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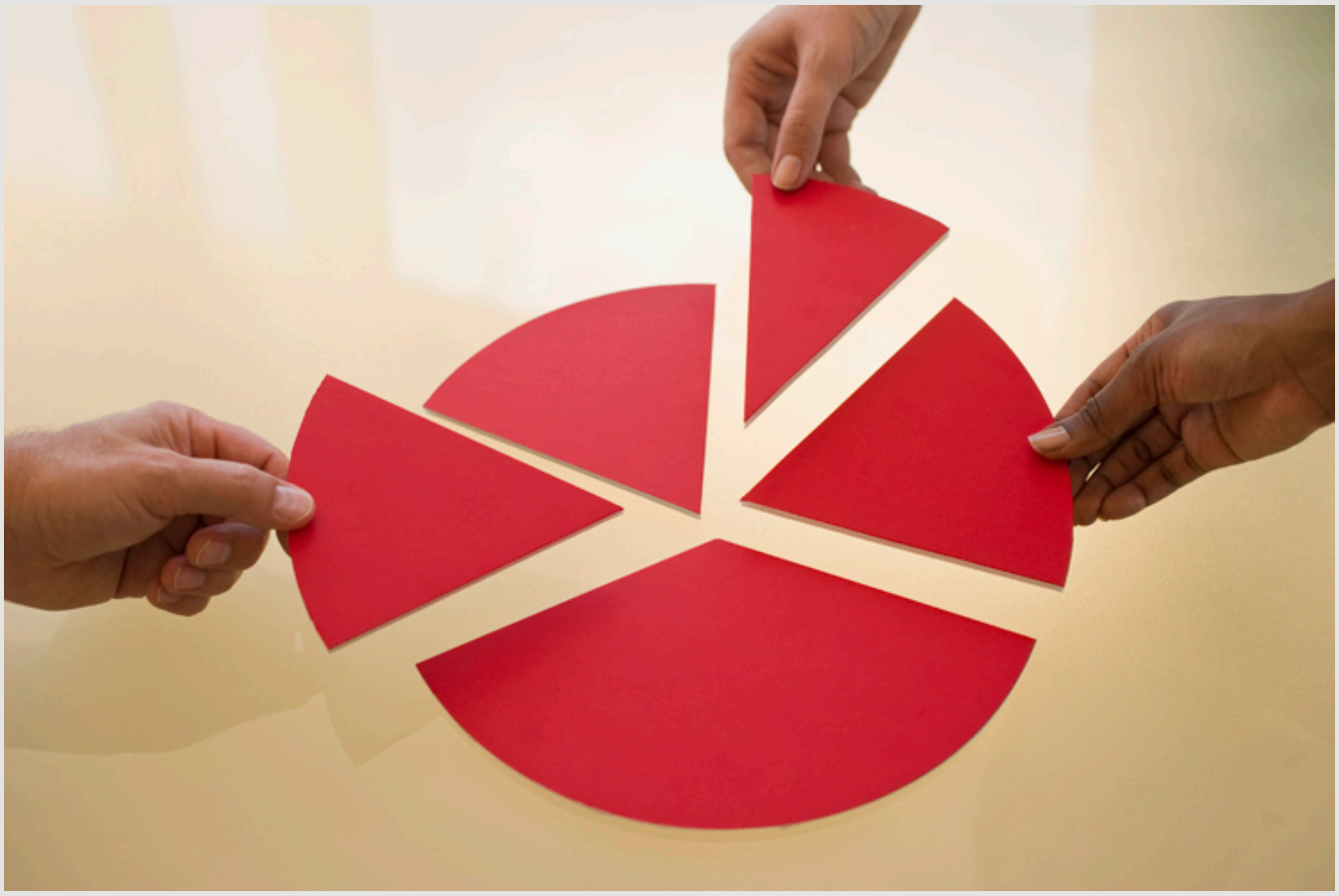

New England State and Local Tax Update

March 2015

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Massachusetts

Massachusetts Supreme Judicial Court determines that all of a financial institution's property was located in Massachusetts for apportionment purposes. The First Marblehead Corporation helped college students obtain financial assistance for the cost of their education, but did not make any loans directly to the students. Instead, it brought together banks, loan guarantors and loan servicing companies. Third-party banks entered into agreements with FMC through which the banks issued loans to student borrowers. The banks sold portfolios of these loans to a number of different Delaware trusts controlled by Gate Holdings, Inc. Gate was a wholly-owned subsidiary of FMC set up largely to hold the beneficial interests of the trusts.

Loan servicing was outsourced by FMC to independent entities. Gate had no employees, payroll, tangible assets, or office space. Its principal office was located at the same Boston address as FMC.

The Massachusetts Appellate Tax Board held that Gate was a financial institution as defined in G. L. c. 63, § 1, because it derived more than 50 percent of its gross income from "lending activities" in substantial competition with other financial institutions. Since it held loans with students in all 50 states, Gate was entitled to apportion its income in accordance with G. L. c. 63, § 2A. There was no dispute over the calculation of Gate's receipts or payroll factors. The sole issue on appeal was the calculation of Gate's property factor.

The Supreme Judicial Court concluded that the loan portfolios that represented all of Gate's property for the tax years at issue should be treated as having been located entirely within Massachusetts.

When the property at issue consists of loans, and the taxpayer does not have a regular place of business as was the case with Gate, then G. L. c. 63, § 2A(e) creates a rebuttable presumption that the loans should be assigned to the taxpayer's commercial domicile. In this case, Gate's commercial domicile was Massachusetts. The presumption may be rebutted if the taxpayer demonstrates that the "preponderance of substantive contacts regarding the loan" occurred outside the state.

Gate argued unsuccessfully that the loans should be assigned to the out-of-state locations of the loan servicers. The court noted that the examination of substantive contacts must consider activities such as "solicitation," "investigation," "negotiation," "approval," and "administration" of the loan. The only possible factor that could apply to Gate was administration of the loan since it had no role in any of the other listed activities.

►The court concluded that the plain and unambiguous language of the statute allowed for only the loan administration activities of the taxpayer (Gate) to be considered. Work performed by agents or independent contractors of the taxpayer, when those entities have their own places of business and staff, are not taken into account. Accordingly, Gate was unable to rebut the presumption and 100 percent of Gate's property was deemed to be located in Massachusetts for apportionment purposes. *The First Marblehead Corporation & Gate Holdings, Inc. vs. Commissioner of Revenue*, Supreme Judicial Court Docket No. SJC-11609 (January 28, 2015).

Massachusetts (continued)

Newly enacted Massachusetts excise tax does not discriminate against satellite television companies.

In 2010, the Massachusetts Legislature established an excise tax upon satellite companies at a rate of five percent of their gross revenues derived from the provision of video programming in Massachusetts. (See G. L. c. 64M, §§ 1, 2.)

DirecTV and Dish Network brought a complaint for declaratory and injunctive relief in Massachusetts Superior Court alleging that the tax violated the Commerce Clause of the United States Constitution. They argued that the tax discriminated against interstate commerce because it did not apply to companies that provide video programming through cable networks. The lower court ruled against the satellite companies and the Supreme Judicial Court affirmed.

The court noted that cable and satellite companies offer similar programming and that there was a great deal of overlap in their methods of operation. However, the companies differ significantly in how they assemble and deliver programming to their customers. Cable companies have substantial operations in Massachusetts and need to gather and distribute programming signals through networks of cables laid on the ground or hung from buildings and poles. Satellite companies rely on uplink centers located outside Massachusetts to transmit signals to satellites orbiting Earth and then to satellite dishes mounted on or near customers' homes.

Cable companies pay franchise fees to local governments at the rate of three to five percent of gross revenues from cable services. At the same time the excise was enacted against the satellite companies, cable companies became subject to personal property tax on their poles, underground conduits, wires, and pipes.

The Supreme Judicial Court rejected the argument that the excise tax discriminates against interstate commerce by disadvantaging the satellite companies and benefiting the cable companies. Each is subject to unique obligations in connection with the privilege of selling video programming services to Massachusetts consumers. No greater tax burden was imposed on the satellite companies. In fact, the statute offers a streamlined collection method to the satellite companies because the tax is administered and collected by the Department of Revenue. Cable companies, on the other hand, must pay varying amounts to each of the local cities and towns in which they operate. In the eyes of the court, "this instance of differential treatment, rather than burdening the satellite companies, is advantageous to them."

Similarly, the calculation of the taxes does not operate to burden the satellite companies. While the satellite companies were subject only to a flat tax rate of five percent of gross revenues, cable companies were obligated, among other things, to pay franchise fees of three to five percent of gross revenues as well as additional fees used to support public-oriented programming, averaging 1.09 percent of gross revenues.

►The court concluded that the satellite companies did not have a reasonable expectation of proving that their obligations were more burdensome than those of the cable companies or that the excise tax discriminated against interstate commerce. DirecTV, LLC & Dish Network LLC vs. Department of Revenue, Supreme Judicial Court Docket No. SJC-11658 (February 18, 2015).

New Hampshire

Proposed New Hampshire property tax legislation would affect utility taxpayers. New Hampshire utility taxpayers pay both a state-level property tax (RSA 83-F) and a local property tax. Both taxes are based on fair market value as of April 1 of each year. The New Hampshire Department of Revenue Administration annually appraises all utility property for purposes of the state-level tax. House Bill 192 would *prevent* local property tax assessors as well as utility taxpayers from using the Department's appraisals as evidence in property tax abatement appeals. House Bill 192, if passed, could create redundant work and costs for municipal assessors, and deprive both parties of valuable third-party evidence of value. It could also result in higher property taxes for companies subject to both the state and local property tax. The bill is sponsored by Rep. James Coffey of Hillsborough.

New Hampshire Supreme Court approves of unit method of valuing multijurisdictional utility property. In an informal opinion, the New Hampshire Supreme Court approved the unit method of valuation of multijurisdictional utility system property. Under the unit method, the entire system is valued and the total value is then apportioned to the communities in which parts of the system are located. Pierce Atwood represented the taxpayer in this case. *Appeal of Town of Gorham*, New Hampshire Supreme Court, No. 2013-0613.

Maine

Legislature Wades Into Governor LePage's Tax Reform Proposal. Maine Governor Paul LePage has proposed a major restructuring of Maine's tax system as part of his FY 2016-2017 budget submission. After a series of public hearings in February 2015, the proposal is now being scrutinized by the Legislature's Appropriations and Taxation Committees.

Generally, the governor's proposal decreases the state's reliance on income tax revenue and increases its reliance on consumption-based sales and use tax revenue. The sales tax increase comes in the form of both increased rates and taxation of new services provided to consumers. The proposal will also likely result in increased property taxes, and also would allow municipalities to tax larger nonprofit entities for the first time. Maine estate taxes would be phased out.

Following is a brief summary of the proposals contained in Governor LePage's tax reform initiative contained in his budget proposal:

Maine (continued)

Income Tax

- Beginning with the 2016 tax year, the top individual income tax rate would be lowered gradually from the current 7.95 percent to 5.75 percent for 2019.
- The ability to claim itemized deductions (*e.g.*, charitable contributions, mortgage interest) would be eliminated for the 2016 tax year and beyond. For 2015, deductions would be limited to $27,500 (other than medical expenses).
- Various tax credits would be eliminated, including the high-tech credit, the jobs and investment credit, the biofuel production credit, and various credits for employer-provided services (*e.g.*, day care).
- Beginning with the 2017 tax year, the top corporate income tax rate would be lowered gradually from the current 8.93 percent to 7.5 percent for 2021.

Estate Tax

- The estate tax exemption would be increased from $2 million to $5.5 million for individuals dying in 2016. The estate tax would be eliminated for decedents dying in 2017 or after.

Sales and Use Tax

- Tax rates on various items would change. The general sales and use tax rate would increase to 6.5 percent; lodging taxes would remain at 8 percent; the tax on prepared foods would drop to 6.5 percent; the service provider tax would be at 6 percent; and the tax on short-term auto rentals would decrease to 8 percent.
- The tax base would be increased dramatically, applying to:
  - Domestic and household services (*e.g.*, landscaping, cleaning)
  - Installation, repair, and maintenance services (all property other than motor vehicles and aircraft)
  - Personal services (*e.g.*, hair care, event planning)
  - Personal property services (*e.g.*, dry cleaning, pet services)
  - Professional services (*e.g.*, legal, accounting, architectural)
  - Additional prepared foods (*e.g.*, candy, soft drinks, snacks)
  - Recreation and amusement services (*e.g.*, movies, golf, skiing)
- The service provider tax would be expanded to apply to cable, satellite, and radio services, and personal interstate and international telecommunications services.
- An important exemption would be created for sales to businesses of professional services, personal property services, and installation, repair, and maintenance services.

Maine (continued)

Property Tax

- Business equipment eligible for the Business Equipment Tax Reimbursement program (BETR) would be transitioned to the Business Equipment Tax Exemption program (BETE) over a four-year period, with BETR fully eliminated in 2019. There is no exception for property enrolled in a Tax Increment Financing agreement (TIF), as had been the case with the most recent BETR conversion proposal.
- BETR would be funded at 90 percent until its elimination. (It had been scheduled to return to 100% funding.)
- Municipal revenue sharing would be funded for the fiscal year beginning July 1, 2015, but would be eliminated the following year. This lack of revenue shared with municipalities would have to be offset by increased local property taxes, reduced spending, or a combination of both. Higher property taxes would have a major negative impact on capital intensive businesses.
- The exemption for nonprofit entities, other than churches, would be limited to the first $500,000 of value and 50 percent of the excess above $500,000.
- The telecommunications tax (paid to the state) would be repealed, and municipalities would be given authority to collect local property tax on that property.
- New retail property would cease to be eligible for BETE or BETR. Existing retail property would be eligible for BETE only through 2025.
- The tree growth and open space property tax programs would require additional compliance measures at both the individual and municipality levels.

Maine Capital Investment Credit Extended. In other legislative developments, the legislature has voted to extend the Maine Capital Investment Credit retroactively to 2014. The Maine Capital Investment Credit closely mirrors federal bonus depreciation. P.L. 2015, ch. 1.

Pierce Atwood LLP's State and Local Tax Group consists of tax and litigation attorneys with decades of experience representing businesses and individuals before state and local taxing authorities throughout New England. Our representation includes assisting clients with tax audits, challenging and resolving assessments, litigating contested tax issues, seeking refund claims before administrative tribunals and state courts, and advocating our clients' positions before state appellate courts. Pierce Atwood attorneys routinely handle matters involving all tax types including state income, excise, sales and use, franchise, utility, telecommunications and fuels taxes, as well as real and personal property tax.

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