Multitstate Taxation

By Phil Tatarowicz and Ted W. Friedman

Developments in Multistate Taxation

New Jersey

On September 15, 2012, the New Jersey Division of Taxation began offering a limited voluntary disclosure initiative to companies that have derived income from the use of intangibles in New Jersey.[1] Under the initiative, the terms of which are layered on New Jersey's standard voluntary disclosure agreement requirements, the Division will accept a look back to periods beginning after December 31, 2003, and will consider discretionary throwout relief by averaging a throwout receipts fraction with a non-throwout receipts fraction. With the exception of a five-percent amnesty penalty assessed for all returns due prior to February 1, 2009, the Division will waive all penalties. In addition, companies that have paid royalties and added the royalties back to their New Jersey entire net income may submit amended returns for any period for which the statute of limitations remains open in order to claim an exception to the add back. The initiative runs through January 15, 2013.

Oregon

The Oregon Tax Court held that a taxpayer's sales of electricity were sales other than sales of tangible personal property.[2] The court based its holding on the testimony and material submitted by expert witnesses as to the nature of electricity, the positions of the Multistate Tax Commission (MTC) and other UDITPA states and considerations of uniformity and consistency in the application of UDITPA provisions to taxpayers generally. Further, under Oregon's sourcing provisions for sales other than sales of tangible personal property, the court found that the greater portion of the costs of income-producing activity related to the taxpayer's sales of electricity occurred at its office and trading location in Canada and not in Oregon. Accordingly, the court held that the revenue from the sales of electricity could not be sourced to Oregon and

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could not, therefore, be included in the numerator of the taxpayer's Oregon sales factor.

The court also addressed the treatment of receipts from the sale of natural gas in the computation of the taxpayer's sales factor. The parties agreed that natural gas is tangible personal property but disagreed as to where the receipts should be sourced under Oregon's version of UDITPA section 16(a). The Department of Revenue advocated for the use of a place-of-delivery rule, contending that the sales were Oregon sales because the contractual point of delivery of the natural gas was a location in Oregon. The taxpayer argued for the use of a destination rule, asserting the sales should not be sourced to Oregon because all of the customers who purchased the natural gas were located in states other than Oregon and no customers used the gas in Oregon. The court agreed with the taxpayer and held that the sales of natural gas at issue were not Oregon sales. The court reasoned that the purpose of the sales factor in apportionment is to recognize the contribution of the market state to the income-producing process and that such a purpose was best served by applying a destination rule.

Texas

The Texas Comptroller of Public Accounts denied franchise tax refund claims of three taxpayers, each of which contended that its taxable margin should be apportioned to Texas under the three-factor apportionment formula in the Multistate Tax Compact of which Texas is a full member.[3] The Comptroller found that the taxpayers were required to apportion their franchise tax under the single-factor apportionment formula in the Texas tax code and that they could not elect to apportion the tax under a three-factor formula. The Comptroller stated that the same issue had been addressed in three previous cases and that the taxpayers had not raised any arguments that required a reconsideration of the prior decisions, each of which required the use of a single-factor formula.

Washington

The Washington State Board of Tax Appeals found that an out-of-state LLC did not have a sufficient nexus to support the imposition of Washington's wholesaling B&O tax and litter tax.[4] The Board found that the sole salesman for the LLC visited Washington only once, for less than an hour, during the seven-year audit period and that such a visit was not a "substantial" activity that was associated with the LLC's "ability to establish and maintain" a market within Washington. Rather, the Board determined that the visit, which did not involve the solicitation of sales, was "slight or incidental to some other purpose or activity." Similarly, the Board found that the LLC's use of leased rail cars to deliver its products in Washington was not "significantly associated" with the LLC's "ability to establish and maintain a market" because the delivery activity could have "just as easily been accomplished" by having the customer itself lease the rail cars.

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The Appeals Division of the Department of Revenue held that a taxpayer was not entitled to a retail sales and use tax exemption on its purchases of machinery and equipment used in its automobile crushing activities because its activities did not constitute a "manufacturing operation," as required under the exemption statutes.[5] The Appeals Division found that the crushing activities did not constitute a manufacturing operation because the taxpayer did not produce a "new, different, or useful product." Although the taxpayer created a more marketable product, the Appeals Division found that the taxpayer did not significantly change the physical form or the underlying properties of the steel vehicle hulks being crushed and, therefore, was not creating a new, different or useful product.

Endnotes

1 NJ Dep't of Tax'n, *Intangible Asset Nexus Initiative, available online at www.state.nj.us/treasury/taxation/voldisc.shtml.*

2 *Powerex Corp. v. Dep't of Rev.,* Or. Tax Ct., No. TC 4800 (Sep. 17, 2012).

3 Texas Comptroller of Public Accounts, Dec. Nos. 106,508, 106,723 and 107,193 (July 13, 2012).

4 *Sage V Foods, LLC v. Dep't of Rev.,* Wash. Bd. Tax Appeals, No. 11-704 (Aug. 31, 2012).

5 *Tax Determination,* Wash. Dep't of Rev., No. 11-0053 (Sep. 27, 2012).