

Tax Section News

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Table of Contents

Chair's Report.....	2
<i>By Allison W. Leppert, Leonard, Street & Deinard</i>	
Commissioner's Column.....	3
<i>Submitted on behalf of Myron Frans, Minnesota Commissioner of Revenue</i>	
IRS Column.....	5
<i>Submitted on behalf of Alan Gregerson, Senior Stakeholder Liaison and Michelle Benson, Midwest Area Manager</i>	
Property Tax: 2011 Legislative Success for Tax Section.....	8
<i>By Nicholas A. Furia, Law Offices of Nicholas A. Furia, PLLC</i>	
New Jersey Division of Taxation versus the Internal Revenue Service.....	10
<i>By Crystal A. Thorpe, PwC</i>	
Pending Minnesota Tax Case Summaries.....	13
<i>By Jerry Geis, Briggs & Morgan, PA</i>	
Public Rulemaking Docket.....	24
<i>Submitted by Susan Barry, Minnesota Department of Revenue</i>	

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“The Taxman’s Lawyer”
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Chair's Report

By Allison W. Leppert, Leonard, Street & Deinard

Welcome to the Tax Law Section! If this is your first time reading our newsletter, thanks for checking us out. If you are a long-time acquaintance of the Section, welcome back. We launched full swing into CLE season on September 15th with a session on "Legal Research for the Tax Practitioner," presented by Karen Westwood, Head of Reference at the Warren E. Burger Library, William Mitchell College of Law. Our thanks to Karen for a great presentation.

Nick Furia, our Vice Chair for 2011-2012, is hard at work arranging CLEs for the coming months, so if you have a topic you would like to learn more about or have a desire to present on a topic, please contact Nick. John Stenzel, our Treasurer for 2011-2012, has jumped on board, representing the Section at the MSBA Assembly as well as the National Association of State Bar Tax Law Sections meeting in October. Ann Petersen, our Secretary for 2011-2012, continues to serve as the newsletter editor this year as well as taking on the duties of Council officer, so please offer your thanks to Ann at our next meeting. Ann is working extra hard to keep the Section vital. We also welcome Caroline Balfour and Mike O'Brien to the Council this year, and we are excited to have them involved at this level, especially as they have been active in the Section in many ways prior to joining the Council. Also, special thanks to Gina DeConcini for her guidance as Past Chair in our Council planning, for her tireless efforts in her many years on the Council and the legislative committee, and for her fantastic work as Chair of the Section this past year.

We are hoping for another busy year for both our legislative committee, headed by Mike O'Brien and Ben Wagner, and our pro bono committee, headed by Teresa Molinaro. If you have an

interest in working with one of these committees, please contact the committee chairs, or let me know, and I can put you in touch with them.

In our Council planning meeting in August, one of the goals we set was that of increasing participation and membership. I would like to ask each one of you reading this newsletter to help us meet these goals by reaching out to a lawyer or law student you know who is interested in tax or practices in tax but is either not a member or not currently active in the Section. I got involved in the Section at the suggestion of Fran Holmes, one of our former Chairs, and I know many members who became active through another member's reaching out. Why not invite someone to the next council meeting and CLE? We would love to see you there.

Commissioner's Column

Improving tax administration makes policy sense

Submitted September 2011 on behalf of Myron Frans, Minnesota Commissioner of Revenue

As Commissioner, a key priority for me is to make certain that the tax system and the Department of Revenue are working efficiently and accurately. As Revenue does every year, we are in the process of reviewing and considering potential changes that we can recommend to Governor Mark Dayton and the Legislature to improve and streamline state tax laws.

Governor Dayton has asked all state agencies to improve the quality and efficiency of their services while reducing costs. At Revenue, we are working to improve our internal operations while giving taxpayers more ways to do business with us online.

Agency Operations

We recently combined our Individual Income Tax and Withholding divisions to reduce duplication and costs. This merger will help us serve taxpayers more efficiently while ensuring that we get the highest return on each public dollar we spend.

The Department also has filled a newly created position – internal audit manager – to help improve our oversight of those public funds. Mike Turner will oversee all of Revenue's financial, operation and compliance audits while working to ensure that agency has appropriate internal controls, reviews, risk management and governance practices. Mike will also lead the newly created internal audit committee that will report directly to me and advise the department on ways to improve internal audit controls.

We also have taken other steps to strengthen our internal financial controls, including:

- More restrictive access and more stringent reporting requirements for tax refunds issued by employees.

- Policy changes to require approval of manual refunds and thereby reduce the potential for theft.
- Increased management training and education for supervisory employees.
- Employee education and training.

The agency is in the final phase of switching over to a new integrated tax software system that replaces a patchwork of older programs while improving transparency, accountability and tracking of all transactions. Not only is this system more efficient, but it provides tighter security for both the department and taxpayers.

Improved e-Services

Thanks in part to the new integrated tax system, we are improving our e-Services offerings for taxpayers. In October, we will start moving business taxpayers to the new online filing and payment platform. We expect to complete the switch by the end of this year. Individual taxpayers will eventually be able to use the system, too.

In the new e-Services, you can still file, pay and keep your business registration information up to date. Also as a new service addition, with a single login ID you will be able to view all of your business accounts and letters, send and receive secure messages, and much more. If you provide tax services to multiple clients, you may also request access to view, file and/or pay on their behalf using your login ID once both you and your client(s) have been moved to the new system.

We are posting several online tutorials to help introduce our “new and improved” e-Services. Once your business is moved to the new system, the next time you log in you will be asked to create a new Web profile. To do so, just follow the prompts and refer to the online help if needed.

Looking ahead

Finally, we are taking a bottom-up look at how we can improve Minnesota's overall tax policy for state residents and businesses. Creating jobs is a top priority for Governor Dayton. In August, he began a statewide economic development tour. The governor's tour culminates on October 25 with a "jobs summit" in St. Paul. Along the way, Governor Dayton is meeting with local business owners, community leaders and elected officials. People who live, own and work in a community are the ones who know best the challenges and opportunities they face.

In a similar vein, tax practitioners like you have firsthand experience with how our tax system affects your work, clients and employers. Your input has often guided the Department in the past, and I want to make sure you stay involved as we move forward.

If you have feedback about our proposals as they take shape, or ideas of your own, please let us know – either through the MSBA or by contacting me at the Department.

IRS Column

Submitted by Alan Gregerson, Senior Stakeholder Liaison and Michelle Benson, Midwest Area Manager

IRS Shows Continued Progress on International Tax Evasion

The Internal Revenue Service continues to make strong progress in combating international tax evasion, with new details announced today showing that the recently completed offshore program pushed the total number of voluntary disclosures up to 30,000 since 2009. In all, 12,000 new applications came in from the 2011 offshore program that closed last week.

The IRS also announced that it has collected \$2.2 billion so far from people who participated in the 2009 program, reflecting closures of about 80 percent of the cases from the initial offshore program. On top of that, the IRS has collected an additional \$500 million in taxes and interest as down payments for the 2011 program — a figure that will increase because it does not yet include penalties.

“By any measure, we are in the middle of an unprecedented period for our global international tax enforcement efforts,” said IRS Commissioner Doug Shulman. “We have pierced international bank secrecy laws, and we are making a serious dent in offshore tax evasion.”

Global tax enforcement is a top priority at the IRS, and Shulman noted progress on multiple fronts, including ground-breaking international tax agreements and increased cooperation with other governments. In addition, the IRS and Justice Department have increased efforts involving criminal investigation of international tax evasion.

The combination of efforts helped support the 2011 Offshore Voluntary Disclosure Initiative (OVDI), which ended on September 9. The 2011 effort followed the strong response to the 2009 Offshore Voluntary Disclosure Program (OVDP)

that ended on October 15, 2009. The programs gave United States taxpayers with undisclosed assets or income offshore a second chance to get compliant with the tax system, pay their fair share and avoid potential criminal charges.

The 2009 program led to about 15,000 voluntary disclosures and another 3,000 applicants who came in after the deadline, but were allowed to participate in the 2011 initiative. Beyond that, the 2011 program has generated an additional 12,000 voluntary disclosures, with some additional applications still being counted. All together from these efforts, taxpayers came forward and made 30,000 voluntary disclosures.

“My goal all along was to get people back into the U.S. tax system,” Shulman said. “Not only are we bringing people back into the U.S. tax system, we are bringing revenue into the U.S. Treasury and turning the tide against offshore tax evasion.”

In new figures announced today from the 2009 offshore program, the IRS has \$2.2 billion in hand from taxes, interest and penalties representing about 80 percent of the 2009 cases that have closed. These cases come from every corner of the world, with bank accounts covering 140 countries.

The IRS is starting to work through the 2011 applications. The \$500 million in payments so far from the 2011 program brings the total collected through the offshore programs to \$2.7 billion.

“This dollar figure will grow in the months ahead,” Shulman said. “But just as importantly, we have changed the risk calculus. Americans now understand that if they try to hide assets overseas, the chances of being caught continue to increase.”

The financial impact can be seen in a variety of other areas beyond the 2009 and 2011 programs.

- **Criminal prosecutions.** People hiding assets offshore have received jail sentences running for months or years, and they have been ordered to pay hundreds of thousands and even millions of dollars.
- **UBS.** UBS AG, Switzerland's largest bank, agreed in 2009 to pay \$780 million in fines, penalties, interest and restitution as part of a deferred prosecution agreement with the United States government.

The two disclosure programs provided the IRS with a wealth of information on various banks and advisors assisting people with offshore tax evasion, and the IRS will use this information to continue its international enforcement efforts.

IRS Offers Filing and Penalty Relief for 2010 Estates; Basis Form Now Due January 17; Extension to March Available for Estate Tax Returns

The Internal Revenue Service announced that large estates of people who died in 2010 will have until early next year to file various required returns and pay any estate taxes due. In addition, the IRS is providing penalty relief to certain beneficiaries of these estates on their 2010 federal income tax returns.

This relief is designed to give large estates, generally those over \$5 million, more time to comply with key tax law changes enacted late last year. Revised versions of the estate tax forms are now available on IRS.gov, and the carryover basis form will be released this fall.

The IRS is providing the following relief:

- Large estates, opting out of the estate tax, now will have until Tuesday, January 17, 2012, to file Form 8939. This special carryover basis form, required of estates making this choice, was previously due on November 15, 2011. Because this is a change

in the specified due date rather than an extension, no statement or form needs to be filed with the IRS to have this new due date apply.

- 2010 estates that request an extension on [Form 4768](#) will have until March 2012 to file their estate tax returns and pay any estate tax due. Normally, a six-month filing extension is automatically granted to estates filing this form, but extensions of time to pay are granted only for good cause. As a result, most 2010 estates that timely file Form 4768 will have until Monday, March 19, 2012 to file [Form 706](#) or [Form 706-NA](#). For estates of those dying late in 2010 (after December 16, 2010 and before January 1, 2011), the due date is 15 months after the date of death. No late-filing or late-payment penalties will be due, though interest still will be charged on any estate tax paid after the original due date.
- Special penalty relief is provided to many individuals, estates and trusts that already filed a 2010 federal income tax return, or obtained an extension and plan to file by the October 17, 2011 extended due date. Late-payment and negligence penalty relief applies to persons inheriting property from a decedent dying in 2010, who then sells the property in 2010 but improperly reports gain or loss because they did not know whether the estate made the carryover basis election. Details are in Notice 2011-76, available at www.irs.gov.

IRS Issues Guidance on Tax Treatment of Cell Phones; Provides Small Business Recordkeeping Relief

The Internal Revenue Service issued guidance designed to clarify the tax treatment of employer-provided cell phones.

The guidance relates to a provision in the Small Business Jobs Act of 2010, enacted last fall that removed cell phones from the definition of listed

property, a category under tax law that normal requires additional recordkeeping by taxpayers.

The Notice issued today provides guidance on the treatment of employer-provided cell phones as an excludible fringe benefit. The Notice provides that when an employer provides an employee with a cell phone primarily for non-compensatory business reasons, the business and personal use of the cell phone is generally nontaxable to the employee. The IRS will not require recordkeeping of business use in order to receive this tax-free treatment.

Simultaneously with the Notice, the IRS announced in a memo to its examiners a similar administrative approach that applies with respect to arrangements common to small businesses that provide cash allowances and reimbursements for work-related use of personally-owned cell phones. Under this approach, employers that require employees, primarily for non-compensatory business reasons, to use their personal cell phones for business purposes may treat reimbursements of the employees' expenses for reasonable cell phone coverage as nontaxable. This treatment does not apply to reimbursements of unusual or excessive expenses or to reimbursements made as a substitute for a portion of the employee's regular wages.

Under the guidance issued today, where employers provide cell phones to their employees or where employers reimburse employees for business use of their personal cell phones, tax-free treatment is available without burdensome recordkeeping requirements. The guidance does not apply to the provision of cell phones or reimbursement for cell-phone use that is not primarily business related, as such arrangements are generally taxable.

Details are in the memo and in Notice 2011-72, posted on www.irs.gov.

Property Tax: 2011 Legislative Success for Tax Section

By Nicholas A. Furia, Law Offices of Nicholas A. Furia, PLLC

Since 2007, the MSBA Tax Section has attempted to make legislative changes to Minn. Stat. § 278.05, subd. 6(a), more commonly known as the "60-Day Rule." The 60-Day Rule applies to many taxpayers who contest their property tax assessment by filing a petition under Minn. Stat. § 278.01. In its pre-2011 form, the statute required owners and tenants of "income-producing" property (e.g. office buildings, shopping centers, hotels, and apartment buildings) who filed a Ch. 278 petition to produce certain types of "information" to the County Assessor in which the property was located within 60 days of the April 30 appeal deadline or face a motion for automatic dismissal of their petition, with prejudice.

Over the years, there has been a great deal of litigation involving how the term "information" in the statute should be defined, and whether that term was exhaustive, or in any way limited. The Minnesota Tax Court and Minnesota Supreme Court often interpreted the statute, and two Minnesota Supreme Court rulings in 2006 and 2007 prompted the need for legislative action.

First, Kmart Corporation vs. County of Stearns, 710 N.W.2d 761 (Minn. 2006), held that the Tax Court's reversal of its own relatively well-settled law (that tenants need not produce tenant-paid expense data to the county assessor) was permissible because Tax Court decisions are not precedential. Id. at 769. Also, the Court in Kmart stated: "consistent with our past decisions, we interpret the 60-day rule to require production of expense information that is useful and relevant to the appraisal process." Id. at 766. Thus, taxpayers could no longer rely on prior Tax Court decisions for guidance on how to comply with the 60-Day Rule, and moreover, the Supreme Court broadened the scope of expense information far

beyond what practitioners and their clients realistically thought had to be produced.

Next, the Supreme Court further broadened the meaning of "information" that had to be produced in order to avoid dismissal under the 60-Day Rule in Irongate Enterprises vs. County of St. Louis, 736 N.W.2d 326 (Minn. 2007). In Irongate, the Supreme Court held that "information" included shopping center leases (and basically any other information a taxpayer had that could have any bearing whatsoever on the valuation process). Id. at 331. Certainly, prior to Irongate, practitioners and their clients did not think leases had to be produced under the 60-Day Rule. After Irongate, practitioners and their clients were left to wonder what information they would have to produce in order to comply with the 60-Day Rule. Because of the state of the law and the Supreme Court's suggestion that problems with the 60-Day Rule's language and underlying policy needed to be directed to the legislature, the MSBA Tax Council took action.

In late 2007, the Tax Council decided to draft proposed legislation, seek the MSBA's support thereof, and engage the MSBA's lobbyists to get the bill authored, passed, and ultimately enacted. The MSBA's Legislative Committee and General Assembly both voted to support our proposed language, and to support legislative changes to the 60-Day Rule for six years.

In 2008, the statute was amended to more specifically enumerate what information had to be provided in order to comply. However, the statutorily required production remained limitless and thus (in the author's opinion) hopelessly ambiguous. Again in 2010, the Tax Council renewed its efforts to amend the statute, and found support for doing so from property tax attorneys,

assessors, and county attorneys throughout Minnesota, as well as their lobbying groups.¹ After multiple meetings and countless revisions of proposed legislation, the private property tax attorneys, county assessors, and county attorneys agreed to joint Minn. Stat. § 278.05, subd. 6(a) language which accomplishes three critical things:

- (1) It makes the list of things a taxpayer must produce to the county assessor exhaustive and therefore clear;
- (2) It specifically states that leases do not have to be produced within the initial compliance period; and
- (3) The compliance deadline is now August 1 each year.

On May 31, 2011, Governor Dayton signed the amended "60-Day Rule" statute into law. It remains to be seen how the legislative changes will be interpreted by the courts, but the language appears to explicitly prevent the results in Kmart and Irongate. The property tax bar and the counties are, for the most part, pleased with the new language. Most of us hope that the new language will result in far fewer 60-Day Rule disputes reaching a courtroom.

The amended Minn. Stat. § 278.05, subd. 6(a) can be viewed at <http://www.nfurialaw.com/pdf/article.pdf>.

¹ The author would like to personally thank all of the various property tax attorneys, assessors, county attorneys, appraisers, and lobbyists who spent a great deal of time and made many compromises along the way to get the new bill passed.

New Jersey Division of Taxation versus the Internal Revenue Service

By Crystal A. Thorpe, PricewaterhouseCoopers

States are increasingly facing fiscal obstacles, and as a result, employing creative tactics to increase revenue collection efforts. One such approach is focusing resources towards the enforcement of transfer pricing. In fact, some states are reaching beyond state tax adjustments and seeking to adjust federal income tax, thereby increasing the amount of state taxable income. As of recent, the state of New Jersey has risen to the occasion by taking on the Internal Revenue Service ("IRS") in its approval of transfer pricing arrangements with taxpayers.

In early summer of 2011, the New Jersey Division of Taxation (the "Division") issued a technical advisory memorandum (referred herein as "TAM-17") that addresses the treatment of intercompany transfer pricing and advanced pricing agreements ("APAs"). Specifically, the Division states that in evaluating the appropriateness of intercompany transfer pricing, it is not constrained by APAs and may use other criteria in determining a "fair and reasonable tax" under New Jersey law.¹ The implications of TAM-17 could potentially be considerable for taxpayers that have endured the time and expense of securing an APA with the IRS.

U.S. Internal Revenue Code ("IRC") § 482 and the Treasury Regulations ("Treas. Reg.") promulgated thereunder (the "Section 482 Regulations") set forth the arm's length standard for intercompany pricing between related parties. The Section 482 Regulations provide that "[t]he purpose of section 482 is to ensure that taxpayers clearly reflect income attributable to controlled transactions, and

to prevent the avoidance of taxes with respect to such transactions" by placing "a controlled taxpayer on a tax parity with an uncontrolled taxpayer by determining the true taxable income of the controlled taxpayer."²

The Division has incorporated certain principles of the Section 482 Regulations to produce a fair and reasonable tax. N.J. Stat. Ann. § 54:10A-10 allows the Division to make adjustments "as may be necessary to make a fair and reasonable determination of the amount of tax payable."³ The "fair and reasonable tax" is defined as the "tax that would have been payable by a taxpayer reporting the same transaction(s) on a separate entity basis where the parties to the transactions(s) had independent economic interests."⁴ The Division has also incorporated certain transfer pricing methodologies prescribed in the Section 482 Regulations into its rule on adjustments.⁵

In accordance with the Section 482 Regulations, the IRS has an APA program that provides a voluntary process whereby the taxpayer and the IRS may resolve actual or potential transfer pricing disputes on a prospective basis in a principled and cooperative manner. The APA is a binding agreement between the taxpayer and the IRS whereby the IRS agrees not to impose a transfer pricing adjustment for the covered transaction(s) for the taxation year(s) at hand that is consistent with the agreed transfer pricing methodologies.⁶

In TAM-17, the Division advises that in "most cases" to arrive at a "fair and reasonable tax" it

¹ New Jersey Division of Taxation, TAM-17, June 6, 2011.

² Treas. Reg. § 1.482-1(a).

³ N.J. Stat. Ann. § 54:10A-10.

⁴ N.J. Admin. Code tit. 18, § 18:7-5.10(a)3.

⁵ N.J. Admin. Code tit. 18, § 18:7-5.10.

⁶ Rev. Proc. 2008-31, 2009-23 I.R.B. 1133.

will utilize the Section 482 Regulations to audit and adjust items above line 28 of Schedule A of the Corporation Business Tax return.⁷ If the taxpayer can demonstrate it has met the standards of the Section 482 Regulations, it is unlikely adjustments will be made.⁸ That being said, the Division states that it will merely "take into consideration" an APA between the IRS and the taxpayer to evaluate the appropriateness of intercompany pricing and the determination of a "fair and reasonable tax."⁹

The Division goes on to state that the language of N.J. Stat. Ann. § 54:10A-10 "goes *beyond* IRC 482" in certain circumstances, which includes the Division's authority to include a "fair profit" in a taxpayer's income.¹⁰ Additionally, the taxpayer is held to the burden of proof to "demonstrate with clear and convincing evidence that a report by a taxpayer discloses the true earnings of the taxpayer on its business carried on in this State..."¹¹ The Division will not be limited to "indices, trade practices, cost sheets, Internal Revenue Reports or any other factor in determining the appropriate transfer price for goods, services, intangibles or other dispositions between related parties."¹² The explicit language of N.J. Stat. Ann. § 54:10A-10 reaches further than the scope of the Section 482 Regulations and allows the Division to apply other criteria that produces "a fair and reasonable tax". In short, through the issuance of TAM-17 the Division will consider the relevance of an APA, but the APA itself is not a predetermined defensive shield. However, should the Division move to codify

TAM-17 in regulation, taxpayers will have ample opportunity to comment on the proposed content for which the Division will be obliged to respond before adopting regulation.¹³

In response to TAM-17, various commentators have voiced concerns, particularly regarding the Division's expansive authority to make transfer pricing adjustments notwithstanding the fact the IRS has approved a transfer pricing arrangement.¹⁴ One observation notes that "New Jersey is but one state where the failure [to] adhere to all components of an advance pricing agreement is a concern.... While New Jersey's regulations specifically adopt transfer pricing principles under the Section 482 Regulations, the Division was careful in its notice to delineate areas where its authority to make adjustments varies from federal procedures."¹⁵ In practice, the New Jersey's policy of challenging APAs as insufficient to determine a 'fair and reasonable' result for state tax purposes will likely create uncertainty for taxpayers with APAs in place. This will be a major issue going forward, both in New Jersey, and in other states that are the heirs of New Jersey, in adopting similar approaches on audit.¹⁶

The State of Minnesota has yet to adopt an approach similar to New Jersey, but it is not far behind in proactively enforcing transfer pricing principles to increase state revenue. As of recent, Minnesota introduced a bill that would allow the state to enter into a contract with an independent third party, which would enhance the state's

⁷ New Jersey Division of Taxation, TAM-17, June 6, 2011.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* (emphasis added).

¹¹ *Id.*

¹² *Id.*

¹³ Schaefer, Frank, et. al., "New Jersey Re-Emphasized Differences between its Statute and IRC Sec. 482, Discussed Advanced Pricing Agreements", State & Local Tax Alert, GrantThornton, July 5, 2011.

¹⁴ Venere, Jim, "New Jersey: Division of Taxation Examines Intercompany Transfer Pricing and Advanced Pricing Agreements," KPMG, June 8, 2011, No. 2011-274.

¹⁵ Grasso, Anthony et. al., "New Jersey Division of Taxation: State not bound by advance pricing agreements with IRS", myStateTaxOffice, PwC, June 10, 2011.

¹⁶ *Id.*

ability to collect tax revenues.¹⁷ This bill was not voted on by either house of legislature, but that does not stop the bill from being reintroduced in the future. Other states are introducing similar legislation whereby third party firms would be able to contract with states to perform audits of multi-state taxpayers for a contingent fee.¹⁸ Moreover, the United States Patent and Trademark Office granted a patent to Chainbridge Software, Inc., which developed a computer generated method for analyzing intercompany transactions designed to perform corporate income tax adjustments for the benefit of state tax authorities.¹⁹ Thus far, the Company's clients include the District of Columbia, New Jersey, Minnesota, California, and various other states.²⁰ On a further note, state case law is increasingly making its mark by contesting transfer prices on intercompany transactions as well as the transfer of valuable intangibles, such as trademarks, trade names, and patents, from a high-tax state to a low-tax state.²¹

reflects both international *and* intra-state transactions.

The aforementioned development of state practices leads to the conclusion that the discerning taxpayer should be prepared to be well-equipped from both a state and federal tax perspective. Taxpayers can no longer merely assume that states will automatically adhere to federal approval of their transfer pricing arrangements. To overcome fiscal challenges, states will continue to increase tax collection efforts through enforcement of transfer pricing principles. Such efforts could take the form of various different approaches on audit. In advance, taxpayers should rise to the challenge by vigilantly ensuring that their transfer pricing policies are arm's length, with documentation that

¹⁷ H.F. 904 87th Leg. Sess. (Minn.2011).

¹⁸ Baker Donelson: Bearman, Caldwell & Berkowitz, PC, "*Spotlight on SALT: Is There a Bounty Hunter in Your Future?*" April 5, 2011.

¹⁹ Moses, Molly, "*Virginia Company Receives Patent for Transfer Pricing Study Method*," 95 DTR G-2, May 17, 2011. The Chainbridge Software, Inc. is a company that provides tax policy analysis and state corporate tax compliance products and services. See www.chainbridge.com

²⁰ *Id.*

²¹ See, e.g., *Geoffrey, Inc. v. Comm'r of Revenue*, 899 N.E.2d 87 (2009); *Kimberly-Clark Corp. v. Comm'r of Revenue*, Nos.: C282754, C295077, C299008, (Mass. App. Tax Ct. 2011).

Pending Minnesota State Tax Case Summaries

May 9, 2011 — August 9, 2011

By Jerry Geis, Briggs & Morgan, PA

CROW WING COUNTY WASTE MANAGEMENT V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8358R

Taxpayer's Counsel

John J. Sausen, Assistant County Attorney

Filed: May 9, 2011

DOR's Counsel

Rita Coyle DeMeules

Issue: 1. Whether certain equipment required by the State of Minnesota used for gas monitoring and collection as part of municipal solid waste management services and used to minimize passive landfill gas emissions into the atmosphere by destroying the methane fraction of the landfill gas qualifies for exemption under Minn. Stat. § 297A.70, Subd. 3(a)(2) and as defined as "waste management" in Minn. Stat. § 115.02, Subd. 36.

Years: Sales and use tax exemptions for the period beginning May 1, 2007 through and including May 31, 2009.

Amount: \$29,110.15 refund

Status: **Awaiting Discovery**

YIK LO V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8359

Taxpayer's Counsel

Thomas E. Brevier

Filed: July 21, 2011

DOR's Counsel

Mark B. Levinger

Issue: 1. Whether Yik Lo is a "responsible person" for sales and use taxes of HKD, Lo for the years December 1, 2004 through November 30, 2007.

Years: Sales and use taxes of HKD, Lo for the period December 1, 2004 through and including November 30, 2007.

Amount: \$222,584.08

Status: **Awaiting Discovery**

YAU LO V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8360

Taxpayer's Counsel

Thomas E. Brever

Filed: May 20, 2011

DOR's Counsel

Mark B. Levinger

Issue: 1. Whether Yau Lo is a "responsible person" for sales and use taxes of HKD, Lo for the years December 1, 2004 through November 30, 2007.

Years: Sales and use taxes of HKD, Lo for the period December 1, 2004 through and including November 30, 2007.

Amount: \$222,584.08

Status: **Awaiting Discovery**

MARY V. WINSTEAD AND PETER W. BLEWETT V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8361

Taxpayer's Counsel

Pro se

Filed: May 19, 2011

DOR's Counsel

Kyle R. Gustafson

Issue: 1. Whether taxpayers operate a trade or a business of free lance writing projects or is conducting a "hobby loss" under IRC Code § 183.

Years: Minnesota individual income tax returns 2007 through and including December 31, 2009.

Amount: \$8,470.80

Status: **Awaiting Discovery**

INTERSTATE TRAFFIC SIGNS, INC. V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8362

Taxpayer's Counsel

John E. Valen

Filed: May 23, 2011

DOR's Counsel

Mark B. Levinger

Issue: 1. Whether Interstate Traffic Signs, Inc. is liable for sales and use taxes for the period July 1, 2007 through and including August 31, 2010 by not computing taxes on "pick-up charges" (and labor associated with "pick-up") for the purposes of the "sale price" as defined in Minnesota sales and use tax.

Years: Sales and use tax for the period July 1, 2007 through and including August 31, 2010.

Amount: \$41,512.63

Status: **Awaiting Discovery**

REED R. OLSEN V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8363-S

Taxpayer's Counsel

Pro se

Filed: May 24, 2011

DOR's Counsel

Jeremy D. Eiden

Issue: 1. Whether taxpayer since he did not claim his real property tax refund check within the statutory period can have it reissued.

2. Minn. Stat. § 290A.18, Subd. 2 provides that if a person to whom a property tax refund check was issued, does not cash that check within 2 years from the date the check was issued, the right to the refund shall lapse and the refund shall be deposited into the general fund.

3. A second statute to be construed is Minn. Stat. § 270C.346, Subd. 1 which states that the Commissioner may, based on a showing a reasonable cause, issue an uncashed property tax check that has lapsed.

Years: Property tax refunds for the periods 2004, 2005 and 2006.

Amount: Undetermined

Status: **Awaiting Discovery**

YIK LO AND YAU LO V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8364-R

Taxpayer's Counsel

Thomas E. Brever

Filed: June 17, 2011

DOR's Counsel

Mark B. Levinger

Issue: 1. Whether the Commissioner's audit of Yik Lo and Yau Lo for income taxes for the period 2006 and 2007 was correctly computed based on the Tax Court's determination of taxpayer's failure to prove tax collected on beverage sales and estimated by a sales tax examiner.

Years: Minnesota individual income tax returns for 2006 and 2007.

Amount: \$77,898.61

Status: **Awaiting Discovery**

MICHAEL AND ELIZABETH FITZGIBBONS V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8365

Taxpayer's Counsel

Peter B. Wold

Filed: June 23, 2011

DOR's Counsel

Kyle R. Gustafson

Issue: 1. Whether Michael Fitzgibbons and Elizabeth Fitzgibbons have committed fraud by not filing Minnesota individual income tax returns for the period 2001 through and including 2007.

2. Whether Minn. Stat. § 289A.60, Subd. 6, which imposes a 50% fraud penalty, has application in this case.

Years: Minnesota individual income tax returns for 2001 through and including 2007.

Amount: \$228,003.18

Status: **Awaiting Discovery**

LARRY KLADEK V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8366

Taxpayer's Counsel

Neal J. Shapiro

Filed: June 24, 2011

DOR's Counsel

Kyle R. Gustafson

- Issue: 1. Whether Larry Kladek is personally liable for sales and use taxes for Kladek, Inc., which operated the King of Diamonds Gentlemen's Club in South Saint Paul for the periods October 1, 2006 through and including March 31, 2010.
2. Whether Kladek, Inc. should have collected sales taxes on the admissions to the VIP Lounge, cover charges, and AMT transactions for the period October 1, 2006 through and including March 31, 2010 for sales taxes.

Years: Sales and use taxes for the period October 1, 2006 through and including March 31, 2010.

Amount: \$248,942.53

Status: **Awaiting Discovery**

BROWN TANK, LLC V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8367-R

Taxpayer's Counsel

Gordon P. Heinson

Filed: Notice of Appeal

filed March 26, 2011

DOR's Counsel

Rita Coyle DeMeules

- Issue: 1. Whether certain fabrication and construction of tanks and related equipment are subject to tax in Minnesota or nontaxable as out of state jobs for the sales and use taxes for the period July 31, 2004 through and including November 30, 2007.
2. Whether Brown Tank, LLC. is liable for negligence penalty of \$126,445.53 for negligent failure to follow existing sales tax laws and regulations for the period July 31, 2004 through and including November 30, 2007.

Years: Sales and use taxes for the period July 31, 2004 through and November 30, 2007.

Amount: \$1,610,758.85

Status: **Awaiting Discovery**

RUSSELL V. ELY V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8368

Taxpayer's Counsel
Bradford C. Delapena

Filed: June 29, 2011

DOR's Counsel
Mark B. Levinger

- Issue:
1. Whether taxpayer, who is an insurance agent and broker selling surplus lines insurance (insurance coverage unavailable through any insurer generally licensed to write insurance in Minnesota), should be subject to surplus lines gross premium tax base of 3% under Minn. Stat. § 297I.05, Subd. 7(a) for the periods June 30, 2007 through and including June 30, 2010.
 2. Whether the Commissioner's change in position on inclusion of certain fees in the base of the surplus lines from premium tax did not have the force and effect of law because the Commissioner did not adopt it by means of a Rule promulgated in accordance with the Minnesota Administrative Procedure Act.
 3. Whether the Commissioner's position to change his long-standing position on the taxation of surplus lines fees was arbitrary and capricious and cannot be sustained.
 4. Whether the fees at issue were includible in the surplus lines gross premium tax base for periods that preceded the effective date of a 2010 law change, which provided legislative clarity, was an attempt by the Commissioner to give the 2010 law change unlawful retroactive effect.

Years: Surplus lines gross premium tax for years beginning June 30, 2007 through and including June 30, 2010

Amount: \$14,413.80

Status: **Awaiting Discovery.**

JANIS SICARD V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8369

Taxpayer's Counsel
Pro Se

Filed: August 11, 2011

DOR's Counsel

- Issue:
1. Whether taxpayer should receive a property tax refund in the amount of \$533 for the individual income tax return for 2009.

Years: Property tax refund Minnesota individual income tax return for 2009.

Amount: \$533.00

Status: **Awaiting Return and Answer of Commissioner.**

TDL INVESTMENTS, LLC V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8370

Filed: August 15, 2011

Taxpayer's Counsel

DOR's Counsel

Megan K. Heinzelman

Issue: 1. Whether TDL Investments, LLC is a successor in interest to LT Pizza, Inc. and therefore liable for the taxes and debts of LT Pizza, Inc. for back sales tax for periods February 29, 2008 through and including February 28, 2010 and withholding tax for periods December 31, 2009 through and including March 31, 2010.

Years: Sales tax for the periods February 29, 2008 through and including February 28, 2010 and withholding tax for the periods December 31, 2009 through and including March 31, 2010.

Amount: \$168,359.20

Status: **Awaiting Return and Answer of Commissioner.**

DAKOTA HALAL MARKET, INC. V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8371

Filed: August 15, 2011

Taxpayer's Counsel

DOR's Counsel

Daniel L. M. Kennedy

Issue: 1. Whether Dakota Halal Market, Inc. is liable for additional sales and use taxes for the periods January 1, 2006 through and including December 31, 2010 for purchases of prepaid telephone cards, including recharging or adding value to existing cards.

2. Whether a 10% negligence and failure to file and failure to pay penalties should be abated on the grounds of reasonable cause.

3. Whether the statute of limitations can be expanded because of a 25% omission of sales and use tax.

Years: Sales and use tax for the periods January 1, 2006 through and including December 31, 2010.

Amount: \$52,389.47

Status: **Awaiting Return and Answer of Commissioner.**

LINDA HOUGHTON V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8372

Taxpayer's Counsel

Frederick M. Young

Filed: August 16, 2011

DOR's Counsel

- Issue: 1. Whether the values for real property of the decedent's estate were correctly computed for the Minnesota estate tax return.
2. Whether penalties should be abated on the basis of reasonable cause.

Years: Estate tax return.

Amount: Undetermined

Status: **Awaiting Return and Answer of Commissioner.**

DONALD ROSS V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8373

Taxpayer's Counsel

Barbara Olson

Filed: July 21, 2011

DOR's Counsel

- Issue: 1. Whether taxpayer can receive a refund for 2004, which allegedly was claimed and filed after the time limit allowed by State law under Minn. Stat. § 289A.40, Subd. 1.
2. Whether the refund was timely under Minn. Stat. § 289A.40, Subd. 1(a) because Mr. Ross met the requirements of IRC § 6511(h).
3. Whether the Commissioner improperly included \$202,061 in Mr. Ross's taxable income, which was attributable to an IRA rollover contribution.

Years: Individual income tax return refund for 2004.

Amount: Undetermined

Status: **Awaiting Return and Answer of Commissioner.**

TKK, INC. V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8374

Taxpayer's Counsel

Bradley R. Janven

Filed: July 26, 2011

DOR's Counsel

Issue: 1. Whether TKK, Inc., which is a bar, should be subject to additional sales tax assessment based on a reconstructed audit by the Minnesota Department of Revenue for the average amount of alcohol served/poured per drink and sold by the establishment for sales and use taxes for the period July 1, 2007 through and including March 31, 2011.

Years: Sales and use taxes for the period beginning July 1, 2007 through and including March 31, 2011.

Amount: \$70,637.85

Status: **Awaiting Return and Answer of Commissioner.**

MINNESOTA ENERGY RESOURCES CORP. V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8375

Taxpayer's Counsel

Ann E. Kennedy

Filed: August 2, 2011

DOR's Counsel

Mark B. Levinger

Issue: 1. Whether the value of the real and personal property of the natural gas pipeline company was properly computed for the real and personal property taxes under Chapter 273.

2. Whether the value of the pipeline company should be adjusted and reduced to equalize the property valuation with properties of the same class and with comparable localities in the 53 counties where the taxpayer operates.

Years: Real and personal property taxes for the assessment year 2001, payable in 2012.

Amount: Undetermined

Status: **Awaiting Return and Answer of Commissioner.**

RICHARD COLLIN BARNETT V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8376

Filed: August 8, 2011

Taxpayer's Counsel

DOR's Counsel

Pro Se

Issue: 1. Whether Richard Barnett is personally liable for the sales and use taxes of Northstar MSP, Inc. for sales and use taxes for the period July 1, 2002 through and including March 31, 2005.

Years: Sales and use taxes for period July 1, 2002 through and including March 31, 2005.

Amount: \$92,760.45

Status: **Awaiting Return and Answer from Commissioner.**

SHAWN BARNETT V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8377

Filed: August 8, 2011

Taxpayer's Counsel

DOR's Counsel

Pro Se

Issue: 1. Whether Shawn Barnett is personally liable for the sales and use tax debts of Northstar MSP, Inc. for the period July 1, 2002 through and including March 31, 2005.

Years: Sales and use tax for period July 1, 2002 through and including March 31, 2005.

Amount: \$92,760.45

Status: **Awaiting Return and Answer of Commissioner.**

LEONARD & GLORIA DUNHAM V. COMMISSIONER OF REVENUE

Minnesota Tax Court Docket No. 8378

Filed: August 9, 2011

Taxpayer's Counsel

DOR's Counsel

E. C. Meisinger

Issue: 1. Whether the income and the deductions on Schedule C for the Minnesota individual income tax returns for the periods 2005 through and including 2007 were correctly computed.

2. Whether penalties for 2005 through and including 2007 on the Minnesota individual income taxes should be abated on the grounds of reasonable cause.

Years: Minnesota individual income tax returns for the periods 2005 through and including 2007.

Amount: \$28,504.46

Status: Awaiting Return and Answer of Commissioner.

Minnesota Revenue

PUBLIC RULEMAKING DOCKET as of September 19, 2011

Submitted by Susan Barry, Minnesota Department of Revenue

Rulemaking records are kept in the Appeals and Legal Services Division of the Minnesota Department of Revenue, at 600 North Robert Street, St. Paul, Minnesota 55146. Public files may be viewed, by appointment, during regular business hours, from 8:00 a.m. to 4:00 p.m., Monday through Friday, by calling Susan Barry, the Rulemaking Coordinator, at (651) 556-4062., or e-mailing her at Susan.Barry@state.mn.us.

Requests for Comment, various rule Notices, and Rules, when published in the State Register, are posted on the department's website, and generally a link to the State Register is also provided. Additionally, a rule's Statement of Need and Reasonableness (SONAR) is posted on the department's website until that rule is promulgated. The following address will link you to the department's rulemaking webpage: http://taxes.state.mn.us/legal_policy/pages/other_supporting_content_rules.aspx and a link at the bottom of that webpage will take you to another webpage showing the status of previously proposed rules.

Sales and Use Tax

Topic: Sales Tax; Fund-raising Sales by or for Nonprofit Groups; Chapter 8130

Governor's Office File #: AR # 221

Contact Person: Michal Garber (651) 556-4067

Current Status: CONTINUES ON HOLD.

History: Published the Request for Comments in the *State Register* on September 19, 2005 (30 S.R. 308). Comment period will remain open until publication of either a Notice of Intent to Adopt or a Notice of Intent to Withdraw Rules.

Tax Administration

Topic: Practice of Attorneys, Accountants, Agents, & Preparers Before Department of Revenue—Former

Employees of the Department of Revenue; Part 8052.0300, new Subpart 3a

Governor's Office File #: AR # 538

Contact Person: Cecilia Morrow (651) 556-4079
Current Status: Drafting rule and SONAR (statement of need and reasonableness).

History: The Request for Comments was published in the *State Register* on April 12, 2010 (34 S.R. 1336). The Request for Comments stated "The Department is considering adding a new subpart 3a, which discusses the extent to which former employees of the Department of Revenue are ineligible to practice. This planned revision was originally part of other revisions to the same rules, for which a Request for Comments was published in the *State Register* on Monday, October 13, 2008 (33 S.R. 673). As that previous rulemaking project progressed, the Department decided to remove this revision and make it into this separate rulemaking project." The Department received one comment by the deadline, which was June 4, 2010, at 4:30 p.m.

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Tax Section News

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