



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

## Pennsylvania Bar Association Tax Law Section

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## PENNSYLVANIA

### Legislative / Administrative Update

Pennsylvania spending package of \$31.9 billion became law on July 10, 2017 without the governor's signature. For more information, please see:

<http://www.budget.pa.gov/Pages/default.aspx>



**Pennsylvania Budget.** On July 27, 2017, the Senate passed HB542 (26-24). The following is a summary of key developments:

### *Sales & Use Tax Developments:*

- ◆ Marketplace providers will be required to collect sales tax on each sale at retail that they facilitate for marketplace sellers.
  - “Marketplace provider.” A person who, either directly or indirectly through agreements or arrangements with third parties and pursuant to an agreement with a marketplace seller, facilitates a sale by a marketplace seller. For purposes of this definition, a person “facilitates a sale” if the person or an affiliated person: (1) collects the payment made by a customer to or for a marketplace seller regardless of whether the marketplace provider receives compensation or other consideration in exchange for its services; and (2) provides the forum in which, or by means of which, the sale takes place, including a shop, a store, a booth, an internet website, a catalog or a similar forum.
  - “Marketplace seller.” A person, whether or not the person is required to register to collect tax under this article, who: (1) has an agreement with a marketplace

### 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](mailto:Ilya.Lipin@bakertilly.com) and Paul Morcom at [pmorcom@mcneslaw.com](mailto:pmorcom@mcneslaw.com).

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provider under which the marketplace provider will facilitate sales for the person; and (2) makes sales at retail subject to tax under this article.

- ◆ Remote Seller Study - If federal legislation relating to remote sellers has not been enacted by Dec. 31, 2018, the Independent Fiscal Office, in conjunction with the Department of Revenue, will conduct a study assessing the legal implications and fiscal impact of mandating notice requirements for remote sellers. By April 1, 2019, results of the study, if a study is produced, shall be provided to the chairman and minority chairman of the Appropriations Committee of the Senate, the chairman and minority chairman of the Finance Committee of the Senate, the chairman and minority chairman of the Appropriations Committee of the House of Representatives and the chairman and minority chairman of the Finance Committee of the House of Representatives.
- ◆ Help desk / Call center – separately invoiced help desk or call center support are not sales of tangible personal property subject to sales tax.
  - *Corporate Net Income Tax – NOLs*: HB 542 removes the flat dollar amounts and imposes a limitation based on the taxpayer's taxable income: 35 percent for taxable years beginning after Dec. 31, 2017, and 40 percent for taxable years beginning after Dec. 31, 2018.
  - *Severance Tax*: HB542 imposes a severance tax on the extraction or other removal of natural gas from unconventional wells.
  - Tax rate increase on gross receipts of telecom, electric companies and sales of natural gas.
  - *Tax Appeals Reform*
    - Periods to file an appeal are reduced from 90 days to 60 days for filing a petition before the Board of Appeals and an appeal to the Board of Finance and Revenue.
    - Compromise payments are due within 60 days or the compromise will be voided.
    - Establishes a summary claims procedure for cases under \$6,000.

For additional information, please see:  
[http://cst.informz.net/cst/data/images/2%20--%20Appeals%20Reform\\_7\\_17.pdf](http://cst.informz.net/cst/data/images/2%20--%20Appeals%20Reform_7_17.pdf)

## **Senate Bill 812 – Mandatory Unitary Combined Reporting**

This bill would enact mandatory unitary combined reporting in the state, adopt the OECD's tax haven blacklist, reduce the corporate income tax rate to 6.49 percent by Jan. 1, 2022, and provide for new rules for net loss deductions. The bill is currently pending in the 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=812>

Two similar measures are also currently pending in the Finance Committee:

- ***Senate Bill 164 - Closing the Delaware Loophole***  
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>
- ***House Bill 463 - Corporate Net Income Tax reduction and phase-in of Combined Reporting***  
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>

## **Wayfair Agrees to Collect Pennsylvania Sales and Use Tax**

The Pennsylvania Department of Revenue has announced that the online retailer Wayfair Inc. began collecting Pennsylvania sales tax for online purchases on May 1, 2017. The change in company policy is a result of an agreement with the department. Wayfair is the 16<sup>th</sup> largest online retailer in the U.S., and the agreement is expected to provide *millions of dollars* in sales tax revenue to help address the state's budget deficit. (Press Release: Wayfair to Begin Collecting Pennsylvania Sales Tax, Pennsylvania Department of Revenue, 05/24/2017)

## **2016 Common Level Ratios**

The State Tax Equalization Board has released the common level ratio real estate valuation factors for 2016. For Pennsylvania Realty Transfer Tax purposes, these factors are applicable for documents accepted from July 1, 2017 to June 30, 2018.

For more information, please visit:  
<http://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/Pages/Realty%20Transfer%20Tax/Common%20Level%20Ratios.aspx#aspx#Ratio.aspx#WWeg14Tyupo>

## Sales & Use Tax / Charitable Exemption

Under the Institutions of Purely Public Charity Act (10 § P.S. 376(a)(5)), a charitable organization that possesses a valid exemption under 72 P.S. § 7204 is entitled to a rebuttable presumption that it is exempt from Pennsylvania sales and use tax if its annual program service revenues are less than \$10 million. The statute also requires the Department of Revenue to increase the maximum revenue level by 1 percent annually, effective as of July 1. Effective for the period between July 1, 2017 and June 30, 2018, a charity will be entitled to a rebuttable presumption if its annual service revenues are less than \$12,081,090. (Adjustment of Program Service Revenue Amounts, Pennsylvania Department of Revenue, Pa. Bull. No. 17-1098, Vol. 47, No. 26, 07/01/2017.)

## Supreme Court Updates

***Valley Forge Towers Apartments NLP v. Upper Merion Sch. Dist.***, Pa. Sup. Ct., Dkt. 49 MAP 2016, J-14-2017, (07/05/2017).

Montgomery County's most recent countywide assessment of real property occurred in 1996. The Upper Merion Area School District (school district) is located in Montgomery County. Since the market value of many properties have changed since then, the school district decided to appeal the assessment of some of its properties. The school district retained a private firm, Keystone Realty Advisors (Keystone), to advise it as to which properties should be targeted for appeal. On Keystone's recommendation, the school district concentrated solely on commercial properties, including apartment complexes. The school district filed administrative appeals against the appellants who owned apartment complexes in the school district. The county's Board of Assessment Appeals (the board) denied the appeals and the school district appealed the denials to the Montgomery County Court of Common Pleas (Common Pleas).

While the cases were pending, the appellants sought declaratory and injunctive relief against the school district on the theory that it had violated the Uniformity Clause by systematically appealing only the assessments of commercial properties. The appellants claimed that they were not required to exhaust statutory remedies because the uniformity violation that they asserted could not be cured via the statutory appeals process. The school district filed preliminary objections,

noting that it had a statutory right to appeal property assessments, that selective appeals do not violate the Uniformity Clause as a matter of law, and that the appellants failed to exhaust their statutory remedies. The Common Pleas court sustained the preliminary objections, and the Commonwealth Court affirmed the decision.

The Pennsylvania Supreme court granted *de novo* review to consider whether the Uniformity Clause permits the school district, pursuant to its statutory right to appeal individual property assessments, to concentrate solely on commercial properties while foregoing appeals as to single-family residences that may have even lower assessment ratios.

The Supreme Court held that the appellants' complaint set forth a valid claim that the school district's selective appeal of real estate assessments of commercial properties violates the Uniformity Clause and noted that "a taxing authority is not permitted to implement a program of only appealing the assessments of one sub-classification of properties, where that sub-classification is drawn according to property type — that is, its use as commercial, apartment complex, single-family residential, industrial or the like." The Supreme Court summarized two principles it has articulated in *Downingtown Area Sch. Dist. v. Chester Cty. Bd. of Assessment Appeals*, 590 Pa. 459, 913 A.2d 194 (2006) and *Clifton v. Allegheny Cty.*, 600 Pa. 662, 969 A.2d 1197 (2009), which were misconstrued by the Commonwealth Court:

First, all property in a taxing district is a single class, and, as a consequence, the Uniformity Clause does not permit the government, including taxing authorities, to treat different property sub-classifications in a disparate manner. Second, this prohibition applies to any intentional or systematic enforcement of the tax laws and is not limited solely to wrongful conduct.

With respect to the exhaustion doctrine, the court noted that the legal remedy provided by the assessment appeal procedure was inadequate to address the constitutional questions raised by the appellants. The adjudicatory process undertaken by the board of assessment appeals is solely directed at ascertaining the subject property's value and applying a ratio to that value. The board is not given statutory power to alter this procedure or to refuse to determine the proper assessment per the legislative directive, based on a uniformity claim relating to a taxing district's alleged scheme of selectively targeting a particular sub-classification of properties.

Thus, the court held that the appellants were not required to exhaust the administrative remedies.

The case been remanded back to Common Pleas in order for parties to do discovery and prove their claims. This case has broad ramifications on school district-initiated assessment appeals.

*Nextel Commc'ns of the Mid-Atlantic, Inc., v. Commw.*, Pa. Sup. 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*.

## Commonwealth Court / Superior Court Cases

### Sales and Use Tax

*Green Acres Contracting Co., Inc. v. Commw.*, Pa. Commw. Ct., Dkt. No. 81 F.R. 2013, (06/13/2017) (en banc).

The taxpayer is a construction contractor engaged primarily in the installation of highway guardrail systems, consisting of guardrail panels, guardrail posts and road signs for the Pennsylvania Department of Transportation (PennDOT) and other state departments of transportation. The taxpayer “uses nuts, bolts and washers to attach 12.5-foot-long guardrail panels to each other to obtain the required guardrail length and to attach these guardrails to guardrail posts ...” The taxpayer purchased the nuts, bolts, washers and guardrail blocks without paying any sales tax on those items and used them in the construction and installation of guardrail systems for PennDOT and other entities.

The taxpayer filed exceptions to the Commonwealth Court, seeking relief of tax assessed on equipment used to construct and install guardrail systems, contending that they were exempt as building machinery and equipment (BME). As noted below, the statute distinguishes between “guardrails,” which are excluded from the BME definition, and “guardrail posts,” which are not. The statute does not specify the tax status of the nuts, bolts, washers and guardrail blocks, all of which are necessary for guardrail system construction.

BME, as defined, includes generally “control system[s] limited to energy management, traffic and parking lot and build-

ing access” and specifically includes “guardrails” but does “not include guardrail posts,” as follows:

**The term shall include** boilers, chillers, air cleaners, humidifiers, fans, switchgear, pumps, telephones, speakers, horns, motion detectors, dampers, actuators, grills, registers, traffic signals, sensors, card access devices, **guardrails**, medial devices, floor troughs and grates and laundry equipment, together with integral coverings and enclosures, whether or not the item constitutes a fixture or is otherwise affixed to the real estate, whether or not damage would be done to the item or its surroundings upon removal or whether or not the item is physically located within a real estate structure. **The term** “building machinery and equipment” **shall not include guardrail posts**, pipes, fittings, pipe supports and hangers, valves, underground tanks, wire, conduit, receptacle and junction boxes, insulation, ductwork and coverings thereof. 72 P.S. § 7201(pp) (emphasis added).

In its exceptions, the taxpayer argues that it was an error to conclude that nuts, bolts and washers are tax exempt only insofar as they are used to connect horizontal guardrail panels because the term “guardrails” refers to the entire guardrail system, not just the horizontal elements of guardrails. Examining the structure of the BME definition, the taxpayer argues that “guardrails” are included as a “control system,” with the “guardrail posts” carved out from that category, just as “insulation and ductwork” are carved out of the category of “air conditioning.” Because “guardrail posts” are a carve-out from the broader category of “guardrails,” the taxpayer contends that everything else that is part of the “guardrails,” other than the posts, remain exempt, including the horizontal elements (guardrail panels), guardrail blocks and connecting materials (nuts, bolts and washers).

Guided by the Statutory Construction Act of 1972, the Commonwealth Court interpreted the statute as not distinguishing between the nuts, bolts, washers and guardrail blocks used to connect the different parts of the guardrail system to each other. The court held that the guardrail posts are excluded from the definition of BME, and the nuts, bolts, washers, and guardrail blocks that the taxpayer utilized to connect the elements of the guardrail system together fall within the definition of “guardrails” and are therefore exempt from use tax as BME.

## Pennsylvania Utility Gross Receipts Tax

*Am. Elec. Power Serv. Corp. v. Commw.*, Pa. Commw. Ct., Dkt. No. 861 F.R. 2013, (05/04/2017).

The taxpayer sought a review of the BF&R order finding that, under the Tax Reform Code of 1971, it was subject to the utilities gross receipts tax (GRT) and that its sales of electricity to the Letterkenny Industrial Development Authority (LIDA) did not qualify for the resale exemption because LIDA was not a political subdivision.

The taxpayer was a regulated wholesaler of electricity by the Federal Energy Regulatory Commission (FERC) but was not a public utility and did not itself produce electricity. LIDA was formed in 1997 under Pennsylvania's Economic Development Financing Law and is described as "a public instrumentality of the Commonwealth." LIDA is governed by a 15-member board of directors appointed by the Franklin County commissioners. After LIDA was created, it assumed control of the Depot's Electrical Distribution System (EDS). It purchases power as a wholesale customer from a third-party wholesale supplier and then sells that electricity to the customers in the Cumberland Valley Business Park, which LIDA developed, as well as to the Army for use in its retained industrial area. LIDA contracts with Allegheny Power to operate and maintain the EDS and bill LIDA's customers.

Two years before the taxpayer started making wholesales to LIDA, the taxpayer's counsel spoke with the department's Corporate Tax Division about the resale exemption to GRT and the taxpayer's sales to municipalities. The department told the taxpayer's counsel that all sales made to municipalities should be reported on the taxpayer's GRT Report as exempt unless the municipality itself consumes the electricity. The taxpayer then filed a GRT Report for 2010, reflecting its sales to LIDA and the Borough of Pitcairn, another of its customers, but claimed the gross receipts from those sales were nontaxable because they were sales for resale. However, neither LIDA nor Pitcairn filed, reported or paid GRT on the electric energy they purchased from the taxpayer in 2010.

The department found the resale exemption did not apply and assessed GRT on the taxpayer's receipts from sales to LIDA, increasing the taxpayer's 2010 GRT liability from \$0 to \$380,546. The taxpayer appealed the assessment to the Board of Appeals, and when it denied relief, appealed to the BF&R.

At the BF&R, the taxpayer argued that it was not subject to GRT because it was not an electric light company as it did not sell electricity at retail, i.e., to end-use purchasers. In the alternative, the taxpayer argued that it was entitled to the resale exemption for the sales for resale to Pitcairn and LIDA. The BF&R found that the taxpayer was subject to GRT, but found that it should have received the resale exemption for receipts from sales to the Borough of Pitcairn because Pitcairn is a municipality. However, the BF&R found that the taxpayer was correctly denied a resale exemption for sales to LIDA because LIDA was not a political subdivision and there was no evidence that LIDA reported GRT to the Commonwealth for the relevant time period.

The Commonwealth Court affirmed the BF&R's decision and concluded that the taxpayer was an electric light company engaged in the electric light and power business and, therefore, subject to GRT. The court held that per Section 2810(i) of the Electricity Generation Customer Choice and Competition Act, the taxpayer was *deemed to* be an electric company subject to GRT, although it was not a taxpayer under the terms of the GRT. The court rejected the taxpayer's argument that a wholesale seller of electricity and does not sell electricity or related services to end-users, i.e., retail customers, that it does not fall within the definition of an "electric distribution company" or an "electric generation supplier," making it not subject to GRT.

The court further held that whether the taxpayer is licensed by the Public Utility Commission is not determinative as to whether it is engaged in the electric light business or if it is subject to the tax. The court held that LIDA was not a political subdivision under the Statutory Construction Act and, therefore, the taxpayer's sales for resale to LIDA did not qualify for the resale exemption.

Lastly, the court held that the Commonwealth was not precluded from collecting the tax under the doctrine of equitable estoppel because the taxpayer could not have relied upon the department's advice or upon its purportedly exempt status as there was no misrepresentation because any comments specifically concerned the taxpayer's receipts from sales to a municipality, not sales to an authority created pursuant to the EDFL, such as LIDA.

## Personal Income Tax

**Kerr v. Commw.**, Pa Commw. Ct. Dkt., No. 158 F.R. 2012, (07/06/2017) (opinion not reported).

The taxpayer petitioned the Commonwealth Court to review BF&R's order sustaining BOA's order dismissing the taxpayers petition for reassessment, concluding that it was untimely filed. The taxpayer claimed that he did not receive the notice of assessment and that the department could not prove receipt because it was not sent by certified mail.

Per 72 P.S. § 7338, the assessment is not required to be sent by certified mail, but does provide that taxes due must be paid within 90 days after mailing of the notice unless a petition for reassessment is filed within the 90-day period. The assessment notice clearly specified that the taxpayer had until July 6, 2009 to pay the taxes or file the petition within 90 days of the assessment's notice date. The taxpayer and his accountant contacted the department about the notice and were advised of their appeal rights. However, the taxpayer did not pay the taxes due and did not file a petition for reassessment until March 25, 2011.

The court held that "the law is well established that the code's time limitations are to be strictly enforced" and under the circumstances presented, the BF&R properly dismissed the taxpayer's petition as untimely.

## Real Property Transfer Tax / Real Property Tax

**Grudsky v. Lackawanna Cty. Tax Claim Bureau**, Pa. Commw. Ct., Dkt. No. 1526 C.D. 2016, (06/08/2017).

The taxpayer filed a petition to set aside the tax upset sale claiming that the Lackawanna County Tax Claim Bureau did not comply with the notice requirements of the Real Estate Tax Sale Law, which the Court of Common Pleas of Lackawanna County denied.

During the trial, the director of the bureau testified about the procedures it followed in this tax upset sale, which included sending a letter by certified mail to a Brooklyn, New York, address. However, the letter was returned by the postal service as unclaimed. All of the county records showed the same Brooklyn address, and the Pennsylvania voter registration records did not list the taxpayer. The director acknowledged not checking the Lackawanna County telephone directory for another address for the taxpayer because "[he]

didn't think there was a need" because he did not find that the taxpayer was registered to vote "anywhere in the Commonwealth." The taxpayer testified that, although he owned the Brooklyn address, he has not lived there since his childhood, and the building was rented. The taxpayer contended that the bureau's acknowledged failure to search the county telephone directories invalidated the sale.

The Commonwealth Court reversed the trial court's decision and set aside the property tax sale because the bureau failed to comply with the notice requirements of the Real Estate Tax Sale Law. The court found that the trial court erred in excusing the bureau's failure to search current telephone directories on grounds of futility. The court held that even where the bureau has the correct address, it must make a reasonable effort to locate the property owner when the certified mailing is returned unclaimed. The court noted that the bureau was required, at a minimum, to search current telephone directories, which it did not. As such, the bureau did not reasonably try to find the taxpayer and notify him of the tax sale.

**Downingtown Area School Dist. v. Chester County Bd. of Assessment Appeals (Appeal of Marchwood Associates)**, Pa. Commw. Ct., Dkt. Nos. 1461 C.D. 2016; 1462 C.D. 2016, (07/07/2017) (opinion not reported).

The Downingtown Area School District retained a property tax consulting service firm, Keystone Realty Advisors LLC (Keystone), to review the market values and assessments of properties and identify under-assessed properties on which the school district could file tax assessment appeals. Upon recommendation, the school district filed 23 non-residential assessment appeals to the Chester County Board of Assessment Appeals (assessment board), including assessment appeals of the taxpayer's large apartment complex. After the assessment board issued two decisions indicating no change in the assessment, the school district appealed to the trial court, and the taxpayer asserted a new matter alleging that under the equal protection clause of the U.S. Constitution and the uniformity clause of the Pennsylvania Constitution, the school district's assessment appeal was an unconstitutional spot assessment and discriminated against the taxpayer as a commercial property owner.

On June 1, 2016, the trial court applied the common level ratio to set assessment values for the taxpayer's property

for the years at issue, but did not address the Uniformity or Equal Protection Clause issues. On June 10, 2016, the taxpayer filed post-trial motions, arguing that it had proven that the school district's assessment appeal policy violated the Uniformity Clause. On July 1, 2016, 31 days after the trial court's decisions were issued, the school district filed motions to strike the taxpayer's post-trial motions on the procedural ground as the Pennsylvania Rules of Civil Procedure do not apply in tax assessment appeals and post-trial motions are only permitted in such appeals when specifically permitted by local rule or when a trial court invites a party to file them and here, the local rules do not permit the filing of post-trial motions, and the trial court did not invite the filing of post-trial motions.

The trial court granted the school district's motions to strike the taxpayer's post-trial motions and held that the taxpayer failed to file its appeals from the June 1, 2016 orders on or prior to July 1, 2016. Thus, the court held that the taxpayer's appeals from the June 1, 2016 orders were untimely and not issues that were preserved to appeal.

The Commonwealth Court held that the trial court did not explicitly invite post-trial motions, nor did it schedule argument on them. Thus, the trial court did not err in granting the school district's motion to strike the taxpayer's post-trial motions and, thereafter, in determining that any appeal of the June 1, 2016 orders was untimely and thus, no issues were preserved for appeal. Further, the court held that the taxpayer failed to prove that *nunc pro tunc* relief was warranted because the taxpayer has failed to show extraordinary circumstances involving fraud or a breakdown in the court's operations through an officer's negligent or improper acts. The court noted that the taxpayer's attorney is not an innocent party who was misled, but rather a person who merely made an inaccurate assumption.

***City of Bethlehem v. Kanofsky***, Pa. Commw. Ct., Dkt. No. 1502 C.D. 2016, (05/17/2017) (opinion not reported).

A *pro se* taxpayer appeals the Northampton County Common Pleas Court's order granting the City of Bethlehem's Motion for Judgment for Want of Sufficient Affidavit of Defense (motion) and entering judgment in favor of the city and against the taxpayer. The only issue on appeal was whether the taxpayer raised any cognizable claims in affidavit of defense.

The Commonwealth Court affirmed the trial court's decision that the taxpayer failed to raise any cognizable claims because none of the 12 issues in the taxpayer's 1925(b) statement ordered by the court related to the sufficiency of his affidavit of defense, the only cognizable issue before the court. The court held that because the taxpayer's affidavit of defense contained no allegations relevant to the existence, validity or accuracy of his property's delinquent taxes, the trial court properly determined there were no unresolved issues of material fact and that the trial court properly granted the city's motion and entered judgment in the city's favor against the taxpayer.

### **Board of Finance and Revenue**

***In re Sony Corp. of Am.***, Pa. Bd. of Fin. & Revenue, Dkt. No. 1513777, (01/25/2017).

The taxpayer requested BF&R to strike the Department of Revenue's assessment of its corporate net income tax and asserts that it is entitled to deduct available net loss carryforwards from a single-member LLC that it acquired.

The BF&R denied the petition, finding that the taxpayer could not deduct the net loss carryforwards from the SM-LLC that it acquired because the merger failed to meet the requirements of a Type A merger under I.R.C. § 368(a)(1) (A), allowing the taxpayer to deduct losses. The BF&R denied the remaining relief for the taxpayer's failure to meet the burden of proof.

***In re LBC II SUB III LLC***, Pa. Bd. of Fin. & Revenue, Dkt. No. 1601880, (01/25/2017).

The taxpayer, a limited liability company engaged in investing, requested application of the Keystone Opportunity Improvement Zone (KOIZ) credit. The taxpayer subleased property in the Cira Centre and Pennsylvania Department of Community and Economic Development (DCED) approved the taxpayer as a qualified business. Alternatively, the taxpayer argued that its 2013 franchise tax liability should have been zero using single-factor apportionment because the taxpayer's only asset was an interest in another LLC.

The BF&R denied the petition because the taxpayer did not establish that it directly conducted business in the KOIZ because it had no employees to do so and reported no payroll income. The taxpayer did not have gross receipts to report in a sales factor. Additionally, the taxpayer's request for sin-

gle-factor relief was denied for lack of sufficient information on the percentage of the taxpayer's ownership interest in another LLC.

*In re Wertz II*, Pa. Bd. of Fin. & Revenue, Dkt. No. 1524394, (10/27/2016).

The taxpayer deducted unreimbursed employee business expenses (UE expenses) from his gross compensation in calculating his taxable income for a negotiated payment to the taxpayer's former employer to relinquish rights to the two-year restrictive covenant so that the taxpayer could become employed by a new employer. The taxpayers claimed that the expenses were reasonable, ordinary, actual and necessary to the new job.

The BF&R upheld the personal income tax assessment because the taxpayer failed to establish that the negotiated payment to the taxpayer's former employer to relinquish a non-compete agreement constitutes a valid UE expense. Per ruling, the taxpayer failed to establish that the expenses were ordinary, actual, reasonable and necessary to the business conducted.

## PHILADELPHIA

### Legislative / Administrative Updates

#### **Philadelphia Wage and Net Profits Tax - Philadelphia Bill No. 170198**

Effective July 1, 2017, Philadelphia Bill No. 170198 decreases the rate of Philadelphia earnings tax and wage and net profits tax from 2.4004% (3.9004%, including the 1.5% PICA tax) to 2.3907% (3.8907% including the 1.5% PICA tax) for residents, and from 3.4741% to 3.4654% for non-residents. As the Philadelphia School District income tax is imposed at the same rate as wage and net profits tax for Philadelphia residents (including the 1.5% PICA tax), the Philadelphia School District tax rate also decreases from 3.9004% to 3.8907% effective July 1, 2017.

For more information, please see:  
<https://phila.legistar.com/LegislationDetail.aspx?ID=2978198&GUID=747C17ED-7D22-4F6E-ADAF-909B98F5ED-DA&FullText=1>

#### **Philadelphia Keystone Opportunity Zone, Economic Development District, and Strategic Development Area - Philadelphia Bill No. 170515**

Effective June 21, 2017, Philadelphia Bill No. 170515 provides for extension of Keystone Opportunity Zone, Economic Development District, and Strategic Development Area benefits to certain designated areas and properties in Philadelphia. The extensions or expansions will take effect on approval of an application for the expansion and extension by the DCED as provided by Act of 02/14/2012, P.L. 183, No. 16. Sales tax exemptions for the extended or expanded areas will take effect on a date established by the DCED. All other exemptions, abatements or credits for the extended or expanded areas will take effect on the earlier of: (1) the date on which such parcel is occupied by a qualified business and the existing benefits expire; or (2) such other date as established by the DCED. Once effective, the exemptions, abatements and credits will remain in effect for a period of 10 years.

For more information, please see:  
<https://phila.legistar.com/LegislationDetail.aspx?ID=3053675&GUID=AF2B9ECE-6258-4BB8-9C15-2E639F65167D>

#### **Philadelphia Realty Transfer Tax - Philadelphia Bill Nos. 170016 and 170205**

Effective May 17, 2017, Philadelphia Bill No. 170016 excludes transactions involving the transfer of property between a stepparent and stepchild, or the spouse of a stepchild, from Philadelphia realty transfer tax.

For more information, please see:  
<https://phila.legistar.com/LegislationDetail.aspx?ID=2947969&GUID=36987AE6-8326-4547-A9AA-19203D62F3FB>

Effective May 17, 2017, Philadelphia Bill No. 170205 exempts the Philadelphia Land Bank from the payment of Philadelphia realty transfer tax. The bill also excludes transactions involving the transfer of property to the land bank by gift, dedication or deed, in lieu of condemnation or deed of confirmation in connection with condemnation proceedings or a reconveyance by the condemning body of the property condemned to the owner of record at the time of condemnation, which reconveyance may include property line adjustments provided said reconveyance is made within

one year from the date of condemnation; and conveyances of tax delinquent property to a land bank pursuant to a sheriff's sale or tax claim bureau sale, from the definition of taxable transactions for purposes of the tax.

For more information, please see:

<https://phila.legistar.com/LegislationDetail.aspx?ID=2978205&GUID=EF35275E-F9A3-4ED3-809F-6E7DD-B1576A4&Options=ID%7CText%7C&Search=170205>

### **Philadelphia Earned Income Tax Credits**

Effective May 8, 2017, Philadelphia Bill No. 170245 amends the city's Earned Income Tax Credit (EITC) policy to allow all persons who work in Philadelphia to receive the EITC in addition to those who live in the city. The ordinance amends the provisions governing the duty to provide notice of the EITC program for tax year 2017 and thereafter.

For more information, please see:

<https://phila.legistar.com/LegislationDetail.aspx?ID=2980802&GUID=304E5DB1-A3E9-4FE8-9656-9E41F166B129>

### **Philadelphia Realty Use & Occupancy Tax - Philadelphia Bill No. 170199 and Philadelphia Bill No. 170200**

Philadelphia Bill No. 170199 authorizes the Board of Education of the School District of Philadelphia to continue to impose school district tax on real property located in the city through 2018 and thereafter.

Philadelphia Bill No. 170200 authorizes the Board of Education of the School District of Philadelphia to continue to impose the use and occupancy tax effective July 1, 2017 and thereafter.

### **Commonwealth Court Cases**

*Williams v. City of Phila.*, Pa. Commw. Ct., Dkt. Nos. 2077 C.D. 2016, 2078 C.D. 2016, (06/14/2017).

The Commonwealth Court affirmed the ruling of the Philadelphia County Court of Common Pleas sustaining the preliminary objections of the City of Philadelphia and dismissing the complaint regarding the validity of the Philadelphia Beverage Tax (PBT) and denying taxpayers' petition for a special injunction.

The court affirmed that the PBT did not violate the Sterling Act or is expressly or impliedly preempted by the common-

wealth's sales tax. The PBT taxes non-retail distribution transactions and not retail sales to a consumer. As a result, the PBT does not violate the duplicative-tax prohibition in the Sterling Act or encroach upon a field preempted by the sales tax because the taxes do not share the same incidence and merely have related subjects.

The court also affirmed that the PBT was not implicitly preempted by the § 2013(a) of the federal Food Stamp Act and related regulations, and 72 P.S. § 7204(46), which bar the imposition of a tax on items purchased at retail with food stamps. The court held that the taxpayers' claims are without merit because the federal statute and regulations only prohibit the imposition of a tax on retail purchase transactions, and not a tax on non-retail distribution transactions within the reach of the PBT. Since the PBT is never "collected" upon "purchases" at "retail" and is only collected from either distributors or dealers upon distribution transactions, no recipient of program benefits is ever liable for the payment of the PBT. The fact that the PBT may be passed on to recipients through higher retail prices does not alter the incidence of the PBT nor transform it into a prohibited tax within the purview of Section 2013(a) of the Food Stamp Act, its regulations, or 72 P.S. § 7204(46).

The court also affirmed that the PBT does not violate the Uniformity Clause of the Pennsylvania Constitution because it is not a property tax. The PBT is not imposed on the ownership of the sugar-sweetened beverages or on their sale. Rather, the PBT is an excise tax that is imposed if the beverages are supplied, acquired, delivered or transported for purposes of holding them out for retail sale in the city.

Lastly, the court also affirmed the trial court's denial of a request for a special injunction because the taxpayers could not prevail on the merits of their claims regarding the invalidity of the PBT and as a result were not entitled to injunctive relief.

### **Soda Taxes Elsewhere:**

- ◆ **Santa Fe, New Mexico:** On March 8, 2017, the city of Santa Fe, New Mexico rejected imposition of soda tax at 2 percent per ounce by 11 to 8 margin. The city earmarked the revenue for pre-k education. For additional information, please see: <https://www.usnews.com/news/best-states/new-mexico/articles/2017-05-02/the-latest-santa-fe-soda-tax-vote-draws-crowds>

- ◆ **Cook County, Illinois.** On July 1, 2017, the Cook County Circuit Court granted an emergency motion for a temporary restraining order against the county's imposition of the sweetened beverage tax. The court held that the plaintiffs have established:
  - An ascertainable claim for relief: the plaintiffs will be required to undertake administrative tasks of implementing new systems to comply with the collection and display requirements of the tax;
  - No adequate remedy at law: the defendants' proposal for the refund of taxes in the event the plaintiffs should prevail does not provide a reasonable procedure to return the collected money to the taxpayers.
  - Irreparable harm or damage: the plaintiffs will be irreparably harmed if the tax goes into effect and is subsequently found unlawful. The plaintiffs will suffer from greatly increased administrative and overhead costs that could not be recouped.
  - Likelihood success on the merits: the plaintiffs have persuaded the court that a fair question exists as to the constitutionality of the sweetened beverage tax.

On July 10, 2017, the Illinois Appellate Court, First District, upheld the temporary restraining order staying the implementation of Cook County's sweetened beverage tax. The court directed the circuit court to conduct a preliminary injunction hearing on July 12, 2017, which was rescheduled for July 21, 2017. *Illinois Retail Merchants Ass'n et al. v. Cook Cnty. Dep't of Revenue*; No. 1-17-1587; Case No. 17 L 050596.

- ◆ **Seattle, Washington:** On June 6, 2017, Seattle signed into law legislation imposing a 1.75 cent-per-ounce tax on sodas and other sweetened beverages. The tax will go into effect in January 2018. The city projects the tax will bring in approximately \$14.8 million in 2018.
- ◆ **Massachusetts:** Massachusetts is currently considering soda tax legislation, H. 3329 and S. 1562. Under both bills, beverages containing between five and 20 grams of sugar per 12 fluid ounces would be taxed at one cent per

ounce. Beverages with 20 grams of sugar or more per 12 fluid ounces would be taxed at two cents per ounce. Beverages with non-zero-calorie syrups and powders would also be subject to the tax rates. The tax is expected to generate \$368 million per year.

*City of Phila. v. Rivera*, Pa. Commw. Ct., Dkt. No. 513 C.D. 2016, (06/22/2017) (opinion not reported).

The property owners of a storage garage filed a motion to redeem property after it was sold at a sheriff's sale and a separate motion to set aside the sheriff's sale based on the city's failure to provide proper notice. The city and owners entered into an agreement to redeem the property and the Philadelphia County Common Pleas Court granted additional time to complete the redemption. After the owners failed to redeem the court denied their motion to redeem. However, the owners proceeded with their other motion to set aside the sale, which was granted after the court *sua sponte* raised an issue that the city has failed to comply with the Pa.R.C.P. 3129.2.

The Commonwealth Court reversed the Philadelphia County Common Pleas Court's order setting aside of a sheriff's sale, finding that the property owners of a storage garage were properly served notice of the sale. The court found that the city complied with the Municipal Claims and Tax Liens Act's service requirements. Specifically, per 72 P.S. § 7193.2(c), the notice ordering a tax sale must be served by first-class mail and does not require posting or information pertaining to the date, place and time of the sale be listed in the affidavit of service. Further, per holding in *Mullane v. Cent. Hanover Bank and Trust Co.*, 339 US 306 (1950), the "[d]ue process does not require that a property owner receive actual notice before the government may take his property. [The] due process requires the government to provide 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Thus, since the city complied with the statutory notice requirements, the court reversed the trial court's decision.