

# Tax Report

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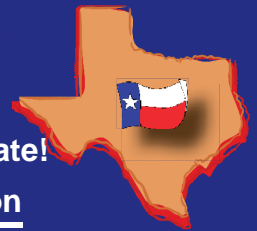
September 2010

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## Income Tax

### The Shifting Landscape of the Work Product Doctrine

This article analyzes developments concerning work product doctrine protection for tax accrual work papers since *Textron*. It considers the differing tests the courts have used in deciding whether the doctrine is applicable and makes recommendations for protecting papers prepared pursuant to the requirements of FIN 48.

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## Property Tax

### Complete Auto and Property Taxation

#### The TECO Barge Case

This article examines a Tennessee appellate court decision applying the "substantial nexus" test of *Complete Auto* to ad valorem taxes against tugboats and barges moving along waters through the state. The court treats earlier "situs" precedents as establishing "substantial nexus" with respect to instrumentalities "habitually used" within the taxing jurisdiction. The taxpayer conceded that the tax was fairly apportioned and the court ruled against the taxpayer's contention that the tax was not fairly related to services provided by the state, though it was not clear that any services were provided or available to the taxpayer's vessels on such sojourns.

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## Sales and Use Tax

### A Beehive of Activities SALT Issues Focus on Digital Goods and Services

This article reports on various sales and use tax developments concerning electronically-delivered goods and services. Included are consideration of a recent Pennsylvania Supreme Court ruling, the introduction of the Digital Goods and Services Tax Fairness Act of 2010 in Congress, and a report from the South Carolina Taxation Realignment Commission recommending numerous changes to that state's sales tax laws, with respect to digital goods and other transactions.

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## Value Added Tax

### The Determination of Value Added

This article describes the several versions of value added taxation by which value added is calculated, specifically the addition, subtraction and tax credit or credit invoice methods. It identifies the ways in which such methods are similar, indicates their respective strengths and weaknesses, and explains why the credit invoice method has been more widely adopted.

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**Robert D. Butterbaugh, CMI**  
**President June 2010-2011**

The summer has passed very quickly for me. The first few months of my Presidency have been quite active yet very rewarding for me. I really enjoyed meeting many of the registrants and addressing the participants at the August 2010 Basic Property Tax School. Rick Izumi, CMI, School Chair, and Del Blair, CMI, Vice-Chair, along with their group of instructors, continue to make upgrades in the course and are doing a great job. They are to be commended for their outstanding instruction. Many thanks as well to the rest of the team of Basic School instructors: Rae Akers, CMI; Bill Dearien, CMI; Glen Fandl, CMI, ASA; Tom Kuder, CMI; Mindy McLees, CMI; Jason Raab, CMI; Bob Sperling, CMI; and Mark Young, CMI, for their time and the expertise they share through their participation in these IPT education programs.

As IPT President, I have been asked to attend several functions during the month of September. Unfortunately, there are scheduling conflicts. I have asked IPT's First Vice President, Linda Falcone, CMI to represent me and to open IPT's Sales and Use Tax Symposium in Indiana Wells, California, while I represent the Institute at the Canadian Property Tax Association's 2010 Workshop in Quebec. IPT's close association with the CPTA was begun in 1976 by our first President, Derek S. McCleery, CMI.

The Sales and Use Tax Symposium consistently has good attendance, and this year is no exception. I would like to express the Institute's appreciation toCarolynn Iafate, CPA, Esq. and to Mark Bennett, CPA, the 2010 Symposium Chair and Vice-Chair respectively, for all of their efforts. Carolynn and her committee have worked to present an outstanding program. We also have a large number of candidates sitting for the CMI Professional Designation exams prior to the Symposium.

I will be able to participate in IPT's first VAT Symposium, which will be held immediately following the Sales and Use Tax Symposium, September 29-October 1. I know that Immediate Past President Lee Zoeller, CMI, has worked hard during his presidency to translate his vision of the first VAT program into a reality and is looking forward to the success of this program. Ken Helms, CMI, VAT Symposium Chair, and Harley Duncan, Vice Chair, along with their committee, are to be congratulated on developing this new program, which offers an excellent agenda of topical sessions of interest to those who work in the VAT field. IPT is particularly proud to introduce this new annual offering, as VAT is (and will continue to be) a "hot topic" in today's global economy.

The Institute's final school of the year is the Intermediate Personal Property Tax School. The course is being held at the Georgia Tech Hotel and Conference Center on October 10-15, 2010. Chair Chris Muntifering, CMI, and Vice-Chair Diane Brown, CMI, along with their committee of instructors, are finalizing the instructional presentations. I encourage you to take advantage of this once-a-

*(Continued on page 3)*

year offering or send someone from your company. This school receives excellent reviews each year.

November will be a busy month with four IPT education programs on tap. The Property Tax Symposium in Austin, Texas is scheduled for October 31 - November 3, 2010. Chair Stephen Davis, Esq. and his fellow committee members have planned an excellent program featuring many outstanding speakers.

The Property Tax Symposium will be followed by the Income Tax Symposium and Advanced Sales and Use Tax Academy being held concurrently, November 8-11, 2010, in Miami, Florida. Headed by Income Tax Symposium Chair Glenn McCoy, Esq. and Vice-Chair Karey Barton, the committee has put together an excellent agenda of sessions filled with very timely topics. Under the leadership of Chair Arlene Klika, CMI, along with Vice-Chair Richard Ayoob, Esq., the Advanced Sales and Use Tax Academy committee has designed a program with sessions that are different from those normally presented at a symposium or conference, but will be very important to sales tax professionals. Finally, our last program in November and for the year 2010 is the Georgia One-Day Tax Seminar. I look forward to seeing many of you at these programs.

I am pleased to announce IPT's first Credits and Incentives (C&I) Symposium which will be part of IPT's 2011 education programs calendar. Kyle Caruthers has agreed to serve as committee Chair. I look forward to this program and believe it represents a growing segment of corporate and consulting tax responsibilities. Even

with ongoing corporate capital expenditure constraints spawning from the global economic recession, the various federal and derived state tax stimulus programs for "green initiatives" and consideration by states who are evaluating the efficacy of programs which best allow them to stay competitive with other states have elevated the visibility of C&I programs and the need for tax professionals to be well educated in this field. The committee members, who will be responsible for developing this program, are as follows: Amanda P. Brown, CPA, Turner Broadcasting System, Inc.; Greg L. Cardwell, CMI, ConocoPhillips Company; A. Sonali (Allie) Carlson, Esq., Reed Smith, LLP; Amy Eisenstadt, Esq., General Electric Company; Michael A. Harris, PricewaterhouseCoopers LLP; Helen D. Lemmon, CMI, Ryan; Steven R. Loveless, CMI, International Paper Company; Ali Master, Ernst & Young LLP; David L. Moore, American Electric Power Service Corporation; Chris G. Muntifering, CMI, General Mills, Inc.; Hartley Powell, KPMG LLP; Sherri R. Swindle, CPA, Fedex Corporate Services, Inc.; Dorothy Upperman, CPA, Wal-Mart Stores, Inc.; David W. Walls, CPA, The Procter & Gamble Co.; Jim Watts, Deloitte Tax LLP, and J. L. Zamboldi, PPG Industries, Inc.

Planning has begun for IPT's 35<sup>th</sup> Annual Conference to be held June 26-29, 2011 in San Antonio, Texas. Mark your calendar and plan to join us for another rewarding educational opportunity and special "35<sup>th</sup> anniversary" social program.

Robert D. Butterbaugh, CMI  
President





## The Shifting Landscape of the Work Product Doctrine

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**M**any tax professionals were disappointed by the Supreme Court's recent denial of certiorari in the *Textron* case,<sup>1</sup> in which the First Circuit Court of Appeals had held that the work product doctrine (sometimes called work product privilege) did not protect tax accrual workpapers. Even though *Textron* concerned federal taxes and federal courts, the possible implications for state taxes and state courts are obvious. Concerns over those state tax implications are highlighted by the need to protect often detailed "FIN 48" workpapers and by state taxing authorities' heightened aggressiveness, specifically in issuing subpoenas and generally in their handling of audits. While the IRS has historically exercised a policy of restraint against requests for tax accrual workpapers, state departments of revenue do not have such a policy. States have no specific barrier to requesting those workpapers and, once in their possession, the states may have information sharing agreements with other tax agencies that result in that information being shared.

We, counting ourselves among the disappointed, consider in this article the current status of the work product doctrine in the context of tax accrual

<sup>1</sup> The U.S. Supreme Court denied certiorari on May 24, 2010 in the case *Textron Inc. v. United States*, U.S. S.Ct. No. 09-750.

workpapers in state tax audits and state tax litigation, and take heart in the D.C. Circuit Court of Appeals' recent decision in *Deloitte* (citation below, issued after the Supreme Court's certiorari denial in *Textron*). We conclude that the Court's decision not to review *Textron* does not make the First Circuit's decision the law of the land and that protections still exist to prevent the compelled disclosure of tax accrual workpapers – that is, if your company has crossed its T's and dotted its I's.

## Background

Multistate businesses routinely engage in a variety of activities and transactions with tax implications that may result in litigation with the Internal Revenue Service or one or more state departments of revenue. Businesses often engage counsel to evaluate and opine on these matters, both in response to actual litigation threats (such as audit-related inquiries) or merely in anticipation that the activity or transaction will eventually result in litigation. Those opinions and memoranda are clearly protected by the attorney-client privilege, which is designed to encourage open communication between a client and attorney and prevents the compelled disclosures to an adversary of confidential communications seeking legal advice. But in the wake of FIN 48—and potentially in the wake of the IRS's pending requirements per Announcement 2010-9 for reporting uncertain tax positions—businesses often share (either willingly or as a requirement to receive audit sign-off) those opinions and memoranda with their financial auditors (which are, necessarily, independent third parties). Such disclosure waives the attorney-client privilege.<sup>2</sup>

The question remains, however, whether the work product doctrine can apply to tax accrual workpapers and, if so, whether sharing those work papers with outside auditors waives work product protection.

## *Textron*

The *Textron* case tested the scope of the federal work product privilege codified as Federal Rule of Civil

<sup>2</sup> In fact, merely disclosing the "gist" of an opinion may be enough to waive attorney-client privilege even if the actual written opinion or memoranda is not provided. *Long-Term Capital Holdings v. United States*, 2002 U.S. Dist. LEXIS 23224 (D. Conn. 2002), modified by 2003 U.S. Dist. LEXIS 7826 (D. Conn. 2003).

*(Continued on page 5)*

Procedure 26(b)(3). Federal Rule 26(b)(3) states: “[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”

Eight federal circuits apply the “because of” test to determine whether a document had been prepared “in anticipation of litigation” under Federal Rule 26(b)(3). Under that test, a document satisfies the “in anticipation of litigation” requirement when it is prepared because of the possibility of litigation even if the document was prepared for other purposes as well—thus, a document can be prepared for dual purposes (anticipation of litigation and for another purposes, such as financial statement use, and still qualify as work product). In conflict with this majority rule, the Fifth Circuit applies the “primary purpose” test under which a document is deemed prepared “in anticipation of litigation” when the “primary motivating purpose” for preparing a document is to assist in litigation.

In *Textron*, the First Circuit Court of Appeals aggravated the existing split between the majority rule and the Fifth Circuit by creating an altogether new test for determining when a document is prepared in “anticipation of litigation.” Under that new test, a document is prepared “in anticipation of litigation” only when it is “prepared for use in possible litigation.” As Judge Torruella demonstrated in dissent, *Textron*’s “for use in” test appears to be significantly narrower than both the widely-accepted and long-standing “because of” test and the Fifth Circuit’s “primary purpose” test.

Unfortunately, the U.S. Supreme Court’s denial of certiorari in *Textron* effectively makes it the final word in the federal courts *within the First Circuit*— unless, of course, it can be distinguished on its facts. Outside of the First Circuit, the *Textron* decision should have little legal impact, although it may embolden the IRS and state departments of revenue.

## Why An Answer Is Needed for State Tax Purposes.

To the extent litigants in state courts look to the federal courts for an appropriate standard for determining whether a document has been prepared “in anticipation of litigation,” the split among the federal courts may lead to confusion and unwarranted disclosures.

But what law should apply in state courts? Each of the fifty states has adopted a work product privilege that applies to civil litigation in the state’s court system. These are often identical to, or substantially similar to, Federal Rule 26(b)(3).<sup>3</sup> Because of such similarities, state courts routinely look to the federal courts’ interpretations of Federal Rule 26(b)(3) for guidance when interpreting the state’s work product privilege. Moreover, the states courts often look to federal guidance from circuits other than their own.<sup>4</sup> And because of the split in the federal courts, there could be a similar difference in the direction taken by various state courts that are in different federal circuits.

Realistically, any party seeking the production of documents will most certainly rely on *Textron*’s new “for use in” standard, while a party seeking protection will likely rely on decisions such as *United States v. Adlman*, 134 F. 3d 1994 (2d Cir. 1998), or *In re Grand Jury Subpoena*, 357 F.3d 900 (9th Cir. 2004), for the more inclusive “because of” test.<sup>5</sup> As a result, litigants could face uncertainty in each jurisdiction until the highest court in each of the fifty states considers and addresses the scope of the work product privilege.

Broad application of the *Textron* “for use in” test could force litigants to waive otherwise valid state-level work product privilege claims. With different tests for determining when a document is prepared “in anticipation of litigation,” the same document may fail the First Circuit’s test and not qualify for protection there but may satisfy another jurisdiction’s test and

3 See, e.g., *Soter v. Cowles Publishing Co.*, 174 P.3d 60, 72 (Wash. 2007) (Washington’s privilege is “nearly identical to” Federal Rule 26(b)(3)); *McKinnon v. Smock*, 336 N.W.2d 197 (Iowa 1983) (Iowa’s work product discovery limitations are the same as those pursuant to Federal Rule 26(b)(3)); *Kelch v. Mass Transit Admin.*, 400 A.2d 440, 446 (Md. 1979) (Maryland’s privilege is “substantially similar to” Federal Rule 26(b)(3)).

4 See, e.g., *Crowe Countryside Realty Assoc. v. Novare Engineers, Inc.*, 891 A.2d 838 (R.I. 2006) (Rhode Island work product decision in which the court relies on guidance from Third Circuit and Sixth Circuits); *Gall v. Jamison*, 44 P.3d 233 (Colo. 2002) (Colorado work product decision in which the court relies on guidance from Seventh Circuit, Fourth Circuit, and Tenth Circuits); *Gold Standard, Inc. v. Am. Barrack Resources Corp.*, 805 P.2d 164 (Utah 1990) (Utah work product decision in which the court relies on guidance the Fifth Circuit, Seventh Circuit, Ninth Circuit, and the D.C. Circuits).

5 One court has noted that the split in decisions between Fifth Circuit’s “primary purpose” test and the majority of circuits’ “because of” test was not particularly troubling to the business community because “the result [for tax accrual workpapers] is the same regardless of which test the court applies.” *Regions Fin. Corp. v. United States*, No. 06-895, 2008 WL 2139008 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13877 (11th Cir. Dec. 30, 2008).

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be protected in that second jurisdiction.<sup>6</sup> As a result of the differing treatment, the work product privilege protection that applies to a document in, say, the Eleventh Circuit, could be waived if a litigant was required to provide such document to an adversary in the First Circuit. In effect, the availability of the work product privilege could depend upon whether a particular issue has already been litigated in a “for use in” jurisdiction.

This situation is exacerbated by the federal-state and state-to-state information sharing agreements. Being forced to providing a document that fails the “for use in” test to one tax agency could result in that document being provided to other tax agencies in jurisdictions where the document would have been protected under the “because of” test (but for the production in the “for use in” jurisdiction).

The risks are more obvious with regard to matters arising within the First Circuit states (Maine, Massachusetts, New Hampshire, and Rhode Island) because the highest courts of three of those states currently employ the “because of” standard.<sup>7</sup> Since *Textron*, however, decisions from the highest court in each Maine, Massachusetts, and Rhode Island—which are binding on the state’s lower courts—appear to be in direct conflict with the interpretation of Federal Rule 26(b)(3) enunciated in *Textron* (but are consistent with the standards used in other circuits).

## The Massachusetts View: *Comcast*

In fact, *Commissioner of Revenue v. Comcast Corp.*, 901 N.E.2d 1185 (Mass. 2009), addressed facts quite similar to the facts in *Textron*. There, the Massachusetts Supreme Judicial Court determined that the state’s work product privilege prevented the compelled disclosure of the documents at issue. *Comcast* involved a Massachusetts tax audit during which the Massachusetts Department of Revenue examined the gain from a particular transaction and sought the production of documents relating to the transaction. Comcast provided some documents

6 Compare, e.g., *Regions Fin. Corp. v. United States*, No. 06-895, 2008 WL 2139008 (N.D. Ala. May 8, 2008), appeal dismissed, No. 08-13877 (11th Cir. Dec. 30, 2008) (Federal Rule 26(b)(3) applied to tax accrual workpapers) with *Textron* (Federal Rule 26(b)(3) did not apply to tax accrual workpapers).

7 See, e.g., *Commissioner of Revenue v. Comcast Corp.*, 901 N.E.2d 1185, 1203-04 (Mass. 2009); *Springfield Terminal Ry. Co. v. Department of Transp.*, 754 A.2d 353, 357-359 (Me. 2000); *Henderson v. Newport County Regional YMCA*, 966 A.2d 1242, 1247 (R.I. 2009).

but withheld others claiming that they were protected by the state’s work product privilege. The withheld documents had been prepared by accountants at the request of one of Comcast’s in-house attorneys and provided “a detailed analysis of Massachusetts tax law and an outline of the feasibility of the potential restructuring in light of applicable Massachusetts law and the potential for [Massachusetts Department of Revenue] litigation.”<sup>8</sup>

Relying on the First Circuit’s initial, but now-vacated, decision in *Textron*<sup>9</sup> for the proposition that the “work product doctrine protects tax accrual workpapers where [the] ‘function of the documents was to analyze litigation,’” the Massachusetts Supreme Judicial Court determined that the *Comcast* documents were prepared “‘because of’ the reasonable possibility of litigation with the [Massachusetts Department of Revenue].”<sup>10</sup>

Even though *Comcast* reflects the Massachusetts Supreme Judicial Court’s interpretation of the scope of the Massachusetts’ work product doctrine, some fear that the Massachusetts Department of Revenue will argue that documents similar to those protected from disclosure in *Comcast* are now discoverable under the revised *Textron* standard issued by the First Circuit. In response, Massachusetts businesses can be expected to assert that those documents continue to be protected, relying on Massachusetts Supreme Judicial Court precedent in *Comcast*. Consequently, taxpayers in litigation with the Massachusetts Department of Revenue may face protracted discovery battles regarding the scope of the work product doctrine.

## The D.C. Circuit Court Affirms the Continued Vitality of the Work Product Doctrine in *Deloitte*

Fortunately, a more taxpayer-friendly decision was recently issued by a different federal Circuit Court – namely the Court of Appeals for the D.C. Circuit.

In the course of tax litigation brought by Dow Chemical Company in the federal court for the Middle District of Louisiana, the government subpoenaed documents from Dow’s independent auditor, Deloitte & Touche USA, LLP (“Deloitte”). The subpoena was issued

8 901 N.E.2d at 1205 (internal quotations omitted).

9 *United States v. Textron Inc. & Subsidiaries*, 553 F.3d 87 (1st Cir. 2009) (vacated and replaced by 577 F.3d 21).

10 *Comcast Corp.*, 901 N.E.2d at 1205.

*(Continued on page 7)*

from the U.S. District Court for the District of Columbia because it required that the documents be produced in Washington DC. While Deloitte produced some documents, it withheld three documents as attorney work product. The government filed a motion to compel.<sup>11</sup>

One of the three documents was prepared by Deloitte, summarizing a meeting with Dow and outside counsel about the possibility of the tax litigation that ultimately ensued and the proper financial accounting treatment of the exposure related to that litigation. The other two were prepared (at least in part) by counsel – one by a Dow in-house attorney and another by Dow’s outside counsel. Dow had disclosed the latter two documents to Deloitte to enable Deloitte to “review the adequacy of Dow’s contingency reserves.” In fact, Deloitte had informed Dow that if Dow did not disclose those two documents, Deloitte might not be able to give Dow an unqualified audit opinion.

In its motion to compel, the government argued that the memorandum prepared by Deloitte was necessarily not attorney work product and, even if it was, Dow waived work-product protection when it orally disclosed the information recorded in the memorandum to Deloitte. The government also argued that Dow waived the work product protection that otherwise attached to its two legal memoranda when Dow gave them to Deloitte.

In affirming the D.C. District Court, the Circuit Court first rejected the government’s contention that a document prepared by a public accountant cannot receive protection under the work product doctrine. The Circuit Court noted that Federal Rule 26(b)(3) only partially codifies the work-product doctrine announced in *Hickman v. Taylor*, 329 U.S. 495 (1947), and does not provide an exhaustive definition of what constitutes work product. Specifically, the court noted that while Rule 26(b)(3) addresses only “documents and tangible things,” the *Hickman* definition of work product also extends to “intangible” things.<sup>12</sup> Thus, *Hickman* provides work-product protection for intangible work product (namely, mental impressions) even though Rule 26(b)(3) does not expressly do so. As such, the fact that Deloitte created the document in question did not preclude work product protection so long as the document contained the thoughts and opinions of counsel developed in anticipation of litigation.

The D.C. Circuit Court then rejected the argument that

<sup>11</sup> *U.S. v. Deloitte LLP*, D.C. Cir. Ct. App. No. 09-5171 (June 29, 2010), affirming in part, vacating and remanding in part, 2009-1 U.S.T.C. ¶150,450.

<sup>12</sup> 329 U.S. at 511.

because the memorandum in question was prepared by Deloitte as part of the routine audit process (and arguably not in anticipation of litigation), it could not constitute work product. After noting the split among courts regarding the proper test for determining whether a document was prepared “in anticipation of litigation,” the Circuit Court advised it applies the “because of” test, asking “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”<sup>13</sup>

The court concluded that the Deloitte memorandum recorded information prepared by Dow because of the prospect of litigation – rejecting the government’s argument that a document’s *function* (here, its use in a financial audit), not its *content* (attorney’s mental impressions), determines whether it is work product. The government also relied on *Textron* to argue that when a document was created to further an independent audit, it necessarily was not prepared in anticipation of litigation. Rejecting this, the court noted that the “because of” test it employs is broader than the Fifth Circuit’s “primary motivating purpose” test. The Court also distinguished *Textron*, questioning whether the *Textron* court was actually applying the “because of” test or had created a more exacting standard that looks to whether the documents were “prepared for use in possible litigation.” So, even though the Deloitte memorandum was created as part of a financial audit, it was still eligible for work product protection. The Circuit Court did remand the matter back to the District Court to review whether all, or only parts, of the Deloitte memorandum are protected as work product.

For the two memoranda prepared by Dow counsel, the Circuit Court also rejected the government’s argument that Dow waived work-product protection by disclosing them to Deloitte. Although the voluntary disclosure of attorney work product to an adversary waives work-product protection, the Court rejected the premise that Deloitte is a potential adversary of Dow. The Circuit Court acknowledged Deloitte’s power to issue an adverse opinion, but concluded that power does not cause Deloitte to be the sort of litigation adversary contemplated by the waiver standard. This was particularly clear when the question was more precisely drawn – namely, the court determined that the question should be whether Deloitte could be an adversary to Dow in the litigation that the documents at issue address, and not whether Deloitte could be Dow’s adversary in any conceivable future litigation.

<sup>13</sup> *Deloitte, supra* (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 2010)).

(Continued on page 8)

The Dow documents at issue would not likely be relevant to any future dispute with Deloitte and, as such, no waiver occurred in Dow's disclosure of the documents to Deloitte.

Nor did Deloitte's independent auditor obligations make it a conduit to Dow's adversaries. Dow had a reasonable expectation of confidentiality because Deloitte, as an independent auditor, has an obligation to refrain from disclosing confidential client information.<sup>14</sup>

As with *Textron*, the *Deloitte* decision is specific to one federal circuit – here, the D.C. Circuit Court of Appeals.<sup>15</sup> The solid reasoning behind the decision does, however, give some comfort to all businesses that struggle with the balance between satisfying the information demanded by financial auditors and concerns over protecting privilege.

## Conclusion

No doubt the parameters of the work product doctrine in the context of tax accrual workpapers will continue to develop in decisions issued by the myriad federal and state judicial bodies that resolve tax cases. In the meantime, every company should proactively manage its document protections. This involves careful consideration (and discussions with counsel and auditors)

- Document preparation – begin discussing work product with counsel when you request an opinion or memoranda to be produced. Is the particular advice being requested in anticipation of litigation? If so, the document itself should make this point perfectly clear. It is important to document your specific litigation directly

<sup>14</sup> American Institute of Certified Public Accountants Code of Professional Conduct, Rule 301.

<sup>15</sup> It is worth noting that the U.S. Tax Court rules clearly indicate that Tax Court trials are conducted in accordance with the rules of evidence applicable in non-jury trials held before the U.S. District Court for the District of Columbia. Tax Court Rule 143(a). The rules for the U.S. District Court for the District of Columbia follow and incorporate the Federal Rules of Civil Procedure (including rule 26(b)(3) – work product). As the *Deloitte* decision is from the U.S. District Court for the District of Columbia, the court's decision in *Deloitte* is the interpretation of federal work product that controls for the D.C. District. As a result, a strong argument can be made that the *Deloitte* interpretation of the how the work product doctrine applies to tax accrual workpapers should be the predominant interpretation for Tax Court purposes.

in the document, particularly since the individuals requesting the document may have moved on to other companies or retired by the time a department of revenue audits the year at issue. The authors of this article often include introductory language in opinions along the lines of “You have asked for our opinion regarding [XYZ transaction] because you expect to litigate the tax consequence of this transaction in various states. We understand that your concern is based on your past audit and litigation experience and the audit and litigation experiences of similarly situated corporations. We understand that, in addition to preparing for anticipated litigation, you may also incorporate our conclusions in your preparation of financial statements.”

- Maintaining document confidentiality in the regular course of business – it is important that protected documents not be circulated too widely because of the risk of waiver. We recommend that companies adopt procedures to segregated protected documents from non-protected ones.
- Maintaining document confidentiality during the discovery processes (in audit or in court proceedings). Just because auditors or state deputy attorneys general ask for a document, does not mean that your company is required to provide it. Instead, produce a privilege log that confirms the existence of a particular document but also preserves the protections for that document. Remember that voluntary disclosure to one state department of revenue will waive any protections in other jurisdictions.

Perhaps, one day, the Supreme Court will resolve the circuit split regarding whether tax accrual workpapers qualify for work product doctrine protection. Until that day comes (if it ever does), careful planning is required to ensure that protections are appropriate and substantiated and a watchful eye is needed to prevent inadvertent disclosure of protected documents.

## Property Tax

### Complete Auto and Property Taxation The TECO Barge Case

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In *TECO Barge Line, Inc. v. Wilson*, 2010 WL 2730591 (Tenn.Ct.App., July 9, 2010), (not final), the court had before it an objection to the constitutionality of ad valorem assessments against certain vessels moving through Tennessee. The taxpayer, n/k/a United Barge Line LLC (“United”), operates barges and tugboats for hire in the central states and throughout the Southeast. The barges haul mainly coal, grain and steel. Within Tennessee, United’s boats and barges travel principally on the Mississippi River, but regularly use the Tennessee River on trips between Alabama and Kentucky. United was not domiciled in Tennessee and neither owned nor leased any real property there.

United was assessed ad valorem property taxes with respect to its vessels for several years on the authority of Tenn. Code Ann. § 67-5-1301(a)(13), which provides, ungrammatically and ambiguously, for the assessment of

all of the properties of every description, tangible and intangible, within the state, owned by and all personal property used and/or leased by the following named persons . . . .

(13) Water transportation carrier companies which operate boats and barges over the waterways of this state for hire, which are registered with the United States army corps of engineers or any other federal or state agency and/or domiciled in this state and/or owning or leasing real or personal property located in this state.

The court interpreted the statute as restricted to property “used within the State,” a reading which, standing alone, would not appear to constrain its reach to property that has acquired a tax situs in the state.

The evidence showed that United owned 20 tugboats and 700 barges for the years in question. It further revealed that actual loadings within Tennessee (i.e., instances when United’s vessels did more than simply

move through the state in interstate commerce) amounted to .02 to .03 percent of systemwide loadings and were not pre-scheduled or part of United’s normal operating procedure, but were occasioned sporadically by requests from other barge lines. There was no evidence as to the “total number of United’s boats and barges that traveled on the Mississippi River through Tennessee.” The appellate court nonetheless concluded that the taxpayer’s “testimony supports the Commission’s determination that United regularly traveled within Tennessee over the Mississippi and Tennessee Rivers to conduct its boat and barge operations during the tax years in question.”

United challenged the assessments on Commerce Clause grounds, contending (as one of its arguments) that the “substantial nexus” prong of the four-part test articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) required habitual use of the state’s ports, not just regular use of waterways within the state. As a corollary, it objected that the fourth prong of the *Complete Auto* test, requiring that the disputed tax be fairly related to the services provided by the state, was not satisfied because traffic upon the subject waters did not burden state-provided infrastructure in the way that land vehicles traveling upon roads and bridges does. The appellate court upheld the assessments for 2005 through 2008. (Discussion of the reversal as to the assessments for earlier years as unlawful retribution for protesting the 2005 assessments is omitted from this article.) In sustaining the 2005-2008 assessments, the court may have reached the right result, but the ruling raises numerous questions.

At the outset, the question arises whether the case should have been treated as raising Due Process rather than Commerce Clause concerns. One of the cases cited in the opinion, *Braniff Airways, Inc. v. Nebraska Board of Equalization*, 347 U.S. 590 (1954), considered a Commerce Clause challenge to an apportioned ad valorem tax against flight equipment of Braniff. The airline, identifying its objection as one grounded in the Commerce Clause, contended that its aircraft acquired no **situs** in the state of Nebraska. It also asserted, unsuccessfully, that federal law regulating air transportation preempted state taxation. The record showed that Braniff flew into and out of Nebraska on a daily basis, making 18 regularly-scheduled landings and takeoffs per day, discharging and loading passengers, mail and freight and flying fixed air routes into and out of the state. Braniff also did some refueling in Nebraska, rented some depot space there and secured sundry services in the state in support of its operations. The three-part apportionment formula (averaging in-state percentage

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of arrivals/departures, revenue tons handled, and originating revenues) was not challenged. The Court said that Braniff's situs argument alluded to the wrong constitutional provision:

While the question of whether a commodity en route to market is sufficiently settled in a state for purpose of subjection to a property tax has been determined by this Court as a Commerce Clause question, the bare question whether an instrumentality of commerce has tax situs in a state for the purpose of subjection to a property tax is one of due process.

The Court treated the argument as preserved, nonetheless, and held that the "only question" implicated by the Due Process Clause was "whether the tax in practical operation has relation to the opportunities, benefits, or protection conferred or afforded by the taxing State." It concluded that the "eighteen stops per day by appellant's aircraft [established] sufficient contact" to sustain an apportioned ad valorem tax on Braniff's fleet. The opinion recognized that no individual plane was permanently in Nebraska, but said that the "basis of jurisdiction" to tax was the "habitual employment of the property," meaning the fleet at large, within the state, saying that "Nebraska certainly affords protection during such stops." The Court made no effort to "relate" or compare the tax imposed with the benefit of the protection afforded Braniff's property, and has previously made clear that such a weighing of relative values is not required. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The point for present purposes is that the *Braniff* question was characterized as one of situs, not substantial nexus, and the relevant constitutional safeguard was said to be the Due Process Clause. The question in relation to the *TECO Barge* case is whether invoking that clause, rather than the Commerce Clause, and considering situs rather than substantial nexus, would have yielded a different analysis.

In this regard, it is noteworthy that *Complete Auto* states the first prong of the four-part Commerce Clause test in terms of "activities:" the tax is examined to determine whether it "is applied to an *activity* with a substantial nexus with the taxing state." [emphasis supplied] The "substantial nexus" test has been widely used in the context of taxes, such as sales and income taxes, in which transactional activities constituting sales or yielding income, are the object of the tax. Taken at face value, the language does not seem applicable to *property* taxes. In fact, *Complete Auto* concerned

a Mississippi sales tax. In tracing the development of the four prongs of the Commerce Clause test laid out there, the opinion does not invoke earlier property tax cases (in which the question was the tax situs of the property), but analyzes other sales and income tax decisions. Among the precedents discussed are the following decisions: *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (New Mexico gross receipts tax imposed on receipts from sale of advertising space in publications); *Illinois Central R.R. Co. v. State of Minnesota*, 309 U.S. 157 (1940) (gross earnings tax); *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951) (Connecticut apportioned net income tax); *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954) (*Railway Express I*-tax on gross receipts for privilege of doing business); *Railway Express Agency v. Virginia*, 358 U.S. 454 (1959) (*Railway Express II*-reworded tax on going concern value based on gross receipts); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (apportioned business net income tax); *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948) (franchise tax for privilege of doing business measured by value of capital used, invested or employed in Mississippi—characterized in *Colonial Pipeline, infra* as a tax on "activities related to a corporation's operation of an interstate business"); and *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975) (capital stock value tax for privilege of doing business in the state).

On the other hand, the Court may not have intended a literal interpretation of the word "activity." It has, in other property tax cases, alluded to the activities of the owner in considering Commerce Clause objections. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564 (1997), the Court relied on the business activities of the Maine property owner in deciding that a property tax exemption violated the Commerce Clause. The activities were not considered as part of a nexus examination, however, but in describing the discriminatory effect the statute had in imposing a heavier tax burden on Maine camp operators whose clientele consisted chiefly of non-residents. Interestingly, the dissent mentions *Complete Auto*, with the implication that it is applicable to property taxes, as well as sales, income and other state or local levies.

No suggestion is made that the last three prongs of the *Complete Auto* formulation are inapplicable in testing a given property tax against the constraints of the Commerce Clause. Numerous cases, going back at least to *Pullman's Palace Car Co. v. Commonwealth of Pa.*, 141 U.S. 18 (1891), address the requirement of fair apportionment of ad valorem taxes where movables

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are concerned. As *Camps Newfound* illustrates, the discrimination prong is applicable to property taxes. And the fourth “fairly related” prong, whether viewed as a Commerce Clause requirement, a Due Process mandate, or both, is certainly applicable to property taxes, as *Braniff* shows. The question is the first prong, demanding “substantial nexus,” and its role in adjudicating property taxes.

The substantial nexus test of *Complete Auto* may be applicable to property taxation, but it does not appear that the Court has said so or explained the relationship between Commerce Clause substantial nexus and Due Process situs. Both appear to look to the contacts between the object of taxation and the jurisdiction asserting the right to tax. But as we know from *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Due Process and Commerce Clauses have very different concerns, the first focused on the fairness of imposing any tax, and the second having structural concerns, namely, the maintenance of a free-flowing national economy, unfettered by state and local barriers. Further, it is obvious that the “substantial nexus” prong demands that the relationship between the triggering activities and the taxing jurisdiction be “substantial.” At bottom, it is not apparent how the constitutional limitation requiring “situs” for property tax purposes compares with the “substantial nexus” constraint.

One approach might be to say that a property’s situs should first be ascertained. If a property has situs outside the tax jurisdiction, the Due Process clause should bar its taxation even if the owner as an entity, or its business activities, have substantial nexus with the jurisdiction asserting tax. Consider, for example, an owner with real property and business operations in Texas (not domiciled in Texas), and certain movables which never enter the State of Texas. The fact that the owner and its activities have substantial nexus and are subject to taxation within Texas would not cause movables habitually used only in Utah and Colorado, for example, to be subject to Texas ad valorem taxation. On the other hand, a corporation with property having a Texas situs would be subject to tax on such property, and would by virtue of having that property in Texas (unless *de minimis*) have substantial nexus with the state for purposes of other taxes.

This last point reveals a connection between “substantial nexus” and “situs” and an alternative approach might propose that the substantial nexus prong of *Complete Auto* subsumes the situs requirement. Thus the Court might say that where property taxes are concerned, a substantial nexus must obtain between the property to be taxed and the jurisdiction asserting

the power to tax the property. In that light, the *TECO Barge* opinion statement that the courts “have held that regular traffic through a state, including boat and barge traffic over a state’s waterways, is sufficient to create a “substantial nexus,” while not precisely accurate, may anticipate the resolution just considered. At the federal level, *TECO Barge* cites *Central R.R. Co. of Pa. v. Commonwealth of Pa.*, 370 U.S. 607 (1962) and *Braniff Airways, supra*, in support of the equation. Both discuss situs, but neither says anything about “substantial nexus.” In *Central R.R.*, the Court considered, as it had in *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952), the powers of the domiciliary state to lay an unapportioned tax against the full value of all of the taxpayer’s property, though it included instrumentalities of interstate commerce used in other states. The two decisions (*Central R.R.* and *Standard Oil*), incidentally, are not entirely consistent.

In *Standard Oil*, the Court rejected Ohio’s effort to tax all the Ohio corporation’s barges and ships saying that most, if not all, of the barges and boats which Ohio has taxed were almost continuously outside Ohio during the taxable year.” Citing *Ott v. Mississippi Barge Line Co.*, 336 U.S. 169 (1949), the Court said that under its holding, those vessels “could be taxed by the several states on an apportionment basis,” a result which “precludes taxation of all of the property by the state of the domicile.” One glaring deficiency in that analysis is hard to miss—there was no finding that any of the vessels had acquired a tax situs outside Ohio, a point made by dissenting Justices Black and Minton. And the case is factually unlike *Ott*, in which the Court held that vessels operating along the Mississippi and loading and unloading in New Orleans were subject to an apportioned ad valorem tax by Louisiana and New Orleans, as against Due Process and Commerce Clause challenges, because they had acquired a tax situs in those jurisdictions.

The *Ott* Court, by the way, was unwilling to consider the contention that since the vessels were not shown to be in Louisiana or New Orleans on a “continuous” basis throughout the year, the threshold applied in earlier cases like *Pullman’s Palace Car Co. v. Commonwealth of Pa.*, *supra*, they could not have situs there. Instead, it relied on **argument** by the state attorney general that “the statute was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.” The opinion also reflects a bit of jurisprudential melding, effectively equating the Commerce Clause and Due Process restrictions, saying the first is concerned with apportionment, the latter with the relation between the tax and benefits

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afforded by the taxing jurisdiction, then concluding that the Due Process “requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State.” One would not expect to be interested in the fairness of an apportionment scheme if the property were not taxable in the jurisdiction at all because it lacked situs there. To say it differently, the jurisdictional amenity of the property should be the first inquiry and only if that inquiry is resolved in favor of taxation should the question of apportionment come into play. Or again, an apportionment formula, regardless of its fairness, cannot confer situs or substantial nexus on property.

In *Central R.R.*, the Court sustained the state of domicile’s tax, a capital stock tax described as a property tax against the Pennsylvania company’s tangible and real property, including freight cars used in interstate commerce. This time the Court said that the taxpayer had failed to establish (except as to cars used exclusively in New Jersey) that any of the rail cars had gained tax situs outside Pennsylvania. In *dicta*, the opinion proposed that states through which the rail cars moved on fixed routes and regular schedules could tax them. In fact, it opined that tax situs might be acquired in other jurisdictions “even if the rolling stock does not follow prescribed routes and schedules,” but continued to insist that the cars would have situs only if “habitually employed” in some other such state or states.

*Braniff, Pullman’s Palace Car, American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899), and other decisions require that the property be “continuously present” or “habitually used and employed” in the taxing jurisdiction. These decisions reveal another conceptual complexity. While logic suggests that the apportionment question and the nexus question are distinct, they are intertwined, perhaps inextricably. In the case of a fleet of rail cars, trucks, aircraft or ships, the cases say that it is not a prerequisite to ad valorem taxation that any given unit be habitually used or present in the taxing jurisdiction. If the fleet at large is continuously in the taxing jurisdiction, through one or more such units, an apportioned share of the fleet value may be taxed—e.g., on the basis of the average number of vessels within a state during the tax year. That apportioned subset of the fleet is thus considered to have acquired situs for ad valorem tax purposes. It is in this regard that there is ample precedent for the *TECO Barge* outcome—if the record supports the conclusion that United boats and barges regularly traveled within Tennessee, the taxability of an apportioned share of those vessels was probably a foregone conclusion.

The decision is nonetheless at the margins in one important respect. If the few unscheduled loadings and unloadings within Tennessee are disregarded as *de minimis*, the case presents the question of a state’s constitutional authority to tax instrumentalities of interstate commerce which simply move through the state, albeit repeatedly—property which is at all times moving in the stream of interstate commerce. It has clearly not, in the historical vernacular, “come to rest as part of the mass property of the state.” United did present a related argument. It contended that the tax was not “fairly related” under the fourth prong of *Complete Auto*. The testimony reflected that the maintenance of the rivers it used, for example, through dredging to ensure continuing navigability, was provided by the U.S. Army Corps of Engineers. The same was true with respect to the provision and maintenance of buoys, channel markers and signage. There is no indication in the opinion that the state provided any police protection to vessels plying those rivers within Tennessee’s boundaries; they were U.S. Coast Guard jurisdiction. And the record established that United was required by controlling federal law to provide its own fire suppression systems and qualified operators. While the Court has declined to engage in a weighing of the tax against the cost or value of the services provided by the jurisdiction asserting the right to tax, it has never said that a tax would be upheld in the wholesale absence of any such benefits.

Regrettably, the Court has substantially diluted any operational effect the fourth “fairly related to services” prong might otherwise have. In *Commonwealth Edison Co. v. Montana*, 453 U.S. 623 (1981), it said that “the test is closely connected to the first prong of the *Complete Auto Transit* test . . . [and that the only] additional limitation [it imposes is] that the measure of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a ‘just share of the state tax burden.’” At first blush, even that formulation seems somewhat encouraging, appearing to permit the argument that a tax is not reasonably related to the “extent of the contact” if there is no contact between the parties in the form of services available to the taxpayer.

On the other hand, this iteration plainly changes the examination from one looking at the relationship between the tax imposed and the “services provided by the state” into one considering an entirely different relationship—that between the tax and the “extent of the taxpayer’s activities or presence.” Whether the state or local taxing authority provides any services arguably becomes irrelevant—it is no longer an express

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requirement of the fourth prong. And *Commonwealth Edison* further emasculated the fourth prong saying that “the only benefit to which the taxpayer is constitutionally entitled . . . [is] that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes.” That restatement of the test virtually nullifies any function the fourth prong might otherwise serve since every state and local government is part of the provision of an “organized society” and devotes taxes to public purposes. The “restriction” is so understated, in fact, that it would seem to sanction a tax against a party with no business, property or other contacts whatever in the jurisdiction—because the state, in devoting taxes to public purposes, helps establish an organized society not just within its boundaries but in other states as well. Thus, businesses in State A, having no contact whatever with State B except the receipt by mail of purchases from vendors in State B, could be said to benefit from the organized national society which State B is part of maintaining. For purposes of the *TECO Barge* ruling, the point is simply that there should be some meaningful constitutional *quid pro quo* prerequisite to taxation. While an exact weighing of taxes imposed on a given taxpayer against the cost or value of the benefits that taxpayer receives is patently unworkable, the “civilized society” version of the test makes no real demand at all that the taxing jurisdiction justify its levy through a showing that some services and benefits obtain beyond their participation in American “civilization.” All state and local government levies would always satisfy this constitutional “test,” with the result that the only question is whether the taxpayer, its activities and/or property have the required nexus with a given taxing jurisdiction. If mere movement through the geographical boundaries of a state or local tax jurisdiction are constitutionally sufficient, without more, then aircraft will be subject to ad valorem taxes in every jurisdiction whose airspace they enter, though they never touch down or receive any benefits from those jurisdictions.

If the *TECO Barge* case sees further appellate review, it would be extraordinarily helpful to see the court explain the relationship between “substantial nexus” and “situs” in the context of property taxation, and indicate the Commerce Clause or Due Process limits, if there are any, on a state’s prerogative to tax instrumentalities of interstate commerce that never come to rest in the jurisdiction and enjoy no services from the taxing jurisdiction.

## Sales and Use Tax

### A Beehive of Activities SALT Issues Focus on Digital Goods and Services

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**S**ALT professionals have always found themselves confronted with issues arising from changing technologies. The increasing availability of digital goods and services has only accelerated the pace at which new questions emerge. The sales and use tax disputes often cluster around the definition of “tangible personal property” since intangibles are not subject to sales taxes and services are generally taxed only on a specifically-enumerated basis. The demarcation between tangible personal property and services has manifested itself in such rules as Florida Administrative Code Rule 12A-1.062(5), which reads, in part, as follows:

The charge for furnishing information by way of electronic images which appear on the subscriber’s video display screen does not constitute the sale of tangible personal property nor does it constitute the sale of a taxable information service.

That rule derives from litigation in which the author was counsel for a financial information service that provided, among other kinds of content, real-time trade information from the floors of various stock exchanges.

Florida rules draw another distinction found in a number of jurisdictions—between “canned” software, treated as tangible personal property, and “custom” software, treated as a non-taxable service. FAC Rule 12A-1.032(4) provides, in part, that

The charge which a computer technician makes for a customized software package . . . is construed to be a service charge and exempt. Retail sales of pre-packaged programs . . . where the programs are fully useable by the customer without modifications . . . are taxable as sales of tangible personal property. However, where the vendor, at the customer’s request, modifies or alters a pre-packaged program to the

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customer's specification and charges the customer for a single transaction, the charge is for a customized software package and is exempt as a service transaction.

While the sale or licensing of canned software is generally taxable under the rule, if it is delivered via electronic download, the Department regards the transaction as a non-taxable service transaction—because there is no transfer of tangible personal property. AA 10A-028.

The Pennsylvania Supreme Court came to a different conclusion in a recent ruling. It held that canned software is tangible personal property for sales tax purposes, and that licensing of the same is taxable, even if the software is downloaded electronically. *Deckert LLP v. Commonwealth of Pennsylvania*, 2010 WL 2817174 (Pa., July 20, 2010). The statute defines “tangible personal property” as “corporeal personal property,” but the examples listed in the definition do not include software. The court deferred to a Department statement of policy issued in wake of the repeal of tax on “computer programming services” that said the sale of canned software “remains taxable.” The court inferred from the statement that such software was taxable before and after that legislation. Prior to a 2005 Commonwealth Court ruling holding canned software taxable, *Graham Packaging Company LP v. Commonwealth of Pennsylvania*, 882 A.2d 1076 (Pa. Cmwlth. 2005), the Department had always treated electronic downloads of software, even if canned, as not entailing any transfer of tangible personal property. A motion for reconsideration and application for reargument has been filed with the court raising this matter and making the point that there was no extant agency policy to which deference should be given. In *Graham Packaging*, the lower court concluded that canned software was tangible personal property, and that when electronically downloaded by a customer, it was an electronic copy that still has a physical form. On an “essence of the transaction” basis, therefore, the customer was held not to be purchasing mere knowledge, an intangible, but the tangible copy of an electronic program that has a physical existence on some remote disc or other medium.

Digital delivery is an issue other than just in the context of software, of course. The Florida Department of Revenue has opined that the sale of video downloads by streaming over the Internet is the sale of a taxable “communication service.” TAA 10A-031. The taxpayer was not providing Internet access, which

customers acquired separately. The Department concluded that the taxpayer was selling subscribers “a digital **video programming service** that is delivered over a broadband network using Internet protocol for transmission.” [emphasis in original] The term “communications service” is expansively defined for CST and gross receipts tax purposes as “the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points by or through any electronic, radio, satellite, cable, optical, microwave, or other medium or method now in existence or hereafter devised, regardless of protocol used . . . .”

This last ruling is part of a national debate over the proper treatment for sales and use tax purposes of “digital equivalents,” in particular books, music, and movies that sold in the form of bound publications, CDs or DVDs is routinely taxed as the sale of tangible personal property. The Streamlined Sales and Use Tax Agreement generally addresses “specified digital products,” “digital audio video works,” “digital audio works,” and “digital books” separately from “tangible personal property” and from “ancillary services,” “computer software,” and “telecommunications services.” S. 332A. Such products are defined in Appendix C, Definition of Products Definitions, and by exclusion from other defined terms (see above). The Agreement generally restricts tax to a sale to or use by the “end user” (excludes electronic transfer “for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, distribution, redistribution, or exhibition of the product, in whole or in part, to another person or persons”). S. 332D.1. Further, any tax on less than “permanent” (indefinite) use of such products must be specifically imposed. The Agreement mandates parallel treatment of “specified digital products” which are transferred electronically and those which are transferred in tangible form—e.g., if electronically downloaded canned software is exempt, canned software sold on a disc must also be exempt.

On June 30, 2010, HR 5649, the Digital Goods and Services Tax Fairness Act of 2010 was introduced in Congress by Rep. Rick Boucher (D-Va.) and Rep. Lamar Smith (R-Tx.). The Act bears some resemblance to the Internet Tax Freedom Act. It prohibits, for example, multiple and discriminatory taxes by state or local jurisdictions on or with respect to the sale or use of digital goods or digital services. S. 3. And it defines “multiple” and “discriminatory” in similar terms. The term “multiple tax” is defined to mean “any tax with respect to which no credit is given for comparable



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taxes paid in other States or local jurisdictions on the same transaction.” S. 6(10). A “discriminatory tax” is a state or local tax imposed with respect to the sale or use of a digital good or digital service at a higher rate than on tangible personal property or similar services “that are not delivered or transferred electronically.” S. 6(8)(A). A tax is also discriminatory if imposed on a seller of digital goods or services at a higher rate or on a broader tax base than that generally imposed on sellers dealing in tangible personal property or similar services not delivered or transferred electronically. S. 6(8)(B). Finally, the definition treats a tax as discriminatory if it requires collection by different sellers or on other terms disadvantageous by comparison with those applicable to sales of tangible personal property or similar services not delivered electronically, taking all taxes, rates, exemptions, deductions, credits, incentives, exclusions and similar factors into account for this purpose. S. 6(8)(C). The Act would make the ban on such multiple and discriminatory taxes permanent.

The term “digital good” means “any good or product that is delivered or transferred electronically to the customer, including software, information maintained in digital format, digital audio-video works, digital audio works, and digital books” and the term “digital service” means “any service that is delivered or transferred electronically,” including remote access to or use of a digital good, but excluding “telecommunications service, Internet access service, or audio or video programming service.” “Audio or video programming service” is defined to mean programming provided by, or comparable to that provided by, a radio or television broadcast station. “Video programming” is defined to exclude on demand, pay-per-view and similar services. The phrase “delivered or transferred electronically” is defined to mean “delivered or transferred to the customer by means other than tangible storage media,” and includes remote access or use of products and services. S. 6(2). The exclusion of telecommunications service is intended, at least in part, to preclude the taxation of digital goods and services under pre-existing telecommunications services tax laws. The Florida ruling cited above, treating digital video programming service as a “communications service” would be an example. As in some other jurisdictions, the Florida treatment would also run afoul of the proscription against discriminatory taxation since communications services are taxed at a higher rate than the sales tax rate applicable to tangible personal property.

The Act is drafted so as to constrain tax to the final retail sale. It restricts the imposition of tax to “a sale to, or use by, a customer,” S. 4(a), and defines “customer” to mean a “person that purchases a digital good or digital

service, for a purpose other than resale.” S. 6(1). In terms similar to the Streamlined Sales and Use Tax Agreement, the phrase “purchase for resale” includes the purchase of a digital good or service for further commercial broadcast, rebroadcast, transmission, retransmission, licensing, relicensing, reproduction, copying, distribution, redistribution, or exhibition of the digital good or digital service, in whole or in part, to another person.”

While state sales taxes on tangible goods and enumerated services generally include resale provisions, and anti-pyramiding statements, they effect, intentionally it would seem, some multiple taxation with respect to covered goods and services. This happens, in part, because the term “retail sale” (the transaction triggering tax) is routinely defined as a sale for *any* purpose other than resale and such laws ordinarily require strict adherence to resale requirements, such as the timely procurement of a resale certificate from the purchaser. Thus sales in which any incidental use is made by the purchaser will preclude resale treatment, and items that are in fact resold may be taxed twice or more in succession by virtue of a buyer’s failure to supply the required resale documentation to the seller. Where services are concerned, resale treatment is often limited to sales to purchasers engaged in the sale of services, so that services that are a direct cost of goods transactions are subjected to multiple or pyramiding taxation. The Act is intended to avoid such results where digital goods and services are concerned.

In addition, the Act adopts sourcing rules designed to attribute each digital good or service transaction to a single state and local jurisdiction. It does so by restricting the power to tax to the state and local jurisdiction “whose territorial limits encompass the customer’s tax address.” S. 4(b)(1). The term “tax address” is defined by reference to a series of rules that tie to those found in the Mobile Telecommunications Sourcing Act and Streamlined Sales and Use Tax Agreement. The Act explicitly adopts sourcing rules promulgated pursuant to the Agreement. The default rules first define the customer’s tax address as the “customer’s primary place of use” per s. 124 of 4 U.S.C. in the case of digital goods or services sold by a provider of mobile telecommunications services sourced under s. 117 of that law, if furnished in conjunction with such services. S. 4(b)(2)(A). That effectively ties such related services together for sourcing purposes and defers to the federal sourcing rule. If that rule is not applicable, the tax address is the business location of the seller if the digital good or service is received by the customer there. S. 4(b)(2)(B). If neither the subparagraph (A) or (B) rule is applicable, the tax

*(Continued on page 16)*

address is such other location where the customer receives the digital good or service, if known to the seller (subparagraph C), and if none of the first three rules apply, then the customer's address, including the address of the customer's payment instrument (e.g., check) if no other address is available. The last default rule uses the selling address.

Specific treatment is accorded bundled transactions. Section 5 of the Act provides that if the charges for digital goods or services are aggregated with the charges for other goods or services, the digital goods and services may be taxed at the same rate and on the same basis as such other goods and services—unless the seller “can reasonably identify the charges for the digital goods or digital services from its books and records kept in the regular course of business.” That provision mirrors similar treatment in s. 123(b) of the Mobile Telecommunications Sourcing Act and allows the seller to disaggregate charges for digital goods and services from a bundled charge that would otherwise be fully taxable.

The Act creates exemptions for “digital education service,” “digital medical service,” and “digital energy management service.” S. 4(d) and S. 6(4)-(6). Each such service is defined. Since the Act does not bar taxation of digital goods and services, the exemptions are presumably intended to protect against taxation of such services if tax is otherwise generally imposed upon services delivered electronically. Sales and use taxes, even when applicable to services, ordinarily exempt education and health services—as a means of making the tax less regressive. Energy management services are frequently exempt as a matter of public policies favoring lower energy costs.

The Act proscribes the extension of taxes on the sale or use of tangible personal property, telecommunications service, Internet access service, or audio or video programming service to digital goods and services by way of administrative regulation, ruling or other interpretive measure. This prohibition responds to such a development within nearly a dozen states whose statutes do not specifically address the sales or use tax treatment of goods and services delivered electronically. It would require the issue to be dealt with by legislatures, rather than tax collection agencies. Excluded from the prohibition are administrative constructions that have been approved in a judicial determination rendered on or before June 30, 2010.

Finally, the Act confers jurisdiction over violations to federal district courts. S. 7. And the Secretary of Commerce, in consultation with the Secretary of the Treasury and the Executive Director of the Streamlined Sales Tax Governing Board, would be authorized to

promulgate implementing regulations. S. 8. It is not clear whether such regulatory authority is intended to preempt regulations by states with respect to taxation of digital goods and services. The Act applies to state and local taxes imposed on the sale or use of digital goods, whether imposed on the vendor or customer, whether measured by gross receipts or as a fixed charge, and irrespective of its name, but specifically excluding ad valorem taxes and taxes measured by net income. Its overarching goal is a nationally uniform sales and use tax approach to digital goods and services.

In other developments, the South Carolina Taxation Realignment Commission (TRAC) has released a draft report that would make a substantial number of changes to its sales and use tax laws, including but not limited to the taxation of software and electronically delivered products. The draft report of June 28, 2010, proposes the elimination of some \$700 million worth of “exemptions,” a recommendation which is in a number of instances actually a recommendation for a new tax, not the repeal of an exemption. Included in the recommendations are the following provisions:

- subjects to sales and use tax data processing services, software delivered over the Internet, and digital products (e.g., books, movies and music) as defined in the Streamlined Sales and Use Tax Agreement;
- adds an Amazon “click through” nexus provision;
- adds an affiliate nexus presumption for Internet sellers similar to that adopted in Colorado and elsewhere;
- subjects to tax direct material promotional advertising materials;
- taxes both canned and custom software, regardless of method of delivery;
- repeals the exemption for sales to the federal government (an interesting proposal given the prohibition under the U.S. Constitution against taxation of the federal government);
- repeals the exemptions for newspapers, water sold by public utilities and non-profits, farm products sold by producers, hearing aids, drugs, prosthetic and other medical devices and supplies;
- subjects groceries to tax at a 2.5% rate.

A host of other revenue-yielding measures are included in the report, which had its first reading on July 21, 2010. Public comment began at a meeting on August 13, 2010.

## Value Added Tax

### The Determination of Value Added

**Dr. Robert F. van Brederode**

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**M**any countries favor sales tax systems in which taxes are imposed at all stages of the production and distribution chain to prevent tax accumulation and its associated detrimental economic effect in disturbing economic neutrality between businesses. This can be realized by taking into account at each stage subsequent to the first the tax paid at an earlier stage, and taxing only the value added since the previous stage by each individual business. Value added is the value that a business or producer adds to raw materials or purchases other than labor prior to selling the thus-improved product or service. Table 1 demonstrates the value added of a business, basically the difference between gross turnover (sales) and costs of procurement.

**Table 1: The Value Added in the Manufacturer and Distribution Chain**

| VAT rate 10% | Input | Value Added | Sales Price |
|--------------|-------|-------------|-------------|
| Producer 1   | -     | 150         | 150         |
| Producer 2   | 150   | 50          | 200         |
| Wholesaler   | 200   | 30          | 230         |
| Retailer     | 230   | 70          | 300         |

The question arising is which methodology is the most appropriate to determine the value added of a particular business. In principle, three distinct approaches are available. The first method seeks to tax the total of all elements that constitute value added (addition method). The second method taxes the difference between total outputs minus total inputs, or in other words, value added is determined by deducting total procurement costs from total turnover (subtraction method). The third method deducts the tax paid on procurement costs from the tax due on total sales (tax from tax method).

### 3.2.2.1. Addition Method

Under the addition method, all elements of the turnover of a business are taxed insofar as they have not been taxed at previous stages of the distribution chain. In essence, the value added of a business is determined by adding up its profit, wages (including employer's social insurance tax), income in the form of government subsidies, royalties and interest, and multiply the sum with the statutory tax rate. On a national scale, the addition method VAT has not been adopted anywhere, but Israel applies it to the financial sector.<sup>1</sup> The state of Michigan applied a Single Business tax (SBT) from 1976 through 2007, which was, in essence, a modified addition VAT. It derogated from the standard form in that it provided for an apportioned formula, allocating one third of the tax base to the place of production and two thirds to the place of sale, mixing origin and destination principles. As a result, imports received a competitive advantage since they were tax significantly lower than domestically produced goods.<sup>2</sup> The New Hampshire Business Enterprise Tax is also an addition VAT levied on businesses with turnover beyond a certain threshold. The tax base is apportioned to New Hampshire on the basis of a three factor formula. The BET liability can be credited against a business' liability under the state's business profits tax.<sup>3</sup> The addition method cannot accommodate multiple rates, because company accounts do not distinguish different product categories within their sales that coincide with different sales tax rates, nor do they divide inputs by differential tax liabilities.<sup>4</sup>

### 3.2.2.2. Subtraction Method

Like the addition method, the subtraction method is an accounts-based method that relies on aggregative data over a fixed period of time (generally a year) to compute the value added. The subtraction method VAT is imposed on gross receipts of a business, but allows certain deductions. Total purchases in a certain tax period are deducted from total sales in that same period to arrive at the value added generated by the business, and the tax liability is calculated by multiplying the value added with the statutory tax rate, or  $t$  (output  $-$  input). Generally, business gross receipts neither include interest or similar income, nor proceeds from the sale of notes, bonds, and similar assets. Inputs are

<sup>1</sup> See Alan Schenk and Oliver Oldman, *Value Added Tax: A Comparative Approach*, Cambridge, 2007 at p.328.

<sup>2</sup> *Supra*, at p. 400.

<sup>3</sup> *Supra*, at p. 403.

<sup>4</sup> Alan A. Tait, *Value Added Tax: International Practice and Problems*, (Washington, DC, IMF, 1988), at p.5.

*(Continued on page 18)*

immediately deductible, i.e., expensed, and capital goods, therefore, are not subject to depreciation rules. Typically, however, wages and interest payments are non-deductible.

This method cannot accommodate multiple rates and because of its close resemblance to an income tax there exist serious doubt whether border tax adjustments of a subtraction VAT are permissible under WTO rules.

### 3.2.2.3. Tax Credit Method

This method calculates the tax on a transaction-by-transaction basis, and has, therefore, the advantage of accommodating a multiple rates consumption tax. In principle, each transaction is subject to the tax. A business will charge tax on its sales and incur tax on its purchases. Over a statutory reporting period (generally a calendar month, quarter or calendar year, depending on the level of total gross turnover or the estimated total tax due) a business will determine its tax liability by deducting the total amount of tax paid on procurement in the period from the total amount of tax charged on its sales in the period.

**Table 3: Tax from Tax Method VAT**

| VAT Rate 10% | Sales | Tax on Sales | To Treasury   |
|--------------|-------|--------------|---------------|
| Producer 1   | 1,000 | 100          | 100           |
| Producer 2   | 2,000 | 200          | 200-100 = 100 |
| Producer 3   | 3,000 | 300          | 300-200 = 100 |
| Wholesaler   | 4,000 | 400          | 400-300 = 100 |
| Retailer     | 5,000 | 500          | 500-400 = 100 |
| Total        |       |              | 500           |

In this simplified model, we assume that each stage of the production and distribution chain creates an additional value of 1,000 to a single product. Producer 1 made his product from scratch and has, therefore, no inputs. When he sells his product for 1,000 he has to charge an additional 100 in tax (rate 10%) for a total sales price of 1,100. On his periodical tax return, he has to account for the 100 in tax and remit this amount to the taxing authority. Producer 2 adds 1,000 in value and sells the product for 2,000 plus 200 in tax, thus for a total of 2,200. On his tax return, he will account for the tax on the sale, but he also receives a credit for the tax paid on his procurement. Producer 2 deducts the 100 in tax paid to producer 1 from the tax due on his sale to producer 3, and remits the difference (200

-/ 100) of 100 to the taxing authority. Each business will be required to operate two bookkeeping ledgers in record of the tax. One to register the tax payable on sales (output-tax), and another to register the tax credit on procurements (input-tax). The total amount of tax credits over the statutory period is then deducted from the total amount of tax payable, and the difference is the tax due.

Since a discount is provided at each stage of the production and distribution chain for tax paid to the previous stage, in the end, the final consumer pays exactly 10%, the statutory rate, in tax over the retail price, and no tax accumulation occurs. As this example demonstrates in simplified form, each stage of the production and distribution chain pays in effect tax over his value added, measured as the difference between tax on sales and tax on procurement. Tax is charged on each sale, and a tax credit arises in regard of each purchase. In this sense, this system qualifies as a transaction tax. However, the value added over the statutory tax period is not calculated on a transaction basis. Tax payable is computed as the total tax charged on all transactions, and the tax credit is the total tax incurred on all purchases in a given tax period. In practice, a business may very well buy products that are not sold in the same tax period. Products bought remain tax free in stock until they are resold or used in the production of another good or service that is subsequently sold. In addition, most tax from tax systems allow for the immediate deduction of tax paid in relation to capital goods, although they are used over a longer period of time. In other words, the value added of a particular business is estimated on an aggregate level over an arbitrary time period. In this sense, the name value added tax is not completely accurate. The value added is assessed indirectly by applying the tax rate "to a component of value added (outputs and inputs) and the resultant tax liabilities are subtracted to get the final net tax payable."<sup>5</sup>

### 3.3. Summary and Evaluation

There are in essence two methods and four sub-systems to tax value added. Value added is either approached from a composite perspective and it is determined by adding those elements that constitute the value added, or from a subtractive perspective, deducting costs from turnover. In other words, value added can be defined in terms of additive elements or in subtraction elements:

<sup>5</sup> Alan A. Tait, *Value Added Tax: International Practice and Problems*, (Washington, DC, IMF, 1988), at p.5.

*(Continued on page 19)*

Value added = Wages + Profits  
or  
Value added = output -/- input

The four basic forms lead to the same result and can be classified as either direct or indirect.

The direct additive or accounts method =  $t(w+p)$

The indirect additive method =  $t(w) + t(p)$

The direct subtractive method =  $t(\text{output} -/- \text{input})$

The indirect subtraction method =  $t(\text{output}) -/- t(\text{input})$

Where  $t = \text{tax}$ ;  $w = \text{wages}$ ; and  $p = \text{profit}$

The direct methods resemble in approach most taxes in the sense that they first determine the tax base, such as income or wealth, and then apply the tax rate to that value. Interestingly, it is the indirect subtraction or credit invoice method which has enjoyed unsurpassed proliferation. According to Tait<sup>6</sup> there are four principal reasons for this. Most importantly, under a credit invoice VAT the tax liability is attached to the transaction, which makes it superior from a legal and technical perspective. The second advantage is the audit trail created by the mandatory invoicing on a transaction basis. Thirdly, direct methods can not accommodate a multiple rate VAT, where indirect methods can. The fourth reason is that the credit invoice method VAT is the most practical one, since the tax liability can be calculated on a weekly or monthly, or quarterly or annual basis.

6 *Supra.*, p.5 and 6.



## Mark Your Calendar for a new program!

**Credits and Incentives Symposium**  
November 9 - 11, 2011  
Hyatt Regency Monterey Hotel  
Monterey, California

IPT President Robert D. Butterbaugh, CMI announces a new addition to the Institute's educational programs - a Credits and Incentives Symposium.

This new program will be presented for the first time in 2011 and was approved by the IPT Board of Governors at their June 2010 meeting in Phoenix, Arizona. The 2011 Credits and Incentives Symposium will be held November 9 - 11 at the Hyatt Regency Monterey Hotel in Monterey, California, immediately following the 2011 Income Tax Symposium.

## Income Tax Symposium ~ November 8 - 11, 2010 Doral Golf Resort ~ Miami, Florida

This two and a half-day state and local income tax symposium features general presentations of timely interest to all state and local income tax professionals as well as specialized breakout sessions. The program, developed to emphasize practical applications of theories, techniques, and procedures to everyday situations, will be valuable to state and local income tax representatives from all industries at all levels of experience.

[Program](#)

[Registration](#)

[Hotel Reservation](#)



## CMI CANDIDATE CONNECTION



## CMI CORNER

### QUESTIONS OF THE MONTH:

**Q** **uestion:** What IPT schools will I be required to complete, and how are education points calculated?

Click on the appropriate link ([Property](#), [Sales](#), [Income](#)) to go to the Education Checklist in your tax specialty for detailed information regarding the requirements to become an eligible candidate and for guidelines in calculating education points.

**Q** **uestion:** What if my application is reviewed and found to be short of education points?

You may submit additional education documentation to supplement your original application. Applicants are strongly encouraged to be liberal, rather than conservative, when submitting education documentation for credit. Applicants **MUST SUBMIT DOCUMENTATION TO IPT** as they attend additional programs in order to update their eligibility status. This includes IPT programs. IPT program attendance is NOT automatically linked to CMI applications.

**Q** **uestion:** Can I submit education from training provided by my employer?

Yes, as long as it meets the requirements as described in the CMI Brochure, and proper documentation is provided.


**Q** **uestion:** Do you have a list of courses that are pre-approved?

No, IPT reviews each course individually after a completed application is submitted.

Any questions regarding the CMI Professional Designation can be addressed to Christina Akin, Manager of Education and Certification programs at [cakin@ipt.org](mailto:cakin@ipt.org) or Emily Archer, Certification Specialist at [earcher@ipt.org](mailto:earcher@ipt.org).

**H**ow can I check on my CE credits earned towards my designation?

A report is sent by e-mail each year to all CMIs indicating their status. However, if you need one immediately, simply send an e-mail to Christina Akin at [cakin@ipt.org](mailto:cakin@ipt.org) or Emily Archer at [earcher@ipt.org](mailto:earcher@ipt.org), and we will send you a copy of your most recent status report. If your term is expiring in the current year and you are short of any credits, you will receive several e-mails before the end of your term indicating what items are missing.



## TTARA


Texas Taxpayers and Research Association

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### Annual Membership Meeting

October 13-14, 2010  
AT&T Conference Center, Austin, TX

This two-day meeting will offer an excellent preview of "things to come" for TTARA and the taxpayers of the state as lawmakers prepare to convene in the 82<sup>nd</sup> regular session of the Texas Legislature. You can view the agenda and register for the meeting by [CLICKING HERE](#)



### CODE OF ETHICS - CANON 20

**IT IS UNETHICAL to have, acquire, or seek a personal interest in a matter that is adverse to the interests of a client or employer.**

## ONE-DAY TAX SEMINARS



### **WISCONSIN ONE-DAY TAX SEMINAR**

Monona Terrace Convention Center  
Madison, Wisconsin  
September 23, 2010

[Wisconsin One-Day Tax Seminar Brochure](#)

[Wisconsin One-Day Tax Seminar Registration Form](#)

### **GEORGIA ONE-DAY TAX SEMINAR**

The Atlanta Marriott Century Center  
Atlanta, Georgia  
November 19, 2010

Information on this program will be posted on our website at [www.ipt.org](http://www.ipt.org) as soon as it becomes available.



### **Sales Tax Symposium Renaissance Esmeralda Indian Wells, California September 26 - 29, 2010**

This two and a half-day sales and use tax program features general presentations of timely interest to all sales and use tax professionals as well as offering more specialized discussion sessions. It is designed to provide exposure to up-to-date practices, alternate methods and approaches, as well as being a comprehensive review of the current state of the art in the sales and use tax field.

[Program](#)   [Registration](#)   [Hotel Reservation](#)

### **Value Added Tax Symposium Renaissance Esmeralda Indian Wells, California September 29 - October 1, 2010**

IPT's much anticipated 1st VAT Symposium will be held this fall. Whether you are a full-time VAT Tax professional, or a sales tax manager with VAT responsibilities, this two and one-half day program will provide you with the ideas, tools and resources to assist you in your practice. Featuring some of the leading experts from America and abroad, it will offer sessions on the current issues facing the field today.

[Program](#)   [Registration](#)   [Hotel Reservation](#)

## Intermediate Personal Property Tax School

October 10 - 15, 2010  
Atlanta, Georgia

### Program

### Registration

### Hotel Reservation

If you are searching for ways to enhance your skills in personal property tax management, this school is for you. The IPT Personal Property Tax School builds on your fundamental knowledge of property tax issues using a unique arrangement of informative lectures and participation in small group workshops. Students will be able to expand their current knowledge of personal property tax, classification, valuation, audits, and appeals. Previous coursework or experience is recommended. Don't miss this opportunity to enhance your career.

## Advanced Sales Tax Academy

November 8-11, 2010 ~ Doral Hotel ~ Miami, Florida

[Program](#)   [Registration](#)   [Hotel Reservation](#)

The following is a chronological, topical overview of the program.

- General Session: **What's on the Economic Horizon**
- General Session: **States' Reaction to a Bad Economy**
- General Session: **SSTA Implementation - Top to Bottom**
- General Session: **Digital Goods**
- Breakout Session: Case Study Session - **Dealing With Downsizing - Part 1**
- General Session: **Internet and Other Remote Seller Taxation: Constitutionally Permitted?**
- General Session: **Tax Considerations for Corporate Business Activities**
  - Leasing of Tangible Personal Property - Is My Lease Subject to Sales/Use Tax?
  - Over-collection of Sales Tax: A Windfall for States?
  - VAT: What the U.S. Tax Professional Needs to Know
- Breakout Session: Case Study Session - **Tax Department as a Profit Center - Part 2**
- General Session: **Tax Considerations in the Corporate Business Environment**
  - Changes in Business Structures
  - Voluntary Disclosure - Don't Get Hit by a Big Stick When You Go After the Carrot
  - ERP Implementation Strategies: Why Should Tax have a Seat at the Table Throughout the Project?
  - Interplay Between Income, Sales, and Property Tax
  - Contracts and Other Transactions: How Can a Tax Professional Assist and Add Value?
- General Session: **Ethics**
- General Session: **Sales Tax Management - Defending Your Sales Tax Department**
- General Session: **Accounting for Contingencies: Sales Tax Takes Center Stage in Financial Reporting**

## Property Tax Calendar ~ October 2010

Information provided by the International Appraisal Company

This information is provided for quick reference and reminder purposes only.

Dates vary; users should confirm dates for their jurisdiction.

### October Appeals Due:

IL\* MA\* RI\* VA\* WI\*

\*Dates vary, check jurisdictions

Personal Property Filing Dates: WV 10/1

Assessment Dates: AL 10/1 and CT 10/1

# Careers

Please visit the [Career Opportunities](#) page on the IPT website for complete position descriptions and requirements.

## Positions Available:

**Property Services Professional (Overland Park, Kansas)** – Marks Nelson Vohland Campbell Radetic LLC. To apply, send resume to [lpoe@marksnelsoncpa.com](mailto:lpoe@marksnelsoncpa.com).

**Date Posted:** 8/26/2010 (IPT737)

**Senior Tax Analyst, Sales and Property Tax (Shoreview, Minnesota)** – Deluxe Corporation. To apply, please visit <http://jobs.deluxe.com/>.

**Date Posted:** 8/24/2010 (IPT736)

**Manager, Property & Production Taxes (St. Louis, Missouri)** – Arch Coal, Inc. Qualified candidates interested in this position should send resume to John Amato 314-994-2886; fax 314-994-2961; or email [jamato@archcoal.com](mailto:jamato@archcoal.com).

**Date Posted:** 8/19/2010 (IPT735)

**Corporate Income Tax Manager (Kansas City, Missouri)** – DST Systems. EOE. No agencies. If interested, please apply online at [www.dstsystems.com](http://www.dstsystems.com) under auto req id 8982BR.

**Date Posted:** 8/17/2010 (IPT734)

**Manager, Sales and Use Tax Compliance (Phoenix, Arizona)** – U.S. Foodservice, Inc. Apply at [www.usfoodservice.com](http://www.usfoodservice.com).

**Date Posted:** 8/17/2010 (IPT733)

**Senior Tax Manager (McLean, Virginia)** – Northrop Grumman. To apply for this position, please visit our website [https://ngc.taleo.net/careersection/ngc\\_pro/jobdetail.ftl?lang=en&job=29907](https://ngc.taleo.net/careersection/ngc_pro/jobdetail.ftl?lang=en&job=29907).

**Date Posted:** 8/16/2010 (IPT732)

**Senior State and Local Income/Franchise Tax Manager (Seattle, Washington)** – Amazon.com. Send resume to [tiffanca@amazon.com](mailto:tiffanca@amazon.com).

**Date Posted:** 8/12/2010 (IPT731)

**Property Tax Manager (Santa Anna, California)** – Carrington Mortgage Holdings, LLC. Send resume to [Liza.Merkel@carringtonmh.com](mailto:Liza.Merkel@carringtonmh.com).

**Date Posted:** 8/12/2010 (IPT730)

**Senior Manager Transaction Tax** – Send resume to [Robert.Burkett@xo.com](mailto:Robert.Burkett@xo.com).

**Date Posted:** 8/6/2010 (IPT729)

**Tax Analyst (Buffalo, New York)** – Sodexo. Candidates should apply online at [www.sodexousa.com](http://www.sodexousa.com), Careers referencing Job ID 2607. **Date Posted:** 8/7/2010 (IPT728)

**State and Local Tax, Credits and Incentives Manager/Senior Manager (Various locations)** – Ernst & Young. Send your resume directly to [susan.dolan@ey.com](mailto:susan.dolan@ey.com).

**Date Posted:** 8/4/2010 (IPT727)

**Property Tax Professional (Fort Wayne, Indiana)** – Baden Tax Management. Please mail resume with cover letter to Baden Tax Management at 6920 Pointe Inverness Way, Suite 301, Fort Wayne, Indiana 46804 or via email at [btm@badentax.com](mailto:btm@badentax.com).

**Date Posted:** 8/2/2010 (IPT725)

**State and Local Tax/ Sales and Use Manager & Senior Manager (Various Cities)** – Ernst & Young LLP. Send your resume directly to [susan.dolan@ey.com](mailto:susan.dolan@ey.com).

**Date Posted:** 7/31/2010 (IPT724)

**Associate - Sales & Use Tax Audit (Atlanta, Georgia)** – MCR Consultants LLC. Send resume to [mradvansky@mcrtax.com](mailto:mradvansky@mcrtax.com).

**Date Posted:** 7/30/2010 (IPT723)

**Senior Associate – Sales & Use Tax Audit (Atlanta, Georgia)** – MCR Consultants LLC. Send resume to [mradvansky@mcrtax.com](mailto:mradvansky@mcrtax.com).

**Date Posted:** 7/30/2010 (IPT722)

**Sales Consultant and Marketing Director (San Antonio, Texas)** – Please mail, email, or fax your resume, salary history, and references to: Assessment Technologies Ltd, 121 Interpark Blvd, Suite 308, San Antonio, Texas 78216, [Vhanks@atechltd.com](mailto:Vhanks@atechltd.com) or fax to 210.222.9519.

**Date Posted:** 7/30/2010 (IPT721)

**Business Process Consultant (Minneapolis, Minnesota)** – Target Corporation. Please copy and paste the following link into your browser address bar:

<http://appclix.postmasterlx.com/track.html?pid=ff80808129b8316b0129f03af5714e6f&source=&p=codes=SPAZK>. **Date Posted:** 7/22/2010 (IPT720)

To submit a position announcement, email Toby Miller at [tmiller@ipt.org](mailto:tmiller@ipt.org). Include the job title, city/state, and the Tax Specialty, i.e. Property/Sales/Income.

## **IPT 2010 CALENDAR OF EVENTS**

### **Wisconsin One-Day Tax Seminar**

Monona Terrace  
Convention Center  
Madison, Wisconsin  
September 23, 2010

### **CMI - Sales Tax Exams**

Renaissance Esmeralda  
Indian Wells, California  
September 24 - 25, 2010

### **Sales Tax Symposium**

Renaissance Esmeralda  
Indian Wells, California  
September 26 - 29, 2010

### **Value Added Tax Symposium**

Renaissance Esmeralda  
Indian Wells, California  
September 29 -  
October 1, 2010

### **Intermediate Personal Property Tax School**

Georgia Tech Hotel and  
Conference Center  
Atlanta, Georgia  
October 10 - 15, 2010

### **Texas Taxpayers and Research Association (TTARA) Annual Meeting**

AT&T Conference Center  
University of Texas  
Austin, Texas  
October 13 - 14, 2010

### **CMI - Property Tax Exams**

Hilton Austin  
Austin, Texas  
October 30, 2010

### **Property Tax Symposium**

Hilton Austin  
Austin, Texas  
October 31 - November 3, 2010

### **Advanced Sales and Use Tax Academy**

Doral Resort  
Miami, Florida  
November 8 - 11, 2010

### **Income Tax Symposium**

Doral Resort  
Miami, Florida  
November 8 - 11, 2010

### **CMI - Income Tax Exams**

Doral Resort  
Miami, Florida  
November 11 - 12, 2010

### **Georgia One-Day Tax Seminar**

Atlanta Marriott Century Center  
Atlanta, Georgia  
November 19, 2010

## **IPT 2011 CALENDAR OF EVENTS**

### **Sales Tax School I:**

Introduction to Sales and Use  
Taxes  
Georgia Tech Hotel and  
Conference Center  
Atlanta, Georgia  
February 27 -  
March 4, 2011

### **ABA/IPT Income Tax Seminar**

The Ritz-Carlton  
New Orleans, Louisiana  
March 21 - 22, 2011

### **ABA/IPT Sales Tax Seminar**

The Ritz-Carlton  
New Orleans, Louisiana  
March 22 - 23, 2011

### **ABA/IPT Property Tax Seminar**

The Ritz-Carlton  
New Orleans, Louisiana  
March 24 - 25, 2011

### **Sales Tax School II: Theory and Practice for the Experienced Sales & Use Tax Professional**

Marriott Kingsgate Conference  
Center  
University of Cincinnati  
Cincinnati, Ohio  
May 1 - 6, 2011

### **Intermediate Real Property Tax School**

Marriott Kingsgate Conference  
Center  
University of Cincinnati  
Cincinnati, Ohio  
May 15 - 20, 2011

### **Basic State Income Tax School**

The Mason Inn Conference  
Center & Hotel  
George Mason University  
Fairfax, Virginia  
June 5 - 10, 2011

### **Advanced State Income Tax School**

The Mason Inn Conference  
Center & Hotel  
George Mason University  
Fairfax, Virginia  
June 5 - 10, 2011

### **CMI - Income Tax Exams**

Marriott San Antonio Hill  
Country  
San Antonio, Texas  
June 24 - 25, 2011

### **CMI - Sales Tax Exams**

Marriott San Antonio Hill  
Country  
San Antonio, Texas  
June 24 - 25, 2011

### **CMI - Property Tax Exams**

Marriott San Antonio Hill  
Country  
San Antonio, Texas  
June 25, 2011

### **35th Annual Conference**

Marriott San Antonio Hill  
Country  
San Antonio, Texas  
June 26 - 29, 2011

### **Property Tax School**

Georgia Tech Hotel and  
Conference Center  
Atlanta, Georgia  
August 14 - 18, 2011

### **CMI - Sales Tax Exams**

Renaissance Orlando at  
SeaWorld  
Orlando, Florida  
September 23 - 24, 2011

### **Sales Tax Symposium**

Renaissance Orlando at  
SeaWorld  
Orlando, Florida  
September 25 - 28, 2011

### **Intermediate Personal Property Tax School**

Georgia Tech Hotel and  
Conference Center  
Atlanta, Georgia  
October 16 - 21, 2011

### **CMI - Property Tax Exams**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 5, 2011

### **CMI - Income Tax Exams**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 5 - 6, 2011

### **Income Tax Symposium**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 6 - 9, 2011

### **Property Tax Symposium**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 6 - 9, 2011

### **Credits and Incentives Symposium**

Hyatt Regency Monterey Hotel  
Monterey, California  
November 9 - 11, 2011

Please check IPT's online [\*\*Calendar of Events\*\*](#) for additional programs that may be added.