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Significant State Tax Litigation Around the Country

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US Supreme Court: Recently Decided Cases

- *Hemi Group, LLC v City of New York,* 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010).
  - Does the federal Racketeer Influenced and Corrupt Organizations law (RICO) apply to taxes?
  - New York City sued an Internet cigarette distributor, Hemi, claiming it intentionally failed to comply with a federal law, the Jenkins Act. The Act requires out-of-state cigarette distributors to report their shipments of cigarettes to the destination state (New York in this case).
  - The Court held there was a lack of proximate cause because only the State of New York, and not New York City, was entitled to the reports. It's not known why the state refused to join the suit.
  - Federal PACT Act recently passed (Prevent All Cigarette Trafficking Act – P.L. 111-154) that expands the states' powers to enforce the Jenkins Act.
  - Since the Court's ruling, the State of Illinois has sued Hemi.

US Supreme Court: Recently Decided Cases

- *Bilski v. Kappos,* 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010).
  - Claimed "invention" explained how commodities buyers and sellers in the energy market could hedge or protect against risk of price changes. "Invention" was both steps in process and related mathematical formula.
  - Under the Patent Act, 35 U.S.C. § 101, four categories of discoveries or inventions that are patent eligible are "processes, machines, manufactur[ing] or composition of matter." Three specific exceptions to these categories are "laws of nature, physical phenomena, and abstract ideas."
  - Held: Petitioners' attempt to patent the concept of hedging risk and application of the concept to energy markets are not patentable processes but are attempts to patent an abstract idea.

US Supreme Court: Recently Decided Case

- *Levin v. Commerce Energy,* 130 S.Ct. 2323, 176 L.Ed.2d 1131 (2010).
  - Independent gas marketers ("IMs") challenged taxes applied to them and not to local gas distribution companies against whom they were in direct competition.
  - Held: The comity doctrine required the IMs' equal protection and commerce clause claims be brought in state court. The comity doctrine prohibits federal courts from interfering with state tax administration.
  - *Hibbs v. Winn*, 542 U.S. 88 (2004), does not restrict the scope of the comity doctrine.
  - This case differs from *Hibbs* because no fundamental right or classification was involved; IMs were seeking the court's assistance to better their competitive position; the Ohio courts were better suited to provide a remedy for any unconstitutional taxation.
  - Related to the *Hibbs v. Winn* case*, Arizona Christian School Tuition Org. v. Winn*, 130 S.Ct. 3350, 176 L.Ed.2d 1218, Case No. 09-987 (May 24, 2010), is pending before the Court. Primary questions: 1) standing (state expenditure issue) and 2) establishment clause.

Polling Question 1

- In *Commerce Energy* the Court used the comity doctrine to restrict the ability of taxpayers to sue in federal district court. Do you feel you would get a better result if you could appeal your state and local tax assessments to federal court?

1. Yes, the state and local tribunals are biased.
2. Depends on the legal issue.
3. No, I do not trust the federal courts either.
4. It does not matter, I will get the same result.

US Supreme Court: Cert. Granted

- *CSX Transportation, Inc. v. Alabama Department of Revenue,* 130 S.Ct. 1568, 177 L.Ed.2d 323, Case No. 09-520 (June 14, 2010).
  - Question Presented: Whether a state's exemption of railroad competitors, but not railroads, from a generally applicable sales and use tax is subject to challenge as "another tax that discriminates against a rail carrier" under Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 11501(b)(4)?
  - Oral arguments made November 10, 2010

US Supreme Court: Cert. Denied

- *Exelon Corp. v. Department of Revenue,* 917 N.E.2d 899 (Ill. 2009).
  - Electric utility claimed credits in excess of $10M for 1995 and $4.3M for 1996 based on theory that electricity was tangible personal property.
  - 1957 opinion of Illinois Supreme Court said electricity was intangible property.
  - Based on expert testimony, Court reversed its prior finding and held electricity was tangible personal property. Court referred to the operative language in 1957 opinion as obiter dictum. Taxpayer wins!
  - On motion for rehearing or modification, Court modifies opinion to apply on a prospective basis only. Taxpayer loses!
  - Criteria for prospective application:
    - Deciding an issue of first impression;
    - Retroactive application not necessary to advance purpose of decision;
    - A balance of the equities favors rendering the decision "entirely prospective."

US Supreme Court: Cert. Denied

- *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392 (Ky. 2009).
  - Kentucky Supreme Court held that legislation that retroactively barred taxpayers from filing combined returns and prohibited the issuance of tax refunds related to such filings did not violate constitutional due process requirements or deny the taxpayers equal protection under the Kentucky Constitution.
  - The court reasoned that the legislation was constitutionally valid because the amendments were enacted for the legitimate governmental purpose of regulating revenue, and were rationally related to that purpose.

US Supreme Court: Cert. Denied

- *Triple-S Management, Corp. v. Municipal Revenue Collection Center (CRIM), 130 S.Ct. 3498,* Appeal from Supreme Court of Puerto Rico, Case No. 09-233 (June 28, 2010).
  - Petitioner incorporated as a for-profit entity in 1959 to provide low cost medical insurance was still allowed by Puerto Rico Treasury to obtain tax-exempt status as a non-profit entity. After several reviews affirming petitioner's non-profit status, in 2003 Treasury prospectively denied non-profit entity status.
  - CRIM took over administration of property tax from Treasury and refused to apply status change prospectively only. CRIM assessed property taxes retroactively back 15 years.
  - Retroactive imposition of property tax did not violate the Due Process Clause.

US Supreme Court: Cert. Filed

- *Ford Motor Credit Co. v. Mich. Dep't of Treasury*, Appeal from Michigan Court of Appeals, Case No. 10-481 (Oct. 12, 2010).
  - Petitioner provided financing for consumers that purchased motor vehicles from affiliated dealers. Legislation passed that prevented Petitioner from taking a sales tax deduction for bad debts.
    - The amendment also retroactively barred taxpayers from deducting bad debts from sales tax where taxpayers did not have a sales tax liability for the retail sale underlying the loan.
  - Michigan Court of Appeals held that retroactively eliminating the bad debt deduction did not violate the Due Process Clause because Petitioner did not have a vested right in the continuance of a tax law.
  - A response is due from the Department of Treasury by Nov. 12, 2010.

Polling Question 2

- *Ford* is pending cert. before the United States Supreme Court and the Court has denied cert. in *Exelon*, *Triple-S* and *Johnson Controls* . Has your company been negatively impacted by retroactive tax changes or the application of a judicial decision on a "prospective only" basis?
  1. Yes.
  2. No.

US Supreme Court: Cert. Denied

- *Missouri Gas Energy v. Schmidt*, 130 S.Ct. 1685, Appeal from Supreme Court of Oklahoma, Case No. 08-1458 (May 27, 2009).
  - Oklahoma Supreme Court held that the Commerce Clause did not prohibit the county from assessing an ad valorem tax on FERC allocation of stored gas. Rejecting the taxpayer's argument that storage is a necessary and recognized component of the interstate transport of natural gas, the court reasoned that large volumes of gas were stored for a substantial part of the year, which provided substantial nexus with Oklahoma. *Cf. Peoples Gas*.
  - U.S. Solicitor General opposed *certiorari*, arguing that states may tax inventory that is in transit when it is stored for a substantial part of the year in the state.
- *Peoples Gas v. Harrison Cent. Appraisal Dist.*, 270 S.W.3d 208 (Tex. App. 2008).
  - Gas distribution company bought natural gas already in the interstate pipeline system, transporting it from Texas to Chicago, Illinois. While in interstate commerce, the gas was stored in Texas.
  - Court of Appeals held that the Commerce Clause prohibited the district from assessing an ad valorem tax. Although property is subject to tax where it comes to rest, the court reasoned that the natural gas was temporarily interrupted out of necessity and so was still in interstate commerce, shielding the gas from the district's ad valorem tax.

US Supreme Court: Cert. Denied

U.S. v. Textron Inc. and Subsidiaries, 577 F.3d. 21 (1st Cir. 2009)(*en banc*).

- Textron Inc., maker of Cessna airplanes and Bell helicopters, was ordered by a federal appeals court to give the government documents related to tax shelter investments.
- Held: Work product protection did not apply to Textron's tax accrual work papers because they were prepared in the ordinary course of business and not in anticipation of litigation.
- Eleven amicus briefs were filed in support of Textron, cert. denied May 24, 2010.

U.S. v. Deloitte LLP, No. 09-5171, 610 F.3d 129 (D.C. Cir. June 29, 2010).

- Counter to *Textron*, the US Court of Appeals for the D.C. Circuit ruled that the government could not obtain a company's protected work product materials. The *Deloitte* decision held that the disclosure of work product information, *e.g.,* an opinion by a company's outside tax counsel, to a company's financial auditor does not waive the protected confidentiality. *Deloitte* is the first significant setback to the ongoing efforts by the IRS to obtain work product that may be included in tax accrual work papers.

  Schedule UTP (Uncertain Tax Position Statement).
- Query, assuming the I.R.S. appeals, will the Court accept cert. on this case?

Apportionment

Bellsouth Advertising & Publishing Corp. v. Chumley, 308 S.W.3d. 350 (Tn. Ct. App. 2009).

- Court held that the Commissioner could apply alternative apportionment formula. Taxpayer sourced receipts in accordance with law using cost of performance (COP).
- Commissioner invoked an alternative apportionment formula and required the taxpayer to use market sourcing rules. Court held that the Commissioner established that the statutory formula did not adequately represent the taxpayer's business activity in the state, based solely on the fact that Bellsouth generated substantial revenue from the distribution of advertising within the state.
- Taxpayer's petition of review to the Tennessee Supreme Court was denied

Ameritech Publishing, Inc. v. Wisc. Dept. of Rev., No. 2009AP445 (Wisc. App. Ct., Dist. IV, June 24, 2010)

- Taxpayer's performance of directory advertising services for advertisements placed in telephone directories distributed in Wisconsin constitutes the performance of an income-producing activity in Wisconsin. Advertising income included in numerator of taxpayer's Wisconsin sales factor.
- Court held that income-producing activity associated with the advertising services was, in essence, the providing of access to the Wisconsin audience.

Apportionment

Media General Communications, Inc. et al. v. South Carolina Department of Revenue, 694 S.E.2d 525 (S. Car. 2010).

- Media General and its affiliates were a group of communications companies. SC DOR issued assessments against three group members on a separate entity basis arguing that combined reporting was not authorized by law or past DOR practice. Media General unitary group's tax was $3.76 million when calculated on a separate entity basis and $863 thousand using combined filing. **DOR agreed that separate entity filing did not fairly represent the corporations' business activities**, but argued it had no authority to use UDITPA Sec. 18 alternative apportionment to allow combination. SC Supreme Court allowed tax to be determined on a combined basis.

Carmax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue (Docket No. 09-ALJ-17-0160-CC, 4/22/2010).

- Carmax's used car sales operations are operated through two entities, Carmax East (with locations in SC) and Carmax West (no SC locations). SC DOR used alternative apportionment to effectively imposed separate accounting on Carmax's West income - using Carmax's West royalty and financing receipts in SC to those same receipts derived everywhere. Admin. law court dismissed the negligence penalty noting that the Taxpayer filed in accordance with the law. Carmax argued that if a business is unitary, the alternative apportionment provisions should not apply. However, the court affirmed the alternative apportionment determination. The taxpayer has appealed this decision.

Polling Question 3

- Have you seen more states attempt to use alternative apportionment to apportion your company's income?

1. No, the states have not tried to modify my company's apportioned income using alternative apportionment.
2. On rare occasions, one or more states has tried to use alternative apportionment.
3. The states use alternative apportionment on a regular basis.
4. My company regularly requests the states to use alternative apportionment.

Apportionment—California Sales Factor

General Mills, Inc. v. FTB, 172 Cal. App. 4th 1535 (2009)

- Trial court concluded that commodity hedging transactions did not generate "gross receipts" for sales factor purposes
- Trial court did not reach the issue whether inclusion of such receipts would be distortive under RTC §25137 (i.e., UDITPA §18)
- Court of Appeal reversed the trial court's decision
  - Full sales price of commodity futures contracts are "gross receipts" includible in the sales factor
  - Court noted that hedging activity was an integral part of the taxpayer's business activity
  - Case remanded to trial court to address the distortion issue
- On November 1, 2010, trial court determined on remand that inclusion of hedging receipts was distortive
  - Futures trading activity qualitatively different from main line of business
  - Sufficient quantitative distortion for FTB to exclude hedging receipts under RTC §25137

Business/Non-Business Income

- *Oracle v. Dep't of Revenue*, 2010 Ore. Tax LEXIS 32 (Ore. Tax Ct. Feb. 11, 2010).
  - Oregon Tax Court held that taxpayers are not required to report business income to states that have adopted UDITPA uniformly or consistently.
  - Taxpayer was permitted to report gains from the sale of stock as non-business income on their Oregon tax return while reporting it as business income on their California return.
  - The two states' definitions of business income were different, resulting in different reporting of the gain.
  - Court noted that uniformity would compromise notions of federalism and states' rights.

Business/Non-Business Income

- *CenturyTel, Inc. v. Dep't of Revenue*, 2010 Ore. Tax LEXIS 222 (Ore. Tax Ct. Aug. 9, 2010).
  - Oregon Tax Court held that gain on deemed asset sale in an I.R.C. §338(h)(10) transaction was apportionable business income
  - Tax Court held that gain on deemed sale of assets was apportionable business income because the selling taxpayer's parent used some of the sale proceeds in a unitary business
  - Tax Court cited no authority for its position that use of the proceeds by the parent of the selling taxpayer is relevant for purposes of applying the UDITPA business/non-business income provisions
  - Tax Court relied on its recent decision in *Crystal Communications, Inc. v. Dep't of Revenue*, 2010 Ore. Tax LEXIS 207 (Ore. Tax Ct. July 19, 2010)

California—Treatment of Dividends and Interest Expense Disallowance

Apple Inc. v. Franchise Tax Board,
Cal. Ct. App. Case No. A128091 (pending)

- Issue 1: Whether dividends paid by foreign corporations in a W/E setting should be eliminated under RTC § 25106 or deducted under RTC §24402
  - FTB applied LIFO approach to prorate dividends between §25106 and §24402
  - Apple asserts that §25106 and *Fujitsu v. FTB* (2004) mandate preferential ordering and that all dividends should be eliminated
- Issue 2: Whether interest expense deductions should be disallowed under §24425, where Apple's dominant purpose for its borrowing was not to provide funds to the foreign dividend payors
- On January 26, 2010, trial court found in favor of FTB on Issue 1 and in favor of Apple on Issue 2. Case is on appeal.
- Impact on DRD under §24411 and proper application of foreign investment interest offset under §24344

Economic Substance

- *Hormel Foods Corp. v. Wisconsin Dep't of Revenue*, (Tax Appeals Commission March 29, 2010)
  - Hormel set up a subsidiary, Foods LLC, and transferred its trademarks and intellectual property to Foods LLC. Hormel paid royalties to Foods LLC in exchange for use of the licenses.
  - Tax Appeals Commission found that Foods LLC lacked economic substance and therefore denied Hormel the ordinary and necessary business expense deduction for royalties paid.
  - Many findings of facts dealt with documents from E&Y discussing the state tax savings that would come from setting up the intangible holding company; also license agreements were exclusive and Foods LLC only income came from Hormel; eventually income flowed back up to Hormel through dividends.

Economic Substance

- *HMN Financial, Inc. v. Minnesota Commissioner of Revenue,* 782 N.W.2d 558 (Minn. 2010).
  - HMN Financial established a "captive REIT" for tax planning purposes. The Commissioner concluded that HMN's business structure lacked economic substance and business purpose, and disregarded the structure, attributing substantial additional income to HMN. The MN Tax Court upheld Commissioner's findings.
  - The MN Supreme Court reversed, noting that the Commissioner does not have the authority to attribute income and assess taxes to a business on the ground that the business structured itself to comply with the relevant tax statutes and was motivated to do so solely by tax avoidance.
  - Law has been modified in MN to give Commissioner greater authority to attribute income and assess taxes to a business.

Related Party Add-Back Statutes

Beneficial New Jersey, Inc. v. Dir., Div. of Taxation, Dkt. No. 009886-2007 (N.J. Tax Ct., Aug. 31, 2010)

- Tax Court held that the Division of Taxation's disallowance, or "add back," of interest paid by a subsidiary to its parent is "unreasonable;" therefore, the subsidiary's interest expense deduction was allowed
- Tax Court rejected the taxpayer's argument that it satisfied the so-called "three percent exception," agreeing with Div. of Taxation that the 3% range applies to effective rates, not statutory tax rates
- Tax Court also rejected the taxpayer's argument that the so-called "guarantee exception" applied, narrowly construing the word "guarantee" and holding that the exception did not apply because the subsidiary/taxpayer did not guarantee the parent's debt
- Tax Court stated that its decision to apply the "unreasonable exception" is not intended to create a rule of general applicability
- The Division of Taxation is not going to appeal the Tax Court's decision

Click-Through Nexus: New York "Starts Spreading The News"

- New York: 2008 Budget
- Presumption of substantial nexus to collect and remit use tax if:
  - Annual sales from affiliates are over $10K;
  - Compensate affiliates on commission basis; and
  - Do not obtain annual certificate from affiliates to not actively solicit
- *Amazon.com/Overstock.com*, 2010 NY Slip Op. 07823 (11/4/2010)
  - Appellate court rejects facially unconstitutional challenge to the law and dismisses equal protection challenge
  - Court notes there was no or limited discovery, accordingly, the court remanded the case back to trial court to determine if the law is unconstitutional "as applied"
  - Court questions whether affiliates sales are "significantly associated" with remote seller doing business in state (Amazon.com <1.5%) and raises concern with Amazon.com's "SchoolRewards" program with nonprofits
  - Passive advertising is not enough – oddly the court does imply that targeted mailings and/or calls to generate sales may cross the line

Click-Through Nexus: New York "Starts Spreading The News"

- 2009 Adoption:
  - North Carolina
  - Rhode Island (legislation to repeal introduced)
- 2010: Colorado & Oklahoma*
  - Rejected: IA, IL, MD, NM, VT, VA
  - Colorado
    - Must provide notice that use tax is owed
    - File annual report to purchaser & state
  - Oklahoma – only provide notice that use tax is owed
  - Both states presume related entity creates nexus

*Colorado 's and Oklahoma's enacted laws go beyond "click-through nexus" and impose significant and, arguably, unconstitutional reporting requirements upon out-of-state sellers – Colorado requiring the mailing of annual statements.

Click-Through Nexus Litigation

- *Amazon v. North Carolina DOR*
  - Amazon.com LLC filed suit 4/19/10 in federal Western District Court of Washington alleging the North Carolina Dep't of Revenue's attempts to obtain names, address, and purchases of customers violates the First Amendment of the US Constitution, Washington State Constitution, and federal Video Privacy Protection Act, 18 USC § 2710 - American Civil Liberties Association (ACLU) also filing suit
  - District Court 10/25/2010 granted Amazon.com declaratory relief – but suggested a modified request by NC DOR for general information was not prohibited
- *Direct Marketing Association v. Colorado*
  - DMA filed suit 6/30/2010 alleging Colorado law violates Commerce Clause based on the notice and reporting requirements are tantamount to the use tax collection burden found unconstitutional in *Quill* and it violates the First Amendment because it compels retailers to engage in commercial speech

Telecommuting or Telework

- **States are employing policies that will forestall the move to telecommuting.**
- Two current problems – the "convenience of the employer" rule, and telecommuting as nexus-creating activity (See *Telebright*).
- "Convenience of the employer" – An individual working out-of-state may be required to pay tax on wages earned in the state in which the employer has its principal place of business. Result is double taxation as employee's home state will assert tax on same wages. States with such a rule – NY, DE, NE and PA.
  - Federal legislation a solution? The Telecommuter Tax Fairness Act (H.R. 2600). would abolish "convenience of the employer" rule and provide for apportionment of individual income among states.

Telecommuting or Telework

- *Telebright Corp. v. Dir., Div. of Taxation,* 25 N.J. Tax 333; 2010 N.J. Tax LEXIS 4 (Tax Ct. 2010)
  - NJ Tax Court held that Telebright had nexus with NJ through the in-state activities of an employee who telecommuted from her NJ home, subjecting Telebright to NJ's corporation business tax
  - Tax Court further noted that a laptop owned by Telebright and used by the telecommuter for a short period of time also constituted the use of property in NJ and found it irrelevant that the telecommuter did not solicit sales or establish and maintain a market for Telebright in NJ
  - The Due Process Clause and the Commerce Clause were not offended
- Florida Letter Ruling – Issued 9/1/2010
  - Taxpayer requested letter ruling on whether an employee in Florida performing on-line administrative duties at home: 1) created nexus and 2) if so, was it protected by P.L. 86-272
  - Held: 1) taxpayer has nexus and is required to file Florida corporate income tax return and 2) because the employee was not soliciting sales, taxpayer not afforded any protection under P.L. 86-272

The Retroactive Nightmare Continued

- *River Garden Retirement Home v. Franchise Tax Board,* 2010 Cal. App. LEXIS 1146 (2010).
  - Question Presented: Whether the FTB permissibly applied CA's post-amnesty penalty?
    - Held: Post-amnesty imposition of penalty permissible. Taxpayer could have availed itself of amnesty program and chose not to; post-amnesty penalty did not operate retroactively; and penalty was not subject to standard statute of limitations for deficiencies.
  - Question Presented: What is the appropriate remedy when a deduction is found to unconstitutionally discriminate against out-of-state entities in violation of the commerce clause?
    - Remedy issue arose from *Farmer Bros.*, 108 Cal. App. 4th 976 (2003), wherein the CA Court of Appeals held that statute permitting dividends received deduction ("DRD") violated the commerce clause because the deduction was permitted if the dividend was received from a corporation subject to CA tax, but not permitted if the dividend was from a corporation not subject to CA tax. FTB's remedy was to permit DRD for tax years ending prior to December 1, 1999, but disallow the deduction for all taxpayers for years ending on or after December 1, 1999.
    - Held: FTB remedy appropriate. Whether "modest period of retroactivity" is involved is a "facts and circumstances" test.

Unclaimed Property – Delaware

Staples, Inc. v. Thomas Cook, Case no. 5447- (4/30/2010)

• Staples, Inc. filed an action for injunction and other equitable relief at the Delaware Court of Chancery. Audit initiated in 2005 going back to 1995 using sampling techniques in the absence of holder records.

• When Delaware fails to conduct audits in a timely manner (as in the instant case), efforts to prove an item is not unclaimed property are often futile because the records have been destroyed under normal record retention schedules.

•Staples also points out that Delaware is demanding payment more than three years after it filed its unclaimed property reports – which should prevent an assessment of unclaimed property prior to 2007.

• COST and other interested parties pursued changes to Delaware's escheat laws. Recent law (SB 272) provides for : 1)an administrative review process, 2) excludes UCC transactions for goods received but not billed and 3) codifies Delaware's ability to use estimation techniques (sampling).

Unclaimed Property – Delaware v. New Jersey

Recently Enacted Legislation in New Jersey (A 3002 - 6/30/2010)

- New Jersey's legislation requires unused stored-value cards to escheat to the state where the cards were sold or issued.
- U.S. Supreme Court in *Texas v. New Jersey* , 379 U.S. 674 (1965), addressed competing claims by states for the same unclaimed property. Court held: 1) property reportable to state of last known address on holder's books and records, and 2) if no address is known (or the state of the last known address does not escheat the property), property escheats to the state where the holder is incorporated (often Delaware).
- State of Delaware recently announced that it will continue to require to escheat to Delaware based on the U.S. Supreme Court's priority rules
- Federal district court issued a partial injunction on New Jersey's law 11/13/2010
- Will Congress or the U.S. Supreme Court have to act to resolve this conflict?

Unclaimed Property – Federal Card Act of 2009

- Applies to gift certificates and prepaid cards
- Does not apply to promotional, loyalty, reward and cards that can be used solely for telephone services
- Law requires expiration date for certificates or cards issued after 8/22/2010 to not expire for at least five years and any inactivity fees can be imposed no more than monthly and must be conspicuously noted
- Expiration date based on when the card last reloaded (*i.e.,* card issued 9/2010 and reloaded 10/2011 is valid until 9/2016 (not 8/2015))

- Some states have shorter dormancy periods for escheatment
  - Iowa is three years
  - New Jersey just modified law creating a two-year dormancy period

- Creates compliance challenges - how will conflict be resolved?

California—Local Taxes

- **Chevron v. City of Richmond, Contra Costa Superior Court, Case No. C09-00491 (Dec. 16, 2009)**
  - City's business tax was held to be facially invalid under the Commerce Clause and the Internal Consistency Test. City's appeal dismissed.
- **Roman Catholic Archbishop of San Francisco, Corp. Sole v. City & County of San Francisco, Case No. 498795 (pending)**
  - Case involves issue whether transfer tax applies to transfer of Church parish and school real property pursuant to internal restructuring withing the SF Archdiocese.

Income Tax – Erroneous Refund

- *Indiana v. Aisin USA Manufacturing*, 926 N.E.2d 83 (Ind. Ct. App. 2010)
  - The DOR alleged that it made an error and overpaid a taxpayer $616,000 when making a refund, discovered after the statute of limitations expired
  - When the taxpayer protested the assessment and argued that the statute had lapsed, the DOR cancelled the assessment without issuing a letter of findings
  - DOR then sent the taxpayer a series of letters asking the taxpayer to return the overpayment and asserting that keeping the overpayment did not represent the "actions of a responsible corporate citizen."
  - Taxpayer refused to return overpayment and DOR filed suit claiming unjust enrichment and criminal theft; DOR sought treble damages of $3.4M
  - Court of Appeals dismissed the action stating Tax Court had exclusive jurisdiction, but noted that "statutes of limitation should apply regardless of whether the State is the plaintiff or a defendant."
  - Law has been modified in Indiana to give DOR greater authority to capture erroneous refunds

QUESTIONS?