Multistate Taxation

By Phil Tatarowicz and Ted W. Friedman

Developments in Multistate Taxation

California

The California Franchise Tax Board (FTB) issued a Technical Advice Memorandum providing that for tax years beginning before January 1, 2011, a taxpayer whose only contact with another state was the sale of tangible personal property into that state is not taxable in that state under U.S. Constitutional standards for purposes of California's throwback statute, and that a taxpayer must demonstrate a physical presence in a destination state in order to avoid the application of California's throwback rules.[1] The FTB pointed out that effective for tax years beginning on or after January 1, 2011, California enacted legislation providing that a taxpayer is doing business in California where a taxpayer's only contact with the state are sales exceeding $500,000.00. The FTB stated that, by enacting such legislation, the California Legislature "determined for the first time that substantial economic presence meets U.S. Constitutional standards under California law," but that such legislation specifically provides that the newly enacted circumstances apply only to tax years beginning on or after January 1, 2011.

Indiana

The Indiana Department of Revenue found that an out-of-state media and marketing services company failed to source the sales of compilations of audience profile data to Indiana and include the sales in the company's Indiana sales factor.[2] During the years at issue, the company measured the number and characteristics of audience members listening to radio, television and other media programs by conducting surveys. The company then compiled the survey results and

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sold the information to various interested parties. The Department disagreed with the company's assertion that the money earned from selling information to Indiana customers was earned by conducting surveys at out-of-state locations. The Department reasoned that the out-of-state surveys did not produce income because the company was not paid to conduct the surveys; rather, the company was paid because it sold the compilations of data based on the surveys to Indiana customers. Accordingly, the Department determined that the company's "income producing activity" took place in Indiana because Indiana was the place where services were provided to Indiana customers and the place where the company derived its income.

Louisiana

The Louisiana Department of Economic Development (LED) adopted regulations to administer a newly created corporate tax apportionment program.[3] The program allows the secretary of the LED to invite businesses that meet certain eligibility requirements to use a single sales factor computation for corporate income and franchise tax purposes. Among other criteria, to be eligible for participation in the program at least 50 percent of the total annual sales of a business from its Louisiana site or sites must be to out-of-state customers or to in-state customers who resell the product to out-of-state customers. In addition, the activities of the Louisiana site or sites must include at least one of the following: (1) corporate headquarters; (2) logistics; (3) warehousing; (4) data center; (5) clean technology; (6) destination health care; (7) research and development; (8) renewable energy; (9) digital media and software development; or (10) any other business sector targeted by the secretary as a focus of the LED's economic development efforts. The program is applicable for corporate income tax periods beginning on or after January 1, 2013, and for corporate franchise tax periods beginning on or after January 1, 2014.

Michigan

The Michigan Court of Appeals held that an importer and distributor of wines and spirits, which also owned the exclusive rights to trademark and license a product line known as Grey Goose vodka ("Grey Goose"), improperly included the amount it received from the sale of its tangible and intangible assets related to Grey Goose in its Michigan sales factor denominator.[4] The court found that the sale of the Grey Goose brand did not meet the definition of "sale" under the Michigan Single Business Tax Act (SBTA) as a "use of intangible property which constitutes business activity." The court determined that the amount received by the importer in the Grey Goose transaction was not for the "use" of the Grey Goose brand name; rather, it was for the transfer of title to the Grey Goose brand as a whole. Therefore, the court concluded that the Michigan Tax Tribunal (MTT) did not err in ruling that the Grey Goose transaction was not a "sale" under the SBTA. However, the court allowed the importer to supplement the record and remanded the case to the MTT to determine whether the importer was entitled to use an alternative method of apportionment.

New York

The New York Supreme Court, Appellate Division, reversed a decision issued by the Tax Appeals Tribunal and held that a corporation engaged in publishing and television broadcasting was entitled to include in the denominator of its property factor television programming that it obtained for use under licensing agreements, regardless of whether the programming was delivered on videotape or by satellite.[5] The court found that programming on videotape had long been considered by the Department of Taxation and Finance to be rented tangible property that could be included in the property factor and determined that there was "no rational distinction for taxation purposes between programming sent to a station on videotape and programming sent via satellite."

Tennessee

The U.S. Supreme Court denied a petition for *certiorari* in *Scholastic Book Clubs, Inc. v. Roberts*[6]. Consequently, the decision of the Court of Appeals of Tennessee, which held that an out-of-state vendor's connections with Tennessee's schools and teachers that participated in the vendor's book selling program established a sufficient nexus with the state to support an assessment of sales and use taxes under the Commerce Clause, will stand.[7]

ENDNOTES

[1] Technical Advice Memorandum 2012-01, Cal. Franchise Tax Bd. (Nov. 29, 2012).

[2] Letter of Findings, Ind. Dep't of Rev., 02-20120316 (Nov. 28, 2012).

[3] La. Admin. Code Tit. 13, §§4101-4111.

[4] *Sidney Frank Importing Co. v. Dep't of Treas.,* Mich. Ct. App., No. 306742 (Dec. 4, 2012).

[5] *Meredith Corp. v. Tax App. Trib.,* N.Y. SCt, No. 512597 (Nov. 21, 2012). Paul H. Frankel, Hollis L. Hyans and Amy F. Nogid of Morrison & Foerster LLP represented Meredith Corp. in the case.

[6] *Scholastic Book Clubs, Inc. v. Roberts,* SCt, No. 12-374 (Nov. 26, 2012).

[7] *Scholastic Book Clubs, Inc. v. Farr,* Tenn. Ct.App., 373 SW3d 558, (2012).