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PA TAX LAW NEWS

CORPORATE NET INCOME TAX - Nonbusiness Income, Fair Apportionment and Unrelated Asset Arguments Rejected *by James L. Fritz*

In a recent 4-3 decision, Pennsylvania's Commonwealth Court rejected the Glatfelter Pulpwood Company's request to exclude from its Corporate Net Income Tax base the extraordinary gain on its sale of Delaware timberland pursuant to a plan by which the company sought to dispose of most of its timberland holdings (362 F.R. 2007, May 4, 2001). The timberland was part of holdings the company had used to generate 25% of the pulpwood it sold to its parent, a paper manufacturing company. The subsidiary company historically had made pulpwood acquisitions on the open market to provide the other 75% of its parent's pulpwood requirements. The court refused to grant relief on three basic grounds.

Nonbusiness Income

First, the court rejected the company's argument for "nonbusiness income" treatment. Similar to many other states, in Pennsylvania "nonbusiness income" is income other than "business income," which is defined as:

> Income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if either the acquisition, the management or the disposition of the property constitutes an integral part of the taxpayer's regular trade or business operations. The term includes all income which is apportionable under the Constitution of the United States.

The company had made only inconsequential sales of timberland prior to adopting its "Timberland Divestiture Plan." Although a series of sales were made under the Plan, the court majority agreed with the company that the sale of Delaware timberland was not a "transaction … in the regular course of [Glatfelter's] … business" – referring to the first part of the "business income" definition, traditionally called the "Transactional Test."

However, the court's majority did conclude that the sale met the second part of the "business income" definition – known as the "Functional Test." Here, the majority believed the management and disposition of the Delaware timberland were an integral part of the company's business. The majority distinguished the Pennsylvania Supreme Court's 1994 decision in *Laurel Pipe Line Company v. Board of Finance and Revenue*, 537 Pa. 205, 642 A.2d 472 on the basis that Laurel had liquidated a distinct part of its pipeline holdings, while Glatfelter continued its business and, in the majority's eyes, did not liquidate a part of its business.

Had the majority viewed the sale as part of a liquidation, it would have needed to address changes made by Act 23 of 2001 – after *Laurel* was decided – which changed the wording of the Functional Test from the conjunctive to the disjunctive, and added the "apportionable under the Constitution" catchall language to the "business income" definition. A footnote in the majority opinion, however, suggests that the changes would likely yield a different result if facts similar to *Laurel* again come before the court.

Since the three dissenters did not write a dissenting opinion, it is not possible to know whether they disagreed with the majority's nonbusiness income analysis.

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Fair Apportionment

One suspects, however, that the dissenters may have taken issue with the majority's fair apportionment analysis under the Commerce Clause and Due Process requirements – the company's second argument. The most problematic fact in this case is that, taken together, Delaware and Pennsylvania taxed 142% of Glatfelter's income. Without the gain from sale of the Delaware timberland, the company realized a loss. Delaware taxed 100% of the gain on the land – which one could argue was fair because that state provided various legal, environmental and other protections to the land holding. Pennsylvania, however, attempted to impose a tax of more than $2 million based on a gain from sale of property to which it arguably provided few or no benefits and protections.

The majority cited to the four-prong test set out in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the second prong of which requires that a state tax be "fairly apportioned" and the fourth prong of which requires that the tax be "fairly related to the services provided by the state." Applying what is generally known as the "Internal Consistency" test of fair apportionment, the majority noted that the test was satisfied because if every state applied Pennsylvania's version of the three-factor apportionment formula, no more than 100% of Glatfelter's income would be taxed.

The majority, however, did not specifically discuss the "External Consistency" test of fair apportionment. This is curious since actual double taxation would seem to be a factor requiring consideration of that test.

The majority held that the tax passed muster under the fourth prong of the Complete Auto test because Pennsylvania hosted the infrastructure used by Glatfelter to deliver all its pulpwood - thereby providing services for which it could fairly ask compensation by taxation. We suspect, however, that the company may argue on appeal that Pennsylvania provided no services to the Delaware land, itself, and by taxing 42% of the gain on sale of that land, imposed a tax out of all reasonable proportion to the benefits provided by the Commonwealth.

Unrelated Assets

Glatfelter also argued for relief under what we call Pennsylvania's "Multiformity and Unrelated Assets Doctrine." This doctrine has some similarities to the Unitary Business doctrine. But, since Pennsylvania is a separate-company state, the PA doctrine looks only at the activities and assets of the company being taxed by the Commonwealth. The doctrine excludes lines of business which are not operationally integrated with the business activities conducted by the company within the state, and excludes investments and other assets which are not used in the integrated business conducted in whole or in part in the state. With facial logic, the court majority rejected this argument because Glatfelter had used its timberland holdings as part of its integrated pulpwood production and acquisition business.

We expect that Glatfelter will file exceptions to the Commonwealth Court's decision and that, ultimately, the case will be appealed to the Pennsylvania Supreme Court.

If you have any questions concerning Pennsylvania corporate taxes, please contact Jim Fritz (jfritz@mwn.com) or another member of the McNees SALT group. ■

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REAL ESTATE ASSESSMENT DEADLINES APPROACHING - Opportunities May Exist for Businesses to Reduce Taxes *by Randy L. Varner*

The annual deadlines to file real estate tax assessment appeals in Pennsylvania counties are fast approaching. Most counties have set deadlines of either August 1 or September 1, so it is important that business property owners evaluate their assessments immediately in order to determine whether an appeal is necessary. If your business owns property in a county that is undergoing a county-wide reassessment, in most cases your appeal will be due 40 days after the date on the notice of reassessment.

While your business should review assessments on an ongoing basis to ensure that it is not paying too much in property taxes, it is especially important that it does so in this economic climate. The fair market value of your business property should be based on what a prospective purchaser would pay for the property. An assessment that reflected fair market value in past years may now be too high as a result of the decline of the fair market value of your property. For instance, if your business has lost tenants or has suffered other adverse consequences that may have led to a decline in the property's fair market value, the assessment is probably too high.

We can help you evaluate whether a tax assessment appeal would be appropriate. Given the impending appeal deadlines, it is important that the analysis be started soon. Please feel free to contact me at 717.237.5464 or rvarner@mwn.com, or any other member of the McNees SALT group to discuss any assessment that you feel may be too high. ■

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PA TAX TIPS - Sales & Use Tax Exclusions for Manufacturing, Fabricating, Compounding, Processing and "Other Operations" *by James L. Fritz*

In the January 2011 edition of the *PA Tax Law News* newsletter, we offered a broad overview of the production-based exemptions under Pennsylvania's Sales & Use Tax, Capital Stock and Franchise Taxes, local Business Privilege Taxes and Real Property Tax. This article focuses on a more detailed discussion of the activities qualifying under the Pennsylvania Sales & Use Tax exclusions for Manufacturing, Fabricating, Compounding, Processing and "Other Operations."

The Tax Reform Code provides a specific listing of activities qualifying as "processing" and a general definition for "manufacture."

Specifically Defined "Processing"

The Legislature has defined "processing" to include a number of somewhat narrowly proscribed activities, many of which were added after tax auditors challenged their qualification under "manufacturing" or other more broadly-defined exclusions. These activities include the Cooking, Baking or Freezing of Fruits, Vegetables, Mushrooms, Fish, Seafood, Meats, Poultry or Bakery Products and packaging for wholesale distribution; the Electroplating, Galvanizing, Enameling, Anodizing, Coloring, Finishing, Impregnating or Heat Treating of Metals or Plastics; the Production, Processing and Bottling of Non-alcoholic beverages for wholesale distribution; and twenty additional categories of activities which are listed in the January article.

Specifically Deemed "Manufacture"

The statute provides that "manufacture" shall include, but not be limited to, specific activities, including publishing, printing, mining, quarrying, research and several other activities also listed in the January article.

Specifically Deemed Not to be "Manufacture"

The statute also specifically indicates that "manufacture" shall not include: constructing, altering, servicing, repairing or improving real estate; repairing, servicing or installing tangible personal property; producing a commercial motion picture; and the cooking, freezing or baking of fruits, vegetables, mushrooms, fish, seafood, meats, poultry or bakery products.

General Definition of "Manufacture"

For everyone conducting activities not specifically listed as exempt or taxable, the statute provides the following general definition of "manufacture:"

> The performance of manufacturing, fabricating, compounding, processing or other operations, engaged in as a business, which place any tangible personal property in a form, composition or character different from that in which it is acquired whether for sale or use by the manufacturer…

72 P.S. § 7201(c).

Manufacturing

The term "manufacturing" has been used as a basis for exemption in a number of other tax statutes. Since the term was not defined in those statutes, the courts developed various expressions of the meaning of the term. Generally, the courts have defined the term narrowly. As discussed below, the sales and use tax definition of "manufacture," on the whole, provides a significantly broader result. However, it is important to remember that any activity which has already been determined to qualify as "manufacturing" under other taxes will automatically qualify as "manufacture" for sales and use tax purposes.

Following are some examples of activities held to constitute "manufacturing" under taxes other than the Sales & Use Tax:

- Producing asphalt
- Making cabinets
- Candy production
- Ready-mixing concrete
- Sewing garments (but not just embroidering garments)
- Producing Coke or gas from coal
- Making skim milk or buttermilk powder, sour cream, butter, cottage cheese or ice cream
- Tanning animal skins
- Producing iron from iron ore
- Refining crude oil
- Making potato chips
- Building new engines
- Shoemaking
- Producing snow from water and compressed air

Fabricating

The term "fabricating" is not defined in the sales and use tax statute or in the related Revenue Department regulations. An early sales and use tax case looked to the following dictionary definition:

> To form into a whole by uniting parts; to frame; construct; build, as, to fabricate a bridge or ship; to fabricate a book, specif.: To make, shape, or prepare (a part of anything, as of a ship, bridge, automobile, etc.) according to standardized specifications, so as to be interchangeable. To construct or build up into a whole by uniting interchangeable or standardized parts, often made elsewhere; as, a fabricated ship, automobile, or the like. To form by art and labor; to *manufacture*; produce.

Commonwealth v. Donovan, 76 Dauph. 191 (1960).

The court noted several activities, previously treated as "manufacturing," that could also be considered "fabricating:"

- Manufacturing of steam engines
- Making of aluminum awnings
- Making of gummed paper

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- Making of barrels from staves, hoops and nails
- Printing and publishing of books and periodicals

In a letter ruling, the Department of Revenue characterized the cutting and pre-drilling of components and the pre-assembly of cabinetry as "fabrication" activities. Similarly, a taxpayer making various building and pole signs was referred to as a fabricator in another ruling.

As will be discussed below, the sales and use tax exclusion for "manufacture" requires only a change in "form, composition or character," which would seem to encompass many "fabricating" activities.

Compounding

Few Pennsylvania cases discuss the terms "compound" or "compounding" in a taxation context. An early case looked to a definition in Webster's New International Dictionary, defining "compound" as:

> To put together, as elements, ingredients, or parts, to form a whole; to combine; unite. To form or make up, as a composite product, by combining different elements, ingredients; or parts; as, to compound a medicine. … To compose; to constitute.

Commonwealth v. Donovan Co.

In addition to the compounding of a medicine, the court noted that the making of concrete from cement, sand and crushed stone and the making of asphalt floors could be considered "compounding," noting that such activities had previously been exempted under other taxes as "manufacturing." The court considered the following activities, previously held to constitute "manufacturing" to "more properly" fall within the bounds of "processing" or "compounding:"

- Production of artificial gas
- Refining of crude petroleum and producing lubricating and illuminating oils
- Making condiments, drugs and dyes
- Brewing of malt liquors
- Making soft drink syrup and flavoring extracts
- Production of coke from Coal
- Producing wood alcohol, charcoal, tar and acetate of lime by burning cordwood in retorts
- Making butter and cheese
- Production of artificial gas for illumination
- Production of peanut butter
- Making potato chips
- Making gasoline
- Making ice cream, cottage cheese and butter

Processing

One of the more confusing aspects of Pennsylvania's current sales and use tax statute is that it provides separate exclusions for tangible personal property used in "manufacture" and for that used in "processing," then defines "manufacture" to include "processing." The key is that the separate exclusion for "processing" is qualified by reference to the list of specific activities in the definition of that term set out in the statute (see discussion above). The term "processing" as used in the definition of "manufacture" includes no such qualification. The term "processing" as used in defining "manufacture," therefore, refers to the common meaning of the term.

The sales and use tax authorities speaking to the common meaning of "processing" are somewhat limited. As discussed above under "compounding," the Dauphin County Court of Common Pleas' 1960 decision in the Donovan case lists a number of activities that may have been characterized as "processing" or "compounding," but does not make clear which would be the more descriptive term. In *Commonwealth v. C.F. Manbeck, Inc.*, 45 Pa. D. & C.2d 549 (Dauph. Co. C.P. 1967) the court treated the taxpayer as a "processor" and described the company as being "engaged in the business of preparing, processing and packaging frozen poultry in sealed containers for wholesale distribution."

A better understanding of the common meaning of "processing" may be gained from an examination of the following activities which were denied the "manufacturing" exemption under other taxes but would seem to qualify as "processing:"

- Pasteurization of milk and the production of condensed and evaporated milks were merely "processing" – use of large, expensive machinery notwithstanding
- Production of smoked hams, pickled and dry pork
- Cleaning, drying, pickling, salting, smoking, boiling and baking of meat
- Milling of grain and spinning of cotton
- Extracting usable iron from steel plant slag
- Processing of unfinished cloth by dying, autoclaving, bulking, adjusting stretch, curing, flame retarding, heat setting, mildew proofing, imparting permanent press, water repellence and dimensional stability, and changing terry cloth to velour
- Preparation of foods by process of cutting, chopping or dicing and then blending
- Production of fruit juice, fruit drinks and iced tea by process of adding water and sucrose to a fruit juice slurry or to a powdered mix
- Cutting, pressing and folding cloth

"Other Operations"

In *Commonwealth v. Sitkin's Junk Co.*, 412 Pa. 132, 194 A.2d 199 (1963), the Pennsylvania Supreme Court established beyond question that the sales and use tax exclusion for "manufacture" would be given a much broader meaning than had been given the "manufacturing" exemptions under the Capital Stock Tax and other taxes.

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Sitkin purchased mixed and unsorted scrap metal. Utilizing certain machinery and equipment, Sitkin removed unusable portions and sorted the scrap. Sitkin then sometimes cut the scrap into "convenient lengths" and sometimes baled the scrap. Through Sitkin's actions, the scrap was made useful in the production of steel and Sitkin sold it to various steel mills.

Prior to this decision, the lower court had interpreted the sales and use tax exclusion for "manufacture" to have the same basic meaning as the "manufacturing" exemptions from Capital Stock, Franchise and local mercantile taxes – requiring the production of a "new and different product." Taking this approach, the Dauphin County Court of Common Pleas had held that Sitkin did not produce a new product. However, on review, the Pennsylvania Supreme Court noted:

> By specifically defining 'manufacture,' the legislature indicated its intent that 'manufacture' be construed in accordance with the statutory language and that the construction of such word was not to be controlled by prior judicial construction of such word under prior tax statutes. By way of example, the Act provides that the finished product had to be 'different' from that form in which it was acquired whereas under prior judicial construction the finished product had to be both 'new and different.'

Analyzing the statutory definition, the Court noted that, to satisfy the definition of "manufacture," an activity must be a type of activity described in the definition, and must produce a result specified in the definition. Under the statute, the activity must be Manufacturing, Fabricating, Compounding, Processing, or "Other Operations." Based on principles of statutory construction, the Court interpreted legislative intent to require "other operations" to "include and embrace other types of activities not covered by the words 'manufacturing, fabricating, compounding, processing.'" The court then cited a dictionary definition indicating that "[a]n 'operation' is an 'action' or 'activity' and is the 'action of making or producing something.'"

Applying this broad definition of "other operations," the Court held that Sitkin's activities qualified.

Transformation of Form, Composition or Character

The statutory definition further requires that the activity place tangible personal property "in a form, composition or character different from that in which it is acquired whether for sale or use by the manufacturer …." 72 P.S. § 7201(c). In *Sitkin's*, the Court did not dwell on the specifics of "form," "composition" or "character" but ruled more generally that all three "change standards" of the statute were satisfied:

> The court below took the position that the scrap subjected to the taxpayers' activities remained scrap even when such activities had been completed. That may well be. However, such scrap, after and as a result of the handling and activities of the taxpayers, was in 'a form, composition and character' different from that scrap which had been acquired by the taxpayers. Posed in another fashion, would the Commonwealth assert that a farmer who purchased machinery to drain marsh land was subject to tax on such machinery because, after its operation upon the land, land remained where there was land before and that it was not, therefore, used directly in a farming operation? We think not. In the one case there is a different category of land while in the case at bar there is a different category of scrap; as a result of both operations that which was useless has been rendered useful and, in each instance, something different has been produced.

The key takeaway from this statement is that the change need not rise to the level of something "new" – it is sufficient if there has been some lesser degree of change. Subsequent cases have addressed the required change somewhat more specifically.

In *Commonwealth v. Air Products and Chemicals, Inc.*, 475 Pa. 318, 380 A.2d 741 (1977), the Pennsylvania Supreme Court ruled that conversion of a liquefied gas into a gasified state was a sufficient change in "form, composition or character."

In *Commonwealth v. Goodyear Tire and Rubber Co.*, 88 Dauph. 301 (1967), the court concluded that the retreading of a tire did not produce a change in form or character, however, the vulcanization of the "green tread" attached to the worn tire carcass produced chemical and physical changes which constituted a change in "composition" as specified in the statute. The court cited a dictionary definition stating that:

> Composition is the 'formation of a whole particular arrangement or combination of parts of a unit or whole.'

However, the Commonwealth Court's decision in *Marweg v. Commonwealth*, 513 A.2d 525 (1986), holding the production of ice not to qualify as "manufacture," suggests that if the change is easily produced the activity may not qualify.

After *Sitkin* and its progeny, the key to qualifying for the sales and use tax exclusion for manufacture appears to depend, first, on establishing that the activity rises at least to the level of an "other operation" – a relatively low hurdle. Second, it must be shown that the result of the activity is somehow "different" in form, composition or character but the change is not so slight or so easily produced as to be viewed as superficial.

The terms "manufacturing," "fabricating," "compounding" and "processing" all seem more demanding than "other operations." As a result, those terms probably add value primarily by suggesting that

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any activity previously characterized by one of these terms should likely qualify for exclusion from sales and use tax.

Examples of "Manufacture"
Following are examples of activities which have been treated as "manufacture" for sales and use tax purposes:

- Conversion of liquid to gas
- Use of cameras, film, and other equipment to produce custom portraits
- Making pizzas
- Retreading tires (including vulcanization)
- Production of Electricity; Production of Electricity using landfill gas, natural gas, or solar panels
- Producing skin lotions and moisturizers by combining raw materials such as cocoa butter or mineral oil, heating, agitating and homogenizing
- Producing canned (not custom) software
- Spot welding steel and plating to produce metal shelving

Following are examples of activities denied exclusion for "manufacture" under the sales and use tax statute:

- Internet Service Provider's conversion of electronic signals.
- Making ice on a commercial basis
- Printing customer invoices which did not consist of "substantially similar matter"

If your company is engaged in activities seemingly like those described above as qualifying for exemption, but you have not been claiming exemption on services, materials, equipment and supplies used in those activities, we would be happy to help you determine whether you should begin claiming exemption and whether you may have potential refund claims! ■

PENNSYLVANIA DEPARTMENT OF REVENUE RELAXES "PAY TO PLAY" RULE - Posting Security May Not Be Required *by Randy L. Varner*

In Miscellaneous Tax Bulletin 2011-01, the Pennsylvania Department of Revenue changed its policy concerning security to be filed in cases where taxpayers appeal Board of Finance and Revenue decisions on petitions for reassessment.

Until the release of 2011-01, if a taxpayer wanted to keep the Department from filing a lien or engaging in other collection activities during the pendency of the appeal, the taxpayer had to file security, usually in the form of a bond or letter of credit, in an amount equal to 120% of the tax found due and owing by the Board of Finance and Revenue. The recent bulletin provides an alternate, less expensive method for taxpayers to forestall liens and collection activities.

Now, within 30 days of filing a petition for review to the Pennsylvania Commonwealth Court in which a taxpayer seeks review of a Board of Finance and Revenue decision, the taxpayer may submit a current financial statement to the Department showing that the ultimate collection of the amount contested in the appeal is not in jeopardy. If the Department agrees that the unpaid amount is not in jeopardy, the Department will not require the filing of security, and will not file a lien or pursue any other collection action during the pendency of the appeal.

If the taxpayer fails to submit a financial statement, or if after examining a submitted financial statement the Department determines that the unpaid amount is in jeopardy, it will notify the taxpayer that it intends to file a lien or pursue other collection action. In such a case, the taxpayer will be provided with 15 days to file appropriate security with the Court before the Department takes any action. ■

MARCELLUS SHALE NATURAL GAS WELL "IMPACT FEE" PROPOSED - Majority of Revenues Targeted to Local Government *by Randy L. Varner*

Senator Joe Scarnati (R-Jefferson) has recently proposed a plan that would impose an "impact fee" upon Marcellus Shale natural gas wells, with most of the generated revenue being targeted to those local governments most affected by Marcellus Shale drilling.

Under the proposal, a "base fee" of $10,000 would be imposed on each Marcellus Shale well, which is adjustable based on volume and price adjustment factors. As volume and prices increase, the base fee would rise. The proposal tags the Pennsylvania Public Utility Commission (PUC) as the collector and distributor of the impact fee. Initially, the proposal would capture fees from 2010 by making them payable in two equal installments on August 1, 2011 and October 1, 2011. Thereafter, a year's fees would be due on March 1 of the following year.

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PAYMENT FOR USE OF COIN-OPERATED AIR VENDING MACHINE NOT SUBJECT TO SALES TAX *by Sharon R. Paxton*

In *Air-Serv Group, LLC v. Commonwealth*, No. 459 F.R. 2008 (April 14, 2011), a three-judge panel of the Commonwealth Court ruled, with one dissent, that charges for the use of coin-operated air vending machines are not subject to sales tax. The court concluded that the air dispensed from such a machine does not constitute "tangible personal property" and that the process of using a vending machine to pump air is not a taxable service.

Air-Serv owns, installs, maintains, and services coin-operated air vending machines, which are located at gas stations and convenience stores. It charges a fee for the right to use its machines, which pump air from the atmosphere through a compressor, for a specific number of minutes. The charge for use of the machines does not vary with the amount of air placed into a tire or other inflatable device, or with the amount of time for which the machine is operated. Air-Serv asserted that atmospheric air is not taxable as "tangible personal property" for several reasons. The court agreed, noting that the air dispensed from Air-Serv's vending machines is not chemically different from atmospheric air and that atmospheric air is not "personal property" because it is not subject to ownership by any private individual, group or entity.

In addition to arguing that atmospheric air is "tangible personal property," the Commonwealth had contended that the process of using a vending machine to pump air is a taxable service because a customer inflating a tire is engaged in altering, mending or repairing tangible personal property, which is a taxable service. The parties had stipulated that Air-Serv is selling an entirely different kind of service – "the opportunity to use the vending machine's compressor to pump air for a fixed period of time." The court therefore determined that Air-Serv's air vending service is not subject to sales tax because it is not a specifically enumerated taxable service, and it is not analogous to any of the taxable services enumerated in the statute and the Department of Revenue's regulations.

Judge Leadbetter dissented on the basis that Air-Serv is not selling air, but rather the right to use its equipment for a fee, which is taxable as a rental or license to use tangible personal property. In a lengthy footnote, the majority rejected the dissent's position for several reasons. First, the majority determined that it would be inappropriate for the court to raise this issue on its own since the parties had not raised or briefed this issue and had not developed a factual record concerning this question. Regarding the merits of the dissent's position, the majority further noted the possibility that the machines might be fixtures, a form of real property, and not personal property. Since the parties did not stipulate to any facts pertaining to whether the air vending machines were fixtures or personal property, the majority determined that the state of the record precluded the court from reaching the issue of whether the use of an air vending machine is a taxable rental or license. ■

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Revenues generated from the fee would be split three ways. First, the majority of the funds would be distributed to local governments through a newly created "Local Services Fund." The Local Services Fund would be distributed by giving 36% of the fund to counties with Marcellus Shale wells, 37% of the fund to municipalities with Marcellus Shale wells, and 27% of the fund to municipalities having no wells, but located in counties with Marcellus Shale wells. Counties and municipalities could use these funds for road and bridge repair, preservation and improvement of water supplies and surface waters, maintenance and improvements to waste and sewage systems, and other activities related to health, welfare and safety consequences of Marcellus Shale gas wells. Of particular interest is that the proposal would prohibit a municipality that adopts an overly restrictive drilling zoning ordinance from receiving any revenues from the fee.

A portion of the revenues also would be allocated to conservation districts across the state, and to address statewide environmental and infrastructure impacts.

Revenue estimates have been projected using the recent averages of volume and gas price and assume 1,500 new Marcellus Shale wells per year. The total 2010/2011 fees collected are projected to be $121.2 million, for 2012 the projection is $103 million, for 2013 the projection is $127 million, for 2014 the projection is $150 million, and finally for 2015, fees are estimated at $172 million. Supporters of the proposal note that the revenue projections for the impact fee are higher than several of the severance tax plans that were considered during the past few years.

Importantly, because the proposal has been crafted as a "fee" rather than a "tax," and with none of the proposed revenues earmarked for the General Fund, it has a chance of being signed by Governor Corbett.

We will continue to monitor this proposal and others that relate to the imposition of fees and taxes on the Marcellus Shale industry. ■

RECENT REAL ESTATE TAX DECISIONS

by Timothy J. Horstmann

***Church of the Overcomer v. Delaware County Board of Assessment Appeals*, No. 269 C.D. 2010 (March 17, 2011)**

The Commonwealth Court has held that a church's community center was not entitled to an exemption from real estate taxation. After first determining that the exempt status of the community center must be considered separate from the status of the church, the Court considered whether the community center met all of the requirements of the Institutions of Purely Public Charity Act. The Court determined that the center had failed to satisfy the "community service" and "charity to persons" elements of the Act, because the center failed to show that it provided services to individuals unable to provide for themselves, or had made known the availability of free services to the public.

***City of Philadelphia v. Cumberland County Board of Assessment Appeals*, No. 1725 C.D. 2010 (April 4, 2011)**

The Commonwealth Court has held that investment property owned by a charitable trust was not entitled to an exemption from real estate taxation. The trustee, the City of Philadelphia, derived investment income from the property which it used for the benefit of Girard College. The Court determined that the City's role as trustee did not establish that the trust was a Commonwealth agency immune from real estate taxation. The Court also determined that the trust, while qualifying as an institution of purely public charity, did not use the instant property for its charitable purpose, as it was used solely to generate investment income.

***Blair v. Berks County Board of Assessment Appeals*, No. 1310 C.D. 2010 (May 3, 2011)**

The Commonwealth Court has affirmed a decision of the Court of Common Pleas of Berks County, which, among other things, applied the common level ratio to the value of a farmstead located on a forest reserve, but not eligible for preferential assessment under the Clean and Green Act. Under the statute at issue, the assessment of a farmstead not eligible for a Clean and Green preferential assessment must be assessed based on its fair market value. However, that assessment must meet the Constitutional requirement of uniformity. Therefore, the application of the common level ratio was proper.

***Elmhurst Group v. Board of Property Assessment Appeals and Review*, No. 2258 C.D. 2009 (May 3, 2011)**

The Commonwealth Court has held that property owned by the Allegheny County Industrial Development Authority and leased to a for-profit entity responsible for its property taxes was properly subject to real estate taxation. Relying heavily upon its prior decision in Tech One Associates – a decision that has been appealed to the Pennsylvania Supreme Court – the Court held that where the lessee assumes the responsibility for paying the taxes, the buildings and other improvements on the leased property must be included in a property's assessed value, as the economic realities are different than a lease where the lessor is responsible for the taxes. ■

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