SPECIAL TOPICS IN STATE AND LOCAL TAX  
Georgetown University Law Center

Professor: Stephanie A. Lipinski-Galland

Course Location: McDonough, 200  
Course Time: Monday, 5:45 PM – 7:45 PM  
Credits: 2.0  
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The biggest challenge of a multistate tax practice is dealing with the practical issues of multiple states with sometimes conflicting laws and regulations. Most companies operate in multistate environment and must learn how to apply their operational realities to a patchwork of state and local tax laws and regulations. With telecommuting, internet and other work options, and a fluid workforce, this course will also review the state and local tax rules for employers/employees and individuals. This course reviews the basic concepts that govern multistate taxation on an operational level and detailed practice and procedures guidelines. The issues surrounding audits and record access will be discussed along with the use of tools such as managed audits and voluntary disclosures. Appeals on administrative and judicial levels will be reviewed with an emphasis on statute of limitation, de novo and other issues. Additionally, this course will provide a review of the relationships between the states, information sharing between and among the states and the federal government, and the natural tension between taxpayers and the state revenue departments.

OVERVIEW AND CLASS GOALS

I. Course Themes

The course deals with SALT issues that are common to most if not all jurisdictions. Issues include practical considerations on a corporate and individual level, and a detailed discussion of practice and procedure concepts.

Module A: Introduction of General Concepts and State Tax & the Individual

Module B: State Tax & the Individual; Trusts and Estates

Module C: Multistate Corporations – Practical Issues Including Multistate and Multitax Implications of Corporate-Shareholder Transactions

Module D: Employment

Module E: Practice & Procedure

Module F: Local Level and Review
MODULE A:  INTRODUCTION AND GENERAL CONCEPTS (1/23/2017) Instructor: Lipinski Galland

I. Structural concerns:
   a. Taxes
   b. Administrators
   c. Stakeholders Transparency

MODULE B:  STATE TAX & THE INDIVIDUAL AND TRUSTS AND ESTATES  
(1/30/2017)   Instructor: Lipinski Galland

I. Personal Income Tax

   a. Conformity to Internal Revenue Code
      
      A. General conformity to federal provisions and definitions.
         i. Use of federal gross income.

      B. Additions/Subtractions to Federal Income
         i. Interest from state/local bonds excluded from federal return added back if from other states/localities.
         ii. Additional for lump sum distributions from pension plans and subtractions from state pension plans and taxable portions of SS
         iii. Examples of additions:
            1. Alabama – alimony, gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind, in whatever form and interest, royalties, rents, dividends, securities, or transactions of any business carried on for gain or profit.
            2. Arizona – Beneficiary’s share of trust or estate income, ordinary part of lump sum distribution, interest from government obligations, individual NOLs, partnership loss or income, amounts by which the adjusted basis of property computed pursuant to IRC exceeds the adjusted basis of such property computed under state law for property held for the production of income that is sold or disposed of during the taxable year.
            3. Delaware – interest from Delaware (or political subdivisions) bonds, dividends paid by a regulated investment company, percentage depletion deduction for oil or gas wells allowed for fed purposes, any deduction exceeding $30k for a NOL carry back.
            4. Illinois – interest/dividends exempt from Fed taxation except stock dividends of qualified public utilities, amounts withdrawn from medical savings accounts, etc.
5. Massachusetts – S corp. income subject to Mass tax, earned income from foreign sources, interest from governmental obligations unless from Mass(political subdivisions, agencies or instrumentalities)
6. North Carolina – interest on obligations other than NC, market price of gleaned crop for which the taxpayer claims an exemption, federal estate tax attributable to decedent income
7. Tennessee – income from investment trusts or mutual funds, distributions which result in payments of profits from an S corp. to its shareholders, dividends from FNMA, GNMA, and Federal Home Loan Mortgage Corporation.

iv. Examples of Subtractions
1. Alabama – amounts received from life insurance policies, and contracts received by reason of the death of insured, contributions made by an employer or behalf of an employee to a trust which is part of qualified cash or deferred arrangement.
2. Arizona – Federal and state retirement benefits up to $2,500, lottery winnings, SS or rail road benefits, income previously recognized.
3. Delaware – interest of obligation of the US, $2k on income for low-income disabled or elderly persons, federal losses that were not deducted on previous returns because DE limitations on NOL carry back.
4. Illinois – US obligations, income exempted by reason of federal statutes, distributions from mutual funds, interest on specified obligations on state and local governments.
5. Massachusetts – Dividends received form regulated Investment Company, income received from and taxable to any trustee or fiduciary, dividends received from a corporate trust.
6. North Carolina – SS benefits, interest on NC, fed or nonprofit educational institution, refunds of state, local or foreign taxes, severance taxes, compensation for pecuniary loss for erroneous conviction or imprisonment.
7. Tennessee – Dividends on insurance policies, interest from savings accounts, checking accounts, credit unions, or money market accounts.

v. Railroad Retirement Fund and other Pensions (SEE Davis and Harper)

C. Effect of a Federal Settlement on State Tax Liability
a. Buder v. Department of Revenue, 869 SW2d 752 (Mo. 1994)
vi. Taxpayer and IRS settled suit on deductions
vii. Missouri tried to adjust MO liability based on settlement.
viii. Taxpayer stated settlement did not create an adjustment to gross income and Missouri tax is based on federal gross income.

B. Exemption, Standard Deduction and Filing Status

C. Examples of 2010 Personal Exemption “one offs” (NOTE that each state must allow nonresidents the same personal exemptions as residents enjoy) can be prorated on number of days in taxing state.
i. Arkansas – Personal exemptions are allowed as a credit.
ii. Conn. – combined standard deduction and exemption is reduced by $1k for every 1k or part of that ADJ Gross exceeds $48k.
iii. Georgia – Blind or 65+ is a deduction not an exemption.
iv. Hawaii – exemption is phased out for Taxpayers whose income exceeds certain threshold amounts.
v. Md – same as HI
vi. Minn. – no separate computation at state level – exemption amount is taken directly from federal return.
vii. Nebraska – credit that decreases as taxable income increases.
viii. New Mexico - Exemptions cannot exceed $2,500.
ix. NC – requires taxpayers to add back difference between state and federal exemptions.
x. Oregon – allowed as a credit and subject to phase out.

D. Joint Filing and Same Sex Couples
i. SEE Supplemental

E. Domestic Couples
i. Still available but restrictions remain
ii. Not civil unions, etc.
iii. File single with allocations
   1. If on mortgage, can divide up mortgage interest.

2. Residence Issues
A. General
i. Power of states to tax resident’s personal income.
   1. New York ex rel. Cohn v. Graves, 300 US 308, 57 S.Ct. 466 (1937) Court has upheld the right of the states to impose taxes on the income of residents derived from out of state sources. (Including services, rent of land, out of state bonds, and trusts created in other states.
      a. Credit usually given to account for taxes paid to other states, etc.
   2. Restrained from taxing income of nonresidents.
      a. Except income earned from that state, or if nonresident is a beneficiary of services borne by the taxing state.
ii. Definition of Residence
   1. Varies but has common factors:
      a. Domiciled in state.
      b. Not transitory or temporary
      c. Specified period
      d. Maintenance of permanent place/abode.
   B. Cal defines as “every individual who is in this state for other than a temporary or transitory purpose. Cal. Rev. & Tax Code Sec. 17014.
   C. Ohio defines as individual who lives in and maintains a permanent place of abode in this state, and who does not maintain a permanent place of abode elsewhere, unless such individual in the aggregate, lives more than three hundred and thirty-five days of the taxable year outside this state. Ohio Rev. Code Sec.5747
   D. Pennsylvania has a 30 day/183 rule.
   E. While this is a SALT class, foreign domicile is an issue. High level of proof needed. Problems when taxpayer moves but has to return to US for residual issues or to report back in at work.

iii. Black’s a place where a man has his true, fixed, and permanent location home and principal establishment, and to which whenever he is absent he has the intention of returning…..A person may have more than one residence but only one domicile.

iv. In People ex rel. Ryan v. Lynch (262 NY 1, 186 NE (1933) the New York Court of Appeals held in determining the liability of income tax, domicile plays no necessary part. Residence at a fixed date determined the tax.

v. BUT SEE Section 514 of the Soldiers and Sailors Relief Act of 1940. Military cannot be treated as being residents is located as a result of military station. The result is to prohibit the state from taxing the military person on income earned from sources outside of the state including income from intangibles.

3. Taxation of Nonresidents Income
   A. Federal Constitutional power to tax Nonresident Income
      i. Shaffer v. Carter – as to nonresidents, the jurisdiction extends only to their property owned within the State and their business, trade or profession carried on therein, and the tax is only on such income as is derived from those sources.
         1. Note that the Due Process Clause does not prohibit the double taxation that can come from both the taxpayer’s
residence and the state from where the money is earned as it applies to earning from intangibles. *Curry v. McCanless*, 307 US 357, 59 S. Ct. 900 (1939).

2. Nonresidents are generally taxed on their “source” income – income derived from activity in the taxing state.

3. Cal has regulations that provide that the portion of personal income resulting from a unitary multistate business can be computed by using the UDITPA formula. It further provides that if the Cal business is separate from the other lines of business in the multistate business then separate accounting can be used. Corporate calculations affecting personal income tax!

4. Partnerships are interesting – *Devevoise v. State tax Commissioner*, 383 N.Y.S. 2D 698 (N.Y. App. Div. 1976) law partner of NYC law firm required to allocate income received to NY even though he worked in DC. Court held that no evidence that the percentage of time that he worked in DC had anything to do with the distributive share of the partnership income. HAD HE BEEN AN EMPLOYEE, IT MIGHT HAVE BEEN DIFFERENT. ALSO, IF THE LAW FIRM HAD HAD A DC OFFICE.

5. When is income received as a participant of business rather than as an executive or employee of a business when the nonresident executive or employee is a participant in the business.

6. Most states look to federal law and the definition of a “joint enterprise for profit.” This is the definition that the feds use to describe a partnership entity classification for purposes of federal income tax. In *Wohlreich v. Tully* 72 A.D.2d. 825(1979), a nonresident entered in to an agreement with a NYC partnership. The partnership was an investment activity. The NY partnership gave the nonresident money to invest and was to receive 50% of the profits from the trading activity. For tax purposes, the underlying agreement was considered a partnership. All of the profit was included in the main partnership. SEE NOTES.

7. Employees have to allocate the amount of work done in and out of the state to determine the amount subject to the tax (i.e., Accenture issues). Executives and employees have to allocate compensation on the total number of working days both within and without the taxing state. Ratios may differ between states so pay attention to the state statutes.

8. Commission employees: they work on commission, is the amount subject to tax the amount that is attributable to the commission on the goods/etc. delivered into the taxing state or all commissions?
a. Commissions only or base and commission?
b. Compare two NY cases: Case one – resident of NJ that worked for a corporation. His office was in NY. His territory included the whole East Coast. Taxpayer claimed he was only an employee and therefore only taxable on commissions from NY. The App Division went with the Tax Commissioner. Case 2 – Petition of Wyman, DTA No. 809078 (N.Y. Div. Tax App. May 7, 1992) SEE NOTES.
c. States will generally look to the federal classification of employee or independent contractors. ISSUE – if independent is reclassified IRC Sec. 530 will provide relief for the employers but not the employees……however if classified as non-employee under Sec. 3509, the some argue that the non-employee should be able to use the state law allocation rule since Sec. 530 only applies to Subtitle C taxes (Employment taxes) and the starting point for calculating income that will be subject to state tax is found in Subtitle A which determines Federal adjusted Gross income. This Subtitle is based on common law standards.

B. Allocation of Compensation
   i. Generally, based on time spent in taxing state v. non taxing state.
   ii. Based on the performance of services by the employee to the benefit of the employer. Necessity is a word generally thrown in as well.
      2. NY case – In re Zelinsky (No. 817065) NY Div. Tax App. Nov. 2, 2000) court held that the test still needed to apply even though the underlying employee was double taxed. It did not matter that the residence state did not grant a credit.
         a. Hellerstein poses an interesting issue – he says that the convenience of the employer test is not the right one. The rule violates the Due Process Clause. He would look to the fact that since the job is located in the state that allocation of the income to the state of the job is sufficient……See cite in Carpenter v. Chapman, 276 A.D.2d 634 (3rd Dept. 1050) NOTE: Can this be used to argue that sales by an internet company should be thrown back to the state where the company is located? Some companies would try to argue that the sales are in the destination state
especially if the destination state does not have a sales tax!

C. Foreign Aliens
   i. IRS classifies an alien as anyone who is not a US citizen.
   ii. Resident Alien
       1. Taxed on worldwide income (just like US citizens)
       2. Must meet one of two tests:
          a. Green Card
          b. Substantial Presence
             B. Physically present in the US for 31 days during the current year or 183 days over a three year period. (current and two immediately before)
   iii. Nonresident alien
        1. new arrival on a J-1 or F-1 visa
        2. Students will not meet the “substantial presence” test until 5 calendar years and visiting teachers/profs 2 calendar years.
   iv. Proof for purposes of Residency
        1. Virginia case
           a. IMF
           b. Banking

D. Commerce Clause Issues
   i. Public Law 86-272
      1. More closed identified with corporate taxation
         a. Denies state right to impose tax measured by net income derived from business if the taxpayer’s contacts are below a minimum threshold and it is only the solicitation of sales (Wrigley)
         b. If services not covered by 86-272.
   ii. Public Law 104-95
       1. Prohibits state taxation of retirement income of any individual who is not a resident or domiciliary at the time of payments.
          a. Covers not only state level but local as well.
       2. This retirement income is NOT income received after retirement but payments from specifically defined deferred compensation plans.
          a. May include some non-qualified plans but there are certain restriction that have to be met to get this safe harbor.
       3. There are a number of plans that may benefit from protection but you must research before you retire…..LOL

E. Pass through entities
   i. LLCs
1. State taxation generally follows fed rules
   a. If LLC is taxed as a partnership then partnership rules will apply.
   b. States such as California have been very aggressive concerning taxation of LLCs. Must withhold at 7% unless distribution is less than $1,500.

   B. Members will earn 2 types of income from an LLC
      1. share of income, gains, losses of actual LLC activity
      2. gain or loss on the disposition of the LLC itself.

   C. Individuals are usually only taxed on the income derived from sources within a taxing state

   D. Resident individuals are taxed on all income regardless of where the income is earned.

   E. Composite returns are allowed in some states.
      1. Some states require and some states just allow.
         a. Required if member does not agree to file its own return.
         2. There are still issues as to passive losses, etc.

   F. Credit for Taxes Paid to Another State
      i. Limitations on amount of credit.
         1. Wants to make sure that the taxpayer can take the credit but the underlying has to be the same category for each tax.
         2. Difference between the high tax state and the lower tax state.
         3. May be differences between nonresident and resident taxpayers.
         4. Also, some income may be tax by the foreign state but not by the credit state.

   G. Credit may be for US Territories but NOT for political subdivision of the taxing state.
      i. Some states may only allow a credit when the nonresident state allows a similar credit. (Some states do not have an income tax - obviously no credit can be given.)

II. Other Individual Tax Issues
   a. Gift and estate tax—relation to federal estate and gift tax
(1) Conformity

b. Nondisclosure of taxpayer information and comparison to I.R.C. § 6103

c. Treatment of withholding and lottery winnings

d. Penalties—imposition of negligence, failure to file, failure to pay and others

(1) Relief from penalties—reasonable cause and not due to willful neglect, and other abatement of penalty provisions, and request for waiver of penalty

(2) Potential for settlement of tax liability without penalties

f. Jeopardy Assessments—standards

g. Offers in compromise—standards, when applicable

h. Installment agreements—standards, when applicable

MODULE C: MULTISTATE CORPORATIONS INCLUDING Mergers/ACquisitions/TransACtIONS WITh MULTIPLE TAX ISSUES (2/6, 2/13, 2/23, 2/27 – 2017) INstructors: Steve Wlodychak and Todd Lard

Effects of Select Transactions On Enterprises and Their Owners - 2/6/2017

A. Corporate-Shareholder (IRC Subchapter C) Transactions (2/8, 2/18, 2/22)
   • Peter L. Faber, State and Local Income and Sales Tax Aspects of Corporate Acquisitions, NYU 69th Institute on Federal Taxation (to be handed out in class)
   • HMN Financial, Inc. v. Commissioner of Revenue, 782 N.W.2d 558 (Minn. 2010)
   • FTB audit memo on Farmer Bros. policy (to be handed out in class)
   • Allied Signal v. New Jersey, 504 U.S. 768 (1992)

1. Formation and IRC 351
2. Distributions
   i. Review of IRC 301(c) treatment of distributions
      1. (c)(1) – Dividend, to extent of E&P
         1. What’s E&P?
      2. (c)(2) – Return of basis
      3. (c)(3) – Capital gain, if distribution is in excess of basis.
ii. Review of Dividend Received Deductions
   1. IRC 243
   2. State rules
3. M&A
   i. Asset Transactions
      1. Jurisdiction to tax
      2. Amount of gain
      3. Character of gain
      5. Allocation of purchase price
      6. Apportionment factors
   ii. Stock Transactions
      1. Gain
      2. Classification
      4. Tax-Free
      5. NOLs
         1. IRC 382
         2. State conformity problems [
       6. 338(h)(10)
          1. Purchases out of consolidated group compared to S corporation variant.
          2. IRC 453B(h) problems for installment notes issued as part of purchase price.
          3. State entity level taxes
          4. State decoupling (e.g., NYC – 338(h)(10) election is “void”) – the benefits of California’s separate state election provision
   7. Apportionment factors
   iii. Stock Transactions Treated as Asset Transactions
   iv. Business Purpose, Economic Substance
   v. Sales and Use Tax Implications
   vi. Real estate transfer taxes
      1. Implications of “controlling interests” taxes (e.g., NYS/NYC, Washington, Washington, DC, Pennsylvania (Philadelphia variant on definition of “real estate company”), Illinois, New Jersey, Delaware, Maine, certain California jurisdictions (conflict with state law))
   vii. Tax Clearance

B. Partner-Partnership (IRC Subchapter K) Transactions

   Partnership Outline (to be handed out in class)

   1. Formation
   2. Operations
      i. Allocations
   • Amerada Hess Corp. v. State ex rel. Tax Com'r, 704 N.W.2d 8 (N.D. 2005)
   • NCR Corp. v. Taxation and Revenue Dept., 856 P.2d 982 (N.M. App. 1993)
   • Dow Chemical Co. v. Commissioner of Revenue, 391 N.E.2d 253 (Mass. 1979)

1. Outbound
   i. Foreign Dividends
   ii. Subpart F income
   iii. IRC Sec. 78 gross-up
   iv. Factor representation

2. Inbound
   i. Jurisdiction and treaty protection
   ii. Base
   iii. Apportionment

D. Other (e.g., RICs, REITs, Cooperatives, Complex Trusts, etc.) (2/27/2017)

1. REIT structure, uses, and taxation
2. Cooperative taxation
3. Business trust taxation

Module D – EMPLOYMENT TAX ISSUES (3/6/2017) Instructor: Lipinski Galland

A. Basics of employment taxes

1. Types of employment taxes
   a. Income taxes (federal and state)
   b. Social Security and Medicare taxes (federal)
   c. Unemployment taxes (federal and state)
   d. Miscellaneous employment taxes (state taxes)
2. Mechanics of employment taxes

   a. What are wages
   b. What is employment
   c. Who is an employer
   d. Withholding at source and control of the payment of wages
   e. Filing requirements
   f. State unemployment insurance tax rates

Reading Materials: IRC §§ 3402, 6041, 6045, 6051, 6672; Treas. Reg. § 31.3402; 20
NYCRR § 132.18(a); New York State Department of Taxation and Finance, TSB-M-06(5); Winstead v. United States, 109 F.3d 989 (4th Cir. 1997); IRS Publication 15, Circular E, Employer’s Tax Guide; IRS Publication 15-A, Supplemental Employer’s Tax Guide; IRS Publication 393, Federal Employment Tax Forms; Cal. Unempl. Ins. Code §§ 621, 650; 686; 977; 1034; 1036; 1051; 1052; 1061; 1265

Note: All IRS Publications available at www.irs.gov;

New York Department of Taxation and Finance, TSB-M-06(5)I available at
www.tax.ny.gov/pdf/memos/income/m06_5i.pdf

3. Employment tax disputes


Note: DE 1009, Petition for Reassessment and Review available at www.edd.ca.gov

DE 1000BA, CUIAB – Board Appeal and DE 6412TF, Office of Appeals Tax Hearing
Information; DE 1433, CUIAB Appeals Procedure available at www.cuiab.ca.gov/forms

B. Primary employment tax issues

1. Worker classification

   a. Differences between employees and independent contractors
   b. Statutory employees
   c. Statutory independent contractors
   d. PEOs

Note: IRS Form SS-8 available at www.irs.gov


2. The employment tax treatment of payments to employees and contractors
   a. Exempt and nonexempt income and activities
   b. Tax reporting obligations


Note: All IRS forms and publications available at www.irs.gov

3. SUTA Dumping and unitary theory as it relates to employment taxes

Reading Materials: U.S. Department of Labor, Unemployment Insurance Information Letter 30-04; DE 231D, Multistate Employment; DE 231UE, Unity of Enterprise; Ohio R.C. §§ 4141.24, 4141.48; In re Bethlehem Steel Corp., P-T-33 (1968)


DE 231D, Multistate Employment and DE 231UE, Unity of Enterprise available at www.edd.ca.gov
In re Bethlehem Steel Corp. available at www.cuiab.ca.gov/precedent_decisions_Numerical.shtml#001

C. International Employment Tax Issues

   1. Nonresident alien and resident aliens and residency status

Reading Materials: IRS Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities
2. Tax treaties  
**Reading Materials**: IRS Publication 901, *U.S. Tax Treaties*

3. Totalization Agreements  
**Reading Materials**: Social Security Administration Overview of Totalization Agreements; U.S. – Australian Totalization Agreement Description and Agreement

Note: All Totalization Agreement information available at [http://www.ssa.gov/international/totalization_agreements.html](http://www.ssa.gov/international/totalization_agreements.html)

D. Employees in transit and teleworking issues  
See Supplement  

**Instructors**: Lipinski Galland, Wethekam, Levine

**AUDITS**

I. What is An Audit? - 3/20/2017

II. Authority to Audit  
   a. Federal Constitutional Issues  
   b. State Constitutional and Statutory Issues

III. Audit Selection Criteria  
   a. Refund Claims  
   b. Purchase/Sale of Business  
   c. State Government Contracts  
   d. Reference From Other Party Audit  
   e. Result of Federal RAR Adjustment

IV. Statute of Limitations Issues

V. Dealing with Audits: - 3/27/2017  
   a. Audit Process
(1) Records

(a) Access to Records

(b) Authority to Request Information

- “IDRs” (Information Document Requests)
- Summons Authority
- Format of Document Production
- Confidentiality

(2) Administrative Appeals Process - 4/3/2017

(a) Statute of Limitations Issues

- Differences among types of taxes

(b) Choice of Venue/Jurisdiction

(c) Issues of “Record” or “De novo”

(3) The Notice of Deficiency—Form, Issuance and Consequences

(a) Final vs. Proposed

(b) Correct Taxpayer

(c) Limitation Periods

IV. Choice of Forum

a. Prepayment Forum

(1) Bonds

b. No Prepayment Requirement Forum

c. Other Options

(2) Non-deficiency cases—employment tax, responsible officer, Real Property taxes, special taxes, and certain fees.

V. Enforcement—Collection Tools - 4/10/2017

Wethekam & Levine

a. Liens—Creation and Duration
(1) Priority

(2) Release and Discharge of Property from Lien

b. Levies—Distraint and Seizure

(1) Levy on Money or Accounts Receivable in hands of third party

(2) Seizure of Taxpayer’s Property

(3) Administrative Sale Provisions

   (a) Personal Property

   (b) Real Property

(4) Redemption (of real property) by Taxpayer

c. Protective claims

d. Housekeeping of how to protect claims

e. Offsets between taxes

VI. Settlement Issues

a. Authority to Settle

b. Ability to waive interest and/or penalty

c. Confidentiality

d. Information sharing

e. Legislative approval for refunds

MODULE F: LOCAL LEVEL TAXES (NON-PROPERTY) - (4/18/16)
Instructors: Lipinski Galland and Calhoun

Authority for Localities to Impose Tax

Federal Basis

A. The federal Constitution provides that any powers not given to the federal government are reserved to the states, subject to constitutional limitations such as Equal Protection and the Commerce Clause. It is in this context of
delegation of powers that the focus of the issue of authority for localities to tax shifts to a review of state constitutions and the rights given or shared by the states and their political subdivisions.

B. An example of utilizing the federal/state analysis is a situation is the delegation of power the power to tax by a state constitution from the state to the local level. What is the power; under what circumstances can the lower level jurisdiction impose the tax, what are the restrictions of that power.

**State Basis**

A. States, through their constitutions, define the “separation of power” that provides the platform for taxation by the political subdivisions within the state. These political subdivisions can include cities, towns, counties and other political subdivisions including special taxing authorities such as water/sewer authorities, regional transportation districts, etc.

B. Constitutions differ on how the power is shared with the localities and the restrictions and allocation of the power to tax definitely vary from state to state. Some states, due to either history (the way the state was formed) or just political reality have granted its political subdivisions “home rule” or some variation of home rule. This “home rule” allows a political sub to set up its own separate tax regime that stands alone from the state system. Other states have delegated limited powers to the localities to tax and still others have the state act as an agent for the localities for purposes of collection and reallocation back to the locals.

C. PRACTICE NOTE: Both the taxing jurisdictions and the taxpayers should refer to the respective state constitutions to clearly understand what the constitution allows or does not allow. Taxing jurisdictions need to know the perimeters of the tax authority provided under their constitutions because most local level officials serving in the “legislative” function on the local level are citizens that do not have an extensive tax background in knowing what taxes or fees can and cannot be imposed. Taxpayers need to have a compete understanding about what taxing powers are given to the local taxing authorities in order to defend against taxes not permitted by that state’s constitution. It is not unknown for a locality to impose a tax on the theory that “the city next door passed this tax/fee; it should be ok to do the same in this county.” This of course being done not knowing, that for some reason, the city could do what the county could not do.

D. The following an example of how a few states’ Constitutions have devolved the power to tax to the localities and some of the restrictions to that power.

i. California
Article 13 of the California Constitution addresses taxation. Within this Article, there are:

a. Provisions for property tax, property tax exemptions and restrictions for imposing additional property tax;

b. Appeals from property tax assessments;

c. Restrictions on the localities for purposes sales and use taxes (Sec. 25.5);

d. Authorization for cities and counties to enter into contracts to apportion revenue collected from any sales or use tax imposed by them which is collected by the state (Sec. 29);

e. A provision that states that “no legal or equitable process shall issue in any proceeding in any court against the State or an officer thereof to prevent or enjoin the collection of any tax. (Sec. 32); [Faint echoes of the Tax Injunction Act?]

f. Restrictions on the state or any political subdivision to levy or collect a sales or use tax on the sale of, or storage, use or consumption of food products for human consumption (Sec. 34);

g. The imposition of a sales and use tax of ½ per cent for the benefit of “Local Public Safety Services”;

h. Allocations of tax monies to general funds and special fund, local revenue funds, etc. (Sec. 36); and

i. Article 13 (C) provides that “no special purpose districts or agencies, including school districts” shall have power to levy general taxes. This section also provides that all taxes imposed by local governments shall be deemed to be either ‘general taxes or special taxes.”

Article 11 of the California Constitution addresses local government. It too, touches on the powers that local governments derive from the state.

a. Section 11 provides that the Legislature may not delegate to any private person or body the power to levy taxes or make assessments in lieu of the county or municipal corporation.

b. Section 14 provides a restriction on localities from levying a property tax unless a majority of the voters have approved the tax. Section 6 provides that when a charter city and a
When charter county consolidate, the charter city powers supersede the county powers. This is good to know when there is a conflicting provision between the two jurisdictions. Example: the county taxed and the city did not. Unless the city adopts the taxing provision upon consolidation, the city “no tax” position would prevail.

ii. New York

a. Unlike the California Constitution, the New York Constitution appears to spend more time addressing issues of how money is appropriated and how the state, cities and counties will enter into debt. Great attention is paid to the process of entering into debt, how to pay it off and how much debt each entity can assume.

b. Article VIII, Local Finances, Sec. 10 addresses the limitation of amount to be raised by real estate taxes for local purposes and exceptions to this provision/restriction. It should be noted that this section contains the language “[N]othing in this section shall be deemed to restrict the powers granted to the legislature by other provision of their Constitution to further restrict the powers of any county, city, town, village, or school district to levy taxes on real estate.” Section 11 also provides an exemption for New York City for the limitations of Article VIII. The New York Constitution gives the legislature the power to restrict taxation by the sub jurisdictions in order to “prevent abuses in taxation and assessments “Sec. 12.

c. Article IX, Local Governments, Sec. 2 provides, in part, that the localities shall have the powers for the “levy, collection and administration of local taxes authorized by the legislature and of assessments for local improvements, consistent with laws enacted by the legislature. (c)(8).

d. Article XVI specifically addresses “Taxation.”

1. This Article, specially states that “[T]he power of taxation shall never be surrendered, suspended or contracted away…. [A]ny laws which degage the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review.

2. This Article also provides that the legislature shall provide for the “supervision, review and equalization of
assessments shall in no case exceed full value.”

3. Especially important to New York and New York City specifically, the Article provides that intangible property within the state not employed in the carrying on of any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property have taxable situs within this state for purposes of death taxation. Also “[U]ndistributed profits shall not be taxed. Sec 3.

4. Sec. 4 also has an “anti-discrimination” provision.

iii. Virginia

a. Articles 4, 7 and 10 of the Virginia Constitution provide taxing authority in general and specifically how the taxing power is allocated to the political subdivisions of the Commonwealth.

b. Article 4 provides that each tax shall be passed by a majority of the general Assembly and shall “specifically state the tax” being imposed. In the annotations to this Article, there is a caution that Article 4 only applies to the “ordinary and general taxes for state purposes and not to local taxes for local purposes.” However, the Virginia Supreme Court held in Marshall v. N. Va. Transp. Auth., 275 Va. 419 92008) that the “General Assembly is not authorized pursuant to Va. Const., Art. IV, sec. 11 to enact a law to the extent that the enactment granted legislatave power to the authority, [the Transportation Authority] an unelected subdivision, to impose certain taxes and fees to finance bonds. Laws authorizing such assessments had to be imposed by a majority of elected representatives of a legislative body and could not be imposed by a political subdivision [appointed] empowered to address transportation issues.”

c. Article 7 of the Virginia Constitution addresses Local Government™ and it is under this Article, that the localities derive their general powers of taxation. When an act of Assembly involves the organization, government, and powers
of any county, city, town or regional government, including such powers of legislation, taxation, and assessment, the authorization found in Va. Const. Art. VII, Secs. 1 & 2 prevails over the restrictions in Article Sec. 14.

d. Article 10 of the Virginia Constitution specifically addresses taxation. This Article is a consolidation of all the “tax rules” under which the Commonwealth operates including:

1. Uniformity;

2. “Reasonable relationship” differences of rates of taxation;

3. The power to define and classify taxable subjects;

4. Segregation of property to be taxed by the State and property to be taxed by the local jurisdictions; and

5. Exemptions for elderly or disabled persons.

6. General ability of the Commonwealth to tax. “The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings or occupations. Southern Ry. V. Commonwealth, 211 Va. 210 (1970)

7. Virginia has delegated the power to actually value the property of most real and personal property to the local level jurisdictions, however, the state still retains the authority under the Constitution and the Constitution itself defines how the property shall be taxed as far as uniformity. Additionally, there is some property that is still valued on the state level, such as utility property - valued by the Va. State Corporation Commission, but the rate and actual imposition of the tax is done on the local level.

8. In the annotations for this Article, the courts have held that this Section 1 must be read with Section 2 to achieve both uniformity and equality.
9. “Exemption from taxation is the exception and any doubt is resolved against the one claiming the exception. DKM Richmond v. City of Richmond, 249 Va. 401 (1995) [Property tax]


11. Section 5 of Article 10 provides the imposition of franchise taxes and taxation of corporate stock.

Constitutional Restrictions on Local Taxation

Just as state taxation is subject to the federal constitutional limitations, local level taxes are subject to the same federal limitations in addition any state constitutional limitations.

Uniformity, Equal Protection, and Discrimination

Most of the time, the political subs are taxing all its citizens in the same way, for example – if there is a local sales tax, it applies to all purchases by all citizens subject to any state or local level exemptions.

While there have not been a lot of cases regarding equal protection, the fact remains that political subs are subject to the same limitations in relation to the issue of equal protection. All members of a class of persons must be subject to the same tax equally. (See the Virginia provisions.)

An example of the issues in this area is the imposition of fees for television or telecommunication providers. Is it permissible for a political sub to favor a classic cable television provider over a satellite or wireless provider? Lots of county supervisors and city council people were given shares of cable providers when cable first started and given local tax exemption or exclusion when cable first started. When other forms of television started to come on the scene, there was an inclination not to extend the “bennies’ given to the cable folks to the newcomers.

In discussion of the taxes below, “federal” constitutional issues that are discussed everyday on state level income taxes are surfacing in the court cases deciding local level tax issues.

Types of Local Level Taxes

This section will focus on the types of taxes imposed on a local level, not property tax based. Local level taxes are restricted only by the state constitution (and in some instances the federal constitution – think tonnage) and the imagination of the local taxing jurisdictions. These are some of the most used types of taxes and it not meant to be inclusive.
A. Gross Receipts
   i. Basis
      a. Generally speaking, gross receipts is just that – how much do you make. Most localities that use gross receipts as the starting point have low rates. This balances the use of gross receipts as the base for the tax calculation. Also some localities will have tiering that will set a ceiling as to the top amount that is paid.
      b. PRACTICE NOTE: localities that impose a gross receipts tax generally do it by entity. Generally, there is no “combined reporting” on the local level and each entity is charged the tax on its own gross receipts. Companies that restructure their companies and set up multiple entities may have to pay tax on each entity. (However see New York City General Corporation Tax – an income tax based on receipts below)

B. Business/Professional/Privilege Based Taxes
   i. Business license/professional license
      a. Differences
      b. Business license
         1. Flat versus tiered
      c. Professional license
         1. Variance by profession
         2. Constitutional issues of prohibition of practice
   ii. Privilege
      a. Based on the “privilege of doing business in a locality
         1. Usually a flat fee but can be based on earnings.
         2. May be according to the type of business activity.

C. An example of business license tax: Virginia BPOL Taxes
   i. Only receipts attributable to the exercise of a privilege subject to licensee at a definite place of business within the jurisdiction should be included in the BPOL tax base.

a. This case has it all! Apportionment, Commerce Clause, what factors or measuring stick should you use if the most obvious measuring stick does not work, etc. The Virginia Supreme Court found for the Taxpayer and remanded it back to the County to come up with the most appropriate way to measure the actual gross receipts earned or attributable to the activity in the county.

D. Local Level Income Taxes

i. Maryland

a. Local level income tax that is reported on state return but rates is based on county/city.

b. 1.25% - 3.20 % determined by local officials

c. Wynne – the one to watch? Clearly a Commerce Clause issue. Pomp and Friedman will be discussing this case at length so we will not go into this case, but suffice to say, this case is bringing the federal Constitution issues down to the local level.

ii. Ohio cases

a. In Hillenmeyer v. City of Cleveland Board of Review et al. al., the issue of allocation of income based on “games played” under a City of Cleveland ordinance and/or regulation is at issue. The taxpayer stated that the underlying Board of Tax Appeals erred when it tried to include income earned under an apportionment formula that brought income earned for services performed elsewhere into Cleveland. This case brought up not only the Commerce Clause, and the Due Process Clause, but Equal Protection as well... The taxpayer stated that the BTA “acted unreasonably and unlawfully by affirming the decision of the City of Cleveland Board of review, because Appellant and other professional athlete are specifically singled out and excluded for the protection afforded by R.C. 718.011, which prohibits collection of municipal income taxes from nonresident individuals who performed personal services within the municipality on twelve or fewer days during a calendar year, in violation of the Equal Protection Clause of the United States Constitution...

b. Cleveland continues to rack up points from Saturday v. City of Cleveland Board of Review. Same issue with athlete - Colts football player – Commerce Clause of US Constitution, Due Process of both the federal and state Constitutions and Article XVIII of the Ohio Constitution. (Appeal to Ohio Supreme Court, Case No. 14-0292, Filed Feb. 25, 2014, Bd. of Tax Apps. Case No. 2011-4027).

c. City of Riverside v. State, 2014 – Ohio – 1974. This is a case where the City of Riverside sued the state of Ohio on the basis that an exemption (R.C. 718.11(H) provided an exemption from the municipal level tax for individuals that worked on Wright Patterson Air Force Base. Riverside said that the provision violated the “buck Act, (U.S.C. 105 et. Seq.) , the Ohio and federal Equal Protection Clauses and violated the “one-subject rule” of the Ohio Constitution.

1. While this was a case looking at standing, etc. the take away in this case is the holding by the Court that “the standard for determining whether a statute or ordinance violates equal protection is essentially the same under the state and federal Constitutions.”

Ted Bernert graciously supplied these cases.

iii. New York City – While NYC does impose a personal income tax, it is administered by the State Tax Department. It also imposes a General Corporation Tax.

In two recent cases in New York City, In the Matter of the Petition of The McGraw-Hill Companies (“McGraw-Hill”) and In the Matter of the Petition of AETNA, Inc. (“AETNA”), the taxpayers sought refunds from the New York City from payments of the General Corporation Tax (GCT).

In McGraw-Hill, the issues were whether the taxpayer could compute the GCT by applying the business allocation percentage (BAP) to its entire net income where the BAP receipts factor included income for the receipts for the provision/sales of credit ratings from one of the taxpayer’s divisions which was allocated according to tan audience-based method. The other issue was whether the taxpayer could be considered a “manufacturer” and
thereby qualified to use a double weighted Bap receipts factor. [Sounds like a state level income tax issue?] The court decided that the taxpayer could allocate receipts from it credit ratings division according to the audience based methodology. The court further held that since the division was an information publisher, the tax treatment of the receipts had to be consistent with the tax treatment of other publishers. The taxpayer could therefore receive its refunds. Not all was in favor of the taxpayers – the court held that since less than 50% of the income could be contributed to manufacturing, the taxpayer could use the double weighted sales factor.

This recitation of *McGraw Hill* clearly indicates that the federal level constitutional issues of uniformity apply on the local level.

In *AETNA*, another refund request was at issue. In New York City, insurance companies are not included in the GCT calculations. The taxpayer had sought a refund of tax based on the fact that the receipts for the HMO activities had been included in the calculation. It should be noted that the issue noted by the court was “whether the HMOs were an insurance business and therefore not subject the GCT and not properly ‘included in the Petitioner’s GCT combined report.”

Two issues pop out in this case, the local level courts (1), made a decision as to what type of company qualified to be taxed by the City (insurance or not) and (2), looked at the makeup of the entities that were included in a combined tax return for purposes of New York City GCT.

The take away here is that the same analysis that should be used on a state level as to the qualification and proper inclusion of lines of business in a combined return was done in this case.

Peter Faber argued these cases and is no stranger to state level analysis!

E. Commuter Taxes

i. District of Columbia

a. Commuter tax not allowed in DC courtesy of the U.S. Congress under the District of Columbia Home Rule Act. Unlike the “home rule” discussions above, this home rule indicates a restriction of the ability of the District to tax and
govern itself. This Act was in response to some less than stellar behavior by the District.

b. The Act was passed on December 24, 1973 and while it gave certain powers to the District, it also required that all legislation passed by the DC Council has to be reviewed by a specific Congressional committee and had final say over the revenue bills promulgated by the Council. The CFO (who is the owner of the Office of tax and Revenue) is a direct report to the Congress. The Home Rule Act specifically prohibits the Council for promulgating laws that would:

1. Lend public credit for private projects (bonds);

2. Impose a tax on individuals who work in the District but live in another state;

ii. New York City

Sitting here in New York City, we know is a bit presumptuous to discuss NY but this discussion only goes to use NYC as an example.

a. New York City had a commuter tax until 1999. In 2009, the state of New York enacted a Metropolitan Transportation Mobility Tax. This new regime imposes a 0.34% tax on payrolls and self-employment (pass through entities) in New York City, Nassau, Suffolk, Westchester, Rockland, Putnam and Dutchess counties. While not a commuter tax per se, this tax covers funding for the Metropolitan Transportation Authority. It is just a coincidence that the respective counties had their funding responsibilities reduced at the same time.

b. Tax language from NY website:

1. The Metropolitan Commuter Transportation Mobility Tax (“Mobility Tax”) was enacted in May 2009 to establish an additional source of funding for the Metropolitan Transportation Authority. The tax affects employers and those who earn self-employment income in the Metropolitan Commuter Transit District (“MCTD”). The MCTD includes the five New York City boroughs and the following counties: Nassau, Suffolk, Westchester, Rockland, Putnam, and Dutchess.

2. **Who is affected by the Mobility Tax?**

   a. Employers who:
• Are required to withhold New York State income tax from employee wages, and

• Whose payroll expense exceeds $2,500 in any calendar quarter?

• Employers without any payroll expense for employees employed within the MCTD will not have a tax liability.

• Individuals, Partners & Members of an LLC, treated as a partnership, who:

• Have net earnings from self-employment allocated to the MCTD that exceed $10,000 for the tax year.

3. **What is the tax rate?**

• Employers: 0.34% of an employer’s total payroll expense for employees employed within the MCTD.

• Individuals, Partners & Members: 0.34% of net earnings from self-employment allocated to the MCTD during the tax year. For purposes of calculating the tax, the allocation of net earnings from self-employment from activities both within and without the MCTD is the same methodology that is used to calculate the personal income tax.

F. **Liquor Taxes**

i. Some cities and counties, such as Philadelphia, have a separate liquor tax. This tax is not the “duty” type tax imposed by the federal government; it is very much akin to a sales and use tax but only on liquor sales.

G. **Utility taxes**

i. Layered on top of state and federal

ii. Flat versus usage

H. **Telecommunication taxes**

i. Layered on top of state and federal
ii. Percentage or flat

iii. Challenge with new technologies

iv. Subject to restrictions on “Internet Tax Freedom Act”

I. Garbage, Parking, etc.

J. Special Taxing Districts

   i. Most states give the localities the right to impose special taxes at the local level if not prohibited by the state constitution. This can take the form of a local level sales tax, special district taxes, airport authority concession taxes, telecommunications or utility taxes, cable taxes or other similar taxes.

   ii. What these special taxes have in common is that they are imposed at a level lower that the state. They can be voted on at a local election or passed by the local governing body.

K. Fuel taxes

   Alabama

   What would a discussion of local taxes be without including Alabama? In City of Birmingham v. Veterans Oil Company, the City tried to impose a 1947 city ordinance that was not codified until 2007 and was unknown to all of the taxpayers similarly situated in the City of Birmingham. Amazing….Bruce Ely and Marc Ayers brought us this charming case. CV-09-2602)

L. Non-Titled Personal Property Tax

   i. While the introduction stated that property taxes were not going to be discussed in this review, Cook County Illinois has to be mentioned. In Horwood Marcus & Berk CHTD. V. The Cook County Department of Revenue, the Illinois Appellate Court held that an attempt by Cook County to impose a “non-titled personal property tax” was invalid. In a complicated discussion of whether one of the parties had standing to sue, the Court finally got down to the meat of this decision. In order to close a “loophole” in the sales tax provisions, the Cook County Board of Commissioners imposed a non–titled personal property tax that would capture the value of non-titled personal property bought outside of Cook County but brought in to the county at a later time. The tax was imposed on the “value” of the property.

   ii. The Counties Code of the Illinois Code provides in part that “no home rule county has the authority to impose, pursuant to its home
rule authority, a ***use tax based on *** the selling price of said tangible personal property.” 55 ILCS 5/5-1009 (West 20012). This code section further explains that this limitation is pursuant to the Illinois Constitution. The Court found that the tax was basically a tax on the “value” of the property and was in violation of the Counties Code. It did not go further as to address the issues of whether the section violated the Illinois state Constitution or federal Dormant Commerce Clause. “This court address constitutional issues “only as a last resort, relying whenever possible on constitutional grounds to decide cases.2014 IL App (1st) 132646-U (August 4, 2014)

Examples of Specific City Level Tax Regimes

i. Philadelphia

a. Philadelphia has a multitude of taxes. In addition to the usual ones, amusement, liquor and parking taxes, Philadelphia also has a Business Income and Receipts Tax, separate sales and use tax, a Use and Occupancy Tax, a New Profits Tax and a Wage Tax.

b. The Business Income and Receipts tax (“BIRT”) is based on BOTH gross receipts and income. Both parts must be filed. It is sometimes confused with the Net Profits Tax but is a separate tax. Philadelphia does have a provision that if a business meets certain criteria may qualify for “Active Presence” status and will only have to file a Gross Receipts return. The BIRT is filed and paid on an annual basis and the measure is the activity from the previous year. It should also be noted that businesses must file these returns even if the business has not made a profit in the preceding year. NOTE: most gross receipts taxes follow this pattern. Because it is on the gross receipts and not “income”, a company may still be liable for tax even if no profit was made and the company is in a NOL position.

c. The BIRT is subject to some credits, such as, the Keystone Opportunity Zone and other credits.

d. Another Philadelphia taxis the Use and Occupancy Tax. This tax is imposed on the commercial use of any real estate in Philadelphia and includes use of your residence as an office, or tenant’s use of the property. The owner is the one that is responsible for filing the return. The measure of the tax is the assessed value of the property. This is not a PROPERTY TAX. The tax can be collected for the tenant.
e. The Nets Profit Tax is levied on the net profits from the operation of a business in Philadelphia. It is applied to residents, even if the business carried on by the Philadelphia resident if located outside of Philadelphia and nonresidents that operate who conduct business in Philadelphia. Individuals, partnerships, associations, estates, trust, and pass through entities must file the return each year, even if no profits were realized.

f. One more Philadelphia tax needs to be mentioned – the wage tax. The tax is imposed on salaries, wages, commissions, and other compensation paid to an employee who is employed or renders services to an employer. ALL Philadelphia residents owe this tax regardless of where they actually work. Nonresidents that work in Philadelphia must pay the tax. Generally, the employers are the ones that withhold and remit the tax, but if the employer does not have to withhold, the employee must registrar and file.

ii. San Francisco

a. Where to start …San Francisco has given us much to discuss.

1. General Motors Corp. v. City and County of San Francisco, 69 Cal. App. 4th 448 (1999) San Francisco imposed a business tax that effectively imposed the tax on business that manufactured tangible personal property outside of the city but sold that product in the city. The Appellate court held that because the tax was not imposed equally on businesses that both manufactured and sold within the City, the tax was in violation of the internal consistency test and discriminated against out-of-the city manufacturers.

2. San Francisco has imposed a new “Gross Receipts Tax” that replaces the old Payroll tax. A business will either pay the Gross Receipts tax or a Business Registration Fee. There is threshold of 1 million dollars after which the Gross Receipts Tax kicks in. It is unclear how the calculation will be done and whether apportionment is going to play a part in the new Gross Receipts Tax. The requirement to file a combined return for related entities may trigger a new set of litigation as to who is in the combined return and what amounts will be included in the return. The actual return is not available as of this
date and the “worksheet” cannot be used as a return. Three is five year “phase in” of the Gross Receipts Tax.

M. Local Level Case Law

i. **Hartney Fuel Oil Company v. Hamer, Ill.**

ii. **Midwest Gaming & Entertainment, LLC v. The County of Cook, Cook County Department of Revenue, and Zahra Ali**, No. Ch. 15736 Cir. Ct. Cook County IL.) Stuck down the Cook County Gambling Machine tax.

iii. **Horwood Marcus & Berk v. Cook County Department of Revenue 2014 IL App. (1st) 132646-U (August 4, 2014.)**

iv. **Ford Motor Company v. Chicago Dep’t of Revenue, 2014 Il App (1st) 130597 (June 27, 2014)**

v. **Chicago Bears Football Club v. Cook County Dep’t of Rev., 2014 Il App (1st) 122892 (August 6, 2014)**

vi. **Ford Motor Credit Co. v. Chesterfield County (Va. March 4, 2011) Record No. 092158.**

vii. **Ex parte Shelby County Board of Equalization, Alabama Supreme Court, No. 1130017**

viii. **City of Birmingham v. Leaf River Energy Center, LLC, Ala. S. Ct., Dkt. No., 1120132 (May 10, 2013).**


x. **Coleman et al. v. Campbell Co. Public Library Bd. of Trustees, Kentucky Court of Appeals, Case No. 2013-CA-000883-MR**

xi. **Kuhnhein et al. v. Kenton Co. Public Library Bd. of Trustees, Kentucky Court of Appeals, Case Nos. 2013-CA-000874-MR and No. 2013-CA-001010 (Pending).**

xii. **Laborde et al. v. the City of Gahanna, No. 13-3731, U.S Ct of Apps (6th Cir)(File name: 14a024n.06)**

Every state code has a provision that allows for an appeal of local taxes. The trick is to find out where the appeal provisions are located and how the process has to follow. Some states have the appeal rights in the state tax code but the taxpayer might have to look either at the administrative process provisions or the city/county/local level authorization provisions.

In some states, it is a mix of local and state and care must be taken to follow the process - some state will have very strict times lines to file provisions and failure to follow those provisions could leave the taxpayer without remedy.

In Virginia, Va. Code Sec. 58.1-383.1 provides in part that a taxpayer can appeal to the Local Commissioner of the revenue or other assessing official. The statute of limitation is one year from last day of the year the assessment was made or within one year from the date of the assessment whichever is later.

It provides that the Commissioner can hold a conference with the taxpayer and that the Commissioner “shall” issue a written determination that set forth the reasons for the determination. Within 90 days after the appeal has been filed. If the Commissioner has not rendered a determination after one year, and with 30 days written notice by the taxpayer to the Commissioner, the taxpayer can deem the appeal denied, and appeal the State tax Commoner. The taxpayer has 90 days to file the appeal with the State Tax Commissioner upon either the delivery of the determination by the Local Commissioner or the deemed denied period.

The State Tax Commissioner has 30 days to decide if the Tax Commissioner has jurisdiction to hear the appeal.

The Tax Commissioner has 90 days to issue a determination to the taxpayer unless both the taxpayer and the Tax Commissioner agree to a longer period. This extension cannot be longer than 60 days.

There is suspension of collection activities during this period. One note – the Tax Commissioner in Virginia is prohibited from making a determination regarding the valuation or the method of valuation of property subject to any local tax other than a local business tax. This effectively means that the process for appealing
real property has to follow the process set out in the property tax section rather than the “short cut” of appealing to the State Tax Commissioner.

This section also lays out the judicial appeal process under Sec. 58.1-3984. While collection activity is usually suspended during this period, the Code does provide for collection if there are issues as to the taxpayer’s ability or intent to pay the tax should the final determination go against the taxpayer. The court must be a party to this process. This section would also apply in the complete appeal all the way up to the court of highest appeal.

If the taxpayer makes the determination that they will pay the tax to cut off the interest clock, the court needs to know that the tax was paid and that part of the remedy in the pleadings is to grant a refund of the tax paid.

PRACTICE NOTE: Failure to note a refund request as a pleading in an appeal may put the taxpayer at a disadvantage – the statute of limitations for a refund may have passed by the time the litigation on the assessment has finished.

What is interesting is that this suspension provision does not apply if the appeal is one for a local business tax or local mobile property tax (car) that is initiated by a direct filing to the court and the appeal to the Local Commissioner and Tax Commissioner is bypassed.

Another paragraph in this section provides that both the Local Commissioner and the State Tax Commissioner has the authority to issue an opinion in specific cases to interpret a local business tax matter or any other local tax.

Va. Code Section 58.1-3995 provides that while a matter is in appeal, the locality cannot deny a taxpayer a permit or license to go on with their business while the appeal in in process.

See Attached Appeal Document.

FINAL CLASS AND REVIEW (4/24)

Instructor: Lipinski Galland

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