2020 National Conference of State Tax Judges
Case Law Update and Discussion Topics
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Local Property Tax Cases

A. Exemptions and Abatements

Gourmet Dining, LLC v. Union Township, 2020 NJ Lexis 747, 243 NJ 1, 233 A.3d 410, 2020 WL 3525557. Submitted by Josh Novin, Tax Court Judge, Tax Court of New Jersey.

The Court held that the arrangement by which a for-profit restaurant operated within a state university was taxable as a lease or lease-like interest because the public-benefit-oriented exemptions were not intended to exempt the for-profit operator of a high-end, regionally renowned restaurant situated on a college campus, when the overriding purpose of the commercial endeavor was focused on profitmaking; thus, as the exclusive operator and manager of the establishment, the for-profit restaurant had to bear its fair share of the local real property tax burden.

Judgment of Appellate Division reversed; judgment of Tax Court (Joshua Novin, J.T.C.) reinstated.

Appeal of Keith R. Mader 2000 Revocable Trust & a., __ N.H. __, __ A.3d __, 2020 N.H. LEXIS 107,2020 WL 3009072 (June 10, 2020), reversing and remanding *In re: 13 Town of Bartlett Appeals* (BTLA Docket No. 29009-17PT, *sub nom In re: 13 Town of Bartlett Appeals*; and subsequent Decision on Remand (October 8, 2020). Submitted by Albert F. Shamash, Member, N.H. Board of Tax and Land Appeals.

McLoughlin, Jennifer. 2020. "New Hampshire Justices Undo Dismissal of Tax Abatement Appeals." *State Tax Notes*.

These 13 appeals present the issue of what constitutes "reasonable cause and not willful neglect" with respect to property tax abatement. They were first decided by the Board of Tax and Land Appeals ("BTLA" or "board"), vacated and remanded by the New Hampshire Supreme Court, and then followed by the board's Decision on Remand. The board dismissed each appeal, finding the Taxpayers did not meet their burden of proof on this threshold jurisdictional issue. The supreme court vacated and remanded "for further consideration as to whether the omissions of the [Taxpayers'] personal signatures and certifications on their [abatement] applications [filed with the "Town"] were 'due to reasonable cause and not willful neglect' as we have construed that phrase." (The Supreme Court Opinion is reported in the June 11, 2020 issue of State Tax Notes.)

The Decision on Remand, issued very recently and still subject to a possible rehearing motion followed by a second appeal to the supreme court, found dismissal of each appeal was proper.

After reviewing the legal standards articulated in the Supreme Court Opinion, the facts presented and the relevant chronology, the board found the Taxpayers had failed to meet their burden of proof on the issue of reasonable cause and not willful neglect (in failing to sign and certify each abatement application).

Relevant factors noted in the Supreme Court Opinion and the board's rulings included the following: the Town sent each Taxpayer notice of the tax year 2017 assessments at least three months before the abatement application filing deadline (March 1, 2018), but the Taxpayers waited until February 7, 2018 to seek legal representation by an attorney; this attorney told their representative he would be leaving in a few days for a two-week vacation in Morocco; they did not agree to the terms of his "Representation Agreement" until February 20; after this attorney (the name partner in a large law firm) returned from vacation on February 26, he prepared and filed the 13 abatement applications the next day (on February 27) without Taxpayer signatures and certifications; "all but one" of the Taxpayers own property in New Hampshire but "were located out of state"; this attorney did not consult the Taxpayers further or provide them an opportunity to review the applications; instead, he signed each application and certified there was a good faith basis for the application and the facts stated in them were true to the best of his knowledge. [The application form he filled out states the applicant (taxpayer) must sign the abatement application even if an attorney or tax representative is involved.]

GHJCC Swim & Racquet Club, LLC v. Town of Bloomfield, (decided by Judge Arnold Aronson September 16, 2020). Submitted by Arnold W. Aronson, Judge Trial Referee, Connecticut Tax and Administrative Appeals.

Cross motions for partial summary judgment were filed regarding the denial of an exemption to a 501(c)(3) limited liability company swim and tennis club organized in Connecticut. The Club is a disregarded entity from its sole corporate member, the Joyce D. and Andrew J Mandell Greater Hartford Jewish Community Center, Inc. (JCC), also a 501(c)(3) corporation. Although the property had been listed as exempt since its purchase in 1999, the assessor denied the exemption in 2018. The assessor alleged that the plaintiff was not entitled to the exemption because it is not an entity organized exclusively for charitable purposes as required by Connecticut's exemption statute.

Citing both New York and New Jersey case law, the court distinguished 501(c)(3) federal tax exemption from local property tax exemption. The court also examined the relevant documents to determine the Club's claimed charitable purpose. The exemption application stated that the Club's purpose was to be an "outdoor pool and tennis facility providing summer recreational, social and athletic programs for children and families in the community. The Club's articles of organization state that the purpose of the club is "to engage in any lawful act or activity for which limited liability companies can be formed" in Connecticut.

The court rejected the argument that the Club was fulfilling the charitable purpose of the JCC. The court determined that the denial of a property tax exemption was proper and granted summary judgment on that issue.

McClain Museum, Inc. v. Madison Cty. Assessor, 134 N.E.3d 1096 (Ind. Tax Ct. 2019). Submitted by Martha Wentworth, Judge, Indiana Tax Court.

The Museum, an Indiana non-profit corporation, exhibited military equipment used by the United States armed forces in a variety of conflicts. It is recognized by the Army as a historical preservation site for military equipment. The Museum was open to the public free-of-charge for limited hours and upon request, though it accepted donations. The building had a reception area known as the "Officer's Club," which was rented out for social occasions such as wedding receptions. The building also had areas for storage and for the restoration of military vehicles. The Indiana Board of Tax Review issued a final determination denying the museum the educational purposes exemption and the charitable purposes exemption.

The Tax Court affirmed in part and reversed in part. First, the Tax Court affirmed the denial of the educational purpose exemption. The Tax Court explained "[w]hile there is no doubt that the public is educated and its knowledge enhanced about military history through the Museum's displays, the Museum has nonetheless made no showing . . . that it conducts educational services, training, or coursework related to that topic."

The Court reversed the denial of the charitable purposes exemption. The term "charitable purpose," the Court noted, "is defined and understood in its broadest constitutional sense." The Indiana Board of Tax Review viewed the museum as the founder's hobby. The Court disagreed, holding that the Museum "conveys a gift for the benefit of the general public that is charitable in nature." The Court approved a 75% exemption for the real property. The Museum's exhibition area, restoration area, and most of its storage area were deemed exempt as being exclusively used for charitable purposes. The Court found that the Officer's Club and areas used for non-museum storage were taxable, as the Museum did not prove they were predominantly used for a charitable purpose. The Court reversed the Indiana Board and awarded a partial exemption.

The Caring Community of Connecticut v. Town of Colchester, 2020 Conn. Super. Lexis 651, 2020 WL 3767574. Submitted by Arnold W. Aronson, Judge Trial Referee, Connecticut Tax and Administrative Appeals.

This case involves 2015-2018 tax appeals of seven parcels owned and operated by Caring Community, a 501(c)(3) corporation. The seven "Community Living Arrangement" (CLA) facilities are for the care of intellectually and developmentally disabled individuals. The CLAs are licensed and fall under the auspices of the Department of Developmental Services. Prior to October 1, 2015, the assessor listed the subject facilities as tax exempt. However, on February 8, 2016, the assessor notified the plaintiff that he was revoking the exemptions because the exemption was based on a clerical error. Prior to the time they were marked exempt, Community Care paid the taxes and were then reimbursed by the State of Connecticut.

On motion for summary judgment, the plaintiff's position was that it is organized for charitable purposes and used exclusively for carrying out one or more of such purposes, and therefore exempt from paying property taxes. The town's objection to exemption from property taxes was that the plaintiff is reimbursed by the state for the property taxes that the plaintiff pays to the town of Colchester.

The court (Judge Arnold Aronson) denied summary judgment finding that there are genuine issues of material fact dealing with the relationship between the plaintiff and the state of Connecticut as to whether the Caring Community is in fact a private charitable organization entitled to a property tax exemption or an agency/contractor engaged by the State of Connecticut to provide care and treatment for intellectually and developmentally disadvantaged individual.

B. Discovery

Dr. Michael Sherman v. Ventnor City, 2019 NJ Tax Unpub. Lexis 33, Docket No. 12930-2017 (Tax Nov. 21, 2019). Submitted by Mark Cimino, Judge, New Jersey Tax Court.

Taxpayer, Dr. Michael T. Sherman, appealed the assessment of his property in the City of Ventnor. While the appeal was pending, the property was sold to a third party. The City requested an inspection of the property in preparation for trial, however, the new owner rebuffed requests for an inspection. The City filed a motion to dismiss for failure to allow discovery. The issue is who had the burden to secure the inspection, and who should suffer the consequences if an inspection cannot be completed. The court (Mark Cimino, J.T.C.) determined that the onus in upon the taxpayer to secure the inspection, and failing the completion of an inspection, the matter must be dismissed.

Milewski v. Town of Dover, 2017 WI 79 (July 7, 2017). Submitted by Lorna (Rory) Hemp Boll, Commissioner, Wisconsin Tax Appeals Commission.

The Wisconsin Supreme Court dealt with this same issue in 2017, with a 100-page groups of decisions addressing constitutional issues involving Wis. Stat. § 70.47(7)(aa), which states that property owners cannot challenge the amount of an assessment "if the person has refused a reasonable written request by certified mail of the assessor to view such property."

C. Valuation

Rush v. Town of West Hartford, 2020 Conn. Super. Lexis 95. Submitted by Arnold W. Aronson, Judge Trial Referee, Connecticut Tax and Administrative Appeals.

Property owners brought this 2016 tax appeal of a residential one-half acre property located two-thirds in West Hartford and one-third in the neighboring town of Farmingdale. The one-third in Farmingdale has lakeside frontage, which the West Hartford portion does not have, and the West Hartford portion has an existing sewer lift station. The assessor valued the West Hartford portion at $375,000, the West Hartford appraiser valued it at $245,846, and the taxpayer's appraiser valued it at $139,555. Judge Arnold Aronson found value to be $200,000.

Miller v. Deschutes County Assessor, TC-MD 190273N (Apr 10, 2020). Submitted by Allison R. Boomer, Presiding Magistrate, Oregon Tax Court.

Taxpayers' property was damaged by fire in 2006, resulting in a reduction in their real market value and maximum assessed value. The county assessor made an error in calculating the maximum assessed value, reducing it by a greater proportion than the real market value. See ORS

308.146(5)(a) (providing for a reduction in maximum assessed value when property is damaged or destroyed by fire); OAR 150-308.146(5)(a) (requiring maximum assessed value to be reduced in the same proportion as real market value). The county assessor discovered its error in early 2019 and assessed additional value for the current and prior five tax years. Taxpayers appealed, contending among other things that the error was one of "valuation judgment" rather than a "clerical error" under ORS 311.205. A "clerical error" includes one that (i) arises from an error in the assessor's tax records; (ii) "would have been corrected as a matter of course" had the assessor discovered it; and (iii) "[f]or which the information necessary to make the correction is contained in the records." ORS 311.205(1)(a)(A). By contrast, "an error in valuation judgment is one in which the assessor . . . would arrive at a different opinion of value." ORS 311.205(1)(b)(D). After reviewing the relevant administrative rules and case law, the court concluded that the maximum assessed value error at issue was a clerical error because it was either a purely mathematical error or a misapplication of the law, neither of which involved appraisal expertise or judgment.

Public Service Company of New Hampshire d/b/a Eversource Energy, 2020 NH. Master Docket No.: 28873-14-15-16-17PT (June 23, 2020). Submitted by Theresa Walker, Member, N.H. Board of Tax and Land Appeals.

This ruling resolved 138 property tax appeals for four tax years filed by a large utility, Eversource, in 47 municipalities. The property at issue consists primarily electric distribution and transmission assets and one hydroelectric generation facility. Eversource is the largest electric provider in New Hampshire. The appeals were consolidated for hearing and decision by agreement of the parties. After twelve days of hearings spanning four weeks, the board found Eversource did not carry their burden of proving disproportionality based on the appraisal and other evidence it submitted. Abatements (totaling approximately $194.4 million) were nonetheless granted in 91 of the 138 appeals because of the evidence presented by the municipalities, primarily through one appraisal firm that also served as the assessing contractor for many of them. Prior to the current appeals, the board heard and decided 86 appeals spanning two tax years (2011 and 2012) in 2015. The supreme court affirmed the board's decision in those appeals in June, 2017. (Those decisions were presented at the 2017 Tax Judges Conference.)

In New Hampshire, a municipality's selectmen are required to appraise the value of the property located within the municipality, including utility property. See RSA 75:1 (Supp. 2016); RSA 72:8 (2012); see also RSA 72:9 (2012) (stating that utility property that is situated in more than one town "shall be taxed in each town according to the value of that part lying within its limits"). In more than 30 years of litigation between Eversource (formerly Public Service Company of NH) and municipalities throughout the State, Eversource has repeatedly argued the value of its assets is roughly equivalent to net book value ("NBV" commonly defined as original cost less depreciation). For their part, the municipalities argued the value of the assets can be estimated using the sales comparison, income and cost approaches to value and argued NBV allows some assets to escape taxation if they are 100% depreciated.

Apropos to the ongoing battles between utility taxpayers and taxing authorities, our supreme court noted the following some years ago [in Southern New Hampshire Water Co., Inc. v. Town of Hudson, 139 N.H. 139 (1994)]:

[S]ince taxes are a legitimate operating expense, the utilities are allowed to include them in rate base, and thus simply pass along any tax increases to ratepayers in the form of higher utility bills. On the other hand, in those instances where the utility is fortunate enough to win a battle and reduce its tax payments, the town's other taxpayers must make up the difference. When one considers that ... ratepayers and taxpayers are likely to be one and the same persons, it becomes obvious that the only real winners in this game are the lawyers and expert witnesses, who collect their fees regardless of the outcome. To avoid this needless waste of time and money, I join with the [board] in urging the legislature to consider the adoption of a uniform method of utility valuation for ad valorem tax purposes.

As a postscript, and perhaps intended to stem the flood of litigation, as well as to provide some valuation stability to utility companies, RSA 72:8-d Valuation of Electric, Gas, and Water Utility Company Distribution Assets went into effect on August 20, 2019. In summary, it provides that some assets owned by electric, gas and water utility companies will be assessed using a standardized formula. That formula, which has a five-year implementation plan, dictates that distribution and transmission assets (for electric and gas companies) will be assessed using "a weighted average of 70 percent of each asset's original cost and 30 percent of each asset's net book cost." See RSA 72:8-d, II(a)(1).

Southlake Indiana, LLC v. Lake Cty. Assessor, 135 N.E.3d 692 (Ind. Tax Ct. 2019). Submitted by Martha Wentworth, Judge, Indiana Tax Court.

The Tax Court reversed the Indiana Board's final determination that adopted the Assessor's appraisal and income approach values. The dispute was primarily about what constituted market rents. The Assessor's appraiser noted that discount department stores are frequently constructed in build-to-suit transactions, and therefore, build-to-suit rents were market rents. Southlake's appraiser said that sale leasebacks and build-to-suit transactions included non-realty components that are either difficult or impossible to remove, so she avoided using them in her market rent calculations. To help determine which appraiser's estimate of market rent was best, the Board "used its own unique evaluation method."

First, the Court held that the Indiana Board's market rent conclusions were contrary to law. The Assessor's appraiser and the Indiana Board relied on build-to-suit data that was not adjusted or explained as reflecting market rents as required by Kerasotes. Second, the Court found that the Indiana Board provided little basis for its evaluation method that was used to determine which appraiser's market rent estimate was best. The Court believed that "no reasonable person reviewing the administrative record would find enough relevant evidence" to support the Board's unique evaluation method and as a result, concluded that it was unsupported by substantial and reliable evidence.

Discussion Topic 1

How to Handle Unfair Critiques of Our Decisions

What do we do when a higher court overturns one of our decisions carelessly or in perhaps incorrectly, or when someone writes an article criticizing your decisions without merit?

Willens, Robert. 2020. "Wisconsin's Real Estate Transfer Fee Jurisprudence Needs Repair." *State Tax Notes*.

Wilmoth, David. 2020. "Wisconsin Real Estate Transfer Fee Decisions Need No Repair." *State Tax Notes*.

Wisconsin had both happen in the past few months. First, we dismissed a case for lack of subject matter jurisdiction, and a higher court, in a three-page decision with no legal reasoning, sent it back to us conferring jurisdiction on the Commission regarding subject matter far outside our defined scope. Around the same time, an "expert" wrote an article in Tax Notes which launched some harsh but unfounded criticism at some recent WI decisions regarding real estate transfers between entities. In the Tax Notes situation (initial article Tax Notes, May 18, 2020), we had a better expert (former Commissioner and tax expert Dave Wilmoth) write an article (see Tax Notes, June 15, 2020) explaining why the "expert" was completely wrong, but we have no recourse for the trial court decision other than to make some passive aggressive comments in our upcoming decisions about how we know nothing about the topics but the ruling makes us opine on them anyway. Wisconsin would really like to hear how others have handled these types of issues.

State Tax Cases

A. Sales and Use Tax

Citrix Systems, Inc. v. Commissioner of Revenue, 484 Mass. 87; 2020 Mass. Lexis 67; 139 N.E. 3d 293; 2020 WL 563319. Submitted by Mark J. DeFrancisco, Massachusetts Appellate Tax Board Member.

The issue was whether subscription fees paid for software housed in servers located outside of Massachusetts were subject to Mass sales tax. The software enabled users, in Massachusetts and other states, to remotely "screen share" a host computer.

The Supreme Judicial Court of Massachusetts held that a taxpayer's subscription fees involved transfers of rights to use software installed on a remote server under 830 Mass. Code Regs. 64H.1.3(3)(a) (2006) because when its customer purchased a subscription for access to an online product, the customer gained access to a remote network of the taxpayer's servers running proprietary software, which was necessary for its products to function; and the taxpayer's sales of subscriptions for online products constituted sales of tangible personal property under Mass. Gen.

Laws ch. 64H, § 1 because substantial evidence supported the Appellate Tax Board's determination that the object of the transaction was acquiring access to and use of the online products. The taxpayer's products involved access to a network of servers hosting proprietary software, and that software was necessary for its online products to function.

B. State Income Tax - Domicile

Appeal of L. Mazer & M. Mazer; 2020-OTA-263P (FIT). Submitted by Kristin Kane, Chief Counsel, California Office of Tax Appeals. Presented by John Johnson, Administrative Law Judge, California Office of Tax Appeals.

Appellant-husband moved from California to Malaysia for the purpose of employment and signed a two-year contract which stated that the employer will provide him with a leased car, leased apartment, petrol/toll allowance, a cellular phone, and payment for the phone bill. Appellant-wife continued to live at their home in California and remained a domiciliary and resident of California. Appellant-husband ceased his employment after 13 months. On their California return, Schedule CA, appellants subtracted one-half of appellant-husband's wages earned in Malaysia. FTB determined that appellant-husband was a resident of California and, after adding back the subtracted wages to their taxable income, proposed an assessment of additional tax.

In its opinion, the Office of Tax Appeals (OTA) noted that California residents are taxed upon their entire taxable income (regardless of source), while nonresidents are only taxed on income from California sources. (R&TC, §§ 17041(a), (b), & (i), 17951.) OTA stated that, in determining residency for an individual not domiciled in California, the inquiry is whether the individual is in California "for other than a temporary or transitory purpose." (R&TC, § 17014(a)(1).) But for an individual domiciled in California, the inquiry is whether the individual "is outside [California] for a temporary or transitory purpose." (R&TC, § 17014(a)(2).) OTA stated that, in order to determine which residency test to apply, it must first determine whether appellant-husband was domiciled in California.

OTA determined that appellant-husband remained a domiciliary of California because appellant-wife continued to maintain a home in California and appellants provided no evidence to indicate any steps taken to move appellant-wife to a new permanent home in Malaysia. In addition, appellant-husband returned to the home at the conclusion of his out-of-state employment. OTA determined these facts indicated that his domicile did not change from California to Malaysia. (*See Appeal of Addington* (82-SBE-001) 1982 WL 11679); Cal. Code Regs., tit. 18, § 17014(c).) As a result, OTA stated that appellant-husband will be considered a resident of California if it is determined he was outside the state for a temporary or transitory purpose.

OTA noted that, where a California domiciliary leaves the state for employment purposes, it is particularly relevant to determine whether, upon departure, the taxpayer substantially severed his or her California connections and then took steps to establish significant connections with his or her new place of abode, or whether the California connections were maintained in readiness for his or her return. (*Appeal of Harrison* (85-SBE-059) 1985 WL 15838.) OTA examined that factors provided in *Appeal of Bragg* (2003-SBE-002) 2003 WL 21403264, to assist in determining where appellant-husband had the closest connection. OTA determined that appellant-husband did not make significant connections in Malaysia because his connections were only those provided by his employer as a matter of job convenience, and he made no attempt to sever his substantial connections with California. As a result, OTA found that appellant-husband's presence in Malaysia was for a temporary or transitory purpose and that he was a resident of California.

C. State Income Tax - Nexis

Aroya Investment I, LLC**,** 2020-OTA-255P (FIT). Submitted by Kristen Kane, Chief Counsel, California Office of Tax Appeals. Presented by Kenny Gast, Administrative Law Judge, California Office of Tax Appeals.

Office of Tax Appeals (OTA) concluded that for the 2016 tax year, Aroya Investment I, LLC (appellant), which was classified as a partnership for tax purposes, was doing business in California and therefore subject to the $800 annual LLC tax because its distributive share of property from 1155 Island Avenue, LLC (Island), which was also classified as a partnership for tax purposes and undisputedly doing business in California under R&TC section 23101, exceeded the property factor threshold of $54,771 under R&TC section 23101(b)(3) by way of R&TC section 23101(d). In short, this opinion stands for the proposition that for tax years beginning on or after January 1, 2011, even if a taxpayer's facts fall squarely within those of *Swart Enterprises, Inc. v. Franchise Tax Bd.* (2017) 7 Cal.App.5th 497 (*Swart*), it is still considered doing business in California if the objective thresholds of R&TC section 23101(b)(1)-(4) are met (including by way of R&TC section 23101(d)).

During the tax year at issue, appellant's sole connection to California was holding a minority, non-managing membership interest in Island, which was formed to, among other things, own, operate, lease, finance, sell, and manage a facility on property that it had acquired from the Thomas Jefferson School of Law in San Diego, California. Although appellant did not dispute FTB's contention, which the panel sustained, that its distributive share of Island's California real property significantly exceeded $54,771 under R&TC section 23101(b)(3), it nonetheless argued that it was not doing business in California under R&TC section 23101(a) and *Swart* because it was a limited partner of Island.

The panel rejected appellant's contention for three reasons. First, for taxable years beginning on or after January 1, 2011, subdivisions (a) and (b) of R&TC section 23101 contain two alternative tests for doing business, and the satisfaction of *either test* leads to a nexus finding. Since appellant did not dispute its property exceeded the bright-line threshold amount under R&TC section 23101(b)(3), it was doing business in California and that ends the inquiry. Therefore, a duplicative analysis under subdivision (a) is unnecessary. Second, appellant mistakenly asserted *Swart* considered and dismissed a similar argument to the one FTB advanced in this case because, as the panel pointed out, *Swart* dealt with a tax year *prior to* 2011 when only subdivision (a) of R&TC section 23101 was applicable. Lastly, for purposes of applying the bright-line tests, the plain language of R&TC section 23101(d) itself makes no distinction between active versus passive ownership interests, or general versus limited partnerships (or even unitary versus nonunitary partnership interests). Therefore, a passthrough entity's sales, property, and payroll factors still flow up to the partners under any of those circumstances for purposes of R&TC section 23101(d). Accordingly, the panel denied appellant's refund claim because it found appellant was doing business in California under R&TC section 23101(b)(3).

D. Estate Tax

Shaffer v. Commissioner of Revenue, 485 Mass. 198 * | 148 N.E.3d 1197 ** | 2020 Mass. LEXIS 331 *** | 2020 WL 3885886. Submitted by Mark J. DeFrancisco, Massachusetts Appellate Tax Board Member.

The issue was whether the estate of a surviving spouse who died a resident of Massachusetts was subject to Mass estate tax on intangible property that was subject to a QTIP trust established by the first-to-die spouse while both spouses were residents of New York. The case raised constitutional and statutory issues.
The Supreme Judicial Court of Massachusetts held that the Appellate Tax Board properly upheld the Commissioner of Revenue's assessment of an additional Massachusetts estate tax under Mass. Gen. Laws ch. 65C, § 2A(a), based on the value of the assets in a qualified terminable interest property (QTIP) trust because there was no constitutional or statutory barrier to the assessment where the surviving spouse's domicile in Massachusetts at the time of her death provided the connection to the Commonwealth to allow Massachusetts to impose the tax, and because the predeceasing spouse's estate did not make a Massachusetts QTIP election, nor was there otherwise any Massachusetts QTIP property, the QTIP assets were includable in the estate for purposes of the Massachusetts estate tax.

E. Corporate Franchise Tax – Royalties

The Walt Disney Company and Consolidated Subsidiaries, Tax Appeals Tribunal, August 6, 2020. Submitted by Roberta Moseley Nero, President and Commissioner, New York State Tax Appeals Tribunal.

This is a corporation franchise tax case involving the worldwide entertainment company whose various related member companies rely heavily on their ability to exploit Disney's intellectual property and pay royalties for the use of that intellectual property. The significant issues addressed in this case are whether Disney may exclude royalties received from its non-New York related members from the computation of its entire net income (ENI) under the Tax law, and if not, whether denying Disney such an exclusion violates the dormant Commerce Clause of the United States Constitution.

The Tax Law provides that royalty income from a related member may be deducted in determining New York ENI unless the royalty payments would not be required to be added back under the Tax Law. New York requires royalty payments made to a related member to be added back to the extent the payments were deductible in calculating federal taxable income, unless certain exceptions apply – none of which were applicable in this case. The question is whether royalty payments from a non-New York related member are required to be added back. Disney essentially argued that as none of the statutory exceptions applied, the royalty payments were required to be added back. The Division of Taxation's position was that as the add back provision did not apply to non-New York taxpayers, an add back could never be required from such related members. Based upon various principals of statutory construction, the Tribunal concluded that royalty payments from non-New York related members were not required to be added back and accordingly that Disney was not allowed to deduct such income.

Disney contends that by reaching this decision, the Tribunal made the statute at issue unconstitutional as applied in that it now discriminated against interstate and foreign commerce because the New York member's income exclusion was based upon the New York activities of its related member royalty payer. The Tribunal reviewed the constitutional claim by considering the overall economic interest of the related members. When looked at that way, the Tribunal found no constitutional violation because tax was paid, whether directly or indirectly, both in the instance of the related member being a New York taxpayer and the instance of the related member being a non-New York taxpayer.

F. Corporate Franchise Tax Credit - Retroactivity

NRG Energy, Inc., Tax Appeals Tribunal, December 17, 2019. Submitted by Roberta Moseley Nero, President and Commissioner, New York State Tax Appeals Tribunal.

This is a corporation franchise tax case involving a power provider that was denied a qualified empire zone enterprise (QEZE) tax credit because its certification under the program was revoked half-way through 2009, the year for which the credit was claimed. The revocation was based upon statutory amendments introduced in January of 2009 and adopted in April of that year (the 2009 amendments) that changed the criteria NRG was required to meet to be certified. All previously certified businesses were reviewed in 2009 to determine whether they continued to be qualified for the program. NRG's certification was revoked on the basis of this review. In our initial review of this case, the Tribunal found that the application of the 2009 amendments constituted a retroactive application of a tax statute and remanded the case to the Administrative Law Judge to determine whether such retroactive application was constitutional. The Administrative Law Judge found that it was; the Tribunal, in our decision after remand, disagreed and found an unconstitutional retroactive application of the 2009 amendments in this case.

The Tribunal applied the ***Replan*** factors and found as follows: (1) NRG reasonably relied upon the tax benefits in effect at the start of 2009, and while NRG did nothing to change its conduct after the introduction of the 2009 amendments in January, it was uncontested that the changes NRG could have made to comply with the new terms would have to have been made in December of 2008; (2) the 97-day retroactive application of the statute at issue in this case did not amount to a violation of NRG's due process rights; and (3) a Court of Appeals decision regarding the 2008 tax year, http://www.nycourts.gov/reporter/3dseries/2013/2013_03935.htm), had already found that the legislative purposes in adopting the 2009 amendments were to stem abuses in Empire Zones Program and increase tax receipts and that retroactively denying credits to taxpayers did nothing to deter behavior that had already occurred. In weighing these three factors, the Tribunal looked to the Court of Appeals decision and found that, once it is determined that NRG could not have taken any action that might have blocked the revocation of its certification after December of 2008, there is nothing to distinguish this case. Accordingly, it concluded that the retroactive application of the 2009 amendments violates NRG's due process rights. The Tribunal did note that, while such a conclusion was unusual when dealing with a retroactive period of less than a year, it was not unheard of.

The New York State Tax Tribunal had one other case this year concluding that the retroactive application of a statute constituted a due process violation, Franklin C. Lewis, Tax Appeals Tribunal, May 21, 2020 (https://www.dta.ny.gov/pdf/decisions/827791.dec.pdf.). Submitted by Roberta Moseley Nero, President and Commissioner, New York State Tax Appeals Tribunal.

G. Corporate Franchise Tax - Apportionment

Powerex Corp. v. Dept. of Rev., ___ OTR ___ (Oregon Tax Court Case No. 5339, July 15, 2020). Submitted by Robert Manicke, Judge, Oregon Tax Court.

In this corporate income tax apportionment case, the court granted summary judgment for the taxpayer on the taxpayer's principal claim that it was not a "public utility." The taxpayer, a subsidiary of a Canadian utility, operated solely as an unregulated wholesaler of electricity and natural gas. Many of the taxpayer's electricity sales were to California utilities. It had no plant or equipment in Oregon, and it had no obligation to sell electricity or gas to any member of the public.

The main issue was whether the taxpayer operated "for public use," within the definition of "public utility" in Oregon's version of the Uniform Division of Income for Tax Purposes Act ("UDITPA"). Like many other states, Oregon excludes public utilities from UDITPA and allows greater authority to the state taxing authority to craft alternative apportionment regimes for public utilities.

The taxpayer historically had considered itself as a UDITPA taxpayer, not a public utility, and the Oregon Department of Revenue had agreed. In the early 2000s, the Department adopted a regulation under UDITPA that sourced electricity and gas sales to Oregon if the parties agreed in their contract that the electricity or gas was being delivered in Oregon. The taxpayer contested that regulation, and in 2015 the Oregon Supreme Court invalidated it on the grounds that UDITPA required sourcing according to the "ultimate destination," which for the taxpayer often was California.

Shortly after the Supreme Court's decision, the Department declared the taxpayer a public utility, adopted essentially the identical regulation outside UDITPA, and audited and assessed the taxpayer a deficiency for a new set of tax years.

Oregon's version of UDITPA, as enacted in 1965, defines "public utility" as "any business entity whose principal business is ownership and operation for public use of any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, oil, oil products or gas." ORS 314.610(6) (emphasis added).

The taxpayer argued that it did not operate for "public use" because it could freely pick and choose its customers and had no obligation to sell electricity or gas to anyone. Under Oregon's statutory interpretation jurisprudence, the court examined the statutory text, context including case law from around the country on "public use," and the legislative history of UDITPA and Oregon's adoption of it.

The court agreed with the taxpayer that there was no public use of its property. Therefore, the court did not have to address taxpayer's additional claims that the Department had adopted its new rule for an improper purpose or by improper methods, and that the Department had improperly applied the rule retroactively.

Discussion Topic 2

Unique Properties and Sales Comparison Approach.
How to fit a square peg into a round hole?

New Jersey had a case this year with a very unusual fact pattern. An oceanfront block consisting of six lots with all utilities had never been developed. It was located in the middle of a highly developed and popular seaside town. For decades the property was undevelopable due to a NJ Department of Environmental Protection regulation that prohibited development on properties with dunes. In 2012, Superstorm Sandy washed away the dunes, and in 2013 the owner commenced a development plan. Prior to the October 1, 2013 valuation date for tax year 2014, the New Jersey Department of Environmental Protection agreed that the dune rule prohibiting development no longer applied, but a site plan was not submitted until January 2014. The assessment for 2014 was based on six fully developable lots with approvals. In September 2014, site plan approval was given for the site reconfigured as four lots instead of six.