5 KEY TAKEAWAYS

Income Tax Jeopardy! A Potpourri of Hot Topics

Kilpatrick's David Hughes recently participated in a panel discussion at the **Taxpayers' Federation of Illinois** annual state and local tax conference in Rolling Meadows, Illinois. David's session, **"Income Tax Jeopardy! A Potpourri of Hot Topics"** explored several different cutting-edge issues in state income tax, including net operating losses, flow-through entities, apportionment, gross receipts taxes and audits.

David's key takeaways from the session include:

1

Sales of Pass-Through Interests. Several states – including Massachusetts, New York and Ohio – are taxing partners on the sale of their partnership interests even if the seller/partner is a non-resident. This is known as "investee apportionment" and it looks to the location of the partnership (or other flow-through) rather the location of the seller (who might be in a no-tax state like Florida). Massachusetts has been especially aggressive on this issue and has sought to tax partners that do not have a "unitary" relationship with the partnership (see the *VAS Holdings* case).

2

Watch Out for Oregon. An Oregon ballot measure is asking voters to approve a new 3 percent gross receipts tax for large businesses regardless of profitability. The revenue raised by the new tax would be returned to Oregon residents as a rebate. A 3 percent gross receipts tax would be unprecedented and would significantly increase the tax bill for Oregon businesses subject to tax. The Oregon legislature has indicated that they are not in favor of the proposal.

3

NOL SOL. The statute of limitations (SOL) for adjusting net operating losses (NOL) can be a frustrating issue for multistate taxpayers. Many states (and the IRS) take the position that they can adjust a company's NOL in a year that is otherwise closed by the SOL. While states acknowledge that they cannot assess a deficiency in any year closed by the SOL, they often do seek to collect a deficiency in an open year that results from the NOL adjustment. Taxpayers often find it challenging to defend an NOL adjustment from a very old tax year. A recent New Jersey case (*R.O.P. Aviation v. Division of Taxation*) is one of the few cases that prohibits this.

4

Transfer Pricing Audits. Some separate reporting states (notably Indiana, Alabama, Louisiana and South Carolina) are ramping up their transfer pricing audit activity and investing heavily in their transfer pricing capabilities. There are several pending cases in South Carolina (including the *Tractor Supply* case) and Louisiana recently settled a large transfer pricing case with Conoco. Some states (North Carolina and New Jersey) have offered transfer pricing amnesty programs and Indiana offers an Advance Pricing Agreement (APA). An issue to watch is whether the state expressly adopts the federal section 482 rules in making its transfer pricing adjustments.

5

Retroactivity in New York? The New York legislature enacted sweeping tax changes in 2015. Nearly nine years later, the New York Department of Taxation finally adopted regulations to interpret and apply the new laws. Be on the lookout for whether the Department will attempt to apply its rules retroactively.

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