

Akerman Practice Update

TAXATION

June 2010

Akerman Presents a Summary of State and Local Tax Developments

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Minnesota

In *HMN Financial, Inc. and Affiliates v. Commissioner of Revenue*, Minn. S. Ct., Dkt. No. A09-1164 (May, 20, 2010), the Minnesota Supreme Court held that the Commissioner lacked the authority under Minnesota statutes and common law to disregard the taxpayer's chosen tax structure. The taxpayer employed the common captive REIT structure in which the REIT affiliate recognized income received from real estate loans, but received a deduction for all dividends paid to its direct parent. These dividends flowed up to HMN Financial, Inc. which deducted 80% of the total under Minnesota law. The Commissioner sought to collapse the captive REIT structure and disallow the taxpayer's dividend received deduction.

The Commissioner argued that no fewer than five different statutes provided sufficient authority to disregard the captive REIT structure. The Court carefully considered each of these statutes and failed to find the source of the power claimed by the Commissioner.

The Commissioner also argued that sufficient authority existed under Minnesota common law to disregard the captive REIT structure. In support of this argument, several decisions of the Court were cited purporting to provide the Commissioner authority to tax according to substance rather than form.



“[I]f the Court concludes that the taxpayer has complied with the relevant statutes, ‘that ends [the Court’s] analysis.’”

The Court quickly distinguished the precedent by arguing that no cited case supports the “radical” position that the Commissioner can disregard statutes providing certain tax structures with favorable tax treatment. In holding for the taxpayer, the Court stated that its proper role is to “construe the relevant statutes to determine if a taxpayer is in compliance with those statutes” and if the Court concludes that the taxpayer has complied with the relevant statutes, “that ends [the Court’s] analysis.”

Washington

Effective June 1, 2010, Washington has modified their B&O tax nexus rules with respect to service activities and the activity of receiving royalty income. Under the new rules, a taxpayer will be deemed to have “substantial nexus” with Washington if: (1) the taxpayer is a resident or domiciled in the state; (2) the taxpayer is organized or commercially domiciled in the state; or (3) the taxpayer is organized or domiciled outside the state, but has more than \$50,000 of property in the state, more than \$50,000 of payroll attributable to the state, more than \$250,000 of receipts from the state, or at least 25% of total property, total payroll, or total receipts in the state. If a taxpayer has nexus with Washington in any one year, it is deemed to have nexus for the following year.

Income from service activities and royalties is apportioned to Washington based solely on a receipts factor. Washington has outlined a hierarchy of rules relating to when gross income will be deemed attributable to the state for purposes of apportionment. Notably, gross income is attributable to Washington if the customer receives the benefit of the service or has used the taxpayer’s intangible property in the state.

Florida

On May 28, 2010, the Governor of Florida signed into law Florida’s amnesty program. The program runs from July 1, 2010 to September 30, 2010 and applies to the following taxes: sales tax, fuel tax, corporate income tax, communications services tax, gross receipts tax, and intangible tax. A taxpayer currently under audit is eligible to participate and will receive a full waiver of penalties, but will only receive a 25% reduction in interest. A taxpayer who has not been contacted by the Department will receive a full waiver of penalties and a 50% reduction in interest. A taxpayer who has entered into a settlement agreement with the Department prior to July 1, 2010 is not eligible for amnesty.

Akerman is ranked among the top 100 law firms in the U.S. by *The National Law Journal NLJ 250* (2009) in number of lawyers and is the largest firm in Florida. With more than 500 lawyers and government affairs professionals, we serve clients from major business centers in Florida, New York, Washington, D.C., California, Virginia, Colorado, Nevada, and Texas.

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