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Tax Policy

Paul H. Frankel, partner in Morrison & Foerster LLP and chairman of the BNA Multistate Tax Advisory Board, is a leading authority on state tax issues. Each year, he and his colleagues prepare this list of important issues in state taxation facing tax practitioners, with a focus on judicial developments. As in past years, nexus continues to be a hotly debated concept. Another hot topic this year was add-backs.

2011 Hot Topics in State Taxation: Nexus, Add-Backs Among Most Active Topics This Year

BY PAUL H. FRANKEL, CRAIG B. FIELDS, AND BEE-SEON KEUM

The past year saw marked developments in state tax law. Although participation by the U.S. Supreme Court was still too limited, many important developments occurred at the state level. Among the most active topics were nexus and add-backs.

U.S. SUPREME COURT

CSX Transportation v. Alabama

In *CSX Transportation v. Alabama*, the U.S. Supreme Court held that an interstate rail carrier may challenge as discriminatory under the federal Railroad Revitalization and Regulatory Reform Act (4-R Act) Alabama's imposition of sales and use taxes on railroads that purchase diesel fuel while providing an exemption for motor carriers and international water carriers that also purchase diesel fuel.[1] The Court determined that the 4R Act's prohibition on discrimination extends to sales and use taxes (as opposed to gross receipts taxes only) and that prohibited discrimination can result from exempting competitors from a tax.

The Court remanded the case to the trial court to determine whether Alabama actually discriminated against the rail carrier as alleged, or whether it could offer a sufficient justification for declining to provide the exemption at issue to rail carriers.

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Arizona Christian School Tuition Organization v. Winn

In *Arizona Christian School Tuition Organization v. Winn*, the U.S. Supreme Court held, in a 5-4 opinion, that taxpayers do not have standing to challenge an Arizona personal income tax credit for contributions to school tuition organizations.[2] The taxpayers alleged that the Arizona tax credit violates the Establishment Clause of the U.S. Constitution because most of the credits are for religious school tuition. The Court held that the exception to the general rule against taxpayer standing does not apply where the challenge involves a tax credit rather than a government expenditure. The

[1] *CSX Transp. Inc. v. Alabama Dept. of Rev.*, 131 S. Ct. 1101 (2011).

[2] *Arizona Christian School Tuition Org. v. Winn* and *Garriott v. Winn*, 131 S. Ct. 1436 (2011).

Court reasoned that any financial injury remains speculative when the government declines to impose a tax and the tax credit at issue is implemented by private action rather than state intervention.

KFC v. Iowa

In April we filed a petition with the U.S. Supreme Court requesting review of an Iowa Supreme Court opinion holding that *Bellas Hess* and *Quill* do not apply beyond the sales and use tax area.[3] It's time for the Court to accept this burning issue. Since there's one Commerce Clause, there should be no taxation of any kind without physical presence.

APPORTIONMENT

Alabama

In *Kimberly-Clark Corp. v. Alabama Dept. of Rev.*, the Alabama Supreme Court held that the gain from the sale of an Alabama mill and Alabama timberland by a corporation primarily engaged in the manufacture and sale of paper-related consumer products was nonbusiness income allocable to Alabama.[4] The corporation had sold the mill and timberland pursuant to a change in corporate strategy that shifted focus to its consumer products rather than its manufacturing.

The court determined that the sale of the properties was an extraordinary transaction that represented the corporation's divestiture of a part of its business rather than a transaction conducted in the regular course of the corporation's business and, therefore, the gain from the sale was properly classified as nonbusiness income. One wonders what the auditors would have recommended if the mill and timberland were not in Alabama.

New Jersey

On May 4, 2011, we argued *Whirlpool* before the New Jersey Supreme Court contending that the state's throwout statute is facially unconstitutional under the Due Process, Commerce, and Supremacy Clauses of the U.S. Constitution.[5] If we win, everyone wins. If we lose, we intend to establish that the statute is unconstitutional as applied.

COMBINED/CONSOLIDATED RETURNS

North Carolina

In *Delhaize America Inc. v. Lay*, the North Carolina Superior Court of Wake County, also known as the Business Court, held that the department could require the forced combination of a corporation and a subsidiary that owned trademarks based on the Court of Appeals' decision in *Wal-Mart Stores East Inc. v. Hinton*.[6]

The court found that there was a circular cash flow and distortion of income when royalty payments from the corporation to its subsidiary were returned to the corporation in the form of tax-free dividends. The court struck down the department's assessment of a 25 percent penalty because North Carolina law prohibited taxpayers from filing combined returns unless ordered to do so by the department, and the department had not issued any guidance on when it would require combined returns.

South Carolina

In *Media General Communications Inc. v. South Carolina Department of Revenue*, the South Carolina Supreme Court upheld an Administrative Law Court decision allowing the use of combined reporting as an alternative apportionment method when the standard separate entity apportionment method does not fairly represent the taxpayer's business activity in South Carolina.[7]

The department had stipulated that the combined reporting method fairly represented the taxpayer's business activity in South Carolina, as compared with use of the separate entity method. The court determined that, under the South Carolina statutory provisions allowing the employment of ''any other method'' to effectuate an equitable apportionment where the statutory apportionment formula does not fairly represent a taxpayer's business activities in the state, combined reporting was allowed.

GAINS

Georgia

In *Trawick Construction Co. v. Georgia Dept. of Rev.*, the Georgia Supreme Court held that the gain from an Internal Revenue Code §338(h)(10) election must be excluded from the determination of Georgia corporate income tax of a Subchapter S corporation.[8] The taxpayer's shareholders had sold their stock. A §338(h)(10) election was made so that for federal tax purposes the transaction would be treated as a deemed sale of corporate assets. The taxpayer argued that its §338(h)(10) election was inapplicable to the determination of Georgia corporate income tax because it was not an election ''made by corporate taxpayers'' as required by Georgia Code Ann. §48-7-21(b)(7).

The court agreed with the taxpayer that, because a §338(h)(10) election is not one of the elections approved by the relevant Georgia code section, the gain from the deemed sale of assets recognized by the taxpayer's corporation on its federal return did not constitute Georgia taxable income. The court observed that it was not unreasonable to require the state to forgo a §338(h)(10) election made for an S corporation when

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3 *KFC Corp. v. Iowa*, 792 N.W.2d 308 (Iowa 2010), *cert. filed* 4/28/11; *citing National Bellas Hess Inc. v. Dept. of Rev.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

4 *In re Kimberly-Clark Corp. & Kimberly-Clark Worldwide Inc. v. Alabama Dept. of Rev.*, Ala., No. 1070925, 9/17/10.

5 *Whirlpool Properties Inc. v. Director, Div. of Taxn.*, N.J., No. A-25-10 (argued 5/4/11).

6 *Delhaize America Inc. v. Lay*, N.C. Super. Ct., No. 06 CVS 08416 (1/12/11); *Wal-Mart Stores East Inc. v. Hinton*, 676 S.E.2d 634 (N.C. Ct. App. 2009).

7 *Media General Comms. Inc. v. South Carolina Dept. of Rev.*, 694 S.E.2d 525 (S.C. 2010).

8 *Trawick Construction Co. v. Georgia Dept. of Rev.*, 690 S.E.2d 601 (Ga. 2010).

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the state had consistently refused to recognize the corporation's original federal Subchapter S election.

NEXUS

Connecticut

The Department of Revenue Services issued guidance on the application of its 2009 economic nexus legislation.[9]

Effective for tax years beginning on or after Jan. 1, 2010, corporations, partnerships, and S corporations deriving income from or having a "substantial economic presence" within Connecticut attributable to the purposeful direction of business activities toward Connecticut are subject to tax in Connecticut. The bright-line test for determining economic nexus is whether the company had $500,000 or more in receipts attributable to Connecticut sources during a taxable year.

The licensing of intangible property in Connecticut will subject a corporation to income tax when the intangible property generates gross receipts within Connecticut for the corporation, the activity through which the corporation obtains gross receipts from intangible property is purposeful, *and* the corporation's presence in Connecticut as indicated by its intangible property and its activities relating thereto satisfies the bright-line test.

If the U.S. Supreme Court grants review to KFC and if KFC wins, there will be no subjectivity.

Maryland

In *W.L. Gore & Associates Inc. v. Comptroller of the Treasury*, the Maryland Tax Court held that two out-of-state subsidiaries that held intellectual property and funds for a parent corporation located in Maryland were subject to corporate income tax in Maryland for their receipt of royalty and interest income.[10]

The court found that the subsidiaries were passive, non-operational entities that did not have a business existence separate from the parent company based on

- the lack of independent expenditures in the subsidiaries' tax returns;
- the sharing of employees, directors and officers, office space, and corporate services; and
- a "circular flow of money through royalties, dividends and loans which support the unitary business of [the parent corporation] and its wholly owned subsidiaries."

Therefore, the court concluded that the subsidiaries had nexus with Maryland and the imposition of Maryland corporation income tax did not violate the Due Process or Commerce Clauses of the U.S. Constitution. If the subsidiaries are shams, why do they exist for tax purposes?

Michigan

In *Vestax Securities Corp. v. Department of Treasury*, the Supreme Court of Michigan reversed a determination by the Michigan Court of Appeals that an out-of-state corporation was subject to the Michigan single business tax (SBT). The corporation, a securities broker-dealer, had contractual relationships with independent registered representatives (IRRs) in Michigan that used the corporation to facilitate securities transactions. The Court of Appeals held that the corporation was subject to the SBT because the IRRs were physically present in Michigan doing business as agents of the corporation and thereby creating substantial nexus.[11]

In reversing the judgment of the appeals court, the state Supreme Court stated that the evidentiary record did not support the Court of Appeals' determination that the IRRs were the corporation's agents or that there was a substantial nexus between Michigan and the corporation's business activities sufficient to impose the SBT.

New York

In *Amazon.com LLC v. New York Dept. of Taxn. and Fin.*, the Appellate Division of the Supreme Court, First Judicial Department, rejected a facial challenge to a New York statutory provision ("affiliate nexus provision") creating a rebuttable presumption that a vendor is doing business in New York for sales and use tax purposes when the vendor solicits business through an in-state representative and compensates the representative with a commission.[12]

The Appellate Division determined that the affiliate nexus provision did not violate the Commerce Clause substantial nexus requirement on its face because the provision only imposed a sales tax collection obligation when a New York state resident received a commission based on a sale in New York pursuant to a business-referral agreement with an out-of-state vendor, thus satisfying the physical presence requirement for collecting sales tax.

The court said the affiliate nexus provision did not violate the Commerce Clause substantial nexus requirement on its face but remanded for a determination of whether it is unconstitutional as applied.

The Appellate Division also rejected Amazon.com's and Overstock.com's Due Process facial challenges. The appeals court remanded the case for a determination of whether the affiliate nexus provision is unconstitutional as applied. With an increasing number of states

[9] Informational Publication, Conn. Dept. of Rev. Svcs., No. 2010(29.1), 12/28/10.

[10] *W.L. Gore & Associates Inc., Gore Enterprise Holdings Inc., and Future Value Inc. v. Compt. of the Treas.*, Md. Tax Ct., Nos. 07-IN-OO-0084, 07-IN-OO-0085 and 07-IN-OO-0086, 11//9/10).

[11] *Vestax Securities Corp. v. Dept. of Treas.*, 2011 Mich. LEXIS 945 (Mich. 6/1/11).

[12] *Amazon.com LLC v. New York Dept. of Taxn. and Fin.*, 2010 NY Slip Op. 07823 (N.Y. App. Div. 11/4/10)

jumping on the affiliate nexus bandwagon, further developments are anticipated.

In *Shell Gas Gathering Corp. #2*, the Tax Appeals Tribunal affirmed an administrative law judge's ruling that the Division of Taxation properly imposed corporate franchise tax on the taxpayers, two out-of-state holding companies that were not licensed to do business in New York and had no direct contacts with New York.[13]

The tribunal affirmed the ALJ's determination that the taxpayers had sufficient nexus to be taxed in New York under N.Y. Tax Law Article 9-A as the corporate general partners of a partnership doing business in New York. Focusing on whether New York has given something for which it may impose a tax in return, the ALJ concluded, and the tribunal affirmed, that New York accorded privileges and immunities to the taxpayers that led to capital appreciation, which inured to the benefit of the taxpayers, and therefore the taxpayers were properly subjected to tax in New York.

Ohio

In the first commercial activity tax (CAT) nexus case, the Ohio tax commissioner issued a final determination against L.L. Bean, an out-of-state catalog company that sells merchandise to customers through orders received via the telephone, mail, and the internet, assessing CAT on the ground that the company had ''bright-line presence'' in Ohio by making sales to customers in Ohio in excess of the statutory threshold.[14]

During the period at issue, the company made sales to customers in Ohio that resulted in gross receipts attributable to Ohio in excess of $500,000. Ohio Rev. Code Ann. §5751.01(I)(3) provides that a person that has $500,000 of gross receipts in Ohio at any time during the calendar year has bright-line presence and therefore nexus in Ohio. In reaching its determination, the department rejected the company's argument that the bright-line presence nexus standard violated the Commerce Clause of the U.S. Constitution on the ground that *Quill*'s physical presence nexus requirement applied only to sales and use taxes and not to other taxes such as the CAT.[15] The company has appealed the decision to the Ohio Board of Tax Appeals.[16]

ADDBACK STATUTES AND DENIALS OF DEDUCTIONS

California

In *River Garden Retirement Home v. Franch. Tax Bd.*, the California Court of Appeal held that a corporation was not entitled to a dividends received deduction on its California corporation franchise tax return because Cal. Rev. and Tax. Code §24402, the statutory provision allowing the dividends received deduction, had been declared unconstitutional in *Farmer Brothers Co. v. Cal. Franch. Tax Bd.*[17]

Following *Farmer Brothers*, the Franchise Tax Board (FTB) had announced that it would disallow all deductions under §24402 for tax years ending on or after Dec. 1, 1999, and had issued notices of proposed assessment to the corporation for the tax years at issue. Additionally, the court held that the corporation, which had chosen not to participate in an amnesty program administered by the FTB due to its pending appeal, was not entitled to a refund of the amnesty penalty imposed by the FTB because the corporation had not paid its deficiency assessments until after the amnesty period had expired.

Massachusetts

In *Kimberly-Clark Corp. v. Commissioner of Revenue*, the Appellate Tax Board determined that the commissioner properly disallowed deductions and required that royalties and interest paid to an intellectual property management subsidiary and a cash management subsidiary, respectively, be added back to the taxpayer's income.[18]

The board found that the intercompany loans within the cash management system did not constitute bona fide debt because of the absence of an intent to repay; the absence of security, default, or collateral provisions; and the taxpayer's failure to establish that the transactions were at arm's length. Further, the board found that the taxpayer failed to demonstrate economic substance and a valid business purpose other than a motivation for tax reduction in the intellectual property transfer and license-back transactions because the royalty payments were immediately returned to the taxpayer through the operation of the cash management system.

Minnesota

In *HMN Financial Inc. v. Commissioner of Revenue*, the Minnesota Supreme Court reversed the Tax Court's decision and held that the commissioner of revenue did not have the statutory or common law authority to disregard a bank holding company's captive real estate investment trust (REIT) structure that was organized in compliance with the relevant statutes but was formed solely for tax purposes.[19]

The organizational structure of the bank holding company, HMN, and its affiliates, which were part of a unitary business that filed a Minnesota combined report, included an affiliate incorporated under Minnesota law as a foreign operating corporation (FOC) and another affiliate created as a captive REIT. The organizational structure allowed considerable Minnesota tax benefits to HMN because the REIT received a 100 percent dividends paid deduction, HMN excluded the FOC from its combined unitary report, and HMN was al-

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13 *Shell Gas Gathering Corp. #2*, N.Y. Tax App. Trib., Nos. 821569 and 821570, 9/23/10.

14 Final Determination of Tax Commissioner, Ohio Dept. of Taxn., 8/10/10.

15 The department relied on *Ohio Grocers Assn. v. Levin*, 123 Ohio St.3d 303 (Ohio 2009), which held that the CAT was not the functional equivalent of a sales tax but an excise tax on the privilege of doing business in Ohio.

16 *L.L. Bean Inc. v. Levin*, 2010 Ohio Tax LEXIS 1881.

17 *River Garden Retirement Home v. Cal. Franch. Tax Bd.*, 113 Cal. Rptr. 3d 62 (Cal. Ct. App. 2010), *review denied*, 2010 Cal. LEXIS 11603 (Cal., 11/10/10); *Farmer Bros. Co. v. Cal. Franch. Tax Bd.*, 108 Cal. App. 4th 976 (2003).

18 *Kimberly-Clark Corp. v. Comr. of Rev.*, Mass. App. Tax Bd., Nos. C282754, C295077 and C299008, 1/31/11.

19 *HMN Financial Inc. v. Comr. of Rev.*, 782 N.W.2d 558 (Minn. 2010).

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lowed to deduct 80 percent of the dividends received from the FOC.

The Tax Court had ruled in favor of the commissioner, who argued that because HMN's captive REIT structure allegedly lacked economic substance and a business purpose, the captive REIT structure should be disregarded and additional income attributed to HMN. In overruling the Tax Court, the court observed that neither the courts nor the commissioner had the power to disregard statutes that allowed favorable tax treatment to impose a different tax treatment where the taxpayer complied with the relevant statutes.

New Jersey

On June 10, 2010, the Division of Taxation issued a notice explaining the "unreasonable" exception to the requirement that taxpayers add back interest expenses pursuant to N.J. Rev. Stat. §54:10A-4(k)(2)(I).[20]

The notice provided that the "unreasonable" exception would apply where:

- the taxpayer demonstrates that the related party paid tax in New Jersey for the interest income (as provided for by New Jersey Regs. §18:7-5.18(a)(2));
- the taxpayer has both a receivable and a payable from the exact same entity resulting in both interest income and interest expense, for which the Director would permit netting; and
- the taxpayer is involved in a "cash sweep" management system with its related members.

In *Beneficial New Jersey Inc. v. Director, Division of Taxation*, the New Jersey Tax Court held that the taxpayer was not required to add back interest expenses paid to its parent, which had borrowed funds from third parties and loaned them to its subsidiaries with interest at the maximum applicable federal rate.[21] The parent, which did not file New Jersey returns, had included the interest income it received from the taxpayer in its various state tax returns while the taxpayer had deducted the interest payments made to its parent in computing its New Jersey taxable income.

The Tax Court held that the "unreasonableness" exception to the interest expense add-back requirement was applicable because, as the reason for the parent-subsidiary loan arrangement was that the parent could obtain more favorable interest rates than the subsidiary could obtain, the loans from the parent had economic substance.[22]

Subsequently, the division explained its position that *Beneficial* does not create a general rule of applicability and that decisions involving exceptions to the add-back will be made on a case-by-case basis, based on the totality of circumstances.[23]

In our *Crestron Electronics* case, the question before the court was whether a corporation's entire net income for New Jersey corporation business tax (CBT) purposes included the taxpayer's extraterritorial income as that term was defined in I.R.C. §114(e).[24] The court concluded that (1) since New Jersey law couples a corporation's entire net income for CBT purposes to its federal taxable income with limited exceptions and (2) because federal law excluded extraterritorial income from federal taxable income during the period at issue and there was no exception to the federal statute in New Jersey law, extraterritorial income was also excluded from entire net income under CBT.

SALES AND USE TAX

Alabama

In *State Department of Revenue v. Boyd Brothers Transportation Inc.*, the Alabama Court of Civil Appeals held that the company, an operator of a long-haul trucking business, was not subject to Alabama sales tax on its receipts from individual lease-purchase agreements it entered into with its drivers.[25]

Pursuant to the agreement, a company driver would lease the company truck in exchange for monthly payments for a fixed period, with an option for purchasing the truck at the end of the lease period. The company retained title to the truck during the lease period and took possession of the truck if the driver defaulted on the agreement.

Regarding the lease-purchase agreements on which the drivers defaulted, the court determined that because no title was transferred to the drivers during the lease period, there was no completed sale and therefore no sales tax was due on the transactions pursuant to the agreement. Furthermore, the court determined that no sales tax was due on the transfer of title to a driver who exercised a purchase option because the company was not a licensed dealer under the relevant Alabama statute.

Iowa

In *Sherwin-Williams Co. v. Iowa Dept. of Rev.*, the Iowa Supreme Court held that a company qualified for the manufacturing exemption from sales and use tax for its use of machinery that mixed base paint with colorant to create colored paint in its Iowa retail outlets.[26]

The Iowa court said there was nothing in the statutory definition that required a "manufacturer" to be principally engaged in the business of manufacturing.

The company manufactured, distributed, and sold paint and paint-related products in its own retail outlets

[20] Add Back of Interest Expense (N.J. Div. of Taxn., 6/10/10).

[21] *Beneficial New Jersey Inc. v. Director, Div. of Taxn.*, N.J. Tax Ct., No. 009886-2007, 8/30/10.

[22] New Jersey provides an exception from the interest expense add-back requirement if the taxpayer establishes by clear and convincing evidence, as determined by the director, that the disallowance is unreasonable. N.J. Rev. Stat. §54:10A-4(k)(2)(I).

[23] N.J. Div. of Taxn., Technical Advisory Memorandum TAM-13, 2/24/11.

[24] *Crestron Electronics Inc. v. Director, Div. of Taxn.*, N.J. Tax Ct., No. 011795-2009, 1/23/11.

[25] *State Dept. of Rev. v. Boyd Brothers Transp.*, 56 So. 3d 701 (Ala. Civ. App. 2010).

[26] *Sherwin-Williams Co. v. Iowa Dept. of Rev.*, 789 N.W.2d 417 (Iowa 2010).

and in independent retail stores. Affirming the decisions of the Court of Appeals and the District Court, the court found that the company met the statutory definition of ''manufacturer'' and that the machine at issue was ''directly used,'' as defined by the statute, in processing paint. The court reasoned that, in examining whether a retail establishment could be considered a manufacturer, there was nothing in the statutory definition of ''manufacturer'' that required that a manufacturer be principally engaged in the business of manufacturing.

New York

In our *Matter of Hair Club for Men LLC* case, an ALJ of the New York Division of Tax Appeals held that a nonsurgical hair loss treatment that involved attaching a ''matrix'' of hair to a client's head was a nontaxable hair restoration service rather than a taxable sale of a hairpiece.[27]

The taxpayer's business model during the year at issue involved selling memberships entailing all-inclusive hair care services, including consultations with stylists, the application of a customized hair matrix, and follow-up visits for haircuts, styling, and addition of new hair. The ALJ found that the taxpayer's clients were not purchasing hairpieces but rather hair restoration services, and that the hair matrix itself was incidental to the hair restoration service.

MISCELLANEOUS

Unclaimed Property

New Jersey

On Aug. 26, 2010, the New Jersey Treasurer announced that stored value card (SVC) issuers were temporarily exempted until Oct. 1, 2010, from the provisions of Section 5(c) of Chapter 25 of the Laws of 2010, effective July 1, 2010.[28]

Section 5(c) requires issuers of SVCs, including gift cards, to report unredeemed balances from SVCs where there has been no activity or contact for a two-year abandonment period. Further, Section 5(c) requires SVC issuers to obtain the name and address of the purchaser or owner of each SVC issued or sold and, at a minimum, to maintain a record of the owner or purchaser's zip code. Additionally, under Section 5(c), if the SVC issuer did not have the name and address of the purchaser or owner of the SVC, the address of the owner or purchaser of the SVC will be considered to be the address of the New Jersey business that sold or issued the SVC (the ''place of purchase presumption'').

On Nov. 13, 2010, the U.S. District Court for the District of New Jersey issued a preliminary injunction against the enforcement of the place-of-purchase presumption of Section 5(c) and the relevant guidances issued by the Treasurer.[29] In addition, the court enjoined New Jersey from enforcing Chapter 25 retroactively against issuers of SVCs with existing SVC contracts that obligate the issuers to redeem the SVCs solely for merchandise services.[30]

This development represents a significant victory for holders of unclaimed property against states that have attempted to impose jurisdictional priority rules that fall outside of the permissible boundaries of the U.S. Constitution.

Work-Product Protection

District of Columbia

In *United States v. Deloitte LLP*, the U.S. Court of Appeals for the District of Columbia Circuit rejected the Internal Revenue Service's position that work-product protection cannot apply to documents prepared in connection with a financial audit and that work-product protection is waived by disclosure to an independent auditor.[31]

Significantly, the court adopted a broad view regarding the application of work-product protection to ''dual-purpose'' documents, *i.e.*, documents prepared in anticipation of litigation but also used for business purposes. Among the documents to which work-product protection applied were work papers prepared by an independent auditor who had recorded the mental impressions of the taxpayer's outside counsel concerning anticipated litigation. As a practical consideration that applies equally to state tax audits and disputes, *Deloitte* underscores the importance of keeping a record regarding the purpose of meetings with outside auditors.

Procedure

North Carolina

A U.S. District Court judge ruled that the North Carolina Department of Revenue cannot force Amazon.com to disclose customer information on the ground that the request violates the First Amendment.[32]

The department had requested from Amazon.com ''all information for all sales to customers with a North Carolina shipping address'' for the period at issue, and in response, Amazon.com had provided the department with purchase records without disclosing its customers' personally identifiable information.

In granting Amazon.com's motion for summary judgment, the judge held that the department's demands for personally identifiable customer information, including names and addresses of North Carolina residents, was an overbroad request that implicated the

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[27] *Matter of Hair Club for Men LLC*, N.Y. Div. Tax App., No. 822686, 8/19/10.

[28] Treasury Announcement, N.J. Office of the Treasurer, 8/26/10.

[29] *American Express Travel Related Services Co. Inc. v. Sidamon-Eristoff*, 755 F. Supp. 2d 556, 2010 U.S. Dist. LEXIS 120153 (D. N.J. 2010).

[30] However, the court declined to enjoin New Jersey from enforcing Section 2 of Chapter 25 of the Laws of 2010, which modified the presumptive-abandonment period for travelers' checks from 15 years to three years. *American Express Travel Related Services Co.*, 2010 U.S. Dist. LEXIS 120153 at *2.

[31] *United States v. Deloitte LLP*, 610 F.3d 129 (D.C. Cir. 2010).

[32] *Amazon.com LLC v. Lay*, 758 F. Supp. 2d 1154 (W.D. Wash. 2010)

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First Amendment due to the disclosure of individuals' reading, listening, and viewing habits.

CONCLUSION

There have been many developments in the areas of nexus, combined reporting, apportionment factors, add-backs, and denials of deductions. Increased state demand for tax revenues is sure to make the rest of 2011 lively and interesting.