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COURT OF APPEALS AFFIRMS REVOCATION OF TAX EXEMPTION FOR PUBLIC PARKING FACILITIES

By Michael J. Hilkin

Reversing a decision by the Appellate Division, the Court of Appeals has held in a 5-2 decision that a charitable organization is not entitled to a continued exemption from real property taxes for the public parking facilities it owns and operates. *Matter of Greater Jamaica Dev. Corp. v. New York City Tax Commission*, N.Y. Decision No. 108 (July 1, 2015).

Facts. Greater Jamaica Development Corporation ("GJDC") was formed in 1967 as a charitable not-for-profit corporation with a mission to promote the development of the business district of Jamaica, Queens. In 1998, it created Jamaica First Parking, LLC ("JFP") to acquire, develop, and operate parking facilities in Jamaica on a nonprofit basis. JFP operated five facilities, four of which had formerly been operated by the New York City Department of Transportation, and the fifth of which was built on vacant land purchased from the City with monies received from the operation of the other four parking facilities. The parking facilities offered below-market rate parking accessible to local retail stores, state and federal office buildings, and religious organizations.

In 2001, the IRS concluded that (1) JFP was a disregarded entity for federal income tax purposes, and (2) JFP's activities would not adversely impact GJDC's federal tax-exempt status because JFP's operation of the parking facilities was "substantially related" to GJDC's charitable purposes and would "lessen the burdens of government." Further, in 2007, the New York City Department of Finance ("Department") granted real property tax exemptions for the five parking facilities pursuant to RPTL § 420-a, which allows a property tax exemption for property owned by entities organized or conducted for charitable purposes when the primary use of such property is for such purposes. However, in February 2011, the Department revoked the property tax exemption prospectively on the grounds that the operation of parking facilities was not a charitable activity as contemplated by RPTL § 420-a.

GJDC and JFP challenged the revocation, and the trial court ruled in the Department's favor. However, as discussed in the January 2014 issue of *New York Tax Insights*, the Appellate Division, Second Department, reversed on the basis that when an exemption has been granted, the Department has the burden to establish "revocation of the tax exemption on the grounds that petitioners' activity did not conform to a

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charitable purpose within the meaning of RPTL 420-a," and that the Department had not met its burden.

The Court of Appeals Decision. The Court of Appeals concluded that the property was not exempt. It found that while the taxing authority seeking to revoke a previously granted property tax exemption carries the *initial* burden of establishing that a property is not exempt from taxation, the Department satisfied this initial burden simply by demonstrating the grounds outlined in the exemption revocation letter provided by the Department. Such grounds included that JFP's parking facilities were not used for a charitable purpose or a purpose incidental to a charitable purpose, but instead were used for economic development, and that JFP collected monies exceeding the costs of the parking facilities and used its excess proceeds to fund other operations, such as the purchase of land for a fifth parking facility. The majority was also persuaded by an affirmation submitted by the New York City Assistant Corporation Counsel, who claimed that the factual allegations in GJDC and JFP's court petition challenging the exemption revocation established that the parking facilities were not entitled to exemption because JFP was created for the sole purposes of acquiring, owning, developing, and operating public parking facilities to promote GJDC's purpose of promoting commerce and business growth in Jamaica.

After finding that the Department had sustained its initial burden, the Court determined that GJDC and JFP failed to carry the burden of showing that the use of JFP's parking lots carried out GJDC and JFP's exempt charitable purpose. The majority determined that evidence of GJDC's and JFP's federal income tax-exempt status was insufficient to establish that the parking facilities were entitled to exemption from real property taxes under RPTL § 420-a, reasoning that the IRS's determination for federal income tax purposes requires "an analysis of the organization and its operation as a whole," while RPTL § 420-a requires both that real property (1) be owned by an entity organized for charitable purposes *and* (2) be used for carrying out such charitable purposes. While agreeing that GJDC and JFP were entities organized and operated for charitable purposes, the majority concluded that they failed to demonstrate that the use of their public parking facilities was consistent with their charitable purposes.

The Court called the operation of parking facilities that enable visitors to frequent local businesses in downtown Jamaica "laudable," but nonetheless concluded such activities were not charitable because they fulfilled the "primary purpose of economic development," focusing on the fact that the economic benefit conveyed by the below-market rate parking provided by JFP inures to the benefit of private enterprise. The majority also rejected the argument that the parking facilities fulfilled a "charitable" purpose by lessening the burden on local government—even though federal Treasury Regulations specifically identify such a purpose as charitable for federal income tax purposes.

Notably, a dissenting opinion strongly took issue with the majority's conclusions. The dissent stated that no change in facts or law predicated the change in the tax exemption for JFP's parking facilities, and that the Department's explanation for revoking the exemption was that the Department made a "mistake" and "erroneously awarded" the exemption "in the first instance." The dissent then classified the taxing authority's revocation of the exemption as a "flip-flop," and stated that a taxing authority should be required to show "some objective indication" other than a "mere change of heart" for revoking a previously issued exemption.

Additional Insights

It had been well established under New York law that when a taxing authority has granted a property tax exemption and later attempts to revoke it, the burden of proof is on the taxing authority. *See, e.g.*, *Matter of New York Botanical Garden v. Assessors of the Town of Washington*, 55 N.Y.2d 328 (1982). In this case, however, the burden on the taxing authority appears to have been easy to meet. As discussed in the dissent, no facts or law changed between the time the Department granted an exemption for JFP's parking facilities in 2007 and revoked such exemption in 2011. Instead, it appears that the Department reexamined the facts surrounding JFP's parking facilities and reached a different legal conclusion—or, in the words of the dissent, had a "change of heart"—and the majority agreed with the Department's revised reasoning.

STATE AND CITY TAX DEPARTMENTS ISSUE GUIDANCE ON INVESTMENT CAPITAL IDENTIFICATION REQUIREMENTS

By Irwin M. Slomka

The New York State Tax Department (for Article 9-A) and New York City Tax Department (for the new Subchapter 3-A tax) have issued memorandums containing guidance as to how stock must be "clearly identified" in order to qualify as investment capital.

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Technical Memorandum, TSB-M-15(4)C, (5)I, "Investment Capital Identification Requirements for Article 9-A Taxpayers," (N.Y.S. Dep't of Taxation & Fin., July 7, 2015); *Finance Memorandum*, "Investment Capital Identification Requirements for the Corporate Tax of 2015," (N.Y.C. Dep't of Fin., July 17, 2015).

Under last year's New York State corporate tax reform legislation, the definition of "investment capital" was narrowed, and investment income was made entirely exempt from Article 9-A tax. This past spring, significant "technical" changes were made to the definition of investment capital, resulting in a new five-part test. Among other things, in order to qualify as investment capital, the stock must be held for investment for more than one year, and, for stock acquired after 2014, the stock must have never been held for sale to customers in the regular course of the taxpayer's business. The five-part test also applies to the new Subchapter 3-A tax that replaces the New York City general corporation tax for most corporations.

One important new criterion under the new law is that before the close of the day on which the stock is acquired, the stock must be "clearly identified" in the taxpayer's records as stock held for investment (as required for securities dealers under IRC § 1236(a), whether or not the taxpayer is a dealer).

The memorandums provide that for securities dealers subject to IRC § 1236, in order to qualify as investment capital, the stock must be timely identified in the corporation's records as being held for investment under IRC § 1236(a)(1). That federal identification will be determinative in qualifying as investment capital, and a separate New York identification will not be accepted by the Department. It will not be sufficient for a securities dealer to merely identify the stock as being held for investment under IRC § 475 (relating to mark to market accounting for securities dealers).

For non-dealers, in order to be "clearly identified," the stock must be recorded, by the close of the day it is acquired, in a separate account maintained solely for investment capital purposes. The investment account must disclose, among other things, the CUSIP number for the stock, the date of purchase, the number of shares purchased, and the purchase price. The investment account can be maintained in the taxpayer's books of account for recordkeeping purposes only, or it may be a separate depository account maintained by a clearing company as nominee for the taxpayer. For stock acquired by non-dealers before October 1, 2015, a transition rule permits the taxpayer to make the necessary identification before October 1, 2015 (the transition rule does not apply to securities dealers).

The pronouncements also address the identification requirements where stock is owned by a partnership. If a corporate partner in such a partnership follows the aggregate method of taxation, then the partnership itself must follow the identification rule, even though it is not the actual "taxpayer."

Additional Insights

The 2015 "technical" changes regarding investment capital were quite substantive, and they impose significant recordkeeping requirements on both dealers and non-dealers in order to treat stock as investment capital. The apparent thrust of the 2015 legislation was to provide a bright-line test for whether stock qualifies as investment capital, particularly for securities dealers, where the failure to designate the stock as an investment for purposes of IRC § 1236(a)(1) will now be determinative. It is likely that many dealer firms currently do not make an IRC § 1236(a)(1) election for stock but will now have to do so in order to obtain investment capital treatment. The absence of a transition rule for dealers means that such firms run the risk that previously purchased stock can never qualify as investment capital if they did not make an IRC § 1236(a)(1) identification.

For non-dealers seeking investment capital treatment for stock acquired before October 1, 2015, it will be critical to comply with the new identification requirements for that stock before October 1, 2015, or else risk foregoing investment capital treatment. It seems clear that one important consequence of corporate tax reform—not fully apparent until the 2015 technical changes were enacted—is to severely limit the availability of investment capital treatment.

APPELLATE DIVISION AFFIRMS DENIAL OF INVESTMENT TAX CREDIT TO NUCLEAR POWER PLANT THAT PRODUCES STEAM AND WATER TO GENERATE ELECTRICITY

By Kara M. Kraman

In a unanimous decision, the Appellate Division has affirmed a New York State Tax Appeals Tribunal decision holding that certain assets used in the operation of a pair of nuclear power plants to produce steam used to generate electricity did not qualify for the investment tax credit ("ITC") for manufacturing under Article 9-A.

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Matter of Constellation Nuclear Power Plants LLC v. Tax Appeals Trib. of the State of N.Y., 2015 N.Y. Slip Op. 06183 (3d Dep't, July 16, 2015).

The taxpayer owned and operated two nuclear power plants in New York State. Equipment at both plants created steam from water, which was then used to generate electricity. The steam was then condensed back into water so the cycle could be repeated. Both plants used the steam to generate the electricity that they sold. Both of the plants sold only electricity and did not sell steam or water.

At issue was whether the taxpayer was entitled to an ITC for the specific equipment used solely to create steam and to condense it back into water. An ITC is allowed under Article 9-A for tangible personal property and other tangible property that is "principally used" by the taxpayer in the production of "goods" by manufacturing. Tax Law § 210(12)(b)(i)(A). Under the case law, "goods" constitute "tangible movable personal property having intrinsic value." *Matter of Leisure Vue, Inc. v. Comm'r of Taxation & Fin.*, 172 A.D.2d 872 (3d Dep't, 1991). The term "goods" does not include electricity. Tax Law § 210(12)(b)(i)(A).

The taxpayer did not claim the ITC for equipment that was directly used to produce electricity. However, it did claim the ITC for the equipment engaged in producing steam from water and water from steam on the grounds that such equipment was not used to produce electricity, but rather to manufacture or process "goods" in the form of steam and water.

The Tribunal had rejected the taxpayer's argument, finding that the power plants utilized "unified, integrated processes that harnessed the energy from nuclear fission and produced electricity" and that "it is inappropriate to artificially divide a unitary process when the facts show that the parts and steps operate interdependently and indivisibly in accomplishing a singular task." Accordingly, the Tribunal determined that the equipment was principally used in the production of electricity and did not qualify for the ITC.

The Tribunal also rejected the taxpayer's argument that it was principally engaged in producing a "good," concluding that the taxpayer failed to carry its burden of establishing that either the water or steam was a "good" suitable for use.

Court Decision. On appeal, the Appellate Division, Third Department, affirmed the Tribunal's decision in its entirety. The court concluded that the equipment was principally used in the production of electricity because all of the disputed assets were necessary to the ultimate purpose of producing electricity, and that the water and steam were produced only to serve the purpose of manufacturing electricity. The Appellate Division distinguished its decision in *Matter of Brooklyn Union Gas Company v. N.Y. State Tax Appeals Trib.*, 107 A.D.3d 1080 (3d Dep't, 2013), noting that, in that case, the individual analysis of certain component parts of a taxpayer's integrated gas delivery system was undertaken to determine whether those assets were used for the separate purpose of manufacturing rather than distribution, and that ultimately it was found that those parts were not used in manufacturing because they did not significantly change the nature of the gas delivered.

The court concluded that the equipment was principally used in the production of electricity because . . . the water and steam were produced only to serve the purpose of manufacturing electricity.

The Third Department also held that even when the equipment used to produce water and steam was viewed in isolation, the Tribunal correctly determined that such equipment was not engaged in manufacturing. The court noted that the equipment served to convert water into steam, and steam into water again, in an ongoing continuous cycle that made no permanent change in the water and yielded no final product. Accordingly, it concluded that such assets were not principally engaged in producing any tangible property other than electricity.

Additional Insights

Although the Appellate Division expressly rejected the idea that *Brooklyn Union Gas* "mandate[s] an asset-by-asset approach," it also expressly rejected the idea that *Brooklyn Union Gas* mandates "any other specific form of inquiry as the prescribed method by which the Tribunal must determine eligibility for investment tax credits." This is significant because it suggests that there could be facts and circumstances under which an asset-by-asset approach would be appropriate in determining whether the ITC applies. However, to employ such an approach, a taxpayer would presumably need to at least be able to demonstrate that the equipment is used to manufacture a good that is itself eligible for the ITC, and that the good is not produced solely for the ultimate purpose of producing another good that is not eligible for the ITC.

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TAX APPEALS TRIBUNAL HOLDS SALES TAX APPLIES TO FIXED MONTHLY CHARGES FOR MOBILE VOICE SERVICES

By Hollis L. Hyans

The New York State Tax Appeals Tribunal has affirmed the decision of an Administrative Law Judge holding that bundled charges for interstate and intrastate wireless voice services were subject to New York sales tax in full. *Matter of Helio, LLC*, DTA No. 825010 (N.Y.S. Tax App. Trib., July 2, 2015).

Facts. Helio LLC sold wireless mobile telephone and Internet access services to customers throughout the United States, including in New York, during 2006 through 2009, the audit period. It offered two fixed monthly plans: "A La Carte" plans allowed interstate and intrastate voice calls and ancillary services, such as call waiting and call forwarding, for a specified number of minutes per month, with charges varying based on the number of minutes purchased. "All-In" plans were similar, but also included data-based services such as Internet access, text messaging, and email, and had higher monthly rates. Helio also invoiced its customers for its costs of contributing to the Federal Universal Service Fund ("FUSF"), relying on safe harbor percentages established by the Federal Communications Commission to calculate the amount of FUSF contribution cost fee to charge to its customers.

Helio collected and remitted New York sales tax only on the portion of the fixed monthly charges for the two plans that it determined was attributable to voice services for New York intrastate calls, and argued that the portion attributable to interstate calls was not subject to New York sales tax. It did not collect sales tax on the FUSF contribution fees that it recovered from its customers. Helio also charged per-minute overage charges to customers who exceeded their allotted minutes each month.

The Department of Taxation and Finance assessed sales tax on the full amount of the fixed monthly charges for both plans, taking the position that bundled charges were taxable in their entirety, and tax on the FUSF fees. The Department also assessed tax on all of the overage charges. Minimum interest was imposed, but not penalties, and the Department stated in the audit report that reasonable cause existed for Helio's filing position.

ALJ Decision. The ALJ rejected Helio's argument that the language in Tax Law § 1105(b)(1), which imposes tax on telephony and telephone services "except interstate and international . . . telephone . . . service and except any telecommunications service the receipts from the sale of which are subject to tax under paragraph two of this subdivision . . . " provided an exception from tax for charges for interstate calls, whether separately stated or bundled with charges for intrastate calls. The ALJ focused on § 1105(b)(2), which imposes tax on "[t]he receipts from every sale of mobile telecommunications service . . . or any other services that are taxable under subparagraph (B) of paragraph one . . . sold for a fixed periodic charge (not separately stated) . . . " (emphasis added), and found that the full amount of fixed monthly charges for mobile voice services is subject to tax and not covered by the exception in § 1105(b)(1) for interstate telephony. The ALJ also found that the FUSF fees were properly subject to tax because they were an integral part of the service that Helio chose to pass on to its customers.

The Tribunal agreed with the ALJ's analysis and found that the exception from tax in Tax Law § 1105(b)(1) for interstate and international service charges did not apply to bundled charges.

The ALJ did agree with Helio that overage charges and Internet charges were not subject to tax, and the Department did not appeal those findings to the Tribunal.

Tribunal Decision. The Tribunal agreed with the ALJ's analysis and found that the exception from tax in Tax Law § 1105(b)(1) for interstate and international service charges did not apply to bundled charges. As did the ALJ, the Tribunal focused on the language in § 1105(b)(2). It found that the statute imposed tax on "'all voice services' that are 'sold for a fixed periodic charge'" and "does not differentiate between intrastate or interstate and international service." The Tribunal agreed with the ALJ that Helio's interpretation of § 1105(b)(2) would make the use of the word "or" meaningless, and every word in a statute should be deemed to have a meaning. Like the ALJ, the Tribunal relied in part on the decision in *People v. Sprint Nextel Corp.*, 41 Misc. 3d 511 (N.Y. Sup. Ct., NY Cnty. 2013), *aff'd.*, 114 A.D.3d 622, *leave to app. granted*, No. 103917/11 (1st Dep't, June 12, 2014), stating that the court in *Sprint Nextel* found statutory

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construction arguments similar to those made by Helio to be inconsistent with the statute's plain language. The Tribunal found further support for its decision in Tax Law § 1111(l)(2), which sets forth provisions for computing receipts from mobile telecommunications services, and found that it expressly "does not allow for the unbundling of mobile telecommunications voice services from a periodic charge," only for the unbundling of other telecommunications services that are not voice services.

The Tribunal also agreed with the ALJ in rejecting Helio's argument that the federal Mobile Telecommunications Sourcing Act ("MTSA") preempts the Tax Law, finding no conflict between the Tax Law and the MTSA, since the MTSA only applies to tax on mobile telecommunications charges aggregated with other charges if the taxing jurisdiction does not otherwise subject the mobile telecommunications charges to tax, and here New York does otherwise subject the charges to tax. The Tribunal also held that the FUSF charge was subject to tax, and rejected Helio's attempt to rely on an ALJ decision in another case as being "settled law" that such fees are not subject to tax, *Matter of XO New York, Inc.*, DTA No. 820634 (N.Y.S. Div. of Tax App., Dec. 28, 2006), pointing out that since ALJ decisions may not be cited as precedent, they can hardly be relied upon to establish "settled law." Finally, the Tribunal found no basis in Helio's equal protection argument, since it concluded that all mobile telecommunications services sold for a fixed charge are subject to tax.

Additional Insights

This is the second publicly reported case to deal with the question of exactly what is subject to tax when charges for interstate mobile telephone services– which, if separately set forth, are clearly not subject to tax—are bundled with charges for taxable intrastate services, and whether mobile service providers may use reasonable methods to estimate and segregate the charges. Although the Tribunal agreed with the Department's interpretation of the statute, there is an exemption provided in Tax Law § 1105(b)(1) for interstate charges, and the auditors apparently recognized that other interpretations of the statute are not unreasonable in not imposing penalties. The Tribunal also relied in part on the Third Department's decision in the *Sprint Nextel* case, without noting that leave to appeal that decision was granted, and that the case is currently pending before the Court of Appeals, where it has not yet been argued. It is interesting to note that in *Sprint Nextel*, the case was brought by the Attorney General under the False Claims Act, and substantial penalties are being pursued against a taxpayer who took a position apparently similar to that taken by Helio, against whom no penalties were asserted at all by the Department, raising further questions about whether actions brought under the False Claims Act are an appropriate vehicle for resolving complicated statutory interpretation issues.

COURT REMANDS FOR FURTHER PROCEEDINGS ON AWARD OF COUNSEL FEES UNDER THE FREEDOM OF INFORMATION LAW

By Irwin M. Slomka

In pursuing Freedom of Information Law requests to the New York State Department of Taxation and Finance, some taxpayers and representatives may be unaware that the Public Officers Law permits a court to award "reasonable attorney's fees" where the requesting party "substantially prevails" in appealing a wrongful denial of access to records. A recent court decision, while not dispositive of the issue, serves as a reminder of this potentially important tool. *Matter of Richard T. Saxton, et al. v. N.Y.S. Dep't of Taxation & Fin., et al.*, Memorandum & Order, Case No. 520128 (3d Dep't, July 9, 2015).

Public Officers Law § 89.4(c) provides that a court may assess against an agency "reasonable attorney's fees and other litigation costs reasonably incurred . . . in any [Freedom of Information Law] case . . . in which such person has substantially prevailed." The case stemmed from a criminal State tax proceeding against an individual. The individual, along with his counsel's employee, filed a Freedom of Information Law ("FOIL") request with the Department seeking various records relating to the Department's criminal investigation of the individual. After a long delay, the Department provided numerous records, and the Records Appeals Officer certified that there were no other records responsive to the request.

The individual brought an Article 78 appeal, after which the Department acknowledged that there were approximately 135 additional records that had not been disclosed, despite the certification. An Albany County Supreme Court judge concluded that the individual had "substantially prevailed" and ordered the Department to pay him $25,000 in counsel fees, out of a request for nearly $135,000 in counsel fees.

The individual appealed that award, contending that the judge's decision to limit attorney fees was an abuse

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of discretion. The Third Department acknowledged that the judge had the discretion not only to determine whether counsel fees should be awarded, but also in calculating the reasonable amount of any reward, and noted that such awards generally will not be disturbed on appeal absent an abuse of discretion by the court. The court concluded that the judge had failed to explain how he applied the various relevant factors for determining the award of legal fees. It therefore reversed the award of attorney fees, and remitted the matter back to the judge for a more detailed disposition.

Additional Insights

The ability to recover attorney's fees in a FOIL appeal in which the requesting party "substantially prevails" in the courts is an important protection against the Department withholding documents where it had no reasonable basis to do so. Unlike the recovery of litigation costs under Tax Law § 3030—which applies in tax cases at the administrative or judicial level—the award of legal fees under FOIL is not limited to prevailing parties that fall below a threshold net worth amount or that are businesses with not more than 500 employees. This case illustrates the importance of adequately documenting those legal fees that are incurred by reason of the Department's wrongful refusal to disclose.

INSIGHTS IN BRIEF

State Tribunal Upholds Rejection of Sales Tax Exemption Certificates

The New York State Tax Appeals Tribunal has upheld an Administrative Law Judge decision holding that a company that provided security guard services subject to sales tax failed to prove that it relied in good faith on exemption certificates received from customers. *Matter of Crown Security, LLC, et al.*, DTA Nos. 824873 & 824957 (N.Y.S. Tax App. Trib., July 2, 2015). The exemption certificates produced by the company were found to be incomplete and, in all but one instance, identified the purchase of tangible personal property rather than security services. The Tribunal also held that since the company had been advised during a prior sales tax audit that its services were subject to sales tax, it could no longer rely "in good faith" on exemption certificates.

Taxpayer Subpoena Challenge Rejected by State Tribunal

A taxpayer's challenge to an Administrative Law Judge's issuance of *subpoenas duces tecum* on the grounds that the subpoenas were preempted under ERISA was rejected by the New York State Tax Appeals Tribunal. *Matter of Patrick Murphy, et al.*, DTA No. 825277 (N.Y.S. Tax App. Trib., July 2, 2015). The Tribunal held that it could not address the taxpayer's newly raised argument that ERISA preempted the Division of Tax Appeals from making a determination as to the existence of an ERISA plan. The Tribunal concluded that the issues raised should first be resolved through the hearing process, and since the subpoenaed documents were not "utterly irrelevant to any proper inquiry," it upheld the ALJ's order denying the taxpayer's motion to withdraw the subpoenas.

S Corporation Held to be Engaged in For Profit, Allowing Losses to be Taken by Shareholders

A New York State Administrative Law Judge has rejected the Department's claim that an S corporation's activities were not engaged in for profit, and that therefore its individual owners could not deduct losses from the S corporation on their State resident income tax returns. Applying the various factors used by the courts and contained in federal tax regulations in determining whether an activity is engaged in for profit within the meaning of IRC § 183, the ALJ concluded that the weight of the evidence supported the taxpayers' position that the antiques business and real estate activities of the S corporation were engaged in for profit and not as a hobby. *Matter of Steve and Linda Horn*, DTA No. 825333 (N.Y.S. Div. of Tax App., July 2, 2015).

Action for Legal Malpractice Based on Advice Provided in 2005 Allowed to Proceed

In *Overseas Shipholding Group, Inc. v. Proskauer Rose, LLP, et al.,* 2015 N.Y. Slip Op. 05772 (1st Dep't, July 2, 2015), the Appellate Division denied a motion to dismiss a legal malpractice claim arising out of tax advice provided in connection with a restructuring and credit facility agreement, and found that the claim was adequately pleaded and should proceed to trial. The court rejected arguments that the action was time-barred, since the plaintiff claimed that the allegedly deficient advice, while beginning in 2005, continued through the course of an ongoing representation and that it continually relied on the defendants' advice. It also rejected a claim that a 2006 credit facility agreement drafted by a different law firm severed any causal connection between the work done in 2005 and plaintiff's increased tax liability, noting that issues of causation are for the trier of fact and not to be resolved on a motion to dismiss.

State Tribunal Affirms Holding of Responsible Person Liability

The New York State Tax Appeals Tribunal affirmed the decision of an Administrative Law Judge that the wife

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of the owner of an entity operating BMW motorcycle dealerships was personally responsible for unpaid sales and use tax owed by the entity. *Matter of Susan Sacher*, DTA No. 824107 (N.Y.S. Tax App. Trib., July 2, 2015). The Tribunal noted that she had held herself out to third parties as an officer of the business, since she was listed as a corporate officer on various bank accounts, and that she had provided both a personal guaranty and a corporate guaranty. It also found that Mrs. Sacher had gained a "unique economic benefit" from the motorcycle franchise business, since she operated a motorcycle insurance business to which the dealerships' customers were referred for insurance, and that she had conceded liability as a responsible person for periods both before and after the separate periods at issue.

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Panhandle Eastern Pipeline Co. v. Kansas
Pier 39 v. San Francisco
Powerex Corp. v. Oregon
Rent-A-Center v. Oregon
Reynolds Metals Company v. Michigan
Reynolds Metals Company v. New York
R.J. Reynolds Tobacco Co. v. New York
San Francisco Giants v. San Francisco
Science Applications International Corporation v. Maryland
Scioto Insurance Company v. Oklahoma
Sears, Roebuck and Co. v. New York
Shell Oil Company v. California
Sherwin-Williams v. Massachusetts
Sparks Nugget v. Nevada
Sprint/Boost v. Los Angeles
Tate & Lyle v. Alabama
Thomson Reuters v. Michigan
Toys "R" Us-NYTEX, Inc. v. New York City
Union Carbide Corp. v. North Carolina
United States Tobacco v. California
UPS v. New Jersey
USV Pharmaceutical Corp. v. New York
USX Corp. v. Kentucky
Verizon Yellow Pages v. New York
Wendy's International v. Illinois
Wendy's International v. Virginia
Whirlpool Properties v. New Jersey
W.R. Grace & Co.—Conn. v. Massachusetts
W.R. Grace & Co. v. Michigan
W.R. Grace & Co. v. New York
W.R. Grace & Co. v. Wisconsin

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