Multitstate Taxation

By Phil Tatarowicz and Ted W. Friedman

Developments in Multistate Taxation

California

On September 15, 2012, a new law took effect that expanded the categories of retailers that are required to collect and remit sales tax on the sales of tangible personal property (TPP) to California consumers.[1] The new law applies to retailers that enter into agreements under which a person in California, for a commission, directly or indirectly refers potential purchasers of TPP to the retailer, whether by an Internet-based link or an Internet Web site, provided that (1) the total cumulative sales price from all of the retailer's sales, within the preceding 12 months, of TPP to purchasers in California that are referred pursuant to all such agreements is in excess of $10,000; and (2) the retailer, within the preceding 12 months, has total cumulative sales of TPP to purchasers in California in excess of $1 million.

Illinois

On August 28, 2012, Governor Pat Quinn approved the Illinois Independent Tax Tribunal Act of 2012, which was signed into law as Public Act 97-1129.[2] The Act created the Illinois Independent Tax Tribunal, an agency independent of the Illinois Department of Revenue, which will begin exercising its jurisdiction on and after July 1, 2013. The Illinois Independent Tax Tribunal will have original jurisdiction over determinations of the Department reflected on notices of deficiency, tax liability, claim denial or penalty liability issued pursuant to certain Illinois tax acts, including the Illinois Income Tax Act and the Use Tax Act.

Minnesota

The Minnesota Tax Court reversed an order of the Minnesota Commissioner of Revenue and held

Phil Tatarowicz is Of Counsel to Morrison & Foerster in Washington, D.C., and Professor of Law and Distinguished Visitor from Practice at Georgetown University Law Center.

Ted W. Friedman is an Associate at Morrison & Foerster LLP in New York, New York.

that a corporate taxpayer and an LLC, of which the taxpayer was a member, were not operating as a unitary business and, therefore, the income of the LLC could not be combined with that of the taxpayer for apportionment purposes.[3] The Tax Court found that there were (1) an insufficient flow of value between the taxpayer and the LLC; and (2) inadequate control by the taxpayer over the LLC to support a finding of a unitary business relationship.

The Tax Court found that there was no flow of value between the businesses because the taxpayer received no favorable treatment in its transactions with the LLC, as all of the transactions occurred at arm's length with pricing at fair market value. In addition, the LLC had its own departments that were responsible for making its own operational and strategic decisions. Further, the corporation and the LLC had no common employees and maintained separate human resources personnel, legal and accounting departments, data processing systems, intellectual property ownership, purchasing and office facilities and bank accounts. The Tax Court also found that the extent to which the corporation's personnel interacted with the LLC's committees, activities and board of directors was consistent with any parent corporation's oversight of and involvement in its subsidiaries. Finally, the corporation's payment of its own personnel while they were involved with the LLC was consistent with the personnel acting on the corporation's behalf.

The Tax Court also found that the corporation neither had the potential to control nor did it actually exercise control of the LLC because the corporation had only one of three votes to set the fees charged by the LLC, and the corporation did not restrict the LLC's solicitation of customers. Further, the Tax Court found that the corporation's contributions of capital to the LLC did not equate to control.

In addressing a separate issue, the Tax Court held that the plain language of a Minnesota statute did not require the corporation to apportion a second subsidiary's Code Sec. 382 limitation. Rather, the Tax Court found that the Minnesota statute requires a taxpayer to apply its Code Sec. 382 limitation to its net income before apportionment.

North Carolina

The North Carolina Court of Appeals affirmed a trial court's determination that the North Carolina Department of Revenue had, under prior North Carolina law, properly combined the income of a taxpayer and its subsidiary upon the Department's finding that the taxpayer's separate entity return failed to disclose its "true earnings" in the state.[4] The Court of Appeals held that the forced combination did not violate the taxpayer's procedural due process rights because the taxpayer received adequate fair notice, in the form of a 1987 attorney general's opinion and several final decisions of the Department, that the definition of "true earnings" was not limited to a determination of whether corporations and their affiliates performed transactions at arm's length and for fair compensation.

In addition, the Court of Appeals reversed the trial court's determination that the taxpayer was entitled to a refund of the penalty assessed by the Department. The Court of Appeals found that because the taxpayer received fair notice of the definition of "true earnings," it could expect combination for purposes of taxation and, therefore, imposition of the penalty did not violate its right to procedural due process.

Pennsylvania

On August 30, 2012, the Pennsylvania Department of Revenue issued a news release to remind remote sellers with Pennsylvania nexus that it expects compliance with the September 1, 2012 deadline to become licensed and begin collecting sales tax.[5] According to the news release, businesses with Pennsylvania nexus that do not register and begin collecting Pennsylvania sales tax by September 1 will face a variety of escalating enforcement options over time, including assessment, audit, lien or referral to a collection agency or the Office of Attorney General.

South Carolina

The South Carolina Department of Revenue issued a Private Letter Ruling explaining that a group of subsidiary corporations may file a South Carolina consolidated return even though they are included in separate federal consolidated groups and/or file as single entities for federal income tax purposes.[6] The parent corporation was organized outside the United States and is not subject to federal or South Carolina corporate income tax. The parent owns a number of foreign disregarded entities, one of which owns the subsidiaries at issue. The letter ruling explains that the parent does not have to be part of the consolidated group in order for its subsidiaries to file a consolidated return, so long as the parent has control of at least 80 percent of the total

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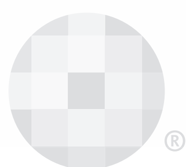
combined voting power of all classes of stock of its subsidiaries and each of the subsidiaries has nexus with South Carolina.

Utah

Effective July 26, 2012, the Utah Tax Commission amended an administrative rule to provide that the shipment or delivery of goods into Utah by means of private vehicle, rail, water, air or other carrier no longer constitutes "doing business in Utah under P.L. 86-272" for purposes of Utah's corporation franchise tax.[7]

Endnotes

1 Cal. Rev. & Tax. Code §6203; 2011 Cal. Stat. ch. 313 (A.B. 155).
2 Ill. H.B. 5192, Pub. Act No. 97-1129 (2012).
3 *Express Scripts, Inc. v. Comm'r of Rev.,* Minn. Tax Ct., No. 8272R (Aug. 20, 2012).
4 *Delhaize America, Inc. v. Lay,* N.C. Ct. App., No. COA11-868 (Aug. 21, 2012).
5 Pennsylvania Dep't of Rev., News Release (Aug. 30, 2012). The Department issued a Tax Bulletin on December 1, 2011, which explained Pennsylvania's sales tax nexus law for remote sellers. *See* Pennsylvania Dep't of Rev., Sales and Use Tax Bulletin 2011-01 (Dec. 1, 2011).
6 S.C. P.L.R. 12-4 (Aug. 27, 2012).
7 Utah Admin. Code r. 865-6F-6 (effective July 26, 2012).



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