State & Local Tax Insights

Assigning Sales of Other Than Tangible Personal Property in California: Emergence of a Market-State-Based Approach

By Timothy A. Gustafson and Carley A. Roberts

New regulations are on the way with respect to statutory changes regarding apportionment and sales of other than tangible personal property. There is still time to consider California's new direction.

Over forty years ago, the California Legislature adopted the Uniform Division of Income for Tax Purposes Act ("UDITPA") sales factor for its apportionment formula.[1] One primary objective in doing so was to "promote uniformity in allocation practices among the … states which impose taxes on or measured by the income of corporations."[2] With regard to sales of other than tangible personal property, the UDITPA sales factor was designed to reflect a taxpayer's "income producing activity," which is defined by California regulations as "transactions and activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of obtaining gains or profit"[3] and the location of which is based on where the "costs of performance"[4] are incurred.

The California Legislature recently discarded the design of the UDITPA sales factor regarding sales of other than tangible personal property and repealed the cost of performance rules for sourcing such sales for inclusion in the California sales factor for apportionment purposes.[5] One primary objective in doing so was to "address[ ] the fiscal emergency declared by the Governor by proclamation issued on December 19, 2008, pursuant to the California Constitution."[6] In addition, the Legislature's repeal of the costs of performance provisions was intended to provide "fair treatment" of service providers for sales factor apportionment purposes.[7] California's current costs of performance rule is an all-or-nothing rule that can sometimes produce inequitable results. For example, neither UDITPA nor California's statutory provisions deals explicitly with the assignment of receipts from services for sales factor purposes. As a result, receipts from services are sub-

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Market-State-Based Approach

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ject to the general "costs of performance" rule for assigning sales of other than tangible personal property. For service providers that expend substantial amounts of time or costs in more than one state, some states will receive no tax, whereas other states will receive tax windfalls from services performed, to a considerable extent, in other states.

Thus, for tax years beginning on or after January 1, 2011, sales, other than sales of tangible personal property, are sourced to California as follows: (1) sales from services are in California to the extent the purchaser of the service received the benefit of the service in California; (2) sales from intangible property are in California to the extent the property is used in California, except for sales of marketable securities, which are in California if the customer is in California; and (3) sales from the sale, lease, rental, or licensing of real or tangible personal property are in California if the real or tangible personal property is located in California.[8]

The California Franchise Tax Board ("FTB") was authorized in 2009 to "prescribe regulations as necessary or appropriate to carry out the purposes" of the new market-state-based approach established by the Legislature.[9] With 2010 now well under way, the FTB has begun the process of amending its regulations to reflect these statutory changes. On February 10, 2010, the FTB held its first Interested Parties Meeting ("IPM")[10] to discuss and brainstorm regarding possible amendments to California Code of Regulations, title 18, section 25136 (sales other than sales of tangible personal property) ("Regulation 25136"). In attendance was a group of approximately 50-60 individuals (with perhaps another 20 or so individuals participating via telephone), primarily comprised of tax practitioners and FTB attorneys and staff. A handful of members of the business community participated as well.

Among other things, participants questioned the need for definitions of certain statutory terms, such as the seemingly interchangeable "purchaser" and "customer." More importantly, questions raised during the IPM underscored the difficulty of identifying where a party "received the benefit of [a] service" and ascertaining "the extent [ ] property is used in [a] state."[11]

The California Court of Appeal addressed similar questions in the context of tangible personal property over fifteen years ago in *McDonnell Douglas Corp. v. Franchise Tax Board*.[12] There, the court permitted an aircraft manufacturer to exclude sales of aircraft that were destined for use outside of California but that were delivered to purchasers in California from the manufacturer's California sales factor numerator for apportionment purposes.[13] In determining where the tangible personal property was used, the court applied the "destination" rule rather than the "place of delivery" rule and declined to follow the FTB's regulation in effect at the time.[14]

In reaching its decision, the court in *McDonnell Douglas* considered the rulings of a number of different states in rejecting the FTB's regulation and upholding the destination rule.[15] The FTB now intends to follow suit and will undoubtedly draw inspiration for its new regulations from other states that have gone before. Prior to the IPM, the FTB encouraged would-be participants to review the relevant provisions of Iowa's and Ohio's laws and rules regarding the situsing of sales of other than tangible personal property under similar market-state-based approaches.[16]

Iowa law, for example, applies language similar to California's new statutory "received the benefit of [a] service" language. Specifically:

> Gross receipts are includable in the numerator of the apportionment factor *in the proportion which the recipient of the service receives benefit of the service in this state*.[17]
>
> With respect to a specific contract or item of income, *all gross receipts from the performance of services are includable in the numerator of the apportionment factor if the recipient of the service receives all of the benefit of the service in Iowa*. If the recipient of the service receives some of the benefit of the service in Iowa with respect to a specific contract or item of income, *the gross receipts are includable in the numerator of the apportionment factor in proportion to the extent the recipient receives benefit of the service in Iowa*.[18]

Iowa offers a number of "noninclusive examples of the application" of its rules, including:

> (b) A corporation headquartered in State Y is building an office complex in Iowa. The corporation from State Y contracts with an engineering firm from State X to oversee construction of the buildings on the site. The engineering firm performs some of their service in Iowa at the building site and also some of their service in State X. The gross receipts from the engineering service are attributable to Iowa and included in the numerator of the apportionment factor because the recipient of the service received all of the benefit of the service in Iowa.
>
> (c) A corporation from State A contracts with a computer software company from State D to develop and install a custom software application in a business office in Iowa of the company from State A. The software firm does consulting work on the project in State A and in Iowa. The software development is done in State D and in Iowa. The software package is delivered to the corporation from State A in Iowa. The gross receipts from the software development are attributable to Iowa and included in the numerator of the apportionment factor because the recipient of the service received all of the benefit of the service in Iowa.[19]

Likewise, Ohio situses gross receipts for services to the location of the ultimate use or benefit of the service for the purposes of its commercial activity tax:

> In general, gross receipts from services are sitused to Ohio in the proportion

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Upcoming 2010 Conferences

The following is a list of conferences through December 2010, in which Morrison & Foerster attorneys will be participating.

April 15

Annual State and Local Tax Update: East Coast

New York, New York

Eric J. Coffill
Craig B. Fields
Paul H. Frankel
Hollis L. Hyans
Carley A. Roberts
Thomas H. Steele
Andres Vallejo
Mitchell A. Newmark

April 22

New York State Bar Association

New York State and New York City Institute

New York, New York

Hollis L. Hyans

April 28

Utilities and Power Conference

Charlotte, North Carolina

Paul H. Frankel

April 29

Council on State Taxation (COST)

COST Advanced School

Atlanta, Georgia

Paul H. Frankel

May 2 – 4

Washington, D.C. Delegation: California State Bar Taxation Section

Washington, D.C.

Carley A. Roberts
Timothy A. Gustafson

May 3

Texas Tax Executives Institute School

Houston, Texas

Paul H. Frankel

May 7

New Jersey Tax Executives Institute

TEI State Tax Day

Randolph, New Jersey

Paul H. Frankel

May 14

Tax Executives Institute

New England TEI State Tax Day

Needham, Massachusetts

Paul H. Frankel

Council on State Taxation (COST)

New York City Regional Program

New York, New York

Eric J. Coffill
Hollis L. Hyans
Thomas H. Steele

May 17

Energy Tax Association 20th Annual Meeting

San Antonio, Texas

Craig B. Fields
Mitchell A. Newmark

May 17 – 18

Council on State Taxation (COST)

2010 Spring Audit Session and Income Tax Conference

Austin, Texas

Paul H. Frankel
Carley A. Roberts

May 19

Georgetown University Law Center

Continuing Education: "Managing the Stages of a State Tax Controversy" Symposium

Washington, D.C.

Craig B. Fields

May 20

Tax Executives Institute (TEI)

Denver Chapter SALT Meeting

Denver, Colorado

Thomas H. Steele

May 20 – 21

Georgetown State & Local Tax Institute

Washington, D.C.

Paul H. Frankel
Hollis L. Hyans
Andres Vallejo

June 3

Council on State Taxation (COST)

Philadelphia – Mid-Atlantic Regional Seminar

Philadelphia, Pennsylvania

Paul H. Frankel
Hollis L. Hyans
Carley A. Roberts

June 8

Federation of Tax Administrators (FTA) Annual Conference

Atlanta, Georgia

Paul H. Frankel

June 10

The Fourteenth Annual Multistate Tax Institute

Milwaukee, Wisconsin

Paul H. Frankel

June 21

Interstate Tax Conference

New York, New York

Paul H. Frankel

June 23

Tax Executives Institute (TEI)

Philadelphia, Pennsylvania

Eric J. Coffill

June 28 – 30

Institute for Professionals in Taxation (IPT)

Phoenix, Arizona

Eric J. Coffill
Amy F. Nogid

September 23

CalCPA Society

Sacramento, California

Carley A. Roberts

September 25

National Conference of State Tax Court Judges

St. Paul, Minnesota

Paul H. Frankel

September 27

Institute for Professionals in Taxation

IPT Sales Tax Symposium

Indian Wells, California

Paul H. Frankel

October 20

Council on State Taxation (COST)

COST Annual Meeting

Phoenix, Arizona

Paul H. Frankel

October 28

Chicago Tax Club

Rosemont, Illinois

Paul H. Frankel

November 4

2010 California Tax Policy Conference

San Diego, California

Paul H. Frankel
Carley A. Roberts

November 9

Michigan Tax Conference

Detroit, Michigan

Paul H. Frankel

November 11

16th Annual Paul J. Hartman SALT Forum

Nashville, Tennessee

Paul H. Frankel

December 8

New Jersey CPA State Tax Day

Edison, New Jersey

Paul H. Frankel

December 13 – 14

New York University's 29th Institute on State and Local Taxation

New York, New York

Craig B. Fields
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Market-State-Based Approach

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> that the purchaser's benefit in Ohio with respect to what was purchased bears to the purchaser's benefit everywhere with respect to what was purchased. *Except as otherwise set forth in this rule, the physical location where the purchaser ultimately uses or receives the benefit of what was purchased is paramount in determining the proportion of the benefit received in Ohio.*[20]

Ohio, however, offers flexibility in the manner in which a taxpayer may comply with the rule, specifically:

> The tax commissioner will not require taxpayers to upgrade their systems in order to comply with the general provisions of this rule as long as the taxpayer makes a good faith effort to situs receipts from services in a reasonable, consistent, and uniform method that is supported by the taxpayer's business records as they existed at the time the service was provided or within a reasonable time thereafter.[21]

Rather than examples, Ohio law offers a "list" of no less than 54 specifically enumerated "services and the situsing method to be used for commercial activity tax purposes."[22] Such services include "Accounting Services,"[23] "Computer Programming Services"[24] and "Payroll Services."[25]

During the IPM, other states' rules were discussed, including those of Minnesota, which provide for a cascade approach:

> (i) Sales of intangible property are made within the state in which the property *is used by the purchaser*. If the property is used in more than one state, the sales must be apportioned to this state pro rata according to the portion of use in this state. If the portion of use in this state cannot be determined, the sale must be excluded from both the numerator and the denominator of the sales factor. Intangible property is used in this state if the purchaser used the intangible property in the regular course of its business operations in this state.
>
> (j) Receipts from the performance of services must be attributed to the state where the services are received. For the purposes of this section, receipts from the performance of services provided to a corporation, partnership, or trust may only be attributed to a state where it has a fixed place of doing business. *If the state where the services are received is not readily determinable or is a state where the corporation, partnership, or trust receiving the service does not have a fixed place of doing business, the services shall be deemed to be received at the location of the office of the customer from which the services were ordered in the regular course of the customer's trade or business. If the ordering office cannot be determined, the services shall be deemed to be received at the office of the customer to which the services are billed.*[26]

By the close of the meeting, most questions as to how the FTB will proceed remained unanswered: e.g., which terms need or do not need to be defined, whether the regulation will include industry-specific provisions or merely illustrative examples, and which states' laws will the FTB consider. Taxpayers should have a better idea of the direction California will take shortly, as the FTB must move quickly on this project in order to have new regulatory provisions in place for taxable years beginning January 1, 2011. As of the date of the writing of this article, the FTB is working on the first draft of the amendments to its Regulation 25136. Upon completion, the FTB will likely publish the draft and hold a second IPM for comment. Stay tuned for developments. ■

MoFo Attorney News

Morrison & Foerster's State & Local Tax Group would like to welcome the following new attorneys to the firm:

- **Nicole L. Johnson joins us as an associate in the New York office**
- **Jenny Kim joins us as an associate in the Sacramento office**

The State and Local Tax Group would also like to congratulate Carley A. Roberts, who resides in our Sacramento office, and R. Gregory Roberts, who resides in our New York office, on becoming partners.

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1 Cal. Rev. & Tax. Code § 25136 (2008) (added Cal. Stats. 1966, ch. 2, § 7).
2 Frank M. Keesling & John S. Warren, *California's Uniform Division of Income for Tax Purposes Act*, 15 UCLA L. Rev. 156 (1967).
3 Cal. Code Regs. tit. 18, § 25136(b); *see also* Cal. Rev. & Tax. Code §§ 25134–25136; *General Mills v. Franchise Tax Bd.*, 172 Cal. App. 4th 1535, 1547 (Ct. App.), *review denied*, S173180, 2009 Cal. LEXIS 7862 (Cal. July 29, 2009).
4 Cal. Rev. & Tax. Code § 25136 (2008). California regulations likewise define "costs of performance": "direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer." Cal. Code Regs. tit. 18, § 25136(c).
5 SB 15, 3d Ex. Sess. (Cal. 2009); AB 15, 3d Ex. Sess. (Cal. 2009).
6 *Id.*
7 Assembly Bill Analysis, AB 15, 3d Ex. Sess., Concurrence in Senate Amendments (Cal. Feb. 14, 2009); Senate Bill Analysis, SB 15, 3d Ex. Sess., Senate Rules Committee (Cal. Feb. 14, 2009).
8 *See* Cal. Rev. & Tax. Code § 25136(a) (2009).
9 Cal. Rev. & Tax. Code § 25136(b) (2009).
10 Cal. Franchise Tax Bd., Interested Parties Meeting, http://www.ftb.ca.gov/law/intParty/ipmtg_021010.pdf (last visited Mar. 25, 2010).
11 Cal. Rev. & Tax. Code § 25136 (2009).
12 26 Cal. App. 4th 1789 (Ct. App.), *review denied*, S041611, 1994 Cal. LEXIS 5994 (Cal. Nov. 3, 1994).
13 *See id.* at 1796.
14 *See id* at 1796; *see also* Cal. Code Regs. tit. 18, § 25135(a)(3).
15 *McDonnell Douglas Corp.*, 26 Cal. App. 4th at 1794 – 1795. In fact, the California Court of Appeal considered rulings from states, including Ohio and Minnesota, to which now the FTB looks for guidance in drafting Regulation 25136, discussed *infra*.
16 *See* Cal. Franchise Tax Bd., Proposed Regulation Section 25136 Interested Parties Meeting Discussion Paper, http://www.ftb.ca.gov/law/intParty/021010_topic.pdf (last visited Mar. 25, 2010). At the IPM, the FTB also distributed the Meeting Notice and Information Regulation "25136 (2011): 50 State Analysis," available at http://www.ftb.ca.gov/law/intParty/25136_50_State_Analysis.pdf (last visited Mar. 25, 2010).
17 Iowa Admin. Code r. 701-54.6(422) (emphasis added).
18 Iowa Admin. Code r. 701-54.6(1) (emphasis added).
19 Iowa Admin. Code r. 54.6(1)(b)(c).
20 Ohio Admin. Code 5703-29-17(A) (emphasis added).
21 *Id.*
22 Ohio Admin. Code 5703-29-17(C).
23 Ohio Admin. Code 5703-29-17(C)(1).
24 Ohio Admin. Code 5703-29-17(C)(13).
25 Ohio Admin. Code 5703-29-17(C)(40).
26 Minn. Stat. § 290.191(5)(i), (j) (emphasis added).

Don't Be Cruel: Elvis Concert Tickets, Spa Gift Certificates and MetroCards; A Brief Foray Into New York State Abandoned Property Law

By Hollis L. Hyans and Amy F. Nogid[1]

One might puzzle over the possible connection among tickets to an Elvis Presley concert, gift cards to a spa and Metropolitan Transportation Authority MetroCards. The answer is simple: each raises questions regarding New York State's Abandoned Property Law ("APL").

Elvis Concert Tickets

Had he lived, Elvis Presley would have turned 75 on January 8, 2010. He recorded hundreds of songs, fifteen of which had the word "blue" in their title; he performed with a pistol in each of his boots; he preferred sponge baths; and he once used black shoe polish to color his hair.[2] Fascinating trivia, but what may interest tax professionals more relates to what happens to the ticket sales proceeds from concerts scheduled after his death, including one that had been slated for August 22, 1977, at Nassau Coliseum, in Long Island, New York.

Elvis died on August 16, 1977, leaving millions of distraught fans worldwide and thousands of holders of unused tickets for the August 22, 1977 concert, valued at almost $86K, not small change in 1977 dollars. After the six-year statute of limitations applicable to contract claims had run (and the right of ticket holders to request refunds from the Nassau Coliseum was therefore deemed to have expired), Presley's estate sued Nassau County, the owner of the Coliseum, to recover the proceeds from the tickets.[3] Although the APL's five-year dormancy period had long expired, and the Nassau County Treasurer had not yet remitted the proceeds from the concert to the State's Comptroller, the Coliseum surprisingly countered that the monies paid for the tickets did not belong to Presley's estate but instead constituted unclaimed property under New York's APL, and only the ticket holders could establish a right to the funds. Presley's estate argued that, due to the memorabilia value of the tickets, the ticket holders had already received value for their purchase, and therefore the ticket holders had no further claims.

In his initial opinion, Justice Wager, after breathing a sigh of relief that, notwithstanding post-death sightings, The King was "thankfully not in this courthouse during this court's consideration of this case," found "compelling evidence" of the tickets' memorabilia value, indicating that ticket holders who had not claimed refunds had received value, and stated that as between the parties "[i]f ultimately there is to be a windfall to someone, it should not be to the County, which played no part in generating the proceeds."[4] He also called Nassau County "disingenuous" and noted the County's "questionable conduct" in seeking to retain the monies it alleges had been abandoned in contravention of the same APL provisions that it invoked in its defense.[5] However, the court determined that, in light of the County's APL defense, the State needed to be served in the action to ensure a "complete adjudication of the issue."[6]

Of course, the State asserted its entitlement to the unclaimed ticket sale proceeds. The court then reversed itself and rejected The King estate's "memorabilia" claim on the basis that it was not the ticket holders' intent to purchase tickets for their memorabilia value; the memorabilia value of the tickets, incident to Elvis' untimely death, did not establish that the tickets were not abandoned property and entitle Elvis' estate to the proceeds. After stating that "this court is not blind to the obvious fact that the ticket holders, having failed to seek refunds these past 13 years will likely never apply to the State's Abandoned Property Law fund for reimbursement," the court nonetheless asserted that the State was not receiving a windfall because the APL is merely custodial and not a true escheat provision, which would permanently divest the owner of title and give the State unfettered use of the funds.[7] The decision was affirmed on appeal.

However, if getting something for nothing does not constitute a windfall, such term is seriously in need of a redefinition. While the State may properly claim such a windfall in the absence of a rightful owner, for example, by property owners' deaths without heirs, stripping holders of rights to property that the owners intentionally have not claimed is improper. In the instant situation, for example, the tickets arguably do not constitute escheatable property on two alternative grounds: the property was not abandoned because the ticket holders volitionally retained the tickets; and Elvis' estate gave the ticket holders ample consideration – valuable tickets due to the death of Elvis. Elvis' estate, rather than the State, should have received recompense.

At least two other states, North Carolina and Tennessee, have also addressed the issue of unused Elvis concert tickets.[8] The North Carolina Court of Appeals rejected the North Carolina Treasurer's attempt to claim the unclaimed ticket proceeds from a concert scheduled to be held at the Cumberland County Memorial Auditorium in August 1977. North Carolina's Treasurer aligned itself against the City of Asheville, the Cumberland County Auditorium Commission, the Presley concert tour promoter and Presley's estate and, using an increasingly common, yet improper, ploy by states in their efforts to seek monies, a.k.a. the "Noble Purpose Doctrine," the Treasurer argued that the monies deposited in the escheat fund would be better off in the State's hands where they would be "used to provide tuition funds for North Carolina students at public institutions of higher education."[9] The court was not moved by the Noble Purpose Doctrine, and held that the ticket proceeds were neither derelict nor abandoned property and that "com-

Elvis Concert

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mon sense leads us to believe that heavy expenses were incurred in connection with the concert by some if not all of the parties claiming the proceeds" of the ticket sale.[10] The North Carolina court also properly respected the derivative rights doctrine, which provides that states can succeed to no greater rights to the property than the owners; in this case, the ticket buyers' only right was to attend a concert or seek a refund, and the failure of the holders to return tickets for refunds did not establish that abandoned property existed.[11]

In the Tennessee litigation, the Presley estate and promoter sued the City of Memphis, the County of Shelby, and the Coliseum Board to recover the balance of the unrefunded ticket proceeds; the State of Tennessee intervened in the case claiming the funds as unclaimed property. Although the trial court ruled that the plaintiffs were entitled to the unrefunded ticket balances, less any amounts due to the Coliseum under the contract, the Tennessee Court of Appeals reversed. The court concluded that on Presley's death, the contract between the Coliseum's management company as agent for Presley and the ticket holders became void, divesting the plaintiffs of the right to recover any funds under the contract, and vesting in the ticket holders the right to refunds. Since the Presley plaintiffs no longer had any rights under the contract, applying the derivative rights doctrine resulted in the State's entitlement to the unclaimed ticket proceeds, notwithstanding the undisputed facts that costs had been incurred by the Coliseum; that the funds would not exist but for "Elvis Presley's unique skills and talents while living and the legendary status he continues to hold in the years after his death"[12] and the court's acknowledgment that "experience shows that abandoned property is seldom claimed."[13] In the court's view, although both the Presley plaintiffs and the State would receive windfalls if they were to be awarded the ticket proceeds, "our legislature intended such windfalls to benefit the public rather than individuals in precisely the manner we hold here."[14]

Unjust enrichment – even to the State – should never be a goal of government. Ample basis existed in each of these cases to conclude that the tickets did not constitute abandoned property, because the ticket holders were on full notice and had been given ample time to pursue refunds. Those who elected not to request refunds received consideration for their purchase in the form of memorabilia value, and even today a market continues to exist for unused tickets from Elvis concerts.[15]

Spa Gift Certificates

New York has also taken a hard line with respect to gift cards, ignoring the derivative rights doctrine, *i.e.*, the limitation of the government to succeed only to the rights existing to the property owner, by giving the State the right to receive unredeemed balances on cards after their expiration date from the retail issuer of gift cards. In *Kimberley's A Day Spa, Ltd. v. Hevesi*,[16] the company had sought a ruling on two questions from the New York State Comptroller regarding gift certificates. The first was whether gift certificates that had expired prior to the APL's five-year dormancy period were required to be remitted to the State. The second question, which assumed an affirmative response from the State Comptroller, concerned whether the company's "legitimate contract right to and expectation of the profit from the sale of the gift certificate" impacts its reporting and remittance under the APL.

Having received adverse responses to its questions from the Comptroller, Kimberley's A Day Spa (the "Spa") challenged in court the determinations as arbitrary and capricious. The Albany Supreme Court affirmed the Comptroller's determinations. APL § 1315 had been amended in 1983 to provide that gift certificates issued after December 31, 1983, and remaining unused after five years, constituted unclaimed property; the provision is silent regarding expiration dates. Further, the State's General Business Law § 396-i did not (and does not) restrict the issuance of gift cards with expiration dates or preclude businesses from dishonoring certificates presented after their expiration date.[17] The court concluded that, since the Spa's gift cards were issued after the amendment date, APL § 1315 did not impair the Spa's right to contract under the Contract Clause, and that there was no taking of private property without just compensation and without due process of law.

The decision, however, is a departure from the basic underpinnings of unclaimed property law as protecting owners' existing property rights – not granting additional property rights to owners – and New York decisions that have respected and applied such derivative rights doctrine.[18] Further, while public policy considerations may warrant the federal government's or a state's intervention in circumscribing appropriate consumer protection provisions related to gift card issuance, *e.g.*, providing restrictions on dormancy fees or expiration dates,[19] the APL should not be used to restrict the ability of businesses and their customers to determine the terms and conditions of their contractual provisions or expand existing, negotiated, property interests.

MetroCards

While the decisions in *Presley* and *Kimberley's A Day Spa* suggest a revenue-motivated yet consumer protective approach by the Comptroller, which is unsupported by the APL,[20] the APL itself provides a giant, unwarranted and unsupportable loophole, by excluding public corporations from compliance with the unclaimed property provisions related to "services not rendered or for goods not delivered" and "unredeemed gift certificates."[21]

Application of the loophole allows the New York State Metropolitan Transit Authority ("MTA") to retain unused balances on stored value cards issued to New York mass-transit users called "MetroCards."[22]

The MetroCards bear an expiration date, and contain the statement "subject to applicable tariffs and conditions of use." No statement is made on the card regarding refunds of any unused portions on expired cards. However, the MTA will not refund any MetroCard balances if the claim is not made within two years after the stated expiration date.[23] The unclaimed balances are sizable, estimated to total $53.1 million in 2009, up from $21 million in 2004 and $40 million in 2008.[24]

No justification exists for excluding public corporations, in particular the MTA, from the APL. The MTA is a "New York State-chartered public benefit corporation created by the Legislature in 1965 to deliver transportation services in the New York area."[25] Public authorities, "which have long functioned as a virtual shadow government largely immune from public accountability,"[26] enable the State to avoid constitutional limits on debt issuance using a business-like organization structure.[27] Public authorities currently have between $140 billion and $150 billion in debt, and due to long-standing pervasive concerns regarding these public authorities, various legislation have been enacted to address those concerns, the most recent of which, the Public Authorities Reform Act of 2009, became effective on March 1, 2010. Further, although the MTA is authorized to collect fares and issue debt, the Legislature recently passed tax provisions to address the MTA's 2009 $1.8 billion operating budget shortfall.[28]

Under *Kimberley's A Day Spa*, the existence of an expiration date on a stored value card does not eliminate application of the APL; if the MetroCards were issued by a non-public corporation an escheat requirement would exist with respect to any unused balances. Further, if the underlying rationale for excluding the MTA from the APL was the self-financing aspect of public authorities, the current existence of tax enactments targeted toward funding MTA deficits indicate that the rationale is no longer vital. Surely, if the State can seek purportedly abandoned funds held by Nassau County, as it did in *Presley*, it is appropriate to similarly require the MTA to be required to comply with the APL as a holder of abandoned property.

Concluding Thoughts

Unclaimed property laws can serve both governmental financial interests and the interests of owners of abandoned property. However, states have increasingly been using their unclaimed property laws as revenue raising devices, under the guise of protecting property owners. Further, in the absence of clear evidence that a contractual provision is intended to circumvent unclaimed property laws, *i.e.*, amounting to private escheat by the holder, governmental rights should be derivative of those of the property owner. Finally, governmental and quasi-governmental entities should be held to the same unclaimed property rules as private corporations and entities; government should not be seeking windfalls via escheat provisions. ■

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1 This article was published in State Tax Notes in substantially similar form under a different title.

2 Valerie Kellogg, *Still Can't Help Loving Elvis*, Newsday, Jan. 3, 2010 at C14-C15. Other interesting facts regarding The King include: he wore a chai (Hebrew for "life") necklace because he did not "want to miss out on going to heaven on a technicality" (his mother's maternal grandmother was Jewish), and he would impersonate an officer and after pulling people over would give the drivers autographs instead of tickets.

3 *Presley v. County of Nassau*, No. 15534/83 (N.Y. Sup. Ct. Nassau County July 10, 1989), *modified after being held in abeyance*, 560 N.Y.S.2d 173 (N.Y. Sup. Ct. Nassau County 1990), *aff'd*, 591 N.Y.S.2d 72 (N.Y. App. Div. 2d Dep't 1992).

4 *Presley v. County of Nassau*, No. 15534/83 (N.Y. Sup. Ct. Nassau County July 10, 1989).

5 *Id.*

6 *Id.*

7 *Presley v. County of Nassau*, 560 N.Y.S.2d at 176-77.

8 *North Carolina State Treasurer v. City of Asheville*, 300 S.E.2d 283 (N.C. Ct. App. 1983); *Presley v. City of Memphis*, 769 S.W.2d 221 (Tenn. Ct. App. 1988).

9 *North Carolina State Treasurer v. City of Asheville*, 300 S.E.2d at 284.

10 *Id.*, 300 S.E.2d at 285.

11 *See, e.g., Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951).

12 *Presley v. City of Memphis*, 769 S.W.2d at 225.

13 *Presley v. City of Memphis*, 769 S.W.2d at 223.

14 *Presley v. City of Memphis*, 769 S.W.2d at 225.

15 A $12.50 ticket, to a August 28, 1977 concert in the Mid South Coliseum in Memphis, Tennessee, is offered on eBay for $360.

16 *In re Kimberley's A Day Spa v. Hevesi*, 810 N.Y.S.2d 616 (N.Y. Sup. Ct. Albany County 2006).

17 General Business Law § 396-i was amended in 2004 (N.Y. Laws of 2004, ch. 170) to add subsection 3-b (now 3-c) to provide: "Nothing in this section shall be construed to prevent unclaimed funds related to gift card certificates from becoming abandoned under section thirteen hundred fifteen of the abandoned property law." N.Y. Gen. Bus. Law §396-i.

18 *See, e.g., In re Traveler's Express Co. v. Regan*, 498 N.Y.2d 569, 572 (N.Y. App. Div. 3d Dep't 1986) (holding that since the Comptroller's right to uncashed traveler's checks was derivative of the rights of the owners if the holder did not exercise its right to assess maintenance charges against owners it could not do so against the Comptroller: "the State has any and all rights of the owners to the property it claims as abandoned property.").

19 Consumer protection laws in certain states may also prohibit or limit the use of expiration dates. The federal Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009, signed into law on May 22, 2009, and effective as of August 21, 2010, addresses certain prepaid cards, gift cards, and gift certificate-related issues, including dormancy fees and expiration dates.

20 Presley's estate has, however, otherwise benefitted from the APL. The Presley estate was to receive $9,959 from New York State related to unclaimed royalties. Tamara Conniff and Georg Szalai, *Settlement Ends Royalty Rumble*, The Hollywood Reporter (May 5, 2004), *available at* http://www/allbusiness.com/services/motion-pictures/4894065-1.html.

21 N.Y. Aband. Prop. Law § 1315(1).

22 MetroCards were first introduced in the 1990s, and in 2003, the MTA discontinued the use of tokens on New York City subways and on buses, leaving MetroCards as the only mode of accessing public transit. MetroCards have a ten-digit serial number with a magnetic strip, and an Automated Fare Collection database retains the data regarding the monetary value loaded on the card and the turnstiles at which the card is used. *See, e.g.*, MetroCard (New York City) http://en.wikipedia.org/wiki/MetroCard_(New_York_City) (last visited Mar. 10, 2010).

23 The MTA's website provides that "every MetroCard has an expiration date. The date is located at the upper left corner on the back of the card. The expiration date is usually about one year from the date of purchase. If your Pay-Per-Ride MetroCard expires, you have two years from the expiration date to transfer any remaining money to a new card. Within the first year after expiration, bring your expired card to any subway station and ask the agent to make the transfer. After that time, the expired MetroCard must be sent to MetroCard customer claims." Problem with MetroCard, http://www.mta.info/metrocard/problems.htm#expired (last visited Mar. 10, 2010).

24 Eric Luu, *MTA Finds $53M on the Ground*, NBC New York, Dec. 3, 2009, http://www.nbcnewyork.com/news/local-beat/Gold-Mine-in-the-Subway-78416637.html.

25 Letter from Carmen Maldonado, Audit Director, Office of the State Comptroller of the State of New York, to Peter Kalikow, Chairman, MTA (Oct. 4, 2001).

26 Nicholas Confessore, *Paterson Signs Bill to Rein in State's Free-Spending Public Authorities*, N.Y. Times, Dec. 12, 2009.

27 *See, e.g., Public Authorities in New York State* (Citizens Budget Comm'n, New York, N.Y.), Apr. 2006.

28 2009 Sess. Law News of N.Y. Ch. 25 (A. 8180) Sponsor's Memorandum, Laws 2009, ch. 25. Litigation challenging the constitutionality of the enactment has been commenced. Complaint, *Hampton Transportation Ventures, Inc. v. Silver*, No. 09-45760 (N.Y. Sup. Ct. Suffolk County Dec. 14, 2009).

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