SURVEY OF STATE AND LOCAL TAXATION

GEORGETOWN UNIVERSITY LAW CENTER
2016 FALL SEMESTER

ADMINISTRATIVE MATTERS

Contact Information:
Philip M. Tatarowicz
Professor, Graduate Tax Office

Karl A. Frieden
Vice President and General Counsel
Council on State Taxation

Class Location, Meeting Times, Final Exam
Class Location: McD 160
Meeting Time: Wednesdays, 1:20 – 3:20 PM
Final Exam: Take-home exam

Securing Class Materials: Grades and Final Exam
Welcome to State and Local Tax: U.S. Subnational Taxation of Multijurisdictional Entities. Information concerning class content and PDFs to reading assignments is available via “The West Education Network” ("TWEN") system, which can be accessed via www.lawschool.westlaw.com. Contact Thanh Nguyen [redacted information] if you did not receive instructions for setting-up and creating your OnePass username and password that will allow you access to the TWEN system.

The TWEN system should be visited before preparing for each class to ascertain there have been no changes to assigned reading assignments or content. Further, the TWEN system should be consulted before each class to verify no announcements or other administrative items have been posted concerning class changes.

Note: Class readings are parceled between “assigned” and “optional.” Students are not required, nor will they be called upon, to discuss optional readings, which may be discussed by the professor during class. However, in advance of the relevant class, students should read and be prepared to discuss assigned readings.

Exam
Grades will be awarded based on a single take-home exam that can be taken on a date of the student’s choosing between December 6 – 17, 2016, inclusive. Students will be allowed three hours to complete the exam. The primary objective of the exam will be to test students on their ability to identify and analyze issues and their ability to apply the legal principles and rules that will be taught in this course to hypothetical fact patterns.
CLASS SCHEDULE AND ASSIGNMENTS

CLASS ONE – Phil Tatarowicz (August 31, 2016)

Course Overview; Dynamics and Taxonomy of State and Local Taxes (SALT); State Constitutional and Other Self-Imposed Limitations

1. Welcome and Overview
   a. Course Syllabus
   b. Administrative Matters

2. Why a Need for this Course?

   Assigned Readings:

3. Factors Contributing to the Dynamics of SALT
   a. Illustrative Stakeholders

4. Taxonomy of SALT
   a. Direct v. Indirect Taxes
   b. Inland v. Border Taxes
   c. Ad valorem v. Excise Taxes
   d. Taxes v. Fees
   e. Other Tax-like Burdens
   f. States’ Continuing Experimentations: Competitive Tax Bases and their Vacillating Revenue and Legal Dynamics

   Assigned Readings:
   Drees Co. v. Hamilton Township, 132 Ohio St.3rd 186 (2012).

5. State Constitutional and Other Self-Imposed Limitations on the Powers of Subnational Governments to Tax

CLASS TWO – Karl Frieden (September 7, 2016)

Sales and Use Taxes

1. In a Nutshell: GRT v. VAT v. SUT
2. Common Issues that Engage Lawyers
   a. Nexus
   b. Sourcing
   c. Select New Era GRTs and Illustrative Issues
      i. Ohio’s Commercial Activity Tax
      ii. Texas Margins Tax
   d. Financial Statement Implications
3. Overview of Sales and Use Taxes
   a. Constitutional Framework of Sales and Use Taxes

   **Assigned Readings:**

   b. Diversity of Structural Taxing Regimes Found Today
   c. Illustrative Legal Controversies Driven By the Competing Demands of Simplicity and Fairness

4. Defining a Sale
   a. Illustrative Statutory Requirements
   b. Parceling Taxable Sales of Tangible Personal Property From Non-Taxable Sales of Services or Intangibles

   **Optional Readings:**
   *Dine Out Tonight Club, Inc. v. Dep’t of Revenue Servs.*, 556 A.2d 580 (Conn. 1989).

   Illustrative Judicial Standards, e.g., the “True Object” Test

   **Assigned Readings:**

   Bundled Transactions

   **Assigned Readings:**

5. Illustrative Taxable Transactions
   a. Leases v. Sales

   **Optional Readings:**

   b. Promotional Materials

   **Optional Readings:**

   c. Intercompany Transactions

   **Assigned Readings:**
   *Ind. Dep’t of Revenue v. Belterra Resort Ind.*, LLC, 935 N.E.2d 174 (Ind. 2010).
d. Repair Services

**Optional Readings:**
Wisconsin Dept. of Rev., “Sales and Use Tax Treatment of Extended Service Contracts and Warranties” (Sept. 1, 2010).

e. Delivery and Transportation

**Assigned Readings:**

f. Drop Shipments

**Assigned Readings:**
New Mexico Tax’n and Rev. Dep't, Rev. Rul. 401-09-05 (Dec. 3, 2009).

**CLASS THREE** – Karl Frieden (September 14, 2016)

*Sales and Use Taxes (cont.)*

6. Illustrative Exclusions and Exemptions
   a. Sale for Resale Exemption

**Assigned Readings:**


b. Bad Debts

**Assigned Readings:**

c. Interstate and Foreign Commerce

**Assigned Readings:**

d. Temporary Storage

**Assigned Readings:**
Conn. Gen. Stat. § 12-408c

e. Occasional, Isolated, and Casual Sales
Assigned Readings:  
Virginia Dep’t of Taxation, PD 10-120 (July 1, 2010).

f. Containers and Packaging Materials

Assigned Readings:  

g. Ingredient and Component Exemption

Assigned Readings:  

h. Manufacturing Type Exemptions

Assigned Readings:  

i. Taxable Services and Intangibles

Assigned Readings:  

7. Adapting Old Regimes to New Models and Remote Vendors: E-Commerce, Cloud Computing
   a. Substantial Nexus and Internet Taxation

Assigned Readings:  

   Direct Mktg. Ass’n v. Brohl, 735 F.3d 904 (10th Cir. 2013).


b. Sales Taxation of Cloud Computing
   c. Development of a Streamlined Sales Tax System

Assigned Readings:  
The Main Street Fairness Act, H.R. 2701 (July 29, 2011).
Federal Limitations on the Powers of Subnational Governments to Levy Taxes and Fees

1. Introduction
2. Legislative, Executive and Judicial Branch Limitations
3. The Court’s Contemporary Standards
   a. First Amendment

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b. Equal Protection Clause

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c. Privileges and Immunities Clause

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d. Import-Export Clause

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e. Duty of Tonnage Clause

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f. Supremacy Clause

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g. Due Process Clause

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h. Commerce Clause
CLASS FIVE – Phil Tatarowicz (September 28, 2016)

Transfer Taxes

1. Definition and History
2. Real Estate Transfer Taxes
   a. Purpose
   b. Current Use and Reliance
   c. Tax Policy Pros and Cons
3. Controlling Interest Transfer Taxes
   a. Overview
   b. Tax Computation

c. Special Situations
d. Exemptions

4. Special Situations in Real Estate Transfer Taxes
   a. Tiered Structures
   b. Transfers of RE to a Newco or Other Tax Avoidance Transfers
5. Concluding Remarks

Capital Stock Taxes

1. Definition and History
2. Jurisdictional Basis
3. Pro Forma Computation and Issue Analysis
   a. Illustrative Tax-Base-Scope Issues

Optional Readings:


b. Illustrative Tax-Base-Valuation Issues

c. Sourcing (“allocating”) the Tax Base

4. Conclusion

Local Taxes

**Assigned Readings:**
Bender’s State Taxation: Principles and Practice, Part 6, Special Issues in State Taxation, Chapter 29 LOCAL TAXES, sections 29.01 (State Law Limitations on Taxation by Political Subdivisions); 29.02 (Taxation by Political Subdivision); 29.03 (Local Income Taxes); and 29.05 (Miscellaneous Fees and Taxes) (On TWEN).

State Government Tax Collections Summary Report: 2013, Governments Division Briefs (April 08, 2014)

CLASS SIX – Karl Frieden (October 5, 2016)

Unemployment Taxes

1. Definition and History

**Assigned Readings:**
*Unemployment Insurance Taxes: Options for Program Design and Insolvent Trust Funds*, Tax Foundation Background Paper, October 2011, Number 61.

2. Computing State Unemployment Taxes

3. Managing State Unemployment Tax Costs

**Optional Readings:**

*Appealing to the Board of Review*, State of Illinois Department of Employment.

**Assigned Readings:**


4. The Experience Based Tax Rate  
   a. SUTA Dumping  

5. Illustrative Factors that Can Influence an Employer’s Experience Based Rate  
   a. Mergers, Acquisitions and Transfers  
   b. Rate Management and Statutory Elections  
   c. Policy  

6. Implications of Recent Recession  
   a. FUTA Credit  
   b. Interest on Federal Loans  

7. Concluding Observations  

CLASS SEVEN – Kendall Houghton (October 12, 2016)  

Unclaimed Property  

1. Overarching Policies and Legal Principles  
   a. Uniform Acts  
   b. Defining Intangible Property and Unclaimed Property  
   c. “Holder”  
   d. Derivative Rights Doctrine  
   e. Windfalls  
   f. Reuniting Property with Owners  

**Assigned Readings:**  
BNA Multistate Tax Management Portfolio 1600: Unclaimed Property  
(Introduction; History and Evolution of Current UP Law; Uniform Acts; Features of the Uniform Acts) (On TWEN).  

2. Complex Legal Issues and Unsettled Questions  
   b. Defenses to UP Claims:  
      i. Conditions Precedent (property rights have not vested) v. “Private Escheat”  
   c. Jurisdictional Claims  
      i. Texas v. New Jersey and Supreme Court Jurisdictional Precedent  
      ii. Third Priority Rule  
      iii. Foreign Owner Property  
      iv. Place-of-Purchase Presumption  
   v. Current Litigation  

**Assigned Readings:**  


3. Audit Process
4. Audit Defense Best Practices
5. Strategic/Legal Issues that Arise in Audit
6. Practical Applications of UP Theory (e.g., estimations, identification of “holder” in multi-party arrangements, etc.)
7. Settlement or Litigation of UP Disputes

Assigned Readings:
Slide deck on multistate unclaimed property audit examinations, case study.

CLASS EIGHT – Phil Tatarowicz (October 19, 2016)

Income Based Taxes; Select Issues Facing Multijurisdictional, Multibusiness Enterprises

1. Definition, History, Policy Pros and Cons, and Pro Forma Computation
   a. Income Based Taxes and Their Legal Incidence
   b. Income v. Franchise Taxes
   c. Income Based Taxes: Illustrative Characteristics
   d. Resident v. Territorial Systems

Assigned Readings:
Multistate Tax Commission, Income & Franchise Tax Audit Manual, Rev. March 2013, (hereafter “MTC IFTAM”), pp. 4-7,

2. Nexus and P.L. 86-272

Assigned Readings:
MTC IFTAM, pp. 16-23,

3. Tax Base
   a. The Starting Point: Conformity to Federal Taxable Income
   b. Select State Addition Modifications
      i. Related Party Addbacks
   c. Select State Subtraction Modifications

Assigned Readings:
MTC IFTAM, pp. 52-59,
4. Unitary Tax Doctrine

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CLASS NINE – Phil Tatarowicz (October 26, 2016)

Income Based Taxes (cont.)

1. Separate v. Group Reporting Methodologies
   a. Introduction
   b. Illustration of Group Reporting Methodologies

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<td>Prentiss Willson, Combined Reporting, Georgetown University Law Center’s 2014 Advanced State and Local Tax Institute (On TWEN)</td>
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2. Sourcing the Taxable Base
   a. The Uniform Division of Income for Tax Purposes Act (UDITPA)

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<td>Uniform Division of Income for Tax Purposes Act, sec. 1(a), West's Uniform Laws Annotated (2002). (UDITPA)</td>
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<td>MTC IFTAM, pp. 60-70</td>
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c. Policy Issues

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<td>Professor Richard Pomp, Report of the Hearing Officer, Multistate Tax Compact Article IV Proposed Amendments (October 25, 2013),</td>
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CLASS TEN – Karl Frieden (November 2, 2016)

Ad Valorem Property Taxes

1. Introduction
2. Defining “Property” and “Tax”

**Assigned Readings:**


3. General Classification of Property
   a. Real Property
   b. Tangible Personal Property
   c. Intangible Personal Property
   d. Distinguishing Real and Tangible Personal Property

**Optional Readings:**

*Sears Roebuck & Co. v. Seven Palms Motor Inn, Inc.*, 530 S.W.2d 695 (Mo. 1975).


4. Assessment and Calculation of Tax
   a. Split Tax Rolls

**Optional Readings:**


b. Central Assessment
c. Transportation and Utility Companies

5. Calculation of Property Tax
   a. Real Property Tax
   b. Personal Property Tax
   c. Common Property Tax Exemptions

6. Uniformity
### Optional Readings:


### 7. Fairness Principle and Its Political Challenges

### Assigned Readings:


a. Uniformity

### 8. Payments In Lieu Of Taxes (“PILOT”)

### Optional Readings:


### 9. Equalization

### Optional Readings:


### 10. Determining Fair Market Value

a. Obsolescence

b. Approach 1: Cost

### Optional Readings:


*Nestle USA, Inc. v. Wisconsin Dep't of Revenue*, 795 N.W.2d (Wis. 2011).
c. Approach 2: Income

**Optional Readings:**

*St. Louis Cnty. v. Sec. Bonhomme, Inc.*, 558 S.W.2d 655 (Mo. 1977) (en banc).


d. Approach 3: Comparable Sales

**Optional Readings:**


**CLASS ELEVEN** – Karl Frieden (November 9, 2016)

Excise Taxes

**Optional Readings:**


*Justin Higginbottom*, *Bag Taxes Disappointing in Debut*, Tax Foundation Fiscal Fact No. 224 (May 7, 2010).

**Illustrative Industry Specific Taxes**

1. Premium and Retaliatory Taxes

**Assigned Readings:**


2. Severance Taxes
3. Telecommunication Taxes
4. Hospital and Medical Provider Taxes

**Statutory and Negotiated Incentives; Tax Incentives**

1. Introduction
Optional Readings:

2. Dynamics and Importance in Multistate Cost Management
   a. Statutory Incentives
   b. Negotiated Incentives

3. Tax Policy Arguments - Pros and Cons

4. Illustrative Legal Challenges
   a. Federal Law
      i. Permissible Incentive or Discriminatory Taxation?

   Assigned Readings:
   Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004).

   ii. Establishment Clause

   Assigned Readings:

b. State Law
   i. Authority to Award an Incentive

   Assigned Readings:

   ii. Standing to Challenge

   Assigned Readings:

   iii. Business Purpose

   Assigned Readings:

   iv. Impact of Subsequent Law Changes

   Assigned Readings:

   v. Scope of clawback provisions

   Assigned Readings:
5. Summary

CLASS TWELVE – Karl Frieden (November 16, 2016)

Understanding the SALT Implications of International Operations

**Assigned Readings:**

1. State Impact Of Tax Treaties
2. Impact of Foreign Operations on State Taxable Income Base
3. Differences Between Federal and State “80-20” Companies
4. Inclusion of Foreign Entities in State Unitary Returns
5. Application of Intercompany expense Add-back Rules to Cross-border Transactions
6. Process For Identifying Barriers To Tax Efficient Transfers of Assets

Unincorporated Multijurisdictional Enterprises

1. Partners and Partnerships
2. Single Member and Multi-Member LLCs
3. S Corporations
4. Individuals

THANKSGIVING BREAK – NO CLASS (November 23, 2015)

CLASS THIRTEEN – Phil Tatarowicz (November 30, 2016)

SALT Technical and Policy Challenges Facing Multijurisdictional Enterprises

1. Reorganizing Enterprise Operations – Mergers & Acquisitions
   a. Introduction & Overview
   b. Avoiding Traps and Saving Taxes

**Assigned Readings (See TWEN for PDFs):**

**Optional Readings (See TWEN for PDFs):**

2. Subnational Tax Policy Dynamics
   a. Introduction & Overview
      i. Balancing Federalist and Subnational Tensions
      ii. National Uniformity v. Fiscal Federalism
      iii. Search for a State and Local Ideal Tax Regime

b. Judicial Case Study Illustrating Complexities of the Challenges

Assigned Readings (See TWEN for PDFs):