5 KEY TAKEAWAYS

Don’t Forget the Tax Department When Planning

On November 11, 2014, Kilpatrick’s David Hughes presented at the **Institute for Professionals in Taxation’s** annual income tax summit in Tucson, Arizona. David’s presentation, **“Left in the Dust - Don’t Forget the Tax Department When Planning,”** concerned state and local tax (SALT) problems that arise when a tax department is not consulted on a transaction.

Here are five key takeaways:

1

Timing. Get the tax department (or outside tax advisors) involved early! While SALT issues might not be the focal point of a transaction, they can easily derail a deal if they are left unaddressed until the eleventh hour. At the same time, the tax department and tax advisors should be proactive about finding a role in the deal to begin the tax due diligence process sooner rather than later.

2

Sales and Use Tax on the Deal. The tax department should be involved in a transaction to determine whether the deal is subject to state sales and use tax. Stock sales - including stock sales treated as asset sales for tax purposes - are not subject to sales tax because stock is an intangible. While a sale of assets is generally subject to sales tax, several exemptions and exclusions - including sale for resale, “occasional sales” and sales of machinery/equipment - will likely apply when all the assets of a business are sold. But watch out for titled property - including real estate and vehicles - that might be subject to special transfer taxes even if otherwise exempt from a traditional sales/use tax.

3

What is “Tax”? Most sale agreements require the seller to indemnify the buyer for any unpaid “tax” of the seller that the buyer inherits as part of the deal. But what exactly is a “tax”? Is unclaimed property, for example, included within the definition of “tax” in the sale agreement?

4

Due Diligence. Due diligence is an important part of any transaction and the tax department should be involved to assist with tax due diligence. There are three primary areas of interest for SALT due diligence: **1)** identify and quantify potential buyer exposure for unpaid taxes by seller; **2)** minimize state and local taxes on the transaction as well as future taxes for the buyer; **3)** identify post-acquisition integration issues (such as “instant unity”) and impact on state returns.

5

Fact Gathering. So exactly how does a tax department gather information as part of the SALT due diligence process? There are two primary ways: **1)** Public information (SEC filings, annual reports, press releases, web site); and **2)** Ask the Seller for information (org chart (pre and post close), schedule of sales and employees by state (current and historic), tax returns, ASC 740 analysis or other internal tax memos (but note potential privilege) and historical and ongoing audit files.

For more information, please contact:

www.ktslaw.com

David Hughes: dhughes@ktslaw.com