CASE LAW UPDATES PROGRAM
NATIONAL CONFERENCE OF STATE TAX JUDGES
SEPTEMBER 7, 2017

A. VALUATION CASES

Two sets of electric utility property appeals heard and decided by the New Hampshire Board of Tax and Land Appeals ("BTLA") and affirmed by the New Hampshire Supreme Court:

In re: Public Service Company of New Hampshire ("PSNH"), BTLA Docket Nos. 26246-11PT, et al. (July 2, 2015), reh'g denied (September 14, 2015), aff'd sub nom Appeal of Public Service of New Hampshire, __ N.H. __, __ A.3d __ , 2017 WL 2392541 (June 2, 2017); and
In re: New Hampshire Electric Cooperative, Inc. ("NHEC"), BTLA Docket Nos. 26401-11PT, et al. (July 2, 2015), reh'g denied (September 14, 2015), aff'd sub nom Appeal of New Hampshire Electric Cooperative, Inc., __ N.H. __, __ A.3d __ , 2017 WL 2407213 (June 2, 2017).

The BTLA held consolidated hearings on a number of tax year 2011 and 2012 property tax appeals filed against a number of municipalities by two regulated utilities: PSNH, a for-profit electric generation, transmission and distribution utility; and NHEC, a non-profit, member owned ("cooperative") electric distribution utility. The hearings in 109 separate dockets (86 involving PSNH and 23 involving NHEC) consumed eight and nine days, respectively, and resulted in two consolidated decisions which were then appealed to the supreme court.

In New Hampshire, utilities, like other owners of real property, are subject to a local tax based on market value. In determining market value, municipal assessors have the option of setting values themselves or using values allocated by the New Hampshire department of revenue administration ("DRA"): the DRA assesses a separate utility tax, similarly based on market value estimation by its appraiser employing the unit method, and uses values allocated to each municipality for equalization and other purposes (allocation of county-wide tax burdens, for example). While some accept the DRA utility values, other municipalities arrive at higher assessed values using different valuation methods, prompting PSNH and NHEC to challenge them in separately filed tax abatement appeals.

The BTLA decided, after reviewing all of the evidence presented, including appraisals and considerable expert testimony, that PSNH and NHEC did not meet their respective burdens of proving the challenged assessments were disproportional and required abatements (except in a small number of appeals where the municipalities stipulated to lower the assessed values to some extent). The supreme court affirmed the BTLA's decisions.

Among the issues addressed in these appeals was whether the BTLA was required to give the DRA appraisals (based on the unit method and allocation based on original cost) more probative weight or deference. The court found "each utility appraisal involves numerous discretionary decisions" and ruled the BTLA, as fact finder, was "not required to find the DRA appraisals or allocated values credible as a matter of law" and, because of sufficient evidence in the record, "could properly reject the DRA appraisals and allocated values." The court further ruled New

Hampshire law did not require use of the unit method (or any other specific approach or method for that matter) to value utility property for local assessment purposes. In doing so, the court rejected a number of "uniform taxation" arguments by PSNH and NHEC, concluding it would be up to the legislature, not the courts, to "adopt a uniform methodology for valuing utility property."

At present, numerous subsequent year PSNH and NHEC appeals, as well as appeals filed by other utilities, remain on the BTLA's docket: upwards of 350 separate appeals; not including those that may be filed for tax year 2016. It remains to be seen whether the recent tax year 2011 and 2012 decisions will obviate the need to hear and decide additional utility property tax appeals in the near future.

Appeal Nos. 13-1343 and 14-1241 Utah State Tax Commission - Ad Valorem Property Tax
This is a property tax valuation case for a centrally assessed wireless telecom company. One of the issues dealt with the value of the spectrum licenses issued by the FCC. Under Utah law, this is intangible property, which is not subject to the ad valorem property tax. The difficulty focused on capturing taxable enhancements to the system while excluding intangible property. Major disagreements between the competing appraisals became the real focus of the case after the parties agreed that 76% of the system wide unit value was attributable to intangible property. The Property Tax Division's appraisal adjusted for intangibles by using the historic cost less depreciation (HCLD) cost indicator of only the tangible property and a Rule 62 yield capitalization income indicator adjusted for intangibles. The Division gave 60% weight to its cost indicator and 40% weight to its income indicator. The taxpayer had chosen a different approach, using a replacement cost new less depreciation indicator based on cost indexes and arguing that if the HCLD cost indicator was used, further adjustment should be made for functional obsolescence. The taxpayer gave its cost indicator 60% weight for one tax year and 50% for the second year. For both years, the Taxpayer weighted the income approach at 40%. (The taxpayer's appraiser gave 10% weight to a sales indicator for the second year at issue.) For its income approach, the taxpayer had used both a yield capitalization indicator and a discounted cash flow indicator. There was considerable disagreement with the DCF indicator on the weighting and forecasted revenues. Another area of disagreement was the capitalization rates used by the appraisers and the Taxpayer had made adjustments for both flotation and liquidity. At the hearing, affected counties also offered appraisals indicating a higher value than what had been assessed by the Division.

In its decision, the Commission ruled that the HCLD indicator was a reliable indicator of value as it was based on accounting book values that were readily available and were in audited formats. The book values of intangibles were not added in the Division's HCLD. The Commission did not adjust the HCLD value for functional obsolescence. The Commission did not accept the Taxpayer's argument that flotation and liquidity adjustments should be made to the capitalization rate. The Commission held that by giving 60% weight to its HCLD, which excluded intangibles, and 40% weight to the Rule 62 yield capitalization income indicator, which both captures less value and had been adjusted for intangibles based on book ratio, the Division had appropriately assessed the unitary tangible value while removing intangible property from the value.

Powell Street 1 LLC v. Multnomah County Assessor and Department of Revenue, State of Oregon, Tax Court Regular Division, TC 5263, August 2, 2017

In this case the valuation date came just after an anchor tenant in a small mall had vacated about one half of the rentable space. Although a letter of intent had been negotiated and signed by the landlord and a replacement tenant, it was non-binding. Other spaces' rental payments, which were typical of the market, conditioned rental payments on the occupancy of the anchor space. Emphasis in appraisals was on the income and sales comparison approaches. Cost was either secondary (department) or not conducted at all (taxpayer). Taxpayer's appraisal considered the substantial vacancy of the property on the basis that the property was actually vacant as of the assessment date. The department's appraisal did not consider the substantial vacancy of the property on the basis that the property had not been vacant for more than a market standard period of time as of the assessment date. Taxpayer argued that the value in exchange standard imposed by statute required an appraiser to take the substantial vacancy into account in the valuation process because a market participant would "absolutely" consider the substantial vacancy.

The department argued that taxpayer's income approach to value did not value the fee simple estate of the property because, according to the appraisal literature, all rentable space (vacant or otherwise) is to be considered rented out at a market rate of rent. Despite the department's arguments, this case was not, on the evidence before the court, a dispute over what qualifies as fee simple valuation.

At trial, the department's appraiser did not dispute the type of adjustments made in taxpayer's income approach, but rather the timing of them.

Taxpayer's appraisal *did in fact* determine the value of the property based on all vacant rentable space being rented out at a market level of rent, but then took a stabilization deduction to reflect the substantial vacancy of the property

Furthermore, the appraisal literature presumes that a property can be immediately and with minimal cost rented out.

The evidence in this case demonstrated that, at least for an anchor tenant, the size of buildout would have required public approvals and expenditures on public improvements on the site. And the landlord typically gave a large amount of allowance for tenant improvements to attract an anchor tenant.

In other words, securing an anchor tenant would take a significant amount of time and money. The appraisal had to reflect that.

The evidence clearly supported the taxpayer's position that the market would consider the substantial vacancy of the property. This is so even though taxpayer's appraiser admitted that "there is no source that I can state where it [The Appraisal of Real Estate (14th ed)] says that it's appropriate valuation methodology to account for stabilization costs within the context of a fee simple analysis."

Acocella v Cedar Grove Township, Tax Court of New Jersey

Taxpayer appealed a vacant, landlocked parcel lacking street access, situated adjacent to his residential property on one side, and bordering a utility easement and county park land at the remaining property lines. The township argued that due to taxpayer's common ownership of the vacant and residential properties, the vacant parcel was not landlocked and was subject to development. After trial the court found the parcel to be landlocked, a condition unaffected by taxpayer's common ownership of the two properties. Contrary to the township's argument,

absent proof of unity of title an easement by necessity over taxpayer's adjacent residential property in favor of the vacant parcel fails to arise. The court further found the potential for development of the vacant parcel appeared remote and adequate proof of the township's alternate highest and best use for a three-lot residential subdivision was lacking. The court found value based on the highest and best use of the parcel in its present condition as vacant land with impaired development potential and entered judgment reducing the assessment.

<u>A.E. Staley Mfg. Co</u>, Tennessee State Board of Equalization Assessment Appeals Commission, Appeal Nos. 69230, 78373, 86872, January 31, 2017
<u>Loudon County v. Tennessee State Board of Equalization, Assessment Appeals Commission and A.E. Staley Mfg. Co.</u>, Chancery Court for Loudon County, Tennessee 9th Judicial District, August 15, 2017
Loudon County and Tate & Lyle (assessed as A.E. Staley) reached a compromise concerning the taxation of the subject properties (real and person) in Loudon County. The parties negotiated a payment in lieu of tax (PILOT) agreement and restored the original values by agreement which resolved all of the pending appeals and the Petition for Review filed in Chancery Court.

<u>Monroe Cnty. Assessor v. SCP 2007-C-26-002, LLC</u>, 62 N.E.3d 478 (Ind. Tax Ct. 2016), review denied. [CVS 1]
Affirming the Indiana Board's final determination that an appraisal may use aggregated national and regional data, rejecting the Assessor's argument that the Court's past decisions had incorrectly interpreted **"market value-in-use."**

<u>Monroe Cnty. Assessor v. SCP 2002 E19 LLC 6697</u>, 77 N.E.3d 270 (Ind. Tax Ct. 2017), petition for review filed, No. 49T10-1512-TA-00032 (Ind. 2017). [CVS 2]
Affirming the Indiana Board's final determination that an appraisal may use national and regional data under the **"market-value-in-use"** standard.

<u>Steven J. Drew v. Jubilee Community Association</u>, The Board of Tax Appeals of the State of Washington, October 27, 2016
The issue is the assessed values of two improved parcels designated as "common open space" in a "planned residential development." The resulting zero value is somewhat counter-intuitive but is supported by a Washington State Supreme Court decision in *Twin Lakes Golf and Country Club v. King County,* 87 Wn.2d 1, 548 P.2d 538 (1976).

B. <u>STATUTORY ISSUES</u>

<u>Xpress Natural Gas, LLC v. Town of Baileyville</u>, Maine State Board of Property Tax Review, October 12, 2016.
Pursuant to Maine law, municipal assessors may demand that a taxpayer provide a "true and perfect list" and the "nature, situation and value" of its personal property to assist the assessors in making a correct and complete assessment and to guard against property escaping taxation. Failure to comply with a proper demand bars a taxpayer from seeking an abatement of its personalty unless the taxpayer can show that it was "unable" to furnish the demanded information. Here, the Town mailed three written demands for information to Xpress Natural Gas (XNG), headquartered in Boston. XNG asserted that it did not receive any of the demands, but did not otherwise assert it was unable to provide the demanded information. None of the demands was returned to the Town as undeliverable. XNG maintained that the Town had to prove it provided actual notice to XNG. The Board disagreed, relying on *Jones v. Flowers,* 547

U.S. 220 (2006), the presumption of regularity in mailing, and the generally applicable definition of "notice" in the Maine tax code.

Metal USA Plates & Shapes Southeast, Inc. v. Louisiana Department of Revenue and O'Neal Steel Louisiana LLC v. Louisiana Department of Revenue, May 10, 2017
This case was unique in that the codified law, both in the statute book and on the Legislature's website, was not consistent with the actual Act of the Legislature. The clerk of the House of Representatives who testified at the hearing stated that he was unaware of any other example of this occurring. The root cause of this was the passage by the Legislature of two different Acts affecting the same subparagraph on the same day. The first Act deleted a reference to residential uses, the later Act retained that requirement.

Under the language of either Act 1 or the Institute's codified version of La. R.S. 47:301(10)(x), the Taxpayer would have won as they would be a "person" who has purchased "any fuel or gas." However, under the language of Act 9, they were not entitled to an exclusion. The Taxpayer argued that there was no conflict, and that there were really two exclusion enacted distinctly on the same day.

The Board agreed with the Secretary that the distinction between "residential" use (as referenced in Act 9) and all uses (whether residential or commercial) (as implied by Act 1) constitutes a real conflict between the two Acts. The Board then ascertained which was enacted last and applied that enactment, irrespective of the codified statutory text.

Emera Maine v. Town of Eddington and Emera Maine v. Town of Bradley, Maine State Board of Property Tax Review, June 29, 2016
The Emera Maine decision of the Board involved the 2012 valuation of a high voltage transmission line called Line 396 that runs through the Towns of Eddington and Bradley. Both Towns assessed Line 396 to MEPCO, the actual owner. Emera Maine owns a high voltage transmission line called Line 390 that also runs through the Towns of Eddington and Bradley. According to Emera the Towns assessed both Line 390 and Line 396 to Emera for the 2012 tax year.

Emera appealed its assessment of high powered transmission line property by both Towns for the 2012 tax year claiming an illegal double-tax. The Towns countered that the error was an error in valuation - not an illegality - and therefore the appeal to the Board was untimely; secondly that Emera is estopped from claiming double taxation because the property was indeed identified on a list provided to the Towns by Emera of all Emera's taxable property for that tax year; and that in any event Emera Maine cannot prove as a matter of fact that the specific property was double-taxed by the Towns, given in part that neither Line is assigned a Map and Lot number by either Town.

The Board concluded that the appeal did not involve valuation and was therefore timely. The Board implied that Emera was not estopped from granting an abatement having identified the property by mistake on a list of all its property provided to the Towns for 2012, and that Emera had met its burden to prove double–taxation for that tax year.

The Superior Court affirmed the decision and Emera Maine has been further appealed to our Supreme Court.

C. EXEMPTIONS

Circle of Children v. Lane County Assessor, Oregon Tax Court – Magistrate Division, TC-MD 150500C (Feb 8, 2017)
Plaintiff challenged the county assessor's denial of property tax exemption for Plaintiff's property, a 61.22-acre parcel with facilities that formerly functioned as a conference center. Plaintiff was a nonprofit corporation exempt from taxation under IRC § 501(c)(3), organized for the primary purpose of "providing free instruction to the general public, and particularly children, on how to live in an earth friendly, sustainable way * * *." Plaintiff's property was in disrepair and most of Plaintiff's activities were in the nature of making repairs to the property, largely through the help of volunteers; seeking grant money; and obtaining appropriate land use approvals to operate as an overnight camp and retreat center. Plaintiff offered some community and youth-focused activities at the property throughout the year, and helped needy visitors. The issues for decision were: (1) whether Plaintiff qualified as a "charitable institution" under ORS 307.130; and (2) whether Plaintiff actually and exclusively used the property in its charitable work. To be a charitable institution, Plaintiff's performance must involve "gift or giving." The parties disputed the significance of the fact that numerous individuals and groups provided volunteer services to Plaintiff. The court found that fact tended to support a conclusion that Plaintiff was a charitable institution. With respect Plaintiff's actual use of the property, the court followed a line of cases holding that preparing a property for use in future exempt activities qualified as use for purposes of property tax exemption. Although Plaintiff's progress was slow due to its reliance on volunteer labor and its limited financial resources, the court was satisfied that Plaintiff had made sufficient progress toward its ultimate charitable use of the property as a camp and retreat. However, the court denied exemption for the staff residences because they were not reasonably necessary to Plaintiff's charitable use of the property, particularly while preparing the property for future use.

Platte River Whooping Crane Maintenance Trust, Inc., v. Hall County Board of Equalization, Nebraska Tax Equalization & Review Commission (March 15, 2017), on appeal to the Nebraska Supreme Court.
The Trust, a 501(c)(3) charitable organization, purchased more than 800 acres of irrigated agricultural land in central Nebraska in a location adjacent to the Platte River and where Sandhill Cranes congregate to rest and feed every year during their migration from Mexico to Canada. The Trust converted the land to native grasses and placed bison on many of the acres. The Trust also created walking trails for visitors and tourists traveling across Interstate 80 so that they could experience the native prairie and wildlife. The Trust filed an exemption application with the County Assessor, asserting that the land should be exempt from property taxation as a charitable organization. The County Board denied the exemption application. The Commission found that the Trust did not qualify as a charitable organization under Nebraska law, which have been limited to enterprises providing relief to the poor and distressed. HELD: The Tax Equalization & Review Commission Affirmed the County Board's denial of the exemption application. The Decision is on appeal to the Nebraska Supreme Court.

Fisher v. City of Millville, 29 N.J. Tax 91 (Tax 2016), aff'd ____N.J. Super ____, 2017 N.J. Super, Lexis 90 (App. Div. 2017)
The court granted the city's motion for summary judgment which denied the taxpayer the disabled veteran's property tax exemption because it was undisputed that the taxpayer was never directly exposed to the dangers or the potential dangers of the battlefield by her service in a Rear Detachment.

Hamilton Cnty. Assessor v. Duke, 69 N.E.3d 567 (Ind. Tax Ct. 2017), petition for review filed, No. 49T10-1309-TA-00069 (Ind. 2017).
Affirming the Indiana Board's denial of a religious purposes exemption for its daycare center and *Reversing* the Indiana Board's grant of an educational purposes exemption for failure to apply the proper statutory test.

Emco Chemical Distributors Inc., v. Wisconsin Department of Revenue, Wisconsin Tax Appeals Commission, Docket No. 14-M-141, February 27, 2017
This case involved the "readying rule." We had to decide how close to completion the project had to be for the related machinery and equipment to qualify for a manufacturing exemption.

D. INCOME TAX CASES

Microsoft Corporation v. Wisconsin Department of Revenue, Wisconsin Tax Appeals Commission, August 10, 2017
The Department of Revenue sought to measure sales for the sales factor by looking at the ultimate end user of Microsoft's software to determine whether sales were in Wisconsin. Microsoft sells to OEMs who incorporate the software into the laptops etc. the OEMs sell. We held (in a partially state statute specific decision) that you can't look through to the customer's customers to determine sales.

E.I. DuPont De Nemours v. Indiana Dep't of State Revenue, 2017 WL 2953373 (Ind. Tax Ct. 2017)
The Court held that the Department could make unlimited retroactive net operating loss adjustments but not assessments because they were limited by a statute of limitations. The Court further held that Dupont was not entitled to Indiana's research & development expense deduction because it chose to take the credit on its federal return, not the expense deduction. The Court also held that the taxpayer's intercompany interest expense deductions were not to be disregarded as lacking economic substance, business purpose, or as a sham; that Dupont's sale of a subsidiary was non-business income; and that no penalty applied.

General Foods Credit Investors #3 Corporation v. Director, Division of Taxation; Docket No. 011330-2015, decided February 22, 2017.
The court held that plaintiff did not obtain sufficient benefits and burdens of ownership of assets subject to a sale-leaseback transaction between plaintiff and New Jersey Transit for those assets to be treated as plaintiff's property for purposes of the property allocation fractions used to calculate plaintiff's Corporation Business Tax liability. See N.J.S.A. 54:10A-6(A). Plaintiff purchased the assets from New Jersey Transit solely to make use of their federal tax benefits and transferred back to New Jersey Transit through a sublease all other significant benefits and burdens of ownership. In light of this conclusion, the court held that imputed rental income from those assets should not be included in plaintiff's receipts allocation fractions. See N.J.S.A. 54:10A-6

***Cheng Shin Rubber USA, Inc. v. Dept. of Rev.*, Oregon Tax Court - Magistrate Division, TC-MD 150268D, March 31, 2017.**
Cheng Shin Rubber USA (Cheng Shin) is a Georgia-based wholesale tire distributor that sells tires to Les Schwab Tire Centers (Les Schwab) in Oregon. Cheng Shin has no warehouses, property, or employees in Oregon and they do not have employees or agents that regularly visit Oregon. The Dept. of Rev. sought to impose Oregon corporation excise tax on the basis that

Cheng Shin offered a manufacturer's warranty for defects and required the purchaser to go to an authorized dealer/distributor. Les Schwab is the only authorized entity in Oregon. Les Schwab offered its own road hazard warranty with greater coverage then the manufacturer's warranty. If a customer brought a tire manufactured by Cheng Shin for repair or replacement, Les Schwab would inspect the tire, and if damage was due to a manufacturing defect, it would submit a claim to Cheng Shin for the cost of the tire. The issue was whether Cheng Shin is immune from taxation in Oregon under Public Law (PL) 86–272 (15 USC §§ 381 to 384).
PL 86-272 prohibits states from imposing a net income-based tax on corporations doing business in the state if their activities are limited to "the solicitation of orders" - which means taking and filling orders. The court found that the warranty work performed in Oregon by Les Schwab was done on behalf of Cheng Shin. That warranty work represented more than mere "solicitation of orders" and was the basis to find a sufficient nexus for the state to impose an excise tax on the out-of-state corporation. The case is currently on appeal to the Regular Division of the Oregon Tax Court.

Matter of Luizza, New York State Tax Appeals Tribunal, March 29, 2016
Retroactive Application of Tax Statute
Facts. This case involves a nonresident taxpayer who decided to sell a company of which he owned 100% of the stock. The company had elected to be treated as an S corporation for federal tax purposes, and was recognized as such for NYS tax purposes. The buyer requested, and the taxpayer agreed, to make an election under IRC § 338(h)(10) to allow the sale of the stock to be treated, for federal tax purposes, as a deemed sale of the Company's assets to the buyer, followed by a deemed liquidation of the company in exchange for its stock. The taxpayer agreed to the transaction being structured in this manner based upon the advice he received from his tax advisors that under the NYS law in effect at the time of the transfer, the election would not result in any additional NYS tax being due. More than two years after the sale, and after the taxpayer had filed his personal tax return including the sale, the Legislature amended the Tax Law to require that nonresident taxpayers recognize NYS source income on the gain or loss from 338(h)(10) transactions, and not be allowed any offset or increase to any such recognized gain or loss recognized from the deemed liquidation. The amended statute, adopted in 2010 was made applicable to tax years beginning on or after January 1, 2007. The transaction at issue occurred in 2008. The NYS Division of Taxation of the Department of Taxation and Finance (DTF), pursuant to the retroactive application of the statute, issued a notice of deficiency to the taxpayer based upon the improper allocation of the gain from the sale to NYS.

Law. When determining if the retroactive application of a tax statute violates a taxpayer's due process rights, NY courts have adopted a "multi-factor balancing of equities test" the important factors being "(1) "the taxpayer's forewarning of a change in the legislation and the reasonableness of . . . reliance on the old law," (2) "the length of the retroactive period," and (3) "the public purpose for retroactive application" (***James Square Associates LP v Mullen***, 21 NY3d 233, 246 [2013] [citations omitted]. "Furthermore, raising money for the state budget is not a particularly compelling justification. Absent an unexpected loss of revenue, such a legislative purpose is insufficient to warrant retroactivity in a case where the other factors militate against it, as is the situation here" (id at 250). In a 2013 case, with facts similar to those in ***Luizza***, the Court of Appeals found that the retroactive application of a tax statute did not violate petitioner's due process rights given a legislative finding that the amendment of the statute was to overrule an erroneous overturning of a long standing policy of DTF by the Tax Appeals Tribunal, particularly when the legislative finding was supported by "the unrefuted affidavit of a DTF auditor detailing this State's taxation policy" ***Caprio v NYS Dept. of Taxation and Finance***, 25 NY 3d 744 [2015] [court also relied on an internal Power Point presentation distributed to new auditors]).

Opinion. *Luizza* dealt with the same statute at issue in *Caprio*. The primary difference in the cases was that at issue in *Caprio* was an installment sale transaction, while at issue in *Luizza* was a deemed sale of assets under IRC 338(h)(10). The Tribunal found that it was bound by the Court of Appeals decision in *Caprio* because the decision continuously referenced both the installment sale and deemed asset sales language of the retroactive statute at issue. Thus, the retroactive imposition of the statute was held not to violate petitioner's constitutional rights.

Status. The decision is final as petitioner did not appeal it.

Bourassa v. Lynette T. Riley, Commissioner of the Georgia Department of Revenue (Dec. 2015)
The Georgia Tax Tribunal affirmed the Department of Revenue's jeopardy assessment and the Department's estimate of the taxpayer's income from selling drugs, which was based on the projection method of restructuring income.

Appeal Nos. 15-1154 & 16-518 Utah State Tax Commission
New Law Statutorily Defining Domicile in Utah
Summary of Law Change: Effective beginning with tax year 2012, a new definition of "domicile" was adopted by the legislature for purposes of determining who is a Utah resident individual for income tax purposes. Utah Code Sec. 59-10-136 significantly changed the prior law and may be inconsistent with the laws of surrounding states, meaning that an individual may now be a resident of Utah for individual income tax purposes and also a resident individual in another state based on that state's laws.
Appeal No. 15-1154: For taxpayers filing federal joint returns as married and are not legally separated, if one spouse is domiciled in Utah, the other spouse is domiciled in Utah for individual income tax purposes. In this case, a resident who was domiciled in Utah married a life-long resident of another state. They maintained their separate residences after the marriage. The out-of-state resident never moved to Utah, had no Utah source income, was not employed in Utah, never got a Utah driver license, never registered to vote in Utah or registered a vehicle in Utah. He was never-the-less found to be domiciled in Utah under the new Utah Code Subsection 59-10-136(5) and therefore subject to tax on his income.
Appeal No. 16-518: Three different ways could be applied to find domicile under the new statute for purposes of the Utah Income Tax:

1. If a taxpayer or taxpayer's spouse claim a child as a dependent on the federal return and that child is enrolled in public school in Utah, then the taxpayer is domiciled in Utah. Utah Code Subsection 59-10-136(1).
2. If the taxpayer or the taxpayer's spouse receives the primary residential exemption on a residence in Utah, there is a rebuttable presumption that the taxpayer is domiciled in Utah. Subsection 59-10-136(2).
3. If the taxpayer's spouse is domiciled Utah, then the taxpayer is domiciled in Utah. Subsection 59-10-136(5).

Allen v. Commissioner of Revenue Services, 324 Conn. 292 (2017)

The president/CEO of a large corporation was awarded unqualified stock options related to his performance as an executive of the corporation. When the executive retired and moved to another state that had no income tax (Nevada), he subsequently exercised the stock options resulting in additional income of approximately $12 million. The state of Connecticut required

the executive to file a Connecticut Income Tax Return for the period in which the stock options were awarded. The executive challenged the state's claim. The trial court, relying on federal tax principles, held that the value of the stock options could not be determined at the time of the issuance of the stock option and the only way to value the stock was to take the value when exercised. The trial court's decision was affirmed by the Supreme Court of Connecticut. The executive has filed for cert. to the U.S. Supreme Court.

E. SALES AND USE TAX CASES

In the Matter of the Appeal of Admiral Beverage Corporation, Doc. 2014-107 (Wyo. St. Bd. of Equal., Oct. 19, 2016).

Introduction: The question presented was whether, following purchase and receipt of a plane in South Carolina, the purchaser's flight to two business meetings in Texas and Montana before entering its home destination in Wyoming, constituted "prior-use" under Wyoming's regulatory "prior use" exception to use taxation.

Material facts: Admiral Beverage, a Wyoming-based bottling company, purchased a used aircraft in South Carolina for $4 million. Admiral Beverage intended to register, hangar and base the plane in Worland, Wyoming, its headquarters. From South Carolina and before entering Wyoming, Admiral Beverage's pilot flew the plane and company president to prearranged business meetings in Addison, Texas, and Great Falls, Montana, fueling the plane in Nebraska. South Carolina incentivizes such purchases through extremely low excise taxes; Admiral paid South Carolina sales tax of $294. Wyoming's use tax, complementary to its sales tax, would have resulted in a minimal use tax assessment of 5% (with a credit for South Carolina excise tax).

The Wyoming Department of Revenue (DOR) assessed Admiral Beverage use tax, asserting the tax applied when property purchased outside of Wyoming is first stored, used, or consumed, in Wyoming. Wyo. Stat. Ann. § 39-16-103(a)(i)(2013); Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i) (2012). The DOR reasoned that while Admiral Beverage first used the plane outside Wyoming, it first stored the plane at its headquarters in Worland, Wyoming, and therefore owed Wyoming use tax. The Department also asserted the first use exception did not apply to residents.

Majority holding: A majority of the Board held the DOR "prior use" exception rendered the South Carolina purchase free from Wyoming use tax. The State Board rejected the DOR's determination that use tax applied when property was alternatively first used, or first stored, or first consumed in Wyoming. Contrary to the DOR's tax decision, the DOR's liberal "prior use" exception dictated no use tax applied if purchased property was used "in the manner for which it was manufactured or assembled in another state, prior to its use in Wyoming." Rules, Wyo. Dep't of Revenue, ch. 2 § 4(i) (2012).

Concurrence and Dissent: The dissent concurred in the majority's rejection of the DOR's legal analysis, but would have affirmed the use tax assessment for a different reason. Relying on the "prior use" rule's history, the dissent noted there was no statutory basis whatsoever for the exception. The use tax statutes did not authorize the "prior use" exception, which was entirely regulatory in origin. Yet, the Wyoming Supreme Court had on several occasions upheld an earlier version of the "prior use" rule as a "self-imposed" limitation on the State's broad taxing authority. *See Exxon Corp. v. Wyo. State Bd. of Equalization*, 783 P.2d 685, 688 (Wyo. 1989). Importantly, the "prior use" rule originally required out-of-state purchasers demonstrate a "bona fide first use" of property purchased outside the state. The original "prior use" rule, the dissent reasoned, logically required the DOR scrutinize claimed out-of-state first use claims and to reject the claimed prior use if not used for a "bona fide first use" outside of the state, i.e. to evade use

tax. In 1997, with no statutory impetus, the DOR removed the "bona fide first use" trigger from its rule, making "prior use" dependent only on a purchaser's out-of-state use in accordance with the manufacturer's intent.

The dissent would not have enforced the DOR's expanded prior use exception. The broadened "prior use" exception effectively prevented application of use tax on any out-of-state purchases of property that could be nominally used before entering Wyoming. Further, the DOR could not by rule abandon its authority to question a spurious prior use outside of Wyoming, especially if the prior use was contrived or likely engaged to evade use taxation. The revised rule prevented the intended application of the use tax, the overall objective of which was to place out-of-state purchases on par with instate purchases from an excise tax standpoint. The dissent concluded the DOR's liberal "prior use" rule effectively exempted many types of property, contrary to legislative intent. The dissent cited *Guardian Industries Corp. v. Department of Treasury*, 621 N.W.2d 450 (Mich.App. 2000) as an appropriate application of use tax to out-of-state airplane purchases.

New Cingular Wireless v Tax Appeals Tribunal | *Supreme Court, App. Div. 3d, August 3, 2017*
Sales Tax Refund Requirement that Taxes Be Repaid to Customers Prior to Refund being Granted

Facts. New Cingular settled a multi-state lawsuit alleging that it had improperly charged its customers sales tax for internet access services and remitted such tax to various state taxing authorities. The settlement provided that refund claims would be submitted by New Cingular and subject to each state's individual laws regarding the processing of refunds. Where, as in NYS, those procedures required New Cingular to refund the erroneously collected tax to its customers first, the funding of a pre-refund escrow account would constitute repayment of the sales taxes to the customers. New Cingular chose not to deposit any funds into the escrow account prior to filing for a refund because DTF indicated that despite such deposits constituting repayment of sales taxes to its customers under the terms of the settlement, DTF did not consider such deposits sufficient to constitute the repayment to its customers required by the statute. The Tax Appeals' ALJ issued a determination that petitioner had not made the required repayment of sales taxes to its customers and therefore, upheld the refund denial. New Cingular then funded the pre-refund escrow account and brought a motion to reopen the record in order to present evidence of the motion. The ALJ denied the motion as the evidence did not constitute newly discovered evidence but was evidence not in existence at the time of the hearing.

Law. Tax Law § 1139 requires repayment or reimbursement of erroneously collected sales taxes before a refund may be granted.
The Tribunal's Rules of Practice and Procedure provide for a motion to reopen the record if there is newly discovered evidence (evidence which could not have been discovered with the exercise of reasonable diligence in time to be placed into the record) which would probably have produced a different result.

Opinions. The Tax Tribunal upheld the conclusions of the ALJ that petitioner at the time of the hearing had not made the required repayment of tax to its customers, and that the evidence regarding the funding of the pre-refund escrow account did not constitute newly discovered evidence. Thus the Tribunal upheld the denial of the refund while being precluded from reaching a decision on the substantive issue of whether the funding of the pre-refund escrow account constituted the required repayment of sales taxes to the customers.
The Appellate Division agreed that prior to the funding of the pre-refund escrow account, Cingular had not made the required repayment to its customers. However, the court concluded that "Based upon the particular facts of this case, and absent a viable alternative, we find that it was an abuse of discretion to deny petitioner's motion to reopen the record." The Court then,

while acknowledging that such a conclusion would normally result in further proceedings before Tax Appeals, took the extraordinary step of remanding directly to DTF. The Court's decision was based upon the facts that Cingular's customers were clearly owed over $106 M in refunds for erroneously collected for sales tax, had been owed such amounts for some 7 to 12 years, and DTF was holding such funds that neither it nor Cingular had any right to.

Status. It is unknown whether DTF will appeal.

Odebrecht Construction Inc. v. Newell D. Normand, Board of Tax Appeals State of Louisiana Local Division, Docket No. L00141, April 2, 2016

Odebrecht is one of four followup cases to an earlier case establishing the scope of a Federal Contractor exclusion. This case involved a tax exclusion related to the imposition of sales and use tax on a contractor's purchase and use of materials for construction of a federal levee project. There is an exacting federal contract and regulatory regime governing these contracts. The federal regulations provide that title passes upon delivery if the line item was separately bid, tracked, and paid, ie. "direct cost reimbursable line items."

The matter involves Louisiana's exclusion from base of: "corporeal movable property which is intended for future sale to the United States government or its agencies, when the title to such property is transferred to the United States government or its agencies prior to the incorporation of that property into a final product."

The Board found that H piles and Steel Pipe that were separately bid qualified, but that myriad transactions where the Corps and Contractor agreed outside the bid process to handle in a similar fashion where not excluded. This turned on the specific language of the federal regulations, which classified when the government took title to the material.

Scholastic Book Clubs, Inc. v. Lynnette T. Riley, Commissioner of the Georgia Department of Revenue (Feb. 2017)

The Georgia Tax Tribunal found Scholastic liable for sales and use tax pursuant to Georgia law and that such imposition did not violate the Commerce Clause when Scholastic used Georgia teachers to solicit sales, manage orders, and distribute products in their classrooms.

Matter of 677 New Loudon Corporation d/b/a Nite Moves, New York State Tax Appeals Tribunal, August 25, 2016

Sales Tax on Admission Charges and Fees for Private Performances at Adult Entertainment Venue

Facts. Nite Moves in an adult entertainment venue which features semi-nude and nude dancing by females on a central stage and also lap or table dances and private dances. There was an admission charge for entrance to the establishment which included the dances on the central stage, and additional charges for private dances occurring in private rooms. These two charges constituted the bulk of the assessments issued to Nite Moves which, after a conciliation conference, amounted to $323,000 plus interest.

Several expert witnesses testified on behalf of Nite Moves including a cultural anthropologist, a skilled dancer and choreographer trained in ballet, an accomplished gymnast and a local dance teacher. These witnesses all concluded that both the dances on the main stage and the private dances staged at Nite Moves were choreographed performances. A local award winning entertainment critic concluded that the performances were art. Several dancers testified that their routines were choreographed. Nite Moves also entered into evidence CDs of the main stage and private dances that were staged specifically for presentation to Tax Appeals.

Law. Tax Law § 1105(f) imposes sales tax on receipts from certain admission charges to, or for use of, a place of amusement. For purposes of this tax, admission charge means "[t]he amount paid for admission, including any service charge and any charge for entertainment or amusement or for the use of the facilities therefore" (Tax Law § 1101[d][2]) and place of amusement means "[a]ny place where any facilities for entertainment, amusement, or sports are provided" (Tax Law § 1101[d][10].
Tax Law § 1105(f)(1) excepts from taxation admission charges to, or for, "dramatic or musical performances." Dramatic or musical arts admission charges are defined in Tax Law § 1101(d)(5) as "any admission charge paid for admission to a theatre, opera house, concert hall or other hall or place of assembly for a live dramatic, choreographic or musical performance."

Opinion. The ALJ held that petitioner had failed to prove that the additional charges for the private dances were admission charges for a "dramatic or musical performance." However, the ALJ found that regarding the central stage performances, petitioner had proven that such performances were choreographed dance performances under the Tax Law. The Tribunal did not disagree with the conclusions of the ALJ regarding the content of the performances. However, the Tribunal found that to qualify for the exemption there was also a condition related to the setting of the performance in that it had to be "a theatre, opera house, concert hall or other place of assembly for a live dramatic, choreographic or musical performance." It was clear based upon the description of the private rooms where the private dances were performed that those rooms did not constitute such a place. The Tribunal noted that at first glance the central stage area did appear to be a place of assembly for live dramatic choreographed performances. However, the Tribunal reversed the holding of the ALJ that the front-door admission charges only allowed customers access to the central stage area and performances. The Tribunal pointed out that there was nothing in the record indicating that someone could avoid the front-door admission charge and pay only for a private dance. Thus, the front-door admission charge included allowing customers the option of paying for the private dances. Accordingly, the front-door admission charges did not qualify for the exemption because they included the option of paying for admission to the private rooms.

Status. The Appellate Division recently granted the State's motion to dismiss based upon failure to properly serve the Tribunal with the Article 78 petition. Nite Moves' motion for reargument or permission to appeal to the Court of Appeals was also denied. It appears that the decision is final.

F. GROUP DISCUSSION

Alabama - Technology is changing very drastically and rapidly, and there are some key state and local tax issues that involve this changing technology, especially in the area of sales and use taxes. Are there any resources, conferences, etc., that explain the workings of technology, from basic to advanced, in a way that would relate to the issues we are facing?

Wisconsin - How do other jurisdictions handle lost documents? We frequently have taxpayers who have sent original documents to the Department where they are misplaced, lost, or sometimes never even received. Taxpayers have the burden of proof so they need those documents to prove their cases, so we get complaints of bad faith or worse against the Department for losing evidence to their own benefit.

G. ADDITIONAL CASES (TIME PERMITTING)

6787 Steelworkers Hall, Inc. v. Snyder, 71 N.E.3d 97 (Ind. Tax Ct. 2017).
Affirming the Indiana Board's final determination that use of the property for union-related purposes did not qualify for a charitable purposes exemption.

Fisher v. Carroll Cnty. Assessor, 74 N.E.3d 582 (Ind. Tax Ct. 2017).
Affirming the Indiana Board's final determination that the original 2012 and 2014 assessments were correct, rejecting taxpayer's argument that her property should be treated as a park or common area.

Hamilton Square Inv. v. Hamilton Cnty. Assessor, 60 N.E.3d 313 (Ind. Tax Ct. 2016), review denied.
Reversing the Indiana Board's final determination that residential "common areas" were limited to just the land and improvements within the building footprint of the taxpayer's apartment complex.

Howard Cnty. Assessor v. Kohl's Ind., 57 N.E.3d 913 (Ind. Tax Ct. 2016), review denied.
Affirming the Indiana Board's final determination that under the **"market-value-in-use"** standard, sales to secondary users may be used as comparable properties.

Spencer Cnty. Assessor v. AK Steel Corp., 61 N.E.3d 406 (Ind. Tax Ct. 2016), review denied.
The Court heard a constitutional challenge, which the Indiana Board was without authority to resolve, to a statute that provided taxpayers a favorable method of personal property valuation if its integrated steel mill was located "in Indiana." The Court held that the "in Indiana" requirement did not violate the Commerce Clause or the Fourteenth Amendment of the United States Constitution and was not a special law or non-uniform assessment prohibited by the Indiana Constitution.

Klink Trucking, Inc. v. Ind. Dep't of State Revenue, 2017 WL 3048618 (Ind. Tax Ct. 2017)
Public Transportation Exemption. The Court held that the taxpayer's trucks and related expense items were predominately used in providing public transportation during 2008-2010, and thus were exempt from Indiana sales tax.

Merchandise Warehouse Co. v. Ind. Dep't of State Revenue, 67 N.E.3d 666 (Ind. Tax Ct. 2017), petition for review filed, No. 49T10-1302-TA-00009 (Ind. 2017).
Manufacturing Exemption. The Court held that freezing services did not constitute "production" so electricity and freezer equipment purchases were not exempt.

Orbitz v. Ind. Dep't of State Revenue, 66 N.E.3d 1012 (Ind. Tax Ct. 2016).
The Court held the taxpayer was not a "retail merchant" and thus, not liable for sales or innkeeper's taxes.

Chestnut Point Realty, LLC v. East Windsor, 324 Conn. 528 (2017)
This was a case of statutory interpretation where the statute (C.G. Statute sec. 12-117a that permits a taxpayer to appeal an adverse valuation by the assessor to the superior court recites in pertinent part "(a)ny person. . . claiming to be aggrieved . . . make application, in the nature of an appeal . . . to the judicial district . . . which shall be accompanied by a citation to such town or city . . . to appear before said court (and) served and returned in the same manner as is required

in the case of a civil action . . . ." The taxpayer took an appeal by making application to the superior court (filing the appeal with the court) without serving the town. The trial court dismissed the case on the basis that service of the appeal on the town was jurisdictional and required for the start of the action. The trial court held that the failure of the taxpayer to serve the town rather than file an application with the court within the 45 day statutory period given to take an appeal deprived the court of jurisdiction. The Supreme Court of Connecticut affirmed in 324 Conn. 528 (2017).

Fairfield Merrittview, Ltd Partnership v. Norwalk, Conn. App (2017); 320 Conn. 535 (2016)

This was a case where the parties disputed the net rentable area of the subject property. Conflicting evidence was introduced and the trial court selected that evidence that appeared to be most credible. The trial court also excluded "tenant other income" in the amount of $190,000 that was used by the town to increase the income of the property for the purpose of valuation. The trial court excluded the $190,000 because the town's appraiser could not tell how much of the $190,000 came from the businesses located on the property and how much was attributed to the real estate. The trial court was affirmed by the Supreme Court of Connecticut noting that there was sufficient support in the record for the trial court's decision. The additional income was attributed to the use of a common area for the benefit of the tenants and the appraiser's allocation of $190,000 as a benefit to the tenant that was quantified by the appraiser.