2022 National Conference of State Tax Judges
Case Law Updates Program
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SECTION ONE: LOCAL PROPERTY TAX CASES

A. EXEMPTIONS AND ABATEMENTS

State, et al. v. ABOR, et al., CV-21-0134-PR (April 5, 2022). Submitted by Sara Agne, Presiding Judge, Arizona Tax Court.

The Arizona Board of Regents (ABOR), a state agency, and Omni Enterprises (Omni), a private entity, entered into an option agreement for Omni to build a hotel and conference center on ABOR-owned land, which is exempt from property taxation. The agreement contained an option for Omni to lease the property for sixty years for a prepaid rent amount, as well as annual rent for the lease term, with a $10 right of purchase for Omni at the end of the lease. ABOR paid $19.5 million toward construction costs and retained a right to use the conference center for seven days per year.

The Arizona attorney general filed a tax court complaint alleging in part that ABOR abused its tax-exempt status and improperly diverted tax revenues under the agreement with Omni. The tax court found that the attorney general lacked authority to bring those claims, and the Arizona Supreme Court agreed: ABOR's property is exempt from taxation under the Arizona Constitution as it is the State, and thus the Arizona attorney general lacked a viable tax to enforce under his statutory authority to do the same. Other claims were remanded for further proceedings.

Atlantic City Opera Theater v. Atlantic City, 013513-2018 (December 16, 2021), Submitted by Mark Cimino, Judge, Tax Court of New Jersey.

The issue in this matter is whether the property meets the requirements for tax exemption as an opera theater. The taxpayer asserts that the only proofs are that the property is used as an opera theater. However, taxpayer's statements have not been subjected to the rigors of cross-examination and an evaluation by the trier of fact. A trier of fact is free to weigh the evidence and to reject the testimony of a witness, even though not directly contradicted, when it contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth. Notably, to the casual observer, the property seems to be designed and furnished for residential use. With unresolved credibility issues, the cross-motions for summary judgment are denied.

Hoggard I v. Department of Revenue, TC 5336 (June 7, 2019), Submitted by Robert Manicke, Judge, Oregon Tax Court.

This case raises the issue of when an issue becomes moot and whether the court nevertheless can and should decide the substantive issue. The case is a few years old but seems relevant for future cases.

On June 29, 2017, the county assessor mailed an "omitted property notice" to the taxpayers/homeowners (husband and wife) informing them that the assessor had discovered a kitchen and bath remodel that had not been placed on the tax roll. The notice informed the taxpayers of two upcoming dates:

- The assessor "intended" to add the remodel to the property tax roll on July 19, 2017, unless taxpayers were to file an objection before then.
- Any appeal must be filed in the Tax Court Magistrate Division by October 17, 2017.

At the first case management conference before the magistrate, on February 1, 2018, the magistrate questioned whether a single notice sufficed under the omitted property statute. After that hearing, the assessor's representative posed that question to county counsel, who advised on February 6 that the assessor's office should switch to a two-notice process, adding, "Otherwise, we are vulnerable to a challenge." On March 5, the assessor's office nevertheless proceeded to file a motion to dismiss taxpayers' appeal, devoting four paragraphs to an argument that the appeal was untimely.

On April 9, the assessor's office asked its supervisory agency, the state Department of Revenue (DOR), whether the statute requires one notice or two. The DOR responded on May 17 that the law requires an assessor to send two notices, one to inform the taxpayer of the deadline to object, and another one after the assessor has added the omitted property to the roll informing them of their right to appeal to the Magistrate Division. The response stated that a taxpayer's deadline to appeal does not start to run until the second notice is sent.

Meanwhile, taxpayers conceded before the magistrate that they had missed the deadline to appeal, and they proceeded to seek relief from the deadline on the grounds of hardship. They filed an explanation disclosing, among other things, that the wife had been diagnosed with cancer during the time leading up to the deadlines, revealing the details of specific symptoms, and explaining that they also had been preoccupied with advocating for the husband's dying sister-in-law. The magistrate could not determine that these events caused the untimeliness and dismissed their case. At no time did the assessor's office inform taxpayers that its lawyer and its supervising agency had advised the assessor's office that it had erred by failing to send a second notice, or that the taxpayers' appeal was timely.

The taxpayers then engaged counsel, who appealed to the regular division on their behalf in September 2018. By operation of law, the DOR became the defendant, instead of the county assessor, when the appeal was filed. The DOR seemed to agree that the assessor's notice was defective and that the taxpayers' original appeal to the magistrate division was timely. the DOR held discussions with the taxpayers and the assessor, and the assessor sent the taxpayers a notice

on February 13, 2019, stating that the assessor was removing the assessment and refunding the additional tax paid. The 2019 notice stated, however, that the assessor intended to restart the process by sending "proper notification." The DOR moved to dismiss the taxpayers' appeal as moot.

On February 25, 2019—after taking significant discovery that revealed the assessor's communications with the DOR and the assessor's lawyer—the taxpayers filed a motion asking the court to enter judgment, to enable them to seek a post-judgment award of attorney fees. The taxpayers invoked a statute that allows a court to adjudicate a case against a governmental body that has become moot if, among other things, the governmental act is capable of repetition yet evading review. The court held that the statutory requirements were satisfied, issued a judgment against the DOR, and later awarded most of the taxpayers' requested attorney fees.

Township of Green v. Life With Joy, Inc.; Life With Joy, Inc. v. Township of Green, Nos. 009572-2016, 009068-2018; 008566-2017, 013541-2019, 010728-2020 (March 24, 2022), Submitted by Vito Bianco, Judge, Tax Court of New Jersey.

The taxpayer satisfied its burden showing that the subject property, a living and learning center for young adults with developmental disabilities, was used in furtherance of the taxpayer's charitable purpose. Because the non-charitable profit-generating use of the subject property was de minimis, the subject property satisfied the profit test under New Jersey statutes. With regard to its 2019 tax appeal, the taxpayer should have been aware of the filing deadline, and its timeliness was inexcusable; hence, the court lacked jurisdiction to hear the appeal.

B. VALUATION

Mesquite Power, LLC v. Arizona Department of Revenue, TX2021-000516 (September 12, 2022), Submitted by Sara Agne, Presiding Judge, Arizona Tax Court.

A power plant in Maricopa County was put into service in 2003, and the membership interests in the ownership LLC were acquired various times over the years since by different taxpayers. Relevant to this decision of the Arizona Tax Court, the membership interests were fully acquired by the taxpayer at issue for tax year 2022 in 2018 and 2019.

Each year, taxpayers for electric generation facilities must file a verified report with the taxing authority, stating the information the Arizona Department of Revenue (DOR) requires before it can value the property. Part of that information includes the cost of constructing the property at issue or the cost of acquiring it in an arm's length transaction.

Arizona law recognizes that (i) some power plant acquirers may gain possession of the legacy cost information from the seller of the plant and (ii) some may not. The Arizona DOR had argued that the taxpayer had a duty to report costs by vintage year (legacy cost information) and a duty to acquire that information, even if it did not possess it after the arms' length transaction.

The Arizona Tax Court found that the DOR's view would render that part (ii) of the Arizona statute on calculating and reporting cost information superfluous–if taxpayers were always

required to proceed as if they had possession of the cost information and were required to retrieve it if they did not have it. Therefore, the plaintiff power plant owner could proceed with its appeal of the DOR's valuation, as it did not waive its right to appeal by filing a verified report without legacy cost information reported by vintage year.

Griffith Energy, LLC v. Arizona Department of Revenue**,** TX2021-000517 (September 12, 2022), Submitted by Sara Agne, Presiding Judge, Arizona Tax Court.

This case involves the same rationale and result as, and was decided the same date as, Mesquite Power, LLC v. Arizona Department of Revenue, but factual distinctions in that the taxpayer at issue here acquired all the membership interests in a Mohave County power plant in 2020.

Uhrich v. Assessors of Wayland, Mass ATB Findings of Fact and Reports, 2022-175 (September 12, 2022), Submitted by Mark DeFrancisco, Chairman, Massachusetts Appellate Tax Board.

The subject property is an 85,378-square-foot parcel of land improved with a single-family home that straddles the Wayland-Lincoln town line, with 73,181 square feet of land located in Wayland and the remaining 12,197 square feet located in Lincoln. The town line also divides the single-family home.

Although both municipalities assessed and taxed that part of the subject property that was in their respective jurisdictions, the taxpayers only challenged the assessed value in Wayland; in fact, they called the Lincoln assessor as a witness in their appeal.

The land in either municipality was insufficient to constitute a buildable lot: the land in Wayland had no street frontage and the land in Lincoln was well short of the required 80,000 square foot lot to constitute a buildable lot in Lincoln.

Historically, Wayland had treated all 73,181 square feet of the taxpayer's property in Wayland as rear acreage, with a relatively low value, while Lincoln treated all 12,197 square feet of the taxpayer's property as a high-value prime lot, using a land-curve methodology to increase the value even higher than the base per-square-foot value of an 80,000 square foot prime lot.

For the year at issue, the Wayland assessors determined that some of the Wayland land should be treated as a prime lot, because land in Wayland was necessary to constitute a buildable lot. The Wayland assessors' approach was to carve out a 60,000 square foot lot, which was the minimum buildable lot size in Wayland, and attribute all 12,197 square foot in Lincoln as a prime lot and the remainder of the 60,000 square feet as a prime lot in Wayland. The Wayland assessor also used the base value of a 60,000 square foot prime lot and did not increase it by using a land curve.

The Wayland assessor attempted to engage the Lincoln assessor prior to issuing their tax bills in an effort to get both communities to agree on this approach. The Lincoln assessors declined the invitation, maintaining that since it provided all services and provided frontage, Lincoln was entitled to all of the prime lot value.

The ATB found that the method employed by the Wayland assessors–in which the lower of the two communities' prime-lot requirements was satisfied, and both communities shared the prime lot value–resulted in a reasonable allocation of the subject property's land value that recognized the need for land located in both towns to constitute a buildable residential lot.

Given that land in both towns was necessary to constitute a buildable lot, the ATB analogized the situation with zoning cases where owners of land that was split between two zoning districts could combine the contiguous land in another district to satisfy frontage and other zoning requirements.

Because it similarly ignored the contribution of the Wayland land to the subject property's value, the ATB rejected the suggestion of the Lincoln assessor that value allocation of properties located in two municipalities should depend only on the level of services provided by the municipalities. Not only was there no authority offered for such an approach, the ATB determined that linking real estate tax to services provided is an unworkable formula and would lead to arguments about the extent of use of municipal services, including local public schools, elder services, snow removal, street cleaning, and a host of other municipal services that some taxpayers may use while others do not.

G&I IX OIC LLC v. County of Hennepin, A21-1493 (August 24, 2022), Submitted by Jane Bowman, Chief Judge, Minnesota Tax Court.

The Minnesota Tax Court found that the Data Practices Act prohibits Hennepin County from disclosing the nonpublic data contained within its expert appraisal report.

The question to the Supreme Court was whether Hennepin County, in a property tax trial involving respondent G&I IX OIC LLC, may use an expert report containing nonpublic data about comparable rental properties to establish the market value of G&I's office tower.

The Minnesota Supreme Court reversed a tax court decision granting a tax petitioner's motion to strike certain nonpublic data about comparable income-producing properties, which allows counties to introduce expert reports that contain otherwise nonpublic data about comparable properties.

Jusseaume v. Yavapai County, TX2021-000356 (July 22, 2022), Submitted by Sara Agne, Presiding Judge, Arizona Tax Court.

A property taxpayer could appeal what they claimed was an unlawful computation of limited property value that arose as part of an appeal under Arizona's error-correction statutes in response to a Notice of Proposed Correction. The Arizona Tax Court found the issue arose as a result of the application of the valuation-—including limited property value determination—and legal classification criteria for the corrected tax year. The taxing authority had argued that the case was barred because it sought an independent review of the overall valuation of the property that was not a result of an error as required by the error-correction statutes.

South Point Energy Center, LLC v. Arizona Department of Revenue, et al., CV-21-0130-PR (April 26, 2022), Submitted by Sara Agne, Presiding Judge, Arizona Tax Court.

The Arizona Supreme Court considered whether the Indian Reorganization Act of 1934 expressly preempted Mohave County's ad valorem property tax on a power plant owned by non-Indian lessees of land when the land was purportedly acquired by the federal government under the Act and held in trust for the benefit of an Indian tribe. The Court held that the Act did not expressly preempt that tax.

The Court's rationale was that ownership rights in land generally include permanent improvements affixed to that land by a lessee but not if the parties agree that the lessee owns those improvements. Here, the lessee owned the power plant improvements and was a non-Indian entity; the property taxes fell solely on it, and not on the tribe's land, Vice Chief Justice Timmer wrote for the Court.

The Arizona Supreme Court remanded the case to the Arizona Court of Appeals, as the lower court had not addressed whether the tax court had correctly ruled that the power plant also was not impliedly exempt from the County's tax under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

C. SETTLEMENT

1000 Harbor Blvd., LLC by TT UBS Financial services, Inc. v. Township of Weehawken **and** ***1200 Harbor Boulevard, LLC v. Township of Weehawken***, 007840-2018, 002115-2019, 002389-2020 and 003701-2016, 004768-2017, 003266-2018, 002099-2019, 003317-2020 (March 4, 2022), Submitted by Mary Siobhan Brennan, Judge, Tax Court of New Jersey.

These matters involve requests by the municipality to vacate judgments entered by the court a year earlier based upon a subsequent property sale. During the tax years at issue (2016–2020) adjacent properties located at 1000 and 1200 Harbor Boulevard were owned by affiliates of Hartz Mountain Industries, Inc. Hartz developed the two properties as high-rise commercial buildings in an area on the Hudson River to the east of the helix of the Lincoln Tunnel.

The municipality's attorney drafted and filed Stipulations of Settlement with the court in early January 2021. The Stipulations of Settlement referred to a separate tax settlement agreement previously executed by the parties; however, the parties did not provide the agreement to the court. The court entered judgments for all pending tax appeals on January 21, 2021. On November 29, 2021, 1000 Harbor Boulevard was sold to a third party at a purchase price of $75 million more than the 2020 agreed upon property value in the related tax appeal.

In January 2022, the municipality filed motions to vacate the January 2021 judgments and to invalidate the negotiated assessment reductions included in the separate tax settlement agreement for tax years 2021, 2022, and 2023. It alleged that the taxpayers must have known of the contemplated pending sale of the property prior to signing the agreement; that the pending sale was material information; and that the taxpayers did not disclose the pending sale in answers to interrogatories. The municipality further argued that the court should relieve them from the

court's judgment because of the fraud, misrepresentation, or other misconduct of the taxpayers and because the newly discovered evidence would likely have altered the judgments. Additionally, it argued that the failure to inform them of the sale violated court rules and the continuing duty to amend interrogatories under New Jersey case law.

The taxpayers filed cross-motions for enforcement of the judgments and the provisions of the separate tax settlement agreement and, as to 1000 Harbor Blvd, LLC's tenant, to order pre-judgment interest plus attorney fees and costs as provided for in the separate tax settlement agreement. They argued that they did not know of the sale prior to signing the Stipulation of Settlement and that the sale does not constitute a valid reason to vacate the judgments. Taxpayer 1000 Harbor Blvd also argued that the failure to provide a timely refund payment entitled it to pre-judgment interest of five percent based on the side agreement plus attorney fees and costs.

The court held that since each annual assessment is a discrete event under New Jersey statutes, that the November 2021 sale is irrelevant to the market value for tax years 2018, 2019, and 2020, and that there was no supporting evidence or case law justifying vacating the judgments. As to the separate tax settlement agreement, the court held that since the agreement was neither reviewed nor approved by the court, and since the 2021, 2022 and 2023 settlement provisions were not related to pending appeals before the court, those provisions were not within the statutory jurisdiction of the court.

The court did, however, find that it had jurisdiction over the provisions related to tax years 2018, 2019, and 2020, and pursuant to the agreement, the court awarded refund interest in accordance with the statutory rate, as well as related attorney fees and costs. The interest and attorney fees and cost are currently on appeal.

The court filed an amplification letter with the Appellate Division explaining the reasons that the court awarded attorney fees and costs with respect to the cross-motion for interest due on the judgment and the methodology used to calculate the costs.

D. CONSTITUTIONAL OBJECTION TO ASSESSMENT/JURISDICTION

Appeal of Acosta and Castro, 2022-OTA-253P (March 30, 2022), Submitted by Cheryl Akin, Presiding Judge, California Office of Tax Appeals.

The issue was whether Office of Tax Appeals (OTA) has jurisdiction to decide whether 49 U.S.C. section 11502(a), a federal statute, preempts or otherwise prohibits California from taxing resident appellant-wife's community property share of nonresident appellant-husband's out-of-state railroad wages for the 2016, 2017, and 2018 tax years; and if OTA has jurisdiction, whether California was preempted.

49 U.S.C. section 11502(a) provides in full: "No part of the compensation paid by a rail carrier providing transportation subject to the jurisdiction of [the Surface Transportation Board] under this part to an employee who performs regularly assigned duties as such an employee on a railroad in more than one State shall be subject to the income tax laws of any State or subdivision of that State, other than the State or subdivision thereof of the employee's residence."

Based on article III, section 3.5, of the California Constitution, California Code of Regulations, title 18, (Regulation) section 30104(a), case law from the Board of Equalization (OTA's predecessor), OTA concluded that it was prevented from ruling on the issue in the appeal because appellants did not direct OTA to, nor was OTA aware of, any appellate court decision that has determined whether 49 U.S.C. section 11502 preempts Revenue and Taxation Code (R&TC) section 17041(a), the California statute authorizing California to tax in full appellant-wife's community property share of nonresident appellant-husband's out-of-state railroad wages. OTA also concluded that neither Regulation section 18051(d) nor R&TC section 17951(b)(2) changed the result because the former only addresses whether a nonearning spouse has a marital interest in the earning spouse's income and the latter only prohibits California from taxing a nonresident's out-of-state railroad wages under 49 U.S.C. section 11502, not a California resident spouse's community property share of those wages.

E. JURISDICTION/COVID-19 EFFECT ON RELAXATION OF STATUTORY REQUIREMENTS

Branchburg Hospitality LLC v. Township of Branchburg, 32 N.J. Tax 546 (February 25, 2022), Submitted by Kathi F. Fiamingo, Tax Court of New Jersey, presented by Christine Nugent, Tax Court of New Jersey.

The taxpayer, a hotel, failed to provide sufficient basis to support a finding that the tax payment requirements should be relaxed because it provided no evidence of the effects of COVID-19 on its business. It also did not provide anything to demonstrate what steps it took to reduce costs, obtain grants and loans, or otherwise mitigate the claimed effects of COVID-19.

F. HOMESTEAD DEDUCTION/TAX CAPS

Monroe County Assessor v. Strychalski, 176 N.E.3d 267 (August 31, 2021), Submitted by Martha Blood Wentworth, Indiana Tax Court.

The Strychalskis purchased a residence on a lake in Indiana; they also owned a residence in Illinois. The assessor removed the Indiana homestead deduction having determined on audit that the Strychalskis had claimed homestead deductions on both their Illinois and their Indiana properties. The Strychalskis appealed to the Monroe County Property Tax Assessment Board of Appeals (PTABOA) and then to the Indiana Board of Tax Review, explaining that the Illinois homestead deduction was their son's because he was listed as an owner on the deed, he paid the property taxes, and he got the benefit of the homestead deduction.

Indiana law provides a homestead deduction from assessed value of one's principal place of residence in Indiana. Accordingly, one is not entitled to more than one homestead deduction.

In its final determination, the Indiana Board found that the evidence indicated that the Strychalskis were using the Indiana property as their principal place of residence and "although they were originally receiving an additional homestead deduction in Illinois, that was an error

they have since corrected." Consequently, the Indiana Board found that the Strychalski's Indiana property was entitled to the homestead deduction. The assessor appealed.

The tax court reversed the Indiana Board's final determination. The record contained contradictory evidence about the location of the Strychalski's principal place of residence. Their drivers' licenses, state income tax returns, and voter registration cards all indicated that their principal place of residence was in Illinois; nonetheless, they had testified that the Indiana property was their primary place of residence. "Although the Court may have weighed the evidence differently [than the Indiana Board], it will not reweigh th[at] evidence or judge anew the credibility of the witnesses."

The court explained, however, that the record evidence clearly demonstrated that the Strychalskis confirmed that they received a homestead deduction on their Illinois property during the years at issue. The Indiana Board reasoned that the Strychalskis had received the Illinois deduction in error, but the court explained that that reasoning was unsupported by probative evidence and was thus conclusory for two reasons. First, the Indiana Board acknowledged in its final determination that the ownership of the Illinois property was "somewhat unclear." Second, the Indiana Board relied on the absence of contrary evidence to show that their son would have been entitled to the Illinois homestead deduction, turning the burden of proof concept on its head. Although the Strychalskis did testify that they went to the county in Illinois and changed the record to show their son as the owner of the Illinois property going forward, they did not meet their burden of proof because they failed to provide evidence that they refunded the property tax on the deduction amounts they received to undo their benefit for the years at issue. Therefore, the tax court reversed the Indiana Board's final determination because it was not based on probative evidence that the Strychalskis did not have two homestead deductions or that their son had the Illinois homestead deduction.

Matthew A. Schiffler v. Marion County Assessor, 184 N.E.3d 726 (February 23, 2022), review denied, submitted by Martha Blood Wentworth, Indiana Tax Court.

Schifffler owns residential property in Indianapolis, Indiana. His property consists of a house with an attached garage, a detached carriage house, and a second, free-standing garage, all of which are situated on approximately 2.5 acres of land. The petitioner used the carriage house as "an entertainment room" and the free-standing garage as a place to enjoy hobbies such as woodworking.

For the 2019 tax year, the petitioner's house, attached garage, and one acre of land were awarded the benefit of Indiana's homestead deduction and therefore received the credit allowed for under the Indiana Constitution's 1% "tax cap." The petitioner's carriage house and free-standing garage, however, were not considered to be part of the statutorily defined "homestead" and, as a result, were subject to the 2% and 3% tax cap credits.

Schiffler challenged the amount of the tax caps applied to his carriage house and free-standing garage, first with the Marion County PTABOA and then with the Indiana Board. During the Indiana Board hearing, Schiffler argued that because he used the carriage house and free-standing garage as extensions of his main house, they should also be considered as his homestead property that is eligible for the homestead deduction and applicable 1% tax cap credit. Alternatively, he argued that those improvements should qualify for the 1% tax cap because they: 1) constitute "curtilage," which the Indiana Constitution includes as homestead property; and 2) are "attached" to the main house by a common, connected, cement driveway.

The Indiana Board denied Schiffler's appeal. In its final determination, the Indiana Board stated that "the Indiana Constitution does not establish the tax caps directly, rather, it directs the legislature to do so. Thus, it is our responsibility to examine whether [the petitioner's] property qualifies for a homestead deduction under the Indiana Code, not whether it meets the constitutional definition of curtilage." The Indiana Board explained that even though Schiffler's evidence demonstrated that he used the carriage house and detached garage as extensions of his home, they did not qualify as part of his homestead eligible for the standard homestead deduction—and thus 1% property tax cap—because:

- the legislature has put specific limits on what type of property is eligible for a homestead deduction. Specifically, Ind[iana] Code § 6-1.1-12-37 provides that the homestead includes "house or garage" and "another residential yard structure that is ... ***attached*** to the dwelling."
- The legislature did not define attached, and absent such guidance, we must give the term its ordinary and usual meaning. We are not persuaded that any structure, so long as it shares a driveway or utilities, is "attached." Rather, it seems far more likely that the legislature intended the homestead to only apply to buildings that were structurally attached via a shared roof or wall. Because neither [the carriage house nor the detached garage] is connected in such a way, they fall outside the bounds of the homestead deduction and thus the 1% tax cap.

The tax court reversed the Indiana Board's final determination, explaining that the plain language of the standard homestead deduction statute (Indiana Code § 6-1.1-12-37) applies to an individual's "dwelling" and the one acre of real estate surrounding it. Contrary to the position advocated by the assessor, the term "dwelling" was not defined as "just one" house and garage. Instead, a "dwelling" is defined as the "[r]esidential real property <u>improvements</u> that an individual uses as [his] residence, <u>including</u> a house or garage." I.C. § 6-1.1-12-37(a)(1)(A) (emphases added). That plain language places no limitations on the number of improvements that can qualify as a "dwelling;" rather, it hinges on an improvement's eligibility for the standard homestead deduction as a "dwelling" based on <u>how</u> the individual uses it. Moreover, through its use of the phrase "<u>including</u> a house or garage," the plain language of the statute indicates that a dwelling can consist of improvements that are <u>not</u> a house or garage. Because the Indiana Board determined that the petitioner's carriage house and detached garage were used as extensions of

his home, those improvements necessarily constituted part of his "dwelling" and were therefore eligible for the standard homestead deduction and the 1% property tax cap.

G. ASSESSMENT/BURDEN OF PROOF

Southlake Indiana, LLC v. Lake County Assessor, 181 N.E.3d 484 (December 13 2021), review denied, 190 N.E.3d 922 (June 28, 2022). Submitted by Martha Blood Wentworth, Indiana Tax Court.

The Lake County Assessor appealed the Tax Court's 2021 opinion to the Indiana Supreme Court, which ultimately, unanimously denied review. The essence of the case was the meaning of the word "**correct**," undefined by the statute, but used in the statute as the standard to be met by an assessor when the assessor has the initial burden of proof under Indiana's burden shifting statute.

Standard of Review
This case came to the tax court because the Indiana Board had failed to make its final determination within the maximum time provided by statute. The tax court hears direct appeals *de novo*. Moreover, when an assessment increased more than 5% from the previous year's assessment, as here, the court must examine each of the parties' evidentiary presentations through the lens of the "burden-shifting statute." Indiana Code § 6-1.1-15-17.2 (repealed in response to this opinion effective March 21, 2022). The burden-shifting statute provides that when a taxpayer appeals an assessment that increased more than 5% from one year to the next, **the assessor who made the assessment has the burden to prove the assessment is correct in any appeal to the Indiana Board or Indiana Tax Court**. If the assessor does not meet this initial burden of proof, **then** the taxpayer may introduce evidence to prove the **correct assessment**. If neither the assessor nor the taxpayer meet their burden of proof, then the assessment **reverts** to the original assessment for the prior tax year. Ind. Code § 6-1.1-15-17.2(a), (b) (2021) (emphases added). See also *Southlake Indiana, LLC v. Lake County Assessor*, 174 N.E.3d 177, 178-81 (Ind. 2021) (explaining the burden of proof under Indiana Code § 6-1.1-15-17.2 with respect to Southlake's appeals of the mall's 2011–2014 assessments).

Southlake Indiana, LLC owns the Southlake Mall located in Hobart, Indiana. For the 2015 and 2016 tax years, the assessor valued the subject property at $242.9 million. Southlake challenged the assessments, first appealing to the Lake County PTABOA and then to the Indiana Board. Because neither the PTABOA nor the Indiana Board acted on the appeals, Southlake initiated a direct appeal with the tax court challenging each year's assessments.

The court conducted a five-day trial on the matter via Zoom. During the trial, both Southlake and the assessor presented USPAP appraisals, along with the testimony of their preparers, valuing the subject property. Both appraisals utilized the income capitalization approach to value the property but arrived at very different results: Southlake's appraisal estimated the subject property's market value-in-use to be $142.3 million in 2015 and $144.5 in 2016; the assessor's

appraisal estimated the value of the subject property to be $259 million in 2015 and $241.7 million in 2016.

The tax court found that under the "burden-shifting statute, the Assessor bore the burden to prove her original assessment was 'correct.'" The tax court first looked at the plain meaning of the word "correct," which was not defined by the burden-shifting statute, concluding that it meant "exactly and precisely." The court noted that while the plain meaning presented practical evidentiary hurdles, they were not insurmountable, and to find another meaning would require relying on attenuated assumptions rather than probative evidence. Accordingly, the tax court held that the assessor did not meet her burden because her appraisal evidence did not "exactly and precisely" conclude to her original assessment. Because the assessor did not meet her burden, the court explained, the burden-shifting statute provided Southlake the opportunity to "prove the correct assessment." The court held that Southlake's appraisal evidence was not probative because it did not provide sufficient detail and analysis about how the appraiser derived his capitalization rate for the court to draw any reliable conclusion of financial and risk comparability between the mall and five other purportedly comparable mall properties.

Given that neither party met their requisite burden of proof, the court ordered that the mall's assessment revert to the assessment that was in place for the 2010 assessment, $110.4 million.

The Indiana Supreme Court unanimously denied review on June 28, 2022; nonetheless, the legislature repealed and replaced the burden-shifting statute in response to the tax court's opinion effective March 21, 2022. The new statute now reads very differently.

SECTION TWO: STATE TAX CASES

A. CORPORATE BUSINESS TAX

Vangilder, et al. v. Arizona Department of Revenue, CV-20-0040-PR (March 8, 2022), Submitted by Sara Agne, Presiding Judge, Arizona Tax Court.

The Arizona Supreme Court reviewed whether the Pinal County Regional Transportation Authority and the Pinal County Board of Supervisors acted lawfully when they adopted Proposition 416 (a regional transportation plan) and Proposition 417 (a transportation excise tax). Review of the latter required the Court to determine whether a two-tiered retail transaction privilege tax, where the first $10,000 of any single item would be taxed at one rate and any excess amount would be taxed at a zero percent rate, was lawfully adopted as part of the transportation excise tax.

The Court considered the resolution, ballot provision, and voter publicity pamphlet, and a four-justice majority concluded that the County complied with state law in adopting the transportation excise tax. The same majority also concluded, however, that Arizona law did not permit adoption

of a two-tiered retail transaction privilege tax on tangible personal property as part of a transportation excise tax and therefore invalidated that two-tiered tax. The majority found that the tax as constructed and approved by voters was neither a permissible "variable rate" tax, nor a permissible "modified rate" tax.

Though the Arizona Department of Revenue was a named defendant, it supported the plaintiffs' position that the tax was invalid. The relevant Arizona statute provides of a county transportation excise tax: "The department shall collect the tax at a variable rate if the variable rate is specified in the ballot proposition. The department shall collect the tax at a modified rate if approved by a majority of the qualified electors voting." A.R.S. § 42-6106(C).

A three-justice dissent would have found that the adoption of the regional transportation plan was lawful and that the two-tiered retail transaction privilege tax was not a "modified rate," as the majority did, but would have further found that the Legislature gave Pinal County express authority to adopt the two-tiered transportation excise tax on retail sales as a "variable rate" tax.

In the Matter of Goldman Sachs Petershill Fund Offshore Holdings (Delaware) Corp., TAT (E) 16-9 (GC) (March 12, 2021), Submitted by Robert Firestone, Commissioner, Office of Administrative Tax Appeals, New York City Tax Appeals Tribunal

This is a very important case concerning a state's power to tax the gain from the sale of an interest in a limited partnership (or in an LLC taxed as a limited partnership) held by a non-domiciliary corporation, and on the related issue of nexus.

The petitioner, Goldman Sachs Petershill Corp., is a non-domicilliary corporation incorporated in Delaware, with no connection to, or contact with, New York City except for its interest in Claren, an LLC taxed as a partnership for federal income tax purposes. petitioner's interest in Claren gave it no rights in the management of the LLC. During the tax year, and the two preceding years that petitioner owned its interest in Claren (indirectly, through another limited partnership), Claren conducted 100 percent of its business in New York City.

On its New York City General Corporation Tax (GCT) return, petitioner reported its distributive share of Claren's income from its Partnership Federal Income Tax Return, but petitioner excluded the capital gain from the sale of its interest in Claren. petitioner argued that, because it was not engaged in a unitary business with Claren, the capital gain was not subject to the GCT because it was not derived from Claren's New York City business activities but from petitioner's own effort to manage and sell its investment in Claren. Petitioner argued the City had no nexus to the gain, even though the entire value of that gain derived from Claren's business entirely conducted within the City. Petitioner also argued that because petitioner had no right to manage the LLC nor any rights to its property, it did not engage in any "purposeful activities" directed to the City as required by Due Process.

The Tribunal, in a decision affirmed by the Appellate Division of the New York Supreme Court, held that non-tax legal principles such as managerial rights or property rights are irrelevant to the taxation of income derived from a partnership. As a partnership, Claren was a mere conduit for the income earned from its City business. That income was taxable to petitioner as a partner

under federal income tax principles, and those same tax principles applied under the GCT. Only tax principles are relevant here. If petitioner was not taxable on the gain, as it is under principles of taxation, no one is, and the income derived from Claren's New York City business would permanently escape taxation. Petitioner was on notice, for purposes of Due Process, that its interest in a partnership doing business in the City would subject petitioner to City taxation of the income derived from that business, including the gain from petitioner's sale of its interest in that business.

B. APPORTIONMENT/JURISDICTION/STATE INCOME TAX

Appeals of Kwon, et al., 2021-OTA-296P (April 14, 2021), Submitted by Cheryl Akin, Presiding Judge, California Office of Tax Appeals.

The primary issue in this appeal was an attempted Internal Revenue Code (IRC) section 1031 exchange by an LLC (KMC) during the 2003 tax year.

In April 2003, KMC sold real property (a shopping center) and attempted to defer the gain by performing an IRC section 1031 exchange. KMC properly identified the Gallery Property as replacement property for the exchange. As part of a plan to acquire the Galleria Property, appellants who were the members of KMC, and three additional individual investors created a new LLC (Galleria) on August 1, 2003. On an unspecified date in August 2003, a purchase agreement between the seller of the Galleria Property, and KMC and the three investors (as joint tenants) as buyers, was executed. Prior to the execution of this purchase agreement, there was a prior nonbinding written draft agreement between the seller and Galleria as the original buyer for the Galleria Property. The new buyers (i.e., KMC and the three investors) paid seller a $100,000 modification fee for this substitution. The purchase closed on August 29, 2003, and KMC and the three investors received undivided tenant-in-common (TIC) interests in the Galleria Property which they immediately contributed to Galleria.

IRC section 1031 provides that a transfer of property may qualify for nonrecognition treatment if three general requirements are satisfied: (1) the taxpayer must effectuate an exchange (exchange requirement); (2) the exchange must involve like-kind properties (like-kind requirement), and (3) both the relinquished property and the replacement property must be held for a qualified purposes (holding requirement). Only the exchange requirement was at issue in this appeal. In order to meet the exchange requirement and perform a valid IRC section 1031 exchange, the same taxpayer (here KMC) needed to both relinquish the exchanged property (the shopping center) and acquire the replacement property (the Galleria Property).

Applying the substance over form doctrine as developed in cases such as *Gregory v. Helvering* (1939) 293 U.S. 465, *Commissioner v. Court Holding Co.* (1945) 324 U.S. 331, *U.S. v Cumberland Public Service Co.* (1950) 338 U.S. 451, *Chase v. Commissioner* (1989) 92 T.C. 874, and *Appeal of Brookfield Manor, Inc., et al.*, (89-SBE-002) 1989 WL 37900, Office of Tax Appeals concluded that in substance Galleria, not KMC, acquired the Galleria Property. The following facts were significant to this conclusion: the parties initially negotiated for the purchase of the Galleria Property by Galleria; KMC and the additional individual investors were only substituted as buyers after the essential terms of the sale had been agreed upon and shortly

before the purchase closed; Galleria paid the initial $2 million deposit into the escrow account for the purchase of the Galleria Property; there was no evidence that KMC and the additional three investors negotiated for the purchase of the Galleria Property on their own behalf; Galleria paid the expenses associated with the purchase of the Galleria Property such as the exchange fee, title fees, and broker commissions; and KMC and the three investors failed to pay any of the operating expenses of the Galleria Property as TIC owners following the claimed acquisition of the Galleria by the TIC owners. Because KMC did not both relinquish the exchanged property (the shopping center) and acquire the replacement property (the Gallery Property) the exchange requirement was not met, and a valid IRC section 1031 exchange was not performed by KMC.

C. APPORTIONMENT/CORPORATE FRANCHISE TAX

Powerex Corp. v. Department of Revenue, 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. Oregon statutes allow the Department of Revenue (DOR) to craft apportionment regulations for public utilities that differ from UDITPA.

The taxpayer historically had considered itself as a UDITPA taxpayer, not a public utility, and the Department of Revenue had agreed. In the early 2000s, the DOR 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, not Oregon. (For a fun read, see 357 Or 40 (2015), where the Oregon Supreme Court decided that electricity is "tangible personal property," not a service, and remanded the case to the Tax Court to decide where the electricity was delivered.)

Shortly after the Supreme Court's decision, the DOR declared the taxpayer a public utility, adopted a regulation for public utilities that contained essentially the identical text that the Supreme Court had invalidated under UDITPA, audited the taxpayer, and assessed a deficiency for a new set of tax years. The taxpayer appealed, arguing it was not a public utility and therefore

should continue to have its sales sourced (to California, not Oregon) based on UDITPA's ultimate-destination rule.

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.

After reviewing many cases defining "public use" as of Oregon's adoption of UDITPA in 1965, 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 DOR had adopted its new rule for an improper purpose or by improper methods, and that the DOR had improperly applied the rule retroactively.

D. SALES TAX/REMOTE VENDOR

U.S. Auto Parts v. Commissioner of Revenue, Mass ATB Findings of Fact and Reports 2021-385 (December 7, 2021), Submitted by Mark DeFrancisco, Chairman, Massachusetts Appellate Tax Board.

Taxpayer appealed to the ATB from the Commissioner of Revenue's refusal to abate an assessment of use tax against it under a newly enacted regulation, 830 CMR 64H.1.7 ("Regulation"). The Commissioner determined that the regulation required U.S. Auto Parts, which had not previously had a use tax collection, remittance, or return obligation, to collect use tax from Massachusetts customers purchasing its products via the Internet and remit such tax to the commissioner.

The fundamental issue before the ATB was whether the commissioner could impose a use tax collection and remittance responsibility on the taxpayer, an out-of-state corporation whose presence in Massachusetts was limited to the placement of cookies and apps on the computers and portable devices of its Massachusetts customers and the use of third-party content delivery networks (CDNs) that allowed the taxpayer's customers expedited access to its website via the CDNs' servers located in Massachusetts and elsewhere.

Taxpayer moved for summary judgment, arguing that it did not have a "physical presence" in Massachusetts under the Supreme Court precedent in *Quill Corp. v. North Dakota*, 504 U.S. 298

(1992) (*Quill*) and, therefore, the commissioner could not impose on it a use tax collection and remittance responsibility.

The commissioner opposed the taxpayer's motion and moved for summary judgment in his favor. The principal focus of the commissioner's argument was that the Supreme Court's decision in *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080 (2018) (*Wayfair*), promulgated nine months after the effective date of the regulation and the tax period at issue, overruled *Quill* and its physical presence standard and must be applied retroactively to the present appeal.

The ATB granted summary judgement in favor of taxpayer on the following grounds:

1. *Wayfair* cannot be applied retroactively: The ATB held that, given the *Wayfair* court's emphasis on the non-retroactive application of the statute at issue there to avoid Commerce Clause concerns, the language of the regulation itself, which stated that the sales tax statute would be enforced to the extent allowed under the "physical presence" standard under *Quill*, and the fundamental unfairness of a retroactive application of the *Wayfair* ruling to the transactional tax at issue, the *Quill* physical presence standard, and not *Wayfair*, governed the appeal.
2. Virtual Presence does not satisfy *Quill*: The court's analysis in *Wayfair* makes clear that the "virtual presence" of Internet retailers via cookies, apps, and the use of CDNs does not satisfy the *Quill* physical presence standard. In fact, the court in *Wayfair* used the regulation as an example of states' attempts to apply the *Quill* physical presence standard to Internet retailers, observing that such attempts are "proving unworkable."

The Supreme Judicial Court has granted direct appellate review of the commissioner's appeal and solicited amicus briefs. Oral argument is set for November 4, 2022.

E. INCOME TAX/SOURCING

Appeal of Sheward, 2202-OTA-228P (May 25, 2022), Submitted by Cheryl Akin, Presiding Judge, California Office of Tax Appeals.

The issue in this appeal was whether appellant had California source income in an amount sufficient to establish a California filing requirement. In order to determine the correct tax, Office of Tax Appeals (OTA) determined the amount of appellant's California source income.

Appellant was an Ohio resident who received gross receipts for horse race judging services from California (where she performed services under a contract with the California Horse Racing Board (CHRB)) and also from the State of Minnesota and from Minnesota Harness Racing, Inc. (MHRI). Appellant was issued 1099s by each of these entities, which she reported on her federal Schedule C. After deducting her trade or business expenses on the Schedule C, appellant reported net business income of $51,772 out of $94,301 total gross receipts.

Because appellant did not file a California tax return, the California Franchise Tax Board (FTB) estimated appellant's California source income based solely on the 1099 issued to appellant by the CHRB. FTB's tax assessment estimated appellant's California source income to equal the

gross receipts she received from the CHRB ($53,824), which exceeded appellant's net business income from all sources ($51,722).

Because OTA found that appellant was conducting a single unitary sole proprietorship business within and without California, California Code of Regulations, title 18, (Regulation) section 17951-4 required the application of the Uniform Division of Income for Tax Purposes (UDITPA) to determine appellant's California source income. OTA first followed the cascading market-based sourcing rules under Regulation section 25136-2 and found that appellant's contract with CHRB required that she perform horse race judging services for horse races held in California. Because these horse races took place in California, OTA concluded CHRB received the benefits of appellant's services only in California.

Next, OTA found that it was more likely than not that the State of Minnesota and MHRI did not receive the benefit of appellant's horse race judging services in California. In addition, OTA found that appellant's horse race judging business reported on a single federal Schedule C was a single unitary trade or business conducted both within and without California. Therefore, OTA concluded that while appellant did not file a California tax return, she had provided sufficient evidence (specifically her federal and Ohio state returns for the tax year) to permit OTA to properly calculate the amount of appellant's California source income from her unitary horse race judging trade or business pursuant to UDITPA. Applying UDITPA, OTA then calculated a sales factor by dividing appellant's California gross receipts by her gross receipts from all sources. ($53,824/$94,301 = 57.1 percent). Thus, approximately 57.1 percent of appellant's net business income from her horse race judging business was sourced to California. Applying that 57.1 percent sales factor to appellant's net business income of $51,722 as reported on appellant's federal Schedule C, OTA concluded that appellant's California source income was $29,562 rather than the gross receipts used by FTB ($53,824).

Cases and Presenters For 2022 National Conference of State Tax Judges

AZ – Sara Agne

- *Vangilder, et al. v. Arizona Department of Revenue*
- *South Point Energy Center, LLC v. Arizona Department of Revenue, et al.*
- *State, et al. v. ABOR, et al.*
- *Jusseaume v. Yavapai County*
- *Griffith Energy, LLC v. Arizona Department of Revenue*
- *Mesquite Power, LLC v. Arizona Department of Revenue*

CA – Cheryl Akin

- *Appeal of Acosta and Castro*
- *Appeals of Kwon, et al.*
- *Appeal of Sheward*

IN – Martha Blood Wentworth

- *Monroe County Assessor v. Strychalski*
- *Matthew A. Schiffler v. Marion County Assessor*
- *Southlake Indiana, LLC v. Lake County Assessor*

MA – Mark DeFrancisco

- *Uhrich v. Assessors of Wayland*
- *U.S. Auto Parts v. Commissioner of Revenue*

MN – Jane Bowman

- *G&I IX OIC LLC v. County of Hennepin*

NJ – Mark Cimino

- *Atlantic City Opera Theater v. Atlantic City*

NJ – Vito Bianco

- *Township of Green v. Life With Joy, Inc.; Life With Joy, Inc. v. Township of Green*

NJ – Mary Siobhan Brennan

- *1000 Harbor Blvd., LLC by TT UBS Financial services, Inc. v. Township of Weehawken* and *200 Harbor Boulevard, LLC v. Township of Weehawken*

NJ – Kathi Fiamingo (presented by Christine Nugent)

- *Branchburg Hospitality LLC v. Township of Branchburg*

NY – Robert Firestone

- *In the Matter of Goldman Sachs Petershill Fund Offshore Holdings (Delaware) Corp.*

OR – Robert Manicke

- *Hoggard I v. Department of Revenue*
- *Powerex Corp. v. Department of Revenue*