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LEGISLATION AND LITIGATION UPDATE IN WESTERN UNITED STATES

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Legislation and Litigation Update in Western United States

I. **Arizona**

A. Home Depot USA, Inc. v. Arizona State Department of Revenue, Arizona Superior Court No. TX 2006-000028 (December 9, 2010)

1. Home Depot not permitted to claim a bad debt deduction from sales tax where it sold its receivables to a finance company.

2. The Court rejected Home Depot's claims that the denial of the deduction was unjust enrichment to the State.

3. The Court also rejected Home Depot's argument that the denial of the deduction was a violation of Equal Protection.

4. Under a prior Court of Appeal decision, Daimler Chrysler Services North America, LLC v. Arizona Department of Revenue, 210 Ariz. 297 (2005), the bad debt deduction was not available to the finance company as well.

5. There have been a series of similar cases throughout the United States.

B. House Bill 2551 (Introduced January 25, 2011)

1. A so-called "click-through" nexus bill has been introduced in the Arizona House of Representatives that would provide for Arizona transaction privilege tax purposes, a person making sales of tangible personal property is presumed to be conducting business in Arizona if the seller contracts with a resident of Arizona who, for a commission or other consideration, directly or indirectly refers potential customers to the seller by an internet website link or otherwise.

2. The presumption would be applicable only if the cumulative gross income or gross proceeds from sales by the seller to customers in Arizona who are referred to the seller by all residents with that type of an agreement with the seller exceed $10,000 during the preceding 12 months.

3. The presumption would be able to be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in Arizona on the seller's behalf that would satisfy the nexus requirement of the U. S. Constitution during those preceding 12 months.

II. California

A. Nortel Networks Inc. v. State Board of Equalization, 191 Cal. App. 4th 1259 (2011)

1. Software licensed by a taxpayer to operate switching equipment was exempt from California sales and use tax under statutes regarding technology transfer agreements ("TTA") in that the software was (a) copyrighted, (a) contained patented processes, and (c) enabled the licensee to copy the software and make and sell products (telephone calls) that embodied the patents and copyright. (California Revenue and Taxation Code ("RTC") §§ 6011, subd. (c)(10)(D), 6012, subd. (c)(10)(D).)

2. The taxpayer designed, manufactured, and sold switch hardware. It entered into licensing agreements with a telephone company giving the company the right to use the taxpayer's software programs in the switches. The license gave the telephone company the right to produce telephonic communications without fear of infringing upon the taxpayer's patents.

3. The Court noted that the TTA statutes apply when the transfer of patents and copyrights is at issue. The Court further noted that a licensing agreement is exempt from sales and use tax if it is a TTA. The TTA statutes cover agreements that license the right to make and sell a product or to use a process that is subject to the patent or copyright interest. The appellate court held that the licenses gave the telephone company the right to reproduce the copyrighted material on its computers. As such, the prewritten programs were nontaxable TTAs.

4. The Court held that the attempt by the California State Board of Equalization ("BOE") to limit the scope of the statutes by excluding prewritten computer programs was an invalid exercise of its regulatory powers. The TTA statutes do not restrict agreements that transfer an interest in prewritten software. Rather, they apply to any agreement that involves the sale or license of copyrighted materials or patented processes. The BOE exceeded its authority by excluding all prewritten computer programs from the definition of a TTA, even the licensing of a prewritten program that is subject to a patent or copyright. The TTA statutes encompass any transfer of an interest subject to a patent or copyright, and that includes prewritten programs licensed by the taxpayer.

B. HSBC Retail Services, Inc. v. State Board of Equalization (Court of Appeal of California, First District, No. A125995, November 18, 2010)

1. In this unpublished decision, the Court held that the taxpayer did not satisfy all three prongs of the WFS Financial, Inc. BOE Memorandum Opinion (December 14, 2000) permitting bad deductions for persons other than the retailer. The action related to the period 1997-1999 which predated the enactment of RTC § 6055(b) which broadened the scope of those entitled to claim the bad debt deduction. See also Regulation 1642.

C. Loeffler v. Target Corporation (California Supreme Court No. S173972)

1. Case pending in the Supreme Court. This case presents the following issue: Does article XIII, section 32 of the California Constitution or RTC § 6932 bar a consumer from filing a lawsuit against a retailer under the Unfair Competition Law ("UCL") (Bus. & Prof. Code sections 17200, et seq.) or the Consumers Legal Remedies Act (Civ. Code, section 1750, et seq.) alleging that the retailer charged sales tax on transactions that were not taxable?

2. The issue is may a consumer in a sales tax transaction sue a retailer under the consumer protection laws for allegedly collecting sales tax reimbursement improperly on a transaction the plaintiff contends is not subject to sales tax. Target collected sales tax reimbursement from appellants who purchased a cup of coffee "to go." Appellants, like most plaintiffs in these kinds of cases, argued that they were not challenging a tax but the collection of a charge – sales tax reimbursement. The Court of Appeal held that the two concepts were "intertwined" so that a challenge to collecting sales tax reimbursement was in fact a challenge to collecting the underlying tax. The Court also held that consumer remedies laws could not be used to resolve tax disputes.

3. There are numerous amici curiae, including the BOE. Case is fully briefed awaiting oral argument.

D. Yabsley v. Cingular Wireless (California Supreme Court No. S176146)

1. Petition for review pending in the Supreme Court. The court ordered briefing deferred pending its decision in Loeffler v. Target Corp.

2. The issue is whether or not Cingular violated the False Advertising Law (Bus. & Prof. Code, §§17500 et seq. ("FAL"), a sub-set of the UCL) when it advertised it would collect sales tax reimbursement on sales of cellular phones. Under Regulation 1585, the retailer must pay sales tax (and may

collect sales tax reimbursement) on the full unbundled price of the phone when it sells a cell phone bundled with a service contract. The Court of Appeal (Second District) agreed with the trial court that regulations under the UCL provided the same safe harbor for suits that statutes did. This holding conflicted with that of the First District which had stated in a footnote in Krumme v. Mercury Ins. Co., 123 Cal. App. 4th 924 (2004) that they did not.

3. The Court of Appeal issued a published opinion. However, upon notification from the Attorney General that it had not been served as required in such cases with the appeal papers, the Court vacated the opinion and provided for additional briefing and oral argument. The Court reissued its opinion regarding the FAL, but also added that the Loeffler decision foreclosed such suits in any event.

E. Local Tax Allocation Cases

1. There are a series of cases pending in court and before the BOE which deal with the issue of whether local sales and use taxes have been properly allocated to a particular city or cities.

a. City of Alhambra, et al. v. State Board of Equalization, LASC No. BS 124978

b. City of Palmdale v. State Board of Equalization, LASC No. BS 124919

c. City of Los Angeles v. State Board of Equalization, LASC No. BS 124950

F. Universal City Studios v. State Board of Equalization, SFSC No. CGC-10-498151

1. Case involves the issue of what is the proper amount of taxable sales related to the taxpayer's lump sum charges for access to its theme park attractions, meals and beverages.

G. New Audit Regulations

1. Regulation 1698.5, which sets forth comprehensive procedures for sales and use tax audits, was approved by the California Office of Administrative Law. The new regulation, which was proposed by the BOE, became effective August 18, 2010. According to the BOE, the regulation was necessary to clearly establish taxpayers' and BOE staff's responsibilities and duties during the audit process in order to ensure that BOE staff completes audits in a timely and efficient manner and to help

taxpayers better understand and avoid confusion regarding the BOE audit process. The regulation includes the expectation that audits be completed within a two year period commencing from the date of the opening conference and ending on the date of the exit conference.

H. Revenue and Taxation Code Section 6150

1. On October 19, 2010, legislation was enacted imposing a sales tax of 7.25% (6.25 on after July 1, 2011) on providers of in-home support services, including domestic and related services, heavy cleaning, personal care, protective supervision and transportation services for health-related requirements. The proposed tax will become effective only if specified federal approval requests for matching funds are granted.

I. Revenue and Taxation Code Section 6833

1. A collection cost recovery fee is imposed on any person that fails to pay an amount of tax, interest, penalty, or other amount due and payable under this part. The fee shall be in an amount equal to the BOE's costs for collection, as reasonably determined by the BOE. Currently, the fee ranges between $185 to $925 depending on the size of the liability. The fee shall be imposed only if the BOE has mailed its demand notice to a person for payment, which advises that continued failure to pay the amount due may result in collection action, including the imposition of a collection cost recovery fee.

2. Interest does not accrue with respect to the collection cost recovery fee.

3. The fee is to be collected in the same manner as the collection of any other tax imposed under the Sales and Use Tax Law.

4. If the BOE finds that a person's failure to pay the fee is due to reasonable cause and circumstances beyond the person's control, and occurred notwithstanding the exercise of ordinary care and the absence of willful neglect, the person shall be relieved of any liability for the fee.

5. Any person seeking to be relieved of liability for the collection cost recovery fee is required to file with the BOE a statement under penalty of perjury setting forth the facts upon which the person bases the claim for relief.

6. The statute shall be operative with respect to a demand notice for payment which is mailed on or after January 1, 2011.

J. Evidence Code Section 524

1. Until recently, the California Evidence Code did not set forth the standard of proof in cases involving assertions by the BOE of civil tax fraud. Regulation 1703 has provided that fraud or intent to evade shall be established by clear and convincing evidence. Effective January 1, 2011, California Evidence Code section 524 was added to codify this regulation.

III. Colorado

A. The Direct Marketing Association v. Huber, USDC No. 10-CV-01546-REB-CBS (January 28, 2011), CCH Colo. Tax Rptr. ¶ 201-018

1. A U.S. District Court issued a preliminary injunction that prohibits Colorado from enforcing provisions that require an out-of-state seller not obligated to collect Colorado sales tax to notify its Colorado customers of their obligation to self-report and pay use tax; provide its Colorado customers with an annual report detailing the customer's purchases from the seller in the previous year; and provide the Colorado Department of Revenue with an annual report that includes the name, address, and total amount of purchases of each of the seller's Colorado customers.

2. The Court found that the plaintiff demonstrated a substantial likelihood of prevailing on its claims that the statute violates the Commerce Clause by discriminating against interstate commerce and imposing an undue burden on interstate commerce.

   a. The statute imposes a notice-and-reporting burden on out-of-state retailers that is not imposed on in-state retailers. The Court concluded that it is unlikely that the state will be able to show a lack of nondiscriminatory alternatives to the notice-and-reporting scheme.

   b. The statute imposes use tax-related responsibilities on out-of-state retailers whose only contact with Colorado is by mail or common carrier.

3. The Court held that these retailers are likely protected from such burdens on interstate commerce by the safe harbor established by the U.S. Supreme Court in Quill Corp. v. North Dakota, 504 U.S. 298 (1992). Although the burden of the notice-and-reporting requirements may be somewhat different than the burden of collecting and remitting tax, the

sole purpose of the burden imposed by the statute is the collection of use tax when sales tax cannot be collected.

4. The Court also held that the plaintiff demonstrated that denial of a preliminary injunction would cause irreparable injury and that both the balance of harms and the public interest favored issuance of an injunction. Without an injunction, the plaintiff's members would suffer irreparable injury in the form of compliance costs that they would be unable to recover if the statute is later declared unconstitutional.

5. The Court further held that the issuance of an injunction might delay the state's collection of some use taxes, but would not prevent the collection of those taxes, if the statute is ultimately upheld. The public's interest in revenue-raising will not be substantially impaired by an injunction, and the enforcement of a law that likely is unconstitutional, even if the goal of the law is important and legitimate, does not serve the public interest.

6. The Colorado Department of Revenue has informed taxpayers that, pending further action by the court, they are not required to comply with the remote-seller reporting requirements. (http://www.colorado.gov/cs/Satellite/Revenue/REVX/1251581938320)

B. House Bill 1193 Enacted (Effective March 1, 2010)

1. So-called "Amazon Law" (nexus presumption) enacted.

2. A sales tax is imposed on out-of-state online retail sales in the same way online sales made by retailers with physical locations in Colorado are subject to sales tax.

3. A presumption of nexus would be present for a retailer who is part of a corporate group that includes another retailer with physical presence in Colorado.

   a. A retailer who does not collect Colorado sales tax and is part of a "controlled group of corporations" that has a "component member" who has a retail presence in the state, is presumed to be doing business in the state.

   b. The terms "controlled group of corporations" and "component member" are both defined as having the same meaning as set forth in the Internal Revenue Code of 1986, as amended.

4. The presumption can be rebutted by proving that the component member with an in-state presence did not engage in constitutionally sufficient

solicitation on behalf of the retailer who does not collect Colorado sales tax.

5. A retailer who does not collect Colorado sales tax is required to notify Colorado purchasers that sales or use tax is due on all purchases made from the retailer and the purchaser is required to file a sales or use tax return. Retailers who fail to provide the required notification can be penalized $5 for each failure.

6. A retailer who does not collect Colorado sales tax is required to notify Colorado purchasers by January 31 of the year following any purchases made from the retailer that sales or use tax is due. The notification should include, if available, the dates of purchases, the amounts of each purchase, and the category of the purchase, including, if known by the retailer, whether the purchase is taxable or exempt. The notification requirements specify that the notice must be a separate first class mailing and can not be included with other shipments.

7. The legislation also provides authorization for the Department of Revenue to require a retailer who does not collect Colorado sales tax to notify the department through an annual statement of purchases made by each Colorado resident summarizing the total Colorado purchases made by each purchaser. The annual statement must be made by March 1 of each year and if the retailer's total Colorado sales exceed $100,000 in a year, that report must be made by magnetic media or another machine readable form. A penalty of $10 for each purchaser that should have been included on the annual statement is provided.

8. The enforcement of the law has been enjoined as noted above.

C. Senate Bills 56 and 73 (Introduced January 19, 2011)

1. Would repeal the so-called “Amazon Law”.

2. S.B. 56 would provide a use tax exemption for purchases of tangible personal property made by Colorado purchasers from out-of-state retailers that do not collect Colorado sales tax, which would have a neutralizing effect on the Amazon law.

3. S.B. 73 would repeal multiple tax bills enacted last year, including the Amazon law.

IV. **Hawaii**

A. CompUSA Stores LP v. Hawaii Department of Taxation, ____ Hawaii _____, _____ P. 2d _____(February 14, 2011), CCH Hawaii Tax Rptr. ¶ 200-853

1. The Hawaii Supreme Court held that under prior law, Hawaii use tax applied to an out-of-state computer and electronics retailer's mainland purchases of inventory items that were ultimately shipped or delivered to the retailer's two stores in Hawaii. The retailer held a general excise tax license and did not manufacture the goods it sold to Hawaii customers. The inventory was transported from third-party vendors outside Hawaii by either cross-dock or drop shipment delivery. In cross-dock delivery, third-party vendors shipped the goods to the retailer's consolidated centers outside Hawaii, and the goods were subsequently shipped from the consolidated centers to the retailer's stores in Hawaii. In drop shipment delivery, the vendors shipped the goods directly to the retailer's stores in Hawaii. In both types of deliveries, title and risk of loss passed to the retailer on the mainland.

2. The Court found that the use tax applied because the retailer was licensed and was a "retailer" for purposes of the tax as it engaged in sales of tangible personal property for consumption or use by purchasers and not for resale. The retailer also satisfied the requirements for use of the property in the state because it kept the goods for sale in the state. The requirement of importing or purchasing the goods for resale was satisfied because the retailer directed the transport of goods from its mainland consolidation centers or suppliers to its Hawaii retail stores in order to restock its retail stores and resell the goods. The purchase-for-resale requirement was satisfied in both the drop shipments and the cross-dock shipments. The requirement of purchase from an unlicensed seller was satisfied because the retailer's purchases from the third-party vendors did not subject the third-party vendors to the general excise tax.

3. The Court also distinguished the instant case from its decision in Baker & Taylor, Inc. v. Kawafuchi, 103 Haw. 359, 82 P.3d 804 (2004), which held that a mainland book seller was not subject to use tax on books that it sold and shipped F.O.B. mainland to the Hawaii State Library because the sales of books were made directly from the book seller to the library. The book seller had no offices or employees in Hawaii and did not have a general excise tax license. The book seller did not use the books in Hawaii because title passed on the mainland and it had no presence in Hawaii to make any use of them. The electronics retailer in the instant case was the purchaser of the goods, it had title to the goods when they arrived in Hawaii, and it used the goods by keeping them for sale in Hawaii.

a. The Court concluded that the retailer's suppliers were comparable to the book seller in Baker & Taylor because, once title passed from the suppliers on the mainland, they could no longer import or purchase from themselves.

b. CompUSA was in the opposite position because it had title to the goods when they arrived in Hawaii and the retailer was able to use the goods in Hawaii after title passed on the mainland.

B. Letter Ruling No. 2010-32 (December 2, 2010)

1. Commercial aircraft purchased or leased by an airline and used in interstate commerce to transport passengers and goods throughout the United States, including Hawaii, were not subject to Hawaii use tax.

2. The aircraft were either

a. leased by the airline under operating leases or financing leases, or

b. purchased by the airline and financed by seller financing under conditional sales contracts or installment mortgage financing.

3. The leased aircraft were exempt because, under statute, the term "use" does not include the leasing or renting of any aircraft and the term "leasing" includes all forms of lease, regardless of whether the lease is an operating lease or financing lease.

4. The purchased aircraft were exempt because the conditional sales contracts and installment mortgage financing were functionally equivalent to financing leases.

C. Senate Bill 1355 and House Bill 1265 (Introduced January 25, 2011)

1. Legislation has been introduced which would conform Hawaii general excise tax laws to the provisions of the Streamlined Sales and Use Tax (SST) Agreement, generally effective if and when the state becomes a party to the SST Agreement. As introduced, the legislation reflects amendments made to the SST Agreement through 2009.

2. To achieve the required single state tax rate for the general excise tax, the legislation would:

a. Move the 0.5% tax rate for wholesale transactions to a new chapter;

b. Add a new chapter on the taxation of imports of property, services, and contracting;

c. Move the 0.15% tax on insurance producers to a new chapter; and

d. Eliminate the tax on businesses owned by disabled persons.

3. The legislation would also provide for destination-based sourcing and amnesty.

D. House Bill 1183 (Introduced January 25, 2011)

1. Legislation has been introduced which includes a so-called “click-through nexus” provision, an expanded nexus provision applicable to all taxes administered by the Department of Taxation, and a general excise tax reporting requirement for remote sellers.

2. The proposed “click-through nexus” provision would provide that the term “engaging” in business would include the sale of tangible personal property by a person soliciting business through an independent contractor or other representative if the person enters into an agreement with a Hawaii resident under which, the resident, for a commission or other consideration, directly or indirectly refers potential customers to the person by a link on an Internet website or by other means. The presumption would be able to be rebutted by proof that the resident with whom the person has an agreement did not engage in any solicitation in Hawaii on behalf of the person that would satisfy constitutional nexus requirements during the taxable year in question.

3. The legislation also proposes an expanded nexus provision that would presume that an out-of-state person or entity conducting business in Hawaii is systematically and regularly engaging in business in Hawaii and is subject to Hawaii tax if, during any year, the person or entity:

a. Engages in or solicits business with persons within Hawaii; and

b. Earns income, gross proceeds, gross rental, or gross rental proceeds attributable to sources in Hawaii.

4. This provision would also allow the assessment and remittance of tax on a basis other than monthly, for good cause, which includes compliance with the U.S. or Hawaii Constitutions.

5. The legislation also proposes a remote seller reporting requirement that would apply to any person or entity conducting business in Hawaii that:

a. Has its commercial domicile in another state;

b. Is presumed to be systematically and regularly engaging in business in Hawaii under the expanded nexus provision discussed above; and

c. Does not collect the general excise tax on sales of tangible personal property to Hawaii residents.

6. The legislation would require such persons and entities to file an annual statement with the Department of Taxation that includes:

a. The names of Hawaii residents to whom the out-of-state business sold tangible personal property during the taxable year;

b. The dates of each sale;

c. The ZIP code of the shipping address of each sale; and

d. The dollar amount of each sale.

7. Any out-of-state business presumed to be engaging in business in the state that files such an annual statement would be relieved of any duty to collect general excise tax on sales of tangible personal property to Hawaii residents for the taxable year for which the statement is filed.

V. **Idaho**

A. Gracie, LLC v. Idaho State Tax Commission, 237 P. 3d 1196 (ID, 2010)

1. The Idaho Supreme Court concluded that two tanning salon businesses were denied a resale exemption from Idaho use tax on tanning and spa equipment purchased outside the state for use in Idaho. The Court held that a resale exemption was available only if the tanning and spa equipment was purchased for the purpose of renting the equipment to customers, and not if the equipment was purchased to provide tanning and spa services to customers.

2. The Court further held that the taxpayers' customers purchased not merely the use of tanning and spa equipment but also a package of services offered by the taxpayers. Those services included the expertise and assistance of the taxpayers' employees; an individual room that provided privacy and security; the availability for purchase of tanning lotions, skin care products, protective eyewear, and other accessory items; and cleaning and maintenance of the equipment. Moreover, many customers received

spa packages that included wellness, relaxation, UV therapy, and skin rejuvenation services. Because the service component was an integral and significant part of their business, the transactions did not qualify for a resale exemption.

B. House Bill 29 (Introduced January 2011)

1. This legislation is designed to eliminate certain exemptions from the sales tax, and reduce the sales tax rate from 6% to 5%.

2. The main features of the legislation are:

a. Retain the production/agricultural exemptions;

b. Eliminate ten exemptions—broadcast equipment, commercial aircraft, railroad rolling stock and remanufacturing, drivers education automobiles, trade in value, ski lifts and snow grooming equipment, heating materials, utility sales, precious metal bullion, and telecommunications equipment;

c. Extend sales tax to nine categories of services. (professional, personal, business, construction, transportation, repairs, lottery and pari-mutual betting, media measurement, and miscellaneous).

d. Maintains the exemption for medical services;

e. Extends sales tax to motor vehicle purchases by related parties, sales through vending machines, and sales by outfitters and guides.

VI. **Nevada**

A. Senate Bill 34 (Introduced December 14, 2010)

1. This legislation would ensure continued compliance with the Streamlined Sales and Use Tax Agreement.

2. The bill would apply sales and use taxes to retailers whose activities have a sufficient nexus with the State.

3. The legislation also includes "Amazon" type nexus provisions.

VII. **New Mexico**

A. Senate Bill 95 (Introduced January 13, 2011)

1. A so-called "click-through" nexus bill has been introduced that would provide that a person with no physical presence in New Mexico is presumed for retail sales and use tax purposes to be engaged in business and to have nexus with the state if the person enters into an agreement with an affiliate physically present in New Mexico under which, the affiliate, for a commission or other consideration, would directly or indirectly refer potential customers, whether by a link on an Internet site or otherwise, to that person.

2. The presumption would be applicable only if the cumulative gross receipts from sales by that person to customers in New Mexico who are referred to that person by all affiliates with this type of agreement with the person are in excess of $10,000 during the preceding 12-month period ending on June 30 of any year.

3. The presumption would be able to be rebutted by proof that the affiliate with whom the person has an agreement did not engage in any solicitation in New Mexico on behalf of the person that would satisfy constitutional nexus requirements.

VIII. **Washington**

A. Sprint Spectrum L.P. v. State of Washington Department of Revenue, Washington Board of Tax Appeals, No. 08-152 (2010), CCH WA Tax Rptr. ¶ 203-204

1. The Washington Board of Tax Appeals held that the Washington Department of Revenue could not assess use tax on fully discounted cell phones the taxpayer sold to customers along with one- or two-year wireless service contracts that were priced to recover the cost of the phone because the taxpayer collected and remitted sales tax on the service charges, including the portion that was allocated to the recovery of the cost of the phone. Use tax was not applicable because the taxpayer was not a "consumer". Rather, it sold cell phones in the normal course of business.

2. The Board further held that the cell phones were not used as promotional items or given away for free because the fully discounted phones were transferred for the valuable consideration of extended wireless service contract purchases.

3. The Board also concluded that the taxpayer's sales of cell phone services to nonbusiness customers did not qualify for the exemption for a "residential class of service" because this exemption is intended to include only a phone with a land line connected to a home address. The taxpayer's

internal classification of customers as residential did not bring the sales within the exemption as it only reflected marketing and billing practices.

B. Special Notice No. 11/02/2010

1. The Washington Department of Revenue recently concluded that online searchable databases (OSD) are digital automated services (DAS) and therefore do not qualify for the sales tax exemption for digital goods used only for a business purpose. OSDs, such as legal research services, are DAS as they are transferred electronically and use at least one software application.

2. The Department will accept prior reporting of sales as taxable or exempt, but will enforce the current policy beginning January 1, 2011.

IX. Wyoming

A. Sinclair Oil Corporation v. Wyoming Department of Revenue, 238 P. 3d 568 (WY, 2010)

1. The Wyoming Supreme Court held that materials purchased and used by a refinery owner to construct embedded concrete foundations for a reformer and hydrocracker did not qualify for a manufacturing machinery exemption from Wyoming sales and use tax because the foundations were real property, not tangible personal property. The exemption applied only to manufacturing machinery, and the term "machinery" included only tangible personal property.

2. The Court concluded that the foundations were real property because the concrete and related foundation materials were articles that had been buried or embedded. The taxpayer had excavated the sites, drilled holes into the bedrock, and placed concrete piers into the holes. It then poured a concrete cap and pedestal on top. According to the Court, these facts established that the foundation materials were placed in the ground (buried) and fixed firmly in a surrounding mass (embedded). By the time the hydrocracker and reformer were bolted to the foundations, the foundations had become real property.

3. The Court further held that the foundations were not eligible for exemption even though the hydrocracker and reformer qualified as exempt manufacturing machinery and even though the foundations were necessary for the exempt machinery to be operated safely and properly.

4. The Court also rejected the taxpayer's argument that if the foundations were real property, then no sales tax was due on its purchase of the

foundation materials. The concrete and related materials were personal property when the taxpayer purchased them and thus were subject to sales tax. When the foundation materials were later buried and embedded, they were converted into real property.

B. Maverick Motorsports Group LLC v. Department of Revenue, Docket No. 173-473, Laramie District Court (August 20, 2010)

1. A Wyoming District Court held that a Wyoming vendor was liable for uncollected Wyoming sales taxes on sales of motorcycles, snowmobiles, and all-terrain vehicles (ATVs) to nonresident customers at its stores in Wyoming. At issue were sales in which the customers took possession of their vehicles at the taxpayer's dealerships in Wyoming. Vendors must collect Wyoming sales taxes from nonresident customers unless the vehicle is delivered outside the state by the vendor.

2. The Court held that the taxpayer presented no evidence to support any agreement with its purchasers regarding the passage of title or possession. Thus, the Court concluded the delivery of the vehicles at issue occurred in Wyoming.

3. The Court rejected the taxpayer's assertion that the sales were destination sales or interstate sales.

4. The taxpayer was not taxed on vehicle sales for which it submitted sufficient proof of out-of-state delivery by persons other than the customers.

5. The Wyoming Supreme Court heard oral arguments on August 15, 2010.