

# PA TAX LAW NEWS

## PA UNCLAIMED PROPERTY FILINGS DUE APRIL 15TH *by Sharon R. Paxton*

The deadline for filing a 2010 Abandoned and Unclaimed Property Report with the Pennsylvania Treasury Department is April 15. Holders of unclaimed property may request a 90-day extension of the filing deadline, but the Department will not grant extensions for two consecutive years. Although not statutorily required, businesses with no reportable unclaimed property for the year should consider filing negative reports with the Department, as non-filing may be a red flag for a future audit. Unclaimed property reporting requirements were explained in some detail in the April 2010 issue of the *McNees PA Tax Law News* ([www.mwn.com/unclaimed\\_April](http://www.mwn.com/unclaimed_April)). Following are some additional pointers.

### Business-to-Business Transactions

Pennsylvania does not exempt “business-to-business transactions” from unclaimed property reporting requirements. A number of other states do exempt such transactions, but the rules vary from state to state. Companies holding unclaimed property for the benefit of another business should be aware that, if the state of the business’ last known address, as reflected on the company’s records, does not require the reporting of the property, that property will nevertheless be reportable to the company’s state of incorporation if that state does not exempt the transaction. For example, assume that a business incorporated and operating in Pennsylvania purchased goods from a supplier in Ohio and made a payment to the Ohio supplier that was never processed by the supplier. Ohio has a broad business-to-business exemption from unclaimed property reporting, which would exempt the balance due from the Pennsylvania business to the Ohio supplier. However, Pennsylvania does not exempt such transactions. Therefore, the Pennsylvania

business would be required to remit the amount owed to the Ohio supplier to the Pennsylvania Treasury Department as unclaimed property.



### Voluntary Compliance Program

The amnesty program offered by the PA Treasury Department for companies with unreported unclaimed property expired in October 2010. However, companies that have never filed unclaimed property reports with Pennsylvania still may obtain a waiver of interest and penalties by participating in the Department’s ongoing Voluntary Compliance Program (“VCP”). To participate, a holder of unclaimed property must complete a review of its books and records for at least ten years prior to the current report year, disclose in writing all

business positions, methodologies and estimation techniques (if applicable) and property types reviewed to determine the unclaimed property liability, and disclose any methods of due diligence performed. A report must be filed within 90 days after execution of the VCP agreement.

For advice concerning unclaimed property reporting obligations or participation in the Voluntary Compliance Program, please contact Sharon Paxton or another member of the McNees State and Local Tax Practice Group. ■

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## GOVERNOR CORBETT PROPOSES “NO NEW TAX” BUDGET *by James L. Fritz*

**K**eeping his election pledge, Governor Corbett has proposed a Pennsylvania budget for 2011-12 which would require no tax or fee increases. In fact, the Governor would actually provide some additional tax reductions for Pennsylvania’s business community. Whether these will hold up after debate by the General Assembly remains to be seen since closing a \$4 billion structural deficit required the Governor to propose many spending reductions, some very drastic.

### Tax Highlights from the Governor’s Budget proposal:

- No severance tax on Natural Gas
- Maintain 100% Bonus Depreciation (see separate article)
- Maintain Capital Stock and Franchise Tax phase-out, reducing corporate taxes by \$70 million in 2011-12 (elimination of the tax still scheduled for 2014)
- R&D Tax Credit - allocation increased from \$18 million to \$55 million
- Education Improvement Tax Credit (EITC) – allocation increased from \$60 million to \$75 million
- Job Creation Tax Credit – maintain current \$10.1 million allocation
- Film Production Tax Credit – maintain \$60 million allocation
- Neighborhood Assistance Tax Credit – allocation increased from \$8.1 million to \$18 million
- Coal Waste Removal and Ultra Clean Fuels Tax Credit – \$18 million allocation
- Resource Enhancement and Protection Tax Credit - increased from \$4.5 to \$10 million

The Governor’s budget would reduce expenditures for general government operations by more than two percent and would eliminate 1,500 government positions. Many DCED programs, including economic development programs, would be consolidated and DCED’s budget would be reduced by \$114 million. The Department of Revenue, however, fared quite well under the Governor’s budget, with an overall increase. It appears that the

budget would maintain funding for badly-needed upgrades to the Department of Revenue’s technology.

Although his cuts to many other programs would be relatively modest, Governor Corbett risks becoming known as the “Anti-Education Governor.” He has proposed reducing state support for basic education by \$1 billion and reducing support for state-owned and state-related colleges and universities by 50 percent. The state-owned colleges and universities would lose more than \$230 million and the state-related universities (Penn State, Pitt, Temple and Lincoln) would lose more than \$320 million. To partially offset K-12 cuts and prevent them from simply translating into local property tax increases, the Governor has proposed that local school districts negotiate one-year wage and salary freezes (would require re-opening existing contracts in many districts).

In reaching a balanced budget for 2011-12, the Governor does not have available \$2.65 billion of federal fiscal assistance, \$750 million of one-time revenues and \$665 million of one-time expenditure reductions used to balance the 2010-11 budget. To close the gap, the Governor proposes to cut spending by \$2.613 billion. In addition, the Governor’s budget anticipates that a recovering economy will generate a revenue increase of more than \$1 billion as compared to 2010-11. The Governor’s budget assumes a 1.5 percent increase in Pennsylvania employment during 2011 and growth of 1.8 percent in 2012. Increased personal incomes and increased consumer spending will be key inasmuch as the Personal Income Tax and the Sales and Use Tax produce approximately 70 percent of General Fund revenues. ■



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## 100 % BONUS DEPRECIATION

by Timothy J. Horstmann

The Department of Revenue has announced (Corporation Tax Bulletin 2011-01, February 24, 2011) that businesses claiming 100% bonus depreciation on their federal tax returns pursuant to the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 may also claim this benefit for purposes of Pennsylvania corporation taxes. The Department's announcement is in line with previous interpretations of the Tax Reform Code's decoupling provisions, which permitted corporations to recoup any unclaimed bonus depreciation once the property is fully depreciated for federal income tax purposes. Because the Act of 2010 provides for bonus depreciation equal

to 100% of the depreciable cost, a property placed into service during the bonus period will be fully depreciated this year, and therefore may also be fully depreciated for purposes of Pennsylvania corporation taxes. ■



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## PA REVENUE DEPT. PURSUING USE TAX ON PURCHASES FROM ONLINE RETAILERS AND OTHER OUT-OF-STATE VENDORS

by Sharon R. Paxton

The PA Department of Revenue continues to contact businesses with no recent Use Tax reporting history, to encourage participation in the Department's Use Tax Voluntary Compliance program by conducting a self-audit of their books and records. This initiative is intended to recover tax owed by Pennsylvania businesses on taxable items, such as office equipment and supplies, purchased from out-of-state retailers who do not collect Pennsylvania Sales Tax.

The benefits to participation in the Voluntary Compliance Program include a limited look-back period and a waiver of penalties. Voluntary Compliance is available to businesses that are not registered with the Department for Sales and Use Tax purposes and for which no investigations or collection actions have begun. A business can elect to participate in the Voluntary Compliance Program, even if it has not received a notice from the Department of Revenue. Businesses that do not respond to a Use Tax Voluntary Compliance letter received from the Department may face additional tax enforcement measures.

Non-taxed online purchases are of particular concern to the Department and are part of the impetus behind its Voluntary Compliance Program. While estimates vary, Pennsylvania is missing out on hundreds of millions of dollars annually in Use Tax revenue. The Department recognizes, however, that its authority to force many online retailers to collect Pennsylvania tax is limited by court decisions.

Pennsylvania retailers have been frustrated by the Department of Revenue's failure to require various online retailers to collect Pennsylvania Sales Tax. However, in order for a state to impose a tax collection obligation on an out-of-state retailer, such imposition

must be authorized by statute and must satisfy certain constitutional requirements. Pennsylvania's Sales and Use Tax statute contains very broad nexus provisions. Nevertheless, online retailers take the position that constitutional requirements prohibit Pennsylvania from imposing a Sales Tax collection obligation on out-of-state retailers with no physical presence in the state.

A detailed explanation of the applicable constitutional requirements is beyond the scope of this article, but the United States Supreme Court has ruled that the Commerce Clause of the U.S. Constitution requires a physical presence in, and a "substantial nexus" with, a state before that state can impose a tax collection obligation. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). The physical presence requirement can be satisfied through in-state activities conducted by another on a retailer's behalf, even if those activities are conducted by an independent contractor. See, e.g., *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). However, a state may not impose a tax collection duty on a vendor whose only connection with customers in that state is by mail or common carrier. See *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). Many online and mail order retailers have structured their businesses in a way that they maintain avoids the establishment of a physical presence in Pennsylvania and the concomitant obligation to collect tax on sales to Pennsylvania customers.

The McNees State and Local Tax Practice Group provides advice on Use Tax filing and payment obligations, including the identification of taxable and nontaxable purchases, and can assist businesses who would like to participate in the Department's Use Tax Voluntary Compliance Program. The Group also advises retailers concerning sales tax collection obligations and procedures. ■



## OTHER RECENT PA TAX DEVELOPMENTS *by Timothy J. Horstmann*

### Philadelphia Hotel Tax

The Court of Common Pleas of Philadelphia County has upheld the Philadelphia Tax Review Board's ruling that Expedia, an online vendor of discount hotel rooms, is not an "operator" of a hotel, and is not required to remit hotel occupancy taxes on fees charged to its customers exclusive of the hotel room rate. Under the Philadelphia Code, an "operator" of a hotel is defined to mean only those who "maintain, operate, manage, own, have custody of, or otherwise possess the right to rent or lease overnight accommodations in any hotel." The Court found that Expedia merely acted as a middleman between the hotel and the guest, and the hotel reserved all rights with respect to the actual renting of hotel rooms. Consequently, the fees that it charged separate from the hotel rate were not subject to the tax. *City of Philadelphia v. Tax Review Bd.*, No. 00764 (Pa. Com. Pl. January 18, 2011)

### Inheritance Tax

An irrevocable trust that permitted the grantor-trustee to alter the disposition upon the donor's death of the trust assets was subject to Pennsylvania Inheritance Tax. Under Pennsylvania law any transfer by a decedent prior to death for less than adequate consideration is subject to Inheritance Tax, if the decedent retained the right to designate the persons who shall possess the transferred property. Because the irrevocable trust permitted the grantor-trustee to change the beneficiary of the trust assets, it was subject to Inheritance Tax. Pennsylvania Inheritance Tax Ruling No. INH-10-003 (November 29, 2010).

### Charitable Exemption

In an unreported decision just in time for baseball season, the Commonwealth Court has ruled that a baseball field owned by a nonprofit corporation and open to the public qualifies for real estate tax exemption. By reducing the burden on municipalities to maintain public ball fields, the Court held that the field's owner met the requirement under the Pennsylvania Constitution and statute that its activities relieve the government of some of its burden. *State College Baseball Club v. Centre County Board of Assessment Appeals*, No. 402 C.D. 2010 (February 17, 2011) (opinion not reported).

### Local Business Privilege Taxes

Lehigh Valley Senator Pat Browne recently re-introduced legislation (S.B. 405) which would add a "base of operations" requirement to all mercantile and business privilege taxes imposed by local municipalities under the Local Tax Enabling Act. The "base of operations test" would limit the scope of mercantile and business privilege taxes to those businesses that have an actual, physical and permanent place of business in a municipality from which operations are managed, and would apply regardless of whether the tax is on gross receipts or on the privilege of doing business. S.B. 405 is in response to the Pennsylvania Supreme Court's decision in *V.L. Rendina, Inc. v. City of Harrisburg*, 938 A.2d 988 (Pa. 2007), in which the Court overturned prior precedent and held that a "base of operations" is not required in order to impose such a tax. ■

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