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STATE TRIBUNAL HOLDS IT DOES NOT HAVE JURISDICTION TO HEAR TAX REFUND CLAIM

By Kara M. Kraman

The New York State Tax Appeals Tribunal held that it did not have jurisdiction to consider a tobacco wholesaler and distributor's tobacco products tax refund claims where the wholesaler's petition was filed prior to the issuance of a notice of refund claim denial. *Matter of Globe Wholesale Tobacco Distributors, Inc.*, DTA No. 826617 (N.Y.S. Tax App. Trib., Nov. 7, 2019). However, despite finding that it did not have jurisdiction to consider the refund claims, the Tribunal nevertheless concluded that the Administrative Law Judge correctly denied the claims.

Facts. Globe Wholesale Tobacco Distributors, Inc. ("Globe") is a licensed New York State wholesaler and distributor of tobacco products. The New York State Department of Taxation and Finance audited Globe for the tobacco products tax for the period May 2009 through April 2012. During the course of the audit, the Department determined that Globe had made several errors in its calculation of the tax. As a result, on July 5, 2013, the Department issued a Notice of Determination assessing additional tax due of $55,965, plus interest, for the tax period August 1, 2011 through April 30, 2012. On November 7, 2014, Globe timely filed a petition with the Division of Tax Appeals protesting the 2013 Notice.

On December 5, 2013, the Department issued a *Technical Memorandum* providing new guidance for determining a distributor's wholesale price of cigars. Technical Memorandum, "Determining a Distributor's Wholesale Price of Cigars Using the Industry Standard Adjustment Ratio," TSB M 13(12)M (N.Y.S. Dep't of Taxation & Fin., Dec. 5, 2013) (the "TSB-M"). The TSB-M stated that it was "[e]ffective for cigars imported into New York on or after December 1, 2013." Having concluded that under the TSB-M it would be entitled to refunds, on December 19, 2013, Globe sent the Division a letter indicating that Globe wished to claim a refund for open periods through November 2013, but did not specify a refund amount or include any documentation with the letter.

On or about July 2, 2015, Globe filed a second claim for refund that encompassed the entire audit period and perfected the protective refund claim it had made on December 19, 2013. In September 2015, the Department issued a notice granting Globe's refund claims for November 2011 through April 2012,

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but denying Globe's refund claims for August 2011 and September 2011 on the grounds that the two-year statute of limitations had already expired for those periods.

ALJ Determination. In the proceeding below, the ALJ determined that the Department properly denied Globe's refund claims for August 2011 and September 2011 because those refund claims were barred by the two-year statute of limitations under Tax Law § 476. The ALJ also determined that Globe was not entitled to relief under the Taxpayer Bill of Rights provision that requires the Department to disclose to the taxpayer overpayments discovered during the course of an audit because the TSB-M was not issued until after the audit was completed and only applied prospectively. The issue of subject matter jurisdiction over the refund claims was not raised and was not addressed by the ALJ.

Law. Tax Law § 2008(1) provides that all proceedings in the Division of Tax Appeals "shall be commenced by the filing of a petition . . . protesting any written notice of the division of taxation which has advised the petitioner of a tax deficiency, a determination of tax due, a denial of a refund or credit application . . . or any other notice which gives a person the right to a hearing."

[The Tribunal] concluded that Globe's petition, filed prior to the issuance of the refund claim determination notice, should be properly dismissed as premature.

Tribunal Decision. Citing to Tax Law § 2008(1), the Tribunal held that the Division of Tax Appeals did not have jurisdiction to consider Globe's refund claims because its jurisdiction is premised on the filing of a petition protesting a written notice issued by the Department. In this case, Globe's petition, dated November 7, 2014, was in protest of the July 5, 2013 Notice of Determination. However, the amounts assessed by the Notice of Determination were later reduced to zero by the Department and that notice was cancelled. The refund claim determination notice was not issued by the Department until September 2015. The Tribunal noted that while the Tax Law does contain exceptions to the requirement that a petition claiming a refund must protest a written refund claim denial, such as the exceptions under the personal income tax and the corporation franchise tax that allow a taxpayer to assert a refund in a petition of a notice of deficiency (or even after the petition has been filed), there is no such exception to the requirement under the tobacco products tax. Therefore, it concluded that Globe's petition, filed prior to the issuance of the refund claim determination notice, should be dismissed as premature.

While the Tribunal concluded that it could not consider whether the denial of Globe's refund claims was proper because it did not have jurisdiction, it nevertheless briefly addressed the substantive issues in the underlying case "in order to provide a complete record," and found the ALJ's determination of those issues to be correct. Accordingly, the Tribunal modified the determination of the ALJ to "dismiss" rather than "deny" Globe's claim for refund, and granted Globe's petition to the extent that the Notice of Determination was cancelled, but dismissed the petition to the extent Globe claimed a refund.

ADDITIONAL INSIGHTS

This case is unusual inasmuch as the Tribunal has rarely raised a subject matter jurisdiction objection on its own, especially where, as here, subject matter jurisdiction appears to have been presumed by both parties, as well as by the ALJ. As such, the decision serves as a reminder to always check the specific procedural requirements of the article of the Tax Law under litigation. While under the corporation franchise tax (Article 9-A) and the personal income tax (Article 22), refund claims may be asserted as part of a taxpayer's protest of a notice of deficiency and the Tribunal would have jurisdiction over those claims, this is not the case, for example, under the alcoholic beverages tax (Article 18) and the tobacco products tax.

ALJ FINDS NO RESPONSIBLE PARTY LIABILITY FOR INDIVIDUAL

By Hollis L. Hyans

A New York State Administrative Law Judge has cancelled a Notice of Determination issued by the Department of Taxation and Finance to an individual whom the Department alleged was personally liable for a restaurant's sales and use tax liability, finding that the individual was not a person responsible for collecting and remitting sales and use tax on behalf of the restaurant during the period at issue. *Matter of Chuanmin Shi*, DTA No. 828139 (N.Y.S. Div. of Tax App., Oct. 31, 2019).

Facts. In 2015, the Department began a sales and use tax audit of New Shanghai Tan Restaurant, located in Flushing, New York. The Department was advised that the restaurant was out of business and the owner was

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incarcerated, but that the owner's son would obtain a power of attorney from her when he visited her in jail. Despite numerous requests for records, no sales tax records or power of attorney were provided. Therefore, the auditor used an estimated audit methodology to calculate tax due, and issued a Notice of Determination to the restaurant asserting sales tax of nearly $200,000, plus interest and penalty, for the period September 1, 2012 through February 28, 2015.

The Department also issued a Notice of Determination to petitioner, Chuanmin Shi, as a responsible person for the period March 1, 2013 through February 28, 2015, seeking sales tax of approximately $160,000 plus interest and penalties. For its assessment against Mr. Shi, the Department relied on the restaurant's electronically filed sales tax returns for the quarters ended August 31, 2012 through August 31, 2014, indicating that they were submitted by "C Shi"; the restaurant's withholding, wage reporting, and unemployment insurance returns for periods in 2009, 2011, and 2012; and the restaurant's application for a sales tax registration electronically submitted by Mr. Shi on April 24, 2009. Mr. Shi contested the assessment, and a hearing was held before an ALJ.

The Hearing. Mr. Shi testified that although he had held an ownership interest in the restaurant prior to the period at issue, he had relinquished that interest to Ms. Fu Ling Shi (to whom he was not related) in 2012, since he was spending much of his time in China caring for his sick father. Pages from Mr. Shi's passport confirmed that he was in China during a significant portion of late 2011 through the middle of 2013. Mr. Shi testified that he was not an officer or director of the restaurant during the relevant time and had no check-signing authority, no ability to hire and fire employees, and no access to the restaurant's computers or corporate checkbook. His testimony was supported by affidavits of other individuals establishing that Fu Ling Shi became the sole owner of the restaurant in approximately May 2012.

The Department introduced copies of documents purportedly signed by Mr. Shi that had been filed under the New York Alcoholic Beverage Control Act and with the New York State Liquor Authority. Mr. Shi testified that he had not signed those documents, and he presented a handwriting report from a forensic document examiner confirming that the signatures were not his. Mr. Shi also denied submitting or authorizing the sales tax returns relied upon by the Department, and introduced evidence showing that the email address of the individual who submitted the returns was that of the restaurant's accountant, who had also written checks that were used to make payments of some of the restaurant's sales tax liabilities. Mr. Shi also submitted notarized letters from the accountant, and copies of the restaurant's federal tax returns, indicating that Fu Ling Shi was the sole shareholder of the restaurant during 2012-2014 and that the accountant had prepared the federal returns.

In 2014, former employees of the restaurant brought a lawsuit under the Fair Labor Standards Act ("FLSA") against the restaurant, successor entities, and the former owner and managers. Mr. Shi was not named as an owner or manager in that action.

The ALJ found that Mr. Shi had established, by credible testimony, documents, and affidavits, that he was no longer associated with the restaurant as of May 2012, [and] that his apparent signature on documents related to the restaurant's liquor license had been forged . . . .

Evidence submitted at the hearing also established that Fu Ling Shi had been arrested for obtaining stolen credit/debit card information to manufacture counterfeit cards. At her bail hearing, the Assistant United States Attorney stated that she used the restaurant as a front for the counterfeit credit card operation, and that she and her co-conspirators were able to create counterfeit documents. Fu Ling Shi pled guilty to one count of conspiracy and was sentenced to prison and subject to forfeiture.

The Decision. The ALJ found that Mr. Shi had met his burden of demonstrating that he was not responsible for the restaurant's unpaid sales and use tax.

The ALJ identified the relevant question in determining personal liability as whether the individual had sufficient authority and control over the operations of the company so that he becomes personally responsible for unpaid sales taxes, looking at such factors as the individual's status as an officer, director, or shareholder; his or her authorization to write checks; whether he or she signed tax returns; his or her control over financial affairs; and whether he or she had authority to hire and fire employees. While noting that the petitioner bears the burden of proof by clear and convincing evidence, the ALJ determined that here the burden had been met.

The ALJ found that Mr. Shi had established, by credible testimony, documents, and affidavits, that he was no

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longer associated with the restaurant as of May 2012, that his apparent signature on documents related to the restaurant's liquor license had been forged, and that the sales tax returns apparently electronically submitted by "C Shi" had in fact been submitted by the restaurant's accountant. Finding the absence of any evidence establishing that Mr. Shi, for the relevant period, had an ownership interest in the business, had received any wages, or had exhibited any other indicia of control, the ALJ cancelled the notice of determination.

ADDITIONAL INSIGHTS

Often, it can be very difficult for an individual to meet the burden of establishing by "clear and convincing evidence" the lack of authority and ability to control a business with which he or she has been affiliated, and few such efforts are successful. Here, the result was achieved by a combination of a number of unusual facts, including the admitted criminal activities of the actual owner, and by careful trial preparation, involving the submission of expert evidence that signatures were forged, testimony by Mr. Shi that the ALJ described more than once as "credibl[e]," and supporting affidavits that included evidence from the company's own accountant. The ALJ expressly noted that the civil and criminal legal proceedings involving Fu Ling Shi led to the conclusion that she and her son were responsible for the restaurant's sales tax obligations during the period at issue, and the ALJ also found "telling" that, although the Department was claiming Mr. Shi was under a duty to act on behalf of the restaurant, he had not been named as a defendant in the FLSA action brought by the restaurant's former employees.

TAX DEPARTMENT REVISES DRAFT APPORTIONMENT REGULATIONS TO ADDRESS SALES OF PARTNERSHIP INTERESTS

By Irwin M. Slomka

The New York State Department of Taxation and Finance has posted on its website revised draft Article 9-A business apportionment regulations, specifically to provide guidance regarding the sourcing of net gains from the sale of partnership interests. Part 4, Apportionment (N.Y.S. Dep't of Taxation & Fin., released Nov. 8, 2019). Originally released in September 2016 (and updated in August 2017 and, most recently, in July 2019), the regulations pertain to the computation of a corporation's business apportionment factor for tax years beginning after 2014.

The July 2019 revisions (discussed in the August 2019 issue of *New York Tax Insights*) were extensive, and included the removal of a provision that excluded receipts arising from "unusual events," a provision that was consistent with regulations in place for decades that only included in the factor receipts from transactions in the ordinary course of the corporate taxpayer's business. The July version also included several new provisions principally impacting the financial services industry. For example, a provision was added that a corporation will not be considered a registered securities broker-dealer solely by reason of its being a partner in a partnership (or a member of a limited liability company) that is itself registered as such (a position that is contrary to earlier New York State and City pronouncements and that is currently being litigated). The earlier revisions also included a new section addressing the sourcing of brokerage commissions received by a registered securities broker-dealer, including an example of a broker earning commissions where it contracts with an investment advisor to execute trades for an investment partnership. Under the example, the investment advisor is considered to be the "customer responsible for paying" the commissions to the broker and, since under the example the mailing address for the investment advisor is New York, the broker must source the commissions to New York State, a conclusion that is also in dispute.

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While the preamble to the November 2019 revisions states that they replace draft regulations released in August 2017, they actually replace the July 2019 draft, and are more limited in scope. However, they add a potentially important example involving the sourcing of a corporate partner's net gains from its sale of a partnership interest, which under the Tax Law are excluded from the apportionment factor unless the Commissioner determines that their inclusion is necessary to properly reflect the taxpayer's income or capital (*i.e.*, a discretionary adjustment).

[The revisions] add a potentially important example involving the sourcing of a corporate partner's net gains from its sale of a partnership interest . . . .

Under the example, the net gain constitutes 75% of the corporation's business receipts, and the corporate partner has been employing the aggregate method under Article 9-A for reporting its interest in the partnership. The example provides that, under these facts, a discretionary adjustment to include the net gains in the apportionment factor is appropriate and that, since the corporation employs the aggregate method, the sale is treated as the sale of the underlying assets of the partnership. The example goes on to require that the net gains be "reasonably divide[d]" among the assets owned by the partnership and then calls for application of the various sourcing rules under the statute for each type of partnership asset deemed sold, such as for the sourcing of gains from tangible personal property, real property, and goodwill.

ADDITIONAL INSIGHTS

The new example is welcome inasmuch as the exclusion from the apportionment factor of net gains from sales of partnership interests can distort the corporate partner's income and capital attributable to the State. The example does leave certain important questions unresolved, including: Will the discretionary adjustment be applied where the net gains constitute, for instance, only 25% of the corporation's business receipts, rather than 75%? What will constitute a "reasonable division" of the net gain to the corporate partner's pro rata share of each of the partnership's underlying assets? Are there situations where the net gain is included in the apportionment factor based on the partnership's own New York business allocation percentage or based on the commercial domicile of the purchaser of the partnership interest? Would there be a discretionary adjustment under the example if the corporate partner employed the entity method of reporting its partnership interest, instead of the aggregate method?

Although the Department cautions on its website that taxpayers cannot rely on draft regulations, in the absence of formal guidance from the Department it is likely that many taxpayers and practitioners already have relied on them in preparing their Article 9-A returns. This raises questions as to which version of the draft regulations will be applied when the Department audits tax returns that were filed in accordance with an earlier version of the draft regulations, and also how refund claims based on earlier versions will be handled.

INSIGHTS IN BRIEF

STATES' LAWSUIT CHALLENGING TREASURY REGULATION LIMITING CHARITABLE DEDUCTIONS PROCEEDS TO BRIEFING

A federal district court judge has issued an order setting a briefing schedule on the federal government's motion to dismiss and for summary judgment in a lawsuit brought by the states of New York, New Jersey, and Connecticut in July 2019 contesting a Treasury Regulation promulgated in June 2019. Scheduling Order, *New Jersey v. Mnuchin*, 19 Civ. 6642 (PGG) (S.D.N.Y., Nov. 7, 2019). The regulation provides that where a state or locality allows a taxpayer a state or local tax credit for a charitable contribution, the taxpayer's federal charitable deduction must be reduced by the value of that credit. New York State enacted legislation in 2018, to ease the claimed burden of the $10,000 SALT deduction cap, authorizing the establishment by the State and localities of charitable funds – the proceeds from which would be used for government-type functions – that would enable taxpayers to make qualifying deductible charitable contributions to those funds (assuming they exceeded the standard deduction) and also to claim state and local tax credits. New Jersey and Connecticut also enacted similar charitable fund tax credit programs. The states claim that they have a proprietary and sovereign interest in the charitable tax credit programs, and contend, among other things, that the Treasury Regulation limiting the deduction is unlawful because it is inconsistent with the plain meaning of IRC § 170 dealing with charitable deductions. This case is separate from the more publicized action brought by the same states (plus Maryland) challenging the $10,000 SALT cap, which was recently dismissed by a federal district court judge (discussed in the November 2019 issue of *New York Tax*

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Insights), and which has now been appealed by the states to the U.S. Court of Appeals, 2nd Circuit. *New York v. Mnuchin*, No. 19-3962 (2d Cir. filed Nov. 26, 2019).

STATE TAX DEPARTMENT LIMITS DISCLOSURE REQUIREMENTS FOR CONDOMINIUM TRANSFERS UNDER REAL ESTATE TRANSFER TAX

The New York State Department of Taxation and Finance has issued administrative guidance limiting the disclosure requirements in New York State real estate transfer tax returns for the names and addresses of members, managers, and other authorized persons of a limited liability company that sells or purchases a condominium unit in New York State. *Technical Memorandum*, "Changes to the Filing Requirements for the Real Estate Transfer Tax on Certain Conveyances Involving LLCs," TSB-M-19(2)R (N.Y.S. Dep't of Taxation & Fin., Nov. 4, 2019). Under a new law that went into effect on September 13, 2019, State transfer tax returns involving transfers of "residential real property containing one-to-four family dwelling units" by or to an LLC cannot be accepted for filing without disclosing the names and addresses of all LLC members, managers, and other authorized persons. Tax Law § 1409(a). Following complaints from the New York real estate industry that such disclosures would adversely impact the New York City condominium real estate market – the names and addresses of LLC members would not be protected from public disclosure – the Tax Department issued the pronouncement interpreting the new law as applying only to a "building" that contains one to four family dwelling units, which would not include an individual residential condominium unit.

ALTERNATIVE APPORTIONMENT ALLOWED FOR PROVIDER OF CREDIT RATINGS

A New York State Administrative Law Judge has held that Moody's Investors Services, Inc. could source its receipts from providing credit ratings in 2011 through 2013 using the same market sourcing method that the Department of Taxation and Finance had found appropriate for 2014 under the Commissioner's discretionary authority. *Matter of Moody's Corp. & Subsidiaries*, DTA Nos. 828094 & 828203 (N.Y.S. Div. of Tax App., Oct. 24, 2019). The ALJ rejected the Department's argument that Moody's had failed to request alternative apportionment before filing its returns for those years, noting that letters had been submitted to the Department as long ago as 2008 and 2009. However, the ALJ agreed with the Department that Moody's could not exclude royalties received from its foreign affiliates from its apportionable income, and that it was required to include a captive insurance company in its New York State combined filing group, since the insurance company was properly treated as a combinable "overcapitalized captive insurance company."

BUYERS OF MARINA FOUND LIABLE FOR SALES TAX

In a lawsuit brought by the sellers of a marina and boat shop against the purchasers, the Appellate Division, Third Department, affirmed the decision of the trial court that the purchasers were responsible for the payment of sales tax assessed by the Department of Taxation and Finance. *Gaines Marina & Servs., Inc. v. CMS Marine Storage, LLC*, No. 528195, 2019 NY Slip Op. 07825 (3d Dep't, Oct. 31, 2019). The court rejected the purchasers' argument that the sellers had agreed to assume responsibility for the payment of sales tax due on the tangible personal property that was transferred, finding that the relevant contractual language only required that any tax liabilities already imposed by law on the sellers would continue to be retained by them. The court found that the liability for payment of sales tax was statutorily imposed on the purchasers, and there was no indication in the contract of an intent to shift liability for the payment of sales tax due on the transfer of personal property.

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Astoria Financial Corp. v. New York City (NYC Tax App. Trib. 2016)
Clorox Products Manufacturing, Co. v. New Jersey (NJ App. Div. 2008)
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Daimler Investments US Corp. v. New Jersey (NJ Tax Ct. 2019)
Dollar Tree Stores Inc. v. Pennsylvania (PA Bd. of Fin. & Rev. 2015)
Duke Energy Corp. v. New Jersey (NJ Tax Ct. 2014)
E.I. du Pont de Nemours & Co. v. Michigan (MI Ct. of App. 2012)
E.I. du Pont de Nemours & Co. v. Indiana (IN Tax Ct. 2017)
EchoStar Satellite Corp. v. New York (NY Ct. of App. 2012)
Former CFO of Fortune 500 Co. v. New York (NYS Div. of Tax App. 2017)
frog design, inc. v. New York (NYS Tax App. Trib. 2015)
Hallmark Marketing Corp. v. New York (NYS Tax App. Trib. 2007)
Kohl's Department Stores, Inc. v. Virginia (VA Sup. Ct. 2018)
Lorillard Licensing Co. v. New Jersey (NJ App. Div. 2015)
Lorillard Tobacco Co. v. New Jersey (NJ Tax Ct. 2019)
MeadWestvaco Corp. v. Illinois (U.S. 2008)
Meredith Corp. v. New York (NY App. Div. 2012)
Nerac, Inc. v. New York (NYS Div. of Tax App. 2010)
Rent-A-Center, Inc. & Subsidiaries v. Oregon (OR Tax Ct. 2015)
Reynolds Innovations Inc. v. Massachusetts (MA App. Tax Bd. 2016)
Reynolds Metals Co. v. Michigan (MI Ct. of App. 2012)
Scioto Insurance Co. v. Oklahoma (OK Sup. Ct. 2012)
Thomson Reuters Inc. v. Michigan (MI Ct. of App. 2014)
United Parcel Service General Svcs. v. New Jersey (NJ Sup. Ct. 2014)
Wendy's International, Inc. v. Illinois (IL App. Ct. 2013)
Wendy's International, Inc. v. Virginia (VA Cir. Ct. 2012)
Whirlpool Properties, Inc. v. New Jersey (NJ Sup. Ct. 2011)
W.R. Grace & Co.-Conn. v. Massachusetts (MA App. Tax Bd. 2009)

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