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NEW YORK'S HIGHEST COURT UPHOLDS SALES TAX ON INFORMATION SERVICES AND INTERPRETS TAX EXCLUSION IN FAVOR OF DEPARTMENT

By Irwin M. Slomka

Reversing a decision of the Appellate Division, a sharply divided New York Court of Appeals has upheld the assessment of sales tax on information services by interpreting the statutory exclusion for information services that are "personal or individual in nature" as inapplicable when the information is obtained from publicly available sources. Probably even more far-reaching is the Court's holding on how tax statutes should be interpreted, with the Court (by a narrow 4-3 majority) concluding that ambiguities in a statutory *exclusion* – like the "personal or individual" exclusion for taxable information services – must be interpreted like tax *exemption* statutes, in favor of the government, rather than the taxpayer. *Wegmans Food Mkts., Inc. v. Tax Appeals Trib.*, No. 56, 2019 NY Slip Op. 05184 (N.Y., June 27, 2019). The decision may be among the most significant tax decisions to be issued by the Court of Appeals in recent years.

Facts. Wegmans Food Markets, Inc. ("Wegmans"), a regional supermarket chain, contracted with RetailData, LLC to monitor its competitors' retail prices through "competitive price audits" of competitor supermarkets. RetailData collected pricing information on specified retail products by scanning prices directly from competitors' store shelves. It compiled the pricing information into confidential reports uniquely tailored for Wegmans, which Wegmans used for its own pricing strategies.

Following an audit, the Department determined that Wegmans had purchased a taxable information service, rejecting Wegmans' claim that the information was "personal or individual" in nature and therefore excludable from sales tax.

Sales tax is imposed on the furnishing of information services, but charges for information services are excludable if (i) personal or individual in nature to each client and (ii) the information cannot be substantially incorporated into reports furnished to other clients. Tax Law § 1105(c)(1). It was undisputed that Wegmans was purchasing an information service, with the sole question being whether the information was personal or individual to Wegmans.

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ATTORNEY ADVERTISING

The Tax Appeals Tribunal had held that the information services did not qualify for the exclusion because the information was obtained from competitors' supermarket shelves, which was widely accessible and not confidential. The Appellate Division reversed that decision, holding that the pricing information furnished to Wegmans did not derive from a widely accessible common source or database as that test had previously been applied by the New York courts. Since the personal or individual provision was a statutory exclusion, the Appellate Division held that it should be interpreted in favor of the taxpayer. The Court of Appeals granted the Tax Department's motion for leave to appeal.

[T]he court opined that . . . statutory *exclusions* should be interpreted "in favor of the taxing power," concluding that in interpreting tax statutes, there is no difference "between exemptions, exclusions and deductions."

Decision. In a far-reaching decision issued only three weeks after the oral argument, a majority of the court upheld as rational the Tribunal's decision that the pricing information furnished to Wegmans was not personal or individual in nature because it was collected from publicly available, widely accessible and non-confidential sources – *i.e.*, competitor supermarket shelves. According to the majority, the fact that the information was customized for Wegmans' needs did not change the outcome.

Furthermore, although it is not clear that the majority found the sales tax law to be ambiguous so as to raise questions of statutory interpretation, the court nonetheless opined that, under its decision in *Mobil Oil Corp. v. Finance Administrator of New York*, 58 N.Y. 2d 95 (1983), statutory *exclusions* should be interpreted "in favor of the taxing power," concluding that in interpreting tax statutes, there is no difference "between exemptions, exclusions and deductions." In so holding, the court rejected the argument that its long-standing decision in *W.R. Grace v. New York State Tax Commission*, 37 N.Y.2d 193 (1975), had clearly distinguished between tax exclusions and tax exemptions.

Concurring opinion. In a lengthy opinion concurring with the court's conclusion that the information being furnished was not "personal or individual in nature," the judge strongly criticized the majority for failing to acknowledge its own "landmark decision" in *Grace* and the considerable judicial precedent over several decades recognizing a distinction in interpreting tax exemptions and tax exclusions.

Dissent. Another judge, in a lengthy (and equally blunt) dissent, not only disagreed with the majority's "abolishing [of] the exclusions/exemptions distinction" under New York law ("I doubt our legislature intended to establish a rule, whether for exclusions or exemptions that taxpayers should lose whenever the language of a tax statute is unclear"), but also criticized the majority for failing to address what the "personal or individual" exclusion actually means. The dissent traced the legislative history for the exclusion and concluded that the "personal or individual" language was meant to modify the *information service* being provided, to make sure that the information, as here, was customized to the client's needs so as not to be in the nature of a commodity capable of being sold to others. According to the dissent, the majority (and the Tribunal) had erroneously looked to whether the *information itself* was personal or individual.

ADDITIONAL INSIGHTS

The Court of Appeals opinion, and its concurrence and dissent, offers an interesting (and, at times, quite entertaining) discourse among judges with strongly opposing views on the issues before the court. The majority's decision that information obtained from a publicly available and non-confidential source can never qualify for the personal or individual exclusion – which is consistent with the Department's current policy – can only be justified if the "personal or individual" phrase modifies the noun "information," and not the information service itself. The dissent provided ample authority for why it modifies the latter. The court's decision could significantly limit the availability of the exclusion, although if the primary function is the furnishing of a nontaxable service rather than information, it should not result in sales tax in the first place.

Yet it is the court's narrow 4-3 decision regarding the rules of statutory construction that will likely have the most far-reaching impact. The concurring opinion succinctly characterized the majority's holding on statutory construction as follows: "[T]he majority today declares a new rule: in New York, the taxpayer always loses." It must be acknowledged that there has been considerable confusion over the years regarding the distinction between the statutory interpretation of tax exemption and tax exclusion provisions, with courts having frequently used the terms interchangeably, something that the majority in *Wegmans* refused to even acknowledge. It is difficult to see why a statutory exclusion – for example, the sale for resale exclusion under the sales tax – should be interpreted more narrowly than a tax imposition statute. Both reflect the

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legislature's view of types of activities and transactions that are properly taxable. One interesting question posed by the concurring opinion is that if the statutory exclusion is as clear as the majority found, then it was unnecessary to apply rules of statutory interpretation in the first place, thus possibly rendering the majority's holding on such interpretation to be in the nature of nonbinding *dicta*.

ALJ REFUSES TO ALLOW DEDUCTION OF ROYALTIES RECEIVED FROM FOREIGN NONTAXPAYER AFFILIATES

By Hollis L. Hyans

A New York State Administrative Law Judge has upheld the Department of Taxation and Finance's denial of a deduction for royalties received from foreign affiliates, claimed under a former provision of the Tax Law that allowed royalties to be deducted unless the recipient would not be required to add them back to income. *Matter of Walt Disney Co. & Consolidated Subsidiaries*, DTA No. 828304 (N.Y.S. Div. of Tax App., May 30, 2019). The ALJ disallowed the deduction because the foreign affiliate royalty payers were not New York taxpayers, and rejected the argument that the statute on its face contained no requirement that the royalty payers had to be New York taxpayers.

Facts. Petitioner, The Walt Disney Company and Consolidated Subsidiaries ("Disney"), filed combined New York State corporation franchise tax returns for the 2008 through 2010 fiscal years in issue. During these years, it licensed intellectual property to its "alien" (non-U.S.) affiliates, pursuant to licensing agreements granting the alien affiliates the right to exploit various Disney characters, copyrights, motion pictures and other intellectual property in specified non-U.S. markets. The licensing agreements generally covered three categories: one for motion picture or television programming; another for consumer products or merchandising; and a third for operating a theme park. There was also an "other" category, which covered the right to operate a Disney-themed cruise line. The foreign affiliates paid for the right to access, promote and exploit the Disney characters, movies and other intellectual property, and for the rights to advertise, promote, produce and license products incorporating Disney intellectual property, with payment generally based on a percentage of gross revenues with certain modifications. The alien affiliates were all organized under the laws of foreign countries and were not includable in Disney's New York State combined return.

On its amended return for the 2008 fiscal year, and on its original returns for the 2009–2010 fiscal years, Disney deducted from its New York entire net income royalty amounts ranging from approximately $1.5 billion to $2.1 billion, which it described as "a deduction from the combined entire net income base for foreign royalty income under N.Y. Tax Law § 208(9)(o)(3)."

On audit, the Department asked for support and statutory authority for the deducted amounts. Disney responded with supporting information, and the audit file did not state that Disney failed to adequately substantiate the deductions or that the amounts claimed were not in fact royalties. The auditor denied the deductions solely on the ground that no deduction was permitted under Tax Law former § 208(9)(o)(3) when the alien affiliates were not New York taxpayers.

Law. During the audit years, Tax Law former § 208(9)(o)(3) provided that a taxpayer could deduct from its taxable income royalty payments received from a "related member" during the taxable year, "unless such royalty payments would not be required to be added back" under the expense disallowance provisions or other similar provisions of the Tax Law. Royalty payments were not required to be added back under the statute only if covered by a specific statutory exception, none of which was argued to apply here. A "related member" was defined in Tax Law former § 208(9)(o)(1)(A) to include certain entities "whether such person, corporation or entity is a taxpayer or not."

The disagreement between the parties concerned whether Disney was entitled to deduct the payments from the nontaxpayer alien affiliates. There was no dispute that all the alien affiliates were "related members" under the statutory definition.

Hearing. Disney filed a petition challenging the denial of the deduction, and a hearing was held. In the Department's answer to the petition, and in its counsel's opening statement at the hearing, the Department, in addition to denying the deductibility under Tax Law former § 208(9)(o)(3), also argued that the majority of the payments Disney was seeking to deduct did not constitute "royalties" as defined in the State. Disney argued that all the amounts claimed as royalties came directly from Disney's accounting system, were treated as royalties for financial reporting purposes and reflected payments for the licensing of Disney's intangible property.

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At the hearing, the Department attorney who oversaw income tax legislation and guidance during the audit period testified that Tax Law former § 208(9)(o)(3) "'does not say anything about' the royalty payer having to be a New York taxpayer." The audit supervisor similarly testified that Tax Law former § 208(9)(o)(1)(A) stated that the royalty payer did not have to be a New York taxpayer.

The ALJ focused . . . on what he determined to be the statutory purpose, to address "a common tax avoidance strategy . . ." and found that deducting royalty income from Disney's entire net income did not advance this legislative purpose.

Decision. The ALJ upheld the denial of Disney's royalty deductions. He dealt first with the Department's argument that Disney had not met its burden of proving that the payments it received from the alien affiliates were royalties. Although Disney argued that the issue was never raised on audit or as a basis for the notice of deficiency, the ALJ found that the Department may assert an alternative basis for the deficiency as long as the petitioner is given notice and an opportunity to be heard, and that the answer and opening statement clearly raised the issue.

After reviewing the evidence, the ALJ determined that the payments were indeed royalties, finding that they were made in connection with the licensing of intangible assets, in that the agreements granted the alien affiliates the right, in return for royalty payments, to exploit the Disney characters, copyrights, trade names and other intellectual property rights. The ALJ also noted that the auditors had been satisfied that the payments were royalties, and – despite allowing the issue to be raised – stated that the Department was seeking "to put petitioner at a disadvantage to prove something during the formal hearing process that should have been explored at the audit level."

However, the ALJ rejected Disney's argument that the statute permitted the deduction. Disney argued that nothing in Tax Law former § 208(9)(o)(3) required the "related members" making the royalty payments to be taxpayers for the phrase "unless such royalty payments would not be required to be added back" to apply; that Tax Law former § 208(9)(o)(2) expressly included as "related members" corporations whether or not they were taxpayers, indicating that the Legislature intended the royalty deduction to apply regardless of whether the payer was a taxpayer; and that the royalty payments would not meet any of the permitted exceptions to the addback requirement. The ALJ focused instead on what he determined to be the statutory purpose, to address "a common tax avoidance strategy whereby a corporation transferred its intangible assets … to a related corporation and paid a royalty for the use of those intangible assets thereby reducing its taxable earnings in New York," and found that deducting royalty income from Disney's entire net income did not advance this legislative purpose. The ALJ also concluded that Disney's interpretation of the statute "effectively adds words that are not present (*i.e.*, *if the payer were a New York taxpayer*)," and that Disney's arguments overlook that the foreign affiliates' payments "would not be required to be added back to federal taxable income because the foreign affiliates were not New York taxpayers."

Disney also argued that its position is supported by the 2013 amendments to the statute, which removed the royalty income deduction provision among other changes, with the Memorandum in Support noting as the reason for the change that the statute had been interpreted by taxpayers in ways "inconsistent" with "the Department's interpretation," including regarding "the scope of the 'related members' definition." The ALJ rejected this argument too, finding the amendment instead bolstered the Department's position that Tax Law former § 208(9)(o)(3) required the royalty payer to be a New York taxpayer.

Finally, the ALJ also rejected Disney's argument that providing a royalty income deduction only if the payer is a New York taxpayer violated the anti-discrimination provision of the Commerce Clause, holding that the Division of Tax Appeals lacks the authority to find a statute unconstitutional on its face, and that while the Division can find a statute unconstitutional as applied, here Disney had not met its burden of showing a constitutional violation, because "[t]he transaction is subject to tax . . . only once regardless of whether the payer is a New York taxpayer."

ADDITIONAL INSIGHTS

The language in Tax Law former § 208(9)(o)(3) and the definition of "related member" in Tax Law former § 208(9)(o)(2) – which applied for years prior to 2013 – have long been recognized to create an opportunity for the argument that Disney raised in this case, since the statutory definition of "related member" quite clearly includes nontaxpayers, nothing in Tax Law former § 208(9)(o)(3) requires the royalty

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payer to be a taxpayer, and in many situations none of the exceptions to the addback would apply.

There are reportedly other cases pending before different ALJs raising similar claims, and there may soon be additional decisions on this issue, and possible appeals, in which the Department's and the taxpayers' positions may be more fully explored, so this determination may not be the final word on the issue.

GUIDANCE ISSUED ON ATTRIBUTION OF INTEREST FOR CORPORATIONS WITH IRC § 163(j) INTEREST LIMITATIONS

By Kara M. Kraman

The New York State Department of Taxation and Finance has issued a Technical Memorandum under the Article 9-A corporate franchise tax providing a method for attributing interest expense deductions for corporations impacted by the federal interest deduction limitations under IRC § 163(j), and for corporations with deemed repatriated income under IRC § 965(a). *Technical Memorandum*, "Attribution of Interest Deductions for Article 9-A Taxpayers with Repatriated Income or IRC § 163(j) Limitations," TSB-M-19(2)C, (2) I (N.Y.S. Dep't of Taxation & Fin., June 12, 2019).

Under Article 9-A, since a corporation is not taxed on its investment income, other exempt income (including exempt CFC income), and exempt unitary corporation dividends, a corporation's interest expenses attributable to those categories of income are disallowed. The Memorandum provides important guidance on this frequently troublesome area of New York corporate tax law, an area made more complex by the interplay of the interest attribution rules and IRC § 163(j), which generally limits a taxpayer's federal deduction for net business interest to 30% of its adjusted taxable income for the year.

IRC § 163(j) Interest Expense Limitation

For taxpayers impacted by the IRC § 163(j) interest expense limitation, the Memorandum provides a method for determining the interest expense attribution amounts after application of the § 163(j) limitation. First, it requires that a corporation calculate the amount of interest expense subject to attribution prior to the § 163(j) limitation and the portion of that amount that is directly attributable to each category of income under Article 9-A ("directly traceable amounts"). It then requires that the corporation calculate the total amount of interest expense subject to attribution after the § 163(j) limitation ("limited interest amount").

The Memorandum explains how the limited interest amount should be attributed to each category of income. If the directly traceable amounts (pre-application of the § 163(j) limitation) are greater than the limited interest amount (post-application of the § 163(j) limitation), the directly traceable amounts must be recalculated for each category of income by multiplying the limited interest amount by a fraction for each income category, the numerator of which is the directly traceable amounts to that income category and the denominator of which is the pre-§ 163(j) limitation amounts traceable to all income categories. If the directly traceable amounts are less than (or equal to) the limited interest amount, then no adjustments must be made to the directly traceable amounts, and the excess interest expense is indirectly attributed to each category of income by formula.

IRC § 163(j) Carryforward Amounts

The Memorandum provides that IRC § 163(j) interest carryforwards may not be directly traced. Instead, those amounts are indirectly attributed by formula.

IRC § 965(a) Repatriation Amounts

The Memorandum also provides the methodology for attributing interest expenses to deemed repatriation amounts under IRC § 965(a). If the CFC stock generating the repatriated income constitutes business capital to the taxpayer, no modification to the existing interest attribution method is needed. However, if the CFC stock constitutes investment capital to the taxpayer, the Memorandum provides for a modified method of calculating the attributable interest expenses.

ADDITIONAL INSIGHTS

The new guidance is important in that it reconciles directly attributed interest expenses (which are pre-limitation) with the interest expenses actually deducted (which are post-limitation). The IRC § 163(j) interest expense attribution methodology does not apply to taxpayers that have made the 40% interest expense "safe harbor" election, an annual election that generally allows a corporation to add back 40% of its investment income, exempt CFC income, and exempt unitary dividends in lieu of being subject to direct and indirect interest expense attribution.

TRIBUNAL UPHOLDS SALES TAX ON CHARGES FOR HAUNTED HOUSE ATTRACTIONS

By Hollis L. Hyans

The New York State Tax Appeals Tribunal has affirmed the decision of an Administrative Law Judge that admission charges to walk through haunted house-type attractions, featuring actors and special effects equipment, were subject to sales tax as charges for access to a "place of amusement" and were not nontaxable charges for the use of "amusement devices." *Matter of Ronald J. Doherty, Jr. d/b/a Eerie Productions*, DTA No. 826909 (N.Y.S. Tax App. Trib., May 29, 2019).

Facts and Background. Petitioner Ronald Doherty, Jr., doing business as Eerie Productions, operates a haunted attraction called "Frightworld" in Buffalo, New York. Frightworld contains a common area, which patrons may enter for free, and five separately themed haunted house attractions, for which patrons were required to pay a fee of $23 to enter during the 2010 through 2013 period in issue. Each attraction was constructed of theatrical flats enclosed by temporary walls, and each contained props (*e.g.*, a dentist's drill, a chainsaw, a CO2 gun) and electric and pneumatic systems that operated the special effects and animation (*e.g.*, animated snakes, a laser hallway designed to look like water with an airbag effect that squeezed around patrons' legs, a gravity tilt bridge inside a cave, vortex tunnels and simulated ceiling drops). Actors were hired to "scare forward" the patrons to prompt them to move through each of the five attractions, and employee handbooks stated such descriptions as patrons "want to see real live vampires and graveyard ghouls … [and] be startled by killer clowns" and that "Frightworld is a tightly choreographed show."

In a previous audit, sales tax on the charges to enter the five attractions had been asserted by the Department, along with additional tax on expense purchases, and the audit was resolved without any agreement regarding later years. During the course of that audit, Mr. Doherty requested and received *Advisory Opinion*, TSB-A-10(11)S, dated March 26, 2010 (the "2010 Advisory Opinion"), concluding that sales tax was due on the admission charges. During the audit for the period in issue, Mr. Doherty requested another Advisory Opinion, contending that the facts submitted in connection with the 2010 Advisory Opinion were inaccurate.

A second Advisory Opinion, TSB-A-14(29)S, was issued on August 21, 2014, again concluding that the admission charges were taxable.

ALJ Determination. An ALJ found that the admission charges were taxable, distinguishing the haunted attractions from amusement devices such as automatic phonographs and bowling games that have been held not to constitute places of amusement. The ALJ also refused to abate penalties, noting that the petitioner had requested and received the 2010 Advisory Opinion advising that the Department believed sales tax was due, yet did not begin collecting tax.

Tribunal Decision. The Tribunal affirmed the ALJ's decision. Mr. Doherty argued that the statute was ambiguous, citing *Fairland Amusements, Inc. v. State Tax Commission*, 66 N.Y.2d 932 (1985), in which the Court of Appeals, reversing the Appellate Division, found the statute to be ambiguous and held that tickets for individual carnival rides were not taxable. The Tribunal rejected that argument, holding that any ambiguity relevant to this case had in fact been resolved by *Fairland*, and that the only question was whether the charges were for entering a location where amusement facilities are found, or instead were charges to use amusement devices.

While acknowledging that rides such as Ferris wheels, merry-go-rounds and coin-operated games have been held by the New York courts to be nontaxable amusement devices and not taxable places of amusement, the Tribunal distinguished the haunted attractions, finding that patrons were paying to enter haunted attractions and be entertained by actors hired to put on a show, and thus were much more like the "peep-show" booths that had been held by the Court of Appeals to be *places of amusement* and not *amusement devices* in *1605 Book Center, Inc. v. Tax Appeals Trib.*, 83 N.Y.2d 240 (1994). The Tribunal also decidedly rejected Mr. Doherty's argument that the attractions were designed to move patrons through the attraction quickly, saying "it makes no sense to claim that patrons enter an attraction just to be pushed out of it." The Tribunal also sustained the imposition of penalties for the reasons stated by the ALJ.

ADDITIONAL INSIGHTS

The issue of whether a charge is for a taxable entry to a "place of amusement" or for a nontaxable amusement device such as a carnival ride or coin-operated game has recurred over the years, and has resulted in decisions that could arguably support the finding of nontaxability, depending upon the facts of a given case and how close the attraction actually is to the types of attractions found to be nontaxable, such as the rides in *Fairland*

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Amusements or the automatic phonographs and bowling games found nontaxable in *Bathrick Enterprises, Inc. v. Murphy*, 27 A.D.2d 215 (3d Dep't, 1967), *aff'd*, 23 N.Y.2d 664 (1968). Here, however, both the ALJ and the Tribunal found that patrons were paying not for a ride – all patrons walked through the attractions themselves – or for use of a device, but rather for the experience of being scared and entertained by live actors employing props and animated devices.

In addition, it is always important to remember when requesting an Advisory Opinion that an adverse opinion may be issued, and that while a taxpayer is always free to challenge that opinion – which is, after all, nothing but the Department's position – that disregard can carry the additional burden of penalties if the Department's position is later upheld.

INSIGHTS IN BRIEF

NEW TAX LEGISLATION ENACTED AT END OF LEGISLATIVE SESSION

On June 24, 2019, New York Governor Cuomo signed into law tax legislation that: (i) allows the exclusion of 95% of a corporation's gross global intangible low-taxed income (GILTI) from its New York State corporate income tax base, effective for taxable years beginning after 2018 (Part I); and (ii) increases the threshold for businesses with no physical presence in New York State to register as sales tax vendors, and to collect and remit sales tax, from more than $300,000 in sales of tangible personal property delivered in the State (in the immediately preceding four sales tax quarters) to more than $500,000 in such sales. The increased sales tax threshold also applies to the new marketplace provider sales tax collection provisions. (Part J.) S. 6615.

FEDERAL APPELLATE COURT UPHOLDS DISMISSAL OF CLAIMED CLASS ACTION FOR SALES TAX OVERCHARGES

The U.S. Court of Appeals, Second Circuit, has affirmed the dismissal of a putative class action brought in federal court against Costco for alleged sales tax overcharges involving purchases made using manufacturers' coupons. *Guterman v. Costco Wholesale Corp.*, No. 18-3184 (2d Cir., June 12, 2019). The Second Circuit held that the law and precedent was clear that Tax Law § 1139 – which provides that a taxpayer may seek a refund from the Tax Department of sales tax that has been "erroneously, illegally or unconstitutionally" charged or collected–was the exclusive remedy for such claims, and there was no dispute that the plaintiff never filed an application under § 1139 for his claims against Costco.

EXCLUSION FROM SALES TAX FOR ADMISSION CHARGES TO PARTICIPATORY SPORTING ACTIVITIES HELD INAPPLICABLE TO NYC SALES TAX

An Administrative Law Judge upheld the denial of sales tax refund claims made by the operator of indoor cycling class studios, holding that the claimed sales tax exclusion for charges for admission to facilities for participatory sporting activities does not apply to the New York City special sales tax on charges for "health salons, gymnasiums … and similar establishments." *Matter of SoulCycle, Inc.*, DTA Nos. 827698 & 827699 (N.Y.S. Div. of Tax App., May 23, 2019). The ALJ held that the exclusion, which does apply for New York State sales tax purposes but was specifically eliminated when the New York City sales tax law was amended in 2008, does not apply to the separate New York City special sales tax under Administrative Code § 11-2002.

U.S. SUPREME COURT REVIEW REQUESTED OF NEW YORK'S DENIAL OF TAX CREDITS

New York State nondomiciliary individuals who were denied credits against their New York personal income taxes for taxes paid to another state on intangible investment income have asked the U.S. Supreme Court to take the cases and rule that New York's approach violates the dormant Commerce Clause. In petitions filed on June 24, 2019, the taxpayers asked the Court to review the New York Court of Appeals' dismissal of their respective appeals, both of which contended that it was unconstitutional for New York to deny a credit for taxes paid to Connecticut on the same income. *Edelman v. N.Y.S. Dep't of Taxation & Fin.*, No. 18-1570 (U.S., petition for cert. filed June 24, 2019); *Chamberlain v. N.Y.S. Dep't of Taxation & Fin.*, No. 18-1569 (U.S., petition for cert. filed June 24, 2019). As discussed in the May 2019 issue of *New York Tax Insights*, the Court of Appeals declined to review the two Appellate Division decisions, finding that "no substantial constitutional question [was] directly involved." The taxpayers are arguing that "subjecting taxpayers domiciled in other States who travel frequently to and maintain homes in New York to double taxation of intangible income" discriminates against interstate commerce and is "plainly inconsistent" with the Supreme Court's decision in *Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015).

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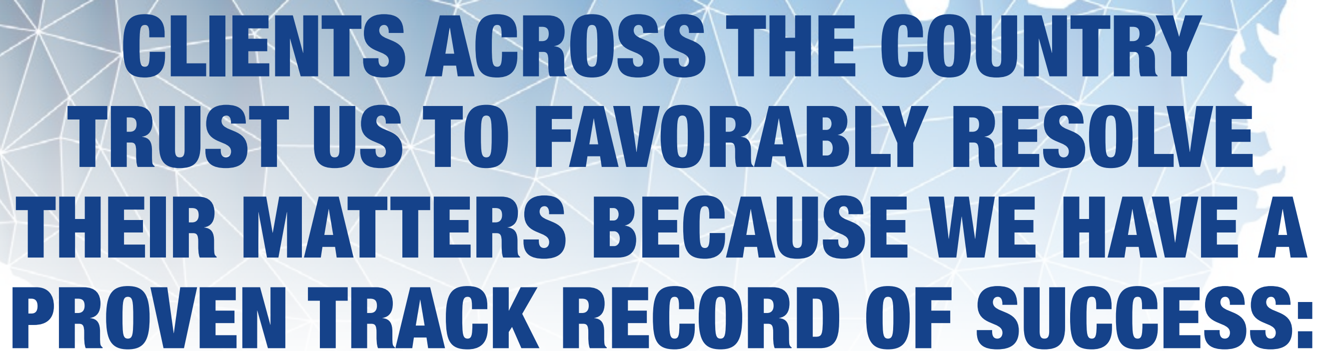

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AE Outfitters Retail Co. v. Indiana (IN Tax Ct. 2011)

Agilent Technologies, Inc. v. Colorado (CO Sup. Ct. 2019)

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