CASE LAW UPDATES PROGRAM
NATIONAL CONFERENCE OF STATE TAX JUDGES
OCTOBER 31, 2019

A. VALUATION

Powell Street I, LLC v Multnomah County Assessor & Department of Revenue, 365 Or 245 (2019), aff'g 22 OTR 423 (2017)

This property tax valuation case is noteworthy for two reasons: it addresses the concept of "stabilized" vs. "non-stabilized" occupancy, and it expressly applies Oregon's "substantial evidence" standard of Supreme Court review of Tax Court factual determinations.

Facts. The subject property was a shopping center. As of the assessment date, it had lost its anchor tenant grocery store approximately one year before and was about 51% vacant. The taxpayer's appraiser initially found a "real market value" ("RMV," generally equivalent to fair market value) of $14.7 million but reduced his conclusion to $10.01 million after determining that the property suffered from non-stabilized occupancy and could be sold only at a discount to a buyer willing to invest in improvements and rent concessions necessary to attract a new anchor tenant. The county's appraiser determined that the occupancy *was* stabilized and concluded an RMV of $17.5 million. The Tax Court agreed with the taxpayer's appraiser.

Legal Framework: Fee Simple Interest Valuation. Citing an article by Joan Youngman, the Oregon Supreme Court first noted that Oregon law generally requires valuation of the fee simple interest, meaning the sum of all legal interests in a given parcel. This approach may cause the RMV to differ from the amount that a seller could obtain in an arm's-length sale, such as when the property is burdened by a long-term, tenant-favorable lease. A fee simple approach would include both the value of the owner's interest and the additional value attributable to the tenant's favorable lease terms.

Analysis: Stabilized vs. Non-Stabilized Occupancy. The Supreme Court focused on the concept of "stabilized occupancy," which it defined by reference to the Appraisal Institute's Dictionary of Real Estate Appraisal:

> "The occupancy of a property that would be expected at a particular point in time, considering its relative competitive strength and supply and demand conditions at the time, and presuming it is priced at market rent and has had reasonable market exposure. A property is at stabilized occupancy when it is capturing its appropriate share of market demand."

The Oregon Department of Revenue (the "Department") argued that the 51% vacancy rate (in a market with a prevailing rate of 8-10%) was due to the below-average "skill and luck" of the *particular* owner and should be ignored when seeking to determine the price on which a *hypothetical* buyer and seller would agree.

The Supreme Court looked to the factual record from the Tax Court. The Tax Court had found that the Department failed to present evidence that the departure of the grocery business and continued absence of a new anchor tenant had anything to do with the personal characteristics of the owner. This finding was supported by evidence that the anchor tenant's operator terminated the lease because of his age, poor health, and the distraction of a second store closure. Regarding

the continued vacancy, the parties' appraisers agreed that a one-year vacancy period was well within market norms for an anchor location.[1]

The Supreme Court agreed with the Tax Court's findings and thus rejected the factual premise of the Department's argument. Because the Department had asserted that the reason the property was stabilized had to do with particular characteristics of the owner, the Supreme Court concluded that the property was not, in fact, stabilized.[2]

Application of Oregon's "Substantial Evidence" Standard of Review. Procedurally, the opinion is a good example of Oregon's current standard of review of Tax Court decisions. Before a 1995 law change, the standard amounted to "*de novo* on the record." Under that prior standard, the Supreme Court issued numerous opinions expressly declaiming its dissatisfaction:

> "Direct, *de novo* review of often extremely complicated factual issues by a court consisting usually of seven relative amateurs in the taxation field, after those issues already have been decided by a judge especially selected for his or her expertise in this area of the law, should be eliminated." *United Tel. Co. v. Dep't of Revenue*, 307 Or 428, 432, 770 P2d 43, 44 (1989).

The 1995 amendment created the current standard, which the Supreme Court applied in *Powell Street I*: "The scope of the review *** shall be limited to errors or questions of law *or lack of substantial evidence in the record* to support the tax court's decision or order." ORS 305.445 (emphasis added).

Madison County Assessor v. Sedd Realty, 125 N.E.3d 676, 677 (Ind.Tax Ct. 2019)

The Assessor challenged the Indiana Board of Tax Review's final determination reducing the assessed value of Sedd Realty's River Ridge shopping center. River Ridge, is part of the larger River Ridge Plaza retail center that has 10 buildings on 2 strip shopping centers with freestanding outlot improvements. At the administrative hearing, both parties presented USPAP compliant appraisals using all 3 valuation approaches that differed by $2 to $ 3 million in AV per year. The Indiana Board relied on the income approach valuations, adopting Sedd's appraisal conclusions for net operating income because the Assessor's NOI conclusions valued leased-fee interests. Next, the Board rejected the Assessor's capitalization rates, but instead of adopting the TP's appraisal cap rates, the Board developed its own unique cap rate based on select information from each of the appraisal reports. The Court reversed the Board's determination as arbitrary and capricious and unsupported by substantial evidence

In the Matter of the Appeal of Spire Storage West LLC, Docket No. 2018-51 (Wyo. St. Bd. of Equalization Aug. 5, 2019).

Facts: Spire Storage purchased a natural gas storage company, Ryckman Creek, out of bankruptcy in December of 2017. Ryckman Creek consists of a depleted subterranean natural gas reservoir and all equipment required to inject, extract and treat produced natural gas for sale. Ryckman Creek sold the stored gas to companies needing consistent natural gas supplies at

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[1] The Department also argued that the 12-month period of vacancy was too short to justify treating the property as non stabilized and proffered a formula for determining at what point after substantial vacancy a property should be classified as non-stabilized. Although the Supreme Court did not address this point, the Tax Court found persuasive the taxpayer's evidence that, on any given date such as the annual assessment date, the market would "absolutely" react to a high vacancy rate. *See* 22 OTR 423, 434-35 (2017).

[2] The Supreme Court also rejected the Department's parallel argument that any discount to FMV caused by the need to make tenant improvements would be a prohibited "developer's discount" that would reflect the unique circumstances of the property owner. The court found that the non-stabilized occupancy of the subject property would impair its value to *any* seller.

stable prices, such as utilities. Evidence at trial demonstrated that the company struggled and filed bankruptcy for several reasons, including operational decisions and the gas storage industry's overall decline in the face of increased gas supplies nationwide, declining natural gas prices and less supply volatility.
Spire challenged Assessor's 2018 taxable valuation of the facilities at $90 million, arguing that the $26 million purchase price received in bankruptcy reflected the properties' fair market value. Spire also submitted an independent appraisal based on the cost, income and sales comparison appraisal methods, estimating a value nearly identical to the company's acquisition cost in bankruptcy.
On the day of the contested case hearing, a Delaware Bankruptcy judge presiding over Ryckman Creek's bankruptcy issued a ruling on various matters and noted that acquisition of the business facilities was at fair market value. Spire Storage asked the County Board of Equalization to consider the bankruptcy judge's ruling in its adjudication of the tax appeal. The County Board refused and limited its deliberations to evidence received at trial.

Issues

1) Did the Assessor err in not accepting the bankruptcy acquisition price as the FMV under the cost valuation method?

2) Did the County Board err as a matter of law when it refused to consider the bankruptcy court's ruling as it related to whether the bankruptcy acquisition was at FMV?

3) Did Spire Storage carry its burden of demonstrating that Assessor failed to comply with Wyoming law in valuing the facilities?

Analysis and Conclusion

We determined that while the law does not prevent consideration of a sales price generated in bankruptcy proceedings, Assessor did not err when she rejected the purchase price paid for the Ryckman Creek facilities. Substantial evidence indicated a sale literally days before the bankrupt party's planned shuttering of the facilities due to lack of interest from purchasers and poor business performance. Appraisers possess broad discretion when considering such transactions.
The County Board did not err when it refused to consider the bankruptcy court's ruling, which occurred months after the valuation process. We determined the County Board, as an appellate review body, was limited to Assessor's valuation and materials available to her in that process. The County Board lacked authority to reconsider the valuation with new evidence presented at trial.
For several reasons, we determined that Spire West's proffered valuation was insufficient. However, Assessor's contract appraiser testified that he disagreed with the assessed value as well, so we concluded that substantial evidence did not support the County Board's affirmance of the Assessor's valuation. We ordered Assessor to perform a new valuation in accordance with Wyoming law.

Madison Paper Industries. v. Town of Madison, State Board of Property Tax Review Docket No. 2016-009 (August 1, 2018)

This appeal involved Madison Paper Industries' mill assets and associated hydro facilities (the Anson and Abenaki hydro plants) for the tax year April 1, 2016. The Board concluded that Madison Paper Industries did not meet its burden of proof to produce credible evidence of value for the Mill assets in large part because MPI did not consider owner-imposed restrictions on the sale of other Mills that it used as comparables in its sales approach which resulted in a proposed value of the Mill assets at $2,600,000 million as compared to the $38,070,181 assessment. The failure to analyze the effect, if any, of owner- imposed restrictions in its sales approach was deemed not credible by the Board. Moreover, the Board concluded that Madison Paper's proposed valuation of that part of the two hydro plants associated with the mill assets in Madison

was less than 10% of the hydro assessment and therefore that part of Madison Paper's property was not substantially overvalued by the assessors. The issue of the effect of owner-imposed restrictions on the value of property for assessment purposes will likely re-surface in those several appeals filed by Walmart from various municipal assessments that are currently pending before the Board.

Firstlight Hydro Generating Company v. Boards of Assessors of Montague & Gill, Docket Nos. F325471-74 Commonwealth of Massachusetts Appellate Tax Board (December 10, 2018)

The case involves a hydro-electric power plant located in the towns of Montague and Gill. The facilities are located along the Connecticut River and total almost 900 acres between the two towns. There are two facilities one in each town. They each have turbines and other related equipment and the total generating capacity is about 68 megawatts. The assessed value for the facilities for the year in question was $126,856,303.

Firstlight hydro is a merchant generator and while it is not a rate regulated utility it does sell power to ISO New England which is an independent system operator that makes sure there is adequate power available to the region and electricity is dispatched primarily on a lowest cost basis. While there several issues related to the re-licensing of the plant with FERC the sole question before the board was the valuation.

Firstlight through its expert witness challenged the assessment relying almost exclusively on a DCF methodology. The expert's opinion of value using DCF was $104,555,373. The assessors did not offer affirmative evidence but instead rested on the presumptive validity of the assessment. The ATB rejected the use of the DCF methodology as an unreliable approach for ad valorem tax purposes. The Board noted that the great impact of weather on water supply, government regulation and emerging energy technologies made a twenty-year projected income stream highly speculative and unreliable.

John Wilson, King County Assessor v. 3922 SW Alaska, LLC, Docket Nos. 84567 and 84568, The Board of Tax Appeals State of Washington

The decision involves a stalled construction project, where shoring has already been completed. The issue is whether the shored site should be valued as an improvement. The Assessor values the shored site as an improvement, but the Owner places a value on the land only and not on the improvement.

B. EXEMPTIONS

Rainbow Housing Corp. and Gilead Community Services, Inc. v. Town of Cromwell, HHB CV 186045100, Superior Court, Judicial District of New Britain, (June 7, 2019)

The plaintiffs bring this action challenging the denial of their application for a real property tax exemption related to the property. Rainbow Housing Corporation (Rainbow) a Connecticut nonstock corporation, is an asset holding company that owns real property. Gilead Community Services, Inc. (Gilead), a Connecticut nonstock corporation, is an entity formed exclusively for charitable purposes and provided an array of support services to individuals with severe mental illness or substance abuse disorders. Rainbow and Gilead are each a subsidiary of the Connecticut Institute for the Blind, an entity also organized exclusively for charitable purposes.

Rainbow owns the property which it leases to Gilead. Gilead conducts a "Supervised Apartment Program", known as "Valor Home" a transitional, community based support program for men ages 18 or older, who suffer from severe mental illness, with or without co-occurring disorders who need a supportive, supervised environment, and who are not appropriate for occupancy in a

traditional group home. Valor Home has a five-client program capacity. Gilead receives 75 percent of its funding from the State Department of Mental Health and Addiction Services (DMHAS) and also receives charitable support from the public. Valor Home residents pay a monthly rental fee which is well below area market rental rates and these payments constitute about five percent of Valor Homes' annual operating budget.
The court concluded that the plaintiffs are charitable organizations, are engaged in full time exclusive pursuit of their charitable purposes, the housing provided by Gilead is part of Gilead's rehabilitation program, the contractual payments from DMHAS were to provide for various rehabilitative services in a residential setting which is permissible under the statute and there is nothing in the stipulated facts to conclude that the treatment provided is not temporary.

In the Matter of the Appeal of Aaron's Inc., North Carolina Property Tax Commission, No. 16 PTC 0124 (March 1, 2018), aff'd Court of Appeals of North Carolina (Filed February 19, 2019), Taxpayer's appeal for discretionary review to the North Carolina Supreme Court was denied.
Issue: Aaron's, Inc. ("Taxpayer") appealed from the Final Decision of the North Carolina Property Tax Commission, which determined that property in the physical possession of Taxpayer's customers pursuant to "Lease Purchase Agreements" is subject to *ad valorem* taxation. Taxpayer argued that such property constitutes "inventories owned by retail and wholesale merchants," and is thus exempt from taxation pursuant to N.C. Gen. Stat. § 105-275(34).
Holding: The North Carolina Court of Appeals held that the Property Tax Commission properly determined that property in the physical possession of a taxpayer's customers pursuant to lease purchase agreements was subject to ad valorem taxation because such property did not fall within the class of exempt "inventories" described in N.C. Gen. Stat. § 105-275(34). The transfer of possession of property following the execution of the agreement was not properly categorized as a "sale" within the meaning of N.C. Gen. Stat. § 105-273(8a) where the customers were under no obligation to purchase the property, and the substantial increase in cost by purchasing under the agreement rather than outright was consistent with the denomination of the transactions as a lease rather than a sale of the property.
The decision of the three-judge Court of Appeals panel was unanimous. The North Carolina Supreme Court denied the Taxpayer's petition for discretionary review.

C. INCOME TAX CASES

Hutsenpiller v. Dept of Rev., TC-MD 180167N (Apr 10, 2019)
Taxpayers purchased a house in New Hampshire in 2004 and occupied it until 2008 when they moved to Washington. They rented it for part of 2010 and continued to try to sell and rent the house from 2011 through 2013 when they finally sold it at a loss. The issue for the 2013 tax year was whether taxpayers could deduct a loss on the sale under IRC section 165 and suspended losses from their rental activity under IRC sections 167, 168, 212 and 469. The deductibility of those losses depended on whether taxpayers converted the house in 2010 from personal property to property held for the production of income. Court applied the factors set forth in *Newcombe v. Comm'r*, 54 TC 1298 (1970), meant to reveal whether the taxpayers' primary purpose was to realize a profit from the house: (1) the length of time the house was occupied by the taxpayer as a personal residence before placing it on the market for sale; (2) whether the taxpayer permanently abandoned all further personal use of the house; (3) the character of the property (recreational or otherwise); (4) offers to rent; and (5) offers to sell. With respect to offers to rent, courts have held that a property "converted to income-producing purposes by a rental" is not "reconverted to nonbusiness use once the rental arrangement ceases." *See McBride v. Comm'r*,

50 TC 1, 10 (1968); *Newcombe*, 54 TC at 1302. Court considered additional factor: consistent treatment of property on tax filings. Court held in favor of taxpayers.

Appeal of Bindley, 2019-OTA-179P

This case involves the reach and application of California's new market-based sourcing rules. Bindley, an AZ resident, contracted with a California company to write two screenplays for total compensation of $40,000. The Franchise Tax Board (FTB) received Form 1099 information about the payment, and asked Bindley to file a California return or explain why no return was due. Bindley responded that he had paid tax on his screenwriting income in Arizona and never set foot in California. The FTB still determined that Bindley was subject to California tax, under California's market-based sourcing rules, because Bindley's California-based clients received the benefit of his screenwriting services in California.

In a case of first impression, the OTA held that California's UDITPA, which was amended in 2011 to contain market-based sourcing rules, applied in determining the source of Bindley's income. It held that although the market-based sourcing rules were primarily directed at corporations that were subject to the UDITPA, they also had become applicable to individuals by virtue of a pre-existing California regulation which provided that out-of-state individuals and partnerships conducting a "unitary business" within and without California must apply the principles of California's UDITPA in determining the source of their income. Accordingly, when the UDITPA changed to market-based sourcing for services, the change affected not just corporations, but individuals and partnerships as well. FTB's determination was upheld.

In *Bindley* it was relatively clear that the benefit of the Bindley's screenwriting services was received in California. In several cases where FTB's determination was based upon nothing more than the fact that an in-state payor issued a Form 1099 to an out-of-state recipient, OTA has rejected FTB's determination as being without a rational foundation and unreasonable. For example, in one recent case, the FTB determined that an out-of-state computer consultant had California source income because he received a Form 1099 from a California consulting company. The taxpayer showed that although he was paid by a California company, he was actually providing services to an out-of-state customer of the California consulting company. Accordingly, FTB's determination was overturned.

Niemela v. Dept. of Rev., TC-MD 180091R, 2019 WL 1977228 (Or Tax M Div, May 2, 2019)

Part 1 – Exemption from state taxation

Like many states, Oregon taxes the income of nonresidents for in-state sourced income. Taxpayer, a Washington resident, worked on dredge boats in various locations on the Columbia River between Oregon and Washington. During dredging season, he worked 7 days a week; 5 days dredging on the river and 2 days doing maintenance work docked on the Oregon side of the river. During the off-season his work consisted primarily of maintenance duties while dry docked in Portland, Oregon. Taxpayer claimed an income tax exemption from Oregon under the federal Waterway Exclusion Act (46 USC 11108(b)), for all of the work he performed during dredging season but not for his work in the off season while the boat was in dry dock. The Department denied the exemption with respect to the portion of his earnings made during dredging season for maintenance work performed while docked on the Oregon side of the river.

In 1999, Congress passed the Waterway Exclusion Act prohibiting states from taxing the income of a nonresident interstate waterway worker who performs regular duties on interstate waterways. Subsequently, two Oregon Magistrate Division cases considered the Act. In *Davis v. Dept. of Rev*. TC-MD 030062E, 2003 WL 22908839 (Or Tax M Div Nov 25, 2003), the court concluded that the exemption did not apply to work performed while boats were docked on the Oregon side of the river. In *Espinoza v. Dept. of Rev*., TC-MD 050768B, 2006 WL 2992948 (Or

Tax M Div, Oct 19, 2006), the court concluded the exemption did not apply to work on Willamette River because it was solely within Oregon and not an "interstate waterway." In 2010, Congress amended the Waterway Act intending to abrogate the holdings of the Oregon Tax Court cases. One legislator stated, "It is my sincere hope that this minor change will make clear that States are prohibited from taxing the income of a nonresident interstate waterway worker, period."

The court granted taxpayer's appeal and held taxpayer was entitled to an exemption for work he performed while docked on the Oregon side of the river during dredging season.

Question: What about maintenance work taxpayer performed in dry dock not during dredging season? Taxpayer did not seek to exempt those wages.

Part 2 – What should a judge do when confronted with incompetent taxpayer representation? (issue not addressed in the decision).

Taxpayers representative asked only three irrelevant questions on direct examination and did not lay a foundation for any exhibit. Should a judge ask questions to lay a foundation for the exhibits? Consider the answer might be different based on statutory or case law. As a former Judge Pro Tem in the Los Angeles Superior Court, my answer would be no. But, as a former Administrative Law Judge in Oregon, the answer would be yes.

Kunath v. City of Seattle, 444 P.3d 1235 (Wash. Ct. App. 2019), *as amended on denial of reconsideration* (Aug. 7, 2019).

City-based graduated income tax not constitutional, but options may exist for future income tax in Washington.

Opinion issued by Court of Appeals, Division 1, after transferred back to Court of Appeals by Washington Supreme Court, where Division 1 held that because of stare decisis the City of Seattle's adoption of a graduated net income tax was unconstitutional. Strangely, though, the court also held unconstitutional RCW 36.65.030, thus paving the way for cities, counties, and city-counties to enact a non-graduated net-income tax. This is strange because the court could have decided the case without ruling RCW 36.65.030 unconstitutional (generally courts will seek to avoid interpretations that will produce illegal or unconstitutional results. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 816, 123 P.3d 88 (2005)), but the appellate court seemed eager to remove that blockade to local governments imposing an income tax.

Ivelia v. Dept of Rev., TC-MD 180054R, 2018 WL 6650859 (Or Tax M Div, Dec 18, 2018)

Oregon allows qualifying taxpayers to elect a special pass-through entity tax rate. That election must be made on the "original return" and is irrevocable. Taxpayers obtained an extension to file their 2016 federal and Oregon tax returns. Taxpayers filed their first Oregon return on September 20, 2017, which did not elect the pass-through rate. On October 17, 2017, taxpayers filed an amended return electing the pass-through rate. The issue before the court was whether original return means first filed return or any timely filed return.

The court first determined that under federal law a timely filed amended return is treated differently than a later filed amended return. It is well established under federal law that a timely filed amended return supersedes the earlier return. See *Haggar v. Helvering*, 308 US 389 (1940); *National Lead Co. v. Comm'r*, 336 F 2d 134 (2nd Cir 1964) etc. Even so called "irrevocable" elections are not irrevocable until after the deadline for making the election in the first place.

The court went on to consider whether there was any basis in Oregon law for a different outcome mindful of the legislatures' intent that the federal meaning of terms control unless another meaning is "clearly required" by Oregon law. Finally, the court noted that the departments was authorized to make rules governing the pass-through entity election but failed to make any.

Given the absence of convincing justification to depart from the federal interpretation of "original return", the court granted taxpayers' appeal.
The department subsequently announced that it would accept pass through entity rate elections made on a timely filed amended return.

Matter of Catalyst Repository Systems, Inc., New York State Tax Appeals Tribunal, July 24, 2019. Franchise Tax for Business Corporations – classification of receipts as from services vs. other business income under former Article 9-A; NY allocation.
Facts: Catalyst Repository Systems, Inc., (Catalyst) is a Colorado-based data and document repository that provides online litigation support to its customers. Catalyst filed corporation tax and MTA surcharge returns for tax years 2008, 2009 and 2010 with the Division of Taxation (Taxation), on which it computed a business allocation percentage (BAP) equal to zero. In computing its BAP, Catalyst treated its receipts as arising from services performed entirely in Colorado.
Catalyst licensed the use of its system to its customers. Catalyst tagged and hosted its customers' data on its servers at its Colorado headquarters. Catalyst's customers accessed the system via the internet to sort and retrieve their data.
Decision: On exception, Taxation contended that the proper categorization of the receipts at issue should be solely determined by the language of the agreements with Catalyst's customers. Taxation argued that those receipts constituted payments for licenses, which are intangible assets and other business receipts (OBR) under Tax Law former § 210. Taxation noted that OBR are allocated to the location where they are earned - here, the location of Catalyst's NY customers. Taxation also argued that the meaning of the term "service" must be understood as that term was commonly understood at the time of enactment of article 9-A. Taxation also argued that the change to mandate customer-based sourcing was consistent with the long-standing purpose of the receipts factor, which was to reflect the location of a taxpayer's customers.
The Tribunal first considered whether the receipts were from services and concluded that they were not. It examined the language of the agreements between Catalyst and its customers and found that the license to use Catalyst's system was an intangible asset. It also found that the ordinary meaning of the term "service" did not include provision of an intangible asset. The Tribunal concluded that Catalyst's receipts from licenses to use its system were properly classified as OBR for BAP purposes.
Turning to the question of allocation, the Tribunal found that the location of the work that resulted in the receipts is the location to which the receipts must be allocated. Finding that virtually all of the work that resulted in the receipts at issue occurred in Colorado, the Tribunal concluded that the receipts at issue may not be allocated to New York. Although Taxation's advisory opinions were cited as persuasive authority for the contrary conclusion, they were found to be unpersuasive because they offered no statutory or regulatory justification for the conclusions asserted.
The Tribunal also rejected Taxation's argument that the 2015 corporate tax reform amendments expressed a longstanding departmental policy, finding that Taxation failed to overcome the presumption that the corporate tax reform amendments affected a material change in the law.

Zelia, LLC v. Robinson, Docket No. 10430D (La. Bd. Tax App. 4/10/19) 2019 WL 2487926

Zelia (same owner as New Orleans NBA and NFL teams) obtained refundable tax credits by entering into an Enterprise Zone Contract (Contract) with the Department of Economic Development (LED) at Benson Tower (commercial rental building). LED determined that Zelia had failed to create enough net new jobs, and cancelled the Contract. LDR proceeded to recoup

the refund by Assessment. Zelia appealed the Assessment to the BTA, and named both LDR and LED as defendants.

BTA determined that it could not order the LED to reinstate the EZ contract, but that it had jurisdiction over the recoupment via assessment (exclusively appealable to the BTA). LDR and LED appealed, and the First Circuit reversed and held that the assessment was a 'mere tool' and that the 'real dispute' was over the LED's cancellation of the Contract. LDR filed a MSJ arguing that BTA was therefore limited to merely verifying that LED had in fact cancelled the contract.

Judge Graphia granted the MSJ finding that LDR had a mandatory obligation to recoup overpayments on the voided Contract, and that there was therefore no mechanism to challenge its assessment.

Judge Lobrano dissented, observing that LDR's recoupment obligation was statutorily subject to "the same provisions for the collection of other tax debts" and no one else could exercise jurisdiction over the appeal from an assessment. He found that the First Circuit's decision unconstitutionally left Zelia without any means of redress, and that a statutory provision or rule of decision must be construed in a fashion that upholds its constitutionality.

Judge Cole concurred with the grant of MSJ. He stated that he agreed with Judge Lobrano's analysis, but that he was compelled to follow the interlocutory writ of the First Circuit. He observed that the domicile of the taxpayer had changed during the pendency of the litigation, and that the matter was now appealable to the Fifth Circuit. However, he found that it would be better for the appellate court to address the applicability of the First Circuit's jurisdictional ruling and whether or not it should follow it under the Louisiana appellate court doctrine of 'law of the case.'

Note: On Oct. 12, Amendment No. 3 was ratified by the voters, adding Sec. 35 to La. Const. art. V. This provision codifies the BTA, states that it has jurisdiction over <u>all matters related to</u> state or local taxes or fees or other claims against the state... including related constitutional questions.

Additions to BTA jurisdiction are procedural and should be applied retroactively, and that "where the law has changed during the pendency of a suit and retroactive application of the new law is permissible, the new law applies on appeal even though it requires reversal of a judgment which was correct under the law in effect at the time it was rendered." S*ecurity Plan Fire Ins. Co. v. Donelon, Comm. Of Ins.* 220 So.3d 769, 775 (La. App. 1st Cir. 5/10/17).

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

<u>Estate of Chernowitz v. Director, Div. of Taxation</u>, 2018 N.J. Tax Unpub. LEXIS 63 (Tax 2018)

In 2012, at the age of ninety-eight years, Edith Chernowitz gifted 5.1 million dollars of her 18 million dollar in assets to her family. The federal unified estate and gift tax exclusion was scheduled to be reduced after December 31, 2012 from 5.12 million to 1 million dollars. Ms. Chernowitz died in 2014. Her estate, the taxpayer in this case, was assessed New Jersey transfer inheritance tax on the entire 5.1 million dollar gift. The law sets up a presumption that transfers 1) without adequate valuable consideration 2) of a material part of the estate 3) made within three years of death, are in contemplation of death. The taxpayer estate argues that all the elements have not been satisfied and even if they have, the taxpayer can rebut the presumption through evaluation of nine criteria which are: 1) age, 2) health, 3) time between gift and death, 4) desire to avoid taxes, 5) whether gift part of prior testamentary plan, 6) past history of gifts, 7)

whether gift to natural objects of bounty, and 8) whether gift motivated by emergency (e.g. donee's illness). For the reasons set forth in much greater detail in this opinion, the court determines that the elements establishing the presumption have been met, and that the taxpayer has failed to overcome the presumption.

E. REAL PROPERTY TRANSFER TAX

In the Matter of Steuben Delshah LLC and In the Matter of African American Parent Council Inc. NYC Tax Appeals Tribunal (June 24, 2019)

This case came to the attention of the New York City (NYC) Department of Finance (Department) as the result of the investigation by the Richmond County District Attorney of a pattern of transactions engaged in by Michael Shah (Shah), to avoid the NYC real property transfer tax (RPTT). The delay resulting from the Department's policy of waiting until a criminal investigation is concluded before completing its own investigation caused the statute of limitations to expire, shifting the burden to the Department to prove fraud for which there is no statute of limitations.

The transaction at issue involved the transfer of real property (Property) from a third party to a tax-exempt straw entity (AAPC) and the contemporaneous transfer of the Property to an entity controlled by Shah (Shah-controlled entity). Although RPTT returns were filed for the transfers to and from the straw entity, there was no way to determine from the face of each tax return that there were two transactions or that AAPC was a straw entity.

The Department issued deficiency notices on several of the transactions after the statute of limitations (SOL) expired. The Department asserted that the transactions at issue were fraudulent and the SOL doesn't apply and made a motion to consolidate the Petitions filed with the Tribunal for each of the transactions for hearing. In this case the Tribunal addressed the legal standard applicable to a motion for summary judgment on the issue of fraud and the legal standard applicable to a motion for consolidation.

This matter was remanded to the ALJ Division for hearing and it was ordered that the matter be consolidated for hearing with other cases involving transfers to entities asserted to be Shah-controlled entities and AAPC.

F. SALES AND USE TAX CASES

Boyne USA, Inc. v. State of Montana Department of Revenue, Case No: SPT-2018-24/June 11, 2019

Procedure: Cross-Motions for Summary Judgment

Boyne USA, Inc.'s (Boyne) Motion for Summary Judgment was granted as to the issue of no-show and cancelation fees.

The Department of Revenue's (DOR) Motion for Summary Judgment was granted as to the Resort Services Fee (RSF).

1. Whether the no-show and cancellation deposits, forfeited by perspective guests to a Boyne facility, include the state Lodging Facility Use Tax (4%) and Sales Tax (3%).
2. Whether the Resort Services Fee, an additional 7% charge, Boyne collected for each completed lodging reservation was taxable under the state Use and Sales Tax.

Statement of the Law:

1. The DOR never determined whether the forfeited no-show and cancelation deposits were taxable. Nor, was the Board offered convincing evidence that a taxable event occurred. In order for the DOR to assess a tax obligation as due, a taxable event must happen first. The taxable event hinges on the term "for the use of the facility for lodging." MCA §15-

65-101(1). Here, without an actual "use" of the facility, no taxable event occurred, and thus no Use or Sales tax was due to the state.

2. A two-part test is used to determine when a charge or service is not taxable. ARM 42.14.202(3). The ARM states the nontaxable charges must be both separately stated, and cannot be integral to the use or occupancy of the room. Here, the charge was stated separately within Boyne's reservation system, but the RSF is a flat 7% of the room rate that goes into Boyne's general fund. During the online reservation process Boyne does not offer an opt-out option, nor is there any information concerning the existence of a process to request a decrease or removal of the fee. As such, the fee is "integral", and is part of the accommodations charge as defined by statute.

State Bar of Wisconsin v Dep't of Revenue (WTAC 9/20/2019)

Wisconsin Tax Appeals Commission decided that On-Demand webcasts were not taxable. This case forced us to analyze newer technology under old technology era statutes. First, because specified digital goods are not taxable if a tangible version is exempt, Petitioner argued (based on some related guidance drafted by the Department) that the Live Seminar was a tangible version because you can "sense" it so the On-Demand seminar should also be exempt. We rejected that notion, but then ruled for Petitioner based, instead, on the True Objective Test. We found that the true objective of the purchaser was to buy not only educational content but the full continuing education service. The Live CLE Seminar is an exempt educational service and so is the On-Demand format.

Drivetime Car Sales Company, LLC v. Lynnette T. Riley, Commissioner of the Georgia Department of Revenue, Tax Tribunal Docket No. 1715968 (December 13, 2018)

The Drivetime Car Sales Company case involves a deduction for bad debts in connection with sales tax paid contemporaneously on installment sales of tangible personal property reported on the accrued basis. The State of Georgia provides special provisions for such deductions benefitting any Dealer who reports on the accrual basis. However, the aforementioned deductions or potential refunds are not assignable.

Drivetime Car Sales is a wholly-owned subsidiary of Drivetime Sales and Finance Company, which in turn is a wholly-owned subsidiary of the holding company Drivetime Automotive Group. Drivetime Car Sales sells cars and originates financing. Such financing is always assigned to Drivetime Sales and Finance. All three Drivetime organizations are separate entities all owned by the same two individuals and two family trusts.

The Georgia Revenue Department has denied a sales tax bad debt deduction to Drivetime Sales and Finance because they are an ineligible assignee. Drivetime Sales and Finance alleges it qualifies for the deduction because it is one of an IRS-designated Controlled Group hence not an assignee. The Tax Tribunal in the case granted the Department of Revenue's Motion for Summary Judgment.

Arcerlor Mittal Laplace, LLC v. St. John the Baptist Parish School Board, Docket No. L00187 (La. Bd. Tax App. 1/8/19) 2019 WL 2487981

Arcerlor Mittal Laplace, LLC (AML) melted scrap metal in a furnace to manufacture mild carbon steel. Carbon electrodes conducted heat in the furnace to melt the scrap metal, and miniscule carbon fragments broke off and mixed with the molten metal. AML's product requires a certain amount of carbon content (generally added by bags of powdered carbon), so the added carbon from the electrodes had some benefit to the finished product.

AML also mixed slag chemicals into the molten mixture in the furnace. These chemicals bonded with impurities in the molten scrap and rose to the top in a foam that could be removed. The removed slag foam was separated into 'slag metal.' A third party, Barfield, removed the slag metal and harvested valuable minerals from the slag metal. It took the slag metal without charge, but sold the extracted minerals back to AML. This arrangement provided revenue to Barfield, and provided AML with cheaper access to materials and no cost for slag removal.

La.'s further processing exclusion has three parts: (1) raw materials beneficial to the end product, (2) raw materials identifiable in the end product, and (3) raw materials purchased for the purpose of inclusion in the end product. The Louisiana Supreme Court has held that this applied to both the primary end-product and to by-products, so long as those by-products are resold as corporeal movables (tangible personal property) even when the by-product is sold at a loss. *Bridges v. NISCO,* 190 So.3d, 282 (La. 5/3/16).

BTA found the electrodes were a heat source and that the carbon contribution was only incidental and were not exempt, but it found that the slag materials were exempt. Although, AML did not purchase the slag chemicals for inclusion in its steel, it did purchase the slag chemicals for inclusion in its slag metal by-product.

BTA declined to adopt the parish view that AML gratuitously gave away slag metal. The definition of sale includes a barter or exchange, which could be the exchange of property for a service rendered. BTA noted the legal presumption that "businesses generally do not give away their assets" *Columbia Gulf Transmission Co., supra*, and observed the record established benefits of the exchange to AML (cheaper minerals and free slag removal).

Richardson's RV v. Indiana Dep't of State Revenue, 112 N.E.3d 192 (Ind. December 5, 2018), rev'g, Richardson's RV v. Indiana Dep't of State Revenue, 80 N.E.3d 293, (Ind.Tax Ct. August 1, 2017)

Richardson's owns and operates an RV dealership in northern Indiana. It sells RVs onsite and online. In a typical online sale, physical transfer of the possession depended on a customer's state of residence. Customers from Indiana—or from one of the 40 states with reciprocal tax exemption agreements, drove their RVs directly off the lot paying Indiana's 7% sales tax. Customers from the 9 states *without* reciprocal tax exemption agreements usually chose to take delivery 3 miles north in the non-reciprocal state of Michigan, forgoing Indiana's sales tax to pay instead use tax in their own state.

The Indiana Supreme Court stated: "Richardson's RV thought it could avoid paying Indiana sales tax if it took RVs it sold to certain out-of-state customers into Michigan before handing over the keys. The Indiana Department of Revenue quarreled with this understanding, telling Richardson's that it owed tax for those sales. On review, the Tax Court determined Richardson's owed no sales tax because it did not complete these transactions in Indiana. We disagree. Because Richardson's structured these Michigan deliveries solely to avoid taxes with no other legitimate business purpose."

The reversed Tax Court opinion stated: "The Department contends that Richardson's' physical delivery of RVs to non-reciprocal customers in Michigan should be disregarded as an impermissible attempt to avoid Indiana sales tax. (citations omitted) . . . Michigan deliveries were not made for the purpose of affording non-reciprocal customers a means to escape taxation or to free Richardson's from collecting and remitting sales tax on the transactions. Instead, the unrebutted evidence demonstrates that Richardson's' delivery procedures were designed to further the legitimate business purposes of ensuring tax is paid to the proper jurisdiction, avoiding double taxation, and maintaining competitive pricing. (citation omitted) Accordingly,

Richardson's had legitimate business purposes for delivering RVs to its non-reciprocal customers in Michigan, and the Court will not disregard the deliveries in Michigan.

G. PROCEDURAL ISSUES

The 45 Great Jones Apartment Corp. v The Tax Commission of the City of New York and NYC Department of Finance (Supreme Court NY County 10/25/2018).
The New York Supreme Court denied the petition to annul a determination made by the Tax Commission to withdraw its offer to reduce tax assessments on Petitioner's property. Appeal pending.
An offer to reduce a property tax assessment was agreed to, implemented by the Department of Finance and then withdrawn by the Tax Commission after audit. The court found that the Tax Commission's withdrawal was not arbitrary and capricious and had a rational basis insofar as the Tax Commission's regulations authorize the Tax Commission to withdraw a written offer for any reason and contemplate a situation where Finance would have to reverse actions regarding an offer that has been accepted but not approved. Regarding Petitioner's additional arguments that the Tax Commission's withdrawal: (1) deprived it of the benefits of the agreement; (2) is prohibited by the voluntary payments doctrine and (3) impairs the "Obligation of Contracts" under the U.S. Constitution, the Court held that the terms of the offer negated the inference of a binding contract and, coupled with the regulation on point, put petitioner on notice that the offer was contingent on final approval.

Matter of Accidental Husband Intermediary, Inc., New York State Tax Appeals Tribunal, April 11, 2019. Franchise Tax on Business Corporations - timeliness of refund claim.
Facts: Petitioner produced a film in New York City entitled The Accidental Husband (film). Production of the film ended in 2007. Petitioner applied to the Governor's Office of Motion Picture and Television Development for an Empire State film production tax credit (film credit) related to the film. Thereafter, petitioner received a tax credit certificate (certificate) approving petitioner's application for the film credit. The film credit is required to be claimed over a two-year period: one-half of the total amount of the credit is claimed in the year the film is completed; the remaining half being claimed in the following year. Petitioner filed its 2007 return prior to being certified for the film credit, as petitioner did not receive its certification until October 15, 2008. Petitioner then timely-filed its 2008 return claiming one-half of the film credit. Filed with its 2008 return were the CT-248 (claim for empire state film production credit) and a copy of the certificate. In 2012, petitioner filed an amended 2007 return claiming one-half of the film credit, which resulted in a refund claim. (The Tribunal found that petitioner was unable to prove its assertion that it had filed another 2007 amended return prior to 2012.) The Division of Taxation (Taxation) denied the refund claim because it was filed beyond the three-year period of limitations for refunds of franchise tax.
Decision: The Tribunal found, in applying the federal informal refund claim doctrine to the 2007 request for refund, that the 2008 return, including the attachments: (1) provided Taxation with notice that the taxpayer was asserting a right to a refund; (2) described the legal and factual basis for the requested refund; and (3) obviously contained a written component. Thus, Taxation knew, or should have known, that a claim for refund was being made.
The Tribunal noted that while a formal refund claim for a particular year generally may not be deemed to be an informal refund claim for another year, it had held in the past that a return for a

particular year can be considered an informal refund claim for the immediately preceding year where the return contains sufficient information to "place[ ] the issue before the Division" (***Matter of Miles***, Tax Appeals Tribunal, September 13, 1990). The Tribunal recognized that the certification and CT-248, taken in consideration with the return, provided Taxation with enough information to begin an inquiry into the issue had it chosen to do so.
The Tribunal rejected Taxation's argument that the 2008 return did not contain an unequivocal request for a refund for the 2007 tax year. Given the extensive nature of the application process, and Taxation's familiarity with that process, the Tribunal concluded that petitioner's course of conduct in successfully applying for the film credit is reasonably interpreted as "a claim to a right to a future refund." The Tribunal ultimately concluded that petitioner's 2008 return, including attachments, together with petitioner's course of conduct in applying for and gaining eligibility for the credit, was properly deemed an informal refund claim for the film credit for 2007.

The Succession of Anthony Ciervo, Jr. v. Dep't of Rev., Docket No. 10832D (La. Bd. Tax App. 9/11/18) 2018 WL 5793328

After taxpayer's death, his estate participated in an IRS offshore asset VDA, after the three-year prescription (statute of limitations) on state tax collection had expired. Dept. of Revenue ("LDR") learned from the IRS that he had tens millions of dollars of unreported income in offshore accounts. LDR assed Louisiana income tax against estate based on adjusted income as reported to the IRS. The prescriptive period is suspended by the filing of a "false or fraudulent" return "with the intent to evade taxes."

La. Code of Civil Procedure provides that fraud is an affirmative defense that must be pled in an answer. the BTA forbade LDR from arguing that Ciervo had committed fraud or filed 'fraudulent' returns. However, the BTA found that Ciervo filed "false" returns. To suspend prescription, the false return must result from the "intent to evade taxes." The taxpayer was obviously unavailable, so only circumstantial evidence of his intent could be considered. After considering federal income tax cases, the BTA found that Ciervo's actions qualified. Ciervo had filed returns that substantially understated his income, and he had secreted his assets away overseas. The Board noted that the taxpayer failed to offer any alternative explanation for Ciervo's conduct at trial.

Note: Legislative response (Act 367 of 2019 amending R.S. 47:1580B):
B. The running of such prescription shall also be suspended prior to the lapse of the prescriptive period set out in the Constitution of Louisiana as hereinafter provided: …(3) With respect to income tax, for any period from the time of the commencement of an audit or examination of a taxpayer by the United States Internal Revenue Service, or during the period that assessment of tax remains open pursuant to the provisions of 26 U.S.C. 6501(e) resulting in an adjustment to the taxpayer's United States income tax, until one year from the time the secretary of the Department of Revenue is notified by said the taxpayer or the federal government of an agreed change to the taxpayer's United States income tax return.

H. STATUTORY CONSTRUCTION

PeaceHealth St. Joseph Medical Ctr v. Dept. of Revenue, 79648-8-I, 2019 WL 4322548, (Wash. Ct. App., Sept. 11, 2019).
B&O deduction on moneys from non-Washington medical assistance programs not allowed

Court of Appeals reviewed the Board of Tax Appeal's (Board) ruling under chapter 34.05 RCW, and like the Thurston County Superior Court judge, reversed the Board, finding that plain language of RCW 82.04.4311 did not support hospital's (taxpayer's) claim for business and occupation (B&O) tax deduction on compensation received from non-Washington medical assistance programs (Medicaid or CHIP programs). The appellate court stated that it gives no deference to the Board's interpretation of the statute in question, only the administrative agency's (Department of Revenue) interpretation of that statute, since the latter is charged with administering the statute, whereas the former (the Board) is only a quasi-judicial body interpreting the statute.

KPCII 61 Whitcher, LLC for itself as assignee from, and on behalf of, Principal Life Insurance Co. Tax Tribunal Docket No. 1905248 (August 6, 2019)
The State of Georgia imposes an intangible recording tax upon every holder of long-term notes secured by real estate in accordance with O.C.G.A. § 48-6-6 1 which provides:
Every holder of a long-term note secured by real estate shall, within 90 days from the date of the instrument executed to secure the note, record the security instrument in the county in which is located the real estate conveyed or encumbered or upon which a lien is created to secure the note There is imposed on each instrument an intangible recording tax at the rate of$1.50 for each $500.00 or fraction thereof of the face amount of the note secured by the recording of the security instrument.....The maximum amount of any intangible recording tax payable as provided in this Code section with respect to any single note shall be $25,000.00.
Section 48-6-65 further provides in relevant part:
(a) No tax other than as provided in this article shall be required to be paid on any instrument which is an extension, transfer, assignment, modification, or renewal of, or which only adds additional security for, any original indebtedness or part of original indebtedness secured by an instrument subject to the tax imposed by Code Section 48-6-61 when:
(I) It affirmatively appears that the tax as provided by this article has been paid on the original security instrument recorded.
Georgia Revenue Regulation 560-1 1-8.04 states that:
[Georgia] Revenue Regulation 560-1 1-8.04 states that "[i]ntangible recording tax is not required to be paid on any instrument that modifies by extension, transfer, assignment or renewal, or gives additional security for an existing note, when the intangible recording tax has been paid on the original instrument. . .
In the KPCII Whitcher case the original Borrower sold the Real Estate to a new Borrower (KPCII Whitcher) who assumed the indebtedness and all other obligations of the original Borrower and original Guarantor. The new Borrower (KPCII) paid under protest an intangible tax for which they sought a refund from the holder thereof. The Georgia Revenue Department denied their refund claim, stating that the assumption of a note by a new borrower does not qualify under 48-6-65 and Regulation 560-1 1-8-.04 because transfer and assignment of a note only apply to transfer and assignments between Lenders. The taxpayer argued that the transfer was exempt from intangible recording tax pursuant to 48-6-65. The Tax Tribunal agreed with the Taxpayer that the language of the exemption was not limited to instruments only between Lenders.

I. VALUATION

873 WB LLC v. City of Hartford, HHBCV 176037885
The plaintiff brings this tax appeal challenging the assessment of its property, a large apartment building located in the city of Hartford. The city's assessor determined that the fair market value of the subject property as of October 1, 2016 was $11,205,500. The plaintiff purchased the

building on December 3, 2015 for $11,550,000. The plaintiff claims that it overpaid for the property by approximately $3,000,000.
The plaintiff's appraiser, was of the opinion that the fair market value of the subject, as of October 1, 2016, was $8,250,000. The city's appraiser was of the opinion that the fair market value of the subject was $11,600,000. The city's appraiser, using the income approach to value, arrived at NOI of $1,094,124. There was no significant difference between the two appraisers' NOIs. The only difference between plaintiff's value of $8,250,000 and the city's value of $11,600,000 using the income approach, is the cap rate selected by each appraiser.
The city's appraiser's development of a cap rate is based on his determination that the highest and best use of the subject property, as of the date of revaluation, was as a condominium complex. The difference between plaintiff's selection of a cap rate and the city's selection of a cap rate is that Plaintiff's appraiser's tax-loaded cap rate was based on 70% of the Hartford mill rate of 74.29 mills whereas the city's appraiser's tax-loaded cap rate was based on an assessment ratio of 32.21% that applied only to residential real estate. The city's appraiser used an assessment of 32.21% because he theorized that if the subject was treated as a condominium complex, the individual owners of the condos would be assessed as residential, not as commercial. However, there was no indication that the prior owner or the purchaser of the subject property had any intention of buying the subject for a conversion to a condominium complex. The use of the subject, at the time of purchase, was for rental income.
From the evidence presented, the city's valuation of the subject using the highest and best use as a condominium rental complex, cannot be justified. The city's use of the sales comparison approach and the use of the income approach, related to condominiums, fails to support his opinion of the fair market value of the subject at $11,600,000, as of October 1, 2016. It is important to note that the value of the subject for assessment purposes is determined at the time of revaluation, not some future use of the property that may be more productive of income.

Roque Island Garner Homestead Corp. v. Town of Jonesport, State Board of Property Tax Review, Docket No. 2018-001 (May 16, 2019)
This is a second appeal by Roque Island Corp. - the owner of an archipelago of islands off the coast of Jonesport, Maine. The owner sought farmland classification for the largest of the islands within the archipelago. It claims that the Town excluded from farmland classification more acreage than required under section 1105 of Title 36 that provides that "[a]reas other than woodland, agricultural land or horticultural land located within any parcel of farmland … are valued on the basis of just value (i.e. fair market value)." The Town excluded 10 acres as "residential waterfront" which is consistent with other similarly situated waterfront residential property throughout the Town of Jonesport. The Taxpayer argued that only 5.7 acres should be assessed as residential waterfront because the remaining 4.3 acres of the 10 excluded by the Town is used as farmland. The Board concluded that the Taxpayer is not entitled to any specific number of farmland classified acres and for the assessor to meet the constitutional requirement of equal treatment for similarly situated property in the Town - here waterfront residential property - the assessor had little choice but to assess the residential property using a base lot measure as was done for all other residential property in the Town and then whatever is left assess as classified farmland. The Board concluded that the assessor properly excluded 10 acres as waterfront residential property and denied the appeal.

Clark County Assessor v. Meijer Stores LP, 119 N.E.3d 634 (Ind. Tax Ct. 2019)
The Clark County Assessor challenged the Indiana Board of Tax Review's final determination that lowered the assessed value of the Meijer store in Jeffersonville, Indiana. Both parties presented USPAP compliant appraisals, and the Board found the Meijer appraisal more persuasive. The Assessor asked the Court to reverse the Board's final determination because it

did not comply with generally accepted appraisal practices by 1) failing to require sales comparables to be adjusted to account for expenditures incurred after those properties were purchased, and 2) permitting the use of leased-fee sales as comparable properties. Moreover, the Assessor claimed there was no evidence supporting the Board's conclusions that the Assessor's leased-fee sales were not credible and that Meijer's property suffered from obsolescence. Several of the recurring Big Box issues are addressed including the use of vacant store sales, leased-fee sales, and the necessity of adjustments to comparables. The Court affirmed the Board's findings.

J. CIGARETTE TAX

Matter of ERW Enterprises, Inc. & Eric White, d/b/a ERW Wholesale, New York State Tax Appeals Tribunal, May 29, 2019. Cigarette Tax – penalty for possession of unstamped cigarettes; whether such penalty was excessive; and whether warrantless vehicular search and seizure of cigarettes was unconstitutional.

Facts: Eric White is owner of ERW Enterprises, Inc. and sole proprietor of ERW Wholesale. White directed an employee of ERW Wholesale to deliver 9000 cartons of Native American-sourced cigarettes to purchasers on Native American territory with a truck registered to ERW Enterprises. En route, NYS police stopped the truck and executed a warrantless search. The troopers discovered that the cigarettes were unstamped and seized the shipment. The Division of Taxation issued notices of determination to both taxpayers in December 2014, imposing a $1.2M penalty on each.

ERW Enterprises is a construction company primarily engaged in heavy site work and has never been directly engaged in the business of tobacco trading. ERW Wholesale, by contrast, operates a tobacco wholesale business. White possesses a business license issued by the Seneca Nation of Indians that permits him to operate as a tobacco wholesaler under the name ERW Wholesale. The only apparent connection of ERW Enterprises to the cigarette sale was that the truck used for delivery was registered to it.

Decision: Petitioners argued on exception that that they did not unlawfully transport untaxed cigarettes. They claimed that since they did not hold title to the cigarettes at the time of their seizure, they did not possess unstamped cigarettes within the meaning of the statute. Petitioners also contended that sales of cigarettes between Native Americans on reservation lands need no tax stamps even if they are transported through New York.

The Tribunal noted that, under the regulations and case law, licensed cigarette agents are the only lawful entry points for cigarettes in New York. While the existing systems of prior approval or coupons preserve the tax-exempt status of sales to Native American customers, it does not exempt such cigarettes from tax stamping requirements.

The Tribunal found that ERW Enterprises did not "possess" the untaxed cigarettes for purposes of penalty liability. The Tribunal found its level of control over the truck and involvement in the transaction too attenuated.

Turning to ERW Wholesale, the Tribunal found that ERW Wholesale was not a contract carrier lawfully transporting cigarettes and thus did not qualify for the safe harbor provision for common and contract carriers. As ERW Wholesale was not a licensed cigarette stamping agent, it could not lawfully transport unstamped cigarettes to its end customer.

The Tribunal rejected ERW Wholesale's argument that title to the cigarettes was required to impose the penalties at issue. Mere possession or control is all that is required under the statute. Finally, the Tribunal addressed ERW Wholesale's excessive fine arguments, but did not find that the fines involved were grossly disproportional to the gravity of petitioners' actions.

K. GROUP DISCUSSION

Wisconsin - Discovery in property valuation cases. Following decades of the parties just working things out, we recently are faced with stalemates regarding the order of production of expert reports. We have gone back and forth between efficiency (simultaneous disclosure of expert reports) and burden of proof (taxpayer should have to go first). We have fashioned an acceptable solution but we'd like to hear how other states handle this.

Oregon - Discussion Topic: Fees

- Does your court or tribunal charge a filing fee? If so, what is the amount?
- Does your court or tribunal charge other fees, such as for motions or trials?
- Are your fees uniform or do they vary by case type, amount in controversy, or other factors?
- Does your court or tribunal offer fee waivers, deferrals, or payment plans?
- Does your court or tribunal award fees to the prevailing party?
- Does your court or tribunal have the authority to change your fee schedule?
- Do you have any past success or lessons learned with respect to fees?

Louisiana - the adoption of a constitutional amendment to codify the BTA in the judiciary article of our state constitution. The adopted amendment also extended BTA jurisdiction to constitutional questions (previously reserved to our elected courts). Half of all constitutional amendments in Louisiana fail, the main lesson was have enough support at the legislature to get the desired ballot language.

New La. Const. art. 5, Sec. 35: The remedies required by Article VII, Section 3(A) of this Constitution shall extend to any unconstitutional tax paid by a taxpayer. The Board of Tax Appeals is continued, subject to change by law enacted by two-thirds of the elected members of each house of the legislature. It shall have jurisdiction over all matters related to state and local taxes or fees or other claims against the state [as provided by law]. The legislature may extend the jurisdiction of the Board of Tax Appeals [by 2/3 vote] to matters concerning the constitutionality of taxes, fees, or other matters related to its jurisdiction.

Ballot Question Approved by Voters: Do you support an amendment to protect taxpayers by requiring a complete remedy in law for the prompt recovery of any unconstitutional tax paid and to allow the jurisdiction of the Board of Tax Appeals to extend to matters related to the constitutionality of taxes?

Wisconsin - Whether and to what extent do municipalities participate in valuation cases. In Wisconsin, some municipalities do not participate at all, some join immediately with what they call a "cross-appeal" (which is not exactly correct), some intervene later (which often draws objections). Participation ranges from sitting quietly to saying "me too" to whatever the Department says to introducing the city's own appraisals, and we've seen everything in between.

Oregon - Our court recently held a public forum to discuss proposed rules changes. One topic that garnered special interest was the issue of privacy versus access to court records. Flings in our courts, with limited exceptions, are available to the public unless the court orders them sealed. However, our filing system locks all electronic documents filed by the parties by default. Court created documents are unlocked by default. The parties can still request the documents

from us. Our Department of Revenue suggested we change the practice and allow electronic access to documents as the default. Many of the private bar opposed such a change. They like the practice of making it harder to obtain documents, even if less convenient, to protect privacy and prevent data mining. What do other courts do?

Montana - We have evolving law relating to whether exhibits or testimony offered in our hearings that are alleged to be confidential trade secrets require a hearing and or testimony to prove they are in fact confidential. In that past our Board has "punted" the question to a court of law but our Supreme Court is now expecting administrative courts to make reasoned decisions based on testimony and evidence. We now have to balance the public's right to know affairs of government with a corporation's right to hold certain business information confidential.

M. ADDITIONAL CASES (TIME PERMITTING)

Babara Parnoff et al v. Town of Stratford HHBCV 136030852S

The present action involves pro se appeals of real property tax assessment concerning residential property located in Stratford. Plaintiffs prosecuted an earlier tax appeal that was dismissed for failure to diligently prosecute on June 1, 2007 and nonsuited on December 20, 2011. The plaintiffs never sought to open the second nonsuit. The procedural history of these two tax appeals concerning the property spans seventeen years and four town-wide property tax assessment revaluations, which were undertaken in the years 2000, 2004, 2009 and 2014, and multiple amendments to the Plaintiff's second Complaint filed in 2012.

The defendant town seeks summary judgment. The main argument of the defendant, is that Connecticut's statute regarding "accidental failure of suit" does not apply to administrative appeals. The distinction between an administrative appeal and a tax appeal is that the trial court decides an administrative appeal based upon the record developed in the administrative proceedings. In a tax appeal, the court's decision is a trial de novo based upon the trial court's findings of fact.

In the present action, the pretrial judge's 2011 nonsuit was a disciplinary action for failure to comply with a court notice. The disciplinary action taken by the pretrial judge was not an "accidental failure of suit" but a disciplinary action in which the court found that the plaintiffs ignored court rules and procedures.

The plaintiffs' attempt to set aside the nonsuit entered by the pretrial judge by interjecting "accidental failure of suit" in the present tax appeal must fail. A judgment of nonsuit terminates the action, but since the judgment is not on the merits, the party nonsuited is free to initiate a new action on the same cause. The defendants' motion for summary judgment as to counts one through eight (dealing with the plaintiffs' tax appeals challenging the assessors' valuations for the years of October 1, 2000; October 1, 2004; October 1, 2008; and October 1, 2009, is granted.

Verizon of NJ, Inc. v. Borough of Hopewell 31 NJ Tax 49

In a case involving land line service only, the court found in favor of the borough and affirmed the imposition of the business personal property tax for tax year 2009 against a telecommunications company as the court adopted a definition of the local exchange based on the geographic boundaries as depicted on the telecommunication company's tariff and product guide exchange maps, and as represented in the Local Access and Transport Area LATA system; The court held that the term local telephone exchange was a geographically defined area serviced by a physical construct that functions as the building block for service delivery, call routing and the regulatory infrastructure that has dominated the telecommunications industry for decades and

that the business personal property being taxed was physically located within the boundaries of the exchange bearing its name demonstrated a geographic component to the definition of a local telephone exchange.

HPT TA Props. Trust v. Bloomsbury

Taxpayer is the owner of real property located in defendant, Bloomsbury Borough. The property site consists of two non-contiguous tax parcels of land containing a total land area of 13.47 acres. Taxpayer challenges the borough's assessment of its real property taxes on both lots for years 2014, 2015, 2016 and 2017.

At the beginning of the trial, the parties advised the court that both of their experts had rejected the Sales Comparison and Income Capitalization Approaches to value, and both experts had relied upon the Cost Approach to valuation because of the unique and specialized use of the property. The parties also stipulated to the Improvement value of the property for purposes of the Cost approach.

The court found credible the opinions of the experts that the property is a limited market, special purpose property. The improved structures were designed for a specific use and would likely require significant alterations to be put to any other use. In addition the property's location is paramount and specific to its use and purpose. The court recognized that the Cost Approach was the most credible method of determining value in light of the special nature of the property and the dearth of reliable sales and income data.

During the trial, the borough assessor testified, and each party presented an expert real estate appraiser who offered an opinion of the true market value of the land component of the property on each of the relevant valuation dates. Both experts agreed that the highest and best use of the property "as improved" and "as vacant" is its continued use as a truck stop/travel center, and the court accepted this opinion of highest and best use.

Due to the stipulations, the court’s sole determination was the land value of a unique, special use property, where the depreciated cost of improvements has been successfully determined. The difficulty this case presented was how to fairly interpret, analyze, and reconcile the comparable land sales provided by the experts, when those sales by necessity have different zoning and highest and best uses. It would be inequitable to hold a taxpayer to a standard that cannot be met and so the court must apply the law and the facts as they are presented.

Zoning is often the most basic criterion in selecting comparable sales. Sites zoned the same as a subject property are the most desired and appropriate comparable sales. When sufficient sales in the same zoning category are not available, data from similar categories can be used after adjustments are made. As a general rule, the greater the dissimilarity between the subject and the comparable sales, the more potential there is for distortion and error in sales comparison.

All land has value, and the court's review of the comparable land sales offered by both experts is the best evidence available to determine the subject property's land value. In choosing the most credible land sales, the court gave greater weight to those land sales zoned commercial, that are in the Highlands region, and on or near roads or highways with heavy truck volume.

After weighing probative value of the land sales provided by the experts, the court concluded a true value price per acre of $200,000. The court’s confidence in its land value determination is

supported by the current land value contained within the subject property's assessment. Although as a general rule, the land assessment cannot be evidence of value because the allocation between land and improvements is viewed to be merely an administrative act, the evidence in this case was presented differently. The testimony of the borough assessor clearly and unequivocally was that the land assessment was based on a $200,000 per acre value attributed to a 2006 revaluation using the Cost Approach. The $200,000 price per acre was not therefore arbitrary or merely an administrative act. Also land values do not change at the same rate as improvements because depreciation is not a factor. So while not dispositive of value, the court cannot conceive of any reason why given the assessor's testimony, the land assessment cannot be considered as supporting the other credible evidence establishing value.