Inching Towards Objective Fairness: Tennessee Changes the Informal Conference Process to Make Challenging Assessments Fairer and Easier for Taxpayers

The Tennessee General Assembly recently enacted legislation that significantly changes the informal conference process applicable to disputed assessments. While not as ambitious as the previously proposed independent tax tribunal, this compromise legislation adds clarity to the deadline for filing litigation and is intended in other ways to improve the fairness and efficiency of the informal dispute resolution process. In this article, the authors discuss the major changes effected by the new law and point out some of its potential shortcomings and some remaining areas of confusion.

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New York State Fiscal Year 2014-15 Budget Legislation Provides Extensive Tax Reform

This article outlines and summarizes the major provisions of the recently-enacted fiscal year 2014-15 New York State budget legislation, which adopts a number of the proposals set forth in the final report issued last year by the New York State Tax Reform and Fairness Commission. The changes made by this legislation include the application of economic nexus principles, repeal of the separate tax regime for banking institutions, mandatory combined unitary reporting, and various other changes in the corporate tax area as well as changes to the estate and property taxes.

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Kentucky Court of Appeals Awards Substantial Refunds After Determining Taxpayer’s Removal of Non-Kentucky Subsidiaries from Its Consolidated Returns was Justified Under Applicable Nexus Statute

After much anticipation by the Tax Bar, the Kentucky Court of Appeals decided to kick-off the Fourth of July weekend in grand fashion by determining that Kentucky’s nexus statute prevails over its elective consolidated return statute and awarding AT&T significant refunds resulting from the removal of all of its non-Kentucky subsidiaries from its consolidated return. This article traces the history of the case, discusses the Court of Appeals’ analysis, and highlights how it differs from that of lower court decision it affirmed.

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I would like to thank the Institute's members for the opportunity to serve as your President for the upcoming year. To sum up my feelings in just one word, "WOW"! What an honor. I have for many years had a professional goal to serve IPT someday as its President; thank you all!!!!

As your newest President, I look forward to continuing a long tradition of service of IPT Presidents who have led this premier tax educational organization. My special thanks go out to IPT’s immediate Past President Arlene M. Klika, CMI, CMI, CMI. Yes, that is three CMIs. She has the distinction of having earned CMIs in three disciplines: Property Tax, Sales & Use Tax and Income Tax. So, how long will it take to have her go after the CCIP, Certified Credits & Incentives Professional?? What a tough act to follow! But seriously, I want to thank Arlene, on behalf of all the members of IPT, for an outstanding year of dedicated service and hard work in the continuation of the various goals and initiatives she set and accomplished for our organization.

I would also like to express my appreciation to the outgoing Board members; Kyle Caruthers and William J. McConnell, CMI, CPA, Esq. It has been an honor and privilege to work with these tax professionals, and I am confident that IPT will continue to benefit from their continued service.

Also, I would like to recognize the Institute’s newly-elected First Vice President, Margaret C. Wilson, CMI, Esq., and newly-elected Second Vice President, Chris G. Muntfering, CMI, as well as the newly-elected members of the Board of Governors; Leslie S. Fisher, CMI and Carolyn M. Shantz, CMI, CPA. In addition, I would like to recognize Kenneth R. Marsh, CMI, who was re-elected for another three-year term on the Board. Thank you, all, for your willingness to serve.

In addition, I would like to thank all of the 2013-14 Committee Chairs and members for all of their contributions to the Institute during the year, which has resulted in the finest schools and symposia available that is the backbone of IPT.

If you missed the 38th Annual Conference this year, held at the beautiful JW Marriott Desert Ridge in Phoenix, it was really “cool.” Seriously, the weather was at least 10 degrees lower than normal. You also missed an excellent educational program. This would not have been possible without the outstanding efforts of the Annual Conference Program Chairs, David H. LeVan, CMI, Overall Chair; Minah C. Hall, Esq., Credits and Incentives Chair; Anna T. Westbrook, CMI, Property Tax Chair; Glenn C. McCoy, Jr., Esq., Income Tax Chair, and Carolyn M. Shantz, CMI, CPA, Sales Tax Chair. Thank you to the committee members and the Networking Committee for all your cheerleading and enthusiasm. Sessions were well attended and many, such as the keynote address by William F. Fox, PhD and the keynote session on Ethics presented by Marianne Jennings, JD, were superb, engaging and well received.

As each IPT President assumed office, each reflected upon what to focus on for his or her term. The Institute has been very successful, because it has continued to move forward, proceeding down new paths and expanding its scope. It continues to be our desire to progress. I feel that we need to continue to develop a strong vision and create a structure that will stimulate our membership to embrace that vision to make it a reality. To this end, I will be focusing on: 1) Working to gain state/local tax authorities’ acceptance of the CMI designation in lieu of other licensing requirements, 2) Selecting the first Sponsored Research team and commencement of an inaugural project, 3) Updating the Sales and Use Taxation book, 4) Adding substantially to Distance Learning course offerings, and 5) Planning two 2015 Regional Industry Workshops (Northwest—Manufacturing and Washington DC—Government Contracting).

Looking ahead to my 2014-15 term, it is not too soon to start thinking of ideas for our 39th Annual Conference in San Diego. The theme of the meeting is currently under "construction," so if you have any thoughts or ideas for a keynote address or any professional development sessions, contact the Overall Chair, Terry Palmer, through the IPT office.

In conclusion, I am looking forward to working with our entire membership throughout the coming year, and I would like very much to hear from you to discuss ways to enhance and improve this premier educational organization.

Arthur E. Bennett, CMI
President
TAX PROCEDURE

Inching Towards Objective Fairness: Tennessee Changes the Informal Conference Process to Make Challenging Assessments Fairer and Easier for Taxpayers

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During this past legislative session, the Tennessee General Assembly worked with the Department of Revenue to adopt legislation (H.B. 1431, 2014 Tenn. Pub. Acts, ch. 854) that significantly changes the procedure for appealing tax assessments in Tennessee. The legislation was in response to a bill proposed in the prior session that would have even more dramatically changed the procedure in Tennessee by creating a separate tax tribunal to hear all Tennessee tax disputes, with the decisions of that tribunal subject to immediate review by the Court of Appeals. The Department defeated that proposal and, as a compromise, introduced the legislation that was adopted this session. Rather than completely overhauling the tax challenge procedure, the recently adopted legislation addressed some of the more objectionable practices under the prior procedure while keeping that procedure largely in place. As discussed below, the primary focus of the legislation was to (1) clarify the deadlines under the procedure, (2) provide the appearance of objectivity in informal conference decisions, and (3) provide the possibility of efficiently resolving disputes by agreement. The new procedures take effect January 1, 2015.

Deadline for Filing Litigation Clarified

To challenge a tax assessment in Tennessee without first paying the tax imposed, a taxpayer has the option of having an informal conference with the Department to discuss the assessment. To request an informal conference, a taxpayer must submit a written request within 30 days of the assessment being issued. The informal conference process allows a taxpayer to meet with a hearing officer and, typically, a representative of the Department’s audit department to discuss the issues underlying an assessment and explain why the taxpayer believes the assessment is in error. After the conference takes place, the hearing officer has the authority to issue a decision upholding the assessment, eliminating the assessment, or adjusting the assessment. Once an informal conference decision is entered, and assuming the assessment is not eliminated in its entirety as a result of that decision, a taxpayer can further challenge the assessment by filing suit in court. Alternatively, if the taxpayer chooses not to participate in the informal conference process, it can short circuit the process by filing a lawsuit to challenge the assessment as long as it does so within 90 days of the assessment being issued.

Under the procedure currently in place, the 90-day period for filing suit begins running as soon as the initial assessment is issued but is stayed at the time a request for an informal conference is made. The 90-day period then begins running again once an informal conference decision is issued. As a result, under the current procedure, the deadline for filing litigation to contest an assessment is, at best, confusing because it requires a taxpayer to literally count the days that passed before it made the informal conference request in order to determine how many days are left before the 90-day deadline passes once an informal conference decision is issued. This confusion posed the very real risk that taxpayers would inadvertently miss the deadline for filing litigation simply because they incorrectly counted days on their calendars. This procedure also opened the door for disputes between taxpayers and the Department regarding the date on which informal conference requests were made, allowing an incorrectly dated letter to cause a taxpayer to lose its ability to pursue a claim in court.

The new procedure adopted by the General Assembly attempts to avoid this danger by clarifying the deadline for filing litigation to challenge an assessment. Under the new legislation, an initial assessment issued by the Department is a “proposed” assessment. As with the current procedure, taxpayers can still request an informal conference to challenge a proposed assessment by submitting a written request to the Department within

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30 days of the proposed assessment. Unlike the current procedure, however, the 90-day deadline for filing litigation does not begin to run until the assessment becomes “final,” which does not take place until an informal conference decision is entered or, if no request for an informal conference is made, 31 days pass after a proposed assessment is issued.

By tying the 90-day deadline to the issuance of an informal conference decision, the new procedure allows taxpayers to have certainty and clarity regarding their deadlines for filing litigation and significantly reduces the risk that taxpayers will accidentally miss those filing deadlines by incorrectly counting the days on their calendars. Under the new procedure taxpayers should be able to simply rely on the date on their informal conference decision and calendar the deadline for filing suit 90 days thereafter.

The new procedure is not completely free of risk, though. As with before, to request an informal conference to challenge an assessment before filing suit in court, the request must be made in writing and submitted to the Department within 30 days of the proposed assessment. If a request is not made in writing within 30 days, the assessment becomes final and the 90 days for filing suit begins running at that point. This poses a risk to taxpayers because the Department will often agree to conduct an informal conference even if the conference was not requested within 30 days of the initial assessment. Under the new procedure, even if the Department goes forward with an informal conference in these circumstances, the failure to timely request an informal conference will not prevent the 90 days from running and the deadline for filing litigation likely passing before an informal conference decision is issued.

In addition, there is also still some risk for confusion in determining the deadline for filing litigation under the new procedure in circumstances where an informal conference request has been made but is subsequently withdrawn. In those circumstances, an assessment becomes “final” on the date the informal conference request is withdrawn or on the 31st day after the proposed assessment was issued, whichever comes later. Accordingly, in these circumstances, taxpayers will again be forced to get out their calendars to count the days that have passed since the initial assessment was issued in order to determine their filing deadlines. Also, tying the deadline to the date a taxpayer withdraws its request again risks the possibility of a dispute regarding the exact date on which that withdrawal was submitted to the Department.

The new procedure has one additional quirk when it comes to decisions from the informal conference that do not simply uphold an assessment. If an informal conference decision results in an adjustment of a taxpayers liability, an assessment does not become final – and the 90 days for filing suit do not begin to run – until a revised assessment is issued. In these circumstances, taxpayers should be able to rely on the date on the revised assessment for determining their 90 day deadline, but it puts additional pressure on the hearing officer issuing an informal conference decision to be precise in stating whether his or her decision is upholding the assessment, which would start the running of the 90-day deadline immediately, or is a decision to adjust the assessment in some way, which would not start the 90-day period. A failure to be precise on this point could risk the deadline passing while a taxpayer mistakenly waits for an adjusted assessment to be issued.

In the vast majority of circumstances, however, the new procedure that goes into effect in 2015 will greatly increase the clarity of a taxpayer’s deadline for filing litigation and avoid the possibility that a taxpayer will lose its claim only because it miscalculated that deadline. Most significantly, by providing for a full 90-day period to file litigation once an informal conference decision is entered, the new legislation eliminates the potential for confusion that exists as a result of the current statute that begins the 90 days with the assessment itself and tolls the running of that period during the informal conference process.

In this way, the new legislation is similar to legislation adopted several years ago to clarify the deadline for filing litigation related to a refund claim. Under that legislation, the previously floating deadline was replaced with a deadline that required any lawsuits related to a refund claim to be filed within one year of the date the claim was filed, regardless of whether the claim was actually denied or deemed denied due to a lack of response from the Department for six months. See Tenn. Code Ann. § 67-1-1802(c)(1). In subsequent years, the General Assembly adopted additional legislation providing that this one year deadline could be extended by agreement of the parties. See Tenn. Code Ann. § 67-1-1802(c)(1). Through these changes, as with the recent changes to the deadlines related to filing suit without paying the tax, Tennessee has made it easier for taxpayers to determine the applicable deadline to file litigation and, as discussed further below, has encouraged the more efficient resolution of tax disputes without the need to file litigation at all.

Creating the Appearance of Objectivity

By far, the most consistent criticism of the current informal conference procedure is the lack of impartiality

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or objectivity of the hearing officer making the informal conference decision. Rightly or wrongly, the public perception is that the hearing officer – a Department of Revenue employee – has his or her informal conference decision reviewed and approved by members of the Department’s legal office and audit department before issuing any decision. Obviously, allowing the same people who participated in the issuance of the assessment in the first place to also approve any decision ruling on the appropriateness of the assessment greatly undermines the independence and, indeed, purpose of the informal conference process. The new legislation includes several provisions intended to create clear separation between the hearing officer and the rest of the Department and to restore public confidence in the objectivity of any informal conference decision.

Driving this point home, the new legislation includes a provision that expressly states: “Personnel conducting informal conferences shall exercise independent judgment with the objective of resolving disputed proposed assessments without litigation.” To give effect to this mandate, and ensure hearing officers exercise independent judgment, the new legislation goes on to prohibit informal conference personnel from engaging in “ex parte communications with audit division personnel regarding the issue under review.” As a slight caveat from this prohibition, the informal conference office can communicate with other Department personnel on an ex parte basis regarding “ministerial, administrative, or procedural matters” and can also ask audit personnel to examine new evidence submitted at a conference and make a recommendation to the hearing officer resulting from that examination.

Assuming these exceptions to the prohibition on ex parte communication are maintained as intended – and the scope of “ministerial, administrative, or procedural matters” is not expanded beyond the non-substantive issues those terms appear intended to address – these new provisions should go a long way toward making the informal conference process one in which a taxpayer can expect to receive a fair and objective review of the issues underlying an assessment. Of course, the mere fact that the informal conference process is housed in the Department and the hearing officers are employed with the Department undermines this to some extent. Still, the new legislation provides a much-needed emphasis on the independence of the informal conference process.

Authority to Resolve Disputes by Agreement

In the same provisions that require independence of the informal conference process, the new legislation also creates a new authority for the hearing officer that should also significantly improve the conference process and help taxpayers and the Department alike to efficiently resolve disputes. As stated above, the new legislation expressly provides that “the objective” of the informal conference process is “resolving disputed proposed assessments without litigation.” For that purpose, the new legislation gives the hearing officer authority to recommend to the Commissioner that the Department compromise a proposed assessment. The Commissioner can then compromise the tax liabilities without written approval of the Comptroller or Attorney General.

If the Department takes advantage of this new authority to compromise assessments, it can resolve disputes much more efficiently than it has the authority to do under the current legislation. Currently, the hearing officer is authorized only to consider the disputed issues before it and to decide whether the assessment is correct or incorrect as a matter of Tennessee law under the facts presented. The hearing officer is completely without authority to recommend a compromise even when the issue before him or her is a close one or would otherwise benefit from being resolved by agreement rather than litigation. Moreover, under the current procedure, any settlement of assessed liability greater than $25,000 that is disputed in litigation requires approval from the Comptroller and Attorney General. By giving the hearing officer the express authority to recommend settlement prior to litigation and the Commissioner express authority to resolve disputed liability based on that recommendation without the approval of the Comptroller and Attorney General, the new legislation gives the Department and taxpayers the ability to much more quickly and inexpensively resolve disputes.

Despite granting the Commissioner authority to settle proposed assessments without pre-approval of other state officers, the new legislation potentially undercuts that authority by giving the Comptroller and Attorney General the right to require their approval for any compromise or “class of compromises.” Conceivably, the Comptroller or Attorney General could act upon this right and require approval for all or the vast majority of compromises and, by doing so, undermine the benefits of granting compromise authority to hearing officers and the Commissioner. Assuming they do not do so, though, the ability to compromise assessments during the course of the informal conference process is another significant improvement to that process enacted by the new legislation adopted in Tennessee.
New York State Fiscal Year 2014-15 Budget Legislation Provides Extensive Tax Reform

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fter several Commission reports1 and multiple drafts in the New York State legislature, Governor Andrew Cuomo signed the final fiscal year 2014-15 New York State budget legislation on March 31, 2014.2 Among its many reforms, this legislation revamps the state’s corporate tax regime, most notably for banking corporations. Generally, the provisions are effective for tax years beginning on or after January 1, 2015.

Other significant changes include a decrease in the corporate franchise tax rate, the imposition of a mandatory unitary combined reporting system, the application of economic nexus, and the creation of various tax incentives and rate reductions for “qualified manufacturers” in the state. The changes to estate tax, property tax, and additional tax credits mean these reforms will also affect other types of taxpayers. At this time, the enacted reforms to the New York State tax law regime generally do not apply to New York City, with limited exceptions.

Corporate Tax Reform

The budget bill implements substantial changes to New York State’s corporate tax landscape, as outlined below.

Economic Nexus

- Corporations will now be taxable in New York for purposes of the corporation franchise tax and the metropolitan tax (“MTA”) surcharge if they derive $1 Million or more of receipts from activity in New York;3 and

- A corporation that is part of a combined group satisfies the threshold requirement for combined reporting if the New York receipts of all group members who individually exceed $10,000 equal $1 Million or more in the aggregate.4

Tax Rates

- The existing corporate franchise tax rate of 7.1 percent is reduced to 6.5 percent effective January 1, 2016;5

- With the elimination of Article 32 of the New York Tax Law, both general corporations and banking corporations will be subject to Article 9-A with the following three tax bases: business income base, capital base, and fixed dollar minimum base;6

- The MTA surcharge is increased to 25.6 percent effective for tax years beginning on or after January 1, 2015 and before January 1, 2016 with adjustments in rates at the Commissioner’s discretion based on financial need;7

- Qualified New York manufacturers will have an effective tax rate of 0 percent;8 and

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2 Ch. 59 (A.B. 8559 / S.B. 6359), Laws 2014.
3 N.Y. TAX LAW §§ 209.1(b); 209-B.1(a).
4 N.Y. TAX LAW § 209.1(c).
5 N.Y. TAX LAW § 210.1(a).
6 N.Y. TAX LAW § 210.1.
7 N.Y. TAX LAW § 209-B.1(a).
8 N.Y. TAX LAW § 210.1(a)(vi). “Qualified New York manufacturers” are defined as manufacturers principally engaged in the production of goods who also have property in the state used for qualifying activities where: (1) the adjusted basis of such property for federal income tax purposes at the close of the taxable year is at least $1 Million; or (2) all of its real and personal property is located in the state. Id. It is important to note that qualified emerging technology companies

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• The capital base tax rate will be completely phased out by 2021 with qualified New York manufacturers paying a lower tax rate during the phaseout period.9

**Fixed Dollar Minimum Tax**

• While the legislation retains the current fixed dollar minimum tax base on New York-sourced receipts, it incrementally increases the maximum tax due of $5,000 to $200,000 for taxpayers with over $1 Billion in New York receipts.10

**Bank Tax Reform**

• The Article 32 bank franchise tax has been repealed, thereby subjecting banking corporations to the Article 9-A corporation franchise tax beginning January 1, 2015;11 and

• Under the new combined reporting rules (see below), banks and general business corporations may be included in the same combined filing group under Article 9-A.12

**Apportionment**

• The budget legislation modifies current New York apportionment to a single receipts factor with a set of intricate customer-based sourcing rules.13 Specific provisions exist for various types of sales including other business receipts, rents and royalties, and digital products;

• Taxpayers now have the option to make an annual and irrevocable election to use a fixed amount of 8 percent of all net income from qualified financial instruments in the apportionment numerator.14 Without this election, receipts and net gains from these instruments are sourced based on customer location;

• Income from intangible property, such as patents and trademarks, is now sourced to New York based on the extent activities related to the intangible take place in the state;15 and

• Receipts from services and other business receipts are sourced to the state based on a customer location hierarchy, specifically starting with where the customer receives the benefit of the transaction.16

**Combined Reporting**

• The legislation completely replaces the existing combined reporting standards, including the substantial intercorporate transactions requirement,17 and requires unitary combined reporting for tax years beginning on or after January 1, 2015;18

• Combined reporting will be required for any taxpayer that meets specified thresholds of common ownership and control with respect to other corporations and is engaged in a unitary business with those corporations;19

• Combined returns are also now required for certain types of entities meeting specific defined requirements;20

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9 The enacted legislation imposes the following capital base tax rates for general corporations: 0.15 percent for taxable years beginning before January 1, 2016; 0.125 percent for taxable years beginning in 2016; 0.10 percent for taxable years beginning in 2017; 0.075 percent for taxable years beginning in 2018; 0.05 percent for taxable years beginning in 2019; 0.025 percent for taxable years beginning in 2020; and 0.00 percent for tax years beginning on or after January 1, 2021. N.Y. Tax Law § 210.1(b). The newly enacted capital tax base rates for qualified New York manufacturers for these tax periods are 0.15 percent, 0.106 percent, 0.085 percent, 0.056 percent, 0.038 percent, 0.019 percent and 0.00 percent, respectively. Id.

10 N.Y. Tax Law § 210.1(c).

11 Ch. 59 (A.B. 8559 / S.B. 6359), Part A, § 1.

12 N.Y. Tax Law § 210-C.

13 N.Y. Tax Law § 210-A.

14 N.Y. Tax Law § 210-A.5. “Qualified financial instruments” are defined as instruments that are assets marked-to-market under IRC §§ 475 or 1256, and specifically exclude loans secured by real property.


17 N.Y. Tax Law § 211.4.

18 N.Y. Tax Law § 210-C. Tax on combined reports will be the highest of (1) combined business income tax base multiplied by the applicable tax rate, (2) combined capital base multiplied by the applicable tax rate, or (3) the fixed dollar minimum of the designated agent of the combined group. Tax on combined reports will also include the fixed dollar minimum tax of each taxpayer in the group (see discussion regarding changes to fixed dollar minimum tax above). N.Y. Tax Law § 210-C.1.

19 N.Y. Tax Law § 210-C.2(a).

20 N.Y. Tax Law § 210-C.2(b). Specifically, combined returns are now required for (1) captive real estate investment trusts (Continued on page 9)
• Excluded from combined reporting are entities taxable under the telecommunications or insurance tax regimes of Article 9 and Article 33 respectively, New York S corporations, and corporations with no New York nexus affiliates and who are subject to tax solely because of their interest in a limited partnership doing business in New York;21 and

• Corporations may now elect an irrevocable and binding six-year option to be combined with any non-unitary affiliates if certain thresholds are met.22 Unless affirmatively revoked, the election would be automatically renewed for an additional seven years.

NOLs
• Currently, net operating losses ("NOLs") are pre-apportioned and are carried forward or backward in conjunction with federal NOLs. The legislation will apply prospectively starting on or after January 1, 2015 and will require taxpayers to compute New York NOLs on a post-apportionment basis;23

• While the NOL deduction for New York state purposes is no longer tied to the federal amount, the maximum deduction is limited to reducing the tax on entire net income to the higher of the tax on capital base or the fixed dollar minimum;24 and

• The legislation also creates a prior net operating loss ("PNOL") conversion subtraction that may be applied against the business income before the NOL deduction is taken.25

Various Other Reforms
The legislation also provides for various other tax reforms including, but not limited to:

• Significant changes and enhancements to the New York tax credit scheme, including a refundable tax credit of 20 percent of real property tax paid on property used for manufacturing;26

• Several amendments to the New York gift tax and estate tax for decedents dying on or after April 1, 2014, including a tax rate hierarchy for decedents dying on or after April 1, 2014 and before April 1, 201527 and an increase in the basic estate tax exclusion amount from the current $1 to $2,062,500 for decedents dying on or after April 1, 2014 and before April 1, 2015, and gradually increasing from such amount to eventually tie to the federal exclusion amount (currently $5,250,000) by January 1, 2019;28

• The repeal of the generation-skipping tax;29

• The repeal of the “add-on” minimum tax for individual taxpayers;30 and

• The ability for tax return preparers electronically filing personal income tax returns to accept electronic signatures from individual taxpayers.31

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Conclusion

This legislation includes many provisions that accomplish major tax reform. The adoption of an economic nexus standard represents a significant change and may result in more out-of-state entities being subject to New York corporate franchise tax and the MTA surcharge. Although there has been a state trend of adopting economic nexus standards, the constitutionality of this approach is questionable. Courts intended that the nexus test would be based on a case-by-case analysis of whether a taxpayer had enough presence in a state to be subject to tax. Under the judicial approach, many factors beyond receipts in the state should be considered in making a nexus determination. By basing a nexus determination on only a taxpayer’s receipts in New York, out-of-state companies are being deprived of a thorough nexus analysis.

While this article summarizes the key provisions that have been enacted by the New York State legislature, taxpayers should note that many of the newly enacted tax reforms are complex in nature and will likely require a detailed analysis individualized to the taxpayer’s situation.

32 See Complete Auto Transit v. Brady, 430 U.S. 274 (1977), and subsequent cases.

Playing Without Paying In Texas

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The Texas pay-to-play rule is one of the reasons that Texas often ranks near the bottom of scorecards ranking the states on the fairness of their tax appeal processes. The rule generally requires a taxpayer to pay disputed tax as a prerequisite to a court appeal. However, recent decisions in Richmont Aviation v. Combs1 and EVO Inc. v. Combs2 have recognized that the open courts provision of the Texas Constitution creates a right to play without paying in Texas. Most state constitutions have some form of open courts provision, so this protection might be available in other states with pay-to-play rules.

The Texas Pay-to-Play System. The Texas Tax Code provides three methods to litigate a tax case in court: (1) a refund lawsuit - a taxpayer can pay the disputed tax to the Comptroller, file a refund claim, obtain a final order denying the refund claim, and then file a refund lawsuit in district court;3 (2) a protest lawsuit - a taxpayer can pay the disputed tax to the Comptroller under protest accompanied by a statement of grounds and then file a protest lawsuit in district court;4 or (3) an injunction lawsuit - a taxpayer can file a statement of grounds with the Texas Attorney General, post a bond with the Comptroller sufficient to guarantee payment of twice the taxes, fees, and penalties, and then file a lawsuit to enjoin the Comptroller from collecting the tax.5 However, a taxpayer may be excused from the prepayment requirement if the taxpayer files an oath of inability to pay and the court concludes after a hearing that prepayment would constitute an unreasonable restraint on the party’s right of access to the courts.

2 EVO Incorporated v. Combs, Cause No D-1-GN-12-002969; In the 126th Judicial District Court of Travis County, Texas (2014).
3 Tex. Tax Code §112.151, et seq.
4 Tex. Tax Code § 112.051, et seq.
5 Tex. Tax Code § 112.101, et seq.

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The District Court Decision in Richmont Aviation. The dispute began when the Comptroller assessed Texas sales tax on the purchase of an aircraft. Richmont requested a redetermination claiming the sale for resale exemption, but the Comptroller upheld the assessment. Richmont then filed an injunction lawsuit in district court without posting the requisite bond. Following a preliminary hearing, the district court found that “Richmont did not submit sufficient evidence that prepaying the tax or submitting a bond would constitute an unreasonable restraint on its right of access to the courts” and the court granted the Comptroller’s plea to the jurisdiction.

The Appellate Decision in Richmont Aviation. The Austin Court of Appeals reversed and remanded on the ground that the Texas Tax Code violated the open courts provision of the Texas Constitution and imposed unreasonable financial barriers to court access even though the statute excused prepayment for indigent taxpayers. The remand indicated that Richmont could proceed without posting a bond or proving that it was unable to post a bond.

Commentary on Richmont Aviation. The Richmont Aviation decision recognized that a taxpayer may appeal an assessment without paying the assessment or posting a bond. However, the remedy is not perfect. The Texas Tax Code provides that if a redetermination or jeopardy determination becomes final without payment, an additional 10 percent penalty is added to the determination. And interest will continue to accumulate at the prime rate plus one percent. Litigation without payment raises the stakes for the taxpayer.

Also, the Texas Attorney General could file a collection action during the pendency of the taxpayer's lawsuit to permanently enjoin collection. The taxpayer could then seek a temporary injunction, but, ironically, the Texas Rules of Civil Procedure require the applicant to post a temporary injunction bond in an amount fixed by the district court. The resolution of this “Catch-22” situation is not clear. It may be that a taxpayer is required to post a bond to obtain a temporary injunction even though the taxpayer is not required to post a bond to obtain a permanent injunction.

Finally, if the unpaid tax is franchise tax, the Comptroller will commence proceedings to forfeit the taxpayer’s right to transact business in Texas. Thus, the Richmont Aviation solution is not perfect.

The District Court Decision in EVO. The dispute began after EVO sought a taxability ruling and the Comptroller’s Tax Policy Division determined that EVO’s wellbore video inspections constituted the taxable sale of tangible personal property rather than the nontaxable sale of an information service. EVO filed a protest payment lawsuit on two representative transactions, but the Comptroller returned the protest payments because EVO did not file tax returns and did not report tax on all similar transactions. After various pleas to the jurisdiction and pleading amendments, the parties ultimately agreed to proceed solely on an injunction lawsuit without a bond being posted. The district court held a bench trial and ruled for EVO on the merits. The Comptroller filed a notice of appeal and then withdrew the notice so that the district court judgment is now final.

Commentary on EVO. The EVO decision established that it is possible to obtain a judicial declaratory ruling on taxability without paying the disputed tax. This outcome was particularly important to EVO because its competitors were not charging sales tax on similar products. If EVO had followed the informal advice of the Comptroller’s Tax Policy Division and started charging sales tax, EVO would have been at a competitive disadvantage. Under the Tax Code as written, EVO’s only remedy would have been to charge and remit the tax, request an administrative refund hearing, and then file a refund lawsuit, during which time it would have been losing business to competitors.

The EVO solution has its limitations. The issues must be “ripe” for adjudication, which means that facts are sufficiently developed so that an injury has occurred or is likely to occur, rather than being contingent or remote. Ripeness in a tax case may require a definitive agency ruling that is applicable to the taxpayer. In the EVO case, the Comptroller contended that an email exchange between the taxpayer and Tax Policy was insufficient. To resolve the issue, the parties agreed to abate the litigation until the Comptroller issued a formal taxability ruling on the transaction at issue.

Furthermore, for the litigation to be worthwhile, the taxpayer must be engaged in singular high-dollar transactions

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6 Tex. Tax Code §§ 111.0081 (deficiency determinations) & 111.022 (jeopardy determinations).
7 Tex. Tax Code § 111.060.
8 See Tex. Tax Code § 111.010.
9 Tex. R. Civ. P. 684.

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10 See Tex. Tax Code § 171.251, et seq.
or multiple low-dollar transactions with essentially the same facts. In EVO’s case, all of its down-hole videos are similar in that they are used for diagnostic purposes, which was the key to the ruling that EVO was providing a nontaxable information service. So a judicial ruling on two transactions should be applicable to all transactions.

For future applicability, the Texas injunction statute is helpful because it provides that in granting an injunction, the court “shall determine whether the amount of the assessment or collection of which the applicant seeks to prohibit is due and owing.” Ordinarily, findings of fact are not recited in a judgment, but this statute seems to permit a judgment to include a “determination” of taxability.

If a taxpayer attempts to use the judgment as precedent for future transactions, the Comptroller may argue that the judgment does not apply if the facts are different. But taxpayers may face that argument any time they attempt to use a prior decision as precedent, whether it be a judicial decision or an agency ruling.

Applicability in other states. Many state constitutions have some form of open courts provision. These open courts provisions, including the Texas provision tend to be general. The Texas provision states: “All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.” Accordingly, state jurisprudence must also be reviewed to determine how broadly the courts have applied the protection. The states have adopted a “daunting variety of remedy guarantee interpretations.” Nevertheless, the Texas experience may give credence to the application of the open courts provisions to tax cases in other states.

Conclusion. The Texas Comptroller has a petition for review of the Richmont case pending before the Texas Supreme Court. The Texas Supreme Court, like the United States Supreme Court, had discretionary review, so it may or may not act on the case. Unless and until the Richmont decision is reversed, Texas taxpayers can, at least in some circumstances, play without paying, as evidenced by the EVO litigation.

12 Tex. Tax Code § 112.1011(b).
141.200 defined a consolidated return to include all corporations except those exempt from taxation under KRS 141.040, and treated an affiliated group electing to file a Kentucky consolidated return as a “single corporation” for all purposes of KRS Chapter 141.

The matter originated after AT&T, a publicly-traded corporation with hundreds of subsidiaries across the nation, including twenty or so in Kentucky, filed amended returns with the Kentucky Department of Revenue (“Department”) removing all non-Kentucky subsidiaries from its consolidated return, which were originally included in such returns for tax years 1995-1997.

The Department denied AT&T’s refund claim, as it asserted that all of AT&T’s subsidiaries (Kentucky and non-Kentucky) comprised the affiliated group and were to be treated as one corporation under KRS 141.200’s definition of “affiliated group,” which was tied to Section 1504(a) of the Internal Revenue Code requiring inclusion of all corporations (here, subsidiaries) connected through stock ownership of a common parent corporation (here, AT&T).

This denial was appealed to the Kentucky Board of Tax Appeals (“KBTA”), which generally sided with the Department in January of 2008 with the exception of allowing AT&T to remove one of its non-Kentucky subsidiaries, American Ridge, an exempt insurance company under KRS 141.040(f), from its consolidated return. However, only eight (8) months later, the KBTA’s decision was reversed by the Jefferson Circuit Court, which agreed with nearly every argument made by AT&T, but primarily due to its determination that KRS 141.200 was ambiguous and unconstitutional under the Commerce and Due Process Clauses of the U.S. Constitution.

The Department then appealed this decision to the Kentucky Court of Appeals (“Court”), where briefs were filed and oral argument was held in August of 2009. Although it was believed that an opinion from the Court would be imminent soon thereafter, it took several years for the opinion to be issued, due in part to the Court’s need to assign the appeal to a differently composed three-judge panel in 2012. But, in early July, the Court’s long-awaited opinion did not disappoint.

Following the reasoning of the Jefferson Circuit Court, the Court agreed that the crux of the matter centered on the statutory construction and authority of the two (2) statutes governing Kentucky’s corporate income tax returns, KRS 141.040 and KRS 141.200. In a unanimous opinion from the newly-appointed three-judge panel, the Court affirmed the Circuit Court’s decision and determined that the pre-2005 nexus provisions of KRS 141.040, rather than the elective consolidated corporation income tax return provisions of KRS 141.200, prevailed, with the result that only those subsidiaries with some sort of physical presence in Kentucky, and not all members of the U.S. affiliated group, must be included in AT&T’s consolidated return.

The Court determined that KRS 141.200 was ambiguous because “it is capable of being understood in more than one way,” as KRS 141.200(1)(b) provides that corporations exempt under KRS 141.040 (i.e., those without physical presence in Kentucky and other enumerated entities, such as insurance companies), yet KRS 141.200(3) requires that all members of an affiliated group (i.e., all subsidiaries of a common parent) be listed on the consolidated return. Therefore, due to this ambiguity, the Court followed the long-settled rule in Kentucky that such ambiguities must be resolved in favor of the taxpayer, citing to the Kentucky Supreme Court’s seminal decision in George v. Scent, 346 S.W.2d 784, 789 (Ky. 1961) as support.

Make no mistake about it, this is a significant win for Kentucky taxpayers, because despite the statute of limitations likely running for most taxpayers due to the six years the case was pending before the Court, and the amendments to both KRS 141.200 and KRS 141.040 in 2005, it is possible that other taxpayers filed protective refund claims with the Department years ago after becoming aware of this case making its way through the court system.

Also, although the Court’s decision is a bright spot for taxpayers, the Court’s decision was rather limited in comparison to the Circuit Court’s opinion which not only similarly found that KRS 141.200 was ambiguous, but also made other significant determinations based on KRS Chapter 13A and the U.S. Constitution.

For example, in reversing the KBTA’s decision that AT&T had elected to be treated as a single corporation under KRS 141.200(3) and thus had a physical presence in Kentucky under KRS 141.040, the Circuit Court also determined that 103 KAR 16:200, the Administrative Regulation concerning the consolidated income tax return method, was invalid as it did not include all exemptions listed under KRS 141.040, in violation of KRS Chapter 13A which governs the promulgation of all Administrative Regulations by agencies, including the Department. This was a significant and taxpayer-friendly decision by the Circuit Court which was not discussed or analyzed by the Court.

Moreover, the Circuit Court also analyzed AT&T’s constitutional arguments and held that KRS 141.200 violated

(Continued on page 14)
the four-prong test under *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) in violation of the Commerce Clause. Specifically, the Circuit Court held that (1) the activities of the out-of-state subsidiaries lacked substantial nexus with the taxing state because a great majority of AT&T’s subsidiaries have nothing to do with the state of Kentucky; and (2) KRS 141.200 discriminates against interstate commerce because out-of-state corporations which invest in certain printed material within Kentucky are by 141.040 excluded from a consolidated return, thus establishing a preference for in-state corporations and investors. The Circuit Court also held that the Department’s interpretation of KRS 141.200 violated the Due Process Clause because of lack of nexus between the state and entity it seeks to tax. It likewise would have been important for tax jurisprudence had the Court upheld this analysis, but its opinion did not reach these constitutional issues.

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**New Markets Tax Credits: Program Update & Review of Recent Allocations to CDEs**

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**I. Introduction.**

An article published by this author in the July 2013 *Tax Report* (the “Companion Article”) described at length the essential legal and practical elements of the federal New Markets Tax Credit (“NMTC”) program, which provides businesses and other project proponents with powerful economic incentives to make investments in low-income communities that might otherwise fail to attract capital investment. In that context, the article discussed several critical issues and timely opportunities related to the implementation of current program objectives. Now, following the most recent announcement by the United States Department of Treasury’s Community Development Financial Institutions Fund (the “CDFI Fund”) of slightly more than $3.5 Billion in NMTC authority (the “Current Allocations”), the program remains a vibrant, if competitive, economic development tool, with particularly strong opportunities pursuant to the Current Allocations for businesses that meet program requirements and are seeking financing for equipment and operating capital.

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1. See Rice, E., *New Markets Tax Credits: Program Update and Review of Fundamentals*, IPT Tax Report, at pages 14-21 (July 2013). Please refer to this prior article for additional description of and comment on the NMTC program.

2. As embodied in Section 45D of the Internal Revenue Code (“IRC”).


(Continued on page 15)
II. Background.

By way of reminder and reference, the NMTC program (the “Program”) was first enacted by Congress in 2000, and has been periodically renewed and expanded thereafter, most recently in early 2013 when Congress passed the American Taxpayer Relief Act of 2012 (“ATRA”), which the President signed into law on January 3, 2013. For NMTC purposes, ATRA had the effect of reauthorizing the Program for the 2012 and 2013 programmatic years – and the CDFI Fund has now subsequently allocated the authorized $7 Billion in NMTCs in the two “Rounds”, with $3.5 Billion for the 2012 Round allocated on April 24, 2013, and the remainder allocated in the 2013 Round as part of the Current Allocations.

As a public policy matter, the Program was designed to catalyze economic development in the most impoverished areas of the United States by providing incentives to private investors, removing typical barriers to market-rate commercial lending and investing, and, thereby, increasing available capital. Consequently, the support from the Program’s federal tax credits then helps economically distressed communities attract additional private investment capital and fill project financing gaps by enabling investors to make larger investments than would otherwise be possible. The affected low-income communities benefit not only from the job growth associated with these investments, but also from greater access to public facilities, goods, and services (such as manufacturing, food, retail, housing, health, technology, energy, education, and childcare).

To do so, the Program:

- Provides a taxpayer with the ability to claim NMTCs totaling thirty-nine percent (39%) of the taxpayer’s qualified equity investment (“QEI”) into a qualified community development entity (“CDE”).
- Requires these NMTCs to be claimed over a period of seven (7) years (the “NMTC Compliance Period”), and
- Delivers substantial economic benefits to “qualified active low-income community businesses” by delivering flexible, low-cost financing to projects and endeavors that enhance their viability.

Hence, the NMTC program provides investors with a tax-credit based incentive to invest in low-income communities; and provides businesses in those communities with a substantial financing source that would not otherwise be available to them.

III. Details of Current Allocations.

As described in the Companion Article, CDEs remain the primary gatekeepers of the Program and provide the essential entry point to the NMTC process for QALICBs and their advisors. And with respect to CDEs, the Program continues to be highly competitive.

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5 See New Markets Tax Credit Program Update, at the CDFI Fund website: [http://www.cdfi.gov/news_events/CFDI-2013-01-New-Markets-Tax-Credit-Program-Update.asp](http://www.cdfi.gov/news_events/CFDI-2013-01-New-Markets-Tax-Credit-Program-Update.asp) (last accessed June 24, 2013). Although President Obama and members of Congress have proposed to make the Program a permanent feature of the Code, at present it remains part of the so-called “extender” package subject to periodic renewal by Congress. Because the Program enjoys congressional support on a largely bipartisan basis, the likelihood that it will be reauthorized in 2014 for subsequent programmatic years remains high, but not certain.


7 In the eleven (11) Rounds to date, the CDFI Fund has made a total of eight hundred thirty-six (836) allocation awards to CDEs totaling $40 Billion of NMTC authority, in the aggregate, including $3 Billion in Recovery Act awards.

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8 A “qualified equity investment” for purposes of NMTCs is, in general, an equity investment in a CDE, substantially all of which is used by the CDE to make “qualified low-income community investments.” See IRC § Section 45D(b), et seq.

9 A “qualified community development entity” for purposes of NMTCs is, in general, a: (i) special domestic corporation or partnership that has a primary mission to serve or provide in- community investments.” See IRC § Section 45D(c), et seq.

10 The NMTCs are claimed as a credit offsetting otherwise ap-pertaining federal income tax liabilities (in other words, NMTCs are not a “refundable” tax credit) in the following manner: five percent (5%) in the first three (3) years beginning with the year in which the QEI is made, and six percent (6%) in each of the next four (4) years. See IRC § Section 45D(a), et seq.

11 See IRC § Section 45D(a), et seq.

12 The financial benefits to the QALICB can be substantial, and provide as much as twenty to twenty-five percent (20-25%) of the overall project value.

(Continued on page 16)
For the 2013 Round, to which the Current Allocations relate, three hundred ten (310) CDEs applied to the CDFI Fund for allocations and they requested a total of almost $26 Billion in allocations – thus indicating a demand more than seven times the capacity authorized by Congress, and demonstrating significant increases in both the number of applicant CDEs (10%) and requested allocation (18%) from the 2012 Round. This demand speaks to the strength of the Program in the marketplace, but also suggests its practical limitations and the competitive dynamic at work between CDEs to demonstrate to the CDFI Fund the value of their respective projects financed with NMTCs when ultimately deployed.

Of the applicant CDEs, then, as part of the Current Allocations the CDFI Fund ultimately made allocation awards to eighty-seven (87) CDEs, or twenty-eight percent (28%) of the total applicant pool, totaling $3.501 Billion.13 Although the number of CDEs selected for allocations has remained relatively constant in recent years,14 several major national CDEs were surprisingly not selected to receive allocations in this Round (including both USBank and Wells Fargo, which had both been consistent recipients previously).

A. Distribution of Allocatees.

In terms of distribution, both geographically and with regard to emphasis, the successful CDE allocatees were widely disbursed:

- Forty-one (41) successful CDEs, representing forty-seven percent (47%) of the total, are certified by the CDFI Fund to conduct transactions nationally;
- Fifteen (15) successful CDEs, representing seventeen percent (17%) of the total, are certified by the CDFI Fund to conduct transactions in a defined multi-state service area;
- Twelve (12) CDEs, representing fourteen percent (14%) of the total, are certified by the CDFI Fund to conduct transactions on a statewide basis;15 and
- Nineteen (19) CDEs, representing twenty-two percent (22%) of the total, are certified by the CDFI Fund to conduct transactions on a statewide basis;16

Overall, this distribution is relatively consistent with allocations made in prior Rounds, but does show a slightly higher emphasis on local-level CDEs (an increase of 46%, year-to-year).

In addition, and also largely unchanged from the 2012 Round of allocations, the Current Allocations are earmarked for Major Urban areas ($2.011 Billion, or 57%), Minor Urban areas ($680 Million, or 19%), and Rural areas ($742 Million, or 21%) – a slight increase for Major Urban areas at the expense of Minor Urban areas in comparison to the 2012 Round.17

B. Emphasis on Business Financing.

Of potentially greater consequence, however, the Current Allocations demonstrate a fairly important shift in the thrust of the Program away from direct NMTC-based real estate-related financing and toward broader business financing. More specifically, this pivot away from real estate-related finance is reflected in the fact that, pursuant to commitments made by CDEs to the CDFI Fund in their 2013 Round applications (and as will be subsequently confirmed by each CDEs respective allocation agreement with the CDFI Fund):

- Approximately $2.575 Billion (75%) of NMTC investment proceeds will likely be used to finance and support loans to or investments in businesses in low-income communities (typically in the form of loans or equity investments in businesses for operating capital and equipment acquisition); while

13 The slight discrepancy in total allocation above the $3.5 Billion authorized by Congress for the current Round reflects approximately $1 Million in previously allocated authorization returned to the CDFI Fund by CDEs from previous Rounds for various technical reasons.

14 Eight-five (85) CDEs received allocations in the prior Round, for example.

15 These successful statewide CDE allocatees represent California (2), Iowa, Kentucky, New Jersey, Oklahoma (2), Pennsylvania, Texas, Vermont, and Wisconsin (2), respectively.

16 These successful local-level CDE allocatees represent: Los Angeles (two), San Diego, and San Francisco, California; Atlanta, Georgia; Chicago, Illinois; Fort Wayne, Indiana; Detroit, Michigan; Saint Paul, Minnesota; Kansas City, Missouri; Las Vegas, Nevada; Philadelphia and Pittsburg, Pennsylvania; Greenville, South Carolina; Danville, Virginia; Seattle, Washington; Washington, DC; Milwaukee and West Allis, Wisconsin, respectively.

17 Compared to Major Urban areas ($1.859 Billion, or 54%), Minor Urban areas ($824 Million, or 24%), and Rural areas ($744 Million, or 22%) for the 2012 Round.

(Continued on page 17)
• Only approximately $830.713 Million (24.2%) of NMTC investment proceeds will likely be used to finance and support real estate.

In comparison, in the 2012 Round, only about fifty-nine percent (59%) of allocations were earmarked for business-based financing, while forty-one percent (41%) went to real estate-based projects. But the longer term implications are even more noteworthy and dramatic when one considers that historically approximately two-thirds of all NMTC financing have been focused on real estate projects.18

C. HFFI.

In addition, as mentioned in the Companion Article, in recent years the Program has been influenced by the Department of Treasury’s interagency collaboration with the Department of Agriculture and the Department of Health and Human Services on the Health Foods Funding Initiative (“HFFI”) – a program designed to alleviate the phenomenon of “food deserts” through the support projects related to grocery, food distribution, and other similar businesses. As was the case with the 2012 Round, while there was no specific set-aside of NMTCs for HFFI in the Current Allocations, applicant CDEs were asked to indicate if they intended to devote a percentage of their allocation to HFFI activities. In this regard, sixty-one (61) of the 2013 Round allocatees (70.1%) indicated that they intend to devote some portion of their NMTC allocation to Healthy Food Financing activities. This represents a significant reduction from the 2012 Round in which slightly more than eighty-two percent (82%) of the successful CDEs made similar commitments. Thus, it’s clear that there has been at least a temporary programmatic de-emphasis on HFFI-related NMTC financing, both at the CDFI Fund and among participating CDEs.

IV. Insights and Current Program Opportunities.

Although projects nationwide and in manifold functional categories remain eligible for NMTC financing, the Current Allocations (and the programmatic fluctuations described above), create important opportunities and considerations for prospective QALICBs which tax professionals should bear in mind in the year ahead because the direction of the Program is enforced through allocation agreements that the CDFI Fund requires CDEs to enter in connection with their respective allocations. Consequently, CDEs will be primed to favorably consider NMTC project opportunities that meet one or more of these targets.

With that in mind, in light of the Current Allocations the following areas of opportunity are particularly noteworthy:

A. Competition Between CDEs Creates Pressure to Demonstrate Community Impact.

Insofar as the Program is increasingly competitive (both as between CDEs and multiple, viable NMTC projects sponsored by QALICBs), parties operating in the current NMTC dynamic can presume that projects will be highly vetted and underwritten by CDEs with a strategic view to the overall impact on the subject low-income community. Although in the recent, post-2008 marketplace, the flexible, and admittedly amorphous, concept of “community impact” has been heavily weighted to job creation, as competition between qualifying projects becomes even more intense for finite NMTC allocations, CDEs are likely to be even more demanding of QALICBs and their project in order to assure that each dollar of tax credit subsidy is bringing real benefit to the low-income communities the Program is designed to serve.

B. Projects for Operating Businesses.

As noted in Section III(B), above, the primary programmatic shift in recent years has been the incline away from real estate financing and toward operating business financing. This shift is unmistakable, and will create ripples through the industry because real estate developers, corporate users, and non-profit organizations were early adopters of the NMTC program and have driven the preexisting real estate focus that has characterized the Program’s implementation. Due to the shrinking availability of real estate-related NMTC allocation, competition for those credits will be fierce. That said, for enterprises that are positioned to benefit from the CDFI Fund’s current direction in this regard, such prospective QALICBs will find real opportunities and less competition.

C. Historically Underrepresented States and Territories.

As in the 2012 Round, the Current Allocation carries forward a soft objective to expand the use of NMTC financing beyond areas of the country in which they have been more heavily used over the first decade (Continued on page 18)

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or so of the Program’s existence. For a variety of historical reasons, a disproportionately high number of NMTC transactions have been completed in certain States and Territories, while certain other States and Territories have failed to complete a proportionate share of transactions. As a result, and in an effort to begin to even out those disparities, the CDFI Fund has identified the following underrepresented jurisdictions and encouraged CDEs to complete transactions in LICs located there to the extent possible:19

- **States** – Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Nevada, Tennessee, Texas and West Virginia; and
- **Territories** – American Samoa, Common-wealth of the Northern Marianas Islands, Guam, and the U.S. Virgin Islands.

Again, all other things being equal, if QALICBs propose projects in these jurisdictions, they are likely to enjoy better odds of identifying available NMTC allocation.

**VI. Summary.**

In summary then, the federal NMTC program, while complex, remains a powerful economic development tool that provides incentives that catalyze investments in low-income communities. But the Current Allocations reveal an increasingly competitive marketplace for these limited tax resources; and, although projects of all types remain eligible, practitioners and potential project proponents that are aware of (and can tailor their opportunities to) the current program objectives of the CDFI Fund – and particularly those oriented toward non-real estate business financing – will have valuable strategic advantages and a greater likelihood of successful implementation.

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19 No formal quota or requirements are in place to enforce this, and projects remain eligible in all jurisdictions, but projects in the identified States and Territories will receive additional attention.
This two-day program brings you the latest developments affecting Value Added Taxation around the globe, emphasizing practical considerations. Last year, for example, the Symposium focused on such matters as EU VAT recovery, the use of trading companies and other corporate structures, the transformed China system and the inclusion of new categories of services in its VAT base, among other topics. This year’s symposium will offer a blend of general sessions and smaller breakout sessions, which are structured to allow for more interaction, and include such timely topics as: implications of moving the VAT function into a shared services center, an overview of VAT compliance challenges for a multinational company, Top 10 mistakes for US-based companies and an update of the most recent changes in the tax law around the globe. Attendees will have ample opportunity, and will be encouraged, to interact with speakers and panels as those present share their expertise and experiences. While some working knowledge of Value Added Taxation is suggested, the program is structured so that even those new to the discipline will find valuable takeaways. Registration materials will be available early August.

The Institute’s annual Property Tax School will be held at the Georgia Tech Hotel and Conference Center located in the heart of Atlanta. The Georgia Tech facilities offer state-of-the-art technology as well as the warm hospitality of this southern city. The purpose of the Property Tax School is to provide a basic but comprehensive foundation in the theory and practice of property tax management for businesses, including demonstration of valuation techniques used by property tax professionals. The school is recommended for individuals with less than five years of experience in the field and little or no exposure to appraisal training. The course will be conducted by a faculty of experienced tax professionals. These instructors will facilitate an informative, cooperative, and effective educational experience consistent with the highest standards of adult continuing education and the goals and objectives of the Institute. The course registration form and school program are on IPT’s website. Members may also register online.

Make your hotel reservation soon!
Credits & Incentives Symposium
September 21-24, 2014 ~ Arlington, VA
Crystal Gateway Marriott Hotel

Now in its fourth year, this two and one-half day Symposium has proven immensely popular with those professionals having responsibilities relating to state/federal tax credits and incentives for their employers or clients. The 2014 Symposium will see the acclaimed Beginner’s Boot Camp reprised and will offer a deep dive into sundry statutory and discretionary credits. The emphasis is on the practical, with industry-specific sessions, and sessions focused on compliance and transferability of credits, consideration of lobbying requirements and the impact of open records and meeting laws, among other matters. New Market Tax Credits, State Economic Development Agency panels, state-specific reviews and much more round out this year’s program. Enhance your knowledge and skills in this important arena and bring bottom-line value to your company or the companies you serve.

Program  Registration  Hotel Reservation

State Business Income Taxation Book

State Business Income Taxation includes contributions from some of the nation’s preeminent state business income tax practitioners, a virtual Who’s Who of SALT professionals. This treatise, derived from the authors’ many years of expertise in state business income taxation, is a vital reference tool. Let the leading state and local income tax experts provide you with the answers you need by purchasing this book and accompanying CD today!

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Income Tax Symposium
November 9 - 12, 2014 ~ Fort Lauderdale, FL
Marriott Harbor Beach Resort

This two and one-half day Symposium continues its focus on balance-sheet issues, emphasizing planning opportunities and compliance requirements. This year’s edition will also feature tips and ideas on how to manage an in-house tax department including a detailed look at opportunities offered by tax technology. Expect the 2014 iteration of the Symposium to also examine the new nexus standards, mull Equifax and the legislative response, review the evolution of sales factor sourcing rules, confront New York’s confusing tax scheme and other non-traditional taxes, and highlight emerging audit issues and litigation developments. Stay in the A-game by attending the 2014 IPT Income Tax Symposium in Ft. Lauderdale, Florida.

Property Tax Symposium
November 9 - 12, 2014 ~ Fort Lauderdale, FL
Marriott Harbor Beach Resort

This year’s two and one-half day Symposium takes on some of the pressing practical issues confronted by those responsible for ad valorem property tax obligations. From classification conundrums (structure, real or personal property) to tax situs for movable property, from taxation of possessory interests in government-owned property to extraction of intangibles values, utility valuation elements, complex obsolescence considerations, appeals pitfalls, and much more, this program delves deep into matters that affect your business and professional responsibilities. Stay abreast of the issues and opportunities of the day. Join your colleagues in Ft. Lauderdale, Florida for the 2014 Property Tax Symposium.

CODE OF ETHICS: CANON 6

IT IS UNETHICAL to offer or give anything of value to a public official to induce that official to take any action with respect to a tax matter.
2014 Sales Tax Symposium

This year’s program is being held September 21 - 24 in Washington, DC, at the Marriott Renaissance Washington DC Downtown Hotel. Full program and registration information is available on IPT’s website: www.ipt.org.

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**General Sessions (6 Sessions):**

- The Power of Influence (Motivational)
- Top 10 Sales and Use Tax Cases
- Federal Legislation and National Trends
- Mock Trial: Between a Rock and a Hard Place - Class Action versus Qui Tam
- Avoiding the Ethical Briar Patch: Everyday Practice Advice for the Sales Tax Professional
- National State Update and Discussion of Questions from Audience

**Breakout Sessions:**

(34 Individual Offerings with 15 Repeated - Denoted by “**”)

- Avoiding The Family Feud: Intercompany Transactions and Taxes
- Beginner Basics
- Business Taxes and Other Local Taxes
- Canadian Indirect Taxes *
- Cloud Changes Everything *
- Crafting an Incentives and Credits Game Plan *
- Current Developments in State Exemptions *
- Data Analytics
- Implementing Automation - Selecting Your Engine
- Fas 5/ASC 450 *
- Government Contractors
- Hospitality and Restaurant
- Industry Issues - The Energy & Utilities Industry
- Industry Discussion - You think you are not a Telecom? Think again!
- Industry Issues: Manufacturing *
- Local Tax Lunacy *
- Managed Audits and Compliance Agreements *
- Managing Your Tax Practice Globally
- Managing Audit Mysteries *
- Marketplace Fairness Act Readiness
- Oil & Gas Downstream
- Oil & Gas: What’s Up for Upstream Operations and Field Services?
- Property Tax 101 *
- Retail
- Sales and Use Taxes and Contracting with Uncle Sam
- Sales and Use Tax Treatment of Leasing Transactions
- Sales Tax Planning (Recurring or Big Ticket Items) *
- Sales Tax/VAT
- Sourcing and Nexus for Services *
- State Tax Controversies and Litigation *
- State Tax Audits & Sampling *
- Tax Problems in Mergers/Acquisitions *
- What Sales Tax Professionals Must Know About Unclaimed Property
- Working With Governmental Affairs
Congratulations to the following IPT members who recently successfully completed the examination requirement for earning the CMI designation in the following disciplines at IPT’s 38th Annual Conference held in Phoenix, Arizona.

**Congratulations!**

**Sales Tax**
- Kristy A. Applegate, CMI, KPMG LLP
- Suchandra Sai Avula, CMI, Deloitte Tax LLP
- Edward J. Baran, Jr., CMI, CPA, Edward Baran, Jr., CPA
- Claire Cook, CMI, KPMG LLP
- Trisha A. Davidson, CMI, Allyn International Services Inc.
- Kerry Wiggins Downam, CMI, KPMG LLP
- Derek Brian Gee, CMI, CPA, RingCentral, Inc.
- John P. Gibboney, CMI, Deloitte Tax LLP
- Joshua Grabow, CMI, Service Corporation International
- Timothy M. Jackstadt, CMI, DuCharme, McMillen & Associates, Inc.

**Property Tax**
- Thomas Bumgardner, CMI, Texas Industries, Inc.
- Andrew Golden, CMI, Ernst & Young LLP
- Ian P. McPike, CMI, Grant Thornton LLP

**Income Tax**
- Christopher Joseph Hallstrom, CMI, Ryan, LLC
- Daniel Manning, CMI, Ryan, LLC
- Martin W. Tschida, CMI, Hein & Associates

**Sales Tax**
- Faraz A. Khan, CMI, KPMG LLP
- Scott Komlanc, CMI, WellPoint Inc.
- Nancy-Mylene Lemay, CMI, CGA, MS Taxation, PricewaterhouseCoopers LLP
- Brenda L. Mello, CMI, Grand Canyon Education, Inc.
- Melinda Moore, CMI, Lufkin Industries, LLC a General Electric Company
- Raul Ramos, CMI, Ernst & Young LLP
- Pui Shan Revdiwala, CMI, Grant Thornton LLP
- Paul Schechter, CMI, CPA, Dixon Hughes Goodman LLP
- Andrew P. Wagner, CMI, JD, LLM, FedEx Corporation
Reminder: CMI Candidate Policies

CMI/CCIP Candidate Application and Exam Fees
On January 1, 2014, CMI and CCIP Candidate Application and Exam fees changed to the following:
There is a $100 CMI/CCIP candidate application fee and $50 fee per exam. Candidates will pay $150 at the time of application to cover the application fee and first exam fee. All fees are nonrefundable and nontransferable to another exam administration or another candidate. However, if a candidate cancels the registration for an exam prior the cutoff date (30 days prior to the exam), the fee may be used at the next exam opportunity. The $50 exam fee will apply to candidates taking both the written and oral exams, or only the written exam or oral exam.

CMI/CCIP Candidate Exam Review Policy
In order to provide concrete, objective and standardized information to candidates following an unsuccessful CMI/CCIP exam attempt, the following policy replaces the previous exam review policy. It went into effect November 2013 for Property Tax and June 2014 for Income and Sales Tax.
Candidates, who did not pass the written and/or oral exam, will receive a list of categories in which further study and/or experience is needed as indicated by their exam performance.

More information on all of these announcements can be found on IPT’s website at www.ipt.org.

Question of the Month:
What happens to my certification if my membership becomes inactive or I change employers?
A member’s certification remains active for six months after his or her membership becomes inactive. Membership will become inactive upon a change of employers. If membership is reactivated within the six-month grace period, the member’s certification is unaffected. Once the certification is changed to inactive status, however, the member must submit the Application to Reactivate Designation along with all required CPE documentation and fees.

More information on all of these announcements can be found on IPT’s website at www.ipt.org. If you have questions about the CMI Professional Designation that are not answered on our website, please contact Emily Archer, Certification Officer, at earcher@ipt.org.

Property Tax Calendar ~ September 2014
This information is provided by International Appraisal Company (IAC) and is provided for quick reference/reminder purposes only. IPT and IAC make no guarantee to completeness or accuracy and are not responsible for errors or omissions or for any results from the use of this information. We strongly suggest confirmation of all information with local taxing jurisdictions.

Appeals Due:

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Personal Property Filing Dates: WV 9/1
Assessment Dates: None

* Dates vary, check jurisdiction
Confirm all information with local taxing jurisdictions.
Careers

Please visit the Career Opportunities page on the IPT website for complete position descriptions and requirements.

Positions Available:

**Director of International Tax (San Francisco, California)** – Specialty: International Tax. Gap Inc. Send resume to jake_dombroski@gap.com.
Date Posted: 7/28/2014 (IPT1459)

**Sr. Director of Sales, Use & VAT (San Francisco, California or Albuquerque, New Mexico)** – Specialty: Sales, Use, and Value Added Tax. Gap Inc. Send resume to jake_dombroski@gap.com. Date Posted: 7/25/2014 (IPT1458)


**Senior Tax Accountant (Atlanta, Georgia)** – The Home Depot. Interested persons should email lynn_monsalvatge@homedepot.com.
Date Posted: 7/23/2014 (IPT1455)

**Tax Manager (Atlanta, Georgia)** – The Home Depot. Interested persons should email lynn_monsalvatge@homedepot.com. Date Posted: 7/23/2014 (IPT1454)

**Corporate Manager Income Tax Compliance (Dallas, Texas)** – Resume can be sent to cw2128@att.com.
Date Posted: 7/23/2014 (IPT1453)

**Tax Accountant, part-time (Alpharetta, Georgia)** – AMEC. Apply online by clicking on the following link: https://sjobs.brassring.com/TGWEbHost/jobdetails.aspx?pArtnerid=25283&siteid=5191&AReq=20727BR. Date Posted: 7/22/2014 (IPT1452)

**Director Employment Tax and Benefits (Dallas Texas)** – Candidate can send resume to CW2128@att.com. Date Posted: 7/22/2014 (IPT1451)


**Property Tax Analyst (Louisville, Kentucky)** – Ventas, Inc. Send resume to humanresources@ventasreit.com. Date Posted: 7/17/2014 (IPT1448)

**Business Development Manager (Dallas, Texas)** – Baden Tax Management, LLC. Interested candidates should send resume to: btm@badentax.com. Date Posted: 7/17/2014 (IPT1447)

**Property Tax Senior Consultant (Wheaton, Illinois)** – Barron Corporate Tax Solutions. Please forward resume with salary requirements to: tbarron@barrontax.com. DatePosted: 7/17/2014 (IPT1446)


**Property Tax Manager (Atlanta, Georgia)** – RockTenn. Contact: Liz Christianson, EChristianson@rocktenn.com, 678-291-7916. Date Posted: 7/15/2014 (IPT1442)
**International VAT/GST Manager (Atlanta, Georgia)** – RockTenn. Contact: Liz Christianson, EChristianson@rocktenn.com, 678-291-7916. Date Posted: 7/15/2014 (IPT1441)

**Sales & Use Tax Manager (Atlanta, Georgia)** – RockTenn. Contact: Liz Christianson, EChristianson@rocktenn.com, 678-291-7916. Date Posted: 7/15/2014 (IPT1440)


**State Tax Analyst (Florham Park, New Jersey)** – BASF. Upload a resume as part of our process http://on.basf.com/1qNJAbC. Date Posted: 7/11/2014 (IPT1434)


**Property Tax Manager (Los Angeles, California)** – Fresh & Easy. Send resume to pia.carr@freshandeasy.com. Date Posted: 7/10/2014 (IPT1432)

**Senior Manager Sales/Use Tax (Costa Mesa, California)** – Apply for this position, email your Resume to: jmorris@thinkllp.com. Date Posted: 7/10/2014 (IPT1431)

**AVP of Sales Tax: Audit (Jacksonville, Florida)** – CIT. Send resume to denise.smith@cit.com or apply at https://cit.csod.com/ats/careersite/JobDetails.aspx?id=1217. Date Posted: 7/10/2014 (IPT1430)


**Tax Compliance Specialist (Alpharetta, Georgia)** – GSA. Send resume to carol@gsaaudits.com. Date Posted: 7/6/2014 (IPT1428)

**Lead Analyst Sales Tax (Chicago, Illinois)** – GE. Send resume to eric.walbrandt@ge.com. Date Posted: 7/6/2014 (IPT1427)

**State Tax Manager (Franklin, Tennessee)** – Tax Specialty: Income Tax. For consideration, please apply on-line through Nissan's job center: https://sjobs.brassring.com/1033/ASP/TG/cim_jobdetail.asp?SID=a7p5SwWIKlCyGr9x7Wjix32S0aWm1hhP55wHRc1Yffz05Mu_slp_rhc_iXFOVEBg/pbC4&jobId=628819&type=search&JobReqLang=1&recordstart=1&JobSiteId=5154&JobSiteInfo=628819_5154&GQId=0. Date Posted: 7/6/2014 (IPT1426)


IPT 2014 CALENDAR OF EVENTS

Property Tax School
Georgia Tech Hotel & Conference Center
Atlanta, GA
August 10 - 14, 2014

Value Added Tax Symposium
Crystal Gateway Marriott Hotel
Arlington, VA
September 17 - 19, 2014

CMI Sales Tax Exam
Renaissance Washington DC
Washington, DC
September 19 - 20, 2014

CCIP Exams
Crystal Gateway Marriott
Arlington, VA
September 20 - 21, 2014

Credits and Incentives Symposium
Crystal Gateway Marriott Hotel
Arlington, VA
September 21 - 24, 2014

Sales and Use Tax Symposium
Renaissance Washington DC
September 21 - 24, 2014

Personal Property Tax School
Georgia Tech Hotel & Conference Center
Atlanta, GA
October 12 - 16, 2014

CMI Income Tax Exams
Marriott Harbor Beach Resort
Fort Lauderdale, FL
November 8 - 9, 2014

CMI Property Tax Exams
Marriott Harbor Beach Resort
Fort Lauderdale, FL
November 8 - 9, 2014

Income Tax Symposium
Marriott Harbor Beach Resort
Fort Lauderdale, FL
November 9 - 12, 2014

Property Tax Symposium
Marriott Harbor Beach Resort
Fort Lauderdale, FL
November 9 - 12, 2014

Regional/Industry Workshop
Iselin, NJ
November 20 - 21, 2014

IPT 2015 CALENDAR OF EVENTS

Sales Tax School I
Georgia Tech Hotel & Conference Center
Atlanta, GA
February 22 - 27, 2015

ABA-IPT Advanced Income Tax Seminar
The Ritz Carlton Hotel
New Orleans, LA
March 16 - 17, 2015

ABA-IPT Advanced Sales/Use Tax Seminar
The Ritz Carlton Hotel
New Orleans, LA
March 17 - 18, 2015

ABA-IPT Advanced Property Tax Seminar
The Ritz Carlton Hotel
New Orleans, LA
March 19 - 20, 2015

Sales Tax School II
Marriott Kingsgate Conference Center
Cincinnati, OH
April 26 - May 1, 2015

Please check IPT’s online Calendar of Events for additional programs that may be added.