CASE LAW UPDATES PROGRAM
NATIONAL CONFERENCE OF STATE TAX JUDGES
OCTOBER 11, 2018

A. EXEMPTIONS

Great Bay Kids Company, Inc. v. Town of Exeter, BTLA Docket No.: 28562-16EX (June 15, 2018), rehearing denied (August 15, 2018).

Is a nonprofit organization offering early childhood education to kids from six months through five years of age employing qualified teachers and applying a systematic course of instruction entitled to a full "education" property tax exemption under New Hampshire law? The board's answer in this very recent decision (still subject to a possible supreme court appeal) was "yes."

The New Hampshire education exemption statute (RSA 72:23, IV) provides a full property tax exemption to non-profit "schools, seminaries of learning, colleges, academies and universities." The statute does not define "school"; the Town decided to deny the exemption, noting compulsory education does not begin until the age of six in New Hampshire; therefore, the Town argued, a preschool offering programs to younger children should not qualify for a school" exemption under this statute. (The Town initially denied the exemption and then, after the Taxpayer filed its appeal with the board, decided to grant a partial (20%) exemption because approximately 20% of the children were old enough to attend public school.)

The Taxpayer presented a substantial amount of evidence to support its claim for a full exemption, including two expert witnesses (one a tenured professor of education). The largely unrefuted testimony and documents persuaded the board the primary purpose and activities of the preschool on the property were to provide early childhood education, not, as the town argued, simply custodial or day care. The board's reasoning for granting the appeal for a full exemption included the following:

> The Taxpayer correctly noted education does not start at the age a child can be enrolled in a public kindergarten program and does not end at the ages of 16, 17 or 18, when compulsory education is no longer required in various states. Clearly, education continues to occur for individuals beyond these ages (whether in public or private, secular or religious institutions), as well as for individuals enrolled in "adult education" programs. As a result, institutions providing education to older populations can also qualify for an exemption provided they meet the statutory requirements.
>
> Similarly, schools providing education to children below kindergarten age should not automatically be excluded from qualification for an education exemption. Instead of a bright-line test based entirely on age, the focus should be on whether structured, systematic education programs commensurate with the learning abilities of the children are being provided rather than merely "child day care." In this regard, a school focusing on the education of children with special needs

> would not be disqualified from an education exemption simply because most other schools offer a different curriculum.
>
> In further response to the Town's arguments, the Taxpayer correctly pointed out both public and private schools for older children provide a large amount of custodial and other care, in addition to an education curriculum. Such programs include monitoring of students' health and safety and providing for various extra-curricular activities, including sports, art, music, drama and other programs, not to mention nutrition (free or subsidized breakfasts and lunches) as well as supervision by teachers and other staff of children during lunch, recess on the school's playground, after school and during entry and exit from the school (busing and private vehicles).

Note: the board's additional research uncovered a split of authority across the states, dependent both upon the wording of the exemption statutes and the facts presented. Some jurisdictions, like Wisconsin and New York, have granted property tax exemptions to preschools. Others, like Michigan and Virginia, have not. (The Michigan preschool denied an education exemption was, on remand, found to qualify for a charitable exemption.)

<u>Platte River Whooping Crane Maintenance Trust, Inc., v. Hall County Board of Equalization</u>, 298 Neb. 970, 906 N.W.2d 646 (2018).

The Trust, a 501(c)(3) charitable organization, purchased more than 800 acres of irrigated agricultural land in central Nebraska in a location adjacent to the Platte River and where Sandhill Cranes congregate to rest and feed every year during their migration from Mexico to Canada. The Trust converted the land to native grasses and placed bison on many of the acres. The Trust also created walking trails for visitors and tourists traveling across Interstate 80 so that they could experience the native prairie and wildlife. The Trust filed an exemption application with the County Assessor, asserting that the land should be exempt from property taxation as a charitable organization. The County Board denied the exemption application. The Commission found that the Trust did not qualify as a charitable organization under Nebraska law, which had been limited to enterprises providing relief to the poor and distressed.

HELD: The Nebraska Supreme Court reversed the Tax Equalization & Review Commission, finding that the Crane Trust, a conservation group, was a charitable organization under Nebraska law, and that the Subject Property was used exclusively for charitable purposes, thus qualifying the property for an exemption from property tax.

<u>In re: Vanderbilt University Medical Center</u>, Tennessee State Board of Equalization Assessment Appeals Commission (Final Decision and Order, May 8, 2018)

Taxpayer is a 501(c)(3) non-profit educational, research and healthcare institution exempt from federal income tax. Taxpayer operates to provide medical training and medical services at various facilities. Some of the Taxpayer's medical training is delivered through a classroom component, while other aspects are delivered through live practice at one of its several medical services facilities.

Taxpayer has several different types of students who work and learn at its various locations where the number of hours and number of students are subject to change on a regular basis. Students who work and operate out of Taxpayer's facilities are not present 100% of the time. Taxpayer's facilities are staffed by both employees and students, and services are at times rendered without the presence of any students.

The County Assessor appealed the granting of exemption status by the Administrative Law Judge. The Commission found that the County Assessors failed to carry their burden to show that the Taxpayer should not receive a full exemption and that the subject property is used by the Taxpayer in its educational initiatives for the benefit of its students and researchers. Furthermore, the Commission held that although partial exemptions are granted, the County Assessors failed to show what percentage would be appropriate.

Brookdale Physicians' Dialysis Assoc., Inc. v. Department of Finance of the City of New York, 2018 Slip Op 31841 (U) Supreme Court, New York County (August 2, 2018).

Brookdale Dialysis, a for profit corporation, leased space in a building (Property) owned by Schulman Inst., a not-for-profit corporation which provides funds for charitable health care purposes through two not-for-profit charitable corporations, Nursing Inst. and The Brookdale Hospital. Both are located one block from the Property, and are affiliated with each other through the Brookdale Health System.

Although Brookdale Dialysis is operated for profit, it services 80% of the patients from Brookdale Hospital, its physicians work at Brookdale Hospital and the Nursing Inst., all of its nurses, technicians and staff are Brookdale Hospital staff, and Brookdale Hospital relies on Brookdale Dialysis' machines to treat 30,000 of its patients, 22,000 of which are treated at the Property.

The City denied an exemption for the Property. Although the owner Schulman Inst. was a not-for-profit corporation organized for exempt purposes, the City argued that the lessee Brookdale Dialysis was neither organized nor operated the Property for exempt purposes, as required by RPTL §420-a[1][a]. The City further argued that the Schulman Inst. profited on its lease to Brookdale Dialysis, which paid all "utility, repair and maintenance" on the property, prohibited by RPTL §420-a[1][b].

The court ruled against the City, concluding that the operations of Brookdale Dialysis, Brookdale Hospital and Schulman Inst. were so enmeshed that the Property was used for an exempt purpose. The court disregarded the profit earned on the lease, relying on case law holding that so long as property is used for charitable purposes, it will not lose its exemption merely because the owner earns a profit on a market rent.

B. VALUATION CASES –PERSONAL PROPERTY TAX

Kohl's Department Stores, Inc. v. Town of Rocky Hill, Connecticut Superior Court (August 7, 2018)

This case involves the taxation of personal property consisting of furniture, fixtures and equipment (FF&E) owned by Kohl's, a large department store in Connecticut.

Tangible commercial personal property is taxable annually as compared to real estate which, in Connecticut, is taxable every five years. A statute in Connecticut requires the owner of the personal property to file a declaration annually with the assessor listing each item of personal property, its original cost and a depreciation percentage listed in the statute. The statute contains a depreciation schedule running from 95% down to 30%.

In the Kohl's case, the assessor relied on the initial declaration filed by Kohl's and adopted the original cost less the statutory depreciation to arrive at the assessed value of the item.

Kohl's engaged an appraisal company to do a revaluation of the depreciation of each item of the FF&E of Kohl's for each of the four years contested by Kohl's. Kohl's submitted the new revaluation of the depreciation schedule to the assessor who refused to recognize the new valuations of the FF&E which was based upon the appraiser's study of depreciation factors.

The town did not engage its own appraiser, but instead relied on challenging the methods used by Kohl's appraiser during a cross examination of the appraiser at the time of trial. The court, after considering the credibility of the appraiser's testimony, rendered a decision in favor of Kohl's.

<u>Storey v. Crook County Assessor, TC-MD 170316G, WL 2219773 (Or Tax M Div May 15, 2018</u>

In this personal property valuation appeal, taxpayers challenged roll value of individually owned rental cabins' furnishings at the Brasada Ranch resort in central Oregon. The county had set the roll by depreciating the furnishings' original purchase price by 10 percent each year, a technique not clearly derived from market evidence. Taxpayers argued the individual furnishings should be valued separately, as items of "used furniture," and provided listing data showing that individual items of used furniture sell for a small fraction of their original value. The court valued the furnishings collectively, holding their highest and best use was as assembled in a rental cabin at Brasada Ranch. After surveying the meager evidence, the court found the best value indicator was an unlisted sale of furnishings between cabin owners.

<u>In the matter of the Appeals of Troy D. Clements, Campbell County Assessor</u>, Doc. Nos. 2017-48, 49 (Wyo. St. Bd. of Equalization, Aug. 8, 2018)
<u>In the Matter of the Appeal of Carbon Creek Energy, LLC, and Powder River Midstream, LLC</u>, Doc. No. 2017-50 (Wyo. St. Bd. of Equalization, Aug. 8, 2018)

<u>Facts</u>: In 2015, taxpayers purchased all coal bed methane (CBM) interests and production equipment owned by two major oil and gas companies operating throughout three counties in Wyoming's Powder River Basin. Taxpayers separately purchased the "gathering" system assets, basically the pipelines, compressors, dehydrators, etc. from a third company. Taxpayers argued that their arm's length purchases of the assets, specifically the prices paid for the production and gathering equipment, must set the fair market value of the equipment for tax purposes under the Department of Revenue's prescribed cost valuation method. *See Thunder Basin Coal Co. v. Campbell Cty.*, 2006 WY 44, 132 P.3d 801 (Wyo. 2006). If correct, the equipment's taxable values dropped considerably from the previous years. The Campbell County Assessor and

Johnson County Assessor disagreed and instead relied on the equipment's original retail purchase prices, trended and depreciated to the present day under the cost valuation method.

The Campbell County Board of Equalization upheld application of the cost valuation method, rejected taxpayers' demand that the 2015 transactional prices set the value, but ordered the Assessor to adjust for the severe downturn in the natural gas market in 2015. Campbell County's Assessor appealed. The Johnson County Board of Equalization upheld the Assessor's valuation in all respects. The taxpayers appealed.

Issues: Although these cases presented numerous issues on appeal, two are noteworthy:
1) Given two separate appeals in neighboring counties concerning the same property acquisitions, did constitutional uniform taxation principles compel either county board of equalization to follow the ruling issued by the other county board? Similarly, was the State Board of Equalization, in reviewing appeals from each county board, required to apply the earlier issued Campbell County Board's ruling to the other?
2) Was either assessor, under the cost valuation method, required to rely upon a recent arm's length purchase price of the equipment to value the equipment at issue?

Analysis and Conclusion

In response to the uniform taxation argument, the State Board held that uniform taxation did not render one ruling dispositive or even precedential. The taxpayers at each trial produced similar evidence, but the county assessors based their valuations on different considerations: one found the transactions to be arm's length, while the other did not. The county boards of equalization reached similar conclusions, but for different reasons. Finally, non-uniform taxation in Wyoming requires a showing of "systematic, arbitrary, or intentional undervaluation of property, as compared to the valuation of other property in the same class[.]" *Weaver v. State Bd. of Equalization*, 511 P.2d 97, 98 (Wyo. 1973). No intentional or systematic non-uniformity was demonstrated. The State Board rejected taxpayers' argument that one Board's determination should apply to the similar appeal notwithstanding the like property, claims and arguments from the taxpayers.

As to whether an arm's length sale of property is compelling or dispositive evidence of that property's value, the State Board determined that assessors must at least consider a timely arm's length sale of equipment when valuing that equipment, but that assessors have broad discretion to reject application of a recent sale of the property valued. For part of the property at issue, the Johnson County Assessor properly rejected the taxpayer's post-hoc allocated sales prices, which taxpayers inadequately explained. When valuing the gathering system equipment, however, the Johnson County Assessor improperly rejected the admitted arm's length prices paid and was required to use the prices as a "data point" in applying the trended cost valuation method under the Department of Revenue's rules, or at least justify her reason for rejecting.

C. VALUATION CASES – PROPERTY TAX

395 Bangor Brewer, LLC v. City of Brewer, Maine State Board of Property Tax Review, February 15, 2018

Petitioner claims that the lots in its five-lot parcel in an industrial park were overvalued for tax year 2016. The assessed value of the five lots for the 2016 tax year was $3,481,800. The Petitioner asserts that the value of the five lots for the 2016 tax year was $1,890,000. The focus of the appeal is centered on Lot 13, a mixed-use building. The Board determined that Petitioner presented credible evidence that the City of Brewer had substantially overvalued the subject property and that the fair market value of the five lots for the 2016 tax year was $1,890,000.

Menard, Inc. v. City of Escanaba, 315 Mich. App. 512 (2016)

Taxpayer filed a petition to appeal the ad valorem property tax assessments for tax years 2012, 2013 and 2014 for a big box store. The parties agree that the highest and best use of the property is as an "owner-occupied freestanding retail building." The Tribunal determined that the sales-comparison approach as set forth by Taxpayer "was persuasive and was meaningful to an independent determination of market value." The matter was reversed and remanded to the Tribunal with specific instructions regarding additional evidence and testimony.

CVS Corp. (#6998-02) v. Monroe Cnty. Assessor, 83 N.E.3d 1281 (Ind. Tax Ct. 2017).

The Court affirmed the Indiana Board's decision noting that the Board had authority to take official notice of the records of prior similar proceedings before it, but that it was not required to do so. The Indiana Board's conclusion that TP's income approach was not persuasive in this case (although it was found dispositive in similar prior cases) was not arbitrary or capricious because **each tax year stands alone** and the TP failed to adequately explain its analysis of the evidence.

CVS Corp. (#6998-02) v. Monroe Cnty. Assessor, 83 N.E.3d 1286 (Ind. Tax Ct. 2017).

The Court affirmed the Indiana Board's decision upholding county's assessments of real property for the 2011 through 2013 tax years. **The parties agreed to an expedited review procedure before the Indiana Board based on stipulated evidence** consisting of the property record card, the 14th edition of "The Appraisal of Real Estate," the 2014-2015 Uniform Standards of Professional Appraisal Practice ("USPAP"), the parties' USPAP-compliant appraisal reports from certified appraisers, a report from the Assessor reviewing CVS's appraisal report, and the Indiana Board's records of 2 previous cases involving 2 Monroe County CVS stores. CVS argued that **1)** the determination is contrary to law because the Indiana Board affirmed the assessments instead of determining that the property's 2011 value must revert to its 2010 assessed value under Indiana statutory law, **2)** that the final determination is not supported by substantial evidence because the Indiana Board did not select either parties' appraisals' value determination, and **3)** that the Indiana Board abused its discretion/was arbitrary and capricious because it found the assessor's appraisal more persuasive contrary to the result in 2 previous Tax Court decisions involving similar properties, similar facts, similar arguments, and the same attorneys and appraisers. The Court held that the reversion remedy only applied when the burden shifting statute was implicated, that there was substantial evidence that the Tax Court will not reweigh, and the Board did not abuse its discretion when it discounted the reliability of the TP's appraisal report because it had scant explanation and made mere conclusory statements.

<u>Parikh v. Livingston Township,</u> Tax Court of New Jersey (January 25, 2018)

In this case, Taxpayers undertook a residential addition and alterations pursuant to a township building permit obtained February 5, 2015. A certificate of occupancy dated August 7, 2015 issued for the completed work was received by the assessor November 4, 2015. In October 2016, the assessor levied two added assessments on the property, representing value added for full tax year 2016, and for the final four months of tax year 2015. The county tax board affirmed the assessments and taxpayers appealed the judgment to the tax court. The added-omitted property tax assessment scheme under New Jersey law (N.J.S.A. 54:4-63.2 and 63.3) permits the local taxing district to tax value added to the property by the taxpayer through work completed after the October 1 of the pre-tax year, the valuation date established by New Jersey law (N.J.S.A. 54:4-23.) Here the work was completed prior to the October 1 pre-tax year valuation date. The tax court upheld the 2015 partial levy finding it constituted a valid omitted added assessment based on the date the alterations were completed. However, the assessor's November 2015 discovery of alterations to the property, completed before October 1, 2015, failed to satisfy the plain language of statute (N.J.S.A. 54:4-63.2) necessary to sustain the full year 2016 added assessment. Thus the added assessment statute was not an option available to the assessor to capture the added value in tax year 2016. In order to capture the added value for the full 2016 tax year, the assessor had only two available options. He was required to include the value in setting the 2016 assessment as of October 1, 2015; or, file an appeal of the 2016 assessment through the normal appeal process.

<u>Maryland</u>

A man had a forest that was 136 acres. In Maryland as I imagine in many states, there is a special agriculture assessment, much lower than market value. In this last assessment cycle he was given the agriculture rate for 135 acres and the residential rate for one acre that provided space for a trailer to house him during logging. He appealed and claimed the entire 136 acres should be assessed at the agriculture rate.

<u>Deschutes County Assessor v. Leszar,</u> TC-MD 170099N (Jan. 9, 2018)

The county assessor appealed from the local board of property tax appeals, which had reduced the real market value from the tax and assessment roll to the taxpayers' requested value. The improvement was new property so "exception value" was at issue. The court considered both the cost approach and the sales comparison approach, ultimately agreeing with the county assessor that more weight should be placed on the sales comparison approach in an active market where properties sell above cost. The taxpayers raised an issue under the state constitution of whether the subject property was valued uniformly with nearly identical neighboring properties. Oregon requires "relative uniformity," which is generally achieved through use of the real market value standard. Taxpayers must show "widespread and systematic nonuniformity" in order to establish a violation of the uniformity clauses. Here, the court found that the county assessor's distinction between two adjacent neighborhoods in the same resort community lacked any rational basis to support different market trends. However, the court declined to find that the subject property was singled out for disparate treatment, thus taxpayers failed to prove "widespread and systematic nonuniformity."

D. <u>INCOME TAX CASES</u>

<u>Camp v. Louisiana Department of Revenue</u>, BTA Docket No. 10,609 D (La. Bd. Tax App. 6/13/18).

The Taxpayers made a $50+ million sale of their medical food company to Nestle Health Sciences. This transaction was structured as a tax-free IRC 368 reorganization (took Nestle stock with the same basis). Louisiana has a personal income tax deduction for the net capital gains "arising from" the sale of a Louisiana domiciled business. These taxpayers sold a batch of Nestle stock a few years later and claimed the Net Capital Gains deduction. The Department argued that Nestle is not a Louisiana domiciled business so it could not apply. The Taxpayer argued that the entire gain "arose from" the earlier transaction. The Board held that the portion of gain attributed to post-sale Nestle stock appreciation was taxable, but that the portion of gain up to the value of the Nestle shares on the date of the original reorg transaction date would excluded form tax.

<u>Utah State Tax Commission v. See's Candies, Inc.,</u> 2018 UT 57 (October 5, 2018)

See's Candies, a Berkshire Hathaway Subsidiary, sold its intellectual property to another Berkshire Hathaway Subsidiary, Columbia Insurance Company in exchange for market price paid in shares of Columbia's stock. Thereafter, See's paid Columbia market rate royalties for use of the See's trade name. See's deducted these royalty payments from its taxable income. The Tax Commission held that under Subsection 59-7-113 the Tax Commission has broad authority to allocate the royalty income from Columbia and back to See's to more "clearly to reflect the income" of these corporations. See's appealed this decision to the district court which disagreed and determined that the conditions where it was "necessary" for the Tax Commission to apply Subsection 59-7-113 are ambiguous. To clarify this ambiguity, the district court sought guidance from the federal interpretation of the similarly worded IRC §482. Through an analysis of the application of IRC 482, the district court concluded that the application of 59-7-113 is limited to circumstances where "related companies enter into transactions that do not resemble what unrelated companies dealing at arm's length would agree to do." The district court held that because the transaction between See's and Columbia was conducted at reasonable market terms, 59-7-113 does not apply to allow the commission to allocate income between Columbia and See's. The commission appealed this decision to the Utah Supreme Court which affirmed the district court's decision.

<u>Capital One Auto Finance, Inc. v. Dept. of Rev.</u>, 363 Or 441 (2018)

Oregon is one of a few states still imposing two complementary net income taxes on corporations. The 1929 <u>corporation excise tax</u> ("CET") applies to a C corporation "doing business" in the state. The 1955 <u>corporation income tax</u> ("CIT"), applies to a C corporation with income from "sources within" Oregon and is a legacy of the long-since overturned opinion in *Spector Motor Service v. O'Connor*, 340 US 602 (1951), which limited a state's ability to a foreign corporation conducting interstate activities. Both taxes are traditional net income taxes, and the CIT statutes incorporate virtually all of the CET. The Oregon Supreme Court this year affirmed the Tax Court (Breithaupt, J.) in concluding that physical presence is not required for imposition of the corporation income tax.

The taxpayer concededly did business in Oregon selling automobile finance products, and it filed CET returns, but the taxpayer argued that the gross receipts of two banking affiliates based in Virginia could not be included in the numerator of the taxpayer's sales factor. (Oregon taxes the unitary business within a consolidated group, has single-factor apportionment based on sales, and at the time followed the *Joyce* rule allowing inclusion of receipts in the numerator only of an affiliate subject to Oregon tax.) Thus, the substantive issue was whether the banks were subject to either or both of the CET or CIT. The parties stipulated to two key facts: (1) the banks had no physical presence in Oregon, and (2) the banks had substantial amounts of receipts from customers in Oregon, primarily by providing credit cards to Oregon residents.

The Tax Court, starting with a statutory analysis, decided that the banks were "doing business" in Oregon for purposes of the CET and also derived income from "sources" in Oregon for purposes of the CIT. The Tax Court then held that taxing the income of the banks also passed constitutional muster despite their lack of physical presence, because the *Quill* test, then in effect, did not apply to net income taxes.

On appeal to the Oregon Supreme Court, and about two months before the US Supreme Court granted *certiorari* in *South Dakota v. Wayfair*, the taxpayer abandoned its constitutional arguments in its opening brief. The Oregon Supreme Court focused on whether the banks satisfied the "income from Oregon sources" test under the CIT and did not reach whether the banks were "doing business" in Oregon for purposes of the CET.

The taxpayer argued that the 1955 legislature implicitly had built a physical presence requirement into the CIT, because the statutory definition of income "derived from sources within" Oregon consisted of three non-exclusive examples, all of which implied a physical presence requirement. The first example is income from tangible property located in Oregon; the second is intangible property with a situs in Oregon, and the third is income from "activities carried on in" Oregon. However, the court rejected the idea that any of these implicitly required the taxpayer to have a physical presence in Oregon. Rather, the statute merely required that the source of the income be in Oregon. The plain meaning of "source" could include an "individual, company, or corporation initiating a payment," i.e. a customer located in Oregon.

Applying this essentially market-based approach, the Supreme Court held that the banks were subject to the CIT, and that the $150 million in fees they charged annually to Oregon customers were includible in the taxpayer's numerator. The Court found it unnecessary to decide whether the banks were "doing business" for purposes of the CET, because the amount of the deficiency was the same under the complementary CIT. The Court also found it unnecessary to decide a subsidiary question under the CIT, namely whether the banks were engaged in "activities carried on in Oregon," notwithstanding that the banks undertook their activities from offices outside Oregon.

Thus the Supreme Court decided that the taxpayer's physical presence is not required for imposition of the corporation *income* tax, and the Court left untouched the Tax Court's conclusion that no physical presence is required for imposition of the corporation *excise* tax.

<u>Matter of Leslie Mays</u>, New York State Tax Appeals Tribunal (December 21, 2017)

<u>Facts:</u> Petitioner accepted a job offer and relocated to New York City. As part of her compensation package, petitioner was provided with temporary housing in a hotel in New York City, a location she chose in consultation with her employer. The hotel apartment the taxpayer chose was fully furnished and contained a bedroom, bathroom, living/dining room, and kitchen. Although the arrangements for the hotel originally were scheduled to end in April 2011, the taxpayer extended her stay until the end of May 2011.

Pursuant to an audit, the Division of Taxation determined that petitioner was a statutory resident of the City and State due to her maintenance of a permanent place of abode in New York City and her physical presence in the City for more than 183 days in 2011. As a result, the Division issued a notice of deficiency asserting New York State and City income tax against petitioner. Petitioner filed a protest with the Division of Tax Appeals. Following a hearing, the administrative law judge determined that the taxpayer was a statutory resident of the State and City due to her maintenance of a permanent place of abode for substantially the entire year and her presence in the City for more than 183 days. On exception, petitioner argued that the dwelling place in the hotel was not a permanent place of abode as she did not maintain it within the meaning of the statute and its use was not permanent, but rather a temporary use of a corporate apartment.

<u>Decision:</u> The Tribunal held that the threshold question in determining whether a taxpayer maintained a permanent place of abode is whether it is permanent – i.e. whether it is a dwelling suitable for year-round use. Once resolved, the next step in the sequential analysis is whether the taxpayer has a legal right to reside in the dwelling and, if so, whether that right was exercised. If the taxpayer has no legal right to reside in a dwelling, the question turns to what factors, if any, that indicate the taxpayer's relationship to and actual use of the dwelling. Next, the question of whether a taxpayer "maintained" the dwelling within the meaning of the statute depends on whether the taxpayer did what was necessary to continue his or her living arrangements in that place. If a taxpayer took steps to continue his or her living arrangements in such a dwelling, it may be concluded that the taxpayer maintained a permanent place of abode notwithstanding his or her legal right to occupy that dwelling. The Tribunal found that the dwelling in this case met the requirements for permanency and petitioner maintained the hotel apartment by doing what was needed to continue living there, had exclusive use of it, and was present in New York for more than 183 days, which made her a statutory resident. Accordingly, the notice of deficiency was sustained.

E. <u>CONSTITUTIONAL ISSUES</u>

<u>Black Eagle Minerals LLC v. Alabama Dep't of Revenue,</u> Alabama Tax Tribunal, BIT 11-975-JP and 12-1229-JP – Opinion and Final Order, January 23, 2018

Alabama requires pass-through entities to file a composite return on behalf of its non-resident members and to pay income tax on the non-residents' distributive shares of the income of the entity. If the entity does not do so, it becomes liable for the tax. On appeal, Black Eagle argued that Alabama's composite reporting and payment requirements violated the Commerce Clause, citing *Complete Auto Transit*. Specifically, Black Eagle stated that its tax burden was "based solely on the fact that its investors were nonresidents" and that it would have no liability "if it were wholly owned by Alabama residents." Black Eagle acknowledged that the Tribunal lacks jurisdiction to declare a statute facially unconstitutional, but argued that its claim constituted only an as-applied challenge. The Tribunal disagreed, noting that the requirements complained of by Black Eagle are found on the face of the statute: "there is nothing particular about this Taxpayer's fact situation that would distinguish it from the facts of other taxpayers who also are subject to Alabama's composite reporting and payment requirements." Thus, the Tribunal lacked jurisdiction.

William Fielding, Trustee of the Reid and Ann MacDonald Irrevocable GST Trust for Maria V. MacDonald, et al., vs. Commissioner of Revenue, Minnesota Tax Court (May 31, 2017)

As you know, a state may tax all the income of a "resident" *without regard to source,* whereas for a non-resident, it may tax only income derived from in-state sources and activities. This means that a state could, in theory, expand its taxing power by expanding the definition of "resident." This case involves such an attempt. It concerns a state statute defining a trust as a "resident trust" based solely on the domicile of the grantor when the trust became irrevocable. I ruled that the domicile of the grantor *alone* was not a sufficient basis to justify taxation of worldwide income without regard to source. The Minnesota Supreme Court affirmed, but on the separate ground that—even taking into account the trust's other state "contacts" – there was not sufficient nexus to justify resident tax treatment. *See Fielding v. Commissioner of Revenue*, 916 N.W.2d 323 (Minn. July 18, 2018). Thus, whereas I ruled on a principled basis, the Supreme Court ruled on a factual one. Nevertheless, the case illustrates in an interesting way that there are substantive limitations to the contacts that can justify taxing a person as a "resident" notwithstanding state law definitions.

Matter of Bayerische Beamtenkrankenkasse AG, New York State Tax Appeals Tribunal (September 11, 2017)
Matter of Landschaftliche Brandkasse Hannover, New York State Tax Appeals Tribunal (September 11, 2017)

Facts: Petitioners provide non-life insurance services in Europe for which they receive premiums. Petitioners have never conducted any insurance business in the United States and never sought authorization to conduct business in New York. Petitioners' business activities in the United States and New York were limited to two partnerships whose activities consisted of ownership and management of real estate, some of which was in New York. Petitioners did not write any premiums in the United States and thus reported no premium income on their federal or New York State returns.

Petitioners argued that, as unauthorized non-life insurance corporations, they should be subject to tax under Tax Law § 1502-a, a franchise tax on premiums that is applicable only to authorized non-life insurance corporations, based upon certain advisory opinions issued by the Division of Taxation of the Department of Taxation and Finance and the legislative history of the statute. Petitioners argued that even if they were taxable under Tax Law § 1501, their entire net income should have been subject to the allocation percentage set forth in Tax Law § 1504 (a) to determine their New York entire net income rather than an alternative allocation method provided for under Tax Law § 1504 (d). Petitioners also contended that this alternative allocation formula, as applied to them, was unconstitutional because the formula permitted the state to tax income "out of all proportion" to petitioners' New York business, thus violating the Due Process Clause of the United States Constitution. Petitioners also asserted that the Division's alternative allocation method impermissibly discriminates against them due to their status as alien insurers and thereby violates the United States-Germany Tax Treaty and the Foreign Commerce Clause of the United States Constitution. These claims were premised on the different treatment petitioners claimed they were accorded as alien insurers because they do not report their worldwide income. Petitioners contended that they are treated differently than similarly situated taxpayers that are incorporated in the United States.

The Division countered these arguments by contending that the alternative allocation formula was reasonable due to petitioner's lack of premium income that would have made up part of their New York entire net income under the allocation formula provided for under Tax Law § 1504 (a). The Division also argued that petitioners' applied Due Process challenge should be rejected because the allocation formula cannot take into consideration values stemming from non-U.S. activities. With regard to petitioners' Foreign Commerce Clause claim, the Division contended that all similarly situated taxpayers, described by the Division as domestic, foreign and alien unauthorized non-life insurance corporations that do not earn premium income in the United States, but do earn income from domestic investments, will not have premium factors present, which could lead to the use of an alternative allocation formula as provided for under section 1504 (d). Finally, the Division argued that the Tax Appeals Tribunal lacks authority to review a claim under the United States-Germany tax treaty.

<u>Decision:</u> In considering section 1502-a, the Tax Appeals Tribunal held that nothing in the advisory opinions or legislative history relied upon by the petitioners required a departure from the unambiguous language of the statute that it applied only to authorized non-life insurance corporations. Instead, the Tribunal found that petitioners were subject to tax under Tax Law § 1501, a franchise tax on every insurance corporation for the privilege of exercising its franchise, doing business, employing capital, owning or leasing property, or maintaining an office in New York. Furthermore, the Tribunal found that the Division's exercise of its discretion in employing an alternative allocation method under section 1504 (d) rather than the statutory allocation under section 1504 (a) was proper because it had shown that the application of the statutory allocation method was out of proportion to petitioners' business transacted in New York.

However, the Tribunal rejected the Division's argument that it lacked jurisdiction to review a claim of a violation of the nondiscrimination provision under the United States-Germany Tax Treaty, holding that the language of the treaty did not limit relief to the mutual agreement procedure provided for therein. As the means of redress of a claim arising under the treaty was not exclusive to that procedure, the Tribunal concluded that it had the authority to consider whether the Division's actions violated the nondiscrimination provision of the treaty, which stated that nationals of the contracting states shall not be subjected in the other contracting state (including state and local governments) to "other or more burdensome" taxation or procedures to which nationals of that state in the same circumstances are not subjected. The Tribunal found that petitioners, based on their status as alien unauthorized non-life insurance companies, were treated differently under the Tax Law than a foreign (non-New York, but U.S.-based) unauthorized non-life insurance company because such hypothetical company's premiums factor would not render calculation of its allocation under Tax Law § 1504 (a) an impossibility. As a treaty is the supreme law of the land under the U.S. Constitution and part of the law of each state, the Tribunal held that the United States-Germany Tax Treaty must prevail where it conflicts with the Tax Law. Although deeming consideration of petitioners' Foreign Commerce Clause argument unnecessary in light of the foregoing, the Tribunal held that the application of the Tax

Law to petitioners in this case prevented the United States from "speaking with one voice" in regulating foreign trade. Consequently, the Tribunal deemed petitioners' notices of deficiency as invalid and canceled the same.

<u>Wittemyer v. City of Portland,</u> 361 Or 854 402 P3d 702 (2017)

The taxpayer challenged the Portland "arts tax" on the ground that it was an unconstitutional "poll or head tax." The city of Portland imposed a $35 tax on all residents receiving at least $1,000 of income per year, except for those under 18 and those whose households were at or below federal poverty guidelines. Article IX, section 1a, of the Oregon Constitution states, in pertinent part: "No poll or head tax shall be levied or collected in Oregon."

This case was not heard in the Oregon Tax Court. It originated in a county-level circuit court and reached the Oregon Supreme Court on appeal from the Court of Appeals. The Tax Court had previously dismissed a similar appeal on jurisdictional grounds because, under controlling precedent, the Tax Court's jurisdiction does not encompass the tax laws of local governments.

Tracing the history of poll taxes from the Book of Exodus to the 1910 constitutional amendment prohibiting such taxes, the Oregon Supreme Court concluded that for purposes of the Oregon Constitution a poll tax "is one that applies uniformly on a per capita basis, but does not take income, property, or resources into account in any way." The court held that the arts tax was not a poll tax—notwithstanding its flat, single-tier rate—because it did not apply to individuals earning less than $1,000 per year, because certain types of income were not counted (such as Social Security benefits and state and federal pension benefits), and because residents of households at or below the federal poverty threshold were exempted.

F. <u>TRANSFER INHERITANCE TAX</u>

<u>Estate of Johnston v. Dir., Div. of Tax'n,</u> Docket No. 10286-2015, 2018 N.J. Tax Unpub. LEXIS 45 (June 15, 2018).

The issue is whether a statutory tort claim of waste pursued by an administrator in his personal capacity is a debt of decedent owing at the date of death that would reduce the clear market value of the estate. Reducing the clear market value of the estate would reduce the amount of transfer inheritance tax. The administrator is the sole beneficiary of the estate. There are two requirements that are necessary for a debt to be a valid deduction from the estate. The first requirement is that the debt, or more appropriately the money the estate intends to pay for the debt, must be supported by consideration or damages. Otherwise, the payment constitutes what is merely a donative distribution of the estate. The second requirement is that the decision to pay the debt must have been entered at arm's length. This is not to suggest full-blown litigation, but rather a process in which the parties dealt with each other at arm's length and without collusive effect.

While the Tax Court does not resolve or adjudicate tort claims, the Tax Court must still examine whether such claims were conducted or negotiated at arm's length. There are a number of factors that may be indicative as to whether a debt of the decedent arose in an adversarial context through an arm's length process. These factors include: the relationship, either familial or otherwise between the executor and the person asserting the debt; if the parties are indeed related, the quality of their relationship (i.e., ex-spouse, siblings who do not get along); whether the same parties are on both sides of the proceeding or directing the proceedings (i.e. individual who is both an executor and a claimant or beneficiary); the value of a claim as determined by a qualified appraiser, or the overall quality of the valuation of the claim; whether a full hearing was held in the matter instead of the entry of a default judgment or consent judgment; whether the debt or the damages had some relationship to adequate consideration or properly reflect damages; whether there are proofs that exist prior to death that establish a claim; whether an action to collect a debt was instituted prior to the death of the decedent; whether the payment of the claim results in a reduction of tax obligations, while at the same time not leading to diminution of actual monies received by a beneficiary of the estate or the beneficiary's family; whether the debt actually has the effect of transferring the estate distribution from one family member to another, and; whether each side of the dispute is represented by separate counsel. Upon applying the factors, the court dismissed the matter.

G. TOBACCO TAX

Winner Tobacco Wholesale v. Commissioner of Revenue, Minnesota Tax Court, Docket No.: 9049-R (August 6, 2018)

Minnesota assesses a tobacco tax on the "wholesale sales price" of tobacco products brought into the state by a distributor. "Wholesale sales price" is defined as "the price stated on the price list in effect at the time of sale for which a manufacturer or person sells a tobacco product to a distributor." At issue was whether "wholesale sales price" included federal excise tax. Taxpayer argued that it erred in paying Minnesota tobacco tax on its purchases of tobacco products to the extent the prices of those products incorporated (whether explicitly or not) federal excise taxes.

Specifically, taxpayer alleged that between May 2012 and December 2013, it paid Minnesota tobacco tax "on the total invoice price of its tobacco product purchases," including federal excise tax, when it should have paid Minnesota tobacco tax on only the prices of "the tobacco products" themselves.

The parties filed simultaneous motions for summary judgment. In support of their cross-motions, the parties submitted copies of taxpayer's purchase records from May 2012 to December 2013. Three manufacturers reported federal excise tax on the products sold, separately from the product prices themselves. The court therefore granted taxpayer's motion for summary judgment, and denied the Commissioner's motion for summary judgment, to the extent that the invoices made part of the record show that taxpayer paid Minnesota tobacco tax on amounts in excess of the price of tobacco and related products as stated on the invoice. Taxpayer's arguments in support of a larger refund—a refund of federal excise tax not separate from the price of the tobacco product itself—was found to be contrary to the statutory definition of "wholesale sales price."

H. SALES AND USE TAX CASES

<u>PFMC v. Dep't of Rev.,</u> Wis. Tax Rptr (CCH) ¶ 402-234 (WTAC 2018).

Petitioner's operations at two plants produced airborne contaminants. Petitioner was required by law to ventilate and clean the air for safety and environmental purposes. An Exhaust Ventilation and Air Treatment (EVAT) System at each plant exhausted and cleaned contaminated air, replacing it via air makeup units that drew in outside air. Regulations required plant temperatures to be 60-65 degrees. The air makeup units preheated outside air in winter to maintain plant temperature, even though plant operations and conventional HVAC systems could have heated the plants but for the exhaustion and replacement of contaminated air. The Commission determined that the air makeup units were an integral part of the EVAT Systems because the Systems could not properly function without them. Preheating air drawn in did not mean that the EVAT Systems were not used exclusively in pollution abatement. Preheating was not to heat the plant, but to allow the Systems to operate safely and legally. The air makeup units were components of a "waste treatment facility" under the meaning of Wis. Stat. § 70.11(21) and the fuel and electricity used in operating them was exempt from Wisconsin sales tax pursuant to Wis. Stat. § 77.54(26).

<u>Newegg, Inc. v. Alabama Dep't of Revenue,</u> Alabama Tax Tribunal, S. 16-613-JP -- Op. & Prel. Order, May 11, 2018; Op. & Final Order, June 14, 2018

In 2015, the ADOR adopted a rule that requires certain remote sellers to collect and remit use tax to Alabama. The rule applies only to sellers "who lack an Alabama physical presence …" It also is limited to those whose sales exceed $250,000 per year and who conduct at least one activity listed in § 40-23-68. On appeal, the Tribunal refused the ADOR's request to hold Newegg's appeal in abeyance during the pendency of *South Dakota v. Wayfair*. Instead, the Tribunal focused on the fact that the rule required the conducting of at least one activity listed in § 68. The ADOR claimed that Newegg conducted two such activities, but one of those activities was "dependent on the overturning of *Quill*." The other (the distribution of catalogs into Alabama) was disputed by Newegg. The request for an abeyance was denied because of the disputed factual question concerning catalogs, which was not dependent on the overturning of *Quill*. However, Newegg's motions to exclude the ADOR's expert reports and testimony were granted because they were offered by the ADOR to show that *Quill* had become unworkable and that compliance costs to be borne by remote sellers would be proportionate to those borne by in-state retailers. The Tribunal then directed the ADOR to inform the Tribunal of whether it continued to claim that Newegg had conducted the marketing activities described in § 68. Also, the ADOR was directed to explain how its assessment was valid when *Quill*'s physical-presence standard was the law and when the ADOR had stipulated that Newegg had no physical presence in Alabama. The ADOR responded by filing a Motion for Entry of Final Order, agreeing that its final assessment was "due to be voided at this time." Newegg waived its request for attorney fees

I. PROCEDURAL ISSUES

Work v. Jackson County Assessor, Oregon Tax Court – Magistrate Division, TC-MD 160213R, Sept. 21, 2016, dism'd on other grounds sub nom Work v. Dept. of Rev., 22 OTR 396 (July 20, 2017)

Taxpayer initially sought to correct his property tax for the period 2002-03 through 2015-16. The parties subsequently stipulated to correct the 2010-11 through 2015-16 tax years. The court declined to accept the stipulation ordering the correction for the 2014-15 and 2015-16 tax years and dismissing the remaining years. The court held that taxpayer was not aggrieved for the 2013-14 tax year because the relief requested would not result in a change in tax and dismissed that tax year. The court further held that it was only authorized by statute to change or correct the current tax year and, under certain circumstances, the two prior years and dismissed the 2010-11 through 2012-13 tax years.

Taxpayer appealed to the Regular Division, Judge Breithaupt presiding, requesting that the stipulation be upheld in its entirety. The Department of Revenue was substituted as the real party in interest and filed a "motion to dismiss for failure to state a claim over which the court has jurisdiction." The court identified three issues: 1) whether the court has subject matter jurisdiction; 2) whether taxpayer stated facts sufficient to constitute a claim for relief; and 3) if dismissed, the effect on the magistrate decision.

As to 1), the court rejected the Department's argument that the court lacked subject matter jurisdiction noting that the court's authority to provide relief and the court's jurisdiction are separate inquiries. The court found it had jurisdiction because the claim arose under the tax laws of the state. Regarding 2), the court determined that taxpayer failed to identify a claim for relief for any of the tax years and dismissed the taxpayer's appeal. The court dismissed taxpayer's complaint with respect to the 2014-15 and 2015-16 tax years because he was not aggrieved by the magistrate's decision, having requested values identical to those obtained in the Magistrate Division. The court dismissed the 2013-14 tax year for lack of aggrievement as the value he sought would not result in a change to his tax. The court dismissed the remaining years because taxpayer failed to identify any statutory authority for the court to grant relief. Finally, as to 3), the court found that as a result of the dismissal, the magistrate's decision would be given effect, noting that if the magistrate acts outside of the court's jurisdiction, the decision would not be effective, but because the magistrate acted within the court's jurisdiction, any errors in the lower court's ruling would stand, absent an appeal by the aggrieved party. Because the Department did not file an independent appeal, they had no standing to dispute the decision of the magistrate. The court held that, subject to possible limited statutory exceptions, counterclaims are not permitted in the Tax Court.
This case is on appeal to the Oregon Supreme Court (S065202)

Adamek v. Louisiana Department of Revenue, BTA Docket No. 10,475 D (La. Bd. Tax. App. 3/6/18).

The Department followed the statutory protocol to transmit a formal notice of assessment (~$1.5 million) by certified mail. The notice was never delivered and was returned unclaimed. The taxpayer then received a seizure notice letter, he then filed an appeal to the Board which was two months late under the date on the face of the '60 day letter' (a notice that was properly sent but was never received). The taxpayer argued that the US Supreme Court case of *Jones v.*

Flowers 547 U.S. 220 (U.S. 2006) mandated that the Department 'do more' once it had actual notice that the certified mail was not received. The Department pointed to federal income tax cases (progeny of *Phillips)* which had held that you are out at the US Tax Court even if you don't receive your'90 day letter.' The federal courts have held that the presence of a post-deprivation remedy was sufficient due process. The Board has held that you cannot seek a refund in this taxpayer's circumstance because a final assessment is treated like a Judgment of an established liability. Louisiana's post-deprivation remedy in this circumstance would therefore be limited to a 'claim against the state,' an archaic procedure where the Board recommends the appropriation by the Legislature of payment of "any claim for money erroneous paid into the treasury, or for any other claim against the state lawfully, justly, or correctly due, or when principles of justice and equity so require, even when a refund might not otherwise be permitted by law." Unlike all other BTA cases, a claim against the state decision is not appealable to the Court of Appeal.

The Board split with Judge Graphia agreeing with the Taxpayer that the Department should have 'done more,' and that denying an assessment appeal would violate due process. Judge Lobrano held that the claim against the state procedure 'barely' satisfied the requirements of due process, pointing to other states where refunds are required to be appropriated. Judge Cole held that the Louisiana Supreme Court had specifically held that the tax appeal remedies collectively satisfy due process so he was obligated to follow that precedent.

<u>Camp O-At-Ka, Inc. v. Town of Sebago,</u> Maine State Board of Property Tax Review, May 5, 2017

Petitioner is a nonprofit boys' summer camp. Petitioner asserts that it should be exempt from taxation because it is a benevolent and charitable institution. Petitioner applied for exemption on July 13, 2015, after the April 1st deadline to file for exemption for the 2015 tax year and before the time period within which to file for exemption for the 2016 tax year. Maine does not have a statute that sets forth the process for determining whether an entity qualifies for exemption from property tax and an abatement proceeding is the manner in which an exemption is pursued. The Board does not have jurisdiction to hear the appeal because Petitioner failed to make a timely abatement application for either the 2015 or 2016 tax year.

<u>Verizon Americas Inc. v. Alabama Dep't of Revenue,</u> Alabama Tax Tribunal, BIT 16-582-JP – Op. & Prel. Order, October 23, 2017

Cellco Partnership filed a 2011 composite income tax return on behalf of Vodafone and paid $4.4M in tax on Vodafone's distributive share of Cellco's Alabama income. In November 2012, Vodafone timely filed its own Alabama return for 2011, but failed to claim the $4.4M composite payment as a credit. In March 2013, Vodafone filed an amended return and claimed the credit, requesting that amount as a refund. After 6 months, the refund was denied by operation of law, but Vodafone did not appeal the denial within the two-year statutory period (which expired in September 2015). Instead, in October 2015, Vodafone filed a second refund petition with the ADOR, again requesting a refund of the $4.4M composite payment, plus a $10,090 refund based on an IRS audit change. This second petition was filed within the allowable three-year period for requesting a refund. The ADOR again allowed the petition to be denied by operation of law. Verizon, as successor to Vodafone, then appealed to the Tribunal. The Tribunal ruled that the second request for a refund of the $4.4M composite payment, which merely was a restatement of its first request, was a nullity. Therefore, it was Vodafone's first refund request against which the statute of limitations must be measured. But that period had expired before an appeal was filed. Thus, the Tribunal lacked jurisdiction to consider the refund request for $4.4M. The request for a refund of the amount related to the IRS audit change constituted a "new claim," however, and the appeal as to that amount was filed timely.

J. VALUATION

***B. Devine v. City of Middletown*, Superior Court Judicial District of New Britain (March 8, 2018).**

Owner of house refused to allow assessor and his appraiser to set foot on his property for the purpose of conducting a periodic town wide revaluation of real estate. The owner threatened the assessor with arrest for trespassing and a civil lawsuit claiming damages.

Connecticut requires an assessor to periodically conduct a town-wide inspection of all real estate for the purpose of revaluation and to inspect the exterior and interior of the property. However, Connecticut Statutes require the permission of the property owner to enter the interior of the property.

The statute involved here is Connecticut General Statutes sec. 12-62(a)(3) which recites:

> "Full inspection or fully inspect means to measure or verify the exterior dimensions of a building or structure and to enter and examine the interior of such building or structure in order to observe and record or verify the characteristics and condition thereof, provided permission to enter such interior is granted by the property owner or an adult occupant. . . ." (Emphasis added.)

The court held that there is a requirement that all taxpayers are obligated to pay their fair share of taxes and if the taxpayer fails to allow entry to his or her property in order to conduct a valuation for assessment purposes, the taxpayer cannot complain if the assessor, acting in good faith, uses other means to determine the valuation of the property. The property owner cannot complain if the assessor makes an error in judgment in valuing the property.

Interesting to note that the Wisconsin Supreme Court in *Milewski v. Town of Dover*, 377 Wisc. 2d 38 (July 7, 2017) struck down a Wisconsin statute that deprived a property owner the right to appeal his or her assessment if the property owner prohibited the assessor from inspecting the interior of the property. The Wisconsin court held that this statute violated the property owner's Fourth Amendment rights against an illegal search without a warrant.

Switzerland County Assessor v. Belterra Resort Indiana, LLC, 101 N.E.3d 895 (Ind. Tax 2018), review denied.

Belterra presented an appraisal separately valuing each of the components of its resort (riverboat, golf course, and hotel) for a cumulative value of about $45 million. The Assessor presented an appraisal using a "going-concern" approach valuing the resort at about $130 million. Even though the Indiana Board found specific parts of each appraisal flawed, it determined there was enough probative evidence between the 2 appraisals to support a resort value of $98.5 million.

The Tax Court affirmed in part and reversed in part. **First**, the Tax Court held that the record evidence supported the Indiana Board's decision to give <u>no weight to the valuation of the hotel</u> by Belterra's appraiser because he used income and expense data for full-service hotels without making adjustments reflecting the inherent differences between full-service hotels and the taxpayer's "luxury destination resort hotel." Belterra argued that the Indiana Board simply misunderstood its appraiser's evidence and position, but the administrative record showed that indeed the appraiser failed to account for the inherent differences, he relied on income and expense figures from non-luxury franchised hotels, and he actually testified that he valued Belterra's hotel as market-based, full-service hotel.

The Court reversed the Indiana Board's <u>adoption of the Assessor's appraiser's going concern valuation</u> because there was no substantial or reliable evidence that supported the growth projections used to calculate the resort's overall earnings before interest, taxes, depreciation, and amortization (EBITDA) that the appraiser relied on. The record actually showed that, among other things, casino businesses suffered from a weak economic climate, declining gaming revenues, limited population and retail sales growth, and a loss in market penetration during the relevant years. The discrepancy with the TP's growth projections was explained by the fact that the taxpayer relied on its EBIDA projections developed for internal budgeting purposes.

The Court remanded the matter to the Assessor with instructions to reinstate the previous year's assessment subject to certain modifications.

K. <u>TAXATION OF GOVERNMENT OWNED PROPERTY</u>

<u>In Re: City of Clarksville</u>, Tennessee State Board of Equalization, Administrative Law Judge (Initial Decision & Order issued November 2, 2017)

The property consists of approximately 144 acres of land along the Cumberland River. The property is owned or leased by the City of Clarksville and has evolved into three distinct developments including a public park, a marina and a restaurant. Although leases for the marina and restaurant had been in place for some time, the City did not receive a tax bill until October 2014. The property had previously been used as a fairgrounds.

The city eventually developed the property into a park that features a fishing pond, children's playground, public boat ramp, dog park, amphitheater, walking, running and cycling trails and areas for sports. In conjunction with this, and pursuant to a redevelopment study, the City entered into a lease to provide for the development and management of a marina. The Clarksville Marina has 85 covered slips and private parking. Also as part of the redevelopment, a full service restaurant was constructed on a 5.67 acre tract within the park. The restaurant has ample parking and it is open to the public.

Unlike many appeals involving the assessment of public properties, this was not an assessment of a leasehold, but rather an assessment of the fee simple. The only issue to be determined was whether the property "is used exclusively for …municipal purposes." The Administrative Law Judge found that the record supported the Assessor's determination that the use of the property did not meet the requirements to be exempt from taxation.

<u>In Re: Great Smoky Mtn. Nat. Park</u>, Tennessee State Board of Equalization, Administrative Law Judge (Initial Decision & Order issued December 8, 2017)

The issue on appeal was whether the Taxpayer had a taxable interest in LeConte Lodge, a rustic lodging and retail establishment in the Great Smoky Mountains National Park. There was no dispute that the underlying fee interest in the LaConte Lodge property was exempt as property of the federal government.

Under its agreement with NPS however, the Taxpayer was required to pay NPS a percentage of its gross sales as a franchise fee, maintain and repair the facility, and perform certain non-revenue generating park services in exchange for the opportunity to operate the lodge and sell lodging/meal packages and concession items. The assessor took the position that this was tantamount to rent. The Taxpayer characterized the percentage of the gross sales it retained as a management fee, and its operation of the lodge as a service to NPS.

The Administrative Law Judge found that the contract in question granted NPS an unusually high level of control over both the taxpayer's operations and the lodge. Thus he found that the arrangement constituted a management contract in substance.

With respect to the taxpayer's leasehold surrender interest, although the agreement allowed a concessioner to encumber the leasehold surrender payment right for purposes related to the premises (e.g. to finance approved capital improvement projects), subject to NPS Approval, no part of the LeConte Lodge real property could be pledged as collateral. The Administrative Law Judge found that the leasehold surrender interest was the equivalent of an unsecured payment obligation on concessioner-provided rehabilitation and construction of NPS owned improvements. Accordingly the Administrative Law Judge found that the Taxpayer's right to receive payment of the leasehold surrender interest value upon contract termination did not constitute a real property interest subject to taxation.

L. <u>GROUP DISCUSSION</u>

Wisconsin - We are frequently faced with taxpayers who have produced little or nothing in discovery so the Dept of Rev brings a motion for SJ. Even though it's pretty obvious that Petitioner can produce nothing more at trial, we're not always comfortable granting SJ even if Petitioner fails to respond to the motion. So, SJ or trial anyway when evidence is likely too minimal to meet Petitioner's burden?

Oregon - What should a Judge do when presented with a stipulation that exceeds their apparent authority? How does your jurisdiction handle "counterclaims" – i.e., requests for relief by the defendant? In the property tax context, may the defendant request an increase in value, even if the defendant established the value? May the plaintiff dismiss its case notwithstanding a defendant's claim for relief? May the defendant raise a new claim by, for example, challenging an additional property?

M. ADDITIONAL CASES (TIME PERMITTING)

Kovacs v. Monroe Twp., 2018 N.J. Tax Unpub. LEXIS 41

Taxpayer and her mother purchased 9 acres of vacant farmland in 1984 for the purpose of creating a sanctuary for rescued horses. Taxpayer applied for and was granted qualified farmland assessment. In 1985, taxpayer secured permits and had a pole barn erected on the property. Taxes were paid without incident until 2014 when, as a result of a municipal wide revaluation, taxpayer's property tax bill increased by over $2,000. Taxpayer believed that the assessment had been in error and that the municipal had inadvertently valued her property as if it included a residence. After several years of dispute, taxpayer successfully filed an appeal in 2017. Upon receipt of the tax appeal, the municipal assessor lowered the assessment indicating that the prior assessor had isolated one acre for improvements to be assessed at fair market value. Choosing to represent herself, taxpayer filed a correction of error complaint. The court ruled that the error alleged did not involve an exercise of the tax assessor's discretion, opinion, or judgment, and therefore is correctable under *N.J.S.A.* 54:51A-7.

Positive Health Care, Inc. v. City of Newark, 29 N.J. Tax 213 (2016), aff'd, Nos. A-2689-15T3, A-0535-16T4, 2018 N.J. Super. Unpub. LEXIS 1189 (App. Div. May 22, 2018)

Positive Health Care, Inc. (PHCI) appealed from an order of the Tax Court, denying PHCI's motion to amend its complaint concerning Newark's tax assessments on its properties, to include the years 2010, 2012, 2013, and 2014. The appeals concerned residential properties owned by PHCI, a nonprofit entity whose mission is to provide housing for homeless persons suffering from AIDS or HIV infection. Using private loans and matching grant money provided by the federal Department of Housing and Urban Development (HUD), PHCI purchased twelve properties in Newark to house its needy clients. As a condition of funding, HUD required "the inclusion of a restrictive covenant in the deeds mandating" that the properties be used to house persons with HIV/AIDS and their families for twenty years. PHCI appealed to the Essex County Tax Board, which dismissed the appeals without prejudice. PHCI filed an appeal with the Tax Court for the 2010 tax year. On October 20, 2014, PHCI amended its case information statements to delete the 2010 tax year and add the 2011 tax year. In the meantime, PHCI did not apply for tax exemptions, file tax appeals, or pay property taxes for tax years 2012, 2013, and 2014.

On May 11, 2015, the Tax Court entered a case management order, noting the parties had advised that the dispute was settled pending approval by the Newark City Council. The settlement involved the City's agreement that the properties qualified for property tax exemptions. While the parties were working out the settlement, PHCI filed a motion seeking to re-amend its pleading, to once again appeal as to the 2010 tax year, as well as the tax years 2012, 2013, 2014, and 2015. Ultimately, the City only signed a settlement agreeing to a tax exemption for 2011 and 2015. The Tax Court denied the motion to amend, reasoning that the amendment would be futile, because PHCI failed to file timely tax appeals for the years covered by the amendment. The Tax Court also found that there was no evidence of unfair dealing or misrepresentation by the City of Newark. PHCI filed an appeal of the tax court order and argued that, because it is a nonprofit charitable organization, its properties cannot be taxed. The Appellate Division affirmed the Tax Court holding that PHCI's argument overlooks the requirement that an entity seeking a tax exemption has the obligation to make a timely application for the exemption, and to file a timely appeal of assessments on its property if it claims the assessments are improper.

PHCI also contended that because it bought the properties using HUD funds, it operates its programs using HUD grants, and its programs serve important federal housing policies, the Supremacy Clause barred Newark from assessing taxes on PHCI's property. The Appellate Court held that where the federal government had sold property to private individuals, taking back a mortgage to secure the unpaid balance of the purchase price, the property was not exempt as property owned by the United States government and therefore real estate taxes could be assessed.

Starke Cnty. Assessor v. Porter-Starke Servs., Inc., 88 N.E.3d 814 (Ind. Tax Ct. 2017).

The Assessor challenged the Indiana Board's grant of an 81% charitable purposes exemption for the taxpayer's real property owned and used in the provision of mental health services. The Assessor argued 1) that the Indiana Board improperly treated the TP as per se exempt because it was an I.R.C. §501(c)(3) non-profit Certified Mental Health Clinic (CMHC) and 2) that the determination is unsupported by substantial evidence because Porter-Starke failed to present evidence that showed a sufficient public benefit (relief of the burdens of the government) to justify granting the exemption. Good deeds alone are insufficient to support an exemption, and the Indiana Supreme Court requires "a more rigorous review of the financial operation of parties pursuing the charitable exemption." The Tax Court found that the Indiana Board properly weighed all the evidence regarding Porter-Starke's operations, services, and resultant public benefits in granting the exemption.

Garrett LLC v. Noble County Assessor, 49T10-1712-TA-22 (Ind. Tax 2018).

The Court affirmed the Indiana Board's decision upholding the 2016 assessment of TP's contaminated foundry property due to the TP's failure to present the Indiana Board with probative evidence. The TP's record evidence showed that it purchased the property for $1.00 in 2014, that the property was contaminated, and that it agreed with the Assessor to a smaller AV in 2015 than that assessed in 2016. The Court affirmed the Indiana Board, however, because the TP's evidence of its 2014 $1.00 purchase price was not the result of a market value sale and was not related to the value on the 2016 assessment date. The TP similarly failed to present evidence that the property's contamination alone rendered the property valueless and that the 2015 stipulated assessed value was probative of the property's 2016 value.

Nova Tube Indiana II LLC v. Clark County Assessor, 101 N.E.3d 887 (Ind. Tax Ct. 2018).

The Court reversed the Indiana Board's decision upholding the 2011 through 2013 assessments of the TP's industrial property because the Assessor did not meet her initial or rebuttal burdens to show that her assessment increases were correct. Specifically, while the Assessor's evidence established that the property sold in a market value transaction in May 2014, her evidence did not relate the May 2014 sales price to the market value-in-use of the property as of the relevant valuation dates. Consequently, the property was assessed in accordance with the TP's appraisals because the Indiana Board found them to be probative of its market value-in-use and the Assessor did not challenge that finding on appeal.

<u>Succession of Ciervo v. Louisiana Department of Revenue</u>, BTA Docket No. 10832 D (La. Bd. Tax App. 9/11/18).

The Taxpayer had understated Federal and Louisiana gross income by $32 million over 7 years. He participated in the federal Offshore Voluntary Disclosure Program after Louisiana's 3 year prescriptive period (statute of limitations) had run. The Louisiana Code of Civil Procedure requires a party to plead fraud as an affirmative defense (the Revenue Department did not). The prescription statute provides for an interruption in the running of liberative prescription by the filing of a "false or fraudulent return." The Board ruled that the Department was procedurally barred from showing fraud, but could seek to establish whether it was a "false return." The only case law stated that this had to be more than simply inaccurate and that there had to be an intent to mislead. However, the Board (looking to IRS cases) found that an understatement of income this substantial and offshore concealment of assets required mitigating evidence or an explanation for the conduct by the Taxpayer.

<u>Willis-Knighton Med. Ctr. v. Louisiana Department of Revenue</u>, BTA Docket No. 9,734 D (La. Bd. Tax App. 11/8/17)

Act 25 of the 2016 1st Special Session suspended all sales tax exemptions and exclusions except those in a 'retained list.' The retained list did not include (and therefore the law suspended) a statutory exemption for prescription drugs. However, the Louisiana Constitution precludes the state from imposing sales tax on: "(1) Food for home consumption, as defined in R.S. 47:305(D)(1)(n) through (r) on January 1, 2003….(3) Prescription drugs." The statutory definition of drugs for the purpose of the statutory exemption (which was also the statutory definition at the time of this constitutional amendment) provided that "Drugs includes all pharmaceuticals and medical devices which are prescribed for use in the treatment of any medical disease." The Department argued that the exemption for medical devices was suspended because it was not within the constitutional clause Prescription drug, and the statutory exemption was properly suspended. The Board found that the people author the Constitution, therefore you must ascribe the 'regular and ordinary' meaning of a word, not import a 'legal or technical' definition.

<u>In re: Revel Logging LLC</u>, Tennessee State Board Equalization Assessment Appeals Commission (Final Decision and Order, July 27, 2018)

Taxpayer owns several 1,000 acres of timber through Revel Logging LLC and other related entities. The primary business is to harvest their own timber but occasionally Taxpayer harvests timber on other property. The entity owns 30 trucks, and 3 of them occasionally haul other products. Approximately 80% or more of Taxpayer's income is produced by harvesting trees and the remaining amount is from trucking activities.
The Commission held that the property is exempt since the predominant revenue stream relates to the harvesting of timber. The Commission also recommended an assessment of the trucking business portion in future tax years.

<u>In Re: First Volunteer Bank</u>, Final Decision and Order, Tennessee State Board of Equalization Assessment Appeals Commission (6/6/2018)

Taxpayer owns (through foreclosure) over twenty separate parcels that were part of a planned residential development called "Waterstone." The original developer designated two parcels "community lots" devoted to the remaining parcels under certain deed restrictions to ensure that owners in the development would have free access to the adjacent river. Such restrictions remain in place despite the overall failure of the development to come to full fruition.
The County Assessor appealed the property values adopted by the Administrative Law Judge. The Commission found that the values adopted by the Administrative Law Judge represent the sound, intrinsic and immediate value of most of the subject properties as of January 1, 2016. However, the Commission found that the two community lots had a value of zero. Specifically, the Commission held that the restrictive covenants on the two community lots effectively reduce their value to zero and instead enhance the value of the beneficiary parcels.

<u>In re: Angels Cove LLC,</u> Initial Decision & Order, Tennessee State Board of Equalization, Administrative Law Judge (March 6, 2018)

Taxpayer homeowner's association challenged the assessor's valuation of common area parcels that were unimproved with the exception of items such as picnic area amenities and extra parking for guests of residents. The common area parcels did not generate income, although homeowner's association dues were applied to its upkeep and maintenance. The common area parcels were unbuildable due to their physical features (topography and lack of road access) and the legal restriction that they remain part of a 20% reserve necessary for the "cluster" development plat upon which relatively small residential lot configurations were dependent. The common areas constituted nothing more than pleasant surroundings shared by the individual lots. Taxpayer contended that the common area lots should not be taxed, as any value attributable to them would already be reflected in the values of the individual residential lots that the common area served to enhance. The assessor recommended a 70% reduction. The administrative judge found that due to the physical features and legal restrictions on the use of the undevelopable subject properties, they only had nominal value.

***<u>Matter of NRG Energy, Inc</u>.*, New York State Tax Appeals Tribunal (March 14, 2018)**

<u>Facts</u>: Petitioner was a power provider that owned and operated power plants in New York. Petitioner applied for and became eligible for tax credits pursuant to the New York State Empire Zones Act, which provided tax credits for business development in specified areas of New York. Petitioner was awarded a certificate of eligibility for the program by the Department of Economic Development on December 2, 2002, effective August 8, 2002. In April 2009, legislation amending the Empire Zones Act to include new criteria for continued certification under the program was signed into law. In June 2009, the Department of Economic Development notified petitioner that its certification for eligibility in the Empire Zones Program was being revoked effective January 1, 2008 with respect to a plant that it operated in Oswego County. In 2010, petitioner filed a tax return for 2009 claiming a refund of Qualified Empire Zone Enterprise (QEZE) credits for payment of real property taxes, which application did not include property taxes paid for the Oswego County plant. In 2013, petitioner filed an amended 2009 tax return in which it claimed a refund of real property taxes paid for the Oswego County generating plant. The Division of Taxation notified petitioner in April 2014 that because its

certification of eligibility for the Oswego County plant had been revoked, its claim for a refund had been disallowed.

An administrative law judge determination found that the application of the 2009 amendments to petitioner's 2009 tax year was not a retroactive application and thus sustained the refund denial. Petitioner filed an exception with the Tax Appeals Tribunal, arguing that the 2009 amendments to the Empire Zones Program was a retroactive application of a tax law in violation of its rights under the Due Process Clause of the United States Constitution. It also argued that there was selective enforcement of these amendments that violated the Equal Protection Clause of the United States Constitution. The Division of Taxation countered that its denial of the refund claim was not a retroactive application of the 2009 legislative amendments when applied to tax year 2009, but, if it were found to be, such retroactive application was permissible under the factors set forth by the New York State Court of Appeals in ***James Sq. Assoc. v Mullen*** (21 NY3d 233 [2013]). It also asserted that petitioner had failed to show intent to discriminate against petitioner as would be required to show an Equal Protection violation.

<u>Decision:</u> The Tax Appeals Tribunal agreed with petitioner that application of the April 2009 legislative amendments to the beginning of 2009 constituted a retroactive application of a tax statute. The Tribunal noted that court decisions have varied in resolving the question of whether application of statute adopted in an open tax year and made effective as of the first day of that year constituted a retroactive application of a statute, and if so, whether such application is permissible notwithstanding its retroactivity. The Tribunal opined that there is no rule that requires an automatic determination that such a statute has a retroactive effect. Rather, the question that must be addressed is whether the new provision attaches new legal consequences to events completed before its enactment. The Tribunal found that the new Empire Zones Program requirements made effective January 1, 2009 attached new legal consequences to actions of petitioner that occurred prior to the enactment of the statute. The next question to be considered was whether the retroactive application of the 2009 amendments was constitutionally permitted. As resolving that question requires a review of the facts in the case under the ***Replan Development*** factors (***Matter of Replan Dev., Inc. v Dept of Hous. Preserv. & Dev. of the City of N.Y.***, 70 NY2 451 [1971]), and as the administrative law judge did not reach this issue, the matter was remanded for consideration of this issue based on the evidence and arguments in the record.