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NEW YORK TAX INSIGHTS

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Appellate Division Affirms NYC Tribunal Holding That Receipts from Credit Ratings Business Are Receipts from Services

By Kara M. Kraman

In a unanimous decision, the Appellate Division affirmed the decision of the New York City Tax Appeals Tribunal, which had held that McGraw-Hill's receipts from its credit rating business were receipts arising from the performance of services and sourced to where the services were performed, rather than "other business receipts," sourced to where the receipts were "earned." *S&P Global Inc. f/k/a McGraw-Hill Financial, Inc. v. New York City Tax Appeals Tribunal*, 2017 NY Slip Op. 01448 (1st Dep't, Feb. 23, 2017). The Appellate Division also upheld the Tribunal's conclusion that McGraw-Hill did not have a First Amendment right to source its credit ratings receipts for New York City general corporation tax purposes using an "audience-based" methodology similar to that available to publishers and broadcasters.

Facts. McGraw-Hill, through its Standard & Poor's ("S&P") division, operated a credit rating agency to provide ratings, risk evaluations and investment research. Debt issuers hired S&P to prepare credit ratings for use by investors, intermediaries and the issuers themselves. S&P employed approximately 1,200 analysts who prepared the ratings. Upon approval by an S&P ratings committee, the ratings were communicated to the issuer, and then usually made public on the S&P website to registered users free of charge. The debt issuers, rather than the website users or investors, paid S&P for providing the credit ratings, usually based on a percentage of the offering amount, and also paid for follow-up monitoring.

For the tax years 2003 through 2007, McGraw-Hill filed general corporation tax ("GCT") returns, and the credit rating fees of its S&P division were reported in McGraw-Hill's receipts factor as receipts derived from the performance of services, sourced based on a place-of-performance methodology. In 2009, McGraw-Hill filed amended GCT returns, requesting refunds for those years totaling approximately $35 million. The refund claims were based on sourcing the credit rating receipts, which McGraw-Hill now reported as "other business receipts," to "customer" locations. The Department of Finance disallowed the refund claims on the grounds that the credit rating fees were from the performance of services, sourced based on where the services were performed.

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ALJ and Tribunal Decisions. The Chief ALJ had held that McGraw-Hill was entitled to a discretionary adjustment to source its credit rating receipts using an audience-based allocation methodology on First Amendment grounds (pertaining to freedom of the press). The City Tribunal reversed the Chief ALJ's decision, holding that the denial of use of an audience method did not violate McGraw-Hill's First Amendment rights. The City Tribunal also rejected McGraw-Hill's argument that its credit rating receipts constituted "other business receipts," concluding that McGraw-Hill was compensated for its work in generating the ratings—which involved substantial investigation and analysis—and thus the receipts in question constituted receipts from the performance of services which are sourced based on a place-of-performance method.

Appellate Division Decision. The Appellate Division affirmed the City Tribunal decision, finding that the terms of S&P's agreements with its clients "make it clear that petitioner is being paid for a service, namely, 'analytic review and issuance of a rating.'" The court further noted that, even where a rating was not issued, the issuer compensated S&P based on the time, effort and charges incurred.

While the Appellate Division acknowledged that the credit ratings at issue are a form of speech, it found that the Department's allocation of the receipts did not single out or target credit rating agencies . . . .

Like the Tribunal, the Appellate Division also held that the allocation of the receipts in question did not violate the First Amendment. While the Appellate Division acknowledged that the credit ratings at issue are a form of speech, it found that the Department's allocation of the receipts did not single out or target credit rating agencies, as the sourcing method applies to any "First Amendment speaker" that derives income from sources other than advertising and subscription sales. The Appellate Division also distinguished *McGraw-Hill, Inc. v. State Tax Commission*, 75 N.Y.2d 852 (1990), which held that the State of New York could not source McGraw-Hill's revenues from advertisements in its periodicals based on place of performance, because this represented differential treatment between the print media and the broadcast media, in violation of the First Amendment. The court held that, unlike in that case, the Department was not seeking to impose a different sourcing method for the same type of revenue, namely advertising, against different members of the press that are engaged in substantially the same business.

Additional Insights.

The impact of the Appellate Division's decision (if left standing) under the current New York City business corporation tax, applicable to tax years beginning on or after January 1, 2015, is not entirely clear. Under the current tax, receipts from services are generally sourced based on where the customer "derives the benefit" of that service. For example, if McGraw-Hill's paying "customer" is the issuer, then it should look to where the issuer "derives the benefit" of the service. Where the issuer "derives the benefit" is unclear. However, there is certainly a colorable argument that the issuer derives the benefit of the service, at least in part, at the location of the party viewing the rating for free on S&P's website. If that is the case, then McGraw-Hill may have a good argument for using so-called "audience-based sourcing" under the current business corporation tax.

Transfers of Motor Vehicles Between Related Parties Held Subject to Sales Tax

By Irwin M. Slomka

In an interesting decision that raises questions regarding when related-party transfers of tangible personal property will be subject to sales tax, an Administrative Law Judge held that the transfer of certain motor vehicles between related parties were retail sales subject to New York State sales tax, even though no consideration was paid to the transferors. *Matter of CLM Associates, LLC*, DTA No. 826735 (N.Y.S. Div. of Tax App., Feb. 23, 2017).

Facts. CLM Associates ("CLM"), a single member LLC located in Westchester County, was part of a group of eleven related auto dealerships, each of which was also a single-member LLC owned by the same closely held parent. In 2002, as a result of a restructuring, CLM became the administrative entity for the group of dealerships, performing such functions as accounting, human resources and records retention.

At issue was the taxability of intercompany transfers of ownership of "loaner cars" offered to customers who serviced their vehicles at the dealerships. In 2002, as part of the restructuring, it was decided that loaner cars, although initially acquired and used exclusively by the dealerships, would thereafter be titled and insured in CLM's name. According to CLM, this was done for various business reasons, including limiting potential dealership liability in the event of an accident involving a loaner car.

To effectuate the transfers, each dealership created an invoice or bill of sale designating CLM as the purchaser

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for each transfer and, while not apparent from the decision, showing a purchase price. Although sales tax was often shown on the invoice (although it was not clear why), the tax was never actually paid. The loaner cars were then registered in CLM's name with the Department of Motor Vehicles.

During the course of an audit of a related entity, the auditor became aware of the numerous loaner car transfers with CLM. A sales tax audit of CLM was then commenced for the period September 2004 through August 2010. The auditor examined all loaner car transfers made during an agreed-upon test period. The auditor concluded that the loaner car transfers constituted taxable sales of tangible personal property, apparently based on the purchase price set forth in each invoice. However, since CLM often traded in used loaner cars to the dealerships when it received a new loaner car (which trade-ins were then sold by the dealerships as used vehicles), the auditor allowed CLM a credit against the consideration for trade-ins that were either identified in the invoices or, if not identified, were shown to have been traded in on the same day as CLM acquired a new loaner car. The auditor then extrapolated the results over the entire audit period, and the Department issued a Notice of Determination for sales tax of $1.1 million, plus interest, but without penalties, on that basis.

At the hearing, CLM claimed that the loaner car transfers were not retail sales and thus were not subject to sales tax because CLM did not pay consideration for the transfers. Alternatively, CLM argued that the auditor should have allowed credit for the other used loaner-car trade-ins, even though not reflected in the invoices and not traded in on the same day as the acquisitions of the new loaner cars by CLM.

ALJ Decision. The ALJ held in favor of the Department that the loaner car transfers were retail sales of tangible personal property and thus subject to sales tax under Tax Law § 1105(a). The ALJ first noted that the term "sale" is broadly defined to include "[a]ny transfer of title or possession or both . . . for a consideration" (Tax Law § 1101(b)(5)) and that it is "presumed that all receipts for property" are subject to tax "until the contrary is established." Tax Law § 1132(c)(1). He then rejected CLM's claim that there was no consideration for the transfers, noting that CLM provided consideration to the dealerships by, among other things, becoming partially liable for losses that could arise from use of the loaner cars and becoming jointly and severally liable on the financing for their initial acquisitions by the dealerships.

As for CLM's claim that the substance of the transactions did not change the financial responsibilities of the dealerships, the ALJ pointed out that this was not supported by the record, stating: "Petitioner may not disregard this self-created arrangement to avoid sales tax disadvantages resulting therefrom." The ALJ also distinguished *Browning-Ferris Industries, Inc.*, Advisory Opinion (TSB-A-86(4)S) (N.Y.S. Dep't of Taxation & Fin., Jan. 9, 1986), where the Department ruled that a transfer of property to a related corporation as a capital contribution and without consideration was not a retail sale. The ALJ concluded that, besides not being binding, the facts in the Advisory Opinion were materially different because of the various financial undertakings by CLM resulting from the loaner car transfers.

[T]he decision . . . may raise questions regarding whether a taxpayer that transfers tangible personal property to an affiliate for no stated consideration, but that nonetheless derives a financial benefit from doing so, might nonetheless have sales tax exposure for the transfer.

The ALJ also rejected CLM's claim that it should be entitled to additional "trade-in" credits. Noting that CLM had failed to provide invoices to substantiate trade-ins against specific loaner car acquisitions, the ALJ found that the auditor had "generously and reasonably" allowed CLM credits for trade-ins that occurred the same day as particular loaner car transfers, even in the absence of formal documentation linking the trade-in to a particular transfer. The ALJ did allow CLM an adjustment for use tax paid by the dealerships for their use of long-term loaner cars.

Additional Insights.

The result largely stems from the fact that the sales tax remains a form-driven tax, and here the related parties documented the transfers of the loaner cars as sales for consideration, as evidenced by actual invoices and bills of sale. Although not cited in the decision, the sales tax regulations provide only limited protection from sales tax for intercorporate transfers of tangible personal property (for instance, restricting the imposition of sales tax for property transferred to a related party "as a contribution to capital"). 20 N.Y.C.R.R. 526.6(d)(8)(ii). Still, many consider the transfer of tangible personal property among related parties for no actual consideration to be a nontaxable transaction, even if there is some ancillary financial benefit to the transferor resulting from the transfer. Thus, the decision (if upheld) may raise questions regarding whether a taxpayer that transfers tangible personal property to an affiliate for no stated consideration, but that nonetheless

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derives a financial benefit from doing so, might nonetheless have sales tax exposure for the transfer.

The decision does not address whether sales tax was paid when the dealerships purchased the loaner cars that were, in turn, conveyed to CLM. Nor does it discuss whether the vehicle registration forms that were filed with the Department of Motor Vehicles for the loaner car transfers indicated a purchase price. It should be noted that, while the decision refers to the statutory presumption that "all receipts for property" are taxable—with the burden of proving the contrary placed on the taxpayer—the applicability of that presumption is not clear since there were no actual sales "receipts" for the loan car transfers.

Third Department Affirms Imposition of Tobacco Products Tax and Penalties

By Hollis L. Hyans

The Appellate Division, Third Department, has upheld the imposition of tobacco products tax and penalties against a tobacco wholesaler, affirming the decision of the Tax Appeals Tribunal. *Matter of Jay's Distributors, Inc. v. Jerry Boone*, No. 521531 (App. Div. 3d Dep't, Jan. 11, 2017). Although the Tribunal had set aside the fraud penalty that had originally been imposed by the Department of Taxation and Finance, the Appellate Division affirmed the Department's right to impose the late payment penalty instead and found that the Department had properly established the existence of willful intent necessary to sustain the penalty.

Facts. Jay's Distributors, Inc. ("Jay's") was a cigarette and tobacco wholesaler and tobacco distributor licensed in New York and operating from a warehouse in Jersey City. It was wholly owned by Kaushik Shah, who also owned another company, Vikisha, Inc., a tobacco wholesaler licensed and doing business solely in New Jersey. Jay's sold cigarettes, tobacco products, and accessories, as well as non-tobacco products such as food and nonalcoholic beverages, to retail outlets in the greater New York metropolitan area.

On audit of Jay's New York State tobacco tax returns, the Department requested all supporting records of purchases and sales, but the records that were provided were not complete. Jay's and Vikisha both purchased tobacco products from third-party suppliers and stored them in the same Jersey City warehouse, and there was complete commingling of inventory between Vikisha and Jay's, with no record of a physical inventory ever having been performed. Missing purchase invoices and gaps in sales invoice numbers were also found, and computerized records were not produced on audit, because Jay's determined that the records reflected only the combined totals for all the companies in the group. In an attempt to confirm quantities of product bought, the auditor sent letters to suppliers, and the responses supported the auditor's conclusion that the purchase records received from Jay's and Vikisha were not complete.

The Department chose 2005 as a test period and, after a detailed audit, found a large discrepancy between the products purchased by Jay's and its sales, including "unaccounted-for" purchases for which no purchase invoices were provided. Based on the auditor's experience with the shelf life of tobacco products, the auditor made assumptions about the amounts of products being sold based on the purchases. The Department then made a determination of purchases from Jay's records and third-party information, subtracted sales that had been reported in either New York or New Jersey, and determined the remainder to be excess inventory, to which the Department applied an average price. The Department also found instances where a distributor purchased inventory from Vikisha and then sold it back for the same price, a series of events that the auditor had never seen before and for which he could identify no business purpose.

In order to impose the late payment penalty, the Department must only meet the lower burden of showing willful neglect, and the court found the Department had met this burden by showing "a conscious, intentional failure or reckless indifference."

The State of New Jersey had audited Vikisha for the period October 2002 through September 2006 and found no additional tax due. The Department therefore took the position that all purchases that exceeded the total of New Jersey and New York reported sales were excess inventory that must have been imported or sold in New York.

History Below. The Department assessed additional tobacco tax due of over $3 million, and asserted both late payment and fraud penalties. After a hearing, an Administrative Law Judge upheld the assessment in full, finding that the use of a test period was appropriate due to the inadequacy of Jay's records, and that Jay's had failed to prove error in the audit method or result, noting particularly the commingling of inventory and the auditor's testimony about the perishable nature

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of tobacco products. The ALJ also sustained the fraud penalty, relying again on the commingling of inventory, the circular transactions, the poor record keeping and the substantial underreporting of liability.

Jay's appealed the ALJ decision, and the Tax Appeals Tribunal sustained the imposition of tax, agreeing that the Department had properly used an indirect audit method due to the absence of reliable records and to the various discrepancies that appeared from the review of third-party information. The late payment penalty—which is based on a finding of willful neglect—was sustained, but the Tribunal set aside the fraud penalty, finding a lack of the "'clear, definite and unmistakable'" evidence that is required to sustain a fraud penalty.

Appellate Division Decision. The appeals court affirmed the Tribunal's decision in all respects. First, it noted the limited standard of review applicable to tax cases, which requires the Tribunal's decision to be confirmed if it has a rational basis and is supported by substantial evidence. Since Jay's failed to keep sufficient records to permit verification of its sales, an indirect audit was appropriate, and the taxpayer has the burden to establish by "clear and convincing evidence" that the audit method or assessment was erroneous.

The court found that Jay's failed to sustain that burden, since records were missing, the inventory was commingled with another company's inventory in a shared facility, and there were no records that would have allowed the Department to track the flow of products. The third-party evidence showed the purchase of more products than could be determined to be sold in the available records, and the circular transactions were further evidence of a possible "scheme to avoid payment of tobacco taxes." The court noted that Jay's witnesses were unable to explain the discrepancies discovered by the Department or to demonstrate what had happened to the unaccounted-for products.

The court also rejected Jay's challenge to the late payment penalty, despite the fact that the Tribunal had canceled the penalty originally imposed for fraud due to the Department's failure to meet its burden of proving willful intent. In order to impose the late payment penalty, the Department must only meet the lower burden of showing willful neglect, and the court found the Department had met this burden by showing "a conscious, intentional failure or reckless indifference." The court relied on Jay's failure to maintain a separate and secure warehouse as required by statute and the multiple deficiencies in recordkeeping.

Additional Insights.

It is important to remember that the taxpayer generally bears the burden of proving that a tax assessment is incorrect. Here, the commingling of product and the absence of records that are required by law to be maintained made it impossible for the wholesaler to demonstrate that it had tracked all its products and remitted the correct amount of tax. Although the Tribunal had set aside the fraud penalty—on which the Department bears the burden of establishing by clear and convincing evidence "unmistakable" evidence of fraud—the court found that the Department did meet the lower burden of demonstrating "willful neglect." The evidence relied upon was essentially the same evidence—or lack of evidence—that established the underlying liability.

ALJ Holds Sales Tax Applies to Electricity Used to Provide Telecommunications Services

By Michael J. Hilkin

A New York State Administrative Law Judge has held that a company was not entitled to a refund of sales tax paid on electricity used to power equipment necessary to provide telecommunications services and carry signals to its customers, rejecting the company's claim that the electricity was exempt from sales tax as a purchase for resale. *Matter of XO Commc'ns Servs., LLC*, DTA Nos. 826686 & 827014 (N.Y.S. Div. of Tax App., Mar. 9, 2017).

Facts. XO Communications Services, LLC ("XO") is a provider of intrastate, interstate, and international telecommunications services, including voice services, Internet services, optical services and private data networks to businesses, wholesalers and governmental entities. XO maintains a number of central offices that house equipment used to provide telecommunications services, including voice switches that provide basic voice services, routers for voice and Internet services and long haul optical transport equipment to provide connectivity over a fiber optic network.

In 2013, XO filed two refund claims, originally totaling over $1.1 million, but ultimately reduced to under $150,000, seeking a refund of sales tax it paid on the electricity used to power the central office equipment that provided telecommunications services and carried signals to its customers. XO asserted that the electricity was exempt from sales tax as a purchase for resale, and at the hearing its central argument relied on the exemption applicable to purchases of tangible personal property for resale. The Department rejected XO's premise and denied the claims.

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Tax Law. New York State imposes sales tax on the receipts from every "retail sale of tangible personal property," Tax Law § 1105(a), and provides a sale for resale exemption for tangible personal property within the statutory definition of "retail sale." Tax Law § 1101(b)(4)(i). Under the regulations, the exemption applies when a person in the course of business operations purchases tangible personal property for resale "either in the form in which purchased, or as a component part of other property or services." 20 N.Y.C.R.R. 526.6(c)(1).

Separately, New York State imposes sales tax on the receipts from every purchase of electricity, other than purchases for resale. Tax Law § 1105(b)(1)(A). The regulation outlining the sales taxation of utility services, including electricity, discusses the purchase for resale exemption, stating that "[p]urchases of utility services by a utility for resale as such may be made without payment of sales tax," but, when the utility services are resold by the purchaser, it must collect sales tax on such sales. 20 N.Y.C.R.R. 527.2(e).

The ALJ concluded that XO's electricity purchases were not purchases for resale because XO's electricity purchases were "simply an overhead expense" incurred "to produce the telecommunication services it sold."

The Decision. Relying in part on a sales tax decision issued by the Appellate Division in 2008, which rejected a sales tax refund claim by a predecessor entity to XO based on arguments similar to those made in the current case, the ALJ concluded that the Department had properly denied XO's refund claims. *See Matter of XO New York, Inc. v. Comm'r of Tax'n and Fin.*, 51 A.D.3d 1154 (3d Dep't 2008) (the "prior Appellate Division decision"). XO argued that the findings in the prior Appellate Division decision were *dicta* and should not be controlling because the court had held that the resale argument had not been raised before the Division of Tax Appeals or the Tax Appeals Tribunal and therefore had not been preserved for review. However, the ALJ found that, while the decision was not binding precedent, the court in the prior Appellate Division decision provided guidance that is "properly considered for subsequent construction of the same statute."

In support of its argument that certain of its electricity purchases were exempt purchases for resale, XO argued that electricity constitutes "tangible personal property" that makes up a "component part of its telecommunications services," and thus the purchase for resale provision within 20 N.Y.C.R.R. 526.6(c)(1) is applicable. However, quoting from the prior Appellate Division decision, the ALJ determined that "[e]lectricity, simply stated, is not a tangible piece of property that has a material existence or physical form." The ALJ also noted that the sales tax imposition statute separately imposes tax on "retail sales of tangible personal property" (*see* Tax Law § 1105(a)) and sales of electricity (*see* Tax Law § 1105(b)(1)), further supporting the view that electricity is not included within the definition of tangible personal property.

The ALJ concluded that XO's electricity purchases were governed instead by the purchase for resale exemption applicable to utility services within 20 N.Y.C.R.R. 527.2(e). The ALJ explained that such regulation states that it is applicable to the purchase of electricity "for resale *as such*" (emphasis added) and contains no language stating that it is applicable to electricity purchased that constitutes a "component part" of a service. The ALJ concluded that XO's electricity purchases were not purchases for resale because XO's electricity purchases were "simply an overhead expense" incurred "to produce the telecommunication services it sold." The ALJ pointed out, among other things, that XO did not invoice, charge or delineate charges for electricity on its bills to customers.

The ALJ also rejected XO's argument that the imposition of sales tax on its electricity purchases would result in multiple taxation, again quoting from the prior Appellate Division decision, which held that "simply because a purchase is made to produce or provide a product that will ultimately be sold to a consumer, does not automatically exclude or exempt that transaction from application of the sales tax."

Finally, the ALJ concluded that, even if XO would have been entitled to a resale exemption for the electricity used to power the equipment used in providing telecommunications services, XO's evidence was insufficient to support the amount of its refund claim. XO agreed in a brief that the resale exemption only applies to the services it provides that are subject to tax, and ultimately claimed the exemption only for a percentage of the electricity used by its central offices, equal to the percentage of its revenue from services subject to tax. However, the ALJ stated that such calculation did not suffice because, among other things, XO had the burden to show the amount of electricity purchased solely for purposes of resale, and there was "no evidence that the percentage of sales . . . correlates to the actual amount of energy used to provide service to customers."

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Additional Insights.

While the prior Appellate Division decision may not have been strictly preclusive on the resale issue, since it found that the question of the applicability of the resale exemption had not been properly preserved for appellate review, XO certainly faced an uphill battle in trying to convince the ALJ that the exclusion should apply, since it does not appear that there were any significant changes in the relevant facts nor any modifications to the law.

In addition, in further support of her conclusion that XO had failed to properly support its refund claim, the ALJ relied on New York case law stating that a purchase ostensibly for resale must be "purchased for one and only one purpose: resale." *Matter of Savemart Inc. v. State Tax Comm'n*, 105 A.D.2d 1001, 1002-03 (3d Dep't 1984). In the absence of any evidence in the record that the purchases had been treated by the parties as sales for resale, and the apparent lack of contemporaneous documentation, it was extremely difficult for XO to establish that its purchases related *solely* to its sales of services to its own customers.

INSIGHTS IN BRIEF

ALJ Grants QEZE Credit Claim for Payments in Lieu of Taxes

After remand from the New York State Tax Appeals Tribunal, an Administrative Law Judge has found that a company's claim for a qualified empire zone enterprise ("QEZE") credit should be granted, since the approximately $7 million payment in lieu of taxes ("PILOT") qualified as "eligible real property taxes" under Tax Law § 15. *Matter of Forest City Enterprises*, Inc., DTA No. 825157 (N.Y.S. Div. of Tax App., Feb. 23, 2017). In its earlier decision, the Tribunal had held that the company's allegation that it had an employment number of at least one—a necessary criteria for obtaining the credit under Tax Law §§ 14 and 15—was deemed admitted because of the Department's failure to timely serve and file its answer. The only remaining issue was whether the $7 million PILOT payment was eligible, and the ALJ rejected the Department's claim that the payment failed to qualify because it was not based upon the initial assessed value of the property, finding no such limitation was contained in the Tax Law, and determined that the payment qualified in all other respects.

NYC ALJ Upholds Limitation on "Mere Change in Form" Exemption Under Real Property Transfer Tax

A limited liability company sponsor of a Manhattan condominium development that conveyed a condominium unit to one of its members for $10 million of consideration was held to qualify only for a 25% "mere change in form" exemption from the New York City real property transfer tax, not a 50% exemption as was claimed. *Matter of Vestry Acquisition LLC*, TAT(H)15-14(RP) (N.Y.C. Tax App. Trib., Admin. Law Judge Div., Feb. 7, 2017). The New York City ALJ found that the grantee LLC member owned a 25% beneficial interest in the condominium unit before the conveyance and 100% after the conveyance, which resulted in a 75% change in beneficial interest subject to transfer tax.

NYC Issues Corporate Tax Guidance for Attributing Liabilities Under Capital Tax Base

For purposes of the alternative tax on capital under the New York City business corporation tax (effective for tax years beginning after 2014), different capital tax rates are imposed on the portion of a corporation's business capital representing insurance capital and utility capital. A new Finance Memorandum provides that the existing methodology for attributing liabilities between items of investment and business capital will be extended to the attribution of liabilities among the categories of business capital. "Tax on Capital: Calculating Liabilities Attributable to Categories of Business Capital," *Finance Memorandum* 17-2 (N.Y.C. Dep't of Fin., Mar. 2, 2017). In particular, in computing liabilities indirectly attributable to insurance and utility capital (which are taxed at a lower rate than other business capital), taxpayers should use the ratio of the average fair market value of insurance and utility capital to the average fair market value of all business capital, before subtracting liabilities attributable to those categories of capital.

Consideration in REIT Transfer Limited to Estimated Market Value of the Underlying Property

A New York City Administrative Law Judge has held that for purposes of applying the New York City real property transfer tax, the consideration in a REIT transfer is limited to the estimated market value of the underlying real property. *Matter of VCP One Park REIT, LLC*, TAT(H) 14-26 (RP) (N.Y.C. Tax App. Trib., Admin. Law Judge Div., Jan. 24, 2017). The ALJ held that estimated market value (as determined from the City's most recent real property tax assessment) was the exclusive measure of the consideration, both for determining whether the transfer was a qualified REIT transfer and for computing the transfer tax due on a qualified REIT transfer.

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