

PA TAX LAW NEWS

PA LAUNCHES TAX AMNESTY *By Timothy J. Horstmann*

Pennsylvania is running a Tax Amnesty Program until June 18, 2010.

Amnesty is available to taxpayers owing state taxes and related interest and penalties that were delinquent as of June 30, 2009. Taxpayers that have enrolled in deferred payment plans are also eligible, but only with respect to the unpaid portion of the liability. The Department has also indicated that taxpayers owing only interest and penalties will be eligible.

Taxes covered include personal income taxes, corporation taxes, sales and use taxes, and inheritance taxes. Local taxes are not covered, with the exception of Philadelphia and Pittsburgh local sales, use and hotel occupancy taxes.

Taxpayers wishing to participate in the program must file amnesty returns covering all delinquent periods, unless the delinquent tax is unknown to the Department. In that event, the taxpayer is only required to disclose liabilities dating back to July 1, 2004. The amnesty return must include all information that would otherwise be required to be filed on a standard return. A taxpayer that files the return and pays the tax and half the applicable interest will be excused from paying otherwise applicable penalties and the other 50% of the interest.

Participants in the program who fail to maintain compliance with Pennsylvania tax reporting and payment obligations may lose the penalty and interest forgiveness provided under the amnesty program. The Department will re-impose the forgiven amounts if either of the following occurs within two years following the conclusion of the program: (1) the taxpayer becomes delinquent for three consecutive periods for semi-monthly, monthly or quarterly filing or payment; or (2) the taxpayer becomes delinquent for more than 8 months on any filing of reports and/or payments due on an annual basis. In both cases, the delinquency is excused if the

taxpayer has filed a timely judicial or administrative appeal.

All participants in the amnesty program will waive all rights to file a petition for refund or otherwise contest the taxes reported and paid through the program. The Department retains the right to assess additional taxes upon review or audit of returns filed by program participants. In the event of such an assessment, the program participant would have all of the normal appeal rights afforded to taxpayers, but only with respect to the additional tax assessed.

The program also provides for the imposition of a special “amnesty penalty” on taxpayers failing to report and pay an eligible tax during the amnesty period. All such taxpayers will be subject to a special, additional 5% penalty, which is imposed upon the total amount of unpaid tax, interest and penalties that are otherwise outstanding. The 5% penalty will not apply where a taxpayer has entered into a deferred payment plan, has filed an administrative or judicial appeal during the amnesty period, or is under bankruptcy protection. For some taxpayers with potential tax liabilities from previous unfiled tax years, this penalty would be substantial.

Eligible taxpayers should consider taking part in the Amnesty Program, especially if they face large interest assessments on unpaid taxes. The program may not be suitable for all taxpayers, however, especially those with issues requiring appeal.

The attorneys of the State and Local Tax Group of McNees Wallace & Nurick LLC are available to answer any questions regarding the amnesty program. ■

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PHILADELPHIA AMNESTY BEGINS MAY 3RD

By James L. Fritz

Running a week behind the Commonwealth's tax amnesty, the City of Philadelphia is offering a similar amnesty for city taxes. The city amnesty program will run from May 3rd through June 25th. Like the state, the city offers forgiveness of all penalties and half the interest.

With very limited exceptions, the Philadelphia amnesty will apply to all city-administered taxes, including amusement, parking, real estate, realty transfer, wage and net profits, realty use and occupancy, liquor sales, hotel room rental, business privilege and vehicle rental taxes. The local sales and use tax, administered by the state Department of Revenue, is covered by the Commonwealth's amnesty program.

Delinquencies from February 1, 1986 through June 30, 2009 are eligible. This includes both unfiled and under-reported periods as well as current assessments. Participants in a prior city amnesty program may not participate in the current program. Unlike the state amnesty program, the city program does not offer a limited look-back period for unknown liabilities. Taxpayers currently under audit may request an immediate assessment for part of the audit deficiency, so that they may pay that part under the amnesty program.

Additional details, forms and answers to frequently asked questions may be found online at: www.phillytaxamnesty.com. ■



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ADMINISTRATIVE SERVICE FEE NOT TAXABLE HELP SUPPLY SERVICE

By Sharon R. Paxton

In *All Staffing, Inc. v. Commonwealth*, 325 F.R. 2006 (January 5, 2010), a three-judge panel of the Commonwealth Court ruled that administrative services performed by All Staffing, Inc., a professional employer organization ("PEO"), were not subject to Pennsylvania's sales tax because they did not fall within the definition of "help supply services." The Commonwealth has filed Exceptions to the Court's decision and oral argument has tentatively been scheduled for June 2010.

All Staffing is a PEO, an entity that provides certain human resources-related services ("PEO Services") to clients by placing the clients' employees on its payroll. After a client's employees are transferred to All Staffing's payroll, the client retains control and direction over the day-to-day activities of the employees and makes all hiring, firing, wage setting, disciplinary and other business and personnel decisions. All Staffing performs various PEO Services for its clients, including data processing services, human resources assistance, safety and risk management assistance, and maintenance of workers' and unemployment compensation accounts. The PEO Services that All Staffing provides for its clients are performed by its own personnel under All Staffing's supervision, and almost all of these services are performed at All Staffing's offices, away from client worksites. All Staffing's clients pay for all costs of the employees placed on All Staffing's payroll, as well as an administrative service fee for the PEO Services.

The Commonwealth contended that, because All Staffing places all of a client's employees on its payroll, its business activities fall within the definition of "help supply services," and thus fees charged for the PEO Services are subject to sales tax. (The taxability of reimbursements for "employee costs" were not in dispute because, when employee costs included in the price for "help supply services" are separately stated, those costs are not subject to sales tax; only the "service fee" is taxed.) All Staffing argued that the sales tax statute imposes tax on a vendor's provision of "help" to its customers, and that it does not provide "help" (i.e., personnel) to any of its clients. Rather, it is the client's payroll that is transferred to All Staffing, and All Staffing has never introduced a single new individual to a client's workforce. All Staffing further noted that it uses its own employees, not the clients' employees on its payroll, to provide the PEO Services, and its clients do not supervise the employees providing the PEO Services. The Commonwealth Court agreed with All Staffing's position that the PEO Services are not subject to sales tax because those services are performed solely by All Staffing's own employees who are supervised by All Staffing and not by its clients. ■



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PA BUDGET INCHING FORWARD

By James L. Fritz

While Commonwealth revenue collections continue to come up short of projection for the current year (General Fund \$720 million short of target through March) and it is almost universally acknowledged that pension fund shortfalls will present a major financial problem for the Commonwealth in Fiscal 2011-2012, there seems to be little interest in voting for tax increases in what is an election year for most Pennsylvania legislators.

Sales & Use Tax Expansion

On March 23rd, the Pennsylvania House, by a 107-89 vote, adopted a 2010-2011 General Fund budget similar to the Governor's February budget proposal and sent it to the Senate. This, however, did not include Governor Rendell's proposal to reduce the sales tax rate from 6% to 4%, but broaden the tax base to produce a net tax increase of more than half a billion dollars. In fact, the House also did not vote on any of the other tax increases and changes proposed by the Governor - including combined reporting of Corporate Net Income Tax, a natural gas severance tax, elimination of the sales tax vendors' allowance and expansion of tobacco taxes to cover cigars and smokeless tobacco.

At this point, most observers see little likelihood that the Governor's sales tax proposal will be adopted this year. This has been the case since the Governor's February budget address. In the Senate where Republicans are in firm control, leaders immediately called the Governor's sales and use tax proposal "dead on arrival." The Governor's sales and use tax proposal would expand the tax base to include nearly all services and eliminate 74 categories of tax exemptions. It would retain consumer exemptions for food, clothing and prescription medicines and business exclusions for manufacturing and processing machinery and equipment.

The services to become subject to tax under the Governor's proposal would include:

- Accounting, auditing and bookkeeping services
- Administrative services
- Advertising, public relations & related services
- Air transportation
- All other professional and technical services
- Architectural, engineering & related services
- Consulting (scientific, environmental & technical)
- Custom computer programming, design and data processing
- Electrical, plumbing, heating & air conditioning maintenance
- Information services
- Legal services
- Transportation services

- Scientific research & development services
- Specialized design services
- Waste management and remediation
- Water and sewage services

Among the exemptions directly impacting the business community that would be eliminated are:

- Bad debts
- Catalogs and direct mail advertising materials
- Charges for returnable containers
- Common carrier equipment
- Public utility equipment and supplies
- Rail transportation equipment
- Wrapping and packaging supplies

The Governor's proposal seems to have the potential to greatly increase "tax pyramiding" - tax would be imposed on numerous business inputs, and again when the company's products are sold. In industries which are not vertically integrated and have a chain of companies providing intermediate services and products, there is a particularly great risk of imbedding multiple layers of tax in the final cost of product. Smaller companies which must purchase multiple services which they cannot produce in-house would also be particularly affected. And, as there has been no mention of an inter-company exemption, additional tax would be imposed on services rendered by related companies. Even with the lower rate, it seems likely that many industries could find themselves bearing higher total tax burdens.

In proposing to lower the rate and broaden the sales and use tax base, the Democrat Governor seems to have borrowed from proposals advanced by Republican Sam Rohrer, who is now opposing Attorney General Tom Corbett for the Republican gubernatorial nomination. Although Rohrer would use additional revenues to replace school real estate taxes, Governor Rendell proposes to put the additional revenue collected in FY 2010-11 into a new "Stimulus Transition Reserve Fund," which would be tapped to replace federal stimulus funding that has shored up the 2009-10 budget and will provide Pennsylvania with approximately \$2.8 billion in FY 2010-11. Only \$500 million of stimulus funding will be available in FY-2011-12.

The most serious effect of the Governor's sales tax proposal may be to give legislators ideas for next year when Pennsylvania faces a huge pension funding shortfall, which it must start to pay off in FY 2011-12.

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PA BUDGET INCHING FORWARD *continued from page 3*

Combined Reporting; Single Sales Factor; Removing NOL Cap

Unless there is a quick sea-change from last year's budget debate, the Governor's resurrected proposal to move from separate company reporting to combined reporting for Corporate Net Income Tax purposes would also seem to have tough sledding ahead. While past proposals would have substantially reduced the rate in conjunction with combined reporting, this time the Governor has proposed only a one percent reduction, from 9.99% to 8.99%. The proposal does appear to have some support on the Governor's side of the aisle. In conjunction with combined reporting, the Governor proposes to eliminate the use of property and payroll factors for apportionment and move to a "single sales factor." On a standalone basis, this proposal has had substantial business support, and the Commonwealth has made several increases in the weighting of the sales factor over recent years. It will be interesting to see whether the Governor's opponents will seek to sever this part of the Governor's proposal and incorporate it into the final budget on a standalone basis.

The same could be said for the Governor's proposal to lift the current cap on net operating loss carryforwards. The Governor would lift the cap prospectively and retain the current \$3 million or 20% cap for prior year losses.

The Governor's budget proposals indicate that these Corporate Net Income Tax changes, taken as a whole, would generate in excess of

\$70 million in additional annual state revenue. Additional revenue generated in FY 2010-11 would be added to the "Stimulus Transition Reserve Fund."

Natural Gas Severance Tax

There seems to be substantial debate over the Governor's proposal for a natural gas severance tax. Many other states impose a severance tax on natural gas. With the Marcellus Shale formation underlying a large part of the Commonwealth, many see a golden opportunity to generate revenues to deal with current and future revenue shortfalls.

Cigars & Smokeless Tobacco

Pennsylvania apparently is the only state in the Union that does not tax cigars and smokeless tobacco. The Governor's budget documents claim that in public polling, 90 percent of the public supports taxing these products. Southcentral PA Tobacco farmers and their allies, however, have been successful in the past in opposing this tax.

Wither and When?

It is difficult to believe that Pennsylvania's General Assembly will vote for any general tax increase in an election year. Facing a substantial revenue shortfall in the current fiscal year and with fiscal storm clouds on the horizon, however, we would not be surprised to see some narrow "adjustments" in Pennsylvania's tax system, in conjunction with this year's budget. Will that be resolved by June 30th? Your bet is as good as ours! ■

REAL ESTATE ASSESSMENT DEADLINES APPROACHING - OPPORTUNITIES MAY EXIST TO REDUCE TAXES

By Randy L. Varner

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

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

We can help you evaluate whether a tax assessment appeal would be appropriate. Given the impending appeal deadlines, however, it is important that the analysis be started soon. [Contact Randy Varner at 717-237-5464 or rvarner@mwn.com, for assistance in evaluating any real estate assessment that you feel may be too high.] ■

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TOWNSHIP “FLAT TAX” ON BUSINESS UPHELD

By Timothy J. Horstmann

The Commonwealth Court, in an unreported opinion, has affirmed a decision of the Court of Common Pleas of Bucks County, which held that a business privilege “flat tax” ordinance passed by Warrington Township did not violate the Local Tax Reform Act or the Uniformity Clause of the Pennsylvania Constitution.

The tax in question was imposed on only those businesses with gross receipts in excess of one million dollars. A consortium of local businesses filed a facial challenge to the ordinance, on the ground that the “flat tax” was in reality a gross receipts tax that carved out all businesses that did not exceed one million dollars in gross receipts, in violation of the prohibition on new gross receipts taxes under the Local Tax Reform Act. The consortium also argued that the tax violated the Uniformity Clause of Pennsylvania’s Constitution (on the ground that the tax unfairly targeted those businesses that exceeded the one million dollar threshold) and improperly taxed receipts generated in 2008 prior to the passage of the ordinance.

The Commonwealth Court rejected these arguments, and explained that the tax was not a gross receipts tax, but a “flat tax,” which was clearly permitted under prior precedent. There was also no Uniformity Clause violation, as the township, in passing the ordinance, had taken into account the ability to produce revenue and found that those businesses with gross receipts in excess of one million dollars generally consumed a larger percentage of the township’s resources. Finally, the Court found that the ordinance did not improperly tax receipts generated prior to its passage, as the tax was a flat tax on the privilege of doing business, and merely consulted 2008 receipts to determine whether the tax applied. The consortium has filed notice of its intent to appeal the decision to the Pennsylvania Supreme Court. *Shelly Funeral Home, et al. v. Warrington Twp.*, No. 769 C.D. 2009, December 31, 2009. ■

PA FUEL TAX INCREASE LOOMING?

The federal government’s recent denial of Pennsylvania’s application to toll I-80 created a \$470 million hole in Pennsylvania’s 2010-2011 transportation budget. If Pennsylvania chooses to make up the revenue loss with an increase in the fuels tax, the rate could increase by a very substantial percentage. Governor Rendell has called a special session of the General Assembly, beginning May 3rd to deal with this issue.



ALLEGHENY COUNTY COUNTYWIDE REASSESSMENT PLAN ADOPTED

By Randy L. Varner

As we previously reported in this newsletter, the Pennsylvania Supreme Court struck down Allegheny County’s use of a 2002 base-year property tax assessment scheme as unconstitutional in *Clifton v. Allegheny County* (Pa. April 29, 2009). As part of its holding, the Court ordered Allegheny County to conduct a countywide reassessment. The Court remanded the matter back to Judge Wettick in Allegheny County for the development of a reassessment plan.

Judge Wettick scheduled a trial for mid-October requesting that both the taxpayers and the county present proposals for reassessment. At the hearing, the taxpayers presented a plan but the county did not. Because Judge Wettick found the taxpayers’ plan to be inadequate, on November 10 he issued a ruling setting forth his own reassessment plan, which divided the county into four parts and which implemented the reassessment over a four-year period. Judge Wettick further ordered that his plan would be implemented unless the county informed the court that it could conduct a countywide reassessment for use in 2012.

Eventually, the county did present a plan to the court which was approved by Judge Wettick on December 11. The approved plan will be implemented in stages. The countywide reassessment and final certification of values by the county will be complete in January 2012.

Under the plan, the county will send preliminary values to property owners in the third quarter of 2011 for informal reviews. One major issue with the plan is that it will require property owners to pay their 2012 property taxes before filing an appeal. Currently, appeals are heard before taxes are due. ■

PENNSYLVANIA SUPREME COURT RULES THAT ELECTRICITY DISTRIBUTION, TRANSMISSION AND TRANSITION CHARGES ARE SUBJECT TO SALES TAX

By Sharon R. Paxton

On November 5, 2009, in *Spectrum Arena Limited Partnership v. Commonwealth*, 983 A.2d 641 (Pa. 2009), the Pennsylvania Supreme Court affirmed the April 2008 decision of the Commonwealth Court that distribution, transmission and transition charges associated with the purchase of electricity for non-residential purposes (“Delivery Charges”) are subject to Pennsylvania Sales Tax. Numerous refund claims had been filed by commercial electricity users seeking a refund of sales tax paid on Delivery Charges in cases where the electricity charges had been “unbundled,” i.e., one utility company generated the electricity purchased by the consumer and another “local” utility company delivered the electricity to the consumer through its power lines.

Prior to enactment of the Electricity Generation Customer Choice and Competition Act (“Competition Act”), local electric utility companies generated electricity and distributed that electricity directly to consumers located within the geographical area served by that utility. Costs associated with the generation and distribution of electricity were presented to the consumer with a single amalgamated cost for the amount of electricity provided. Due to the “bundled” nature of the charges for electricity service, the entire cost of generation, transmission and distribution was subject to sales tax. The Competition Act broke up the local utility company’s monopoly over the generation of electricity by allowing consumers to purchase electricity from any supplier. However, for obvious practical reasons, the Competition Act maintained transmission and distribution as services on which the local utility could continue to hold a natural monopoly subject to the supervision of the Public Utility Commission.

Spectrum Arena had argued that the Delivery Charges imposed by the local utility company were not subject to sales tax because they were not taxable charges for “electricity for nonresidential use” and did not otherwise qualify as charges for tangible personal property or as a specifically enumerated taxable service. In addition to statutory construction arguments, Spectrum Arena relied, in

part, on the fact that the Department of Revenue’s regulations exempt delivery charges from sales tax when billed by a party other than the vendor supplying the product. In rejecting Spectrum Arena’s arguments, the Court determined that the generation and distribution companies were “together” the “vendor,” and there was “no truly independent electricity delivery company” as contemplated by the Department’s regulations at 61 Pa. Code §54.1(c). The Court also adopted the position that electricity is not a finished product, “capable of sale at retail,” until it is both generated and

delivered to the consumer. Thus, the Court determined that the Delivery Charges are part of the purchase price of electricity and not “independent” delivery charges. Unfortunately, in reaching its conclusion regarding the proper statutory interpretation, the Court, in several instances, mistakenly characterized statutory references to the Tax Reform Code as references to the Competition Act. The Court also seemed to equate the definition of “sales of electric energy” for Utilities Gross Receipts Tax purposes with the definition of “sale at retail” of “electricity for nonresidential use” for Sales Tax purposes, when those two taxes are governed by different sections of the Tax Reform Code.

PENNSYLVANIA SUPREME COURT AFFIRMED THE APRIL 2008 DECISION OF THE COMMONWEALTH COURT THAT DISTRIBUTION, TRANSMISSION AND TRANSITION CHARGES ASSOCIATED WITH THE PURCHASE OF ELECTRICITY FOR NON-RESIDENTIAL PURPOSES (“DELIVERY CHARGES”) ARE SUBJECT TO PENNSYLVANIA SALES TAX.



Spectrum Arena had further contended that applying sales tax to the Delivery Charges, but not to similar charges for the delivery of natural gas, created an improper disparate tax scheme. The Court rejected this argument on the basis that the Department of Revenue’s Policy Statement regarding the taxability of unbundled electricity charges demonstrates the legislature’s intention to apply a different tax treatment to electricity delivery charges. The Court’s analysis on this point seems weak - it simply construed the content of a Policy Statement issued by the Department of Revenue as evidence of the legislature’s intention to implement a disparate tax scheme for “unbundled” delivery charges for electricity and natural gas, with no further citation to authority or factual support.

Since Spectrum Arena did not file an application for reargument of the case, the Supreme Court’s decision has become final. ■

PA NOTES

By James L. Fritz

Sales Tax - Drop Shipments: A Virginia retailer, which otherwise had nexus with Pennsylvania, was required to collect Pennsylvania sales tax from a Massachusetts customer when that customer instructed the retailer to ship goods to Pennsylvania. This would include deliveries to the Massachusetts company's Pennsylvania customer unless the Massachusetts company tendered a "resale" exemption certificate. **PA Ruling No. SUT-99-134**, reissued February 16, 2010.

Personal Income Tax - Military Spouses Residency Relief Act: Under certain conditions, a service member's nonmilitary spouse can maintain out-of-state residency so that his/her compensation income will not be subject to Pennsylvania's Personal Income Tax. However, non-compensation income from Pennsylvania sources (e.g. from a Pennsylvania trade or business) will be subject to tax. **Personal Income Tax Bulletin 2010-1**, issued March 17, 2010.

Sales & Use Tax - Printing Exclusion: The Pennsylvania Supreme Court has affirmed, per curiam, the Commonwealth Court's 2009 decision in *EUR Systems, Inc. v. Commonwealth*, 965 A.2d 319, in which the court ruled that a provider of fulfillment services could not claim the printing exclusion for equipment and supplies used in producing telephone bills. While some degree of individualization of documents is permissible, each telephone bill was so different from the others that they did not satisfy the regulation's requirement of "substantial[ly] similar printed matter." *EUR Systems, Inc. v. Commonwealth*, No. 48 MAP 2009, March 24, 2010.

Realty Transfer Tax - Transfer to Irrevocable Living Trust: In a 2-1 decision, a panel of the Commonwealth Court has ruled that an irrevocable trust may be treated as a "living trust" for purposes of exemption from realty transfer taxes where the settlors (husband and

wife) designated themselves and their only child as the beneficiaries and retained substantial lifetime rights of dominion and enjoyment of the trust corpus (farmstead), including the right to sell the property. The dissent agreed with the Department of Revenue and the appeals board that only a revocable trust can qualify as "will substitute," which is one of the statutory requirements to constitute a living trust. *Miller & Miller v. Commonwealth*, No. 757 F.R. 2007, April 8, 2010.

Gross Premiums and Annuity Consideration Tax - Guaranty Association Credit: The credit for guaranty association assessments must be determined separately for each assessment class and not on all types of covered policies. As to credit for assessments in the annuity class, the "proportionate part factor" used to determine the proportion of the assessment allowed to be credited includes annuity considerations in both the numerator and denominator. *Allstate Life Insurance Co. v. Commonwealth*, No. 89 F.R. 1997, March 25, 2010.

Surplus Lines Tax - Exemption of State Instrumentalities: A seven-judge en banc panel of the Commonwealth Court has affirmed the 2009 decision of a 3-judge panel of the court (973 A.2d 1101), holding that Temple University is not considered an instrumentality of the Commonwealth for purposes of exemption from surplus lines tax. Furthermore, the General Assembly's failure to specifically address Temple's status in amending the tax statute could not imply intent to continue the exempt treatment previously granted by the Department of Revenue because there is no reason to suspect that the legislature was aware of a letter from a taxing officer to the university's previous broker, or would be aware of the Department's tax treatment of any individual taxpayer. *Valentine Co. v. Commonwealth*, No. 562 F.R. 2006, January 15, 2010. ■



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