NY Tax Minutes: Marketplace Guidance, Tax Return Bill

By **Timothy Noonan and K. Craig Reilly** (June 6, 2019, 9:57 AM EDT)

Timothy Noonan

Craig Reilly

We're back after a brief one month hiatus. One of your authors celebrated the birth of his first child in April, which led to some last-minute calls to duty on the home front. Your other author was at the ready to fill in, but he has 12 kids already (no joke), so we decided to dedicate April to our dependents (new and old), and to our clients. We'll leave it to readers to guess which author has one mouth to feed and which has 12.

The good news, however, is that New York state taxes wait for no one, so we have plenty to report this month. Below, we cover the state's most recent guidance for marketplace providers and remote vendors, along with the New York state legislature's approval of a (Trump?) tax return disclosure bill.

We also cover a series of new decisions and determinations from the New York State Division of Tax Appeals, including two Tax Appeals Tribunal decisions that detail separate doctrines with broad application across tax types: (1) the informal refund claim doctrine and (2) the public interest privilege limiting disclosure of tax-related documents. Finally, we introduce our new lightning round review of administrative law judge determinations. This month, we focus on a series of recent sales and use tax determinations.

The Headlines

New York State Issues Additional Guidance for Remote Vendors and Online Marketplace Providers

As we've reported in **prior columns**, 2019 has already been a busy year in New York state (and around the country) for online sales tax legislation and other guidance.

In New York, the Tax Department, on Jan. 15, 2019, first issued an underwhelming one-page, three-paragraph notice,[1] explaining the state's position on economic nexus for sales tax purposes. Surprise! New York state had economic nexus all along!?

According to the notice, and as summarized in a second, recently issued tax publication,[2] any vendor who (1) sells more than $300,000 in tangible personal property, and (2) makes more than 100 separate sales of tangible personal property delivered into New York state during the immediately preceding four sales tax quarters will be required to register and comply with New York state sales tax laws, regardless of whether the vendor has any other presence in the state.

Initially, some Tax Department representatives claimed that because the laws imposing New York's economic nexus standard had been on the books for years, the state would be within its rights to impose the law going back even before the U.S. Supreme Court's South Dakota v. Wayfair Inc. decision. Thankfully, the state's most recent guidance walks back that position, noting that New York's economic nexus provisions became effective on the date of the Wayfair ruling — June 21, 2018.

The recent publication also explains that for purposes of calculating the $300,000 and 100 transaction sales thresholds, vendors should run a rolling calculation that includes the immediately preceding four sales quarters. Whether vendors will want the hassle of continuously monitoring these thresholds, as opposed to simply registering and leaving the tax turned on, is another story. The publication concludes by providing additional information to vendors on the state's registration and voluntary disclosure programs.

In addition to the state's economic nexus guidance, there have also been recent changes to the sales tax collection rules for marketplace providers. As we reported in **March**, the state's 2019-2020 budget called for a new "consistent framework for the collection of required sales taxes by internet marketplace providers." This was oddly preceded by a sales and use tax advisory opinion,[3] which claimed that it was already "within the discretion of the commissioner of taxation and finance" to treat online marketplaces as co-vendors of the independent sellers operating on their markets. The advisory opinion left us asking, if that were true, what is the purpose of the state's new law?

In terms of prospective compliance, however, the state's premature advisory opinion is likely a moot point, as on May 31, 2019, the state issued a technical memorandum[4] outlining the sales tax collection requirements for marketplace providers that are effective June 1, 2019.

According to the new guidance, a "marketplace provider" is a person who, pursuant to an agreement, facilitates sales of tangible personal property by a marketplace seller or sellers. In order to "facilitate sales of tangible personal property," the marketplace provider must both (1) provide a forum for third parties to make sales, and (2) collect the payment made by a customer.

The guidance goes on to explain that the state's new economic nexus rules (discussed above) will apply to marketplace providers, meaning that a person with no physical presence in New York state who facilitates sales for marketplace sellers is a marketplace provider and is required to register for sales tax purposes and collect and remit sales tax if, in the previous four sales tax quarters: (1) the cumulative total of the person's gross receipts from sales made or facilitated of tangible personal property delivered into the state exceeded $300,000, and (2) such person made or facilitated more than 100 sales of tangible personal property delivered in the state.

Marketplace providers are not required to collect sales tax on transactions that are not considered the sale of tangible personal property, such as sales of: services (for example, transportation services or electric service); restaurant food; hotel occupancy; or admissions to places of amusement.

Generally, the technical memorandum goes on to instruct that marketplace providers cannot refuse to collect tax on a marketplace seller's sales, even if the seller is already registered for sales tax purposes. Instead, the marketplace provider should provide marketplace sellers with a newly issued Form ST-150, "Marketplace Provider Certificate of Collection,"[5] certifying that the marketplace provider, not the marketplace seller, will collect and remit sales tax on the sales that it facilitates.

A marketplace seller is relieved from liability for the collection of sales tax if it receives Form ST-150 from the marketplace provider. Alternatively, marketplace providers can avoid the requirement to issue Forms ST-150 if the marketplace provider has a publicly available

agreement with its marketplace sellers that includes the following statement or one that is substantially similar:

[Marketplace provider name] is registered to collect New York state sales tax and will collect sales tax on all taxable sales of tangible personal property that it facilitates for marketplace sellers for delivery to a New York state address.

New York Sends Tax Return Disclosure Legislation to Governor

On May 22, 2019, the state's legislature approved measures[6] authorizing the state to provide the tax return information of ~~Donald Trump~~ elected and high-ranking public officials to specific congressional committees.

Continuing the much-publicized back and forth over the president's tax returns, New York's bills allow the Tax Department to provide state tax return information of individuals elected to federal, state and local offices to the House Ways and Means Committee, the Senate Finance Committee and the Joint Committee on Taxation "in furtherance of [any] legitimate task of the Congress."

The bills, as originally drafted, applied to all taxpayers, but amendments were added in order to limit the scope, so that the disclosures cover only "the president of the United States, vice-president of the United States, [a] member of the United States Congress representing New York state," and other specified high-ranking office holders, along with entities controlled by such individuals. The legislation now heads to the governor's office, where Gov. Andrew Cuomo, a vocal critic of the president, is expected to sign it.

Republicans in both New York's Senate and Assembly criticized the bills as an unwarranted invasion of taxpayer privacy. But, from our experience, the state is already permitted to share tax return information with other states and with the IRS, so the law doesn't come as much of a shock to us. What's more surprising perhaps is Democratic lawmakers' attempts to claim that the new law is not directly targeted at President Donald Trump. I mean, come on ...

The Cases

Each month, we highlight new and noteworthy cases from New York State's Division of Tax Appeals and Tax Appeals Tribunal, along with any other cases involving New York taxes. This month, we cover two recent decision from the Tax Appeals Tribunal that each outline separate doctrines with broad application across tax types: (1) the informal refund claim doctrine, and (2) the public interest privilege, which limits disclosure of tax-related documents.

We also highlight an Appellate Division decision, upholding a New York City Tax Appeals Tribunal determination that denied a taxpayer the right to use a reduced real estate investment trust real property transfer tax rate. Finally, we provide a new lighting round, reviewing a slew of recent sales and use tax administrative law judge, or ALJ, determinations.

Tax Appeals Tribunal Grants Taxpayer's Informal Film Credit Refund Claim

In Matter of Accidental Husband Intermediary Inc.,[7] the petitioner, who had produced a film in New York City, challenged the state Tax Department's denial of its 2007 claim for Empire State film production tax credit refunds.

The petitioner finished production on its film in 2007, and, as required under the Empire State film production credit procedures, submitted its initial credit application in November 2006. In 2007, the petitioner sent in its final application, reporting its actual production costs and requesting a certificate evidencing the grant of the film credits. On Oct. 15, 2007, the petitioner received its certificate of tax credit, approving a $1,203,501 refundable credit for the tax year ending Dec. 31, 2007.

Pursuant to Tax Law Section 24(a)(2), the petitioner was required to claim the credit over a two-year period, so half of the credit was claimed on the petitioner's 2008 business corporation franchise tax return. Because, however, the petitioner did not have its final certificate when it filed its original 2007 return, the 2007 portion of the credit was claimed on an amended return, the timing of which was at issue in the tribunal's decision.

Although the Tax Department acknowledge receipt of the petitioner's 2008 return, the department claimed that it never received the 2007 amended return until after the three-year statute of limitations for claiming a credit or refund had expired. The petitioner challenged the denial of the credit, arguing that (1) it timely filed its 2007 amended return in January 2009; (2) its original 2008 return constituted an informal refund claim for 2007; and (3) the Tax Department should exercise its discretionary authority under Tax Law Section 1096(d) to grant the 2007 credit.

Regarding the petitioner's first argument of timely filing, the petitioner submitted an affidavit from its secretary/vice president, affirming that he received the amended 2007 return from the petitioner's accountant and personally directed and confirmed the mailing of the return. The petitioner, however, did not have any other proof of mailing — practitioner side bar: If claiming a $500,000 tax refund, the cost of certified mail receipts is money well spent — so the tribunal held that the petitioner had failed to prove timely mailing of its refund claim.

But according to the tribunal, it also had to consider the federal informal refund claim doctrine under which "courts have held that under certain circumstances, it is sufficient that the taxpayer submit a so called 'informal claim' within the statutory period, and then, outside the limitation period, submit a formal claim."

The tribunal described the doctrine's three elements as (1) the informal claim must provide the taxing authority with notice that the taxpayer is asserting a right to a refund; (2) the claim must describe the legal and factual basis for the requested refund; and (3) the claim must have a written component. Looking to the petitioner's 2008 return, which claimed one-half of the available credit and also included a copy of the petitioner's credit certificate, the tribunal held that the petitioner had timely filed an informal claim for its 2007 film production credits.

Even though the petitioner's 2008 return lacked an explicit statement that the petitioner was seeking a refund for the 2007 tax year, the tribunal held that its "inquiry into the existence of an informal claim does not end with an examination of the four corners of the proffered documents." Instead, the "sufficiency of the written component of an informal claim must be considered in the context of the surrounding circumstances." And what surrounding circumstances did the tribunal find compelling in this case?

Well, preproduction, the petitioner applied for and was granted an allocation of film credits. Post-production, the petitioner provided the state with its actual costs of production and received from the state a certificate evidencing the credit. And even though the Tax

Department didn't issue the certificate, it certainly knew that the certificate represented a credit allocation that was to be paid out in two equal parts over 2007 and 2008 (this payment was mandated under the state's tax law).

We can debate the merits of New York's film credits, but, for the time being, the law is the law, and it's unfortunate to see the Tax Department grasping at excuses in order to avoid delivering tax benefits to taxpayers who have properly earned them. Thankfully, the tribunal saw through these excuses and reached the right result in this case.

Tax Appeals Tribunal Orders In Camera Review of Subpoenaed Audit Documents

In Matter of Moody's Corp. & Subsidiaries,[8] the issue before the tribunal was whether the Audit Division may be compelled by a Division of Tax Appeals-issued subpoena to produce certain information that the division claims is protected from disclosure under the "public interest privilege."

By way of background, Moody's was audited for tax years 2004 through 2010, and the audit focused primarily on how Moody's sourced its credit rating receipts for corporation franchise tax purposes. Moody's maintains that during the audit, the Audit Division asserted that Moody's was required to source its credit rating receipts on an origination basis (i.e.¸ where the service was performed), and that the division claimed that it never allows credit rating service providers to source their receipts on a destination basis.

Based on this guidance, Moody's alleges that it entered into a closing agreement to settle its audit, believing that all other providers (like, for example, one of its biggest competitors, McGraw-Hill Cos.) were also required to source their credit rating receipts on an origination basis.

Fast forward a couple years, and Moody's learns byway of two other reported determinations[9] that the Tax Department had, in fact, permitted its competitor McGraw-Hill to source its credit rating receipts on a destination basis. After learning that it had been duped, Moody's sought a refund for the taxes it paid under the closing agreement. In connection with its refund claim, Moody's filed various requests for documents and information that it claims are relevant to the substantive tax issues surrounding its refund.

Initially, Moody's sought the release of the documents through a Freedom of Information Law request. But after several rounds of litigation, much of the requested documentation was withheld as interagency or intra-agency materials that are not final agency policy or determinations.[10] Moody's then requested that the Division of Tax Appeals issue a subpoena duces tecum, pursuant to 20 NYCRR 3000.7, ordering the Audit Division to produce various documents relating to its sourcing of credit rating receipts for tax years 2004 through 2010.

The Audit Division responded to Moody's request with a motion to withdraw the subpoena, and in deciding the motion, an ALJ initially focused on the so-called "public interest privilege" and agreed to the division's request to withdraw the subpoena. The ALJ described the public interest privilege as attaching to "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communication or the sources should not be divulged." The judge described the applicable test as a balancing of the public interests involved, which include considering the encouragement of candor in the development of governmental policy.

After considering the various public interests for and against disclosure, the ALJ concluded that "based on the public interests at play, the public interest in nondisclosure of the documents subject to the subpoena here at issue serves the purpose of ensuring candor by government personnel during the deliberative process accompanying audit activities and policy formulation and outweighs the public interest in petitioner's need to obtain the documents to establish its underlying claims of disparate treatment and detrimental reliance."

Both parties took exception to the ALJ's order, and after reviewing the procedural background, the Tax Appeals Tribunal agreed with the ALJ's description of the public interest privilege, but also found that in order for a truly proper balancing analysis to occur, the documents in question must have been subject to an in camera review by the actual decision maker — i.e., the ALJ (the tribunal did note that the documents were previously reviewed by other judges in litigation involving Moody's original FOIL request). And because the ALJ made his decision without reviewing the documents himself, the tribunal remanded the matter back to the ALJ to do an in camera review as part of his balancing test.

On further review, we hope that the ALJ takes a narrow view of the public interest privilege. We have no issue with encouraging candid discussions between agency personnel. That's how things get done. But when the issue is one of disparate and potentially arbitrary determinations as between similarly situated taxpayers (think back to the division's whole, "we never let taxpayers source credit rating receipts on a destination basis"), we have real concerns about letting the Audit Division operate without any public scrutiny. How does one prove an action is "arbitrary and capricious" if you can't get the proof of how the action came to be? So, as the ALJ reviews the documents in question, we hope that the public interest privilege is applied sparingly.

Appellate Division Disallows Reduced REIT New York City Transfer Tax Rate

Under Section 11-2102.e(2)(C) of the New York City Administrative Code, which deals with the imposition of the city's real property transfer tax, certain real property transfers to real estate investment trusts, or REITs, are subject to a reduced tax rate. A REIT transfer, to which the reduced rate applies, occurs where there is (1) an instrument transferring real property or an economic interest therein to a newly formed REIT; (2) the value of the ownership interest in the REIT received by the grantor as consideration for the transfer is at least 40% of the value of the equity interest in the real property or economic interest that was transferred; and (3) the grantor retains its ownership interest in the REIT for at least two years.

According to the New York State Supreme Court, Appellate Division, in VCP One Park REIT LLC v. New York City Tax Appeals Tribunal,[11] the petitioners, who transferred an economic interest into a newly formed REIT failed the 40% test and were therefore not able to calculate their tax using the reduced REIT rate. In determining whether the value of the REIT interests received by the petitioners equaled at least 40% of transferred property, the Department of Finance initially used the actual consideration paid for the property interest plus the tax paid by the grantees. The value of the REIT shares received by the petitioners, who were the grantors in the case below, were only 39.13% of this amount, so the city denied the petitioners use of the lower REIT rate.

In appealing the Department of Finance's initial determination, the petitioners pointed to Section 11-2102.e(3) of the New York city code, which states that:

For purposes of determining the consideration for a real estate investment trust transfer taxable under this subdivision e the value of the real property or interest therein shall be equal to the estimated market value as determined by the commissioner of finance for real property tax purposes as reflected on the most recent notice of assessment issued by such commissioner.

Accordingly, the petitioners argued that the value to be used in the 40% test was "estimated market value" not actual consideration.

The appellate division disagreed with the petitioners, however, and upheld the lower New York City Tax Appeals Tribunal determination, which found that Section 11-2102.e(3) does not supersede the general definition of consideration contained within the city code. According to the court, the petitioners failed to point to any laws that supersede "Administrative Code Section 11-2102.e(2)(C)'s specifications for the satisfaction of the 40% test, including with respect to any specifications regarding the calculation of the consideration of REIT interests received by the grantor." The petitioners therefore "fail[ed] to show that the tribunal erred to the extent it applied the 40% test under the terms of Administrative Code Section 11-2012.e(2)(C) or in its calculation of the consideration subject to the RPTT rate of 2.625% applicable to the non-REIT transfer."

Sales Tax Lightning Round

There were also several noteworthy sales tax determinations issued by the New York State Division of Tax Appeals this past month, so we've decided to try something a little different this month and offer a lighting round of summaries.

- *No collateral estoppel in dock fee sales tax matters* – In Matter of Genesee Yacht Club Inc.,[12] the issue was whether dock fees received by a Rochester-area yacht club qualified as either (1) membership dues taxable under Tax Law Section 1105(f)(2), or (2) nontaxable receipts from the rental of real property. The ALJ held that the dock fees, which were separate and apart from members' yearly dues, were taxable under Tax Law Section 1105(f)(2)'s "very broad" definition of dues. Additionally, although a neighboring yacht club had previously won a state court case against the Tax Department, wherein the court held that the neighboring club's charges for dock and mooring space constituted nontaxable charges for leasing real property, the ALJ found that collateral estoppel could not preclude the Tax Department from assessing tax in this case. According to the ALJ, "the doctrine of estoppel does not apply in tax cases unless 'unusual circumstances support a finding of manifest injustice,'" and because, the state court decision at issue was a "unreported case that cites no authority for its conclusion that the dock fees do not constitute dues ... it is determined that collateral estoppel has no application here, nor it is it manifestly unjust for petitioners to be required to lawfully collect tax on dock fees charged to its members." Our definition of "manifest injustice" might include two sailors paying different taxes for the same service on the same river in the same state, but the ALJ disagreed.

- *No participatory sports exception for New York City sales tax* – In Matter of SoulCycle Inc.,[13] New York City-based SoulCycle argued that charges for its spin classes were exempt from tax as admission charges for a participatory sports activity. As summarized by the ALJ, New York City imposes a 4.5% sales tax on the "sale of services by weight control salons, health salons, gymnasiums, Turkish and sauna bath and similar establishments and every charge for the use of such facilities."[14] And although New York state expressly excludes from its sales tax

certain "charges to a patron for admission to, or use of, facilities for sporting activities in which such patron is to be a participant,"[15] the ALJ noted that Section 11-2001 of the New York City Administrative Code expressly omits the participatory sports exclusion from the city tax imposed on other admission charges, and the exclusion therefore also does not apply to the city's 4.5% tax on "receipts from every sale of services ... by health salons, gymnasiums ... and similar establishments and every charge for the use of such facilities." According to the ALJ, "petitioner's attempt to benefit from an exclusion on admission charges while simultaneously claiming that its fees are not admission charges is nonsensical and hereby rejected."

- *Automobile lease assumption results in second tax* – In Matter of Eric Zim,[16] the petitioner assumed a lease of a 2015 Lexus and paid sales tax of $693.63 when he registered the car with Department of Motor Vehicles. The original lessee had paid $1,116.57 in sales tax when he leased the car and the petitioner therefore filed a claim for refund, noting that, pursuant to Tax Law Section 1111(i) and Section 527.15(a) of the state's sales and use tax regulations, the full tax was due and paid at the inception of the lease on the total amount of lease payments. Although the petitioner argued that his tax was therefore a double tax (we agree), the ALJ held that the petitioner was not entitled to a refund or credit for the taxes previously paid, as Section 527.15(e) of the state's regulations limits refunds and credits for "early [lease] terminations." But where the ALJ's determination misses the mark is by overlooking the theory behind the sales taxation of leases, which is that they are a series of periodic sales that, when dealing with long-term automobile leases, are accelerated so that tax is due with the first lease payment. There is nothing in the law, however, providing that this "deemed payment" is negated by a subsequent assumption of the lease by a third party. And since, in this case, we're talking about the same lease, all of the consideration was, by law, already paid for the lease, and there is no new consideration to tax, even if the ALJ is correct that the lease assumption qualifies as a subsequent sale.

Timothy P. Noonan is a partner and K. Craig Reilly is an associate at Hodgson Russ LLP. Noonan and Reilly are regular contributors to Tax Authority Law360.

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[1] https://s3.amazonaws.com/pdfs.taxnotes.com/2019/2019 1612_STTDocs_NYdtf_011519SalesTaxRegisPDFONLY.pdf.

[2] https://www.tax.ny.gov/pubs_and_bulls/publications/sales/nexus.htm.

[3] https://www.tax.ny.gov/pdf/advisory_opinions/sales/a19-1s.pdf.

[4] https://s3.amazonaws.com/pdfs.taxnotes.com/2019/2019-21473_STTDocs_NYdtf_053119MarketplaceProviderGuidance.pdf.

[5] https://www.tax.ny.gov/pdf/current_forms/st/st150.pdf.

[6] https://legislation.nysenate.gov/pdf/bills/2019/S5072Aandhttps://legislation.nysenate.gov/pdf/bills/2019/S6146.

[7] https://www.dta.ny.gov/pdf/decisions/827186.dec.pdf.

[8] https://www.dta.ny.gov/pdf/decisions/827396.dec.pdf.

[9] Matter of McCraw-Hill Cos., NY City Tax Appeals Tribunal, ALJ Div., Feb. 24, 2007 and Matter of McCraw-Hill Cos., NY St. Div. of Tax Appeals, DTA No. 825598, Feb. 12, 2015.

[10] See, N.Y. Public Officers Law § 87(2)(g)(iii).

[11] VCP One Park REIT LLC v. New York City Tax Appeals Tribunal, 171 A.D.3d 632 (N.Y. App. Div. 2019).

[12] https://www.dta.ny.gov/pdf/determinations/827668.det.pdf.

[13] https://www.dta.ny.gov/pdf/determinations/827698.det.pdf.

[14] NYC Administrative Code § 11-2002.

[15] N.Y. Tax Law § 1105(f)(1).

[16] https://www.dta.ny.gov/pdf/determinations/827991.det.pdf.