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# MoFo New York Tax Insights

## Taxpayers Prevail Where Department Used Unreasonable Audit Methodology

Editors

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By Kara M. Kraman

**In a pair of decisions, each involving estimated sales tax assessments on restaurants, two separate New York State Administrative Law Judges struck down the audit methodologies used by the Department's auditors. *Matter of Richmond Deli & Bagels, Inc., and Nabila Hussain*, DTA Nos. 823244 & 823250 (N.Y.S. Div. of Tax App., July 5, 2012) and *Matter of Forestview Restaurant, LLC; Matter of George A. Peppes Officer of Forestview Restaurant, LLC*, DTA Nos. 823465 & 823466 (N.Y.S. Div. of Tax App., June 28, 2012).**

**Both ALJs determined that the records provided by the restaurants' owners during the audit were insufficient, and therefore the Department was within its rights to resort to an alternate audit methodology. However, both ALJs found in each case that the audit methodologies used were unreasonable and lacked a rational basis. Recognizing that the Department has a fair amount of leeway in choosing audit methodologies, in each case both ALJs nonetheless held that the audit methodology selected must be reasonably calculated to reflect the sales taxes due.**

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# Taxpayers Prevail By Showing Unreasonable Audit Methodology

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In *Forestview Restaurant*, the Department's auditor attempted to determine a restaurant's sales tax by observing the operations of the restaurant after it had been significantly remodeled. The remodeled restaurant was larger, more expensive, served alcoholic drinks, and employed more people than the original restaurant had employed. The ALJ concluded that using the estimated sales of the remodeled restaurant, which presumably were significantly larger, to estimate the sales of the original restaurant was not a method reasonably calculated to reflect the correct tax due, and accordingly the ALJ ruled that the sales tax assessment could not stand. In response to the Department's claim that it had been the *taxpayer* that requested an observation test, the ALJ held that this did not relieve the Department of its obligation to employ a method reasonably calculated to reflect the tax due.

In the other decision, *Richmond Deli & Bagels*, after determining that the books and records were inadequate, the auditor estimated total sales based on prepaid cigarette credits claimed by a deli grocery store, reasoning that estimated cigarette sales were a certain percentage of the store's total sales. Although the auditors claimed to rely on ratios of cigarette sales to total sales derived in two other audits of similar establishments, the Department did not offer any evidence regarding the facts in those audits. The ALJ found that, in this case, where the auditor had not observed the taxpayer's business—or, for that matter, a similar business—the Department did not establish a rational basis for a percentage relationship between cigarette sales and total sales. As a result, the ALJ ordered that the sales tax assessment be cancelled.

**Additional Insights.** In general, considerable discretion is given to an auditor in choosing a method of estimating sales when a taxpayer fails to maintain sufficient records. Taxpayers will not be granted relief based on any imprecision that results from the use of an alternative method, provided such method is reasonable. These decisions demonstrate that, notwithstanding this discretion in choosing an alternative method, the method chosen must be rationally related to the operation of the taxpayer's business.

**Editor's Note:** As we went to press, yet another ALJ decision was issued cancelling an estimated sales tax assessment against a restaurant. *Matter of J. Sahantadam, Inc. and John Gormel*, DTA Nos. 823328 and 823329 (N.Y.S. Div. of Tax App., July 13, 2012). Once again, the ALJ held that while the taxpayer's incomplete records allowed the Department to use an estimated methodology, the method used – this time based on data taken from an industry publication -- was not reasonably calculated to reflect the correct taxes due under the facts in the case.

# Motion Pictures Delivered in Digital Form are not Subject to Sales Tax

**By Open Weaver Banks**

In *Matter of American Multi-Cinema, Inc. and RKO Century Warner Theaters, Inc.*, DTA Nos. 823589, 823590 and 823646 (N.Y.S. Div. of Tax App., Jun. 21, 2012), an Administrative Law Judge held that payments to motion picture distributors for licenses to exhibit motion pictures delivered in digital format via hard drives are not subject to sales tax.

Each of the petitioners operated several theatres in New York State where motion pictures were exhibited to the public. Petitioners did not own the motion pictures they exhibited, but instead received the motion pictures from motion picture distribution companies ("distributors") pursuant to licenses to exhibit the motion pictures.

Petitioners received the motion pictures either in tangible form on 35mm celluloid film ("35mm Film Model") or in digital form ("Digital Model"). Petitioners paid sales tax to the distributors on the license payments, and sought a refund of sales tax paid only with respect to payments to distributors for motion pictures delivered in digital form.

The decision describes in detail the differences between the 35mm Film Model and the Digital Model for delivering motion pictures. In particular, to exhibit a motion picture delivered under the 35mm Film Model, petitioners required a physical copy of the motion picture for each screen on which the motion picture was to be exhibited. The physical copy was delivered to petitioners on metal shipping reels. Five or six shipping reels together held an average-length motion picture. In order to exhibit a motion picture, petitioners removed the 35mm film from the shipping reels, made adjustments such as inserting trailers, and assembled the separate segments of the motion picture prior to loading the 35mm film onto a projector for exhibition. When the exhibition period for a given motion picture ended, petitioners returned the

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# Motion Pictures Delivered in Digital Form are not Subject to Sales Tax

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motion pictures on their original shipping reels to the distributors in the original shipping cases.

Under the Digital Model, motion picture images and sounds were recorded in the form of compressed data that was stored on computer servers and exhibited through digital projectors. Digital motion pictures were delivered by distributors in several different ways, including via a portable computer hard drive on which the data file was saved, as a download transmitted via a network, or via a satellite transmission. All of the receipts at issue related to digital motion pictures delivered via portable hard drives.

Each portable hard drive contained one or two digital motion pictures and digital trailers, and was shipped to petitioners in a case about the size of a child's lunch box. Upon receipt of a portable hard drive, petitioners copied or uploaded the digital motion pictures onto a "digital media block" or computer server that was part of a digital motion picture projection system. The original data files remained on the hard drive after uploading. The copied files were stored on the media block or server, and were available for exhibition until the digital motion picture was no longer being exhibited, at which time petitioners deleted the files. Petitioners uploaded the files containing a digital motion picture onto multiple media blocks or servers using the same hard drive received from the distributor.

**UNDER THE DIGITAL MODEL, THE ALJ FOUND THAT TANGIBLE PROPERTY IS NOT EMPLOYED IN CARRYING OUT THE PRIMARY PURPOSE OF THE TRANSACTION.**

For security reasons most digital motion pictures were encrypted and required a separate digital key known as a "KDM" to unlock the files and exhibit the digital motion picture. Distributors transmitted the KDM to petitioners via email. Each KDM was set to be active for a particular period of time, at the end of which period the KDM was typically programmed to expire, causing petitioners to lose access to the digital motion picture so that the content could no longer be exhibited. Once the exhibition period for a particular motion picture was complete, petitioners deleted the digital motion picture data file from their servers. Petitioners also returned the hard drive to the distributor in its shipping package. The distributors did not separately charge petitioners for the use of the hard drives, which remained the distributors' property.

The parties did not dispute that license payments for the exhibition of a digital motion picture are not subject to sales tax when the motion picture is transferred to the exhibitor electronically, for example by satellite or network download, with no accompanying transfer of tangible personal property. Likewise, the parties did not dispute that license payments for the exhibition of a motion picture under the 35mm Film Model are subject to sales tax.

Petitioners contended that the Digital Model transactions distributed by hard drive did not constitute taxable sales of tangible personal property, because under the Digital Model the distributors did not transfer title or permanent possession of the hard drives, no separate consideration was paid for the hard drives, and the temporary transfer of the hard drives from the distributors was insufficient to support imposition of the tax. The Department disagreed, arguing that the licenses to exhibit the digital motion pictures were inseparable from the hard drives on which the digital motion pictures were delivered, and that petitioners' possession of the hard drives was a sufficient transfer of tangible personal property to constitute a taxable sale.

The ALJ held for the petitioners based upon two findings: (1) unlike content on 35mm film, content in digital form does not become an inseparable part of the tangible personal property (the hard drives), and (2) in the Digital Model the tangible personal property is not necessary to exercise the license and exhibit the content. According to the ALJ, the "primary purpose, in the 35mm film context . . . cannot be achieved without the continuous possession and use of the physical film during the exhibition." That is, in the 35mm Film Model the license is valueless without physical possession and use of the tangible personal property. On the other hand, under the Digital Model, the ALJ found that tangible property is not employed in carrying out the primary purpose of the transaction. The ALJ characterized the hard drives as mere containers or vessels used "to accomplish delivery of the desired content to its place of exhibition in an orderly fashion" but not "necessary to carry out the licensed use of the content."

**Additional Insights.** The Department acknowledged in *American Multi-Cinema* that digital motion pictures delivered purely electronically, with no accompanying transfer of tangible personal property, are not subject to sales tax. In general, the Department has taken the position that charges for digital products transferred purely electronically, such as videos, music, audio recordings, artwork, e-books, ringtones, and "wallpaper," are not for sales of tangible personal property and thus are not subject to sales tax. *Advisory Opinion*, TSB-A-11(20)S (Jul. 8, 2007); *Advisory Opinion*, TSB-A-08(63)S (Nov. 24, 2008); *Google Inc.*, TSB-A-08(22)S

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(May 2, 2008); *Spiritual Compass, LLC*, TSB-A-07(16)S (Jun. 22, 2007); *Apple Computer, Inc.*, TSB-A-07(14)S (May 17, 2007); *Universal Music Group*, TSB-A-01(15)S (Apr. 18, 2001). However, the Department argued that that the transfer of the same digital data on hard drives—rather than electronically—pushes it over the line to make the transaction taxable, and has so ruled in response to taxpayer inquiry. *See Advisory Opinion*, TSB-A-12(10)S (May 14, 2012). That position has now been rejected by the ALJ, although the decision is subject to appeal to the Tax Appeals Tribunal, and the time to file an exception to the ALJ's decision has been extended until August 22, 2012.

# Guidance for Employers for Withholding on Nonresident Employees Under the "14-Day Rule"

**By Irwin M. Slomka**

One vexing problem that many employers face is knowing when to withhold New York State income tax on wages paid to their nonresident employees who principally work outside the State, but who perform some services in the State. Failing to comply with these withholding requirements can subject the employer to liability for the failure to withhold tax, as well as related interest and penalties. Only wages paid for services performed in the State are subject to withholding.

In response to what were then growing concerns from businesses and practitioners regarding the compliance and audit difficulties, the Department significantly revised its Withholding Tax Field Audit Guidelines, first in 2004, and again in 2005. Notably, those revisions created a "safe harbor" *de minimis* rule for employers with respect to wages paid to nonresident employees based outside New York State who work no more than 14 days in the State during the calendar year. The Department has now issued a more concise and accessible technical memorandum explaining employer withholding responsibilities under this "14-day rule." "*Withholding on Wages Paid to Certain Nonresidents Who Work 14 Days or Fewer in New York State*," TSB-M-12(5)I (N.Y.S. Dep't of Taxation & Fin., July 5, 2012).

Under the 14-day rule, an employer is not required to withhold New York State income taxes on wages paid to a nonresident employee who is based outside the State and who performs services both within and outside the State if (i) the employer reasonably expects that the employee will not work in the State for more than 14 days during the calendar year, *and* (ii) the employee does not in fact work in the State for more than 14 days. The 14-day rule does not apply to various categories of nonresident employees, including athletes and entertainers. The memorandum also excludes from the 14-day rule protection compensation paid to traveling salespersons whose compensation is based entirely on the volume of business they generate. The earlier Audit Guidelines were silent on this latter category of employee.

**EMPLOYERS NEED TO MONITOR THE IN-STATE VISITS OF THEIR NONRESIDENT EMPLOYEES—AND PARTICULARLY THEIR HIGHER-EARNING EMPLOYEES—THROUGHOUT THE YEAR.**

The new memorandum also addresses the following issues:

- *Employer's Reasonable Expectation.* The 14-day rule does not apply if the employer *reasonably expects* the employee to be required to work in the State for more than 14 days during the calendar year, even if the employee actually works in the State for less than 14 days. The memorandum does not discuss when an employer's expectation will be considered "reasonable," although it can be assumed that the employee's job responsibilities and prior in-State work activity will be relevant.

- *Counting Working Days.* While any part of a day worked in the State counts toward the 14 days, days spent in the State *solely* for job-related training, such as an in-house training course, trade association conference, or professional development seminar or convention, do not count. Although some may view the use of the term "solely" as a scaling back of the job training protection, more likely this has been the Department's practice before the TSB-M was issued. One possible area where the memorandum may reflect a favorable expansion of the rule is in the number of days that can be considered for job-related training. Under the 2005 Audit Guidelines, the Department's auditors were instructed to "not count a *reasonable* number of training days/professional development days." The new memorandum does not expressly limit the protection to a "reasonable" number of such days, perhaps suggesting that as long as the employee is present in the State *solely* for job-training purposes, the day should not count toward the 14 days.

- *After 14 Work Days Are Reached.* If the nonresident employee reaches 14 work days in the State, even though

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# Guidance Issued for Withholding on Nonresident Employees

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expected to work less, the employer must thereafter withhold on all New York State wages paid after the 14th work day. This does not represent a change from the Audit Guidelines, but is a reminder that employers need to monitor the in-State visits of their nonresident employees—and particularly their higher-earning employees—throughout the year.

- *Changes in Circumstances During the Year*. Where, during the year, an employee is reassigned to a primary work location in the State, or to a different position at the company, that will result in the employee actually working in the State more than 14 days, the employer must thereafter withhold on all State wages paid after the change.
- *Employer Reporting Requirements*. The memorandum also discusses employers' reporting requirements with respect to their nonresident employees regardless of the application of the 14-day rule. For example, employers may be required to file quarterly withholding tax returns listing the name, social security number, and wages paid to each employee who resides in or is employed in the State, whether or not the wages are subject to withholding.

It should be kept in mind that the 14-day rule protects the employer from liability, but does not relieve the nonresident employee from having to file a State income tax return and pay the proper tax, even where the employee works 14 or fewer days in the State, if the employee has New York State adjusted gross income in excess of the New York State standard deduction (currently, $15,000 for married individuals filing a joint return). There is no New York City income tax on nonresidents, so the 14-day rule is limited to protection from New York State and City of Yonkers tax.

# Tribunal Affirms Denial of QEZE Tax Credits for Lack of a Business Purpose

**By Hollis L. Hyans**

Affirming the decision of an Administrative Law Judge, the New York State Tax Appeals Tribunal held that the Department of Taxation and Finance properly denied claims for Qualified Empire Zone Enterprise ("QEZE") credits because the petitioner did not establish that it had a valid business purpose for restructuring its business and that its purpose was anything other than obtaining tax credits. *Matter of Dunk & Bright Furniture Co. and James F. Bright*, DTA Nos. 823026 and 822710 (N.Y.S. Tax App. Trib. Div. of Tax App., June 28, 2012).

Petitioner Dunk & Bright Furniture Co., Inc. ("D&B Furniture"), operated a retail home furnishings business. In the late 1990s and early 2000s, the business owner, James Bright, made changes in the company's operations, including: the creation of a special-purpose company to lease warehouse space and sublet the space to D&B Furniture; purchasing property for warehouse space; assuming responsibility for delivering the furniture, a service that had previously been performed by a third party; and engaging in other ventures related to the furniture business. Mr. Bright had considered the business advantages of forming separate special-purpose entities to conduct various parts of the business.

**[FOR QEZE PURPOSES] A VALID BUSINESS PURPOSE MUST "ALONE OR IN COMBINATION CONSTITUTE THE PRIMARY MOTIVATION FOR SOME BUSINESS ACTIVITY . . . WHICH . . . CHANGES IN A MEANINGFUL WAY, APART FROM TAX EFFECTS, THE ECONOMIC POSITION OF THE TAXPAYER."**

In 2002, a plan of reorganization was proposed by counsel, described as a "tax planning idea," which included setting up a holding company that would allow the flexibility to restructure the existing operations, segregate the liabilities, and allow for the realization of additional incentives under the Empire Zone Program. Pursuant to this plan, Dunk & Bright Holdings, Inc. ("D&B Holdings"), was formed, and later changed its name to Dunk & Bright Furniture Co., Inc. The board minutes stated that the reorganization was undertaken "'to maximize tax benefits,'" and the corporate tax returns contained a statement that the purpose for the reorganization "'was to provide the corporate structure the flexibility to take advantage of certain New York State incentives.'" No other separate entities for the carpet operations and furniture operations were created, and none of the identified business purposes ever materialized.

Under the QEZE program, qualified businesses received certain tax credits and exemptions directly linked to job creation. The possibility of an existing business simply forming a new entity to qualify for such benefits without actually creating any new jobs, a practice known as "shirt changing," had been identified

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# Lack of Business Purpose Leads to Denial of Credits

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as a potential problem by the Legislature, and the statute was amended in 2002 to provide that an entity "shall not be deemed a new business if it was not formed for a valid business purpose . . . and was formed solely to gain empire zone benefits . . . " Tax Law former § 14(j)(4)(B). A valid business purpose must "alone or in combination constitute the primary motivation for some business activity . . . which . . . changes in a meaningful way, apart from tax effects, the economic position of the taxpayer." Tax Law § 208(9)(o)(1)(D).

The business purpose requirement was enacted on May 22, 2002, and was made applicable to entities created on or after August 1, 2002. The change resulted in a significant increase in the number of businesses being set up between May 22 and August 1, and therefore the legislature added an additional requirement that businesses first certified as eligible to receive QEZE benefits prior to August 1, 2002, had to meet the business purpose test to retain those benefits for tax periods beginning on or after January 1, 2005.

The Department conducted an audit and concluded that the petitioner did not meet the "valid business purpose" test set forth in the law, and that the reorganization was undertaken solely for the tax benefits. It issued assessments of additional personal income tax to Mr. Bright and his wife for the years 2005 through 2007, resulting from the disallowance of QEZE-based real property tax credits claimed for those years, and assessments of sales and use tax to the company for 2005 through February 2008, also based upon disallowance of the company's QEZE-based sales tax exemption.

*The ALJ Decision.* The ALJ agreed with the Department, finding that the company had failed to demonstrate that it had reorganized for business purposes and not merely to obtain the tax credits. The ALJ interpreted the statutory language as requiring petitioners to meet both parts of a two-part standard: they had to establish that the reorganization was undertaken for one or more business purposes which, apart from tax avoidance or reduction, constitute the *primary* motivation for the reorganization; and second, that the reorganization was not undertaken solely in order to gain QEZE benefits.

*The Tribunal Decision.* The Tribunal agreed in all respects with the ALJ. First, it reviewed the requirements of the statute, and agreed with the Department and the ALJ that the statute "imposes both a requirement and a restriction"–the entity must establish that it was formed for valid business purposes, *and* that it was not formed solely to acquire Empire Zone benefits. While it noted that the business purpose test is "not a strict standard, but rather a flexible test," and that consideration of tax consequences of business activities is permissible, "such consideration cannot serve as the primary motivation." Here, the Tribunal found no contemporaneous documentation that the goal of segregating liabilities served as a primary purpose. There was no business plan, correspondence, or minutes referencing such a motivation, and the only available contemporaneous documentation referenced tax-planning motives. The Tribunal also found that the reorganization did not meaningfully change the company's economic position, since none of the necessary changes that would have accomplished the alleged purpose of segregating liabilities ever occurred. Therefore, the Tribunal found that the company did not meet either prong of the valid business purpose test.

**[THE TRIBUNAL] AGREED WITH THE DEPARTMENT AND THE ALJ THAT THE STATUTE "IMPOSES BOTH A REQUIREMENT AND A RESTRICTION"–THE ENTITY MUST ESTABLISH THAT IT WAS FORMED FOR VALID BUSINESS PURPOSES, *AND* THAT IT WAS NOT FORMED SOLELY TO ACQUIRE EMPIRE ZONE BENEFITS.**

The Tribunal also rejected the company's second argument, based on a recent Appellate Division case, *James Square Associates LP, et al. v. Mullen*, 91 A.D.3d 164 (4th Dept. 2011), that a different burden of proof should apply, and that the business purpose requirements were unconstitutional since they were being retroactively applied. In *James Square*, covered in the January 2012 issue of *New York Tax Insights*, the Appellate Division, Fourth Department, held that retroactive application of certain 2009 legislative changes to the QEZE program improperly deprived the taxpayers of promised benefits on which they had relied in making decisions on how to conduct their business. The Tribunal found, first, that *James Square* did not apply a different burden of proof, but merely used a "balancing of the equities" test to determine whether the 2009 amendments could constitutionally be applied to the taxpayers in that case. On the retroactivity question, the Tribunal distinguished the facts from those in *James Square*, where amendments enacted in 2009 were retroactively applied back to January 1, 2008. The anti-"shirt changing" amendments had been enacted in April 2005, and were being applied to periods from December 1, 2005 through February 29, 2008. Since there was no deprivation of a preexisting, actual vested right, but merely

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a prospective change to stop a perceived abuse, there was no violation of the Constitution.

**Additional Insights**. The attempt to demonstrate a valid, non-tax "business purpose" for transactions with obvious tax benefits can be very challenging, particularly when, as was apparently true in this case, the documentary evidence refers repeatedly to the anticipated tax advantages, and the taxpayer is unable to produce contemporaneous records of additional motives. While generally the business motivations for a transaction are only one element of the dispute, here the statute itself explicitly requires a valid business purpose, since the legislature had already identified what it perceived as a problem in existing businesses simply reconstituting themselves in order to take advantage of Empire Zone benefits. The Tribunal found that, while at the hearing the company representatives provided testimony about the furniture business, the potentials for growth, and business considerations leading up to and after the reorganization, and a "Statement of Business Purpose" was created by the company during the Department's audit, there was no contemporaneous documentation demonstrating any of these motivations. The Tribunal distinguished these facts from such cases as *Matter of Graphite Metallizing Holdings*, DTA No. 822416 (N.Y.S. Tax App. Trib., July 7, 2011), discussed in the August 2011 issue of *New York Tax Insights*, in which contemporaneous documentation of non-tax business purposes was presented, and the Tribunal sustained the use of QEZE credits, despite the presence of additional tax-saving motivations.

# Department Will Not Treat Insurance Company Reimbursements as Taxable "Premiums"

**By Hollis L. Hyans**

In late 2010, a New York State Administrative Law Judge held that deductible reimbursements accrued or received by an affiliated group of New York licensed insurance companies from their insured policyholders were not "premiums" under Tax Law § 1510(c)(1) and are therefore not subject to the tax on premiums. *Matter of American Zurich Ins. Co.*, DTA Nos. 822840, *et al.* (N.Y.S. Div. of Tax App., Oct. 14, 2010). The Department did not appeal the decision, but since ALJ decisions are not precedential, the exact effect of the decision has remained unclear and insurance companies were left without clear rules on how to report. The Department has now issued guidance, and formally announced that it will be following the ALJ decision in *American Zurich*. *Treatment of Deductible Reimbursement Payments to Insurance Corporations*, TSB-M-12(6)C (N.Y.S. Dep't of Tax. & Fin., July 9, 2012).

In *American Zurich*, the issue concerned workers' compensation insurance policies, which included a deductible endorsement, under which the policyholder retains a certain dollar portion of the risk of workplace injury by agreeing to reimburse the insurance companies for compensable claims up to the amount of the deductible endorsement. The ALJ held that these deductible amounts do not constitute "premiums" as defined by Tax Law § 1510(c)(1), which narrowly defines "premiums" as consisting of only eight specified items, none of which include deductible reimbursements.

The Department has now agreed it will not treat amounts received as deductible reimbursements as premiums, as long as:

- The payments are received or accrued by an insurance corporation from or on behalf of an insured policyholder, pursuant to a contract of insurance containing a deductible provision, and requiring the policyholder to repay the amounts; and
- The insurance company did not include a cost (or factor) to cover the premiums tax as regards deductible reimbursement accounts in calculating the premiums charged to the policyholder, and the reimbursement amounts are not treated for statutory accounting purposes as premiums.

The Department also stated that its policy applies not only prospectively but also to any tax periods for which the statute of limitations is open for issuance of a notice of deficiency or for a claim for refund or credit.

# Insights in Brief

**Adult Video Booths Not Subject to Sales Tax**

In *Matter of VGR Systems Corporation*, DTA Nos. 823639, 823640 (N.Y.S. Div. of Tax App., June 14, 2012), an ALJ held that the provision of video-viewing booths to adult bookstores was not the rental or lease of tangible personal property subject to

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# Insights in Brief

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sales tax. Although the bookstore proprietors paid a percentage of the gross revenue derived from the machines to the provider, obtained permits and insurance, and provided the videos, the provider of the booths was found to have maintained control of the booths and to have been merely renting space from the proprietors. The most important factor establishing that VGR did not relinquish possession or control of the booths to the proprietors was the fact that only VGR employees were able to access the lockboxes, token dispensers, and other mechanisms for payment, and that VGR retained the right to exclusive access to the money contained in the machines.

**Court of Appeals Denies Review in Two City Tax Cases**

The Court of Appeals has declined to hear an appeal in *Matter of Bankers Trust Corp. v. Tax Appeals Tribunal*, 2012 NY Slip Op 77169 (June 26, 2012). In that decision, the Appellate Division, First Department, upheld a City Tribunal decision holding that a taxpayer was not entitled to a 17% deduction under the City bank tax for interest income received from its third- and fourth-tier subsidiaries. The Court of Appeals also declined to hear an appeal in *Matter of Murphy & O'Connell v. Tax Appeals Tribunal*, 2012 NY Slip Op 77481 (June 28, 2012), in which the Appellate Division, First Department, held that payments made by a partnership to a pension plan for the benefit of its partners were nondeductible payments to partners for unincorporated business tax purposes.