

# Tax Report

Institute for Professionals in Taxation  
Excellence Through Tax Education  
October 2011

**Income Tax Symposium &  
Property Tax Symposium**  
Monterey, California  
November 6 - 9, 2011

**Credits & Incentives Symposium**  
Monterey, California  
November 9 - 11, 2011



program & registration at [www.ipt.org](http://www.ipt.org)

## Credits and Incentives

### Changes to Michigan Incentives – Out with the Old, in with the New

This article summarizes issues associated with credits and incentives being used under the Michigan Business Tax, being replaced by the new Corporate Income Tax, and the alternative calculations that must be made to determine whether to remain on the MBT. It also describes proposed legislation that would put a new incentives regime in place.

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### Considerations when Buying and Selling State Tax Credits

The number of state tax credits has risen dramatically over the past couple of years. While the growing number of credits introduces a number of tax planning opportunities including monetizing the tax credits, these opportunities also come with a number of tax and business issues that need to be considered. The article is designed to introduce the reader to some of the major business and tax concerns that arise when looking at transactions that involve state tax credits.

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## Income Tax

### Making Waves on the Left Coast: California's Ever-Changing Sales Factor Rules

Over the course of the last three years, the California Legislature enacted a single sales factor election with market-based sourcing and a reversion to the *Finnigan* rule effective for tax years beginning on or after January 1, 2011. The Franchise Tax Board currently is in the process of promulgating regulations applicable to certain of these amendments. This article explores the details regarding the election to use single sales factor apportionment, the proposed cascading approach to market-based sourcing, and the statutory requirement for sourcing based on the *Finnigan* rule.

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## Property Tax

### Legislative Property Tax Update

The author reviews numerous changes made to Texas property tax laws during the 2011 Session. The changes include protection against dismissal of protests and lawsuits filed with the owner incorrectly named, new notice and protest measures relating to rendition penalties, and notice to owner requirements where attorneys are engaged by third parties.

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## Sales and Use Tax

### The Multistate Tax Commission's Draft Model Sales & Use Tax Notice and Reporting Statute

MTC General Counsel describes a draft proposal, based on similar Colorado statutes, that would require sellers not collecting state tax to satisfy specified notice and reporting obligations. States could adopt provisions requiring such sellers to notify purchasers that tax may be due and give annual reports to each purchaser and the taxing authority of total purchases made by that purchaser. Exceptions would be made for certain sellers, including small sellers and those with de minimis sales in the jurisdiction. The article briefly considers policy compatibility and constitutional issues raised by the proposed model legislation.

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## Amicus Curiae Brief

### IPT Files Amicus Brief in the Supreme Court of the State of Washington

**Tesoro Refining and Marketing Company,**  
Respondent,  
**v.**  
**State of Washington,**  
**Department of Revenue,**  
Petitioner

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Visit IPT's website to plan your Continuing Education schedule for the remainder of the year or refer to the IPT 2011 calendar of events on this page to see what is being offered. The Institute's programs are accepted by most organizations for continuing education purposes. Check with the administrator of your designation/certification.



Linda A. Falcone, CMI  
President June 2011-2012

**F**all is here and there is a nip in the air (most of us really appreciate it this year) and daylight is certainly not lasting as long as it did a month ago – and with these changes comes the realization that within the next month, the Institute's educational offerings for the year will conclude.

I have just returned from the 2011 Sales Tax Symposium which was held at the Renaissance Orlando at SeaWorld® in Orlando, Florida, from September 25-28. It was a highly successful program, both in content as well as in attendance. Over 580 tax professionals attended the program developed by Mark W. Bennett, Program Chair, Carolyn Campbell Shantz, CMI, CPA, Vice Chair and their committee. The Institute could not present our educational programs without the support and efforts of the planning committees and speakers. I enjoyed not only the educational sessions but also meeting more sales tax members as well as seeing old friends.

The Institute's new Mentoring Program was kicked off with a session on Tuesday evening at the Symposium. The number of participants was greater than expected and the program is off to an excellent start. Gwen Evans, CMI, Chair, and her committee members should be congratulated for all their work in launching this new program.

The Social Networking Committee headed by Berranthia Brown, CMI, Chair, is in the process of planning the launch of IPT into Social Media. She and her committee are currently exploring options and formulating a plan for the launch.

I would also like to take this opportunity to congratulate the organization's newest CMIs. Twenty-nine (29) Sales Tax Members were successful in achieving the CMI Professional Designation. The exams were given in Orlando just prior to the Symposium.

The Intermediate Personal Property Tax School, held at The Georgia Tech Hotel and Conference Center, will begin October 16th. Tax professionals from all over the United States have signed up to attend this five-day program. I want to take this opportunity to thank Committee Chair, Chris Muntifering, CMI, and Vice Chair, Diane Brown, CMI, along with the other highly-qualified and gifted instructors for their dedication and service to this organization.

If you have not already done so, I would like for you to review the program agendas for the Income, Property and Credits and Incentives Symposia. It is not too late to take advantage of one of these fine offerings. All three programs are being held at the Hyatt Regency Monterey Hotel in Monterey, California. Registrations for IPT's first Credits and Incentives Symposium have exceeded expectations.

Finally, The Georgia One-Day Tax Seminar is scheduled for November 18, 2011, and attendance is expected to be high.

I encourage you to visit IPT's website for information concerning the educational programs being offered in 2012 and include these in your plans for the coming year.

I would also like to call special attention to the 36th Annual Conference in Indian Wells, California. I have always enjoyed our programs in Indian Wells and wanted to have my Conference in Southern California. The area has much to offer. The Program Committee, under the leadership of Overall Chair Terry Palmer, has begun to formulate the schedule for the Annual Conference. If you have any suggestions or recommendations, please contact the Committee.

The next meeting of the Board of Governors will be held on Sunday, November 6, 2011, in Monterey, California. Committee Chairs are to report on committee progress at that time.

Please feel free to contact me at any time, as I look forward to receiving your ideas and suggestions as to how we can better serve the membership.

Linda A. Falcone, CMI  
President



## Credits and Incentives

### Changes to Michigan Incentives – Out with the Old, in with the New

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### A New Day in Michigan

The Michigan Corporate Income Tax (“CIT”), effective January 1, 2012, contains none of the statutory or discretionary credits and incentives that comprised the bulk of the Michigan Business Tax (“MBT”).<sup>1</sup> Instead, the Administration has proposed a new incentive regime, based on an annual budget allocation, comprised of grants, loans and other forms of direct assistance.

What is interesting is how Michigan chose to address the discretionary credits that had been granted. Now defined as “certified credits,” taxpayers will have the option to keep their discretionary credits if they elect to stay on the MBT.

### Certified Credits

Certified credits are those credits that the state had contractually obligated itself to provide, dependent upon the credit recipient satisfying its obligations. These credits receive a certificate evidencing the credit that is issued by the Michigan Economic

Development Corporation upon completion of the project to which the credit related.<sup>2</sup> Certified credits include: all Michigan Economic Growth Authority (“MEGA”) Credits (standard, high-tech, rural and retention) which provided a credit based on a percentage of personal income tax withholding over a set period of time, Brownfield Credits, Renaissance Zone Credits for which a development agreement was executed with the Michigan Strategic Fund or part of a collaborative agreement (limiting the Renaissance Zone credit to tool and die renaissance zones or Next Energy renaissance zones, not the geographically assigned renaissance zones), Historic Preservation Credits, Michigan Film Credits (both infrastructure and production company credits), Michigan Early Stage Venture Investment Credits, Photovoltaic MBT Credits, Anchor Jobs Credits, Defense Contracting MBT Credits, Anchor District Credits, Polycrystalline Energy Credits, Battery Projection Credits and Hybrid R&D Technology Credits. Certified credits also include tax vouchers issued by the Michigan Early State Venture Act, and specific credits issued for NASCAR activities.<sup>3</sup>

The Administration will honor the existing certified credits, and those granted by December 31, 2011, but only if a taxpayer elects to remain under the MBT regime.<sup>4</sup> Alternatively, taxpayers can choose to follow the new CIT regime, and forgo their certificated credits. The election must be made on the first tax return filed after January 1, 2012, and remains in place for the duration of the certificated credits, including any carryforwards.<sup>5</sup> Once made, the election cannot be changed or amended. If a taxpayer making such election is a member of a unitary business group, the entire group, not just the entity receiving the credit, is required to make the election.<sup>6</sup>

<sup>1</sup> This “credit” is actually a compliance mechanism that has the effect of phasing in the CIT for up to \$700,000 in gross receipts. To qualify for the small business credit, a C corporation must have business receipts of less than \$20 million, adjusted business income may not exceed \$1.3 million, and owner/operators cannot receive compensation or distributable shares of income in excess of \$180,000. MCL 206.671.

<sup>2</sup> The certificate is issued by the Department of Treasury upon the submission of a Request for Certificate of Completion, which is submitted by the taxpayer upon the completion of the project, or a particular project phase, depending if the project is a phased project.

<sup>3</sup> MCL 208.107.

<sup>4</sup> MCL 206.608(1). Technically, the MBT has not been repealed. Such repeal will not occur until the Secretary of State receives a written notice from the Department of Treasury that the last certified credit or any carryforward from that credit has been claimed. See, Enacting Section 1, 39 PA 2011.

<sup>5</sup> MCL 206.608(2).

<sup>6</sup> MCL 208.500(1).

Taxpayer's will need to be careful in calculating their forecasted tax estimates to make the correct decision of which alternative is more advantageous. Note, this first year election is not required for Brownfield Credits or Historic Preservation Credits. For these credits, taxpayers may choose to elect to file under the MBT in the specific year in which the certificate is received. In order to simplify the monetization of these two credits, the statute provides for a refund of these credits at 90% of the credit value, which can be requested prior to the actual filing of the MBT return for the year the credit is claimed.<sup>7</sup> For certain Historic Tax Credits, the refund may be limited to 86%.<sup>8</sup>

The election is also available to flow-through entities and individuals who are no longer subject to an entity level tax under the CIT. Flow-through entities may elect to pay the MBT with offset by a certified credit in lieu of paying the tax due under the Individual Income Tax Act.<sup>9</sup>

The decision of whether or not to make the election is not straightforward. In making the determination of whether the election provides a greater benefit, i.e., staying on the MBT and offsetting the tax with credits, or changing to the CIT and foregoing any credits, the certified credits are actually applied to the higher of either the MBT liability (including non-certified credits), or the CIT liability.

### Example:

Step 1: Determine MBT liability utilizing both non-certified and certified credits and compare to CIT liability with no credits. If the MBT scenario is better, the company would elect to file under the MBT and use their certified credits.

Step 2: Once the decision has been made to file under the MBT, the actual certified credit is applied against the higher liability of the MBT liability before the certified credit or the CIT liability.

<sup>7</sup> MCL 206.510.

<sup>8</sup> MCL 206.510(2).

<sup>9</sup> MCL 206.500(2).

### Example:

Company A				Company B				
Step 1	<b>MBT Calculation:</b>		<b>CIT Calculation:</b>		<b>MBT Calculation:</b>		<b>CIT Calculation:</b>	
	Gross Receipts Liability:	\$ 6 mil			Gross Receipts Liability:	\$ 8 mil		
	+ Business Income Liability:	\$ 3 mil			+ Business Income Liability:	\$ 2 mil		
	<b>Liability Before Credits:</b>	<b>\$ 9 mil</b>			<b>Liability Before Credits:</b>	<b>\$10 mil</b>		
	- Non-Certified Credits	\$ 2 mil			- Non-Certified Credits	\$ 8 mil		
	- Certified Credits	\$ 5 mil			- Certified Credits	\$ 3 mil		
	<b>Total Liability</b>	<b>\$ 2 mil</b>	<b>\$3 mil</b>		<b>Total Liability</b>	<b>(\$ 1 mil)</b>	<b>\$3 mil</b>	
Step 2	<b>MBT Calculation:</b>		<b>CIT Calculation:</b>		<b>MBT Calculation:</b>		<b>CIT Calculation:</b>	
	Gross Receipts Liability:	\$ 6 mil			Gross Receipts Liability:	\$ 8 mil		
	+ Business Income Liability:	\$ 3 mil			+ Business Income Liability:	\$ 2 mil		
	<b>Liability Before Credits:</b>	<b>\$ 9 mil</b>			<b>Liability Before Credits:</b>	<b>\$10 mil</b>		
	- Non-Certified Credits	\$ 2 mil			- Non-Certified Credits	\$ 8 mil		
	<b>Liability Before Cert Credits</b>	<b>\$ 7 mil</b>	<b>\$3 mil</b>		<b>Liability Before Cert Credits</b>	<b>\$ 2 mil</b>	<b>\$3 mil</b>	
Use the Greater Liability	- Certificated Credits	\$ 5 mil			- Certified Credits		\$3 mil	
	<b>MBT Liability</b>	<b>\$ 2 mil</b>	<b>N/A</b>		<b>MBT Liability</b>	<b>\$0</b>		
Summary	Company A Liability = \$2 Mil			Company B Liability = \$0				

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## New Incentive Regime

Currently pending in the legislature are Senate Bills 556, 566<sup>10</sup>, 567<sup>11</sup> and 568.<sup>12</sup> Under these bills, Michigan adopts a new incentive regime that does not rely on tax credits or abatements to provide assistance. There are two main programs - a Community Revitalization Program and a Michigan Business Development Program. The Community Revitalization Program provides a statutory framework for replacing the Brownfield Redevelopment and state Historic Tax Credits. It provides for community revitalization incentives, in the form of grants, loans, and other economic assistance, for eligible investments in Michigan. The proposed legislation prohibits the Michigan Strategic Fund from approving more than 25% of a project's eligible investment up to \$10.0 million for a single project, and prohibits a grant of more than \$1.0 million. The proposed legislation also requires an applicant to enter into a written agreement to provide for repayment and penalties if the applicant fails to comply with the agreement.<sup>13</sup> These bills are tie-barred, requiring passage of all three for them to become effective.

The Michigan Business Development Program provides a statutory framework for replacing the prior Michigan Economic Growth Authority ("MEGA") credits. It provides for incentives, in the form of grants, loans, and other economic assistance, for new eligible investment in Michigan or for the creation of qualified new jobs in Michigan. A written agreement must be entered into, there must be an approved business plan, and the local municipality must also make a financial commitment to the project.<sup>14</sup> Further guidance is expected upon passage of the bills.

One thing is certain, the tax landscape continues to change in Michigan and companies looking for incentives must stay alert for proposed guidance that will further define the new Michigan incentives.

<sup>10</sup> MCL 125.2005

<sup>11</sup> MCL 125.2090 – 125.2090b

<sup>12</sup> 125.2090c – 125.2090d

<sup>13</sup> See Senate Fiscal Agency analysis to S.B. 566-568, MCL (S-2), dated September 19, 2011. Available at [www.senate.michigan.gov/sfa](http://www.senate.michigan.gov/sfa)

<sup>14</sup> S.B. 556

## Credits and Incentives

### Considerations when Buying and Selling State Tax Credits

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Federal general business tax credits were first inserted into the Internal Revenue Code in 1962 under then-President John F. Kennedy. The original general business tax credit was implemented as a way to stimulate investment in business equipment and invigorate the stagnant economy. Over time the role of federal tax credits has evolved and the number of general business tax credits has increased to over two dozen currently in the Code. Not surprisingly, many states have taken a similar approach and introduced tax credits that are applicable against state taxes; these "stimulators" have grown rapidly and been modified over the last decade. For example, Missouri has experienced a five-fold increase in the number of state tax credits available between 1998 and 2010, and virtually every state offers some form of tax credit program. With state tax credit programs tailored to meet the needs of a particular state – and a particular segment within the state, there are a number of state tax credits available for a wide variety of activities.

As one can imagine, the proliferation of state tax credits has yielded a marked increase in the number of parties that are unable to efficiently utilize the tax credits they are generating due to a lack of tax liability. Sometimes these parties are tax-exempt entities that are generating state tax credits and will not have to pay state tax. In other instances the parties are tax-paying entities that, either through tax planning, a temporary downturn in profitability, or just the sheer volume of tax credit eligible activity, are not currently paying state tax. In these situations the monetization of tax credits often represents one of the few win-win opportunities in the tax world since the seller of the tax credit can convert an asset that it is currently unable, or possibly never able, to use for immediate cash.

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One common example would be an individual that is looking to rehabilitate a vacant historic structure creating new vibrant office space in one of the 30 states offering a state historic rehabilitation tax credit program. While that individual might generate a \$500,000 state tax credit on \$10,000,000 of rehabilitation expenses, it is unlikely that said individual would be paying sufficient tax in the first year of operations to utilize the credit as most real estate projects generate taxable losses in the early years. While carrying these credits forward may create a future benefit, the individual has the option to monetize the credits, generating approximately \$400,000 in cash<sup>1</sup> during construction, which could be deployed to help fund construction and any operating deficits during the initial years. The taxpayers purchasing the tax credits also make a positive return since rather than paying \$500,000 to the state in taxes, they utilize the tax credits, which in turn saves them \$100,000. This creates a win-win for both parties.

State tax credits target many different activities including the development of affordable rental housing, job creation, film production, brownfield development and historic preservation. For the purpose of this article the universe of state tax credits has been divided into three segments:



- 1) Allocable state tax credits – those tax credits that are required to be allocated in a similar fashion to other federal and state tax attributes. In order to monetize these tax credits the monetization structure needs to be in place prior to the generation of the tax credit. The structures used to monetize these tax credits are similar to the monetization structures used in federal tax credits such as the Low Income Housing Tax Credit, Historic Tax Credits and Renewable Energy Tax Credits. Additionally, these tax credits are often the hardest to monetize as it is difficult to separate the state tax credit from the federal tax attributes and the economics of the underlying activity which gave rise to the credit.
- 2) Bifurcatable – those tax credits that can be specially allocated to any partner. Many programs allow 100% of the state tax credits to a partner regardless of the partnership interest of that partner. The monetization of bifurcatable state tax credits is simpler as the state tax credit investor

can receive a minimal amount of economic and other tax attributes (often 1% or less) while receiving 100% of the state tax credits, creating minimal transaction leakage. Of note, the state tax credit investor needs to be a partner at the time the tax credit is generated in order to receive the allocation.

- 3) Certificated tax credits – those tax credits that can be converted to certificates which can be bought and sold much like bearer bonds with the party attaching the certificates to its tax return in lieu of payment.

The credits have been divided into these three primary segments due to the different tax consequences for using or monetizing the credits associated with each type of tax credit. Allocable state tax credits have the most straightforward tax treatment. The tax credits are generated and then allocated in accordance with federal tax rules. The credit claimant can then utilize the credit on any year return which is allowable as a reduction of taxes due. The one catch is that in using the credit the taxpayer is not considered to have paid the taxes resulting in a loss of the federal deduction for state taxes paid. For example, a person with a \$300 state tax liability and \$100 of state tax credits allocated to him on

his K-1 will see that liability reduced to \$200. When the taxpayer goes to claim a federal tax deduction on state taxes paid, the deduction will only be \$200, not the original \$300 pre-credit liability. For a corporation paying at a 35% federal tax rate this means that \$1 of allocable state tax credits is only worth \$0.65.

Alternatively, if we look at certificated state tax credits, IRS guidance<sup>2</sup> indicates that the certificates are considered “property” and presumably this is due to the fact that they are not allocated in accordance with tax attributes. When the credit holder goes to use the credit to reduce its tax liability, it is assumed to have paid its liability in exchange for the asset. This creates a gain or loss depending on the relation of the credit holder’s basis in the property to the liability it extinguished. Since the asset was provided in extinguishment of tax liability for federal deduction purposes it is considered as if the state taxes were paid. For example, if a party generates \$300 of certificatable tax credits with a \$0 basis and sells the certificates to a third party for \$200, then the seller would have to recognize a taxable gain

<sup>1</sup> This is a purely hypothetical example of state tax credit proceeds used to illustrate a point. In general, state HRTC can sell for anywhere from \$0.25 to \$0.95 for \$1 of tax credits.

<sup>2</sup> IRS CCA 200445046

on the sale of \$200. When the purchaser goes to utilize its certificates to reduce its tax liability by \$300, it will have taxable income of \$100. That said, the purchaser will receive a \$300 federal deduction for paying \$300 of state taxes.

Although there is a clear differentiation between allocated and certificated tax credits, in each example the IRS generates the same amount of tax under either scenario. The seller/user of the certificated credits will combine to pay the difference between their \$0 basis and the face value of the credits whereas the party in the allocated credit will lose a tax deduction equal to the face value of the utilized credits by not being able to consider the use of the tax credit as paying state taxes.

One recent development that is being hotly debated among tax professionals is the tax treatment for bifurcated credits. In the Virginia State Historic Tax Credit case the 4th U.S. Circuit Court of Appeals reversed the lower court and ruled that the bifurcation of the tax credits created a disguised sale of property subject to federal tax under IRS Treasury Regulation 1.707-3. This ruling brings the tax treatment of bifurcated tax credits more in line with the treatment of certificated tax credits. It is generally agreed that this case is far from settled, with further appeals expected. Additionally, the case in question had a number of facts that were favorable towards reaching a disguised sale conclusion that may not be evident in all bifurcated tax credits.

Regardless of whether it is a certificated or allocated tax credit, the parties to the transaction have a number of items to contemplate when trying to value a state tax credit. While it would be nearly impossible to create an all inclusive consideration list when evaluating the different state tax credits, the following are three important items to consider when a party intends to utilize the tax credits either on its tax return or via monetization.

1) Delivery period – This is the period of time over which the tax credit is generated. Some credits are generated over a period of one year while other investments generate credits over a 10-year period. Investments in allocated or bifurcated tax credits with a longer delivery period are often harder to sell as the investor will need to be confident that it will have sufficient tax liability to utilize the tax credit in future years. Certificated tax credits generally do not have a delivery period as the credits can be freely transferred allowing each year's credits to be transferred to a different party.

2) Recapture – Many of the state tax credits are subject to either partial or full recapture under certain circumstances. The events that cause recapture and the time period in which recapture can occur can be a significant factor when evaluating transaction risk. For example, under the Massachusetts Historic Tax Credit program, any disposition of the tax payer's interest in the Historic project within the first 60 months results in recapture of the tax credit equal to the portion of the 60-month holding period not maintained. Furthermore, if the credit is transferred via certification the recapture is the responsibility of the transferor, not the transferee. In this type of situation a party purchasing the Massachusetts Historic Tax Credit certificates is unlikely to be concerned about recapture due to foreclosure or other transfers of project ownership as the recapture risk lies with the project owner. Alternatively, the Florida New Markets Tax Credit program identifies five different causes for recapture over the seven-year recapture period and 100% of all of the past credits generated by that investment would be recaptured and all future credits would be invalidated.

3) Restrictions on use – Not all tax credits are created equal. Some tax credits may apply only to certain types of taxation while other tax credits may have a restriction on the amount of tax that the credit can be used to offset. Since the value of the tax credit decreases the longer it takes for the holder of the credit to utilize it, it is important for holders or potential buyers to consider any restrictions. For example, the state of Virginia's Department of Taxation website lists 27 different tax credits, many of which are small credits targeted at individuals, but these credits have varying restrictions on use. The Recyclable Materials Processing Equipment and Alternative Recycling Credit is uncapped per taxpayer but the allowable credit is limited to 40% of the tax liability as computed prior to applying the credit (with excess credit being carried forward). In comparison the Worker Retraining Tax Credit is limited only by the parties' tax liability in that year and unused credits can be carried forward for up to three years and used against future tax liability. Alternatively, Virginia's Land Preservation Tax Credit is limited to \$50,000 per year per taxpayer.

Another example of the restrictions on the use of tax credits can be seen when looking at tax credit programs in Pennsylvania. The Pennsylvania tax code offers two somewhat similar tax credits in the Keystone Opportunity Zone and the Keystone

*Continued on page 9*

Innovation Zone Tax Credits. Both of these tax credits are designed to promote investment and hiring within specifically designated areas; however, the fact that the Keystone Opportunity Zone Tax Credit is eligible to be applied against the state's insurance premiums tax while the Keystone Innovation Zone Tax Credit is not applicable against insurance premiums tax changes the level of incentive for different parties and means that the tax credits will likely have varying monetization values.

In conclusion, it should be noted that there are more than 200 different state tax credits currently available to companies. These tax credits have different rules around timing of the credit, recapture, restrictions on use and transferability including the resulting taxation. It is important to understand what credits you may already be eligible for, whether or not you can efficiently utilize the credits, if adjustments can be implemented to gain eligibility, or whether you can monetize the tax credits as part effective state tax planning.

## Income

### Making Waves on the Left Coast: California's Ever-Changing Sales Factor Rules

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Over the course of the last three years, the California Legislature has enacted several significant changes that will impact how taxpayers apportion income for purposes of the Corporation Franchise Tax. The changes, generally effective for tax years beginning on or after January 1, 2011, include a single sales factor election with market-based sourcing and a reversion to the *Finnigan* rule. This article will explore these changes as well as efforts by the Franchise Tax Board ("FTB") to promulgate regulations applicable to certain of these amendments.

### Single Sales Factor Election

Since 1993, California has employed an apportionment formula consisting of a property factor, payroll factor, and double-weighted sales factor.<sup>1</sup> For tax years beginning on or after January 1, 2011, however, most corporate taxpayers may elect to apportion income to California based on a single sales factor.<sup>2</sup> The single sales factor election is an irrevocable annual election

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<sup>1</sup> See Cal. Rev. & Tax. Code § 25128(a). On a going forward basis, a taxpayer deriving more than fifty percent (50%) of its gross business receipts from qualified business activities (i.e., agricultural, extractive, savings and loan, banking, or financial activities) is required to continue using a traditional three-factor apportionment formula. See *id.* §§ 25128(b)-(d), 25128.5(a).

<sup>2</sup> See *id.* § 25128.5.

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that must be made on a timely filed original return.<sup>3</sup>

### ***New Regulatory Requirements for the Election***

On September 22, 2011, the California Office of Administrative Law approved the FTB regulation addressing the application of the single sales factor election.<sup>4</sup> The regulation interprets the requirement of a timely filed original return by defining an "original return" as the last return filed on or before the due date, including extensions.<sup>5</sup> Such original return is "timely filed" if it is filed on or before the due date, including extensions.<sup>6</sup>

For taxpayers filing combined reports, each taxpayer member of the combined reporting group must make the election in order for it to be effective.<sup>7</sup> The regulation provides examples addressing the application of the election to partnerships and scenarios involving qualified business activities.<sup>8</sup>

In addition, the regulation provides a business asset test for non-electing taxpayers that become part of a combined group electing to use single sales factor apportionment.<sup>9</sup> If the total business assets of the electing taxpayer members are greater than those of the non-electing taxpayers, then the non-electing taxpayers are deemed to have made the single sales factor election.<sup>10</sup> If the total business assets of the electing taxpayer members do not exceed the total business assets of the non-electing taxpayers, then the single sales factor election is terminated as of the date the non-electing taxpayers are determined to be

included in the combined group.<sup>11</sup>

Taxpayers making the single sales factor election should consider the potential impact of forced combination or decombination. For example, if a non-electing corporation is included in the combined group on audit, and has more business assets than the electing members of the combined group, then the combined group may lose the benefit of the single sales factor election.

### ***Controversy Surrounding the Election***

Allowing taxpayers to elect the weighting of the sales factor has not met with universal approval. California Governor Jerry Brown has been outspoken in his call to eliminate the election and require all taxpayers to use a mandatory single sales factor apportionment formula. In addition, the California Teachers Association sponsored Proposition 24 as a ballot initiative to repeal the single sales factor election and certain other tax provisions. The measure was not approved by California voters in the November 2010 election.

In January 2011, a bill was introduced proposing a mandatory single sales factor apportionment formula with market-based sourcing for all taxpayers.<sup>12</sup> The bill passed in the Assembly on September 8, 2011, but failed to pass in the Senate on September 9, 2011 due to a lack of Republican support.<sup>13</sup>

### **Market-Based Sourcing for Taxpayers Electing Single Sales Factor Apportionment**

For tax years prior to 2011, and beginning in 2011 for taxpayers not electing to use single sales factor apportionment, sales of other than tangible personal property (i.e., services and intangibles) are included in the numerator of the California sales factor if 1) the income-producing activity is performed wholly within California; or 2) the income-producing activity is performed both in and outside California and a greater proportion of the income-producing activity is performed in California than in any other state based

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<sup>3</sup> See *id.* § 25128.5(a).

<sup>4</sup> See Cal. Code. Regs. tit. 18, § 25128.5. The new regulation is effective October 22, 2011 and applies to tax years beginning on or before January 1, 2011. See *id.* The single sales factor regulation is modeled after the rules setting forth procedures for making a water's edge election (effective for tax years beginning on or after January 1, 2008). See *id.* § 25113.

<sup>5</sup> See Cal. Code. Regs. tit. 18, § 25128.5(a)(20).

<sup>6</sup> See *id.* § 25128.5(a)(30).

<sup>7</sup> See *id.* § 25128.5(b).

<sup>8</sup> See *id.* § 25128.5(b)(3).

<sup>9</sup> See *id.* § 25128.5(b)(4)(A).

<sup>10</sup> See *id.* § 25128.5(b)(4)(A).

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<sup>11</sup> See *id.* § 25128.5(b)(4)(A).

<sup>12</sup> See Cal. S.B. 116 (2011); Cal. A.B. 40 (2011).

<sup>13</sup> See Cal. S.B. 116; Cal. A.B. 40.

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on costs of performance (“COP”).<sup>14</sup>

For tax years beginning on or after January 1, 2011, if a taxpayer elects to use single sales factor apportionment, then the taxpayer is required to use market-based sourcing, rather than COP, for purposes of determining whether receipts from sales other than sales of tangible personal property should be included in the sales factor numerator.<sup>15</sup> Under the new rules, sales are included in the numerator of the sales factor based on the location where the purchaser receives the benefit of the services or the intangibles are used.<sup>16</sup> Although not discussed in detail here, it is important to note that the market-based sourcing rules will be used in applying California’s new “doing business” standard that went into effect on January 1, 2011.<sup>17</sup>

In order to implement the change to market-based sourcing, the FTB has issued a draft regulation to determine the location of the benefit of the services or use of the intangibles.<sup>18</sup> Most recently, the FTB held a public hearing on August 10, 2011 to accept comments on the draft regulation. The FTB plans to issue a revised version of the draft regulation, which

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<sup>14</sup> See Cal. Rev. & Tax. Code § 25136(a).

<sup>15</sup> See *id.* § 25136(b). As originally enacted on February 20, 2009, California required all taxpayers to use market-based sourcing, rather than COP, for tax years beginning on or after January 1, 2011. See Cal. S.B. 15. (3rd Ex. Sess. 2009). On October 8, 2010, the California Legislature amended the market sourcing requirement to apply only to taxpayers electing to use a single sales factor apportionment formula. See Cal. S.B. 858 (2010).

<sup>16</sup> See *id.* § 25136(b). For purposes of calculating the sales factor, the term “sales” means all “gross receipts” not allocated as nonbusiness income. See *id.* § 25120(e), (f)(1). For tax years beginning on or after January 1, 2011, the term “gross receipts” means gross amounts realized (not reduced by the cost of goods sold or basis of the property) on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction that produces business income in which income, gain, or loss is recognized under the Internal Revenue Code (“IRC”). See *id.* § 25120(f)(2). The term “gross receipts” does not include payment of debt principal, insurance proceeds, litigation damages, property acquired by an agent on another’s behalf, tax refunds or benefits, pension reversions, contributions to capital (except for sales of securities by a dealer), cancellation of debt income, amounts realized from exchanges of inventory that are not recognized under the IRC, amounts received from intangible assets held in a treasury function, or amounts received from hedging transactions involving intangible assets. See *id.*

<sup>17</sup> See Cal. Rev. & Tax. Code § 23101(b). As relevant here, under the new standard, a taxpayer is “doing business” within California if sales for the applicable tax year exceed the lesser of \$500,000 or twenty-five percent (25%) of the taxpayer’s total sales.

<sup>18</sup> See Prop. Cal. Code Regs. tit. 18, § 25136(b).

will be subject to a fifteen day comment period.

Like the market-based sourcing rules adopted by some other states, such as Illinois and Maine, the FTB’s draft regulation provides a “cascading” approach to determine where receipts should be sourced.<sup>19</sup> The draft regulation provides specific rules for sales of 1) services to individuals; 2) services to business entities; 3) complete transfers of intangible property; 4) licensing of marketing intangibles; 5) licensing of non-marketing and manufacturing intangibles; and 6) licensing of mixed intangibles.<sup>20</sup>

### **Sales of Services to Individuals**

For sales of services to individual customers, the benefit is presumed to be received at the customer’s billing address.<sup>21</sup> The taxpayer may overcome this presumption by showing, based on a preponderance of the evidence, that either the contract between the taxpayer and customer or the taxpayer’s books and records provide the extent to which the service is performed within California.<sup>22</sup> If the taxpayer overcomes the presumption, then the taxpayer may use an alternative method based on its contract or books and records.<sup>23</sup> If the taxpayer cannot determine an alternative method from its contract or books and records, then the location of the benefit of the services must be reasonably approximated.<sup>24</sup>

### **Sales of Services to Business Entities**

For sales of services to business entities, the benefit is presumed to be received at the location indicated by the contract between the taxpayer and customer or the taxpayer’s books and records, regardless of the customer’s billing address.<sup>25</sup> The taxpayer or FTB may overcome this presumption by showing, based on a preponderance of the evidence, that the location

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<sup>19</sup> See *id.* § 25136(b); 35 Ill. Comp. Stat. § 5/304(a)(3)(C-5); Me. Rev. Stat. Ann. tit. 36, § 5211.16-A.A.

<sup>20</sup> See Prop. Cal. Code Regs. tit. 18, § 25136(b).

<sup>21</sup> See *id.* § 25136(b)(c)(1).

<sup>22</sup> See *id.* § 25136(b)(c)(1)(A).

<sup>23</sup> See *id.* § 25136(b)(c)(1)(A).

<sup>24</sup> See *id.* § 25136(b)(c)(1)(B).

<sup>25</sup> See *id.* § 25136(b)(c)(2).

Continued on page 12

indicated by the contract or books and records was not the actual location where the benefit was received.<sup>26</sup> If the contract and books and records do not provide the location where the benefit is received or the taxpayer overcomes the presumption, then the location where the benefit is received must be reasonably approximated.<sup>27</sup>

If the location where the benefit is received cannot be reasonably approximated, then it is presumed to be the location from which the customer placed the order for service.<sup>28</sup> If the location from which the customer placed the order for service cannot be determined, then the location of the benefit is based on the customer's billing address.<sup>29</sup>

### **Complete Transfers of Intangible Property**

For sales constituting complete transfers of intangible property, the intangible is presumed to be used where the contract between the taxpayer and customer or the taxpayer's books and records provide that the purchaser will use the intangible.<sup>30</sup> The taxpayer or FTB may overcome this presumption by showing by a preponderance of the evidence that the purchaser's use of the intangible is inconsistent with the contract or books and records.<sup>31</sup> If the contract or books and records do not provide where the intangible property will be used or the taxpayer overcomes the presumption, then the location where the property will be used must be reasonably approximated.<sup>32</sup> This reasonable approximation must be based on the purchaser's activities in the jurisdictions where the purchaser will use the intangible and may include population data.<sup>33</sup> If the location of the purchaser's use of the property cannot be reasonably approximated, then the receipts are sourced based on the purchaser's billing address.<sup>34</sup>

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<sup>26</sup> See *id.* § 25136(b)(c)(2)(A).

<sup>27</sup> See *id.* § 25136(b)(c)(2)(B).

<sup>28</sup> See *id.* § 25136(b)(c)(2)(C).

<sup>29</sup> See *id.* § 25136(b)(c)(2)(D).

<sup>30</sup> See Prop. Cal. Code Regs. tit. 18, § 25136(b)(d)(1)(A).

<sup>31</sup> See *id.* § 25136(b)(d)(1)(A).

<sup>32</sup> See *id.* § 25136(b)(d)(1)(B).

<sup>33</sup> See *id.* § 25136(b)(d)(1)(B).

<sup>34</sup> See *id.* § 25136(b)(d)(1)(C).

### **Licensing Marketing Intangibles**

For sales constituting the licensing, leasing, rental, or other use of marketing intangibles (i.e., an intangible used in the marketing of goods or services, such as a trademark), royalties and license fees are presumed to be attributable to the location of the end users of the marketed goods or services, as provided in the contract between the taxpayer and licensee or the taxpayer's books and records.<sup>35</sup> If the contract and books and records do not provide the location of the end users, then the location of the use of the intangible property must be reasonably approximated based on the customer's activities, including through the use of population data.<sup>36</sup> If the licensing of the marketing intangible is for use in wholesale sales and the taxpayer cannot develop information regarding the location of the ultimate end users, then the taxpayer may source the receipts based on California's population as compared to the total population of the geographic area in which the licensee uses the marketing intangible.<sup>37</sup>

### **Licensing Non-Marketing and Manufacturing Intangibles**

For sales constituting the licensing, leasing, rental, or other use of non-marketing and manufacturing intangibles, such as patents and copyrights used for production purposes, the intangible is presumed to be used in the location where the license fee is paid for use of the intangible, as provided in the contract between the taxpayer and licensee or the taxpayer's books and records.<sup>38</sup> If the location of use cannot be determined from the contract or books and records, or the taxpayer or FTB overcomes the presumption, then the location of use of the intangible must be reasonably approximated based on the customer's activities to the extent such information is available.<sup>39</sup> If the location of use cannot be reasonably approximated, then the location of use is presumed to be the licensee's billing address.<sup>40</sup>

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<sup>35</sup> See *id.* § 25136(b)(d)(2)(A)(1).

<sup>36</sup> See *id.* § 25136(b)(d)(2)(A)(2).

<sup>37</sup> See *id.* § 25136(b)(d)(2)(A)(3).

<sup>38</sup> See *id.* § 25136(b)(d)(2)(B)(1).

<sup>39</sup> See Prop. Cal. Code Regs. tit. 18, 25136(b)(d)(2)(B)(2).

<sup>40</sup> See *id.* § 25136(b)(d)(2)(B)(3).

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## Licensing Mixed Intangibles

For sales constituting licensing of mixed intangibles, the FTB will accept reasonable separately stated fees for the marketing and non-marketing intangibles as provided in the licensing contract.<sup>41</sup> If the FTB determines that the separately stated fees are unreasonable, then it may source the fees based on a reasonable method that reflects the licensing of the marketing and non-marketing intangibles.<sup>42</sup> If the licensing fees are not separately stated, then it is presumed that the fees are paid entirely for the marketing intangible, unless the taxpayer or FTB reasonably establishes otherwise.<sup>43</sup>

## Return to Finnigan

Over the last forty-five years, California has repeatedly switched between application of the *Joyce* rule and the *Finnigan* rule.<sup>44</sup> Since 1999, California has applied the *Joyce* rule.<sup>45</sup>

Under the *Joyce* rule, the California destination sales of a member of a combined group are included in the numerator of the California sales factor only if the member is taxable in California.<sup>46</sup> Similarly, sales originating in California may be thrown back to the numerator of the California sales factor if the member making the sale is not taxable in the destination state, even if another member of the combined group is taxable in the destination state.

Under the *Finnigan* rule, the California destination sales of a member of a combined group are included in the numerator of the California sales factor if any member of the unitary group is taxable in California.<sup>47</sup>

Similarly, sales originating in California may be thrown back to the numerator of the California sales factor only if any member of the unitary group is not taxable in the destination state.<sup>48</sup>

In another about-face, California recently enacted legislation codifying the *Finnigan* rule for tax years beginning on or after January 1, 2011.<sup>49</sup> The FTB has issued a draft regulation implementing the change to the *Finnigan* rule.<sup>50</sup> The draft regulation provides the method for calculating the California source combined business income of a taxpayer member in a combined group.<sup>51</sup> The FTB has an interested parties meeting scheduled for October 4, 2011 to discuss these proposed amendments.

While the MTC and a majority of combined reporting states apply the *Joyce* rule, a minority of states, including California and New York, now apply the *Finnigan* rule.<sup>52</sup> A number of states that are recent adopters of combined reporting statutes (e.g., Massachusetts, Michigan and Wisconsin) have adopted the *Finnigan* rule.<sup>53</sup>

The *Finnigan* rule is attractive to state legislatures because it often results in a higher apportionment percentage for out-of-state taxpayers than the percentage they would compute under the *Joyce* rule (at least in states that receive more inbound sales than outbound sales). It remains to be seen whether California's return to *Finnigan* will lead a shift towards more states adopting the *Finnigan* rule, particularly as more states continue to adopt combined reporting.

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<sup>41</sup> See *id.* § 25136(b)(d)(2)(C)(1).

<sup>42</sup> See *id.* § 25136(b)(d)(2)(C)(1).

<sup>43</sup> See *id.* § 25136(b)(d)(2)(C)(2).

<sup>44</sup> California applied the *Joyce* rule from 1966 to 1988, the *Finnigan* rule from 1988 to 1999, and the *Joyce* rule from 1999 through 2010. See Cal. Rev. & Tax. Code § 25135; *Appeal of Finnigan*, Cal. State Bd. of Equal., No. 88 SBE-022-A (Aug. 25, 1988) ("*Finnigan I*"), *reh'g denied* (Jan. 24, 1990) ("*Finnigan II*"); Cal. FTB Notice 90-3 (June 8, 1990).

<sup>45</sup> See *Appeal of Huffy Corp.*, Cal. State Bd. of Equal., No. 99-SBE-005 (Apr. 22, 1999).

<sup>46</sup> See *Appeal of Joyce*, Cal. State Bd. of Equal., No. 66-SBE-069 (Nov. 11, 1966).

<sup>47</sup> See Cal. Rev. & Tax. Code § 25135(c).

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<sup>48</sup> See *id.*

<sup>49</sup> See Cal. Rev. & Tax. Code § 25135(c).

<sup>50</sup> See Prop. Cal. Code Regs. tit. 18, § 25106.5(c)(7)(A).

<sup>51</sup> See *id.* § 25106.5(c)(7)(A).

<sup>52</sup> See Cal. Rev. & Tax. Code § 25135(c); *Disney Enterprises, Inc. v. N.Y. Tax App. Trib.*, N.Y.3d 392 (N.Y. Ct. App. 2008); MTC, *Statement of Information Concerning Practices of MTC and Signatory States Under P.L. 86-272* (July 27, 2001).

<sup>53</sup> For Texas Margin Tax purposes, Texas applies the *Joyce* rule for the purpose of computing the sales factor, but also requires taxpayers to report based on *Finnigan* for informational purposes. See Tex. Tax Code § 171.103.

## Conclusion

The mechanics of the sales factor calculation continue to increase in importance as the trend towards single sales factor apportionment and heavier sales factor weighting expands. As such, California taxpayers should continue to monitor the changing tax landscape in California, as well as the FTB's policies in applying the legislative changes. Taxpayers expecting significant California tax liabilities should follow the progress of the draft regulations and participate in the FTB's interested parties meetings.

In addition to the impact on taxpayers' California tax liabilities, California is often a model for state tax law changes and policies throughout the United States. In light of this, prudent taxpayers should remain aware of the law changes and political climate in California.

[Subsequent to submission of this article for publishing, the FTB issued a revised draft of the proposed market-based sourcing regulation. See Prop. Cal. Code Regs. tit. 18, § 25136-2. The fifteen day comment period is open through October 24, 2011.]

## Property Tax

### Legislative Property Tax Update

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**P**opp, Gray & Hutcheson is pleased to report the following legislative developments during the latest session, in a number of which the firm was involved.

The session focused primarily on important technical changes resulting in improvement to the property tax system. There were 289 property tax related bills filed, and 57 were passed and sent to the governor. By comparison, in 2009 there were 354 property tax bills introduced with 54 passing, and in 2007, there were 310 introduced with 65 passing.

Many of the hot issues of previous sessions received little attention this year. Appraisal caps as a method of limiting property taxes had been a hot topic in previous sessions. It appears the Legislature may now understand that, as many studies have indicated, appraisal caps are an ineffective and damaging approach to property tax limitation. When appraisal cap bills were heard in Senate Finance, only one person testified in favor, and there was no legislative movement of these bills.

Similarly, there has been much discussion in previous sessions of strengthening the truth in taxation provision or providing revenue limitations on taxing units. These bills also received little attention from legislators.

Interest appears to have faded on several other previously hot topics such as popular election of chief appraisers or board of directors and changing the composition and selection of ARB members.

Overall, it was a very favorable session for taxpayers. The highlights of the session for taxpayers are as follows:

- Made attorney fees recoverable for a taxpayer in a State Office of Administrative Hearings appeal proceeding;

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- Enhanced the credibility of Appraisal Review Boards by limiting who may provide ARB's continuing education courses, who may comment on the courses and who may serve as their attorney;
- Provided a new notice and protest process for the imposition of a rendition penalty;
- Prevented the dismissal of a protest or lawsuit filed in the incorrect owner's name;
- Attorneys hired by a third party are now required to give notice of their engagement to the property owner.

The only bill of significance that passed that could be detrimental to taxpayers changed the interest rate on a refund following a lawsuit from eight percent to prime plus two percent. This is tempered by the fact that almost all appraisal districts require waiver of interest as part of the settlement of the lawsuit.

## Protests and Appeals

### HB 1887 by Villarreal

(Effective on Governor's Signature)

(Portion of bill-see OMNIBUS below for entire bill)

Allows correction of the appraisal roll under Section 25.25 if a person shows non-ownership of the property.

Changes the lawsuit filing deadline for a Section 25.25 lawsuit from 45 to 60 days.

Provides that a taxpayer must pay under protest the amount not in dispute for a motion pending under Section 25.25 or a 41.411. The ARB shall determine compliance with the payment requirements and the taxpayer may appeal the ARB decision to district court.

Prevents dismissal of a protest if it is filed in the name of the owner, a person identified in the appraisal records, an affiliate of the owner, or a misnomer that is not misleading.

Allows a property owner or a lessee that filed the protest to intervene in a lawsuit to prevent dismissal of the lawsuit because it was filed in an incorrect name.

Requires an ARB order to contain both the initial value and the final value.

Requires the court to order mediation upon motion of a party.

Provides that a no-evidence motion for summary judgment may be defended by introduction of evidence presented at the appraisal review board in the form of affidavit or testimony.

Provides that an expert witness may prepare an opinion of value on a chemical or utility property based on its characterization as personal rather than real property.

Requires attorney hired by a third party, such as a tax consultant, to provide notice to the property owner of the engagement, including an explanation of the attorney's ethical obligation to the property owner, a description of the duties the third party will perform in the lawsuit, and an explanation that the attorney will receive compensation from the third party and that the property owner's consent is required to receive compensation from the third party.

Requires that a separate request form be filed for each appeal for purposes of a refund request after an appeal.

### HB 2203 by Otto

(Effective on Governor's Signature)

Collin, Denton, Fort Bend, Montgomery and Nueces counties are added to the SOAH property tax appeal pilot program. The program previously applied to Harris, Tarrant, El Paso, Travis, Bexar and Cameron counties. The initial fee for SOAH is changed to \$1500 from \$300. SOAH had been having difficulty collecting fees from losing taxpayers and the purpose here was to remedy their problem. The award of attorney fees to a prevailing taxpayer under Section 42.29 of the Tax Code is authorized. The pilot expiration date is changed from January 1, 2013 to January 1, 2014.

### HB 2220 by Davis

(Effective on Governor's Signature)

A taxpayer that files a motion under Section 25.25 or 41.411 must comply with the payment under protest provisions contained in new Section 25.26 and 41.4115 which are similar to the Section 42.08 payment requirements. A taxpayer may protest failure to comply with these payment requirements to the ARB.

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**SB 1404 by Hinojosa**

(Effective on Governor's Signature)

Changes deadline for a lawsuit under Section 25.25 from 45 to 60 days.

**SB 1441 by Ellis**

(Effective 9/1/11)

Provides for the correction, under section 25.25, of an erroneous owner.

**SB 1341 by Seliger**

(Effective on Governor's Signature)

A taxing unit may not be made a party to a lawsuit under Chapter 42. Notice of a Section 42.08 compliance hearing must be mailed to each collector. A taxing unit may intervene in a lawsuit for the limited purpose of determination of compliance with Section 42.08.

## Appraisal District Operations

**HB 1887 by Villarreal**

(Effective on Governor's Signature)

(Portion of bill--see OMNIBUS below for entire bill)

Clarifies existing law that persons not required to be registered as tax consultants such as lawyers, realtors and brokers have clear authority to receive ARB notices without the filing of fiduciary authorizations. Lawyers do not have to file fiduciary authorizations but this created some practical difficulty in receiving notices.

Provides that the chief appraiser, employees of another appraisal district, a member of the board of directors and an ARB member are prohibited from providing ARB education courses. Previously, the course could not be provided by the appraisal districts. The Comptroller is responsible for providing ARB education courses or contracting with service providers to provide ARB education courses.

Prohibits communication by a chief appraiser, an employee of the appraisal district, a district board member, an officer or employee of a taxing unit, and a lawyer representing the appraisal district from commenting on, or discussing with, the ARB an education course offered to the ARB.

Authorizes an ARB to retain a licensed appraiser to advise it on appraisal methodology.

Prohibits a person related to a member of the board of directors from serving on the ARB.

Adds members of the board of directors, property tax consultants and attorneys representing taxpayers to those prohibited from ex parte communications with an ARB. The chief appraiser and other employees of the district were previously prohibited from ex parte communication with the ARB.

Prohibits a person from serving as an attorney to an ARB if the person represents the appraisal district, a taxpayer or a taxing unit. An exception is provided for the county attorney. Provides an exception to the ARB hiring of an attorney that represents an appraisal district to allow the attorney to seek the dismissal of a lawsuit improperly filed against the ARB.

**HB 896 by Howard**

(Effective on Governor's Signature)

Allows the board of directors to appoint auxiliary ARB members to hear protests but the auxiliary members have no voting rights.

**HB 1179 by Flynn**

(Effective on Governor's Signature)

Changes are made to the registration requirements of appraisal district appraisers and assessors and collectors.

**HB 2387 by Menendez**

(Effective on Governor's Signature)

Provides that an appraisal district may not employ a general counsel. The board of directors may employ a general counsel to the district to serve at the will of the board.

**SB 1546 by Patrick**

(Effective 9/1/11)

Provides that a person designated as an agent who misses a protest hearing is entitled to a new hearing upon a showing of good cause. Previously, this applied only to an owner who had not designated an agent under Section 1.111.

**SB 682 by Huffman**

*Continued on page 17*

(Effective on Governor's Signature)

Allows appraisal districts access to criminal records for the purpose of review of appraisal review board candidates.

### **SB 1130 by Hegar**

(Effective on Governor's Signature)

Information provided to an appraisal district concerning sales information provided by persons other than the owner, including MLS information, was previously made confidential. This created a lack of sales information in some counties. Previously, the provision did not apply to counties of less than 20,000. This was raised to counties of less than 50,000.

## **Rendition**

### **HB 533 by Villarreal**

(Effective on Governor's Signature)

Requires that the chief appraiser must provide notice of the rendition penalty. The property owner then may protest the imposition of the penalty. Previously, the penalty could appear for the first time on the tax bill without notice to the property owner. The penalty becomes final if not protested or upon final determination of a court.

Provides that a property owner does not have to render property subject to valuation under Section 23.24. Section 23.24 provides that if the valuation method for real property takes into consideration the value of personal property, the personal property is not subject to additional taxation.

## **Exemptions**

### **HB 252 by Hilderbran**

(Effective in part 9/1/11 and 1/1/12)

Provides that an applicant for a residence homestead cannot claim a residence homestead in another state and in Texas at the same time. The application for exemption must include a copy of a driver's license or a state issued identification and a

vehicle registration or utility bill.

### **HB 645 by Orr**

(Effective 9/1/11)

Provides that an organization applying for a charitable exemption may provide federal tax identification rather than a driver's license number, personal identification certificate number or social security number as is currently required.

### **HB 2280 by Eiland**

(Effective on Governor's Signature)

Requires that one member of the TCEQ pollution control exemption advisory committee must be from a school district or junior college that had or has such an exemption.

### **HB 3133 by Rodriguez**

(Effective 9/1/11)

Clarifies that the exemption for organizations that build low income housing is not lost on a technicality, and provides that the property should be valued based on its restricted use relating to limitations on marketability. Currently, Habitat for Humanity affiliates receive a property tax exemption on land they have acquired and are using to build affordable housing. Some Habitat for Humanity affiliates have created community development housing organizations (CHDO) to take advantage of certain federal funds. However, there was some question as to whether this results in loss of exemption.

### **SB 201 by Uresti**

(Effective 1/1/12)

Provides that a person who qualifies for a totally disabled veteran's residence homestead exemption after January 1 may receive the exemption for a portion of the year. If a totally disabled residence homestead exemption is lost during the year, the taxes are based on the number of days the person qualified.

### **SB 516 by Patrick: SJR 14**

(Effective on Governor's Signature)

Provides that a surviving spouse of a totally disabled veteran is entitled to the disabled veteran homestead exemption upon the death of the disabled veteran spouse.

*Continued on page 18*

**SB 1120 by Seliger**

(Effective on Governor's Signature)

Provides that property of a municipal power agency located outside the boundaries of the municipality that created the agency is not exempt from taxation.

## Appraisal and Special Appraisal

**HB 361 by Otto**

(Effective 9/1/11)

Removes the requirement that one member of the agriculture advisory board be a representative of the county agricultural stabilization service.

**HB 2476 by Harless**

(Effective 1/1/12)

Changes the method for determining the market value of heavy equipment inventory for rent or lease.

**HB 3727 by Hilderbran**

(Effective 2012 tax year)

Provides that the market value of a "temporary production aircraft" is set at ten percent of the aircraft's list price.

**SB 449 by Watson: SJR 15 Estes**

(Effective on Governor's Signature and passage of constitutional amendment)

Provides that agricultural use for purposes of open space valuation includes water stewardship. The applicable category of land for purposes of water stewardship treatment is the category in place before the water stewardship began. Includes standards for water stewardship. Land is not eligible for water stewardship valuation if located within a city. Land is also not eligible if it is developed to an extent that it would no longer qualify for open space or timber valuation except based on water stewardship.

**SB 1385 by Lucio**

(Effective 9/1/11)

Provides authority, not previously present, for a chief appraiser to waive certain penalties of dealer's inventory of motor vehicles, outboard vessels or heavy

equipment if the penalty was due to a reasonable cause.

**SB 1505 by Uresti**

(Effective 1/1/12)

Changes the methodology for valuing oil and gas property.

## Collections

**HB 499 by Rodriquez**

(Effective on Governor's Signature)

Provides that taxes that become delinquent on a supplemental tax bill sent after the resolution of a lawsuit may incur the additional attorney fee collection penalty provided in Section 33.08.

**HB 843 by Geren**

(Effective 9/1/11)

Authorizes an assessor to deliver a tax bill by electronic means upon request of a taxpayer.

**HB 930 by Darby**

(Effective on Governor's Signature)

Changes are made to the tax warrant requirements.

**HB 1090 by Gonzalez**

(Effective 9/1/11)

Changes the interest rate on lawsuit refunds from eight percent to two percent plus prime not to exceed eight percent.

**HB 1118 by Ritter**

(Effective on Governor's Signature)

Provides that property purchased by a taxing unit at a tax sale may be resold for its current appraised value or for a greater amount and the sale will be free and clear of any post-judgment taxes so long as each taxing unit entitled to receive proceeds approves the sale.

**HB 2104 by Jackson** (Effective 9/1/11)

*Continued on page 19*

Provides that the minimum amount of bond required of a tax collector is set at \$2500. Previously, there was no minimum but there was a maximum of \$100,000. A county of greater than 1.5 million may now set a bond at greater than \$100,000.

**HB 2169 by Aycock** (Effective on Governor's Signature)

Provides that taxing units are specifically authorized to rescind tax payment discounts that they have previously adopted. There was some question as to whether they had this authority.

**HB 2338 by Paxton**

(Effective 9/1/11)

Requires a county that maintains a website to post tax rate information and truth in taxation information for all of the taxing units in the county.

**SB 432 by Jackson**

(Effective 9/1/11)

Reduces the delinquent tax penalty of an installment payment of property in a disaster area to six percent from twelve percent.

**SB 551 by Williams**

(Effective 9/1/11)

Provides that interest is not due on an omitted property improvement if the appraisal district had constructive notice of the improvement, the land was taxed in the prior year and the taxpayer pays within 120 days after the tax bill is sent. A tax bill on an improvement that escaped taxation must state that no interest is due on the bill if paid within 120 days.

**SB 582 by Harris**

(Effective 9/1/11)

Changes service of process procedures in a delinquent tax suit against a limited liability corporation which has forfeited its right to transact business.

**SB 762 by Corona**

(Effective 9/1/11)

Provides additional procedures for the transfer of a property tax lien.

## Omnibus

**HB 1887 by Villarreal**

(Effective on Governor's Signature)

(Portions contained in previous sections)

Clarifies existing law that persons not required to be registered as tax consultants, such as lawyers, realtors and brokers, have clear authority to receive ARB notices without the filing of fiduciary authorizations. Lawyers do not have to file fiduciary authorizations but this created some practical difficulty in receiving notices.

Provides that the chief appraiser, employees of another appraisal district, a member of the board of directors, and an ARB member are prohibited from providing ARB education courses. Previously, the course could not be provided by the appraisal districts. The Comptroller is responsible for providing ARB education courses or contacting with service providers to provide ARB education courses.

Prohibits communication by a chief appraiser, an employee of the appraisal district, a district board member, an officer or employee of a taxing unit, and a lawyer representing the appraisal district from commenting on or discussing with the ARB an education course offered to the ARB.

Authorizes an ARB to retain a licensed appraiser to advise them on appraisal methodology.

Prohibits a person related to a member of the board of directors from serving on the ARB.

Adds members of the board of directors, property tax consultant and attorney representing a taxpayer to those prohibited from ex parte communications with an ARB. The chief appraiser and employees of the district were previously prohibited from ex parte communication with the ARB.

Prohibits a person from serving as an attorney to an ARB if the person represents the appraisal district, a taxpayer or a taxing unit. An exception is provided for the county attorney. Provides an exception to the ARB hiring of an attorney that represents an appraisal district to allow the attorney to seek the dismissal of a lawsuit improperly filed against the ARB.

Allows correction of the appraisal roll under Section 25.25 if a person shows non-ownership of the property.

*Continued on page 20*

Changes the lawsuit filing deadline for a Section 25.25 lawsuit to 60 days from 45 days.

Provides that a taxpayer must pay under protest the amount not in dispute for a motion pending under Section 25.25 or 41.411. The ARB shall determine compliance with the payment requirements and the taxpayer may appeal the ARB decision to district court.

Prevents dismissal of a protest if it is filed in the name of the owner, a person identified in the appraisal records, an affiliate of the owner, or a misnomer that is not misleading.

Allows a property owner or a lessee that filed the protest to intervene in a lawsuit to prevent dismissal of the lawsuit because it was filed in an incorrect name.

Requires an ARB order to contain both the initial value and the final value.

Requires the court to order mediation upon motion of a party.

Provides that a no-evidence motion for summary judgment may be defended by introduction of evidence presented at the appraisal review board in the form of affidavit or testimony.

Provides that an expert witness may prepare an opinion of value on a chemical or utility property based on its characterization as personal rather than real property.

Requires an attorney hired by a third party such as a tax consultant to provide notice to the property owner of the engagement, including an explanation of the attorney's ethical obligation to the property owner, a description of the duties the third party will perform in the lawsuit, and an explanation that the attorney will receive compensation from the third party and that the property owner's consent is required to receive compensation from the third party.

Requires that a separate request form be filed for each appeal for purposes of a refund request after an appeal.

## Sales and Use Tax

### The Multistate Tax Commission's Draft Model Sales & Use Tax Notice and Reporting Statute

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### Introduction

This December 1, 2011, the Multistate Tax Commission's Executive Committee will meet in Charleston, South Carolina, where one of several interesting items on its agenda will be the proposed Model Sales & Use Tax Notice and Reporting statute.<sup>1</sup> The model requires remote sellers that do not collect and remit the state's sales or use tax to notify in-state purchasers that tax may be due directly to the state and to make two annual reports (one for the purchaser and one for the tax department). The Executive Committee will decide whether the model should move to the final stage of the MTC uniformity process: consideration for adoption by the Commission.

The MTC Uniformity Committee initiated this project in 2010, just days after similar legislation was introduced in the Colorado legislature. Since then, "use tax notice" legislation has been introduced in at least

<sup>1</sup> The Executive Committee will also consider whether draft model compact amendments for Article IV.1(g) (definition of "sales") and Article IV.17 (sales factor sourcing for services and intangibles) are ready for public hearing. Note that the Multistate Tax Commission's meetings are open to the public, dial-in is provided for those who cannot attend in person, and comments from the public are welcome and encouraged.

*Continued on page 21*

ten states,<sup>2</sup> enacted in five,<sup>3</sup> and subject to litigation in one.<sup>4</sup> If adopted by the Commission, the proposal would serve as a model for other states that wish to consider the concept. This note gives a brief summary of the proposed model, explains its role, and highlights a few of the issues it raises.

## The Model and its Role

In a broad sense, the variety of approaches for addressing consumers use tax compliance challenges fall into one of two categories: (1) efforts to lift the *Quill* physical presence limitation, or (2) efforts to work within the *Quill* physical presence limitation.<sup>5</sup> Efforts to lift the *Quill* limitation have focused on Congress and the federal Streamlined legislation,<sup>6</sup> but also include the periodic ruminations on another attempt through the courts. Because the drive toward federal legislation was built on a collaborative uniformity effort that resulted in a Streamlined Sales and Use Tax Agreement enacted by 21 states, these efforts

<sup>2</sup> Introduced: *Alabama* – HB 365 (2011); *Arizona* – HB 2341(2011); *California* – AB 155 (2010); *Colorado* – HB 1193 (2010); *Hawaii* – HB 1183 (2010); *Maine* – LD 469 (2011); *Oklahoma* – HB 2359 (2010); *South Carolina* – SB 36 (2011); *South Dakota* – SB 146 (2011); *Vermont* H 436 (2011, sec. 36b).

<sup>3</sup> Enacted:

- *Colorado* – §39-21-112(3.5), C.R.S. (2010) (notice and annual reports to purchaser and Department) <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=>
- *Oklahoma* – Ok. Stat. §710:65-21-8 (notice requirement only.) <http://www.tax.ok.gov/rules/710-65-21-8%20AD-OPTEd.pdf>.
- *South Carolina* – S.C. code ann. § 12-36-2691(E)(1) (requires notice by an entity that qualifies for a “distribution facility” nexus safe-harbor.) <http://e-lobbyist.com/gaits/text/317603>
- *South Dakota* – SB 146 (2011) (notice required) <http://legis.state.sd.us/sessions/2011/Bills/SB146ENR.pdf>
- *Vermont* – 32 V.S.A. § 9783 (authorizes NY-style associate nexus after 15 states have adopted such approach. In the meantime, requires remote sellers to notify customers of possible use tax responsibility.) <http://www.leg.state.vt.us/docs/2012/Acts/ACT045.pdf>

<sup>4</sup> *Direct Marketing Association v. Huber*, U.S. Dist. Ct., Dist. of Co., No. 10-cv-01546-REB-CBS (Order granting motion for preliminary injunction; January, 2011)

<sup>5</sup> *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

<sup>6</sup> See, S. 1452, Main Street Fairness Act (112<sup>th</sup> Congress) introduced July 29, 2011  
<http://thomas.loc.gov/cgi-bin/query/z?c112:s1452>:

will have been productive regardless of whether the ultimate goal is ever reached.

The second category – efforts to work within the *Quill* limitation – includes all those statutes, rules, and directives necessary to effectively administer the tax in the reality of the meantime. What constitutes physical presence in the context of remote sellers and internet sales? Guidance on this point includes the states’ “affiliate nexus” rules (regarding when the physical presence of a related entity may create representational nexus<sup>7</sup>) and “associate nexus” rules (patterned on New York’s legislation regarding when the physical presence of a resident engaged in selling or referring sales through its website creates representational nexus<sup>8</sup>). It is understood that without a physical presence an entity cannot be required to collect and remit the use tax, no matter how extensive its market in the state. But does that mean the entity cannot be required to perform any responsibilities for the state? The Commission’s model Sales & Use Tax Notice and Reporting Statute, based on the Colorado legislation, would establish notice and reporting responsibilities applicable to entities that do not have a physical presence and are not required to collect and remit sales or use tax.

### The model’s key features are:

***Stand-Alone Act:*** The model is designed so that it can be introduced as a stand-alone Act, rather than as part of the tax statute, because it does not impose a tax or require collection of a tax.

***Notice and/or Reporting Required:*** Sellers that do not collect and remit state sales or use taxes on items delivered into the state must provide (states could enact one or more of the following requirements):

<sup>7</sup> See e.g.: *Alabama*, Ala. Code §40-23-190; *Kansas*, K.S.A. §79; *Maine*, Me. Rev. Stat. Ann. tit. 36, §1754-B(1)(G); *Minnesota*, Minn. Stat. §297A.66; and over 25 others. The Commission developed a model affiliate nexus statute but when it was considered in August 2006 it did not receive the population-weighted votes required for adoption.

<sup>8</sup> See e.g.: *California*, Cal. Rev. & Tax Code §6203; *Connecticut*, Conn. Gen. Stat. §12-407(a)(12)(L); *New York*, N.Y.S. §1101(8)(vi); *North Carolina*, N.C. Gen. Stat. §105-164.8; *Rhode Island*, R.I. Gen. Laws §44-18-15(a)(2); *Vermont*, Vt. Stat. Ann. Tit. 32, §9701. The Commission states voted in March 2010 to develop a model similar to these types of statutes. Uniformity Committee drafting began with the completion of the Colorado style model. A teleconference is scheduled for October 11, 2011 to review the first draft. <http://www.mtc.gov/Uniformity.aspx?id=5303>

Continued on page 22

1. Notice to customers at the time of the transaction that tax is not being collected and that the customer may owe the tax directly to the department;
2. Annual report to customers showing their purchases for the year; and/or
3. Annual report to the tax department showing total dollar amount of each purchaser's purchases.

*Exceptions:* (1) small sellers, (2) sellers with only *de minimis* in-state sales, and (3) sellers that are registered to collect the tax.

*Penalties and Interest:* Penalties apply for failure to provide notice or reports, and interest accrues on the penalty once it becomes final.

*Confidentiality:* All customer information received by the tax agency would be treated as confidential taxpayer information.

## Issues Raised

Several issues have been raised regarding the model. Two of the most important are its compatibility with other major efforts, most notably Streamlined, and its constitutionality.<sup>9</sup>

### Policy Issue - Compatibility with Other Efforts?

Because the Commission's proposed model and the Streamlined effort address the same basic problem – low consumers' use tax compliance – questions have come up as to whether the two are compatible. But each effort approaches the problem in a different manner. The Streamlined effort is focused on encouraging remote *sellers* to collect and remit the tax, either purely voluntarily or as required by possible federal legislation. The model is focused on educating and assisting in-state *buyers* with their use tax responsibilities in

<sup>9</sup> These and other issues are discussed in depth in the hearing officer's report for the model, available at: [http://www.mtc.gov/uploadedFiles/Multistate\\_Tax\\_Commission/Uniformity/Uniformity\\_Committee\\_and\\_Subcommittees/June\\_6,\\_2011\\_Executive\\_Committee\\_Meeting/Hearing%20Officer%20Report%20with%20Exhibits.pdf](http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Uniformity/Uniformity_Committee_and_Subcommittees/June_6,_2011_Executive_Committee_Meeting/Hearing%20Officer%20Report%20with%20Exhibits.pdf)

Also see additional comments at [http://www.mtc.gov/uploaded-Files/Multistate\\_Tax\\_Commission/Committees/Executive\\_Committee/Scheduled\\_Events/2011-05-27%20Letter%20of%20Rep.%20Choy%20RE%20SalesUse%20Tax%20Reporting%20Model.pdf](http://www.mtc.gov/uploaded-Files/Multistate_Tax_Commission/Committees/Executive_Committee/Scheduled_Events/2011-05-27%20Letter%20of%20Rep.%20Choy%20RE%20SalesUse%20Tax%20Reporting%20Model.pdf)

situations *where the seller does not collect* and remit for them. It is generally agreed that collection by sellers is a more efficient mechanism for administering sales and use taxes. As the streamlined project makes progress in that direction, it's the preferred approach. The Commission model would not change or interfere with that effort. These two could complement each other by working toward seller collection on the one hand; and buyer education and compliance on the other. The same compatibility should hold for the model and the New York style "associate nexus" approach. A state might logically employ all three approaches.

### Legal Issue – Constitutionality?

The Commission model is based on the Colorado sales & use tax notice and reporting statute, which was subject to litigation almost immediately after it was enacted. The Direct Marketing Association filed suit in the U.S. District Court for the District of Colorado arguing that the new law violates several state and federal constitutional provisions, including the dormant commerce clause, right to privacy, and right to free speech.<sup>10</sup> And in January, 2011, the District Court granted DMA's motion to preliminarily enjoin Colorado from administering its statute while the lawsuit is pending. Should the Commission stay its consideration of the model pending the results of this litigation?

There would be costs as well as benefits associated with a stay. The benefit of waiting to propose a model until its legal issues are conclusively resolved is, of course, certainty. But it could be a long time before such certainty is achieved in this matter. The Colorado litigation is in its early stages. And as the concept is tested in other state or federal Courts, those Courts may view the issues differently. Meanwhile, state commentators have recommended states consider adopting this or similar approaches. A published article by experts at the New York State Department of Taxation and Finance reviews the constitutional issues and recommends, consistent with the proposed model, that states require sellers to make reports to the department and provide notice to buyers.<sup>11</sup> Five states have now enacted laws along these lines, and legislation has been introduced in others. Having a

<sup>10</sup> *Direct Marketing Association v. Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue*, United States District Court for the District of Colorado, Civil Action No. 10-cv-01546-REB-CBS.

<sup>11</sup> A New Way Forward for Remote Vendor Sales Tax Collection; Robert Plattner, Daniel Smirlock, and Mary Ellen Ladouceur; Tax Analysts Special Report; January 18, 2010; p. 187, 194.

*Continued on page 23*

model available – one that has benefited from the input of state and private sector tax experts through the Commission uniformity process – could assist states in adopting legally sound legislation in the first place. It may also assist states in adopting more uniform legislation, which is important to minimizing the potential for administrative burden on interstate remote sellers.

What are the constitutionality arguments? The Colorado District Court granted DMA's motion because it found DMA is likely to succeed on its dormant commerce clause argument.<sup>12</sup> The Court applied *Quill* and reasoned that although the Act does not explicitly target out-of-state sellers, "in practical effect, [it] impose[s] a burden on interstate commerce that is not imposed on in-state commerce."<sup>13</sup> But by some analyses, this reasoning is incomplete.<sup>14</sup> To assess discrimination, there must be a comparison. And to compare the treatment of interstate sellers with in-state sellers, one must consider the requirements imposed on in-state sellers as well.<sup>15</sup> It remains to be seen how, or even whether, the Court will weigh the contrasting requirements of notice (that tax is due to seller), collection, reporting (of the tax), and remittance on the one hand; and notice (that tax may be due directly to the state) and reporting (of the potential tax base) on the other. Ironically, because the Court found the case should be reviewed in the context of *Quill*, this approach, which was intended as a means of working within the *Quill* limitations, may ultimately be a vehicle for a Court to reconsider the *Quill* limitations.

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<sup>12</sup> The parties have now filed cross motions for summary judgment on that issue; and the Court has agreed to certify its decision on those cross motions for appeal. The other constitutional arguments will be stayed, pending the ultimate resolution of the dormant commerce clause issue. The decision granting preliminary injunction is available at:

<http://www.thedma.org/segment/segmentfiles/catalogers/20110126OrderGrantingPI.pdf>.

<sup>13</sup> *Direct Marketing Association v. Roxy Huber, in her capacity as Executive Director, Colorado Department of Revenue*, USDC Dist. of Co., Civil Action No. 10-cv-01546-REB-CBS, Order Granting Motion for Preliminary Injunction (January 26, 2011)

<sup>14</sup> It should also be mentioned that the model does not literally distinguish between in-state and interstate commerce. It distinguishes between sellers that are required to collect and remit the tax and those that are not required to collect and remit the tax. Under current U.S. Supreme Court precedent, this distinction is in-state and interstate sellers with a physical presence vs. interstate sellers without a physical presence. Interstate sellers that have no physical presence in a state would be subject to the requirements of the proposal.

<sup>15</sup> See, *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (other related laws taken into account in determining whether an Act discriminates in violation of the dormant commerce clause.)

## Amicus Brief

***Tesoro Refining and Marketing Company,***  
Respondent,  
**v.**  
***State of Washington, Department of Revenue,***  
Petitioner.

**Cass D. Vickers, CMI, Esq.**

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**N**orman J. Bruns and Michelle DeLappe of Garvey Schubert Barer in Seattle graciously contributed their time and expertise in preparing an amicus curiae brief on IPT's behalf in an important Washington Supreme Court decision, *Tesoro Refining and Marketing Co. v. Department of Revenue*, Case No. 85556-1. The case considers legislation that retroactively denies a B&O tax deduction. The Department had for years interpreted the controlling statute as affording the deduction to manufacturers, as well as those engaged in wholesaling and retailing, but changed its position in response to a refund claim from Tesoro, asserting that it did not apply to manufacturing. The Department secured legislation, operating retroactively over the preceding 24 years, endorsing its new stance. IPT considers such retroactive tax measures inconsistent with equitable tax administration and therefore sought and received permission to file this friend-of-the-court brief asking that the Court of Appeals decision striking the retroactive measure be upheld. Excerpted portions of the brief appear below:

“Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation because it can deprive citizens of legitimate expectations and upset settled transactions.”

Another concern - very much present here - is the potential for targeting unpopular taxpayers with retroactive laws. *Tesoro*, 159 Wn. App. at 118 (“[T]he legislative history of the 2009 act shows the recent amendment was in direct response to Tesoro’s refund request.”)

Protections from unfair retroactive legislation are deeply ingrained in Washington law. Reflecting the

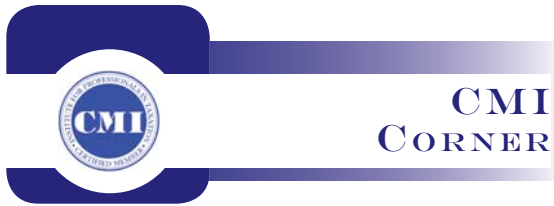
same fundamental notions of justice discussed above, the Washington Constitution generally requires delayed effective dates for new legislation. Const. art. II, § 41. This allows citizens time to learn of new legislation, consider its effect, and adjust the conduct of their affairs accordingly.

Washington’s specific concern with legislation imposing tax on prior transactions is clearly articulated in the cases cited by the Court of Appeals. In *State v. Pacific Tel. & Tel. Co.*, 9 Wn.2d 11, 113 P.2d 542 (1941), this Court considered whether an existing tax, newly extended in 1939 to transactions as early as 1935, exceeded the “limit of permissible retroactivity.” The Court concluded that the four-year retroactive period was excessive and struck down the statute’s retroactive feature. This Court also held that retroactive application of a new tax for the two and one-half months preceding enactment violated due process. *Bates v. McLeod*, 11 Wn.2d 648, 655-56, 120 P.2d 472 (1941). These cases are this state’s controlling precedents on retroactive tax increases, as correctly decided by the Court of Appeals in this case. This Court should adhere to those precedents.

Citing *Carlton* as an example, Justice Kennedy observed in *Eastern Enterprises*, [524 U.S. 498] “In our tradition, the degree of retroactive effect is a significant determinant in the constitutionality of a statute.” *Id.* at 548.

Retroactively reversing this Court’s interpretation of the 1983 legislation - an interpretation initially adopted by the Department of Revenue, itself, see *Dot Foods*, 166 Wn.2d at 915-17, 921 - is an example of the lengths to which lawmakers can go if they perceive themselves as unfettered by due process constraints on tax legislation. Similarly, in this case, the Department altered its interpretation of the 1985 legislation at issue here very recently. Confronted with litigation, the Legislature decided to extend the Department’s new interpretation far into the past. This conduct offends the values of uniform and equitable administration of taxes that underlie the common law and constitutional protections for taxpayers.

The Court of Appeals issued a well-reasoned analysis rejecting the Legislature’s mid-litigation attempt to change the law applying to past tax periods. Affirming the Court of Appeals’ decision will appropriately guide the Legislature away from further misuse of the power of taxation.



## Question of the Month

### **H**ow do I find the “Application for Continuing Education Credit” form that I need to submit with my CE?

This form is available on our website. To access the form, please click on “CMI Professional Designation” at the top of our home page and scroll to the bottom of the page. At the bottom of the page, click on the link that says “Current CMIs” in your respective discipline. The form is at the bottom of the page under “Forms”. You may also use the following link: <http://www.ipt.org/files/pdf/Contedappfillin.pdf>

Credits submitted from other organizations must include IPT’s Application for Continuing Education Credit Form with the required information and be submitted no later than March 31 of the year following the year that the credit was earned. This form must also be attached to any employer in-house CE reports.



## What is the CMI Designation Program?

The CMI professional designation is a mark of distinction in property, sales and use and state income taxation. Earning the CMI designation is both a personal achievement and a credit to the profession. The CMI designation is more than a mere credential; it is a demonstration of expertise in your respective field. It also shows the rest of the tax world that professionals in taxation, namely IPT members, are serious about professional development and recognizing professional experience and knowledge. Since the beginning of the CMI professional designation program in 1979, over 1600 income, property and sales and use taxation professionals have earned the CMI designation. Currently, there are nearly 1000 active CMIs working in the taxation profession. By becoming a CMI, you can become a member of this select group of recognized tax professionals.

Those interested in pursuing the designation in 2012 should start planning now to be sure they meet the minimum criteria needed to sit for the exams. Our website contains valuable information for candidates including a checklist to help them determine the CE requirements needed to sit for the exam. Each discipline has its own checklist. Please use the links below to help plan your future:

[CMI-Income Candidate Page](#)

[CMI-Property Candidate Page](#)

[CMI-Sales Candidate Page](#)

Any questions regarding the CMI Professional Designation can be addressed to Christina Webb, Manager of Education and Certification programs at [cwebb@ipt.org](mailto:cwebb@ipt.org) or Emily Archer, Certification Specialist at [earcher@ipt.org](mailto:earcher@ipt.org).

## MARK YOUR CALENDAR!

### 2012 ABA/IPT ADVANCED TAX SEMINARS

**MARCH 19-23, 2012  
THE RITZ-CARLTON  
NEW ORLEANS, LA**



**ADVANCED ABA/IPT  
INCOME TAX SEMINAR  
MARCH 19-20**

**ADVANCED ABA/IPT  
SALES/USE TAX SEMINAR  
MARCH 20-21**

**ADVANCED ABA/IPT  
PROPERTY TAX SEMINAR  
MARCH 22-23**

### Property Tax Calendar November 2011

This information is provided by International Appraisal Company (IAC) and is provided for quick reference/reminder purposes only. Neither IPT nor IAC makes any guarantee to completeness or accuracy and is not responsible for errors or omissions or for any results from the use of this information.

Dates vary; users should confirm dates for their jurisdiction.

#### Appeals Due:

MA*	RI*	VA*	WI*
CA	11/30-Counties that do not mail assessment notices by 8/1		
NY	Yonkers 11/1-11/15		
ND	11/1 of the year after the year in which taxes are due (Abatement request)		

\*Dates vary, check jurisdiction

#### Personal Property Filing Dates:

CT 11/1

**Assessment Dates:** None

### GEORGIA ONE-DAY TAX SEMINAR

November 18, 2011

**Crowne Plaza Ravinia Hotel  
Atlanta, GA**

Program

Registration





Photos courtesy of Monterey County CVB



## *Don't miss IPT's Property Tax Symposium in Monterey, California, set on the dramatic Pacific Ocean coastline, November 6-9, 2011!*

**T**his two and a half-day Property Tax Symposium features general presentations as well as specialized breakout sessions of timely interest to all property tax professionals. The program, developed to emphasize practical applications of theories, techniques, and procedures to everyday situations, will be invaluable to property tax representatives from all industries at all levels of experience. This program can be used to help meet the requirements for the CMI in Property Tax.

### **General Sessions Include:**

- The Economy: Fast and Furious
- Ethics: Prominence to Prison: Why Smart People do Dumb Things
- The Nestlé and UTGR Decisions: Case Studies in Challenging & Litigating Assessments of Unique Properties
- Real Estate Damage Economics
- Common Misuses of Survey Publications for Cap Rates & Discount Rates

### **Breakout Sessions Include:**

- Commercial & Industrial Transactions Since the Crash, Where Do They Go From Here - Midwest
- Ethics in Negotiation
- Property Tax Incentives
- The Graying Property Tax Profession - What are we doing to bring new people in
- Commercial & Industrial Transactions Since the Crash, Where Do They Go From Here- SE
- The Art of the Appeal: Practical Tips for Handling Property Tax Appeals
- Hotel Valuation
- Commercial & Industrial Transactions Since the Crash, Where Do They Go From Here- NE
- CIP: Real & Personal Property Valuation Issues
- Property Tax Reform - Legislative & Case Law Update
- CMI Academy - Part I (Designed for CMIs)
- Commercial & Industrial Transactions Since the Crash, Where Do They Go From Here- West
- Implications of Commodity Prices on Industrial Property Tax Valuations
- CMI Academy - Part II (Designed for CMIs)
- CMI Academy - Part III (Designed for CMIs)
- Fee Simple vs. Leased Fee - The Battle Continues
- How Is the Green Movement Creating Functional Obsolescence?
- Wind Energy Facilities Valuation and Taxation Issues
- New Lease Accounting Rules & Implications for Property Tax Purposes
- Commercial Real Estate
- Energy
- Hotel & Healthcare
- Industrial
- Personal Property
- Retail
- Telecom/High-Tech

**Program & registration at [www.ipt.org](http://www.ipt.org)**

**IPT members may register online by logging into the "members only" section.**



Photos courtesy of Monterey County CVB

## *Attend IPT's Income Tax Symposium in Monterey, California set on the dramatic Pacific Ocean coastline, November 6 - 9, 2011!*

**T**his two and a half-day state and local Income Tax Symposium features general presentations as well as specialized breakout sessions of timely interest to all state and local income tax professionals. The program, developed to emphasize practical applications of theories, techniques, and procedures to everyday situations, will be invaluable to state and local income tax representatives from all industries at all levels of experience. This program can be used to help meet the requirements for the CMI in Income Tax.

### **General Sessions Include:**

- The Economy: Fast and Furious
- Ethics: Prominence to Prison: Why Smart People do Dumb Things
- State Tax Planning
- California Update
- Top 10 "Hot Topics" in State Income/Franchise Taxation
- Partnership Issues
- State Tax Ramifications of Codification of the Economic Substance Doctrine
- Apportionment: Dividing Up Your Income so There's Some Left for You
- Unitary Business
- The "Other" Business Taxes - Michigan, Ohio, and Texas

### **Breakout Sessions Include:**

- Nexus in Texas (and Everywhere Else)
- Dividends and Royalties from Foreign Operations: Reducing the State Tax Impact
- Mergers and Acquisitions
- Combined Reporting
- Credits and Incentives
- It's a Privilege, or is it?: Privilege Issues in IRS Audits and Administrative Proceedings

**Program & registration at [www.ipt.org](http://www.ipt.org)**

**IPT members may register online by logging into the "members only" section.**



Photos courtesy of Monterey County CVB

## ***IPT's First Credits and Incentives Symposium is in Monterey, CA set on the dramatic Pacific Ocean coastline, November 9 - 11, 2011!***

Identify Best Practices to help your business face today's economic challenges by wisely utilizing credits and incentives. This Symposium is the culmination of many dedicated efforts by experienced colleagues in the Credits and Incentives area to make this program effective, interesting, and, most importantly, informative. We hope you will make plans to attend and to join IPT in expanding and strengthening the educational opportunities for professionals in the credits and incentives field.

### **General Sessions Include:**

- State of the Economy/Why Incentives
- What's Hot: Trends and Observations in State and Local Incentives
- In Charge of Change: Inside the Government's Point of View
- Divergent Stakeholder Perspectives
- Hot Off the Presses: Legislative & Judicial Developments in Credits & Incentives
- Pitfalls for the Unwary
- Playing Aboveboard: Ethical Considerations for Credits & Incentives in an Uncertain Economy

### **Breakout Sessions Include:**

- Who's Invited to the Table: Identifying the Parties
- Main Street Stimulus: Best Practices for Improving the Bottom Line
- Types of Incentives: Negotiated, Statutory, and Unusual
- CSI Incentives—Property Tax Opportunities Uncovered
- Sales Tax Incentives
- Income Tax Incentives: Differing State Approaches during an Uncertain Economy
- Green Credits: Integrating Tax and Corporate Sustainability
- Identifying, Maximizing, and Preserving Employment-Related Credits & Incentives in the U.S. and Abroad
- Gunfight at the C&I Corral: Audit Defense & Controversy

**Program & registration at [www.ipt.org](http://www.ipt.org)**

**IPT members may register online by logging into the "members only" section.**



Photo courtesy of Palm Springs CVA

**36<sup>th</sup> Annual Conference**  
**Renaissance Esmeralda Resort**  
**Indian Wells, California**  
**June 24 - 27, 2012**

Set against the Santa Rosa Mountains at the foothills of Palm Springs' Coachella Valley, IPT's 36th Annual Conference offers you a splendid setting to take advantage of an exceptional opportunity to build upon and improve your tax knowledge and to share ideas with other tax professionals. Mark your calendar!

# Careers

Please visit the [Career Opportunities](#) page on the IPT website for complete position descriptions and requirements.

## Positions Available:

**Senior Sales Tax Specialist (Valley Forge, Pennsylvania)** – Saint-Gobain. Interested applicants please apply online @ <http://www.saint-gobain-northamerica.com>. **Date Posted:** 9/29/2011 (IPT066)

**Senior Accountant/Analyst (Albuquerque, New Mexico)** – Gap Inc. Apply online at [www.gapinc.com/careers](http://www.gapinc.com/careers), job #01LF7. **Date Posted:** 9/29/2011 (IPT065)

**Sales and Use Tax Accountant (-Oakbrook Terrace, IL)** – Redbox Automated Retail, LLC. Please send resume to Camille at [chenderson@redbox.com](mailto:chenderson@redbox.com). **Date Posted:** 9/29/2011 (IPT064)

**Real and Personal Property Tax Manager (Michigan)** – DuCharme, McMillen, and Associates, Inc. Submit your resume with cover letter to [resumes@dmainsc.com](mailto:resumes@dmainsc.com). **Date Posted:** 9/22/2011 (IPT063)

**Senior Analyst, International Tax (Seattle, Washington)** – Amazon. Send resume to [darrjack@amazon.com](mailto:darrjack@amazon.com). **Date Posted:** 9/22/2011 (IPT062)

**Tax Analyst (Plano, Texas)** – PepsiCo. Please send resume to [eliane.fishkind@pepsico.com](mailto:eliane.fishkind@pepsico.com). **Date Posted:** 9/20/2011 (IPT061)

**Practice Administrator (Pittsburgh, Pennsylvania)** – Paradigm Tax Group. Send resume to [odiaz@paradigmatx.com](mailto:odiaz@paradigmatx.com). **Date Posted:** 9/15/2011 (IPT060)

**Property Tax Agent (Houston, Texas)** – If you would like to view the job opportunity, go to [View details12877BR](#) - Property Tax Agent. **Date Posted:** 9/12/2011 (IPT059)

**Sales Tax Analyst (Juno Beach, Florida)** – Florida Power & Light. Please send resume to [heather.matfin@fpl.com](mailto:heather.matfin@fpl.com). **Date Posted:** 9/12/2011 (IPT058)

**Sales Consultant and Marketing Director (San Antonio, Texas)** – Please mail, email, or fax your resume, salary history, and references to: Assessment Technologies Ltd, Attn: Vicki Hanks 121 Interpark Blvd Suite 308, San Antonio, Texas 78216, [Vhanks@atechLtd.com](mailto:Vhanks@atechLtd.com) or fax to 210.222.9519. **Date Posted:** 9/9/2011 (IPT057)

**Sales Tax Accountant (Deerfield, Illinois)** – Walgreens. For immediate consideration, please apply online: [https://walgreens.taleo.net/careersection/std\\_cs\\_ext/jobdetail.ftl?lang=en&job=005250](https://walgreens.taleo.net/careersection/std_cs_ext/jobdetail.ftl?lang=en&job=005250). **Date Posted:** 9/7/2011 (IPT056)

**Senior Manager, Property Tax (Atlanta, Georgia)** – Home Depot is seeking a Senior Manager, Property Tax for our Atlanta Store Support Center. Apply online at [www.homedepot.com/careers](http://www.homedepot.com/careers), job #70484. **Date Posted:** 9/7/2011 (IPT055)

**Tax Manager (Chicago, Illinois)** – Fieldglass, Inc. Send resume and cover letter, including salary requirements to Laura Calabrese at [icalabrese@fieldglass.com](mailto:icalabrese@fieldglass.com). **Date Posted:** 9/1/2011 (IPT054)

**11002729, Sr. Fuel Tax Compliance Analyst (Phoenix, Arizona)** – Send resume to [Marilyn.Lincoln@usfood.com](mailto:Marilyn.Lincoln@usfood.com). **Date Posted:** 8/30/2011 (IPT053)

**SALT, Income and Franchise Tax Manager (Dallas, Texas)** – Specialty: Income & Franchise tax. Send resume to [Nichole.Fasbender@us.gt.com](mailto:Nichole.Fasbender@us.gt.com). **Date Posted:** 8/30/2011 (IPT052)

**Property Tax Professional (Fort Wayne, Indiana)** – Baden Tax Management, LLC. Please e-mail your resume along with a cover letter to [tchurchward@badentax.com](mailto:tchurchward@badentax.com). **Date Posted:** 8/30/2011 (IPT983)

**Income Tax Accountant (Franklin, Tennessee)** – Walgreens. For immediate consideration, please apply online via the following link: [https://walgreens.taleo.net/careersection/std\\_cs\\_ext/jobdetail.ftl?lang=en&job=005051](https://walgreens.taleo.net/careersection/std_cs_ext/jobdetail.ftl?lang=en&job=005051). **Date Posted:** 8/29/2011 (IPT051)

To submit a position announcement, email Toby Miller at [tmiller@ipt.org](mailto:tmiller@ipt.org). Include the job title, city/state, and the Tax Specialty, i.e. Property/Sales/Income.

## **IPT 2011 CALENDAR OF EVENTS**

### **CMI - Property Tax Exams**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 5, 2011

### **CMI - Income Tax Exams**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 5 - 6, 2011

### **Income Tax Symposium**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 6 - 9, 2011

### **Property Tax Symposium**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 6 - 9, 2011

### **Texas Taxpayers and Research Association (TTARA)**

Hyatt Regency Austin  
Austin, Texas  
November 7 - 8, 2011

### **Credits & Incentives Symposium**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 9 - 11, 2011

### **Georgia One-Day Tax Seminar**

Crowne Plaza Ravinia Hotel  
Atlanta, GA  
November 18, 2011

## **IPT 2012 CALENDAR OF EVENTS**

### **Sales Tax School I:**

Introduction to Sales & Use Taxes  
Georgia Tech Hotel & Conference Center  
Atlanta, Georgia  
February 26 - March 2, 2012

### **ABA/IPT Income Tax Seminar**

The Ritz-Carlton  
New Orleans, Louisiana  
March 19 - 20, 2012

### **ABA/IPT Sales Tax Seminar**

The Ritz-Carlton  
New Orleans, Louisiana  
March 20 - 21, 2012

### **ABA/IPT Property Tax Seminar**

The Ritz-Carlton  
New Orleans, Louisiana  
March 22 - 23, 2012

### **Sales Tax School II:**

Theory & Practice for the Experienced  
Sales & Use Tax Professional  
Marriott Kingsgate Conference Center  
University of Cincinnati  
Cincinnati, Ohio  
April 22 - 27, 2012

### **Intermediate Real Property Tax School**

Marriott Kingsgate Conference Center  
University of Cincinnati  
Cincinnati, Ohio  
April 29 - May 4, 2012

### **Basic State Income Tax School**

Georgia Tech Hotel & Conference Center  
June 4 - 8, 2012

### **Advanced State Income Tax School**

Georgia Tech Hotel & Conference Center  
June 4 - 8, 2012

### **CMI - Income Tax Exams**

Renaissance Esmeralda Resort  
Indian Wells, California  
June 22 - 23, 2012

### **CMI - Sales Tax Exams**

Renaissance Esmeralda Resort  
Indian Wells, California  
June 22 - 23, 2012

### **CMI - Property Tax Exams**

Renaissance Esmeralda Resort  
Indian Wells, California  
June 23, 2012

### **36<sup>th</sup> Annual Conference**

Renaissance Esmeralda Resort  
Indian Wells, California  
June 24 - 27, 2012

### **Property Tax School**

Georgia Tech Hotel & Conference Center  
Atlanta, Georgia  
August 12 - 16, 2012

### **CMI - Sales Tax Exams**

Hyatt Regency Minneapolis  
Minneapolis, Minnesota  
September 28 - 29, 2012

### **Sales Tax Symposium**

Hyatt Regency Minneapolis  
Minneapolis, Minnesota  
September 30 - October 3, 2012

### **Value Added Tax Symposium**

Hyatt Regency Minneapolis  
Minneapolis, Minnesota  
October 3 - 5, 2012

### **Intermediate Personal Property Tax School**

Georgia Tech Hotel & Conference Center  
Atlanta, Georgia  
October 14 - 19, 2012

### **Texas Taxpayers and Research Association (TTARA)**

Hyatt Regency Austin  
Austin, Texas  
October 15 - 16, 2012

### **CMI - Income Tax Exams**

Key Bridge Marriott  
Arlington, Virginia  
November 2 - 3, 2012

### **Income Tax Symposium**

Key Bridge Marriott  
Arlington, Virginia  
November 4 - 7, 2012

### **Advanced Sales & Use Tax Academy**

Key Bridge Marriott  
Arlington, Virginia  
November 4 - 7, 2012

### **CMI - Property Tax Exams**

Tampa Marriott Waterside Hotel & Marina  
Tampa, Florida  
November 10, 2012

### **Property Tax Symposium**

Tampa Marriott Waterside Hotel & Marina  
Tampa, Florida  
November 11 - 14, 2012

Please check IPT's online [Calendar of Events](#) for additional programs that may be added.