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New York Audit Software Subject to Freedom of Information Law Disclosure

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In *Matter of TJS of N.Y., Inc. v. New York State Dept. of Taxation & Fin.*, Case No. 512259 (N.Y. App. Div. 3d Dep't Nov. 3, 2011), the Appellate Division held that the Department of Taxation & Finance was required to turn over audit software in response to a Freedom of Information Law ("FOIL") request from a taxpayer.

The taxpayer, TJS of New York, Inc. ("TJS"), appealed the Department's denial of a FOIL request for records in connection with a sales tax audit performed by the Department. The lower court ordered the Department to provide TJS with copies of its records in an electronic format. Although the Department complied with this request, some of the provided data could not be viewed without a copy of the Department's Audit Framework Extension software, which the Department refused to provide. TJS moved to compel

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State Audit Software Subject to FOIL

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production of the software so that it could view the Department's electronic files, and the lower court denied TJS' motion, concluding that the software was exempt from FOIL under Public Officers Law § 87(2)(i), which exempts material that, "if disclosed, would jeopardize the capacity of an agency… to guarantee the security of its information technology assets."

THE APPELLATE DIVISION EXPLAINED THAT STATUTORY EXEMPTIONS FROM FOIL ARE NARROWLY CONSTRUED TO PROVIDE MAXIMUM ACCESS, AND THE AGENCY SEEKING TO PREVENT DISCLOSURE CARRIES THE BURDEN OF DEMONSTRATING THAT THE REQUESTED MATERIAL FALLS SQUARELY WITHIN A FOIL EXEMPTION BY ARTICULATING A PARTICULARIZED AND SPECIFIC JUSTIFICATION FOR DENYING ACCESS.

In reversing the lower court, the Appellate Division held that the software at issue constituted a "record" for FOIL purposes because it contained information. The Appellate Division rejected the Department's argument that the software was a mere "delivery system," finding that the software was the "means" for conducting an audit. Using data entered by an auditor, the software performed reconciliations, created letters, produced forms, determined taxes due or refunds owed, and created a comprehensive audit report.

The Appellate Division also rejected the Department's argument that the software was exempt from FOIL under Public Officers Law § 87(2)(i). The Appellate Division explained that statutory exemptions from FOIL are narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access.

According to the Department, the software qualified for exemption from FOIL because it could be used to generate false letters or forms which, if sent to taxpayers, could lead them to disclose confidential information. The Appellate Division disagreed with the Department and concluded that, on its face, the information technology exemption relied upon by the Department is concerned with ensuring the security of information technology assets. As the Department did not articulate a concern regarding the use of the software to breach or compromise its own information technology infrastructure, the Appellate Division concluded that the Department failed to meet its burden of demonstrating the applicability of the exemption.

Additional Insights

It is interesting to note that the taxpayer in this case apparently had to bring two proceedings in the trial court (first to obtain the electronic records themselves, and then to seek the necessary software to read the records), and another in the Appellate Division just to obtain copies of the records used by the Department in issuing an assessment of tax due. Without such information from the Department's files, it can be very difficult to challenge an assessment and, as seen in this decision, courts generally recognize the importance of providing full information.

Taxpayers making FOIL requests to obtain audit information in connection with their petitions to the Division of Tax Appeals should be aware that neither the Division of Tax Appeals nor the Tax Appeals Tribunal have jurisdiction to provide a remedy if the Department claims that materials are exempt from FOIL disclosure. *Matter of Markowitz*, DTA No. 801735 (N.Y.S. Tax App. Trib., Feb. 27, 1998). Instead, taxpayers may appeal the denial of access to requested records with the Records Access Officer pursuant to the Department's regulations, and a final denial of access by the Records Access Officer is subject to judicial review. To seek relief from a final denial of access by the Records Access Officer, a taxpayer must institute a CPLR Article 78 proceeding in the New York Supreme Court. N.Y. Pub. Off. Law § 89(4)(b).

Payments for Telephone Number "Porting" Services Not Subject to Sales Tax

By Irwin M. Slomka

The New York State Department of Taxation and Finance has ruled that telecommunications carriers' payments to an administrator to manage and maintain regional databases for telephone number "porting" are not subject to New York sales and use tax. *Advisory Opinion*, TSB-A-11(25)S, Oct. 11, 2011. The Advisory Opinion presents an interesting situation where the Department prudently concluded that payments that were, at least in part, for access to data were nonetheless not in exchange for a taxable information service.

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Payments for "Porting" Services Not Taxable

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The facts in the Advisory Opinion are very detailed but can be summarized as follows: Under the Federal Telecommunications Act of 1996, local exchange and cellular telephone carriers ("carriers") must provide phone number "portability"—that is, telephone service customers who switch carriers must be allowed to retain their telephone numbers. This "porting" of numbers between carriers is facilitated by a Local Number Portability Administrator ("LNP Administrator"). The LNP Administrator works under a Master Agreement which sets forth all pricing and charges for these services.

The LNP Administrator maintains a database enabling carriers to identify and route phone numbers to effectuate a portability system. All carriers within a region have access to the LNP Administrator's database of telephone numbers. The LNP Administrator facilitates this system by, among other things, maintaining a data center, developing software, integrating the proper hardware, collecting the numbering information, providing security and a disaster recovery center, and issuing reports regarding these services. The data supplied by the carriers to the LNP Administrator remains the property of the carrier furnishing the data.

The FCC requires that carriers contribute to the cost of maintaining these portability centers and allowing portability in a competitively neutral manner pursuant to 47 CFR § 52.32. Accordingly, these "shared costs" or "allocable charges" are allocated by the LNP Administrator to each carrier based on the carrier's end-user telecommunications revenues. The charges are unrelated to the number of "porting transactions" for the respective carriers. Since 2009, the aggregate amount of allocable charges is a predetermined fixed fee negotiated with the carriers.

The LNP Administrator invoices the allocable charge to each carrier each month using an "invoice rate" adjusted annually based on collection history. Where the invoice rate results in the over or under collection of the total allocable charges, the under or over collections balance (plus interest) is applied as a credit or debit each year.

The Department was asked whether the "shared cost" charges for these services—which include the furnishing of phone number information—are subject to sales and use tax. The Department concluded that the charges are not subject to tax. It noted that the LNP Administrator is providing a variety of services in operating and maintaining a portability system far beyond the mere furnishing of phone number information. Moreover, the payments by the carriers are not for any single aspect of the service; rather, they are required by law to pay for the costs of portability in general. The Department also noted that the LNP Administrator does not own the telephone number information being conveyed. According to the Advisory Opinion, "in light of all the circumstances here, the shared costs Petitioner allocates to the telecommunications carrier . . . are not payments for a taxable service."

Additional Insights

The Advisory Opinion reaches the right result, but curiously does not even mention that the critical issue was whether the payments were in exchange for taxable "information services." Indeed, without actually saying so, the Department has applied the "primary function" test in concluding that the payments were not for an enumerated taxable service. The Advisory Opinion can best be read as concluding that, although information is being provided by the LNP Administrator to the carriers, the *primary function* of the service is the operation of a telephone number portability system. This seems reasonable, particularly in light of the 2009 and 2010 administrative law judge decisions in *Matter of Nerac*, DTA Nos. 822568 & 822651 (N.Y.S. Div. of Tax App., July 15, 2010) and *Matter of Telecheck*, DTA No. 822275 (N.Y.S. Div. of Tax App., Nov. 5, 2009)—neither of which was appealed by the Department—in which application of the primary function test to consulting and check-verification services, respectively, were held not to constitute taxable information services.

Although there was undoubtedly information being furnished to the carriers here, the Advisory Opinion did *not* apply the so-called "cheeseboard" rule contained in 20 NYCRR 527.1(b) to the allocated "shared cost" charges. Under that rule, where taxable and nontaxable goods or services are furnished as part of a "bundled transaction" (such as a taxable cheeseboard sold with nontaxable cheese), and where the charge for the taxable component is not separately broken out, then the entire "bundled charge" is taxable.

Failure to Serve Notice on Representative Tolls Time to File Protest

By Hollis L. Hyans

A petition challenging a sales tax assessment that was filed well outside the 90-day statutory appeal period was nonetheless allowed to proceed because the Department of Taxation and Finance had failed to serve the taxpayer's representative with a copy of the Notice of Determination. *Matter of Rosalind Sanchez*, DTA No. 823870 (N.Y.S. Div. of Tax App., Nov. 3, 2011).

Failure to Serve Notice on Representative Tolls Time to Protest

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In a Notice of Determination dated September 8, 2009, the Department asserted sales and use tax liability against Ms. Sanchez as an allegedly responsible officer of a corporation of which she was president. A petition challenging the Notice on behalf of Ms. Sanchez was not filed until September 2010, a year later. In response, the Department moved to dismiss the petition as untimely.

The Department submitted evidence of its general practice and procedure for processing statutory notices, and affidavits establishing that the Notice was properly mailed to Ms. Sanchez on September 8, 2010, including proof that a piece of mail bearing the assigned certified control number was delivered to her address. However, no copy of the notice was sent to Ms. Sanchez's claimed representative, a CPA, who was named on a Power of Attorney on behalf of both Ms. Sanchez and the corporation.

The Department argued that the power of attorney was effective only for the corporation, since the form listed only the corporation's address, without a personal address for Ms. Sanchez; provided only the corporation's EIN; and had the entry of "president" under the "title" heading.

The Administrative Law Judge rejected the Department's arguments. He found that the power of attorney did in fact list "two distinct taxpayers, petitioner and the corporation of which petitioner was president." It was signed by Ms. Sanchez; it listed two assessment numbers, one of which was for the notice issued to her in her personal capacity; it stated that it related to sales tax; and it listed the same period as was set forth in the Notice of Determination. The ALJ found that the power of attorney expressed a "clear intent" to name the representative on behalf of Ms. Sanchez in her individual capacity, and was sufficient to put the Department on notice that the representative had been appointed. Since the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with a copy of the statutory notice, the time to file a petition had not expired, and the Department's motion for summary determination was denied.

Additional Insights

In practice, the statutory time frame for filing a protest in response to a Notice of Determination – 90 days – is very strictly applied. However, as the ALJ noted in *Sanchez*, it has been established that a taxpayer's properly named representative must be served with a copy of any statutory notice, and failure to serve a copy on the representative tolls the 90-day period. The rationale for this requirement was set forth by New York's highest court in *Matter of Bianca v. Frank*, 43 N.Y.2d 168, 173 (1977), in which the Court of Appeals stated that, "once a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. …[A]ny documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney. This is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified." The Tax Appeals Tribunal has applied this rule more broadly, even when the representative named is not an attorney, as was the case in *Sanchez*. *See Matter of Multi Trucking, Inc.*, DTA Nos. 804829 & 804830 (N.Y.S. Tax App. Trib., Oct. 6, 1988). Here, although the power of attorney was signed on behalf of both the corporation and the individual who was its president, the ALJ found that it clearly served to put the Department on notice that the representative was named by the individual, as well as the corporation, and that the representative needed to be served.

THE ALJ FOUND THAT THE POWER OF ATTORNEY EXPRESSED A "CLEAR INTENT" TO NAME THE REPRESENTATIVE ON BEHALF OF MS. SANCHEZ IN HER INDIVIDUAL CAPACITY, AND WAS SUFFICIENT TO PUT THE DEPARTMENT ON NOTICE THAT THE REPRESENTATIVE HAD BEEN APPOINTED.

The decision does not reveal whether the corporation had filed a timely protest to the Notice of Determination. However, as discussed in the *Matter of Grillo* decision reported on page 5, it is worth noting that the statute also provides that a timely petition filed with the Division of Tax Appeals by an entity contesting a sales tax liability is deemed to include any separate personal determinations issued against allegedly responsible officers, and the individuals do not even need to file separate petitions. Tax Law § 1138(a)(3)(B).

New York Real Property Owned by a Partnership Not Includible in Decedent's New York Estate

By Kara M. Kraman

The Department of Taxation and Finance has ruled that a nonresident decedent's interest in a revocable trust that held an interest in a partnership that held New York State real property was

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Real Property Not Included in New York Estate

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not includible in the decedent's New York gross estate. *Advisory Opinion*, TSB-A-11(1)M (N.Y.S. Dep't of Taxation & Fin., Aug. 19, 2011). The Department concluded that the decedent's interest in the revocable trust was an intangible asset, and not includible in the decedent's New York gross estate, even though the partnership held by the trust owned New York realty.

The estate of an individual who was not a New York State resident at the time of death is nonetheless subject to the New York estate tax if the estate includes real or tangible personal property sitused in the State, and the gross estate, plus adjusted taxable gifts and specific exemptions, exceeds $1 million. For nonresident decedents, the estate tax is calculated by multiplying the amount of the maximum state death tax credit by a fraction, the numerator of which is the decedent's New York gross estate and the denominator of which is the decedent's federal gross estate. A nonresident decedent's New York gross estate is equal to the personal and real property in the Federal gross estate that have an actual situs in New York. For New York State estate tax purposes, the gross estate includes all property that a person owned, had control over, or had an interest in on the date of his or her death, including real property.

At the time of the decedent's death, the decedent was domiciled in Virginia and did not maintain a residence in New York. Several years prior to her death, the decedent established a revocable trust which owned a 50 percent general partnership interest in a partnership that owned eight cooperative apartments in Brooklyn, New York.

In the Advisory Opinion, the Department ruled that the decedent's interest in the revocable trust that held, through the partnership, New York real property, was not includible in the New York gross estate. In reaching its conclusion, the Department relied on an earlier Advisory Opinion in which it found that the nature of a decedent's interest in a revocable trust depended upon the nature of the property held by the trust. *Advisory Opinion*, TSB-A-10(1)M (N.Y.S. Dep't of Taxation & Fin., April 8, 2010) (ruling that an interest in a revocable trust that held an interest in an LLC that elected to be taxed as a partnership and that owned New York real property was an intangible asset and not includible in the New York gross estate numerator).

Pursuant to Tax Law § 951(a), the Department must look to the Internal Revenue Code ("IRC") to determine the nature of the estate's interest in a partnership. Under the IRC, a partnership is considered to be separate from its owner. Thus, for New York State estate tax purposes, an interest in a partnership is generally considered an intangible asset and is not part of a decedent's New York gross estate, regardless of whether the partnership owns New York real property. Accordingly, the Department ruled that where the property held by a decedent's revocable trust is a general partnership interest in a partnership that holds real property, the decedent's interest in the revocable trust constitutes intangible property and is thus not includible in the New York gross estate.

Additional Insights

The result in this opinion is in marked contrast to the well-established principle that holding a general partnership interest in a partnership that owns New York real property will subject a nonresident individual partner to New York State *income* tax. For purposes of determining whether a taxpayer is subject to State income tax, the Department looks through the partnership owning New York real property, and treats each partner as owning property in the State. However, in determining whether a decedent is subject to the New York estate tax, the Department does *not* look through the partnership and attribute its ownership of real property in New York to each of its partners. This Advisory Opinion is a reminder that nonresident decedents can minimize their New York estate tax by not holding New York real property directly.

No Costs Allowed to Petitioner Who Challenged a Sales Tax Assessment

By Hollis L. Hyans

A New York State Administrative Law Judge has denied an application for costs and fees filed by a petitioner who had succeeded in substantially reducing the asserted tax liability through settlement. *Matter of Frank M. Grillo*, DTA No. 823237 (N.Y.S. Div. of Tax App., Nov. 3, 2011). The decision turned on whether the position of the Department of Taxation and Finance was substantially justified, and that, in turn, depended upon whether the Department had used the correct address when it sent the Notice of Determination to the petitioner.

The case arose out of an assessment issued to Mr. Grillo in March 2007 as an allegedly responsible officer for payment of taxes claimed due from Trinsic Communications, Inc. Trinsic's primary business address was in Tampa, Florida. Since January of 1995, Mr. Grillo had lived in Jackson, Mississippi. He joined Trinsic in April of 2003 as its senior vice-president – business group, and was solely responsible for Trinsic's business sales and marketing until August 2004. While his official business address was at Trinsic's Tampa offices, he continued to live in Jackson, Mississippi, and worked primarily out of an office maintained by

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No Costs Allowed to Petitioner

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Trinsic in Alabama. Mr. Grillo was appointed Trinsic's acting chief operating officer in August 2004, following the resignations of the company's previous chairman, president and chief executive officer, senior vice president and chief technology officer. He continued to work primarily from Alabama through August 2005, and resigned from Trinsic effective September 30, 2005. He remained a resident of Mississippi until he moved to Georgia in 2007.

Trinsic filed for protection under Chapter 11 of the United States Bankruptcy Code in February 2007, and entered into an asset purchase agreement for the sale of substantially all of its operating assets, which was approved by the Bankruptcy Court on March 23, 2007. On April 9, 2007, Trinsic filed a motion to convert its Chapter 11 proceeding into a Chapter 7 liquidation proceeding. Mr. Grillo also filed for personal bankruptcy protection.

Audit and Assessment. The audit of Trinsic had commenced in May 2005, just a few months before Mr. Grillo left his position. Despite requests by the Department, no responsible party questionnaire, which would have included home addresses, was submitted for him. No New York State resident or nonresident personal income tax returns had been filed, and Mr. Grillo did not appear in the Department's data system.

Using the LexisNexis database, the auditor had found 16 different addresses for Mr. Grillo's name and social security number, and was unable to narrow the information. Trinsic's 2004 federal income tax return listed the company's Tampa address as Mr. Grillo's address. On March 2, 2007, the Department issued a Notice of Determination to Mr. Grillo as a responsible officer for $646,823, plus penalty and interest, in sales and use tax allegedly due from Trinsic for the period from December 1, 2003, through May 31, 2005, and mailed the notice to him at Trinsic's Tampa, Florida, address.

Protest Filed. In June 2009, Mr. Grillo responded to a collection call from the Department made to his mobile phone and provided his current Georgia home address. A copy of the notice was then sent to him at the Georgia address, and he stated that he had been unaware of the existence of the notice prior to his receipt of this copy in 2009. He filed a petition challenging the notice on September 12, 2009. Since a timely petition had been filed in response to an associated assessment filed against Trinsic, the individual protest was therefore also considered timely under Tax Law § 1138[a][2][B], which provides that timely protests filed by a business will also be deemed to include protests by individuals charged with responsible person liability.

In 2010, Mr. Grillo entered into a negotiated closing agreement with the Department resolving all issues upon payment of $17,283. The closing agreement did not address whether either of the parties was the prevailing party, which left Mr. Grillo with the option of seeking costs and fees. He filed an application for $44,525 in attorneys' fees and nearly $100 in expenses. He also provided information concerning his net worth, which was a negative number, his responsibility for payments ordered by the Bankruptcy Court, and identification of other assets.

Application for Costs. In order to be entitled to costs, a party must be the "prevailing party," and have a net worth that does not exceed $2 million. Even if both criteria are met, the Department is not required to pay fees and costs if it can establish that its position was "substantially justified." Tax Law § 3030. In his application for costs, Mr. Grillo alleged that he was the prevailing party, due to the substantially reduced dollar amount for which the assessment was resolved, and that the Department should not have mailed the notice to him at the company address two years after he had left his employment. Therefore, he argued that the Department was not substantially justified in its actions. No other ground, such as a claimed lack of personal responsibility for the company's taxes, was raised.

THE ALJ FOUND THAT, UNDER THE CIRCUMSTANCES, WHERE THE AUDITOR HAD TRIED TO LOCATE A PERSONAL ADDRESS BUT HAD BEEN UNABLE TO DO SO, RELIANCE ON THE COMPANY'S ADDRESS WAS REASONABLE, AND "CONSTITUTED THE USE OF 'SUCH ADDRESS AS MAY BE OBTAINABLE'"

The ALJ first concluded that, in light of the reduction of assessed tax from nearly $650,000, plus penalty and interest, to the settlement amount of a little over $17,000, even without more information concerning the basis for the reduction, "petitioner was clearly the prevailing party with respect to the amount in controversy." Since his net worth did not exceed $2 million, he was entitled to receive fees and costs under the statute, unless the Department established that its position was substantially justified.

The ALJ reviewed the Department's efforts to find the correct address for Mr. Grillo, noting that in general it was not sufficient simply to mail a responsible person notice to the address of the business. The statute requires mailing to the person's last known address, and refers to use of an address given in the last return or application filed; if no such filing was made, notice must be sent "to such address as may be obtainable." Tax Law § 1147(a)(1).

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No Costs Allowed to Petitioner

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Here, no filings had been made by Mr. Grillo in New York, and the ALJ acknowledged that there was no evidence he was ever obliged to make such a filing. Nonetheless, the ALJ found that, under the circumstances, where the auditor had tried to locate a personal address but had been unable to do so, reliance on the company's address was reasonable, and "constituted the use of 'such address as may be obtainable'" as required by the statute. Therefore, he held that the Department had established it was substantially justified, and no fees or costs would be awarded.

Additional Insights

The ALJ found that it would have been "patently unreasonable" to require the Department to have mailed a copy of the notice to all 16 possible personal addresses it found in its database search, although the opinion does not reveal whether any of those addresses were actually correct. The ALJ also notes that the petitioner did not suggest any other reasonable efforts that the Department could have used to find his personal address. However, the decision does not seem to adequately address the fact, raised by the petitioner, that the company's address was used nearly two years after Mr. Grillo had left his employment, which appears to have been known by the Department. By this time, the company had not only already filed for bankruptcy protection but had entered into a contract to sell all of its assets, and a month later the bankruptcy proceeding was converted into a liquidation, additional circumstances indicating that the chances of actual transmittal of the notice to a long-departed employee would be remote at best. Whether the use of the company's address was reasonable in light of these additional circumstances seems a little more doubtful and should have been worthy of further inquiry by the Department.

It is also interesting to note that the ALJ decided that a party need not have received a victory at the Division of Tax Appeals or the Tax Appeals Tribunal to be considered a "prevailing party" for purposes of obtaining costs. Here, where the settlement amount was less than 3% of the amount originally assessed, the ALJ found the petitioner to have been the prevailing party for purposes of an award of costs.

Insights in Brief

Informal Request for Conciliation Conference Prior to Notice of Determination Did Not Meet Statutory Requirements

The Appellate Division, Third Department, affirming a Tax Appeals Tribunal decision, held that a taxpayer who failed to file a formal request for a conciliation conference during the prescribed 90-day period following the issuance of a Notice of Determination gave up his right to protest the Notice. *Matter of Winners Garage, Inc. v. Tax Appeals Tribunal of the State of New York*, 2011 NY Slip. Op. 07762, Case Nos. 510462, 510463 (3d Dep't Nov. 3, 2011). The fact that the taxpayer made an informal request for a conciliation conference at the conclusion of the audit, but prior to his receipt of the Notice and the running of the 90-day period, did not change this outcome, nor did the fact that the Department's auditor mistakenly provided the taxpayer with a conciliation conference request form (which the taxpayer failed to file) prior to the start of the 90-day period during which the taxpayer could have properly filed it.

Taxpayer Appeals Tribunal Decision in *Gaied*

In the July 2011 issue of New York Tax Insights, we discussed the Tax Appeals Tribunal's reversal of its earlier decision, which involved the "permanent place of abode" definition for statutory residency. *Matter of John Gaied*, DTA No. 821727 (N.Y.S. Tax App. Trib., June 16, 2011). In its reversal, the Tribunal held that an individual's Staten Island home occupied by his parents was his permanent place of abode for statutory residency purposes because the taxpayer had a physical property right to the property, and therefore his actual use of the property was unimportant. On October 14, 2011, the taxpayer instituted an Article 78 proceeding to appeal the Tribunal's decision to the Appellate Division, Third Department.

Assisted Living Facility Not Tax Exempt

The Appellate Division, Third Department, has affirmed the decision of the New York State Supreme Court that an assisted living facility in Plattsburgh, New York, was not exempt from real property taxation as organized exclusively for a charitable purpose under RPTL § 420-a(1)(a). *Pine Harbour, Inc. v. Dowling*, No. 512073 (N.Y. App. Div. 3rd Dep't Nov. 3, 2011). The facility, which had been granted tax exempt status pursuant to Internal Revenue Code § 501(c)(3), provided residential and health related services to aging adults, for which it charged between $99 and $155 per day, plus a reservation fee and charges for supplemental services, and none of its residents received supplemental security income or other government subsidy. The court found that "providing retirement housing to senior citizens who are not in fact poor does not constitute a charitable activity," and therefore the facility did not qualify for the exemption.

Petitioner Failed to Demonstrate Change of Domicile

In *Matter of Philip Terranova*, DTA No. 822699 (N.Y.S. Div. of Tax App., Oct. 27, 2011), a New York State ALJ held that the petitioner had failed to demonstrate that he had changed his domicile to Florida from New York during 2001 and 2002. Mr. Terranova was a New York State domiciliary at least through 1999, when

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he sold his historic residence in Buffalo and moved into another Buffalo residence owned by his parents, which he agreed to maintain and repair in lieu of paying rent. The ALJ found that since Mr. Terranova retained substantial ties to Buffalo, including his family's business, which he actively ran, maintained ties to close relatives in Buffalo, and spent more time in Buffalo than in Florida, he had failed to meet his burden of establishing a change in domicile to Florida and was taxable as a New York resident.