
Bill to Restore Full State, Local Tax Deduction Emerges in New Congress.

The "SALT" deduction was curbed by the GOP-backed tax law passed in late 2017.

Two New York lawmakers in the U.S. House have re-introduced a bill to fully restore a federal tax deduction for state and local taxes that was significantly scaled back under the massive federal tax overhaul that was enacted a little over a year ago.

Rep. Nita Lowey, a Democrat who now chairs the House Appropriations Committee, introduced the legislation on Thursday, with Rep. Peter King, a Republican, signing on as a co-sponsor. The bill has been referred to the tax-writing Ways and Means Committee.

It would eliminate a $10,000 cap the 2017 GOP-led tax code revamp imposed on the federal income tax deduction for state and local property, income and sales taxes that households pay. Lowey and King sponsored a nearly identical two-page bill in the last Congress.

"Repealing the SALT deduction was a callous move designed to target New York taxpayers," Lowey said in a statement.

The bill she is backing is apt to face long odds in the Senate, which is still controlled by Republicans.

The limits imposed on the so-called "SALT" deduction drew strong opposition from groups representing cities, counties and mayors, as well as congressional lawmakers in higher-tax states, such as New Jersey and New York.

But capping the deduction promises to raise around $650 billion for the federal government over 10 years, providing a key revenue boost to partially offset other policy changes, including the corporate and individual rate cuts, that were core elements of the tax law.

One of the main arguments state and local groups made against eliminating or curtailing the SALT deduction, is that it would make it harder for states and localities to impose and raise their own taxes to help pay for projects and services.

The thinking goes that residents would become more resistant to state and local taxes because they would no longer be able to write-off the expense on their federal tax returns.

Experts at the Urban-Brookings Tax Policy Center have noted that, in 2018, 96 percent of the additional tax from the limitation of the SALT deduction was expected to fall on the top 20 percent of taxpayers and 57 percent on the top one percent.

Lowey represents New York's 17th congressional district, which is located north of New York City in the lower Hudson River valley and includes part of Westchester County. The median household income in the district was about $96,100 in 2017 Census Bureau estimates show.

That's higher than the median household income for all of New York, which Census estimates for 2013 to 2017 peg at around $62,000.

King's district is located on Long Island and includes portions of Nassau and Suffolk counties. The estimated median household income there in 2017 was about $97,300.

Route Fifty

By Bill Lucia,
Senior Reporter

JANUARY 4, 2019

[Eliminating the SALT Deduction Cap Would Reduce Federal Revenue and Make the Tax Code Less Progressive.]

Rep. Nita Lowey (D-NY) and Rep. Peter King (R-NY) introduced a bill in the House of Representatives to repeal the $10,000 cap on the state and local deduction (SALT). The SALT deduction cap was introduced as part of the Tax Cuts and Jobs Act as a means to broaden the individual income tax base and partially fund reductions in statutory tax rates. Repealing this provision of the TCJA would reduce federal revenue by more than $600 billion over the next 10 years. It would also almost exclusively provide tax relief to the top 20 percent of income earners, the largest tax cut going to the top 1 percent of earners.

Under previous law, individuals who itemized their deductions could deduct the amount of state and local taxes against their federal taxable income. The taxes individuals could deduct included state and local individual income taxes (or sales taxes), real estate taxes, and personal property taxes. The amount individuals could deduct was unlimited.

The TCJA broadened the tax base by limiting the amount individuals could deduct in state and local taxes to $10,000. For high-income taxpayers, this cap increased federal taxable income. By itself, this provision would increase federal tax liability. However, high-income taxpayers also received offsetting tax cuts, such as lower statutory tax rates, a much larger Alternative Minimum Tax Exemption, and a reduction in the corporate income tax. On net, these taxpayers tended to have a lower liability under current law, even with the capped SALT deduction.

Continue reading.

The Tax Foundation

by Kyle Pomerleau

January 4, 2019

Opportunity Zones: What We Know and What We Don't.

Key Findings:

- The Tax Cuts and Jobs Act created the Opportunity Zones program to spur investment in economically distressed census tracts. Opportunity zones reduce capital gains taxes for individuals and businesses who invest in qualified opportunity zones.
- Opportunity zones were estimated to cost $1.6 billion in revenue from 2018-2027. New regulations stipulate that the program's benefits would continue through 2047, meaning the program's revenue impact could increase over time depending on how many investors utilize the program.
- Research suggests place-based incentive programs redistribute rather than generate new economic activity, subsidize investments that would have occurred anyway, and displace low-income residents by increasing property values and encouraging higher skilled workers to relocate to the area.
- While opportunity zones present certain budgetary and economic costs, it is unclear whether opportunity zone tax preferences used to attract investment will actually benefit distressed communities.

Introduction

The Tax Cuts and Jobs Act (TCJA) created the Opportunity Zones program to increase investment in economically distressed communities. The program provides preferential capital gains treatment for investments within designated low-income census tracts. Policymakers hope opportunity zones will unleash investment in low-income communities throughout the country.[1]

This analysis describes opportunity zone program incentives, reviews both academic and government evidence on the effects of place-based incentive programs, and discusses possible outcomes for opportunity zone residents. Overall, we find opportunity zones will present certain budgetary and economic costs to taxpayers and investors, but based on evidence from other place-based incentive programs, we cannot be certain opportunity zones will generate sustained economic development for distressed communities.

Continue reading.

The Tax Foundation

January 8, 2019

TAX - LOUISIANA

Filmore Parc Apartments II v. Foster

Court of Appeal of Louisiana, Fourth Circuit - November 7, 2018 - So.3d - 2018 WL 5830453 - 2018-0359 (La.App. 4 Cir. 11/7/18)

Taxpayer filed petition to recover ad valorem taxes, alleging that it provided public housing and, therefore, was exempt from ad valorem taxation.

The District Court granted summary judgment for parish assessor. Taxpayer appealed. The Court of Appeal reversed and remanded. On remand, the District Court denied in part and granted in part assessor's motion for summary judgment and denied in part and granted in part taxpayer's cross-motion for summary judgment. Assessor appealed, and taxpayer filed answer.

The Court of Appeal held that:

- Fact issues remained as to whether certain units were entitled to public use exemption, but

- Remaining units were not entitled to public use exemption.

Genuine issues of material fact as to whether housing units for very low-income and extremely low-income tenants that were subject to Section 8 rent subsidies were utilized in a way that was dedicated and open to the public, or used in a way that benefited the general public, and as to the use of revenue generated from the units, precluded summary judgment for tax assessor as to issue of whether the units were entitled to public use exemption from ad valorem taxation, in proceeding on taxpayer's petition to recover taxes paid under protest.

Low-income housing units were not entitled to public use exemption from ad valorem taxation; the units were not subject to Section 8 housing assistance program contract restrictions, the units were fully occupied during the tax year, and the units generated income to subsidize units for very low-income and extremely low-income tenants that were subject to Section 8 rent subsidies.

TAX - OHIO

Kohl's Illinois, Inc. v. Marion County Board of Revision

Supreme Court of Ohio - November 6, 2018 - N.E.3d - 2018 WL 5839296 - 2018 -Ohio- 4461

County board of revision and school board sought judicial review of a decision of the Board of Tax Appeals adopting an appraisal valuation that reduced the value of owner's property.

The Supreme Court of Ohio held that Board properly applied collateral estoppel to preclude relitigation as to covenant that prohibited valuation complaints.

Non-enforceability of a covenant in a tax-increment-financing (TIF) agreement that purportedly prohibited property owner from contesting county auditor's valuations of the property was actually determined in a prior decision of the Board of Tax Appeals, and thus the Board properly applied collateral estoppel to preclude school board's attempt to relitigate the issue in owner's subsequent appeal to the Board contesting the property's valuation; the prior decision included a finding that the proponents of applying the covenant failed to prove that they were entitled to its enforcement, the prior decision made no statement about retaining jurisdiction in remanding to county board of revision, and Board's remand order did not call for county board to reconsider whether to enforce the covenant.

Fitch Rtgs: ACA Repeal Would Be Negative for Non-Profit Health Providers

Fitch Ratings-New York-17 December 2018: Any reduction in the Affordable Care Act (ACA), either through repeal, piecemeal legislative efforts or legal challenges to its constitutionality, is detrimental for the U.S. not-for-profit healthcare sector, particularly in those states that have or are expanding Medicaid, according to Fitch Ratings. Should Friday's legal decision in Texas ruling that the ACA is unconstitutional be upheld, tens of millions of people would be directly affected. Those that currently receive healthcare insurance under expanded Medicaid would likely become bad debt or charity for provider organizations.

U.S. District Judge Reed O'Connor ruled the ACA is unconstitutional due to a recent change in federal tax law. The ACA has been under regular political legal pressure since its passing in 2010 but has managed to survive two Supreme Court challenges in 2012 and 2015.

The 2012 ruling, combined with the recent change to the U.S. federal tax code, underpins Friday's court decision. During the 2012 Supreme Court challenge, the ACA was upheld, with one of the deciding opinions that the penalty for not having health insurance was considered a tax, which Congress has the power to impose. With the recent tax overhaul bill (The Tax Cuts and Jobs Act), this penalty has been eliminated. The recent ruling sided with the argument that, with the penalty requirement no longer in place, there is effectively no longer a tax, and therefore, the entire ACA is not constitutional.

This latest ruling is highly likely to be appealed, potentially up to the Supreme Court. Ultimately, we believe the ACA will survive through the appeals process as it has survived other challenges in the Supreme Court. However, renewed debate on the ACA will generate further uncertainty for healthcare providers and the general public alike.

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3 Ways Tax Reform Has Impacted the Muni Market.

Observers thought the federal law would stifle the sale of municipal bonds — and in effect infrastructure projects. But it hasn't been that bad.

SPEED READ:

- The impact of the federal tax overhaul on the municipal bond market hasn't been as bad as many feared.
- But the elimination of so-called advanced refunding bonds has reduced the overall supply of municipal bond offerings.
- While banks are retreating from the muni market, taxpayers in high-tax states are sheltering more of their income in municipal bonds.
- States are on pace to issue 20 percent more new debt this year.

When Congress passed the tax overhaul last December, some worried that it would ultimately hurt the way governments finance major infrastructure projects by making the municipal bond process more expensive.

In some ways, it has. But there have also been some pleasant surprises. Overall, 2018 has been a good year for governments issuing bonds.

Look at Detroit, which was recently able to sell bonds backed by the city's own credit for the first time in decades. It not only did so with a junk bond rating, but it also got a lower interest rate on the debt than it expected simply because of low supply — thanks to the federal tax law. Investor demand for the higher yield that comes with riskier securities like Detroit was also a factor.

Here are three ways tax reform has impacted the municipal bond market in 2018.

Muni Bond Supply Is Down

Far and away, the most notable effect that the tax overhaul had on the municipal market this year was through the elimination of a valuable cost-saving tool for municipalities. Called advanced refunding bonds, the tool allowed governments to refinance debt earlier, thus letting them take advantage of lower interest rates years sooner.

Losing this benefit has pushed down supply. By some estimates, it's cut refinancing activity by as much as 20 percent.

Overall, Municipal Market Analytics' Matt Fabian is predicting that total bond issuance this year will be around $320 billion — down about $100 billion from 2017. While he and other analysts thought that governments would find a way to replace the savings opportunity with other types of bonds, that hasn't happened. "The dominant response," he says, "has simply been to not [refinance] the bond."

Taxpayers Turn to Muni Bonds as Banks Retreat

Historically, banks and insurance companies buy a lot of municipal bonds, making up 28 percent of the market. But since the tax bill passed, banks' muni holdings have fallen every quarter this year.

That's because the law slashed the corporate income tax rate from 35 percent to 21 percent. That, combined with rising interest rates, has made low interest rate muni bonds less attractive relative to other investments.

Observers initially feared that, at a minimum, muni rates would have to go up in order to be competitive. That, or corporations would start selling off their municipal debt.

Neither has happened. According to data from Municipal Market Analytics, banks' total municipal bond holdings have only fallen 7 percent over the last year.

Meanwhile, tax reform's caps on state and local tax deductions offer taxpayers in high-tax states an opportunity to shelter more of their income in municipal bonds. That's helped pick up the slack. "Individual investors are chomping at the bit," says G. Joseph McLiney, a municipal bond consultant. A lack of volume this year and an appetite for tax-exempt income, he says, has worked in the market's favor and kept costs steady.

States Issue More New Debt

While the overall supply is down, governments have already surpassed last year's total of $203 billion in new municipal bonds and are on pace for a 20 percent increase for the year.

The tax overhaul played an indirect role in this development in that it helped state revenues grow by more than was expected this year. The improved economic conditions led some governments to pull the trigger on long-awaited projects. “It’s important to keep in mind that in November of 2016 alone, [voters] approved roughly $60 billion in new bond offerings,” she says. “Often, it takes a few years for those projects to culminate, and this year we saw some of that materialize.”

The jump in new money is a bit of a surprise to Payden & Rygel’s Ksenia Koban, though. She expected the elimination of advance refundings and some other bond programs to take a bigger slice out of the new money market.

GOVERNING.COM

BY LIZ FARMER | DECEMBER 19, 2018

Tax Trends Heading Into 2019.

Key Findings

- State tax changes are not made in a vacuum. States often adopt policies after watching peers address similar issues. Several notable trends in tax policy have emerged across states in recent years, and policymakers can benefit from taking note of these developments
- The enactment of the federal Tax Cuts and Jobs Act (TCJA) expanded many states’ tax bases and drove deliberations on tax conformity. At year’s end, only five states conform to an older version of the federal tax code, though many have yet to resolve issues raised by their tax conformity regimes.
  Several states experimented with mechanisms to allow their high-income taxpayers to avoid the new cap on the state and local tax (SALT) deduction, efforts cast into doubt–though not entirely ended–by draft U.S. Treasury regulations.
- Three states and the District of Columbia cut corporate taxes in 2018, with rate reductions pending in two other states. Reductions in other taxes on capital are ongoing as well, with Mississippi beginning the phaseout of its capital stock tax.
- The U.S. Supreme Court’s *Wayfair v. South Dakota* decision ushered in a new era of sales taxes on e-commerce and other remote sales, but many states have yet to implement the provisions the Court strongly suggested would protect such tax regimes from future legal challenges.
- A second state (Arizona) adopted a constitutional amendment banning the expansion of the sales tax to additional services, with similar efforts–which have the effect of locking an outdated sales tax base in place–expected to emerge in other states in 2019 and beyond.
- A court ruling has states scrambling to legalize and tax sports betting, while shifting public attitudes continue to render the legalization and taxation of marijuana an attractive revenue option in a growing number of states. In 2018, seven states adopted sports betting taxes, while two legalized and taxed marijuana.
- States continue to grapple with the appropriate taxation, if any, of e-cigarettes, with two states adopting taxes at rates reflective of vapor products’ potential for harm reduction, while the District of Columbia increased its tax to a punitive 96 percent rate.
- Business head taxes came out of nowhere to become a key consideration for several cities, particularly those with thriving tech sectors.
- Consideration of gross receipts taxes continue as corporate income tax revenues decline, though concerns about their economic effects have generally helped stave off their adoption.
- Two states repealed their estate taxes in 2018, continuing a decade-long trend away from taxes on

estates and inheritances.
- Revenue triggers, a relatively modern innovation, again featured prominently in tax reform packages and will continue to do so.

Continue reading.

Tax Foundation

by Jared Walczak

December 19, 2018

Tax Changes Taking Effect January 1, 2019.

Champagne will flow, *Auld Lang Syne* will be sung, resolutions will be made (and soon forgot, and never brought to mind), and, in a handful of states, taxes will change.

There is less January 1st activity than we usually see, but this does not mean 2018 was a quiet year. Rather, state consideration of tax conformity after the enactment of the Tax Cuts and Jobs Act (TCJA) of 2017 moved many changes forward, with rate reductions and other adjustments adopted midyear made retroactive to the start of the year. For instance, Idaho, Utah, and Vermont all trimmed income tax rates this year—but made them effective January 1 of 2018, not 2019.[1]

This was also a significant year for ballot measures, but some of the changes approved by the voters will take time to go into effect. Voters approved the legalization and taxation of marijuana in both Michigan and Missouri, but marijuana won't go on sale in these states on January 1st.[2] Lawmakers and regulators still have work ahead of them before the new regimes go into effect.

Continue reading.

Tax Foundation

by Jared Walczak

December 27, 2018

TAX - OHIO

Chagrin Realty, Inc. v. Testa

Supreme Court of Ohio - November 30, 2018 - N.E.3d - 2018 WL 6332544 - 2018 -Ohio-4751

Nonprofit corporation appealed tax commissioner's denial of its application for real-property-tax exemption relating to property it leased to a nonprofit tenant, which was also the sole member of a foundation that was the sole member of the nonprofit corporation.

The Board of Tax Appeals rejected corporation's contention, and, nearly three years later, reissued its decision upon corporation's request. Corporation appealed.

The Supreme Court of Ohio held that:

- Property did not qualify as property used for charitable purposes;
- Corporation could not establish its tax-exempt charitable status by relying on the activities of its nonprofit tenant
- Corporation's core activity was to own and lease subject property; and
- Fact that nonprofit corporation was exempt from federal income tax did not establish its charitable-use tax exempt status under Ohio law.

Property owned by nonprofit corporation and rented to nonprofit tenant, which was also the sole member of a foundation that was the sole member of the nonprofit corporation, did not qualify as property used for charitable purposes, as basis for tax exemption; owner's sole use of the property was leasing it, and leasing was not a use that was exclusively for charitable purposes.

Nonprofit corporation that owned property could not establish its tax-exempt charitable status by relying on the activities of its nonprofit tenant, which was also the sole member of a foundation that was the sole member of the nonprofit corporation; despite allegation that corporation was organized for the sole purpose of holding title to property and collecting rental income, corporation was itself a separate legal entity and could not rely on vicarious exemption to establish its charitable status.

Nonprofit corporation's core activity was to own and lease subject property, and therefore, corporation did not qualify for tax-exempt charitable status, despite fact that its nonprofit tenant was the sole member of a foundation that was the sole member of the nonprofit corporation; fact that proceeds of income-producing lease inured to the benefit of foundation did not support claimed charitable status, and corporation engaged in ongoing business activity of leasing real property, an activity that generates substantial revenue.

Fact that nonprofit corporation was exempt from federal income tax as an entity organized for the exclusive purpose of holding title and collecting rent from an exempt organization did not establish its charitable-use tax exempt status under Ohio law; federal tax laws provided for a charitable-use exemption on a less restrictive basis than Ohio law.

TAX - NEW YORK

T–Mobile Northeast, LLC v. DeBellis

Court of Appeals of New York - December 13, 2018 - N.E.3d - 2018 WL 6533281 - 2018 N.Y. Slip Op. 08539

Cellular telephone service provider brought hybrid article 78 proceeding and declaratory judgment action against city and school district, seeking to compel city to determine and approve provider's petitions for property tax refunds for tax paid related to its equipment and antennas housed on rooftops of office buildings within its service area.

The Supreme Court, Westchester County, denied the petition and dismissed the proceeding. Provider appealed. The Supreme Court, Appellate Division, affirmed, and provider was granted leave to appeal.

The Court of Appeals held that provider's equipment was subject to taxation as real property.

Cellular telephone service provider's base transceiver stations and large rectangular antennas mounted to the exterior of buildings were "inclosures for electrical conductors" under the tax statute's definition of real property; the transceiver stations were essentially cabinets that housed cables and other electrical components and provided battery power, and the antennas were part of the transceiver stations.

Various cables in cellular telephone service provider's data transmission installations were "lines" and/or "wires" under the tax statute's definition of real property.

Components of cellular telephone service provider's data transmission installations were "used in connection with the transmission or switching of electromagnetic voice, video and data signals between different entities separated by air, street or other public domain," as required to be subject to taxation as real property; primary function of the equipment installations was to transmit cellular data.

Phrase "for electrical conductors" in statute defining telecommunications equipment taxable as real property modifies only "inclosures," and the provision encompasses, when not owned by a local utility, lines, wires, poles, and supports, regardless of whether they are related to the conduction of electricity, as well as "inclosures for electrical conductors," when those items are used in the transmission of data signals across public domain.

Central office equipment phaseout from taxation related to property located in the "central office" of a telephone company did not encompass cellular telephone service provider's large data transmission installations, which were mounted to the outside of buildings dispersed throughout the provider's service area.

"Station connections" exception to statutory definition of telecommunications subject to real property taxation relates to wiring physically connecting customer telephones to telephone poles and does not encompass cellular telephone service provider's large outdoor installations including fiber optic cables and antennas.

Save the Crew? Will Do!

The Grateful Dead were noted in their live performances for, among other things, beginning a song and then segueing to one or more other songs before concluding the first song in the thread. Sometimes, the Dead would wait several concerts to complete the original song.

Today we emulate the Grateful Dead by completing a string of posts that began in May about the potential relocation of Major League Soccer's Columbus Crew to Austin, Texas. In our first post, we described the lawsuit brought by then-Ohio Attorney General, and now Governor-Elect, Mike Dewine to apply Ohio's "Art Modell Law" to halt the Crew's departure. We observed in this post that if successful, Ohio's Art Modell Law could serve as a model to other states to prevent the relocation of professional sports franchises that have benefited from publicly financed arenas, stadiums, and other facilities. Our second post reported Major League Soccer's award of an expansion franchise to Cincinnati, which demonstrates that a state's enactment of an Art Modell Law evidently will not dissuade a professional sports league from expanding to that state.

Continue reading.

The Public Finance Tax Blog

By Michael Cullers on December 20, 2018

Squire Patton Boggs

[No New Taxes: Cities Seeking New Soccer-Specific Stadiums Exhibit Similar PR, Financial Tactics.]()

In jockeying for Major League Soccer retention and inclusion, numerous cities in recent weeks have echoed a similar mantra.

No new taxes levied upon the broad general public.

For decades, sports teams have extracted favorable financial deals with host cities because of the basic supply-demand dynamic which exists for professional sports teams who hold the threat of being mobile if unsatisfied.

Namely, if you don't build it, we will leave (or never come in the first place).

And while we shouldn't expect public financing of sports facilities to ever completely dissipate (both for political and legitimate reasons), there is no question it is becoming more difficult for teams to extract the volume of public subsidies they once enjoyed from local, county, and state coffers.

[Continue reading.]()

Forbes

by Patrick Rishe, Contributor

Dec 21, 2018

[Want to Invest in Opportunity Zones? Think P3.]()

Public-private partnerships may just be the secret to maximizing the enhanced benefits of this program for investors and local governments.

By now, everyone in commercial real estate have been deluged with notices from lawyers, accountants and consultants explaining the significant benefits of raising funds to invest in opportunity zones under the new tax law. And these notices are quite accurate. The tax benefits are significant, especially for investors with large capital gains or investors with long-time horizons (which basically describes everyone who invests in real estate).

However, many may wonder, after reading all these, how to put together a commercial real estate deal that will appeal to investors and leverage the opportunity zone tax benefits to enhance returns. The answer to this question is complicated and represents the biggest reason why—at least initially—the supply of dollars to invest in opportunity zones will exceed the number of available deals.

Why is this? Simply put, state governments chose opportunity zones for location in areas with chronically low employment rates and incomes. These areas are not traditionally appealing for investment. The basic idea of the major deferrals, reductions and eliminations of capital gains taxes in the new provisions is to get investors to build and create jobs in those zones. However, the practical side of finding real estate deals that can locate well in economically depressed areas remains significant.

SOUND FINANCIALS

This is where public-private partnerships or “P3” arrangements can help facilitate deals. In the U.S., a large number of state and local governments have updated their laws to facilitate P3 deals. At their core, P3 real estate deals combine public and private assets into real estate facilities that serve public and private uses. The kinds of buildings in the P3 space right now include workforce housing, K-12 schools, higher education teaching and research facilities, government office buildings, sports facilities, public safety buildings and even speculative commercial office buildings that aim to attract private tenants in areas where governments want to see economic growth. Additionally, there is robust deal flow into heavy civil facilities, such as roads, bridges, ports and tolled highway lanes.

In trying to cobble together an economically viable real estate deal in tough geography, partnering with the public sector can be of significant benefit. First, it can ease—and in some cases subsidize—the cost of basic infrastructure that catalyzes growth, such as roads, transit, water/sewer, education and public safety.

Second, public sector users often can locate facilities in areas outside of class-A commercial zones. For example, having a new charter school, 50,000 feet of government office space or a new police precinct on a long-term lease provides a credit tenant that eases the burden of raising capital and attracting private sector users to an area. For more “commercial” government uses—such as research buildings, hotels, convention centers and sports arenas—the advantages are even more significant.

Finally, the opportunity zone law itself provides tax advantages that make private capital more willing to accept lower returns on a long-term lease or build to suit for a government use. Put differently, one of the big obstacles to P3 deal formation using private capital is the higher return it seeks, relative to public revenue or general obligation debt. In this scenario, the opportunity zone tax advantages enhance the return on capital, making rates compare more favorably to the cost of funds from other public sources.

The state and local governments that figure this out first, and put P3 deals on the table in opportunity zones, will be the ones that capture the early advantages from the new law. On the private-sector side, consider public-private partnerships an essential tool to help create an availability of real estate deals that will satisfy the coming demand from investors seeking to benefit from the new law.

Commercial Property Executive

by Brad Alexander

DEC 17, 2018

Brad Alexander, a senior advisor with McGuireWoods Consulting, has extensive knowledge in structuring public-private partnerships and negotiating economic incentives. He is a former congressional and state legislative staffer.

New Tax Breaks Could Lift Distressed Areas - or Become a Big, Gentrifying Tax Giveaway.

Jamie Stolpestad is building two apartment buildings in St. Paul's St. Anthony Park neighborhood, right in the heart of an "O-Zone."

Loren Schirber is gearing up for the "O-Zone" on St. Paul's East Side, where he foresees at least two dozen tiny apartments, a dog park, a solar installation and an all-season food truck hall.

They're hoping $100 million in projects will follow, including the massive redevelopment of Ramsey County's former Government Center West building on Kellogg Boulevard.

So what are "O-Zones," or Opportunity Zones? Distressed areas. Tax shelters. Opportunities for urban — and rural — renewal. The outcroppings of a federal effort to marry philanthropy, private-sector tax avoidance and housing advocacy.

Others might sum them up in a single word: Hope.

Continue reading.

By FREDERICK MELO | fmelo@pioneerpress.com | Pioneer Press

PUBLISHED: December 15, 2018

Opportunity Zone Investors Draw Criticism Over Targets.

WASHINGTON — A real estate investment firm co-founded by President Donald Trump's son-in-law and adviser, Jared Kushner, is betting big on the administration's Opportunity Zone tax breaks.

But New York-based Cadre, in which Kushner still holds at least a $25 million passive stake, made it clear to potential investors in recent marketing materials that it doesn't plan to look for development deals in most of those zones because of their "unfavorable growth prospects."

Instead, Cadre said it will target a "small subset" of zones in such cities as Los Angeles, Seattle and Miami where both populations and incomes are already set to rise faster than the national average.

Cadre is a high-profile example of how early investor interest in the program appears focused on the places that need it the least: zones that qualified for the tax breaks despite already drawing substantial investment or are undergoing gentrification.

Among the examples of such zones is a swath of the Upper East Side of Manhattan that includes the top of Fifth Avenue's Museum Mile, where three-bedroom apartments overlooking Central Park sell for $4 million. Another is Ledroit Park in the nation's capital, which falls mostly in what real estate blog Curbed has anointed Washington's "most gentrified" ZIP code. Yet another Opportunity Zone includes part of The Willows neighborhood of Menlo Park, Calif., less than 2 miles from Stanford's campus, where the tech boom has driven home prices to $1,500 per square foot, 10 times the national average. The Opportunity Zone where Amazon put its New York City headquarters in Queens has a median household income of more than $130,000.

“It’s hard to imagine why we should be subsidizing that,” said Brett Theodos, a researcher whose Urban Institute analysis found nearly one-third of the nation’s more than 8,700 Opportunity Zones are showing signs of pre-existing heavy investment. “These investors are not bad people. They are responding to the incentives.”

Such is the major criticism of the Investing in Opportunity Act, which became law last December as part of the Republican-sponsored tax overhaul. Promoted by Trump in a White House event last week, it offers developers potentially millions of dollars in capital-gains tax breaks to invest in zones selected by states on the basis of such factors as high poverty and low income.

While the program highlights an average 32 percent poverty rate in the zones, it includes a wide range of areas — and allows “contiguous” tracts that might not be low-income but are close enough to distressed areas to qualify.

Cadre said in a statement to The Associated Press that the neighborhoods it is targeting for investment may be poised for growth but still exhibit low median incomes and are “capital deprived.”

“The Opportunity Zone tax benefits only kick in if we succeed for the communities in which we invest,” the statement said.

There’s no evidence the administration sought to include better-off Opportunity Zones in the program. A White House spokesman told the AP last week that the choice of the zones was up to the states. The Treasury Department, which certified the final roster of zones, declined to comment on the presence of gentrified areas in the program.

For some funds, the gentrification of some zones was an explicit selling point, a much safer bet than putting money in distressed areas.

Anthony Scaramucci, the hedge-fund executive who was briefly the White House communications director for Trump, is trying to raise as much as $3 billion for Opportunity Zone projects. On a marketing call last week, he pitched both a warehouse project in Savannah, Ga., and a “swanky” hotel project in Oakland, Calif.

“For those of you who have yet to go to that part of the Bay Area, I can tell you that it is fully gentrifying,” Scaramucci said.

Fundrise, another Opportunity Zone fund that is trying to raise $500 million for investments, is targeting many of the same areas as Cadre, ranking its “Top Ten” targets for Opportunity Zone investing based on which have the fastest-rising housing costs.

One measure of how much the zones overlap with developers’ pre-existing interests is how much they overlap with their current holdings. An AP review of Kushner’s holdings found that he holds stakes in 13 Opportunity Zone properties, all in locations deemed by the Urban Institute to be showing indications of rapid change or full-out gentrification.

An AP investigation found that Kushner and his wife, Ivanka Trump, both helped push for the program and as a couple stand to benefit financially from it. Even though Kushner gave up any management role in Cadre, ethics watchdogs say it is a conflict that arose from their decision to become presidential advisers without divesting from their extensive investments.

Marcy Hart, a Philadelphia real estate tax lawyer who has advised clients on the Opportunity Zone program, says she hasn’t seen much indication that the program is redirecting investment to places that lacked it before.

“There are some projects that have probably come online because they’re in Opportunity Zones,” she said. “But my clients were already investing in these areas.”

Even some of the program’s strongest proponents have acknowledged that not all the Opportunity Zones are equally needy. At a Kemp Foundation gala last month honoring Sean Parker, a San Francisco venture capitalist who helped push for the Opportunity Zones’ creation, Parker himself said that the zones included some “low hanging fruit,” neighborhoods that were already clearly drawing investment.

But the program’s incentives are great enough, he said, that after the obvious opportunities are exhausted, investors will eventually turn their attention to needier areas.

“There will be a lot of capital sitting in opportunity funds, and it’s going to have to find a place to go,” he said.

by JEFF HORWITZ and STEPHEN BRAUN The Associated Press | December 18, 2018.

Information for this article was contributed by Bernard Condon of The Associated Press.

Ranking QOZs: How State And Local Officials Can Make Their Opportunity Zones More Attractive To Developers.

It goes without saying that not all opportunity zones are created equal or present the same investment opportunities.

As the Qualified Opportunity Zone tax program gains national attention from investors looking to deploy billions in capital gains into those areas, sources tell Bisnow the designated areas stand to benefit greatly from opportunity zone-friendly policies enacted at the federal, state and municipal level to further lure investment where it is most needed.

With more than $6 trillion in unrealized capital gains eligible to be deployed in opportunity zones, interested investors who invest those capital gains into an Opportunity Zone fund within 180 days can defer taxes on those gains through 2026. Investors also are eligible to receive tax forgiveness on their opportunity zone investment capital gains if held for at least a decade.

“All OZs are not equal. There are some that are already well underway to being revitalized, and others where it is hard to believe 10 years is enough time for a turnaround,” RegentAtlantic Managing Partner and Chief Investment Officer Chris Cordaro said.

Continue reading.

BisNow.com

by Champaign Williams, National Editor

December 19, 2018

Opportunity Zones Can Boost Business Where it's Needed.

A year ago, Republicans and Democrats finally agreed on something: the Opportunity Zones program. Speaker of the House Paul Ryan, a Wisconsin Republican, called it “the critical component of our poverty-fighting agenda,” while Cory Booker, a New Jersey Democrat, proclaimed that “this could end up being the greatest economic development initiative in a generation in our country.”

OZ investors receive significant tax advantages. If you sell an investment and put what you’ve made in a qualified Opportunity Fund that finances businesses or real estate projects located in an OZ, then you can defer your capital gains tax until the end of 2026. You also pay no capital gains tax on new earnings you make through the Opportunity Fund if you stay invested for ten years.

The Economic Innovation Group calculates that $6.1 trillion in unrealized capital gains will be eligible to benefit from this program. But OZs require more than money; they need local leadership and smart strategies. As EIG recently noted, “State and local leaders are responsible for devising the strategies that will take these few new lines of the tax code and turn them into something that unlocks opportunity for local residents and entrepreneurs. Capital alone is not a strategy.”

Other regions are already ahead of southeast Louisiana. Erie, Pennsylvania’ mayor worked with 35 local groups to prioritize projects and created a concierge service to ensure they happen; Birmingham’s mayor secured twice as many OZs as any other city in Alabama and launched an online mapping tool to showcase them; and the mayors of Louisville, Oklahoma City, and South Bend have all unveiled OZ investment prospectuses in the last month.

But we can catch up quickly because our OZ map is, in a word, opportune. Gov. John Bel Edwards designated 150 Louisiana OZs, with 47 in 2 parishes: East Baton Rouge and Orleans. The entirety of downtown Baton Rouge, all of the New Orleans BioDistrict and Central Business District, and properties surrounding both Baton Rouge Metropolitan Airport and Louis Armstrong New Orleans International Airport all qualify. So do areas near Southern University, the Louisiana Tech Park at the Bon Carré Business Center, the Algiers Naval Support Activity and the NASA Michoud Facility.

There are also resources to help Louisiana investors become first movers and market makers, such as LED’s map of Louisiana zones, GNO.zone, which GNO, Inc. created to highlight OZ projects, and OZ Guide, a platform for best practices and breaking news.

Now is the time to take what we have learned about economic growth and resilience across southeast Louisiana — 13 years after Katrina, a decade after Gustav and the Great Recession, eight years after the BP oil spill, and two years after the Baton Rouge floods — and design a comprehensive OZ strategy to spur innovation. Based on that plan, public officials and civic leaders should court OZ funds that catalyze high-growth industries, while developing strategic public-private and philanthropic-private partnerships that create additional incentives for priority projects.

OZs unlock new sources of capital, so we should look for transformation, not simply one-off transactions, when studying the map.

Investments in and around Michoud provide a precedent. Recently, GE located its world-class Technology Center for the Americas there, announcing a major expansion that created 100 new jobs. As center director James Martin explained, “We can handle some of the largest structures on the planet, we’ve got access to a deep water port, and we have relationships with local universities. New Orleans is going through a technology renaissance moment, and it’s attracting a lot of talent.” OZs can bring additional investment to industries and areas where companies like GE have already seen so much promise.

Not only will Baton Rouge and New Orleans benefit, but we should also expect greater investment in the 80 miles between them. The 23 parishes that comprise the southeast Louisiana Super Region (population 2.6 million) contain 87 OZs. By comparison, the 12 counties in the Charlotte region (population 2.5 million) have 46 OZs spanning North Carolina and South Carolina, the 13 counties in the Dallas/Fort Worth region (population 7.4 million) have 50 OZs, and the 30 counties of the Atlanta metropolitan area (population 5.9 million) have 65 OZs.

To reiterate, our region is in a very fortunate position right now.

Funds flowing to OZs could easily exceed previous programs, such as New Markets Tax Credits, Low-Income Housing Tax Credits, or Enterprise Zones. Because of how it is structured — with no caps, no need for annual Congressional approval, and almost no reporting requirements — this program could lead to more investment than all of those programs combined.

Every OZ fund can invest in zones anywhere across America. If we don't distinguish ourselves, other regions will, and investment will go elsewhere. But if we plan for innovation at the outset, while taking a holistic, region-wide approach, we are well positioned to lead the nation in the next decade of economic development through OZs.

Louisiana, opportunity knocks.

The Advocate

by Rob Lalka

DEC 25, 2018 – 6:00 PM

Rob Lalka directs Tulane's Albert Lepage Center for Entrepreneurship and Innovation.

ROB LALKA IS COFOUNDER AND PARTNER AT MEDORA VENTURES, A STRATEGY CONSULTING FIRM, AND PROFESSOR OF PRACTICE AT TULANE'S A.B. FREEMAN SCHOOL OF BUSINESS, WHERE HE IS THE EXECUTIVE DIRECTOR OF THE ALBERT LEPAGE CENTER FOR ENTREPRENEURSHIP AND INNOVATION.

P3 Industry Gets an Early Holiday Present in IRS Guidance on Interest Deduction: Nossaman

Contractors and investors in P3s can continue taking a full tax deduction for interest on debt under recent IRS guidance (Revenue Procedure 2018-59, issued November 26). Many P3s are highly leveraged, and the interest deduction is a valuable tax benefit for developers. Were this deduction restricted, P3 developers' (and by extension governments') costs would rise; potential investors would demand higher rates of return; and infrastructure projects would be more costly. Without this guidance, the 2017 tax law would otherwise severely restrict the interest deduction for businesses.[1] The IRS' position is welcome (and a relief) and caps an intense letter-writing campaign by industry groups – including the Design-Build Institute of America, Associated General Contractors of America, Performance Based Building Coalition, and Association for the Improvement of American Infrastructure – to the IRS and Treasury.[1]

The deduction restriction (new section 163(j)) emerged from last year's Tax Cuts and Jobs Act ("TCJA") and generally caps a business' interest deductions at 30% of "adjusted taxable income" (which is similar to, but not the same as, EBITDA or EBIT).[2] "Real property trades or businesses" can elect out of these new deduction limits, but at the price of less-generous depreciation for their buildings and other improvements. The actual section 163(j) language is a good deal more complicated, and the Treasury proposed regulations accompanying the IRS guidance consist of 400-plus pages trying to explain everything.[3]

Revenue Procedure 2018-59 provides a safe harbor – which most P3s should meet – under which a P3 will be a "real property trade or business."[4] As a result, companies and investors in a P3 can elect out of the restricted interest deduction rules – and, because the tax-exempt government agency in a P3 usually owns the improvements which otherwise give rise to depreciation deductions, giving up the more generous depreciation treatment usually is not an issue. Because Revenue Procedure 2018-59 is an administrative promulgation and not a regulation, it is effective immediately and not subject to the comment period and other delays with the accompanying Treasury proposed section 163(j) regulations.

Revenue Procedure 2018-59 follows a trend of mostly favorable treatment for infrastructure by the IRS and Congress, including continuing to allow an exemption for interest on private activity bonds used to funds P3s[5] and proposed regulations issued in June clarifying that investment of bond proceeds in infrastructure projects will not trigger rebates to the government under the Code's exempt bond arbitrage provisions.[6]

[1] The letter can be viewed here.

[2] The text of Code section 163(j) is available here. The text of the TCJA and accompanying Congressional reports, can be viewed here.

[3] The proposed regulations (REG-106089-18) are available here.

[4] Revenue Procedure 2018-59 is available here.

[5] Earlier drafts of the TCJA would have ended this tax exemption (see our prior post (November 10, 2017) but the final bill kept it.

[6] The proposed regulations (REG-106977-18) are available here.

Nossaman Infra Insight Blog

By Douglas Schwartz on December 11, 2018

Looking To Invest In Qualified Opportunity Zones? These Resources May Help.

As investors across the nation seek to deploy billions of dollars in capital gains into Qualified Opportunity Zones, they are actively seeking guidance about the program and on the hunt for resources to help identify neighborhoods, assets and available land within opportunity zones most ripe for investment.

The program, created through the passing of the Tax Cuts and Jobs Act last year, aims to incentivize private investment in underserved and otherwise blighted communities across the U.S. in exchange for a hefty tax break.

More than 8,700 census tracts have been classified as opportunity zones and numerous opportunity zones funds have already launched to take advantage of the program — with an estimated $6 trillion in unrealized capital gains eligible to be deployed into opportunity zones, according to a study conducted by Real Capital Analytics.

In response to high demand from firms and high net worth individuals interested in the opportunity zones program, a number of tools have come to market to help potential investors understand how the program works, identify neighborhoods that qualify for it and locate assets within the designated areas in need of investment.

“Opportunity zones have brought national attention to areas of the country that have been too often looked over for investment. Unlike traditional community development institutions, knowledge and understanding about these communities is quite limited,” Smart Growth Americas Vice President of Land Use and Development Christopher Coes told *Bisnow*. Coes is also director of national real estate developer and investor network LOCUS.

“The structure of the opportunity zones tax incentive places the onus on the investor to identify and conduct due diligence … which requires an understanding of not only the project but also the place. Because of this demand, we’re seeing a lot of tools [come to market] to help assist investors and policymakers.”

Bisnow has assembled a list of some of these resources below.

CRE Models Opportunity Zones One-Stop Shop

St. Petersburg, Florida-based real estate data and analysis company CREModels’ Opportunity Zones Resource Center is fit with an interactive map that allows users to search by address to identify neighborhoods and assets within opportunity zones, downloadable documents and links to other opportunity zones portals. When using the map, users can find granular information for specific tracts, including population size and density, number of households, household sizes, total housing units and other occupancy figures such as vacant units, owner-occupied units and occupied rental units.

“High-net worth investors are sitting on an extraordinary amount of capital gains. Our Qualified Opportunity Zones Resource Center gives developers and real estate investment fund managers the tools and resources they need as they work with such investors on acquisitions and development projects in these low-income areas,” CREModels Managing Director Mike Harris said in a statement.

Economic Innovation Center Opportunity Zones Resources

Economic Innovation Center, an economic public policy organization founded in 2013, has created a resource page on its site that links to state-by-state opportunity zone updates. Each state on an interactive map of the U.S. links to a profile PDF that provides a complete overview of the state’s opportunity zones program, including how many tracts were designated as opportunity zones, the number of residents in each zone and the number of jobs and businesses in each zone. It is not clear how often this page is updated.

Enterprise Community Partners Opportunity Zones Eligibility Tool

Opportunity360, a subsidiary of Enterprise Community Partners — a nonprofit that works to make housing more affordable and sustainable nationwide — has created an Opportunity Zones Explorer tool to help potential investors identify which tracts in their states qualify for the Opportunity Zones program. This tool also identifies if those tracts qualify for any other federal place-based programs.

"In addition, users can filter tracts using the Opportunity360 Outcome Indices to see how people living in these tracts are faring across our five outcome dimensions and explore tracts that were eligible but not designated by the states as Opportunity Zones," the organization wrote on its site.

Novogradac OZ Mapping Tool

National professional services provider Novogradac & Co. has created a resource center dedicated to opportunity zones. The dominant resource on this page is an Opportunity Zones Mapping Tool that users can search for Qualified Opportunity Zones by address or zooming into an interactive map. The map also reveals how many public housing developments are underway in those tracts.

Reonomy Opportunity Zones Search Tool

New York-based real estate data provider Reonomy unveiled a new search tool in October that allows its clients to gather multiple layers of information about properties and building owners in opportunity zones in rural, urban and metropolitan areas. Using various filters, users can search by location, asset type, sales and debt. Since creating this search feature, Reonomy has identified about 6.75 million commercial properties that fall within opportunity zones, Reonomy Director of Product Patrick Rafferty said.

"I think there's going to be a substantial uptick in demand for those properties [located in opportunity zones]. I think owners of those properties can expect there is going to be a renewed or elevated interest in those properties and … people acting on that now will have a first mover advantage. Our product helps offer that," Rafferty said.

Smart Growth America-LOCUS Opportunity Zones Navigator

LOCUS, a national network of real estate developers and investors spearheaded by Smart Growth America, has created an Opportunity Zone Navigator that allows users to search within opportunity zones for transit, environmental, economic, housing and affordability information. The map is interactive and users can use filters to advance their search to identify opportunity zones with brownfields, or how many commercial and industrial jobs are within each tract, for example.

"LOCUS created the Opportunity Zones Navigator to provide real estate professionals and locals [with] a centralized, user-friendly tool to identify opportunity zones that are ideal for creating new vibrant and walkable neighborhoods," Smart Growth Americas' Coes said. "Our goal [is that] the tool can facilitate investments that will achieve the greatest economic and social impact."

Yardi Matrix Opportunity Zones Search Tool

Commercial real estate software company Yardi Matrix has created a "Quick Search" and "Property Type Advanced" search tool that allows its subscribers to locate multifamily, self-storage and office assets within opportunity zones.

bisnow.com

Champaign Williams, National Editor

December 9, 2018

Trump to Steer More Money to 'Opportunity Zones'

WASHINGTON — President Trump directed federal agencies on Wednesday to steer spending toward certain distressed communities across the country — part of his administration's push to turn a tax break included in last year's $1.5 trillion tax package into a broader effort to combat poverty and geographic inequality.

Mr. Trump signed an executive order at the White House to push federal resources to so-called opportunity zones — a small but lucrative provision tucked into his signature tax cut that in recent months has vaulted to prominence among real estate developers and other investors.

Mr. Trump told attendees at the meeting that the zones would receive "massive incentives" for private-sector investment. He said the goal of the order was to help "draw investment into neglected and underserved communities of America so that all Americans regardless of ZIP code have access to the American dream."

Continue reading.

The New York Times

By Jim Tankersley

Dec. 12, 2018

Opportunity Zones Have Accelerated Investment, But Not In The Neighborhoods That Need It.

It has been nearly a year since Qualified Opportunity Zones became law, and the early numbers suggest they may not be working as intended.

The program is meant to encourage private investment in destitute or underserved communities by allowing investors to defer capital gains tax on income invested in those zones. A new report from Real Capital Analytics shows that on average, land prices in census tracts designated as opportunity zones are not significantly lower than outside of them.

Since the Tax Cuts and Jobs Act was passed, transaction volume for land purchases have grown in every quarter, with Q3 seeing a year-over-year increase of over 50%. Deal volume outside of opportunity zones have remained stagnant over the same period, according to RCA. Though investors have responded to the new tax break, they haven't changed their behavior meaningfully, RCA Senior Vice President Jim Costello said.

Continue reading.

Bisnow

by Matthew Rothstein

December 5, 2018

TAX - MISSISSIPPI

NRG Wholesale Generation LP v. Kerr

Supreme Court of Mississippi - December 6, 2018 - So.3d - 2018 WL 6381152

Taxpayer appealed from county board of supervisor's calculation of the true value of taxpayer's power plant for purposes of computing ad valorem tax.

The Circuit Court entered judgment in favor of county, awarding county $533,827.80 together with eight percent interest per year. Taxpayer appealed.

The Supreme Court of Mississippi held that:

- The trial court did not err in excluding taxpayer's proffered expert testimony on the true value of its industrial power plant, and
- The trial court did not abuse its discretion by denying taxpayer's motion for a change of venue.

On appeal from the county board of supervisor's calculation of the true value of taxpayer's power plant for purposes of computing ad valorem tax, trial court, in a trial de novo, did not err in excluding taxpayer's proffered expert testimony on the true value of its industrial power plant, when expert failed to use the underlying statutorily mandated historical cost-less-depreciation approach for calculating the true value

On appeal to the circuit court from county board of supervisor's calculation of the true value of taxpayer's industrial power plant for purposes of computing ad valorem tax, the circuit court did not abuse its discretion by denying taxpayer's motion for a change of venue, even though a majority of the 91-person venire knew the county tax assessor and the board; during voir dire, the court struck every juror that said he or she could not be fair and impartial, and every juror taxpayer challenged for cause was dismissed by the court.

TAX - LOUISIANA

Smith v. Robinson

Supreme Court of Louisiana - December 5, 2018 - So.3d - 2018 WL 6382118 - 2018-0728 (La. 12/5/18)

Taxpayers, Louisiana residents and owners of several limited liability companies (LLC) and Subchapter S corporations that transacted business in Texas, Arkansas, and Louisiana, brought action seeking recovery of income taxes paid under protest.

The District Court found that Act amending State income tax statute violated the dormant Commerce Clause. The Department of Revenue appealed.

The Supreme Court of Louisiana held that:

- Taxpayers' payment of a Texas franchise tax constituted a net income tax imposed by and paid to another State for purposes of entitlement to resident income tax credit;
- Statute governing entitlements to resident income tax credits for income taxes paid to another State failed the fair apportionment test for determining the validity of a state tax under the dormant Commerce Clause; and

- Statute governing entitlements to resident income tax credits for income taxes paid to another State impermissibly discriminated against interstate commerce, in violation of the dormant Commerce Clause.

Payment of a Texas franchise tax by taxpayers, Louisiana residents who were owners and members of several limited liability companies (LLC) and S corporations, pass-through entities that transacted business in Texas, Arkansas, and Louisiana, constituted a “net income tax” imposed by and paid to another State for purposes of entitlement to resident income tax credit in Louisiana; the Texas franchise tax was essentially imposed on an income basis, the payment of the tax was made by pass-through entities doing business in Texas, but the credit was being claimed by individual shareholders and members.

Statute governing entitlements to resident income tax credits for income taxes paid to another State failed the fair apportionment test for determining the validity of a state tax under the dormant Commerce Clause; the statute, as amended, failed to fairly apportion the tax according to each state’s relation to the income since no credit was given with respect to taxes paid on income earned from sources in Texas, which created the potential for multiple taxation of the same income.

Statute governing entitlements to resident income tax credits for income taxes paid to another State, which failed to give credit to resident taxpayers with respect to taxes paid by pass-through entities on income from sources in Texas, impermissibly discriminated against interstate commerce, in violation of the dormant Commerce Clause; the statute, as amended, resulted in the double taxation of interstate income as compared with the taxation of intrastate income, which created an incentive for taxpayers to opt for intrastate, rather than, interstate economic activity.

Vacation Rental and Shared Housing Tax Surcharge.

The enactment in October of a shared housing surcharge in Chicago and a new tax on online bookings in Pennsylvania both will have an impact on the hotel industry.

Chicago’s Shared Housing Surcharge
The City of Chicago has enacted a new surcharge targeting one of the hotel industry’s biggest competitors: the vacation rental and shared housing industry. Section 3-24-030(C) of the Chicago Municipal Code imposes a new surcharge (the “shared housing surcharge”) on the rental or lease of any vacation rental or shared housing unit in the City. Effective December 1, 2018, the shared housing surcharge is 2%, plus the 4% surcharge already in place under Section 3-24-030(B), for a total surcharge of 6% of the gross rental or leasing charge.

The shared housing surcharge is also in addition to the City’s 4.5% hotel accommodations tax. Thus, effective December 1, 2018, the total City tax rate on vacation rentals and shared housing units will be 10.5% (compared to 4.5% for most hotels). As with the hotel accommodations tax, operators are responsible for collection and remittance of the shared housing surcharge.
A vacation rental is defined in §4-6-300 as a dwelling unit that contains six or fewer sleeping rooms that are available for rent or for hire for transient occupancy by guests. Likewise, a shared housing unit is a dwelling unit with six or fewer sleeping rooms that is rented in whole or in part for transient occupancy by guests. City Code §4-14-010.

The surcharge does not apply to temporary accommodations provided by a hospital or the rental of an accommodation which is considered a permanent residence of the person who occupies it.

Pennsylvania's New Tax on Online Travel Agencies
Also in October, Pennsylvania enacted Act 109, a new law increasing the tax payable by online travel agencies for hotel room bookings in the state. This new tax will apply to online travel agencies.

The new law eliminates a loophole that allowed online booking websites to charge the hotel occupancy tax only on room rates as negotiated with the hotel, rather than on the final amount paid by the guest. Under the new law, which is expected to take effect February 1, 2019, online booking agents will also be required to pay tax on accommodation fees and other charges included in the booking price. Guests will pay tax on the same base whether they book through online booking agents or directly through the hotel.

The goal of the new law was to level the playing field for hotel bookings and to raise funds for tourism for the state of Pennsylvania.

Akerman – SALT Insights

Corporate Tax Breaks Cost U.S. Schools Billions of Lost Revenue: Report

(Reuters) – Corporate tax subsidies, in the spotlight again after Amazon.com Inc's secretive quest to find a site for its second headquarters, are costing American public schools big money, according to a report issued on Tuesday.

In fiscal 2017, U.S. public schools lost $1.8 billion across 28 states through corporate tax incentives over which most schools themselves had little or no control.

The 10 most affected states could hire more than 28,000 new teachers if they were able to use the lost revenues, according to the report released by Good Jobs First, a left-leaning Washington think tank.

The report comes amid increased taxpayer scrutiny of such deals following Amazon's nationwide, yearlong search for its "HQ2" site.

Amazon decided last month to build two new headquarters at $5 billion each in New York City and Arlington, Virginia, saying it will hire up to 50,000 people altogether.

Though conducted mostly in secret, the search was still a public spectacle, pitting state against state in a bidding war and raising questions about transparency and the need for such subsidies for a company run by Jeff Bezos, the richest man in the world.

States and cities have long used abatements, subsidies and other tax incentives to lure companies, keep them from leaving or encourage them to expand.

Such deals are meant to boost development and investment, and proponents say the lost tax revenue is worth it because they grow local economies.

But it can be hard to know whether the benefits outweigh the burdens. And until recently it has been difficult to discern how much one entity may have lost because of another entity's tax breaks.

However, a governmental accounting rule issued in August 2015 now requires local U.S. governments to report how much money they lose on corporate tax breaks for development projects

– their own, or another nearby governmental entity.

Good Jobs examined the first full year of reporting for most of the school districts, which are particularly affected because most of their revenue comes from property taxes – yet they typically have little influence over subsidies granted by the cities or counties where they are located.

“Cities say they care about economic development, but then they end up granting subsidies in a way that cuts out control by school boards, parents and others,” said Good Jobs’ Scott Klinger, who authored the report.

Good Jobs reviewed financial reports from fiscal 2017 for more than 5,600 of the nation’s 13,500 independent school districts.

Of the five districts that lost the most, three are in Louisiana. Together, they lost more than $158 million, or at least $2,500 for each student enrolled.

More than half of the districts did not report any such losses, in many cases because the new accounting rule appeared to have been “simply ignored,” the report said.

In Oregon’s Washington County, Intel Corp and Genentech, the U.S. biotech arm of Swiss drugmaker Roche, have both been getting a property tax exemption on capital projects for years. Its Hillsboro School District lost nearly $97 million in fiscal 2017, more than any district in the country, the report found.

Nathan Buehler, spokesman for Oregon’s economic development agency, declined to comment because he had not had “an opportunity to review the study, its findings, and the context to the data going in to it.”

Intel spokesman William Moss declined to comment on the report but noted that “with nearly 20,000 employees in the Hillsboro area, Intel is an anchor of the local economy.”

Genentech did not comment on the report but noted its $17 million it has donated to science education across U.S. cities in the last four years. It also said it had promised in 2006 to create 250 new jobs in Hillsboro but now has more than 450 full-time employees.

“We strongly believe in stable funding for local municipalities and tie our company’s success to a well-educated and well-compensated workforce,” Genentech said.

In Pennsylvania, the School District of Philadelphia, which only last year regained control from state officials after climbing out of a deep fiscal crisis, lost the second most revenue at $62 million.

While the Philadelphia district clearly “bears one of the largest burdens in the country of the upfront costs … this study only looks at one side of the ledger, so it is impossible to comment on the net impact of these incentives,” spokesman H. Lee Whack Jr. said in an email.

City spokesman Mike Dunn said the study does not appear to factor in “the value of enhanced development resulting from the incentives.” It had already commissioned a new study of tax credits.

“We remain committed to further discussions with our colleagues on City Council about the future of the abatement, including proposals that would see it modified,” Dunn said.

The Hillsboro district did not reply to a request for comment.

Reuters

Dec. 4, 2018

(Reporting by Hilary Russ in New York; Editing by Lisa Shumaker and Bill Berkrot)

It's a Natural Gas Giant vs. School Kids in Arkansas Tax Fight.

- **Southwestern Energy is contesting how it's taxed in the state**
- **Amid dispute, local school hasn't enough money for books**

A $2.7 billion company is contesting its local tax bills in Arkansas. Seven hundred students in the tiny town of Pangburn are paying the price.

Houston-based Southwestern Energy Co. has filed lawsuits in six Arkansas counties disputing the way its taxes are calculated and isn't paying some as the cases are decided. That's left the Pangburn School District, which counts on Southwestern as its largest taxpayer, without enough money for library books, computer lab upgrades, or new teachers.

The district's troubles show what happens when a locality relies too much on a single company or industry. That's what sent Detroit spiraling into bankruptcy as auto-industry jobs disappeared, and it forced New Jersey to rescue junk-rated Atlantic City as casinos shuttered. Now it's Arkansas's turn as declining natural gas prices and production threaten a key source of revenue for some municipalities.

"It's just filtered through our whole system," said Stacy Hopkins, business manager for the school district, which is located 64 miles (103 kilometers) from Little Rock. "At the end of the day, our main objective is to educate these kids. We're doing our best to cut in other areas that don't affect our students."

In Dispute

Southwestern was the first company to pull natural gas from the Fayetteville Shale in 2004, and went on to become a top producer in the state. Now, production out of Arkansas, after growing rapidly between 2007 and 2010, has plummeted. Southwestern said earlier this year that it would sell its Fayetteville exploration and production business to focus on "higher margin" assets in other regions of the country.

In court, Southwestern is arguing the counties calculate taxes using an industry metric of natural gas prices that is averaged over three years, which has resulted in the company paying levies based on higher prices than what it earns in the market. The company is also arguing that the amount it is allowed to deduct in lease operating expenses, or what it costs to get gas out of the ground, is too low, which drives up the tax bill.

In Cleburne County, Southwestern has been overcharged by about $2 million a year, company spokeswoman Christina Fowler said.

"Southwestern Energy recognizes the uncertainty that this tax issue is creating for local school districts and county governments," Fowler in an emailed statement. "That is why we have been working with the state regulatory authority and county governments to find an equitable resolution."

Natural gas futures have since popped to multi-year highs in November.

If the fiscal problems at some of the districts worsen, the state may need to step in since it guarantees debt issued by school districts.

“It’s like a perfect storm,” said Mark Whitmore, a lawyer representing Conway County, one of the counties that Southwestern has sued. “The fact that they’re not paying has left these schools in duress.”

The lawsuits add to the pressure communities in the Fayetteville Shale face. The lower prices and falling production has caused dramatic drops in assessed property value, which is what determines property taxes they can collect, the Arkansas Assessment Coordination Department said in a report.

In Van Buren County, the assessed value has plummeted 25 percent since 2014 to $145 million in 2016, according to the report. That’s a hard hit to rural areas in a state that has already seen half its mining and logging jobs disappear in the last decade, according to the U.S. Bureau of Labor Statistics.

In Pangburn, Hopkins said she’s concerned that if Southwestern wins, it will spur other companies and individuals to contest their tax bills too.

“It’s not just an oil and gas issue — any company can do this,” she said. “Any taxpayer can do this if they’ve got the money.”

Bloomberg Business

By Amanda Albright

December 8, 2018, 4:00 AM MST

TAX - GEORGIA

Love v. Fulton County Board of Tax Assessors

Court of Appeals of Georgia - December 3, 2018 - S.E.2d - 2018 WL 6288099

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

The trial court granted defendants’ motion to dismiss for failure to state a claim, and then dismissed other pending motions as moot. Citizens appealed.

The Court of Appeals held that:

- Citizens failed to rebut the presumption that the trial court followed the law and limited its consideration to the amended petition and attached exhibits in ruling on defendants’ motion to dismiss for failing to state a claim on which relief could be granted;

- Citizens failed to allege that county board of tax appraisers and other defendants failed entirely to conduct an investigation and reach a decision regarding the ad valorem tax status of stadium lessee's interest in new football stadium, as required to state a mandamus claim;
- Sovereign immunity clearly barred the plaintiffs' declaratory and injunctive relief claims against the board and other defendants in their official capacities; but
- The doctrine of official immunity did not operate to bar suits for declaratory or injunctive relief against county officers in their individual capacities.

Fitch Ratings: Struggles Continue for U.S. NFP Hospitals in 2019

Fitch Ratings-Austin-05 December 2018: Not-for-profit hospitals will continue struggling to adapt to the paradigm shift in the broader health care sector into next year, according to Fitch Ratings 2019 not-for-profit hospital and health systems outlook report.

Fitch maintains a negative sector outlook for not-for-profit hospitals for 2019 due largely to ongoing operational weaknesses, which have evolved from an ongoing trend into a real fundamental shift in the sector. "Hospitals now have to continuously focus on operational, clinical and transformational initiatives to offset compressed commercial rate increases and little, if any, net rate increases from governmental sources," said Senior Director Kevin Holloran. Countering operational pressures for hospitals is the fact that balance sheets are stronger than they have been in over a decade.

It's this balance sheet flexibility that will benefit larger hospital systems most as they plan to cut billions from their expense bases in order to become profitable on Medicare rates. Lower rated hospitals, in contrast, are less able to trim expenses, and as such are more likely to be price takers than price makers when negotiating commercial rates.

Consolidation of hospital systems through M&A and alignment activity is also likely to continue in 2019. "Size and scale alone do not necessarily result in success, though further consolidation is a logical outcome given current industry pressures," said Holloran.

Operating pressures notwithstanding, Fitch maintains its stable outlook for not-for-profit hospitals next year. "Most hospitals will be able to offset short-term operational pressures with their absolute levels of cash and investments," said Holloran.

"Fitch 2019 Outlook: U.S. Not-for-Profit Hospital and Health Systems" is available at www.fitchratings.com.

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Not-for-Profit Hospital Expenses will Continue to Outpace Revenue in 2019.

Moody's Investors Service expects not-for profit hospitals will continue on their course in 2019 with expenses continuing to outpace revenue, according to its new report.

Moody's maintained its negative outlook on the sector as weak volume trends, reimbursement compression, more Medicare patients and growing bad debt loads will limit revenue growth, analysts projected in its 2019 outlook released Monday.

Operating cash flow will be flat or slightly decline, hinging on providers' ability to further cut expenses, according to the report.

"The margins are at some of the lowest levels that we have seen in a while, but that's more a function of expenses outpacing revenue," Lisa Goldstein, associate managing director for Moody's public finance group, told Modern Healthcare in September.

This week, my colleagues and I are attending AdvaMed's annual MedTech Conference. Participants will hear about the latest innovations, such as new digital products that incorporate the latest advances in wireless technology and increasingly powerful computing capabilities for generating clinical and economic insights.
Read more >

Hospitals are doing a better job of limiting expenses by cutting staff, boosting productivity and squeezing supply costs, according to the report. Salaries and supplies expense growth fell to 6% and 5.9% in 2017 from 7.7% and 8.2% in 2016, respectively. Overall drug price growth will likely continue to slow, which will also help.

Total expense growth is expected to drop slightly to 4% to 5% in 2019 from 5.7% in 2017. But that will still eclipse projected revenue growth of 3% to 4%.

Inpatient admission will remain very weak, following 2017's median admission growth of 1%, according to the report.

Outpatient visit growth will also remain soft, highlighted by median growth declining for the first time in five years to 2.2% in 2017 as the number of outpatient surgeries significantly dropped. More competition coupled with the ongoing shift to outpatient services will suppress margins. Value-based pay models and higher out-of-pocket expenses will are poised to drag utilization.

Meanwhile, demand for temporary nurses, continued recruitment of employed physicians, wage increases associated with lower unemployment, innovative specialty drugs and expanded use of medical devices will drive up expenses.

"The not-for-profit healthcare outlook remains negative amid some glimmers of stability," Diana Lee, a Moody's vice president, said in a statement.

Medicare as a percentage of gross revenue rose to 45.6% in 2017 from 43.7% in 2013, according to Moody's data. Overall reimbursement rate increases will continue to be in the low-single-digit range. This combined with growing bad debt levels will strain not-for-profits' balance sheets, according to the report.

Bad debt levels are projected to grow in the 8% to 9% range as commercial insurers will continue to limit coverage and raise copays and deductibles.

Medicare inpatient base rates will grow about 3% in fiscal 2019, a bit higher than in prior years. However, the CMS estimates that about 80% of hospitals will incur readmission penalties of up to 3% of their diagnosis-related group. Site-neutral payments and capping 340B drug discount rates would also hurt not-for-profit hospitals.

The uncertain state of work requirements for Medicaid eligibility and a looming reduction in Medicaid disproportionate share funding would acutely impact not-for-profit providers, according to the report.

Meanwhile, commercial insurers' negotiating leverage will rise as more Medicare and Medicaid beneficiaries are covered by managed-care programs, which feature lower rate increases and higher denial rates. Certain hospitals will face additional margin constraints as budget-strapped states seek to reduce spending on their employee health benefit plans, analysts said.

Not-for-profit hospitals will still seek scale to alleviate financial pressures, according to the report. But the jury is still out on long-term savings for larger systems that acquire struggling, Goldstein said.

"Day 1 integration is key to making these deals work," she said. "We've seen mergers go very smoothly; we've seen mergers over the years that have been wobbly coming out, and some have been very difficult."

Modern Healthcare

By Alex Kacik | December 3, 2018

State + Local Tax Insights: Fall Issue 2018 - Top Ten Best Audit Practices

Benjamin Franklin famously said that nothing in this world is certain except death and taxes. And the certainty of taxes leads to the inevitability of audits. Whether you are preparing for your first State tax audit or your thousandth, keeping in mind the following ten best practices will help ensure that the audit goes as smoothly as possible.

NO. 1: IDENTIFY POTENTIAL ISSUES –

The best offense is a good defense – true in both sports and tax. When you are preparing the tax returns, consider any issues that an auditor may focus on. Some items that might attract an auditor's attention include instant unity for combined reporting states, characterization of income as business or nonbusiness income, sourcing of services for apportionment purposes and, unsurprisingly, any item that has a large tax effect. By preserving the necessary records to support your company's filing positions in the beginning, you will decrease your work later.

Please see full Issue below for more information.

Morrison & Foerster LLP

November 27, 2018

[States Rush to Collect Online Sales Tax.]

The process will be more of a struggle in some states than others.

State and local governments, responding to a June U.S. Supreme Court decision, have begun to collect sales taxes from out-of-state retailers. But depending on tax systems already in place, the process will go much more smoothly in some states than in others.

Analysts expect new rules being drafted around the country in response to the *South Dakota v. Wayfair* Inc. decision to deliver billions of dollars annually to state coffers. They will also force retailers to navigate an untested patchwork system stretched across the nation's 12,000 state and local taxing districts.

The high court decision was meant to level a playing field, where for decades sales tax laws that applied to brick-and-mortar stores often didn't apply to online retailers. State and local governments saw an end to years of lost revenue from the booming online retail sector. Offline retailers celebrated the ruling as an overdue corrective.

Continue reading.

Route Fifty

By John Tomasic,
Special to Route Fifty

NOVEMBER 28, 2018

[How IRS Ruling Will Impact Airport Projects.]

WASHINGTON – Airport authorities will have an easier time signing leases at their bond-financed terminals for prohibited uses such as retailers specializing in the sale of regional wines under a new Internal Revenue Service private letter ruling.

The ruling publicly released Friday allows floating private equity to be used for a prohibited use for a tax-exempt bond-financed airport terminal renovation.

Floating private equity refers to money that is not the proceeds of a bond sale that can be moved around as needed, rather than dedicated to a specific location. Prohibited uses include stores specializing in the sale of alcohol for offsite consumption, health clubs and gambling facilities such those featuring slot machines.

The ruling applies to exempt facility bonds, the same concept the IRS used in a 2015 rule that allows floating private equity to be applied to private use in a government bond financed project.

Ed Oswald, a former Treasury official who is a partner at Orrick Herrington & Sutcliffe in Washington, joined with John Stanley, an associate at Orrick's San Francisco office, in making the request to the IRS on behalf of an unnamed client.'

The IRS letter ruling did not identify the airport owner, but did say the terminal complex "includes boarding areas, which have a wide variety of retail shops, bars, restaurants, coffee shops, and similar passenger amenities” operated by third parties under leases.

The airport, according to the IRS, is in the process of making “substantial renovations to portions of the terminal complex” that include “the complete demolition and reconstruction of the boarding area” and will finance part of the costs of the renovations with the proceeds of a bond issuance.

The request to the IRS indicated that private money other than the funds from the tax-exempt bond sale will be set aside for non-qualified uses. Oswald said in an interview the ruling allows airports to more easily move prohibited use facilities to other parts of their terminals with the application of the floating private equity.

“We can borrow from the thinking from the 2015 private use regulations regarding private activity bonds and adopt a similar theme and allow equity to flow to these prohibited facilities,” Oswald said.

“Although duty-free shops have long sold bottled alcohol, those shops generally offer a wide range of other products for sale,” Oswald and Stanley wrote in their summary of the ruling. “This newer trend in airport concessions is towards smaller spaces that primarily or exclusively sell bottled alcohol, particularly in wine-growing regions.”

Charles Almond at Bracewell in Houston described the IRS letter ruling as “not surprising, but helpful.”

“Big airports are in some respects almost like big cities,” Almond said. “There’s lots of stuff going on there. There are tens of thousands of people going through an airport and you see the types of retail have developed into a pretty wide variety.”

Almond said the ruling is an extension of the 2015 rule for government bonds issued under section 141, applying the same principle to qualified use bonds issued under section 142.

“I think large airports would be wise to use this to avoid pitfalls where a kind of prohibited use sneaks up on you,” Almond said. “I think it’s a positive development.”

Almond said there have been workarounds to allow prohibited uses in bond-financed airport terminals “if you were constantly vigilant about the types of retail that were going into your facility and had great communication between the finance people are the airport and the people who were doing the retail leasing and planning.’’

Going forward, Almond said, “You can allocate those prohibited uses to that equity wherever they are located and avoid those sort of uh-oh moments.”

The Bond Buyer

By Brian Tumulty

November 26, 2018, 2:58pm EST

[IRS PLR: Airport Permitted to Allocate Bond Proceeds to Qualified and Non-Qualified Uses.]

The IRS ruled for Dallas-Fort Worth Airport, holding that a major airport could treat its inter-terminal-building transportation facilities (a bus system on the “non-secure” side of the terminal buildings and a train system on the “secure side” of the buildings) as discrete facilities, separate from the terminal buildings, that qualify for governmental (“non-AMT”) financing.

Read IRS Private Letter Ruling 201847001.

Charles L. Almond of Bracewell LLP represented Dallas-Fort Worth Airport in this matter.

TAX - KENTUCKY

Scalise v. Sewell-Scheuermann

Supreme Court of Kentucky - November 1, 2018 - S.W.3d - 2018 WL 5732156

Taxpayer brought action against mayor for violation of the Kentucky Constitution, seeking to recover surplus sanitation assessment revenue that was not devoted to trash collection and recycling.

Mayor filed a motion to dismiss, which the Circuit Court granted. Taxpayer appealed and the Court of Appeals reversed the Circuit Court and remanded. Mayor sought discretionary review, which the Supreme Court granted.

The Supreme Court of Kentucky held that:

- Sanitation assessment was not a user fee;
- Excess revenue generated by sanitation assessment was a tax;
- Repeal of state statute on cities’ use of excess revenues did not indicate Legislature’s intent to hold city officials strictly liable for using revenues collected for one purpose on another lawful purpose; and
- Recognition of an offset defense for mayor was not unwarranted, overruling *City of Newport v. Rawlings*, 289 Ky. 203, and *City of Newport v. McLane*, 256 Ky. 803.

Sanitation assessment imposed by city ordinance was not a user fee and could be considered a tax, and thus taxpayer could establish action against mayor based on allegedly unconstitutional use of excess revenues collected under the ordinance for general city purposes, where excess fees had historically been treated as taxes by the Supreme Court.

Excess revenue generated by city’s sanitation assessment, which was diverted to a general fund for other city expenditures, was a tax, and thus taxpayer could bring action against city’s mayor based on constitutional prohibition against collecting taxes for one purpose and spending them for another; when the annual sanitation assessment ordinance was passed and monies were collected, it was abundantly clear that excess funds would be generated, such that the predictable excess regularly devoted to general city expenditures took the form of a tax.

Repeal of state statute on cities’ use of excess tax revenues did not indicate intent by Legislature to hold city officials strictly liable for collecting tax revenues for one purpose and then using them for different lawful purposes, and thus mayor could invoke an offset defense in action brought by taxpayer based on city’s use of excess revenues from a sanitation assessment for general city purposes; the statute in question did not create the offset defense and its repeal therefore did not eliminate the defense, in that the statute was simply a repackaging of an older statute which already provided for offset, and subsequent statutes on city tax assessments made no effort to prohibit offset in plain and unmistakable language.

Recognition of an offset defense for mayor in an action brought by taxpayer based on city's use of excess revenues from a sanitation assessment for general city purposes was not unwarranted and did not render city taxation statutes limiting the use of revenues meaningless; the offset defense shielded city officials acting in good faith from shouldering significant personal liability for using excess funds on municipal obligations that benefited all taxpayers, but it also placed a burden on these officials to account for excess funds and imposed personal liability for any expenditures not made for valid municipal obligations, such that the offset defense did not relieve city officials from having to defend their actions in a court of law.

TAX - OHIO

[Harrah's Ohio Acquisition Company, L.L.C. v. Cuyahoga County Board of Revision]()

Supreme Court of Ohio - October 30, 2018 - N.E.3d - 2018 WL 5778882 - 2018 -Ohio- 4370

School board sought judicial review of a decision of the Board of Tax Appeals adopting a value for a horse-racing facility provided by owner's appraisal.

The Supreme Court of Ohio held that:

- Adjustment of comparable sales to account for value of potential video-lottery-terminal (VLT) licenses was proper;
- Reduction of facility's market value to account for value of owner's VLT license was proper;
- Board was required to consider appraisal of facility as if generating income under hypothetical lease;
- Board properly denied motion for judicial notice that some casinos operated on leased real estate; and
- Facility's sale price in bankruptcy proceeding was not relevant evidence of facility's minimum value.

Appraiser's reduction, as part of his sales-comparison analysis, of real-property values of his comparable sales by allocating 50 to 60% of the comparable-sales prices to the value of racing and potential video-lottery-terminal (VLT) licenses was not contrary to law, in proceeding before the Board of Tax Appeals regarding the real-property valuation of a horse-racing facility; appraiser simply placed value on an intangible asset, namely, the opportunity to acquire valuable licenses.

Appraiser's reduction, as part of his income-capitalization analysis, of $50 million from the market value of a horse-racing facility, representing the value of a video-lottery-terminal (VLT) license, was not contrary to law, in proceeding before the Board of Tax Appeals regarding the real-property valuation of the facility; that there were territorial restrictions on the conduct of VLT licensees did not make their licenses part of the real property on which the licensees operated, and non-transferability of a VLT license did not render such license part of the real property.

Board of Tax Appeals was required to consider an appraisal of an owner-occupied horse-racing facility as if it were leased, in proceeding regarding the real-property valuation of the facility; a property owner could realize the value of its property by encumbering it with a lease, so that an appraiser could take that possibility into account when valuing it, and appraising the facility as if generating income under a hypothetical lease was consistent with real-estate valuation statute's directive to determine "the true value of the fee simple estate, as if unencumbered," so long as the appraisal assumed a lease that reflected the relevant real-estate market.

Board of Tax Appeals properly denied school board's motion for judicial notice that some casinos operated on leased real estate or, alternatively, to allow introduction of evidence supporting the assertion three months after hearing before the Board closed, in proceeding regarding the real-property valuation of a horse-racing facility; rule permitting judicial notice did not override general rule requiring parties to present their evidence before the hearing record closed, school board's new evidence existed at the time of the hearing, and board did not show that it was prevented from timely presenting the evidence.

Sale price of a horse-racing facility and related assets in a bankruptcy proceeding was not relevant evidence of the facility's minimum value, in proceeding before the Board of Tax Appeals regarding the real-property valuation of the facility.

TAX - MASSACHUSETTS

Cichocki v. Town of Rehoboth

Supreme Judicial Court of Massachusetts - November 15, 2018 - 110 N.E.3d 1195

Homeowners sought extraordinary relief from decision upholding town's foreclosure on their home. A single justice of the Supreme Judicial Court denied relief. Homeowners appealed.

The Supreme Judicial Court of Massachusetts held that homeowners were not entitled to relief under Supreme Judicial Court's power of general superintendence over inferior courts or in nature of mandamus.

Will 'Opportunity Zones' Work? We May Never Know. Here's Why.

As America grapples with widening inequality and deepening political polarization, a group of wonks in Washington is quietly embarking on a new national experiment to rehabilitate the country's most distressed regions. Tucked into the 2017 Republican tax law, Opportunity Zones, as the program is called, offer huge tax incentives for financiers who invest in downtrodden communities.

The promising idea has one potentially huge flaw, however: As the Treasury Department finalizes the program's rules in preparation for its launch in 2019, researchers and economists are increasingly worried that the agency is leaving out critical requirements to track the law's effects—and as a result, we may never know if Opportunity Zones actually work.

The new law has attracted attention in policy circles because it's the most specific thing the Trump administration has done to help "left behind" areas, and could cost more than $1 billion a year, at least initially.

But it's far from a sure thing. Earlier versions of the idea have been tried, with an unproven track record. The Opportunity Zones provision was originally drafted with a requirement for the Treasury Department to provide detailed information on the distressed regions and the impact of investments, but that dropped out when the tax bill was finalized. And when the Treasury Department released its proposed rules for the program last month, it didn't require investors to disclose much detailed information.

Without better reporting requirements in this version, critics say, it's hard to know if the law will have any effect besides saving investors money and draining federal tax revenues.

“There’s never going to be a really rigorous evaluation of this program,” said Tim Bartik, an economist at the Upjohn Institute. “There will always be questions.”

Federal programs often pass Congress without any evidence they work, in part because it’s so difficult to collect data on the impact of broad policies. But Opportunity Zones are a trackable scheme, operating in the data-rich field of finance, where investments and returns are all carefully measured by the financial players involved. It appears, however, they won’t need to report those results to Washington.

“The regulations, as they are right now, don’t include any of the data fields we were hoping for,” said Nick Fritz, an official at the Sorenson Impact Center at the University of Utah, which focuses on improving the social impact of investing. Fritz is optimistic about Opportunity Zones but worries that the lack of data will make it hard to know whether the program actually succeeds.

Tax incentives for investing in distressed areas first gained traction in the 1980s, when they were pushed by NFL-player-turned-congressman Jack Kemp as a free-market solution to regional poverty. They were expanded during the Clinton administration, which liked to back ideas that were politically centrist and didn’t sound like “welfare.”

But despite billions of dollars targeted toward communities—through both direct spending and the tax code—policymakers know little about the results. In numerous studies over the years, some have found small positive gains, others small negative ones. Two major studies, conducted by the Government Accountability Office in 2006 and 2010, concluded that there simply wasn’t enough data to evaluate.

As a result, many economists are skeptical that Opportunity Zones will do what they promise, helping lift up impoverished areas. Instead, they argue, money will be funneled to areas that are on the cusp of a development boom and don’t need the extra help. Since the zones were designated by state governments—which could designate up to 25 percent of their low-income communities as Opportunity Zones—they also worry that political considerations and lobbying efforts influenced the states’ selection process.

“The places that got picked got picked for a reason, and the ones that got passed over got passed over for a reason,” said Adam Looney, a senior fellow at the Brookings Institution who has been closely tracking Opportunity Zones. That initial design choice, he said, will make it difficult to fairly compare the results of the program without deeper information on the areas that actually received the investments.

The program is built on the fact that investors nationwide are sitting on $6 trillion in unrealized capital gains—money that they’ve made in the stock market and other investments but haven’t put to new use because doing so would trigger a tax payment. The new law will allow investors to defer those taxes by rolling that money into “Opportunity Funds,” new vehicles that invest primarily in distressed areas. If they hold that investment for 10 years, any new returns are tax-free. (They do eventually have to pay taxes on the deferred capital gains.)

Supporters believe the law will result in a flood of new investor money into those areas. But it comes at a cost to the government: The Joint Committee on Taxation projects that the tax break will cost $7.7 billion during the first five years, falling to $1.6 billion over a decade as investors pay their deferred capital gains.

Given the disagreements over the potential for the program, experts on both sides agree that good data is essential. The original bill, introduced by Sens. Tim Scott (R-S.C.) and Cory Booker (D-N.J.) in February 2017, required Treasury to submit an annual report to Congress, starting five years after enactment, with detailed information about how the tax incentive was affecting Opportunity Zones, including which communities and projects actually received investment.

That section was dropped from the bill when it was inserted into the GOP tax package, however, because the Republican Congress passed the tax law through budget reconciliation—a process that, by Congress' rules, can include reforms that only affect taxes or spending. The reporting requirement fell outside that boundary.

That's left Treasury with broad authority to collect information about the program—or not. The agency's initial proposal and an accompanying proposed IRS form require Opportunity Funds to provide basic information, such as the name of the fund, and aggregate investment numbers. Those numbers are used to prove to the IRS that investors are actually investing their money in Opportunity Zones, but they don't provide the granular, transaction-level data that would show which specific tracts and types of projects received money. The omission has left even supporters concerned that limited data will make it harder to grow political support for the program.

"It's the crux of really realizing the power and potential of this incredibly exciting bill," said Tracy Palandjian, CEO of Social Finance. "Without an intentional framework about how to think about how to measure the payment over time … we're going to be back to the old tales that these things are ineffective."

Not everyone is so concerned. John Lettieri, president of the Economic Innovation Group, a leading proponent of the program, dismissed the skeptics' concerns that states designated less-needy tracts for investment. He pointed to recent research from the Urban Institute, which found just 3 percent of the selected areas were experiencing substantial socioeconomic improvement. As a result, he said, researchers will be able to analyze the program's impact, even without the additional data.

Lettieri agreed that additional reporting requirements would be helpful and was optimistic that they would be added in the future. But he added that the agency had to craft such requirements so they don't impose a heavy burden on investors or, worse, require them to turn over proprietary information.

"You want to avoid implicitly restricting or inhibiting the very things the incentive was designed to do," Lettieri said, adding, "[The] right balance needs to be struck."

A spokesperson for the Treasury Department said the agency hasn't written off the idea and is "considering whether the initiative could benefit from a more robust data collection effort in future tax years."

"We believe we can spend some time to get this right and still have enough data to analyze its effectiveness," said the spokesperson. "Our current focus is on ensuring that the tax incentives of [Opportunity] Zones best serve communities and benefit investors."

If the Treasury Department does add new requirements going forward, it won't be a huge surprise. The agency had a tight timeline for drafting rules and launching the program, forcing it to prioritize some elements of the rollout over others. If reporting requirements are added, researchers will breathe a sigh of relief. Given the long-term nature of the investments—the tax benefits rise substantially as investors hold their investments for longer—a retrospective requirement could be enough to answer their questions about whether it works.

But, said Fritz, the researcher at Sorenson Impact, the real challenge with later reporting is the effectiveness of the funds themselves. The longer Treasury takes to collect and analyze data, the less investors will know about what types of projects have the greatest impact on low-income communities. “This limits the ability of municipalities and funds to learn from others’ best practices and make sound, impactful investments,” Fritz added.

Even with the best economic data, debates over the effectiveness of public policies are never settled. Despite decades of evidence on minimum wage increases, for instance, researchers are still sharply divided on its impact. In other words, experts suggested, even if Treasury imposes significant reporting requirements on Opportunity Funds, disagreements over such place-based policies will continue—but that’s not a reason to not collect the data at all.

“Will we be able to evaluate the efficacy of this tax expenditure and, in particular, who it’s benefiting?” said Laurel Blatchford, president of Enterprise Community Partners and a former senior official at the Department of Housing and Urban Development. “There’s a lot of excitement and a lot of questions.”

THE AGENDA

By DANNY VINIK

11/20/2018

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Opportunity Zone Investment Prospectus Guide.

A HOW-TO FOR OPPORTUNITY ZONES

OVERVIEW
The Tax Cuts and Jobs Act of 2017 provides a new incentive—centered around the deferral, reduction, and elimination of capital gains taxes—to spur private investments in low-income areas designated by states as Opportunity Zones. This provision is based heavily on the Investing in Opportunity Act (S. 1639) introduced by Senator Cory Booker (D-NJ) and Senator Tim Scott (R-SC). Given the significant interest among investors, it is possible that this new tax incentive could attract hundreds of billions of dollars in private capital, making this one of the largest economic development initiatives in U.S. history.

The broad objective of this new tax incentive—expanding economic opportunities for places and people left behind—cannot be achieved by the market and outside investors alone. Cities in the broadest sense—local governments for sure but also universities, philanthropies, employers, local financial institutions and community development organizations—will need to act with deliberate agency and purpose if Opportunity Zones are to spur growth that is inclusive, sustainable and truly transformative for each city’s economy.

To enable such intentional action, Accelerator for America engaged New Localism Advisors to create a replicable product—an Investment Prospectus—to enable cities, counties and states to communicate their competitive advantages, trigger local partnerships and identify sound projects that are ready for public, private and civic capital. Our aim was to help communities and investors get smarter and more precise about the broad range of investment possibilities that exist in Opportunity Zones and, literally, help make and shape markets where there were none.

To date, mayors in five cities—Joe Schember in Erie, Greg Fischer in Louisville, David Holt in Oklahoma City, Pete Buttigieg in South Bend and Michael Tubbs in Stockton—have led multi-sector efforts to design and release the first versions of an Investment Prospectus. The five cities have deliberately followed a common template and routinized format in order to enhance the potential for replicability across multiple cities.

We have created this Opportunity Zone Investment Prospectus Guide to speed the process by which a broad group of cities adopt this market tool and build Investment Prospectuses that are customized to local assets and advantages and scalable across cities by asset classes and product types. Our ambitions are large: to grow the number of cities with Investment Prospectuses from our original five cities to fifty communities by March 2019 and unveil them at an Investors Summit at Stanford University.

Using the Louisville effort as a base, this document walks through each core element of the Investment Prospectus unveiling, where appropriate, information about the source of data, why the data was chosen, and what cities should do with it. Accelerator for America and New Localism Advisors have partnered with the Nowak Metro Finance Lab at Drexel University and identified institutions like PolicyMap to ease the replication process and codify best practices.

Continue reading.

Drexel University Lindy Institute for Urban Innovation

New Incubation Program Opens to Help Social Impact Orgs Ready for Opportunity Zone Funds.

Kresge grant to Calvert Impact Capital will send cohort of five potential fund managers through exploratory program

The Kresge Foundation announced today a $390,000 grant to Calvert Impact Capital that will support the Opportunity Zones Incubator, a technical assistance program for social impact entities that are interested in or exploring taking a Qualified Opportunity Fund to market.

Kresge selected five mission-aligned organizations that are exploring ways to direct capital to Opportunity Zones to enter the incubation program, where they will receive technical assistance around potential fund structures as well as assistance related to legal, tax and accounting considerations. Holland and Knight and Plante Moran will both assist Calvert Impact Capital with providing support to the organizations.

The Opportunity Zone legislation in the Jobs and Tax Act of 2018 provides tax forgiveness to investors who invest in more than 8,000 designated, low-income Census tracts across the U.S.

Kresge, in partnership with The Rockefeller Foundation, released a call in the summer of 2018 for letters of inquiry from potential Opportunity Zone fund managers, drawing more than 141 responses. From those applications, Kresge has selected a dozen to move forward through either this technical assistance incubator program or into a due diligence process for impact investments. Over the coming months, The Rockefeller Foundation intends to select additional fund managers to participate in the technical assistance program alongside Kresge.

The five organizations that are exploring starting an Opportunity Zone Fund through this incubation program are:

- Craft3, a regional nonprofit that makes loans in Oregon and Washington to strengthen the resilience of businesses, families and nonprofits.
- New Orleans Startup Fund, a nonprofit venture fund, established by Greater New Orleans business and community leaders, that provides seed capital and technical assistance to early-stage firms that demonstrate significant growth potential.
- Gulf Coast Housing Partnership. which works in the Gulf Coast region to promote community and economic development through various programs implemented to deliver effective and meaningful results.
- **Renaissance HBCU Opportunity Fund**, a partnership between Renaissance Equity Partners and an affiliate of the HBCU Community Development Corporation to invest in value-added and opportunistic real estate on or near the campuses of Historically Black Colleges and Universities.
- Fifth Ward Community Redevelopment Corporation, which seeks to enhance quality of life for individuals and families living in Houston's fifth ward, eliminate blight, attract investment and resources, encourage commercial and business development, coordinate government and public service, and offer a sense of destination and creative placemaking.

The Opportunity Zones initiative takes a free-market approach unmatched by any federal spending guarantees, which means that designation as an Opportunity Zone doesn't mean that a community will receive money for schools, health care or other public services, or even that they'll receive any money at all.

"These five organizations understand deeply what it takes to invest in low-income communities," said Rip Rapson, Kresge's President and CEO. "We hope through this incubation program they can prepare impact funds that will test whether the Opportunity Zones legislation will support impact investing methods, in which social impact outcomes are weighted heavily. We hope this sets this new market on a trajectory more likely to serve low-income communities well."

Kresge's Social Investment Practice sees Opportunity Zones as a potential benefit to low-income communities, but only if early market movers prioritize community impact and measure and report on their outcomes.

"The goal of this effort is to strengthen these fund managers' investment concepts through high-quality advisory services," said Kimberlee Cornett, Kresge's managing director of the Social Investment Practice. "Through partnership with Calvert Impact Capital, these managers will be better prepared to approach investors and further develop their programmatic thesis for future investment considerations."

Calvert Impact Capital has been working in low-income communities across the U.S. for nearly 25 years and is committed to ensuring that the Opportunity Zone tax incentive is leveraged in a way that provides inclusive economic opportunity and growth for people living and working in designated zones.

"We want to fill gaps to more efficiently move money into these communities," said Beth Bafford, vice president of Syndications and Strategy at Calvert Impact Capital. "This is an incentive that defers heavily to the market in its implementation, and early movers will define it. We want to show investors what good can look like."

November 29, 2018

[Why States Hoping for Online Holiday Sales to Boost Budgets May Not Get Their Wish.]

This is the first holiday season since the U.S. Supreme Court allowed states to tax online shopping.

Retail experts are anticipating that the Thanksgiving shopping weekend will once again be record-breaking, particularly for online sales. Last year, the Monday after Thanksgiving — nicknamed Cyber Monday — saw a record $6.6 billion in sales, up 16.8 percent from the previous year.

But if states are hoping for a revenue windfall in the aftermath of the U.S. Supreme Court ruling this year that allowed them to collect online sales taxes — not so fast. "Ultimately, I think there will be a nice little bump to states," says Brian Kirkell, a principal at the tax consulting firm RSM, "but it's not going to change much."

That's because there are still a lot of unknowns when it comes to how much the ruling will affect revenues.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | NOVEMBER 21, 2018

[Renewable Energy: Leveraging the Opportunity Zones Tax Incentive to Improve Returns on Renewables, Storage Plus, and Standalone Storage.]

Federal and state tax credits for renewable energy facilities are winding down, but a new federal tax incentive enacted in tax reform may provide a boost to many new installations, repowering projects, and storage facilities. The Qualified Opportunity Zones ("QOZ") incentive provides attractive tax benefits for investors with capital gains that, unlike other federal incentive programs such as the New Markets Tax Credit and Historic Rehabilitation Tax Credit, can be combined with the Investment Tax Credit ("ITC") and Production Tax Credit ("PTC") for facilities located in geographic areas that are designated as QOZ. Further, QOZ benefits will remain in place for a significant period after the ITC and PTC have become less valuable or expired. Recently released regulations provide significant clarity and highlight how valuable the QOZ incentive can be for qualified investments. See our October 23 alert for a discussion of how the regulations make the QOZ incentive even more interesting.

How does the QOZ Incentive work?

The QOZ incentive is designed to encourage long-term investment in over 8700 low-income areas in rural and urban parts of all 50 states, the possessions, and the District of Columbia that have been designated by the Secretary of the Treasury as QOZs. The benefits of the QOZ incentive are available when a taxpayer disposes of a capital asset and, within 180 days, invests the proceeds in a qualified opportunity fund ("QOF") that invests in QOZ property, either through a direct investment in QOZ tangible business property ("QOZBP") or a newly-issued equity interest in a partnership (including an LLC) or corporation operating a business in a QOZ ("QOZB"). A QOF can be a corporation or a partnership (including an LLC) for U.S. federal income tax purposes and can function as an investment fund, a private investment entity, or many options in between. The major requirement is that at least 90 percent of the QOF's assets (measured by cost or value, depending on the applicable facts) must be invested in QOZ property as described above. For more details about the terms and conditions of the QOZ incentives, see our [March 14 alert], which contains a helpful overview.

What are the benefits of the QOZ Incentive?

The QOZ incentive consists of three tax benefits for investors.

- First, federal taxes on capital gains invested in QOFs may be deferred until 2026.
- Second, if the taxpayer holds the QOF investment for at least five years, the basis of the asset sold to generate proceeds for investment in the QOF may be increased by 10 percent, thus reducing the capital gain that is eventually recognized. The basis will be increased by another 5 percent if the taxpayer holds the QOF investment for at least seven years.
- Third, if the taxpayer holds the QOF investment for at least 10 years, capital gains realized upon disposition of the investment are free from federal income tax due to a step up in basis of the investment to its fair market value at the time of disposition.

Who can use the QOZ Incentive?

Any U.S. person and certain non-U.S. persons can invest in a QOF and use the QOZ incentive. This includes individuals, corporations, partnerships, and trusts. Partners investing capital gains from a partnership have a longer window to invest in a QOF than the partnership would.

How does the QOZ Incentive help renewables projects?

Many QOZs are located in desirable locations for renewable energy projects and standalone storage. An equity interest in a renewable energy facility (e.g., solar, wind, biomass, geothermal) generally should be a qualified asset, provided that the facility is located in a QOZ and all the requirements of the QOZ incentive for tangible property or a QOZB are met. In addition, there is extensive overlap in the type of property that qualifies for the QOZ incentive, PTC, and ITC, which may boost the value of the ITC and PTC even while the credit rates are sun-setting. Specifically, all three incentives require an ultimate investment in tangible property that is used in a trade or business (ITC and PTC qualified assets also must be personal property). Moreover, the QOZ incentive is:

- technology agnostic;
- available for standalone storage as well as transmission assets;
- available for new installations, as well as repowering or rehabilitation (including installation of storage) of existing installations acquired after December 31, 2017 when expenditure thresholds are met and the work required to meet those thresholds is completed within a 30-month period;
- compatible with the structuring techniques familiar to tax equity investors and developers AND offers new options for tailoring the structure to suit certain investors; and
- may be combined with other available tax credits, including the ITC and PTC.

The benefits of leveraging the QOZ incentive with other tax incentives can be considerable. However, the terms and conditions to meet QOZ requirements are quite complex, so it is important that investors and developers obtain good counsel in order to avoid costly mistakes that could result in loss of QOZ benefits. Our Opportunity Zones and Renewables teams would be happy to help you determine how the QOZ incentive can help your projects pencil out and to make sure you are complying with all QOZ requirements.

Opportunity for Treasury comments/more guidance coming

The U.S. Treasury has requested taxpayer comments on a variety of points in the Proposed Regulations and on several issues to be addressed in forthcoming proposed regulations expected by the end of the year. Taxpayers may provide responses to these requests and other comments through December 28, 2018. Comment opportunities include how long a QOF may take to reinvest proceeds in qualified assets, the treatment of vacant land, how to determine if at least 90 percent of a QOF's assets are qualified assets, how exits must be structured, and when the 30-month period for repowering or other rehabilitation activities of existing projects begins.

K&L Gates

by Elizabeth C. Crouse and Mary Burke Baker

Nov 16, 2018

After the Retail Apocalypse, Prepare for the Property Tax Meltdown.

Big-box retailers nationwide are slashing their property taxes through a legal loophole known as "dark store theory." For the towns that rely on that revenue, this could be a disaster.

WEST BEND, WI—Kraig Sadownikow doesn't look like an anti-corporate crusader. The mayor of West Bend, Wisconsin, stickers his pickup with a "Don't Tread on Me" snake on the back window, a GOP elephant on the hitch, and the stars-and-stripes logo of his construction company across the bumper.

His fiscal conservatism is equally well billboarded: In the two hours we spent at City Hall and cruising West Bend in his plush truck, Sadownikow twice mentioned the 6 percent he has shaved off the Wisconsin city's operating budget since becoming mayor in 2011, and stressed its efforts to bring more business to town.

So you might be surprised to learn that Sadownikow (he instructed me to pronounce his name like *sat-on-a-cow*) is personally boycotting two of the biggest big-box retailers in his town, Walmart and Menards, the Midwestern home improvement chain. He's avoiding shopping at these companies' stores until they cease what he sees as a flagrant exploitation of West Bend's property tax system: repeat tax appeals that, added up, could undermine the town's hard-won fiscal health.

Continue reading.

NEXT CITY

LAURA BLISS

NOV 14, 2018

TAX - OREGON

Seneca Sustainable Energy, LLC v. Department of Revenue

Supreme Court of Oregon - November 8, 2018 - 363 Or. 782 - 429 P.3d 360

Taxpayer brought action challenging Department of Revenue's determination as to its industrial property's real market value, the assessor's notation of the assessed value on the assessment roll, and enterprise zone's sponsor's imposition of a public benefit contribution.

Following bench trial, the Tax Court issued opinion setting the real market value of taxpayer's electric cogeneration facility at $38.2 million and $19.1 million for two tax years. The Department appealed.

The Supreme Court of Oregon held that:

- Taxpayer's claims all fell within the sole, exclusive, and final judicial authority of the Tax Court;
- Taxpayer had standing to challenge the Department's erroneous real market value determination; and
- Evidence was insufficient to support Department of Revenue's real market value determination with regard to taxpayer's electric cogeneration facility.

Taxpayer's claims, which challenged the Department of Revenue's determination as to its electric cogeneration facility's real market value, the assessor's notation of the assessed value on the assessment roll, and enterprise zone's sponsor's imposition of a public benefit contribution, all fell within the sole, exclusive, and final judicial authority of the Tax Court, regardless of whether or not the facility was exempt from taxation during the years at issue; taxpayer was subject to taxation, irrespective of whether it owed any taxes in a given year, all the statutes that related to taxpayer's claims bore on tax liability, the first arising out of the Department's obligation to determine real market value for industrial properties, and the second arising out of the assessor's obligation to ensure that the tax rolls accurately reflected assessed values, and at all material times, taxpayer was paying property taxes on the real property underlying its electric cogeneration facility.

Taxpayer was aggrieved by Department of Revenue's erroneous real market value determination with regard to taxpayer's electric cogeneration facility, and because the erroneous act affected taxpayer and its property, taxpayer had standing to challenge that determination in the Tax Court; taxpayer alleged a wrong, the erroneous real market value determination, as well as a private interest that was different from that of the general public, the imposition of an excessive public benefit contribution directly resulting from that erroneous determination, along with an attendant increase in property taxes.

Evidence was insufficient to support Department of Revenue's real market value determination with regard to taxpayer's electric cogeneration facility for the tax year in question; the Department's appraiser relied on a power purchase agreement that provided taxpayer with revenues significantly in excess of what a purchaser of the property on the assessment dates would have been able to negotiate for, for electricity, capacity, and renewable energy credits (REC), and erroneously considered intangible assets by valuing taxpayer's entire property and business under the income approach, subtracting only an amount for working capital.

TAX - NORTH DAKOTA

Thompson v. Molde

Supreme Court of North Dakota - November 13, 2018 - N.W.2d - 2018 WL 5916790 - 2018 ND 245

Property owners brought action against county for fraud, inverse condemnation, and slander of title, based on alleged lack of county authority to tax their property.

The District Court granted summary judgment in favor of county. Property owners thereafter filed motion for transfer and assignment of property tax obligations to county's attorney. The District Court denied the motion and awarded attorney fees to county. Property owners appealed.

The Supreme Court of North Dakota held that:

- Property owners failed to establish a claim for abatement or refund, and
- Property owners' appeal was frivolous.

Property owners, who challenged county's assessment of taxes on their property, failed to establish a claim for abatement, where they did not submit such claim to county board of commissioners for administrative review prior to seeking judicial relief.

Property owners' appeal to trial court's grant of summary judgment against them, in their action challenging county's tax authority over their property, was frivolous, and thus county was entitled to attorney fees and double costs; owners' arguments on appeal, such as that "it is the federal government's obligation to pay the real estate tax[,]" were so devoid of merit that owners should have been aware of the impossibility of success.

Sports Stadiums Are a Bad Deal for Cities.

But cities can fight back.

When I want to go to an Oakland A's baseball game, I walk 10 minutes to the MacArthur bart station. The station was part of an infrastructure plan that cost Bay Area taxpayers in the 1960s and '70s $1.6 billion, and currently costs billions in maintenance and expansion. I pay a few bucks to ride—about 75 percent of bart's operating costs are maintained by fares. If the train car I step into is new, it cost taxpayers $2 million.

The train travels south, dips underground through downtown Oakland, hangs a left around Lake Merritt, and resurfaces in Fruitvale. It stops outside of the looming monstrosity called the Oakland–Alameda County Coliseum, home to the A's and, for now, the Raiders. Just behind it is the Oracle Arena, home to the Golden State Warriors basketball team, also for now. Both stadiums opened in 1966 and together cost $25.5 million for construction, in addition to $1 million for the land they sit on, all funded by municipal bonds, which is to say taxpayers.

I and my fellow passengers walk over the sloping concrete bridge, where vendors hawk tickets, T-shirts, and beers amid the din of train whistles and street drummers, and we merge with other fans. They've come in cars and buses, maybe bicycles or Bird e-scooters, streaming in on public roads that will cost Oakland at least $66 million to improve and maintain in 2019. We all go inside, having given our money to John J. Fisher, the billionaire majority owner of the A's, who in exchange lets us watch his team play.

Continue reading.

THE ATLANTIC

RICK PAULAS

NOV 21, 2018

TAX - MINNESOTA

Phone Recovery Services, LLC v. Qwest Corporation

Supreme Court of Minnesota - October 31, 2018 - N.W.2d - 2018 WL 5624225

Limited liability corporation (LLC) brought qui tam action against telecommunications carriers under the Minnesota False Claims Act (MFCA).

Attorney General declined to intervene. Carriers filed a motion to dismiss, which the District Court granted. LLC appealed. The Court of Appeals affirmed. The Supreme Court granted review.

The Supreme Court of Minnesota held that:

- Plain meaning of "[s]tatutes relating to taxation" referred to any portions of state statutes that pertained to taxation;
- Surcharges collected by telecommunications carriers were taxes; and
- Use of the definition of tax from statute defining words and phrases in legislation did not convert all fees to taxes.

Plain meaning of the phrase "[s]tatutes relating to taxation[,]" in section of the Minnesota False Claims Act (MFCA) that excluded qui tam actions regarding such statutes, referred to any portions of state statutes that related to, bore upon, or pertained to levying, assessing, or imposing a tax; the phrase "relating to taxation" and the MFCA itself were unambiguous, the exclusion was not restricted to statutes enacted under the State's taxing power in that the plain language did not invoke this power, and the MFCA's reference to "portions" of statutes relating to taxation did not suggest legislative intent to focus only on statutes comprising Minnesota's counterpart to the Internal Revenue Code.

Surcharges for the funding of state 911 emergency system and telephone assistance programs were taxes, and thus provision of the Minnesota False Claims Act (MFCA) which excluded qui tam actions regarding statutes pertaining to taxation applied to action against telecommunications carriers based on failure to pay these surcharges; the surcharge amounts were established by the Commissioner of Public Safety and the Public Utilities Commission, surcharge payments collected by carriers were deposited in the State's special revenue fund and paid to the Commissioner, and the amounts owed for these surcharges were not tied to a consumer's level of use of the 911 system or telephone assistance programs.

Use of the definition of "tax" from state statute defining words and phrases in legislation did not convert all fees to taxes regardless of Legislature's intent, and thus the definition could be used to characterize surcharges for the funding of state 911 emergency system and telephone assistance programs as taxes, which the Minnesota Fair Claims Act (MFCA) exempted from qui tam actions; the definitions statute applied absent clear intent to the contrary, the plain and unambiguous language of the MFCA tax bar provision could not be construed to encompass only a restricted subset of statutes or suggest intent to have such a restriction, and the definitions statute did not generally define all fees and charges to be taxes.

TAX - MISSISSIPPI

Board of Supervisors of Clarke County, Mississippi v. BTH Quitman Hickory, LLC

Supreme Court of Mississippi - October 18, 2018 - So.3d - 2018 WL 5076361

Taxpayer sought review of county's ad valorem tax assessment.

The Circuit Court entered judgment for taxpayer. County board of supervisors appealed.

The Supreme Court of Mississippi held that taxpayer's failure to post a bond deprived the circuit court of subject-matter jurisdiction.

TAX - OHIO

Huber Heights City Schools Board of Education v. Montgomery County Board of Revision

Supreme Court of Ohio - October 24, 2018 - N.E.3d - 2018 WL 5292203 - 2018 -Ohio- 4284

City board of education appealed decision of the Board of Tax Appeals adopting county board of revision's decrease in value of property for property tax purposes, as sought by taxpayer.

The Supreme Court of Ohio held that:

- Board of education bore burden of proving new value of property under test of *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 875 N.E.2d 91;
- Board of education's appraisal review testimony was insufficient to carry burden of proving new value of property; and
- Board of education was not entitled to reinstatement of auditor's original valuation as default.

City board of education's notice of appeal put taxpayer and Supreme Court on notice that it was asserting that Board of Tax Appeals (BTA) erred in property tax appeal by mischaracterizing rule of *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 875 N.E.2d 913, which laid out test for determining whether the board of education bore the burden before the BTA of proving a new value for property tax purposes, and thus Supreme Court had jurisdiction to review that claim; board of education's notice of appeal mentioned Bedford no fewer than three times, assignment of error in notice of appeal was not required to rise to level of reasoned argumentation, and board of education's exposition on Bedford issue took on more concrete shape in its appellate brief.

Elements of test for determining when the board of education bears the burden before the Board of Tax Appeals (BTA) of proving a new value for property tax purposes, be that the auditor's value or some other value, under *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 875 N.E.2d 91, are as follows: first, the property owner must have filed either an original or a countercomplaint; second, the board of revision must have ordered a reduced valuation based on competent evidence offered by the property owner; third, the board of education must have appealed the board of revision's decision to the BTA; and fourth, the board of revision's reduction in value must have been based on appraisal evidence, not a sale price.

Board of education bore burden before the Board of Tax Appeals (BTA) of proving a new value of property for property tax purposes under test of *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 875 N.E.2d 91, in board of education's appeal of county board of revision's reduction of valuation of taxpayer's property on taxpayer's complaint, even though board of revision's valuation did not precisely align with appraisal report presented by taxpayer, especially given that board of revision explicitly mentioned taxpayer's evidence, and no other evidence, as prelude to announcing its determination of value, and that determination differed by less than 2% from opined value by taxpayer's appraiser.

Testimony by appraisal reviewer criticizing taxpayer's appraisal evidence and stating that appraisal-reviewer did not have any opinion as to value of property, was insufficient for board of education to carry its burden to prove new value of property for property tax purposes, in board of education's appeal before Board of Tax Appeals challenging board of revision's reduction of valuation based on taxpayer's appraisal evidence; board of education was required to provide competent and probative evidence of new value, and appraisal-reviewer's testimony did little, if anything, to assist BTA in fulfilling its duty to determine taxable value of property.

Taxpayer presented competent and at least minimally plausible evidence in form of appraiser's testimony and appraisal report to board of revision in seeking reduction of property's value for property tax purposes, and thus board of education was not entitled to reinstatement of auditor's original valuation as default on appeal to Board of Tax Appeals from board of revision's reduction of valuation of property, though board of revision asserted that appraisal report was flawed.

TAX - OHIO

Kohl's Illinois, Inc. v. Marion County Board of Revision

Supreme Court of Ohio - November 6, 2018 - N.E.3d - 2018 WL 5839296 - 2018 -Ohio- 4461

County board of revision and school board sought judicial review of a decision of the Board of Tax Appeals adopting an appraisal valuation that reduced the value of owner's property.

The Supreme Court of Ohio held that Board properly applied collateral estoppel to preclude relitigation as to covenant that prohibited valuation complaints.

Non-enforceability of a covenant in a tax-increment-financing (TIF) agreement that purportedly prohibited property owner from contesting county auditor's valuations of the property was actually determined in a prior decision of the Board of Tax Appeals, and thus the Board properly applied collateral estoppel to preclude school board's attempt to relitigate the issue in owner's subsequent appeal to the Board contesting the property's valuation; the prior decision included a finding that the proponents of applying the covenant failed to prove that they were entitled to its enforcement, the prior decision made no statement about retaining jurisdiction in remanding to county board of revision, and Board's remand order did not call for county board to reconsider whether to enforce the covenant.

The Impact of Tax Reform on the Federal Historic Tax Credit One Year Later.

It was a Saturday morning in early December 2017.

Historic Tax Credit Coalition leaders and their advisors were on the phone with Hill staff arguing for a better deal than the 10 percent historic tax credit (HTC) offered by Senate Finance Committee Chairman Orrin Hatch, R-Utah. The cost of retaining the 20 percent credit had been calculated at $3.7 billion over 10 years. We were challenged to find this amount of savings by the end of the day, from IRC Section 47 alone. After estimating the savings from an annual HTC cap, per-project cap and a slightly reduced credit percentage, the only fix that got us close was a five-year credit. The Coalition ran out of time trying to sell the idea of coupling the 5-year credit with elimination of the 100 percent basis adjustment. Through interviews with HTC industry participants, this article tries to paint a picture of what this change has meant for the HTC nearly 12 months later.

Grandfathered Deals Drive the Market

Interviews with preservation consultants, investors and syndicators indicate that HTC volume in the first two quarters of 2018 was robust. The rush to close on projects that qualified for grandfathering as a one-year credit created a sharp increase in activity. This industry feedback is corroborated by Brian Goeken of the National Park Service (NPS) who reported that, during the last calendar quarter of 2017 there was a 40 percent increase in Part 1 and a 10 percent upswing in Part 2 approvals over the previous year. In mid-August 2018, Part 2 approvals were up 4 percent. Given the turmoil and uncertainty of the past 12 months, any outcome that approaches last year's record high of $1.2 billion in credits approved would be extraordinary–an indication that demand for the HTC is resilient.

Investor Appetite Remains Strong

Tim Karp at JPMorgan Chase said that the firm's appetite for the HTC is unchanged. "The HTC is a powerful tool for community development and commercial real estate," he said. "We thought so before tax reform and we continue to believe that." Merrill Hoopengardner of the National Trust Community Investment Corporation (NTCIC) said that NTCIC expects to do a record volume of HTC transactions in in its fiscal year 2018.

While the four largest banks by asset size–Bank of America, Citibank, Wells Fargo and Chase–have plenty of tax liability despite the lower tax rate, U.S. Bank (fifth-largest) has shifted its HTC business model post-tax reform. Due to its reduced tax rate combined with its past high volume of LIHTC, HTC, new markets tax credit (NMTC) and solar credit investing, USB will emphasize HTC syndication over direct investments going forward. Steve Kramer and Kristen Switzer said their HTC platform will underwrite and close transactions on their books, monitor construction, then sell their interests in the partnership to a pre-identified investor before the property is placed in service. Precluded by the HTC revenue procedure, U.S. Bank has not provided investor guarantees.

Will There Be a Slowdown on Five-Year Credit Deals?

There is speculation among some industry professionals that developers' intensive focus on closing grandfathered deals has weakened their pipeline of five-year credit projects. NTCIC reports that it saw a flurry of activity for grandfathered projects in the first six months of calendar 2018. Their first five-year transactions are just coming in now. Chase also indicated that the industry is seeing a pipeline increase in five-year deals during the fourth quarter.

While these comments might suggest a slowdown is coming in 2019, the recent history of the HTC has shown a consistent increase in qualified rehabilitation expenditures since the Great Recession. Time will tell whether the statistics bear out these industry concerns.

Pricing Impacts of the Five-Year HTC

While investor interest has stayed strong despite the lower corporate tax rate, the time value of money and the reduced value of associated capital losses have combined to lower pricing for the federal HTC. An analysis done by Novogradac in late December 2017 projected a new range of pricing depending on what discount rate investors apply to the five-year credit stream. At an 8 percent discount rate, pricing was expected to drop by 10 to 15 percent to a range of 77 cents to 81 cents. At a 6 percent rate, pricing was projected to drop 7 to 13 percent to a range of 78 cents to 84 cents. However, on a deal-by-deal basis, high investor competition appears to be driving prices to the upper end of the Novogradac projections. Ted Russell of Wexford Science and Technology said that one of their large five-year credit transactions with a single credit tenant attracted six bids with a range of prices from the high 80s to low 90s. NTCIC reported seeing pricing from 80 cents to 90 cents depending on deal size, quality of sponsorship, Community Reinvestment Act value and the product. The company also expects to see adjustments to investor cash requirements and partnership flip percentages as investors try to maintain higher pricing. At least two investors are offering pay in schedules that extend beyond Part 3 approval. That said, there have been only a handful of five-year projects closed. Trends are hard to document with so few data points.

HTC Financing Gap Tests Developer Creativity

Developers are the closest to the ground when it comes to pricing trends and strategies for closing financing gaps. Two projects that could not qualify for grandfathering illustrate the continued creativity of HTC developers in the face of adversity.

Dominium has been working on its Ft. Snelling HTC/LIHTC affordable housing project in Minnesota for some time. Faced with a five-year federal and Minnesota state HTC, Dominium was able to secure $29 million in affordable housing bonds to help shore up the financing gap. The developer was also successful in advocating in the state legislature for a grandfathering of the previously one-year Minnesota credit for the Ft. Snelling transaction. Jeff Huggett plans to look for new projects that pencil at 82 cents and target deals that also provide other incentives such as the NMTC and state HTCs.

Alexander Company’s Soldiers Home veterans’ housing project in Milwaukee was dealt a blow when they were unable to obtain the Congressional approval needed to have a signed Enhanced Use Lease (EUL) with the Department of Veterans Affairs (VA) prior to the end of December 2017. EULs require multiple, time-consuming layers of approval including a Section 106 review, OMB sign-off and a vote of Congress. With both the federal and Wisconsin state credits changed to five-year vesting, Jon Beck stated that the project suddenly had a multimillion dollar financing gap. To close the gap, Alexander was able to obtain a $5 million VA Military Construction Grant. The company also successfully lobbied the Wisconsin Housing and Economic Development Agency to allow a “hybrid” LIHTC structure where they used a two-condominium structure to deploy 9 percent and 4 percent LIHTC credits on the same deal. Once Alexander maxed out on the state’s 9 percent per project credit cap, the company earned 4 percent credits on the property’s excess eligible basis.

Darin Smith, CEO of Arch Icon Development in Woodbine, Iowa, faces similar challenges with the five-year credit. Smith does market-rate and affordable housing projects in midsize cities and towns in the Midwest. He said he is filling the HTC gap by seeking out properties that can also utilize the LIHTC. In small towns, there are few local financing tools to use, so he looks to other federal credit programs to close the gap created by the five-year HTC. The most impacted part of his business is market-rate housing where twinning with other credits is not possible, and the numbers no longer work, no matter what he pays for the building.

State HTC Impacts

According to state HTC syndicators, the demand for these credits has remained robust since tax reform.

Three states had statutory language requiring their credit programs to conform to the new federal credit vesting schedule. New York state advocates acted swiftly to change their state law last spring to retain a one-year credit. There is confusion in Minnesota where some attorneys are issuing opinions that state law requires Minnesota credits to follow federal vesting. The state historic preservation office reports they have rulings from the revenue department that maintain the one-year credit. Advocates are working to resolve these contradictions. In Wisconsin, proponents plan to ask the legislature in January to return to a one-year credit.

Federal Legislative Outlook
The HTTC has convinced its House and Senate champions to take a second look at eliminating the HTC's downward basis adjustment. The bill, The Historic Tax Credit Enhancement Act, was introduced this spring in both Houses. Darin LaHood, R-Ill., is the original sponsor in the House with two original co-sponsors, Mike Kelly, R-Pa., and Earl Blumenauer, D-Ore. Sen. Bill Cassidy, R-La., is the original sponsor in the Senate joined as of this date by four co-sponsors, Johnny Isakson, R-Ga., Ben Cardin, D-Md., Susan Collins, R-Maine, and Sherrod Brown, D-Ohio.

Industry analyses show that elimination of the basis adjustment, which would conform the HTC to the LIHTC, should increase HTC pricing substantially by lowering investors' capital gains taxes upon exit. Washington Report panelists at the recent Novogradac HTC conference in Nashville were cautiously optimistic that any year-end, lame-duck tax bill could include this fix.

Conclusion
One year after tax reform, the HTC program is enjoying continued high demand from both developers and investors. NPS stats verify the incentive's continued popularity. Concerns that lowering corporate tax rates would dampen investor appetite have not materialized. Developers are adjusting their acquisition strategies amid lower pricing projections for the federal HTC by targeting projects that fill the HTC gap with NMTCs and state HTCs and hoping for relief from upcoming opportunity zones incentive benefits. Interviews indicate that market-rate housing and small-town projects may suffer because they don't offer as many ways to close the gap.

Novogradac Journal of Tax Credits

Published by John Leith-Tetrault on Tuesday, November 6, 2018

[Can Trump's Tax Break Turn Distressed Areas Into 'Opportunity Zones'?]

David Dragoo's two companies own 164 acres of former farmland along the Uncompahgre River near downtown Montrose, Colorado. He's planning to redevelop the area by adding a hotel, apartments, space for outdoor recreation businesses and a path along the river.

It's an unusually ambitious project for a sleepy town of about 20,000, known mostly for an airport where the glitterati disembark on their way to Telluride. And the project is attracting an unusual amount of attention, because it's in a federally approved "opportunity zone" where investors can get a tax break for spending money on certain businesses and property.

"There are now investors reaching out to us from all around the East Coast," Dragoo said. He's heard from businesses looking to relocate and developers aiming to build apartments. "There are groups that are looking at it and saying, 'We just want to buy the whole thing.'"

The tax break, created under the tax law President Donald Trump signed last year, could be a game changer for towns in rural areas such as Montrose. The zones are expected to attract billions of dollars from people eager to reduce their tax bill on money they've made selling stocks, bonds or property.

Nationally, there are over 8,700 such census tracts, nominated by states for their combination of economic distress and growth potential and approved by the U.S. Treasury Department and IRS earlier this year.

But as investors start to open their wallets, some local leaders and national economic development experts worry most of the cash will be spent in booming cities. When it does flow to rural places, they warn, it's more likely to flow to real estate projects such as Dragoo's rather than to local startups desperate for capital.

"I'm worried that none of this money is going to flow where it's really needed," said Paul Major, president and CEO of the Telluride Foundation, a philanthropic organization that focuses on Western Colorado. "You can see 99 percent of the money going to urban redevelopment projects and accelerating gentrification."

For instance, one of Amazon's chosen sites for its new headquarters is in an opportunity zone in Queens that's close to a low-income census tract but is already dense with pricey condos.

Past tax incentives intended to spur growth in distressed areas, such as the New Markets Tax Credit program, have had mixed success. About 83 percent of New Markets money from 2001 to 2015 went to cities, according to research by Rebecca Lester, an assistant professor at the Stanford Graduate School of Business who studies tax policy.

That may be because more people live in cities, because city projects are better-known, or because urban economies are stronger, Lester said. But she expects opportunity zone money to end up even more concentrated in cities than New Markets money, because there are fewer restrictions on how the money can be spent.

Economic developers in rural Colorado remain hopeful that with enough preparation and marketing savvy, they can attract investment dollars — and not just to large, downtown real estate deals.

"The money has always flowed to the cities, so that's something that we're used to," said Deana Sheriff, economic recovery coordinator for the West End Economic Development Corporation, which works in the outer reaches of Montrose County. "We just have to work a little harder to make sure our voices are heard as well."

The Latest, Greatest Economic Incentive

Unlike other economic development incentives, opportunity zones aren't a program with a federal, state or local approval process for projects. Congress created some parameters — for instance, investors can't just buy a building in a zone, they must improve it.

But the program is designed to give investors a tax break simply by investing in a given area. "You could rehab affordable housing and turn it into luxury condos and still get an incentive," said Brady Meixell, senior research assistant at the Urban Institute. "There's no rule against that."

To get the tax benefit, people must invest their capital gains in an opportunity zone fund, which in turn invests in businesses or property in a zone. Investors can defer paying taxes on their gains right away. They earn a 15 percent tax cut on those gains if they hold on to their shares for seven years.

And if they hold on to their shares for 10 years, they don’t have to pay income taxes on money they make when the shares increase in value.

“Those tax benefits are huge,” said Chris Montgomery, founder and managing director of Four Points Funding, a real estate investing group based in Steamboat Springs, at a recent conference for economic developers in Estes Park, Colorado.

“They’re not big enough to make a bad investment good,” he said, “but they’re really significant.”

The IRS released some guidance last month but has yet to clarify all the details of the tax break. Until it does — probably early next year, lobbyists say — many investors are holding off on taking an equity stake in a business or building a structure in an opportunity zone.

In hot real estate markets such as the Denver area (Montrose is located on the other side of the state), however, opportunity zones already have set off a fundraising frenzy.

Andrew Klein owns 750 acres in an opportunity zone in Aurora, not far from Denver International Airport. The land around the airport, once home mostly to prairie dogs, is now filling up with subdivisions, hotels and business parks.

Klein’s company, Westside Investment Partners Inc., is planning to construct industrial buildings that could house businesses such as data centers and logistics companies.

He said he’s talked to many investors, from wealthy Coloradans to national groups that handle family fortunes. The people he’s talked to are, collectively, willing to spend some $100 million on his project, he said.

“I’m currently out in New York City meeting with people who want to develop in opportunity zones,” he said when he spoke to Stateline last week.

Yuriy Gorlov, a vice president of the Aurora Economic Development Council, said that some local landowners and developers are putting together seven- and eight-figure investment funds.

The money flowing in will help accelerate development around the airport, he said. “Instead of taking the next 20 years to build out a large swath of land out there, maybe it’ll take 10 years.”

Rural Investment

Rural Colorado presents investors with fewer obvious moneymaking opportunities. While Denver and other cities along Colorado’s Front Range have rapidly added people and jobs in recent years, many rural places are shrinking as farming and some mining jobs disappear.

Recognizing that rural places such as Montrose County need a boost, the Colorado Office of Economic Development and International Trade gave the federal government a list of opportunity zones skewed toward rural areas.

Only 40 percent of the state’s 126 zones are in the Front Range, according to Jana Persky, strategic initiatives manager for the development office.

Persky has been crisscrossing the state for months, speaking at conferences and meeting with local leaders to explain the opportunity zone incentive and encourage communities to start promoting themselves and lining up projects to pitch to investors.

“Investors are finding it,” she said of the incentive. “We want to make sure that communities are equally informed and equally prepared.”

Montrose hasn’t had to do much to market itself, thanks to a July Forbes article that name-dropped the county and called opportunity zones “the most unbelievable tax break ever.”

After the article was published, “the phone started ringing off the hook,” Montrose’s mayor, Roy Anderson, said, adding that he expects multiple businesses to relocate to the town in the next six to nine months, partly because of the opportunity zones.

Smaller towns west of Montrose haven’t gotten as much attention. Sheriff of the West End Economic Development Corporation is working with three tiny communities in a remote and rugged region near the Utah border: Naturita (population 500), Norwood (600), and Nucla (700).

Both Nucla and Naturita’s main streets look like stretches of highway, Sheriff said. “The town of Naturita literally does not have sidewalks.” The towns are hoping their zone designations will lead to improving sidewalks and renovating buildings.

Her office also is compiling data to convince investors that there’s demand for housing in the area. “We’ve got folks that want to move into the region, but there’s simply no place” to house them, she said.

In many rural places, investors likely will have to take advantage of not just the opportunity zone but layers of other incentives to make money, economic development experts say.

“Deals aren’t just going to surface,” said Major of the Telluride Foundation. They’ll need to be put together using everything from foundation grants to state job training assistance, state tax credits, and a state and local program that pays companies up to $10,000 for every new job created, he said.

Communities may need to go the extra mile to draw investment to needed projects that aren’t particularly lucrative, such as a day care center or affordable housing, Major said. “Are there parcels of land that nobody thought about, that the town owns? The town could donate that to do a housing project that opportunity zone capital can invest in.”

Businesses Need Not Apply (Yet)

The architects of the opportunity zone incentive intended capital gains to flow to businesses as well as real estate. But investors have shown less enthusiasm in taking an equity stake or partnership interest in businesses.

This is partly because it’s harder to make money that way and partly because the IRS has yet to finalize how such investments must be structured.

According to the IRS rules so far, investors must put their money into businesses that generate half their gross income within the zone. That’s a problem, because investors are most interested in growth businesses that sell regionally or nationally, said Montgomery of Four Points Funding.

Even though he’s hoping his fund will invest in real estate and businesses, he said it’ll likely invest more in real estate.

“Most people that are raising money are doing it just for real estate,” he said. “It’s an easier path forward.”

Major noted that it's hard to make a profit investing and growing a business, particularly in a rural area. "You're not going to have a Google, or Amazon, or a Facebook in a distressed, rural community.

"What you're going to have is small, medium-sized businesses that grow slowly."

Major has been helping Natalie Binder, a vacation rental manager based in Telluride, look for funding for her passion project: a camp near Nucla and Naturita that could become a destination for people who want to escape Colorado's increasingly crowded mountain towns.

She's envisioning cabins, platforms for tents, a vintage bus used as a check-in desk, and funky art made of junk — "kind of like a Burning Man meets Marfa meets Colorado," she said, adding that she reached out to some investors working on opportunity funds, but they didn't bite.

"They were too busy to even talk," she said. She's hoping to find investors who are interested in the project with or without the zone designation.

If the final IRS rules skew the incentive almost entirely toward real estate, "then that's a big failure," said John Lettieri, president and CEO of the Economic Innovation Group.

The Washington, D.C.-based organization, created by Napster founder Sean Parker, came up with the opportunity zone idea and lobbied Congress to include the incentive in the tax law.

But real estate development can be beneficial, Lettieri said, if it sets the stage for businesses to move to and expand in distressed communities. "For many of these communities, the built environment is the first step to broader economic growth."

That's why Montgomery sees potential in Dragoo's project, which would cluster apartments, businesses and amenities such as restaurants — creating an attractive place for people to live and work.

And that's why Sheriff is confident that more attractive main streets will encourage mountain bikers and ATVers to linger in the area. "We've seen it happen in other communities," she said. "You have to go out and spend the money first."

By Sophie Quinton

BY STATELINE | NOVEMBER 19, 2018

The Qualified Opportunity Zone Program: Thoughts on the Long-Awaited Treasury Guidance

Treasury takes an important first step in bringing clarity to the QOZ program.

The Proposed Regulations provide a 31-month grace period for development of a QOZ Business –

The treatment of land is clarified for purposes of the Qualified Opportunity Zone Business Property rules –

The Proposed Regulations confirm that an investor's share of partnership debt under Code Section 752 is not treated as a separate investment in a Qualified Opportunity Fund –

Please see full Publication for more information.

by Thomas Morton

November 15, 2018

Pillsbury Winthrop Shaw Pittman LLP

Amazon's New York Home Qualifies as 'Distressed' Under Federal Tax Law.

There are wine bars and a cycling studio along the riverfront in Long Island City, among gleaming high-rise apartment buildings with views of Midtown Manhattan. The soon-to-open library branch is a modern art cube of concrete, the median income is $138,000 a year, and America's hottest online retailer is about to move in.

In the eyes of the federal government, the census tract that will house Amazon's new headquarters in New York is an "opportunity zone," eligible for tax credits meant to spur investment in low-income communities.

The retail giant said Tuesday that it had selected this upscale slice of Long Island City to house one of two new secondary headquarters. The decision was based on a host of factors, including state tax incentives and, in Amazon's words, the ability to attract top talent. But the choice could give eager developers — who almost certainly would have flocked to the area anyway — a tax benefit conveyed by a provision in the $1.5 trillion tax overhaul that President Trump signed last year.

Continue reading.

The New York Times

By Jim Tankersley

Nov. 14, 2018

Nuggets of Midterm Gold from our Public Policy Practice: Squire Patton Boggs

The midterm elections are (mostly!) over. What's coming next? No one is in a better position to tell you the answer than our Public Policy colleagues. Here for your reading and savoring are two pieces – a breakdown that spans all areas of law, and an analysis of what the election means specifically for tax policy.

Click here for the big breakdown, and be sure to click "Download" to download the full .pdf.

Click here for the tax-focused piece.

The Public Finance Tax Blog

By Johnny Hutchinson on November 12, 2018

Squire Patton Boggs

Tax Reform Shines Light on Muni Bond Funds.

The 2017 Tax Cuts and Jobs Act (TCJA) is the first major set of reforms to this country's tax codes in decades. While it's getting lots of headlines for cutting corporate rates and lowering the highest marginal federal tax bracket, the new law also features a less appealing feature for many high net-worth investors.

Starting with individual 2018 tax returns, the state and local taxes (SALT) you pay will be capped at $10,000 a year as a tax deduction against your income in calculating federal taxes. Among the common types of taxes that many states impose are personal income tax, corporate income tax, sales tax, and real property tax. This $10,000 cap is low for high net-worth individuals in states with high tax rates like California and New York.

Muni bonds are issued to help finance public projects like road repairs and water treatment plants. To help enhance their allure to investors and to provide lower cost of capital for the municipalities, interest income paid to investors is exempt from federal taxes and may also be exempt from state taxes, if issued within the state. As we have stated many times before, the investor's expected return equals the cost of capital of the firm or in this case, the municipality. That cost of capital is a measure of the risk and, in the case of munis, the tax benefits offered to the buyers of those securities.

Continue reading.

Index Fund Advisors

Murray Coleman
Investment Writer – Index Fund Advisors

Wednesday, November 14, 2018

TAX - OHIO

Beavercreek Towne Station, L.L.C. v. Greene County Board of Revision

Supreme Court of Ohio - October 25, 2018 - N.E.3d - 2018 WL 5292383 - 2018 -Ohio- 4300

City school district board of education filed a valuation complaint challenging the tax valuation of a shopping center on five separate real-estate parcels.

The county board of revision, and subsequently the Board of Tax Appeals valued the individual parcels by reference to the aggregate price allocated to those parcels from the total amount paid under a portfolio-sale agreement. Property owner and one of its tenants appealed.

The Supreme Court of Ohio held that:

- Commercial tenant had no standing independent from its landlord to challenge the valuation;
- Fact that commercial tenant lacked standing to appeal the decision did not support exclusion of evidence presented of the value of tenant's parcel;

- Ample evidence supported Board of Tax Appeals' inference of a typographical error; and
- The Board was required to give full consideration of the appraisal evidence of the value of the parcels at issue.

Record supported conclusion that shopping-center owner authorized attorney to appeal tax-valuation decision, and therefore, fact that commercial tenant, on whose behalf attorney was also appealing the same decision, lacked standing to appeal the decision did not support exclusion of evidence presented of the value of tenant's parcel; notice of appeal from board of revision decision relating to tenant's parcel was explicitly prosecuted as a joint appeal of owner and tenant, and was signed by attorney, who gave her attorney-registration number along with her contact information and signed as appellant or representative.

Although shopping-center owner's filing of two separate notices of appeal from the same Board of Tax Appeals decision was not good practice and parties should avoid it, such circumstances did not present a jurisdictional defect, given that both notices of appeal separately invoked the court's jurisdiction at the time they were filed.

Ample evidence supported Board of Tax Appeals' inference of a typographical error in portfolio-sale agreement's exclusion of parcel number from contractual allocation, in proceedings challenging whether sale price of shopping center represented its value for tax purposes; deeds and property-record cards confirmed that the parcel was sold as part of the total sale and that the parcel number on the contractual allocation was a typographical error.

In challenge to tax valuation of shopping center sold as part of portfolio sale, Board of Tax Appeals (BTA) was required to give full consideration of the appraisal evidence of the value of the parcels at issue; BTA adopted an allocated aggregate sale price of leased properties as the property value of each parcel without giving proper consideration to the appraisal evidence, and appraiser testified that the contract rent on two parcels exceeded the market rent derived from rent comparables, as could support finding that sale price did not indicate value of unencumbered fee-simple estate.

The Midterms Came With Anti-Tax Fervor in States.

- **Tax increases struck down in states where Democrats made gains**
- **Bucking the 'Republican caricature of tax and spend liberals'**

Democrats may have gotten their blue wave in 2018. But with it came a decidedly red anti-tax wave, too.

Voters in Maine, Missouri, Colorado, Montana, and South Dakota shot down various measures that would have increased taxes. In Florida, they made it harder for lawmakers to pass tax hikes, something supported by outgoing Republican Governor Rick Scott. North Carolina voters also lowered the maximum possible income-tax rate to 7 percent.

The rebuke came even as wage growth remains strong, unemployment stands near a half-century low and federal taxes were reduced this year. In some places, voters rejected tax increases even while voting for Democrats, showing Americans of both political persuasions aren't feeling particularly charitable toward government.

Continue reading.

Bloomberg Markets

By Amanda Albright and William Green

November 9, 2018, 5:47 AM PST

GFOA: Bringing Sales Tax into the 21st Century

Since the mid-1900's, state and local governments have struggled with the issue of taxing remote sales. For decades, the primary method of remote sales was in the form of mail-order businesses. In 1967, the U.S. Supreme Court ruled in Bellas Hess v. Department of Revenue, 386 U.S. 753 (1967), that a state could not require sellers to collect use taxes if the only connection with customers in the state is through materials sent by common carrier or mail.

Then in 1992, the Supreme Court upheld the standard in Bellas Hess in Quill v. North Dakota, 504 U.S. 298 (1992), holding that a state can only require a business to collect and remit sales tax if the business has substantial presence (i.e. nexus) in that state. Both decisions, however, occurred well before the Internet forever changed the way consumers shopped and transformed the retail marketplace into the billion-dollar global platform we know today.

As a result of these decisions, state and local governments faced growing numbers of uncollected sales taxes over the past several decades. In an attempt to remedy this, there have been efforts at the federal level to enact legislation that would establish a framework of sales tax simplification and administration. The intent of the framework is to bring sales tax laws into the 21st century and grant state and local governments the ability to enforce existing sales tax laws on remote sales, while also minimizing the burden of collection on retailers. The billions of dollars state and local governments forego each year is much needed revenue that could support vital services in communities across the country like infrastructure, public safety, and education.

But 2018 proved to be a landmark year for the issue of remote sales tax. In June, the U.S. Supreme Court reversed those two pivotal cases by finally removing the antiquated physical presence requirement that has burdened state and local sales and use tax laws. This report will take a brief look at the importance of these taxes and how sales tax administration could be one step closer to 21st century modernization.

Download: Bringing Sales Tax into the 21st Century

The Week in Public Finance: How Tax Policies Fared at the Ballot Box

Efforts to raise state taxes largely failed. That wasn't the case at the local level.

With a few exceptions, voters across the country on Election Day approved statewide proposals to reduce or limit taxes while also widely rejecting any efforts to raise them. But that wasn't the story at the local level, where several tax increases passed.

Three out of four states voted to restrict tax policy. In Florida, voters enacted a two-thirds legislative supermajority requirement to pass a tax increase. Arizona voters favored a new ban on taxing services. And North Carolinians opted to lower that state's income tax rate cap.

Measures that limit lawmakers' taxing authority have a mixed track record. "These measures happen in waves," says Wake Forest University political professor John Dinan. "You might say there's a bit of a resurgence in their success judging by Tuesday's results."

Continue reading.

GOVERNING.COM

BY LIZ FARMER | NOVEMBER 9, 2018

Crowdfunding and Opportunity Zones Joining Forces in Philadelphia Project.

The project will be big: 40,000 square feet of mixed-use space with a restaurant from former "Top Chef" contestant Sylva Senat, a co-working space and business incubator, and a new home for a landscape architecture firm that specializes in green roofs. Plus, its 39 residential apartments are meant to be market-rate affordable — leased at a monthly rate that people who live in the surrounding Northwest Philadelphia neighborhood can afford without a rental subsidy.

To raise the $7.2 million necessary to build the project out, Mosaic Development Partners could have gone the simple route, says Gregory Reaves, principal and managing partner of the Philadelphia-based firm. The project, called Golaski Labs, wouldn't have been difficult to finance, and Mosaic probably could have done it with a single investor, Reaves says. Instead, the firm has developed a complex financing structure that will take advantage of New Markets Tax Credits, a small portion of equity offered through the crowdfunding service Small Change, and capital raised through the new Opportunity Zones tax incentive created as part of the Tax Cuts and Jobs Act passed at the end of 2017.

Continue reading.

NEXT CITY

BY JARED BREY | NOVEMBER 5, 2018

Is Your Investment Eligible for Opportunity Zone Funding?

The 2017 Tax Cuts and Jobs Act provides tax incentives for investments in "Opportunity Zones," in an effort to promote economic development in selected communities. Investors can reduce by up to 15 percent taxes on existing capital gains invested via designated "Qualified Opportunity Funds," deferring those taxes for up to 10 years and eliminating 100 percent of the future capital gains tax on profits generated by the Qualified Opportunity Funds.

Investors, investment managers, municipalities, real estate developers and business owners can benefit from this program – but should first work to understand the types of projects and investments that are best suited for Opportunity Zone funding.

Key Concepts to Understanding the Opportunity Zones Program

For Investors

Opportunity Zone investments exists within an asset class spectrum. The vast majority of investments are likely to be made within the real estate sector, with a smaller but important portion of investments to be made in operating businesses. Understanding how to maximize your return while diversifying your risk profile will be important.

For Investment Managers

Most Opportunity Zone communities have a limited number of "investment ready" projects. Funds will need to be strategic in identifying a pipeline of investment ready projects and selective about developing "but for funding" and concept projects.

When assessing whether or not a project is eligible for Opportunity Zone funding, it's helpful to consider which of the following three categories it would fall under:

- **Conceptual projects:** Projects that have not completed their pre-development phase and do not have funding. Opportunity Zone funding alone is not enough to move these projects forward. The community will need to make some investment to move these conceptual projects to the investment ready stage.
- **"But for Funding" projects:** Projects that have already completed their pre-development phase but have funding gaps. The Opportunity Zone funding typically completes the funding source needed to execute a project. This typically represents a smaller, identifiable fraction of projects in most communities.
- **Investment Ready projects:** Projects that have already completed their pre-development phase and are essentially funded. The Opportunity Zone funding typically supplants or complements an existing funding source. This represents the smallest but most readily identifiable fraction of projects in most communities.

For Municipalities

Cities will need to market investment ready projects at a minimum but will also need to select and invest in concepts that will develop into investment ready projects. Identifying partners to help in this process as well as partners to ultimately invest will be critical.

Download our guide to the Opportunity Zones program and funding eligibility.

Faegre Baker Daniels

November 7, 2018

IRS Releases New Guidance to Facilitate Opportunity Zone Program.

The Opportunity Zone program was created by the 2017 Tax Cuts and Jobs Act and is intended to increase investment in areas designated as Opportunity Zones (i.e., economically distressed communities). The general idea behind the program (which we have previously written about here) is that investors are able to defer paying tax on gains from selling property by investing the proceeds from the sale into an Opportunity Zone Fund.

The IRS recently issued much needed guidance on how the Opportunity Zone program will work.

Specifically, the IRS released anxiously-awaited proposed regulations, along with Rev. Rul. 2018-29, and a draft Form 8996 (that entities will need to file with the IRS to certify that they qualify as a Qualified Opportunity Fund).

Our colleague, Steve Mount, has been at the forefront of the Opportunity Zone program from its inception. He has written yet another insightful article in Bloomberg's Tax Management Real Estate Journal describing the new guidance in more detail. Click here to read the article. You can read Steve's earlier articles on Opportunity Zones here and here.

The Public Finance Tax Blog

By Cynthia Mog on November 6, 2018

Squire Patton Boggs

Results of 2018 State and Local Tax Ballot Initiatives.

Read the results.

TAX - OHIO

Hilliard City Schools Board of Education v. Franklin County Board of Revision

Supreme Court of Ohio - October 24, 2018 - N.E.3d - 2018 WL 5292231 - 2018 -Ohio- 4282

Land owner and owner of branch bank sought judicial review of Board of Tax Appeals' decision adopting a higher value for the property than the value adopted by county board of revision.

The Supreme Court of Ohio held that:

- Appraisal submitted by school board did not constitute a use valuation, and
- Board properly relied on the appraisal as determining value of fee-simple estate as if unencumbered.

Appraisal of branch bank submitted by school board did not constitute a use valuation, as opposed to a market valuation, based on its reference to definition of "special-purpose property," and thus the Board of Tax Appeals properly relied on the appraisal in determining the property's value; appraisal did not attribute to the property a special adaptation of improvements that made the property less marketable, as circumstance typical of special-purpose properties, but instead the appraisal referenced the present use of the property as a branch bank in the context of deciding which comparables were more analogous to the property, and, focusing on bank buildings, appraisal concluded that property's best use was as a freestanding commercial building.

Board of Tax Appeals properly relied on an appraisal of a branch bank submitted by school board as determining the value of the fee-simple estate as if unencumbered; Board made findings regarding the appraisal's adjustments to leased comparables, there was no conflict between a sale price and appraiser's opinion, but instead the case involved conflicting appraisals and credibility of an appraiser's testimony, concerning which matters the Board's discretion was at its greatest, and property owners' reasons in opposition to the appraisal merely established that the Board might have exercised its discretion differently.

IRS: You Can Still Issue Tax-Exempt Bonds to Advance Refund Most Taxable Bonds, Including BABs

For those who still had doubts, the IRS has now made it crystal clear: You can still issue tax-exempt bonds to advance refund most taxable bonds. In other words, the much-lamented "repeal of tax-exempt advance refunding bonds" in the Tax Cuts and Jobs Act from December 2017 isn't ironclad. The repeal prevents the issuance of tax-exempt bonds to advance refund only (1) other tax-exempt bonds and (2) a very limited subset of taxable bonds. The IRS expressed this conclusion in Chief Counsel Advice Memorandum 201843009, dated August 31 and released on October 26.

Following the logic of this guidance, the only taxable bonds that can't be advance refunded with tax-exempt bonds are taxable bonds that:

- Have a federal subsidy, such as Build America Bonds (i.e., "tax-advantaged bonds," as defined in Reg. 1.150-1(b), that are not tax-exempt bonds) **and**
- Do not lose their subsidy at the time that the tax-exempt bonds that advance refund them are issued.

One way to force a tax-advantaged taxable bond to lose its tax advantage is to "legally defease" it, which happens in almost all advance refundings once the issuer deposits Treasury securities acquired with proceeds of the advance refunding bonds into the refunding escrow on the issue date. Perhaps the only exception – certain governmental bonds cannot be legally defeased under state law.[1]

That's the bottom line. Read on for a little more about this guidance and the history behind it.

Continue Reading

The Public Finance Tax Blog

By Johnny Hutchinson on October 28, 2018

Squire Patton Boggs

IRS Says Some Advance Refundings Still OK.

WASHINGTON — The Internal Revenue Service is publicly affirming that last year's tax law changes do not preclude the issuance of tax-exempt bonds to advance refund non-tax-advantaged, taxable bonds.

The assurances were made in an IRS Chief Counsel Memorandum released Oct. 26 after Treasury and IRS officials told bond attorneys that at a conference earlier this year during discussions about the limitations on the termination of advance refundings under the Tax Cuts and Jobs Act enacted in December.

The memo appears to respond to a March 29 written request by the National Association of Bond

Lawyers to Christie Jacobs, director of the IRS Indian Tribal Governments/Tax Exempt Bonds Office to clarify the new law.

Three tax attorneys who are members of NABL told The Bond Buyer that this newly released memo should address any uncertainty in the municipal bond market over the scope and limitations of the termination of advance refundings for tax-exempt bonds.

“I think this is going to be good enough for probably everyone,” said Matthias Edrich, a partner at Kutak Rock in Denver.

Perry E. Israel, a sole practitioner in Sacramento, Calif., described the IRS memorandum as “big news.”

The memo “specifically addresses” whether tax-exempt bonds can be used to advance refund Build America Bonds, Israel said.

“It says if you defease the BABs, they are reissued and you no longer can get the subsidy for the BABs,” Israel said. “There is only one tax-advantaged thing outstanding and, so yes, you can advance refund that as long as you defease them.”

The timing of the news is important because Build America Bonds were issued in 2009 and 2010 and most of them had 10-year call dates.

“There probably are a lot of issuers who may have been undecided about the economics and they will be callable in the next two years,” said Johnny Hutchinson, chair of the NABL Tax Law Committee and a partner at Squire Patton Boggs in Houston.

A significant percentage of attorneys who attended the NABL Tax and Securities Law Institute in February were uncertain whether advance refundings still were legal in any instance.

“The folks at Treasury and the IRS thought that it was obvious that this pre-existing Treasury regulation that allows you to ignore tax-exempt advance refundings on taxable bonds continued to apply,” Hutchinson said.

Hutchinson was particularly encouraged that the IRS memo went to the IRS enforcement staff, which means “you wouldn’t have to spend a lot of time on an audit trying to convince the enforcement folks that the position the policy folks were taking was the right position.”

“It also makes clear that the same logic will extend even to a tax-advantaged taxable bond as long as it is legally defeased in the course of the refunding,” Hutchinson said. ”There’s only maybe a very small subset of bonds, some general obligation bonds in some states, that can’t be legally defeased. But for any for any tax-advantaged, taxable bonds that can be legally defeased, they will lose their subsidy on the date that they were defeased, which is usually the issuance date of the advance refunding bonds.”

Although the memo from the IRS Office of Chief Counsel was released publicly on Oct. 26, it is dated Aug. 31.

Johanna Som de Cerff, a senior technician reviewer in IRS Branch 5 of the Chief Counsel’s Office, sent the memo to Patricia P. Wang, area counsel for the Pacific Coast area of the Tax Exempt & Government Entities Division.

By Brian Tumulty

BY SOURCEMEDIA | MUNICIPAL | 10/30/18 07:01 PM EDT

IRS Use of Section 6700 Penalties for Muni Wrongdoers to be Audited.

WASHINGTON – The Treasury Department Inspector General for Tax Administration plans to audit the Internal Revenue Service's use of a much-feared enforcement tool under which it can impose penalties for the misconduct of municipal bond transaction participants such as underwriters, lawyers, municipal advisors or their firms.

The audit, listed in TIGTA's annual audit plan for fiscal 2019, could spell trouble for the IRS' tax-exempt bond folks, who seem to have virtually stopped using these penalties under Section 6700 of the Internal Revenue Tax Code.

"Taking 6700 action against law firms or banks does not make you popular when you're trying to leave the IRS," said Mark Scott, former director of the IRS Tax-Exempt Bond Office who now has a private practice representing whistleblowers. "It decreases your opportunities for post-government employment."

Section 6700 was originally intended to allow the IRS to impose penalties against promoters of abusive tax shelters.

But in 1989 Congress approved legislation allowing the agency to apply Section 6700 in municipal bond enforcement cases so it could go after the bad actors in muni bond transactions and not be restricted to declaring bonds taxable or entering into settlement agreements with issuers. This tax enforcement tool, unlike others, has no statute of limitations.

The revised Section 6700 allowed the IRS to impose penalties on municipal bond transaction participants who make or provide statements related to the tax exemption or other tax benefits in transactions that they know or have reason to know are false or fraudulent.

The penalties can apply to individuals or firms, including underwriters, bond counsel or other lawyers, issuers, conduit borrowers, financial advisors, or feasibility consultants.

The penalties used to equal the lesser of $1,000 per activity or 100% of the gross income from the activity, with the IRS taking the stance that "activity" could mean a single bond, typically $5000, so the penalties would soar in large transactions.

But since Oct. 23, 2004, penalty amounts have been required to be 50% of the gross income derived, or to be derived, from the activity of the person or firm targeted with enforcement action.

IRS tax-exempt bond officials ramped up the use of this section in 2000, with Scott, who was then the IRS' national bond director, telling The Bond Buyer at that time that the agency was using this anti-abuse tool in more than 40 bond audits, representing about 10% of its pending bond audits.

A TIGTA audit of the IRS Tax-Exempt Bond Office's enforcement activities from fiscal year 2002 through fiscal year 2004 that was released in September 2005 found the office closed 16 Section 6700 cases with more than $34 million in penalties in 2002, 44 with more than $4 million in penalties in 2003 and 19 with $6.61 million in penalties in 2004.

Scott left the IRS at the end of 2005 to join the law firm of Vinson & Elkins, which no longer exists.

He was replaced by Cliff Gannett, who retired from the IRS in June 2013. Gannett was in turn replaced by Rebecca Harrigal in October 2013. Harrigal left in December 2016 to join Greenberg Traurig as a shareholder in its public finance practice.

A TIGTA audit on TEB enforcement activities from fiscal year 2005 through fiscal year 2010, released in August 2012, found the number of Section 6700 misconduct investigations had dropped to two in fiscal 2010 from 21 in fiscal 2005.

"TEB office management stated they believe the reason for the decrease in cases can be attributed to the suspension of eight investigations in fiscal 2006 and 2007 that they plan to reactivate in the future, and that highly public criminal prosecutions have created a deterrent effect," TIGTA said in the audit, the second and last one done on TEB's enforcement program.

Robert Henn, former acting director of the TEB Office, had high hopes for the use of this tool when he told The Bond Buyer in a November 2012 interview as he was set to retire at the end of the year that he was disappointed he would not see completion of the IRS' efforts to pursue Section 6700 probes of firms and individuals that violated the tax laws by participating in schemes to rig the bids for guaranteed investment contracts and other products for the investment of muni bond proceeds.

The IRS had initially investigated bid-rigging but referred the cases to the Department of Justice's division for criminal prosecution in 2005. The DOJ launched a massive antitrust probe in the municipal market in 2006 that led to the indictments and convictions of numerous firms and individuals, as well as some settlements.

Later Scott obtained information from the TEB Office under a Freedom of Information Act request showing its examination plans for fiscal 2015 included only one Section 6700 case pending at that time.

By Lynn Hume

BY SOURCEMEDIA | MUNICIPAL | 10/31/18 07:04 PM EDT

IRS Publishes 2019 Pension Plan Limitations: Day Pitney

The IRS recently announced the cost-of-living adjustments applicable to certain dollar limitations for employee pension benefit plans for 2019. The resulting dollar limits are as follows:

- The annual benefit limit for defined benefit plans is increased from $220,000 to $225,000.
- The annual addition limit for defined contribution plans is increased from $55,000 to $56,000.
- The annual limit with respect to the exclusion for elective deferrals to a 401(k), 403(b) or 457 plan is increased from $18,500 to $19,000.
- The limit on annual contributions to an individual retirement arrangement (IRA) is increased from $5,500 to $6,000. The dollar limit for an additional catch-up contribution to an IRA for individuals age 50 or older remains unchanged at $1,000.
- The annual limit on compensation that can be taken into account under a qualified retirement plan is increased from $275,000 to $280,000.
- The dollar limit for determining key employees in a top-heavy plan is increased from $175,000 to $180,000.
- The dollar amount for determining the maximum account balance in an employee stock ownership plan (ESOP) subject to a five-year distribution period is increased from $1.105 million to $1.130

million. The dollar amount used to determine the lengthening of the five-year distribution period is increased from $220,000 to $225,000.
- The dollar limit for catch-up contributions for 401(k) plans for individuals age 50 or older remains unchanged at $6,000. In addition, the dollar limit under SIMPLE plans and SIMPLE IRAs for catch-up contributions for participants who are age 50 or older remains unchanged at $3,000.
- The limitation used in the definition of "highly compensated employee" is increased from $120,000 to $125,000.

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

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

Day Pitney Alert

November 2, 2018

Day Pitney Author(s) Kathy A. Lawler David P. Doyle Liza J. Hecht Thomas F.J. O'Mullane

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TAX - VERMONT

Williams v. Town of North Hero

Supreme Court of Vermont - October 19, 2018 - A.3d - 2018 WL 5093028 - 2018 VT 114

Town appealed decision by hearing officer of Property Valuation and Review Division to impose a $2,000 discovery sanction against it in property-tax-reappraisal appeal.

The Supreme Court of Vermont held that hearing officer abused his discretion in imposing a monetary sanction against town, where town had fully complied with order compelling discovery.

TAX - OHIO

Groveport Madison Local Schools Board of Education v. Franklin County Board of Revision

Supreme Court of Ohio - October 24, 2018 - N.E.3d - 2018 WL 5291926 - 2018 -Ohio- 4286

Taxpayer appealed determination of the Board of Tax Appeals (BTA) independently valuing property on school board's appeal of determination of county board of revision adopting taxpayer's appraisal value of property.

The Supreme Court of Ohio held that:

- BTA discharged its duty to perform independent valuation of property, and
- BTA's valuation of property was presumed to be proper in accordance with constitutionally required uniformity.

Board of Tax Appeals (BTA) discharged its duty to perform independent valuation of property for property tax purposes, though taxpayer asserted that BTA erred in utilizing unreliable "consulting report” prepared by school board’s appraiser as if it were an appraisal, and that BTA engaged in profusion of errors; BTA did not rely on consulting report in undifferentiating matter, but instead looked at information within report and evaluated it in conjunction with its consideration of report prepared by taxpayer’s appraiser, including consideration of different approaches with respect to expense items, and taxpayer did not demonstrate profusion of errors.

Independent valuation of property by Board of Tax Appeals (BTA) for property tax purposes, which adjusted value upward from board of revision’s valuation to amount very similar to county’s original valuation, was presumed to be proper, though taxpayer alleged that BTA’s decision created appearance of being outcome oriented in violation of constitutionally required uniformity, where taxpayer offered no evidence that would impugn motives of the BTA.

TAX - OHIO

Spirit Master Funding IX, L.L.C. v. Cuyahoga County Board of Revision

Supreme Court of Ohio - October 25, 2018 - N.E.3d - 2018 WL 5291849 - 2018 -Ohio- 4302

Restaurant owner challenged county board of revision’s valuation of its property for tax purposes.

The Board of Tax Appeals valued the property in according to a recent sale price. Owner appealed.

The Supreme Court of Ohio held that the Board of Tax Appeals was required to consider restaurant owner’s appraisal evidence.

Board of Tax Appeals was required to consider restaurant owner’s appraisal evidence in valuing its property for tax purposes, despite fact that there had been a recent arm’s-length sale and the property was not encumbered by an above-market lease; appraiser’s valuation could have some evidentiary value as an independent matter apart from the concern of the lease.

A Google in Newark? VCs Hit Snag in New Tax Break for Poor Areas.

- **IRS proposal on income may bar startups from opportunity zones**
- **Investors say many high-growth businesses won’t meet threshold**

Dan Borok got excited when last year’s Republican tax overhaul included a provision that stood to help his venture capital firm pursue its mission of funding businesses and creating jobs in Newark, New Jersey.

Then came the fine print.

Borok said he was stunned earlier this month by a long-awaited Treasury Department proposal detailing how taxpayers qualify for special breaks by investing in low-income areas throughout the U.S. While the guidelines are generous to investors, buried in the rules is a clause that could deter venture capitalists — and investment in businesses that could stimulate those downtrodden neighborhoods.

One of the rules requires that businesses generate at least half their gross income within the distressed community or “opportunity zone” in which they operate. That’s fine for, say, an apartment building or a grocery store, but a disaster for a business hoping to manufacture a product to be sold widely, or provide services online.

Borok's firm Newark Venture Partners has backing from Amazon.com Inc.'s Audible unit, Prudential Financial Inc. and several other prominent firms with offices in the New Jersey city. He worked for Google in the early 2000s, a company he says would never have met the 50 percent income test.

"None of the revenue came from Mountain View," he said, referring to the Silicon Valley city where the search-engine giant is headquartered. For a lot of high-growth businesses, "their customer base is not where the company is."

The clause seems to be at odds with the intent of the legislation, which is to attract private capital to roughly 8,700 disadvantaged economic areas and create jobs. Treasury Secretary Steven Mnuchin has suggested that $100 billion could flow to opportunity zones. The Economic Innovation Group, a Washington think tank that helped push the idea, has called the incentive the most ambitious effort to spur investment in low-income areas in a generation.

The tax breaks are especially attractive for people looking for ways to minimize levies on capital gains. Investors can plow proceeds from the sale of a business, stock or other asset into opportunity funds, deferring those taxes until 2026 — and potentially reducing their liabilities by as much as 15 percent. If the funds buy and hold qualifying businesses or property in opportunity zones for at least a decade, investors can avoid paying capital gains on any of the fund's appreciation altogether.

'Unintentional Consequence'

Such incentives should be a natural fit for investors looking to take their winnings from a tech startup and deploy it in another one located in an opportunity zone. But the Treasury regulations will hurt high-growth startups, which tend to generate most of the net new jobs, according to Steve Case, the AOL co-founder whose firm Revolution LLC has focused on seeding companies outside well-established tech hubs.

In July, Case hired two real estate executives to help make direct investments in opportunity zones. Before the legislation passed, Case was also a prominent backer of the tax breaks.

"I hope the Treasury Department will see the unintentional consequence of this new restriction and amend it in the final rules," Case said in a statement.

So far, the most interest and activity in opportunity zones has come from the real estate industry. Some of the highest-profile firms that are wading into the market — from Goldman Sachs Group Inc. to hedge fund EJF Capital — have plans to use the tax breaks to develop buildings.

"One of the fears that many have is that this incentive will end up being predominantly used" to invest in rental properties, said Michael Novogradac, a specialist in tax breaks for low-income housing, community development and renewable energy. If the gross-income requirement isn't changed, "it'll definitely restrict the number of operating businesses in opportunity zones that benefit from the incentive."

Old Tax Code

The backlash against such a small detail in a document that ran dozens of pages shows the difficulties regulators face as they rely on guidelines and definitions in the old tax code to implement the new law's provisions. The legislation left open a lot for interpretation, forcing regulators to fill in gaps and sparking criticism about who will ultimately benefit.

Even before the proposed regulations were released, researchers and nonprofits argued the opportunity zone provisions were written so broadly that savvy investors and real estate developers could exploit them for projects they might have done anyway or that displace lower-income residents. There's also no requirements for businesses to hire employees from within the zones or benefit the communities more broadly.

Treasury is currently studying the gross-income issue, collecting information and hearing from stakeholders, according to an official. The department is committed to swiftly issuing sound regulations that best serve communities and investors, the Treasury official said.

Potential investors welcomed most of Treasury's other proposed regulations related to opportunity zone businesses. One of them stipulates that only 70 percent of a company's tangible property has to be in a designated area, a threshold that an official previewing the regulations earlier this month for reporters said was favorable. Many investors, accountants and lawyers following the regulatory process were concerned the bar would've been set higher.

'Terrible Economics'

Still, rules like that could be moot if the income requirement stays in the final regulations, said Steve Glickman, chief executive officer of Develop LLC, a consulting firm for investors in opportunity zones, and a co-founder of the Economic Innovation Group.

"I'm not sure they totally realized the impact this is going to have on high-growth business investment," he said. Only allowing local businesses, like hardware stores and restaurants, "sounds like great politics, but it turns out to be terrible economics."

Treasury is accepting comments on the opportunity zone proposals until Dec. 28. The department is also planning to release a second batch of regulations by the end of the year addressing the ongoing operations of opportunity zone funds.

For now, some investors who hope to use the opportunity zone tax breaks to finance businesses are waiting, hopeful that the income requirement will be revised or eliminated.

"Given what we know about the intent behind this legislation, we feel this is an oversight that will be rectified," said Peter Brack, managing partner of Hypothesis Ventures, a firm that invests in startups outside California's Bay Area. "A responsible venture investor would be sitting on the sidelines right now until this is clarified."

Bloomberg Economics

By Noah Buhayar

October 31, 2018, 1:00 AM PDT Updated on October 31, 2018, 8:07 AM PDT

— With assistance by Laura Davison

Much-Awaited Guidelines Opening the Opportunity Zone Floodgates.

'Tis the season for Opportunity Zone investing. The new tax incentive to invest in economically distressed areas was already drawing significant interest before Oct. 19, the day when the Internal

Revenue Service (IRS) proposed key guidelines that many were waiting upon to begin making their cash available for investment in designated Opportunity Zones. The guidelines provided important clarity on a number of questions that were still preventing a large number of investors from making their cash available for Opportunity Zones.

A number of Opportunity Funds — vehicles for aggregating the funds to make multiple Opportunity Zone investments — are already forming. Novogradac & Co., an accounting firm that specializes in community development finance, published a directory of 21 Opportunity Funds, with stated goals to raise as much as $4.8 billion in capital under the new tax incentive. The National Council of State Housing Agencies also published a directory of Opportunity Funds, with some overlap between the two. Under the new law, it's also possible to create single-investment Opportunity Funds for investing in just one eligible business or property.

Treasury Secretary Steven Mnuchin has said that he anticipates as much as $100 billion in investment through the Opportunity Zones tax incentive. As Next City has reported recently, many in fast-growing cities such as Austin, Texas, are concerned that the flood of capital could exacerbate existing gentrification challenges, while others in places such as Alabama are eager to connect investors to projects in places that haven't had much access to community development capital before.

Federal records show four meetings hosted at the Office of Information and Regulatory Affairs to discuss the proposed guidelines before their release. Attendees included representatives from the Department of the Treasury, major accounting firms, lobbyists for the logistics industry, departments of economic development or commerce from six states, Economic Innovation Group (the think thank that hatched the Opportunity Zones tax incentive) and venture capitalist Ross Baird.

If you are still getting informed on Opportunity Zones, you're far from alone. The program has only been around since the passage of the Tax Cuts and Jobs Act at the end of 2017. The program offers tax breaks on capital gains income for investing in designated Opportunity Zones across the country.

The new law gave states, specifically governor's offices, the responsibility to select Opportunity Zones from among eligible census tracts. To be considered eligible, census tracts had to have a poverty rate of at least 20 percent or a median family income not exceeding 80 percent of median family income for the metropolitan area or statewide median, whichever is higher. States could select up to 25 percent of eligible census tracts, and up to five percent of their selections could also be census tracts that did not meet qualifications themselves but were adjacent to an eligible census tract. Based on those parameters, out of 42,176 possible census tracts, all 50 states, five territories and the District of Columbia chose 8,762 census tracts to receive designation as Opportunity Zones.

The designation process intentionally differed from the EB-5 Immigrant Investor program, which allows foreign investors to "buy" permanent U.S. residency by making an investment in a project located in a distressed area. Under the EB-5 program, developers can gerrymander census tracts together to create an "area" that meets the unemployment threshold of the program, with the project receiving the investment located far from areas of actual high unemployment. That won't be possible under this program.

Some 35 million people live in designated Opportunity Zones, with a majority being people of color, according to an analysis by the nonpartisan Urban Institute. The same researchers also created a ranking of census tracts based on existing investment trends, which revealed that many selected Opportunity Zones are already receiving a significant amount of outside investment. In selected metropolitan areas, they also found, a large proportion of selected Opportunity Zones are already experiencing demographic shifts toward more highly educated, higher-income households.

Here's how the tax incentive works: If I have a million dollars in capital gains income, from the sale of stock or real estate or other assets (including works of art), I can temporarily defer federal tax payments on that capital gains income by investing the million dollars directly into an eligible business located in an Opportunity Zone or into an Opportunity Fund, which must invest at least 90 percent of its assets into eligible businesses located in Opportunity Zones. Eligible businesses include real estate projects (excluding golf courses, country clubs, massage parlors, hot tub or suntan facilities, race tracks, gambling establishments or liquor stores). If I leave the million dollars in this investment for five years, I get a ten percent reduction in my original capital gains taxable income; if I leave it for seven years, I get a 15 percent reduction; in other words, I'd be taxed on $850,000 of capital gains income instead of the original one million. Bonus: if I leave the funds invested for at least ten years, any new capital gains income from that investment are tax-free at the federal level.

One of the key questions addressed in the new IRS guidelines pertains to the timeline of raising capital versus actual investment in eligible projects or businesses. While investors want the tax benefits right away, real estate projects can take years to aggregate necessary capital, especially if they are projects with an intentional plan to benefit communities. Under the new guidelines, Opportunity Funds have 31 months from receiving capital from investors before they must invest the capital into an actual project — provided that they have a plan to do so within six months of receiving the capital. That means investors can have the confidence to invest in Opportunity Funds with a pipeline of projects that might take longer to come to fruition for the sake of community benefit.

Another key question concerned the law's requirement that businesses receiving Opportunity Zone investment must conduct "substantially all" of its business inside an Opportunity Zone — as a safeguard against businesses registering an address inside an Opportunity Zone for the purposes of raising capital without actually hiring anyone or serving anyone inside that Zone. Under the final guidelines, at least 50 percent of the gross income of an eligible business must come from "the active conduct of a trade or business in the qualified Opportunity Zone." Some advocates were hoping for a higher percentage, but others feared that might discourage investors from taking advantage of the program.

The IRS also created a "70-30 rule," permitting up to 30 percent of an eligible business' property to be located outside a designated Opportunity Zone. So if a local restaurant chain has five locations, for example, at least four of them must be inside an Opportunity Zone.

On other suggested safeguards, the IRS has so far been mute or is leaning more toward being friendly to investors instead of the 35 million Opportunity Zone residents. Despite calls from advocates to do so, there are no guidelines for eligible businesses to hire residents who live in the Opportunity Zones where they are operating, nor are there requirements that any housing units created with Opportunity Zone capital be affordable for existing residents of Opportunity Zones. The IRS also released a draft version of the required form to "self-certify" as an Opportunity Fund. The form is one page long, two if the fund is "out of compliance," and the only measure of compliance is the percentage of the fund's assets located inside a designated Opportunity Zone. Opportunity Funds must pay a nominal fee — based on how much the fund is below the 90 percent threshold — for each month in the previous tax year they are not in compliance.

With so few "guard rails" at the federal level, some are looking to states or municipalities to create measures for protecting Opportunity Zone residents from displacement, or at least incentives to encourage more responsible behavior on the part of Opportunity Funds.

"We believe the state, in designating these zones, has a responsibility to protect the communities that are already there and make sure they benefit from these zones," Paulina Gonzalez, executive director of the California Reinvestment Coalition, told Next City earlier this year.

NEXT CITY

BY OSCAR PERRY ABELLO | OCTOBER 30, 2018

IRS Issues Proposed Regulations for Qualified Opportunity Zone Funds.

Treasury issued long-awaited Proposed Regulations and a Revenue Ruling today (October 19, 2018) regarding key issues involved with investing in and forming Qualified Opportunity Zone Funds ("OZ Fund") and the OZ Fund's investments in Opportunity Zone Businesses ("OZ Business"). Although the Proposed Regulations do not answer all of our key questions, Treasury did provide generally taxpayer friendly guidance to the issues discussed below. These Regulations are only proposed, and are therefore subject to further revisions based on comments received by Treasury. However, Treasury has provided that taxpayers can rely on many of these proposed rules, provided that the taxpayer applies the rule in its entirety and in a consistent manner.

- **Treatment of Land.** Land is excluded from the requirement that the original use of opportunity zone property commence with the OZ Fund or that the OZ Fund substantially improve the property, alleviating fears that land could only be a "bad" asset. Very favorably, if the OZ Fund purchases an existing building and the underlying land, the OZ Fund is only required to substantially improve ("double the basis") the building. The cost of the land is disregarded for this purpose.
- **Treatment of Capital Gains of Partnerships and other Pass-Thru Entities.** Partners have 180 days from the end of the partnership's taxable year to invest in an OZ Fund. Accordingly, capital gains recognized by a partnership early in 2018 (or even very late 2017) may still be eligible for investment in OZ Funds, even if 180 days have passed. A partnership has the option of either investing capital gains in an OZ Fund itself or allocating the gain to its partners, thereby permitting the partners the opportunity to invest their distribute share of the gain in an OZ Fund. If desired, the partner has the option to select the 180-day period starting from the date of the partnership's sale of the property.
- **Treatment of Working Capital.** The Proposed Regulations provide a working capital safe harbor for investments in OZ businesses that acquire, construct, or rehabilitate tangible business property. An OZ business can hold the working capital for a period of up to 31 months if there is a written plan that identifies the working capital as held for the acquisition, construction, or substantial improvement of tangible property in an opportunity zone and such written plan identifies a schedule of expenditures. This alleviates the concern that cash invested by an OZ Fund in an OZ business would be a "bad asset" for the OZ business. Working capital can be held in cash, cash equivalents, or debt instruments with a term of 18 months or less.
- **Only 70% of an OZ Business' Tangible Assets Need to be OZ Property.** An OZ Fund that invests directly in assets must have 90 percent of its assets be qualifying OZ Property. Qualifying property includes an investment into an OZ Business. An OZ Business only needs to have "Substantially all" of its tangible assets consist of qualifying OZ Property. The Proposed Regulations define, for this purpose only, "substantially all" as 70 percent of the OZ Business' tangible assets. This is critical in allowing investors in non-real estate businesses to take advantage of the opportunity zone benefits. The Proposed Regulations provide alternative methods for determining compliance with the "substantially all" test, based either on the values in an applicable financial statement of the OZ business, or, if the business does not have an applicable

financial statement, applying the methodology used by its Fund investors (who hold at least 5 percent of the OZ business) for determining their compliance with the 90 percent asset test.

- **The OZ Fund Can Borrow Money.** The Proposed Regulations provide that deemed contributions of money derived from a partner's share of partnership debt do not create a separate, non-qualifying investment in the OZ Fund. There had been concern that the proportion of the investment relating to money borrowed by the Fund would result in a non-qualifying investment. The Proposed Regulations do indicate that Treasury is considering an anti-abuse rule for investments that may be considered abusive. In addition, the Proposed Regulations imply that partners in OZ Funds do get outside basis for amounts borrowed by the OZ Fund, thereby potentially permitting the investors to take advantage of OZ Fund losses.
- **"Gains" are Limited to Gains Treated as Capital Gain.** Treasury has specifically limited the OZ Fund benefits to gain that "is treated as a capital gain" for Federal income tax purposes. Although this provision could have been clarified better, we think that "treated as a capital gain" is intended to include Section 1231 gains (special rules apply gains from hedging/straddles).
- **Special Allocations are Permitted.** Investors must receive an equity interest in an OZ Fund. For OZ Funds organized as partnerships, the Proposed Regulations specifically permit special allocations. Depending on whether additional limits are placed on special allocations, this may permit a certain amount of "carried interest" to be paired with an equity investment for OZ Fund service providers.
- **Early Disposition of OZ Fund interest.** If an OZ Fund investor sells all of its interest in an OZ Fund before the end of deferral in 2026, the OZ Fund investor can maintain the original gain deferral by reinvesting the proceeds into a new OZ Fund within 180 days. This allows an investor to get out of a bad deal without losing the deferral benefits. Note that the Proposed Regulations specifically deferred until future Regulations issues involved when the OZ fund itself sells OZ Fund property. These issues include what a "reasonable period of time" is for the OZ Fund to reinvest in qualifying assets and what the potential income tax consequences to the Fund and its investors of such a sale of OZ Fund property by the OZ Fund.
- **Valuation of Assets for Purposes of the 90% Test.** For purposes of determining whether a Fund holds 90 percent of its assets in qualified opportunity zone property, the Proposed Regulations require the Fund to use asset values reported on an applicable financial statement of the Fund. Applicable financial statements are prepared in accordance with U.S. GAAP and either: (1) filed with a federal agency besides the IRS (which includes the SEC); or (2) are audited and used to make decisions by the taxpayer. If a Fund does not have an applicable financial statement, the Fund must use its cost in acquiring the assets for the calculation. Treasury is seeking comments as to whether adjusted basis or another valuation method is a better measurement than cost.
- **90% Asset Test Testing Dates.** The Proposed Regulations provide for the possibility that an OZ Fund formed late in the taxable year could have to fully comply with the asset tests by the end of that year. The law requires that an Oz Fund invest 90 percent of its assets in qualified opportunity zone business property, measured as the average of two Testing Dates. The first testing date is the last day of the 6th month following formation, and the second Testing Date is the last day of the taxable year. For example, if a calendar-year fund selects April as its first month as an OZ Fund, then its first testing dates are the end of September and the end of December. However, if a Fund is formed in the last half of the taxable year, then it will have only one testing date, which may be soon after formation. This creates the possibility that an OZ Fund formed in December only has until the end of December to fully comply. We are hoping that the final Regulations will provide more time for the OZ Fund to initially comply.
- **Limited Liability Companies (LLCs) Can Be OZ Funds.** So long as the LLC is taxed as a partnership or a corporation, an LLC can be an OZ Fund.

The Proposed Regulations are generally favorable to investors, and so we expect that Opportunity

Zone investments will really take off. Based on the 70 percent “substantially all” rule for OZ Businesses, we expect that Opportunity Zone investments will not be limited to real estate investors. In addition, we think Opportunity Zone investments are more likely to be structured with OZ Funds owning OZ businesses rather than the OZ Fund owning assets directly, because of the working capital safe harbor, the substantially all test, and the testing dates for OZ Funds.

Polsinelli PC

by Korb Maxwell, Jeffrey A. Goldman & S. Patrick O’Bryan

Saturday, October 20, 2018

Update on Qualified Opportunity Zones: First Set of Guidance Issued: Ballard Spahr

Ballard Spahr to hold webinar on November 1, 2018

The Tax Cuts and Jobs Act introduced a new tax-incentive program known as Qualified Opportunity Zones (QOZs). In 2018, governors of all 50 states, the District of Columbia, and the five U.S. possessions designated more than 8,700 QOZs. The program’s benefits include gain deferral and gain elimination for taxpayers who roll over capital gain into a Qualified Opportunity Fund (QOF).

Specifically, if an investor (1) recognizes capital gain, (2) invests cash in an amount equal to the capital gain in a QOF within 180 days of the date the gain is recognized, and (3) makes an election (on IRS Form 8949) to treat the investment as a QOZ investment, the investor is eligible for the QOZ tax benefits. These benefits include (1) deferral of tax on the rolled-over gain until the earlier of the date the investor sells its interest in the QOF or December 31, 2026, (2) 10% of the investor’s roll-over gain is eliminated if on or before December 31, 2026, the investor holds its interest in the QOF for at least five years and another 5% of the roll-over gain is eliminated if the investor holds its interest in the QOF on or before December 31, 2026, for a total of seven years (for a total gain elimination of 15%), and (3) if the investor holds its QOF interest for at least 10 years, the investor will pay no tax on any gain recognized when such QOF interest is sold. There is no tracing of funds to the proceeds of a sale that produces capital gain; the investor may obtain the cash from any source to invest an amount equal to the roll-over gain in a QOF. There are a variety of technical requirements a fund must satisfy to be a QOF. (See below and see our March 1, 2018, e-alert on qualified opportunity zones.)

Investors and promoters of QOFs have been anxiously awaiting guidance from the U.S. Department of the Treasury and the IRS on the issues raised by the statutory language creating this incentive program. On October 19, 2018, the first set of proposed regulations (Proposed Regulations) and a Revenue Ruling were released providing initial guidance on QOFs. At least two more proposed regulations packages are expected, one this year and one in the spring of 2019. The Proposed Regulations and Revenue Ruling address some of the important uncertainties necessary to implement this program, which is expected to stimulate a great deal of investment. Taxpayers may rely on the Revenue Ruling and taxpayers may rely on the Proposed Regulations—with certain limitations—before they are finalized.

INITIAL GUIDANCE

What type of gain may be rolled-over?

The Proposed Regulations clarify that only gain treated as capital gain may be rolled over into a QOF to obtain QOZ benefits. This includes long-term and short-term capital gain from the sale or exchange of a capital asset, gain that is treated as capital gain from the sale of a Section 1231 asset (depreciable property used in a trade or business held for more than one year and real property used in a trade or business held for more than one year other than dealer property, inventory and certain other exceptions), and "unrecaptured section 1250 gain" (the gain on real estate currently subject to tax at a 25% rate). To be eligible for QOZ benefits, cash (not property) in an amount equal to the gain must be contributed to a QOF within 180 days of when the capital gain is recognized. The Proposed Regulations also provide that, subject to certain rules, eligible capital gain will include capital gain a QOF investor recognizes on the sale of a QOF interest on or before December 31, 2026.

What types of taxpayers may roll over cash equal to capital gains they recognize into a QOF?

Individuals, partnerships, corporations (including S corporations, REITs, and RICs), trusts, and estates may roll over gain into a QOF and obtain the tax benefits of investing in a QOF with respect to gains realized on or before December 31, 2026. The Proposed Regulations clarify that either a partnership or its partners may roll over gain realized by the partnership. If the partnership rolls over the gain, the partnership has 180 days from the sale that produces the gain to roll over the gain. If the partnership opts not to roll over the gain, one or more of the partners may roll over their share of the gain. If a partner rolls over gain, the partner's 180-day period starts from the last day of the partnership's tax year or, if the partnership notifies the partners of the date of the sale, at the election of a partner rolling over the gain, the partner's 180-day period may start on the date of the partnership's sale. Similar rules apply to S corporations, trusts and estates, and their shareholders and beneficiaries.

When does the ability of an investor to take advantage of the 10-year benefit expire?

Once a QOF investor has held its QOF interest for at least 10 years, the QOF investor can sell that interest and pay no tax on any gain. But, to be a QOF, a fund—among other things—must be invested directly or indirectly in a QOZ, and all QOZs expire on December 31, 2028. Therefore, there was concern that a fund no longer could qualify as a QOF when the QOZs expire. The Proposed Regulations solve this problem by providing that a QOF investor pays no tax on the sale of a QOF interest if (1) the QOF investor rolls over capital gain into a QOF in a timely manner, (2) the investor holds its QOF interest for at least 10 years, and (3) the QOF investor disposes of its QOF interest no later than December 31, 2047.

How does a fund qualify as a QOF?

To be a QOF, an entity must be certified and must satisfy three tests: (1) it is organized as a corporation or partnership (the Organization Test), (2) it is an investment vehicle formed for the purpose of investing in QOZ Property (the Purpose Test), and (3) at least 90% of the entity's assets are invested in QOZ Property (the 90% Asset Test). QOZ Property is (a) an entity interest in a subsidiary partnership or corporation [1] that is a QOZ Business, or (b) QOZ Business Property. For each month that a QOF does not satisfy the 90% Asset Test, it would owe a penalty. The Proposed Regulations provide clarification about the certification process and each of the three elements required to qualify an entity as a QOF.

FAQs published by the IRS in July 2018 indicated that an entity could self-certify as to QOF status. The Proposed Regulations state that self-certification will be accomplished by filing Form 8996 with the tax return filed for the first taxable year the entity "wants" to be a QOF. A draft of Form 8996 and accompanying instructions were released simultaneously with the Proposed Regulations.

With respect to the requirement that a QOF be organized as a corporation or partnership, the Proposed Regulations state that a QOF must be a corporation or partnership for federal income tax purposes, thus clarifying that an entity formed as a limited liability company under state law but taxed as a partnership for federal income tax purposes is eligible for QOF status. Neither a QOF nor its subsidiary partnership can be a disregarded entity.

The Proposed Regulations place a special limitation on the Organization Test for a QOF formed under the laws of any one of the U.S. possessions (Puerto Rico, U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Marianas). Those entities may be a QOF only if organized for the purpose of investing in QOZ Property relating to a trade or business operated in that particular possession in which the entity is organized. This requirement is carried over to the definition of what investments in stock or partnership interests will be QOZ Property. A QOF formed under the laws of one of the 50 states or District of Columbia cannot treat as QOZ Property the acquisition of corporate stock or a partnership interest in a corporation or partnership formed under the laws of a possession. This limitation apparently reflects the IRS interpretation of the definition of "domestic" corporation or partnership for purposes of the Opportunity Zone benefits. The possession limitations are highlighted in the draft instructions to Form 8996.

With respect to the Purpose Test, Form 8996 requires that the entity certify that, by the end of the first tax year of the QOF, its organizing documents include (1) a statement that the entity's purpose is to invest in QOZ property, and (2) a description of the qualified opportunity zone business or businesses in which the QOF expects to directly or indirectly engage. It is not clear how much detail is required as to the description of businesses in the organizing documents, but the draft Form 8996 seems to expand the statutory requirement.

The Proposed Regulations state that there is no legal barrier to an existing entity filing Form 8996 to become a QOF—as long as the other requirements are met. Thus, an existing partnership or corporation could seek new cash equity infusions that would qualify for QOZ benefits, which likely would require amending the existing entity's organizing documents to substantiate the Purpose Test. This would mean that the existing entity would need to bifurcate the new qualifying investments from any prior investments for purposes of measuring the 90% Asset Test and for purposes of passing on the capital gains relief.

In self-certifying, the QOF also will specify on Form 8996 the first month of the initial year in which it wants to be a QOF. This date will be relevant not only for purposes of determining whether a qualifying investment has been made, but also for purposes of measuring the 90% Asset Test. Failure to identify the first month on Form 8996 will result in the IRS treating the first month of the entity's taxable year as the first month the entity intends to be a QOF.

As to the third requirement, the Initial Guidance describes how to establish the dates for measuring the 90% Asset Test and how QOZ investments are valued. The 90% Asset Test is based on the average of the QOF's assets on two snapshot dates: the last day of the first six months of a QOF's tax year and the last day of a QOF's tax year. (If a QOF has less than six months in its initial tax year, the only relevant date is the last day of its tax year.) The Proposed Regulations provide that—for purposes of determining if a QOF satisfies the 90% Asset Test—if the QOF prepares financial statements filed with the Securities and Exchange Commission or with a federal agency other than the IRS—or has certified audited financial statements that are prepared in accordance with Generally Accepted Accounting Principles (U.S. GAAP)—then the value of the assets reported on such financial statements are to be used for valuation of the QOF's assets. In other cases, the QOF's cost basis of the assets on the date of acquisition by the QOF is to be used. The Proposed

Regulations also include special rules to permit a QOF to use the most favorable valuation method for a subsidiary that is a QOZ Business that is owned by multiple QOFs.

How are the terms QOZ Business Property and QOZ Business defined?

There are different requirements regarding the types of assets a QOF can own and operate directly and the types of assets a QOF's subsidiary can own and operate. The Proposed Regulations provide relatively little guidance on this aspect, reserving these issues for subsequent guidance. As discussed above, to be a QOF, 90% of a fund's assets must be composed of (1) interests in one or more corporate or partnership subsidiaries that qualify as QOZ Businesses and/or (2) QOZ Business Property. For a QOF's subsidiary to be a QOZ Business, substantially all (at least 70%, as defined in the Proposed Regulations) of its tangible property must be QOZ Business Property, it must not be a "sin business" (golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack, or other facility used for gambling, or any store the principal purpose of which is the sale of alcoholic beverages for off-premises consumption), no more than 5% of its assets can be nonqualified financial assets (e.g. cash, stock, bonds, partnership interests, and options etc.), a substantial portion of its intangible assets must be used in the active conduct of its trade or business, and at least 50% of its gross income must be from the active conduct of a trade or business within the QOZ.

QOZ Business Property is property (1) purchased by a QOF or a subsidiary of a QOF (that is a QOZ Business) from an unrelated person (related means more than 20% common ownership) after December 31, 2017, [2] (2)(i) the original use of which in the QOZ commences with the QOF or its subsidiary (that is a QOZ Business) or (ii) the QOF or its subsidiary (that is a QOZ Business) substantially improves such property, and (3) substantially all of the use of such property is in a QOZ during substantially all of the time it is held by the QOF or the QOF's subsidiary (that is a QOZ Business).

Property is substantially improved if during any 30-month period during which it is owned by a QOF or its subsidiary, the QOF or its subsidiary essentially spends at least as much to improve the property as it spent to buy the property. The Revenue Ruling provides a taxpayer friendly rule applicable to a QOF or subsidiary of a QOF that buys land and improvements—that is for purposes of determining whether such land and improvements are substantially improved, the cost of the land is not included. For example, if a QOF's subsidiary buys land and a building for \$100—\$60 of which is allocable to the land and \$40 of which is allocable to the building—the subsidiary is only required to spend \$40 to satisfy the substantial improvement test. But, the land nevertheless remains in the numerator (assuming it was acquired from an unrelated person after 2017) to determine if substantially all (at least 70%) of the subsidiary's assets are QOZ Business Property. As a result, to determine if at least 70% of the QOF subsidiary's assets are QOZ Business Property in the prior example, the \$60 allocable to the land is treated as QOZ Business Property. The Revenue Ruling does not address what constitutes a substantial improvement if the purchased asset is vacant land.

There are advantages and disadvantages if a QOF invests in a QOZ through a subsidiary QOZ Business, as opposed to investing directly. The advantages include that only 70% of the tangible assets of a QOZ Business must be QOZ Business Property, whereas a greater percentage (up to 90%) may be required if the QOF invests directly in QOZ Business Property. Also, a subsidiary QOZ Business can hold more working capital than can a QOF (see below). There also are certain disadvantages if a QOF invests in a QOZ through a subsidiary QOZ Business as opposed to directly. In contrast to a business conducted by a QOF itself, a subsidiary QOZ Business cannot be a sin business, 50% of such subsidiary QOZ Business' gross income must be from the active conduct of a trade or business, a substantial portion of the subsidiary QOZ Business' intangible assets must be used in the active conduct of its trade or business, and less than 5% of its assets can be nonqualified financial assets.

<u>What does "substantially all" mean?</u>

There are a variety of places where the QOZ rules use the term "substantially all." One such place is in one of the requirements that a partnership or corporate subsidiary of a QOF must satisfy to qualify as a QOZ Business—i.e., that "substantially all" of the subsidiary's tangible assets (owned or leased) must be QOZ Business Property. The Proposed Regulations explain that substantially all for this purpose means 70%. The meaning of substantially all for other QOZ purposes remains undefined.

<u>Can a QOF or its subsidiary hold working capital and for how long?</u>

Unfortunately, the Proposed Regulations do not provide that a QOF can hold working capital as part of the assets that meet the 90% Asset Test. However, the Proposed Regulations establish a safe harbor for reasonable amounts of working capital that a QOF's Subsidiary (a QOZ Business) can hold. This safe harbor provides a QOF's subsidiary with greater flexibility to qualify as a QOZ Business as its property or business is being developed. In fact, the Proposed Regulations specify that reasonable working capital may be held by a QOF's subsidiary (a QOZ Business) if (1) the working capital amount is designated in writing for the acquisition, construction and/or substantial improvement of tangible property in a QOZ, (2) there is a written schedule consistent with the ordinary start-up of a trade or business for the expenditure of the working capital, (3) the working capital is spent within 31 months of receipt of such funds, and (4) the working capital actually is used in a manner that is "substantially consistent" with the first three requirements. It is unclear how much specificity must be included on the written schedule as to the actual property or business to be conducted by the QOZ Business.

Likewise, the Proposed Regulations provide that working capital that fits within the safe harbor also counts toward satisfying the 50% gross income test and the intangible property test that the QOZ Business must meet and clarifies that tangible property satisfies the QOZ Business requirements even while working capital is still being expended.

<u>What are other interesting aspects of the Proposed Regulations?</u>

Carried Interest

The Proposed Regulations make clear that an interest in a QOF may include any equity interest in the QOF, including preferred stock and a partnership interest with special allocations. As a result, it appears that if a promoter timely invests an amount equal to all or a portion of capital gain it recognized in a QOF that is a partnership and acquires an interest in the QOF, including its carried interest, its entire interest in the QOF (including the carried interest) may be eligible for QOZ benefits.

Borrowing

The Proposed Regulations make clear that an investor can borrow against its QOF interest without interfering with the investor's QOZ benefits. However, the Proposed Regulations do not address whether a QOF that is a partnership can make debt financed distributions to a partner without the partner recognizing gain. The Proposed Regulations also clarify that debt incurred by a QOF that is a partnership or its subsidiary partnership that is a QOZ Business is not treated as an investment by the QOF's investors for purposes of determining how much capital gain has been rolled over or for purposes of determining if other than capital gains have been invested in the QOF.

Installment Sales

The QOZ law permits a taxpayer to obtain QOZ benefits if the taxpayer rolls over capital gain from a sale of property to an unrelated person and cash equal to the gain is invested in a QOF within 180 days of the sale. The Proposed Regulations explain that the 180 days begins on the day on which the gain would be recognized if the taxpayer did not make an election to defer the gain under the QOZ rules. This provision in the Proposed Regulations might open the door for a taxpayer who recognizes gain after December 31, 2017, from an installment sale that occurred before 2018 to roll over post-2017 gain from that installment sale into a QOF.

Attributes when roll-over gain is recognized

When all or a portion of the roll-over gain is recognized on the earlier of December 31, 2026, or when the investor disposes of its interest in the QOF, the gain will have the same attributes as the gain rolled over. For example, if the rolled-over gain is short-term capital gain, it will be short-term capital gain when it is recognized and, if all or a portion of the gain rolled over is "unrecaptured section 1250 gain" from the sale of real estate (gain currently subject to tax at a 25% rate), such gain will retain its character as unrecaptured section 1250 gain. The tax rates applicable at the time the roll-over gain ultimately is recognized will apply to that gain, not the rates applicable when such gain was realized and deferred. This presents additional return risk, as the applicable tax rates may be higher when the gain ultimately is recognized.

Issues not yet answered

Among the issues requiring further guidance:

- What constitutes the active conduct of a trade or business, particularly in the context of a QOF's subsidiary QOZ Business that owns real estate?
- What does original use in the QOZ mean?
- What transactions cause the deferral to end?
- What are the administrative rules and applicable penalties if a QOF fails to satisfy the 90% Asset Test?

The Proposed Regulations state that soon to be released proposed regulations will provide guidance on how long a QOF has to reinvest proceeds from a sale of one or more of its assets to continue the qualify as a QOF.

If you have any questions about investing in or forming and operating a QOF, please contact any member of Ballard Spahr's QOZ team.

Members of Ballard Spahr's QOZ Team will be presenting a seminar/webinar on QOZs addressing the Initial Guidance on **November 1, 2018, at 3:00 pm ET**.

[1] For this purpose, we are using the term subsidiary to mean an entity treated as a partnership or corporation in which the QOF has any direct ownership interest.

[2] Property will not qualify as a QOZ Business Property if it is contributed to—as opposed to purchased by—a QOF or a subsidiary of a QOF.

October 26, 2018

by members of the Qualified Opportunity Zones Team – Wendi L. Kotzen. Linda B. Schakel, Molly R. Bryson & Mark O. Norell

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Structuring Opportunity Zone Funds.

The Opportunity Zones Program created by the U.S. Tax Cut and Jobs Act of 2017 (the "OZone Program") and the first wave of proposed regulations issued by the Treasury Department on October 19, 2018 (the "Regulations") have been designed to generate economic activity in low-income urban and rural communities. Sullivan & Worcester's Opportunity Zones Practice Group has analyzed the OZone Program and Regulations and has successfully structured multiple Qualified Opportunity Funds ("QOFs") with an anticipated aggregate capital raise of nearly $600 million.

As we and our clients continue to develop innovative QOF structures, we will provide a series of advisories that highlight specific structuring elements that are consistent with the OZone Program and the Regulations.

Additional Time to Invest Capital Gains (October 26, 2018)

Under §1400Z-2(a)(1)(A), to be able to elect to defer capital gains, a taxpayer must generally invest in a QOF during the 180-day period beginning on the date of the sale or exchange giving rise to the capital gain. The Regulations, however, allow for flexible tax planning and provide the opportunity to make strategic decisions about the commencement and expiration of the 180-day investment period.

According to the Regulations, a partnership may elect to defer all or part of a capital gain to the extent it makes an eligible investment in a QOF. If the partnership itself makes an eligible investment in a QOF within the 180-day period following the transaction giving rise to the capital gain, the capital gain that is invested by the partnership in the QOF is not included in the net capital gain allocated to the partners under Code Sections 702 and 706.

If, however, the partnership chooses to not reinvest the gain in a QOF, then the capital gain will be included in the gain distributed on the partnership K-1 to its partners.

In turn, a separate 180-day investment period for the partners begins on the last day of the partnership's taxable year, which is the date when the partnership-level gain is treated as distributed to the partners under Code Section 706.

The Regulations then go one step further and add a feature that gives flexibility to the partners. If a partner knows that the partnership has recognized eligible gain on a sale or exchange to an unrelated party, and that the partnership has chosen to not make an eligible investment in a QOF, then the partner may treat his/her own 180-day period as being the same as the partnership's 180-day period.

Example:

Assume a partnership sells stock held for investment and recognizes capital gain on March 1, 2019. The partnership would have 180 days (i.e., until August 27, 2019) to invest the gain in a QOF. If the partnership elects to invest this gain in a QOF, the invested gain will not be included in capital gain distributed to its partners for the tax year. If the partnership chooses not to invest this gain in a

QOF, then the individual partners are permitted to invest their distributive share of the partnership gain in a QOF. Under these circumstances, the 180-day period would commence on December 31, 2019 (assuming the partnership is a calendar year taxpayer), and partners would have 180 days (i.e., until June 28, 2020) to make an eligible QOF investment.

If, however, a partner is aware that the partnership recognized the gain on March 1, 2019 and has made the decision not to invest in a QOF, such partner can decide whether to invest his/her distributive share of the partnership gain during the partnership's 180 day period (i.e., until August 27, 2019) or during the second 180-day period beginning on December 31, 2019 (i.e. until June 28, 2020).

Although it seems anomalous, it appears that the individual partner cannot make a qualifying investment related to the partnership gain during the period after August 27, 2019 and before December 31, 2019.

However, these rules provide exceptional flexibility in managing the 180-day investment period, especially when there is good communication between the partnership and its partners. At the extreme, gain recognized by a calendar-year partnership on January 1, 2019 could potentially be invested by an individual partner as late as June 28, 2020.

The Regulations state that rules analogous to the rules provided for partnerships and partners apply to other pass-through entities (including S corporations, decedents' estates, and trusts) and to their shareholders and beneficiaries. Comments are requested regarding whether taxpayers need additional details regarding analogous treatment for pass-through entities that are not partnerships.

Sullivan & Worcester

by Daniel Ryan

October 29, 2018

NABL: IRS Office of Chief Counsel Issues Memo Regarding the Use of Tax-Exempt Bonds to Advance Refund Taxable Bonds.

The Office of Chief Counsel of the Internal Revenue Service (IRS) has released a memorandum regarding the use of tax-exempt bonds to advance refund taxable bonds.

The memo, which is dated August 31, 2018, but which was released on October 26, 2018, applies to a particular transaction and sets forth a fact pattern in which tax-exempt bonds advance refund and cause a legal defeasance of tax-advantaged taxable bonds. Such legal defeasance caused an extinguishment of the tax-advantaged taxable bonds and a deemed new issue of non-tax-advantaged taxable bonds. The author of the memo states: "Section 149(d), as amended by § 13532 of the 2017 Act, does not preclude the issuance of tax-exempt bonds to advance refund non-tax-advantaged, taxable bonds under the facts described below. There will not be two sets of tax-advantaged bonds outstanding for the same project or activity." This means that tax-exempt bonds may be issued to advance refund tax-advantaged taxable bonds that are legally defeased in the advance refunding, because a legal defeasance of tax-advantaged taxable bonds results in the loss of their tax-advantaged status.

The memo does not discuss tax-advantaged taxable bonds that cannot be legally defeased.

The memorandum from the Office of Chief Counsel can be found here.

Background: As you may recall, NABL sent a letter to the IRS Office of Indian Tribal Governments/Tax Exempt Bonds (ITG/TEB) requesting written guidance that section 13532 of the 2017 Act does not preclude the issuance of tax-exempt bonds to advance refund taxable bonds. The NABL letter is available here.

TAX - CALIFORNIA

Glovis America, Inc. v. County of Ventura

Court of Appeal, Second District, Division 6, California - October 10, 2018 - Cal.Rptr.3d - 2018 WL 4907994 - 18 Cal. Daily Op. Serv. 10, 019 - 2018 Daily Journal D.A.R. 10, 074

Taxpayer filed complaint for refund of property taxes paid based on value of lease of federal lands.

The Superior Court sustained county's demurrer without leave to amend, and taxpayer appealed.

The Court of Appeal held that:

- Lease included option to extend;
- Lease amendment's removal of word "option" did not remove taxpayer's option to extend lease; and
- It was reasonable to assume taxpayer would exercise option to extend lease.

Taxpayer's lease of federal land included option to extend beyond five-year term such that assessor could consider option when valuing taxpayer's possessory interest, although U.S. Navy was required to approve lease extension and was able to terminate lease at will, where lease defined five-year term as initial lease term and explicitly gave taxpayer the exclusive right to lease Navy's property for two more five-year terms, and lease contained no language permitting the Navy to withdraw or revoke its offer.

Lease amendment's removal of word "option" did not remove taxpayer's option to extend term of possession of federal land, where taxpayer's five-year lease term remained the "initial" lease term, taxpayer retained exclusive right to extend lease another ten years, U.S. Navy could not revoke or withdraw its offer, exemption from contract term limits remained intact, and mechanism to determine the amount of future rent was substantively unchanged.

Evidence was sufficient to support assessor's finding that it was reasonable to assume taxpayer would exercise option to extend initial five year lease of federal lands for additional ten years as permitted by lease and thus to justify higher tax valuation; although U.S. Navy could terminate the lease at any time, Navy had renewed all previous leases, the parties had anticipated a long-term business relationship, current lease was not subject to the federal five-year contract term limit, and renegotiation terms implied an exemption from competitive bidding requirements.

Fall 2018 Property Tax and Valuation Digest: Pullman & Comley

In this Fall 2018 Issue:

- U.S. Supreme Court Internet Sales Tax Decision and Property Values
- Bulk Discount Not Available
- Appraiser's Credibility Rules
- Geese Attacks Don't Generate Assessment Reduction
- Dark Store Issue Makes It to the Ballot Box
- Allocation Argument Wins; Appeal Fails
- Visual Artists Rights Act Damages Awarded

Continue reading.

Pullman & Comley, LLC

October 24, 2018

Legal Alert: IRS Tells Utility Not To Count Its (Deferred Tax) Chickens Before They Hatch.

The affiliated group of which a taxpayer-utility was a wholly owned subsidiary filed tax returns on which it did not claim bonus depreciation since the availability of bonus depreciation had temporarily expired. Following the retroactive restoration of bonus depreciation,1 the affiliated group filed amended tax returns claiming refunds attributable to the increased depreciation deductions. In PLR 201842001 (Oct. 19, 2018), the Internal Revenue ruled that "in calculating the amount of the [accumulated deferred income taxes] under Section 1.167(l)-1(h)(1)(iii)" that are used to reduce rate base, the reserve "should only include amounts of tax that are actually deferred and amounts of zero-cost capital that are actually received." Thus, until the refunds were actually received, the deferred taxes attributable to the incremental depreciation deductions could not be used to reduce base.

Eversheds Sutherland Observation: PLR 201842001 is entirely consistent with prior rulings that provide that to the extent accelerated depreciation deductions contribute to a net operating loss, the deferred taxes related thereto may not be used to reduce rate base, consistent with the normalization rules, until the losses are realized. See, e.g., PLR 201709008 (normalization rules require that deferred taxes attributable to accelerated depreciation that are used to reduce rate base must be reduced by the deferred tax asset reflecting yet-unused net operating losses).

1 P.L. 113-295 (Tax increase Prevention Act of 2014); P.L. 114-113 (Protecting Americans from Tax Hikes (PATH) Act of 2015).

Eversheds Sutherland (US) LLP

October 24, 2018

Municipalities Can't Tax Internet Providers, Except When They Can.

Local governments are hurting from lost telecom franchise fees as the industry relies more and more on broadband, but cities can tax Internet providers and restore lost funds.

Mention the word “landline” to modern consumers, and you’ll likely get the same quizzical look as if you’d said “rotary phone.” As consumers shift almost uniformly to mobile phones and larger organizations rely on cable connections instead of DSL for their office “landlines,” the local income associated with telecom franchise fees has nosedived.

Adding to the complexity of the revenue issue is the Internet Tax Freedom Act (ITFA) of 1998, which prohibits taxing Internet usage – so, even though telecommunications companies are utilizing locally-owned phone lines to provide broadband Internet access to residents, localities can no longer tax the services being provided like they used to. However, creative minds have been working to find ways that accommodate the various federal statutes while still increasing revenue for local governments.

In recent months, cities have started to pass legislation allowing localities to tax Internet providers directly for using city right–of-ways (ROWs). It’s a highly technical loophole, but with broadband being at the forefront of the next major tax revolution, its one that your municipality may want to consider – and soon.

Cities That Tax Internet Providers

In 2016, for example, the Supreme Court of Oregon recently upheld the city of Eugene’s seven percent tax on Internet providers for utilizing city ROWs to deliver its broadband services. Its decision was based on the ambiguous language used by the Federal Communications Commission (FCC) – they determined that the provisions of the Cable Act can more precisely be read as limitations only on the cable franchising process and the terms that may be included in a cable franchise agreement.

In other words, local governments have every right to regulate the business activities that are being conducted within their territory, especially when the city’s ROWs are being used for those activities.

Oregon isn’t the only state to subject telecoms companies to such regulations. Even a decade ago in 2008, the U.S. Court of Appeals ruled in favor of Jefferson City, Missouri, that that cellular services provided through public ROWs, including those that are bundled with Internet data access charges, are subjected to a tax on telecommunications providers.

State Legislative Restrictions

Telecom companies are predictably against this type of emerging legislation. With more than 80 percent of their revenue being derived from broadband now, they do not want states or cities to be able to levy taxes on these services and are taking action to prevent such legislation.

Just this year, two legislatures in Texas passed bills that would prohibit local governments from enforcing telecom license fees, and more are surely in the works. The telecommunications industry has deep pockets and a vested interest in this issue – so time is of the essence for municipalities that want to take action.

These ongoing legal battles point toward a future in which telecoms companies are once again contributing more significantly to local government revenue. And the solutions to the issue of lost telecom revenue are realistic, viable and capable of being implemented; provided they are done correctly.

Cities wishing to enforce their own regulations for use of city ROWs should know that their efforts to do so must be artfully crafted and specifically tailored to withstand scrutiny under federal regulations and provisions under the Cable Act and the ITFA. While cable and telecommunications conglomerates are notorious and financially capable of mounting strong defenses of any efforts to enforce or expand the taxes levied upon them, they are not able to counter local governments' lawful efforts to implement such measures.

efficientgov.com

by Jonathan Gerth

October 26, 2018

About the Author
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Otero County Sues Law Firm Over Bonds.

ALBUQUERQUE, N.M. — The Otero County Board of Commissioners is suing a major Albuquerque-based law firm for legal malpractice, breach of fiduciary duty and breach of contract.

The county claimed in district court filings that Sutin, Thayer & Browne provided an inaccurate tax opinion when the firm served as the underwriter for a municipal bond sale in 2002. The bonds were sold by the county to raise money for what is now the Otero County Detention Center, which houses federal detainees and is privately operated.

Specifically, the county claims the law firm issued an opinion letter stating that interest on the bonds would be exempt from federal income tax for those who held the bonds. In 2016, according to the complaint, the Internal Revenue Service made the opposite determination: that the interest was indeed taxable income.

The county wrote in the filings that, "as a result of such negligence, Otero County incurred damages which include, but are not limited to, the costs of responding to the Internal Revenue Service audit, the cost of converting the interest on the bonds to a higher taxable rate as required by the IRS . . . the additional taxable interest costs incurred by the county . . . and such other damages as may be proved at trial."

Ben Thomas, president and CEO of Sutin, Thayer & Browne, denied the allegations and said he was confident the firm's attorneys had acted appropriately.

Daymon Ely, an attorney for the county and a state representative, said the county chose to file the lawsuit now because of issues surrounding the statute of limitations.

The IRS agency determined that the bond interest was taxable because, among other issues, the detention center is operated by the private contractor Management & Training Corp. in a "net profit agreement," according to what appears to be a partial version of an IRS letter included in the filings. Such a relationship results in "private business use" and makes the bonds ineligible for tax exemption, according to the letter.

Management & Training Corp. did not respond to a request for comment late Monday.

The county is seeking unspecified damages, fees, costs and expenses and interest.

The Albuquerque Journal

By Marie C. Baca

Monday, October 22nd, 2018 at 3:31pm

Opportunity Zones: Making Them Work for Minnesota.

Opportunity zones will be in the news over the next few months. Since opportunity zones have the potential to affect communities across the state, now is a good time to learn a little bit about what they are, how they might work, and what they may mean for Minnesota communities.

Opportunity zones were created in December of 2017 through a bipartisan effort to guide more investment into low-wealth communities.1 States may designate eligible census tracts as opportunity zones, and taxpayers with capital gains can defer paying taxes on those gains by investing in opportunity funds that support investments in the in opportunity zones. These funds can be used for activities including commercial real estate development, infrastructure, housing, and business development. If an investor stays in an opportunity fund, their capital gains taxes are reduced over time. Additionally, the investor does not pay any tax on the gains earned on the opportunity fund investment if they stay invested for ten years.

Driving private investment in low wealth communities is intended to ensure that places that have suffered from a lack on investment capital are able to benefit and grow. The State of Minnesota designated a range of census tracts as opportunity zones including both urban and rural communities following consultation with local governments.2 However, designating a census tract as an opportunity zone does not mean that any investment will happen in that tract. Decisions about where investment occurs will be based on the interests and needs of the investors. Areas that are attractive targets for investment are those that are likely to have the highest financial returns for investors. This has raised fears that opportunity zones could be an investment vehicle that encourages gentrification and displacement.3 Meanwhile disinvested rural areas are unlikely to attract investment without substantial mission focused effort and targeted efforts by local partners.

Continue reading.

North Star Policy Institute

By Margaret Kaplan | September 6, 2018

How Alabama Plans to Take Advantage of Opportunity Zones.

Alex Flachsbart credits his founding of Opportunity Alabama, a first-of-its-kind nonprofit dedicated to maximize the impact of the state’s Opportunity Zones, to “being a nerd.”

Last November, he used Ctrl-F to search the Tax Cuts and Jobs Act of 2017 for the term “low income.” In his search, he says, “I stumbled upon the Opportunity Zone program.”

“Opportunity Zones,” passed as part of the $1.5 trillion tax overhaul, were devised to attract capital to urban, suburban and rural areas where investment lagged after the Great Recession. It allows investors to avoid some taxes when they fund projects in designated zones.

This past Friday, the Treasury Department outlined new rules with the intent of giving investors confidence to pour billions of dollars into these economically distressed areas. It's estimated within community-development circles that these tax incentives could prompt $30 billion of investment across the country. Treasury Secretary Steve Mnuchin told The Hill he thinks it will draw $100 billion of investment into economically distressed areas.

It's the type of program that Flachsbart, an attorney, felt like Alabama had missed out on in the past.

"Alabama is utterly underserved when it comes to programs targeted toward low-income communities," he says. Flachsbart rattles off a list: the state has perennially found itself on the "underserved states list" for the New Markets Tax Credit program; only one organization received designation to apply to the New Markets Tax Credit program in the past decade; up until recently there were no strong statewide CDFIs (community development financial institutions) operating across Alabama.

He founded Opportunity Alabama to help build the state's "underdeveloped" community financing infrastructure, focusing on Opportunity Zones. "We saw this program as an opportunity to get something fundamentally right," Flachsbart says. "This could finally be our answer to how we can create sustainable funding mechanisms for our low-income communities — if done right."

Doing things right will be crucial so that Opportunity Zones truly benefit low-income areas. So far the program lacks clear "guard rails," which would help ensure that existing communities benefit from influxes of capital and are protected against displacement.

Analysts, like those at nonpartisan Urban Institute, have expressed concern that tax incentives could draw investors to finance projects with little benefit to existing residents, like luxury condos or hotels.

Flachsbart says that Opportunity Alabama will serve as an intermediary to facilitate investor access to all potential projects in Alabama's 158 opportunity zones. "We're working with every project that comes through the door, whether that be a five-star hotel or a community facility providing daycare services in a super rural area," he says.

After introducing "projects to investors and investors to projects," as Flachsbart says, the nonprofit will step back from negotiations and take on the role of independent data tracker. Opportunity Alabama is developing a system — which Flachsbart wants paired with every project in an opportunity zone — so the nonprofit can track its impact and, more broadly, the impact of the program on all of Alabama's low-income communities.

He also sees Opportunity Alabama's role as engaging incoming investors in community development strategies, whether that be hiring practices or partnerships with local organizations. Each zone, he knows, will have unique needs. While there's concern of gentrification and displacement spurred by Opportunity Zones, he points to rural areas of Alabama where the need for jobs is more urgent. "The key will be to engage all the right stakeholders of each community from the beginning," he says.

Given the state's lack of a framework for community development financing, much of the nonprofit's early work has gone to education and awareness around the program. The next step, according to Flachsbart, is working with communities to develop project promotion strategies, build a pipeline of investable projects across the state, and finally cultivate local and national funding networks.

"By the end of the year, I hope Alabama is the first state in the country with a real depth of knowledge in every county, how this works and how to harness this incentive to facilitate community development," Flachsbart says.

He's found a willing partner in Birmingham, a city with 24 opportunity zones. The city's government is creating the Birmingham Inclusive Growth Fund with the intent to attract investments in areas like the Innovation District, Civil Rights District and Fourth Avenue Business District.

While Opportunity Alabama will begin as an intermediary, Flachsbart envisions the nonprofit eventually raising its own capital to build a portfolio of impactful projects across the state.

For now, "we're building this plane while we're flying it," he says. "We're the only bespoke opportunity zone 501(c)(3) organization in the country. Anyone who wants to pattern this model is welcome to come steal from us."

NEXT CITY

BY EMILY NONKO | OCTOBER 24, 2018

A Texas Real Estate Developer Has a New Financing Trick. But the IRS Doesn't Buy It.

A real estate developer may have invented a creative twist in project financing—but that innovation is now mired in a tax dispute and litigation.

The trouble centers on the Statler Hotel on Commerce Street in downtown Dallas.

Decades after the Jackson Five and Frank Sinatra performed on its stage and long after it became perhaps the first building to pipe music into its elevators, the structure had fallen into disrepair. It sat vacant for 16 years, its insides rotting, at one point facing demolition as Dallas' mayor lobbied to raze it and replace it with a park.

Like many U.S. cities, Dallas has worked over the past decades to revitalize its emptied core, to coax businesses to open offices and developers to build residential spaces.

Aiming to spend money to make money, Dallas ramped up economic incentives to encourage development that might spark economic activity. Its first method—issuing bonds and using the proceeds to seed redevelopment projects—sputtered during the financial crisis. So the city revamped the program, says Denise Rappmund, a senior analyst with Moody's Investors Service, paying incentives for a queue of approved projects.

Today, Dallas' downtown is thriving. In that sense, the program worked. But the messiness of the Statler project highlights the vulnerability of public finance, as municipalities and states struggle to right lopsided balance sheets where liabilities dwarf revenues.

Centurion American Development Group, a Texas real estate developer, decided to capitalize on the city's incentives to renovate the Statler and attached and related properties, including the Old Dallas Central Library. In April 2014, Dallas gave the developer a credit of up to $46.5 million in "tax increment financing," or TIF, basically a property-tax rebate paid out over a set amount of time.

The project's scope expanded, and a $175 million undertaking grew into a $255 million one.

Centurion needed to finance the increased cost. What it came up with was apparently an innovation in municipal finance.

Centurion linked up with conduit issuer the Wisconsin Public Financing Authority, a governmental organization that since 2009 has helped others capitalize on tax advantages to finance quasipublic projects.

Through the investment bank Jefferies and the law firm Orrick, Herrington & Sutcliffe, Centurion assigned its TIF revenues to the Wisconsin authority—functionally selling them—which placed the resulting bonds with an investor. Centurion then received $26.5 million, for $41.5 million in future payments.

TIFs are lent as collateral all the time, but they've never been sold, according to the project's minority owner, Fiamma Statler, another Texas developer working on the project. "No one has ever taken their TIF and then sold it by way of muni bonds for cash now," says Fiamma's lawyer Gregory Ziegler of Macdonald Devin.

Developers would love to sell TIFs to get cash at a project's start, instead of suffering through years of negative cash flow, says Bob Dendy, founder of Elite Financial Management in Dallas, a money manager. "Bundling 'em up and selling them to somebody else at a discounted rate is unique, and may one day be considered ingenious," he tells Barron's.

Moody's rated the bonds Baa3, the lowest rung of investment-grade. The credit-rating agency didn't have anything to compare it to in its universe of credits because "we don't rate anything else exactly like it," says Moody's senior analyst Rappmund. "What's different about this was it's not the city's TIF issuing this debt—it's sort of derivative," she says.

The city of Dallas, in fact, was largely uninvolved.

The creativity initially sparked interest among other developers, Rappmund says, but none of them were as far along in development. That's important, because for the Statler bond to be paid, the property needed to be operating and generating revenue, with guests arriving and its restaurants humming.

At the time Moody's reviewed the bonds, the Statler renovation was roughly two-thirds complete.

The project deadline slid, from October 2016 to October 2017, and it opened unfinished. Another extension gave Centurion until this month to complete the project. Tenants moved in; the residences are now about 89% occupied. The Dallas Morning News now operates out of the Old Dallas Central Library. This April, D magazine named the hotel the "community impact deal of the year," saying it was not just an expensive historic renovation, but a "place to behold."

Then the Internal Revenue Service took a look at the project's financing. The agency warned the Wisconsin authority that the issuance "may fail one or more" tax code provisions. In July, the IRS determined that the interest wouldn't be tax exempt as advertised.

The IRS declined to comment, but those provisions include proceeds going to private use instead of public benefit.

The tax determination, says Dendy of Elite Financial Management, may mean that the buyer of the bonds overpaid by up to $10 million.

The Wisconsin authority is appealing the IRS determination. Andrew Phillips, its lawyer at von

Briesen & Roper, underscored that the PFA is simply a conduit, neither underwriting debt nor selling it, and that TIF revenues are unaffected by the IRS determination; the only thing it affects is what PFA pays in interest on the bonds.

But he told Barron's: "I'll be perfectly honest with you. I've intentionally made it my goal not to know about the Statler project…I just want to make sure PFA comes out of the other side of it."

In August 2017, the Dallas Morning News reported that the Securities and Exchange Commission was looking into the TIF sale, examining whether investors got full and accurate information and the proceeds were used as promised. The SEC and Centurion declined to comment on the investigation. Lawyers from Orrick, Herrington didn't return requests for comment.

In August, Fiamma sued Centurion in state court, accusing it of defrauding Dallas taxpayers by using TIF funds for its own benefit and "artificially marking up the cost of construction" to pocket the money, including "falsifying and manufacturing change orders showing phantom increases in the cost of construction."

Centurion's lawyer Gregory Shamoun said through a spokesperson, "The lawsuit has no merit and is without basis in law or fact. Centurion is confident that the city of Dallas will successfully defend against this frivolous lawsuit."

Fiamma owns 20% of the project, but was fired in early 2016 after objecting to using a construction company owned by Centurion CEO Mehrdad Moayedi. Fiamma founder and CEO Frank Zaccanelli says he didn't even know about the TIF sale. And, he says in the lawsuit, almost all of the proceeds flowed into an entity formed days earlier with no ties to the project except that it's also owned and managed by Moayedi.

"What should have been a shining example of how the public benefits from public-private partnership redevelopment projects," the lawsuit says, "has, sadly, proven only to be yet another dark chapter in the sordid tale of Dallas municipal public office corruption, further unjustly enriching yet another wealthy developer with the public's money at the expense of the taxpayers."

Representatives for Dallas declined to comment, but Ziegler, Fiamma's lawyer, says the city has no imminent plans to make the TIF payments. A Jefferies spokesperson declined to comment.

There may be more problems: Texas stipulates that TIF proceeds go to "project costs," like paying the architect or pouring concrete. But these were booked as a developer's fee, according to Fiamma's lawsuit, which may violate the agreement between Centurion and Dallas, the Texas tax code, or statements in the bond offering.

Ramifications reach beyond Texas. The TIFs ended up with an unidentified Wisconsin pension fund, the lawsuit says. Without the tax deduction, the fund could be out millions of dollars.

And for all of the effort to rejuvenate districts and stitch funding gaps, this deal may leave a hole in Dallas tax revenue, and carve a new one in a Wisconsin pension.

Innovative indeed.

Barron's

By Mary Childs

Oct. 19, 2018 5:26 p.m. ET

PRIVATE ACTIVITY BONDS - FEDERAL

[Scott v. Commissioner of Internal Revenue]

United States Tax Court - August 22, 2018 - T.C. Memo. 2018 - 1332018 WL 4031058 - 116 T.C.M. (CCH) 204

Whistleblower petitioned for redetermination of IRS's decision to deny his application for award for original information made to the Whistleblower Office. IRS moved for summary judgment.

The Tax Court held that whistleblower award was not warranted since the IRS made no adjustments and collected no proceeds.

Whistleblower was not entitled to an award for reporting certain tax-exempt bonds issued by a city's industrial development agency that he contended violated the general arbitrage yield restriction rules and thus constituted taxable private activity rules, where IRS examined the bonds issued by the agency and the examination was closed without any adjustments and there was no sufficient evidence that any proceeds were collected, as whistleblower merely proffered hearsay about IRS's alleged malfeasance in other similar cases, which, even if true, was not relevant to the present case.

TAX - TEXAS

[In re Occidental Chemical Corporation]

Supreme Court of Texas - October 12, 2018 - S.W.3d - 2018 WL 4939073

Owners of commercial piers that crossed county boundary petitioned for writ of mandamus to determine which county was authorized to assess ad valorem taxes.

The Supreme Court of Texas held that:

- Resolving issue was not dependent upon determination of questions of fact, as would have precluded original jurisdiction;
- Mandamus relief was necessary, and thus original jurisdiction was not precluded;
- Issue gave strong and special reason for exercise of original jurisdiction;
- Statute providing original jurisdiction to resolve issue did not violate prohibition on retroactive laws;
- As a matter of first impression, taxes were owed to county from which piers extended; and Owners were entitled to mandamus relief.

Determining counties' legal authority to assess ad valorem taxes on piers that crossed county boundary was not dependent upon determination of any doubtful question of fact, and thus Supreme Court was not precluded from exercising original jurisdiction over mandamus action; even if there were fact issues regarding how much tax was owed by pier owners, those issues were not required to be resolved and did not preclude Court from deciding to which county taxes were owed.

Mandamus relief was necessary as the only reasonably effective relief from double taxation imposed on owners of piers that crossed county boundary, and thus Supreme Court was not precluded from exercising original jurisdiction over owners' action to determine which county had authority to assess ad valorem taxes; owners had no remedy to double taxation except to pay under protest and wait for one county to obtain judgment that other must refund taxes, which neither county had shown pressing interest in achieving, as boundary dispute litigation had lasted for 46 years.

Issue of which county was authorized to assess ad valorem taxes on owners of piers that crossed county boundary presented questions of general public interest and called for speedy determination, which gave strong and special reason for Supreme Court's exercise of extraordinary original jurisdiction, and thus Supreme Court had jurisdiction over owners' mandamus action; even though issues involved only two counties and handful of taxpayers, counties litigated boundary dispute for 46 years and had been double taxing owners for ten years, owners were unable to join counties' action against each other regarding boundary dispute, and counties' blatant double taxation was unprecedented.

Statute providing Supreme Court with original jurisdiction to resolve which county had authority to assess ad valorem taxes on piers that crossed county boundary did not violate state constitution's prohibition on retroactive laws, despite contention that county had vested right to continue litigating boundary dispute in district court; vested-rights test was no longer proper test, statute was jurisdictional, which did not take away substantive rights, and substituting original proceeding in Supreme Court for later review on appeal was not unconstitutionally retroactive.

Ad valorem taxes owed by owners of commercial piers, which extended from land of one county into waters of another county, were due to land county, rather than water county; water county could not practically render services such as fire and police protection to piers, while land county could easily access piers from land, water county could do little, if anything, to improve value of piers or provide public conveniences, as land county could, and right to construct piers sprung from ownership of land bordering shore, rather than submerged lands.

Owners of piers that were subject to double taxation from two counties assessing ad valorem taxes were entitled to mandamus relief, despite contention that county that was not entitled to assess taxes acted in reliance on valid statutes requiring assessment of taxes, which allegedly made taxation a mistake, rather than an ultra vires act correctable by mandamus; tax statutes did not provide county legal authority to assess and retain taxes on piers.

Learning from Opportunity Zones: How to Improve Place-Based Policies.

Congress created Opportunity Zones to funnel investment to economically distressed neighborhoods, in its 2017 tax bill. Opportunity Zones offer favorable capital gains treatment for taxpayers who invest in designated low-income communities. While the program was intended to target distressed areas, eligibility was broad—57 percent of all neighborhoods in America qualified—and not all were truly distressed. State governments, which had broad discretion to select from qualifying areas, faced a conflict between selecting deeply distressed areas versus already improving or gentrifying areas that were more likely to provide tax benefits to investors.

We now have a complete list of all areas designated as Opportunity Zones. Some are areas clearly in distress. Others, not so much. That's a problem for the program's impact; poor geographic targeting reduces the impact of the program and limits the benefits that accrue to poor residents. While federal criteria helped direct state's choices to relatively disadvantaged places, in some cases states sought loopholes or picked places that did not need the help. And regulations released in October 2018 allow as much as 30 percent of Opportunity Zone funds to be invested outside of qualified Zones.

As one illustration, some neighborhoods were eligible to be picked as Opportunity Zones because they are college towns, with large numbers of students that make the neighborhood appear poor, even when clearly not disadvantaged. Dozens of neighborhoods that weren't poor but had many college or graduate students were picked.

Continue reading.

The Brookings Institute

by Hilary Gelfond and Adam Looney

Friday, October 19, 2018

'Opportunity Zones' Rules Help Bring Program Into Sharper Focus.

Proponents of the initiative believe it could attract billions of dollars of new investment to struggling communities.

Rules for the Opportunity Zones program issued by the U.S. Treasury Department on Friday provided substantial new insights into how the recently launched economic development initiative will work, but also leave a number of significant questions unanswered.

The proposed rules focus on two broad areas: the establishment and operation of the special funds that can make investments through the program, and the tax breaks for capital gains that individual taxpayers and companies funnel into those funds.

Proponents of the program have high hopes for the sums of money that it could attract in the years ahead to businesses and real estate projects in struggling communities across the U.S.

"We anticipate that $100 billion in private capital will be dedicated towards creating jobs and economic development in Opportunity Zones," Secretary Steve Mnuchin said about the program, which was created as part of last year's massive federal tax overhaul.

Senior Treasury Department officials said during a conference call with reporters on Friday that the draft guidelines should provide enough information for so-called Opportunity Funds to confidently begin operating, and for taxpayers to invest in them.

Treasury expects to issue a second round of guidance before the end of the year. One of the officials on Friday's call said they anticipate that the draft rules issued this week could be finalized by spring, following a 60-day public comment period.

Steve Glickman, founder and CEO of Develop LLC, an advisory firm for Opportunity Zones investors, said he expects that the first round of rules will help to get more real estate investors off the program's sidelines. "They've been waiting for these regs," he noted.

But the big money that could flow toward the program, according to Glickman, is sitting with major institutional wealth managers, who generally handle investments for entities like endowments, commercial banks, pension funds, and insurance companies.

"They're not going to invest until they feel like they've got as much regulatory clarity as is feasibly possible," he said. "They're going to continue to wait."

A basic but important issue that the proposed rules clarify is that only capital gains, from the sale of assets like stock, are eligible for the tax breaks afforded under the program.

Taxpayers who qualify to make investments include individuals, corporations, partnerships, regulated investment firms, real estate investment trusts, and estates and trusts.

Investments through the program can't be issued as debt. They have to be equity investments, like stock or a partnership stake in a business.

Route Fifty

By Bill Lucia,
Senior Reporter

OCTOBER 19, 2018

Opportunity Zones: Government Issues Proposed Regulations - Shearman & Sterling

On Friday, October 19, 2018, the Treasury Department and the Internal Revenue Service issued highly-anticipated proposed regulations regarding "Qualified Opportunity Zones." The Qualified Opportunity Zone regime was introduced as part of the Tax Cuts and Jobs Act of 2017 to encourage private investment in distressed communities.[1] Under the regime, investors that wish to defer capital gains recognized upon a sale or exchange of an asset to an unrelated party (and to derive other tax benefits) can invest that gain in a Qualified Opportunity Fund, which in turn invests in so-called "Qualified Opportunity Zone Property." Since its enactment, industry participants have been awaiting the release of additional guidance to address many of the uncertainties regarding the application and implementation of the regime, particularly regarding how an entity will qualify as a Qualified Opportunity Fund and timing for investing capital gains into such funds. This note provides a detailed analysis of the most important clarifications and changes made by the proposed regulations and identifies certain key issues which still require guidance.[1]

Part I – Background

Included among the many significant changes contained in the Tax Cuts and Jobs Act of 2017 (the "Act") was the establishment of a new tax regime relating to qualified opportunity zones ("QOZs") under Sections 1400Z-1 and 1400Z-2 of the Internal Revenue Code of 1986, as amended (the "Code"), to encourage private investment in distressed communities throughout the United States. Under that regime, and as described in greater detail below, investors that wish to defer capital gains recognized upon a sale or exchange of an asset to an unrelated party on or prior to Dec. 31, 2026 can invest that gain in a Qualified Opportunity Fund ("QOF"), which in turn invests in so-called "qualified opportunity zone property."

Each individual State, possession of the United States and the District of Columbia was permitted to nominate as QOZs a certain number of census tracts that qualify as "low income communities" as such term is defined under Code Section 45D(e). To date each State, possession and the District of Columbia has identified the permitted number of QOZs. The designated QOZs can be found here (https://www.cdfifund.gov/Pages/Opportunity-Zones.aspx) and are not subject to change.

The Act provided the framework for the QOF program, but practitioners and industry participants have recognized that guidance from the Treasury Department ("Treasury") and the Internal Revenue

Service (“IRS”) would be critical to making the QOZ regime usable in the manner Congress had intended. Many interested parties submitted comments on the QOZ regime to the government and on Friday, Oct. 19, 2018, highly-anticipated proposed regulations (the “Regulations”) on the QOZ regime were issued.

The Regulations demonstrate that Treasury and IRS are being responsive to the comments they received and are showing a thoughtful approach to the issues raised. Nevertheless, the government indicated that additional guidance (including another round of proposed regulations) will be forthcoming as the Regulations did not address all of the significant issues that have been identified. The government also highlighted in the preamble to the Regulations areas where they are soliciting additional comments.

The question now becomes: what do the Regulations and related guidance mean for the implementation of the QOZ regime and the formation of and investment in QOFs? It is clear from the guidance that Treasury intends for taxpayers and fund sponsors to start taking advantage of the QOF program. Although the Regulations will not be effective until published in final form, the government confirmed that the Regulations generally may be relied upon currently if applied consistently. Many QOF sponsors and potential investors were awaiting guidance (in the form of the Regulations) prior to investing in or launching QOFs, as applicable. With the current round of guidance, our expectation is that sponsors and investors generally will feel comfortable moving forward on their QOF offerings and investments, notwithstanding that many key issues remain unresolved.

Part II – Eligibility for Investors to Receive QOZ Tax Benefits

As described in detail below, the benefits of the QOZ regime are generally available when an “eligible taxpayer” invests “eligible gain” into a QOF within 180 days of the recognition of such gain.

Eligible Taxpayers

The benefits of the QOZ regime generally are available to eligible taxpayers that invest in a QOF in a manner that satisfies all of the requirements of the QOZ regime and make what is referred to as a “gain-deferral election.”

Important Clarification

- The Regulations clarify that the benefits of the QOZ regime are available to any “eligible taxpayer,” which is defined to include any taxpayer that recognizes capital gain for federal income tax purposes (including individuals, C corporations (including RICs and REITs), partnerships, and certain other pass-through entities).
- The Regulations provide rules that permit a partnership to get the benefits of the QOZ regime by investing eligible gains and, to the extent that the partnership does not do so, provide rules that allow a partner to invest such partner’s share of eligible gains not invested in a QOF by the partnership into a QOF.
- Specifically, if all or any portion of a partner’s distributive share of a partnership’s capital gain satisfies the rules for QOF investment eligibility (including not arising from a sale or exchange with a person that is a “related person” with respect to either the partnership or the partner),[2] the partner generally may make a gain-deferral election with respect to an eligible investment of such capital gain in a QOF.[3]
- The Regulations state that rules analogous to the rules provided for partnerships and partners apply to other pass-through entities (including S corporations, decedents’ estates, and trusts) and to their shareholders and beneficiaries.

Eligible Gains

Gain is treated as "eligible gain" for purposes of the QOF program if it satisfies the following requirements:

- the gain must be treated as capital gain for federal income tax purposes,
- the gain must be gain that would otherwise be recognized no later than Dec. 31, 2026, and
- the gain must not be recognized as a result of a sale or exchange engaged in by the taxpayer with a related person.

Important Clarifications

- The Regulations clarify that QOZ tax benefits are available only with respect to the investment of capital gains. Thus, ordinary income (including as a result of depreciation recapture) is ineligible to receive the benefits of the regime.
- The Regulations provide that where a taxpayer recognizes a single capital gain, it may invest different parts of such gain into different QOFs and make the gain-deferral election with respect to each such investment.
- Special rules are provided that may limit the ability of taxpayers to make the gain-deferral election with respect to the investment of gains from "section 1256 contracts."

The 180-Day Investment Period

A taxpayer's investment of "eligible gains" into a QOF must be made within the 180-day period beginning on the date of the transactions or events giving rise to the gain.

Important Clarifications

- The Regulations provide that the first day of the 180-day period generally is the date on which the gain would be recognized for tax purposes (determined without regard to the gain-deferral election).
- For example, where publicly-traded stock is sold at a gain in a regular-way trade on an exchange, the 180-day investment period begins on the trade date for such sale (i.e., the date on which such gain would otherwise be recognized).
- However, in the case of a partner investing its distributive share of partnership gains into a QOF, the partner's 180-day investment period generally begins on the last day of the partnership's taxable year, but the partner may choose to begin its own 180-day investment period on the same date as the start of the partnership's 180-day investment period where the partner knows (or receives information) regarding both the date of the partnership's gain and the partnership's decision not to elect deferral under the QOZ regime.

Investment of Amounts in Excess of Eligible Gain

If an investor makes an investment in a QOF in excess of its eligible gains, its investment in the QOF is treated as two separate investments: one investment relating to its recent sales or exchanges, which may qualify for the QOZ tax benefits; and a separate investment, consisting of the excess amount, which will not qualify for those tax benefits (even if the investor holds its QOF interest for at least 10 years).

Important Clarification

- The Regulations clarify that, where the QOF is a partnership, a deemed contribution of money resulting from an allocation of QOF-level liabilities under Section 752(a) of the Code does not constitute an investment in the QOF. As a result, such a deemed contribution does not result in the partner having a separate, non-qualifying investment in the QOF.

Special Rule for Offsetting-Position Transactions

The Regulations provide that any capital gain from a position that is or has been part of an "offsetting-positions transaction" is not eligible to receive QOZ tax benefits upon investment in a QOF. For this purpose, an "offsetting-positions transaction" means (i) any straddle and (ii) any other transaction in which a taxpayer has substantially diminished its risk of loss from holding one position with respect to personal property by holding one or more other positions with respect to personal property (whether or not of the same kind), regardless of whether either of the positions is with respect to actively traded personal property.

How to Elect QOZ Gain Deferral

The preamble to the Regulations indicates that a taxpayer will make the gain-deferral election on Form 8949 (Sales and Other Dispositions of Capital Assets) to be attached to its federal income tax return for the taxable year in which the gain would have been recognized if it had not been deferred. Revised instructions to Form 8949 are expected to be released shortly to prescribe the information that the taxpayer must provide to make the gain-deferral election.

Part III –Tax Benefits from Investing in QOFs

An investor may obtain three types of federal income tax benefits as a result of its investment in a QOF. These benefits, and the extent to which the Regulations clarify their availability and operation, are discussed below.

Deferral of Capital Gains

The first benefit of the QOZ regime is that an eligible taxpayer receives a temporary deferral of any eligible gains invested into a QOF so long as such gains are invested within the 180-day investment period and the taxpayer makes the gain-deferral election. The deferral of gain extends until the earlier of (i) the investor's disposition of its interest in the QOF, or (ii) Dec. 31, 2026.

Important Clarifications

- Under the Regulations, if a taxpayer acquires an interest in a QOF and makes a gain-deferral election in connection with such acquisition, and the taxpayer later sells its QOF interest, the taxpayer may further defer the recognition of the originally deferred gain (presumably as well as any subsequent appreciation in the original QOF interest) by investing such gain in a QOF within the 180-day investment period and making a gain-deferral election with respect to such new QOF investment. Continued deferral of the originally deferred gain upon the new QOF investment is permitted, however, only if the taxpayer has disposed of its entire investment in the original QOF.
- The Regulations provide that the tax attributes of deferred gain are preserved through the deferral period, such that the attributes of such deferred gain are taken into account when the gain is included. For example, if a taxpayer made a gain-deferral election with respect to the investment of short-term capital gain into a QOF, the deferred gain later recognized by the taxpayer on Dec. 31, 2026 (or, if earlier, the date of the sale of the taxpayer's QOF interest) will be short-term capital gain.
- The Regulations also address situations in which a taxpayer invests into a single QOF at different times and receives interests in such QOF with identical rights (i.e., fungible interests). In such a case, if the taxpayer later disposes of less than all of its interests in the QOF, the Regulations

require that the QOF interests disposed of be identified using a first-in, first-out (FIFO) method. Similarly, where a taxpayer acquires a QOF interest in a single purchase but with separate gains possessing different tax attributes, the Regulations provide that a pro-rata method must be used to determine the character, and any other attributes, of the gain recognized. Where the QOF is a corporation (e.g.¸ a REIT), these rules deviate from the normal rule permitting the specific identification of the shares being sold.
- The Regulations also confirm that a taxpayer's use of a QOF interest as collateral for a loan will not impair the eligibility of the taxpayer for gain deferral (and the other QOZ regime tax benefits) so long as the taxpayer remains the owner of such interest for federal income tax purposes.

Elimination of a Portion of Deferred Gains Upon Fifth and Seventh Anniversaries

The second benefit of the QOZ regime is that up to 15 percent of the gains invested in a QOF can be eliminated, depending on the investor's holding period with respect to its interest in the QOF. If an investor holds its QOF interest for at least five years, the tax basis of the QOF interest is increased on the fifth anniversary of the investment by ten percent of the amount of gain initially invested in the QOF. If an investor holds its QOF interest for at least seven years, the tax basis of the QOF interest is increased on the seventh anniversary of the investment by an additional five percent of the amount of gain initially invested in the QOF. The Regulations did not clarify or otherwise modify the rules relating to the gain elimination occurring on the fifth and seventh anniversaries of the investment.

Unanswered Question

- It remains unclear whether, in a case where the fifth and/or seventh anniversary of a taxpayer's acquisition of an interest in a QOF occurs after Dec. 31, 2026, the taxpayer will still be entitled to the benefit of the basis step-up otherwise available when those anniversaries occur no later than Dec. 31, 2026. From a practical perspective, this will not be an issue for taxpayers investing in QOFs on or before Dec. 31, 2019.

No Gain upon Sale or Exchange of QOF Interest after the Tenth Anniversary of the Investment

The third benefit of the QOZ regime is that if an investor holds its interest in the QOF for 10 years or more, for purposes of determining the gain or loss the investor recognizes from the sale or exchange of such QOF interest, the investor may elect for the basis of such QOF interest to be equal to its fair market value on the date such QOF interest is sold or exchanged (the "FMV Basis Election"). As a result, the investor generally will not recognize gain and will not owe tax on the sale or exchange of its QOF interest 10 years or more after it acquired the QOF interest.

Important Clarification

- Under the Code, the designations of all QOZs now in existence will end on December 31, 2028. Taxpayers and practitioners had expressed concern that the termination of QOZ status could jeopardize the QOZ tax benefit for QOF interests sold after the 10-year holding period where such sales occur after 2028. The Regulations address this concern by permitting taxpayers to make the FMV Basis Election, even after QOZ designations expire, until Dec. 31, 2047. We note that the government has requested comments regarding whether this provision should provide even more flexibility to taxpayers, either by extending the Dec. 31, 2047 deadline for making the FMV Basis Election or by allowing QOF investors to receive the benefit of a FMV Basis Election without being required to sell their QOF interests by a particular date.

Unanswered Questions

- Where a QOF is a partnership, the FMV Basis Election will not always achieve Congress's intention of eliminating the taxable gain that would otherwise be realized upon the sale of the QOF interest after the tenth anniversary of its acquisition because the FMV Basis Election does not specifically take into account the fact that the taxpayer's "amount realized" for tax purposes would exceed the fair market value of such interest by virtue of the partnership's allocation of a portion of its liabilities to the taxpayer. If this issue is not addressed in subsequent guidance, a taxpayer may recognize significant amounts of gain upon its disposition of a QOF partnership interest, notwithstanding its FMV Basis Election.
- As currently drafted, the QOZ regime permits the FMV Basis Election only upon the sale of a QOF interest. The government received a number of comment letters requesting that the regime should allow taxpayers to benefit from the FMV Basis Election to avoid gain recognition when a QOF sells one or more underlying properties after the taxpayer has held the QOF interest for ten years. Such a change would make the regime more flexible and avoid the need to establish multiple QOFs to acquire separate properties that are unlikely to be sold together. The Regulations do not address this point, although it is possible that subsequent guidance will provide relief.
- Some commentators have suggested that a service provider could benefit from the FMV Basis Election when it sells its carried interest in the QOF (or a capital interest in the QOF acquired at least in part on account of services provided to the QOF), as long as the service provider acquired its original interest in the QOF in part by making a capital investment of eligible gain. In this regard, the Regulations confirm that an "eligible interest" includes a partnership interest "with special allocations." In the absence of guidance specifically addressing this issue, however, it is unclear whether a carried interest acquired by a service provider in exchange for both services and an investment of eligible gain would be treated in full as an eligible interest (or, instead, would be treated as two separate interests where only the portion of the interest acquired in exchange for the capital investment would qualify as an eligible interest).

Part IV – Qualification of an Entity as a Qualified Opportunity Fund

Types of Entities That May Be a QOF and Qualifying Investments in a QOF

Under the Code, a QOF must be "organized as a corporation or a partnership" for the purpose of investing in "qualified opportunity zone property" (which does not include interests in another QOF). A REIT may qualify as a QOF.[4]

Important Clarifications

- The Regulations clarify that any entity classified as a corporation or partnership for federal income tax purposes is eligible to be treated as a QOF. Thus, a QOF may be organized as a limited liability company.
- The Regulations provide that there is no prohibition on using a pre-existing entity as a QOF (or as a subsidiary entity operating a qualified opportunity zone business) so long as the pre-existing entity satisfies all of the requirements set forth in the Regulations. Nevertheless, even though an entity in existence prior to 2018 may qualify as a QOF, property acquired by such an entity prior to 2018 will not qualify as qualified opportunity zone property.
- The Regulations state that a QOF must be organized in one of the 50 States, the District of Columbia or, if the QOF is organized for the purpose of investing in qualified opportunity zone property that relates to a trade or business operated in U.S. possession, such U.S. possession.
- The Regulations clarify that only equity interests in a QOF (including preferred stock or a partnership interest with special allocations) may qualify for QOZ tax benefits. Thus, a debt instrument cannot be an eligible interest.

Satisfaction of the 90-Percent Asset Test by a QOF

In order to qualify as a QOF, an entity must hold at least 90 percent of its assets in "qualified opportunity zone property" ("QOZ property"). This test (the "90-Percent Asset Test") is applied by taking the average of the percentage of QOZ property held by the QOF (1) on the last day of the first six-month period of the taxable year of the QOF and (2) on the last day of the taxable year of the QOF.

Important Clarifications

For purposes of the 90-Percent Asset Test, the Regulations helpfully adopt a 31-month working capital safe harbor for QOF investments in QOZ businesses that acquire, construct, or rehabilitate tangible business property in a QOZ. The safe harbor allows a QOF, in determining whether a trade or business in which it has invested is a QOZ business, to treat the trade or business's cash, cash equivalents, and debt instruments with a term of 18 months or less as working capital that does not disqualify the trade or business from being a QOZ business so long as:

- there is a written plan that identifies the working capital as held for the acquisition, construction, or substantial improvement of tangible property in a QOZ,
- there is written schedule consistent with the ordinary start-up of a trade or business for the expenditure of the working capital assets within 31 months of the receipt by the business of the assets, and
- the business substantially complies with the schedule.

We think that the first two of these requirements should not impose significant additional obligations on QOFs or QOF sponsors and are consistent with business plans and construction schedules that are customary in construction projects. However, substantial compliance with the schedule is a point which may require additional guidance because developers may deviate from construction schedules due to events such as force majeure, contractor defaults and customary change orders. While we do not think that the intention was for these events to impact compliance, additional guidance would be useful and we expect comments to request clarification.

- In connection with the 31-month working capital safe harbor for certain financial property, the Regulations provide a much-needed safe harbor for tangible property of a QOZ business. If (i) a business utilizes the working capital safe harbor described directly above, (ii) the tangible property for which the working capital is dedicated is expected to satisfy the necessary requirements to be QOZ business property as a result of the planned expenditure of the working capital assets within the 31 months immediately after the working capital was acquired, and (iii) the working capital assets are actually used in a manner that is substantially consistent with the business's 31-month schedule, then that tangible property is treated as QOZ business property for purposes of determining whether the QOF's interest in the business is QOZ property.
- The Regulations address how the 90-Percent Asset Test is to be applied with respect to an entity's first year as a QOF if the entity elects to become a QOF beginning with a month other than the first month of its first taxable year. In such a case, the testing to be done for the first six-month period occurs at the end of the first six months during the year when the entity was a QOF. If an entity elects to be treated as a QOF beginning in a month after June, the only testing date for the first year of QOF treatment will be at the end of the Dec.
- For example, if a calendar-year entity that was created in January elects to begin treatment as a QOF in April, the first 90-Percent Asset Test testing date is at the end of Sept. (i.e., the end of the first six-month period during which it was treated as a QOF). (There would also be another testing date at the end of Dec.) This could be useful if the QOF would have trouble satisfying the 90-Percent Asset Test if the first testing date were earlier in the year. However, the treatment of the

entity in this case as a QOF would not begin until April so that any investment of gain in the QOF made during Jan., Feb. or March would not benefit from the QOZ regime.
- For purposes of the 90-Percent Asset Test, the Regulations require the QOF to use the asset values that are reported on its "applicable financial statement" for the taxable year.[5] If a QOF does not have an applicable financial statement, the Regulations require the QOF to use the cost of its assets. Presumably, the "cost" of an asset is its original acquisition price, and is not reduced by depreciation or otherwise adjusted.

Self-Certification as a QOF

To qualify as a QOF, the applicable entity will need to complete a self-certification form and attach that form to the entity's timely filed (taking extensions into account) federal income tax return for the taxable year. Thus, no pre-approval or action by the IRS is required.

Important Clarification

- Contemporaneous with the issuance of the Regulations, the IRS released Form 8996 (Qualified Opportunity Fund), as well as instructions to that form, to be used by QOFs both for initial self-certification and for annual reporting of compliance with the 90-Percent Asset Test. It is expected that Form 8996 will be attached to the QOF's federal income tax return for the relevant tax years.

Part V – QOZ Property

QOZ property means any of the following: (1) qualified opportunity zone business property ("QOZ business property;") (2) qualified opportunity zone stock ("QOZ stock;") and (3) qualified opportunity zone partnership interests ("QOZ partnership interests.") The rules and definitions relevant to determining what constitutes QOZ property are described directly below.

QOZ Business Property

QOZ business property is tangible property used in a trade or business of a QOF if (i) such property was acquired by the QOF by purchase from an unrelated party after Dec. 31, 2017, (ii) either the "original use" of such property in the QOZ commences with the QOF or the QOF "substantially improves the property" and (iii) during substantially all of the QOF's holding period for such property, substantially all of the use of such property was in a QOZ. Property shall be treated as substantially improved by the QOF only if, during any 30-month period after the QOF acquires such property, additions to basis with respect to such property in the hands of the QOF exceed an amount equal to the adjusted basis (in the hands of the QOF) of such property at the beginning of such 30-month period.

Important Clarifications

- The Regulations provide that in determining whether a building has been substantially improved, improvements are measured by the QOF's additions to the adjusted basis of the building itself, and not the land on which the building is located. Thus, if a QOF spends $200 to acquire land together with a building on the land, and $120 of the purchase price is allocated to the building and $80 is allocated to the land, the QOF will need to spend more than $120 (and not $200) to substantially improve the property.
- Contemporaneous with the issuance of the Regulations, the IRS released Revenue Ruling 2018-29, which addresses the application of the "original use" and "substantial improvement" requirements to land and structures that are acquired together by a QOF. Of particular importance, the ruling provides:

- The requirement that the original use of tangible property in the QOZ commence with a QOF is not applicable to land on which a building the QOF has acquired is located.
- While not explicitly stated, the ruling indicates that land will constitute a qualifying asset for purposes of the 90-Percent Asset Test as long as the QOF owning the land satisfies the original use or substantial improvement test for a building situated on the land.

QOZ Stock and QOZ Partnership Interests

QOZ stock and QOZ partnership interests are any equity interests issued to a QOF after Dec. 31, 2017, solely in exchange for cash, by an entity classified as a domestic corporation or partnership for federal tax purposes the only trade or business of which is (or will be) a qualified opportunity zone business ("QOZ business") (as described below). As of the time such interests are issued, the issuing partnership or corporation must either conduct a QOZ business or, in the case of a new partnership or corporation, must be organized for purposes of conducting a QOZ business. For the QOZ stock or QOZ partnership interest to retain this designation, the issuing entity needs to be an entity the only trade or business of which is a QOZ business for "substantially all" of the QOF's holding period for such equity interest. The Regulations do not provide any guidance on the meaning of "substantially all" of the QOF's holding period.

QOZ Business

An entity is a "QOZ business" if:

- substantially all of the tangible property owned or leased by such entity is QOZ business property (determined as if such owner were a QOF),
- such entity does not operate, or lease land to, any private or commercial golf course, country club, massage parlor, hot tub facility, suntan facility, racetrack or other facility used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises,
- at least 50 percent of the total gross income of such entity is derived from the active conduct of a trade or business in a single QOZ,
- a substantial portion of the intangible property of such entity is used in the active conduct of a trade or business in a single QOZ, and
- less than five percent of the average of the aggregate unadjusted bases of the property of such entity is attributable to "nonqualified financial property" (e.g., stock, partnership interests, options, futures contracts, forward contracts, warrants, notional principal contracts and annuities).

For purposes of determining whether an entity satisfies the requirements above, tangible property that ceases to be QOZ business property shall continue to be treated as QOZ business property until the earlier of:

- the five-year anniversary of the date on which such tangible property ceases to be so qualified, or
- the date on which such tangible property is no longer held by the entity.

Important Clarifications

- In determining whether an entity is a QOZ business, the Regulations provide that if at least 70 percent of the tangible property owned or leased by a trade or business is QOZ business property, then the business will be treated as satisfying the requirement that substantially all of its tangible property consist of QOZ business property. We note, however, that the Regulations did not adopt the same 70 percent standard for the many other uses of the phrase "substantially all" throughout the rules (which the government indicated would be addressed in future guidance).

- The requirements that (x) at least 50 percent of gross income must be derived from the active conduct of a trade or business in the QOZ, and (y) a substantial portion of the intangible property must be used in the active conduct of such trade or business, will be deemed satisfied during the 31-month start-up period if the only income of the business during that period is from working capital.

Part VI – What Comes Next for QOFs?

In issuing the Regulations, the government made clear that it is continuing to work on additional published guidance, including more proposed regulations to be issued in the "near future." The government indicated that it expects the forthcoming proposed regulations to address the following issues:

- the meaning of "substantially all" in each of the various places where it appears in the QOZ provisions (other than as provided above);
- the transactions that may trigger the inclusion of gain that has been deferred under a gain deferral election;
- the "reasonable period" for a QOF to reinvest proceeds from the sale of qualifying assets without paying a penalty;
- the administrative rules that apply when a QOF fails to maintain the 90-Percent Assets Test; and
- information reporting requirements relating to the QOZ regime.

The government also solicited comments with respect to numerous aspects of the Regulations, as well as other issues relating to QOFs and the QOZ regime. In the meantime, taxpayers generally may rely on the Regulations as long as they do so consistently.

As noted above, notably absent from the Regulations is additional guidance on whether a FMV Basis Election will be available when a QOF disposes of property (rather than the QOF investor selling its QOF interest). While it is possible that future guidance will provide more flexibility with respect to QOF dispositions, challenges continue to exist for using a single QOF to invest in multiple properties given the lack of relief on this issue. Also notable is that the Regulations did not provide relief from the apparent requirement that a QOF invest in property either directly or through first-tier investment entities (and thus the use of more than one level of regarded entities below a QOF to hold operating assets could potentially disqualify the QOF).

Given the scope of the guidance provided by the Regulations (and in particular the manner in which the Regulations addressed land and financial assets held by QOFs), we expect that what has been very keen interest in the QOF program will turn into actual QOF investments and QOZ projects under development. We expect that when investing in QOFs, sponsors and investors will rely on advice from legal and tax practitioners in analyzing the Regulations based on their specific circumstances.

Footnotes

[1] For a general overview of the Qualified Opportunity Zone regime, see our prior client publication dated May 14, 2018 entitled "Opportunity Zones: A Preliminary Examination" available at www.shearman.com.

[2] Throughout this memorandum, parties are "related" to each other if such parties have more than 20 percent common ultimate ownership, or one party directly or indirectly owns more than 20 percent of the equity interests of the other party.

[3] The partner's eligible investment of such capital gain must be made no more than 180 days after

the end of the partnership taxable year in which the capital gain was realized. QOFs cannot invest in other QOFs. Thus, under current Treasury guidance, the only way for a partner in a QOF to defer gains recognized by the QOF is to timely make an additional investment of such partner's own cash in that QOF, or another QOF, in either case within the applicable 180-day investment period and before the end of 2026.

[4] REIT status, as compared to partnership status, may result in state or local income tax benefits and may allow non-U.S. investors in the QOF to avoid tax return filing obligations. Furthermore, ordinary REIT dividends entitle shareholders that are U.S. domestic individuals to claim a 20 percent deduction under the Act through 2025.

[5] A taxpayer has an "applicable financial statement" if it has one of the following:

A financial statement that is required to be filed with the Securities and Exchange Commission (SEC);
A financial statement that the taxpayer is required to provide to a federal agency other than the IRS; or
A certified audited financial statement that the taxpayer provides to creditors for purposes of making lending decisions, to equity holders for purposes of evaluating their investment in the taxpayer, or for other substantial non-tax purposes, but only if the taxpayer reasonably anticipates that the statement will be directly relied on for the purposes for which it was provided.

Shearman & Sterling

October 22, 2018

The Week in Public Finance: Most States' Tax Systems Worsen Income Inequality.

A new report ranks the most and least fair tax systems.

Some people pay more than their fair share of taxes — and it's not the rich.

According to a new report by the progressive-leaning Institute on Taxation and Economic Policy (ITEP), the lowest-income households pay 50 percent more, on average, of their income in state and local taxes than the wealthiest. That leads to worsening inequality in four out of every five states.

"While state and local taxes can't eliminate income inequality, well-designed systems can help lessen the problem," says Meg Wiehe, ITEP's deputy director. "Meanwhile, it's clear that steeply regressive systems only make it worse."

Continue reading.

GOVERNING.COM

BY LIZ FARMER | OCTOBER 19, 2018

New Report Finds that Upside-down State and Local Tax Systems Persist, Contributing to Inequality in Most States.

ITEP's sixth edition of *Who Pays? A Distributional Analysis of the Tax System in All 50 States* finds that most state and local tax systems continue to tax low- and middle-income households at higher rates than the wealthy. On average, the lowest-income households pay 50 percent more of their income in these taxes than the very rich. The national average effective state and local tax rate is 11.4 percent for the poorest 20 percent, 9.9 percent for the middle 20 percent, and 7.4 percent for the richest 1 percent.

For information on your state, visit our interactive map.

State and local tax systems in 45 states worsen income inequality by making incomes more unequal after taxes. The worst among these are identified in ITEP's Terrible 10. Washington, Texas, Florida, South Dakota, Nevada, Tennessee, Pennsylvania, Illinois, Oklahoma, and Wyoming hold the dubious honor of having the most regressive state and local tax systems in the nation. These states ask far more of their lower- and middle-income residents than of their wealthiest taxpayers.

Key similarities among these states drive this result. Seven of the ten most regressive states do not levy a broad-based personal income tax—and in the three states that do, they are structured in a way that makes them much less progressive than average. Further, six of the ten states rely heavily on regressive sales and excise taxes to fund state and local government.

Five states and the District of Columbia, on the other hand, have made their tax systems somewhat more equitable for those with the least ability to pay taxes. Those states are California, Vermont, Delaware, Minnesota, and New Jersey. To varying degrees, these states have used their tax codes to promote opportunity and lessen inequality—or at the very least, not make it worse. Here's how: highly progressive income tax brackets and rates; the use of targeted, refundable low-income credits; and a lower reliance on regressive consumption taxes.

Most state and local tax systems are inequitable and every state still has room for improvement. An overreliance on regressive, slow-growing taxes prevents states from investing in the priorities that will bolster the prospects of low- and middle-income residents: education, workforce development, infrastructure improvements, and adequate healthcare. How we fund these priorities matters. Upside-down tax systems, which tax lower-income people at higher rates than their top-earning neighbors, are inherently inequitable and deprive state coffers of the funds needed to develop thriving communities that benefit us all.

Institute on Taxation and Economic Policy

October 17, 2018

Disclosure Requirements for Tax-Exempt Bonds - Significant Changes Made by the SEC Under its Recently Amended Disclosure Rules: Murtha Cullina

Tax-exempt bonds are a critical source of affordable capital for many organizations. At the end of 2017, not-for-profit health care, educational and social service providers rallied together to forestall efforts in Congress to eliminate the ability for these organizations to issue many types of tax-exempt bonds. Fast forward to late 2018, the SEC has dopted rules concerning financial disclosure for tax-exempt bond transactions which will significantly impact the ability of issuers to maintain compliance with public disclosure requirements in the future.

Public vs. Private Offerings

From a public disclosure perspective, there are two kinds of bonds issued in the market today –(1) bonds sold in underwritten public offerings, which are held by individual and/or institutional investors purchased in the public markets after a formal offering involving the delivery of an 'Official Statement' and (2) privately or directly placed bonds, sold to one or a small number of bank investors who hold the bonds like a traditional bank loan, but provide the funds at a tax-exempt rate. Directly-placed bonds have become much more common over the last few years (from $66.5 billion at year end 2010 to $190.5 billion by the end of Q1 2018), and have replaced the problematic letter of credit structure previously used by banks in the tax exempt bond market. Though direct placements do not offer the 20-30 year maturities of a public bond issue, many issuers are attracted by the lower cost and flexibility that they provide.

Differing Disclosure Requirements

Disclosure requirements differ significantly between bonds sold publicly and those directly placed with a bank. For direct-placement bonds, disclosure is made directly to the investor/bank and not made publicly. As with a bank loan, the investing bank decides what needs to be disclosed by the issuer and when such disclosure will be required. Not-for-profits still must meet their 'normal' public disclosure requirements, including IRS and other regulatory filings.

In a public bond sale, the issuing not-for-profit must make a commitment in what is called a "continuing disclosure agreement" (CDA) to provide to the marketplace annual financial and operational information about the issuer (including audited financial statements) and also agrees to make – on an ongoing basis over the life of the bonds – the "event specific" required disclosures. These events include: principal and interest payment delinquencies; material non-payment related defaults; unscheduled draws on debt service reserves or credit enhancements reflecting financial difficulties; substitution of credit or liquidity providers; adverse tax opinions or other material events affecting the tax status of the security; material modifications to rights of security holders, material bond calls, and tender offers; defeasances; the release, substitution, or sale of property securing repayment of the securities, if material; rating changes; bankruptcy matters, specified M&A transactions, and the appointment of a successor or additional trustee. These disclosure events are disseminated to investors in all cases electronically through the Municipal Securities Rulemaking Board's Electronic Municipal Market Access (EMMA) website (www.emma.msrb.org).

As noted in our August 22nd newsletter, the SEC recently approved amendments to Exchange Act Rule 15c2-12 (Rule) which sets forth an issuer's public disclosure requirements. The amendments added two new types of "continuing disclosure" events to the list of material events that must be reported as part of a bond issuer's ongoing disclosure obligation. The two new types of disclosure events are: (15) the incurrence of a material "financial obligation" of the issuer, and (16) any default, acceleration, termination or modification under the terms of a financial obligation, any of which "reflect financial difficulties" of the issuer.

Financial Obligation Disclosure – What Needs to be Disclosed?

The amendments to Rule 15c2-12 raise a number of important compliance issues, including:

- Whether and how much of the new text set forth in the Rule (and the SEC's adopting release guidance) for events (15) and (16) to include in future CDAs.

- The term “debt obligation” (part of the “financial obligation” definition) is not defined in the Rule, but guidance is provided in the Adopting Release (e.g., leases operating as vehicles to borrow money are included within the term “debt obligation”).
- The correct meaning of the term “material” as used in event (15), which the SEC confirmed in the Adopting Release is to be applied using existing Supreme Court standards (TSC v. Northway, whether information would be
- important to the total mix of information made available to the reasonable investor).
- The need to implement new (or improve existing) disclosure controls and procedures of the issuer, with respect to events that could trigger disclosure under the two new event items.
- Disclosure “calls” under the new (15) and (16) events are not clearly defined, and will require the considered judgment of issuers, their officers, and likely, outside counsel and other advisors, all within the ten business day time frame provided in the Rule.

Effective Date and Applicability

The SEC’s Rule amendments will become effective on February 27, 2019. As a result, every public bond issue issued after that date will be subject to the Rule’s expanded reporting requirements. In addition, for any public bond offering closing between now and February 27, 2019, it is possible the underwriter may ask for voluntary compliance with the revised rule by adding these new disclosure items to your CDA. Certainly as the effective date draws closer, underwriters, or perhaps issuing authorities, will likely feel more inclined to request advance compliance. If you are looking to issue bonds in the coming few months, you should check with your underwriter about these compliance issues with sufficient time before your offering gets underway.

What about Existing Bond Deals?

In its adopting release adding the new types of disclosure events, the SEC explained that “[t]he amendments to Rule 15c2-12 will impact only those [CDAs] entered into in connection with offerings that occur on or after [February 27, 2019].” The SEC also noted that “[CDAs] entered into prior to the compliance date would not be required to reflect changes made to the Rule by such amendments.”

Simple enough, but how will bond trustees, state financing authorities, and other market participants interpret and apply the contractual language of existing CDAs in light of the amendments to the Rule? Can the language of these agreements be read to include the new required disclosures even if the SEC says that the issuer does not have to comply?

We’ve reviewed a number of continuing disclosure agreements entered into during the period 2005-2016, and found that typically the CDAs:

- define the “Rule” as “Rule 15c2-12(b)(5) adopted by the [SEC] under the Exchange Act of 1934, <u>as the same may be amended from time to time</u>;”
- provide that the CDA is “executed and delivered” for the benefit of the Bondholders and is intended to “assist the underwriters in complying with the Rule;”
- include a list of “Listed Events” that incorporate the current list of disclosure events (currently 14 separate events or circumstances included in the Rule); but
- <u>do not</u> specifically provide that the list of Listed Events shall be deemed to include any new disclosure items added to the Rule by SEC rulemaking of otherwise.

Given that (1) the CDAs we read do not sweep in any new disclosure items and (2) the amended Rule specifically excludes pre-February 27, 2019 bond issuances from compliance, it seems to us that this expanded reporting should not be required. If you have a CDA in place currently, you should review the language with counsel and evaluate your entity's disclosure requirements.

Murtha Cullina

By Edward B. Whittemore and Robert V. Giunta, Jr.

October 9, 2018

Hawkins Advisory: Rule 15c2-12 Compliance Alert

The attached Hawkins Advisory (Compliance Alert) supplements the Hawkins Advisory regarding Rule 15c2-12 that is dated August 22, 2018.

Read the Advisory.

Trump Tax Law Saved These Bonds, But IRS Sees Issuance Dwindling.

- **Private activity bond projects estimated to drop 27% by 2025**
- **Market has little faith Trump infrastructure plan will happen**

Tax advantages for bonds funding private hospitals and sports stadiums survived last year's tax overhaul thanks to an eleventh hour compromise. The securities may be headed for a decline anyway.

Projects financed by so-called private activity bonds, or PABs, are projected to fall by more than 27 percent over the next eight years, according to recent data from the Internal Revenue Service. Issuers may be concerned that PABs will be a target the next time lawmakers go hunting for revenue to offset a second round of tax cuts or extend other benefits.

The estimates also show the market has little faith that President Donald Trump's plan to rebuild America's infrastructure will ever become a reality. PABs are a key element of the administration's $1.5 trillion proposal released in February. But the plan has stalled amid Democratic criticism, and Trump has said any action on infrastructure will have to wait until after the November congressional elections.

There were 3,043 bond issues in 2017, a figure that is expected to decrease to 2,200 by 2025, the IRS said. The agency based its estimates on how many PAB tax forms have been filed in the past, while factoring in law and policy changes. Previously, the IRS has said it expected the number to stay at about 3,000 a year.

"There still continues to be an expectation that Congress may repeal or at least restrict certain categories of PABs," said Robert Capizzi, a partner at the law firm Chapman and Cutler.

The bonds are typically used by companies to inexpensively finance projects. Investors like them because they generate tax-exempt interest.

The House version of the 2017 tax bill called for abolishing the tax exemption for PABs, which prompted an outcry from state and local government officials. After a compromise with the Senate, the final version of the bill kept the bonds' benefits mostly intact.

Doing away with the exemption would save the government $38.9 billion over a decade, according to the Joint Committee on Taxation, Congress's official scorekeeper.

The tax law does eliminate the breaks for advance refunding bonds, which are vehicles used by state and local governments to refinance outstanding securities that can't yet be repurchased from investors.

So far, the tax law has had more effect on the demand side, rather than on the issuance side, said Chad Farrington, who heads municipal bond credit research at Columbia Threadneedle Investments.

Banks and insurers — who own about 25 percent of the private activity bond market — have less incentive to buy the bonds now because the tax law slashed the corporate rate and limited interest deductions, he said.

A lower corporate rate reduces the yield of a private activity bond as compared to a more liquid taxable bond, making private activity bonds less attractive to banks and insurers. The tax law also limited how much interest expense banks can deduct of the debt they incur to buy some bonds.

Airports and Aquariums

Private activity bonds are issued by state and local governments and other public authorities to give private entities access to tax-exempt debt for qualified projects like airports, toll roads, stadiums, zoos or aquariums. The private entity is required to pay back the bonds, typically with revenues from the project and usually without backing from the municipality. Investors don't have to pay income taxes on the interest on the bonds.

The bonds fund a range of projects including Bank of America Corp. and Goldman Sachs Group Inc.'s buildings in Manhattan. The Los Angeles airport, LAX, and the Barclays Center in Brooklyn have also received tax-exempt funding. Without private activity bonds, these projects would mostly be funded by taxable debt.

Generally, private activity bonds provide more yield than traditionally issued state and local government debt because they contain more risk than a security backed by property taxes or a dedicated revenue stream. They also act as way for investors to diversify their portfolios.

Critics of the bonds say PABs allow high-income individuals to avoid taxes and ultimately increase the federal deficit.

No 'Good Alternative'

Trade groups and analysts have mixed views on how the tax changes will affect the private activity bond market in the short term. Respondents to a Securities Industry and Financial Markets Association survey project long-term tax-exempt municipal issuance to reach $275 billion in 2018, a 23 percent drop from the $358.8 billion in expected issuance in 2017, the group said in a report.

The Council of Development Finance Agencies expects to see issuances in 2018 decline slightly from the record highs in 2017. Last year, there was a flurry of activity in December as issuers rushed to take action out of fear Congress would eliminate the tax break.

Trump made restoring American infrastructure a pillar of his campaign and promised $1.5 trillion in new investment. But his plan would provide only $200 billion in federal funding over 10 years to spur states, localities and the private sector to spend the balance of $1.5 trillion — with no identified way to pay for it.

The plan stalled amid Democratic objections that Trump's budget proposal would cut more than the $200 billion amount from other transportation programs.

If Democrats take control of at least one congressional chamber, it's likely Trump's plan as is would face opposition since it relies so heavily on private dollars.

"For infrastructure projects, there isn't a good alternative" to private activity bonds, said Tim Fisher, manager of government affairs at the Council of Development Finance Agencies. "Municipal bonds have been the backbone of American infrastructure since the end of the 19th century."

Bloomberg Markets

By Laura Davison

October 9, 2018, 1:00 AM PDT

— With assistance by Danielle Moran, and Mark Niquette

TAX - OHIO

Columbus City Schools Board of Education v. Franklin County Board of Revision

Supreme Court of Ohio - August 15, 2018 - N.E.3d - 2018 WL 3913177 - 2018 -Ohio- 3254

Owner of low-income-housing property filed a complaint seeking a reduction in the property's valuation for tax purposes.

City board of education filed a countercomplaint urging retention of the auditor's valuation. The county board of revision reduced the assessed value, and the board of education appealed. The Board of Tax Appeals increased the value. Owner appealed.

The Supreme Court of Ohio held that:

- Board of Tax Appeals was required to consider memorandum submitted by owner's appraiser purporting to show that adding in the property's rent subsidies resulted in a rent elevated above market rent;
- It lacked jurisdiction to consider whether property was 100 percent rent restricted; and
- Fact that contract establishing rent subsidies was not in the record did not preclude consideration of rent subsidies.

In determining the true value of a low-income-housing property that was both rent restricted and rent subsidized, Board of Tax Appeals was required to consider memorandum submitted by owner's appraiser purporting to show that adding in the property's rent subsidies resulted in a rent elevated above market rent; although Board admitted memorandum into record, it never explicitly weighed the memorandum's probative value.

Because city board of education did not cross-appeal Board of Tax Appeals' finding that subject property was 100 percent rent restricted as of the tax-lien date, Supreme Court lacked jurisdiction to consider issue, in property owner's appeal of Board's decision increasing the valuation of low-income-housing property.

Fact that contract establishing rent subsidies was not in the record did not preclude consideration of rent subsidies in valuing low-income-housing property that was both rent restricted and rent subsidized, where level of subsidy could be derived from owner's appraiser's report.

TAX - OREGON

Comcast Corporation and Subsidiaries v. Department of Revenue

Supreme Court of Oregon, En Banc - August 16, 2018 - 363 Or. 537 - 423 P.3d 706

Taxpayer, an interstate broadcaster, appealed Department of Revenue's determination that taxpayer had underpaid income taxes.

The Tax Court granted Department's motion for partial summary judgment and entered limited judgment. Taxpayer appealed.

The Supreme Court of Oregon held that all gross receipts of taxpayer from transactions and activities in the regular course of its trade or business, not solely receipts from broadcasting activities, qualified as "gross receipts from broadcasting" in calculating sales factor by which taxpayer's receipts were attributable to Oregon for income tax purposes.

All gross receipts of interstate broadcaster from transactions and activities in the regular course of its trade or business, not solely receipts from broadcasting activities, qualified as "gross receipts from broadcasting" in calculating sales factor by which broadcaster's receipts were attributable to Oregon for income tax purposes; sales factor was directed to class of taxpayers, rather than class of income-generating activity, legislature expressly excluded receipts from selling property, which would have been unnecessary if "gross receipts from broadcasting" only included receipts from broadcasting activities, and legislative history indicated that legislature intended phrase to broadly include all receipts.

TAX - NEW HAMPSHIRE

Marist Brothers of New Hampshire v. Town of Effingham

Supreme Court of New Hampshire - September 14, 2018 - A.3d - 2018 WL 4369609

Operator of religious, residential youth summer camp brought action against town, challenging town's denial of a request for a charitable tax exemption for real property.

After a bench trial, the Superior Court upheld town's denial of the exemption. Operator appealed.

The Supreme Court of New Hampshire held that:

- Operator was established and was administered for charitable purpose;
- Charging fees and tuition did not preclude charitable tax exemption;
- Operator was obligated to perform its stated purposes to public, rather than simply to its members;

- Off-season rentals of property were incidental and did not preclude exemption;
- Annual contribution to affiliated religious entity did not disqualify operator from exemption; and
- Allowing camp employees' relatives to attend camp for free did not preclude exemption.

Property Owned by Public Charity and Leased to a Non-Profit Providing Affordable Housing Does Not Qualify for Property Tax Exemption - Review Denied

Grand Lodge of Kentucky Free and Accepted Masons, et al. v. City of Taylor Mill et al., 14-CI02367 (Kenton Cir. Ct. Oct. 9, 2015), aff'd in part, rev'd in part, and remanded, 2015-C--001617- MR (Ky. App. Feb. 10, 2017), motion for discretionary review denied, 2017-S--000122 (Ky. June 6, 2018).

In Grand Lodge of Kentucky Free and Accepted Masons, et al. v. City of Taylor Mill et al., the Kentucky Court of Appeals held that the real property owned by a nonprofit organization but occupied by senior citizens as their residence is subject to ad valorem taxation and not subject to the charitable exemption found in Section 170 of the Kentucky Constitution. Grand Lodge of Kentucky Free and Accepted Masons ("Grand Lodge") is a recognized public charity and generally receives the constitutional exemption from property taxes on real property it owns and occupies. The property at issue in this case is a 24-acre tract of real property that Grand Lodge leases to Masonic Retirement Village of Taylor Mill, Inc. ("MRV"), a nonprofit organization with a purpose of providing and maintaining affordable housing to senior citizens. It established a retirement community in the city of Taylor Mill, Springhill Village, which is located on the real property MRV leases from Grand Lodge. The Court of Appeals first held that the residents, not Grand Lodge or MRV, were the occupants of the property for purposes of the constitutional tax exemption, explaining that the Resident Agreements gave the residents exclusive rights to occupy the property during the term of the agreement in exchange for consideration. The Court further held that there is no "occupancy" interest in real property, and that occupancy was instead a result of possession of real property. Thus, this possessory interest was enough to subject the residents to property tax under Section 170 and KRS 132.195. However, the Court of Appeals went on to hold that the individual units should be considered as leaseholds for purposes of valuation, explaining that "[t]he law is well-settled that a leasehold's fair market value for taxation purposes is obtained by subtracting the fair market value of the real property with the leasehold from the fair market value of the real property without the leasehold." The Kentucky Supreme Court denied discretionary review.

by Mark A. Loyd, Jeffrey T. Bennett, Bailey Roese, Brad Hasler, Stephanie M. Bruns and Brett J. Miller

October 12 2018

Bingham Greenebaum Doll LLP

Who's Knocking? Investors Rush to Set Up Opportunity Zone Funds Ahead of Deadline.

Firms like Fundrise and Youngwoo & Associates have launched $500 million funds, hoping to take full advantage of generous tax incentives for building in distressed neighborhoods

Investment firms are scrambling to cash in on the federal Opportunity Zones plan, hoping to take full advantage of the generous tax incentive program ahead of a looming deadline.

Enacted late last year, the program provides tax deferments and tax breaks to developers and investors who build projects in designated low-income neighborhoods across the country.

Already, a handful of firms have launched $500 million so-called opportunity funds — others have targeted far smaller amounts — putting them in position to invest in the 8,700 federally-approved Opportunity Zones nationwide. Among them are Fundrise, EJF Capital and a joint venture of Youngwoo & Associates and EquityMultiple that each recently announced their plans. RXR Realty is also reported to be in talks to set up a fund.

Part of the federal tax overhaul plan, Opportunity Zones award investors increasing discounts on capital gains — or taxes resulting from the sale of certain assets — the longer the asset is held in the designated zones. Investors who hold a property for at least five years in an Opportunity Zone receive a 10 percent break; those who hold it for seven years receive 15 percent. As a separate benefit, an investor can forgo paying capital gains taxes on the appreciation of an investment in Opportunity Zones if the asset is held for at least 10 years.

But the window is closing for investors who want to take full advantage of the 15 percent concession. That's because the capital gains deferment ends on Dec. 31, 2026. So, investors have until Dec. 31, 2019, if they want to reap the benefits of the entire seven-year tax break.

With just over a year to raise money, find a project, draft the documents and pour in the capital, investment firms are now in Opportunity Zone overdrive. But more than nine months after it began, the program is still short on specifics.

The rules in the initial legislation allow almost any property — with a few exceptions — to qualify as long as it is in an Opportunity Zones. But this has left many unanswered questions. For instance, would a developer qualify for the program if he were to refinance a property in an Opportunity Zone? Or would leasing a business meet the parameters of an opportunity fund? Also, would projects that have already broken ground count?

The Treasury Department and the IRS are expected to provide more details in the coming weeks, but without clear guidance so far, real estate investors have turned to their own circles for advice.

Invest late, you're "toast"

Mark Edelstein, chairman of Morrison Foerster's global real estate group, said the law firm's clients have been seeking guidance the Opportunity Zones program.

"Real estate people know it takes time to do deals," said Edelstein, speaking last week at a real estate seminar the firm held in its Midtown Manhattan office. "If they start [an opportunity fund] in July of 2019, they are toast. They won't have time to draft the document and get the entity."

Bryan Woo, executive vice president of Youngwoo & Associates, said there remain many unknowns. "Without guidance from the IRS, no one knows what to do," he said. But that hasn't stopped him.

Last month, the firm announced plans for a $500 million nationwide opportunity fund in a partnership with real estate investment startup EquityMultiple. Woo said the December 2019 deadline had prompted the fund's launch. The fund will possibly target developments in New York, Oakland, Seattle, Detroit, Los Angeles and Portland, Oregon.

“Based on the spirit of the bill, I think it is a tremendous opportunity,” said Woo, who recently attended a conference in New Orleans that covered the recent movement around Opportunity Zone funds. “Naturally there are a lot of people running around in the past month.”

Local developers are also diving in. Avra Jain, a former Wall Street bond trader who is now a developer in Miami, said her firm is looking to set up site specific opportunity funds. This includes a $2 million to $3 million fund she closed for a 95,000-square-foot flex warehouse development site at 1010 Northwest 72nd Street in Miami.

“Everybody is still waiting on clarification from the Treasury on some important policies.” Jain said. “We want clarification before we do something in a bigger way.”

But some major players are taking a wait-and-see approach.

RXR Realty is weighing whether to launch a fund, but will hold off until regulators provide that detail. Mike Maturo, chief financial officer, said the company is under less pressure ahead of the 2019 deadline because it already has $1 billion of pipeline inventory located in designated Opportunity Zones. The firm, he said, will look to take advantage.

“It makes a lot of sense for us to participate in this program,” he said. “If guidelines are finalized, we will move very quickly.”

The Real Deal

By David Jeans and Keith Larsen | October 09, 2018

TAX - MISSOURI

State ex rel. Missouri Clean Energy District v. McEvoy

Missouri Court of Appeals, Western District - August 7, 2018 - S.W.3d - 2018 WL 3736893

Missouri Clean Energy District (MCED) petitioned for writ of mandamus to order county collector of revenue to deliver tax bills that included Property Assessment Clean Energy (PACE) Act special assessments.

The Circuit Court granted the MCED’s request for mandamus relief. Collector appealed.

The Court of Appeals held that:

- Proper procedure for issuing a permanent writ of mandamus was not followed;
- Issuance of a permanent writ based on hearing for a preliminary writ was not prejudicial to the collector, and thus was not reversible error;
- Collector did not have discretion in collecting PACE Act special assessments, and thus contracts between collector and MCED were not contradicted by statute; and
- Petition for a writ of mandamus was appropriate remedy for MCED to pursue in its action against the collector.

Proper procedure for issuing a permanent writ of mandamus was not followed in proceedings in which Missouri Clean Energy District’s (MCED) sought to require county collector of revenue to deliver tax bills that included Property Assessment Clean Energy (PACE) Act special assessments; a summons was issued instead of a preliminary writ.

Issuance of a permanent writ of mandamus based on hearing for a preliminary writ was not prejudicial to a county collector of revenue, despite not allowing the collector another hearing to present evidence, and thus was not reversible error, in mandamus proceedings on Missouri Clean Energy District's (MCED) seeking to require the collector to deliver tax bills that included Property Assessment Clean Energy (PACE) Act special assessments; collector's own time constraints necessitated issuance of a permanent writ within a week of the hearing and collector did not identify any issues that she would have raised at a second hearing that were not raised in the first hearing.

County collector of revenue did not have discretion in collecting Property Assessment Clean Energy (PACE) Act special assessments, and thus contracts between collector and Missouri Clean Energy District (MCED) to deliver tax bills with PACE assessments were not contradicted by statute; the PACE statute provided that such contracts were to be delivered to the collector but not that the collector would have any discretion over whether contracts should be enforced.

Petition for a writ of mandamus was appropriate remedy for Missouri Clean Energy District (MCED) to pursue in its action against county collector of revenue alleging that the collector failed to deliver tax bills that included Property Assessment Clean Energy (PACE) Act special assessments; MCED could have brought action to otherwise collect the amounts contracted for with the collector, but there was no alternative measure to force the collector to place the PACE assessments on tax bills, as required by law.

TAX - OHIO

State ex rel. Perry Township Board of Trustees v. Husted, Secy.

Supreme Court of Ohio - September 21, 2018 - N.E.3d - 2018 WL 4540093 - 2018 -Ohio-3830

Township board of trustees filed complaint for writ of mandamus, seeking to compel county board of elections to place proposed township property-tax levy to renew and increase existing tax levy for road construction and repair on general election ballot.

The Supreme Court of Ohio held that county board of elections had no clear legal duty, under statute governing resolutions to renew existing levies, to place on general election ballot the proposed ballot language by township board of trustees for resolution to renew and increase existing tax levy for road construction and repair, which stated that renewal and increase would commence in last year of existing levy, and thus township board of trustees was not entitled to writ of mandamus compelling such action, where statute did not specify that renewal and increase, if approved, could commence in final year of existing tax levy.

Illinois Nonprofit Hospital Property Tax Exemptions Upheld: Orrick

On September 20, 2018, the Illinois Supreme Court published its opinion in *Oswald v. Hamer*, which upheld Section 15-86 of the Illinois Property Tax Code ("Section 15-86"), an Illinois statute that provides for a charitable property tax exemption to eligible nonprofit hospitals and their hospital affiliates. *Oswald* helps clarify the conditions that nonprofit hospitals must satisfy in Illinois to remain exempt from the state's property tax. However, the court in *Oswald* did not foreclose the possibility of additional future challenges to Section 15-86 and the property tax exemptions of nonprofit hospitals. As a result, nonprofit hospitals in both Illinois and around the country and the investors that invest in them should anticipate continued scrutiny of the eligibility of nonprofit hospitals for property tax exemptions.

Background

The status of property tax exemptions for nonprofit hospitals has been in flux and under scrutiny for a number of years in Illinois and other states on various grounds, including that the nonprofit hospitals are not engaged in sufficient charitable activities to justify the exemption from property taxes. The uncertainty surrounding nonprofit hospital eligibility for property tax exemption creates risk both for nonprofit hospitals and the investors that invest in them.

The Illinois Constitution places restrictions on the legislature's ability to exempt property from taxation. Section 6 of Article IX of the Illinois Constitution ("Section 6 of Art. IX") permits the legislature to exempt two limited categories of property from property taxation. Most significantly for nonprofit hospitals, the second of these categories includes property used "exclusively for . . . charitable purposes."

Within the constraints of Section 6 of Art. IX, the Illinois legislature enacted Section 15-65 of the Illinois Property Tax Code ("Section 15-65"). Section 15-65 exempts real property from state taxation if two criteria are met: (i) the property is "actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit" and (ii) the property is owned by an institution of public charity or certain other entities. In other words, Section 15-65 requires both charitable use and charitable ownership to qualify for property tax exemption.

In 2010, uncertainty was introduced into Section 15-65's two-pronged analysis when the Illinois Supreme Court, in *Provena Covenant Medical Center v. Department of Revenue*, held that a nonprofit healthcare organization's hospital complex did not meet the requirements for property tax exemption under Section 15-65. The *Provena* court determined that Section 15-65's charitable use requirement was not satisfied because, in part, the nonprofit healthcare organization failed to demonstrate that it provided more than a *de minimus* amount of free or discounted care. Although the court noted that Section 15-65 did not require a strict "dollar-for-dollar correlation between the value of the tax exemption and the value of the goods or services provided by the charity," the court emphasized that an organization seeking charitable tax exemption should be able to demonstrate that its activities help relieve some of the burdens on the government entities that are for going their taxes. Because the court's analysis implied the existence of an unknown quantitative or monetary threshold for charitable care and services, *Provena* created a great deal of uncertainty about what standards should be applied for charitable property tax exemptions in Illinois.

In response to *Provena*, Section 15-86 was enacted in 2012 and provided for a charitable property tax exemption specifically for nonprofit hospitals and their hospital affiliates with clearer, more formulaic guidelines to demonstrate eligibility for the property tax exemption. Specifically, subsection (c) of Section 15-86 provides that a charitable property tax exemption shall be issued to a nonprofit hospital or hospital affiliate that can demonstrate that the value of its "qualified services or activities" (as defined by Section 15-86) in a given year is greater than or equal to its estimated property tax liability for that year.

Oswald v. Hamer

In *Oswald*, an Illinois taxpayer challenged the constitutionality of Section 15-86. The taxpayer-plaintiff argued that Section 15-86 is facially unconstitutional because it requires the grant of a property tax exemption under Section 15-86 if the value of a nonprofit hospital's charitable services exceeds its estimated property tax liability without regard to the Illinois constitutional requirement that exempt property be used "exclusively for . . . charitable purposes."

The Illinois Supreme Court rejected the taxpayer-plaintiff's argument and upheld the constitutionality of Section 15-86. The *Oswald* court found that the Illinois legislature intended to comply with the Illinois Constitution when it enacted Section 15-86. Accordingly, the court in *Oswald* construed Section 15-86 to permit, but not require, the grant of a property tax exemption if the requirements of Section 15-86 are satisfied.

Key Takeaways

Illinois Nonprofit Hospitals Must Satisfy the Requirements of the Illinois Constitution and Section 15-86 to Receive Property Tax Exemption

Oswald upheld the constitutionality of Section 15-86 because it is possible for Illinois nonprofit hospitals to comply with the requirements of Section 15-86 and the constitutional requirement that the subject property be used "exclusively for . . . charitable purposes." As a result, both requirements still apply. A nonprofit hospital in Illinois seeking a charitable property tax exemption under Section 15-86 must document the "qualified services or activities" that exceed its estimated property tax liability for that year. Additionally, the hospital must be prepared to demonstrate that the property is used for exclusive charitable purposes in accordance with the requirements of the Illinois Constitution.

Oswald *Maintains Current Illinois Property Tax Exemption Requirements but Leaves the Door Open to Future Scrutiny*

Oswald is a somewhat favorable case for Illinois nonprofit hospitals because it upholds the constitutionality of Section 15-86, which has, for the past several years, provided some additional guidance and clarity on the statutory requirements for a charitable property tax exemption for nonprofit hospitals in Illinois. However, because the taxpayer-plaintiff in *Oswald* asserted a facial challenge to Section 15-86 and because nonprofit hospitals must still show that the subject property is used exclusively for charitable purposes under the Illinois Constitution, the *Oswald* holding does not foreclose the possibility of future challenges to the property tax exemptions granted to individual nonprofit hospitals. Further, *Oswald* is specific to Illinois and is not binding authority on regulators or courts in other states. Therefore, nonprofit hospitals and the investors that invest in them should continue to monitor developments with respect to the eligibility of nonprofit hospitals for property tax exemptions and anticipate continued scrutiny of those property tax exemptions.

by Brandon Dias

Orrick Public Finance Alert | October.04.2018

Rep. Meadows Introduces Bill to Extend the 'Opportunity Zones' Policy.

Washington, D.C. – This week, Rep. Mark Meadows (R-NC) introduced H.R. 6890, the Creating Advancement and Personal Improvement in Targeted American Localities (CAPITAL) Act of 2018.

The Tax Cuts and Jobs Act of 2017 included a provision implementing a new mechanism called "Opportunity Funds." Opportunity Funds allow investors to defer and reduce their capital gains tax bills in exchange for investing in projects located in economically disadvantaged areas, known as "Opportunity Zones," designated by the Department of the Treasury. These distressed areas typically have an unemployment rate of about 14%, a lower than average median household income, are usually located in counties where 20 percent (or more) of the population has been living below the poverty line for 30 years.

Opportunity Zones are a powerful provision enacted in the tax cuts law that creates an incentive for Americans to invest in less-fortunate communities. However, current law allows designations to expire after 10 years. Meadows' bill, H.R. 6890, would allow for the designation of new opportunity zones every 10 years, allowing the policy's benefits to build and compound rather than expire.

Opportunity Funds benefit the state of North Carolina directly. On May 18 of this year, the Treasury Department certified 252 areas in NC as official Opportunity Zones, with more than 450 unique North Carolina census tracts identified for further review. This is a major catalyst for economic development and increased opportunity for under-privileged residents and families.

Rep. Meadows released the following statement:

> "The Opportunity Zones policy embodies principles the government ought to support: the encouragement of communities to band together and use market forces and private investment to help fellow citizens and rebuild middle-America, particularly economically depressed areas. Opportunity Zones are tremendous market-drivers that achieve real investment for areas in need, including for my home state of North Carolina, with over well 200 areas directly benefiting. This is a policy we need to extend and make permanent. When we encourage the private sector to invest, the benefits are tremendous. I'm proud to introduce this bill and look forward to working with my colleagues on a bipartisan basis to extend the policy for the future."

To read the bill, click here.

Sep 27, 2018

Early Adopters Move Ahead with Opportunity Zones Funds.

The opportunity zones (OZ) incentive has been part of the federal tax code for less than a year, but early participants are setting the groundwork to facilitate and make qualified opportunity fund investments in distressed communities.

Time is of the essence. Qualified investments allow taxpayers to defer taxes on their gains until the end of 2026, but they get a step-up in basis only if they hold fund shares for at least five years–with larger step-up at seven years. That means investments need to be made by the end of 2021 to qualify for the minimum incentive to reduce their required 2026 tax payment. The Novogradac Journal of Tax Credits spoke with a few early OZ participants about their planned investments and the flexibility of the incentive.

Fundrise

One early opportunity fund manager is Fundrise, an online real estate investment platform. Co-founder and CEO Ben Miller describes Fundrise as "Blackstone meets Amazon." Miller said Fundrise investors tend to be individuals investing through limited liability corporations or trusts.

Miller learned about OZs in April and spent the past few months consulting legal experts on how the new incentive might make sense for Fundrise investors. Miller said that Fundrise's longtime focus on multifamily housing and urban markets made OZs a natural fit.

"We're operating in opportunity zones already," said Miller, referring to previous Fundrise investments in areas later designated as opportunity zones. "It wasn't a big leap for us to then start to look at opportunity zones as its own investment strategy."

Fundrise launched its OZ fund in early August, but posted a teaser landing page on its website two weeks earlier, which drew favorable responses by interested investors. Fundrise aims to raise $500 million for investment before the fund closes Dec. 31, 2019.

Miller said Fundrise's OZ fund has two properties in the pipeline already. One is a historic rehabilitation of a multifamily property in Washington, D.C. The other is a creative office renovation in Los Angeles.

Virtua Capital

Phoenix-based Virtua Partners immediately began assembling a pipeline of investments as OZs were designated in spring.

"The bill as written, along with IRS FAQs that have been promulgated, suggest that capital gains dating back to 2017 were eligible for participation, as long as they were reinvested within 180 [days], so we looked to build a product for those potential investors," said Zachary Chavez, vice president of Virtua Capital Management LLC. "Understanding that the best deals are going to be picked up first, we've been building our pipeline since the earliest designations were approved by Treasury in mid-April."

Virtua's current fund has a $200 million goal and will focus on single-family and multifamily housing development, as well as some limited service hospitality investments.

Chavez mentioned three particular projects in the pipeline that will drive investment to three cities in Arizona. One is a 128-room hotel called SpringHill Suites Marriot flagged hotel in Avondale that will be located near the Banner Estrella Medical Center and University of Phoenix Stadium.

The second project is a 90-apartment multifamily rental housing development in Tempe. "As far as we know, it was the first opportunity zones zoning case that was passed and approved," said Chavez.

The third Arizona investment in Virtua's pipeline is a single-family residential development in Glendale made of 81 townhomes.

Another Phoenix-based investment management company, Caliber – The Wealth Development Company, also got a head start on building its real estate pipeline. "We don't have the luxury of waiting," said Chris Loeffler, CEO of Caliber. "We need to get our project pipeline moving and ready for capital flow–when the money comes in, it needs to be deployed quickly."

Caliber launched a $500 million OZ fund that will be leveraged to target $1 billion of hospitality, commercial and residential real estate investments in the Southwest growth markets of Arizona, Texas, Colorado, Nevada and Utah.

Loeffler describes the OZ incentive as an "accelerant" to Caliber's business model. Loeffler said the OZ tool provides patient capital that allows Caliber to pursue interesting and creative developments in areas that greatly need them.

Caliber's planned investments in Arizona include a new hotel for Tucson's convention center, a revitalization of historic downtown Mesa, energy-efficient town homes in Tempe and several investments near Grand Canyon University in Phoenix. In Texas, Caliber is planning to develop university housing in San Antonio.

Investors are already interested. "In the last decade raising and deploying over $225 million in client capital, I've never seen the level of interest in one of our funds that we've seen with this," said Loeffler.

Access Ventures

Access Ventures of Louisville, Ky., similarly found significant interest in its opportunity fund, which it founded in partnership with the Local Initiatives Support Corporation. "We've had conversations with over 100 individual investors–high-net-worth individuals or family companies that have been sitting on real estate or stock for a long time and they want to sell the assets that they've held," said Ross Baird of Access Ventures. "I think opportunity zones are probably the best fit for individuals who own significant assets that they've been wanting to sell."

Access Ventures will focus its opportunity fund on operating business. "Traditional community development has been large-scale real estate and housing," said Baird. "I think there's a real benefit in also investing in operating businesses in these communities that are building wealth."

Access Ventures expects to raise $100 million minimum in its fund and will likely focus on OZs with about six to 10 operating businesses ready for investment so that the fund can invest in all of them. Baird says the OZ incentive can benefit businesses that are too risky for debt and do not gross enough for venture capital equity.

Baird sees a lot of potential in the OZ tool, especially when leveraged with other incentives. "What will make opportunity zones successful is the ability and knowledge of how to blend different incentives, whether it's the new markets tax credit or low-income housing tax credit," said Baird. "It's about being able to get that capital stack right."

Obsidian Opportunity Fund

Allen Alley, co-founder of Obsidian Opportunity Fund, saw OZs as complementary to Obsidian's expertise in fund management and solar development.

"It fits well into what we're doing because there's a large overlap between rural communities designated as opportunity zones and rural communities suited for solar development," said Alley.

The Obsidian Opportunity Fund has a large pipeline of shovel-ready solar projects, including two solar installations in Oregon. Alley said he expects Obsidian's opportunity fund to provide hundreds of millions of dollars initially, with later capacity to invest $1 billion in solar.

Alley said one of the benefits of the OZ incentive for renewable energy properties is providing a new source of equity. "We think opportunity zones are going to give us a chance to do these solar investments beyond the time when other [incentives] phase out," said Alley.

As interested participants await more guidance from the IRS, Alley said Obsidian's strategy is proceed conservatively. "We're playing it straight down the middle," said Alley. "We try to be conservative in every interpretation we're using and putting together the structures we think were intended." Alley said that if an investor invests in an opportunity fund before IRS guidance is released and the investment is no longer tenable under the new guidelines, Obsidian will refund the investment.

Blazing a New Trail

Early leaders in opportunity funds are forging ahead with cautious optimism, each recognizing it as a tool with a double bottom line: to provide a tax benefit to investors and to bring capital to economically underserved communities.

In that way, it could close the gap on investments that might not otherwise be feasible. "I think it's a really exciting opportunity–no pun intended–for the United States," said Alley. "I think it's a new paradigm to do it this way. I don't think we've ever seen anything like this before."

Baird likewise sees the OZ incentive as a creative way to finance developing businesses that otherwise wouldn't qualify for traditional debt or venture capital equity. "I think broadly we've needed an excuse to innovate on a number of tools to support entrepreneurs," said Baird. "Whether or not this is the perfect tool, it is a good flash point for innovation."

Published by Teresa Garcia on Tuesday, October 2, 2018

Novogradac Journal of Tax Credits

As Fund Managers Await Regulations, Key Questions Surface With Qualified Opportunity Funds.

As part of the Tax Cuts and Jobs Act, signed into law by President Trump on December 22, 2017, Congress introduced new tax incentives designed to encourage long-term investments in low-income American communities. States were eligible to nominate certain economically distressed areas to the Treasury Department to be designated as "qualified opportunity zones." Investors in qualified opportunity zones, facilitated by investing in "qualified opportunity funds," can achieve a range of tax benefits. For an in-depth overview of these tax benefits, see our earlier publication here.

Private fund managers have expressed an understandable eagerness to create qualified opportunity funds, but many tax advisors have realized that the rules governing qualified opportunity zones (under new Section 1400Z of the Internal Revenue Code) provide an imperfect roadmap. The rules contain a litany of uncertainties and ambiguities that leave fund managers and investors to navigate at their own peril. The Internal Revenue Service is expected to issue regulations that will attempt to clear up many of these issues, but the timing and substance of those regulations remain uncertain, making it difficult for fund managers and investors to sit on the sideline waiting for answers. As of September 2018, proposed rules are under review by the Office of Management and Budget's Office of Information and Regulatory Affairs.

Fund managers and potential investors are already facing a running clock to take advantage of one of the most significant tax benefits of the qualified opportunity program. Investors must invest in a qualified opportunity fund by December 31, 2019, in order to be eligible for the cumulative 15 percent basis step-up with respect to the invested gains. Complicating this timing element further is that for those investors seeking to invest in a committed capital fund, there is an open question about when an investor's capital commitment is deemed to be "invested" for purposes of Section 1400Z. Accordingly, investors who have already realized gains or may realize significant gains in the near future must ensure that the terms of any private investment fund in which they are seeking to invest not only adequately address the asset tests for the fund's own compliance with Section 1400Z, but also permit the investors to fully invest their gains within the required timeframe set out by Section 1400Z. An investor who commits to a private investment fund, but is not deemed to have invested within the required timeframe, may be faced with not only paying taxes on gains that the investor expected to have been deferred pursuant to the new tax incentives under Section 1400Z, but may also require additional capital to fund capital calls if the investor was relying on its full pre-tax gain for fulfilling its commitment to the fund.

This article highlights some of the unanswered questions that fund managers who are interested in launching qualified opportunity funds will need to contend with until the Treasury Department addresses the issues in its anticipated regulations. The following list is not intended to be comprehensive or exhaustive but rather to illustrate that a number of key issues regarding investing in opportunity zone funds remain open.

> **Q.** How does a business's need for cash balances, cash reserves, and working capital accounts coexist with the 90 percent asset test[1], which characterizes cash as a "bad" asset?
> **A.** At some point, most qualified opportunity zone businesses and qualified opportunity funds will require cash reserves in excess of 10 percent to satisfy other Section 1400Z requirements or to simply operate their business with sufficient working capital. Companies, such as real estate investment businesses, may also be required under applicable laws or financing agreements to carry certain cash reserves at all times. While the arbitrary measuring dates under the 90 percent asset test provide private investment funds and businesses with opportunities to plan ahead, we anticipate that the IRS will provide more flexibility while still protecting from potential abuse.
>
> **Q.** How is the 90 percent test applied to a private investment fund in its initial, partial tax year if the fund was created between July 1 and December 31, given that the first measurement date under the test is six months after the start of the tax year?
> **A.** Given that this language comes directly from Section 1400Z, the IRS may not have the authority to interpret this test any other way than to require testing six months after formation, but perhaps a taxpayer in this situation will only have to measure its assets on December 31 of that initial year.
>
> **Q.** In determining whether a business constitutes a qualified opportunity zone business, how does the "substantially all" test differ from the 90 percent asset test applied throughout the rest of Section 1400Z? What does "substantially all" mean?
> **A.** We anticipate that the IRS will address what constitutes "substantially all" in the upcoming regulations. Without more clarity, it will be extremely difficult for a business attempting to qualify as a qualified opportunity zone business to determine how much tangible property it will need to acquire, which will also be a sensitive decision given that the company cannot carry large cash reserves to fund expenditures.
>
> **Q.** In a fund with capital call mechanics, at what point is an investment considered to be made by investors seeking to defer recognition of gain?[2] Can investors defer recognition of gain in an amount equal to the full amount of their capital commitment upon making the commitment, or must investors actually wait until capital is contributed to consider it invested?
> **A.** The conservative approach is to assume that cash is not invested until capital is contributed, not merely committed. This is a complicated outcome, however, because investors that wish to defer a gain by investing it in a qualified opportunity fund will pressure fund managers to make capital calls quickly, since the investor must "invest"

within 180 days of generating the gain to qualify for the deferral. Fund managers could face a “catch-22 scenario” because the fund may not be able to make a premature capital call and put the cash in reserves without violating the 90 percent asset test and, even if they are able to do so, such a capital call would drag down the private investment fund’s returns.

Q. How are assets measured for purposes of the 90 percent asset test? If the metric is fair market value, does the private investment fund need to pay for biannual appraisals of all of its assets? If the metric is adjusted basis, does this create a disincentive for qualified opportunity zone businesses to purchase depreciable assets, which would run contrary to the program’s goal to encourage capital expenditures?
A. The simplest and perhaps most effective approach would be to measure assets by their initial cost basis. Measuring fair market value would require costly and time-consuming valuations, and it is unclear how often those valuations would need to take place. Measuring with adjusted basis would create a disincentive to purchase depreciable property, which runs contrary to legislative intent. Initial cash basis will be simpler to track and measure without concerns about inadvertently falling below 90 percent on a given day.

Q. Does a qualified opportunity fund itself need to be a qualified opportunity zone business? If not, could a qualified opportunity fund make direct investments in the “black listed” businesses[3] that a qualified opportunity zone business cannot invest in?
A. This seems like an illogical outcome, but the IRS may not have the authority to read Section 1400Z any differently, and this issue may not garner the same attention as some of the other issues discussed herein.

Q. How is real estate characterized under the 50 percent gross income test?
A. A qualified opportunity zone business must derive 50 percent or more of its gross income from the active conduct of a qualified business within a qualified opportunity zone. We anticipate that the regulations will clarify whether certain real estate activities are “active” or “passive” for purposes of this test, especially given that real estate may be one of the most prevalent types of qualified opportunity zone investments.

Q. Can investors defer ordinary gain, or does the gain have to be capital?
A. The House and Senate bills used the term “capital gain,” as does the title of Section 1400Z, but the language within Section 1400Z did not include the word “capital” before the word “gain.” Investors will benefit more from deferring tax at ordinary income rates versus lower capital gains rates, so a favorable answer from the IRS would presumably lead to more investments in qualified opportunity zones. Based on legislative history, however, we suspect that only capital gains will qualify.

Q. Can investors defer capital gains allocated to them by a partnership?
A. Section 1400Z stipulates that the investor must sell or exchange an appreciated asset, so we doubt that an asset sold by a partnership qualifies. This outcome would also present a challenge in determining when the gain was generated for purposes of the 180-day clock—i.e., would the clock start running when the partnership sold the asset? If so, the partner might not know how much gain will be allocated to it until the partnership files its Form 1065 and issues K-1s, which would likely occur more than 180 days from the date of sale. The regulations may touch on this topic, but without further guidance we assume that gains allocated from a partnership are ineligible.

There are many unanswered questions posed by Section 1400Z with respect to investments in qualified opportunity zone funds. Those considering organizing or investing in entities that intend to certify as qualified opportunity funds would be well served by consulting with knowledgeable legal counsel prior to organizing or investing in qualified opportunity funds.

Should you have any questions concerning this legislation or qualified opportunity zones in general, please contact any of the authors of this alert or any members of the Day Pitney Investment Management and Private Funds group or Tax group.

[1] Under the 90 percent asset test of Section 1400Z, the assets of a qualified opportunity fund must be comprised of at least 90 percent "qualified opportunity property," to which cash does not qualify.

[2] Under Section 1400Z, investors may defer capital gains that would otherwise be recognized in that taxable year by investing such gains in qualified opportunity funds.

[3] These businesses include private or commercial golf courses, country clubs, massage parlors, hot tub facilities, suntan facilities, racetrack or other facilities used for gambling, or any store the principal business of which is the sale of alcoholic beverages for consumption off premises.

Day Pitney Advisory

October 3, 2018

Day Pitney Author(s) Justin M. Hannan, Brent A. Morowitz, Peter J. Bilfield, Stephen Ziobrowski

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Opportunity Zones: An Opportunity to Apply Lessons Learned from the New Markets Tax Credit Program

The Internal Revenue Service (IRS) is currently working on guidance on how the qualified opportunity zone (OZ) benefit under Internal Revenue Code (IRC) 1400Z-2 will be administered. Thus far, the IRS has posted a list of Frequently Asked Questions about OZs with additional guidance in the form of interim regulations anticipated in the very near future.

There hasn't been this much interest or excitement in a community and economic development incentive since the New Markets Tax Credit (NMTC) program was established as part of the Community Renewal Tax Relief Act of 2000. It is not surprising, therefore, that Opportunity Zones (OZ) legislation borrowed some of the same attributes of the NMTC in attracting private investment in low-income communities. Particularly notable is the census tracts eligible for designation as OZs mirror the low-income tract criteria for the NMTC program.

Other similarities between the two incentives include, but are not limited to

1. the list of "sin" businesses in the statute that a qualified opportunity zone business can not engage;
2. the 180-day time requirement for taxpayer investments in opportunity funds to qualify for deferral versus 12 months for CDEs to invest taxpayer equity under the NMTC program;
3. Less than 5 percent of the average of the aggregate unadjusted bases of the property of an OZ business or qualified active low-income community business (QALICB) may be attributable to nonqualified financial property;
4. At least 50 percent of the total qualified OZ business or QALICB's gross income must be derived

from the active conduct of such business; and
5. Both are tax-driven incentives under the Internal Revenue Code.

Despite these similarities, there is one particularly noticeable distinction: the means by which private investment in low-income communities will be incentivized. In the case of OZ investments, capital will flow from an untapped reservoir of unrealized capital gains estimated to be approximately $6 trillion, according to the Economic Innovation Group. In stark contrast, the NMTC is subject to congressional allocations of tax credit authority that currently extends through 2019 at $3.5 billion annually. Furthermore, allocations of NMTCs are awarded through a very competitive annual award process, with typically only one in three applications receiving awards.

With the potential to stimulate private investment well beyond the NMTC program's annual limits of tax credit authority, it's no wonder that a great deal of attention is getting paid to ensuring guidance forthcoming from the Treasury Department addresses key issues of interest to investors and potential fund managers related to the tax treatment of investments and the implementation of qualified opportunity funds.

One aspect of the OZ incentive that should not be overlooked is the need to ensure that the real estate bias that occurred with the NMTC in the early years is not replicated with the OZ incentive when it comes to investing in small businesses. To mitigate against a real estate bias, the CDFI Fund added a question about innovative uses of an NMTC allocation several years ago that now includes providing qualified low-income community investments (QLICIs) where the total QLICIs received by the QALICB are $4 million or less, making QLICIs as debt or equity with an original term less than or equal to 60 months, and providing QLICIs for non-real estate activities such as working capital, inventory or equipment purchases. While unscored, the CDFI Fund was clear that responses to this question would be considered in Phase II of the allocation application reviews and could affect the size of an applicant's NMTC allocation. This incentivized some CDEs to either pivot from strictly real estate investing or to increase their commitment to financing operating businesses.

Taking lessons learned from the NMTC program, it would be optimal to have the initial guidance from Treasury attempt to ensure investments into small businesses are on a par with real estate development. Toward that end, it would be particularly helpful to have interim gains receive favorable tax treatment provided they were reinvested within an OZ thereby allowing for the liquidation and redeployment of capital during the ten-year holding period for permanent exclusion of any post-acquisition appreciation in the investment. This added flexibility would encourage diversification between real estate and operating businesses investments.

It would also be beneficial to extend the deployment timeline well beyond the current 180-day timeframe to allow sufficient time to assemble and underwrite OZ businesses. Extending the timeframe to 12 months beginning on the date the cash is received by the opportunity fund would be similar to the time permitted to community development entities to invest taxpayer equity under the NMTC program.

Another consideration would be to set a "substantially all" standard of 70 percent for business' tangible property in order for a business to qualify as an OZ business in recognition of the fact that there are many normal costs/tangible properties of operating businesses that are not likely qualified as OZ property.

Addressing these issues now will send an important signal that the OZ incentive is open for small businesses.

Novogradac & Company LLP

Published by Bob Ibanez on Wednesday, September 26, 2018

Tax Reform May Chill Affordable-Apartment Projects.

Last year’s federal tax overhaul significantly lowered the corporate tax rate. And while this is expected to be a boon to corporations, it could also ultimately result in far fewer affordable apartments being built each year.

The issue is that investors will have less incentive to make equity investments in below-market-rate apartment complexes in return for credits that lower their federal tax bills.

Affordable apartments are usually funded, in part, by investors who purchase low-income housing tax credits. Roughly 38,000 projects and 2.3 million affordable units have been produced or preserved through the program since 1987, according to an analysis from the Urban Institute. These credits are authorized by Congress, then distributed to the states, which award them to developers of specific projects. The credits are then sold to investors, often banks.

That equity is often used in tandem with mortgages or other financing, either in new-construction projects or to renovate and preserve the units as affordable. Without the tax credits in the equation, these projects tend not to get financed.

The 2017 Tax Cuts and Jobs Act lowered the corporate tax rate from 35 percent to 21 percent. That move is expected to significantly reduce investor demand for the credits, thus drying up a considerable source of funding for these projects.

The analytics company Reis Inc. recently projected that as many as a third of 132,000 units under development were at risk of not getting financing as a result of the tax overhaul. Reis also said that another 26,350 market-rate units planned to be mixed with other affordable units also were at risk.

Other studies suggest the change could also deal a significant blow to developments in the lower-end apartment market, where analysts say there is significant supply shortage.

Novogradac & Co., a San Francisco-based public-accounting firm that specializes in affordable housing, estimated that the tax change would translate into roughly $1.7 billion in lost equity annually and an estimated loss of between 200,500 to 212,400 housing units over 10 years.

The actual impact is unclear, however. Last year, Congress temporarily increased the available credits over the next four years. In theory, there could be more funding available for these projects. Traditionally, tax credits have been in high demand. Also, banks have always had another major incentive to jump into these projects. The investments can help them meet their obligations to lower-income areas under the Community Reinvestment Act.

“I think the impact is still fairly uncertain,” said Corianne Scally, a senior research associate at the Urban Institute, who has co-authored reports on the low-income housing tax credit program. “There is less tax incentive for investors to make an equity investment, but there are more credits that are going to be available through a temporary boost. And it is just really kind of unclear how things will turn out on average.”

Scally said a number of projects could be threatened. Rural areas, in particular, could struggle to attract investors. Interest in the program has dried up before. During the Great Recession, the price for the tax credits — basically the average amount of equity a developer would pay for each dollar of tax credit written off their federal income tax — fell to a 15-year low in the 2008 to 2009 period, according to the Urban Institute. As a result, the number of new and preservation apartment projects declined sharply, from roughly 116,000 units in 2004 to 61,000 in 2010.

“I am assuming there is a subset of investors that just simply might not be interested any longer, as well as those that would be willing to pay less on the dollar for tax credits, since the [value of the] tax credits have gone down,” Scally said.

During an interview last week, Sarah Mickelson, the director of public policy for the National Low Income Housing Coalition (NLIHC), also noted the uncertainty brought by the tax change. The equity attracted by the low-income tax credits is layered with other financing programs to produce apartments for the lowest-income residents.

“The affordable-housing crisis is primarily concentrated among people with the lowest incomes,” Mickelson said. “The reason for that is because it doesn’t make a lot of financial sense for developers to build housing that is that deeply affordable. The amount of money that you can take in rents just isn’t enough to make the deal pencil out.”

Scotsman Guide

Oct 2, 2018

California's Already-High Demand for Tax-Free Debt May Grow More.

- **Top earners have yet to see full results from December tax law**
- **California yields may continue to be less than that of market**

If you think there’s a fight to score California bonds now, just wait until tax season.

Certified public accountants are reporting that the Internal Revenue Service continues to issue rulings “week after week” since the tax overhaul that passed in December, Kim Friedricks, managing director of fixed income at Kayne Anderson Rudnick, said at a Bond Buyer conference in Los Angeles.

As tax professionals pore over the new rules for their clients and as “the average high earner starts to see the results, I think we’re going to see another big boost in demand through tax season,” Friedricks said.

That would lead California yields to still hold below those seen in the rest of the municipal market, which will track the expected rise of Treasury rates, she said.

The law, which capped state and local tax deductions, has already heightened the allure of California bonds from state residents seeking tax shelters. It’s led to some securities yielding less than AAA debt. And there’s no relief from state government: Governor Jerry Brown vetoed a bill that would have achieved a way around the cap.

Indeed, Tom Lockard, head of investment banking at 280 CapMarkets, said the firm is “marketing” the delayed full impact of the law as he too hears that tax professionals are still working it out for their clients. “It’s only going to create more demand,” he said during the conference.

To be sure, some investors are already chafing at the skimpy yields on California debt and are sitting out some deals.

"We are not married to the tax-exempt municipal bond," said Ksenia Koban, a municipal-credit analyst at Payden & Rygel Investment Management. "Even for individuals in the top tax brackets, often times inside of five years, you're better off holding a Treasury than paying through the scale for a California tax-exempt."

Bloomberg Markets

By Romy Varghese

October 4, 2018, 8:38 AM PDT

New Index Ranks States by Business Tax Climate.

Similar rankings have attracted scrutiny in the past.

Wyoming, Alaska and South Dakota received the best marks in a 50-state index of business-related tax policies that the conservative Tax Foundation released on Wednesday.

The absence of certain types of taxes, such as corporate or individual income tax, or sales tax, is a common trait among the 10 states at the top of the ranking. But the group says some states, such as Indiana and Utah, made it into the top 10 even though they levy those taxes.

New Jersey is the state that ranked worst on the index, just above it are California, New York and Connecticut. The Tax Foundation says the 10 states lowest on the list also tend to share characteristics, such as complicated, "nonneutral" tax systems, and relatively high tax rates.

The index, according to the group, is designed to show how well states structure their tax systems and "provides a roadmap for improvement." This year's findings look at tax conditions as of July 1.

"Tax competition is an unpleasant reality for state revenue and budget officials, but it is an effective restraint on state and local taxes," the report says.

Business climate rankings, including those from the Tax Foundation, have attracted criticism previously. The group Good Jobs First issued a 2013 report that derided the rankings as "corporate-sponsored, pseudo-social science" that have distorted policy debates.

The report points to a corporate tax burden ranking by the Council on State Taxation that in past years had drastically different findings than Tax Foundation business climate assessments—at one point ranking Wyoming 45th, while the Tax Foundation ranked the state No. 1.

In its latest release, The Tax Foundation addresses some of these criticisms and says that its "index does not purport to measure economic opportunity or freedom, or even the broad business climate, but rather the narrower business tax climate."

The latest Tax Foundation report also warn states against using special tax incentives and subsidies as tools to attract businesses, instead encouraging broad-based tax policy changes to do so.

The authors point to a situation where North Carolina agreed to provide the computer company Dell

$240 million of incentives to bring a facility to the state. But the company announced it would close the plant closed after just four years of operations.

Route Fifty

By Bill Lucia,
Senior Reporter

Sep 26, 2018

IRS Updates VCP Submission Procedures: Day Pitney

On September 28, the Internal Revenue Service (IRS) released Rev. Proc. 2018-52, which provides an updated statement of the correction programs under the Employee Plans Compliance Resolution System (EPCRS). Generally, EPCRS allows sponsors of tax-qualified retirement plans to correct failures that would otherwise cause a plan to run afoul of the qualification requirements of Sections 401(a), 403(a), 403(b), 408(k), or 408(p) of the Internal Revenue Code of 1986, as amended (Code).

According to Rev. Proc. 2018-52, the primary purpose of publishing a revised EPCRS was to set forth new submission procedures under the Voluntary Compliance Program (VCP). Specifically, beginning April 1, 2019, plan sponsors must submit VCP applications (and pay applicable user fees) electronically through the www.pay.gov website. Submissions must be converted into a single PDF document before being uploaded and may not exceed a 15MB size limitation. A sponsor with a lengthy VCP application must remove pages to ensure the PDF is no greater than 15MB, and fax the remaining documents to the IRS.

During a transition period from January 1, 2019, through March 31, 2019, plan sponsors may elect to submit VCP applications either electronically or on paper under the procedures set forth in Rev. Proc. 2016-51.

Rev. Proc. 2018-52 notes that the Treasury Department and IRS are currently reviewing comments on potential changes to EPCRS relating to the recoupment of overpayments and the expansion of the Self-Correction Program (SCP).

Rev. Proc. 2018-52 modifies and supersedes Rev. Proc. 2016-51.

Day Pitney Advisory

October 3, 2018

Day Pitney Author(s) David P. Doyle Thomas F.J. O’Mullane

Who Benefits from the State and Local Tax Deduction?

The House of Representatives passed a bill last week that would make permanent the individual provisions of the Tax Cuts and Jobs Act (TCJA). One such provision is the $10,000 cap on the state and local tax (SALT) deduction. The benefits of the SALT deduction overwhelmingly go to high-income taxpayers, particularly those in high-income and high-tax states. In 2016, 77 percent of the benefit of the SALT deduction accrued to those with incomes above $100,000; only 6.6 percent went to taxpayers with incomes below $50,000.

The value of the SALT deduction as a percentage of adjusted gross income (AGI) increases with a taxpayer's income. In 2016, taxpayers with AGIs between $0 and $24,999 claimed, in aggregate, SALT deductions worth only 2.3 percent of AGI, whereas taxpayers with incomes of $500,000 or higher claimed deductions worth 7.7 percent of AGI. AGI is used to calculate taxable income; wealthier taxpayers, then, enjoy a SALT deduction worth a greater percentage of their taxable income.

Continue reading.

The Tax Foundation

by Robert Bellafiore

October 5, 2018

The Benefits of the State and Local Tax Deduction by County.

The House of Representatives passed a bill last week that would make permanent the individual provisions of the Tax Cuts and Jobs Act (TCJA). One such provision is the $10,000 cap on the state and local tax (SALT) deduction. This map shows the variation, by county, in the amount of that deduction taken by taxpayers. As you can see, the benefits of the SALT deduction vary widely by county: the average deduction across the ten counties with the highest SALT deduction is $15,736, compared to an average of $1,727 for the country overall.

The measurement used here is mean deduction amount taken per return—in other words, the total value of all the deductions for state and local taxes, divided by the number of returns filed.

This map is interactive—hover the mouse over a given county to see its average amount of state and local deduction claimed.

Continue reading.

The Tax Foundation

by Robert Bellafiore

October 5, 2018

California Gas Tax Repeal May Squeeze State in Next Recession.

- **November ballot measure would roll back a gas-tax increase**
- **Increased voter requirements could hamper budget flexibility**

A rare push in California to roll back taxes may jeopardize the state's finances the next time the economy falls into a recession.

In November, voters will decide whether to approve a ballot measure that would repeal a gas-tax increase passed by the legislature last year to fund transportation improvements and require future hikes to be approved at the polls. Proponents say it would instill discipline in a state they believe squanders the fuel-tax revenue for non-infrastructure expenses. But it could also make it difficult for the state to respond to a downturn in the economy, which is now in the second-longest expansion on record.

"It adds an element of risk to the state's credit profile in the event of a recession," said Paul Mansour, head of municipal research at Conning. He said he was "very concerned" about the measure. "It shows a potential lack of support for infrastructure and possibly shifting the burden to the general fund, which has been steadily built up. This can undo a lot of progress."

Carl DeMaio, a chairman of the committee behind the repeal, said the higher taxes and fees needlessly burden residents. He and other supporters are also spearheading another campaign for a potential ballot measure in 2020 that would require 100 percent of the gas tax to go to road repairs, instead of public transit and the controversial $77 billion high-speed rail project.

"We don't have revenue problem, we have a spending problem," said DeMaio.

In 2017, California Governor Jerry Brown signed a package that was estimated to raise $5 billion annually for transportation improvements through higher gas taxes and vehicle fees. Resentment in the state that already had some of the country's highest gas prices started almost immediately as opponents quickly got a repeal on the November ballot. Congressional Republicans seeking to preserve their edge in the House have funded the measure as they face Democrats energized by antipathy toward President Donald Trump.

The measure is "pretty unique" for California since it's a rollback of a tax that is already in place, said Mark Baldassare, president and chief executive officer of the Public Policy Institute of California. A September poll from the San Francisco-based group shows the repeal narrowly losing.

If passed, improvements to the state's infrastructure may end up competing for general fund dollars with other needs, Fitch Ratings said in a release. It ranks the state AA-. Brown in June signed a $138.7 billion budget that included a $13.8 billion rainy day fund, the largest ever for the state.

Fitch noted that the state legislature already needs the go-ahead from two-thirds of its members to pass tax increases. "Additional extensions of voter approval requirements for state revenue increases could erode the state's revenue framework and ultimately its ability to manage its budget in response to changes in the economy," it said.

Bloomberg Markets

By Romy Varghese

October 3, 2018, 11:00 AM PDT

New York Towns Gearing Up to Fight IRS Ruling on Local Taxes.

New federal code capped state and local tax deductions at $10,000, hurting some residents in the high-tax suburbs

An emerging coalition of New York municipalities is preparing to challenge proposed Internal Revenue Service regulations that clouded the ability of cities and towns to set up funds that allow residents to pay their local taxes as charitable contributions.

The group of municipalities—which includes Westchester County—will file public comments with the IRS and is considering a lawsuit, according to Assemblywoman Amy Paulin, a Democrat who lives in Scarsdale.

The new federal tax code signed into law by President Trump in December put a $10,000 cap on state and local tax deductions, a change that has hurt some residents in New York's high-tax suburbs.

State lawmakers approved a bill in March that allowed the creation of the charitable funds. Under New York's law—which is similar to legislation adopted in New Jersey and Connecticut—localities can issue a taxpayer a credit against their property taxes for up to 95% of the amount donated to a designated charitable fund. New York may issue credits against state income tax for up to 85% of a donation.

Fourteen New York municipalities have set up the charitable funds, according to a database of local laws and interviews with municipal officials. Charitable deductions against federal income aren't limited, but the IRS rule would block the relief intended by New York lawmakers by requiring taxpayers to subtract the value of the state credits from the amount of their donation.

Daniel A. Rosen, a partner at Baker & McKenzie who is working with the coalition, said the IRS proposal is contrary to the agency's earlier treatment of donation-and-credit systems in states such as Alabama that provide state incentives for taxpayers who donate to funds supporting community college programs.

"State and local tax benefits have never been viewed, by the federal government, like a tote bag," Mr. Rosen said in an interview. He said he is considering a pre-enforcement challenge to the regulations, which could be finalized after a Nov. 5 public hearing.

A spokesman for the IRS, Dean Patterson, said he declined to comment because the proposed regulations remain open for public comment.

But the IRS ruling in August that declared the charitable-donation structure unlawful has had a chilling effect, according to Gerry Geist, executive director of the state's Association of Towns and a member of the coalition.

The Village of Rye Brook collected $21,169 from six taxpayers this summer, but Mayor Paul Rosenberg expects the fund will be dissolved.

Ithaca set up a fund in June but no taxpayers used it, according to Mayor Svante Myrick. He attributed the lack of participation to the ability of taxpayers to pre-pay their 2018 city taxes in the last days of 2017, before the new deduction caps took effect.

"We're accepting contributions," Mr. Myrick, a Democrat, said. "Frankly I'd rather keep their money here in New York state than use it to finance this tax cut for millionaires and billionaires."

Scarsdale Public Schools moved to set up a fund but waved off. David Albert, a spokesman for the New York State School Boards Association, said he was "warning districts to wait until we received more guidance."

Different types of localities collect taxes at different times: Towns and counties generally issue bills in January; school districts in September. Some villages send tax bills in June and July, and were able to collect donations and issue credits before the proposed IRS regulations were published in the federal register on Aug. 27.

The state-level funds remain open, according to state Budget Division spokesman Morris Peters, and are part of Gov. Andrew Cuomo's multi-pronged challenge to the federal tax law.

In July, New York State Attorney General Barbara Underwood filed a lawsuit along with three other states saying the tax law unfairly targeted New York and other high-tax states governed by Democrats.

Representatives for the IRS and Treasury Department have said they are reviewing the suit.

Mr. Peters said figures of how many taxpayers have donated to the state aren't available. But at least one donor was Ms. Paulin, who said she and her husband contributed $100,000 to the state fund and $10,000 to the Village of Scarsdale fund.

"It's monetary, but it's also a protest," Ms. Paulin said. "I worry that the changes to SALT are going to destroy our way of life in our state, and I want to be part of an effort to preserve that."

The Wall Street Journal

By Jimmy Vielkind

Sept. 30, 2018 11:00 a.m. ET

In Need of More Research – The Congressional Research Service's Error-Filled Report on Private Activity Bonds (and, Specifically, Qualified 501(c)(3) Bonds)

As readers of this blog know, the version of the Tax Cuts and Jobs Act that was passed by the House of Representatives would not have allowed any private activity bond (including any qualified 501(c)(3) bond) to be issued as a tax-exempt bond after December 31, 2017. The version of the Tax Cuts and Jobs Act passed by the Senate, and the version ultimately enacted into law, did not include this repeal of tax-exempt private activity bonds.

We've previously explored (here) why the House wanted to eliminate tax-exempt private activity bonds and debunked the purported policy bases that were articulated by members of the House in support of the repeal of tax-exempt private activity bonds. The need for exploration and debunking remains, in light of both the Republicans' insatiable desire to enact tax cuts and the release by the Congressional Research Service of its report titled "Private Activity Bonds: An Introduction," which appears to have been drafted to afford a policy rationale to eliminate the income tax exemption for interest paid on certain private activity bonds (which elimination would, of course, be used to cover the cost of income tax rate reductions).[1] To discover the errors in CRS's report, hit the jump.

Continue reading.

By Michael Cullers on September 25, 2018

Fitch Ratings: Operating Margins Remain Under Siege for U.S. NFP Hospitals

Fitch Ratings-Austin-20 September 2018: Stunted operating margins remain a thorn in the side for U.S. not-for-profit hospitals, though balance sheets are healthier, according to Fitch Ratings in a new report.

Ongoing struggles with operating margins reflect a broader sector trend in which healthcare reform pressures have only been alleviated not eliminated.

"Labor and wage pressures for experienced staff will continue with the U.S. labor market improving and the need for clinicians still strong," said Senior Director Kevin Holloran. "Another factor that will add to operating margin woes is the ongoing transition to population health and at-risk contracting."

Fitch Ratings' 2018 medians show that operating margins have declined across the board for the entire rating spectrum of hospitals. Key balance sheet metrics like days' cash on hand, cash to debt and leverage, however, have improved over the last year and are now at all-time highs. Whether this means better days ahead for the sector remains to be seen. One thing is clear, however. "Operating margins remain under pressure for the second straight year, which means stress is not letting up for not-for-profit hospitals," said Holloran.

Though Fitch's revised rating criteria places more emphasis on balance sheet strength, operating profitability is still very much a pivotal factor in determining a hospital's fiscal health. Despite weakening operating margins, the median rating for Fitch's rated credits remains at 'A'. That said, "should operational pressures continue for an extended period of time, even strong balance sheets will begin to come under pressure," said Holloran.

Fitch has augmented its analysis of not-for-profit hospitals with two new key ratios: Cash to Adjusted Debt and Net Adjusted Debt to Adjusted EBITDA. Fitch's "2018 Median Ratios for Non-profit Hospitals and Healthcare Systems" special report is available at www.fitchratings.com or by clicking on the above link.

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The Week in Public Finance: Amid Rising Home Prices, 2 States Take Property Tax Proposals to Voters

Ballot measures in California and Louisiana seek to protect homeowners from huge property tax spikes.

SPEED READ:

- Voters in California and Louisiana face ballot measures that would reduce their property taxes at a time when the median U.S. home price has risen by 40 percent in five years
- California's Proposition 5 would help seniors, the disabled or people who are homeless as the result of a natural disaster.
- Louisiana's Amendment 6 would phase in homeowners' new property taxes over four years.

Home prices have risen, but when voters in two states head to the polls in November, they could at least reduce their property taxes.

The median home price has risen by 40 percent nationwide in the past five years and is still rapidly rising. The increase is blamed largely on a housing shortage. The problem has been especially acute in California, which — along with Louisiana — is considering property tax reductions this fall.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | SEPTEMBER 28, 2018

Governments Can Improve TIF Practices.

The Lincoln Institute of Land Policy and Professor David Merriman have developed five recommendations on ways to improve Tax Increment Financing (TIF) for economic development. Their guidance stems from case studies and a review of academic work on TIF theory, practice, and effectiveness.

1.States should track and monitor TIF use. Basic monitoring helps states evaluate the use of TIF and helps state legislators better understand whether TIF regulations are achieving their goals.

2. States should revise statutes to allow counties, school districts, and other overlying local governments to opt out of contributing resources to TIF districts. This measure would diminish or eliminate the incentive for local governments to use TIF as a device to capture revenues that otherwise would have gone to overlying governments.

3. State legislators should review their "but for" TIF requirements to determine whether they are effective. Prior to the creation of a TIF district, some states require proof that the planned development would not occur "but for" the tax increment financing. An effective "but for" clause can prevent communities from using TIF when other tools might be more helpful and transparent.

4. Local governments should provide extensive, easily accessible information about TIF use, revenues, and expenditures. This information would enable local elected officials to monitor and regulate the application of TIF, shortening the duration of TIF arrangements, for example, or making other adjustments to the terms of use as needed.

5. Researchers should study, document, and explain the different outcomes resulting from TIF use in various geographic areas. To date, academic studies of TIF document mixed outcomes but do not clearly identify the factors that explain this variation.

> "The basic design of TIF has significant virtues, but decades of experience and research from around the United States show that often TIF is flawed in practice."

Smart Incentives agrees with many of these recommendations, which are consistent with our guiding principles on the need for better data, analysis, transparency and accountability in incentive use. We also appreciate the emphasis on understanding outcomes.

Going past the high-level recommendations, we found some of the topics from the review of previous research interesting. For example, the discussion around "but for" in the paper highlights the issue of whether the diverted revenues would exist "but for" the TIF – not simply whether the development itself would have occurred. This brings into the conversation a look at local government choices relative to other taxing jurisdictions and the implications of shifting rather than creating development. It also includes a reminder that there can be negative fiscal effects from development that often are not, but should be, counted.

The extensive look at studies examining efficacy in economic development raises the usual frustrations with academic studies that yield "mixed" findings, with 42% showing positive results, 42% with neutral or mixed results, and 16% with negative results.

What is interesting is the variety of ways those results are measured. The chapter begins with the statement that, "TIF is designed to promote real estate investments that raise the market and assessed values of real estate parcels in a given area." The studies, however, examine variables that include "employment, retail sales, assessed values, growth in median house value, median household income, and value of building permits, among others." It's not surprising the findings are mixed.

We generally agree with the point that "the purpose of stimulating growth in property values is to ultimately improve citizens' quality of life," which is presumably the way all government activities should be measured and evaluated. But there may be some additional steps or metrics that are needed to help link TIF activity to those broader outcomes as we think through exactly how a TIF district influences community-wide measures like employment or income.

Learn more and read the entirety of this highly informative report [here].

Smart Incentives

by Ellen D. Harpel | Sep 19, 2018

[Opportunity Zones and Shared Prosperity: Emerging Principles from Cleveland.]

Since their enactment in the 2017 Tax Cuts and Jobs Act, [Opportunity Zones] have attracted significant interest as a potential major source of untapped capital to revitalize America's struggling neighborhoods and communities. A growing number of local leaders are eager to turn this buzz into investment that delivers economically inclusive and racially equitable outcomes.

Yet those leaders face an important challenge: how can they ensure that private funds deliver sustainable investment in lower-income communities that truly need it, rather than simply accelerate real estate development in neighborhoods where market forces are already strong?

While cities await further guidance from the U.S. Department of Treasury—a crucial step in determining how the Zones actually function—a group of community leaders in Cleveland recently convened to address these questions. Organized as part of the Shared Prosperity Partnership, a national collaboration between the Kresge Foundation, Brookings, the Urban Institute, and Living Cities, the discussion drew on national and local expertise in community and economic development and finance. The discussion highlighted three principles that can inform cities' efforts to use Opportunity Zones to spur equitable community revitalization:

Continue reading.

The Brookings Institute

Rachel Barker and Alan Berube

Wednesday, September 19, 2018

TAX - CONNECTICUT

Town of Ledyard v. WMS Gaming, Inc.

Supreme Court of Connecticut - September 4, 2018 - A.3d - 330 Conn. 752018 WL 4175892

Town brought action against owner of slot machines to collect unpaid personal property taxes imposed on the machines. Owner and town filed cross motions for summary judgment as to owner's liability for town's attorney fees incurred in defense of tribal nation's separate federal action against town, in which tribal nation challenged town's authority to impose personal property taxes on machines that owner leased to tribal nation.

The Superior Court granted town's motion and denied owner's motion. Owner appealed. The Appellate Court dismissed the appeal. Owner of slot machines appealed.

The Supreme Court of Connecticut held that trial court's decision concluding that owner of slot machines was liable to town for town's attorney fees incurred in defense of tribal nation's separate federal action against town, in which tribal nation challenged town's authority to impose personal property taxes on owner's slot machines leased to tribal nation, was an appealable final judgment in town's action against owner seeking to collect the taxes, even though the trial court had not determined the amount of attorney fees owed; all that remained to be done after the trial court's decision was for town to file a motion for attorney fees, which it did, and for the court to conduct a hearing on that motion to determine the amount of the fees.

TAX - NEW YORK

NYCTL 2009-A Trust v. Morris

Supreme Court, Appellate Division, Second Department, New York - September 12, 2018 - N.Y.S.3d - 2018 WL 4344592 - 2018 N.Y. Slip Op. 06022

New York City Tax Lien (NYCTL) Trust and Bank of New York brought action against property owner to foreclose a tax lien encumbering premises.

The Supreme Court denied NYCTL Trust's motion for summary judgment. On appeal, the Supreme Court, Appellate Division, affirmed. NYCTL Trust filed second renewed motion for summary judgment and also sought to appoint a referee to compute the amount due, to substitute plaintiff, and to amend the caption. The Supreme Court, Queens County, denied motion for summary judgment. NYCTL Trust appealed.

The Supreme Court, Appellate Division, held that:

- NYCTL Trust demonstrated their prima facie entitlement to judgment as a matter of law;
- NYCTL Trust made a prima facie showing that they satisfied due process rights of property owner; and
- Property owner failed to raise a triable issue of fact rebutting NYCTL Trust's prima facie showing or as to the merit of his affirmative defense.

New York City Tax Lien (NYCTL) Trust moving for summary judgment in action to foreclose property tax lien demonstrated their prima facie entitlement to judgment as a matter of law by submitting the subject tax lien certificate, which was presumptive evidence of a valid and enforceable lien, along with proof that no payments had been made on the tax lien.

New York City Tax Lien (NYCTL) Trust moving for summary judgment in action to foreclose property tax lien made a prima facie showing that they satisfied the due process rights of property owner by furnishing constitutionally adequate notice of the sale of the tax lien.

Property owner failed to raise a triable issue of fact rebutting New York City Tax Lien (NYCTL) Trust's prima facie showing or as to the merit of his affirmative defense in opposition to NYCTL Trust's motion for summary judgment in action to foreclose property tax lien.

Little Publicized Section of Tax Cut and Jobs Act Could Cause Burden for Governments.

Changes to Internal Revenue Code section 162(f) and an added section 6050x imposed by the Tax Cut and Jobs Act could result in burden for governments. Under section 162(f), taxpayers cannot deduct amounts paid or incurred to a government or governmental entity in response to a violation of law or potential violation of law. An exception exists if a taxpayer can show that the amount (i) constitutes restitution for damage or harm that may have been caused by the violation of or potential violation of law, or (ii) is paid to come into compliance with any law that was violated. Additionally, the court or settlement agreement must identify the amount as restitution or as paid to come into compliance with the law.

The Tax Cuts and Jobs Act also added section 6050X which requires governments and governmental entities to report amounts received from taxpayers under section 162(f). Section 6050X requires governments to report the amount of the nondeductible payment, any amount that constitutes restitution or remediation of property, and any amount paid for coming into compliance with any law that was violated or part of the investigation.

Issues that have been noted by states include:

- The reporting is required at the point the suit or agreement is reached making it impossible to trigger the reporting from the financial transaction.
- Each state agency's legal counsel would need to be made aware of the reporting requirements related to 6050x as it would be legal counsel's responsibility to determine when a suit or settlement agreement is finalized and whether it is subject to 6050x reporting.
- The forms would need to be immediately produced for 6050x reporting for the "defendant" in the suit. The forms would also need to be filed with the IRS (per the requirements of this notice/section of the law).
- Such reporting would pose a substantial administrative burden on a state having to review all settlements/suits a State may have to determine if the reportable under the law (6050x).
- It also appears that the tax reporting burden would be on the legal counsel whom is not generally an expert in tax reporting.

As the provision applied when the law was passed on December 22, 2017 however, the IRS has released transitional guidance on the new requirement setting the compliance date for some time after January 1, 2019. The proposed regulations are expected soon.

A copy of the transitional guidance (Notice 2018-23) regarding nondeductible penalties under Code sections 162(f) and 6050X can be found here.

Further, the IRS is seeking comment on the burden of the 6050x transitional guidance. This is not a request for comment on the guidance itself but rather a request for comment on the burden of collection i.e., a paperwork reduction notice. Nonetheless, people often provide comment on the actual requirement even though the notice requests comment on paperwork burden.

Should you have any comments on the issue, please provide those to Cornelia Chebinou. Should we receive enough input, we will craft an association response. The paperwork reduction notice is available here.

A Reshuffling of the 8038 Deck.

The IRS recently released a new Form 8038-G, which is the information return for issues of tax-exempt governmental bonds, and a new Form 8038, which is the information return for tax-exempt private activity bonds. In addition, the IRS has released draft instructions for each form. The revised forms are in part a response to changes made to the Internal Revenue Code by the Tax Cuts and Jobs Act (P.L. 115-97), which was signed into law on December 22, 2017 ("TCJA"). Keep reading for more information on the new forms, the fate of some old forms, and some gratuitous commentary.

Continue Reading

The Public Finance Tax Blog

By Cynthia Mog on September 13, 2018

Squire Patton Boggs

The Trouble With TIF.

Cities love to use Tax Increment Financing to boost development. Should they?

Local governments often hail this tool as a way to revitalize investment-deprived neighborhoods, fix dilapidated roads, clean up polluted waters, revamp blighted property, and foster commercial activity and job creation. It's often poorly understood by city taxpayers, but it affects them in very real ways.

I'm talking about Tax Increment Financing (TIF), a popular mechanism meant to boost economic development. Its usage is widespread: Every state but one employs it, and it's a go-to move for many cities trying to revive struggling neighborhoods, especially in the Midwest. But how effective is it, really?

The answer, like life itself, is complicated. But David Merriman, a professor at the University of Illinois at Chicago, takes a stab at it in a new report for the Lincoln Institute of Land Policy. After reviewing available research on the implementation and impacts of TIF, Merriman concludes that the mechanism, while helpful in some ways, leaves a lot to be desired.

Continue reading.

CITY LAB

TANVI MISRA

SEP 12, 2018

TAX - ALABAMA

Burnett v. Chilton County Health Care Authority

Supreme Court of Alabama - August 31, 2018 - So.3d - 2018 WL 4177518

Objector brought action county and county health care authority for a judgment that act concerning authorization of county to levy a sales tax for hospital operations was unconstitutional, and objector sought an injunction against act's enforcement.

The Circuit Court entered judgment on the pleadings for county and county health care authority. Objector appealed.

The Supreme Court of Alabama held that:

- Act was not a bill for raising revenue within the meaning of provision of state constitution that mandated that all bills for raising revenue originate in the House of Representatives, but
- Failure of published notice to state that bill that eventually became the act repealed a prior act was a violation of notice provision of state constitution regarding local acts.

Act concerning authorization of county to levy a sales tax for hospital operations was not a "bill for raising revenue" within the meaning of provision of state constitution that mandated that all bills for raising revenue originate in the House of Representatives, and thus the bill's origination in the Senate was not a basis to find it unconstitutional.

Failure of published notice to state that legislative bill, which eventually became an act, that concerned the authorization of county to levy a sales tax for hospital operations repealed a prior act was a violation of notice provision of state constitution regarding local acts, and thus the newer act would be struck down, despite arguments that the prior act, which also concerned the authorization of county to levy a sales tax for hospital operations, was unconstitutional for being dependent on a local referendum and for delegating the power to levy taxes; the unconstitutionality of the purportedly repealed act was disputed, and even if newer act repealed prior act by implication, state constitution's notice provision still required informing the people affected by the repeal.

Rising Special Purpose Taxes Carry Long-Term Funding Concern.

Tight budgets and public backlash to broad-based tax increases are causing a growing number of state and local governments to enact special purpose taxes, which directly link revenues to specific programs, stoking concerns about their long-term financial viability.

Whether they are for teacher salaries and school safety enhancements in Florida, road repairs in Mississippi, police protection in Kansas, public health services via soda tax in Boulder, Colorado, or even flood control in Iowa, tax policy experts say the use of special purpose taxes is clearly on the rise.

While this trend of augmenting existing income, sales and property taxes might be understandable, critics worry about the long-term ramifications that this ad hoc funding will have on the delivery of essential services.

"The appeal of special purpose taxes is that voters tend to have much more favorable views of specific government services than they do of government as a whole," said Jared Walczak, senior policy analyst at the conservative-leaning Tax Foundation. "The problem with special purpose taxes is that they tie the hands of policymakers."

Not only do they crimp the ability of elected officials to reprioritize spending and respond to changing circumstances, Walczak said, but these quid pro quo taxing arrangements also lock in specific spending targets, even as needs and priorities change.

Part of the problem, or impetus, behind the trend is the simple fact that the cost and demand for top-quality local service has, in many jurisdictions, risen faster than local wages and income. While inflation is clearly not a new problem, the increased use of this type of municipal taxing response to it is.

"Special purpose taxes have a longstanding history but are being once again popularized mostly as a result of backlash against state and local tax increases as well as due to cuts in state aid to localities," said Lucy Dadayan, senior research associate at the Urban-Brookings Tax Policy Center. "Politicians and government officials know that voters are most likely to support new taxes that are targeted to a specific need or purpose."

For example, Dadayan points to Coweta County, Georgia, as an example of a jurisdiction that has successfully used special purpose taxes to fund scores of local projects since 1986 via a program it calls the Special Purpose Local Option Sales Tax, or SPLOST.

Like most special purpose taxes, Coweta's SPLOST program requires ongoing annual or biennial approval from voters. As a result, county government actively and unapologetically promotes the benefits that the 1 percent local sales tax levy brings to the community.

“SPLOST has enhanced quality while keeping property taxes low, has minimized long-term debt in Coweta County, and an estimated 40 percent of shoppers” who pay the tax live outside the county, Coweta’s website says, alongside photos of the many roads, bridges, parks, playgrounds, firetrucks, equipment and building repairs the tax has funded.

To be sure, special purpose taxes — or any tax revenue, for that matter — can be shown to support all manner of popular programs and projects, but these visible and tangible outcomes do not reflect how efficiently the money was spent in building a particular bridge or building, or if the revenue was equitably shared between different neighborhoods and districts.

Frank Shafroth, director of the Center for State and Local Leadership at George Mason University, sees the rise of special purpose taxation as worthy of attention.

“It is hard to find anyone who likes taxes,” Shafroth said via email, “but every city, county, and school district either is mandated to have a balanced budget, or wants to reduce their costs of borrowing to finance public infrastructure.”

In fact, Shafroth feels the salesmanship that is involved with many of these taxes is not entirely unlike traditional retail advertising, which plainly identifies costs and benefits for consumers to see.

“That means that, increasingly, these jurisdictions want to ensure voters appreciate that their taxes will be devoted to paying for valuable public infrastructure or services,” Shafroth said of this store-like marketing of public finance.

Carl Davis, research director for the Institute on Taxation and Economic Policy, has written extensively about the impact of reduced state and federal aid and cost shifting on localities, but argues that if relabeling a tax is all that is needed to get vital programs funded, so be it.

“Telling people exactly how a tax will improve their community is key to overcoming knee-jerk antitax sentiments,” Davis said, noting that “the whole reason taxes exist is to fund public services that people need and want.”

While the debate over the merits of dedicated revenues, which assign tax receipts to a specific purpose, versus consolidated funding, which puts all municipal revenues into one big pot, may never be settled, experts say it’s important to at least be aware of the trend and its potential impacts.

“Raising taxes for teacher pay raises, funding the fire department or fixing potholes is a lot more attractive than raising taxes to fund general government operations,” Walczak pointed out, “even if, at the end of the day, the spending mix is the same.”

Law 360 – Tax Authority

By Matthew Nesto · September 10, 2018, 6:44 PM EDT

–Editing by Tim Ruel and John Oudens.

[The Week in Public Finance: Thanks to SCOTUS, States Are Taxing Online](#)

Sales. But the Legal Fight May Not Be Over.

In its bid to start collecting a sales tax on internet purchases, Colorado could run afoul of the Supreme Court's ruling.

The U.S. Supreme Court may have ruled that states can collect sales taxes for online purchases, but it turns out it's not so easy. Thanks to the complexities of tax structures in some states, the legal challenges may not be over.

This week, Colorado signaled it was moving forward on taxing out-of-state retailers by notifying them of a new requirement. In order to sell goods online to Coloradans, retailers have to register by Nov. 30 for a remote seller's license.

But here's the potential problem: As it's worded, Colorado's notice puts the onus on out-of-state retailers to figure out how to comply with one of the most complicated taxing structures in the country. The state has more than 300 separate sales tax jurisdictions which are locally administered. In its landmark sales tax ruling, *Wayfair v. South Dakota*, the Supreme Court said that a state may require collection of sales tax by out-of-state internet retailers so long as the law does not discriminate against or place excessive burdens on retailers.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | SEPTEMBER 14, 2018

Developers Still Exploring Possibilities of Opportunity Zones.

One of the more bipartisan aspects of the Tax Cuts and Jobs Act of 2017 passed last December was the creation of the Opportunity Zones Program. Investors willing to put their capital gains to work in some of the country's most vulnerable communities may defer their tax obligations to as late as the end of 2026. Those willing to stay invested in these areas for ten years or more may be relieved of their capital gains tax burden altogether.

ULI South Carolina invited tax and government affairs experts to help demystify the Opportunity Zones Program at the 10th Annual Capital Markets Conference held in September at the Sanctuary Resort on Kiawah Island.

Moderator Mark Cooter, who serves as accounting firm Cherry Bekaert's managing partner in South Carolina, introduced three panelists who have become well versed in the program in a very short time: Mary Burke Baker, a government affairs counselor at K&L Gates in Washington, D.C.; Michael Elliot, director of tax services at Cherry Bekaert; and Bobby Werhane, assistant vice president in the Charlotte, North Carolina, office of Bellwether Enterprise Real Estate Capital. (Download Presentation)

Baker kicked off the discussion with a primer on the program, defining Opportunity Zones as low-income areas in a given census tract with a 20 percent poverty rate or a median income less than 80 percent of the surrounding area. Governors and local officials determined which areas in their state should become Qualified Opportunity Zones and submitted their list to the U.S. Department of the Treasury for approval. (See the list by state here.)

Opportunity Zones need capital. Individuals and businesses with windfalls from the sale of assets need tax-friendly places to put their capital gains. The program gives these investors 180 days from the sale of the asset to put their capital gains into an Opportunity Fund. Those managing the Opportunity Fund have another 180 days to invest in Opportunity Zone Property, which Baker defined as “either a direct interest in tangible property located in an Opportunity Zone, or an investment in stock of a business or partnership interest operating in an Opportunity Zone.”

Since the purpose of the program is to “incentivize new activity and create jobs” in these low-income areas, Opportunity Funds are required to hold at least 90 percent of their assets in Opportunity Zones Property.

“They don’t want to see passive investments,” explained Baker. “The property has to be newly used by the Opportunity Fund or . . . substantially improved . . . within a 30-month period.”

Here’s where it gets good for the long-range investor.

The program offers tax incentives on the initial capital gains investments in a number of ways, and the longer you stay, the less you will pay in taxes. Those who hold on to their Opportunity Fund investments for five years get a 10 percent increase in basis; those who hold on for seven years get a 15 percent increase in basis. Those who hold on for ten years before selling their interest do not pay any taxes at all on their initial investment.

And there are other benefits, and not just for developers.

“Opportunity Zones also have relevance for retail and manufacturing, for warehouse, for startups, for incubators, for renewable-energy projects,” Baker explained. “They’re urban, they’re rural, they’re everywhere. If you have clients interested in these other areas, they provide another hook.”

If the Opportunity Fund itself generates capital gains, said Baker, “they can be reinvested, but that’s considered a different tranche, on a different timeline.”

“And, unlike the 1031 exchange, where you can’t get any cash back, here you can reinvest your full gain,” Elliot said. “You can get your basis back, keep that cash, and reinvest it elsewhere.”

Elliot also said that if you sell your investment in the Opportunity Fund before 2026, you will pay taxes on that gain. If it goes down in value, “you only have to recognize the lesser of your original per gain investment.”

According to Elliot, “all things being equal, this program lets you come out ahead.”

Though certain elements of the program are necessarily political, the panelists emphasized that it came together in a spirit of bipartisanship. It began when impact investor Sean Parker—of Napster and Facebook fame—approached lawmakers about ways to bring investors and community stakeholders together for mutual gain.

“It started as freestanding legislation, introduced by South Carolina’s own Senator Tim Scott,” Baker said, “and included 81 bipartisan co-sponsors in the House and 14 in the Senate.”

Once the program was swept up in the tax bill, it was fast-tracked, leaving unanswered questions and plenty of room for well-documented controversy and skepticism. While the Treasury Department is expected to deliver new guidelines by the end of 2018, there’s no telling which of the “fixes” the federal government will be able to address and which ones will require additional legislation.

Despite all the unknowns, the panel agreed that the potential benefits associated with Opportunity Zone investing were substantial and worth pursuing, albeit with considerable caution and under the guidance of experts who can stay current on every aspect.

"This is a completely new type of capital that excites us," said Werhane, echoing the sentiments of Elliot, Baker, and Cooter, "especially when we overlay that with the idea of bringing mission-based, communal change to areas."

Urban Land

By Lisa Rubenson

September 10, 2018

CA Releases New OZ Webpage.

Access the Webpage.

How the Triple Tax Exemption on Puerto Rico's Bonds Financed Its Territorial Status - and Helped Spark Its Debt Crisis.

How did Puerto Rico manage to incur a monumental debt of $72 billion without raising red flags among the sophisticated investors who continuously bought its bonds? Here associate professor of business Evaluz Cotto–Quijano points to the role of a tax exemption designed by the US Congress over 100 years ago to finance Puerto Rico's territorial government by inflating its bond debt instead of appropriating federal funds.

On June 30, 2016, a day before the government of Puerto Rico missed a bond payment, the US Congress and President Obama passed the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA). This statute places the Financial Oversight and Management Board for Puerto Rico in charge of handling Puerto Rico's debt crisis "[to] provide a method to achieve fiscal responsibility and access to capital markets."

PROMESA excludes the government of Puerto Rico from the control of the process to restructure the crippling $72 billion debt that could threaten the stability of the US financial institutions (mainly investment companies—hedge funds, closed-end funds, open-end funds—and monoline insurance companies) that bought Puerto Rican bonds.1) Its enactment and implementation raise many questions. One, especially, comes to mind: How was such a monumental debt incurred?

In this essay, I discuss issues not addressed in most media coverage of PROMESA and the Puerto Rico debt crisis. This debt crisis, I argue, goes beyond the simplistic narrative of a profligate people redeemed by the intervention of the US government through PROMESA. I propose that the enormity of the Puerto Rican bond debt is the intended result of a US government policy dating back more than a century to finance the operations of its territorial government.2)

Continue reading.

Pro – Market

Posted on September 11, 2018 by Evaluz Cotto-Quijano

Taxpayers Urged to Demand Elected Officials Resist Investing Public Money in Rays' New Stadium.

It will be a baseball palace – a 28,000-seat stadium on 14 acres north of Ybor Channel in Tampa's nightlife district with paneled windows to let the breeze blow in off the bay and a translucent roof to see lightning lace the summer sky.

It will be the new home of the Tampa Bay Rays, scheduled to open by first pitch of the 2023 season, and it will cost $892 million.

The Rays have no funding plan for their proposed new stadium, but one thing is sure: They aren't going to pay for much of it.

Americans for Prosperity – Florida (AFP-FL) is among groups raising alarm about the Rays' new stadium proposal as a Dec. 31 deadline nears for the franchise to opt out of its Tropicana Field lease with St. Petersburg or remain there through 2027.

"We absolutely oppose using taxpayers money for the stadium," AFP-FL Director of Coalitions Demetrius Minor told Watchdog News. "We are not saying don't build it, we're saying you shouldn't build it with public money."

When the Rays formally announced the proposal in July, it prompted an immediate response from most members of the Tampa City Council and Hillsborough County Commission that little to no public money would be funneled into the stadium.

Mayor Bob Buckhorn, while acknowledging the ballpark would be a great addition, noted there was little momentum to ask taxpayers to pay for a ballpark, suggesting the Rays and local business leaders could find "creative ways" to fund it.

But Minor said the AFP-FL and others fear the Rays will essentially coerce local taxpayers into kicking in direct and indirect subsidies to build the stadium by threatening to move elsewhere.

The Rays are proposing to contribute anywhere from $150 million to $400 million – how much depends on securing "naming rights" – and a local advocacy group, Rays 2020, is working to generate private financing for the stadium.

But hidden in the proposal are federal, state and local subsidies pivotal to the project.

The city, for instance, could be asked to contribute some or all of the $83 million in infrastructure improvements for the project, including water, sewer and utility lines, a pedestrian walkway over Adamo Drive and a 1,000-space parking garage.

The county, for instance, could be asked to contribute a share of hotel taxes it collects to upgrade and maintain tourism-related infrastructure.

The proposed Ybor City stadium site is within one of 32 federally designated "economic opportunity zones’ in Hillsborough County. It is among the 427 tracts in Florida granted that designation by the U.S. Treasury Department in June under provisions of the Tax Cut and Jobs Act of 2017 signed into law by President Donald Trump in December.

The designation allows developers to delay paying taxes on certain investments or real estate sales if they build in that zone, something supporters say will draw investors but critics argue is a “sweetheart deal” that diverts capital away from projects that offer a better return on investment for taxpayers.

“They’re saying, ‘We’re going to rob Peter to pay Paul,” Minor said. “The return-on-investment is not going to be what they say it is.”

Minor pointed to a 2018 study by the Florida Office of Economic and Demographic Research that found public subsidies and incentives for pro sports stadiums through the Florida’s Professional Sports Facilities Incentive Program returns only 32 cents per tax dollar spent.

He called any attempt to infuse public money into the proposal “corporate welfare,” cautioning that end-arounds to side-step taxpayers’ input is “nothing new.”

Minor said Georgia’s Cobb County taxpayers are paying $300 million – more than $400 million over time – for Sun Trust Stadium, where the Atlanta Braves now play.

“Cobb County is now closing down public libraries because they can’t afford it,” he said.

There are plenty of examples in Florida illustrating how taxpayers eventually pay more for sports stadiums then they get back in jobs, tax revenues and economic development.

In July, AFP-FL called upon Miami-Dade County residents to speak out against the “whale of a deal” the Miami Dolphins are seeking in a request for $750,000 a year in property tax exemptions in addition to a $5 million “bonus” taxpayers give the team to host other events at its stadium. The deal could be worth nearly $58 million, the group says.

“The Dolphins went fishing for taxpayer subsidies and Miami-Dade and Miami Gardens elected officials swallowed hook, line and sinker,” AFP-FL State Director Chris Hudson said in a statement. “But it’s wrong that local taxpayers are being asked to pad the privately owned Dolphins’ bottom line. The only ones benefiting from this deal are the teams’ shareholders.”

In 2009, Miami-Dade County borrowed $400 million to finance the Miami Marlins’ new ballpark. Projections forecast the subsidy could ultimately cost county taxpayers $2.4 billion.

During the 2018 legislative session, Rep. Manny Diaz, Jr., R-Hialeah Gardens, sponsored House Bill 13 “to curtail abuses that have gone on, where cities are being held hostage” by prohibiting public money or land from being used to build stadiums for sports teams.

HB 13 passed the House on Jan. 12 in a 75-27 vote, but died in the Senate Appropriations and Commerce & Tourism committees.

Minor said local and state taxpayers must “put the pressure on elected officials” to resist sports stadium promoters that promise big returns in exchange for public subsidies.

Ultimately, he said, there is only so much money available to address so many needs. Money spent on stadiums is money not spent elsewhere.

"Government should not be in the business of picking winners and losers," Minor said.

By John Haughey | Watchdog.org

[Statement by U.S. Conference of Mayors President Columbia (SC) Mayor Steve Benjamin on Meeting with Treasury Secretary on Opportunity Zones.]

Washington, DC—Today, a bipartisan delegation of mayors, led by U.S. Conference of Mayors (USCM) President Columbia (SC) Mayor Steve Benjamin, met with Treasury Secretary Steve Mnuchin to discuss the importance of timely and effective IRS guidance to implement the Opportunity Zone provisions of the Tax Cuts and Jobs Act of 2017. The delegation included Rochester Hills (MI) Mayor and USCM Vice President Bryan Barnett; Louisville (KY) Mayor and USCM 2nd Vice President Greg Fischer; Detroit (MI) Mayor Mike Duggan; and Mesa (AZ) Mayor John Giles.

Below is a statement on the meeting from Mayor Benjamin:

"Mayors across the country—both Democrat and Republican, and from cities large and small, are excited about the great potential of this new federal initiative. It is a true once-in-a-generation chance to reconnect communities with capital investment. In fact, we are already seeing a remarkable degree of interest from investors, philanthropies and community stakeholders nationwide.

During our meeting with the Secretary, we conveyed our enthusiasm about the capacity for Opportunity Fund investments to revitalize communities that have long been overlooked by private investors. We told the Secretary that investors, entrepreneurs, and local leaders are activated and already preparing business and community plans to implement the Opportunity Zone program.

But we also expressed our concern that without timely and effective IRS guidelines that allow Funds to attract a wide-ranging array of investors and deploy capital to new and existing businesses, the opportunity to revitalize low-income areas will be lost. Clarity is needed now to ensure that this innovative tool is broadly accessible and can spur economic development as was intended by Congress and the Administration.

We are encouraged today by the Secretary's commitment to the successful implementation of Opportunity Zones, and we pledged our assistance to help launch the Opportunity Zone program and bring investment to people and communities who need it most."

[3 Ways Blue States Could Still Get Around Tax Reform.]

The IRS has moved to block high-tax states from circumventing GOP limits on tax deductions — but not in every way possible.

The Internal Revenue Service issued [new regulations] late last month in an effort to [end workarounds by blue states] hoping to bypass the state and local tax deduction cap introduced under December's federal tax overhaul. But observers say that even with the new regulations, states still have several ways to get around the cap.

So far, Connecticut, New Jersey, New York and Oregon have passed laws that would allow residents who owe more than $10,000 in state and local taxes to pay the remainder into a state or local charitable trust, which is still deductible under federal law. Similar proposals are pending in California and Illinois.

Residents in the above states who itemize their taxes average far more in state and local tax deductions than the new federal cap. As such, states with high taxes have an interest in protecting their rates by making sure their residents can lower their federal tax burden by still deducting those taxes from their income.

Continue reading.

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BY LIZ FARMER | SEPTEMBER 6, 2018

TAX - SOUTH CAROLINA

PBBM-Rose Hill, Limited v. Commissioner of Internal Revenue

United States Court of Appeals, Fifth Circuit - August 14, 2018 - F.3d - 2018 WL 3853450 - 122 A.F.T.R.2d 2

Limited partnership petitioned for redetermination of final partnership administrative adjustment (FPAA) which determined that it was not entitled to charitable contribution deduction for its donation of a conservation easement to a land trust and penalty for overvaluing the conservation easement.

The United States Tax Court entered decision for IRS. Partnership appealed.

The Court of Appeals held that:

- In determining whether public-access requirement for qualified conservation easements was fulfilled, Tax Court was required to focus on terms of the deed and not on actual use of the land after donation;
- Terms of easement fulfilled public-access requirement for partnership to be able to claim charitable contribution deduction;
- Terms of easement did not fulfill the perpetuity requirement for partnership to be able to claim charitable contribution deduction;
- Fair market value of property before partnership donated it, based on its highest and best use, was IRS expert's estimate of $2,400,000 rather than taxpayer's expert's estimate of $15,680,000, so that total amount that could be deducted was $100,000 instead of the $15,160,000 claimed by partnership;
- Managerial signature on cover letter of report sent prior to issuance of FPAA satisfied IRS's obligation to obtain written managerial approval of initial determination of gross valuation misstatement penalty; and
- Gross valuation misstatement penalty applied to penalize partnership's overstatement of the deduction, but not to decision to claim deduction which it was not entitled to claim.

Early Navigation of Opportunity Zone Waters Leaves Many Questions.

Opportunity Zones provide investors a new method to defer or eliminate tax on gains that is more flexible than Section 1031 exchanges. While I.R.C. §1031 like-kind exchanges now only permit delaying capital gains recognition for real estate investments, the 2017 Tax Cuts and Jobs Act created a new program that permits temporary and sometimes permanent deferral of capital gains for certain private investments in businesses and property in low income areas for the purposes of economic revitalization and community development. There is also no cap on the amount of money that may be invested pursuant to this program.

To qualify for this tax treatment, the investment must be in certain low-income areas designated as Qualified Opportunity Zones ("O Zones"). The investment is made via a Qualified Opportunity Fund ("O Fund") which is an investment vehicle that must hold at least 90% of its assets in Qualified Opportunity Zone Property, which may be stock or a partnership interest in a business located in an O Zone ("O Zone Business"), or other property located in an O Zone ("O Zone Property"). O Zone Property has three prongs and is defined as: 1. tangible property used in a trade or business of the O Fund if such property was acquired by the O Fund by purchase after December 31, 2017; 2. the original use of such property in the O Zone commences with the O Fund or the O Fund substantially improves the property; and 3. during substantially all of the O Fund's holding period, substantially all of the use of such property was in an O Zone.

Depending on the length the Opportunity Zone investment is held, the existing gain invested may be deferred, up to 15% of that gain may be cancelled via a stepped-up basis, and additional capital gain on the appreciation may be exempt. O Funds offer investors a means of deferring built in gain (or a portion of the gain) from sales of existing assets. Investors may defer paying taxes on gains from the sale to, or exchange with, an unrelated person of any property held by the investor if those gains are invested within 180 days in an O Fund. Use of a qualified intermediary is not required. As long as the O Fund is certified, (i.e., holding at least 90% of its assets in O Zone Property), the gain qualifies for favorable tax treatment.

Qualifying gain can be deferred until the earlier of December 31, 2026, or the date the investment in the O Fund is sold or exchanged. The amount of gain includible is the lesser of the amount of gain originally deferred, or the excess of the fair market value of the investment over the investor's basis in the investment.In addition, the law provides for the possible reduction of the amount of gain realized while invested in the O Fund through a step-up basis adjustment if the investment in the O Fund is held beyond five and seven years, and the possible permanent exclusion of gain on the appreciation for the interest in an O Fund if the investment is held in the O Fund for 10 years or more.

Despite growing interest in O Funds and investing in O Zones, the law does not address many practical issues of how O Funds will operate and the timing for compliance measures. Very little guidance has been given to date, however, it is expected that additional guidance will be provided by the Treasury Department by the end of summer 2018. Additional guidance from the Treasury Department is needed most notably on the following provisions:

Initial O Fund Investments

The statute provides that an O Fund must hold at least 90% of its assets in Qualified Opportunity Zone Property, which includes stock or partnership interests in an O Zone Business, and O Zone Property acquired by the O Fund after December 31, 2017. The 90% requirement is determined twice a year, on the last day of the first 6-month period of the taxable year of the O Fund, and on the last day of the taxable year. Assuming the O Fund has a January to December taxable year, then the

O Fund must satisfy the 90% requirement on June 30 and December 31 of each year. The statute does not provide for a grace period for initial investments to meet these deadlines, and this is needed, especially now as the tax benefits for investors in O Funds are time-sensitive.

Valuation of the 90% Asset Requirement

The statute is silent on how to value an O Fund's assets for purposes of satisfying the 90% requirement. Because there are various ways to value an asset, such as fair market value, adjusted tax basis, and original cost basis, guidance will be needed from the Treasury Department on how to meet this requirement.

Definition of a Qualified Opportunity Zone Business

An O Zone Business is defined in part as a business in which substantially all of the tangible property owned or leased by the taxpayer is Qualified Opportunity Zone Business Property. There is no additional information in the statute regarding what "substantially all" means and the Treasury Department should provide a percentage threshold amount to give that term substantive meaning. Additionally, while the statute is intended to provide for investments in both existing businesses and new businesses located in an O Zone, an existing business may have difficulty meeting the "substantially all" test if the definition of O Zone Business Property is interpreted to require that the property owned by the business had to have been purchased after December 31, 2017. Accordingly, some clarification is needed to ensure that existing businesses operating in an O Zone meet the qualifications of an O Business.

Definition of Qualified Opportunity Zone Business Property

It is unclear from the definition of Qualified Opportunity Zone Business Property what property will satisfy the original use test versus the substantial improvement test in the second prong. If an O Fund purchases vacant land and proceeds to develop the land by constructing an apartment complex, will this be considered "original use"? What if the land holds abandoned single family homes and the O Fund demolishes the homes first and then proceeds to construct the apartments? As the statute does not answer those questions, clarification is needed to determine what constitutes original use and what constitutes substantial improvement. Further, guidance is needed on how funds are treated during the substantial improvement phase of the O Zone Business Property. The statute provides that property will be treated as substantially improved if during any 30-month period beginning after the date of acquisition of such property, additions to basis with respect to such property in the hands of the O Fund exceed an amount equal to the adjusted basis of such property at the beginning of such 30-month period. It is unclear from the statute whether property which is in the process of substantial improvement qualifies as O Zone Business Property. Additionally, it is also unclear from the statute whether funds used for the substantial improvement of the property qualify as O Zone Property for purposes of the 90% asset requirement. The Treasury Department will need to issue guidance on this matter since a large portion of investments in O Funds will likely be used for new construction and development.

Definition and Certification of Opportunity Funds

The statute defines O Funds as any investment vehicle organized as a corporation or partnership. It's unclear whether an O Fund can be organized as a limited liability company ("LLC"). While a LLC with more than one member can be treated as either a corporation or a partnership for tax purposes, the Treasury Department should clarify whether an O Fund can be organized as a LLC. The statute also requires that the Treasury Department prescribe regulations for the certification of O Funds. The IRS has issued guidance indicating that O Funds will be able to self-certify on their tax returns, however, no certification form has been issued to date. There is also confusion over whether the O Fund must satisfy the 90% asset requirement before it may be certified. Until the self-certification form is published, it's unclear what is required.

Opportunity Zone tax incentives provide an innovative investment device for favorable gain tax treatment to spur investment in distressed areas. Investing in O Zones is a promising way to defer gains and stimulate the economy in distressed areas across the U.S. Interested stakeholders have addressed the statute's deficiencies with the Treasury Department and with the right regulatory guidance, O Funds and O Zones could rise to meet their intended potential.

AZBIGMEDIA.COM

ECONOMIC DEVELOPMENT | 3 Sep | JENNIFER DELGADO AND DOUG WOOD

Jennifer Delgado is an attorney with the law firm of Burch & Cracchiolo. Jennifer represents and advises her clients on real estate transactions, including purchase and sale agreements, financing arrangements, commercial and residential leases, and landlord/tenant issues. Jennifer also advises and represents individuals, small and medium-sized businesses as to business entity structure, corporate formation, compliance matters and day to day operations, including buy sell agreements, non-compete agreements and mergers and acquisitions.

Doug Wood is an attorney with the law firm of Burch & Cracchiolo. Doug practices in the areas of Business and Corporate law, Estate Planning and Probate, and Tax Controversy. Doug joined the Firm in July 2015. Prior to joining the Firm, Doug practiced as a certified public accountant with a large national accounting firm focusing his practice on taxation.

TAX - SOUTH CAROLINA

PBBM-Rose Hill, Limited v. Commissioner of Internal Revenue

United States Court of Appeals, Fifth Circuit - August 14, 2018 - F.3d - 2018 WL 3853450 - 122 A.F.T.R.2d 2018-5471

Limited partnership petitioned for redetermination of final partnership administrative adjustment (FPAA) which determined that it was not entitled to charitable contribution deduction for its donation of a conservation easement to a land trust and penalty for overvaluing the conservation easement. The United States Tax Court entered decision for IRS. Partnership appealed.

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obligation to obtain written managerial approval of initial determination of gross valuation misstatement penalty; and
- Gross valuation misstatement penalty applied to penalize partnership's overstatement of the deduction, but not to decision to claim deduction which it was not entitled to claim.

TAX - SOUTH CAROLINA

Olds v. City of Goose Creek

Supreme Court of South Carolina - August 8, 2018 - S.E.2d - 2018 WL 3749764

Taxpayer appealed decision of city council regarding computation of gross income under business license tax ordinance, and further asserted claims against city for violation of equal protection, violation of procedural due process, abuse of process, violations of state and federal constitutions, and violation of the South Carolina Freedom of Information Act, against city administrator and city finance director for conspiracy, and against city's department of public works for breach of contract.

The Circuit Court affirmed the city council's decision regarding the meaning of gross income under city ordinance, and granted city summary judgment on taxpayer's other claims. Taxpayer appealed. The Court of Appeals affirmed. Taxpayer petitioned for writ of certiorari.

The Supreme Court of South Carolina held that city erroneously required taxpayer's business license fee to be calculated on "gross receipts"/"sales price" derived from his dealings in property, rather than a properly calculated "gross income."

While city was permitted by statute to levy a business license tax on gross income, the city ordinance went from broadly defining gross income as the "total revenue of a business" to narrowly mandating that the gross income figure reported to city conform to the gross income reported to the State Tax Commission, which, under the federal tax code would be defined as gains derived from dealings in property.

TAX - CALIFORNIA

Citizens for Fair REU Rates v. City of Redding

Supreme Court of California - August 27, 2018 - P.3d - 2018 WL 4057226 - 18 Cal. Daily Op. Serv. 8613

Taxpayer organization, individuals, and company hired to recover refunds of government fees filed petition for writ of mandate and complaint for declaratory and injunctive relief against city, asserting that payment in lieu of taxes transferred from city electrical utility to city's general fund was unlawful tax.

Organization, individuals, and company filed second complaint against city, seeking declaration that new two-year budget violated requirement that any special taxes for cities be approved by voters. Actions were consolidated. Following bench trial, the Superior Court denied petition for writ of mandate and issued memorandum of decision in favor of city. Organization, individuals, and company appealed, and the Court of Appeal reversed and remanded with directions. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that:

- Payment in lieu of taxes was not a “tax” requiring voter approval, and
- Rate utility imposed on ratepayers did not exceed the reasonable costs of providing electrical service and thus was not a “tax” requiring voter approval.

Payment in lieu of taxes transferred from city electrical utility to city’s general fund was not a “tax” requiring voter approval under Proposition 26; as utility had more than enough non-rate revenue to cover the payment, the payment was not necessarily passed through to and imposed on ratepayers.

Rate city electrical utility imposed on ratepayers did not exceed the reasonable costs of providing electrical service and thus was not a “tax” requiring voter approval under Proposition 26; revenue realized from rate payments was insufficient to cover utility’s other operating expenses, all rate revenues went to covering utility’s uncontested operating costs, remaining unpaid shortfall and payment in lieu of taxes to city to cover costs of services that other city departments provided to utility had to be satisfied from utility’s other sources of income, and that budgetary transfer was not paid out of rate revenues.

Disney Walks Away From Millions in Economic Incentives.

Is one of corporate America’s savviest companies reconsidering its reliance on subsidies, or is it seeking to avoid further regulation?

Earlier this month, the Walt Disney Company presented the city of Anaheim with a surprising request: It asked the California city to terminate two agreements that provide Disney with hundreds of millions of dollars in economic assistance.

The request comes as Disney’s relationship with Anaheim has grown increasingly strained in recent years. Critics, led by Anaheim Mayor Tom Tait, a libertarian-leaning Republican businessman who was elected in 2010, have criticized the city for agreeing to a 45-year moratorium on a gate tax and a $267 million economic assistance package for a new luxury hotel in the Downtown Disney District. Tait has argued that the money should instead be used to shore up the city’s bottom line.

In a letter to the mayor and city council, Disneyland Resort President Josh D’Amaro acknowledged “an unprecedented and counterproductive” level of animus between the company and the city that has hosted Disneyland since the theme park first opened in 1955. As a result, wrote D’Amaro, Disney had decided to ask the Anaheim “to join us in terminating” the two agreements at the center of the controversy.

On Tuesday, the Anaheim City Council acted on this request. It voted unanimously to revoke the two agreements. Tait described the vote as one that would boost city finances and serve as an example for other corporations to follow. “I think this type of move is bold, and I think it’s an example for other corporations out there,” he says. “Maybe there is a realization that long-term, it’s in their best interest that they are in a healthy vibrant community. I think there is a chance here that Disney could be a trendsetter.”

But not everyone is applauding the move. Some saw another reason for the company’s change of heart — a ballot initiative that will go before Anaheim voters in November. Unions representing Disneyland workers championed the ballot initiative, which, if it passes, will raise the minimum wage for businesses that accept economic assistance from the city to $15-an-hour and then increase it by another dollar per year until 2022, after which workers would receive a yearly cost-of-living adjustment.

Disney has insisted that their decision to terminate the two economic assistance packages was not an effort to sidestep the new ballot initiative. Yet that is precisely what critics of the company such as Vermont Sen. Bernie Sanders, who recently joined Disneyland workers to push for the measure, have accused it of doing. “Disney is so nervous that the living wage ballot initiative in Anaheim is going to pass,” Sanders told The Guardian, “it would rather end some of the corporate welfare it receives from local taxpayers than pay all 30,000 of its workers’ decent wages.”

Ada Briceño, co-president of UNITE HERE, which represents 3,000 Disneyland employees and is currently in the middle of contract negotiations, insists the fight is not over. “Subsidies or no subsidies,” she says, “we are adamant that Disney has to give its workers a dignified way of life.”

Greg LeRoy, who heads Good Jobs First, an organization that monitors corporate subsidies and has been critical of economic assistance packages, says companies such as Disney that employ large numbers of low-wage workers have historically gone to great lengths to avoid regulations that would require them to raise wages. “It would not be unusual for Disney to withdraw from a tax break package because of the wage standards,” he says. “[They] don’t want anyone telling them what to pay. They don’t want to set the precedent.”

As for Tait’s hope that Disney’s change of heart could set a precedent for corporate America’s dealings with other cities, LeRoy is skeptical. He says there has been a reduction in the number of economic assistance packages approved by state and local governments over the past 10 years. However, it’s not because corporations are asking for less, or that states and localities are taking a harder line. It’s because there are fewer deals to be had overall.

What is on the rise is extremely expensive “mega-deals,” such as Wisconsin’s $4.7 billion assistance package to Foxconn or the current competition for Amazon’s second headquarters. LeRoy sees the intense pursuit of mega-deals as another sign of what some economists have described as the winner-take-all economy. “Even at a time when unemployment is really low,” he says, “state and local governments appear desperate to spend to get jobs.”

As for Disney, it seems to view its decision to terminate its two most recent agreements with Anaheim as a one-off decision. In a statement released to Governing after the city council vote on Tuesday, Disney spokeswoman Liz Jaeger defended the practice of negotiating economic assistance packages. “These tax incentive policies, which are successfully and widely used across the country to stimulate economic growth and development,” she says, “unfortunately became counterproductive in Anaheim, prompting our decision to step away from them.”

GOVERNING.COM

BY JOHN BUNTIN | AUGUST 31, 2018

Treasury Releases Guidance on Permissibility of State Legislation to Circumvent SALT Deduction Cap.

On Aug. 23, 2018, the Department of the Treasury (Treasury) and the Internal Revenue Service (IRS) issued proposed regulations under Section 170 of the Internal Revenue Code (Code) addressing the federal income tax treatment and characterization of state legislation allowing certain charitable contribution payments made by taxpayers in exchange for a corresponding credit against state and local taxes (SALT).

Continue reading.

Brownstein Hyatt Farber Schreck

August 29, 2018

For Goldman, a New Tax Break Makes Helping the Poor More Lucrative.

- **Firm creates opportunity funds as rivals eye U.S. incentives**
- **Banks and investors may defer $7.7 billion in taxes by 2022**

For almost two decades, a Goldman Sachs Group Inc. unit has tended billions of dollars in bets off Wall Street, funding projects in struggling neighborhoods around New York and beyond.

Now, thanks to a new U.S. tax break, its deals could become a lot more lucrative.

The tax overhaul Republicans pushed through in December includes a lesser-known passage creating a new type of investment vehicle — "opportunity funds" — that can win steep tax breaks for supporting projects in low-income communities. Few if any banks are as well positioned to capitalize on the incentives as Goldman Sachs, which began creating funds days after the law passed. It's now weighing whether to set up more to let clients invest, too.

"We have a big leg up," said Margaret Anadu, who heads the bank's Urban Investment Group. "This is investing that we're already doing."

Opportunity funds are both innovative and controversial. They have to focus their investments in roughly 8,700 low-income communities selected by state governors and other officials. Zones range from gritty urban neighborhoods to shrinking Rust Belt towns.

Proponents say the program will provide a much-needed jolt to areas typically avoided by developers. But detractors have warned the law is written too broadly, giving savvy investors a break on projects they might have pursued profitably anyway. There are also concerns the program may accelerate gentrification, driving out low-income residents.

Goldman Sachs, for its part, is hardly shy: It's racing to make use of the new tax break and potentially popularize it on Wall Street. Anadu said the firm wants its investments to have a positive impact.

Days after the legislation passed, Goldman Sachs created an opportunity fund to invest in a project that will add affordable housing to New York's Jamaica neighborhood. In April, it did the same for money it put toward a development in East Orange, New Jersey, that will expand a grocery store in an area short on healthy food. In June and August it did deals in Brooklyn and Baltimore.

The funds are especially attractive for firms looking for ways to redeploy capital gains — of which Goldman Sachs and its clients have plenty. Investors start by plowing those proceeds into opportunity funds, deferring taxes until 2026. And, if the funds buy and hold qualifying assets for at least five years, investors can reduce the tax they pay on appreciation, or eventually eliminate it altogether.

Hit to Tax Collections

Deferrals will let opportunity zone investors cut tax payments immediately

The deferrals are expected to cost the government $7.7 billion by 2022, an impact that will eventually wane as investors resume payments, according to the Joint Committee on Taxation. There's no limit on the ultimate benefit for investors, whose profits depend on the gains generated by their projects and how long they hold onto the assets.

Researchers and non-profits have been raising red flags since the law went into effect. A study from the Urban Institute estimated almost 4 percent of the areas picked were already attracting large numbers of wealthier, college-educated transplants. That may seem small, but investors aren't required to spread their projects evenly, potentially concentrating their efforts in areas already destined to gentrify.

Goldman's Urban Investment Group started in 2001 and pursues a strategy known as social impact investing, looking to generate profits while contributing to communities. The unit is small enough that the bank doesn't break out its results in financial reports. But over the years, its name has appeared in numerous media reports describing its piece of local revitalization projects, many supported by other tax credits.

The head of that group, Dina Powell, left the bank to join the administration last year, as did Goldman Sachs President Gary Cohn, who became Trump's top chief economic adviser. Neither was directly involved in the crafting of the opportunity zones plan, according to two congressional aides who worked on the legislation.

Publicly, the idea was long championed by the Economic Innovation Group, a non-profit founded by Sean Parker, the Napster creator and first president of Facebook Inc. The think tank proposed opportunity zones three years ago in a white paper written by Jared Bernstein, a member of the Obama administration's economic team, and Kevin Hassett, the head of Trump's Council of Economic Advisers. A roster of lawmakers from both parties, including Senators Tim Scott of South Carolina and Cory Booker of New Jersey, sponsored earlier bills to create the zones before it was tucked into the broader tax overhaul.

Mnuchin's Pitch

At first glance, the legislation looks promising for Goldman.

Anadu's team recently reexamined the roughly $7 billion the firm has deployed since its inception. Executives found that more than $5 billion of that money went to projects in areas eligible to become opportunity zones.

For now, the firm's ambitions are being tempered by uncertainties. The Internal Revenue Service and Treasury have yet to issue rules that will affect how investors qualify for the benefits, leaving accountants and lawyers to pore over the legislation for clues.

Late last week, Treasury Secretary Steven Mnuchin, who started his career at Goldman Sachs, talked up the tax break to a group of wealthy investors in the Hamptons. In an interview afterward, he repeated a remark by a billionaire in the room: "It's not about the zone, it's about the opportunity."

Mnuchin was emphasizing that there's an opportunity to move businesses into the zones, creating jobs and spurring the economy, a Treasury spokesman said Wednesday. While most of the people in the room had been looking at the tax break as an incentive to develop real estate, the initiative is really a chance to expand business, he said.

Mnuchin predicted guidance for investors should be available “shortly.”

The wait is a big reason why Goldman Sachs has yet to decide whether to offer opportunity funds to clients, Anadu said. In particular, there’s ambiguity over what happens if multiple investments are wrapped into a fund. So while awaiting guidance, the firm is placing each investment into a single fund.

To be sure, some of the nation’s largest banks also have programs to help struggling communities and no doubt have expertise in vetting projects. JPMorgan Chase & Co., for example, has a community development arm that provides financing for a variety of projects. The firm has also set out to help cities such as Detroit, where the bank has promised to invest $150 million by 2019. A spokesman declined to comment on its plans for opportunity funds.

Other investors are already pushing ahead. Among them, RXR Realty, which focuses on property in the New York area, is seeking to raise $500 million for an opportunity fund, a person familiar with the matter said earlier this month. Steve Case’s venture capital firm Revolution LLC recently hired two real estate executives to begin making direct investments with a focus on the zones.

PNC Financial Services Group Inc. is planning opportunity funds. And a number of banks in addition to Goldman Sachs, such as Wells Fargo & Co., have participated in calls held by the Economic Innovation Group to keep abreast of the law’s implementation, according to a person familiar with the talks.

Seeking Limits

This month, the National Housing Conference, an advocate for affordable housing, sent a letter to the Treasury pointing out what the non-partisan group sees as flaws in the legislation. The group encouraged policymakers to implement guardrails and gather data to prevent abuse. It said it would be “tragic” if higher-priced rentals replaced more affordable units because of the incentives.

Goldman Sachs says it shares some concerns raised by critics. It’s worrisome, Anadu said, that the law doesn’t require investors to align their goals with community priorities. The bank plans to do so, and voluntarily measure the outcomes of its projects, she said.

“Being thoughtful about the impact of our investments is not just positive for the communities themselves,” Anadu said, “but also meaningfully mitigates risk.”

Bloomberg Wealth

By Noah Buhayar

August 29, 2018

— With assistance by Sridhar Natarajan, Laura Davison, Ivan Levingston, Michelle Davis, Amanda L Gordon, and Saleha Mohsin

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Opportunity Zones: An Updated Overview and Look at What's Ahead

SUMMARY
Created as part of the 2017 tax reform deal, the Opportunity Zones Program is designed to drive

long-term capital to distressed communities by providing tax benefits on investments in Opportunity Funds, or "O Funds". This brief offers an updated, high-level overview of the program as of August 2018.

DESCRIPTION
The Opportunity Zones concept was originally introduced in the Investing inOpportunity Act (IIOA), and enacted in 2017 as part of the Tax Cuts and Jobs Act. At its essence, it offers special treatment on capital gains in a way that's designed to drive long-term investment in a diverse range of low-income communities throughout the nation. Various tax incentives are provided to encourage investment through privately- or publicly-managed (or in some cases joint public-private) Opportunity Funds.

Continue reading.

Enterprise Community Loan Fund, Inc.

By Rachel Reilly

Incentives for Qualified Opportunity Zone Investments: Check Your Locations

In Short

The Background: The Tax Cuts and Jobs Act created a new tax incentive program to encourage investments in qualified opportunity zones ("OZs"). Taxpayers seeking to redeploy gains from other sources can obtain favorable tax deferral and tax reduction if the gains are reinvested in OZs.

The Development: All of the OZs have been designated, and both developers and investors should determine if their projects are in those zones, as the tax benefits can be substantial.

Looking Ahead: Taxpayers may take advantage of this new program for property disposed of through 2026.

The Tax Cuts and Jobs Act created a new tax incentive program to encourage investors to reinvest gains from other sources in qualified OZs. OZs are low-income communities identified by specific census tracts that were selected by the governor of each state and approved by the Secretary of the U.S. Treasury. There are more than 8,000 OZs in urban and rural areas. Investors, developers, investment funds, and other businesses should review the locations of OZs to determine if they encompass existing or future investment plans.

Gains from dispositions of property may receive preferential tax treatment if a taxpayer reinvests those gains in an OZ. Reinvestment must be made through a qualified opportunity fund ("OZ Fund") within 180 days of the property's disposition. A taxpayer may elect this treatment of gains for any property disposition occurring through December 31, 2026. Gains may be short- or long-term from dispositions of any type of property. Because deferred gains are reinvested, a taxpayer's initial basis in an OZ Fund investment would be zero. A taxpayer's potential tax benefits from an investment are:

- Deferral of tax on reinvested gains until earlier of disposition of the investment or December 31, 2026;
- If held five years, a step-up in basis of 10 percent of the reinvested gain, thereby reducing the tax eventually payable on the deferred gain;

- If held seven years, an additional step-up in basis of 5 percent; and
- If held 10 years, an election to have the investment's basis be equal to its fair market value, thereby potentially eliminating recognition of gain on the investment.

The value of the tax benefits may be significant. For a corporate taxpayer subject to a 21 percent marginal rate, net present value of the tax deferral for an investment made in 2018 and disposed in 2026 could be 9 percent to 11.5 percent of the deferred gain assuming a range of discount rates of 6 percent to 10 percent. For an individual whose gain is subject to a 37 percent marginal rate (e.g., on short-term capital gains), net present value could be 16 percent to 28 percent of the deferred gain assuming the same discount rates. Naturally, actual benefits would vary from these simple estimates.

If a taxpayer holds a OZ Fund investment through 2026, the taxpayer must recognize the deferred gains (after reduction for any basis step-ups) at the end of 2026 equal to the lesser of (i) the remaining deferred gain or (ii) the fair market value of the investment. Therefore, if the OZ Fund continues after 2026, the taxpayer would need sufficient funds from sources outside of the OZ Fund to pay the taxes from this recognition event.

An OZ Fund must maintain at least 90 percent of its assets in qualified OZ property. Qualified property includes specific types of real estate and other tangible property, as well as equity interests in qualified businesses in the OZ. Specific types of "sin" properties and businesses are excluded such as golf courses, country clubs, massage parlors, hot tub facilities, suntan facilities, racetracks, gambling facilities, and liquor stores. There are a number of other technical rules that apply. Failure to comply with all requirements would subject the OZ Fund to annual penalties and cause investors to lose tax benefits.

To foster new investments, qualified property must be acquired after 2017 and must either be substantially improved or used for the first time by the OZ Fund or its subsidiary. An OZ Fund's property may also qualify under other programs (such as the tax credit programs for low income housing, new markets, and historic rehabilitations) that may enhance the investment potential. An OZ Fund may receive funds that are not reinvested gains (and do not qualify for the new program's benefits), in which case the sources of capital need to be separately tracked.

Investors and business owners should consider the potential benefits of the new program for any OZ investment. Each investment should be reviewed to determine if the new program is consistent with the investment's business plan and the investors' goals. That evaluation should include a careful analysis of whether the investment qualifies under the new program and is structured to maintain compliance with the program's conditions.

But all analyses begin with a simple question of whether or not the business is located in a qualified OZ. If so, the possible tax benefits should be evaluated.

Further guidance from the IRS is expected on this program.

Two Key Takeaways

1. Evaluate all investments to determine if they are located in OZs.
2. Any project or business in an OZ that anticipates obtaining capital from taxpayers (instead of tax-exempt investors) should determine if the investment would benefit from qualifying under the program.

Jones Day

August 31, 2018

Firm Offers Data on Hundreds of Businesses in 'Opportunity Zones'

The dataset's creators hope to draw attention to small companies eligible for investment under the economic development program.

For state and local officials seeking to identify small businesses that could make for good investments under the recently created Opportunity Zones program, a New York City-based market intelligence firm says that it has data that could be useful.

The company, SMB Intelligence, earlier this month rolled out an interactive map and dataset that now feature about 2,800 small businesses and chains, located throughout the U.S., that are both "investable" and located within areas that are eligible for the program.

SMB describes itself as a "mission-driven" firm that seeks to "advance inclusive economic growth" by bolstering small businesses. "We think that Opportunity Zones has huge potential," the company's CEO and founder, Steve Waters, said by phone on Wednesday.

"We view it as: this is an excellent opportunity to direct capital to businesses that are often overlooked by traditional investors and lenders," Waters added. "We're basically trying to do everything we can to intentionally direct that capital towards entrepreneurs."

The Opportunity Zones initiative offers tax breaks for people and corporations that funnel capital gains, from investments such as stocks or hedge funds, into "Opportunity Funds."

These funds are expected to make investments in economically distressed census tracts designated as zones. Governors selected the zones, which were then certified by the Treasury Department and the IRS. There are now zones in about 8,700 census tracts, in all 50 states.

Because the program is still in its early stages it's still unclear how far it will go toward amping up investment in poor areas.

Waters said that, as it stands, interest in real estate investment under the program appears to be strong, but that it's less certain capital will "naturally flow" from the Opportunity Funds to small businesses.

But he believes the data that his firm has pulled together can help on this front, providing agencies with a valuable reference as they put together documents that describe possible investments in their areas. He's not aware of anything else like it currently available.

There's been interest in the data. Since posting it online, he said, about 40 state and local agencies, and 50 investors have reached out to SMB about it. The firm has plans to provide the data, which is updated every two weeks, to 15 agencies on a pilot basis starting in September.

Waters said he's not sure yet how much the company might charge to access the information. He wants people to use it, but said it is labor intensive to assemble.

A footnote attached to a version of the interactive map that is currently available for free online explains that the company, which has a dozen people on staff, relies on "proprietary open-source intelligence” methods to compile the information.

That process involves people and computers tracking and analyzing information about small businesses gleaned from thousands of sources, ranging from news publications and social media, to government and real estate data.

SMB has a system to classify “prime growth” businesses—independent companies or small chains that meet certain conditions and could use investment capital to start up or expand.

The dataset includes details for each company, like what type of business it is (for instance, a restaurant, eye clinic, or art gallery), and whether the business is minority- or woman-owned, whether it is independent or a small chain, and how many establishments it has.

“There’s not like one secret source,” Waters noted, referring to the data. “We track growth signals.”

Some experts on Opportunity Zones have suggested that local government officials will have a key role to play in flagging promising businesses in the zones for investors. Waters says his company’s dataset could help to supplement this type of local knowledge.

“Everyone that we’ve had an inquiry from has looked at that initial map and has found something on there that they were not aware of,” he added. “That map is focused on planned growth. So a lot of times this is information that has not necessarily completely circulated.”

ROUTE FIFTY

by BILL LUCIA

AUGUST 29, 2018

[IRS Proposed Regulations Erode South Carolina Conservation Easement Tax Credit.]

On August 23, 2018 the Internal Revenue Service issued [Proposed Regulations] regarding the $10,000 cap on the deductibility of state and local taxes imposed under the Bipartisan Budget Act of 2018 (Code Section 164(b)(6)).

The Proposed Regulations were issued in response to a work around proposed by states with high state and local tax rates. For example, to avoid the new $10,000 cap on the deductibility of state and local income taxes, New York adopted legislation that permitted property taxpayers to make a charitable contribution to state or municipal governmental entities in exchange for a credit against state or municipal taxes. Under this statutory scheme taxpayers could convert a state and local tax deduction, which is capped at $10,000, into a charitable contribution deduction with no cap.

The Proposed Regulations provide that if a taxpayer makes a payment to an entity which would otherwise entitle the taxpayer to a charitable deduction and the taxpayer in return receives or expects to receive a state or local tax credit in exchange for such payment, the tax credit constitutes a return benefit, a quid pro quo, which reduces the charitable deduction. Specifically the Proposed Regulations provide that the amount of any charitable deduction otherwise available to a taxpayer is reduced by the amount of any state or local tax credit that the taxpayer receives or expects to receive in consideration for the taxpayer’s payment or transfer.

The Proposed Regulations provide a de-minimis exception if the state tax credit does not exceed 15% of the amount paid ("contributed") by the taxpayer or 15% of the fair market value of the property transferred by the taxpayer.

South Carolina provides a state tax credit equal to the lesser of 25% of the charitable deduction resulting from the gift of a qualified conservation contribution or $250 per acre of property to which the qualified conservation contribution applies. Under the Proposed Regulations, a South Carolina taxpayer may lose a portion of their charitable contribution deduction as a result of their receipt of the state tax credit.

For example, if a taxpayer owns a 1,000 acre farm with a value before the conservation easement of $3,000,000 and a value of $1,800,000 after placing a conservation easement on the farm the charitable deduction will be $1,200,000 and the state tax credit will be $250,000 ($250,000 is less than $1,200,000). The 15% safe harbor under the Proposed Regulation is $180,000 (1,200,000 x 15% = $180,000). The state tax credit $250,000 exceeds the 15% safe harbor amount ($180,000) and accordingly the taxpayer's charitable deduction is reduced by $70,000.

The regulations, which are in proposed form but are applicable to gifts made after August 22, 2018, suggest that that upon issuance of the final regulations the IRS may allow the taxpayer to decline state or local tax credits and receive full deduction for their charitable contribution.

Haynsworth Sinkler Boyd, P.A.

August 31, 2018

Fitch Ratings: US States to Gain Modest Tax Revenue from Sports Gaming

Fitch Ratings-New York-21 August 2018: Initial data on US states' sports gaming revenues support Fitch Ratings' view that tax revenue increases will be relatively modest as most states will seek to balance tax gains with encouraging operator participation. However, secondary tax revenue benefits related to consumer participation in other gaming and entertainment, food, and lodging purchases, may provide a more significant boost to states' tax revenues, although still modest in the context of overall budgets.

A few states have begun to see the revenue benefits from the US Supreme Court's ruling in favor of legal sports gaming. Since the May 14, 2018 ruling nullifying the federal Professional and Amateur Sports Protection Act (PASPA), Delaware, Mississippi and New Jersey rolled out full scale sports gaming operations. West Virginia will begin on September 1. Previously, only Nevada offered a full array of sports betting.

Delaware's swift expansion on June 5 was facilitated by legal and administrative procedures already in place as it was one of four states with permitted sports betting under PASPA. Delaware's three casinos garnered $15 million in sports wagers through July with the state lottery's 50% share of residual earnings providing a modest $668,000 in tax revenue to the state in comparison to an approximate $212 million in total gaming tax revenue in fiscal 2018.

New Jersey sports wagering opened on June 14 with legal gaming at Atlantic City casinos, three racetracks and online sports books. The state recorded $57 million in sports wagers through July, providing for almost $7.3 million in gross gaming revenue. The 8.5% tax rate on in-person bets and 13.0% rate for online wagers garnered about $620,000 in tax revenue for the state. The state projects $25 million in sports gaming tax revenue for the fiscal year ending June 30, 2019; a small 11% of $233 million in gaming taxes and a negligible amount compared to $37 billion in total state revenue projected for fiscal 2019.

Yet, to the extent sports gaming boosts other consumption, the increase in gaming could modestly benefit Atlantic City's economy and finances, while boosting related state and local tax revenue. The city and gaming revenue recently benefitted from the opening of two new casinos, although revenue losses were recorded in July at the seven existing casinos as the new properties siphoned customers. Yoy in July, casino revenue was up at more than 10%, compared to July 2017 and total gaming revenue, which includes online gaming and sports wagering activity, was up almost 13.0%. Total state gaming tax revenue was up 12.5% yoy.

Mississippi began taking bets on August 1 through one casino, although this was followed by multiple opening announcements from among the state's 28 casinos. Given the sizable casino presence and current southern US monopoly on sports gaming, the state could provide a robust sports betting market, although mobile wagering is only permitted on casino premises. Moderate tax rates on net revenue of 8% to the state and 4% to host localities should also encourage casino participation.

States to watch include Pennsylvania, as the Gaming Control Board approved rules for sports betting on August 15, although casinos still need to apply for licenses at a considerable $10 million initial fee and develop infrastructure prior to taking first bets. Rhode Island's foray is expected in October at two casinos and similar to Delaware net revenue will be shared between the casinos and the state lottery. Other states continue to consider legalization and new regulations, including Connecticut, Indiana and New York.

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Additional information is available on www.fitchratings.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.

Even When Teams Pay, Stadiums Still Aren't Free for Cities.

MLS' Columbus Crew is willing to pay for a new stadium in Austin, but is the Texas city really getting a deal?

While many cities are no longer willing to foot the bill for sports stadiums, they are still facing other costs or lost revenue when teams come to town.

These can take several forms: forgone property tax revenue if cities offer an exemption, missed ticket and parking tax revenue if teams are allowed to keep it for themselves, or passed on stadium maintenance and improvement costs.

Who's responsible for maintenance and improvements can be a particular flashpoint as crumbling stadiums are often used as a reason by teams to relocate. That's what happened when Stan Kroenke moved the NFL's St. Louis Rams to Los Angeles in 2016 and what precipitated the sale of the NBA's Seattle SuperSonics and eventual move to Oklahoma City in 2008.

Continue reading.

GOVERNING.COM

BY LIZ FARMER | AUGUST 22, 2018

TAX - MICHIGAN

Davis v. Detroit Public Schools Community District

United States Court of Appeals, Sixth Circuit - August 9, 2018 - F.3d - 2018 WL 3763429

Sports arena opponents brought action seeking declaratory judgment and mandamus relief alleging that school board had authority and obligation to place on next city election ballot question asking city voters to approve or disapprove of certain tax expenditures.

The United States District Court dismissed claims, and entered partial final judgment. Opponents appealed.

The Court of Appeals that opponents lacked standing to seek declaratory and mandamus relief.

Opponents of public financing for construction of sports arena lacked standing to seek declaratory and mandamus relief to require school board to place on next city election ballot question asking city voters to approve or disapprove of tax increment finance entities' use of property tax revenue intended for school operating purposes to finance sports arena, where opponents were not affected by school board's decision in any personal and individual way, and school board's failure to place tax question on ballot affected all city voters equally.

TAX - OHIO

Columbus City Schools Board of Education v. Franklin County Board of Revision

Supreme Court of Ohio - August 15, 2018 - N.E.3d - 2018 WL 3913177 - 2018 -Ohio- 3254

Owner of low-income-housing property filed a complaint seeking a reduction in the property's valuation for tax purposes. City board of education filed a countercomplaint urging retention of the auditor's valuation.

The county board of revision reduced the assessed value, and the board of education appealed. The Board of Tax Appeals increased the value. Owner appealed.

The Supreme Court of Ohio held that:

- Board of Tax Appeals was required to consider memorandum submitted by owner's appraiser purporting to show that adding in the property's rent subsidies resulted in a rent elevated above market rent;
- It lacked jurisdiction to consider whether property was 100 percent rent restricted; and
- Fact that contract establishing rent subsidies was not in the record did not preclude consideration of rent subsidies.

Will This New Investor Tax-Incentive Policy Avoid Mistakes of the Past?

In an ideal world, Opportunity-Zone designation will infuse capital into low-income, historically marginalized communities. But without clear guidelines in place, will those benefits materialize?

Historians have meticulously documented how government policies and racial discrimination combined to result in billions of dollars invested in the creation of white-only, middle-class suburbs across the United States, while systematically denying the same investment to black people and black communities. You can read about it most recently in Richard Rothstein's "The Color of Law."

The consequences of this history remain firmly entrenched, as evidenced by today's racially-segregated metropolitan areas and astounding levels of racial-wealth inequality. With government backing to build their homes and cement what was, in most cases, the primary source of wealth, white homeowners left other groups in the dust. In Boston, according to a study funded by the Federal Reserve, white households have a median net worth of $247,500, compared with just $8 (not a typo) in median net worth for U.S.-born black households. In Los Angeles, another Federal Reserve-funded study found that white households in that city have 100 times the median net worth of black and Latino households.

The next big chapter of this history is probably being written as you're reading this, thanks to the new federal policy known as "Opportunity Zones," passed as part of the Tax Cuts and Jobs Act at the end of 2017. A broad array of affordable housing developers, community development lenders, venture capitalists, real estate investment platforms, local housing and economic development agencies, bankers, and others have already lined up to utilize the new policy. It's intended to drive billions of dollars in private investment into communities of color and other low-income communities that previous policies have left behind. Whether the policy will actually benefit the current residents of those communities remains to be seen.

Continue reading.

NEXT CITY

By Oscar Perry Abello

Aug 22, 2018

Frustrated Developers, Investors Seek Opportunity Zone Guidance.

Strategic Realty Holdings CEO and founder Eddie Lorin sums up the frustrations many real estate investors have when they further delve into the nuances of the new federal Opportunity Zone program.

Lorin recalled how, at a recent Opportunity Zones Coalition meeting, a venture capitalist came in, “high-fiving the people in the room and saying, ‘This is the greatest thing [to happen] for distressed properties and distressed areas.’”

“And then he left and said, ‘Oh, my God, we got more problems,’” Lorin told a crowd of more than 350 at Bisnow’s Evolution of LA’s Submarkets & The Impact of Opportunity Zones event Tuesday at the JW Marriott in downtown Los Angeles.

The story encapsulated the questions around the Opportunity Zone program, which passed late last year as part of President Donald Trump’s Tax Cut and Jobs Act.

Continue reading.

bisnow.com

by Joseph Pimentel

August 16, 2018

Opportunity Zones May Help Investors And Syndicators More Than Distressed Communities.

The Tax Cuts and Jobs Act (TCJA) created a new tax-advantaged Opportunity Zone program to encourage investments in economically-distressed communities that are nominated by governors and certified by the Treasury Department. Congress had previously tried similar approaches with Empowerment Zones and Renewal Communities. But its latest effort is remarkable for its lack of a governmental oversight role and for its generosity to investors.

The law allows taxpayers to postpone until 2026 taxes on profits from the sale of any property, if the profits from the sale are reinvested in an Opportunity Zone fund that, in turn, invests in businesses in a targeted community. It also allows taxpayers to exclude from tax any gains that arise from investing in the fund if the fund is held for 10 years. This opens the door to big profits for both investors and syndicators, even as the social benefits of the initiative are unclear at best.

The process works like this: Assume a taxpayer recognizes a $200,000 profit on the sale of stock in a public company. By investing the amount of the gain in an Opportunity Zone fund, she can postpone capital gains taxes until 2026. If the taxpayer holds her Opportunity Zone fund shares for five years, her $200,000 deferred gain is reduced by 10 percent, to $180,000. After seven years, it is reduced by another 5 percent, to $170.000. And, if she sells after 10 years, she may exclude any appreciation in the value of the Opportunity Zone Fund shares. Thus, if she sold her fund shares for $300,000, she could exclude from tax her entire $100,000 gain (her basis would be $200,000, even though she had recognized only $170,000 of deferred gain). Investment banks, syndicators, or anyone else may establish opportunity zone funds. For a fee, of course.

The Joint Committee on Taxation scored the new tax incentive program as a small revenue loser over the budget window, primarily because the deferred gain must be recognized by 2026, which was within TCJA's 10-year budget window. But because the incentives for Opportunity Zone investments are so much more generous than prior programs, the revenue loss might turn out to be substantial, and far out of proportion to the local economic development they are intended to encourage.

The new Opportunity Zones have three novel features:

First, a taxpayer need only reinvest gains, not the entire proceeds from a sale of assets. The capital gains provisions of the earlier programs noted above required a taxpayer to reinvest all sales proceeds, not just profits. Other provisions in the tax code that defer gains also require reinvestment of all proceeds (e.g., like-kind exchanges, involuntary conversions, etc.).

Second, the other programs permitted a taxpayer to defer gains from the sale of assets within a qualified zone, but not defer gains from the sale of assets outside the zone. Another change: Empowerment Zone and Renewal Communities programs permitted only capital gains to be deferred, but the new program appears to permit other income to be deferred, like gains from the sale of inventory, though this may have been a drafting error.

Finally, syndicators may organize and market the opportunity funds, which can invest more expansively than earlier programs could. The Treasury has certified 8,700 Opportunity Zones, twelve percent of U.S. census tracts, many of which already attract businesses and investments. By comparison, Congress authorized only 40 empowerment zones and 40 renewal communities.

In addition, eligible Opportunity Zone businesses are more wide-ranging, including investments such as residential rental property businesses, which were excluded by the earlier programs. The additional businesses may be lower risk for investors and, perhaps, less beneficial for the community.

The fundamental problem with Opportunity Zones is the disconnect between the size of the potential tax costs, which are uncapped, and the social benefits from the investments, which will be hard to measure. Presumably, some taxpayers will recharacterize already-planned projects or restructure existing business arrangements through, for example, sale-leasebacks, to obtain the new tax incentives. Other taxpayers may try to invest in already-gentrifying areas that were nominated by governors, lessening the focus on economically distressed communities. And, syndicators may lure other taxpayers with the promise to delay and even eliminate taxes.

We will not know for some time whether the program is worthwhile since Congress asked the IRS to begin reporting on the operations of the program in 2022. But as with many tax incentive programs, Congress might have created a more effective program by investing directly in distressed communities rather than creating new tax subsidies for investors and additional cash flows for syndicators that develop and market the deals.

Forbes

by Steve Rosenthal

August 20, 2018

NHC Submits Opportunity Zones Comment Letter.

Read the letter.

National Housing Council

August 15, 2018

IRS Moves to Block Blue States From Getting Around GOP Limits on Tax Deductions.

The Trump administration has delivered another blow to California.

The Internal Revenue Service and Treasury Department on Thursday moved to block efforts by lawmakers in California and other Democratic-controlled states to help their residents avoid a new limit on state and local tax deductions.

The proposed rule targets legislation in those states that would allow taxpayers to claim a charitable deduction for state and local tax payments above the $10,000 limit set in the tax cuts passed by Congress last year.

The Treasury Department said the legislation being considered in various state s amounts to a tax dodge for wealthier Americans.

"Congress limited the deduction for state and local taxes that predominantly benefited high-income earners to help pay for major tax cuts for American families," Treasury Secretary Steven T. Mnuchin said.

"The proposed rule will uphold that limitation by preventing attempts to convert tax payments into charitable contributions," he said.

The IRS will accept comments on the rule through Oct. 11 and then will hold a public hearing on it Nov. 5.

Thursday's announcement escalated a partisan battle over the tax-cut law that was pushed through by President Trump and congressional Republicans with no Democratic support.

California and New York are among the states that have been looking for ways around the limit on state-and-local tax deductions that Republicans included in the $1.5-trillion tax-cut law that took effect Jan. 1.

Many of the states hardest hit by the limit are high-tax ones controlled by Democrats, and leaders there have complained the tax bill targeted the deduction for political reasons.

A bill from state Sen. Kevin de Leon (D-Los Angeles) would allow California residents to circumvent the new $10,000 deduction limit through a complicated process involving state tax credits for contributions to school districts, charter schools, child-care centers operated by local educational agencies and community college districts.

Under the bill, taxpayers would be able to deduct 100 percent of the contributions on their federal tax returns because there are no limits on charitable deductions.

But the Treasury rule released Thursday would require taxpayers to reduce the federal charitable tax deduction they are claiming by the amount of any credit they receive on their state and local taxes. That would effectively prevent taxpayers from circumventing the cap through the workaround programs.

It also would hit some existing, limited programs in dozens of states that offer federal charitable deductions for contributions to fund schools and other programs.

The federal state-and-local tax deduction had been unlimited until this year, with the new limit projected to generate billions of dollars a year in additional revenue to the U.S. Treasury to help offset money lost by the bill's cuts to corporate and individual rates.

Rep. Kevin Brady (R-Texas), a lead author of the tax bill, cheered the new rule.

"These Treasury regulations rightly close the door on improper tax evasion schemes conjured up by state and local politicians who insist on brutally taxing local families and businesses," he said.

However, the limits on state-and-local tax deductions will hit some families hard. The average state-and-local deduction taken by the 6.1 million California residents who filed for it in 2015 was $18,438, according to the Tax Policy Center. Only New York and Connecticut had a higher average deduction.

Eight tax experts released a 44-page research paper in January arguing that California and other states would be allowed to turn state and local tax payments into charitable contributions based on previous IRS rulings and court opinions.

Some tax law experts also have said that it would be very difficult for the IRS to prohibit efforts designed to circumvent the state-and-local tax-deduction limit without also disallowing the federal tax deduction for contributions to more than 100 existing charitable programs in 33 states.

Those programs, many of them in Republican-controlled states, fund state-supported activities such as public schools and college scholarship programs.

The Treasury Department said Thursday that it expected some spillover effect on those other programs, but that only about 1 percent of taxpayers would see an effect on tax benefits for donations to school tax credit programs.

By Jim Puzzanghera

BY TRIBUNE NEWS SERVICE | AUGUST 24, 2018

IRS Proposal Would Sink States' Tax Deduction Workarounds.

The U.S. Treasury Department and IRS released their highly anticipated regulatory proposal on Thursday.

Proposed regulations the U.S. Treasury Department and IRS issued Thursday would block state attempts to provide taxpayers with a way around the recently imposed cap on state and local tax deductions.

Last year's Republican-led tax overhaul capped the federal deduction that individual taxpayers can claim for certain state and local taxes they pay at $10,000. Some states have sought to create a pathway for circumventing this cap by relying on charitable contributions, which remain fully deductible under the federal tax code.

These workarounds involved soliciting contributions to help pay for public services, and then allowing people to claim a state tax credit on par with the contributions to lower the state taxes they owe.

[Continue reading.](#)

ROUTE FIFTY

by BILL LUCIA

AUGUST 23, 2018

IRS Moves to Block New York Plan to Skirt SALT Deduction Cap.

- **Taxpayers won't get big federal write-off above state credit**
- **Regulations are likely to face challenges from high-tax states**

The Internal Revenue Service put the tri-state area on notice: The charitable workarounds New York, New Jersey and Connecticut approved following the new federal cap on deductions for state and local taxes aren't acceptable to the federal government.

Taxpayers who itemize will only be eligible for a federal deduction that's a small fraction of their charitable donations for property tax payments, according to proposed regulations issued by the Treasury Department on Thursday. The charitable contribution strategies in high-tax states were created so taxpayers would be able to write off the full donation amount from their federal taxes.

President Donald Trump's tax overhaul created a $10,000 limit for state and local tax deductions, a pittance for Northeastern states that have high property taxes. Democratic governors in those states have battled the Republican law's cap, saying they're being unfairly targeted.

"The IRS is hastily proposing politically motivated regulations to further the agenda of the Trump administration and block reforms that deliver relief to New York taxpayers," New York Governor Andrew Cuomo said in a statement. "Make no mistake: we will use every tool at our disposal, including litigation, to fight back."

The Treasury regulations say taxpayers can receive a federal tax write-off equal to the difference between the state tax credits they get and their charitable donations. That means a New Jersey taxpayer who makes a $30,000 charitable donation to pay property taxes and receives a $27,000 state tax credit would only be able to write off $3,000 on a federal tax bill.

"Congress limited the deduction for state and local taxes that predominantly benefited high-income earners to help pay for major tax cuts for American families," Treasury Secretary Steven Mnuchin said in a statement. "The proposed rule will uphold that limitation by preventing attempts to convert tax payments into charitable contributions."

Earlier this year, Cuomo and New Jersey Governor Phil Murphy signed legislation allowing local governments to set up charitable organizations to accept property tax payments. In turn, homeowners receive credits for those donations to offset federal taxable income.

New Jersey gives taxpayers a 90 percent state tax credit for donations made to local municipalities, counties and school districts. Under the IRS proposal, only 10 percent of the donation amount would now be eligible for a federal tax break. New York provides an 85 percent state credit.

Connecticut approved similar legislation and one of three California bills to allow taxpayers to make charitable contributions has advanced through its first Assembly committee.

The Treasury rules provide some leeway for states that provide credits of 15 percent or less of the donation amount. In those cases, taxpayers can deduct the full charitable contribution on their federal taxes.

Municipalities had been awaiting IRS guidance before creating the charitable funds. The IRS had warned taxpayers in May to proceed with caution after the states approved the maneuvers involving charitable organizations to circumvent the new federal limits. The rules released Thursday are likely to be contested by those states.

"I have no doubt this is going to get challenged," Stu Gibson, a tax litigator with law firm Schiff Hardin, said before the regulations were released. "State legislatures are being very creative in how they approach this."

School Voucher Programs

Cuomo is also spearheading a lawsuit by four states to have the so-called SALT cap struck down. He's said the state is "ready to fight if the IRS takes hasty and politically motivated action" against New York's efforts to avoid the deduction cap.

New York, New Jersey, Connecticut and Maryland sued the Trump administration in July saying the new cap unfairly targets them. The states claim the tax law overturned more than 150 years of precedent. The state and local tax deduction is essential to prevent federal tax powers from interfering with constitutionally guaranteed state rights, according to the lawsuit. Legal experts have said the suit has little chance of success.

Treasury faced a complex task in creating regulations that block the new SALT workaround proposals while taking into account existing programs in states such as Georgia and Alabama that give donors credits for making contributions to hospitals and schools. More than 30 states have programs that give taxpayers breaks for charitable donations.

Most taxpayers won't be affected by the new Treasury rules since the majority of Americans don't itemize, or if they do, their SALT deductions are less than $10,000, according to Treasury officials. But those who make contributions to existing school voucher programs could see some changes to their tax benefits under the proposal.

"The proposed IRS rule issued by the Treasury Department will harm state tax credit scholarship programs that are currently benefiting more than 250,000 students," John Schilling, the president of the American Federation for Children, a lobbying group for private schools, said in a statement. Taxpayers who previously donated to the programs will likely be advised by their accountants to stop because of a reduced tax benefit, Schilling said.

Regulations that distinguish the SALT credit programs from tax credit arrangements used to fund education vouchers could have put Treasury in a tricky political spot for seemingly preferring red states over blue states, said Glenn Newman, a former president of the New York City Tax Commission.

"In theory, the tax law should be the tax law across the board," Newman, now a shareholder at law firm Greenberg Traurig, said in an interview prior to the proposal's release.

Bloomberg Politics

By Laura Davison

August 24, 2018

— With assistance by Gerald Silverman

New York Taxpayers Have Four-Day Window to Try to Beat SALT Cap.

- **IRS move to block workarounds would take effect after Aug. 27**
- **Places like Scarsdale have already created charitable funds**

Some New Yorkers successfully prepaid a portion of their property taxes at the end of last year in a bid to ease the hit from a new federal cap on state and local tax deductions. Those who want to try to lessen the pain this year may just have a few days left before the window closes.

The Internal Revenue Service took an important step on Thursday toward blocking the charitable workarounds high-tax states like New York approved in response to the tax law's $10,000 limit. But the agency said the regulations take effect after Aug. 27, giving New York taxpayers who have already made donations to charitable funds this year — or can hustle and make them in the next four days — a possible break on their 2018 taxes, according to tax experts.

"I would think you would clearly want to take advantage of it, assuming that the fund is up and running," Howard Wagner, a director in the national tax services group at Crowe, said referring to the four-day window.

The so-called SALT cap limit is one of the most disputed provisions of President Donald Trump's tax law. The overhaul created a $10,000 limit for state and local tax deductions, a pittance for Northeastern states that have high property taxes. Democratic governors in those states have battled the Republican law's cap, saying they're being unfairly targeted.

While some municipalities had been awaiting IRS guidance before creating funds and accepting donations, others went ahead and established them. In New York, the villages of Rye Brook, Scarsdale, Upper Brookville, Roslyn Harbor, Cove Neck and Matinecock have created charitable trusts, according to Peter Baynes, executive director of the New York State Conference of Mayors and Municipal Officials.

So far in Rye Brook, just six taxpayers donated to the village's charitable fund, even though about 100 people inquired about it, according to Nicholas Mecca, the Receiver of Taxes in the Town of Rye.

New York State has set up a special revenue fund, but there isn't any money in it yet, said Jennifer Freeman, director of communications for New York State Comptroller Thomas DiNapoli. The state's department of taxation and finance has received inquiries from taxpayers interested in making charitable donations for income tax payments and updated its website Friday with details on how to make the donations.

Still, taxpayers should be cautious about contributing to funds before Aug. 27 because the IRS proposal makes it clear that the agency considers its position to be settled law, according to Michael Greenwald, a partner at accounting firm Friedman.

“It is possible that contributions before the effective date will be challenged,” Greenwald said.

Brian Streig, a tax director at accounting firm Calhoun, Thomson + Matza said he thinks taxpayers will have a case: “Your rebuttal is that the IRS’s reg says Aug. 27 is the effective date,” he said. “I think you could win.”

After Aug. 27, taxpayers who itemize will only be eligible for a federal deduction that’s a small fraction of their charitable donations for property tax payments, according to proposed regulations issued by the Treasury Department on Thursday. The charitable contribution strategies in high-tax states like New York were created so taxpayers would be able to write off the full donation amount from their federal taxes.

The Treasury regulations say taxpayers can receive a federal tax write-off equal to the difference between the state tax credits they get and their charitable donations. That means a New York taxpayer who makes a $20,000 charitable donation to pay property taxes and receives a $17,000 state tax credit would only be able to write off $3,000 on a federal tax bill.

Property Tax Prepayments

Since New York, New Jersey and Connecticut just passed laws this year allowing for charitable contributions, some systems in those states may still not be ready to take payments.

In New Jersey, no county has set one up, and “I’m not aware of any county that is thinking about setting one up at this time,” said John Donnadio, executive director of the New Jersey Association of Counties.

Even if one has been set up, there could be practical barriers. Many villages and towns have already collected their 2018 taxes, and residents may have missed their chance to donate. And many homeowners’ tax payments are made automatically by banks, so it’s not clear those can be adjusted on such short notice.

It isn’t the first time municipalities have been caught off guard by the SALT deduction changes. Taxpayers stood in line outside county offices at the end of last year, rushing to prepay their 2018 real estate tax bills in the hopes they could apply it to their 2017 tax return, which allowed for unlimited SALT deductions.

Only those who already had their taxes assessed ended up qualifying for the the additional tax write-off for their 2017 tax bills following IRS guidance on the matter.

Residents of states that have had charitable tax break programs in effect for some time, such as Georgia and South Carolina, that benefit hospitals or schools, will probably have an easier time writing checks before the new rules go into effect, said Steve Rosenthal, a senior fellow at the Urban-Brookings Tax Policy Center.

“The reality is that the red states are further along in setting up their high-percentage credit schemes," said Carl Davis, research director at the Institute on Taxation and Economic Policy. "So it may be easier for folks in red states to rush to claim credits before Aug. 27."

'Politically Motivated Regulations'

It's a short window, but it may be taxpayers only shot, since the proposed rules "completely eliminate the reason to use the SALT deduction cap workarounds," said Jared Walczak, a senior policy analyst at the Tax Foundation.

Earlier this year, New York Governor Andrew Cuomo signed legislation allowing local governments to set up charitable organizations to accept property tax payments. In turn, homeowners receive credits for those donations to offset federal taxable income. New York provides an 85 percent state credit, so under the Treasury rules, only 15 percent of the donation amount would be eligible for a federal tax break.

New Jersey and Connecticut approved similar legislation. One of three California bills to allow taxpayers to make charitable contributions has advanced through its first Assembly committee.

The Treasury rules are likely to be contested by high-tax states.

New Jersey Governor Phil Murphy said Friday that the state will wage a a three-front fight by pursuing legal action, considering any possible state legislative remedies and working with the state's congressional delegation.

Cuomo is spearheading a lawsuit by four states, including New Jersey, to have the SALT cap struck down, which legal experts have said has little chance of success.

"The IRS proposed new politically-motivated regulations to block reforms that deliver relief to New York taxpayers," Cuomo said in a statement Friday. "As we take steps to undo this new attack on our state, I want to alert New Yorkers to the Aug. 27 deadline."

Bloomberg Wealth

By Laura Davison, Lynnley Browning, and Ben Steverman

August 24, 2018

— With assistance by Gerald Silverman, and Robert Lee

TAX - FLORIDA

Andrews v. City of Jacksonville

District Court of Appeal of Florida, First District - June 18, 2018 - So.3d - 2018 WL 3015264 - 43 Fla. L. Weekly D1370 - 2018 Employee Benefits Cas. 214, 374

Citizens brought action against city council challenging referendum on whether to adopt a one-hal--cent sales surtax to address underfunded pension liability.

After the surtax was approved in the election, the Circuit Court granted city's motion for summary judgment. Citizens appealed.

The District Court of Appeal held that:

- Ballot title and summary were not misleading and clearly articulated chief purpose of referendum, and
- Ordinance setting date of referendum was within city council's legal authority, such that referendum was not void ab initio.

Ballot title and summary were not misleading and clearly articulated chief purpose of referendum, which was to reduce or eliminate city's unfunded pension liability through the use of a sales surtax, though summary did not contain every detail or ramification of proposed surtax; summary declared what state law would require of city in order to levy surtax, summary allowed voters to comprehend the sweep of measure, and summary could not and was not required to contain every detail of proposed tax, as state statute limited length of summary to 75 words.

Ordinance setting date of referendum on surtax for purposes of reducing or eliminating unfunded pension liabilities was within city council's legal authority, such that the referendum was not void ab initio, though city council passed ordinance prior to effective date of statute authorizing counties to levy surtax; statute did not prescribe date that ordinances could be passed to set referendum, ordinance merely authorized vote on whether to adopt surtax and did not attempt to levy a premature surtax, several preconditions still had to be met before the surtax could go into effect, and the ordinance recognized the requirement to meet those preconditions by providing for future "separate legislative action" before actually levying the surtax.

TAX - CALIFORNIA

Johnson v. County of Mendocino

Court of Appeal, First District, Division 2, California - August 8, 2018 - Cal.Rptr.3d - 2018 WL 3750338 - 18 Cal. Daily Op. Serv. 7881

Objectors brought declaratory judgment action against county, challenging validity of county ballot measure imposing tax on commercial cannabis businesses.

The Superior Court dismissed action. Objectors appealed.

The Court of Appeal held that:

- Tax imposed was a general tax rather than a special tax that would require two-thirds majority, and
- County was not required to prove that so-called tax was in fact a tax rather than a fee.

Tax imposed on commercial cannabis businesses by county pursuant to ballot measure was a general tax rather than a special tax, and therefore simple rather than two-thirds majority was required for approval of tax, even though ballot measure listed certain types of services for which tax might be allocated; funds from tax were not earmarked or dedicated to any specific project but rather were described as being for support of general county services, and measure did not in any way limit county's ability to spend proceeds collected under tax.

Pursuant to Proposition 26, which had amended constitution to define a tax as opposed to a fee, county was not required to prove that so-called tax, which was imposed on commercial cannabis businesses pursuant to ballot measure, was in fact a tax rather than a fee disguised as a tax; Proposition 26 was concerned with requiring government to prove that a fee was not in fact a tax, rather than the other way around.

IRS Issues Guidance on ITC Eligibility for Solar Projects in Notice 2018-59 Including Methods for Establishing Beginning of Construction and Eligibility of Transferred Energy Property.

On June 22, 2018, the IRS issued Notice 2018-59 (the "ITC Notice"), providing guidance as to how a taxpayer establishes that construction has begun with respect to solar facilities qualifying for the Internal Revenue Code Section 48 investment tax credit (the "ITC"). The ITC provides a credit to taxpayers equal to a percentage of the basis of qualifying energy property, which percentage varies depending on the type of such property, the year in which construction begins, and the year in which the property was placed in service. In general, the ITC Notice is similar to guidance provided for wind facilities qualifying for the ITC or the Internal Revenue Code Section 45 production tax credit and promulgated in Notice 2013-29, as clarified and modified by later notices.

Construction has begun when a taxpayer establishes either of the following:

1. Physical work of a significant nature has begun and the taxpayer maintains a continuous program of construction. Work performed for the taxpayer pursuant to a binding written contract entered into prior to the manufacture, construction or production of the energy property or components of energy property for use by the taxpayer in the taxpayer's trade or business (or for the taxpayer's production of income) is taken into account in making this determination. This test depends on the relevant facts and circumstances and is focused on the nature of the work performed rather than the amount or the cost; it is not subject to a fixed minimum amount of work or cost threshold. The test includes both on-site and off-site work, such as off-site manufacture of components and on-site installation of racks or other structures to attach photovoltaic panels to a site. Preliminary activities, such as clearing a site, are not physical work of a significant nature under this test.

A continuous program of construction involves continuing physical work of a significant nature, as determined based on the facts and circumstances. Certain disruptions beyond the taxpayer's control, such as severe weather conditions and natural disasters and delays in obtaining permits and licenses, are treated as excusable and will not cause a taxpayer to fail to satisfy the continuity requirement. Notwithstanding the foregoing, if a taxpayer places an energy property in service by the end of a calendar year that is no more than four calendar years after the calendar year during which construction of the energy property began, the continuity requirement will be deemed satisfied with respect to the energy property.

2. The taxpayer has paid or incurred five percent (5%) or more of the total cost of the energy property and makes continuous efforts to advance toward completion of the energy property. All costs properly included in the depreciable basis of the energy property are taken into account to determine whether this test is met. The total cost of energy property does not include the cost of land or any property not integral to the energy property. If the total cost of an energy project that is a single project comprised of multiple energy properties exceeds its anticipated total cost such that less than 5% of the total cost of the project at the time it is placed in service was in fact paid or incurred at the time the 5% standard is tested, the five percent safe harbor is not met with respect to the entire project but may met with respect to some of the energy properties comprising the project so long as the total aggregate cost of such energy properties is not more than twenty times greater than the amount the taxpayer paid or incurred. This relief is not available where a single project is not comprised of multiple energy properties.

The determination of whether multiple energy properties are operated as part of a single energy project is made during the calendar year during which the last of the properties is placed in service and depends on the relevant facts and circumstances, including whether the properties have a common intertie, share a common substation, were financed pursuant to the same loan agreement, and other non-exclusive factors. However, the taxpayer may disaggregate such property for purposes of applying the continuity requirement.

The five percent safe harbor test also includes a continuity requirement that, based on the relevant facts and circumstances, a taxpayer make continuous efforts to advance towards completion of an energy property. This may generally include paying or incurring additional amounts, entering into binding written contracts for future work to construct the energy property, obtaining necessary permits, or performing physical work of a significant nature. As with the physical work test, certain disruptions beyond the taxpayer's control are considered excusable for purposes of the continuity requirement and the continuity requirement is deemed met if certain timelines are met, as described above.

With respect to facilities that are transferred, a fully or partially developed energy property that satisfies the "begun construction" qualification will continue to satisfy such qualification with respect to a transferee acquiring such property before the facility is placed in service. However, in the case of a transfer of solely tangible personal property to an unrelated transferee, amounts paid or work performed by the transferor with respect to such transferred property will not be taken into account to determine whether construction has begun.

The IRS also advised in the ITC Notice that it will not issue private letter rulings to taxpayers regarding the application of the ITC Notice or the beginning of construction requirement of Internal Revenue Code Section 48.

Locke Lord LLP

August 13, 2018

In Opportunity Zones, Good Things Come to Those Who Hustle.

An important milestone in America's economic recovery was reached last month when the Treasury Department approved the last round of Opportunity Zone designations.

The Tax Cuts and Jobs Act of 2017 created a new financial product called "Opportunity Funds," which allow investors to defer and reduce their capital gains tax bills in exchange for investing in projects located in economically distressed areas referred to as Opportunity Zones.

An initial review of the 8,700 designated Opportunity Zones reveals just how far removed these communities are from the national economic recovery. The average unemployment rate is a stubbornly high 14.4 percent. These communities typically have 38 percent of prime age adults out of the workforce — nearly 10 points higher than the country as a whole. Median household income is lower, and these areas are twice as likely as other communities to be located in a county where (at the very least) 20 percent of the population has been living below the poverty line for 30 years.

Continue reading.

e21

by John Bailey

August 14, 2018

Your Tax Dollars At Play: How Stadium Tax Scams Pick Fans' Pockets.

Tax dollars build sports stadiums far more often than they should, which is going to make this entire column possible.

Stadium finance is so awash in public money that it is difficult to imagine how stadiums and arenas are built *without* tax dollars. Occasionally, a city and its taxpayers get a freebie: Anschutz Entertainment Group and MGM Grand covered the cost of T-Mobile Arena in Las Vegas. The New York Jets and Giants built their Met Life Stadium without tax dollars. Los Angeles Rams owner Stan Kroenke so desperately wanted to drag his team out of St. Louis that he's footing the bill for a stadium for both the Rams and the Chargers. The Golden State Warriors, meanwhile, are privately funding a new arena in San Francisco's Mission Bay.

Continue reading.

Forbes

by Jason Notte

Aug 17, 2018

Can States Tax Gas Stations on Tribal Lands?

After years of fights between Washington state and the Yakama Nation, the debate is heading to the U.S. Supreme Court.

The Yakama Nation and Washington state have been fighting over governance issues ever since the tribe signed its 1855 treaty with the federal government. Recently, those fights have involved fees on cigarettes and rules for logging trucks. But the biggest dispute over the years has been about fuel taxes. And now the U.S. Supreme Court is stepping in.

Washington state lawmakers have tried repeatedly to impose fuel taxes on Indian tribes, and the tribes have repeatedly fought back. The Yakama have been especially adamant in their resistance, arguing that the fuel taxes violate a provision of their treaty that guarantees them the right to travel freely on public highways.

The Yakama convinced the Washington Supreme Court to uphold their exemption even though lawmakers crafted the current tax in 2007 to avoid the legal pitfalls of previous fuel tax levies that Native Americans were able to avoid. The state high court's decision in March was such a jolt to state taxing authority that Idaho, Kansas, Nebraska, North Dakota, South Dakota and Wyoming supported Washington's last-ditch effort to get the U.S. Supreme Court to reverse the ruling and reimpose the tax.

In general, states cannot tax Native Americans for activity on reservations, but they can for most activities that occur off tribal lands. Courts determined that Washington's previous fuel taxes, which were collected at gas stations, didn't apply to those on tribal lands.

That's why the state legislature changed the tax scheme in 2007. It imposed a per-gallon fuel tax on suppliers, blenders, distributors, exporters and importers of motor fuels. Whoever owned the fuel first inside Washington state's borders had to pay it. Because the Yakama fuel stations imported their fuel from Oregon, the state said, they would have to pay the tax.

States, though, don't have the last word on the matter. The federal government does. Treaties with Indian tribes are part of federal law. Under the 1855 treaty with the Yakama Nation, the federal government guaranteed that the tribe would have the "right, in common with citizens of the United States, to travel upon all public highways." The state Supreme Court relied on that language to determine that the right to travel meant the Yakama shouldn't have to pay the fuel tax, since it's impossible to import fuel without traveling on public highways.

The state isn't buying this. "The challenged law does not restrict [a Yakama-owned company's] right to travel on Washington public highways," according to the state's brief. It simply asks them to pay for importing fuel the way every other business does.

Other states, specifically those that have joined the case, have reason to be concerned. Idaho, for example, has tribes within its borders whose treaties with the U.S. government include the same "right to travel" language that the Yakama have in Washington. Now that the U.S. Supreme Court has taken the case, those states will soon find out whether the Yakama's fuel tax exemption applies more broadly or not at all.

GOVERNING.COM

BY DANIEL C. VOCK | AUGUST 2018

An Exception to an Exemption: Michigan's Lessee-User Tax

Under various statutes, certain types of property, owned by certain entities, and used for certain purposes, are exempt from paying property taxes in Michigan. But there is an exception to this exemption meant to address situations where the property is exempt based on ownership, but is leased to a non-exempt entity.

In order to deal with this scenario, the Michigan legislature created the "Lessee-User Tax" under MCL 211.181. The Lessee-User Tax provides:

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

For example, if an exempt hospital or medical facility leases space to for-profit doctors, it's likely that the leased real property owned by the exempt hospital/medical facility is taxable to the lessee. However, there is an exception to the Lessee-User Tax (you might call it an exception to the exception on exemption – quite the tongue twister): it does not apply to property that is used as a concession at a public airport, park, market, or similar property and that is available for use by the general public.

The issue of what constitutes a "concession" has been the subject of considerable litigation over the years. One of the more recent appellate decisions dealing with the issue is the 2005 case of *Services System Assoc v City of Royal Oak*, also known as "The Detroit Zoo" case.

The case involved a for-profit company providing food and catering services to the public at the Detroit Zoo (an exempt non-profit). Royal Oak sought to tax the company for its equipment, buildings, and other improvements, and the company claimed to be a concession. It was undisputed that the zoo was a "public park" open to the public, so the court looked to the agreement at issue between the zoo and the company, and found that the zoo retained control over the company's operations – a fact that weighs in favor of a concession.

Ultimately, the court found that the company was a concession, in light of its agreement that "imposes standards of service, minimum hours of operation, and oversight of petitioner's concession stand at the Detroit Zoological Institute" and "infringes on the control of petitioner's rights, the hours that can be worked, the foods that can be sold, and provides for unilateral termination by the Detroit Zoo."

Property tax exemptions are an important issue for both those claiming exemptions, as well as municipalities and their assessing departments who rely on property tax revenue to fund community operations and services. Therefore, understanding the nuances of the statutory framework – such as when the Lessee-User Tax applies – that gives rise to these exemptions is critical.

Foster Swift Collins & Smith PC

by Laura J. Genovich

USA August 16 2018

[Florida Banks and Mortgage Servicers: Claims Following Tax Deed Sales Must Now be Filed Early]

While banks and other mortgage holders have recently been obtaining windfalls on dormant mortgages, recent changes to Florida Statute Section 197.582 will require early filing of claims following tax deed sales.

What does this change mean?

The new rules apply the same procedure to tax deed sales that now apply to ordinary foreclosure sales: lienholders must make a timely post-sale administrative claim or it's lost. The new amendments still require administrative notice to go to all lienholders. From there, recipients have "120 days from the date of the notice to file a written claim with the clerk for the surplus proceeds." Fla. Stat. § 197.582 (3). The most important change, however, is that "[e]xcept for claims by a property owner, claims that are not filed on or before close of business on the 120th day after the date of the mailed notice as required by Section 197.582(2), are barred. A person, other than the property owner, who fails to file a proper and timely claim is barred from receiving any disbursement of the surplus funds." Fla. Stat. § 197.582(5).

What do banks and servicers need to know about the new system?

Under the new system, the clerk still has the right to institute an interpleader action in the case of competing claims, but this is likely to occur much less often, because competing claims will appear less often because many will be barred by the failure to file a timely administrative claim. Fla. Stat. § 197.582(6). While the legacy procedures will apply for a short while longer, the new statutory bar applies to "tax deed application filed on or after October 1, 2018." 2018 Fla. HB 1383 § 4. This change does not allow mortgagees to passively await a clerk's interpleader action, as they might have in recent years. If they fail to institute new procedures to monitor and respond to notices related to tax deed surpluses, they will lose and the owners, who long ago defaulted on the record, will get the last laugh, as they do not face the same 120 bar as lienholders and could obtain the entire surplus for themselves.

Background on Florida's tax deed surplus law

In the deepest depth of the economic crisis of 2008–2012, many banks and mortgage servicers in Florida abandoned their residential foreclosure lawsuits, often dismissing a case before, or even after, a final judgment was obtained. Frequently, economics dictated the course. More than being merely undersecured—"upside down"—certain assets were negative value when the cost of repairs, taxes, curing code violations and past-due homeowners' assessments were taken into account. Under these circumstances, a successful foreclosure would be a Pyrrhic Victory at best.

Following dismissals, the moribund, defaulted mortgages remained public records and valid liens. They provided an opportunity for compensation to the mortgage holder if the homes were ever sold. In the meantime, homeowners often remained in their homes, because Florida is a "lien theory" state, where the homeowner's rights of ownership and possession usually continue until the finalization of a foreclosure.

The "free house" deal usually came to an end. When homeowners stop paying their mortgages, they typically defaulted on tax obligations as well. The normal procedure is straightforward. After paying past due taxes, outside investors obtain tax certificates, which can be sold at a judicial sale after two years; the winning bidder obtains the property through a tax deed. The tax deed wipes out nearly all other liens, including first position mortgages and homeowners association liens. *See A to Z Props. v. Fairway Palms II Condo. Assoc.*, 137 So. 3d 453 (Fla. 4th DCA 2014)

After the tax certificates and accrued interest are paid at the tax deed judicial sale, the remainder is deemed a tax deed surplus. The mortgagee (or other lienholders) historically were entitled to that tax surplus in their order of lien priority; their liens, which formerly attached to the property, now attached to the surplus, while the property itself would be owned free and clear by the winning bidder.

Historically, when there were competing liens in a property generating a tax deed surplus, parallel and slightly contradictory mechanisms were set in motion for asserting lien rights. Initially, the tax collector was supposed to send out notice of the surplus to all the known and possible lienholders, who would then file a claim within 90 days. Fla. Admin. Rule 12D-13.065(4). However, in the case of competing liens—including overlapping mortgages, judgment liens, and homeowner association lien claims—the clerk of the court was obliged to begin an interpleader action and send notice again to the lienholders.

In these lawsuits, regardless of whether or not a claim had earlier been filed, lien priority controlled. *See generally DeMario v. Franklin Mortg. & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4th DCA 1994) (holding that in spite of failure to file administrative claim, mortgagee "as superior lienholders, their claim must be recognized and they are entitled to the excess proceeds of the tax sale."); *Kerr v. Broward Cnty.*, 718 So.2d 197 (Fla. 4th DCA 1998). This lien priority rule allowed lienholders to obtain recompense, even though they had not responded within the 90 day administrative claim filing deadline and may have otherwise sat on their rights for many years.

The changes to the statute now require swift action at the administrative level in order to secure the benefits of the rising housing market.

Adams and Reese LLP

byChristopher A. Roach

August 20, 2018

CDFI Fund Releases Application Demand for 2018 Round of NMTC Program.

The U.S. Department of the Treasury's Community Development Financial Institutions Fund (CDFI Fund) announced today that it received a total of 214 applications under the 2018 round of the New Markets Tax Credit Program (NMTC Program). The NMTC Program advances economic development in economically distressed communities by making tax credit allocations available to Community Development Entities (CDEs) for targeted investments in eligible areas.

The CDEs that applied under the 2018 round are headquartered in 43 states, the District of Columbia, and Puerto Rico. These applicants requested an aggregate total of $14.8 billion in NMTC allocation authority, over four times the $3.5 billion in authority available for the 2018 round.

The NMTC Program was established by Congress in December of 2000 and permits individual and corporate taxpayers to receive a credit against federal income taxes for making qualified equity investments in CDEs. The credit provided to the investor totals 39 percent of the cost of the investment and is claimed over a seven-year period. Substantially all of the taxpayer's investment must be used by the CDE to make qualified investments in low-income communities. Successful applicants are selected only after a competitive application and rigorous review process that is administered by the CDFI Fund.

Through the first fourteen rounds of the NMTC Program, the CDFI Fund has made 1,105 awards totaling $54 billion in tax credit allocation authority. This $54 billion includes $3 billion in Recovery Act Awards and $1 billion of special allocation authority to be used for the recovery and redevelopment of the Gulf Opportunity Zone.

For more information about the NMTC Program, visit the CDFI Fund's website.

Wednesday, August 8, 2018

Incentives Watch: State Tax Incentive Review Programs Come of Age.

State governments across the country have fallen in love with the use of credits and incentives to spur economic growth and social progress. The last twenty years have seen an explosion of state tax credit programs, including historic rehabilitation/preservation credits, economic development credits, and even individual credits to assist first responders and veterans. But growing with this expansion is concern that states have no way of knowing whether a particular program is working. Reform in this area is picking up steam, and seeks not just to understand the bald dollar value of credits offered but also evaluate the return on investment the state receives. Though most evaluation is done in monetary terms, some states are beginning to look past finances to determine a credit's effect on homelessness, poverty rates, and educational access. Several recent pieces of legislation seek to obtain this information in order to guide policy makers toward programs that are worth the public's time and resources.

Credit Evaluation: Flying Blind?

Current state evaluation of credit offerings is uneven and incomplete. Just 10 states have an established method in place of reviewing major tax incentives, according to a report by Pew Charitable Trusts in 2017. The evaluation was based on three criteria: 1) well-designed plans for regular reviews, 2) experience in producing quality evaluations, and 3) a process for informing policy choices. Too often states merely collect information on the total value of credits offered in a given year, and perhaps the identities of the recipients. States rated as "leaders" in the Pew report seek to understand efficacy, through both achieving the desired result and understanding the cost.

Continue reading.

Bloomberg BNA

Aug 7, 2018 / by Kevin Thayer

House Bill to Expand Tax Credit Program Would Target Rural Areas.

Legislation introduced in late July would add authority to the New Markets Tax Credit program.

Two lawmakers in the U.S. House are proposing to expand the size of a tax credit program, in an effort to drive new investment in rural America.

Reps. Jason Smith, a Missouri Republican, and Terri Sewell, an Alabama Democrat, in late July introduced legislation dubbed the Rural Jobs Zones Act. They're both members of the tax-writing Ways and Means Committee. Their bill would provide $500 million annually in 2018 and 2019 in additional New Markets Tax Credit authority, specifically aimed at rural areas.

The tax credit program was enacted in 2000 and is designed to draw investment capital to low-income communities. Through 2017, Treasury made awards totaling $54 billion in New Markets Tax Credit authority, according to a July report from the department.

Continue reading.

Route Fifty

by Bill Lucia

AUg 6, 2018

TAX - ILLINOIS

Keystone Montessori School v. Village of River Forest

United States District Court, N.D. Illinois, Eastern Division - July 17, 2018 - F.Supp.3d - 2018 WL 3438940

Primary and secondary school with tax-exempt status, which was a not-for-profit Illinois corporation, brought action in state court against village, alleging claims including a class-of-one equal protection claim regarding development permit which required school to forfeit its right to a property tax exemption to operate on property that zoning ordinance otherwise prohibited.

Village removed case to federal court and moved to dismiss for failure to state a claim.

The District Court held that:

- Unconstitutional conditions doctrine did not apply, and
- Allegations did not raise a plausible inference that village targeted school for less favorable tax treatment than it accorded other not-for-profit entities.

Payment of property taxes to village did not implicate the Takings Clause, and thus unconstitutional conditions doctrine did not apply to claim by primary and secondary school with tax-exempt status that village violated the federal and Illinois constitutions by conditioning a development permit on school's payment of property taxes; right to seek a property tax exemption was rooted in the Illinois tax statute.

Allegations in class-of-one equal protection complaint by primary and secondary school with tax exempt status did not raise a plausible inference that village targeted school for less favorable tax treatment than it accorded other not-for-profit entities in violation of the Equal Protection Clause by granting development permit requiring school to forfeit tax exempt status; permit singled out school for favorable treatment by authorizing it to operate at a location where it was otherwise prohibited by village's generally-applicable zoning ordinance, and no other not-for-profit entity operated in an area where its activities were otherwise prohibited by zoning ordinance, or owned and occupied a presumptively tax-generating property, but still exercised its statutory right to property tax exemption.

TAX - WEST VIRGINIA

Charleston Area Medical Center, Inc. v. United States

United States Court of Federal Claims - July 31, 2018 - Fed.Cl. - 2018 WL 3629294

Two nonprofit medical centers brought putative class action against the United States, seeking to recover statutory interest paid at higher, standard rate, rather than lower corporate rate, for their tax refunds.

The government moved for judgment on the pleadings, and medical centers moved for summary judgment.

The District Court held that nonprofit medical centers were "corporations" subject to lower corporate interest rate on tax refunds.

Nonprofit medical centers, which were incorporated under provisions of state law, were "corporations" within meaning of the Internal Revenue Code (IRC), and were thus subject to lower corporate interest rate on refunds of the employer portion of Federal Insurance Contributions Act

(FICA) taxes they paid for medical residents whom IRS subsequently determined were students exempt from such taxes; common usage and definition, IRC's own definition, structure of the specific statutory provision at hand, and use of the term in the IRC as a whole, all indicated that term "corporation" in interest rate provision of the IRC plainly encompassed both for-profit and not-fo--profit corporations.

District court would decline to look to Treasury regulations that formerly set forth IRS's views on the essential characteristics of a corporate entity, so as to find that nonprofit medical centers were not "corporations" subject to lower corporate interest rate on refund of employer portion of Federal Insurance Contributions Act (FICA) taxes they paid for medical residents whom IRS subsequently determined were student exempt from such taxes; medical centers were unambiguously "corporations" under the definition in Internal Revenue Code (IRC) section governing statutory interest on tax refunds, regulations upon which medical centers relied were repealed and superseded by "check the box" regulations that harmonized with the foregoing interpretation of the statutory interest provision, and even if the now-superseded regulations had remained in effect, they would not apply to medical centers, since they were incorporated under state law.

More Counties Join PILT Class-Action Lawsuit Against the Feds.

STATE AND LOCAL ROUNDUP | Fact-checking Trump's claims on Calif. wildfires … a big N.M. groundwater ruling … and Detroit's dismal rental inspection compliance.

Good morning, it's Wednesday, Aug. 8, 2018. Budget and finance news leads Route Fifty's state and local government news roundup but there's a lot more. Scroll down for more news from places like Wilmington, North Carolina; Utah County, Utah; and the Plains of St. Augustin in New Mexico.

Continue reading.

Route Fifty

By Michael Grass,
Executive Editor

August 8, 2018

Investing In Qualified Opportunity Zones.

The new tax law created a new investment vehicle called " qualified opportunity funds" that have tax advantages. The rationale for the tax benefits is to direct resources to low-income communities – "qualified opportunity zones." Each state nominates communities as qualified opportunity. Qualified opportunity zones can be found by going here.

"A qualified opportunity fund is an investment vehicle that can be organized as a corporation or a partnership that holds at least 90% of its assets in qualified opportunity zones," says John Bowen, cofounder of BSW Inner Circle and author of *Elite Wealth Planning: Lessons from the Super Rich*. "From the date of sale of an appreciated asset, the investor has 180 days to invest in a qualified opportunity fund. The investor receives either stock or an interest in the fund."

According to Edward Renn, an internationally acclaimed tax lawyer at WithersBergman, "There are a number of tax incentives of qualified opportunity funds including (1) the deferral of capital gains taxes from the sale of appreciated assets until the earlier of December 31, 2026 or the disposition of the qualified opportunity fund, (2) possibly lowering of the capital gains tax up to 15% because of an increase in the basis of the appreciated assets used to buy the fund interest, (3) possibly eliminating capital gains due on the appreciation in a qualified opportunity fund if it is held for 10 years or longer."

Example: Sale of a Business

John sold a business for a $12 million capital gain in June of 2018. John located three properties in two Qualified Opportunity Zones with a total purchase price of $12 million. John formed a limited partnership as his Qualified Opportunity Fund and his attorney made sure the partnership agreement contained appropriate language to be treated as a Qualified Opportunity Fund.

If John holds the Qualified Opportunity Fund until December 31, 2026 instead of paying $671,000 in federal tax by April 15, 2019, $570,000 of tax will be due by April 15, 2027.

The tax reduction is attributable to the 10% basis bump after holding the Qualified Opportunity Fund for five years and an additional 5% basis bump for holding the Qualified Opportunity Zone for seven years.

If John waits at least ten years to sell the three properties consisting of the Qualified Opportunity Fund investments, any gain on the properties will escape tax.

John gets eight years of federal tax deferral, a reduction of 15% on the deferred gain, and tax-free proceeds on the sale of the Qualified Opportunity Zone property.

Forbes

by Russ Alan Prince

I am president of R.A. Prince & Associates, Inc. I consult with family offices, the ultra-wealthy and select professionals.

Aug 6, 2018, 05:33am

[Figuring Out If 'Opportunity Zones' Can Revitalize Struggling Neighborhoods.]

In two Alabama cities, those laying groundwork for the new tax incentive program see both promise and risks in the investments it could spur.

BIRMINGHAM, Ala. — Boarded-up houses and vacant storefronts dot the streets of Woodlawn.

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Continue reading.

Route Fifty

by Bill Lucia

Aug 5, 2018

Opportunity Zones: Moving Toward a Shared Impact Framework.

Introduction

The tax bill passed in 2017 includes a provision creating various benefits for investors that move capital gains into designated low-income census tracts, known as Opportunity Zones, through special investment vehicles known as Opportunity Funds.

This tax benefit has captured the attention of a wide range of stakeholders—from investors attracted by a new tax incentive to community development practitioners drawn by the promise of increased investment in low-income areas.

Many elements of this new investment tool are uncertain, including if and how Opportunity Funds will manage and report on the social and environmental impact of their investments. Yet even amid this uncertainty, investors are looking to take advantage of the benefit.

Continue reading.

Federal Reserve Bank of New York

State and Local Taxes in Indiana: Ice Miller

Recent developments

Have there been any notable recent developments concerning state and local taxation in your state, including any regulatory changes or case law?

Indiana recently passed legislation in response to the federal Tax Cuts and Jobs Act (TCJA). The legislation conforms to the TCJA in part and decouples from it in part. Historically, Indiana has not taxed foreign earnings and decoupled from some of the foreign provisions within the TCJA. Further, Indiana has generally decoupled from capital expensing provisions and thus decoupled from the interest expense limitations. Indiana has had a net operating loss carryforward limitation and preserved its own approach. Other adjustments included Indiana decoupling from the income recognition changes to Internal Revenue Code § 118 in order to enhance its economic development tools. The legislature may look to make further adjustments when it next meets in early 2019. Indiana recently published an information bulletin that sets out its interpretation of this new law.

Indiana also recently passed legislation with respect to the taxability of software as a service. In general, the legislation provides that remotely accessing computer software is not subject to Indiana sales and use tax. Indiana is now one of only a few states taking this business-friendly approach. Indiana recently published an information bulletin that sets out its interpretation of this new law.

Continue reading.

Ice Miller LLP

by Mark J. Richards

August 6, 2018

California Accidentally Posts Draft Tax Collection Rules for Online Retailers -- Legal Challenges Possible if Draft Rules are Adopted.

Background

The California Department of Tax and Fee Administration (CDTFA) inadvertently posted on its website a draft notice containing new tax collection rules for retailers, indicating that California may adopt use tax collection thresholds for remote vendors similar to the thresholds adopted under South Dakota's law effective August 1, 2018. In response to the recent U.S. Supreme Court decision in *South Dakota v. Wayfair, Inc.*,1 the draft notice stated that certain retailers are required to register with the CDTFA and to collect California use tax starting August 1, 2018, if they meet one of the following thresholds during the preceding or current calendar year:

1. The cumulative sales price of the retailer's sales of tangible personal property for delivery in California exceeds $100,000, or
2. The retailer sold tangible personal property for delivery in California in 200 or more separate transactions.

The draft notice continued to state the following:

Continue reading.

Reed Smith LLP

by Shail Shah, Mike Shaikh and Yoni Fix

August 10 2018

TAX - PENNSYLVANIA

Williams v. City of Philadelphia

Supreme Court of Pennsylvania - July 18, 2018 - A.3d - 2018 WL 3455401

Objectors, including consumers, retailers, distributors, producers, and trade associations, brought action challenging city's "beverage tax" on certain sweetened beverages, seeking declaratory and injunctive relief, including declaration that tax was expressly preempted by the Sterling Act, governing city's imposition of local taxes.

The Court of Common Pleas sustained the city's preliminary objections. Objectors appealed. The Commonwealth Court affirmed.

On limited appeal by allowance, the Supreme Court held that Commonwealth's sales and use tax and city's beverage tax had distinct legal incidences, and thus city's tax was not preempted by Sterling Act.

Commonwealth sales and use tax upon soft drinks and city's beverage tax on certain sweetened beverages had distinct legal incidences, and thus city's tax was not preempted by Sterling Act, which granted city broad taxing power unless Commonwealth imposed tax having same legal incidence relevant to same subject or transaction, though objectors asserted both taxes reached retail sales; sales and use tax was imposed on retail sales, was measured by purchase price, and fell directly upon consumers, beverage tax applied to distributor/dealer level transactions for purposes of retail sale, independent of whether retail sale occurred, measure was volume of fluid ounces, and payer was distributor or dealer, but never consumer, and retail sales nexus did not convert distributor/dealer level tax into retail sales tax.

TAX - CONNECTICUT

Walgreen Eastern Company, Inc. v. Town of West Hartford

Supreme Court of Connecticut - July 24, 2018 - A.3d - 329 Conn. 484 - 2018 WL 3468411

Pharmacy tenant brought action to challenge decision of town board of assessment appeals regarding valuation of real property.

The Superior Court entered judgment in favor of taxpayer in part and determined value of property. Taxpayer appealed.

The Supreme Court of Connecticut held that:

- Court was required under the income capitalization approach to consider both contract rents and market rents;
- Court properly considered pharmacy tenant's leasehold interest as one indicator of the true and actual value;
- Evidence was sufficient to support finding that continuing use as retail pharmacy was highest and best use of property; and
- Tenant failed to establish that assessment of real property was manifestly excessive.

Court considering assessment of pharmacy property subject to 75-year lease was required under the income capitalization approach to consider both contract rents and market rents.

Trial court properly considered pharmacy tenant's leasehold interest as one indicator of the true and actual value of the owner's interest in the subject property, and consideration of actual rents did not lead to improper value of leased fee interest rather than fee simple interest; valuation under the income capitalization approach was required to consider both contract rent and market rent, and court was able to consider the value of the leasehold interest in connection with the other substantial evidence regarding the true and actual value of the subject property, and, on the basis of all of the testimony and evidence presented at trial, determined the true and actual value of the subject property.

Evidence in tax appeal was sufficient to support finding that continuing use as retail pharmacy was highest and best use of property; experts noted existence of national chain pharmacy submarket, and there was evidence of the property's special features for a national retail pharmacy, including that it was a freestanding building with a corner location and with a traffic signal at the intersection, which had been remodeled to pharmacy tenant's specifications and was under a triple net lease.

Pharmacy tenant failed to establish that assessment of real property subject to long term lease was manifestly excessive based on comparison to other properties in town; town applied the same process to valuing the other properties that it applied to the subject property, other properties were dissimilar to the subject property because they were smaller, less recently remodeled, and not stand alone buildings at a corner with a traffic signal, and town's original $5,020,000 assessment overvalued property only by $120,000.

The Post-Wayfair Future of SALT Controversies: The Due Process Clause

This is the fourth in a series of articles written for MICPA members examining the far-reaching impact of the Supreme Court's decision in South Dakota v. Wayfair, Inc.

As discussed in a previous E-News article, (MICPA News June 26, 2018), the recent *Wayfair* decision removed the physical presence requirement of the Commerce Clause.[i] In general, a state may tax an out-of-state company if two constitutional limitations are satisfied – one under the Commerce Clause and another under the Due Process Clause. The Commerce Clause requires that a state tax does not unduly burden interstate commerce. The Due Process Clause requires that a company has at least minimal contacts with the state that seeks to impose a tax.

Although many state tax disputes previously focused on the Commerce Clause, the fact that *Wayfair* lowered the Commerce Clause's bar likely means that the Due Process Clause will be significantly more important in deciding whether a state can require out-of-state companies to collect sales tax. Companies must now consider the due process doctrine to determine if enough connection exists for the state to have jurisdiction over them.

Continue reading.

Foster Swift Collins & Smith PC

Tax Law Blog

July 26, 2018

Figuring Out If 'Opportunity Zones' Can Revitalize Struggling Neighborhoods.

In two Alabama cities, those laying groundwork for the new tax incentive program see both promise and risks in the investments it could spur.

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Continue reading.

Route Fifty

By Bill Lucia,
Senior Reporter

August 5, 2018

Real Estate Funds Move Into Opportunity Zones, Raising Concerns About Displacement.

Fundrise has made its mark by democratizing commercial real estate investing. By pooling commitments of as little as $10,000 from 50,000 investors, the firm has made the asset class accessible to investors who don’t necessarily have a seven-figure net worth.

Since 2012, the company has invested $500 million in equity across about 150 deals. Now, Fundrise is planning a $500 million fund to invest in so-called opportunity zones. Across the country, 8,700 mostly low-income census tracts qualify for significant investment tax benefits under the Investing in Opportunity Act that was part of last year’s U.S. tax-cut bill.

“It’s a promising opportunity for us,” Fundrise’s CEO Ben Miller told ImpactAlpha.

Funds like the one Fundrise is raising could again democratize access to the tax advantages to be offered by opportunity funds. The tax-law provision allows investors to defer taxes on capital gains for long-term investments made into fund that invest at least 90% of their capital into opportunity zones.

Continue reading.

Impact Alpha

by Jessica Pothering

August 1, 2018

Changes Keep Coming for Long-Stable Historic Tax Credit.

For a provision that’s been an enduring part of the federal tax code for 40 years, the historic tax credit (HTC) has been on a bit of a roller coaster ride the past 18 months.

Back in February 2017, optimism was abound as the Historic Tax Credit Improvement Act was introduced for the second straight session of Congress. The legislation would improve the credit and received broad congressional support. But enthusiasm slowly waned as fears over the elimination of the credit took hold (to date, the legislation hasn't made it out of committee in either the House or Senate).

The concerns about elimination of the credit were real, as last winter's landmark tax legislation threatened the continuation of the credit and ultimately eliminated the 10 percent rehabilitation credit for non-historic properties placed in service before 1936 and slightly reduced the value of the credit by expanding the period over which the credit is claimed to five years. The legislation also reduced the top corporate tax rate from 35 percent to 21 percent, potentially reducing the demand for HTCs.

A few months later came bipartisan legislation to recover much of the loss in value of the credit by eliminating the basis adjustment requirement for HTC properties. Without the requirement to reduce the basis of the property by 100 percent of the HTC, investors could increase equity pay-ins to rates similar to those seen before enactment of tax reform legislation and would bring the HTC into line with the low-income housing tax credit (LIHTC), which is also claimed over multiple years.

It's been a busy 2017 and 2018 in the HTC world, requiring significant involvement from groups supportive of the credit, spearheaded by the Historic Tax Credit Coalition (HTCC).

"Certainly on the public policy front and as far as a threat to the industry, it's been an unprecedented time," said Merrill Hoopengardner, chairwoman of the HTCC.

A History of Consistency

The HTC will commemorate its 40th year as part of the tax code Nov. 6. That's the anniversary of the day President Jimmy Carter signed the Revenue Act of 1978, adding a 10 percent rehabilitation tax credit for commercial buildings that met certain requirements. Two years earlier, President Gerald Ford had signed legislation to permit owners to receive income tax deductions for charitable contributions of interest in property for conservation purposes–the launch of a tax benefit, but not a credit.

The HTC was expanded to a three-tier credit in 1981 and then switched to a two-tier credit as part of the landmark Tax Reform Act of 1986: A 20 percent credit for certified historic buildings, a 10 percent credit for non-historic buildings placed in service before 1936, which at the time meant 50 year-old buildings.

The next 31 years saw few significant changes to the federal HTC. There were alterations, including when the HTC was given a boost to help recovery in areas hit by natural disasters in the GO Zone Act of 2005 and when the Housing and Economic Recovery Act (HERA) of 2008 allowed the HTC to be taken against a taxpayer's alternative minimum tax (AMT) and added a new LIHTC qualified allocation plan selection criterion for historic properties.

Then came a series of real–and potential–changes.

HTC Improvement Act

On Feb. 16, 2017–44 days after the start of the 115th Congress–Sens. Ben Cardin, D-Md., and Susan Collins, R-Maine, and Reps. Mike Kelley, R-Pa., and Earl Blumenauer, D-Ore., introduced legislation to make significant enhancements to the HTC: The Historic Tax Credit Improvement Act of 2017.

With support from such organizations as the HTCC, similar legislation was introduced in the 114th

Congress and in the 113th and 112th Congress under a different title: the Creating American Prosperity through Preservation (CAPP) Act.

Provisions in the Historic Tax Credit Improvement Act of 2017 include:

- an increase in the HTC for certain small projects,
- to allow credit transfers for certain small projects,
- to lower the expenditure threshold to qualify for the HTC from 100 percent to 50 percent of the adjusted basis,
- to reduce the depreciable basis adjustment for HTC property, and
- to modify certain tax-exempt property rules.

After the legislation was assigned to committees, it continued to pick up sponsors–by July of this year, the legislation had 82 co-sponsors in the House (43 Republicans, 39 Democrats) and 13 in the Senate (four Republicans, nine Democrats). Fourteen of the House co-sponsors are on the Ways and Means Committee, but the bill remains in committee.

Tax Reform: Major Shake-up

While the HTC Improvement Act was gaining co-sponsors, a more threatening piece of legislation was framed: H.R. 1, the Tax Cuts and Jobs Act of 2017.

The original version of the tax legislation passed by the House of Representatives repealed both the HTC and the 10 percent non-historic credit, causing consternation in the historic preservation community and igniting negotiations in the Senate to save it. Initially, Senate legislation preserved the HTC, but reduced it to 10 percent. Then an amendment by Sen. Bill Cassidy, R-La., saved the day by preserving the 20 percent credit, while making it allowable ratably over five years, beginning with the year the property is placed in service.

It was a victory, but at a cost: the loss of the 10 percent non-historic credit and the ability to claim the entire 20 percent HTC at the time property is placed in service.

It didn’t take long for legislators to begin working on legislation to offset some of the lost value.

Historic Tax Enhancement Act of 2018

With encouragement from the HTCC and other historic preservation advocates, the Historic Tax Enhancement Act of 2018 was introduced in both houses of Congress in June, with bipartisan sponsorship (Republican Sens. Bill Cassidy and Collins, Democratic Sen. Cardin; Republican Rep. Darin LaHood and Democratic Rep. Blumenauer). By early July, there was another co-sponsor in the Senate, six more in the House.

The focus of the legislation is to eliminate the basis adjustment requirement, which would allow the tax credit to reclaim much of the value lost due to the necessity of taking the credit ratably over five years. With the basis adjustment requirement eliminated, the HTC would have the same policy as the LIHTC.

In the wake of tax reform, Novogradac research indicated how much the value of HTC equity would be affected if the basis adjustment were eliminated. It would move from a range of 77-84 cents with basis adjustment to 82-97 cents without it. That would put it in line with the value of the credit before tax reform was passed.

The legislation was introduced by some of strongest supporters of the HTC in Congress and the press release announcing the bill heralded the success of the HTC program in the states and districts for each of the co-sponsors.

The HTC Enhancement Act is a logical next step for the HTC after tax reform, although it’s no lock to pass. However, a logical opportunity for both pieces of legislation to pass will be the final months of the 115th Congress–the so-called lame-duck session.

The final weeks of a congressional session have historically been good to the tax credit community: that’s when we got permanency for the 9 percent floor for the LIHTC and extensions of the new markets tax credit, the production tax credit and the Section 1603 cash grant program; as well as GO Zone boosts for the HTC, NMTC and LIHTC over the past decade. This year–with tax extenders and technical corrections both on the table–there is a chance for the historic preservation community to get the two major pieces of HTC legislation passed.

“We’re cautiously optimistic that we’ll be in the mix –if there’s a mix to be gotten into,” Hoopengardner said. “Particularly with the Historic Tax Credit Enhancement Act.”

For those seeking a powerful argument to promote the HTC legislation, there’s an obvious answer: the economic success of the program.

Powerful for Renovation, Economy

The HTC is a proven economic engine, encouraging development, creating jobs and resulting in a net financial gain for the federal government.

This year’s annual report by the U.S. Department of the Interior’s National Park Service (NPS) said the HTC has leveraged nearly $90 billion in private investment in rehabilitating historic properties since 1976. More than 43,000 properties completed renovation with help from the credit over the years.

Another report–put out each year by the NPS and Rutgers University–is even more impressive. Last year’s Annual Report on the Economic Impact of the Federal Historic Tax Credit said that federal HTC-assisted rehabilitation has created an inflation-adjusted total of $131.8 billion in expenditures, 2.5 million jobs and almost $30 billion in federal taxes since 1978. The fiscal year 2016 totals included the creation of $1.1 billion in federal taxes.

That’s an important figure for those in the HTC world: The HTC creates not only jobs and expenditures, but increases federal tax income. For instance, the NPS-Rutgers report says the historic cost of the credits to the federal government in inflation-adjusted 2016 dollars is $25.2 billion, while it brought in $29.8 billion in federal tax receipts. That’s a net $4.6 billion gain due to the HTC over the history of the program.

The HTC is a revenue-generator.

As the historic preservation community recovers from last year’s rescue of the credit and pushes for both the Historic Tax Credit Improvement Act and the Historic Tax Credit Enhancement Act, members will gather Sept. 27-28 at the Novogradac 2018 Historic Tax Credit Conference in Nashville. Among other topics, we will discuss how to advocate for the two major pieces of legislation.

The past 18 months have been a time of change for the federal HTC, but one thing that hasn’t changed: the federal HTC is good for history and good for the federal budget. Passage of both major pieces of legislation would make it more so.

Published by Michael Novogradac on Wednesday, August 1, 2018

Washington Nationals Win Fans in the Bond Market.

Their success puts people in the seats, which has led to upgrades of D.C. stadium bonds.

The Washington Nationals may be having a down year by their current standards, but investors who bought their stadium bonds are winning more than ever.

The team is in third place in the National League East after finishing the past six seasons in either first or second. It's been a dramatic turnaround for the former Montreal Expos, who played their first season in the U.S. capital in 2005 and failed to post a winning record until 2012. In the midst of that mediocre stretch, the District of Columbia issued $510 million in ballpark revenue bonds in May 2006.

At that time, the debt was rated 1 BBB by S&P Global Ratings, just two steps above speculative grade. Analysts said the pledged tax revenue stream was highly dependent on stadium events. Or, as Bloomberg's municipal-bond guru Joe Mysak put it in his column: Paying stadium bonds is easier if you score more runs. In offering documents, a revenue study made the assumption that "the future owner(s) of the team will strive to maintain a competitive ball club."

Well, the Nationals have done more than just that, with winning records in each of the last six seasons. S&P has taken notice, raising its rating on the D.C. stadium bonds this week to A-, following an earlier upgrade in March 2016. Moody's Investors Service has also boosted the debt since it was issued. That's a boon for investors like Franklin Resources, which, according to Bloomberg data, has held about $29 million of the bonds since 2009, before the team's fortunes changed. Invesco appears to have purchased about $31 million of the securities.

The backdrop of all this, of course, is that public funding for stadiums has become an anathema in recent years. Consider my Bloomberg Opinion colleague Barry Ritholtz's column from last month, for instance:

> Your tax dollars are being wasted, on an enormous scale, by uncompetitive socialist enterprises that ignore the basic rules of economics.
>
> I refer, of course, to the practice of politicians who give taxpayer dollars to subsidize the business of sports by paying for the construction and/or renovation of stadiums and arenas. These exercises in crony capitalism make no sense whatsoever. There has never been a decent reason to subsidize these successful businesses, which rarely produce a real return on the public's investment. Nor is civic pride a justification.

The way D.C. arranged to back the ballpark bonds is tame in comparison to some of the worst stadium deals. According to S&P, funds come from four sources: rent from the Nationals franchise; stadium taxes on tickets, food, beverages and parking; a utility tax; and a fee levied on businesses in the district that have $5 million or more in annual gross receipts. Largely, it comes down to the team's performance and whether fans fill the seats.

It's clear that winning solves that issue, too. While attendance remained below 2 million from 2009 to 2011, it jumped to 2.37 million in 2012, when the Nationals went 98-64 and finished first in their division. The team has gone on to average 2.57 million fans per year from 2013 to 2017.

Not all sports financing happens to coincide with a team's turnaround. As Bloomberg News's Amanda Albright reported earlier this week, ice rink projects are responsible for some of the rare defaults in the $3.8 trillion muni market precisely because they often depend on ticket sales and rental revenue to repay their debts. The Atlanta Braves have been known to rope small towns into bidding wars for their minor-league franchises. Sometimes, the cities pledge to cover shortfalls with their general fund revenue. That's led to credit downgrades, not upgrades.

The upward trajectory of the ballpark bonds' ratings, then, should be viewed in isolation, rather than as a verdict on stadium financing as a whole. As Mysak wrote in 2006, consultants concocted a chart of ballpark-related sales growth that "might be termed the 'happily ever after' projections." Basically, that proceeds increase at a steady pace year after year.

Well, sometimes happily ever after comes true. "We base the upgrade on a track record of strong and stable revenues, well in excess of debt service, providing flexibility to prepay existing principal and resulting in improved coverage levels," S&P analyst Timothy Barrett wrote in a July 31 report.

Indeed, a good chunk of the debt has already matured or D.C. has taken it out. More will be called at 100 cents on the dollar in a month (the securities are selected by lottery, according to Bloomberg). Even so, a smattering of bonds changed hands over the past two weeks at a price above par, speaking to investor demand.

The Nationals, meanwhile, enter the home stretch of the season five games behind the division-leading Philadelphia Phillies, and a similar distance from the top of the NL wild-card race. They've won twice this week at home, including a dominant 25-4 victory over the New York Mets that set a new team scoring record.

That kind of scoring will certainly keep the bond payments flowing.

1 Like many pre-crisis muni deals, the bonds were insured, so the enhanced rating was AAA.

Bloomberg Opinion

By Brian Chappatta

August 2, 2018, 11:43 AM PDT

TAX - LOUISIANA

Beer Industry League of Louisiana v. City of New Orleans

Supreme Court of Louisiana - June 27, 2018 - So.3d - 2018 WL 3216508 - 2018-0280 (La. 6/27/18)

State alcoholic beverage foundation and state restaurant association filed separate petitions against city and city's chief financial officer and director of finance, seeking injunctive relief and declaratory judgment that provisions municipal code allowing for imposition and collection of occupational license tax or excise tax on dealers of alcoholic beverages were unlawful and unenforceable.

After petitions were consolidated, the Orleans Civil District Court, Orleans Parish, granted plaintiffs partial summary judgment, declaring the provisions in question to be unlawful, unconstitutional, and unenforceable. Defendants appealed.

The Supreme Court of Louisiana held that state gallonage tax levied on dealers who handled high alcohol content beverages was an "occupational license tax" authorized by state constitution and, thus, municipal ordinance authorizing similar tax was likewise constitutionally permissible. Such tax indirectly taxed the handling of liquor rather than constituting a property tax upon the liquor itself, was triggered by business conduct consisting of the professional handling of alcohol, and designated specific class of merchants, namely dealers, who were responsible for payment.

IRS Releases New "Issue Snapshot" on Single-Family Housing Bonds: Squire Patton Boggs

The IRS has released another "issue snapshot," which deals with qualified mortgage bonds (or, as they are often called in our lingo, single-family housing bonds). An issuer uses the proceeds of qualified mortgage bonds to make loans to private homeowners. Because of the private loan limitation, the bonds are private activity bonds. To be tax-exempt, then, the bonds must meet all of the requirements for qualified mortgage bonds (which recapitulate most of the other tax-exempt bond requirements, filtered through a fish-eye lens). Private activity bonds involving loan programs (such as single-family housing bonds or student loan bonds) rather than project financing raise the question of what to do when the issuer receives repayments of the loans made with the proceeds of the bond issue – can they be used to originate more loans, or must they be used to pay down bonds?

This new issue snapshot analyzes this issue, walking through the mechanics of a refunding of single-family housing bonds where the issuer has on hand repayments of some of the mortgage loans (often referred to as "replacement refunding" transactions). The issue snapshot also describes how long the refunding bonds can be outstanding without getting more volume cap. For most bonds subject to volume cap, refunding bonds don't need additional volume cap as long as the amount of the refunding bond doesn't exceed the amount of the refunded bond. For qualified mortgage bonds, there's an additional back-stop – you can't go longer than 32 years from the issuance date of the original mortgage bond without getting more volume cap. (The 32-year rule is intended as a rough-justice substitute for the fact that there isn't truly a bond-financed "asset" with a "useful life," in qualified mortgage bond financings in the same way that one exists in, say, a solid waste disposal facility financing; the typical length of a residential mortgage is around 30 years.) In addition, in general, mortgage repayments can be used to originate new mortgage loans only within 10 years after the issuance date of the original mortgage bond.

The issue snapshot contains "Issue Indicators or Audit Tips" for examining agents (and, by extension, us), which are worth a read. The full list of issue snapshots can be found here; the aspects regarding tax-exempt bonds continue to form quite an eclectic mix.

The Public Finance Tax Blog

By Johnny Hutchinson on July 24, 2018

Squire Patton Boggs

TAX - CALIFORNIA

Time Warner Cable Inc. v. County of Los Angeles

Court of Appeal, Second District, Division 1, California - July 19, 2018 - Cal.Rptr.3d - 2018 WL 3471088 - 18 Cal. Daily Op. Serv. 7224

Telecommunications company filed refund petition, contesting valuation of its possessory interests in public rights-of-way based on television, broadband, and telephone revenue.

The Superior Court reversed in part, and county appealed.

The Court of Appeal held that:

- Assessor was not required to value possessory interests in public right-of-way by capitalizing cable television franchise fee and could include broadband and telephone revenue;
- Evidence did not support assessor's determination that five percent of gross income from all three income streams represented the fair market value of the possessory interests;
- Assessor was required to allocate portion of economic rent to nontaxable intangible assets; and
- Substantial evidence supported use of 10-year term of possession.

In light of lack of evidence of an open and competitive market, assessor was not required to value telecommunications company's possessory interests in public right-of-way, which company used to provide cable television, broadband internet, and telephone services, by capitalizing cable television franchise fee, but rather could base value on the economic rent the possessory interests would command in a rational market; while company argued that possessory interests were available to any prospective cable operator at five percent of television revenue, there was no evidence prospective cable operators were purchasing new franchises or there was an actual, working market for cable television possessory interests, and subject possessory interests generated a considerable amount of revenue for company beyond television services.

Evidence did not support assessor's determination that five percent of gross income from all three income streams, including cable television, telephone, and broadband internet, represented the fair market value of telecommunications company's possessory interests in public right-of-way; while there was evidence cable companies paid five percent of television revenue as franchise fee for the possessory interest to provide cable television service, and company may have previously paid a franchise fee on cable modem service, there was no evidence as to purported similarities in the way possessory interests were used to provide television, broadband, and telephone services, and television, broadband, and telephone businesses did not operate in similar competitive environments.

When assessing tax on telecommunications company's possessory interests in public right-of-way, county assessor was required to allocate portion of economic rent to nontaxable intangible assets.

Substantial evidence supported assessor's use of 10-year term of possession when assessing telecommunications company's possessory interests in public right-of-way which company used to provide cable, telephone, and broadband internet services, even though average remaining term of company's franchises was five years; there was substantial evidence that company and the franchisors understood that the acquired franchises would last as long as company wanted them to last, and company acknowledged that all parties implicitly understood that it would physically occupy its rights-of-way for as long as it chose to do so, notwithstanding anticipated change from local to state control.

Tax Exemption Offsets Lack of Competition in Municipal Bond Markets.

The tax exemption for earnings on municipal bonds cost the federal government almost $31 billion in 2017. The exemption is intended to promote state and local investment, but many analysts argue the policy is an inefficient way to provide such a subsidy.

In a paper presented at the 2018 Municipal Finance Conference at Brookings, Duke University economists Juan Carlos Suárez Serrato, James W. Roberts, Andrey Ordin, and Daniel Garrett show that each dollar of tax exemption for interest paid on municipal bonds generates about $1.80 in savings for municipal authorities. In the paper "Tax Advantages and Imperfect Competition in Auctions for Municipal Bonds," using data on submitted and winning bids at municipal bond auctions, the authors estimate that each percentage point increase in the effective personal income tax rate on taxable bonds reduces municipal borrowing costs by roughly 9 percent, implying state and local governments receive a significant subsidy via the tax exemption.

How is it that the tax benefit has such a large impact on state and local borrowing costs? Suárez Serrato and coauthors say lack of competition in muni bond auctions—which often include few participants who need specialized information about each municipality and bond issuance—allows powerful bidders to suppress the price of the bond below what they would be willing to pay in a competitive auction. When a tax increase raises the value of the tax exemption, additional investors join the auction and bid higher prices. The tax hike not only raises the price investors are privately willing to pay, but also makes the auction more competitive. As evidence for this hypothesis, the authors show the pass through from tax savings to borrowing costs is larger for bonds issued by school districts and smaller jurisdictions, where auctions tend to have very few bidders and often are private.

[T]ax exemption is an effective policy for subsidizing state and local governments, and that its removal could place substantial burden on municipalities.

What does this mean for the importance of muni bond tax exemptions? The Suárez Serrato analysis implies the tax exemption is an effective policy for subsidizing state and local governments, and that its removal could place substantial burden on municipalities. In an analysis of the effects of the recently enacted Tax Cuts and Jobs Act, the authors find the new law—which limits the deductibility of state and local taxes and hence raises the effective tax rate—may lower interest costs for municipalities by 2.5 percent. An Obama-era proposal to limit the deductibility of muni interest income, on the other hand, would lead to an increase in state and local borrowing costs of around 31 percent, on average.

Suárez Serrato and coauthors note that these large policy effects exist primarily because of inefficiencies in primary municipal bond markets. If the tax advantages turn into public savings because bond auctions tend to be uncompetitive, then policies aimed at increasing competition in municipal bond auctions could significantly lower borrowing costs without sending the bill to federal and state taxpayers.

The Brookings Institute

Sage Belz and Louise Sheiner

Monday, July 23, 2018

Sports Stadium Subsidies Continue Unabated, Despite No Good Justification.

Less than two miles from the Capitol building sits the brand new Audi Field. Home of the D.C. United soccer team, the new stadium hosted its first match on July 14, 2018, and gave D.C. taxpayers a first look at their $150 million "investment."

Audi Field officially won the title of "largest stadium subsidy in MLS history" after the D.C. city council voted 12-0 for the stadium in 2014. The team achieved this despite owners Jason Levien, Erick Thohir, and soon-to-be majority owner Patrick Soon-Shiong pegging their net worth in the billions. Soon-Shiong himself is worth almost $8 billion, and will become the wealthiest owner in the league.

The ownership group's $250 million contribution to the project, combined with the $150 million it received from taxpayers, makes it the most expensive soccer stadium in American history, as well. This raises the question of why local taxpayers had to fork over $150 million to build a stadium that would represent a small percentage of D.C. United's billionaire ownership's wealth.

Continue reading.

The Washington Examiner

by Curtis Kalin & Adam Kazda | July 22, 2018 12:00 AM

IRS PLR: City Agreement to Deliver Water to Power Company Won't Result in Private Business Use of Bonds.

The IRS ruled that a city's agreement to deliver water to a company won't cause tax-exempt bonds used by a governmental entity to construct a new reservoir to meet the section 141(b) private business tests, finding that the agreement isn't an output contract and even though the company will receive a special economic benefit from the project, it won't be making private payments for it.

Read the IRS Private Letter Ruling.

IRS PLR #201830006

Fixing America's Forgotten Places.

Opportunity Zones, created by Trump's tax law, are meant to help the heartland thrive and make the country more equal—but can they pull it off?

FRESNO, Calif.—Census tract 06019000100 has a lot going for it. Locals cheer the melting-pot atmosphere, the arts scene, the nearby nature, and the affordable housing—affordable in national terms, which feels all the more amazing given that it is a quick drive both to the grandeur of Yosemite and to the tech hub of the Bay Area. Start your car up and grab a coffee here at 9 a.m., and you could be standing in downtown San Francisco or in front of Apple's headquarters by noon.

For all that, though, this tract has its problems. There is the stifling summer heat, the poverty, and the pollution. Technology companies have not flooded into the area like they have in the Bay and in Reno, and the city faces underinvestment and blight. Roughly two-thirds of the families in 06019000100 live below the poverty line. The surrounding county is economically depressed too, with an unemployment rate above 8 percent, one of just a handful of places nationally where that is still true. Moreover, the income gap between households in Fresno County and Santa Clara County, where Apple is headquartered, has widened in the past 10 years.

Still, Fresno is a place that feels on the cusp, as if just a little more investment, a little more infrastructure, and a little more spit and elbow grease might help it thrive. It has what a real-estate broker might call "good bones," with plenty of lower-cost real estate and highway saturation. It has a steady supply of educated workers, by virtue of being home to Fresno State, among other schools. And it has a powerful industrial base, in terms of agriculture as well as in other industries. "If you are a company that is looking at having a West Coast presence, especially a distribution or an e-commerce center, there's no better place than Fresno County right now," said Lee Ann Eager, the president of the Fresno County Economic Development Corporation (motto: "Living the California dream").

Continue reading.

THE ATLANTIC

ANNIE LOWREY

JUL 24, 2018

As States Legalize Sports Gambling, Convenience and Tax Rates Are Key.

There isn't a one-size-fits-all approach to legalization, but one analysis says states should see serious budget revenue gains with the right policies.

WASHINGTON — States legalizing sports gambling will not only see more in-state gross gaming revenue but also private sector economic activity that boosts their gains beyond any tax on proceeds, according to an analysis by Regional Economic Models, Inc.

Gross gaming revenue, or GGR, refers to the amount of money retained by betting operations after payouts.

Following the Supreme Court's May 14 decision, in *Murphy v. National Collegiate Athletic Association*, striking down federal restrictions on sports gambling, many states are considering GGR taxes to fund highway construction, pay for social services or make infrastructure repairs.

"Some of these priorities may be harder to get at with a smaller budget," said Peter Evangelakis, a senior economist at REMI, at a Thursday discussion of sports betting policies in D.C.

While illegal bookies and office pools will also crop up, state legalization of sports gambling will increase sporting event sales from travel to food to merchandise. States that tax GGR will likely increase state spending, which will in turn generate more growth as the money is fed back into their economies, Evangelakis said.

The Professional and Amateur Sports Protection Act of 1992, the federal prohibition on sports betting that the Supreme Court overturned this year, allowed licensed sports pools to continue in Nevada. In 2007, the Nevada Gaming Control Board reported $248.8 million in state revenue from sports wagering.

An estimated 69 million people, 28 percent of U.S. adults, bet on sports—averaging $1,554 per bettor annually, according to a 2015 Ernst & Young survey.

States have two main choices when considering legalizing sports gambling: how convenient to make access and how much to tax GGR.

REMI's model considers "low convenience" gambling to be limited to brick and mortar casinos, "moderate convenience" to include gas stations and convenience stores, and "high convenience" to add online betting to the mix. A low tax is 6.75 percent, base tax would be 10 percent, and a high tax is 15 percent.

Kentucky has horse racing with legal gambling and a state lottery but no casinos, so it's considered moderate convenience. REMI's 10-year model projects Kentucky would see a $93.6 million increase in GGR if the state legalized sports gambling this year, which translates to a $9.4 million increase in state revenue with a base tax of 10 percent.

State employment would spike in 2019 with two-thirds of new jobs in the gaming sector, dipping slightly as prices rise. Migration would more gradually increase before leveling off around 2029.

The gross domestic product in Kentucky would increase by about $150 million and personal income by $80 million, the analysis concludes.

Connecticut, which is home to the second- and third-largest casino in the U.S., is otherwise a low convenience gambling state. Should Connecticut legalize sports betting, REMI says it would see a $139.5 million increase in GGR and $9.4 million increase in state revenue with a low tax of 6.75 percent.

"I will say here the impacts are more muted," Evangelakis said. "Connecticut's gaming sector has much higher productivity, so even though the size of the sales and the revenue rises faster, they need less employment."

Route Fifty

By Dave Nyczepir,
News Editor

JULY 26, 2018

The Downsides of Property Tax Caps.

They have created fiscal stress for states and municipalities, and exacerbated inequality. A new report offers a simple solution to alleviate those issues.

Property tax caps are hampering municipalities' ability to fund basic services and are exacerbating inequality, according to a report released by the Center for Budget and Policy Priorities (CBPP) last week.

The tax caps, which first became popular during the 1970s tax revolt and have since spread to 44 states plus the District of Columbia, have created fiscal stress for the states that adopted the limits. As a result, states have cut aid to cities and counties, and municipalities have become more reliant on sales taxes and fees that disproportionately hurt the poor and people of color.

Prior to the first state cap in 1977, property taxes accounted for an average of 50 percent of local revenue across the country, according to the report. In 2015, property taxes accounted for 39 percent of local revenue.

Property tax revenue is shared by states and their localities. The study focused on the impact of caps in Michigan, Massachusetts, Oregon and New York. When adjusted for inflation, Massachusetts cut its unrestricted aid to municipalities by 44 percent from 2001 to 2015. In New York, more than three-quarters of cities and half of the counties reported significant fiscal stress due to the state's adoption of its tax cap in 2011 and subsequent cuts in state aid. And in Michigan, state aid declined in every city outside of Detroit from 2008 to 2014, dropping 17 percent across the state.

Because of property tax caps, "states are pushing too many costs down to the lower level," said Ron Deutsch, executive director of the Fiscal Policy Institute, during a press call about the report.

Property tax caps, according to the analysis, also contribute to inequality. For one, the caps strangle funding for public education, which the researchers see as a pathway for minority and low-income children to move up the socioeconomic ladder.

"I think in particular with schools we have a great imbalance between our high-needs school districts and our well-off school districts in terms of per pupil spending. The tax cap is institutionalizing these inequities," Deutsch said.

Secondly, white homeowners reap the largest benefits from the cap because they have historically owned homes at a greater rate than people of color and on average own more valuable homes.

And because the caps have led municipalities to turn to fees and sales taxes to make up the difference, those costs fall disproportionately on poor residents and people of color since they account for a larger portion of their income. Across the country, the share of local revenues derived from fees went from 16 percent in 1977 to 23 percent in 2015.

"Property tax caps lock in those inequities," says Iris Lav, former deputy director of the Center for Budget Policy and Priorities.

The study points to a report from the U.S. Department of Justice that examined the use of fees in Ferguson, Mo., and warned of "the illegal enforcement of fines and fees in certain jurisdictions around the country — often with respect to individuals accused of misdemeanors, quasi-criminal ordinance violations, or civil infractions." The DOJ report went on to explain that people facing these fines and fees "may confront escalating debt; face repeated, unnecessary incarceration for nonpayment despite posing no danger to the community; lose their jobs; and become trapped in cycles of poverty that can be nearly impossible to escape."

A Proposed Solution

The report has a recommendation to alleviate some of these issues: Flip the current property tax cap formula.

Right now, most states limit the annual increase in property taxes to 1.5 or 2.5 percent or the rate of inflation — whichever number is lower. Setting the limit instead at whichever number is higher, the researchers say, would provide more cash for governments and make revenues more predictable.

"We never thought the tax cap was the right solution," said Deutsch. "Property tax caps should be eliminated. If they aren't eliminated, at the very least, they should be amended."

To control runaway costs for homeowners living on more modest incomes, states could adopt "circuit breakers," which caps property taxes for people who make below a certain amount.

The report is being released in a year when federal tax reform is being upended. President Trump signed a tax package in December that caps the mortgage interest deduction and the state and local tax deduction. New York is one of four states suing the federal government over both.

The states claim the mortgage interest deduction cap violates the 10th Amendment, which protects states' rights. Furthermore, they contest the tax reform was intended to undermine their ability to raise taxes and point to Treasury Secretary Steven Mnuchin's statement this year that the cap was intended to "send a message" to high-tax states.

"The capping of SALT deductions has made it harder for states to raise the revenue they need to rely on," says Michael Leachman, CBPP's senior director of state fiscal research. "We are seeing it play out that people are not willing to pay higher property taxes."

GOVERNING.COM

BY J. BRIAN CHARLES | JULY 26, 2018

Bill Introduced to Authorize Additional $1 Billion in Rural NMTC Allocation.

Rep. Jason Smith, R-Mo., and Rep. Terri Sewell, D-Ala., today introduced the Rural Jobs Act, which would authorize an additional $500 million in new markets tax credit (NMTC) allocation per year for 2018 and 2019 for certain rural areas. Under H.R. 6627, the new allocation would target Rural Jobs Zones, which are NMTC-eligible census tracts in rural communities that are eligible for the United States Department of Agriculture (USDA) Business & Industry program. At least 25 percent of the new allocation would be prioritized for persistent poverty counties and high-migration rural counties.

Friday, July 27, 2018

How State Tax Cuts in Kansas Raised Municipalities' Borrowing Costs.

New research reveals that big tax cuts can sometimes be worse for the fiscal health of states and localities than previously estimated. This is the finding of a new paper entitled "State Tax Cuts and Debt Market Outcomes," to be presented at the 2018 Municipal Finance Conference at Brookings. In their paper, Komla Dzigbede of SUNY Binghamton and Rahul Pathak of Baruch College find that large tax cuts enacted in Kansas increased interest rates and reduced credit ratings on state and municipal bonds, compounding on the state's already significant fiscal woes. Utilizing the Kansas tax cuts as a natural experiment, the authors show that the state-wide tax cuts created spillover into local municipalities that made it harder for them to borrow money.

In 2012, the Kansas legislature passed a bill that reduced individual income tax rates, reduced the number of income brackets from three to two, and eliminated taxes on so-called pass-through businesses, or S-corporations. A year later, the legislature passed another bill further reducing income tax rates, raising the state sales tax, and reducing the standard deduction. Newly elected Governor Sam Brownback described the tax cuts as a means to accelerate economic growth and job creation, calling them “a shot of adrenaline into the heart of the Kansas economy.” Despite increasing the state budget deficit by a wide margin, Brownback reasoned that an increase in economic growth spurred by the tax cuts would offset the initial decline in revenue. However, after facing significant budget shortfalls, the Kansas legislature in 2017 voted to override Gov. Brownback’s veto, and raised taxes by $1.2 billion, effectively reversing the tax cuts of 5 years earlier.

While there is contention over whether or not tax cuts increase economic growth, the direct effects of lower revenues can lead the fiscal condition of a state or locality to worsen.

Dzigbede and Baruch’s analysis expands upon the economic literature related to tax cuts and economic growth more broadly. While there is contention over whether or not tax cuts increase economic growth, the direct effects of lower revenues can lead the fiscal condition of a state or locality to worsen. This in turn could lead to higher borrowing costs and a lower credit quality of the securities issued by the borrowers, further compounding budgetary stress. If the effects on borrowing costs and credit quality are particularly large, the fiscal challenges of the state as a whole could also spill over into the fiscal picture of individual counties.

Utilizing data on individual bonds issued by the state of Kansas, as well as by Kansas municipalities, from 2005-2015, the authors estimate the change in total interest costs as well as changes in credit ratings after the tax cuts went into effect. The study compares the financing outcomes in Kansas to that of surrounding states. Controlling for factors related to the characteristics of each bond, the authors find that on average, the tax cuts led to an increase in interest rates for Kansas state-issued bonds of 0.43 percentage points and for local government-issued municipal bonds of 0.34 percentage points, compared to the neighboring states of Colorado, Nebraska, Missouri, and Oklahoma. In addition, the financial strain placed on the state and counties reduced the probability of municipal bonds receiving higher credit ratings (AA/Aa2 or above). This decline in credit ratings can account for roughly half of the increase in overall borrowing costs.

In light of these findings, the authors argue that the indirect financial implications of tax changes should be considered as part of states’ budget constraints when assessing the merits of any major tax policy. Additionally, the results from bond issuances among local municipalities suggest spillover effects from state to local financing conditions. Therefore, the authors argue localities should be given a voice in major state-level tax changes.

The Brookings Institute

Michael Ng and David Wessel

Monday, July 16, 2018

[Critics of Online Sales Tax Ruling Urge Congress to Rein in States.]

Meanwhile, the top Republican on the House Judiciary Committee warns the U.S. Supreme Court decision could "unleash chaos."

WASHINGTON — Republican lawmakers left open the possibility on Tuesday that Congress could take action to legislate around a recent U.S. Supreme Court decision that paves the way for states to collect greater sales taxes from internet retailers.

But there are no signs yet that any legislation is gaining serious traction on Capitol Hill.

Tuesday's discussion unfolded as the House Judiciary Committee convened to consider the ramifications of the June ruling in *South Dakota v. Wayfair, Inc.*, which overturned a legal precedent that blocked states from gathering sales taxes from out-of-state online vendors.

Continue reading.

Route Fifty

By Bill Lucia,
Senior Reporter

July 24, 2018

S&P: U.S. Not-For-Profit Acute Health Care Stand-Alone Hospital Median Financial Ratios -- 2017 vs. 2016

Medians for stand-alone hospitals in 2017 saw a continuation of the broad trends identified in last year's median reports—namely, operating margin compression combined with general balance sheet stability with some variability among individual balance sheet metrics.

Continue Reading

Jul. 17, 2018

S&P: U.S. Not-For-Profit Health Care Small Stand-Alone Hospital Median Financial Ratios -- 2017

S&P Global Ratings defines a small stand-alone hospital–which is a subset of our stand-alone hospital universe–as one having annual total operating revenues of less than $150 million.

Continue Reading

Jul. 17, 2018

S&P: U.S. Not-For-Profit Health Care Children's Hospital Median Financial Ratios -- 2017 vs. 2016

Children’s hospitals rated by S&P Global Ratings continue to exhibit healthy credit characteristics. This has led to favorable rating distributions and overall healthy financial median ratios reflecting stable and strong credit fundamentals.

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Jul. 17, 2018