COST FALL 2017
Kentucky State and Local Tax Developments

Timothy J. Eifler
Direct Dial: (502) 560-4208
Email: timothy.eifler@skofirm.com

Jennifer S. Smart
Direct Dial: (859) 231-3619
Email: jennifer.smart@skofirm.com

Stephen A. Sherman
Direct Dial: (502) 568-5405
Email: stephen.sherman@skofirm.com

Andrew J. Donovan
Direct Dial: (859) 231-3076
Email: andrew.donovan@skofirm.com

Stoll Keenon Ogden PLLC
500 West Jefferson Street, Suite 2000
Louisville, KY 40202

Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, KY 40507

TABLE OF CONTENTS

COST FALL 2017
Kentucky State and Local Tax Developments

Timothy J. Eifler
Direct Dial: (502) 560-4208
Email: timothy.eifler@skofirm.com

Jennifer S. Smart
Direct Dial: (859) 231-3619
Email: jennifer.smart@skofirm.com

Stephen A. Sherman
Direct Dial: (502) 568-5405
Email: stephen.sherman@skofirm.com

Andrew J. Donovan
Direct Dial: (859) 231-3076
Email: andrew.donovan@skofirm.com

Stoll Keenon Ogden PLLC
500 West Jefferson Street, Suite 2000
Louisville, KY 40202

Stoll Keenon Ogden PLLC
300 West Vine Street, Suite 2100
Lexington, KY 40507

I. <u>INCOME/FRANCHISE TAXES.</u>

A. Legislative Developments.

None.

B. Judicial Developments.

1. *World Acceptance Corporation, et al. v. Commonwealth of Kentucky, Finance & Administration Cabinet, Department of Revenue*, Kentucky Board of Tax Appeals, File No. K13-R-18, Order No. K-24682 (August 29, 2014), appealed to Franklin Circuit Court, Civil Action No. 2014-CI-1193 (August 14, 2015), *vacated and reversed* (November 10, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-001852 (Pending).

On November 10, 2015, the Franklin Circuit Court granted the Kentucky Department of Revenue's (the "KDOR") motion to alter, amend, or vacate the Court's August 14, 2015 Order holding that an out-of-state corporation and its Kentucky subsidiary were required to file consolidated income tax returns. In so doing, the Court affirmed the final ruling of the KDOR and the Kentucky Board of Tax Appeals (the "KBTA"). The taxpayers, World Acceptance Corporation ("WAC") and its wholly-owned subsidiary, World Finance Corporation of Kentucky ("WFCKY") (collectively "Taxpayers") amended the separate returns initially filed by WFCKY to reflect the consolidated filing of the Taxpayers for tax years 2007-2010. The amended returns resulted in significant refund claims being owed to the Taxpayers, and the KDOR denied the refund claims. Notably, the Taxpayers relied upon a letter ruling issued by the KDOR advising WAC to file a consolidated return.

The Taxpayers appealed the KDOR's denial of their refund claims to the KBTA, which ruled in favor of the KDOR. The Taxpayers appealed the KBTA's decision to the Franklin Circuit Court, which initially reversed the KBTA and ordered the KDOR to grant the Taxpayers' refund claims. In its first order, the Court held the KDOR's interpretation of the relevant statutes contradicted fundamental rules of statutory construction. Nevertheless, the Court granted the KDOR's motion to alter, amend, or vacate the Court's judgment, finding its initial Order was "erroneous".

The KDOR argued the facts contained in the anonymous request for a letter ruling submitted by WAC were materially different from the facts provided in WAC's amended return because WAC failed to disclose that management services were performed outside Kentucky or that the employee providing services in Kentucky also worked in another state. The Court concluded the KBTA's finding that the facts presented in WAC's amended returns were materially different from the facts presented in WAC's request for a letter ruling was based upon substantial evidence. The Court noted that WAC did not disclose that its employee working in Kentucky also worked the majority of the time in other states or that management services were performed outside Kentucky. Furthermore, in a holding that provides unprecedented protections to the KDOR and greatly undermines the utility of the letter ruling process, the Court held:

> [A]n anonymous request for a letter ruling submitted by a taxpayer is not binding on either [the KDOR], the taxpayer, or a Kentucky court of law so long as that request contains facts that are materially different from those submitted in a subsequent filing with [the KDOR] ***or if [the KDOR] misapplies the applicable statutes and regulations to the facts submitted to it by the taxpayer.***

(Emphasis added).

The Court next proceeded to address the parties' statutory construction arguments. Kentucky Revised Statute ("KRS") 141.200(10)(b) requires taxpayers to file separate returns *unless* there is a "common parent corporation doing business in Kentucky" that has nexus with an affiliate. Under KRS 141.200(9)(c), a "common parent corporation" is defined as the member of an "affiliated group" that meets the ownership requirement of paragraph (a)1 or (b)1 of KRS 141.200(9). Because KRS 141.200(9)(a)1 applies to taxable years prior to January 1, 2007, only KRS 141.200(9)(b)1 applied in the instant case. KRS 141.200(9)(b)1 defines an "affiliated group" as "(1) or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if [the common parent owns 80% or more of the stock and value in at least one other includible corporation and 80% of the stock in each of the includible corporations, excluding the common parent, is owned directly by one or more of the other corporations]."

An "includible corporation" is defined as any corporation doing business in Kentucky *unless* the corporation falls within one of the nine exceptions enumerated in KRS 141.200(9)(e). Of relevance here, KRS 141.200(9)(e)7 provides that a corporation is not an includible corporation if the corporation realizes a net operating loss and the corporation's Kentucky property, payroll and sales factors pursuant to KRS 141.120(8) are de minimis. Similarly, KRS 141.200(9)(e)8 states that a corporation is not an includible corporation if the sum of its property, payroll, and sales factors described in KRS 141.120(8) is zero.

The KDOR argued that under KRS 141.200(9)(b)1, the parent, WAC, must, but does not, meet the definition of "includible corporation" because WAC was a corporation realizing a net operating loss whose property, payroll and sales factors were de minimis. The Taxpayers argued the definition of "includible corporation" applicable to a "common parent corporation" is set forth at KRS 141.200(9)(b), *i.e.*, a common parent corporation is an includible corporation if the ownership requirements set forth in that section are satisfied. Furthermore, the Taxpayers argued that even if KDOR was correct that KRS 141.200(9)(e)7 is applicable, WAC's apportionment factors were not de minimis (per KDOR's own letter ruling), and therefore, this section does not prohibit WAC from meeting the definition of "includible corporation".

In its final Order, the Court rejected the Taxpayers' argument that KRS 141.200(9)(b) contains the definition of "includible corporation" applicable to a "common parent corporation". The Court found KRS 141.200(9)(e) sets forth the definition of "includible corporation" for both "common parent corporations" and other non-parent companies, while KRS 141.200(9)(b) enumerates the ownership requirements for the affiliated group as a whole. The Court reasoned it must presume that when the legislature uses a defined term in a section in which it has already defined the term, the term must mean what is written in its definition and nothing else. The Court also held WAC's interpretation was contrary to the legislative history of KRS 141.200(9), finding the legislature amended the statute in 2006 to *narrow* the types of common parent corporations that could be part of an affiliated group.

After holding WAC must meet the definition of "includible corporation" in KRS 141.200(9)(e), the Court next found WAC did not meet this definition because WAC fell within the exceptions in either KRS 141.200(9)(e)7 or KRS 141.200(9)(e)8, as its property, payroll, and sales factors were either zero or de minimis.

The Court also summarily dismissed the Taxpayers' arguments that the KDOR's denial of their refund claims violated KRS 13A.130, Sections 27 and 28 of the Kentucky Constitution, and the doctrine of contemporaneous construction.

The Court's Order gives short shrift to the standard that must be satisfied for a motion to alter, amend, or vacate to be granted, which the Court acknowledges is "an extraordinary remedy and should be used sparingly."

The Taxpayers have appealed to the Kentucky Court of Appeals, and briefing has been completed.

The authors' firm represents the Taxpayers in this action.

C. Administrative Developments.

1. 2017 Kentucky Tax Alert – Electronic Filing of Tax Returns.

On January 1, 2017, the KDOR issued a special edition of the Kentucky Tax Alert addressing electronic filing of returns. The KDOR began accepting corporate income tax returns on January 6, 2017. Forms 725 and 720 mandatory nexus consolidated returns and supporting schedules can now be e-filed for tax year 2016. If a federal extension is used as a six-month extension to file a Kentucky return, a copy of the image of the federal extension is required to be attached to the electronic submission.

Direct debit is an option for e-filed corporate income tax return forms, although direct deposit is not available. Any Kentucky form or schedule requiring a Kentucky Corporation/LLET account number must be populated with the appropriate number associated with the FEIN, and the numbers must match the KDOR's records. The KDOR encourages taxpayers to file electronically but also notes that, for taxpayers who choose to file by mail, the mailing address for the filing of paper returns has changed to: Kentucky Department of Revenue, P.O. Box 856910, Louisville, KY 40285-6910.

The KDOR also encourages the electronic filing of withholding returns using its Withholding Returns and Payment System ("WRAPS"). Employers with 100 or more W-2s are required to file electronically, and employers with 250 or more 1099 or W-2G forms are required to submit those forms in electronic format to: Kentucky Department of Revenue, CD Processing, 501 High Street, Station 57, Frankfort, KY 40601.

2. New Markets Development Program Credit.

The KDOR has issued a permanent regulation, 103 KAR 15:180, effective November 4, 2016, regarding implementation of the new markets development program credit. KRS 141.434 establishes a nonrefundable tax credit for a person or entity making a qualified equity investment in a qualified community development entity ("CDE") as provided by KRS 141.432(6). The KDOR's regulation establishes guidelines and filing requirements of a CDE so that the KDOR may certify qualified equity investments and allocate tax credits accordingly.

D. Trends.

Taxpayers in Kentucky continue to hear a great deal about tax reform. In his State of the Commonwealth address in January, Governor Matt Bevin promised tax reform this year. The General Assembly, on the other hand, continues to show great reluctance with regard to the subject. Regardless, a commitment has been expressed to tackle tax reform in the near future—likely during the regular legislative session in 2018. The Governor has emphasized the need to make Kentucky's tax code more competitive, including repealing the business inventory tax while ensuring localities are made whole for any revenue loss. If the Governor is able to persuade the General Assembly to join him, corporation income tax topics that could be considered include single sales factor apportionment; repeal of Kentucky's mandatory nexus consolidated filing methodology; and conforming the definition of "cost of goods sold" that is part of the limited liability entity tax to the federal definition of the term.

II. TRANSACTIONAL/GROSS RECEIPTS TAXES.

A. Legislative Developments.

1. Credit for Fuel Purchased by Certificated Air Carriers.

House Bill ("HB") 368 was signed by the Governor on March 21, 2017, and was effective 90 days after adjournment of the 2017 legislative session. It amends KRS 144.132 to extend the credit for sales and use tax paid on fuel purchases by certificated air carriers to persons who contract with one or more certificated air carriers for the transportation by air of persons, property, or mail, and are responsible for the purchase and payment of aircraft fuel, including jet fuel to transport the persons, property, or mail. "Certificated air carrier" means an air carrier that is listed on the United States Department of Transportation certificated air carrier list or a foreign indirect air carrier registered with the United States Department of Transportation. The legislation also repeals outdated provisions.

B. Judicial Developments.

1. *Northland Custom Processing, LLC v. Finance & Administration Cabinet, Department of Revenue*, Kentucky Board of Tax Appeals, File No. K15-R-15, Final Order No. K-25070 (April 11, 2016), appealed to Franklin Circuit Court, Civil Action No. 16-CI-514 (May 13, 2016) (Pending).

In *Northland Custom Processing*, the KBTA held the KDOR was precluded from re-litigating an issue decided previously by the Kentucky Court of Appeals even though the opinion of the Court of Appeals was unpublished. The case presented to the Court of Appeals, *Northland Corp. v. Revenue Cabinet*, No. 88-CA-27-S (Ky. App. 1988), was referred to as "Northland I". In Northland I the KDOR had denied Northland's qualification for and refund claims related to purchases of energy that should have qualified as exempt from sales and use taxes pursuant to KRS 139.480(3). The "energy exemption" provides that the purchases of energy or energy producing fuels used in manufacturing or processing that exceed 3% of the "cost of production" are exempt from sales and use tax. Generally, the calculation of "cost of production" includes direct costs related to raw materials.

The question in Northland I was whether the lumber used by Northland in a kiln-drying process was direct material that had to be included in the cost of production. The Court of Appeals, affirming the KBTA and Franklin Circuit Court, held that lumber was not a direct material in the process as the operation produced heat, not lumber, and therefore, Northland had properly excluded the costs of the lumber in calculating its energy exemption and in applying for an energy direct pay authorization, which is necessary for claiming the exemption.

The KDOR argued that Northland I should not be applied because *Louisville Edible Oil Products, Inc. v. Revenue Cabinet*, 957 S.W.2d 272 (Ky. App. 1997) ("*LEOP*") constituted a "major change" in the law since the Northland I decision. The KBTA held that *LEOP* was not a major change that would bar the application of collateral estoppel in this case because the case *did not involve the question of whether the lumber was a direct material cost*. Instead, the case held that all direct material costs, including raw materials, had to be included in the cost of production. The KDOR has appealed the KBTA's decision to the Franklin Circuit Court.

2. *Kentucky CATV Ass'n v. City of Florence et al,* 520 S.W.3d 355 (Ky. 2017).

The Kentucky Supreme Court recently held a portion of the state's Multichannel Video Programming and Communications Services Tax (the "Telecommunications Tax" or "Telecom Tax"), which prohibits a Kentucky political subdivision from levying and collecting franchise fees or taxes on services subject to the Telecom Tax is unconstitutional as applied to cities.

The Telecom Tax, enacted by the General Assembly in 2005 and codified at KRS 136.600 through 136.660, imposes a 3% excise tax on all retail purchases of multichannel video programming ("MVP") services, as well as a 2.4% tax on the gross revenues received by all providers of MVP services and a 1.3% tax on the gross revenues received by providers of communications services. KRS 136.660(1)(a)-(c), the Telecom Tax's "Prohibition Provision", prohibits local governments from levying or collecting franchise fees or taxes from MVP and communications service providers. MVP and communications service providers are entitled to a credit against the Telecom Tax for any franchise fees actually paid. *Id.* at (5).

Historically, cities and some counties required cable and telecommunications companies to obtain their consent to place their facilities in the public rights-of-way. Section 163 of the Kentucky Constitution provides that no utilities shall be permitted to lay their facilities within the the public rights-of-way within a city or town without the consent of their legislative bodies (i.e. a "franchise"). Section 164 limits local franchises to a twenty year term and requires local governments to award franchises to the "highest and best bidder" pursuant to a public bidding process. Local governments historically imposed franchise fees (typically a percentage of gross revenues derived within the jurisdiction) as compensation for the grant of these rights.

The Telecom Tax regime was intended to hold local governments harmless from the loss of franchise fee revenue as a result of the Prohibition Provision. A portion of the state Telecom Tax revenue is allocated and distributed to local governments that previously levied franchise fees or taxes pursuant to a revenue sharing formula. KRS 164.648 through 136.656. Good intentions notwithstanding, those distributions proved 17% less than historical franchise fee collections. After several unsuccessful attempts to amend the Telecom Tax distribution formula, cities sought relief from the courts.

In 2011, the Kentucky League of Cities, Inc. and several cities in the Commonwealth (the "Cities") filed a declaratory judgment action against the Finance and Administration Cabinet (the "Cabinet") and state officials alleging that the Telecom Tax violated Sections 163 and 164 of the Kentucky Constitution insofar as it prohibits cities from collecting franchise fees from MVP and communications service providers. In response, the Cabinet and the Kentucky CATV Association, Inc. (the "Association"), an intervening defendant, argued that Sections 163 and 164 neither explicitly nor implicitly provide municipalities the power to collect franchise fees. The Association also argued Section 181 of the Kentucky Constitution reserves to the General Assembly the power to prohibit municipalities from collecting franchise fees.

Relying upon legislative history, the Court held the framers of the Kentucky Constitution intended municipalities to have the power to grant franchises *and* to collect fees in exchange for the granting of those franchises. The Court found the Proceedings and Debates in the Constitutional Convention of 1890 made it clear Sections 163 and 164 were intended to provide for municipal benefit via the sale of franchises. According to the Court, by granting municipalities the ability to enter into a franchise agreement, the Constitution affords municipalities the full range of contract law, including the ability to receive consideration in exchange for the performance of the contract. The Court also held that while Section 181 grants the General Assembly the right to delegate (or not to delegate) to municipalities the authority to collect "license fees on franchises", a city's power to collect franchise fees for the use of its public rights-of-way is delegated by the Constitution, not the General Assembly.

The authors' firm represents the Kentucky CATV Association, Inc. in this action.

3. *Sam's East, Inc. v. Department of Revenue,* Kentucky Board of Tax Appeals, File No. K13-R-21 and *Wal-Mart East v. Department of Revenue*, File No. K13-R-20 (June 27, 2014), Franklin Circuit Court, Civil Action No. 14-CI-00870 (June 9, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-001054 (September 9, 2016), *motion for discretionary review denied*, Kentucky Supreme Court, No. 2016-SC-550-D (March 15, 2017).

The Kentucky Court of Appeals upheld the constitutionality of a 2009 amendment to KRS 139.570, which retroactively set a cap on the total reimbursement allowed to retailers for collecting and remitting the sales tax. During the period for which the taxpayers claimed refunds (July 2003 to June 2008), KRS 139.570 provided that a seller may deduct on each sales tax return 1% of the tax due in excess of $1,000 as reimbursement for the cost of collecting and remitting the tax. Three budget bills enacted during the refund period placed a $1,500 cap on the total reimbursement allowed per seller in any month. Effective July 1, 2008, the Kentucky General Assembly passed a separate bill (that is, separate from the budget bills) formally amending KRS 139.570 to reflect the $1,500 cap. In 2009, the General Assembly repealed and reenacted KRS 139.570 to include the $1,500 reimbursement limit and apply the limit retroactively from July 1, 2003 to June 30, 2004, and for the period of July 1, 2005 to June 30, 2008.

On average, Petitioners Wal-Mart Stores East, LP ("Wal-Mart") and Sam's East, Inc. ("Sam's") collect and remit a combined $17 million in sales tax each month to the KDOR. For the periods of July 1, 2003 – June 30, 2004 and July 1, 2005 – June 30, 2008, Wal-Mart and Sam's remitted the sales tax collected and withheld $1,500 as vendor compensation. On September 8, 2008, Wal-Mart and Sam's submitted refund claims to the KDOR for vendor compensation owed to them over the $1,500 limit. They argued their refund claims were filed after the $1,500 cap provisions in the budget bills expired and within the four year statute of limitations set forth in KRS 134.580.

After the KDOR denied their refund claims, the Petitioners appealed to the KBTA, which affirmed the KDOR's denial and held it did not have jurisdiction to reach the Petitioners' constitutional challenges. The Petitioners appealed to the Franklin Circuit Court, which affirmed.

On appeal, the Kentucky Court of Appeals first held the repeal and reenactment of KRS 139.570 did not violate Section 180 of the Constitution, which provides that every act enacted by the General Assembly levying a tax must specify the purpose for which the tax is levied, and no tax levied and collected for one purpose shall ever be devoted to another purpose. The Petitioners argued that by taking money that was supposed to be collected for reimbursing vendors and redirecting this money to the General Fund, the money was collected for one purpose and devoted to another. The Court disagreed. The Court found that taxes collected by retailers are held in trust for the Commonwealth and thus belong to the Commonwealth (not the retailers) at all times. The Court also held that KRS 139.570 was never intended as a tax purpose statute; instead, it was an allowance or deduction statute that provided the purpose for the deduction, not the purpose for the tax itself. KRS 139.020, however, provides the purpose of the sales tax: to pay off certain state bonds and to provide monies for the General Fund. Thus, the Court found the money was collected for the General Fund all along and not impermissibly transferred.

The Court also rejected the Petitioners' argument that the budget bills violated the provision of Section 51 of the Kentucky Constitution requiring that an act relate to only one subject and that the subject be expressed in the title of the act. The Court held that because the 2009 Act did not violate Section 180, refunds due the Petitioners were constitutionally capped at $1,500. The Court noted that the Petitioners did not appear to argue that the 2009 Act violated Section 51, only that the budget bills violated Section 51. Since the 2009 Act applied the $1,500 cap retroactively throughout the refund period, the Court held it need not address the constitutionality of similar cap provisions contained in the budget bills.

The Court did not determine whether the Petitioners' claims were barred by the statute of limitations, as the circuit court did not address this issue since it found the Petitioners' refund claims were not meritorious, and the Court declined to address an issue on which the circuit court did not have the opportunity to rule.

The Kentucky Supreme Court denied the Petitioners' motion for discretionary review on March 15, 2017.

4. *Interstate Gas Supply, Inc. for use and benefit of Tri-State Healthcare Laundry, Inc. v. Department of Revenue, Finance and Administration Cabinet*, Kentucky Court of Appeals, Case No. 2013-CA-001766 (February 26, 2016), *motion for discretionary review granted*, Kentucky Supreme Court, No. 2016-SC-000281 (October 13, 2016) (Pending).

A decision issued by the Kentucky Court of Appeals held Section 170 of the Kentucky Constitution exempts an institution of purely public charity from the use tax imposed by KRS 139.310. The Court held the use tax imposed by Kentucky statute is similar enough to an *ad valorem* tax to render its enforcement on government entities unconstitutional under Section 170 of the Kentucky Constitution.

The taxpayer, Tri-State Healthcare Laundry, Inc. ("Tri-State") is an institution of purely public charity providing laundry services to several non-profit hospitals in Northern Kentucky. Tri-State purchased all of the natural gas used in its business from Interstate Gas Supply, Inc. ("IGS"), a for-profit corporation headquartered in Ohio. Though a charitable institution, Tri-State is not an IRC § 501(c)(3) organization. Pursuant to KRS 139.340, IGS collected and remitted use tax on the natural gas it sold to Tri-State. Tri-State and IGS then timely filed an application for a refund of the use taxes paid by Tri-State and collected and remitted by IGS on the basis that Tri-State is exempt from use tax under Section 170, which provides, in pertinent part:

> There shall be exempt from taxation public property used for public purposes; . . . real property owned and occupied by, and personal property both tangible and intangible owned by, institutions of religion, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted to the cause of education. . .

The KDOR denied the refund claim, citing *Children's Psychiatric Hospital v. Revenue Cabinet*, 989 S.W.2d 583 (Ky. 1999). In *Children's Psychiatric Hospital*, the Supreme Court of Kentucky held Section 170 does not exempt purely public charities from the hospital provider tax imposed on hospitals and physicians throughout the Commonwealth. The KBTA and the Franklin Circuit Court affirmed the KDOR's denial, holding that under *Children's Psychiatric Hospital*, the exemption set forth in Section 170 is limited to property taxes and does not apply to use taxes.

The Kentucky Court of Appeals reversed. Citing *Commonwealth ex rel. Luckett v. City of Elizabethtown*, 435 S.W.2d 78 (Ky. 1968), the Court stated that under Kentucky law, "the use tax imposed by KRS 139.310 is similar enough to an *ad valorem* tax to render its enforcement on governmental entities unconstitutional under Section 170." The Court distinguished the provider tax at issue in *Children's Psychiatric Hospital*, noting the provider tax is imposed on revenues commonly generated by the rendering of *services* to patients, and not by the acquisition or use of any property. Thus, unlike the use tax, the provider tax does not function in any way similar to a property tax. Finding no indication that *Children's Psychiatric Hospital* explicitly or implicitly overruled *City of Elizabethtown*, the Court held that imposing the use tax on institutions of purely public charity, like Tri-State, violates Section 170 of the Kentucky Constitution.

The KDOR sought a rehearing at the Court of Appeals, which was denied. The KDOR filed a motion for discretionary review with the Kentucky Supreme Court, which was granted on October 13, 2016. Briefing is complete and an oral argument was held on April 20, 2017.

The authors' firm represents IGS/Tri-State in the action.

5. *Novelis Corporation v. Finance and Administration Cabinet, Department of Revenue*, Kentucky Board of Tax Appeals, File Nos. K13-R-35; K14-R-22 (March 24, 2016), appealed to Madison Circuit Court, Civil Action No. 16-CI-00189 (April 22, 2016) (Pending).

The KBTA has held that refractory shapes used at an aluminum processing plant are subject to sales and use tax, rejecting the taxpayer's claim that the shapes are industrial supplies or, alternatively, machinery for new and expanded industry. The taxpayer, Novelis Corporation ("Novelis"), operates a plant in Berea, Kentucky, where it processes aluminum cans and aluminum scrap into ingots that are sent to a sister plant for further processing. The majority of the refractory shapes are used as a protective lining for the room-sized furnaces or aluminum smelters that melt scrap aluminum during the hot metal stage.

Novelis argued the refractory shapes are similar to "fire brick", which is listed as an industrial supply exempt from sales and use tax pursuant to KRS 139.470(10). The statute exempts certain tangible personal property directly used in manufacturing or industrial processing, if the property has a useful life of less than one year. Repair, replacement, and spare parts, however, are excluded from the exemption. As opposed to industrial supplies, which are intended to be "used up" in the manufacturing process, repair and replacement parts are used to maintain or repair machinery and equipment.

The KBTA found the refractory shapes were an integral part of the large furnaces that melt the molten aluminum. Any item that touches the molten aluminum must be lined with this refractory material, and the refractory items must be purchased each year because they wear and erode. Testimony before the KBTA indicated the shapes are replaced during annual or semi-annual outages at the taxpayer's plant. Because the shapes wear and erode and are used to mend and repair the furnaces, the KBTA held these items are taxable repair and replacement parts. The KBTA concluded the refractory shapes were distinguishable from fire brick, as the shapes are specially engineered slabs purchased by the taxpayer that are not consumed completely during the manufacturing process, unlike the standard fire brick included in the industrial supplies definition since the 1960s.

The KBTA also held the refractory shapes do not qualify as exempt machinery for new and expanded industry because repair, replacement, and spare parts are excluded from the exemption. Furthermore, the KBTA held the shapes are not exempt from sales and use tax pursuant to KRS 139.480(23), which exempts certain machinery or equipment used primarily for recycling purposes. The KBTA found that when the aluminum enters the hot metal stage of the taxpayer's operation, the equipment, including the refractory shapes, is primarily being used for manufacturing purposes and not recycling purposes. The KBTA noted the taxpayer can and does receive an income tax credit for some of its recycling equipment, which it uses to transform aluminum cans and scrap aluminum into the raw aluminum product used for its furnaces. Finally, the KBTA rejected the taxpayer's contemporaneous construction argument, holding the statute at issue was unambiguous.

The taxpayer has appealed the KBTA's decision to the Madison Circuit Court. Briefing is complete and oral argument was heard on January 11, 2017.

6. *Rent-a-Center East, Inc. and Rent-Way, Inc. v. Finance and Administration Cabinet, Department of Revenue*, Kentucky Board of Tax Appeals, File No. K14-R-17 (September 6, 2016), appealed to Franklin Circuit Court, Civil Action No. 16-CI-1075 (October 6, 2016) (Pending).

The hearing officer at the Kentucky Board of Tax Appeals ("KBTA") issued a recommended decision in favor of KDOR. The full KBTA, however, found in favor of the taxpayers, Rent-a-Center East, Inc. and Rent-Way, Inc. The taxpayers are rent-to-own companies that rent and sell household goods, including furniture, appliances, electronics, and computers. To rent or purchase tangible personal property, customers must execute a Rental Purchase Agreement and pay a rental purchase fee. The taxpayers collect and remit sales tax on the rental purchase fee.

The Rental Purchase Agreement provides that customers are liable for the fair market value of the property if it is lost, stolen, damaged, or destroyed. At the time of signing the agreement, customers have the option of purchasing an "Optional Liability Waiver Provision", which covers much of a customer's potential liability for losses. Customers choosing to purchase this coverage pay a separately stated waiver fee in addition to the weekly, semi-monthly, or monthly rental payment. The optional waiver fee is then added to the original Rental Purchase Agreement.

The taxpayers did *not* collect and remit sales tax on optional waiver fees charged to customers for tax years 2007 through 2011. Although the KDOR failed to pick up these waiver fees in prior audits, it concluded the waiver fees were taxable and issued assessments to the taxpayers for the tax years at issue. The KDOR argued the waiver fees were part of the taxpayers' gross receipts from the lease or rental of tangible personal property and thus were subject to Kentucky sales tax.

The taxpayers appealed the assessments issued by the KDOR, arguing the waiver fees were charges for intangible property and therefore not subject to sales tax. The KBTA agreed, rejecting the recommended decision in favor of the KDOR. The KBTA held the optional waiver agreement, for which a separately stated fee is charged, is not tangible personal property as defined by Kentucky law. Indeed, the KBTA noted that the KDOR conceded the waivers at issue were not tangible personal property. Because Kentucky imposes sales tax only on gross receipts derived from retail sales of tangible personal property (and certain select services not at issue in this case), the KBTA held the waiver fees were not subject to tax.

The KDOR has appealed the KBTA's decision to the Franklin Circuit Court and briefing is underway.

7. *Humana, Inc. v. Kentucky Department of Revenue*, Kentucky Claims Commission, File No. K16-R-03 (February 8, 2017).

The Kentucky Claims Commission ("Commission"), formerly the KBTA, has held Humana, Inc. responsible for sales tax on paper purchased by it for use in the provision of services to its insurance affiliates. Humana is the parent corporation of numerous subsidiaries including many in the health insurance business. These health insurance affiliates enter into an agreement with Humana specifically entitled "Corporate Service Agreement" and referred to as the "Service Agreement". Humana is designated or referred to as the "Service Provider" and the insurance affiliate as "the Company".

The Service Agreement states Humana will provide management, information systems, accounting, financial and legal services, and human resources management in exchange for the "consideration … described on Schedule B" of the Service Agreement. The Service Agreement makes no mention of retail sales of tangible personal property such as the statements provided by Humana to the customers of the insurance affiliates. The statements provide a wide range of information specific to each individual customer with regard to his or her health insurance or health plan.

This dispute arose when the KDOR issued a sales tax assessment for paper purchased by Humana. While Humana had paid tax on this paper in years past, for periods covered by the audit Humana provided its paper vendor with a resale certificate. Humana argued the provision of the customer statements was a sale of printed material and thus, use of the resale certificate was appropriate.

The Commission concluded that the statements were the result of a combination of the provision of legal, accounting and information technology services and that these services were the "object or essence of the transaction." In support of its conclusion the Commission relied on 103 KAR 26:010, §1, which provides that "persons engaged in the business of rendering service shall be classified as consumers … of the tangible personal property they use incidentally in rendering the service."

Humana did not appeal and the Commission's decision is final.

C. Administrative Developments.

1. Guidance for Local Jurisdictions Considering Implementation of Utility Franchise Fees.

The Kentucky Department of Revenue (the "KDOR") recently issued guidance on its website to taxpayers regarding local jurisdictions considering whether to renew or establish a franchise fee on cable service and/or communications service rather than relying on receipts from the state telecommunications taxes. The guidance was issued in response to the Kentucky Supreme Court's decision on June 15, 2017 holding that a portion of Kentucky's telecommunications tax prohibiting cities from collecting franchise fees from cable providers in exchange for use of their rights-of-way was invalid.

The KDOR noted that, under KRS 136.660(4), any political subdivision that chooses to impose a franchise fee on any cable or communications service will forfeit distributions of all state telecommunications receipts during the time in which any franchise fees are being collected. The KDOR also indicated that while each franchising jurisdiction is uniquely situated, in many cases, the current distributions of state telecommunications taxes are and will continue to be greater than any revenues that might be generated from local franchise fees.

The KDOR indicated that the repealed franchise value property tax component of the cities' historical tax base comprised, on average, at least 20% of their total collections amount. The KDOR further noted that if a local jurisdiction elects to activate a franchise fee, the jurisdiction would likely want to determine whether any new collections would exceed both the property tax and franchise fee components of its 2005 tax base to verify whether the decision to forfeit telecommunications receipts from the state makes sound financial sense.

Finally, the KDOR's guidance sets forth considerations for those local jurisdictions that intend to proceed with imposition of a franchise fee. First, any such jurisdiction must notify the KDOR in writing of the effective date of the franchise fee. The KDOR's guidance requests that a ninety-day notice be provided to it before franchise fees are implemented. Local jurisdictions should also provide a ninety-day notice period to cable companies and other utility providers before imposition of franchise fees. This notice period is to ensure that cable companies can perform any database changes or communicate billing changes to their affected customer base.

D. Trends.

Tax reform will likely be considered during the 2018 regular legislative session. Likely transaction tax topics include expansion of the sales and use tax base to certain services, elimination of some sales tax exemptions and potential rate change.

III. <u>PROPERTY TAXES.</u>

A. Legislative Developments.

1. Municipal Solid Waste Disposal Facilities.

HB 402 was passed into law and signed by the Governor. The bill removes "municipal solid waste disposal facilities", *i.e.*, landfills, from KRS 136.115 and KRS 136.120, which subjected the facilities to the centrally-assessed property tax as public service companies. Beginning with the 2017 tax year, landfills are subject to property tax in the same manner as other commercial enterprises. The KDOR retains the sole power to value and assess the real property and improvements of landfills and to bill and collect the associated state property taxes. HB 402 has been codified at KRS 132.202.

Pursuant to KRS 132.202(3)(c), which directs the KDOR to promulgate an administrative regulation to implement a valuation methodology for landfills, the KDOR promulgated 103 KAR 8:160, which went into effect December 2, 2016.

2. Land Bank Authorities.

HB 318, signed into law on March 21, 2017, and effective 90 days after adjournment, amends KRS 65.370 to provide that when a property is acquired by a land bank authority, all state, county, city, and school district taxes are extinguished. For the first five years following the conveyance of the property by the authority to an owner that is subject to ad valorem property taxes, 50% of the property taxes collected from the property, except school districts, must be remitted to the authority.

3. Property Valuation Administrators.

HB 284, effective March 21, 2017, amends KRS 132.690, relating to PVA inspections, to provide that improvements to real property must be inspected on-site or in person visually by the PVA or his or her deputy. Subsequent inspections may be on-site or through the use of digital imaging technology or by other means approved by the KDOR. The legislation also amends KRS 133.120 to provide for an extension of time for PVA taxpayer conferences and subsequent appeals to local boards of assessment appeals for up to 25 days, as approved by the KDOR. The legislation amends various statutes to conform.

4. Manufactured homes.

HB 270, signed into law on March 21, 2017, and effective 90 days after adjournment, creates a new section of KRS Chapter 186A to require the owner of a manufactured home that has been converted to real estate to file an affidavit of severance with the county clerk when the manufactured home is to be removed from real estate located within the county. The county clerk is required to provide a copy of the affidavit of severance to the PVA for adjustment of the real property tax rolls of the county.

B. Judicial Developments.

1. *Union Underwear Company, Inc., d/b/a Fruit of the Loom v. Russell County Property Valuation Administrator*, Kentucky Board of Tax Appeals, File No. 15-S-01 (April 11, 2016), appealed to Russell Circuit Court, Civil Action No. 16-CI-00151 (November 7, 2016).

This case involves alleged "omitted property" tax bills issued by the Russell County Property Valuation Administrator ("PVA") to the taxpayer for tax years 2009-2014. Kentucky law permits local governments such as counties and cities to issue industrial revenue bonds ("IRBs") to finance certain types of projects, such as manufacturing facilities that will increase employment and other economic activity. The IRB structure reduces a portion of the real and tangible personal property taxes otherwise payable by the taxpayer to local and state government as a result of the existence of the project. Kentucky law provides that real and tangible personal property held by a county or city is exempt from property tax (with the exception of an economically insignificant state leasehold tax). By transferring title in the project to the governmental authority and leasing the project back over a period of years, there is a reduction in the taxpayer's property taxes during the term of the lease. Once the IRBs are paid in full, the taxpayer is subject to property tax at regular state and local tax rates.

In this case, the City of Jamestown issued IRBs in order for the taxpayer to construct a new manufacturing facility. The taxpayer conveyed the real property it purchased from the Russell County Development Association and the manufacturing facility to the city in 1983 and the city leased the property back to the taxpayer. The terms of the lease provided that the lease commenced on the date of the issuance of the bonds and expired on the date the bonds were retired or December 1, 2010, whichever was later. The bonds were paid off and, by its terms, the lease expired in 2000. The city was not notified by the trustee of the bonds, as required, that the bonds had been retired. Thus, while the PVA was assessing the property, the taxpayer continued to receive the statutory exemption from local taxation and the reduced state rate through 2014 when it closed the plant. The PVA is required to assess property even though it is exempt from taxation.

In 2015, the PVA sent a letter to the taxpayer stating "he had deemed the property to be omitted property for the tax years 2009-2014" and the PVA issued "omitted tax bills" based on an assessed value of $24,873,800. Initially, the property was assessed at $4,000,000 and the assessment had increased to $10,000,000 by 2005. While there was no question that the property should have been taxed at full state and local tax rates once the bonds were retired, the question presented was whether the PVA had the statutory authority to issue retroactive tax bills in this circumstance. The KBTA held that the PVA lacked such authority.

The KBTA noted that there are two limited circumstances in which a PVA can amend or send additional bills. Those circumstances include property that was not listed, i.e., omitted property, and instances in which the taxpayer intentionally fails to provide additional information requested in writing by the PVA. The property at issue was not "omitted property" because it was on the tax rolls, and the PVA had not requested information that the taxpayer had failed to provide. As a result, the KBTA held that the PVA lacked the statutory authority to attempt to retroactively assess the property and the tax bills were held to be invalid.

The PVA timely noticed an appeal to the Russell Circuit Court. On November 7, 2016, the Court issued an Order adopting the KBTA's analysis and affirming the KBTA's decision. The PVA did not appeal the Circuit Court's Order, and the decision is final.

2. *Coleman et al. v. Campbell Co. Public Library Bd. of Trustees*, Kentucky Court of Appeals, Case No. 2013-CA-000883-MR (March 20, 2015) and 2016-CA-001642 (October 27, 2016) (Pending) and *Kuhnhein et al. v. Kenton Co. Public Library Bd. of Trustees*, Kentucky Court of Appeals, Case Nos. 2013-CA-000874-MR and No. 2013-CA-001010 (March 20, 2015); *motions for discretionary review denied*, Kentucky Supreme Court, No. 2015-SC-188-D and No. 2015-SC-189-D (December 10, 2015).

In a joint decision in *Coleman et al. v. Campbell Co. Public Library Bd. of Trustees* and *Kuhnhein et al. v. Kenton Co. Public Library Bd. of Trustees*, the Kentucky Court of Appeals held that library districts formed by petition must set their rates in accordance with KRS 132.023 and, in certain instances, KRS 173.790. Both cases were initially filed as refund class actions challenging the method by which the library districts calculated their real property tax rates.

Under Kentucky law, library districts can be formed under a variety of different methods. Prior to July 13, 1984, and in accordance with KRS 173.790, library districts could be formed by filing a petition signed by 51% or more of the voters who voted in the last general election with the County Fiscal Court. The petition had to specify the property tax rate to be levied to fund the district. The statute also provides that the property tax rate for a library district created by the petition method prior to July 13, 1984, cannot be increased or decreased without prior approval of the voters.

Taxpayers in Kenton and Campbell counties brought suit against the library districts, asserting that the districts increased their tax rates despite the fact that no petitions had been filed in accordance with KRS 173.790. The library districts argued that this requirement has been impliedly repealed by subsequent enactments of the General Assembly. Specifically, the library districts point to KRS 132.023, which was enacted in 1979 and sets forth a formula for calculating ad valorem property tax rates. From 1979 until the present, the library districts have utilized KRS 132.023 to calculate their tax rates. In their complaints, the taxpayers asserted the petition requirement in the library district statutes, as a more specific limitation only on library districts, controls over the more general limitations subsequently enacted by the legislature in KRS ch. 132.

In orders granting partial summary judgment in favor of the taxpayers, both the Campbell and Kenton Circuit Courts ruled the petition procedures outlined in KRS 173.790 had to be followed and that KRS 132.023 did not repeal the petition procedures. Thus, both courts held the increases in the property tax rates in the districts were improper. In the *Kuhnhein* case in Kenton Circuit Court, the judge ruled no refunds were due pursuant to the action because the plaintiffs had not met the requirements of KRS 134.590, Kentucky's statute governing property tax refunds.

Both library districts appealed. In *Kuhnhein*, the taxpayers cross-appealed with regard to their refund claims. In a joint opinion, the Court of Appeals reversed the rulings of the circuit courts and found that the libraries could determine their tax rates using KRS 132.023. As a result of holding in favor of the libraries, the Court did not reach the cross-appeal issue of refunds.

The Court found that KRS 132.023 and KRS 173.790 should be read harmoniously, and held KRS 132.023(1) must be used to set the tax rate at the compensating tax rate, but when a library district seeks to increase its tax rate above the 4% compensating rate the district must comply with the petition requirement of KRS 173.790. The Court found support for its opinion in the fact that there had been no legislative action on the issue for over 30 years, the library districts had operated in good faith in compliance with directives of the executive branch, and to hold otherwise would adversely affect 80 library districts.

The taxpayers filed motions for discretionary review with the Kentucky Supreme Court, which were denied on December 10, 2015. The actions were remanded to the circuit court, where the parties completed summary judgment briefing in the *Coleman* case. On September 16, 2016, the Campbell Circuit Court entered an order holding that the decision of the Court of Appeals should be applied prospectively only and, therefore, the library district is not required to refund taxpayers for the excess they paid in ad valorem taxes prior to the rendering of the opinion. The taxpayers filed a motion to alter, amend, or vacate the Court's Order, which was denied.

The taxpayers have appealed the Circuit Court's order to the Court of Appeals.

The authors' firm represents the taxpayers in both cases.

3. *Grand Lodge F & A.M. and Springhill Village Retirement Community v. Kenton County PVA and City of Taylor Mill*, Kentucky Board of Tax Appeals, File No. K12-S-69 (November 19, 2014), appealed to Kenton Circuit Court, Civil Action No. 2014-CI-02367 (October 9, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-001617 (February 10, 2017), *motion for discretionary review filed*, Kentucky Supreme Court, No. 2017-SC-122-D (March 10, 2017) (Pending).

The Kentucky Court of Appeals has held possession of a residential unit in a retirement community constitutes a taxable leasehold interest. The units at issue are part of the "Springhill Village Retirement Community", which is owned and operated by two purely public charities exempt from taxation under Section 170 of the Kentucky Constitution.

Recognizing the two charities are tax-exempt entities, the PVA assessed the residential units *to the residents* to whom the units had been leased. The PVA assessed the residents pursuant to KRS 132.195, which provides that when any real or personal property exempt from taxation is leased to "a natural person, association, partnership or corporation in connection with a business conducted for profit", the leasehold is subject to state and local taxation.

The charities and individual residents of the community appealed the assessments to the KBTA. The KBTA voided the assessments on the basis that the charities were tax-exempt and the property was being used for a charitable purpose. However, the Kenton Circuit Court reversed holding that by focusing on the *use* of the property, the KBTA failed to recognize "the separate interests of the residents as part of the 'bundle of rights' encompassed within the total legal interests in the real estate." The charities and individual property owners appealed to the Kentucky Court of Appeals. The Court adopted the Kenton Circuit Court's legal analysis holding the residents are responsible for property tax on the value of their "interests", which the Court categorized as a leasehold interest.

The Court continued, however, and found the PVA's valuation of the residents' property erroneous, and thus the assessments were vacated. The Court instructed the PVA to follow the "well-settled" Kentucky law for determining the fair market value of a leasehold interest for tax purposes. This well-settled law states that the fair market value of a leasehold interest is the difference between the fair market value of the real property with the leasehold and the fair market value of the real property without the leasehold. While this formula for valuation sounds easy, its application may be difficult. For example, in this case, the residents were prohibited from transferring the unit or subletting the unit. The issue becomes what constitutes the fair market value of the property with the leasehold in place.

The charities and residents have filed a motion for discretionary review with the Kentucky Supreme Court.

4. *Stearns Coal Company v. McCreary County Property Valuation Administrator*, Kentucky Board of Tax Appeals, File No. K12-S-58

(January 13, 2014), appealed to McCreary Circuit Court, Civil Action No. 14-CI-00026 (February 11, 2014) (Pending).

Stearns Coal Company ("Stearns") owned property located in McCreary County consisting of approximately 400 acres and improvements. Between 1992 and 2010, the property was valued at $1 million for property tax purposes. In 2011, a new PVA assessed the property at $10 million. Stearns appealed the PVA's value and the circuit court entered a value of $1 million for the 2011 year.

In 2012, the PVA again reassessed the property and valued it at $14 million. Stearns appealed to the local board of assessment appeals, which reduced the valuation to $12 million. Stearns then appealed to the KBTA.

Stearns presented separate appraisals of the land and improvements. Using comparable sales, Stearns' appraiser valued the land at $360,000. A second appraiser valued the improvements at $500,000. However, the appraisal for the improvements considered only the coal, preparation plant, and handling facilities; it did not value other improvements such as the mineshaft, elevator, shop building or office building. The PVA failed to offer any information to rebut Stearns' appraisals.

The KBTA held Stearns carried its burden of proof as it related to the land. The use of comparable sales by Stearns and the lack of evidence presented by the PVA were sufficient for the KBTA to rule for Stearns on the land value. The KBTA rejected, however, Stearns' valuation of the improvements because the valuation failed to account for all improvements on the property. The KBTA also found there was insufficient evidence to support the PVA's claimed value of $12 million. In setting its value, the KBTA used the 2011 agreed upon value of $1 million, subtracted the $360,000 value of the land and determined the improvements had a value of $640,000. The PVA has appealed the KBTA's decision to the McCreary Circuit Court.

5. *Kuhnhein v. Northern Kentucky Area Planning Comm'n and the Northern Kentucky Area Planning Council*, Kentucky Court of Appeals, Case No. 2014-CA-000468-MR (September 11, 2015), *motion for discretionary review denied*, Kentucky Supreme Court, No. 2015-SC-000593 (August 17, 2016).

The Kentucky Court of Appeals granted judgment in favor of the Northern Kentucky Area Planning Commission and Northern Kentucky Area Planning Council (collectively "NKAPC"), finding the collection of ad valorem taxes by the NKAPC was valid because the NKAPC had not been dissolved as provided by statute. The NKAPC was formed in 1961 by adjoining Kenton and Campbell counties in Northern Kentucky pursuant to KRS 147.610, which permits the creation of an area planning commission "[i]n any two (2) or more adjacent counties, one (1) of which has a city having a population of more than 50,000 and not more than 200,000 inhabitants as declared by the last federal census". The City of Covington in Kenton County then had a population of more than 50,000 inhabitants.

Pursuant to KRS 147.660(1), a validly created area planning commission is a political subdivision "in perpetual existence, with power to . . . levy an annual tax" to defray necessary and incidental expenses of the commission. The statute also provides a method for dissolving a commission, and provides that any member county of an area planning commission may withdraw its membership but, the commission would continue to function with the remaining county members.

In 1984, Campbell County withdrew from the NKAPC by following the process outlined by statute, and, in 2008, the City of Covington's population dropped below 50,000. Nevertheless, the NKAPC continued to operate as an area planning commission comprised of Kenton County and various cities within its territory, and the NKAPC continues to assess ad valorem taxes to fund its operations.

This action was filed by Garth Kuhnhein, a resident of Kenton County. Mr. Kuhnhein alleged the assessment and collection of ad valorem taxes by the NKAPC was invalid because the commission no longer meets the requirements of an area planning commission under KRS 147.610. The Kenton Circuit Court granted summary judgment in favor of the NKAPC.

The Kentucky Court of Appeals affirmed. The Court noted the statutory procedures for dissolving the NKAPC had not been successfully followed; therefore, the commission continued to exist. Although the Court noted there may be "some rational logic" to Mr. Kuhnhein's position, it held the statute was clear that the NKAPC could only be dissolved by following the necessary statutory procedures. The Court found that accepting Mr. Kuhnhein's argument "would be repugnant to the constitutional doctrine embodied in Sections 27 and 28 of the Kentucky Constitution [separation of powers]", as the dissolution of an area planning commission is power exercised by the legislative department of the government and may not be exercised by the judiciary.

Mr. Kuhnhein filed a motion for discretionary review with the Kentucky Supreme Court, which was denied on August 17, 2016. The Opinion of the Court of Appeals is now final.

6. *Wilgreens, LLC and Walgreen Co. v. David O'Neill, Fayette County Property Valuation Administrator*, Kentucky Board of Tax Appeals, Final Order No. K-24624 (March 26, 2014), Fayette Circuit Court, Civ. Action No. 14-CI-1566 (February 18, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-000407 (September 23, 2016) (not to be published), *motion for discretionary review denied*, Kentucky Supreme Court, No. 2016-SC-590 (March 15, 2017).

The Kentucky Court of Appeals upheld an assessment of $5,086,000 for tax years 2012 and 2013 on property serving as the location for a Walgreens retail store. The property is situated on Nicholasville Road in Lexington, Kentucky, in a high traffic area surrounded by a residential community and high-end retail. In 2005, the petitioners, Wilgreens, LLC and Walgreen Co. (collectively "Walgreens") entered into an agreement with the owner of the property to construct the building according to Walgreens' specifications. That same year, the owner entered into a triple net lease with Walgreens, wherein Walgreens agreed to pay all real estate taxes on the property. The owner later placed the property for sale and in 2007, the land

and building subject to the lease sold for $6,275,000. The property also was listed for sale in 2013 at a price of $6,900,000.

The Fayette County PVA used the income approach to in arriving at his $5,086,000 value for tax years 2012 and 2013. Walgreens argued the property was worth only $2,600,000, and appealed the PVA's assessments. At the KBTA, both parties presented testimony from three witnesses. Walgreens' certified appraiser valued the property at $2,600,000 by comparing sales of two properties outside of Fayette County and five properties within Fayette County. The properties within Fayette County, however, were in a small strip shopping center and were not located on Nicholasville Road. The KBTA upheld the PVA's value of $5,086,000, noting that the existence of a long-term, build-to-suit lease on commercial property adds measurable value to that property which must be taken into consideration by the PVA when assessing the property. The KBTA found that Walgreens' witnesses either provided no valuation evidence or failed to provide an analysis quantifying the difference in value between the PVA's assessment and Walgreens' proposed value.

The Fayette Circuit Court and the Kentucky Court of Appeals affirmed. The Court of Appeals rejected Walgreens' argument that the PVA overvalued the property by taking into consideration the income generated under Walgreens' triple net lease, which Walgreens asserted was above-the-market. The Court found the PVA's inclusion of this income was consistent with KRS 132.191(2)(b), which provides the PVA may value property using the income approach by estimating the present value of future benefits arising from ownership of the property. The Court also noted that Walgreens attempted to show the property was overvalued by relying on sales of very different properties. Notably, none of the sales relied upon by Walgreens involved properties located on Nicholasville Road or anywhere similar. Indeed, the Court reasoned that the property was capable of generating exactly the kind of income derived under the lease due to its highly desirable location.

The Kentucky Supreme Court denied Walgreens' motion for discretionary review on March 15, 2017.

7. *Buffalo School Apartments, LLLP v. LaRue County Bd. of Assessment Appeals, et al.*, File Nos. K16-S-30 & K16-S-77, Final Order No. K-25305 (Ky. Claims Comm'n July 6, 2017).

The Kentucky Claims Commission ("Commission") recently held that tax credits awarded under Section 42 of the Internal Revenue Code ("IRC") must be excluded from the value of a low-income housing tax credit ("LIHTC") apartment complex.[1] The property at issue in the appeal, known as the Buffalo School Apartments, is an adaptive reuse of an historic school into 19 units of affordable housing for senior citizens in LaRue County. The LaRue County Property Valuation Administrator ("PVA") assessed the property at a value of $2,671,454 for tax year 2016. Upon the appeal of the taxpayer, the local board of assessment appeals lowered the assessment to a value of $1,323,936. The taxpayer appealed the decision of the local board to the Commission, and the PVA filed a cross-appeal.

[1] *Buffalo School Apartments, LLLP v. LaRue County Bd. of Assessment Appeals, et al.*, File Nos. K16-S-30 & K16-S-77, Final Order No. K-25305 (Ky. Claims Comm'n July 6, 2017).

The objective of the LIHTC program is to facilitate the construction of affordable housing through the issuance of tax credits, which are used by private investors to offset their income. Pursuant to IRC § 42, each state receives an allocation of tax credits based on its population. The Kentucky Housing Corporation ("KHC") is responsible for administering the LIHTC program in Kentucky. Developers of LIHTC properties compete for tax credits awarded through the KHC. The tax credits are then sold to private investors, and the revenue generated by the sale of the tax credits provides the capital to build LIHTC properties. The tax credits are utilized by investors to offset their taxable income over a 10-year period.

In exchange for the tax credits, LIHTC properties in Kentucky are required to be operated in accordance with rent and income restrictions for a period of 30 years. The residents of Buffalo School Apartments are restricted to incomes not to exceed 60% of area median income, and the rent charged for the dwelling units is restricted to 50% of area median market rents. The rent and income restrictions are recorded in a restrictive covenant placed on the deed to the property. Thus, any prospective purchaser of the property is also subject to these restrictions.

The primary point of contention between the taxpayer and the PVA was whether the value of the tax credits should be excluded from the value of the real property. The taxpayer presented an appraisal report prepared by an MAI certified appraiser. The appraiser testified that the property should be valued at no more than $230,000 using the income approach to valuation, which takes into account the restricted rents and higher expenses of LIHTC properties. The appraiser also testified that the tax credits should be excluded from the property's value because they are separate from the market value of the real estate.

Following the hearing, the Commission's hearing officer issued a Recommended Order finding in favor of the taxpayer and setting the value of the property at $230,000. In a Final Order issued July 6, 2017, the Commission adopted the hearing officer's Recommended Order. The Commission relied upon the appraiser's testimony and Kentucky case law holding that the value of the tax credits should be excluded from the value of the real property. The Commission also held that the tax credits are intangible property, which is exempt from state and local property tax pursuant to KRS § 132.208.

The PVA did not appeal the Commission's decision and this case is now final.

The authors' firm represented the taxpayer in this case.

8. *City Farm, LLC, et al v. Tony Lindauer, Jefferson County Property Valuation Administrator*, Kentucky Board of Tax Appeals, Final Order No. K-25295 (May 24, 2017).

Typically, land in the Commonwealth is valued at its fair market value for purposes of ad valorem property tax. Ky. Const. § 172. However, the agricultural and horticultural land is to be valued according to the land's value for agricultural or horticultural use. Ky. Const § 172A. Thus "agricultural land" is valued at a lower amount than other land in the Commonwealth. This case involves the proper definition and scope of the term "agricultural land" as found in KRS 132.010(9). The case began when the Appellant, Stewart Ogden, the then-owner of 15.5783 contiguous acres of undeveloped land in Jefferson County, Kentucky (the "Land"), applied to the Jefferson County Property Valuation Administrator ("PVA") for agricultural valuation of the Land. At the request of the PVA, the Appellant included with his application a forest stewardship plan prepared by a forester with the Division of Forestry of the Kentucky Energy and Environment Cabinet. Pursuant to this plan, the timber was assigned a value, but its aesthetic value exceeded its timber value. The PVA denied the Appellants application and subsequent online appeal with the PVA alleging the timber on the Land had no value.

The Appellants, Stewart Ogden and City Farm, LLC (a Kentucky limited liability company that owned the farm for a portion of the 2015 tax year), filed an appeal of the PVA's determination with the Jefferson County Board of Assessment Appeals ("BAA") arguing the Land qualified for agricultural valuation. The BAA issued a determination sustaining the PVA's valuation methodology for the Land and the Appellants filed an appeal with the Kentucky Claims Commission ("Commission"). On appeal to the Commission, the PVA abandoned the argument that agricultural valuation should be denied due to the value of the timber and instead asserted that Appellants must prove that the Land is used for harvesting and selling timber, thinning trees and maintenance.

The Commission found for the Appellants and refused to adopt the PVA's proposed definition. The Commission cited KRS 132.010(9)(a) for the definition of "agricultural land" as including "*any tract of land*, including all income-producing improvements, *of at least ten (10) contiguous acres* in area *used for* the production of livestock, livestock products, poultry, poultry products and/or *the growing of* tobacco and/or other crops including *timber*." The Commission stated that because the Land exceeded 10 acres and was being used for the growing of timber (trees) it satisfied the definition of "agricultural land." In further support of the Appellant's position the Commission stated that nowhere in the statutory definition is there a requirement that the land actually be producing income; the statute requires only that the land have an income producing capability. The Commission stated that had the legislature intended to add additional requirements as the PVA suggested, it would have done so. Additionally, the Commission stated that all woodlands in the Commonwealth are treated alike, whether managed or unmanaged, because they all have an income-producing capability. The Commission held that when a taxpayer requests agricultural valuation upon his or her land and does not seek further reductions beyond the standard agricultural valuation, no additional evidence of harvesting, selling, thinning, maintenance, income production, or otherwise is required.

The Commission reversed the ruling of the BAA and ordered the Land be defined as agricultural land and therefore be assessed using the agricultural valuation method.

The authors' firm represented the Appellants in this action.

C. Administrative Developments.

1. Updated Guidance on Assessing Agricultural Property in Kentucky.

In 2016, the KDOR responded to a letter from Fayette County PVA David O'Neill seeking guidance on the statutory requirements for valuing agricultural property. Mr. O'Neill's office recently updated its website to outline the revised guidelines implemented by the KDOR and the Fayette County PVA involving agricultural property assessments for tax years beginning January 1, 2017.

The Fayette County PVA will now request an application from property owners seeking an agricultural classification and will exercise best efforts to continually verify agricultural use. Prior to 2017, the PVA required only agricultural *capability* for non-commercial property of ten acres or more to receive an agricultural assessment. In response to Mr. O'Neill's request for guidance, the KDOR clarified that actual agricultural *use*, not agricultural *capability*, is required for the property to receive an agricultural classification. The application required by the Fayette County PVA will allow property owners to outline the agricultural activity occurring on their property.

The Fayette County PVA will no longer automatically grant agricultural classification for properties transferred on or after January 1, 2013. New owners will be required to request agricultural classification through the application process.

As the KDOR stressed in its response to Mr. O'Neill's letter, only properties with a minimum of ten acres *after* subtracting acreage used for personal pleasure, such as a residence, lawn, or swimming pool, are eligible for agricultural classification per KRS 132.450(2)(a). The Fayette County PVA notes that the agricultural classification will be removed from properties failing to meet the ten acre threshold after subtracting acreage used for personal pleasure.

Mr. O'Neill's letter last summer was prompted, at least in part, by public concern over his office's decision to value property scheduled for commercial development according to the property's "agricultural" value, which is significantly less than the "fair cash value" standard applicable to other property in the state. In an effort to increase transparency in this area, the Fayette County PVA intends to publish a list of properties slated for future development that continue to receive agricultural classification until the actual use of the property changes. This list will be published when the annual tax roll is published, or approximately April 15 of each year.

Pursuant to KRS 132.450(2)(b), property scheduled for commercial development continues to receive agricultural classification until the use of the land actually changes. This occurs when (1) an approved final plat is recorded in the Clerk's Office or (2) work begins at the development site. The Fayette County PVA notes that when the property's use changes, it will remove the agricultural classification at the first legal opportunity, which is January 1 of each year.

D. Trends.

Kentucky's Governor has indicated he would like for the business inventory tax on property to be repealed in the 2018 legislative session. The difficulty is that the majority of the funds from this tax flow to local governments (as opposed to the state). Taxpayers can expect this repeal if the Governor and legislature can find a way to make the local governments whole. Also, there have been some indications that consideration might be given to modifying the cap on property tax rates, which have kept Kentucky's rates low for nearly four decades.

IV. OTHER TAXES/EXACTIONS.

A. Legislative Developments.

1. CMRS 911 Prepaid Service Charge.

Beginning January 1, 2017, a commercial mobile radio service ("CMRS") prepaid service charge of $0.93 is imposed on all retail transactions involving the sale or purchase of (1) prepaid cellular phones; (b) prepaid calling cards for cellular phones; (c) additional minutes or airtime for a prepaid cellular phone; or (d) additional minutes or airtime for a prepaid calling card for cellular phones. KRS 65.7634. The service charge is not subject to Kentucky sales tax when separately stated on the invoice. KRS 139.470(23)(c). Retailers are required to report and remit the services charges to the Department on a monthly basis; the first return is due February 20, 2017. Retailers may retain 3% of the monthly service charged collected and timely remitted as compensation for the cost of collections.

2. Distilled Spirits.

HB 100, effective January 1, 2018 or as otherwise stated, was signed into law on March 21, 2017. It amends KRS 241.010 and the definitions applicable to distilled spirits to add "vintage distilled spirits", defined as a package or packages of distilled spirits that (a) are in their original manufacturer's unopened container; (b) are not owned by a distillery; and (c) are not otherwise available for purchase from a licensed wholesaler within the Commonwealth.

B. Judicial Developments.

1. *Revelation Energy, LLC v. Commonwealth of Kentucky, Finance and Administration Cabinet, Department of Revenue*, Pike Circuit Court, Civil Action No. 14-CI-00799 (May 20, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-000930 (Pending).

The taxpayer in this case, Revelation Energy, LLC ("Revelation"), alleged the pre-purchase refund permit requirement set forth in KRS 134.580(8) and KRS 138.345 violates the Due Process Clause and Equal Protection Clause of the United States Constitution and Section 2 of the Kentucky Constitution. KRS 134.580(8) states that "[n]o person shall secure a refund of motor fuels tax under 134.580 unless the person holds an unrevoked refund permit issued by the department before the purchase of gasoline or special fuels and that permit entitles the person to apply for a refund under KRS 138.344 to 138.355." KRS 138.345 states that "[n]o person shall secure a refund of tax under KRS 138.344 unless the person is the holder of an unrevoked refund permit issued by the KDOR before the purchase of the gasoline or special fuel, which permit shall entitle the person to make application for a refund under KRS 138.344 to 138.355."

From October 20, 2009 through January 5, 2011, Revelation purchased significant amounts of special fuel for use in unlicensed vehicles and equipment for nonhighway purposes related to its coal mining operations in Kentucky. Revelation purchased the fuel from licensed Kentucky dealers, who charged Revelation the special fuel tax imposed by KRS 138.220 and the petroleum environmental assurance fee imposed by KRS 224.60-145. Until the beginning of

2011, Revelation was unaware its nonhighway use of the special fuel meant its purchases were exempt from the special fuel tax and the petroleum environmental assurance fee.

Once Revelation became aware it had been paying special fuel tax and the petroleum environmental assurance fee on its special fuel purchases in error, Revelation applied for a Kentucky motor fuels tax refund permit with the KDOR. The KDOR granted Revelation's application and issued a permit with an effective date of January 6, 2011. In October 2011, Revelation submitted refund applications to the KDOR for refund of the special fuel taxes and petroleum environmental assurance fees it mistakenly paid during the calendar years ending December 31, 2009 through December 31, 2011. Revelation's refund applications were filed within the four year statute of limitations imposed by KRS 134.590.

The KDOR granted Revelation's refund claim for taxes and fees paid on purchases of special fuel *after* the January 6, 2011 effective date of Revelation's motor fuels tax refund permit. However, the KDOR denied Revelation's refund claim for $968,182.18 in special fuel taxes and $65,546.28 in petroleum environmental assurance fees Revelation paid on its purchase of special fuel for non-highway purposes made between October 20, 2009 and January 5, 2011, alleging Revelation did not meet the pre-purchase refund permit requirement set forth in KRS 134.580(8) and KRS 138.345.

Revelation protested the KDOR's denial of its refund claim, alleging the pre-purchase refund permit requirement is unconstitutional. The KDOR issued a Final Ruling denying Revelation's claim, and Revelation appealed to the KBTA. The KBTA upheld the KDOR's Final Ruling, finding it did not have jurisdiction to rule on Revelation's challenge to the facial constitutionality of the pre-purchase refund permit requirement under KRS 134.580(8) and KRS 138.345.

Revelation appealed the KBTA's order to the Pike Circuit Court. In a lengthy opinion, the Court held the pre-purchase refund permit requirement in KRS 134.580(8) and KRS 138.345 violates the Due Process Clause of the United States Constitution. The Court noted the Due Process Clause requires states to provide sufficient procedural safeguards against erroneous or unlawful exactions of tax. In order to satisfy this standard, the government must provide taxpayers with either: (1) a pre-deprivation remedy, which allows the taxpayer to withhold the tax and dispute the amount owed; (2) a post-deprivation remedy, which allows the taxpayer to challenge the amount paid and obtain a refund of taxes wrongfully collected; or (3) a combination of both a pre-deprivation remedy and a post-deprivation remedy that allows the taxpayer to challenge its correct tax liability.

The Court found that, where applicable, KRS 134.580 generally satisfies this standard by providing Kentucky taxpayers with the right to challenge a Kentucky tax they believe was erroneously paid or wrongfully collected, and to obtain a refund if their challenge is successful. However, the Court noted, when a taxpayer erroneously pays motor fuels tax on the purchase of non-highway special fuel, the pre-purchase refund permit requirement restricts the taxpayer's right to pursue a refund claim under KRS 134.580 to only those taxes paid after the taxpayer secured a motor fuel refund permit from the KDOR. Thus, the refund permit requirement effectively eliminates any meaningful post-deprivation remedy provided by KRS 134.580 for taxpayers like Revelation who discover they have mistakenly overpaid fuel taxes and are left with no recourse to recover the overpayment. The Court noted it was unaware of any other state tax for which the taxpayer's general refund rights for the overpayment of taxes are similarly restricted.

Importantly, the Court found the Supreme Court's decision in *McKesson Corporation v. Division of AB&T*, 496 U.S. 18 (1990) – where the Court outlined guidance regarding the protections a state must provide in the context of tax refund procedures in order to satisfy the requirements of due process – was not limited to unconstitutional taxes. The Court also distinguished the pre-purchase refund permit requirement from permissible procedural refund requirements, such as a statute of limitations period for claiming a refund. The Court noted that a statute of limitations period typically begins to run upon the occurrence of an identifiable event, such as the filing of a tax return or the payment of tax. The taxpayer then has a reasonable period of time in which to uncover any error and seek a refund. In addition, statutes of limitation provide a balance in that a reasonable limitations period protects the state's interest in financial stability by not having to account for an indefinite number of refund claims. Unlike a reasonable statute of limitations, however, the pre-purchase refund permit requirement provides no room for taxpayer error and eviscerates a taxpayer's remedy where the taxpayer erroneously pays tax without first seeking a permit.

The KDOR has appealed the Pike Circuit Court's Opinion and Order to the Kentucky Court of Appeals. The case has been submitted for a decision without oral argument.

2. *City of Lancaster v. Garrard County*, Kentucky Court of Appeals, Case No. 2013-CA-000716-MR (July 3, 2014), *petition for rehearing denied* (December 2, 2014), *motion for discretionary review granted and case remanded to Court of Appeals,* No. 2014-SC-000738-D (February 18, 2016) (Pending.).

The Kentucky Supreme Court granted discretionary review in *City of Lancaster v. Garrard County* for the purpose of vacating the opinion of the Kentucky Court of Appeals. The Court remanded the case to the Court of Appeals for further consideration in light of its decision in *Greater Cincinnati/Northern Kentucky Apartment Association, Inc. v. Campbell County Fiscal Court*, which upheld a 911 fee on each occupied individual residential and commercial unit in Campbell County. In *City of Lancaster*, the Kentucky Court of Appeals reversed and remanded a decision of the Garrard Circuit Court upholding Garrard County's 911 fee as a valid user fee. On August 13, 2012, the Garrard County Fiscal Court adopted Ordinance O-08-12-1, which replaces the subscriber charge on landline telephones used to help fund 911 emergency telephone service with a fee of $0.25 imposed upon each and every water meter in Garrard County. The ordinance also requires every water company and water association in Garrard County to collect and remit the fees. On November 9, 2012, a civil action was commenced in Garrard Circuit Court challenging the legality of the ordinance. The lawsuit was filed against Garrard County, Kentucky, and the Garrard County Fiscal Court, alleging the ordinance is unconstitutional and collection of the fee is an unconstitutional taking of property.

While the circuit court upheld the validity of the ordinance, the Court of Appeals held the fee is not a valid user fee but instead an invalid tax. Appellants claimed the circuit court erred in granting summary judgment upholding the validity of the fee. The Court of Appeals agreed. The Court noted that, under Kentucky case law, a valid user fee exists where there is a reasonable relationship between the fee charged and the benefit received. Generally, the Court stated, a user fee is imposed upon the recipient of a benefit received from the government or for a particular government service. The Court gave as examples of valid user fees tolls paid by drivers for the use of a particular highway or fees paid by individuals with landline phones for the benefit of 911 service. The Court found the fee of $0.25 upon each water meter imposed by Garrard County's ordinance is not directly related to the benefit of 911 telephone service.

Although the Court found the circuit court erred by granting summary judgment upholding the ordinance as imposing a valid user fee, the Court of Appeals did not reach the questions of whether the fee constitutes a license or a tax. The Court directed the circuit court to consider these questions on remand. However, the Court noted that if the circuit court finds the ordinance imposes a tax, both parties have conceded at oral argument that the tax would be unconstitutional and thus in violation of Kentucky law.

After its petition for rehearing was denied, the Fiscal Court filed a motion for discretionary review with the Kentucky Supreme Court. As noted, the Court granted the Fiscal Court's motion and remanded the case to the Court of Appeals for further consideration in light of the Court's decision in *Greater Cincinnati/Northern Kentucky Apartment Association, Inc. v. Campbell County Fiscal Court*. The case is now once again under submission to the Court of Appeals for a new opinion.

The author's law firm represents amicus curiae in this litigation.

3. State 911 funding - *Virgin Mobile USA, L.P. v. Commonwealth of Kentucky ex rel. Commercial Mobile Radio Service Emergency Telecommunications Board*, 448 S.W.3d 241 (Ky. 2014), *remanded and final judgment entered*, Jeff. Cir. Ct. No. 08-CI-010857 (July 29, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-001312 (July 14, 2017).

In this case, Virgin Mobile USA, LP ("Virgin Mobile") challenged the imposition of the CMRS service charge imposed under KRS 65.7629 prior to July 2006. Virgin Mobile remitted the CMRS service charge to the CMRS Board from 2002 through 2005. However, rather than collecting the tax from its customers, Virgin Mobile remitted the tax from its general revenues. Virgin Mobile stopped remitting the tax in June 2005 and requested refunds of all prior payments after learning that several national tax reporting agencies had determined the service charge did not apply to prepaid wireless services. The CMRS Board refused to issue the refunds. After the statutes were amended in July 2006 to clearly apply to prepaid wireless connections, Virgin Mobile began crediting its prior payments against the services charges. Virgin Mobile began remitting tax in November 2008 after exhausting its credit.

Jefferson Circuit Court. The CMRS Board filed suit against Virgin Mobile in Jefferson Circuit Court, which held for the CMRS Board, awarding it the service charges, as well as additional amounts, that Virgin Mobile did not remit between 2005 and 2007.

Ky. Court of Appeals. The Court of Appeals affirmed the circuit court and determined that Virgin Mobile was a CMRS provider subject to the tax. The court determined that the 2006 amendments changed only the permissible methods of collection and not the duty to collect. The court also held that because it affirmed the circuit court in finding that the pre-2006 statute applied to Virgin Mobile and Virgin Mobile was required to collect the charges in question, the issue of whether Virgin Mobile was entitled to a refund or credit was moot, and the court declined to address the issue further.

Ky. Supreme Court. The Kentucky Supreme Court granted motions for discretionary review filed by Virgin Mobile and the CMRS Board and noted that the issues before it were disputed questions of law; thus, its review would be *de novo*. The Court next stated that it would be guided by the rule of statutory construction that the intention of the General Assembly must be ascertained and given effect.

The Court first addressed Virgin Mobile's argument that the lower court erred in holding that the CMRS service charge applied to it prior to the July 2006 amendments. The Court found that Virgin Mobile was entitled to summary judgment holding that it was not required to collect from its prepaid customers a CMRS service charge prior to July 2006. In reaching this conclusion, the Court analyzed the language of the pre-2006 statute, finding that Virgin Mobile did not provide monthly billing and therefore could not be a "billing provider" under the pre-2006 statute's mandatory collection procedure. The Court noted that it could "reasonably find" an intent by the General Assembly in the pre-2006 statute that all wireless customers pay the CMRS charge. But, the Court abided by the plain language of the statute, concluding that the plain language showed no intention to require all CMRS providers to collect the service charge, but rather, only "billing providers" that sent monthly bills to their customers.

The Court next addressed whether Virgin Mobile was entitled to a refund of amounts mistakenly paid or a credit for such amounts against post-July 2006 charges. The Court summarily rejected Virgin Mobile's refund claim, stating that because Virgin Mobile repaid itself by setoff, the issue of refund was not properly before the Court. The Court found that because Virgin Mobile used a credit, it had the money in hand and was not due a refund.

The Court proceeded to discuss Virgin Mobile's credit/recoupment claim. The Court rejected Virgin Mobile's claim that KRS 134.580 authorized a refund or credit on the basis that CMRS charges are paid into the CMRS Fund and not "into the State Treasury" as required by the statute. Noting the merits of Virgin's common law refund claim, the Court nevertheless rejected it on the basis that such claims involved the right to refund which the Court already had found not to be at issue. The Court noted that had Virgin Mobile remitted the amounts when due, and timely filed an action for a refund, the common law right to a refund would have been proper. The Court concluded that Virgin Mobile's erroneous payment of pre-2006 CMRS charges did not justify its failure to make the required payments after July 2006. The Court found no authority for Virgin Mobile's recoupment by credit.

Ultimately, the Court affirmed the Court of Appeals insofar as it affirmed the trial court's judgment that Virgin Mobile was liable for the underpayment of post-July 2006 CMRS fees totaling $286,807.20. As a result, the CMRS Board will have an award against Virgin Mobile for this amount based on failure to remit post-2006 CMRS fees, despite the Court's finding that

Virgin Mobile was not required to originally pay that amount under the pre-2006 statute and that Virgin Mobile could have initiated an action to recover the erroneously paid CMRS charges. The Court reversed the Court of Appeals on the issue of attorney's fees, concluding that the resolution of the case was mixed with Virgin Mobile winning on the pre-2006 issue and the CMRS Board winning on the post-2006 issue. The Court found the attorney's fee issue must be reassessed by the trial court, taking into account the extent of each party's success in determining whether to award attorney's fees. Virgin Mobile's petition for rehearing was denied on December 18, 2014, and the opinion of the Court is now final.

Jefferson Circuit Court – remand. On remand, Virgin Mobile sought to pursue its claim for refund. Virgin Mobile filed a CR 67 motion with the Jefferson Circuit Court seeking to deposit into court the amount of post-July 2006 CMRS charges determined to be owed (the amount of the "credit" taken). The trial court denied Virgin Mobile's motion based on the law of the case doctrine and held that Virgin's refund claim had been adjudicated. The trial court entered its final judgment. Virgin Mobile satisfied the judgment and has appealed the issue of whether it is entitled to a refund of the pre-July 2006 CMRS charges it mistakenly paid. The case has been submitted for a decision without oral argument.

The authors' firm represents Virgin Mobile in this action.

4. *T-Mobile South LLC v. Kentucky Commercial Mobile Radio Serv. Emer. Telecommunications Bd.*, Kentucky Board of Tax Appeals, File No. K09-R-24 (Sept. 23, 2015), appealed to Franklin Circuit Court, Civil Action No. 15-CI-01124 (Pending).

The KBTA has held it lacks jurisdiction over disputes concerning the State's emergency 911 fund. The fund is operated and maintained by the CMRS Board. In this case, the petitioner, T-Mobile, appealed a ruling issued by the CMRS Board denying T-Mobile's claim for a refund of service charges it had remitted. The case was held in abeyance pending final resolution of *Virgin Mobile U.S.A., L.P. v. Commonwealth of Kentucky*, 2012-SC-000621-DG & 2012-SC-00626-DG (Ky. Dec. 18, 2014) (to be published), which addressed the same substantive issue, *i.e.*, the collection of the service charge by wireless prepaid phone providers. The CMRS Board moved for dismissal based on lack of jurisdiction. The motion to dismiss initially was denied by the KBTA without explanation, but the issue was revisited when new members of the KBTA took office.

The KBTA's jurisdictional statute, KRS 131.340, empowers it to hear final rulings "of any agency of state government affecting revenue and taxation". The issue presented was whether the KBTA had jurisdiction to hear an appeal in which the petitioner sought a refund of the 911 service charge. Pursuant to statute, the CMRS Board collects the 911 service charge from wireless providers to implement and maintain an enhanced wireless 911 service. The service charge goes into the "CMRS fund".

The parties' arguments centered upon whether the service charge is a "fee" or a "tax". Unlike taxes, fees must bear a relationship to the cost of administering the regulatory program. T-Mobile argued the service charge is a tax because the amounts collected from the service charge exceed those expended in administration and enforcement of the CMRS statutes.

However, the CMRS Board argued, and the KBTA agreed, that the statute governing the service charge – KRS 65.7631 – clearly provides that all funds collected are used to establish and improve emergency 911 services. T-Mobile also claimed the service charge was paid directly to the Kentucky State Treasurer, and this direct payment made the charge a tax, although information at oral argument revealed the money was then transferred from the General Fund to the CMRS fund. The KBTA found that whether money was initially deposited into the state treasury or a special fund was not dispositive of whether the charge was a "fee" or "tax". Because it found the service charge was a fee over which it had no jurisdiction, the KBTA dismissed T-Mobile's appeal.

T-Mobile has appealed the KBTA's decision to the Franklin Circuit Court.

5. *Telrite Corporation (d/b/a Life Wireless) v. Commercial Mobile Radio Service Emergency Telecommunications Board of Kentucky*, Franklin Circuit Court, Civil Action No. 15-CI-00886 (August 12, 2015) (Pending).

In this action, Telrite Corporation is seeking a refund of state 911 fees mistakenly remitted on wireless phone services provided at no charge to qualifying low-income Kentucky consumers under the federal Lifeline Program. The Lifeline Program is administered by the Federal Communications Commission ("FCC") with the purpose of providing low-income Americans with access to basic phone and internet services. Telrite Corporation, under the name of Life Wireless is a nationally recognized Lifeline provider in Kentucky.

In this action, Telrite seeks a declaration that Telrite has no duty to collect or remit state 911 fees relative to its Lifeline customers who make no payment for services provided to them. Under KRS 65.7621 et seq. a commercial mobile radio service ("CMRS") emergency telecommunications service charge is imposed on each emergency call. Telrite's position is that they should not have a duty to collect or remit taxes to the state based on this CMRS emergency telecommunications service charge for Lifeline customers who make no payment to Telrite for services provided to them. Telrite further seeks a declaration that it is entitled to a refund of amounts mistakenly paid from Telrite's own funds with respect to such customers for the periods July 2013 through September 2014. Telrite is further seeking an order requiring the CMRS Board to issue the refunds. Summary judgment briefing is underway.

The authors' law firm represents Telrite in this litigation.

6. *Ohio Valley Wholesale Distributors, Inc. v. Commonwealth of Kentucky et al.*, Boyd Circuit Court, Civil Action No. 13-CI-00209 (April 16, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-000754-MR (March 24, 2017); and *OVWD, Inc. (Ohio Valley Wholesale Distributors, Inc.) v. Finance and Administration Cabinet, Department of Revenue*, Kentucky Board of Tax Appeals, File No. K13-R-15 (Pending).

In these actions, OVWD (f/k/a Ohio Valley Wholesale Distributors, Inc.) is challenging the KDOR's assessment of cigarette and other tobacco products ("OTP") tax on OVWD's sales of untaxed cigarettes and OTP to out-of-state distributors. OVWD is a wholesale tobacco and convenience store merchandise distributor located in Ashland, Kentucky. The KDOR audited and assessed OVWD $11.5 million, including cigarette and OTP tax of $8.4 million plus interest, penalties and fees. The KDOR determined that the cigarettes and OTP in question were not actually sold to out-of-state distributors but to Superior Wholesale LLC, a licensed resident wholesaler located in Lexington, Kentucky.

The KDOR claims these transactions violated KRS 138.195 which provides that "[n]o person licensed under this section except nonresident wholesalers shall either sell to or purchase from any other such licensee untax-paid cigarettes." The KDOR further claims OVWD was required to stamp these cigarettes pursuant to KRS 138.146 prior to selling them to Superior Wholesale LLC and that OTP tax was similarly due on sales of OTP to resident, licensed wholesalers pursuant to KRS 138.140(4).

OVWD appealed to the KBTA. In its petition of appeal, OVWD alleged the cigarettes and OTP were sold to out-of-state distributors and, though admitting Superior Wholesale, LLC paid for the product, disputes the KDOR's determination that Superior was the actual purchaser. OVWD also claimed the KDOR has no authority to directly assess cigarette tax against a cigarette licensee and that the KDOR's exclusive statutory enforcement mechanism is the seizure and sale of untax-paid cigarettes. OVWD further claimed the KDOR's imposition of tax on cigarettes and OTP sold to out-of-state customers violates Section 2 of the Kentucky Constitution because it impedes the free flow of commerce and violates the Commerce Clause of the U.S. Constitution because it subjects such cigarettes to an undue risk of multiple taxation. OVWD claimed that any tax owed is the obligation of OVWD's customers or Superior, not OVWD. OVWD also challenged the KDOR's assessment of penalties one year after issuing its assessments of tax as an arbitrary exercise of power in violation of Ky. Const. § 2.

In addition to the proceeding at the KBTA, OVWD also filed an action in circuit court. Prior to the issuance of the KDOR's Final Ruling, OVWD filed a declaratory judgment action in Boyd Circuit Court seeking a declaration that that the tax assessment violated the Kentucky and U.S. Constitutions because the KDOR lacked statutory authority for the assessment and the assessment discriminated against interstate commerce. The Boyd Circuit Court held OVWD failed to exhaust its administrative remedies and dismissed OVWD's complaint for lack of jurisdiction.

OVWD appealed the circuit court's dismissal of its complaint, and on March 24, 2017, the Court of Appeals affirmed. The court noted that it is incontrovertible that the KBTA is statutorily vested with jurisdiction over tax-related appeals, and a taxpayer challenging an assessment must exhaust his administrative remedies, including taking an appeal to the KBTA, as prerequisite to proceeding in court. A party is not required to exhaust his administrative remedies only if the party is attacking the constitutionality of a statute or regulation as void on its face or where his complaint raises an issue of jurisdiction as a mere legal question, not dependent upon disputed facts, so an administrative denial of the relief sought would be clearly arbitrary. The court rejected OVWD's argument that a party also need not exhaust his administrative remedies when an agency has acted in excess of its statutory authority, finding this argument was not supported by Kentucky case law. The court also found that, contrary to OVWD's arguments, the KBTA has the authority to determine whether the KDOR acted beyond the scope of its authority in assessing a cigarette tax and whether the KDOR arbitrarily interfered with the free flow of Commerce in violation of Section 2 of the Kentucky Constitution and the Commerce Clause.

OVWD has thirty days to seek discretionary review from the Kentucky Supreme Court.

C. Administrative Developments.

1. Motor Fuels Taxes – Op. Att'y Gen. 16-010 (November 10, 2016).

In response to a request from Hardin County Magistrate E.G. Thompson, Kentucky Attorney General Andy Beshear issued an Opinion last fall advising that a county may not enact a local motor fuels tax. The Opinion relies upon Section 181 of the Kentucky Constitution, which authorizes the General Assembly to delegate to counties the power to levy ad valorem or license taxes only; the legislature may not delegate to counties or other local governments the power to assess excise taxes.

To determine whether a local motor fuels tax qualifies as an "excise tax", the Opinion refers to Black's Law Dictionary, which defines "excise" as "a tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee)." The Opinion also relies upon Kentucky case law holding gasoline or motor fuels taxes are levied on the commodity itself and are excise taxes on the distribution, consumption, or use of the good. Because motor fuels taxes are excise taxes and the Kentucky Constitution does not authorize local governments to enact excise taxes, the Opinion concludes that a county may not enact a local motor fuels tax.

D. Trends.

None.

V. **<u>OTHER NOTES OF INTEREST.</u>**

A. Legislative Developments.

1. Kentucky Claims Commission.

HB 453 was signed by the Governor on March 21, 2017, and was effective 90 days after adjournment. It codifies Executive Order 2016-576, which created the Kentucky Claims Commission ("Commission") effective October 1, 2016. The bill establishes KRS Chapter 49 for the creation of the Commission and amends and repeals various statutes to conform. The Governor's Executive Order and this legislation abolish the KBTA and combine the functions of the KBTA, the Crime Victims Compensation Board, and the Board of Claims into the Commission. The Commission must consist of three members appointed by the Governor with the consent of the Senate. At least one member must be an attorney licensed to practice in Kentucky, at least one member must have a background in taxation, and at least one member must be a crime victim, relative of a crime victim, or a victim's advocate. All appointments are for a three-year term.

2. Taxpayer Questions.

On March 21, 2017, the Governor signed HB 245 into law, effective 90 days after adjournment. HB 245 amends KRS 131.130 to permit the Commissioner to respond to the public's and taxpayers' questions and to publish those responses. The legislation allows the KDOR to include examples as part of any response or publication to assist taxpayers and the public in understanding and interpreting tax laws. The fiscal note to HB 245 states that the responses will not have the force and effect of law since the responses will not be promulgated within an administrative regulation.

3. Reorganization of KDOR.

The Governor signed HB 395 into law on March 27, 2017, effective 90 days after adjournment. HB 395 amends KRS 131.020 and reorganizes units within the KDOR and the Office of the Secretary of the Finance and Administration Cabinet and codifies Executive Order 2016-602, signed on August 12, 2016. The legislation creates the Office of Tax Policy and Regulation and the Division of Protest Resolution within the office of the KDOR Commissioner and abolishes the Division of Protest Resolution within the Office of Processing and Enforcement. HB 395 also amends KRS 12.020 and KRS 42.0145 and establishes the Office of Inspector General and the Office of Legislative and Intergovernmental Affairs within the Office of the Secretary of the Finance and Administration Cabinet. The legislation creates a new section of KRS Chapter 42 to establish the Division of Special Investigations within the Office of the Inspector General. The Division will investigate alleged violations of the tax laws and recommend criminal prosecution of the laws when warranted.

4. Tourism Development Act.

HB 390, signed into law by the Governor on March 27, 2017, and effective 90 days after adjournment, amends KRS 148.850 to reorganize the Tourism Development Finance Authority by adding two members, one of whom must represent the film industry and one with experience in financial management or economic development. The legislation also amends KRS 148.853 to prohibit any tourism development project from being eligible for incentives if it is lewd, offensive, or deemed to have a negative impact on the tourism industry.

B. Judicial Developments.

1. Open Records - Office of the Attorney General, 12-ORD-225, appealed by Mark F. Sommer to the Franklin Circuit Court, *Mark F. Sommer and Tax Analysts v. Department of Revenue*, Case No. 13-CI-29 (August 26, 2014), denial of KDOR's motion for reconsideration (June 25, 2015), appealed to Kentucky Court of Appeals, Case No. 2015-CA-001128 (January 13, 2017) (to be published), *motion for discretionary review filed*, Kentucky Supreme Court, No. 2017-SC-71-D (February 13, 2017).

In an Opinion affirming the judgment of the Franklin Circuit Court, the Kentucky Court of Appeals held the KDOR is required by the Open Records Act to produce redacted copies of its final rulings in tax administration cases ("Final Rulings"). The case began in 2012 when tax attorney Mark Sommer submitted an Open Records Request to the KDOR requesting Final Rulings issued by the KDOR from 2004 to the present.

The KDOR denied Mr. Sommer's request, citing KRS 131.190 and 131.081(15), which provide that certain tax schedules, returns, or reports filed with the KDOR may not be disclosed if there is an expectation of taxpayer privacy. The KDOR claimed that Final Rulings not appealed to the KBTA were exempt from disclosure under the Open Records Act. The KDOR also claimed that a review of all of the documents to determine what redactions were needed was unduly burdensome pursuant to KRS 61.872(6). Although the KDOR conceded that Final Rulings appealed to the KBTA are public records, it declined to produce those Final Rulings as well.

The Office of the Attorney General affirmed the denial of Mr. Sommer's request, and Mr. Sommer appealed to the Franklin Circuit Court. Tax Analysts, a non-profit news organization, was granted leave to intervene after the KDOR denied a nearly identical open records request filed by the news organization.

The circuit court reversed the Attorney General's ruling and ordered the KDOR to produce the requested information with appropriate redactions. The court found that Final Rulings appealed to the KBTA were public records and the KDOR's denial of access to those rulings was entirely without basis. The court also held that even those Final Rulings that had not been appealed to the KBTA were subject to disclosure with proper redactions. The court denied the KDOR's motion for reconsideration and awarded costs to Mr. Sommer and Tax Analysts, including attorney's fees.

The KDOR did not appeal the portion of the circuit court's judgment regarding Final Rulings appealed to the KBTA. However, the KDOR argued the circuit court erred by holding Final Rulings *not* appealed are also subject to disclosure under the Open Records Act.

The Court of Appeals affirmed, finding the KDOR had taken an unreasonably and overly broad view of KRS 131.190(1)(a) and 131.081(15). The court held that exceptions to the disclosure of public records are to be strictly construed, and when a public record contains both exempt and non-exempt information, government agencies are required by KRS 61.878(1)(l) to separate the material and make the non-exempt material available for inspection. The court noted that the substantive portions of the Final Rulings "contain a wealth of information relative to the implementation of our tax laws." The court also found the KDOR itself had used redacted copies of Final Rulings to support its position in litigation with other taxpayers, a fact undermining its position throughout the proceedings.

The KDOR has filed a motion for discretionary review with the Kentucky Supreme Court.

2. Open Records - *Pike County Fiscal Court v. Utility Management Group, LLC*, Kentucky Court of Appeals, Case No. 2013-CA-000929-MR (June 12, 2015) (to be published), *petition for rehearing denied* (November 2, 2015), *motion for discretionary*

review granted, Kentucky Supreme Court, No. 2015-SC-680-D (Pending).

In *Pike County Fiscal Court v. Utility Management Group, LLC,* the Kentucky Court of Appeals considered whether a change to Kentucky's Open Records Act ("ORA") was merely a clarification—and thus would apply retroactively—or a substantive change to the law. At issue in this case was whether Utility Management Group, LLC ("UMG") qualified as a public agency subject to the disclosure requirements of the ORA. Notably, UMG provided water, sewer, garbage, and other services to the City of Pikeville and a Pike County Water District through publicly bid contracts. Pike County sent an open records request to UMG seeking copies of UMG's "checks and expenses."

At the time of the request, KRS 61.970(1)(h) treated as public agencies subject to the ORA "any body which derives at least twenty-five percent (25%) of its funds ... from state or local authority funds." UMG denied the request, claiming UMG constituted a "wholly private entity" not subject to the ORA. Pike County requested the Office of the Attorney General ("OAG") review UMG's refusal to comply with the ORA request, and the OAG determined that UMG fell within KRS 61.970(1)(h) and should comply with Pike County's request. UMG then challenged the OAG's decision in Pike Circuit Court. Before the circuit court could rule, the Kentucky General Assembly amended the ORA to exempt from the 25% calculation public funds received as compensation for goods and services provided by a publicly bid contract. The circuit court treated the amendment as a "remedial clarification" that applied to all pending suits and thus held that UMG fell within the exception and was not a public agency subject to the ORA.

However, the Kentucky Court of Appeals disagreed and held that the amendment to KRS 61.970 represented a substantive instead of remedial change in the law, and therefore did not apply retroactively. In reaching this decision, the Court first noted that Kentucky statutes do not apply retroactively unless the statute explicitly provides for retroactivity. Finding no express statement of retroactivity, the Court next stated, "[S]tatutory amendments that seek only to clarify, not substantively change, existing law are remedial in nature." These remedial amendments apply retroactively even absent an express statement of retroactivity.

Kentucky has not adopted a specific test to determine whether an amendment clarifies or substantively changes a statute. Therefore, the court examined law from other jurisdictions and "identified three criteria courts generally consider: (1) the plain language used by the General Assembly in the amendment itself; (2) any case law or agency decision indicating the prior statute was susceptible to differing interpretations; and (3) legislative history surrounding the amendment."

In determining that the amendment to KRS 61.970(1)(h) did not merely clarify the law, the Court analyzed these three criteria. First, the Court noted the plain language of the amendment suggested the General Assembly intended the changes as only a clarification. Second, the Court analyzed the history of the ORA and noted that the Act remained virtually unchanged for over thirty-five years. The Court found this to be convincing evidence that the General Assembly intended the amendment as a substantive change and not a mere clarification. Third, the Court noted, "There appears to be no prior case law by our courts deeming this portion of the ORA ambiguous." The Court thus concluded that the amendment to KRS 61.970 was a substantive change to the law and should not apply retroactively.

The Court of Appeals denied UMG's petition for rehearing, and UMG filed a motion for discretionary review with the Kentucky Supreme Court. The Court granted review on June 8, 2016. Oral argument was held on February 10, 2017.

3. *Suzette Sewell-Scheuermann as Taxpayer for the Use and Benefit of the City of Audubon Park v. Michael Scalise*, Kentucky Court of Appeals, Case No. 2014-CA-000915 (April 15, 2016), *motion for discretionary review granted*, Kentucky Supreme Court, No. 2016-SC-000246 (March 15, 2017).

In this appeal, the Kentucky Court of Appeals held the Mayor of the City of Audubon Park and seven members of the City Council ***personally liable*** for $677,000 of funds raised by a sanitation tax but diverted over a five year period to pay other, non-sanitation expenses of the City.

Beginning July 1, 2007 and annually thereafter the City Council approved ordinances setting a "sanitation tax" which was a fixed amount billed separately as an annual charge on the City of Audubon Park property tax bills. As described by the City's website, "households are assessed a fee for garbage/yard waste/recycling collection/storm damage reserve" included with the annual property tax bill which "amount varies due to contract terms with the waste management vendor." The ordinances specified that the tax was levied for the purpose of paying for sanitation services for the City, including garbage and trash collection, as well as recycling.
A taxpayer and resident of the City filed suit alleging that each fiscal year the City Council diverted a portion of the tax revenue generated by the sanitation tax and placed the funds in the City's general fund, where the revenue was expended on items unrelated to sanitation. The taxpayer alleged that the Mayor and City Council Members who voted to allow the expenditure of sanitation tax revenue on unrelated items violated Section 180 of the Kentucky Constitution, KRS 92.330 and KRS 92.340. The taxpayer sought a judgment against these individuals equal to the unauthorized expenditures.

Section 180 of the Kentucky Constitution provides in relevant part that "every ordinance and resolution passed by any county, city, town or municipal board or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied, *and not tax levied and collected for one purpose shall ever be devoted to another purpose.*" KRS 92.330 contains a similar requirement. KRS 92.340 provides for personal liability and authorizes a taxpayer relator action:

> If, in any city of the home rule class, any city tax revenue is expended for a purpose other than that for which the tax was levied or the license fee imposed, each officer, agent or employee who, by a refusal to act, could have prevented the expenditure, and the members of the city legislative body who voted for the expenditure, shall be jointly and severally liable to the city for the amount so expended. The amount may be recovered of them in an action upon their bonds, or personally. The city attorney shall prosecute to recovery all such actions. If he fails to do so for six (6) months after the money has been expended, any taxpayer

> may prosecute such action for the use and benefit of the city. A recovery under this subsection shall not bar a criminal prosecution. Any indebtedness contracted by a city of the home rule class in violation of this subsection or of KRS 92.330 or 91A.030(13) shall be void, the contract shall not be enforceable by the person with whom made, the city shall never assume the same, and money paid under any such contract may be recovered back by the city.

The trial court held that there were no damages because the diverted funds were applied to the legal obligations of the City, and therefore, the City was not actually harmed. The trial court dismissed the complaint, and the taxpayer appealed.

The Court of Appeals held that Section 180, KRS 92.330 and KRS 92.340 simply mean what they say and the taxpayer satisfied all elements necessary such that the Mayor and City Council Member should be held to be "jointly and severally liable to the city" for the amount of sanitation tax revenue that they allowed to be expended for matters other than sanitation. The Court found no indication in the statutory language that the General Assembly intended to exempt liability if the officials use the funds on other city-related liabilities. The Court agreed with the taxpayer that this is the very action KRS 92.330 and 92.340 prohibit. The Court distinguished cases addressing funds raised for a specific purpose which become surplus once the purpose has been achieved. "[I]n the case of taxes which repeat each year, leftover revenues generated in one year should be used for that purpose, either in the year levied or some other year." The Court also noted that any excess funds after payment of the City's contract for sanitation should be used for sanitation in the following year "since there is no way to refund a tax that was lawfully levied and collected."

The Mayor and City Council Members moved for discretionary review by the Kentucky Supreme Court, and the Court granted review on March 15, 2017.

C. Administrative Developments.

1. Electronic Filing of Tax Returns.

The KDOR has instituted a new system called "E-File" for filing online returns. The E-File system provides improved functionality for users who already file sales and use tax returns online and also extends electronic filing to other taxes, including transient room taxes, waste tire fees, and the new CMRS 911 service charge. The new E-File system is accessed through the Kentucky Business One Stop portal at http://onestop.ky.gov/Pages/default.aspx.

D. Trends.

Watch for tax reform in the 2018 legislative session.

VI. BIOGRAPHIES.

A. Andrew J. Donovan

Andrew J. Donovan is an Associate in Stoll Keenon Ogden's Lexington office. He joined the firm in 2017 and is a member of the Tax practice as well as the Business Services practice.

Mr. Donovan completed his undergraduate work from the University of Alabama-Huntsville and received his Juris Doctor from the University Of Kentucky College Of Law. Mr. Donovan has passed the Kentucky Bar exam, and at the time of this publication he is awaiting official swearing-in.

To learn more about Andrew visit http://www.skofirm.com/attorneys/andrew-donovan

B. Timothy J. Eifler

Timothy J. Eifler is a Member in the Louisville office of Stoll Keenon Ogden PLLC. He serves as Chairperson of the State and Federal Tax Group, and also is a member of the firm's Business Litigation Practice Group. He is involved in all aspects of the firm's tax practice, but has concentrated in complex state and local tax planning, audit defense and federal, state and local tax controversies. A significant portion of Mr. Eifler's practice has also focused on tax-motivated transactional matters and the negotiation and implementation of state and local tax incentives, including corporate income tax credits, wage assessments and sales and use tax and property tax abatements.

In addition to handling matters before the federal, state and local taxing authorities, administrative tribunals and federal and state courts, Mr. Eifler has represented clients before the Kentucky General Assembly on legislative matters through testimony, drafting legislation and preparing comments for legislative hearings. He is AV® Preeminent™ Peer Review Rated by Martindale-Hubbell®, is listed in The Best Lawyers in America® for tax law, and is honored as a Kentucky Super Lawyer for his legal accomplishments in the field of tax law. Mr. Eifler is a member of the Louisville, Kentucky, Indiana, Tennessee, and American Bar Associations. Since 1994, he has been involved with the taxation sections of the Louisville, Kentucky and American Bar Associations. He also finds time to give back to the community by serving on the boards of directors of various nonprofit organizations.

To learn more about Tim visit http://www.skofirm.com/attorneys/timothy-j-eifler.

C. Stephen A. Sherman

Stephen A. Sherman serves as Counsel to the Firm in the Louisville office of Stoll Keenon Ogden PLLC and a member of the State and Federal Tax Practice Group. He has been with Stoll Keenon Ogden PLLC since 2008.

Mr. Sherman completed his undergraduate work from the University of Notre Dame and his Juris Doctor from Ave Maria School of Law in Ann Arbor, Michigan. A former President and Secretary of the Federalist Society, Mr. Sherman also served as the Notes Editor for the Ave Maria Law Review. In 2008, he earned his Master of Laws in Taxation from the University of Florida Levin College.

To learn more about Stephen visit http://www.skofirm.com/attorneys/stephen-a-sherman.

D. Jennifer S. Smart

Jennifer S. Smart is Counsel to the Firm in the Lexington office, and a member of the State and Federal Tax Practice Group. Ms. Smart represents Kentucky, regional and national companies in their state and local tax matters, including policy, lobbying, controversies and litigation. She represents clients of varied industries before the Kentucky Department of Revenue, the Kentucky Claims Commission, and before the courts of Kentucky. Ms. Smart also represents clients before the Kentucky General Assembly regarding legislative and regulatory matters. She was formerly a Staff Attorney and Attorney Manager with the Kentucky Department of Revenue's Office of General Counsel, Legal Services for Revenue.

Ms. Smart is AV® Preeminent™ Peer Review Rated by Martindale-Hubbell®. She is listed in The Best Lawyers in America® in the areas of Litigation and Controversy-Tax. She has been recognized as a Kentucky Super Lawyer for tax law for several years. Ms. Smart is a registered Legislative Agent, a member of the Broadband Tax Institute, a practitioner member of COST and is a Regional Editor of the American Bar Association Property Tax Deskbook. She is a member of the American, Kentucky, Tennessee, Louisiana and Fayette County Bar Associations.

To learn more about Jennifer visit http://www.skofirm.com/attorneys/jennifer-s-smart.