Your Other Partner

A Newsletter of the Pennsylvania Bar Association Tax Law Section • January 2018

Calling all writers!
The Tax Law Section newsletter is now accepting article submissions.

The subject matter should be relevant to tax lawyers and articles should be no longer than 1,500 words. All submissions must include a short author biography. Electronic submissions (MS Word) are preferred. Submit articles to: Ilya Lipin at Ilya.Lipin@bakertilly.com and Paul Morcom at pmorcom@mcneslaw.com.

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Pennsylvania

FY2018 Budget – HB 542

On Oct.30, 2017, Gov. Tom Wolf signed into law House Bill 542 (H.B. 542) providing for numerous tax changes in an effort to address Pennsylvania budget for the 2018 fiscal year. A summary of the key changes is provided below.

Sales/Use Tax:

Marketplace Sales Tax Collections and Reporting: HB 542 provides that effective March 1, 2018, remote sellers, marketplace facilitators or referrers with an aggregate sales of $10,000 or more during the immediately preceding 12 calendar-month period must file an election with the Department of Revenue (DOR), on the form to be prescribed by the department, to either: (1) collect and remit sales tax imposed, or (2) to comply with the notice and reporting requirements.

Key definitions: "Marketplace facilitator" is a person who facilitates the sale at retail of tangible personal property by listing or advertising sale at retail in any forum and collecting payment from the purchaser and transmitting the payment to the person selling the property.

"Marketplace seller" is a person who has an agreement with a marketplace facilitator pursuant to which marketplace facilitator facilitates sales for the person.

"Referrer" is a person who, pursuant to an agreement with a marketplace seller or a remote seller, lists or advertises for sale at retail products by physical or electronic means or transfers a purchaser to a marketplace seller or remote seller via an internet link or other method, for which the referrer receives

consideration from the marketplace seller or remote seller, and does not collect a receipt from the purchaser from the sale. A definition of "referrer" excludes a person engaging in the business of printing or publishing a newspaper, provides internet advertising services, and does not provide the marketplace seller's or remote seller's shipping terms or advertise whether a marketplace seller or remote seller collects a sales or use tax.

"Remote seller" is a person who does not maintain a place of business in Pennsylvania that through a forum sells tangible personal property at retail subject to sales tax.

Election: The initial election must be made prior to March 1, 2018 and will be in effect through June 30, 2019. If an election is not submitted, the taxpayer is deemed to have elected to comply with the notice and reporting requirements. An election may be changed from notice and reporting requirements to collection and remittance at any time during a fiscal year.

The requirement to make an election by the marketplace facilitator only applies to sales at retail: (1) through the *marketplace facilitator's forum* made by or on behalf of a *marketplace seller* that does not maintain a place of business in Pennsylvania; and (2) by a *marketplace facilitator* on its own behalf if the *marketplace facilitator* does not maintain a place of business in Pennsylvania.

The requirement by a referrer to make an election applies only to sales at retail directly resulting from a referral of a purchaser to: (1) a marketplace seller that does not maintain a place of business in Pennsylvania; (2) a remote seller, and (3) a referrer's own products if the referrer does not maintain a place of business in Pennsylvania.

Notice and Reporting Requirements: Notice and reporting requirements for marketplace facilitators and remote sellers imposed by HB 542 include:

(1) Posting a notice on its forum that informs purchasers with the delivery location in Pennsylvania that sales or use tax may be due in connection with the purchase and delivery, and that the purchaser is required to file a return if use tax is due in connection with the purchase and delivery;

(2) Providing a written notice to each purchaser at the time of the sale that sales tax is not being collected in connection with the purchase, a statement that the purchaser may be required to remit use tax directly to the department, and instructions for obtaining additional information from the department as to how remit use tax.

The written notice provided to the purchaser, noted above, must be displayed on all invoices, order forms, receipts, or similar documents, whether in paper or electronic form. Further, unless the transaction is exempt from sales and use tax, a marketplace facilitator or a remote seller cannot make a statement that sales or use tax is not imposed on a transaction.

(3) No later than Jan. 31 of each year, providing a written report to each purchaser required to receive the written notice, noted above, containing the following:

(a) A statement that the marketplace facilitator or remote seller did not collect sales tax in connection with the transaction and that the purchaser may be required to remit use tax to the department;

(b) A list, by state, indicating the type and purchase price of each product purchased or leased by the purchaser from the marketplace facilitator or remote seller and delivered to location within Pennsylvania;

(c) Instructions for obtaining additional information from the department regarding how to remit use tax to the department;

(d) A statement that the marketplace facilitator or remote seller are required to submit a statement to the department that includes information about the purchaser and the total amount of purchases made from the marketplace facilitator or remote seller.

HB 542 provides for a hierarchy rule of sending this report to the purchaser: first-class mail to the purchaser's billing address; if unknown, then to the purchaser's shipping address; if unknown, then electronically to the purchaser's last known email address.

(4) Submit a report to the department, no later than Jan. 31 of each year, that includes, with respect to each purchaser required to receive notice noted above, the following: name of the purchaser, purchaser's billing address, Pennsylvania address where the purchase was delivered,

aggregate amount of the purchaser's purchase from the marketplace facilitator or remote seller, and the name and address of the marketplace facilitator, marketplace seller or remote seller that made the sale to the purchaser. This report must be submitted to the department by an officer of the marketplace facilitator or remote seller and include a statement made under the penalty of perjury that reasonable efforts were made to comply with the notice and reporting requirement.

Notice and reporting requirements for referrers imposed by HB 542 include:

(1) Posting a notice on its platform, which prominently displays and may include pop-up boxes or notifications by other means that appear when the referrer transfers a purchaser to another person to complete the sale, that informs purchasers with the delivery location in Pennsylvania:

   a. That sales or use tax may be due in connection with the purchase and delivery;

   b. The person to which the purchaser is being referred to may not collect or remit sales tax to the department relating to the transaction;

   c. The purchaser is required to file a return if use tax is due in connection with the purchase and delivery and not collected by the person;

   d. Instructions for obtaining additional information from the department regarding how to remit sales and use tax to the department;

   e. If the person to whom the purchaser is being referred does not collect sales tax on a subsequent purchase by the purchaser, the person may be required to provide information to the purchaser and the department about the purchaser's potential sales or use tax liability.

(2) No later than Jan. 31 of each year, providing a written notice to each remote seller to whom the referrer transferred a potential purchaser located in Pennsylvania during the prior year. The notice must include a statement that a sales or use tax may be imposed on the transaction, that the remote seller may be required to make an election (described above), and instructions for obtaining additional information regarding sales and use tax from the department.

(3) No later than Jan. 31 of each year, submitting a report to the department that includes a list of persons who received a written notice noted above. This report must be submitted to the department by an officer of the referrer and include a statement made under the penalty of perjury that reasonable efforts were made to comply with the notice and reporting requirement.

Recordkeeping: HB 542 subjects a remote seller, marketplace facilitator or referrer to recordkeeping requirements which may be subject to examination by the department.

Penalties: The department shall assess a penalty in the amount of $20,000 or 20 percent of total sales in Pennsylvania, whichever is less, against a marketplace facilitator, remote seller, or referrer that fails to comply with the reporting requirements. The penalty shall be assessed separately for each violation, but may only be assessed once in a calendar year.

Remote Sales Reports: If federal legislation has not been enacted addressing remote sellers by Dec. 31, 2018, the Independent Fiscal Office, in conjunction with the Department of Revenue, shall conduct a study assessing the legal and fiscal implications of mandating notice requirements for remote sellers. Results of the study shall be provided to the General Assembly by April 1, 2019.

Computer Services: HB 542 clarifies the definition of "tangible personal property" to include support services related to canned software, but to exclude from the definition separately invoiced help desk or call center support.

Note: Per PA DOR Letter Ruling SUT-17-002, Pennsylvania imposes sales/use tax on information retrieval products. Act 84 of 2016 expanded definition of "tangible personal property" resulting in imposition of sales and use tax on various types of digital downloads including maintenance, updates and support.

Wrapping Supplies: HB 542 expands the wrapping supplies exemption to include kegs used to contain malt or brewed beverages.

Corporate Net Income Tax:

Net Loss Deductions: HB 542 removes the fixed-dollar cap limitation on net loss carryovers, but keeps the limitation based on the percentage of taxpayer's taxable income, which in 2018 is increased to 35 percent of the taxpayer's taxable income from the current 30 percent limitation, and in 2019 to 40 percent. This provision of HB 542 addresses the Pennsylvania Supreme Court's ruling in *Nextel* finding that flat-dollar limitation of the net loss carryover provision violated the Uniformity Clause of the Pennsylvania Constitution.

This change becomes effective after the Secretary of Revenue submits a notice of the *Nextel* decision for publication in Pennsylvania Bulletin.

Note: The department announced that for the 2017 tax year only the net loss carry over limitation of 30 percent of taxable income will be available.

For more information, see:
http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/Documents/Tax%20Bulletins/CT/ct_bulletin_2017-01.pdf

Manufacturing Innovation and Reinvestment Deduction: A taxpayer must make a capital investment in excess of $100 million for the creation of new or refurbished manufacturing capacity within three years of a designated start date. Within five years of the start date the taxpayer must attest to DCED that the project is completed. Upon approval of completion, DCED shall determine the maximum allowable deduction from taxable income for the taxpayer, which shall be equal to five percent of the private capital investment utilized and may be utilized each year for the five tax years immediately following the DCED satisfaction determination. The deduction is nontransferable, the taxpayer cannot reduce its liability by more than 50 percent, and any unused portion shall expire at the end of the corresponding tax year.

Personal Income Tax:

ABLE Savings Accounts: Act 17 of 2016 established the Pennsylvania ABLE (Achieving a Better Life Experience) Act. This provision allows a deduction for contributions to an ABLE account and exempts undistributed earnings in the ABLE account as well as distributions from the ABLE account.

Nonresident Withholding: HB 542 requires entities making rent and royalty payments on Pennsylvania property to nonresidents in excess of $5,000 to withhold personal income tax on those payments. Requires companies that bring out-of-state independent contractors into Pennsylvania for work in excess of $5,000 to withhold personal income tax from the compensation. Businesses are required to electronically file 1099-MISC forms for all employees and all classes of Pennsylvania source income. This provision will become effective 60 days after HB 542 is enacted into law (i.e., Dec. 29, 2017). On Dec. 14, 2017, the Department of Revenue issued Informational Notice Personal Income Tax 2017-01 to help provide guidance to payors of Pennsylvania-source income on their filing, withholding and remittance obligations. Additionally, the notice provides guidance to every lessee of Pennsylvania real estate who makes lease payments to a non-resident lessor, on their filing, withholding and remittance obligations.

Note: Although this provision is effective Dec. 29, 2017, the department's guidance specifies that the withholding requirement starts on Jan. 1, 2018.

Tax Appeals ("Revenue Maximization" provision): HB 542 reduces the period the taxpayer has to file a petition for reassessment and petition of review of tax adjustment from 90 days to 60 days after the mailing date of the respective notice. Similarly, the period to appeal the decision from the Board of Appeals to the Board of Finance and Revenue is also reduced from 90 days to 60 days after the mailing date of the department's notice of the decision and order. These provisions become applicable 60 days from the effective date HB 542 is enacted into law (i.e., Dec. 29, 2017).

Note: HB 542 excludes previously proposed provisions requiring all evidence and arguments to be presented at the Board of Appeals.

Fireworks Tax: Imposes a new tax at the rate of 12 percent of the sale price on consumer fireworks that are suitable for use by the public. The tax would be in addition to the sales and use tax already imposed on such sales. The new tax does not apply to display fireworks used by professional pyrotechnicians. There is a nonrefundable license application fee of $2,500 for a facility and $1,000 for a temporary structure.

Credits: In addition to the current Film Production Tax Credit, HB 542 provides for a Film Production Tax Cred-

it District which allows the department to designate two districts for the purposes of enhancing, promoting and expanding film production opportunities and establishing a film production industry in Pennsylvania. Tax credit districts must be located on deteriorated property and contain at least one qualified production facility and six soundstages. The property must be occupied by two or more qualified businesses that make a total capital investment of at least $400 million within five years after the designation of the district.

With respect to Keystone Opportunity Zones (KOZ), HB 542 extends the application date for additional KOZ currently allowed from October 2016 to October 2018.

HB 542 also provides that before a tax credit can be awarded, the department may make a finding that the taxpayer has filed all required state tax reports and returns for all taxable years and paid any balance of state tax due, unless the tax due is currently under appeal.

HB 542 also makes amendments to various credits (Entertainment Economic Enhancement Program, City Revitalization and Improvement Zones (CRIZ) and Neighborhood Improvement Zones (NIZ).

Temporarily Celebrate Defeated Proposals: Sales tax on storage, increase in hotel taxes, severance tax, mandatory combined reporting and many others.

For more information, please see:
http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=H&type=B&bn=0542

HB 271 – Gambling Excise Tax Provisions

HB 271 extensively revises gaming provisions for horse racing, for amusements generally (in the areas of fantasy contests, lottery and iLottery), for gaming (in the areas of general provisions, of Pennsylvania Gaming Control Board, licensees, table games, interactive gaming, revenues, administration and enforcement, and miscellaneous provisions).

For more information, please see:
http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=H&type=B&bn=0271

HB 674 – State Lottery Provisions

HB 674 requires the DOR to determine whether an individual winning a single prize of more than $2,500 from the Pennsylvania Lottery is delinquent and owes state taxes. If the prizewinner is found delinquent, the amount of state taxes owed will be deducted from the lottery winnings and paid to the Commonwealth after any amounts deducted pursuant to 23 PS § 4308 for child support.

HB 674 authorizes that, in the event that the payroll tax imposed by the city of the second class A produces less that the revenues projected in the first full year after the imposition of the tax, the city may for a second year adjust the rate to one that is sufficient to generate revenue equal to the revenue collected from the mercantile or business privilege tax in the final year it was levied.

For more information, please see:
http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=H&type=B&bn=0674

SB 181 – Performance Based Budgeting, Tax Credit Efficiency Review

SB 181 creates a freestanding act providing for performance-based budgeting and tax credit efficiency review, establishes the Performance-Based Budget Board and provides for its powers and duties and imposes duties on the Independent Fiscal Office (IFO).

For more information, please see:
http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=S&type=B&bn=0181

Legislative / Administrative Update

Pennsylvania Sales and Use Tax Ruling No. SUT-17-002, 05/17/2017

Enforced as of Aug. 3, 2017, information retrieval products as subscription to specialized internet-based research services constitute tangible personal property and are subject to Pennsylvania sales and use tax. The ruling notes that "[t]he information retrieval products constitute tangible personal property in that the transactions are comprised of both (i) a license to electronically access and use canned computer software and (ii) the right to electronically access tangible personal property. The transactions are therefore subject to the imposition of Pennsylvania Sales and Use Tax."

For more information, please see:
http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/Documents/Letter%20Rulings/SUT/SUT-17-002.pdf

Pa. Dep't of Revenue, Info. Notice 2017-01, 10/13/2017

The Pennsylvania Department of Revenue (DOR) provides sales/use tax notice to taxpayers engaged in timbering operations as a business enterprise and vendors selling property or services to such taxpayers. Act 84 of 2016 amended Article II of the Tax Reform Code of 1971 to exclude from tax the purchase or use of tangible personal property or taxable services predominantly used directly in timbering operations, effective July 1, 2017. 72 P.S. § 7201(k)(8), (o)(4). This information notice clarifies the property or services that are considered to be directly used in timbering operations and therefore excluded from Pennsylvania sales/use tax.

For more information, please see:
http://www.revenue.pa.gov/GeneralTaxInformation/TaxLawPoliciesBulletinsNotices/Documents/Informational%20Notices/info_notice_sut_2017-01.pdf

Pa. Dep't of Revenue, Hurricane Harvey/Hurricane Irma - Additional Extension of Time to File, 10/23/2017.

The DOR posted a notice regarding the extended filing deadline for corporate taxpayers directly impacted by the severe storms and flooding from Hurricane Harvey and Hurricane Irma, in accordance with IRS notices IR-2017-135 and IR-2017-150. The extension is applicable to filers of the Corporation Tax Report RCT-101 and the S Corporation/Partnership Information Return PA-20S/PA-65. For both forms, the new due date is Jan. 31, 2018. The notice provides a schedule of impacted tax periods and explains how taxpayers can avoid a late filing penalty.

For more information, please see:
http://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/Pages/Corporation%20Taxes/Hurricane-Harvey-Irma-Extension.aspx#.WgETlVtSyUk

Proposed Pennsylvania Realty Transfer Tax Regulations – Update from Chris Jones

Philadelphia Bar Association hereby submitted comments on the draft realty transfer tax regulations issued by the DOR in October 2017.

Pennsylvania Supreme Court Cases

Nextel Commc'ns of the Mid-Atlantic, Inc., v. Commw., Pa. Sup. Ct., Dkt. No. 6 EAP 2016, (10/18/2017)

For the 2007 tax year, a taxpayer was permitted to deduct from its taxable income the greater of: net losses sustained in prior tax years up to $3 million or 12.5 percent of its 2007 taxable income. In 2007, Nextel claimed the 12.5 percent amount because it totaled more than $3 million (approximately $5.6 million), but still ended up paying approximately $4 million in taxes. Nextel filed for a refund arguing that the cap violated the Uniformity Clause, because corporations with incomes of less than $3 million can use a carryover loss deduction for zero tax liability, while larger corporations do not have the same benefit. The refund was denied. At the Commonwealth Court, Nextel prevailed, with the court holding that "[l]ike similarly-situated taxpayers with $3 million or less taxable income in the 2007 Tax Year, Nextel should be permitted under the NLC deduction provision to reduce its taxable income to $0 by virtue of its positive net operating loss position that tax year."

The Pennsylvania Supreme Court determined that a $3 million flat deduction for net loss carryovers is unconstitutional, as it is applied to Nextel, because it violates the Uniformity Clause of the Pennsylvania Constitution. However, as a remedy, the court severed the fixed-dollar limitation but retained the percentage limitation, because according to the court it was consistent with the legislature's intent to encourage investment in the commonwealth, while ensuring its financial health. Accordingly, Nextel's refund claim was denied.

Note: On Jan. 4, 2018, Nextel's Application for Reargument with Application for Consolidation with R.B. Alden Corp v. Commonwealth, 60 MAP 2017, or with Application for Remand to Correct a Factual Error was denied by the Pennsylvania Supreme Court. Also, the Application for Leave to Intervene by R.B. Alden Corp. was denied as moot.

Level 3 Commc'ns, LLC v. Commw., Pa. Sup. Ct., Dkt. No. 2 MAP 2017, (10/18/2017).

The Pennsylvania Supreme Court affirmed the Commonwealth Court holding that services Level 3 sold to AOL were nontaxable internet access rather than taxable telecommunications services. The Commonwealth Court's decision noted

that the AOL end-users were already on the internet when they were directed to www.aol.com, as they have entered via the taxpayer's point of presence.

Commonwealth Court Cases

Corporate Net Income Tax

RB Alden Corp. v. Commw., Pa. Commw. Ct., Dkt. No. 73 F.R. 2011, (09/12/2017).

The taxpayer alleged that it owed no Pennsylvania corporate net income tax on a $29.9 million capital gain profit resulting from a partial liquidation of an out-of-state corporation's interest in a limited partnership that operated an apartment building in Pennsylvania for the following reasons:

- Gain from a sale of the partnership interest is "nonbusiness income";
- The gain must be excluded from its apportionable tax base under the doctrines of multiformity or unrelated assets;
- The gross proceeds from the sale of the partnership interest should be sourced to New York, the state in which it is headquartered, for the purposes of calculating the sales factor of its corporate net income tax apportionment fraction, rather than Pennsylvania, where the property from which the sale is derived is located;
- Under the tax benefit rule, it is entitled to exclude from business income the gain from the sale because it had previously taken a deduction for which it received no benefit; and
- Under *Nextel*, limiting its net loss carryover deduction to $2 million violates the Uniformity Clause of the Pennsylvania Constitution.

In the 2016 decision, the court held that the income gained by the taxpayer from the sale of a portion of the partnership was properly treated as business income subject to tax in Pennsylvania and declined to adopt the tax benefit rule in the context of the corporate net income tax. However, the court concluded that the $2 million limit on the amount of the net loss carryover deduction violated the Uniformity Clause of the Pennsylvania Constitution.

The Commonwealth took exceptions to the following:

- That the $2 million limit on the amount of the net loss carryover deduction violated the Uniformity Clause of the Pennsylvania Constitution as it applied to the taxpayer.
- That limiting a tax deduction for sensible budgetary planning is not a legitimate state purpose sufficient to withstand a uniformity challenge, as well as this court's purported failure to analyze the limitation as an equal protection challenge, under which the broad legislative goal of assuring stability in state finances is a relevant consideration.
- That the taxpayer overcame its heavy burden in challenging the constitutionality of the limitation.
- That the court's remedy that allowed the taxpayer to deduct an unlimited amount of net operating losses, which reduced the taxpayer's tax liability to zero and arguably does not comport with legislative intent.

The taxpayer took exceptions with regard to the application of the tax benefit rule.

The Commonwealth Court denied exceptions filed by the Commonwealth and the taxpayer. The court held that, consistent with *Nextel*, the $2 million net loss carryover deduction limitation violates the Uniformity Clause of the Pennsylvania Constitution as it applies to the taxpayer, any exceptions of the taxpayer to this court's analysis of the tax benefit rule are rendered moot. Further, because the limitation is unconstitutional as applied to the taxpayer, the taxpayer would be entitled to a 100 percent offset of its corporate net income tax, thereby resulting in the taxpayer owing zero tax to the Commonwealth for fiscal year 2006 (the same result the taxpayer sought through application of the tax benefit rule).

Sales and Use Tax

Downs Racing, LP v. Commw., Pa. Commw. Ct., Dkt. Nos. 201 F.R. 2013, 202 F.R. 2013, (10/12/2017) (opinion not reported).

The taxpayer filed exceptions before the Commonwealth Court to reconsider the following two issues: (1) whether the court erred by holding that taxpayer's payments to vendor for closed circuit television services were subject to sales and use taxes; and, (2) whether the court erred by holding that the taxpayer's payments to another vendor for the intellectual property necessary to operate its multi-player gaming system were subject to sales and use taxes.

The Commonwealth Court overruled the taxpayer's exceptions and affirmed the assessment against the taxpayer by finding that payments for closed circuit television services and royalty fees to license intellectual property were subject to sales and use tax.

The court held that closed circuit television services were presumed taxable because the invoices did not separate taxable service charges from non-taxable service charges. The court alternatively concluded that since the vendor was obligated to provide, install and maintain the equipment on the taxpayer's various properties and the vendor provided its own personnel, whom it supervised and controlled, as it would if the vendor had performed these services for the taxpayer at its own facilities, the services were taxable.

With respect to the intellectual property license, the court overruled the exception and noted that without the intellectual property, the taxpayer could not use or operate its poker machines. Thus, the object of the transaction is the intellectual property and not the license. Further, citing the *Dechert* decision, just because the code does not expressly mention "intellectual property" in its definition of "tangible personal property" does not mean that it does not constitute tangible personal property.

Note: One of the key holdings in this case was the fact that the court said that a nontaxable item that is not separately stated on the invoice is taxable. Although there is a regulation that addresses the separately stated issue, taxpayers have been able to get settlement relief on this issue in the past. Now with a court opinion specifically addressing this issue, it will be interesting to see how the Office of Attorney General and the DOR handle settlements on the non-separately stated issue.

Personal Income Tax

Daman v. Commw., Pa. Commw. Ct., Dkt. No. 1009 F.R. 2013, (09/22/2017) (opinion not reported).

The taxpayers (husband and wife) file a *pro se* petition for the review of BF&R order disallowing some unreimbursed employee expenses. The taxpayer (wife) was employed as a per diem/standby nurse at two separate hospitals in Maryland and Delaware. She traveled from her Pennsylvania home to her temporary residence in Maryland where she would stay for several days at a time until her scheduled shifts ended for the week, at which point she would return home to Pennsylvania.

Various documentary evidence was submitted in support of claimed unreimbursed employee business expenses: mileage logs, home office expense receipts, registered nurse license and education receipts, receipts for tolls and rental costs in Maryland, cell phone bills and miscellaneous expenses. The taxpayers claimed all of these expenses were incurred as necessary and reasonable costs of employment in Maryland. The taxpayers also submitted letters from both out-of-state employers indicating the taxpayer was employed as a temporary or standby nurse and was not reimbursed for any expenses incurred in the course of her employment.

The BF&R found that the taxpayers submitted substantial evidence to support business expenses related to taxpayer's uniform and nursing education costs because these expenses were supported by specific payment verification and receipts. The BF&R denied the vast majority of the claimed unreimbursed business expenses – which it summarized as travel costs from Pennsylvania to Maryland, temporary housing in Maryland, cell phone costs, cable and television costs and meal expenses – because they were personal in nature and the taxpayers failed to prove they were required as a condition of the taxpayer's employment.

The Commonwealth Court quashed the taxpayers' personal income tax review petition, finding that the BF&R properly disallowed most of the unreimbursed employee business expenses that the taxpayers claimed on their 2010 joint return. The court held that the taxpayers failed to follow the PA Rules of Appellate Procedure and also could not prevail on the merits, because the BF&R did not certify a record to this court, the taxpayers failed to submit any of this evidence to the court and it is not part of the stipulated record.

Local Taxes

S & H Transp., Inc. v. City of York, Pa. Commw. Ct., Dkt. No. 242 C.D. 2017, (10/05/2017) (opinion not reported).

The taxpayer is a Pennsylvania corporation headquartered in the City of York that provides freight brokerage services. The taxpayer receives a freight shipment order from a customer, locates a common carrier to transport the freight shipment and negotiates a contract with the freight carrier on behalf of the customer. The taxpayer invoices its customer for the full balance owed, including the delivery cost charged by the

freight carrier plus its commission for providing the brokerage services. The taxpayer then remits payment to the freight carrier on behalf of the customer and retains the remaining funds as its freight brokerage commission. Since the taxpayer collects the entire balance due from customers, its records reflect gross receipts that include delivery charges despite the fact that the taxpayer is not itself a freight carrier.

Following an audit, the city discovered that for tax years 2007-2011, the taxpayer claimed the public utility services exception to the BPT. The city determined that the taxpayer did not qualify for this exception and issued a notice of assessment. The taxpayer appealed and the tax assessment appeal hearing officer affirmed the city's assessment. The taxpayer then appealed to the trial court, which held that the taxpayer qualified for the exception, and the city appealed to the Commonwealth Court, which found that the taxpayer was not entitled to the exception because it was not involved in the rendering of any public utility services.

The Supreme Court affirmed on appeal, concluding "that the rates of the common motor carriers with whom S&H does business are not fixed and regulated by the PUC, and thus the entire exception is inapplicable." The case was then remanded to the trial court to determine the amount the taxpayer owes for tax years 2007-2011 pursuant to the BPT.

At the trial court, the taxpayer argued that it is entitled to deduct freight delivery charges from its taxable gross receipts because it is merely a conduit, and the freight delivery charges completely pass through the taxpayer from its customers to the freight companies. The city admitted that the taxpayer was a "middleman" and argued that the taxpayer should be taxed not just on its gross earnings but on the gross receipts as reflected in its records, i.e., the taxpayer should also be taxed on monies it receives from its customers and passes directly onto freight carriers. The trial court rejected the city's argument, holding instead that the BPT could only reasonably be interpreted as applying to the gross commissions earned by S&H, not its total gross receipts, because it is not fair to do so. Accordingly, the trial court held that the taxpayer was entitled to deduct freight delivery charges from its gross receipts before calculating the BPT due to the city.

On appeal, the Commonwealth Court agreed with the city's argument that the taxpayer does not fall within the freight delivery exception of the LTEA or the regulations because it is not the seller of goods and the trial court erred in applying a fairness standard to the BPT. The court held that the taxpayer was not the seller, purchaser or a freight carrier in the transactions, but merely a broker of services, which does not fall within a plain language of the exclusion.

***Gary St. Fleur et. al., v. City of Scranton*,** Pa. Common Pleas Ct., Dkt. No. 17-CV-1403, (08/31/2017).

Scranton residents sued the city of Scranton alleging that the city collected nearly $10 million in excess of the 2017 statutory cap as allowed under Act 511. The statutory cap was approximately $27.3 million, based on the formula that looks at the total market value of all Scranton property as calculated by the Pennsylvania STEB; however, the amount collected by Scranton for fiscal year 2017 was approximately $38 million.

Scranton argued that it is a Home Rule Charter municipality, and under the Home Rule Charter Law 53 P.S. § 2901 – et seq., it is not subject to the statutory cap of Act 511. The plaintiffs said the city budgeted $38 million for fiscal 2017.

The Local Tax Enabling Act, Act 511, contains a mechanism to force a reduction in the city's tax rates and also requires any tax monies levied and collected in any fiscal year in excess of the cap to be sequestered in an account for expenditure in the following fiscal year.

The Lackawanna County Court denied Scranton's motion for reconsideration and allowed Scranton residents' lawsuit to proceed. The judge held that Act 511 is the statute that is applicable in every part of the commonwealth, with exclusion of cities of first class, which cannot be changed or modified through the Home Rule Charter Law. The judge noted that "there is substantial ground for difference of opinion on this issue" and that "an immediate appeal may materially advance the ultimate determination of this matter."

Unemployment Compensation Excise Tax

Hosp. Mgmt. Corp. v. Commw., Pa. Commw. Ct., Dkt. No. 380 C.D. 2017, (10/03/2017).

The taxpayer acquired and merged with two other entities in March 2011. The Office of Unemployment Compensation Tax Services was unaware of the taxpayer's acquisition and assigned rates to the taxpayer for 2011 through 2014. Two years after learning of the merger, the office transferred

the taxpayer's experience of the acquired entities and issued revised rate notices (an assessment), which resulted in significantly higher excise tax rates for the taxpayer.

The Commonwealth Court affirmed the decision to uphold the Office of Unemployment Compensation Tax Services' denial of taxpayer's appeal for unemployment compensation excise tax rates. The taxpayer argued that the office's two-year delay in issuing revised unemployment compensation rates did not comply with the prompt notice requirement.

The court disagreed and held that under 43 PS § 795.315(a)(2), where the taxpayer did not inform the office of the merger, the two-year delay in rate change was reasonable.

Aarsand Mgmt., LLC v. Dep't of Labor & Indus., Pa. Commw. Ct., Dkt. No. 1726 C.D. 2016, (08/31/2017).

The taxpayer paid wages in the commonwealth subject to the Unemployment Compensation Law. The Office of Unemployment Compensation Tax Services notified the taxpayer of its 2016 contribution rate by sending a contribution rate notice and imposing a delinquency excise tax rate. The notice also provided that the last day to appeal was March 30, 2016. The taxpayer appealed on May 25, 2016. The office and the department denied taxpayer's untimely appeal.

The Commonwealth Court affirmed the Department of Labor and Industry's order denying the taxpayer's untimely appeal. The court found that the taxpayer's failure to timely appeal was due to negligence. The court waived the taxpayer's issue concerning the application of the delinquency rate because the taxpayer did not raise the issue in the statement of questions involved.

Real Property Transfer Tax / Real Property Tax Cases

Saturday Family LP, v. Commw., Pa. Commw. Ct., Dkt. Nos. 781 F.R. 2013; 782 F.R. 2013, (08/14/2017).

The Commonwealth Court has overruled the exceptions filed by the Commonwealth to an order and held that the Commonwealth was bound by its own regulation and that a ground lease with a primary term of less than 30 years and an option to renew the lease at fair market value rent for up to six, five-year periods was not subject to realty transfer tax.

On exceptions, the Commonwealth contended that for a renewal period to be excluded from the term of the lease the lease must provide an extension at the true fair rental value at the time of the extension. The Commonwealth Court found the Commonwealth's interpretation unreasonable because 61 Pa. Code § 91.193(b)(24)(v) required that the renewal rent be at fair market value, which was itself a legally binding condition that limited the parties' ability to agree to a rental price for the renewal period.

In re Carey, Sr., Pa. Commw. Ct., Dkt. No. 1315 C.D. 2016, (08/16/2017) (opinion not reported).

In 2015, the Cameron County Tax Claim Office (Tax Claim Office) attempted to sell a taxpayer's property at an upset tax sale but did not receive any bids. The Tax Claim Office informed the taxpayer that if the delinquency was not satisfied before a certain date, the Tax Claim Office would list his property at a judicial sale. In a letter to the Tax Claim Office, three months later, the taxpayer wrote that he was never notified of the 2015 upset tax sale. In 2016, the taxpayer's property was sold at a judicial sale.

The *pro se* taxpayer filed a Motion to Proceed In Forma Pauperis, which the trial court granted, and a Motion to Recognize Co-owner as Being Confined, which the trial court denied on the ground that there was "no cognizable claim for relief ...presented in the context of movant's status as being incarcerated." The taxpayer appealed the order that denied his Motion to Recognize Co-owner as Being Confined, but he did not appeal the order that confirmed the judicial sale.

On appeal, the taxpayer appeared to argue that the judicial sale is invalid because he was "confined" and, therefore, "incapacitated" at the time of the judicial sale, that the judicial sale violated his constitutional rights, and that he was not given any notice of the delinquent tax (upset) sale and that the notice of the judicial sale failed to specify what property would be subject to a judicial sale.

The Commonwealth Court's scope of review in tax sale cases is limited to a determination of whether the trial court abused its discretion, rendered a decision that lacked supporting evidence or clearly erred as a matter of law. In affirming the trial court's decision, the Commonwealth Court held that the taxpayer's motion did not provide any cognizable claim for relief. The court noted that it is not aware of any authority, nor does the taxpayer provide any, that supports the argument that confinement of a property owner has any impact on a judicial sale.

Kliesh v. Borough of Morrisville, Pa. Commw. Ct., Dkt. No. 1877 C.D. 2016, (07/28/2017) (opinion not reported).

The taxpayer owned a vacant property that needed major repairs. The school district filed a tax claim and placed a lien on the property for a failure to pay real estate property taxes for the 2015 tax year. The taxpayer filed a complaint to which the school district filed preliminary objections, noting that the taxpayer's allegations were without merit. The trial court held that the taxpayer failed to raise meritorious issues on appeal.

On appeal to the Commonwealth Court, the taxpayer did not challenge the lawfulness of the assessment, but argued that there were no legal orders filed by Common Pleas Court based on the merits of the case; the Common Pleas judge filed the orders in violation of the Judicial Conduct Rules; and claimed that the Common Pleas judge had been stalking him. The Commonwealth Court affirmed the trial court's dismissal of the taxpayer's complaint challenging a property tax lien as taxpayer's allegations were without merit.

Philadelphia

Legislative / Administrative Updates

Phila. Office of the Controller, The Economic Impact of the Philadelphia Beverage Tax, (10/16/2017)

The Philadelphia City Controller published a report on the economic impact of the beverage excise tax. The controller's office contacted approximately 1,600 businesses throughout the city, reaching more than 50 commercial corridors over a four-week period. The survey asked businesses to assess their 2017 revenues from the third and fourth quarters, compared to the same quarters in 2016. Of the businesses contacted, nearly half agreed to complete the questionnaire. According to the controller, 88 percent of businesses reported revenue losses, with 57 percent reporting losses exceeding 10 percent. The controller concluded that the beverage tax has needlessly impacted specific businesses in the city.

Note: Michigan Gov. Rick Snyder (R) signed H.B. 4999 into law on Oct. 26, prohibiting any local unit of government from imposing a tax or fee on the sale, manufacture or distribution of food.

The Cook County, Illinois, Board of Commissioners voted to repeal, effective Dec. 1, 2017, the Cook County Sweetened Beverage Tax Ordinance.

Commonwealth Court Cases

School Dist. of Philadelphia v. Bd. of Revision of Taxes, No. 161201152, (verbal ruling 09/08/2017).

A Philadelphia judge, after oral argument on motions to quash, granted the motions and dismissed dozens of real estate tax assessment appeals by the city's school district — the first time a court has clearly responded to the Pennsylvania Supreme Court's July *Valley Forge* decision.

The Philadelphia School District, through the recommendation of a consultant, Keystone Realty Advisors LLC, only appealed the assessments of 138 commercial properties in Philadelphia for the 2017 tax year. The court took judicial notice that the number of selected properties appealed is less than the number of commercial properties in Philadelphia. The court also took judicial notice that there are a significant number of residential properties in Philadelphia that could have been selected. The court also noted that all of the appealed properties were commercial (though they do represent a "diverse subgroup" of commercial properties). Using the *Valley Forge* analysis, the court found that the Philadelphia School District violated the Uniformity Clause by systematically appealing the assessments of a select number of one sub-classification of properties.

The Philadelphia School District has appealed the court's decision to Commonwealth Court. Briefs are due in early 2018. There are 93 related dockets to this appeal, 1493 CD 2017 to 1612 CD 2017. This litigation could have a significant impact on how school district assessment appeals are handled going forward throughout the commonwealth. Also, it could drastically change how current school district appeals are handled with regards to motions and discovery.