A Newsletter of the Pennsylvania Bar Association Tax Law Section • May 2017

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 ilya.a.lipin@pwc.com and Paul Morcom pmorcom@mcneslaw.com.

Pennsylvania

Legislative / Administrative Update

House Bill 218 – Budget

In response to Gov. Tom Wolf's $32.3 billion budget proposal, the House passed a budget bill HB 218 that calls for $800 million less in spending. HB 218 would significantly reduce the operating budget of the Department of Revenue, thus impacting its operations.

The Philadelphia Bar Association Tax Law Section is submitting comments regarding HB 218.

For additional information and status, please see: http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2017&sind=0&body=H&type=B&BN=0218

House Bill 542 - Remote Sales Tax Notice

This bill requires a remote seller making a sale in Pennsylvania to notify the purchaser that sales or use tax is due on the nonexempt purchase and that Pennsylvania requires the purchaser to pay the tax due on the purchaser's tax return. The term "remote seller" means a vendor located outside of Pennsylvania that sells tangible personal property or services that are not exempt from Pennsylvania sales tax to a purchaser in Pennsylvania but does not collect the tax. A failure to provide the notice will subject the remote seller to a penalty of $5 for each failure, unless the remote seller shows reasonable cause for the failure.

On or before Jan. 31 of each year, a remote seller must send a notice to each purchaser in Pennsylvania who made $500 or more of purchases from the remote seller in the previous

calendar year. The notice must include all of the following: (1) the total amount paid by the purchaser for purchases made from the remote seller in the previous calendar year; and (2) a statement that the Commonwealth requires a sales or use tax return to be filed and sales or use tax to be paid on nonexempt purchases made by the purchaser from the remote seller.

The notice must be sent separately by first-class mail or electronic mail and may not be included with any other shipments. The notice must include the name of the remote seller and the words "important tax document enclosed" on the exterior of the mailing. Failure to send the notice will subject the remote seller to a penalty of $10 for each failure, unless the remote seller shows reasonable cause for the failure.

For additional information and status, please see: http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2017&sind=0&body=H&type=B&bn=0542

House Bill 463 - Corporate Net Income Tax Reduction and Phase-in of Combined Reporting

This bill would gradually reduce the corporate net income tax over a five-year period from its current 9.99 percent, to 6.99 percent and provide for a phased closing of the so called "Delaware Loophole" by implementing mandatory combined reporting. The bill was referred to the Senate Finance Committee.

For additional information and status, please see: http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2017&sind=0&body=S&type=B&bn=0463

Senate Bill 164 - Closing the Delaware Loophole

This bill would require unitary combined reporting for tax years beginning after Dec. 31, 2016. The measure includes a "tax haven" description (but not a list of jurisdictions) and would phase-in a reduction of the corporate tax rate from 9.99 to 6.99 percent. The bill was referred to the Senate Finance Committee.

For additional information and status, please see: http://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2017&sInd=0&body=S&type=B&bn=164

Pennsylvania Department of Revenue Tax Appeals Legislative Proposal

The department has submitted proposals, including a summary proposal and draft legislation that would dramatically change the tax appeals process in Pennsylvania. In summary, under the department's proposal, the taxpayers would be required to make all of their legal arguments and present all relevant facts in a very short period of time, at the Board of Appeals level (the initial step in the appeals process), even if they have not been given a clear explanation of the grounds for the assessment made against them. Moreover, the department wants to eliminate the existing right to de novo appeals to the Board of Finance and Revenue and, ultimately, the courts.

The Philadelphia Bar Association Tax Section submitted comments addressing the Department of Revenue Tax Appeals Legislative Proposal on April 21, 2017.

On April 27, 2017, the department noted that "the draft has been withdrawn and is undergoing review and revision."

Sales and Use Tax Bulletin 2016-02 – Procedure for Handling of Large and Complex Sales and Use Tax Refund Petitions - DRAFT

The department is changing the procedure for the handling of large and complex sales and use tax refund petitions. To improve overall tax compliance and to improve the efficiency of reviewing these requests, large refund requests may be addressed through the field audit process.

There are several advantages for both taxpayers and the department in addressing refund requests through a field audit:

- Overpayments established would offset any audit liability, potentially reducing the amount of interest and penalty due if a follow-up audit were conducted after a refund was granted.
- A field audit could involve a stratified random sample of liabilities and overpayments, including overpayments to third parties, to limit the number of transactions required to be reviewed at all appellate levels.
- Through a field audit, areas of liabilities and overpayments would be specifically identified and discussed with the taxpayer, so that the taxpayer could take corrective action to improve compliance.

- A taxpayer could provide on-site evidence to the auditor, allowing an informed decision regarding the proper application of sales and use tax.
- Consolidating the liability and overpayment issues into a field audit would allow the appellate process to handle both issues simultaneously.

The Board of Appeals may dispose of a refund petition by issuing a decision and order under 72 P.S. § 9703(c) requiring a field audit. The taxpayer's due process rights will be fully preserved through the field audit process. The audit will encompass at least the same periods within the three-year refund window and may extend to additional periods if the taxpayer agrees to a waiver of the statute of limitations on assessments. Any refunds not granted in the audit may be raised in a refund petition within six months of the mailing date of the notice of assessment, or within three years of actual payment of the tax, whichever is later, under 72 P.S. § 10003.1(b).

The decision to conduct a field audit will be at the discretion of the department but, in general, large or complex refund petitions or recurring issues are more likely to be referred for a field audit. If the taxpayer has requested a hearing on the petition form, a hearing will be scheduled. The issue of an audit referral may be discussed at the hearing.

Petition for Refund Instructions - Sales and/or Use Tax Summary Appeal Schedule - DRAFT

Instructions to the appeal schedule provide the following:

- Any petitioner may include this schedule with any petition for refund when the amount of refund requested is $100,000. Failure to file the preliminary appeal schedule, when required, will result in a request for the complete sales and use tax appeal schedule.
- In determining whether a petitioner has requested a refund of $100,000 or more, the BOA may consider all petitions filed within one year as a refund request.
- The summary schedule is requesting a list of the issues, the estimated number of transactions per issue, the estimated dollar amount per issue and the calendar year for which the issues / transactions occurred. Examples of issues would be the resale exemption, computer services, direct use, etc.
- The appeal schedule is requiring the year in which transactions involving those issues occurred, the number of transactions per issue, and the dollar amount per issue. The total dollar amount in this schedule must match the total dollar amount of the refund requested. Failure for the amount requested on the petition to match with the total dollar amount on the preliminary appeal schedule will result in a request for the complete sales and use tax appeal schedule.
- The summary schedule is not required for petitions of refund filed pursuant to Section 247 and 247.1 of the Tax Reform Code, 72 P.S. § 247, 247.1 (prepayment of tax and refund of sales attributed to bad debt).

Draft Sales and Use Tax Summary Appeal Schedule Sales and Tax Bulletin 2017-XX

Draft Sales and Use Tax Appeal Schedule

http://www.boardofappeals.state.pa.us/

Changes to Instructions for the Petition for Refund for Sales and/or Use Tax – Form REV-39 - DRAFT

The instructions provide that the enclosed appeal schedule is required with the petition when filing a petition for sales and use tax with the BOA. The instructions are intended to provide general guidelines applicable to all sales and use tax petitions for refund filed with the BOA. Failure to provide any of the information requested in Sections I-III may result in the dismissal of the petition.

Sales and Use Tax Letter Ruling No. SUT-17-001, Act 84 of 2016 – Digital Goods and Support Services to Canned Computer Software, (02/09/2017)

The department first introduced and then removed sales and use tax Letter Ruling No. SUT-17-001.

SUT-17-001 (02/09/2017)

- The Revenue Ruling No. SUT-17-001 concluded that all support services to canned computer software are subject to Pennsylvania sales and use tax when transferred in

a sale at retail or made use of after being obtained in a purchase at retail.

- The department considers the Legislature's express inclusion in Act 84 of 2016 of the "maintenance, updates and support" language within the definition of tangible personal property to operate as rendering all such services to canned computer software as being subject to tax.
- Specifically, the department considers any support involving the access to, use of, or alteration of the software itself as constituting a taxable component of the transaction.
- It also includes any updates, upgrades, enhancements, patches, modules and/or other modifications to canned software, whether provided and billed separately, or in conjunction with such support.

SUT-17-001 (04/04/2017)

- The department considers "support" to mean the providing of advice or guidance concerning otherwise taxable digital or electronic tangible personal property.
- This includes identifying the source of problems affecting the usability of the property and/or attempting to place the property in or restore the property to a useable state. This includes, but is not limited to what is commonly referred to as help desk support or call center support.
- The support may be delivered verbally, online or through automated means that reside on a customer's device or by human means.
- The support may be delivered by the property vendor or a third-party support provider who may or may not have remote access to the customer's device.
- Providing support is taxable regardless of the method of billing.

Examples include, but are not limited to, the following:

- A vendor provides support via a remote desktop where they access and alter the software directly.
- A vendor provides telephone support where they troubleshoot/discuss the issue with the customer and subsequently provide a patch or module to fix the issue.
- A customer sends a copy of the software program to a vendor who accesses, uses or alters and then returns the corrected version of the software.
- A vendor provides telephone support in the form of a call-in help desk providing direction as to the use, correction or manipulation of the software.

Removed in the 04/04/2017 version:

- A vendor distributes upgrades, patches and/or modules to its customers.
- A vendor provides training with respect to the use, correction or manipulation of the software.

The following guidance can be applied to the following questions:

(1) How is "support" defined? This is defined above.

Prior version (02/09/2017): Support includes any and all support services to canned computer software.

(2) Does "support" encompass all types of technical support for canned computer software?

Yes, if the technical support is to canned computer software. *(Same in both versions)*.

(3) Does "support" include "consulting"?

No, unless activities described as consulting fall within the above definition of support. However, as this letter deals only with support and the term consulting may be used to describe various activities, this letter may not be interpreted as a definitive determination of the taxability of what taxpayers may describe as consulting.

Prior version (02/09/2017): Yes, if the consulting relates to canned computer software.

(4) Does "support" include "training"?

No, the above definition of support does not include training.

Prior version (02/09/2017): Yes, if the training relates to canned computer software.

(5) Is "support" of canned computer software that is sold via tangible media also taxable?

Yes, the medium of transfer of the canned computer software or support is not relevant as to a determination of taxability. (Same in both versions).

Pennsylvania Tax Amnesty Program: April 21-June 19, 2017

The department will administer a 60-day tax amnesty program from April 21, 2017 through June 19, 2017 as authorized under Act 84 of 2016.

For more information please visit:

- Department's Amnesty website: http://www.revenue.pa.gov/taxamnesty/Pages/default.aspx#.WH7EU1UrJEY
- Amnesty Q&A: http://www.revenue.pa.gov/taxamnesty/Documents/tax_amnesty_qa.pdf
- Amnesty guidelines: http://www.revenue.pa.gov/taxamnesty/Documents/2017_tax_amnesty_program_guidelines.pdf

Pennsylvania Department of Revenue – Strategic Plan 2016-2020

The department developed and published a strategic plan for 2016-2020, which discusses the structure of the department, its values, strategic goals and initiatives and highlights recent achievements (elimination of capital stock and foreign franchise taxes, launch of the tax registration office, personal income tax fraud program and sales tax desk review program).

For more information, please see the following: http://www.revenue.pa.gov/Documents/2016-20_dor_strategic_plan.pdf

Supreme Court Updates

Nextel Commc'ns of the Mid-Atlantic, Inc., v. Commw., Pa. Commw. Ct., Dkt. No. 6 EAP 2016 (oral arguments 04/05/2017).

Case update: On April 5, 2017 the Pennsylvania Supreme Court heard oral arguments in Nextel.

In summary, the Commonwealth Court ruled that Pennsylvania law discriminated against Nextel in 2007 by imposing a $3 million carryover cap on operating losses, which prevented Nextel from reducing its taxable income to zero, unlike thousands of other corporate taxpayers that were able to utilize their net operating losses in full against their taxable income (not exceeding $3 million) and reduce their taxable income to zero.

For coverage of the hearing, please visit: https://www.bna.com/nextel-tax-hero-n57982086316/

Mission Funding Alpha v. Commonwealth of Pennsylvania, Pa. Commw. Ct., Dkt. No. 313 F.R. 2012 (12/10/2015) (oral argument May 9, 2017).

On May 9, Mission Funding Alpha, No. 2 MAP 2016, was argued before the Supreme Court. The question is: Where a taxpayer pays the tax on the date it is due but does not file its annual report until several months later, does the three-year refund period commence on the date the tax was paid or the date when the annual report was filed? Commonwealth Court found the three-year period commenced on the date the report was filed.

Commonwealth Court / Superior Court Cases

Commonwealth Court Litigation Update

(by Karen M. Gard - Acting Chief Deputy Attorney General)

Robert M Kerr, No. 158 FR 2012, is scheduled for argument in Commonwealth Court in June. This is a personal income tax case involving a jurisdiction issue. Taxpayer filed its petition with the Board of Appeals more than 90 days from the mailing date of the notice of assessment.

Commonwealth Court has listed two cases on exceptions before the court in the June session. The court ordered both submitted on briefs. ***Saturday Family Trust***, No. 782 FR 2013 – Commonwealth Court held that a lease with a term of less than 30 years containing renewal options at fair market value which, if exercised, would extend the lease term beyond 30 years, and a provision establishing binding fair market value is not subject to realty transfer tax.

The other case before the court on exceptions is ***Downs Racing***, Nos. 201-202 FR 2013. The court found in Commonwealth's favor that Downs was not able to establish the nontaxable part of a bundled purchase that includes closed circuit TVs and simulcast services.

Greenacres Contracting, No. 81 FR 2013 was submitted on briefs on exceptions in Commonwealth Court's March

session. The court found in the Commonwealth's favor that nuts, bolts and guardrail blocks installed for the Commonwealth and municipalities do not qualify as building machinery and equipment.

The Commonwealth's brief in Level 3, No. 2 MAP 2017 was filed in the Supreme Court on April 25, and Level 3's brief is due on June 13. Commonwealth Court found that services Level 3 sold to American Online were nontaxable internet access rather than taxable telecommunications services.

Argued in April in Commonwealth Court with a decision issued on May 4 is ***American Electric Power Service Corp***, No. 861 FR 2013. The court found that the taxpayer is subject to gross receipts tax and does not qualify for the resale exemption.

Local Tax Cases

Upper Moreland Twp. v. 7 Eleven, Inc., Pa. Commw. Ct., Dkt. No. 144 C.D. 2016, (04/13/2017).

The taxpayer maintained a corporate and a franchise store and a regional office for its Northeast Division in the Upper Moreland Township. Franchise stores, pursuant to the terms of the franchise agreement, pay a fee known as "7-Eleven charge" in exchange for various services provided to franchise stores by the taxpayer.

From 2003-2011, the taxpayer filed Business Privilege Tax (BPT) returns with the township; these returns reported receipts generated by sales at the corporate store within the township, but did not include the 7-Eleven charges collected by the taxpayer from franchise stores in the Northeast Division. The township assessed delinquent taxes, taxing 100 percent of the taxpayer's charges from franchise stores within Pennsylvania and applied the apportionment factor (receipts in township as a percentage of total receipts) to charges paid by franchise stores in other states.

The taxpayer appealed the assessment to the township's local tax review board. After a hearing officer sustained the assessment on administrative appeal, the taxpayer appealed to the trial court, which determined that the BPT imposed on the taxpayer was unconstitutional and invalidated the assessment in full.

The trial court found that the township's assessment failed to satisfy the external consistency of the fair apportionment prong of the *Complete Auto* test because it taxed 100 percent of 7-Eleven charges from franchise stores, even though the activity that generated these Pennsylvania 7-Eleven charges resulted from economic activity from both inside and outside of the state.

To determine whether a tax is externally consistent, a court must apply a subjective inquiry of whether a local tax assessment seeks to tax "only that 'portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed.'" *Philadelphia Eagles Football Club, Inc., v. City of Philadelphia*, 823 A.2d 108, 131 (Pa. 2003). In a constitutional challenge to the external consistency of local tax on interstate commerce, the taxpayer bears the burden of showing by clear and cogent evidence that the income attributed to a local taxing municipality is (1) disproportionate to the business transacted by the taxpayer in that municipality; (2) has resulted in a grossly distorted assessment on the taxpayer; or (3) is inherently arbitrary or produced an unreasonable result. *Philadelphia Eagles*, 823 A.2d at 132. The constitutional challenge does not require a taxpayer to prove what portion of receipts is derived from interstate verses intrastate commerce.

The Commonwealth Court affirmed the trial court in part, finding that the township's BPT assessment was unconstitutional. The court noted that the township's argument that the taxpayer failed to segregate intrastate from interstate receipts ignores the fact that the taxpayer proved that all 7-Eleven charges are the product of interstate commerce. The taxation of those receipts must therefore be apportioned to reflect the location of the various interstate activities that generated the receipts. A local taxing authority is entitled to tax its fair share of receipts from interstate commerce.

The Commonwealth Court stated that the trial court abused its discretion by not remanding the matter for recalculation because the township could still constitutionally tax receipts that were validly apportioned.

Wolk v. Sch. Dist. of Lower Merion, Pa. Commw. Ct., Dkt. No. 1465 C.D. 2016, (04/20/2017).

The School District of Lower Merion appealed from the order of the Common Pleas Court of Montgomery County, which granted the taxpayers' request of injunctive relief.

Along with enjoining the school district from "enforcing or collecting a tax increase for fiscal year 2016-17 of over 2.4 percent more than was in effect for the prior fiscal year," the trial court also ordered the school district to "adopt a resolution revoking the tax increase of 4.4 percent for fiscal year 2016-17 and enact a tax that represents an increase of no more than 2.4 percent greater than the tax in effect for fiscal year 2015-16." The school district appealed to this court.

The Commonwealth Court dismissed appeal as the school district failed to file post-trial motions. After reviewing "the nature of relief granted" by the trial court, the Commonwealth Court concluded that the trial court granted a permanent injunction. Further, the Commonwealth Court noted that pursuant to *City of Philadelphia v. New Life Evangelistic Church*, 114 A.3d 472 (Pa. Commw. Ct. 2015), the district failed to file post-trial motions within 10 days of the trial court's order and therefore, the issues raised on appeal were waived.

Sales and Use Tax Cases

None

Tax Exempt Organizations

In re: Appeal of the City of Coatesville (Appeal of City of Coatesville), Pa. Commw. Ct., Dkt. Nos. 511 C.D. 2016; 530 C.D. 2016; 607 C.D. 2016; 608 C.D. 2016, (02/16/2017) (opinion not reported).

Huston Properties Inc. is a wholly-owned non-profit subsidiary of the Stewart Huston Charitable Trust. Its sole purpose is to own, operate and maintain the Huston Building in Coatesville, which is approximately 111 years old and served as the headquarters for Lukens Steel Company, the first producer of boiler plates in the United States. The property is on the National Register of Historic Places. Bethlehem Steel Corporation transferred the property to Huston by deed restricting the property to use "consistent with the preservation and conservation of said tract of land as a historic structure."

Huston's bylaws provide that any revenue in excess of that needed for operation and maintenance of the property is to be turned over to the trust. However, this has never occurred because the expenses consistently exceed rental income, and the trust has needed to subsidize a substantial part of Huston's expenses. The remainder of Huston's expenses come from its lease of office space in the building to both for-profit and nonprofit entities. Some of the nonprofits pay full rent, but others pay nominal or no rent. Huston maintains a small office, occupied by its sole employee, who manages the property. The trust also maintains an office on the property, rent free.

In 2013, Huston applied for an exemption from real estate tax, asserting the property was regularly used as an institution of purely public charity. The Chester County Board of Assessment granted a partial exemption of 72 percent, for the 2014 tax year, because 72 percent of the leasable space was let to nonprofits, and 28 percent was leased to for-profit companies. The city and the district filed appeals. Following a trial *de novo*, the Court of Common Pleas of Chester County affirmed the board's grant of a partial exemption for 72 percent of the assessed value.

The Commonwealth Court reversed and remanded the trial court's ruling upholding the grant of a partial charitable exemption because the trial court failed to analyze each of the elements contained in *Hospital Utilization Project v. Commw.*, 487 A2d 1306 (Pa. 1985 (HUP) and make specific findings. Under HUP, an entity qualifies as an institution of "purely public charity" when it meets the following five prongs: (1) advances a charitable purpose; (2) donates or renders gratuitously a substantial portion of its services; (3) benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (4) relieves the government of some of its burden; and, (5) operates entirely free from private profit motive. An entity seeking a charitable exemption must establish it meets the five requirements in Section 5 of Act 55, 10 P.S. § 375(a)-(f), which requirements track the HUP test with additional specifications, and must be applied separately.

While the trial court recognized the standards put forth in HUP, which lists five specific elements that must be satisfied in order to qualify for exemption, the trial court only recognized the standards set forth in HUP, as well as Act 55, but it did not analyze each of these elements nor make findings to show how Huston satisfied them.

The trial court also cited the decision in *Unionville-Chadds Ford [Sch. Dist. v. Chester Cnty. Bd. of Assessment Appeals*

(Longwood Gardens), 714 A.2d 397 (Pa. 1998)] as a further basis for its decision. In *Longwood Gardens*, affirmed by the Commonwealth and Supreme Courts, the court found that the operator of a public garden can be a purely public charity for the purposes of exemption from real estate taxes. Subsequently, various other cases have confirmed that the ruling in *Longwood Gardens* is not to be narrowly construed. In this case, however, the court ruled that the facts in *Longwood Gardens* are not similar enough to the case at issue to relieve the trial court of its responsibility to apply each of the five prongs in HUP (as well as the statutory requirements) and make specific factual findings. The Commonwealth Court also noted that prior cases have limited precedential value with regard to charitable exemptions because charitable exemption cases are so fact-intensive.

Real Property Transfer Tax / Real Property Tax Cases

Hart v. Bulldawg LLC, Pa. Commw. Ct., Dkt. No. 107 C.D. 2016, (02/14/2017) (opinion not reported).

The taxpayer filed an amended petition to set aside the sheriff's sale contending that the bid price at the sheriff's sale of $1,100 was grossly inadequate for the property with the fair market value exceeding $78,000. The taxpayer argued that sales of property for less than 10 percent of fair market value of the property typically have been found to be grossly inadequate.

The trial court denied the taxpayer's petition holding that despite the low bid price in comparison to the alleged fair market value, the taxpayer did not offer evidence to support the alleged fair market value. Further, the trial court noted that it was unable to set aside the sheriff's sale, because the taxpayer's petition to set aside was untimely.

On appeal, the taxpayer testified that he purchased the property for $20,000. The taxpayer argued for the first time on appeal that, at the very least, the tax sale should be set aside based on the purchase price of $20,000.

The Commonwealth Court held that the trial court did not err in determining that the alleged fair market value of $78,000 to $100,000 was not supported by evidence. Noting that per Pennsylvania Rules of Appellate Procedure, "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal," the court noted that "[t]his rule pertains to the preservation of issues, and does not require a litigant to make identical arguments at each stage of his case." The court held that the taxpayer did raise the issue that the tax sale should be set aside because the tax sale price was less than 10 percent of the alleged fair market value of the property (*i.e.*, the sale price of $1,100 is less than 10 percent of the 2013 purchase price of $20,000). The court noted that the "term 'grossly inadequate price' has never been fixed by any court at any given amount or any percentage," that the taxpayer did provide the trial court with evidence at the hearing of the alleged fair market value of $20,000 and did preserve the issue of gross inadequacy. The trial court erred by failing to evaluate the evidence and determine if the sale price was grossly inadequate in light of the evidence at the hearing. Accordingly, the Commonwealth Court vacated the trial court's order and remanded to determine whether the tax sale should be set aside for gross inadequacy.

Fasnacht v. Board of Property Assessment, Pa. Commw. Ct., Dkt. No. 356 C.D. 2016, (03/09/2017).

The taxpayers purchased the property in 2013 and in 2015 were notified of a change in the property's assessment. The County Board of Assessment Appeals denied the request to change the assessment. The taxpayers appealed to the trial court contending that the change of the assessed value was an impermissible spot assessment.

At trial court, the county introduced testimony of the field appraiser who stated that she received a building permit for a patio enclosure in 2010. The assessor testified that while she monitored the progress of work on the patio enclosure, she also observed construction that was not included on the permit, including an addition to the rear of the home, increasing the living area of the second floor, a two-story attached garage with a living area above, and an above-ground pool or hot tub, which held no value for assessment purposes but was also something new. In 2015, the assessor determined that the construction was compete and issued a "change of assessment notice," adding that the calculation of the newly assessed value from $33,540 to $66,120 was not a new appraisal, but was "predetermined in our system from the 1995 reassessment."

The taxpayers claimed that the assessment was an illegal spot assessment and that the increased assessment was untimely as the improvements were completed before they purchased

the property in 2013, and the law requires reassessment on completion of the improvements.

The trial court noted that Pa. Cons. Stat. Ann. § 8817 specifically provides that an assessor may change the assessed value of real property when improvements are made, and that a change in the assessed value based on improvements will not be construed as a spot assessment. The trial court further observed that there is no requirement for a property owner to inform the assessment office that improvements to the property are complete.

In denying the taxpayer's appeal, the trial court held that the field assessor's testimony established that she was aware of ongoing construction at the property, she monitored the construction on numerous occasions, and she initiated a change to the assessment at the time she reasonably determined, based on her experience and expertise as a field appraiser, that construction was finally completed. In light of these facts, the trial court concluded that the reassessment was not made at an arbitrary time in the future and was not an impermissible spot reassessment.

The Commonwealth Court held that an assessment based on the completion of improvements that started before the current owners purchased the property was not an illegal spot assessment and was not untimely as it occurred within a reasonable time after the field assessor observed that the improvements were completed. In reaching this conclusion, the court recognized that the statutory scheme, insofar as it contains no specific requirements governing the timing of appraisal visits or timelines for applying the value of improvements to a property's reassessment, may result in potentially painful surprises to unwary purchasers of property.

Lee v. Luzerne Cty. Tax Claim Bureau, Pa. Commw. Ct., Dkt. No. 1041 C.D. 2016, (03/28/2017) (opinion not reported).

Appellants purchased property at a judicial sale, which was previously owned by Westminster Memorial Gardens Incorporated (Westminster) and was utilized and registered as a cemetery. However, the cemetery registration had lapsed, the property was abandoned, and the property's taxes were not paid. After purchase, the appellants realized that the cemetery was still active as burials were still taking place on the property because Westminster had pre-sold burial plots. Appellants have not sold any burial plots and did not intend to continue the property as a cemetery.

After realizing that burial grounds are exempt from taxation, the appellants stopped paying property taxes, which led to the property being scheduled for an upset tax sale for delinquent taxes. Appellants filed a petition alleging that pursuant to 72 P.S. § 5020-204(a)(2), the property should be exempt from all taxes as a burial ground and that pursuant to 9 P.S. § 15, the property, as a neglected burial ground, should have been placed in the care of the township and not sold at the 2005 judicial sale. The appellants requested: (1) the property be exempt from tax; (2) a refund of taxes paid from the time of purchase to present; and (3) reversal of the 2005 judicial sale and refund of the price paid and all costs associated with the sale. The upset tax sale was stayed pending the outcome of the petition.

The Luzerne County Tax Claim Bureau argued that: (1) the appellants did not apply for tax exempt status; (2) the suit exceeded the statute of limitations for a judicial tax sale; and (3) appellants have no grounds to challenge Westminster's tax status or the 2005 tax sale because the taxes were levied against Westminster, not the appellants.

After the Court of Common Pleas of Luzerne County denied the appellant's Petition to Set Aside Tax Sale and Reassess Property, the appellants appealed to the Commonwealth Court, arguing that the trial court erred and abused its discretion in denying the petition.

The Commonwealth Court held that the appellants filed their petition seven years after purchasing the property at the judicial tax sale, and thus their challenge of the judicial tax sale is barred by the statute of limitation. The court held that the record is void of any evidence showing that appellants applied for tax-exempt status or contested the property's tax assessment. A property owner must affirmatively request tax exempt status. In affirming the trial court, the Commonwealth Court held that it cannot grant the appellants' request for retroactive tax exempt status, nor can it grant the appellants' tax exempt status currently or in the future without the appellants properly requesting such tax relief.

Board of Finance and Revenue

BFR Statistics for 2016

	CNIT	Misc Tax	PIT	Sales Tax
Review	656	225	753	738
Review of Refund	344	41	208	1,237
Refund		9		
Total	1,000	275	961	1975

In re Morphotek Inc., Pa. Bd. of Fin. & Revenue, Dkt. No. 1602307, (12/14/2016).

The taxpayer filed a refund claim at the BOA, claiming an entitlement to deduct an unlimited amount of NOL for tax year 2013, which was denied.

The BFR denied the taxpayer's petition because the taxpayer failed to establish entitlement to a refund from applying more available NOL than the amount authorized by the Tax Reform Code. Specifically, the BFR denied relief because the limit on NOL for a tax year beginning in 2013 was set at the lesser amount of either the greater taxable income or the amount of net loss, up to the amount of taxable income reported according to the law. The BFR noted that the taxpayer correctly used NOL in its original tax calculation. Further, the taxpayer failed to provide sufficient evidence that the department unconstitutionally applied Pennsylvania law.

In re Jonestown Bank & Trust Co., Pa. Bd. of Fin. & Revenue, Dkt. No. 1516943, (09/22/2016).

The taxpayer, a regional financial institution, sought a refund of sales and use tax paid on a variety of transactions, including real estate appraisal fees, claiming them as nontaxable. The BOA denied relief.

The BFR partially granted the taxpayer's petition as the taxpayer established its entitlement to a refund of tax paid on real estate appraisal fees. Specifically, the BFR held that the taxpayer demonstrated that it is entitled to a refund of tax paid on real estate appraisal fees. The taxpayer established that appraisal fees are not among the enumerated services.

In re AXA LA Fitness Holdings LLC, Pa. Bd. of Fin. & Revenue, Dkt. No. 1603902, (12/14/2016).

The taxpayer, a company engaged in investing, sold its interest in the limited partnership, reporting gross receipts and a gain on the sale. The taxpayer requested the allocation of the sales gains outside Pennsylvania by nonbusiness income, multiform or unrelated income treatment or by special apportionment. Alternatively, the taxpayer requested to include the gross receipts derived from the sales gains in its sales factor.

The BFR held that the taxpayer's gains from the sale of an interest in a limited partnership based in Illinois constituted business income. The BFR further held that the taxpayer failed to provide details and evidence regarding its multiform or unrelated income and special apportionment claims. However, the BFR allowed the inclusion of the sales gross receipts in the sales factor as the gains were business income.

In re Huntsworth Health Corp., Pa. Bd. of Fin. & Revenue, Dkt. No. 1509291, (09/28/2016).

The taxpayer, a Pennsylvania corporation in the advertising field, reported its tax liability for 2012 based on an adjusted income apportioned by property, payroll and sales factors. The taxpayer is a public relations and communications agency operating in the areas of life science (prescription medicines and devices) and lifestyle (consumer health and well-being brands) and provides services to national and global pharmaceutical, biotech and wellness companies. The taxpayer requested a refund claim to reduce the sales factor numerator based on market-based methodologies. The BOA denied the refund. The taxpayer appealed and requested a refund based on a customer billing address or population approach.

The BFR denied the taxpayer's capital stock tax refund because the taxpayer failed to prove that its income-producing activity, or even a greater proportion of the activity, occurred outside Pennsylvania. The BFR held that the taxpayer did not prove that the income-producing activity, or even a greater proportion of income-producing activity, occurred outside Pennsylvania for each provided receipt.

In re CompuCom Sys., Inc., Pa. Bd. of Fin. & Revenue, Dkt. No. 1602992, (11/02/2016).

The taxpayer reported no corporate net income tax due and did not make any installment payments during 2012. The taxpayer filed a petition for refund at the BOA, which dismissed the claim, because the taxpayer was seeking a

refund for a tax year in which it reported no tax due and a year in which it did not pay any tax.

The taxpayer filed a petition at the board requesting an increase in the net loss carryforward. The taxpayer argued that the discrepancy in its net loss carryforward is the result of an audit of its 2010 tax report. The taxpayer argued that BOA's decision seems to indicate that the taxpayer cannot challenge the department's findings regarding the net loss adjustment until 1) the use of the net loss carryforward impacts the amount of its taxable income such as to then reduce its tax liability; or 2) it files a return with its original net loss carryforward and the state again seeks to adjust the net loss carryforward, at which point it will need to appeal to the BOA again. The taxpayer also requested the BFR to use its discretion to rule on the net loss carryforward now rather than some period in the future when jurisdictional matters may be settled but available information becomes even less reliable.

The BFR dismissed the taxpayer's petition, finding that the taxpayer could not file a petition for a refund for a tax year in which it did not report or pay any tax.

In re Rampelt, Pa. Bd. of Fin. & Revenue, Dkt. No. 1603648, (10/27/2016).

The taxpayer stated that she purchased the vehicle in Indiana and paid the purchase price, minus the amount she received for her trade-in and rebate, and paid tax of 7 percent on the final purchase price.

The taxpayer moved to Pennsylvania and registered her vehicle with the help of the American Automobile Association (AAA), which erroneously listed the purchase price of the vehicle to include the service contract and Allstate tire/wheel insurance. Therefore, the taxpayer remitted an additional sales tax to the Commonwealth of Pennsylvania. The taxpayer believes that the additional sales tax was paid in error, due to AAA overstating the purchase price of the vehicle. The taxpayer believes that the vehicle service insurance (contract) and tire/wheel insurance are not part of the cost of the vehicle and not subject to taxation.

The BFR denied the taxpayer's petition for refund as the taxpayer failed to establish entitlement to a refund for sales tax paid on a vehicle purchased in Indiana and later registered in Pennsylvania. Upon review, the BFR concluded that, pursuant to 61 Pa. Code § 31.44(a)(4), service contracts and wheel/tire insurance were included in the purchase price of the vehicle.

Philadelphia

Legislative / Administrative

Philadelphia Budget FY18

The FY18 proposed budget assumes revenues totaling $4.34 billion, a growth of 4.35 percent from the FY17 estimate, with $3.25 billion from local tax receipts, an increase of 5.22 percent from FY17. The budget assumes 12 months of the Philadelphia beverage tax, estimated at $92.4 million, and a relatively significant growth in the Business Income and Receipts Tax (BIRT), from a relatively flat estimate from FY16 to FY17, due to a higher growth projected in corporate profits.

The FY18 proposed budget continues to drive down wage and business tax rates to make the city more competitive. The resident portion of the wage tax rate is proposed to be 3.8907 percent, and the non-resident portion is 3.4654 percent. Reform of the BIRT is also included in the FY18 budget, now with the full $100,000 exclusion in place, as well as a rate reduction on the net income to 6.3 percent.

For more information, please see: https://beta.phila.gov/documents/mayor-kenneys-fiscal-year-18-budget/

City of Philadelphia
General Fund
Revenue Comparison
Fiscal Years 2016, 2017 & 2018
(Amounts in Thousands of Dollars)

	FY 2016 Actual	FY 2017 Estimate	16 to 17 % Change	FY 2018 Proposed	17 to 18 % Change
Taxes - Current & Prior Years					
Wage, Earnings & Net Profits Tax	1,398,398	1,450,048	3.69%	1,494,338	3.05%
Real Estate Tax	571,647	584,379	2.23%	600,558	2.77%
Business Income & Receipts Tax	474,171	465,113	-1.91%	489,886	5.33%
Real Estate Transfer Tax	237,347	232,861	-1.89%	242,921	4.32%
Sales Tax	169,383	186,584	10.16%	198,083	6.16%
Other Taxes	115,702	121,233	4.78%	129,241	6.61%
Philadelphia Beverage Tax	0	46,183	N.A.	92,412	100.10%
Total Taxes	**2,966,648**	**3,086,401**	**4.04%**	**3,247,439**	**5.22%**

Bill No. 160015-A

On Sept. 27, 2016, City of Philadelphia enacted an annual self-reporting requirement for businesses (1) located in a KOZ with annual gross revenue in excess of $2 million; or (2) that received financial assistance from the City of Philadelphia of $50,000 or more in the previous calendar year. The term "financial assistance" is defined under Philadelphia Code § 17-1401 to include any grant, loan, tax incentive, bond financing subsidy or other form of assistance provided in the amount of $50,000 or more through the authority or approval of the city. Businesses must comply with the self-reporting requirement by May 1, 2017. Penalties for late filing are $1,000 for failure to comply within the first 30 days of May 1, 2017 and $100 per day each day thereafter.

For additional information, please see: https://phila.legistar.com/LegislationDetail.aspx?ID=2554766&GUID=1AB21F49-1958-43BD-9453-802CE10F2A8C

Proposed Bill No. 170015 – intends to legislatively reverse the Pennsylvania Supreme Court's *Keystone Health Plan East* decision

§19-1703. Refunds.

(1)(d). Every petition (i) for refund, or (ii) for credit attributable to, moneys collected by the department on or after Jan. 1, 1980, for or on behalf of the city or the School District of Philadelphia, including, but not limited to any tax, water or sewer rent, license fee or other charge, and interest and penalties thereon, shall be filed with the department within three years from the date of payment to the City or the School District of Philadelphia or the payment due date, whichever is later.

The ordinance shall take effect immediately.

For more information, please see: https://phila.legistar.com/LegislationDetail.aspx?ID=2947968&GUID=E2D401BE-51A8-40C5-AE4E-06E6272C7F3F

Commonwealth Court Cases

Williams v. City of Phila, Phila. Ct. of Common Pleas, Dkt. No. 1452, (12/19/2016)

Case Status Update: On April 5, 2017 – The Commonwealth Court heard arguments over the legality of the Philadelphia's soda tax.

On Dec. 19, 2016, the Philadelphia Court of Common Pleas sustained the defendant's preliminary objections and dismissed an action seeking declaratory and injunctive relief against the Philadelphia sweetened beverage tax, finding that the tax is not duplicative of, or preempted by, Pennsylvania sales tax, is not preempted by state implementation of the federal Supplemental Nutrition Assistance Program (SNAP), and does not violate the Uniformity Clause of the Pennsylvania Constitution. Effective Jan. 1, 2017, the beverage tax imposes a 1.5 cent-per-ounce tax on the sale, delivery or acquisition of any sugar-sweetened beverage (SSB) to or by a dealer for the purpose of the dealer holding out the taxable beverage for retail sale within the city.

Dutton v. Tax Review Bd., Pa. Commw. Ct., Dkt. No. 108 C.D. 2016, (03/02/2017) (opinion not reported).

The taxpayer filed with the City of Philadelphia's Tax Review Board (TRB) an appeal of the overdue taxes, including interest and penalties, owed on two properties for tax years 2003 through 2012. The TRB issued decisions abating the penalties imposed for the years 2008 through 2012. The taxpayer requested a rehearing and, following a hearing, the TRB issued decisions abating the penalties and half of the interest imposed for the years 2008 through 2012. The Philadelphia County Court of Common Pleas affirmed the TRB's decision.

The taxpayer appealed to the Commonwealth Court claiming that the TRB erred in failing to consider appraisals and pictures of the properties in issuing its decisions.

The Commonwealth Court affirmed the trial court and the TRB and found that the taxpayer never sought to introduce this evidence to the TRB. Thus, the court noted that the TRB did not err in failing to consider evidence that was never offered for its consideration.

Collier v. City of Phila, Pa. Commw. Ct., Dkt. No. 649 C.D. 2016 (03/06/2017) (opinion not reported).

City's Office of Property Assessment (OPA) issued notice of proposed valuation for 2014 for the taxpayer's Spring Garden Street property and sent it to the taxpayer's Conshohocken Avenue property where the taxpayer previously resided. The taxpayer appealed the assessment to the Board of Revision of Taxes (BRT), which was denied. Thereafter, the taxpayer appealed the BRT's decision to the trial court alleging that she never received the OPA's notice of assessment or notice of the BRT's hearing.

The trial court conducted hearings where the taxpayer testified that she did not receive the OPA's notice because she does not reside or receive mail at the Conshohocken Avenue property. She also presented evidence that some divisions of the city's Revenue Department sent tax and water bills for the Spring Garden Street property to her at the Spring Garden Street address. In fact, the trial court continued the first hearing so that the taxpayer could present water bills that the City sent to her during the relevant time period at the Spring Garden Street address. The city presented the notice that was sent to the Conshohocken Avenue property. At the conclusion of the hearing, the trial court affirmed the BRT's decision because the OPA's notice was sent to the Conshohocken Avenue property, which the taxpayer owns.

On appeal to the Commonwealth Court, the taxpayer claimed that the OPA's negligence in failing to send notice to the appropriate address constitutes fraud, therefore warranting *nunc pro tunc* relief.

The Commonwealth Court held that the trial court did not err in dismissing a request for an appeal *nunc pro tunc* of a property tax assessment. The court noted that allowing an appeal nunc pro tunc is a recognized exception to the general rule prohibiting the extension of an appeal deadline, which is intended as a remedy to vindicate the right to an appeal where that right has been lost due to certain extraordinary circumstances. Generally, in civil cases, an appeal nunc pro tunc is granted only where there was "fraud or a breakdown in the court's operations through a default of its officers."

The court found no evidence that the taxpayer submitted a change of address to the OPA, even though the law places the burden of providing the taxing authority with an accurate mailing address on the property owner. Assessment valuations are also available on the OPA website, where taxpayers can also correct or question information, including their mailing address. The court found the trial court's rejection of the taxpayer's evidence regarding city's alleged knowledge of the taxpayer's correct address did not violate the taxpayer's due process rights.

City of Philadelphia v. Hawkins, Pa. Commw. Ct., Dkt. No. 2555 C.D. 2015, (03/29/2017).

The purchaser bought a property at a sheriff's sale, which was acknowledged by a sheriff's deed on Jan. 8, 2015. The trial court granted the taxpayer's redemption petition filed on Oct. 5, 2015 pursuant to Section 32 of the Municipal Claims and Tax Liens Act (Act).

On the appeal to the Commonwealth Court, the purchaser argued that: (1) the taxpayer did not complete the redemption process on time; and (2) that if redemption succeeds, the taxpayer must make the purchaser whole, by placing him in the same financial position he occupied prior to the tax lien sale, to include interest and costs.

The Commonwealth Court affirmed the trial court, finding that the taxpayer timely filed her redemption petition on Oct. 5, 2015. The court noted that the Act only required the taxpayer to begin the redemption process within the nine-month period by filing the redemption petition. Further, the taxpayer demonstrated that she could pay the full redemption payment, thereby making the purchaser whole by placing him in the same financial position he was in before the tax lien sale.