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MoFo New York Tax Insights

Court Holds Television Programming Is Included in the Property Factor Regardless of Delivery Method

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By Hollis L. Hyans

The Third Department has held that television programming delivered via satellite was included in the property factor, rejecting the decision of the Tax Appeals Tribunal, which had held that the programming was excluded as intangible property, and the position of the Department of Taxation and Finance, which had excluded the programming from the factor because it was delivered via satellite rather than on videotape. *Matter of Meredith Corporation v. Tax Appeals Trib*., NY Slip Op. 7909 (3d Dep't, Nov. 21, 2012).

Meredith Corporation is an Iowa-based publishing and television broadcasting company. It filed refund claims for its tax years ending in June 1998, 1999, and 2000, claiming that its property factor should include, as the rental of tangible personal property, payments it made for television programming for airing on the 12 television stations it operated. Since none of Meredith's TV stations were located in New York State, the payments would be included in the denominator but not the numerator of the property factor.

(continued on page 2)

In This Issue

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Court Holds Television Programming Is Included in the Property Factor

(continued from page 1)

For the years in issue, the statute, Tax Law § 210(3)(a)(1), included in the property factor tangible personal property, both owned and rented. As the Third Department recognized, under the Department's long-standing policy, and consistent with a 1991 Opinion of Counsel, broadcasters like Meredith included owned programming and rented programming, if delivered on videotape, in their property factors, at original cost, multiplied by a New York audience factor. At the hearing, the Department's auditors agreed that programming delivered by videotape would be considered tangible personal property and included in the factor, but because Meredith's programming was delivered by satellite, the Department argued that it could not be included. This new position had never been articulated in any statute, regulation, or public release. Nonetheless, in a technical bulletin issued in 2008, in which the Department advised that all programming, no matter how delivered, would be excluded from the property factor for years beginning on or after January 1, 2008, for purposes of the Metropolitan Commuter Transportation District ("MCTD") surcharge, the Department also said, without citation, that film delivered by satellite had always been excluded. TSB-M-08(6)C (N.Y.S. Dep't. of Tax. & Fin., June 4, 2008).

At the hearing before the ALJ, Meredith established, and both the ALJ and Tribunal agreed, that no matter how the programming was delivered, it was stored on tangible media in order to be broadcast, and that those hard copies were required under contract to be returned or destroyed after the broadcast. The Tribunal also found that there was no difference in Meredith's use of the programming or its economic activity whether the programming was delivered by satellite or by videotape, and that the transition to satellite delivery in the early 1980s made "no difference to [Meredith's] business activity."

Tribunal decision. The Tribunal agreed with Meredith that the method of delivery — videotape or satellite — was "not dispositive" of whether the payment was included in the factor and that the method of delivery was "irrelevant." However, the Tribunal found instead that the payments for programming, no matter how delivered, were payments for intangible rights and could not be included in the property factor. In reaching that decision, the Tribunal purported to rely on *Disney Enters., Inc. v. Tax App. Trib.*, 40 A.D.3d 49 (3d Dept. 2007), *aff'd on other grounds*, 10 N.Y.3d 392 (2008), which had held that Disney could not increase the value of the film it owned (which all parties agreed was included in the factor) by measuring it by its then-current fair market value, rather than its original cost. In *Disney*, there was no question that the value of the Mickey and Minnie films, and all other Disney property, was included in the factor measured by cost, but the substantial appreciation in the value of the films was at issue.

Appellate Division decision. The Appellate Division has now reversed the Tribunal, holding that the Department made a significant change to its long-standing policy by applying retroactively a new rule that only programming delivered by tangible media would be included in the property factor. The Appellate Division noted that the definition of tangible personal property had not changed in nearly a century; that the Department had unquestionably long included in the factor programming delivered by tangible media; and that the record contained no "rational explanation of the videotape/satellite distinction that was germane to taxation." Therefore, there was "no rational distinction for taxation purposes between programming sent to a station on videotape and programming sent via satellite." The Appellate Division found that the Tribunal's decision was a retroactive application of a new interpretation of the statute and had to be annulled.

THERE WAS "NO RATIONAL DISTINCTION FOR TAXATION PURPOSES BETWEEN PROGRAMMING SENT TO A STATION ON VIDEOTAPE AND PROGRAMMING SENT VIA SATELLITE."

Given this decision, the Appellate Division did not reach Meredith's argument that the new statutory interpretation was baseless, or that the Tribunal applied an incorrect interpretation of the decision in *Disney*.

Additional Insights. The court's decision may be significant for all broadcasters who consistently followed the Department's long-standing position that rented programming was included in their property factor. As the Tribunal found, the shift to satellite delivery occurred by the 1980s and made no difference to the business operations of television broadcasters, which still were required to store that programming on tangible media in order to broadcast it. The Department was unable to present any justification for treating film delivered by satellite differently from film delivered by videotape.

For years after 2006, the single-sales-factor method of apportionment was completely adopted under Article 9-A, and thus the treatment of programming in the property factor is no longer an issue, except for determining the MCTD surcharge. Since the Third Department did not reach the issue of the validity of the Department's new 2008 interpretation excluding all

(continued on page 3)

programming from the property factor for the MCTD, or the issue of whether the Tribunal's reliance on *Disney* to exclude all rented film from the property factor would be respected, the treatment of rented film in the MCTD property factor after 2008 remains unresolved.

Morrison & Foerster LLP represented Meredith on its appeal to the Appellate Division.

ALJ Upholds Retroactive Application of Stock Option Regulations

By Irwin M. Slomka

An Administrative Law Judge has held that the Department of Taxation and Finance correctly applied retroactively a 2006 regulation regarding the computation of New York source income from stock options, which superseded an earlier (and contrary) Tax Appeals Tribunal decision. *Matter of Lawrence Gleason*, DTA No. 823829 (N.Y.S. Div. of Tax App., Oct. 25, 2012).

Facts. Lawrence Gleason, a Connecticut resident, was employed by American Airlines until he retired in April 2005. During his employment, he performed services both within and outside New York State. For several years beginning in 1996, American Airlines granted him incentive nonstatutory stock options. Mr. Gleason exercised the stock options in 2006, after he had retired, generating approximately $350,000 in compensation that year. Mr. Gleason filed a 2006 New York nonresident return but did not source any of his stock option income to New York.

Following an audit of Mr. Gleason's 2006 return, the Department sourced his stock option income to New York using a New York workday allocation ratio for the 2004 tax year, the last full year that Mr. Gleason worked. After the case proceeded to the Division of Tax Appeals, the Department modified its methodology, applying an allocation ratio using a date-of-grant to date-of-retirement allocation period. For options granted to Mr. Gleason between 1996 and 2001, the Department computed the fraction based on the ratio of the taxpayer's New York workdays from year of grant *through 2001* (more on this later) to total workdays from year of grant until he retired in April 2005. For stock options granted in 2003 (none were granted in 2002), the Department applied the ratio of New York workdays from 2003 (the year of grant) through Mr. Gleason's retirement, to total workdays from 2003 until his retirement. At issue was the correctness of the Department's allocation period calculation and the applicability of a regulation pertaining to stock option sourcing.

Background on Stock Option Sourcing. Effective December 27, 2006, and applicable to taxable years commencing on or after January 1, 2006, the Department amended its personal income tax regulations to set forth an allocation period for sourcing a nonresident's income from stock options. A nonresident's stock option compensation is multiplied by a New York workday fraction for the individual's "allocation period" to determine the portion of that income derived from New York sources. For most types of stock options, the regulations provide for a New York workday fraction based on an allocation period from the date the option was granted to the date of vesting. In light of the confusion at the time over the proper method of sourcing stock option income, the regulations permitted, at the taxpayer's election, and for the 2006 tax year only, use of an allocation period from the date of grant to the earliest of the date of exercise, date of termination of employment, or the date the compensation is recognized for federal income tax purposes. 20 NYCRR 132.24(c)(3).

These regulation amendments were promulgated after to the Tax Appeals Tribunal decisions in *Matter of Stuckless*, referred to by the ALJ as *Stuckless I and Stuckless II*. Those cases involved income from stock options granted when the taxpayer was a New York resident but exercised when he was no longer a resident. (In contrast, Mr. Gleason was always a Connecticut resident.) In *Stuckless I*, the Tribunal held that a 1995 Technical Services Bureau memorandum for sourcing stock option income (which applied a grant-to-exercise allocation method) was inapplicable, and moreover was not "legal authority." The Tribunal instead measured the New York source income from the taxpayer's stock options based on the appreciation in value of the underlying stock until the time he moved out of New York. *Matter of E. Randall Stuckless*, DTA No. 819319 (N.Y.S. Tax App. Trib., May 12, 2005). In December 2005, the Tribunal granted the Department's motion for reargument. Nine months later, in *Stuckless II*, the Tribunal withdrew its earlier decision and held that a single year-of-exercise allocation period should apply instead. *Matter of E. Randall Stuckless*, DTA No. 819319 (N.Y.S. Tax App. Trib., August 17, 2006). The Tribunal stated in *Stuckless II* that "[i]f the Division wishes to . . .create a separate set of new rules for identified special circumstances, we think such a change should be effected through legislation or adopted in regulations."

In the meantime, the Tax Law was amended in April 2006, specifically to address *Stuckless I*, to provide that "a nonresident taxpayer who has been granted statutory stock options . . . shall compute his or her New York source income as determined under rules and regulations prescribed by the commissioner." Tax Law § 631(g). The above-described regulation, effective December 27, 2006, was promulgated in response to this legislative directive.

ALJ Decision. The ALJ held that the Department reasonably and correctly concluded that Mr. Gleason's 2006 stock option income was allocable to New York in accordance with the stock option regulation amended in December 2006. Although the method used by the Department's auditor in assessing the tax (based on an allocation period *for 2004 only*) was not specifically authorized

(continued on page 4)

ALJ Upholds Retroactive Application of Stock Option Regulations

(continued from page3)

under the regulation, it was nonetheless found to be reasonable under the circumstances, based on the limited information the auditor had been given by the taxpayer. The ALJ held that the methodology for the revised deficiency, based in part on an allocation period through 2001, was also reasonable, noting that it was an "approximation" of the date-of-grant to date-of-termination method provided for in the regulations for 2006 only. The ALJ noted that the Department's inclusion in the numerator of the allocation fraction of New York workdays from date of grant to 2001 was an error (since Mr. Gleason retired in 2005), but an error that worked *in Mr. Gleason's favor*.

THE ALJ HELD THAT THE DEPARTMENT REASONABLY AND CORRECTLY CONCLUDED THAT MR. GLEASON'S 2006 STOCK OPTION INCOME WAS ALLOCABLE TO NEW YORK IN ACCORDANCE WITH THE STOCK OPTION REGULATION AMENDED IN DECEMBER 2006.

The taxpayer's position appeared to be that the application of the Department's regulation retroactive to the 2006 tax year violated Mr. Gleason's due process rights. Although not entirely clear from the decision, Mr. Gleason seemed to be arguing that either *Stuckless I* (sourcing stock option income based on actual appreciation of value) or *Stuckless II* (using a year-of-exercise allocation period) should have been applied. The ALJ disagreed.

The ALJ first noted that the Division of Tax Appeals does have the authority to determine whether a Departmental regulation is constitutionally valid, whether facially or as applied. However, the ALJ went on to conclude that the history of New York's treatment of nonresident stock option income — and particularly the Tribunal's granting in December 2005 of the Department's motion to reargue *Stuckless I* — should have put Mr. Gleason on notice in 2006 that he could not rely on *Stuckless I* or on *Stuckless II*, holding that any reliance on the "tenuous precedent of either *Stuckless I* or *II* at any time during 2006 was unreasonable."

The ALJ also found that the retroactive applicability of the regulation amendments, from December 27, 2006 to the beginning of the year, fell within a constitutionally permissible range of retroactivity. The ALJ also rejected Mr. Gleason's argument that by amending the Tax Law in April 2006, the Legislature had "improperly usurped the Tribunal's authority," noting that it was the "Legislature's prerogative" to amend the Tax Law as it sees fit.

Additional Insights. The regulations now generally provide for a date-of-grant to date-of-vesting allocation period for sourcing most stock option income. The correctness of that regulation for years after 2006 does not appear to be impacted by the Gleason decision, whatever its eventual outcome. The ALJ's statement that it was "unreasonable" for the taxpayer to have relied on the Tribunal decision *Stuckless II* at any time during 2006 is questionable. However, its impact appears to be limited to whether the 2006 regulation could undo retroactively the year-of-exercise methodology decided in *Stuckless II*, and not to the viability of that regulation.

Petition Found Untimely Under Special Rule for Fraud Claims

By Hollis L. Hyans

In *Matter of Leslie Thompson*, DTA No. 824908 (N.Y.S. Div. of Tax App., Nov. 8, 2012), a New York State Administrative Law Judge held that a request for a conciliation conference was untimely, because it had not been filed within 30 days of the issuance of a Notice of Deficiency alleging fraud.

The Department claimed that it had issued a Notice of Deficiency on November 10, 2011, seeking additional personal income tax for 2004 through 2009 of nearly $150,000, plus interest and a penalty for alleged fraud, bringing the total amount sought to more than $330,000. Ms. Thompson claimed that she had not received the Notice, nor had her representative, who had been retained in April 2011 and who had discussed the case with the Department's employees, corresponded with them and met with the Department on her behalf. On November 23, the representative requested a copy of the Notice of Deficiency. Although it is not clear from the determination whether such a copy was provided, Ms. Thomson's representative provided a power of attorney on December 20, 2011, and on January 4, 2012, a copy of a Notice and Demand for Payment of Tax Due was mailed to the representative.

The ALJ reviewed the mailing records provided by the Department and found that the Department established that the Notice of Deficiency was indeed mailed to Ms. Thompson on November 10, 2011. Although there is generally a 90-day period from the date of mailing of a Notice of Deficiency to file a request for a conciliation conference or petition for a hearing, a 2010 amendment to the Tax Law provides that, whenever a notice imposes a fraud penalty, the request for review must be filed within 30 days of the mailing of

(continued on page 5)

Petition Found Untimely Under Special Rule for Fraud Claims

(continued from page 4)

the notice. Tax Law § 170[3-a][b], [h]. Because the request for a conciliation conference was not filed until January 17, 2012, more than 60 days after the mailing date, it was untimely.

The ALJ also held that Ms. Thompson's representative did not have to be served with a copy of the Notice, despite the usual rule that, once an attorney has appeared, the time period for filing does not begin to run until counsel has been served. Here, the ALJ stated that, while there may have been discussions, correspondence, and a meeting, "those events do not constitute an appearance that would toll the period for filing a petition or require the service of a notice." Because no power of attorney had been filed at the time the Notice was mailed, the representative had not formally appeared on behalf of the petitioner and was not required to be served.

Additional Insights. This case illustrates the importance of paying careful attention to the exact rules that govern different proceedings before the Bureau of Conciliation Services and the Division of Tax Appeals. Whenever a notice includes a fraud penalty, a response must be filed within the very short 30-day period, and that rule is clearly set forth in the statute.

However, the situation involving the representative seems a little murkier. The representative requested a copy of the Notice on November 23, when the 30-day period would still have been open, and it is not clear what response, if any, was received. It also appears that, prior to the issuance of the Notice, the representative had a series of telephone calls and correspondence with the Department, as well as a personal meeting, which the determination acknowledges. No explanation is provided as to why the Department was willing to correspond and meet with the representative without a power of attorney, which seems inconsistent with the Department's strict adherence to the rules of confidentiality prohibiting the sharing of taxpayer information with anyone who has not filed a valid power of attorney.

Hotel Is a Co-Vendor of Audiovisual Services Sold to Guests by a Third Party

By Open Weaver Banks

In an *Advisory Opinion*, TSB-A-12(25)S (N.Y.S. Dep't of Taxation & Fin., Oct. 15, 2012), the Department of Taxation and Finance ruled that a hotel is a co-vendor with respect to sales of audiovisual ("AV") equipment and services by a third party AV provider to the hotel's guests. Therefore, it is liable for sales tax if the AV provider does not properly collect and remit the sales tax on those sales. However, the Department does not consider the hotel to be either a purchaser or a seller of such equipment and services.

The Petitioner in the Advisory Opinion owns a hotel, which serves as a venue for events that require the provision of AV equipment and services, such as conferences and professional meetings. The Petitioner does not own AV equipment, and has entered into a contract with an AV service provider (the "Provider") that specifies that the Provider is the sole "in-house" provider of AV services and equipment, and that the Provider is to render such services at the hotel for the benefit of the hotel and its customers. Under the contract, the Provider pays the hotel a commission from the proceeds of its equipment rentals and AV services.

Hotel guests may use the Provider or select an outside AV vendor. If a hotel guest selects in-house AV services, the guest must enter into a separate contract with the Provider, and the hotel is not a party to such agreement. However, the hotel's contract with the Provider sets forth guidelines that the Provider must follow in rendering its services at the hotel, including the types of equipment to be used at the hotel.

A hotel guest has the option to be billed through the guest's master account at the hotel, or may choose to be billed directly by the Provider. When charges for the AV services are billed through the guest's master account at the hotel, the charges are separately stated as a miscellaneous charge on the hotel's bill. The hotel remits the total amount collected from its guests, including any sales tax charged, but excluding the hotel's commission, to the Provider, which then remits the applicable sales tax paid by the hotel guests on its sales tax return.

In response to the Petitioner's inquiry as to whether it would be considered to be the purchaser of the Provider's services for its guests, the Department answered in the negative, finding that the Petitioner is neither purchasing the AV services nor selling such services as a component part of its catering services. Therefore, it is not required to pay sales tax on its purchases of those services.

(continued on page 6)

Hotel Is a Co-Vendor of Audiovisual Services Sold to Guests by a Third Party

(continued from page 5)

On the other hand, the Department concluded that the Petitioner is a co-vendor of the services, based upon the following facts: (1) the hotel's receipt of a considerable commission from guests' use of the in-house AV services; (2) use of the master billing account to bill guests for AV services; and (3) Petitioner's right to set forth guidelines that the Provider must follow in rendering its services at the hotel.

The Department concluded that, as a co-vendor, the Petitioner is jointly and severally liable for any sales tax due on the sales of AV service contracts if it collects the receipts and then turns those receipts over to the Provider, and the Provider subsequently fails to remit the tax due on such sales. In addition, if the Petitioner collects the receipts on the Provider's behalf, the Provider is jointly and severally liable for any sales tax due on the sale of AV services if the hotel fails to remit the tax due on such sales. Furthermore, the Petitioner and the Provider must each be able to substantiate how and when tax received from its co-vendor was remitted to the Department.

Additional Insights.

In the Advisory Opinion, the Department explains that if the Petitioner were to contract with its guests for the provision of the AV services, but then hire an AV provider to provide such services to its customer, the sale of such service to the Petitioner would be subject to tax. That was the conclusion of the Third Department in *21 Club, Inc. v. Tax Appeals Tribunal*, 69 A.D.3d 996 (3d Dep't, 2010), which held that the rentals of AV equipment by a provider to a restaurant and catering business were not exempt from sales tax as sales for resale where the business provided the use of the AV equipment to its catering customers. According to the Third Department, the 21 Club's re-rental of the AV equipment was "purely incidental to the primary purpose of the business."

In the Advisory Opinion, the Department essentially concludes that the double taxation of the AV equipment rentals that occurred in *21 Club* – in that case, sales tax paid on the rental of equipment to the restaurant and sales tax collected on the catering charges that included the equipment charges -- can be avoided by having customers contract directly with an AV service provider, even if that provider has created an in-house relationship with the hotel. The Department reached a similar conclusion in a 2011 *Advisory Opinion*, TSB-A-11(27)S (Oct. 17, 2011), which also addressed the taxation of AV services at hotels.

Because the Department found a "shared interest" between the hotel and the AV provider in both Advisory Opinions, the Department has conferred co-vendor status on the hotel and the AV provider. There is very little precedent for co-vendor status in New York law. In fact, the Division's regulations limit the concept of a "co-vendor" to a person operating a club or similar merchandising plan, or operating as an independent contractor representing a particular supplier selling tangible personal property. 20 NYCRR § 526.10(e). In light of the Department's conclusion in the Advisory Opinion, an AV provider who enters into such an arrangement with a hotel should make sure that the hotel computes the correct amount of sales tax on the AV equipment and services, and the hotel has an interest in making sure that the AV provider remits that amount to New York in a timely fashion.

Earned Income Tax Credit Denied Due to Lack of Proof

By Amy F. Nogid

In *Matter of Gin Shu Lin*, DTA No. 823823 (N.Y.S. Div. of Tax App., Nov. 1, 2012), a New York State Administrative Law Judge held that, while an individual seeking the earned income tax credit had established that she had two dependents, she failed to establish her wages and therefore had failed to meet her burden of proof.

The earned income tax credit ("EITC") is available to supplement the earnings of individuals who earn less than specified amounts. The State's EITC became effective in 1994, and is based on a percentage of the federal EITC. The State EITC has varied since its enactment, from 7.5 percent of the federal amount in 1994 to 30 percent for 2003 and later. Tax Law § 606(d)(1). There is also a New York City EITC, which is 5 percent of the federal EITC. While the State and City EITCs are derived from the federal credit, the State, which administers both the State and City personal income tax, can conduct its own independent audit or examination and is not bound to accept the actions of the IRS.

Although the claimant in *Lin* had provided a Form IT-2 (Summary of W-2 Statements, reflecting wages), a search by the auditor of the Department's Wage Reporting and Withholding System could find no employer reporting the claimant's New York wages. Since the EITC is computed as a percentage of earned income, the ALJ held that the claimant's inability to establish her wages deprived her of a right to *any* EITC.

Additional Insights. Substantiation is often an issue with EITC claimants, particularly those who are cash earners and may be either self-employed or lack proper documentation from their employers. In May 2012, after meetings with community

(continued on page 7)

organizations and tax professionals, including Morrison & Foerster LLP, the Department of Taxation and Finance issued DTF-215, *Earned Income Tax Credit, Recordkeeping Suggestions for Self-employed Persons*, in an attempt to educate taxpayers on the kinds of documentation necessary to support a claim.

The *Lin* case serves as a reminder to EITC claimants and their tax preparers that the Department scrutinizes and confirms the information underlying EITC claims. Claimants and tax return preparers should also be aware that penalties apply if claims are determined to be fraudulent, which could strip claimants of the right to EITC in subsequent years and/or subject them to heightened future audit scrutiny.

Only First Two Years of Tuition Expenses for Pharmacy Program Are Qualified Tuition Expenses

By Kara M. Kraman

The Department of Taxation and Finance has ruled that tuition expenses for only the first two years of a university's six-year combined undergraduate and doctorate pharmacy program meet the definition of "qualified college tuition expenses" deductible under Tax Law § 606(t)(2)(C), which excludes tuition for "a post baccalaureate or other graduate degree." *Advisory Opinion*, TSB-A-12(6)I (N.Y.S. Dep't of Taxation & Fin., Oct. 15, 2012). The Department reasoned that tuition payments for the first two years of pre-pharmacy undergraduate study before the student was formally admitted into the pharmacy doctorate program were qualified college tuition expenses because (i) students paid the regular university tuition and not the special professional tuition rate applicable once they were formally admitted to the doctorate program, and (ii) students could apply the credits from their two years of undergraduate pre-pharmacy study toward a bachelor's degree if they were not admitted to, or chose not to go into, the doctorate program. The Department also noted that although the Doctor of Pharmacy was a professional degree and not a graduate degree, it was analogous to a "post baccalaureate" degree under the statute because while students did not need a bachelor's degree to be enrolled, they could apply to the program after earning one.

Insights in Brief

Department Announces Special Audit/Compliance Nexus Policy for Businesses and Individuals in New York Temporarily Due to Hurricane Sandy

The Department of Taxation and Finance has announced an audit and compliance policy under which it will not assess corporate franchise taxes, personal income taxes, and withholding taxes in certain situations when a business or individual is present in New York State temporarily to work solely as part of the Hurricane Sandy relief efforts and does not otherwise have nexus with the State. For corporate tax purposes, such corporations will not be considered to have nexus prior to January 1, 2013, and will only be considered to have nexus going forward if they continue to have employees or offices in the State after December 31, 2012. For personal income tax purposes, self-employed individuals and employees who are nonresidents of the State will not be liable for State personal income tax for income earned in the State prior to January 1, 2013, if they are temporarily doing business or working in the State solely as part of the Hurricane Sandy relief efforts or because they were relocated to the State temporarily due to the hurricane's effects on their own or their employer's business location outside the State, and will be considered to be subject to income tax going forward only if they continue to work or do business in the State after December 31, 2012. *"Additional Information for Businesses and Taxpayers Regarding Hurricane Sandy,"* N.Y.S. Department of Taxation & Fin., www.tax.ny.gov.

New York City Announces Hurricane Emergency Sales Tax Exemption Program

The New York City Industrial Development Agency will provide emergency assistance to small businesses affected by Hurricane Sandy through the establishment of a Hurricane Emergency Assistance Sales Tax Exemption Program. It will provide sales tax exemptions of up to $100,000 for each affected company on purchases of building, construction, and renovation materials; machinery and equipment and other items of personal property; and services to rebuild after the storm. Applications for sales tax benefits — which are limited to 250 applicants — must be filed by *February 1, 2013. "Hurricane Emergency Sales Tax Exemption Program,"* N.Y.C. Economic Development Corp., www.nycedc.com.

Parking Charges Paid by Both Member and Nonmember Residents of Cooperative Housing Development May Qualify for Exclusion from New York State and City Parking Taxes

The Department of Taxation and Finance has ruled in an Advisory Opinion that motor vehicle parking charges paid to a cooperative housing association located in Manhattan (or paid to a parking facility operator within the development) may qualify for exclusion from New York State and City parking taxes, whether

(continued on page 8)

Insights in Brief

(continued from page 7)

paid by a member or a nonmember resident of the cooperative. If the charges are paid by a qualifying *member* resident of the cooperative, then no State or City sales taxes would be due. Parking charges paid by a *nonmember* resident, however, may only qualify for exemption from the additional parking tax imposed in Manhattan. *Advisory Opinion*, TSB-A-12(28)S (N.Y.S. Dep't of Taxation & Fin., Oct. 24, 2012).

Two Adjacent Apartments Treated as One for Purposes of the "Mansion Tax"

The Appellate Division, Third Department, has sustained a decision by the New York State Tax Appeals Tribunal applying the 1% tax surcharge on the sale of residential real property for a price exceeding $1 million (generally referred to as the "mansion tax") to the sale of two apartments purchased separately by a husband and wife. *Michael Sacks v. Tax Appeals Trib*., 2012 NY Slip Op. 7160 (3d Dep't, Oct. 25, 2012). While the units were purchased separately pursuant to different contracts, the court held that the application of the tax "is not dependent upon the form of the underlying transactions, but on the economic reality…" Here, the two units had already been consolidated by the previous owner, were reconfigured to be fully accessible to each other, had a single kitchen and functioned as a single-family residence, and the two transactions occurred simultaneously with payment from the same joint bank account, all leading to a conclusion that the entire conveyance was properly subject to tax.

Gummy Drinking Cups Subject to Sales and Use Tax

The Department of Taxation and Finance had issued an Advisory Opinion concluding that edible gummy drinking cups are subject to sales and use tax as confections. The cups are composed of pectin, evaporated cane sugar, natural flavors and colors, come in five flavors – lime, lemon, bitter, vanilla, and pepper – and, although this is not specified in the opinion, appear to be marketed as cups to hold alcoholic beverages. Based on the product's ingredients, such as evaporated cane sugar and pectin, and the fact that they are advertised as "all natural pectin confections," the Department concluded they were not exempt as food but subject to tax as candy and confectionery under Tax Law § 1115(a)(1)(i). *Advisory Opinion*, TSB-A-12(29)S (N.Y.S. Dep't of Tax. & Fin., Oct. 24, 2012).