Daily Tax Report ®

Digital Stalemate • Navigating Relief • State Budget Shortfalls

By Erin McManus

July 12, 2020, 9:01 AM

This is a weekend roundup of Bloomberg Tax Insights, which are written by practitioners, featuring expert analysis on current issues in tax practice and policy. The articles featured here represent just a handful of the many Insights published each week. For a full archive of articles, browse by jurisdiction at Daily Tax Report, Daily Tax Report: State, and Daily Tax Report: International.

This week we look at the digital tax impasse, state and local budget shortfalls, getting severance right, navigating the Covid-19 relief provisions, and more. We'll hear from:

- **John Harrington** of Dentons on group decision-making theory and the digital tax stalemate
- **Jeff VanderWolk** of Squire Patton Boggs on getting past the digital tax impasse
- **Jeffrey Katz** on state and local government responses to budget shortfalls
- **David Webb, Stuart Schabes, and Carl Hartley** of Baker Donelson on navigating the Covid-19 relief provisions
- **Mark Poerio** of the Wagner Law Group on not avoiding ERISA in severance plans
- **KPMG** practitioners on transfer pricing adjustments to the Covid-19 economic downturn
- **Philip Urofsky** and **Richard Gagnon** of Shearman & Sterling LLP on divergent views over disgorgement deductibility
- **James Yimin Zhao** and **Rachel Zhao** of Deloitte China on sales and marketing service providers operating in China

- **Alan Lederman** of Gunster, Yoakley & Stewart P.A. on tax and non-tax advantages to Chapter 12 bankruptcy

- **Michael Semes** of BakerHostetler on the convoluted nature of tax litigation in Pennsylvania

- **Andrew Bab** of Debevoise & Plimpton LLP on PIPEs accounting
- **Michael Troege** of ESCP Business School on the current pro-debt bias of corporate taxation
- **Carlo Galli** of Clifford Chance on recent Italian Supreme Court decisions questioning the dividend withholding tax exemption
Treasury Secretary Steven Mnuchin during a press briefing at the White House on July 2. Photographer: Michael Reynolds/EPA/Bloomberg

U.S. Treasury Secretary Steven Mnuchin recently requested a “pause” in the ongoing negotiations over the taxation of digital services providers. A pause in a relationship is usually not a sign that the relationship stands a good chance of enduring. John Harrington of Dentons looks at theories of group decision-making to suggest some possible outcomes in the negotiations led by the OECD. Read: The Unsurprising Stalemate on Digital Taxation

With the U.S. declaring multilateral negotiations on proposed tax law changes regarding cross-border business income to be at an “impasse,” Jeff VanderWolk of Squire Patton Boggs outlines how the situation came to that point and what the parties need to do to move forward. Read: The Anatomy of an Impasse—Taxation of the Digital Economy

How are state and local governments dealing with the financial effects of the Covid-19 pandemic, and what could that mean for taxes? Jeffrey Katz of JD Katz looks at existing sources of revenue and how state and local governments might try to introduce new taxes and squeeze more revenue out of existing sources. Read: Between a Pandemic and a Hard Place—State and Local Governments Respond to Coronavirus-Prompted Budget Shortfalls
Elected officials and government agencies have been busy enacting and interpreting Covid-19 relief legislation. However, navigating the programs available, including the Paycheck Protection Program (PPP), employer tax deferral, and tax credits under the Families First Coronavirus Response Act and CARES Act, has proved challenging for employers wanting to take advantage of the programs. David Webb, Stuart Schabes, and Carl Hartley of Baker Donelson walk through the various programs. Read: Navigating Covid-19 Relief Loans, Employer Tax Deferral, and Tax Credits

Some employers think it is safest to follow informal, unwritten practices and to avoid the federal labor law known as ERISA. Mark Poerio of the Wagner Law Group highlights the risks lurking off the known, generally predictable ERISA path. Read: Getting Severance Right Through ERISA

Transfer pricing practitioners analyzing controlled entities’ profitability may find that the usual benchmarking approaches don’t work well in 2020, and there is significant divergence between the controlled entity results and reference ranges. Prita Subramanian, Valentin Krustev, Hilary Eisenberg, and Mariah Hughes describe three general types of transfer pricing adjustments that are relevant to the current situation and illustrate their application with case studies. Read: Transfer Pricing Adjustments to the Covid-19 Economic Downturn

In June the U.S. Supreme Court issued an opinion restricting the SEC’s use of disgorgement and, to some extent, undermining proposed IRS rules prohibiting the deduction of disgorgement. Philip Urofsky and Richard Gagnon of Shearman & Sterling LLP explain the concept of disgorgement and what the Liu decision could mean for the proposed tax rules. Read: A Step Too Far? The IRS Proposes Non-Deductibility of Disgorgement

China has an enormous consumer market, and many multinational companies have set up sales and marketing service providers in the country. James Yimin Zhao and Rachel Zhao of Deloitte China examine the regulatory and practical considerations surrounding the sales and marketing service model, which MNCs may potentially face from both transfer pricing and agency-type permanent establishment perspectives. Read: Considerations for Sales, Marketing Service Providers of Multinational Companies Operating in China

Chapter 12 bankruptcy offers farmers special non-tax and tax advantages when streamlining their operations to seek to achieve financial viability. Alan Lederman of Gunster, Yoakley & Stewart P.A. walks us through a recent bankruptcy court decision that illustrates these advantages. Read: Eliminating the Inevitability of Farm Debt and Taxes Through Chapter 12 Bankruptcy
The recent Pennsylvania Commonwealth Court ruling in *D&R Sports Inc.*, which held that a taxpayer must properly raise and preserve tax issues before briefing at that court, could directly impact at least one case pending there as well as all future tax cases. The decision reminds taxpayers of the necessity of properly raising, preserving, and pleading issues at Pennsylvania’s tax administrative and judicial forums and highlights the procedural and substantive complexities of Pennsylvania tax litigation, writes Michael Semes of BakerHostetler. *Read:* D&R Sports Decision Impacts All Pennsylvania Tax Cases

Many public companies that find themselves short on cash are turning to private investments in public equity (PIPEs) as a reliable and quick source of funds. Andrew Bab of Debevoise & Plimpton discusses the curious accounting considerations that can arise when a public company decides to go down this path. *Read:* A Surprise in the PIPE Dream—Two-Class Accounting

Professor Michael Troege of ESCP Business School discusses the current pro-debt bias of corporate taxation and the instability this imbalance causes. He suggests a solution that would align the taxation of equity and debt in order to fix the problem. *Read:* How Companies Could Benefit from Ending the Pro-Debt Bias in Taxes

Carlo Galli of Clifford Chance discusses a recent series of Italian Supreme Court decisions questioning the dividend withholding tax exemption under the EU Parent-Subsidiary Directive. *Read:* Italy’s Supreme Court Snubs EU Parent-Subsidiary Directive—But For How Long?

**Corporate Tax Chat: Uber**

Bloomberg Tax chatted with Francois Chadwick, the global head of tax for Uber, about the state of digital taxation worldwide. Chadwick, who leads more than 200 employees around the globe, is part of a team helping to shape global tax and accounting policy for the company. He previously worked for KPMG and the European Commission, and he launched a tax tech startup. *Read:* Corporate Tax Chat With Francois Chadwick of Uber

**From the Archive**

Bloomberg Tax contributors’ opinions on the OECD’s Inclusive Framework digitalization project have ranged from cautious optimism to outright skepticism.

Will Morris of PwC postulated what the new world of international tax will look like and examined the likelihood and dubious wisdom of the inclination of national governments to tax “the other.”
Most people with a desk job are now working from home and remaining productive through use of the internet, and doing so without any additional expense. Jeff VanderWolk of Squire Patton Boggs questioned whether it makes sense for the OECD to pursue increased taxes on automated digital services businesses in the near future when those services will be key to a global economic recovery.

The OECD has proposed fractional apportionment as a way for tax authorities to handle digital transactions. Selena Schneider of Crowe looked at the advantages and disadvantages of using and implementing the method.

**Beyond Tax**

What’s happening outside the world of tax?

What’s your law firm’s strategy for keeping the business you have and expanding new business? Do you have the business development talent you will need to accomplish this? Eva Wisnik, president and founder of Wisnik Career Enterprises, talks with two law firm CMOs about what their law firms—BakerHostetler and Selendy & Gay PLLC—are focusing on and why it’s important to keep investing in BD and marketing. Read: Law Firms Should Focus on Business Development Hiring in Pandemic

Local businesses across the country have been hit hard by the pandemic, with severely reduced revenues leading to layoffs and even closures. Mayer Brown’s Lauren Pryor says a Community Business Capital (C2B) peer-to-peer funding program that draws small-dollar investments from individual investors could be a lifeline. Read: The C2B Initiative—A Lifeline for Struggling Local Businesses

With the safety of in-person bar exams increasingly in question, it’s time for other options for lawyer licensing, say four law professors, all members of the Collaboratory on Legal Education and Licensing for Practice. Licenses can be based on law graduates’ successful completion of substantial credit hours in closely supervised law school clinical courses. Read: Clinical Education—A Safe and Sure Pathway to Law Licensure

Law firms that are resilient are better equipped to handle the economic downturn and survive when corporate law departments consolidate outside counsel and service providers. Yvonne Nath, strategy and culture consultant at LawVision, looks at questions law firms need to ask themselves to gauge their staying power. Read: Does Your Law Firm Have Staying Power in the Economic Downturn?

**Exclusive Content for Bloomberg Tax Subscribers**

(*Note: Your Bloomberg Tax login will be required to read the following content.*)
Albert Feuer explains that tax-advantaged employee benefit plans such as 401(k) plans, 403(b) plans, 457(b) plans, money purchase pension plans, and defined benefit plans may, but need not, permit participants to withdraw a portion of their accrued plan benefits before they retire. In order to make such funds more readily available to those with Covid-19 cash-flow needs, Section 2202 of the CARES Act broadens the circumstances under which plans may make distributions and provides distributees with more favorable tax treatment for some of those distributions, including expanding the opportunity to repay the distribution to a tax-advantaged plan.

_Bloomberg Tax Insights articles are written by experienced practitioners, academics, and policy experts discussing developments and current issues in taxation. To contribute, please contact Erin McManus at emcmanus@bloombergtax.com._

To contact the reporter on this story: Erin McManus in Washington at emcmanus@bloombergtax.com

To contact the editors responsible for this story: Meg Shreve at mshreve@bloombergtax.com; Kathy Larsen at klarsen@bloombergtax.com

© 2020 The Bureau of National Affairs, Inc.   All Rights Reserved