PENNSYLVANIA STATE TAX DEVELOPMENTS

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I. INCOME/FRANCHISE TAXES

A. Legislative Developments

1. Corporate Net Income Rate Reduction. On July 8, 2022, Gov. Wolf signed into law Act 53 of 2022, which gradually decreases the corporate net income tax rate over the next 9 years. Beginning January 1, 2023, the rate will be 8.99% and will continue to decrease by 0.5% each year until it reaches 4.99% in 2031.

2. **Market Sourcing.** Act 53 of 2022 also changed the sourcing for sales of certain intangible property to market sourcing (from cost of performance), effective for tax years beginning January 1, 2023.

3. **Economic Nexus.** Act 53 of 2022 added economic nexus as a basis for the imposition of corporate net income tax, effective for tax years beginning January 1, 2023. There is a rebuttable presumption that a corporation with at least $500,000 of sales sourced to Pennsylvania for the tax year pursuant to the sales factor rules contained in 72 P.S. § 7401, has substantial nexus with the state and is subject to corporate net income tax.

   Notably, the legislature did not make this provision retroactive and included it as a prospective measure. This is contrary to the Department's 2019 Corporation Tax Bulletin 2019-04, which asserted that economic nexus was a basis for imposing corporate net income tax for periods prior to any legislative change.

B. Judicial Developments

1. Pennsylvania's Supreme Court Holds Due Process Requires Uncapped NOL Deduction and Refund. On December 22, 2021, the Pennsylvania Supreme Court issued its decision in *General Motors Corp. v. Commonwealth*, 12 MAP. 2020, 2021 Pa. LEXIS 4263 (Pa. 2021), affirming the Commonwealth Court's holding that *Nextel Communications of the Mid-Atlantic, Inc. v. Commonwealth*, 171 A.3d 682 (Pa. 2017), applies retroactively to tax year 2001. In *Nextel*, the Supreme Court held that Pennsylvania's cap on the NOL deduction for 2007 violated the Uniformity Clause of the Pennsylvania Constitution, and held that the remedy in that case was to sever the flat-dollar NOL cap but preserve the percentage-based cap. Because Nextel had already paid its tax by applying the percentage-based cap to its NOL deduction, the decision provided Nextel no relief.

However, in *General Motors*, there was no percentage-based cap in place during the tax year at issue (2001); there was only a flat-cap. The Commonwealth Court determined that the *Nextel* holding—that the flat cap was unconstitutional—applied retroactively to the 2001 tax year and remedied the Uniformity Clause violation by specifically severing the flat-cap from the statute, thereby entitling General Motors to an unlimited NOL deduction.

The Supreme Court affirmed the retroactivity determination, finding that *Nextel* did not establish a new principle of law. However, the Court reversed the Commonwealth Court with respect to the statutory remedy, severing the NOL deduction entirely instead of merely severing the flat cap. The Supreme Court determined that that statutory result was more consistent with the intent of the General Assembly when it enacted the NOL provisions.

Ultimately, however—and most importantly—notwithstanding the elimination of the NOL deduction from the statute for 2001, the *General Motors* Court held that due process, under the principles of *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), requires that GM's tax position for 2001 must be equalized with the position of the taxpayers who were favored by the cap (i.e., the taxpayers to which the cap did not apply because their income did not exceed the cap). Thus, the Court held that because the favored taxpayers could not have their tax increased to equalize the treatment because the statute of limitations had expired to assess them, the only way to equalize the treatment is to allow GM an NOL deduction without applying a cap just like the favored taxpayers were allowed. As a result, GM was entitled to a complete refund of the tax is paid for 2001.

2. Other Pre-2007 NOL Cap Litigation. As explained above, for tax years prior to 2007, Pennsylvania's statutory NOL cap was $2 million. During this period, there was no percentage cap. While *General Motors* addresses the 2001 tax year, there is also pending litigation involving the flat-dollar cap for the 2006 tax year.

In *RB Alden Corp. v. Commonwealth*, 13 M.A.P 2020, in 2016, the Commonwealth Court initially followed *Nextel* and ordered that the taxpayer's tax must be computed without capping the NOL deduction, and the state appealed to the Pennsylvania Supreme Court. After the Supreme Court issued its decision in *Nextel* in 2018, the Court remanded *RB Alden* back to the Commonwealth Court "for reconsideration in light of [the] decision in *Nextel*." Next, in 2019, after the Commonwealth Court issued its decision in *General Motors*, it issued an unpublished opinion in *RB Alden* concluding that the taxpayer's tax must be recomputed without capping its NOL deduction for the same reasons the court explained in its *General Motors* opinion. The state again appealed *RB Alden* to the Pennsylvania Supreme Court, and the Court held the case in abeyance pending the outcome of the state's appeal in *General Motors*. As discussed above, the Supreme Court issued its decision in *General Motors* in late 2021 holding that federal due process requires an uncapped NOL deduction and a refund for GM. As a result, in February 2022, the Supreme Court once again remanded *RB Alden*, this time with instructions to conduct "further proceedings consistent with this Court's decision in *General Motors*." The case remains pending at Commonwealth Court.

3. 2007-forward NOL Cap Litigation. During tax years after 2007 but before the statutory elimination of the flat cap in 2017, Pennsylvania's NOL deduction cap continued to be the greater of a flat-dollar cap and a percentage-based cap.

Applying the Supreme Court's decision in *General Motors*, all taxpayers that paid tax because of the NOL cap for any year before 2017 should be entitled to a refund.

The *General Motors* Court's due process analysis and holding applies the same for all years before 2017, including the 2007–2016 tax years when the NOL cap was the greater of a flat-dollar cap or a percentage-based cap.

The *General Motors* decision applies to these tax years as follows:

For any given year during 2007–2016, thousands of taxpayers were allowed an uncapped NOL deduction (and thus paid no tax) because their income did not exceed the flat dollar cap. In contrast, taxpayers whose income exceeded the flat dollar cap had their NOL deduction

capped and therefore paid tax. Thus, just like General Motors, the high-income taxpayers paid tax for 2007–2016 because their income exceeded the flat-dollar cap, while thousands of low-income taxpayers paid no tax because their income did not exceed the cap.

As a result of the statutory severance analysis in *Nextel*, the flat dollar cap in each of the 2007–2016 tax years must be stricken, leaving a percentage cap in the statute to be applied to all taxpayers for each of those years. Thus, just as in *General Motors*, the high-income taxpayers have no statutory right to an additional NOL deduction. Yet despite that conclusion on the statutory severance question, *General Motors* stands for the proposition that the high-income taxpayers are entitled to an uncapped NOL deduction as a matter of due process "to equalize [their] tax position" with the thousands of taxpayers that had been able to take an uncapped deduction because their income was less than the flat dollar cap.

And again, just as in *General Motors*, because the statute of limitations has expired to assess the low-income taxpayers for the 2007–2016 tax years, the state must equalize the tax position of the high-income taxpayers "with the favored taxpayers who were not subject to the … [net loss carryover] deduction cap" by recomputing the high-income taxpayers' tax without capping the NOL deduction and issuing a refund based on that recalculation.

Now, in the case of *Alcatel-Lucent USA, Inc. v. Commonwealth*, 803 F.R. 2017, the state is arguing that the Supreme Court's opinion in *General Motors* does not apply to tax years 2007–2016. The *Alcatel* case is currently pending in the Commonwealth Court. Prior to the Supreme Court's decision in *General Motors*, a three-judge panel issued an initial unpublished decision in *Alcatel* ruling against the taxpayer, but that decision has now been undermined by *General Motors*. On June 22, 2022, the court, *en banc*, heard oral arguments regarding the application of the Supreme Court's decision in *General Motors*. The parties are now awaiting the court's decision.

4. Sales Factor Sourcing – COP v. Market. Pennsylvania's statutory rule for sourcing receipts from services changed from a cost of performance method to market sourcing, effective beginning with the 2014 tax year. Despite the statutory change, the Department continues to enforce its position that even under the pre-2014 cost of performance sourcing method, sales of services are sourced to the location of the customer. The Department supports its position by relying upon the "income producing activity" prong of the statute—and the statutory requirement that you only look to the location of a taxpayer's costs of performance if the "income producing activity" occurs in more than one state. The

Department then goes on to equate "income producing activity" with the location where the "benefit is received" by the customer. Under this analysis, receipts from services are effectively sourced on a market basis, even for tax years before the statutory change.

This issue has been raised by taxpayers for several years and is frequently resolved through settlement. However, the issue is now squarely before the Pennsylvania Supreme Court to decide in the *Synthes* case.

In *Synthes*, the Commonwealth Court concluded that: 1) the pre-2014 cost of performance statute is ambiguous; 2) the Department's interpretation of the pre-2014 cost of-performance statute as effectively requiring market-based-sourcing was reasonable; 3) the Department's interpretation was entitled to deference; and 4) the statutory change to market sourcing in 2014 was merely a clarification of existing law and not an indication of the General Assembly's intent to change the law. The parties appealed to the Pennsylvania Supreme Court, and the Court heard oral argument on March 10, 2022. The parties are now awaiting the Court's decision. *Synthes USA HQ, Inc. v. Commonwealth*, 11 M.A.P. 2021, 108 F.R. 2016.

C. Administrative Developments

1. Split-Apportionment Bulletin. On February 17, 2022, the Department issued Corporation Tax Bulletin 2022-01, providing guidance on the apportionment of income by a taxpayer involved in one or more activities that are subject to special apportionment formulas under 72 P.S. § 7401(3)2.(b)-(e), as well as activities subject to the ordinary single sales factor apportionment under 72 P.S. § 7401(3)2.(a)(15)-(17).

The Bulletin discusses the case of *Buckeye Pipeline Co. v. Commonwealth*, 689 A.2d 366 (Pa. Cmwlth. 1997). In that case, the Commonwealth Court held that a taxpayer involved in both special apportionment activities and ordinary apportionment activities could use both apportionment formulas: the special apportionment formula for the special apportionment tax base, and the ordinary apportionment formula for the remaining tax base.

The Bulletin then explains the Department's position regarding how to divide an affected taxpayer's tax base between the portion subject to the special apportionment formula and the portion subject to the ordinary apportionment formula. According to the Bulletin, the Department's position is that the overall income of the taxpayer should be divided between the two segments based on each segment's proportion of the taxpayer's total gross receipts, without regard to the expenses or resulting profitability of each segment.

2. "Pay to play" for assessment appeals? Even though prepayment is not required by statute, the practice of the Board of Appeals and the Board of Finance and Revenue is to require prepayment of an assessment before they will consider arguments to reduce the assessment other than arguments involving the narrow issue(s) that the Department of Revenue chose to list as the basis for the assessment. The administrative boards routinely dismiss these "offset" arguments without addressing their merits. The policy of the Department of Revenue and the administrative appeal boards seems to be that the only way to raise an offset issue when challenging an assessment is to pay the assessment and file a refund claim.

One of the members of the three-member Board of Finance and Revenue has acknowledged how the Board's practice results in a prepayment requirement, and the board member rebuked this practice in several dissenting opinions where the majority opinion dismissed the offset issues because they were outside the basis of the assessment. The dissenting board member stated:

> I would not interpret the basis of assessment as narrowly as the Board does here … rather, I would address the merits of any issue relating to a reported item that was included in the calculation of tax that was assessed by DOR. To apply such a narrow interpretation of the basis of assessment would require this Petitioner, and similarly situated taxpayers, to pay the assessment in order to challenge the tax calculations which resulted in the assessed tax increase. I am hesitant to require a taxpayer to pay an assessment in order to challenge it, and am unwilling to narrowly construe the basis of assessment to deprive a taxpayer of due process to challenge a tax increase without having to pay an assessment.

3. Federal Tax Reform Guidance—GILTI and IRC § 163(j). On January 24, 2019, the Department released Corporation Tax Bulletin 2019-02, addressing the Pennsylvania tax treatment of global intangible low-taxed income ("GILTI") and foreign-derived intangible income ("FDII"). In the Bulletin, the Department concludes that GILTI is included in the corporate income tax base and treated as a dividend. Therefore, taxpayers will be able to deduct 100% of included GILTI from wholly-owned subsidiaries from Pennsylvania taxable income. The Department also concludes that taxpayers cannot claim the GILTI or FDII deductions for Pennsylvania income tax purposes.

On April 29, 2019, the Department released Corporation Tax Bulletin 2019-03 to explain how the interest deduction limitation imposed by Internal Revenue Code § 163(j) impacts taxpayers' corporate net income tax calculations. In it, the Department concludes that when a federal

consolidated group does not trigger the § 163(j) limitation, no limitation will apply for Pennsylvania purposes. If the federal limitation applies, however, taxpayers must separately compute their individual federal limitations (without accounting for any state-specific items), to reach the starting point for their Pennsylvania returns. The Bulletin also describes how taxpayers subject to the § 163(j) limitation should treat interest addback adjustments, nonbusiness income, and in the case where a partnership has corporate partners. The Bulletin indicates that additional guidance may be forthcoming on § 163(j) as the need arises. However, nothing new has been issued as of the publication of this outline.

D. Trends and Outlook for 2022/2023

1. Addback Audits and Appeals. For tax years beginning after December 31, 2014, 72 P.S. § 7401(3)1.(t) requires taxpayers to add back related-party intangible expenses and certain interest expenses to taxable income unless one of several exceptions applies. Taxpayers have been curious to see how the Department would apply those exceptions, and we're starting to find out more now that assessments for post-2014 years have been issued and appealed. As the Department ramps its auditing back up post COVID-19 shutdowns, addback continues to be an audit focus for the Department. For example, the Department has, in certain situations, taken an aggressive approach to interpreting the breadth of the interest expenses that are covered by the addback statute, and the Department has also continued to rely on the "sham transaction" doctrine to disallow interest deductions. We suspect that forthcoming assessments will continue to reveal more trends in the Department's interpretation of the addback provisions.

There are several appeals pending involving the application of the addback exceptions. Take, for example, the case of Trader Joe's East Inc. ("TJE"). TJE is a wholly-owned subsidiary of Trader Joe's Company ("TJC"). During tax years ending June 30, 2017 and June 30, 2018, TJE, which facilitates TJC's East Coast operations, paid TJC for services and intangibles but did not deduct those expenses in computing its Pennsylvania corporate net income tax liability. Importantly, TJC had engaged an independent accounting firm to prepare a transfer pricing report and establish arms-length prices for its services and intangibles.

TJE filed refund claims at the Board of Appeals, claiming it was entitled to the "principal purpose" addback exception under 72 P.S. § 7401(3)1.(t)(2) for the expenses paid to TJC. Specifically, TJE claimed that because it existed to further TJC's East Coast operations and the transactions were at arms-length, the intercompany expenses had legitimate economic purpose and substance. And because TJE's arrangement with TJC was formed five years before TJE entered

Pennsylvania, the principal purpose of the expenses could not have been the avoidance of Pennsylvania corporate income tax.

In Orders dated September 23, 2021, the Board of Finance and Revenue granted relief, finding that TJE proved its intercompany expenses qualified for the "principal purpose" addback exception. (Board of Finance and Revenue Docket Nos. 2012853, 2012860).

The Commonwealth appealed the Board of Finance and Revenue's Orders. In its Petitions for Review, the Commonwealth suggests that the "principal purpose" exception considers whether the taxpayer seeks to avoid taxation, *generally*, and not necessarily just Pennsylvania corporate taxation. The appeals are pending and docketed at 598 and 599 F.R. 2021.

2. Refund Opportunity for Entities Receiving Service Income from Out-of-State Affiliates after 2014. A decision from Pennsylvania's Board of Finance and Revenue indicates that companies earning revenue for the performance of services for out-of-state affiliates may be able to source those receipts to the location of the affiliate rather than to the location of the ultimate consumer of the service, even if the ultimate consumer is in Pennsylvania.

In the Board's decision, the taxpayer (based in Pennsylvania) provided its affiliates (also based in Pennsylvania) with sales and marketing services, which are subject to market-based sourcing for periods after January 1, 2014. Those affiliates produced pharmaceuticals that were ultimately sold to the patients of the physicians targeted by the taxpayer's sales and marketing services. The taxpayer argued that its receipts from sales and marketing services should not be sourced based on the location of the affiliates, but instead should be sourced based on the location of the customer that ultimately purchased the pharmaceuticals.

In denying the taxpayer relief, the Board found that the "market for these services is the locations of the affiliated entities," not the location of the pharmaceutical's ultimate consumer. Based on the Board's decision, there may be a refund opportunity for taxpayers sourcing service receipts to Pennsylvania if the direct customer of the service is an out-of-state affiliate. *In Re: Teva Sales and Marketing Inc.*, Board of Fin. and Rev. Docket No. 1813182 (Decision Issued May 14, 2019). The taxpayer appealed the Board's decision to Commonwealth Court, where it remains pending. *Teva Sales and Marketing Inc. v. Commonwealth*, 566 F.R. 2019.

3. Department Continues to Apply Non-Statutory "Split-Apportionment" Method for Taxpayers Engaged in Distinct Activities that Each Require a Different Statutory Apportionment Formula. Pennsylvania's generally-applicable statutory formula for apportioning business income is based on a sales-factor only, but Pennsylvania has different statutory apportionment formulas that apply to business income from activities in specific industries, like pipeline companies. But what is a taxpayer to do if only a portion of its business income is from pipeline company activities and the rest is not? In other words, how do you apply these rules when a particular taxpayer has some business income subject to the general apportionment rule and also has other business income subject to the special industry rule for pipeline companies? The case of *Buckeye Pipeline Co. v. Commonwealth*, 689 A.2d 366 (Pa. Commw. Ct. 1997) answered this question by requiring the use of a so-called "split-apportionment."

The Department's approach to split-apportionment in this context has been to divide a taxpayer's overall income between the pipeline segment and non-pipeline segment based on each segment's percentage of the taxpayer's overall gross receipts. Under the Department's method, more income would be attributed to a particular segment simply because that segment earned a higher volume of gross receipts; but that method ignores the expenses incurred to generate the receipts and it ignores whether a particular segment in fact earned income or generated a loss. In a 2017 Board of Finance and Revenue case, the taxpayer argued that the Department's method was inappropriate, and instead the income for a particular segment should be computed based on the actual revenues and expenses for the particular segment. (Of course, after the income for a particular segment is established, then the statutory apportionment formula for that segment is applied to that income amount.) The Board agreed with the taxpayer and concluded that the Department's method "did not calculate the adjusted income of each business segment according to the Tax Reform Code." The Commonwealth appealed to Commonwealth Court, and the case ultimately settled.

The Department continues to follow the approach that the Board concluded was not consistent with the statute, and the Department continues to issue assessments on this basis. As noted above in **Administrative Developments**, the Department issued a Bulletin setting forth its approach in 2022. There are ongoing appeals on this issue.

II. SALES AND USE TAXES

A. Legislative Developments

1. Peer-to-Peer Car Sharing Taxable Next Year. As a result of Act 53 of 2022, sales and use tax will apply to peer-to-peer car-sharing programs

in the same manner that it applies to traditional vehicle rentals. According to the Senate Appropriations Committee's fiscal note accompanying the bill, the change is intended to "ensure[] a level playing field between shared vehicle platforms and traditional rental car companies". The change, which includes a collection obligation for facilitators of such rentals, takes effect on January 1, 2023.

2. Miscellaneous Exemptions Enacted. While there have not been wholesale legislative changes to Pennsylvania's sales and use tax during 2021 and 2022, a few additional exemptions were enacted:

- After December 31, 2021, items manufactured for the purpose of initiating, supporting, or sustaining breast feeding are exempt;
- After December 31, 2021, multipurpose agriculture vehicles used in farming are exempt; and
- Effective August 29, 2021 (60 days after enactment of the law), helicopter simulators, training materials, and corresponding software are exempt from Pennsylvania's sales and use tax.

3. Vendor Sales Tax Absorption - Act 13 of 2019 removes the long-standing prohibition against vendors advertising that sales and use tax is included in the vendor's stated price. Now, vendors can advertise that they will absorb sales and use tax; however, the vendor must: (i) state on any receipt provided to the customer that the vendor will pay the tax and not imply that the transaction is exempt from sales and use tax, (ii) separately state the amount of sales and use tax on any receipt provided to the customer, and (iii) keep books and records documenting the purchase price and the sales and use tax absorbed and remitted to the state.

B. Judicial Developments

1. Pennsylvania Court Concludes Fulfillment by Amazon Does Not Create Nexus. Among the services offered by Amazon to merchants that sell goods on its platform is the Fulfillment by Amazon ("FBA") Program. As part of the program, Amazon handles warehousing the merchant's inventory and shipping the product to customers once orders are placed. Upon agreeing to participate, merchants must ship their inventory to an Amazon facility selected by Amazon. Merchants have no further control over the location of their inventory once it is in Amazon's possession unless they purchase add-on services.

Multiple states, including California, Pennsylvania, and Washington, take the position that the presence of such inventory in an in-state Amazon warehouse creates sales and use tax nexus for the merchant who owns the inventory. In response to nexus questionnaires sent by

Pennsylvania to FBA participants on this basis, the Online Merchants Guild, an association of remote sellers, filed a Petition for Declaratory and Injunctive Relief in Commonwealth Court on June 2, 2021.

The Guild argued that the federal due process clause protects FBA merchants from falling within the Commonwealth's taxing jurisdiction because FBA participation did not create sufficient minimum contacts with the state. The Commonwealth Court agreed.

On September 9, 2022, the Court granted the Guild's application for summary relief, concluding that because FBA merchants' connections to Pennsylvania were limited to Amazon's storage of their inventory in Amazon warehouses, the merchants did not have sufficient contact with the state in order to be liable for tax. It is not yet known whether the Court's decision will be appealed. *Online Merchants Guild v. Hassel*, Docket No. 179 M.D. 2021.

2. Sales Tax Over-Collection Class Actions Pending. Multiple taxpayers, including discount warehouse clubs, furniture stores, and convenience stores, are currently subject to class action lawsuits in Pennsylvania regarding the collection of taxes. Some claims are for the over-collection of sales tax on the pre-discount cost of items purchased with coupons, while others are for the over-collection on exempt items. In addition to the potential taxes at issue, these class actions seek to recover attorney's fees and to impose statutory penalties, including those imposed on a per-transaction basis.

In one such case, BJ's Wholesale Club is accused of over-collecting sales tax on the pre-discount cost of items purchased with coupons. In May of 2020, the Commonwealth Court held that where it was obvious a coupon was used to purchase taxable items (if every item on the receipt was taxable, for example), but BJ's Wholesale collected tax on the un-discounted price, a refund was due. However, where it is unclear whether the coupon was for a taxable or nontaxable item, no refund could be granted. The implication of granting a refund in this case is that it establishes over-collection of tax by BJ's Wholesale, which may impact the class action pending against the company. On exceptions, the Commonwealth Court's decision was reaffirmed. The Court's decision has since been appealed and is now scheduled for oral argument before the Pennsylvania Supreme Court on October 25, 2022. *John G. Myers v. Commonwealth*, 67-68 MAP 2021.

3. Manufacturing and Help Supply. In a case currently pending in Commonwealth Court, the taxpayer, Quality Driven Copack, is a Pennsylvania corporation engaged in business of assembling, and selling at wholesale, pre-cooked frozen sandwiches, entrees, and bowl/bag type

meals. To create its product, the taxpayer purchases the food components and packaging materials, blends the components into meals, packages, and then freezes them to complete the process. The taxpayer's main arguments are that: (1) its purchases of property for the meal assembly line are exempt property directly used in manufacturing or processing; and (2) its purchase of staffing services are not taxable help supply services.

On December 29, 2021, the Commonwealth Court issued a decision finding that the taxpayer's meal preparation does not involve enough change to the raw materials to constitute manufacturing, but that based on the evidence presented, the taxpayer did not provide enough supervision of the staffing service employees to rise to the level of taxable help supply. Both the taxpayer and Commonwealth filed exceptions to the Court's decision in January 2022 and briefs on those exceptions have been submitted for consideration at the Court's *en banc* calendar on October 12, 2022. *Quality Driven Copack, Inc. v. Commonwealth*, Docket Nos. 862 & 879 F.R. 2013.

4. Fuel Blending as Manufacturing. The Commonwealth appealed a Board of Finance and Revenue decision granting Wawa a refund of tax paid on the purchase of blending equipment used at Wawa's fuel stations. To the extent the equipment was used to blend raw gasoline and biofuels into consumer-grade vehicle fuel, the Board agreed with Wawa that the equipment qualifies for Pennsylvania's manufacturing exemption. On appeal, the state will seek to convince the Commonwealth Court otherwise, arguing that the "blending of two or more fuel products does not meet the definition of 'manufacturing' or 'processing' under the Tax Reform Code." *Commonwealth v. Wawa Inc.*, 275-76 F.R. 2021.

5. Financial Institution Security Equipment Exemption Limited. On July 17, 2018, the Commonwealth Court issued its opinion in *Victory Bank v. Commonwealth*, denying the taxpayer's refund claim and holding that the taxpayer's computer hardware did not qualify as exempt financial institution security equipment.

Under the sales tax exemption for financial institution security equipment, which is set forth in a Department regulation, tax is not due on the "attachment or affixation of security equipment to real estate."

The taxpayer argued that its purchases of computer hardware were exempt because the hardware has power cords that are "attached" to buildings' electrical systems. In addition, the taxpayer argued that its purchases of software were exempt as a "component part of the hardware."

In contrast, the Commonwealth argued that the "method-of-attachment" test set forth in precedential case law requires *permanent* attachment or affixation. In those cases, the issue was whether certain items retained their character as tangible personal property upon installation. The Commonwealth also argued that the regulation was superseded by statutory amendments that implicitly require permanent affixation.

In its July 17, 2018 Opinion, the Commonwealth Court ruled in favor of the Commonwealth and found that plugging a computer into an electric outlet did not amount to installation. While the court declined to hold that the Department's regulation was superseded in its entirety, it did find that the higher affixation standard argued by the Commonwealth applied. In response to exceptions filed by the taxpayer, the court held that, unlike a situation where the Department's litigating position conflicts with a regulation, a subsequently-enacted statute allows a court to amend or void a conflicting regulation to be consistent with the new statute, because a regulation cannot exceed the scope of its enabling statute.

On November 13, 2019, Victory Bank filed a Notice of Appeal in the Pennsylvania Supreme Court. Briefing was completed in May 2020 and on October 1, 2020, the Court issued a decision affirming the Commonwealth Court's decision per curiam. *Victory Bank v.* Commonwealth, 89 MAP 2019.

C. Administrative Developments

1. SUT Bulletin 2021-03: Remote Help Supply Services. The Department of Revenue issued a new sales and use tax bulletin on September 16, 2021 to address the sourcing of help supply services given the "technological developments [that] have allowed some help supply employees to work remotely."

Historically, the Department has taken the position that help supply services are subject to tax in Pennsylvania if the "delivery or use" of the service occurs in Pennsylvania. Regulatory guidance provides that "delivery" occurs in Pennsylvania if the temporary worker reports for work "at a location" in Pennsylvania while "use" occurs if that worker performs work "at a location" in Pennsylvania. On its face, this policy does not contemplate a worker who provides services remotely from a location outside Pennsylvania. SUT Bulletin 2021-03 changes that. In it, the Department states that the "delivery or use" of remote help supply services occurs where the purchaser receives the benefit of the services. Specifically, the Department says that "[w]hether the help supply employee is reporting in person or remotely is not determinative." Instead, providers of help supply services should look to the location to

which the work is delivered in determining the location of delivery or use under the Department's new guidance.

2. SUT Bulletin 2021-05: Taxation of Equipment Rentals and Equipment Rentals with Operators. On November 2, 2021, the Department of Revenue issued SUT Bulletin 2021-05 to explain its treatment of equipment rentals which include the provision of an operator. In the case of a rental with an operator for a lump sum price, the Department's position is that the equipment rental is taxable—even if an operator is provided—unless it can be proven that the customer did not provide any direction on what task is to be performed. If the operator's services are separately stated, the Department will treat them as taxable help supply services while also imposing tax on the equipment rental itself unless the customer can rebut the presumption that the customer provided direction on the task to be completed.

3. SUT Letter Ruling re: Membership Fees. On January 31, 2020, the Department of Revenue issued a sales tax letter ruling addressing sales of memberships through which members receive access to publications and other tangible personal property. The letter ruling provided that if membership fees include both services and taxable tangible personal property, those membership fees are taxable (essentially treating the fees as bundled transactions). That letter ruling, however, is no longer available on the Department's website, which creates a question as to whether this authority remains valid. Letter Ruling No. SUT-20-001.

4. SUT Bulletin 2019-03: Sales Tax Absorption. The Department of Revenue issued a sales and use tax bulletin to address the requirements relating to sales tax absorption under Act 13 of 2019 (discussed above in the Legislative Developments section). The bulletin provides an example of sales tax absorption, and how such absorption applies to the persons responsible for collecting and remitting sales tax. In particular, when absorbing sales tax, the taxpayer must (1) provide the customer with a receipt stating that the sale is subject to sales tax and that it will pay the sales tax; (2) provide the customer with a receipt separately stating the sales price of the items sold and the sales tax; (3) separately state in its books and records the sales price and the sales tax; (4) calculate the sales tax by multiplying the sales price by the applicable tax rate; and (5) remit the sales tax to the Department. The bulletin specifies that the retailer in the example is solely responsible for paying sales tax to the Department, and it cannot obtain a refund of sales tax even if it's later discovered that the customer was not subject to sales tax.

5. SUT Bulletin 2019-04: Proper Use of Direct Pay Permits. SUT Bulletin 2019-4 provides guidance on the correct use of direct pay permits. In particular, the direct pay permit must be used in conjunction with a properly completed exemption certificate. The bulletin specifies that only

the holder of the direct pay permit can use the permit; it cannot be used by a vendor to justify not charging tax on sales to the holder of a permit. The taxpayer holding the direct pay permit must present its vendor with the exemption certificate in order for the vendor to not charge tax on the sale.

III. OTHER TAXES

A. Unclaimed Property

1. Judicial Developments

State Treasurer Sues to Obtain Shareholder Information. On May 10, 2019, Pennsylvania's State Treasurer filed a Commonwealth Court complaint seeking to compel PPL Corporation ("PPL") to provide shareholder information in connection with an ongoing unclaimed property audit. Pennsylvania's third-party auditor requested that PPL provide shareholder information such as social security numbers and street addresses (irrespective of the shareholders' state of residence).

PPL declined to provide the requested information, arguing that it is not needed in order to make a preliminary determination as to the applicability of the state's unclaimed property laws. Rather, PPL argues that it should be able to provide limited owner information to isolate items that may be subject to escheat in Pennsylvania and then provide detailed information for only those items. In response, the Treasurer issued a subpoena to which PPL raised further objections, spurring the Treasurer to file a complaint.

Following briefing and argument, on July 20, 2021, the Commonwealth Court overruled PPL's objections and ordered that PPL submit an Answer to the Treasurer's Complaint. That Answer seeks dismissal of all Counts of the Complaint while also raising numerous arguments regarding the subpoena's enforceability as a new matter. The Treasurer has also filed a request for partial summary judgment for which oral argument was held on June 23, 2022. The parties now await the Court's decision.

If PPL ultimately prevails, the decision could serve as an important check on the ability of auditors to "fish" for owner information not directly relevant to the enforcement of Pennsylvania's own unclaimed property laws. *Garrity v. PPL Corp.*, 272 MD 2019.

U.S. Supreme Court Asked to Decide Escheat Dispute Between States. In response to litigation initiated by Pennsylvania and Wisconsin in federal district court over the priority rules for MoneyGram payments, Delaware has petitioned the Supreme Court of the United States to settle the dispute as a case of original jurisdiction. Central to the dispute is

whether payments issued by MoneyGram fall within the scope of the federal Disposition of Abandoned Money Orders and Traveler's Checks Act ("FDA"), which subjects certain written instruments to the unclaimed property laws of the state in which they were purchased rather than to the issuer's state of incorporation. As MoneyGram's state of incorporation, Delaware will be able to recover unclaimed MoneyGram payments issued anywhere in the country if successful.

In response to Delaware's petition, the Court appointed a Special Master to gather evidence and develop a record for their review. On July 23, 2021, the First Interim Report of the Special Master was issued. In it, the Special Master delivered a preliminary loss to Delaware with a recommendation that the Court find MoneyGram payments to be within the scope of the FDA. In subsequent briefs, Delaware argues that the MoneyGram checks are third-party bank checks not intended to be subject to the FDA, while the other states involved in the litigation support the Special Master's findings.

On February 22, 2022, the Court agreed to hear oral argument regarding Delaware's objections to the Special Master Report. That argument took place on October 3, 2022. *Treasury Dep't of the Commonwealth v. Delaware State Escheator David Gregor*, Case 1:16-cv-00351-JEJ (M.D. Pa. Feb. 26, 2016).

B. Gaming Taxes

1. Legislative Developments

Sunset of Additional Tax on Table Games Repealed. On top of the standard 12% tax imposed on gross table game revenue, Pennsylvania's legislature enacted an additional 2% tax effective August 1, 2016. That tax was scheduled to expire on August 1, 2021, but Act 25 of 2021 repealed the expiration date, thereby making the cumulative 14% tax rate permanent.

2. Judicial Developments

Events Tickets: Services or Tangible Personal Property? Pennsylvania law allows a deduction from the gross terminal revenue and gross table game revenue tax bases for certain promotional items. However, five items are excluded by statute from qualifying for the deduction: travel expenses, food, refreshments, lodging, and services. The Supreme Court of Pennsylvania recently resolved a years-long dispute by concluding that the exclusion for "services" does not extend to event tickets. Thus, their cost is deductible.

Throughout this litigation, the Commonwealth argued that when you consider substance over form, tickets to baseball games, concerts, etc. are representative of services and therefore not deductible, while the taxpayer argued that the tickets are intangible personal property—not services. In October 2019, the Commonwealth Court agreed with the taxpayer, finding that ambiguity as to the reach of the term "services" within the Gaming Act must be construed in the taxpayer's favor.

In response to the state's appeal, the Pennsylvania Supreme Court unanimously affirmed the Commonwealth Court's order on November 17, 2021. The Court determined that although the tickets provide a right to attend a concert, they are personal property for gaming tax purposes; "the physical tickets themselves can be moved freely or transferred by their owner to another and have an inherent value". *Greenwood Gaming and Entertainment, Inc. v. Commonwealth*, 19 MAP 2020. As a result, the cost of event tickets given to casino patrons are deductible for gaming tax purposes.

Gaming Tax Refund Claim Denied as Untimely. Over the course of several years, Greenwood Gaming and Entertainment, Inc. argued unsuccessfully through multiple levels of appeal that it was entitled to deduct the value of promotional giveaways from the tax bases of its gross terminal revenue and gross table game revenue liability calculations. In April 2014, the Pennsylvania Supreme Court finally ruled in favor of Greenwood Gaming and permitted the requested deductions, subject to certain qualifying criteria. *Greenwood Gaming and Entertainment, Inc. v. Commonwealth*, 90 A.3d 699 (Pa. 2014).

Upon receiving the favorable Pennsylvania Supreme Court decision, Greenwood Gaming filed a refund claim for closed periods—where tax was paid more than three years prior to filing. Both the Board of Appeals and Board of Finance and Revenue dismissed these refund clams as untimely.

On appeal to Commonwealth Court, Greenwood Gaming requested a review of the merits of its refund claim on the basis that: (i) dismissal violates its due process rights since they have been harmed and the Commonwealth was on notice of their claims by virtue of the prior appeals; and (ii) as applied here, the statute of limitations is inequitable because Greenwood Gaming could have been liable for making a claim unsupported by the law in effect at the time as a result of the history of losses prior to the Pennsylvania Supreme Court decision.

On September 6, 2018, the Commonwealth Court unanimously granted summary relief in favor of the Commonwealth. The Court held that Greenwood Gaming failed to timely file its request for refund and

equitable principles could not revive the request. Greenwood Gaming filed exceptions to the Court's decision on October 8, 2018. On September 30, 2019, the Commonwealth Court issued its opinion denying Greenwood's exceptions. *Greenwood Gaming and Entertainment v. Commonwealth*, 609 FR 2015 (Pa. Commw. Ct. 2019). Greenwood appealed to the Pennsylvania Supreme Court and on August 18, 2020, the Court issued an order affirming the Commonwealth Court's decision.

Impact of "Stipulations" Agreed Upon at Administrative Level. In a case currently pending before Commonwealth Court, the underlying issue is whether "momentum dollars" (redeemable points) are deductible for purposes of computing the Gross Revenue Terminal Tax and the Gross Table Games Revenue Tax. The parties are currently arguing over procedural issues surrounding the impact of agreements at the administrative appeal level. Specifically, the taxpayer and the Department of Revenue stipulated to particular facts at the Board of Finance Revenue—that momentum dollars are tangible personal property when awarded to a patron. On appeal, the Office of Attorney General is arguing that the Commonwealth is not bound by the factual stipulation made between the Department of Revenue and the taxpayer at that administrative level. On May 12, 2021, the Court heard argument on this issue as well as whether the Commonwealth waived its right to raise particular issues since it did not file a cross-appeal and whether the same methodology applies for setting the deduction amount for the Gross Revenue Terminal Tax and the Gross Table Games Revenue Tax. The parties are awaiting the Court's decision. *Downs Racing, L.P. v. Commonwealth*, 802 F.R. 2016.

3. Administrative Developments

Gaming Tax Bulletin. The Department issued Pennsylvania Gaming Tax Bulletin 2019-01. The Department issued this bulletin to address the gaming expansion under Act 42 of 2017 and, specifically, the applicability of the Department Bulletin 2015-01 addressing the deductibility of promotional items from "gross terminal revenue". As stated in Bulletin 2019-01, the Department's policy "remains that 'cash equivalents' generally do not include amounts provided to players as part of reward programs unless the amounts meet the definition of 'cash equivalent'" for purposes of determining promotional play deductions.

C. Bank Shares Tax

1. Legislative Developments

Treatment of Reports of Condition for Merged Institutions. Act 25 of 2021 amended the definition of "receipts" for Bank Shares Tax purposes

to account for mergers and acquisitions. Pursuant to the new definition, the income statements included in each institutions' Reports of Condition should be "combined as if a single institution had been in existence for that year."

Edge Act Exclusion Phase-In. Act 84 of 2016 made a number of changes to the Bank Shares Tax. Among those still being phased in is the exclusion of the equity of Edge Act subsidiaries (formed pursuant to 12 U.S.C. § 611) from the bank shares tax base. This exclusion will be phased-in with a 20% exclusion for calendar years beginning on or after January 1, 2018, and a 100% exclusion for calendar years beginning on or after January 1, 2022.

D. Gross Receipts Tax

1. Legislative Developments

Sales of Electric Power to Boroughs for Resale. Act 28 of 2020, signed June 5, 2020, amends Title 8 (applying to Boroughs and Incorporated Town) of the Pennsylvania statutes, to provide that the sale of electric power to a borough for resale inside the limits of the borough, and the sale of electric power by a borough inside the limits of the borough, are exempt from the gross receipts tax imposed under 72 P.S. § 8101.

2. Judicial Developments

Resale Exemption Does Not Apply to Receipts from Sales to IDAs. In a decision affirmed by the Pennsylvania Supreme Court, a taxpayer was denied gross receipts tax ("GRT") relief on its sales to an Industrial Development Authority ("IDA"). The taxpayer, a wholesale seller of electricity, sought to exclude amounts from its tax base that were generated from the sale of electricity to an IDA that resold the electricity to its own customers.

In ruling against the taxpayer on its resale argument, the Commonwealth Court found in May 2017 that the IDA was not a qualifying purchaser for purposes of the resale exemption because it was not itself subject to the GRT. In March 2018, the Commonwealth Court overruled exceptions that were filed by the taxpayer and affirmed its decision. The taxpayer appealed that decision to the Pennsylvania Supreme Court. On December 28, 2018, the Pennsylvania Supreme Court affirmed the order of the Commonwealth Court. *American Electric Power Serv. Corp. v. Commonwealth,* 199 A.3d 880 (Pa. 2018).

3. Trends and Outlooks

Philadelphia Department of Revenue Guidance on Like-Kind Exchange Treatment - Under IRC § 1031, no gain or loss is recognized on like-kind exchanges of property used in trade, business, or investment. The guidance specifies that the City of Philadelphia has not adopted IRC § 1031; therefore, the Philadelphia Department of Revenue will not recognize the tax free treatment of like-kind exchanges for purposes of the net profits tax or the gross receipts portion of the business income and receipts tax ("BIRT").

The guidance also said that taxpayers in Philadelphia that report net income for BIRT purposes using Method I cannot defer the recognition of gain under IRC § 1031. However, taxpayers electing to report net income for BIRT purposes under Net Income Method II, can defer the recognition of gain on a like-kind exchange if IRC § 1031 allowed the deferral of gain recognition for federal income tax purposes.

Corporation Tax Bulletin 2021-01 – Telecommunications Gross Receipts Tax – Taxable Entities. On February 4, 2021, the Department issued a notice providing guidance concerning the persons and entities subject to the gross receipts tax. The Bulletin clarifies that telephone and telegraph companies, mobile telecom service providers, limited partnerships, associations, joint-stock associations, co-partnerships, and persons engaged in providing telephone, telegraph, or telecommunications services in Pennsylvania are subject to the tax. The Bulletin also makes clear that a taxpayer need not be a public utility or other regulated entity to be subject to the gross receipts tax so long as the taxpayer's functions and receipts fall within the scope of the tax. The Bulletin directs taxpayers to *Verizon Pennsylvania, Inc. v. Commonwealth*, 127 A.3d 745 (Pa. 2015) and Corporation Tax Bulletin 2018-04 for further guidance on the receipts subject to the tax.

Corporation Tax Bulletin 2020-01 – Telecommunications and Electric Gross Receipts Tax Sales for Resale. On January 23, 2020, the Department of Revenue issued a sales tax bulletin clarifying the exemption for resales to political subdivisions in light of the *American Electric Power Serv. Corp. v. Commonwealth* decision discussed above. That decision requires a taxpayer claiming a sale for resale to substantiate that the counterparty actually resold the commodity in a transaction on which gross tax is ultimately paid. Accordingly, as described in the bulletin, the Department developed a Sale for Resale Acknowledgement Form that can substantiate such transactions. The Sale for Resale Acknowledgement Form will be issued by the

Department to resellers and sellers wishing to claim a sale for resale exemption must obtain this form from the reseller.

E. Personal Income Tax

1. Legislative Developments

Non-employee Income Tax Withholding Requirements. Under Act 43 of 2017, taxpayers filing Form 1099-MISC who pay at least $5,000 annually to any one nonresident individual or disregarded entity with a nonresident member, are now required to withhold income tax from such payments. With respect to payees who receive less than $5,000 annually from the taxpayer-payor, withholding is discretionary. However, payments from the United States and Pennsylvania governments are exempt from withholding regardless of their aggregate value. Additional information and guidance—including a withholding exemption certificate—is available on the Department's website.

2. Judicial Developments

Gain from Like-Kind Exchanges. The Pennsylvania Commonwealth Court affirmed the Board of Finance and Revenue's assessment of personal income tax on the taxpayer's gain from like-kind exchanges. The taxpayers, who used the federal income tax ("FIT") method of accounting, contended that net gains on like-kind exchanges should be taxed only when the replacement property is sold because such deferrals are permitted under IRC § 1031. But the Court held that net gains resulting from like-kind exchanges should be taxed in the years the exchanges occurred because, unlike IRC § 1031, the Pennsylvania Tax Reform Code ("TRC") does not permit tax deferrals on net gains from like-kind exchanges of real property and the TRC gives the DOR the authority to disallow a method of accounting if it does not clearly reflect income. The Commonwealth Court concluded that the taxpayer's use of the FIT accounting method does not clearly reflect income for personal income tax purposes because the TRC does not permit tax deferral on like-kind exchanges. Petitioners filed exceptions to the Commonwealth Court's decision. The parties filed briefs on exceptions and the Pennsylvania Institute of Certified Public Accountants filed a brief in support of the Petitioners. The case is tentatively scheduled for oral argument on exceptions in December 2022. 741-742 F.R. 2017.

Refund Statute of Limitations for Paid Assessments. In *Epifanio Torres v. Commonwealth*, the Department conducted a desk audit and used information received from the IRS to assess tax against the taxpayer. The Department issued an assessment notice to taxpayer on January 9, 2008. The taxpayer paid the assessed tax on September 3, 2014, and filed a refund claim on October 29, 2015, over three years after the date

of the assessment notice. The taxpayer argues that its refund claim was timely filed under section 72 P.S. § 10003.1(b), which requires the taxpayer to file a petition for refund for taxes paid with respect to the audit period within six months of the mailing date of the notice of assessment, determination or settlement, or within three years of actual payment of the tax, whichever is later. The Department filed Application for Relief to dismiss the action on April 30, 2019. The court held oral argument on February 11, 2020 before a panel. On February 28, 2020, the court filed its Memorandum Opinion affirming the Board of Finance and Revenue decision. The Taxpayer filed exceptions on March 20, 2020 and filed its brief on July 2, 2020. On November 17, 2021, the Court issued a Memorandum Opinion in which it dismissed the Taxpayers exceptions. The Taxpayer filed a Notice of Appeal with the Pennsylvania Supreme Court (91 MAP 2021, 2022 Pa. LEXIS 886 (Pa 2022)), where the Court affirmed the Commonwealth Court decision on June 22, 2022.

Foreign Tax Credits. In *Neubauer v. Commonwealth,* a taxpayer is challenged the disallowance of credits for tax paid to foreign countries, and specifically whether the disallowance is unconstitutional under *Comptroller v. Wynne*, 135 S. Ct. 1787 (2015). *Neubauer* was originally held pending the petition for certiorari to the U.S. Supreme Court in *Steiner v. Utah*, which was denied by the Supreme Court on February 24, 2020. Thus, the stay of the matters was lifted by the Commonwealth Court. On May 10, 2022 the parties filed a Stipulation for Judgment to resolve the appeal without the need for litigation.

F. Local Taxes

1. Legislative Developments

Philadelphia NOL Carryforward Period. On Jan. 24, 2019, Philadelphia enacted an ordinance that extended the NOL carryforward period for the business income and receipts tax ("BIRT"). The ordinance only becomes effective when the Pennsylvania General assembly passes authorizing legislation. If enacted, NOLs may be carried forward for 20 tax years (instead of only 3 tax years) following the year in which they were incurred. The ordinance applies only to those losses incurred on or after the ordinance's effective date. NOLs incurred prior to the ordinance's effective date retain the three-year carryforward period. The earliest net loss may be carried over to the earliest taxable year possible.

The General Assembly has introduced bills to authorize this, but nothing has been enacted. The latest, HB 324, was re-reported as committed to Appropriations on July 6, 2022.

Proposal for Destination-Based Local Sales and Use Tax. On July 17, 2020, Pennsylvania Representatives Innamorato and Kenyatta issued a memorandum to all House members seeking to close the "Amazon Local Sales Tax Loophole". Under current law, local taxes imposed by Philadelphia and Allegheny counties source sales using an origin approach. Amazon, which does not have physical presence in Philadelphia County or Allegheny County, is not subject to the local sales tax under the current origin-based approach. The draft language proposed by the representatives would source sales using a destination approach for local sales tax purposes, which is consistent with sourcing for state sales tax purposes. The proposed legislation would require online sales in Pennsylvania to be finalized at the address of the purchaser, thereby subjecting sales to Philadelphia and Allegheny county addresses to local sales tax, thereby closing the "Amazon Loophole". On June 23, 2021, a bill including this proposal (HB 1656), was referred to the House Finance Committee for consideration.

2. Judicial Developments

Commonwealth Court Denies Philadelphia Wage Tax Refund. On January 7, 2022 the Commonwealth Court affirmed the orders of the Philadelphia County Court of Common Pleas, which denied a taxpayer refund of Philadelphia Wage Tax paid 2013 through 2016.

The taxpayer, a Philadelphia resident, worked in Wilmington, Delaware during the periods at issue. Her employer withheld the following taxes: Philadelphia wage tax; Wilmington earned income tax; Pennsylvania income tax; and Delaware income tax. On her Pennsylvania personal income tax return, the taxpayer claimed a credit for the Delaware tax (5%) to offset her Pennsylvania income tax (3.07%). The taxpayer also claimed a credit for the Wilmington tax (1.25%) and the balance of the Delaware tax paid (5% - 3.07% = 1.93%) to offset her Philadelphia tax (3.92%).

The taxpayer was allowed a full credit for Delaware tax against Pennsylvania tax, and for Wilmington tax against Philadelphia tax, but not for the remaining Delaware tax against Philadelphia tax. The taxpayer argued that disallowance of the unused Delaware tax credits results in double taxation and an effective tax rate that is 1.93% higher than her intrastate counterparts. Thus, the disallowance places an unconstitutional burden on interstate commerce.

The Commonwealth Court found that the taxpayer never pays more than one state and one local tax, and the higher effective

rate is a product of the taxpayer's choice to work in Delaware, which imposes a higher income tax rate. The Court also found the Philadelphia tax scheme internally and externally consistent, and dismissed the taxpayer's reliance on *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015). Specifically, the Court found that *Wynne* does not compel a locality such as Philadelphia to credit a taxpayer for "dissimilar" taxes paid, such as the Delaware tax. *Zilka v. Tax Review Bd. City of Philadelphia*; No. 1063 C.D. 2019; No. 1064 C.D. 2019 (Pa. Commw. Ct. 2022). The Pennsylvania Supreme Court has accepted the taxpayer's petition for allowance of appeal of the Commonwealth Court decision and

7% Amusement Tax Upheld. On September 21, 2021, the Commonwealth Court ruled that Tremont Township's 7% Amusement Tax was permissible under section 8402(c)(2) of the General Local Government Code, 53 Pa.C.S. § 8402(c)(2).

Section 8402(c)(2) allows a municipality "which has on or before December 31, 1997 levied, assessed or collected or provided for the levying, assessment or collection of an amusement [tax] . . . may continue . . . to collect on such subjects upon which the tax was imposed by the municipality as of December 31, 1997, at a rate not to exceed the effective rate as collected by the municipality as of December 31, 1997, or 5%, whichever is greater[.]" If a municipality did not levy such a tax as of December 31, 1997, it is permitted to levy such a tax, but at a rate no higher than 5%. In 2018, Tremont Township repealed its former amusement tax, which had existed since 1953 and was levied at 10%. A new amusement tax was enacted in its place, at 7%.

The taxpayer, operator of an off-road driving terrain park, challenged a civil complaint for unpaid amusement taxes by alleging that the 7% rate was impermissible under Section 8402, because the township had repealed, rather than amended, its prior amusement tax. Accordingly, because the new amusement tax did not exist as of December 31, 1997, it was subject to the 5% cap.

The trial court ruled in favor of the township in May 2020 and the Commonwealth Court affirmed. Under the plain language of the statute, the court determined that so long as the former amusement tax existed on or before December 31, 1997, the township was free to levy such a tax as high as the prior effective rate or 5%. The court's conclusion turned on the meaning of

"has" in the context of whether an amusement tax existed prior to 1998, and found that use of the word "has" indicated that it is of no consequence whether the municipality later repeals or amends the amusement tax, so long as an iteration of the tax had existed as of the pivotal date. *Rausch Creek Off-Road Park LLC v. Tremont Twp.*, 263 A.3d 1213 (Pa. Commw. Ct. 2021).

Uniformity Challenge to Local Property Tax Assessments. On January 16, 2020, the Commonwealth Court ruled that a school district's practice of targeting commercial properties to raise tax revenue did not violate the uniformity clause of the Pennsylvania Constitution. In particular, the court determined that Bethlehem Area School District's assessments that were filed exclusively against commercial properties were based on efforts to identify properties, regardless of their classification, that would generate at least $10,000 in new tax revenue. The Pennsylvania Supreme Court declined to hear the appeal without comment. *Bethlehem Area Sch. Dist. v. Northampton County*, 66 – 67 MAL 2020.

In contrast, on July 29, 2021, the Commonwealth Court upheld the Trial Court's decision that the City's reassessment solely of commercial properties in order to raise revenue was not uniform. *Duffield House Assocs. LP v. City of Philadelphia*, No. 1501 C.D 2019 (Pa. Commw. Ct. 2021). Here, a group of commercial property owners and lessees appealed their 2018 Philadelphia real estate tax assessments on the grounds that they were selectively assessed. The Philadelphia Court of Common Pleas struck the assessments and in reinstating the 2017 assessments, ordered the City of Philadelphia to refund approximately $118 million to taxpayers. The City and School District appealed and argued that their methodology for issuing the 2018 assessments did not violate Pennsylvania's Uniformity Clause. Ultimately, the Court rejected their arguments and upheld the trial court's decision striking the 2018 assessments.

IV. ADDITIONAL NOTES OF INTEREST

A. Liability Offsets Coming. The Department of Revenue has announced that effective December 1, 2022, it will begin to automatically apply credits sitting on taxpayers' accounts to offset outstanding liabilities on account. This offsetting process will occur across tax types and years. For example, the Department may apply a sales and use tax overpayment against a corporate net income tax underpayment.

According to the Department's announcement, offsetting should not occur until after statutory appeal periods have been exhausted or expired, with respect to

liabilities subject to a payment plan or for taxpayers under bankruptcy protection, and offsetting will not be done across the accounts of affiliated taxpayers because each is a separate and distinct taxpayer.

When liabilities are offset, the Department will issue an Offset Notice to the taxpayer, which will be subject to the statutory deadlines for filing a refund claim. Taxpayers should review these notices closely to confirm their accuracy and ensure their right to challenge any inaccurate or undesirable offset is preserved.

B. Extended Tax Return and Refund Claim Deadlines. In response to COVID-19, the Department of Revenue extended the due date for various 2019 tax returns. For example, the due date for calendar year C-corporation taxpayers to file their 2019 RCT-101 was delayed to August 14, 2020 (instead of May 15). In addition to granting some reprieve from the original filing deadlines, this means affected taxpayers will have until August 14, 2023 to file a refund claim for if they determine they overpaid their 2019 tax. Taxpayers with fiscal-year reporting periods will be similarly impacted.

V. BIOGRAPHIES

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Lee is a partner in Reed Smith's State Tax Group. He works closely with clients to determine the best course of action--from strategy development through litigation--to resolve the taxpayer's issues. In addition to representing clients in state tax appeals, Lee also provides multi-state advice to corporations on various state income, franchise and sales tax issues--and works with these corporations to implement any resulting tax-saving strategies.

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Frank is a partner in Reed Smith's State Tax Group. He focuses his practice on state tax planning and controversy matters, specializing in income/franchise and sales and use taxes. He advises clients in a variety of industries, with an emphasis on the pharmaceutical, financial services, and consumer product industries.

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Kenny is a partner in Reed Smith's State Tax Group. His practice focuses primarily on multi-state corporate tax and sales and use tax issues. Kenny represents clients in a wide range of industries in connection with state tax return positions, audits, administrative appeals, and litigation in various jurisdictions.

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