

2025 WINTER TAX MEETING

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STATE & LOCAL TAX COMMITTEE 2023-2025 OFFICERS



Steve Young, Chair
Holland & Hart
Salt Lake City, UT. (801) 799-5886
spyoung@hollandhart.com



John Biek, Chair-Elect
Neal Gerber Eisenberg
Chicago, IL, (312) 980-0706
jbiek@nge.com



Leah Robinson, Vice Chair
Mayer Brown
New York, NY, (212) 506-5799
leahrobinson@mayerbrown.com



David Hughes, Vice Chair
Kilpatrick Townsend & Stockton LLP
Chicago, IL, (312) 606-3212
dhughes@ktslaw.com



Christi Mondrik, Vice Chair
Mondrik & Associates
Austin, TX, (512) 542-9300
CMondrik@mondriklaw.com



Jennifer Karpchuk, Vice Chair
Chamberlain Hrdlicka
Philadelphia, PA, (610) 772-2314
jkarpchuk@chamberlainlaw.com

FROM THE EDITORS

As we gather in Los Angeles this week, it is hard not to think of the recent, devastating fires in Eaton and the Palisades. “The city burning is Los Angeles’s deepest image of itself,” Joan Didion wrote in 1968. Having occurred so recently between January 7th and 22nd, burning may be our deepest image of the city right now. Those interested in donating or volunteering while in town can find information on the [Official Website of the City of Los Angeles](#). There is also a comprehensive list of local, state, and federal organizations working in various ways to help victims on the [Los Angeles Homeless Services Authority Website](#).

We meet at the [JW Marriot Los Angeles L.A. Live](#) during an unsettling time in state and local tax as taxing authorities more brazenly than ever grab for transactions, income, and residents across state lines. The Florida Department of Revenue has decided to ignore its cost of performance rule, opening the floodgates on corporate income tax cases. In October, the Ohio Board of Tax Appeals ruled in favor of the taxpayer in finding that when purchase, receipt, and delivery of a motor vehicle occurs entirely outside the state, it is not subject to the Ohio commercial activity tax. It seems like all states are fighting to keep (and tax) residents who have left them behind. Of course, we cannot forget about [Diane Zilka](#). If there ever was a clear line, it is becoming harder by the day to see it.

States are not necessarily eager to clear up the confusion. There have been mixed reactions by states and taxpayers since SCOTUS overturned the Chevron Doctrine in *Loper Bright*. Some states have reduced their use and publication of guidance while [Minnesota S.F. 783](#), for example, would establish a new private letter ruling program at the Department of Revenue. What is the future of these when taxpayers want guidance, but only when it is right and in their favor? Will taxing authorities continue to issue guidance with the knowledge that any ruling unfavorable to a taxpayer can trigger litigation?

Reconciling overturned case law, changes in agency guidance, and increasingly aggressive positions by states on sourcing and apportionment, state and local tax practitioners are ready for the dry spell from SCOTUS to end. While it can be tricky operating day-to-day in the weeds of this current SALT landscape, practitioners may find relief this week by looking towards the stars. This meeting’s SALT stars are here to guide you on topics ranging from partnership audit rules, apportionment, and taxation of nonresident individuals. Thank you to our wonderful moderators and speakers!

If you have extra time in the city, you can see other types of stars at the [Griffith Observatory](#) or on the [Hollywood Walk of Fame](#). Looking outside the box for creative solutions on your most difficult case? Get inspired at the [Eastern Projects Gallery](#), currently featuring “SALT of the Earth” by Simon Silva. If you need more SALT at the end of the day, grab a scoop of Coca Nibs & Frangipane or Cake Batter Chocolate Fudge a short walk from the hotel at [Salt & Straw](#). For all its difficulties, SALT can be a little sweet, too.

The Editorial Staff

EDITORIAL STAFF



Kyle Wingfield

Editor
Williams Mullen (Richmond, Virginia)
kwingfield@williamsmullen.com



Ilya Lipin

Editor
BDO USA (Philadelphia, PA)
ilipin@bdo.com



Jeanette Moffa

Editor
Moffa Sutton Donnini (Fort Lauderdale, FL)
jeanettemoffa@moffataxlaw.com



Divya Jeswant

Editor
Kean Miller (New Orleans, LA)
divya.jeswant@keanmiller.com



Scott Woody

Editor
SpencerFane (Phoenix, AZ)
swoody@spencerfane.com

FROM THE CHAIR

Steve Young

Holland & Hart

Thanks for all your efforts in putting on a terrific meeting in St. Louis. Thank you to **Jeanette Lohman** and **Matthew Landwehr** for hosting the Thursday night Executive Committee dinner at **Thompson Coburn**. Thanks to **Stephanie Lipinski Galland** and **DiAndrea Green** for planning that, and a great Friday night social dinner.

We look forward to seeing you in Los Angeles. Thanks to **Dirk Giseburt** for hosting the Thursday EC meeting at **Davis Wright**. Thanks to **Stephanie Lipinski Galland** and **DiAndrea Green** for planning the Thursday EC dinner. Thanks to **Masha Yevzelman** for organizing the Thursday luncheon, to **Jennifer Karpchuk**, **Christi Mondrick**, and **John Biek** for organizing the Thursday SALT panels, to **Masha**



Yevzelman, Jennifer Karpchuk and **Aliza Sherman** for organizing the Friday morning Women in SALT Coffee Connection, and to **Rich Jones** for leading the Friday morning Roundtable.

Lastly, thanks to **Kyle Wingfield, Ilya Lipin, Jeanette Moffa, Scott Woody,** and **Divya Jeswant** for preparing Connexus.

On May 8-10, the SALT Committee will be meeting in person in Washington, DC with the rest of the Tax Section on the normal Thursday to Saturday schedule.

All the best,

Steve Young

2025 MIDYEAR TAX MEETING



THURSDAY, FEBRUARY 20

12:00 – 1:00 p.m. (PST)

Who Wants to Be a Millionaire—State Taxation of Foreign Income Edition. (Non-CLE)

In *Who Wants to Be a Millionaire – State Taxation of Foreign Income Edition*, contestants will take you through a fast-paced, game-show style exploration of states’ taxation of foreign income—from taxing repatriation income, GILTI, and foreign dividends (with or without factor representation) to whether mandatory worldwide combined reporting is going to make a comeback.

Moderator/Game Show Host: **Masha Yevzelman**, Fredrikson & Byron, P.A. (Minneapolis, MN)

Panelists/Contestants: **Bryan Dixon**, Anheuser-Busch (St. Louis, MO); **Jaye Calhoun**, Kean Miller LLP (New Orleans, LA); **Fred Nicely**, Council On State Taxation (Washington, DC)

Location: JW Marriott (900 W Olympic Blvd, Los Angeles, CA 90015)

THURSDAY, FEBRUARY 20 (Continued)**2:00 – 2:50 p.m. (PST)****Partnership Audit Rules (BBA) – Federal and State Tax Considerations, Including Partnership Terminations. (CLE)**

As the IRS conducts partnership audits applying the procedures set forth in the BBA, affected businesses and individuals will have SALT considerations in adjustments that affect the reporting of entity and individual tax reports. Even in states where there is no individual income tax, entity-level taxes are affected by the adjustments made in federal tax audits. In addition, states that model their passthrough taxes after the federal tax regime are directly impacted in tax administration. This panel will start off with a summary of the BBA partnership audit rules, and how they are being implemented, and then delve into the SALT implementation to compare/contrast their state counterparts. If time permits, the discussion will include a brief synopsis of the MTC's Partnership Tax Project.

Moderator: **Christi Mondrik**, Mondrik & Associates (Austin, TX)

Panelists: **James Creech**, Baker Tilly US (San Francisco, CA); **Kate Kraus**, Covington & Burling LLP (Los Angeles, CA); **Kathleen Quinn**, Jones Walker LLP (New York, NY)

Location: JW Marriott (900 W Olympic Blvd, Los Angeles, CA 90015)

2:50 – 3:40 p.m. (PST)**“Moor” Than Meets the Eye: Beyond Moorman, Single Sales Factor and Strategies for Proving Distortion. (CLE)**

Join us as we revisit *Moorman* and its implications for the single sales factor and alternative apportionment. This panel will explore how the single sales factor can lead to distortions, examine strategies for effectively proving and addressing these distortions, and obtaining alternative apportionment from the states.

Moderator: **Jennifer W. Karpchuk**, Chamberlain Hrdlicka (Philadelphia, PA)

Panelists: **Marty Dakessian**, Dakessian Law (Los Angeles, CA); **Joe Garrett**, Deloitte Tax LLP (Birmingham, AL); **Alysse McLoughlin**, Jones Walker LLP (New York, NY)

Location: JW Marriott (900 W Olympic Blvd, Los Angeles, CA 90015)

THURSDAY, FEBRUARY 20 (Continued)

3:40 – 4:30 p.m. (PST) Descending into the Depths of Grayness: Navigating the Pitfalls of State Income Taxation of Nonresident Individuals. (CLE)

Under well-established constitutional principles, states are allowed to tax resident taxpayers on all of their income, wherever derived, providing the resident taxpayer a credit for some, all or none of the income taxes paid to other states on that income, whereas nonresident taxpayers are subject to tax only on their income derived from sources in the nonresident state. But it’s not as simple as that. This panel will discuss a number of potential challenges that nonresident taxpayers face, including how nonresident states source gain from the sale of an ownership interest in a passthrough entity or other business entity operating in the state, compensation for remote work or business travel, stock options and other types of deferred compensation, and how a resident state may limit its credit for taxes paid by the individual taxpayer to nonresident states.

Moderator: **John A. Biek**, Neal, Gerber & Eisenberg LLP (Chicago, IL)

Panelists: **Richard L. Jones**, Sullivan & Worcester LLP (Boston, MA); **Debra S. Herman**, Hodgson Russ LLP (New York, NY)

Location: JW Marriott (900 W Olympic Blvd, Los Angeles, CA 90015)

6:00-9:00 p.m. (PST) Executive Committee Meeting and Dinner (Non-CLE; Invitation Only)

Location: Davis Wright Tremaine LLP (350 S. Grand Ave 27th Floor, Los Angeles, CA 90071)

FRIDAY, FEBRUARY 21

8:30 a.m.-9:30 a.m. (PST) Women in SALT Coffee Connection (Non-CLE)

This is a networking session for women in state and local tax. Come network with and learn more about fellow women SALT colleagues from throughout the country.

Location: JW Marriott (900 W Olympic Blvd, Los Angeles, CA 90015)

Friday, FEBRUARY 21 (Continued)

9:30-11:30 a.m. (PST)

State and Local Tax Practitioner's Roundtable (Non-CLE; Executive Session)

Moderator:

Richard L. Jones, Sullivan & Worcester, LLP (Boston, MA)

Location:

JW Marriott (900 W Olympic Blvd, Los Angeles, CA 90015)

6:00-9:00 p.m. (PST)

Social Dinner (Non-CLE; Tentative)

Location:

Jonathan Club (545 S Figueroa St, Los Angeles, CA 90071)

SAVE THE DATE: 2025 MIDYEAR TAX MEETING



The 2025 Midyear Tax Meeting will take place **May 8-10, 2025** at the Marriott Marquis in Washington, DC. As the date approaches, the SALT Executive Committee will be in touch with additional details.

2024 FALL MEETING RECAP

The Tax Section’s Fall 2024 Meeting kicked off Thursday evening with the Executive Committee Meeting and Dinner hosted by **Jeanette Lohman** and **Matt Landwehr** at the Thompson Coburn, LLP Saint Louis office. **Stephanie Anne Lipinski Galland** (Richmond, VA) and **DiAndria Green** (Atlanta, GA) planned the Executive Committee Dinner as well as Friday’s social dinner at Gian Tony’s. There was a special thank you to Jeanette and Matt Landwehr and their firm Thompson Coburn, LLP who hosted the other SALT events as well.



Masha Yevzelman (Minnesota, MN), **Jennifer Karpchuk** (Philadelphia, PA) and **Aliza Sherman** (Elmwood Park, NJ) helped us all start the day by organizing the Women in SALT Coffee Connection Friday morning before the CLE activities started. Masha also organized the Friday Luncheon.



Brian Browdy (Chicago, IL), **Prof. Hayes Holderness** (Richmond, VA), and **Nikki Dobay** (Portland, OR) started off the CLE events with their presentation on external consistency and its potential relationship with single sales factor and alternative apportionments, “Unfair Apportionment: Can the External Consistency Rule Help?” **David Hughes** (Chicago, IL) moderated the panel.

Stefi George (NYC), **Matt Landwehr** (St. Louis, MO), and **Alla Raykin** (Atlanta, GA) continued the Friday CLE events with their timely two-part presentation, “NOLs Yesterday, Today, and 20 Years from Now.” **Leah Robinson** (NYC) moderated both panels.

Bob Mahon (Seattle, WA), **Stephanie Gilfeather**, (Seattle, WA) and COST’s **Karl Frieden** (Washington, DC) closed out Friday’s CLE events with an expansive panel on the taxability of digital goods through the lens of the state of Washington’s tax scheme, “Washington Digital Products: A Case Study in the Challenges of Sales Tax Policy in the Digital Era.” **John A. Biek** (Chicago, IL) moderated the panel.

As always the meeting was not complete without the Saturday morning SALT Practitioner’s Roundtable. **Richard L. Jones** (Boston, MA) moderated the lively and timely discussion.



SAVE THE DATE

Upcoming Events and Conferences

CONFERENCES

- **2025 ABA / IPT Advanced Tax Seminars** – March 10-14, 2025, Royal Sonesta, New Orleans, LA
- **2025 May Tax Meeting** – May 8-10, 2025, Marriott Marquis, Washington, DC
- **2025 “Virtual” Fall Tax Meeting** – October 13-17, 2025 – Location TBD
- **2026 Midyear Tax Meeting** – January 15-17, 2026, Marriot Marquis, San Diego, CA
- **2026 “Virtual” Fall Tax Meeting** – October 12-16, 2026, Location TBD

If you would like to share an upcoming event with SALT Committee members, please contact Kyle Wingfield, kwingfield@williamsmullen.com.

ANNOUNCEMENTS

MOVES, PROMOTIONS, AND APPOINTMENTS

- **Matt Boch** (Little Rock, AR) has resigned from the Arkansas Tax Appeals Commission and is joining Kutak Rock as a Transition Partner in its Little Rock office.
- **Bruce Ely** (Birmingham, AL) has been reappointed by Bloomberg Tax for a second year as Senior Fellow with oversight of their PTE products and SALT products generally. Bruce is Bloomberg's only Senior Fellow on the SALT side. That involves assisting their reporters with understanding and explaining complicated tax issues, editing their Pass-Through Entity Navigator online treatise, conducting in-house seminars for their reporters, and giving them a head's up as to hot issues that should be reported.
- **Jennifer Karpchuk** (Philadelphia, PA) was recently elected equity shareholder and Chamberlain Hrdlicka. She also was elected Chair of the Tax Section of the Philadelphia Bar Association.
- **Daniel Mudd** (Louisville, KY) was recently named Vice-Chair of Frost Brown's Louisville office, where he now oversees 160 attorneys and 250 total employees in the office.
- **Christi Mondrik** (Austin, TX) is moving Mondrik & Associates to an office condo that Christi and her husband purchased. Christi reports, "It's a little larger than the space we've been renting and we've been having the architects and contractors customize it for us. It's conveniently located across the highway from the Domain, which they've been calling our "second downtown," and it's right across the street from the back entrance to the company where my husband works."

IN THE NEWS

- **Ted Bernert** (Columbus, OH) was interviewed in Tax Notes State in its January 6, 2025 issue. A copy of "Feel the SALT Burn With Ted Bernert" is attached to this newsletter.
- **Art Rosen** (New York) was recently interviewed by the Journal of State Taxation. A copy of "A Chat with Art Rosen" is attached to this newsletter.

RECENT CASES AND DECISIONS

- **Frank Crociata** (Phoenix, AZ) and **Scott Woody** (Santa Fe, NM), both with Spencer Fane, LLP, were part of a larger team that successfully obtained a ruling from the New Mexico Court of Appeals finding that a multi-national corporation's overseas divestment was not apportionable income based on the New Mexico statutory definition of unitary corporations.
- **Brett Durbin** of the Ballard Spahr Seattle office (the Lane Powell firm has joined Ballard Spahr) and **Dirk Giseburt** of Davis Wright in Seattle collaborated over two-plus years on a case that resulted in a rare taxpayer victory at the Washington Supreme Court in December 2024, *Envolve Pharmacy Solutions, Inc. v. Washington Dep't of Revenue*, 560 P.3d 839. Brett represented the taxpayer and Dirk was counsel to amicus curiae Association of Washington Healthcare Plans at both the court of appeals and the state supreme court. The dispute involved the unique exemption from the Washington B&O tax for "any person in respect of insurance business upon which a tax based on gross premiums has been paid to the state." The primary question was whether the exemption applies only to the carrier that pays the insurance premiums tax or also to its affiliates (such as the taxpayer Envolve Pharmacy Solutions) that contract with the carrier to perform insurance business activities necessary to the performance of the insurance contracts. The Court's 5-4 majority approved the latter interpretation (which was also the Department of Revenue's express interpretation from 1990 to 2019), relying on statutory interpretation arguments presented in both the taxpayer's and amicus briefs, and it may also have sub silentio cared about the impact that increasing taxes on health insurance businesses could have on premiums and on access of lower-income households to insurance, which was an economic effect featured in the briefs.

MEMBER SPOTLIGHT: MASHA YEVZELMAN

Masha is a member of the SALT Executive Committee and a shareholder at Fredrikson & Byron, P.A. in Minneapolis, Minnesota, where she chairs the firm's tax disputes and litigation group. She has built a reputation for providing strategic legal counsel to businesses and individuals navigating complex tax regulations and compliance issues. Masha's contributions extend beyond her practice, as she frequently shares her insights through speaking engagements, publications, surprise appearances at birthday parties, and Executive Committee dinners. In addition to her expertise in tax, Masha has become our go-to expert for anything related to history and philosophy (more on that below). We appreciate her contributions to the SALT Executive Committee and the broader SALT community.



What first interested you in SALT?

I started working at Fredrikson during law school, at the beginning of my 2L year. My very first project was for a partner who later became my mentor—Tom Muck. Tom practiced exclusively in state and local tax and though it would be a great idea to have a law student (me) do a 50-state survey of case law about external obsolescence. For obvious reasons, it wasn't the project that made me interested in SALT, but it was working with Tom. The rest is history.

What is one of your favorite memories from a SALT Committee meeting?

It's not so much a memory, but a feeling. It was one of my first few meetings and at that time I was just starting to work on some federal controversy matters in addition to SALT. So I left the comfort of the SALT meeting, and thought it would be a great idea to go to a few federal sessions. The sessions were very informative, but I quickly realized that I didn't belong in those rooms. I remember returning to the SALT committee room and having a very specific feeling—these are my people and this is where I want to be.

As a history and philosophy major at Macalester College, what happened that you ended up in SALT?

History and philosophy are the PERFECT majors for a career in SALT. Think of all the old Supreme Court cases we get to cite and the constitutional law arguments we get to develop. History also teaches how to view the past with a critical eye, to dig deeper, and to draw parallels and connections to the present. And Philosophy is all

about logic and understanding and responding to different worldviews—SALT skills. In fact, some of my favorite SALT practitioners and tax court judges were also history and/or philosophy majors (or participated in philosophy club).

What do you wish you had known at the beginning of your career in SALT?

I wish I would have known how collegial and welcoming the SALT committee is and how rewarding it is to be involved. I have made incredible friends through the SALT committee, feel like I have a strong support network of amazing colleagues, and have learned so much at SALT committee meetings—in particular at the Saturday (or is it Friday now?) Roundtable. The earlier someone gets involved, the better.

Outside of work, what hobbies and interests do you have?

I love traveling, cooking, and going to amazing restaurants. Over winter break, my family and I went to Costa Rica and stayed at an ecolodge in the rainforest near Golfito Bay, which happened to have delicious food and a cooking class. The trip was definitely an adventure—no one got hurt (though I thought I was going to die almost every day) and everyone had a great time.

Your prediction about the place of SALT going forward. Thoughts?

States and local jurisdictions will always need to fill their coffers, so I predict that SALT will not go out of style. Rather, with all the chaos and changes at the federal level, I bet SALT will become even more important. However, I don't see SCOTUS taking more state tax cases. They sadly turned away some really good ones this past year—Zilka, Disney/IBM, Ellingson Drainage, Santa Fe, etc. I don't see that changing in the near future.

AMICUS BRIEF SUBCOMMITTEE UPDATE

Task Force Members

Gregg Barton (Co-Chair), Dirk Giseburt (Co-Chair), Ted Bernert, Jaye Calhoun, Bruce Ely, Lynn Gandhi, Rich Jones, Chuck Moll, David Nagle, Leah Robinson, Stewart Weintraub

Preface (Standard)

This Subcommittee is tasked with studying and recommending to the American College of Tax Counsel (“ACTC”) whether the ACTC should file an amicus brief in a particular state or local tax case that is either on petition for writ of *certiorari* to or pending before the U.S. Supreme Court, or in rare instances, in a state or local tax case on appeal to a state’s highest appellate court. Conversely, the ACTC’s Amicus Brief Committee may seek the Subcommittee’s input on whether a particular state or local tax case is ripe for the filing of an amicus brief by the ACTC.

In either scenario, if the ACTC elects to move forward with the filing of an amicus brief, members of this Subcommittee (and other members of the SALT Committee) are given the opportunity to become involved in preparing the brief. The SALT Committee is not permitted to file an amicus brief of its own or as a listed co-author of any such brief.

The SALT Committee is not permitted to file an amicus brief of its own or as a listed co-author of any such brief.

Developments Since September 2024:

- The Subcommittee received no request for an amicus brief during the period.
- With regard to developments in matters in which ACTC took action on the Subcommittee’s recommendation, the petition on behalf of Zilka was denied on January 13, 2025. A summary is provided below.

***Zilka v. Tax Review Board City of Philadelphia*, U.S. Supreme Court Docket No. 23-914 (pet. for cert. filed 2/20/24).**

On March 25, 2024, following a positive recommendation from this Subcommittee, the ACTC, through its counsel at Kostelanetz LLP and Troutman Pepper Hamilton Sanders, filed an amicus brief in support of Zilka’s petition before the U.S. Supreme Court. The ACTC amicus brief is available at <https://tinyurl.com/2sbm3e3b>.

On December 9, 2024, and at the Court’s invitation, the United States Solicitor General expressed the view that review by the Court was not warranted because, in its view, Philadelphia’s income tax satisfied the internal consistency test regardless of whether the proper analysis aggregates state and local taxes. Petitioner filed a supplemental brief on December 23, 2024, which the Court denied the petition on January 13, 2025.

STATE TAXATION OF DIGITAL PRODUCTS - MTC PROJECT

Task Force Members

Trever Asam, Gregg Barton, Ted Bernert, Scott Clark, Hayes Holderness, Bruce Johnson, Lindsay LaCava, Matt Schaefer, and Shirley Sicilian

Preface

The Uniformity Committee of the Multistate Tax Commission (MTC) continues to conduct working sessions addressing the “State Taxation of Digital Products” Project (“Project”). For more information about the Project, the link is here: <https://www.mtc.gov/uniformity/sales-tax-on-digital-products/>.

Recent developments relevant to the MTC Project warrant the SALT Committee’s attention.

The role of the Task Force

The members of the Task Force continue to believe that we should monitor the Project. As always, our role is not to support or oppose the broadening of the sales and use tax bases in the states to include more digital products. Instead, we see our role as helping the drafters focus on the implications of the proposals and in particular to focus on potentially unforeseen implications.

The Project generally

The MTC continues to focus on developing a broad definition of digital products. The Project does not advocate in favor of taxing these services as defined but is creating a definition that could be utilized by those states wishing to amend state taxing statutes to address the digital economy.

At the last meeting of the Project, it was announced that the MTC would focus on the development of a broad definition. The alternative approach of expanding the tax base incrementally by enumerating discrete services and providing uniform definitions would solely be within the purview of the Streamlined Sales Tax Project and presumably be off the table for the MTC discussions.

Defining the digital tax base

Ray Langenberg has proposed a definition for automated digital products, which reads:

Automated digital product” - an item, including software and service, which is provided for noncommercial use in a binary format, and for which additional human intervention to produce a similar item for additional customers is minimal.

The amendment would dispose of the distinctions between tangible personal property and services or considerations of the methods of delivery. The definition does not attempt to incorporate principles of the Internet Tax Freedom Act (ITFA). Note that as the breadth of the tax base expands and delivery over the internet is not a criterion, the ITFA issues fade.

The issue came up as to whether a taxpayer purchasing a CD at Walmart would be acquiring an Automated Digital Product as defined. Ray expressed the conclusion that the transaction would come within the definition. Ray's write-up includes a reference to the United Nations Model Taxation Convention between Developed and Developing Countries (2021) ("Report"). The Report, which addresses net income and gross receipts taxes, lists the types of transactions that would come within the similar definition used in that Report:

- Online advertising services;
- Supply of user data;
- Online search engines;
- Online intermediation platform service;
- Social media platforms;
- Digital content services;
- Online gaming;
- Cloud computing services; and
- Standardized online teaching services.

The state representatives to the Project have not publicly endorsed or challenged the Langenberg model. Ray stated his belief that his model could work politically in the states.

The MTC plans to set up a new workgroup to address the Langenberg model and other possible definitions of digital products that will include both government and non-government participants. This contrasts with the other Project working groups, which were limited to state participants. So far two of the Task Force members plan to participate in this workgroup: Ted Bernert and Bruce Johson. These members would not be representing the ABA Tax Section but would solely be participating in their individual capacities.

The MTC bundling workgroup continues forward.

Next steps

The Task Force is not prepared to accede to the approach of broadly defining digital products in contrast to increasing the tax base incrementally by reference to well-defined discrete services that could be chosen by the states for legislation.

The Task Force members have concerns about the meaning and scope of the current working definition proposed by Ray Langenberg. We welcome recommendations from members of the SALT Committee for a definition that could be used or other thoughts about how the Tax Section should respond.

It is unclear when it will be appropriate for the Tax Section to provide written input for the Project.

MODEL STATE ADMINISTRATIVE TAX TRIBUNAL TASK FORCE

Reported By: **Garland Allen** (Santa Monica, CA)

Recent Developments

Following is a summary of significant state tax adjudication developments since our September 24, 2024, report. Thanks to Priya Nair of COST for alerting us to many of these.

1. CALIFORNIA

On October 8, 2024 the California Assembly's Revenue and Taxation Committee held an informational hearing titled "Evaluating California's Newest Tax Agencies." The hearing's purpose was to help legislators and the public understand how the Office of Tax Appeals (OTA) and the California Department of Tax and Fee Administration (CDTFA) have improved tax administration in the state.

The OTA and CDTFA were created in 2017, in the wake of scandals surrounding the operation of the Board of Equalization (BOE), to take over functions previously performed by the BOE. Before 2017, the BOE's members administered the sales and use tax and adjudicated administrative tax appeals involving those same taxes, plus appeals involving franchise and income taxes administered by the Franchise Tax Board.

The shift placed sales tax administration in a new CDTFA and administrative hearings in taxpayer disputes in a new OTA. The BOE's portfolio is now limited mainly to overseeing property tax practices among county assessors and assessing property tax on railroads and utilities with property in multiple counties.

The OTA is an independent body that weighs taxpayer appeals, mainly with panels of three administrative law judges, said new OTA Director Myriam Bouaziz. According to a white paper prepared for the hearing, the BOE published an average of 161.5 opinions a year in the 1980s but that number dropped to 3.2 opinions in the early 2000s. By contrast, the OTA is required to issue written opinions in every case, and since 2018 has published 2,800 opinions on its website.

Asked if the OTA's administrative law judges have the authority to invalidate regulations – an authority that the BOE utilized—Bouaziz said the OTA does not believe it has the authority to invalidate regulations but is awaiting a legal opinion from the Attorney General.

Asm. Mike Gipson asked Bouaziz what the win-loss ratio is for taxpayers who appeal to the OTA. Bouaziz said the OTA does not track that information.

2. GEORGIA

On November 5, 2024, 52% of Georgia's voters approved a legislature-proposed ballot measure to create a judicial-branch tax court to replace the state's administrative tax tribunal. The new court will have concurrent jurisdiction over tax appeals with the state trial court.

Under current law a taxpayer's only appeal from an adverse tribunal decision is to the Fulton County Superior Court. With the new tax court, a disaffected taxpayer will be able to appeal directly to the Georgia Court of Appeals and potentially to the Georgia Supreme Court.

Another significant difference between the new court and the tribunal is that the taxpayer will be able to have any constitutional arguments decided by the court, which will likely be much more familiar with federal and state constitutional precedent than a state trial court judge.

The statutes authorizing the ballot measure (HB 598 and HB 1267) require the governor to appoint the first chief judge of the court. He is expected to do so before July 1 of this year, so that the appointee can obtain the approval of the state Senate and House judiciary committees by the end of 2025 and the court can start operation on July 1, 2026.

The new tax court fulfills the overall objective of the Model Act, which is to establish a judicial branch forum to adjudicate taxpayer disputes in states where that is possible.

3. PENNSYLVANIA

SB 1051, signed by Pennsylvania Gov. Josh Shapiro on October 29, 2024, authorizes the Board of Finance and Revenue (the Board)—a tax tribunal administered by the state treasurer that is responsible for the second and final level for most administrative appeals before going to court—to initiate and oversee the voluntary settlement of tax appeals.

For individuals challenging a personal income tax assessment, the new law also extends the deadline to appeal a Department of Revenue Board of Appeals decision to the Board from 60 to 90 days, which may be extended by up to 30 days for cause.

Most importantly, SB 1051 establishes a formal settlement conference process where disputes can be resolved in a more timely and efficient manner. Participation in the settlement process is voluntary, with either party able to opt out. Under current law, the Board has no authority to direct a settlement process.

The Board receives approximately 4,200 appeals a year. Treasury estimates that up to 500 cases annually could be resolved under this process. The current compromise process is retained.

Feel the SALT Burn With Ted Bernert

by Doug Sheppard

Seasoned SALT is devoted to catching up with former prominent members of the state and local tax community who have either retired or moved on to other work.

In this installment, *Tax Notes State* senior editor Doug Sheppard interviews Ted Bernert, who recently retired after 40 years with BakerHostetler and nearly 50 years practicing state and local tax law.

When “Play That Funky Music” topped the pop and R&B charts stateside and hit the top 10 in five other countries in 1976, Wild Cherry put the international spotlight on their hometown of Steubenville, Ohio. Even Helen Reddy noted their origins when she introduced them for a nationally televised performance on *The Midnight Special* that year.

The single and self-titled album that spawned it went platinum, but the success was short-lived: Wild Cherry never had another significant hit and was finished by the end of the decade. Another Steubenville native kicking off his career that year, however, would enjoy a long and noteworthy career in state and local tax.

Ted Bernert may not have enjoyed worldwide fame in a SALT tenure that lasted nearly half a century, but he appeared before the Ohio Supreme Court over 40 times, chaired the American Bar Association Section of Taxation’s State and Local Taxes Committee, and has taught law as an adjunct professor at Capital University Law School for 30 years and counting. Tax wasn’t initially on the agenda when he pursued his law degree, but Bernert — whose uncle was a lawyer — had been interested in the legal profession as early as high school, when he was a member of the debate team.

“I knew I wanted to be a lawyer, so I was involved with debating and that kind of thing; I actually debated on the radio,” Bernert recalled. “I

went to Ohio Northern University because that’s where all the lawyers from Steubenville went to school. But then it turned out that I didn’t stay there; I wasn’t a small-town boy, and I went to Ohio State for law school.”

That move put him in the city where he’s lived for half a century, Columbus, which is also where he landed his first job with the Law Offices of Carlton S. Dargusch. Before he ascended to partner, however, he clerked for the firm from 1975 to 1977. Dargusch, for whom the firm was named, stood out partially because he was a septuagenarian retired Army brigadier general who served as deputy director of the Selective Service during World War II. But more importantly, he played a pivotal role in the development of Ohio tax law.

“He had drafted a lot of the early tax law in Ohio and had been a member of the [Ohio] Tax Commission, which was a predecessor to the Department of Taxation and the tax commissioner,” Bernert said. “So it was a great opportunity.”

Two years of clerking for Dargusch solidified Bernert’s resolve to pursue a career in SALT and, more importantly, instilled some of the values that ensured his longevity in the field.

“The most important thing he told me was that you never go and ask somebody you’re reporting to what you ought to do — that you should always go to them and say, ‘Here’s the issue and here’s how I plan to deal with it,’” Bernert said. “And I really found that to be maybe the best piece of advice I ever got, because I used that throughout my career. He also had the attitude that if there’s a problem with somebody below you, that’s your problem; you can’t just blame it on them.”

When Dargusch passed away in 1984, Bernert moved on to BakerHostetler, where he remained until his retirement on December 31, 2023. Retirement allowed Bernert more time to spend



Ted Bernert

with his wife, two grown children, and grandchildren — not to mention for travel and charitable work.

And as evidenced by the fact that he's continued his work as an adjunct professor, he hasn't entirely abandoned his SALT roots, which form the basis of our interview.

Doug Sheppard: What about tax attracted you to it? Because there had to have been some draw.

Ted Bernert: I look at myself as a litigator who did tax cases, and I was exposed to it at the firm, and the issues were very interesting. The big part of the practice was the manufacturing exemption for sales tax, and that really got you involved in a lot of interesting issues — trying to figure out how the manufacturing process worked and whether the items that were purchased for it were used so as to qualify for exemption.

There were a number of other types of cases. I mean, they were just interesting cases, so that's what attracted me to it. And when I graduated from law school, they didn't fire me; I just stayed

on and kept working. Then in 1984, General Dargusch died, and I wanted to try the large firm practice, and I was lucky enough to move to BakerHostetler, and was there the rest of my career.

Sheppard: That's 40 years — most people don't spend that long with one firm.

Bernert: Right. There's something wrong with you if you do that today, right? Everybody moves around in the legal profession so much. That's not totally true, but it's certainly different than when I was practicing.

Sheppard: How did your practice evolve?

Bernert: We did all kinds of taxes, and we had a right of direct appeal to the Ohio Supreme Court from the Board of Tax Appeals, which meant they had to take our cases. So I had an opportunity to appear before the Ohio Supreme Court more than 40 times, and had many oral arguments, and that was just very interesting to me. I really enjoyed that practice.

We had a number of different kinds of cases, and all the different taxes — property valuation cases, both personal and real at that time. Sales tax was also a big part of it, and we had a corporate income tax up until 2005.

Sheppard: Right, that was when they replaced it with the commercial activity tax [CAT].

Bernert: That's correct, and that changed things. But before that, Ohio had both a net worth and a net income tax, and that raised a lot of issues.

Sheppard: What were some of the more noteworthy cases?

Bernert: Well, in 1990 I had a case that involved an organization called The Way International,¹ and their idea was that they operated like the first century Christian church. And they applied for a sales tax exemption for their purchases, and the tax commissioner and the Board of Tax Appeals denied the exemption. So we went up to the supreme court arguing that they were a church for sales tax purposes. The difficulty was that they refused to say that they were a religious organization, because they took that as a bad thing; you had gotten away from the roots.

¹*The Way International v. Limbach*, 50 Ohio St. 3d 76 (1990).

So we had an interesting battle there, but when we got to the supreme court for oral argument, one of the justices asked my opponent, “Well, if the first century church applied for exemption, would they ever qualify?” And to his credit, he was honest and said no. [laughs] That sort of affected the court.

And then neither he nor I knew that one of the justices’ fathers had been a home church preacher, and one of the big arguments of the tax department was that it couldn’t be a church because they didn’t have any buildings — and they just taught out of their homes. The justice didn’t take kindly to the idea that it wasn’t valid to have a home preacher. That was an interesting case.

The second case I should mention is *Epic Aviation*,² which concerned AirNet, which was a package delivery company. The issue was the equipment that was used in delivering packages, and a lot of states allow an exemption for equipment that’s used for that purpose. But Ohio takes a different approach and says that the exemption would be under the public utility exemption. And so it became a question of: What does it mean to be a public utility? And that in turn went to if you were a certified carrier — one of the big ones like UPS or FedEx — that you would qualify, but it wasn’t limited to them.

So we had to determine what it meant to be a public utility, and in turn what it meant to be a common carrier. And the concept of common carriage is one we’ve all heard of, but I found it to be a pretty elusive concept. So I couldn’t figure out what it meant, and the idea is that you’re required to carry — a common carrier is required to carry the package. But what does that mean?

Well, after a couple of years, I finally realized that what they were really talking about was that you had to carry a package of your competitor. So if your competitor came to you and said, “I want you to carry this” and you’re going there anyway, even if you don’t necessarily want to help your competitor, you have to do it.

So once we got that far, then we were trying to find a precedent that said that. And I looked high and low and couldn’t find a really good case that

stood for that proposition. And again, talking to the client, he explained to me that he would never litigate that issue, because although he was required to carry today, he would be reaching out to competitors next week and asking them to carry for AirNet.

So it was interesting to me that I didn’t have a statute to deal with any sort of definition; I didn’t even have a case, but the common law reflected the customs of the industry that everybody understood — and it was the basis for finally getting the exemption. It isn’t judge-made law; I think it’s really judge-found law based on custom. That was really interesting. We cited *Blackstone’s Commentaries* in a tax case, which was a little different.

Sheppard: Was it intimidating the first time you went before the Ohio Supreme Court?

Bernert: Oh yeah, I was nervous. But I remember distinctly driving down to the first argument in 1979 and thinking I couldn’t remember any part of my argument — nothing. It was just a complete blank. Once I got up there, I was OK. I had been doing debating, and I like that kind of stuff.

I was always nervous, but I really enjoyed it. I thought the best part of the practice was oral argument. And because of the right of direct appeal, the court was more knowledgeable about tax matters generally. So when I argued before the court of appeals, it took more time to get them to focus on what the issues were, but the supreme court had a pretty good handle on it most of the time. So it was a really good experience.

Sheppard: It must be unusual in the SALT experience for the court to have knowledge of taxes.

Bernert: I think that’s absolutely right. But I think it’s been very good for Ohio practitioners because the court has that knowledge. The right of direct appeal was taken away several years ago by the General Assembly. But then it was restored for tax commissioner and municipal tax cases, but it was not restored for property valuation cases, because most of those are — as you might imagine — valuation issues that aren’t necessarily the type of legal issues that the court could sink its teeth into. The court does accept some real property tax cases for review.

²*Epic Aviation LLC v. Testa*, 149 Ohio St. 3d 203, 2016-Ohio-3392 (2016).

I think Ohio has been very lucky, and I know other litigators are probably envious of it. But because we affect revenue — that is, these cases do — I think there's a good reason for the court to hear these cases. It's been good for the state of Ohio.

Sheppard: Was there any case you argued before the court that was contentious?

Bernert: Well, actually, the last case that I had, which I wrote up for *Tax Notes State*, had to do with fracking.³ And one of the justices — who ended up writing the decision — was really pushing me hard on the case. But ultimately, the decision came out OK. That was the *Stingray* case,⁴ and it ended up making a difference, because for decades the tax department, Board of Tax Appeals, and the courts had applied the narrow construction of sales tax exemptions, and what the court said is that they weren't going to do that anymore. They were going to apply a clear lens and just look at the statutes, and not construe it in favor of taxation. So it was worth it to go through the grilling I got from Justice Pat DeWine.

Sheppard: Did you do any tax planning in your practice?

Bernert: I did some — not the kind of contingent stuff; what we would do is some planning for taxpayers, we got involved in transactions, and we would help people with domicile issues. The last couple of years, we were trying to help people deal with the state and local taxes on remote workers. I was helped by the fact that I litigated cases, because I felt like I had a better understanding of the risk that clients were undertaking. But I was a litigator first and a planner second.

Sheppard: How did your practice evolve over the nearly 50 years you were in it?

Bernert: It became more national. I've always been very Ohio-centric, but I think over time, I got more involved with multistate issues — and of course with *Wayfair*,⁵ that was a necessity.

Sheppard: Did that evolve your practice right there? Because one of the big issues after *Wayfair*

for a lot of remote retailers and taxpayers was how their states would implement it, and how it would apply to taxpayers. Was that what the general thrust was?

Bernert: It was, but there was also the issue beforehand, in which before the *Quill*⁶ case the Department of Taxation took very aggressive positions and basically said, "You'd better come in and you'd better comply with the law because we're going to win the *Quill* case." So there was some planning involved at that time — just trying to situate yourself without knowing which way *Quill* was going to turn out.

Then over time, it was a question of: What is physical presence? Just like everybody else, we were trying to help people deal with that.

In sales tax, you were dealing with vendors and whether they should take an aggressive position or not regarding taxability. I was always much more conservative when I was representing vendors than I was consumers; there was some interesting tension there, and the vendor doesn't want to get caught up in this. There were a number of different issues like that.

Sheppard: What happened with your clients regarding the department's position when states essentially lost the *Quill* case in 1992?

Bernert: It was extraordinary. Before *Quill* was decided, we were able to agree to collect, but if the case turned out differently, then we could stop collecting. And those were agreements with the department, and after *Quill* — the vendors stopped collecting at that point.

And then Ohio was involved in Streamlined, so that was a big deal in between *Quill* and *Wayfair*. Ohio's really the largest state in the Streamlined Sales and Use Tax Agreement, so we were keeping an eye on that and how that was working out — and that changed Ohio law quite a bit, because previously Ohio had different ways of using the tax rate brackets, and there were certain other ways that Streamlined had a lot of impact on Ohio.

Sheppard: What organizations did you get involved in throughout your career? For example, you chaired the ABA Section of Taxation's State and Local Taxes Committee.

³ Edward J. Bernert, "A Clear Lens for Tax Statutes," *Tax Notes State*, Sept. 25, 2023, p. 1013.

⁴ *Stingray Pressure Pumping LLC v. Harris*, 2023-Ohio-2598 (2023).

⁵ *South Dakota v. Wayfair Inc.*, 585 U.S. 162 (2018).

⁶ *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992).

Bernert: Yes. I got involved in the Council On State Taxation, the Tax Executives Institute, and the Institute for Professionals in Taxation [IPT], but I put a lot of effort into the ABA Tax Section. It's been a really good bunch of people; I'm still involved with them. I guess I'm flunking retirement because I'm still involved with the ABA Tax Section. I'm on the planning committee for ABA-IPT in New Orleans, and I'm the chair of the task force on the taxation of the digital economy — working with the Multistate Tax Commission.

Sheppard: Ohio has had a lot of tax changes over the past 20 years or so. You mentioned the repeal of the corporate income tax, which was replaced by the commercial activity tax in 2005. But there's also been the repeal of the alternative minimum tax this year and the implementation of a new financial institutions tax in 2012. How did all these tax changes affect your practice?

Bernert: One of the things that I was lucky to be involved with was drafting legislation and lobbying. It has been pretty interesting. We've had occasions in which we had a difficult audit issue and were able to get the General Assembly to address it and deal with the issue. There have been a lot of opportunities to affect the law that way.

I didn't agree with the commercial activity tax and still think it's a bad tax. My clients like it, but I don't think it works very well. It's really a hidden tax in that it's not going through the clients' tax department budgets, if you will; they're not filing returns and paying tax. But I do think they're paying tax to the sellers who sell into Ohio. It clearly pyramids, and if you look at the biggest taxpayers, it's not who you would expect; it's companies with high volume and low margin, and if you're just starting out, it's problematic.

But the CAT has been cut down considerably with recent amendments increasing thresholds before the tax kicks in. I don't know what percentage of taxpayers are going to be paying the CAT going forward, but I've heard it's as low as 10 percent of the taxpayers that will actually have a commercial activity tax. So I don't think that was very good.

A big issue in Ohio recently has been that the school districts are permitted to file complaints and seek real property tax increases, and there are

a lot of big fights going on, because their authority to do that is being cut back by the Legislature. This concept that third parties can file complaints has been around for a very long time, and then it became institutionalized when a couple of law firms really pushed that issue very hard.

At the same time, we had a determination that the sale price was . . . at one time, it was really almost applied without any ability to challenge it — a sale is a sale is a sale — and then the Legislature and the supreme court backed off on that. And so that's been a very contentious issue. The issue becomes you can buy property, and then later on the school district files the complaint, and it relates back to the time before you acquired the property. That always caused a lot of consternation. So that issue's being worked out now, but the school districts aren't very happy about it.

The other thing that was going on was that school districts were doing side deals with the taxpayers. The revenue from the real estate tax goes to a number of different entities: for example, the county, the city, the library, and ADAMH, which is a mental health service. And what the school boards would do is just get their piece, be satisfied, and then drop the case — and the General Assembly eliminated that. That's a struggle that's still being worked out some, but that's been a very big change.

Sheppard: Where did most of the complaints tend to come from? Was it the smaller districts, which are usually the ones that are chronically underfunded because they have such small property tax bases?

Bernert: I don't think so. I think that the big cities were really involved with that. It was very rarely applied to residential; it was applied to commercial. So you would see these cases in which there's a lot of commercial property, which in turn would be large cities — although it's not confined to large cities by any means.

Sheppard: What prompted you to retire?

Bernert: So I was 72 and I just figured that was enough. I have grandkids, give the guy behind me a chance to develop his own practice. I'm glad. It was time.

What I'm able to do now is projects I couldn't do before. The most recent article I wrote for *Tax Notes State* could not have been written while I

was practicing.⁷ I took some positions that would make my clients squeamish.

Sheppard: In your mentoring, what kind of advice do you give to aspiring and younger SALT attorneys?

Bernert: I've struggled a little bit with those who want to litigate and don't want to touch tax, but a lot of tax lawyers don't want to litigate. But there really is a great opportunity to blend those two together, and it's been a real opportunity to get involved. Now, we don't get into civil courts below the appellate level because we have anti-injunction statutes, but we have hearings, we litigate cases, and then we get a chance to appeal it. So there's a real opportunity to get before state supreme courts and make law. There's a real opportunity to work with the legislatures; I think it's easier to do that than if you're doing federal law, for example. If you're sitting in Columbus, Ohio, it's hard for you to get too much involved in what Congress is doing, but you certainly can get involved at the state level.

And the issues are very interesting. I got involved in issues and I would bring in people — other litigators who weren't in tax — and they would get very much engaged with the legal issues. Perhaps surprisingly, I think the justices on the Ohio Supreme Court enjoyed the tax issues. I mean, I tell people that I've never prepared a tax return for a client in my career, so it really is just dealing with legal issues — and interesting issues once you get past the idea that it's a tax. So that's the advice I would give: It's a real opportunity to make an impact, get involved in some pretty interesting issues, and litigate cases.

Sheppard: What do you miss and not miss about being a full-time practicing attorney?

Bernert: Just being in the middle of things. I did enjoy preparing cases for trial, and it's a little harder for me to stay on top of things. I'm trying very hard to stay up with developments and going to the ABA sessions and doing ABA-IPT, but I'm just missing out on some of that. I also miss the camaraderie; I talk to people who are still practicing, but it's not quite the same.

The things I don't miss are obvious things. I do not miss doing time charges, and I don't miss the administration of the practice.

Sheppard: Plus, as you just alluded to, you're probably freer to speak your opinion.

Bernert: Yeah, that's absolutely right. I mean, there are some things that I want to do and things I want to pursue. I still have some things I'm working on.

Sheppard: So what are some of your future goals?

Bernert: Well, right now the biggest thing I'm working on is what's happening with the MTC and the sales and use taxation of the digital economy. Our group put together a reaction to it in writing that we submitted to the MTC through the ABA Tax Section. As that project goes forward, we have a task force that will react to what the MTC is doing — because that's really big, I think. It's going to have a big impact. It's very broad in what they're doing; I think they're looking at states like New Mexico, South Dakota, and Hawaii in terms of what the taxes should look like, because digital is so involved in everything. So I'm really focused on that project and trying to help influence it. ■

⁷ Bernert, "Taxation of Remote Workers in Ohio," *Tax Notes State*, Oct. 21, 2024, p. 147.

A Chat with Art Rosen

By Bruce M. Nelson and Arthur R. Rosen

Continuing the JOURNAL's series of interviews with state and local tax (SALT) leaders, Bruce M. Nelson talks with Art Rosen with McDermott Will & Emery. Early in his career, Art served as the deputy counsel of the New York State Department of Taxation and Finance, as well as counsel to the governor's Temporary Sales Tax Commission and tax counsel to the New York State Senate Tax Committee. Prior to joining law firms in New York City, Art held executive tax management positions at Xerox Corporation and AT&T.

Bruce: My first question is always the same. When you were eight-years old running around in the backyard, I'm guessing you didn't say to yourself, I want to grow up and be a tax attorney, particularly a tax attorney in state and local tax. So, how did you end up in your profession?

Arthur: Well, there are probably two or three influences involved. First, when I was eight-years old, running around the backyard, I wanted to be a physicist. I'm sure that I didn't know exactly what that was, but I knew I liked math and science; I didn't realize until I was older that my father was a physicist—I just knew he worked in space programs. He tried to talk me out of becoming a physicist from my early childhood through high school. Being a physicist, he told me, is a very insecure job because once a missile program is over, you must look for another missile program on which to work.

Bruce: Okay, but everyone's going to be sitting there wondering, okay, wait a minute. He got an undergraduate degree in physics and then went to law school.

Arthur: While I was in college, two of my brothers-in-law were in law school, and they were telling me about the cases they were reading, and I thought this sounds pretty interesting. And so those two things—my father's advice and what I heard about studying law—made me decide to go to law school.

In law school, I found that I felt very comfortable with tax courses, and I came to realize that other people who had majored in science or engineering in college, as I did, also felt very comfortable with tax because, to use mathematical terminology, tax law is more a matter of discrete functions as opposed to continuous functions (which are common in other areas of the law).

Anyway, my first job after law school was with Coopers & Lybrand. But, I had worked for the City of New York while in law school and became slightly involved with New York politics. When Hugh Carey was elected as governor of

BRUCE M. NELSON, M.A., is a CPA with more than 35 years of experience in state and local tax. He is a frequent seminar speaker and teaches continuing education tax classes for the Colorado Society of CPAs and the AICPA and has published more than 50 tax articles. **ARTHUR R. ROSEN** is a Partner Emeritus at McDermott Will & Emery.

New York in 1974, my name was provided to his people as somebody they might want to hire. And so I was appointed by the governor to a relatively high position, especially since I was quite young, in the New York tax department. I became the Deputy Counsel of the New York State Department of Taxation and Finance—that's how I got into state and local tax.

Bruce: Fascinating. It's so funny to find out how different people have ended up in state and local tax. I remember the first time I saw you speak was at the New York University (NYU) summer state and local salt program. In fact, weren't you involved in helping start that program?

Arthur: Yes, that is one thing of which I remain most proud. What happened was I saw that NYU had a federal tax program each summer, I think for decades. And I, being a state and local tax person, felt discriminated against. Why not something for state and local tax? So I approached the people who ran the federal program at NYU and said, "Why don't we start a parallel state and local program?" They said, "Sure," and right away it was done. So I developed an outline for a program, lined up speakers from around the country, and it worked well. I'm no longer involved, but yeah, the NYU Summer SALT program is one of my children.

I know of at least one company where the international tax and state local tax work together under the same single manager, because they really are very similar with all the different laws and treaties among the countries. The SALT folks have a treaty among the 50 states that, as I said earlier, we call the Constitution.

Bruce: That feeling of discrimination is probably quite common among state and local tax practitioners. What do you think?

Arthur: I believe that, to varying degrees, that is correct. I recall another instance of feeling that discrimination. I realized, after being in the tax field for a few years, that Lexis—the principal research tool in those days—carried a great deal of federal tax authority, even including revenue rulings, etc. In contrast, even state tax quasi-judicial

decisions weren't included in the database. While I was with New York State, I approached the company responsible for Lexis, Mead Data, and suggested that state tax authority be carried on the system. Mead Data responded with a proposal that the state furnish the material to Lexis, and Lexis would compensate the state with royalties collected from any Lexis customer who accessed that material. New York was not interested in going into business in that manner so that idea went nowhere. I then asked Mead Data whether they might be convinced to do as I was suggesting if it appeared, based on a survey I would undertake, that there such material would have wide appeal; Mead Data said, "Go ahead." So I asked my fellow members of the State and Local Tax Committee of the American Bar Association's Tax Section whether they would use such material if it were on Lexis. A great majority responded in the affirmative. I relayed that to Mead Data and voila—we got state tax administrative authority on Lexis! I was just recently looking at the correspondence regarding this experience and it brought a huge smile to my face.

Bruce: So you've been active in the ABA for quite a while. What is your most gratifying memory of that activity?

Arthur: Well, I guess it could be called an episode of idealism! Paul Frankel (who was with Morrison & Foerster at the time) and a couple of other state tax practitioners started a monthly SALT lunch group, sponsored by NYU (this was separate and apart from the summer program we discussed a few minutes ago). At those lunches, there would be a comprehensive roundtable discussion of recent developments and related thoughts of those in attendance. That was a very valuable tool for keeping up-to-date and keeping intellectually alert. So, when I became Chair of the ABA State and Local Tax Committee, I stole that idea and we had a similar roundtable—although sans lunch—at each of the ABA meetings. I believe that those are seen as pretty worthwhile for all of those who attend.

Bruce: Getting back to your time with New York, what else did you take away from your experience working there?

Arthur: After seeing how the State Tax Commission decided cases, it was obvious to me that the state needed an independent adjudicatory body to resolve New York tax controversies. So, after I had left state government, Paul Cuomo, a fellow member of the New York state bar association's tax section, and I spent several years regularly going to the state legislature, trying to get an independent appeals body established. Finally, with the help of a couple of legislative staffers, we were successful in getting legislation adopted that instituted the Division of Tax Appeals

and its Tax Appeals Tribunal. The reason we wanted to do that is we really thought that it was unfair to have the same body that had issued an audit assessment determining whether that assessment was correct. Although technically the Tax Commission was somewhat separate from the units that performed audits, it really wasn't, which is something I learned from my own experience at the state. I was so happy that Paul and I were able to get the system changed.

Bruce: When did you start writing? Was that at the state? I ask because I remember years ago reading your BNA portfolios on sales and use tax and attributional nexus. What prompted you to start writing?

Arthur: At the first law firm at which I worked, Roberts & Holland, there was an implicit understanding that one builds his/her professional reputation by writing and speaking. So that was one reason. Second, I had, as many people do, all these ideas in my head that I wanted to articulate. I wanted to say to the world, "What about this?" I wanted to share my thoughts with other people and so I started a periodical called *Inside New York Taxes* that soon had quite a lot of subscribers. I guess it was a little egocentric or something, so maybe it was a sign of a bad personality trait.

Bruce: (Laughter) I don't think so. In fact, I remember you wrote an article back in 1989 on attributional nexus. What prompted your interest in that?

Arthur: I had some client matters focusing on nexus and it seemed to me that the three indirect nexus approaches that states were taking were all related. There was the agency approach, there was the alter ego approach, and there was a representative approach. I pulled those all together because they seem to have a lot of commonalities in their conceptual bases. And the word "attributional" sounded very sophisticated, very intellectual. And so I thought that that would sound cool. So that's how I came up with that name, and it was a good way for me, and I think some other people, to focus on the nexus issue and what the nature of the relationship was between an in-state person and out-of-state business.

Bruce: Well, nexus continues to be a hot issue. I am sure you're familiar with the Multistate Tax Commission's (MTC) revision of Public Law 86-272.

Arthur: You mean their revision of *their interpretation* and *their suggested* application of the law.

Bruce: Yes, that's right.

Arthur: They're not amending the law.

Bruce: That's right. I stand corrected. They're not amending the law. What are your thoughts about that?

Arthur: In general, I think the Supreme Court's *Wayfair* decision was unfortunately sloppy. And the sloppiness I'm identifying is the Supreme Court failing to make a distinction between a business merely collecting a sales tax and a business actually paying a direct tax. There's a big distinction, and I can't really blame the Court itself, because I don't think there was any *amici* who clearly raised that distinction. But there's a huge difference. One is merely an administrative burden that is implicated in collecting and remitting a sales tax; the other, in contrast, is a direct tax such as an income tax, where the taxpayer has similar administrative burdens, but also has an economic burden.

In answer to your specific question, it seems to me that the federal statute has not changed. I think that what the MTC is in the process of doing, as they have often done in policy issues, is going to as extreme a position as possible to help their member states raise taxes even though doing so is detrimental to the American economy.

Bruce: There are many folks who think that basically the MTC interpretation essentially guts the protections of Public Law, 86-272. Do you agree with that?

Arthur: Yes, and it's scary to see a body like the MTC really trying to override what Congress has done. I think the MTC is clearly trying to effectively change the law. And when administrative agencies say, "Well, times have changed and the way we deal with each other in business has changed, therefore we have to change our application of the law." And I say, "No, that's what the legislative body does. The executive branch is supposed only to execute existing laws, not to update them or change them. And you know, the Supreme Court has ruled that administrative agencies, on the federal level, have gone too far, and those agencies are not playing their appropriate role of merely administering and executing laws.

Bruce: Isn't there an argument that really this whole issue over Public Law 86-272 is fundamentally just an issue over the principles of federalism?

Arthur: Well, not really, because, you'll remember, it only applies to interstate commerce.

Bruce: Right.

Arthur: And one of the major provisions that the states adopted in their 1789 treaty—known as the "U.S. Constitution"—was their giving up their sovereignty in the context of interstate commerce. A number of historians believe that was the main driver for adopting the

Constitution to replace the Articles of Confederation. The goal was to have a single economy in the country. The Commerce Clause is really essential to what America is today.

Bruce: I agree because in 1789, if you were a merchant in New York City and you wanted to ship something to Philadelphia, you had two options. First, you could ship it across New Jersey. But if you did that, you would have to pay a toll or a fee at every little town, village, hamlet, and wide spot in the path before you got to Philadelphia, which made it quite difficult to sell any of your products at a profit. Or, you could just ship your product by boat down the New Jersey coast and up the Chesapeake Bay to Philadelphia. But there you ran the risk of paying a tariff to every port you may have stopped at along the way.

As you pointed out, many historians see the Commerce Clause as an attempt by the Constitutional Convention to create a free market among the states, although they didn't use that terminology.

Arthur: Right. In fact, there were almost interstate wars over the issue.

Bruce: Yes, that's right.

Arthur: You know, the growth of single-sales factor with market sourcing for services is another way in which the whole original concept of income taxes has been turned on its head. In biblical days, wealth taxes were the predominant source of governmental funding. Income taxes are relatively recent, and this idea of taxing accretion to wealth directed the tax to the location, the jurisdiction, where the income was earned, the location that furnished the inputs that generate income, labor, and capital.

During the Congressional Willis committee proceedings, every economist who testified said that the apportionment factors should be payroll and property. The sales factor was added as a concession to the market states solely to get uniformity throughout the country. Everybody would be happy. Of course, we never got that uniformity. And now with so many single-sales factor and market-sourcing states, you have the opposite. You have a tax in the jurisdiction where consumption takes place, as opposed to where the wealth is created by employing labor and capital.

For example, suppose you live in Wisconsin, retire, and decide to write your memoirs. You purchase a computer, a desk, and some reference books and you spend eight hours a day, five days a week for a year, writing. You finish the manuscript and you find a buyer, say a publishing house in New York. Where did you really earn that money? You earned it in Wisconsin, not where you happen to have a customer.

Bruce: Do you think that at some point the federal government's going to step in and enforce at least some uniformity. After all, today I can be a small business in Bangor, Maine; someone in California accesses my interactive website; and now I have a filing obligation in California.

Arthur: I think that Congress has shown little interest in cleaning this up, and my best guess of what's going to happen is the changes that are taking place in the context of international taxation, something I really don't know a lot about, is going to have a secondary or byproduct effect of getting the states to go to the same place, not because they want to be uniform. There's no place else to go.

I remember the beginning period of the Streamlined Sales Tax initiative being very exciting. I remember when we started the process, I was reading a book called *The First American: The Life and Times of Benjamin Franklin* by a historian, H. W. Brands, and how exciting it had been to start this new country. And that's how I felt at the inception of the Streamlined Sales Tax organization. But in the effort to get more and more states to join, there were so many variations that states could make by toggling this on, toggling this off, making this change, *etc.* that it ended up not being nearly as uniform as we had dreamt in the beginning. So, I think in the income tax context, I'm not optimistic about there being a voluntary, conscious uniformity, but some uniformity may come simply as a reaction to international tax changes.

Bruce: When you look back over your career in litigation, were there any cases that you found particularly fascinating or fun? And I'd like to hear about both the ones in which you were successful and the ones in which you perhaps weren't so successful.

Arthur: Sure. One was RJ Reynolds and that involved whether the New York statute, which allowed accelerated depreciation for property in New York—but not for property outside New York—that was constitutional under the Commerce Clause; we won that one. Whenever you get a court to decide a state statute is unconstitutional, that is a memorable victory.¹

Another one was GTE Spacenet, which ended up being really two cases.² In one of those cases, the New York Tax Department had taken a position for many years as to which type of franchise tax (gross receipts or net income) applied to the owning entity of an operating business by looking solely at the operating business—the ultimate question was whether the owner entity was a utility or a general business. We won that one by showing that the taxpayer itself was merely a general business and what its investee did was not legally relevant. But the other GTE

Spacenet case there was, for me, much more memorable. The New York Tax Law imposed a special tax on revenue realized from selling telephony or telegraphy “by wire,” and the question was whether revenue from “wireless” telecommunications should be subject to that tax. The state took the position that the system in question used wires in its equipment, *etc.* and that in the communication network there are wires; therefore the revenue should be taxable. We showed a trial that the term “wireless” had a technical and common definition from decades ago, when the statute was enacted. There are two types of communication. There was communication by wireless or by radio on the one hand, and, on the other hand, there was communication by wire, which is not by radio. Many telecommunications are transmitted nowadays by radio *via* waves in the air. The court recognized that, and we had a great success, due to the deep dive into the relevant history and technology.

Another one that I was happy with was the Supreme Court of Minnesota in the MBNA case, where we argued that the state’s revenue agency had not followed the state’s Administrative Procedure Act, thereby making the state’s position unenforceable. That was a case that has been used by many others after that.³

Let me talk about three more. One was Pharmacia & Upjohn. New York State provides a sales and use tax exemption for medicine and drugs. The state took the position that when pharmaceutical companies sent samples into the state, use taxes were due. Those samples, of course, included a bottle with cotton inside and a label and informational inserts. The state’s position was that the statute didn’t say that bottles and cotton were exempt—just the medication, the drugs. My kids were maybe about eight years old at the time, I told them about the state’s position and even they started laughing. Everybody thought how silly the state’s position was. Did the legislature really expect a salesperson from a pharmaceutical company to go to a doctor’s office and say, “Doctor, hold out your hands. I’m going to pour in our sample medicine.”

The state initially lost, then relitigated, and in the second case, the court held that 92% was exempt. It was just a silly position the state had taken.⁴

A case in which I totally enjoyed the oral argument when the state appealed its loss at the administrative judge level. It involved a company that wanted to file its corporation income taxes on a combined basis. One of the companies was Heidelberg Eastern and its affiliate was East Asiatic Corp. One company imported food products (canned hams) and the other imported very expensive, multimillion-dollar printing presses from Heidelberg, Germany. They seemed to be totally different businesses, but we showed why they were symbiotic in a lot of ways. In the oral argument, I started

by saying, “the King and I, ‘Anna and the King of Siam,’” and then I paused for about three seconds and the tribunal looked as though they were thinking, “What’s he talking about?” And I said, “Well, that’s how this company started. The sea-captain H.N. Andersen who had taken Anna over to Siam/Thailand brought back teak wood and thus started an import/export business. Both of these companies had that commonality, and we went on about the companies’ synergies—that was a fun, fun oral argument.”⁵

The final case in this category after which I felt absolutely wonderful was the New York Times case. Upon audit, New York wanted to disallow a combination with a subsidiary that was a partner in a Finnish paper manufacturing business and to force a combination with a subsidiary that printed and distributed the Times outside of New York. Some observers thought that we were crazy to think that we could win both arguments. But we did!

Bruce: We know that nobody has an RBI of 100, so tell us about some memorable losses.

Arthur: Before I do that, I feel that I must make clear that each victory in controversy was only possible because of the fantastic, brilliant work of those with whom I worked on those cases—associates, younger partners, and the clients’ in-house tax counsel.

Bruce: That totally makes sense. I’m sure that each of them learned a lot from working on those cases. Now let’s turn to your less happy memories.

Arthur: Those cases about which I was—and continue to be—very disappointed about their outcome.

In the General Electric Capital Corp case, we thought we had a sure winner. During oral argument before the Court of Appeals (New York’s highest court), I could barely make my argument “None of your business,” but, instead, I said that this is one of the biggest companies in the world, and we only have a few million dollars at issue and so, given the billions of dollars in the state budget, it’s a *de minimis* amount. Well, we walked out of the oral argument thinking we definitely had a winner (the client’s internal tax counsel and I “high-fived” when we got outside the courtroom but, alas, we ended up losing. I suspect we lost because the court didn’t want the decision to cost the state anything at all. There was no rationale in the opinion that really made sense. The statute we were looking for support was very explicit, and the court pretty much ignored the statute.⁶

Similarly, in another case, we raised the Constitutional internal consistency tests because an individual who was a New Jersey resident but worked in New York and had a New York apartment. New York provides no credit

against resident income taxes for taxes paid to another state on intangible income, such as interest and dividends. But the Court of Appeals found an easy way out of it by saying that interstate commerce wasn't impacted here so the internal consistency test was irrelevant. That a person works in New York and lives in New Jersey doesn't affect interstate commerce clearly flies in the face of the Goldfarb case where the Supreme Court had said that similar facts in the legal licensing case did implicate the Commerce Clause.⁷

And the last one was disappointing, where again the courts tended to disregard the law. It was American Express case in Idaho in which the state held that the distribution of promotional materials by American Express to Idaho residents was subject to the state's use tax. Idaho's use tax statute differed from that in other state cases but to no avail. That this seemed contrary to the Supreme Court's holding in D.H. Holmes didn't bother the court. We had a similar sad story in Hawaii.⁸

So those are all heartbreakers.

Bruce: Several attorneys have told me that one of the things that attracted them to state and local tax, as opposed to even federal taxation, is that it seems like every issue ends up being a constitutional issue. You think that's a fair statement?

Arthur: I think that until recently, the most important state and local tax issues were, indeed, constitutional at their base. That's because of two drivers. First, which state has a right to impose any tax at all in a given situation is obviously the primary fundamental question. And second, how can the right state tax in a manner that is consistent with Due Process and Commerce Clause requirements. The issues arise because every state, of course, wants to impose tax as much as they can, especially on out-of-staters. In other words, what could be better than to raise revenue from people who are not part of your society, don't vote, or companies that don't employ people in your state? So there is a natural inclination to raise taxes as much as possible from outside parties, and that does, at its base, violate, or could violate, the Commerce and Due Process clauses. So yes, I think that that's true.

I think that, nowadays, the focus has shifted somewhat when we look at fair apportionment. Because I think after *Wayfair*, perhaps "the nexus ship has sailed." And so, I think while it is a little less than it used to be, constitutional issues are often there. I remember talking to a federal tax lawyer about the constitutional aspects of tax cases, and he laughed, for it is uncommon in the federal tax world to run into constitutional arguments. But from our perspective, it's real.

Bruce: True, when you start writing a memo for a federal tax question, you generally don't start off by having a discussion of whether or not the 16th Amendment was properly ratified.

Arthur: Exactly.

Bruce: For someone in law school today, or someone who's thinking about becoming a CPA, is SALT still a good area to go into? Or do you think there are other tax challenges that may be more interesting in the future?

Arthur: I don't know a lot about other areas of the law, but from what I've seen, if he or she is interested in tax, I think what's going on in both the international sphere and state and local sphere are the most exciting. Yes, there are federal changes every couple of years that can keep people people's interest, but with state and local, because you have the constant drive for revenue from the states taking different positions, there's always something exciting going on. And if an individual wants to get involved in the SALT community—through writing, speaking, attending conferences—I think that remains the best. It seems to me that we SALTERs are a different kind of people. Federal tax lawyers are very intellectual and somewhat ivory towerish. And I mean that, I really mean that with respect, whereas SALT people, they are half tax lawyers and half litigators, and that makes the personalities markedly different, I think, more down to Earth, perhaps. Maybe we take ourselves a little less seriously, and why, I guess, is a major reason why I've loved my career so much.

Bruce: Well, even though I'm not an attorney, I worked for a few years in a boutique firm that did only state and local tax litigation. One of the things that I discovered that I thought was fascinating was how attorneys approach tax questions differently than we bean counters do.

Arthur: Oh, absolutely.

Bruce: It was a good experience for me, because I thought that both parties brought some things to the table that were useful.

Arthur: I could be wrong here that accounting firms are more concerned about how much time they are permitted to spend on an issue. They have real tight client budgets, whereas in my practice we have had this amazing luxury of being able to spend as much time as we have to to get to what we think is the perfect answer. In other words, we don't have the time constraints of accounting firms. So, I think that is one major difference,

Bruce: That's a good point. When you have an April 15th deadline and an issue that could really use 10 hours

of research, you may have only two hours because you have 14 other returns to get done; so, you come up with the best answer you can given the time that you have, and then you move on and hope you got it right.

Arthur: Perfectly said, perfectly said, I think that's right.

Bruce: Of course, I always tease my federal friends by telling them that if you are in federal tax, you were a wuss because you only had to deal with one Internal Revenue Code and one set of IRS auditors, whereas if you're in state and local tax, you've got 50 different codes and 50 different auditors, and you're not only doing income tax, you're doing sales tax and any other tax that no one else wants to work on.

Arthur: I know of at least one company where the international tax and state local tax work together under the same single manager, because they really are very similar with all the different laws and treaties among the countries. The SALT folks have a treaty among the 50 states that, as I said earlier, we call the Constitution.

Bruce: For example, the first time you work a like-kind exchange on a federal return, it can be challenging. But by the twentieth time, it's a lot easier and you are more comfortable. But in SALT, you can't ever really get to that level of comfort, because the States not only differ, but they may change the law between now and next Tuesday,

Arthur: Exactly, announcements are coming out all the time. Yes, absolutely right.

Bruce: Some people thrive on that sort of challenge. I think it's fascinating, I think it's interesting, and I think it's one of the things that makes state and local tax fun, that you're never, ever certain, of really where you stand.

Thanks so much for taking the time to chat with me; it's been really interesting.

Arthur: Thank you very much.

Bruce: You've done some work in the legislative area other than help establish New York's administrative adjudicatory process, right?

Arthur: Yes Sir.

Bruce: Can you tell me about a couple of your most memorable experiences?

Arthur: Sure. The one with the most far-reaching effect was developing the concept and principle incorporated in the federal Multistate Telecommunications Sourcing Act. The major wireless companies in the country retained me to help them address the very messy situation generated by the mobility of consumers using their cell phones. If one were in a car traveling from New York to New Jersey speaking to a friend who was in a car traveling from California to Nevada, which state should impose its sales and use (or comparable) tax on the receipts from that call? And were the roaming carriers agents of the home carrier or of the customer? The possibilities were too great in number and too complicated for my meager mind to comprehend. But fortunately, the Supreme Court had recently decided the Jefferson Lines case, ruling that the one jurisdiction where a multistate bus trip began could impose its tax on the entire fare. I grabbed at this idea of simplicity and suggested that the customer's home state should be the only state eligible to impose tax on the entire monthly bill. Congress agreed and that idea is now federal law.

My second memorable experience was one where I was not successful at all. Over a period of several years, I had developed federal legislation that would ensure that states could impose direct taxes—such as corporate income taxes—only on businesses that had a non-*de minimis* physical presence in the state. That was based on the concept that only the state that provides the protections and opportunities for a business' labor and capital should be entitled to impose tax on that business. Unfortunately, the business community believed that Congress would never enact such legislation; to this day, I believe that was a self-fulfilling position; had more companies been engaged in fighting for that legislation (BATSA), it might be law today. A side—somewhat harrowing—aspect of that work was testifying in Congress on 9/11/2001 and having to evacuate the Capitol buildings as the fourth plane was headed for us. Many of us who were there that day believe that we owe our lives to those passengers aboard United Airlines Flight 93 who sacrificed themselves in bringing that plane down in Pennsylvania.

ENDNOTES

¹ *R.J. Reynolds Tobacco Co. v. City of New York Department of Finance*, 237 AD2d 6, 667 NYS2d 4 (N.Y. App. Div. 1997).

² *GTE Spacenet v. N.Y. St. Dept. of Tax. Fin.*, 201 AD2d 429, 607 NYS2d 677 (N.Y. App. Div. 1994).

³ *MBNA America Bank, N.A., v. Commissioner of Revenue*, No. A04-1826, 694 NW2d 778 (Minn. 2005).

⁴ *Pharmacia & Upjohn Co.*, New York Division of Tax Appeals, Tax Appeals Tribunal, DTA No. 818583, July 22, 2004.

⁵ *Heidelberg Eastern, Inc.*, East Asiatic Company, Inc., New York Division of Tax Appeals, Tax Appeals Tribunal, DTA Nos. 806890, 807829, May 5, 1994.

⁶ *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals*, Tax Appeals Trib.,

2 NY3d 249, 253, 810 NE2d 864, 778 NYS2d 412 (2004).

⁷ *John S. Tamagni et al. v. Tax Appeals Tribunal of the State of New York et al.*, Court of Appeals of the State of New York, No. 45, 91 NY2d 530, 695 NE2d 1125, 673 NYS2d 44 (1998).

⁸ *American Express v. Idaho State Tax Commission*, 128 Idaho 902, 920 P2d 921 (1996).

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