ILLINOIS TAX FACTS

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LEADING ILLINOIS COURT TAX DECISIONS, 2009-2011

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Jones Day's state and local tax practice is an integrated part of an extensive worldwide business tax team. The Tax Practice covers U.S. federal income taxes, state and local taxes, and taxes assessed by foreign jurisdictions. The practice provides advice on tax planning, controversies, and legislative and regulatory matters. Mark Rotatori and Morgan Hirst are partners in Jones Day's

THIS ARTICLE IS A BRIEF SUMMARY OF SIGNIFICANT ILLINOIS TAX CASES ADDRESSED IN 2009-2011 BY THE ILLINOIS SUPREME COURT, LOWER ILLINOIS COURTS, AND THE SEVENTH CIRCUIT.

INCOME TAX

AT&T Teleholdings Inc. v. Department of Revenue 11-0498 (1st Dist.) Appeal from 09-COEL-008 (Cir. Ct. Cook County Jan. 20, 2011) n January 20, 2011, the Circuit Court of Cook County issued a memorandum opinion and judgment order affirming an administrative law judge's decision that a business's capital loss should be allocated among all members of a business

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group reporting losses in Schedule D to the business group's consolidated federal returns in proportion to the sum of all separate capital losses. Otherwise, a group member could reap a windfall by carrying back the business group's total capital loss to offset the member's individual gains in previous years.

The case stemmed from Ameritech Corp.'s (now known as AT&T Teleholdings Inc.) disposal of its cellular telecommunications business in 1999 when it merged with SBC Communications Inc. As a result of the sale of its business, Ameritech realized a $2.7 capital gain between October 9 and December 31, 1999. After the merger, Ameritech and SBC began filing combined Illinois returns as a unitary business group. In 2002, the consolidated group reported $3.6 billion in net capital losses. Ameritech attempted to carry back those losses to offset the $2.7 billion gain. The Department of Revenue denied Ameritech's attempted carry-backs in excess of $83.9 million, which represented Ameritech's pro rata share of the reported losses by the federal consolidated group members, as represented on Schedule D of the consolidated return, and an Administrative Law Judge affirmed the denial after Ameritech protested. The court agreed with the administrative decision, explaining that state regulation 100.5270 required the use of the federal return allocation method, and that the federal regulations mandate that capital losses be allocated among members reporting losses on Schedule D in proportion to each member's share of the sum of the individual's separate capital losses.

NOTES FROM THE INSIDE. . .

By J. Thomas Johnson

Normally this issue of Tax Facts covers the recent Judicial Tax developments here in Illinois and a wrap up of legislation actions for the year. Due to the extended Veto session our review of Legislative activities will wait until the next issue which should be out early next month and will include highlights of the Governor's budget message that is scheduled for February 22nd. He recently issued a projected four year General Funds revenue and expenditure projection that is now required each year. He was the first Governor to do so last year and we applauded his efforts in providing this new perspective on the state's fiscal outlook. The latest projection shows the fiscal challenges still facing the state even after the significant tax increase that was adopted last year. More to come on this subject in next month's issue.

I want to thank Mark Rotatori and Morgan Hirst of Jones Day for their research and work on the judicial update that makes up this issue of Tax Facts. We appreciate the support of our many professional firm members in bringing you key tax developments here in Illinois.

Ameritech appealed the circuit court's ruling to the First District Appellate Court on February 14, 2011. Briefing was ongoing at time this summary was prepared.

Dods v. Hamer - 1-09-2548 (1st Dist. Aug. 19, 2010) In an unpublished opinion issued on August 19, 2010, the First District Appellate Court upheld the Circuit Court of Cook County and ruled a couple who spent 51% of their time at a home they owned in Florida were not Illinois residents for purposes of the Illinois Income Tax Act ("IITA") despite that they maintained a residence in Illinois.

The Dods owned three homes, one in Illinois, one in Florida, and a third in Michigan. In early 2002, Mr. Dods retired as CEO of an Illinois corporation, and the Dods changed their domicile to Florida and ceased paying Illinois income taxes. Nevertheless, the Dods continued to receive mail at and claim the Illinois Property Tax Act homestead exemption for their Illinois residence, at which they spent approximately 28% of their time. In addition, Mr. Dods continued to serve as the chairman of the Illinois corporation of which he previously served as CEO, retained investments in Illinois banks, kept vehicles in Illinois, and donated to Illinois charities.

In 2007, the Illinois Department of Revenue issued a notice of deficiency to the Dods, claiming that they owed $570,918 in income taxes covering the tax years 2002-2004. After appealing the initial notice, the Dods paid the amount into a protest fund and filed an action in the Circuit Court of Cook County to recover they payment. In support of their claim of Florida domicile, the Dods explained that they had surrendered their Illinois drivers licenses and obtained Florida drivers' licenses, fostered relationships with churches and healthcare professionals in Florida, and registered to vote in Florida. Both the circuit and appellate court agreed with the Dods, explaining that under the IITA, an individual ceases to be a resident of the state whenever "he leaves Illinois for other than temporary or transitory purposes," and concluding that when "[v]iewed in its entirety, the evidence supports" that Mr. and Mrs. Dods were residents of Florida who merely spent time in Illinois for temporary or transitory purposes, including to care for Mr. Dods' ill mother and for business consulting purposes. The court rejected the Dods' erroneous claiming of the homestead exemption should prevent them from asserting they were non-residents, given that Mr. Dods also claimed an exemption on his Florida residence and contacted his county assessor in Illinois and offered to pay back taxes for the Illinois residence when he discovered the error.

Byrd v. Hamer - 408 Ill. App. 3d 467 (2d Dist. January 28, 2011) On January 28, 2011, the Second District Appellate Court affirmed a circuit court's decision that casual gambling losses are not excluded from gross income under the Illinois Income Tax Act. The Byrds gambled substantial amounts of money over three years.

The Byrds argued that they were professional gamblers and should therefore be allowed to deduct gambling losses. Further, they claimed that, if they are considered casual gamblers, not allowing deductions for losses would violate the Due Process and Equal Protection clauses of the Fourteenth Amendment and also the Uniformity clause of the Illinois Constitution.

Illinois "piggy-backs" on the federal tax code to determine gross income. Under the federal tax code, if a taxpayer gambles as a trade or business, then the losses are allowed as above-the-line deductions. On the other hand, if the losses are from casual gambling, then they are allowed as below-the-line deductions. Section 203 of the Illinois Income Tax Act requires adding back below-the-line deductions to compute gross income for state filings. However, it does not require such an add back for trade or business deductions. Therefore, losses from casual gambling can increase state tax liability, but losses from gambling in a trade or business do not increase state tax liability.

The court first decided that the Byrds were not professional gamblers. The court distinguished the Byrds' gambling habits from those of the taxpayer in *Commissioner of Internal Revenue v. Groetzinger*, 480 U.S. 23 (1987). Most important, Jerry Byrd was employed full time in the graphic arts field while he was gambling, and the Byrds did not rely on their gambling winnings for income. While the Byrds spent over two days every week gambling, the taxpayer in *Groetzinger* gambled 60-80 hours every week.

Next, the court rejected all of the Byrds' constitutional arguments. The court found that there was no double taxation because any money used for a winning wager was excluded from gross income as a return of capital. The court also found that the concept of gross income is clearly defined, and any exclusions or deductions are granted solely by legislative grace. Also, the court found that the taxation scheme does not violate the Uniformity clause because there are real distinctions between professional and casual gamblers, and the Byrds failed to provide adequate justification as to why the court should overlook this distinction.

SALES AND USE TAX

Kean v. Wal-Mart Stores - 235 Ill. 2d 351 (November 19, 2009) On November 19, 2009, the Illinois Supreme Court affirmed an appellate court ruling that purchases made on a retailer's website could include shipping costs as part of the selling price to determine sales tax liability. Kean, representing a class of similar purchasers, claimed Wal-Mart violated the Consumer Fraud and Deceptive Business Practices Act when Wal-Mart included shipping charges in the sales price. Kean argued that the shipping charges are a separate transaction and should not included in the calculation of sales tax for the purchase.

The Court, however, concluded that these specific shipping charges were part of the sales price. Section 130.415 of the Illinois Administrative Code includes shipping charges in the sales price if the buyer and seller do not contract separately for shipping. The items Kean purchased were items that could only be purchased online, and were not available to pick up in a store. Thus, the selling price had to include the shipping charges because the purchase could not occur without delivery. The shipping charge was properly included when calculating sales tax liability because the shipping charge was part of the sales price.

American Airlines, Inc. v. Illinois Department of Revenue - 402 Ill. App. 3d 579 (1st Dist. December 18, 2009) On December 18, 2009, the First District Appellate Court affirmed a circuit court's ruling that a second refund claim filed after expiration of the statute of limitations was not an amendment of a previous timely filed claim covering the same time period, and was therefore barred as untimely. American Airlines' original, timely filed refund claim sought a refund of a fuel exemption for certain international flights pursuant to an IRS revenue ruling. After the statute of limitations period expired, American filed a second claim, seeking additional refunds for a broader category of international flights pursuant to the Illinois Use Tax Act. The Department of Revenue rejected the second filing as untimely under the Use Tax Act.

The court upheld the rejection, relying on *W.L. Miller Co. v. Zehnder*, 315 Ill. App. 3d 799 (4th Dist. 2000). *Zehnder* held that when claims for credit are based upon related but distinct legal bases, the latter claim does not relate back to the former. Here, American's second claim, while relating to credits for international flights, covered different types of flights and relied on slightly different authority. Further, the court in American held that the relation-back doctrine in the Illinois Civil Practice Law was inapplicable because the Use Tax Act fully regulated the procedures for refunds.

American Beverage Association v. City of Chicago - 404 Ill. App. 3d 682 (1st Dist. September 23, 2010) On September 23, 2010, the First District Appellate Court affirmed a circuit court's ruling upholding a local tax on bottled water. In order to discourage the use of single-use plastic water bottles and to fund recycling programs to offset the environmental impact of those bottles, the City of Chicago imposed a five cent per bottle tax. Though imposed on purchasers, the tax was collected by retailers and wholesalers.

The court first held that the tax is not an occupation tax that exceeds Chicago's home rule authority because the tax is imposed on purchasers, not retailers. Also, the court held that the Illinois General Assembly did not intend to deny home rule units like the City of Chicago the ability to impose food taxes. The tax also does not violate section 8-11-1 of the Illinois Municipal Code because it is a uniform per bottle tax, and not a tax on gross receipts. Finally, the court held that the tax satisfies Illinois's Uniformity Clause because the tax is imposed on all non-carbonated water, and the environmental impact is reasonably related to the tax.

Irwin Industrial Tool Co. v. Illinois Department of Revenue - 238 Ill. 2d 332 (September 23, 2010) On September 23, 2010, the Illinois Supreme Court affirmed an appellate court ruling that an airplane stored in Nebraska could still incur use tax liability in Illinois. ATC Air, a wholly-owned subsidiary of Irwin Industrial Tool Co., purchased the plane, which was to be stored near Irwin's Nebraska office. ATC Air incurred no sales tax liability on the purchase in Nebraska. Several of Irwin's directors and officers were located in Illinois, and a function of the plane was to shuttle personnel between Illinois and other locations. The circuit court held that there was a sufficient nexus between the plane's use and Illinois to incur use tax liability, but that the tax liability should be apportioned according to the plane's actual physical presence in Illinois.

The First District Appellate Court affirmed in part and reversed in part. The court agreed that there was a sufficient nexus between the purchase and Illinois to incur use tax liability. Almost half of the flights were used to transport employees to and from Illinois. But as to apportionment, the court stated that the "fair apportionment test" of *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977), only prohibits multiple taxation. In other words, the fair apportionment test is satisfied as long as there is a credit system for sales tax already paid. Thus, use tax liability in Illinois on the full purchase price was appropriate because the original sale incurred no sales tax, and there was no issue of multiple taxation. The Illinois Supreme Court affirmed the appellate court's ruling.

Hartney Fuel Oil Co. v. Illinois Department of Revenue - 3-11-0144, 3-11-0151 (3d Dist.) Appeals from 09-MR-11, 08-MR-13, 08-MR-15 (Cir. Ct. Putnam County Jan. 27, 2011) On January 27, 2011, the Circuit Court of the Tenth Judicial Circuit in Putnam held that Hartney Fuel Oil Co. produced sufficient evidence to support its position that its sales transactions were sitused at its sales office in the Village of Mark in Putnam County, which consisted of a single sales representative with whom customers could place daily purchase orders, such that the Illinois Department of Revenue erred in assessing additional taxes on behalf of Forest View and Cook County, where Hartney's main office was located. The Village of Mark and Putnam County are not home rule jurisdictions, whereas both Forest View and Cook County are home rule jurisdictions in which retailers are subject to an additional 2.5% Retailer's Occupation tax. A jurisdiction with home rule authority may levy the additional 2.5% tax only if sufficient sales activity takes place in the home rule jurisdiction.

After conducting an audit of Hartney, the Department of Revenue determined that Hartney's sales were subject to state and local taxes in Forest View, where credit checks of customers were performed, rather than in Mark, where purchase orders were accepted. Hartney petitioned the court for injunctive and declaratory relief to determine the situs of its fuel sales. The Department of Revenue argued that because the necessary credit approval of fuel customers was performed in Forest View, where Hartney's sales office relayed the purchase order after receipt, not enough of Hartney's sales activity took place in Mark to overcome the presumption of accuracy of the Department's audited assessment. Though agreeing that the burden of proof is on Hartney, the circuit court disagreed with the Department, holding that Hartney, reasoning that the relevant inquiry is not how much sales activity took place in Mark, but rather whether sufficient sales activity took place in Forest View. The court explained that under 86 Ill. Admin. Code 220.115(c)(1), "the seller's acceptance of purchase order...is the most important single factor in the occupation of selling" and that place of receipt will be deemed place of acceptance "in the absence of clear proof to the contrary," and concluded that the defendants here did not come forward with "clear proof to the contrary" that the place of receipt of the purchase orders (Mark) was not the place of acceptance, and therefore the situs of the sale.

The Department of Revenue appealed the circuit court's decision to the Third District Appellate Court on March 1, 2011. A ruling had not been issued at the time this summary was prepared.

City of Chicago v. StubHub, Inc.; City of Chicago v. eBay, Inc. - 2011 IL 1111127 (Oct. 6, 2011) 624 F.3d 363 (7th Cir. September 29, 2010) 622 F. Supp. 2d 699 (N.D. Ill. December 21, 2009) On September 29, 2010, the Seventh Circuit certified for the Illinois Supreme Court the issue of whether municipalities may require internet auction sites to collect and remit amusement taxes. The Seventh Circuit also rejected arguments that the tax violated the Federal Communications Decency Act and the Internet Tax Freedom Act. The U.S. District Court for the Northern District of Illinois had originally held that StubHub and eBay were not reseller's agents subject to amusement tax liability under Chicago's Amusement Tax Ordinance. The ordinance imposes an 8% amusement tax surcharge on sales by ticket resellers and reseller's agents.

The Illinois Preemption Act prevents home rule units from exercising their home rule authority to tax purchases of tangible personal property unless given authority. A home rule unit is an Illinois county given independent authority to enact various types of laws. Home rule units can tax items authorized by the Illinois General Assembly. But, during deliberations of the 2005 amendment to the Illinois Ticket Sale and Resale Act, the General Assembly rejected a proposal that would have made internet auction sites responsible for collecting and remitting amusement tax. These deliberations suggested that the Illinois General Assembly had not intended to provide home rule units the authority to tax internet auction sites. After determining that the auction sites sold tangible personal property, the district court held that the City of Chicago exceeded its home rule authority by imposing its amusement tax on internet auction sites.

On October 6, 2011, the Illinois Supreme Court answered the Seventh Circuit's certified question in the negative. The Court first determined that StubHub could be subject to the City's amusement tax as a reseller's agent because it provides services that help ticket owners resell their tickets, and is compensated for those services. The Court ultimately concluded, however, that the City of Chicago exceeded its home rule authority by requiring electronic intermediaries like StubHub to collect and remit its amusement tax. In reaching this conclusion, the Court agreed with StubHub that the problem the City's amusement tax ordinance was designed to address related to the opening of new markets and the protection of consumers, not the need to raise revenue. Relying on the same General Assembly debates addressed by the district court, the Court then reasoned that the State has a greater interest than any municipality in solving the identified problem, and that the State has traditionally played a greater role than municipalities in addressing problems related to new markets and consumer protection. Because the City's amusement tax ordinance, as applied to Internet auctioneers, addressed a State rather than a local problem, the Court concluded that the City overstepped its home rule authority by applying its amusement tax ordinance to Internet auctioneers.

PROPERTY TAX

Provena Covenant Medical Center v. Illinois Department of Revenue - 236 Ill. 2d 368 (March 18, 2010) On March 18, 2010, the Illinois Supreme Court affirmed the Fourth District Appellate Court's ruling that the Provena Covenant Medical Center should not be granted a property tax exemption under Section 15-65(a) of the Property Tax Code as property used for a charitable purpose. The Provena Covenant Medical Center is a hospital in Urbana, Illinois owned by Provena Hospitals, a non-profit organization. The Court held that, to qualify for a property tax exemption, Provena must also show that its land is used actually and exclusively for charitable purposes.

The Court applied the factors laid out in *Methodist Old Peoples Home v. Korzen*, 39 Ill. 2d 149, 156-57 (1968), to determine whether a property owner exhibits characteristics of a charitable institution. Under the *Korzen* test, to be classified as a charitable institution, a property owner should: (1) have no capital, capital stock, or shareholders; (2) earn no profits or dividends but rather derive its funds mainly from private and public charity; (3) dispense charity to all who need it and apply for it; (4) not provide gain or profit in the private sense to any person connected with it; and (5) not appear to place any obstacles in the way of those who need and would avail themselves of the charitable benefits. The Court concluded that Provena failed to meet the second requirement because it received minimal funds from charities and most of its funds from accounts receivables. Also, Provena only dispensed charity to a "de minimus" number of patients who lacked insurance and otherwise qualified for free or discounted care. Therefore, the Court held that, even though the hospital is owned by a nonprofit company, it failed to meet the requirements for a property tax exemption.

Z Financial LLC v. Dunn - 389 Ill. App. 3d 735 (1st Dist. April 30, 2009) On April 30, 2009, the First District Appellate Court reversed a circuit court's decision and held that a taxpayer should not receive an extension to redeem his property from a tax sale because he did not make a bona fide attempt to repay the amount due. Z Financial purchased delinquent real estate taxes on property owned by Dunn and filed a petition for a tax deed. Dunn received an estimate covering the cost to redeem the property, but the estimate did not include credits for certain property tax payments that he made. An employee in the Cook County clerk's office instructed Dunn to pay the full estimated amount and to follow the procedures to receive a refund for an overpayment. Instead, Dunn merely paid what he believed to be the correct amount on the last day of the redemption period. The clerk's office refused the payment and granted Z Financial the tax deed to the property.

The circuit court, relying on *Hawkeye v. Lanz*, 378 Ill. App. 3d 842 (1st Dist. 2007), rejected the clerk's decision and found that Dunn made a bona fide attempt to redeem the property. However, the appellate court reversed the circuit court, distinguishing *Z Financial* from *Hawkeye*. In *Hawkeye*, the taxpayer attempted to pay his full amount due, but failed to timely pay the balance because the clerk's office had provided an incorrect payment due date. Here, Dunn did not follow the advice provided by the clerk's office and did not attempt to fully pay his amount due. Moreover, Dunn waited until the last day to pay the estimate, even though he was informed of the refund procedures one and a half months prior. Because the disputed payments were correctly included in the estimate, Dunn did not receive any misinformation, and thus Dunn did not make a bona fide attempt to repay his balance.

Fakhoury v. Pappas - 395 Ill. App. 3d 302 (1st Dist. September 30, 2009) On September 30, 2009, the First District Appellate Court affirmed a circuit court's decision to certify a class of taxpayers challenging the Treasurer's post-judgment interest calculations on property tax refunds. Section 23-20 of the Property Tax Code was amended on January 1, 2006, altering the post-judgment interest rate from a flat 5% rate to the lower of either the 5% rate or the consumer price index. The Treasurer applied this amendment retroactively, claiming that all refunds requested after 2006 were covered by the new rate regardless of when the refunded tax was actually paid.

Subsequently, in *General Motors Corp. v. Pappas*, 911 N.E.2d 504 (1st Dist. 2009), the First District Appellate Court held that the amended interest rate covers only the refund of taxes paid after January 1, 2006. There, the court found that the new rate did not cover taxes paid before January 1, 2006, even if the refund claim was filed after January 1, 2006.

In *Fakhoury*, the Treasurer attempted to avoid the *General Motors* holding by arguing that the court lacked jurisdiction to hear the case because the Property Tax Code prohibits class actions for tax objections. While Section 23-15(a) of the Property Tax Code prohibits class actions for tax objections, the court held that this case was not a tax objection. All of the plaintiffs in the class had already filed their objections and received a final decision. None of the plaintiffs were attacking the amount of the tax refund nor the award of interest. The only issue was how the interest was calculated, which the plaintiffs did not consider during their tax objection. Therefore, because all of the plaintiffs had a similar issue that was only incidental to the actual tax objection, the court held that the granting of class certification was proper.

Devon Bank v. Miller - 397 Ill. App. 3d 535 (1st Dist. December 29, 2009) On December 29, 2009, the First District Appellate Court reversed a circuit court's decision, and held that a subsequent purchaser of a tax deed is not a bona fide purchaser if he has constructive notice of a material defect in a tax deed, such as the failure to provide notice the tax sale to the record owner. Devon Bank was the legal owner/trustee of a vacant lot included in a land trust. The trust beneficiary failed to pay the property taxes for the lot, and the property was auctioned at a tax scavenger sale. The successful bidder at the tax scavenger sale later acquired a tax deed to the property without providing required notice of the tax deed proceedings to Devon Bank. The successful bidder then conveyed the property to two individuals, who conveyed the property to Miller.

Devon Bank argued that the original tax deed should have been voided for want of notice. The company that acquired the tax deed failed to provide notice to Devon Bank because it did not conduct a satisfactory title search, instead relying solely on an unofficial tract index that did not list Devon Bank as the owner of the property. The appellate court agreed with Devon Bank and held the tax deed void because the lack of notice deprived the circuit court of jurisdiction to enter the deed.

Even if the tax deed was void, Miller argued that he retained rights as a bona fide purchaser. But Devon Bank demonstrated that Miller was not a bona fide purchaser because the sale was suspicious on its face, and a reasonable person would make further inquiry and see the deed was deficient. A person is not a bona fide purchaser if they have constructive notice of defective title. Miller's title insurance policy stated that the property was purchased via a tax deed. Miller should have been on notice to investigate the tax deed to ensure proper procedures were met. If Miller had properly investigated the tax deed, he would have realized that Devon Bank never received notice of the tax sale. The appellate court agreed with Devon Bank and found that Miller did not properly investigate the tax deed and therefore was not a bona fide purchaser.

Calumet Transfer, LLC v. Property Tax Appeal Board - 401 Ill. App. 3d 652 (1st Dist. May 14, 2010) On May 14, 2010, the First District Appellate Court affirmed a circuit court's decision that the price of property acquired from an estate in bankruptcy is not, *per se*, the fair market value of the property for purposes of property tax valuation. Calumet purchased two lots from entities in bankruptcy. Calumet argued that, because both transfers were at arm's length, the fair market value of the properties should be the sale price rather than some other assessed value.

The court disagreed, finding that it was reasonable to conclude that sales in bankruptcy are often sales under duress, and other valuation methods are more reliable. The court clarified that its ruling does not mean that sales in bankruptcy are always under duress, just that the Property Tax Appeal Board can reasonably allow an assessor to challenge the arm's length nature of the sale, and provide alternate evidence of fair market value.

Oakridge Development Co. v. Property Tax Appeal Board - 405 Ill. App. 3d 1011 (2d Dist. September 17, 2010) On September 17, 2010, the Second District Appellate Court affirmed a decision by the Property Tax Appeal Board that land used as farmland for the prior two years, but not actively used as farmland when sold to the petitioner, should no longer be classified as farmland for valuation purposes. Oakridge purchased property from a family that had farmed the land the prior two years. However, no farming of the property took place in the year of the sale. Therefore, the property was reclassified from agricultural to urban, and the value of the property rose from $11,000 to $3 million.

Section 9-155 of the Property Tax Code directs the assessor to value the property as of January 1 of that year or in accordance with Sections 10-110 through 10-140. The court held that Sections 10-110 through 10-140 require farmland to be currently used as a farm *and* be used as a farm for the prior two years. The court rejected Oakridge's argument that Section 9-155 should control and that the property should still qualify as farmland because it was used as a farm as of January 1. In reaching its decision, the court noted that the word "or" in Section 9-155 meant that the property should be viewed as of January 1 only if the assessor was not using the Section 10-110 through 10-140 assessment.

Further, the court held that the property could only be considered farmland if active farming occurred. Relying on *Santa Fe Land Improvement Co. v. Ill. Prop.Tax Appeal Bd.*, 113 Ill. App. 3d 872 (3d Dist. 1983), the court rejected Oakridge's contention that the designation of property should not change until the landowner actually uses the property for a different purpose. Finally, the court rejected Oakridge's argument that the vast increase in valuation would amount to a confiscation of the property, holding that normally assessed property taxes are not analogous to the arbitrary and capricious taxes cited by Oakridge.

Millennium Park Joint Venture LLC v. Houlihan - 241 Ill. 2d 281 (December 23, 2010) 393 Ill. App. 3d 13 (1st Dist. June 29, 2009) On June 29, 2009, the First District Appellate Court affirmed the circuit court's declaratory judgment that

Millennium Park Joint Venture "MPJV" operated under a license and was not subject to property tax. MPJV entered into a Concession Permit Agreement with the Chicago Park District to use portions of Millennium Park for a restaurant, bakery, retail store, and storage area. MPJV was subject to various restrictions under the agreement. For instance, the agreement set forth minimum dates and times of operation, permitted uses of the area, staff qualifications and responsibilities, and minimum amounts of insurance MPJV had to carry.

Before reaching its decision on the merits, the appellate court found that the circuit court had proper jurisdiction over the case. Usually, tax challenges must be made with an administrative agency before a judicial action can be filed. However, the "unauthorized by law" doctrine grants a taxpayer direct judicial relief if an assessor lacked authority to impose the tax in the first place. The court likened this case to *County of Knox ex rel. Masterson v. Highlands, LLC*, 188 Ill. 2d 546 (1999), where the Illinois Supreme Court found that an assessor was unauthorized to declare land as not being used for agricultural purposes. The court reasoned that the determination of an agency's power is one of law and a proper function of the judiciary.

As to the merits, the court found that the tax assessor's actions were unauthorized because the agreement was a license and not a lease. Relying on *Charlton v. Champaign Park District*, 110 Ill. App. 3d 554 (4th Dist. 1982), the court held that the agreement was a license because MPJV did not have complete possession of the property, MPJV's use of the property was not exclusive, MPJV was subject to various restrictions on how they conducted business, and the agreement lacked a definite description of the property. On December 23, 2010, the Illinois Supreme Court affirmed the decision.

Grace Community Assemblies of God v. Illinois Department of Revenue - 409 Ill. App. 3d 480 (4th Dist. April 18, 2011) On April 18, 2011, the Fourth District Appellate Court affirmed a circuit court's decision that land used sporadically, but exclusively for religious purposes, was exempt from property tax liability as religious use property. Grace Community acquired property originally intending to build a large church. However, the plans later fell through. During the taxable time period at issue, the land was used on twelve dates for activities such as services, prayer walks, youth activities, and camping. The circuit court held that these activities were sufficient to provide an exemption from property tax liability.

The appellate court affirmed. Article 9, Section 6 of the Illinois Constitution authorizes the General Assembly to exempt property used for religious purposes from property tax liability. Section 15-40(a) of the Property Tax Code exempts property "used exclusively" for religious purposes. The court held that the sporadic use of the property, coupled with Grace Community's active plans to build a church satisfied the exclusive use requirement.

OTHER TAX ISSUES

Wirtz v. Quinn - 953 N.W.2d 899 (July 11, 2011) 407 Ill. App. 3d 776 (1st Dist. Jan. 26, 2011) On July 11, 2011, the Illinois Supreme Court reversed a First District Appellate Court decision that struck down legislation intended to fund a $31 billion capital spending program for roads, bridges, high speed rail, and other forms of transportation.

On July 13, 2009, Governor Quinn signed into law the Capital Projects Act, a 280-page piece of legislation which amends multiple Illinois revenue laws, including the Illinois Lottery Law, the State Finance Act, the Use Tax Act, the Service Use Tax Act, the Service Occupation Tax Act, the Retailer's Occupation Tax Act, The Motor Fuel Tax Act, the Riverboat Gambling Act, and the Liquor Control Act, among others. Wirtz Beverage Illinois, LLC and W. Rockwell Wirtz, on behalf of all Illinois taxpayers, challenged the bill in circuit court. Among other challenges, Wirtz claimed that the Act violated the "single subject" clause found in Section 8(d) of the Illinois Constitution, which provides that "[b]ills, except for bills for appropriations and for the codification, revisions or rearrangement of laws, shall be confined to one subject." The circuit court rejected all of Wirtz's challenges and denied the petition in its entirety. The First District Appellate Court reversed on single subject clause grounds. Specifically, the appellate court ruled that the Act's numerous provisions, which extended beyond merely tax provisions, could not be classified as on the single subject of "revenue" and declared the Act void in its entirety.

On July 11, 2011, the Supreme Court reversed the appellate court's judgment regarding the single subject clause, rejected the remainder of plaintiffs' claims, and affirmed the judgment of the circuit court. Contrary to the appellate court's conclusion that the single subject of the Act was "revenue" the Supreme Court classified the Act's single subject as "capital projects" and concluded that "no provision in the Act [] stands out as being constitutionally unrelated" to that single subject. In support of this conclusion, the court reviewed the provisions of the Act as well as its legislative history, which the court found "demonstrates that the legislators were aware that they were voting on sources of funding for capital improvements in the state."

Metropolitan Life Ins. Co. v. Hamer - 08 L 50788 (Cir. Ct. Cook County Jan. 6, 2011) On January 6, 2011, the Circuit Court of Cook County held that Metropolitan Life Insurance Company ("MetLife") was not subject to the double interest penalty under the 2003 Tax Delinquency Amnesty Act, 45 ILCS § 745/10 *et seq.* ("2003 Amnesty Act") for additional Illinois income tax liability for the tax years 1998 and 1999 uncovered by a federal tax audit completed in July 2004. The Internal Revenue Service began a routine audit of MetLife for the tax years 1997-1999 on December 12, 2000. The Illinois Department of Revenue then commenced an examination of MetLife's Illinois tax returns for the tax years 1998 and 1999 in May 2002. At the conclusion of the federal audit in May 2004, the IRS determined that MetLife owed additional federal income taxes. MetLife provided the finalized federal audit adjustments to the Department's auditor in August 2004, who used these adjustments to determine that MetLife owed additional tax liability. In the interim period between the initiation and completion of MetLife's federal and state audits, the Illinois General Assembly passed the 2003 Amnesty Act. The 2003 Amnesty Act created an Amnesty Period that commenced on October 1, 2003 and extended through November 17, 2003, during which taxpayers could report and satisfy outstanding taxes due to the state that accrued between June 30, 1983 through July 1, 2002 without paying interest or penalties.

After MetLife paid the additional taxes owing to the state, the Department billed MetLife double interest with respect to the federal change tax liability. MetLife paid the $2,207,456 of double interest under protest and subsequently filed an action against the Department contesting the double interest. MetLife argued it should not be subject to double interest because it was going through a federal audit at the time of the Amnesty Period and so could not at that time make a good faith estimate as to the final federal change, as required under the terms of the Amnesty Program. The circuit court ruled in favor of MetLife on the grounds that MetLife was not required to report the federal changes during the Amnesty Period because the additional federal taxes were not yet assessed and therefore were not known by MetLife to be a tax "due" to the state.

Brooker v. Madigan - 388 Ill. App. 3d 410 (1st Dist. February 17, 2009) On February 17, 2009, the First District Appellate Court reversed a circuit court's decision and held that the amended Illinois Estate and Generation-Skipping Transfer Tax Act should not be based on whether a party would claim a federal estate tax credit, but rather how much the party could feasibly claim. Originally, the Illinois and federal estate taxes were coupled, meaning that estates could retain a credit of up to 16% of their federal estate tax liability for payment of state estate tax liability. However, in 2001, Congress enacted the Federal Economic Growth and Tax Relief Reconciliation Act ("FEGTRRA"), which slowly phased out the state credit. In response, Illinois amended its estate tax to nevertheless impose liability on an amount equal to the federal credit that would have been allowed before the FEGTRRA, despite the fact that after the FEGTRRA, the credit was no longer available.

The estate of Nancy Brooker claimed no state estate tax liability. The estate argued that, because it received a large federal credit for other reasons, it would not have claimed a federal estate tax credit or paid corresponding Illinois estate taxes credit pre-FEGTRRA, and therefore should not now owe any Illinois estate tax. The court disagreed, holding that an estate's state tax liability is the maximum possible amount the estate could have claimed under the old scheme and not the amount it would have claimed. The court distinguished other state cases interpreting similar statutes because those statutes intentionally tried not to impose any further tax liability, while the Illinois statute intended to keep a revenue stream and impose a new tax rate.

Pooh-Bah Enterprises Inc. v. Cook County - 232 Ill. 2d 463 (March 19, 2009) On March 19, 2009, the Illinois Supreme Court reversed the First District Appellate Court's holding, and found that the exclusion of adult entertainment venues from the "small venues exemption" in both the City of Chicago and Cook County's amusement tax is not unconstitutional content-based discrimination. Both the City of Chicago and Cook County exempt small venues that seat less than 750 patrons from amusement tax liability. However, adult entertainment is expressly excluded from the exemption. Pooh-Bah, an operator of an adult entertainment venue, claimed the law was overbroad and unconstitutional content-based discrimination. The appellate court agreed, holding that this exclusion was content-based discrimination, and that the defendants failed to provide justification to withstand strict scrutiny. The Illinois Supreme Court reversed, distinguishing content-based decisions that place significant burdens on disfavored viewpoints and content-based decisions that solely subsidize favored speech. The Court found that the exclusion of adult entertainment issues represented the latter, and was therefore constitutional. Citing *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991); and *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), the Court found that strict scrutiny should not apply to all speech discrimination, but rather a court should look at each regulation individually. The Court reasoned that the amusement tax is generally applied to a broad range of amusements encompassing both protected and unprotected speech. Therefore, the exclusion did not violate the First Amendment because there was little risk of suppressing disfavored views. On October 5, 2009, the U.S. Supreme Court declined review.

P&S Grain, LLC v. County of Williamson - 399 Ill. App. 3d 836 (5th Dist. April 2, 2010) On April 2, 2010, the Fifth District Appellate Court reversed a circuit court's decision, and held that two companies had proper standing to challenge the imposition of a school facility tax. The plaintiffs, an Illinois LLC and a Missouri corporation doing business in Illinois, challenged a new county retail occupancy tax. The circuit court dismissed the action because the plaintiffs lacked standing. The circuit court first held that Section 11-301 of the Illinois Code of Civil Procedure only allows citizens to challenge disbursements of funds from the state, and corporations are not citizens. The circuit court also held that the plaintiffs lacked standing because they could pass along the tax

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liability to their customers, and therefore did not suffer an injury.

The appellate court reversed, rejecting both conclusions. First, the court noted that the tax is imposed on the retailer, not the customer. While retailers normally pass along the liability to their customers, they are not obligated to do so. However, retailers still face the liability regardless of whether they choose to pass it to their customers. Further, the Illinois Supreme Court, in *Springfield Rare Coin Galleries, Inc. v. Johnson*, 115 Ill. 2d 221 (1986), held that a corporation has standing to challenge a provision in the Retail Occupation Tax Act. The appellate court reasoned that, if a corporation could challenge a provision in the Retail Occupation Tax Act and the current tax is treated as it would be under the Retail Occupation Tax Act, the plaintiffs should have standing to challenge this current tax. Finally, the court found that there is no rational policy for preventing a corporate entity from challenging the disbursement of public funds.

DTCT, Inc. v. City of Chicago - 407 Ill. App. 3d 945 (1st Dist. February 18, 2011) On February 18, 2011, the First District Appellate Court affirmed a circuit court decision holding that separate businesses controlled by the same individual, who maintains control over operations and wages, can be consolidated for purposes of the Chicago employer's expense tax. Section 3-20-030(A) of the Chicago Municipal Code imposes a tax on an employer's business that employs 50 or more individuals. The definition of business includes "entities which are subsidiary or independent." Therefore, individual businesses that might not meet the 50 employee threshold can still face tax liability if they are consolidated under a single employer. The plaintiffs were three separate groups of related companies that own McDonald's franchises. Each group was owned by the same individual who controlled all aspects of the franchise as well as paid all wages.

At issue in this case was a 1997 information bulletin and a 2005 Department of Revenue ruling. The bulletin was issued to interpret the employer's tax and provide examples of businesses sufficiently related to justify consolidation, and businesses that are separate and should be treated separately. The 2005 ruling introduced the concept of a unitary business group and defined the group as "a group of persons related through common ownership... and whose members are functionally integrated through the exercise of centralized management." The taxpayers asked the court to follow the 1997 bulletin and not the 2005 ruling.

However, the First District found that the plaintiffs could be deemed consolidated under both the bulletin and the ruling. The court determined that the taxpayers' business structure most closely resembled that of the consolidated example in the bulletin, and the 2005 ruling only clarified the tax provision. Because the same individual exercised centralized control of the plaintiff companies and the wages of their employees, those companies could be deemed a consolidated entity, and thus were subject to the tax.

Kansas City Southern Railway Co. v. Koeller - 653 F.3d 496 (7th Cir. July 27, 2011) On July 27, 2011, the Seventh Circuit ruled that an Illinois' subdivision's method of calculating assessments due from railroads under the Illinois Drainage Code, 70 ILCS § 605/4-18 *et seq.* discriminated against railroad carriers, in violation of the Railroad Revitalization and Regulatory Reform Act ("4-R Act").

In 2008, the Commissioners of the Sny Island Levee Drainage District (the "District") changed their method of collecting an annual maintenance assessment from all District residents under the Illinois Drainage Code. Significantly, for land owned by railroads, pipelines, and utilities ("RPU Properties"), the Commissioners altered their decades-old method of calculating assessments under a per-acre formula to a formula based on the "benefit" those properties received from a drainage levy. As required by Section 605/4-19 of the Drainage Code, the Commissioners petitioned to the Pike County Court for authorization of the changed formula. After conducting an evidentiary hearing in October 2008, the court certified the new assessment method as "necessary and advisable." Subsequently, Kansas City Southern Railway Company and Norfolk Southern Railway Company, the two railroads implicated by this changed assessment, filed suit in the Central District of Illinois, alleging that the new method of calculating assessments constituted "another tax that discriminates against a rail carrier providing transportation" in violation of Section (b)(4) of the 4-R Act. The district court concluded that the assessment was "another tax" within the meaning of the 4-R Act, but that the railroads failed to demonstrate how the tax was discriminatory.

In a July 27, 2011 opinion, the Seventh Circuit reversed the district court's holding. The court agreed that the new assessment constitutes a "tax" actionable under the 4-R Act, but unlike the district court, found that the railroads presented sufficient evidence revealing actionable discrimination in relation to a comparison class of "commercial and industrial" taxpayers subject to the District's maintenance fee because the new method of calculating the assessment "imposes a proportionately heavier tax on railroads than other activities." The court concluded that if, as the Commissioners of the District argued, the Illinois Drainage Code requires them to assess all property on a benefit basis rather than a per-acre basis, then all agricultural, commercial and industrial properties must be assessed in that manner along with RPU Properties.

ILLINOIS HOUSE AND SENATE 2012 97TH GENERAL ASSEMBLY CALENDAR

MARCH 2012						
SUNDAY	MONDAY	TUESDAY	WEDNESDAY 1	THURSDAY 1 SESSION	FRIDAY 2 SESSION	SATURDAY 3
4	5	6 SESSION	7 SESSION	8 SESSION	9 SESSION DEADLINE-COMMITTEE HBs & SBs	10
11	12	13	14	15	16	17
18	19	20	21 SESSION	22 SESSION	23 SESSION	24
25	26 SESSION	27 SESSION	28 SESSION	29 SESSION	30 SESSION DEADLINE-3RD READING HBs & SBs	31

APRIL 2012

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
1	2	3	4	5	6 PASSOVER GOOD FRIDAY	7
8 EASTER	9	10	11	12	13	14
15	16	17 SESSION	18 SESSION	19 SESSION	20	21
22	23	24 SESSION	25 SESSION	26 SESSION	27	28
29	30					

MAY 2012

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
		1 SESSION	2 SESSION	3 SESSION	4 SESSION DEADLINE- COMMITTEE HBs & SBs	5
6	7	8 SESSION	9 SESSION	10 SESSION	11 SESSION	12
13	14 SESSION	15 SESSION	16 SESSION	17 SESSION	18 SESSION	19
20 SENATE-PM SESSION	21 SESSION	22 SESSION	23 SESSION	24 SESSION	25 SESSION DEADLINE-3RD READING- HBs & SBs	26 SESSION
27 SESSION	28 MEMORIAL DAY SESSION	29 SESSION	30 SESSION	31 SESSION ADJOURNMENT		

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June 15th, Chicago

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September 20th, Rolling Meadows