

## I. INCOME/FRANCHISE TAXES

### Judicial Developments

#### Intangible Expense Add -Back

*Kohl's Department Stores, Inc. v. Virginia Dep't of Taxation, Case No. 760CL 12-1774 (pending, Cir. Ct. of the City of Richmond)*

Kohl's Department Stores has filed a complaint for a refund based on the intangible expense add-back exception for income that is "subject to" tax by another state. Va. Code § 58.1-402(B)(8). Kohl's paid royalties to an affiliate, which was subject to tax on those royalties in Illinois.

The Department is arguing that Kohl's is only entitled to an exception to the add-back *to the extent* that the intangible expense payments made by Kohl's were subject to tax in another state. The Department is also arguing that Kohl's cannot claim a refund based on the "subject to" tax add-back exception for the period at issue in the appeal, because the taxpayer had entered into an audit settlement for the period that precluded subsequent refund claims. The *Kohl's* case remains pending at the Circuit Court level.

*Lorillard Tobacco Co. v. Virginia Dep't of Taxation, Case No. 13-509 (pending, Cir. Ct. of the City of Danville)*

Lorillard's complaint seeks a refund based on the same intangible expense add-back exception issue raised by Kohl's.

#### Reed Smith's Observations

Virginia has had an add-back in effect since 2004 for intangible expenses paid to related entities. There are several exceptions to the general rule requiring add-back of intangible expenses. One of these exceptions is for situations in which "the corresponding item of income received by the related member is subject to a tax based on or measured by net income or capital imposed by ... another state." Va. Code § 58.1-402(B)(8).

The Department has historically treated the "subject to tax" exception as applying only to the extent that the taxpayer actually paid tax on the royalty income (post-apportionment) in the other state. Recently, a retroactive amendment to the "subject to tax" exception was proposed in the General Assembly at the Department's behest. The amendment would have "clarified" the exception by limiting the "subject to tax" exception to the portion of the intangible expense included in the income of the related entity and subject to tax in another state, on a post-apportionment basis. Ultimately, the amendment was withdrawn because of lack of support.

A final decision in either the *Kohl's* or the *Lorillard* case would provide much-needed clarity on the scope of the “subject to tax” add-back exception. A decision in the *Kohl's* case would also provide guidance on whether an audit settlement precludes future refund claims.

### **Property “Owned and Used” In Virginia**

*Lorillard Tobacco Co. v. Virginia Dep't of Taxation*, Case No. 13-614 (pending, Cir. Ct. of the City of Danville).

In addition to requesting relief from an intangible add-back assessment, Lorillard is seeking a refund based on an adjustment to its property factor.

Lorillard ages its tobacco in Danville, Virginia, and included the value of the aging tobacco in computing its property apportionment factor on its original return.

Under Virginia law, the property factor is a fraction, the numerator of which is the average value of the corporation's real and tangible personal property owned and used or rented and used in Virginia during the tax year, and the denominator of which is the average value of all of the corporation's real and tangible personal property owned and used or rented and used during the taxable year and located everywhere, to the extent such property is used to produce Virginia taxable income. Va. Code § 58.1-409.

Lorillard is arguing that the aging tobacco should not be included in the property apportionment factor because it is not both “owned and used” by Lorillard in Virginia. The tobacco can only be used when it is aged sufficiently to be transformed into cigarettes. Lorillard argues that the aging tobacco is akin to property “under construction” or that is being “developed to the point where [it] could be placed in production” and, thus, is not inventory.

Lorillard also relies, in part, on previous sales and use tax rulings that the Department issued (to Lorillard) holding that the property Lorillard used in aging tobacco is subject to use tax because aging tobacco is not “processing or treatment.”

### **Reed Smith's Observations**

Taxpayers who age goods or raw materials in Virginia prior to manufacture or sale should consider filing refund claims. The longer that the goods are aged in Virginia, the larger an impact this would likely have on the Virginia property apportionment factor.

## **Rulings of the Tax Commissioner**

### **Transfer Pricing / Intangible Expense Add-Back**

P.D. 13-140 (July 19, 2013)

The taxpayer paid franchise fees to its parent and claimed a deduction for these fees. The auditor disallowed the deduction. In the ruling, the Department allowed the deduction, stating that “the mere fact that . . . franchise or management fees appear[s] to be out of proportion with other expenses incurred” is insufficient for the Department to perform an equitable adjustment. The taxpayer provided the Department with “several independent transfer pricing studies” that showed that the fees were arm’s length.

The taxpayer also claimed an exception to the intangible expense add-back for the royalties it paid to its parent based on:

- The “subject to tax” exception, described above in the context of *Kohl’s* and *Lorillard* cases. The Department rejected the taxpayer’s application of the “subject to tax” exception, except to the extent the parent’s royalty income was subject to an income-based tax on a post-apportionment basis in another state.
- The “valid business purpose” add-back exception. The Department rejected the taxpayer’s application of this exception, because the taxpayer did not follow the specific procedures for claiming the exception set forth in the Department’s regulations.

## **Manufacturing Apportionment**

### **P.D. 13-6 (January 7, 2013)**

In P.D. 13-6, the Department provided extensive guidance for multistate manufacturers (corporations falling within NAICS Sectors 11, 31, 32, or 33) that elect to apportion using a more-heavily weighted sales factor, as permitted by Va. Code. § 58.1-422. P.D. 13-6 provides guidance on how to apportion income for a manufacturing company that is part of an affiliated group, the treatment of pass-through entity manufacturers, recapture for failure to comply with applicable wage and employment requirements, and substantiation requirements.

Of note, a corporation can only use the elective apportionment method for manufacturers if the average weekly wage of its full-time employees is greater than the lower of the state or local (determined at the city/county level) average weekly wages for its industry. Manufacturers can introduce independent evidence of state or local industry wages, or can rely on the Virginia Employment Commission’s data for the quarter in which the manufacturer’s taxable year ends. For the first three years after electing to use the more heavily weighted sales factor, a manufacturer must also maintain 90 percent full-time employment, as compared with the year prior to making the election.

**P.D. 13-84 (February 28, 2013)**

In P.D. 13-84, the Department clarified the allowable methods for calculating the average number of full-time employees for the base year and the first three years of the election. An employer can “use any set of numbers that represents qualifying employment for the entire taxable year, and may derive an average from the set of numbers using the mean, median or mode method.” However, an employer cannot divide the number of hours worked by its employees by the minimum number of hours required for an employee to qualify as full-time. Using a method for one year does “not bind the manufacturer to use the same method in subsequent years.”

**Reed Smith’s Observations**

Virginia’s elective apportionment method for manufacturers does not contain any explicit territorial limitations on the location of the manufacturing activities. However, P.D. 13-6 implies that a manufacturer must manufacture in Virginia to qualify for the elective apportionment method. If the Department imposes such a territorial limitation on the location of manufacturing activities, the limitation could have Commerce Clause implications.

It is also unclear as to how the “wage” requirements will be computed (e.g., use Virginia Employment Commission data vs. use manufacturing company’s current or most recently available quarterly wage data). Further, P.D. 13-6 does not require a manufacturer to split out its average Virginia wages and employment from its average total wages and employment, which could allow taxpayers some room to interpret the election in a manner most favorable to them.

The Department’s guidance on the method for calculating the average number of employees specifically allows an employer to change its method between years. Thus, an employer can calculate its number of qualified employees for the base year using the method that produces the lowest result, and for the other years using the method that produces the highest result. Under this method, even an employer that substantially reduces its number of qualified employees could qualify for the election.

## II. TRANSACTIONAL TAXES

### Legislative Developments

**Increased Sales and Use Tax Rate**

The state-wide sales and use tax rate increased from 5 percent to 5.3 percent, effective July 1, 2013. HB 2313; P.D. 13-103 (June 13, 2013). A taxpayer who entered into a contract to purchase taxable property prior to April 3, 2013 is entitled to a refund of the additional 0.3 percent, as long as the property is delivered prior to September 30, 2013.

### Affiliate Nexus Law

The legislature created a legal presumption to require registration by a dealer for collection of retail sales and use taxes if any commonly controlled person maintains a distribution center, warehouse, fulfillment center, office, or similar location within the commonwealth that facilitates the delivery of property sold by the dealer to its customers. The presumption can be rebutted by demonstrating that the activities conducted by the commonly controlled person in the commonwealth are not significantly associated with the dealer's ability to establish or maintain a market in the commonwealth for the dealer's sales. The statute's requirements came into effect September 1, 2013.

### Reed Smith's Observations

The passage of this law was the result of the combined efforts of Amazon.com, Gov. McDonnell, members of the general assembly, and in-state retailers. In connection with the passage of this law, the governor agreed on February 22, 2012, to suspend Amazon's Virginia sales-tax collection responsibilities until September 1, 2013.

## Judicial Developments

### Sales and Use Tax Audit Sampling

*Nortel Networks, Inc. v. Commonwealth of Virginia Department of Taxation (Delaware Bankr. Case No. 09-10138)*

The Department conducted a sample sales and use tax audit of the taxpayer. As part of the audit, the Department credited the taxpayer for taxes paid by its customers during the sample period, but refused to extrapolate the customers' payments to the remainder of the audit period. According to the taxpayer's internal detail audit, if the Department had extrapolated the customer payments, it would have resulted in a \$644.99 tax liability rather than the \$1,090,146.33 assessment that the taxpayer received.

The taxpayer argued that the Department's sample methodology was "arbitrary and unreasonable" and "would result in a windfall to the Department." The parties ultimately settled at approximately 90 percent relief to the taxpayer.

Although this case was settled prior to being decided, the fact that the reasonableness of the Department's audit methodology was the subject of a dispute in a case before a United States Bankruptcy Court is notable. Companies that have filed for bankruptcy should be aware that Bankruptcy Court can hear state and local tax controversies and can serve as a favorable forum for settlement. Because the taxpayer in this case had filed for bankruptcy under chapter 11, this action was filed as an adversary action in Bankruptcy Court. This case is part of a trend of the Bankruptcy Courts retaining jurisdiction over state tax claims.

## Bad Debts

*Best Buy Stores, L.P. v. Commonwealth of Virginia Department of Taxation* (Richmond Circuit Court No. LT 2635-1)

Best Buy sought sales tax refunds, the claims stemming from customers who defaulted on their Best Buy private label credit card accounts and therefore never paid the full purchase price or full amount of sales tax for the merchandise they received. Best Buy argued that it was required to pay the commonwealth the full amount of sales tax due on credit purchases at the time credit was extended rather than waiting until after the customers repay their credit obligations. When the customer then defaults on the payments, Best Buy incurs a loss not only on the unpaid principal amounts, but also on the corresponding unpaid sales tax.

Motions for Summary Judgment were filed in March 2013, and a hearing was held April 4 (please email Dan Dixon at [ddixon@reedsmith.com](mailto:ddixon@reedsmith.com) if you'd like to see copies of the motions or the court's order ruling on those motions). On April 24, the court ruled on the motions in favor of the Department. In that decision, the court focused on Best Buy's contract with Beneficial National Bank USA ("BNB"). Under the contract, when a customer made a purchase on his or her Best Buy credit card, Best Buy paid the commonwealth the sales tax. Then BNB would purchase sales slips from Best Buy at a price designated under their agreed purchase plan. This price was discounted to take into account projected losses for bad debts. The court held that, under Va. Code § 58.1-612(B), BNB and Best Buy were not a "group or combination acting as a unit." Thus, when considering a bad debt refund under Va. Code § 58.1-621, BNB must be considered a separate and independent actor from Best Buy because it purchases the sales slips from Best Buy.

The court ultimately held that although Best Buy receives less than the full purchase price through a fixed discount for anticipated losses (under the contract), it does not suffer the loss from an account that has found to be worthless, as required in Va. Code § 58.1-621. And because BNB ultimately suffers the actual bad debt loss (as an independent actor), Best Buy is not entitled to a tax refund on sales tax attributable to bad debt.

## Rulings of the Tax Commissioner

### Allocation method for mixed-use tangible personal property

P.D. 13-139 (July 18, 2013)

The taxpayer in this ruling provided Internet, television, and VoIP telephone services to customers, using the same broadband lines and related equipment to provide all of its services. Virginia offers a sales and use tax exemption for property used in providing television broadcasting and Internet services, but not for telephone equipment.

If property is used for both exempt and non-exempt purposes, it is taxed based on the proportion of time that it is used for non-exempt purposes. In this case, the taxpayer was able to prove that only 0.2 percent of its total bandwidth was used to provide telephone services. Rather than use the bandwidth (which clearly established actual usage), the auditor determined the taxable portion of the broadband lines and equipment by using a formula that included the average of the percentage of telephone subscribers to total subscribers, the telephone revenue to total revenue, and telephone bandwidth to total bandwidth.

The taxpayer objected to the auditor's methodology, and argued that the revenue and subscriber ratios did not accurately reflect the proportion of time that the broadband lines were used for telephone services.

The Department refused to follow an allocation of the broadband lines based purely on a bandwidth-ratio, based on a misplaced technological analysis. Citing the taxpayer's 10-K, the Department stated that digital services take up less bandwidth than the same services would consume if provided in analog format. "Accordingly, a reduction in bandwidth usage is achievable by merely switching from analog to digital equipment." Based on this, the Department reasoned that bandwidth cannot "produce a fair representation" of the proportion of taxable use of the mixed-use property.

After rejecting the use of a bandwidth-only allocation methodology, the Department proposed using the "actual amount of time that subscribers used" telephone services, compared with the total time subscribers used telephone, television, and Internet services.

### **Reed Smith's Observations**

It is hard to square the Department's conclusion in this ruling with the rule requiring the allocation of property between exempt and non-exempt equipment based on usage time. If the taxpayer purchases equipment to increase its bandwidth, then bandwidth should be the proper metric to allocate the value of the equipment between taxable and nontaxable uses. This is especially true when the taxpayer can provide data showing exactly how much bandwidth is used for each use.

The Department's proposed methodology is faulty as a matter of Virginia law because it focuses on how the taxpayer's customers use the services rather than how the taxpayer uses the equipment. This is incorrect and produces distortive results.

### **Software maintenance**

P.D. 13-51 (April 29, 2013)

In P.D. 13-51, the Department ruled that a vendor could treat a software maintenance agreement as non-taxable only if it retained documentation for each update showing that the update was delivered electronically. The vendor had entered into software maintenance agreements with its customers that did not indicate the method of delivery, although the vendor represented that all updates were delivered electronically during the period covered by the ruling.

### **Reed Smith's Observations**

This ruling creates a trap for the unwary and imposes a high compliance burden on software vendors. If a vendor intends to provide software updates to customers in Virginia via electronic delivery, the maintenance agreement should specify that the updates will be delivered electronically, or the vendor should keep records of how each update was delivered.

### **Interstate sale exemption**

#### **P.D. 13-52 (April 29, 2013)**

In P.D. 13-52, the Department ruled that property delivered to another state, but modified in Virginia, falls within Virginia's sales tax exemption for interstate sales, as long as title to the property does not transfer in Virginia and the customer did not expressly request that the modification be performed in Virginia.

The taxpayer in this ruling was a vehicle manufacturer that shipped vehicles to Virginia for modification prior to delivery into another state. The vehicles were shipped "FOB (free on board) destination." The Department ruled that the vehicles were exempt under the interstate sale exemption because, under the FOB terms, title to the vehicles did not pass in Virginia. The Department also ruled that there was no constructive delivery of the vehicles in Virginia because the taxpayer, rather than the customer, decided to modify the vehicles in Virginia. However, if the customer had expressly requested that the vehicles be modified in Virginia, then there would have been constructive delivery and the vehicles would not have qualified for the interstate sale exemption. See P.D. 96-63 (April 24, 1996).

### **Sales and Use Tax Audit Sampling**

#### **P.D. 13-133 (July 8, 2013)**

In P.D. 13-133, the Department ruled that a taxpayer undergoing a sales tax sample audit is not entitled to a credit for self-assessed use tax paid by its customers. The Department reasoned that there could have been transactions outside the sample period where the taxpayer did not charge sales tax and the customer did not self-assess use tax, so removing the sample transactions where the taxpayer did not charge sales and the customer did self-assess "would distort the sample and nullify its statistical validity."



### Reed Smith's Observations

As is the case in many states, taxpayers in Virginia must overcome a heavy burden to demonstrate that the sample used by an auditor produces unfair or inaccurate results. The *Nortel* case (discussed above) shows the lengths to which the commonwealth is willing to go to defend the results of its sampling.

The holding in this ruling is in clear tension with the *Nortel* settlement and the purpose of sampling. If a vendor is subjected to a sales tax audit using a sample period, and the vendor is able to demonstrate that one of its customers paid use tax on a purchase from the vendor during the sample period, the Department's position – as expressed in this ruling – essentially forces the vendor to undertake a detail audit instead of crediting and extrapolating sample transactions on which use tax was paid.

## III. PROVIDERS' BRIEF BIOGRAPHY/RESUME

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Michael's practice runs the gamut from state corporate income tax assessment appeals and refund claims, to state tax planning in connection with business transactions. Michael has represented dozens of clients in the administrative and judicial appeals of state income tax issues, with particular experience in Pennsylvania, Massachusetts, Michigan and Virginia. Many of these appeals have resulted in multimillion-dollar refunds or assessment reductions. Michael also advises public and private clients with state and local sales and transfer tax issues in connection with acquisitions and divestitures throughout the United States, and counsels clients on their financial accounting provisions for state taxes.

### Representative Matters

- Advised employee leasing affiliate of a national IT company in a refund claim involving the proper sourcing of the leasing affiliate's receipts for Michigan single business tax purposes that resulted in a refund in excess of \$10 million.
- Advised national client in nationwide state corporate income and franchise tax return review that resulted in more than \$10 million in refunds.

- Advised numerous clients in nationwide nexus reviews and voluntary disclosures.
- Advised numerous clients in state tax appeals and exposure analyses involving intangible holding companies, producing numerous successful settlements.

### Select Publications

- "Massachusetts Tax Developments – A Reed Smith Quarterly Update (1st Quarter 2013)," *Reed Smith Client Alert*, 25 April 2013  
Co-Author(s): Robert E. Weyman, Brent K. Beissel
- "Pennsylvania Tax Developments – A Reed Smith Quarterly Update," *Reed Smith Client Alert*, 23 April 2013  
Co-Author(s): Frank J. Gallo, Kenneth R. Levine, Christine M. Hanhausen
- "Software Vendor Challenges Massachusetts' Restrictive Policy on Multiple Points of Use Certificates," *Reed Smith Client Alert*, 12 April 2013  
Co-Author(s): Robert E. Weyman
- "Disk or No Disk – Cloud Computing Services Not Taxable In Virginia," *Reed Smith Client Alert*, 11 January 2013  
Co-Author(s): Daniel M. Dixon
- "Virginia Tax Amnesty Begins October 7: Avoid the Traps and Maximize the Opportunities," *Reed Smith Client Alert*, 30 September 2009  
Co-Author(s): Daniel M. Dixon
- "Virginia General Assembly Extends Virginia Tax on Telecom Companies to Noncorporate Entities on a Retroactive Basis," *Reed Smith Client Alert*, 20 March 2009  
Co-Author(s): Daniel M. Dixon
- "Taxpayers Challenge Virginia's Telecommunications Gross Receipts Tax on Multiple Fronts," 10 November 2008  
Co-Author(s): Kenneth R. Levine, Daniel M. Dixon
- "Virginia Supreme Court Holds That Virginia's Tax on Telecommunications Companies Does Not Apply to Pass-Through Entities," *Reed Smith Client Alert*, 15 September 2008
- "Maryland Comptroller's Continuing Efforts to Generate Revenue: The Comptroller Starts Assessing the 'Wolves in Sheep's Clothing'," *Reed Smith Client Alert*, 5 February 2008  
Co-Author(s): Stephen J. Blazick

### Select Speaking Engagements

- "Click-Through Nexus: An Examination of Recent Developments," ABA/IPT Sales & Use Tax Seminar, New Orleans, Louisiana, 22 March 2012

- "Philadelphia Local Taxes," Pennsylvania Bar Institute, 23 September 2011
- "Legal Entity Restructuring and State Tax," Strafford Publications Teleconference, 22 November 2010
- "Tax Amnesties - Evaluating the Latest State Offers," Strafford Publications Teleconference, 11 February 2010
- State Tax Group Teleseminar – "Get The Inside Story: Virginia Tax Amnesty - Minimizing Risk While Maximizing Opportunity," 9 October 2009
- Reed Smith's "Maryland Voluntary Disclosure for Intangible Holding Companies" Teleseminar, 8 May 2008
- "Sales and Use Tax Issues in Mergers, Acquisitions and Divestitures," COST Intermediate/Advanced Sales and Use Tax School, Atlanta, Georgia, 2008 - 2013

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Dan has been a member of Reed Smith's State Tax Group since 2007. He currently focuses his practice on Pennsylvania, Virginia, California, Texas, and New Jersey sales and use and income tax issues. Dan has developed a particular focus on the taxation of software and emerging technologies, and also has extensive experience in state unemployment insurance law. Recently Dan's knowledge in the oil and gas industry has led to the development of a niche practice related to the taxation of natural gas drilling and extraction in the Marcellus Shale region of Pennsylvania.

**Representative Matters**

- Defeated \$6 million Pennsylvania sales and use tax assessment for major firm food service provider client.
- Defeated more than \$15 million in income tax assessments related to nexus and P.L. 86-272 issues for major firm pharmaceutical client.
- Advised national client in nationwide state corporate income and franchise tax return review that resulted in more than \$10 million in refunds.
- Successfully negotiated with the New Jersey Division of Taxation to reduce a \$20 million petroleum gross receipts tax and motor fuels tax New Jersey Assessment to zero.
- Prevailed in New York unemployment insurance claim regarding employee classifications issues.

- Received multimillion-dollar California software sales and use tax refund for major firm computer services client.

### Select Publications

- "Taxing the Marcellus Shale," *Legal Intelligencer*, 23 July 2013
- "Virginia Court Denies Best Buy's Bad Debt Credit, Leaves Hope for Other Retailers," *Reed Smith Client Alert*, 31 May 2013
- "The Wall Street Journal, Forbes, BusinessWeek and Fortune 500 Companies All Agree: No One Knows Taxing the Cloud Like Reed Smith State Tax!" *Reed Smith Client Alert*, 18 March 2013  
Co-Author(s): Lee A. Zoeller, Kelley C. Miller
- "Reed Smith Marcellus Shale Tax Update – Sales and Use Tax," *Reed Smith Client Alert*, 24 January 2013  
Co-Author(s): Lee A. Zoeller, Stephen J. Blazick
- "Disk or No Disk – Cloud Computing Services Not Taxable In Virginia," *Reed Smith Client Alert*, 11 January 2013  
Co-Author(s): Michael A. Jacobs
- "The Nortel Dilemma: Taxability of Canned Software in California," *Bloomberg BNA*, August 15, 2012.BNA
- "Pennsylvania Passes Marcellus Shale Unconventional Gas Well Fee," *Reed Smith Client Alert*, 14 February 2012  
Co-Author(s): Stephen J. Blazick, Lee A. Zoeller
- "New Jersey Joins the Click-Through Nexus Initiative," *Taxing Tech*, 30 January 2012
- "Drilling for Dollars: File Your Pa. Marcellus Shale Refund Claim Now," *Rigzone*, January 2012  
Co-Author(s): Stephen J. Blazick
- "Virginia Tax Amnesty Begins October 7: Avoid the Traps and Maximize the Opportunities," *Reed Smith Client Alert*, 30 September 2009  
Co-Author(s): Michael A. Jacobs
- "Virginia General Assembly Extends Virginia Tax on Telecom Companies to Noncorporate Entities on a Retroactive Basis," *Reed Smith Client Alert*, 20 March 2009  
Co-Author(s): Michael A. Jacobs
- "Taxpayers Challenge Virginia's Telecommunications Gross Receipts Tax on Multiple Fronts," *State Tax Notes*, 10 November 2008  
Co-Author(s): Michael A. Jacobs, Kenneth R. Levine

**Select Speaking Engagements**

- Tax Executives Institute – Harrisburg Chapter  
"2013 State and Local Tax Update (Including Marcellus Shale Update) & Clouds, Codes, and Crunching Numbers: An Update on Current Multi-State Tax Developments," September 2013
- Council on State Taxation – Los Angeles: "Clouds, Codes, and Crunching Numbers: An Update on Current Multi-State Tax Developments," August 2013
- Tax Executives Institute – Westchester Fairfield Chapter  
"2013 State Tax Bootcamp," February 13, 2013
- Reed Smith State Tax Teleseminar – "Clouds, Codes, and Crunching Numbers: An Update on Current Multi-State Tax Developments and Trends in the Taxation of Electronic Goods and Services," 27 July 2011
- State Tax Group Teleseminar – "Get The Inside Story: Virginia Tax Amnesty - Minimizing Risk While Maximizing Opportunity," 9 October 2009