Tax Report

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October 2013

Income Tax Symposium
Renaissance Esmeralda Hotel
Indian Wells, CA
November 3 - 6, 2013
Program Registration Hotel Reservation

Property Tax Symposium
Renaissance Esmeralda Hotel
Indian Wells, CA
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Program Registration Hotel Reservation

Sales Tax

Mobility Medical, Inc. v. Miss. Dept. of Revenue: Mississippi's Win-At-All-Costs Litigation Strategy Completely Rewrites the History and Nature of the State's Sales Tax (And That's Bad News for All Involved)

In its recent denial of rehearing in *Mobility Medical*, the Mississippi Supreme Court declined the opportunity to reconsider a decision issued earlier this year, in which it ignored clear statutory language and its own well-established precedent to accept the Department of Revenue's argument that a seller is *not required* to add sales tax to the purchase price and collect the tax from its customer. This article analyzes the *Mobility Medical* case and, by tracing the history of Mississippi's sales tax law and jurisprudence, demonstrates how fundamentally the Mississippi Supreme Court has altered the very nature of the state's sales tax. The author also discusses how this decision is likely to result in a great deal of uncertainty and significant adverse consequences to sellers, buyers, and Mississippi commerce in general.

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Income Tax

Market-based Sourcing in Texas?

In recent years, a significant number of states, through either legislation or regulation, have moved away from traditional costs-of-performance sourcing of receipts from sales of services and intangibles toward a market-based sourcing approach. In certain other states, however, taxing authorities have sometimes applied market-based sourcing either by invoking authority for equitable apportionment or through questionable interpretations of existing law and regulations. This article examines a recent decision by the Texas Comptroller that appears to be an example of the latter approach and which may signal an intent by the Comptroller to apply market-based sourcing under other circumstances.

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Property Tax

California Takes One Step Forward and Two Steps Back (and Nobody Gets Too Far Like That): Three New Cases Change the California Property Tax Landscape

This article examines three recent California property tax cases, two of which were handed down by the California Supreme Court in August. The author explains that while one of those decisions, *Elk Hills Power*, represents for the most part a welcome confirmation of prior precedent regarding the taxation of intangibles, the court failed to adequately justify its distinction for their treatment under the income approach. The article then contrasts how, in *Western States Petroleum Association*, the same court ignored well-established law regarding the definition of an appraisal unit that could deprive certain taxpayers of Proposition 13 protections. Finally, the article discusses how the decision in *Dreyer's Grand Ice Cream* creates a new evidentiary requirement to establish the existence of obsolescence caused by superadequacy.

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Tax Administration

Kentucky Tax Practitioner Partners With Tax Analysts To Tackle State Tax Transparency Where Open Records Request For Final Agency Decisions Is Denied

Given the heavy reliance on tax collections to balance state budgets and the increasing complexity of state tax laws, the need for transparency in the administration of those taxes by state taxing authorities has never been more important. This article examines the debate over state tax transparency by focusing on a closely-watched case currently pending in the Kentucky courts. The case, which was brought by veteran state tax practitioner Mark F. Sommer, involves an Open Records Act request seeking release of final agency decisions, which was denied by the Kentucky Department of Revenue. This case is particularly noteworthy in that, after fighting for transparency in tax administration at the federal level for over 40 years, Tax Analysts, the well-known publisher of various tax journals, has for the first time become directly involved in the transparency issue at the state level by partnering with Sommer and intervening in the Kentucky case.

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Value Added Tax

Finanzamt Freistadt Rohrbach Urfahr vs. Unabhängiger Finanzsenat Außenstelle Linz (C-219/12): The Recovery of Input Tax Paid on the Purchase of a Solar Panel – Decision by the European Court Of Justice

In July's Tax Report, we commented on the Advocate General's opinion in this case. This article reports on the recent decision by the European Court of Justice. The case involves a scenario in which a homeowner purchased a solar panel; and although the solar panel produces less than the household's annual consumption of electricity, the homeowner also had a contract to supply electricity to the network electricity provider. The question presented was whether the homeowner is entitled to recover as input tax the VAT that he had incurred on his purchase and installation of the solar panel. The article explains the European Court of Justice's rationale for holding that although the homeowner's provision of electricity to the network would constitute an economic activity, his recovery of input tax ultimately depends on whether and to what extent the solar panel's production was sold to the electricity provider.

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President's Corner

Arlene M. Klika, CMI
President June 2013-2014

The Credits and Incentives Symposium, chaired by Minah C. Hall, Esq., and vice chairs Steven A. Carter, CPA and Marcus Panasewicz, was recently held in Dallas, Texas, and was another very successful educational event for IPT. Nearly 250 people attended the Symposium which was presented for the first time only three years ago. The committee worked very diligently to present a program of interest to those involved in corporate business credits and incentives. I had the opportunity to meet many attendees, and they are very appreciative for the C & I programs being offered by IPT. I would like to express our appreciation not only to Minah, but also to Vice Chairs, Steven Carter, CPA, and Marcus Panasewicz, as well as to the speakers and session leaders who participated in making this a successful educational event.

As this Report goes to press, IPT's 33rd Sales Tax Symposium will be taking place in Monterey, California. Symposium Chair Carolyn Campbell Shantz, CMI, CPA, and Vice Chair Doug Sigel, Esq., along with their committee, have an excellent program planned, which includes the latest legislative and judicial developments throughout the United States as well as many other diverse and timely topics. Due to a scheduling conflict, I will not be able to attend, but Past President, Linda Falcone, CMI, will be providing the 600+ attendees an overview of IPT in my absence.

The Institute's VAT Symposium will be held October 2-4, 2013, also in Monterey, immediately following the Sales Tax Symposium. To date, there are over 100 registrants who have planned to attend. I encourage you to pass along the program information about IPT's involvement in this area of global concern to the person who handles VAT for your company.

I will be representing the Institute at the Canadian Property Tax Association's Annual Workshop in Montreal the following week. IPT's close association with CPTA began with our first President, Derek S. McCleery, CMI, who recognized the need to develop professional relationships with other tax-related groups.

There is still time to register for IPT's final school of the year, the Personal Property Tax School, which will be held October 13-18 in Atlanta, Georgia. Chair Chris G. Muntifering, CMI, along with Vice Chair Diane Brown, CMI, and their faculty continue to present a top-quality educational program. The Institute's schools are held once a year, and offer the opportunity to obtain valuable technical knowledge in any of the three tax disciplines as well as continuing education credit. If you were unable to attend or have someone from your company attend an IPT school this year, be sure to mark your calendars for early registration next year. A calendar of events for 2014 is on the IPT website. A new Credits and Incentives School will be offered for the first time in 2014. Watch for more details on IPT's website and in future email announcements.

I attended the Wisconsin local luncheon held in Milwaukee on September 19 which included an update on multistate nexus issues for both income and sales tax. The local luncheons are an excellent way to network with your colleagues and discuss current topics of interest. Check the IPT website for local luncheons that may be held in your region.

The 2013 New Jersey One-Day Tax Seminar will be held October 22nd at the Hilton Woodbridge Hotel in Iselin, New Jersey. The Institute is most appreciative of the efforts of Margaret Wilson, CMI, Esq., IPT's 2nd Vice President, for developing the informative program for this well-attended seminar. These one-day tax seminars have received outstanding ratings by both state tax administrators and taxpayers. The Institute's last One-Day Tax Seminar of the year will be held November 1st in Atlanta, Georgia, in cooperation with the Georgia Department of Revenue. Please make plans to attend this excellent program, if it is a state where you have interest.

I invite you to join me and attend one of IPT's two remaining Symposia this fall, the Property Tax Symposium and the Income Tax Symposium, which will be held concurrently November 3-6, 2013, in Indian Wells, California. Both are outstanding educational programs featuring many well-known speakers, and offer excellent value for your educational dollar as well as many networking opportunities. Both are programs that top tax professionals will not want to miss. Further information on these programs is on the website.

I am enjoying working with the many individuals who are contributing to the success of the various IPT programs and activities. If you have any suggestions on how we may better service the membership, please let me hear from you.

Arlene M. Klika, CMI
President

SALES TAX

Mobility Medical, Inc. v. Miss. Dept. of Revenue: Mississippi's Win-At-All-Costs Litigation Strategy Completely Rewrites the History and Nature of the State's Sales Tax (And That's Bad News for All Involved)

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The Mississippi Supreme Court recently refused to reconsider its decision in *Mobility Medical, Inc. and Mobility Medical of North Mississippi, LLC v. Mississippi Department of Revenue*, No. 2011-CA-01780-SCT (June 6, 2013), rehearing denied August 29, 2013. In so doing, the Court left in place a decision that overlooks controlling statutes and court precedent directly on point, rewrites over 80 years of Mississippi tax policy and history, and could portend significant consequences to Mississippi's vendors, customers and marketplace.

The Decision

Mobility Medical sold medical equipment to a wide range of Mississippi customers, including federal employees and retirees covered by the Federal Employees Health Benefits Plan ("FEHBP"). The FEHBP is a federal healthcare system which reimburses private insurance carriers who participate in the plan as third-party payors on behalf of federal government agencies. Because the federal government primarily funds the FEHBP, Congress explicitly prohibited states from assessing taxes "directly or indirectly, on a carrier or an underwriting or plan administration subcontractor of an approved health benefits plan . . . with respect to any payment made from the Fund."

This federal exemption recognizes that these third-party payors are essentially filling the role that the federal government otherwise directly would perform. If the federal government had not "outsourced" this administrative function to the third-party insurance carriers, it would be the party directly reimbursing its enrolled employees and retirees for these medical equipment purchases. Since the states cannot tax purchases made directly by the federal government with federal funds, the logic behind the federal law is that states should similarly be prohibited from taxing those purchases routed through the third-party payors. Economically, no difference exists between the two options.

The Mississippi Department of Revenue, however, sought to tax this equipment and assessed Mobility Medical for all of these presumably nontaxable sales. After all, no state-level exemption existed to shield these sales from taxes. To justify its assessment in the face of the federal prohibition, the Department contended that the sales tax is not a pass-through tax to the customer, is assessed solely against the vendor and is, therefore, entirely outside the scope of the federal exemption. That these charges *might* be passed along by the seller to the federal employees and retirees and *might* ultimately be reimbursed by the plan was irrelevant.

The Mississippi Supreme Court accepted this position, using a cheeseburger analogy to conclude that a vendor is merely *permitted* to pass the sales tax through to the customer, and is not *required* to do so. By so holding, the Court sustained the assessment on the ground that the company was not required to add the sales tax to the price of the medical equipment and, furthermore, that the FEHBP was not required to reimburse the insurance companies or the plan enrollees for this tax. Thus, the Court avoided altogether the significant conflict existing between the Department's assessment and federal law.[1]

[1] The federal preemption issue embedded in this case is significant in its own right, and could be the topic of another article altogether. Mississippi travelled an adjacent road before when it attempted to tax independent vendors on liquor sold to federal military installations within the state, relying on an identical argument that the tax was levied on the vendors rather than the federal government and, thus, did not run afoul of a similar statute prohibiting states from taxing federal instrumentalities. The United States Supreme Court flatly rejected the state's position, holding that the mark-up was exactly the same as a sales tax, the legal incidence of Mississippi's tax rested squarely upon the federal government and the state's regulation was, there-

(Continued on page 5)

Given the importance of this decision, it was notable that the Court cited no Mississippi statutes, regulations, court decisions or other authority in support of its conclusions. Anyone reading the opinion, who was not already familiar with the existing authorities, naturally would assume that all of these issues were ones of first impression before the Court and had not in any way been addressed by the Mississippi Legislature. That would be an incorrect assumption, however, because no shortage of statutory and earlier Court precedent exists to directly contradict the Department's position.

The History and Nature of Mississippi's Sales Tax

Through roughly the first third of the 20th century, Mississippi had no broad-based sales tax comparable to today's system. Instead, the state imposed a hodge-podge of privilege taxes levied on a wide range of specifically enumerated businesses.[2] These taxes were not the rate-based taxes to which we are now accustomed but, rather, were fixed-dollar fees which varied wildly by business and jurisdiction, with separate Code sections imposing the tax on each distinct type of business. For example, different taxes were levied on barber shops ($2.50 per chair[3]), coffin dealers (anywhere from $25 to $100[4]), ferries ($5 to $150[5]), lawyers ($10[6]), street cars ($20[7]) and whiskey distillers ($50[8]). Even fortune tellers and gypsies ($100 each[9]) enjoyed their own distinct statutes and privilege tax levies. These privilege taxes generally were paid to the county tax collector, and only limited exemptions existed for the blind, deaf, dumb and maimed, as well as Confederate soldiers and their wives and widows.[10] The tax collector paid these amounts over to the state auditor, and the collector was personally liable for any privilege taxes he failed to collect.[11] Because the tax was not based on volume of business or sales price, it was clear this flat-fee tax was levied directly and exclusively upon the business and not its customers.

In 1934, however, Mississippi became one of the first states (if not *the* first) to adopt a broad rate-based sales tax to replace these multiple and unwieldy privilege taxes.[12] Structurally opposite of the earlier privilege taxes, the sales tax applied broadly with only specific exemptions, and it was a rate-based tax rather than a flat fee. The seller subject to the tax was required to report and pay the tax, just as it is today, but uncertainty existed as to the exact nature of the tax. Whereas the old privilege taxes were clearly levied on the business rather than the customer, the new sales tax was calculated as a percentage of the business' sales and seemed to be passed through to and economically borne by the ultimate consumer. Naturally, widespread confusion existed as to whether businesses were to bear this new tax as they had in the past, or pass it on to their customers.

This uncertainty made it difficult for the state to calculate, collect and enforce the tax, and resulted in businesses jockeying for economic advantage over their competitors based on whether they absorbed or passed the tax along to their customers. Thus, in 1936 the Legislature amended the new sales tax laws to mandate that businesses add the sales tax to their invoices and collect the tax from their customers.[13] That statute provided that any business subject to the tax "shall add the amount of such tax due by him to the sales price of said property and shall collect the amount of said tax . . . from the purchaser of the property at the time the sales price is collected, and in addition thereto."[14] Adding teeth to the law, failure to do so was a criminal offense, punishable by a fine of no less than $50 nor more than $100. In 1936, this was a considerable sum of money - the equivalent of roughly $800 to $1,600 in today's dollars - and apparently could be levied on a per-offense basis.

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fore, invalid. *United States v. Tax Commission of Mississippi*, 421 U.S. 599 (1975). Interestingly, in that case Mississippi had demanded that the distillers add the tax as a mark-up to their invoices and collect it directly from the military and even threatened them with criminal prosecution for failure to do so, directly opposite of their position in *Mobility Medical* that passing the tax through to the customer is optional. It is also interesting that the Mississippi Supreme Court made no reference whatsoever to this case, even though it would appear to mandate the outcome of the federal preemption issue.

[2] See, Sections 3771-3891, Miss. Code of 1906.

[3] Section 3776, Miss. Code of 1906.

[4] Section 3791, Miss. Code of 1906.

[5] Section 3814, Miss. Code of 1906.

[6] Section 3831, Miss. Code of 1906.

[7] Section 3874, Miss. Code of 1906.

[8] Section 3889, Miss. Code of 1906.

[9] Sections 3815 and 3818, Miss. Code of 1906.

[10] Sections 3894 and 3895, Miss. Code of 1906.

[11] Sections 3904 and 3908, Miss. Code of 1906.

[12] Miss. Laws of 1934, ch. 199.

[13] Miss. Laws of 1936, ch. 155.

[14] This law exists in substantially the same form today as Section 27-65-31.

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Cases requiring the courts to construe the application and legality of the new sales tax appeared almost immediately. The seminal case defining the nature of the sales tax as a pass-through tax and the seller a collection agent for the state is *Woodrich v. St. Catherine Gravel Co.*, 195 So. 307 (Miss. 1940). In 1937, only three years after the new sales tax was enacted, St. Catherine sold gravel and sand to Woodrich for a fixed per-ton price, but failed to address sales tax in the contract terms. This oversight likely was due to the fact that contracts until then had no need to address privilege taxes since they clearly were borne by the business. The State Tax Commission demanded St. Catherine pay the 2% sales tax, after which St. Catherine demanded that sum from Woodrich. Although St. Catherine had added the tax to its invoices, Woodrich refused to pay the tax on the basis that the contract did not provide for it, and St. Catherine sued to collect.

The Mississippi Supreme Court noted that the sales tax laws explicitly required St. Catherine to add the tax to the contract price and to collect it from Woodrich, irrespective of the absence of contract terms to that effect. The Court held that by operation of law, the statute superimposed the tax obligation on their contract so as to create between them "the relationship of debtor and creditor as to the sales tax." Any agreement between the parties that the tax was to be included within the sales price or absorbed by St. Catherine would have been illegal. In upholding St. Catherine's cause of action, the Court expressly concluded the statute required the seller to pass the sales tax on to the buyer "and really constitutes the seller a collector thereof for the State." To hold otherwise, the Court noted, would frustrate the Legislature's intent "to prevent dealers and sellers of tangible personal property from jockeying with the trade with the sales tax." In other words, no business should be permitted to seek a commercial advantage over another by promising to absorb the sales tax while its competition passed it through to the customer as the law intended.[15]

The Supreme Court's holding in *St. Catherine Gravel Co.* was the natural consequence of a case it had decided two years earlier, wherein the Mississippi attorney general sought and received an injunction against businessmen who had openly refused to add the sales tax to their customers' invoices. In *State Ex. Rel., Rice v. Allen*, 177 So. 763 (Miss. 1938), the Court acknowledged the mandatory nature of the 1936 amendment and its importance to the overall ability of the state to collect and equitably distribute the tax, and it approved the injunction requiring the defendant businesses to add and collect the tax from their customers.

Thus, since the earliest days of Mississippi's sales tax, the tax has been considered a pass-through tax practically and economically borne by the consumer, and the law has granted sellers absolutely no discretion as to whether they must add the tax to their sales price.[16] Furthermore, if a seller failed to do so, whether intentionally or by oversight or error, it was permitted to sue the customer to collect the tax if that were necessary. Until now, these fundamental policy principles have remained undisturbed, and numerous other courts throughout the country have cited these decisions in similar cases.

Consequences to Mississippi Vendors, Consumers and the State Economy

The *Mobility Medical* decision places Mississippi businesses in a tense situation and will likely lead them to be overly conservative in collecting sales taxes out of an abundance of caution. Prior to this decision, if that business had mistakenly undercharged tax to its customers, a private right of action existed per the *St. Catherine Gravel Co*. decision to recover those taxes from the consumer. This right existed even if the contract terms and conditions made no reference to the tax. Regardless of whether it made sense from a customer relations standpoint to pursue such an action, the cause of action existed nonetheless. Since the Supreme Court has now discarded the two principles underlying its holding in *St. Catherine Gravel Co*., namely the characterization of the sales tax as being passed through to the customer and the recognition that the vendor was merely the collection agent for the state, that remedy likely is extinct unless specifically spelled out in the contract.

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[15] *See also Viking Supply Corp. v. Mantee Dev. Found., Inc*. 218 So.2d 887 (Miss. 1969) (acknowledging that it would have been illegal for seller to have agreed to absorb the sales tax, but concluding that the buyer had not carried its burden of proof that such an agreement existed anyway).

[16] Similarly, see Mississippi's use tax laws, Section 27-67-11(3)("Every person required or authorized to collect the tax shall add to the sales price of tangible personal property, services or specified digital products the amount of the tax imposed on purchaser for the use, storage, or consumption thereof, and, when so added, the tax shall be a debt from the purchaser to the seller until paid, and shall be collectible at law in the same manner as other debts. It shall be unlawful for any person to advertise, hold out, or state to the public or to any customer that the tax herein imposed will be assumed or absorbed by the seller or that any part thereof will be refunded. Said tax shall be stated separately from the sales price on the sales invoice and shown separately on the seller's records. The purchaser shall pay the tax to the seller as trustee for and on account of the state.")

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Thus, a cautious business will closely examine its contract terms and conditions and, furthermore, will charge tax and remit it to the state if there is any question whatsoever whether the tax is due. This likely will lead to more instances where taxes are overcharged. However, because even excess collections are considered "trust fund monies" collected by and on behalf of the state per Section 27-65-31, once those funds are paid by the seller to the state, the seller may very well be able to overcome any attempt by the customer to recover the over-collected amounts from the seller.

A savvy business also may be tempted to "jockey" with the sales tax in order to gain a commercial advantage over its competition. For example, according to the *Mobility Medical* decision, a large retailer now is explicitly permitted to offer to absorb all or a portion of the sales tax knowing that its smaller competitor cannot financially afford to do so. Imagine the ads resulting from such gamesmanship: "***Bring in the ad, and we'll beat anyone's sales tax rate in town!***" Only a few years after the law was enacted, the Supreme Court in *St. Catherine Gravel Co*. specifically recognized that one of the Legislature's primary reasons for requiring vendors to add the sales tax to the sales price was to address this very problem, *i.e.*, "to prevent dealers and sellers of tangible property from jockeying with the trade with the sales tax." The *Mobility Medical* decision now appears to have opened the floodgates to that very practice.

The consumer, on the other hand, has no incentive at all to pay the tax, whether it is added to an invoice or not. After all, the Supreme Court just stated that the sales tax is not required to be passed through to the customer, but rather is the sole and exclusive responsibility of the seller. It simply is not the customer's problem, as the Court expressly noted that the customer may refuse to pay the tax. If the customer refuses to pay, the vendor apparently no longer has the right to sue for its collection absent an express contractual provision to that effect, given that the Supreme Court eviscerated the principles underlying the Court's earlier holding in *St. Catherine Gravel Co*.

Furthermore, the Department has created an additional incentive for the customer to refuse to pay. If that customer later realizes it has overpaid sales taxes to the vendor, the Department's longstanding position is that the customer has no direct right to claim a refund from the state because the customer was not the "taxpayer" who remitted the tax. Instead, that customer must first convince the vendor to refund those taxes, and then the vendor can apply for a refund or credit from the state.[17] The Department's position is that the vendor must refund the tax to the customer before applying for a refund or credit, in order to certify that it bore the economic burden of the tax as required by the refund statutes.

Taken to its logical end, the Court's decision could very well have set Mississippi on a course toward a "cash-on-the-barrelhead" economy. The cautious seller knows it must collect the tax from its customers at the time of sale or it may not be able to do so later. The cautious customer who takes delivery of goods on account to pay later may simply refuse to pay the sales tax included on its invoices knowing the seller has no legal recourse against it, and that the customer has no meaningful remedy if it turns out the tax was overstated or not due in the first place.

The ramifications of the *Mobility Medical* decision are a result of the Department's short-sighted, win-at-all-costs tax policy and litigation strategy. Not only will the decision create significant tension between buyers and sellers and raise new legal issues regarding their rights and relationships with one another, it also will likely harm the overall Mississippi economy by making it unnecessarily complicated and risky to do business in the state. The Department has not indicated whether or how it will address the issues presented by *Mobility Medical*, but a "cash-on-the-barrelhead" economy simply is not a viable option in the 21st century.

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[17] The vendor may be reluctant, if not unwilling, to refund taxes to the customer in advance for at least two reasons. First, the vendor will have no assurance at that point that the Department will agree to either the fact or amount of the overpayment. In addition, even assuming there is no question regarding whether and to what extent sales tax was overpaid, the seller's refund to the customer will in effect be an interest-free loan until the seller receives its refund from the state.

INCOME TAX

Market-based Sourcing in Texas?

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A major trend in state corporate income tax is the adoption of statutes and regulations imposing market-based sourcing rules for services that focus on where the services are received. A related trend is for taxing authorities in states where such changes in the law have not been enacted to attempt to circumvent existing apportionment rules to accommodate market-based theories. The Texas Comptroller of Public Accounts recently issued a hearing decision that may reflect this trend.

The issue in Comptroller Decision No. 104,224 (2013) was how to source sales of television programming by a satellite television provider that performed most of its services outside Texas. Despite the Texas rule that services are sourced to where they are performed, the Comptroller held that all receipts from programming provided to Texas subscribers should be apportioned to Texas. The Comptroller based its decision on the electronic processes that occurred inside receiving equipment located in the state, even though the receipts from sales and leases of the equipment were already apportioned to Texas.

Facts

The Taxpayer's direct-to-home satellite system included four major elements: (1) the programming source, (2) the uplink center, (3) the satellite, and (4) the receiving equipment located at the subscriber's home, *i.e.*, the antenna (dish) and in-home receiver.

Programming Source

The Taxpayer did not create original programming, but purchased the right to broadcast news and entertainment programming produced by providers such as ESPN, Disney, and HBO.

Uplink Center

The programming providers transmitted content to Taxpayer's uplink centers (none of which were located in Texas). Equipment at the uplink centers processed the incoming programming signals to assure quality (*e.g.*, amplifying the signal), to protect copyrights (e.g., by encrypting the data), to insert content (*e.g.*, public service announcements), and to put the signal into a form that could be transmitted from the uplink centers to satellites orbiting the Earth.

Satellite

After receiving the signal from the uplink centers, the satellites performed further processing and then broadcast the signal back to Earth.

Receiving Equipment

To capture and view programming, consumers had to sign a subscriber agreement and purchase or lease certain specialized equipment consisting primarily of a compatible satellite antenna dish, in-home receiver, and remote control. A customer service agent at Taxpayer's headquarters in Colorado would send a command signal to microchips embedded in the receiver so that it unscrambled the broadcast signal and allowed programming content to pass through to the subscriber's television.

Customers were billed monthly, and charges for the receiving equipment were separately stated from charges for the programming content. Receipts for equipment sales and leases were not at issue in the hearing. The Taxpayer had properly sourced to Texas all receipts for tangible personal property sold or leased to Texas residents.

Comptroller's Analysis

The Comptroller agreed with the Taxpayer that the programming revenue should be sourced as receipts from a service. Basic Texas law regarding the sourcing of services was clear. For a receipt to be considered a Texas receipt "the act done or the property producing the income must be located in Texas." *Humble Oil & Refining Co. v. Calvert*, 414 S.W.2d 172, 180 (Tex. 1967). Comptroller regulations stated that receipts from services are apportioned to the location where the service is performed. 34 Tex. Admin. Code §§ 3.549(e)(38) & 3.557(e)(33). If services are performed both inside and outside Texas, the receipts are Texas receipts on the basis of the fair value of the services that are rendered in Texas. Id.

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Despite the regulations basing apportionment on where the service is performed, the Comptroller relied on a rarely cited 1980 Comptroller Decision to shift the focus to where the service is received by emphasizing "end-product acts":

> Services performed within Texas are units of service sold, the performance of which occurs within Texas and the focus is on the specific, **end-product acts** for which the customer contracts and pays to receive, **not on non-receipt producing, albeit essential, support activities**.

Comptroller Decision No. 10,028 (1980) (emphasis added).

The Comptroller acknowledged that each of the Taxpayer's actions in receiving and transmitting the programming was essential to its business. However, the Comptroller ruled the act that produced the receipts at issue was the act performed by the receiver the Taxpayer sold or leased to its subscribers:

> Petitioner's customers contract for the receipt of television programming. Petitioner contracts to provide the programming, and it is the microchips within the receiver that unscramble and decode the satellite's encrypted signal that completes the transaction and produces the programming receipt.

Based on this reasoning, the Comptroller apportioned all receipts from programming to Texas despite the fact only the final step in the direct-to-home satellite system occurred in Texas. The programming was not produced in Texas. The uplink centers that processed incoming programming signals were not located in Texas. The satellites were not in Texas. The customer service agents that sent command signals to the receiving equipment were not in Texas. Only the receiving equipment was in Texas.

Conclusion

Because Texas law sources services to the state where the services are performed, Texas has been presumed to stand apart from the market-based trend of sourcing services where they are received. Comptroller Decision No. 104,224, however, may signal the Texas Comptroller's intent to accomplish market-based sourcing in some circumstances by emphasizing the "end-product act" performed in Texas. This decision could be very significant, especially for taxpayers delivering services into Texas via electronic media.

PROPERTY TAX

California Takes One Step Forward and Two Steps Back (and Nobody Gets Too Far Like That):[1] Three New Cases Change the California Property Tax Landscape

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The California Supreme Court issued two long-awaited decisions in August (*Elk Hills Power, LLC v. Board of Equalization* and *Western States Petroleum Association v. Board of Equalization)*, and the Fifth District Court of Appeal issued another (*Dreyer's Grand Ice Cream, Inc. v. County of Kern)*. On a positive step forward, *Elk Hills* ratifies well-developed precedent and should thwart what has become California assessors' widespread effort to tax intangible assets in blatant disregard of longstanding constitutional, statutory and regulatory authority. *Western States,* in contrast to *Elk Hills,* simply ignores more than 30 years of consistent law and practice to authorize creation of a "split roll" that could deprive California manufacturers and the owners of other heavily fixturized businesses of important Proposition 13 protections. *Dreyer's* creates a new evidentiary requirement to establish the existence of obsolescence caused by superadequacy, without analysis, authority or explanation. Taxpayers should prepare their assessment appeals to meet this arbitrary new standard accordingly.

Elk Hills Power, LLC v. Board of Equalization[2]

Elk Hills has already been considered by two recent IPT publications. The first was prepared by the author before the decision issued, speculating about what the Supreme Court might do, which was presented at the 2013 IPT Annual Conference in Orlando, Florida ("Property Tax on Intangibles – Focusing on California"). The hope was that the Supreme Court would unambiguously ratify existing

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[1] With apologies to The Desert Rose Band, "One Step Forward."

[2] *Elk Hills Power, LLC v. Board of Equalization* (2013) 57 Cal.4th 593.

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authority requiring that intangible assets be removed from assessment, such as *GTE Sprint Communications Corp. v. County of Alameda* (1994) 26 Cal.App.4th 768, which requires that intangible assets be individually identified, valued and deducted from an income indicator based on operating business revenues.[3] The fear was that the Supreme Court would somehow reinterpret the California constitution to materially limit the exclusion of intangible assets. Another article issued after the decision issued in IPT's September 2013 Tax Report is a very fine overview by Gregory Fletcher entitled: "So, What Is That Assembled Workforce Worth, Anyhow?"[4] Nevertheless, some of the practical context and consequences of that decision relating to four problem areas still bear review.

Elk Hills addresses whether emission reduction credits ("ERCs") required to operate a power plant, which were conceded to be intangible assets, were properly added to the assessed value determined by a cost approach, and were properly not removed from the income indicator in the context of an income approach. The Supreme Court held that the ERCs should have been excluded from the cost indicator, but drawing a puzzling distinction, held that the ERCs did need to be removed from the income indicator.

We start with the principle that businesses as such, and the intangible assets they own, are not taxable in California by means of a property tax (or at least are not supposed to be taxed). The income tax ensures that business or enterprise value is taxed based on net revenue. The *tangible assets owned by the business* are, however, subject to property taxation. That critical distinction can make the difference of hundreds of millions of dollars in assessable value on a major manufacturing facility, or between 15% and 20% in the assessed value of a smaller and less complex property such as a hotel.

The practical context in which *Elk Hills* issued is not fully disclosed by the decision. Many California assessors and the California Assessors' Association ("CAA") have been hostile, to put it mildly, to the very concept that meaningful intangible assets exist, much less that such assets must be removed from an assessed value based on operating revenue and/or the sales price of an operating business. The CAA went so far as to instruct its members to disregard those portions of the State Board of Equalization's ("SBE") *Assessors' Handbook* Section 502 ("AH 502") dealing with intangible assets, and instructed them to use the CAA's version of those materials. Much of the CAA's philosophy expressed in the substitute materials was expressly rejected by the SBE, following extensive public comment, when AH 502 was approved. For example, the CAA's version of the SBE's *Handbook* (adopted in secret without public input of any kind) would allow a deduction for assembled workforce only if that workforce or management was proved to be "superior," thereby hinging a deduction for workforce on qualitative judgments that would be difficult, if not impossible, for a taxpayer to prove, much less quantify. It should be emphasized that the CAA has no official standing and no judicial authority recognizes the expertise or authoritativeness of the CAA, whereas the SBE is expressly charged by statute to implement regulations and promulgate guidance as required to ensure uniform application of property tax law, and as the administrative interpretation of the SBE, has "been relied upon by the courts and been accorded great weight in the interpretation of valuation questions."[5] Thus, the first area of controversy was the validity of the SBE's guidance materials.

A second area of continuing controversy has been that many assessors have aggressively misinterpreted California statutes, which were intended to confirm that intangible assets were not assessable, to instead justify assessing those assets. This controversy is framed by a handful of sentences found in two statutes. Revenue and Taxation Code section 212(c) broadly exempts intangible assets from assessment, with an apparent qualification:

> Intangible assets are exempt from taxation. . . . *[E]xcept as otherwise provided* in the following sentence, the value of intangible assets and rights shall not enhance or be reflected in the value of

[3] *See also Service America Corp. v. County of San Diego* (1993) 15 Cal.App.4th 1232, 1240-1242; *Shubat v. Sutter County Assessment Appeals Board* (1993) 13 Cal.App.4th 794, 804; *County of Orange v. Orange County Assessment Appeals Board No.1* (1993) 13 Cal.App.4th 524, 532-534; and *County of Los Angeles v. County of Los Angeles Assessment Appeals Board No. 1 (Dollar Rent-A-Car Systems)* (1993) 13 Cal.App.4th 102, 111-113; *County of Stanislaus v. Assessment Appeals Bd*. (1989) 213 Cal.App.3d 1445, 1455.

[4] https://www.ipt.org/IMIS15/iptdocs/Files/TaxReports/2013TaxReportSep.pdf

[5] *Auerbach v. Assessment Appeals Bd. No. 2 for County of Los Angeles* (2008) 167 Cal.App.4th 1428, 1441 (citing *CAT Partnership v. County of Santa Cruz* (1998) 63 Cal.App.4th 1071, 1085, n. 12); *Prudential Ins. Co. v. City and County of San Francisco* (1987) 191 Cal.App.3d 1142, 1155; *Watson Cogeneration Co. v. County of Los Angeles* (2002) 98 Cal.App.4th 1066, 1070-1071 (citing and relying on portion of AH 502 dealing with treatment of intangibles); *Hunt-Wesson Foods, Inc. v. Alameda County* (1974) 41 Cal.App.3d 163, 180 ("assessor's handbooks are subject to judicial notice by the courts").

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taxable property. Taxable property may be assessed and valued by assuming the presence of intangible assets or rights necessary to put the taxable property to beneficial and productive use.

(Emphasis added.) Revenue and Taxation Code section 110(d) provides:

> *Except as provided in subdivision (e),* for purposes of determining the "full cash value," or "market value" of any taxable property, all of the following shall apply: (1) the value of intangible rights relating to the going concern value of a business using the taxable property shall not enhance or be reflected in value of the taxable property."

(Emphasis added.)

Subdivision (e) of Section 110 provides that "[t]axable property may be assessed and valued by assuming the presence of intangible assets of rights *necessary* to put the taxable property to beneficial or productive use." (Emphasis added.) Assessors argued that the exclusions codified by Sections 212(c) and 110(d) did not include intangible assets *necessary* to put property to its highest and best use, based on the last clause of Section 212(c) and section 110(e), which assets included enterprise related assets such as assembled workforce and franchise.

A third problem area is the standard of review that a trial court must use when reviewing an assessment appeals board's decision approving use of an appraisal method which does not, and is incapable of, removing the value of intangible assets from assessment. Assessors who prevail before assessment appeals boards invariably contend that the trial court must apply a substantial evidence standard of review so that, if any evidence supports the board's decision, the board's findings must be sustained. Assessors then argue that their bare testimony to the effect that they removed or "considered" removing the intangibles, constitutes substantial evidence that the intangible assets were in fact removed from assessment. An example of this occurs where an assessor enrolls the purchase price of an operating hotel that has an internationally known franchise (flag), and then uses an income approach based on operating business revenue to "corroborate" purchase price. The assessor contends that by deducting expenses from gross revenues to implement the corroborating income approach (a "method" expressly disapproved by *GTE Sprint* and the SBE), he has "accounted for" intangible assets, and that testimony is sufficient to create "substantial" evidence that the trial court may not disregard. The correct alternative to the substantial evidence test is *de novo* review in which that trial court makes an independent determination whether a particular "method" does in fact remove the intangible assets from assessment without deference to the assessment appeals board.

A fourth problem area derives from a minority line of cases which did not require removal of a particular class of intangible assets from assessment, i.e., those which are the product of governmental regulatory activity. These can be referred to as the "Regulatory Asset Cases."[6] Assessors use these cases without regard to the specialized class of assets there at issue to support the assessment of intangible assets in all contexts.

Elk Hills resolved three of these active issues squarely in favor of taxpayers, and materially narrowed the scope of the Regulatory Asset Cases. However, by failing to disapprove the Regulatory Asset cases, and instead attempting to distinguish the indistinguishable, *Elk Hills* includes some unnecessarily awkward text and a fuzzy distinction.

As to the first problem area, the Supreme Court unambiguously ratified the longstanding exclusion of intangible assets from assessment, as well as the primacy of the SBE's definitive consideration of the issue in AH 502. *Elk Hills* cites *GTE Sprint* with approval seven times, and does not distinguish or limit that case, and also cites *Service America Corp., Shubat, County of Orange* and *Dollar Rent-A-Car System* with approval. AH 502 is thrice cited with approval, and the CAA version of the *Handbook* is not mentioned. The Supreme Court calls out specific types of common business assets as not being

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[6] The Regulatory Asset Cases are *Roehm v. County of Orange* (1948) 32 Cal.2d 280 (liquor license); *Los Angeles SMSA Limited Partnership v. State Bd. of Equalization* (1992) 11 Cal.App.4th 768,774-778 (cellular telephone company's FCC License); *American Sheds, Inc. v. County of Los Angeles* (1998) 66 Cal.App.4th 384, 388 (landfill use permit akin to zoning); *Watson Cogeneration Co. v. County of Los Angeles* (2002) 98 Cal.App.4th 1066, 1072 (independent power generator's above market, PUC approved SO4 power sale agreement that controlled pricing and represented a government incentive intended to encourage the development of independent power generation); and *Freeport-McMoran Resource Partners v. County of Lake* (1993) 12 Cal.App.4th 634, 645-646 (SO4 power sale agreement, questioning whether the SO4 agreement arose from enterprise activity).

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assessable, which include business enterprise or "going concern" itself, and intangible assets related to enterprise activity such as "customer base, [patents and copyrights,] assembled workforce, … favorable … contracts, inventory of advertising materials and goodwill." (*Elk Hills* at 619, *citing GTE Sprint* at 998.*)* The Supreme Court expressly affirms that: "When using [the income] approach, '[i] ncome derived in large part from *enterprise* activity [may not] be ascribed to the property being appraised. . . .'" (*Elk Hills*, *supra* at 619, citing *County of Stanislaus*, at 1455, emphasis original.) In other words, the prohibition against assessing businesses as distinct from the assets owned by the business is squarely affirmed.

As to the second problem area, *Elk Hills* rejected the assessor's strained interpretation of Sections 212 and 110. The Supreme Court observed that the third clause of Section 212 and Section 110(e) simply means that assessors must assess taxable property at its fair market value, but did not mean that assessors were free to ignore their obligation to allocate value between assessable and nontaxable asset classes when intangible assets were "necessary" to attain the highest and best use of a property. The statutes simply allow property to be "enhanced" from scrap value to fair market value. "[T]he Court of Appeal erred in concluding that section 110(e) operates to the complete exclusion of section 110(d)," -- that is, subdivision (e) does not "trump" subdivision (d). (*Elk Hills* at 615.)

The third problem area, the standard of review, should finally be laid to rest: "Because *Elk Hills* challenges the Board's methodology that includes the value of the ERCs in its unitary valuation of the power plant, the issue here is a question of law [reviewed de novo]." (*Elk Hills* at 606.)

Finally, as to the Regulatory Asset Cases, the Supreme Court held that such assets (those resulting from government sources as distinct from those derived from enterprise activity) could not be assessed "directly" by adding such components to a cost approach, but could be assessed "indirectly" by means of an income approach without removing such components as required by *GTE Sprint* and Section 110(d) (2). The Supreme Court justifies the disparate treatment of the same asset under the two valuation methods based on a tenuous assumption that "under an income … approach, not all intangible rights have a quantifiable fair market value that must be deducted." (*Elk Hills* at 617.) The difference between the two classes of cases is explained to be "one of degree," that is, assets that merely allow a property to generate income when put to its beneficial or productive use, as distinct from assets like goodwill, customer base, franchises or the like that "make a direct contribution" to the going concern as reflected in an income analysis. (*Id.* at 618.)

The Supreme Court distinguishes the ERCs from other assets because they are necessary to "enhance" the property, which means such assets change the property from mere scrap to an operating facility, but there is no "separate stream of income related to enterprise activity, or indeed any separate stream of income at all" attributable to the ERCs. (*Elk Hills* at 619.)

The view that some can be taxed "indirectly" by using the income approach seems at odds with other language in the decision, which acknowledges that an income approach does in fact directly assess intangible assets that are required to generate the income being capitalized: "[I]ncluding the fair market value of an intangible asset within the unit whole amounts to the direct taxation of those assets." (*Elk Hills* at 617.)

The apparent inconsistency is worrisome and is subject to abuse by aggressive taxing authorities. The cost of the ERCs was readily known and the cost approach is often used to segregate intangible assets from the income indicator. If *Elk Hills* is construed to mean that a cost method of segregation is insufficient as an evidentiary matter, and instead that a separate income stream that makes a "direct" contribution to the going concern value must be attributable to an intangible asset to trigger a duty to exclude that asset from assessment, then *Elk Hills* would have to be considered as an extremely adverse case for taxpayers. But, such a reading is unreasonable. This is so for at least three reasons. First, such construction is inconsistent with the Supreme Court's express, repeated citation of authority that does not require that a separate income stream be attributable to an asset as a condition to exclude that asset from assessment. Second, the Supreme Court enumerates specific assets such as goodwill and assembled workforce to which no specific revenue stream can typically be isolated. Third, the text relating to separate income streams arises solely in the context of Regulatory Asset Cases, and seems intended to justify or explain that minority line of cases dealing with those specific types of assets. This is consistent with text in those cases, which distinguish between basic operating authority that derives from governmental sources and those assets required to conduct operations based on that authority. The better view is that *Elk Hills* does not expand the Regulatory Asset Cases into more general enterprise contexts.

It is undisputable that *Elk Hills* actually limits the Regulatory Asset Cases by prohibiting the inclusion of such assets in a cost indicator, even if the rationale for drawing a

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distinction between the cost and income approaches in this context is murky at best. Moreover, the Supreme Court suggests that if a separate revenue stream can be attributed to a regulatory asset, that intangible asset must be removed from assessment based on an income approach.

It remains to be seen whether assessors and lower courts which have declined to follow the well developed statutory and case authority will now follow the Supreme Court's direction.

Western States Petroleum Association v. Board of Equalization[7]

Western States Petroleum Association ("WSPA") challenged the validity of a new regulation adopted by the California State Board of Equalization ("SBE") known as "Rule 474" (tit. 18, Cal. Code Regs., § 474). Rule 474 changed the way the appraisal unit is defined in State Board of Equalization's Rule 461, which later rule expressly delineates fixtures as a separate appraisal unit. Rule 461 segregates fixtures and land to ensure that fixture depreciation is fully considered. Rule 461 has been in effect since 1979. The separate appraisal of fixtures required that the value of fixtures be tracked separately from land. The lesser of the fair market value or trended base year value (acquisition value) was enrolled for fixtures, and the lesser of fair market value and trended base year value of land was enrolled. This usually meant that the depreciated (fair market) value of fixtures was enrolled and the trended base year value of land was enrolled.

Rule 474, which was nominally limited to petroleum refiners, created a one-industry exception to Rule 461. The exception allowed assessors to combine land and fixtures into a single appraisal unit so that increases in land value offset fixture depreciation. Under Rule 474, the lesser of the combined fair market values of fixtures and land are compared to the combined trended base year values of fixtures and land and the lesser of the two consolidated appraisal units is the taxable value. This means that when land values increase (which increases were previously excluded from assessment under Proposition 13), such increases may now offset fixture depreciation and so become assessable without a change in ownership as (formerly) required by Proposition 13.

The SBE acknowledged that its new rule "masked" the reduction in value attributable to depreciation. Its own staff advised that, "Essentially this treatment eliminates any value reduction due to the machinery and equipment due to depreciation."[8] The mechanism whereby the taxable value is increased by the new rule is demonstrated by the following chart:

	Prop.8 Market Value ($millions)	Prop. 13 Base-Year Value ($millions)	**Rule 461(e) Assessed Value**
Appraisal			
Unit #1			↓
Land	125	70	
Improvements	35	20	
Unit #1 Value	160	90	90
Appraisal			
Unit #2			
Fixtures/Unit #2 Value	500	525	500
Total Prop. 8/Prop. 13 Value	660	**615**	**590**
		↑ **Rule 474 Assessed Value**	

7 *Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal.4th 401

8 Memorandum from James M. Williams to Tom McClaskey, dated January 30, 1996, supporting Annotation No. 850.0016

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The SBE justified the need for the new rule by stating that petroleum refineries are “unique,” and thus required a new valuation method because the fixtures sell as a unit with land in the marketplace. The reality that all power plants, theme parks, ski resorts, sound stages and brewery fixtures sell as units with the land on which they rest, and so are no different than other heavily fixturized facilities, was not considered (or disputed).

The separate valuation of fixtures and land instructed by every publication of the SBE for 35 years, expressly including those that related to refinery valuation, provided that fixtures should be assessed separately from land consistent with Rule 461.

WSPA challenged the new law as violating the Administrative Procedures Act (“APA”) on various grounds, which included: (1) the Rule was inconsistent with existing law (article XIIIA of the California constitution (Proposition 13)) because it permitted assessment of increased land values without a change in ownership, and also Rule 461 and Revenue and Taxation Code section 51, which defined the appraisal unit to require separate assessment of fixtures; (2) the Rule was unnecessary because there was in fact no distinction between petroleum refiners and other heavily fixturized facilities and there had been no change in market conditions or the law; (3) the economic impact statement (“EIS”) prepared by the SBE to disclose the amount of tax increase that would be generated by the new regulation did not actually quantify the amount of tax; and (4) that the new regulation constituted a change in method that resulted in a tax increase without the required legislative approval in violation of article XIII, section 3 of the California Constitution.

The latter two points were particularly sensitive in two respects: The first is that the issue of the SBE’s acknowledging that the new rule would cause a tax increase triggers a different aspect of Prop. 13 than its prohibition against assessing land at current market value in the absence of a change in ownership – which is the prohibition against changing tax methodology that results in a tax increase without a two-thirds vote of the Legislature. It is widely considered that the SBE developed a ridiculously low estimate of Rule 474’s expected tax impact in order to avoid triggering a Section 3 violation. Second, while the SBE conceded that it was required under the APA to identify the economic impact of the proposed regulation, it contended that the amount of tax increase was not the correct reference point. Instead, the SBE argued that the administrative cost to comply with the new regulation, which was nominal, was the correct reference point. Credit should be given the SBE for sheer bravado in making this later argument: The SBE itself calculated the economic impact of Rule 474 by reference to the tax impact, albeit using an inexplicable method. Hence, two key issues were: (1) whether the SBE could avoid a constitutional restriction on the taxing power that applied to the Legislature; and (2) if the SBE was not subject to that constitutional limitation, whether the SBE would be required to publicly quantify the tax increases it sought to impose.

Both the trial court and the court of appeal held Rule 474 was invalid, both because it was inconsistent with existing law and because the economic impact statement was woefully inadequate. Most significantly, the lower courts recited the extensive administrative history relating to the separate assessment of fixtures and found that there had been no change in the market or law that made the change in assessment methodology “necessary,” as required by the APA. Both courts were sharply critical of the EIS. The trial court observed, in its statement of decision, that “that there was zero analysis of, I mean zero analysis of what happens with fixtures. How the fixtures change.” The Court of Appeal stated that it was “utterly unable to understand why this calculation is correct as a measure of increased taxes from treating refineries as a single assessment unit for decline in value purposes.”[9]

The Supreme Court affirmed the court of appeal in part, and so invalidated the Rule. It held that the EIS statement was inadequate, using language not dissimilar to that used below: “We cannot discern any theory or facts that would tend to justify this method of estimation, and even the Board’s post hoc efforts to explain the estimate in its briefing and at oral argument offer none.” Moreover, the Supreme Court upheld the interpretation of the APA that required the EIS to realistically disclose the amount of tax that it will levy. This was a sharp blow to the SBE, which will now have to publicly acknowledge that it is raising taxes and quantify the amount of those taxes. *i.e.*, the SBE will “own” the tax increases it creates. So far, so good. But then the Supreme Court held that Section 3 did not restrain the SBE’s ability to change methods of taxation even when doing so will result in hundred million dollar tax increases. Thus, if a tax increase is intended, there is no constitutional bar, but only a disclosure obligation.

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[9] *Western States, supra,* 57 Cal.4th at 430.

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The Supreme Court's dramatic expansion of the SBE's rulemaking authority is only considered superficially, and is expressed in only a page and a half of text that focuses on the literal language of the constitution mentioning only the Legislature. The Supreme Court gave no consideration of the purpose or context of Section 3 in Proposition 13.

Taxpayers fared poorly on the substantive issue, which was whether fixtures could be combined into a single appraisal unit with land for assessment purposes. The Supreme Court held that such combination was not proscribed by Section 51, because that statute defined the appraisal unit in the alternative -- that is, as "that persons in the marketplace commonly buy and sell as unit, or that is normally valued separately." The latter phrase has uniformly been interpreted for decades to refer to fixtures in light of Rule 461, the Task Force Report to the Legislature concerning the implementation of Proposition 13 that expressly advised that the separate fixtures should continue and the command of Revenue and Taxation Code section 51(a)(2) that depreciation and obsolescence be taken "into account." The Supreme Court instead focused on the literal language of the statute to allow the SBE to choose between definitions.

The Supreme Court was untroubled by (and did not even mention) the long-prevailing acceptance of the separate assessment of fixtures, or by the SBE creating exceptions to Rule 461 on an ad hoc basis and thereby creating dis-uniform assessment practices. Instead, the Supreme Court characterized more than three decades of consistently valuing fixtures separately -- and which continues *for all other types of property except refineries* -- as a form of tax evasion:

> To account for fixture depreciation separately when land and fixtures are actually bought and sold as a single unit would allow the owner to claim a reduction in real property value that is economically fictitious, resulting in a tax windfall.

(*Western States* at 423.) Recall that separate assessment of fixtures continues to be *required* by SBE Rule 461(e). Fortunately, Rule 461(e) remains in effect after *Western States*, and any change will require a new rule, which will have only prospective application.

The SBE was relieved of three separate impediments to increasing taxes by administrative regulation, which were changing assessment methods to increase tax without a 2/3 vote of the Legislature (section 3 of article XIIIA); permitting the assessment of increases in land value without change in ownership (section 2 of article XIIIA); and disregarding the long standing interpretation of Section 51(d) and Rule 461(e) requiring the separate assessment of land and fixtures to allow use of a single appraisal unit in the presence of fixtures. The Supreme Court had to work overtime to clear all of the impediments required to grant the SBE this new power to raise property tax.

Dreyer's Grand Ice Cream, Inc. v. County of Kern[10]

Dreyer's Bakersfield, California, plant is the largest ice cream manufacturing facility in North America. Having said that, the facility is materially underutilized. It has excess manufacturing capacity. This is so, as even the Kern Assessor and his hired economist agreed, because Dreyer's was making all the ice cream novelty products it could sell ("just as they testified, they're adjusting their production to demand"). In other words, it was undisputed that the market established the utilization of Dreyer's facility. It was also undisputed that Dreyer's was a prudent operator.

Excess capacity is also referred to as "superadequacy" and represents an "over-improvement" of the property. Reducing the cost indicator for "over-improvement" is a mandatory legal requirement:

> Reproduction or replacement cost *shall be reduced* by the amount that such cost is estimated to exceed the current value or the reproducible value by reason of … over- or under-improvement and other forms of depreciation or obsolescence.

(SBE Rule 6(e), emphasis added.)

When a facility includes components that exceed market requirements, then "external" or "economic" obsolescence is said to exist:

> External obsolescence, also known as economic obsolescence, is a loss in value resulting from adverse factors external to the property that decrease the desirability of the property. This type of depreciation may include the loss of value due to any one or a combination

[10] *Dreyer's Grand Ice Cream, Inc. v. County of Kern,* Kern County Superior Court Case No. S-1500-CV-269386, 5th District Court of Appeal Case No. F064165.

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> of the following factors: … ***Inadequate demand for the product relative to production capacity*** ….

(SBE, Letter to Assessors No. 2010/30, "Guidelines for Substantiating Additional Obsolescence for Personal Property and Fixtures" dated June 11, 2010 (adopted May 26, 2010) ("*Guidelines*"), p. 8, emphasis added.)

> A utilization adjustment… may be appropriate when equipment is significantly underutilized, that is, it may be appropriate when property is not used at design or expected capacity…. Utilization adjustments may be made when there is excess capacity beyond the control of a prudent operator that is recognized in the market.

(SBE, *Assessors' Handbook*, Section 504, "Assessment of Personal Property and Fixtures" (Oct. 2002), p. 79.)

A prudent operator's actual operating experience should constitute prima facie evidence that the facility could not be utilized at a greater capacity. To put this common sense into an appraisal context:

> Whether underutilization results from a mis-forecast of the market or an actual decline in demand or both is, however, irrelevant from an appraisal perspective. ***The current owner is typically motivated to maximize the utilization or occupancy of his property, and if there is spare capacity, it is unlikely that a potential buyer will pay for the increment of unusable or excess capacity***.

Spletter, Kathy G., "Appraising Properties with Declining Utility," International Association of Assessing Officers ("IAAO") *Journal of Property Tax Assessment and Administration*, Vol. 8, No. 4 (2011) 25, 30.[11] This truism is reflected by a recent *Los Angeles Times* story, under the headline that GM's president was lauding the "automakers re-birth," which explained, "GM showed the discipline to build only the number of cars that buyers wanted, dumping its old model of keeping factories spitting our vehicles, regardless of demand."[12]

Notwithstanding that no controversy existed about the reason for Dreyer's excess manufacturing capacity, the Kern County Assessment Appeals Board denied Dreyer's relief on grounds that it had failed to prove that the excess capacity was due to external causes beyond the control of the taxpayer.

The Court of Appeal eventually affirmed, concluding in part that Dreyer's had not "presented data from the marketplace or other evidence of market demand." There was no indication that any such evidence existed for Dreyer's unique products – the Assessor's economist attempted to use census data to show that demand for "frozen desserts" was stable, but he admitted that such data could not be extrapolated to the subject facility. The Court of Appeal characterized the plant finance manager's review of production and manufacturing capacity, and testimony that Dreyer's production was determined by demand, as mere "lay opinion" that could be disregarded by the Board. The Court of Appeal does not discuss, or even mention, the SBE's *Guidelines*.

The better practice even before *Dreyer's* was for taxpayers to introduce evidence of actual operations *and* evidence of external market conditions when attempting to obtain an adjustment for economic obsolescence due to inadequate demand. However, there was no *requirement* that evidence of external market conditions be developed, and one wonders why a court would require a taxpayer to introduce additional, redundant evidence, concerning an undisputed element of the case. *Dreyer's* seems to hold, without explanation, rationale or authority, that evidence of external market conditions can be required, making compliance with the "better practice" even more advisable.

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[11] Prior to publication by the IAAO, the paper upon which this article is based was awarded the 2011 Literary Award by the Institute for Professionals in Taxation.

[12] Hirsch, Jerry, *Los Angeles Times,* "GM Overcomes Turmoil, Sees Rebirth, Executive Mark Reuss Says," Aug. 30, 2013, p. B-1.

TAX ADMINISTRATION

Kentucky Tax Practitioner Partners With Tax Analysts To Tackle State Tax Transparency Where Open Records Request For Final Agency Decisions Is Denied

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The debate over what state tax transparency means has never been a hotter topic than now, in an era where state governments so heavily rely on tax collections to balance their budgets. This is especially true in Kentucky, where the Commonwealth faces $32 billion in unfunded pension liabilities.

The overarching goal of any tax system must be to collect the correct amount of taxes, not more nor less. However, in order to achieve collection of the right amount, it is incumbent upon the departments of revenue to enable taxpayers to determine what that "right" amount is. Thus, the more transparent a tax system, the more likely a taxpayer will pay, and the state will collect, the right amount of tax. This is axiomatic in a voluntary tax compliance system.

And in a system where taxpayers are treated uniformly and fairly, then what is it that departments of revenue have to hide? After all, why keep taxpayers in doubt, constantly guessing on what tax policy is, was, and how it is changing?

There are two common reasons advanced for a lack of transparency at the state level – confidentiality and lack of departmental resources. Any taxpayer who has sought disclosure of information from a department of revenue has likely been given one or both of these two reasons for the department's denial of the request. There seems to be an inherent conflict when it comes to taxpayer confidentiality and state tax transparency – but one that can easily be resolved by balancing both interests. Redaction of taxpayer information, for instance, would allow departments of revenue to publish their administrative findings without disclosing a taxpayer's identity.

Then the problem of lack of governmental resources arises. Departments of revenue assert that the redaction of rulings and administrative decisions, for instance, is too burdensome with the limited employees and resources that exist. But state tax transparency must start somewhere; and redaction is not expensive or too burdensome if, for instance, the administrative decisions and rulings are drafted from the outset with redaction in mind, *e.g.*, with limited taxpayer information to begin with. Other options include sending rulings and final administrative decisions to the involved taxpayer for redaction/deletion approval before being published. Plus, transparency reduces the likelihood that taxpayer questions will turn into full-fledged controversies that will require even more governmental resources.

A case currently pending in the Kentucky courts illustrates this debate over state tax transparency. In *Mark F. Sommer v. Finance and Administration Cabinet*, Civil Action No. 13-CI-29 (Franklin Cir. Ct., Div. I), state tax practitioner Mark F. Sommer ("Sommer") sought, via a request under the Kentucky Open Records Act, certain final administrative decisions (referred to as "Final Rulings" in Kentucky) in fully redacted format from the Kentucky Department of Revenue ("Revenue"). In particular, Sommer sought a copy of each Final Ruling issued by either the Department of Revenue or the Finance and Administration Cabinet between January 1, 2004 through February 23, 2012 (the date of Sommer's request). The relevance of this time period is that it is post-tax modernization in the Commonwealth and that all such rulings were being numbered sequentially for identifying purposes.

Sommer specifically asked that Revenue redact any identifying and/or confidential information to preserve taxpayer confidentiality. Revenue identified approximately 700 requested documents within its custody and control, but denied wholesale Sommer's request on the bases of taxpayer confidentiality, that the request was too burdensome, and that the documents requested were not public records. Specifically, Revenue cited KRS 131.190(1)(a) which states, in relevant part:

> No present or former commissioner or employee of the Department of Revenue . . . ., present or former secretary or employee of the Finance and Administration Cabinet, former secretary or employee of the Revenue Cabinet or any other person, shall intentionally and without authorization inspect or divulge any information acquired by him of the affairs of any persons, or information regarding

(Continued on page 18)

> the tax schedules, returns, or reports required to be filed with the department or other proper officer, or any information produced by a hearing or investigation, insofar as the information may have to do with the affairs of the person's business.

The Department, however, did not cite any of the exemptions provided under the Open Records Act.

Sommer then appealed Revenue's denial to the Office of the Attorney General. The Office of the Attorney General affirmed Revenue's denial, citing the harsh consequences that exist for a Revenue official who violates taxpayer confidentiality as its rationale for siding with Revenue's failure to disclose information.

Sommer appealed the Attorney General's Order to the Franklin Circuit Court, where the case is currently being briefed.* Subsequent to Sommer filing his appeal, Tax Analysts moved to intervene as a party to the action. After fighting this issue at the federal level for over 40 years in defense of disclosure and tax transparency, which through numerous successful suits has resulted in case law giving the public access to Internal Revenue Service ("IRS") private letter rulings and technical advice memoranda, this is Tax Analysts' first fight in the courts for state tax transparency. The Franklin Circuit Court granted the motion on July 24, 2013 in the face of Revenue opposing their joining the action.

In a brief filed on September 3, 2013, Sommer and Tax Analysts argued that: (1) Revenue bears the burden of proof under Kentucky law; (2) any material not specifically exempted from the Open Records Act must be produced for inspection; and (3) exemptions from disclosure must be narrowly construed to protect the public interest. Sommer posited that "[t]he Open Records Act's presumption of openness is grounded in the notion that inspection of public records reveals whether a public agency is serving the public, and also provides impetus for agencies steadfastly to pursue the public good."

The Kentucky Open Records Act, KRS §§61.870 *et seq.*, is structured along the lines of the federal Freedom of Information Act ("FOIA"), which provides a right of access to records of federal agencies, and which may withhold records only to the extent that one of nine enumerated exemptions applies. The burden is also on the agency seeking to protect records, and the exemptions from disclosure are to be narrowly construed. *See* 5 U.S.C. §552. In construing the FOIA in the context of tax matters, courts have noted that a key statutory purpose is preventing agencies from developing bodies of "secret law" that may have an effect on the rights of the public, but are not publicly disclosed. *See Tax Analysts & Advocates v. IRS*, 505 F.2d 350, 353 (D.C. Cir. 1974).

The concern about "secret law" is particularly salient in the field of taxation, given that tax codes tend to be complicated, and there is a strong need for guidance to taxpayers and tax professionals on how a taxing authority views various compliance and legal issues. The IRS makes public a large amount of guidance in the form of final and official statements of IRS policy, as well as more informal statements of how the staff construes the Internal Revenue Code on specific points. In making these records public, the IRS first redacts information that would identify individual taxpayers, given Congress' restrictions on the disclosure of tax return information and significant criminal penalties for violating that requirement – penalties much more severe than those at any state level.

And while the IRS can annually redact and publish some thousands of private letter rulings and technical advice memoranda in the face of even harsher civil and criminal sanctions for improper disclosure of taxpayer return information (such as a fine of up to $5,000 and/or a sentence of up to five years in prison), this is not a federal versus state issue. Published reports suggest that approximately 45 states and the District of Columbia issue the equivalent of private letter rulings. Of those, approximately 35 states make those rulings publicly available in some manner, typically by publishing a redacted version on the department of revenue's website. According to the Federation of Tax Administrators, many of those states have at least some years of archived letter rulings posted – and if not, they will at least list the ones they have issued, which can then be requested. *See* C. Griffith, A. Hamilton & J. Carr, *Transparency in State Taxation, Part 2: Legislative Process and Letter Rulings*," 64 State Tax Notes 331, 334 (Apr. 30, 2012).

Closer to home, in Kentucky's neighboring state of Indiana, for instance, final rulings are made available to the public in redacted form on the Internet via a search engine format, with no need for request ever to be made. A

(Continued on page 19)

* The author represents Sommer as his counsel in this matter.

taxpayer's need for transparency in Kentucky, or in any state that lacks transparency, is no different from the need of taxpayers at the federal level or in states such as Indiana where disclosure is provided.

The *Sommer* case addresses an issue that exists in many states across the country, and the outcome of this case may very well set the tone for whether states must be more transparent in their tax administration and enforcement.

Taxpayers desire certainty – what the law is, how to follow it, an understanding of how those laws will be enforced and a comfort that they will be enforced consistently. There are benefits to both taxpayers and taxing authorities to strive for a more transparent tax system, as transparency will improve both efficiency and voluntary compliance. After all, sunshine is the best antiseptic.

VALUE ADDED TAX

Finanzamt Freistadt Rohrbach Urfahr vs. Unabhängiger Finanzsenat Außenstelle Linz (C-219/12): The Recovery of Input Tax Paid on the Purchase of a Solar Panel – Decision by the European Court Of Justice

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Irvine, CA
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E-mail: howard.lambert@ey.com.

The European Court released its judgment on 20 June 2013 in this Austrian referral asking whether the installation of a solar panel system by the occupant of a private dwelling for the purposes of generating and supplying electricity to an electricity provider constitutes an economic activity for VAT purposes, thereby enabling input tax recovery on related installation costs.

The householder installed a solar panel system on the roof of his house which produced electricity but had no storage capacity. The householder had a contract with an electricity provider under which he sold electricity to that provider, where all of the electricity produced by the solar panel system was fed into the network. The householder then bought back from that provider (at the same unit price) such electricity as was necessary to meet the household's needs. Both supplies (*i.e.*, by and to the householder) were subject to the standard rate of VAT, which was invoiced and paid to the tax authorities. The household's annual consumption of electricity was greater than the solar panel system's annual production. The householder incurred VAT on the purchase and installation of the solar panel system (which was funded in part by a grant), which he sought to deduct as input tax on the basis that his sale of electricity constituted an economic activity. The Austrian tax authorities refused his input tax claim. The referral sought to establish whether the householder's approach was correct.

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* The views expressed in this article are those of the author and do not reflect the views of Ernst & Young LLP or any other member of Ernst & Young Global Limited.

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The European Court held that, since the solar panel system produced electricity which was supplied to the network provider in exchange for consideration on a continuing basis, this constituted an economic activity for VAT purposes. It was irrelevant in this regard whether that activity was intended to make a profit, as was the fact that the electricity produced by the solar panel system was always lower than the household's consumption. As the solar panel system was used exclusively for the purposes of making taxable supplies, the householder was entitled to deduct the input tax incurred on related costs.

The Court's summary judgment reads:

> Article 4(1) and (2) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, must be interpreted as meaning that the operation of a photovoltaic installation on or adjacent to a house which is used as a dwelling, which is designed such that the electricity produced is (i) always less than the electricity privately consumed by its operator and (ii) supplied to the network in exchange for income on a continuing basis, falls within the concept of "economic activities" as defined in that Article.

2013 Personal Property Tax School

October 13 - 18, 2013

Georgia Tech Hotel & Conference Center

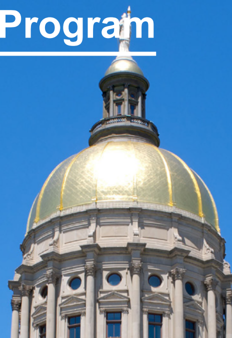
Atlanta, Georgia

Click here for Registration

Members may also register online.

New Jersey One-Day Tax Seminar
Hilton Woodbridge Hotel
October 22, 2013 ~ Iselin, NJ
Program Registration

Georgia One-Day Tax Seminar
The Westin Atlanta Perimeter North
November 1, 2013 ~ Atlanta, GA
Program Registration



CODE OF ETHICS: CANON 16

IT IS UNETHICAL to state or imply IPT authorization, endorsement or approval of any business, product or service.

IPT Property Tax Symposium At-A-Glance

November 3-6, 2013 ~ Renaissance Esmeralda ~ Indian Wells, California

Program **Registration** **Hotel Reservation**

SUNDAY, NOVEMBER 3, 2013	
3:00-7:30pm	Registration
5:30-6:00pm	New Member/First-Time Attendee Orientation
6:00-7:30pm	Welcome/Networking Social Hour sponsored by Grant Thornton LLP and the Law Offices of Nicholas A. Furia, PLLC
MONDAY, NOVEMBER 4, 2013	
6:30-7:45am	Continental Breakfast (For guests of hotel residing under IPT's group rate)
8:00-8:30am	Opening of Symposium
8:30:9:30am	GENERAL SESSION: Property Tax and Income Tax California Style
9:45-10:45	GENERAL SESSION: California Tax Policy: How do we get re-elected?
11:00am-Noon	GENERAL SESSION: The Human Side of Ethics
12:00 noon	Lunch
Concurrent Breakout Sessions (Select 1 of 4)	
Monday 1:00-2:15pm	• Appraisal Preparation in Litigation (Repeated at 2:30pm) • Makeover of a Property Tax Group • Crude Oil to Fuel: Valuing the Oil and Gas Industry • CMI Academy I - Personal Property
Concurrent Breakout Sessions (Select 1 of 4)	
Monday 2:30-3:45pm	• Appraisal Preparation in Litigation (Repeated from 1:00pm) • How to Deal with Rising Assessments After Years of Decline (Repeated at 4:00 pm) • Valuation and Assessment Issues with Leaseholds • CMI Academy II - Real Property
Concurrent Breakout Sessions (Select 1 of 4)	
Monday 4:00-5:15pm	• I'm in Property Tax? Now what? • How to Deal with Rising Assessments After Years of Decline (Repeated from 2:30 pm) • Personal Property Roundtable • Real Property Roundtable
6:00-7:30pm	Networking Social Hour Sponsored by Duff & Phelps
TUESDAY, NOVEMBER 5, 2013	
6:30-7:45am	Continental Breakfast (For guests of hotel residing under IPT's group rate)
Concurrent Breakout Sessions (Select 1 of 3)	
Tuesday 8:00-9:15am	• State Reviews - Legislative and Case Law Updates • The Erosion of Proposition 13 • Anatomy of a Real Property Tax Trial

TUESDAY, NOVEMBER 5, 2013, continued Concurrent Breakout Sessions (Select 1 of 4)	
Tuesday 9:30-10:45am (Sessions repeat-ed at 11:00am)	• Review Board Presentation: Preparation & Execution for a 15 Minute Window of Opportunity • Valuation Issues as They Relate to the Assessment of Complex Industrial Properties • The Future of the Property Tax Professional • The Sales Approach with Limited Sales
Concurrent Breakout Sessions (Select 1 of 4)	
Tuesday 11:00am-12:15pm (Sessions repeated from 9:30am)	• Review Board Presentation: Preparation & Execution for a 15 Minute Window of Opportunity • Valuation Issues as They Relate to the Assessment of Complex Industrial Properties • The Future of the Property Tax Professional • The Sales Approach with Limited Sales
12:15 -1:15pm	Lunch
Concurrent Breakout Sessions (Select 1 of 3)	
Tuesday 1:15-2:30pm (Sessions repeat-ed at 2:45pm)	• Best Evidence of Value: Value in Use vs. Highest & Best Use • Planes, Trains and Automobiles • The REIT Effect - Inflating Market Values?
Concurrent Breakout Sessions (Select 1 of 3)	
Tuesday 2:45-4:00pm (Sessions repeated from 1:15am)	• Best Evidence of Value: Value in Use vs. Highest & Best Use • Planes, Trains and Automobiles • The REIT Effect - Inflating Market Values?
Industry Roundtable Discussion Sessions (Select 1 of 5)	
Tuesday 4:15-5:15pm	• Energy • Hotel & Healthcare • Industrial • Retail • Telecom/High-Tech
6:00-7:30pm	Networking Social Hour
WEDNESDAY, NOVEMBER 6, 2013	
6:30-7:45am	Continental Breakfast (For guests of hotel residing under IPT's group rate)
8:00-9:00am	GENERAL SESSION: Real Estate Damage Econom-ics: Current Methodologies for Measuring Diminution in Value
9:15-10:15am	GENERAL SESSION: Intangibles Are the Real Thing
10:30-11:30am	GENERAL SESSION: Economic and Commercial Real Estate Outlook
11:30am	ADJOURN

IPT Income Tax Symposium At-A-Glance

November 3-6, 2013 ~ Renaissance Esmeralda ~ Indian Wells, California

Program **Registration** **Hotel Reservation**

- "State of the State" of California
- California Tax Policy
- The Human Side of Ethics
- The State of Nexus
- The Blurring of the Lines: Business vs. Non-Business Income
- The "Other" Entities – Pass-Throughs: What Not to Miss
- The Myth of Full Apportionment
- *Gillette* Case Update and Ramifications
- Alternative Apportionment: How to Get It; How to Avoid It
- Combined Reporting – "Minor" Differences Can Have a Major Impact
- Sourcing for Sales of Other than Tangible Personal Property
- Non-Income Taxes (TX, IL, OH, LA, AL, PA, WA)
- Pitfalls of Intercompany Transactions
- State Audit Trends - How to Prevail as the States Get More Aggressive

State Business Income Taxation

State Business Income Taxation **includes contributions from some of the nation's preeminent state business income tax practitioners, a virtual Who's Who of SALT professionals. This treatise, derived from the authors' many years of expertise in state business income taxation, is a vital reference tool. Let the leading state and local income tax experts provide you with the answers you need by purchasing this book and accompanying CD today!**

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Photo by Hindrik Sijens

NYU Institute on State and Local Taxation

The 32nd New York University Institute on State and Local Taxation will be held December 12-13, 2013, at The Grand Hyatt, New York, New York. Get the latest SALT developments from some of the nation's most knowledgeable practitioners. The annual NYU Institute on State and Local Taxation addresses all major areas of taxation and attracts attorneys, accountants, state tax officials, tax directors, tax managers and anyone seeking expert discussion on the latest technical, legislative, and planning developments. Additional information regarding the program can be found at www.scps.nyu.edu/salt.

47th Annual CPTA National Workshop

The Fairmont Queen Elizabeth
Montréal, QC
October 6 - 9, 2013
Preliminary program & registration form available at www.cpta.org

Property Tax Calendar ~ November 2013

This information is provided by International Appraisal Company (IAC) and is provided for quick reference/reminder purposes only. IPT and IAC make no guarantee to completeness or accuracy and are not responsible for errors or omissions or for any results from the use of this information. We strongly suggest confirmation of all information with local taxing jurisdictions.

Appeals Due

MA* **RI*** **VA*** **WI***

CA** 11/30 - Counties that do not mail assessment notices by 8/1

NY** Yonkers 11/1 - 11/15

ND** 11/1 of the year after the year in which taxes are due (Abatement request)

Personal Property Filing Dates: CT 11/1

Assessment Dates: None

* Dates vary, check jurisdiction

** Date falls on a weekend, should be next business day. Confirm all information with local taxing jurisdictions.

SALT Wire Web Page to Provide Current Tax News and Information to IPT Members

IPT is pleased to announce the addition of a new page on its web site called the SALT Wire. As a supplement to IPT's monthly Tax Report, the SALT Wire web page will provide members with current news and information related to important cases, legislation, regulations, rulings and other announcements in the state and local tax field. Visitors to IPT's home page will see a SALT Wire tab (upper right, in the blue menu bar) that will hyperlink to the SALT Wire page (or to a log-in screen if not already logged in); and the subject of new posts will also be displayed as a scrolling text hyperlink on the home page. Members visiting the SALT Wire page can add comments to posts directly on the web page through replies, and can also share posts with other members through the e-mail and social media links on the page.

Anyone having SALT news or information that they believe would be of interest to IPT's members is encouraged to submit posts to the SALT Wire page by e-mailing the content of the post to Keith Landry, IPT General Counsel, at klandry@ipt.org. Items posted on the SALT Wire page will include the name and contact information of the contributor, and IPT will endeavor to place appropriate material on the SALT Wire page as quickly as possible, which in most cases should be on the same day as submission. Members are also encouraged to check the IPT web site regularly for new posts and to interact with each other using the reply, e-mail, and social media sharing features associated with the SALT Wire page.

TTARA
Texas Taxpayers and Research Association

Annual Membership Meeting
November 13-14, 2013
AT&T Conference Center, Austin, TX

This two-day meeting offers insightful public policy discussions as well as time to visit with old friends. You can view the agenda and register for the meeting by **CLICKING HERE.**

CMI Corner

CMI Candidate Connection

TOP TEN REASONS TO BE A CMI

A CMI is a Certified Member of the Institute for Professionals in Taxation. Certification is offered in three separate and distinct categories: State Income Tax, Property Tax, and Sales and Use Tax. Below are ten great reasons to become a CMI.

1. **Credibility.** Business units within a company, outside clients, and taxing authorities interacting with a CMI can have confidence that the CMI is knowledgeable, experienced, subscribes to ethical standards, and maintains a high level of expertise through required continuing education.

2. **Professional credentials.** Attaining the CMI designation may satisfy governmental regulatory requirements. For example, in some states the designation exempts property tax professionals from licensing examination requirements. The designation may also qualify a CMI to testify as an expert witness.

3. **Recognition of achievement and stature.** The designation is a formal recognition by the CMI's peers that the holder of the designation has achieved a high level of expertise and proficiency as a tax professional. By satisfying rigorous experience, educational and testing requirements, the CMI has earned increased stature within his profession.

4. **IPT Code of Ethics.** The Code of Ethics strengthens the integrity of the designation, by providing that CMIs are not only bound by the Code, but are also obligated to help enforce it.

5. **Promotion of the profession.** By exemplifying high standards of excellence in the field, CMIs enhance the image of the profession inside and outside industry.

6. **Uniqueness.** The CMI is the only designation available for State Income Tax, Property Tax and Sales Tax professionals.

7. **Career opportunities and employment security.** A CMI has an advantage generally in the marketplace, and specifically when seeking a promotion, increased compensation, or additional responsibility. Certification establishes the willingness of a CMI to invest in his or her own professional development, and identifies the CMI as an individual who can adapt to changes in technology and business practices.

8. **Self-esteem.** The CMI defines himself or herself beyond a job description or academic degree. As a certified professional, the CMI can control his or her own professional destiny and derives a deep sense of personal satisfaction from it.

9. **Commitment to the profession.** Achieving the designation demonstrates to the CMI's peers, colleagues, and superiors that he or she is committed to the tax profession and is capable of performing at or above established standards. University degrees no longer represent the full measure of professional knowledge and competence in the market, and certification sets the CMI apart as a leader in the field of state and local taxation.

10. **Leadership and teaching opportunities.** Because CMIs have demonstrated expertise in the field, the profession naturally looks to them to provide ideas and strategies for the continued enhancement of their discipline. Similarly, they are the most qualified individuals to help with the education and training of others who are new to the field.

The major requirements for the CMI Professional Designation include membership in the Institute, at least five years of relevant tax experience, completion of prescribed educational requirements, and successful completion of both comprehensive written and oral examinations. For more information on the CMI Professional Designation, please visit our website, www.ipt.org, and follow the links under "Professional Designations."

If you have questions about the CMI Professional Designation that are not answered on our website, please contact Emily Archer, Certification Officer, at earcher@ipt.org.

Careers

Please visit the Career Opportunities page on the IPT website for complete position descriptions and requirements.

Positions Available:

Tax Analyst Sales Tax – Please go to http://www.nexteraenergy.com/careers and search for Job Number 1301517 to see the official job posting and application link. Date Posted: 9/20/2013 (IPT1240)

Manager, Income Franchise (St Louis, Missouri) – Tax Specialty: Income Franchise Tax, State and Local Tax. Apply URL: http://bit.ly/16AYoAC. Date Posted: 9/20/2013 (IPT1239)

Senior Associate, Income Franchise (St Louis, Missouri) – Tax Specialty: Income Franchise Tax, State and Local Tax. Apply URL: http://bit.ly/16AYxUH. Date Posted: 9/20/2013 (IPT1238)

Senior Associate, Sales & Use Tax (St Louis, Missouri) – Tax Specialty: Sales & Use Tax, Indirect Tax. Apply URL: http://bit.ly/16AZoF4. Date Posted: 9/20/2013 (IPT1237)

Senior Property Tax Accountant (Atlanta, Georgia) – The Home Depot. Apply online at https://careers.peopleclick.com/careerscp/client_homedepot/external/gateway.do?functionName=viewFromLink&jobPostId=211895&localeCode=en-us. Date Posted: 9/19/2013 (IPT1236)

Senior Tax Analyst (Houston, Texas) – Targa Resources. All candidates must apply online at http://www.targaresources.com/careers/careers-overview. Date Posted: 9/19/2013 (IPT1235)

International Tax Supervisor (Memphis, Tennessee) – To apply: http://www.internationalpaper.com/applications/recruitment/external/jobdetail.aspx?id=40011343. Date Posted: 9/13/2013 (IPT1234)

Manager Sales and Use Tax (Memphis, Tennessee) – To apply http://www.internationalpaper.com/applications/recruitment/external/jobdetail.aspx?id=40446349. Date Posted: 9/13/2013 (IPT1233)

Property Tax Accountant (Atlanta, Georgia) – Georgia Power Company. Qualified candidates should apply to: https://southerncompany.taleo.net/careersection/cs_ep/joblist.ftl Job requisition #GPC2002721. Date Posted: 9/13/2013 (IPT1232)

Transaction Tax Manager (San Diego, California) – Cricket Communications.To learn more about career opportunities at Cricket please visit www.leapwireless.com/careers. Date Posted: 9/13/2013 (IPT1231)

Tax Audit Manager (Dallas, Texas) – 7-Eleven. Please see our website to review all requirements and apply for this position: http://careers.7-eleven.com/careers/job_detail.html?id=2296&title=TaxAuditManager. Date Posted: 9/13/2013 (IPT1230)

State and Local Indirect Tax Manager (Seattle, Washington) – Amazon. Send resume to stephaw@amazon.com. Date Posted: 9/9/2013 (IPT1229)

Senior Canada Tax Analyst (Seattle, Washington) – Amazon. Send resume to stephaw@amazon.com. Date Posted: 9/9/2013 (IPT1228)

Senior Property Tax Consultant (Tampa, Florida) – Send resumes to: rahul.sharma@ryan.com. Date Posted: 9/5/2013 (IPT1227)

Sales Tax Analyst (Williamsville, New York or Simsbury, Connecticut) – Click on this link to review all requirements and apply for this position: https://external-careers-sodexo.icims.com/jobs/23429/job. Date Posted: 9/4/2013 (IPT1226)

Sales Tax Lead (Long Beach, California) – Airgas USA, LLC . Send resume to Craig.Kwasizur@Airgas.com. Date Posted: 8/30/2013 (IPT1225)

Property Tax Compliance Manager (Atlanta, Georgia) – RockTenn. Contact: Jo Burkhardt, JBurkhardt@rocktenn.com, 678-291-7744. Date Posted: 8/26/2013 (IPT1224)

Transaction Tax Manager North America (Atlanta, Georgia) – RockTenn. Contact: Jo Burkhardt, JBurkhardt@rocktenn.com, 678-291-7744. Date Posted: 8/26/2013 (IPT1223)

Transaction Tax Manager Domestic (Atlanta, Georgia) – RockTenn. Contact: Jo Burkhardt, JBurkhardt@rocktenn.com, 678-291-7744. Date Posted: 8/26/2013 (IPT1222)

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Tax Accountant (Minnetonka, Minnesota) – Resumes can be sent to sarah_dungey@datacard.com. Date Posted: 8/26/2013 (IPT1221)

Property Tax Staff Accountant – Go to www.TimeWarnerCable.com/careers. Date Posted: 8/23/2013 (IPT1220)

Oil Refinery Appraiser/Consultant – We are seeking an independent contractor who has experience valuing oil refineries. Please send your resume to: John@ccitax.com. Date Posted: 8/23/2013 (IPT1219)

Property Tax Manager (San Antonio, Texas) – Clear Channel Communications, Inc. Interested candidates – https://clearchannel-openhire.silkroad.com/epostings/index.cfm?fuseaction=app.jobInfo&version=1&jobid=1659. Date Posted: 8/23/2013 (IPT1218)

Do you need CEC/CLE/CPE credit?
(MAI, CPA, CMI, CAE, etc.)

The Institute's programs are accepted by most organizations for continuing education purposes. Check with the administrator of your designation/certification.

IPT 37th Annual Conference

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Thank you to IPT members who have already joined the IPT LinkedIn group as we now have over 2500 members. We encourage you to join the IPT LinkedIn Discussion group and share the group with other tax professionals in your network.

Follow IPT on Facebook and Twitter and like our Facebook page for updates on IPT event registration, photos, and other IPT news.

If you have not already done so, please join these groups today by clicking on the icons below.

Thank you for your continued support of IPT!

IPT 2013 CALENDAR OF EVENTS

Personal Property Tax School
Georgia Tech Hotel and Conference Center
Atlanta, GA
October 13 - 18, 2013

New Jersey One-Day Tax Seminar
Hilton Woodbridge Hotel
Iselin, NJ
October 22, 2013

Georgia One-Day Tax Seminar
The Westin Atlanta Perimeter North
Atlanta, GA
November 1, 2013

CMI - Property Tax Exams
Renaissance Esmeralda Hotel
Indian Wells, CA
November 2 - 3, 2013

CMI - Income Tax Exams
Renaissance Esmeralda Hotel
Indian Wells, CA
November 2 - 3, 2013

Property Tax Symposium
Renaissance Esmeralda Hotel
Indian Wells, CA
November 3 - 6, 2013

Income Tax Symposium
Renaissance Esmeralda Hotel
Indian Wells, CA
November 3 - 6, 2013

Please check IPT's online Calendar of Events for additional programs that may be added.

IPT 2014 CALENDAR OF EVENTS

23rd Annual Ohio Tax Conference
Hyatt Regency Hotel
Columbus, OH
January 28 - 29, 2014

Sales Tax School I
Georgia Tech Hotel & Conference Center
Atlanta, GA
February 23 - 28, 2014

ABA-IPT Advanced Income Tax Seminar
The Ritz Carlton
New Orleans, LA
March 31 - April 1, 2014

ABA-IPT Advanced Sales/Use Tax Seminar
The Ritz Carlton
New Orleans, LA
April 1 - 2, 2014

ABA-IPT Advanced Property Tax Seminar
The Ritz Carlton
New Orleans, LA
April 3 - 4, 2014

Sales Tax School II
Marriott Kingsgate Conference Center
Cincinnati, OH
April 27 - May 2, 2014

Credits and Incentives School
Marriott Kingsgate Conference Center
Cincinnati, OH
May14-16, 2014

Advanced State Income Tax School
Georgia Tech Hotel & Conference Center
Atlanta, GA
June 2 - 6, 2014

Basic State Income Tax School
Georgia Tech Hotel & Conference Center
Atlanta, GA
June 2 - 6, 2014

CMI Sales Tax Exams
JW Marriott Desert Ridge
Phoenix, AZ
June 27 - 28, 2014

CMI Income Tax Exams
JW Marriott Desert Ridge
Phoenix, AZ
June 28 - 29, 2014

CMI Property Tax Exams
JW Marriott Desert Ridge
Phoenix, AZ
June 28 - 29, 2014

Annual Conference
JW Marriott Desert Ridge
Phoenix, AZ
June 29 - July 2, 2014

Real Property Tax School
AT&T Executive Education Center
Austin, TX
July 13 - 18, 2014

Property Tax School
Georgia Tech Hotel & Conference Center
Atlanta, GA
August 10 -14, 2014

Personal Property Tax School
Georgia Tech Hotel & Conference Center
Atlanta, GA
October 12-16, 2014

CMI Income Tax Exams
Marriott Harbor Beach Resort & Spa
Fort Lauderdale, FL
November 8 - 9, 2014

CMI Property Tax Exams
Marriott Harbor Beach Resort & Spa
Fort Lauderdale, FL
November 8 - 9, 2014

Income Tax Symposium
Marriott Harbor Beach Resort
Fort Lauderdale, FL
November 9 - 12, 2014

Property Tax Symposium
Marriott Harbor Beach Resort
Fort Lauderdale, FL
November 9 - 12, 2014

OTHER EVENTS 2013

47th Annual CPTA National Workshop
The Fairmont Queen Elizabeth
Montréal, QC
October 6 - 9, 2013
Preliminary program & registration form available at www.cpta.org

Texas Taxpayers and Research Association (TTARA)
AT&T Conference Center
Austin, Texas
November 13 - 14, 2013

NYU Institute on State and Local Taxation
The Grand Hyatt
New York, New York
December 12-13, 2013