During the run-up to the election, President-elect Joe Biden released his Build Back Better plan, which included several proposed modifications to the OZ incentive. These proposed changes have since been included in the Biden-Harris transition plan for racial equity and include:

- Incentivizing qualified opportunity funds (QOFs) to partner with nonprofit or community-oriented organizations, and jointly produce a community-benefit plan for each investment, with a focus on creating jobs for low-income residents and otherwise providing a direct financial impact to households within the OZs.
- Directing that OZ benefits be reviewed by the Department of Treasury to ensure these tax benefits are only being allowed where there are clear economic, social, and environmental benefits to a community, and not just high returns–such as those from luxury apartments or luxury hotels–to investors.
- Introducing transparency by requiring recipients of the OZ tax break to provide detailed reporting and public disclosure on their OZ investments and the impact on local residents, including poverty status, housing affordability and job creation.

Additionally, there has been a bipartisan call for data collection and transparency intended to enhance efforts to evaluate OZ policy and guard against abuse. Legislation introduced during the 116th Congress includes:

- S. 2994: Improving and Reinstating the Monitoring, Prevention, Accountability, Certification and Transparency Provisions of Opportunity Zones, introduced by Sen. Tim Scott, R-S.C.
- S. 2787: Opportunity Zone Reporting and Reform Act, introduced by Sen. Ron Wyden, D-Ore.
- H.R. 4999: Opportunity Zone Fairness and Inclusion, introduced by Rep. Henry Johnson, D-Ga.
- H.R. 5011: Opportunity Zone Accountability and Transparency Act, introduced by Rep. Ron Kind, D-Wis.

During 2021, the OZ Working Group will continue to foster opportunities for its members and continue to provide a platform where industry stakeholders can discover how best to implement the OZ incentive into their business strategy. The group will also continue to maintain a leadership role within the OZ industry by keeping abreast of emerging issues and providing input for shaping proposed legislation and rulemaking. With the likely change in administration, the group will turn its immediate focus to the following regulatory and legislative initiatives:

Administration Oversight

- Revisiting the final OZ regulations and identifying ways the regulations could be improved to enable the OZ incentive to better meet policy objectives, such as additional incentives to encourage affordable housing and other mission-driven investments.
- Reviewing and commenting on policy recommendations for data collection and transparency, including ways in which Treasury can use the Community Development Financial Institutions (CDFI) Fund to help carry out its policy objectives.
- Reviewing the impact of the 2020 U.S. Census and making recommendations on how modifications to census tracts should affect or not affect OZs.
- Reviewing and commenting on proposed rules under the Community Reinvestment Act (CRA) to ensure that CRA serves as a robust incentive to invest in OZs.

Legislative Activity

- Commenting on legislative efforts to provide greater community impact that use targeted incentives or disincentives for specific types of business that create more jobs or meet other policy goals.
- Reviewing and making recommendations for fair transition rules should some higher income or contiguous census tracts be determined to be ineligible as OZs.
- Providing recommendations on the types of information that should be collected from QOFs, qualified OZ businesses and investors to enable Treasury the ability to assess the OZ incentive's impact on community outcomes while at the same time protecting taxpayer privacy.

Conclusion

The leadership of the OZ Working Group has contributed greatly to the success of the OZ incentive during the first three years of implementation and there is still more work to do to successfully transition the incentive under a new administration and to maximize its potential to transform distressed communities. The OZ Working Group is excited to flip the calendar to a new year where we will continue our work of helping to shape the implementation of the OZ incentive toward the maximum efficiency and effectiveness in transforming communities. Parties interested in joining the OZ Working Group can contact John Sciarretti at John.Sciarretti@novoco.com.

Novogradac

Published by Jason Watkins, John Sciarretti on Wednesday, December 2, 2020

[Last-Minute Opportunity Zone Strategies for 2020, with Ashley Tison.]()

With just a few weeks left in the year, what are some last-minute strategies and options to keep in mind for Opportunity Zone investors?

Ashley Tison is an Opportunity Zone consultant and attorney based in Charlotte, North Carolina. Along with Jimmy Atkinson, he is co-founder of OZ Pros, an Opportunity Zone advisory firm.

Click the play button below to listen to my conversation with Ashley.

Opportunity Db

By Jimmy Atkinson

December 9, 2020

TAX - NEW JERSEY

Metz Family Ltd. Partnership v. Township of Freehold

Tax Court of New Jersey - October 20, 2020 - 32 N.J.Tax 69

Taxpayer appealed township's assessment of its local retail shopping center with warehouse component to the rear.

Township filed motions seeking orders for joinder of county board of taxation and Director of the Division of Taxation.

As matter of first impression, the Tax Court held that joinder of board and Director, as parties, was warranted.

Joinder of county board of taxation and Director of the Division of Taxation, as parties, was warranted in taxpayer's appeal from township's property tax assessments, where board and Director approved assessor's initial application to perform annual reassessment, allegedly monitored assessor's progress, and apparently verified assessment as qualifying on Director's list for implementation of Revaluation/Reassessment; board and Directors should explain and defend their process and explain why there was no average ratio for assessments, for only they could provide such information.

TAX - VIRGINIA

International Paper Company v. County of Isle of Wight

Supreme Court of Virginia - September 17, 2020 - 847 S.E.2d 507

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

The Isle of Wight Circuit Court granted county's motion to strike, and taxpayer appealed.

The Supreme Court held that:

- Machinery and tools tax plan did not improperly interfere with corporate taxpayer's vested right to tax refund judgment;
- County had the statutory and constitutional authority to impose taxes on corporate taxpayer's machinery and tools property as well as authority to execute tax relief program;

- Taxpayer provided prima facie evidence sufficient to show that tax relief program payments were integrated into the taxation process and had the same effect as partial tax exemptions; and
- Taxpayer provided prima facie evidence that county machinery and tools tax assessment was non-uniform, invalid, and illegal.

County's machinery and tools tax plan did not improperly interfere with corporate taxpayer's vested right to tax refund judgment, although tax plan may have "clawed back" the money paid to taxpayer under refund judgment, where taxpayer received the money it had a vested right to receive, county had authority to increase the tax rate, and tax increase did not retroactively alter the prior tax rates or interfere with the paid judgment.

County had the statutory and constitutional authority to impose taxes on corporate taxpayer's machinery and tools property as well as authority to execute tax relief program, even if the practical effect was to "claw back" tax refunds paid to taxpayer for prior years; county did not revise previous assessments, but instead increased tax rate for subsequent years, and tax relief program was to help businesses negatively impacted by the adjustment to the tax rate.

Corporate taxpayer's assertion that county's machinery and tools tax "assessment is otherwise invalid or illegal" because it is not uniform was sufficient to state a constitutional uniformity claim.

Corporate taxpayer provided prima facie evidence sufficient to show that county machinery and tools tax relief program payments were integrated into the taxation process and had the same effect as partial tax exemptions, and thus that taxpayer's machinery and tools tax assessment was non-uniform, invalid, and illegal, as required to survive motion to strike; stated purpose of tax relief program was to relieve liability for tax rate increase for certain class of taxpayers whom county deemed to be "harmed" by the rate increase, county structured the program to directly exempt certain tax liability and payments from the program directly offset tax liability, program factually correlated with tax rate increase and was funded predominantly by the tax rate increase, and relief payments were calculated by using tax figures.

Corporate taxpayer provided prima facie evidence that county machinery and tools tax assessment was non-uniform, invalid, and illegal; tax relief formula treated taxpayers differently based upon whether the county had lawfully owed that taxpayer a refund on taxes overpaid in prior years, which created a sub-class of taxpayers, refund and relief payment were negatively correlated, only taxpayers who had received a refund were required to pay the tax assessment increase, and net tax rates paid by taxpayers, given the payments made to some taxpayers by the tax relief program, were not uniform

---

NABL Submits Letter to Treasury and IRS.

On Wednesday, December 3, 2020, the National Association of Bond Lawyers (NABL) submitted a letter to the U.S. Department of the Treasury ("Treasury") and Internal Revenue Service (IRS) requesting an extension of IRS Notice 2020-53 through December 31, 2022. The notice, released on July 1, 2020, in response to the coronavirus pandemic provides relief relief to bond issuers, operators, owners and tenants of qualified residential rental projects and qualified low-income housing projects financed with exempt facility bonds, and state agencies that have jurisdiction over these projects, from otherwise-applicable federal tax law compliance requirements.

Read the full letter here.

Hawkins Advisory re: Rev. Proc. 2020-49 - Extension of Ability to Hold Telephonic TEFRA Hearings.

In consideration of the ongoing Covid-19 pandemic, Treasury and the Internal Revenue Service have extended the temporary guidance originally provided in Rev. Proc. 2020-21, published in May of 2020. The temporary guidance allows issuers of private activity bonds to hold the public hearings required by the TEFRA rules by teleconference until December 31, 2020. The release on November 4, 2020 of Rev. Proc. 2020-49 extends the period during which issuers may hold telephonic hearings to September 30, 2021.

Read the Hawkins Advisory describing Rev. Proc. 2020-49.

Opportunity Zones: Past, Present, and Future, with Rachel Reilly.

With a new President taking office next month, what does the future hold for Opportunity Zones? And what policy reforms under a Biden-Harris administration would improve the policy such that it more closely adheres to legislative intent?

Rachel Reilly is former director of impact strategy at Economic Innovation Group, a bipartisan public policy organization that helped to create the Opportunity Zone legislation.

Continue reading.

Opportunity Db

By Jimmy Atkinson

December 2, 2020

TAX - NEW YORK

Wells Fargo Bank, N.A. as Trustee for Carrington Mortgage Loan Trust, Series 2006–NC2 Asset- Backed Pass-Through Certificates v. Budram

Supreme Court, Appellate Division, Third Department, New York - November 5, 2020 - N.Y.S.3d - 2020 WL 6493824 - 2020 N.Y. Slip Op. 06323

In action by mortgagee to enforce its mortgage after taxpayer-mortgagors reacquired property from city following tax foreclosure sale, the Supreme Court entered order dismissing complaint and, upon reargument, adhered to its prior decision dismissing complaint.

The Supreme Court, Appellate Division, held that any transfer of real property from city back to taxpayers, after the city had acquired a fee simple interest therein by a deed issued following tax foreclosure sale, could not be considered a redemption of the property or a rescission of the tax foreclosure, and did not restore mortgage lien.

Any transfer of real property from city back to taxpayers, after the city had acquired a fee simple interest therein by a deed issued following tax foreclosure sale, could not be considered a redemption of the property or a rescission of the tax foreclosure, and did not have effect of restoring mortgage lien which had been extinguished upon city's acquisition of fee simple interest in property by the issuance of deed following expiration of taxpayer-mortgagors' right of redemption; mortgagee, having made no attempt to protect its mortgage interest in tax foreclosure proceeding, could not attempt to enforce its mortgage once taxpayer-mortgagors reacquired the property from city.

IRS Releases UBTI Calculation Regs for Exempt Orgs.

Treasury and the IRS have released final regulations on calculating the unrelated business taxable income of tax-exempt organizations.

The final regs (T.D. 9933) issued November 19 address section 512(a)(6), a Tax Cuts and Jobs Act provision that requires exempt organizations with more than one unrelated trade or business to calculate UBTI separately for each one. The regs provide guidelines for identifying separate UBTI and explain when EOs can treat investment activities as one unrelated trade or business when computing UBTI.

The final guidance adopted some clarifications provided in the proposed regs (REG-106864-18) without change. Those clarifications involve the section 513(b) definition of unrelated trade or business applying to individual retirement accounts and the inclusions of subpart F and global intangible low-taxed income being treated in the same manner as dividends when determining UBTI.

UBTI Calculation Regs Reflect Public Input.

Guidance from the IRS and Treasury to help tax-exempt organizations calculate unrelated business taxable income if they have more than one unrelated trade or business adopts many suggestions offered in public comments.

The final regulations (T.D. 9933), released November 19 ahead of official publication in the Federal Register, address section 512(a)(6), a Tax Cuts and Jobs Act provision that requires exempt organizations with multiple unrelated trades or businesses — silos — to calculate UBTI separately for each one.

The final regs explain how an EO can determine if it has more than one unrelated trade or business and, if it does, how to calculate its UBTI.

"The IRS should be commended for its speedy efforts in issuing final guidance on 512(a)(6), along with their level of consideration given to the 17 comments submitted in response to the proposed regulations," Meghan R. Biss of Caplin & Drysdale Chtd. told Tax Notes.

The preamble to the final regs discusses reducing the administrative burden on organizations and the IRS by adopting bright-line rules, Biss noted.

"In doing so, I believe that the IRS is taking into account how it will enforce these rules," Biss said. "To me, the rejection of facts and circumstances is an indication that they want agents to avoid the enforcement difficulties posed in other EO areas that rely solely on a facts and circumstances test."

NAICS Codes
The final regs retain the proposed regs' (REG-106864-18) provision requiring an EO to identify each of its separate unrelated trades or businesses by using the first two digits of the North American Industry Classification System (NAICS) code that most accurately describes the unrelated trade or business.

The determination is based on the more specific NAICS code that describes the organization's activity, and the descriptions in the current NAICS manual of trades or businesses using more than two digits of the NAICS codes are relevant in making that determination, according to the preamble.

In response to comments, the final rulemaking incorporates a NAICS rule for identifying particular industries and provides that when there are sales of goods both online and in shops, the separate unrelated trade or business is identified by the goods sold in shops if the same goods generally are sold online and in stores.

If an EO concludes that its trade or business activities would be most accurately described by different NAICS two-digit codes, the activities should be identified that way and treated as separate unrelated trades or businesses, according to the final regs.

Like the proposed rulemaking, the final regs say the NAICS two-digit code has to identify the separate unrelated trade or business in which the EO directly or indirectly engages. It may not describe activities substantially related to accomplishing the organization's exempt purpose.

The final regs, in response to comments, eliminate the restriction on changing NAICS two-digit codes. An organization that changes the identification of a separate unrelated trade or business must report the modification in the tax year of the change in accordance with forms and instructions.

IRAs, Subpart F Income
The final regs adopt the proposed rulemaking's clarification that the definition of unrelated trade or business applies to IRAs.

Likewise, the proposed regs' clarification that inclusions of subpart F income and global intangible low-taxed income are treated the same way as dividends for purposes of determining UBTI is retained in the final rulemaking.

Net Operating Losses
An EO with more than one unrelated trade or business will determine the net operating loss deduction separately for each of its unrelated trades or businesses, according to the final regs. They also provide that reg. section 1.512(b)-1(e), which addresses the application of section 172 in the context of UBIT, applies separately for each such unrelated trade or business.

The final regs say an organization with losses in a tax year beginning before January 1, 2018, and in a tax year starting after December 31, 2017, will deduct its pre-2018 NOLs from total UBTI before deducting any post-2017 NOLs regarding a separate unrelated trade or business against the UBTI from such trade or business. The IRS and Treasury rejected a commentator's request to permit an EO to choose the order in which it uses pre-2018 and post-2017 NOLs based on its own facts and circumstances.

The final regs clarify that pre-2018 NOLs are taken against the total UBTI in a way that allows for maximum use of post-2017 NOLs, rather than pre-2018 NOLs, in a tax year.

"For example, the final regulations further clarify that an exempt organization may allocate all of its pre-2018 NOLs to one of its separate unrelated trades or businesses or it may allocate its pre-2018 NOLs ratably among its separate unrelated trades or businesses, whichever results in the greater utilization of the post-2017 NOLs in that taxable year," the preamble explains.

The final rulemaking also provides that after offsetting any gain from terminating, selling, exchanging, or otherwise disposing of a separate unrelated trade or business, any remaining NOL is suspended.

But the suspended NOLs may be used if the previous separate unrelated trade or business later resumes or if a new unrelated trade or business that is accurately identified using the same NAICS two-digit code as the previous separate unrelated trade or business begins or is acquired in a future tax year, according to the preamble.

In response to six commentators, the final regs provide that for purposes of section 512(a)(6), a separate unrelated trade or business that changes identification is treated as if the originally identified separate unrelated trade or business is terminated and a new separate unrelated trade or business begins.

Therefore, none of the NOLs from the previously identified separate unrelated trade or business will be carried over to the newly identified separate unrelated trade or business, the preamble explains.

The change in identification may apply to all or a part of the originally identified separate unrelated trade or business. If the change applies to the originally identified separate trade or business entirely, any NOLs attributable to that separate unrelated trade or business are suspended, the final regs say.

If the change in identification applies to the originally identified separate unrelated trade or business in part, the originally identified separate unrelated trade or business that remains unchanged keeps the entire NOLs attributable to it, including the part for which the identification is changing.

Investment Activities
Despite pleas from some commentators, the final regs, like the proposed version, treat an EO's investment activities that are subject to UBIT as a separate unrelated trade or business for purposes of section 512(a)(6).

Regarding specified payments from controlled entities, the IRS and Treasury adopted the language in the proposed regs without change, rejecting the suggestion that all specified payments be treated as one unrelated trade or business for purposes of section 512(a)(6).

Qualified Partnership Interest
The final regs rejected commentators' recommendations of alternative or additional methods for identifying a qualified partnership interest (QPI).

The rulemaking adopts the proposed regs' position that once an organization designates a partnership interest as a QPI, it can't subsequently identify the trades or businesses conducted by the partnership that are unrelated trades or businesses regarding the EO using NAICS two-digit codes unless and until the partnership interest stops being a QPI.

In response to a commentator, the final regulations clarify that if an organization whose interest must be considered when determining the EO's percentage interest for purposes of the first prong of the control test is a general partner in a partnership in which an EO holds an interest, that interest is not a QPI.

Regarding the first prong of the control test, the final regs keep the 20 percent capital interest threshold of the proposed regs. However, they make clear that the EO must satisfy the percentage interest requirement for its tax year with which or in which the partnership's tax year concludes.

TAX ANALYSTS

by FRED STOKELD

POSTED ON NOV. 20, 2020

IRS PLR: City's Geographic Boundaries Constitute Qualified Service Area

The IRS ruled that the entire geographic area of a city is a qualified service area of its public utilities commission within the meaning of section 141(d)(3)(B)(i) but expressed no opinion on whether the interest on bonds used to finance the city's plan to provide retail electric service will be tax-exempt.

Read the IRS Private Letter Ruling.

Citations: LTR 202046004

IRS PLR: Renewable Energy Facility Is Not Public Utility Property

The IRS ruled that the portion of a public utility's photovoltaic array built on a customer's land that is the dedicated renewable energy facility serving that customer will not be public utility property within the meaning of section 168(i)(10) and former section 46(f)(5).

Read the IRS Private Letter Ruling.

Citations: LTR 202047004

IRS Attacks Impact Investing With Flawed Logic: A Critical Review of the IRS Argument

On October 9th, the Internal Revenue Service released Private Letter Ruling 202041009 (the "Ruling"), which, in what many in the nonprofit community would have expected to be a relatively straight-forward exemption approval for a new 501(c)(3) nonprofit organization (the "Nonprofit"), resulted in not just a denial of the Nonprofit's tax-exempt status, but, in some respects, a repudiation of impact investing as a whole, including program related investments (PRIs). While private letter rulings are only legally binding on the taxpayer that requested the ruling (in this case, the Nonprofit), these rulings are used by practitioners as a guide to IRS's position on the application of the tax law. Thus, a negative IRS ruling is generally viewed as a warning to all others in similar circumstances. All is not necessarily lost for the Nonprofit in the Ruling. The Nonprofit still has a variety of options to consider taking to continue its fight, which the authors of this article hope it will vigorously do. As the goal of this article is not to review all of the legal strategies one could take in the exemption process, we note that there are various options so readers know that this story may not be over.

Ruling Overview

The Ruling was prompted by the Nonprofit seeking a Determination Letter from IRS confirming that it qualifies for exemption as an organization described in Section 501(c)(3) of the Internal Revenue Code. According to the Ruling (which is heavily redacted to preserve the confidentiality of the actual applicant), the Nonprofit was formed: Exclusively for charitable purposes, including, for such purposes, increasing the capital available to organizations that develop and/or operate (i) long term affordable housing for the economically and physically disadvantaged, (ii) community facilities such as schools and community health centers, (iii) businesses providing access to healthy foods, (iv) sustainable energy projects, (v) commercial real estate, and (vi) other projects that may increase social welfare.

The exempt purpose of the Nonprofit, more generally, is to "deploy capital into projects that promote a social good and that otherwise struggle to find financing in normal capital markets" in low income and underserved communities. Capital for the Nonprofit's work comes from impact investors, specifically in the form of equity investments in pooled investment funds organized by the Nonprofit. The Ruling describes impact investors as "individuals and institutions who want to see that their funds accomplish positive social and environmental objectives and as a concomitant objective to earn financial returns and utilize capital to finance projects and organizations in line with the investors' dual objectives". While we recognize there are many different views on how to define an impact investor, this is the version used in the Ruling. Unlike many determination requests from applicants in the exemption process, the Nonprofit had already begun conducting activities prior to making its request for an IRS determination. Thus, the Ruling provides actual examples of activities undertaken by the Nonprofit, namely two funds that were already organized. The first was a loan fund focusing on preventative healthcare and social service investments in an effort to reduce costly acute care interventions. The initial projects included the provision of housing and social services for the chronically homeless and for individuals exiting incarceration to reduce recidivism and the prison population. The second loan fund targeted small-scale energy efficiency and clean energy project finance. In this case, initial projects included efficiency upgrades in non-profit affordable housing units and at a non-profit senior living facility. Both projects focused on lowering operating and utility costs. The Ruling describes the funds' projects as "not commercially financeable". In fact, in characterizing all of the investments made to date by the Nonprofit, the Ruling states:

These kinds of activities are not well supported by traditional capital markets. The activities are too niche, too small scale, or too low-return to draw the attention and resources of banks, venture capital and private equity funds, and public stock and bond markets.

The Ruling also describes, in brief detail, the manner in which the Nonprofit selects projects for investment, which includes both somewhat traditional investment due diligence considering both risk and return, as well as social and environmental impact screens. In order for the Nonprofit to become sustainable it charges a "substantially below market" management fee for its services to the investment funds it manages. To the extent the Nonprofit earns any funds in excess of its costs, which it endeavors to keep low by sharing space and services with its parent organization 501(c)(3) nonprofit organization, such excess is either invested into one or more of the funds or contributed to its parent. Some other facts describing the Nonprofit's activities include that: (a) it will likely be required to register with the Securities and Exchange Commission (SEC) as an investment advisor at some point, (b) no guarantees are made to investors that they will receive a "fair market return", (c) "as of a couple of years ago" the Nonprofit was already managing assets, (d) no charitable deductions are offered to investors in the Nonprofit's funds, despite the Nonprofit's management activities being conducted in furtherance of its charitable mission, and (e) the Nonprofit's model is projected to be successful, with substantial excess revenue over expenses by its third year of operations. Questionable Application of Legal Precedent In reviewing the law governing qualification for exemption in the Ruling, IRS relies on a variety of Treasury Regulations articulating both the "organizational test" and the "operational test".

The former requires that an organization be organized in a manner that qualifies for exemption; in other words, the governing documents must meet the literal requirements for exemption. The latter test, being the more complex of the two, requires that the organization engage primarily in activities that accomplish one or more of the organization's exempt purposes. The Ruling then proceeds to recite a series of Revenue Rulings from the late 1960s through the mid-1970s, as well as a number of court cases dating back to 1945. After analyzing the precedent, IRS ultimately determined that the Nonprofit fails to qualify for tax-exempt status because it fails to satisfy the operational test for exemption, more specifically, that a substantial portion of the Nonprofit's activities consists of managing funds for a fee that provide a market or near-market return for investors. In other words, more than an insubstantial amount of the Nonprofit's activities further non-exempt purposes. As IRS characterizes the Nonprofit's activities, the funds are open to any interested investors who expect market or near-market returns while also capitalizing on activities with a public purpose. Ultimately, IRS believes the Nonprofit's "charitable objectives or results are incidental to [its] business purposes of maximizing returns for [its] investors." While some of the authority underlying the IRS conclusion is on point, a number of the citations referenced may best be described as misguided or, at worst, far from applicable to the Nonprofit's activities. For example, IRS compares the Nonprofit to an organization denied exemption in Revenue Ruling 69-528, where the organization provided investment services for a fee to other nonprofits in a manner similar to what is considered an unrelated trade or business when operated by a nonprofit organization. In contrast, the Nonprofit charged below-market fees for investments not made in common stocks, but in specifically curated projects that not only advance the Nonprofit's exempt purposes but that would not otherwise be funded without the Nonprofit's actions. IRS seemingly ignores the fact that the Nonprofit's purposes were advanced by its investment in those projects, which were charitable. IRS similarly cites Revenue Ruling 72-369 for the proposition that offering services at cost is not enough to qualify an activity as charitable.

However, the Nonprofit is not providing general managerial and consulting services at cost like the organization in Revenue Ruling 72-369, but is rather providing below-market rates for its investment services as part of a package meant to increase the desirability of investment in exempt purpose projects that would not be funded otherwise. Again, these are projects that were otherwise not commercially financeable. In Revenue Ruling 74-587, a nonprofit invests in economically depressed areas with loans tailored to business needs based on a primary goal of advancing charitable goals, as opposed to amassing profit. While some individuals and businesses receiving financial assistance from the organization may not qualify for charitable assistance, they are "merely instruments" in effectuating the organization's exempt purposes. IRS contrasts this organization with the Nonprofit, stating that because the Nonprofit screens potential investments for both financial feasibility/risk and social/environmental impact, as well as charging fees and benefitting investors, the Nonprofit is primarily concerned with the rate of return. On the other hand, the Nonprofit will only invest if the exempt purposes screen is met, so the assertion that the Nonprofit's investments are "first and foremost concerned with the risk and return potential" seems an unfair characterization based simply on the order of operations of the Nonprofit's vetting methodology; IRS said form counts more than substance. Additionally, the activities of the organization in Revenue Ruling 74-587 are not without private benefit (to the individuals/businesses). There is no indication the loans are interest-free and there clearly is no requirement that the recipients qualify for charitable assistance.

The cases cited by IRS in the Ruling highlight the impact of the commerciality doctrine on the exemption analysis, which is somewhat murky in practice but basically equates to the fact that substantial commercial activity, as defined based on all relevant facts and circumstances, must be in furtherance of a nonprofit's exempt purposes in order to be acceptable. Various court cases over time have enumerated different facts and circumstances to be weighed, but a few commonly cited examples include whether the activity competes with for-profit enterprises, as well as how the activity is priced, advertised and funded. IRS believes the Nonprofit's activities are like those typically operated by commercial ventures, with funding solely from management fees and resulting in a high financial reserve advising against a finding of exemption. However, a comparison to B.S.W. Group, Inc. v Commissioner, 70 T.C. 352 (1978), for example, is not directly on point as the Nonprofit is not offering consulting services for high fees, but instead charges below-market rates and eschews a carried interest typical of fund managers, all designed to not generate a profit for the Nonprofit. It is operating to provide investments that otherwise are not offered in the market because they could not attract capital, even if there is the potential for market or near market returns. The lack of competition is, in a way, the reason the Nonprofit created the funds in the first place and is the basis of its exempt purpose. Other cases are cited by IRS, including Airlie Foundation v. Commissioner (283 F. Supp 2d 58 (D.D.C., 2003) and Living Faith, Inc. v. Commissioner, 950 F.2d 365 (7th Cir. 1991), in order to continue the competition argument, as well as to point to revenue from investment fees (as opposed to donations) and a projected high financial reserve as counseling against exemption. However, the Nonprofit invests any reserve back into its exempt projects or donates the funds to its parent 501(c)(3) organization. Additionally, based on the facts provided in the Ruling, it is a bit of a stretch to compare the Nonprofit's "promotional efforts," described as a publicly available brochure and offering documents accompanying the private funds that would be required by securities laws, with the wide-spread advertising and "commercial catch phrases" used to promote the restaurants and health food stores run by Living Faith, Inc.

Ultimately, the facts and circumstances of the Nonprofit's activities do not fit neatly with the precedents cited by IRS, which means there seems to be a significant basis for challenging the legal foundation for the position taken by IRS to deny the Nonprofit's exemption.

Tensions with Established Impact Investing Practices

In addition to applying flawed logic to the facts as presented, the Ruling seems to indicate a discomfort with the very types of activities that drive impact investing, including programrelated investments (PRIs) made by private foundations. The Ruling provides a definition of impact investing that highlights dual objectives of positive social and/or environmental good and financial returns, such that the investment is not exclusively about generating profit. Nonprofits have long engaged in impact investing, sometimes termed "mission related investments (MRIs)" and IRS has declined to penalize nonprofit organizations for investments made with a charitable mission in mind that may offer lower returns than standard investment alternatives. The tax law explicitly blesses PRIs, on the other hand, with private foundations authorized to treat amounts expended in connection with PRIs as part of their required 5% minimum distribution requirements and without being considered imprudent from an investment perspective. The Treasury Regulations define PRIs as investments characterized by a primary purpose to advance exempt purposes, without a significant purpose of production of income or appreciation of property. The actual production of significant income or appreciation, however, is not, in and of itself, considered evidence of a significant purpose involving the production of income. In fact, an investment is considered to be made primarily to accomplish exempt purposes if it significantly furthers the accomplishment of the nonprofit organization's exempt activities and if the investment would not have been made but for such relationship between the investment and the accomplishment of the exempt activities. A relevant consideration is whether investors solely focused on profit would make the investment on the same terms.

The Ruling stands in stark tension with PRIs and the larger impact investing environment, as the PRI criteria seem to directly echo the facts in the Ruling. The Nonprofit created "not commercially financeable" funds in furtherance of its exempt purposes, as typical capital markets were not an option due to the "niche," "small-scale," and "low-return" nature of the investments. In short, the investments further the Nonprofit's purposes and would not have been made but for the Nonprofit's efforts. While the Nonprofit was able to provide market or near-market returns to its investors, in the PRI context, the mere creation of profit is not enough to villainize the investment itself. IRS makes much of the Nonprofit's costsaving efforts, which again, are not enough to make profit the primary motive. Similarly, evaluating potential investments for both risk and social impact does not automatically mean a PRI is not in furtherance of exempt purposes, nor should the assumption be made about the Nonprofit's activities simply because the possibility of a return is considered. While the investors in the Nonprofit's funds may have entertained any number of reasons for investing in the Nonprofit's projects, the Nonprofit offers no promises or expectations to investors about market returns and focuses instead on furthering its exempt purposes in innovative ways. Additionally, there is no requirement that a PRI, or for that matter, charitable activities, only benefit a recipient that would otherwise qualify for charitable assistance, though IRS cites this as a reason against exemption. Lastly, as noted, PRIs are not considered to have a primary profit motive simply because they happen to be a good investment with market or near-market returns. Characterizing the Nonprofit's activities as "trying to secure the highest returns possible for your clients" misses the greater context in which the Nonprofit is operating, namely in a space where projects in furtherance of exempt social and environmental purposes would not otherwise get done. IRS is also uneasy about the fact that investors, including the general public as opposed to simply exempt organizations, can (and are) benefitting from the Nonprofit's investments. However, in the PRI context, the private enterprises that receive support are most certainly benefitted, but so are exempt purposes furthered. On the other hand, PRI returns are required to be recycled by the investing private foundation for charitable purposes. Perhaps the decision in the Ruling would have come out differently had the Nonprofit's management activities been funded through donations as opposed to below-market fees, but the arguments made by IRS strain against the backdrop of established PRI regulations.

The Ruling may result in the curbing of creative fundraising of third-party dollars by nonprofit organizations striving to provide much-needed capital for exempt-purpose facilities and services when facing a dearth of traditional funding options. One of many dangers with this approach is a reduced ability for nonprofits to court or work with outside funding that is not a charitable donation, grant or loan, which, in turn, will reduce the probability that many difficult-to-fund projects with immense social good will ever be started. While IRS may have legitimate arguments in favor of such restrictions, the reasoning provided in the Ruling is not altogether convincing.

Thursday, October 22, 2020

Treasury Releases Priority Guidance Plan.

On November 17, 2020, the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) announced the release of the 2020-2021 Priority Guidance Plan. The 2020-2021 Priority Guidance Plan sets forth guidance priorities for the Treasury and the IRS. Each year, the Treasury Department's Office of Tax Policy and the IRS use the Guidance Priority List to identify and prioritize that tax issues that should be addressed through regulations, revenue rulings, revenue procedures, notices, and other published administrative guidance. The Guidance Priority List focuses resources on guidance items that are most important to taxpayers and tax administration. Published guidance plays an important role in increasing voluntary compliance by helping to clarify ambiguous areas of the tax law.

You can find the 2020-2021 priority guidance plan here.

TAX - OHIO

Athens v. McClain

Supreme Court of Ohio - November 5, 2020 - N.E.3d - 2020 WL 6494232 - 2020 -Ohio- 5146

Municipalities brought action against Tax Commissioner challenging constitutionality of statutes governing state collection and administration of municipal net profit taxes.

The Court of Common Pleas entered judgment for Tax Commissioner. Municipalities appealed. The Court of Appeals affirmed. Municipalities appealed.

The Supreme Court held that:

- General Assembly's authority to limit municipal power to levy taxes includes administrative acts that the enactment requires;
- General Assembly acted within its authority when it enacted centralized administration system for municipal net profit taxes;
- Statute providing for state's retention of a one-half percent of municipal net profits taxes as part of centralized administration exceeded General Assembly's authority; and
- The unconstitutional retention provision could be severed.

General Assembly acted within its authority when it enacted centralized administration system for municipal net profit taxes; laws did not take over a municipality's own internal operations but instead made administration of municipal net profit tax, for those taxpayers that elected centralized administration, an operation of the state tax department, with the state thereby becoming a fiduciary for the municipalities whose taxes it collected.

Statute directing State Treasurer to retain one-half percent of municipal net profit taxes for collection and administration services, as part of centralized administration, rather crediting amount to fund that distributed funds to municipalities, exceeded General Assembly's general power to legislate, since municipalities exercising home-rule authority were not persons "subject to" the state's regulation.

TAX - SOUTH DAKOTA

Flandreau Santee Sioux Tribe v. Terwilliger

United States District Court, D. South Dakota, Southern Division - October 21, 2020 - Slip Copy - 2020 WL 6158920

Flandreau Santee Sioux Tribe, filed action seeking a judicial declaration that, under federal law, the State of South Dakota did not have the authority to impose the South Dakota excise tax in connection with services performed by non-Indian contractors on the Tribe's on-reservation construction project.

The District Court held that:

- The contractor's excise tax is not expressly preempted by federal law.
- The case turns on whether the imposition of the State contractor's excise tax on Henry Carlson Company, a non-Indian contractor, for construction services performed on-reservation is preempted under the Bracker balancing test.
- The federal government has a strong interest in the construction, renovation, maintenance, and safety of Indian gaming facilities and the extent of federal regulation and control weighs against imposition of the State excise tax.
- Federal interests weigh against the imposition of the State excise tax.
- The State excise tax interferes with the Tribe's interests in tribal self-sufficiency, self-determination, and sovereignty.
- The State failed to establish that the use of State services funded by the State general fund sufficient to justify the imposition of the State excise tax.
- The State's interest in being reimbursed for State services is minimal, and does not weigh in favor of imposition of the excise tax.
- The loss of the Tribe's excise tax would have a small impact to the State's budget, and more importantly, State agencies' budgets funded by the State general fund from a loss of the Tribe's excise tax.
- The State's general interest in raising revenue cannot justify the substantial burden on federal and tribal interests and weighs against imposition of the excise tax.
- The State's general regulation of the construction industry does not outweigh the tribal and federal interests in Indian gaming revenue.
- The State's interest in uniform application of the contractor's excise tax is minimal and weighs against imposition of the excise tax.
- The term "trade" as used in the Indian Trader Statutes includes the sale of construction materials and services to Indians on-reservation. Thus, the Indian Trader Statutes expressly preempt the State contractor's excise tax at issue here.
- Based on the discussion of federal and tribal interests discussed, and incorporating the federal and tribal interests under IGRA that coincide with the federal and tribal interests under the Indian Trader Statutes, the federal and tribal interests weigh against imposition of the State excise tax.

"In conclusion, the court finds that under a Bracker analysis, the State of South Dakota's interest in imposing the contractor's excise tax does not outweigh the tribal and federal interests in promoting tribal self-sufficiency and self-governance, ensuring the Tribe is the primary beneficiary of gaming, protecting gaming as a means of general tribal revenue, and securing tribal economic development. Considering all the Bracker factors, the evidence presented at trial demonstrated: (1) a strong historical backdrop of tribal sovereignty and sovereignty in the field of Indian gaming; (2) the federal regulatory scheme of IGRA is extensive; (3) there is a strong federal interest in the construction and maintenance of Indian gaming to protect the environment and public health and safety of Indian gaming facilities and patrons while simultaneously promoting tribal self-sufficiency and strong tribal government as evidenced by the statutory structure of IGRA; (4) the Tribe's own regulation of gaming, gaming revenue and on-reservation construction is extensive; (5) the economic burden of the State excise tax falls directly on the Tribe; (6) the State excise tax places a substantial burden on the Tribe's ability to generate gaming revenue and provide essential tribal governmental programs through the Tribe's budget; (7) there is no nexus between the services or regulations funded by the State general fund and provided by the State to the Tribe, tribal members, or Henry Carlson Company and the Casino renovation project; (8) any State services provided to the Tribe, tribal members, the Casino, or Henry Carlson Company off-reservation are not connected to the Casino renovation project and minimal; (9) the State does not uniformly apply the contractor's excise tax or its Department procedures for Indian country tax exemptions; and (10) the State provides little government services funded from the general fund to the Tribe, tribal members, the Casino, or Henry Carlson Company; the State does not uniformly apply the tax; and as a result, the State can only demonstrate a general interest in raising revenue."

"The South Dakota contractor's excise tax on Henry Carlson Company's gross receipts derived from the on-reservation construction and renovation of the Royal River Casino is not per se invalid nor expressly preempted under IGRA. After considering the federal, tribal, and state interests under the Bracker balancing test, the court finds that the tax interferes with federal and tribal interests reflected in IGRA. This outweighs the State's minimal interests. Thus, the State tax is preempted under IGRA."

"Additionally, because Congress has not said otherwise, Indian Trader Statutes expressly preempt the contractor's excise tax. In the alternative, even if the Indian Trader Statutes do not expressly preempt the State tax, after considering the federal, tribal, and state interests under the Bracker balancing test, the court finds that the tax interferes with federal and tribal interests reflected in the Indian Trader Statutes. This outweighs the State's minimal interests. Thus, the State tax is preempted under the Indian Trader Statutes. Because the State's interests do not outweigh the strong federal and tribal interests under IGRA or the Indian Trader Statutes, the State contractor's excise tax is preempted under federal law."

Biggest Source of Tax Revenue in Every State.

Stacker used survey data from Pew Charitable Trusts, which analyzed tax revenue for U.S. states for the 2019 financial year. For each state, it found the biggest source of tax revenue from the following categories—personal income, corporate, general sales, selective sales, severance, licenses, and property. The data was released in June 2020.

The 50 states have carved out their own ways to collect taxes from their residents and businesses. Those states rich in natural resources collect severance taxes on oil and natural gas extraction, while Delaware trains its tax eye on corporations. Most stick to more typical personal income and sales taxes.

Nearly every state employs progressive ways of taxing the rich more than the poor, although several use flat-rate income taxes that take a much bigger relative bite out of low incomes than of big salaries. And in many states, sales taxes, the most regressive levy of all, comprise the biggest source of public revenue.

The size of tax revenues range from the enormous $188 billion collected last year by the state of California to the far more modest $1.78 billion pocketed by the state of Alaska.

People everywhere love to complain about the taxes they pay, but a survey taken this year found 48% of people thought the amount of taxes they paid were about right, and more than the 46% who thought their taxes were too high. Another 3% thought the taxes they paid were too low.

Check out the list to see what kinds of tax dollars your state collects, and how it compares with the rest of the country.

View the list.

dbrnews.com

Ellen Dewitt | Nov 13, 2020

States Go After Small Businesses on Amazon - and Sometimes Amazon - for Millions in Back Sales Taxes

The Supreme Court in 2018 gave states the power to make new rules for collecting sales taxes online. But back taxes on products sold by small businesses on Amazon's marketplace are still a major point of dispute.

Amazon is one of the nation's largest retailers in part because of its rapidly growing online marketplace, which allows small business owners to sell their products to a vastly larger group of consumers. In fact, Amazon's marketplace sales more than doubled in just three years, climbing to about $230 billion in 2019, accounting for more than half of the online giant's business.

But up until last year, many of those sales weren't taxed because the legal requirement to do so was murky. Now, some state governments are trying to recoup those taxes. But whether they're going after Amazon or small business owners themselves for that money depends upon the state.

In California, a state agency is trying to collect back taxes from Fulfilled-By-Amazon (FBA) sellers from as far back as 2012, when Amazon first opened warehouses and fulfillment centers there.

Earlier this year, Philadelphia-based FBA seller Brian Freifelder received a notice from the California Department of Tax & Fee Administration (CDTFA) warning that he could owe California up to $1.6 million in back sales tax, plus penalties and interest. (After the story made national news, the CDTFA admitted the $1.6 million estimate was "higher than it should have been," but did not let Freifelder off the hook.)

The CDTFA argues that a business owner's inventory stored for sale in California amounts to having a physical presence there, and therefore triggered the eligibility for those sales to be taxed. The action by the agency has sparked at least two lawsuits, the most recent one filed in September by the trade organization Online Merchants Guild. The guild, which represents FBA sellers, says those sales taxes should have been collected by Amazon in the first place because Amazon was the retailer. In the marketplace format, it argues, merchants are the equivalent of suppliers because they don't have control over where their products are shipped or sold.

"They [the CDTFA] have no more discretion to go after Amazon sellers than they do Black & Decker for their sales within Home Depot," said Paul Rafelson, executive director of the guild.

But California isn't alone in trying to directly collect from sellers, with Massachusetts, Minnesota, Washington and Wisconsin also sending demands for back taxes in recent years.

In South Carolina, however, the state is targeting Amazon itself. It sued the company for $12.5 million in unpaid sales tax, interest, and penalties for the first quarter of 2016 alone. An administrative law judge sided with South Carolina, but that ruling is under appeal. The state says Amazon is liable for remitting sales tax for third-party marketplace sales because customers are using Amazon's website and fulfillment services for the purchase.

Amazon said last year the ruling was without merit and hinted at the scale of the potential financial hit if other states followed this tack. "If South Carolina or other states were successfully to seek additional adjustments of a similar nature, we could be subject to significant additional tax liabilities."

Most states sought to clarify the responsibility for collecting taxes after the landmark 2018 Supreme Court ruling that allowed states to collect sales taxes from online sellers, no matter where those merchants are located. In enacting their own sales tax laws, many governments made a distinction between businesses doing direct sales to in-state consumers and those done via online marketplaces such as Amazon or Ebay.

These marketplace facilitator laws, which have been passed in 33 of the 45 sales tax states, make clear that the marketplace platform is responsible for collecting sales taxes—not the merchant who is providing the product. The intent was to keep in place protections for small business owners for whom it may be cost prohibitive to comply with dozens of different sales tax laws. For example, California's law that took effect in 2019 says that remote retailers must register to collect and remit sales tax once their annual sales into the state exceed $500,000.

But far from clearing things up, those facilitator laws have in some cases added to the confusion. In California, State Treasurer Fiona Ma criticized the CDFTA's approach, calling it "a wrong-headed and retroactive administration of the state's tax law." She argued in a letter to Gov. Gavin Newsom that the state's policy was unfair to small businesses without the ability to comply, while possibly forcing them out of business. Since then, the legislature passed another law that limited the state's look-back period to 2016 for collecting marketplace sales taxes, but that still targets sellers.

Scott Peterson, Avalara's vice president of U.S. tax policy, said that state legislatures can potentially step in to protect marketplace sellers from past tax liability. But in California, that ship has likely sailed.

"They could have let the past be the past," he said. "But instead they doubled down."

Route Fifty

By Liz Farmer

NOVEMBER 12, 2020

[Results of 2020 State and Local Tax Ballot Measures.]

[Read the Tax Analysts report.]

November 3, 2020

[State Ballot Tax Initiative Outcome Mixed; Modest Revenue Effects - Fitch]

Fitch Ratings-New York-11 November 2020: Taxes were on the ballot in a number of states in the 2020 election, and the outcome of these statewide ballot initiatives will have a modest effect on state budgets for the most part, Fitch Ratings says. Voters split in their support of taxes against a backdrop of weakening state revenues. Measures targeting narrow types of activity or those with specific funding purposes fared better.

Notably, Illinois voters rejected a graduated income tax, narrowing the state's fiscal options. This would have replaced the flat tax provided for in the state constitution and would have generated an estimated $1.3 billion in state tax revenue in the second half of the current fiscal year. Budget cuts are likely, but the state may also raise revenues, such as choosing to increase the flat income tax rate. Borrowing is already included in the enacted budget, but additional debt without mitigating structural measures could compound pressures on Illinois' IDR of 'BBB-' with a Negative Rating Outlook.

California voters also rejected a constitutional amendment, Proposition 15, or the "split roll." Had it passed, California's Legislative Analyst's Office estimated it would have increased local property taxes by $8 billion-$12.5 billion per year statewide beginning in 2025, reducing cost pressure on the state to fund schools.

In Colorado, voters approved the reduction of the state income tax rate to 4.55% from 4.63%, which is expected to reduce state revenues by $169.8 million in fiscal 2021-2022. Voters also chose to repeal the Gallagher Amendment, which currently limits residential property to no more than 45% of the total statewide property tax base by essentially reducing assessments when residential property values rise. The repeal will prevent an automatic residential property tax cut anticipated in fiscal 2022 and relieve the state from an estimated $247 million fiscal offset to school districts. Voters also approved a new tax on nicotine vaping products and an increase in existing tobacco taxes, raising fiscal 2021-2022 revenue by an estimated $175.6 million, the majority of which will initially go to K-12 education. Fitch maintains a 'AA'/Stable rating on the Colorado School Credit Enhancement Program, also known as the School District Intercept Program, or SDIP, and a 'AA-'/Stable rating on the Colorado Charter School Moral Obligation Program.

Arizona voters also supported a K-12 tax measure, approving an additional 3.5% tax on higher earners that will raise around $827 million for schools and teacher salaries. Arkansas voters made permanent a roughly $300 million 0.5% percent sales tax increase, first authorized in 2012, to fund transportation infrastructure. Oregon increased the cigarette tax by $2.00 per pack and created a 65% tax on e-cigarettes, generating around $160 million annually revenues for health initiatives and tobacco cessation efforts. The revenue will nominally alleviate pressures on the general fund's $22 billion biennial budget.

Gaming initiatives passed in Maryland, Nebraska, South Dakota and most Louisiana parishes will have a marginal effect on tax revenue. Taxes on related activity such as entertainment, food, and lodging may have secondary revenue benefits, although this is unlikely to materialize until the coronavirus is contained.

Recreational cannabis legalization passed in all states where it was on the ballot: Arizona, Montana, New Jersey and South Dakota. In addition, Mississippi approved medical marijuana. While this provides a new tax source for these states, in all cases Fitch anticipates modest effects on state budgets.

Other notable ballot initiatives, including Alaska's Measure 1 regarding fuel-production taxes, have not been called yet.

Contact:

Eric Kim
Senior Director, Head of States Ratings

+1 212 908-0241
Fitch Ratings
Hearst Tower
300 W. 57th Street
New York, NY 10019

Sarah Repucci
Senior Director, Fitch Wire
+1 212 908-0726

Media Relations: Sandro Scenga, New York, Tel: +1 212 908 0278, Email: sandro.scenga@thefitchgroup.com

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.

TAX - ALABAMA

Ex parte Department of Revenue

Supreme Court of Alabama - October 30, 2020 - So.3d - 2020 WL 6374805

Department of Revenue sought review of Tax Tribunal's judgment in favor of taxpayer, an electronic-bingo operator, in taxpayer's challenge to Department of Revenue's determination that it owed $75,000,000 in sales taxes and consumer-use taxes for operator's electronic-bingo activities for a particular four-year period.

The Circuit Court denied Department's motion for recusal but did not provide any specific rationale or reasoning. Department petitioned for a writ of mandamus.

The Supreme Court held that:

- Department was entitled to the recusal of trial judge, but
- Department was not entitled to mandamus relief in regard to its request that the case be reassigned.

Department of Revenue was entitled to the recusal of trial judge in Department's appeal of Tax Tribunal's determination that Department's $75,000,000 assessment of sales taxes and consumer-use taxes for business taxpayer's electronic-bingo activities for a particular four-year period was void; a reasonable person would question judge's impartiality in light of his recusal in earlier challenges to the tax assessments at issue as well as his recusals in other cases involving the same parties and the Supreme Court's removal of him in a case involving the same parties without the issue of recusal having been heard in the circuit court, and nothing in the record on Department's mandamus petition indicated that the reasons for recusal set forth in the previous cases did not remain.

Department of Revenue failed to demonstrate a clear, legal right to mandamus relief in regard its request that its appeal of Tax Tribunal's determination that Department's $75,000,000 assessment of sales taxes and consumer-use taxes for business taxpayer's electronic-bingo activities for a particular four-year period be reassigned, even though Department was entitled to recusal of the trial judge; Supreme Court had set forth well-established procedures for a trial judge to request reassignment of a case once he or she recused himself or herself or was disqualified, and the materials before the Supreme Court indicated that the trial judge, when having recused himself in other cases, had followed those procedures.

IRS Extends Period for Telephonic Public Hearings for Private Activity Bonds to September 2021: Holland & Knight

Because of the continuing COVID-19 crisis, the IRS has issued Revenue Procedure 2020-49 (the Revised Guidance), which extends the period during which remote telephonic hearings qualify as "public hearings" required for private activity bonds to Sept. 30, 2021. Originally, such telephonic hearings could not be held past Dec. 31, 2020.

The IRS previously released guidance in Revenue Procedure 2020-21 (the Prior Guidance), allowing remote telephonic hearings to qualify as "public hearings" required for private activity bonds under Section 147(f) of the Internal Revenue Code of 1986, as amended. (See Holland & Knight's previous alert, "IRS Provides Procedures for Telephonic Public Approval Hearings for Private Activity Bonds," May 5, 2020.)

To qualify, the hearing must be held by teleconference accessible to the residents of the approving governmental unit by calling a toll-free telephone number. That toll-free number and the procedures for calling in with comments should be published in the public notice for the hearing. In addition to this telephonic access, the approving governmental unit may also offer additional access to the hearing by other telephone numbers or by internet-based meeting technology.

The Revised Guidance applies only to hearings held telephonically – thus internet only or other non-telephonic hearings do not qualify.

The Revised Guidance applies to public hearings held from May 4, 2020, through Sept. 30, 2021.

Holland & Knight LLP

November 6, 2020

GAO Says Oversight of Opportunity Zones Could Improve.

Congress should give Treasury the authority to collect data and report on the performance of Opportunity Zones, in collaboration with other agencies, so the program can be better evaluated for outcomes such as its effect on employment or housing in the zones, the Government Accountability Office said in a report released November 9.

Read the GAO Report.

Top Questions to Ask Before Investing in an Opportunity Zone Fund.

What are the biggest questions you should ask before investing in an Opportunity Zone fund?

With many investors facing a year-end deadline for rolling over their capital gains into an Opportunity Zone investment, know which questions to ask any fund manager before writing that big check.

Continue reading.

opportunitydb.com

By Jimmy Atkinson

November 11, 2020

TAX - ALABAMA

Jefferson County Board of Education v. City of Irondale

Supreme Court of Alabama - October 23, 2020 - So.3d - 2020 WL 6235733

County board of education and several public-school employees, who worked either as public-school teachers or support staff, sought to avoid application of an occupational tax imposed by city.

The Circuit Court entered summary judgment for city. County board of education and public-school employees appealed.

The Supreme Court held that:

- Nature of services performed by employees of county board of education was not an adequate basis for excluding them from having to pay city's occupational tax;
- State-agent immunity was not a basis to find that employees of county board of education were exempt from city's occupational tax; and
- City's occupational tax neither violated statutorily mandated salary schedule for employees of local boards of education nor failed to ensure equitable pay for such employees.

Nature of services performed by public-school employees, who worked either as teachers or support workers, was not an adequate basis for excluding them from having to pay city's occupational tax; ordinance applied to all employees working in the city limits, regardless of the person's employer or place of residence, and occupational tax did not create a new or additional requirement for gaining or maintaining employment by the county board of education.

State-agent immunity was not a basis to find that employees of county board of education were exempt from occupational tax imposed by city; ordinance did not affect any government function of the county board of education, payment of the occupational tax was not related to a board employee's government responsibilities, and if the county board of education was unwilling to withhold the occupational tax for its employees, the ordinance provided a procedure for employees to independently comply with the requirements of the ordinance.

Occupational tax imposed by city ordinance neither violated statutorily mandated salary schedule for employees of local boards of education nor failed to ensure equitable pay for such employees so as to preclude occupational tax from being applied to employees of county board of education; despite argument that a difference in net wages occurred based on where employees of county board of education provided services within county, nothing in ordinance prohibited county board of education from paying employees gross wages exactly as required under the mandated salary schedule, and statute in question did not state that employees of local boards of education were otherwise exempt from local, state, or federal taxes.

The COVID-19 Pandemic Continues On and So Do Telephonic TEFRA Hearings: Squire Patton Boggs

Remember earlier this year when the novelty of working from home hadn't worn off, when every day wasn't Groundhog Day, when we hadn't run out of Netflix to watch, and when we were all concerned about how to satisfy the in-person TEFRA hearing requirement for tax-exempt private activity bonds in the midst of a pandemic and all sorts of Stay-at-Home orders? I know, that seems like decades ago!

As a refresher, on Star Wars Day,[1] the IRS responded to NABL's request for relief from the in-person TEFRA hearing requirement in the form of Rev. Proc. 2020-21. Rev. Proc. 2020-21 permits telephonic TEFRA hearings during the period between May 4, 2020 and December 31, 2020. Specifically, during this period, a governmental unit can meet the TEFRA requirement that the public hearing be held in a convenient location by affording the general public access to the hearing by toll-free telephone call.[2] It's clear that the IRS was also hoping that the COVID-19 pandemic would be all but a distant memory by the end of 2020.

Unfortunately, it looks like the COVID-19 pandemic is probably going to be with us beyond December 31, 2020. So, yesterday, the IRS issued Rev. Proc. 2020-49, which extends until **September 30, 2021** the period during which telephonic TEFRA hearings can be held in lieu of in-person TEFRA hearings. Hopefully, we won't be in quarantine until then.

Now back to your regularly scheduled stalking of election coverage.

---

[1] Or May 4, 2020 – you can choose how you want to recognize days in 2020.

[2] Never have the authors of this blog explained to so many people what a toll-free number is.

The Public Finance Tax Blog

By Taylor Klavan on November 5, 2020

Squire Patton Boggs

TAX - CONNECTICUT

American Tax Funding, LLC v. Design Land Developers of Newtown, Inc.

Appellate Court of Connecticut - October 20, 2020 - A.3d - 200 Conn.App. 837 - 2020 WL 6126558

Assignee of town municipal property tax liens against estate brought action against estate which sought the foreclosure of tax liens for one year of delinquent taxes and sought an in personam money judgment for two years of delinquent taxes.

The Superior Court granted assignee's motion for default for failure to plead, and assignee filed a motion for a default judgment regarding two counts seeking money judgment. Estate filed a motion to set aside the default and an answer. Thereafter, the Superior Court granted assignee's motion for default judgment. Estate appealed.

The Appellate Court held that:

- Estate's appeal of default judgment against it was moot because trial court lacked jurisdiction, and thus dismissal of appeal was required, and
- Mootness of appeal warranted vacatur of trial court's judgment.

Because estate was not a legal entity, default judgment against it and in favor of assignee of tax liens on estate property was a nullity, and thus, trial court lacked jurisdiction to render default judgment against estate and estate's appeal was moot and required dismissal; assignee's complaint named estate as defendant, summons listed the estate as the party served, service on the estate was executed by serving coexecutor of estate, complaint did not name any coexecutor in a representative capacity, nor did coexecutors names appear on any appellate materials in an individual capacity, all materials filed by estate were submitted under name of, or behalf of, estate, and appellate file was not replete with references to coexecutors, nor were they treated as real parties in interest.

Mootness of appeal due to trial court's entry of default judgment against estate, which was not a legal entity and lacked the capacity to be sued, warranted vacatur of trial court's order, where estate was not responsible for mootness of its appeal, and trial court's unreviewable judgment could have had preclusive effects against estate in subsequent litigation.

Webpage Will Provide Updates on TE/GE Compliance Strategies.

The IRS Tax-Exempt and Government Entities Division is launching a new webpage to keep its stakeholders up to date on its compliance strategies during the fiscal year.

TE/GE officials announced the webpage November 5 during a briefing on the division's fiscal 2021 program letter, which has been transformed from a static document to one designed to more accurately reflect evolving compliance strategies.

The new webpage is part of that approach, acting TE/GE Commissioner Edward Killen explained. It will be easily accessible through links on irs.gov, and TE/GE will announce quarterly updates to the webpage for its communities and stakeholders, he said.

"As initiatives are closed and as we close compliance strategies, we will share the accomplishments and other relevant information that resulted from those efforts," Killen said. He added that the new approach will increase flexibility and transparency and give taxpayers greater insight into TE/GE's activities, "which we feel will support voluntary compliance and stakeholder engagement."

Fiscal 2021 Priorities

TE/GE will continue working with other IRS divisions on syndicated conservation easements, abusive charitable remainder annuity trusts, and other trends, Killen said.

The division will also team up with the Large Business and International Division and the Research, Applied Analytics, and Statistics office to support compliance in the global high-wealth arena in areas of concern to TE/GE, especially regarding private foundations, retirement plans, and closely held businesses like employee stock ownership plans, Killen added.

TE/GE will continue to identify and pursue fraud and will use enhanced techniques to identify and develop civil and criminal fraud cases, including promoter investigation cases, when appropriate, according to the program letter. The division will also recommend criminal prosecution and civil penalties or injunctions against taxpayers or promoters who evade taxes.

According to acting TE/GE Deputy Commissioner Philip Lindenmuth, TE/GE will continue leveraging technology and data analytics to identify areas of noncompliance, detect emerging issues, and help the division allocate its resources for maximum effect and value. And for the first time, TE/GE will use robotic process automation to make processes more efficient and effective, he said.

The division will also be introducing a small-entity compliance initiative to address voluntary compliance challenges faced by small entities, Lindenmuth said.

Implementation of electronic filing of tax-exempt organization forms will continue as well. In fiscal 2021 TE/GE will work on e-filing for forms 990-T, 990-EZ, and 4720, Killen said.

TE/GE expects to launch an online interactive tax assistance tool in December to help taxpayers avoid making excess contributions to their 401(k) plans. There will also be an expansion of taxpayer digital communications, "which offers a secure exchange of messages and documents for taxpayers and their representatives," Killen said.

Erroneous Revocations

Killen also addressed the IRS's recent acknowledgment that it mistakenly revoked the tax-exempt status of thousands of nonprofits because of computer issues.

The revocations occurred after the IRS, responding to the COVID-19 pandemic, extended the calendar-year deadline for filing exempt organization information returns to July 15. Because of systemic limitations, the IRS couldn't update the deadline in the program that automatically issues revocation notices to organizations that have failed to file returns for three straight years. That caused some revocation notices to be issued prematurely.

Killen noted that the IRS immediately took steps to solve the problem, including by making sure that erroneously revoked entities are still listed as exempt and by communicating directly with affected taxpayers.

"Taxpayers should not be adversely impacted by this administrative error," Killen said.

TAX ANALYSTS

by FRED STOKELD

POSTED ON NOV. 6, 2020

Tax Exempt & Government Entities FY 2021 Program Letter: NABL

The Tax Exempt & Government Entities (TE/GE) FY 2021 Program Letter has been released.

It captures priorities for new fiscal year. TE/GE will also use their new Compliance Program and Priorities webpage to provide information about additional priorities at the end of each quarter during the fiscal year.

FY 2021 compliance program and priorities align with the IRS Strategic Goals:

- Strengthen Compliance Activities
- Improve Operational Efficiencies
- Maintain a Taxpayer-Focused Organization
- Ensure Awareness and Collective Understanding
- Leverage Technology and Data Analytics
- Develop Our Workforce

They will release a summary of FY 2020 accomplishments when all the data is available. You can also view the annual program and accomplishment letters for previous years.

————————————
Jessica Giroux
National Association of Bond Lawyers
Washington, DC
(202) 503-3300

The Surprising Durability of OZ Multifamily in a Pandemic, with Pete LaMassa.

What are the biggest questions on the minds of Opportunity Zone investors? And what have been some of the most surprising real estate market outcomes from the coronavirus pandemic?

Pete LaMassa is Opportunity Zone deal captain and managing director at Bridge Investment Group, a vertically integrated real estate private equity firm with a $1 billion Opportunity Zone strategy.

Click the play button below to listen to my conversation with Pete.

Continue reading.

opportunitydb.com

By Jimmy Atkinson

November 4, 2020

TAX - LOUISIANA

D90 Energy, LLC v. Jefferson Davis Parish Board of Review

Supreme Court of Louisiana - October 20, 2020 - So.3d - 2020 WL 6145158 - 2020-00200 (La. 10/1/20)

Local tax board sought judicial review of decision by state tax commission, which reversed tax board decision affirming ad valorem property tax assessments against taxpayer and ordered reimbursement of taxes paid under protest.

The District Court affirmed the commission's decision. Tax board appealed. The Third Circuit Court of Appeal reversed and vacated. Taxpayer petitioned for writ of certiorari.

The Supreme Court held that:

- Tax Commission had the authority to receive supplementary evidence to aid in its valuation of taxpayer's wells;
- Tax Commission was not arbitrary and capricious by relying on the purchase price of wells to establish their fair market value;
- The specific provision for valuing oil and gas wells applied rather than the general provision applicable to "all property";
- A preponderance of the evidence existed to support Tax Commission's finding that sale of wells was a valid arms length transaction, and that the fair market value of the wells was $235,000;
- Sufficient evidence existed to establish shut-in status of two gas wells, as required to entitle tax payer to a 90 percent reduction; and
- Taxpayer was not required to make payment under protest to obtain review of ad valorem tax assessments.

The Tax Commission, on review of taxpayer's unsuccessful protest of ad valorem tax assessments on two gas wells and one salt water disposal well to the board of review, had the authority to receive supplementary evidence to aid in its valuation of the wells; regulation established by the Commission that governed appeals to the Commission expressly contemplated "new" evidence being presented to the Commission, and there was no accompanying prohibition against the receipt of new evidence.

Tax Commission was not arbitrary and capricious by relying on the purchase price of two gas wells and one salt water disposal well to establish their fair market value for purposes of calculating ad valorem tax; the Commission's regulation permitted it to consider the sale in determining fair market value.

On appeal from ad valorem tax appraisal on two gas wells and one salt water disposal well, the specific provision for valuing oil and gas wells applied rather than the general provision applicable to "all property."

A preponderance of the evidence existed to support Tax Commission's finding that sale of two gas wells and one salt water disposal well was a valid arms length transaction, and that the fair market value of the wells for purposes of calculating ad valorem taxes for three tax years was $235,000; a $100,000 cancelled check dated the same day as the sale supported that amount as the purchase price, which was further documented through e-mails, taxpayer's president testified under oath that he paid $100,000 for the property, that the property had been listed on the open market, and that the sale was fairly negotiated, and the plug and abandon cost of $45,000 per well was established by uncontroverted testimony.

Sufficient evidence existed to establish shut-in status of two gas wells, as required to entitle tax payer to a 90 percent reduction in ad valorem taxation for the tax year in which the wells were shut-in; taxpayer presented testimony of a production gauger to prove the wells were shut in, and while the assessor claimed he relied on Department of Natural Resources report showing production from the wells for tax year in question, the production gauger explained that resulted from another company introducing gas into taxpayer's pipeline, and not from taxpayer's wells.

Taxpayer was not required to make payment under protest to obtain review of ad valorem tax assessments, and the assessor's judicial challenge to the Tax Commission's valuation did not create an obligation for taxpayer to protest a tax it agreed with.

TAX - NORTH DAKOTA

[RFM-TREI Jefferson Apartments, LLC v. Stark County Board of Commissioners]

Supreme Court of North Dakota - October 21, 2020 - N.W.2d - 2020 WL 6157021 - 2020 ND 204

Commercial property taxpayers appealed county board of commissioners decision denying their applications for tax abatements or refunds of taxes paid on apartment and hotel properties.

The District Court affirmed, and taxpayers appealed.

The Supreme Court held that:

- Board could not adopt assessment in light of assessor's concession that the assessed value exceeded the market value of the properties, and
- Board did not violate taxpayers' due process rights at hearing.

County board of commissioners could not adopt tax assessor's assessment of apartment and hotel properties in light of assessor's concession that the assessed value exceeded the market value of the properties; assessor conceded the properties could not have sold for the value they were assessed, such that their market value was less than their assessed value, and, as properties were commercial properties, their market value was synonymous with their true and full value.

County board of commissioners did not violate commercial taxpayers' due process rights when it considered taxpayers' information presented in written form and orally summarized by counsel and gave terse responses to their requests concerning the hearing format and time limitations, where board held a special hearing and did not restrict the taxpayers' time to present their case or their manner of doing so.

[The 2020 Election and Opportunity Zones, with Mike Novogradac and John Sciarretti.]

What impact will the 2020 election have on the Opportunity Zones incentive? Expect major changes if Joe Biden is elected, and potential expansion of the program if Donald Trump wins reelection. The balance of power in the Senate should have an impact as well.

Mike Novogradac is the managing partner of Novogradac, a top 50 accounting firm founded in 1989. John Sciarretti is chair of the Novogradac Opportunity Zones conferences and leader of the Novogradac Opportunity Zones Working Group.

[CONTINUE READING »]

Understanding Opportunity Zone Investments in Multifamily Projects.

Baker Tilly's podcast series specifically for professionals in the multifamily housing industry.

On this episode, multifamily housing leaders and hosts, Don Bernards and Garrick Gibson, speak to Executive Vice President of Baker Tilly Capital, Mike Fitzpatrick, on Opportunity Zones (OZ). They discuss the types of projects that are attractive to investors in the current market, the general underwriting benchmarks sponsors should be aware of, and how the election is impacting OZ equity.

If you have large capital gains, Mike will share some options for getting into an investment and how you can factor the value of OZ benefits into your investment analysis.

Listen to the Podcast.

We Heard You Missed Us – We're Back! To Talk about Business Days: Squire Patton Boggs

It's fall, and that means two things. Pumpkin spice everything, and a calendar that's replete with holidays – Sukkot, Halloween, Thanksgiving, and Sweetest Day[1] to name but a few. Diligent readers of The Public Finance Tax Blog will remember that we previously posted an exhaustive analysis of the "hold-the-offering-price-method" of establishing the issue price of tax-exempt bonds (the "HTOP Method"). These same readers no doubt remember Treasury regulation § 1.148-1(f)(2)(ii)(B), which requires that the underwriter agree in writing neither to offer nor sell a bond to which the HTOP Method will apply at a price that is higher than the bond's initial offering price to the public for a period that begins on the sale date of the issue and that ends on the close of the fifth business day after the sale date.[2]

These readers are now perhaps wondering whether, given the surfeit of autumnal holidays, they have correctly counted the number of business days to achieve a successful invocation of the HTOP Method. Don't worry; we're here to help.

Continue Reading

The Public Finance Tax Blog

By Michael Cullers on October 19, 2020

Squire Patton Boggs

GAO Offers Recommendations on Exempt Hospital Oversight.

To ensure that nonprofit hospitals provide sufficient benefits to their communities to justify their tax-exempt status, Congress should clarify what requirements must be met and the IRS should improve its oversight, according to the Government Accountability Office.

In a report released October 19, the GAO noted that it's difficult for the IRS to verify community benefits because the Affordable Care Act, which established requirements under section 501(r) to help ensure nonprofit hospitals help their communities, is vague about the types of activities that qualify. Further, the IRS lacks the authority to specify such activities, the report says.

The unclear standards and the IRS's implementation of them provide exempt hospitals "with broad latitude to determine the nature and amount of community benefits they provide," the report says.

"The lack of clarity makes it difficult for IRS to ensure that hospitals receiving a tax exemption undertake services and activities that provide benefits to the communities in which they operate," the GAO said. "Additional clarity in the [tax code] about specific services and activities Congress believes would provide sufficient community benefits could improve IRS's ability to oversee tax-exempt hospitals."

However, T.J. Sullivan of Faegre Drinker Biddle & Reath LLP was skeptical that Congress would act to clarify the meaning of community benefit or give Treasury and the IRS authority to do so. "Experience tells me this idea is headed for Sleepy Hollow," he said.

Improving Oversight

In the meantime, the GAO offered the IRS several suggestions for improving oversight.

For one, the IRS could revise the Form 990 Schedule H, "Hospitals." According to the report, the schedule asks for community benefit information inconsistently, resulting in uncertainty about the benefits hospitals provide. The form directs hospitals to describe how they've addressed three of the factors in the community benefit standard but not the other three, the report notes.

This reporting approach, the GAO said, could lead to incomplete information on how hospitals are providing community benefits, among other consequences.

A revised Schedule H "that enables tax-exempt hospitals to present community benefit information clearly, consistently, and comprehensively could help IRS, Congress, and the broader public better understand the full scope of the community benefits a hospital provides and whether the benefits sufficiently justify a tax exemption," the report says.

The IRS should also consider requiring nonprofit hospitals to report their community benefit expenses by facility rather than at the hospital organization level, the GAO said.

Otherwise, the IRS "may be missing an opportunity to collect information that would more clearly and transparently demonstrate the benefits tax-exempt hospitals provide to the communities in which they operate," the report says. "This information, in turn, would allow Congress, IRS, and the public to weigh the costs and benefits of the hospital's tax exemption."

But Sullivan noted that the IRS pointed out in the report that the information in Form 990 is based on entire organizations, not necessarily facilities or systems of related organizations.

Also, it took years for hospitals and their accounting firms to get comfortable with Schedule H reporting, and changing the whole approach would be challenging, said Sullivan, who was IRS special assistant for healthcare from 1989 to 1996 and a senior GAO evaluator from 1979 to 1984.

"For those of us advising tax-exempt hospitals, this one bears watching," Sullivan remarked.

Other Recommendations

To further improve IRS oversight of community benefit requirements, the report calls on the agency to establish a well-documented process for identifying hospitals at risk of noncompliance with the community benefit standard that would ensure hospitals' community benefit activities are being reviewed consistently.

Specific audit codes for identifying potential noncompliance with the community benefit standard should also be established, the GAO said.

The IRS agreed with all the report's recommendations.

TAX ANALYSTS

by FRED STOKELD

POSTED ON OCT. 20, 2020

Biden Win Could Spark Revamp Of Opportunity Zone Program.

Democratic lawmakers are rallying behind former Vice President Joe Biden's drive to reshape requirements for opportunity zones, which could spark a revamp of the program to deliver more benefits to low-income residents should Biden win the election.

Key Democrats in both the Senate and the House said if their party wins control of the White House and both chambers of Congress, they want to work with Biden to try to reshape parameters for the nation's 8,700 opportunity zones authorized under the 2017 Tax Cuts and Jobs Act .

But they also made clear contentious disputes over the scope of potential restrictions on the zones and their projects would need to be settled in both chambers if such legislation is to be advanced as part of a 2021 stimulus package or a broader tax measure aimed at reshaping the 2017 tax overhaul.

In the House, Rep. Karen Bass, D-Calif., chair of the Congressional Black Caucus, predicted there would be a strong drive in the next Congress to reshape opportunity zones if Democrats win the White House, driven by Biden and allies in Congress including Majority Whip Jim Clyburn, D-S.C.

"Reforming opportunity zones is a big priority. There have been gaps in the opportunity zone that have allowed gentrification to increase. There just needs to be more guardrails on it," Bass told Law360.

Clyburn told Law360 that several Democrats were concerned the benefits of the program go primarily to investors and developers rather than the people who live in the areas that the program is supposed to help.

With an eye to addressing these concerns, Biden has called for new requirements for opportunity zone funds and investors to disclose data on investments and community benefits, stronger oversight by the U.S. Department of the Treasury and incentives for opportunity funds to team up with nonprofits on projects to create jobs and help low-income residents.

In addition to Biden's general goals, Clyburn and Bass made clear they hoped to revive parts of H.R. 5042, legislation that Clyburn introduced in November known as the Opportunity Zone Reform Act. The bill would bar stadiums, self-storage facilities and residential rental housing projects aimed mainly at higher-income tenants from qualifying for the program and exclude census tracts with a median family income exceeding 120% of the national median family income from being designated as opportunity zones.

Sen. Ron Wyden, D-Ore., ranking member on the Senate Finance Committee, has offered S. 2787, the Opportunity Zone Reporting and Reform Act, which would impose restrictions similar to those in Clyburn's bill. But he also made clear he was open to developing other ideas in the next Congress.

"I want to do what fixes the problem," Wyden told Law360.

Under the program, investors can defer taxes on capital gains invested in opportunity zone funds and businesses. Gains on the opportunity zone investments can be earned tax free if the investments are held at least 10 years.

Currently, opportunity zones are limited, for the most part, to qualified census tracts with a poverty rate of more than 20% or a median family income that does not exceed 80% of the median family income for the state or surrounding metropolitan area. But there is an allowance for 5% of a state's opportunity zones to be census tracts contiguous to low-income communities as long as such a census tract's median family income does not exceed 125% of the adjoining low-income community's median family income.

A study by the Economic Innovation Group, a bipartisan public policy organization, found a proposal in the Wyden and Clyburn bills to set a qualification cap at 120% of national median family income would exclude about 30 census tracts with higher median incomes that have been designated as opportunity zones under the exemption for contiguous tracts. Proponents argue the new standard would help direct more investment to low-income communities.

Republicans, for their part, have backed President Donald Trump's efforts to promote opportunity zones and defended the program against some Democratic plans to reshape it. For example, Sen. Jim Lankford, R-Okla., a member of the Finance Committee, said he was skeptical of tighter restrictions that could affect private investment in projects in existing opportunity zones.

"Those are folks looking for ways to be able to just mess with the opportunity zones. I would look at it, and see what the proposal is," Lankford said.

While opposing immediate changes to economic criteria for the zones, Lankford said he would be open to the idea of reshaping such standards "when there is a new set of census tracts" based on 2020 census data, "to make sure we are dealing with the highest-need areas."

Chris McCannell, a senior government relations consultant for GrayRobinson PA and an adviser to the Opportunity Funds Association, which represents funds with stakes in opportunity zones, said proposals by Wyden and Clyburn to screen existing opportunity zones based on national median family income could divide the two parties in the next Congress.

"If Democrats control the House and Senate and there's a Democratic administration, it could get some traction. But this could create complexity for current and future projects at a time when investment is needed to recover from the [COVID-19] pandemic," McCannell told Law360.

McCannell predicted GOP lawmakers would push back against proposals for major changes such as a new median income standard and a ban on certain types of projects, including stadiums.

"Changes like these would likely face opposition from Republicans, who believe they would infringe on the program's ability to live up to its full potential," McCannell said.

Stan Veuger, a resident scholar at the American Enterprise Institute, said a tougher median family income standard for opportunity zones would "eliminate some of the most egregious contiguous opportunity zones in big coastal metropolitan areas" but could also make the program "inaccessible to pockets of poverty surrounded by gentrified neighborhoods."

In light of such concerns, Sen. Ben Cardin, D-Md., a senior member of the Finance Committee, said he doubted there would be consensus support for a plan to reset the median family income cap.

"It's very hard to surgically draw it without adversely affecting some communities" that already depend on the program, Cardin told Law360.

Cardin said he believed lawmakers would need to take care in drafting any restrictions on projects to ensure there are no unintended effects on efforts to create jobs in low-income communities. For example, he said he was hopeful any restrictions on projects would not affect potential development in an opportunity zone near Pimlico Race Course in Baltimore.

While lawmakers continue to discuss restrictions on opportunity zones and on projects, Sen. Cory Booker, D-N.J., said he believed there was an opening to rally bipartisan support for efforts to encourage Treasury to develop forms for the collection of data on investors and investments in opportunity zones, and on the impact of projects in the zones.

Lawmakers in both parties have examined the program's regulations, promoted investments in the zones to address the pandemic's fallout and encouraged the Internal Revenue Service to provide flexibility for qualified opportunity funds and investors.

Booker said he hoped to work with Sen. Tim Scott, R-S.C., a member of the Finance Committee, and other lawmakers to promote a bipartisan proposal sponsored by Scott, S. 2994, that would require qualified opportunity funds and investors in the funds to file annual reports with data on investments and investors.

Rep. Ron Kind, D-Wis., a senior tax writer as a member of the House Ways and Means Committee, has backed a similar bipartisan proposal. It would require Treasury to make annual reports on qualified opportunity funds and to expand that report in the sixth year after enactment to include data on the impacts and outcomes of opportunity zones, including data on job creation, poverty reduction and new business starts.

"The reporting is critical," Booker told Law360. "There are so many projects. We need to stop the abuses to the program. But we need to expand the opportunity there to create more jobs and investment."

Law 360 Tax Authority

By Alan K. Ota · October 20, 2020, 4:58 PM EDT

–Editing by Robert Rudinger and Vincent Sherry.

How Regional EDA Groups Can Leverage Opportunity Zones, with Chad LaComb.

How can a regional economic development planning commission help their communities leverage their Opportunity Zone designations? Invest Acadiana serves as…

CONTINUE READING »

TAX - PENNSYLVANIA

Lohr v. Saratoga Partners, L.P.

Supreme Court of Pennsylvania - October 1, 2020 - A.3d - 2020 WL 5823332

Property owners filed petition to redeem property that had been sold in an upset tax sale.

The Court of Common Pleas denied the petition. Owners appealed, and the Commonwealth Court affirmed. Owners sought discretionary review, which was granted.

The Supreme Court held that:

- Equal protection challenge to the omission of a post-sale right of redemption from the Real Estate Tax Sale Law (RETSL) was subject to rational basis review, rather than strict scrutiny;
- Legislature had a legitimate interest in enacting provision of RETSL barring redemption of property after an upset tax sale; and
- Legislature's decision to include a post-sale redemption remedy in Municipal Claims and Tax Liens Act (MCTLA) but not in RETSL did not violate equal protection.

Property owners' asserted right to redeem property after an upset tax sale was not a fundamental constitutional right, but a statutory remedy provided as part of the legislative tax collection process, and thus owners' equal protection challenge to the inclusion of that right in the Municipal Claims and Tax Liens Act (MCTLA), which applied to two large urban counties in the state, but not in the Real Estate Tax Sale Law (RETSL), which applied in the county in which their property was located, was subject to rational basis review, rather than strict scrutiny.

Legislature had a legitimate interest in enacting provision of Real Estate Tax Sale Law (RETSL) barring redemption of property after an upset tax sale, for purposes of property owners' equal protection challenge to legislature's omission of the post-sale redemption remedy from the RETSL while including it in the Municipal Claims and Tax Liens Act (MCTLA); purposes of the RETSL were to expedite the collection of delinquent real estate taxes, to retain the productivity of the real estate, and to maintain economic value, which were legitimate state interests.

Legislature's decision to include a post-sale redemption remedy in Municipal Claims and Tax Liens Act (MCTLA), which applied to two large urban counties, but not in Real Estate Tax Sale Law (RETSL), which applied to most other counties, was rationally related to legitimate government purpose of expediting collection of delinquent real estate taxes, and thus distinction did not violate equal protection; lack of a redemption provision in RETSL ensured certainty and finality for tax sales, which, in turn, likely encouraged higher bids based on the greater security provided to the purchaser, RETSL provided greater pre-sale protections than MCTLA, and state constitution specifically granted legislature power to classify counties according to population.

University Research Parks and Opportunity Zones, with Brian Darmody.

Can university research parks, incubators, and accelerators catalyze innovation in Opportunity Zones?

Brian Darmody is CEO of the Association of University Research Parks (AURP). Many of AURP's member institutions are located in Opportunity Zones.

Click the play button below to listen to my conversation with Brian.

Continue reading.

OpportunityDb

By Jimmy Atkinson

October 14, 2020

Group Seeks Extension of Relief for Issuers of Tax-Exempt Bonds.

SUMMARY BY TAX ANALYSTS

The Rhode Island Health and Educational Building Corporation has asked Treasury and the IRS to extend to at least December 31, 2021, the temporary COVID-19 relief provided in Rev. Proc. 2020-21 regarding the public approval requirement under section 147(f) for tax-exempt qualified private activity bonds.

FULL TEXT PUBLISHED BY TAX ANALYSTS

October 7, 2020

David J. Kautter
Assistant Secretary
Office of Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Michael J. Desmond
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Krishna Vallabhaneni
Tax Legislative Counsel
United States Department of the Treasury
1500 Pennsylvania Avenue, NW, Room 3044
Washington, DC 20220

Re: Extension of COVID-19 Relief for Issuers of Tax-Exempt Bonds

Dear Mr. Kautter, Mr. Vallabhaeni, and Mr. Desmond:

The widespread outbreak of the novel coronavirus disease (the "COVID-19 Pandemic") is the subject of an ongoing emergency declaration made by the President of the United States pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act on March 13, 2020. The COVID-19 Pandemic has also been, and continues to be, the subject of numerous emergency declarations by state and local governments. The COVID-19 Pandemic prompted state and local governments to severely limit or, in some cases, prohibit in-person gatherings by members of the general public.

In response to the COVID-19 Pandemic, Revenue Procedure 2020-21 ("Rev. Proc. 2020-21"), effective May 4, 2020, provides temporary guidance regarding the public approval requirement under §147(f) of the Internal Revenue Code for tax-exempt private activity bonds. Rev. Proc. 2020-21 provides that for the period ending on December 31, 2020, hearings held by teleconference that are accessible to the residents of the approving governmental unit by calling a toll-free telephone number will be treated as held in a location that, based on the facts and circumstances is convenient for residents of the approving governmental unit for the purpose of §1.147(f)-1(d)(2) of the Treasury Regulations.

The same factors that led to the temporary relief provided in Rev. Proc. 2020-21 continue to exist in many jurisdictions, including Rhode Island. Even in areas where explicit restrictions have been relaxed, members of the public generally have been encouraged to continue to practice social distancing, and, while personal choices vary, certain members of the public continue to limit engagement with others. Still others are required to quarantine in their homes after potential exposure to those with confirmed cases of COVID-19.

Accordingly, we respectfully request that the time period for the temporary relief provided in Rev. Proc. 2020-21 be extended to at least December 31, 2021.

If you have any questions, please contact Kim Mooers at 401-831-3770, or through email at kmooers@rihebc.com

Sincerely,

Kimberly Mooers
Executive Director
Rhode Island Health and Educational Building Corporation
Providence, RI

CC:
Helen M. Hubbard, Associate Chief Counsel, Financial Institutions & Products, Internal Revenue Service
Melissa Moye, Director, Office of State and Local Finance, U.S. Department of the Treasury
Johanna Som de Cerff, Acting Branch Chief, Internal Revenue Service
Zoran Stojanovic, Assistant to the Branch Chief, Internal Revenue Service
Brett York, Acting Deputy Tax Legislative Counsel, U.S. Department of the Treasury

WAS THIS ARTICLE HELPFUL?

California Supreme Court Will Hear Bay Area Tolls Case.

The California Supreme Court will consider whether a bridge toll increase in the San Francisco Bay Area was an unlawfully approved tax.

According to an October 16 release by the supreme court, justices accepted review of the appellate court's decision in *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority* on October 14, but deferred briefing until it rules on a separate case, *Zolly v. City of Oakland*, which addresses a similar question.

In July 2018 the tax watchdog group Howard Jarvis Taxpayers Association challenged the June 2018 passage of Regional Measure 3, a ballot measure to increase tolls on San Francisco Bay Area bridges by $1 in 2019, 2022, and 2025, for a cumulative increase of $3. The toll increase was promoted as a means to raise revenues for local transportation improvements in the region. The measure was approved with a 55 percent majority of voters in the nine-county Bay Area, but the association alleged in its suit that the toll increase is actually a tax under state law that thus required a two-thirds vote of approval.

The association notes that the tolls will be spent on a wide range of transportation improvements in the region that will be used by payers and nonpayers of the toll increase alike. It argues that under state law, the fee amount and the use of its revenue must be closely related to the benefit or service it's charged for, or else it's a tax. The group claims that the toll revenue is being used too broadly to qualify as a fee for bridge use.

California law "classifies an exaction as a 'fee' if it is charged for goods or services delivered to the payer," or mitigates harm caused by a payer, Tim Bittle, director of legal affairs for the Howard Jarvis association, wrote in a September 2018 newsletter explaining the group's position. "A 'tax,' on the other hand, raises revenue for government programs and policies without requiring any direct nexus between the payer and the use of the funds."

Both the San Francisco County Superior Court and the California First Appellate District ruled against the association. However, the supreme court's decision to hear the case means justices are willing to consider its arguments.

Randy Rentschler of the Bay Area's Metropolitan Transportation Commission told Tax Notes October 16 the supreme court's decision to review the case is disappointing, and that the legal uncertainty threatens key transportation projects in the region. He said the 2018 measure was the third of such measures approved since 1988.

"In the past, no one took it to court," Rentschler said, arguing the group's claim that the toll increase is a tax is erroneous. But voters in 2010 approved Proposition 26, which treats more levies as taxes under state law. According to Rentschler, however, judges have agreed that the toll is not a tax under Proposition 26. "We've had two courts look at this and ruled against them."

The issue in the case is similar to the one in *Zolly v. City of Oakland*, which the supreme court will hear first. That case involves a dispute over whether Oakland's waste management franchise fees are unlawfully approved taxes. A separate panel of the California First Appellate District Court in March determined that the fees were taxes because they weren't reasonably related to the value of the franchise rights for which they're charged.

The appellate court's ruling in *Bay Area Toll Authority* and the *Zolly* opinion conflict with one another. At issue is language in Proposition 26 that amended the state constitution to restrict the types of charges that aren't considered taxes and therefore don't require a two-thirds majority vote to pass. The amendment created a list of such charges and included in the criteria for several that they be based on the actual cost to the government of the service for which the fee is charged. But the criteria for the type of charge that encompasses bridge tolls and franchise fees — charges for entrance, use, purchase, rental or lease of government property — lacks that wording.

However, the law also contains a general provision burdening government with proving that a charge is not a tax, including that its amount is linked to the cost of the service it's charged for, "and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity."

The appellate court in *Bay Area Toll Authority* determined that the absence of any reference to a cost relationship in the list's description of charges for entrance or use of government property means the general provision doesn't apply to that particular type of fees. The *Zolly* court, in contrast, determined that the general provision means that all nontax levies on the list must be linked to the cost of the service to the government, regardless of whether the specific description of each one on the list says so or not.

Bittle told Tax Notes October 16, "We're encouraged the supreme court has granted review" of Bay Area Toll Authority, and "we believe the court of appeal in *Zolly* got it right."

"Everything about Prop. 26 was intended to narrow the field of fees and expand the universe of taxes so that more things would require a two-thirds majority approval," Bittle said.

In *Howard Jarvis Taxpayers Assn. v. Bay Area Toll Authority*, the Howard Jarvis association and plaintiffs are represented by the group's attorneys; the Bay Area Toll Authority is represented by attorneys with the Metropolitan Transportation Commission and Orrick, Herrington & Sutcliffe LLP; the State Legislature is represented by attorneys with the Office of Legislative Council and Olson Remcho LLP; and the Metropolitan Transportation Commission is represented by its own counsel and Orrick, Herrington & Sutcliffe LLP.

TAX ANALYSTS

By PAUL JONES

POSTED ON OCT. 20, 2020

TAX - CONNECTICUT

Town of Redding v. Georgetown Land Development Company, LLC

Supreme Court of Connecticut - September 21, 2020 - A.3d - 2020 WL 5637649

Town, water pollution control commission, and fire district brought action to foreclose municipal tax liens against, among other lienholders, assignee of real estate tax liens originally levied by special taxing district created to finance development project.

Town and fire district filed motions for partial summary judgment with respect to priority, asserting that their tax liens had priority over the tax liens that assignee had acquired from taxing district. Assignee also moved for partial summary judgment.

The Superior Court granted plaintiffs' motions for partial summary judgment and denied that of assignee, and the Superior Court subsequently rendered a judgment of strict foreclosure in favor of town and fire district. Assignee appealed from both orders, and appeal was transferred to the Supreme Court.

The Supreme Court held that:

- Assignee’s liens were subordinate to town’s liens, but
- Assignee’s liens were superior to those of fire district.

In priority dispute over real estate tax liens held by different municipal entities on the same property, tax liens held by assignee, which were originally levied by special taxing district created to finance development project, were subordinate to tax liens held by town; it was undisputed that district’s assignment of tax liens to assignee did not affect priority of those liens, priority clause of special act of legislature that created district for this project provided that district’s lien for unpaid taxes “shall take precedence over all other liens or encumbrances except a lien for taxes of the town,” use of word “except” indicated legislature’s intent to remove town’s tax liens from class of liens over which district’s liens had priority, and review of other statutes addressing lien priority indicated that legislature intended phrase “except a lien for taxes of the town” in priority clause to convey, not just absence of priority over town’s liens, but subordination to them.

In priority dispute over real estate tax liens held by different municipal entities on the same property, tax liens held by assignee, which were originally levied by special taxing district created to finance development project, were superior to those of fire district; it was undisputed that taxing district’s assignment of tax liens to assignee did not affect priority of those liens, priority clause of special act of legislature that created taxing district for this project provided that taxing district’s lien for unpaid taxes “shall take precedence over all other liens or encumbrances except a lien for taxes of the town,” and by listing town’s tax liens as the only type of lien that was not inferior to taxing district’s liens, legislature was presumed to have intended to exclude all other types of liens and encumbrances, including tax liens held by fire district, such that fire district’s liens were inferior to taxing district’s liens.

Opportunity Zone Rule Change Seeks to Entice Foreign Investors.

IRS considering new rules for overseas investors who want to reap benefits from the tax program

Potential changes to the rules for Opportunity Zones could soon allow some foreign investors to reap major tax benefits from the program.

The Internal Revenue Service is considering new rules pertaining to foreign investors’ ability to defer capital gains in the Opportunity Zones program. The new regulations could be released in December, according to the White House Office of Management and Budget. The extent of the changes is unclear, but experts predict they will be geared toward giving foreign investors more clarity on their tax liabilities.

Bloomberg Tax first reported the news.

Both Democrats and Republicans have been targeting Opportunity Zones. President Donald Trump claims the initiative has helped uplift Black and Latino communities, while Democratic presidential candidate Joe Biden said he wants to reform the program to ensure it’s being used to help distressed areas.

Continue reading.

The Real Deal

By Keith Larsen

September 25, 2020

[State and Local Tax Ballot Measures to Watch on Election Day 2020.]

[Read the report.]

October 5, 2020

[Announcing OZ Pitch Day 2020, an Online Investor Matchmaking Event.]

If you're an investor with capital gains, how can you find your Opportunity Zone investment and get invested before the end of this year? Today I'm officially launching the OpportunityDb OZ Pitch Day 2020 Online Event.

OZ Pitch Day will take place on Tuesday, November 17, 2020 and will feature roughly one dozen Qualified Opportunity Funds.

[Continue reading.]

Opportunitydb.com

By Jimmy Atkinson

October 7, 2020

TAX - DISTRICT OF COLUMBIA

[Jaswant Sawhney Irrevocable Trust, Inc. v. District of Columbia]

District of Columbia Court of Appeals - September 3, 2020 - A.3d - 2020 WL 5250476

Property owner appealed from decision of the District of Columbia Office of Tax and Revenue (OTR) that denied application for real property tax exemption.

The Superior Court dismissed for failure to state a claim. Property owner appealed.

The Court of Appeals held that:

- Property owner was not required to be the same legal entity as the Gurdwara's congregation in order to qualify for a property tax exemption for a church building;
- Sikh Gurdwara, owned by nonprofit charitable corporation and operated in an auxiliary nature by that same organization, could satisfy the concurrent ownership and use requirement for a property tax exemption for a church building;
- Property owner's statement, that the property since its purchase had been dedicated to the identical purpose of the prior owner, was insufficient to establish that the prior owner continued to

operate the Gurdwara, and thus, that the current property owner would not qualify for the exemption; and
- Property owner's claim could not be defeated on the basis property owner could have been characterized as doing more to serve another cause in the public interest on a not-for-profit basis.

Fitch: Mortgage Delinquencies Will Not Notably Affect Property Tax Payments

Fitch Ratings-New York-29 September 2020: Fitch Ratings does not expect fiscal 2021 property tax collections to be meaningfully affected by mortgage forbearance programs or delinquencies, but potential for timing delays is elevated. Mortgage servicers are obligated to advance property taxes when a borrower is not making mortgage payments and, due to the elevated number of delinquent loans and loans in forbearance, servicer liquidity is critical. Unemployment levels remain high, and Fitch expects a slower economic recovery following a third-quarter 2020 bounce back. In the absence of further federal aid, mortgage delinquencies may increase, placing greater pressure on mortgage servicers.

Property taxes have traditionally been a stable and predictable source of revenues for local governments, moderating higher volatility in more economically sensitive taxes, service charges and state aid. Overall property tax collections saw minimal declines during the Great Recession despite widespread mortgage defaults and foreclosures.

Home prices are still rising, as detailed in our U.S. RMBS Sustainable Home Price Report (Second-Quarter 2020), although growth is decelerating. Mortgage delinquencies, excluding mortgages in foreclosure, declined in August to 6.9%, but the rate of decline was slower than in the previous two months, according to Black Knight. The states with the highest delinquency rates were Mississippi, Louisiana, Hawaii, New York and Florida. During the Great Recession, the total delinquency rate peaked at 10.6%.

Forbearance has been offered in greater numbers than during the Great Recession but is trending downward from its peak in June. The share of mortgages in forbearance was 6.87% as of September 20, per the Mortgage Bankers Association. Mortgages in forbearance are generally reported as delinquent, although some borrowers with loans in forbearance are still making payments on time.

A few local governments postponed property tax deadlines or waived late payment fees for payers who can demonstrate they are affected by the coronavirus. Property tax delays are predictable and allow officials to plan for alternate sources of liquidity until tax payments are received. In contrast, an inability by servicers to advance payments to governments could cause an unexpected short-term liquidity shortfall. Almost all Fitch-rated local governments have sufficient liquidity, through internal resources, cash management tools or access to the short-term market, to offset this risk, which is reflected in higher ratings. Those local governments with weaker liquidity tend to be rated low investment-grade or non-investment grade.

A majority of US mortgages are pooled in securitizations as a tool for financing the loans. US mortgage servicers for private residential mortgage-backed securities (RMBS), Government National Mortgage Association (GNMA) RMBS, or Fannie Mae and Freddie Mac (Government Sponsored Enterprises, or GSEs) RMBS, are required by transaction documents or servicing guidelines to advance property taxes for delinquent borrowers to preserve the lien position, and did so even through the 2007-2008 housing crisis. Servicers of GSE and GNMA loans are also incentivized to continue to advance principal and interest (P&I) and taxes and insurance (T&I) to maintain their relationships with GSEs and GNMA, which guarantee mortgage performance. Mortgages guaranteed by the GSEs comprise 60%-70% of the mortgage market, while the remainder is mainly held by bank and credit union portfolios.

While most banks are unlikely to face near-term difficulties with advancing requirements, nonbank servicers, which have weaker credit profiles, are more challenged as they have greater loan exposure by dollar amount than banks. In response, master servicers, the GSEs and GNMA increased oversight of nonbank primary servicers to ensure servicer continuity and continued payments of P&I and T&I.

Many nonbank servicers secured additional lines of credit to make advances, and diversified entities benefitted from the GSE's four-month limit on the obligation to advance P&I. So far, servicers have shown adequate liquidity to advance missed payments, and T&I are generally a smaller percentage of total monthly payments and do not materially add to servicers' advancing obligations.

Contacts:
Amy Laskey
Managing Director, US Public Finance
+1 212 908 0568
Fitch Ratings, Inc.
Hearst Tower
300 W. 57th Street
New York, NY 10019

Michael Rinaldi
Senior Director, US Public Finance
+1 212 908-0883

Roelof Slump
Managing Director, US Residential Mortgage-Backed Securities
+1 212 908-0705

Sarah Repucci
Senior Director, Fitch Wire
+1 212 908 0726

Media Relations: Elizabeth Fogerty, New York, Tel: +1 212 908 0526, Email:
elizabeth.fogerty@thefitchgroup.com

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.

TAX - NEBRASKA

State ex rel. McNally v. Evnen

Supreme Court of Nebraska - September 10, 2020 - N.W.2d - 307 Neb. 103 - 2020 WL 5505918

Sponsors of three proposed initiatives relating to gaming devices petitioned for writ of mandamus to compel Secretary of State to place initiatives on ballot in general election.

The Supreme Court issued alternative writ requiring Secretary of State to place initiatives on ballot.

The Supreme Court held that:

- Supreme Court would exercise its original jurisdiction over petition for writ of mandamus
- As matter of first impression, it was appropriate to review each initiative individually, rather than as whole, even if each initiative bore connection to others;
- Initiative to amend state constitution's prohibition against gambling by creating exception that would authorize games of chance conducted within licensed racetrack enclosures did not violate single subject rule;
- Initiative to amend constitution did not present risk of impermissible logrolling;
- Alleged impact on gaming at tribal casinos from proposed ballot initiative to amend constitution was not relevant to whether initiative violated requirement that it contain single subject;
- Initiative for enactment of statute allowing games of chance to be conducted by licensed racetrack enclosures and for establishment of Nebraska Gaming Commission to regulate same did not violate single subject rule; and
- Initiative for enactment of statutes establishing annual tax on gross revenues generated by games of chance within licensed racetrack enclosures, which would distribute 70% of tax revenue to provide property tax relief, did not violate single subject rule.

TAX - VIRGINIA

International Paper Company v. County of Isle of Wight

Supreme Court of Virginia - September 17, 2020 - S.E.2d - 2020 WL 5554579

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

The Isle of Wight Circuit Court granted county's motion to strike, and taxpayer appealed.

The Supreme Court held that:

- Machinery and tools tax plan did not improperly interfere with corporate taxpayer's vested right to tax refund judgment;
- County had the statutory and constitutional authority to impose taxes on corporate taxpayer's machinery and tools property as well as authority to execute tax relief program;
- Taxpayer provided prima facie evidence sufficient to show that tax relief program payments were integrated into the taxation process and had the same effect as partial tax exemptions; and
- Taxpayer provided prima facie evidence that county machinery and tools tax assessment was non-uniform, invalid, and illegal.

County's machinery and tools tax plan did not improperly interfere with corporate taxpayer's vested right to tax refund judgment, although tax plan may have "clawed back" the money paid to taxpayer under refund judgment, where taxpayer received the money it had a vested right to receive, county had authority to increase the tax rate, and tax increase did not retroactively alter the prior tax rates or interfere with the paid judgment.

County had the statutory and constitutional authority to impose taxes on corporate taxpayer's machinery and tools property as well as authority to execute tax relief program, even if the practical effect was to "claw back" tax refunds paid to taxpayer for prior years; county did not revise previous assessments, but instead increased tax rate for subsequent years, and tax relief program was to help businesses negatively impacted by the adjustment to the tax rate.

Corporate taxpayer provided prima facie evidence sufficient to show that county machinery and tools tax relief program payments were integrated into the taxation process and had the same effect as partial tax exemptions, and thus that taxpayer's machinery and tools tax assessment was non-uniform, invalid, and illegal, as required to survive motion to strike; stated purpose of tax relief program was to relieve liability for tax rate increase for certain class of taxpayers whom county deemed to be "harmed" by the rate increase, county structured the program to directly exempt certain tax liability and payments from the program directly offset tax liability, program factually correlated with tax rate increase and was funded predominantly by the tax rate increase, and relief payments were calculated by using tax figures.

Corporate taxpayer provided prima facie evidence that county machinery and tools tax assessment was non-uniform, invalid, and illegal; tax relief formula treated taxpayers differently based upon whether the county had lawfully owed that taxpayer a refund on taxes overpaid in prior years, which created a sub-class of taxpayers, refund and relief payment were negatively correlated, only taxpayers who had received a refund were required to pay the tax assessment increase, and net tax rates paid by taxpayers, given the payments made to some taxpayers by the tax relief program, were not uniform.

Securities Law Considerations for Opportunity Zone Funds.

What securities laws should Qualified Opportunity Fund issuers be aware of before they start raising capital from investors? And what are the major differences between the different types of private placement offerings?

Clem Turner is a New York-based corporate and securities attorney for CSG He leads the firm's alternative capital practice and specializes in Opportunity Zones, among other alternative investment vehicles.

Continue reading.

Opporunitydb.com

September 30, 2020

TAX - OHIO

Village of Put-in-Bay v. Mathys

Supreme Court of Ohio - September 16, 2020 - N.E.3d - 2020 WL 5537009 - 2020 -Ohio-4421

Village filed criminal complaints against operators of business that made motorized golf carts available for rent within village, alleging they violated ordinance requiring owners of vehicles that were made available for hire and use within the municipality to pay a license fee on those vehicles.

After transfer from village's mayor court, the Court of Common Pleas granted operators' motions to dismiss. Village appealed. The Court of Appeals reversed and remanded. Operators appealed, and the Supreme Court accepted the appeals.

The Supreme Court held that:

- Ordinance was constitutional exercise of village's right to tax, and
- Ordinance did not violate constitutional provision relating to operation or use of vehicles on public highways.

Village ordinance requiring owners of vehicles that were made available for hire within municipality to pay license fee on those vehicles was not expressly preempted by statutes imposing state license tax on motor vehicles and allowing an additional $5 tax by counties and municipalities under certain circumstances, and thus ordinance was constitutional exercise of village's right to tax; fact that municipalities were limited in their ability to impose a tax on the operation of a motor vehicle did not mean that General Assembly had prohibited all taxes involving motor vehicles, and municipal tax imposed by village ordinance was not same as, or similar to, state license tax, as it imposed business tax on rental vehicles, not license tax on operation of motor vehicles on public highways.

Village ordinance requiring owners of vehicles that were made available for hire within municipality to pay license fee on those vehicles did not violate prohibition in Home Rule Amendment to State Constitution stating that no monies derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways could be expended other than for listed purposes and "other statutory highway purposes," though funds collected from taxes levied by local ordinance were expended on local purposes; ordinance operated as a business tax on the privilege of renting one's vehicle as a business venture and did not concern or otherwise place any limitations on operation or use of vehicles on public highways.

TAX - ALABAMA

Campbell v. City of Gardendale

Supreme Court of Alabama - September 4, 2020 - So.3d - 2020 WL 5268049

Taxpayer brought putative class action against city, county, and county's tax collector based on challenge to the constitutionality of two municipal taxes adopted by city in connection with city's planned creation of a municipal school system, which was a plan that had been rejected by the Court of Appeals.

Circuit Court entered summary judgment for defendants. Taxpayer appealed.

The Supreme Court held that Alabama Constitution's local amendment providing that the Jefferson County property tax for schools is reduced by the amount of municipality's special or additional taxes levied and collected for public-school purposes was not a basis for invalidating ad valorem taxes collected by Jefferson County municipality in connection with city's planned creation of a municipal school system, regardless if the municipal taxes were special or additional taxes being levied and collected for public-school purposes.

Timing Considerations for Opportunity Zone Investors, with Ashley Tison.

As we approach the fourth quarter of 2020, what are some of the most important timing considerations for Opportunity Zone…

CONTINUE READING »

TAX - SOUTH CAROLINA

Weaver v. Recreation District

Supreme Court of South Carolina - September 2, 2020 - S.E.2d - 2020 WL 5224473

Taxpayer brought declaratory judgment action against special purpose district and others to challenge constitutionality of statute addressing millage levied in certain special purpose districts.

The Circuit Court granted judgment to defendants. Taxpayer appealed.

The Supreme Court held that:

- Statute does not violate constitutional prohibition on taxation without representation;
- Statute is not unconstitutional special legislation; and
- Statute does not violate Home Rule.

The statute addressing the millage levied in certain special purpose districts is not special legislation prohibited by the South Carolina Constitution; the statute affects all special purpose districts with unelected governing bodies throughout the state, so the legislation is applied uniformly to a valid class of entities.

The statute addressing the millage levied in certain special purpose districts is not special legislation prohibited by the South Carolina Constitution; the statute affects all special purpose districts with unelected governing bodies throughout the state, so the legislation is applied uniformly to a valid class of entities.

The statute addressing the millage levied in certain special purpose districts does not violate the Home Rule as set forth in the state constitution and the Home Rule Act; the statute applies to a broad class of districts having similar characteristics, and a county council retains its authority over taxation.

Opportunity Zones Get Big Push as Critics Question Who They Help.

- **Trump pitching tax break expansion during reelection campaign**
- **Incentives are drawing investment, but benefits still in question**

Contentious economic development incentives lawmakers and the White House are pitching as an answer to the nation’s economic and social ills are structurally unable to help fix those problems—and may even exacerbate them—critics say.

Opportunity zones, originally a bipartisan proposal from Sens. Tim Scott (R-S.C.) and Cory Booker (D-N.J.), are meant to lift struggling neighborhoods out of poverty by luring investors with tax breaks. President Donald Trump has repeatedly touted the tax incentives as one of his administration's major wins since they were enacted in the 2017 tax code overhaul.

"I got criminal justice done, I got opportunity zones," Trump said during a recent interview with Axios, weeks after tweeting something similar. "I did more for the Black community than anybody with the possible exception of Abraham Lincoln, whether you like it or not."

Continue reading.

Bloomberg Tax

by Lydia O'Neal

Sept. 8, 2020, 1:46 AM

Where to Find Some of the Best Opportunity Zone Opportunities.

A widespread group of mostly-impoverished, densely-packed urban neighborhoods offers some of the best potential for Opportunity Zone investment, according to ATTOM Data Solutions and CityBldr. A study from the two firms spotlights 11 neighborhoods in seven states and the District of Columbia for some of the nation's most attractive opportunities to take advantage of federal reinvestment tax benefits.

These range from Anacostia in southeast Washington, DC, to the South Shore area of Chicago to City Heights in central San Diego. Other neighborhoods identified include Mid-City in central Los Angeles; Parramore in west-central Orlando; Central District in eastern Seattle; West Colfax in western Denver; Spartan Keyes in eastern San Jose; North End/New Center in northern Detroit; Buckman/Kerns in southeastern Portland, OR; and Hilltop in central Tacoma.

Most of those neighborhoods stand out as notably poorer and more densely populated than the U.S. as a whole, with lower income and educational levels and far higher percentages of renters than homeowners. However, contributing to their economic potential, a few have above-average educational levels, and most have home values far above the national median home price.

These neighborhoods also have seen a wide range of median home price increases and decreases over the past year. In South Shore, prices have nearly doubled in the past 12 months, while in L.A.'s Mid-City section, they've declined nearly 12%, according to ATTOM data.

ATTOM and CityBldr reported that between 53% and 98% of households rent homes in the 11 areas, compared to 36% nationwide. The lowest rental rate is in Detroit's North End/New Center, while the highest is in Orlando's Parramore community.

The areas were identified by CityBldr as among those where both communities and housing developers have the most to gain from Opportunity Zone tax benefits. The findings were based on machine learning technology from various data sources and a detailed understanding of the various markets.

"This data tells us that housing developers should consider investing in these neighborhoods because they have an immense amount of potential, plus tax benefits aimed at realizing that potential," said Bryan Copley, co-founder and CEO of CityBldr. "What we've done with this study is create a standardized score to compare every Opportunity Zone in the U.S. to determine which areas would yield the highest average return on investment."

September 4, 2020

[Board of Education of Richland School District No. 88a v. City of Crest Hill]

Appellate Court of Illinois, Third District - July 24, 2020 - N.E.3d - 2020 IL App (3d) 190225 - 2020 WL 4251700

School Board filed verified complaint that challenged city's approval of tax increment financing (TIF) for redevelopment project's noncompliance with statutory mandates and procedural requirements.

The Circuit Court granted summary judgment for the city. School Board appealed.

The Appellate Court held that parcels separated by utility right-of-way were not contiguous.

Tax Increment Allocation Redevelopment Act for redevelopment of blighted property did not allow city to jump a 234.9 foot portion of natural gas right-of-way, located in unincorporated excluded area of approved tax increment financing (TIF) district, to establish required contiguity between two parcels, and, thus, financing district was not contiguous.

The contiguity touching requirement for tracts of land that touch or adjoin one another in a reasonably substantial physical sense ensures a municipality has properly constructed a tax increment financing (TIF) district and is legitimately reaping tax increment financing benefits under the Tax Increment Allocation Redevelopment Act for redevelopment of blighted property.

Point-to-point touching or cornering is generally not sufficient to satisfy the requirement of contiguity of tracts of land under the Tax Increment Allocation Redevelopment Act for the redevelopment of blighted tracts of land that will benefit from tax increment financing (TIF); point-to-point touching and cornering are merely a subterfuge to reach outlying areas.

TAX - PENNSYLVANIA

[Dechert LLP v. Pennsylvania Department of Community and Economic Development]

Commonwealth Court of Pennsylvania - June 23, 2020 - A.3d - 2020 WL 3421689

Business filed petition for review, seeking declaratory relief that the Department of Community and Economic Development (DCED) misconstrued the Keystone Opportunity Zone, Keystone Opportunity Expansion Zone and Keystone Opportunity Improvement Zone Act (KOZ Act) as precluding a beneficiary who previously enjoyed tax exemptions in a now-expired zone from moving to an active zone and again enjoying tax exemptions.

The Commonwealth Court holds, as a matter of first impression, that the movement from an expired zone into an active zone is not grounds for deeming a business unqualified for the tax benefits under the KOZ Act, assuming the business qualifies under the KOZ Act and meets the express relocation requirements.

Family Office Investing in Provo OZ Tech Accelerator Campus, with Hall Labs.

What are the strategic advantages to investing in early growth, patent-protected technology companies located in Opportunity Zones? Matt Van Dyke…

CONTINUE READING »

Opportunity Db

September 9, 2020

Novogradac Conference Speakers Expect Opportunity Zones Will Continue to be a Game-Changer for Low-Income Communities.

Legislators, policymakers and stakeholders at the Novogradac 2020 Opportunity Zones Virtual Conference in July discussed opportunity zones (OZ) legislation, reporting requirements, guidance and the evolving marketplace–all in the context of how the OZ incentive can play a role in strengthening communities and the economy.

“Opportunity zones changed the conversation,” said Daniel Kowalski, Counselor to the Secretary of Treasury, during the Novogradac conference. “Most economic incentive programs are grants or debt and the opportunity zone is an equity play. … It’s important we have this new tool that focuses on equity and changes the conversation about what you need to do in order to build up a low-income community.”

Bipartisan Support in Washington

Conference speakers shared their outlook on OZ legislation, generally agreeing that the two most likely vehicles for OZ legislation this year are a COVID-19 relief bill or an end-of-year tax package. In particular, proposals for an extension of the OZ incentive and for an expansion of reporting requirements have gained traction in Congress.

“The COVID-19 pandemic has made it clear that legislation around a two-year time extension is now more important and more necessary than ever before,” said Sen. Tim Scott, R-S.C., author of the original OZ legislation and a member of the tax-writing Senate Finance Committee, during his conference keynote address. “This will allow those using the OZ incentive to weather the storm and give our communities more time to plan and harness the potential of opportunity zones.”

Sen. Scott said he would continue working to get his bipartisan Improving and Reinstating the Monitoring, Prevention, Accountability, Certification and Transparency Provisions of Opportunity Zones (IMPACT) Act passed into law so that decision makers can better track and understand the impact of OZs. The IMPACT Act would institute reporting requirements that were included but later stripped from the 2017 tax reform package that enacted OZs.

“We really need to work to get the IMPACT Act passed,” said Emily Lavery, legislative assistant to Sen. Scott. “It’s extremely robust … and includes the largest scope of minute-level data on actual community impact, which is really what we’re trying to understand.”

Chad Maisel, economic policy advisor for Sen. Cory Booker, D-N.J., said that there is support from both sides of the aisle and from both chambers of Congress for OZs to succeed.

“I think the basis of any legislative package to move forward is likely to revolve around reporting and increased transparency,” said Maisel. “It’s something that Sen. Booker has talked a lot about and Sen. Scott has talked a lot about.” Maisel added that Sen. Booker is also interested in phasing out the small percentage of higher-income [contiguous] census tracts designated by governors as OZs, but that might not need a federal tax incentive as much as other areas.

In addition to having support in Congress, the OZ incentive is also a priority for the White House Opportunity and Revitalization Council. The council is made up of 17 federal agencies and federal-state partnerships working together to focus resources into OZs and other economically distressed communities.

Alfonso Costa Jr., former deputy chief of staff for the U.S. Department of Housing and Urban Development, outlined the White House Opportunity and Revitalization Council’s report on OZ best practices and said that additional actions will be made public in the near future.

“The White House Opportunity and Revitalization Council is intently focused on making sure that OZs are places where existing residents are the ultimate beneficiaries of the funds being invested through qualified opportunity funds, and that will never change,” said Costa.

Reporting and Data Collection

On the topic of reporting and data collection, Kowalski said the Internal Revenue Service (IRS) Form 8996 for qualified opportunity funds (QOFs) will provide two key pieces of information to help evaluate the OZ incentive: the amount of investment being made and the location of those investments.

Kowalski estimates that it will take about 18 months for Treasury to compile and process OZ information reported through Form 8996, so a complete set of data for 2019 OZ investments might not be available until mid-2021.

Kowalski said that once Treasury processes the Form 8996 information, the department should be able to create a heat map to illustrate where OZ investments are being made. Different gradations of color can show the depth of investment in a particular tract on a dollar basis.

Certain economic indicators are not tracked through Form 8996, such as income, poverty levels and job creation and destruction–information that will be available through the American Community Survey (ACS). The challenge is comparing ACS data, which is averaged over five years, with single-year data for OZ investments reported through Form 8996. Kowalski said Treasury will need to work through the time difference between the two data sets.

IRS Guidance

Notice 2020-39
As a response to the COVID-19 pandemic, the IRS in June provided OZ deadline relief through Notice 2020-39. Among several provisions, the guidance provided extensions for taxpayers to invest their capital gains in a QOF.

Panelists said the deadline extensions in Notice 2020-39 provided welcome relief, especially for transactions negotiated pre-COVID-19 that may need re-examination. “In some cases, you are seeing [developments] looking for capital and not necessarily meeting investor expectations that have changed post-COVID," said Julia Shin, vice president and managing director of impact investing for Enterprise Community Investment Inc. "The additional time that has been granted [through Notice 2020-39] has been helpful in working through some of these questions and I think will still be very helpful moving forward."

Implementing the Final Rule

Novogradac partner and conference chairman John Sciarretti led a discussion with representatives from the IRS on the final OZ regulations released in December 2019. The panel covered several aspects of the final rule, including the investment standard test, which requires that a QOF hold at least 90 percent of its assets in OZ property at the end of a six-month period. Under the final rule, the option to disregard recently contributed property for up to six months before a testing date does not address any earnings on that property nor does it address any capitalized organizational or startup costs that funds might have during the process.

Sciarretti suggested that Treasury allow funds to exclude earnings on the temporary contribution and to ignore any capitalized costs related to organization and startup. Panelist Alfred Bae, general attorney for the IRS, responded that it is reasonable for funds to disregard the earnings on contributions that were otherwise being disregarded under the Treasury regulations. Bae said that taxpayers should also be allowed to ignore organization and startup costs. QOFs having no assets in either the numerator or the denominator due to these disregarded assets can report as 100 percent on Form 8996, according to Bae.

Another discussion topic was how the IRS would treat a change in the use of working capital plan as a result of COVID-19. Sciarretti gave examples of how some entities have found it necessary to adjust their plans because of COVID-19, including difficulty raising financing or needing to change plans for a full-service hotel to office or residential space. Julie Hanlon Bolton, deputy associate chief counsel for the IRS, said the IRS is considering stakeholder requests that entities that modify or change their business plans because of COVID-19 are not considered to fail the working capital safe harbor requirement to use working capital assets in a manner "substantially consistent" with their written plan and schedule.

Other topics covered by the IRS panel included the treatment of related-party additions to basis, the infusion of working capital assets, triple-net leases and measuring the working capital safe-harbor COVID-19 extension.

Future Regulations

Since final regulations were issued in December 2019, followed by technical corrections in April, Kowalski said he considers the status of OZ regulations complete for now. One area in which Treasury may consider issuing guidance is the redrawing of census lines after the latest census update.

OZ Marketplace

Another topic discussed was the effects of the COVID-19 pandemic and an observed slowdown or pause in some OZ activity. Factors stemming from COVID-19, such as economic uncertainty, construction delays and underwriting challenges have contributed to some OZ participants taking a pause. Panelists said that those planning OZ developments in commercial retail and hospitality, in particular, may be rethinking their strategies.

The pandemic has also prompted businesses to think about evolving patterns of commerce, such as a greater focus on online shopping, which makes warehousing and delivery services even more important. There may also be a push to produce more goods domestically to avoid supply chain disruptions, especially in the pharmaceutical industry. Panelists said business can consider OZ investments as an opportunity to meet these evolving market demands while benefiting OZ communities.

Speakers discussed a final rule published by federal regulatory agencies June 25 to modify the Volcker Rule's prohibition on banking entities sponsoring or investing in covered funds—a ruling that allows banks to participate in the OZ incentive. Panelists said this rule change makes them optimistic that more dollars will flow into the OZ space.

The conference also included discussion of OZ investment in operating businesses. "It's been well documented that the overwhelming majority of OZ investments to date have been in real estate," said Michael Kressig, a Novogradac partner and panel moderator. "The original sponsors of the incentive certainly envisioned a place for real estate investments, but they also believed that in order for this incentive to have its intended economic, catalytic impact on these distressed communities that it was really important that operating businesses and the job creation that they generate have a big place in the market."

"I think that the recent regulation changes are very helpful to the operating business environment," said Terry Jester, CEO of Solpad and the Impact OZ Fund. "There is a challenge of getting the message out about whatever these operating businesses' needs are and applicability for distressed communities or distressed areas."

Outlook

Despite challenges, including the COVID-19 pandemic, speakers expressed optimism that the OZ incentive will continue to drive capital into neighborhoods in need.

"The time to reinvest in our most distressed communities is right now," said Sen. Scott. "The IRS has worked hard to create flexibility that will allow folks investing in 2020 to have the time they need to make smart, impactful investments. I also want to encourage those creating powerful change through opportunity zones to be vocal–I mean be loud, be seen, be heard. We need to hear your stories because the more information is in the public forum about the success of the opportunity zones, the more traction the zones will have across the country."

Published by Teresa Garcia on Tuesday, September 1, 2020

---

11 U.S. Neighborhoods Emerge As Best Candidates For Opportunity Zone Investments.

Areas Identified Are More Impoverished and Densely Populated, With Low Homeownership Rates; Most Already Have Home Prices Far Exceeding National Levels; While Prices Have Both Increased and Decreased Since First Half of 2019

IRVINE, Calif., Sept. 3, 2020 /PRNewswire/ — ATTOM Data Solutions, curator of the nation's premier property database and first property data provider of Data-as-a-Service (DaaS), teamed up with CityBldr, a Seattle-based proptech company that uses AI to determine the best use of land, to discover that a widespread group of mostly-impoverished, densely-packed urban neighborhoods ranging from Anacostia in southeast Washington, DC, to the South Shore area of Chicago, IL, to City

Heights in central San Diego, CA, offer some of the most attractive opportunities in the nation for housing developers to take advantage of federal reinvestment tax benefits.

CityBldr data spotlights 11 neighborhoods in seven states and the District of Columbia with some of the best potential for using Opportunity Zone tax benefits designed to spur revival in low-income communities across the United States. The zones were established by Congress under the 2017 Tax Cut and Jobs Act.

Along with Anacostia, South Shore, and City Heights, other neighborhoods identified include Mid-City in central Los Angeles; Parramore in west-central Orlando, FL; Central District in eastern Seattle, WA; West Colfax in western Denver, CO; Spartan Keyes in eastern San Jose, CA; North End/New Center in northern Detroit, MI; Buckman/Kerns in southeastern Portland, OR; and Hilltop in central Tacoma, WA.

Most of those areas stand out as notably poorer and more densely populated than the U.S. as a whole, with lower income and educational levels and far higher percentages of renters than homeowners. However, contributing to their economic potential, a few have above-average educational levels, and most have home values that far exceed the national median home price. They also have seen a wide range of median home price increases and decreases over the past year, from nearly doubling in Chicago's South Shore neighborhood, to a drop of 12 percent in the Mid-City section of Los Angeles, according to ATTOM.

The areas were identified by CityBldr as among those where both communities and housing developers have the most to gain from Opportunity Zone tax benefits, based on machine learning technology from various data sources and a detailed understanding of the various markets.

"This data tells us that housing developers should consider investing in these neighborhoods because they have an immense amount of potential, plus tax benefits aimed at realizing that potential," said Bryan Copley, co-founder and CEO of CityBldr. "What we've done with this study is create a standardized score to compare every opportunity zone in the U.S. to determine which areas would yield the highest average return on investment."

Todd Teta, chief product officer with ATTOM Data Solutions, noted that ATTOM contributed another key element showing home price changes from the first half of 2019 to the first half of 2020 in those areas.

"Factoring in home values and how they've done in the past year adds a critical piece of data to the picture," said Teta. "Developers can get a demographic snapshot of what these areas look like, plus the hard numbers on how home prices are changing."

Key data points for areas spotlighted in the study:

- Median household incomes in these areas range from $20,205 in Tacoma's Hilltop area to $57,009 in the Spartan Keyes section of San Jose. Seven of the 11 areas have median household incomes below $40,000 and all 11 are beneath the national level of $61,937.
- Population densities range from about 2,400 people per square mile in the North End/New Center neighborhood in Detroit to 19,400 per square mile in Chicago's South Shore area. Nationwide, the number is just 93 per square mile.
- All 11 areas have poverty levels that are higher than the national rate of 13.1 percent, running from 16.3 percent in the Mid-City section of Los Angeles to 49.4 percent in the City Heights area of San Diego.
- Between 53 percent and 98 percent of households rent homes in the 11 areas, compared to 36

percent nationwide. The lowest rental rate is in Detroit's North End/New Center area, while the highest is in Orlando's Parramore community.
- In three areas, the percentage of adults with college degrees outpaces the national figure of 32.6 percent: Spartan Keyes in San Jose (37.5 percent), Central District in Seattle (48.7 percent) and Buckman/Kerns in Portland (56.5 percent). Levels in other spotlighted areas range from 3.6 percent in the Parramore section of Orlando to 31.5 percent in Denver's West Colfax neighborhood.
- Despite relatively high levels of economic distress, the typical home sells for more than the national median home price in eight of the 11 areas, according to data collected by ATTOM in the first half of 2020. The lowest median home prices are in North End/New Center in Detroit ($40,501), Parramore in Orlando ($105,000) and Hilltop in Tacoma ($217,000). The highest are in Central District in Seattle ($795,500), Mid-City in Los Angeles ($860,750) and Spartan Keys in San Jose ($885,000).
- The largest increases in median home prices from the first half of 2019 to the first half of 2020, based on ATTOM data, were in North End/New Center in Detroit (up 25 percent), Parramore in Orlando (up 31 percent) and South Shore in Chicago (up 91 percent). The biggest declines were in Spartan Keys in San Jose (down 7 percent), Mid-City in Los Angeles (down 12 percent) and Hilltop in Tacoma (down 32 percent). However, while the opportunity zone in Hilltop (census tract 614) saw a sharp decline of 32 percent, the city of Tacoma, WA saw an increase of 12 percent in median home sales prices from last year.

Report methodology

The overview of these opportunity zones looked at high redevelopment values defined by CityBldr in an analysis designed to showcase area that offer the greatest value to be gained by investors for building multifamily apartments, rowhomes or townhomes in those areas. Those census tracts included in the analysis also must have sufficient home sales prices from ATTOM Data Solutions, to show a year-over-year and two-year median home sales price change. Various data points mentioned above to help offer context for these opportunity zones came from Censusreporter.org.

About CityBldr
CityBldr is a technology company that determines the best use of land. The company offers commercial real estate, residential real estate, government and architecture products and powers acquisitions for some of the world's most admired companies. For a ranking of sites within these or other opportunity zones, submit inquiries to hello@citybldr.com.

About ATTOM Data Solutions
ATTOM Data Solutions 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 data collected by ATTOM, assigning each property record with a persistent, unique ID — the ATTOM ID. The 9TB 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, marketing lists, match & append and introducing the first property data delivery solution, a cloud-based data platform that streamlines data management – Data-as-a-Service (DaaS).

ATTOM Media Contact:
Christine Stricker
949.748.8428

christine.stricker@attomdata.com

ATTOM Data and Report Licensing:
949.502.8313
datareports@attomdata.com

CityBldr Inquiries:
hello@citybldr.com

Opportunity Zones Continue to Make an Impact.

Edmon Rakipi, principal at Opp Zone Capital, shares why he expects the Opportunity Zone Program to revitalize some of the hardest-hit real estate sectors going forward.

The investment activity trajectory in qualified Opportunity Zones has been fluctuating since the end of last year, when important clarifications were added to the program legislation. Mirroring the economic outlook, the program had a great start to 2020, followed by a slowdown in spring and a rebound at the beginning of summer, according to commercial real estate valuation firm BBG.

Although the nation is bracing for a new slowdown in the last quarter of the year, Notice 2020-39—issued by the Internal Revenue Service in June—is expected to boost investors' confidence in placing capital. Edmon Rakipi, principal at Opp Zone Capital—an entity that provides specialized Opportunity Zone investment and fund management services nationwide—expects the OZ program to contribute to the revitalization of some of the hardest-hit real estate sectors.

Continue reading.

Commercial Property Executive

By Roxana Baiceanu

AUG 31, 2020

Opportunity Zone Investing in Silicon Valley, with Urban Catalyst.

Does the Silicon Valley tech migration create a unique investment case for ground-up development in fast-growing downtown San Jose's Opportunity…

CONTINUE READING »

Opportunity Db

September 2, 2020

TAX - NEW YORK

International Student Exchange, Inc. v. Assessors Office of Town of Islip

Supreme Court, Appellate Division, Second Department, New York - July 15, 2020 - N.Y.S.3d - 185 A.D.3d 815 - 2020 WL 3980650 - 2020 N.Y. Slip Op. 03911

Nonprofit public benefit corporation brought an article 78 proceeding to annul determination of town board of assessment review that denied nonprofit's application for property tax exemption.

The Supreme Court granted petition, annulled board's determination, and directed town's assessor's office, board, and town to grant nonprofit a full property tax exemption for tax year. Defendants appealed.

The Supreme Court, Appellate Division held that:

- Nonprofit was organized exclusively for a tax exempt purpose, but
- Issue of fact existed as to whether nonprofit used its property exclusively for exempt educational purpose.

Nonprofit public benefit corporation that facilitated student exchange was organized exclusively for a tax exempt purpose for purposes of Real Property Tax Law, where nonprofit's Articles of Incorporation stated that it was not organized for the private gain of any single person, and even if the nonprofit benefited economically from its programs or from the rental of the property, its filed financial documents set forth that the benefit inured to the organization, not to its officers or employees personally.

Issue of fact existed as to whether nonprofit benefit corporation that facilitated exchange students used its property exclusively for exempt educational purpose, thus requiring that matter be remitted to trial court for determination of whether nonprofit was entitled to full or partial property tax exemption, on appeal from trial court's determination that nonprofit was entitled to full property tax exemption; no evidence indicated what portion of the building was actually used in furtherance of educational purpose, and nonprofit indicated on its application that it intended to lease portion of property.

White House Estimate: $75 billion Raised by Opportunity Zone Funds Thru 2019.

In a report released earlier this week, the White House Council of Economic Advisers estimated that $75 billion of private…

CONTINUE READING »

Opportunity Db

August 25, 2020

Challenges for Smaller Opportunity Zone Developers, with Garth Everhart.

What are some challenges that smaller Opportunity Zone project developers face? And are there benefits to investing in a smaller…

CONTINUE READING »

Opportunity Db

August 26, 2020

When Will Tax Revenues Rebound? It Depends on the Tax.

Some taxes are more impaired by the pandemic recession than others, and each jurisdiction is impacted differently, but many will still suffer revenue slumps into next year and even beyond.

Without claiming to own a crystal ball, my multi-decade experience in public finance and investment analysis gives me some insights that can hopefully help state and local government policymakers, budgeters, managers and union leaders as they plan ahead for the economy's transition from pandemic recession to an elongated economic and fiscal recovery.

It doesn't take a crystal ball to see that even if the economy grows by 6 percent in 2021 from this winter's bottom-out point, as the most optimistic Wall Street economists forecast, many states and localities will remain underwater, struggling or unable to maintain full-scale public services in the face of continuing revenue shortfalls.

Let's first clear the air about the stock market and its limited forecasting value for public budgeting. The major stock indexes are back up to pre-pandemic levels, but that is not a useful predictor for governmental tax revenues. The lost earnings of 2021 will have only a fractional impact on the long-run value of shares in big businesses; blue-chip investors are already looking out toward 2022 and beyond. Where the business-sector pain will continue to be felt most acutely is in the lower tier of smaller public companies and the even smaller privately owned businesses.

Continue reading.

GOVERNING.COM

GIRARD MILLER, FINANCE COLUMNIST | AUGUST 18, 2020

TAX - WASHINGTON

PeaceHealth St. Joseph Medical Center v. Department of Revenue

Supreme Court of Washington - August 6, 2020 - P.3d - 2020 WL 4516799

Department of Revenue appealed a decision of the Board of Tax Appeals granting taxpayers, which were non-profit medical center operators, a refund of business and occupation taxes paid on compensation received from out-of-state subsidized health care programs.

The Superior Court reversed. Taxpayers appealed. The Court of Appeals affirmed. Taxpayers petitioned for review, which was granted.

The Supreme Court held that:

- Statute establishing a business and occupation tax deduction for public and nonprofit hospitals for "compensation for health care services covered under…medical assistance, children's health, or other program under [statutory chapter governing Medicaid and Children's Health Insurance Programs (CHIP) programs]" applies only to compensation received from in-state Medicaid and CHIP programs, not to compensation received from all states' Medicaid and CHIP programs, and
- Such statute did not violate dormant commerce clause pursuant to government function exemption.

Pursuant to government function exemption, state statute limiting business and occupation tax deduction available to public and nonprofit hospitals for Medicaid and Children's Health Insurance Programs (CHIP) compensation to only in-state, rather than out-of-state, compensation did not violate dormant commerce clause; deduction supported a quintessentially public function by helping to subsidize government's provision of essential health care services to state's citizens by facilitating expansion of government's overall purchasing power for such services.

TAX - VERMONT

Martinez v. Town of Hartford

Supreme Court of Vermont - August 7, 2020 - A.3d - 2020 WL 4557061 - 2020 VT 70

Taxpayer, proceeding pro se, appealed from decision of Property Valuation and Review Division (PVR) hearing officer setting the fair market value of his single-family dwelling at $509,900, equalized to a value of $492,300, for purposes of town's property tax grand list.

The Supreme Court held that:

- Although the sale price of a property in a contemporaneous arms-length transaction is strong presumptive evidence of fair market value, for purposes of Vermont's property tax statute, it is not solely determinative and may be overcome, in rare cases, by other evidence of value, and
- In the present case, the hearing officer did not err by relying on comparable sale evidence in concluding that the sale price did not accurately reflect fair market value.

Although the sale price of real property in a contemporaneous arms-length transaction is strong presumptive evidence of fair market value, for purposes of Vermont's property tax statute, it is not solely determinative and may be overcome, in rare cases, by other evidence of value; statute expressly and without qualification allows factfinder to consider other factors beyond the recent, arms-length sale price, and, while case law emphasizes that such sale establishes a strong presumption as to the fair market value of the property, Supreme Court has never held that existence of a bona fide sale price conclusively establishes fair market value or precludes hearing officer from considering competing evidence of fair market value.

Hearing officer's appraisal of taxpayer's single-family dwelling at $509,900, equalized to a value of $492,300, for purposes of town's property tax grand list, was rationally derived from the findings and evidence, even though taxpayer had recently purchased the home for $350,000; while it was undisputed that sale was bona fide, other evidence showed that sale price did not represent property's fair market value, including town's unchallenged comprehensive market analysis report which valued taxpayer's property at $510,000 based on nine recent sales of comparable properties in the same planned unit development whose adjusted prices ranged from $501,400 to $515,000, and under these circumstances, hearing officer did not abuse his discretion by affording greater weight to independent market data than to sale price in determining fair market value.

[Potential Legislative Improvements to Opportunity Zones, with Emily Lavery.]

Why are Opportunity Zones more important now than ever before, and what legislative changes are being considered to improve the…

[CONTINUE READING »]

August 19, 2020

PUBLIC UTILITIES - FEDERAL

[SFPP, L.P. v. Federal Energy Regulatory Commission and United States of America]

United States Court of Appeals, District of Columbia Circuit - July 31, 2020 - F.3d - 2020 WL 4377850

Partnership oil pipeline filed tariff increases and, after Federal Energy Regulatory Commission (FERC) issued three orders, the Court of Appeals vacated the orders in part.

On remand, FERC issued two further orders that removed the income tax allowance, among other holdings. Pipeline and shippers petitioned for review.

The Court of Appeals held that:

- FERC's decision to remove income tax allowance was not arbitrary and capricious;
- Pipeline was not entitled to reopen administrative record;
- FERC decision to direct partnership oil pipeline to use its originally filed index rates was not arbitrary;
- FERC did not act contrary to law or arbitrarily and capriciously in permitting pipeline to remove deferred tax account from its cost of service; and
- FERC's decision to allow pipeline to recover litigation expenses through three-year surcharge was adequately explained and reasonable.

Federal Energy Regulatory Commission (FERC) reasonably identified double-recovery problem in granting both an income tax allowance and a discounted cash flow return on equity, and thus FERC's decision to remove income tax allowance for partnership oil pipeline was not arbitrary and capricious; FERC explained that granting an income tax allowance for investor-level taxes did not alter investor's discounted cash flow rate of return, but rather it only inflated pipeline's cost of service with tax costs already covered by that return.

Partnership oil pipeline was not entitled to reopen record at Federal Energy Regulatory Commission (FERC) regarding tariff dispute and FERC's decision to remove income tax allowance; even though other parties would not be precluded from arguing that their recovery of income tax allowance did not result in double-recovery of investors' income tax costs, pipeline had fully litigated issue at FERC and Court of Appeals, and FERC could deny pipeline another bite at the apple while leaving door open for others to argue issue on facts of their cases.

Federal Energy Regulatory Commission's (FERC) decision to direct partnership oil pipeline to use its originally filed index rates in its compliance filing, which calculated certain refunds, was not arbitrary; FERC explained that it would not permit refunds following a rate case that were based on index rates different from those previously filed by pipeline and accepted by FERC, cost-of-service litigation neither altered industry-wide annual inflationary changes justifying annual index changes nor addressed annual cost changes pipeline itself experienced, and allowing pipeline retroactive adjustment would have inoculated pipeline from risk of its chosen ratemaking strategy.

Federal Energy Regulatory Commission (FERC) did not act contrary to law or arbitrarily and capriciously in permitting partnership oil pipeline to remove deferred tax account from its cost of service; refunding tax account to ratepayers or continuing to remove it from rate base would have constituted impermissible retroactive ratemaking, as decision by FERC to return account to shippers would have as a necessary predicate a conclusion that account should not have been collected in the first place, regardless of reason that account became overfunded.

Federal Energy Regulatory Commission's (FERC) decision to allow partnership oil pipeline to recover tariff litigation expenses through three-year surcharge was adequately explained and reasonable, despite contention that costs should have been spread over 11 years of litigation, where 85.9% of expenses were incurred over three-year period to which surcharge would apply.

TAX - ARIZONA

State ex rel. Brnovich v. City of Phoenix

Supreme Court of Arizona - August 3, 2020 - P.3d - 2020 WL 4431892

Attorney General brought special action seeking resolution of issue of whether ordinance imposing fees on commercial ground transportation providers who transported passengers to and from airport violated state constitution's prohibition on the imposition or increase of taxes or other transaction-based fees on services.

The Supreme Court held that:

- Fees imposed by ordinance were not transaction-based and thus did not violate constitutional prohibition on the imposition or increase of taxes or other transaction-based fees on services, and
- Statutory requirement for local government to post a bond, in a special action by Attorney General to determine whether a local law violates state law or constitution, was so incomplete and unintelligible as to be unenforceable.

Trip fees which ordinance imposed on commercial ground transportation providers who transported passengers to and from airport were not transaction-based and thus did not violate constitutional prohibition on the imposition or increase of taxes or other transaction-based fees on services; neither imposition of trip fee nor its amount depended on whether a passenger took a ride, cancelled it, or even paid for it, but rather, trip fees were based on providers' use of airport property in picking up and dropping off passengers at designated sites as recorded by technology-based trip-tracking or provider reports.

Statutory requirement for local government to post a bond, in a special action by Attorney General to determine whether a local law violates state law or constitution, was so incomplete and unintelligible as to be unenforceable, where neither statute nor legislative history clarified bond's purpose, conditions on which it was based, what would happen if no bond were posted, or what conditions were required to exonerate bond.

Why 2020 is Primed For Opportunity Zone Investments.

OZs are an effective investment vehicle, especially in this precarious moment

Amid all the bad news, there may be one bright spot this summer (and beyond) for investors: Opportunity Zones. New deadlines, growing momentum, and various market factors will converge to make such investments — and the positive social impact they bring — more attractive than ever.

First, a new IRS deadline extension should help put 2019 capital gains to work this summer and the months that follow. Here's why: in normal times, regulations dictate that investors have 180 days from when capital gains are realized to invest them in a qualified opportunity fund (QOF); however, in response to the economic crisis, these regulations have been adjusted such that investors who realized capital gains on or after October 4, 2019 now have until the end of 2020 to invest in a QOF. This gives investors sorely needed time to make decisions and should ultimately prime OZs for the rest of the year.

The recent selloff in the stock market only adds to the dry powder on hand this summer. Coming off a strong bull run, COVID-19 incited some investors to sell stock and take (a potentially unplanned) recognition of capital gains. Investors with newfound liquidity might find OZs an appealing diversifier in a volatile environment.

But none of this would matter if OZs weren't such an effective investment vehicle, especially in this precarious moment. Their long-term nature (investors must hold onto assets for 10 years to realize their full benefit) provides ample time for projects to move through the downturn and appreciate before investors look to sell.

OZ investors today can also be confident knowing they're getting in at the start of a new real estate cycle, replete with lower labor, land and construction costs, and historically low-interest rates.

These factors, in tandem with the growing momentum of Q3 and Q4 OZ investments from 2019, have already borne fruit. QOFs have continued to make deals, close construction financing agreements and break ground on new developments. At least four new OZ developments have started construction since March in the D.C. area alone.

Most importantly, as the U.S. begins to emerge from the immediate aftermath of COVID-19 – and with protests continuing across the country – there will be an added focus on social impact and equitable recovery of our hardest-hit and historically underfunded communities. These priorities are shared by the OZ program, which aims to invest and uplift these very communities.

In this respect, we expect residential housing to remain the top investment area, be it affordable housing, apartment buildings in emerging regions, or multifamily housing serving a growing population. On the other hand, retail and hospitality may remain at higher risk, given the uncertainty of these industries' recoveries.

The coming wave of OZ investment will also underscore the need for specialty financial administration, more transparency and better reporting. Now more than ever, new and existing investors will demand a quantitative measurement of their dollars' social impact, a clear picture of how many jobs it created, and whether it met affordability mandates. And with so much else in our lives still wracked with unknowns, they'll want to know that the QOF they choose fully understands the complex tax, accounting, and compliance nuances inherent in a specialty fund.

With all that said, one thing is clear: For those looking to escape the turbulent market for calmer waters — while contributing to the recovery of our hardest-hit communities — now may be the perfect time to check out Opportunity Zones.

Governor Gavin Newsom's 2019-2020 proposed budget includes language which addresses the issue of federal conformity related to the Opportunity Zones, on page 94 of the budget summary: "The state will also make EIFDs a more attractive economic tool by pairing them with the federal Opportunity Zones program. To make Opportunity Zones more effective, the state will conform to federal law allowing for deferred and reduced taxes on capital gains in Opportunity Zones for investments in green technology or in affordable housing, and for exclusion of gains on such investments in Opportunity Zones held for 10 years or more.

californiaglobe.com

By Reid Thomas, July 31, 2020 10:45 am

Can Opportunity Zones Recover from the COVID-19 Crisis? (Episode #104)

Do Opportunity Zones have the potential to create a more optimistic and hopeful outlook, and to help build national recovery…

CONTINUE READING »

HUD's Carson Provides Opportunity Zone Updates.

The Mayor of Fort Myers, Florida said he is "encouraged" by results of the Opportunity Zone initiative for economically struggling neighborhoods in his city.

U.S. Housing and Urban Development Secretary Dr. Benjamin Carson, Chairman of the White House Opportunity and Revitalization Council, this week delivered an update on government-designated Opportunity Zones located in Fort Meyers Florida.

Carson visited Opportunity Zone neighborhoods in Fort Myers to view the progress made as a result of the 2017 Tax Cuts and Jobs Act, which created Opportunity Zones in the effort to stimulate long-term investments in low-income communities. Opportunity Zone plans are in place for communities in all 50 states this year.

"Today, I am encouraged by the force of positive change happening here in Fort Myers as a result of the Opportunity Zones initiative. I thank [Fort Myers] Mayor [Randy] Henderson and the local leadership for their determined partnership in ensuring economic growth and opportunity for all," Carson said.

Henderson added that the Opportunity Zone initiative is an important program for the City of Fort Myers.

"Secretary Carson has championed attainable housing and public private partnerships that make it possible to attract investors, particularly in our Opportunity Zones."

Housing advocates such as the National Association of Realtors (NAR) have expressed support for Opportunity Zones as a tool for building more housing in economically distressed areas.

On December 12, 2018, the White House established the Council to support the administration's pledge to encourage public and private investment in urban and economically distressed areas, including Opportunity Zones.

Secretary Carson last month delivered the latest report outlining Opportunity Zone best practices and examples of revitalization occurring nationwide to President Donald Trump.

At that time, Carson reported, "There are inspiring stories happening in real time, with action being taken by State governments, local governments, Qualified Opportunity Funds, public-private partnerships, and others to spur revitalizing investments in the areas of most need. This report will prove to be especially helpful and encouraging to communities as they continue to admirably fight the invisible enemy known as COVID-19."

dsnews.com

TAX - FLORIDA

Discount Sleep of Ocala, LLC v. City of Ocala, Florida

District Court of Appeal of Florida, Fifth District - June 19, 2020 - So.3d - 2020 WL 3394724 - 45 Fla. L. Weekly D1490

Businesses brought class action against city, challenging city's fire service user fee as an unconstitutional tax.

The Circuit Court granted city's motion to dismiss. The District Court of Appeal reversed. On remand, the Circuit Court denied class certification. The District Court of Appeal reversed again and, after a bench trial, the Circuit Court entered judgment in favor of city. Businesses appealed.

The District Court of Appeal held that:

- Fee was not paid in exchange for a particular governmental service;
- Fee benefited payors in a manner not shared by non-payors;
- Fee was not paid by choice;
- Law-of-the-case doctrine precluded the Circuit Court from concluding that statute of limitations barred businesses' claims;
- Voluntary payment defense did not preclude refund of fee payments;
- City did not act in good-faith reliance on a presumptively valid statute in imposing the fee; and
- Refund of fee payments would not have imposed an intolerable burden on city.

City's fire service user fee was not a charge paid in exchange for a particular governmental service, as factor for determining validity of fee in businesses' class action challenging the fee as an unconstitutional tax; city provided comprehensive fire services to anyone within the city limits regardless of whether they had paid the fee, and fire services did not constitute a utility.

City's fire service user fee benefited payors in a manner not shared by non-payors, as factor for determining validity of fee in businesses' class action challenging the fee as an unconstitutional tax; although payors and non-payors had access to the same fire services, payors received special financial benefits such as lower insurance premiums.

City's fire service user fee was not paid by choice, as factor for determining validity of fee in businesses' class action challenging the fee as an unconstitutional tax; the fee appeared on businesses' utility bill along with charges for water, sewer, and electric services, failure to pay fire service fee would lead to disconnection of water, sewer, and electric services by city, and unpaid fire service charges constituted a lien on the property.

City ordinance repealed city's fire service user fee, and thus law-of-the-case doctrine precluded trial court from concluding, contrary to prior appellate court judgment which remanded the matter, that the statute of limitations barred businesses' class action claims challenging user fee as an unconstitutional tax; ordinance's plain language made it clear that repeal became effective on the mayor's signing and mayor did sign the ordinance.

Businesses challenging city's fire service user fee as an unconstitutional tax did not pay the fee voluntarily, and thus voluntary payment defense did not preclude refund of fee payments; failure to pay the service fee resulted in loss of water, sewer, and electric services, as well as a lien on the property to which services had been provided.

City did not act in good-faith reliance on a presumptively valid statute in imposing a fire service user fee, and therefore good-faith defense did not preclude a refund to businesses challenging the fee as an unconstitutional tax, where no statute specifically allowed city to charge a fire service fee.

Refund of fire service user fee payments would not have imposed an intolerable burden on city, and therefore good-faith defense did not preclude a refund to businesses challenging the fee as an unconstitutional tax; city could have authorized a special assessment, used a portion of reserve funds, implemented bonds, sold surplus city property, or transferred funds from other city accounts to provide for the refund.

TAX - MARYLAND

Carbond, Inc. v. Comptroller of Treasury

Court of Special Appeals of Maryland - July 29, 2020 - A.3d - 2020 WL 4354908

Corporate taxpayer sought judicial review of Tax Court's denial of its refund claim and affirmed the Comptroller's assessments of admissions and amusement taxes. The Circuit Court affirmed the Tax Court's decision. Taxpayer appealed.

The Court of Special Appeals held that taxpayer's electronic gaming devices were "games of entertainment" subject to admissions and amusement taxes.

Coin-operated electronic gaming devices placed in bars, restaurants, and convenience stores throughout city and county were "games of entertainment" subject to admissions and amusement taxes; the refrigerator-sized machines, replete with spinning wheels and lights, inherently involved use of recreational facilities or equipment.

IRS Final Rules Offer Safe Harbors for Users of SALT Workarounds.

Final regulations addressing payments to charitable organizations in exchange for state or local tax credits stick closely to the proposed regs but make some clarifications for safe harbors.

Safe harbors in the August 7 final regs (T.D. 9907) allow a C corporation or specified passthrough entity that receives or expects to receive state or local tax credits in return for payments to or for the use of a section 170(c) entity to treat the credit-sized portion of the payment like an ordinary and necessary business expense under section 162.

The treatment matches the proposed rules (REG-107431-19) from December 2019 to make it clear that such payments constitute an allowable deduction as a trade or business expense under section 162 rather than a charitable deduction.

Continue reading. (Subscription required.)

TAX ANALYSTS

POSTED ON AUG. 10, 2020

FRED STOKELD

Finding Uncommon Value in Untapped OZ Markets, with Four Points Funding.

What are some of the economic advantages of rural multi-asset multifamily and outdoor-focused hospitality Opportunity Zone fund investing? Chris Montgomery…

CONTINUE READING »

TAX - MICHIGAN

Rafaeli, LLC v. Oakland County

Supreme Court of Michigan - July 17, 2020 - N.W.2d - 2020 WL 4037642

Former property owners brought action against county and its treasurer, alleging due-process and equal-protection violations as well as unconstitutional taking by selling their real properties in satisfaction of their tax debts and retaining surplus proceeds from tax-foreclosure sale of their properties.

The Circuit Court granted summary disposition to county and treasurer, and denied reconsideration. Taxpayers appealed. the Court of Appeals 4803570, affirmed. Taxpayers appealed.

The Supreme Court held that:

- Former owners did not “forfeit” all rights, titles, and interests they had in their properties under the General Property Tax Act (GPTA) by failing to pay their real-property taxes;
- GPTA did not create new rights beyond those prescribed in Michigan and United States Constitutions;

- Nature of former owners' claim was taking without just compensation, not deprivation of property without due process of law;
- Aggrieved property owners had cognizable, vested, common law right to collect surplus proceeds from tax-foreclosure sale of his or her property;
- Amendments to GPTA did not abrogate aggrieved property owners' cognizable, vested, common law right to collect surplus proceeds from tax-foreclosure sale of his or her property;
- Government's retention of surplus proceeds from tax-foreclosure sale was unconstitutional taking; and
- Government could not rely on its taxing power to justify retention of surplus proceeds from tax-foreclosure sale under GPTA.

Under the General Property Tax Act (GPTA), "forfeiture" simply permits defendants to seek a judgment of foreclosure; forfeiture does not affect title, and it does not give the county treasurer, or the state if the state is the foreclosing governmental unit, any rights, titles, or interests to the forfeited property.

Former property owners did not "forfeit" all rights, titles, and interests they had in their properties under the General Property Tax Act (GPTA) by failing to pay their real-property taxes; former owners did not use their properties for illicit purposes or commit criminal offense by not paying their property taxes.

General Property Tax Act (GPTA) did not create new rights beyond those prescribed in Michigan and United States Constitutions, and therefore former property owners could not contest legitimacy of government's authority to foreclose on their properties for unpaid tax debts and they could not contest sale of their properties to third-party purchasers on due process grounds to extent government complied with due-process, since GPTA stated its intent to only comply with minimum requirements of due process.

Nature of former property owners' claim was taking without just compensation, not deprivation of property without due process of law, where former owners alleged that compliance with General Property Tax Act (GPTA) notice provisions did not justify defendants' retention of surplus proceeds from tax sale and asked court to reverse decision of Court of Appeals and remand to circuit court for determination of just compensation.

Aggrieved property owners had cognizable, vested, common law right, protected by Michigan's Takings Clause in inverse-condemnation action, to collect surplus proceeds from tax-foreclosure sale of his or her property, although General Property Tax Act (GPTA) did not recognize divested property owner's right to surplus proceeds.

Amendments to General Property Tax Act (GPTA) did not abrogate aggrieved property owners' cognizable, vested, common law right, protected by Michigan's Takings Clause in inverse-condemnation action, to collect surplus proceeds from tax-foreclosure sale of his or her property.

Although government was entitled to seize owners' properties under General Property Tax Act (GPTA) to satisfy unpaid delinquent real-property taxes, as well as any interest, penalties, and fees associated with foreclosure and sale of those properties, government's retention of surplus proceeds from tax-foreclosure sale was unconstitutional taking.

Government could not rely on its taxing power to justify retention of surplus proceeds from tax-foreclosure sale under General Property Tax Act (GPTA), since government's ability to take taxpayers' properties was limited by what taxpayers actually owed as result of failing to pay their taxes and therefore any physical taking of property was arbitrary and disproportionate tax.

SPECIAL ASSESSMENTS - NORTH DAKOTA

Holter v. City of Mandan

Supreme Court of North Dakota - July 22, 2020 - N.W.2d - 2020 WL 4210906 - 2020 ND 152

Landowner sought review of city's decision to specially assess her undeveloped residential lots for street improvements.

The District Court dismissed. Landowner appealed.

The Supreme Court held that special assessments, based on linear feet, were not arbitrary, capricious, or unreasonable.

City's special property tax assessments, based on linear feet, on undeveloped residential lots for street improvements were not arbitrary, capricious, or unreasonable, even if assessments were slightly less than total value of the properties, where properties were assessed under city special assessment policy, city used policy to determine benefits and assessments to properties in an improvement district, and special assessment commission did more than simply take total cost of project and divide it by using a formula.

TAX - MINNESOTA

Enbridge Energy, Limited Partnership v. Commissioner of Revenue

Supreme Court of Minnesota - July 8, 2020 - N.W.2d - 2020 WL 3818130

Taxpayer filed petitions to challenge valuation of pipeline system for two tax years.

The Tax Court entered judgment in favor of Commissioner of Revenue. Taxpayer appealed.

The Supreme Court held that:

- Tax Court was not required to exclude indirect construction expenses from the cost indicator of value;
- It did not commit clear error in determining that taxpayer did not carry its burden regarding expenditures listed in its construction work in progress (CWIP) accounts;
- Taxpayer was not entitled to include only expansionary construction work in progress (CWIP) expenses;
- Tax Court error in requiring taxpayer to show that nationwide or industrywide factors contributing to pipeline obsolescence affected pipeline to a greater extent than other pipelines was harmless; and
- Tax Court had discretion to depart from default weightings to pace equal weight on the cost and income indicators of value.

Tax court was not required to exclude indirect construction expenses from the cost indicator of value for pipeline system under construction; under general appraisal practices and industry standards for pipeline company accounting, construction work in progress (CWIP) expenses included the direct and indirect costs of construction.

Tax court valuing pipeline under construction did not commit clear error in determining that taxpayer did not carry its burden to show that expenditures listed in its construction work in progress (CWIP) accounts reflected the cost of items that were not installed as of the valuation dates; although taxpayer argued that evidence of in-service dates it offered were synonymous with when projects were installed, it conceded that the in-service dates could relate to an entire project and might not capture when portions of that project were installed.

Taxpayer was not entitled to include only expansionary construction work in progress (CWIP) expenses and exclude non-expansionary expenses for valuing pipeline system under cost approach.

Tax court error in requiring taxpayer to show that nationwide or industrywide factors contributing to pipeline obsolescence affected pipeline to a greater extent than other pipelines was harmless; although court erred by expecting proof that governmental regulations affected taxpayer more than others, its underlying finding that governmental regulations did not adversely affect taxpayer since it was regulated on a cost-of-service basis was not clearly erroneous, record indicated taxpayer's inability to meet existing demand undercutting claims that drop in oil prices negatively affected demand and competitors were interfering with business, and evidence supported court's concerns regarding appraiser's methodology.

Tax court had discretion to depart from default weightings to pace equal weight on the cost and income indicators of value to calculate the unit value of the pipeline system if dictated by the circumstances of the case.

COVID's Impact on Opportunity Zone Funds May Surprise You.

It seems no industry has remained unscathed or unaffected by the coronavirus pandemic up to this point. As some industries thrive others are devastated, leaving participating investors in opportunity zones wondering how their investments and funds may be impacted.

Opportunity zones (OZs) are designated census tracts that were created as a part of the Tax Cut and Jobs Act of 2017 (TCJA) and offer major tax benefits to participating investors that redirected capital into an opportunity zone fund (OZF) established for the development of new business, real estate, or expansion of established businesses in an opportunity zone.

OZs aren't hit as hard as you may have thought

Considering that opportunity zones are 8,700 of the most rural or low-income census tracts across the United States, concern over the performance of these funds as well as their ability to execute their initial projects is understandable. The Economic Innovation Group (EIG) conducted a national study in June in which 52% of the respondents stated they have been negatively impacted by the coronavirus in some way.

Continue reading.

The Motley Fool

Jul 27, 2020 by Liz Brumer

---

9 Early Conclusions of Opportunity Zones for Equitable Development, with Brett Theodos.

In its early days, how effective has the Opportunity Zone incentive been for equitable development projects? Brett Theodos is senior…

CONTINUE READING »

Opportunity Db

July 29, 2020

IRS Provides Additional Relief for Tax-Exempt Hospitals.

Deadline for completing certain needs assessment requirements moved to Dec. 31

WASHINGTON — Because of the burdens the COVID-19 pandemic has placed on hospitals, the Internal Revenue Service today provided additional relief to hospital organizations that must meet the Community Health Needs Assessments (CHNA) requirements.

Notice 2020-56 extends the deadline for conducting a CHNA and adopting an implementation strategy to meet the community health needs identified through the CHNA to Dec. 31, 2020.

Tax-exempt hospital organizations filing Forms 990 must indicate on Schedule H if they have conducted a CHNA in the current taxable year or in either of the two immediately preceding taxable years and if they have adopted an implementation strategy to meet the significant health needs identified through the most recently completed CHNA. Since these requirements may affect the hospital's tax-exempt status and because the law imposes a $50,000 tax on a hospital organization for each hospital facility that fails to meet either or both of these requirements, the extension provided in the notice provides significant relief.

Under Notice 2020-56, the time for hospitals to comply with any CHNA requirements due to be performed on or after April 1, 2020, and before Dec. 31, 2020, is extended to Dec. 31, 2020.

Previously, the IRS issued guidance extending the due date to July 15, 2020; today's guidance further extends that due date.

Hospitals using the relief in today's notice that file Form 990 prior to Dec. 31, 2020, should state in the narrative of Part V.C. of Schedule H (Form 990) that they are eligible for and are relying on the relief provided in the notice, and should not be treated as failing to meet the requirements of section 501(r)(3) prior to Dec. 31, 2020.

Additional tax relief related to the COVID-19 pandemic can be found on IRS.gov.

Tax Analysts

July 14, 2020

IRS Asks Puerto Rico Power Utility to Return BAB Payments.

- **Prepa must return subsidy payments on BABs in bankruptcy**
- **Island power authority issued $676 million of BABs in 2010**

The U.S. Internal Revenue Service told Puerto Rico's electric company that it has to repay the federal subsidies it received for bonds sold a decade ago as part of the government's stimulus program in the last recession.

The IRS in a July 10 letter asked the Puerto Rico Electric Power Authority to return Build America Bond subsidy payments made since July 1, 2017, the day before the utility's bankruptcy, according to a filing to bondholders on the Municipal Securities Rulemaking Board's website.

Prepa, as the utility is known, sold a combined $676 million of taxable Series YY and EE Build America Bonds in 2010. The federal government covers 35% of interest costs on BABs. The IRS began examining Prepa's subsidy payments in 2019.

The IRS also won't make subsidy payments for credits that Prepa has requested since July 2017, according to the bondholder filing.

"Prepa intends to respond to the IRS and is currently considering its options," according to the filing.

Bloomberg Markets

By Michelle Kaske

July 21, 2020, 8:34 AM PDT

TAX - CALIFORNIA

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

Court of Appeal, First District, Division 4, California - June 30, 2020 - Cal.Rptr.3d - 2020 WL 3529750 - 20 Cal. Daily Op. Serv. 6497 - 2020 Daily Journal D.A.R. 6829

City brought action to establish that voter initiative to adopt special tax was validly enacted.

The Superior Court granted city judgment on pleadings, and initiative's opponents appealed.

The Court of Appeal held that:

- Constitutional provision requiring two-thirds vote of qualified electors to approve special taxes adopted by "Cities, Counties and special districts" did not apply to limit citizens' initiative power to raise special tax by majority vote;
- Constitutional provision requiring two-thirds vote of qualified electors to approve special taxes adopted by "local government" did not apply to limit citizens' initiative power to raise special tax by majority vote; and
- City charter did not require that voter initiative to impose special tax obtain concurrence of two-thirds of voters.

TAX - NEW JERSEY

Gourmet Dining, LLC v. Union Township

Supreme Court of New Jersey - June 30, 2020 - A.3d - 2020 WL 3525557

Operator of fine dining restaurant located on university campus sought judicial review of county tax board's dismissal of operator's challenges to property tax assessments.

The Tax Court denied operator's motion for summary judgment and granted township's motion for summary judgment. Operator appealed, and the Superior Court reversed and remanded. The Supreme Court granted petition for certification.

The Supreme Court held that:

- Commercial success, rather than public purpose, was paramount factor, and
- Restaurant was not a use of the building for the university.

Commercial success, rather than public purpose, was paramount factor in arrangement between university and operator of competitive high-end restaurant located on university's campus, and thus restaurant operator was not entitled to public property tax exemption; providing food services for students, or even faculty or administrators, was not the key purpose of the restaurant, which was not even promoted as a form of convenience for students and researchers at the building, or the university generally, benefits such as employment opportunities for students were incidental, and while portion of restaurant's revenue went to scholarships, that could not transform otherwise nonexempt purpose a public purpose.

High-end restaurant located in building on university campus was not a use of the building for the university but rather for the restaurant operator, and thus restaurant was not exempt from taxation on grounds it was used for college; profit, after all expenses were paid, went to restaurant.

Conscious Capitalism in Opportunity Zones, with Travis Steffens.

What is conscious capitalism, and how can choosing to adhere to this concept create positive social impact in Opportunity Zones?

CONTINUE READING »

Opportunity Db

July 15, 2020

Key Takeaways from the Novogradac OZ Conference, with Mike Novogradac and John Sciarretti.

What were the biggest highlights from last week's Novogradac Opportunity Zones Virtual Conference? Mike Novogradac is the managing partner of…

CONTINUE READING »

Opportunity Db

July 22, 2020

Little-Noticed Change to TIF Law Allows Ohio Municipalities and Townships to Redirect up to 25 percent of their TIF Funds to Public Safety, Road and Bridge Maintenance During FY 2020 & 2021.

This month, the Ohio General Assembly fast-tracked a school construction finance measure as a mini-capital appropriations bill. Amended Senate Bill (Am. SB) 4 was signed into law by Governor DeWine on July 24, 2020, after the measure was prioritized by leaders in the Ohio House and the Senate. A provision included in Am. SB 4 deserves attention among municipal and township officials and economic developers.

Am. SB 4 became the legislative vehicle of choice for state lawmakers to insert a key change in municipal and township tax increment financing (TIF) law. With this amendment, municipalities and townships can ostensibly "borrow" from their respective TIF funds to cover certain costs unrelated to underlying TIF projects.

Contained in so-called uncodified language (i.e., a legislative directive neither published nor otherwise to appear in the Ohio Revised Code), Section 17 of Am. SB 4 states that municipalities or townships may do either or both:

- *During their fiscal year ending in 2020.* Appropriate and expend the sum of (1) up to 25 percent of the unencumbered moneys on deposit in the subdivision's TIF fund as of October 12, 2020 (Am. SB 4's effective date); plus (2) up to 25 percent of the amounts to be deposited during the remainder of the 2020 fiscal year. The legislative authority must act between Oct. 12 and the last day of its 2020 fiscal year.
- *During their fiscal year ending in 2021.* Appropriate and expend the sum of (1) up to 25 percent of the unencumbered balance of the TIF fund as of fiscal year 2021's first day; plus (2) up to 25 percent of the amounts to be deposited during fiscal year 2021. The legislative authority must act during the 2021 fiscal year.

A simple mathematical example may be helpful. A municipal TIF fund with $500,000 on-deposit as of Oct. 12, of which $200,000 is unencumbered, and that receives another $500,000 during the remainder of fiscal year 2020 would have $175,000 in TIF fund moneys that could be redirected.

If it chooses to act during these periods, a municipality or township may use such TIF fund moneys "solely to pay current public safety expenses or road and bridge maintenance expenses" of the subdivision that are not eligible to be reimbursed by its CARES Act – Coronavirus Relief Fund payment (e.g., Ohio House Bill 481).

Note, however, that moneys in the TIF fund to be redirected to public safety, road and bridge maintenance must be unencumbered. In other words, TIF fund moneys cannot be redirected if they are otherwise spoken for (i.e., encumbered) to pay debt service on TIF bonds or other contractual obligations.

A key feature of this uncodified law change is that the redirected TIF fund moneys are treated as a (forgivable) loan. That is, a municipality or township must reimburse the TIF fund, but only so long as and to the extent that federal funds are received by the subdivision "that may be used to pay for or reimburse those expenses[.]" Put another way, a municipality or township that chooses to redirect its unencumbered balance of TIF fund moneys this year and/or next may not have to replenish its TIF fund by the amount of the loan if federal funds for public safety, road and bridge maintenance are not received before the TIF exemption period expires.

Although initial reporting on this amendment to Am. SB 4 emphasized the loan nature of these redirected TIF fund moneys, payments from a TIF fund can be used for public safety, roads and bridges without need for repayment from the subdivision's local revenue sources; any such repayment would be sourced from the federal government, if future Congressional legislation were to allow. Such repayment may not be required if the federal funds never materialize.

Bricker & Eckler LLP

July 22, 2020

TAX - HAWAII

Ocean Resort Villas Vacation Owners Association v. County of Maui

Supreme Court of Hawai'i - June 19, 2020 - P.3d - 2020 WL 3397756

Taxpayers brought action against county, seeking declaratory relief regarding the legality and constitutionality of county's timeshare real property tax classification and whether its method of promulgation violated the Hawai'i Sunshine Law.

The Circuit Court granted taxpayers' motions for partial summary judgment. County brought an interlocutory appeal, and the Supreme Court accepted transfer of the appeal from the Intermediate Court of Appeals. After voluntary mediation and settlement, county moved to partially dismiss the appeal and for remand for vacatur, and the motion was denied.

The Supreme Court held that:

- The Circuit Court lacked subject matter jurisdiction;
- Taxpayers' recourse was through county procedures for appealing tax assessments; and
- Disapproval of stipulation and motion for partial dismissal were warranted without remand for evaluation of potential vacatur.

Taxpayers' declaratory-judgment action challenging legality and constitutionality of county's timeshare real property tax classification was a "controversy with respect to taxes," and thus circuit court lacked subject matter jurisdiction pursuant to declaratory judgment statute; taxpayers' original and amended complaints all sought declaratory relief in form of voiding county's real property timeshare tax, a result which would have interfered with assessment or collection of taxes.

Taxpayers' recourse to challenge legality and constitutionality of county's timeshare real property tax classification was through county procedures for appealing tax assessments, rather than declaratory judgment in circuit court; taxpayers alleged classification and rates violated equal protection clauses, rights of free speech and to petition, and procedural due process rights, taxpayers sought declaratory judgment as to illegality of amended assessment, and taxpayers brought § 1983 action that was dependent upon alleged constitutional violations.

Supreme Court's disapproval of appellees' and appellant's stipulation and order to remand and vacate circuit court's decision, and denial of appellant's motion for partial dismissal of appeal, were warranted without remand for circuit court to evaluate potential vacatur; there were grave concerns with adopting process by which an appellate court, based solely on settlement of parties, approved stipulation to dismiss an appeal when parties' end goal was vacating judgment, mootness on appeal occurred solely by reason of voluntary settlement of parties, and no fact-intensive inquiry was required.

TAX - PENNSYLVANIA

[Colonial School District v. Montgomery County Board of Assessment Appeals]

Commonwealth Court of Pennsylvania - May 28, 2020 - A.3d - 2020 WL 2758698

School district appealed decision of county board of assessment appeals to issue notice of no change to taxpayer's assessment.

Taxpayer filed petition to dismiss school district's tax assessment appeal. The Court of Common Pleas denied taxpayer's petition to dismiss. Taxpayer appealed.

The Commonwealth Court held that:

- Trial court's order denying taxpayer's petition to dismiss was collateral order, and
- Trial court relied on factual findings not supported by substantial evidence.

Trial court's order denying taxpayer's petition to dismiss school district's appeal of county board's tax assessment ruling was a collateral order, and therefore the order was appealable as of right; trial court's order related to taxpayer's constitutional issue asserting that school district's tax assessment appeal policy violated Uniformity Clause of state constitution, and the constitutional issue was separable from merits of school district's appeal challenging taxpayer's real estate valuation as too low, trial court's order involved an important question involving Uniformity Clause, and if Commonwealth Court declined immediate review, taxpayer's constitutional claim would be postponed and taxpayer would incur substantial cost.

In denying taxpayer's petition to dismiss school district's appeal of county board's tax assessment ruling, trial court relied on factual findings not supported by substantial evidence when it concluded that school district's decision to appeal valuation of taxpayer's mall conformed to Uniformity Clause of state constitution; school district's stated basis for filing assessment appeal was a recorded mortgage that, on its face, indicated that taxpayer's mall had higher fair market value than shown in the assessment, and trial court's finding that mortgage on mall exceeded its fair market value was based on a statement of counsel for school district, which did not constitute evidence.

TAX - CALIFORNIA

[Howard Jarvis Taxpayers Association v. Bay Area Toll Authority]

Court of Appeal, First District, Division 2, California - June 29, 2020 - Cal.Rptr.3d - 2020 WL 3496798 - 20 Cal. Daily Op. Serv. 6366

Taxpayers brought action against regional transportation commission, regional toll authority, and state legislature to challenge the validity regional ballot measure increasing tolls on area state-owned bridges, which was a ballot measure that received a simple majority of votes in the legislature and at the election but not, as taxpayers alleged was required by the state constitution, a two-thirds majority in both houses of the legislature and at the election.

The Superior Court entered judgment on the pleadings for regional transportation commission, regional toll authority, and state legislature. Taxpayers appealed.

The Court of Appeal held that:

- Toll increase was imposed by state legislature and not by regional transportation authority, and
- Toll increase was a charge imposed for entrance to or use of state property.

Increase in tolls to cross region's state-owned bridges, which was increase approved by simple majority of voters at election pursuant to bill passed by state legislature, was imposed by state legislature and not by regional transportation authority, as was relevant to determining, pursuant to state constitution, what kind of majorities needed to approve increase in state legislature and at election, assuming that increase was a "tax" as defined by state constitution's provision on tax increases; legislative bill at issue required boards of supervisors in region's counties to call a special election, bill required imposition of a toll increase of up to three dollars, subject to voter approval, and bill specified in great detail the uses to which the resulting revenue would be put.

Increase in region's tolls to cross state-owned bridges, which was an increase approved by simple majority of voters at election called pursuant to bill passed by the state legislature, was a charge imposed for entrance to or use of state property, and thus it was not a "tax" as defined by state constitution's provision on majorities required for tax increases, despite argument that funds resulting from toll increase were to be used for improvements to public transit and other programs unrelated to crossing the bridges.

TAX - CALIFORNIA

City of Chula Vista v. Sandoval

Court of Appeal, Third District, California - May 27, 2020 - 49 Cal.App.5th 539 - 263 Cal.Rptr.3d 236 - 20 Cal. Daily Op. Serv. 4859 - 2020 Daily Journal D.A.R. 5050

Seven cities filed a petition for a writ of mandate and a complaint for declaratory relief against county auditor-controller, challenging the methodology used to distribute the residual pool of former tax increment following dissolution of redevelopment agencies.

The Superior Court granted the petition. Auditor-controller appealed.

The Court of Appeal held that taxing entities with favorable passthrough agreements are paid in full and can also receive a proportionate amount of the residual pool of money.

Taxing entities which have favorable passthrough agreements with a redevelopment agency are paid in full and can also receive a proportionate amount of the residual pool of money left after the obligations, including passthrough agreements, are paid, when county auditors distribute the residual pool of former tax increment from the dissolution of redevelopment agencies; passthrough payments are not capped at their pro rata shares.

New Tax Schemes To Help Fill State Coffers.

MUNIS in FOCUS: Eric Kazatsky, Senior U.S. Municipals Strategist for Bloomberg Intelligence, discusses the new tax schemes that will be needed to help fill state coffers. Hosted by Paul Sweeney and Vonnie Quinn.

Play Episode.

Bloomberg Radio

July 10, 2020

Annual Top 25 Opportunity Zone Influencers List Released.

The prestigious insider listing of who's who in the Opportunity Zone industry – the Top 25 OZ Influencers – has been released in the latest edition of Opportunity Zone Magazine.

The prestigious insider listing of who's who in the Opportunity Zone industry – the Top 25 OZ Influencers – has been released in the latest edition of Opportunity Zone Magazine. The annual tribute showcases the industry's leading and most influential OZ professionals, who inspire and lead through their vision and innovative accomplishments. Through their work and advocacy, the Opportunity Zones continue to change lives by serving as a driving force to revitalize the economy and distressed communities across the country.

New for this year is the ranked Top 25 category, honoring the most powerful OZ professionals who stand out among their peers. The list also revealed the winners in five other categories: attorneys, fund managers/developers, tax specialists, policy influencers and professionals in specialized fields. To see the complete list, visit http://www.opportunityzone.com/magazine.

"We are excited to recognize the best of the best in the Opportunity Zone industry with our Top 25 OZ Influencers award," said Ali Jahangiri, CEO of OpportunityZone.com.

RANKED OVERALL WINNERS:

1. Daniel Kowalski, Treasury
2. Tim Scott, U.S. Senator (R-SC)
3. Scott Turner, White House Opportunity and Revitalization Council
4. Margaret Anadu, Goldman Sachs
5. Barry Sternlicht, Starwood Capital
6. Joseph Scalio, KPMG
7. Craig Bernstein, OPZ Capital
8. Michael Novogradac, Novogradac & Company
9. Jessica Millett, Duval & Stachenfeld, LLP
10. Alfonso Costa Jr, Housing and Urban Development
11. James Lang, Greenberg Traurig
12. Steve Case, Revolution
13. Brad Molotsky, Duane Morris
14. Steve Glickman, Develop

15. Avy Stein, Cresset Capital Management
16. David Coelho, Bridge Investment Group
17. Daniel Cullen, Baker McKenzie
18. Andrew Comiter, Comiter, Singer, Baseman & Braun, LLP
19. Shafron "Shay" Hawkins, Opportunity Funds Association
20. Kevin Shields, Griffin Capital
21. Olivia Byrne, K&L Gates
22. Reid Thomas, NES Financial
23. John Lettieri, Economic Innovation Group
24. Ira Weinstein, CohnReznick
25. Blake Christian, Holthouse, Carlin, Van Trigt, LLP

Follow us on social media:
Twitter: @OpportunityZoneExpo
Facebook: @opportunityzoneexpos
LinkedIn: https://www.linkedin.com/company/opportunity-zone-expo/
Instagram: @opportunityzoneexpo

Media Contact:
Marie Ekberg Padilla
Editor in Chief
Opportunity Zone Magazine
949-293-0829
marie(at)opportunityzone(dot)com
http://www.opportunityzone.com

Single-Family Rental Investment Strategies in Opportunity Zones, with Jeff Pintar.

How can built-to-own single family rentals be incorporated into an Opportunity Zone investment portfolio? Jeff Pintar is founder and CEO…

CONTINUE READING »

Opportunity Db

July 8, 2020

TAX - MISSOURI

Kansas City Chiefs Football Club, Inc. v. Director of Revenue

Supreme Court of Missouri, en banc - June 2, 2020 - S.W.3d - 2020 WL 2845762

Taxpayer, which operated a professional football team, sought review of decision of Administrative Hearing Commission, finding that taxpayer was "purchaser" of specified items used in renovation of football stadium, and was thus liable for sales tax and use tax with respect to such items.

The Supreme Court held that:

- That taxpayer made advance payments to vendors, as contemplated by project funding agreement, did not make taxpayer the "purchaser" of items provided by vendors within the meaning of statutes governing sales tax and use tax;
- Taxpayer had no legal right to use tax credits it received after it made donation to state finance board, having sold the credits and donated the proceeds;
- Funds donated by taxpayer no longer belonged to taxpayer after it made donation, and thus taxpayer was not "purchaser" of items bought with those funds; and
- That taxpayer stood to receive incidental benefit from project did not render it the "purchaser" of items bought with project funds.

That taxpayer, which operated a professional football team, paid money directly to vendors involved in stadium improvement project in advance, even though agreement to fund project required taxpayer to make donations to state finance board for use in project, did not demonstrate that taxpayer was purchaser of items provided by vendors, for purposes of sales and use tax statutes; taxpayer made advance payments to only three of nine vendors, governing agreements contemplated that taxpayer might make such advance payments, but that it would have been reimbursed by project fund after completing requisite paperwork, and there was no indication taxpayer failed to follow procedure for reimbursement.

Taxpayer, which operated a professional football team, had no legal right to use tax credits that it received and then sold after making donation to state finance board, as part of funding plan for project to improve football stadium, and thus to the extent money from sale of those credits spent from project fund to buy items for project, taxpayer was not the purchaser of those items within the meaning of the sales and use tax statutes; tax credits were briefly held in project fund, but were quickly sold to unrelated third parties, so taxpayer had no right to use or carryover such tax credits any longer, and proceeds from sale were donated by taxpayer to project fund, and were thus beyond taxpayer's ownership and control.

Funds donated by taxpayer, which operated a professional football team, to state finance board as part of funding plan for improvements to stadium, no longer belonged to taxpayer after donation was made, even though taxpayer received tax credits as a result of donation, and thus taxpayer was not purchaser of items purchased with donated funds, for purposes of sales tax and use tax statutes; mechanism used by taxpayer was explicitly contemplated by statutes governing financing of projects of economic benefit to state through state finance board, and there was no dispute that donations from taxpayer to finance board were placed into project fund.

That taxpayer, which operated a professional football team, stood to receive incidental benefit from publicly-financed stadium improvement project, did not render taxpayer the purchaser of items purchased by state finance board, even though such purchases were at least partially funded by donations made by taxpayer to board for purposes of project, and thus taxpayer was not liable for sales tax or use tax with respect to items purchased with those funds; finance board determined that statewide economic benefits of project exceeded benefits provided to taxpayer under agreement for project funding, as contemplated by statute governing tax credit financing of public projects.

TAX - OKLAHOMA

Miller v. Ellis

Supreme Court of Oklahoma - June 15, 2020 - P.3d - 2020 WL 3171335 - 2020 OK 52

Objectors brought action challenging legal sufficiency of referendum petition on city ordinance amending tax increment financing district.

The Supreme Court held that gist of referendum petition was legally insufficient.

Gist of referendum petition on city ordinance amending tax increment financing district was legally insufficient, where gist did not provide even an outline, it failed to provide any explanation of what amendments were, effect they had on existing law, and effect on law if ordinance they were contained in was rejected by voters at polls, it failed to mention ordinance that was target of petition by name, and it did not contain even summary of considerably more detailed description in petition itself.

Why Mobile Home Parks May Be the Perfect OZ Investment, with Sam Hales.

Could mobile home parks be the perfect (recession-resistant) Opportunity Zone investment? Sam Hales is CEO of Saratoga Group, a real estate investment firm focused on investing in affordable housing, specifically through mobile home communities located in Opportunity Zones. On May 27, he presented his MHP investment thesis to the OpportunityDb network. Click the play button below to listen to the condensed audio recording of the…

Read More »

Opportunity Db

July 1, 2020

Opportunity Alabama From OZs To Covid-19 Recovery.

We're spotlighting the impact of each of the Forbes OZ 20 Grand Prize winners. Two communities and two funds were honored at the 2020 Winter Innovation Summit for bringing transformative capital to long-overlooked areas across the U.S.

Opportunity Alabama's singular skill for connecting capital, community leaders and developers earned the nonprofit a Forbes OZ 20 Grand Prize. Now that knack for coalition and capacity-building work is being leveraged to help Alabama communities bounce back from Covid-19's economic blows.

Next week, Opportunity Alabama (OPAL) will be announcing the first cohort of a new initiative called the Rural Recovery Accelerator, aimed at providing economic-development training and resources to counties with populations under 175,000 across the state.

Covid-19 has reminded the country how existing inequities are easily compounded by the unexpected. Small and low-income communities that were struggling before the pandemic are also less likely to have the resources and infrastructure necessary to take surefooted economic steps in the months ahead. To make the outlook even worse, shrinking economies mean shrinking tax bases, muddling hopes for local government intervention.

OPAL wants to use its expertise to help communities think beyond immediate concerns about "reopening," instead focusing on the next six to twenty-four months. Over the course of an intensive six-to-eight week program, OPAL's recovery accelerator will lead participating communities through the process of putting together a recovery roadmap, a data profile, a pipeline of potential deals, a community recovery website, and outlining their community's broader recovery ecosystem.

Members of the OPAL team will continue to provide resources after the course to make sure each community's deal pipeline sees investment.

Communities—at the city, town, or business district level—can designate between one and five local coordinators to participate, committing in-kind time and effort. OPAL then helps local coordinators to map trajectories, connect the dots and take first steps. Thanks to funding from the Appalachian Regional Commission and Delta Regional Authority, the accelerator will be free for communities in 54 Alabama counties.

Seeing where a few missing pieces make all the difference is OPAL's raison d'être. If OPAL's work in opportunity zones (OZs) is any indication, communities will see the Rural Recovery Accelerator's returns continue to multiply.

OPAL's investment ecosystem-building track record started when founder and CEO Alex Flachsbart was working as an attorney in Birmingham.

A partner at the firm where Flachsbart worked came to him with an offer to help a group in Selma. Flachsbart would need to help the Selma group figure out how to get their project off the ground, including everything from the project's legal framework to whether grants or other incentives were available.

"You never get to do that as a lawyer," says Flachsbart, "so it was a lot of fun."

For that project and others, part of Flachsbart's work became turning rocks, looking for money wherever he could to "help move the needle in low-income places." Flachsbart went deep into the weeds researching everything he could find: social impact bonds, CDFIs, New Markets Tax Credit. It was on Twitter, during a sleepless night caring for his infant daughter, that Flachsbart's research into economic development incentives finally led him to OZs.

Flachsbart recalls the moment of realization, thinking "this is the missing equity solution we've been looking for."

One of the lessons Flachsbart learned as a lawyer was that "using law and finance as tools only gets you so far." To get projects off the ground, says Flachsbart, you depend on "that third leg of community—community engagement and community support."

With the tax incentive at the heart of the OZ framework, Flachsbart finally saw how to "connect all these disparate stakeholders who believe in low-income community revitalization."

Before final guidance on OZs came from the Treasury Department in early 2019, OPAL was already laying a foundation for one of the nation's most creative information hubs to connect capital, communities, institutional partners and leaders. Instead of focusing on just a few areas, OPAL developed a data-driven, scalable strategy for all 158 of Alabama's census tracts that were designated as OZs.

It was "almost a no brainer," as Flachsbart describes it. "This opportunity zone incentive gave us a vehicle for having a conversation that we needed to have for 20, 25 years."

Those conversations are happening now. "We have more collaboration than we've had—I know— in my adult life," says Anthony C. Hood, Ph.D., Director of Civic Engagement University of Alabama's president's office and part of the Opportunity Alabama team.

Conversations and collaboration mean it's now a lot easier for wealthier Alabamans to invest in Alabama. "A guy in rural west Alabama sells his company and makes $5 million," Flachsbart explains. "There's now infrastructure in place where he knows to call the local mayor because the local mayor had a conversation with him about opportunity zones, who then goes and calls the local economic developer who's got five easy shovel-ready projects teed up."

OZs are already making a difference for local investment in Alabama. For Tanya Maloney, Director of Economic Development in Helfin, OZs opened the door for a new senior care facility in her city that wouldn't have seen investment otherwise. In Maloney's words, "it's just a shining example of what opportunity zones can do for a rural community."

The Opportunity Alabama team hopes there will be shining examples for years to come. "Hope means that we have quality of life for the next generation," Flachsbart reflects when asked what it means to his work. "It means that we're able to confront the challenges that we have today, have open conversations about the past, have open conversations about the still-open wounds that exist in parts of our society"

Forbes

Jun 22, 2020

TAX - WASHINGTON

Lakehaven Water and Sewer District v. City of Federal Way

Supreme Court of Washington - June 18, 2020 - P.3d - 2020 WL 3278869

Water and sewer districts brought action against noncharter code city, seeking declaratory judgment that city lacked authority to impose an excise tax on water and sewer utilities, and alleging that tax was unconstitutional.

The Superior Court granted city's motion for summary judgment. Districts' motion for direct review was granted.

The Supreme Court held that:

- City had legislative authority to impose tax on districts;
- Legislature does not need to delegate taxing authority to code cities in "express" terms, abrogating *King County v. City of Algona*, 101 Wash.2d 789, 681 P.2d 1281, *Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 650 P.2d 193, and *Carkonen v. Williams*, 76 Wash.2d 617, 458 P.2d 280;
- A municipal corporation providing water-sewer services to ratepayers is a proprietary function not subject to governmental immunity from taxation;
- Districts lacked personal standing to assert due process vagueness challenge;
- Districts lacked representational standing to assert due process vagueness challenge; and
- The state constitution's privileges and immunities clause does not apply to municipal corporations.

Code city had legislative authority to impose excise tax on water and sewer districts, despite contention that express statutory authorization was needed to allow one municipality to impose tax on other municipalities; tax provision of municipal code gave cities broad authority to impose taxes on "all" places and kinds of business, without distinguishing between public and private business entities, and statute governing municipal business and occupation taxes did not apply to services traditionally taxed as a utility business.

The legislature does not need to delegate taxing authority to code cities in "express" terms; general articulations of municipal taxing authority are sufficient as long as the legislature's intent is plain; abrogating *King County v. City of Algona*, 101 Wash.2d 789, 681 P.2d 1281, *Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 650 P.2d 193, and *Carkonen v. Williams*, 76 Wash.2d 617, 458 P.2d 280.

A municipal corporation providing water-sewer services to ratepayers is a proprietary function, rather than a governmental function, and thus not subject to governmental immunity from taxation.

Pelosi's Infrastructure Bill Takes The Wrong Road On Tax Subsidies.

House Speaker Nancy Pelosi (D-CA) has rolled up many different committee bills into a single, massive 2,300-page, $1.5 trillion infrastructure package that the Democratic-controlled House likely will pass next week. But the bill is more than the usual collection of road, bridge, and water projects. It also is a Christmas tree of tax breaks. I counted roughly two dozen new, restored, or expanded tax credits for everything from renewable energy, economic development, supportive services, investments in low-income housing and historic properties, and environmental justice.

And that doesn't include the fistful of expanded tax-exempt bond financing mechanisms for both public and private projects, including subsidies for first-time farmers and a seemingly unlimited variety of businesses, including "facilities used for the creation or production of intangible property." The bill, called the Moving Forward Act, is so big that the legislative summary is 96 pages long.

Still no way to pay for infrastructure

For all the revenue measures in this package, there is one thing it doesn't include: Some way to pay for all this spending. Financing has been the missing element in nearly all of the major infrastructure plans floating around Congress and the White House for the past three years.

There is widespread desire for a big infrastructure bill on the part of most Democrats and Republicans. President Trump has been promoting one since his 2016 election campaign. And the COVID-19 economic slowdown makes the idea of a big new federal spending bill even more attractive as a tool for stimulus and job creation. But neither party is willing to take the lead when it comes to tax increases to finance the new projects. So nothing happens.

Pelosi's measure will not pass the Senate. It is a classic message bill that gives House Democrats the opportunity to crow about their ambitious plan, and gives Democratic challengers to Senate Republicans the opportunity to blast incumbents for blocking the measure. Which they almost certainly will.

So many tax subsidies

But those tax subsidies. So many subsidies. There are two main problems with them: Many have only the remotest connection to infrastructure. And few would achieve the policy goals their sponsors intend.

How, for instance, do tax credits for residential solar hot water heaters (30 percent through 2025) fit the definition of public infrastructure?

Then there is the tax credit of up to $2,500 for buyers of used all-electric vehicles. What does it have to do with infrastructure? Well, the vehicles would travel on roads. But that seems like a stretch.

More importantly, what policy goal would it achieve? True, you might get some old gas-guzzlers off the street. But if you want to encourage production of all-electric vehicles—and thus create new green jobs and increase access to capital— you want to subsidize new cars, not used ones.

Maybe you could make an equity claim: Low-income people can’t afford new all-electrics so government should help them buy used cars. But the tax credit isn’t refundable, so it won’t do many low-income people any good. And it phases out at income between $30,000 and $40,000, so it won’t help many middle-income people either.

Besides, maybe government would be better off spending taxpayer dollars on improving public transit and getting people out of cars entirely. Or, it could impose a carbon tax, rebate the revenue to taxpayers, and let them decide what they want to do with the money.

Private activity bonds

And those private activity bonds for farmers and firms that create intangible property? For four decades these tax-exempt municipal bonds have made it possible for politicians to finance well-connected local businesses on the taxpayer’s dime. This probably is why they never seem to go away.

With interest rates so low and the Federal Reserve pumping out money for commercial loans as fast as it can, do state and local governments need to use subsidized muni-bonds to help businesses. Besides, the real winners in the private activity muni-bond game are the bond lawyers and investment bankers who put the deals together in return for sweet fees.

And even worse initiative is the bill’s proposal to restore the tax-exemption for so-called advance refunding bonds. This bit of financial legerdemain lets state and local governments sell new low-interest tax-free bonds and reinvest the proceeds before eventually buying back older higher-yielding paper. The game often ends up costing governments more, but the bond lawyers and bankers get a nice cut off the top.

After decades of scandal (see here too), the 2017 Tax Cuts and Jobs Act banned the use of tax-exempt bonds for advance refundings. Now, House Democrats want to bring them back.

There is no doubt that the US desperately needs to improve its public infrastructure. And with interest rates low and unemployment high, this would be a nice time to do it. But House Democrats would be better off sticking to that important goal, and ditching the pile of tax subsidies that have found their way into the bill.

Forbes

Howard Gleckman

Jun 26, 2020

NABL: IRS Resumes Form 8038-CP Processing

The Internal Revenue Service (IRS) has made an announcement that the functions supporting the processing of Form 8038-CP Return for Credit Payments to Issuers of Qualified Bonds have started to resume.

On June 1, 2020, the functions responsible for the processing of Form 8038-CP started to resume operations and will be processing Forms 8038-CP in order of receipt and as a high priority. If your client has already filed a Form 8038-CP, they are asked not to file a duplicate return.

As NABL understands it based on the information posted on the IRS website, direct pay subsidy payments were delayed because the forms on which they are processed (i.e., the 8038-CP) are paper returns with no electronic alternative and the IRS was unable to process individual paper tax returns due to safety concerns related to the COVID-19 pandemic. As a result, requests from issuers with direct payments were delayed until processing centers began to reopen.

For more information, click here.

Opportunity Zone Expansion Ideas to Aid in COVID-19 Recovery, with Blake Christian.

Opportunity Zones may just be the perfect vehicle to deliver economic relief to the areas hardest hit by the coronavirus pandemic. How can the incentive be expanded to further catalyze the recovery effort? Blake Christian is a tax CPA for Holthouse Carlin & Van Trigt (HCVT), a regional accounting firm with offices across the western United States. Click the play button below to listen to …

Read More »

Opportunity Db

June 24, 2020

Taxes May Rise Next Year, But That Is Good News For Muni Investors.

Summary

- With budget deficits soaring, Americans should expect higher tax burdens to be forthcoming, on both a national and local level.
- Democratic candidate Joe Biden is rising in the polls, and his platform includes higher taxes on high-income earners and corporations.
- While nobody likes taxes, investing in municipal bonds is a way to mitigate an individual's tax obligations.

Continue reading.

Seeking Alpha

Jun. 28, 2020

TAX - RHODE ISLAND

ACP Land, LLC v. Rhode Island Public Utilities Commission

Supreme Court of Rhode Island - June 1, 2020 - A.3d - 2020 WL 2829552

Owners and operators of solar energy systems and wind turbines petitioned for review of Public Utilities Commission (PUC) order that approved interconnection tax which electric and gas utility charged owners and operators to interconnect to utility's power distribution system and then paid to IRS as contributions in aid of construction.

The Supreme Court held that:

- Utility was reasonable in believing that it owed an interconnection tax to IRS, and
- PUC order comported with parties' settlement with respect to escrow or refund of tax funds.

As reasonably determined by Public Utilities Commission (PUC), electric and gas utility was reasonable in believing that it owed interconnection tax to IRS as contributions in aid of construction, which utility passed along to owners and operators of solar energy systems and wind turbines to interconnect to utility's power distribution system, where IRS notice relating to possible safe harbor from interconnection tax for power generators connecting to a distribution system was not clear when read as a whole, utility hired nationally-recognized accounting firm to analyze IRS notice, accounting firm produced opinion that IRS notice was not clear, and, in a private letter ruling six months before release of notice, IRS had reached a conclusion opposite to that claimed by owners and operators.

Public Utilities Commission (PUC) order approving interconnection tax that electric and gas utility reasonably charged wind and solar power generators and paid to the IRS comported with parties' settlement with respect to escrow or refund of tax funds, where, under settlement agreement, utility agreed to hold tax funds in escrow until a decision was made by PUC and not by IRS, PUC determined that utility was reasonable in continuing to charge an interconnection tax, and PUC order did not provide for a refund of collected taxes to generators.

The Opportunity Zone Incentive Isn't Living Up to Its Equitable Development Goals. Here Are Four Ways to Improve It.

COVID-19's disproportionate impact on Black communities and the recent killings of George Floyd, Breonna Taylor, and other Black Americans have shone a spotlight on the US's ongoing legacy of state-sanctioned violence, segregation, discrimination, and racially driven disinvestment. Nationwide protests have lifted up the need for government to invest in Black neighborhoods and remedy the poor economic conditions it purposefully created for these communities in decades and centuries past.

The Opportunity Zone (OZ) incentive, created by the Tax Cuts and Jobs of Act of 2017, aimed to establish an economic development tool that would foster equitable development outcomes—such as quality job creation and business growth—in undercapitalized communities, many of which are majority Black. Two years after OZs were designated, is the incentive living up to its goals?

Without the federal government requiring detailed reporting on OZ investments, answering that question has been challenging. But through nearly 70 interviews with a range of stakeholders working on mission-oriented OZ projects across the US, we assessed how the program is working in practice.

Continue reading.

The Urban Institute

June 17, 2020

Economics in Brief: Opportunity Zones Aren't Creating Jobs.

Opportunity Zones Aren't Creating Jobs, Study Says

A new report from the Urban Institute finds that the Trump administration-touted Opportunity Zones have enriched real estate developers rather than the small businesses the program was allegedly designed to help.

The New York Times reports that the tax break, which as Next City readers already know, gives investors a break on capital gains taxes — or eliminates them entirely — if they invest the money into a designated geographical area known as an Opportunity Zone.

But the report finds that developers who took advantage of Opportunity Zone tax breaks would have proceeded with their projects even without the tax incentive, and that investors in the program are mainly interested in putting their money into luxury developments that have the opportunity to bring high returns, rather than affordable housing or small businesses.

Continue reading.

NEXT CITY JUNE 19, 2020

Updates from the White House Council on Opportunity Zones, with Scott Turner.

What is the state of Opportunity Zones from the perspective of the White House Opportunity and Revitalization Council, now one year into its mission? Scott Turner is executive director of the Council — a collaboration of 17 Federal agencies and Federal-State partnerships with a mandate to identify and disseminate best practices for utilizing the Opportunity Zones tax incentive and existing Federal resources to stimulate economic

Read More »

June 17, 2020

White House OZ Council Issues Opportunity Zones Best Practices Report.

The White House Opportunity and Revitalization Council (WHORC) has delivered their Opportunity Zones Best Practices Report to the President. Listen to WHORC executive director Scott Turner on the Opportunity Zones Podcast. The Council's report includes Opportunity Zones case studies and best practices observed around the country. The report highlights several inspiring stories that involve public-private partnership between state and local governments, Qualified Opportunity Funds, and …

Read More »

June 18, 2020

Pandemic Makes Municipal Stadiums an Even Worse Deal for Taxpayers.

Cities across the country are struggling to make their debt payments on municipal stadiums in an era of canceled events, report Sebastian Pellejero and Heather Gillers in the Wall Street Journal:

> Public officials have borrowed billions of dollars to build stadiums for major teams. Since 2000, more than 40% of almost $17 billion in tax-exempt municipal bonds sold to finance major-league stadiums were backed by levies on hotels and rental cars—making tourism taxes the predominant means of public stadium finance, according to the Brookings Institution.
>
> The borrowers envisioned the sports facilities as a form of economic development that would attract fans from near and far, raising cities' national profile and boosting their revenue beyond what was needed to pay back the bonds. The pandemic has turned that calculus on its head, crushing tourism proceeds and turning stadiums into a strain on city budgets.

But that calculus was never very sound, as I've written here before. Academic studies have consistently found few if any economic benefits of subsidies for stadiums, arenas, convention centers, and the like.

Several Cato studies over the years have looked at the absurd economic claims of stadium advocates. In "Sports Pork: The Costly Relationship between Major League Sports and Government," Raymond Keating finds:

> The lone beneficiaries of sports subsidies are team owners and players. The existence of what economists call the "substitution effect" (in terms of the stadium game, leisure dollars will be spent one way or another whether a stadium exists or not), the dubiousness of the Keynesian multiplier, the offsetting impact of a negative multiplier, the inefficiency of government, and the negatives of higher taxes all argue against government sports subsidies. Indeed, the results of studies on changes in the economy resulting from the presence of stadiums, arenas, and sports teams show no positive economic impact from professional sports – or a possible negative effect.

In Regulation magazine (.pdf), Dennis Coates and Brad Humphreys found that the economic literature on stadium subsidies comes to consistent conclusions:

> The evidence suggests that attracting a professional sports franchise to a city and building that franchise a new stadium or arena will have no effect on the growth rate of real per capita income and may reduce the level of real per capita income in that city.

And in "Caught Stealing: Debunking the Economic Case for D.C. Baseball," Coates and Humphreys looked specifically at the economics of the new baseball stadium in Washington, D.C., and found similar results:

> Our conclusion, and that of nearly all academic economists studying this issue, is that professional sports generally have little, if any, positive effect on a city's economy. The net economic impact of professional sports in Washington, D.C., and the 36 other cities that hosted professional sports teams over nearly 30 years, was a reduction in real per capita income over the entire metropolitan area.

In an updated study from the Mercatus Center at George Mason University, Coates finds similar results:

- *Professional sports can have some impact on the economy.* Looking at all the sports variables, including presence of franchises, arrival and departure of clubs in a metropolitan area, and stadium and arena construction, the study finds that the presence of a franchise is a statistically significant factor in explaining personal income per capita, wage and salary disbursements, and wages per job.
- *But this impact tends to be negative.* Individual coefficients, such as stadium or arena construction, sometimes have no impact, but frequently indicate harmful effects of sports on per capita income, wage and salary disbursements, and wages per job.

Michael Farren of Mercatus summed up, "Furthermore, peer-reviewed academic research consistently shows that public financing for professional sports stadiums is a poor way to spur economic development or accomplish 'downtown revitalization.' "

The pandemic and the event cancellations it has generated have seriously disrupted the financial calculations that cities made in building stadiums at taxpayers' expense. But they were never a good bargain.

The Cato Institute

by David Boaz

June 11, 2020

No Written Plan Relief May Stymie Opportunity Zone Projects.

The IRS recently extended opportunity zone deadlines to provide relief to projects facing delays due to the COVID-19 pandemic, but the agency's silence on amendments to written plans may jeopardize ventures that unexpectedly need to change course.

The Internal Revenue Service recently issued guidance providing automatic deadline relief to qualified opportunity funds, allowing opportunity zone businesses an extra 24 months to move cash into projects. Normally if a fund operates a qualified opportunity zone business, then no more than 5% of a qualified opportunity zone's assets can be held as cash or other financial property.

Final regulations provided a working capital safe harbor so QOZ businesses can hold more money for up to 31 months if they create and are "substantially consistent" in following a written plan, including a schedule of how money will be used in future development. The rules allow the government to extend that period by another 24 months if there is a federally declared disaster.

However, the IRS did not explicitly say whether a company can amend its written plan if a project has to make substantial changes due to the novel coronavirus, which causes the respiratory disease COVID-19, according to Steven R. Meier, a tax partner at Seyfarth Shaw LLP.

This is especially problematic for investors in hotels, restaurants and entertainment facilities that may want to develop multifamily units or distribution centers instead because the economic landscape has drastically changed since projects were originally put in place, Meier said.

"With projects that are underway and invested into the business, there remains a quandary as to how to deal with possibly having to radically adjust a business plan," Meier said. "It would have been nice for the IRS to acknowledge that plans that went into place in the middle of March this year are probably about as good as the paper they're written on."

Joseph B. Darby III, a tax partner at Sullivan & Worcester LLP, told Law360 that he has many clients who want to change their written plans, since the coronavirus pandemic has put a damper on opportunity zone projects currently in the works.

"Many people are just not sure what to do and whether they'll be able to proceed," he told Law360.

In many instances, the projects are not following a written plan or schedule due to construction delays or unavailability of workers, so many are considering whether to make adjustments or whether changing the plan will result in disqualification from the opportunity zone program's tax benefits, he said.

The final rules require a QOZ business to have a written plan that identifies the financial property that will be held to acquire, construct or substantially improve property in the zone. The plan must have a written schedule that is consistent with ordinary business operations, under which the property is used within 31 months, but that deadline has been extended by another 24 months because of COVID-19. The regulations also require that the business must be "substantially consistent" with the written plan and schedule.

Uncertainty remains in how the government will decide how a project can be "substantially consistent" with a written plan and its schedule, Darby said. If investors want to be successful as they figure out how to navigate business challenges created by the pandemic, it would be helpful to know what changes, if any, to a written plan are acceptable and what cannot be changed, he said.

Organizations such as the Opportunity Zones Working Group of Novogradac & Co. LLP have asked the government for temporary relief that would allow businesses to modify such plans. Many entities have had to change their plans dramatically in response to the COVID-19 crisis "so they can prosper in the post-pandemic world," the Novogradac group said in May.

A taxpayer-friendly position could say that if a plan was already written and was affected by COVID-19, modifications should be allowed, Darby said. This approach would be consistent with the final rules because they already allow a safe harbor extension by 24 months if there is a disaster, so it would also make sense to allow necessary plan and schedule modifications due to COVID-19, he said.

Until more is known, Darby said, many of his clients are taking a wait-and-see approach, since they do not know what the IRS will decide or what the business climate may be like six months from now.

Meier said he had also seen many investors in hospitality projects that want to pivot, but they are worried about what will happen to their potential tax benefits if the project is not substantially consistent with the pre-COVID-19 written plan and schedule requirements.

While some projects located near a hospital or university will likely wait it out, since such businesses will likely go forward with construction, other projects that are more leisure-oriented may want to make fundamental changes to their plans to better adjust to dramatic changes in consumer behavior, he said.

If amendments are not allowed, then the purpose of the opportunity zone program — to encourage investment in economically depressed areas — is undermined, since without that flexibility, investors would face the choice of either going forward with a potentially noncompliant project or pulling out of the project entirely, he said.

People do not invest money in funds expecting the money to do nothing, so investors' interests in creating successful projects are aligned with the desire to create businesses that bring long-term value to low-income areas, Meier told Law360.

"If the IRS can write a regulation" on the working capital safe harbor, he said, "they can certainly write a modification to that regulation."

Edward A. Renn, a tax partner at Withers Worldwide, told Law360 that there might already be some leeway in making changes, because he had seen some opportunity zone projects change their plans before the novel coronavirus pandemic began.

"I think in the real world, those [written plans] are not as carved in stone as they're made out to be," he said. "I think people have amended those if their projects have gone faster or slower than they intended."

Given the intention behind the postponement guidance, it would be hard to imagine the government penalizing an opportunity zone project for not, for example, having the foundation of a building in New York set because Gov. Andrew Cuomo shut down the construction site for three months, Renn said.

"I really don't think you'll lose your qualification or tax-free rollout simply because you're behind on your schedule and this notice didn't give you this specific right to amend it," he said.

Law 360

By Amy Lee Rosen · June 10, 2020, 6:59 PM EDT

–Additional reporting by David van den Berg, Joshua Rosenberg and Jaqueline McCool. Editing by Robert Rudinger and Neil Cohen.

Building Cities With Online Platforms And Opportunity Zones.

If recent headlines have taught us anything, it is that economic support and investments can go a long way toward helping cities, businesses and individuals navigate any number of challenges (the pandemic is only among the most recent challenges).

Unemployment is at historic levels. Small businesses (and not a few large ones) are at risk of going under. Across urban and rural settings, communities are in need of investment.

To that end, according to Valla Vakili, managing director and head of the studio at Citi Ventures, data can make all the difference in helping funds get where they need to go to revitalize those communities.

His conversation with Karen Webster took place after Citi Ventures added new features to the City Builder online platform — a digital offering launched at the end of last year that connects investors with "opportunity zones."

Continue reading.

ByPYMNTS

Posted on June 5, 2020

Pros and Cons of the 180-Day Opportunity Zone Deadline Extension.

On June 4, the IRS issued a new notice that provides a lot of additional coronavirus relief for Opportunity Zone investors and Opportunity Zone funds. Will this relief pose short-term challenges for Opportunity Zone capital raising? And might it cause a tsunami wave of investment toward the end of this year? Click the play button below to listen to this special episode. Episode Highlights How …

Read More »

June 8, 2020

Why Attend the Opportunity Zone Expo, with Rich Zhang.

Last year, the Opportunity Zone Expo hosted six live, in-person events. But due to the ongoing coronavirus pandemic, their 2020 conference will be entirely online. Learn how you can still benefit from attending, who you will meet, and how you can save 20 percent on last-minute tickets. Rich Zhang is brand manager for the Opportunity Zone Expo. Click the play button below to listen to …

Read More »

June 10, 2020

Novogradac 2020 Opportunity Zones Virtual Conference.

Virtual | July 15, 2020 – 12:00pm to 5:30pm

As the nation rallies together to control the spread of COVID-19, Novogradac has decided to pivot our Opportunity Zones Conference that was to be held in Long Beach, Calif. on July 15-16 to a virtual conference on July 15. This new virtual experience will include valuable and insightful sessions that will address how current events affect the opportunity zones incentive, and how OZ investment can contribute to recovery efforts.

Each session will feature:

- a live Q&A with esteemed OZ experts to answer your questions.
- attendees will also be able to enter a networking hub to participate in chat rooms covering important topics
- the Novogradac Nexus exhibit hall to meet with our valued sponsors.

Novogradac is designing this new experience to be as informative as our live events. The Events Desk is available to answer any questions by email or by calling us at 415-356-7970. We look forward to seeing you at our premiere Novogradac Virtual Opportunity Zones Conference!

Click here to learn more and to register.

IRS Provides More Deadline Relief for Opportunity Zone Funds and Investors.

Investors looking to roll capital gains into qualified opportunity funds will now have until the end of the year to make those investments in some cases.

The IRS said in Notice 2020-39, 2020-26 IRB 1, released June 4, that taxpayers looking to take advantage of Opportunity Zone benefits and whose deadline to invest was between April 1 and December 31 will have until the end of the year to invest in QOFs.

Investors normally have 180 days from the time they recognize an eligible gain to invest that gain in a QOF. In response to the economic slowdown caused by the coronavirus pandemic, the IRS initially provided broad relief in Notice 2020-23, 2020-18 IRB 742, that allowed investors whose 180-day deadline was set to expire between April 1 and July 15 to have until July 15 to make the investment.

The Opportunity Zone program, created by the Tax Cuts and Jobs Act, allows for the deferral, reduction, and in some cases elimination of capital gains tax by investing in qualified funds or businesses. The final Opportunity Zone regulations (T.D. 9889) include a 31-month working capital safe harbor under which an Opportunity Zone business can hold cash as long as it has a written plan in place.

Under reg. section 1.1400Z2(d)-1(d)(3)(v)(D), a business could get an additional 24 months if it’s located within a federally declared disaster area as defined in section 165(i)(5). However, it wasn’t clear whether all Opportunity Zone businesses were operating in disaster areas because of the pandemic.

The IRS said that as a result of President Trump’s emergency declaration, “all qualified opportunity zone businesses holding working capital assets intended to be covered by the working capital safe harbor before December 31, 2020, receive not more than an additional 24 months to expend the working capital assets of the qualified opportunity zone business," as long as the regulatory requirements are met.

The guidance also extends relief for testing qualified assets of QOFs, along with extending the so-called 12-month reinvestment period for QOFs.

Michael J. Novogradac of Novogradac & Co. LLP said the IRS has addressed the three big issues that the Novogradac Opportunity Zones Working Group had asked it to address, including the 180-day time period to invest and the 30-month substantial improvement test. Some nuanced issues are still open, but several of those were indirectly addressed by the guidance, he added.

TAX ANALYSTS

---

3 Lingering Opportunity Zone Questions Amid The Pandemic.

The COVID-19 pandemic has severely slowed the commercial real estate market as investors are skittish and banks are reluctant to loan, and while the IRS on Thursday provided important relief for investors in opportunity zone projects, questions and hurdles for such deals still remain.

One of the lingering questions about the opportunity zone program created as part of President Donald Trump's late 2017 tax overhaul is how to satisfy a requirement that at least half of employment at opportunity zone businesses take place within the zone, which at the moment is tricky given that so many people are working remotely amid the pandemic.

And while changes earlier this week from the IRS will help current investors and projects, challenging timeline requirements still exist for would-be investors. The program allows investors to defer payment of capital gains if those gains are put into an opportunity zone, and gains on the opportunity zone investment are also tax-free if the position is held for 10 years.

Here, Law360 looks at three lingering questions about opportunity zones amid the COVID-19 pandemic.

Will tax and employment concerns weigh on investors?

The IRS on Thursday granted several timeline extensions for opportunity zone investors, and lawyers say that while the changes are important for current projects, tax and employment issues remain.

Investors using the program must put capital gains into an opportunity zone fund within 180 days of a sale, and the IRS on Thursday said if that 180-day point occurs or occurred between April 1 and Dec. 31, the deadline to invest in a fund is now Dec. 31.

Likewise, if projects between April and the end of year had hit the law's requirement that 90% of assets in a fund be in an opportunity zone project, projects get an exemption from that requirement until the end of the year. And the months between April and December also will not count toward the required 30-month timeline during which developers have to add improvements to properties, the IRS said Thursday.

Michael Krueger, a partner at Newmeyer & Dillion LLP, said that 90% rule has been challenging for companies to meet during the pandemic, given construction and government approval delays.

But one lingering issue, according to John Gahan, a partner at Sullivan & Worcester LLP, is the question of where employees at opportunity zone projects work. As the law is written, at least half of employees' hours at an opportunity zone business need to occur within the opportunity zone, and that's still a big unknown given that so many employees are working from home amid the pandemic.

"If there is one [thing] missing in the relief, it is how to incorporate where people work," Gahan said. "Anything more probably needs to come from Congress."

And tax questions also remain. As the program stands, deferred gains are to be taxed in 2026, and there's concern in the investor community about what tax rates may be in 2026, said Kate Kraus, a partner at Allen Matkins Leck Gamble Mallory & Natsis LLP.

"That could be much higher than 2019-2020 tax rates. This is something that the Treasury and IRS can't address. Congress would need to enact new legislation," Kraus said.

And while the new guidance from the IRS helps those who are already in the midst of projects, it doesn't necessarily make it any easier for investors who are on the sidelines and hoping to dive into opportunity zones.

"If you have not already harvested your gain, doing so now, your 180 days would have been in December anyway," Gahan said. "So it helps those who already have gain. Maybe those who sold stock during the early days of pandemic."

How will investors approach the substantial improvement requirement?

Lawyers say the relief on the question of the 30-month clock for substantial improvements is helpful for current projects or projects that are in the works, although for would-be projects, that 30-month requirement still could pose timing problems, particularly in jurisdictions where entitlement is slow to come by.

The law requires developers to invest an amount in improvements equal to the value of the purchased building — but not the land — and to do so within 30 months.

While it's possible Congress could, say, lower that requirement to 50% of the building value, which would likely bring more investors to projects, Gahan said he doesn't expect to see calls for additional guidance at this point.

But there's another way investors could get around that tricky 100% requirement.

If investors purchase opportunity zone properties from the government through a bankruptcy sale, they can bypass that substantial improvement requirement altogether. And Krueger expects more of such opportunities in the near term.

"In 12 to 18 months, when all of the moratoriums on foreclosures are expired and people stop kicking the can down the road, [real estate] is going to crash," Krueger said. "It's a very unique situation where you can acquire something from the government."

And since struggling malls are already Americans with Disabilities Act compliant and on transportation lines, those could be the kinds of properties that end up changing hands, and if opportunity zone investors pick them up, substantial improvements may not be required, Krueger said.

"What I envision, and what I recommend to the politicians, is take these malls back that are vacant, and turn them into what is needed. … All of these malls are perfect locations for that," Krueger said. "The J.C. Penneys may now become Kaiser Permanente dialysis centers."

Will investors shift more focus away from real estate?

While much of the focus of opportunity zones has been real estate, the law also allows for investment in companies, and that option may become more attractive as construction and the real estate market writ large continue to be major unknowns.

"Whether credit is available or whether there's labor, restrictions on labor, all of these things can have … an impact on an opportunity zone project," said Matt Ertman, a partner at Allen Matkins. "It you can't get entitlements done within the timelines, you're going to have a tough time getting a project completed."

And as Silicon Valley investors and entrepreneurs find themselves with capital gains from sale of stock — the Nasdaq on Friday hit a record high — those investors may look to opportunity zone investments in other companies, as opposed to brick-and-mortar real estate, as a tax strategy.

Krueger said he even thinks company human resources departments should help employees find options for such investments.

"Property itself may not be the most attractive investment now. [Capital] may go back into the startup companies. It doesn't have to be real estate that you invest in in an opportunity zone," Kreuger said. "What I am seeing is a large draw to disruptive technology. More fintech. More remote work, remote access. Those are more attractive."

"Commercial real estate for a large tenant that's going to put all of their employees in that one space, that's no longer a sure thing," he added.

By Andrew McIntyre · June 5, 2020, 5:34 PM EDT

–Additional reporting by David van den Berg. Editing by Rebecca Flanagan and Alanna Weissman.

Law 360 Tax Authority

IRS Grants Pandemic Deadline Relief On Opportunity Funds.

The novel coronavirus pandemic has prompted the Internal Revenue Service to grant automatic deadline relief to qualified opportunity funds and investors, including an extension of the 180-day investment period for some investors to Dec. 31 in a notice released Thursday.

Taxpayers for whom the last day of the period in which investments must be made in qualified opportunity funds, or QOFs, to satisfy the 180-day requirement falls on or after April 1 automatically get the extension to Dec. 31, according to Notice 2020-39. Taxpayers don't have to contact the IRS or send letters or other documents to get the relief, the notice said.

However, they must make a valid deferral election and file needed forms with a timely filed federal income tax return or amended return for the taxable year in which the gain would be recognized if Internal Revenue Code Section 1400Z-2(a)(1) didn't apply to defer recognition of the gain, according to Thursday’s notice.

The opportunity zone program, established by the 2017 Tax Cuts and Jobs Act , is meant to bring monetary investments into lower-income communities to help spur economic development in them. Opportunity zones allow investors to reinvest capital gains within a 180-day window into designated low-income areas in return for certain tax benefits that grow the longer the money is invested in a QOF through Dec. 31, 2026.

Final regulations on opportunity zones came out in December that allowed for two methods of investing in the program. Under a one-tiered structure, a QOF directly holds qualified zone property. Investors in one-tiered structures must invest gains into a QOF within 180 days of the sale or exchange that gave rise to the gain, under the final rules. If investors have already successfully invested in a QOF, it must generally hold 90% of its assets in qualified property, as measured every six months, or face penalty, the rules said.

For QOFs whose last day of the first six-month period of the taxable year or last day of the taxable year falls between April 1 and Dec. 31, any failure by the QOF to satisfy the 90% investment standard is due to reasonable cause under IRC Section 1400Z-2(f)(3), the IRS said in Thursday’s notice. Those failures will also be disregarded for purposes of determining whether the QOF or any otherwise qualifying investments in it satisfy requirements of IRC Section 1400Z-2 and its regulations for any taxable year of the QOF, the notice said.

The relief is automatic, but QOFs must accurately complete all lines on Form 8996, Qualified Opportunity Fund, filed for each taxable year except that the QOF should indicate “zero” where penalties are supposed to be recorded, the IRS said Thursday. The form must be filed with the QOF’s timely filed federal income tax return, according to the notice.

Richard LaFalce, partner at Morgan Lewis & Bockius LLP, said the notice should give opportunity zone investors the certainty they need to move forward.

“While the COVID 19 pandemic may cause investors and sponsors to reevaluate their plans for opportunity zone investments, any delay should not be driven by concerns regarding the ability to satisfy the OZ tax rules during the pandemic,” LaFalce told Law360.

The breaks the IRS provided in Thursday’s notice follow Sen. Tim Scott’s renewing his push for giving investors three additional months to put capital gains into qualified opportunity funds to encourage participation in the program during a Tuesday webcast hosted by Politico. In early May, Scott, R-S.C., also asked the IRS and the U.S. Department of the Treasury to ease the program’s requirement that QOFs have to invest at least 90% of assets in qualified opportunity zone property, at least through the end of the year.

The IRS didn’t immediately respond to a request for comment.

Tax Analysts

–Additional reporting by Amy Lee Rosen, Joshua Rosenberg and Stephen Cooper. Editing by Neil Cohen.

Updated IRS Opportunity Zones FAQs.

The following questions and answers (Q&As) were prepared in response to inquiries that have been proposed to the IRS. They are intended to provide a basic understanding and awareness of Opportunity Zones.

These Q&As do not constitute legal authority and may not be relied upon as such. They do not amend, modify or add to the Income Tax Regulations or any other legal authority.

Access the FAQs.

TAX - GEORGIA

Hojeij Branded Foods, LLC v. Clayton County

Court of Appeals of Georgia - May 28, 2020 - S.E.2d - 2020 WL 2763498

Operator of fast food concession stand at international airport brought action against city, county, and various city and county officials seeking a refund of ad valorem property taxes paid in two particular years based on precedent establishing that airport retail spaces were usufructs, rather than estates in real property.

The Superior Court granted defendants' motions to dismiss for failure to state a claim, based on sovereign immunity. Concession stand operator appealed.

The Court of Appeals held that statute governing tax refund claims against a county or city waived sovereign immunity for five years after payment of the tax, rather than three years.

Statute governing tax refund claims against a county or city waived sovereign immunity for five years after payment of the tax, rather than three years; statute allowed a taxpayer to file a claim directly with the county or city within three years after payment of the tax and barred commencement of a lawsuit thereafter until the earlier of 90 days or denial of the claim, but did not make filing such a claim a prerequisite to filing a lawsuit and did not otherwise indicate that the three-year period applied to such a lawsuit, and statute expressly provided that any lawsuit seeking a refund had to be commenced within five years after payment.

TAX - MICHIGAN

Honigman Miller Schwartz and Cohn LLP v. City of Detroit

Supreme Court of Michigan - May 18, 2020 - N.W.2d - 2020 WL 2530162

Law firm operating offices within and outside of city appealed the ruling of the Tax Tribunal, which upheld city's imposition of an additional tax assessment under the Uniform City Income Tax Ordinance (UCITO).

The Court of Appeals reversed. City's application for leave to appeal was granted.

The Supreme Court held that calculation of revenue from services encompasses all services performed within the city without regard to where those services are delivered.

For purposes of the Uniform City Income Tax Ordinance (UCITO), "performed," under the payroll factor for calculating the taxable net profit of a business for activities that are not exclusively conducted within a city, means to carry out an action, and accordingly, compensation for "services performed within the city" is calculated on the basis of the location at which the employee has carried out the service for compensation.

City income tax statutes establish the framework upon which city taxes of a business are to be calculated under the business allocation percentage method where the net profits of a business derive from activities conducted both inside and outside of the city; only that portion of net profits from business activities conducted within the city is subject to the city tax.

For purposes of the Uniform City Income Tax Ordinance (UCITO), "rendered" means to do a service for another, and not to transmit to another or deliver; thus, the calculation of revenue from services under the revenue factor, for determining the taxable net profit of a business, encompasses all services performed, i.e., done or carried out, within the city without regard to where those services are delivered.

IRS Extends Safe Harbor for Renewable Energy Projects.

Companies facing delays in putting their renewable energy projects into service will get an additional year of safe harbor time from the IRS.

In Notice 2020-41, the IRS said it is providing an extra year to the four-year "Continuity Safe Harbor" offered in existing guidance related to the production tax credit for renewable energy facilities under section 45 and the investment tax credit for energy property under section 48 because some companies are facing supply chain delays related to the COVID-19 pandemic.

If projects are placed in service in five years, construction will be deemed continuous.

The IRS also said it is providing assurance for taxpayers who already started construction by incurring 5 percent of project costs, and made payments for services or property and reasonably expected to receive such services or property within 3 ½ months. The notice provides that if the services or property are received by October 15 the taxpayer's expectations at the time of the 2019 payment are deemed reasonable.

The guidance is useful to companies developing renewable energy projects and producing electricity from sources such as wind, biomass, geothermal, landfill gas, trash, and hydropower. The safe harbor is also available for taxpayers using technologies such as solar panels, fuel cells, microturbines, and combined heat and power systems, the IRS said.

IRS PLR: Investment in Opportunity Opportunity Fund Deemed Timely.

The IRS ruled that a taxpayer's investment in a qualified opportunity fund was deemed timely filed because the taxpayer reasonably relied on a qualified tax professional and the government's interests would not be prejudiced by granting the relief.

Read the IRS Private Letter Ruling.

NABL: Delay in Direct Pay Bond Payments

NABL members are receiving inquiries from their clients regarding delays in timely payment of refundable tax credit payments for direct pay bonds, including build America bonds.

As we understand it based on the information posted on the Internal Revenue Service (IRS) website, direct pay subsidy payments are delayed because the forms on which they are processed (i.e., the 8038-CP) are paper returns with no electronic alternative and the IRS is currently unable to process individual paper tax returns. As a result, requests from issuers with direct payments will be delayed until processing centers are able to reopen and in some cases direct payments may not be received until after the corresponding interest payment date.

You can find updated information on the IRS website at the following location: IRS Operations During COVID-19: Mission-critical functions continue, under Paper Tax Returns.

Opportunity Zone Fundraising Trends, with Nick Parrish.

What Opportunity Zone fundraising trends can be gleaned after raising $465 million? And what's next for Opportunity Zones in the midst of the coronavirus pandemic? Nick Parrish is managing director and head of business development at Cresset Partners, a multifamily office that specializes in alternative investments in real estate, private capital, and Opportunity Zones. Their first QOZ fund closed earlier this year after raising $465

Read More »

Opportunity Db

May 27, 2020

HUD Releases Toolkit to Guide Local Leaders in Developing Strategic Plans for Opportunity Zones.

The U.S. Department of Housing and Urban Development (HUD) published a toolkit guide Thursday to provide local leaders with strategies for promoting economic development in federal opportunity zones (OZs). "Opportunity Zones Toolkit Volume 2: A Guide to Local Best Practices and Case Studies," includes background on the incentive, strategies and case studies of successful examples.

Novogradac

Friday, May 29, 2020

IRS Notice Extends Continuity Safe Harbor to Five Years for PTC, ITC

Properties Affected by COVID-19-Related Delays.

The Internal Revenue Service today issued a notice to extend the continuity safe harbor for renewable energy production tax credit (PTC) and investment tax credit (ITC) properties that began construction in 2016 or 2017. Notice 2020-41 adds an extra year to the four-year continuity safe harbor in existing guidance, stating that those projects placed in service within five years will be deemed continuous. The extension is due to industry-wide delays in the supply chain caused by the COVID-19 pandemic. The notice also extends the 3½-month continuity safe harbor for taxpayers to satisfy the beginning-of-construction requirements to include any services or property received by Oct. 15, 2020. The notice will be discussed **June 25** in an upcoming Novogradac webinar. Stay tuned for details.

For community development, affordable housing and renewable energy updates related to COVID-19, see Novogradac's dedicated page.

Novogradac

May 27, 2020

States Grappling With Hit to Tax Collections.

COVID-19 has triggered a severe state budget crisis. While the full magnitude of this crisis is not yet clear, state revenues are declining precipitously and costs are rising sharply with many businesses closed and tens of millions of people newly unemployed. Due to the economy's rapid decline, official state revenue projections generally do not yet fully reflect the unprecedented fiscal impact of the coronavirus pandemic. In many cases, states do not even know how much their revenues have already fallen, in part because they've extended deadlines for filing sales and income tax payments that otherwise would have been due in recent weeks. Executive and legislative fiscal offices in many states are analyzing new economic projections and producing initial estimates of the damage before state legislatures meet in regular or special sessions to address shortfalls. Some states have released initial or preliminary estimates. (See Table 1.)

Continue reading.

Center on Budget and Policy Priorities

April Tax Collections Plummet from Tax Deadline Shifts and Fallout of COVID-19.

As expected, April tax collections fell sharply with many states experiencing year-over-year declines of at least 50 percent, as highlighted in the below state-by-state press articles. The precipitous drops were brought on by a combination of states shifting their tax deadlines to July 15, and the economic impact of the coronavirus.

Tax Deadline Shifts
On March 21, the U.S. Treasury Department and Internal Revenue Service (IRS) announced that the federal income tax filing deadline would be extended from April 15, 2020, to July 15, 2020. Following

this federal action, 40 states also chose to extend their state tax deadline to July 15, 2020, while seven states chose other deadlines, according to the American Institute of Certified Public Accountants (AICPA). The tax deadline shift led many taxpayers to postpone filing their tax returns, causing a sharp drop in personal income tax payments in April.

Personal Income Taxes
Within the personal income tax category, states saw the largest declines within the non-withholding component which includes estimated and final payments. States are hopeful that they will receive most of the delayed payments in July. However, some of the deferred taxes may not be collected in July as taxpayers' financial outlooks worsen. Most states also noted a decline in the withholding category of personal income taxes (or the amount withheld from an employee's paycheck and paid directly to the government) in April. The declines were perhaps not as much as many had expected with the unemployment rate reaching 14.7 percent in April. This may be partly explained due to many states taxing unemployment benefits.

Continue reading.

NASBO

By Brian Sigritz

Opportunity Zone Deals Suddenly Accelerate As Program Starts To Look More Attractive.

In the first month after the coronavirus ground the U.S. economy to a halt, the opportunity zone marketplace had slowed along with the rest of the commercial real estate industry.

The opportunity zones program has been described by the Trump administration as a tool to inject hundreds of billions of dollars into underserved communities. In its first two years, the program had yet to live up to the buzz it generated throughout the industry.

But over the past month, opportunity zone investors have been some of the most active players in the real estate market, closing deals and starting new projects as most traditional sources of capital stay on the sidelines.

Continue reading.

BisNow

by Joseph Pimentel and Jon Bannister

May 19, 2020

---

3 Biggest Changes in the IRS Correcting Amendments to OZ Regs, with Jessica Millett and Ashley Tison.

In April, the IRS published correcting amendments to the final regulations on Qualified Opportunity

Funds. What are the key changes that Opportunity Zone participants need to be aware of? Jessica Millett is partner and chair of Duval & Stachenfeld's tax practice group. Ashley Tison is co-founder at OZ Pros. Click the play button below to listen to my conversation with Jessica and Ashley. Episode Highlights

Read More »

Opportunity Db

May 20, 2020

Opportunity Zone Stakeholders are Invited to Respond to this EIG Survey.

Your response is requested for a national survey of Opportunity Zones stakeholders. The Economic Innovation Group is conducting the survey to gain insights on current market activity, investor behavior, and factors that may shape the OZ ecosystem in 2020 and beyond. The survey targets individuals and organizations engaged in the following activities: Opportunity Zone Investors and Wealth Managers Financing Partners Qualified Opportunity Fund (QOF) Managers

Read More »

Opportunity Db

May 20, 2020

Reps. Kind, Kelly Urge Treasury, IRS to Provide Regulatory Relief for Opportunity Zones Investments Affected by COVID-19 Pandemic.

Reps. Ron Kind, D-Wis., and Mike Kelly, R-Pa., today submitted a letter to the Department of the Treasury and the Internal Revenue Service, seeking regulatory relief for opportunity zones (OZ) investments affected by the COVID-19 pandemic. The letter makes six specific requests, including an extension until the end of 2020 for the 180-day period to invest capital gains in qualified opportunity funds; to deem a failure to meet the 90 percent asset test from March 13-July 15 to be due to reasonable cause; and to extend the 30-month substantial-improvement period by one year for those periods that end in 2020.

Novogradac

Tuesday, May 19, 2020

Opportunity Zone Bill May Help Cos. That Missed PPP Funds.

A proposal to allow small businesses affected by COVID-19 to qualify for opportunity zone investments could shore up the finances of companies that missed Paycheck Protection Program funds, but securing those investments may not be easy.

Reps. John Curtis, R-Utah, and Henry Cuellar, D-Texas, introduced the Small Business Opportunity Zone Act in April, which would allow small businesses affected by the novel coronavirus pandemic to be classified qualifying businesses in which investors can receive favorable opportunity zone tax benefits. The legislation is meant to create a new incentive to encourage investments in smaller companies that have been impacted by COVID-19 through supply chain disruptions, staffing changes, decreases in sales or customers, or a partial or full suspension of business.

The measure may dovetail well with the Paycheck Protection Program, which provided $350 billion in loans to small businesses, but for which money has quickly run out, resulting in many companies not receiving financial assistance, said Joseph B. Darby III, a tax partner at Sullivan & Worcester LLP.

Continue reading.

law360.com

By Amy Lee Rosen · May 20, 2020, 6:59 PM EDT

IRS Aids State and Local Governments With Tax-Exempt Tender Bonds and Commercial Paper: McGuire Woods

State and local governments frequently finance capital projects such as airports and utility systems by issuing tax-exempt qualified tender bonds (also commonly called variable rate demand obligations or "lower-floaters") and commercial paper. These obligations give the issuer the benefits of long-term financing with short-term interest rates.

However, tender bonds and commercial paper are variable-rate obligations. This exposes issuers to higher interest rates in times of market dislocation.

During the week of March 9, 2020, the extent of the COVID-19 outbreak was becoming apparent. The World Health Organization declared the outbreak a pandemic, President Trump declared a national emergency and many state governors declared states of emergency. Investors fled tender bonds and commercial paper. Over the course of the following week, the rates on these obligations increased fourfold.

State and local governmental issuers often seek to lessen the budgetary blow from spiking interest rates by purchasing their own tender bonds and commercial paper and holding them until the markets return to normal.

An issuer with sufficient liquidity may find a temporary purchase and hold strategy to be attractive. However, it is fraught with federal tax issues. A debt obligation generally is treated as retired or extinguished when an issuer purchases it because the interests of the issuer and the holder merge. The ability to resell the obligation on a tax-exempt basis requires the retesting of all the various program requirements for new issues of tax-exempt bonds. The reissuance of the debt obligation may result in various negative consequences to the issuer, including changes in yield for purposes of the arbitrage investment restrictions, acceleration of arbitrage rebate payment obligations, deemed terminations of integrated interest rate swaps under the qualified hedge arbitrage rules, new public approval requirements for qualified private activity bonds, and change in law risk. The obligation may lose its tax-exempt status.

Fortunately, the IRS has provided administrative relief to promote liquidity and stability in the tax-exempt tender bond and commercial paper markets in response to the COVID-19 pandemic.

On May 4, 2020, the IRS published Revenue Procedure 2020-25 to expand existing authority for state and local governmental issuers to purchase their own tender bonds and commercial paper on a temporary basis without causing a reissuance or retirement. To qualify, the issuer must purchase the bonds or paper during calendar year 2020 and not hold the debt after Dec. 31, 2020. The revenue procedure affords additional relief for purchases of tender bonds pursuant to qualified tender rights. The issuer may hold such a bond for 180 days after the purchase (instead of the usual 90 days) so long as the purchase occurs before Dec. 31, 2020.

Revenue Procedure 2020-25 allows the issuer to refund its purchased obligation with a tax-exempt refunding bond, to tender the purchased obligation for purchase pursuant to a qualified tender right the same as any other bondholder, or otherwise to sell the purchased obligation during the permitted holding period without jeopardizing its tax-exempt status.

Note: State and local governments often issue tender bonds and commercial paper to finance projects for non-governmental conduit borrowers. Examples include an economic development authority issuing tax-exempt tender bonds and lending the proceeds to the private operator of a solid waste disposal facility or the 501(c)(3) owner of a hospital. Also, tender bonds are often secured by a third-party credit and/or liquidity provider, such as a commercial bank. Conduit borrowers and credit and liquidity providers are generally allowed to purchase, hold and resell the tax-exempt tender bonds and commercial paper from which they benefit or secure without regard to any permitted holding period.

McGuireWoods has established a COVID-19 Response Team to help clients navigate urgent and evolving legal and business issues arising from the novel coronavirus pandemic. Lawyers in the firm's 21 offices are ready to assist quickly on questions involving healthcare, labor and employment, education, real estate and more. For assistance, contact a team member or email covid-19@mcguirewoods.com.

McGuireWoods has published additional thought leadership analyzing how companies across industries can address crucial business and legal issues related to COVID-19.

May 12, 2020

Urban Core Development in Opportunity Zones, with Alex Bhathal.

The Sacramento Kings ownership group successfully spearheaded downtown Sacramento's revitalization, which by the end of 2018 had resulted in a hugely positive community impact and a downtown job increase of 38 percent. Now, can they leverage the Opportunity Zone incentive to replicate this success in similar markets across the country? Alex Bhathal and his family are principal co-owners of the Sacramento Kings NBA franchise and…

Read More »

Opportunity Db

May 13, 2020

Tax-Averse Nashville Goes Where Few Other Cash-Poor Cities Dare.

- **Virus lockdown has blown wide holes in city budgets nationwide**
- **Music City's mayor sees property-tax hike as way to bridge gap**

Nashville's Music Row has gone quiet, its teeming hotels have emptied and its bustling restaurants, like the Capitol Grille, a fixture since 1910, are open for take-out only.

In a matter of weeks, the coronavirus pandemic has frozen the tourist-powered economy of one of the hottest cities in America. Nashville, Tennessee, finds itself staring into what Mayor John Cooper is calling its worst financial situation ever.

Nashville's Music Row has gone quiet, its teeming hotels have emptied and its bustling restaurants, like the Capitol Grille, a fixture since 1910, are open for take-out only.

In a matter of weeks, the coronavirus pandemic has frozen the tourist-powered economy of one of the hottest cities in America. Nashville, Tennessee, finds itself staring into what Mayor John Cooper is calling its worst financial situation ever.

Cooper did what few mayors have dared. Last month, he proposed a 32% property-tax increase to help Nashville's city-county government weather an estimated $470 million revenue loss over the next 16 months.

"This is the last thing anybody in my job would want to be doing," Cooper said in an interview.

Nashville's crisis is echoing across America. Just about every big city in the U.S. is facing revenue declines from weeks of stay-at-home orders, according to a National League of Cities survey. Congress has earmarked $150 billion for states and local governments — Nashville is slated to receive $122 million — but the money must be spent on public health and can't be used to fill budget holes.

State and local governments are in "uncharted territory" and will have to start making serious cuts if they don't get more help, said Richard Auxier, a senior policy associate in the Urban-Brookings Tax Policy Center.

"Their revenue was literally turned off," he said.

Millions Jobless

Few city officials around the country are following Nashville's lead. With the pandemic comes the concern that tax hikes may dampen economic recovery at a time when millions of Americans are suddenly jobless.

Leaders of New York, Chicago, San Diego, Memphis and Charlotte, North Carolina, have all grappled with virus-related deficits without plans to increase taxes.

Seattle officials have talked about a new payroll tax to help close a budget gap that could grow to $300 million, but they had to delay discussions because of restrictions on government meetings during the pandemic. Philadelphia, with a $650 million deficit, is opting to cut services "down to the most essential," Mayor Jim Kenney said. He would, however, raise taxes on businesses and commuters.

Extra Expenses

Nashville restaurateur Howard Greenstone said Cooper's proposal comes as retailers are preoccupied trying to navigate new social-distancing restrictions and a bleak outlook for tourism.

Greenwood said he pays about $75,000 in property taxes for one of his restaurants, Adele's, a popular brunch spot, and the tax bill could rise by $24,000 as a result.

"These extra expenses are going to be crippling," he said.

Nashville, like many other cities, has fiscal troubles that predate the pandemic. Taxes are political poison in Tennessee, a legacy of the Tea Party movement, and officials have engaged in financial engineering to keep them low.

It restructured some of its municipal bonds in 2010, putting off payments to avoid higher taxes, according to the state comptroller's office. Since then, outstanding debt ballooned to $4.4 billion in fiscal 2019.

Even as the local economy boomed, Nashville, with a population of about 670,000, resisted raising taxes. A 2017 property reassessment in the county showed a median increase of 37% in property values over the previous four years, which could have bolstered an argument for adding revenue to pay for expanded services. But a state law that mandated reassessments be "revenue neutral" resulted in some residents paying less. Nashville officials didn't work around the rule.

"We dug some of our own hole," said Freddie O'Connell, a city-council member.

In November, State Comptroller Justin Wilson warned Nashville that it was cash-poor.

"Would you want to take a flight, a 3,000-mile flight, if the pilot says, 'Well, I expect we have enough gasoline to get us 3,002 miles?'" Wilson said. "That's how you're operating."

Cooper's fiscal 2021 budget would avoid layoffs, but they loom.

"If this is not passed, my ability to finance next year will demand immediate and sharp layoffs, which would also be unprecedented," Cooper said.

Even with the proposed hike, he said, property taxes would remain lower than other cities in the state and below the city's historic norm.

Effects of the virus may have persuaded at least one reluctant lawmaker. With the metro area projected to lose at least 24,000 jobs this year, the timing of the hike "couldn't be worse," said city-council member Jeff Syracuse. And though he's voted against hikes before, he said this time it may be necessary.

"A third of the county got a tax break in 2017," Syracuse said. "That's indicative of the unsustainability that we face."

Bloomberg Markets

By Amanda Albright

May 11, 2020, 6:00 AM PDT

IRS Offers Tax-Exempt Bond Issuers More Flexibility.

The IRS is offering expanded periods in which state and local governments may purchase and hold their own exempt qualified tender bonds and tax-exempt commercial paper.

In Notice 2020-25, 2020-22 IRB 1, the IRS said May 4 that it is providing the added flexibility to help government bond issuers adapt to changing financing needs during the coronavirus pandemic.

The change applies for purposes of sections 103 and 141 through 150, and the notice says an exempt qualified tender bond or exempt commercial paper purchased by its governmental issuer on a temporary basis will be treated as continuing in effect without resulting in a reissuance or retirement of the bond if the issuer buys it during the permitted holding period and holds the bond no later than the end of the holding period.

"The governmental issuer may refund the purchased bond with a refunding bond, tender the purchased bond for purchase in a qualified tender right in its capacity as a bondholder, or otherwise resell the purchased bond" during the permitted holding period, the IRS said.

Regarding the purchase of a particular obligation of exempt commercial paper, including a purchase at maturity, "a refinancing of that purchased tax-exempt commercial paper with tax-exempt commercial paper during the permitted holding period will be treated as part of the same issue as the issue of which the purchased tax-exempt commercial paper was a part," the IRS said.

The notice is effective May 4, 2020, and issuers may apply it retroactively to purchases on or after January 1, 2020.

Emily Swenson Brock of the Government Finance Officers Association said the group's members are glad to see the IRS relief.

"States and local governments across the country have had to rethink public processes as a result of this pandemic, and we are happy that the IRS/Treasury is thinking outside the box as well," Brock said. "Additionally, relief as it pertains to a potentially costly and burdensome reissuance process due to self-liquidity is a meaningful acknowledgement by the IRS."

Phone It In

The IRS also announced May 4 that it is temporarily allowing public approval hearings on qualified private activity bonds to take place by telephone.

Between now and December 31, 2020, a public hearing on qualified private activity bonds held via teleconference (toll free) will satisfy the requirement that the conference be convenient for residents of the approving governmental unit, the IRS said in Rev. Proc. 2020-21, 2020-22 IRB 1.

The IRS added that governmental units may also offer greater access to hearings by providing other telephone numbers or through internet-based meeting technology.

The guidance received high marks from the National Association of Bond Lawyers (NABL) and other public finance organizations.

"NABL applauds the IRS responding to the COVID-19 crisis by providing clarity regarding the ability to hold telephone public hearings and providing relief regarding issuers' ability to provide self-liquidity," NABL President Richard J. Moore said in a statement to Tax Notes.

Moore, a partner at Orrick Herrington & Sutcliffe LLP, also praised "the retroactive nature of this guidance, given that some issuers have been adapting to the COVID-19 crisis for almost two months now."

NABL is studying the guidance and may have further suggestions, Moore said, adding that if conditions warrant, it may request extensions of the relief periods.

TAX ANALYSTS

by FRED STOKELD

POSTED ON MAY 5, 2020

IRS Issues Revenue Procedure, Notice Providing Guidance for Private Activity Bonds During COVID-19-Related Economic Disruption.

The Internal Revenue Service (IRS) today issued two types of guidance concerning tax-exempt private activity bonds (PABs), which are used with 4 percent low-income housing tax credits (LIHTCs) to finance affordable housing. In Revenue Procedure 2020-21, the IRS provides temporary guidance to allow hearings held by teleconference due to the COVID-19 pandemic to meet the statutory public approval requirement for PABs. Notice 2020-25 temporarily expands the circumstances and period for which a PAB is treated as "continuing in effect" without requiring the reissuance or retirement. There also is relief regarding a holding period and qualified hedge. The IRS said the allowances are being made in recognition of the need for liquidity and stability in the market during the current period of economic disruption. Notice 2020-25 is in effect retroactive to Jan. 1.

For community development, affordable housing and renewable energy updates related to COVID-19, see Novogradac's dedicated page.

May 4, 2020

Hawkins Advisory: Recently Released Regulatory Relief for Issuers of Certain Tax-Exempt Bonds

Treasury and the Internal Revenue Service released welcome temporary guidance addressing two of the many issues provoked by the COVID 19 pandemic.

Rev. Proc. 2020-21 permits issuers of private activity bonds to hold the public hearings required by the TEFRA rules by teleconference, expanding existing guidance requiring such hearings to be conducted in person.

Notice 2020-25 generally allows issuers of governmental bonds to purchase and hold their own tax-exempt qualified tender bonds and commercial paper during calendar year 2020, without causing such obligations to be considered extinguished for federal tax purposes.

It should be noted that the provisions set forth in both these measures apply to events taking place in calendar year 2020.

Read the Advisory.

IRS Expands Ability of Issuers to Purchase Their Own Tax-Exempt Bonds: Holland & Knight

The COVID-19 crisis has caused many disruptions in the municipal bond market. Over the course of the crisis, many issuers of tender bonds or tax-exempt commercial paper have been unable to remarket their tender bonds or roll-over their commercial paper either at all or at commercially advantageous interest rates. There have been instances where even issuers with strong credits have been forced to remarket their short-term bonds at rates in excess of 10 percent.

In such circumstances, some issuers have considered holding their bonds during the crisis period rather than remarket or roll them over at high interest rates. However, the problem is that under federal tax rules, there are situations where the debt is treated as either exchanged for new debt (reissued) or retired when it is purchased by the issuer. While the municipal bond market has stabilized lately, there is still concern regarding this.

In light of this situation, the IRS has released guidance in Notice 2020-25 (the Guidance), a temporary rule that provides:

1. Issuers of tax-exempt qualified tender bonds can purchase and hold their own bonds during calendar year 2020 without the bonds being treated as reissued or retired. During this period, the issuer also may refund the purchased bond with a refunding bond, tender the purchased bond for purchase in a qualified tender right as a bondholder or otherwise resell the purchased bonds.
2. Tax-exempt bonds purchased during calendar year 2020 pursuant to a qualified tender right can be held for up to 180 days by the issuer or on behalf of the issuer without the bonds treated as being retired (the prior law's period was 90 days). For example, bonds purchased on Dec. 31, 2020, pursuant to a tender right can be held by the issuer until June 2021 without the bonds being treated as retired. However, a tender bond purchased by an issuer on Jan. 1, 2021, would revert to the prior 90-day holding period.
3. Issuers of tax-exempt commercial paper may purchase and hold this debt during calendar year 2020 without the debt being treated as reissued or retired. During this period, the issuer also may refinance the purchased commercial paper (even if purchased at maturity) with more commercial paper that will be treated as part of the same issue as the purchased commercial paper.
4. Qualified hedges of tax-exempt bonds will not be treated as terminated as a result of the governmental issuer holding the hedged bonds during the periods described in Nos. 1, 2 and 3 above.

Prior Law Issues

Under prior law, issuers were allowed to hold their own tender bonds when they were unable to remarket them for up to 90 days without the bonds being treated as retired. However, those provisions applied only when issuers were unable to remarket their bonds at par following reasonable best efforts, and it was unclear whether it would apply in cases where remarketing was possible but at unfavorable interest rates. Also, many considered the 90-day period to be too short under the COVID-19 crisis and it did not cover commercial paper. The Guidance provides comfort to issuers in these areas.

The Guidance took effect on May 4, 2020, and may be applied retroactively to purchases on and after Jan. 1, 2020.

May 8, 2020

Holland & Knight LLP

Holland & Knight attorneys are assisting a number of issuers in analyzing the impact of COVID-19 legislation and proposals on future tax-exempt bond financings. For questions about a specific situation and its impact on your organization, contact the author or another member of Holland & Knight's Public Finance Team.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem. Moreover, the laws of each jurisdiction are different and are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult competent legal counsel.

The IRS Comes Through: New Guidance Allows Phone TEFRA Hearings and Helps Issuers Repurchase their VRDOs Without Extinguishing Them

As described in our previous post, NABL hasn't been binge watching Tiger King and binge eating like the rest of us during this time at home during the COVID-19 pandemic. Instead, on March 25, 2020, NABL asked the IRS to adopt a proposed notice that would address two municipal bond concerns caused by the pandemic: (1) the requirement of in-person TEFRA hearings for tax-exempt private activity bonds; and (2) the extinguishment of qualified tender bonds and commercial paper if the issuer of such debt repurchases it without meeting certain requirements.

The IRS responded on Star Wars Day[1] with Rev. Proc. 2020-21 and Notice 2020-25, which should help alleviate these two concerns through the end of 2020.

Continue Reading

By Taylor Klavan on May 4, 2020

The Public Finance Tax Blog

Squire Patton Boggs

NABL: Treasury Issues Immediate Relief

The U.S. Department of the Treasury (Treasury) has issued guidance providing immediate relief to issuers in certain circumstances:

- Provides temporary guidance regarding the public approval requirement under § 147(f) of the Internal Revenue Code (Code) for tax-exempt qualified private activity bonds, available here.

- Expands the temporary rule allowing governmental issuers to purchase certain of their own tax-exempt bonds, available here.

Temporary guidance regarding the public approval requirement:

A hearing conducted between May 4, 2020 and December 31, 2020 that is held by teleconference accessible to the residents of the approving governmental unit by calling a toll-free telephone number will be treated as held in a location that, based on the facts and circumstances, is convenient for residents of the approving governmental unit for the purpose of § 1.147(f)-1(d)(2). Provided the requirements of the preceding sentence are satisfied, governmental units are not precluded from offering additional access to the hearing by other telephone numbers or by internet-based meeting technology. Issuers may apply this revenue procedure retroactively to public hearings held telephonically before May 4, 2020 in response to the COVID-19 pandemic.

Expanded temporary rule allowing governmental issuers to purchase certain of their own tax-exempt bonds:

Solely for purposes of § 103 and §§ 141 through 150, the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) will treat a tax-exempt qualified tender bond or tax-exempt commercial paper that is purchased by its governmental issuer on a temporary basis as continuing in effect without resulting in a reissuance or retirement of the purchased tax-exempt bond if the governmental issuer purchases the tax-exempt qualified tender bond or tax-exempt commercial paper during the permitted holding period and holds the bond or paper no later than the end of the permitted holding period.

NABL Letter:

On March 25, in response to the COVID-19 pandemic, NABL sent a letter to the U.S. Treasury asking it to address certain tax issues that may affect the functioning of the tax-exempt bond markets during the current outbreak of the novel coronavirus disease.

In the letter, NABL asked for the following:

(1) Clarity that, at least for a temporary period, TEFRA hearings are not required to be held in person; and

(2) Relief as it relates to the impact of self-liquidity on extinguishment and reissuance analysis.

You can find NABL's letter here.

For any questions, please contact Jessica Giroux, Director of Governmental Affairs at jgiroux@nabl.org, (518) 469-1565.

Tax Revolts Aren't Out of the Question.

When states and cities tried to raise revenues during the Great Depression, they sparked a furious backlash.

Thanks to coronavirus-induced declines in tax revenue – and record filings for unemployment benefits – state and local governments are in crisis. Many have underfunded pension systems and few have significant reserves. None can run deficits as readily as the federal government.

Like so much of the economic news as of late, the closest precedent is the Great Depression. In the early 1930s, state and city governments confronted massive budget shortfalls. Attempts to close the gap ended up sparking a movement that was largely forgotten: a massive taxpayer revolt across the nation.

In the early 1920s, the federal government cut taxes, but state and local governments actually raised them. “For every penny saved in taxes in Washington, five cents were added to taxes at the City Hall and State House,” as a critic described it in 1932. Property taxes faced some of the steepest increases.

But the additional revenue hardly paved the way to fiscal stability. Instead, state and municipal governments were overwhelmed with debt by the end of the 1920s. The whole system was predicated on never-ending prosperity: Rising property values yielded more taxes, which allowed more spending. Sound familiar?

And then the economy collapsed. The historian David Beito ably chronicled the grueling aftermath. In communities across the country, real estate development collapsed at a mind-boggling rate. In the northeast, for example, residential construction fell 97.3% from 1929 to 1933.

As the value of real estate collapsed, tax rates held steady or even increased as local governments struggled to balance budgets. Deflation only intensified the economic pain, devastating the average taxpayer’s ability to pay up. It didn’t take long for the shame of tax delinquency to begin to fade.

In 1930s, 10% of taxpayers in cities larger than 50,000 were delinquent in their tax payments. By 1933, the number had soared to 26.3%. In rural areas, where falling prices had effectively doubled the tax burden of farmers, it was even worse. In Iowa, for example, nearly half the state’s farm properties were delinquent in 1932.

But there was more to this dire picture than the inability to pay taxes, even if this was a huge part of the problem. Instead, these conditions gave rise to a highly visible, if long underestimated, tax resistance movement that spread throughout both urban and rural areas of the country.

The principal organizations behind these movements were so-called “taxpayer leagues,” local associations that took their case to state legislatures, county boards and city councils. In 1927, only 43 such organizations existed in the entire country. At the height of the crisis, their numbers had swelled to well over 4,000. Thomas Reed, a municipal reformer, likened them to mushrooms: “Every time you go out in the morning, you find more of them.”

These groups began waging a battle against taxes on several fronts. Most obviously, they lobbied for tax cuts, electing politicians who promised to deliver them. They also pressed for draconian cuts to public services.

The more extreme members would make the modern-day Tea Party look pretty tame by comparison. Indeed, many of the most vocal and visible tax resisters argued for the ultimate act of defiance: a strike on paying taxes. In most places, politicians and bondholders managed to keep activists from acting on these threats. Not so in Chicago.

It was not surprising that this city, infamous for its municipal corruption and high taxes, would give rise to the most radical of the tax resistance campaigns. Their best-known slogan left absolutely no room for compromise: “1930 taxes cannot and will not be paid!”

As some of the activists argued for closing the schools as a way of saving money, teachers and municipal employees staged rallies. Their allies in the national press, alarmed at the scale of the movement, cast the resisters as anarchists. “This is not only a tax strike, it is a revolt against government,” declared Mauritz Hallgren of the Nation.

In the end, Chicago’s government won, but at considerable cost. State courts ultimately sanctioned the seizure of delinquent taxpayers’ property, and the movement ultimately fell prey to internal rivalries.

Elsewhere, the anti-tax revolt faced a blunt campaign spearheaded by bondholders and their allies. “Pay your taxes,” they cried. Many citizens reluctantly decided to fall in line when confronted with the prospect of closed schools and furloughed police officers.

There may have been another reason for the movement’s downfall: the repeal of Prohibition in 1933. This act, as a team of economists has noted, enabled state and local governments to raise much-needed revenue from sales taxes on alcohol as well as licensing fees. Some states also experimented with state liquor monopolies as a way of raising revenue.

At the same time, the federal government taxed alcohol as well, raising significant amounts of revenue. Under the New Deal, much of that revenue went toward supplying unemployment benefits and other aid that individual states and municipalities once provided, lessening that particular burden.

As today’s leaders of cities and states grapple with brutal budget shortfalls, history could very well repeat itself. Absent a quick turnaround – and an unexpected tax windfall like the one that legalizing booze provided — the next few years may witness tax revolts on a scale last seen in the Great Depression.

Bloomberg Opinion

By Stephen Mihm

May 4, 2020, 8:00 AM PDT

[Sales Tax Revenue Forecast and Federal CARES Act in the Current Economic Downturn.]

With a “shelter-in-place” directive, rising unemployment figures and Coronavirus fears, the biggest component of the US GDP – consumer spending – has taken an unexpected tumble. This is particularly worrisome for local and state governments that heavily rely on sales tax revenues.

For instance, in California the sales tax forecast is expected to decline by 36% in the second quarter of 2020 with only a moderate regrowth in the following quarters.

In this article, we will take a closer look at sales tax forecasts for local and state economies and how they’re likely to affect local and state revenue and expenditure budgets.

Continue reading.

municipalbonds.com

by Jayden Sangha

May 06, 2020

[MUNIRevs Offers Free Tax Collection Software to Cities Hit by Tax Revenue Losses.]

DURANGO, Colo., May 6, 2020 /PRNewswire/ — As cities and towns across the country struggle with the pandemic-related loss of business tax revenue, MUNIRevs, a provider of automated tax collection software, is offering municipalities a free, limited version of its trusted solution.

The limited version, made available through the MUNIRevs Cares initiative, gives municipalities that use paper-based, manual business tax collection processes rapid access to an automated, web-based tax collection system that can be accessed by staff working remotely. The benefits of the system include reduced staff time, faster revenue recognition, faster collections, greater efficiency, and increased total collections.

"As a former town finance director, I understand the challenges cities are facing with sharp drops in revenue and budget cuts. We created the MUNIRevs Cares initiative because we want to help cities capture much-needed revenue as quickly as possible. We're offering free, simple setup, free online tax collection, and free support for municipal staff by our expert account management team," said MUNIRevs CEO Erin Neer. "Business owners will also benefit by being able to pay their business taxes online from home or wherever they may be working," she added.

Before starting MUNIRevs in 2011, Neer was the finance director for the mountain town of Mountain Village, near Telluride. Neer brings more than 19 years of experience in municipal finance to every facet of her company.

Access to the system will be available at no cost to municipalities for three months. Those who wish to continue using the system after that will be charged a monthly subscription fee. Those who wish to transition back to manual processes can do so easily while retaining all their data from the MUNIRevs system.

MUNIRevs automates business revenue collection for towns, cities, and states across the U.S. With extensive experience in municipal finance, the MUNIRevs team has revolutionized business tax and licensing processes. It is the trusted source for secure, paperless payment processing, helping cities and states eliminate approximately 95 percent of the manual data entry tasks. Since it was founded in 2011, MUNIRevs has processed more than $1 billion in tax revenues for its clients and more than 50,000 businesses trust MUNIRevs for tax remittance. For more information, visit www.munirevs.com.

[Scott, Senate Colleagues Ask Treasury to Modify OZ Rules Due to Impact of COVID-19.]

Sen. Tim Scott, R-S.C., and eight colleagues sent a letter today to the Department of the Treasury and the Internal Revenue Service, making 10 requests for modification of rules concerning the opportunity zones (OZ) incentive due to the COVID-19 pandemic. Among the requests are a further extension of the 180-day window to invest in a qualified opportunity fund (QOF) following a capital gains event, the addition of COVID-19 as a reasonable cause exception under QOF regulations, a 12-month extension to the 30-month substantial improvement period for qualified OZ property and more. The Opportunity Zones Working Group made [similar requests] April 7.

For community development, affordable housing and renewable energy updates related to COVID-19, see Novogradac's [dedicated page].

May 4, 2020

[Social Impact in L.A.'s Opportunity Zones, with Martin Muoto and Reid Thomas.]

Why is social impact crucial to the long-term success of the Opportunity Zone initiative? Hear from the top urban Opportunity Zone fund, as awarded by the Forbes OZ 20, and the positive story of the impact that they are delivering in South Central Los Angeles. Martin Muoto is founder and managing partner of SoLa Impact, a $115 million Opportunity Zone real estate impact investment fund…

[Read More »]

Opportunity Db

May 6, 2020

[Opportunity Zone Funds Have Raised More than $10 billion, Exceeding Expectations.]

Opportunity Zone funds have raised $10.09 billion as of the end of April, according to a survey conducted by accounting firm Novogradac. This total represents a 50 percent increase over the $6.72 billion that the firm reported near the beginning of the year. The total invested in Opportunity Zones is likely significantly more than that reported number, as survey participation is voluntary and does not…

[Read More »]

Opportunity Db

May 5, 2020

[How to Raise Capital for Opportunity Zone Deals, an OZ Pros Webinar.]

Are you ready to attract investors for your Opportunity Zone deals? On April 29, OZ Pros and

Crowdcreate hosted a webinar about how to form an Opportunity Zone fund and raise capital for OZ deals. Over 200 people attended the live webinar to learn about fund formation, legal structuring, compiling a pitchbook, and crafting the perfect pitch email. Click the play button below to listen…

Read More »

Opportunity Db

May 11, 2020

IRS Opportunity-Zone Letter Ruling Grants Relief on Certification.

The IRS allowed a qualified opportunity fund to file a late self-certification because it saw no prejudice to the government's interests.

In what appears to be the first publicly issued letter ruling of its kind on the Opportunity Zone program, the IRS found that the taxpayer had "acted reasonably and in good faith, and that the granting of relief would not prejudice the interests of the government."

The program, which was created by the Tax Cuts and Jobs Act, allows investors to defer, reduce, and in some cases eliminate tax on capital gains by investing in QOFs. In order to self-certify as a QOF, the fund must file a Form 8996, "Qualified Opportunity Fund."

As the ruling released May 8 noted, the form must be filed by the due date of the tax return, including any applicable extensions.

In this case, the IRS said that the taxpayer and its adviser were aware of the requirement to file Form 8996 along with the federal income tax return. The adviser was expected to file a request for an automatic extension of time to file the tax return but failed to do so because of an administrative error. Neither the tax return nor the Form 8996 was filed by the applicable due date.

The taxpayer filed the tax return and the QOF form by the date that would have applied if the extension had been sought and submitted a request for relief under reg. sections 301.9100-1 and 301.9100-3.

The election to self-certify as a QOF is a regulatory election as defined in reg. section 301.9100-1(b), the IRS said.

"According to Treasury Regulation section 301.9100-3(a), requests for extensions of time for regulatory elections that do not meet the requirements of Treasury Regulation section 301.9100-2 (automatic extensions) must be made under the rules of Treasury Regulation section 301.9100-3," the ruling said. "Additionally, requests for relief subject to section 301.9100-3 will be granted when the taxpayer provides evidence to establish that the taxpayer acted reasonably and in good faith, and that the granting of relief will not prejudice the interests of the government."

The IRS concluded that the taxpayer had met those requirements — although it didn't specifically elaborate on this point — and deemed that the form certifying the taxpayer as a QOF as of the month it was formed was timely filed.

Final regulations (T.D. 9889) on the Opportunity Zone program were released at the end of 2019.

The IRS issued guidance in the wake of the coronavirus pandemic that provided some relief to Opportunity Zone investors, but some practitioners say more relief may be needed.

TAX NOTES

by STEPHANIE CUMINGS

POSTED ON MAY 11, 2020

Now May Be Good Time To Pull Opportunity Zone Investments.

As some investors reevaluate their commitments to qualified opportunity zones in light of the novel coronavirus pandemic, they may enjoy some level of favorable tax treatment in 2020 if they decide to liquidate their capital from the funds.

While investors would likely consider multiple variables before deciding to take money out of QOZs — including the extent to which discrete funds allow for withdrawals, the stability of the market writ large and their ability to write off losses — the tax code has some advantages for those seeking to opt out of funds.

That’s because the opportunity zone legislation, included in the 2017 Tax Cuts and Jobs Act and designed to offer tax relief for investments in low-income communities, doesn’t levy interest-laden penalties on investors who choose to withdraw capital gains from funds. It even restarts the clock on the 180-day window for reinvesting in other funds without losing out on the program’s favorable tax treatment.

And as investors brace for what may be prolonged economic instability, the tax treatment surrounding qualified opportunity funds is likely to play a role in their decisions to stick with current commitments or move capital gains into different areas.

“The risk of any investment is now higher” given the pandemic, Kate Kraus, partner at Allen Matkins, told Law360.

“People are definitely reevaluating whether they want to be invested in opportunity funds, and there are investors who are interested in pulling money out,” Kraus said.

The opportunity zone program allows an investor who sells an asset and reinvests the gains in a QOZ fund to defer taxes on the gains until Dec. 31, 2026. It also forgives taxes on gains from investments held in opportunity funds for at least 10 years.

As of December, 8,764 census tracts had been designated as opportunity zones by state and local officials.

For individuals who sustain capital losses in 2020, liquidating their investments in opportunity funds would likely yield an advantageous tax position, Kraus said.

That’s because whatever capital gains individuals had deferred by virtue of committing them to qualified opportunity funds in previous tax years would be recognized in 2020 if those investors decided to liquidate them this year, she said.

By doing so, those investors would be able to offset their capital gains and losses in 2020, she said, thereby reducing their tax liabilities.

While that "may not be the tax benefit people were looking for when they invested in opportunity funds," Kraus said, it's still better than sustaining a capital loss in 2020 because those losses can't be carried back.

That calculus is made more advantageous given that final QOZ regulations issued by the Internal Revenue Service in December made clear that individuals wouldn't be slapped with interest penalties, or any other kinds of penalties, if they chose to liquidate their investments early, David Shapiro, tax partner at Saul Ewing Arnstein & Lehr LLP, told Law360.

"For those who come into 2020 looking to liquidate, there's no penalty and there's no interest charge," he said.

A key driving force for some investors is that they are simply "too nervous about what the state of the market is" to stick with their opportunity zone investments, James Null, partner at Eversheds Sutherland, told Law360. For those investors, "cash is king," and they'd even be willing to take a tax hit on their capital gains in order to retain more control over their assets, he said.

Clients who are actively reevaluating their investments given the market's current volatility are similarly looking for losses in 2020 — or even in 2019 — to offset previously deferred gains, Null said.

Still, the IRS may look askance at attempts to offset gains and losses by liquidating investments if the agency determines that those individuals lacked bona fide, good-faith intentions to follow through on those commitments, Null said, noting that the final rules also contained an anti-abuse provision.

In an example provided in the final regulations, the IRS said that individuals who direct their capital gains into opportunity funds they've established yet have no intention of actually investing in the projects would not be eligible to participate in the opportunity zone program.

Individuals interested in pulling their investments in QOZs in 2020 may also benefit from the ability to reinvest in other qualified opportunity funds within a 180-day window, Shapiro said. That's because they'd effectively be recognizing a capital gain in 2020, and the 180-day window in which investors can place gains into QOZs begins whenever a capital gain is recognized, he said.

That may be an attractive option for individuals who have become dissatisfied with the funds they've invested in, Saul Ewing's Shapiro said.

But there would also be diminishing returns if investors repeatedly liquidated gains that are parked in QOFs only to redeploy them into other funds later, Shapiro said, since investors may miss out on the increased levels of stepped-up basis.

One provision of the original opportunity zone legislation provides a 15% step-up in basis for investments made before Dec. 31, 2019, if those investments are held for seven years. After that window closes, investments can qualify for a 10% step-up in basis if they're held for five years.

The ability to defer capital gains by investing in opportunity funds is set to expire in 2026, so the deadline for claiming a 10% step-up in basis is Dec. 31, 2021.

Investors who are evaluating the risks of sticking with various projects should also consider any limitations individual funds impose on withdrawals, Shapiro said.

Some funds may impose a penalty on individuals who opt out early, while others may prevent withdrawals altogether for certain periods of time, he said.

The incentives for individual investors, who may be able to secure positive tax treatment if they choose to liquidate in 2020, are much different from those involved for the funds themselves, said Kraus at Allen Matkins. For the funds, there's little to no such upside to investors pulling out early, she said.

While that may be unfortunate for different funds, individuals may be looking at their investment portfolios anew in light of the pandemic.

"The tax benefit of a project is only as good as the project itself," Shapiro said.

Law 360 Tax Authority

By Joshua Rosenberg · May 1, 2020, 4:00 PM EDT

–Editing by John Oudens and Neil Cohen.

IRS PLR: IRS Rules on Utility Company's Accounting Method Change

The IRS ruled that some of a utility company's excess annual deferred income tax amounts were not subject to the normalization method of accounting and further ruled on various aspects of the deferred tax normalization requirements in connection with a consent agreement related to an application for a change in method of accounting.

Read LTR 202017015

State And Local Tax Considerations In Light Of COVID-19: Skadden

The first order of business for many state tax authorities in response to COVID-19 was deciding whether to extend their respective income tax filing and payment deadlines for the 2019 tax year, either automatically by following the Internal Revenue Service's extended deadlines or through separate action. Now that many states have reached a decision on that matter, they face a range of additional tax concerns arising out of the pandemic.

State Conformity With the CARES Act

The federal government enacted the Coronavirus Aid, Relief, and Economic Security, or CARES, Act on March 27 in response to the pandemic. The act included numerous key tax relief provisions intended to ease the financial burden on many companies affected by COVID-19. However, the act raises questions regarding whether states will conform to federal changes that could impact state tax liability and reporting.

Of particular importance are the CARES Act provisions related to net operating loss, or NOL, carrybacks and interest deductibility limitations under Section 163(j).[1]

Under the new law, taxpayers are generally permitted to carry back NOLs arising in taxable years beginning after Dec. 31, 2017, and before Jan. 1, 2021, for up to five years. As of today, a majority of states do not permit taxpayers to carry back NOLs. For those states that do, conformity with the new federal NOL provisions will generally require an act of a state's legislature since most states do not automatically conform with the federal NOL provisions.

Section 163(j), which was put into place through the Tax Cuts and Jobs Act of 2017, sharply limits the ability of businesses to deduct interest payments when calculating their taxable income. Under the limitation, a taxpayer's allowable deduction for interest expense in a particular tax year generally is limited to the sum of 30% of adjusted taxable income plus its business interest income, with any excess carried forward to future years.

The CARES Act temporarily increases, for tax years beginning in 2019 or 2020, the threshold from 30% to 50%. Whether those states that conform to Section 163(j) will adopt the changes made by the CARES Act remains to be seen, though. Because federal taxable income is the starting point for most states in the calculation of state income tax, many states likely will automatically adopt the modifications to Section 163(j), unless a state legislature enacts legislation expressly decoupling from the CARES Act modifications.

New York is the first, and currently the only, state to decouple from this CARES Act provision. On April 3, the New York Legislature amended the New York tax law and administrative code to limit the deduction for business interest expenses to 30% of the adjusted taxable income on state and New York City returns. The law requires taxpayers to do so even if they elect the more generous 50% limit allowed for federal income taxes for 2019 and 2020 tax years.

Relatedly, at the time the TCJA was enacted, some states, such as Connecticut[2], Indiana[3] and Georgia[4], enacted legislation expressly decoupling from the TCJA Section 163(j) provisions. Therefore, in those jurisdictions, the CARES Act modifications to Section 163(j) are not likely to have any effect.

State Tax Impact of Telecommuting

In response to COVID-19, states across the country have issued stay-at-home or shelter-in-place orders requiring the closure of nonessential businesses, encouraging many businesses to ask employees to work remotely. These work-from-home recommendations, although strongly encouraged by state and local governments, could potentially result in additional state tax exposure and withholding obligations for those businesses.

Nexus

State policymakers should consider whether the presence of remote workers will continue to qualify as a nexus creating activity for businesses during this time. To date, six taxing jurisdictions — New Jersey,[5] Mississippi,[6] Indiana,[7] North Dakota,[8] Minnesota[9] and the District of Columbia[10] — have issued formal guidance on this matter stating that remote work in response to COVID-19 will not be cited to trigger nexus. In addition, officials from Pennsylvania have informally indicated that remote workers will not create nexus for companies responding to COVID-19.

Apportionment

State policymakers should consider whether a change in employee location or company property in response to COVID-19 stay-at-home orders will be considered in state apportionment formulas. For those states that rely on property or payroll factors in their apportionment formula, an employee's change in location due to remote work or movement of company property could result in a change to the apportionment of business income. In addition, for those states that use the cost-of-performance method to determine sales sourcing, a change in the location of an employee's activities could similarly impact apportionment for those states.

Individual Residency

Not all individuals complying with stay-at-home orders are doing so in their state of tax residency. State policymakers should consider whether an individual's physical location for the duration of government stay-at-home orders should affect the individual's state residency status. The ability to work remotely means that some employees will choose or be forced to work from a location different than their existing tax residency. Those individuals should be mindful of the state's residency requirements and whether their time in the state will trigger any additional filing obligations.

Payroll Withholding

State policymakers should consider whether an individual's personal change in domicile for the duration of stay-at-home orders will affect employers' payroll tax withholding obligations. Because employees may choose to work from locations outside their home state, employers may be required to withhold additional payroll taxes in those states.

Credits and Incentives

Federal and state governments are rapidly working to establish programs or policies to assist businesses impacted by COVID-19.

Some struggling businesses already may have been participants in existing credit or incentive programs administered by state or local governments before the onset of COVID-19. In most cases, when a business opts to participate in a tax credit or incentive program, the business agrees to satisfy certain employment, investment or growth thresholds in exchange for tax credits or other tax incentives. When a business is unable to satisfy those requirements, it may become ineligible for future credits, and any prior credits may be subject to clawback claims.

State and local policymakers will need to consider whether they will strictly enforce program requirements and, if they do not, the appropriate criteria and process for amending them.

On April 15, the New Jersey Economic Development Authority granted some relief to businesses by extending the annual reporting deadlines for participants that received tax credits through the Grow New Jersey, Economic Redevelopment and Growth, and Urban Transit Hub programs.[11] The press release did not indicate whether participants would otherwise be relieved of satisfying program requirements.

Conclusion

The unprecedented and swift nature of the COVID-19 pandemic has created substantial uncertainty for taxpayers and businesses. Although some states have worked to quickly announce and implement guidance to aid taxpayers, and continue to do so, many have yet to act.

In some states, new tax guidance will require legislative action. To date, 22 states have postponed their legislative sessions, meaning for some taxpayers, any guidance will be delayed until lawmakers reconvene. Nonetheless, we expect that states will continue to provide relief, formally or informally, as states and taxpayers adapt to changing business conditions.

Skadden Arps Slate Meagher & Flom LLP

By Jessica Hough, Carl Erdmann and Paige Braddy · April 24, 2020, 1:38 PM EDT

[IRS Guidance Allows Electronic Requests for Letter Rulings.]

The IRS has issued guidance ([Rev. Proc. 2020-29]) modifying the procedures in Rev. Proc. 2020-1 to temporarily allow taxpayers to electronically submit specified letter rulings, closing agreements, determination letters, and information letters.

Until Rev. Proc. 2020-29 is modified or superseded, both paper and electronic requests for advice from the associate chief counsel offices and the IRS Large Business and International Division will be accepted. The guidance doesn't modify the procedures for determination letters issued by the IRS's Small Business/Self Employed Division, Wage and Investment Division, or Tax Exempt and Government Entities Division.

Taxpayers may electronically submit requests by fax or compressed and encrypted email attachments using the electronic submission procedures described in Rev. Proc. 2020-29. Those requests must be signed using the electronic signature procedures described in the guidance. The processing of paper requests will likely be delayed due to limited availability of IRS personnel.

[Opportunity Zone Success Strategies During COVID-19, with Jill Homan.]

How has the Opportunity Zone marketplace matured over the past 12 months? What has the investor response been? And is the current pandemic-instigated economic downturn threatening to change everything? Jill Homan is founder and president of Javelin 19 Investments, a Washington DC-based commercial real estate investor, developer, and Opportunity Zones advisor. Click the play button below to listen to my conversation with Jill. Episode Highlights…

[Read More »]

Opportunity Db

April 29, 2020

[Pandemic Dos And Don'ts Of State Tax Policy: SALT In Review]

Law360 (May 1, 2020, 1:41 PM EDT) — The novel coronavirus pandemic presents state and local governments with a conundrum like no other. They face significant revenue shortfalls and massive budget deficits. States will have to raise taxes, reduce spending or some combination of the two. On the spending side, states are unlikely to cut spending on health care during a pandemic. They may reduce or delay spending on education and transportation. They will attack waste, fraud and abuse, but there is not a lot of money there. Most states will not be able to resolve this financial crisis by cutting spending.

Most public finance experts I have spoken to think states will have to raise taxes. Part of the quandary is in determining how to do that. This public financial crisis may be different. The fundamentals of the economy before the pandemic were strong. There is a strong possibility that the economy will rebound once the public health risks dissipate. Some types of taxes will deter the economic recovery, but others will have a less deleterious effect. Here is what states should and should not do to deal with likely shortfalls in 2020 and 2021.

Policies to Avoid

Many politicians in states needing money are instinctively drawn to bad tax policy. Certain taxes will curb the recovery. Those policies should be avoided.

First, wherever possible, states should refrain from taxing business entities to close the budget gaps. Business taxation takes many forms, but the two most harmful in the current environment are corporate income and gross receipts taxes. Corporate income taxes are generally ineffective and inefficient ways to raise revenue. They have never raised much revenue, even in years with booming economies. The tax has never raised more than 5% of state tax revenue, and it has raised a much lower percentage of total revenue. Interstate and international competition and a plethora of planning opportunities keep corporate tax revenue in check.

Moreover, research shows that the state corporate income tax falls to an extent on labor in the form of higher wages and on consumers as higher prices. To be sure, the tax falls on shareholders in the form of lower returns. But taxing labor and consumption at a time of high unemployment and dismal retail sales is an unattractive option.

Some states will be tempted to join a handful of states and adopt a gross receipts tax. Virtually all public finance experts consider gross receipts taxes unsound policy choices. Such a tax is inevitably passed on to the consumers as higher prices. The ultimate result is lower consumption. Furthermore, the tax is not tied to profits. Struggling companies, and there will be many in the wake of the crisis, will be subject to tax.

The gross receipts tax falls hardest on businesses with high volume and low margins. The retail industry, along with many other consumer facing-businesses, has thin margins. Thus this tax will likely hit the segments of the economy that have been affected most during the economic downturn. Gross receipts taxes are unsound policy choices; they are particularly unsound during a recession.

Second, states should avoid calls to levy state-level wealth taxes to pay for public COVID-19 costs. The argument is that the very wealthy have weathered the economic downturn better than the rest of the country. That is true, of course. But placing a tax on the value of assets cannot be effectively accomplished at the state level. Few countries place taxes on wealth, and subnational governments cannot impose such taxes. They are simply too difficult to administer and enforce. Most assets held by the wealthy are intangible. Identifying assets and calculating wealth is difficult. Furthermore, there are too many opportunities for people to avoid the tax. The wealthy will move assets or just move.

Third, states should avoid general sales tax increases. During past recessions, states have often raised sales tax rates to close budget gaps. Because the sales tax falls broadly on consumption, states should resist pursuing such policies. As malls and stores closed across the country, personal consumption fell significantly. The economy will need people to shop again. Broad-based sales taxes are generally sound ways to raise revenue, but they curb consumption. States should not impose taxes that will effectively lower buying. A sales tax rate increase could raise substantial amounts of revenue, but the cost of curtailing consumer spending – a prolonged economic downturn – is not worth that revenue.

Here Is What to Do

States will quickly exhaust their nontax options for balancing their budgets. States will spend rainy day funds. They will make short-term budget cuts: hiring freezes, furloughs and delayed spending. State and local governments may or may not get additional federal aid. Most states, though, will need to raise additional revenue over the next two years to balance their budgets.

The first thing states needing money should do is temporarily increase the top tax rates on high-income residents. In the 41 states with broad-based personal income taxes, this would be the fairest and most effective way to raise revenue. The personal income tax has many advantages. Two of the most important, for purposes of this discussion, are fairness and the ability to raise large amounts of revenue quickly in an improving economy.

Those earning high incomes have largely escaped the harshest economic impacts of the pandemic. Higher-income taxpayers have been more likely to keep their jobs and to work remotely. It is the lower-income taxpayers who have suffered the brunt of the economic duress – those who work in restaurants, hotels, retail. A strong argument, a politically salable argument, can be made that those who have survived the economic downtown should be asked to contribute to the recovery.

The personal income tax can raise large amounts of revenue efficiently and effectively. Once the health risks abate, the economy will presumably rebound. The personal income tax is elastic, far more than any other state tax. A personal income tax increase on high-income taxpayers will raise substantial revenue in relatively short time.

The design of such a tax increase, which will vary from state to state, depends on many factors but mostly on actual revenue needs. The increase should fall only on the top earners. Some states may decide to impose a higher rate on annual income over $100,000; other states may choose a greater income threshold, say, $250,000.

It is crucial that the tax increase be temporary. Permanently raising taxes on the wealthy will not work practically or, in many states, politically. There must be an automatic sunset provision after one or two years. I am generally not in favor of high personal income taxes, but a temporary rate increase on those who have weathered this crisis the best is fair.

Raising income taxes is not an option in Texas, Florida, Nevada or other states with no levy on income. Yet these states, heavily dependent on sales taxes, also face large deficits. In oil- and gas-producing states, the crisis is aggravated by falling energy prices.

There are ways that sales-tax states can raise revenue without significantly curtailing the recovery. As noted, a general sales tax increase is not a good idea. The one area of consumption that has actually increased during the pandemic, however, is digital goods and services. Currently, 29 states tax digital goods and services in some manner. But definitions of what is taxed vary significantly. Some states tax these goods narrowly, some states have broad bases.

Sales taxation of digital goods and services is consistent with sound tax policy. The sales tax should fall on all final consumption. There is no tax or economic reason to tax a sweater or a toaster but exempt an e-book. Exempting digital goods results in greater sales tax burdens on other consumption, creating economic distortions. Most important, exempting digital goods and services results in a lot of lost revenue.

Although expanding the sales tax base to include digital goods is sound policy, states should be aware of legal and policy issues presented by such expansion. From a policy perspective, to the extent possible, business purchases of digital goods and services should be exempt because business inputs should never be subject to sales tax. Thus states should avoid policies such as those proposed in Maryland, Nebraska and New York, to target digital advertising services – purchases made exclusively by business. Legally, states should be careful not to run afoul of the Internet Tax Freedom Act , which prevents the taxing of digital goods when nondigital goods are not taxed.

Sales-tax states needing revenue should consider expanding the base to include more services. This is more difficult politically, particularly with respect to professional services. But like digital goods, personal consumption of services should be subject to sales tax. We are a service economy; exempting services from the tax base makes no sense. This is an issue long debated. We know the obstacles to taxing services. States should expand the sales tax to apply to all services, professional and nonprofessional, but should expressly limit those taxes to personal consumption. Most professional services are purchased by business entities; those services should be explicitly exempt from tax. This will raise less revenue, obviously. But it will also blunt some of the intense political opposition to sales taxes on professional services. Most states do not subject most services to sales tax. The current budget crisis should be a catalyst for changing that.

Finally, states should consider raising gas taxes. Since most states earmark gas taxes for transportation, an increase will not affect the overall budget. But there has never been a better time to increase the tax. Lower demand has caused oil prices and consequently gas prices to plummet. States are raising significantly less gas tax revenue. And while Americans are driving less, many transportation costs remain constant. With low gas prices, there is unlikely to be significant political opposition to fuel tax increases.

Conclusion

These proposals have the best chance to raise revenue without severely curbing an economic recovery. Political leaders, for now, should resist the temptation to use the tax laws to advance other goals. There will be proposals to give tax breaks to some industries. There will be attempts to address income inequality. There will be attempts to tax products that some think should not be consumed. The political focus, though, should be on balancing budgets while fostering economic recovery.

by David Brunori

David Brunori is a senior director at RSM US LLP in Washington, D.C., a research professor at The George Washington University and a regular contributor to Law360 Tax Authority.

TAX - NEW HAMPSHIRE

Polonsky v. Town of Bedford

Supreme Court of New Hampshire - April 24, 2020 - A.3d - 2020 WL 1974144

Taxpayer brought suit against town, when it refused to pay him excess proceeds generated by its resale of real property that it had acquired by tax deed.

The Superior Court held that New Hampshire tax scheme regarding town’s obligation for payment of excess proceeds violated “takings” provision of the New Hampshire Constitution and ordered equitable relief in favor of taxpayer, and town appealed.

The Supreme Court, Donovan, J., held that:

- New Hampshire statute that relieves municipality, three years after entry of tax deed by which it acquires taxpayer's property, of any obligation to pay to taxpayer the excess proceeds generated by its resale of property resulted in unconstitutional taking, and
- Taxpayer was not barred from obtaining equitable relief based on his purported "unclean hands."

Bring Back Tax-Exempt Advance Refundings.

Over at our Restructuring GlobalView blog, our public finance colleagues Pedro Miranda and Pedro Hernandez make the case for bringing back tax-exempt advance refundings.

The general shutdown of the economy in response to COVID-19 threatens businesses in most sectors of the economy, and the revenues that those businesses will lose cannot be taxed by state and local governments, threatening their budgets as well. Lawmakers at all levels are searching for grand gestures and bold new ideas to relieve the extraordinary burdens that COVID-19 is imposing. However, the old and tried – the low-hanging fruit – may be even more useful than the new and untried. Tax-exempt advance refunding bonds were a well-established tool that state and local governments formerly used to save money. They allowed state and local governments to reap the benefits of comparatively low prevailing interest rates even when their outstanding debt could not be redeemed until more than 90 days in the future. Citing concerns (even if only as fig leaf for the real objective of raising revenue) about having two sets of bonds (the original new money bonds and the advance refunding bonds) outstanding concurrently for more than 90 days with but a single project to support them, Congress eliminated most tax-exempt advance refunding bonds in the Tax Cuts and Jobs Act of 2017. What better time than a once-in-a-hundred-years pandemic to restore tax-exempt advance refunding bonds to their rightful place?

If Congress restores them, before the ink on President Trump's signature is dry, tax-exempt advance refunding transactions will begin to take shape. The municipal bond market is completely familiar with the regulatory rules and business considerations involved. There are no new rules to learn or unintended consequences to consider. Working groups will convene, tax lawyers will be roused from their parents' basement, and state and local governments can obtain significant cash flow relief using a well-established financing technique.

By Johnny Hutchinson on April 22, 2020

The Public Finance Tax Blog

Squire Patton Boggs

Bill Would Give Opportunity Zone Treatment to Small Businesses Hit by Virus.

Legislation introduced in the House would temporarily classify some small businesses harmed by the coronavirus pandemic as qualified Opportunity Zone businesses.

The COVID-19-Impacted Small Business Opportunity Zone Act, introduced April 16 by Reps. John R. Curtis, R-Utah, and Henry Cuellar, D-Texas, would extend the Opportunity Zones deferment of taxes on capital gains to investments in small businesses that have been negatively affected by the crisis.

The classification as qualified Opportunity Zone businesses would encourage private investment in those entities "by providing their investors with similar tax incentives to Opportunity Zones," said Curtis in a release.

The bill is aimed at small businesses that have experienced supply chain disruptions, staffing challenges, a decrease in sales or customers, or full or partial suspension of business as a result of the spread of COVID-19 or the public and government response to it.

The Opportunity Zone program, created by the Tax Cuts and Jobs Act, allows investors to defer tax on prior gains invested in a qualified opportunity fund until the earlier of the date on which the investment is sold or exchanged or until December 31, 2026.

Rep. Denver Riggleman, R-Va., introduced a bill (H.R. 6513) April 14 that would extend the Opportunity Zone program through 2030.

Even without federal legislation, states may be delaying some deadlines related to Opportunity Zone investments as a result of declaring emergencies as a response to the pandemic.

TAX ANALYSTS

by FREDERIC LEE

POSTED ON APR. 22, 2020

---

8 Opportunity Zone Gain Rules That May Aid Investors.

The qualified opportunity zone program is arguably the most flexible and most impactful tax program passed by Congress in the last 50 years.[1] In this article we explain eight new rules you should know about gain recognition and reinvestment, and how these benefits may be more attractive in light of the COVID-19 crisis.

Taxpayers can elect to invest either short-term or long-term capital gains from virtually any type of asset into a qualified opportunity fund, or QOF, within 180 days of recognizing their qualified gain. But, knowing exactly when the recognition date occurs and when the 180-day reinvestment period starts requires a deep dive into the proposed and final regulations — as well as into each taxpayer's specific facts.

In light of the unprecedented economic challenges presented by the COVID-19 outbreak, taxpayers with short-term or long-term capital gain income generated in 2019, or in early 2020 can use the opportunity zone program to park the qualified gains in a QOF for a period of time, allowing the investors adequate time to perform due diligence on various investments and make qualified opportunity zone business, or QOZB, or QOZB-property investments.

Once the capital gains have been reinvested into a QOF and then dropped into a QOZB, taxpayers have up to 62 months to reinvest the proceeds into various qualified opportunity zone projects. With the tremendous uncertainty in the current market, taxpayers will generally view this extended reinvestment period as a godsend.

The opportunity zone final regulations issued on Dec. 18, 2019, became effective March 16. The new rules give taxpayers tremendous flexibility and extension of time when it comes to determining when the 180-day capital gain reinvestment countdown begins for purposes of meeting the QOF deadline.

Taxpayers can elect to adopt the much more liberal final regulations earlier than their effective date for filing 2019 tax returns. However, this requires that electing taxpayers adopt all aspects of the final regulations — not just the 180-day rule. In most cases, this strategy should not negatively impact a taxpayer, but we highly recommend doing a full evaluation before making an early adoption election.

Below we discuss eight key aspects of the 180-day deadline rules under the proposed and final opportunity zone regulations. Let's take them one at a time.

1. Direct Capital Gains Generated From the Sale of an Asset Held by an Individual, Grantor Trust or C Corporation

There are no changes here between the final regulations and the proposed regulations. The 180-day period starts on the date of sale. Therefore, a taxpayer effectively has 179 days after the date of a sale to contribute all (or a portion) of their capital gains into a QOF.

For example, if an individual, grantor trust or C Corporation sold stock on June 1, 2019, the 180-day deadline would fall on Nov. 27, 2019 — exactly 179 days after June 1. The deadline is not six calendar months from the date of sale (i.e. Dec. 1), as is often misunderstood. There is also no extension of the 180-day period if the last day falls on a weekend.

2. Capital Gains Flowing Through on a Schedule K-1 With No Entity-Level Election

Under the proposed regulations, taxpayers generally needed to wait until the pass-through entity's year-end to begin their 180-day period. For example, an owner of a calendar year pass-through entity has 180 days starting on Dec. 31, 2019 and ending on June 27 to contribute their 2019 share of Schedule K-1 capital gains into a QOF.

Under the proposed regulations, if the flow-through entity notified the taxpayer of their share of Schedule K-1 capital gain and the date of the actual sale, then the equity owner was able to choose to start the 180-day period earlier than year end, i.e. on the date of the actual sale. Interestingly, neither the proposed nor final regulations provide a specific time requirement or form for notification.

Remember, this option will help taxpayers that had identified qualified opportunity zone business property before year-end and that wanted to purchase replacement property early. However, to do that, the pass-through entity should not have made an election to defer the capital gains or have made a QOF investment at the entity level — as further discussed below.

Note that if the entity-level reinvestment election is made, the qualified opportunity zone business property must be purchased and titled under a QOZB, via a two-tier parent-subsidiary QOF-QOZ--property structure. It should not be purchased by the QOF directly and then dropped into a qualified opportunity zone business property, as this may disqualify the qualified opportunity zone business property and ultimately the QOF.

The rationale for this ruling is that the U.S. Department of the Treasury and the Internal Revenue Service wanted to give taxpayers the maximum amount of flexibility and time to invest in the opportunity zone program. Regulators also wanted to ensure that taxpayers did not miss a potential deferral election if they ended up receiving their final Schedule K-1s later than the aforementioned deadline laid out in the proposed regulations.

Under the final regulations, taxpayers can elect to start the 180 days on the pass-through entity's year-end, or on the due date of the pass-through's income tax return (not including any extensions — generally March 15 for partnerships and S Corps, and March 31 for trusts).

For example, if a pass-through entity reports on a calendar year-end, the owner can start the 180-day countdown on either Dec. 31, 2019, or on March 16, for their share of 2019 pass-through capital gains.

If owners choose to start their 180 days on March 15, 2020, then they have until Sept. 10, to contribute their share of 2019 Schedule K-1 capital gains into a QOF. If owners choose Dec. 31, 2019 then they have until June 27, to contribute 2019 capital gains into a QOF. NOTE: Taxpayers with a 2019 gain need to elect to apply the final regulations early if they prefer to extend the reinvestment period to Sept. 10.

The same rules apply if the pass-through entity is on a fiscal year-end basis. For example, if a pass-through entity's year-end is Nov. 30, 2019, then the 180 days would start on Nov. 30, 2019 or Feb. 15, at the election of the equity holder.

Note that limited liability company and partnership managers, and S Corp management should adopt clear guidelines about the process required to make an entity-level reinvestment and the procedure needed for notifying equity holders about capital gains and Internal Revenue Code Section 1231 gain details during the year. This is an area that may generate future litigation for entities that do not take proactive steps.

3. Capital Gains Flowing Through on a Schedule K-1 With Entity-Level Election

Alternatively, the pass-through entity can elect to defer the capital gains at the entity level, which means the 180-days would start on the date of the actual sale.

Under the proposed and final regulations, pass-through entities that make a deferral election are required to notify all of their owners of that deferral election in writing, including the amount of the eligible gain deferral (again — no specific reporting timing is mentioned).

4. IRC Section 1231 Gross vs. Net Gains

One of the most controversial provisions in the proposed regulations pertains to the somewhat complex IRC Section 1231 rules. In general, the Section 1231 rules are as follows:

- Gains from the sale of trade or business property that's held for more than one year — excluding inventory, or IRC Section 1245 or 1250 amounts claimed — are treated as capital gains (federal capital gains are taxed at 0%, 15%, 20% or 23.8% tax rates depending on the individual taxpayer's taxable income and filing status),
- Losses from the sale of trade or business property can be used to offset ordinary income (federal ordinary marginal tax rates range from 10% to 37% depending on the individual taxpayer's taxable income and filing status), and
- Section 1231(c) generally requires taxpayers that had Section 1231 losses claimed during the preceding five years to track those losses and treat them as unrecaptured to the extent that those losses have not yet been applied against any current year Section 1231 gains. The amount of recaptured Section 1231 losses applied to current year Section 1231 gains is treated as ordinary income.

Under the proposed regulations, taxpayers were required to net all of their Section 1231 losses and Section 1231 gains. Further, only the net Section 1231 gains were allowed to be contributed into a

QOF under the proposed regulation — after the net amount of gains and losses was determined. Calendar year taxpayers were also required to wait until Dec. 31 to begin the 180-day period under the proposed regulations and were precluded from investing their 1231 gains prior to year-end.

However, as a result of extensive written and public comments to Treasury, the final regulations allow taxpayers to defer their gross 1231 gains via QOF investments. Treasury also changed the beginning of the investment period from the end of the taxpayer's year to the date on which each asset was sold. Or, taxpayers can apply the rules mentioned above for pass-through K-1 capital gains, including Section 1231 gains.

The opportunity zone final regulations do not explicitly suspend Section 1231(c) losses. Therefore, electing opportunity zone treatment for current year Section 1231 gains is even more valuable for taxpayer's with Section 1231(c) losses since the recapture amount is treated as ordinary income.

5. Regulated Investment Company and Real Estate Investment Trust Dividends

Taxpayers who receive dividend distributions from a regulated investment company, or RIC, or from a real estate investment trust, or REIT, can start their 180-day period at the end of their tax year. The final regulations added that taxpayers can elect to start the 180-day period on the date their dividends are actually received. The 180-day period for undistributed dividends starts on the taxpayer's year-end or the RIC/ REIT's year-end, at the election of the taxpayer.

6. Capital Gains From Installment Sales

The proposed regulations required taxpayers that had capital gains from installment sales to start their 180-day countdown period on the date of sale, provided the assets were owned directly, or to apply the pass-through rules (starting at year-end) if the gains were coming from a K-1. However, this method proved unfair to taxpayers that had to start their 180-day countdown before they actually had the cash in hand to invest into a QOF. Under the final regulations, taxpayers can delay starting their 180-day countdown until the date on which they receive their installment money.

Somewhat surprisingly, the final regulations also clarified that capital gains resulting from pre-2018 installment sales that involve post-2018 payouts now qualify for opportunity zone participation. This ruling allows taxpayers to start a new 180-day period each time an installment payment is received. The 180-day period for pass-through capital gains and Section 1231 installment gains is now treated as though it starts either on the date that the installment money is received, or on the date of the pass-through' s year-end, or on the original due date of the pass-through entity's tax.

7. No 180-Day Safe Harbor

Unfortunately, neither Treasury nor the IRS has provided any relief for a missed 180-day deadline, but they may do so in the future.

8. Further Election Issues

A taxpayer can elect to use either the proposed regulations, or the final regulations. However, once a method is chosen, taxpayers must apply the rules consistently throughout. For example, under the proposed regulations, net Section 1231 gains that were recognized in early 2019 by an individual taxpayer could be invested into a qualified opportunity fund on or after Dec. 31, 2019, and by no later than June 27.

If a taxpayer invested gross Section 1231 gains prior to Dec. 31, they would want to elect early application of the final regulations. Otherwise, they would have an ineligible qualified opportunity fund investment. Making this election means that all final opportunity zone regulation rules apply to them. Individual investors and the qualified opportunity fund and QOZB can make independent elections on the regulatory effective dates. Therefore, careful analysis is required for the initial filings.

Note that each taxpayer's facts and circumstances need to be analyzed carefully in order to identify the 180-day deadline. Missing the deadline could be detrimental. As noted above there is currently no extension or safe-harbor available if you miss the 180-day qualified opportunity fund funding deadline. Therefore, all tax advisers need to be aware of these rules and discuss them with their clients as soon as possible. However, the final regulations are generally much more taxpayer-friendly than the proposed regulations, and they can serve as very helpful tax-savings or tax planning tools.

By Alejandra Lopez · April 21, 2020, 6:24 PM EDT

Alejandra Lopez is a tax manager at Holthouse Carlin & Van Trigt LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See our comprehensive overview of the opportunity zone program here: https://www.hcvt.com/services-Federal-Qualified-Opportunity-Zone.html.

[The Book on Opportunity Zone Investing, with Jim White.]

What insights can be gleaned from the newest book on Opportunity Zone investing? Jim White, PhD is chairman and CEO of Post Harvest Technologies and founder of the PHT Opportunity Fund. He is also a best-selling author; his latest book is Opportunity Investing: How To Revitalize Urban And Rural Communities With Opportunity Funds. Click the play button below to listen to my conversation with Jim.

Read More »

Opportunity Db

April 22, 2020
