DISTRICT OF COLUMBIA STATE TAX DEVELOPMENTS

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NEW UPDATES

I. No Franchise Tax Nexus Due to Presence of Remote Employees During COVID Emergency—Policy Expired as of July 16, 2022

On March 11, 2020, Mayor Bowser declared a public emergency and a public health emergency caused by the novel coronavirus (COVID-19). As a result, the Office of Tax and Revenue ("OTR") announced it will not seek to impose corporation franchise tax or unincorporated business franchise tax nexus solely on the basis of employees or property used to allow employees to work from home (e.g., computers, computer equipment, or similar property) temporarily located in the District during the period of the declared public emergency and public health emergency, including any further extensions by the Mayor and for 90 days after the Mayor declares an end to the public emergency. Additionally, the presence of employees under these conditions will not cause a business to lose the protections of Public Law 86-272. *OTR Tax Notice 2020-05 and Tax Notice 2020-07.*

On July 24, 2021, the Mayor issued an order ending the public health emergency, but continuing the public emergency. On March 17, 2022, the Mayor extended the public emergency to April 16, 2022. The Mayor has not further extended the declaration of public health emergency. As a result, the relief from corporation franchise tax or unincorporated business franchise tax nexus expired on July 16, 2022.

II. DC Settles Deceptive Fees and Sales Tax Lawsuit with Grocery Delivery Service

On August 19, 2022, DC settled a lawsuit against a grocery delivery business for allegedly "charging District consumers millions of dollars in deceptive service fees and for failing to pay hundreds of thousands of dollars in District sales tax." The District of Columbia Office of Attorney General ("OAG") was seeking a court order to stop the business from violating District law in the future, force it to provide restitution to District consumers who were charged deceptive service fees, and to recover unpaid sales taxes, as well as penalties and interest. With respect to the sales tax portion of the suit, OAG alleged that under District law, the business is responsible for collecting sales tax on the delivery services it provides, and that it has failed to collect tax on the service and delivery fees it charged users.

Under the terms of the August settlement agreement, the company is enjoined from making any misrepresentations or material omissions of facts as to the nature or purpose of any fee applied to customers' orders; required to pay $1.8 million to the District for potential restitution, attorneys' fees, and other costs associated with the investigation and litigation; acknowledge that it is a marketplace facilitator under D.C. Code § 47–2001(g-5); and waive its right to claim a refund for the roughly $740,000 it paid in sales tax under protest.

The case is unique because it was brought directly by OAG against the business, rather than through the tax enforcement provisions under District law. This raises concerns similar to those raised by proposals to expand False Claims Act litigation to include tax matters. *District of Columbia vs. Maplebear, Inc. HEP*, No. 2020-CA-003777 (D.C. Super. Ct. Aug. 27, 2020).

III. First Tax Fraud Lawsuit Brought Under D.C.'s False Claims Act

On August 31, 2022, Attorney General Racine announced that the OAG was pursuing a tax fraud lawsuit under the False Claims Act against a billionaire technology executive who allegedly resided in the District for more than ten years but never paid D.C. income taxes. The publicly-traded data tracking company co-founded by the defendant was named as a co-conspirator in the lawsuit. In the suit, the OAG alleges that the executive illegally avoided over $25 million in District taxes by fraudulently presenting himself as a resident of Florida. The OAG also alleges that the executive perpetrated the fraud with the aid of his company, which purportedly filed inaccurate W-2s and deliberately failed to withhold and remit District taxes.

The OAG is seeking unpaid taxes and penalties that could total more than $100 million. The relator (also known as the "whistleblower") filed a complaint in April 2021 under seal, alleging that the executive was boasting to others about how he was avoiding District taxes. The District elected to intervene in the case by filing its own complaint on August 22, 2022, and the complaint was unsealed following the AG's announcement of the case. If the lawsuit yields a recovery for the District, the relator stands to collect 15% to 25% of the proceeds.

This is the first lawsuit brought under the District's False Claims Act, which was amended in 2021 to allow suits for unpaid taxes. (The amendment is discussed in Section VIII.A. of this outline.) The District's amendment follows a trend observed in other states, in which state legislatures, pressured by a lack of tax administration resources, are seeking to expand the reach of their own False Claims Acts to include fraudulent tax returns. It is also noteworthy that the taxpayer's employer was named as a co-defendant in this complaint. A company's determination as to the residency of its employees and its own withholding obligations can seemingly subject the company to False Claims Act liability. *District of Columbia, ex rel. Tributum, LLC v. Michael J. Saylor and Microstrategy, Inc.*, Case No. 2021 CABSLD 001319 B (Sup. Ct. D.C.).

IV. Fiscal Year 2023 Budget Passed with Minimal Corporate Tax Changes

The Fiscal Year 2023 Budget Support Act of 2022 was signed by Mayor Muriel Bowser on July 25, 2022. The budget make several changes to the definition of District gross income (the tax base for the corporate and individual income tax). For example, the budget excluded

certain grants and benefits from the District's gross income upon which its corporate and individual income taxes are imposed, such as:

- Grants for housing providers under D.C. Code Ann. §1-328.04(w);
- Grants for the State Small Business Credit Initiative Venture Capital Program under D.C. Code Ann. §1-328.04(x);
- Funding received to incentivize solar installations under D.C. Code Ann. §8-1774.16;
- Grants for the installation of energy storage systems under D.C. Code Ann. §8-1774.10(c)(22);
- Rebates pursuant to the External Defibrillator Act (Bill 24-714);
- Lump-sum payments from the early educator pay parity program under D.C. Code Ann. §1-325.431(c)(1A); and
- Cash assistance for excluded workers awarded from the Washington Convention and Sports Authority.

V. District Concludes Pass-Through Entity Taxes Paid to Other Jurisdictions Are Deductible

The OTR has notified taxpayers that DC taxpayers may deduct pass-through entity-level taxes paid to other jurisdictions as long as they are "akin to an individual net income tax," and are not an enumerated non-deductible tax (eg, franchise tax, license tax, excise tax, unincorporated business tax, occupation tax, or any tax characterized as such by the other taxing jurisdiction). *OTR Tax Notice 2022–03*.

PREVIOUS UPDATES

VI. INCOME/FRANCHISE TAXES

A. Legislative Developments

1. Combined Reporting Transition Deferred Tax Liability Deduction Delayed

When D.C. transitioned to combined reporting effective for tax years beginning on/after January 1, 2011, it enacted a one-time deduction spread over a seven-year period available to publicly traded companies in the amount of the increase in deferred taxes related to the transition to combined reporting. The law initially allowed the deduction over the seven-year period beginning in the fifth year of combined reporting. But D.C.'s 2020 budget bill delayed the beginning of the seven-year period until 2025. *D.C. Code § 47-1810.08*

2. D.C. Opportunity Zone Program Requirements More Strict than Federal Criteria

D.C.'s 2020 budget bill decoupled the District's Opportunity Zones program from the federal criteria. D.C.'s rules require that qualified opportunity funds show they have invested in a business or property that received a grant, loan, or tax incentive from the District; have invested in an economic development project managed, owned, or disposed of by the District; and have received support from the local Advisory Neighborhood Commission or have received a score of at least 75 on the Urban Institute's Opportunity Zone Impact Assessment Tool. *D.C. Code §47-1803.03.*

B. Judicial Developments

1. Office of Administrative Hearings ("OAH") Again Rejects OTR's Attempt to Limit Taxpayer's Rights in Assessment Appeals

In a series of recent decisions (the first two reported in prior versions of this outline, and one new decision), the OAH has rejected OTR's attempt to limit taxpayers' appeal rights.

Appeal notice sent through MyTaxDC. In one case, the OTR sent an assessment notice through its MyTaxDC.gov online portal—even though neither the taxpayer nor its representative had known of or accessed the portal. The taxpayer missed the 30 day appeal window if calculated from the date sent through MyTaxDC, but within the 30 days of finding out about the assessment. The OTR argued the taxpayer's appeal was untimely. The administrative law judge ("ALJ") found the OTR's argument "completely without merit." To hold the online portal method of notice sufficient, when the taxpayers never once used the portal to communicate with the OTR, would

"violate fundamental due process." *Bechtel v. OTR*, Case No. 2020-OTR-00018 (Nov. 17, 2020),

Appeal notice sent through regular rather than certified mail. In another case, the OTR sent a sent a proposed assessment through regular mail. The taxpayer and its counsel maintained that they never received the notice. The ALJ rejected the OTR's argument that the appeal window ran from the date of the assessment sent through regular mail because it was "inexplicable" for the OTR to send the notice by regular mail when OTR routinely sent other communications via certified mail. The OTR found the taxpayer's protest was timely. *Thomas E. Clark Heating and Air Conditioning v. OTR*, Case Nos. 2020-OTR-00038 and 2021-OTR-00006 (July 7, 2021),

Assessment appeal to OAH that may result in refund. The OTR has argued that a taxpayer cannot appeal an assessment to the OAH when prevailing would result in a cash refund (this would occur because the taxpayer filed an amended return claiming a refund, and the OTR denied it by issuing a proposed assessment of tax deficiency before ever issuing a cash refund). The OTR argued that the OAH lacked jurisdiction to hear the deficiency protest because appeals of refund denials are within the exclusive jurisdiction of the D.C. Superior Court.

The OAH denied OTR's motion to dismiss, finding first that a "deficiency" under D.C. Code § 47-1801.04(12) is not dependent on whether a taxpayer has overpaid or underpaid its taxes; it is based on the OTR's action. In this case, the taxpayer was appealing a notice of proposed assessment of a tax deficiency, so appeal to OAH was proper, without regard to whether the appeal could result in a refund. The OAH also noted that a refund suit relative to an assessment may only be filed in Superior Court after a final assessment is received, which had not happened here. The OAH then noted that the OTR's position would result in the OAH having jurisdiction to hear an appeal for one tax year at issue, but not the other, even though both were based on the same legal issue and both underlying assessments were issued in the same document. Finally, the OAH explained that it would be unfair to deny the taxpayer a forum, even if OTR mistakenly characterized its actions as proposed assessments when it meant to issue refund denials. The proper remedy, in that instance, is to withdraw the proposed assessments and issue refund denials, thereby triggering a new 6-month window for the taxpayer to appeal to Superior Court. *American Express v. OTR*, Case Nos. 2020-OTR-00029; 2020-OTR-00030 (Aug. 24, 2021).

C. **Administrative/Other Developments**

1. <u>OTR Rules Forgiven Paycheck Protection Program ("PPP") Loans Are Excluded From Gross Income</u>

The OTR clarified that an individual's gross income does not include PPP loans that are awarded and subsequently forgiven under D.C. Code § 47-1803.02(a)(2)(GG). The exclusion from gross income applies even if the

forgiven PPP loans were used to pay business expenses that were deducted. D.C. allows business expenses as provided in the Internal Revenue Code. Because the federal Consolidated Appropriations Act of 2021 (Pub. L. No. 116-260) allows PPP loan recipients to deduct expenses paid for using PPP loan amounts, even if the PPP loans are later forgiven, D.C. will also permit expenses paid with forgiven PPP loans. *OTR Tax Notice No. 2021-04.*

2. D.C. Studies Impact of Federal Tax Reform

On February 27, 2018, the District of Columbia chief financial officer released a study entitled "Summary of the Effects of Major Provisions of the Tax Cuts and Jobs Act on District Residents and Businesses," which was presented by Deputy CFO Keith Richardson and OTR Chief Counsel Alan Levine at the D.C. Area State Tax Executives Luncheon Series.

The study outlines the major provisions of the TCJA and their impact on the District and its taxpayers. With respect to corporate income/franchise taxes, the study finds that the reduced federal tax rates and repeal of the federal alternative minimum tax will have no impact on District revenues or on District taxpayers' income or liabilities. 100% bonus depreciation for business assets also will have no impact because the District has previously decoupled from federal bonus depreciation provisions. Furthermore, the limitation on interest expense deductions is expected to increase District taxpayers' liabilities because the District conforms to the interest provisions of the Internal Revenue Code.

The study also notes that the District will follow the federal changes limiting the usage of NOLs to 80% of pre-NOL taxable income and allowing for an unlimited carryforward period for NOLs.

Notably, the study refers to the TCJA's deemed repatriation provision as an area of "major uncertainty" but suggests that it will increase the amount of funds available for investment and dividends in the District.

The study concludes that the federal pass-through business income deduction will not affect District taxpayers because the calculation of District income tax is based on federal adjusted gross income.

3. Market-Based Sourcing Regulations Forthcoming

Speaking at a D.C. Bar State and Local Taxes Committee event on October 12, 2017, OTR counsel Aaishah Hashmi stated that taxpayers may rely on the model market-based sourcing regulations issued by the Multistate Tax Commission ("MTC"), until OTR finalizes its own regulations, which she inferred would be similar to the MTC regulations. OTR's market-based sourcing regulations have still not been promulgated.

VII. TRANSACTIONAL TAXES

A. Legislative Developments

1. Marketplace Seller Legislation Enacted

On March 22, 2019, D.C. enacted legislation requiring out-of-district sellers with substantial economic activity in Washington, D.C. to collect and remit sales tax in the District if, in the current or previous calendar year, they have or had either (a) gross receipts of more than $100,000 from all retail sales delivered into the District, or (b) 200 or more separate retail sales delivered into the District.

The legislation also expanded the definition of retailer to include marketplace facilitators and marketplace sellers. Beginning on April 1, 2019, marketplace facilitators are required to register and collect sales tax on their own behalf and on behalf of all sales on their marketplace regardless of whether the marketplace seller would have been required to collect sales tax if the sale was not facilitated on the marketplace.

The legislation will not be retroactively enforced. *Internet Sales Tax Amendment Act of 2018, D.C. Law L22-0258.*

2. Digital Goods and Streaming Video Services Subject to Sales and Use Tax Effective 2019

The District of Columbia Council enacted legislation amending the sales and use tax treatment of digital goods sold or used in the District. The legislation defines taxable sales of "digital goods" to mean digital audiovisual works, digital audio works, digital books, digital codes, digital applications and games, and any other otherwise taxable tangible personal property electronically or digitally delivered, whether electronically or digitally delivered, streamed or accessed and whether purchased singly, by subscription or in any other manner, including maintenance, updates and support.

The legislation made a corresponding amendment to the video gross receipts tax to exclude sales of services taxable as digital goods. As a result, as of January 1, 2019, sales of streaming video services will be subject to the sales tax, and no longer subject to the gross receipts tax under D.C. Code § 47-2501.01(a).

The legislation did not affect the taxation of software in the District. *Internet Sales Tax Emergency Amendment Act of 2018, D.C. Law A22-0556.*

3. Lodging Tax Rate Increased

Under the District's Fiscal Year 2019 Budget, the total rate of tax on gross receipts for the sale of or charges for any rooms, lodging or accommodations increased from 14.8 percent to 14.95 percent, effective October 1, 2018.

Fiscal Year 2018 Budget Support Clarification Emergency Amendment Act of 2017, D.C. Act A22-0163.

B. Judicial Developments

1. Sales Taxes

Car-Sharing Company Fails to Collect Sales Tax, Hit With $1 Million Bill

On July 23, 2021, the OAG announced that Getaround Inc., which is a car-sharing company based in California, agreed to pay $950,000 to D.C. According to the OAG, Getaround misrepresented the nature of its car rental service, operated without a license, and failed to collect and remit sales tax. In addition, the company agreed to restitution for allegedly listing damaged or stolen vehicles on its platform, and may not file claims for sales and use tax refunds for the period between September 30, 2015 and March 31, 2020.

2. Transfer and Recordation Taxes

Smart Aziken v. District of Columbia, No. 16-TX-675 (D.C. Sept. 20, 2018)

Aziken filed suit against the District of Colombia arguing that the transfer of property to an LLC was eligible for an exemption from transfer and recordation taxes. The issue in the case was whether the property transfer exemption made in connection with entity conversions was applicable to a conversion of a sole proprietorship into a single-member LLC. The Court held that the language "converting entity" does not include an individual/sole proprietorship because in a sole proprietorship an individual owns the business assets directly, rather than through a partnership or corporation. Additionally, the plain meaning of the statute indicates that a sole proprietorship is not an entity that can transfer or receive property without having to pay recordation and transfer taxes.

3. QHTC Certification

NBC Subsidiary WRC-TV, LLC v. D.C. Office of Tax and Rev., No. 14-AA-174 (D.C. Oct. 22, 2015)

This case involved a sales and use tax assessment against a television station that claimed exemptions under the District's qualified high technology company ("QHTC") laws. The D.C. Court of Appeals affirmed a ruling by the OAH, which held that WRC-TV, a broadcast television station that received a majority of its income from advertisements, was not a QHTC.

To qualify as a QHTC, a company must meet certain statutory requirements, including the requirement that the company derive at least 51% of its gross revenues from certain enumerated high technology activities. OTR argued before OAH and on appeal that WRC-TV did not derive at least 51% of its

revenue from high technology activities, but derived its revenue mostly from advertising.

In holding in favor of OTR, the Court of Appeals gave deference to OTR's interpretation of a statute it administers, finding the QHTC statute to be ambiguous and OTR's interpretation to be reasonable. Under its interpretation, OTR found that the statute required a much closer nexus between the listed activities and a QHTC's revenues than the mere use of high technology and systems to transmit television programming. In particular, OTR interpreted the statute to grant the preferential tax treatment only to companies engaged in the development and marketing of high technology systems. In agreeing with OTR, the Court also drew a distinction between companies that develop technology, and those that simply use technology.

Further, the Court was persuaded by OTR's analysis of the legislative history of the QHTC statute—the fiscal impact statement related to the original bill referred to a report that would exclude broadcast companies like WRC-TV from QHTC classification.

4. E911 Tax False Claims Suit

Phone Recovery Servs., LLC v. Verizon Washington, DC, Inc., 15-CV-1338 (D.C. Aug. 16, 2018)

A whistleblower sued several telecommunications companies in Superior Court under the District's False Claims Act alleging that the companies failed to collect and remit over $29 million in Emergency 911 taxes ("E911"). The court granted the defendants' joint motion to dismiss on November 4, 2015, and the plaintiff appealed to the D.C. Court of Appeals. On August 16, 2018, the D.C. Court of Appeals affirmed the court's dismissal of the claim under the False Claims Act and two common law claims that the whistleblower included in its complaint.

The D.C. false claims law in effect at the time of this suit excluded claims made pursuant to District tax laws. One of the defendants' positions in this case, albeit not the deciding issue, is that E911 fees constitute a tax and therefore may not be subject to a false claims suit.

C. **Administrative Developments**

1. OTR Interprets Statutory Sales Tax Exemption For Medicine More Broadly than Existing Regulation; Declares Exemption for At-Home COVID-19 Tests

On January 24, 2022, the OTR issued Tax Notice 2022-02, stating that at-home COVID-19 tests qualify as exempt sales of "medicines, pharmaceuticals, and drugs."

The OTR's broad interpretation of the statutory exemption to apply to at-home tests appears to exceed the narrow interpretation reflected in its regulation.

The regulation requires that to be exempt, the medicine, pharmaceutical, or drug be a substance or mixture recognized in listed pharmacopeia publications and for use "internally … or externally in order to penetrate the skin…." D.C.M.R. 9-449. Because at-home COVID tests are not medicated substances taken internally or applied externally in order to penetrate the skin, they would appear not to be exempt under the OTR's regulation. Thus, through the notice, the OTR has interpreted the statute more broadly than its existing regulation would appear to allow.

Taxpayers selling products that are not consumed internally or externally through the skin, but are used to prevent or mitigate disease—in particular any at-home tests—should evaluate the taxability of their products in light of the OTR's recent interpretation.

2. OTR Narrows Casual and Isolated Sales Exemption

Effective May 14, 2021, the OTR amended the casual and isolated sales and use tax exemption. By statute, D.C.'s casual sale exemption applies to "casual and isolated sales by a vendor who is not regularly engaged in the business of making sales at retail." The OTR's prior regulation defined casual and isolated sales as unplanned and non-recurring sales of property originally acquired for an organization's own use or consumption.

Although regulatory preamble describes the change as a "clarifying guidance," the new regulation appears to go further than the statute and prior regulation by stating that the exemption is not available to any vendor registered with the OTR for a sales and use tax account. Taxpayers who happen to be registered with the OTR but who would otherwise satisfy the statutory exemption (not regularly engaged in making sales at retail) should consider whether the OTR's regulation is invalid as contrary to the statute. D.C.M.R. 9-402.

3. OTR Marketplace Facilitator Guidance

On April 1, 2019, the OTR issued a reminder that effective April 1, 2019, marketplace facilitators are required to collect District sales tax on behalf of marketplace sellers. A "marketplace facilitator" is a person that provides a marketplace that lists, advertises, stores, or processes orders for retail sales subject to sales tax for sale by marketplace sellers, and directly or indirectly collects payment from a purchaser and remits payment to a marketplace seller regardless of whether the marketplace facilitator receives compensation or other consideration in exchange for its services. OTR suggests that marketplace facilitators register for a marketplace sales tax account and begin collecting tax immediately. Marketplace facilitators that are already registered as a vendor or remote seller should add an additional marketplace account to their profile.

On May 26, 2020, OTR issued a notice relating to the sales tax treatment of food, drinks, and alcohol made through marketplaces. The notice

addresses scenarios where marketplace facilitators take food, drink or alcohol orders from customers for delivery or pick-up at a restaurant and directly collect payment from the customers. In these scenarios, the guidance provides that marketplace facilitators are required to collect sales tax from customers at the applicable rate and remit such sales tax to OTR. If a restaurant erroneously receives a sales tax payment from a marketplace facilitator, it should report and remit the funds to the OTR on its sales tax return. *OTR Notice 2020-06*.

4. Taxation of Digital Goods and Streaming Video Services

The OTR added the following chart to its website, delineating the sales taxability of a variety of digital goods as of January 1, 2019:

Digital Good	***Subject to Sales Tax?***	***Rationale***
Applications	*Yes*	*These sales are taxable digital goods. D.C. Code § 47-2001(d-1).*
Software – Canned	*Yes*	*These sales are taxable as data processing services. D.C. Mun. Regs. §9-474.4.*
Software – Prepackaged	*Yes*	*These sales are taxable as data processing services. D.C. Mun. Regs. §9-474.4.*
Software – Customized	*Yes*	*These sales are taxable as data processing services. D.C. Mun. Regs. §9-474.4.*
Digital News and Digital Periodicals	*Yes*	*These sales are taxable as "the furnishing of general or specialized news or current information" and as "news clipping service" under D.C. Code §47-2001(n)(1)(N)(ii).*
Digital Books	*Yes*	*These sales are taxable digital goods. D.C. Code § 47-2001(d-1).*
Digital Audio Books	*Yes*	*These sales are taxable digital goods. D.C. Code § 47-2001(d-1).*
Digital Music Downloads and Streaming	*Yes*	*These sales are taxable digital goods. D.C. Code § 47-2001(d-1).*
Digital Video Downloads	*Yes*	*These sales are taxable digital goods. D.C. Code § 47-2001(d-1).*
Streaming Video Services	*Yes*	*These sales are taxable digital goods. D.C. Code § 47-2001(d-1).*

5. Mytax.dc.gov Portal Available to File/Pay Certain Taxes

On November 1, 2017, OTR announced that businesses are now able to file and pay sales and use taxes, specialized sales taxes, and street vendor and mobile food services taxes using the office's online portal. The multi-phase rollout of mytaxdc.gov is part of OTR's move to the Modernized Integrated Tax System (MITS) that began in 2015. The online portal is already in use

for income and franchise taxes, motor vehicle fuel tax, ballpark fee, nursing provider tax, personal property tax, and gross receipts taxes.

6. New Rules for Exemption Certificates

In October 2017, OTR adopted regulations that provide guidance on the application for, and use of, sales tax exemption certificates and clarify local sales tax exemption requirements. Beginning November 1, 2017, the following changes will go into effect: (i) exemptions must be requested on mytaxdc.gov; (ii) the District will no longer accept the MTC's Uniform Sales & Use Tax Exemption Certificate form; (iii) the requester will be required to complete an online application and attach specified documentation to support each type of exemption request; (iv) OTR will review each request and notify the requester of its disposition; (v) an official certificate will be issued by OTR for approved requests (no more "special" paper for certificates); (vi) approved exemptions will be date stamped with an expiration date; and (vii) taxpayers must reapply prior to the expiration date. *D.C.M.R. 9-417.*

7. Unincorporated Businesses Subject to Tax on Sale Resulting in Liquidation—OTR Conforms Regulation to Amended Statute

D.C. imposes an income tax on unincorporated businesses, such as partnerships and limited liability companies classified as partnerships. Historically, OTR regulation 9-117.13 provided that gain from the sale of property that results in the termination of an unincorporated business is recognized by the owners of the unincorporated entity, rather than the unincorporated entity itself. In 2021, D.C. enacted legislation requiring gain from such a sale to be recognized by the unincorporated entity itself, rather than its owners.

On December 10, 2021, the OTR published a Notice of Final Rulemaking in the District of Columbia Register, making effective amendments to its regulation to conform to the legislation. D.C.M.R. 9-117.

VIII. MISCELLANEOUS

A. False Claims Act Expanded to Include Taxes

On March 16, 2021, the False Claims Amendment Act of 2020 became effective, expanding false claims liability to claims involving taxation. The act applies if the person making any claim, record, or statement reported net income, sales, or revenue totaling $1 million or more in a tax filing to which that claim, record, or statement pertained, and the damages pleaded in the action total $350,000 or more.

This act reflects a troubling trend of jurisdictions undermining the tax administration process by allowing whistleblowers and plaintiffs' attorneys to bring questionable qui tam suits involving state and local taxes. Both the Chief Counsel of the OTR and the

D.C. Attorney General's Office expressed concerns that the new law could raise several administrative and legal issues. For instance, the new law presents the possibility of conflict between qui tam plaintiffs, the attorney general, and the D.C. Chief Financial Officer with respect to matters of settlement. False Claims Amendment Act of 2020, D.C. Law L23-0180.

B. D.C. Pulls The Plug On Certain High Tech Tax Breaks

Under existing law, D.C. taxpayers that meet the statutory requirements for QHTC certification enjoy a host of corporate franchise, sales and use, and property tax benefits. Recent legislation repeals several of those benefits. Below is a summary of the changes:

- Tax Credits
  - Reduces the tax credit for wages to qualified employees to 5 percent of wages paid in the first 24 months after hiring (the current credit is equal to 10 percent of wages paid in that period);
  - Reduces the maximum allowable credit to $3,000 for each qualified employee (the current maximum credit is $5,000 per qualified employee); and
  - Eliminates the ability to carry forward unused credits for employees hired on or after October 1, 2019.

- Corporate Franchise Tax
  - Eliminates the reduced 6 percent corporate franchise tax rate applicable to QHTCs after the initial 5 year exemption (under existing law, the reduced rate applies for as long as the entity continues to certify as a QHTC);
  - Enacts a credit against franchise tax for QHTCs equal to the lesser of $250,000 or the difference between the tax that would otherwise be due under the applicable rate (currently 8.25 percent) and the reduced rate of 6 percent; and
  - Makes the franchise tax credit allowable for 5 years from the later of the tax year ending December 31, 2019, or the last year the QHTC is eligible for the franchise tax exemption.
  - The legislation does not affect the initial 5 year franchise tax exemption for QHTCs.

- Sales Tax
  - Repeals the exemption for most sales by QHTCs in the District; and
  - Repeals the exemption for sales to QHTCs of certain computer and technology equipment.
  - These provisions will affect non-QHTCs as well.

C. D.C. Court of Appeals Rejects Insurance Tax Challenge

In *Unum Life Ins. Co. of Amer., et al. v. D.C.*, 2020 WL 5666899 (D.C. Sept. 24, 2020), the District of Columbia Court of Appeals rejected a challenge to the District of Columbia's tax imposed on select health insurance carriers to fund its health benefit exchange, finding that the tax was not preempted by a provision of the Affordable Care Act (ACA) and did not violate the non-delegation doctrine.

After the ACA's enactment, the District established a health benefit exchange and authorized the authority overseeing the exchange to fund it through a tax on all health insurance companies doing a certain amount of business in the District. A group of insurers who are subject to the tax but do not offer health plans on the District's exchange challenged the tax, arguing that 42 U.S.C. § 18031(d)(5)(A) of the ACA did not permit the District to levy the tax on these insurers. The insurers argued that this ACA provision requires that an exchange itself be self-sustaining without assistance from other sources of state funding.

While noting that the plain text of the provision was ambiguous, the Court concluded that 42 U.S.C. § 18031(d)(5)(A) should be read as a directive to states to ensure that their exchanges are self-sustaining after federal funding is discontinued, and not as a limitation on how states generate funding to support an exchange's operations. The Court noted that when the provision is read in this manner, there is no conflict between it and the District's health carrier tax. The Court also rejected the insurers' alternate argument that the health carrier tax legislation, in which the District Council empowered the District Health Benefit Exchange Authority to assess all health carriers that do business in the District, impermissibly delegated legislative power to the authority.

D. The District of Columbia has a new Taxpayer Advocate

On March 4, 2020, the Office of Tax and Revenue announced the rollout of a new Office of the Taxpayer Advocate (OTA). OTA was created to address complex and unique individual income, business, and real property tax cases which taxpayers have been unable to satisfactorily resolve on their own. OTA's duties also include but are not limited to educating taxpayers on their rights, proposing solutions to the practices and processes of the OTR, recommending legislative action, and preparing an annual report to identify initiatives taken and recommendations. Elena Fowlkes was named the taxpayer advocate for OTR and will manage eight employees within OTA. Unfortunately, the Council failed to enact a bill in 2019 that would have established OTA as an independent agency, and instead OTA was created as a unit within OTR.

E. OTR Implementing New Modernized Real Property Tax System

The OTR implemented its Modernized Real Property Tax System ("MRPTS") in December 2020. The system, supports property tax assessments, ownership and address changes, tax billing, collections, tax relief administration, tax sales, appeals, and the land recordation of real property. The implementation of MRPTS follows OTR's October 2018 implementation of its Modernized Integrated Tax System ("MITS"), which houses more than 20 tax types and fees administered by OTR.

F. D.C. Court of Appeals to Rule on Disclosure of Private Letter Rulings

In 2019, Tax Analysts filed a D.C. Freedom of Information Act request seeking all OTR letter rulings issued from 2016 through 2018. The OTR denied the request, and Tax Analysts appealed. On January 13, 2021, the D.C. Superior Court ruled against Tax Analysts, finding that private letter rulings are exempt from disclosure on the

basis that they contain taxpayer-specific facts, and therefore constitute protected "tax information."

Tax Analysts appealed to the D.C. Court of Appeals, and oral argument was held on March 8, 2022. The issue before the three-judge panel is whether the information contained in the private letter rulings, which necessarily depend upon the private information taxpayers supply when requesting the rulings, are exempt from disclosure. Tax Analysts contends that redacted rulings are not exempt, and that the Superior Court erred when it failed to conduct an in camera review of the private letter rulings to determine if redaction was feasible. *Tax Analysts v. District of Columbia*, 21-CV-0031 (D.C. 2021).

IX. AUTHORS' BIOGRAPHIES

A. Sebastian Watt

Sebastian has been a member of Reed Smith's State Tax Group since 2017. He assists clients with a broad range of multistate matters involving income, sales, and gross receipts tax issues. Sebastian focuses his practice on Pennsylvania tax controversy, where he has handled matters from the first stage of administrative appeal to Commonwealth Court, Massachusetts tax issues, and multistate conformity issues. Prior to joining Reed Smith, Sebastian spent three years working in federal and international tax, giving him a unique perspective on state tax issues.

B. Colin Dolan

Colin is an associate in Reed Smith's State Tax group. Colin assists clients in various industries with a wide array of multi-state tax issues. Prior to his legal career, Colin worked in the financial services and healthcare FinTech industries.

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