"Shaking things up in state and local tax"

SUTHERLAND SALT SHAKER

FORECAST
Tax reform commission clouds forming, high winds, but little precipitation.

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Roam If You Want To: MTSA's Application to Foreign Roaming

In what appear to be two of the first rulings under the federal Mobile Telecommunications Sourcing Act (MTSA), two states' tax administrations have recognized that the Act constrains the states' power to tax wireless communications roaming charges associated with foreign (non-U.S.) customers or communications. The MTSA sources sales (for transaction tax purposes) of mobile telecommunications services if they are "provided in a taxing jurisdiction" to jurisdictions "whose territorial limits encompass the customer's place of primary use," regardless of where the services originate, terminate, or pass through. The application of this federal law is relatively straightforward when, for instance, Texas collects tax on charges related to a call made by a customer whose home service provider is located in Texas even when the customer is traveling in Kansas and makes a call to New York. In this standard case, the MTSA ensures that the transaction is taxable once – based on the customer's primary place of use – regardless of what might have been the pre-existing constitutional restraints on such a tax, but not more than once.

What happens, though, when one or more elements of the transaction take place outside the United States? Two recent state rulings – one addressing calls occurring outside the United States and one addressing calls made by foreign persons while in the United States –

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California Court of Appeal Addresses Proper Remedy for Taxpayers Claiming Dividends Received Deduction, Application of Post-Amnesty Penalties

The California Court of Appeal addressed two issues stemming from the fall-out over California's unconstitutional dividends received deduction in *River Garden Retirement Home v. Franchise Tax Board*, 2010 WL 2776090 (Cal. Ct. App. July 15, 2010): the proper remedy for the denial of the taxpayer's dividends received deduction and whether the taxpayer was liable for post-amnesty penalties as a result of an increase in its tax liability.

River Garden had claimed dividends received deductions for 1999 and 2000 under Cal. Rev. & Tax. Code § 24402. However, in 2003, the California Court of Appeal held that the dividends received deduction was unconstitutional because the deduction was permitted only for dividend-paying corporations subject to tax in California. *See Farmer Bros. Co. v. Franchise Tax Board*, 108 Cal. App. 4th 976 (Cal. Ct. App. 2003). As a result, the Franchise Tax Board (FTB) retroactively disallowed California taxpayers' dividend received deductions for tax years ending on or after December 1, 1999.

In arguing that the FTB's decision to disallow the dividends received deduction for tax years ending on or after December 1, 1999, the taxpayer maintained that (1) other remedies were available, including severance of the portion of the dividends received deduction that was rendered unconstitutional, while leaving intact the remaining portion of the deduction, and (2) denial of the deduction resulted in retroactive taxation of its income violating the Due Process Clause. The first argument was rejected based on *Abbott Laboratories v. Franchise*

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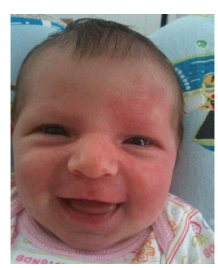
Sutherland SALT Family Expands by Two

Nicholas Marc



Anna Rose

We are pleased to introduce the newest members of the Sutherland SALT family – Nicholas Marc Simonetti and Anna Rose Feldman. Nicholas was born on July 9 and takes after dad Marc with a full head of hair, a voracious appetite, and a passion for the Yankees. Anna followed eight days later, on July 17, and is taking Atlanta by storm with her exuberant smile and laugh, especially while talking about state tax apportionment with dad Jonathan. Congratulations to parents Marc and Kim, and Jonathan and Jenifer!

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Roam If You Want To: MTSA's Application to Foreign Roaming cont'd

are instructive of the scope of the MTSA. According to these two rulings, unless all conditions of the MTSA are met, such transactions may not be taxable at all.

In the Texas Comptroller's Decision, Hearing No. 100,587, Texas (June 4, 2010), the Comptroller ruled that Texas has no authority to tax calls that originated and terminated in Mexico even though the wireless telecommunications service provider in question maintained a telecommunications network in Texas and the customers' primary place of use of these services was in the state. Because the statute defined "taxing jurisdiction" as states and other taxing units *within the United States*, the Comptroller concluded that "[t]he plain meaning of the [MTSA's] language is that the drafters were focused exclusively on resolving interstate taxation issues presented by competing jurisdictions in the United States."

Similarly, the New York State Commissioner of Taxation and Finance ruled, in an Advisory Opinion released May 4, 2010, that New York may not impose state and local sales taxes or telecommunications excise tax under the MTSA on roaming charges related to calls placed within the state by foreign subscribers to foreign carriers' phone plans, because these customers' places of primary use were not within New York, even though these charges would not be subject to tax by any other state. New York Advisory Opinion TSB-A-10(24)S (May 4, 2010).

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Tax Board, 175 Cal. App. 4th 1346 (Cal Ct. App. 2009), in which the court held that to sever the limitation on the availability of the dividends received deduction would contravene the intent of the Legislature in enacting the statute. Regarding the taxpayer's retroactive taxation argument, the court was also not persuaded and held that a four-year period of retroactivity was reasonable, noting that deductions are a matter of legislative grace and taxpayers therefore have no vested right in them. Thus, the FTB was permitted to deny the deductions retroactively without infringing upon the taxpayer's Due Process rights.

The court also rejected the taxpayer's argument that the increase in taxes violated the California Constitution article XIIIA, section 3, known as Proposition 13, which requires that legislation to increase state taxes be approved by two-thirds of all members elected to each of the two houses of the Legislature. The court found that the FTB's denial of the taxpayer's dividends received deduction was not a revenue-increasing enactment subject to Proposition 13 because the FTB has no taxing powers and does not enact legislation.

The taxpayer was assessed a post-amnesty penalty resulting from its failure to pay additional tax during California's amnesty program, which ran from February 1, 2005 to March 31, 2005. The court held that the post-amnesty penalty did not operate retroactively because, at the time the amnesty program was in place, it "function[ed] as an incentive for future conduct." The court reasoned that the penalty was applied to the taxpayer's failure to pay its liabilities pursuant to the amnesty legislation, and therefore, did not increase a tax liability resulting from past conduct.

The constitutionality of California's post-amnesty penalties continues to be the subject of much debate.

SALT PET(S) OF THE MONTH

Killer and Stanley

Brothers Killer and Stanley have been the companions of Sutherland SALT administrative assistant Melissa Bragg since she moved to Atlanta 12 years ago. New to town, Melissa and her friend set out to find a four-legged companion or two at the Atlanta Humane Society. They got lost and wound up at Marietta Humane Society, and there awaited Killer and Stanley for her rescue!

Melissa has good reason to "Bragg" about her kitties. Killer has a gregarious personality and is Melissa's constant companion, accompanying her while doing laundry, the dishes, or cooking. His bed-time rituals are particularly interesting as he helps Melissa put her daughter to bed and then trots down the hall on his own as soon as he hears "it's time for bed." Killer loves to eat and is quite the potato chip connoisseur. When he's excited, he runs and climbs walls sideways.

Stanley is more reserved and is happiest when someone pets him, always welcoming a little TLC. He's a bit skittish at times and tends to disappear if the doorbell rings, but he holds his own when it comes to chasing flies and flashlight beams.

SALT Pet of the Month: It's Your Turn!!

In response to many requests, the Sutherland SALT practice invites you to submit your pet (or pets) as candidates for SALT Pet of the Month. Please send us a short description of why your pet is worthy of such an honor, along with a picture or two. Submissions should be directed to Andrea Christman at andrea.christman@sutherland.com.

Georgia Special Council on Tax Reform Holds First Meeting

On July 28, 2010, the eleven-member Special Council on Tax Reform and Fairness for Georgians went into action to consider a potential overhaul of Georgia's tax scheme. In the next five months, the group will conduct a comprehensive study of Georgia's state and local tax system and search for ideas to stabilize the state government's shaky income stream.

Rep. Larry O'Neal, chairman of the House Ways and Means Committee, noted in his opening remarks to the Council that it is an ambitious mission. Georgia has not attempted a systematic study of its tax code in 30 years. The Council will consider a wide array of proposals including approaches to increase state's sales tax revenue, the effectiveness of the 119 current sales and use tax exemptions, and potentially lowering personal and corporate income taxes.

The Council expressed a commitment to transparency and non-political decision-making, and announced that it will hold statewide meetings in the next few months to get input from Georgians. Updates about current activities can be found on the Council's Internet website http://fiscalresearch.gsu.edu/taxreform/. Lobbyists and legislators may contact members of the Council, but such communications may be made public.

After examination of the tax code this summer and fall, the group will report its findings and recommendations to a special legislative committee by the beginning of the 2011 General Assembly session in January. The committee will then introduce one or more tax reform bills incorporating the Council's recommendations in the House of Representatives, which will decide them on up-or-down votes without amendments.

Taxpayer Wins Georgia High-Tech Credit

The Georgia Court of Appeals held that purchases of electronically delivered computer software qualify as purchases of "computer equipment" for purposes of determining the applicability of Georgia's "high-technology" sales and use tax exemption. *ChoicePoint Services, Inc. v. Graham,* Dkt. A10A0234 (Ga. Ct. App. July 15, 2010). The statutory exemption is provided for "sales … of qualified computer equipment" (including both hardware and software) to Georgia high-technology companies if such companies purchase at least $15 million of computer equipment during a calendar year. To reach this $15 million threshold for the years at issue, ChoicePoint included purchases of taxable and non-taxable (electronically delivered) computer software.

The Georgia Department of Revenue denied ChoicePoint's claim for exemption, arguing that only taxable purchases count toward the calculation of the $15 million exemption threshold because any nontaxable or exempt purchases would not be considered "sales" of computer equipment under Georgia law. The Department relied on its regulation to support its position.

Reversing the decision of the Fulton County Superior Court, the Court of Appeals held that the statutory language was clear that any purchases of computer hardware or software are included in calculating the $15 million minimum threshold regardless of whether such purchases were taxable. Further, the court held that because the statutory language is clear, any regulation that contradicts this plain language is invalid to the extent that it exceeds the scope of, and is inconsistent with, the statute.

The Department has filed a Petition for Certiorari to the Georgia Supreme Court. Sutherland represents ChoicePoint in this matter.

Recently Seen and Heard

July 11-14, 2010
Southeastern Association of Tax Administrators Annual Conference
Little Rock, AR
Steve Kranz moderating the Commissioner's Roundtable
Scott Wright on Questioning Authority: Presumptions in Property Tax Cases

July 12-16, 2010
TEI State & Local Tax Course
Indianapolis, IN
Diann Smith and **Pilar Mata** on Introduction to State Franchise and New Worth Taxes; Managing Protests; and a Mock State Appellate Hearing

July 15, 2010
BNA Webinar
Steve Kranz on Colorado's Sales and Use Tax Reporting Requirements: A Model for Other States?

July 22-25, 2010
TEI 2010 Region VII Conference
Hilton Head Island, SC
Jeff Friedman and **Eric Tresh** on State Tax Roundtable – Planning and Techniques

July 25-29, 2010
Multistate Tax Commission 43rd Annual Conference
Hood River, OR
Steve Kranz on Transparency and State Taxation – The Good, The Bad, The Gray and on the Telecommunications Transaction Tax Administration Project

Gain From the Sale of FCC License Is Business Income, Says Oregon Tax Court

In *Crystal Communications, Inc., v. Oregon Department of Revenue*, the Oregon Tax Court held that gain from the sale of an FCC license was business income to a corporation engaged in the telecommunications services business. *Crystal Communications, Inc. v. Oregon Dep't of Revenue*, No. 4769, at 27 (Or. T.C. July 19, 2010). The case presented two issues: (1) whether the gain from the sale of an FCC license was business income or nonbusiness income; and (2) if the gain was business income, what were the income-producing activities related to the sale of the FCC license for purposes of sourcing that gain.

Before the court could determine whether gain from the sale of the FCC license was apportionable income, it had to determine how to apply different Oregon tax provisions, some of which were adopted prior to the state's adoption of the Uniform Division of Income for Tax Purpose Act (UDITPA). The court determined that UDITPA does apply and held that the sale of the FCC license met the UDITPA functional test because the license was acquired, managed, and used as an integral part of the taxpayer's telecommunications services business; therefore, the gain was apportion-able business income.

The court next analyzed what constitutes income-producing activities for purposes of sourcing the gain from an intangible (i.e., the FCC license). The court held that the income-producing activities in this case included the development,

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Come See Us

August 13, 2010
Manufacturers' Education Council 2010 Annual Ohio Tax Course
Cherry Valley Lodge – Granville, OH
Diann Smith on Major Trends & Multistate Tax Issues including Aggressive State Tax Actions

August 17, 2010
Stafford Webinar
Pilar Mata on Corporate Income Tax: Compiling and Maintaining Audit Files

September 23-25, 2010
ABA Section of Taxation Fall Meeting
Sheraton Centre Toronto Hotel – Toronto, Canada
Steve Kranz on New Breed of Amazon "Taxes" – Colorado's Clever Twist

September 26-28, 2010
Northeastern States Tax Officials Association Annual Conference
Park Plaza Hotel & Towers – Boston, MA
Steve Kranz on Alternative Approaches to Remote Sales Transactions

September 26-29, 2010
IPT Sales and Use Tax Symposium
Renaissance Esmeralda Resort and Spa – Indian Wells, CA
Michele Borens on Join the Penny Pinchers – Learn How to Lower Your Tax Costs Through Proper Contracting Language
Steve Kranz on The Organized Chaos of State Tax Legislation

September 26-29, 2010
The Tax Foundation National Taxpayers Conference
One Washington Circle Hotel – Washington, DC
Charlie Kearns on in-the-news tax issues and on current state fiscal policy developments, pending federal legislation on state tax issues, SSTP developments, and their potential impacts on states and taxpayers

October 24-27, 2010
TEI 65th Annual Conference
Sheraton Chicago Hotel – Chicago, IL
Eric Tresh and **Pilar Mata** on Dangers of Unreliable Intercompany Accounting Issues in State Taxes

New Jersey Superior Court Declines to Toss "Throwout"

On July 12, 2010, the Superior Court of New Jersey, Appellate Division, affirmed the New Jersey Tax Court's decision, holding New Jersey's apportionment throwout rule is not facially unconstitutional. *Whirlpool Properties, Inc. v. Director, Division of Taxation*, Docket A-1180-08T2, and *Pfizer, Inc. v. Director, Division of Taxation*, Docket A-1182-08T2.

New Jersey's throwout rule (repealed for tax years beginning after July 1, 2010) eliminates from the sales factor denominator receipts that are assigned to a state in which the taxpayer is not subject to tax. The Superior Court's decision affirmed the New Jersey Tax Court's reasoning that the standard for determining whether the statute is facially unconstitutional depends upon whether there is any possible set of circumstances under which the statute could operate constitutionally. The court then provided an overview of the same scenarios reviewed by the Tax Court as instances where throwout might be constitutional: (1) where the transactions thrown out of the denominator had an identifiable nexus to the state (i.e., sales that originated within the state, thus akin to throwback), (2) where the throwout rule had no material effect on the sales fraction, and (3) where the property and payroll fractions work to offset the impact of the sales fraction, thus ensuring that the apportionment formula was not distortive.

The Superior Court's analysis did not focus on the fact that the throwout rule affects only receipts attributable to states other than New Jersey. Regardless of the apportionment percentage as compared to the degree of activities conducted within New Jersey, the throwout rule comes into play only when the taxpayer is not subject to tax by another state – and serves to increase New Jersey tax based on the amount of receipts otherwise assignable to another state. Taxpayers argue that the rule is designed to reach extraterritorial values.

The taxpayers have the right to seek review of the Superior Court's decision on the issue of facial constitutionality by filing a petition with the New Jersey Supreme Court. Regardless of the outcome, taxpayers with throwout claims have the right to challenge the throwout rule on an as-applied basis.

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Gain From the Sale of FCC License Is Business Income, Says Oregon Tax Court cont'd

operation, and sale of Crystal's cellular network in the license area, and that the actual sale of the license was merely a step in Crystal's realization of its purpose for obtaining the FCC license – gain on its sale. The court rejected the taxpayer's position that the only relevant activities for determining income-producing activities were the management activities associated with the sale of the FCC license. The court determined that the term "income-producing activity" was not limited to those activities relating to the negotiation and closing of the ultimate asset sale, because the statute defining "income-producing activity" relates to activities having an "ultimate purpose of obtaining gain," which is far broader than the sale of the FCC license.

California Amnesty and Penalties – It's Not Over Yet!

Representative Nancy Skinner introduced sweeping tax amnesty legislation this summer. First and foremost, A.B. 2498 would establish a tax amnesty program for "abusive tax avoidance transactions." "Abusive tax avoidance transactions" are defined broadly to encompass tax shelters, reportable transactions, listed transactions, gross misstatements, noneconomic substance transactions – as well as "any transaction involving financial arrangements that in any manner rely on the use of offshore payment cards (including credit, debit, or charge cards) issued by banks in foreign jurisdictions or offshore arrangements…." The bill would also lengthen the statute of limitations from 8 years to 12 years for such transactions, codify the definition of federal noneconomic substance transactions, and impose a strict liability penalty of 20 percent on noneconomic substance transactions that are disclosed to the Franchise Tax Board and a 40 percent strict liability penalty on such transactions that are not disclosed.

Taxpayers who decide not to participate in the amnesty program will be subject to strict liability penalties ranging from 50 to 200 percent of the adjusted annual interest rate – on top of the state's existing 20 percent understatement penalty, 40 percent fraud penalty, and 40 percent noneconomic substance penalty. And, taxpayers who participate in the amnesty program will be required to give up their appeal rights.

While putting taxpayers between a rock and a hard place, A.B. 2498 also seeks to put their employees and advisors in an uncomfortable position. The proposed legislation would authorize the censure, suspension and disbarment of any certified public accountant or attorney licensed in California who are subject to penalties for aiding and abetting the understatement of a tax liability. The penalties imposed for such actions also would be increased tenfold from $10,000 to $100,000. While one would hope that such Draconian legislation would have small chance of passage, A.B. 2498 has been incorporated into the Democrats' budget proposal and still warrants monitoring.

It Is In the Can: Software Subject to Pennsylvania Tax

On July 20, 2010, the Pennsylvania Supreme Court held that canned computer software is "tangible personal property" for purposes of the Pennsylvania sales and use tax, and, therefore, is subject to tax. *Dechert LLP v. Commonwealth of Pennsylvania*, 922 A.2d 87 (Pa. July 20, 2010). The Dechert decision is consistent with an earlier 2005 Pennsylvania Commonwealth Court decision that held canned computer software was subject to sales tax. *Graham Packaging Co., LP v. Commonwealth*, 882 A.2d 1076 (Pa. Cmwlth. 2005).

In *Graham Packaging*, the Commonwealth Court reasoned that the essence of the purchase of a license to use canned software is the acquisition of a computer program that is stored on a computer and can be physically perceived. Therefore, the taxpayer's argument that the license of the canned computer software was an intangible was rejected, and the Commonwealth Court held that the sale was in essence a sale of tangible personal property – canned computer software.

While the Supreme Court in *Dechert* found the Commonwealth Court's analysis of the nature of canned computer software informative, it found it unnecessary to apply the "essence of the transaction" or the "true object" test. The Supreme Court found that the statutory definition of tangible personal property was not clear and, thus, further analysis of the legislative intent was required. The Supreme Court analyzed the recent statutory amendment to the Pennsylvania tax law to repeal the tax on computer programming services to find "that the legislature intended for canned computer software to be taxed as tangible personal property."

The Supreme Court's holding in *Dechert* does not expand the definition of tangible personal property to capture other digitally delivered content, such as digital music, movies, etc., because the Supreme Court refused to find that computer code was included in the definition of tangible personal property.

Multistate Tax Commission Update

During the week of July 25th, the Multistate Tax Commission held its 43rd Annual Conference & Committee Meetings in Hood River, Oregon. Following is Sutherland's synopsis.

Sales Tax

Project to Draft Model Sales and Use Tax Notice and Reporting Statute: This Sales and Use Tax Subcommittee is rapidly working toward adopting a Colorado-like model statute requiring retailers with no physical presence in a state to provide notice to customers about use tax liability and to file annual reports with both the customer and the customer's state that include purchase information made by each resident customer. The Model requires that the notice to the purchaser appear prior to completion of the transaction. It is not clear how this requirement could be accomplished in some circumstances, such as those in which an online retailer has reduced the purchase process to the single step of clicking a "Purchase" icon/link. The model statute's required notices to customers include an explanation that the retailer does not collect the tax, instructions on how the customer can obtain additional information, and a statement that the customer is required to file a use tax return. The report to the State would require only the total dollar amount of purchases, not a list of individual purchases.

Income and Franchise Tax: All About the Sales Factor!

Project to Amend the Multistate Tax Compact Article IV.17 (Costs-of-Performance): The Income and Franchise Tax Subcommittee continues to debate appropriate sales factor sourcing rules to be applied to receipts from sales of services and the sale or license of intangibles. The MTC is moving toward adopting a market-based rule, rather than the traditional income-producing-activity rule.

A significant part of the discussion rehashed a previously settled debate as to whether the sourcing rule should simply be that receipts from the sale of services are sourced to the state in which the service is delivered or whether a cascade of alternatives (such as customer billing address) should be followed. After a vote, the Subcommittee again rejected the cascading approach, with California remaining in opposition. The Subcommittee also discussed whether Section 16 of the Uniform Division of Income for Tax Purposes Act (which applies to sourcing sales of tangible personal property) should be consolidated with Section 17 (which applies to sales other than tangible personal property). Such a consolidation brought up issues such as whether the throwback rule for sales of tangible personal property should be removed or changed to a throwout rule. Finally, the subcommittee remains committed to a proportional sourcing concept so that receipts could be divided up among the states in which a service was "delivered." To see all of the related documents go to: http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcommittees/43rd_Annual_Conf/Compact%20Amendment%20UC%20memo%207-15-10%20with%20attachments.pdf

Project to Draft Model Mobile Workforce Statute: Sometimes something so weird happens that you are compelled to ask the person next to you if she saw the same thing; like if you are waiting at a stop light and a pygmy hedgehog wearing a cowboy hat whizzes by on a Vespa™. That is the feeling some onlookers had during the Subcommittee's discussion of the MTC's draft Model Mobile Workforce Statute. This project was designed to create a uniform state statute addressing employer withholding and nonresident employee personal income tax liability. The primary provision of the Model is that neither the employer nor the employee would have any reporting or tax liability if the employee spent no more than 20 days working in a state. The project was started as an alternative to proposed federal legislation on the same issue. A not-awful product was developed and made it all the way through the MTC's adoption process to the MTC's Executive Committee for a vote. Then, the Montana Department of Revenue raised numerous concerns and developed a "better" idea. One of Montana's concerns is that the proposal adopts a physical presence standard for personal income tax (which suggests to some that a physical presence test for the corporate income tax is also a good idea). There goes that Vespa. Montana also suggested that companies may "game the system" by setting up dozens of subsidiaries in Nevada and transferring employees from one to another to prevent an employee from ever working more than 20 days in a state for any one employer. As an alternative to the existing Model, Montana proposed entirely eliminating the day-threshold for employee liability and instead using a special MTC web-based "calculator" that employees could access to determine their income tax filing requirements based on each individual state's existing thresholds. Montana demonstrated this calculator (which is really a spreadsheet). Montana also wants employers to apply to each state annually and to comply with other periodic reporting requirements in order to use the withholding threshold. And, the hedgehog waves good-bye.

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